

Hiriart Vs. Ballon

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Decided On : 1835

Appeal No. : 34 U.S. 156

Appellant : Hiriart

Respondent : Ballon

Judgement :

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Hiriart v. Ballon

34 U.S. (9 Pet.) 156

ERROR TO THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF LOUISIANA [*](#)

SYLLABUS

Louisiana. The district court of the United States for the Eastern District of Louisiana, in conformity with the provisions of the Act of Congress of 26 May, 1824, adopted as a rule of practice in that court the regulations established by a

law of Louisiana, by which, on appeal bonds, when the appellants failed in their appeal, on the coming in of the decree or judgment of the appellate court, a summary judgment on motion should be entered against principal and securities in the appeal bonds.

Under this rule, after the affirmance of a decree of the district court by the Supreme Court of the United States, and the filing of the mandate of the Supreme Court, the district court, on a motion for a rule on the security in an appeal bond to show cause why judgment should not be entered against him on the first day of the next term, and no cause being shown, entered a judgment against the security.

The party against whom the judgment was entered afterwards came into court and prayed a trial by jury, which was refused, and he prosecuted this writ of error to reverse the judgment of the district court refusing the said trial.

By the court.

"The rule of the District Court of Louisiana follows the analogy of the laws of Louisiana, being modified only so far as is proper to suit the organization of the courts of the United States, and to conform to the laws thereof. The summary judgment is therefore strictly authorized, and the party had no right to a trial by jury. In becoming a security, he submitted himself to be governed by the fixed rules which regulate the practice of the court."

An appeal was taken in the same case to a decree of the district court dissolving an injunction. Although this appeal was not before the court, the court said, the decree being only interlocutory and not final, is not the subject of an appeal.

General rules for the government of the United States Court in the Eastern District of Louisiana, in suits in that court. [See note [*](#)]

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MR. JUSTICE STORY delivered the opinion of the Court.

This is a writ of error to the district Court of the Eastern District of Louisiana. The plaintiff in error was surety in an appeal bond given upon a writ of error to a judgment of the District Court of Louisiana, rendered in 1830, in the suit of *Jean Gassies Ballon v. Pierre Gassies*, which judgment was affirmed in the Supreme Court of the United States in 1832. Upon the cause's coming back to the district court upon the mandate of the Supreme Court, execution issued against the judgment debtor, Pierre Gassies, and was returned satisfied in part. Upon motion afterwards made, and due notice to Hiriart, a summary judgment was entered against him upon the appeal bond in pursuance of a rule of the district court. The rule is in the following words:

"In all cases of affirmance of judgment, on writs of error, from judgments pronounced in this Court, a rule may be taken on the principal, and his sureties in the appeal bond, returnable ten days after recording the mandate of the supreme court, to show cause why execution should not issue against them, and no cause being shown, judgment shall be entered against them and the principal, and execution issue accordingly."

Hiriart showed for cause, (among other things not necessary to be stated, as they are not cognizable on a writ of error) that the proceeding was irregular, and that if liable on the bond, his liability must be established by an ordinary action, before a competent tribunal. The district court, notwithstanding, entered the summary judgment, and the writ of error is taken to this judgment.

The principal point relied on seems to be that the party was entitled to a trial by jury, and that no such summary judgment is authorized by law. Whether this objection is well founded depends upon the Act of Congress of 26 May, 1824, for the regulation of the practice of the District Court of Louisiana. That act declares, that the mode of proceeding in civil causes in the courts of the United States in Louisiana shall be conformable to the laws directing the mode of practice in the district courts of the states, with a power in the judge to make rules to adapt such laws of procedure to the organization of the courts of the United States. The laws of Louisiana allow appeals from the district courts of the state to the Supreme Court upon giving an appeal bond with security,

and authorize a summary judgment upon such appeal bond upon mere motion in the court from whence the appeal was taken, in execution of the judgment of the appellate court. * The rule of the district Court of Louisiana therefore follows the analogy of the laws of Louisiana, being modified only so far as is proper to suit the organization of the courts of the United States, and to conform to the laws thereof. The summary judgment, therefor, was strictly authorized, and the party appellant had no right to a trial by jury. In becoming a security, he submitted himself to be governed by the fixed rules which regulate the practice of the court. The judgment is

Affirmed with damages at the rate of six percent, and costs.

