**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**

**Brown and Company Vs. Mcgran**

**Brown and Company Vs. Mcgran**

**SooperKanoon Citation** : sooperkanoon.com/79726

**Court** : US Supreme Court

**Decided On :** 1840

**Appeal No.** : 39 U.S. 479

**Appellant** : Brown and Company

**Respondent** : Mcgran

**Judgement** :

Brown & Company v. McGran - 39 U.S. 479 (1840)
U.S. Supreme Court Brown & Company v. McGran, 39 U.S. 14 Pet. 479 479 (1840)

**Brown & Company v. McGran**

**39 U.S. (14 Pet.) 479**

*ERROR TO THE CIRCUIT COURT OF THE UNITED*

*STATES FOR THE DISTRICT OF GEORGIA*

## SYLLABUS

An action was instituted against the consignees of two hundred bales of cotton, shipped by the direction of the owner to Liverpool, on which the owner had

received an advance by an acceptance of his bills on New York, which acceptance was paid out by bills drawn on the consignees of the cotton in Liverpool. Sometime after the shipment of the cotton, the owner wrote to the consignees in Liverpool, expressing his "wishes" that the cotton should not be sold until they should hear further from him. In answer to this letter, the consignees said "Your wishes in respect to the cotton are noted accordingly." No other provision than from the sale of the cotton for the payment of the advance was made by the consignor when the same was shipped, and no instructions for its reservation from sale were given when the shipment was made.

Immediately after the acceptance of the bill drawn against the cotton on the consignees in Liverpool, they sold the same for a profit of about ten percent on the shipment. Cotton rose in price in Liverpool to more than fifty percent profit on the invoice between the acceptance of the bill

of exchange and the arrival of the same at maturity. The shipper instituted an action against the consignees for the recovery of the difference between the actual sales and the sum the same would have brought had it been sold at the subsequent high prices at Liverpool.

It is certainly true as a general rule that the interpretation of written instruments properly belongs to the court, and not to the jury. But there certainly are cases in which, from the different senses of the words used or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects and intentions and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed.

There can be no reasonable doubt that in particular circumstances, a wish expressed by a consignor to a factor may amount to a positive command.

In the case of a simple consignment of goods without any interest in the consignee or any advance or liability incurred on account thereof, the wishes of the consignor may fairly be presumed to be orders, and the "noting the wishes accordingly" by the consignees an assent to follow them. But very different considerations might apply where the consignee should be one clothed with a special interest and a special property founded upon advances and liabilities.

Whenever a consignment is made to a factor for sale, the consignor has a right, generally, to control the sale thereof according to his own pleasure from time to time if no advances have been made or liabilities incurred on account thereof, and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances or incurs liabilities on account of the consignment by which he acquires a special property in the goods, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities, unless there is some agreement between himself and the consignor which contracts or varies this right.

If, cotemporaneous with the consignment and advances or liabilities, there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold before a fixed time, in such a case the consignment is presumed to be received subject to such order, and the factor is not at liberty to sell the goods to reimburse his advances until after that time has elapsed. So when orders are given not to sell below a fixed price unless the consignor shall, after due notice and request, refuse to provide other means to

reimburse the factor. In no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities.

When the consignment is made generally, without any specific orders as to the time and mode of sales, and the factor makes advances or incurs liabilities on the footing of such

consignment, the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell, in the exercise of a sound discretion, at such time and in such manner as the usage of trade and his general duty require, and to reimburse himself for his liabilities out of the proceeds of the sale, and the consignor has no right, by any subsequent orders, given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale except so far as respects the surplus of the consignment not necessary for the reimbursement of such advances or liabilities.

If a sale of cotton in Liverpool by a factor has been made on a particular day tortiously and against the orders of the owner, the owner has a right to claim damages for the value of the cotton on the day the sale was made, as for a tortious conversion. If the sale of the cotton by the factor was authorized on a subsequent day, and the cotton had been sold against orders before that day, the damages to which the owner would be entitled would be regulated by the price of cotton on that day. But the rate of damages should not be obtained from the prices of cotton at any time between the day when the cotton was sold against the orders of the owner and the day on which the sale was authorized by him.

