FORRESTIER v. BORDMAN.

Case No. 4,945.

[1 Story, 43; 2 Law Rep. 325; 1 Hunt, Mer. Mag. 506.][1]

Circuit Court, D. Massachusetts. Oct. Term, 1839.

SUPERCARGO—POWER AND AUTHORITY—SALE OF CARGO—VALIDITY—USAGE OF TRADE—SALE ON CREDIT.

1. A supercargo is not bound to observe the exact terms of his instructions, if thereby the interests of the owner would be sacrificed or his objects frustrated.

2. In cases of necessity or great urgency it is only necessary, that the supercargo should act bona fide and with reasonable discretion, in order to bind the owner.

[Cited in Greenleaf v. Moody, 13 Allen, 367.]

3. If the owner receive the proceeds of a sale by the supercargo without objection, it is a ratification of the sale.

4. All sales but those by del credere commission are at the risk of the shipper.

5. The validity of a sale on credit depends upon the usage of trade in the place, where the sale is made, and such usage is a question of fact for a jury.

6. Where the usage of trade allows discretionary sales on cash or credit a credit sale is at the risk of the shipper, unless some agreement can be shown restricting him to a cash sale.

7. Where a commission merchant or factor has sold goods upon credit, he is bound to exercise due discretion in enforcing payment, and not to sue or put the owner to expense, unless there is reasonable ground to believe, that he will be benefited.

[Cited in Greenleaf v. Moody, 13 Allen, 366.]:

8. Where a commission merchant sells on credit to a person, who becomes insolvent, and does not give notice of that fact to the owner within a reasonable time, he is liable for all the damage the owner suffers in consequence of not receiving such notice.

This was an action of assumpsit brought by the plaintiff, a merchant of Batavia, to recover of the defendant, a merchant of Boston, $1637, the amount advanced by the plaintiff on a sale of flour made by him for the defendant on credit, the purchaser having become insolvent. It appeared in evidence, that in the year 1830, the defendant shipped in the Shylock, 1000 barrels of flour, and placed it in the keeping of Stephen H. Williams, as supercargo. The vessel sailed for Rio Janeiro, and 775 barrels of the flour were there sold. She then put into Monte Video, but the state of the market being very unfavorable, the supercargo concluded to carry the remaining portion to Batavia. He did so, and requested the plaintiff to sell it, and invest the proceeds, together with the proceeds of that sold in South America, for the benefit of the shipper. The market was glutted and the flour was somewhat damaged, but it was sold by the plaintiff to one Johannis, on a credit of six months, and the proceeds, deducting the interest, were invested in coffee, which was shipped to the defendant and by him received. No guaranty commission was charged in the account of sales, and Mr. Williams had no knowledge, that the flour was sold on a credit of six months, until after the sale was made. After the coffee had been shipped to

the defendant, Johannis, to whom the flour was sold, became insolvent, and the plaintiff not being able to obtain payment from him for the flour, claimed in this action to recover of Bordman the amount of the advance.

