

1800. November 14.

MARY SCOTT and ROBERT AITCHISON, *against* DAVID KYLE.

No. 2.

By a minute of sale, dated 19th March 1798, Mary Scott, and her husband Robert Aitchison, agreed to sell to David Kyle, a tenement of houses in the town of Melrose. The price was L. 400, and the sale was to be held as having been concluded on the 24th February preceding. The obligation by the purchaser as to the payment of the price, was in the following terms: " For the which causes, and on the other part, the said David Kyle has made payment to the said Mr and Mrs Aitchison, of the sum of L. 100 Sterling of the price, with interest from the said 24th day of February last, as agreed upon; and he binds and obliges him and his heirs, &c. to make payment to the said Mr and Mrs Aitchison, their heirs, &c. of the further sum of L. 300 Sterling, and that against the term of Martinmas next, with the legal interest of said sum from the said 24th day of February last to the said term of payment, and, if necessary, he shall grant bond to that effect; declaring always, that if the said David Kyle finds it inconvenient for him to pay the said money at the foresaid term of Martinmas next, he shall be further indulged; only when he does settle thereafter, he must then pay of the price, as much money as will at the time buy the same quantity of Government stock in the 3 *per cent.* consols, as L. 300 would have bought on the said 24th day of February last, or pay just L. 300, in the option of the said Mr and Mrs Aitchison; and the said David Kyle shall, at same time, pay the legal interest effeiring to the L. 300 from the said 24th day of February last, and also, a sum equivalent to what Mr and Mrs Aitchison lose between the legal interest and what they might have drawn, had L. 300 been lodged in said funds on the foresaid 24th day of February last; and to save after disputes about what the rate of said stock was on the foresaid day, it is here held to have been  $48\frac{1}{2}$ , which shall be the rule for determining the above points, and as to what shall be the rate of stock at the time of settlement and payment, the rate last stated in the Edinburgh Evening Courant preceding the day of settlement, shall be held as the rate at settling; and it is declared, that the settlement by payment shall be delayed no longer than Whitsunday 1799 years, otherwise the said Mr and Mrs Aitchison shall be at liberty to void the bargain, and resume the subjects, or prosecute for implement in the above terms, in their option; and David Kyle is to have no claim to have back said L. 100 advanced."

Kyle did not pay the L. 300 with interest at Martinmas 1798, and matters were allowed to lie over till July 1799, when Mary Scott and her hus-

A person having purchased a house, on condition, that if the price was not paid by a particular time, he should be bound, at the option of the seller, either to pay the price, or a sum equal to the quantity of Government stock which the price would have purchased at the date of the sale, with the interest of the price from the day of sale, and a further sum, equal to the difference between the legal interest and what the seller would have drawn as interest, had the price been invested in the funds when the sale took place; the bargain was found to be void, both as usurious, and as falling under the 7th Geo. II. c. 8., annulling wagers with regard to the price of the public funds.

No. 2.  
—A penalty stipulated for the non-performance of an illegal contract will not be enforced.

band brought an action against Kyle, concluding, that as the term of Whitsunday 1799 had elapsed, without the defender paying the balance of the price, the bargain should be declared void, and the pursuers found entitled to resume the possession of the subject, and retain the L. 100 which had been paid to account of the price, all in terms of the minute of sale.

In November 1799, Kyle, with a view to stop the action, offered to pay the L. 300 of the price which remained due, with interest from the date of the transaction; but the Government stock mentioned in the minute of sale, having by this time risen to  $62\frac{1}{4}$ , the sellers refused to settle with Kyle, unless he would pay them the following sums, which they contended they were entitled to, in terms of the minute:

At  $48\frac{1}{2}$  per cent., the rate fixed by the minute of sale, the L. 300 would have purchased L. 618, 11s. of Government stock, but, at the rate of  $62\frac{1}{4}$ , it would require

L. 385 0 11

Besides, the pursuers demanded legal interest of the L. 300

from 24th February 1798, to 30th November 1799, - 26 9 3

And also the difference between the legal interest and the interest which they would have actually received, had the L. 300 been employed for their behoof in the purchase of stock, on the 24th February 1798, being

6 5 5

L. 417 15 7

In place, therefore, of L. 326 : 9 : 3, which the defender was willing to have paid, the pursuers demanded L. 417 : 15 : 7; and the action having accordingly been insisted in, Kyle, in defence,

Pleaded: *1st*, The contract by which the sale was concluded is void, as falling under the 7th George II. c. 8. § 1., which declares, "That all contracts and agreements whatsoever, which shall from and after the 1st of June 1734, be made or entered into by or between any person or persons, upon which any premium, or consideration in the nature of a premium, shall be given or paid for liberty to put upon, or to deliver, receive, accept, or refuse any public or joint stock, or other public securities whatsoever, or any part, share or interest therein, and also all wagers, and contracts in the nature of wagers, and all contracts in the nature of puts and refusals, relating to the then present or future price or value of any such stock, or securities as aforesaid, shall be null and void to all purposes whatsoever."

