

TABB V. GIST ET AL.

[1 Brock. 33;¹ 6 Call. 279.]

Circuit Court, D. Virginia.

Nov. Term, 1802.

JUDGMENT—INSANITY—PARTNERSHIP—AGREEMENT—MEMORANDUM.

1. Although a man may not be so absolutely insane, as to avoid his contracts: yet, if he labours under melancholy, it will excuse inattention to his affairs; and will authorise relief against judgments obtained against him during such a state of mind.
2. The rest of the members of a copartnery, cannot engage the firm in another partnership, so as to bind a member, who was not privy, or consenting to it. But his privy may be presumed from circumstances; and, at any rate, his remaining silent and not dissenting, after he knows of the new establishment, will be considered as acquiescence. Moreover, if it could be proved, that he had withdrawn from the old firm, before the establishment of the new, he would, by such acquiescence, still be responsible for the transactions of the new; especially, if it was generally understood, by other people, that the old firm was united with the new.
3. If there be father and son in trade in this country, and a London merchant writes to the father here, that the son, who was then in London, but about to return to Virginia, will inform him of the terms on which the London merchant will sell tobaccos for the father and son; and the son, afterwards makes a memorandum at the foot of the letter, that it was at 10s. per hogs-head, although that memorandum may not have been written in the presence of the London merchant, circumstances may show, that either that or some other remuneration, less than the ordinary commission in London, was agreed upon.

The bill states, that judgments have been obtained by Samuel Gist, in this court, against John Tabb, the complainants' intestate, as surviving partner of Moss Armstead & Co., Richard Hill & Co., Richard Booker & Co., and William Watkins & Co. That, at the time of the commencement of the suits and rendition of the

judgments, the intestate was in a state of mind which unfitted him for business. That a deed of trust has been executed, to secure payment thereof with interest. That Tabb was not a partner of the firms of Moss Armstead & Co. and Richard Hill & Co. That, in 1770, he entered into the firm of Richard Booker & Co.; and, in twelve months after, withdrew from it, with the consent of the other partners, although he permitted them still to retain the credit of his name. That subsequent to this event, the other partners of Richard Booker & Co., formed in their partnership character and name, two new partnerships, the one with Moss Armstead, and the other with Richard Hill; but that their intestate, as they believe, never became a member of either of those firms. That, with respect to the other judgments, a re-settlement ought to take place, as well on account of the mental derangement of Tabb, as on account of the probability, from his not being a beneficial partner in the concern of Richard Booker & Co., that the books and papers, necessary for a defence, were not in his possession. That, in and before the year 1768, Thomas Tabb, the father of John Tabb, carried on trade in Amelia county, very extensively. That, in that year, John Tabb, who was associated with his father, formed a connexion with the defendant Samuel Gist. That it was then, and had been, for some time, a custom among the London merchants to charge a commission of three per cent. on the gross amount of their sales of tobaccos consigned to them. By this mode of doing business, the London trade had been injured, because the merchants of the other ports of Great Britain sold at a fixed rate per hogs-head; generally ten shillings, but frequently as low as five shillings. That a special agreement was made, by which the defendant Gist bound himself to sell the tobacco of Thomas Tabb & Son, for ten shillings per hogshead. That this special agreement was communicated to Thomas Tabb, in general terms,

in 596 a letter of the 31st December, 1768. That if was the practice of Thomas Tabb, in his lifetime, and of his son after his death, to stipulate with their correspondents, for the sale of their tobacco, at a fixed price per hundred, and not at a commission on the gross amount of sales. That, upon a settlement of accounts, upon this principle, it will appear, from a letter addressed by Gist to John Tabb, that he would be indebted to Tabb between two and three thousand pounds sterling, besides a claim, on the same account, for the sales of near 300 hogsheads of tobacco then on hand, and for many other hogsheads shipped afterwards, since even omitting these articles of credit, the balance claimed by the defendant in 1792, amounts only to £246. 18s. 11½d. That, in 1775, or 1776, Gist had in his hands near 300 hogsheads of tobacco, the amount of the sales of which were not returned until after the war; and the plaintiffs have not seen them all; but the defendant states their average price at £20 sterling per hogshead. That they were, in fact, sold for a much higher price; and the plaintiffs therefore, call for an account of sales, stating specifically the time when, and the persons to whom, the several sales were made. Gist, Shore and Bennett, the trustees in the deed of trust, and the several representatives of the deceased partners of the firms, against which the judgments complained of were rendered, are made defendants, and an injunction, with general relief, prayed for. (1) The exhibits, annexed to the bill, are the deed of trust, dated the 2d of January, 1798; a letter of the 26th of February, 1798, from Thomas Shore, the agent of Gist, to Mr. Giles, one of the administrators of Tabb, mentioning the balance alleged to be due, in which he says, he takes no steps, as Mr. Giles appears to be sanguine of making some discovery to do away the claims. (2) A letter from Thomas Shore to Mr. Tabb, of the 30th of December, 1797, stating that he had sent his private account with

Mr. Gist, amounting to £998. 17s. sterling, with a request that it should be bonded, which had been refused; and that, if this refusal should be persisted in, he should institute a suit on the private account, and issue executions on the judgments.

