UNITED STATES v. HALBERSTADT.

Case No. 15,276.
{Gilp. 262.}[1]

District Court, E. D. Pennsylvania. March 31, 1832.

NEW TRIAL—MASTER AND SERVANT—FAILURE TO DEFACE MARKS OF SPIRIT CASK—PENAL ACTION.

1. In a civil action, brought to recover a pecuniary penalty, the court has full power to grant a new trial, although the verdict was in favour of the defendant.

{Cited in U. S. v. Fox, Case No. 15,155.}

2. The responsibility of a merchant for the negligence or unlawful acts of his clerk, is limited to cases properly within the scope of his employment.

3. Where an empty cask, which had contained foreign distilled spirits, has been purchased for, and removed to the store of, a commission merchant by his clerk, before the marks set thereon under the provisions of the act of March 2, 1799 {1 Stat. 627}, have been defaced, the former is not liable to the penalties of the act, if he had no agency in or knowledge of the purchase and removal nor acquiesced in the illegal proceeding of his agent.

4. The provisions of the act of March 2, 1799, which require certain marks to be set upon casks containing foreign distilled spirits, are not repealed, directly or constructively, by the act of April 20, 1818 {3 Stat. 469}, requiring the deposit of distilled spirits in the public warehouses.

By the forty-fourth section of the act of congress of March 2, 1799, regulating the collection of duties on imports and tonnage, it is provided, that on the, sale of any empty cask which has been branded or marked by the officers of inspection as containing foreign distilled spirits, prior to the delivery of it to the purchaser or any removal of it, the marks so set thereon are to be defaced in the presence of an officer of inspection or of the customs; and "every person who shall sell, or in any way alienate or remove, any cask, which has been emptied of its contents, before the marks and numbers set thereon shall have been defaced and obliterated in the presence of an officer of inspection, shall for every such offence, forfeit and pay one hundred dollar with costs of suit." On the 19th April, 1831, twenty-nine empty casks, which had formerly contained foreign distilled spirits, were found at the store and in the possession of the defendant {John Halberstadt,} who was a general commission merchant, having been purchased since they were emptied of their contents, and the marks and numbers set upon them at the time of importation not being defaced or obliterated. On the representation of the collector of the customs, the district attorney brought suits against the defendant, to recover the penalty of one hundred dollars, accruing on the purchase or removal of each cask. On the 27th February, 1832, the first of these suits came on to be tried before Judge Hopkinson and a special jury. The

facts of the purchase of the empty casks, and of their being removed to the warehouse of the defendant, without the marks being defaced, were not denied. Evidence, however, was given to show that he was in the habit of making large and extensive purchases of empty casks, to be sent to Messrs. H. & H. Canfield, merchants in New York, and correspondents of the defendant; that the casks in question were purchased by Mr. Campion, a clerk of the defendant, not for himself, but for and by the direction of the latter, by whom they were paid for, and from whose store they were to be forwarded to New York; but that the defendant had not given any directions in regard to the particular kind of casks, and knew not that the marks were yet upon them, until notice of the fact was given to him by the officers of the customs, by whom they were found at his store. On this evidence, Judge Hopkinson charged the jury, that although it was apparent the law had been violated, yet as neither the purchase nor removal had been made by the defendant, the fact of his having either directed or acquiesced in the act of his agent must be established, to make him liable to the penalty; and that they must ascertain this fact from the whole evidence, and especially from the whole conduct of the defendant, from all that he had said and done. Under this charge the jury found a verdict for the defendant. On the 30th March, 1832, a motion was made on behalf of the United States for a new trial, on three grounds: (1) That the verdict of the jury was against the weight of evidence. (2) That the verdict of the jury was against law. (3) That the court erred in charging the jury, that the defendant was not liable for the acts of his agent, if he had no direct personal agency, nor acquiesced in the acts on which the suit was founded.