*2dly*, The contract is also void, in terms both of the act 1621, c. 28., and the 12th Anne, statute 2. § 16., as being usurious in two respects; *1st*, By stipulating for interest on the L. 300 from the 24th February 1798, although that sum only became due at Martinmas thereafter; *2dly*, By stipulating not only for legal interest, but also for a sum equal to the difference between the

legal interest and that which they would have drawn, had the L. 300 been vested in the funds on the 24th February 1798.

3dly, If the contract is illegal and usurious, it must be null ~~in toto~~, and therefore, that part of it by which the defender was to forfeit the L. 100 paid by him to account of the price, in case he did not fulfil the bargain, must be also void.

The pursuers stated, in point of fact, That when the sale took place, they were desirous that the whole price should have been paid; in which case, as the Government funds were very low, it was their determination to have employed it in the purchase of stock: That the defender knew this, and that the delay in the payment of the price, was agreed to merely for his accommodation, and only upon his suggesting the mode of settlement stipulated in the minute, by which they were just to receive the same advantage as if their money had been applied at the time of the sale, in the manner which they had projected.

In point of law, they

Answered: 1st, The statute 7th Geo. II. c. 8. was meant solely to strike against wagers upon the rise or fall of stock, where the parties had no interest in them. But here the stipulation relates to a sum of money which was *bona fide* destined to be vested in the funds. The pursuers, therefore, having had a fair and substantial pecuniary interest in view by the contract, it neither falls within the words nor the spirit of the statute; Termly Reports K. B. Vol. 8. Part 2. p. 162. *Kentis v. Hawsley*, 8th February 1799.

2dly, Kyle, by the minute of sale, became bound to pay the balance of L. 300, with legal interest at Martinmas. Had he done so, the transaction would have been completely unexceptionable. But the laws against usury do not apply to cases where the obligee is taken bound to heavier prestations only in case of failure, such prestations being regarded, not in the light of an unlawful usance, but as damage which, it is agreed, the obligee shall pay on account of breach of contract; Hume on Crimes, *voce* Usury, 22d January 1672, Skene\*; 23d July 1679, Murray\*.

3dly, But, at all events, the pursuers are not demanding, in this action, either a larger sum on account of the increased price of stock, or alleged usurious profits. The libel is founded entirely on that branch of the minute of sale which provides for the event which has actually occurred, of Kyle's failure in performance. The defender, therefore, is attempting to resist conclusions, founded, not on the alleged objectionable part of the contract, but on one which is not denied to be legal.

The Lord Ordinary found "the sale libelled void and null: Found, That the defender must pay rent for his possession as formerly, and the pursuers must repay the sum of L. 100, and bygone interest due thereon."

\* Cases in the Court of Justiciary.

No. 2. " Found the defender bound to remove from the possession at Whitsunday  
" next, and decerns."

On advising a reclaiming petition, with answers, the Court were unanimous, that the contract was usurious; and, with the exception of one Judge, they were also of opinion, that it was struck at by the statute 7th Geo. II. All were agreed, that a penalty attached to an illegal contract could not be sustained.

The Court " adhered."

Lord Ordinary, *Stonefield.* Act. Lord Advocate *Hope, W. Scott.* Alt. *Monypenny, Tod.*

R. D.

*Fac. Coll. No. 193. p. 443.*

1804. November 16. CUMMING GORDON *against* CAMPBELL.

No. 3.  
A wager is  
not action-  
able.

ON the 29th May 1797, a contract was entered into between Major-General Alexander Campbell of Glendaruel, and Lieutenant-Colonel Alexander Penrose Cumming Gordon of Altyre and Gordonstown, " That in case at  
" any time, in the course of ten years from and after the date hereof, the  
" value of L. 100 Sterling in that part of the British funds called the 3 *per*  
" *cent.* consols, should rise, so as to be rated in the Stock Exchange, Lon-  
" don, at above L. 70 Sterling, then, and in that event, the said Alexander  
" Campbell shall be bound, as he hereby binds and obliges himself, his  
" heirs, executors and successors whomsoever, jointly and severally, to pay  
" to the said Alexander Penrose Cumming Gordon, his heirs, executors or  
" successors, the sum of L. 100 Sterling, with the lawful interest thereof,  
" from and after the time the same shall fall due by the said event, ay and  
" until payment." And, on the other hand, Colonel Cumming bound him-  
self to pay the like sum, if the 3 *per cents.* did not rise to L. 70.

This contract was formally executed on stamped paper, and recorded in the books of Council and Session.

General Campbell died in July 1801, and was succeeded by his brother Duncan. Within the time specified, the 3 *per cents.* rose above L. 70; and an action having been brought for fulfilment of the contract, the Lord Ordinary at first assoilzied the defender, finding the contract not actionable in this Court; but afterward ordered informations.

The pursuer

Pleaded: Although an agreement at play might not be actionable in this country, still the present case is widely different. There was here no game: