Ordered and adjudged that the interlocutors be affirmed. 1788.

BRUCE v. ROSS.

For Appellant, *Ilay Campbell, R. Dundas, Geo. Ferguson.*

For Respondent, *J. Anstruther, Wm. Adam, Will. Honeyman.*

[Fac. Coll. 465.]

EDWARD BRUCE, Clerk to the Signet, *Appellant;*
WALTER ROSS, Clerk to the Signet, *Respondent.*

House of Lords, 14th April 1788.

WAGERS—SPONSIONES LUDICRÆ.—Whether debts incurred by wagering are good in law?—Held, that no action lay on such claims, upon the principle of *sponsiones ludicræ.*

The present question arises out of an action brought for payment of £50, being a sum gained on a wager or bet, taken on the result of an impending election for the burghs of Anstruther Easter, Anstruther Wester, Kilrenny, Crail, and Pittenweem.

The competing candidates for these burghs were John Anstruther, Esq. and Colonel Moncrief; and while the canvass was going on, the election of a knight of the shire of the county of Fife came on at Cupar, where the appellant attended as a freeholder. The respondent, who was agent for Colonel Moncrief, was also at Cupar on that occasion, and met the appellant there. The respondent having, in the course of conversation, boasted much that his constituent, Colonel Moncrief, would prevail and carry the burghs, and having offered, in the presence of a number of freeholders of the county, to back his opinion with a bet to any extent, the appellant took him up, and wagered £50 that Mr. Anstruther would gain the election—the respondent on his part wagering £50 that he would not, but that Colonel Moncrief would ultimately be the sitting member.

The election for these burghs, when it came on, terminated in Mr. Anstruther being returned member to sit in Parliament.

It appeared that the respondent knew, from calculations made, that Mr. Anstruther would gain his election, but his

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hopes lay in being able to overturn this election in favour of Colonel Moncrief by objections to the validity of the voting. A petition was accordingly presented to the House of Commons to set aside the election, on the ground that Mr. Anstruther was unduly elected, but this petition was withdrawn a few days before a Committee was to have been appointed to try the merits of the election.

The respondent having refused to pay the £50, action was raised for payment thereof, to the competency of which, in the course of the proceedings below, no objection was stated by the respondent.

Feb. 28, 1786. Of this date, the Lord Ordinary pronounced this interlocutor:—"In respect it is admitted that at the date of the "wager in question the delegates for the eastern district of "the Fife burghs were chosen, and a majority of them were "known to have declared for Mr. Anstruther; finds that the "object of the wager could only have related to the discussion of a petition to be presented to the House of Commons, complaining of an undue return; and as it is not "denied that the petition was afterwards withdrawn, in "consequence of a private agreement amongst the parties; "therefore, upon this ground in particular, and taking the "whole circumstances of the case together, sustains the defences, assoilzies, and decerns." Upon a representation

Mar. 10, 1786. the Lord Ordinary, of this date, allowed a proof, which having been taken and reported, and informations ordered upon its import, the Lord Ordinary reported the whole cause to the Court.*

Jan. 26, 1787. The Lords pronounced this interlocutor:—"Find that action does not lie in this case; therefore dismiss this action, assoilzie the defender therefrom, and decern."

Against this the appellant preferred a reclaiming petition, but the Lords "refused the desire of the petition, and ad-

Feb. 14, 1787. "hered to their former interlocutor."

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—1. No objection was made to the competency of the action by the respondent in the proceedings below. 2. Every contract or agreement that is not unlawful, as being *contra bonos mores*, or as attended with public detriment, is binding and obligatory, and must

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* The proof seemed to bear on the fact of the bet having been upon the issue of a petition against Mr. Anstruther's return.

