THE
LAW OF BETTING

A GUIDE TO THE LAW OF BETTING CIVIL AND CRIMINAL.

BY

HERBERT W. ROWSELL

AND

CLARENCE G. MORAN,

Of the Inner Temple, Barristers-at-Law.

LONDON:

BUTTERWORTH & CO., 11 & 12, BELL YARD, TEMPLE BAR.

Law Publishers.

SYDNEY:
BUTTERWORTH & Co. (Australia), Ltd.,
76, Elizabeth Street.

CALCUTTA:
BUTTERWORTH & Co. (India), Ltd.,
8/2 Hastings Street.

1911.

Printed by Ballantyne, Hanson & Co.
At the Ballantyne Press, Edinburgh

PREFACE

Our only reason for writing this small handbook is, that we believe there is no contemporary text-book solely concerned with the Law of Betting, civil and criminal. The authors are jointly responsible for the views expressed throughout the work, although each is primarily responsible for that part published under his own name. We believe that every case which bears upon the modern law of betting has been dealt with, and especial attention has been directed to the cases on new consideration. There have been few English, but many Scottish cases on the Street Betting Act, 1906, and the decisions of the Scottish Courts have been included in Chapter I. of the second part of the work.

It has been our aim so to explain the law on a rather technical subject that our labours may be of service to the bookmaker and his client, the inspector of police and the student, as well as to the lawyer and the advocate.

H. W. ROWSELL.
C. G. MORAN.

3 Brick Court, Temple,
June 1, 1911.

TABLE OF CONTENTS

CHAPTER II

CHAPTER III

TABLE OF CASES

A GUIDE TO
THE LAW OF BETTING

PART I

CIVIL

By H. W. Rowsell

CHAPTER I

WHAT IS A BET?

VERY few English laymen would admit their inability to answer the question "What is a bet?" But when one is asked to frame his reply in a definition capable of bearing the test of a legal analysis, the surprising difficulty of the task becomes apparent to him. Then again the phrases, "by way of gaming and wagering," "gaming and wagering contracts," and the like, fall glibly enough from the lips of lawyers, without any real distinction being drawn between the two verbs. Certainly it may be said that now the words are interchangeable, unless one of them occurs alone in a statute, when, of course, the original distinction between them must still be drawn.

Gaming.—The meaning of gaming was, speaking strictly, "playing" a game (*a*) of chance or skill for money or money's worth (*b*); while wagering had the broader sense of staking money on the result of an event whether a game or not, and, if a game, whether the person staking were a player or not. There has been no statutory definition of either of

(*a*) A good deal of confusion probably arose from the meaning to be attributed to the words "playing a game." It was solemnly put forward in *Lynall* v. *Longbotham* (1756), 2 Wilson 36, that a man running against time was "playing at a game of foot-racing."

(*b*) *R.* v. *Ashton*, 22 L. J. M. C. 1; 1 E. & B. (1852) 286. There is even here a question whether the definition ought not to be still further restricted by the omission of the words "or skill" (see *Bew* v. *Harston* (1877), 3 Q. B. D. 454; 47 L. J. M. C. 121), a decision upon the words "gaming upon licensed premises." From this case it appears that the act is none the less gaming because the game is not in itself unlawful. See also *Dyson* v. *Mason* (1889), 22 Q. B. D. 351.

the words, and except for the purposes of penal enactments the difference rarely, if ever, arises; and we may treat the expressions "gaming and wagering contracts," "wagering contracts," and "contracts by way of gaming and wagering" as all equivalent to the one word "bets."

There have been several principles laid down by the Courts for testing whether an agreement is or is not a "bet," and the three best known definitions are as follows:—

Judicial Definitions.—A. A bet is a contract entered into between two or more persons for good consideration, and upon mutual promises to pay a stipulated sum of money, or to deliver some other thing to each other according as some prefixed and equally uncertain contingency should happen within the terms upon which the contract was made (*c*).

B. A contract by which one party is to win and the other to lose upon a future event which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way, A., one of the parties, will lose, but if it turns out the other way he will win (*d*).

C. A contract by which two persons, professing to hold opposite views touching a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay and hand over to him a sum of money or other stake, neither of the contracting parties having any other interest than the sum or stake he will so win or lose, there being no other real consideration for the making of such by either of the parties (*e*).

Thus has the word "bet" been expansively paraphrased; but even these definitions, when critically examined, leave room for objection from a legal point of view.

(*c*) *Johnson* v. *Lawsley* (1852), 12 C. B. 468.

(*d*) *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685. See also *Richards* v. *Starck* (1911), 1 K. B. 296.

(*e*) *Carlill* v. *Carbolic Smoke Ball* (1892), 2 Q. B. at 490; upheld in C. of A. (1893), 1 Q. B. 256.

For instance, the phrases "future uncertain event" (C), "prefixed and equally uncertain contingency" (A), and "future event of an uncertain nature" (B) are too wide. The words "future" "unascertained" must mean "at present unascertained by the parties," otherwise an offer by X. to give Y. 10 to 1 that a certain horse did not win the Derby in a particular past year would not be a bet (*f*).

Then, again, definitions X and Y include all policies of insurance. Though it might be argued that X. does not win when he obtains from Y. only such an amount as indemnifies him from a loss outside the contract, because he would then be no better off after than before the event, the words win and lose must surely be read with reference to what is within the contract only, otherwise a man could not be said to be making a bet when, by backing a horse, he was only going to obtain the same amount as he had laid against it with other backers.

Definition C excludes insurances in which there is an insurable interest, and inferentially excludes all others. But this only opens another loophole. Suppose an owner saying, "My horse is now worth £1000; if he wins such and such a

(*f*) In *Good* v. *Elliott* (1790), 3 T. R. 693, the agreement was dealt with entirely upon the footing that it was a wager, although the event upon which it depended was past. And in *Rourke* v. *Shortt* (1856), 5 E. & B. 904, the wager was as to the price given upon a former occasion for rags. The head-note of this case was: The plaintiff and defendant, while conversing as to some rags which the plaintiff proposed to sell and defendant to purchase, disputed as to the price of a former lot of rags, the plaintiff asserting the price to have been lower than the defendant asserted it to have been. They agreed that the question should be referred to M., a spirit merchant, and that whichever party was wrong should pay M. for a gallon of brandy; and that if the plaintiff was right the price of the lot for sale should be 6s. per cwt., and if defendant was right, 3s. M. decided that the plaintiff was right. Plaintiff sent the rags to defendant, but defendant refused to accept them at 6s., offering 5s. To an action for goods bargained and sold, defendant pleaded the facts specially, averring that 6s. was higher and 3s. lower than the value of the rags bargained and sold, and justified the refusal to accept on the ground that the agreement was made by way of wager, and therefore within statute 8 & 9 Vict. c. 109, sec. 18. Held that the plea was good, whether or not the agreement as to brandy was taken into consideration.

race he will be worth £5000. I will insure him against losing." According to definition C, this is not a bet, because the owner "has another interest than the stake." It may be said that this is not a practical point, and that any owner attempting such an "insurance" would on the turf, if discovered, lose more than he could gain. But it is permissible to put such a case as a test. It is obvious that a man might insure his horse against illness or death before a certain date, and the chances of the horse, if fit, losing a particular race before that date might be infinitesimal, so that in some instances the line of demarcation is almost invisible.

It may be urged that the words as to there being no real consideration for making the contract would govern such a case, and if the intention really was to insure the horse's increased value, the agreement would not be a bet within the definition; but it seems to the authors very doubtful whether this view is tenable, because the consideration must, we think, mean the consideration between parties.

Wager Policies.—By the law of England, as it stood before the passing of the Act of 19 Geo. II. c. 37, a wager policy, properly so called, was deemed a valid contract of insurance. A wager policy in this connection was one in which the parties in express terms stipulated "interest or no interest," or "without proof of interest." Best, C.J., in *Murphy* v. *Bell*, 4 Bing. 567 (1828), said: "Gaming was by no means the sole evil which the legislature by this Act proposed to remedy, but its object also was to prevent policies in this form from being used to protect persons who were carrying on an illegal traffic or made the means of profiting by the wilful destruction and capture of ships" (*g*). It should be observed that the Act referred only to British ships and cargoes, a fact which goes far to support the Chief Justice's view that the Act was based upon the public policy of protecting British property.

(*g*) See Arnould on *Marine Insurance*, pars. 311 *et seq.*, 8th ed. See also Marine Insurance Act, 1906, and Assurance Companies Act, 1909.

It may be said that insurance policies wherein there is no insurable interest are wagers rendered valid by Act of Parliament by implication, and are therefore only valid where there is a particular statute dealing with that particular class of risk, such as those on life, ships, &c. But, on the other hand, it may be urged with at least equal force that only those where there was no insurable interest in those particular statutes, cases were rendered invalid. It is hardly worth while to attempt to decide what is an academic question only, because it is inconceivable that a policy containing an insurable interest, although not regulated by any particular statute, would now be considered void as a wager (*h*).

In conclusion, one may quote the words of Mr. Justice Channell, in *Richards* v. *Starck* (1911), 1 K. B. 296, where he commented upon the "definition of a bet" given in *Thacker* v. *Hardy*: "One would never be surprised to find that, owing to the ingenuity of the human mind, a state of things had arisen which showed that the definition was not exhaustive." In *Richards* v. *Starck* all that the plaintiff had lost was "interest on his money for ninety days" (*i*).

Options.—To turn to a different field of speculation, let us consider the question of "options." I buy a "call option" in Chartereds from A. for seven days at 2s. a share at the price of, say, 40s. If this day week the price is 43s., I should call upon A. to deliver the shares to me, and I should have to pay 40s. a share—in addition, of course, to the

(*h*) It must be remembered that at the time of the passing of what may be called the principal insurance Acts, contracts by way of wagering were not void in law, and the true view seems to be that wagers on lives and ships were objectionable, not *qua* wagers, but as being contrary to public policy, from their very nature and from the fact that they were "a *mischievous kind* of gaming." We shall see later what has been constantly aimed at by the legislature. As to the question of public policy, see the preamble to 14 Geo. III. c. 48, and judgment of Grose, J., in *Good* v. *Elliott* (1790), 3 T. R. at p. 696. It is to be observed that the Act does not apply to goods or ships, but only lives.

(*i*) See also *Whitelaw* v. *M'Kinley*, 27 T. L. R. 49.

2s. I have already paid for the "options"—and I thus should make 1s. a share profit. The real meaning of the agreement, however, is in practice that he will pay me the shilling a share, and no shares will pass, while if they only go to 41s. I shall get back one of the two shillings a share that I have paid. If the shares do not go up at all, I shall not "exercise my option," and he will keep my 2s. It can be seen that the "real inwardness" of this arrangement is a mere gamble upon the price, but so far as we know such an agreement has never been held to be a wagering contract (*k*).

It is true, of course, that A. is supposed to have his shares and hold them at my disposal at the option price for a week for the consideration of 2s. per share, so that I can take them up and sell them if the price goes above the cost to me.

"**Future Goods.**"—But as it has been clearly decided that it is not gaming to sell goods not actually in the possession of the vendor, the mere fact that A. had not the shares at the time of the option could not by itself render the contract void (*l*). It is, of course, also true that in practice I should sell my shares against my option, if the price went up during the currency of it. That is to say, supposing Chartereds went to 43s. to-morrow, I should sell at that price upon the market, and give delivery this day week, or rather the following settlement, of the shares which

(*k*) It is true that Lord Collins in such a case said that if on the evidence the true inference was that the parties never intended the contract to be enforced, it was one of gaming and wagering (*Buitenlandsche Bankvereenging* v. *Hildesheim* (1902), 19 T. L. R. 641). But Lord Esher said in *Sadd* v. *Foster* that the Courts had held that these were not gaming contracts, but he could not understand why (13 T. L. R. 207 (1896)).

(*l*) *Hibblewhite* v. *M'Morice* (1839), 5 M. & W. 462. A contract for the sale of goods to be delivered at a future date is not invalidated by the circumstance that at the time of the contract the vendor neither has the goods in his possession nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them by the time appointed for delivery, otherwise than by purchasing them after the making of the contract.

I should call upon A. to deliver to me under my option. In that case it is perhaps difficult to say that the transaction is a wager (*m*).

It is not worth while elaborating cases, but these illustrations are sufficient to show the difficulty in which Courts are placed in their endeavour to check so-called gambling, without at the same time hindering what is termed commercial enterprise or "commercial speculation."

What can be said, for instance, of an insurance against the birth of twins, or against a child about to be born being a female (see *De Costa* v. *Jones* (1778), Cowp. 729). The person taking out such a policy might be pecuniarily interested in either of these events.

Marine Insurance.—The policy effected upon a ship, "lost or not lost," is perfectly good provided the policy-holder have an "insurable interest" in the ship, even though it turn out that the ship was lost at the date of the issue of the policy. Insurable interest is thus taken to mean that the policy-holder would have had an interest had the ship not ceased to exist. A person may acquire such an interest even after the loss (*n*).

Wagers for Consideration other than Money.—We are unable to find any case in England, before or after the Gaming Acts, of what are sometimes called "freak wagers," such as a bet upon a Presidential Election that if X. be elected, the loser of the bet shall walk on his hands and knees from Chicago to New York, carrying an advertisement of the winner's business or goods. This, by the way, does not seem to come within either definition A or C, because there is no money or other stake dependent upon the result

(*m*) For further description on the subject of options, see Melsheimer and Gardner's *Laws and Customs of the Stock Exchange*, p. 30, where a very ingenious if not wholly plausible case, is put forward of an instance of options being used as a kind of insurance.

(*n*) For questions of Marine Insurance, see Arnould (*supra*), and The Marine Insurance Act, 1906.

of the event. It would be very interesting to know how the Courts, before the Gaming Acts, would have dealt with such a ridiculous agreement.

Suggested Definition.—We feel that it is somewhat presumptuous to attempt to succeed in giving a definition where such great authorities appear to have failed, but it appears to us that the real test is one of "interest" in the event, and that the nearest approach to accuracy that can be obtained is by defining a bet as "an agreement whereby one party thereto is to win and the other to lose, upon the ascertainment of the result of an event in which each party, to the knowledge of the other, has no interest." This is really the view of Mr. Justice Willes in *Wilson* v. *Jones* (1867), L. R. 2 Exch. at p. 141, where he said: "The distinction between a wagering contract and one which is not wagering depends upon whether the person making it has or has not an interest in the subject matter of the contract." He said also (at p. 146): "8 & 9 Vict. has no application to a contract upon a matter in which the parties have an interest." Mr. Justice Blackburn in the same case said: "I apprehend that the distinction between a policy and a wager is this: a policy is, properly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to." He then defines an interest in an event: "That if the event happens the party will gain an advantage; if it is frustrated he will suffer a loss" (*o*).

This would permit a man to insure his horse winning a race, if it could be shown that if the event be frustrated he will suffer loss. It would not cover the case of a man "laying off," because the obligation to pay other debts would not be a legal obligation. It would in fact cover every form of insurance, such as the return of a certain political party to power, provided it could be shown that the insurer had a real interest in the result of the election.

(*o*) See also *Lucena* v. *Crawford* (1802), 3 B. & P. N. R. 75.

A corollary might be added to this proposition, to the effect that where the interest of a party could be ascertained, and the amount receivable by him under the agreement exceeded such sum, the agreement, so far as the excess is concerned, is *pro tanto* wagering, and invalid.

CHAPTER II

HISTORY OF THE LAW OF BETTING

In early times, though the Courts naturally viewed with disfavour the trial of questions that wagers involved, there was nothing to prevent a plaintiff recovering money staked upon any point, however frivolous, (*a*) provided that the bet did not introduce matters which were (1) offensive to third parties; (2) indecent (*b*); or (3) contrary to public policy (*c*).

The law therefore is entirely statutory, and the history of the growth of gaming contracts cannot be better described than by quoting the learned and lucid judgment of Lord Justice Fletcher Moulton in *Moulis* v. *Owen* (1907), 1 K. B. 757 (*d*). The Lord Justice dissented from the rest of the Court upon the main point of the case, but with regard to the branch of the subject that we are now considering there was, we take it, no difference of opinion. His judgment was as follows:—

"Neither games nor gaming were in any wise illegal at common law, and a bet was in olden times a valid contract and would be enforced by the Courts. Juridically speaking,

(*a*) The judges objected to the time of the Courts being wasted to the inconvenience of other suitors over such trivial points as whether "when a player at backgammon has touched a piece he is bound to move it, according to the rules of the game" (*Hussey* v. *Crickitt* (1811), 3 Camp. at p. 172; *Pope* v. *St. Leger* (1692), 1 Salk. 344); and see also argument at 3 Camp. 168 (1811). In quite early times the judges expressed their intention of making the recovery of bets difficult. See *Eggleton* v. *Lewin* (1683), 3 Levinz 118 (Charles II.'s reign).

(*b*) *Da Costa* v. *Jones* (1778), 2 Cowper 729.

(*c*) When horse-racing was illegal a wager on a horse-race was consequently illegal. *Johnson* v. *Bann* (1790), 4 Term. Rep. 1.

(*d*) For French law, see Chitty on Contracts, note to p. 683 of 16th edition.

there is no reason why this should not be so. The reciprocal liability of the parties constituted good consideration both on the one side and on the other, and differs in no substantial respect from the reciprocal liability arising from a wager upon a past event, the result of which is unknown to the parties wagering. Wagers of this latter kind were frequently enforced by our Courts (see *e.g. Good* v. *Elliott* (1790), 3 T. R. 693, prior to the Gaming Act, 1845 (*e*)).

Public Policy.—"The ground for treating gaming contracts in an exceptional way is to be sought in reasons of public policy and not in any defect in the essential qualities of the contracts themselves, and it is clear that the necessity for so doing was not felt in the ages during which our common law was formed, so that the disabilities under which such contracts labour are entirely derived from statute law.

Encouragement of Archery.—"From very early times we find legislation dealing with the subject of the legality of games and gaming, but the earlier statutes have no reference to gaming contracts, but are directed solely to the suppression of games—mainly games of skill—and were based on the principle that they tended to displace practice at archery and like manly sports which tended to render the people more fit for service in war. The earliest statute of this kind which I have found is 12 Richard II. c. 6, which was rendered more drastic by 11 Henry IV. c. 4. It orders persons of the class of servants or labourers to have bows

(*e*) We can find no distinction drawn in the old cases between a bet on a past and a bet on a future event. The Lord Justice says that logically they are in the same position, but we have been unable to discover any suggestion to the contrary. It is possible that the case of *Pugh* v. *Jenkins* (1841), 1 Q. B. 631, has given rise to this confusion; but when one looks at the decision one sees that the words of the statute upon which the case turned were "do and SHALL play," and it was held that having regard to the future tense past events were excluded from the operation of that statute. This turned upon the words in sec. 5. *Jackson* v. *Colegrave* (1694), Carthew 338.

and arrows and use the same on Sundays and holidays, and 'leave all playing at Tennis or Football and other games called Coits, Dice, Casting of the Stone, Kails, and other such importune games.'

"This legislation is carried further by 17 Edward IV. c. 3, which is entitled 'Against Unlawful Games,' and inflicts a fine of £20 and imprisonment for three years upon any occupier who allows persons to play at the forbidden games on his premises. . . . But the most important statute of early times directed against games is 33 Henry VIII. c. 9 (*f*), which remained in force until our days. It is entitled 'The Bill for Maintaining Artillery and the Debarring of Unlawful Games.' . . . By the preamble it sets forth that this has suffered greatly from tennis, bowls, cloysh, and other unlawful games, and it accordingly enacts heavy penalties against people of any degree or condition who keep premises for playing any game rendered unlawful by any statute, or any new unlawful game to be invented in the future, or who frequent such houses, and persons of the working classes are forbidden to play such games. Dice and cards figure amongst the unlawful games prohibited by this statute, but they appear in company with games of pure skill, and it is evident that there was no feeling that the games to which the statute applied were wrong or immoral in themselves; for it will be observed that permits could be obtained for keeping premises for the purpose of the particular games named in the permit (a provision which was repealed by 2 & 3 Ph. & Mary, c. 9), and the prohibition was suspended at Christmas for servants playing in their masters' houses. Moreover, any master could license his servants to play at cards or dice in his house, and if the master possessed an income of £100 a year he could permit his servants to play at such games in their own houses, either amongst themselves or with visitors. No reference whatever is made to wagering or gaming for money,

(*f*) As to 33 Henry VIII. c. 9, see *Murphy* v. *Arrow* (1897), 14 T. L. R. 13.

so that it is evident that down to this date the whole object of the legislation was, as I have said, to prevent popular indulgence in games which would interfere with the practice of archery, and it was a matter of no importance in the eyes of the legislature whether the games were games of skill or chance, or whether or not they were played for money (*g*).

16 Car. II. c. 7.—"The earliest statute which dealt with gaming, properly so-called, is 16 Car. II. c. 7, entitled 'An Act against Deceitful, Disorderly, and Excessive Gaming.' It has been frequently pointed out by the Courts that this Act is strictly for the purpose set out in its title (*h*). It is not directed against gaming in general, but only against such gaming as is unfair and excessive, and games of skill and chance are still mixed up together. It consists of two operative sections—the earlier directed against cheating at games, and the latter dealing with the case of persons playing at games 'other than with and for ready money,' and losing more than £100 upon credit. . . .

9 Anne c. 14.—"This state of things continued until the Act of 9 Anne c. 14 (*i*). It is clear that public opinion at this time was running strongly against gaming in all forms. A few years earlier the Act for the suppression of lotteries, 10 & 11 Will. III. c. 17, had been passed, and it was strengthened by 9 Anne c. 6. This feeling is still more

(*g*) This fact mentioned by the Lord Justice probably accounts for the loose usage of the phrases "gaming and wagering contracts" to which we have called attention (*supra*, p. 3).

(*h*) It was pointed out in the argument on *Applegarth* v. *Colley* (1842), 10 M. & W. 723, that as Charles II. was very much interested in horse-breeding, it was improbable that the Act was intended to do anything to suppress or injure horse-racing.

This statute and so much of 9 Anne c. 14 as was not altered by 5 & 6 Will. IV. c. 41 were repealed by 8 & 9 Vic. c. 109, sec. 18, as also was so much of 18 Geo. II. c. 34 as relates to 9 Anne c. 14.

(*i*) The latest decision upon this Act is *Barkworth* v. *Gant* (1909), 26 T. L. R. 165, C. A.

strongly evidenced by 9 Anne c. 14, which undoubtedly made a very great change in the law of England as regards gaming and gaming contracts.

"At the date of the passing of the Act it was, as we have seen, perfectly legal to play for ready money to any amount, and the winner could keep the winnings. The loser might also go to the limit of £100 on credit, and still be liable to have his debts enforced against him by action at law; but if the losses on credit exceeded this sum, no portion could be recovered by process of law, and the winner was liable to serious penalties. The statute of Anne radically altered this. Although it still purported to be intended only to prevent 'excessive and deceitful gaming,' it enacted that if a person should lose £10 or upwards at any time or sitting and should pay his losings, he could recover them from the winner by action brought within three months; and if he did not do so, any other person could thereafter obtain them by action against the winner, and the amount recovered was to go, one moiety to the person suing, and the other moiety to the use of the poor of the parish where the offence was committed. The Act contains other stringent enactments against cheating and professional gamblers, upon which I need not dwell, and concludes with the quaint exemption of the palaces of the Queen from its application, provided that she is actually resident therein, and the play is for ready money only."

[The Lord Justice then proceeds to deal with the section, which is not material to our present purpose, but which will be referred to later at p. 52.]

12 Geo. II. c. 28.—"We come next to 12 Geo. II. c. 28, which is entitled 'An Act for the more Effectual Preventing of Excessive and Deceitful Gaming.' This Act, which is expressed to be for the purpose of settling doubts whether certain games (including the game of hazard) are within the class of games or lotteries referred to in the Act of William III. and Anne respectively, specifically enacts that they shall

be so included, and prescribes penalties against those who are guilty of playing them.

13 Geo. II. c. 19.—"This Act is declared to be 'a good and wholesome law" by the statute of 13 Geo. II. c. 19, which, by section 9, adds to the proscribed list the game of 'passage,' and all other games which are played with dice, except 'backgammon.'

18 Geo. II. c. 38.—"Another Act passed in the same reign—namely, 18 Geo. II. c. 34—adds 'roulet' to the list of forbidden games, and otherwise strengthens the law against gaming in various ways, and includes a provision that any one who wins or loses at play or betting at any one time the sum or value of £10 shall be liable to indictment. But the Act which made the most substantial change in the law as enacted by 9 Anne c. 14, is 5 & 6 Will. IV. c. 41, ordinarily known as 'The Gaming Act, 1835.' . . . The Gaming Act, 1835, provided that notes, bills, and mortgages, which by the statute of Anne would be rendered utterly void by reason of having been given for a gaming consideration, should in future be treated only as having been given for an illegal consideration.

Statutes are Declarations that Gaming is Lawful.—"Pausing here for a moment, let us consider the cumulative effect of these statutes. In the first place, they have rendered it illegal to play at certain specific games. In the next place, they have radically altered the position of winning at play. At common law such winnings as we have seen were legally recoverable independently of their amount. The very statutes that restricted their recoverability demonstrated this. . . . To use the words of Lord Kenyon, in *Good* v. *Elliott* (*k*), 'All the statutes respecting gaming are so far parliamentary declarations that wagers and gaming had been lawful. . . .'"

We may supplement this by the dictum of Lord Justice

(*k*) (1790), 3 T. R. 692.

Vaughan Williams in *Saxby* v. *Fulton* (1909), 2 K. B. 208, to the effect that gaming and wagering was not illegal except as to certain matters specified by statutes.

Act of 1845.—This clear account of the evolution of the legal position of gaming and wagering brings us down to the important Act of 1845. Upon this and its amending Act of 1892 the bulk of the legal cases now depend. It will therefore be more convenient to treat the points arising upon them in greater detail hereafter; but with regard to the effect of these Acts, it may be said that the statute of 1845 made all wagers void as between the "principals," but only partially affected wagering contracts made through commission agents, at any rate after the decision in *Read* v. *Anderson* (1884), 13 Q. B. D. 779.

Act of 1892.—The Act of 1892 was passed expressly to cover the circumstances of that case, and was very widely drawn, no doubt with the intention of rendering all transactions carried out through commission agents absolutely as void as if they had been made between principals. It cannot be said that this result has been completely achieved.

"New" Consideration.—Since the passing of this Act, in fact quite recently, a series of cases have been decided in which money won upon a wager (not, of course, *eo nomine*) has been held to be recoverable where there has been some other consideration, subsequent or in addition to the mere bet. That is to say, if the winner has, for instance, agreed to give the loser time to pay his losses, it has been held that there is a good and valid contract upon which the winner can sue.

