Case No. 7,144.

JACKSON v. ROBINSON ET AL.

[3 Mason, 138.][1]

Circuit Court, D. Rhode Island. June Term, 1822.

CARGO OF SHIP—TENANTS IN COMMON—SET-OFF—JOINT DEBTS AGAINST SEPARATE DEBTS.

1. A and B were tenants in common with C and D of a ship in certain proportions, and purchased a cargo, by an agreement, on their account in the like proportions for a voyage, and consigned the same to the master for sale and returns; it was held, that they were tenants in common of the cargo and not partners.

[Cited in De Wolf v. Howland, Case No. 3,852.]

[Cited in Putman v. Wise, 1 Hill, 239.]

2. In such case each owner is to be considered as making a separate consignment of his share, although the instructions to the master are joint; and the master has no authority by such consignment of the outward cargo to consign the return cargo to C and D only.

3. If in such case the master without authority consigns the whole cargo to C and D, the latter have no lien on it for any separate and distinct demands against A and B, nor against any firm in which A and B are partners with a third person, nor can C and D set off such debts in a suit brought against them by A and B, or by their assignee, in equity to account for A and B's share of the property.

[Cited in Reed v. Whitney, 7 Gray, 535.]

4. In general, the doctrine of set-off is the same in equity as at law.

[Cited in Howe v. Sheppard, Case No. 6,773.]

5. Joint debts cannot be set-off in equity any more than at law against separate debts, unless there be some other equitable circumstances.

[Cited in Greene v. Darling, Case No. 5,765; Gordon v. Lewis, Id. 5,613; Id., 5,614.]

[Cited in Milburn v. Guyther, 8 Gill, 96.]

Bill in equity. In May, 1819, Messrs. Burrill & Cahoone were owners of one fourth part of the ship Aristomenes, and the defendants, Robert Robinson and R. Potter, were the owners of the other three fourths, viz. Robinson of one fourth and Potter of one moiety. About this period Burrill & Cahoone formed a new partnership, taking in one R. C. Croade, under the firm of Burrill, Cahoone, & Company; but the ship and its concerns formed no part of the fund of the new partnership. The ship owners fitted out the ship, with a cargo owned in the same proportions as the ship, for a voyage from New York to Stockholm and back to New York. The cargo was purchased, and other business for the ship transacted by Burrill. Cahoone, & Company, as agents for all the owners. The ship sailed on the voyage under the command of a Capt. Barker. The bill of lading purported to be a shipment by Burrill, Cahoone, & Company, "on account and risk of Messrs. R. Potter & R. Robinson, merchants of Newport, and E. Burrill & N. Cahoone, merchants of New York," &c. to be delivered at Stockholm, &c. to J. Barker, the master on board, or

to his assignees, paying &c. no freight, being the property of the owners of the ship. The instructions for the voyage, dated on the 6th of June, 1819, were signed by all the ship owners, and directed the master to sell the cargo, to purchase a return cargo of iron, and remit the balance, if any, to London in the proportions owned by the parties on their several accounts, and to return to New York, &c. On or about the day of the ship's sailing a private letter, dated 9th of June, signed by R. Potter and R. Robinson, was handed to the master, with a request of secresy, directing him on his return to stop at Newport, alleging as a reason that they wished to land there their own part of the cargo, and if they could do as well with the other cargo there, end the voyage; but at the same time directing him to clear out at Stockholm for New York. The ship duly arrived at Stockholm and sold her cargo; but the sales falling short of purchasing the full amount of the return cargo, a bill of exchange was drawn by the master upon Messrs. Robinson & Potter for the deficiency, viz, £383 10s. sterling; and the whole of the return cargo was shipped and consigned to Messrs. R. Potter & R. Robinson by the master. The ship arrived at Newport early in November, 1819, and the cargo was there duly entered and landed by Messrs. Potter & Robinson, the consignees, and the moiety belonging to Potter was taken to his own use. The residue was received by Robinson, and the principal part was sold by him. Messrs. Burrill & Cahoone, having failed on the 8th of October, 1819, assigned their interest in the ship and cargo to the plaintiff [Amasa Jackson] by indenture, in trust, to sell the same, and out of the proceeds to pay certain scheduled debts, among which were some customhouse bonds and notes, and as to the residue, to distribute it among their creditors generally. The scheduled debts (as finally