In the Inferior Court of Richmond County in the State of Georgia, Thomas McGran, the defendant, instituted a suit by attachment against the plaintiffs in error to recover damages for the sale of two hundred bales of cotton shipped by him to the plaintiffs in error as his factors, the cotton having been sold for a less price than the same would have produced had the sales been made according to the instructions of the shipper.

The declaration contained three counts, all upon the shipment of the two hundred bales of cotton by Thomas McGran to William and James Brown & Company, at Liverpool, as the factors of the shipper.

The first count alleges that while the cotton remained in the hands of the consignees, the shipper ordered him to hold the cotton until they should hear from

him again, but the same was sold in violation of the order and to the damage of the shipper.

The second count charges the consignees with not having exercised reasonable diligence in keeping and selling the cotton, but that they dealt with the same so negligently and carelessly, so that it was sold at a loss to the shipper.

The third count alleges that the consignees did not sell the cotton to the best interests of the shipper, nor did they obey his instructions, but on the contrary managed the same carelessly and negligently and sold the same contrary to orders, with a reasonable prospect of rise of the article, for $3,000 less than the value of the cotton at the time the same was sold.

The case was removed under the provisions of the Judiciary Act of 1789 to the Circuit Court of the United States for the District of Georgia, the defendants below not being citizens of the State of Georgia and not residing in that state.

The defendants pleaded the general issue, and the cause having been tried in the circuit court, the jury gave a verdict for the plaintiff, Thomas McGran, under the directions of the court, for $4,975.57.

Page 39 U. S. 481

The defendants excepted to the ruling of the circuit court on questions submitted during the trial of this cause, and they prosecuted this writ of error.

On the trial it was given in evidence that two hundred bales of cotton were shipped by defendant in error from Mobile to the plaintiffs in error, at Liverpool, as his factors, to be sold by them under a del credere commission. That this cotton was received by them about 9 April, 1833, and cost, per invoice, $9,151.77. That the plaintiffs in error, through Brown, Brothers & Company, their house in New York, accepted, early in March, 1833, a draft of defendant in error, for $9,000, drawn against said cotton upon their said house in New York; that when this draft arrived at maturity, the said house in New York paid the same, and in order to reimburse themselves, and in pursuance of an arrangement between plaintiffs in error and

defendant in error, drew upon the plaintiffs in error, at Liverpool at sixty days' sight, for 1,871, 9 p. This draft was dated May 7, 1833, was accepted by plaintiffs in error, at Liverpool, June 3, 1833, and fell due and was paid by them on 5 August following. That by the contract between the plaintiffs in error and the defendant in error, the cotton in question became pledged by the defendant in error to the plaintiffs in error to enable them to meet their acceptances and repay their advance thereon.

After shipping the cotton and drawing against it as aforesaid, the defendant in error became insolvent.

On June 3, 1833, plaintiffs in error sold said two hundred bales of cotton for 2,073 4s, 6p,, cash, September 16, 1833, being a profit of about ten percent. On the same day on which they sold this cotton, they sold six hundred and seventy-seven bales in which their Baltimore house was interested, and in a week previous had sold two hundred and sixteen bales in which their Baltimore house was also interested.

At the time of the sale of the two hundred bales of cotton, the defendant in error was indebted to plaintiffs in error in a large sum.

During the week in which the two hundred bales were sold, the sales of cotton amounted to forty-seven thousand two hundred and fifty bales, a larger amount than in any previous week for about eight years.

On April 20, 1833, the defendant in error wrote to plaintiffs in error: "If you have any cottons on hand when this reaches you, in which I am interested, I wish you to hold them until you hear from me again."

This letter was received by William and James Brown & Company on 23 May, 1833, and on the day following, 24 May, 1833, they wrote to Thomas McGran:

"We are in possession

of your esteemed favor of the 20th ultimo, and your wishes in respect to the cotton we now hold on your account, are noted accordingly."

