Ex parte Martha Bradstreet: In the Matter of James Jackson, *ex dem.* Martha Bradstreet, *v.* Daniel Thomas.

Bill of exceptions.

A rule had been granted on the district judge of the northern district of New York, to show cause why he did not sign a bill of exceptions in a case tried before him: The court said, that on the day of the return of the rule, the district judge has a right to show cause; whether the person who obtained the rule moved or not, he had a right to have the rule disposed of.

On the trial of a cause in the district court of the United States for the northern district of New York, exceptions were taken to opinions of the court delivered in the course of the trial; and some time after the trial was over, a bill of exceptions was tendered to the district judge, which he refused to sign, objecting to some of the matters stated in the same, and at the same time, altering the bill then tendered, so as to conform to his recollection of the facts of the case, and inserting in the bill all that he deemed proper to be contained in the same; which bill of exceptions, thus altered, was signed by the judge. On the motion of the party who had tendered the bill of exceptions, a rule was granted on the district judge, to show cause why he did not sign the bill of exceptions as first tendered to him; to this rule, the judge returned his reasons for refusing to sign the bill, so tendered, and stating, that he had signed such a bill of exceptions as he considered correct.

This is not a case in which the judge has refused to sign a bill of exceptions; the judge has signed such a bill as he thinks correct; the object of the rule is to oblige the judge to sign a particular bill of exceptions which has been offered to him; the court granted the rule to show cause; and the judge has shown cause, by saying he has done all that can be required from him, and that the bill offered is not such a bill as he can sign; the court cannot order him to sign such a bill.[1]

A return by the district judge to a rule to show cause, need not be sworn to by him. p. 103.

The law requires that a bill of exceptions should be tendered at the trial; if a party intends to take a bill of exceptions, he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it; a practice to sign it after the term, must be understood to be matter of consent between the parties; unless the judge has made an express order in the term, allowing such a period to prepare it.[2]

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[1] In Ex parte Crane, 5 Pet. 190, it was determined, that a *mandamus* will lie, to compel the signing of a bill of exceptions. The same point was ruled in New York, in People *v.* Judges of Westchester, 2 Johns. Cas. 118; People *v.* Judges of Washington, 1 Caines 511; Sikes *v.* Ransom, 6 Johns. 279; Delavan *v.* Boardman, 5 Wend. 132. But not to settle it in a particular manner. Ex parte Tweed, 1 Hun 252. So, a *mandamus* will lie to the judges of the common pleas, commanding them to amend a bill of exceptions, according to the truth of the case; but a return *quod non ita est*, will be sufficient. Sikes *v.* Ransom, *ut supra.* See People *v.* Baker, 35 Barb. 105. In Pennsylvania, however, the writ of *mandamus* will not lie. In Drexel *v.* Man, 5 W. & S. 397, Chief Justice Gibson said, "It is strange that the writ of *mandamus* should be supposed to give remedy in a case like the present. It is true, that it does so in New York, as appears by The People *v.* The Judges of Washington county, 2 Caines 97, the secret of which is, that the matter is regulated by a particular statute of the state. I have seen no case, English or American, which indicates that it may be used for the purpose, as a prerogative writ." (But see Ex parte Crane, 5 Pet. 190.) "In England, it certainly may not; for we are told by Lord Coke (2 Inst. 426), that the proper remedy is a writ specially framed on the statute of West. II.; and, accordingly, we find a form for it in the Register, p. 182, setting forth the circumstances of the case, and commanding the judges, if they be true, to affix their seals to the bill. If they return, that they are untrue, the superior court proceeds no further, but leaves the complainant to his action for a false return, in which their truth is tried according to the course of the common law. Such a remedy certainly resembles an alternative *mandamus;* still, it is not a prerogative writ, but specific, grounded in a statute." Such a writ was issued on Conrow *v.* Schloss, 55 Penn. St. 28, where it was also determined, that if the judge confess the exception, he will be compelled to sign the bill, without regard to the materiality of the exception. The judge's return to the writ, however, is conclusive, and cannot be contravened. Haines *v.* Commonwealth, 99 Penn. St. 410.

[2] Brown *v.* Clarke, 4 How. 4; Phelps *v.*

Ex parte Bradstreet.

At January term 1829, on motion of Mr. *Key*, and on affidavit filed, the court granted a rule on the Honorable Alfred Conklin, district judge of the Northern District of New York, to show cause why he did not sign a certain
*103] bill of exceptions tendered to him on the part of the plaintiff, in *the case of James Jackson *ex dem.* Martha Bradstreet *v.* Daniel Thomas ; which cause had been tried before him, and a verdict given for the defendant. The rule was made returnable on the second Monday in January of this term. The same rule was obtained in the case of Jackson *ex dem.* Martha Bradstreet *v.* Joseph Kirkland.

To this rule the district judge, on the 10th of December 1829, returned, with the bills of exceptions which had accompanied the copy of the rule as served upon him, his reasons for refusing to comply with the demand of the plaintiff.

