public in regard to this wreck? That is a question of common sense, and on the whole matter I am of opinion that the crew were so placed as to be at least obstructed, if not prevented, from taking the measures that otherwise a reasonable man should take. I am not in the slightest degree moved by the notion that if an alarm had been given on shore, not only to the officials of the river, but given to the neighbourhood, there would not have been found, and that rapidly enough, aid and assistance to accomplish this matter. It is in vain to say that it has not been shown what particular men would have come to their assistance, or what particular appliances would have been produced. If the case were put on such a footing as that, and if the question depended on what the crew and the boats or appliances might have done, it would have been in vain and ridiculous to say that because it was not shown whom they would have alarmed they were to be liberated from taking any steps. I am not going into that matter.

I am, however, moved by the position in which these unfortunate men, the crew of the "Loch Etive," were placed in after the accident, and I am more impressed with it after reading the evidence carefully. In the first place, they had been rescued with great difficulty from drowning. They had been in risk of their lives, an agitating enough affair of itself. In the second place, two of their number were seriously hurt—one of them so severely that he afterwards died. I do not wonder that they were anxious to get to Glasgow in these circumstances. Nor am I prepared to say that the obligation of protecting the navigation was one which should have been preferred to the obligation of protecting their comrade.

Independently of that, however, the crew found a refuge on board another vessel—the vessel, namely, which had run them down. Perhaps I should not say much about that vessel, as the question may yet arise. The "Toward" is not represented here. As far as we can see on the evidence, the other vessel, instead of taking any precaution or aiding the crew of the sunken vessel to take precautions in order to warn the public of the event which had taken place, put on steam at once, and even refused to give them a couple of lights which they asked for, and which could easily have been given. They were evidently far more desirous to complete their voyage than to remedy, or at least to lessen, the evil which their own want of skilful navigation had occasioned.

It is quite true that Mr Sim was aroused at twelve o'clock at night. He thought, as I think most people would have thought, that a light at the masthead would prove effective. Possibly that was an omission, but I cannot help feeling at the same time that it is but a slender omission, and not sufficient to bring this case up to what is necessary in order to make it a case of neglect of reasonable and ordinary precautions.

That is the general aspect of the case as it presents itself to my mind. On the general question, I should think there was no obligation on the part of those in charge; and having given this expression of the views by which I am impressed, I do not think it necessary to go further into that matter of law.

LORDS YOUNG and CRAIGHILL concurred.

The Court recalled the judgment of the Sheriff, and assoilzied the defender.

Counsel for Defender and Appellant—R. V. Campbell—James Reid. Agent—Thomas Hart, L.A.

Counsel for Pursuer and Respondent—D.-F. Kinnear, Q.C.—Mackintosh. Agents—Ronald & Ritchie, S.S.C.

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*Friday, May 27.*

## SECOND DIVISION.

[Sheriff of Lanarkshire.

### RISK *v.* AULD & GUILD.

*Public Company—Shares and Stock—Gaming Contract.*

Is a "bear account" a transaction of a gambling nature, so as to bar the parties from coming into Court upon questions that have arisen between them in connection with such an account?

*Opinions—per* Lord Justice-Clerk (Lord Moncreiff)—that as it does not amount to a wager to contract for the sale of goods of which the seller is not in possession, and has no expectation of being in possession, the operations on such an account are not gaming; *per* Lord Young—that where a case is disclosed of transactions in stocks which have no existence, where the balance to be paid by the one party to the other is truly a bet as to whether certain stocks will rise or fall in value by a certain day, the Court will not interfere to aid the parties.

*Agent and Principal—Stock Exchange—Closing of Customer's Account between Settling-Days—Misrepresentation by Person Employing Stockbroker as to his Means.*

A firm of stockbrokers who had incurred considerable liabilities in acting for a customer who had represented to them that he was possessed of a considerable sum of money, having discovered that his financial position was not what had been described by him, intimated to him that unless he could give them satisfactory references as to his position by the day following their letter, being a day between settling-days, they would at once close his account, and the customer not having complied with their request, they closed his account accordingly. In an action of damages at the instance of the customer—*held* that the brokers were justified in so acting.

