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Sheppard Vs. Wilson

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Court : US Supreme Court

Decided On : 1848

Appeal No. : 47 U.S. 260

Appellant : Sheppard

Respondent : Wilson

Judgement :

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U.S. Supreme Court Sheppard v. Wilson, 47 U.S. 6 How. 260 260 (1848)

Sheppard v. Wilson

47 U.S. (6 How.) 260

ERROR TO THE SUPREME COURT

OF THE TERRITORY OF IOWA

SYLLABUS

The statutes of Iowa provide a mode for taking bills of exceptions by directing that they shall be tendered to the judge for his signature during the progress of the trial, although judges may, and often do, sign bills of exception *nunc pro tunc* after the

trial.

Such is also the English practice under the Statute of Westminster 2, and such is the practice recognized by this Court.

Therefore, where a bill of exceptions was signed two years after the trial, the Supreme Court of Iowa was right in striking it out of the record.

Where, after verdict, a motion was made for a new trial, which was held under a continuance, and an entry was afterwards made that the motion was overruled and judgment entered on the verdict, but at the time of such entry and judgment the court was not legally in session, it was no error in the court, at a subsequent and regular term, to treat the entry thus irregularly made as a nullity, to decide the motion, and enter up judgment according to the verdict.

The difference between this case and that of *Bank of the United States v. Moss,* 6 How. 31, pointed out.

A continuance, relating back, may be entered at any time to effect the purposes of justice.

This was an action commenced in the District Court of Scott County, in the Territory of Iowa, by Wilson against Sheppard and others, for a breach of a contract for hiring a steamboat. It is not necessary to state the facts in the case or any other circumstances than those upon which the decision of this Court turned.

On 7 October, 1841, the cause came on for trial in the District Court of Scott County, when the jury found a verdict for the plaintiff, and assessed his damages at $1,837.50.

A bill of exceptions, containing a recapitulation of the evidence

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upon both sides and sundry prayers to the court, is found in its proper place in the record; but the date of its signature by the judge is 21 December, 1843, whereas

the trial took place in October, 1841.

A motion for a new trial was made by the counsel for the defendants upon several grounds, which it is not necessary to specify.

In April, 1842, the court commenced in Scott County on the 4th, and in Clinton county, in the same district, on the 11th. But on 12 April, whilst the court was in session in Clinton County, the following entries were made in Scott County:

"JOHN WILSON v. JOHN C. SHEPPARD et al. -- Assumpsit"

"And now come the parties by their attorneys, and the defendants move for judgment on the motion for a new trial, made and argued at the last term of this Court in this cause, and held under advisement until the present term."

JUDGMENT

"It is considered by the court that said defendants take nothing by their said motion, and thereupon the plaintiff moves the court for judgment upon the verdict rendered by the jurors aforesaid at the last term of this court in this cause. It is therefore considered by the court that the plaintiff recover of the defendants the said sum of eighteen hundred and thirty-seven dollars and fifty cents, his damages aforesaid in form aforesaid assessed, besides his costs by him about his suit in this behalf expended, and that execution issue therefor."

" *Appeal granted* "

"And thereupon the said defendants, by their attorney, pray an appeal, which was allowed."

Whether or not this appeal prevented the District Court of Scott County from correcting the erroneous entry was one of the questions before this Court.

At October term, 1842, the following proceedings took place in the district court of Scott County:

" *Plaintiff's Motion for Judgment* "

"And afterwards, to-wit, on the third day of October in the year of our Lord 1842, the said plaintiff filed in the court aforesaid the following motion for judgment in this cause, to-wit:"

"WILSON v. SHEPPARD AND OTHERS"

"And now, at this day, October term, 1842, comes the said plaintiff, by Mitchell & Grant, his attorneys, and moves the

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court to enter up judgment in this cause, as of the last fall term of this Court."

"MITCHELL & GRANT, *for Plaintiff* "

" *Second Judgment* "

"And afterwards, to-wit, on the 7th day of October, in the year last aforesaid, the following proceedings were had, to-wit:"

"WILSON v. SHEPPARD AND OTHERS -- *Assumpsit* "

"This day came the said plaintiff, by his attorney, and it appearing to the court that at a previous term of this Court, to-wit, the October term, 1841, the issue previously joined in this cause was submitted to a jury, who, after hearing the evidence and arguments of counsel, returned into court the following verdict, to-wit, they find the issue for the plaintiff and assess his damages at the sum of eighteen hundred and thirty-seven dollars and fifty cents."

