

Hume Vs. Bowie

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Appeal No. : 148 U.S. 245

Appellant : Hume

Respondent : Bowie

Judgement :

Hume v. Bowie - 148 U.S. 245 (1893)

U.S. Supreme Court Hume v. Bowie, 148 U.S. 245 (1893)

Hume v. Bowie

No. 1107

Submitted February 0, 1893

Decided March 20, 1893

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ERROR TO THE SUPREME COURT

OF THE DISTRICT OF COLUMBIA

SYLLABUS

When the parties to a suit tried in the Supreme Court of the District of Columbia, at circuit, cannot agree as to the exceptions, the trial term may, under the rules, be extended into the succeeding term for the purpose of settling them; and in case the judge presiding at the trial dies without settling them, and in consequence thereof a motion be made to set aside the verdict and order a new trial, the then presiding judge in the circuit court may order the motion to be heard in general term, and an order to set aside the verdict and direct a new trial made in general term is not a final judgment from which an appeal may be taken to this Court.

This was an action brought by William B. Bowie in the Supreme Court of the District of Columbia against Frank Hume, as endorser upon a promissory note. The defendant pleaded to the declaration, issue was joined, and on the trial of the cause a verdict was rendered May 25, 1888, in favor of the defendant. During the trial, various exceptions were reserved to the rulings and instructions of the court, which were duly noted at the time by the presiding justice upon his minutes. A motion for new trial was made and overruled June 2, 1888, and an appeal to the general term was thereupon taken, and a bond on appeal duly executed and approved.

The record discloses that on January 3, 1888, the court in general term entered an order directing that in addition to the circuit court to be held by Mr. Justice Hagner on the fourth Monday of January, 1888, a second circuit court should be held at the same time by Mr. Justice Merrick, the court to be held by Mr. Justice Hagner to be known as "Division No. 1," and the court to be held by Mr. Justice Merrick to be known as "Division No. 2." On April 27, 1888, the court in general term ordered that the circuit courts then being held in divisions Nos. 1 and 2 should be continued further by the same justices through the May term

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thereof. This case was tried in the circuit court, division No. 2, by Mr. Justice Merrick; verdict returned May 25th; motion for new trial overruled June 2d; appeal

prayed June 5; bond approved June 12. On July 14, 1888, an order was entered by that justice providing that

"the May term of the circuit court, division number two, is hereby entered as extended, that the bill of exceptions not yet filed may be settled, to-wit: [Here follow names of cases, including this case.]"

On the same day, in division No. 1, the court ordered

"the term of this Court extended for the purpose of setting bills of exceptions and case in the following cases: [cases named], and thereupon the May term adjourned without day, except as above stated."

On January 24, 1889, an order was entered by the general term assigning the justices to serve for the year 1889 as follows:

"First, for the general term, Justices Hagner, James, and Merrick; second, for the circuit court, Chief Justice Bingham; third, for the equity court and orphans' court, Justice Cox; fourth, for the district court, Justice James; fifth, for the criminal court, Justice Montgomery."

April 8, 1889, the death of William B. Bowie was suggested, and Anne H. Bowie, executrix, was substituted as party plaintiff, and, on April 23d she filed her motion to set aside the verdict and judgment, and to grant a new trial,

"because the bill of exceptions containing the exceptions reserved on the trial of the cause cannot be settled, signed, and sealed as required by law, the justice of this court, who presided at the trial of this cause (in divisions No. 2, May term, 1888, of this court) having departed this life without having settled or signed and sealed the same."

Due notice of this motion was given, and it was finally called up on June 8, 1889, before Chief Justice Bingham, holding a special term and circuit court, and "at the request of both parties, by their respective attorneys, was directed to be heard in the general term in the first instance." Subsequently the death of Anne H. Bowie was suggested, and Richard Irving Bowie, as administrator *de bonis non* with the

will annexed, substituted.

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The motion in question was heard upon certain certificates and affidavits, which are set forth in a bill of exceptions taken upon the disposition of the motion. It appeared that the bill of exceptions preserved on the trial was prepared by counsel for plaintiff and submitted to counsel for defendant, but that they could not settle it by agreement, and that before it was considered by the justice who presided at the trial, the latter became ill and afterwards, on February 6, 1889, died, leaving it unsettled.

On April 26, 1892, the motion was sustained by the general term, the judgment and verdict set aside, and a new trial granted. From this order a writ of error was sued out.