The answer of Shore to the allegation in the bill that Tabb withdrew from the firm of Richard Booker & Co., opposes (1) a letter from John Tabb to Gist, announcing the firm, and that he was a member of it; (2) articles of agreement entered into, in January, 1774, with himself, by John Tabb and Theophilus Field, the surviving partners of Richard Booker & Co., for the collection of the debts, and transacting the business of the company; (3) a letter from Tabb to Gist, dated in 1783. long after the death of Field, requiring the account against Richard Booker & Co., and William Watkins & Co., on account of which concerns, he expected to be a considerable sufferer. The answer then states, that the books of Richard Booker & Co. were taken into the possession of Tabb, who collected their debts as surviving partner; and that William Watkins died so long before the rendition of the judgments, that Tabb might have obtained possession of the books; but, even now, the complainants, who are in possession of them, allege no other inaccuracy, in the account, than respects interest. That the defendant does not admit the mental derangement of Tabb. That the defendant cannot answer the allegation of the bill respecting commissions; but supposes, from the showing of the plaintiffs, that the agreement related only to the shipments made by Thomas Tabb & Son. That, as to the shipments made since the war, he avers the allegation to be erroneous, since he well remembers hearing John Tabb say he would ship no more tobacco to Gist; because he refused to sell for a guinea per hogshead; and adhered to the old charge of three per cent. on the amount of sales. That there was an error committed by the jury, as

to interest; and, annexing the accounts on which the judgments were rendered, prays that, if an account should be directed, the errors, to the prejudice of Gist, respecting interest, may be corrected. To that answer, the following exhibits are annexed: (1) A letter from John Tabb to Samuel Gist, in which he says: "That I may have some case and leisure, I have sold two-thirds of two of my stores to Messrs. Theophilus Field and Richard Booker. The first gentleman is a partner of Mr. Call's, and a person of good fortune, at least £25,000; the latter is brought up under my father, and I well know is a careful young man. I am one-third concerned with them, though I have no trouble with the business. Mr. Booker is to have the management of the whole. I have recommended you to them as a correspondent in London, and perhaps Mr. Booker may write to you by this opportunity for some goods. Be pleased to send them, as you may be assured you shall have punctual and timely remittance. The other two stores, I continue on my own account, that I shall have it in my power to send you as much tobacco as you choose." (2) The agreement for the collection of the debts and transaction of the business of Richard Booker & Co., dated the 1st of January, 1774, signed by John Tabb and Theophilus Field. (3) A letter from Tabb to Gist, dated the 1st of August, 1783. in which he expresses a wish to receive the accounts of Richard Booker & Co., and William Watkins & Co., that provision may be made for their discharge, and transmits a bill of £300 to be passed to his credit. (4) A letter from William B. Giles to Thomas Shore, dated 12th December, 1797, in answer to one of the 30th of November, from Shore to him, in which Mr. Giles says, he is informed, by Mr. Tabb, that the debt claimed by Gist on private account was due in consequence of a charge of whole commissions, whereas the agreement 597 was, that the business should be transacted for half commissions. (5)

A letter from Richard Booker & Co. to Gist, promising interest.

The answer of Gist states, that he believes the intestate of the complainants to have been capable of transacting business: and has understood that he assented to the justice of all the claims, with the exception of the charge of commissions, which he had fully explained to Shore in several letters. That the partnership with Richard Booker & Co., and the information respecting it, were given him by Tabb. That he knows nothing of his withdrawing from it; or of his connexion with Moss Armstead & Co., or Richard Hill & Co. That vouchers were sent over to establish the several claims; and Tabb was regularly advised of the amount of the debts from Richard Booker & Co., and William Watkins & Co. That Thomas Tabb & Son were in partnership in 1768, and drew bills to a great amount on Debert, Burkett & Sayre, to whom they shipped tobaccos, for taking them up. That John Tabb arrived in England, and found that house unable to pay his bills, in consequence of which he applied to the defendant to pay his bills, alleging that Debert, Burkett & Sayre were to have sold at ten shillings per hogshead, and he hoped the defendant would sell at the same commission. That the defendant consented from motives of regard to Tabb & Son, and a consideration of their distress; but Tabb soon afterwards sold to him so much of the tobacco as had actually arrived, and no commission was charged. That Tabb, afterwards, proposed to him to sell future consignments on the same terms with Debert, Burkett & Sayre, which he absolutely refused, but engaged to charge two and a half per cent. commission only, on the purchase of their goods, and half per cent. on their premiums of insurance only, although the usual commission, on shipping goods on credit, was five per cent.; and, on insurance, half per cent, on the sum insured. That, notwithstanding the promise of Tabb

to pay interest on monies advanced, he never charged any. That this item amounts to £1624. 18s., a statement of which, with the letters of Tabb, are sent to Shore, and are believed now to be in his power. That the accounts were regularly transmitted to Tabb; and he verily believes were perfectly satisfactory. That, in his accounts of sales, the king's allowance, of ten pounds weight of tobacco, on every hogshead, were deducted from such sales, and the duties not charged thereon. That he has been informed, and believes, that about the year 1768, it was usual, for the merchants of London and Bristol, to charge a commission of three per cent. on the gross amount of sales of tobaccos consigned to them; and, for the merchants of Liverpool, to charge five shillings per hogshead, (merely to deceive the eye,) but to deduct six per cent. from the gross weight of such tobacco, whereby their commission; in fact, amounted higher than those of the merchants of London or Bristol. That the defendant admits the letter of December, 1768, but denies any knowledge of what was added by John Tabb. That this letter related to the cargo of the ship Molly, which was sold by Tabb to Lydes Lidderdale and the defendant, and no commission charged. That he also admits the letter of the 25th of March, 1769; and, after speaking of the lowness of the premium, he adds, "This, together with the commission I charge you on the sales of your tobacco, will enable you to ship to this market on such terms as to answer as well, if not better, than to any port in the kingdom." That he likewise admits the letter of the 9th of June, 1770, stating that he had sent sales of 315 hogsheads by the Nancy, last year, made out in the common form, because he did not choose his clerks should know the terms of sale, but he would credit them for the difference in the account current; that this, however, was intended only for the tobacco by the Nancy, which had been consigned to Debert, Burkett & Sayre, and

which was sold by the defendant. That he also admits the letter of the 25th of March, 1771, in which he says, "You will perceive, in your account current, that I have not charged you any interest, that shall come in against the commission on your tobacco, which I did not care should be seen in the counting house;" but that this also refers to the cargo of the Nancy. That the defendant believes, that the claims stated in the accounts presented by his agent Shore, in 1792, claiming a balance of £246. 18s. 11½d. are just, so far as he knows or believes: but that errors were afterwards discovered, to the prejudice of the defendant, which occasioned them to be re-stated, when the balance was increased to £659. 6s. 10½d. exclusive of interest. That he denies the allegations of the bill respecting the tobaccos on hand in 1775 or 1776; but admits that he did sell tobaccos when the intercourse between the two countries was stopped: accounts of which sales were transmitted to Tabb, when it was opened; with which accounts, he appeared to be perfectly satisfied. This answer was sworn to on the 27th of October, 1801.

