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LAW INTELLIGENCE.

CIRCUIT COURT—BEFORE THE HON. MR. JUSTICE LIVINGSTON.

New-York, June 30, 1803.

COCK, vs. IRVING & SMITH.

For negligence as Agents.

The facts which appeared in evidence on this trial, were shortly these: The plaintiff, a merchant residing in Virginia, had sent a consignment of 15 hogsheads of tobacco, worth about 1400 dollars, to the defendants, who were commission merchants and auctioniers, with directions to sell the same for *cash*. They kept the tobacco on hand for some time, and then sold it to a certain Mr. Gavin on a credit of 60 days. At the time this sale was made it appeared that, with a *limited number* of persons, Gavin was in good credit; several persons who knew him at that time, declared that they had endorsed for him to the amount of the goods in question, or *would* have done so if requested. In June, 1802, this sale was made. The vendee (Mr. Gavin) was then not *generally* known in New-York, had no *domicil*, nor any counting house there; but in the autumn of 1801 had brought goods to a considerable amount from Europe, and in the spring of 1802 had engaged in an adventure to Spain to the amount of 7000 dollars.

It appeared that prior to the sale of this tobacco, the defendants had made some enquiry respecting Mr. Gavin; the person to whom the enquiries were addressed, informed Messrs. Irving and Smith that "he did not know that Mr. Gavin possessed any property, but that he (the witness) would trust him for 12 or 1500 dollars. Upon this information Gavin's note, *without an indorser*, was accepted. In August this note became due, but not being paid, was *protested*; of this the plaintiff was duly informed. The defendants at the same time stated their expectation of its yet being discharged. Under these circumstances they resorted for advice to a young gentleman, a relation of one of the defendants, who recommended taking the assignment of a *policy of insurance* on goods sent to Cadiz; but advised against putting the note in suit. They pursued this advice, and apprized the plaintiff of their proceedings. In reply, he did not *then* disapprove of their conduct, but requested as soon as the money was received it might be remitted to him, or passed to a credit. On the 18th of November, 1802, Gavin eloped, which circumstance the defendants communicated to the plaintiff. In answer to this letter, he then *first* suggested his intentien of considering the defendants as liable for this debt; and for the amount of tobacco thus sold to Gavin the present action was brought.

Mr. Hoffman, for the defendants, from the evidence of this cause raised three questions for the consideration of the jury. He undertook to show—1. That the defendants had acted as faithful & prudent agents in the sale of this tobacco—2. That *after the sale*, they had used all due caution and diligence in securing the debt—and 3. That the plaintiff had confirmed the transaction by his subsequent acquiescence in the measures taken by the defendants.

As to the first point it appeared from the testimony of the witnesses examined, that in the Spring of 1802, Mr. Gavin was a *person of credit*; that his negociations were to a considerable amount; that he brought to this country property of no small value; that he was trusted by several merchants, and that his notes were actually received and discounted at the bank. From the cashier of the bank of the United States, we have it in evidence, that it is a *general rule* at the bank, always to have two *good* names to a note; yet where there is perfect confidence in *one*, a note will sometimes be received. That on a *new loan* however, if the drawer was absolutely in *bad* credit, his note would not be discounted whatever number of indorsers he might have.

It appears then that Mr. Gavin had credit *at* bank and out of bank, of course that his note was to be considered as good for so small a sum as is now in dispute.

In regard to his *residence*, this is not to be considered as the measure of his credit. Many persons of large fortune and established credit from the southward, and from Europe do business in this place to a large amount, without either having a domicil or a counting house here. From the evidence before the jury they must be satisfied that it is the daily practice of commission merchants to sell to persons on credit, such as Mr. Gavin, without any fixed residence, and who have not a very general acquaintance in the mercantile world. But has there been any evidence to shew that the defendants have acted *mala fide* or *unfaithfully* in regard to the plaintiff. On the contrary, has it not appeared that they trusted Gavid on *their own account* to the amount of 1200 dollars, and that they took his note for this sum without an indorser. And surely there is no rule of law, which obliges an agent to take greater care of the concerns of his principal, than of his own. If he takes equal *care*, it is all that law or reason demands. Besides have we not seen that the confidence reposed in Gavin, originated with the plaintiff, that he introduced Gavin to the defendants as one who had offered a certain price for this tobacco. If then a loss ensues, is it not imputable to the plaintiff himself?

