
Hemmenway v. Fisher.

or conjectural state of facts, of which no evidence has been offered. The instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony.

In the case before us, we do not see any evidence in the record which tends, in the least degree, to prove any one of the facts hypothetically assumed in the opinion. If such testimony was given, it certainly does not appear in the transcript. And upon this ground, without examining further into the opinion of the court below, the judgment must be reversed.

AUGUSTUS HEMMENWAY, CLAIMANT OF THE SHIP INDEPENDENCE,
v. WILLIAM B. FISHER.

Where a judgment of the Circuit Court, sitting in admiralty, was affirmed here by a divided court, interest was not to be calculated upon the judgment. The eighteenth rule of this court never applied to cases in admiralty which are brought up by appeal, and the rule itself is repealed by the sixty-second rule.

THIS was an appeal from the Circuit Court of the United States for the district of Massachusetts, sitting in admiralty.

It was argued at the preceding term of this court by *Mr. Loring* for the appellant, and *Mr. Bartlett* and *Mr. Thaxter* for the appellee. The judgment of the Circuit Court was affirmed by a divided court, and a mandate was issued for the amount named in such judgment, but no interest was mentioned, as none was given in the judgment of the Circuit Court. The mandate was not filed in the Circuit Court, and at the present term *Mr. Bartlett* made the following motion, which was argued by *Mr. Gillett*:

And now the appellee moves to amend the judgment rendered in this cause at the December term of this court, in the year of our Lord 1856, by giving to the appellants damages on the decree of the Circuit Court, at the rate of six per centum per annum, and that the judgment be so reformed, and for cause shows—

1st. That the mandate in said cause, though issued, has never been presented to the Circuit Court, and is now returned herewith, and filed with the clerk.

Hemmenway v. Fisher.

2d. That, upon inquiry of several of the judges, it has been ascertained that the question of damages was not passed upon by the court, and so this motion is not precluded by the past action of this court.

3d. That by the rules of this court, (Nos. 17 and 18,) "Where there are no special circumstances, six per cent. interest is allowed on the judgment of the court below," and the omission to insert the same in the record and mandate is deemed by this court a mere *clerical error*, capable of amendment at a succeeding term of this court, if the mandate has not been presented to the Circuit Court, and shall be restored to the files of this court. (*Bank of Kentucky v. Withers*, 3 Peters, 431.)

4th. The fact that the judgment in this case was affirmed upon a division of opinion among the members of the court cannot make it a case of "special circumstances" within the case above cited, since it is hardly to be presumed that in all cases where there are difficulties in a cause, the party ultimately prevailing is to lose his damages.

Any rule that should make damages in such case on a division of opinion upon the main question among the members of the court, would be open to the suggestion that in principle it ought not to make them depend upon an exact equal division, but apportion them according to the number of dissenting opinions among the members of the court.

S. BARTLETT, *for the Appellee.*

The appellant objects to the amendment proposed in the judgment rendered in the above entitled cause, and to the allowance of the interest claimed.

1st. Because no interest or damages were claimed at the hearing in this cause; the proper time to have presented this claim was at the hearing; and it is too late, after a decree has been rendered and a mandate issued, to seek at a subsequent term to raise that question. In the case of the *Santa Maria*, 10 Wheat., 431, 436, the court say, "In this view, it (the claim of interest) was matter open for discussion upon the original appeal; and no interest having been asked or granted, the claim is finally at rest. What was formerly before the court cannot again be drawn into controversy." A decree in which no damages are allowed is conclusive and final.

In the case *Boyce's Ex'r v. Grundy*, reported 9 Peters, 275, the court say, "It is solely for the decision of the Supreme Court, whether any damages or interest (as a part thereof) are to be allowed in cases of affirmance, (p. 290.) If, upon affirmance, no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages, (p. 290.)"

Hemmenway v. Fisher.

In the present case, the motion assumes and admits that no such allowance was made by the court; this decree, therefore, is equivalent to a denial of damages.

The case referred to in 3d of Peters would seem to have been an error of the clerk in not entering the judgment, with the damages which the court decreed, or intended to decree.