The further answer of Gist states, at large, the letter of the 25th of March, 1769, and says, that the defendant believes, that the expression concerning the commission on tobacco, relates only to the cargo of the Nancy, particularly mentioned in his former answer. That he did agree to sell the tobacco consigned to Debert, Burkett & Sayre, on the same terms they were to have sold on; but avers the agreement to have extended to no other tobacco. That he positively refused to sell other tobaccos, to be consigned in future, on the same terms, which was perfectly understood by Tabb. 598 That the sale of a large part of the tobaccos consigned to Debert. Burkett & Sayre, by Tabb, altered the contract; and, in his opinion, authorised him to charge the usual commission on the cargo of the Nancy, which alone remained unsold

by Tabb. That therefore he did charge on that cargo, the usual commission of two and a half per cent.: which was the condition on which he agreed, with John Tabb, to receive all future consignments, and this is the commission alluded to in the letter of the 25th of March, 1769; and not a commission of ten shillings per hogshead. Neither Thomas, or John Tabb, ever objected to the charge of commission in his accounts, and he believes they were perfectly satisfied with them. That, after the death of Thomas Tabb, John Tabb did complain of the commission charged on the cargo of the Nancy, but he did, for the reasons before mentioned, decline to allow it: in which he thinks himself justifiable, and still insists on retaining the charge. That, with respect to future consignments, he only consented to receive them to be sold on a commission of two and a half per cent., leaving it to Tabb to risk the loss from any failure of a purchaser, or to pay him half per cent, for insurance: and, as Tabb never objected to his accounts, he considered him as acquiescing under the charge, and never debited him with the bad debts, although he sustained very heavy losses in the course of these transactions. That he sold about 2,500 hogsheads on their account and they never objected to those term. That the complainants gained the value of the loose tobacco added to the weight; and their accounts of sales were regularly transmitted for seven years, without a single complaint, except as to the cargo of the Nancy. The exhibits attached to this answer, are: (1) Gist's letter to John Tabb, of 6th December, 1768, relating only to a wheat speculation. (2) The letter of December 31, 1768: that of March 25, 1769: that of March 24, 1771; and a letter from Gist of the 31st of March, 1794, to William Watkins & Co. (3) A letter from John Tabb, of the 15th of January, 1774, stating that he expects to collect the whole of the debt of Richard Hill & Co. (4) The letter from Shore to Tabb, of the 30th December, 1797,

respecting the private account of Tabb. There are sundry depositions, relative to the state of Mr. Tabb's mind. Doctor Shore proves, that he was confined, in 1785, 1786, on account of its diseased state. Ross, that a change in him took place in 1784, 1785; when he grew melancholy, and thinks he was deranged from that period. T. Boiling was agent for him, and always followed the directions of Mrs. Tabb, thinking him incompetent to do business. S. Boiling that he was deranged in 1785. Piles, his clerk, that the change commenced in August, 1785, and continued during his life.

Hay & Wickham, for plaintiffs, contended:

(1) That Mr. Tabb was so deranged in his mind, that his representatives ought not to be bound by the judgments, which had been rendered against him. That it was proved, that, from the year 1785, to the date of those judgments, he was totally unfit for business of any kind; that, in consequence thereof, he was, by the advice of his physicians, put under confinement for part of the time; grew melancholy, and continued so during the rest of his life.

(2) That Mr. Tabb was neither a partner of, nor security for, Richard Hill & Co. and Moss Armstead & Co. That he was not privy to their establishment; and the other members could not bind him, in such an undertaking, without his knowledge, as the transactions were out of the common course of the copartnery. Wats. Partn. 130. That Shore proved that Mr. Tabb left the concern of Richard Booker & Co. within twelve months after it was formed. That Gist never regarded him as a security; for, in his letter of the 8th of August, 1772, he says that Booker recommended Richard Hill & Co.; but if Mr. Tabb thought them not safe, he was to get security before the goods were delivered. In April, 1773, he repeats the recommendation, and adds, you have not told me who they were. But above all, in April, 1775, he says he has

debited Mr. Tabb with the monies received by him, of Richard Hill & Co. and begs him to receive as much as possible from his other debts.

(3) That Gist was bound by the contract to sell the tobaccos consigned for a commission of ten shillings per hogshead only, instead of the three per cent, on the gross sales, charged by him. That the allegations of the bill are express upon that point; and ought to have been answered specifically; which was not done; and Gist's own letters, as well as John Tabb's memorandum upon that of the 31st of December, 1768, were conclusive against him.

(4) That payment of any part of the judgments, ought not to be enforced, until a fair account of the sales of the tobaccos on hand, in 1775, 1776, was rendered.