Hyams v. *Stuart King* (1908), 2 K. B. 696, is the best known of this line of cases.

These decisions seem to us to render nugatory the Gaming Acts, or at any rate to modify them extensively, and we imagine that actions to recover winnings will become frequent in our Courts.

CHAPTER III

PARTIES

As we have said, the two principal enactments relating to betting are 8 & 9 Vict. c. 109, sec. 18—

"All contracts or agreements, whether by parole or in writing, by way of gaming and wagering shall be null and void, and 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: provided always that this enactment shall not be deemed to apply to any subscription or contribution or agreement to subscribe or contribute for or toward any plate prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise." (*The Gaming Act*, 1845.)

And 55 & 56 Vict. c. 9—

"Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the 8th & 9th Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any such contract or of any services in relation thereto or in connexion therewith shall be null and void, and no action shall be brought or maintained to recover any such sum of money." (*The Gaming Act*, 1892.)

There are three classes of persons interested or involved in gaming contracts, viz.:—

(1) The principals.

(2) The stakeholder.

(3) Commission agents and other persons paying or receiving or bound to pay or receive the winnings, and persons who are holders of bills of exchange which have been given for the payment of gaming debts.

PART I (CHAPTER III)

PRINCIPALS

"Concealed" Bets.—(1) As between principals the law is fairly clear. When once the contract has been shown to be a "bet," there is no difficulty with regard to their position. It is not always easy to decide whether the contract is a bet or not; but as we have dealt at some length with this aspect of the subject in our remarks upon the definition, there is very little to add. We may, however, point out that the real intention of the parties must be ascertained. For instance, an agreement to purchase a horse at a certain price if the horse can trot a certain number of miles in an hour may be a valid bargain, or it may be a mere cloak for a pure bet (*a*), and it is obvious that this can only be decided upon the circumstances of the particular case. As was said in *Grizewood* v. *Blane* (1851), 11 C. B. 538, "both" parties must intend the contract to be of a wagering nature, and the jury can deduce this from the surrounding circumstances.

Of course in a contract that is on the part of one party perfectly genuine, the other party might say, "On *my* part it was a mere bet; I never intended to deliver the goods, but merely to deal in differences in price." But assuming that the other party really intended the contract to be a genuine purchase, no Court would allow it to be defeated by alleging a secret reservation of this sort, or permit a person to take advantage of his own wrong.

(*a*) *Brogden* v. *Marriott* (1836), 3 Bing. N. C. 88. But it should be observed that the decision turned to a certain extent upon the fact that the issue depended upon an event prohibited by statute. This was before the Act of 1845, but it seems to us that it supports the view for which we have cited it.

And further, if one party really intends to bet, but the other to make a real contract, the agreement will not be a bet. On the same sort of principle of estoppel as before mentioned, the contract will be deemed to be the contract intended by the innocent party. It seems to us, at least, that this is the true principle, otherwise it would be always possible to set up the defence that the parties were not *ad idem*, and that therefore there never had been any contract, which would be quite as good for the prospective defendant as if he established his allegation that the contract was a gaming one.

Duty of Court with regard to Betting Contracts.—As we have seen, the Act of 1845 rendered void as between the principals all wagering contracts, and consequently the Courts will (even if this defence be not raised) dismiss an action brought upon a gaming debt if the true nature of the transaction be disclosed during the trial (*b*).

On the other hand, in *Thwaites* v. *Coulthwaite* (1896), 1 Ch. 496, the Court held that any partner in a betting business can claim a partnership account, unless the business was *criminal* within some of the statutes. It is doubtful whether the case can be regarded as good law, and Darling, J., in the later case of *Thomas* v. *Day* (1907), 24 T. L. R. 272, took the opposite view. But see dictum of Farwell, L.J., in *Hyams* v. *Stuart King* (1908), 2 K. B., at p. 725.

New Consideration.—Then we come to the recent cases

(*b*) *Luckett* v. *Wood* (1907), 24 T. L. R. 617. This case goes extremely far, because it was decided in the Divisional Court on appeal from a County Court; and by the rules no point not taken in the County Court can be taken on the appeal, and the gaming defence had not been raised in the Court below. Now by order (Order X., r. 18 (2)) of the County Court rules the judge is to take the objection even though the defence is not raised by the defendant. This is a welcome opportunity for defendants to take advantage of the Act without incurring any of the odium that in certain circles attaches to a man who attempts to get out of his "debts of honour" by means of these Acts.

in which the Courts have decided that where there has been some fresh element introduced, as, for instance, a "forbearance to sue, and to have the defendant declared a defaulter," such new matter or conduct constituted a good consideration for a fresh agreement to pay, upon which the plaintiff can recover. This principle was enunciated in the Court of Appeal in *Hyams* v. *Stuart King* (1908), 2 K. B. 696, by Sir Gorell Barnes, Pres. P. D. & A. Div., and Farwell, L.J., Moulton, L.J., dissenting.

There are several decisions of Courts of first instance to the same effect. It certainly seems to us that the dissentient judgment of Lord Justice Moulton is the more consonant with the intention of the legislature, and it will be a matter of great interest to see which of the two views the House of Lords will adopt when, if ever, the point comes to be decided by them. It is curious, too, to note that Lord Justice Moulton was the dissenting judge in *Moulis* v. *Owen* (cited *supra*), in which case he was in favour of the plaintiff.

The first of what may be termed the "new series" of these cases is *In re Brown ex parte Martingell* (*c*), in which Buckley, L.J. (then Buckley, J.), following the case of *Bubb* v. *Yelverton* (*d*) said: "The bills (*i.e.* those in question in the action) were given for an altogether new consideration, which was not an illegal consideration. They were given, not to PAY a gaming debt, but to avoid the consequences of not having paid it." The head-note of the case is as follows:—

"After an action to recover a gaming debt had been dismissed, the creditors wrote to the committee of the debtor's club complaining of his not having paid his debts of honour. The debtor, in consideration of this letter being withdrawn, gave the creditors bills in satisfaction of the debt. Before the bills were paid the debtor became bankrupt.

"Held: That the bills were given for good consideration, and that the creditor could prove for the amount due thereon."

Lord Justice Moulton, in *Hyams* v. *Stuart King* (*vide*

(*c*) (1904), 2 K. B. 133. (*d*) (1869), L. R. 9 Eq. 471.

supra), construes this finding of fact to amount to a decision that the bills were given merely as the price of the withdrawal of the letter. This may be an accurate definition of the finding, but the distinction seems to us so subtle that the line of demarcation to the ordinary mind is invisible.

Forbearance to Register as Defaulter.—In *Hodgkins* v. *Simpson* (1908), 25 T. L. R. 53, the defendant, a solicitor's articled clerk, was sued by a turf commission agent with whom he had been betting. In July 1908 a sum of £567, 9s. 9d. was due to the plaintiff in respect of bets. A person on behalf of the plaintiff called upon the defendant and threatened that if he did not pay he would be declared a "defaulter." The defendant replied that that did not matter to him, as he was not a member of Tattersalls, or in fact of any sporting club. Eventually, however, he signed a document couched in the following terms:—

"In consideration of Hodgkins' forbearance to sue and of the fact that I shall not be registered as a defaulter either in the list compiled by the Turf Register or at Tattersalls or any of the sporting clubs, I hereby undertake to pay the sum of £17, 9s. 9d. by July 9, 1908, and to make immediate arrangements with regard to the balance of £550."

Alverstone, L.C.J., held that there was sufficient consideration to support the promise to pay £550, there being nothing to show that the defendant regarded as an empty threat the intimation that if he did not pay he would be posted as a defaulter.

It was also held that the document was not a promissory note within the meaning of the Stamp Act, 1891.

Measure of Damage.—It should be observed that the new contract was treated here, as logically of course it should be, as quite a distinct transaction, and the L.C.J. decided that the measure of damages was such a sum as would flow from the breach by the defendant of his agreement "to do what he could." The judge accordingly assessed the damages at £400.

Treating Matter as Private (*e*).—But in *Ladbroke & Co.* v. *Buckland* (1908), 25 T. L. R. 55, the same learned judge held that there was *no* consideration for a fresh promise by the defendant to pay, and that the action must fail, in the following circumstances:—

The defendant in August 1908 owed the plaintiffs £56 for bets. The plaintiffs having applied for payment, received a letter from the defendant stating that he could not at the moment pay, but that he was negotiating a business which would put him in funds, and asking the plaintiffs on this account to treat the matter as private, otherwise his chances of success would be jeopardised. The plaintiffs replied that they would do so, but would like to know when they might expect a cheque. In a later letter the plaintiffs asked for a settlement by September 21, but received no reply.

The plaintiffs knew the defendant was a member of a certain club, but alleged that they refrained from bringing his conduct before the committee of it and from posting him as a defaulter at the Newmarket Rooms on account of the said agreement.

These two cases bring out in clear relief the difficulty of deciding which category includes any particular set of facts.

"Evidence of Threats."—In *In re Comar ex parte Ronald* (1908), 52 Sol. J. 642, the Court of Appeal laid down the rule that to constitute the required consideration there must be "evidence of threats" on the part of the creditor that he will do some lawful act, and the fact that the defendant merely fears the consequences of the non-payment of his bets will not be sufficient.

Amount with Interest and Further Time.—Then, again, where there was a difference between the amount sued for and the amount alleged to have been won on bets, the Courts

(*e*) But see *Wilson* v. *Connolly* (1911), 27 T. L. R. 212, *infra*, p. 26, where a County Court judge held this was sufficient, and the Court of Appeal refused to disturb the finding.

held that there was good consideration, in the two following cases:—

Goodson v. *Grierson* (1908), 52 Sol. J. 599. A bookmaker sued for a sum of money which the defendant pleaded was in respect of betting transactions. The plaintiff admitted this, but relied upon a new agreement to the following effect: That if the plaintiff would give the defendant time to pay, the defendant would not only pay the amount but also interest thereon up to the date of payment. The plaintiff alleged that this agreement had been carried out by him, and Channell, J., held that he was entitled to judgment because he had shown that there was a good consideration for the payment of the debt.

Settlement of Claim of Larger Amount and Further Time.—*Goodson* v. *Baker* (1908), 24 T. L. R. 338. The defendant owed the plaintiff £375 for money lost in bets, both parties being bookmakers. The defendant admitted £355, and asked the plaintiff to accept a post-dated cheque for £355 in settlement. The plaintiff agreed, and received the cheque post-dated fourteen days. The cheque was dishonoured.

The defendant then asked for further time, which was given, but he did not pay, and the plaintiff, about seven weeks after the cheque was dishonoured, sued for £355. The defendant might have been posted as a defaulter, as he was a member of a club frequented by sporting men.

A. T. Lawrence, J., held that there was sufficient consideration to support the promise to pay the £355, inasmuch as it was a settlement of a claim for a larger amount, and as time had been given to him by the plaintiff to pay this amount, the defendant being desirous of not being posted as a defaulter at any race meeting.

We have merely given these two cases as examples of claims which differ from the amount won by betting, and as showing one of the elements in determining new consideration. It is, of course, by no means an essential factor, nor, even when present, decisive.

That the question is one of fact and not of law is clearly established, if authority be needed, by the decision of the Court of Appeal in *Cohen & Co.* v. *Ulph & Co.* (1910), 26 T. L. R. 128, where the facts were as follow:—

The defendants owed the plaintiffs £137, 13s. 8d. in respect of bets. The defendants stated that they were unable to pay, whereupon the plaintiffs threatened to post them at Tattersalls, although the defendants were not members of that institution. In consequence of this threat the defendants promised to pay if a week's time were given to them for that purpose.

Bucknill, J., held that the agreement was supported by a sufficient consideration, and the M.R., giving judgment in the Court of Appeal, said: "There is no question of law before the Court, and it is impossible to interfere with the finding of fact of Mr. Justice Bucknill."

The case of *Wilson* v. *Connolly* (1911), 27 T. L. R. 212, also in the Court of Appeal, besides being a further illustration of this principle, is an example of what may be regarded as the "minimum" of new consideration in such cases (*f*).

The plaintiff and defendant were both bookmakers. The defendant asked the plaintiff for time, and requested him to keep the matter absolutely to himself, as publicity would do him (the defendant) harm. The plaintiff stated on oath that this in fact would have been the case. The County Court judge found as a fact that a new contract had been entered into, and gave judgment for the plaintiff. With obvious reluctance the judges of the Divisional Court and in the Court of Appeal refused to disturb this finding (*g*).

Having dealt with the more recent cases between principals, it will be convenient to go back a few years and

(*f*) Although the decision in *Goodson* v. *Grierson* would almost suggest that giving time alone would be sufficient, Farwell, L.J., in *Hyams* v. *Stuart King*, in terms said this would not be enough.

(*g*) See also *Bridge* v. *Foster* and *Heathorn* v. *Lloyd*, reported in the *Times* newspaper on March 16 and March 20, 1911, respectively, but they call for no special comment.

consider two very important decisions where, although the parties were in fact, as we think, principals, the Court treated them as in a position analogous to that of stakeholders. It may be said that these cases should be treated under that head, but as in our view the distinction was artificial rather than real, we feel justified in considering them now.

Universal Stock Exchange v. Strachan.—We refer to the *Universal Stock Exchange* v. *Strachan* (Nos. 1 and 2). The case was split into two parts, and is therefore reported in this way. The action was brought by the plaintiff to recover back the sum of £3000 and certain shares deposited by the plaintiff with the defendants, who were "outside brokers." The money and shares were deposited by way of "cover" (*i.e.* security) for the payment of "differences" on the transactions between the parties, which purported to be dealings in stocks and shares.

The learned judge left to the jury the question what was the "real inwardness" of these dealings, and the jury, as they were entitled to do, found that the whole of the transactions (although some were very specious, and bore on the face of them a very businesslike character) were simply "a gamble."

It appeared in evidence that with regard to the money, £3000, it had been treated in the accounts between the parties, with the plaintiff's knowledge, as *appropriated* to meet losses, and that the plaintiff gave notice to terminate the "gamble," but at a time when all the money had been absorbed by appropriation in the accounts in the manner described.

Cave, J., consequently entered judgment for the plaintiff for the return of the securities, but for the defendants upon the claim for the return of the money.

The defendants appealed against the first part of the judgment (*Strachan* v. *Universal Stock Exchange* (1895), 2 Q. B. 329); and the plaintiff against the second (*Strachan* v.

Universal Stock Exchange (2) (1895), 2 Q. B. 697), and thus the case is reported in two parts.

Return of Deposit.—The first branch of the case is put shortly by Lord Esher at p. 331: "The plaintiff is claiming the return of certain valuable shares which he placed in their hands. The answer of the defendants is that the shares were so placed in their hands as security for the performance of a contract, so that if the plaintiff failed to perform it the defendants were entitled to realise and pay themselves the amount of damages caused by the breach of contract.

"The reply to this is that there never was a contract, because the pretended contract was by way of gaming and wagering; so that it follows that if there was no contract there was no breach of contract, and the defendants have no ground for retaining the securities.

"I think a valuable thing deposited by way of security is not deposited to abide the event on which any wager shall have been made within the meaning of the 18th section" (*i.e.* of the Act of 1845).

"That is enough to settle the matter; but I will go further, and say that even if this were a deposit within the meaning of the statute, still, if the contract of deposit is annulled by the party who made the deposit at any time *before the deposit is realised*, he can nullify the deposit and recover back the thing deposited." The italics are ours.

This decision was upheld in the House of Lords (*h*).

The second branch is distinguishable. The same learned judge, Lord Esher ([1895], 2 Q. B. at p. 699), decided (with regard to the money that had been appropriated) with great reluctance that "a person who is so foolish as to give a deposit in such circumstances can never recover it back; and even if he has won the wager, the person who has the deposit can refuse to pay it back (*i*).

(*h*) (1896), A. C. 166.

(*i*) This does not apply to the case of a stakeholder pure and simple (*q.v.*).

"It is quite true that it has been held that before the wager is decided it can be repudiated, and a deposit can be recovered back. These decisions seem to me to be an encroachment on the plain words of the Act, but they are agreeable to my mind, and I do not attempt to question them. But when we are invited to go further and say that after the wager is determined the person who has deposited money can still recover it from the person with whom the bet is made (I am not now speaking of stakeholders), I cannot see that we ought to go that length on the true construction of the Act."

Appropriation.—A. L. Smith, L.J., said: "It is manifest that no action can be brought by one against the other to enforce any contract so declared to be void; but it has been held by authorities, which it is far too late now to question, that as soon as one party to a gaming contract receives notice from the other party that the former declines to abide any longer by the wagering contract, money deposited by him thereupon ceases to be money deposited in the hands of the latter 'to abide the event on which any wager shall have been made.' Any money still *unappropriated* by him becomes money of the former without any good reason for the latter detaining it; and in such circumstances an action for 'money had and received to the plaintiff's use' will lie.

"This *notice* may be given as well after as before the event, to abide which the money has been deposited, has come off; but in the latter case it must be given before the money has been *appropriated* to the purpose for which it has been deposited, for if appropriated it is no longer money of the plaintiff's in the defendant's hands. If it is still unappropriated, the defendant cannot set up the gaming and wagering contract to retain it, for the statute enacts that such a contract is void.

"The result, therefore, is that if one party to a gaming and wagering contract gives to the other party *notice in time* (*k*)

(*k*) *i.e.* before appropriation.

that he withdraws from the contract, he can recover back his deposit; whether in the hands of his co-bettor or a third party he can recover it, *aliter* if he does not."

There was no appeal from this decision; and thus, therefore, the law at present stands. It is clear, however, that such repudiation must be made *before* action brought, and that the omission to do so is not merely a technical objection to the suit *Gatty* v. *Field* (1847), 9 Q. B. 431, cited with approval by Kay, L.J., at p. 703, in *Strachan* v. *Universal Stock Exchange* (*supra*).

The gist of the matter appears to be that "upon repudiation the money ceases to abide the event."

These cases introduce questions of great refinement, and in advising upon any particular set of facts, it is essential to consider carefully how to classify them.

We know of no decision which defines what "appropriation" would be, for instance, in the case of a bookmaker. Presenting a cheque would be a simple illustration, but that would be governed by the statute dealing with securities given for wages, and cannot be used as a test. But it is possible to imagine a case where money ear-marked in some way by the principals to a bet might be recovered after the event had actually been decided. This is the effect of the judgment of A. L. Smith, L.J., though we confess that it seems to us somewhat straining language to say that "it has ceased to abide the event."

"Co-wagerers may be Stakeholders."—Lord Esher says in terms that co-wagerers are for this purpose stakeholders; but these artificial definitions "for certain purposes" lead to endless complications, and the main difficulty in interpreting these Acts appears to have arisen from judges attempting to do "substantial justice" in some cases, while in others striving to give effect to what they believe to be "the intention of the legislature," *i.e.* the discouragement of betting.

These divergent views have recently been very marked.

PART II (CHAPTER III)

THE STAKEHOLDER

We have seen that a "co-wagerer" *may* be a stakeholder, but this must be treated as a very exceptional case.

It is clear law that the Act of 1892 does not prevent the recovery by the depositor of a sum of money deposited with a stakeholder to abide the event of a wager (*Burge* v. *Ashley* (1900), 1 K. B. 744).

The facts of the case were that the plaintiff had deposited the sum of £300 with the defendants (the proprietors of the *Sportsman*), to abide the event of a boxing match between Burge and Dobbs. Dobbs won. After the match Burge gave notice to the defendants not to pay over the £300, but to pay it back to him. The defendants refused, and handed the money to Dobbs. In the action by Burge for the recovery of the money, the defendants set up the Gaming Act, 1892.

"**Paid.**"—The decision turned upon the meaning of "paid" in this Act. A. L. Smith, L.J., in giving judgment, said: "In ordinary parlance I should not think that a person so depositing a sum of money with a stakeholder would say that he 'paid' it to the stakeholder"; and then quoting from his judgment in *Strachan* v. *The Universal Stock Exchange* (*l*), a passage set out on p. 29, he added: "I do not think that this case can be brought within either branch of the section. In my opinion a sum of money deposited with a stakeholder is not 'paid' within the meaning of the section, and I think it would be stretching the language of the Act to make it apply to a sum so deposited."

At first sight *Carney* v. *Plimmer* (1897), 1 Q. B. 634, may

(*l*) (1895), 2 Q. B. 693. The learned judge referred to the earlier cases of *Hastelow* v. *Jackson* (1829), 8 B. C. 221; *Varney* v. *Hickman* (1848), 5 C. B. 271; *Hampden* v. *Walsh* (1875), 1 Q. B. D. 189; and *Trimble* v. *Hill* (1878), 5 App. Cases 324 (*q.v.*).

appear to be in conflict with this decision, but there is a difference—in that the defendant was not the stakeholder himself, but a person who had received the money from him as the result of a wager.

The facts were that two men, of whom Plimmer was one, were engaged in a boxing match; each man was to deposit £500, and the two sums, together with added money, were to be handed to the winner. The other man duly deposited his £500, but the defendant had not the money, and the match would have gone off had not Plimmer obtained the money from the plaintiff, who deposited it with the stakeholder. The match came off and Plimmer won, and thereupon received the two sums of £500, together with £400 added money.

Lord Esher held that this was a loan of £500 from Carney to Plimmer, but that it was a loan made in particular circumstances, which he described in the following terms: "That the loan was in respect of a matter rendered null and void by the Act of 1845 I cannot doubt, because the plaintiff's own evidence is that he lent the money on the terms that if the defendant won he was to repay it, but that if he lost he was to be under no obligation to do so, so that the plaintiff was to be repaid or not according to the result of a wager."

Chitty, L.J., stating the arrangement in a legal form, said: "Money was paid to the stakeholder at the request of the defendant, and on terms that the defendant should repay it when he received it. There was no wagering contract between the plaintiff and the defendant, but there was between the defendant and the other party to the boxing match."

In our opinion, to a certain extent the *ratio decidendi* of this case rather weakens the effect of the decision in *Burge* v. *Ashley* as to the meaning of the word "pay," because if money deposited by one of the wagerers with a stakeholder is not money "paid," it is difficult to see why money "put up," *i.e.* deposited by a third party for one of the wagerers with the stakeholders, should be considered to be "paid"

within the meaning of the Act. *Burge* v. *Ashley*, however, is the more recent case; and perhaps the distinction is that as between the third party and the wagerer, the money may be said to have been "paid" to the wagerer's use. Apart from any subtle distinction of definitions of the word paid, *Carney* v. *Plimmer* seems to be clearly good law, affirming the earlier decision of the Divisional Court in *O'Sullivan* v. *Thomas* (1895), 1 Q. B. 698.

"Deposit with Agent."—Romer, L.J., states the situation with great clearness in *Burge* v. *Ashley* (1900), 1 Q. B. at p. 741, by saying that a person depositing money with a stakeholder was, before the Act of 1892, in the position of a person who has deposited money with an agent, giving him a mandate in a certain future event to deal with the money in a certain way, and who would have the right before the mandate had been acted upon to call upon the agent to return the money (*m*).

Then the learned judge went on to say that a sum so deposited could not be properly described as "paid" within the meaning of the Act of 1892.

Interpleader.—In *Shoolbred* v. *Roberts* (1899), 2 Q. B. 565, and C. A. (1900), 2 Q. B. 497, the stakeholders of money deposited to abide the event of a billiard match between Roberts, the defendant, and one Dawson, interpleaded and paid the sum into Court; and the contest was between the winner of the match (the defendant in the action) and his trustee in bankruptcy.

The match was for £100 a-side, and terminated on April 3, 1899, in the defendant's favour. On March 29 the plaintiff

(*m*) See *Batson* v. *Newman* (1865), 1 C. P. D. 573, where A. and B. had each deposited £50 with C., and agreed in writing that the £100 should be paid to A. if his horse trotted a certain number of miles in a certain time. The umpire decided in favour of A. B. sued C. for his £50 before it had been paid over. *Held* he could recover it. Also *held* that this was a wager and not a prize within the proviso of sec. 18 of the Gaming Act, 1845. Cp. *Saffrey* v. *Mayer* (1901), 1 Q. B. 11, *infra*.

gave notice to the stakeholders that he would claim the money as the defendant's trustee in bankruptcy, and on April 5 the defendant also gave notice claiming the money.

The stakeholders interpleaded, and upon the hearing of the issue, the learned judge decided that £100 of the £200 "put up" belonged to the plaintiff and should be paid out to him, and as to the other £100 made no order.

Mr. Justice Phillimore, following *Diggle* v. *Higgs* (1877), 2 Ex. Div. 422, expressed himself as follows: "I cannot hold that the money was paid in respect of such a contract or agreement, and I think that the promise, express or implied, to repay cannot be construed to cover an implied duty in law to repay money which was paid upon a consideration which did not in law exist. I therefore come to the conclusion that there is nothing in the later Act to take away the common law right of the gamester to recover back his deposit as money paid upon a consideration which in law did not exist.

The Court of Appeal affirmed the learned judge's order so far as this £100 was concerned, but varied it with regard to the £100 "paid" to the stakeholder by Dawson, the other match player, by ordering that sum also should be paid out to the plaintiff. As Dawson made no claim to the money, the law as to wagering contracts was only incidentally treated, but the points of interest in the subject were—(1) That Lord Justice Vaughan Williams expressed grave doubt whether interpleader proceedings ought to be permitted in cases of this sort; (2) That Lord Justice Romer said that a bankrupt cannot set up the Gaming Act of 1845 against his own trustee in order to retain such money against such trustee; (3) That the £100 "paid" by Roberts to the stakeholders ought to be dealt with as money deposited to abide the event of a wager which can be recovered, seeing that by claiming the sum as money deposited and *not* as winnings, the plaintiff, in *substance*, revokes the authority of the stakeholders; (4) That as to Dawson's £100, it ought to be treated as £100 voluntarily placed by him at the disposal of the

trustee or Roberts, to whichever, as between Roberts and the trustee claiming through him, it may belong.

Diggle v. *Higgs* (*n*) finally settled the law that a man who had deposited £200 as his stake in a walking match, and lost the match, could recover the amount from the stakeholder before the latter had paid it over to the winner; but the decision is also of importance upon the construction of the proviso to sec. 18 of the Act of 1845. Lord Cairns there held the meaning to be this: "Provided that so long as there is a subscription which is not a wager, the second part of the section shall not apply to it." The second part of course is that which begins with the words "and no suit shall be brought in any Court of Law or Equity for recovering any sum of money," &c. (see p. 19, *supra*).