On June 9 following, the plaintiffs in error wrote to defendant, annexing a circular showing the extensive business done in cotton during the week and a material improvement in prices, and informed him that, believing this advance would probably equal the expectations he had formed when he last wrote, and thinking it desirable to close his cotton in their hands, as they had then been drawn upon for the advance on it, they had taken advantage of this brisk demand to dispose of the two hundred bales at an advance of one-half to five-eights of a penny per pound upon its value when first landed.

On July 30, 1833, the defendant in error replied to the last letter, referring to his previous letter of April 20, and asked of plaintiffs in error

"Why did you sacrifice my cottons as the draft drawn by Brown, Brothers & Company, at sixty days, on account of these cottons, could not have been accepted more than a day or two before? Therefore, you had sixty days before you had any money to pay for me."

He adds:

"I do not recognize the sale, and do not consider you authorized to sell the cotton before the time the draft drawn on you by Brown, Brothers & Company, against this cotton falls due. If the price is higher on that day than the day you sold it, I will expect you to allow me the difference, and if it is lower, I will be prepared to pay you any balance I may owe you."

On September 4, 1833, the plaintiffs in error replied that there had been a balance due to them from defendant; that the two hundred bales were sold at an advance, and barely squared the accounts. That defendant had been obliged to stop payment, that any loss would be certain to fall on them, and profit not likely to go to him, but to his creditors. That the cotton was not sacrificed, but sold at a profit such as is not frequently realized on that article; that they sold some on account of their Baltimore house, and some immediately before, and immediately after, in

which their said Baltimore house was interested. That near fifty thousand bales changed hands in the same week. That, situated as the defendant in error then was, he could not reasonably have expected them to hold the cotton without pointing out in what manner they should be indemnified in event of loss thereby. That the fact that Brown, Brothers & Company's draft was not due did not alter the case, as they had become responsible some months before, by Brown, Brothers & Company's acceptance of the draft of the shippers.

On July 22, 1833, the defendant in error wrote to plaintiffs that he had received their favor of 24 May and noted the contents. That they would please to sell the two hundred bales soon after the receipt of the letter unless they were of opinion they could do better by holding a little longer. This letter was received by the plaintiffs in error August 23, 1833.

Page 39 U. S. 483

The counsel for the defendant below, prayed the court to instruct the jury, that the matters given in evidence on the part of the defendants were sufficient, and ought to be admitted to bar the plaintiff's action, which instruction the court refused to give.

And the court further refused to instruct the jury:

1. That the advance by the house of Browns, in New York, was in effect an advance by the house in Liverpool, and after advance so made, the shipper had no right to alter the instructions which were given at the time of such advance.

2. That the house in Liverpool having advanced so large an amount on this cotton, having a large previous unsettled claim against the shipper, and the said shipper having afterwards, and before the sale of the cotton, become insolvent; the house in Liverpool had a right to sell for their reimbursement, notwithstanding the subsequent orders of the shipper.

And the court instructed the jury that it was their exclusive province to decide from the evidence in the cause, whether the defendants had advanced any money to

the plaintiff on the cotton shipped by the Mary and Harriet. Whether, when the defendants sold said cotton, the plaintiff was indebted to them upon a previous unsettled claim, and whether the plaintiff had become insolvent before the sale of said cotton, and also further instructed the jury that if they found from the evidence in the cause that the plaintiff had given instructions to the defendants by his letter of 29 April, 1833, not to sell any cottons which the defendants might have on hand when that letter reached them in which the plaintiff was interested until the defendants heard from him again, and that such instructions were received and recognized by the defendants, by the evidence in the cause, and particularly by a letter given in evidence as one from the defendants to the plaintiff dated 24 May, 1833, in reply to the plaintiff's letter to them of 20 April, 1833; that then the defendants were not justifiable in law in the sale of 3 June, 1833, on account of the defendants' having on that day accepted Brown, Brothers & Company's draft for 1,871, 9p., dated 7 May, 1833, at sixty days' sight.

