FRASER, ... APPELLANT.
HILL AND OTHERS, . . . RESPONDENTS.

1853.
12*th April.*

To carry on pawnbroking business without disclosing the partners is a contravention of the 39 & 40 Geo. 3, c. 99.

No pawnbroking contract stipulating to conceal the name of any partner can be valid.

But if the contract were legal in its inception, the mode of carrying it on would not render it illegal.

Therefore an equivocal Exception which might mean either that the contract was illegal in its inception or that the mode of carrying it on had rendered it illegal—*Held* a bad exception.

An exception to a charge ought to be so framed as that the Judge at the trial may decide and set the matter right, if he can.

Where the contract is in writing, and where the stipulation for concealment appears plainly on the face of the instrument, the Court may decide.

But where the contract is the result of circumstances established by parole—the jury must find, as matter of fact, that it comprised in its inception a stipulation for concealment; from whence the Court is to deduce the inference of illegality.

The rule according to which the Judge, and not the jury, decides questions of "probable cause" upon malicious prosecutions,—is a special and exceptional rule of ancient date.

THIS case, which is very fully reported in the Court below (*a*), came before the House on a Bill of Exceptions.

At the trial, the presiding Judge (Lord *Robertson*) was called upon by the Respondents' counsel to direct the jury "that, on the facts proved," there was no lawful pawnbroking partnership between the parties in the issues mentioned. The ground of the application was that the evidence failed to show the necessary publication of the partners' names as required by the Pawnbrokers' Act (*b*).

The learned Judge having refused so to direct the jury, an exception was taken to his charge (*c*).

The exception, upon full argument, was allowed by the Judges of the First Division, who accordingly set aside the verdict, and granted a new trial. The present appeal was against that decision.

The *Solicitor-General* (*Bethell*), and Mr. *Bramwell*,

(*a*) 17th January, 1852; Second Series, vol. xiv. p. 335.

(*b*) 30 & 40 Geo. 3, c. 99. This act requires that the name of every partner in a pawnbroking concern shall appear over the door of the premises, and be inserted in the licences and pawn-tickets, &c.

(*c*) The Bill of Exceptions stated that, "Lord Robertson having charged the jury, the counsel for the Defenders (Respondents) excepted to the charge, in so far as his Lordship had refused to direct the jury that, on the facts proved, there was no lawful partnership between the Pursuer (Fraser) and Alexander Hair in the business of pawnbrokers between the years 1840 and 1844."

for the Appellant: The exception ought not to have been allowed. It was equivocal. It might mean either that the contract was illegal in its inception, or it might mean that, although not illegal in its inception, the mode of carrying it on had been illegal. But the mere mode of carrying it on would not have been sufficient to make the contract itself illegal (*a*). [LORD CHANCELLOR: No—not though the illegality were ever so soon after the date of the contract.] But in the present case the Judge at the trial did leave the question of illegality to the jury. It was for the Respondent to establish illegality; which was not to be presumed. The exception should have stated whether the objection affected the contract in its inception, or arose from the mode of carrying on the business (*Bayne* v. *Whitehaven Railway Company*) (*b*). [LORD CHANCELLOR: You must so except as that the Judge may decide, and set the matter right if he can.]

The *Lord Advocate* (*Moncreiff*), and the *Dean of Faculty* (*Inglis*), for the Respondents: Certain facts in this case are uncontroverted. As to these, it was not necessary to take the sense of the jury; but it was the duty of the Judge to direct upon them that the contract was illegal. The illegality followed from the omission of the name, first over the door; secondly, in the pawn-tickets; and, thirdly, in the licences. The Judge refused to give the direction required; and therefore the exception to his charge was properly allowed. The case is analogous to that of "reasonable or probable cause" in malicious prosecutions — the decision of

(*a*) Per Lord Chancellor Brougham: "If a contract, legal in itself, has been made, nothing done afterwards, how illegal soever, can operate to make the contract unlawful." *Armstrong* v. *Armstrong*, 3 Myl. & K. 64; and see the remarks of Lord Denman in the same case.

(*b*) 7 Bell, App. Ca. 79

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which appertains to the Judge and not to the jury (*Mitchell* v. *Williams*) (*a*).

Thinking the case too clear to require any reply on behalf of the Appellant, the following remarks, in moving for judgment, were delivered by

The LORD CHANCELLOR (*b*):

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My Lords, the point in this case lies in the very narrowest compass, and my mind is so thoroughly made up that it would be nothing short of mere affectation to listen to any further argument upon it. The decision, moreover, relates to a subject with which the very learned Judges who have pronounced it are perhaps not quite so familiar as those who preside in the Courts of this country. Had they been so, I cannot but think that the error into which I humbly conceive they have fallen could not by possibility have occurred.