On the 27th day of February, the return-day of the rule having passed, *Storrs*, after notice to Mrs. Bradstreet, moved to take up the return of Judge Conklin. He said, that many important titles depended upon the decision of the cases in which the rules had been granted, and one of these cases was upon the calendar of this court. The return has been made, and the district judge has obeyed the mandate of this court. The application is also submitted at the instance of the district judge, who is not willing to stand before the court without a decisive inquiry into his proceedings.

Key objected to the court taking up the case, on the application of any one but Mrs. Bradstreet. It was for her to call it up, during the term, and to determine at what time; it will depend on the result of the case on the calendar, what course she will pursue.

Marshall, Ch. J.—The district judge of the northern district of New York has been called upon by a rule of this court to show cause ; and on the day of the return of the rule, he has a right to show cause, whether the person who obtained the rule moves or not. There is no question but that Judge Conklin has a right to have the rule disposed of.

The case went off until the following motion-day, by agreement. Afterwards, Mr. *Storrs* said, the return to the rule had been made by Judge Conklin in his official capacity ; he had not sworn to it ; but if this shall be required by the court, it will be done.

*104] *Marshall, Ch. J.—The judge need not swear to the return of the reasons why he refused to sign the bill of exceptions.

The return set forth, that at the time of the trial of the cause mentioned in the rule, no bill of exceptions was tendered, nor were any exceptions reduced to writing, except by himself, in the minutes which he kept of the trial ; unless, which was probable, the counsel also noted them in their minutes. Several weeks after the trial, the amended bill of exceptions, accompanied by a paper containing numerous amendments proposed by the counsel for the defendant, was delivered to him for correction ; and he

Mayer, 15 Id. 160; Dredge *v.* Forsyth, 2 Black 563 ; Kellogg *v.* Forsyth, Id. 571. The judge is not bound to seal a bill of exceptions, unless presented to him for settlement, within the time prescribed by the rules of court. Haines *v.* Commonwealth, 99 Penn. St. 410. And see Greenway *v.* Gaither, Taney Dec. 227.

thereupon proceeded, with due deliberation, and with the aid of his notes of the trial, to correct and settle the same, in conformity, as nearly as possible, with the truth of the case. No counsel appeared for either party, and no application was made for some time, for the bill of exceptions, by the counsel in the cause. In an amended return, the district judge stated, that some correspondence had taken place with Mrs. Bradstreet, in relation to alterations proposed to be made in the bill of exceptions; and in an interview with her, nothing was said by her, which was understood as an intimation of her intention or wish to be heard further upon the subject.

The return then proceeded to state, that in the bill of exceptions, as proposed by Mrs. Bradstreet, many alterations had been made in terms and language, of little importance, and matters were introduced as having occurred on the trial, which did not occur, circumstances are misstated, and opinions are imputed to him which he did not express; and thus many parts of the amendments proposed by the plaintiff were untrue; and that, therefore, the same were not signed by him. The particulars to which these representations referred were stated in the return.

The return, after stating that in reference to an instrument of writing produced in the cause, in the bill of exceptions as signed by the judge, a brief description of the instrument was inserted, instead of the whole, *in extenso*, which had been done in conformity with the established rules of practice, requiring only so much of the evidence offered upon the trial *as is sufficient fully and fairly to present every question of law [*105 embraced in the exception, proceeded—

"In conclusion, I have only to add the expression of my conviction, that although this rule of law has by no means been rigidly applied in abridging this bill, it has, in no instance, been departed from, to the prejudice of the plaintiff. If, however, on a particular examination of the bill and amendments (without which, I may be permitted to remark, it is impossible to form a just conclusion), your honorable court should, in regard to the documentary evidence, entertain a different opinion, I shall most cheerfully obey its mandate to correct the supposed error."

Storrs, on a motion to discharge the rule, stated, that this court would never require a judge to sign a bill of exceptions which he considers incorrect. The court will adopt another course, and will leave it to the judge to re-examine the bill, and to do what he shall consider proper. The bill of exceptions was not made out and offered to the judge at the trial, which is the practice in New York, nor was it presented to him until a long time afterwards; and it was then corrected according to his notes. The true course would be, to refer the matter back to the judge; and let him appoint a time, on notice to both parties, to appear before him, and revise the bill of exceptions. This the judge is perfectly willing to do.

Mr. Storrs stated, that he was the counsel for the parties in interest in the case, and he was desirous to see that their interests should not suffer. He also wished to present the case on the part of Judge Conklin, and ask the attention of the court to it.