It may be added to prevent misapprehension, that there is also in the same record an appeal taken to a decree of the district court dissolving an injunction to the judgment granted upon a petition in the nature of a bill in equity. This appeal is not before us, and the decree being only interlocutory, and not a final decree, it is not the subject of an appeal.

This cause came on to be heard on the transcript of the record from the District Court of the United States, for the Eastern District of Louisiana, and was argued by counsel, on consideration whereof, it is adjudged and ordered by this Court that the judgment of the said district court in this cause be, and the same is hereby affirmed with costs and damages at the rate of six percentum per annum.

* The record in this case contains the "General Rules" for the government of the United States Court in the Eastern District of Louisiana in civil causes or suits at law, as contradistinguished from admiralty and equity causes and criminal prosecutions, made in pursuance of the seventeenth section of the Judiciary Act of 1789, and of the first section of the Act of Congress of 26 May, 1824, entitled "An act to regulate the mode of practice in the courts of the United States for the District of Louisiana."

It has been considered useful by the Reporter to insert these "General Rules" in this volume.

"At a stated session of the Court of the United States of America for the Eastern District of Louisiana held at the City of New Orleans on Monday, 14 December, Anno Domini 1829."

"Present the honorable SAMUEL H. HARPER, judge of said court."

"Ordered that the following rules be adopted by this court, and all other rules for the practice of this Court are annulled from and after this date."

" *GENERAL RULES*"

"Rule 1. Suits at law shall be commenced by writ or process under the seal of the court and signed by the clerk, and be tested in the name of the judge (or if that office shall be vacant, of the clerk) and shall issue in the name of the President of the United States to the marshal of the district commanding him to arrest or summon the defendant (as the case may be), and shall be returnable on the first day of each term."

"Rule 2. A petition addressed to the court should accompany the writ; it shall state the nature of the case with sufficient precision of circumstance, time and place, which petition shall be signed by the party or his counsel, and shall contain a prayer adapted to the nature of the case, and whatever documents are referred to in the petition, as making part thereof, shall be filed with it, or if copies thereof are annexed, the defendant or his attorney shall have oyer of the original, if he demand it, before he shall be required to file his answer or plea. The writ and petition being filed, a copy thereof shall be made in the French and English languages (in cases where the mother tongue of the defendant is French) and, together with the original writ of process, be delivered to the marshal, who shall serve said copy on the defendant, by delivering the same to him personally, or by leaving it at his usual place of abode, ten days before the day of return mentioned in the writ, allowing one day in addition for every twenty miles the defendant may reside from New Orleans. The writ or process shall run in the words which have

hitherto been adopted in this Court. The marshal shall, whenever any writ or process shall have been served, endorse on the same the time of service and its distance from the city, if the same be made out of the limits thereof."

"Rule 3. The answer or defense of the defendant shall be signed by him or his attorney, and filed with the clerk in the English and French languages (if the mother tongue of the plaintiff be French) on or before the first day of each term, and if no defense or answer shall be filed, nor time given for answer, the court shall, at the first day of sitting thereafter, on the application of plaintiff, cause judgment by default to be entered against the defendant, which if not set aside within three days thereafter, the court shall, if required, enter up final judgment against the defendant; if the demand be liquidated by a note, bond, contract, or former judgment, and if the sum demanded be uncertain, the court shall proceed to hear testimony, assess the damages, and render final judgment for the sum so assessed."

"Rule 4. The answer shall contain nothing impertinent or irrelevant, but the defendant shall be required to plead all such matter of law and fact in the same answer as he may think proper to rely on, conformably to the rules of practice adopted by the first judicial court of the State of Louisiana, prior to the adoption of the 'Code of Practice,' and in all cases where matters of law and matters of fact are pleaded in the same answer, the pleas on points of law submitted to the court, shall be argued and determined before the issues of fact shall be submitted to the jury."

