MELROSE & COMPANY, . . APPELLANTS (*a*).

HASTIE & COMPANY, . . RESPONDENTS.

1854.
27th, 28th Feb.

Goods in a Bonded Warehouse.—Remarks by the Law Peers on the doctrines of Mercantile Law as to the right to retention of Goods deposited in a Bonded Warehouse in the name of A., who had sold to B., who again had sold to C. Great importance of the question; and regret expressed that, from the state of the Record, the House was precluded from examining the decision complained of.

Contract of Sale.—Difficulty of ascertaining from the opinions of the Court below whether the Law of Scotland corresponded or disagreed with the Law of England as to the operations of the Contract of Sale in transferring the property.

Delivery.—How far Delivery is, or is not, essential by the Law of Scotland to the Transfer of the Property; whether the difference between the Law of England and that of Scotland may not be one of phrase rather than of substance?

Issue.—In directing an issue for trial, a question of law is almost always involved. Thus, upon the Issue whether A. is the Son of B., the point will arise, What is a lawful Marriage? Nevertheless, the endeavour should be made to confine the issue as much as practicable to pure facts, and to exclude legal questions.

As far as the nature of things permits, the English Courts constantly separate facts from law. The Scotch Courts ought to do likewise.

An Interlocutor directing a Trial by Jury is not appealable; but upon the question, what the Issue shall be, an appeal is open.

Bills of Exception.—The 48 Geo. III. c. 151, s. 15, does not apply to cases under the Jury Statutes, for which a special

(*a*) See Sec. Ser., vol. xiii., p. 891.

rapidity of movement is secured by the 55 Geo. III. c. 42, sections 7, 8, and 9.

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When exceptions to the ruling of a Judge at a trial are disallowed, the appeal against the interlocutor of disallowance must be within the time limited by the 55 Geo. III. c. 42, and cannot claim the benefit of the 15th section of the 48 Geo. III. c. 151.

IN this case there was a verdict for the Respondents on the 21st of March, 1850; and on the 7th of March, 1851, certain exceptions to the charge of the learned Judge who had presided at the trial were disallowed.

On the 19th of December, 1851, the Court of Session applied the verdict, assoilzied the Respondents, and found them entitled to expenses.

The Appellants, by their appeal, not only impeached the judgment applying the verdict, but also the interlocutor disallowing the exceptions.

Mr. *Anderson*, for the Appellants.

The *Solicitor-General* (Sir *Richard Bethell*), for the Respondents.

The question is sufficiently disclosed by the opinions of the Law Peers.

The LORD CHANCELLOR (*a*):

Lord Chancellor's opinion.

This case is one upon which the Court of Session was divided, and it evidently involves principles of the very deepest importance to the mercantile law of Scotland. So far, therefore, as it is proper for any one when exercising judicial functions to have such a feeling, I confess I do wish that the objections to the competency of this appeal were unfounded. I confess my first impression was, that the case might be gone into; but, attending to the language of the statutes, I have satisfied myself that if we should now hear an appeal from interlocutors

(*a*) Lord Cranworth.

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overruling these exceptions, we should be hearing something which the Legislature has not authorised your Lordships to hear, and, I think, more than that, has expressly forbidden you to hear.

The Pursuers, Melrose & Company, instituted a proceeding in the Court of Session against the Defenders, Hastie & Company, the object of which was to have a Declaration that they were entitled to 591 bags of sugar, imported by Hastie & Company and warehoused at Glasgow, but, as it is alleged (and we may assume the fact to be so), paid for by Melrose & Company; while, on the other hand, Hastie & Company contended that they had a right of retention until certain charges which they had upon that sugar were satisfied. Here, therefore, my Lords, was a very important question. And, for the purpose of asserting their right, Melrose & Company instituted this action, in which they sought these several findings: That it should be found and declared that the Pursuers had been wrongfully obstructed, and that they might lawfully remove the sugar from the warehouse;—whether they had been wrongfully obstructed or not,—that the parties having the control over the sugar should be restrained from removing it for the future;—and, further, that the Defenders should be made responsible in damages for the injury which had resulted from the Pursuers having been wrongfully obstructed. The Court of Session, in order to have this question investigated, directed an issue, "Whether the Defenders had wrongfully obstructed the Pursuers in removing this sugar."