As to the second point, viz. whether *after the sale*, due deligence and caution had been used to secure the debt. The defendants took every measure which prudence dictated. They go to a professional man, who although young, most certainly stood high and very deservedly so in his profession, they rely on his judgment and not on their own, and although he might have omitted to take *every* precaution that might have occurred to a more experienced practioner; yet in all this there is evident proof of an *honest* regard to the interest of their principal.

But supposing the defendants have exceeded their authority in the sale; supposing them to have erred in the measures taken to secure this debt; still as they kept the plaintiff regularly advised of their proceedings, and as he never suggested a hint, of considering them as responsible for this money until *after* the elopement of Gavin, he considered the plantiff as *acquiescing* in this measure, and of course as exonerating his clients from all responsibility. The rule of law on this subject is clear; "*when after a principal is regularly advised of an agent or factor's conduct, and does not disavow the same, he admits it, and takes the responsibility on himself.*" The many letters which passed between the parties after the sale in question, seems decisive on this point. Although the sale was made in June, the protest in August, the elopement of Gavin in November, it was not until the 6th of December, that the plaintiff pretends to consider the defendants as liable for this money.

On these three grounds Mr. Hoffman ruled the jury would find for his clients.

General Hamilton, in reply, for the plaintiff, contended, that the defendants in this transaction had not acted as *prudent* and *faithful* agents of the plaintiff. He admitted they had a right to sell on credit, but in such case they ought to be extremely cautious, lest they should involve their principals in a loss. The rule of law that had been stated he assented to, with the addition of one word. It had been said "that when a man *bona fide* takes the same care of another's property that he does of his own, he is not liable in case of loss." Gen. H. said this was well, with the addition of the word *prudent* before "*man*." The first question in this cause then was "did the defendants in this business act as *prudent* agents?" He contended *not*. They sold this property to a person who was not a resident in New York, who had no *domicil*, no counting-house there; to a person who had no general credit, none at bank, who was known but to a very few merchants. In such a case was it not plainly the duty of a factor to demand a *good* indorser; would any *prudent*, any reflecting agent, have exchanged property to the amount of 1400 dollars for the paper of such a person as Gavin, without some *collateral* security? It is true, it appears they made enquiry of *one* person respecting the vendee's credit; but would not a *prudent* person have gone further and enquired of several. For although it sometimes happens that *one* or *two* persons would accommodate an acquaintance with their names, from *personal* friendship or confidence, yet this does not determine the *general credit* of a merchant; and it is by the state of a man's *general credit* that an agent, in circumstances like those in question, should be governed. In my opinion, therefore, said general H. the defendants in this instance were rash, careless and imprudent; nor will the law justify them in the sale. From their own correspondence we are authorised to draw this conclusion for in one of their letters to the plaintiff, they say "we had great *hesitation*, and some altercation with Gavin."

But a second and not less material point, in which the *imprudence* and want of due regard to the plaintiff's interest on the part of the defendants, appears, we discover, in their conduct after Gavin's note had been protested: ought they not then, immediately, either to have instituted a suit and held Gavin to trial, or have taken some *substantial* security for the debt? Instead of this what is the course they take? They resort to a young man for advice, under whose recommendation they take the assignment of a *policy of insurance* on goods shipped for Cadiz. A policy of insurance! And what security was this? In case of the goods arriving safely at the port of destination it was useless—a mere nullity: it was only on the event of a loss, a chance of 1 to 25 or 30, a slender ground for the plaintiff to rely on for indemnification! Had they taken an assignment of the *effects insured* or the *proceeds* of the voyage, there would have been some discretion and some value in the assignment; but what they *did* take was an "airy nothing, a contingency, a chance for one out of 25;" and can a jury say that such a conduct in agents was either *prudent* or *justifiable?*

Upon the whole, as the loss must fall either on the plaintiff or defendants, he thought the jury would fix it on the latter, from their negligence in not using those means which "*faithful and prudent* agents in like circumstances ought to have used."

The Judge, after summing up the evidences and stating the points made by the council, in a clear and able manner, observed to the jury, on the point of Gavin's credit, that it was not by any means necessary that a man should be *universally known* to be a *person of credit*. It is sufficient to exculpate the defendants from the charge of negligence, if they had *good reason* to believe Gavin responsible for the amount of the effects sold, nor is the want of a *fixed residence* a conclusive circumstance against trusting Gavin—it might excite caution, but not extinguish confidence.