C. P. Curtis, for plaintiff, objected, that the defendant ought not to be permitted to

deny the authority of Williams, the supercargo, to make the sale at Batovia. Williams was admitted as a witness under exception by the plaintiff; he was not competent to prove such a defence as this, without a release, which had not been given him. If this point is insisted on, Williams's testimony ought to be rejected entirely. The sale by Williams at Batavia was a justifiable act. He found, that he could not dispose of the flour at Rio Janeiro, and went to Batavia, where he employed plaintiff to sell it and invest the proceeds in coffee, which the defendant received and appropriated to his own use without objection. This was a ratification by him, if any were needed. Story, Ag. 248, &c. In the next place the defendant objects to the recovery by the plaintiff, because he sold the flour on credit. The flour was consigned to the plaintiff for sale in the usual manner, without specific instructions, and it is proved by the testimony in the case, that sales on credit are usual and customary at Batavia. The flour was damaged, the sale dull, and the purchaser was in good credit when he made the purchase. Williams was in the plaintiff's counting-room almost all the time, and might have inquired about the transaction, and decided in relation to it, but he did not; he left the whole to the plaintiff's discretion, and the plaintiff was justified by the usages of the place in making the sale in the manner proved. Id. 60-220; Paley, Prin. & Ag. 212; 5 Cow. 473. But, it is alleged by the defendant, that the plaintiff, by advancing the amount of the sale and investing it in merchandise consigned to the defendant, assumed the risk of collection at maturity; and that, if this was not so, yet by his neglect to notify the failure of the purchaser to the defendant, he made the debt his own, and so ought not now to recover the amount claimed. As to the first of these averments, the plaintiff replies, that his account of sales showed, that the sale was on six months'credit, and his account current contained no charge of a guaranty commission, which would have appeared there, if the plaintiff had assumed or guarantied the sale. The charge of "discount" was the rebate of interest on the amount of the sale, for six months, at nine per cent, per annum, which is the usual rate of interest at Batavia. This was for cashing the sales. Williams testifies, that Barrell, the plaintiff's clerk, told him the sale was guarantied to him; but Barrell had no authority to make such a declaration for his employer; and the plaintiff was not bound by it; and the documents (which are in Williams's own handwriting), namely, the account sales and account current show no such thing, but negatively prove the contrary. As to the other averment of the defendant it is true, that a considerable time elapsed before the defendant had notice of the insolvency of the purchaser of his flour and of the plaintiff's reclamation on himself; and if defendant has sustained any loss through the plaintiff's neglect in this particular, he is entitled to a deduction to that extent. Story, Ag. 196; Paley, Prin. & Ag. 39. The defendant, however, received notice of the loss of the debt, and of the plaintiff's intention to call on him for reimbursement in May, 1833. He has received the plaintiff's money and has had the use of it ever since November, 1830; and if he now pays it back, he will be just where he

would have been, if the plaintiff, instead of advancing the amount of the sales of flour, had waited for the maturity of Jordan Johannis's note. The evidence shows clearly, that the plaintiff has done all that he could to collect the amount, and in fact succeeded in getting something on account of it, for which he has given the defendant credit. It is said by defendant, that the plaintiff settled his account and paid over the balance, intending such payment to be final. That is the very question. We deny that such was the plaintiff's intent; his conduct shows the contrary; it shows only that he was willing to accommodate the defendant, by advancing the amount, but not that he intended to assume the ultimate responsibility of the debt, without compensation. The plaintiff is entitled to a credit for the balance of his advance with interest.

S. Hubbard and Willard Phillips, for defendant.

This claim is a surprise upon the defendant. It is the first one of the kind in the history of the East Indian trade, yet no one can doubt, that innumerable bad sales have been made by factors in the course of that trade. There are now outstanding debts for sales in India to vast amounts, which would be equally good ground of reclamation by the factors there, against American and European consignors. In order to recover, the plaintiff must show, that a sale by the factor, on credit, at the risk of the consignor, was previously authorized or subsequently ratified by the consignor. It is no violation of duty in the factor to sell on credit in any case, provided he pays over an amount, eqaul to the net proceeds, to his principal, and assumes the outstanding debt for the sales himself. This we contend the plaintiff did in this case; and this we contend is generally done, where the sales are on credit in India, and there is no express explicit understanding between the principal and factor, that the outstanding debt is at the risk of the principal. Sales are usually made on credit in all places, where commerce and civilization have made any progress; but this credit is in many places generally, and in individual cases in all places, a distinct concern between the factor and the vendee, and does not affect the consignor. The naked fact, therefore, that sales are made on credit, to a greater or less extent at any place, is no ground of presumption,

that the credit is at the risk of a distant consignor. Whether it be at his risk must depend upon all the circumstances of the case, showing that the parties so understood it; for the general presumption is, that the consignor does not authorize any other than a cash sale. The burden is on the factor, to make out the authority for any other sale; whether by barter or on credit, at the consignor's risk. The naked fact of occasional or frequent sales on credit at any place does not make out such an authority, without, by testimony, carrying home to the consignors the risk of the sales, and that in so public and notorious a manner, that the consignors may be affected by a notice of the usage, that such risk of the sales reaches them. In this trade, and in all the East India trade, there is no proof of a single instance. We must look into the circumstances of this particular case, then, to find such authority, if it exists. Story, Ag. 298. The consignor is nine thousand miles off. It is his first and only transaction with the plaintiff, and indeed in India. The parties are utter strangers to each other. The business was put into the plaintiff's hands by the supercargo, with whom alone the plaintiff had any communication, direct or indirect, respecting it. No promise or intimation was held out to the plaintiff of any future business or intercourse. The vendee was an American merchant, utterly unknown to the consignor and the supercargo. The supercargo was a young man on his first voyage, and a stranger to the plaintiff.

