REPORTS OF CASES

ARGUED AND DETERMINED

IN

The House of Lords.

DIXON ET AL., ... APPELLANTS.
BOVILL, ... RESPONDENT.

1856.
May 30th,
June 2nd, 3rd,
July 29th.

Iron Scrip Notes, Character of.—An ironmaster gave to his vendee a note in these words: "I will deliver 1,000 tons of "iron when required, after 18th September next, to the "party lodging this document with me." Held, by the Lord Chancellor, that this document was not a negotiable instrument of mercantile exchange.

Jury Trial.—Circumstances under which, the jury having been discharged, "in order that the parties might bring the case before the Court for judgment," it was held that the judgment so pronounced, not having been pronounced by the Court below in the character of arbitrators, it was consequently subject to the reviewing jurisdiction of the House. Embarrassment occasioned by the practice of "not requiring the jury to find for the Plaintiff or the Defendant, or to find a special verdict upon which exception may be taken, if necessary, to the ruling of the Judge.

THE summons was by Thomas Balls and Son, of London, iron merchants, against William Dixon, of Glasgow, ironmaster; and it stated that Balls and Son had in July 1849, purchased from Smith and Son, and paid 2,200*l.* for a document granted by the Appellant Dixon, in the following terms:—"Glasgow, 10th

DIXON ET AL. v. BOVILL.

July 1849.—I will deliver one thousand tons No. 1 pig-iron, free on board here, when required, after the 18th day of September next, to the party lodging this document with me, f.o.b. in Glasgow. (Signed) For William Dixon, John Campbell." That in August and September thereafter Balls and Son had required the Appellant to deliver the said 1,000 tons in smaller quantities:—that on 4th September 1849 the Appellant wrote to Balls and Son:—"On the undertaking being lodged with me, I will ship the iron as required, in the usual way." That Balls and Son lodged the said order with the Appellant on 5th September; but that the Appellant refused to deliver the pig-iron, whereby Balls and Son sustained loss. The summons therefore concluded against the Appellant for delivery to Balls and Son of the foresaid quantity of 1,000 tons of No. 1 pig-iron, and for payment of 1,000*l.*, or such other sum as should be ascertained to be the amount of the loss and damage incurred in consequence of the Appellant's delay in making delivery of the iron to Balls and Son; or ortherwise, and failing his delivering the iron, that he should pay to Balls and Son 3,500*l.*, or such other sum as should be found to be the amount of the loss sustained by them in consequence of such non-delivery.

The Appellant put in a defence, insisting that the order aforesaid could not be received as evidence of any undertaking on his part, because it was unstamped, and did not bear to be granted in favour of any person by name; that it was null under the Act of 1696, c. 25;—that supposing any right to have been constituted under it, such right was not legally transferable without a formal deed of assignment;—that in any view, Balls and Son were liable to all exceptions and defences competent to him (the Appellant) against Smith and Son, the parties who had

purchased the iron from him, and to whom he had granted the undertaking; and as Smith and Son had not paid the price of the iron to him, he was entitled to retain it as against Smith and Son, and consequently against Balls and Son, the holders of the note.

The Appellant delivered 500 tons of the iron to Balls and Son, in terms of a special arrangement; and by a "Minute," Balls and Son restricted the conclusions of the summons to a demand for delivery of 500 tons, and failing delivery, for payment of 2,000*l.* sterling in respect of damages.

Balls and Son having become insolvent, the Respondent, George Hinton Bovill, was appointed to wind up their affairs under a composition contract, and thus became the Pursuer of the Action, and the Respondent to the present Appeal.

The proceedings commenced before the *Sheriff* of Lanarkshire, Sir Archibald Alison; who on the 10th of March 1852, (altering the Interlocutor of the *Sheriff Substitute*,) sustained the defence of Dixon, and in doing so issued the following note :—

> The grounds on which the Sheriff proceeds in pronouncing the above Interlocutor, are, first, that there is a distinction between the English and Scotch law, in regard to the transference of moveable subjects or *jura incorporalia*, the former holding the transfer completed by assignment alone; the latter, in addition, requiring delivery or intimation. 2ndly, That as the Defender's defence against payment is founded on his right of *retention* of a fund which has never passed out of his hands, the fact of intimation of the transfer of the scrip having been made to him, is no derogation to his fundamental and inherent right of *retention*, any more than a similar intimation to the keeper of a bonded cellar, whose goods, which had been transferred by indorsation of their bill of lading, could be excluded by that intimation from pleading his right of retention for warehouse rent, or other similar charges. 3rdly, That these principles have been applied by the Court in the case of Melrose, 7th March 1851; and subsequently, by Lord Dundrennan in the case of Dimmack, Thompson, and Firmstone; and that thus, on principle and authority, the defence founded on the right of retention should be sustained.