" *Appeal prayed by Defendants* "

"Whereupon a motion was made by the attorney for defendants for a new trial herein, which motion was at said October term taken under advisement by the court, and it further appearing to the court that this court has not at any time since decided said motion, but that said motion was continued under advisement until

the present term, that the order of continuance at last term was not entered of record. It is therefore ruled that said order of continuance be entered ' *nunc pro tunc,* ' and the court, having now fully considered the said motion for a new trial, doth overrule the same. And it is further considered by the court that the plaintiff have and recover of and from the said defendants the said sum of eighteen hundred and thirty-seven dollars and fifty cents, his damages in manner and form aforesaid assessed, together with his costs by him about his suit in that behalf expended, and that a special execution against the property attached issue therefor; thereupon the defendants prayed an appeal to the supreme court."

To this judgment of the district court the counsel for the defendants took a bill of exceptions with a view to carry the case up to the Supreme Court of Iowa.

In January, 1844, the case came before the Supreme Court of Iowa, when the counsel for Wilson moved to strike from the record, and reject from the consideration of the court the bill of exceptions filed and dated in December, 1843; which motion the court sustained.

The counsel for Sheppard then moved for a mandamus, directed to the judge of the District Court of Scott County, requiring

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him to sign and seal, *nunc pro tunc,* the bill of exceptions tendered on the original trial. But the court refused to grant the mandamus.

After some other proceedings which it is not necessary to state, the Supreme Court of Iowa, in January, 1845, affirmed the judgment of the District Court of Scott County.

To review this affirmance, a writ of error brought the case up to this Court.

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MR. JUSTICE GRIER delivered the opinion of the Court.

When this case was before this Court at the last term, on a motion to dismiss the writ of error (*see* 46 U. S. 5 How. 211), one of the reasons urged was

"That, Iowa having been admitted into the Union as a state since the writ of error was brought, the act of 1838, regulating its judicial proceedings as a territory, is necessarily abrogated and repealed, and consequently there is no law in force authorizing this Court to reexamine and affirm or reverse a judgment rendered by the supreme court of the territory, or giving this Court any jurisdiction over it."

And the Court there said

"This difficulty has been removed by an act of Congress, passed during the present session, which authorizes the Court to proceed to hear and determine cases of this description."

It afterwards appeared that this Court had been misinformed on this subject, and that, by mistake, the State of Iowa had been omitted in the Act of 22 February, 1847. Since that time (at the present session of Congress), an act has been passed to remedy this omission (*see* Act of 22 of February, 1848), and the Court has proceeded to hear and determine the case on the errors assigned.

Of the numerous errors assigned in this case, but three can be noticed as coming properly under the cognizance of this Court. The cause was originally tried before the District Court of Scott County and removed by writ of error to the Supreme Court of the Territory of Iowa. That court struck from the record the bills of exceptions alleged to have been taken on the

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trial in the court below. Consequently the matters said to be contained in those bills are not before this Court.

But bills of exceptions were taken by the plaintiffs in error to the ruling of the Supreme Court of Iowa, in rejecting the bills sealed by the district court and in refusing to grant a mandamus to the judge of the district court to sign a bill of exceptions *nunc pro tunc,* and this rejection and refusal are now assigned for

error in this Court. It has been questioned whether the action of the Supreme Court of Iowa on these points is the proper subject of a bill of exceptions, or can be reviewed in this Court. But as we perceive no error in the course pursued by the court, it will be unnecessary to notice these objections.

The case was tried in the District Court of Scott County at October term, 1841, and the bill of exceptions which was struck from the record was dated on 21 December, 1843. It did not purport to have been taken on the trial, nor was there any evidence on the record that any exceptions were taken or noted by the judge. And assuming the fact, as stated by the counsel for the defendant below, that he had taken the exceptions during the trial and had reduced them to form afterwards, yet the bill was not settled during the term in consequence of objection made to certain matters therein by the opposite counsel, and the judge, though he signed a bill two years after the trial, refused to sign it *nunc pro tunc,* as if taken on the trial.

