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MARITIME LAW ASSOCIATION OF THE UNITED STATES

ANNUAL MEETING, MAY 20, 1927.

APPENDIX VI.

Report of the Committee on Appeals in Admiralty as New Trials.

To the Maritime Law Association of the United States:

The following Resolution was adopted at the last meeting of the Association:

> "RESOLVED that the President be empowered to appoint a committee of five to examine the present state of the law and practice under the decision of The John Twohy, to report to the next meeting whether any change in the law would be desirable, and, if so, what change should be urged."

Pursuant to this Resolution the President appointed the undersigned as a Committee to deal with the question there stated.

The doctrine of the "John Twohy" is that if an appeal is once taken by one party, that party has no right to abandon it without the consent of his adversary. See *The John Twohy*, 255 U. S. 77, where the Supreme Court said:

> "In view, therefore, of the settled law as to the effect of appeals in admiralty, we are of opinion that the libellants were justified in regarding the appeal taken by the claimants as securing to libellants the right to be heard in the appellate court without the necessity of perfecting a cross-appeal in order to preserve that right. To hold, then, that the appellate court could nevertheless, without affording the libellants an opportunity to be heard, enter a decree the plain effect of which was to deny one of the two claims for which the libel was brought and which, in view of the settled effect of the appeal the libellants could not be presumed to have abandoned, would be to subject

them to a wrong without a remedy, even if it did not amount to a denial of due process of law."

The history of the doctrine is given fully in the opinion of the Circuit Court of Appeals for the Second Circuit (Ward, J.), in the case of *Munson S. S. Line* v. *Miramar S. S. Co., Limited,* 167 Fed. 960. The matter was again discussed in *Reid* v. *American Express Co.,* 241 U. S. 544, where the Court said:

> "that the right to a *de novo* trial in the court below authoritatively resulted from the ruling in *Irving* v. *The Hesper,* 122 U. S. 256,—a conclusion which is plainly demonstrated by the opinion in that case and the authorities there cited and the long continued practice which has obtained since that case was decided and the full and convincing review of the authorities on the subject contained in the opinion in the *Miramar* case."

In view of the fact that at the time the Resolution was adopted, various members of the Association apparently desired to be heard on the subject, your Committee sent out a notice during February last, inviting any member who desired to do so, to give the Committee the benefit of his views. Your Committee has received a number of replies. All of these views have received careful consideration. The most substantial criticism seems to be that at the present time the Courts have no rule requiring an appellee to give notice of his intention to claim the benefit of the *John Twohy* rule. One of our members has called the situation resulting from *The John Twohy,* "litigation by ambush." As the law now stands, an appellee may await the filing of the appellant's brief, indeed await argument, before advancing his claims to relief from the Appellate Court. The appellant may then be wholly unprepared to meet the arguments which may be advanced by the appellee, and the case may be submitted without giving to the appellant a fair opportunity to be heard. This situation has produced an undercurrent of dissatisfaction among a number of the members of the Bar. The existence of any such feeling is obviously unfortunate, and it is equally obvious that an effort should be made to remove it. Your Committee is of opinion that the cause for such a feeling can be removed by the adoption of a rule of court providing in substance that the court will not consider argument directed to setting aside any part of a decree of a trial court

which may be in favor of the appellant unless within twenty days after the appellant has filed the record on appeal the appellee shall file assignments of error, pointing out such errors as he complains of in the decree below.

Your Committee is unanimous in its opinion that it would be unwise to limit in any degree the power of an Appellate Court in Admiralty to deal with appeals as it thinks justice may require. For that reason your Committee recommends that no modification of the "John Twohy" doctrine should be attempted. It seems clear to your Committee that the various Circuit Courts of Appeals have power to regulate the practice in such courts, and that by rule the Courts can specify how and when the appellee shall give notice that he intends to claim the benefit of the "John Twohy" rule. Early in the history of the United States Courts it appears that the rule making power was taken for granted.

It appears from an examination of Judge Ward's opinion in the *Miramar* case that after the adoption of the Everts Act, creating the Circuits Courts of Appeals, the Circuit Courts of Appeals for the various circuits made their own rules as to how appeals should be proceeded with.

In *Credit Company Limited* v. *Arkansas Central Railway Company,* 128 U. S. 258, it was held that an appeal from a decree of the Circuit Court is not "taken" until it is in some way presented to the Court which made the decree appealed from, so as to put an end to the jurisdiction of the lower court over the cause. In that case, the Supreme Court said:

> "An appeal cannot be said to be 'taken' any more than a writ of error can be said to be 'brought' until it is, in some way, presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause, and making it its duty to send it to the Appellate Court. This is done by filing the papers, viz., the petition and allowance of appeal, (where there is such a petition and allowance,) the appeal bond and the citation."

In *Hill* v. *Chicago and Evanston Railroad Company,* 129 U. S. 170, at p. 174, it is said:

> "It is well settled, by repeated decisions of this court, that it has no jurisdiction of an appeal unless the tran-

script of the record is filed here at the next term after the taking of the appeal."

