against the interlocutor authorising him so to amend.

LORD KINNEAR — I am of the same opinion. I think that when a Lord Ordinary intimates that he will only allow an amendment on certain conditions, the party proposing to amend has a clear option before him. He may accept the conditions and alter the record, or he may say that he is not prepared to accept the conditions, and move the Lord Ordinary to allow the amendment without these conditions. The necessary consequence will be that the Lord Ordinary will refuse the motion, and will thus give him a judgment against which he may reclaim, if he desires to bring the question before the Inner House. If he desires to come here at once he will move the Lord Ordinary to grant him leave to reclaim. If leave is not granted the point will remain over until the final decision of the case. But what he cannot do is to alter the record by virtue of an interlocutor giving leave to amend upon conditions, and then reject the conditions upon which leave to amend has been granted.

The Court adhered.

Counsel for Pursuers—C. S. Dickson—Younger. Agents—J. & J. Ross. W.S.

Counsel for Defender — Asher, Q.C.—J. A. Reid. Agents—Morton, Smart, & Macdonald, W.S.

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*Thursday June 23.*

## FIRST DIVISION.

[Lord Wellwood, Ordinary.

## KNIGHT & COMPANY *v.* STOTT.

*Horseracing — Obligation — Principal and Agent—Mandate—Disbursement of Money in Bets—Pactum illicitum—Sponsio ludicra—Relevancy.*

*Held* that commission agents who averred that they had disbursed certain monies at a horserace meeting upon the mandate of the defender, were not barred from suing their alleged principal for recovery of these sums because they had been paid away as bets, and that the pursuers had made their averments sufficiently specific by giving, in each case, the name of the race, of the horse backed, of the amount staked, and of the person with whom the bet was made, even although in half of the cases the name given was merely "a bookmaker."

In September 1891, Knight & Company, commission agents, 109 Argyle Street, Glasgow, brought an action against Captain Stott, Netherwood, Dumfries, for payment of £170, 10s., being the balance still due to them for sums disbursed upon the defender's order as lost bets at the Carlisle horserace meeting of that year.

Upon 3rd December 1891 the Lord Ordinary (WELLWOOD) found the pursuers' averments irrelevant for want of specification, on the ground that they had failed to give with sufficient definiteness the names of the parties with whom the bets were made and the parties to whom they paid the money, and dismissed the action.

The pursuers reclaimed, and at the hearing upon the reclaiming-note moved to be allowed to amend the record. The proposed amended condescendence with relative answers contained, *inter alia*, the following averments—"(Cond. 4) At Carlisle race-course on or about the 30th day of June 1891 and the 1st day of July 1891, the defender employed the pursuers as his agents to make, and if lost to pay, the following bets for him, and the pursuers did accordingly make the following bets and pay for him the following sums, viz.—

| | Race. | Horse. | Sums laid. | Odds. | Persons with whom laid. |
|---|---|---|---|---|---|
| 1. | Corby Stakes, | Bonnie Colleen | £4 0 | 5 to 4 | John Schiller. |
| 2. | Do. | Do. | 4 0 | 5 to 4 | A bookmaker. |
| 3. | Cumberland Plate, | Alice ..... | 10 0 | 10 to 5 | John Schiller. |
| 4 | Do. | Do. | 10 0 | 10 to 5 | A bookmaker" |

Other eighteen similar entries followed, the person with whom the bet was laid being in every case either "John Schiller" or "a bookmaker." The defender's fourth answer was "Denied." "(Cond. 5) The engagements Nos. 1 to 10 inclusive of the above list were made on 30th June 1891, and Nos. 11 to 22 inclusive were made on the following day. They were made by the authority and instructions and for behoof of the defender, and with his knowledge, consent, and approval. The names and addresses of the bookmakers, other than the said John Schiller, referred to in said list, are not known to the pursuers. It is the custom at race meetings for agents such as the pursuers, acting on such instructions as the defender gave the pursuers, to bet with bookmakers, although their names and addresses are unknown, and to pay in the event of the bet being lost, without the name of the payee being noted. This custom was well known to the defender, and he acquiesced in the pursuers conforming to it on his behalf, and instructed them to make and pay said bets on the footing that said custom would be followed. In each of the instances above referred to, where no name is given, the bet was made with and paid to a bookmaker whose name is unknown to the pursuers, and in doing so and acting they relied on the custom foresaid. The said John Schiller's address is No 85 Buchanan Street, Glasgow." The defender answered—"(5) The alleged customs at race meetings are not known and not admitted; *quoad ultra* denied." "(Cond. 6) With the exception of Nos. 3 and 4 in said list, the sums thus staked by the pursuers, on the defender's instructions and for his behoof, were lost and paid by them on his account. The various sums thus lost were paid by the pursuers to the defender's creditors, or the winners from the defender as his agents, and in accordance with his instructions, shortly after the running of each of the said races. The payments thus made by the pursuers, as agents and for behoof of the defender, after