This is a different case; no damages were claimed by the appellant, and none were decreed, or intended to be decreed, by the court. Here was no clerical error, but an omission or waiver of a claim to damages by the appellee; and consequently the court did not decree any.

2d. The appellee cannot rest any claim on the fact that the mandate has not been delivered to the Circuit Court; that is his own wrong.

It was his duty to have delivered it immediately upon its being issued.

And had it been so delivered, the appellant would have paid the amount of the judgment; and has in fact held the money unused from that time to the present, for the purpose, and will do so until the final decree in the Circuit Court.

If therefore the decree is to be changed, and any interest allowed, the appellant claims that he ought not to be charged with interest after the mandate was issued, none having been claimed by the appellee; and the mandate having been retained nearly twelve months in his hands, to the detriment of the appellant.

WILLIAM DEHON, *for Appellant.*

Appellee's Reply.

1st. The ground that appellee must be deemed to have waived the application of a *standing rule of this court* to his case, because he did not specially ask at hearing that it be applied, cannot, it is submitted, be maintained.

2d. The case of the Santa Maria, 10th Wheaton, cited by appellant, has, it is submitted, no application, since it was an attempt to alter the terms of a stipulation made in the admiralty by a claimant, and insert an engagement to pay interest on the sum stipulated. Nor does the case of Boyce v. Grundy, 9 Peters, affect this application, since that case proceeds on the ground that the court passed on the question of allowing damages, and purposely entered the decree without making the allowance. This application proceeds on the ground (supposed to be ascertained) that the court did not pass on the question at all, and that under the general rule damages are to be allowed unless purposely denied; and this is the point determined by 3d Peters, 431.

Hemmenway v. Fisher.

3d. The suggestion, that at all events interest ought to be denied after the mandate issued, ought not to prevail, if there was what the court deem a clerical error, since appellee had no remedy in the vacation of this court, and appellant has in the mean time enjoyed the use of the money.

S. BARTLETT, *for Appellee.*

Mr. Chief Justice TANEY delivered the opinion of the court.

This case was decided at the last term. It was an appeal from the decree of the Circuit Court for the district of Massachusetts, sitting as a court of admiralty. The decree was affirmed here by an equal division of the Justices of this court; and the decree of affirmance was entered by the clerk for the sum awarded by the Circuit Court and costs, and did not give interest on the amount decreed by the court below. The mandate was issued according to the decree; but it was not filed or proceeded on by the appellee, because he supposed that, under the eighteenth rule of this court, he was entitled to interest upon the amount recovered in the Circuit Court, from the date of the decree, and that its omission was a clerical error. And he has now moved the court, to correct it by amending the decree and mandate.

If an error has been committed by the clerk, it is, without doubt, in the power of the court to correct it at the present term.

But the judgment is correctly entered, and the mandate conforms to it. And the mistake on the part of the appellee has arisen from supposing the eighteenth rule to be still in force, and to be applicable to cases in admiralty. But it never applied to admiralty cases.

It will be observed by reference to the seventeenth rule, to which the eighteenth refers, that these rules are in express terms confined to cases brought here by writ of error. And it is true that, by the original judiciary act of 1789, decrees in chancery and admiralty, as well as judgments at common law, in the Circuit Courts, were removable to this court by writ of error, and were not made removable in any other manner. And if that provision in the act of 1789 was still in force, and the rule unrepealed, the appellee would be entitled to the interest he claims, to be calculated under the twentieth rule, to the day of the affirmance of the decree.

But the writ of error, from its form, and the principles which govern it, is peculiarly appropriate to judgments at common law, and is inconvenient and embarrassing when used as process to remove decrees in chancery and admiralty to a su-

Hemmenway v. Fisher.

perior court. The ordinary and uniform mode of removing such decrees to the appellate and revising court, wherever such jurisdictions have been established, has been by *appeal*, with the single exception of this act of Congress. And, in order to remove the inconvenience and embarrassment which this provision in the act of 1789 created, it was repealed by the act of March 2, 1803, and the ordinary mode of *appeal* substituted in the place of the *writ of error*. And as this case came up by appeal, the rules of this court referred to in the argument do not apply to it.

