[1 Queen's Bench Division, 189.]

Jan. 17, 1876.

HAMPDEN v. WALSH.

Wager—Construction of Agreement—Action to recover Deposit—8 & 9 *Vict. c.* 109, *s.* 18.

Plaintiff and W. deposited each £500 with defendant, on an agreement that if W., on or before the 15th of March, 1870, proved the convexity or curvature to and fro of the surface of any canal, river, or lake, by actual measurement and demonstration, to the satisfaction of defendant, W. should receive the two sums deposited; but if W. failed in doing this, the two sums were to be paid to plaintiff. Defendant decided in favor of W.; to this decision plaintiff objected, and before defendant paid over the money to W. demanded the return of his £500 deposited. Defendant, nevertheless, paid both sums to W., and plaintiff brought an action to recover his deposit:

Held, that the agreement was a wager; but that, although 8 & 9 Vict. c. 109, s. 18, which makes all contracts by way of wagering null and void, enacts that no action shall be brought to recover any sum of money alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event of any wager, yet, on the authority of decided cases, that did not apply to the recovery of the sum deposited; and, that, therefore, plaintiff having demanded his deposit back before it had been paid over by defendant, he was entitled to judgment.

ACTION for money had and received, to recover £500 deposited by the plaintiff with the defendant under the circumstances detailed in the judgment.

190] *The facts, correspondence, &c., were stated at great length in the case, but all that is material is stated in the judgment of the court.

1875. Nov. 12 and 15. *Ambrose*, Q.C. (with him *Willis*), for the plaintiff.

Robinson, Sergt. (with him *J. O. Griffiths*, Q.C.), for defendant.

In addition to the cases noticed in the judgment of the court, the following cases were cited for the plaintiff: *Robinson* v. *Mearns* (1); *Batty* v. *Marriott* (2). For the defendant: *Pugh* v. *Jenkins* (3).

Cur. adv. vult.

1876. Jan. 17. The judgment of the court (Cockburn, C.J., and Mellor and Quain, JJ.) was delivered by

COCKBURN, C.J.: This is an action brought to recover the sum of £500 deposited by the plaintiff with the defendant, under the following circumstances:

The plaintiff, it appears, entertains a strong disbelief in the received opinion as to the convexity of the earth, and with the view, it seems, of establishing his own opinion in the face of the world, he published in a journal called Scientific Opinion, an advertisement in the following words: "The

(1) 6 D. & R., 26.
(2) 5 C. B., 818, 827; 17 L. J. (C.P.), 215.
(3) 1 Q. B., 631.

undersigned is willing to deposit £50 to £500 on reciprocal terms, and defies all the philosophers, divines, and scientific professors in the united kingdom to prove the rotundity and revolution of the world, from scripture, from reason, or from fact. He will acknowledge that he has forfeited his deposit if his opponent can exhibit to the satisfaction of any intelligent referee a convex railway, canal, or lake."

The challenge thus thrown out was answered and accepted by a Mr. Alfred Wallace, who offered to stake the like amount "on the undertaking to show visibly, and to measure in feet and inches, the convexity of a canal or lake."

The money was deposited accordingly in a bank, to the credit of Mr. Walsh, the defendant. An agreement was drawn up, whereby it was agreed that, "if Mr. A. R. Wallace, on or before the 15th of March, 1870, proved the convexity or curvature to and fro of *the surface of any [191 canal, river, or lake, by actual measurement and demonstration, to the satisfaction of Mr. John Henry Walsh, of 346 Strand, and of Mr. W. Carpenter, of 7 Carlton Terrace, Lewisham Park, or, if they differed, to the satisfaction of the umpire they might appoint," Wallace was to receive the two sums deposited; while if Wallace failed in showing such actual proof of convexity, the two sums were to be paid to the plaintiff. The agreement concluded with the following proviso: "Provided always, that, if no decision can be arrived at, owing to the death of either of the parties, the wager is to be annulled; or if, owing to the weather being so bad as to prevent a man being distinctly seen by a good telescope, at a distance of four miles, then a further period of one month is to be allowed for the experiment, or longer, as may be agreed upon by the referees."