appeared upon the proceedings) amounted to more than the proceeds. Due notice was given of this assignment to Messrs. Potter & Robinson, before the arrival of the ship, and to the master after her arrival at Newport. The plaintiff demanded the possession of the one fourth part of the cargo from the defendants; but they refused to deliver anything except the balance, after settling all the demands which they claimed upon the fund, including debts due from Messrs. Burrill, Cahoone, & Company. The bill alleged most of the foregoing facts, and charged the consignment by the master to Messrs. Potter & Robinson, to have been by collusion and fraud, and prayed an account, and an injunction against a farther sale of the cargo, and general relief. The answers all denied the collusion. They admitted most of the other facts. The master asserted the consignment to have been in consequence of a verbal communication to him by Burrill on the morning of his departure on the voyage. The other defendants insisted upon their right to retain for balances due to them, or one of them, First, for debts due from Burrill, Cahoone, & Company, asserting the change of the firm to be merely nominal to prevent a set-off; secondly, for the debts due for the purchase of the original cargo, which they alleged had never been paid, and for which they had been sued, but at the same time denying their liability therefor; thirdly, for money paid on some of the custom house bonds and notes scheduled in the assignment to the plaintiff. They further insisted that the plaintiff had no interest in the return cargo beyond what the share of Burrill & Cahoone in the outward cargo had purchased; and that what was purchased by the proceeds of the bill of £383 10s. was exclusively for the benefit of Potter & Robinson. The general replication was filed, and the cause came on for a hearing at this term on the merits.

Mr. Searle, for plaintiff.

Mr. Hazard, for defendants.

STORY, Circuit Justice. The first question presented for consideration in this case is, whether the ship-owners are to be deemed partners as to the cargo, or tenants in common only in the same proportions which they held in the ship. It does not by any means follow because the purchase was made for the account of all, or the shipment was made in the names of all, that this constituted them partners in the sense of a joint interest. They might authorize a common agent to purchase or ship goods for them according to their several and separate interests, without involving themselves in a joint partnership responsibility. In my judgment there was no community of interest in the cargo, as partners. It appears from the admission of the parties, as well as the proofs, that they never were, nor designed to be partners; and that they held their titles to undivided portions of the cargo, not as a common, but as a separate interest. They were, therefore, tenants in common of the cargo, having no general community of the profit and loss, but only a proportion according to their separate interests. If either had died, his share would not have survived to the others. To say that a case like the present constitutes in law a partnership in the ad-

venture for the voyage, would be to say that every tenancy in common of a cargo for such a voyage, consigned to the master, would turn the case into a partnership, and enable any one tenant in common to dispose of the whole. In point of law such a position cannot be maintained. See Hoare v. Dawes, Doug. 371; Coope v. Eyre, 1 H. Bl. 37; Rice v. Austin, 17 Mass. 197; Ex parte Hamper, 17 Ves. 403.

If no consignment had been made of the cargo in this case, each owner must have been considered as authorized to act in respect to his own share, and as having no authority over that of the others. The consignment made to the master of the whole did not vary their rights in this respect. He knew they were not partners, but tenants in common; and though his instructions were signed by all, it was not an act which was intended to confound their rights; but merely to enable him to act upon the same orders for the benefit of all the owners. The instructions show, that the parties always contemplated their interests in their own shares as distinct and separate; and the master is expressly directed, in case the sales exceed the cost of the contemplated cargo, to remit the respective proportions of the owners in the cargo, on their separate accounts, to London. The master had clearly no authority to consign the whole of the cargo to Messrs. R. Potter & R. Robinson, in virtue of these instructions. He does not pretend that he had. He asserts a distinct verbal authority from Burrill on the day of his sailing, authorizing him to consign the share of Burrill & Cahoone to them. But this statement is incumbered with no small difficulty from the nature of the proofs. It is directly denied by Burrill, who says, that he only authorized the ship to be reported to Messrs. Potter & Robinson at New York, and that he never contemplated her going at all to Newport. Indeed the other defendants do not assert any right as consignees derived under any general authority from Burrill & Cahoone. Their own private letter directing a stop at Newport was kept concealed from them; and in that very letter they speak only of their right to have their own shares of the cargo landed at Newport I cannot, therefore, say that the master's conduct in his general consignment of the whole cargo to Messrs. Potter & Robinson, and in proceeding to Newport with it and delivering it to them there, was justified by any authority to be found in the proofs. He was himself the general consignee; and upon the homeward voyage be ought to have made the

consignment general to himself for the use of the owners, or to them directly according to their respective shares.