Looking logically at that issue, it does raise every question, both of fact and of law; but, with all deference to the learned Judges, I must say that I think that this is a most inconvenient mode of having doubtful points of law investigated. It would surely

have been more satisfactory to submit to the jury the pure facts, or as nearly the pure facts as the nature of things permitted, and then for the Court afterwards to apply the law, as they understood it, to the facts.

It is true that in directing a jury upon any trial, we are always involved in the necessity of mixing some law with the facts. If, for example, you direct a jury upon the issue, Whether A B. is the son of C D., that involves the question, What constitutes a lawful marriage? You can hardly direct the trial of any question of fact that will not have mixed up with it some question of law. But the object of the Courts in this country always is to separate, as far as the nature of things permits, the one from the other. I cannot help thinking that the convenience of that course is so obvious, that it would have been infinitely better if the issues directed in this case had been simply issues as to what the facts were. The knowledge of the facts, one way or the other, would have enabled the Court to apply the law, and say what the result was. However, no objection seems to have been taken by either party to the form of the issue which was directed in the Court below.

But now the Pursuers come to your Lordships' House, and, upon referring to their appeal, I observe that they do not complain of that issue having been directed. The issue was evidently directed for the purpose of raising, and logically it did raise, all the three questions; for if it be true, as the Pursuers say, that this was their sugar, and that Hastie & Company had no right to prevent them from taking it from the warehouse, then the jury must have determined that Hastie & Company did wrongfully obstruct. So with the second question, Whether they ought to be prevented for the future from removing, the same result would follow, and so also as to the question of damages.

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That issue was directed, and upon the trial of that issue it seems that certain facts were admitted or proved as to payments, which show that the Pursuers were right in saying that they had paid, but then the party whom they had paid was a middleman in the transaction; and then arose this question, Whether, these payments having been so made, the right contended for by the Pursuers did or did not result?

The learned Judge who tried the case, directed the jury:

> That there was in this case no delivery, actual or constructive of the 591 bags of sugar, and nothing proved in evidence to bar Hastie & Company from retaining these sugars for the balance due by Bowie & Company;—that the circumstance of Melrose & Company having placed the delivery-note, with the indorsation in their favour, in the hands of Duncan, Ferguson & Company, and its having been acted upon by partial removal of the sugars, did not affect the right of retention on the part of Hastie & Company.

That, in fact, involved the whole of the question in dispute, and, the learned Judge having thus laid down the law upon it, the jury found that there had been no wrongful obstruction. To that ruling there was a bill of exceptions, which was brought before the Court of Session, and the Court of Session disallowed them.

Now, in order to see whether it is competent or not to the parties who are aggrieved, or who think themselves aggrieved, to appeal to your Lordships' House, we must look to the statutes, for they alone must guide us. The statute which introduced jury trials into Scotland with reference to civil causes, is the 55th of George III. c. 42, and the sections which have been referred to, and are material, are the 7th, 8th, and 9th. To enable parties, if they think fit, to bring the case to the House of Lords, this provision is made by the 7th section:

> Provided always, that it shall be competent to the party against

whom any Interlocutor shall be pronounced on the matter of the exceptions, to appeal from such Interlocutor to the House of Lords, attaching a copy of the Exception to the Petition of Appeal, certified by one of the Clerks of Session; so as such Appeal shall be presented to the House of Lords within fourteen days after the Interlocutor shall have been pronounced, if Parliament shall be then sitting, or if Parliament shall not be sitting, then within eight days after the commencement of the next Session of Parliament, but not afterwards; and so as the proceedings on such appeal do conform in all respects to the rules and regulations established respecting Appeals.

Then come the provisions of the 8th section, which says:

That if a new trial shall not be applied for, or shall be refused, or if the Exception taken to the opinion and direction of the judge or judges shall be disallowed, the verdict shall be final and conclusive as to the fact or facts found by the jury.

The 9th section is in these terms:

That in all cases wherein the Court shall pronounce a judgment in point of law as applicable to or arising out of the finding by the verdict, it shall be lawful and competent for the party dissatisfied with the said judgment in point of law, to bring the same under review, either by representation, or reclaiming petition, or by appeal to the House of Lords.

There having then been an interlocutor overruling exceptions, the question is whether an appeal against that interlocutor after the fourteen days have expired, is a competent appeal? Competent *primâ facie* it is not; but then what was argued by the learned counsel for the Pursuers, the Appellants in this case, is, that we must look back to the 48 Geo. III. c. 151, which was an Act for regulating the course of proceedings in Scotland before the establishment of Jury Trials; and in the 15th section of that Act we find this proviso:

That when a judgment or decree is appealed from, it shall be competent to either party to appeal to the House of Lords from all or any of the Interlocutors that may have been pronounced in the cause, so that the whole, as far as it is necessary, may be brought under the review of the House of Lords.