And the court further instructed the jury that if they found from the evidence in the cause that cottons were selling for a higher price from 3 June, 1833, when the draft was accepted and when the cotton was sold until the time when the said draft was mature and payable, and if the evidence in the cause ascertains at any time before the maturity of the draft, what such higher price was, and that the cotton belonging to the plaintiff could have been sold for such higher price; that then the plaintiff was entitled to recover from the defendants the difference in price between the sum for which the defendants sold the plaintiff's cotton, and the sum at which it might have been sold before or at the maturity of the draft.

The defendants in the circuit court, excepted to these instructions.

Page 39 U. S. 489

MR. JUSTICE STORY delivered the opinion of the Court.

In the spring of 1833, McGran, a merchant in Georgia, shipped two hundred bales of cotton consigned to the plaintiffs in error, a house of trade in Liverpool, England, there doing business under the firm of William and James Brown & Company, for

sale on

Page 39 U. S. 490

his account. The shipment was made under an arrangement with the house of Brown, Brothers & Company of New York, composed (as seems admitted) either wholly or in part of the partners in the Liverpool house, by which the New York house accepted a draft drawn upon them by McGran for $9,000, the invoice value of the cotton being only $9,151.77, and were to reimburse themselves by a draft on the Liverpool house. Accordingly, the New York house, on 12 March, 1833, addressed a letter to the Liverpool house in which they state:

"We enclose a bill of lading for two hundred bales of cotton, shipped by McLoskey, Hagar & Company, of Mobile, per ship *Mary and Harriet,* on account of Mr. Thomas McGran of Augusta, on which you will please effect insurance. This cotton costs, per invoice, $9,151.77. We have accepted Mr. McGran's draft against this cotton, for $9,000, for which we shall draw on you for our reimbursement when it matures. In handing this draft for acceptance, Mr. McGran says he would not have drawn for so large an advance were it not that there is a balance at his credit with you which has accumulated within the past two years, so that if this should not produce enough to meet the advance, it will be covered by what is at his credit."

The existence of any such balance was utterly denied at the trial, and the Liverpool house contended that there was a balance the other way.

The cotton duly arrived at Liverpool on or about 9 April, 1833. The New York house drew on the Liverpool house for their reimbursement, a bill dated 7 May, 1833, for 1,871, 9 p., at sixty days' sight, being the amount of the advance, and that bill was accepted by the Liverpool house, on 3 June, 1833, and became payable, and was paid on 5 August following. On 3 June, 1833, the very day of the acceptance, the Liverpool house sold the two hundred bales of cotton (the market then being on the rise) on a credit, for the net sum of 2,073 4sh. 6p. After deducting the charges (which amounted to nearly twenty-five percent) which became due and payable on 16 September, 1833; and according to an account

current rendered to McGran, by the Liverpool house on 29 June, 1833, the whole transactions between the parties, including the sale of this cotton, left a balance of 392, 15s. 8p. due to McGran.

At the time when the shipment was made, and the advance arranged therefor, no instructions were given by McGran, touching the sale of the cotton. It accordingly went to the consignees, as factors for sale, the advances having been as above mentioned without any other contract than that implied by law as between a principal and a factor, making advances; that is to say that the factor is to make

Page 39 U. S. 491

sale of the goods, consigned to him, according to his own judgment, in the exercise of a sound discretion as to the time and mode of sale, having regard to the usages of trade at the place of sale, and to reimburse himself out of the proceeds for his advances, and other balance due him.

After the shipment and advance were so made, *viz.,* on 20 April, 1833, McGran addressed a letter to the Liverpool house in which, after acknowledging the receipt of letters of the 4 and 5 March, from them, he added: "If you have any cottons on hand when this reaches you, in which I am interested, I wish you to hold them until you hear from me again." The Liverpool house, in a reply to this letter on 24 May, 1833, used the following language: "We are in possession of your esteemed favor of the 20th ultimo, and your wishes in respect to the cotton we now hold on your account, are noted accordingly." At this time by advices received from other correspondents, the Liverpool house were in possession of information that, at least as early as 8 April, 1833, McGran had failed in business.