It may be appropriate at this point to call attention to sec. 5 of the Betting Houses Act, 1853, which runs as follows:—

Betting Houses Act, 1853, Sec. 5.—"Any money or valuable thing received by any such person aforesaid as a deposit on any bet or as or for the consideration for any such assurance, undertaking, promise or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing or the value thereof may be recovered accordingly with full costs of suit in any Court of competent jurisdiction."

At first sight the words "any such person as aforesaid" seems by the context to refer only to those persons mentioned in sec. 4, viz. the "owners and occupiers," and this appears to have been the view adopted in *Doggett* v. *Cattern* (1865), 1 Jur. N. S. 243; but in *Lennox* v. *Stoddart* (1902), 2 K. B. 21, the Court of Appeal held that if the defendant is within sec. 1, he is also such a "person aforesaid" within sec. 5.

Mr. Justice Joyce, in *Vogt* v. *Mortimer* (1906), 22 T.L.R. 763,

(*n*) (1877) 2 Ex. Div. 422, approved in *Trimble* v. *Hill* (1878), 5 App. Cases 342.

also decided that if the defendant were within either secs. 1, 3, or 4, he would be within sec. 5, and would be liable to refund the money deposited.

It is also important to notice that these two cases are also authorities for the proposition that the Gaming Act of 1892 has not impliedly repealed the section in question.

Facts to be Established under Sec. 5.—A person desiring to avail himself of this section to recover a deposit will have to establish three main elements to form his case, viz. (1) place, (2) person, (3) purpose. He will have to show—

(1) That these are premises within the words "house, office, room, or other place, opened, kept, or used" for the purposes mentioned in sec. 1 of the Act of 1853;

(2) That there is a person who has "kept, used, opened, owned, or occupied," &c., the said premises within the meaning of secs. 1, 3, or 4 (*o*); and

(3) That he has deposited money with such person for the purpose mentioned in sec. 5.

This may seem to be inverting the order of proof, but is the most convenient way of stating the proposition.

Now that there has been a judicial interpretation of the meaning of the words "person aforesaid," no difficulty need arise in advising upon a case of this sort, so far as the "person" is concerned; the purpose, too, can readily be established; and it seems to us that the only real matter requiring consideration is that of "place." But as this is dealt with at length in the second part of this book, it is unnecessary to set it out here.

The effect seems, therefore, to be that a plaintiff having established the fact that he has deposited with the defendant money for the purpose of betting, and that the defendant "owns, occupies, keeps, uses," &c., a "house, office, place," &c., for the purposes specified in the Acts, is in the same position *quoad* the defendant as a depositor of a stake is to the stakeholder who has not parted with the money.

(*o*) For definition of these words, see Part II., *passim*.

It may be noticed that the position of an *ordinary* stakeholder is expressly left unaffected by the Act (see sec. 6).

The most recent decision upon this Act is *Gordon* v. *Chief Commissioner of Metropolitan Police* (1910), 2 K. B. 1080, where the plaintiff, a bookmaker, had kept the proceeds of street betting in a house which had been searched under a warrant issued under sec. 11 of the Act. The money in question, about £100, together with betting slips, had been seized and retained by the police for the purposes of the prosecution of the plaintiff. The plaintiff was acquitted, and he sued the Commissioner for the detention.

It was held that the maxim *ex turpi causa non oritur actio* did not apply, and that the plaintiff was entitled to succeed, as he was not seeking to enforce any illegal contract or asking for any relief dependent upon an illegal transaction. The claim was merely for the detention of money, the property in which had passed to the plaintiff with the possession.

It should be noted that the plaintiff was acquitted, and that the money was received by him in the course of a transaction which was an offence against the Street Betting Act of 1906. Reference is made (Moulton, L.J.'s judgment) to the possibility of a defence under sec. 48 of the Metropolitan Police Act, 1839, at any rate if the plaintiff had been convicted of keeping a gaming-house (*p*).

PART III (CHAPTER III)

PRINCIPALS AND AGENTS

Before the Gaming Act of 1892, in various decisions, culminating in the much-discussed judgment of the Court of Appeal in *Read* v. *Anderson* (*q*), it was held that a person who had employed an agent to bet for him was obliged to

(*p*) On this case, see Part II.

(*q*) (1884), 13 Q. B. D. 779. But no action lay for breach of agreement to make bets on commission (*Cohen* v. *Kittell* (1889), 22 Q. B. D. 680).

reimburse the agent any money paid away by him in the execution of his duty in such agency, and that a principal could not revoke an agent's authority at a time when the agent would be prejudiced by such revocation.

That is to say, where an agent would be obliged, for fear of being declared a defaulter in sporting circles, to pay the losses, the principal could not revoke his authority, and consequently would have to allow the agent to pay, and be bound thereafter to reimburse him.

To meet this application of the general common law to the relations of a principal and agent in betting transactions the Gaming Act of 1892 was avowedly passed. It seems to us to have produced some very unfair results to bookmakers, because although a commission agent who has paid away money on behalf of his principal cannot recover it, yet when he has received money from losers of bets on behalf of his principal, he cannot set up the Act as a defence should his principal sue him for the money received. Clearly both should be irrecoverable, or neither. The bookmaker is stamped as a person to be disregarded in comparison with the person with whom he makes the bets; and one would imagine that the legislature has attempted to put a stop to betting by making the position of the bookmaker as intolerable as possible. This may or may not be a laudable intention, but surely it should have been carried out in clear and express words.

Tatam v. Reeve.—The first decision of importance after 1892, viz. *Tatam* v. *Reeve* (1893), 1 Q. B. 44, illustrated the hardship of the statute, the words of which are, it will be noticed, extraordinarily wide.

The defendant wrote to the plaintiff (who was apparently not a bookmaker at all) the following letter:—

"Dear Mr. Tatam,—Kindly settle the enclosed account for me, as I don't know where to find all the men, and I have to catch an early train for Henley.—Yours truly,

"H. Reeve."

The enclosed account showed that Reeve was indebted to four different people to the amount of £148 in all. It was admitted that, though these were betting debts due by the defendant, the plaintiff had not even made the bets, and was in no way liable to pay any of them. The plaintiff complied with the defendant's request, and, for no other reason, paid these debts. It was held that Mr. Tatam could not recover the sum so paid.

Mr. Justice Wills went so far as to say: "I do not think it matters whether the plaintiff knew or did not know that the payments he made were in payment of bets."

Comments upon, in Hyams v. Stuart King.—If the Act really extends to that length it is indeed oppressive, but Fletcher Moulton, L.J., in *Hyams* v. *Stuart King* (*r*), expressly says that Mr. Justice Wills went too far in so construing it. The expression of the Lord Justice may be said to be *obiter*, but we think that the view of Mr. Justice Wills would not be followed. It might be avoided upon some principle of estoppel, such as by saying the defendant, not having stated, as he was bound to do, the nature of the debts, was estopped from afterwards setting up their real character.

It is quite clear that the Act has no word implying *scienter*, and this seems the only method of avoiding a palpable injustice.

On the other hand, as we have mentioned, where the agent has received money from a loser on account of bets made by him on account of his principal, the latter is entitled to recover them from the agent (*s*). It may be that, on a strict reading of the Act, the case is not within the words of the statute, though it might be fairly said to be included in the earlier Act of 1845, under the words, "money . . . alleged to be won on any wager." It is probably too late now to raise such a contention. But it

(*r*) (1908), 2 K. B. 696.

(*s*) *De Mattos* v. *Benjamin* (1894), 70 L. T. 560; *Bridger* v. *Savage* (1885), 15 Q. B. D. 363.

certainly seems to us that the principal's stake, as distinguished from his winnings, would clearly be irrecoverable, seeing that it was "money paid by him in respect of gaming transactions" within the Act of 1892; unless, of course, it could be contended that money given by the principal is not "paid" to the agent. This decision, of course, involves the construction that the words "or otherwise" are *ejusdem generis* with commission, &c., and means reward to the agent.

No one, of course, has any sympathy with an agent who appropriates his principal's winnings and uses an Act of this sort to maintain that position; but if "sympathy" is to be introduced, it is clear that *Tatam* v. *Reeve* ought to have been decided in the plaintiff's favour.

It is difficult to say what effect the Act of 1892 would have upon a claim for the recovery of money lent by a plaintiff to a defendant for the express purpose of paying a betting debt. The decision of *Ex parte Pyke*, 8 Ch. D. 754, does not help us, because the facts when examined appear to be analogous to those of *Read* v. *Anderson*, the bookmaker in fact paying the debts and suing for money paid to the defendant's use. It cannot be strictly said that if I lend a friend £10 to pay a bet, that I have "paid" the £10 under or in respect of any contract by way of gaming. On the other hand, if, instead of handing the £10 to my friend, I pay the bet myself, I cannot recover it (*Tatam* v. *Reeve*). As between me and my friend's co-bettor the transaction is a "payment," as between me and my friend it is not. The case of *Carney* v. *Plimmer* cannot be said to affect the question, because the point there was that the money was only to be refunded or not according to the *event* of a wager. *Saxby* v. *Fulton* (1909), 2 K. B. 208, seems to support the view that the money would be recoverable, as does also the judgment of Moulton, L.J., in *Moulis* v. *Owen*, as he seems to think that had the plaintiff sued there upon the consideration and not on the security, the matter would have been free from doubt.

Two other cases exemplify, as it seems to us, the extent

to which this element of sympathy influences Courts in construing these Acts. They are—

Fuller v. *Perryman* (1894), 11 T. L. R. 350.

Hirst v. *Williams & Perryman* (1895), 12 T. L. R. 128.

Advancing Money in a Speculation.—In the second, the plaintiff sought to recover £100 paid by her to the defendants in the following circumstances. The plaintiff received from the defendants a circular headed, "Unique Opportunity for Speculation."

Following some flattering references to the prospects of "Brighton A's," the circular ran: "We are so confident of the value of our information that we will guarantee against loss the subscriber of £25 or £50 or upwards towards this speculation. We are certain that speculators have never before had an opportunity placed before them as this one, where they know that the money staked as cover cannot be lost, but will be returned either with or without a handsome profit. There is no further liability, and no obligation or intention of taking up or paying for the entire stock."

The plaintiff paid the defendants a cheque for £50 accordingly, on the understanding that there was to be no further liability and that there was to be no taking up or paying for the stock by the plaintiff. A few days afterwards the plaintiff sent another cheque for £50.

Charles, J., held that as between the plaintiff and the defendant it was not a gambling transaction. The bargain was that in consideration of the plaintiff's advancing money, the defendants undertook to return it.

On appeal, Lord Esher, M.R., said that there was no gambling between the plaintiff and the defendants. The defendants in effect said: "We are going to speculate on the Stock Exchange, and if you advance money we guarantee its return in the event of our speculation resulting in a loss."

In *Fuller* v. *Perryman* (1894), 11 T. L. R. 350, the Court held that "there was no evidence" that these operations

were gaming transactions. It is quite true, as Mr. Lawson Walton pointed out in argument, that "speculation" is not necessarily "gambling"; but if these circulars do not point conclusively to gaming transactions, the words are even more difficult to define than we imagined.

In the later case of *Hirst* v. *Perryman* the Court appears to have grasped the fact that these operations were not "legitimate commercial enterprise," and to have "got round the Act" by treating the guarantee to repay the money as a separate or collateral agreement.

But in *Richards* v. *Starck* (1911), 1 K. B. 296, where the defendant sent out circulars stating that he was going to carry on a "trust" to operate in certain stocks, and promising to divide any profit (less 10 per cent.) amongst contributors to the trust, it was held that such an agreement was a wagering contract, and that the plaintiff could not recover his contribution, although the circular stated that such contribution would be returned even if there were no profits.

It is hopeless to attempt to reconcile all the cases upon this Act, and in the two Perryman cases the Act of 1892 seems to have been wholly disregarded, especially when one takes into consideration the judgments in *Saffery* v. *Mayer*, (1901), 1 K. B. 11, in which the Court of Appeal held that money advanced by one person to another upon a joint account for the purpose of making bets could not be recovered when it had been lost in bets. The Court decided that the handing over of the money was not in the nature of a deposit (within the cases of *O'Sullivan* v. *Thomas* and *Burge* v. *Ashley*) but a payment. The word "pay" in the case of *Tatam* v. *Reeve* seems to be interpreted as equivalent to "repay," *i.e.* "reimburse," but it must not be supposed that it is restricted to that meaning.

Money Paid to Principal, under Mistake of Fact, by Agent.—A very recent case, *Gasson* v. *Cole* (1910), 26 T. L. R. 468, throws some light upon the position. The facts there

were peculiar, and were that the plaintiff, a coal merchant did a certain amount of betting as agent for the defendant, a bookmaker. The plaintiff, at the defendant's request, put "£25 each way" on a horse named Jim Crook for a particular race. Another horse, Rosevern, in fact came in first, and Jim Crook second; but on an objection being made to Rosevern, the stewards declared Jim Crook to be the winner. After the stewards' decision the bets were paid, and the plaintiff handed over (to use a neutral term) £275 to the defendant. Subsequently, on appeal, the stewards' decision was reversed and the race awarded to Rosevern. Thereupon the plaintiff paid back their money to *some* of the persons who had paid him on the strength of the stewards' decision. The plaintiff asked the defendant to refund him the amount, but the request was refused; in spite of this the plaintiff paid back to the rest of the persons betting with him the sums he had received from them. The total amount handed over by the plaintiff to the defendant was £275.

It was contended on the part of the plaintiff that the £275 was money paid to the defendant under a mistake of fact, and that the Gaming Act did not free the defendant from his obligation to return it; and, further, that the defendant was bound to reimburse the plaintiff money paid by him as his agent.

For the defendant it was urged that the whole transaction was by way of gaming or wagering; and, further, that an agent had in any case no right to make payments after his authority was revoked.

The learned judge, in giving his decision, said: "I asked during argument the defendant's counsel whether the rule 'that money paid in mistake of fact could be recovered' applied to a betting transaction. If it is clear that it was a mistake of fact, I think the person would be entitled to recover it. There is a dictum of Baron Bramwell's, in *Aiken* v. *Short* (1875), 1 H. & N. 210, to the following effect:—

"In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact

which, if true, would make the person paying liable to pay the money, not where, if true, it would merely make it desirable that he should pay the money.' That has been quoted with approval, but I do not think it has been acted on so as to disallow a claim. The difficulty here, however, is that this is not a *mere* mistake of fact. The dispute was whether the money was won or not. That depends upon the construction of a gaming contract. Treating it as a bet, it depends upon a contract which is null and void.

"The next question is, was the plaintiff betting as agent for the defendant? If so, he comes within the Gaming Act of 1892. If the plaintiff's case depends upon being an agent, he comes within the express words of the statute.

"Upon the facts the plaintiff is in a difficulty, as he had no right to pay when his authority was countermanded. From either point of view the action cannot be maintained in law."

The chief point of interest in this case is that the learned judge appears to be of opinion that the rule as to recovering money back when paid under a mistake, *does* apply to payments made in connection with gaming transactions; although it is difficult to conceive a case where the mistake can be said to be one *merely* of fact, if the learned judge's interpretation of this transaction is accurate.

With regard to the revocation of authority, which applies only to those bets paid after refusal by the defendant to permit it, the ordinary rule of law that a principal cannot revoke an agent's authority, when the agent will be prejudiced thereby, seems to have been overlooked. On the other hand there can, in our opinion, be no doubt about the case being covered by the Gaming Act; particularly in view of the fact that the Court construed "pay" as "repay" in *Tatam* v. *Reeve*, as mentioned on p. 42, *supra*.

We have already had occasion to notice the effect of the Act of 1892 upon the position of agents paying and receiving money in respect of gaming contracts, but many questions arise upon the converse case where the agent (though

possibly knowing the principal's intention) actually enters into a real and genuine contract with a person who is ignorant of the principal's object.

"Differences."—The best instance of this is a Stock Exchange deal in differences, as carried out by stockbrokers for a client.

If I want to "deal in differences," I order my broker to buy at a certain price (he may or may not know that I cannot possibly take up (*i.e.* pay for) the whole amount of the stock ordered by me), and if the price rises I order him to sell at the enhanced price. I then clear the difference between the price at which I sold and that at which I bought, less of course brokerage. Now the actual legal effect of these transactions is that I have entered into, through my broker, two real contracts—one of purchase and the other of sale.

The persons involved in these operations, besides myself, are my broker and the jobber from whom he buys, and the jobber to whom he sells.

As between the broker and the jobbers there are two real contracts, one to purchase and the other for sale, upon which, by the Stock Exchange rules, my broker is absolutely liable.

The broker has, for example, entered into contracts to buy 100 Canadian Pacifics at 190, and to sell the same number at 192 for the next settlement, and the broker must in one case pay the price and in the other deliver the stock.

I probably never had in my life 19,000 dollars, as my broker well knew; but still, as there are real contracts subsisting between him and the jobbers, the main transaction is not a gaming and wagering contract. Quite apart from the Stock Exchange rules, this would of course be so.

It is even possible that an "investor" like myself may have been indulging in a "flutter," but in the opposite way. That is to say he may, thinking that Canadian Pacifics were going to fall, have given an order to his broker to sell 100 Canadian Pacifics (which he did not possess) at 190;

his broker may have sold them to the jobber who sold them to my broker for me. And he may even have bought, through the same chain of brokers and jobbers, mine at 192, so that I get his money, without having any intention of taking shares, whilst he loses it to me over the sale of shares he never possessed. Even this is not a wagering contract, because the brokers and jobbers with their real contracts intervene between us.

Perhaps we may be permitted to explain that one can, of course, deal in differences by selling shares one does not possess, in the hope that the shares will fall, and of being able to buy them at a lower price before the time of delivery arrives, and thus pocketing the difference in the prices.

Stock Exchange.—It is practically hopeless in these cases to set up the defence of gaming. The only occasions upon which such operations could be thus impeached is where it could be proved that the broker and jobber both knew that the transaction between them was not a real contract. This upon the London Stock Exchange may be considered impossible (*t*).

Outside Brokers.—Outside brokers are, of course, in a totally different position, because they are in fact frequently principals, and do not deal as members of the Stock Exchange.

Other Exchanges.—A case came under our notice in which an officer had been buying a commodity largely upon a certain Exchange. The material in question would have been obviously quite useless to him, amounting as it did to some hundreds of tons. The brokers, who were members of this particular Exchange, of course knew that he was intending merely to gamble in the differences in the price of the commodity.

When suing him for the balance of the amount paid away

(*t*) *Forget* v. *Ostigny* (1895), A. C. 318.

by them, less the amount received by "sales" on his account, they were met by the defence (among others) of the Gaming Acts, and upon this leave to defend under Order XIV. was given.

The case was never tried; but it is clear that this is a possible defence, although the difficulty is in proving that the brokers (there were no "jobbers" in this Exchange, which was, of course, not a Stock Exchange) did not enter into real contracts.

In a case of this sort the defendant should insist upon the fullest possible discovery. There are many features that in a genuine sale of goods would necessarily be present, and if the plaintiff's books omit these, a jury would not take long in coming to the conclusion that the brokers never entered into real contracts. What may be termed "suspicious" features are, for example—

(1) Vagueness of description of goods sold.

(2) Indefiniteness of their position at the time of sale.

(3) Indefiniteness as to place of delivery.

(4) Absence of *indicia* of title, and the like.

In this particular case, for instance, the contracts showed that although goods of a certain standard quality were sold, three or four variations were permissible at varying prices in substitution for the standard quality. The places at which the vendor might give delivery were also widely distributed, towns hundreds of miles apart being named as alternatives. Of course each case must be decided on its merits, but the elements in question might properly be taken into account in ascertaining whether the contracts entered into *by the brokers* were real commercial transactions, or were merely counters in a gamble, and the sales fictions.

The existence of a heavy cross account, with a very small balance on one side or the other between the buying and selling broker, will frequently be discovered.

Clients.—Different Exchanges have different rules with regard to outsiders. The Stock Exchange refuses to recog-

nise their existence at all, while the Metal Exchange, for example, recognises (or did until recently) brokers' clients if their names were inserted in the contracts. This position would give rise to some very nice points of law, if, for instance, the broker on his own initiation omitted his client's name.

Suppose, for instance, I want to gamble in differences in the price of tin. I instruct a metal broker to buy 100 tons at a certain price, and in due course he sends me a bought note showing the purchase, but containing no information as to whether or not he has inserted my name in the contract.

Tin falls heavily, and I cannot pay the difference. The metal broker says he must pay, or he will be declared a defaulter. I tell him that I revoke his authority to pay, and the person who has sold me 100 tons of tin must deliver it to my chambers, and look to me for the price (*u*).

The broker replies: "You cannot revoke my authority, because I shall be declared a defaulter if I do not pay"; and he or his solicitors rely upon the law of agent and principal expressed in *Read* v. *Anderson* (1884), 13 Q. B. D. 779, the contract between him and the vendor being *ex hypothesi* a real contract. My answer to this is that I am *quoad* the vendor an undisclosed principal, and can sue on the contract made by my agent; and that with regard to *Read* v. *Anderson*, the broker has, without my knowledge or consent, chosen (by withholding my name) to make himself liable, and that consequently the rule of law laid down in that case does not apply.

This appears to be the true view, and my position would then be that I am entitled to delivery; of course there may be terms as to cash payment with which I could not comply, and the vendor may in that case be entitled to sell the tin and sue me for the difference, but I should then have him

(*u*) I could, of course, see his books and interrogate him. (I may have a better chance of showing that the transaction was a gaming one if I have, as the other party to the litigation, the "vendor" instead of my broker; discovery, for instance, might be much more valuable.)

for an opponent, and not my broker. Perhaps the point is somewhat academic, but it would seem that if he intended to gamble, the transaction would be a gaming one, even in the unlikely event of my broker having had no such intention, as the contract is one between me and the vendor.

These and other points are not material to our subject, except in so far as they illustrate the importance to a defendant of being able to establish the exact nature of the contract entered into by him (through his broker) with a third party.

It has been suggested in one case (*v*) that it is not enough that each party to a contract should intend to gamble for the contract to be a gaming one, but that each should also be aware of the other's intentions. This may be strictly accurate, but it is not a point of any practical use, because no Court would believe that where two parties intended to gamble, either was in ignorance of the other's object.

As we have pointed out, it is of the highest importance to get at the vendor's intentions; and this, of course, can be only satisfactorily achieved when he is the other party to the litigation. It may be possible in some cases to revoke the agent's authority, and order him not to pay. It will depend, of course, upon the usage of the particular Exchange, and the principal's knowledge of such usage, &c., whether this can be done. In some cases, for instance, an agent to purchase may have no implied authority to pay.

These questions are really hardly within the scope of the present work; but as a great deal of gambling is done in this way, we think it well to indicate the line of defence to be adopted and the methods to be employed in establishing it.

We think that on many exchanges, other than the Stock Exchange, such a defence is quite feasible.

We have dealt with the question of the purchase of stock for the next settlement, and we now have to consider the further element of carrying-over. We may say at once that this does not, upon Stock Exchange transactions, assist in

(*v*) *Grizewood* v. *Blane* (1851), 11 C. B. 538.

the slightest degree the defence of the Gaming Act. The payments of "contango" and "backwardation" are, of course, mere incidents of the "carry-over."

The system still consists in *real* transactions (*w*), the method being as follows: I tell my broker to buy 100 Canadian Pacifics at £190, say (*i.e.* for the next settlement, unless by special arrangement some other date is fixed); before that time I see the prices going steadily down; I am reluctant to lose without a struggle, and as I cannot sell without loss on this side of the settlement date, I ask him to arrange to 'carry over" my bargain—that is to say, that I am not to be obliged to take up any shares at the approaching settlement, but may postpone doing so until the following, *i.e.* the second settlement. He effects this by selling the 100 shares I have bought (or am supposed to have bought) for the first settlement. He does this on "carry-over" day, and the price he gets is the carry-over price, called the "making-up" price, and at the same time and at the same price he buys 100 shares for the second settlement. He has carried out in all three real transactions on my behalf. Suppose the carry-over price to be £187, I have £18,700 to come to me from the jobber who has bought them for the first settlement, and I have to pay away £19,000 to the jobber from whom I originally bought. I thus have to pay £300, and I have got a new contract by which I have to pay £18,700 to the jobber who has sold me the shares for the second settlement.

I shall have, of course, to pay brokerage on these transactions, and in addition (probably) a sum called the "contango" for the privilege of carrying over. We say "probably," because "contango" being a variable quantity may in certain circumstances sink to zero, or even become negative, so that I should be entitled to receive money instead of paying contango. If I do so, the amount so received is "backwardation."

(*w*) *In re Overweg, Haas* v. *Durant* (1900), 1 Ch. 209. We use the word *real* in contradistinction to "gambling."

Of course, too, if the shares go up before the second settlement arrives, I may be able to sell at such a price that I can recoup myself for the loss of the £300, pay all brokerage and contango (if any), and still make money out of the deal.

Mine has been a pure gamble, and yet each of the transactions composing it has been stamped with the imprimatur of a real contract, and it is quite unimpeachable.

Backwardation is, as we have seen, the correlative term to contango, and is generally used to express the amount that one has to pay for the privilege of carrying over a "bear" transaction—that is to say, if I have sold shares (that I did not possess) "for a fall," and because the price has since risen I have not cared to buy them, I can by a similar but reverse process obtain an extension of time. I thus postpone my liability to deliver the shares from one settlement to the next. I pay brokerage and "backwardation." Backwardation may in the same way sink to zero or become a negative quantity, and then, of course, becomes "contango." Backwardation is the opposite or *negative* of contango. The factors which determine the amount of the contango payable upon any particular transaction, and whether the amount shall be negative (that is to say, that backwardation is to be received instead of contango having to be paid) are matters not within the scope of the present work; but it may be said that the chief elements are the number of shares on the market, and the price of money.

PART IV (CHAPTER III)

PRINCIPALS AND THIRD PARTIES OTHER THAN AGENTS

The most common case of this sort is where the principal to a gaming contract gives a cheque or bill for his losses, and the instrument comes into the hands of a *bonâ-fide* holder for value.

The statutes dealing with this branch of the subject are

9 Anne c. 19 (commonly printed c. 14), as amended by 5 & 6 Will. IV. c. 41. (*x*)

The material parts of the earlier statute are as follow:—

> "*All notes, bills, bonds, judgments, mortgages, or securities* and conveyances whatsoever, given, granted, drawn, or entered into or executed by any person or persons whatsoever, *where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever won by gaming* or playing at cards, dice tables, tennis, bowls, or other game or games whatsoever of betting on the sides or hands of such as do game at any of the games aforesaid, or for reimbursing or repaying any money knowingly lent or advanced at the time or place of such play to any person so gaming or betting as aforesaid, or that shall during such play so play or bet, *shall be utterly void*, frustrate, and of none effect to all intents and purposes whatsoever."