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Now I think that the subsequent statute, that of 55 Geo. III. c. 42, making express provisions as to the course of appealing in this particular kind of interlocutory applications, relative to trials by jury, must be understood as so far superseding all that had been previously directed.

Ordinarily speaking, an issue is meant merely to find some particular fact or facts; and when we consider how important it is to have such fact or facts, for all purposes, conclusively established before any further proceedings are taken, there appears a very obvious reason why the Legislature should have limited the time for complaints within a very short period. You may apply immediately for a new trial, or take a Bill of Exceptions, if you choose; and you may come to the House of Lords; but you must do so within fourteen days. The statute gives peculiar facility by giving priority to your appeal over all others, in order that the matter may be once and for ever concluded. The Legislature has laboriously contrived that there shall be no delay in appeals of this nature; but it has provided at the same time that none shall be allowed except where expressly granted—and this was meant as something which should prevent all further enquiry on any fact or facts once found by the jury. Such a regulation is plainly convenient. If in this case, for instance, the issue had been directed to try, whether the sugar had been paid for to Hastie & Company by Bowie & Company, and whether the second portion of sugar which was bought by Melrose & Company had been paid for by Bowie & Company; and any other matters of fact that it would have been important to have ascertained, one sees the great expediency of having that established conclusively before anything further is done. It seems to me, attending to the nature of the subject matter and the

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language of the Act of Parliament, that it is quite clear we cannot carry back, as it were, the proceedings upon jury process to the 15th section of the 48 Geo. III. c. 151, when the fourteen days are run out, and the whole matter comes before the Court upon the final judgment applying the verdict. I think that construction is very much confirmed by the 9th section of the Jury Act, which expressly says—"That in all cases wherein the Court shall pronounce a judgment in point of law, as applicable to or arising out of the finding by the verdict, it shall be lawful and competent for the party dissatisfied with the said judgment in point of law, to bring the same under review, either by representation or reclaiming petition, or by appeal to the House of Lords." *Expressio unius est exclusio alterius.* You may come to this House if you think the verdict does not warrant what the Court by its final judgment is doing upon it. That excludes you from saying that the verdict was improperly obtained.

For these reasons, my Lords, I reluctantly feel myself compelled to say that this case, so far as the appeal against the interlocutor overruling the exceptions goes, is not now in a state in which it is competent to your Lordships to hear it. Consequently we can only hear the Appellants, so far as they can show that upon this record, as it stands, the Court of Session has pronounced an erroneous decision.

The Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, I entirely agree with my noble and learned friend in the regret which he has expressed, and in which I largely share, that we are obliged to exclude the arguments upon the weighty points which are raised in this case, involving as they do one or two matters of the greatest possible importance to the mercantile law of Scotland. I see that there was a

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considerable difference of opinion among the learned Judges of the Court below. They were not, I think, even agreed as to the distinction between the law of England and that of Scotland respecting the contract of sale upon the question whether the property passes by force of the agreement or in respect of delivery (*a*). I think, however, they seem pretty nearly concurrent generally as to the doctrine of retention, lien and stoppage *in transitu*. But I must say, after reading the opinions of those learned persons, that it is impossible to hold that we have any distinct statement showing whether the law of Scotland is the same with our English law upon these important matters; whether it is materially different; whether it is different in a greater or less degree; and also whether it is different in substance, or only different in language.

I however concur in the reasons which my noble and learned friend has given for holding that we must exclude all argument upon this part of the case.

The Appellants have the right still to impeach the application of the verdict.

The case was adjourned from the 27th of February 1854 to the following day, for the purpose of hearing counsel on the question of law involved in the application of the verdict. At the close of the argument the following additional opinions were delivered.

The LORD CHANCELLOR:

Lord Chancellor's opinion.