crediting the £20 applicable to Nos. 3 and 4 of the above list, which sum of £20 was paid to the pursuers on defender's account, amount to £170, 10s. A detailed statement bringing out this balance has been produced, and is here specially referred to. Said sum of £170, 10s. is due and resting-owing by the defender to the pursuers." The defender answered — "(6) Admitted that pursuers have now produced statement referred to; *quoad ultra* denied."

The pursuers pleaded—"(2) The pursuers having paid the sums in question as the defender's agents, and on his instructions and employment as such, they are entitled to decree therefor."

The defender pleaded—"(1) No title to sue. (2) the pursuers' statements are irrelevant. (3) The pursuers' statements being unfounded in fact, and wanting in specification, the defender ought to be assoilzied, with expenses. (4) The alleged transactions are null and void, in respect that they are *sponsiones ludicrae*."

The pursuers argued—(1) The record as amended was relevant. (2) The action was not barred because it arose out of a gambling transaction. It did not require the Court to determine what horses won, but whether or not the defender was due certain sums under a contract of mandate. The pursuers sought to recover certain sums disbursed by them upon the order of the defender. That sums had gone to pay bets or in speculation transactions did not prevent an agent-disburser recovering from his principal—Bell's Prin. sec. 37; *Graham* v. *Pollok* (coursing), February 5, 1848, 10 D. 646; *Knight* v. *Cambers*, 1855, 1 Eng. Jur. (N.S.) 525; *Faulds* v. *Thomson* (stockbroking), June 10, 1857, 19 D. 803; *Calder* v. *Stevens* (horseracing), July 20, 1871, 9 Macph. 1074; *Thacker* v. *Hardy* (stockbroking), December 7, 1878, 4 Q.B.D. 685; *Read* v. *Anderson*, November 16, 1882 10 Q.B.D. 100, *aff.* May 30, 1884, 13 Q.B.D. 779; *Bridger* v. *Savage*, 1885, 15 Q.B.D. 363 (last two cases were cases of betting upon horse races through a commission agent, and were very similar to the present); *Molleson* v. *Noltie* (stockbroking), January 24, 1889, 16 R. 350.

Argued for respondent—(1) The pursuers' averments were still irrelevant. They professed to be suing as commission agents, but there was not a word about commission. They had failed to give the names of half of the persons to whom they alleged they had paid money. It was not sufficient to say "a bookmaker"—the Court would not consider the manners and customs of the turf. (2) The alleged debt arose out of a gambling transaction, of which the Court could take no cognisance. It could not be known whether the pursuers, even supposing the mandate to have been given, were bound to pay out the sums stated without determining whether the horses backed had won or lost, and this the Court would not do—*O'Connell* v. *Russell*, November 25, 1864, 3 Macph. 89. If this was anything, it was not a mandate to disburse money, but to bet.

At advising—

LORD PRESIDENT — The Lord Ordinary dismissed this action on the ground of insufficient specification in the condescendence. Recognising the weakness of their record, the pursuers have tendered a minute of amendment, which gives adequate particulars, and I think we should open the record, allow the amendments of the pursuers and the relative amendments of the defender to be made, but on condition of payment by the pursuer of all expenses from the date of closing the record.

On the assumption that this is done, and the record of new closed, we have to deal with the question whether the action is not open to the objection that its subject-matter is *sponsio ludicra*. I think this plea ill founded.

The pursuers seek reimbursement of monies expended by them on the instructions of the defender. They say that on his instructions they engaged to pay, and did pay, certain sums to certain persons in the event which happened, of certain horses not winning at Carlisle Races. They do not ask us to try the question which horse won in the races in question; the plea would then have application. No dispute of this kind arises on the record, the averment that the horses named lost meaning that they were not declared winners.

I regard it in the same way as I should if the pursuers' case had been that on the instructions of the defender he had given a couple of sovereigns to each jockey for a winning mount, or as a consolation for losing. In this view it is no legal objection to the action that it is connected with or arises out of horseracing. Horseracing is not illegal. Nor is betting illegal in the sense of being prohibited or punishable. It is true that the Courts in Scotland do not entertain actions to determine wagers; it is also true that by the cautious provisions of the Act 1621, c. 14, which is directed against excess in wagering, kirk-sessions were given right to the surplus over 100 merks of every racing bet; and by more modern statutes it is an offence to keep a house for betting. But there is no such legal taint in betting as to infect all the contracts which are in any way related to it, and the action now before us is not open to any other objection.