The act of assembly of Iowa regulating the practice of their courts provides that

"If during the progress of any trial in any civil cause either party shall allege an exception to the opinion of the court and reduce the same to writing, it shall be the duty of the judge to allow said exceptions and to sign and seal the same, and the said bill of exceptions shall thereupon become a part of the record of such cause, and if any judge of the district court shall refuse to allow or sign such bill of exceptions tendered, and the same is signed by three or more disinterested bystanders or attorneys of said court, the judge shall then permit the said bill to be filed and become a part of the record; if the judge refuse, the supreme court of the territory may, when such cause is brought before them by writ of error or appeal, upon proper affidavit of such refusal, admit such bill of exceptions as part of the record."

This act requires that the exceptions must be taken during the progress of the trial, reduced to writing, and tendered to the judge, and gives ample remedy to the party injured in case of a refusal to sign them or permit them to be made a part of the record. If the party does not avail himself of the remedy

given him by the act, he has no one to blame but himself. It is true, judges may and often do sign bills of exception after the trial *nunc pro tunc,* the bills being dated as if taken on the trial; but the propriety of their refusal to do so on particular occasions depends on so many circumstances which cannot appear on the record and are known only to themselves that we ought not to presume they have acted improperly in the exercise of their discretion. Certainly a judge ought not to be called on to make up a bill of exceptions two or more years after a trial, where the counsel have disagreed as to the facts and failed to settle the exceptions at the term in which the cause was tried. It is too plain for argument also that a bill purporting to be taken more than two years after the trial cannot properly be made a part of the record by any possible construction of this act. It is much more stringent in its requirements as to the time and mode in which a bill of exceptions shall be obtained and placed on record, than the Statute of Westminster 2, which first gave the bill of exceptions. Yet under that statute, the courts have always held that the exception should be taken and reduced to writing at the trial. Not that they need be drawn up in form, but the substance must be reduced to writing whilst the thing is transacting. 1 Bacon's Abr., tit. Bill of Exceptions.

The practice is well settled, also, by the decisions of this Court. *See* *Ex Parte Martha Bradstreet,* 4 Pet. 106; and the case of *Walton v. United States,* 9 Wheat. 657, which is precisely parallel with the present. There the objection was made that the bill of exceptions was not taken at the trial, but purported on its face, as in this case, to have been taken and signed after judgment rendered in the cause. "It is true," say the court,

"that the bill of exceptions states that the evidence was objected to at the trial; but it is not said that any exception was then taken to the decision of the court. So that in fact it might be true that the objection was made, and yet not insisted upon by way of exception. But the more material consideration is that the bill of exceptions itself appears, on the record, not to have been taken at all until after the judgment. It is a settled principle, that no bill of exceptions is valid which is not for matter excepted to at the trial. We do not mean to say that it is necessary (and in point of

practice we know it to be otherwise) that the bill of exceptions should be formally drawn and signed before the trial is at an end. It will be sufficient if the exception be taken at the trial, and noted by the court with the requisite certainty, and it may afterwards, during the term, according to the rules of the court, be reduced to form, and signed by the judge. And so, in fact, is the general

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practice. But in all such cases, the bill of exceptions is signed *nunc pro tunc,* and it purports on its face to be the same as if actually reduced to writing during the trial. And it would be a fatal error if it were to appear otherwise; for the original authority under which bills of exceptions are allowed has always been considered to be restricted to matters of exception taken pending the trial, and ascertained before verdict."

These cases are conclusive as to the correctness of the proceedings of the supreme court of Iowa, in striking out the bill of exceptions and refusing to award a mandamus to compel the district judge to sign a bill *nunc pro tunc.* It will be unnecessary, therefore, for this Court to express any opinion on the questions, whether, under the peculiar provisions of the statute of Iowa, a party who had neglected to pursue the course pointed out by it would be entitled, under any circumstances, to the remedy of a mandamus; and if so, whether a refusal by the supreme court to grant it could be alleged for error in this Court.

The only other assignments of error which can be noticed by this Court are those numbered 11 and 12:

"That the supreme court erred in affirming the action of the district court in regard to the judgment of April 12, 1842, on the ground that the supersedeas bond did not appear on the record with the writ of error. And in affirming the judgment rendered by the district court at October term, 1842."

