
Overton et al. v. Cheek et al.

JOHN OVERTON, ROBERT C. BRINKLEY, ROBERTSON TOPP, AND
JAMES JENKINS, PLAINTIFFS IN ERROR, *v.* ELIJAH CHEEK AND
GEORGE W. CHEEK.

Where a writ of error was allowed in open court, in the Circuit Court, but this writ had no seal, and was not returned to this court with the transcript of the record, and two terms afterwards a paper was filed in the clerk's office, in form of a writ of error, but without a seal, and having no authenticated transcript annexed, the cause must be dismissed on motion.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of West Tennessee.

Mr. Davidge moved to dismiss the writ for the following reasons, which motion was opposed by *Mr. Gillet*.

In this cause, a transcript of the record was filed in the office of the clerk of this court on the eighteenth day of February, 1858, and the cause was thereupon docketed. No writ of error was returned with the transcript; nor has any writ of error, in a legal sense, ever been returned. But on the twenty-seventh day of December, 1859, a paper was filed in the clerk's office, in form of a writ of error, but without the seal of the Circuit Court, whose proceedings are to be re-examined, and without an authenticated transcript of the record annexed to and returned with it, as required by the judiciary act.

By reference to the transcript, it will appear that the judgment of the Circuit Court was rendered on the sixteenth day of April, 1857. At the ensuing term of this court, the transcript was filed. The paper filed in the clerk's office purports to have been issued by the clerk of the Circuit Court on the seventeenth day of April, 1857, and it is returnable to this court on the first Monday of December, 1857. It does not appear ever to have been filed in the Circuit Court. There is no citation.

It is submitted—

1. That in order to give jurisdiction to this court, the writ of error must be under the seal of the Circuit Court, whose

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clerk is authorized to issue it. Act of Congress of May eighth, 1792, sec. 9; (1 Statutes at Large, 278.)

2. That the writ of error must be returned at the ensuing term. If a term intervene, the objection is fatal.

Hamilton v. Moore, 3 Dallas, 371.

Steamer Virginia v. West et al., 19 Howard, 182.

Villalobos v. United States, 6 Howard, 81.

United States v. Carey, *ib.*, 106.

3. That there must be annexed to, and returned with, the writ, an authenticated transcript of the record. Without the writ, the transcript is filed without authority of law; and a writ of error without the record of the court to be reviewed, or reasons for not returning it, is not returned. Here the writ of error comes back as it went out. There is no return, and hence no jurisdiction.

4. The writ does not appear to have been filed in the Circuit Court.

Brooks v. Norris, 11 Howard, 204.

5. There was no citation, and no legal evidence of the waiver of the citation. The transcript filed does show that the citation was waived; but that transcript is not legally before this court, not having been returned in obedience to process.

6. That the transcript was not returned in conformity with law and the rules of this court.

Mr. Justice McLEAN delivered the opinion of the court.

This purports to be a writ of error to the Circuit Court of the United States for the district of West Tennessee.

By reference to the transcript, it appears that the judgment of the Circuit Court was rendered the sixteenth of April, 1857. At the ensuing term of the Supreme Court, the transcript was filed.

It appears that a writ of error in the Circuit Court was allowed, in open court, and signed by the clerk the seventeenth day of April, 1857, which was returnable to the Supreme Court on the first Monday of December, 1857. But this writ had no seal, nor was it returned with the transcript to the

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Supreme Court. But on the twenty-seventh of December, 1859, a paper was filed in the clerk's office, in form of a writ of error, but without a seal, and having no authenticated transcript annexed.

From this it appears that no writ of error has been certified with the transcript, and that the paper purporting to be a writ of error, which was filed in December last, being without seal, was void. Two terms of this court have intervened, not including the present term, since the transcript was certified, without a writ of error.

The cause must therefore be dismissed for these irregularities, without noticing others apparent on the record.

STEPHEN O. NELSON, ELLISON BANKSMITH, HENRY C. WALKER, AND THOMAS A. NELSON, PARTNERS UNDER THE FIRM OF S. O. NELSON & Co., APPELLANTS, *v.* LUCIUS C. LELAND, JOHN H. COOKE, DUNCAN C. WILLIAMS, AND McRAE, COFFMAN, & Co., CLAIMANTS OF THE STEAMER BRIGADIER GENERAL R. H. STOKES.

In a collision which took place between a steamboat and a flat-boat on the Yazoo river, more than two hundred miles from its mouth where it falls into the Mississippi river, both vessels were in fault—the flat-boat, because it had not one or more steady and fixed lights on one or more conspicuous parts of the boat, and because of its erroneous position in the river; and the steamboat, because the master, seeing a light ahead, did not stop his boat, and reverse her wheels, until the locality of the light was clearly ascertained.

The collision took place within the admiralty jurisdiction of the courts of the United States.

Upon a motion to dismiss an appeal, upon the ground of a want of jurisdiction originally in the District Court, the question of jurisdiction in that court is a proper one for appeal to this court, and for argument when the case is regularly reached. This court have jurisdiction on such an appeal. The motion to dismiss, upon that ground, must therefore be overruled.

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