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PHILADELPHIA, AUGUST 13.

[*The very intereſting Caſe which was determined on the 3d inſtant, in the Supreme Court of the United States, held in this city, having engaged the public attention, we preſume it will be agreeable to our readers to ſee an accurate ſtatement of the proceedings in that caſe, which we are authoriſed to ſay is authentic.*]

SUPREME COURT OF THE UNITED STATES.

TUESDAY, Auguſt 2, 1791.

WEST, *Plf. in error*, v. BARNES, *et alias Deft.* } WILLIAM BRADFORD, Eſq. of council for the plaintiff in error, preſented to the Court a paper purporting to be a Writ of Error, from the Circuit Court of Rhode-Iſland, iſſued in the name of the Preſident of the United States, and teſted by the Chief Juſtice of this Court, directed to the Judges of the Circuit Court of Rhode-Iſland, and ſigned by the clerk of the ſame: it was accompanied with a copy of the proceedings had in the ſaid Circuit Court, and with an aſſignment of general errors.

On motion of Mr. Bradford, ordered by the Court, that the writ, with the errors aſſigned, be read by the clerk. On this Mr. Bradford moved the Court that the defendants in error be directed to rejoin.

David L. Barnes, Eſq. of Maſſachuſetts, one of the defendants in error, and a counſellor of the Court, roſe and ſtated to the Court that the proceedings in the above cauſe could not be properly before the Court: that the Writ preſented as a Writ of Error, could not in law be regarded as a good Writ of Error, being deficient in thoſe particulars which give a Writ of Error its effect—that it was not properly a Writ from the Supreme Court of the United States, as it was not ſigned by the clerk, nor ſealed with the ſeal of the ſame; but was more properly a Writ from the Circuit Court of Rhode-Iſland, directed to itſelf, although iſſued in the name of the Preſident of the United States, and teſted by the Chief Juſtice of this Court, ſtill that all the proceſs of the Court of the United States was in the ſame ſtyle—and that to poſſeſs theſe particulars cannot make a writ good unleſs accompanied by the ſignature of the clerk and the ſeal of this Court—that he conceived there was an abſurdity in a Court iſſuing a writ directed to itſelf, to cauſe its own proceedings to be removed to a higher Court for reviſion; he therefore prayed the opinion of the Court, whether he ſhould rejoin to the errors aſſigned, or not; conſidering the proceedings as by no means regularly before the Court.

Mr. *Bradford*, in reply, after admitting that the Court could not ſuſtain the motion unleſs the proceedings were regularly before them, obſerved, that a Writ of Error, by the principles of the common law, and of the act of Congreſs, was a Writ of Right, and that it iſſued of courſe upon the application of the party. That it was merely the *form* by which a ſuitor expreſſed his deſire to avail him of the benefit of the appellate juriſdiction provided for in the conſtitution, and to which he was entitled. That in all caſes of *appeal*, the act of the party, without any writ whatſoever, was ſufficient to bring the cauſe before the ſuperior tribunal; and though in caſes of *error* a writ was neceſſary, yet the laws of the United States had neither preſcribed the form, directed by whom it was to be authenticated, nor declared from what Court it was to iſſue. All the *ſubſtantial* proviſions of the act had been complied with. The party had ſued it out—had given ſecurity to proſecute it to effect; and the proper Judge had thereupon iſſued the citation to the defendants in error, which was tantamount to a regular *allocatur*. The writ was in the name of the Preſident of the United States, was teſted in the name of the Chief Juſtice; and whether it was ſigned by the Clerk of the Supreme or of the Circuit Court, was only matter of *form*, and wholly immaterial, where that form was not poſitively preſcribed. The plaintiff had availed himſelf of ſuch a form as the neceſſity of his caſe ſuggeſted, and he ought not to be injured by it unleſs he was clearly wrong.