The ground of the action was that the Appellant having been, from the year 1840, a partner as a pawnbroker with one Hair,—that person in the early part of 1845 fraudulently assigned over to certain other persons, Hill and Sinclair, the partnership-stock, admitting them into partnership, and ousting, or endeavouring to oust, him, the Appellant, from a participation in the profits of the concern, in which he was jointly interested with Hair. The object of the suit was to call to account those persons who had thus been taken into partnership by this fraudulent assignment, it being alleged that they were cognizant of the interest that Fraser had in the property.

My Lords, there can be no question that it is an illegal thing for any person to carry on the business of a pawnbroker without having his name disclosed. The

(*a*) 11 Mee. & Wel. 205. (*b*) Lord Cranworth.

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necessary corollary is, that no contract made so to carry on the business of a pawnbroker can be valid.

Now the defence set up to Fraser's demand in this suit was, that the pawnbroking business was a partnership, and that it had been carried on as a partnership upon a contract that he, Fraser, was not to have his name appear. That was the substance of the defence, and that was the matter proceeded on eventually, it being a question purely of fact; and certain issues were directed which it was supposed would raise, and which in fact did raise, the whole question in dispute.

The first issue was "whether the said deed, bearing to be a deed of copartnery, was executed between the said Alexander Hair, the Defender Walter Hill, and the said deceased James Sinclair, fraudulently and wrongously, for the purpose of transferring and dealing with stock and property belonging to the Pursuer, or in which he had an interest from its being partnership property, and from his having been a partner of the firm of Alexander Hair and Company, Glasgow, to his loss, injury, and damage?"

My Lords, that is the only issue to which I need direct your attention. And the question to be decided was, whether the partnership deed was a fraud by reason of its being a contrivance to transfer to the new partners that property in which Fraser, the Appellant, had an interest. I doubt whether, according to the older forms of proceeding in this country, such an issue could have been endured, because it raises a sort of negative pregnant. But I will assume that, substantially, it raised this question,—whether their act of partnership was a legal partnership; and if it was, then whether the deed was wrongous and fraudulent as between Hair, the assignor, and Fraser, the present Appellant.

The case comes to trial, and at the trial a number of

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witnesses are called on the part of Fraser, for the purpose of showing—first, that there was a partnership and a legal partnership; and the way in which he attempts to prove that is this:—He calls a number of witnesses, who all state the fact that in substance he did appear as a partner; some speaking with more and some with less distinctness. Robert Steel says, "I have heard both"—that is, both Fraser and Hair—"talk of it. It was quite well known they were partners. They had a law-suit about it. Hair remained in possession after that, and a while after he gave it up. I had conversations with Hill before the dispute or law-plea. Hill said Fraser was a partner with Hair, but had denuded himself by not having his name in the licence. He often talked about it, and he knew well they were partners. It was publicly known." And several other witnesses speak much to the same effect.

Now the first question is—If this were not a pawnbroking concern, but some other concern in which there was no necessity for the name appearing, do these facts satisfy you, the jury, that there was a partnership at all? There were no partnership articles, —there was no agreement or memorandum in writing, —nothing but these circumstances from which you, the jury, may or may not infer a partnership. Now, do they or do they not satisfy you of that? If they do not, there is an end of the case. There was no partnership at all. Consequently it was no fraud to transfer the property, in which, in that state of things, it would be quite obvious that Fraser had no interest.

But the second question is this—If Fraser and Hair were partners, was it part of the original agreement that Fraser's name should be concealed? That is to be inferred or not from all the circumstances of the case.

One of the most important facts to lead to the inference that it was part of the original contract, is the fact, that from the beginning to the end, Fraser's name never once appeared. It never appeared over the *door*—according to the evidence at least—it never appeared on the pawnbroker's tickets, and it never appeared in the licences. I think that the conclusion may be very reasonably drawn, as a matter of fact, that it was part of the original contract. But that is a question of fact to be decided by the jury, and not a question of law to be determined by the Judge. There cannot be the least doubt upon the point; and what the Judge should have done—and I dare say what he did—what any Judge would have done if asked by both parties,—was to point out to the jury, first of all, that the question was, Are you satisfied that Mr. Fraser was a partner at all? And then, if you are satisfied that he was a partner, Are you satisfied that it was or was not a part of the original terms or stipulations of the contract that his name should be concealed—that he should, in short, be a secret partner?

But, my Lords, the learned counsel for the Respondents have urged before your Lordships, that the Judge was bound to state, that upon the facts proved there was no legal partnership between the Pursuer and Hair in the business of pawnbrokers. If he had so laid down, I think I may state, without the least fear of contradiction, that upon exception to such ruling, it would not have borne argument. The Judge had no right to say, upon the facts proved leading to a particular conclusion of fact, that the conclusion was or was not established. That was matter for the jury alone to deal with. It would have been error on the face of the record if he had stated that, his not stating which, forms the ground of the present exception.

