**United States Vs. Eliason**

**United States Vs. Eliason**

**SooperKanoon Citation** : sooperkanoon.com/79788

**Court** : US Supreme Court

**Decided On :** 1842

**Appeal No.** : 41 U.S. 291

**Appellant** : United States

**Respondent** : Eliason

**Judgement** :

United States v. Eliason - 41 U.S. 291 (1842)
U.S. Supreme Court United States v. Eliason, 41 U.S. 16 Pet. 291 291 (1842)

**United States v. Eliason**

**41 U.S. (16 Pet.) 291**

*ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR*

*THE COUNTY OF WASHINGTON, IN THE DISTRICT OF COLUMBIA*

## SYLLABUS

An action was brought by the United States against Captain Eliason for a balance due by him as disbursing officer at Fortress Calhoun. The defendant claimed an allowance as commissions on the disbursement of large sums of money under the

orders of the War Department in 1834, and the years included up to 1838, under the regulations of the War Department contained in the Army Regulations printed in 1821,

"at the rate of two dollars *per diem,* during the continuance of such disbursements, provided the whole amount of emoluments shall not exceed two and a half percent on the sum expended."

By a subsequent regulation of the War Department of 14 March, 1835, adopted in consequence of the provisions of an Act of Congress of 3 March, 1835, all extra compensation of every kind for which provision had not been made by law was disallowed. The defendant's intestate claimed that the provisions of the Act of March 3, 1835, were applicable only to the disbursing of public money appropriated by law during the session of Congress in which that act was passed. *Held* that the order of the War Department of 14 March, 1835, took away all right to the extra allowances claimed under the prior army regulations.

In the District of Columbia, a writ of error lies to the decision of the circuit court upon an agreed case. The same principle has been applied in cases brought before the Supreme Court from other parts of the United States. Cited, *Faw v. Robertson's Executors,* 3 Cranch 173; *Tucker v. Oxley,* 5 Cranch 34; *Kennedy v. Brent,* 6 Cranch 187; *Brent v. Chapman,* 5 Cranch 358; *Shankland v. Corporation of Washington,* 5 Pet. 390; *Inglee v. Cooledge,* 2 Wheat. 363; *Miller v. Nichols,* 4 Wheat. 311.

The power of the executive to establish rules and regulations for the government of the army is undoubted. The power to establish necessarily implies the power to modify or to repeal or to create anew. The Secretary at War is the regular constitutional organ of the President for the administration of the military establishment of the nation, and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such are binding upon all within the sphere of his legal and constitutional authority.

In February, 1839, the United States instituted a suit against William A. Eliason, a captain in the United States Corps of Engineers, for the recovery of $2,492.18, a balance in his hands of

Page 41 U. S. 292

moneys paid to him for the purpose of disbursement at Fort Calhoun, and of $108.57, beyond the incidental expenses of fortification, making together $2,600.75. On the decease of Captain Eliason, the suit was proceeded in against his administratrix.

In the circuit court, the counsel for the plaintiffs and the defendant agreed upon the following statement.

"On the trial of the above cause, the plaintiffs, to maintain the issue on their parts joined, offered in evidence the transcript from the Treasury Department (showing the balance claimed) and the defendant then offered evidence to show that the said intestate was a captain in the United States Corps of Engineers, and as such was ordered to take charge and superintend the works on Fortress Calhoun, and took charge of, and continued the said work, from 7 November 1834, to 10 September 1838, and further offered in evidence the general regulations of the War Department, as follows; and further that the said intestate, while thus employed, disbursed $214,392.61; that he was also directed to take charge of and superintended the removal of a lighthouse into Fortress Calhoun, in which service he disbursed $1,143.13; and further, that he was charged with the disbursement of, and did disburse the sum of $1,891.43, for incidental expenses of fortifications, beginning in the year 1830, and that he purchased for the use of the engineer department a set of instruments and case, and the department allowed him for the instruments, but refused to allow him for the case, amounting to $10; and further, that the pay and emoluments of the said intestate had been stopped by the government of the United States, from 31 December 1838, to 15 June 1839, amounting to 1,014.95; and the defendant then claimed credit."

The account of Captain Eliason, which had been submitted to the accounting officers of the Treasury, and the appropriations in the Treasury, were made a part of the case.

