

Case No. 4,261.

ECHEVERIA v. NAIRAC.
FERRER v. SAME.

[Wall. Sr. 29.]¹

Circuit Court, D. Pennsylvania.

May 15, 1801.

TRIAL—NEW GROUNDS OF DEFENCE—CONTINUANCE—ABSENT WITNESS.

Where the defendant, by mistake, gives notice of a new ground of defence, to repel which, the plaintiff sends away his principal witness to obtain testimony, who is still absent, though defendant offers to take the old ground, yet plaintiff is entitled to a continuance, notwithstanding a rule to try or non pros, has been taken.

The causes were commenced in April, 1800, at issue in October term, 1800, and rules taken on the part of the defendant, for trials this term or non pros.

Moylan, Duponceau & Rawle, for plaintiffs, now moved for their continuance. They stated, that the transaction, on which the action was brought, arose in New York. Ferrer, as the agent of Echeveria, had put into the hands of Nairac, 12,000 dollars, to be by him laid out in the shipment of a single cargo, to some of the Spanish colonies in South America; and generally to be accountable for that sum to Echeveria, or Ferrer his agent. Nairac, as they stated, had given Ferrer a receipt for the money, containing this engagement. These actions were brought against Nairac, to produce an account of the moneys. The defendant had pleaded on the 8th of October, 1800, and on the 18th of the same month, during the court which began the 11th, Ingersoll for the defendant, wrote a letter to Moylan, attorney for the plaintiffs, stating, that the defendant would insist for his defence against the suits, upon his right to retain the moneys on account of “cargoes” shipped to one Meunos, a Spaniard, and for which Echeveria was accountable as contractor, &c. The counsel for the plaintiffs stated, that this notice entirely shifted, in their opinion, the nature of the defence expected. They had no idea, until then, that Nairac could mean to involve the appropriation of this 12,000 dollars with his shipments to Meunos, which amounted to near a million; and with which, as far as respected this transaction, Ferrer or Echeveria had not any concern, this being a distinct and separate affair, and relative to a single shipment in the brig—to Meunos. However, on receiving the notice which related to “cargoes,” they deemed it necessary to prepare to meet a defence of that kind; and in the same term of October, 1800, prayed commissions to La Vera Cruz, with a view of obtaining the necessary testimony relative to those immense transactions, in order to show, that the defendant could have no right to retain these moneys on the general account.

It appeared that this commission, with the interrogatories, was not sent away until the 18th January, 1801, and then went by the way of the Havanna, there being no direct trade with La Vera Cruz. The commission was not returned; and the plaintiffs fearing some failure, Ferrer himself had, three months ago, been despatched by land, to La Vera Cruz,

ECHEVERIA v. NAIRAC.FERRER v. SAME.

with duplicate commissions to obtain the testimony, and was now on his journey. They accounted for the delay in sending the first commission, by stating, that the circuit court of the United States, in October 1800, held a long time; that the state fall courts, which were very long and full of business, succeeded; and that many transactions, and an infinite deal of investigation and preparation of exhibits, &c. became necessary in order to complete the commission; and that on the whole it might be expected, the commission would have been returned to

this court, notwithstanding it did not go out until the 18th January, 1801; as the indirect voyage to La Vera Cruz and back to Philadelphia, could be made in that period.

E. Tilghman and Mr. Ingersoll insisted on the non pros. They said Nairac was a foreigner extremely desirous of going out of the country; and had been detained here solely by this suit, much to his detriment: that there were evident laches in suing out the commission. They had obtained it somewhere about the 18th of October, and did not send it away until 18th January, 1801, a space of three months. They could have no reasonable ground to look for its return to this court, after such delay; for that four months was too short a time, within which to expect its remission from La Vera Cruz: though, indeed it did appear that it might be executed and returned in that time with very favorable passages. It was enough, however, that there appeared negligence in sending it out. But to put an end to the whole pretext about the commission to La Vera Cruz, Ingersoll said that they had no intention in the defence of their client to go out of the single transaction of the cargo of the brig—, and though the word “cargoes” had slipped into his notice, it was never contemplated to involve this deposit with Nairac by Ferrer, in the general shipments to Meunos. As, therefore, the commission had been taken out merely to meet a supposed defence, and which would not be set up, the plaintiff Echeveria could be in no difficulty whatsoever.

The counsel for the plaintiff admitted, that this offer and explanation removed every objection on the score of preparation, except one; which was, that Ferrer, who, from being the agent in the transaction, was the principal witness for Echeveria, and on whom they depended, had been sent away to La Vera Cruz, in consequence of the notice of the 18th of October from the defendant’s attorney, with duplicate commissions to procure this evidence, which now, indeed, appeared to be of no consequence.

TILGHMAN, Chief Judge. This is the second term after issue joined. The defendant’s notice of a defence which was not expected, and which induced on the part of the plaintiff the necessity of a commission to La Vera Cruz, was given during October term last. It was certainly, very strict practice for the defendant to take a rule for trial or non pros, the very term he gave this notice; and had the plaintiffs resisted the rule under those circumstances, it might have been refused: but it was obtained as a matter of course, and we must dispose of it on proper principles. We are of opinion, on the whole of the circumstances, that the causes should be continued. No affected delay appears on the part of the plaintiffs: on the contrary, a very great anxiety to get the evidence from La Vera Cruz, by sending Mr. Ferrer by land with duplicate commissions to effect it. It was certainly a great while to keep the commission from October to January; but this is in some measure accounted for from press of courts, and the very elaborate translations, &c. necessary to attend the commission. Besides, it does appear that a return of it might be looked for from the course of the voyage, though sent in January. It is true the explanation and offer

ECHEVERIA v. NAIRAC.FERRER v. SAME.

now made, removes the necessity of this evidence; but then Ferrer, the principal witness as to the individual transaction to be tried, is gone in consequence of the notice of the 18th of October, 1800, which brought into view a different defence. To compel Echeveria to proceed without him, would, possibly, be more injurious, than to have gone on without the commission, had that evidence been material. We are desirous of despatch, and will not easily overlook laches; but in this case we think there is sufficient ground for continuing the causes. Let a continuance be entered.

¹ [Reported by John B. Wallace, Sr., Esq.]