Mr. Gilpin, Dist Atty., for the United States. The evidence on the trial was sufficient to show that the defendant was the principal person in the whole transaction. He directed his clerk to purchase these casks; he had long been in the habit of purchasing them; he must have seen them as they were placed in his store; he could not have failed to know that the marks were still on them. It is not necessary to establish positive and explicit directions; it was his duty to see, that in employing a person to do a particular act the law was not violated. A violation of the law produced by his neglect, and when the act was for his benefit, is to be punished as much as if done by his previous authority. The very neglect to disavow the act of an agent, when it must be well known, is an acknowledgment of its being done with the assent of the principal, and is a participation in it. If the act be criminal, this participation makes the principal equally liable with the actual offender; he may be punished criminally; à fortiori, he is subject to a mere action of debt. 1 Story's Laws, 611 [1 Stat. 660]; Parsons v. Armor, 3 Pet. [2S U. S.] 428; Del Col v. Arnold, 3 Dall. [3 U. S.] 333; Com. v. Gillespie, 7 Serg. & K. 469; Bredin v. Dubarry, 14 Serg. & B. 27; Upton v. Gray, 2 Greenl. 373; State v. Heyward, 2 Nott & McC. 312.

Mr. Chew, for defendant There are three grounds on which this motion should be refused by the court: (1) It is not a case for a new trial. (2) The section on which the

suit has been brought is virtually repealed. (3) The violation of it, if culpable, cannot be charged on the defendant.

(1) This is in effect a criminal prosecution; the object is to punish the defendant for a violation of a public law; a verdict in his favour is an acquittal. Under such circumstances the court ought not to grant a new trial. Especially they should not, on the ground of evidence, on any matter of fact. Now even if the view of the law taken by the district attorney is right, it depends for its effect entirely on the view of the controverted facts taken by the jury. It is a question of evidence; and no case can be shown where on such a question, involving a serious penalty, the verdict has been set aside.

(2) This provision is obsolete. The object of marking the casks was solely for the security of the revenue. It was intended to ascertain what articles were entitled to drawback. Until 181S such a security was necessary; but it was then found ineffectual, and another mode to attain the same object was adopted. Since the act of the 20th April, 1818, casks containing foreign distilled spirits are only entitled to drawback, by being kept in the public stores from the time of importation to that of exportation. It is now entirely immaterial, for any purpose connected with the revenue, whether the marks are erased or not This is the sole purpose for which the law was made. It never was intended to operate against private frauds. 3 Story's Laws, 1715 [3 Stat. 470]; Sixty Pipes of Brandy, 10 Wheat [23 U. S.] 421; U. S. v. The Polly and Jane [Case No. 16,063].

(3) It is not pretended that this defendant committed the act alleged to be illegal; he certainly never did it. It is not pretended he even directed it to be done; there is no evidence of such a fact. It was not necessary for any object he is proved to have had. Now admitting that a principal is liable for a criminal act of his agent, in which he participates; yet all the facts being conceded, they do not amount to such participation.

Mr. Gilpin, for the United States, in reply. There is nothing in this case to exclude it from the usual rule for granting a new trial; that is, a misunderstanding of the jury as to the law and facts. If there was an error in the construction given to the law, in regard to the liability of the defendant for his agent's act, which it is contended there was

then this case falls within a class of cases, where new trials have been repeatedly granted. If there was no such error, no ground exists for a new trial, and it is not asked. Wilson v. Rastall, 4 Durn. & E. [Term R.] 753. As to a repeal of the law, it is certainly not express, for none is to be found. Nor is it inferential; for although it may be true that one object of the marks on casks was to ascertain such as are entitled to drawback, yet many other objects of a public nature and connected with the revenue might be pointed out, and no doubt were intended to be provided for. It is part of the general system for collecting the revenue on wines, spirits and teas; it cannot set aside without changing essentially numerous regulations and provisions: to do this by such a sweeping and sudden repeal, never could have been intended: to effect it by a mere construction of a section of a law, which does not contain the least allusion to such an intention, is going farther than this court can authorise.

HOPKINSON, District Judge. This suit is an action of debt brought to recover the penalty given by the forty-fourth section of the revenue act of March 2, 1799. By that it is enacted, "that on the sale of any cask, chest, vessel or case, which has been or shall be marked pursuant to the provisions aforesaid, as containing distilled spirits, wines or teas, and which has been emptied of its contents, and prior to the delivery thereof to the purchaser, or any removal thereof, the marks and numbers which shall have been set there on, by or under the direction of any officer of inspection, shall be defaced and obliterated in the presence of some officer of inspection, or the customs;" and any person "who shall sell, or in any way alienate or remove any cask, chest, vessel or case which has been emptied of its contents, before the marks and numbers set thereon, pursuant to the provisions aforesaid, shall have been defaced or obliterated in the presence of an officer of inspection, as aforesaid, shall for each and every such offence forfeit and pay one hundred dollars."