Page 41 U. S. 293

The regulations of the War Department of 13 March 1835, were:

"The proviso in the Act of Congress, passed March 3, 1835, entitled 'an act making additional appropriations for the Delaware Breakwater, and for certain harbors, and removing obstructions in and at the mouths of certain rivers, for the year 1835,' and which prohibits the allowance of extra compensation to officers of the army, has been submitted to the Attorney General for his opinion, and that officer has decided that it extends to and prohibits the allowance of all extra compensation of every kind whatsoever for which provision is not made by law; hereafter, therefore, no such extra compensation will be allowed."

The prohibition under this order took effect from the passage of the law.

The instructions, after enumerating particular offices held to be included in the proviso, by the Secretary of War, proceed to say:

"The construction of the act will apply so as to prevent the granting of any extra compensation of any nature whatever unless expressly authorized by law. The Attorney General has decided that the general clause in the above proviso will render illegal the allowance of any percentage or compensation for disbursing appropriations made previous to as well as during the last session of Congress."

Article 67, 14, from the army regulations, printed in 1821, was also in evidence:

"Where there is no agent for fortifications, the superintending officer shall perform the duties of agent, and while performing such duties, the rules and regulations for the government of the agents shall be applicable to him, and as compensation for the performance of that extra duty, he will be allowed for moneys expended by him in the construction of fortifications at the rate of two dollars *per diem* during the

continuance of such disbursements, provided the whole amount of emolument shall not exceed two and a half percent on the sum expended."

In the circuit court, the following judgment was given:

"The court is of opinion that the proviso in the Act of 3 March 1835, ch. 303, is only applicable to the disbursing of public money appropriated by law during the session of Congress in which that

Page 41 U. S. 294

act was passed, and it appearing therein to the satisfaction of the court that no part of the money so as aforesaid disbursed by the said defendant was appropriated at the said session of Congress, the court is also of opinion that the said intestate was entitled to the allowance claimed by him for the disbursements as above stated, and does thereupon order the judgment to be entered for the said defendant."

The United States prosecuted this writ of error.

Page 41 U. S. 296

DANIEL, JUSTICE, delivered the opinion of the Court.

On 16 February 1839, the plaintiffs instituted an action of assumpsit in the Circuit Court of Washington County against William A. Eliason for the balance of $2,600.75 charged against him on the books of the Treasury as disbursing officer at Fortress Calhoun between the dates of 7 November, 1834, and 10 September, 1838.

The defendant Eliason appeared to the suit and filed the plea of *nonassumpsit,* upon which issue was joined, but having died before the cause came to trial, the defendant in error, as administratrix of the decedent, was made a party defendant, and the cause regularly progressed to trial upon the issue made up between the original parties. Upon the trial before the circuit court, the following case was

agreed between the parties by their attorneys, to be subject to the opinion of the court as to the law upon the same, *viz.:*

"On the trial of the above cause, the plaintiffs to maintain the issue on their part joined, offered in evidence the transcripts from the Treasury Department (which are found in pages 12 to 16 of the record), and the said defendant then offered evidence to show that the said intestate was a captain of the United States Corps of Engineers, and as such was ordered to take charge and superintend the works on Fortress Calhoun, and took charge of and continued, the said work, from 7 November 1834, to 10 September 1838, and further offered in evidence the general regulations of the War Department as follows, art. 67, 14:"

" Where there is no agent for fortifications, the superintending officer shall perform the duties of agent; while performing such duties, the rules and regulations for the government of such agents shall be applicable to him, and as compensation for the performance of that extra duty, he shall be allowed for moneys expended by him in the construction of fortifications

Page 41 U. S. 297

at the rate of two dollars *per diem* during the continuance of such disbursements, provided the whole amount of emolument shall not exceed two and a half percentum on the sum expended."

"And further that the said intestate, while thus employed, disbursed $214,392.61; that he was also directed to take charge of, and superintend, the removal of a lighthouse into Fortress Calhoun, in which service he disbursed $1,143.13, and further that he was charged with the disbursement of and did disburse the sum of $1,891.43 for incidental expenses of fortifications, beginning in the year 1830, and that he purchased for the use of the engineer department a set of instruments and case, and the department allowed him for the instruments, but refused to allow him for the case, amounting to $10, and further that the pay and emoluments of the said intestate had been stopped by the government of the United States, from 31 December 1838, to 15 June 1838, amounting to $1,014.95, and the defendant

then claimed credit:"

For compensation for disbursing money on account of

Fortress Calhoun from 7 November 1834, to 10

September 1838, up to which time he was in charge

of said work, inclusive, at $2 per day . . . . . $2,816.00

Of which, this amount only had been allowed. . . . . 234.00

---

Balance . . . . . 2,582.00

For money disbursed on account for removing

lighthouse, &c.; . . . . . 21.64

" money disbursed for incidental expenses of

fortifications. . . . . 46.95

" case of instruments. . . . . 10.00

" pay and emoluments (marked B), copied at page 29 . . 1014.95

---

$3,689.26

For balance of account rendered 29 March, 1839. . . . . 74.79

---

$3,764.05

"And further offered evidence, that all the claims above stated, except that for pay and emoluments, had been submitted to, and rejected by, the accounting officer of the Treasury Department, and further produced and offered in evidence, the following statement of the state of the appropriations under which the disbursements were made."

