JOLLY v. BLANCHARD.

Case No. 7,438.
{1 Wash. C. C. 252.}[1]

Circuit Court, D. Pennsylvania. April Term, 1805.

ARBITRATION AND AWARD—FACTOR—LIEN.

1. The court will not set aside the report of referees, merely because they might not have drawn the same conclusions from the evidence, which the referees have deduced.

{Cited in James v. Schroeder, 61 Mich, 30, 27 N. W. 850; Sanborn v. Murphy, 50 N. H. 71.}

2. An agent or factor, who is ordered by his principal to ship goods in his possession, has no right to retain more than enough to secure any lien he may have upon the goods.

3. He may do this, and obey the order to ship the balance; or, he may ship the whole of the goods, consigning them to a third person, with orders to deliver them to the owner on payment of the sum due to him.

4. If he retains the whole, because of a lien for a small sum, and any loss follows his breach of orders, he will be liable for the same.

This cause having been referred to arbitrators, under a rule of this court, and a report being made; Duponceau, for the defendant [B. Blanchard], moved to set it aside; because, the arbitrators had manifestly erred, both in matter of law and fact; in awarding to the plaintiff 1,009 dollars, the value of a quantity of goods, consigned by the plaintiff [Charles Jolly] to the defendant in St. Domingo; upon the principle, that he had retained them after he had received orders to send them back, in consequence of which, they were seized and destroyed by the brigands: whereas the orders he received were not peremptory, but left the defendant at liberty to return, or retain, the goods, as he pleased; and, independent of this, the defendant had made advances for the plaintiff, to the amount of about 400 dollars, which gave him a lien, of which he could not be deprived, or blamed for not surrendering.

The arbitrators were examined, as to the grounds of their decision; who stated, that they were of opinion, that the defendant ought to have sent back the goods as soon as he received the plaintiff's orders; and that it was in his power to do so: that, the only reason assigned by the defendant before them, for not having sent back the goods, was his lien. But, the arbitrators thought, that he might have retained enough to satisfy his advances, and should have returned the others, or sent them here to his own consignee, to be delivered to the plaintiff, on being satisfied for his advances. The arbitrators met three or four times, devoted much time to the investigation, and always had the parties before them. They allowed the plaintiff the value of the goods here, had they been returned, after deducting insurance and all expenses. They agreed, that the defendant relied very little upon any other ground, for his conduct, than the one above mentioned. The arbitrators decided upon the papers laid before them, and what fell from the defendant

By the correspondence laid before the arbitrators, it appears, that, on the 14th of April, 1803; the plaintiff wrote the defendant that he had seen some of his accounts of sales sent into another house, and hopes that he will receive more favourable accounts of the sales of his cargo. That, if there be not a probability of selling them, rather than make so great a sacrifice, or any thing like it, he would prefer having them sent back. He adds: "You will, therefore, I hope, study our interest very attentively." On the 16th of June the plaintiff, in another letter, expresses his apprehension, that war will take place between England and France; and, supposing that property at the Cape would be more safe from brigands, in the hands of an American, than a Frenchman; suggests the policy of depositing his goods in that way; but, leaves every thing to his discretion, in full confidence of his doing the best for plaintiff's interest. On the 8th of July, the plaintiff wrote to the defendant as follows:—"It is now certain, that war has commenced between England and France. Upon the slightest danger of the French evacuating St. Domingo, ship my goods to America; but, I hope, before this, they are sold." In his letter of the 17th September, he informs the defendant, that, as he had refused to make an advance on the goods, and

had not complied with his request, he should hold him liable if any accident befell them. The plaintiff's letter of the 14th April, got to hand the 9th of June; and, the defendant states, in answer, that, after having paid high duties on the goods, it would not be to the interest of the plaintiff to re-ship them. He hopes to sell, now and then, by small parcels. He says, however, that if the plaintiff insists upon the goods being re-shipped, he, the defendant, will do so. On the 25th of July, the plaintiff's letter of the 16th June, got to hand; and defendant, in answer, says: that he does not know if war is positively declared, though it may be considered as certain many hostilities having been committed on our coasts; speaks of the consequent distresses of the island; that he will neglect nothing in his power, to make the plaintiff's goods safe, by putting them into the hands of an American merchant, as requested. November 11th. The defendant sends plaintiff a bill, for the amount of such goods as he had then sold.

WASHINGTON, Circuit Justice. The letters from the plaintiff left, in my opinion, a great deal to the discretion of the defendant. If they could not be sold without sacrifices being made, the defendant was bound to re-ship them; and, in case of war, he advised, that the goods should be placed under the care of some American merchant. This is the substance of the two letters, of the 14th of April and 16th of June. The letter of the 8th July, is more positive in ordering the goods to be re-shipped, in case of danger that the French would evacuate the island. The defendant's answer to the plaintiff's first letter, seems to assign a plausible, if not a satisfactory reason, for retaining the property; and the new order, contained in that of the 14th of June, the defendant promises to obey, in his answer of the 29th of July. When the defendant received the plaintiff's letter of the 8th of July, does not appear; neither does it appear, when the prohibition took place. But, it is obvious, from the defendant's letter, of the 29th of July, that, although he had not certainly heard of a declaration of war between England and France, yet, that partial acts of hostility had occurred, on the coast of St. Domingo; and he states the commercial embarrassments they had produced, in pretty strong colours. But, whether, under all circumstances, it would have

been most prudent to ship the plaintiff's goods to America, or to retain them, might be extremely questionable. If I were called upon to decide upon the correspondence, I might probably differ in opinion from the arbitrators. But ought I, for this reason, to set aside their award?

In the case of Walker v. Smith [Case No. 17,087], the court refused to grant a new trial, although we were not satisfied with the verdict, and where we had heard the whole evidence laid before the jury. But, in this case, the arbitrators had the advantage of hearing the observations and acknowledgments of the defendant himself, as to the motives of his conduct, and it appears that they were, in some measure, governed in their opinions, by this species of evidence.

It was, perhaps, not going too far for the arbitrators to conclude, from the excuse so entirely relied upon by the defendant, that no other existed; and that, if it had not been for his claim upon the goods, for securing his advances, made on account of the plaintiff, he would have considered himself bound, by the order he had received, to return the goods. But, this excuse was by no means a sufficient one; and, I think the opinion of the arbitrators upon this point, was perfectly correct. An agent has a lien upon the property of his principal, for any balance due him; but, if he is ordered to part with the possession of such property, shall be disobey these orders, and retain goods, to a large amount, in order to satisfy an inconsiderable debt? This defendant might have retained such a part of the goods, as would have been sufficient to secure him; or he might have consigned the whole to his friend here, to deliver them up, on being paid what was due.

Upon the whole, I do not think that the arbitrators have been guilty of those obvious mistakes, in matters of law or fact, which ought to invalidate their report

[1] [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]