G. K. Taylor and Mr. Call, contra.

The derangement of Tabb's mind is not established; the most that can be derived from the testimony is, that he was sometimes melancholy, but utter incapacity is not proved. Tabb knew and approved of the establishments of Richard Hill & Co., and Moss Armstead & Co., at the time of their formation: for Booker had been brought up in his father's counting house, and had the entire confidence of Mr. Tabb himself; and therefore, it is impossible to believe that he had not consulted him upon such important affairs. But whether he knew of the formation of them originally, or not, it is plain he knew of them afterwards; and, as he 599 never dissented, he must be considered as having assented to them from the beginning. Gist was, naturally, led, from the letter of Tabb. and the recommendation of Richard Booker & Co., to believe, that either a partnership, or some agreement for mutual obligation, subsisted between them; which justified his confidence in the responsibility of Richard Booker & Co. for the shipments. Tabb was a continuing partner of Richard

Booker & Co.; and responsible for all their undertakings: which is proved by the articles between Tabb and Field, as surviving partners, and Shore; by sundry letters, the advertisement in the newspapers in May, 1784; and various other circumstances. The inference of law is, that the transactions of the firm were founded on the implied agreement of all the partners, as there is a reciprocal confidence in each, that the principal managers will act for the benefit of the whole. The answer is completely responsive to the bill, and must be disproved, or it is conclusive. The accounts exhibited the transactions fairly and fully; and, if wrong, would, and ought, to have been objected to. John Tabb's memorandum to Gist's letter was immaterial, as Gist was not privy to it; and it does not even appear when it was made. The connexion between Richard Booker & Co., and Richard Hill & Co., and Moss Armstead & Co. was matter of general notoriety; which is sufficient in a case of this nature: and, therefore, Tabb ought to prove dissent, or the contrary be presumed. The accounts had all been sent prior to the war, and no exception taken, which precludes the complainants from objecting to them now. 1 Vin. Supp. 44; 1 Eq. Cas. Abr. 13. The plaintiff's own documents prove that Tabb was considered as a partner.

Cur. adv. vult.

MARSHALL, Circuit Justice. This suit is brought to enjoin judgments to a large amount obtained by the defendant Samuel Gist, against the intestate of the complainants, as surviving partner of Moss Armstead & Co., Richard Hill & Co., Richard Booker & Co., and William Watkins & Co. The points made by the counsel for the complainants are: (1) That their intestate was in such a state of mental derangement when the suits were instituted, and the judgments complained of were rendered, that those judgments ought not to bind him; and his representatives ought

yet to be permitted to defend his estate against the claims on which they are founded. (2) That he is not liable for the debts of Moss Armstead & Co., and Richard Hill & Co.; because he was never a member of either of those firms. (3) That Samuel Gist is greatly indebted to their intestate on private account; which debt ought to be opposed to the debts due from him as surviving partner of Richard Booker & Co., and William Watkins & Co.

Without going into a minute investigation of the testimony respecting Mr. Tabb's state of mind for several years before his death; or determining, whether its derangement was so complete, during the whole of that time, as to invalidate any specific contract he might have entered into, it is sufficient to observe, that the condition of his mind was certainly such, as might well account for his having failed to search out, and set up, a real defence, at law; and therefore, if he possessed such real defence, the judgments ought not to preclude his representatives from it now. The question, whether he was a partner of either or both the concerns of Richard Hill & Co., and Moss Armstead & Co., is therefore considered as now perfectly open, to be decided on such testimony as may be adduced by either party. It is admitted that Mr. Tabb was a partner of Richard Hill & Co., and that Richard Booker & Co. held an interest in Moss Armstead & Co. and Richard Hill & Co.: But it is denied, that Mr. Tabb knew of that interest; and it is contended, that he could not be made a partner of those firms by any act of his co-partners, or otherwise, than by his own consent. It is also admitted, that Gist was unacquainted with the members of either Richard Hill & Co., or Moss Armstead & Co.; that he did not credit them on the confidence, that Richard Booker & Co. were of the partnership: and, of consequence, that the accountability of Mr. Tabb, for them, cannot

be maintained, on the ground of their being led to consider him as a partner.

It was stated by one of the counsel for the defendants, that, being bound by all the acts of the company, Mr. Tabb became a member of any copartnership into which Richard Booker & Co. should enter, whether he did, or did not, assent individually to being engaged. To this opinion, in the latitude in which it was laid down, I cannot subscribe; and, if in the progress of the suit, it should be deemed necessary to insist upon it, and the gentleman who has advanced it, still retains it, I will thank him to furnish me with those authorities, on which, he may rely. The opinion to which I now incline is, that the assent of any member of a particular firm, is necessary to engage him as a member of a new firm; and that the general authority given by all to each, or even to the acting or managing partners, to bind the whole company, does not extend to the erection of new companies, composed of new members. In order to subject Mr. Tabb as a partner of Richard Hill & Co., and Moss Armstead & Co., his consent to become a partner must be shown. But to show this consent, an express declaration from himself cannot be considered as indispensable; other testimony ought to be received, and circumstances must be resorted to in order to ascertain the fact

It is relied upon, by the counsel for the defendant, as prima facie evidence of his assent, that Booker and Field cannot be presumed to have engaged the firm in a new partnership, 600 without his approbation. The circumstances of the company strongly support this presumption. The members of it resided at no great distance, and its business was conducted almost under the eye of Mr. Tabb. In the ordinary course of human affairs, he must frequently have fallen in with his partners, and have made some inquiries into the affairs of the company. It is presuming too much

to suppose he could have remained uninformed of a circumstance so interesting to himself, as that Richard Booker & Co., of whom he was one, had entered into a new partnership; and, if he did know it, and made no objection to it, his consent to the transaction would very certainly be implied. It is not stated that the members composing the firms of Richard Hill & Co., and Moss Armstead & Co., were concealed from the world; or less known than is usual on such occasions. Nor is it stated, not to have been a matter of notoriety, that a share in each was held by Richard Booker & Co. I cannot, therefore, presume any extraordinary concealment to have been used, or that Mr. Tabb was unacquainted with a circumstance which it so much concerned him to know, and which it was so much in his power to know

This presumption has been met by the complainants, who state that their intestate withdrew himself in 1771 from the copartnery of Richard Booker & Co., and might therefore very well be presumed no longer to inquire concerning their transactions. The articles of agreement entered into with Shore, in 1774, seem to me to be very strong on this point. In that paper. Tabb states himself to be one of the surviving partners of the company: he contracts with an agent for the management of its affairs; binds himself for the salary of that agent, whom he obliges to account to him as well as to Theophilus Field, and to pay him as well as Field, the money which might be collected. If he had left only his name to the company, and had no real interest in it, this agreement would, most probably, have been expressed in very different terms. Another evidence on this subject is, I think, his opening a letter to Richard Booker & Co. It is a liberty which only a member of that company would have taken. The counsel for Mr. Tabb's administrators, endeavour to account for it by stating that the London mark was on the letter, and

might well be considered by him as containing a dun. That, I believe, does not follow. Letters from London to American merchants are not necessarily written for the purpose of demanding money. But should this even be conceded, the fact would still evidence a solicitude to inquire into the affairs of Richard Booker & Co.; and that solicitude would have informed him that they had taken an interest in the other firms.

