

Case No. 4,682.

FARRELL v. CAMPBELL.

[7 Blatchf. 158.]¹

Circuit Court, S. D. New York.

Feb. 8, 1870.

PRACTICE IN ADMIRALTY—DECREE BY DEFAULT—DISMISSAL OF APPEAL.

Where, in a suit in personam in admiralty, after answer, a decree was taken by default for the libellant at the hearing in the district court, and a reference was made to a commissioner to take proof of damages, and the respondent appeared before the commissioner and contested the amount of damages, and the commissioner made a report, to which no exception was taken, and a final decree was entered, from which the respondent appealed to this court, and the libellant then moved this court to dismiss the appeal: *Held*, that the motion must be denied, and the case be heard in the usual way, on the call of the calendar.

[Cited in *The Saunders*, 23 Fed. 304; *The Delaware*, 33 Fed. 589; *Re Hawkins*, 147 U. S. 486; 13 Sup. Ct. 512.]

This was a motion on the part of the libellant [James Farrell] in a suit in admiralty, to dismiss an appeal taken by the respondent [Charles Campbell] to this court from a decree of the district court. An answer was put in in the district court; but, when the hearing took place, the respondent, on the court's refusing to postpone the same, declined to appear, and a default was entered, and a reference was made to a commissioner to take proof of damages. [For the hearing on a motion of the respondent to open the default, see Case No. 4,681.] The respondent appeared before the commissioner and contested the amount of damages. The commissioner made a report, to which no exception was taken. A final decree for the

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amount was entered, from which an appeal was taken by the respondent to this court. The libellant now moved to dismiss such appeal.

Charles Donohue, for libellant Dexter.

A. Hawkins, for respondent.

NELSON, Circuit Justice. It is admitted that the appeal is, in form, regular. I agree that the merits were concluded by the default, and cannot be heard over again in this court. That would be hearing an original case, of which this court has no jurisdiction. But the respondent appeared before the commissioner and contested the damages; and, although he took no exception to the report, and will not be able to avail himself of any errors in the same, yet I am not prepared to say that the proper remedy of the libellant is by a motion to dismiss. The case stands on the footing of an appeal in admiralty, where the merits have been contested, and a decree has been entered for the libellant, and an appeal has been taken. Although no errors may have been committed by the court below, and, on a motion to dismiss, this court would so hold, such a remedy could not be applied. The case must be heard in the usual way in which appeals are heard, upon a call of the calendar. In the present case, the respondent had a right to appeal, and to review the decree as to the question of damages, and, hence, it must be heard in the usual way. The motion is denied, but without costs.

¹ [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]