Under the particular circumstances of this case we contend, that notice is irresistibly forced upon the plaintiff, that the consignor did not authorize or intend a sale on credit at his risk. It is shown, that the plaintiff himself supposed, that the credit was at his own risk, by his long delay to give the consignor notice of his claim, or make any demand upon him, though the communication between Boston and Batavia is easy and frequent. The case of the sale of the Jewel to the Emperor of Morocco, on credit, in which the agent was held to have given the credit at his own risk, does not by its circumstances negative an authority to sell on credit at the risk of the principal more strongly than this. The instructions to the supercargo, that he should take the proceeds of the sale of flour in South America to India, and there invest them in a return cargo, exclude any supposition, that a sale of the flour on credit in India, at the risk of the consignor, was authorized or intended, and these instructions were shown to the plaintiff. The testimony shows distinctly, that the supercargo did not authorize a sale on credit at the risk of the consignor, or at his own risk. He states distinctly, that he did not know of the sale being made, and that when the circumstance of the sale being on credit was first brought to his knowledge in the accounts at Batavia, when he was just ready to sail on his homeward voyage, he immediately, on the spot, in the plaintiff's counting-room, told the plaintiff's clerk, and only representative there, and who acted for the plaintiff in settling the accounts, the plaintiff being absent, that he, the supercargo, disclaimed for himself and his principal any sale on credit on his, or his principal's account and risk, and was told by the clerk in reply, that the credit was entirely the affair of the consignee, and the sale was guarantied. The plain

meaning of which was this: "Though we have put down the term of credit in this account of sales, yet it is only for the purpose of showing you, that we make a proper discount of interest, in ascertaining the present cash value of the proceeds of your consignment, in the settlement of our accounts; this circumstance does not affect your risk or responsibility, or the risk or responsibility of your principal. The sale is in effect by the very transaction guarantied." So the supercargo understood the transaction, and so, we contend, he was fully authorized to understand it. The settlement of the account and payment of the precise balance, goes to the same conclusion. Oakley v. Crenshaw, 4 Cow. 250; Simpson v. Swan, 3 Camp. 291; Consequa v. Fanning, 3 Johns. Ch. 587.

The defendant has done nothing to ratify a sale on credit at his risk. He accepted the homeward shipment as the cash proceeds of the outward one, and as the accounts show it actually was. On the first notice of the claim, after so long a delay, he promptly repudiated the notion, that the credit was at his risk.

In the course of the trial a letter, written by the plaintiff's agent to the defendant was called for by the plaintiff, in which some facts were stated, having a bearing upon the case, of which the letter itself was not competent evidence. The defendant objected to the introduction of the letter itself, contending that, if he admitted the facts, intended to be proved by the plaintiff by the introduction of the letter, the letter could not be called for, or at least, that in case of such a letter or paper, a copy of the parts only of which the letter was evidence, could be called for. THE COURT ruled, that the plaintiff had a right to introduce the letter, the jury being instructed not to regard the parts, which were not evidence.

STORY, Circuit Justice (summing up to the jury). The first point made at the bar is, that Williams, the supercargo, had no authority to carry the flour to Batavia and to sell it there, under the terms of his instructions. The voyage contemplated was to several ports of South America, where it was supposed, that the flour might and would be sold, and from hence the vessel was to proceed to India, for a return cargo. Certainly the instructions, in their terms, did not contemplate

