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ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

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Rose *v.* Murchie.

Saturday, October 25th, 1800.

A. is indebted to D. F. & Co. by bond; A. dies, and at the sale of his estate by his executors, F., the acting partner of D. F. & Co., buys a slave, which he carries to his own plantation and there continues him. The amount of the purchase for the slave was held a good discount against the bond, [under the circumstances and practice of the country.] The rule, that a private debt of a partner cannot be set-off against a debt due the company, not applying, because, as the Court thought, the sale of the slave to one partner was in fact a *payment* made on account of the debt to the partnership. P. 414-15.*

This was an appeal from a decree of the High Court of Chancery, where Rose, as executor of Banister, brought a bill for relief against Murchie, surviving partner of Donald, Fraser & Co., James Fraser and David Maitland and Robert Maitland, his attorneys in fact; Stating, that on the 7th of January, 1788, Banister gave his bond to Donald, Fraser & Co. for £200, being the conjectural balance of an account, but in fact only £172, 19s. 6½d., according to account, was due. That other transactions since, (as per account annexed,) will reduce it to £43, 17s. 7d. That they have assigned the bond to Fraser, who was apprised of the errors, and promised to account, but had not. The bill, therefore, prays an account, and for general relief.

The answer of Murchie states the assignment to Fraser, but that he was informed it was given for an unsettled account, and that it was taken without recourse. That he told him one of the discounts set up by the plaintiff was for a negro bought by Simon Fraser, who was a partner of Donald, Fraser & Co., but that the defendant thought Simon Fraser only, and not the company, was liable for the negro.

*See Judge Green's construction thus, of this case, in *Gilliat* v. *Lynch*, 2 Leigh, 505.

Though one having a claim against a partnership cannot set it off against a debt of his to one of the firm; yet he may charge that partner in equity for the needful part of *his share* of the social effects; to ascertain which, and to adjust his own claim against the firm, he should make all the partners defendants to his bill. *Dunbar* v. *Buck, &c.* 6 Mun. 34, of which case, see Judge Green's censure, 2 Leigh. 505.

That joint demands cannot be set off against separate, nor separate against joint, see *Scott* v. *Trent*, 1 Wash. 77; *Armistead* v. *Butler's adm'r.* 1 H. & M. 176; *Ritchie & Wales* v. *Moore*, 5 Mun. 388, 396; *Porter* v. *Nekervis*, 4 Rand. 359; *Gilliat* v. *Lynch*, 2 Leigh, 493.

But when principal and surety are sued, a demand of the *principal* against the plaintiff may be set off. Code of 1849, p. 654, §4.

And for equitable set offs allowed also, see *ib.* §5—9.

A debt due to a defendant as surviving partner, may be set off against one due from him in his own right. *Slipper, &c.* v. *Stidstone*, 5 T. R. 493, 5 Wms. Abr. 108.

And *vice versa*. *French* v. *Andrade*, 6 T. R. 582, 5 Wms. Abr. 109.

The answer of Fraser states, that he knows nothing of the transactions mentioned in the bill, except that Donald, Fraser & Co. being indebted to Thomas Fraser & Co., of which last named house the defendant is a partner and their agent and assignee, the defendant, Murchie, as surviving partner of Donald, Fraser & Co., assigned the said bond to him in discharge of the debt due Thomas Fraser & Co.

The answer of the Maitlands states, that they assisted in the settlement between James Fraser, and Donald, [410] Fraser & Co. And that the bond was assigned without any knowledge of any equity against it.

The deposition of a witness proves that Simon Fraser was the acting partner of Donald, Fraser & Co.

Another witness proves that there were mutual dealings between Banister and the company, and between the plaintiff and the company, after Banister's death. That Simon Fraser bought two sows and a negro named Rochester, at the auction by the executors of Banister's estate. That bonds were generally taken of the purchasers at the sales, except in a few instances, where discounts were admitted; that if Fraser's bond had ever been applied for, he should probably have seen the person who made the application, as he took several bonds from purchasers residing in the town of Petersburg. That he charged the two sows and the negro in the following words: "Simon Fraser, 2 do. (sows being mentioned above,) at 48s. 6d., spotted and black with one year. Simon Fraser, Rochester, £83, 5s. 0d."