"The plaintiffs offered in evidence the regulations of the War Department of 14 March 1835:"

" The proviso in the act of Congress passed March 3, 1835, entitled 'an act making additional appropriations for the Delaware Breakwater, and for certain harbors, and removing obstructions in and at the mouth of certain rivers, for the year 1835,' and which prohibits the allowance of extra compensation to officers of the army, has been submitted to the Attorney General for his opinion, and that officer has decided that it extends to and prohibits that allowance of all extra compensation of any kind whatever for which provision is not made by law; hereafter, therefore, no extra compensation will be allowed."

"And upon the aforegoing statements, it is submitted to the court to say whether the defendant's intestate was entitled by law to the allowances claimed by him for disbursements as above stated. If the court is of opinion that he is so entitled, then the judgment to be for the defendant; if otherwise, for the plaintiffs, for the amount appearing due by the transcript."

"F. S. KEY, for the United States"

"Jos. H. BRADLEY, for defendant"

Upon the statement of facts agreed, as above mentioned, the circuit court pronounced the following opinion and judgment:

"And thereupon, upon the full consideration of the case stated as aforesaid, the said court is of opinion that the proviso in the Act of 3 March 1835, ch. 303, is only applicable to the disbursing of public money appropriated by law during the session of Congress in which that act was passed, and it appearing therein to the

satisfaction of the court that no part of the money so as aforesaid disbursed by the said defendant was appropriated at the said session of Congress; the court is also of opinion that

Page 41 U. S. 299

the said intestate was entitled to the allowances claimed by him for the disbursements as above stated, and do thereupon order the judgment to be entered for the said defendant."

To this opinion an exception was taken by the plaintiffs, which was sealed by the court and made a part of the record.

Before considering the questions of law arising upon the agreed statement and upon the exception taken to the opinion and judgment pronounced upon that statement, it is proper to advert to a point which has been made *in limine* by the counsel for the defendant in error and which, if decided as he has contended it should be, would prove conclusive as to the fate of this cause. It is insisted by the defendant's counsel that this Court cannot take cognizance of the present cause for the reason that, having been tried upon an agreed case, a writ of error will not lie to the decision thereon. This position of the counsel is founded upon a remark of Mr. Justice Blackstone in his Commentaries which has been transferred to the work of Mr. Tidd, and to some other compilations upon the practice in the English courts of common law. The passage in Blackstone, which will be found in his chapter on the Trial by jury, vol. 3, 379 (Coleridge's edition), is as follows:

"Another method of finding a species of special verdict is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the court above, on a special case stated by the counsel on both sides, with regard to the matter of law, which has this advantage over a special verdict that it is attended with much less expense and obtains a speedier decision, the postea being stayed in the hands of the officer of *nisi prius* till the question is determined, and the verdict is then entered for the plaintiff or defendant, as the case may happen. But as nothing appears on the record but the general verdict, the parties

are precluded hereby from the benefit of a writ of error if dissatisfied with the judgment of the court of judge upon the point of law, which makes it a thing to be wished that a method could be devised of either lessening the expense of special verdicts or else of entering the cause at length upon the postea."

It is manifest from this quotation that the reason why, according to the practice in the English courts, a writ of error will not be allowed after a case agreed is this, and this only -- that in those

Page 41 U. S. 300

courts, the agreed case never appears upon or is made a part of the record, and therefore there is no ground of error set forth upon which an appellate or revising tribunal can act. In the language of Justice Blackstone, "nothing appears upon the record but the general verdict, whereby the parties are precluded from the benefit of a writ of error . . . , which makes it," says the same learned judge,

"a thing to be wished that a method could be devised either of lessening the expenses of special verdicts or else of entering the cause at large upon the postea."