He ſaid that in turning this queſtion in his mind, he found himſelf deprived of his uſual guides. There was no expreſs Legiſlative direction, no Judicial deciſion, nor even any Rules of the Courts eſtabliſhed, from which he could argue. But he apprehended the meaning of Congreſs might be inferred from other proviſions in the act; and it was fair to argue *ab inconvenienti*, where the poſition contended for did not contravene the *expreſs* intention of the Legiſlature.

He remarked that a Writ of Error was a ſuperſedeas to an Execution, and that, if it were not ſo, a party might be ruined by an erroneous judgment before it could be reverſed. But the act, in § 14, had directed that it ſhould be a ſuperſedeas and ſtay Execution only when a copy of the Writ of Error is lodged for the adverſe party in the Clerk's office, where the record remains, "*within ten days (Sundays excluſive) after the rendering the judgment complained of.*" He ſaid that the benefit of a ſuperſedeas was an important one, and was intended for all the citizens of the Union; but on the conſtruction of the defendants in error, it could be enjoyed by thoſe only who reſided near the ſeat of the National Government. It would be mockery to tell a ſuitor in Georgia or Kentucky, that he ſhould enjoy this benefit, "*provided he would go to Philadelphia and return in ten days.*" In thoſe Diſtricts the powers of magic would be neceſſary to obtain the benefits of the act; and unleſs the days of chivalry were to return, when a man could mount on the back of a Griffin and poſt through the air, the extreme parts of the Union could never enjoy them. The Legiſlature therefore muſt have intended, that the writ ſhould iſſue in ſuch manner as to ſecure the party the benefit of a ſuperſedeas, and conſequently in the diſtrict where the judgment was rendered. A contrary conſtruction imputed folly or partiality to the act.

That the citation which accompanied the Writ of Error, and formed it as it were, a part of its conſtitution, was directed to be iſſued by a Judge of the *Circuit Court*: and it was reaſonable to infer that a Writ of Error might be authenticated under the ſeal of the ſame Court.

That there was nothing in the *nature* of a Writ of Error which required it to be iſſued by the Court to which it was to be returned: and that the word *return* uſed in the act, did not in legal underſtanding, import a *ſending back*, or that a writ iſſues from the Court into which the proceedings are to be tranſmitted. That in England it iſſued out of Chancery, whether it was to be returned into the King's Bench, Exchequer Chamber, or Parliament. That its true definition was, "A Commiſſion to a Superior Court to examine the judgment of a Subordinate Court of record:" and that the will of the party expreſſed in ſuch a writ as the preſent, was a ſufficient Commiſſion, in a caſe where the right of appeal was clear, and no particular form eſtabliſhed.

Here Mr. Bradford was aſked by the Court how on theſe principles, they were to proceed in caſe a Circuit Court ſhould refuſe to obey the writ? He anſwered, that a rule to return the writ and proceedings, might be obtained in this Court, and obedience to it enforced in the ſame manner as if upon an appeal, the inferior Court ſhould refuſe to ſend up the decree that was complained of.

As to the return which had been objected to, he ſaid it was ſufficiently regular. It was under the ſeal of the Court and ſignature of their Clerk, and muſt be conſidered as the return of the Court.—There was no need of the ſignature of the Judges; and conſtituted as the Circuit Court was, it could not be expected. One of its Judges was indeed a certain perſon and reſident in the diſtrict; but where ſhould the Clerk look for thoſe Judges of the Supreme Court who happened to be on that Circuit—they might be very diſtant from the diſtrict when the return was required. But he would not dwell on that point, and concluded by repeating his motion that the defendant might rejoin.

Mr. Barnes ſaid, he had nothing to add to what he had before offered to the Court, but ſubmitted the matter to their determination.

The Court then informed the parties, that they would conſider the queſtion—and adjourned until the next day at ten o'clock.

WEDNESDAY, Auguſt 3d.

Court being opened, the Chief Juſtice mentioned that the Court were about to deliver their opinion on the queſtion ſubmitted to them yeſterday.

Judge IREDELL.

