7 P.M. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On the Monday September 8th, the defendants not having, as they expected, received an answer on Sunday September 7th, (which in case their letter had not been misdirected, would have been in the usual course of the post,) sold the wool in question to another person. Under these **[682]** circumstances, the learned Judge held, that the delay having been occasioned by the neglect of the defendants, the jury must take it, that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained: and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter term obtained a rule nisi for a new trial, on the ground that there was no binding contract between the parties,

Dauncey, Puller, and Richardson, shewed cause. They contended, that at the moment of the acceptance of the offer of the defendants by the plaintiffs, the former became bound. And that was on the Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon

Jervis and Campbell in support of the rule. They relied on *Payne* v. *Cave* (*a*), and more particularly on *Cooke* v. *Oxley* (*b*). In that case, Oxley, who had proposed to sell goods to Cooke, and given him a certain time at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till **[683]** the plaintiffs' answer was actually received, there could be no binding contract between the parties; and before then, the defendants had retracted their offer, by selling the wool to other persons. But

The Court said, that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them, that the plaintiffs' answer was received in course of post.

Rule discharged.

ELTHAM *against* KINGSMAN. Friday, June 5th, 1818. Semble, that a wager between the proprietors of two carriages for the conveyance of passengers for hire, that a given person should go by one of these carriages, and no other, is illegal. But held, at all events, (the wager having been deposited in the hands of the stakeholder,) that either party having demanded his deposit before the wager was won, was entitled to have it returned to him, and on refusal to maintain an action against the stakeholder.

[Questioned, *Marryat* v. *Broderick*, 1837, 2 M. & W. 373; see *Hampden* v. *Walsh*, 1876, 1 Q. B. D. 194.]

Trover for a watch. Plea, not guilty. At the trial before Park J. at the last assizes for the county of Gloucester, it appeared that the plaintiff and one Brown **[684]** respectively were proprietors of carriages called Fly by Nights, which they let to hire at Cheltenham, and that the following wager was laid between them: the plaintiff betted his watch against Brown's, that a Colonel Longford should go in his (Eltham's) Fly by Night, and no other, that evening to the assembly-rooms. Brown accepted the wager, and both watches were deposited in the hands of the defendant as a stakeholder. Within a very short time after the wager was laid, and before the

(*a*) 3 T. R. 148. (*b*) Ibid. 653.

event happened upon which it was to be determined, the plaintiff demanded his watch of the defendant, and insisted upon its being returned: it was not returned, and Brown having ultimately won the wager, the defendant refused to return the plaintiff his watch, but delivered it to Brown. The learned Judge was of opinion, that the plaintiff having demanded his watch before the wager was determined, was entitled to recover, and directed the jury to find a verdict for him, at the same time giving the defendant leave to move to enter a nonsuit; and in last Easter term, a rule nisi having been obtained for that purpose,

Jervis and Puller now shewed cause. The plaintiff having demanded his watch before the wager was lost, is entitled to recover. The defendant was a stakeholder, a mere agent acting under a countermandable authority, which may be revoked at any time before that authority was executed, viz. in this case, before the plaintiff's watch was applied to the purpose for which it was deposited. *Taylor* v. *Lendey* (*a*)[1], *Cotton* v. *Thurland* (*b*)[1]. This too is an executory contract, and **[685]** while it remained executory it was competent to either party to rescind it. Selwyn's N. P.(*a*)[2]. And the plaintiff having in fact rescinded the contract by demanding his watch, is entitled to recover the same from the defendant. But at all events the Court will not now interfere to alter this verdict. For it is unfit that Courts of Justice should be occupied in the discussion of frivolous questions, in which the parties have no real interest, to the prejudice of those suitors whose valuable rights are waiting the decision of the Court. In *Henkin* v. *Guerss* (*b*)[2] the Court of K. B. held that a wager on a point of practice was not a fit question to be tried; and in *Squires* v. *Whisken* (*c*)[1] Lord Ellenborough C.J. refused to try a wager on a cock-fight, because the discussion of such a question tended to the degradation of Courts of Justice, and was inconsistent with that dignity which it is essential to the public welfare that a Court of Justice should always preserve.

Campbell contrà. This wager is not against public policy, nor injurious to the character or feelings of a third person: it does not lead to indecent evidence, and it has no immoral tendency; it is therefore a lawful wager. [Abbott J. I doubt whether this wager be legal: the effect of it would be to subject a third party to great inconvenience, by exposing him to the importunities of the proprietors of these vehicles: any person who has walked through Piccadilly must be sensible that this is no small inconvenience.] It may be very expedient that the law upon this subject should be altered by Act of Parliament; but as the law now stands, a legal **[686]** wager is a contract attended with all the qualities and consequences of any other contract, and therefore it can as little be rescinded as created without the consent of both the contracting parties. Here an action might have been maintained by Brown as winner of the wager, which is quite inconsistent with the notion that it could be rescinded by the loser. The consideration whether any particular wager be or be not too frivolous for the dignity of the Judge is quite novel, and can afford no means of ascertaining in what cases the action will be held maintainable. Actions upon wagers quite as frivolous as the present have frequently been maintained and sanctioned by Judges of the first eminence in the profession. *Pope* v. *St. Leger* (*a*)[3], *Bulling* v. *Frost* (*b*)[3], *M'Allister* v. *Haden* (*c*)[2], and *Hussey* v. *Crickitt* (*d*). It will therefore be a new doctrine to say, that an action cannot be maintained upon such a wager as the present, or that the subject matter of the wager being deposited in the hands of a stakeholder to abide a particular event, shall be recovered back after that event has happened. In all the cases cited where the money has been recovered back from the stakeholder, the wager itself was illegal.