The same rule in the English courts of law, and the same consequence, as resulting solely from their practice, may be seen in the Treatise on Pleading by Stephen, p. 92, where the author, in speaking of the practice of taking special verdicts, and general verdicts, subject to a special case, remarks that a special case is not like a special verdict entered on record, and consequently a writ of error cannot be brought on this decision. There has been a recent statute enacted in England which, although it is not brought sufficiently to the view of this Court to justify any direct inferences as to its terms or its bearing upon this particular question, may have been designed to remedy the very evil pointed out by Justice Blackstone. By a note to page 92, of Mr. Stephen's Treatise, it is said to have been enacted by 3 & 4 Wm. IV., c. 42, that where the parties, on issue joined, can agree on a statement of facts, they may, by order of a judge, draw up such statement in the form of a special case, for the judgment of the court without proceeding to trial.

By the established practice anterior to this statutory provision, it was in the power of the parties to agree upon a statement of the case; it would seem reasonable and probable, therefore, that the power given to the judge (as an exercise of his judicial functions) to regulate the statement was designed to impart a greater solemnity and permanency to the preparation of the proceeding and to place it in an attitude for the action of some revising power. But even should a want of familiarity with the detail of English practice induce the hazard of misapprehension of its rules, or of the reasons in which they have their origin, the decisions of our own courts, and the long established practice of our own country, are regarded as having put the point under consideration entirely at rest.

Page 41 U. S. 301

By the Act of Congress of 1801, assuming the government of the District of Columbia, in virtue of the cession from Maryland and Virginia, the laws of these states, and, of course, the proceedings in their courts as parts of these laws, were expressly recognized within such portions of the district, respectively, as originally were within the limits of the ceding states. *See* 3 Story's Laws 2089; *United States v. Simms,* 1 Cranch 252. At the period of the cession, the practice is believed to have been well settled, both in Virginia and Maryland, that in trials at law, where special or agreed cases have been made, they have been signed by the counsel, as representing their clients, and spread at large upon the record, as a part thereof, and as constituting the only legitimate ground for the action of the court, and as furnishing the regular and proper test to be applied by an appellate or revising tribunal to this action. The practice is believed to be the same at this day; it has been repeatedly recognized by the decisions of this Court, and if ever heretofore seriously questioned, has never been overruled. *See* *Faw v. Roberdeau's Executor,* 3 Cranch 173; *Tucker v. Oxley,* 5 Cranch 34; *Kennedy v. Brent,* 6 Cranch 187; *Brent v. Chapman,* 5 Cranch 358; and *Shankland v. Corporation of Washington,* 5 Pet. 390. These are cases arising within the District of Columbia, but the same practice has been sanctioned in cases brought hither from without the district, as will be seen in the decisions of *Ingle v. Coolidge,* 2 Wheat. 363, and of *Miller v. Nicholls,* 4 Wheat. 311. This Court therefore has no

hesitancy in declaring that the point of practice raised by the defendant's counsel presents no objection to the regularity in the mode of bringing this case before them.

In considering the exception taken to the opinion of the circuit court in relation to the Act of Congress of March 3, 1835, the order of the War Department of March 13 of the same year, and the rights of the plaintiffs, and of the defendant as connected therewith, this Court has no difficulty in pronouncing the opinion and decision of the circuit court as although untenable. The power of the executive to establish rules and regulations for the government of the army is undoubted. The very appeal made by the defendant to the 14th section of the 67th article of the army regulations is a recognition of this

Page 41 U. S. 302

right. The power to establish implies necessarily the power to modify or repeal or to create anew.

The Secretary of War is the regular constitutional organ of the president for the administration of the military establishment of the nation, and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such be binding upon all within the sphere of his legal and constitutional authority.

Such regulations cannot be questioned or denied because they may be thought unwise or mistaken. The right of so considering and treating the authority of the executive, vested as it is with the command of the military and naval forces, could not be entrusted to officers of any grade inferior to the commander-in-chief; its consequences, if tolerated, would be a complete disorganization of both the army and navy. In the present instance, the order was adopted by the proper authority, and by the same authority promulgated to every officer, through the regular official organ, and the question propounded to the circuit court was neither more nor less than this -- whether a subordinate officer of the army, insisting upon a prior regulation, which he thinks either is or ought to be in force, shall obtain from the

government emoluments which a subsequent order from his superior had warned him that it was not in his power to require? This question can need no argument for its solution. This Court is therefore of opinion that the circuit court erred in allowing to Captain Eliason, a *per diem* as disbursing officer at Fortress Calhoun subsequently to March 1835. Under the 14th section of the 67th article of the army regulations, it does therefore reverse the decision of the circuit court, and directs that a judgment be entered for the plaintiffs for the sum of $2,600.75 as claimed by them, together with their costs.

*Judgment reversed.*