

Owings v. Tiernan.

there was, therefore, error in the court below ; the judgment must consequently be reversed, and a *venire de novo* awarded.

THIS cause came on to be heard, on the transcript of the record from the district court of the United States for the western district of Pennsylvania, and was argued by counsel : On consideration whereof, it is ordered and adjudged by this court, that the judgment of the district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court, with directions to that court to award a *venire facias de novo*.¹

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*OWINGS *et al.* v. The Lessee of TIERNAN.

Practice.

The rule of court for docketing and dismissing causes, made at January term 1835, has never been applied to any cases, where, before the motion was made, the cause has been actually placed on the docket. Under such circumstances, on a motion to docket, where a motion to dismiss was contemporaneously made, the cause was allowed to be docketed ; the usual bond for the clerk's fees being given. Time was given to the plaintiff in error to give the bond.

ERROR to the Circuit Court of Kentucky.

A motion was made by *Underwood*, for the defendant in error, to docket and dismiss the suit, according to the amended rule of the court, made at the last term, for want of its being duly entered on the docket ; the writ of error having been sued out, before the last January term, and the suit not having been docketed at that term, nor at the present term. A motion was contemporaneously made by *Crittenden*, for the plaintiff in error, to docket the suit now, the record having been returned to the clerk's office in October last, and the docketing of it having been delayed on account of the usual bond for the clerk's fees not having been given by the plaintiff in error.

STORY, Justice, delivered the opinion of the court, to the following effect :—The rule of the court for docketing and dismissing causes, has never been applied to any cases, where, before the motion was made, the cause had been actually placed on the docket. In the present case, the motion to dismiss, and the motion to docket the cause, are contemporaneous. The court are of opinion, that, under such circumstances, the motion to docket the cause ought to be allowed, upon the usual bond for the clerk's fees being given. For this purpose, time will be given to the plaintiff in error (as it is asked), until the 1st day of March next. If, by that time, no bond is given, the cause will then be dismissed, according to the motion of the defendant in error.

¹ For a further opinion on this case, see 12 Pet. 345.