THERE are two queſtions before the Court,

1ſt. Whether the tranſcript of the record be returned here, in conſequence of a Writ of Error iſſued agreeable to law?

2d. If it be ſo, whether the return of it be regular?

As to the firſt queſtion, it is objected that the Writ can only iſſue out of the Supreme Court, which is to correct the error complained of, if there be any: Whereas the preſent Writ has iſſued out of the Court which is alledged to have committed the Error.

I am of opinion, that the objection is a good one, and ſhall give my reaſons as clearly as I am able.

The Act of Congreſs, which contains all that concerns Writs of Error, is ſilent on this point.—Though it gives other directions, it does not ſay out of what Court the Writ is to iſſue.

We are therefore under the neceſſity of determining either by *former principles* of law (if ſuch apply) or by *analogy* and *reaſon*.

As to the former, ſo far as precedent is concerned, we have no certain guide. The practice in England is, for this Writ to iſſue out of the Chancery, the general depoſitory of all original Writs: No ſuch practice in America has obtained generally. In New-York indeed, I believe, Writs do iſſue out of the Chancery, by an expreſs Act of Aſſembly. There may poſſibly be one or two other inſtances, though I do not know that there are. But it is certain the general practice in America has been otherwiſe.

We muſt conſequently decide in this caſe, by the reaſon of the thing, and having reference as nearly as we can to general principles of law.

The 14 Section of the Judicial Act enacts, "That all the before mentioned Courts of the United States, ſhall have power "to iſſue Writs of *Scire Facias*, *Habeas Corpus*, *and all other Writs* "*not ſpecially provided for by Statute* which may be neceſſary for "the exerciſe of their reſpective juriſdictions, and agreeable to "the principles and uſages of law."

There are only three ways in which the Writ in queſtion can iſſue.

1ſt. Out of the Supreme Court.

2d. Out of the Circuit Court.

3d. Or out of either, optionally.

The laſt method would create ſuch confuſion and irregularity, it is preſumed nobody would contend for it. Nothing could appear more ridiculous than a Record in which upon one page ſhould be contained proceedings removed by a Writ of Error, iſſued out of one Court, and, upon the next, proceedings exactly ſimilar, though between different parties, removed by a Writ of Error iſſued out of another Court.

That it ſhould iſſue out of the Supreme Court, is natural and obvious, becauſe it is their duty to adminiſter the remedy wanted. Inconveniences only could have ſuggeſted the reverſed mode, of applying for a remedy to the very Court which had occaſioned the grievance.

A Writ from a Court to itſelf ſeems abſurd. Could any thing be more monſtrous than that a Court, upon being informed that a party wanted a Writ of Error, ſhould direct their clerk to make out a Writ directed to themſelves? If a thing is right to be done, and the ſame Court is to do it, it would ſeem proper that it ſhould be done on motion. But ſurely the law would be very unwiſe, in truſting the only remedy for Error with a Court that had committed the Error. It does not act ſo weakly as to ſuppoſe that even Courts of Juſtice will always do what they ought to do. And though afterwards this Court might compel them to do what was right, yet the law will not ſuffer an incongruous proceeding in the firſt inſtance, for the ſake of a complete remedy in the ſecond. But even in this inſtance, it might not be complete, for the ten days after judgment, within which a copy of the Writ muſt be lodged in the Office, or Execution cannot be ſtayed, would almoſt in every caſe elapſe before the final remedy could be obtained.

This indeed is the great objection, and the only plauſible one, to the Writ iſſuing out of the Supreme Court. And it has been urged, and preſſed with much force and ingenuity by the Counſel for the Plaintiff in Error, that the right of obtaining a Writ of Error, might, upon this conſtruction be rendered nugatory in almoſt every inſtance.

This inconvenience does indeed exiſt. It is a very weighty one, and I heartily wiſh, it was in the power of the Court, by a conſtruction that could be juſtified, to remove it: but I think it is not.