Nor indeed were they intended to apply to chancery or admiralty decrees. They were adopted at February term, 1853, and that term continued until the 2d of March. It was on that day that the act of Congress changing the provision in the act of 1789 was approved by the President. And it appears by the minutes of the court that the rules in question were adopted on the same day, that is, March 2d. This act of Congress had therefore, undoubtedly, passed both Houses of Congress before these rules were adopted, and it is evident that they were carefully framed with reference to this change in the law, so as to exclude from their operation admiralty and chancery appeals.

It may be proper to add, that the eighteenth and twentieth rules are no longer in force, even in common-law cases. They have been superseded and annulled by the sixty-second rule, adopted in 1851. By this last-mentioned rule, judgments at common law and decrees in chancery, upon affirmation in this court, carry interest until paid; and the interest is to be calculated according to the rate of interest allowed in the State in which the judgment or decree of the court below was given. The object in changing the rule in this respect was to place the suitors in the courts of the United States upon the same footing with the suitors in the State courts in like cases. For the interest allowed in the several States differs, and in many of them it is higher than six per cent., and in most if not all of them a judgment or decree in a court of the State carries interest until it is paid.

Cases in admiralty, however, are not embraced in the sixty-second rule. It applies to cases of law and equity only. And, indeed, cases in admiralty could not have been justly included. For there could be no reason for giving one rate of interest where a case of collision or salvage was in the first instance tried and decided in Louisiana, and another rate of interest where it was tried and decided in New York, or in any other State where the interest allowed by the State laws was different.

Hemmenway v. Fisher.

Moreover, in cases of collision and salvage, and more especially in the latter, it is impossible to fix the sum that ought to be awarded with absolute certainty by any rule of calculation. It must depend mainly upon estimates, and the opinions of persons acquainted with the subject; and, acting upon mere estimates and opinions, different minds unavoidably come to different conclusions as to the amount proper to be allowed.

And it will sometimes happen in an admiralty case, that this court will think that the damages estimated and allowed in the Circuit Court are too high, and yet the opinion here may approximate so nearly to that of the court below, that this court would not feel justified in reversing its judgment. Besides, new testimony may be taken here, in an admiralty case, and a new aspect given to it. No rule, therefore, fixing any certain rate of interest upon decrees in admiralty, whenever the decree is affirmed, could be adopted with justice to the parties. And a discretionary power is reserved, to add to the damages awarded by the court below, further damages by way of interest, in cases where, in the opinion of this court, the appellee, upon the proofs, is justly entitled to such additional damages. But this allowance of interest is not an incident to the affirmance affixed to it by law or by a rule of court. If given by this court, it must be in the exercise of its discretionary power, and, *pro tanto*, is a new judgment.

In the case before us, no new judgment could be given in this court, because, upon the question of affirming or reversing the decree of the Circuit Court, the Justices of this court were equally divided; and the judgment was affirmed by operation of law, which from necessity affirms the judgment of the inferior tribunal when the judges of the appellate court are equally divided. Upon such an affirmance, the appellee was entitled to the full benefit of the decree of the Circuit Court, but nothing more. The court, being equally divided, could not change the decree of the Circuit Court, nor exercise its discretionary power to allow interest on the decree; for this would have been a new decree. And those Justices who were of opinion that the decree of the Circuit Court ought to be reversed because the damages were too high, were of course opposed to making it still higher by the addition of interest.

The motion to amend the decree and mandate, and give interest on the amount awarded by the Circuit Court, must therefore be overruled.

U. S. v. Pacheco, U. S. v. Hensley, U. S. v. Bidwell, and U. S. v. Sunot et al.

THE UNITED STATES, APPELLANT, *v.* JUANA S. DE PACHECO. THE UNITED STATES, APPELLANT, *v.* SAMUEL J. HENSLEY. THE UNITED STATES, APPELLANT, *v.* JOHN BIDWELL. THE UNITED STATES, APPELLANT, *v.* ANTONIO SUNOT ET AL.