Mr. Walsh being unable to act as referee, a Mr. Coulcher was substituted for him. Certain tests having been agreed on, the experiment was tried on the Bedford Level Canal. The referees differed; Mr. Coulcher being of opinion that Mr. Wallace had proved, Mr. Carpenter, that he had not proved, the convexity of the canal. Thereupon it was proposed that the referees should exercise their power of appointing an umpire; but Mr. Carpenter declined to act further in the matter. A correspondence ensued, when it was agreed to leave the matter to the decision of Mr. Walsh, the present defendant, to whom the two referees should submit their reports, and who was to be at liberty to seek any further information he might deem necessary, and to consult Mr. Solomons, an optician, if he thought proper. Having done so, he decided in favor of Mr. Wallace, as

having "proved to his satisfaction the curvature to and fro of the Bedford Level Canal between Witney Bridge and Welsh's Dam (six miles), to the extent of five feet more or less."

To this decision the plaintiff objected, and before the defendant had paid over the money to Mr. Wallace, demanded to have the £500 he had deposited restored to him. Notwithstanding which, the defendant paid the two sums of £500 to Wallace.

The question for our decision is, whether upon this state of facts the plaintiff is entitled to recover the sum so deposited by him.

One question which presents itself is, whether this agree-
192] ment *amounts in effect to a wager; and if so, whether the plaintiff by the effect of 8 & 9 Vict. c. 109, s. 18, is prevented from maintaining this action.

We will, in the first instance, proceed with the case on the assumption that the agreement is in effect a wager.

It is well established by numerous authorities, which it would be here superfluous to cite, that at common law, a wager, being a contract by A. to pay money to B. on the happening of a given event, in consideration of B. paying money to him on the event not happening, was legal, provided the subject-matter of the wager was one upon which a contract could lawfully be entered on. But by the effect of the statutes of 16 Car. 2, c. 7, of 9 Anne, c. 14, and of other statutes for the prevention of gaming, various forms of betting became stamped with illegality, and no action could be maintained by the winner against the loser in respect of them. Nor could any action be brought by the winner against the stakeholder with whom the amount of the wager had been deposited. Wagers not included in these statutes remained as before, and could be made the subject-matter of an action, although judges sometimes refused to try such actions, especially where the subject-matter of the wager was of a low or frivolous character, as unworthy to occupy the time of a court of justice.

As the law now stands, since the passing of 8 & 9 Vict. c. 109, there is no longer, as regards actions, any distinction between one class of wagers and another, all wagers being made null and void at law by that statute.

But though, where a wager was illegal, no action could be brought either against the loser or stakeholder by the winner, a party who had deposited his money with the stakeholder was not in the same predicament. If, indeed, the event on which the wager depended had come off, and the

money had been paid over, the authority to pay it not having been revoked, the depositor could no longer claim to have it back. But if, before the money was so paid over, the party depositing repudiated the wager and demanded his money back, he was entitled to have it restored to him, and could maintain an action to recover it; and this, not only where, as in *Hodson* v. *Terrill* (1), notice had been *given to the stakeholder prior to the event being [193 determined, but also, where, as in *Hastelow* v. *Jackson* (2), notice was given after the event had come off.

In *Hodson* v. *Terrill* (1) the deposit had been made on a cricket match for £20 a side, and was therefore unlawful within the statute of Anne. A dispute having arisen in the course of the match, and one side having refused to play it out, the plaintiff, who had paid a deposit, claimed to have it returned, and it was held that he was entitled to recover.

So in *Martin* v. *Hewson* (3), in an action for money had and received to plaintiff's use, the defendant having pleaded that the money had been deposited with him to abide the event of a cock-fight, the replication, that before the result was ascertained the plaintiff repudiated the wager, and required repayment of the deposit, was held good. In *Hastelow* v. *Jackson* (2) the Court of Queen's Bench, following the prior cases of *Cotton* v. *Thurland* (4), *Smith* v. *Bickmore* (5), and *Bate* v. *Cartwright* (6), held that, where, money having been deposited with the stakeholder to abide the event of a boxing match, A., the depositor, claimed the whole sum from the stakeholder, as having won the fight, and threatened him with an action if he paid it over to B., the other combatant, which he nevertheless did by direction of the umpire, A. was entitled to recover the money he had deposited as his own stake as money had and received to his use. "If," says Bayley, J., "a stakeholder, pays over the money without authority from the party and in opposition to his desire, he does so at his own peril." These cases have never been overruled, and must be considered as law; although in *Meaning* v. *Hellings* (7), Alderson, B., speaks doubtingly of the decision in *Hastelow* v. *Jackson* (2), using the expression, "that case does not convince me, it overcomes me." But that case seems to have been decided more on the form of the particulars than anything else, and