"Rule 5. The clerk shall keep a docket in which all cases that are at issue shall be entered in the following order. 1. Causes in which both issues to the court and to the country are made up. 2. United States causes of a general nature, and criminal prosecutions. 3. jury causes, other than those of the United States. 4. court causes, or suits to be tried by the court alone. 5. All admiralty causes (the United States admiralty causes having precedence on the list). And in setting the causes for trial they shall be called in the order thus prescribed."

"Rule 6. All causes at issue, whether in point of law or fact, shall be called on the second day of each term at the meeting of the court, and set down for trial. In all cases in which pleas both to the court and country are made, the pleas involving matters of law, or issues submitted to the court alone, shall be first tried, and such of them as may be directed to be tried on the issues of fact, shall be immediately transferred to the jury docket, to be tried on the merits during the same term, in the discretion of the court. In all cases in which dilatory or declinatory pleas or exceptions to form are made and overruled, the party making such plea or pleas, or exceptions, shall pay to the plaintiff all costs of suits up to the time of their being decided against him; and when a plea is made to the jurisdiction of the court, involving the question of citizenship of a party, it shall be tried by a jury, and if the verdict sustains the jurisdiction, all costs shall be paid to the plaintiff, and the cause shall be immediately tried by the same jury on its merits, at the option of the plaintiff, if by the pleading it be a jury cause, if not it shall be forthwith submitted to the court for decision."

"Rule 7. If it be the intention of a party to take an issue on the fact, he must expressly pray for a jury, otherwise the cause shall be wholly tried by the court (except cases where the law itself requires a jury), and shall be put in the fourth class of cases on the docket."

"Rule 8. When a jury is about to be sworn in a cause, each party may peremptorily set aside three of them, but no more, except for a legal cause."

"Rule 9. The clerk shall enter no cause on the docket until the pleadings are fully made up, nor shall any cause be entered thereon except by the clerk or his deputy."

"Rule 10. If any docketed cause shall be called at two courts and not tried, the plaintiff shall be called, and if he does not immediately go to trial, he shall be nonsuited unless it shall appear that it had been continued at defendant's motion, or other satisfactory cause shall be shown to the court, on oath, to prove it was not postponed on account of the plaintiff's neglect, or unless the defendant, at such second calling, shall obtain a further continuance, but nothing in this rule shall be

construed to prejudice defendant's right of calling for a non suit, at any previous court."

"Rule 11. If a cause is at issue, and either party move for a continuance of it on account of the absence of witness, such motion must be on oath or affirmation of the party, his agent or attorney, in writing, subscribed by him, stating that some witness, residing within the reach of the process of the court (who shall be named and the place of his residence mentioned) is wanting; that he believes that such witness is a material and competent witness in the cause; and, to satisfy the court of his materiality, shall state what fact or facts it is expected or believed the witness will prove on the trial; that all reasonable endeavors have been used to procure his attendance at the term; that he cannot safely go to trial without the benefit of his testimony; and that a continuance is not prayed for the purpose of delay."

"If an application be made for a continuance, and also for a commission to procure evidence (the other party not consenting thereto), the affidavit must state what fact or facts it is believe will be proven on the trial of the cause, that the testimony sought is competent and material, that he cannot safely go to trial without the benefit of it, that he believes it can be procured in a certain time, which shall be specified, and that the application is not made for delay. If a commission issue, interrogatories must be filed, as directed in the following rule."

"Rule 12. The clerk is authorized, in vacation, on the written application of the plaintiff or his attorney, to enter the discontinuance of a cause, and with consent of counsel, written, signed, and put on file, to enter on the minutes, rules, and orders, preparatory to trial of causes pending therein, and to issue commissions to take testimony in all cases, at the instance of either party, and if it be not the intention of the party taking out the commission to take testimony *de bene esse* under the thirtieth section of the Judiciary Act of 1789, he shall file interrogatories and serve a copy thereof on the opposite party or counsel, who may, if he thinks proper, add cross-interrogatories, and return the whole to the other within three days, or, in default thereof, the commission may be executed without the cross interrogatories."

"Rule 13. No amendment shall be made to any petition or answer, unless it be made previous to setting the cause for trial (except as to mere matters of form, which may be made at any time before trial) and no amendment shall be made at any time, tending wholly to alter the nature of the action or defense."