*Proof—Relevancy—Acquiescence.*

In an action against a stockbroker for closing an account contrary to orders, to the damage of his customer, it appeared from statements made by the pursuer on record, and from correspondence produced, that he had induced the defenders to act for him on false representations as to his credit, and further that he had, in answer to a letter in which the broker, as a condition of going on with the transactions between them, demanded satisfactory references as to the pursuer's means, written re-

fusing any such reference, and added—"It will be better to close, at least for a time, until you get better information." *Held* that the pursuer had upon the record no good ground of action, and that in any event the terms of his letter imported acquiescence by him in the course proposed to be followed; and proof of the pursuer's averments *refused—diss.* Lord Craighill, who was of opinion that a proof should be allowed in order to explain the relation and position of parties.

This was an action at the instance of John Risk, residing in Glasgow, against Messrs Auld & Guild, accountants and stock-brokers there. The pursuer alleged that he had sustained loss and damage to the amount of £416, through the defenders having while employed by him as his brokers sold between settling-days on the Stock Exchange, and contrary to instructions from him, certain stocks which were then rising in the market, and which would if judiciously realised have brought him the sum sued for in addition to the sum of profit actually obtained. There had been certain dealings in stocks between the parties previous to the transaction in question in this case, which began with instructions given by the pursuer on 16th June for the purchase of 100 shares in the Steel Company of Scotland, 50 to taken up and paid for, and the remaining 50 to be carried over. The pursuer alleges on record that this order was for the joint-benefit of himself and a Mr Craig, and that that was known to the defenders. On 22d June the pursuer wrote to the defenders this letter:—"Gent.,—Sometime ago I gave orders for a bond of £3500 to be looked out for me. Yesterday I got notice that I could get £4000, a first bond on good property, but this will take away the cash I intended for the 50 Steel shares. Would it inconvenience you or upset anything already done to put all the 100 shares on the spec. list, and I could lodge with you say £50 against loss until closed. If any expense beyond the 1s. per share on the 50, charge it.—Yours truly, JOHN RISK." The defenders agreed to this request, and did not require the deposit of £50 offered. Thereafter the defenders on the pursuer's orders made numerous purchases and sales of stock, until about 15th July the purchases and sales represented a sum of £6500. At that date they wrote to him as follows:—"Dear Sir,—In consequence of information we have to-day received, we must ask you to give us a reference as to your position and means, else we must close your account. The information may not be correct, and a reference to your solicitor who offered you a bond for £4000 will doubtless satisfy us." At that period the stocks were being carried over to the next settling-day, 26th July. On 16th July the pursuer wrote this reply:—"Gent.,—I have just got your note, and am rather surprised at it. I rather think you have got bad information, but where a doubt has got hold, instead of giving references or making explanations, as all this has a tendency to unsmooth business between us a little, it will perhaps be better to close, at least for a time, until you may get better information. However, I should not like you to close all at once, as I think this would be imprudent, but we will try to finish up with this account. I expected you would have sold my Huntingtons yesterday; and if they and the Steels are good to-day, close both. Caledonians & Atlantics I think would be better to go on with until near the close of the account. I may say that, except lodging a little money as what I offered you, I never was asked for more before, and had this been proposed at first by you I would have taken it kindlier, as I consider this would not have been out of place, nor do I consider on the whole you are far wrong yet, altho' quite misinformed.—Yours truly, JOHN RISK." On the same day the defenders sold the stocks and closed the account. Thereafter they rendered to the pursuer a statement of account, bringing out a balance in his favour of £52, 15s. 4d. This the pursuer declined to accept, and raised the present action. He averred that the purchase of the Steel Company's shares was partly for himself and partly for Mr Craig, and that Mr Craig having been offered a bond for £4000 had accepted it, and had then arranged with him that he (pursuer) should take all the shares.

