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Supreme Court—April Term, 1888.

WEDNESDAY, April 25th.

ASSOCIATE JUSTICE DOLE, PRESIDING.

The King vs. Luce. Conspiracy, 1st degree. Continued from the 24th.

Examination of Mr. Luce (defendant), continued—I do not remember of ever making the remark reported in the Attorney-General's testimony that I had confessed that I knew no part of the liquor on the order, were for Mr. Canavaro's use.

Cross-examined by Attorney-General—At the time of this transaction I had an account with Captain Hayley; I do not recollect that I admitted that I had no dealings previous to that transaction with Mr. Canavaro. Have been in business since March 30, 1888. Think any account I may have had with Mr. Canavaro previous to the order, would have been closed; cannot recollect that previous to that transaction I had any account with Mr. Canavaro.

Had dealings with Mr. Hayley from the time I started in; was acquainted with Mr. Hayley before I commenced business on Merchant street. I had previously been employed in the house of Henry Macfarlane, Kakaehua street, for about ten years. Knew Hayley as a customer at Macfarlane's. Cannot remember the volume of Hayley's dealings. The quarter's business would vary; probably it would be from \$100 to \$500. Mr. Canavaro's order presented to witness. Cannot fix the date when I gave the order to Hayley. He had it in his hands some time; he may have brought it back next day, perhaps a week after. The proposal about the order came from Hayley, not from me. He told me that Mr. Canavaro told him that if he brought him an order he would endorse it, so that he could get remissions of duties; said he had seen Mr. Canavaro the night before; I think I have a very faint memory; I remember that Hayley used the name of Mr. Canavaro as the party who was to secure this remission; it was in my office that I handed Hayley the order; do not remember if some time elapsed between the conversation and the handing him of the order; I stated at the Interior Office that could not remember the exact state of Hayley's account at the time of that interview; stated yesterday that Hayley was not indebted to me at the time stated; ascertained in the interval between the time of the interview and yesterday, that Hayley was not indebted to me at the time stated, by reference to my books.

Attorney-General here moved the Court that the books referred to be produced, or failing this, that all the evidence of defendant relating to Hayley's account with him be stricken out.

The matter was argued by Attorney-General, Mr. Hartwell and the Deputy Attorney-General.

The Court ruled that all of witness' evidence relative to Hayley's indebtedness to him be stricken out. Exception was taken to this ruling by defendant's counsel.

Mr. Hartwell formulated a question in writing, and asked permission to put it to the witness.

The question was not allowed.

I did not know as to Hayley's financial standing; knew he had \$10,000 in the H. H. Canning Co.; did not know this \$10,000 was in his, Hayley's, mother's name; knew Lansing; did not know from Lansing that he had bills against Hayley that he could not collect; do not remember having seen the evidence on this matter; do not remember of having said absolutely at the interview that I did not see the evidence; never said I did not see the evidence; the order was blank, except the printing, when I handed it to Hayley; the figures inked out, I think, 45; the figures 50 are mine.

Q.—What are your jobbing prices on these liquors. (Objected to by Mr. Whiting, and objection allowed.)

Q.—What is the value of that Dew-Drum whiskey in the Custom House in bond? (Objected to by Mr. Whiting, and objection allowed.)

Part of the goods on this order were to go in my general stock and part were to replace goods taken by Mr. Canavaro. The part to replace Mr. Canavaro's also went into general stock. I had dealings with Mr. Canavaro since the transaction of the order, probably about \$50 or \$60 worth; I believe it is all settled, paid in cash; I am positive if I could not swear that my dealings with Mr. Canavaro exceeded \$37.50, his last bill paid was about \$38; think there were other bills previously; I should say that the liquors charged Mr. Canavaro in this bill \$37.50 were entered before the ventilation and publicity of this matter (bill shows to witness); the bill was paid in January, 1888; goods were purchased in October, 1887. Another and smaller bill before that and subsequent to the date of the order, was paid by Mr. Canavaro.

MR. HARTWELL TO THE JURY.