The gist of the section is italicised. This was modified by the Act of 1835, declaring that such instruments (*y*) should be deemed to have been given for an illegal consideration, instead of being absolutely void. The operative words are as follow:—

> Sec. 1.—"Be it enacted that so much of the hereinbefore recited Acts . . . (*z*) as enacts that any note, bill, or mortgage shall be absolutely void, shall be and the same is hereby repealed: but nevertheless every note, bill, or mortgage which, if this Act had not been passed, would by virtue of the said lastly hereinbefore mentioned Acts or any of them have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration; and the

---

(*x*) This portion of the statute of Anne, as thus amended, is all that now remains of the Act in question. (See sec. 18, Gaming Act, 1845 and (1907), 1 K. B. at p. 752.)

(*y*) It is interesting to observe that the list of instruments is not the same in the two Acts, but we do not think that the discrepancy is material.

(*z*) The principal Acts among those thereinbefore recited are 16 Car. II. c. 7, 10 Will. III. c. 1, 9 Anne c. 14, and 11 Anne c. 1.

said several Acts shall have the same force and effect which they would respectively have had, if instead of enacting that any such note, bill, or mortgage should be absolutely void, such Acts had respectively provided that every note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration: provided always that nothing herein contained shall prejudice or effect any note, bill, or mortgage which would have been good and valid if this Act had not been passed."

Sec. 2.—"In case any person shall . . . make, draw, give or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited Acts . . . declared to be void, and such person shall actually pay to any endorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration . . . and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall have so paid such money, and shall accordingly be recoverable by action at law in any of his Majesty's courts of record." (*a*)

The position is very clearly put by Buckley, L.J., in *Saxby* v. *Fulton* (1909), 2 K. B. 208, to which we refer hereafter (see p. 55).

"The purpose of the section was this: It was thought that the mischief of gaming and betting with the money in one's pocket was not very great, but that the giving of promissory notes or the encumbrancing of one's estates at play was a very serious mischief, and therefore all such securities given for sums lost, whether in lawful or unlawful games, were alike avoided.

"Coming to the Act of 1835, it is plain from the preamble that it was felt to be a hardship that when a bill or note or other security had been given for a consideration arising out of a gaming transaction it should be void, not only in the hands of the person to whom it was originally given, but also in the hands of a *bonâ-fide* holder for value; therefore, in place of the avoidance of the bill or other security, the

(*a*) Secs. 3 and 4 of this Act are repealed by the Statute Law Revision Act, 1874.

legislature substituted the provision that it should be deemed to have been given for an illegal consideration.

"It has been argued that the effect of that Act was that the security was to be deemed to have been given for an illegal consideration, not merely for the purpose of relieving the *bonâ-fide* holder for value, but for all purposes, and that therefore it is not possible to sue upon the consideration.

"I do not agree with that view. I think the intention and effect was to prevent the claim of a *bonâ-fide* holder for value being defeated in cases where it ought not to be."

And later on he adds: "And Cozens-Hardy, L.J., said in the same case, 'In *Quarrier* v. *Colston* there was no security; there was nothing upon which the Act of Anne or the Gaming Act, 1835, could operate.' This means, of course, that those statutes cannot come into operation unless there is a security: they cannot defeat the consideration as distinguished from the security."

These two statutes have so recently received judicial interpretation by the Court of Appeal, that we think the most convenient form of treating them is by giving these recent decisions, together with a table of earlier cases, with comments upon them, showing how the law has been gradually evolved.

In *Moulis* v. *Owen* (already referred to for another purpose) (1907), 1 K. B. 746, the defendant gave a cheque drawn upon an *English* bank to the plaintiff, partly in repayment of money lent to the defendant to *enable* the defendant to play at baccarat at a club in Algiers, and partly to be applied by the plaintiff in discharging gaming debts of the defendant's, incurred in playing at baccarat there. According to French law, the consideration for the cheque was not illegal.

In an action on the cheque, it was held by the majority of the Court (Collins, M.R., and Cozens-Hardy, L.J., Moulton, L.J., dissenting) that inasmuch as the transaction was governed by English law, the cheque must be deemed to have been given for an illegal consideration within the 1st section of the Gaming Act, 1835, and that therefore the action failed.

In *Saxby* v. *Fulton* (1909), 2 K. B. 208, it was decided that money lent in a foreign country for the purpose of being used by the borrower for gaming (such gaming by the local law not being illegal) may be recovered in an English Court.

It will be seen that the doubts raised by various judges, particularly in the case of *Applegarth* v. *Colley* and *Moulis* v. *Owen*, as to the distinction between the consideration for a security and the security itself being illegal, are set at rest by the judgment of Lord Justice Buckley above cited.

A somewhat curious case, in which an attempt was made to invoke the aid of these statutes, was decided by the Court of Appeal more recently still. A. having obtained a cheque for £3000 by fraud from the plaintiff, endorsed it over to the defendant (a commission agent) in payment of betting debts to him amounting to £1400, and received from him the balance of £1600. The defendant had no notice whatever of the circumstances in which the cheque for £3000 had been received by A.

The plaintiff thereafter sued the defendant for £3000 for money had and received. Ridley, J., held that the action must fail. The plaintiff appealed with regard to the claim of £1400; but the Court of Appeal, affirming the Court below, decided that the defendant was in exactly the same position as if he had received the £1400 in cash (*Barkworth* v. *Gant* (1910), 26 T. L. R. 165).

Ridley, J., decided (*b*) that by endorsing the cheque A. did not "*give*" a bill within the meaning of these statutes, and the same view appears to have been taken in the Court of Appeal (*c*).

He also held that there was a new consideration within the decision of *Goodson* v. *Baker* (*d*).

If the decision in *Goodson* v. *Baker* really leads to this

(*b*) 25 T. L. R. 722 (1909).

(*c*) In argument, counsel contended that the endorsing was a "giving," but the Court of Appeal declined to adopt it. It appears to us, however, that this point may be considered to have been left open by the Court of Appeal. In our opinion, it is far from being free from doubt.

(*d*) 24 T. L. R. 338 (1908).

result the opportunities of evasion of the Gaming Acts would appear to be enormous.

Schedule of Cases

There are several other cases, of which *Alcinbrook* v. *Hall*, 2 Wils. 309 (1766), and *M'Allester* v. *Haden*, 2 Camp. 438 (1810), are the principal, but it is unnecessary to cite them all.

1746. *Barjeau* v. *Walmsley*, 2 Strange 1249.

Plaintiff and defendant gamed together. The plaintiff having won all the defendant's money, lent him 10 guineas at a time until the defendant owed the plaintiff 120 guineas.

It was argued that "the agreement to pay" was a "security," but the Court overruled the contention, and the plaintiff recovered.

1757. *Young* v. *Moore*, 2 Wilson 67.

"The statute has made all money *won* at play void: *a priori* all paid contracts of this sort are void. The case in 2 Strange (i.e. *Barjeau* v. *Walmsley*) was for money lent, which is different."

1760. *Robinson* v. *Bland*, 2 Burrows 1077.

Money lent *for gaming* in France.
Security given unenforceable.
Money won not recoverable.
Followed in *Moulis* v. *Owen*.

1793. *Wettenhall* v. *Wood*, 1 Esp. 17.

Money lent for play, without any security, recoverable in assumpsit. Defendant borrowed money from the plaintiff, in a common gambling-house kept by him (the plaintiff), for the purpose of continuing play.

Lord Kenyon held that the money was recoverable because the statute of Anne only avoided the "security."

1838. *Mackinnell* v. *Robinson*, 3 M. & W. 434.

Money lent for the purpose of gaming and to be used at an *illegal* game, such as "hazard," cannot be recovered.

1842. *Quarrier* v. *Colston*, 1 Philips 147.

Money lent for the purpose of playing games *not* forbidden by the law of the country where the gaming takes place, recoverable.

Followed in *Saxby* v. *Fulton*.

1842. *Applegarth* v. *Colley*, 10 M. & W. 723.

Semble that by the statute of Anne not only the security given for a gaming debt, but the contract itself was avoided; but, at all events, this must be taken to be the case since the statute 5 & 6 Will. IV. c. 41.

This decision is inconsistent with *Robinson* v. *Bland* to the extent of money lent. It was approved by the majority of the Court, but Moulton, L.J., in his dissenting judgment in *Moulis* v. *Owen*, said: "The only case which conflicts with this long line of authorities is *Applegarth* v. *Colley*, where the point was not necessary for the decision of the case, but in which Rolfe, B., indicated the view that the statute of William IV. avoided the contract as well as the security whether the statute of Anne did so or not. He bases this conclusion upon reasoning which I think cannot be defended, and, as I have said, it is in conflict with the earlier authorities" (1907, 1 K. B. at p. 767).

1863. *King* v. *Kemp*, 8 L. T. N. S. 255.

Action upon a cheque. Plea that the consideration was money lent for gaming abroad. Held: no defence.

Overruled by the majority of the Court in *Moulis* v. *Owen;* approved by Moulton, L.J., in the same case, who said the decision amounted to saying that the statute of Anne does not apply to gaming beyond the realm.

The criticisms of the M.R. do not seem entirely well-

founded. For instance, there is nothing in the report to show that the counsel in the case was the same gentleman as the M.R. assumed him to be.

It is a little difficult to follow the passage in Lord Justice Cozens-Hardy's judgment in *Moulis* v. *Owen*, where, speaking of *Quarrier* v. *Colston*, he says: "Lord Lyndhurst's judgment does not govern the present case, *although* it leads to the strange result that a parole contract made in France may be valid if there is no security given for the loan; although if there is a security by way of negotiable instrument payable in England, both the security and the debt are bad." In *Quarrier* v. *Colston*, of course, there was a parole contract only.

It may be said at once that statutes of purely local application naturally produce strange results. One has only to glance at any authority upon the "conflict of laws" to be convinced of this. But surely the logical explanation given by Buckley, L.J., puts the matter quite clearly, viz. that the cheque may be void but the consideration still good (*e*). This view is emphasised in Moulton, L.J.'s judgment, where he suggests that an amendment should have been made, and a claim upon the consideration instead of upon the cheque inserted in the statement of claim (1907, 1 K. B. p. 768).

The only point upon this class of transaction not already covered by authority that seems likely to arise, is, What would be the position of a holder of a *foreign* cheque given in similar circumstances?

(*e*) *Blaxton* v. *Pye*, 2 Wilson 309, is a good illustration of the artificial results produced by legislative attempts to place arbitrary limits upon gaming. The bet was 14 guineas to 8 guineas. The winner of 8 guineas, had he been the loser, would have had to pay 14 guineas. But by the statutes 16 Car. II. c. 7 and 9 Anne c. 14, the other party would not have been able to recover any part of the 14 guineas, because it would have been in excess of the statutory limit of £10. It was argued, therefore, that as the winner could not have been compelled to pay had he lost, the transaction was *nudum pactum*, and he ought not to be allowed to recover. And this view seems to have been adopted by the Court. (See also *Ximenes* v. *Jaques* (1795), 1 Esp. 311, as to value of a plate.)

PART II

CRIMINAL LAW

By C. G. Moran

INTRODUCTION

Betting (*a*) is not illegal, and may be carried on by any person, at any time, and in any place, save in those cases where it is prohibited by statute, or by bye-laws made in pursuance of the statute; (*b*) the statutory prohibitions are few in number, and may be classified as follows:—

1. The prohibition of certain betting in the street.
2. The prohibition of a certain betting business carried on in any house, office, room, or other place.
3. The prohibition of certain betting advertisements.

We devote a chapter to each class of restriction.

(*a*) We use the word in the sense in which it has been defined in Part I. c. i. This part does not deal with lotteries or with any form of gambling.

(*b*) "It must be remembered that while the law does not sanction betting, and refuses its aid to carry out any transaction founded upon a bet, it has not made all betting criminal, but only betting carried on in the manner and under the conditions specified in the statute." Lord Russell of Killowen, C.J., in *Reg.* v. *Brown* (1895), 1 Q. B. at p. 131.

CHAPTER I

THE PROHIBITION OF CERTAIN BETTING IN THE STREET

The Increase of Street Betting.—The Betting Act of 1853 for the suppression of betting-houses or offices and the receiving of money in advance by the owners or occupiers of such houses or offices (see the preamble, p. 84), drove the bookmakers into the street. For some years the Act was not very strictly enforced, but as its provisions became better known and the police took action in enforcing them, the public found their opportunities for ready-money betting in the bookmakers' offices, and later in public-houses, newspaper shops, and other places, more and more restricted. The backer therefore being unable to find the bookmaker (except on the racecourse), the bookmaker went out into the street to find the backer. He became peripatetic. The Betting Act of 1853 resulted in a vast extension of street betting. A bookmaker with a good business employed agents to receive betting slips and deposits in the streets of different districts, and even, it is said, inside factories and works. The result was that a number of bye-laws and sections in local Acts were passed for the prevention of betting in the street. At first the legislature and the bye-law authorities, considering that there was nothing illegal in betting, had recourse to the following plan. They said that if there were betting in the street and there were three people together in the street, the matter could be dealt with as an obstruction in the street. The persons arrested and fined, at first, always took the point that they were not obstructing anybody or anything, but the magis-

trates pointed out to them that, by the terms of the bye-law or of the local Act, if they were in the street for the purpose of betting they were deemed to be obstructing the street. If actual obstruction in the highway could be proved, proceedings could be taken under sec. 72 of the Highways Act, 1835 (5 & 6 Will. IV. c. 50). Of course "obstruction" in nearly every case gave a right of arrest. We give two examples of this kind of local prohibition of betting in the street.

Bye-laws: Obstruction.

"Any three or more persons assembled together in any part of a street for the purpose of betting shall be deemed to be obstructing the street."

This bye-law was made in 1875 for Manchester.

Assembled together.—By sec. 393 of the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), "If any two or more persons assemble together in any street or open place within the burgh for the purpose of engaging in lotteries, betting, or gaming, each of such persons shall be liable" to a penalty.

In *Bonnar* v. *Walker* (1896), 23 R. (Court of Justic.) 39, 60 J. P. 135, it was proved that B., the appellant, was walking up and down a street. A young man "joined the appellant and handed him a piece of white paper and two or three pieces of money. B. was arrested, and on him were found fifty-four betting lines and other papers often found on betting men." The Court of Justiciary quashed the conviction, holding that there was no "assembling" in the street. Lord M'Laren expressed the opinion that the two or more persons contemplated as assembling together were persons identified as being together for the prosecution of the same purpose, viz. the making gain out of the public.

We do not consider that the same meaning would be given to the word "assemble" in the above bye-law in this country.

Local Act: Obstruction.—By sec. 23 of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134)—

"Any three or more persons assembled together in any part of a street within the Metropolis for the purpose of betting shall be deemed to be obstructing the street, and each of such persons shall be liable to a penalty not exceeding £5."

Bye-laws: Frequenting and Using a Street.—It will be noticed that to secure a conviction under these provisions, at least three persons must be proved to have assembled together in the street for the purpose of betting. If the betting slips were taken one by one and no tout or scout were also present, the street bookmaker escaped. The fiction therefore of obstruction was dropped, and the later bye-laws took the form of imposing a penalty on persons frequenting and using a street or public place for the purpose of bookmaking or betting. We give four examples of this kind of bye-law which have been held valid:—

"Any person who shall frequent and use any street or other public place within the borough of Wolverhampton for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager with any person, shall be liable to a penalty not exceeding £5."

It was held that this bye-law was one which could properly be made for the good rule and government of the borough under sec. 23 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). *Burnett* v *Berry* (1896), 1 Q. B. 641.

"No person shall frequent any street or public place, and use the same for the purpose of betting or wagering, or agreeing to bet or wager with any person, either on behalf of himself or any other person."

It was held that this bye-law was one which could properly be made for the good rule and government of the county (Stafford) under sec. 16 of the Local Government Act, 1888 (51 & 52 Vict. c. 41). *Jones* v. *Walters* (1898), 62 J. P. 374, 78 L. T. 167, following *Burnett* v. *Berry* (1896), 1 Q. B. 641.

To obtain a conviction it is not necessary to prove annoy-

ance to passengers or other persons. *Jones* v. *Walters* (*supra*).

"No person shall frequent and use any street or other public place, on behalf either of himself or of any other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager with any person, or paying, or receiving, or settling bets."

This is the London County Council bye-law, made by virtue of sec. 23 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), and sec. 16 of the Local Government Act, 1888 (51 & 52 Vict. c. 41).

It has been held that this bye-law is valid and not repugnant to sec. 23 of the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134) (*supra*); *White* v. *Morley* (1899), 2 Q. B. 35; *Thomas* v. *Sutters* (1900), 1 Ch. 10.

It has also been held that this bye-law is valid when made by a county council for rural districts. *Hickey* v. *Hay* (1900), 65 J. P. 232; 17 T. L. R. 52.

By sec. 25 of the Middlesbrough Improvement Act, 1877 (40 & 41 Vict. c. xxx.), the corporation were empowered to make "such bye-laws as they may think fit for the prevention of betting . . . in the public streets . . . and other places of public resort within the borough."

The corporation made a bye-law that "any person who shall frequent and use any street . . . or other place of public resort within the borough . . . for the purpose of bookmaking or betting . . . shall be liable to a penalty."

This bye-law was held to be within the power given by sec. 25 and valid. *Kitson* v. *Ashe* (1899), 1 Q. B. 425.

Place of Public Resort.—It was also held in the same case that an unenclosed piece of private ground habitually used by the public, but without the permission of the owner, might be "a place of public resort" within the meaning of the bye-law.

By a bye-law made under sec. 16 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), it was provided that: "A person shall not, together with any other person or persons, assemble in any street or public place for the purpose of betting" under a penalty not exceeding £5.

The bye-law was held valid by Russell, C.J., and Wright, J., in *Godwin* v. *Walker* (1896), 60 J. P. 308.

Frequent.—A bye-law in these terms, with the omission of the word "other" before the words "public place," was made under sec. 23 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), and sec. 104 of the Sheffield Corporation Act, 1900 (63 & 64 Vict. c. ccxxii.). And "public place" was defined as including "any common, public park, or walks, pleasure or recreation ground, roadside waste, churchyard, chapel-yard, cemetery, market (whether established under market or otherwise), and any open space to which the public have access for the time being." Where a man attended an athletic ground where foot-races were being run, and to which the public had access on payment for admission, and whilst there made a number of bets, it was held that the athletic ground was a "public place," and that the man had "frequented" it within the meaning of the bye-law, as he was there long enough to effect the object aimed at (*Airton* v. *Scott* (1909), 73 J. P. 148; 100 L. T. 393). In this case the Divisional Court followed their own decision in *Jones* v. *Scott*, unreported (November 9, 1906), that a man being in a street or public place for a period long enough to carry out several betting operations "frequented" it.

It has been held that a bookmaker who had transacted betting business with various persons between 1.10 and 1.30 P.M. about one place—a street—had "frequented" it within the meaning of this bye-law. *Davies* v. *Jeans* (1904), 6 F. (Just. Cas.) 37.

Where a man loitered about O. street and the adjoining streets from 1 P.M. to 1.40 P.M. for the purpose of betting, it was held that a magistrate was justified in convicting him of "frequenting and using" O. street for the purpose of betting within the meaning of a local Act. *Lang* v. *Walker* (1904), 5 F. (Just. Cas.) 8.

Bye-laws for Obstruction and for Frequenting and Using Compared.—It will be noticed that in London there were two prohibitions of street betting before the passing of the Act of 1906—sec. 23 of the Metropolitan Streets Act,

1867 (*supra*), and the London County Council bye-law (*supra*): the former rendering an assembly of three or more persons for betting in the street an obstruction; the latter imposing a penalty for frequenting and using a street for the purpose of betting. To proceed under the Act the police had to find three or more persons assembled together, but once that condition was satisfied they had the power of arrest, and the betting slips seen to be handed to the bookmaker might be found on him at the police station. The police could proceed under the bye-law more easily; for on the bookmaker making a few separate bets they could summons him, but they could not arrest him. This led to a difficulty in proving the case. Evidence would be given that betting slips had been handed to the bookmaker, but some magistrates refused to convict unless there was evidence that the writing on the slips related to betting. Of course the slips never came into the possession of the police. Apparently even where the police proceeded under the Act for obstruction, the bookmaker might hand his slips and papers to a "tout" or could object to being searched at the police station; but in the last case the magistrate would consider such conduct evidence of guilt. [See the evidence of Mr. Superintendent R. B. Shannon before the Select Committee on Betting, 1902, at p. 81.]

A Bye-law held Invalid.—But the Courts have not held every bye-law made with regard to betting in the streets to be valid and *intra vires*.

A bye-law, purporting to be made by a county council under sec. 16 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), imposed a penalty on any person frequenting and using any street or other public place.

"For the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions."

Lord Alverstone, C.J., and Kennedy, J. (Phillimore, J., dis-

senting), held that the bye-law was unreasonable and could not be supported. *Scott* v. *Pilliner* (1904), 2 Q. B. 855.

Per Lord Alverstone, C.J.: "Of course a local authority may make a bye-law for stopping street betting by means of tipsters, and if that was all that this bye-law did, it would, in my opinion, be valid."

The bye-law was held to be unreasonable, both on the ground of uncertainty and also (mainly) on the ground that it would strike at perfectly innocent sales of papers.

Objections to Procedure under Bye-laws.—Those concerned to put down betting in the street found two main objections to the procedure under local enactments and bye-laws—

1. The penalties were inadequate to stop the practice, as the profits to the bookmaker were considerable. The case of the bookmaker in London who, on being fined £5, said he would give another £5 for the poor-box is well known.

2. The jurisdiction was local. For instance, at Glasgow the river Clyde at one point was the city boundary. The bookmaker could cross the bridge and defy the police.

Recommendations of the Select Committee of 1902.—In 1902 a select committee of the House of Lords, appointed at the instance of the Bishop of Hereford, reported *inter alia*:—

18. It has been proved conclusively to the committee that the practice of betting in the streets has increased very much of late years, and is the cause of most of the evils arising from betting amongst the working classes.

The fact that bookmakers can ply their trade in the open street, and lie in wait to catch working men in their dinner-hour outside factories and workshops in order to induce them to bet, is undoubtedly a great source of evil.

19. Evidence has also been brought before the committee to show that street bookmakers bet not only with men, but also with women and children.

20. At the present time such offences can only be dealt with as "obstruction" under various local Acts, or under particular bye-laws in each town,

the penalty in either case, and the powers of the police, being inadequate to check the practice.

21. When a street bookmaker is convicted twenty-five times in four years, and is able to pay £137, 8s. in fines and costs (to take a typical example of many cases which have been brought to the notice of the committee), it is obvious that the profits of his calling must be very great, and that the penalties provided by the law to restrain his trade are not sufficiently strong.

22. The committee, therefore, recommend that, in view of the acknowledged evils of this form of betting, there should be further legislation, enabling magistrates to send bookmakers to prison without the option of a fine for the first offence, who have been convicted of betting in the streets with boys or girls, or otherwise inducing them to bet.

The committee further recommend that bookmakers convicted of betting in the streets should be liable to a fine of £10 for the first offence, £20 for the second offence, and that for any subsequent offence it should be within the discretion of the magistrate either to impose a fine of not more than £50, or to send the bookmaker to prison without the option of a fine. The committee also recommend that the police should be given the same power of summary arrest which they possess in cases of obstruction of the highway.

27. Various witnesses have given evidence as to the prevalence of betting at athletic meetings, and to the difficulty which owners of athletic grounds have in preventing a practice which they with justice consider opposed to the best interests of amateur sport.

28. Since the decision in the Kempton Park case, it has been impossible for the police to stop bookmakers carrying on their trade at athletic meetings, except at the direct request of the proprietors of the ground.

29. The committee, therefore, recommend that on any racecourse or other ground on which a sport is being carried on, where a printed notice is publicly exposed by the responsible authorities to the effect that "No betting is allowed," a bookmaker who continues to bet shall be liable to summary arrest and a fine.

The Street Betting Act, 1906.—The result of these recommendations was the Street Betting Act, 1906 (6 Ed. VII. c. 43), containing most of the provisions suggested by the select committee.

We give the Act in full, with notes to each section.

An *Act for the Suppression of Betting in Streets and other Public Places,* 21st December 1906.

By sec. 1 (1) of the Act—

Any person frequenting or loitering in streets or public places, on behalf either of himself or of any other person, for the purpose of bookmaking,

or betting, or wagering, or agreeing to bet or wager, or paying, or receiving, or settling bets, shall

(*a*) In the case of a first offence be liable, on conviction under the Summary Jurisdiction Acts, to a fine not exceeding ten pounds;

(*b*) In the case of a second offence be liable, on conviction under the Summary Jurisdiction Acts, to a fine not exceeding twenty pounds; and

(*c*) In the case of a third or subsequent offence, or in any case where it is proved that the person whilst committing the offence had any betting transaction with a person under the age of sixteen years, be liable on conviction on indictment to a fine not exceeding fifty pounds or to imprisonment, with or without hard labour, for a term not exceeding six months without the option of a fine, or on conviction under the Summary Jurisdiction Acts to a fine not exceeding thirty pounds or to imprisonment, with or without hard labour, for a term not exceeding three months, without the option of a fine and shall in any case be liable to forfeit all books, cards, papers, and other articles relating to betting which may be found in his possession.

"**Frequenting.**"—On the meaning of this word, see the notes on the meaning of the word in the bye-law at p. 66, and *Davies* v. *Jeans* (1904), 6 F. (Just. Cas.) 37; *Lang* v. *Walker* (1904), 5 F. (Just. Cas.) 8; *Airton* v. *Scott* (1909), 73 J. P. 148, 100 L. T. 393, following *Jones* v. *Scott* (Nov. 9, 1906), unreported decision of the Divisional Court. A backer may frequent or loiter, within the meaning of the section, as well as a bookmaker. Grove, J., in *Reg.* v. *Clark* (1884), 14 Q. B. D. at p. 98, in considering the meaning of the word "frequent" in sec. 4 of the Vagrant Act, 5 Geo. IV. c. 83, said: "A single visit to a place, or once passing through a street, can in no sense be said to be a 'frequenting' that place or street." But the decision of the Divisional Court in *Airton* v. *Scott* (*supra*) as to the meaning of the word in a bye-law as to betting is to the contrary. Lord Alverstone, C.J., in that case said: "On the first point argued, that there was no 'frequenting,' it is plain that 'frequenting' means being at a place long enough for the purpose aimed at. We decided in the unreported case of *Jones* v. *Scott*, that a man being in a street for a quarter of an hour, walking up and down in a space of some fifteen to twenty yards, and taking

money and slips from eleven different men on a certain day, that being long enough to carry out his betting operations was frequenting the place."

