

Case No. 6,768.

HOWE v. McDERMOTT.

[4 Cranch, C. C. 711.]¹

Circuit Court, District of Columbia.

March Term, 1836.

PRACTICE—NEW TRIALS—COSTS—JUDGMENT.

When a new trial is granted on payment of costs, although the general rule is that if the costs are not paid by the second day of the term next after granting the new trial, the judgment shall be entered upon the verdict; yet, under particular circumstances the court will, at that term, set aside the judgment and permit the cause to be tried.

Trover [by Howe, executor of Frail, against John McDermott], for a slave. There was a verdict for the plaintiff at the last term. The court at that term, upon affidavits granted a new trial upon the condition of payment of costs. Upon the first calling of the trial-docket of this term, the defendant, who lived in Maryland, had not paid the costs, and the court postponed the cause to the second calling of the docket, when (namely, 26th May, 1836,) the costs not having been paid, THE COURT, on motion of the plaintiff's counsel ordered the judgment to be entered upon the verdict, although Messrs. Key & Dunlop said they expected their client every moment. Afterwards, namely, on the 18th of June, 1836, the defendant appeared with his witnesses to try the cause, and offered to pay the costs, but the plaintiff issued his execution and arrested him.

Messrs. Key & Dunlop moved the court to set aside the judgment, and quash the execution; which THE COURT (MORSELL, Circuit Judge, contra,) did, upon the condition that the defendant should pay all the costs up to this day, including the costs upon the execution, and an immediate trial or continuance at the plaintiff's option.

MORSELL, Circuit Judge, said that he considered the rule to be that if the costs were not paid by the second day of the term next after the granting of the new trial the judgment should be absolute, and he thought the rule should be rigidly enforced. The parties then agreed to try the cause on the 28th of June, on which day, the costs not having been paid, the judgment was entered up absolutely.

¹ [Reported by Hon. William Cranch, Chief Judge.]