including the fixing of the tolls and rates on the whole lines of railway between Glasgow and Wemyss Bay, should be committed to the joint committee, that would have been distinctly stated, whereas it is only the traffic on the Wemyss Bay Railway and Pier, including the tolls rates to be levied in respect of that traffic, which is, according to the agreement, to be managed and fixed by that committee.

"The complainers also founded upon the 60th section of their Act of 1862, which provides that 'while and so long as the Wemyss Bay Co. shall be worked by the Caledonian Co. under the said agreement, only one short distance charge shall be made in respect of the traffic conveyed partly on the lines of the Caledonian Railway Co., and partly on the Wemyss Bay Railway.' But the Lord Ordinary considers that this clause does not affect the construction of the 11th article of the agreement.

"For these reasons the Lord Ordinary is of opinion that the reference inaugurated by the Caledonian Railway Co. is in accordance with the complainers' statute and the agreement confirmed thereby, and that by the reference inaugurated by the complainers, which is the subject of complaint in the process of interdict at the instance of the Caledonian Railway Co., the complainers propose to submit a question to the arbiters which neither they nor the joint committee, in respect of whose difference of opinion the arbiters are called upon to act, are entitled to consider and determine."

The Wemyss Bay Co. reclaimed.

The SOLICITOR-GENERAL and BALFOUR for them.

WATSON and JOHNSTONE for the Caledonian Co.

The Court adhered to both interlocutors.

Agents for Wemyss Bay Co.—M'Ewen & Carment, W.S.

Agents for Caledonian Railway Co.—Hope & Mackay, W.S.

Saturday, July 8.

SECOND DIVISION.

CALDER *v.* STEVENS.

Pactum Illicitum—Sponsio Ludicra. The prize at a racing meeting having been admittedly gained by a certain horse, the owner of the horse raised an action against the stake-holder for the amount of the stakes in his hands—Action sustained, *repelling* the plea that its purpose was to give effect to a *sponsio ludicra*.

This was an action in the Sheriff-court of Haddington by Robert Calder, farmer, Kelloemains, against G. H. Stevens, innkeeper, Gullane. The Sheriff-Substitute (SHIRREFF), after some procedure, repelled preliminary pleas stated by the defender, and the facts and pleas are fully stated in the following Note, appended to his interlocutor:—"This is an action at the instance of the owner of horses that ran in two of the races at what was called 'The Gullane Spring Race Meeting,' held early in the year 1868. The defender consigned the stakes lodged with him by the pursuer which are sued for, and of consent of the defender, warrant was granted by interlocutor of 28th January 1869 for payment of the money to the pursuer. The conclusions of the action still insisted in are therefore only for the stakes lodged by the owners of the four horses that ran along with the pursuer's mare 'Jungle Queen,' in the race called the 'Gullane Hurdle Handicap,' and for the £20 of added money, which the pursuer maintains he is entitled to as the owner of 'Jungle Queen,' the winner of that race.

"The defender admits that he collected funds for the races, that he acted as clerk of the course, and did the duty falling on him in that capacity; he also admits that the pursuer's horse won the 'Gullane Hurdle Handicap.'

"The dilatory pleas are,—*First*, That the action being for a game or gambling debt or claim, it is incompetent, the claim being illegal and not actionable; and *Second*, That under the rules in the programme of the meeting (No. 8 of process), the claim sued for ought to have come before the stewards of the races, and the pursuer is barred from bringing it in 'a civil court.'

"As to the first of these pleas, there are two grounds on which actions to enforce claims arising out of races are incompetent—where it is sought to settle a question of *sponsio ludicra*, or where an action is brought to recover what has been wagered or betted on the result of a race.

"To ask a court of justice to settle which horse has won a race is clearly incompetent, and no action will be sustained where to its disposal it is necessary to settle such a question, or to make any other inquiry into the conduct of games or sports, —*O'Connell* v. *Russell*, 25th November 1864, (3 Macph., p. 94); *Paterson* v. *M'Queen and Kilgour*, 17th March 1866 (4 Macph., p. 602). But there is no question of *sponsio ludicra* to be disposed of here; there is no dispute that the pursuer's horse, 'Jungle Queen,' won the race in question.