"**Loitering.**"—This word does not appear in the form of bye-law generally in use before the Act. It may have been taken from the statement of facts in *Lang* v. *Walker* (1904), 5 F. (J. C.) 8.

Streets.

See section 1 (4) *infra.*

Public places.

See section 1 (4) *infra.*

Alternative Offence.—A person must be charged with committing the offence either in a street or in a public place. Where a person was convicted in Scotland of "loitering for the purpose of betting in a passage or unenclosed piece of ground . . . being a street or public place" within the meaning of the Act, the conviction was quashed, as the information which the conviction followed was alternative. *Lang* v. *Walker* (1909), 47 Sc. L. R. 162.

But in a case in Scotland where a person was charged with loitering in a "street for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager, or paying, or receiving, or settling bets," and convicted, it was held that this was not a general conviction following upon an alternative charge. *Stenhouse* v. *Dykes* (1908), 10 F. (J.) 61.

"**For the Purpose of . . . Betting.**"—In *Dunning* v. *Swetman* (1909), 1 K. B. 774, S., who loitered in a street to distribute handbills, stating that one M. was willing to bet on certain events and at certain odds, and stating that if persons would send M. written offers to bet, with a remittance, their offers would be accepted, was held guilty of an offence under the section.

By sec. 51 of the Burgh Police (Scotland) Act, 1903

(3 Ed. VII. c. 33), "If any person who conducts business of any kind in lotteries, betting, or gaming, shall in any street engage in lotteries, betting, or gaming," he shall be liable to a penalty. And by sec. 4 (31) of the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55), the word "street," for the purposes of sec. 51 (*supra*), was not to include a place "forming part of any . . . railway." A bookmaker was convicted under sec. 51 who stood on a railway and leaning over a fence between the railway and the street received deposits and slips, and paid bets from or to persons in the street, and the conviction was upheld. *Reg.* v. *Wilson* (1910), 47 S. L. R. 468.

"**Second Offence.**"—This means second offence under this Act. Accordingly, when a defendant had been previously convicted under a bye-law providing that "No person shall frequent and use any street or other public place, either on behalf of himself or of any other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager with any person," but had not been previously convicted under the Act, it was held that the justices could not fine him under (*b*). *Rex* v. *Stone* (1908), 72 J. P. 388; 99 L. T. 88. A second offence, we think, means an offence committed after a previous conviction and not the second of two offences committed on the same day. See *Rex* v. *South Shields Licensing Justices* (1911), 27 T. L. R. 330.

"**Third Offence**"—**Betting Transaction with Person under age of Sixteen Years.**—It will be noticed that

(1) In the case of a third or subsequent offence; or,

(2) Where the offender *whilst committing the offence* had any betting transaction with a person under the age of sixteen years,

the prosecution may proceed on indictment.

With regard to (2) we think that the betting transaction with the child must begin whilst the offender is frequenting

or loitering in the street for the purpose of betting, &c. It might perhaps be contended that a man who loitered in the street for the purpose of betting on the City and Suburban, and who was found to have upon him slips relating to bets made with children, "had" betting transactions with children whilst committing the offence. But we do not think this is the proper construction of the section. The requirement that the offender should in fact have a betting transaction prevents this part of the sub-section applying to the case of a man merely loitering for the purpose of betting with boys coming out of school who does not in fact effect a bet. As we have pointed out, the rest of the section refers not to betting but to frequenting and loitering in certain places for the purpose of betting. The act of betting is therefore at most evidence of the actual offence.

Proceeding on Indictment—Appeal.—A person charged before a court of summary jurisdiction under this section cannot elect to be tried by a jury, as the maximum punishment does not exceed three months. But when the sentence is one of imprisonment, he may appeal to Quarter Sessions under sec. 19 of the Summary Jurisdiction Act, 1879. As to Ireland, see sec. 5.

"Forfeit."—There is nothing in the Act as to what is to be done with the documents or articles when an order of forfeiture has been made.

Forfeiture of Documents or Articles relating to Betting —Police no Power to Seize Money—Recovery of, when Seized.—Money is not to be forfeited under this sub-section. The police raided a house, acting under sec. 11 of the Betting Act, 1853 (see p. 130), and seized there £107, 6s. 8d. The owner of the money, who was prosecuted under that Act and acquitted, brought an action against the Chief Commissioner for the return of the money, stating that it was the proceeds of street betting. Warrington, J., sitting as an additional judge of the King's Bench Division, dismissed

the action on the ground *ex turpi causa non oritur actio*, but this decision was reversed by the Court of Appeal, who held that the plaintiff was entitled to the return of the money; Moulton and Buckley, L.J.J., holding that the maxim *ex turpi causa non oritur actio* had no application to such a case, as the plaintiff was not asking the Court to enforce any illegal contract or to grant relief dependent in any way on any illegal transaction on his part. The plaintiff having now acquired the money, had both the possession of it and the property in it, and the detention of it by the police was unjustifiable. But per Vaughan Williams, L.J.: "If it had been found that this money had been deposited to secure to the plaintiff the due payment of a bet on a horse race, and that the money in question remained money tainted with illegality by reason of the purpose of the deposit, I cannot see why the rule *ex turpi causa non oritur actio* should not be applied by the Court when invited to arrest a plaintiff in such a transaction. . . . It has been suggested to me that there is no evidence, and nothing in the plaintiff's case, as stated before Mr. Justice Warrington, to show under what circumstances or for what purpose the plaintiff received the £107, 6s. 8d. There is nothing to prove it was a deposit, and nothing to prove the condition of the deposit if there was one. The money may have been received in payment of some previous transaction, betting or otherwise; some completed transaction." It appeared that the sole fact found about the money was that it was the result of street betting. On this ground, therefore, that it was not proved that the money consisted of deposits, Cozens-Hardy, M.R., agreed with the other members of the Court. *Gordon* v. *Chief Commissioner of Metropolitan Police* (1910), 2 K. B. 1080.

Power of Arrest.—By sec. 1 (2) of the Act—

Any constable may take into custody without warrant any person found committing an offence under this Act, and may seize and detain any article liable to be forfeited under this Act.

Power to Seize and Detain Document or Article relating to Betting.—Any article liable to be forfeited. See sec. 1 (1) (*b*).

Proof of Age.—By sec. 1 (3) of the Act—

Any person who appears to the Court to be under the age of sixteen years shall for the purpose of this section be deemed to be under that age unless the contrary be proved, or unless the person charged shall satisfy the Court that he had reasonable ground for believing otherwise.

Definitions.—By sec. 1 (4) of the Act—

For the purpose of this section the word "street" shall include any highway and any public bridge, road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not; and the words "public place" shall include any public park, garden, or sea-beach, and any unenclosed ground to which the public for the time being have unrestricted access, and shall also include every enclosed place (not being a public park or garden) to which the public have a restricted right of access, whether on payment or otherwise, if at or near every public entrance there is conspicuously exhibited by the owners or persons having the control of the place a notice prohibiting betting therein.

"Public" Bridge, &c.—The Lord Justice Clerk, in *Vallance* v. *Campbell* (1909), S. C. (J.) 9, said: "I think there is no doubt that the word 'public' applies to all these places, including a 'passage.'"

"Passage."—In Scotland "passage" includes "common close or common stair or passage leading thereto." (See sec. 3 and the notes thereunder on "passage.")

A plot of ground owned by a railway company lying between a railway platform and the roadway gave access to the station. The plot formed a recess open to the road but giving access to the station through a door, which, however, was usually kept shut by the company, but was occasionally used by them as an emergency exit. It was held that this plot of ground was not a "public passage"

within the meaning of the section. But *quære* whether the plot was not a "public place" within the meaning of the section or whether it might not have been libelled as a part of the roadway. *Lang* v. *Walker* (1910), 47 Sc. L. R. 162 (Court of Justic.).

"Unenclosed Ground."—In *Breslin and another* v. *Thomson* (1910), S. C. (J.) 5, a field about an acre in extent, at one time fenced off by a wire fence from two streets between which it lay, which had been unrestrictedly used by the public for more than a year as a recreation ground and short cut to a station, the fences having fallen into complete disrepair, was held to be "unenclosed ground to which the public for the time being have unrestricted access," although the field was private property, and was sub-leased by the tenant to two betting men.

"Enclosed Place."—The latter part of the section gives partial effect to the recommendations of the Select Committee of the House of Lords on Betting. (See paragraph 29 of the report (*supra*) at p. 69.) An athletic or football ground may be a "public place" if the notice prohibiting betting is duly exhibited at or near every public entrance.

Nothing contained in the Act is to apply to a racecourse for racing with horses or the ground adjacent thereto on the days when racing takes place. (See sec. 2 (*infra*).)

Act not to Apply to a Racecourse.—By sec. 2 of the Act—

> Nothing contained in this Act shall apply to any ground used for the purpose of a racecourse for racing with horses or adjacent thereto on the days on which races take place.

"Ground . . . adjacent thereto." This is loose language, and may lead to difficulty.

It will be noticed that the exemption only applies on the days when races take place, presumably at the racecourse.

Whether or not a field is "ground used for the purpose of a racecourse for racing with horses" is a question of fact. Accordingly, where a field was used on one day for sports—foot-races, athletic competitions, and also horse-races—the field not being permanently laid out as a racecourse, the Court refused to quash a conviction of justices under sec. 1 of the Act, on the ground that the justices were bound as a matter of law to hold that the field was "ground used for the purpose of a racecourse for racing with horses." *Stead* v. *Aykroyd* (1911), 1 K. B. 57.

Application to Scotland.—By sec. 3 of the Act—

In Scotland "indictment" has the same meaning as in the Criminal Procedure (Scotland) Act, 1887, and "passage" includes common close or common stair or passage leading thereto; and, in the event of an offender failing to make payment of a fine imposed under sec. 1 (1) (*a*) or (*b*) of this Act, he shall be liable to imprisonment in accordance with the provisions of the Summary Jurisdiction Acts; an offence prosecuted summarily under this Act may be tried before the sheriff or before any magistrate of any royal, parliamentary, or police burgh officiating under the provisions of any local or general Police Act.

"Passage" in Scotland.—See sec. 1 (4). In Scotland, a passage to which the public have no right of access, but to which the public in fact could obtain access through the lock on a door being broken, is not a passage within the meaning of the section. *Hasson* v. *Neilson* (1908), S. C. (J.) 57 (Court of Justic.).

A passage within a building formed the entry to two dwelling-houses constituting the lower storey of the building; it was closed at the back; at the entrance from the street there was a door which was open during the day, but generally kept closed at night. Held that this passage was a "street." *Vallance* v. *Campbell* (1909), S. C. (J.) 9 (Court of Justic.).

A plot of ground owned by a railway company lying between a railway platform and the roadway gave access to the station. The plot formed a recess open to the road but

giving access to the station through a door which, however, was usually kept shut by the company, but was occasionally used by them as an emergency exit. It was held that this plot of ground was not a "public passage" within the meaning of the section. But *quære* whether the plot was not a public place within the meaning of sec. 1 (4) or whether it might not have been libelled as part of the roadway. *Lang* v. *Walker* (1910), 47 Sc. L. R. 162 (Court of Justic.).

It appears that the "passage" mentioned in sec. 1 (4) is a public passage. The Lord Justice Clerk, speaking of sec. 1 (4), said in *Vallance* v. *Campbell* (1909), S. C. (J.) 9 (Court of Justic.): "I think there is no doubt that the word 'public' applies to all these places, including a 'passage.'" But in Scotland the term includes "a common close or common stair or passage leading thereto."

A complaint charging A. with frequenting or loitering in "the common close situated at . . ." contrary to secs. 1 and 3 of the Street Betting Act, 1906, was held relevant, although the word "public" was not prefixed to the words "common close" when objection was taken by A. *Vallance* v. *Campbell* (1909), S. C. (J.) 9.

"**Common Close.**"—In Scotland a charge under the section of loitering in a "close" (not in a "common close") is not a relevant charge under the statute. *Winning* v. *Jeans* (1909), S. C. (J.) 26.

"**Common Passage.**"—Before the Act in Scotland any house, building, room, or place did not include a common passage leading to a common stair. *Wright* v. *Smith* (1903), 6 F. (Jus. Cas.) 18.

Application to Ireland.—By sec. 4 of the Act—

In Ireland, where in pursuance of this Act an order is made by a court of summary jurisdiction for a term of imprisonment not exceeding

one month, without the option of a fine, the party against whom the order is made shall be entitled to appeal in like manner as if the term of imprisonment exceeded one month.

Short Title.—By sec. 5—

This Act may be cited as the Street Betting Act, 1906.

THE BETTING ACT, 1853

THE PROHIBITION OF A BETTING BUSINESS

Section I	Section II	Section III	Section IV	Section 79 of the Licensing (Consolidation) Act, 1910
"No house, office, room, or other place	"Every house, room, office, or place	"Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall	"Any person being the owner or occupier of any house, office, room, or place opened, kept, or used	(1) "The holder of a justices' licence
shall be opened, kept, or used	opened, kept, or used		for the purposes aforesaid or either of them, or	shall not . . .
[*First purpose*] for the purpose of the	for the purposes aforesaid			(*b*) open, keep, or use his premises in contravention of the Betting Act, 1853, or
owner, occupier, or keeper thereof, or any person using the same, or	or any of them	open, keep, or use the same	any person acting for or on behalf of any such owner or occupier, or	suffer his premises to be opened, kept, or used in contravention of that Act."
any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of		for the purposes hereinbefore mentioned or either of them ; and	any person having the care or management or in any manner assisting in conducting the business thereof	(2) "If the holder of a justices' licence acts in contravention of this section,
any person having the care or management or in any manner conducting the business thereof		any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully	who shall receive directly or indirectly any money or valuable thing	he shall be liable in respect of each offence to a fine not exceeding,
betting with persons resorting thereto, or		permit the same to be opened, kept, or used by any other person for the purposes aforesaid or either of them ; and	as a deposit on any bet on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse-race or any other race, or any fight, game,	
[*Second purpose*] for the purpose of		any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place		
any money or valuable thing				

occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid or any of them, is hereby declared to be a common nuisance and contrary to law."	shall be taken and deemed to be a common gaming-house within the meaning of an Act of the session holden in the eighth and ninth years of Her Majesty, chapter one hundred and nine, 'to amend the law concerning games and wagers.'" (The Gaming Act, 1845.)	either of them shall on summary conviction thereof, before any two justices of the peace, be liable to forfeit and pay such penalty not exceeding one hundred pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable [*and* *on the non-payment of such penalty and costs*], or [*in the first instance*] if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months."	for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security, or draft on the receipt of any money or valuable thing so paid or given as aforesaid, purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency as aforesaid shall, upon summary conviction thereof before two justices of the peace, forfeit and pay such penalty not exceeding fifty pounds." [The rest follows as in sec. 3, except that the maximum term of imprisonment is three calendar months.]	and in the case of any subsequent offence, twenty pounds.

L. B.

F

CHAPTER II

THE PROHIBITION OF A BETTING BUSINESS CARRIED ON IN ANY HOUSE, OFFICE, ROOM, OR OTHER PLACE

Secs. 1 to 4 of the Betting Act, 1853, and Sec. 17 of the Licensing Act, 1872.—Apart from the prohibition of certain advertisements concerning the business, which is the subject of this chapter, the statutory restrictions on a betting business carried on in any house, office, room, or other place are contained in secs. 1 to 4 of the Betting Act, 1853 (16 & 17 Vict. c. 119), and sec. 17 of the Licensing Act, 1872 (35 & 36 Vict. c. 94). Lord Halsbury, L.C., in construing sec. 1 of the Betting Act, 1853, found it convenient to set out the words of the section in column. See *Powell* v. *Kempton Park Racecourse Co.* (1899), A. C., at p. 158.

The sections of the Betting Act, 1853, are so long, and their provisions are so numerous, and the language employed is so involved, that we have followed the example of Lord Halsbury, setting out the five sections in parallel columns (see p. 80).

It will be seen that sec. 1 of the Betting Act, 1853, enacts that every house, office, room, or other place opened, kept, or used for the two purposes therein stated is a common nuisance and contrary to law; and sec. 2 enacts that it shall be taken and declared to be a common gaming-house within the meaning of the Gaming Act, 1845 (8 & 9 Vict. c. 109). The question whether a house or place is a common nuisance and a common gaming-house, by virtue of the two sections depends upon whether it is opened, kept, or used for either of the two purposes set forth in sec. 1. Sec. 3 provides a maximum penalty of £100, with the alternative of six months'

imprisonment, with or without hard labour, for those who are summarily convicted of opening, keeping, or using; of (in the case of owners or occupiers) knowingly and wilfully permitting others to open, keep, or use; or of assisting in conducting the business of a house, office, room, or other place, opened, &c., for the purpose set forth in sec. 1. Sec. 4 provides a maximum penalty of £50, with the alternative of six months' imprisonment, with or without hard labour, for those who are summarily convicted of—

A. (1) being the owner or occupier of any house, &c., opened, &c., for either of the purposes set forth in sec. 1; or
(2) acting for such owner or occupier; or
(3) assisting in conducting the business of such a house who receive any money or valuable thing
(*a*) as a deposit on any bet on the condition there specified; or
(*b*) as the consideration for any assurance, &c., as therein specified;

and for those who are summarily convicted of—

B. giving any acknowledgment, &c., on the receipt of any money or valuable thing so paid or given as aforesaid (see (*a*) and (*b*), *supra*), purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the condition specified in (*a*).

It will be seen that the penalties in sec. 3 are incurred by those who keep (in the case of owners and occupiers), permit the keeping, or assist in the keeping of the house or place for the two prohibited purposes. The penalties in sec. 4 are directed against the persons there specified who receive money, &c., as a deposit on bets, or who give an acknowledgment (on the receipt of the deposit) of the rights of the depositor if he wins his bet. The one section penalises the keeping of the house or place; the other section penalises the receipt of money and the giving of an acknowledgment by those interested in the keeping of the house or place.

Sec. 79 of the Licensing (Consolidation) Act, 1910, provides for lesser and alternative penalties where a licensed person opens, keeps, or uses, or suffers his house to be opened, kept, or used in contravention of the sections that have been quoted. But it will be noted that the section renders him liable to the penalties where he *suffers* his house to be opened, &c. (see p. 119).

The Two Prohibited Purposes.—It will be seen that no person can be convicted under any of these five sections, unless he owns, occupies, opens, keeps, uses, suffers to be opened, kept, or used, or assists in the conduct of a house, office, room, or other place for one or other of the two purposes specified in sec. 1 of the Act of 1853, viz.:—

The first purpose: Betting with persons resorting (actually and physically) thereto; or

The second purpose: Ready-money betting by deposit.

The Preamble to the Betting Act, 1853.—The preamble to the Betting Act, 1853, was in these words:—

An Act for the Suppression of Betting Houses (16 & 17 Vict. c. 119), now known as the Betting Act, 1853 (see sec. 3 of the Short Titles Act, 1892).

Whereas a kind of gaming has of late sprung up tending to the injury and demoralisation of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies: for the suppression thereof be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows.

This preamble is repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

"Places called Betting Houses or Offices."—It will be noticed that there is no mention in the preamble of a

"room" or "place." The preamble speaks only of betting houses or offices.

Section 1 of the Betting Act, 1853.—Then by section 1:—

"No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing, on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

"**Other Place . . . Used.**"—For this section, printed in column, see p. 80.

As Lord Alverstone, C.J., said in *Rex* v. *Deaville* (1903), 1 K. B. at p. 474: "For the purpose of construing the statute it is now unnecessary to consider any cases decided before the Kempton Park case" (1897), 2 Q. B. 242; (1899), A. C. 143.

The Kempton Park Case: the facts.—We take the facts of that case from the head-note in the *Law Reports* (1899), A. C. at p. 143: "Adjacent to a racecourse there was an uncovered enclosure of about a quarter of an acre, fenced in by iron rails, to which, when race-meetings were held, the public were admitted by the owners of the racecourse on payment of an entrance fee. Among the five hundred to two thousand persons so admitted were always one or two hundred professional bookmakers and most of the persons admitted, other than the book-

makers, went for the purpose of backing horses with the bookmakers, but some did not bet at all. The bookmakers, who were accompanied by their clerks, did not use any apparatus such as a desk, stool, umbrella, or tent, but any particular bookmaker was usually to be found *in or near* the same part of the enclosure calling out the odds to attract backers. In some cases"—there were no lists—"the backers were required by the bookmakers to deposit their stakes; in others, credit was allowed. This use of the enclosure was known to and permitted by the owners thereof."

The plaintiff was a shareholder in the defendant company, and he brought a friendly action against the company asking for an injunction to forbid them from continuing "knowingly and wilfully to permit certain persons to use a certain enclosure belonging to the company illegally within the meaning of" the Betting Act, 1853 (see sec. 3, pp. 80 and 112). Lord Russell, C.J., entered judgment for the plaintiff, following *Hawke* v. *Dunn* (1897), 1 Q. B. 579, but obviously with reluctance. The case was carried to the Court of Appeal and the House of Lords, both Courts giving judgment for the defendants, and overruling *Hawke* v. *Dunn* (*supra*), Rigby, L.J., dissenting in the Court of Appeal, and Lords Hobhouse and Davey in the House of Lords.

The Questions Raised by the Kempton Park Case.—According to Lord Esher, M.R., the case raised three questions:—

(1) Was such an enclosure such a *place* as could come within the meaning of the Act?

(2) Was the enclosure so *used* by anybody as to make the enclosure, or any part of it, a place illegally *used* within the meaning of the statute?

(3) Was such *use* knowingly and wilfully permitted by the company?

Question 3 was really surplusage, for it was admitted that what was done in the enclosure was knowingly and wilfully

permitted by the company. The answers of the judges to Questions 1 and 2 were as follows:—

	Question 1 Was this enclosure a "place," or speaking more strictly, could it be a place if used contrary to the Act?	Question 2 Was the enclosure a place used contrary to the Act?
Court of Appeal		
Lord Esher, M.R. . .	Yes	No
Lindley, L.J.	No	Not considered separately
Lopes, L.J.	No	Not considered separately
A. L. Smith, L.J. . .	Not considered separately	No
Rigby, L.J., dissenting	Yes	Yes
Chitty, L.J.	No	No
House of Lords		
Earl of Halsbury, L.C., Lord Watson, Lord Herschell, and the Lord Chancellor of Ireland	Yes	No
Lord Hobhouse dissenting	Yes	Yes
Lord Davey dissenting .	Yes	Yes
Lord James of Hereford	Yes	No

The Kempton Park Case—What is a Place?—It will at once be seen that all the judges in the House of Lords, and Lord Esher, M.R., thought that the enclosure at Kempton Park, about a quarter of an acre in extent, might be a "place" within the meaning of the Act; Lord Halsbury said: "I do not think, therefore, that the important question is, what is a 'place'? I think in this respect with Rigby, L.J., that *any place which is sufficiently definite, and in which a betting establishment might be conducted*, would satisfy the words of the statute. But I think not only that this is the construction of the words, to which, of course, we must apply the meaning which the Legislature has intended, if we can find it out, but I think it is reasonable and in accordance with good sense that the words should be so construed and so limited." Lord James of Hereford said: "In order to bring the first clause into operation, something must exist that can at least constructively be regarded as

a common gaming-house"; and: "Speaking in general terms, whilst the place mentioned in the Act must be to some extent *ejusdem generis* with 'house,' 'room,' or 'office,' I do not think that it need possess the same characteristics; or instance, it need not be covered in or roofed. It may be, to some extent, an open space. But certain conditions must exist in order to bring such space within the word 'place.' There must be a defined area so marked out that it can be found and recognised as 'the place' where the business is carried on, and wherein the bettor can be found. Thus, if a person betted on Salisbury Plain, there would be no 'place' within the Act. The whole of Epsom Downs or any other racecourse where betting takes place would not constitute a place; but directly a definite localisation of the business of betting is effected, be it under a tent or even movable umbrella, it may be well held that a 'place' exists for the purposes of a conviction under the Act. If this view be correct, I think that the enclosure existing at Kempton Park might, physically speaking, under certain conditions constitute 'a place' within the meaning of the 1st and 2nd sections of the Act of 1853. It is a defined space limited by metes and bounds, and of such an area that a person therein carrying on the business of betting can be found."

The Kempton Park Case—What is "User" of a Place?—But although the judges in the House of Lords thought that the Kempton Park enclosure might be a "place" within the meaning of the Act, the majority came to the conclusion that a person or persons had not "opened, kept, or used" it, or any defined part of it, for the purposes specified in section 1, or either of them. Lord Halsbury, L.C., said: "It is nothing to the purpose that there are a great many of them"—betting men—"who may be found in this enclosure; there is no business conducted by a keeper, owner, &c., in the enclosure. Each betting man is himself conducting his own business of a betting man, and, as I have said, *his betting is in no way connected with the place,* except that he as well

as other people, not betting men, are there." Again he says: "It is the employment of the words 'using the same' which to my mind has led to the difference of opinion" —between the judges. "Those words, unless explained by the context, are necessarily ambiguous. *In one sense every person who enters the enclosure uses it; but he does not use it in the character of owner, keeper, manager, or conductor of the business thereof.* The betting man in his use of the place differs in this respect in no way from any other member of the public who enters it, and who neither does, nor intends to bet. It is the personality of the betting man and not his being in any particular place which affords the opportunity of betting, and a man who walked along a public road shouting the odds in the way here described would be doing exactly the same thing." And again, when dealing with the meaning of the word "use" in the Act, he says: "It is not the repeated and designed, as distinguished from the casual or infrequent, use which the employment of that word imports here, *but the character of the use as a use by some persons having the dominion and control over the place*, and conducting the business of a betting establishment with the persons resorting thereto."

Lord James of Hereford said: "I certainly can find no direct evidence that the enclosure was opened, kept, or used for the purpose mentioned in sec. 1 of the Act, that is, for conducting the business of betting. Doubtless it is proved that betting, as alleged, systematically took place within the enclosure to the knowledge of the defendants. Is that evidence sufficient to establish an infringement of the Act? In my opinion it is not. As was often remarked during the argument of the case at the bar, betting is not illegal in itself, and the statute never intended to make it so. It is only the opening, keeping, or using of a place for the carrying on of a betting business that is illegal. . . . In thus dealing with the case, I have treated the whole enclosure as being the alleged 'place.' There is another view that may be presented, namely, that each peripatetic bookmaker

using the enclosure occupies 'a place,' that is, the ground upon which his two feet rest; and that having permission to stand upon any particular spot he may from time to time select, *there is a shifting appropriation of each of such spots for the purpose of carrying on his business.* But in such case what can be said to constitute the 'place' requisite to constitute the offence? There is nothing in any way resembling a house, office, or room. No defined area exists; nothing to indicate where the bookmaker can be found is to be seen; and as was admitted by *Mr. Asquith* during his argument at the bar, every piece of earth on which a betting man's feet rest, say on Salisbury Plain, cannot constitute a place *ejusdem generis* with house, office, or room. I think the statement of the same learned counsel that 'a place must be a place where a man according to the ordinary usages would be found' is correct."