It would seem, therefore, that if any regulation is to be made of the exercise of the appellee's rights under the "John Twohy" doctrine by rule of Court, such rule cannot be directed to limiting the right of the appellee in the appeal, but to a reasonable exercise of that right by the appellee. In other words, your Committee is of opinion that the Circuit Courts of Appeals would have no power to deprive the appellee of his rights in the Appellate Court, but that it has power by rule to prescribe when the appellee must exercise such rights. As it appears from the decisions of the Supreme Court cited above, that the jurisdiction of the Appellate Court is not complete until the record has been filed in the Appellate Court, your Committee is of opinion that the Appellate Court's rule should be directed toward fixing a reasonable length of time after the filing of the record as the time within which the appellee must make known his complaint respecting the decision of the trial court. By such a regulation the Appellate Court would be doing no more than making a rule for the proper conduct of its own business and would, in the opinion of your Committee, be acting clearly within its powers. For example, the Court by rule now specifies when briefs must be filed, both by the appellant and by the appellee, also how causes shall be heard, etc. Such a rule as we propose does no more. We think, however, that if the rule should attempt to limit the appellee's exercise of his rights before the jurisdiction of the Appellate Court became complete, it might be attacked as being beyond the power of the court. The following is a draft of a suggested rule:

> "If an appellee desires a review of the decree of the District Court or additional relief in the Circuit Court of Appeals, he must file in the Clerk's office of the Circuit Court of Appeals within twenty days after notice of the filing of the apostles on appeal fifteen copies of printed assignments of error, stating the grounds for review or for additional relief, and serve three copies thereof on each of the other parties to the cause. If an appellee shall fail to file and serve such assignments of error as aforesaid, he shall not be heard (either on brief or orally) respecting any matter which has not been made the subject of assignment of error by the appellant."

Your Committee thinks that such a rule would accomplish the following purposes:

1. It would give the appellant due notice of the position which the appellee intends to take in the Court of Appeals.

2. It would limit the period during which the appellee might complain of the decree of the trial court.

3. As the rules (at least of the Circuit Court of Appeals for the Second Circuit) now require that if any new evidence is to be taken in the Appellate Court, application must be made to the court within fifteen days after the filing of the record to take such new evidence, it would give the appellee at least five days after any such application in which to file assignments of error.

Two members of the Association have indicated to the Committee that it might deal with the subject of whether there should be any change in the law relating to review by the Appellate Courts of questions of fact. Your Committee considers that this subject is beyond the scope of the Resolution under which it is acting, yet as it has been impressed upon your Committee that the subject should be dealt with in this report, your Committee is treating with it briefly. Your Committee's attention has been directed to the case of *The Paquete Habana,* 189 U. S. 453, which involved an appeal as to damages in a case which had been previously decided on the merits, in *The Paquete Habana,* 175 U. S. 677. In that case Mr. Justice Holmes intimated that if the trier of the facts had not seen the witnesses, or if the facts depended upon documents, the Appellate Court was in just as good a position as the Trial Judge to determine the value to be given to the evidence. At page 466 of the report, Mr. Justice Holmes said:

> "We do not forget the weight that is given to the findings of a master or commissioner upon matters of fact. But this weight is largely, although not wholly, due to the opportunity, which we do not share, of seeing the witnesses. So far as the commissioner disregarded the testimony of the witnesses whom he saw we should hesitate to overrule his conclusion, although it seems too absolute on the grounds set forth. But the result reached is based on documentary evidence which is before us, and as to which we have equal opportunities for forming a

judgment. It appears to us plain that this evidence was given undue weight."

It has been suggested to your Committee that an Appellate Court should never reverse a case on a question of fact where the trial court has seen the witnesses and has decided the case on conflicting evidence. This suggestion, as your Committee understands the law, goes beyond the present rule, which, as we understand it, is that an Appellate Court will not set aside the finding of a Trial Court unless it is convinced that it is plainly wrong. So far as your Committee has been able to ascertain, the Bar as a whole prefers the law to be left as it is. Your Committee thinks that it would be most unfortunate to make any change in the practice which would destroy the flexible and non-technical character of the Admiralty procedure, and is of opinion that to suggest any change in the law as it now exists would be unwise.

Summarizing the foregoing, your Committee recommends:

1. That the Association take no action respecting limiting the power of the Appellate Courts in dealing with questions of fact;

2. That the Association oppose any limitation of the powers of the Appellate Court to deal with a case on appeal in any manner in which it thinks justice may require.

3. That if the Association is of opinion that an appellee should give reasonable notice of his intention to claim the benefit of The John Twohy rule, a resolution should be adopted asking the Circuit Courts of Appeal to deal with the matter by rule.

Dated, New York, May 20, 1927.

T. CATESBY JONES
LESLIE C. KRUSEN
JOHN C. PRIZER
CHARLES F. DUTCH.

(Note: George de Forest Lord, a member of the Committee, did not sign because absent.)