My Lords, Hastie & Company had purchased from the Mauritius a large quantity of sugar, which was lodged in a bonded warehouse at Glasgow; and they

(*a*) See *Bailey* v. *Culverwell*, 2 Mann. & Gr. 564, where the Queen's Ancient Serjeant has a valuable note on the "Modern Doctrine," that, by bargain of sale, the property passes without either payment or delivery.

sold to Bowie & Company who afterwards made an undersale of about 700 or 800 bags to the Pursuers Melrose & Company. Melrose & Company removed about 170 bags, but left the other 591 bags still in the warehouse and still in the name of Hastie & Company. I should rather say in the name of Duncan Ferguson & Company, who were the agents of Hastie & Company; it is just the same thing, they stood in the name of the seller. Bowie & Company, to whom Hastie & Company had sold, afterwards became bankrupts while the 591 bags of sugar remained unremoved; and so becoming bankrupts, they stood largely indebted to Hastie & Company, not, however, in respect of the 591 bags of sugar, for which it was contended, on the part of the Plaintiffs, that Hastie & Company had been paid. I will assume the fact to be so. Then the right set up by Hastie & Company was this—they said, Subsequently to the sale of this sugar Bowie & Company became largely our debtors, and, by the law of Scotland, we have as against Bowie & Company a right of retention of these sugars although they have been paid for, in order to have a sort of security for the debt which afterwards accrued. Such was the defence set up by Hastie & Company. On the other hand, Melrose & Company who had purchased from Bowie & Company, said, We have paid Bowie & Company for the whole of these sugars; and though we have not removed them, we might have removed them, as we have a warrant from Hastie & Company to remove them. It is hard that we should lose, and that Hastie & Company should be saved harmless. Melrose & Company therefore instituted proceedings in the Court of Session to have this declaration,—that the obstruction to their removal of these sugars was wrongful; secondly, that the parties who were obstructing should

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no longer be allowed to obstruct them; and lastly, that they might recover damages in respect of the obstruction which had occurred.

In order to settle what the rights of the parties were the Court of Session directed an issue, which, I agree with the learned *Solicitor-General,* may be viewed very much in the same category as that in which an action for trover would have been regarded in this country; upon which the whole question of right might be raised, because, although the conclusions of the summons are divided into three heads,—in truth the case all depends upon the one question, Whether there does exist by the law of Scotland the right of retention which is contended for by Hastie & Company.

The Court directed an issue, and the terms of the issue were, "Whether the Defenders wrongfully prevented or obstructed the Pursuers in removing 591 bags of sugar, or any part thereof, from the bonded warehouse in which they were deposited." The case was tried, and the learned Judge who presided, substantially directed the jury that they ought to find for the Defenders, because he held that the right did exist for which the Defenders contended. I do not mean to say that he put it in that language, but that was, substantially, the direction which he gave. The counsel for the Pursuers excepted; and undoubtedly the propriety of that direction involved the whole question in the cause. Therefore the learned counsel for the Pursuers at the trial put the matter exactly upon the proper footing. The learned Judge stated to the jury what he conceived the law to be; the Pursuers objected to that statement of the law, and took the proper course for bringing the matter into the course of judicial investigation by excepting to the direction of the learned Judge. The learned Judge persisted in that direction, and the jury consequently found for the

Defenders. A Bill of Exceptions was brought before the Court of Session, and there the question of the propriety of that direction, or in other words, the question, whether there does or does not exist by the law of Scotland the right of retention contended for, was elaborately argued. The learned Judges were equally divided; and then, pursuantly to the statute, they called in the assistance of three learned Judges from the other division. Of the seven Judges five were in favour of the ruling of the learned Judge who tried the case; that is, in favour of the Respondents, and the two other Judges were of the opposite opinion; so that there was a large majority for the Respondents.

Now, my Lords, what was the course for the Appellants to take if they were dissatisfied with this decision? There can be no doubt about it, because the statute expressly points out that within a certain limited time they are entitled to come by way of appeal to your Lordships' House. They would have had advantages which no other class of Appellants enjoy, because their cause would have been advanced by reason of the nature of the appeal; being of a sort not to brook delay. They would have advantages given to them, not by the rules of your Lordships' House, but actually by statute.

They presented a petition of appeal against the interlocutor which overruled the exceptions and confirmed the learned Judge's ruling; and also against the final decree of the Court applying the verdict.

Now this House intimated yesterday, and indeed finally decided, that so far as this was an appeal against the exceptions, or rather against the interlocutor overruling the exceptions, the Pursuers had not a *locus standi* here, because they had not come within the time limited by the statute.