An argument grounded on inconveniences is, to be ſure, in many inſtances, admiſſible, and in ſome even neceſſary. But I apprehend that it is to be uſed with great caution, leſt a Court, under color of a conſtruction of an act of the Legiſlature, ſhould, in fact, encroach on the legiſlative authority, a thing of the utmoſt moment to be avoided.

The *argumentum ab inconvenienti*, I think, applies in no other inſtance but this—where two conſtructions ſtand, as it were, *in equilibrio*, or nearly ſo; in ſuch a caſe undoubtedly a Court would ſuffer the ſcale to preponderate on that ſide where the inconveniences, upon the whole were ſweeſt—becauſe by ſuch means it is moſt probable they would retain the true ſenſe of the Legiſlature. They are compelled to make a choice; and the preference is not only juſtifiable, but in ſome meaſure unavoidable.

But certainly there is no room for the application of that principle to the preſent caſe, where the two conſtructions oppoſed to each other can bear no manner of compariſon.

It has been argued, that it could not be preſumed the Legiſlature intended to make a proviſion almoſt entirely nugatory, and that therefore a conſtruction which ſuppoſes ſuch an intention muſt be erroneous.

This is grounded upon a ſuppoſition, that when the Legiſlature paſſed the law in queſtion, they knew how the principles of law on this ſubject ſtood before, and were of courſe aware of all the conſequences.

In conſtruing Legiſlative acts, a method of arguing like this has ſometimes been adopted, and poſſibly in ſome inſtances, where the previous law was probably generally known, it may be very proper. But ſurely an argument grounded on a ſuppoſition that notoriouſly is not true, cannot be a good one. No Legiſlature that exiſts on earth doth in fact poſſeſs extenſive and critical legal knowledge. It would be very extraordinary if any did. It is not neceſſary that every Member ſhould be a Lawyer. It is not neceſſary that any ſhould. The proportion of Members who are Lawyers, to thoſe who are not ſuch is in general ſmall. They in no inſtance, I preſume, form a majority. It is therefore not only probable, but natural and ſcarcely avoidable, that a Legiſlature in framing a new law, on an intricate legal ſubject, are not aware of all the conſequences reſulting from it. Even the greateſt Lawyers, in the complex buſineſs of Legiſlation, may not immediately ſee all the conſequences incident to a new ſyſtem introduced. Accordingly, it has been often remarked, that ſcarcely any alteration of the common law, however minute, has at any time been made, but it required one or more, frequently many, ſubſequent amendments. The difficulty muſt of courſe be much increaſed, when an entire new ſyſtem was to be created, and a vaſt variety of objects was to be embraced at once. But the argument as to *intention*, is not complete, without ſuppoſing, not merely that the Legiſlature did not intend that the Writ of Error ſhould iſſue out of the Supreme Court liable to the diſadvantages mentioned, but that it did intend it ſhould iſſue out of the Circuit Court, notwithſtanding the objections that ſo obviouſly lie to that method. And this, I think, no man will ſuppoſe.

It has been further contended, that all that was abſolutely eſſential in reſpect to obtaining a Writ of Error was that the party ſhould ſignify his wiſh to obtain it: and that the manner of granting it was merely form, which ſhould not be rigorouſly inſiſted upon, at the expence of real juſtice.

But this ſurely is much too looſe; the common law is ſimple and energetic; it delights in certainty; its methods of proceeding are all accurate, and not depending on irregularity or caprice. There is ſcarcely any inſtance in which the forms it requires are not a proper guard for ſubſtantial juſtice; and therefore, when it chalks out a method of redreſs, it inſiſts that that method ſhall be ſtrictly purſued, in order that all its proceedings may be uniform and perſpicuous, and ſerve as a plain precedent to future times.

It has been alſo urged, that by the conſtruction given by the council for the defendant in Error, the plaintiff would be defeated of a remedy to which he was entitled by the Conſtitution and Laws of the United States.