therefore afford a ground of action. And although excessive wagering may sometimes be attended with hurtful consequences to the losing party, the law of no country either has arrived, or ever will arrive, at that degree of perfection, as effectually to curb and restrain all the vices, and still less all the follies to which mankind are liable. Unless therefore it can be shown that betting or wagering upon future consequences, is in itself an act of so immoral a nature as to be unfit to be made the ground of an action in a court of law, or is prohibited by some particular statute, the appellant humbly apprehends, that such wagers are equally binding and obligatory as any other contract or agreement whatever. But where the immorality lies in two persons staking their money upon an uncertain event, or where the statute is that prohibits them from doing so, the appellant has not hitherto been able to discover. Gaming with cards or dice for money, is, at least, as hurtful in its consequences, and indeed much more so, because liable to frequent repetition, as laying bets and wagers on uncertain events is what will not readily be disputed; but that this kind of gaming was not prohibited by the common law of Scotland, is perfectly clear from this, that the Legislature found it necessary to restrain it to a certain extent by a special statute 1621, cap. 14. By that act it was statuted and ordained:—"That no man shall play "at cards or dice in any common house, town, hostelrie, or "cook's houses, under the pain of forty pounds of the "realm, to be exacted of the keeper of the said inns, or com- "mon houses, for the first fault, and loss of all their liberties "for the next: Moreover, That it shall not be lawful to play "in any other private man's house, but where the master of "the family playeth himself: And if it shall happen any "man to winne any sums of money at carding or dicing, at- "tour the sum of an hundred merks, within the space of "twenty-four hours, or to gain at wagers upon horse races, "any sum attour the said sum of an hundreth merks, the "surplus shall be consigned, within twenty-four hours there- "after, in the hands of the treasurer of the kirk, if it be at "Edinburgh; or in the hands of such of the kirk-session in "the country parishes as collects and distributes money for "the poor of the same, to be employed always upon the poor "of the parish where such winning shall happen to fall out."

But although by this statute, playing at cards or dice, and even wagers upon horse races are restrained *sub modo*, yet it does in no degree affect wagers upon future contingencies,

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whether confined to a smaller or to a larger sum. And that such wagers were considered to be lawful, and of course to afford a good ground of action by the law of Scotland, is evident from Sir George Mackenzie's observations on this very act of Parliament. His words are, "By the civil law, tit. 43, "lib. 3, l. 1.—Cod. de aleatoribus, He that is overcome at such "games is not obliged to pay; and although he pay, he or "his heirs have repetition. And by the canon law, church-"men who use such games cannot be provided to benefices, "cap. 11, De Excess. Prelat. But yet wagering *seu sponsio*, "was by that law allowed, L. 17, § ult. ff. de Præscript. "Verb. And as our horse races were not condemned by "that law, though they were by ours; for that law did think "that nullam turpitudinem continet in se, sponsio nam inde "rixæ oriri non solent. But our law did condemn horse "races, because they occasioned great idleness and expense. "This act is still exactly observed, but is not extended to 'other wagers; such as that ships will arrive at such a day "or in such a place, which was not found to fall under this "act, which speaks only of cards, dice, and horse races. It "seems that this act would not be extended to any other "game *ex paritate rationis.*" The same author indeed adds, that though wagering was allowed by the civil law, yet if any of the parties certainly knew the thing, whereupon he wagered, but concealed his knowledge, action would not lie upon such wager; and that the courts in Scotland had most justly decided accordingly. But this only serves to strengthen the general rule, that wagers with respect to future contingencies, of which both parties are equally uncertain, are unlawful. And the same observation applies to the last observation which this author makes in the following words: "Wagers likewise upon the death of princes are discharged, "as giving occasion of jealousy: as also wagers concerning "the event of public undertaking for the good of the country, "such as the success of arms, &c. and that lest men should "be tempted either to wish the armies of their native coun-"try not to prosper, or to reveal their secrets to the end "they may not prosper. Vid. zipeum in Not. Juris Belli, lib. "3, in fin. There is such an act as ours, made by Lewis "XIII. of France amongst his statutes, cap. 138, at seq."