DIXON ET AL. v. BOVILL.

The case was then carried by advocation to the Court of Session. On the 7th December 1852 the *Lord Ordinary* (*a*) found as follows :—

The Lord Ordinary finds that the document libelled, and which was granted *in re mercatoria*, is not struck at by the Statute, 1696, chap. 25, and that it does not require a stamped deed of assignation to transfer the right to the said document, to the effect of entitling the holder thereof to enforce implement of the same. Finds that the said document was intimated and transmitted to the Defender by the Pursuers, and acknowledged and acted on by the Defender, as giving the Pursuers right to delivery, before any right of retention had arisen in favour of the Defender as against Messrs. Smith and Son, the original holders. Finds that, in these circumstances, the Defender cannot now plead against the Pursuers any right of retention arising out of the subsequent bankruptcy of Messrs. Smith and Son; but is bound, under the document libelled, to deliver to the Pursuers the iron specified in the said document; and therefore, in the whole matter repels the defences, and decerns against the Defender, in terms of the first conclusion of the libel as restricted.

His Lordship added the following note in explanation of his decision. The question is deemed very important. We therefore give the *Lord Ordinary's* statement and reasoning at length:

The Defender, Mr. Dixon, through his agent, Mr. M'Culloch, appears to have sold to Messrs. Smith and Son of London a parcel of iron of 1,000 tons, at the price of 2,200*l.*, for which they granted a bill, dated 26th June 1849, and payable September 28, 1849. The bill was received by Mr. Dixon, who in return, granted a delivery note, dated 29th June 1849, bearing that he would deliver to the holder of the document 1,000 tons No. 1 pig-iron, free on board at Glasgow, after the 25th of August next, upon the same being lodged with him. Another transaction took place in the course of July, by which Messrs. Smith and Son purchased another parcel of iron of the same description, and at the same price. They accepted a draft for it at 2,200*l.*, at three months, which became payable on the 13th of October 1849. The accepted draft was handed over to Mr. Dixon, and Messrs. Smith and Son received a second iron scrip note, as it is termed, in these terms :— "Glasgow, 10th July 1849.—I will deliver 1,000 tons No. 1 pig-iron, free on board here when required, after the 10th day of September next, to the party lodging this document with me. (B.151.) (Signed) For William Dixon, John Campbell." There appears

(*a*) Lord Rutherfurd.

to have been another transaction for 2,000 tons between the parties, of subsequent date, in which bills and iron scrip-notes were interchanged; but the details are of no importance, and it need not be further referred to. It will be remarked in passing, that the iron was deliverable *during the currency of the bills*, and also that the second parcel of iron was deliverable nearly three weeks *before the bill for the first parcel became payable*. Smith and Son became insolvent, and were unable to retire the bill for the first parcel of iron, which fell due on the — of September, and a commission of bankruptcy was soon afterwards issued. The Respondent is not very explicit in his statements about the date of this insolvency; but it was admitted by his counsel at the debate, and the Lord Ordinary took a note of the admission, that the insolvency was to be held as of the 28th of September, when the bill for the first parcel was dishonoured.

In the meantime, Messrs. Smith and Son had sold to the Complainers, Balls and Son, 1,000 tons of iron. Balls and Son granted Smith and Son their bills for the price, dated 14th July 1849, payable at four months, and these bills have been retired; so that, between Balls and Son and Smith and Son, the price has been paid. Upon granting the bills, Messrs. Balls and Son received from the Messrs. Smith and Son the delivery note, dated 10th July 1849. In the course of August and September 1849, a correspondence took place between Messrs. Balls and Son and Mr. Dixon, which is of great importance. Messrs. Balls and Son, with reference to the scrip which they held, proposed that Mr. Dixon should allow them to divide the parcel, so that they might sell it in portions. This, however, Mr. Dixon refused, by letter of the 29th of August. Messrs. Balls and Son, in a letter of the 30th of that month, say,—"We clearly understood the 1,000 tons was unfettered in any way, or we most assuredly should not have bought your order; for how is it possible for any merchant to take away, or you to deliver, 1,000 tons at once? Our idea was, that as we had only sold 500 tons, 300 and 200, for immediate shipment, it would be an accommodation to you in the result. However, it wants but a few days; if we send you the order for 1,000 tons, will you at once reply to our orders on you, that you will ship the 300 and 200 tons when required?" Mr. Dixon's answer was, of this date:—"Your favour of the 30th ult. was duly received, but owing to the absence of the writer, was not replied to at the time. Messrs. Smith and Son purchased the 1,000 tons pig-iron, as I understood, for their own use; and on the under-taking being lodged with me I will ship the iron as required, in the usual way." On the 5th of September, Mr. Short, on the part of Messrs. Balls and Son, wrote:—"By desire of Messrs. Thomas Balls and Son, of London, I enclose your undertaking, dated the 10th July 1849, for 1,000 tons of No. 1 pig-iron. Against this deposit Messrs. Balls and Son have given an order on you for 300