The defenders referred to the following rule of the Stock Exchange as showing that in the circumstances they were entitled to close the pursuer's account:—"87. When (1) members continue or carry over stock, shares, or other securities for their constituents, the differences, if any, thereon, against said constituents, shall be paid by them to said members not later than twelve o'clock on the settling-day; and failing due payment accordingly by said constituents, said members may thereupon close all their transactions then outstanding for said constituents; and when (2) members have entered into transactions for constituents, and while the said transactions are still outstanding, said constituents become bankrupt or insolvent, or by their own admission, intimation, or otherwise, are unable to implement said transactions, said members may thereupon close all said outstanding transactions; and they may so close said transactions in both cases foresaid either—(*a*) By assuming or taking over said transactions to their own account, or to the account of other constituents, at the average market prices of the day, as said prices shall be fixed by the committee; or (*b*) By selling out or buying in, as the case may be, either at their own hand, or through the secretary officially; and said transactions shall be entered to the credit or debit, as the case may be, of said constituents, and thus fix the balance due on their accounts."

They also pleaded that inasmuch as they had been induced to enter into transactions and incur personal liability on pursuer's behalf in consequence of his false representation that he had the command of £4000, whereas it now appeared that that sum belonged to another person with whom they had no relation at all, they were entitled, on the pursuer's failure to give them satisfactory references as to his position, to close his account.

The Sheriff-Substitute (SPENS) allowed a proof before answer and under reservation of all the pleas of parties.

He added this note:—"Defenders' agent argued on three separate grounds that the action should at this stage be dismissed. These grounds were—first, that on the face of the record and the admitted productions it appeared that the defenders had been induced by false representations to act as the brokers of the pursuer, and

that this being so, the defenders were entitled at any time to close the account—that is to say, at once to put in the market all the stock held for behoof of the pursuer. I do not think it either necessary or advisable to enter at any length into this question at this stage. I am satisfied that this question cannot be disposed of without an inquiry into the facts. The second ground on which defenders' agent craves that the action should be dismissed as irrelevant is that no particulars are given of how the claim of damage preferred is arrived at. I cannot refer to any decision upon the subject, but it is matter of well-known and established practice in the Court of Session that it is not necessary to set forth the particulars of an alleged claim of damage arising from a breach of contract, or otherwise. It is sufficient to set forth, as the pursuer has done here, a claim of damages for an alleged breach of contract, provided the alleged breach of contract is itself distinctly specified, and it rests upon pursuer to establish a specific amount of damage. It is, in the third place, argued by defenders' agent that by the rules of the Stock Exchange, on which he founded, and which were admitted by both parties as binding, the defenders were entitled to close the account on 16th July. This question is left over for determination till after the proof is taken, but I will merely say here that to sell off the pursuer's stock at once, on receipt of his letter of 16th July, without any further communication with him, seems to me to have been imprudent. A point was raised at the discussion as to the measure of damages, assuming the case relevant. I incline to think that defenders' agent is right in contending that damage must be limited, in any event, to the market price of stock on the day when pursuer received information that defenders had disposed of his stock, or at such date, at least so soon thereafter on receipt of the information as reasonably possible, pursuer could have gone into the market and replaced the stock. I refer to this subject here, for at the proof I expect distinct and specific evidence with reference thereto."

On appeal the Sheriff (Clark) pronounced this interlocutor:—"Finds that it appears on the record that the defenders were induced by misrepresentation on the part of the pursuer that he had the control of means to the extent of £4000 to undertake his employment and act for him: Finds that soon after they discovered that they had been misinformed in this respect, and that, in point of fact, as appears from his own letters in process, that he was not possessed of the said means: Finds that in these circumstances they were warranted in refusing to proceed further with his employment or execute his orders: And therefore Finds, in point of law, that he has disclosed on record no relevant case; sustains accordingly the defenders' pleas in law to this effect: Recals the interlocutor appealed against, and dismisses the action and decerns: Finds the pursuer liable in expenses."