any other event than a sale of all the flour at some one or more of the South American ports. It turned out, however, that the flour could not all be sold at the South American ports, or at least not sold, unless at an enormous sacrifice. The parties had not looked for any such event. What then was it the duty of the supercargo to do, in such a case of unexpected occurrence, not within the contemplation of the instructions? Was he to sacrifice the flour, or throw it overboard? No one pretends, that it was intended to be brought back again to the United States under any circumstances. It would probably have been spoiled and ruined on the return voyage, and come home utterly worthless. Now, I take it to be clear, that if by some sudden emergency, or supervening necessity, or other unexpected event, it becomes impossible for the supercargo to comply with the exact terms of his instructions, or a literal compliance therewith would frustrate the objects of the owner, and amount to a total sacrifice of his interests, it becomes the duty of the supercargo, under such circumstances, to do the best he can, in the exercise of a sound discretion, to prevent a total loss to his owner; and if he acts bonâ fide, and exercises a reasonable discretion, his acts will bind the owner. He becomes, in such a case, an agent from necessity for the owner. Suppose, for example, that a cargo of a perishable nature is shipped on a voyage, and is to be carried to a particular port of destination, and there sold, and the ship should in the course of the voyage meet with a storm, which should disable her, and she should go into a port of necessity to refit; and that the cargo should be found so much damaged, that the whole must perish before her arrival at the port of destination; would not the supercargo have a right to sell it there, in order to prevent a total loss, although no such case was contemplated in his orders? Certainly he would have a right to sell; and indeed it would become his duty, under such circumstances, to sell. In truth, in all voyages of this sort, there is an implied authority to act for the interest and benefit of the owner in all cases of unforeseen necessity and emergency, created by operation and intendment of law. I shall put it to the jury to say, therefore, whether the carrying the flour to Batavia, and selling it there, was not an act of necessity to prevent a total loss to the owner. If it was, then the supercargo was justified in directing the sale.

But, in the present case, the flour was actually sold and the proceeds thereof invested in coffee, which came home in the Shylock, and was received by the owner in Boston, without objection, with a full knowledge of all the circumstances, and sold on his own account. Now, I put it to the jury, whether this was not a complete ratification and confirmation of the sale. If the owner did not mean to ratify the sale, it was his duty at that time to have made his objections. He made none; and I put it to the jury to say, whether, having received the coffee, he ought now, at this distance of time, to be permitted to say, that he never meant to ratify the sale. Are his acts reconcilable with any supposition but that of an intentional ratification of the sale, even if unauthorized by necessity? Then, was the sale at Batavia a sale on credit at the risk of Forrestier, or of the defendant? We see, that

no del credere or guaranty commission was in fact charged by Forrestier; and, therefore, it is not to be presumed, that the sale was at his sole risk, unless the other circumstances warrant the presumption, that it was so understood and intended between the supercargo and Forrestier.

And here the first point, which meets us, is, whether a sale on credit by Forrestier was authorized. That depends upon the usage of trade at Batavia. If it is the usage of trade there to sell for cash or upon credit, according to the discretion of the factor or commission merchant employed in the business, and the factor or merchant does sell upon credit in the exercise of his discretion, then I take it, that the owner is bound by the sale, and the sale is at his risk, unless he can show, that there was some restriction imposed by himself, or by the supercargo, requiring a sale for cash. In every sale on credit justified by the usage of the trade, the sale is at the risk of the owner, and not of the factor, unless the latter receives a guaranty commission, or the agreement of the parties, or the usage of the trade, makes the sale at the risk of the factor, or the risk is voluntarily taken by him. Now, in the present case, it seems to me, that the evidence clearly shows, that a sale upon credit is justified by the usage of trade at Batavia. But that I shall leave as a matter of fact for the jury to decide. The evidence seems also to establish, that sales on credit in this trade, like sales on credit in our home trade, are ordinarily at the risk of the owner. At least there is no determinate evidence, (as I understand it,) showing a contrary usage. But that I shall also leave for the consideration of the jury. Then, was any restriction imposed upon the factor in this case as to selling upon credit? No express restriction is pretended. The supercargo does not pretend to have given any. All he says is, that he directed Forrestier to sell and to hold the proceeds subject to his orders, to be invested, as he should direct. He does not pretend, that he directed the sale to be for cash only. Now, certainly, if the usage at the port was to sell for cash or credit, at the discretion of the factor, and he received orders to sell generally, he might fairly presume, that he was authorized to sell either for cash or credit, as would be most for the benefit of his employer. The flour was damaged. It might bring more upon a credit than upon a cash sale; and

thus a credit sale, although the proceeds were to be invested in a return cargo, might by a discount or advance pro tanto, be more for the benefit of the owner, than a cash sale. The question, therefore, for the jury to decide is, whether Forrestier did, by a sale on credit, violate his orders, or act contrary to his duty, so as to make that sale at his own risk.