On the trial, a verdict was rendered for the defendant in conformity with the charge of the court, and a motion has been made, on the part of the United States, for a new trial, grounded on the following reasons: (1) That the verdict is against the weight of evidence. (2) That it is against law. (3) That the court erred in charging the jury that the defendant was not liable for the acts of his agent, if he had no direct personal agency in them, nor acquiesced in the acts on which the suit is founded.

The power of the court to grant a new trial in a penal action when the verdict is in favour of the defendant, has been argued at the bar. Upon this subject, in the case of Wilson v. Rastall, 4 Durn. & E. [Term R.] 753, Lord Kenyon says: "It has been said that if we grant a new trial in this case we shall innovate on the practice of those who have gone before us; but that was more easily asserted than proved; for there is not a single instance where a new trial has been refused in a case where the verdict has proceeded on the mistake of the judge. Where, indeed, the jury have formed an opinion on the

whole case, no new trial in a penal action has been granted, though the jury have drawn a wrong conclusion; but where a mistake of the judge has crept in and swayed the opinion of the jury, I do not recollect a single case in which the court has ever refused to grant a new trial." The chief justice of course lays all the cases of indictments out of the question, because they are criminal cases; but he considers this a civil action. Judges Buller and Grose concurred in this opinion. The question was moved again in the case of Calcraft v. Gibbs, 5 Durn. & E. [Term R.] 19, and Lord Kenyon repeats his former opinion.

The first objection to the verdict then, if true, would not be a reason for a new trial. But in fact the verdict is in full accordance with the evidence, if the court was right in the law which was given to the jury. This is the only real point on this motion. The evidence was, that the casks in question came to the store of the defendant when he was absent from the city. The witness who testified this fact was the clerk and bookkeeper of the defendant, and he further says, that he does not think the defendant ever saw them. The witness did not know where they came from; they were brought to the store by a porter, under the direction of Mr. Campion; he believes Mr. Campion purchased them, and paid for them, and shipped them to New York. Mr. Campion was acting as clerk to the defendant. He was purchasing casks; but the witness could not say whether for himself, or for defendant, or for both. The defendant followed the commission business. These casks were introduced into the books of defendant as shipped for him to New York. The questions of fact resulting from this evidence were, of course, left to the jury; that is, whether the casks belonged to Mr. Campion or the defendant; for whom were they purchased; who was the real owner of them; whether the purchase was made by Mr. Campion for the defendant, as his agent and on his account; whether the purchase and removal of them in violation of the law occurred without the knowledge, direction or acquaintance of the defendant? I instructed the jury that if in their opinion the defendant had no agency in, or knowledge of the purchase and removal of the casks, nor any acquiescence in the illegal proceedings by his agent, although he might be the owner in whole or in part of the casks, he was not liable to the penalties of the act; but the punishment should be visited on the offender, or the person who actually sold or removed the casks in violation of the law. Such are the words of the act of congress; and unless the acts of an agent, in such a case, can be imputed to his principal, although unauthorized

by him and unknown to him, the instruction of the court was right.

The case relied upon by the district attorney, to sustain his objection to the verdict, seems to me to be all sufficient to support it. It is the case of Com. v. Gillespie, 7 Serg. & R. 469. It was an indictment for selling lottery tickets, not authorised by the laws of the commonwealth. The opinion of the supreme court of Pennsylvania, delivered by Judge Duncan, on the point we are considering, is found in page 477. He says: "The evidence was, that a lottery office was kept in a house rented by Gillespie in this city, for several years, under a sign in the name of Gillespie's lottery office; that Gregory, a young lad, acted as his servant or agent in that office, and sold the ticket produced in evidence, a New York literature lottery ticket, and endorsed in the name of Gillespie; a lottery not authorised by the laws of the commonwealth; that Gillespie occasionally visited Philadelphia. I did not instruct the jury," said Judge Duncan, "that Gillespie was criminally answerable for the act of his agent or servant, but I left them to decide whether, from the whole body of the evidence, Gillespie was concerned in the sale of the ticket." The judge, after stating the evidence, continues: "These were circumstances from which the jury might infer his participation in the sale of the ticket." The judge afterwards proceeds: "If they found he had not participated in the transaction, they were instructed to acquit him." In my charge to the jury I directed them, that the defendant was not liable for the acts of the agent, unless he had some agency in or knowledge of them; which is certainly not so strong as the language of Judge Duncan, that the jury must acquit unless they found the defendant "had participated in the transaction."