DIXON ET AL. v. BOVILL.

and another for 200 tons, all of which I trust you will find correct." And with this letter the delivery note was transmitted to Mr. Dixon. It was received, therefore, and held by him *subsequent to the time when*, under the note of 10th July, *he had engaged to make delivery*, and *before* any plea of retention had opened, in consequence of the insolvency of Messrs. Smith and Son.

The rest of the correspondence during the month of September does not appear to be material. The Lord Ordinary, however, must observe, that on Mr. Dixon's part there was very great delay in his correspondence, and in accepting and complying with the various delivery notes made by Messrs. Balls and Son. At last, in consequence of the insolvency of Messrs. Smith and Son, Mr. Dixon refused delivery, and the Complainers intimated their claim for the iron and for damages. A great many points have been taken in defence. It was pleaded, and in reply, very anxiously, before the Lord Ordinary, that the scrip note was illegal, as not being stamped or probative, and was not transferable by mere delivery; but required a deed of assignation probative by the law of Scotland, and duly stamped.

The Lord Ordinary, though he thinks the present case may be decided on its specialties, cannot pass on to consider them without observing that he thinks the scrip note, as it has been called, which occurs here, is in some respects essentially different from the delivery-notes payable to a particular party or order, or to a particular party or bearer, which has been the tenor of most of those that have hitherto been the subject of judgment. The note in this case specifies no party; it contains a simple obligation to deliver, when required, to *the party lodging the document*, and it is not otherwise addressed. And it may be of importance to observe that Smith and Son had objected to the scrip note offered for the first parcel, on the ground that the iron was made deliverable to themselves. Assuming that such a note may be granted, and that it may pass from hand to hand, the first question is—what is the obligation undertaken by the grantor, and has the obligation which he has come under to deliver the iron any reference to *an existing or possible claim of retention as against any third party, whether a purchaser or the original holder?* It seems impossible to doubt that a party may undertake such an obligation. Would any legal difficulty attend the document in which the party bound himself to deliver a certain parcel of goods to the holder of the note, declaring expressly that he waived all claim of retention, or any other plea of personal exception that might be competent to him as against the first grantee in the note, named or not named? The Lord Ordinary sees no objection in law to such a document. If he is right in repelling the prejudicial defence, he thinks it would merit very grave consideration were it necessary to argue the point, whether such be not truly the legal import and character of the note issued in this case. When a party, without reference to the

person with whom he originally transacts, and without reference to any condition as to price, puts into circulation a note of delivery, binding himself absolutely and unconditionally, for so the note may be, and the Lord Ordinary rather thinks should be read; how can he be heard to plead against the holder of the document, who has it for value, that he has a right to retain, in respect of the price not being paid by the unknown original purchaser of the note, or in respect of subsequent and independent transactions between him and that party?

The Lord Ordinary doubts whether too much effect has not been given to the circumstance that the original purchaser may have been known to the complainers. Messrs. Balls and Son may have been aware that Messrs. Smith and Son were the first purchasers from Mr. Dixon. That will not alter the character of the note, or the obligation undertaken by it, and will not bring the case within the principle which has been applied to an order of delivery prestable "to a party named or his order," or "to a party named or bearer." With reference, however, to the decisions upon notes of the last import, the Lord Ordinary cannot feel confident in the distinction to which he has now referred, though, in a case of different circumstances, he would have thought it worthy of grave consideration.

But even this does not appear necessary for the decision of the present case. In this instance the delivery note was presented to Mr. Dixon before any right of retention whatever had arisen in Mr. Dixon's favour as against Messrs. Smith and Son, or against any other party. The insolvency of Smith and Son did not happen for a fortnight afterwards. If Smith and Son had demanded delivery, Mr. Dixon could not have refused it when the scrip was presented. His obligation was prestable during the currency of the bills. The currency of the bills, therefore, formed no ground of exception. But the note was not merely intimated to Mr. Dixon; it was actually transmitted to and received by him; and he not only did not intimate to the Messrs. Balls and Son any *possible* claim of retention, for he had no *actual* claim, but he acknowledged distinctly his obligation to deliver to them in lump,—that is, the whole parcel. The only objection stated by him was, that he did not choose to split the order, as he called it, or make delivery in smaller parcels; and even that objection he waived, and engaged to deliver to the orders of Messrs. Balls and Son, whom he then plainly held to be the owners of the iron, certain parcels of considerable amount. Whether the parcels he thus undertook to deliver exhausted the 1000, is matter of little moment, for the undertaking is equally conclusive of the fact, that in respect of Messrs. Balls and Son's transmitting the note he held them to be the owners of the iron.