(1) 1 Cr. & M., 797.
(2) 8 B. & C., 221.
(3) 10 Ex., 737; 24 L. J. (Ex.), 174.
(4) 5 T. R., 405.
(5) 4 Taunt., 474.
(6) 7 Price, 540.
(7) 14 M. & W., at p. 712.

does not seriously interfere with the authority of *Hastelow* v. *Jackson* (1), which seems to us to be good law.

194] *A distinction has, however, been taken between cases in which the deposit was made to abide the event of an illegal wager, and others, in which the wager, not being prohibited by statute, or of an improper character, was legally binding. In the former cases, the contract between the principals being null and void, the money remains in the hands of the stakeholder devoid of any trust in respect of the other party, and in trust only for the party depositing, who can at any time claim it back before it has been paid over. In the latter, the contract, prior to 8 & 9 Vict. c. 109, s. 18, not being invalid, it was open to contention that money deposited on the wager with a stakeholder must remain with the latter to abide the event.

Greater difficulty, therefore, presented itself where, prior to 8 & 9 Vict. c. 109, s. 18, money was deposited on a wager not illegal; and the Courts of King's Bench and Exchequer were at variance on this point. In *Eltham* v. *Kingsman* (2) the Court of King's Bench, consisting of Lord Ellenborough, C.J., Bayley, Abbott and Holroyd, JJ., held, that even where a wager was legal, the authority of a stakeholder, who was also (as is the case with the present defendant) to decide between the parties, might be revoked and the deposit demanded back. "Here," says Lord Ellenborough, "before there has been a decision the party has countermanded the authority of the stakeholder." "A man," says Abbott, J., "who has made a foolish wager may rescind it before any decision has taken place." In the later case of *Emery* v. *Richards* (3) the Court of Exchequer, where money had been deposited on a wager of less than £10 on a foot race, and therefore, prior to the passing of the statute 8 & 9 Vict., not illegal under the then existing statute, held that the plaintiff could not demand to have his stake returned, but must abide the event. The case of *Eltham* v. *Kingsman* (2) does not, however, appear to have been brought to the notice of the court, and in our view the decision of this court was the sounder one. We cannot concur in what is said in Chitty on Contracts, 8th ed., p. 574, that "a stakeholder is the agent of both parties, or rather their trustee." It may be true that he is the trustee of both parties in a certain sense, so that, if the

195] event comes off and the *authority to pay over the money by the depositor be not revoked, he may be bound

(1) 8 B. & C., 221. (2) 1 B. & Ald., 683. (3) 14 M. & W., 728.

to pay it over. But primarily he is the agent of the depositor, and can deal with the money deposited so long only as his authority subsists. Such was evidently the view taken of the position of a stakeholder by this court in the two cases of *Eltham* v. *Kingsman* (1) and *Hastelow* v. *Jackson* (2); and in that view we concur.

Practically, however, it is now unnecessary to decide this question, if the transaction under consideration is to be looked upon as a wager. For by 8 & 9 Vict. c. 109, s. 18, it is enacted "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

The present wager, though previously lawful, being thus rendered null and void, it follows that the plaintiff must be entitled to recover his deposit, unless that part of the enactment which provides that, "no suit shall be brought or maintained in any court for recovering any sum of money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," affords an answer to the action—a question on which a difference of opinion exists. The question arose in *Varney* v. *Hickman* (3). The plaintiff and one Isaacs had deposited £20 each with the defendant on the event of a match between two horses. Before the race was run the plaintiff gave notice to the defendant that he declined the bet and demanded back his deposit. The plaintiff not attending to contest the race, Isaacs was declared the winner, and the amount of the two deposits was handed over to him by the defendant. An action for money had and received having been brought by the plaintiff to recover the amount of his deposit, the statute 8 & 9 Vict. c. 109, s. 18, was relied upon for the defence. But it was held by the court, consisting of Maule, Cresswell and Williams, JJ., that the part of *s. 18 relating to deposits was meant to apply only [196 to the non-recovery by the winner of a sum deposited by the other party to abide the event, and not to the right of the depositor to recover back his deposit, if demanded before the money was paid over.