The Decision in the Kempton Park Case.—It was held, therefore, that as the bookmakers in the Kempton Park enclosure did not open, keep, or use a place or places for the purposes prohibited by sec. 1 of the Act, or either of them, the company as the owners or occupiers of the enclosure did not knowingly and wilfully permit the place or places to be so opened, kept, or used by the bookmakers.

Illustration of the Kempton Park Case in Brown v. Patch.—Within a very short time of the decision of the Kempton Park appeal, the case of *Brown* v. *Patch* (1899), 1 Q. B. 892, came before a Divisional Court. The judgments in this case show clearly how the decision of the leading case was interpreted. A bookmaker and his clerk carried on their business in the enclosed grounds of a racecourse, but not in a ring. The bookmaker stood on a box close to a cane structure about five feet high, with four legs, and having on the top a board on which was painted the bookmaker's name, "Bob Patch," and the words "London. All in, run or not—pay first past the post." Before each race the bookmaker wrote on

the board the names of the horses on which he offered odds, and the odds he offered. The bookmaker was charged with using a place for the purpose of betting with persons resorting thereto. The short judgment of Channell, J., puts the law as expounded in the *Kempton Park Case* so clearly that we give it in full.

"The law has now been fairly well settled by the decision of the House of Lords in the *Kempton Park Case.* I think there is no difficulty in understanding what is the law and what is the interpretation of the statute, but there is considerable difficulty in applying it in particular cases. The statute seems clearly to be directed against betting places, not against betting persons. Clearly, also, it does not forbid persons using a place by going there and meeting and betting with each other. Nor does it forbid keeping a place where persons may meet and bet with each other. Nor does it forbid carrying on the business of betting with any one who will bet with you. But it does forbid carrying on the business of keeping an office or place to which people may come and bet with you. The judgments in the case in the House of Lords clearly show that that is the matter to be considered. *The important question is not so much, what is a place? but, what is the character of the user of it?* and although the words used are 'house, office, room, or other place,' and it is clear that, according to the ordinary rule, 'place' must be something *ejusdem generis* with 'house, office, room,' yet the analogy is with respect to the way the place is used rather than with respect to the way in which it is constructed. I think those propositions are clearly brought out in the judgments delivered in the House of Lords, and especially in the passages in the judgments of the Lord Chancellor and of Lord James of Hereford, to which my brother Darling has referred. If a man, as was done here, uses certain apparatus with his name on it, and a statement of the odds he is prepared to lay, that apparatus may be used only to indicate his *identity*, and that he is willing to bet with anybody who will bet with him. If the

apparatus is used for those purposes only, it does not in any way localise his business of betting, or bring him within the provisions of the Act. But if it be used to indicate *the place* at which there is a man to be found who will bet with any one who will come and bet with him there, then that apparatus becomes an extremely important and valuable matter to consider. In each case the facts must be looked at to see whether the bamboo stage, or the umbrella, or whatever it is that the man has got, is being used by him merely to indicate that he is prepared to bet with anybody who will bet with him, or whether he is using it to indicate that there is a place at which the business of betting is carried on by him, and to which, therefore, people can go for the purpose of betting with him. With respect to the decisions which have been cited to us, the question in each case being, what is the proper inference to be drawn from the particular facts? although it is useful and valuable to see what inferences learned judges have drawn from particular facts in cases which have come before them, their decisions are not quite like binding decisions on a point of law. The question, after all, is a question of fact in each case—whether you come to the conclusion that there has been a user of a place, analogous to the user of a place like a betting office, at which the person who keeps or uses that place is prepared to bet with people who come there and bet with him. In the present case I think the facts are sufficient to bring it within the statute, and that the inference ought to be drawn that what the respondent did was not merely indicating that he was a man prepared to bet with anybody who would bet with him, but it was indicating that he was using that place as a place where he could be found, and was carrying on his business. He was localising his business there, with the object of attracting people there, and to prevent them from having to look for him all over the grounds. If that inference be drawn, this case is clearly brought within the principle of the decisions which have been held by the House of Lords to be good.

Guided very considerably, of course, by the views taken by the judges who decided *Shaw* v. *Morley* (1868), L. R. 3 Ex. 137, and *Bows* v. *Fenwick* (1874), L. R. 9 C. P. 339, I come to the conclusion upon the facts of this case that the inference ought to be drawn that the respondent's business was localised, and that consequently he was brought within the terms of the statute. Upon these grounds I am of opinion that the magistrates ought to have convicted, and that the case should be sent back with a direction that they ought to convict."

What is a Place?—The law therefore is that for a "place" to be "used" for the purposes specified in sec. 1 of the Act—

(a) *It must be sufficiently definite, and one where a betting establishment might be conducted; it must be* ejusdem generis *with a house, office, or room, and therefore if not a house, office, or room, a booth or stall, or other defined area capable of being used as a house, office, or room. The place must localise the business.*

Cases Affirmed by Kempton Park Case.—Uses within the meaning of the section of a stool covered by an umbrella, as in *Bows* v. *Fenwick* (1874), L. R. 9 C. P. 339; of a box and stand, as in *Brown* v. *Patch* (1899), 1 Q. B. 892; of an unroofed temporary wooden structure with desks, as in *Shaw* v. *Morley* (1868), L. R. 3 Ex. 137; and probably of a nook made by a hoarding with its stays, as in *Liddell* v. *Lofthouse* (1896), 1 Q. B. 295, is sufficient.

Cases Overruled by Kempton Park Case.—On the other hand, user of a recreation ground for cricket and foot-racing, &c., as in *Haigh* v. *Sheffield Corporation* (1874), L. R. 10 Q. B. 102; of enclosed grounds in which a pigeon-shooting match and foot-racing take place, as in *Eastwood* v. *Millar* (1874), L. R. 9 Q. B. 440; and probably of the reserved portion of a field where dog-races were being held, as in

Snow v. *Hill* (1885), 14 Q. B. D. 588, is insufficient. See also *Reg.* v. *Cook* (1884), 13 Q. B. D. 377.

Other Cases Considered in Light of Kempton Park Case.—In *Galloway* v. *Maries* (1881), 8 Q. B. D. 275, the bookmaker's clerk stood on a box in an enclosure by a grand stand during a race meeting. The bookmaker stood by him. The box was not attached to the ground in any way. It appeared that they called out the odds; there was no evidence that they were written up. The two men stood in the same place during the races. In this case it was held that they had used a "place." In the Kempton Park case, Chitty, L.J., said: "Possibly *Galloway* v. *Maries* (*supra*), the case of the box (simply) may be supported on the same ground, but it is open to question." A. L. Smith, L.J., speaks of the bookmaker in *Snow* v. *Hill*, 14 Q. B. D. 588, exercising his business "upon no ascertained piece of ground; in other words, upon no premises akin or equivalent to a betting-house or office, as in *Shaw* v. *Morley*, L. R. 3 Ex. 137; *Bows* v. *Fenwick*, L. R. 9, C. P. 339, *and as had been held in Galloway* v. *Maries* (*supra*)." Lopes, L.J., who was one of the judges who decided the case, said he had felt great hesitation in holding that a wooden box such as described could be a place within the meaning of the Act. Lindley, L.J., thought the case could be supported, and Lord Esher, M.R., thought that it was wrongly decided. The case was cited in *Brown* v. *Patch* (1899), 1 Q. B. 892, but was not commented upon in the judgments. The difference between the facts in *Galloway* v. *Maries* (*supra*) and those in *Brown* v. *Patch* (*supra*) is one of degree. There was something in the nature of a structure, something *ejusdem generis* with a house, office, or room, and it may be that it would be found that it was used to indicate that there was a "place" at which the business of betting was being carried on.

In *Doggett* v. *Catterns* (1864–5), 17 C. B. N. S. 669, 19 C. B. N. S. 765, it appeared that the bookmaker stood under a clump of trees in Hyde Park. Four judges out of seven

of the Exchequer Chamber thought that the habitual use of this spot was the use of a "place" within the meaning of the Act. But according to Lord Halsbury, L.C., in the Kempton Park case, the point is not so much the continuity but the character of the user. Chitty, L.J., said in that case: "From *Doggett* v. *Catterns* (*supra*), in which there was much divergence of opinion, I am unable to obtain any safe guidance." Unless the clump of trees could be said to have formed a sort of stall, such as that made by an advertisement hoarding and its stays in *Liddell* v. *Lofthouse* (1896), 1 Q. B. 295—which was approved by A. L. Smith, L.J., in the Kempton Park case, and by Darling, J., in *Brown* v. *Patch* (1899), 1 Q. B. 896—we do not think that the bookmaker in Hyde Park contravened the Act.

On the facts in *M'Inaney* v. *Hildreth* (1897), 1 Q. B. 600, we think the bookmaker would now escape. He stood on a piece of private ground, to which the public had access, with his back against the hoarding of a skittle-alley. Of course, if the hoarding formed a nook or stall such as that in *Liddell* v. *Lofthouse* (*supra*), that might be sufficient; but in any case the decision is probably contrary to *Rex* v. *Deaville* (1903), 1 K. B. 468 (*infra*).

We think the use of the archway, which was a private thoroughfare, in *Reg.* v. *Humphrey* (1898), 1 Q. B. 875, was the use of a "place" within the Act, and that the decision was right. The case is stronger than that of *Liddell* v. *Lofthouse* (*supra*). But the reasoning of the judgments in *Reg.* v. *Humphrey* (*supra*) is quite contrary to that in the *Kempton Park Case* (*supra*).

Again, if the Kempton Park enclosure could have been a "place" used in contravention of the Act, a piece of garden ground at the back of a row of houses and used in common by their occupiers may well have been a place. See *Rex* v. *Russell* (1905), 69 J. P. 247, and *Reg.* v. *Cranny* (1899), 63 J. P. 826. See also *Flannagan* v. *Hill* (1904), 7 F (Jus. Cas.) 26, and *Clark* v. *Dykes* (1906), 8 F. (Jus. Cas.) 43, decisions upon what is a "place" under sec.

407 of the Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55).

But as Channell, J., said in *Brown* v. *Patch* (*supra*): "The important question is not so much, What is a place? but, What is the character of the 'user' of it?"

The "User" of a Place.—(b) *It must be used by a person having the dominion and control over the "place" in the character of owner, keeper, manager, or conductor of the business. It must be used as localising the business, and the user must be analogous to the use of a betting office.*

"User" where Public have Free Right of Access.—Where the person using is in the exclusive possession of the place, no difficulty arises. But when a bookmaker in the course of carrying on his business goes to some room or other defined area to which the public have access, how can it be said that the bookmaker has the dominion and control over the place in conducting his business if there is no evidence that he has not gone there simply as a member of the public?

"User" of a Bar at a Public-house.—The question first arose in cases where the bookmaker was carrying on his business in the bar of a public-house. The bookmaker contended that since the Kempton Park decision the bar of a public-house was in exactly the same position as the enclosure at Kempton Park. The company, like the licensed person, knew that bookmakers carried on their business on the premises, to which, with the rest of the public, they were admitted. The bookmakers in the bars did not keep to any specific portion of the room, whilst each bookmaker in the enclosure, for obvious reasons, usually kept "in or near" the same place. Grantham, J., distinguished, or endeavoured to distinguish, the two cases in *Belton* v. *Busby* (1899), 2 Q. B. at p. 383. He said: "There is, it seems to me, this great distinction between the racecourse cases . . . and the present, that in the former the bookmakers and the mem-

bers of the public who bet with them go into the racecourse enclosures on exactly the same footing; the place is open to them both on the same terms; the one has no greater right to be there than the other. But that was not the case here. The bookmaker Woods had something in the nature of a right or licence to use the bar of the beer-house for the purposes of his betting business over and above the right of an ordinary member of the public to resort there." In a word, he was there with the licence of the occupier to use the whole of the bar for his betting business. The bookmaker at Kempton Park was merely admitted to the enclosure as a member of the public, with the knowledge that he might stand "in or near" the same place carrying on a betting business. There was no evidence in the Kempton Park case that the company knew the name and business of any particular bookmaker they admitted to the ring. Lord Alverstone, C.J., in *Rex* v. *Deaville* (1903), 1 K. B. at p. 475, said: "It seems to me, therefore, that assuming you find a betting business carried on in a place which is not, either in law or in fact, in possession of the person charged, but is a common place to which persons have access for other purposes, you require to give evidence from which the jury may infer that the person who owns the place authorised or permitted the prohibited business to be carried on." We would add, by the person charged anywhere in a defined place—in the public-house cases, a room or bar.

He also said: "If you get sufficient localisation of the betting business, as is the case where the betting man is in possession of the particular plot of ground or structure on which he carries on his business, the question of the permission or licence of the owner of that plot or structure to use it for betting purposes is immaterial. That is what was pointed out in *Brown* v. *Patch* (*supra*). But in the absence of a localisation of that kind, the permission of the owner is most material."

This then is the law, and nothing short of a "friendly action," by which a decision of the Court of Appeal and of

the House of Lords could be obtained, will alter it. But we confess we think the opinion of Bruce, J., in *Rex* v. *Deaville* (*supra*) was the right one—that in the case of a room, whether the public had access to it or not, the licence and permission of the occupier to the bookmaker to carry on his business there was not material to support a conviction of the bookmaker. Bruce, J., said: "Apart from the language of the Lord Chancellor in the Kempton Park case (*supra*), I should have thought that the evidence established that the defendants were persons using the room, and that it was used by them for the purpose of betting with persons resorting thereto. I am inclined to think that the Lord Chancellor, when restricting the meaning of the term 'use' to 'a use by some person having the dominion and control over the place,' had in his mind the indefinite term 'place' and not the preceding words of the section, 'house, office, room,' and that he did not mean to say that in the case of a *house, office, or room*, a user in common with other members of the public would not suffice."

"User" of a Post Office.—As the law now stands, a bookmaker or a post-office official can, as regards the Act, safely carry on a betting business in a post office—a most convenient spot—provided he can conceal the fact from the person managing the office. Lord Halsbury, L.C., in the Kempton Park case, gave to the word "use" a meaning almost equivalent to "keep." In places, therefore, where the public have access *ex hypothesi*, there can be no "keeping" save with the consent of the occupier or owner.

User in Public-house Cases: Summary of Law.—Accordingly, where a bookmaker carries on a betting business in the bar of a public-house, not occupying any specific portion of the bar, and does so with the knowledge, permission, or licence of the occupier, he "uses" the bar as a "place" within the meaning of the Act (*M'William* v. *Dawson* (1891), 56 J. P. 182; *Belton* v. *Busby* (1899), 2 Q. B. 380; *Tromans*

v. *Hodgkinson* (1903), 1 K. B. 30; see also the earlier case of *Reg.* v. *Preedy* (1888), 17 Cox C. C. 433). In *Reg.* v. *Worton* (1895), 1 Q. B. 227, there appears to have been no evidence of licence on the part of the licensed person. So also where he does so with the permission or licence of a person assisting in the management; for he is clothed with the occupier's authority (*Buxton and another* v. *Scott* (1909), 73 J. P. 133; 100 L. T. 390). But it would appear that the consent of a mere servant who has no power of management is not sufficient (see *Buxton and another* v. *Scott* (*supra*), and *Rex* v. *Moss* (1910), 74 J. P. 214). But where he carries on that business without such knowledge, permission, or licence, he does not "use" the bar as a "place" within the meaning of the Act (*Whitehurst* v. *Fincher* (1890), 17 Cox C. C. 70; *Rex* v. *Simpson* (1903), 1 K. B. 468; *Rex* v. *Albert Deaville* (1903), 1 K. B. 468). And the occupier who gives the permission or licence can be convicted of knowingly and wilfully permitting a "room" to be used by another person contrary to sec. 3 of the Act (*Hornsby* v. *Raggett* (1892), 1 Q. B. 20; *Rex* v. *John Deaville* (1903), 1 K. B. 468).

Evidence of Authority by Publican to "Use."—A bookmaker, therefore, who uses the bar of a public-house without the licence of the occupier or his manager, cannot be convicted, at all events, unless he occupies some specific portion of the bar, and probably not then. That licence will be presumed from the knowledge of the occupier. Lord Alverstone, C.J., said, in *Rex* v. *Deaville* (1903), 1 K. B.: "It seems to me that if there is evidence of a practice of carrying on a betting business for a considerable number of days in a public-house, and that it is brought to the knowledge of the proprietor, it is quite right to direct the jury that they may infer that what the bookmaker was doing was being done with the licence and authority of the publican."

On this question of the use of a bar as a betting place, see the notes to sec. 79 of the Licensing (Consolidation) Act, 1910 (*infra*), at p. 119.

Club: User of.—Of course betting between the *bona-fide* members of a club is not a *user* of the club contrary to the Act any more than a betting between members of a family in the home. *Downes* v. *Jackson* (1895), 2 Q. B. 203; *Oldham* v. *Ramsden* (1875), 44 L. J. C. P. 309; 39 J. P. 583. But the actual decision of this case is no longer law, having regard to sec. 1 of the Gaming Act, 1892 (55 & 56 Vict. c. 9). But where evidence was given that the chairman and secretary of a club always acted as bookmakers, the other members of the club going to it to bet with them, the two bookmakers on many occasions occupying the same places, sitting at the same table, and using the tape list, it was held that there was evidence to go to the jury of an offence under the Act. *Rex* v. *Corrie*, 68 J. P. 294; 20 T. L. R. 365; see also *Rex* v. *Bradley and others* (1908), 1 Ct. Cr. Appeal Rep. 146.

"User" for more than one Object.—It is clear, from the numerous public-house cases already quoted, that the principal user of the house, office, room, or place may be for another and a legitimate object, and yet it may be kept or used contrary to the Act. See *Reg.* v. *Preedy* (1888), 17 Cox C. C. 433.

Newspaper Shop for Delivery of Letters: User of.—Apparently a person making use of a shop by the permission of the occupier for the delivery to him of correspondence relating to ready-money betting is a person using the shop, although he does not either own or occupy it. *Vogt* v. *Mortimer* (1906), W. N. 180, 22 T. L. R. 763.

Definitions of "Place" and of "User."—To sum up: For a "place" to be "used" for the purposes specified in sec. 1 of the Act—

The Place.—A. *It must be sufficiently definite and one where a betting establishment might be conducted; it must*

be ejusdem generis *with a house, office, or room, and therefore if not a house, office, or room, a booth or stall or other defined area capable of being used as a house, office, or room. The place must localise the business.*

The "User."—B. (1) *It must be used by a person having the dominion and control over the "place" in the character of owner, keeper, manager, or conductor of the business. It must be used as localising the business, and the user must be analogous to the user of a betting office.*

The User where Public have Free Right of Access.—(2) *Accordingly, where the public have a free right of access to the house, office, room, or place, of which the person carrying on the business has not possession either in fact or law, he does not use it as a "place" unless he has the licence and authority of the owner or occupier of the place to do so, or of a person clothed with his authority.*

"User" of a Place when Trespassing.—If *Reg.* v. *Humphrey* (1898), 1 Q. B. 875, and *Reg.* v. *Cranny* (1899), 63 J. P. 826, was rightly decided, a person may "use a place" although he and the public have no authority to go there—that is, if the bookmaker and the persons resorting to bet with him are equally trespassers. But if this is so, can it be said that the person has the dominion and control over the place on which he is trespassing? In a word, is the dominion and control merely physical or legal? We consider that the effect of the decision in *Rex* v. *Deaville* (*supra*) is that the dominion and control must be legal. The bookmaker in the bar was physically using the room as an office, but there was nothing to show that he had a right to do so given him by the occupier. Of course if the bookmaker carrying on his business at a place is in fact trespassing, but no evidence is given of that fact, the Court would presume that he had a right to carry on his business at the place. At all events, a

bookmaker who was trespassing should raise the defence that he had no dominion and control over the place, and was a mere trespasser.

Apparently the bookmaker who is using a highway or public land cannot be prosecuted under this Act, for this would come within Lord Alverstone's words in *Rex* v. *Deaville* (*supra*) as a place which is not either in law or in fact in possession of the person charged, but is a common place to which persons have access for other purposes. But see Chapter I. on the prohibition of certain betting in the street. In *Rex* v. *Short* (1900), 34 I. L. T. R. (Q. B.), 127, a bookmaker using the public thoroughfare under an archway was held not to be using a "place" contrary to the Act, as he had no dominion or control over it.

"Opened, Kept, or Used."—The character of the "user" has been dealt with in the last note. To "use" in this section means very much the same as to "keep." Persons resorting to the betting-house to bet with the person keeping it do not "use" it within the meaning of the section. There are, however, some cases on evidence of "opening, keeping, or using." The real gist of the offence created by sec. 1 is the "opening, keeping, or using" of the house, &c., for certain purposes—for the purpose of betting with persons resorting thereto, or for the purpose of receiving money for ready-money betting. What is condemned is the opening, keeping, or using for these purposes. To support a conviction, therefore, under the section it is not necessary to give evidence of persons resorting thereto or of the receipt of money for ready-money betting. If evidence is given that the house was opened and advertised for these purposes, that will be sufficient for a conviction under the section. *Reg.* v. *Brown* (1894), 1 Q. B. 119, and *Hart* v. *M'Creadie* (1899), 36 S. L. R. 912. See also *Reynolds* v. *Agar* (1906), 70 J. P. N. 568. On the other hand, the most usual way of proving that a house, &c., is opened, kept, or used for these purposes is to prove that people did resort there for the

purpose of betting with the user or keeper, or that money was received there for ready-money betting. If this is all the evidence it is clear, from the definition of "user" we have given, evidence of one bet is not sufficient to support a conviction.

Lord O'Brien, L.C.J., said in *M'Connell* v. *Brennan* (1908), I. R. 2 K. B. 411: "The mere *naked fact, without more* . . . that a bookmaker made one bet in a house in which he resided is not enough in my opinion to attach to the house the character of a betting establishment." See *Jayes* v. *Harris* (1908), 72 J. P. 364, where, on an information under sec. 17 of the Licensing Act, 1872 (35 & 36 Vict. c. 94) (*infra*), one bet was held not sufficient evidence of user. See also the ruling in *Reg.* v. *Herbert* (1897), 61 J. P. 679, a decision, however, contrary to *Rex* v. *Deaville* (1903), 1 K. B. 468. But if the fact is not naked, the evidence attending one bet may be sufficient. Gibson, J., said, in *M'Connell* v. *Brennan* (*supra*): "In certain circumstances a single bet in a house or place accepted by the person using the same, without any proof beyond the transaction itself and the conduct and language of the parties, might warrant an inference of guilty user." See also *Foote* v. *Butler* (1877), 41 J. P. 792. Compare the decision in *Martin* v. *Benjamin* (1907), 1 K. B. 64, where it was held that the use of a room on one occasion for the drawing of tickets in a lottery is not an offence under sec. 2 of the Gaming Act, 1802, which forbids the *keeping* of any place for the purpose of a lottery. See also *Reg.* v. *Davies* (1897), 2 Q. B. 199; and *Rex.* v. *Mortimer* (1911), 1 K. B. 70; 75 J. P. 37.

In *Rex* v. *Mean* (1904), 69 J. P. 27, 21 T. L. R. 172, where a publican had been convicted of keeping his premises as a betting-house and the defendant for using the house on November 13, 1903, for both of the prohibited purposes (see pp. 104–5), evidence was admitted to show that betting slips similar to some found on the defendant on his arrest on November 13th at the house, and to others found in the house, had previously been frequently received from cus-

tomers at the public-house by the publican, and had been forwarded on by him to the defendant. Also evidence was admitted to show that lists of the names of persons and of the amount due to them upon bets were an epitome of slips received by him from the publican on occasions prior to November 13th. It was held that both classes of evidence were admissible in any case to prove agency on the part of the publican on November 13th.

Continuing Offence.—As to how far what is prohibited is a continuing offence, see notes to sec. 3 (*infra*), and *Onley* v. *Gee* (1861), 30 L. J. M. C. 222, and *Farmer* v. *Cluer* (1904). 68 J.P. 36.

"Betting with Persons Resorting Thereto."—This is the first purpose specified. Keeping, &c., a house, &c., for this purpose is a separate offence from keeping, &c., a house, &c., for the purpose of receiving deposits on bets. See (*infra*) *Bond* v. *Plumb* (1894), 1 Q. B. 169.

"Betting."—"Betting" means making the wager or contract of betting (see Part I. c. 1). It does not mean the payment of bets already made and lost by the person keeping the house, &c. (see *Bradford* v. *Dawson* (1897), 1 Q. B. 307). And it does not mean the sale of tickets and the receipt of purchase money for tickets in an ordinary sweepstake on a horse-race (see *Reg.* v. *Hobbs* (1898), 2 Q. B. 647).

"Persons Resorting Thereto."—"Resorting" means physically resorting or resorting in person (*Reg.* v. *Brown* (1895), 1 Q. B. 119). Accordingly, a person can keep a house, whether he resides there or not, for the purpose of credit betting with persons in other houses or places by letter or telegram. And such betting is no evidence of a house, &c., being opened, kept, or used contrary to the section (see p. 108).

As to betting at clubs, see p. 100 (*supra*).

The Second Prohibited Purpose.—The section continues:—

For the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid,
as or for the consideration for
any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race or other race, fight, game, sport or exercise;
or as or for the consideration for
securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid.

Ready-Money Betting.—This is the second purpose specified; put shortly, the receiving of deposits on bets—ready-money betting. Keeping, &c., a house, &c., for this purpose is a separate offence from keeping, &c., a house, &c., for the purpose of betting with persons resorting thereto. See (*supra*) *Bond* v. *Plumb* (1894), 1 Q. B. 169.

"Money."—In *Rex* v. *Mortimer* (1911), 1 K. B. 70, 75 J. P. 37, the question was raised (but not decided) whether postal orders were money within the meaning of the section.

"As or for the consideration for."—See *Rex* v. *Mortimer* (1911), 1 K. B. 70; 75 J. P. 37.