The following are sections of the Revised Statutes of the District of Columbia:

"SEC. 770. The Supreme Court in general term shall adopt such rules as it may think proper to regulate the time and manner of making appeals from the special term to the general term, and may prescribe the terms and conditions upon which such appeals may be made, and may also establish such other rules as it may deem necessary for regulating the practice of the court, and from time to time revise and alter such rules. It may also determine by rule what motions shall be heard at a special term, as nonenumerated motions, and what motions shall be heard at a general term in the first instance."

"SEC. 803. If, upon the trial of a cause, an exception be taken, it may be reduced to writing at the time, or it may be entered on the minutes of the justice and afterwards settled in such manner as may be provided by the rules of the court, and then stated in writing in a case or bill of exceptions, with so much of the evidence as may be material to the questions to be raised, but such case or bill of exceptions need not be sealed or signed."

"SEC. 804. The justice who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion shall be made at the same term at which the trial was had. "

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"SEC. 805. When such motion is made and heard upon the minutes, an appeal to the general term may be taken from the decision, in which case a bill of exceptions or case shall be settled in the usual manner."

"SEC. 806. A motion for a new trial on a case or bill of exceptions and an application for judgment on a special verdict or a verdict taken subject to the opinion of the court shall be heard, in the first instance at a general term."

Among the rules of the Supreme Court of the District of Columbia are these:

"2. The terms of the court shall be as follows: Of the general term, on the 4th Monday of January; 4th Monday of April; 1st Monday of October. Of the circuit court, on the 4th Monday of January 2d Monday of May, which term shall not continue beyond the second Saturday in July, except to finish a pending trial; 3d Monday of October. Of the district court, on the 1st Monday of June; 1st Monday of December. Of the criminal court, on the 1st Monday of March; 3d Monday of June; 1st Monday of December. Of the special terms, on the first Tuesday of every month, except August, in which month there shall be no term of court."

"54. Motions for new trial may be grounded on errors of law in the rulings of the justice presiding at the trial."

"1. The motion may be made upon the bills of exception, in which case it must be filed in the circuit court, but shall be heard in the general term in the first instance."

"2. The justice who tried the cause may, in his discretion, before any bills of exceptions are prepared, entertain a motion to set aside the verdict for errors of law founded on the exceptions reserved during the trial and noted on his minutes. An appeal may be taken from the decision of the justice on such motion, in which

case a bill of exceptions must be settled in the usual manner."

"61. If a party desires to present for review in the general term the rulings or instructions of the presiding justice for alleged errors of law, he must at the trial and before verdict, except to such rulings or instructions, and he may at the time

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of taking exception reduce the same to writing in a formal bill of exceptions, or the justice may enter the exception upon his minutes, and proceed with the trial, and afterwards settle the bill of exceptions."

"62. The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it."

"63. Every bill of exceptions shall be drawn up by the counsel of the party tendering it and submitted to the counsel on the other side, and where the bill of exceptions is not settled before the jury retires, the counsel tendering the bill of exceptions shall give notice in writing to the counsel on the other side of the time at which it is proposed that the bill of exceptions shall be settled, and shall also at least three days, Sundays exclusive, before the time designated on such notice, submit to the counsel on the other side the bill of exceptions so proposed to be settled, and if they cannot agree, it shall be settled by the justice who presided at the trial, and in that case the justice shall be attended by the counsel on both sides as he may direct."

"64. In case the judge is unable to settle the bill of exceptions and counsel cannot settle it by agreement, a new trial shall be granted. "

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MR. CHIEF JUSTICE FULLER, after stating the facts in the foregoing language, delivered the opinion of the Court.

This case comes before us on a motion to dismiss the writ of error for want of jurisdiction upon the ground that the judgment brought here by the writ is not a

final judgment. *Baker v. White*, [92 U. S. 176](#) ; *Rice v. Sanger*, [144 U. S. 197](#) ; *Brown v. Baxter*, [146 U. S. 619](#) . The question involved is one of power; for if the court had power to make the order when it was made, then it was not a final judgment, as it merely vacated the former judgment for the purpose of a new trial upon the merits of the original action. If the court had no jurisdiction over that judgment, the order would be an order in a new proceeding, and in that view final and reviewable.