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Mr. *Anderson*, on the part of the Pursuers, has argued the case at great length to-day; and, I confess, at one time I had a doubt whether he was not right to this extent, that we ought to send this matter back to have that cleared up which seemed at the first blush to be an obscurity in the verdict; but I have now come to the conclusion that that impression was erroneous.

The Pursuers are in the character of actors; and the Defenders, Hastie & Company, are the *rei*. The actor and the *reus* are always in this position. If the actor does not make out his case the *reus* is entitled to have an *absolvitur*. The question is not whether the verdict sustains the case of the *reus*; but whether it makes out that of the actor. The Defenders have a right to say, We are entitled to an *absolvitur*, not because we have established anything, but because the Pursuers have established nothing.

The Pursuers say, We are entitled, first of all, to have a declaration that the Defenders have been wrong in obstructing us heretofore; secondly, we are entitled to an injunction or an interdict to prevent our being restrained for the future; and thirdly, we are entitled to damages for what you have done. The jury found that the Pursuers had never been wrongfully obstructed at all. How does that establish the affirmative of either of your propositions? Mr. *Anderson* felt the force of that observation, but said—"I think the case ought to be remitted to the Court of Session to have some further inquiry." Why? The issue was an issue settled by the Court, against which there was no appeal. And here I must remark that there is no authority for the suggestion thrown out in argument at the Bar—that you cannot have an appeal from an interlocutor settling an issue. That is a complete mistake. This House never could have meant to lay

down any such proposition. What the grounds were upon which the appeal was rejected in that case, I know not. But the provisions of the statute are plain. With reference to an interlocutor directing that a matter shall be tried by issue, they enact that there shall be *no appeal*; but with regard to an interlocutor settling *what the issue shall be*, there is no statuteable objection to an appeal; and this House could never lay down any rule so preposterous as that it should not be the subject of appeal, when, in truth, the whole merits of a cause might be involved in such an interlocutor.

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Now, my Lords, how does this matter stand after getting rid of so much of the appeal as relates to the Bill of Exceptions? The only remaining complaint is, that the Court miscarried in applying the verdict—that is to say, looking to the verdict, they ought not to have said The Defenders are to be absolved. But how could they say anything else? Even the learned Judges, constituting the minority in the Court below, are of opinion that no other course could have been taken.

In my opinion, the Court of Session came to the only conclusion they could arrive at, and consequently this appeal is altogether unfounded. I shall therefore move your Lordships that it be dismissed, and that the judgment of the Court of Session be affirmed. But, my Lords, in so moving, I wish it to be distinctly understood that this House does not mean to express any sort of opinion, one way or another, upon the very important question, whether by the law of Scotland there does or does not exist the right of retention which is contended for in this case.

The Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, I take the same view of the question as that which is taken by my noble and learned friend,

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and for the reasons which he has given, in which I entirely concur.

I agree with the learned *Solicitor-General's* reference to the case of trover. It seems to me that this is precisely as if an action of trover had been brought to recover these sugars, and then the question for the jury would have been twofold, Was there a conversion or not—in point of fact, if there was no conversion *cadit quæstio*, Verdict for the Defendant? But if there was a conversion, was it a wrongful or a rightful conversion? In the very words of this issue, that is to say, Had the party converting, which in this case would be by retention, a right to it from a lien, or from an unpaid share, or whatever the other grounds were upon which he set up his right to retain?

Was not this verdict upon a special issue? In a case of trover the plea would have been Not guilty, which would have covered the whole of the special matter, both the denial of fact, and of the conversion, which is the gist, as your Lordships know, of an action of trover —conversion in this case being retention. The plea would have covered also the rightful or wrongful nature of that retention. Denying the wrongfulness of it and affirming the right would have been in sum and substance a plea of Not guilty. If the verdict had been for the Defendant, setting up the plea of Not guilty, then the Court would have had to apply that verdict, that is to say, whether the postea should be given to the Plaintiff or to the Defendant. It is just the position in which the Court of Session stood in applying the special verdict here. The Court would have said, "Verdict for the Defendant—Postea to the Defendant;" that would have been applying the verdict, and that would have made an end of the cause, as *this* makes an end of the cause.

My Lords, I entirely agree with what my noble and

learned friend has said respecting the exclusion of all opinion on the part of this House upon the very important question of Scotch law which is raised by these exceptions, and into which I lamented yesterday that we were precluded from entering.

Appeal dismissed, and Interlocutors affirmed, with Costs.

CLARK, GREY, & WOODCOCK—RICHARDSON, LOCH, & McLAURIN.