A police officer, in opening communication with Mortimer, had written that he wished to open a deposit account with him, and would forward £5, and that his commission would not exceed that amount without a further remittance. His reply was: "On receipt of yours, as suggested I will place you on my list of clients." The £5 was then sent in postal orders, and bets were subsequently made by the officer. It was contended for Mortimer that the postal orders were not received as or for the consideration for any agreement to pay money on bets on horse-races, and that the postal orders were merely deposited as security against bets which might or might not subsequently be made.

But it was held that this contention was wrong, and that the orders were sent and were received as consideration for an agreement to pay bets on horse-races.

Sweepstake on a Horse-Race.—Where a person permits the sale of tickets and the receipt of purchase-money for tickets in an ordinary sweepstake on a horse-race, he does not contravene this part of the section, because (1) he does not enter into any contractual liability towards the subscribers, and (2) the contingency upon which the money is to be paid is not a contingency relating to a horse-race, but a contingency relating to a drawing. *Reg.* v. *Hobbs* (1898), 2 Q. B. 647. And see the judgment of Kennedy, J., in *Reg.* v. *Stoddart* (1901), 1 Q. B. at p. 186.

Money Received Abroad.—The occupier may keep, &c., a house, &c., for this purpose, although the intended place of receipt of the deposits is elsewhere (*Lennox* v. *Stoddart*, *Davis* v. *Stoddart* (1902), 2 K. B. 21; *Vogt* v. *Mortimer* (1906), W. N. 180, 22 T. L. R. 763), and this is so even if the intended place for the receipt of the money is abroad (*Stoddart* v. *Hawke* (1902), 1 K. B. 353), and it is immaterial that the office in this country is not advertised or in any way made known to the public (*Rex* v. *Andrews, Schotz, and Luggar* (1910), 74 J. P. 255). In *Vogt* v. *Mortimer* (*supra*) the backer sent a lump sum to the bookmaker's bank, whilst the bookmaker "used" a newspaper shop for the purposes of his business. But to secure a conviction it must be proved that the house, &c., is kept, &c., for the doing of that which is an essential part of the transaction of the receipt of the money (*Stoddart* v. *Hawke* (1902), 1 K. B. 353). In *Rex* v. *Andrews, Schotz, and Luggar* (1910), 74 J. P. 255, where the betting business was carried on in Holland, a London office where betting circulars and receipts were posted with the Flemish address to save the expense of posting from Holland was held to come within the Act.

Money Paid for Coupons in Newspaper Competitions.—Where a house, &c., is kept, &c., for the purpose of the receipt of money deposited by the players in a newspaper coupon competition as to the result of a race or football

match, the section is contravened if the money deposited is in fact paid not for the newspaper but for coupons in it or enclosed with it giving them the right to play (*Reg.* v. *Stoddart* (1901), 1 K. B. 177; *Stoddart* v. *Hawke* (1902), 1 K. B. 353; *Lennox* v. *Stoddart* and *Davis* v. *Stoddart* (1902), 2 K. B. 21; *Hart* v. *Hay, Nisbet, & Co., Ltd.* (1900), 37 S. L. R. 653; *Hawke* v. *Hulton & Co.* (1906), 22 T. L. R. 169); and (semble) this is so even if the transactions are not, strictly speaking, "bets" (*Reg.* v. *Stoddart* (1901), 1 K. B. 177 at p. 183 (see *Stoddart* v. *Sagar* (1895), 2 Q. B. 474, distinguished in *Reg.* v. *Stoddart* (1901), 1 K. B. 177); but it would appear on the findings of the former case that it was overruled by the latter. *Caminada* v. *Hutton* (1891), 60 L. J. (M. C.) 116, was also distinguished in *Reg.* v. *Stoddart* (1901), 1 K. B. 177, on the ground that in that case the deposit was paid for the newspaper or book and not for the coupons contained in it. And where the manager of the competition publishes in a newspaper an advertisement of the prizes offered to and the rules to be observed and the amounts to be paid by intending competitors, with lists of previous prize-winners, and the office of the newspaper was opened and kept for the purpose of the competition, there is evidence that the manager of the competition is using the office for the second purpose set out in the section (see *supra*), and that the registered proprietor is a person knowingly and wilfully permitting the office to be so used contrary to sec. 3 (*infra*). *Mackenzie* v. *Hawke* (1902), 2 K. B. 216.

Act may Extend to what is not a "Bet" in Ordinary Sense.—The meaning of the words in this part of the section are not limited so as to confine them to deposits on what are called "bets" in the ordinary sense of the word. See Part I., *Reg.* v. *Stoddart* (1901), 1 K. B. at p. 183, and *Lennox* v. *Stoddart* and *Davis* v. *Stoddart* (1902), 2 K. B. at pp. 33, 34, and 36. If a case can be brought within the terms of the section that is sufficient to support a conviction. But (semble) the transactions under

consideration in these cases were bets in the ordinary sense of the word.

Wright v. *Clarke*, *Morris* v. *Clarke*, and *Smith* v. *Clarke* (1870), 34 J. P. 661, were cases brought under this part of the section and sec. 3.

The Legal Betting-House not Prohibited by the Act.—It will be noticed that this second purpose is for the purpose of ready-money betting. A person may not keep, &c., a house for the purpose of

(1) betting with persons (physically) resorting thereto, or for the purpose of

(2) receiving deposits on bets either at that house or elsewhere.

A bookmaker, therefore, cannot carry on a ready-money betting business from a house, room, or "place" in this country. And he cannot carry on a credit or a ready-money betting business if those who bet with him go to the house, room, or "place." But there is nothing in the Act to prevent him from carrying on a credit betting business from a house, room, or "place" in this country whether he resides there or not, provided that the bets are made by telegram or letter and the bets are settled after the event, no deposits being made at the house, office, or "place." The clients, therefore, of the modern (legal) betting-houses in this country are for the most part persons whom the bookmaker can trust and with whom he has either a weekly or monthly account. The betting is done by telegram, generally in code, and the client carries in his pocket a book containing the code words and the terms on which the bookmaker is willing to bet with him—the most important being that the client must never go himself to the bookmaker's house, and he must never send him a deposit on a bet.

House Kept or Used for Paying on Bets.—Further, there is nothing to prevent a bookmaker opening, keeping, or using any house, office, room, or place for the purpose of paying

bets made elsewhere (*Bradford* v. *Dawson* (1897), 1 Q. B. 307); but he must be careful when doing so not to make fresh bets. It is impossible then to carry on a betting-office in this country to which people may come in person and make bets. A ready-money betting business (by deposit) may be carried on in this country, if the office is kept out of the jurisdiction, say in Holland; but in that case, having regard to the decisions of *Reg.* v. *Stoddart* (1901), 1 K. B. 177, and *Rex* v. *Andrews and others* (1910), 74 J. P. 255, care must be taken that no house, office, room, or place is kept or used in this country for sending out circulars, advertisements, &c. As to advertisements of such an office, see p. 139.

"A Common Nuisance and Contrary to Law."—By these words the opening, keeping, or using of such a house, office, room, or "place" for either of the purposes mentioned in the section (see *Bond* v. *Plumb* (1894), 1 Q. B. 169) becomes an indictable misdemeanour, although by sec. 3 of the Act (*infra*) the offence is punishable on summary conviction. See *Rex* v. *Gregory* (1833), 5 B. & Ad. 555, 3 L. J. M. C. 25; *Rex* v. *Crawshaw* (1860), Bell's Crown Cases, 303, 8 Cox C. C. 375; and *Reg.* v. *Brown* (1895), 1 Q. B. 119. The punishment for a common law misdemeanour is by fine or imprisonment or both.

For the procedure in Scotland, see sec. 4 (2) of the Betting Act, 1874.

Betting-Houses to be Gaming-Houses within 8 & 9 Vict. c. 109.—By sec. 2 of the Act—

> Every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house within the meaning of an Act of the session holden in the eighth and ninth years of Her Majesty, chapter one hundred and nine, "to amend the law concerning games and wagers." (The Gaming Act, 1845.)

For this section, in column, see p. 80.

Common Gaming-House.—The keeping of a common gaming-house is a nuisance, and indictable at common law as a misdemeanour, punishable by fine or imprisonment or both. The keeper of a betting-house, therefore, can be indicted under sec. 1 or sec. 2.

Gaming Act, 1845, Sec. 4.—By sec. 4 of the Gaming Act, 1845, "the owner or keeper of any common gaming-house, and every person having the care or management thereof, and also every banker, croupier, and other person who shall act in any manner in conducting the business of any common gaming-house" shall, on summary conviction, be liable to a penalty of not more than £100, or to imprisonment with or without hard labour for not more than six calendar months.

The recovery of penalties may be by distress.

Gaming-House Act, 1854, Sec. 4.—By sec. 4 of the Gaming-House Act, 1854 (17 & 18 Vict. c. 38, sec. 4), a penalty of £500 or of imprisonment up to twelve months is authorised for owners, occupiers, and others having the use of any house, room, or place, "who shall open, keep, or use the same for the purpose of unlawful gaming being carried on therein." As we read sec. 2 of the Gaming Act, 1845, and the judgment of Hawkins, J., in *Jenks* v. *Turpin* (1884), 13 Q. B. D. 505, we consider that this section may be contravened, although the house, &c., is not a common gaming-house. And in any case we are of opinion that sec. 2 of the Betting Act, 1853, does not incorporate this section. If it did, the penalty would be higher than that imposed by sec. 3 of the Act of 1853.

Effect of Sec. 2 of Betting Act, 1853.—As to the power of arrest and search in common gaming-houses, under secs. 3, 6, and 7 of the Gaming Act, 1845, see the notes to sec. 11 (*infra*) at p. 125. With the possible exception of certain powers of arrest and search, and of certain powers in the metropolitan police district (see sec. 48 of the Metropolitan

Police Act, 1839 (*infra*), we consider that this section adds nothing to the powers provided by the other sections of the Act. The keeping, &c., of a betting-house is already an indictable misdemeanour by sec. 1. Sec. 4 of the Gaming Act, 1845, adds nothing to sec. 3 of the Betting Act, 1853. Sec. 4 of the Gaming-House Act, 1854, is not, in our opinion, incorporated in this Act.

By sec. 48 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47)—

"If any superintendent belonging to the metropolitan police force shall report in writing to the said commissioners that there are good grounds for believing any house or room within the metropolitan police district to be kept or used as a common gaming-house, and if two or more householders, dwelling within the same district and not belonging to the metropolitan police force, shall make oath in writing, to be by them taken and subscribed before a magistrate and annexed to the said report, which oath every magistrate is hereby empowered to administer and receive, that the premises complained of by the superintendent are commonly reported and are believed by the deponents to be kept or used as a common gaming-house, it shall be lawful for the commissioners by order in writing to authorise the superintendent to enter any such house or room, with such constables as shall be directed by the commissioners to accompany him, and, if necessary, to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who shall be found therein, and to seize and destroy all tables and instruments of gaming found in such house or premises, and also to seize all monies and securities for money found therein; and the owner or keeper of the said gaming-house, or other person having the care and management thereof, and also every banker, croupier, and other person who shall act in any manner in conducting the said gaming-house shall be liable to a penalty not more than one hundred pounds, or, in the discretion of the magistrate before whom he shall be convicted of the offence, may be committed to the house of correction, with or without hard labour, for a time not more than six calendar months; and upon conviction of any such offender, all the monies and securities for monies which shall have been seized as aforesaid, shall be paid to the said receiver, to be by him applied towards defraying the charge of the police of the metropolis; and every person found in such premises without lawful excuse shall be liable to a penalty not more than five pounds: provided always that nothing herein contained shall prevent any proceeding by indictment against the owner, or keeper, or other person having the care or management of any gaming-house; but no person shall be proceeded against by indictment and also under this Act for the same offence."

Power to Seize Monies and Securities for Money Found in Metropolitan Betting-House.—This section we consider to be incorporated by sec. 2. Accordingly, in the metropolitan police district there is, where action is taken pursuant to this section, a power to seize all monies and securities for monies found in the betting-house, and upon the conviction of the keeper of the house, the monies and securities seized are to be paid to the receiver for defraying the charge of the police of the metropolis (see 63 J. P. 38). But this may only be done where the preliminary conditions of sec. 48 are strictly complied with (*Gordon* v. *Chief Commissioner of Metropolitan Police* (1910), 74 J. P. 189; 102 L. T. 253). Lists, cards, and other documents relating to betting are not instruments of gaming within the meaning of this section, and so must be given up by the police, and must not be destroyed (see *R.* v. *Willcocks and others* (the *Standard* newspaper, 30th December 1889), 54 J. P. 9).

Where a person is summarily convicted under this section, he may appeal to Quarter Sessions. See sec. 13, at p. 134.

For the procedure in Scotland, see sec. 4 (2) of the Betting Act, 1874.

Penalty on Owner or Occupier or User of Betting-House.—By sec. 3 of the Act—

"Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who, being the owner or occupier of any house, room, office, or other place, shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding one hundred pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; [*and on the non-payment of such penalty and costs*], or [*in the first instance*], if to the said justices it shall seem fit, may

be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months."

For this section, printed in column, see p. 80.

The words in italics are repealed by sec. 4 of the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), as to England. See sec. 5 of the Summary Jurisdiction Act, 1879 (43 & 44 Vict. c. 49).

Effect of Section. — This section provides penalty and punishment for three groups of persons:—

A. Owners, occupiers, and users of the betting-house or place for the two purposes, or either of them.

B. Owners and occupiers knowingly and wilfully permitting the betting-house or place to be opened, kept, or used by any other person for the two purposes, or either of them.

C. Persons having the care or management of or in any manner assisting in conducting the business of a betting-house or place opened, kept, or used for the two purposes, or either of them.

The two purposes are, of course, those mentioned in sec. 1—

(1) The purpose of betting with persons physically resorting thereto; and

(2) The purpose of ready-money betting by deposit.

Owners, Occupiers, and Users—Trial by Jury.—Group A can be indicted under either sec. 1 or sec. 2 for a common law misdemeanour, or they can be proceeded against summarily under this section; but in that case the accused can elect to be tried on indictment by a jury (see sec. 17 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49)), as the offender is liable to be imprisoned for a term exceeding three months. And in practice persons charged under the section generally do elect to be tried on indictment, as they stand a better chance of acquittal before a jury than before a police-court magistrate or justices. Or they can be tried under

sec. 4 of the Gaming Act, 1845; but in practice this is never done, as the penalty and punishment is the same in that section as in this. A person making use of a shop by the permission of the occupier for the delivery to him of correspondence relating to ready-money betting is a person "using" the shop, although he does not either own or occupy it (*Vogt* v. *Mortimer* (1906), W. N. 180, 22 T. L. R. 763). See also *Wright* v. *Clarke, Morris* v. *Clarke,* and *Smith* v. *Clarke* (1870), 34 J. P. 661, as to the position of an agent of an undisclosed principal who makes himself responsible for the payment of a ready-money bet.

Group B is concerned with those owners or occupiers who allow other people to keep or use a house or place contrary to the Act. Sec. 79 of the Licensing (Consolidation) Act, 1910, provides a lesser penalty where the offender is a licensed person (see pp. 80 and 119). The effect of sec. 79 is not to overrule this section in the case of a licensed person (*Sims* v. *Pay* (1889), 58 L. J. M. C. 39). Proceedings may be brought against the licensed person under either section, but he cannot be punished under both (*ibid.*). In *Rex* v. *Ritchie* (1905), *Times* newspaper for August 12th, at p. 12, Walton, J., quashed counts of an indictment against a publican as occupier knowingly and wilfully permitting his house to be used by certain persons contrary to the Act, on the ground that the "user" by those persons was not sufficiently set out.

Group C is concerned with the managers and servants of the betting-house or place.

Clients of the Betting-House.—It will be noticed that the clients, those who resort to the betting-house for the purpose of betting or paying deposits, are only liable to a penalty of 6s. 8d. (see pp. 131–2). When found there they can be arrested under either sec. 2 or secs. 11 and 12, brought before the justices and bound over; but they cannot be either fined or imprisoned under this section, for they do not use the house within the meaning of the section. See the notes to secs. 2, 11, and 12, at pp. 109, 125 and 133.

Penalty: One Hundred Pounds.—As to the recovery of the penalty and costs, see sec. 8 (*infra*).

As to the application of the penalty, see sec. 9 (*infra*).

As to the application of the penalty in Scotland, see sec. 4 (3) of the Betting Act, 1874.

Information.—The want of an information will invalidate a conviction under the section unless the irregularity is waived (*Blake* v. *Beech* (1876), 1 Exch. D. 320). An information under this section may be laid before one justice only (*Lee* v. *Gold* (1880), 44 J. P. 395).

Appeal.—An appeal by a person summarily convicted under this section lies to Quarter Sessions. See sec. 13 at p. 134. A person convicted on indictment can appeal to the Court of Criminal Appeal.

Nature of Section.—The wording of the section follows that of sec. 1, and it is, in effect, a clause providing penalty and punishment on summary conviction for the breach of that section by the different classes of persons. The notes on sec. 1, from p. 85 to p. 109, must therefore be consulted in order to understand the section, and more especially the notes on "place" and "user," from p. 85 to p. 101.

The illegal user forbidden by sec. 3 is not necessarily of a house, office, room, or place which is already a common nuisance and a common gaming-house by secs. 1 and 2 of the Act. See *Reg.* v. *Preedy* (1888), 17 Cox, C. C. 433. The house, room, office, or place may also be used for other purposes (*ibid.*).

Continuing Offence.—In *Onley* v. *Gee* (1861), 30 L. J. M. C. 222, an information charged the defendant with having, on the 5th day of October, and on divers other days and times between the said 5th of October and the laying the information—November 16th of the same year—being then the occupier of a certain house, knowingly and wilfully opened, kept, and used the same for the purpose of betting with

persons resorting thereto. The justices were of opinion that the defendant had so used the house on November 8th, and they convicted him of the offence committed on that date. Wightman, J., upheld the conviction, being of opinion that the information only alleged one offence. In *Farmer* v. *Cluer* (1904), 68 J. P. 56, the appellant was convicted by six convictions of using his shop contrary to sec. 3 on six days, and on each conviction he was fined £50—£300 in all—and ten guineas costs. An appeal was brought upon the ground that the appellant ought only to have been convicted of one continuing offence. Quarter Sessions affirmed the six convictions, but reduced the fine on each conviction to one of £10.

"Criminal Cause or Matter."—A conviction under this section is a criminal cause or matter within the meaning of sec. 47 of the Judicature Act, 1873. Therefore, where the High Court has quashed a conviction under this section on a case stated by justices, no appeal lies to the Court of Appeal. *Blake* v. *Beech* (1877), 2 Exch. D. 335.

For the procedure in Scotland, see sec. 4 of the Betting Act, 1874, at p. 137.

Penalty on Persons receiving Money on condition of paying Money on Event of any Bet.—By sec. 4—

"Any person, being the owner or occupier of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, or any person acting for or on behalf of any such owner or occupier, or any person having the care or management or in any manner assisting in conducting the business thereof, who shall receive, directly or indirectly, any money or valuable thing as a deposit on any bet on condition of paying any sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse-race or any other race, or any fight, game, sport, or exercise, or as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security, or draft on the receipt of any money or valuable thing so paid or given as aforesaid purporting or intended to entitle the bearer or any other person

to receive any money or valuable thing on the happening of any such event or contingency as aforesaid, shall, upon summary conviction thereof before two justices of the peace, forfeit and pay such penalty, not exceeding fifty pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable ; [*and on the non-payment of such penalty and costs*], or [*in the first instance*] if to such justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding three calendar months."

For this section, printed in column, see p. 80.

The words in italics are repealed by sec. 4 of the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), as to England. See sec. 5 of the Summary Jurisdiction Act, 1879 (43 & 44 Vict. c. 49).

Effect of Section. — This section provides penalty and punishment for four groups of persons:—

(1) Owners, occupiers (but not users) of the betting-house or place, opened, kept, or used for the two purposes, or either of them (see last section).

(2) Persons acting for or on behalf of any such owner or occupier (see A).

(3) Persons having the care or management or in any manner assisting in conducting the business of a betting-house or place, opened, kept, or used for the two purposes, or either of them,

Who receive money or value as a deposit on a bet as defined in the section.

(4) Any person at all giving an acknowledgment, &c., as defined in the section, on the receipt of a deposit on a bet as defined in the section.

The two purposes are of course those mentioned in section 1—

(1) The purpose of betting with persons physically resorting thereto, and

(2) The purpose of ready-money betting by deposit.

Nature of Section.—The wording of the section follows

that of sec. 1, and it is in effect a clause providing penalty and punishment for the breach by the owners, occupiers, their managers and servants of a betting-house or place, kept or used for the two purposes or either of them, who in fact receive a deposit on a bet or give an acknowledgment on the receipt of such a deposit. Accordingly, a person who makes an arrangement at a shop to receive correspondence relating to ready-money betting, does not come within this section, as he does not own or occupy the shop, but he comes within secs. 1 and 3 of the Act (*Vogt* v. *Mortimer* (1906), W. N. 180; 22 T. L. R. 763). The section is directed against the second purpose specified in sec. 1—against ready-money betting. The notes on sec. 1 from pages 85 to 109, must therefore be consulted in order to understand the section, and more especially the notes on "place" and "user" from p. 85 to p. 109.

It will be noticed that the clients, those who give the deposit or receive the acknowledgment, are only liable to a penalty of 6s. 8d (see pp. 131–2). When found there they can be arrested under either sec. 2 or secs. 11 and 12, brought before the justices and bound over; but they cannot be either fined or imprisoned under this section. See the notes to secs. 2 and 11 and 12 at pp. 109, 125 and 133.

The accused can elect to be tried on indictment by a jury, and if convicted on indictment may appeal to the Court of Criminal Appeal. See sec. 17 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). And in practice persons charged under this section generally do elect to be tried on indictment, as they stand a better chance of acquittal before a jury than before a police court magistrate or justices.

Penalty: Fifty pounds.—As to the recovery of the penalty and costs, see sec. 8 (*infra*).

As to the application of the penalty, see sec. 9 (*infra*).

As to the application of the penalty in Scotland, see sec. 4 (3) of the Betting Act, 1874, at p. 137.

Information.—The want of an information will invalidate a conviction under the section, unless the irregularity is waived. *Blake* v. *Beech* (1876), 1 Exch. D. 320.

Appeal.—An appeal by a person summarily convicted under this section lies to Quarter Sessions. See sec. 13.

For the procedure in Scotland, see sec. 4 (2) of the Betting Act, 1874, at p. 137.

By sec. 79 of the Licensing (Consolidation) Act, 1910 (10 Ed. 7, Geo. 5, c. 24)—

(1) "The holder of a justices' licence shall not . . . (*b*) open, keep, or use his premises in contravention of the Betting Act, 1853, or suffer his premises to be opened, kept, or used in contravention of that Act.

(2) "If the holder of a justices' licence acts in contravention of this section he shall be liable in respect of each offence to a fine not exceeding in the case of the first offence ten pounds, and in the case of any subsequent offence twenty pounds."

For this section, printed in column, see p. 80.

We can see no difference between suffering a house to be used and knowingly and wilfully permitting it to be used within the meaning of sec. 3 of the Betting Act, 1853. The only effect, therefore, of this section is to make provision for a lesser penalty, without the option of imprisonment, where the offence is committed by a licensed person. The holder of a licence must in general be the real resident, holder, and occupier (see *R.* v. *Woodhouse and Others, Leeds Justices* (1906), 2 K. B. 501, and *Leeds Corporation* v. *Ryder* (1907), A. C. 420). As the penalties under the Betting Act are larger, it follows that the licensed person is usually prosecuted under that Act. But a person prosecuted under sec. 3 can, before the charge is gone into, elect to be tried by indictment before a jury (see sec. 17 of the Summary Jurisdiction Act, 1879, and *R.* v. *Preedy* (1888), 17 Cox C. C. 433). And the election to be tried by indictment need not be averred (*R.* v. *Chambers* (1896), 60 J. P. 586). He must be informed of his right to be tried by a jury before the case is gone into (*R.* v. *Cockshott* (1898), 1 Q. B. 582). The appeal against a summary conviction under either

sec. 79 or the Betting Act is to Quarter Sessions; see sec. 99 of the Licensing Act, 1910, and sec. 13 of the Betting Act. In *Wood* v *Nairn* (1897), 61 J. P. 184, a licensed person was proceeded against under the Betting Act, 1853, but the summons was dismissed on a technical point. The prosecutor thereupon took out a summons under sec. 17 of the Licensing Act, 1892, and the licensed person was convicted, but the conviction was held bad by Quarter Sessions, as on the first summons the defendant might have been convicted of the offence of which he was convicted on the second summons. A person cannot be punished under both sec. 79 and sec. 3, but proceedings may still be brought against licensed persons under sec. 3 (*Sims* v. *Pay* (1889), 53 J. P. 420; 58 L. J. M. C. 39).

Where the licensed person allows a bookmaker to bring the deposits received in bets made away from the house to his premises, the deposits also being received away from the house, he cannot be convicted under the section. *Davis* v. *Stephenson* (1890), 24 Q. B. D. 529.

When a licence comes before the licensing bench for renewal, the consequences to a licensed person and to the persons interested in a licensed house are so serious, if the licensed person has been convicted under the Betting Act, 1853, or under sec. 79 of the Licensing Act, 1910, that they altogether outweigh the advantages of any extra trade obtained from those frequenting the house for the purpose of betting with bookmakers. As a consequence there is very little bookmaking business done in public-houses.

By the earlier part of the section, "The holder of a justices' licence shall not suffer any gaming, or unlawful game to be carried on on his premises," and if he does he is to be liable to the same penalties. Betting upon horse-races is not "gaming" within the meaning of the section. *Keep* v. *Stevens* (1909), 73 J. P. 112; 100 L. T. 491.

For the law as to the "user" of the bar of a public-house, see the notes to section 1 at pp. 96–99.

This section applies to England and Wales, but not to

Scotland or Ireland. See sec. 113 of the Licensing (Consolidation) Act, 1910.

There remain for consideration sixteen sections of the Betting Act, 1853.

The seventh section, providing a penalty for persons exhibiting placards or advertising betting-houses, will be dealt with in Chapter III. of this Part on "Certain Restrictions on Betting Advertisements."

By sec. 5. Money received on deposit at a betting house may be recovered from the persons receiving the same.

" " 6. The Act is not to extend to stakes due to the owner of a horse winning a race.

" " 8. Penalties and costs may be levied by distress.

" " 9. The application of penalties is dealt with.

" " 10. On neglect to prosecute any summons, justices may authorise some other person to proceed.

" " 11. Justices may authorise the search of suspected houses, and the arrest of certain persons found therein.