The part of the Conſtitution affecting the ſubject (art. 3, part of ſect. 2) runs thus:

"In all caſes affecting ambaſſadors, other public miniſters and "conſuls, and thoſe in which a ſtate ſhall be a party, the Supreme "Court ſhall have original juriſdiction: *in all the other caſes be*- "*fore mentioned, the Supreme Court ſhall have appellate juriſdiction* "*both as to law and fact, with ſuch exceptions and under ſuch regula*- "*tions as the Congreſs ſhall make.*"

The whole ſubject, therefore, is referred to Congreſs; and though they undoubtedly did intend to give a compleat remedy, yet, if it appears, upon a neceſſary conſtruction of their act, that they have not in fact done ſo, it is not in the power of this Court to ſupply the defect.

There is only one inſtance which I have been able to find (if that be one) wherein a Writ has ever iſſued out of a Court directed to itſelf: but there the circumſtances are peculiar, and will not apply to the preſent caſe.

The inſtance I allude to, is in a caſe where a judgment is given in the petty bag in the chancery in England (whoſe proceedings are in ſuch caſes at common law) upon which it is ſaid a writ of Error lies returnable into the King's Bench; the juriſdiction in this caſe is ſomething doubtful; *Coke* and *Blackſtone* both aſſert it: (4 Inſt. 80. 3 Blackſt. Com. 49) But Sir *Francis North*, who was lord keeper in the time of Charles II denied it; for upon his being applied to for liberty to take out ſuch a writ, he refuſed his conſent, and ſaid *he would enjoin all ſuch Writs of Error.* (1 Veru. 131) In what manner it iſſues I have not been able to diſcover; it is ſaid none have iſſued ſince the time of Queen Elizabeth (3 Blackſt. Com. 49.) But Writs of this nature, though they iſſue out of the Chancery, do not iſſue by order from the chancellor or keeper, nor do I conceive he has authority to ſtop them in caſes where they are due of common right. There are various officers for various purpoſes in the Court of Chancery. It is the particular duty of ſome of thoſe officers to iſſue Writs, and I apprehend they are bound to iſſue them at their peril. It is evident the conſent of the lord keeper in the above inſtance was not neceſſary, for tho out of deference he was applied to for his conſent, he did not merely refuſe to give it, but ſaid *he would enjoin ſuch a Writ of Error.* That could not have been the caſe, *if his conſent had been previouſly neceſſary to obtain it.*

But the clerk of a Circuit Court has certainly no independent authority to iſſue a Writ; but can iſſue ſuch only as the Law expreſsly permits, or the Courts order him.

I am extremely ſorry to be under the neceſſity of voting for a deciſion which may be attended with the great inconveniences pointed out: but in my opinion, the Legiſlature only can remedy them—It is of infinite moment that Courts of Juſtice ſhould keep within their proper bounds and *conſtrue*, not *amend*, acts of Legiſlation. In England, where accurate ideas of law have long obtained (at leaſt in general) inconveniences have frequently been experienced upon trial which were not foreſeen. The Courts of Juſtice in that country formerly countenanced *Fictions* to get clear of them; and many ſuch are now tolerated, in conſequence of a very long acquieſcence. But according to the improved ideas of conſtitutional liberty at the preſent day, no court would dare to introduce, or countenance new ones; they would leave the redreſs to the proper authority, the Legiſlature. I truſt in America this plain and honeſt path will conſtantly be purſued. In no particular are the liberties of the people more deeply intereſted.

My opinion being, for the reaſons I have given, that theſe proceedings are not brought before the Court by a legal Writ of Error; it is unneceſſary, and would therefore be improper, that I ſhould give any opinion upon the ſecond queſtion, the diſcuſſion of which was only material if the firſt had been determined in the affirmative.

[The above is the ſubſtance of Judge *Iredell*'s argument. As he ſpoke chiefly from ſhort notes, it cannot be expected that the very words ſhould be retained, though it is apprehended they are nearly the ſame, with the addition only of one or two obſervations, which were inadvertently omitted in the delivery, but which do not materially change the general ground of the argument.]

(The remainder in our next.)