The Defender pleaded strongly on the maxim, ASSIGNATUS UTITUR JURE AUCTORIS. But the Lord Ordinary is not aware that the maxim can receive application in such circumstances as these,

DIXON ET AL. v. BOVILL.

where the ground of exception competent to the cedent did not exist, when the assignee's right was completed. In this case, certainly, it did not exist, for it arose only in consequence of the *subsequent* insolvency of Messrs. Smith and Son; and it is not and cannot be pretended that any objection could have been taken if the whole parcel had been required to be delivered.

The Lord Ordinary would only observe, in conclusion, that the present is not a question with creditors. It is not a question with the trustee on a sequestrated estate, who claims retention of goods sold, but found undelivered in the bankrupt's hands. Such a case stands upon quite different grounds, and would not be affected by the circumstance even of the price having been paid. Here it is a claim of retention pleaded by the seller, in respect of the price not being paid by the original vendee. The Lord Ordinary does not understand that the trust-deed makes any difference in the case, and does not observe that anything is founded upon this circumstance by the Respondent.

The Appellants submitted this decision to the review of the Second Division, and a variety of procedure having subsequently taken place (*a*), the cause on the merits was finally considered by the Court below (21st February 1854), when the learned Judges of the Second Division pronounced judgment as follows:—

The Lords find that the document founded on, dated Glasgow, 10th July 1849, which was granted *in re mercatoria*, is not struck at by the Statute, 1696, cap. 25, and that it does not require a stamped deed of assignation to transfer the right to the said document, to the effect of entitling the holder thereof to enforce implement of the same. Find that the original pursuers, Balls and Son, became the onerous holders of the said document. Find that they intimated and lodged the said document with the Defender, William Dixon. Find that after 10th September 1849, they were entitled to demand delivery of 1,000 tons of pig-iron No. 1, free on board at Glasgow, in virtue of said document. Find that according to the sound construction and legal effect of said document, no right of retention remained in the Defender, William Dixon, against the holder of said document lodging the same with him, in respect of any claims he might have after the said 10th September against the party who originally entered into the contract of sale with him for the purchase of the said quantity of iron, and repel such plea of retention proponed against the holder of the said document. Find that the said William Dixon was absolutely bound to deliver the said iron in such quantities as might be arranged by the parties

(*a*) See *infrà*, p. 20.

after the 10th September, and did wrongfully refuse to deliver the same to the original Pursuers lodging the document with him. Find that the said wrongful refusal is, in the whole circumstances of the case, to be taken as at 1st October 1849. Find that the said William Dixon, having so wrongfully failed to deliver, is, and the other reclaimer, William Johnston, his trust-disponee, is also bound, in terms of the libel as restricted, now to deliver 500 tons of pig-iron No. 1, free on board at Glasgow, to the present Pursuer, George Hinton Bovill, on demand, under said document, duly lodged in 1849 with the Defender, William Dixon. And find, ordain, and decern accordingly; and allow decree for delivery of the said 500 tons of pig-iron No. 1 to be extracted *ad interim.*

Against this judgment the present Appeal was tendered.

Sir *FitzRoy Kelly* and Mr. *Rolt* for the Appellants. The question is whether upon a contract for the sale of iron the right of the vendee can be transferred, as attempted in this case, *the price being unpaid.* The document of 10th July 1849, purports to be a promissory note; not, however, for the payment of money, but for the delivery of a certain quantity of iron. We submit that the following reasons of appeal are unanswerable. First, we contend that the original vendor is not bound to deliver to the second vendee where the price has not been paid by the original vendee. Secondly, this document is not negotiable, nor can any right under it be transferred by mere delivery. Thirdly, we insist that the Appellant was entitled to retain the iron on the insolvency of the original vendee, although the bill which had been granted for the price was not then mature. And, fourthly, we contend, upon Scotch law, that this document, being blank in the name of the party to whom it was granted, is null and void under the Act of 1696, c. 25. There is upon this question no difference between the law of Scotland and the law of England. This document is not a bill of exchange, neither can it correctly be called a promissory note.

DIXON ET AL. v. BOVILL.

