

THE EARL OF KINTORE AND ANOTHER, APPELLANTS.
THE UNION BANK OF SCOTLAND, . . RESPONDENTS (a).

1863.
March 12th.

Error in Fact: Reversal without prejudice, in respect of an error in fact, not adverted to in the Court below.

Arbiter—Fraud: An arbiter may deal with questions of fraud so as to do justice between the parties, although he has no direct jurisdiction to reduce or set aside an instrument, or to order it to be delivered up to be cancelled (b).

The points involved in this case appear sufficiently from the opinions expressed by the Law Peers.

Mr. *Rolt* and Sir *Hugh Cairns* were for the Appellants.

The *Solicitor-General* (c) and Mr. *Anderson* for the Respondents.

The LORD CHANCELLOR :

*Lord Chancellor's
opinion.*

My Lords, the question to be decided upon this Appeal, or rather the question upon which the Appeal depends, is whether the Respondents have or have not submitted to arbitration in respect of the entirety of their several debts and demands against the Appellant, the Earl of Kintore.

In the Court below it has been found and declared that the preliminary defence of the Respondents (rested on the fact of there having been a submission to arbitration) was a sufficient ground of defence to an action of reduction brought by the Earl. Now with

(a) See this case reported in the Second Series, vol. 24, p. 59.

(b) Per the Lord Chancellor (Lord Westbury) in course of the argument.

(c) Sir Roundell Palmer.

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regard to the several debts which were included in the Respondents' affidavit, by which they sought to qualify themselves to rank as creditors under the trust deed, I am of opinion that that preliminary defence was correctly allowed.

But then arises a material circumstance, and one upon which it is a matter of regret that the point does not appear to have been clearly and directly called to the attention of the Court below, namely, that a bond and disposition in security for 8,000*l.*, alleged to have been granted by Lord Kintore, being one of the items of the Respondents' claim, is not included or mentioned in their affidavit; and accordingly in respect of that bond the Respondents did not claim, so far as the affidavit is concerned, to be ranked as creditors under the trust deed in the pleadings mentioned.

It certainly does appear that the Court below considered that the Respondents had sought, and sought directly, to be ranked as creditors in respect of that bond and disposition in security; and I have no doubt that it was taken for granted, but erroneously taken for granted, that there had been a distinct application to prove in respect of it (*a*).

Under these circumstances I shall humbly submit to your Lordships the propriety of reversing the Interlocutor complained of, so far as relates to this bond and disposition in security, and of remitting the case to the Court below to proceed in the cause, with a declaration that your Lordships' order is not to affect or prejudice any question that may hereafter arise;

(*a*) In this Note the Lord Ordinary said:—"They" (the Respondents) "have advanced a claim to be ranked on the trust estate for a sum of 8,000*l.*;" and then afterwards, "There is nothing involved but the validity of a debt sought to be ranked under the trust."

because in reality the conclusion at which your Lordships now arrive will only be that this particular matter (which appears to your Lordships important to be considered and decided) shall be again submitted to the Court below, it being apparent that a fact was assumed in the Court below which was not correct.

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If that fact had been according to the assumption of the Court below, your Lordships probably would have agreed altogether in the propriety of the Interlocutor complained of. That, however, is a point left utterly undetermined by your Lordships' present decision. I, therefore, shall humbly move your Lordships to reverse that Interlocutor so far as relates to the bond and disposition in security for 8,000*l.*, but without prejudice to any questions that may arise hereafter, and also to reverse the Interlocutor so far as relates to the expenses; reserving those expenses to be considered and dealt with hereafter in the cause as the Court of Session shall think right.

In all other respects I should venture to propose with your Lordships' concurrence that the Interlocutor be affirmed.

Lord CHELMSFORD :

*Lord Chelmsford's
opinion.*

My Lords, it has been argued that the arbiter was not empowered to consider any question of fraud which might be alleged in answer to any creditor's claim.

The reference provides that the arbiter is to determine the amounts of the different debts, and he is to take the oaths of the several creditors upon the verity of their debts, and all other probation necessary for instructing the claims of the several creditors respectively. It is clear that the creditors are to establish the validity of their debts to the satisfaction of the arbiter, and if it turns out that the debt is

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invalid by reason of its being founded in fraud, there is no more reason why the jurisdiction of the arbiter should be excluded from the consideration of that particular ground of invalidity than from the consideration of any other ground upon which the debt cannot be claimed against the estate. Therefore I think it perfectly clear that the question of fraud is a question which is open to the arbiter under this deed.

With respect to the bond and disposition in security for 8,000*l.*, I agree with the noble and learned Lord on the woolsack that it will be desirable not to express any opinion. And I agree, therefore, that the course which has been suggested will be the proper one for your Lordships to adopt on the present occasion.

Lord KINGSDOWN: My Lords, I concur.

JUDGMENT.

Ordered and Adjudged, That the said Interlocutors, complained of in the said Appeal, be and the same are hereby reversed, so far as such Interlocutors relate to the bond and disposition in security executed by the Earl and Countess of Kintore, and the assignation thereof, in the proceedings mentioned, without prejudice to any questions which may arise hereafter upon the record. And it is further *Ordered and Adjudged*, That the said Interlocutors be and the same are hereby also reversed, so far as the said Interlocutors relate to the expenses given in either of the said Interlocutors, but reserving these expenses to be considered and dealt with hereafter in the cause as the said Court of Session shall think right. And it is also further *Ordered and Adjudged*, That the said Interlocutors, in all other respects, be and the same are hereby affirmed. And it is also further *Ordered*, That the cause be and the same is hereby remitted back to the Court of Session in Scotland, to proceed in the said cause, and to do therein as shall be just, and consistent with this Judgment.

DODDS & GREIG—LOCH & MCLAURIN.