Mr. Hartwell addressed the jury on behalf of the defendant. He referred to the revolution and the change in Government that had taken place during the past year—a change for which he was profoundly thankful. Perfection was not claimed to have been reached, but the change had opened up great possibilities for the future of the country. He recited the facts of the special meeting of the Legislature and the committee of investigation into withdrawal of liquors from the Custom House without payment of duties, the findings of the committee that great scandals had existed and recommendation that persons implicated in illegal withdrawals should be prosecuted. The law was cited relative to the importation of goods and the payment of duties thereon. Although the law exempted diplomats from the payment of duties only upon goods imported by themselves, the Government did not consider it necessary that they should import their own goods, but allowed withdrawals by dealers of liquors in bond, free of duty, on the order of these diplomats. No one in the Custom House believed or ever did believe that the liquors imported in all these orders were consumed by these gentlemen themselves. Mr. Tewksbury's evidence went to show that the Custom House officials were not deceived by these orders.

Opinion had been formed in the public mind about these transactions. He would not appeal to any prejudices, if such existed, in the minds of the jury. He asked only that before

the charge of felony was fastened upon defendant, that satisfactory evidence be produced. A great deal had been said and written of late years on prohibition and anti-prohibition. He did not pretend to know what the private opinions of the jurors on these questions might be, but if they had any prejudices against the defendant owing to his being a liquor dealer, they ought to distrust their minds of them. While the highest and best officials in the land sat down to banquets where the wine flows freely, it would not do to hunt down the liquor dealer and let the rest of the community go scot free. He was sorry that one of the leaders in the temperance movement, his friend Mr. Clishman Jones, was not on the jury that he might talk with him. It would be proper to confine attention to the charges presented. The order and erasures on it were then referred to by the speaker. He believed in the spirit of Reform, but it was not right to regard persons as criminals, who did what the statute and the Government allowed them to do. Counsel here referred to Captain Hayley's social standing in this community. If Hayley was as bad a man as the prosecution would represent him to be, if he was a first class scoundrel, it was quite reasonable to suppose him capable of deceiving Mr. Luce. Counsel then proceeded to recite the main facts of the evidence. The only mouth that could give a correct account of this case, outside of Mr. Luce, was that of Mr. Canavaro. Defense wanted him as a witness. The prosecution represented themselves desirous of obtaining his testimony, but no subpoena had been issued for him to come forward. Citations from Wharton on evidence were here read by counsel on the subject of admissions. Referring to the interview in the office of the Minister of Interior, he said he might have made mistakes in that interview, but he was not yet in the Luce Asylum; all the lawyers there present might have made mistakes, but they could not have been such fools as to induce their client to make confessions of criminal acts and thus give himself away to officers of the Government. Counsel continued his review of the evidence, to show the absence of criminal action or intent on the part of defendant. If a person has confidence enough in a man to give him a blank check, signed, it is reasonable to assume that his confidence goes far enough to trust him what to put in it. What would anyone do in similar circumstances? There was no evidence that Hayley did not tell the truth, but told a lie, when he told defendant that Mr. Canavaro had said to fill up the order with liquors on which the remitted duties would be \$500. He asked the jury to keep that point before them when considering their verdict. The attention of the jury was also directed to the sheaf of other and similar orders submitted to them on Tuesday afternoon.

The Court took recess for one hour. On the reassembling of the Court, Mr. Hartwell continued his address, and proceeded to discuss the matter of false pretenses. One man cannot commit a conspiracy. Each one of the counts in the indictment must be proved to make good the charge of conspiracy. It was essential to a conviction to find that Hayley lied, and that defendant knew that he lied about the order. Counsel referred to the Attorney-General's evidence and to his lawsuit with Mr. Luce, in which, as he stated in his evidence, he got "waxed." The Attorney-General was only a human being, and it takes a very strong character not to be influenced by personal feelings towards an opponent. After defining the provisions of the revenue laws, Mr. Hartwell closed his address at twenty minutes past one.

ATTORNEY-GENERAL TO THE JURY.