He added this note:—"It is plain from the record that the defenders were induced to act for the pursuer as brokers on a gross misrepresentation, and that if they had continued to act for him they might have incurred responsibilities of a grave kind without any adequate security. The pursuer by his letter induced the defenders to believe that he had the control of £4000. Before executing his orders they, from inquiries made, ascertained that this statement was questionable, and accordingly before proceeding further they granted him an opportunity of satisfying them on the matter. Instead of doing this he wrote them another letter, the plain meaning of which was that their connection had better terminate, seeing they entertained doubts as to the matter in question, and giving them no satisfactory explanation of the state of his means. By the rules of the Stock Exchange referred to, it would appear that the defenders were acting quite within their power when in these circumstances they brought their connection with the pursuer to an end—indeed, were it not for such rules, no broker would be in safety to deal with parties as to whose means he was not perfectly informed. I would also notice that the statements in the condescendence averred, as regards the alleged claim of damages, are very far from being of that clear and distinct kind, more especially in reference to dates, which an action of this kind would require. In short, I do not think that on his own showing the pursuer has made a case of sufficient relevancy to be remitted to proof."

The pursuer appealed, and argued—The case was plainly not within the rule of the Stock Exchange quoted by the defenders, for that rule only applies to defaulters. Certainly it could not be held to apply to the pursuer without a proof. The case was one where an agent had caused loss to his principal by disobedience of his orders. The English cases of *Lacey* v. *Hill* (*Scrimgeour's claim*) July 2, 1873, 8 L.R. Ch. 921; *Lacey* v. *Hill* (*Crowley's claim*) April 25, 1874, 18 L.R. Equity Cases, 182, were in point. A proof should be allowed.

The defenders argued that no proof could modify the plain meaning of the pursuer's own letters produced in process, which formed in themselves a complete defence.

At advising—

Lord Young—I must say I have a very clear opinion of this case, and that without having any sympathy for either party. I am not going to make any observations on the matter of gambling in shares, which in my opinion the facts as stated here do not press on our consideration. There is no legal or moral objection to persons investing in shares in the expectation that they will rise in value and may therefore be sold at a profit. But there is a gambling of a pernicious description which is very prevalent, and which can only be profitable to brokers and occasionally to lucky gamblers. That gambling consists in selling stocks which have no existence, the operations being often carried on to an extent greatly exceeding the whole stock of the concern, and the proceeding being simply a betting by one party against the other that the stock will or will not rise in value in the course of a fortnight, and the transaction being settled by the losing party paying his balances to the winner. Sometimes this may be done under circumstances which leave no doubt as to its existence, and yet as there is no possibility of proving it, a Court will feel itself bound to aid a party invoking its aid in what is really such a proceeding. But where a case of this pernicious kind is really disclosed, I apprehend that a Court will refuse to aid the parties.

The law is clear. It is stated in two sentences in Addison on Contracts, 7th ed. 209—"A colourable contract for the purchase and sale of railway shares or of goods, where neither party intends to deliver or accept the shares or the goods, but merely to pay the differences according to the rise or fall of the market, is gaming and wagering, and it is for a jury to determine whether the parties really meant to purchase and sell, or whether the transaction was a mere bet upon the future price of the commodity." I look to the record in this action, which is raised by the customer against the broker, and find that the action is for breach of contract, because it is said if the contract had been observed the customer would have made more than he did. The statement might have been so made as to conceal the real nature of the arrangement. But we have a record admitted to be defective and to require amendment. No Judge is more willing than I to allow an amendment in order, to get at the matter really in dispute, but here in a case where the pursuer, a speculator in Glasgow, is engaged in pure gambling for differences, and the only amendment that can be made is to set out more clearly the arrangement under which he contracted with the broker to assist him in gambling, and where the action is one against the broker for so conducting this gambling that the speculator had not made more than he did make, I am not for allowing any amendment. I am prepared on this ground to hold that there is no relevant case stated.