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The rule is unquestionably correctly laid down in *Muller v. Ehlers*, [91 U. S. 249](#) , that when judgment has been rendered and the term expires, a bill of exceptions cannot be allowed, signed, and filed as of the date of the trial in the absence of any special circumstances in the case and without the consent of parties or any previous order of court; but it is always allowable, if the exceptions be seasonably taken and reserved, that they may be drawn out and signed by the judge afterwards, and the time within which this may be done must depend upon the rules and practice of the court and the judicial discretion of the presiding judge. *Dredge v. Forsyth*, 2 Black 563; *Chateaugay Ore & Iron Co., Petitioner*, [128 U. S. 544](#) .

The Supreme Court of the district had power to prescribe rules upon the subject, and had done so. Under those rules, whenever the judge was unable to settle the bill of exceptions and counsel could not settle it by agreement, a new trial followed as matter of course. If therefore in this case the bill of exceptions was open to be settled at the time of the granting of the new trial, the power to grant the latter existed. If the bill were settled, the court, in general term, could hear the case, and if reversible error were found, could set aside the judgment and, if the bill could not be settled, the judgment was necessarily so far *in fieri* as to be susceptible of being vacated under the rule. Ordinarily where a party, without laches on his part, loses the benefit of his exceptions through the death or illness of the judge, a new trial will be granted, *N.Y. Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, [33 U. S. 303](#) ; *Borrow scale v. Bo worth*, 98 Mass. 34, 37; *People v. Judge of Superior Court*,

41 Mich. 726; *State v. We skittle*, 61 Md. 48; *Bennett v. P. & O. Steamship Co.*, 16 C.B. 29; *Newton v. Boodle*, 3 C.B. 795; *Mind v. Arthur*, 7 Dowl. & Lowndes 252, and here the rule is so prescribed.

The rules also provided that the terms of court might be prolonged by adjournment for the purpose of settling bills of exceptions, and an order was accordingly entered prolonging the term at which this judgment was rendered for the purpose of doing that in this case. This was equivalent to

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the practice in many jurisdictions of entering an order granting additional time after the expiration of the term in which to settle such bills. The provision as to the prolongation of the term for the particular purpose is a mere difference in phraseology, and not of the substance, and the question as to the close of the term in other respects is quite immaterial.

It is argued that, as Rule 2, fixing the terms of the circuit court, provides that the May term shall not continue beyond the second Saturday in July, except to finish a pending trial, the order extending the term under Rule 62, for the special purpose of settling bills of exceptions, beyond the limit fixed by Rule 2, could not extend such term beyond the commencement of the succeeding term, which was in this instance the third Monday of October, 1888. The May term, it is said, must necessarily have come to an end, either by the act of the justice who held it or by operation of law through the efflux of time and the commencement of the succeeding term. But we are of opinion that under these rules, the term may be continued indefinitely by order of court, so far as the settlement of bills of exceptions is concerned, and concur in the views of the Supreme Court of the District expressed in *Jones v. Pennsylvania Railroad*, 18 D.C. 426, where it was held that Rule 62 was valid and that, while it would be more proper to specify the time to which the term might be extended under the provisions of that rule, yet an omission to do so did not invalidate the order.

It is to be remembered that the Supreme Court of the District sitting at special term and the Supreme Court sitting in general term is still the Supreme Court; that the judgment of the general term setting aside a verdict and judgment at law and ordering a new trial is equivalent to remanding the cause to the special term for a new trial; that an appeal from the special to the general term is simply a step in the progress of the cause during its pendency in the court, and that, though the judges may differ, the tribunal remains the same. *Metropolitan Railroad v. Moore*, [121 U. S. 573](#) ; *Ormsby v. Webb*, [134 U. S. 62](#) . Some other judge must act on a motion for new trial by reason of inability created by death,

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and while this order was entered at a term subsequent to that at which the judgment was rendered, it was entered in a matter kept within the control of the court by the order of prolongation. Mr. Justice Merrick, if living, might have settled the bill of exceptions in the case in April, 1889 at the time the motion under consideration was made, and inasmuch as, because of his decease, the bill of exceptions could not be settled by him, and counsel could not settle it by agreement, Rule 64 applied. At all events, the court had power to carry that conclusion into effect and, this being so, the order that it entered awarding a new trial was not a final judgment.

The distinction between *Phillips v. Negley*, [117 U. S. 665](#) , and this case is that there, a verdict and judgment had been taken against the defendant, and no motion was made or proceeding had at that term for the purpose and with the view of setting aside the judgment. The litigation was at an end upon the adjournment of the term, and the successful party discharged from further attendance.

The result is that the writ of error must be

Dismissed.