Another circumstance of some weight with me, is furnished by the correspondence with Gist. Richard Booker & Co. (which Gist considered as Tabb), had recommended Moss Armstead & Co., and Richard Hill & Co.; and Gist complained of their want of punctuality. He inquires who they are, and employs Tabb to collect from them. It is scarcely possible, that, under such circumstances, Tabb should not learn that Richard Booker & Co. were interested with them. That an open letter, directed to Richard Hill & Co., should be among Tabb's papers, is not a circumstance of entire indifference. It is true, that letter may have been obtained by his administrators since his death, or may have been received by himself, after he was rendered liable as a partner. If so, this, or any other circumstance tending to do away with the influence arising from being in possession of such a letter, may, and ought to be shown. It does not appear when Tabb, if he ever did, withdrew from Richard Booker & Co.; or when the two other companies were formed. It is said by the plaintiff's counsel, that he withdrew in 1771; and, in January, 1772, Gist writes to Tabb concerning Richard Hill & Co., as his correspondents, and asks concerning their punctuality. It is probable that the new companies were formed prior to the date of the supposed withdrawing; and if so, then, according to the view I have been taking, he would be responsible, whether he withdrew or not: But, if afterwards, (supposing the withdrawing can be proved), even then, according to the same view, he may

be liable to one not knowing that he had withdrawn, as he suffered his name to be used, without any public declaration of dissent. It is unnecessary, however, to decide this question absolutely now; other testimony may be obtained, which may change its present appearance. There may, perhaps, be the testimony of merchants of that day to show that it either was, or was not understood that Richard Booker & Co. had an interest in the two firms of Richard Hill & Co. and Moss Armstead & Co., or other circumstances may be adduced to influence the case. But I have thought it right to signify the impressions received from the testimony now in the cause. If nothing further should appear, the opinion to which I strongly incline is, that Mr. Tabb cannot be considered as ignorant of the copartnership formed by Richard Booker & Co., with Moss Armstead & Co., and Richard Hill & Co.; and, if he was not ignorant of those copartnerships, his silent acquiescence, under their use of the firm, to which he was known to belong, is evidence of his consent that they should use it.

The most material inquiry in the case is, to what commissions was the defendant, Samuel Gist, entitled, on the sales of the tobaccos shipped to him by Tabb? The bill charges expressly, an agreement entered into with Samuel Gist, by John Tabb, while in England, in 1768, that he should sell the tobaccos shipped to him by Thomas Tabb & Son, at a commission of ten shillings per hogshead. The counsel for the complainants suppose this allegation of the bill to have required a much more explicit answer than it has received; and presuming it to have been evaded, infer from 601 thence a consciousness, in the defendant Gist, of its truth. If this explicit allegation had not been as explicitly answered, the answer might very properly have been excepted to, as insufficient. But, on examining the answer, it does not appear to me liable to the objection which has been made to it.

The defendant, Gist, states, that Thomas Tabb & Son had, in 1768, shipped, in different vessels, a very large quantity of tobacco to Debert, Burkett & Sayre, and had drawn bills, on them, to a great amount. That John Tabb preceded both the tobacco and bills, and on his arrival in London, found Debert, Burkett & Sayre unable to pay his bills, and unfit to be trusted with the sale of his tobacco. That, from friendship to Tabb, and compassion for his distress, he consented to sell the tobaccos consigned to Debert, Burkett & Sayre, on the same commission, at which the original consignees were to have sold them. That Tabb applied to him to sell future consignments on the same terms, but he peremptorily refused to do so. The answer then, without stating any agreement respecting commissions on future consignments of tobacco, proceeds to detail the advantageous terms on which he agreed to transact the other business of Thomas Tabb & Son, in London. In this answer no agreement whatever, respecting future commissions on the sales of tobacco, is stated.

In the supplemental answer, this subject is again taken up. The agreement for the ten shillings per hogshead is again declared to have been limited to the sales of the cargoes consigned to Debert, Burkett & Sayre; and that whole transaction is stated more in detail. The answer then proceeds to aver, explicitly, that Gist refused to extend the agreement to future consignments, and that, with respect to them, it was positively contracted that he should sell on a commission of two and a half per cent, with the addition of half per cent, for guaranteeing the debts. The answer adds another circumstance of infinite importance, which, if untrue, it is incumbent on the complainants to disprove. It is, that, for seven years, he continued to transmit accounts of sales and accounts current to Thomas Tabb, and Thomas Tabb & Son, conforming to this idea of the agreement between them, and that they never objected to such accounts.

It is, I say, incumbent on the complainants to disprove it, because, if it is untrue, they must be supposed to possess the means of showing its untruth.

The counsel for Mr. Gist have insisted very strongly on the evidence furnished by the answer, which, they say, is explicit, and is responsive to the bill. It is admitted to be so; and unless there be sufficient reason for questioning the verity of these allegations of the answer, they must decide the cause. Without saying what the opinion of the court may be, when that further information shall be received, which will now be required, I think the different averments of the defendant's answer, and the documents referred to, afford sufficient reason for believing that some agreement, other than that stated by Mr. Gist, must have been entered into by the parties; and, consequently, that a decision ought to be suspended for further inquiry.

