

PALMER v. SANDERS *et al.*

(Circuit Court, S. D. New York. January 25, 1892.)

LEASE—PAROL EVIDENCE TO VARY.

Parol evidence of consent by the lessor to cut trees on the leased premises and on adjoining premises is not inadmissible as varying the written lease, which provides that trees should not be cut on the premises without consent of the lessor.

At Law. Action by John E. Palmer against Elizabeth B. Sanders and Charles W. Sanders, for malicious prosecution. Verdict for plaintiff. Motion by defendants to set the same aside, and for a new trial. Denied.

Palmer & Boothby, for plaintiff.

T. C. Sanders, for defendants.

WHEELER, J. The plaintiff took a lease for five years of a farm in New Jersey belonging to the husband of the defendant Elizabeth, father of the defendant Charles, of which they had charge, some of the fences on which were gone; agreeing in the lease to make all necessary repairs to the fences and buildings, and to expend \$600 in improvements on it within two years, and not to cut any living trees without the consent of the lessor. He carried some fence-posts away from this farm to another, of which he had the use, near by. They went together to look the posts up, and, on the complaint of defendant Charles, he was prosecuted for stealing the posts, imprisoned, tried, and acquitted. This suit is brought for starting that prosecution maliciously.

The defendants claimed that the posts were on the farm, piled, before the plaintiff took the lease; he claimed that he cut part of them on the leased premises, and the rest on land adjoining, belonging to the lessor, with the consent of defendant Elizabeth, acting for the lessor, for rebuilding the fences.

The defendants insist that the parol evidence of this consent was inadmissible, because it would vary or add to the terms of the written lease. But consent to cut trees on the leased premises was expressly provided for in the lease, and not required to be in writing, and consent to cut on the other premises was wholly without the terms of the lease. Besides this, the parol proof must have been admissible to account for the posts which he carried away, and shows that they were not there before he went there. His right, or claim of right, to the posts on account of having cut them with this consent was the turning point on the question of want of probable cause. It was submitted to the jury on all the evidence, and found for the plaintiff. This finding is argued to have been against the weight of the evidence, and reasons in support of that view are brought forward. They were, however, well presented to the jury on the trial, and must have been considered. That there was no evidence to support the finding is not claimed. Under those circumstances, it cannot be disturbed without trenching upon the province of the jury.

In stating the question whether the defendant Elizabeth so took part in the prosecution as to be liable for it, the court appears to have said that the defendants returned to New York together after the making of the complaint, when in fact they came separately. This is relied upon in favor of a new trial. But as they came after the prosecution was started, whether they came together or separately was wholly immaterial. If not, the attention of the court should have been called to the mistake, that it might be corrected. Some other points of the same sort are made, but are similarly and no better founded.

No valid reason for setting aside the verdict is made to appear, and the motion for that purpose must be overruled. Motion denied. Stay continued 30 days, for settling exceptions.

LEM HING DUN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. January 7, 1892.)

APPEAL—DISMISSAL—RECORDS AND BRIEFS.

In the circuit court of appeals dismissals are provided for if no counsel appears or no brief is filed for appellant or plaintiff in error "when the case is called for trial," (Rule 23, 47 Fed. Rep. x.) and also if the record has not been printed "when the case is reached in the regular call of the docket," (Rule 23.) *Held*, that the time meant in each rule is not the time of going through the docket to arrange the business of the court, but the time of actual call for trial, and no motion to dismiss on the grounds mentioned can be entertained before that time.

Appeal from the District Court of the United States for the Northern District of California.

Application for writ of *habeas corpus* to release Lem Hing Dun from restraint on board the steamer City of Peking, and to permit him to land in the United States. The court below found that the prisoner was not entitled to land under the exclusion act, and remanded him to the custody of the master, to be transported to China. The prisoner appeals.

Z. T. Cason, for appellant.

W. G. Witter, Asst. U. S. Atty.

Before HANFORD, HAWLEY, and MORROW, District Judges.

HANFORD, District Judge. A motion to dismiss the appeal in this case has been made for the reasons that the appellant has failed to have the record printed, and copies thereof furnished to the adverse party, as required by rule 23 of this court, and that the attorney for the appellant is not yet prepared to argue the case, although it was docketed in this court prior to the beginning of the present term in October last.

We have acted upon and granted similar motions at this session. In doing so, we were influenced by representations made in open court that counsel for the appellant in each case had declared an intention to abandon the appeal, and by the fact that the motions were not opposed by

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