"Rule 14. In all rules to show cause, the party called upon shall begin and end his case, and on special matters, either springing out of a cause at issue or otherwise, the actor or party submitting a point to the court shall in like manner begin and close, and so shall a defendant who admits the plaintiff's case and takes upon himself the burden of the proof have the like privilege."

"Rule 15. In all cases of affirmance of judgment on writs of error from judgments pronounced in this Court, a rule may be taken on the principal and his sureties in the appeal bond, returnable ten days after recording the mandate of the supreme court, to show cause why execution should not issue against them; and, no cause being shown, judgment shall be entered against them and the principal, and execution issue accordingly."

"Rule 16. Upon the return of an award or umpirage, a three day rule shall be served upon the party or his attorney, against whom the award or umpirage may be, and should the same be confirmed by the court, judgment shall thereupon be entered and execution issue in the same manner as if judgment had been obtained on verdict."

"Rule 17. Every motion made for any rule or order shall be submitted to the court in writing by the counsel who makes it, and if granted by the court, shall be delivered to the clerk to be entered on the minutes."

"Rule 18. Not more than two counsel shall be permitted to argue on the same side of a cause without leave of the court."

"Rule 19. All applications for new trials shall be made within three days after the verdict of the jury or judgment of the court (as the case may be), and if no such application be made, or being made, shall be overruled, judgment shall be signed, and execution issue if required."

"Rule 20. Counselors and attorneys licensed by the Supreme Court of this state may be admitted as such in this Court, but no *attorney in fact* shall be permitted to appear as an *attorney at law* to prosecute or defend any suit."

"Rule 21. After the argument of a cause upon matters of law, submitted to the court, a statement in writing of the points relied upon, and a note of the authorities cited, may be required of the counsel on both sides by the court before giving judgment thereon."

"Rule 22. In all cases where a sum certain is sworn to be due from defendant to plaintiff, special bail shall be ordered, and in all other cases, affidavit being made of the facts, the judge (or in his absence, the clerk) shall order the defendant to be held to bail in such sum as he may think just, but no attorney at law shall be received as special bail."

"Rule 23. The marshal shall not be bound to serve any subpoena on a witness on the day on which the cause is set for trial, wherein such witness is required unless specially directed to do so by the court."

"Rule 24. It shall be the duty of the marshal to summon juries according to law, to serve at each stated term of the court, and he, or his deputy, shall serve a written summons on each juror, expressing the day, hour and place, at which he is to appear, and also whether he is to serve as a grand or a petit juror."

"Rule 25. To all the writs of venire issued for summoning jurors the marshal or his deputy shall make a return upon oath, written at length before the clerk of the court, and in the said return shall make one class of those who were summoned personally, a second class of those for whom summonses were left at their houses, and a third class of those who could not be found."

"Rule 26. The clerk shall keep a book in which shall be entered the names of all persons who shall be summoned as jurors, and on every call of the names, shall note opposite each name the presence or absence of the juror, or, if any juror, once empanelled, shall refuse or neglect to attend punctually every morning on the call of the panel, unless previously excused by the court, he shall be cited to show

cause why he should not be fined for his default; and if he show no sufficient cause, he shall be fined, or otherwise punished, according to law."

"Rule 27. All moneys paid into the court of the United States or received by the officers thereof in causes pending therein shall be immediately (that is, the day after that on which they shall be received) deposited in the Branch Bank of the United States in the name and to the credit of said court, and at each stated session of the court the clerk thereof shall present an account to the court of all moneys remaining therein, subject to the order thereof, stating particularly on account of what causes said moneys are deposited, which account, with the vouchers thereof, shall be filed in court."

"Rule 28. All notes and obligations, and the gross amount of moneys arising from the sale of property in pursuance of any order or decree of this Court, shall be paid into court by the marshal, to be deposited in the Branch Bank, and an account of sales of such property so disposed of shall be filed in court at the same time; and in the cases mentioned in this and the preceding rule, the costs and charges of the suit shall be taxed and first paid out of the moneys in court."

"Rule 29. Money deposited in court pending a suit, shall not be delivered on bond to any party or person."