I shall not rest much, on the omission in the first answer to state what was the real contract to govern future sales to be made, by Gist, for Tabb; because, although such a statement might have been expected, yet the bill does not require it; and the omission to state it was therefore excusable. But I think the motives leading to the contract for ten shillings per hogshead, on the tobaccos consigned to Debert, Burkett & Sayre, deserve some notice. Mr. Gist was aware that his consenting to sell a considerable quantity of tobacco for a commission of ten shillings per hogshead, would lead to the expectation of his continuing to sell on that commission, and might create some presumption that an agreement, to that effect, was actually made. He, therefore, searches for a motive which should discriminate between that particular transaction and the general course of business. The motive which he assigns is friendship and compassion for Tabb. One of the most opulent merchants of Virginia, having near a thousand hogsheads of tobacco

at his disposal, is not much an object of compassion. But Mr. Gist very soon forgets the motives assigned for his own conduct. He considers himself as absolved from the contract he had made, by the act of Mr. Tabb in selling himself the cargo of the Molly, which amounted to about five hundred hogsheads. Now, if, from motives of friendship and compassion, he had consented to sell all the tobaccos consigned to Debert, Burkett & Sayre, at a commission which did not compensate his trouble, I cannot conceive how a diminution of the quantity to be sold, on such terms, could be considered as injurious to him. But the compassion and friendship of Mr. Gist, displays itself in a still more extraordinary manner. He represents himself to have purchased originally the whole cargo of the Molly; but that Tabb afterwards sold a part of it for about £400 more than he was to have given. This is a profit to which he thinks himself, in equity, entitled; and because another person in the market purchased the commodity of his friend at a much higher price than his compassion would allow him to give, he considers it as so much profit withdrawn from himself, for which he is entitled to compensation. In still another view, the statements of Mr. Gist on this subject deserve to be noticed. A comparison between the answers of Gist and Shore, on the subject of commission, suggests a remark too, not altogether unworthy of attention. Mr. Gist says that Mr. Tabb objected, since the conclusion of the war, to 602 the charge of commissions in his accounts, and that he had fully explained that subject in his letters to Mr. Shore. We should expect, then, that Mr. Shore would, in his answer, altogether omit the subject, or give the explanation he had received from Mr. Gist. He does neither. He would appear to have received no information whatever from Gist on this subject, and to remark, only, on the statement made by the complainants in their bill. This would certainly indicate

that the explanation, given him by Mr. Gist, was not such as Mr. Shore chose to rely on. The parties admit some agreement in 1768. Tabb says it was for future consignments; Gist, that it was for those addressed to Debert, Burkett & Sayre.

In examining the testimony in the cause, other than is to be found in the answers themselves, the first document is that of October 10, 1768, which says, "Your son, no doubt, has acquainted you with his selling me the Thomas's cargo, and the price, as also the terms on which I have agreed to sell the Molly's cargo when it arrives; but as these things are out of the common road, I must beg you not to mention it to any person living." This letter plainly relates to a single cargo. Not to future consignments, nor to the whole tobacco consigned to Debert, Burkett & Sayre. The next letter is December 31, 1768, which says, "Your son will inform you the terms we are upon as to the commission, as well as that on which I am to sell your tobacco; which I desire may be an entire secret." At the foot of this letter is a memorandum made by Mr. Tabb, at what time is unknown, in these words, "The terms for selling the tobacco was ten shillings per hogshead for commission, and we to have every advantage for king's allowance, &c." This letter is averred by the defendant to relate, only, to the cargo of the Molly, and in this he may be correct; but I will state some reasons in support of a supposition that he has, perhaps, confounded dates, and that this observation was rather designed for the letter of October 10th, than that of December 31st. Mr. Gist had already mentioned the Molly to Mr. Tabb, and had expressed a confidence, that his son had informed him of the terms on which that cargo was to be sold. When speaking of a contract to have related to a single vessel, he uses terms applying only to a single vessel; when, then, he changes his language, and uses terms applicable to the business

generally, there is reason to suppose he speaks of a contract embracing the business generally. He says too, "Your son will inform you;" a phraseology which contrasted with that of the letter of October 10th, strongly indicates a different contract, of which information had not probably been before given. It is the language which would be used, if the son was then about to sail, or had just sailed, for America; and would give the information verbally. The idea, that the fact is so, receives some support from the circumstance that the letter of December 31st, is addressed to Thomas Tabb, and that of March 25th following, is addressed to Thomas Tabb & Son. It is true, that the words "your son will inform you the terms we are upon as to the commission, as well as that on which I am to sell your tobacco," may be limited by other testimony to a single cargo; but it is not less true, that the words naturally import a general contract; and when it is observed that the agreement, respecting the commission, is confessedly a general one, there is the more reason to believe, that that respecting the tobacco, made between the same persons, probably at the same time, relative to a branch of the same business, and communicated in the same sentence, and with the same mode of expression, was of the same extent. The whole agreement then subsisting, may have respected a single cargo, and the agreement may have been extended. This is said to be explained by the letter of October 10th. I think so.

The next letter, upon this subject, is not to me conclusive; but I think it rather less equivocal than that which has just been noticed. It is the letter of the 25th of March, 1769, and is addressed to Thomas Tabb & Son. In that letter, Mr. Gist states his conviction that the extravagant charges on goods, together with the large commissions on tobacco, have driven the consignment business from London: He is therefore determined to do business, with punctual

people, on the very best terms. This resolution is, certainly, not limited to a single transaction, but is to govern permanently; for it is to retain the consignment business, which was leaving London in consequence of the “extravagant charges on goods, together with the large commissions on tobacco;” and the business he was determined to do “on the best terms,” and clearly on better terms than those which had driven the consignments elsewhere, related to the charges on goods, and the commissions on tobacco. He then proceeds to state to Mr. Tabb, the terms on which he shipped his goods, and did his insurance business, which, he adds, “with the commission I charge on the sale of your tobacco, will enable you to ship tobacco as well to this port, as to any other place in the kingdom: indeed the prices are always better here, but it is the great charge attending it that destroys the sale.” A criticism on this sentence cannot be necessary to show that the words, according to their natural import, relate to the general course of doing business; and, if to any specific agreement whatever, to one which extends to the business generally. Mr. Gist, however, in his answer, avers that these expressions allude only to an agreement to sell the cargo of the Nancy, and that no agreement, at the rate at which that cargo was sold, was ever made 603 for future consignments. This may be true. Admitting it to be true, the necessary inquiry is, what then is the operation of this letter?

