DUNNELL v. MASON.

Case No. 4,179.

{1 Story, 543;[1] 4 Law Rep. 141.}

Circuit Court, D. Rhode Island. June Term, 1841.

FACTORS—SALES UNDER DEL CREDERE COMMISSION—PAYMENTS IN DEPRECIATED CURRENCY—ACCOUNTING.

Where a consignee, with a del credere commission, sells goods for his principal at a certain price, and afterwards, upon a suspension of specie payments in the state, receives payment in bank notes of the state banks at a depreciated value, he is not entitled to deduct the amount of the depreciation from the debt, but must account for the full price, at the specie, or par value, to his principal.

This was an action on the case {by Jacob Dunnell against Robert M. Mason} to recover a balance of account claimed by the plaintiff, under the following circumstances. The plaintiff was a calico printer, at Providence; the defendant a commission merchant, of the firm of Otis & Mason, at New York. In the year of 1838, the plaintiff contracted with the firm of Otis & Mason to print for them a large quantity of cotton cloth, at a rate fixed by the contract and to receive payment for the said printing in the cloth, furnished by the plaintiff, at a price ascertained by the contract. The entire parcels of these prints were to be consigned to Otis & Mason, they to charge the plaintiff, on his proportion of them, the ordinary commission and guaranty, and the usual small charges. Instead of a division of the prints into parcels, one for the plaintiff, and one for the house of Otis & Mason, it was agreed, in order to secure fairness in the sales, that the plaintiff should be entitled to that proportion of the proceeds of the whole of the sales, deducting commission, guaranty, and the usual small charges, which his (the plaintiff's) proportion of the prints bore to the entire parcels. Sales of these prints were effected at Baltimore and Philadelphia by Otis & Mason before and after the suspension of specie payments by the banks of those cities, in October, 1839. In making up the account with the plaintiff, the defendant's firm, in addition to charges of commission, guaranty, &c., charged against the plaintiff the difference of exchange between the cities of Philadelphia, Baltimore, and New York, at rates varying from 6 to 10 per cent. To this charge for the difference of exchange on sales, effected before the suspension of the banks, the plaintiff

objected. The objection was urged on the ground, that this was, in effect, the result of a composition by the defendant's firm with the purchasers of the prints, inasmuch as Otis & Mason appeared to have preferred taking the depreciated currency of the banks of the cities of Philadelphia and Baltimore in payment, rather than take the risk of the delay of payment, which would have been the consequence of exacting specie or its equivalent. This, however, was no matter of concern to the plaintiff, who was protected by the guaranty of Otis & Mason, as well from a partial, as a total loss. The plaintiff allowed in his statement of the account for the difference of exchange on sales made after the suspension. This he allowed to be fair, as the price of the goods was probably enhanced by the price being fixed under a depreciated currency, out of which enhancement he could afford to allow the difference of exchange. But, as to the charge for difference of exchange on sales before the suspension, he insisted, that the guaranty protected him from that in fairness and in justice, as well as at law. If the firm of Otis & Mason had preferred taking payment for the sales made in Baltimore and Philadelphia under a specie basis, after the suspension in a depreciated currency, rather than risk delay, or incur the expenses of a suit, or hazard some other loss, that was their concern, not the concern of the plaintiff, who was protected from all these accidents by Otis & Mason's guaranty. For the defendant, it was contended, that this was a partnership in joint adventure. This difference of exchange was a loss not contemplated by the parties to the contract at the time it was formed, and it ought therefore to be borne equally between the parties. As the difference of exchange was a loss, which did not originally enter into the contemplation of the parties, it could not have been embraced within the objects of the guaranty.

Mr. Ames, for plaintiff.

Whipple & Rivers, for defendant.

STORY, Circuit Judge, in delivering the opinion of the court, said: If the plaintiff and defendant were originally partners in the goods, it would make no difference. The defendant acted under a del credere commission and is therefore bound to account to the plaintiff, as his principal, for the full price, for which the goods were sold, the sale having been at the specie or par price. The plaintiff has nothing to do with the mode, in which the defendant collected the debt. If the purchaser had been totally insolvent, the defendant must have paid the full specie value to the plaintiff under his guaranty; and, receiving the amount in a depreciated currency is a pro tanto loss, for which the defendant is accountable to the plaintiff.

[1] {Reported by William W. Story, Esq.}