On 22 July, 1833, McGran wrote a letter to the Liverpool house, acknowledging the receipt of their letter of 24 May, in which he says:

"I have your favor of 31st (24th) of May, and note the contents. You will please sell my two hundred bales of cotton soon after the receipt of this, unless you are of opinion you can do better by holding a little longer."

This letter was received by the Liverpool house on or about 23 of August, 1833.

On 7 June, 1833, the Liverpool house informed McGran of the sale of the cotton, and in a letter under date of 30 July, 1833, in reply thereto, McGran expressed his surprise at the sale, and added:

"I beg leave to refer you to my letter of 20 April last, the receipt of which you have acknowledged, instructing you not to sell any cottons you had on hand, in which I am interested until you heard from me again. Why did you sacrifice my cottons, as the draft drawn by Brown, Brothers & Company at sixty days on account of these cottons, could not have been accepted more than a day or two before, as it went forward by the packet of 8 May. Therefore you had sixty days before you had any money to pay for me."

And after some other remarks in the style of complaint, he adds:

"You will please take notice that I do not recognize the sale, and do not consider you authorized to sell the cotton before the time the draft drawn on you by Brown, Brothers & Company against this cotton falls due. If the price is higher on that day than the day you sold it, I will expect you to allow the difference, and if it is lower I will be prepared to pay you any balance I may owe you."

To this letter the Liverpool house replied by a letter dated 4 September, 1833, in which they vindicated their conduct, and among other things, said:

"We beg you to bear in mind that there was a balance due us from you on joint transaction from Mr. Clarke; that the two hundred



bales in question were sold after the market had advanced one-half penny per pound, and that it barely squares the account. You had, unfortunately, been obliged to stop payment. We had the opportunity of paying ourselves by selling your cotton in a brisk market to a profit of ten percent, and we ask whether it was reasonable, under such circumstances, to expect us to hold the cotton for the chance of further profit when the loss, if any, was certain to fall on us, and the

profit not likely to go to you, but to your creditors, as was supposed, of whom we knew nothing. This would have been the extreme of injustice toward ourselves and our absent partners, without being any advantage to you."

And after some other remarks vindicating their conduct, they further said:

"We think you must admit that situated as you then were, you could not reasonably have expected us to hold the cotton without pointing out in what manner we should be indemnified in event of loss thereby. That Brown, Brothers & Company's draft was not due does not alter the case. We had become responsible some months before by Brown, Brothers & Company's acceptance of the draft of the shippers."

Here, the correspondence between the parties seems to have closed. The present action was brought to recover damages against the Liverpool house for a supposed breach of orders and of their duty as factors. At the trial there was an account current between the parties and other evidence before the jury; the whole evidence in the case, however, was introduced by McGran. Among other questions before the jury were the following: whether the advance made by the New York house was in effect an advance by the Liverpool house, either as agents or as partners in the latter; whether there was any balance due to the Liverpool house upon the former transactions; whether McGran was insolvent or not, according to the advices received by the Liverpool house; and whether, under the circumstances disclosed in the evidence, the Liverpool house had a right to sell the two hundred bales of cotton for their reimbursement, notwithstanding the wishes or orders contained in the letter of 20 April.

The jury at the trial found a verdict for the plaintiff, McGran for $4,978.57 under certain instructions given by the court, upon which verdict judgment was accordingly rendered, and a bill of exceptions having been taken by the original defendants, the cause now comes before us for revision upon the points made and instructions given at the trial.

The counsel for the defendants asked the court to instruct the jury 1. that the advance by the house of Brown, in New York was in effect an advance by the

house in Liverpool, and after the advance so made, the shipper had no right to alter the instructions which were given at the time of such advance; 2. that the house in Liverpool having advanced so large an amount on this cotton, having a previous unsettled claim against the shipper, and the

Page 39 U. S. 493

shipper having afterwards and before the sale of the cotton, become insolvent, the house in Liverpool had a right to sell for their reimbursement, notwithstanding the subsequent orders of the shipper.

The court refused to give these instructions, and in our judgment with great propriety, as each of them involved matters of fact in controversy before the jury upon which it was exclusively their province to decide. If the defendants meant to draw from the court an opinion in point of law upon the assumed facts, the proper mode would have been to have asked the court to instruct the jury, that if they found the facts to be as thus assumed, then that the law was as these instructions stated.