Neither would the want of a general credit at bank be decisive, if that had been the fact. It is a rule with many persons *never* to indorse, they know the uncertainties of trade, they know if they indorse for one, they may be requested by another, and therefore will not indorse for their nearest friends.

But it seems there were persons who *would* indorse Mr. Gavin's notes, and they were received at bank. Had this person been actually a resident and in *bad* credit, the defendants would not have been justifiable in trusting him.

As to the second point, namely, the security taken for the debt, after Gavin's note was protested, I think better security *might* have been taken. This however seems to have been rather an error of judgment, than a want of fidelity; but admitting the defendants to have been deficient in zeal and prudence in the concerns of their principal, the jury will consider whether his subsequent conduct does not seem to have sanctioned the defendants' measures by something more than silence, by positive acquiescence. If the jury think the defendants have act as "prudent and faithful agents" in this concern, they will find for them. If on the contrary they think the defendants have been guilty of any *mala fides*, of any *gross negligence*, they will find for the plaintiff.

The jury, without retiring from the bar, found for the DEFENDANTS.

IMPERIAL PARLIAMENT.

HOUSE OF COMMONS,

May 24.

WAR WITH FRANCE.

[CONTINUED.]

Mr. Dallas said, that as the question had been so ably discussed already, and as there were many gentlemen much more competent to deliver their sentiments upon the question than he was, he would not trespass long upon the attention of the house. The question before the house involved in it two considerations: the justice of the war, and the conduct of his majesty's ministers in the negociation. Upon the latter point there appeared to be considerable difference of opinion; some gentlemen seemed to think that ministers had not gone far enough in their efforts to preserve peace, while others thought that they had not taken their stand early enough against the aggressions of France. But he wished to recall the attention of the house to what appeared to be the only question now before them. The question was, whether the war in which we were now engaged was on our part a just war or not? As to the conduct of ministers during the negociation, that certainly did not form a part of the consideration before the house, at least the address which had been moved by the noble lord, did not call upon them for any approbation of the conduct of ministers. But as to the real question before the house, he would ask whether there was any man who would say that the conduct of France was not, in every instance almost, marked with insult and aggression against this country, and yet it was proposed in the amendment, to leave out all that part of the address which expressed the opinion of parliament upon the justice of the war. If the amendment was adopted parliament would be pledged to support the war, without giving any opinion whatever upon the nature of the war which they pledged themselves to support. He confessed that he came to the consideration of the papers which had been laid before the house, with a mind not destitute of partiality for his majesty's ministers, who had concluded a treaty of peace, which had been approved of by the country, though perhaps some of its stipulations were liable to objection. It struck him, therefore, that the persons who had made such a peace must be anxious to preserve it; but he came also to the consideration of these papers with another and a superior feeling, viz. an anxious wish, an ardent desire to find his country in the right, a hope that we should not now, for the first time, be found to have departed from that strict observation of treaties, that course of honorable moderation which had always characterised our conduct. These were the feelings with which he came to the consideration of these papers, and not a wish minutely to criticise the conduct of ministers in an arduous, a long and complicated negociation. Upon the desire of ministers to maintain peace, it seemed to him impossible to entertain a doubt. Had they not made every cession stipulated for by the treaty of Amiens, except only that of Malta? and had they not made every effort in their power to prevail on those powers of Europe who were to guarantee that island, to accede to that guarantee, in order that Great-Britain might completely fulfil the treaty? It was not necessary to enter into an examination of the conduct of France, with regard to Holland, to Italy, or to Switzerland. Nobody pretended to defend or excuse their conduct with regard to these states. With regard to the execution of the treaty of peace, every thing on the part of this country manifested a desire to execute the treaty. Every thing on the part of France was evasion, prevarication, and delay—With regard to the mission of colonel Sebastiani he should pass that over, as so much had been said upon it, with merely observing that it was a clear minifestation on the part of France of a desire to get possession of Egypt, and through Egypt, of India. The first consul had told this country that Egypt was his object, but that he would not go to war for it. This was a faithful picture of his mind. He will not go to war; why? because he is restrained by the stipulations of a treaty; because he is restrained by a sense of honor and good faith? No, these are restraints much too weak for his great and daring mind; but he will not go to war now for Egypt because he hopes to get it at another time and by other means, that is to say, he will choose the moment when it is most convenient for him to go to war for it. The British government had constantly asked for explanations of all the conduct of France, which explanations were constantly refused, and, at last, when the British minister had left Paris, then they made an offer, which was in fact nothing less than to ask us to participate in a scheme of plunder and robbery. An honorable member (Mr. Whitbread) had asked for information upon a point upon which it was essential that not only he but the house and the country were entitled to a pacific answer. He had asked for what purpose we were going to war? The answer he would give to that question would be this, "We were going to war for Malta—not for Malta only, but for Egypt—not only for Egypt, but for India—not only for India, but for the integrity of the British empire—not only for the integrity of the British empire, but for the cause of justice, good faith, and freedom all over the world."