" GENERAL RULES OF PRACTICE IN ADMIRALTY"

"Rule 1. The material facts in a libel (except in case of a libel for seamen's wages, or where the United States are libellants) must be sworn to by the libellant, his agent or attorney, before an order for admiralty process shall issue, and every claim must be sworn to in the like manner, before filing the same."

"Rule 2. When the process is *in rem*, and a party is also personally cited, the citation shall be made returnable at the same time with the warrant, to-wit, in fourteen days, and when the proceeding is altogether *in personam*, the process shall likewise be returnable in fourteen days."

"Rule 3. In all cases of seizure and prosecution of any ship or vessel, goods, wares and merchandize, when the claimant may bond of right under the 89th section of the Act of 2 March, 1799, 'to regulate the collection of duties on imports and tonnage,' and in all other cases where the district attorney is consenting to such bonding, the same may be done in the manner directed by the said section, the district attorney naming the appraisers and approving the security."

"Rule 4. The clerk, or in his absence the deputy clerk, be and he is hereby appointed, a commissioner, before whom appraisers of ships or vessels, or goods, wares and merchandize, seized for breaches of any law of the United States, may be sworn or affirmed."

"Rule 5. Appraisers, acting under the orders of the court, shall be severally entitled to receive five dollars in each case wherein they may make an appraisement, to be paid by the party at whose instance the appraisement shall be made."

"Rule 6. All appraisements and bonds taken in pursuance thereof, shall be copied at length in a book to be kept for that purpose, and the originals filed in court."

"Rule 7. No vessel or merchandize, in the custody of the marshal, shall be released upon bond, until the costs and charges of the officers of the court (so far as the same may have accrued) shall be paid by the party giving bond."

"Rule 8. When property is in the hands of the marshal, he shall be authorized, from time to time, on motion to that effect, to sell so much of the same at public auction, after notice, as may be necessary to defray the costs and charges incident to the keeping of the same."

"Rule 9. Moneys paid into court shall not be paid out in pursuance of any decree of the same, upon which an appeal may be had, until ten days (exclusive of Sundays) shall have elapsed after such decree shall have been made, and when an appeal shall be entered, the appellant shall, within ten days, exclusive of Sundays, from the time of making the decree, give security for damages and costs, and if security shall not be given, within that time, the decree may be executed as if there had no appeal been prayed for."

"Rule 10. In proceedings touching seamen's wages, when a party is cited to show cause against the issuing of admiralty process, oath must be made of the service of such citation, in case the party cited does not appear, except the citation has been returned, and served by the marshal, or his deputy."

"Rule 11. No claim shall be filed after the expiration of monition, or return day of the warrant, without the leave of the court, or by consent of the parties libellant, in writing, and put on file."

"Rule 12. In all cases in which the United States are libellants, the clerk is authorized to issue admiralty process without an order from the judge."

" *ADDITIONAL RULES* "

"20th March, 1830"

"1. No denial of the allegation of citizenship made in a petition, nor any dilatory exception or plea in abatement involving matters of fact, shall be allowed, unless verified by affidavit filed therewith by the counsel, agent or party, as to their belief of the truth thereof."

"14th June, 1830"

"2. The testimony of witnesses given at the bar, shall not be reduced to writing by the clerk of the court, or any other person in trials at law, as contradistinguished from admiralty and equity causes."

"3. Facts shall not be submitted to a jury in order to obtain a special verdict in any cause, except by the consent of parties entered on record."

"4. No verbal agreements or arrangements of parties, or their counsel, touching any cause depending in this Court, shall be deemed of any validity, or noticed in any way by the court."

"28th May 1831"

"It is ordered, that the twelfth rule of the rules of this Court relating to suits at law, be so amended as to allow *plaintiffs* in all cases to take out commissions to examine witnesses after the return of service of process, the plaintiff serving the defendant with a copy of his interrogatories, as heretofore required, and when defendant resides in the country, he shall be allowed, in addition to the time now prescribed, one day for every twenty miles distance he may reside from the City of New Orleans, to file cross-interrogatories; commissions on the part of *defendant* shall issue only after issue joined, and in conformity with the previous practice of this Court."

* See Code of Procedure of Louisiana, art. 570, 573, 575, 579, 596, 597.

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