I think therefore that the case must go to proof.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR — I am of the same opinion. The pursuers' case is, that he was instructed by the defender to pay certain money in a certain event which occurred. The question therefore is, as your Lordship has said, not whether a particular horse won, but whether the pursuers made payment in accordance with the alleged mandate of the defender. I do not see why he should not be allowed to

prove both the mandate and the disbursement if he can.

The Court allowed the amendments upon condition of the pursuers paying expenses, and afterwards, upon evidence being produced that the expenses had been paid, of new closed the record, and remitted to the Lord Ordinary to allow the parties a proof of their respective averments.

Counsel for Pursuers and Reclaimers—Dickson—Crabb Watt. Agents—Miller & Murray, S.S.C.

Counsel for Defender and Respondent—H. Johnston—Dewar. Agent—William White, S.S.C.

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*Tuesday, June 28.*

## FIRST DIVISION.

## BOWERS, PETITIONER.

*Curator Bonis—Annuity out of Lunatic Ward's Estate—Amount Fixed by Ward—Petition by Beneficiaries for Increase of Amount—Nobile Officium.*

Where a voluntary annuity, of an amount fixed by a lunatic before being placed under curatory, is being paid out of his estate, the Court will not authorise its increase because of the greater exigencies or altered circumstances of the beneficiary.

Upon 8th March 1892 Miss Jane Elizabeth Bowers and Miss Euphemia Douglas, aged respectively sixty-two and fifty-seven, presented a petition to the Junior Lord Ordinary, in which they explained that they were the only or nearest relatives of Mrs Pringle Pattison, their first cousin, who had been under curatory since 26th July 1888; that for many years before that date they had received an annuity from her of £30; that that annuity had been continued to them out of her estate with the sanction of the Court; that in their declining years they were more in need of support than ever; that they felt their present annuity insufficient for their necessities; and that a small increase would be inappreciable as regarded the ward's income. They accordingly prayed the Court to authorise the *curator bonis* (Mr J. A. Molleson) to increase the annuity to £50 per annum.

The Lord Ordinary remitted to the Accountant of Court to report as to the powers craved, who reported that the ward's gross annual income exceeded £4000, and that there was a free annual surplus from the ward's estate of £341 after paying all expenses, including the annuity of £30; that he was not aware of any case where an annuity formerly paid by a ward had been increased by the Court, but that he knew of nothing to prevent the same being done if the Court were satisfied as to the expediency of it.

The Lord Ordinary (Low) on 14th April 1892 reported the petition to the First Division, with the following note:—"I know of no authority for increasing an annuity under such circumstances as those which are disclosed in this case, and I doubt if I have the power to do so. As the question is one of novelty, and as there seems to be no doubt as to the necessitous circumstances of the petitioners, I have thought it best to report the case."

It was argued for the petitioners that their request was reasonable, and that there was no legal impediment to complying with it. In *Gardner's* case, November 28, 1882, 20 S.L.R. 165, and in this case at a former stage, authority to continue an annuity had been granted. In *Balfour's* case, January 26, 1889, 26 S.L.R. 268, the petition, which was refused, was to pay an annuity for the first time. The ward here had in 1871 herself been a party to the increase of the annuity from £24 to £30, and would doubtless now have further increased the amount.

The *curator bonis* was represented by counsel, but did not oppose the petition.

At advising—

Lord President—I do not think that we are entitled to authorise the Lord Ordinary to grant the prayer of this petition. The duty of the Court in relation to the estate of a ward is that of conservation. No doubt there have been cases, and this is one, in which the Court has regarded the payment of an annuity which the ward himself has paid as part of the expenditure authorised by the ward, but it appears to me to be a long step to take to increase an allowance, the amount of which the ward himself has settled, because of an alleged increase in the exigencies of the donee or owing to a change of circumstances. It is admitted that there is no reported instance of the Court having authorised an expenditure of this sort, and there is certainly no example of a fresh act of benevolence even where the circumstances were most clamant. It appears to me that it would be a bad precedent were we to grant this application.

Lord Adam, Lord M'Laren, and Lord Kinnear concurred.

The Court refused the prayer of the petition.

Counsel for Petitioners—Wm Campbell. Agent—Andrew Clark, Solicitor.

Counsel for *Curator Bonis*—C. K. Mackenzie. Agents—Strathern & Blair, W.S.

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