The consignment then must be taken to be an unauthorized act of the master; and Messrs. Potter & Robinson could not, under such an act, legally acquire any lien to retain the same for any balance due to them even from Burrill & Cahoone, much less from Burrill, Cahoone, & Company. In respect to the facts, it is most manifest, that there was a real change, and not a mere nominal change in the partnership. Croade became a bona fide partner, and brought several thousand dollars of funds into the partnership; and all the accounts between Burrill & Cahoone and Messrs. Potter & Robinson were, with their perfect acquiescence and consent, transferred from the old to the new firm. The cargo was purchased by the new firm as agents for all the ship-owners, and their own notes given for the payment; and they received the funds belonging to the parties and arising from the cargo of a former voyage for the purpose of reimbursing themselves. The debts now set up as due to Messrs. Potter & Robinson, or either of them, are in no just sense the debts of Burrill & Cahoone, but of the new firm of Burrill, Cahoone, & Company. But assuming the posture of the facts to be somewhat different, and the consignment of the master to Messrs. Potter & Robinson to be a justifiable act within the scope of his authority, it will not materially vary the rights of the parties. The consignment would then be counter-mandable by Burrill & Cahoone, subject to any existing lien of the consignees. There is no ground to assert, that these gentlemen have, by any express or implied agreement, acquired a lien on the cargo for any debts due to them or either of them, by the firm of Burrill, Cahoone, & Company. The whole evidence negatives such a supposition. The assignment then must be deemed to operate as a legal transfer of the interest of Burrill & Cahoone to the plaintiff, while it was yet in transitu; and the defendants could not, after notice of such assignment, acquire any title to a subsequent lien in virtue of their possession. They took the property, clothed with all its legal and equitable qualities in favour of the plaintiff.

What ground then is there to permit them to set up against the plaintiff any lien, or any set-off for debts not originally, and before the assignment, attached, to the property? Upon the principles of equity none. All that can be reasonably required is that they should be paid for their disbursements and expenses in respect to the property, and any other charges, that fairly belong to them for payments made on account of the bonds or notes secured by the assignment. Whether the latter ought to be allowed, I do not now absolutely decide; though the present inclination of my opinion is in favour of the allowance.

But it is supposed that the defendant, R. Robinson, is entitled to set off against the plaintiff the debts due him from the firm of Burrill, Cahoone, & Company, because it is suggested he would be entitled to set off any debts due him from Burrill & Cahoone. I

am by no means prepared to admit that he would, under the circumstances of the present case, have a right to set off against the plaintiff any such debt of Burrill & Cahoone. But it is not necessary to decide that point. The question here is much narrower, whether in a suit brought by A and B against him, he would have a right in equity to set off a debt due him from A, B, and C; and if he could enforce that against A and B, whether he could, under circumstances like the present, enforce it against their assignee for a valuable consideration. I take the general doctrine as to set-off to be the same in equity as at law, though it was administered in equity long before the statutes of set-off. Joint debts cannot be set off in equity, any more than at law, against separate debts, unless there be some other circumstances calling for the equitable interference of the court. See Lord Lanesborough v. Jones, 1 P. Wms. 325; Ex parte Twogood, 11 Ves. 517; Ex parte Christie, 10 Ves. 105; Ex parte Stephens, 11 Ves. 24; Taylor v. Okey, 13 Ves. 180; Addis v. Knight, 2 Mer. 117; Ex parte Hanson, 18 Ves. 232; Ex parte Ross, 1 Buck, 125; Ex parte Blagden, 19 Ves. 465. In other words, there must be some equitable circumstances to entitle a party to a set-off, which cannot be reached at law.

1. As to the claim set up by the defendants, Potter & Robinson, for that portion of the cargo which was purchased with the money for which the bill of £383 10s. was drawn, it appears to me to be unfounded. The evidence does not establish it to have been purchased or shipped on their sole account; but it was shipped on account of all the ship-owners in the same manner as the rest of the cargo. The bill being drawn on Messrs. Potter & Robinson does not vary the case, any more than the whole shipment of the cargo being consigned to them, gave them an exclusive proprietary interest. The master admits that his reason for drawing the bill on Messrs. Potter & Robinson only, was because he had made the general consignment of the cargo to them.—2. I think, however, that they have a lien upon the cargo to the extent of that bill, if it has been paid by them, or if they have accepted it and shall hereafter pay it.

As the parties desire it, I will direct inquiries to be made as to the scheduled debts provided for, and the funds secured and received under the assignment.

These are all the observations which I think it necessary to make upon this ease; and shall decree the defendants, Messrs. Potter & Robinson, to account before a master, making all proper allowances, &c. &c. The bill is to stand dismissed as against the

master, but without costs to him. Decree accordingly.

At November term, 1822, the master made his report, to which no exception was taken by the parties, and it was confirmed, and a final decree passed in favour of the plaintiff for the balance found due on the share of Burrill & Cahoone in the cargo.

[1] {Reported by William P. Mason, Esq.}

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