A bill of exchange is a creature of mercantile usage: A promissory note is a creature of Statute, both here and in Scotland (*a*). If the doctrines contended for on the other side were sanctioned, the consequences would be serious indeed. Their proposition is, that instruments may be issued in this form to any number and to any extent, and that the assignees may sue upon them. But this is clearly wrong; for the assignee stands in the place of the assignor, and is subject to his obligations. If so, the present action is not sustainable, any more than if it had been brought by Smith and Son themselves. This is, in effect, a promissory note issued by a private person, payable to bearer, a thing clearly incapable of being enforced. Why might not such a document be for money? What was the use of the Statute 12 Geo. III. c. 72, placing promissory notes on the footing of bills of exchange? Such an instrument is not *in re mercatoria*, and has never been heard of here or in Scotland till the present case. Suppose I write to an ironmaster, saying, "I am "desirous of purchasing one thousand tons of iron, at "such a price, deliverable on the 10th, 15th, and 20th "September next." Suppose the answer states, "We "agree, but we cannot fix the day. However, we will "inquire and let you know." Suppose that two days after they write, saying, "We will deliver 100 tons on "the 5th January." There may be several alterations and much correspondence, and in one of the letters there may be a condition for payment in cash or by good bills. Now, is it to be said that a person producing any one of these letters is entitled to claim delivery, without regard to the rest of the correspondence? We do not deny that Smith and Son might have assigned the benefit of this contract to Balls and Son by a regular deed of assignment, but in that case

(*a*) 3 & 4 Ann. c. 9. and 12 Geo. 3. c. 72.

Balls and Son would stand in the shoes of Smith and Son. The Respondents' contention is the extravagant one that Balls and Son can sue in their own name, without regard to the relations and equities subsisting between the original parties. This broad and novel proposition nothing less than legislative authority can clothe with the attributes of law. The judgment pronounced by the Second Division in this case is therefore erroneous *in toto*, and must be reversed.

The cases and authorities cited by the Appellants were *Leslie* v. *Robertson* (*a*), *Douglas* v. *Erskine* (*b*), *Bruce* v. *Maxwell* (*c*), *M'Ewen* v. *Smith* (*d*), *England* v. *Bates* (*e*), *Townley* v. *Crump* (*f*), *Bloxam* v. *Sanders* (*g*), *Graves* v. *Key* (*h*), *Miles* v. *Gordon* (*i*).

The *Solicitor General* (*j*), Mr. *Anderson*, and Mr. *Bovill* for the Respondents. The engagement here is to deliver iron to the party producing the document, which is of a description not illegal or repugnant to general principle, but eminently calculated to promote convenience in commercial transactions. The nearest approximation to this document is that of a bill of lading.

But even if the decision of the Court below were erroneous or doubtful on the general question, the Appellants are bound by the correspondence. And such was the opinion of the *Lord Ordinary*.

The Respondents' Counsel cited Bell's Prin. (*k*), *Hay* v. *Brookes* (*l*), *Shaw* v. *Fisher* (*m*), *Wynne* v. *Price* (*n*), *Young* v. *Smith* (*o*), *Midland Great Western*

(*a*) Morr. 1397.
(*b*) Morr. 1397.
(*c*) Morr. 1397.
(*d*) 6 Bell, App. Ca. 340.
(*e*) 11 Ad. & El. 856.
(*f*) 4 Ad. & El. 58.
(*g*) 4 Barn. & C. 941.
(*h*) 3 Barn. & Ad. 313.
(*i*) 4 Tyr. 295.
(*j*) Sir R. Bethell.
(*k*) Sect. 8.
(*l*) 10 Ad. & El. 309.
(*m*) 2 De G. & Sm. 11.
(*n*) 3 De G. & Sm. 310.
(*o*) 4 Rail. Ca. 135.

DIXON ET AL. v. BOVILL.

Railway Company v. *Gordon* (*a*), *Gorgier* v. *Melville* (*b*), *Hebblethwaite* v. *McMorine* (*c*), *Mortimer* v. *McMillan* (*d*), *Dimmack's case* (*e*), *Lickbarrow* v. *Mason* (*f*), *Howard* v. *Tucker* (*g*), *Alsager* v. *St. Catherine's Dock Company* (*h*).

Sir *FitzRoy Kelly* replied.

Lord Chancellor's opinion.

The LORD CHANCELLOR:

My Lords, In this case the defence against the action rests upon two grounds: first, the invalidity of the document of 10th July 1849, and, secondly, that the holder can stand only in the place of Smith and Son.

The action was originally brought in the Sheriff's Court, and the *Sheriff* decided upon the latter ground (*i*), namely, that Smith and Son not having paid for the iron, Balls and Son, the holders of the document, could not enforce the contract against Dixon—that Dixon, in truth, had what we should call a lien, or what they call in Scotland a right of retention, until the price was paid.