The court then proceeded to instruct the jury, that if they found from the evidence in the cause that the plaintiff had given instructions to the defendants, by his letter of 20 April, 1833, not to sell any cottons which the defendants might have no hand when that letter reached them, in which the plaintiff was interested, until the defendants heard from him again, and that such instructions were received and recognized by the defendants, by the evidence in the cause, and particularly by a letter given in evidence as one from the defendants to the plaintiff, dated 24 May, 1833, in reply to the plaintiff's letter to them of 20 April, 1833; that then the defendants were not justifiable in law in the sale of 3 June, 1833, on account of the defendants having on that day accepted Brown, Brothers & Company's draft for 1,871, 9 p., dated 7 May, 1833, at sixty days' sight.

It is observable that this instruction is given in absolute terms, without reference to any other facts in the cause which might be found by the jury upon the evidence before them, and therefore must be deemed to apply to every posture of the facts

which the evidence might warrant. It must therefore be deemed to apply to the case, although the advance was originally made by the New York house for and on account of the Liverpool house, as agents or partners thereof, or the Liverpool house had entered into engagements prior to the advance, to become responsible for the reimbursement thereof to the New York house, in the manner stated in the evidence, and although the plaintiff was, before the writing of the letters, actually insolvent, and had failed in business, and that fact was known to the defendants.

One objection taken to this instruction is that it leaves to the jury the construction of the language of the letters of 20 April and 24 May. It is certainly true as a general rule that the interpretation of written instruments properly belongs to the court, and not to the jury. But there certainly are cases in which, from the different senses of the words used or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence,

Page 39 U. S. 494

where the real objects, and intentions, and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed. The present case sufficiently illustrates the distinction. McGran, in the letter of 20 April, says that he wishes the defendants to hold any cottons on hand until they hear from him again. Now this language certainly ordinarily imports only a desire, and not an order, and yet there can be no reasonable doubt that under particular circumstances, a wish expressed by a consignor to a factor may amount to a positive command. So, in the reply of 24 May, the defendants say, "your wishes in respect to the cotton we now hold on your account are noted accordingly."

Here again, the point is open whether the language imports that the defendants construed the wishes of the plaintiff to be simply a strong expression of desire or opinion or a positive order, and also whether the words "noted accordingly" import

that the defendants took notice thereof, or took notice of and assented to obey, the wishes or order of the plaintiff. The language is susceptible of either interpretation, according to circumstances. If the case had been one of simple consignment, without any interest in the consignee or any advance or liability incurred on account thereof, the wishes might fairly be presumed to be orders, and the noting the wishes accordingly an assent to follow them. But very different considerations might apply where the consignment should be, as the present is, one clothed with a special interest and a special property founded upon advances and liabilities. We think, therefore, that this objection is not, under the circumstances of the case, maintainable. It would be quite another question whether the court might not in its discretion have assumed upon itself the right and duty of construing these letters. There is no novelty in this doctrine. It will be found recognized in *Ekins v. Macklish,* Ambler 184-185; *Lucas v. Groning,* 7 Taunt. 164; and *Rees v. Warwick,* 2 Barn. & Ald. 113-115.

But the main objection to the instruction is of a more broad and comprehensive character. The instruction in effect decides that in the case of a general consignment of goods to a factor for sale, in the exercise of his own discretion, as to the time and manner of sale, the consignor has a right, by subsequent orders, to suspend or postpone the sale at his pleasure, notwithstanding the factor has, in consideration of such general consignment, already made advances or incurred liabilities for the consignor at his request, trusting to the fund for his due reimbursement. We are of opinion that this doctrine is not maintainable in point of law. We understand the true doctrine on this subject to be this: wherever a consignment is made to a factor for sale, the consignor has a right generally to control the sale thereof according to his own pleasure from time to time, if no advances have been made or liabilities incurred on account thereof, and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor



makes advances or incurs liabilities on account of the consignment by which he acquires a special property therein, then the factor has a right to sell so much of

the consignment as may be necessary to reimburse such advances or meet such liabilities, unless there is some existing agreement between himself and the consignor which controls or varies this right. Thus, for example, if contemporaneous with the consignment and advances or liabilities there are orders given by the consignor which are assented to by the factor that the goods shall not be sold until a fixed time, in such a case, the consignment is presumed to be received by the factor subject to such orders, and he is not at liberty to sell the goods to reimburse his advances or liabilities, until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price, unless indeed the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factors. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances or incurred liabilities thereon, if the consignor stands ready, and offers to reimburse and discharge such advances and liabilities.