As the act of Congress passed on the 3d of March, 1851, does not specify the time within which an appeal must be made to this court from the District Courts of California, the subject must be regulated by the general law respecting writs of error and appeals. Either party is at liberty, therefore, to appeal from such a decree within five years from the time of its rendition.

Under the sixty-third rule of this court, an appellee in a case from California may docket and dismiss according to that rule; but a new appeal may be taken at any time within five years, or it may be that the record may be filed by the appellant at the same term at which a certificate or record had been filed by the appellee, and the case dismissed.

After a case has been thus docketed and dismissed at the instance of an appellee who is a claimant of land, if a patent should be taken out, it will still be subject to be reviewed by this court at any time within the five years above mentioned.

THESE four cases are put together, because they were all covered by one decision of the court. They were cases from California.

In the first, *Mr. Crittenden* moved to dismiss the appeal.

1st. Because it was not taken during the term at which the decree was rendered.

2d. To docket and dismiss pursuant to the sixty-third rule of court.

Mr. Crittenden offered with his motion a duly-certified transcript of the record; from which it appeared that the decree of the District Court confirming the grant was made on the 22d September, 1856, and that the United States appealed therefrom at the next stated term, to wit 24th March, 1857.

UNITED STATES }
v.
HENSLEY. }

In this case, *Mr. Blair* moved to docket and dismiss pursuant to the sixty-third rule of this court, accompanied by a duly-certified transcript of the record; from which it appeared that the decree of the District Court, confirming the grant, was made 5th July, 1855, and that the United States appealed therefrom on the said 5th July, 1855.

UNITED STATES }
v.
BIDWELL. }

Mr. Blair moved to docket and dismiss pursuant to the sixty-third rule of court, accompanied by a duly-certified transcript

U. S. v. Pacheco, U. S. v. Hensley, U. S. v. Bidwell, and U. S. v. Sunot et al.

of the record; from which it appeared that the decree of the District Court, confirming the grant, was made on the 16th of July, 1855, and that the United States appealed therefrom on the said 16th of July, 1855.

UNITED STATES }
v.
SUNOT ET AL. }

Mr. Blair moved to docket and dismiss pursuant to the sixty-third rule of court, accompanied by a duly-certified transcript of the record; from which it appeared that the decree of the District Court, confirming the grant, was made on the 14th of January, 1856, and that the United States appealed therefrom on the 24th of March, 1857.

The opinion of the court refers to the first-mentioned case, because the first reason given by *Mr. Crittenden* was peculiar to that case; the second reason was common to all the cases.

Mr. Chief Justice TANEY delivered the opinion of the court.

A motion has been made to docket and dismiss this case.

It appears, by a certified copy of the record in the District Court of the United States for the northern district of California, that a decree was passed by that court on the 22d of September, 1856, confirming the title of Pacheco to certain lands therein mentioned. No appeal was taken by the United States at the term at which the decree was made, but an appeal was entered at the next succeeding term, in March, 1857.

Pacheco by his counsel now moves to docket and dismiss the case, upon two grounds: 1st. Because the appeal was not taken at the term at which the decree was rendered; and, 2d. If the appeal might legally be taken at the succeeding term, yet no transcript of the record was filed here within the first six days of the present term of this court.

The first question raised by the motion depends upon the construction of the act of Congress of March 3, 1851, which authorizes an appeal to this court in cases of this description. The act gives the right in general terms to the party against whom the judgment is rendered; and does not limit the time within which the appeal shall be made; nor refer to any particular act of Congress by which the time shall be regulated. It must therefore be governed by the judiciary acts of 1789 and 1803, which regulate writs of error and appeals to this court from inferior tribunals. And by these acts the party may take his appeal at any time within five years after the passing of the decree by the inferior court. The appeal in question was therefore made in time; and this motion cannot be maintained on that ground.

U. S. v. Pacheco, U. S. v. Hensley, U. S. v. Bidwell, and U. S. v. Sunot et al.

The second reason assigned in support of the motion depends upon the sixty-third rule of this court. Under this rule, the appellee in a case from California is entitled to have the case docketed and dismissed, if the transcript of the record is not filed in this court within the first six days of the term next ensuing such appeal; provided the decree of the court below was rendered sixty days before the commencement of the said term of this court.