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My Lords, it was urged by the Respondents' counsel that there is an analogy between the present case and a case which frequently occurs in the Courts of Common Law in this country, where the question of "probable cause" does not go to the jury, but is invariably left to the Judges. In *Mitchell* v. *Williams* (*a*), upon a case for a malicious prosecution, it was held that the Judge had done right in laying down to the jury as a matter of law, that there was no reasonable or probable cause for instituting the proceeding. That, however, is an exception to the ordinary rule—an exception introduced for this reason, that it is thought that the question how far it was proper for a person to have instituted a prosecution, is a question which is infinitely better entrusted to Judges than to juries; and therefore it has been, from the very earliest period of time, the established doctrine that the Judge is bound to state (and it is for that purpose made matter of law) whether there was or was not probable cause for that proceeding which is complained of as having been malicious (*b*). In order to sustain such an action against a party for having prosecuted maliciously and without probable cause, two things must be made out,—that the prosecution was malicious, and that it was without probable cause. Whether it is malicious or not is purely a question for the jury. Whether there was or was not probable cause is a question of law for the Judge. To enable the Judge to arrive at a decision upon that question of law he may, if the circumstances of the case call for it, ask the jury any fact leading or not to a particular conclusion. Did the party do so and so, because upon your answer, "aye or no," I come to the conclusion whether there was or was not probable cause. This, however, I repeat is an exception to the ordinary

(*a*) 11 Mee. & Wel. 205.
(*b*) *Panton* v. *Williams*, 2 Q. B. 169.

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rule. And in the next place it needs no authority, because it is matter of law, and not of fact, which the Judge has to lay down.

The Respondents' counsel have also relied upon the authorities which establish, that where the Court see, by a written agreement of partnership, that it was part of the original contract that the name of any one of the partners should be concealed, there the contract must be dealt with as illegal. There can be no doubt of that proposition, it being once established that to carry on the trade with any partner *secretly* is an illegal act. The moment that you see on the face of the instrument that it was part of the *original* stipulation that the trade was to be so carried on, you see that which makes the original contract null and void.

Nothing can illustrate this doctrine more clearly than the course which one of the cases appears to have taken, where the jury, not having found as a fact that concealment was part of the original stipulation, it was held upon error that the Court could not infer a contract contravening the Acts of Parliament (*a*).

I cannot help thinking from the short observations of Lord *Ivory*, that he must have taken the same view of the case that I should now recommend your Lordships,

(*a*) The case to which the Lord Chancellor here refers was apparently that of *Armstrong* v. *Armstrong*, as reported in 2 Cromp. & Mee. 284, where Lord Denman (delivering the judgment of the Court of Exchequer Chamber) said: "It does not appear, in point of fact, that any contract was made between the parties to carry on the partnership in such a manner as to contravene the Acts of Parliament. That clearly is no part of the written agreement set out, because the words "secret" or "suppressed" are nowhere used in that agreement. It is quite possible the parties may have had a collateral agreement pointing to that object, and, if so, it would have the effect contended for on the part of the plaintiff in error; but that is a fact which ought to have been found by the jury, and which the Court cannot infer." See also *Gilpin* v. *Enderby*, 5 Barn. & Ald. 954.

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because he says, "The only shadow of difficulty which I feel is on the point whether it was not for the jury to decide whether there was a partnership or not, and whether it ought not to have been left to them to find out what were the stipulations of the partnership, instead of their being directed in point of law whether or not there could be a partnership." That seems to me to go to the very bottom of the whole question. No doubt it was for the jury so to decide; and if it was, it ought to have been left to them to decide. Accordingly I apprehend it was so left. In my opinion the learned Judge at the trial was perfectly right; and the interlocutor, which allowed this exception, I think, therefore, was wrong, and ought to be reversed.

The *Solicitor-General:* My Lords, will your Lordships allow me to propose that the judgment of the House should run in this form:—Reverse the interlocutor complained of, repel the exception, and find the Appellant entitled to the expenses in the Court below incurred by reason of that exception; which is exactly the judgment that your Lordships would have pronounced if you had been sitting in the Court of Session, instead of the learned Judges whose decision the House has now been reviewing.

The *Lord Advocate:* I have no objection.

The LORD CHANCELLOR: Be it so (*a*).

(*a*) This case seems to verify an observation of Sir Richard Bethell that, in matters of civil jurisdiction, trial by jury is but "an exotic," as yet unprosperous in Scotland.

ROBERTSON & SIMSON—DEANS & ROGERS.