"The defender pleads that the action *is for 'a game or gambling debt.'* It is undoubted that no action can be sustained for such a debt; or for any claim founded on a wager or bet (Bell's Prin., sec. 36; 1 Bell's Comm., p. 300, 5th edit.). 'It is a fixed rule in the law of Scotland that no action will lie for enforcing a wager' (2 More's Lectures, p. 282). But, as was remarked by Lord Ardmillan at advising *O'Connell* v. *Russell*, 25th November 1864 (3 Macph., p. 94), 'it is not the racing that is illegal; but the gambling attendant on racing is illegal, and no court of justice will give decree for recovery of money so won.' Wagering or betting on the result of the races is just the gambling which is illegal, and courts will not enforce payment of debts thereby incurred, *Wordsworth* v. *Pettigrew*, 1779 (Mor., p. 9524). But the claim here is not grounded on a wager or bet, to which it is essential that there is something staked to be lost or won (Webster's Dictionary). In this case there was nothing staked to be lost or won by the defender; nothing was ventured to be lost or won, either by him or by the parties who had subscribed money for the race. There was no risk of loss incurred by any of the parties who competed in the race. This is an action for payment of a prize offered to the horse of greatest speed of those which should compete for it, to be ascertained by a race, the money to pay which is averred to have been collected by the defender from the public for the express purpose of providing such prizes, and is in the defender's hands (at this stage these averments must be assumed to be true). There is an opinion by Lord Mackenzie, in delivering judgment in the case of *Graham* v. *Pollock*, 5th February 1848 (X. D. P. 648), that the Court will interfere to compel the holder of such a prize to deliver it to the competitor adjudged to be the winner. The other judges, forming the majority

in that case, viz., Lords Fullerton and Jeffrey, seem to be of the same opinion.

"No question of *sponsio ludicra* being raised in this case, and the claim being for a prize offered to the winner of a race, and not founded on a wager, the Sheriff-Substitute is humbly of opinion that the first dilatory plea must be repelled.

"2. The Sheriff-Substitute is of opinion that the second dilatory plea should also be repelled. The whole questions for the stewards of a race meeting have been disposed of, or the parties have not required the decision of the stewards. The functions of the stewards were at an end when it was settled who was the winner of the race.

"*Lastly*, the pursuer avers (cond. 3) that the defender has in his hands funds to meet the pursuer's claims. This is denied by the defender. The Sheriff-Substitute is of opinion that the defender cannot be held liable for the prizes offered beyond the amount he collected for the purpose of the race meeting. The Sheriff-Substitute has therefore allowed the pursuer a proof of his averments as to the amount of funds in the hands of the defender, and to the defender a counter-proof."

The Sheriff (SHAND) adhered.

After a proof had been led the Sheriff-Substitute found that the defender had no funds in his hands. The Sheriff recalled this judgment and pronounced an interlocutor in the following terms:—"Finds that the defender received entry-monies, or sums deposited to the amount of £12, in addition to the sum of £3 paid to him by the pursuer, from persons whose horses ran in the Gullane Hurdle Handicap Race at the Gullane Spring Meeting of 1868, on the arrangement that such entry-monies or deposits should be paid, along with certain added money from expected subscriptions, as a prize to the owner of the horse which should win the race or competition: Finds it is admitted that the pursuer's horse was successful in the race; finds that the defender has failed to prove any facts or circumstances which entitled him to pay away the said sum of £12 on account of expenses disbursed by him in relation to the said race or meeting, or to pay away the same to any person other than the pursuer, and, *separatim*, that he has not proved that said sum, or any part thereof, was in fact paid away on account of expenses or otherwise; finds, in these circumstances, that the defender had at the date of the present action funds in his hands, received as aforesaid, which he was bound to pay over to the pursuer, irrespective of the sum of £6 already consigned in process and paid over to him: therefore finds the defender liable to the pursuer in the sum of £12, with interest as concluded for; *quoad ultra* assoilzies the defender from the conclusions of the action, except as to expenses; finds the defender liable to the pursuer in expenses, and remits," &c.

The defender appealed.

FRASER and SCOTT for him.

SOLICITOR-GENERAL and MARSHALL for respondent.