To understand the nature of these objections, it will be proper to state that this case was tried in the district court of Scott County, at October term, 1841, and a verdict rendered for the plaintiff; and the defendants having moved for a new trial,

the case was continued under a *curia advisare vult.* Owing to a mistake (the cause of which it is unnecessary to explain), the court did not meet at the time appointed by law for the April term in Scott County, but on the week following, which had been fixed for the term of a neighboring county. On 12 April, 1842, an entry was made on the record overruling the motion for a new trial and rendering a judgment on the verdict. The mistake was soon after discovered, and the defendants sued out a writ of error to reverse this judgment as being *coram non judice;* but before the writ was served, at the next regular term of the district court, in October, 1842, that court, treating the entry made on the record in April as a nullity because entered by the clerk without any authority from the court, made the following entry of judgment:

"This day came the said plaintiff, by his attorney, and it appearing to the court that at a previous term of this Court, to-wit, the October term, 1841, the issue previously joined in this

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cause was submitted to a jury, who, after hearing the evidence and arguments of counsel, returned into court the following verdict, to-wit, they find the issue for the plaintiff, and assess his damages at the sum of $1,837.50; whereupon a motion was made by the attorney for the defendants for a new trial herein, which motion was, at said October term, taken under advisement by the court. And it further appearing to the court that this Court has not at any time since decided said motion, but that said motion was continued under advisement until the present term, that the order of continuance at last term was not entered of record, it is therefore ruled that said order of continuance be entered *nunc pro tunc.* And the court, having now fully considered the said motion for a new trial, doth overrule the same, and it is further considered by the court that the plaintiff have and recover,"

&c.; (completing the entry of a judgment in the usual form).

In this action of the court we can see no error or any just ground of complaint on the part of the plaintiffs in error. If the court had ordered the prior entry, made in

April, to be stricken from the record as a mistake or misprision of the clerk, being made without the authority or order of the court, the record could not have been successfully assailed. The court certainly had full power to amend their records, and are the sole judges of the correctness of the entries made therein, and although it has not said in direct terms that this entry should be erased or stricken from the record, it has done so by violent implication when it adjudged that the court had never decided the motion for a new trial, and treated the record as if the entry of 12 April was not upon it or had been entirely erased from it. The objection that the record was beyond the reach of amendment because the writ of error had become a supersedeas and removed it to the supreme court is not founded in fact. The writ of error had not been served on the court, and the record was therefore legally, as well as physically, in possession of the district court and subject to amendment. In order to a supersedeas, the statute of Iowa evidently requires a service of the writ upon the court below, and not only so, but

"that one of the judges of the supreme court shall endorse upon the transcript of the court below allowance of said writ of error for probable cause, and in such cases the party issuing such writ shall give bond to the opposite party, with good security,"

&c.; There is no evidence on the record, that any of these requisites had been complied with.

It is perhaps hardly necessary to state that this case bears no resemblance to that of *United States Bank v. Moss,*

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decided at this term. There, the circuit court had set aside a regular valid judgment entered by the court at a former term after a verdict and trial on the merits; not on the ground that the clerk had made the entry by mistake or without proper authority from the court, but because of some supposed error in law. This case exhibits a question of amendment, and nothing more; it was therefore wholly within the discretion of the court below, which was acquainted with all the facts and

belonged appropriately and exclusively to them. *Matheson v. Grant,* 2 How. 263, 43 U. S. 284 . Besides, the action of the court wrought no injury to the plaintiffs in error. If they had removed the record to the supreme court by the first writ of error before this amendment was made, and obtained a reversal of the judgment because it was entered without the authority of a properly constituted court, the supreme court would have remitted the record with orders to proceed and enter a regular judgment on the verdict.

The objection that the court below could not make this amendment for want of a continuance is hardly worthy of notice. The entry of C. A. V. operates as a continuance, and if it did not, a continuance could be entered at any time to effect the purposes of justice. Such technical objections have long ceased to be of any avail in any court, and are entirely cut off by the statute of jeofails of Iowa of 24 January, 1839, section 6.

The judgment of the supreme court of Iowa must be

Affirmed.

ORDER

This cause came on to be heard on the transcript of the record from the Supreme Court of the Territory of Iowa and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this Court that the judgment of the said supreme court in this cause be and the same is hereby affirmed with costs and damages at the rate of six percentum per annum.

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