I agree also with the Sheriff in his other ground of judgment that it is proved on the evidence of the letter before us (which is not explained by an averment so as to let in proof) that the customer deceived the broker and induced him to lend his credit by a false representation in writing containing a statement which was untrue and calculated to deceive. When a broker has taken up for a customer shares to be paid for on the settling-day, he is bound, if the customer does not put him in funds, either to make payment or take the shares himself. When he is selling on what this pursuer frankly calls a "bear" account, he is liable, and pledges his own credit to the person to whom he sells, and therefore to induce him to give such assistance he requires from the customer an assurance of having means. This customer, for the purpose of giving such assurance, wrote to the broker—"Some time ago I gave orders for a bond of £3500 to be looked out for me. Yesterday I got notice that I could get £4000, a first bond on good property," and so on. Are those statements true? Not a word of them. Were they intended to deceive? Yes, they were. With what object? To induce the broker to pledge his credit. The broker discovers the truth in July and sends the letter mentioned—"In consequence of information we have to-day received, we must ask you to give us a reference as to your position and means, else we must close your account. The information may not be correct, and a reference to your solicitor who offered you a bond for £4000 will doubtless satisfy us." What is his answer? The letter quoted so often, in which he says it is better to close accounts in consequence of the doubt about his position. For a person in that position to bring an action against the broker for not obeying instructions seems to me extravagant.

I think, therefore, first, that the action is not relevant—that there is no case for our aid in correcting the statements on record so as to bring out the true point, and that indeed there is every reason for refusing that aid. And, in the second place, I am also of opinion that on the evidence, *prima facie* conclusive under the pursuer's own hand, of the deceit practised by him in order to aid his credit, no explanation of which is given, the Sheriff is right in the finding in fact which he has made.

Lord Craighill—I am obliged to differ from the conclusion reached by Lord Young and by the Sheriff, for I think that as matters now stand the Sheriff was not warranted in the conclusion at which he has arrived. It might have been that on the pursuer's statements we might have rightly dismissed the action as irrelevant, because not disclosing grounds in law for the conclusion desired—that is, we might have turned the pursuer out of Court on his own statements. Or again, a defender may be assoilzied without any proof, because of admissions made by the pursuer in answer to the defences which are sufficient to destroy his case. But the specialty of this case is that in order to find the action irrelevant we must go outside the statements and admissions made by the parties on record. Something must be done as if after a proof, though there has been no proof. The Sheriff has taken that course, and I think he is wrong. I am far from saying that the pursuer's case is as full and complete as could be desired, and it was plainly the pursuer's interest to have stated more than he has done. But I am not prepared to say his statements are irrelevant. His case is that he, wishing to buy and sell shares, employed the defenders to act as his brokers, and that they sold shares belonging to him without his authority and to his loss. It may be that on a proof we should find they were quite warranted in doing so, but in order to do so now we must go beyond the pursuer's statements and admissions. No doubt the defenders say they were entitled to sell, first, by the rules of the Stock Exchange, which rules and their application to the case both remain to be proved. They say also that the employment was taken by them in consequence of his misrepresentations. It was quite reasonable that the defenders should make inquiry into the financial position of the pursuer, and it may be to demand an answer with regard to it. But we have not yet reached the stage of coming to a conclusion on the facts. The Sheriff has taken into consideration a certain letter, and has dealt with it as if there was nothing else in the case. I should like for my part to have known what was the information of the defenders, and how they came to be anxious as to the pursuer's position. We are not warranted, I think, in taking these letters as if they contained the whole case. To do so would, in my opinion, be to take something for granted where no proof is allowed—in short, to take the defenders' proof and not the pursuer's—and that is a course to the propriety or justice of which I cannot assent. As to the character of the transactions, I cannot adopt it as a ground of judgment that they are betting transactions, and that therefore no facilities ought to be given by the Court to enable one of the parties or the

other to recover that which is due to him. It may be that their true character is what is described by Lord Young, but the pursuer certainly does not say so, and the defenders say the very reverse in statement 1, where they say—"Fifty shares were to be carried over and the remainder taken up and paid for." With these statements before us, I think it would be unjust to both parties if we withheld facilities for proof, or were influenced by considerations which are not properly before us and not determined by proof. I am therefore for reverting to the interlocutor of the Sheriff-Substitute.