The Attorney-General addressed the jury on behalf of the Crown. He agreed with much of what had been advanced by counsel for the defendant. For his own part, personally, he was disposed to feel a great deal of sympathy for the defendant in a criminal trial. When studying for his profession, he had made a kind of resolve always to appear on the part of the person accused. He had no animus and no prejudice against defendant. He was only in the discharge of his duty in endeavoring to bring out the whole truth and all the facts in this case. Any prosecuting officer who could entertain a personal bias against a defendant was unfit for his office. It was a very small soul, that would attribute to another man a susceptibility of personal influence in a case of this kind, as the learned counsel for defendant had done. In his references to politics, counsel admitted that great scandals had existed in the Custom House especially in connection with withdrawals of liquors. It was a great scandal and great iniquity affecting every man in the country. If the Government is defrauded, every man who pays taxes is defrauded. Counsel admitted that the system was dishonest and scandalous, and he admitted that his client was concerned in it. The Legislature represents the people; the Ministers are the servants of the Legislature, and, as a Minister, he was carrying out, in this prosecution, the instructions of the Legislature. Hence the absurdity of counsel charging the Attorney-General with personal animus. And although the verdict of the jury would be a conviction, he would ask the Court not to pass sentence of imprisonment on Mr. Luce. While guilt and corruption and rottenness pervaded the Government throughout, it would not be just to seize upon one man while the others are escaping and lay on him the extreme penalty of the law.

With reference to the orders submitted to the inspection of the jury, there was a distinction to be noted between the others and this one of Mr. Canavaro's. The remitted duties in this case were credited to a third party; it was not so with the other orders. He was not presenting a charge against Mr. Luce for being a liquor dealer, but to vindicate the majesty of the law as against him or any other person going outside the line of his legitimate business. Having done this, he must abide by the consequences. The Attorney-General then proceeded to recite and comment on the evidence and discussed false pretenses. Hayley's character also came in for a share of notice. It was left to the jury to decide whether Hayley had deceived the defendant or not. Suppose Mr. Luce had believed Hayley's story that Mr. Canavaro had directed the filling up of the order with liquors on which the remitted duties would be \$500, it ought

only to suggest to Mr. Luce that there was a three-cornered conspiracy instead of a two-sided one. If he believed Hayley, it does not make him any less a conspirator in conspiring with Mr. Hayley and Mr. Canavaro together. The argument relative to the non-production of defendant's books was dealt with. The counsel for defendant had assumed the responsibility for withholding the books, and he had asked what the prosecution would have done only for admissions. But if the penalty of the law should be the result of the trial, counsel would then assume the responsibility for proxy. With reference to admissions, he had only to say that defendant's counsel led their client into the office of the Minister of Interior, and, under their advice, he had given away his whole case to officers of the Government. Mr. Luce had testified on the witness stand and at the interview that he had no account with Mr. Canavaro at the time the order was made. He had testified again that part of the goods withdrawn on that order went into stock to replace goods purchased by Mr. Canavaro. How did such goods go into stock to replace goods purchased by Mr. Canavaro if no such purchases ever existed? To prove conspiracy, it is not necessary to show actual commission of the offense. It was only necessary to show that men's minds met to arrange and plan the means whereby an act of conspiracy was to be performed. The false pretense is evidenced by the order itself.

The Attorney-General here explained the connection between the several points of the indictment, and proceeded to show that supposing part of the goods in the order was to replace goods purchased by Mr. Canavaro, the remaining part placed in stock was clearly a violation of law and a fraud on the Hawaiian Government. The attention of the jury was also directed to the evidence which showed that Mr. Luce had placed some \$200 to the credit of Mr. Canavaro at the time of the receipt of the goods described on the face of his order, at the Custom House, and that Mr. Canavaro's purchases up to October amounted to about \$200, which were paid for in cash, and that nothing was attempted to be shown as to how the \$200 credit was made available to Mr. Canavaro's use.

The Attorney-General's address, from which the foregoing notes are given, occupied an hour and 23 minutes.

THE JUDGE'S CHARGE.

His Honor the presiding Judge charged the jury, substantially as follows: Gentlemen, you are not to consider the offenses of gross cheat and obtaining goods under false pretenses with conspiracy. Other things introduced need not have happened to make the offense complete. Even if the conspiracy had not been carried out, it would only be necessary to prove the intent of the two persons named in the case (Messrs. Hayley and Luce) to perform the acts charged.