As we have already said, the decree was rendered in September, 1856, and the appeal taken in March, 1857. Consequently it was the duty of the appellant in this case to file a transcript of the record within the first six days of the present term. This was not done. And it appears that no transcript of the record has yet been filed by the appellant. The appellee is therefore entitled to have the case docketed and dismissed under the rules above mentioned.

It is true he has not filed the certificate mentioned in the rule, but has filed a full transcript of the record. But the transcript shows all of the facts which the clerk by the rule is required to certify; and it has always been held by the court to be equivalent to the certificate which the rule prescribes.

It is proper, however, to add in order to prevent mistake on this subject, that the only effect of docketing and dismissing a case under this rule, is to enable the party to proceed to execute his judgment in the court below. It removes the bar to further proceedings in that court, which the appeal created, and does nothing more. And after the case has been docketed and dismissed, the party against whom the decree was rendered, may still, at any time within five years from the date of the decree take a new appeal in the inferior court; and if he files the transcript of the record in this court within the first six days of the term next ensuing his appeal, the appeal will be valid, and the case as fully before this court, for examination and revision, as if it had been brought here at the first term. The act of Congress authorizes the appeal at any time within five years, and the period allowed by law cannot be shortened by any rule or practice of a court. Nor was it intended to be diminished by the rules in question. And when an appeal is taken in the court below, if the appellee desires a speedy and final decision or the controversy, it is in his power to bring the case up to the next succeeding term of this court.

Indeed, it sometimes happens, under this rule, that the court permits the transcript of the record to be filed by the appellant, and the case docketed for argument, at the same term at which it had previously been docketed and dismissed on the motion of the appellee. And where the appellant satisfies the

Spencer v. Lapsley.

court that the omission to file the transcript within the first six days was not owing to any fault or negligence on his part, the court has always allowed him to file it at the same term, and docket the appeal for trial, without putting him to the expense and delay of another appeal.

It follows, from what we have said, that although the case before us must be docketed and dismissed, yet this will not prevent the United States from filing a transcript at the present term, and docketing the case for argument, if they can show that the delay has not arisen from any fault or negligence on their part. And if they fail to do so, they may yet take another appeal at any time within five years, and bring here the decree of the District Court for examination and revision. And if the appellee, after the case is docketed and dismissed, proceeds upon the decree of the District Court, and obtains a patent for the land, his title will still be subject to the decision of this court, if the Government shall hereafter bring up the case within the time limited by law.

We have deemed it proper on this occasion to enter into this full explanation of the rule of court referred to, on account of the multitude of appeals which must unavoidably come up from the District Courts of California, and which, in some shape or other, may be brought before this court, upon motions to dismiss.

ELIPHAS SPENCER, PLAINTIFF IN ERROR, *v.* JOHN W. LAPSLEY.

The judge of the District Court of the United States in Texas had power to order the record of a suit in which he was interested to be transmitted to the Circuit Court of the United States in Louisiana.

A plea in abatement, filed in connection with pleas in bar, was irregular; and the refusal of the court below to allow the plea to be filed is not subject to the review of this court.

A contract for the sale of eleven leagues of land in Texas, issued before the revolution, and subsequently located within the colonizing grant of Austin and Williams, with their consent, and certified by the Secretary of State, was good without the signature of the Governor.

So far as the land was within the colonizing grant of Robertson, his consent was not necessary, the term of his grant having expired.

Where no organization of a colonial grant had taken place by the introduction of settlers, the land not occupied was open for public sale, with the consent of the empresario, and the alcalde was a proper person to put the purchaser in possession.

That the survey was made before the order of survey was directed to the surveyor, was not fatal to the grant. Any preliminary defects were cured by the patent. The fairness of the grant cannot be investigated at law, at the instance of a third party.

A power of attorney, authenticated before a regidor, proved by the handwriting of the regidor and the assisting witnesses, held sufficient.