The *Lord Ordinary*, however, took a different view of the case, for by his Interlocutor he found that the "document libelled was intimated and transmitted to "the Defender by the Pursuers, and acknowledged and "acted on by the Defender as giving the Pursuers "right to delivery, before any right of retention had "arisen in favour of the Defender as against Smith "and Son, the original holders." And upon that ground he reversed the Interlocutor of the *Sheriff* and decerned in favour of the Pursuers.

If the question had turned exclusively upon the validity or invalidity of this document, I am bound to

(*a*) 5 Rail. Ca. 76.
(*b*) 3 Barn. & C. 45.
(*c*) 5 Mee. & Wel. 462.
(*d*) 6 Mee. & Wel. 58.
(*e*) Court of Session, 22d Dec. 1855.
(*f*) 1 Smith's L. Ca. 431.
(*g*) 1 Barn. & Ad. 712.
(*h*) 14 Mee. & Wel. 794.

say that I should not have concurred with the Court of Session. I think that the document is invalid. The effect of such a document, if valid, is to give a floating right of action to any person who may become possessed of it. Now I am prepared to say that this cannot be tolerated by the law either of Scotland or of England. The only cases in which such an action can be sustained are those of bills of exchange and promissory notes depending on the law merchant in the case of bills of exchange, and on the Statute of 12 Geo. III. chapter 72, section 36, in the case of promissory notes. No evidence was given to show any general mercantile usage affecting such instruments as that now in question (*a*) ; indeed, it was impliedly admitted at the trial that no such usage could be established by evidence, and I must, therefore, assume that no such usage exists; that is, that there is nothing in the law merchant to warrant what is now contended for.

Bills of lading, I may observe, afford no analogy whatever. A bill of lading is a mere symbol of property. No right of action passed by indorsement previously to the Act of last session (*b*), which caused a right of action to pass as well as a right of property. No authority for such transferable right of action has been adduced in argument before your Lordships, and all principle is against its validity.

The rule preventing such actions is by no means one of a technical nature. It is a rule founded in extremely good sense. In England, a plaintiff suing

(*a*) As to the trial, see *infrà*, p. 20; and see next case, *Mackenzie* v. *Dunlop*, *infrà*, p. 22, and more especially the evidence of Mr. Connal, p. 38, showing that these iron scrip notes were of recent introduction, ill understood, and "not liked by English correspondents."

(*b*) 18 & 19 Vict. c. 111., enacting that active remedies shall pass with the property.

DIXON ET AL. v. BOVILL.

Lord Chancellor's opinion.

on a contract, unless it be a contract under seal, must prove a consideration. That indeed is not the case in Scotland. But in Scotland, as well as in England, it is a perfectly good defence to show illegality of consideration; *turpis causa*, for instance, or that the instrument in question was given to induce a violation of the law, or that it was an instrument tending to restrain freedom of action in cases where, on grounds of public policy, every one ought to be free, and the like. I give these instances merely as illustrations. Where an action is brought by one of the contracting parties, illegality of consideration can always be pleaded as a defence. So, also, where an action is brought by the assignee of the original contract, which may be done directly in Scotland, and indirectly, by means of a court of equity, in England, the illegality of the original contract affords a good defence. It is the policy of the law to preserve this principle intact, in order to prevent Courts being made ancillary to violations of the law. Now, this principle is entirely defeated, if a contracting party can make a floating contract enforceable by bearer, for the bearer does not sue as assignee of the original contracting party. He may be, and probably is, a stranger to the original contract. His right, if any, is under an independent contract with himself, against which no illegality as between the original parties can be set up. Bills of exchange have been made an exception for the convenience of trade, but it is an exception not to be extended. The drawer of the bill gives to the indorsee a better title than his own; and this leads, or may lead, to many ill consequences; but mercantile convenience has sanctioned it. No such necessity exists in the case of other contracts, and there is no authority to warrant it. Indeed, I may observe that the Statute

of the 12th Geo. III. chapter 72, section 16, affords statutable authority by analogy against the present claim; for if a promissory note could have been made transferable by indorsement at common law, there would have been no necessity for that Statute.

The policy of such a rule may be illustrated by considering in the present case how the matter would have stood if there had been (which there is doubt there was not) illegal consideration between Dixon and Smith. Suppose, for instance, the consideration had been that Smith should aid Dixon in some way in committing a fraud upon the revenue laws; that would have afforded a good defence against Smith and against those who claimed by progress from him. The policy of the law requires that such defence should be pleadable. But these notes, if they are valid, would make such a defence impossible; for it is clear that if they have any effect they give a title independent of that of the original contractor.

