

**Foster v. Driscoll and Others.**

Court of Appeal

[1929] 1 K.B. 470

F. , a financier, L. , a distiller, D. & M. , a firm of shipbrokers, and one A. were minded to load a ship with a cargo of whisky to be carried across the Atlantic and sold in the United States, or at some point from which it could easily be smuggled into the United States, in violation of the laws of that country.

On October 26, 1927, an agreement was entered into between F. , L. and D. &M. , whereby L. agreed to sell to D. &M. 7 500 cases of whisky ... not later than November 26. D. & M. were to take delivery on board a vessel of a regular line of steamers. Payment was to be made by a two bills drawn by F. , accepted by A. and indorsed to L. , payable ninety days from November 26, and to be drawn and accepted on October 26 and handed to L. to hold as security until he should hand the shipping documents or delivery order from bond on or before November 26.

L. agreed to lend D. & M. 25 001. for the purchase of the steamer, the loan to be secured by a first mortgage on the steamer. F. agreed to lend D. &M. 10 001.... to be secured by a second mortgage on the steamer. D. & M. agreed to insure the steamer for 10 001. against all risks including seizure or confiscation and 25 001. against marine risks, and deliver to L. cover notes for 15 001. and 10 001. and to F. a cover note for 10 001. F. and L. agreed jointly to underwrite the insurance for 10 001. against confiscation ...

The documents purporting to be bills of exchange for 55 001. and 48 121. respectively were sent to Lindsay, who was then at Lausanne. They both bore the lithographed heading " London. " Seeing that as inland bills they were null and void, not being on stamped paper, on February 2, 1928, he struck out "London" from each of the documents and substituted " Lausanne" as the place of origin. Then he added the date December 3, 1927, to each of them, and signed his name as drawer to the second and stamped them as foreign bills. The bills were presented for payment on March 5, 1928, dishonoured, and duly protested.

On February 29, 1928, Sir H. S. Foster brought an action against the syndicate, Lindsay, and Attfield, claiming rescission of the two agreements of October 26, 1927...

On March 10, 1928, Lindsay brought an action against Attfield and Sir H. S. Foster as the acceptor and drawer respectively of the bill for 55 001....

On March 7, 1928, Lindsay brought an action against the syndicate and Attfield as acceptors of the alleged bill for 48 121....

LAWRENCE L. J. ;

The evidence led in the three cases under appeal has convinced me that the documents in respect of which relief is sought were documents drawn up for the purpose of dressing up in a legal garb such of the terms of an illegal joint adventure . . .

Wright J. has found that the object of the scheme which brought the parties together was to take advantage of the illicit market for whisky existing in the United States of America, and to make a profit in excess of the ordinary market profit obtainable in this country, by sending whisky either to the United. States or to some convenient entreport for the United States, involving the necessity of their finding a ship, the whisky, finance and some one in a position to dispose of the whisky on the other side of the Atlantic. The learned judge has however shrunk from giving effect to the consequences which in my opinion flow from such a finding — namely, that the Court ought to decline to entertain the actions and counterclaim.

It is plainly established by the evidence that by the laws of the United States the importation into that country of alcohol for beverage purposes is prohibited and made a criminal offence, and that the parties with knowledge of these laws embarked upon their adventure with the object of making a very large profit by importing, or by instigating or aiding and abetting others to import, a considerable quantity of whisky into the United States in violation of the laws in force in that country.

The parties set themselves by no means the easy task of framing documents which should on their face be legal and bear the semblance of ordinary commercial documents and which would safeguard the individual interests of those who were risking their goods and money in the adventure. In these circumstances it is not surprising to find that the documents which were in fact drawn up and which have formed the principal topic of discussion in the Court below and in this Court, do not disclose the true nature of the adventure, or the whole of the terms arranged between the parties. It is settled law, however, that the existence of illegality may be proved by parol evidence notwithstanding the apparent legality of the documents before the Court and that if it be proved that a partnership was established for an illegal purpose the parties will not be allowed to escape the consequences of such illegality merely because they have taken care to conceal it...

The absence of any written record of the arrangements made by the parties as to the disposal of the whisky after it had been shipped on board a regular line of steamships, or as to the part which Mr. Attfield was to take in the adventure, ought not to blind the Court as to the real nature of the transaction or as to the true nature of the documents produced in these proceedings, or induce it to treat such documents as if they related to a legitimate commercial transaction.

The parties; after having met and agreed to join in the adventure , decided to acquire, equip, and man a special steamer which should convey the whisky across the Atlantic, obviously realizing that in view of the object of the adventure it could not be shipped to its intended destination in a regular line of steamships. ...

In my judgment the irresistible inference from the facts which I have stated is that the object of the parties in embarking upon this adventure was to obtain the large profit which would accrue to them by an illicit sale of the whisky in New York, and that Mr. Attfield's part in this adventure was to effect such a sale and to make the best arrangements he could for getting the whisky into the United States either by running it into that country in the Wearhome or by employing rum-runners to effect the importation into that country, or, if necessary, by delivering the whisky to the purchasers outside the Linked States at such a place, in such a manner, and under such conditions, as would ensure that the purchaser would be able to run it into the United States....

On principle I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise , and no such criminal offence has in fact been committed; and none the less so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our Courts would furnish a just cause for complaint by the United States Government against our Government (of which the partners are subjects) , and would be contrary to our obligation of international comity as now understood and recognized , and therefore would offend against our notions of public morality. ...

For the reasons stated I am of opinion that the orders made by the Court below ought to be discharged, and the actions and counterclaim ought to be dismissed

without any order as to the costs of any of the parties either in the Court below or in this Court.