At advising—

LORD JUSTICE-CLERK—The question now in dispute relates to a sum of £20, being the amount of stakes at a race. The defender is the clerk of the course, and he maintains that he is not bound to pay that amount. The defence is, (1) that the subject matter of the action is such that a court of law will not consider; and (2) that it was a condition of the race meeting that the expenses were to be paid out of the funds in the hands of the stakeholder, before the stakes were given; and that the expenses exceeded the amount contributed. In order to make out this second plea the defender must show that it was a condition of the deposit that the expenses were to be paid out of the stakes. He must show that the pursuer was a sort of joint adventurer. The pursuer states—"The monies advertised in the programme of the races were offered unconditionally, that is, they were not stated to be dependent on any particular sums being realized by subscription or otherwise; and the pursuer's horses were entered and run at the meeting on the faith and understanding that the monies were offered *bonafide*, and would be paid to the winners thereof." The statement in answer is—"Denied, with this explanation,—it was implied, if not thoroughly understood by all parties, that the race winnings would depend on the amount of subscriptions realized, and the pursuer, from his racing knowledge, well knew this." The defender states again, in his own statement of facts—"The pursuer, anterior to the races, never asked the defender to become good for any winnings he might acquire; and never antecedently apprised him he would hold him responsible. Further, the defender never said he was or would be responsible, and he avers the pursuer spontaneously came forward to the sport as a joint contributor, and became a party to the joint adventure, taking his chance of payment if he gained." I am of opinion that these statements must be read as applicable not to the stakes but to the added money. But I do not think that the defender intended that the stakes should be subject to deduction for expenses, or that there was any such condition attached to the deposit. It is quite clear upon the figures that the defender has sufficient funds in his hands to pay all the expenses of the meeting, and the stakes to all the winners, the added money being now out of the case.

The defender, then, having money in his hands, says that the subject matter of the action is so tainted that a court of law will not inquire to whom that money belongs. This is not a plea that the Court will look upon favourably. Betting and gambling upon horse races has been discouraged by the civil law and by statute. It was maintained that the Act 1621 made horse-racing, and all that was connected with it, illegal. But that statute does nothing of the sort. It was illegal to wager on racing before the statute was passed, and it gave a means of disposing of money gained by wagers. Bets are illegal, on the ground that they are *sponsiones ludicræ*, and they obtained a statutory legality for the purpose of getting the money paid to the poor. In England a similar result is reached by somewhat different means. There it is held that the unsubstantial nature of the transactions is enough to prevent the courts of law taking cognisance of them. In Scotland we have to some extent adopted this view. Mr Bell in his Commentaries (ii, 1, 1,) says—"By the law of Scotland a rule has been followed on the subject of wagers which is opposed to that of the English law, but which English judges of the highest name have regretted that it is almost too late to adopt in England." And he then quotes the opinion of Lord Mansfield and Mr Justice Ashhurst, in which they regret that there is no law in England similar to our law of gaming, and refer to the Scotch case of *Bruce* v. *Ross*. If the question were, which horse won the race, we could not perhaps decide that on the ground that it was a *sponsio ludicra*. Now,

under the civil law *sponsio* was a contract to deposit a sum in Court to await the result of a lawsuit. In the title of the Digest, *De Aleatoribus* (11, 5, 2,) this distinction is made—"*Senatus consultum vetuit in pecuniam ludere; præterquam si quis certet hasta vel pilo jaciendo vel currendo, saliendo, luctando, pugnando, quod virtutis causa fiat.*" A *cutamen de virtute*, therefore, did not fall under the description of *sponsio ludicra*. This involves the distinction between a game and a bet upon a game. There is nothing illegal in a game. What is illegal is making it the subject of a bet. The cases are quite consistent with the view that horse-racing is a lawful pastime. In the case of *Graham* the Court had no difficulty in entertaining the question to whom a picture, which was a prize at a coursing meeting, should be given. The case of *O'Connell* was not about a prize, but a bet of £100 to £57, that one horse should beat another. A good illustration of the principle is a prize at a rifle meeting. We could not entertain the question which of the competitors had made the highest score, but in the event of there being no dispute who was entitled to the prize, we could give decree against the holder of the prize. Here then is a pure question of the contribution of 5 parties, having paid their money into the hands of the stake-holder, who does not deny receiving it, nor is there any dispute as to who is entitled to receive the money. There is no difficulty as to our jurisdiction.

