FOOTE v. SILSBY et al.

Case No. 4,917.

{1 Blatchf. 542;[1] 1 Fish. Pat. Rep. 391.}

Circuit Court, N. D. New York. June Term, 1850.

WRIT OF ERROR—ALLOWANCE BY JUDGE AT CHAMBERS—ACT OF JULY 4, 1836.

1. A judge of this court sitting at chambers has power to allow a writ of error under section 17 of the patent act of July 4, 1836 (5 Stat. 124), which declares that in patent cases writs of error shall lie as in other cases and "in all other cases in which the court shall deem it reasonable to allow the same."

2. There might be some ground for saying that in allowing such writ the judge must be sitting at a stated term of the court, if a court at chambers and one at a stated term fixed by statute were held by a different body.

3. On the allowance of such a writ of error, an order was made by the judge at chambers giving the party suing out the writ leave to make a bill of exceptions. He had made a case after the trial, which took place two years before, and had moved on the case for a new trial, which was denied. The case contained no stipulation that it might be turned into a bill of exceptions. On a motion to set aside the order: *Held,* that as the case was made, instead of a bill, by direction of the judge before whom the trial was had, and without prejudice to the right of the party to make up a bill with a view to a writ of error, and, as it appeared that the points were made and the exceptions taken at the trial in the required form to entitle the party to the benefit of them on a writ of error, the order must stand.

[Cited in Re Kaine, Case No. 7,598.]

After the decision in this case, refusing a new trial,—Foote v. Silsby {Case No. 4,916},—the plaintiff {Elisha Foote} having perfected judgment for less than 82,000, the defendants {Horace C. Silsby and others} sued out a writ of error from the supreme court, which was allowed specially under the 17th section of the patent act of July 4, 1836 (5 Stat 124), by Mr. Justice Nelson, at chambers, ex parte, on the 15th of June, 1850. He at the same time made an order giving leave to the defendants to make up a proposed bill of exceptions and serve a copy of it, with a view to the settlement of a bill to be attached to and carried up with the record. The plaintiff now moved to set aside the writ of error, and the order allowing it, and also the order for leave to make a bill of exceptions. It appeared that no bill of exceptions had been settled in form before the allowance of the writ of error, but that a case had been made and settled after the trial, on which the motion for a new trial was made. The case contained no reservation of a right to turn the same into a bill of exceptions; but it appeared that it had been at first drawn up in the form of a bill of exceptions, and was changed into a case by direction of Judge Conkling before whom the case was tried, on the ground that the defendants would not be entitled to a writ of error as of course, and that it would be time enough for them to make a bill of exceptions when a writ of error should be specially allowed. The trial was in June, 1848. {Case unreported.}

Samuel Stevens, for plaintiff, contended that the allowance of the writ of error was irregular and ought to be set aside, it having been made not by "the court," as the law required, but by a judge out of court; and that the ";defendants, having made a case, without reserving a right to turn it into a bill of exceptions, could not now have leave to do so. Stewart v. Hawley, 22 Wend. 561.

Samuel Blatchford, for defendants, insisted: 1. That a judge of this court at chambers was "the court," within the meaning of the patent act; that one judge was a quorum of the circuit court for this district by express statute (Act March 3, 1837, § 3; 5 Stat 177), and that a judge, who alone composed a court, was a court whenever he transacted judicial business. U. S. v. The Little Charles {Case No. 15,613}. 2. That the practice pursued in this case as to the bill of exceptions was the same pursued in Hogg v. Emerson, 6 How. {47 U. S.} 437, 447, 457, a case in all respects analogous to this; that a case could not be made in this court with a stipulation to turn the same into a bill of exceptions (Conk. Tr. 273-275), and that, under the facts shown, the defendants were entitled now to put their bill of exceptions into form, if their writ of error was allowed to stand, as their exceptions were taken in proper form at the trial.

NELSON, Circuit Justice. The allowance of the writ of error in this case was granted by me at chambers, and the question is, whether or not a judge at chambers has the power to allow the writ, under the seventeenth section of the patent act of 1836, where the judgment is under the sum of $2000.

That section provides for writs of error and appeals from judgments and decrees in patent cases, the same as in other cases in the federal courts, and adds, that they shall also lie "in all other cases in which the court shall deem it reasonable to allow the same."

This applies to the case of a judgment for the plaintiff for less than $2000, which is the amount required to authorize a writ of error or appeal under the general law on the subject

The argument on the part of the plaintiff is, that the judge must be sitting at a stated term of the court, and not at chambers, to satisfy the language of the act providing for this special writ of error. There might be some reason for this distinction in a case where a court at chambers and one at a stated term fixed by statute were held by a different body. But when they are held by the same individual, as in this case, I doubt if the distinction is well founded. The nature of the subject here seems to indicate chamber business, and the matter may as well be attended to at chambers, as in court in term time. A judge sitting at chambers is a court in the proper and usual sense of the term, and in a sense which may satisfy the words as well as the import of the statute. Although there may be some doubt in the matter I am inclined to hold that the writ was properly allowed.

As to the order in regard to a bill of exceptions, there is no doubt that the points must be made and the exceptions taken in the usual way at the trial, in order to entitle the party to the benefit of them on the writ of error. And, as well as I recollect this case when it was before me, the points in it were taken in the required form, although the paper book itself, on which the motion for a new trial was made, was in the form of a case. That fact is explained, however, in the opposing affidavit and the paper appears to have taken that particular form under the direction of the judge before whom the trial took place, without prejudice to the right of the defendants to make up a bill of exceptions with a view ultimately to a writ of error.

Upon the whole, I think the motion must be denied in both aspects in which it is presented.

Motion denied, without costs.

{NOTE. For other cases involved in this litigation, see note to Foote v. Silsby, Case No. 4,916.}

[1] {Reported by Samuel Blatchford, Esq., and here reprinted by permission.}