That such wagers, though they have seldom been made the subject of law suits, have been sustained in the Court of Session as good grounds of action, appears also from a decision, which is thus reported by Dirleton, 9th February

1676: " A pursuit was intented for a sum of money, which " the defender was obliged, by his promise, to pay, in case " he should be married, having gotten from the pursuer, in " the meantime, a piece, which the pursuer was to lose, in " case the defender should not be married. The Lords sus- " tained the pursuit, though some of their number were " of opinion that *sponsiones ludicræ*, of the nature foresaid, " ought not to be allowed." 2. The Court of Session seemed to have been misled, by supposing that the wager was laid upon the issue of a petition to be preferred to the House of Commons, and by considering it to be improper and indecent to bet upon any thing of the kind; but, although Mr. M'Millan, in his deposition, makes use of the words " ulti- " timately found to be the sitting member;" it is not thence to be inferred, that the question was necessarily to undergo a judicial decision, either in the House of Commons or elsewhere. In common language, it is not unusual to say, that a person is to be found so and so, because he is to be so and so. The bet between the parties depended on a point of fact, then uncertain, viz. Whether Colonel Moncrief or Mr. Anstruther would be the sitting member for a particular district of burghs? and to the determination of that bet, it was of no earthly consequence whether a petition should be presented to the House of Commons or not; or, whether such petition, after being presented, should be prosecuted or withdrawn. The respondent was indeed at pains to prove that Colonel Moncrief was started as a candidate when absent from this country, and without his knowing any thing of the matter. The respondent must therefore admit, that at the time when he laid the wager, he could not possibly know, whether Colonel Moncrief would or would not complain of Mr. Anstruther's return. But, even supposing the respondent, from his particular situation, to have known that a petition would, in all events, be presented, either in the name of Colonel Moncrief, or in the names of individual voters in that interest, still the wager did not depend upon the issue of such petition. Colonel Moncrief might die in the interim, before it could be taken into consideration, or it might be withdrawn, as in fact it was, without being brought to bearing. In either of which cases, the respondent must have lost his bet.

Pleaded for the Respōndent. — 1. The ground upon which the appellant applied to the Lord Ordinary, complaining of his Lordship's interlocutor of the 26th February

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1786, was, that his Lordship had mistaken the fact of the wager. He admitted the justice of his Lordship's conclusion, and only disputed the fact upon which it proceeded; the evidence shows that the fact was as stated in the interlocutor. It is, besides, proved by the appellant's own witnesses, that the terms of the wager offered by the respondent, and taken up by the appellant, were, that Colonel Moncrief should be *ultimately found* to be the *sitting member* in the present Parliament. It was at that time certain that Mr. Anstruther must be *returned;* and, it is equally certain, Colonel Moncrief never could be found to be member by any power or judicature but the House of Commons, or by any other means than the merits of a petition against the election of his opponent being tried in a Committee of that House. Upon this single event, the respondent, to use the appellant's expression, *totally relied.* And, as the petition presented to the House of Commons was afterwards withdrawn, by compromise and agreement between the parties, it became impossible to determine who was right, the appellant or respondent, in their judgment of what the event would be. It therefore follows, that neither party could win.
2. The appellant engaged to prove, that the precise terms of the wager were, that Mr. John Anstruther should not be the sitting representative, that is to say, that the wager was a mere negative on the respondent's part. On the contrary, it is shown by the proof, that the wager was positive upon a single merit, namely, the decision on the merits of Colonel Moncrief's petition to the House of Commons, against the return of Mr. Anstruther.

In regard to the two last interlocutors appealed from, they were pronounced as the *unanimous judgment* of the whole Court; their Lordships being decidedly of opinion, that, by the law of Scotland, no action was competent in cases of this kind. The rule and principle of the civil law, relative to *sponsiones ludicræ,* were early adopted as common law in that kingdom, and have been constantly adhered to. Thus, in the case of Sir Michael Stewart against the Earl of Dundonald, 7th February 1753, William Cochrane having, at a time when three persons were living, who preceded him in the succession to the Earldom of Dundonald, granted bond to John Stewart, on the recital of a certain sum advanced, and obliged himself to pay 100 guineas as soon as he or his heir should succeed to the said Earldom, and having, in point of fact, afterwards succeeded, the Court