General Maitland said, he rose merely in consequence of an allusion to what had fallen from him on a former occasion, and would trespass but a short space upon the time of the house. It had been repeatedly contended, that there were no grounds laid before the house to justify that assertion in the king's message, that armaments were preparing in the ports of France and Holland. He however begged leave to state, that there was an armament in Helvoetsluys, which was avowedly destined for Louisiana; there were also armaments in Havre and Brest, not very extensive ones he admitted, but armaments which could convey 9 or 10,000 men to distant colonies, or could convey twice that number to the shores of Great-Britain or Ireland. The measure which had been adopted by ministers was therefore a measure of precaution, and this was converted into a ground of censure, but it was said, that this might lead to irritation: What! irritate the first consul, who had before threatened us in the face of Europe with his army of 480,000 men! Surely, then, to take precautions against such a danger, was not a ground upon which ministers were deserving of censure. With respect to the previous conduct of France, it had been universally admitted, that it afforded this country just cause of war. He was glad to hear gentlemen make that confession, but he was surprised, after such an admission to hear them contend, that the point on which ministers made their stand, afforded no ground of war at all. He could not help making one observation upon the report of colonel Sebastiani: It was impossible to conceive a more gross insult to the British army, and through the army to the sovereign upon the throne, and to the whole English nation. And what reparation has been given for this insult? Why one that was worse than the insult itself; ministers were told that this official report was necessary as a reparation to the French army, for a publication which had appeared in England. The point, however, which he expressly rose to explain, was an expression of his upon a former occasion, respecting the importance of Malta, which had been referred to in the present debate. He had never treated Malta as a place of no importance; he had only stated, that he did not consider Malta as absolutely necessary to this country, to carry on offensive operations in the Mditerranean.

Mr. Elliot said, that after the question had been so fully discussed he should not take up much of the time of the house; he wished merely to state the motives which influenced his conduct in giving his vote for the original address. He wished, however, to be distinctly understood; in voting for the address, he meant merely to express his opinion of the justice of the war on the part of this country; he meant to give no opinion whatever upon the conduct of ministers. The war appeared to him both just and necessary; he used the word necessary, because we were forced into it for self-preservation and defence, and he really would not give his vote for the war unless he was convinced that it was not only just but necessary. It was not necessary to refer to, or to comment upon, the repeated acts of insult and aggression offered by France to this country; they had increased every day, and went on with accelerated velocity. Upon this subject he was happy to find that there were not two opinions in the house.

With respect to the mission of colonel Sebastiani, it had been said that France had given no satisfactory explanation upon this point; but it appeared to him to be an act which was almost incapable of explanation or of reparation; it was a cool, deliberate, determined act of aggression. It was true, that in entering into this war we commenced it with many disadvantages—we had given up all our conquests; we had given up to France many possessions which were important in a military and commercial point of view, and he was every day more and more confirmed in the opinion which he had always entertained, that we had lost more by the late unfortunate truce, than we could have done by even a disastrous war. Of all things, now that the contest had commenced, he should deprecate a speedy and insecure compromise with France; he hoped that the contest would be continued until real peace and tranquility could be restored.