Lord Ellenborough C.J. In most of the cases the question of illegality has not been so fully considered as it might have been; for hardly any thing that can be called sponsio ludicra can subsist without inconvenience to some person or other. A wager (like the present) that a gentleman should go by one of these **[687]** conveyances rather than another, (the decision of which would expose him to improper importunity and interruptions, and would abridge the exercise of his right of electing his own conveyance,) certainly exposes him to some inconvenience. What has been said of

(*a*)[1] 9 East, 49.
(*a*)[2] 91 n. (*b*)[2] 12 East, 247.
(*a*)[3] 1 Salk. 344.
(*c*)[2] 2 Campb. 438.
(*b*)[1] 5 T. R. 405.
(*c*)[1] 3 Campb. N. P. C. 140.
(*b*) 1 Esp. N. P. C. 236.
(*d*) 3 Campb. 168.

the inconvenience subsisting in Piccadilly is applicable to this case, and arises from the same circumstances. This wager then being pregnant with these consequences to other parties, seems to me to be illegal. Independently, however, of this circumstance, I think there is no distinction between the situation of an arbitrator and that of the present defendant, for he is to decide who is the winner and who is the loser of the wager, and what is to be done with the stake deposited in his hand. Now an arbitrator's authority before he has made his award is clearly countermandable; and here before there has been a decision, the party has countermanded the authority of the stakeholder. The misapplication, too, of the public time, by occupying the attention of the Court in deciding upon foolish wagers of this description, to the prejudice of more important business, affords a further argument against this action. The case, therefore, is full of inconvenience in the various aspects in which it may be viewed. The least that can be said of such a wager is, that it was foolish, and then a Judge ought not to be called upon to decide such a question; but at all events the situation of the defendant cannot be distinguished from that of an arbitrator, whose authority is countermandable, and in that case the verdict is right.

Bayley J. I think this verdict is right. This was a wager, which for the present I will not call illegal **[688]** but foolish, and tending to annoy a particular individual, and waste time in a Court of Justice; then I think, that in such a case it is competent to either party, before the event, to rescind the wager, and insist upon having his stake back again. This case is perfectly new in its circumstances, so that in coming to this conclusion, we break in upon no decided authority. If the wager be illegal, there can be no doubt; but if it be not illegal, still if the party may rescind it, as it appears to me he may do, the conclusion to which the jury have come is right.

Abbott J. The Court ought to endeavour to put a stop to wagers of this description as far as they can consistently with the rules of law; and I think that a Judge at Nisi Prius would best exercise his discretion by refusing to try questions arising out of them; for many persons, who have important questions affecting their rights before the Court, are improperly delayed by the time that is consumed in these idle discussions. Now the utmost that can be said in favour of this wager is, that it was only foolish; and a man who has made a foolish wager, may rescind it before any decision has taken place. It was therefore competent for the party so to act in this case, and having so done, it was the duty of the stakeholder to restore the watch to him. But that is not the only view that in my judgment may be taken of this case; for the tendency of such a wager may be not only to produce inconvenience to a third party, but even to the public; for the wager might be laid, not merely to carry one or two persons, but thirty or forty, and so great tumult, confusion, and disturbance might be produced. It was, therefore, illegal, **[689]** and being so, the defendant could not be justified in retaining the stake deposited.

Holroyd J. I am of the same opinion. I have been much impressed with what fell from my brother Abbott as to the illegality of the wager. For it is one clearly productive of great inconvenience. The plaintiff in this case has brought the action for the watch, the event not having happened at the time when he demanded it back. It is contended, that it had been delivered by him to the defendant, with an authority which was not revocable because another person had then an interest in it. But in the case of an arbitrator his authority may be revoked by either party before the award made, and that even though the other party to the suit has an interest in the award. And besides, until that event happened which was to decide the wager, the property in the watch remained in the plaintiff, and the other party had no interest in it, but only in the contract: the defendant therefore ought to have returned it to the plaintiff, and left Browne to bring his action for it, if he thought himself entitled to it. The case might be different, if the event had happened before the demand was made. The jury have therefore come to a right conclusion.

Rule discharged.

[690] GIBBONS AND OTHERS *against* M'CASLAND, Executrix of O. M'Casland, deceased. Friday, June 5th, 1818. Defendant, having entered into a guarantee in writing, and become liable upon it at a period of more than six years before the commencement of the suit, verbally promised within six years that the matter should be arranged: and afterwards on an action being brought pleaded