The other Judges concurred, and the Court adhered to the Sheriff's judgment.

Agent for the Pursuer—Alex. Cassels, W.S.
Agent for the Defender—W. S. Stuart, S.S.C.

Tuesday, July 11.

FIRST DIVISION.

SPECIAL CASE — WILLIAM JOBSON AND PATRICK ANDERSON (LOW'S TRUSTEES) AND OTHERS.

Process—Special Case—Competency—Trustee. Circumstances in which it was *held* that it was competent for a testator to make his trustees the sole competent judges on certain special points connected with his estate, and that when he had done so neither the trustees nor any party taking benefit under the deed could come to the Court with a special case, asking the Court's opinion on these points.

This Special Case was brought before the Judges of the First Division by the trustees and beneficiaries under the trust-deed of Thomas Low of Mylnefield, in Forfarshire, to determine three questions—(1) Whether the sums realised from the working of a certain quarry of freestone upon the estate were to be paid by the trustees to the liferenters, or were to be retained and accumulated by the trustees for behoof of the fiars of the trust-estate. (2) Whether the sums realised by the sale of wood, being the thinnings of the plantations upon the estate on a somewhat extensive scale, should be paid to the liferenters or to be accumulated as above for behoof of the fiars. (3) In the event of the above mentioned sums being to be accumulated by the trustees, whether the interest upon them was to be paid to the liferenters or not.

In the course of the argument of counsel upon these questions, the Court called attention to the following clause in the trust-deed:—"*Eighthly*, It is hereby expressly provided and declared that the said trustees shall be the sole and only competent judges (*first*), of what shall form and be included in the said free residue and remainder of my said estate and effects, to be paid, assigned, and disponed as aforesaid; and (*secondly*), of what shall form the said nett rents, interest, dividends, and annual profits of the said free residue and remainder to be paid and disposed of as hereinbefore directed; and that the judgment or opinion of the said trustees on these points, and on all other points, as to which it is herein declared that they shall be the sole and only competent judge, shall be final and binding, and obligatory upon all parties concerned or interested under these presents."

The case was continued for argument on the question, Whether, in view of this clause, it was competent for the parties to come into Court at all on these matters?

ADAM and A. J. YOUNG for the trustees.

Solicitor-General (CLARK) and JAMIESON for the beneficiaries.

At advising—

LORD PRESIDENT—The question before us is, whether we should refuse to consider this special case? And before we determine to do so, we must satisfy ourselves that it was the intention of the testator here to prevent any such legal proceeding being taken by his trustees or the beneficiaries. As to the competency of a testator making such a provision, I really cannot entertain much doubt. If a testator were to lay down in his will that there was to be no litigation about his succession whatever, I should have great doubt about the validity of such a provision. But where a testator merely provides that there shall be no going to law upon certain special points, and arranges so clearly for their determination as here, the case is very different, and the provisions must receive effect. I think we may fairly draw an analogy in the matter before us from the 10th section of the trust-deed, which provides that the trustees shall be the sole competent judges in matters connected with the expenses of management of the trust property. Now, can there be the slighest doubt that this clause precludes any person taking benefit under the deed from raising any question in an accounting or otherwise, with respect to such expenditure by the trustees. Now, what is the difference between that class of questions and the ones we have proposed for our decision. These latter questions seem to me just to arise in the course of the administration of the trust. The deed provides that the trustees shall be the sole competent judges of the two questions—1st, What shall be included in the free remainder and residue of the estate to be ultimately paid to certain persons as fiars? And 2d, What shall form the nett annual revenue of the said free residue to be paid in liferent to certain other persons, beneficiaries under the trust? Now, I think that was just as competent a provision on the part of the testator as the one before alluded to. Questions arising between liferenter and fiar are generally questions of detail, better solved by ordinary sound headed men of business than by courts of law. The testator intended that this should be the case here, and that his trustees should not be bound by strict rule of law in the determination of these questions, but should judge, in the exercise of their own discretion as *boni viri*, what was the fair proportion of these sums to