Another witness says that Rochester was always kept at Fraser's plantation, and considered as his property.

The Court of Chancery referred the accounts to a commissioner, who corrected several articles, but submitted it to the Court whether credit for the two sows and the negro Rochester was to be given the plaintiff?

The Court of Chancery confirmed the report, and allowed the plaintiff a credit for the two sows and the negro.

Upon application for a bill of review, the cause was reheard by consent. When the Court of Chancery was of opinion, that the plaintiff was not entitled to a credit for the two sows and the negro, and decreed accordingly. From which decree, Rose appealed to this Court.

HAY, for the appellant. [411]

Although it is generally true, that a debt due from an individual partner cannot be set off against a company demand,

yet there are strong reasons to believe, from the circumstances of the case, that the purchases here were intended to be on account of the company debt; and, under that impression, that the executor took no bond, which indeed was never offered by Fraser, who thereby shewed his own conception of the transaction. Consequently, it would be unreasonable, that the confidence reposed in him by the executor, should expose the latter to the loss of the debt.

BENNET TAYLOR, contra.

It is a general principle, that if one does an act, it is as an individual, unless it be shewn that he did it in a different character. Therefore, Rose ought to have shewn that the purchase was made in his social, and not in his individual character; or else he reverses the general principle. But, in this case, there is the most conclusive proof that the purchase was actually made in his individual capacity, and not as a partner; for the articles are set down to him and not to the company; and the slave is proved to have been carried to his own private estate, and there kept as his own property; which removes every possible presumption that the purchase was made for the benefit of the copartnery. Besides, the articles bought were not of a mercantile nature, or purchased in the course of trade; and, therefore, the company could not be charged with them. Because a transaction of a single partner, unconnected with the nature of the business, does not bind the company, [*Harrison* v. *Jackson et al.*] 7 T. R. 207. And this principle is correct; for, otherwise, it would be in the power of one partner to ruin the concern, by improvident schemes of which they have no knowledge, and of which, consequently, their approbation cannot be presumed.

WICKHAM, in reply.

Although an individual partner will generally be understood to buy for himself, yet circumstances may rebut it. [412] The executor might think the purchase was only a continuance of the transactions between his testator and the company; and if Rose had called for payment, or a bond, Fraser would certainly have refused, whilst the company's debt remained unsatisfied.

Cur. adv. vult.

PENDLETON, President, delivered the resolution of the Court to the following effect:

In January, 1788, Banister gave his bond, payable to Donald, Fraser & Co. for £200, the supposed balance of dealings of Banister, with that company, and another mercantile house of Robert Donald & Co. blended together; in both which Simon Fraser was the active partner; and as such took the bond.

In 1793, Murchie assigned this debt, with a large number of others due to Donald, Fraser & Co. to James Fraser, assignee of Thomas Fraser & Co., of Britain, for a large debt due to them from Donald, Fraser & Co., which debts James Fraser appointed the Maitlands to collect, who sued Rose, the executor of Banister, upon the bond, in the name of James Fraser, as assignee as aforesaid. Rose confessed judgment, reserving his equitable defence; and filed this bill, stating, that Banister's bond, intended to include the balance due to both companies, was taken, without settlement, for a conjectural sum, far exceeding the real balance. He, therefore, prays an injunction; that the accounts may be adjusted, and the real balance paid.

Upon the several answers coming in, a replication is filled. and depositions taken. An order was made by consent, referring it to a commissioner to settle the accounts between the parties. Commissioner Hay reports the settlement, stating a balance of £41 3s. 7d. to be due from Banister's estate, unless the estate was entitled to a credit of £83 5s. for a slave and two sows, purchased by Simon Fraser, at a public [415] sale of that estate. If that was allowed, the balance of £43 15s. would be due to the estate, with interest from April, 1790.

To this article, the dispute between the parties is confined: All other parts of the report being submitted to.

The facts are, that Simon Fraser was the acting partner of both companies; that, with him, the extensive dealings of Banister were transacted; and all the other articles, credited in the company's account, delivered to him or his order; and no account subsisted between them in the individual character of Fraser. And that, Fraser, at the public sale, purchased the articles, which are charged to him, without any agreement or even conversation, about the application of the money.