It is said, that as the supercargo was in the port at the time, Forrestier ought to have consulted him, before he sold on credit. But why should he do so, if he had no knowledge, that the supercargo wished a sale for cash, or wished to be consulted before a sale on credit? The supercargo was a very young man, utterly unacquainted with the trade; and this was his first voyage. It will be for the jury to say, under such circumstances, whether it was the duty of Forrestier to consult him before the sale on credit, or not. There is no usage of trade shown, which requires such a consultation. Then it is said, that the form and language of the account of sales show, that Forrestier took the note of Johannis to himself, and that the whole transaction was thus closed and settled. Now, this is a matter to be judged of by the jury. Does the language of the account import on its face, that the sale was at the risk of the shipper, and that he took the note to himself, advancing cash for the amount, deducting the discount for the time the credit was to run? If the language is equivocal, it is open to construction and interpretation from the known usage of merchants. Ordinarily, in the home trade of the United States, most, if not all the witnesses (as far as I recollect) say, that the like words and statements of account would not import, that the cargo was at the risk of the factor; but that it was at the risk of the owner. However, this is a point, upon which the jury must judge for themselves. Then come the statements of Mr. Barrell, the clerk of Forrestier, made to the supercargo, and to which the latter has testified. I admitted the evidence, but with some hesitation, and thought it proper to be submitted for the consideration of the jury. Now, as Forrestier was not present, unless Barrell had authority in this case, or in cases of this sort, to act and speak, and interpret for Forrestier, his declarations will not bind the latter. The first point, therefore, to be established is, whether Barrell had such authority. If the jury think he had not, then his declarations are of no importance in the cause. If Barrell had such authority, then the jury will consider all the circumstances, and decide, what credit ought to be given to those declarations compared with the other facts and circumstances of the case. If the jury are of opinion, that Barrell was authorized to speak for Forrestier in the premises, and they believe, that there is no mistake or misrecollection of the supercargo at this distance of time, (and he has certainly testified with great candor and fairness,) then it seems to me, that the evidence does show very strongly, if not conclusively, that Forrestier took the risk to himself of the sale on credit; and the present action is not maintainable. It is most unfortunate, that when the supercargo was, as he says, surprised at the sale on credit, which did not come to his knowledge until the day before he sailed on the return voyage, that he did not speak to Forrestier on the subject. If he had, the difficulty

would probably have vanished; or at least, a full explanation could have been made. The supercargo seems to have acted under a strange delusion, that Barrell was a partner in the house. This was an entire mistake.

The next point in the case, (supposing the case to be otherwise with the plaintiff,) is, whether there has been any negligence on the part of Forrestier in not making a demand of Johannis at the maturity of the note, or subsequently in not collecting it from him if then unpaid. It does not appear exactly when Johannis failed. He was in good credit, when the sale was made, (in November, 1830,) and his failure must have been before September, 1831; for he then absconded, the note having become due in the preceding May. The case is left imperfect in this respect. If the note might have been paid, or secured in May, and Johannis was not then insolvent, and the money has been lost by the negligence of Forrestier in not demanding payment or getting security, then he is not entitled to recover. But if Johannis was then insolvent, and unable to pay the note, I do not know, that there was any absolute obligation on Forrestier to institute a suit against Johannis for the recovery of the amount of the note. He was bound to exercise a sound discretion in this respect; and ought not to sue, or put the owner to expense, unless he had some reasonable ground to believe, that a suit would be productive of benefit to the owner. Then was Forrestier guilty of negligence in not giving earlier notice of his claim to the defendant, and of the insolvency of Johannis? Undoubtedly the notice ought to be given within a reasonable time. And if the defendant has suffered any damage or loss by its not being given within a reasonable time, the plaintiff must bear such loss or damage, to be deducted pro tanto from his claim. The letter containing the notice was not sent until the 22d of December, 1832, and it reached Boston about May, 1833. Was there any change of circumstances of Johannis between May, 1831, and December, 1832, from which the defendant has suffered any injury or loss by the delay? The injury must decide this point upon the whole evidence.

Upon the whole, the case is submitted to the jury upon all these points; and they will apply the facts accordingly.

Verdict for plaintiff.

[1] {Reported by William W. Story, Esq. 1 Hunt, Mer. Mag. 506, contains only a condensed report.}