In the later case of *Martin* v. *Hewson* (4), already referred

(1) 1 B. & Ald., 683.
(2) 8 B. & C., 221.
(3) 5 C. B., 271; 17 L. J. (C.P.), 102.
(4) 10 Ex., 737; 24 L. J. (Ex.), 174.

to, the Court of Exchequer adopted the view of the Common Pleas in *Varney* v. *Hickman* (1), Parke, B., saying: "According to the context, the statute prohibits the recovery of money which has been won in such a transaction, or has been deposited to abide the event of a wager, but it does not apply to the case where a party seeks to recover his stake upon a repudiation of the wagering contract."

But in *Savage* v. *Madder* (2), Martin, B., expressed a decided opinion that no action could be brought, either directly upon the contract, or in respect of money deposited by the winner himself in the hands of a stakeholder to abide the event. "It is," said the learned judge, "in fact, expressly within the act of Parliament; and more than that, it is within what the act intended to effect. The object of the act was to prevent trials in courts of law with respect to betting contracts; and rightly so, for they are contracts in relation to transactions with which the time of the courts of law ought not to be occupied. A man who makes bets must take his chance of getting his money. A bet ought to be a contract of honor; and if the loser cannot pay, no action should be maintainable in respect of the debt." What was thus said was, however, unnecessary to the decision of the question before the court. For the plaintiff there claimed the entire stakes as his by the event; he had never repudiated the wager or revoked the authority of the stakeholder. He was seeking to enforce the wager, and was met by the statute and defeated by the effect of the enactment. The question again arose directly in the case of *Graham* v. *Thompson* (3), in the Court of Common Pleas in Ireland, where, in an action for money had and received, the defendant pleaded specially, "that the money was money deposited in the hands of the defendant to abide an event on which a wager
197] had *thereupon been made, to wit, &c., and that that wager had not been repudiated, or any demand of the said money, or any part thereof, made upon him by the plaintiff before the event on which the said wager had been made had taken place, and the said wager had been decided." The plaintiff demurred to this defence, on the ground that it was consistent with it that the plaintiff had repudiated the wager before the defendant had paid over the money to the winner. And the court, taking the same view as had been taken in *Varney* v. *Hickman* (4) and *Martin* v. *Hewson* (5), held the demurrer good. It is unnessary

(1) 10 C. B., 271; 17 L. J. (Ex.), 174.
(2) 36 L. J. (Ex.), 178.
(3) Ir. Rep., 2 C. L., 64.
(4) 5 C. B., 271; 17 L. J. (Ex.), 174.
(5) 10 Ex., 737; 24 L. J. Ex.), 174.

to say what our view might have been had the matter been *res integra;* we are bound by the authority of these decisions, which, if they are to be reviewed, can only be reviewed in a court of appeal.

Thus far we have dealt with the agreement between the parties as a wager. But it was contended before us, on the argument, that this was not a wager, but an agreement entered into for the purpose of trying by experiment a question of science. We think this position altogether untenable. The agreement has all the essential characteristics of a wager. Each party stakes his money on an event to be ascertained, and he in whose favor the event turns out is to take the whole. The object of the plaintiff in offering the challenge he gave was not to ascertain a scientific fact, but to establish his own view in a marked and triumphant manner. To use a common phrase, his object was to back his own opinion. No part of the money staked was to go to the party by whom the experiment was to be made. Lastly, the parties themselves in the written agreement have spoken of it, in terms, as a "wager." We can have no hesitation in holding it to be such.

But even if our view of the agreement were such as was suggested by the defendant's counsel, our decision would be the same, as the principle of the decision of the court in the cases of *Eltham* v. *Kingsman* (') and *Hastelow* v. *Jackson* (*), before cited, would appear to us to apply; according to which we should look upon the defendant merely as the agent of the plaintiff, and as no longer *justified in [198 paying over the money when once his authority had been countermanded.

But as we hold the agreement to have been a wager, and consequently that the case is concluded by the authorities we have referred to, it is unnecessary to decide this point.

Our judgment will therefore be for the plaintiff.

Judgment for the plaintiff.

Solicitor for plaintiff: *A. E. Copp.*
Solicitor for defendant: *W. Jaquet.*

(') 1 B. & Ald., 683. (*) 8 B. & C., 221.