Bander, who acted as clerk at the sales, says, he expected the amount was to be credited in the company's accounts, not then liquidated, and gives his reasons. That the sales were upon credit, the purchasers giving bond and security; which

was generally given, except where the executor allowed discounts to creditors. That he took the other bonds, and was not directed to take Fraser's; nor was one required, as far as he knows or believes.

M'Donald says, that the slave purchased was always kept at Fraser's plantation, and considered as his property, until he and other slaves were conveyed in a deed of trust from Fraser, to the Maitlands and others.

Upon these facts, the commissioner reported his opinion in favour of the amount being charged to the company; and the Chancellor in his first decree confirmed it, making the injunction, to the judgment on the bond, perpetual; and decreeing
[414] the defendant to pay the £43 15s. with interest from April 1790, (the day of payment for the sales) and costs.

Upon a re-hearing, by consent as on a bill of review, the credit was disallowed; the injunction dissolved, as to the £41 3s. 7d. interest and costs; and perpetuated as to the residue. The appeal is from the latter decree.

The rule, that the private debt of a partner cannot be set off against a company debt,* does not apply; since the question is, whether it was such a private debt, or a payment of the company's debt to that partner, who, it is agreed, had authority to receive it?

In *Scott* v. *Trent*, in this Court, 1 Wash. 77, the articles for which the discount was claimed, were confessedly delivered to the acting partner on his private account; and, on a state of them, it was endorsed, that when settled, the balance was to be credited in the company's account. That private account had not been adjusted so as to fix the balance, and on that ground, the discount was not allowed. But, even there the Court said Scott might be relieved in equity. We are in that Court.

In considering this subject, the Court viewed the situation and practice of the country as to the present subject. Simon Fraser, or any other man, is the ostensible merchant opening a store for retailing goods and purchasing commodities. It is the store which gives him credit, and that is answerable for any commodities furnished, whether it belongs to him alone, or to a company, of which he is a partner, or for whom he acts as factor. True it is, if the company fails, the creditor may resort to the agent or factor, on the common principle of

[* *Armistead* v. *Butler's* adm'r. 1 H. & M. 176; *Ritchie* et al. v. *Moore* et al. 5 Munf. 396.]

master and servant, where both are liable. As to the article furnished not being within the nature of the trade, how is the planter to know the objects of the trade? He takes goods, and to pay for them, sells the merchant whatever he is willing to receive; tobacco, wheat, a horse, a slave, or any thing else, for which he is usually credited in the store-books, without enquiry for whom purchased, or how applied. Here the slave was sold to Fraser, still the acting partner, and no bond was required, as in the case of a creditor. He was not a creditor in his private character, but as a partner of the company; and, in the store-book, the estate was entitled to a credit for the amount, which leaves the estate a creditor of Donald, Fraser & Co. for £43 15s., to whom, or to Simon Fraser's estate, the executor of Banister may resort for satisfaction; but, he has no claim as to that, upon the defendant, James Fraser, although he is bound, so far as the debt assigned him was paid. [415]

The last decrees are to be reversed, with costs, and the first affirmed.

DEANES *v.* SCRIBA AND OTHERS.

Wednesday, October 22d, 1800.

A party, who takes no steps to procure the testimony of a sea-faring witness, is not entitled to a continuance of the cause.

A consignee, who neglected to render an account of the outstanding debts for five years, charged with the amount.*

The Court of Chancery, on debts not bearing interest, *in terms*, cannot carry interest down below the decree.†

This was an appeal from a decree of the High Court of Chancery, where Scriba, Scroppal and Starman, brought a bill against the Deanes for an account of the sales of goods consigned by the plaintiffs to the defendants, and for payment of the balance due, with interest.

The answer admits the consignment, without instructions whether to sell for cash or on credit: States, that the defendants sold some for cash and others on credit, and [416]

* See ante, p. 358, point 2d.

† But now, see 1 R. C. of 1819, p. 208, § 58; Code of 1849, p. 673, § 14, 18 and *ante*, p. 358, note. (†)