An agreement has been made between Gist and the younger Tabb for his father, for the sale of a particular cargo of tobacco, at a specified commission. They separate, and the younger Tabb returns to America, and reports the contract to his father. Gist then writes a letter to Tabb & Son, in which he represents the high charges on goods, and on the sales of tobacco, as the causes which had driven the consignment business from London, whither the price of tobacco would allure it, but for these causes. He is determined to do

business on better terms. You perceive, he says, what I have charged on the shipment of your goods, and this, with the commission I charge on your tobacco, will enable you to ship to this port. What commission is here alluded to? Mr. Gist says, the commission on the sales of the cargo of the Nancy. Be it so. But how was that? The letter is clearly designed to affect his future conduct through the medium of his future interest. It must, then, be understood as a proposition for the transaction of future business. The present commission on the cargo of the Nancy, as well as the present charge on insurance, and shipment of goods, must be understood as constituting the rule for future charges, or the letter is deceptive. It would seem as if Mr. Gist was aware of this, and therefore his answer proceeds to state, that in consequence of the sale, by Mr Tabb's agreement, of the greater part of the tobacco consigned to Debert, Burkett & Sayre, he had considered himself as absolved from the contract of selling the cargo of the Nancy at ten shillings per hogshead, and had determined to charge two and a half per cent, on the gross amount of sales, and this was the commission particularly agreed on for the business generally with Tabb, and the particular commission alluded to in his letter of the 25th of March.

Let us inquire how far this explanation will answer the purpose. The letter does not mention the amount of the commission, but plainly alludes to a charge supposed to be known to Mr. Tabb This, he says, was the charge on the sales of the cargo of the Nancy. Mr. John Tabb left England in the expectation that this cargo was to be sold according to the original contract, for Mr. Gist does not allege that he ever told Mr. Tabb he intended to charge a higher commission than was stipulated. The sales of the cargo did not accompany this letter. They were not sent till June in the following year. How then could Mr. Gist refer to two and a half per cent, as the commission on the sales of the

cargo, when he had stipulated to sell for ten shillings, and had never informed Mr. Tabb of his internal resolution to charge a higher commission? Admitting Mr. Tabb to understand this as referring to the sales of that cargo, he must understand it as referring to ten shillings per hogshead commission: because that was the agreement, and it was not changed. But it may be supposed, that this is mere inaccuracy of expression, and that the words refer to the general agreement of two and a half per cent, commission asserted in the answer. Even this will not serve the purpose. The letter apparently alludes to a commission lower than that which it complains of as too high, and the answer expressly states, that the commission alluded to was the customary commission. The defendant also states, that he determined to charge a commission of two and a half per cent, when the letter of the 25th of March was written, and that this is the commission that letter alludes to. Yet, in his letter of the 9th June, 1770, he says, "I have already wrote you by this opportunity, and sent sales of your 315 hogsheads by the Nancy last year, which you will see are made out in the common way as I did not care to let even my clerks know it was to be made out different. I will give you credit for the difference in account current." Even so late as the 24th March, 1771, he says: "You will perceive in your account current, I have not charged you any interest; that shall come in against the commission on your tobacco, which I did not care should be seen in the counting house." Thus, two years after the letter was written, which Mr. Gist asserts alluded to a different commission from that which had been stipulated, he continues to assure Mr. Tabb that the stipulation will be observed. This is not all. There is no reason to suppose the account current, alluded to, contained only the sales of the cargo of the Nancy. His expression is, "I send all your accounts;" and in a different part of the same letter, he speaks of the sales of a different cargo,

as being transmitted. There is no reason to suppose that the commission on the tobacco, which is spoken of generally, is not the commission on all the tobaccos of which accounts of sales were rendered by that conveyance, and the letter makes no discrimination between the commission chargeable on the different cargoes.

I have still another observation to make on this subject. There is much reason to doubt, whether the Nancy was really consigned to Debert, Burkett & Sayre. The allegation of the answer is not, in this respect, responsive to the bill, and, consequently, is not evidence. It does not appear when Mr. Tabb arrived in England. No doubt, on his first arrival, he informed his father of the state of the house of Debert, Burkett & Sayre; and, of consequence, no further consignments would be made to them. How soon this information may have been given, does not appear, but, it certainly, very considerably preceded the 10th of October, 604 1768; because, on that day, Gist gives his father notice, that he had before that time agreed to sell the cargo of the Molly, and purchased from John Tabb, the cargo of the Thomas, and had loaded her with goods, by John Tabb's order, to the amount of £1137. 8s. 0½d. When the Nancy arrived is not stated; but it was certainly some time in the year 1769. The letter of June, 1770, speaks of her as a vessel arriving in 1769. These dates make it very probable, though by no means certain, that she was originally consigned to Gist himself. These appearances, from the answer and letters, the counsel for Mr. Gist have endeavoured to account for in different ways, but they have used one argument which would have very great weight if true; and which, if clearly supported by the fact, might perhaps be conclusive. It is that the accounts current, transmitted by Mr. Gist, have regularly been received by Mr. Tabb, and never complained of. For this assertion they have

the evidence of the answer, and from the nature of mercantile transactions, it must be supposed true, if not disproved by the complainants.