If the convenience of those engaged in trade and commerce requires that scrip notes of this description should be made legal and valid, that must be effected, if at all, by the Legislature; and on any measure being introduced for such an object, it will be for your Lordships and the other House of Parliament to consider and weigh well the social benefits and evils likely to result from the sanctioning of the proposed change. It may be that the general adoption and use of these scrip notes would afford safe facilities to commercial enterprise. It may be, on the other hand, that such a practice would tend to produce and keep alive a restless spirit of inordinate speculation, and so be injurious to those engaged in wholesome commerce. But these are all questions for your Lordships in your legislative, not in your judicial, capacity. Looking

DIXON ET AL. v. BOVILL.

Lord Chancellor's opinion.

at the matter merely as advising your Lordships as a Court of Appeal, I have no hesitation in saying that, independently of the law merchant and of positive Statute, within neither of which classes do these scrip notes range themselves, the law does not, either in Scotland or in England, enable any man by a written engagement to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title.

My Lords, I have thought it right to state this general principle, though I do not think it applicable to the present case. I think the conclusion at which the Court arrived in favour of the Respondents was correct; but I think so by reason of the special dealing which took place between Balls and Son and Dixon.

My Lords, this appears in the correspondence. Balls and Son, it seems, sold a portion of the iron which they thought they were entitled to receive under this scrip note to different persons, some of whom were Messrs. Nash, Cole, and Elton, of Bristol. According to the terms of the note the iron was deliverable on the 18th of September, although it was not to be paid for till some time afterwards, in the month of October. Shortly before the time when the iron became deliverable, Balls and Son having thus sold, or agreed to sell, a portion of it to these gentlemen at Bristol, a correspondence takes place; and I cannot help suspecting, from the correspondence, that Dixon felt himself likely to be unable to execute the contract which he had entered into, or was supposed to have entered into by this note.

The correspondence, as far as I need advert to it, may be stated to have begun by a letter from Balls and

Son to Dixon on the 27th of August. They write, "We requested our friend Mr. William Short to ask you to divide a 1,000 ton order of yours, as we had so sold it, and required to hand our friends delivery orders. He informs us that you object to this, which we consider very hard, as we bought it without any knowledge of any specific arrangement, and know not how to complete our sales if you still refuse us that which is usual, and which cannot affect you in any way, and the day of delivery, 10th September, being so near at hand." To which they answer on the 29th of August, "The sale was made for the express purpose of avoiding the issue of scrip undertakings such as you want; and I am not disposed to make any alteration on the original obligation."

On the next day, the 30th of August, Balls and Son write to Dixon, "We are favoured with your letter of the 29th. We clearly understood the 1,000 tons was unfettered in any way, or we most assuredly should not have bought your order; for how is it possible for any merchant to take away, or you to deliver 1,000 tons at once? Our idea was, that as we had only sold 500 tons, 300 and 200, for immediate shipment, it would be an accommodation to you in the result. However, it wants but a few days; if we send you the order for 1,000 tons, will you at once reply to our orders on you, that you will ship the 300 and 200 tons when required? Your reply will oblige," &c.

A few days afterwards, namely, on the 4th of September, Dixon writes thus to Balls and Son, "Your favour of the 30th ultimo was duly received, but owing to the absence of the writer was not replied to at the time. Messrs Smith and Son purchased the 1,000 tons pig-iron, as I understood, for their own use; and *on the undertaking being lodged with*

DIXON ET AL. v. BOVILL.

Lord Chancellor's opinion.

me, I will ship the iron, as required, in the usual way."

Then a little further correspondence takes place, which it is not necessary for me to go into,—an angry correspondence rather,—but the result was that Dixon did not deliver the iron.

Now, that being what passed between the parties, it appears to me that the Court was perfectly right in adopting the view which had evidently been the view, and as far as I can collect the only view, of Lord *Rutherfurd*, that there had been a clear adoption by Dixon of Balls and Son as the parties to whom he undertook to deliver the iron, and to whom he did deliver some; because, being informed as he was by the holders of this scrip note that they held it, which, though it did not in my view of the case give them a legal right, yet gave them a plausible right;—Dixon, if not liable to deliver to them, certainly was liable to deliver upon his original contract with Smith and Son, who were at that time solvent; and it being probably unimportant to him whether he delivered to one or the other, he enters into a distinct engagement (for so I cannot but consider it, looking to his letter of the 4th of September) that he will hold the iron disposable to the orders of Balls and Son. It appears to me that that is a very rational view of the case which was taken by Lord *Rutherfurd*; and although not the ground upon which the majority of the Court decided, was the ground adverted to by Lord *Wood* as being in his view of the case a sufficient ground (*a*).