On general principles of responsibility of one for the acts of another, the defendant cannot be answerable, penally or even civilly, for acts "not done by his direction, by his authority, with his knowledge, or within the scope of his authority. In the case of Parsons v. Armor, 3 Pet. [28 U. S.] 428, referred to by the district attorney, it is said that "the general rule is, that a principal is bound by the acts of his agent no further than lie authorises that agent to bind him." it is truly added that "the extent of the power given to an agent is deducible as well from facts as from express delegation." In Paley's work on Agency (page 226): "The responsibility of the master for the servant's negligence, or unlawful acts, is limited to cases properly within the scope of his employment." This is the rule as to a civil liability, and the case given is that of an action brought against the owners of a ship for goods lost by the carelessness of the master: there, judgment was given for the defendant, because it did not appear that the ship was actually employed to carry goods for him, for Lord Hardwicke remarked that "no man could say that the master, by taking in goods of his own head, could make his owners liable." It is no doubt true, as stated by Paley, that "if a man employ an agent in the commission of a fraud, he is clearly liable for it himself, as if a goldsmith, by his servant, puts off counterfeit plate, or a taverner corrupts wine." It is added, that "employers are also civilly liable for frauds committed by

their agents, without their authority, if done in their employment;" but by that I understand, not merely that the agent was employed by the principal for some purposes, but in the business in the prosecution of which the fraud was committed. If I employ one as a house servant, and he commits a fraud by Gorging my name, I am not liable for it. The agency must have some relation with the subject of the fraud. The utmost length to which any of the eases have carried the responsibility of a principal for his agent, is to compel him to make satisfaction civilly for an injury done to an innocent person, by the fraud or misconduct of the agent acting by his authority or in his employment. It is very clear, that this principle does not reach the case of a suit for a penalty under an act of congress, or under the circumstances which have been given in evidence in the case in question. If the defendant kept a commission store, the person who purchased and removed the casks was his clerk; and not employed by him, as far as we know from the evidence, to purchase casks or any thing else for him, much less to do so in violation of the act of congress. There was no error in the court's instruction to the jury, that the penalty could not be visited upon the defendant, unless he had some agency in the illegal transaction, or some knowledge of it. The offender against the law, was the person who purchased and removed the casks, without having the marks and numbers first defaced and obliterated according to the provisions of the act of congress; and he must answer for the offence who alone was guilty of it.

This is sufficient to decide the motion for a new trial, but it may be well to notice another matter that has been set up in the defence, for the purpose of correcting the error on which it is founded. We have seen that the suit was brought on the forty-fourth section of the act of March 2, 1799. It seems to have been the opinion of the defendant, that the provisions above alluded to, ordering that the marks and numbers oh the casks shall be defaced and obliterated, are superseded and repealed, by the act of April 20, 1818; "providing for the deposit of wines and distilled spirits in public warehouses;" because it is enacted by the act, "that no drawback shall be allowed of the duties paid on any wines or spirits, unless such wines or spirits shall have been deposited in public or other stores, under the provisions of this act, and there kept, from their landing to their shipment." A constructive repeal of the former provisions is asserted, on the argument that the directions

for obliterating the marks were made, only to prevent frauds in obtaining drawback on wines and spirits not imported, but put into casks in which wines or spirits had been imported, and having the custom house marks and numbers as evidence of such importation. It is altogether a mistake. The provisions of the act of March 2, 1799, are in full force. There is no direct repeal of them, and an argumentative repeal must be much stronger than that now urged, before it should receive any attention. It is plain that other objects may have been in view, other frauds intended to be prevented, by directing the obliterations of the custom house marks from casks which have been emptied of their imported contents, besides the protection of the revenue against fraudulent claims of drawback.

It is not necessary to be more explicit upon so plain a point; but as the error is probably not confined to the defendant, I have thought it expedient to take this occasion to correct it

The motion for a new trial is refused.

{NOTE. Subsequently, at the trial of another of these cases, Judge HOPKINSON charged the jury that the duty of obliterating these marks was upon the seller of the casks, and not upon the buyer. Under this instruction the jury found a special verdict, upon which judgment was entered for the defendant. Case No. 15,277; affirmed by circuit court, Id. 15,278.}

[1] {Reported by Henry D. Gilpin, Esq.}