On the other hand, where the consignment is made generally, without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, there the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a sound discretion, at such time and in such mode as the usage of trade and his general duty require, and to reimburse himself for his advances and liabilities out of the proceeds of the sale, and the consignor has no right, by any subsequent orders given after advances have been made or liabilities incurred by the factor, to suspend or control this right of sale except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities. Of course this right of the factor to sell to reimburse himself for his advances and liabilities applies with stronger force to cases where the consignor is insolvent and where, therefore, the consignment constitutes the only fund for indemnity.

Such then being the relative rights and duties of the parties, we are of opinion that the instruction given to the jury by the learned judge in the circuit court is not maintainable in point of law. The consignment was general to the Liverpool house

for sale, and advances and liabilities were contemporaneous with the consignment; there were no contemporaneous orders limiting or qualifying the general rights of the factors resulting from these circumstances; the consignor subsequently either failed in business or was believed to have failed; the wishes subsequently expressed by the letter of 20 April, even admitting them to have the force of orders, were unaccompanied with any other means of indemnity, or even with any offer of reimbursement of the advances or liabilities. Unless, then, upon the established principles of law, the consignor had a

Page 39 U. S. 496

clear right to control the sale of the consignment by any orders which he might in his discretion choose to give notwithstanding such advances and liabilities, which we are of opinion he had not, the instruction was erroneous.

We have not thought it necessary to enter upon any general examination of the authorities which support the doctrines which have been thus stated by us. But the opinion of Lord Chief Justice Gibbs in *Pothonier v. Dawson,* 1 Holt's 383, and the opinions of the judges in *Graham v. Dyster,* 6 Maule & Selw. 1, 4-5, will be found fully to recognize some of the leading principles.

Another instruction was given by the court to the jury upon the question of damages, supposing the Liverpool house, by the sale, had violated their proper duty. It was that if the jury found from the evidence in the cause that cottons were selling for a higher price from t3 June, 1833, when the draft was accepted and when the cotton was sold until the time when the said draft was mature and payable, and if the evidence in the cause ascertains at any time before the maturity of the draft what such higher price was and that the cotton belonging to the plaintiff could have been sold for such higher price, then the plaintiff was entitled to recover from the defendants the difference in price between the sum for which the defendants sold the cotton and the sum at which it might have been sold before or at the maturity of the draft. This instruction was doubtless framed upon the ground that this was the claim of damages which the plaintiff asserted by his letter of 30 July, 1833. But as that letter was not assented to or the claim

recognized by the defendants, this claim could in no just sense be obligatory upon them, and as a general rule of law applicable to damages under like circumstances, we think that it cannot be maintained.

Supposing the sale made by the defendants on 3 June to have been tortious and in violation of orders, the plaintiff had his election either to claim damages for the value of the cotton on that day as a case of tortious conversion or for the value of the cotton on 23 August following, when the letter of the plaintiff of 22 July was received which authorized a sale. If the price of cotton was higher on that day than at any intermediate period, he was entitled to the benefit thereof. If, on the other hand, the price was then lower, he could not justly be said to be damnified to any extent beyond what he would lose by the difference of the price of cotton on 3 June and the price on 23 August.

For these reasons, we are of opinion that both the instructions given by the circuit court to the jury were erroneous, and therefore the judgment ought to be

*Reversed and the cause remanded with instructions to that court to award a venire facias de novo.*

MR. JUSTICE WAYNE, and MR. JUSTICE CATRON dissented.

**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**