(*a*) Lord Wood, at the close of his opinion, used these words: "The Pursuer having not merely intimated, but lodged the scrip note with the Defender, at which date no claim of retention had opened to the Defender, even as against Smith and Son, whose insolvency did not happen for a fortnight afterwards; and no objection to delivery having been made, or having been capable of being

For these reasons, although the conclusion at which the learned Judges arrived is not, I think, founded upon a correct view of the legal effect of the instrument, I am of opinion that the conclusion itself is correct. I therefore move your Lordships to dismiss this Appeal. And as I cannot but think that this is not quite an honest proceeding on the part of Mr. Dixon, I move that it be dismissed with costs.

JUDGMENT.

The Lords Spiritual and Temporal in Parliament assembled find, That by virtue of the correspondence which passed between Messrs. Balls and Son and the said Appellant William Dixon, and particularly by, virtue of the letter of the said Appellant William Dixon of the 4th of September 1849, he the said Appellant William Dixon became liable to deliver the 1,000 tons of iron to Messrs. Balls and Son, upon their lodging with him, the said Appellant William Dixon, the document of the 10th of July 1849, stated in the summons: And therefore it is *Ordered* and *Adjudged*, That the said interlocutors complained of in the said Appeal, so far as they advocate the cause, alter the Interlocutor of the Sheriff, and find that the Appellants are bound to deliver to the Respondent, in terms of the libel as restricted, 500 tons of pig iron No. 1., free on board, at Glasgow, and so far as they find the Respondent entitled to expenses to the extent of one hundred and sixty-four pounds eight shillings and one penny, and so far as they contain directions consequent on such findings, be and the same are hereby affirmed: And it is further *Ordered* and *Adjudged*, That the said Petition and Appeal be and the same is hereby dismissed this House: And it is further *Ordered*, That the Appellants do pay or cause to be paid to the said Respondent the costs incurred in respect of the said Appeal, the Amount thereof to be certified by the Clerk of the Parliaments.

The affirmance is confined to the specialty arising from the correspondence between Balls and Son and Dixon, as to which the *Lord Chancellor* (the only Law Peer present) concurred with the *effect* of the decree of the second division, as well as with the Interlocutor,

made on that account, I have not heard anything stated to satisfy my mind that a claim of retention afterwards emerging as against Smith and Son, could be competently founded on as a reason for withholding delivery from the Pursuer."

DIXON ET AL. v. BOVILL.

and remarks of the *Lord Ordinary*, so far as these go on the dealing between Balls and Son and Dixon.

Another point was argued at the bar of the House as to the competency or regularity of the Appeal. An issue had been directed. At the trial no parole evidence was offered; the proof was wholly documentary. The case was left to the Court for decision under a "note" or "minute," in the following words:—"In "respect that the parties concur in holding that there "is no question of fact on which the opinion of the jury "could be taken, and that the case on the facts, as now "proved, turns wholly on questions of law for the "Court, the *Lord Justice Clerk* discharged the jury, "in order that the parties may bring the whole case "before the Court for judgment, each party being "entitled to state any questions of law which the "facts raise." The *Lord Chancellor* held that this "note" or "minute" did not create any embarrassment in the decision by the House of the real merits. The cases of *Craig* v. *Duffus* (*a*) and *Dudgeon* v. *Thomson* (*b*) went on the principle that the Court below had really acted as arbitrators by agreement of the parties; and consequently that the decision was not subject to the review of the House. "Now "the question," the *Lord Chancellor* observed, "was, "whether that principle is applicable to the present "case. I think it is not; because, if it were, it "would be carrying the doctrine of *Craig* v. *Duffus* "and *Dudgeon* v. *Thomson* to an alarming extent. "At the same time, I may observe, that I think it is "of extreme importance for the learned Judges, in "trying issues, to proceed strictly in accordance with "the form pointed out by the Statute which establishes

(*a*) 6 Bell's App. Ca. 308. (*b*) *Suprà*, vol. i. p. 714.

" jury trial in Scotland. For, unquestionably, very
" great embarrassment has been upon more than one
" occasion caused by their not adhering strictly to the
" rules which must necessarily govern all jury trials, by
" not requiring the jury to find either for the Plaintiff
" or the Defendant; or to find a special verdict upon
" which exception may be taken, if necessary, to the
" ruling of the Judge. But I do not think that appears
" to be important in the present case."

(*See the next Case.*)

GRAHAME, WEEMS, AND GRAHAME—FRY.