Key, in opposition to the motion, contended: 1. That this court would consider the bills of exceptions as duly tendered, inasmuch as the judge, though he states that they were not tendered during the term, does not

allege that they were out of time ; and if, by the general practice of the court, or by consent, they were written during the trial, and presented afterwards, which is not denied, they ought to be considered in time. 6 Johns. 279 ; 2 Tidd 788. That this had been agreed to, he inferred *from the *106] return made by the district judge, and from the affirmance of facts in the affidavit, not denied in the return. 2. This court will now look at the bills of exception and the return ; and whatever parts of the bills have been objected to, and the objections justified by the return, they will order to be certified ; and such facts as have been objected to, and the objections not sustained by the return, the judge will also be called on to certify. 2 Ld. Raym. 1008. Unless this is done, the remedy by *mandamus* is nugatory. It was unimportant as to the manner in which the omissions should be required to be certified. This might be done in any mode most respectful to the judge.

The intimation of the counsel for the district judge, that the bills of exception may be settled by a hearing before the judge, on notice, would probably remove all the difficulties in the case, if the rule should now be discharged.

Marshall, Ch. J., delivered the opinion of the court.—The court is unanimously of opinion, that the rule ought not to be granted. This is not a case in which the judge has refused to sign a bill of exceptions. The judge has signed such a bill as he thinks correct. If the court had granted a rule upon the district judge to sign a bill of exceptions, the judge could have returned that he had performed that duty. But the object of the rule is, to oblige the judge to sign a particular bill of exceptions, which had been offered to him. The court granted the rule to show cause ; and the judge has shown cause, by saying he has done all that can be required from him ; and that the bill offered to him is not such a bill as he can sign. Nothing can be more manifest, than that the court cannot order him to sign such a bill of exceptions. The person who offers a bill of exceptions ought to present such a one as the judge can sign. The course to be pursued is, either to endeavor to draw up a bill, by agreement, which the judge can *sign ; or to prepare a bill to which there will be no objection, and *107] present to the judge.

The court will observe, that there is something in this proceeding which they cannot, and which they ought not to sanction. A bill of exceptions is handed to the judge, several weeks after the trial of the cause, and he is asked to correct it from memory. The law requires that a bill of exceptions should be tendered at the trial. But the usual practice is, to request the judge to note down in writing the exceptions, and afterwards, during the session of the court, to hand him the bill of exceptions, and submit it to his correction from his notes. If he is to resort to his memory, it should be handed to him immediately, or in a reasonable time after the trial. It would be dangerous, to allow a bill of exceptions, of matters dependent on memory, at a distant period, when he may not accurately recollect them ; and the judge ought not to allow it. If the party intends to take a bill of exceptions, he should give notice to the judge at the trial ; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. A practice to sign it after the term, must be under-

stood to be a matter of consent between the parties, unless the judge has made an express order in the term, allowing such a period to prepare it.

It is ordered by the court, that the *mandamus* as prayed for be and the same is hereby refused; and that the rule heretofore granted in this cause be and the same is hereby discharged.

Rule discharged.

Ex parte JOHN L. TILLINGHAST, Esquire. [*108

Attorneys.

That a counsellor practising in the highest court of the state of New York, in which he resides had been stricken from the roll of counsellors of the district court of the United States for the northern district of New York, by the order of the judge of that court, for a contempt, does not authorize this court to refuse his admission as a counsellor of this court.

This court does not consider the circumstances upon which the order of the district judge was given within its cognisance; or that it is authorized to punish for a contempt, which may have been committed in the district court of the northern district of New York.

Hoffman moved the Court for the admission of John L. Tillinghast, as a counsellor of this court. He stated, that he was a counsellor of court of chancery of the state of New York and of the supreme court of that state, and was, at this time, in the full exercise and enjoyment of the rights and privileges of a counsellor of those courts. He exhibited the certificates, in due form, of the time of the admission of Mr. Tillinghast, to practice in the courts, and that he is now a practitioner of the same. He was enabled to say, from knowing the opinions of three of the judges of the supreme court of New York, that Mr. Tillinghast was respected, and had their confidence.

It was understood, that the rule of this court was, to admit persons who practised in the highest courts of the several states, and Mr. Tillinghast was therefore completely within the rule. It would be disingenuous, not to refer to a circumstance which had occurred in relation to Mr. Tillinghast, in the district court of the United States for the northern district of New York. In that court, he had been stricken off the roll of counsellors of the court, by order of the district judge.

If the causes of that proceeding are now to be inquired into, under the relations which existed between him and Judge Conklin, and the respect he entertained for him, Mr. Hoffman said, he should not interfere. But this court will not look into this circumstance; and the mere fact of an *individual having been stricken off the roll, would not in itself induce the court to refuse his admission here. This might occur at the [*109 request of the individual, or it might be the effect of his acceptance of an office which disqualified him to practice; as that of marshal. Upon this fact alone, the court will not reject this application.

But if the court will go into an examination of the circumstances of the case, Mr. Tillinghast is fully prepared, and willing to proceed; in which he will have the aid of other counsel. He is desirous that this court would hear the facts and decide upon them, and he expects to be able, in the investigation, fully to vindicate himself from all reproach.

It is understood, that on a former occasion, when a *mandamus* was applied for to the district judge, to restore the applicant to the roll of coun-