The complainants have adduced several letters on which they rely, but there are two which seem to me really to evidence that Mr. Tabb always considered himself as entitled to the credit he now claims. They are of March 10, 1773, and March 6, 1774. These letters demonstrate that Mr. Tabb claimed a credit for a deduction on account of the commission, and his own secret mode of transacting the business might prevent their complaining in a different manner; but they do not show what that deduction was. For this, the memorandum at the foot of the letter of the 31st of December, is appealed to. This, the answer avers Mr. Gist to be entirely ignorant of, and from the mode of expression used there is reason to believe that the memorandum was made in Virginia. I will not now say, what its influence ought to be. The answer also admits the contract for the sales of the tobaccos consigned to Debert, Burkett & Sayre, to have stipulated for a commission of ten shillings per hogshead. These circumstances would certainly favour the opinion, that the difference between the commission charged, and ten shillings per hogshead, is the credit to which Mr. Tabb is entitled, if it shall be ultimately determined that he is entitled to any thing. But there are other circumstances of no inconsiderable weight, which would diminish this allowance. The answer, in the most explicit terms, denies an agreement to sell generally at ten shillings; and Mr. Giles in his letter to Mr. Shore, of December 12, 1797, states his information from Mr. Tabb to be, that the business was to be done at half commissions. There is, then, a good deal of difficulty on this point; and if, on the production of the papers which will be directed, the opinion of the court should still be that the complainants are entitled to some deduction, it will

then be necessary to determine what that deduction is. It is very apparent, that many letters and papers must have passed between the parties, which would throw light on this subject. The complainants require that Mr. Gist should be directed to produce on oath all the letters he ever received from the intestate of the complainants. I have no objection to making such an order, but I think justice requires, that it should comprehend the complainants likewise. The letter book of Mr. Tabb, in such a case as this, ought to be exhibited. That a merchant doing business as extensively as Mr. Tabb, should be without a letter book, is a phenomenon in the mercantile world, which requires very clear testimony to be credited.

The shipments made since the war, I consider as very clearly out of the contract. There is not only evidence in the case that Gist claimed the customary commission, but I am well satisfied that the war terminated the old contract.

The complainants also require, that Gist should be compelled to exhibit accounts of sales of the tobaccos in his hands in 1775 and 1776. If he has not already exhibited such accounts, it surely would be reasonable that he should do so. The bill does not allege that they have not been received, and the answer states them to have been transmitted. If, therefore, to transmit duplicates would be any inconvenience to Mr. Gist, I certainly should not direct it; but as they may be exhibited without inconvenience, I have no objection to ordering them, though if any expense attends the filing of them, it ought to be defrayed by the complainants.

There is another part of the case which may be of very considerable magnitude. The answer states that several calculations of interest have been omitted, to which the defendant Gist is entitled. The letters leave it not improbable, that these omissions were designed to balance the commissions. Should the fact

be so, and Mr. Tabb's estate should be credited with the difference of commissions, it is reasonable that it should be debited with the omissions of interest. I give no opinion as to the fact; but I shall direct the commissioner to notice it in the account.

On these principles, the following decree is to be entered: This cause which abates as to the defendant, Thomas Shore, by his death, came on to be heard on the bill, answers, (that of Thomas Shore being read by consent), the depositions and other exhibits filed in the cause, and was argued by counsel. On consideration whereof, It is the opinion of the court that the complainants ought not to be precluded by the proceedings at law, from setting up in this court a just defence, (if any they have.) against the judgments in the bill mentioned. 605 The several claims, therefore, on which the judgments against John Tabb, as surviving partner of Richard Booker & Co., William Watkins & Co., Richard Hill & Co., and Moss Armstead & Co., were referred, are referred to one of the commissioners of this court, who is directed to examine, settle and report the same, stating such matters specially, as either party may require, or he may think fit. And the court is further of opinion, that if, as is in the bill alleged, any balance be due from Samuel Gist to the estate of John Tabb, on the various trans actions between them, that balance ought to be set off from the judgments obtained by the said Samuel Gist, against the said John Tabb, as surviving partner of the several trading companies aforementioned, to ascertain which fact, the accounts between the said Samuel Gist and the said John Tabb, are also referred to one of the commissioners of this court to be examined and settled by him. And he is specially directed to state the accounts between the parties on the following principles: (1) So as to show how they will stand, allowing the defend ant, Samuel Gist, a commission of ten shillings sterling money of

Great Britain, on each hogshead of tobacco shipped to him by Thomas Tabb & Son, and John Tabb, previous to the—day of—,1775, and sold by him on their account, or on the account of either of them subsequent to the 31st of December, in the year 1788. (2) So as to show how the same accounts will stand on an allowance of one and one half per cent, commission on the gross amount of sales of all tobaccos shipped and sold by the same parties respectively, between the same periods. (3) In making up these accounts, he is to calculate interest on the sums due either of the parties, according to any special agreement which may be proved to have subsisted between them, or in default of such agreement being shown, according to the custom of merchants; however, in the accounts rendered, such calculations of interest may have been omitted.

The commissioner is further directed also to state the accounts in such other manner as may be required by either of the parties, stating such matters specially as they or either of them may direct, or he may think fit, and make report to the court in order to a final decree. And the more effectually to enable the commissioner to make up his report, it is further ordered and directed, that the said Samuel Gist do, on oath, exhibit and file with the clerk of this court, all the letters he has ever received from Thomas or John Tabb between the 1st day of January, 1769, and the—day of—,1775, or if it be not in his power to produce such letters, that he state in like manner the cause of such disability. And he is further directed to file with the clerk of this court, such accounts of sales of all the tobaccos received by him prior to the signing the preliminary articles of peace between the United States of America, and his Britannic majesty, to be sold on account of the said John Tabb, as had not been rendered by him previous to the last mentioned time. And it is further ordered, that the complainants

do file with the clerk of this court the letter book of the said John Tabb, or copies of all the letters written by him to the said Samuel Gist, previous to the—day of—, in the year 1775, verified on oath, or if there be no letter book, that they do, on oath, file all the copies which are, or have been, in their possession. All which matters and things are decreed and ordered this 9th day of December, 1802; and by consent of parties, general commissions are awarded the parties, to be executed before any notary public, upon giving reasonable notice thereof.

¹ [Reported by John W. Brockenbrough, Esq.]

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