Under the first count, it requires proof of the using of false pretenses in intent to defraud. I charge you that the first count has not been proved. To prevent the collection of duties does not constitute gross cheat.

Under the second count, in which injury to the Government is charged, if it is proved that the parties conspired to do the act, defendant is liable whether he did it or not.

With regard to the third count, the statute does not require that the removal of goods from the Custom House should be charged to be unlawful to constitute the offense charged. The question is whether defendant combined or entered into an agreement with Hayley to obtain goods from the Custom House and lent himself to the plan proposed by Hayley to obtain the goods without payment of the duties. If he did, he is liable under the second and third counts. There are exceptions to the law requiring duties to be paid on goods before their removal. It was the privilege of defense to show that they had removed the goods in a lawful manner as for the use of the King, the Queen or representatives of foreign governments. If they have not shown this, they have not cleared themselves of the charge.

His Honor here read the statute bearing upon the matter of importations of goods free of duty for foreign representatives.

The jury was charged that defendant was bound to know the law on this point, but he was not bound to know whether Mr. Canavaro had qualified himself to be entitled to the exemptions already referred to. He might take it for granted that Mr. Canavaro had duly accredited himself as a foreign representative.

As the exemptions from the payment of duties under the act, refer only to importations by those privileged persons specified, the defendant was not within the statute in withdrawals for the purpose of placing goods on sale. The defendant was bound to know that goods cannot be taken, without payment of duties, by foreign representatives, except for their own private use and consumption.

It is not within the statute for defendant to obtain goods on such an order as that presented in Court, without payment of duty, and put them in his private stock. It is no defense if the diplomat goes afterward to buy some of the goods, or if they are to fill up former purchases.

With respect to inducement, it is not necessary for the Crown to prove inducement. If Hayley wanted to deprive the Government of duties and defendant had lent himself to the plan proposed, knowing the goods were to go into his general stock, and not to Mr. Canavaro, then defendant is liable.

Hayley's assertions as to what Mr. Canavaro meant are not material to this issue. The order is signed by defendant for goods to be delivered to Mr. Canavaro for consumption. He should prove to you, in order to escape the penalty of the law, that he did not know but that these goods were to go to Mr. Canavaro for his private use and consumption. If when the order was accepted, he knew that the Government was to be deprived of the duties and the goods were to go into his own stock, then he is liable on the second and third counts.

The practices alleged to have prevailed among dealers and the consequent loss to the Government of about \$40,000 revenue (although it was not shown that the whole of the \$40,000 remitted duties was due to illegal withdrawals), referred to in this trial is no excuse and is no defense. It was

necessary that the Government should begin to stop the practice. It is no defense in this case that everyone else was doing the same thing and it was nothing to this trial where the Government commenced to prosecute.

The defendant, by the rules, should have the benefit of any reasonable practical doubt. The jury should not convict unless they find that defendant was knowingly concerned with Hayley in the plan for the withdrawal of the liquors and that he knew the liquors were not intended for use by Mr. Canavaro. If the jury can reconcile the facts of the case with the theory of defendant's innocence, it is their duty to acquit; if not, they must find him liable.

Facts, incidents, etc., are, in a case of this kind, evidence. It is for the jury to take all the facts and weigh them. One person alone may not commit a conspiracy. Defendant must have been implicated with Hayley to be convicted. At the request of the defendant's counsel, the following instructions were also given to the jury:

Conspiring being the gist of the offense, the prosecution must prove, and the jury be satisfied that there was in fact an actual understanding knowingly entered into by the defendant with Hayley to effect a common object.

Mere proof of a wrong intent by one is not sufficient.

The fact of conspiracy must be proved by clear and satisfactory evidence.

A criminal or wrongful intent on the part of the defendant must be shown by the prosecutor to exist; and if the acts of the defendant are equally consistent with innocence on his part as with guilt, he must be found not guilty.

The offense must be proved as laid in the indictment.

Mere proof of a wrong or crime committed by Hayley in this transaction is not sufficient to prove a conspiracy.

The jury retired at 3:15 and at 5 sharp, returned with a verdict of acquittal, three jurors dissenting.

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