Mr. Serjeant Best said, that in his opinion too much time had been occupied in discussing the papers before the house; for it was admitted on all hands that they contained abundant and legitimate causes of war, and yet the house were still discussing whether they should agree with the address to his majesty upon the justice of the war. If he were asked, would he go to war for Malta, he would answer, "No;" he would not go to war for Malta, or a much more extensive possession in the abstract: but it was the manner in which France demanded Malta, it was the disposition she had shewn, it was the designs which she had openly avowed, that in his opinion justified this country in going to war. If the smallest spot of earth was demanded of us, in the manner and under the circumstances that France had demanded Malta, he would refuse it, because he would consider it as essentially connected with the safety and interest of the British empire. He was ready to admit that between the preliminary and definitive treaties, France had repeatedly given us cause for war; but it did not therefore follow that ministers were to blame for not going to war, it by no means followed that a country was always to go to war, whenever it had a just cause of so doing. The French government professed a desire to have the treaty of Amiens strictly carried into execution, and they had contended that by that treaty we were precluded from interfering in any manner in the affairs of the continent. It was impossible to conceive a more absurd or ill grounded assertion than that by that treaty we had shut ourselves out from any right of interposing in the affairs of the continent; because it so happened that in that treaty we did stipulate for the integrity of the different states upon the continent. What right could the French government have to call upon us for a literal execution of that treaty, when France was at that very time, not silently, but openly and avowedly planning a gross infraction both of the letter and the spirit of the treaty?

Mr. Canning said, he was anxious to state his reasons for voting for the address, and against the amendment which was proposed If no amendment had been proposed, she should have contented himself with giving a silent vote upon the occasion in favor of these propositions, which were so clear in themselves, and had been so ably illustrated, that a man must be hard to be convinced indeed, who wanted further illustration, and he must be a vain man who could expect to put the question in a clearer point of view than it now was. But the amendment which had been proposed had rendered it necessary for him to say a few words in answer to the honorable gentleman who had proposed the amendment, and those who had supported it. Gentlemen had contended that it was impossible to vote for the original address without precluding themselves from entering into any examination of the conduct of ministers. This was a proposition to which he could by no means assent. If it was only for the purpose of guarding his own vote against such a construction he should have thought it necessary to have troubled the house upon that point; but he was also anxious to controvert another proposition which had been advanced, viz. that those who disapproved of the conduct of ministers, were bound to withhold their assent from the address. He could not comprehend upon what ground the distinction which had been taken upon these points, was represented, as so absurd, for it appeared to him that these two points, viz. the justice of the war and the conduct of ministers might very fairly and properly be separated on the present occasion. When they are engaged in a war with a great and powerful enemy, their first business was to assure the executive government that they should receive the support of the parliament and of the country; but at the same time warning ministers that if there had been any thing improper in their conduct, that this general support should not protect them, at a proper time, from examination and censure, if censure should become necessary. He did not mean to throw out any insinuations against the conduct of ministers, and if any observation of his had that tendency, he begged leave before hand, to disavow it. He would reserve what he had to say on that point to a future occasion. But no consideration could affect the substantial justice of the war on the part of this country. In describing his opinion of the cause of the war, he could not do better than adopt the language of an honorable member (Mr. Dallas) upon the acquisition of whose talents he congratulated the house. It was a war for the dearest interests of the British empire, into which we were compelled to enter by the deep-rooted, avowed and incurable hostility of France. Whether gentlemen might think that the stand of ministers was not made at the proper point, still there was not, there could not be any difference of opinion upon the justice of the cause in which we were engaged. Whatever imputations might be thrown out against ministers upon other points, no man could say that with regard to Malta, they had shewn any unwillingness to comply with that part of the treaty; on the contrary they had shown the greatest industry in negociating and endeavoring to carry the stipulations relative to that island into effect. If, therefore, under all the circumstances of the case, they kept Malta, the fault was not to be attributed to them, but to France. The question now under consideration was, whether Malta being in our possession, ministers were blameable in making their stand there. Upon this point his opinion was completely made up, and he entirely agreed with the right hon. gentleman (Mr. Grenville) that if Malta had been previously given up, Great-Britain would have been justified, after the designs so openly avowed by France, in endeavoring again to obtain possession of it.

This being the case with regard to Malta, the house was told, by those who supported the amendment, that they had no right to allude to former grievances, and that however bad the conduct of France might have been upon former occasions, we had no right to refer to it now, because it had not been noticed before. He did not understand that the former aggressions of France were now alluded to, as being in themselves distinct and substantive causes of war; they were introduced to