Lord Justice-Clerk—I quite understand the view of Lord Craighill with regard to a decision on the relevancy of this case. But I think that it would be idle to extend this controversy, and that the facts before us, which could not possibly be controverted by any evidence which could be led, are sufficient to support the judgment of the Sheriff. In that state of matters to put the parties to the cost of further procedure and proof would be an outrage on the forms of process which I am not disposed to allow. In the first place, let me say that while I sympathise very much with the views of Lord Young as to the nature of the transactions between these parties, I am not prepared to rest my judgment on that ground. I do not think that these are illegal contracts so far as I can judge of them, and there is no statement that they are so on record. I have referred to the passage of Addison on Contracts quoted by Lord Young, and I think it so modified by what immediately follows that it is impossible to adopt his Lordship's view. In the case of *Hibblewhite* v. *M'Morine*, cited in that passage, Baron Parke says—"I cannot see what principle of law is at all affected by a man's being allowed to contract for the sale of goods of which he has not possession at the time of the bargain and has no reasonable expectation of receiving. Such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognisant of the fact that the goods are not in the vendor's possession; and even if it were a wager it is not illegal, because it has no necessary tendency to injure third parties." In these circumstances, without giving any opinion on the question, I am not inclined to adopt that ground of judgment.

The pursuer's case is that he employed the defenders as his brokers, and that they undertook to hold the stocks over till the next settling-day, and that on a certain day between settling-days (the balance being then in pursuer's favour) the stockbrokers chose without authority to close and sell. I think there is enough to show that the brokers undertook the employment on a certain belief as to the pursuer's position. They admit that they were not entitled to sell without justification, but say that they were justified on two grounds—one being the nature of the rules of the Stock Exchange, the other that the pursuer misled them as to his means. These were grounds on which a proof might have been led. The Sheriff has held proof to be unnecessary, because everything necessary to the defence has been admitted, and no qualification of that admission has been stated from the bar. Lord Craighill complains that one party is allowed proof and not the other. What the Sheriff has really done is, in my opinion, to find that on the statement of the two parties there is no room for inquiry. This pursuer wrote the defenders a letter manifestly for the purpose of raising his credit with them. It was false, and the brokers found that out. What is his statement on record? It is that another man had £4000 and not he. That is conclusive of this, that the pursuer is guilty of wilful falsehood; and I assume from the terms of the letter that it was written to increase his credit. The defenders wrote to him requesting the name of the solicitor who, according to the pursuer's letter to them, offered him the bond. The pursuer will not face that. He says—"Well, if you are not satisfied, let us close." Can anyone doubt that first a false statement and then a refusal of information form a justification for what the defenders did. I know no reason for going into a long proof on such a matter.

But further, the pursuer says in his letter—"Close. I won't satisfy you, but I think you should hold on a little longer." That is not inconsistent with acquiescence in what the brokers said they would do. It is acquiescence.

The Court adhered to the judgment of the Sheriff.

Counsel for Appellant—J. P. B. Robertson—Baxter. Agent—Andrew Fleming, S.S.C.

Counsel for Respondents—D.-F. Kinnear, Q.C.—Guthrie. Agents—Maconochie & Hare, W.S.

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*Friday, May 27.*

## SECOND DIVISION.

[Sheriff of Midlothian.

## WHITE *v.* M'CABE.

*Parent and Child—Aliment.*

This was an action for aliment for an illegitimate child, of which Janet M'Cabe, the pursuer, alleged that Robert White was the father. The pursuer, who had previously had two illegitimate children, alleged that the defender had connection with her on two occasions, once in September 1879 and once in October immediately following. The defender denied that he ever had connection with the pursuer, but with regard to the occasion in October deponed that on that occasion he was in pursuer's company and was intoxicated, but "had no connection with her so far as my knowledge lies."

The Sheriff-Substitute found that defender was the father of the child, and decerned for aliment, and on appeal the Sheriff adhered.

The defender appealed, but the Court, without calling on counsel for respondent, adhered.

Counsel for Appellant—Dundas Grant. Agent—John A. Robertson, S.S.C.

Counsel for Respondent—J. M. Gibson. Agent—R. Broatch, L.A.