" " 12. A commissioner of police may authorise a superintendent of metropolitan police to enter and search suspected houses.

" " 13. An appeal to Quarter Sessions is provided for those summarily convicted under the Act.

" " 14. No information, conviction, &c., is to be removed by *certiorari*.

" " 15. By which distress was not to be unlawful for want of force, was repealed except as to Ireland.

" " 16. Is repealed.

" " 17. Is repealed.

" " 18. Deals with the interpretation of terms.

" " 19. Is repealed.

" " 20. Is repealed, and sec. 4 of the Betting Act, 1874, is substituted for it.

We now set out these sections *seriatim*:—

Money Received on Deposit may be Recovered from the Persons Receiving the Same.—By sec. 5—

"Any money or valuable thing received by any such person aforesaid as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any court of competent jurisdiction."

Recovery of Money Deposited at Betting-House.—An action under this section is a statutory action, and the effect of sec. 1 of the Gaming Act, 1892, is not to repeal this section or to prevent the action sanctioned by it being maintainable (*Lennox* v. *Stoddart* and *Davis* v. *Stoddart* (1902), 2 K. B. 21). This section, therefore, is out of place in this part of the work. It is dealt with in Part I., at p. 36. Where a deposit on a bet, or as specified in sec. 4, is received by any such person at a betting-house or place as defined in the first four sections, the depositor may bring an action to recover it, notwithstanding sec. 1 of the Gaming Act, 1892 (see pp. 19 and 36). The action brought under this section to recover the deposit is not brought upon a contract, express or implied, but pursuant to the terms of the section. The liability on the depositee partakes of the character of a penalty (*ibid.*).

"*Any such person aforesaid.*"

Apparently these words are not confined to the four groups of persons described in sec. 4 (see p. 117), but include and extend to the persons described in secs. 1 and 3 (see *Vogt* v. *Mortimer* (1906), W. N. 180, 22 T. L. R. 763, a decision of Joyce, J., sitting in the K. B. D). Apparently four of the seven judges in *Doggett* v. *Catterns* (1865), 19 C. B. N. S. 765, expressed their opinion to the contrary, that these words in sec. 5 were confined to the groups of persons described in sec. 4.

This Act not to Extend to Stakes due to Owner of Horse Winning a Race.—By sec. 6—

"Provided always, that nothing in this Act contained shall extend to any person receiving or holding any money or valuable thing by way of stakes or deposit to be paid to the winner of any race, or lawful sport, game, or exercise, or to the owner of any horse engaged in any race."

Sec. 7 is dealt with in Chapter III. on "Certain Restrictions on Betting Advertisements." See p. 142.

Penalties and Costs may be Levied by Distress.—By sec. 8—

"If any person convicted under this Act on information before justices shall be adjudged to pay any penalty, or any costs and charges attending the conviction, and shall fail to pay such penalty or costs, the same may be levied by distress and sale of the goods and chattels of the offender, by warrant under the hand and seal of one of the convicting justices: provided always, that if any person shall be committed to prison for default of payment of any penalty and costs, then the costs alone may be levied by distress as aforesaid."

"*Provided always*," &c.

So much of secs. 3 and 4 as prescribe the term of imprisonment for non-payment of penalty and costs is repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), as to England. See sec. 5 of the Summary Jurisdiction Act, 1879 (43 & 44 Vict. c. 49).

"*On information before justices.*"

On the strength of these words, it was contended in *Lee* v. *Gold* (1880), 44 J. P. 395, that the provisions of Jervis' Act did not apply to proceedings under the Betting Act, 1853, and that an information for using a place contrary to sec. 3 of the Act must be laid before two justices; but it was held to be sufficient if such an information were laid before one justice.

In Scotland the term "distress" shall mean poinding and sale. See sec. 4 (1) of the Betting Act, 1874 (37 & 38 Vict. c. 15), at p. 137.

Application of Penalties.—By sec. 9—

"One half of every pecuniary penalty which shall be adjudged to be paid under this Act shall be paid to the informer, and the remaining half shall be applied in aid of the poor rate of the parish in which the offence shall have been committed, and shall be paid for that purpose to the overseer or other person authorised to receive poor rates in such parish, or if the place wherein the offence shall have been committed shall be extra-parochial then the justices by whom such penalty shall be adjudged to be paid shall direct such remaining half thereof to be applied in aid of the poor rate of such extra-parochial place, or, if there shall not be any poor rate therein, in aid of the poor rate of any adjoining parish or district."

But by sec. 34 of the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71), a metropolitan police court magistrate who imposes a penalty under the Act can, if he will, deprive the informer—not being the party aggrieved—of any share in the penalty, although the informer has been guilty of no corrupt practice. *Hawke* v. *Mackenzie* (No. 3) (1902), 2 K. B. 234.

Query whether the remaining half when recovered in the metropolitan police district before a metropolitan police magistrate is to be paid to the Receiver for the metropolitan police district (see sec. 47 of the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71); and *Wray* v. *Ellis* (1858), 28 L. J. M. C. 45). 1 El. and El. 276, a case decided on a very similar section in the Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), sec. 8; but this case was distinguished and doubted by Russell, L.C.J., and Charles, J., in *Reg.* v. *Titterton* (1895), 2 Q. B. at p. 69.

On Neglect to Prosecute any Summons, Justices may Authorise some other Person to Proceed.—By sec. 10—

"In case any person who shall have laid any complaint or information in respect of any offence against this Act shall not appear at the time at which the defendant may have been summoned to appear, or at any time to which the hearing of the summons may have been adjourned, or, in the opinion of any justices having authority to adjudicate with respect to the offence charged in such information or complaint as aforesaid, shall otherwise have neglected to proceed upon or prosecute such information or

complaint with due diligence, it shall be lawful for such justices to authorise any other person to proceed on such summons instead of the person to whom the same may have been granted, or, if such justices think fit, to dismiss the summons already granted, and authorise any person to take out a fresh summons in respect of the offence charged in such information or complaint, in like manner as if the previous summons had not been granted."

Justices may Authorise Search of Suspected Houses.—By sec. 11—

"It shall be lawful for any justice of the peace, upon complaint made before him on oath that there is reason to suspect any house, office, room, or place to be kept or used as a betting-house or office, contrary to this Act, to give authority by special warrant under his hand, when in his discretion he shall think fit, to any constable or police officer, to enter, with such assistance as may be found necessary, into such house, office, room, or place, and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and to arrest, search, and bring before a justice of the peace all such persons found therein, and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises; and any such warrant may be according to the form given in the first schedule annexed to the before-mentioned Act 'to amend the law concerning games and wagers.'"

"*Upon complaint made before him on oath.*"

The Necessity of an Information.—The want of an information renders a conviction under secs. 3 or 4 invalid unless the irregularity is waived (*Blake* v. *Beech* (1876), 1 Exch. D. 320). Accordingly, where persons found in a betting-house are arrested, brought before justices, and then proceeded against under either sec. 3 or sec. 4, there must be an information. Where the High Court quashes a conviction on that ground, there is no appeal to the Court of Appeal (*Blake* v. *Beech* (1877), 2 Exch. D. 335).

"*Warrant.*" For form of, see *infra.*

"*To arrest, search, and bring before a justice of the peace all such persons found therein.*"

The Power of Arrest.—In *Davis* v. *Sly* (1910), 26 T. L. R.

460, Darling, J., has held that the power of arrest given by that section "to arrest . . . all *such* persons found therein," refers back to the particular persons mentioned in sec. 1, presumably persons resorting to the house to bet, and that a person on the premises without any intention of betting cannot be arrested under this section.

The facts of the case were as follows: A solicitor's clerk, desiring to buy a newspaper, went into a newspaper shop which the police had just raided as a betting-house on a warrant under this section. Darling, J., held that the clerk was found therein, although he had gone to the shop after the police had entered it; but he also held that the power given was only to arrest "such persons," "and the word 'such' in sec. 11 he thought must refer back to the particular persons mentioned in sec. 1 of the Act." They must be either the keepers or users of the house or the persons resorting there to bet. The clerk was neither. The action was for false imprisonment, and was brought against the police, and Darling, J., held that the police were protected by the terms of sec. 6 of 24 Geo. II. c. 44.

Who may be Arrested.—Constables therefore when acting under this section must take care only to arrest "such" persons, the keepers of the house, their servants and managers, and (probably) those who have resorted to the house for the purpose of betting. The person buying a newspaper, the milkman leaving the milk, must not be arrested. We can find no suggestion of this limitation on the power of arrest from 1853 to 1910, when Darling, J., discovered it. No such limitation was suggested in the *Kempton Park Case* (1897), 2 Q. B. 242 and (1899) A. C. 143. Lord Hobhouse, one of the dissenting lords, said (see p. 180): "It would be somewhat astonishing if persons entering the enclosure for curiosity only or amusement, found themselves arrested for being in a gaming-house. I cannot find, however, that this consideration has prevented the Courts from holding places under like conditions to be within sec. 1."

In *Murphy* v. *Arrow* (1897), 2 Q. B. 527, of 89 people arrested at a betting-house, the only evidence against 85 was that they were in the betting-house and that betting was going on just prior to the entry of the police. They were all bound over by a metropolitan police magistrate under sec. 9 of the Unlawful Games Act, 1541 (33 Hen. VIII. c. 9), no more to play, haunt, or exercise from thenceforth at any gaming-house, although the only evidence against them was that they were found in the betting-house. Now the warrant given by a justice under sec. 11 is to be in the form given in the first schedule to the Gaming Act, 1845 (see *infra* at p. 132), and that warrant is to arrest, search, and bring before me or other justices "as well the keepers of the same, as also the persons there haunting, resorting, and playing, to be dealt with according to law." Now to haunt means to appear at a place on a number of occasions, certainly more than once. A ghost does not haunt a house if he makes one appearance. A person resorts to a place if he goes there once. The only way to make sense of the words is to read them as if the word "or" was between the words "haunting" and "resorting." The person therefore who may be arrested is a person "haunting" the house or "resorting and playing" there. In other words, if there is not evidence of the person gaming or betting at the house, there must be evidence that he goes there frequently, presumably with the intention of betting or gaming. It will be seen, therefore, that the words of the warrant support the construction put by Darling, J., on the section, and that in all probability the decision in *Murphy* v. *Arrow* (*supra*) was wrong. The business man who went into the house to buy a newspaper and the milkman who went there to leave the milk cannot be arrested under sec. 11.

As to the protection of constables and other persons acting by their order and in their aid under a warrant from a justice, see sec. 6 of the Constables Protection Act, 1750 (24 Geo. II. c. 44).

The Power of Arrest under Sec. 2.—The question, how-

ever, arises whether any larger powers of arrest are given by sec. 2 of the Act (see p. 110). By that section a betting-house is to be deemed a common gaming-house within the meaning of the Gaming Act, 1845. A. L. Smith, L.J., said in the *Kempton Park Case* (1897), 2 Q. B. at p. 274: "Sec. 11 seems to me to have practically the same effect as sec. 2." Sec. 3 of the Gaming Act, 1845, gives justices, except in the metropolitan police district, the power to give authority by special warrant to constables to enter, "with such assistance as may be found necessary," such houses, rooms, or places as justices of the shire, mayors, sheriffs, and other head officers within every city, town, and borough then had authority to enter into where unlawful games shall be suspected to be holden; and the constables are empowered to arrest, search, and bring before a justice of the peace *all such persons found therein as might have been arrested therein by such justices had they been personally present.*

We give the section in full:—

"In every case (except within the metropolitan police district) in which the justices of the peace in every shire, and mayors, sheriffs, bailiffs, and other head officers within every city, town, and borough within this realm, now have by law authority to enter into any house, room, or place where unlawful games shall be suspected to be holden, it shall be lawful for any justice of the peace, upon complaint made before him on oath that there is reason to suspect any house, room, or place to be kept or used as a common gaming-house, to give authority, by special warrant under his hand, when in his discretion he shall think fit, to any constable to enter, with such assistance as may be found necessary, into such house, room, or place in like manner as might have been done by such justices, mayors, sheriffs, bailiffs, or other head officers, and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and to arrest, search, and bring before a justice of peace all such persons found therein as might have been arrested therein by such justice of peace had he been personally present; and all such persons shall be dealt with according to law as if they had been arrested in such house, room, or place by the justice before whom they shall be so brought; and any such warrant may be in the form given in the first schedule annexed to this Act."

Now the power there given is limited to the arrest of all such persons found therein as the justice might have arrested

in person. These persons are defined in sec. 9 of the Unlawful Games Act, 1541 (33 Hen. VIII. c. 9), as "the keepers of the same, as also the persons there haunting, resorting, and playing."

We give the section in full:—

"It shall be lawful to all and every the justices of peace in every shire, mayors, sheriffs, bailiffs, and other head officers within every city, town, and borough within this realm, from time to time, as well within liberties as without, as need and case shall require, to come, enter, and resort into, all and every houses, places, and alleys where such games shall be suspected to be holden, exercised, used, or occupied contrary to the form of this estatute; and as well the keepers of the same, as also the persons there haunting, resorting, and playing, to take, arrest, and imprison, and them so taken and arrested to keep in prison unto such time as the keepers and maintainers of the said plays and games have found sureties to the King's use, to be bound by recognisance or otherwise, no longer to use, keep, or occupy any such house, play, game, alley, or place; and also that the persons there so found be in like case bound by themselves or else with sureties, by the discretions of the justices, mayors, sheriffs, bailiffs, or other head officers, no more to play, haunt, or exercise from thenceforth in, at, or to any of the said places, or at any of the said games."

We have already considered the effect of these words "haunting, resorting, and playing." In our opinion, therefore, the powers under secs. 2 and 11 with regard to arrest are very nearly the same. The power under sec. 11 is to arrest persons resorting to the house to bet; the power under sec. 2 is somewhat wider—to arrest persons "haunting" the house, the Court will presume for the purpose of betting. And, of course, both sections authorise the arrest of the keepers or "users" of the house and those who are assisting them. But the person who does not haunt the house, or who does not go there to bet, is immune from arrest.

Power of Arrest in the Metropolitan Police District.—Sec. 2 of the Act, however, as we have said (see p. 110), incorporates sec. 48 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47) (see p. 111). By that section power is given in the metropolitan police district to arrest *all persons* found

in the betting-house, and every person found on such premises without lawful excuse is liable to a penalty of £5. See the notes to the next section.

It will be remembered that, by the decision of Darling, J., in *Davis* v. *Sly* (1910), 26 T. L. R. 460, a person may be found in the house although he enters it after the police entered under the warrant.

Power to Seize Documents Relating to Betting.—"*To seize all lists, cards, or other documents relating to racing or betting found in such house or premises.*" It will be noticed that there is no power to seize money.

Documents Seized must be Returned to their Owners.—There is no provision as to what is to be done with the lists, cards, and other documents seized. Accordingly they must be returned to their owners, and cannot be destroyed, under sec. 8 of the Gaming Act, 1845, as "instruments of gaming." See *R.* v. *Willcock and others* (the *Standard* newspaper, 30th November, 1889), 54 J. P. 9.

Power to Seize Monies and Securities for Money found in Metropolitan Betting-House.—Money and securities for money may be seized in a betting-house in the metropolitan police district where action is taken under sec. 48 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 37) (see p. 111), and on the conviction of the keeper of the house the monies and securities are paid to the receiver towards defraying the charge of the police of the metropolis (see 63 J. P. 39). But this may only be done where the preliminary conditions of sec. 48 are strictly complied with. *Gordon* v. *Chief Commissioner of Metropolitan Police* (1910), 74 J. P. 189; 102 L. T. 253; (1910), 2 K. B. 1080.

A house was raided under sec. 11, and the police seized £107, 6s. 8d. found therein. In obtaining the warrant, the preliminaries required by sec. 48 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47) (see p. 111), were not complied

with. The plaintiff, a bookmaker, having been acquitted on a charge under the Betting Act, 1853, claimed this money from the police, stating that it was his own received by him as the proceeds of street betting. But Warrington, J., sitting as an additional judge of the Queen's Bench Division, held that the principle *ex turpi causa non oritur actio* applied, and he dismissed the action with costs. But this decision was reversed by the Court of Appeal. Moulton and Buckley, L.J.J., held that the maxim *ex turpi causa non oritur actio* had no application to such a case, as the plaintiff was not asking the Court to enforce any illegal contract, or to grant relief dependent in any way on any illegal transaction on his part. The plaintiff, having once acquired the money, had both the possession of it and the property in it, and the detention of it by the police was unjustifiable. Cozens-Hardy, M.R., agreed with the decision, but not for the same reasons. If it had been proved that the money consisted of deposits he was of opinion that the maxim would apply. But there was "nothing to prove it was a deposit, and nothing to prove the condition of the deposit, if there was one. The money may have been received in payment of some previous transaction, betting or otherwise, some completed transaction." It appeared from the facts of the case that the plaintiff in his evidence had spoken of the money as the "result" of street betting. *Gordon* v. *Chief Commissioner of Metropolitan Police* (*supra*).

The Clients of a Betting-House—Their Liabilities.—The question remains as to what can happen to those people who are found therein who resorted there to bet with the keeper of the house, or who "haunted" it, or resorted and played there. The words of sec. 3 of the Gaming Act, 1845, are: "And all such persons shall be dealt with according to law, as if they had been arrested in such house, room, or place by the justice before whom they shall be so brought." These words refer to the Unlawful Games Act, 1541 (33 Hen. VIII. c. 9). By sec. 9 of that Act, or under sec. 9 of 2 Geo. II.

c. 28, they can be bound over no more to play, haunt, or exercise from thenceforth at any gaming-house (including a betting-house or place within the meaning of the Act). *Murphy* v. *Arrow* (1897), 2 Q. B. 527.

Power to Fine Clients—Query.—It would seem, also, that under sec. 8 of that Act "every person using and haunting any of the said houses and places, and there playing, is liable to forfeit, for every time so doing, six shillings and eightpence."

Aiding and Abetting.—In our opinion those resorting to the house for the purpose of making a bet there cannot properly be said to aid and abet the keeper of the house, and cannot therefore be prosecuted for this under any section of the Act.

"*Any such warrant.*"

The form of the warrant in the first schedule to the Gaming Act, 1845, is as follows :—

"FORM OF WARRANT.

"County of .

"To the Constable.

"WHEREAS it appears to me, J. P., one of the justices of our lady the Queen, assigned to keep the peace in the said county, by the information on oath of A. B. of , in the county of , yeoman, that the house [room or place] known as [*here insert a description of the house, room, or place by which it may be readily known and found*], is kept and used as a common gaming-house within the meaning of an Act passed in the year of the reign of her Majesty Queen Victoria, intituled [*here insert the title of this Act*]:

"This is, therefore, in the name of our lady the Queen, to require you, with such assistants as you may find necessary, to enter into the said house [room or place], and, if necessary, to use force for making such entry, whether breaking open doors or otherwise, and there diligently to search for all instruments of unlawful gaming which may be therein, and to arrest, search, and bring before me, or some other of the justices

of our lady the Queen, assigned to keep the peace within the county of , as well the keepers of the same, as also the persons there haunting, resorting, and playing, to be dealt with according to law; and for so doing this shall be your warrant. J. P. (L. S.).

"Given under my hand and seal at , in the county of , this day of , in the year of the reign ."

Search in Metropolitan Police District—Commissioner of Police may authorise Superintendent of Police to enter and search suspected Persons.—By sec. 12—

If any superintendent belonging to the metropolitan police force shall report in writing to the commissioners of police of the metropolis that there are good grounds for believing and that he does believe that any house, office, room, or place within the metropolitan police district is kept or used as a betting-house or office, contrary to this Act, it shall be lawful for either of the said commissioners, by order in writing, to authorise the superintendent to enter any such house, office, room, or place, with such constables as shall be directed by the commissioner to accompany him, and, if necessary, to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise, and to take into custody all persons who shall be found therein, and to seize all lists, cards, or other documents relating to racing or betting found in such house or premises.

This section only applies to the metropolitan police district.

Power of Arrest in Metropolitan Police District.—The power given is to the superintendent to arrest *all persons* who shall be found therein, not all such persons. In this case, therefore, a person found in the house believed to be a betting-house, who is not there for the purpose of betting, may be arrested. As to what is to be done with them when arrested, see the notes to the last section.

Documents Seized and Returned to their Owners.—As we have said, we consider that sec. 2 of the Act incorporates sec. 48 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47). See pp. 110 and 111. That section gives the commissioners a similar power to authorise the entry of a house and the arrest of all persons found therein. But they

may do so not only on the report of a superintendent as in sec. 12 (*supra*), but also "if two or more householders dwelling within the said district, and not belonging to the metropolitan police force, shall make oath in writing, to be by them taken and subscribed before a magistrate and annexed to the said report . . . that the premises . . . are commonly reported, and are believed by the deponents to be kept or used as a common gaming-house," *i.e.* a betting-house. Every person found on the premises without lawful excuse is liable to a penalty of five pounds. And the superintendent is empowered to seize all monies and securities for monies found in the betting-house, and, upon the conviction of the keeper of the house, the names and securities seized are to be paid to the Receiver for defraying the charge of the police of the metropolis (see 63 J. P. 38). Lists, cards, and other documents are not instruments of gaming within the meaning of this section, and so must be given up by the police, and not destroyed. See *R.* v. *Willcock and others* (the *Standard* newspaper, 30th November 1889), 54 J. P. 9.

"Metropolitan Police Force."

"Commissioners of the Police of the Metropolis."

"Metropolitan Police District."

For the meaning of these terms in Ireland, see sec. 18 (*infra*), at p. 137.

Appeal to Quarter Sessions.—By sec. 13—

Any person who shall be summarily convicted under this Act may appeal to the next General or Quarter Session of the Peace *to be holden for the county or place wherein the cause of complaint shall have arisen, provided that such person at the time of the conviction, gives notice of his intention to appeal, and shall at the time of such conviction or within forty-eight hours thereafter, enter into a recognisance with two sufficient securities conditioned personally to appear at the said session to try such appeal, and to abide the further judgment of the Court at such session, and to pay such costs as shall be by the last-mentioned Court awarded;* and it shall be lawful for the magistrates or justices by whom such conviction shall have been made to bind over any party who shall have made information against the party convicted, and any witnesses who shall have been examined, in sufficient recognisances to attend and be examined at the hearing of such appeal;

and every such witness, on producing a certificate of being so bound under the hand of the said magistrate or justices, shall be allowed compensation for his or her time, trouble, and expenses in attending the appeal, which compensation shall be paid in the first instance by the treasurer of the county or place in like manner as in cases of misdemeanor under the provisions of an Act passed in the seventh year of the reign of King George the Fourth, intituled An Act for Improving the Administration of Criminal Justice in England ;[1] and in case any such appeal shall be dismissed and the order or conviction affirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the Court, shall be repaid to the said treasurer by the appellant.

The words in italics were repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), as to England.

"*Any person who shall be summarily convicted under this Act.*"

That is, under either secs. 3, or 4, or 7 (see p. 142), or under sec. 2, as contravening provisions as to gaming-houses.

The appeal against a summary conviction under sec. 79 of the Licensing Act, 1910, is to Quarter Sessions under sec. 99 of that Act.

This section does not apply to Scotland. See sec. 4 (4) of the Betting Act, 1874 (37 & 38 Vict. c. 15). For appeal in Scotland, see the terms of that sub-section.

No Objection in Matter of Form and "Certiorari" taken away.—By sec. 14—

On any such appeal no objection shall be allowed to the information whereon the conviction has taken place, or to such conviction, on any matter of form or on any insufficiency of statement, provided it shall appear to the Justices in Quarter Sessions that the defendant has been sufficiently informed of the charge intended to be made against him, and that such conviction was proper on the merits of the case; and no information, conviction, or judgment of the justices in General or Quarter Sessions shall be removed by certiorari into the Court of Queen's Bench.

The words in italics were repealed by sec. 4 of the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), as to England.

[1] 7 and 8 Geo. IV. c. 28.

This section does not apply to Scotland. See sec. 4 (4) of the Betting Act, 1874 (37 & 38 Vict. c. 15).

Distress not Unlawful for Want of Form.—By sec. 15—

When any distress shall be made for any money to be levied by virtue of the warrant of any justice under this Act, the distress shall not be deemed unlawful, nor shall any party making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, warrant of apprehension, conviction, warrant of distress, or other proceeding relating thereto, nor shall such party be deemed a trespasser from the beginning on account of any irregularity which shall be afterwards committed by him, but all persons aggrieved by such defect or irregularity may recover full satisfaction for the special damage by an action on the case in any of Her Majesty's courts of record.

This section was repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), as regards England, and then again repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19), except as to Ireland.

Tender of Amends, &c.—By sec. 16—

No plaintiff shall recover in any action for any irregularity, trespass, or other wrongful proceeding made or committed in the execution of this Act, or in, under, or by virtue of any authority hereby given, if tender of sufficient amends shall have been made by or on behalf of the party who shall have committed such irregularity, trespass, or other wrongful proceeding before such action brought, and in case no tender shall have been made it shall be lawful for the defendant in any such action, by leave of the court where such action shall depend, at any time before issue joined to pay into court such sum of money as he shall think fit, whereupon such proceeding, order, and adjudication shall be had and made in and by such court as in other actions where defendants are allowed to pay money into court.

This section is repealed by the Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56).

Limitation of Actions.—By sec. 17—

No action, suit, or information, or any other proceeding of what nature soever, shall be brought against any person for anything done or omitted to be done in pursuance of this Act, or in the execution of the authorities under this Act, unless notice in writing shall be given by the party intending to

prosecute such suit, information, or other proceeding to the intended defendant one calendar month at least before prosecuting the same, nor unless such action, suit, information, or other proceeding shall be brought or commenced within three calendar months next after the act or omission complained of, or in case there shall be a continuation of damage then within three calendar months next after the doing such damage shall have ceased.

This section is repealed by the Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56).

Interpretation of Terms.—By sec. 18—

In *Ireland* the term "Metropolitan Police Force," and the terms "Commissioners of the Police of the Metropolis," and the terms "Metropolitan Police District" shall mean and include respectively the *Dublin* Metropolitan Police Force, the Commissioners of Police of *Dublin* metropolis, and the police district of *Dublin* metropolis.

Commencement of Act.—By sec. 19—

This Act shall commence and come into operation on the first day of December, one thousand eight hundred and fifty-three.

This section is repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

Act not to extend to Scotland.—By sec. 20—

This Act shall not extend to Scotland.

This section was repealed by sec. 4 of the Betting Act, 1874 (37 & 38 Vict. c. 15), which was in the following terms:—

Extension to Scotland.—

The twentieth section of the principal Act is hereby repealed, and the principal Act, as amended by this Act, shall extend to Scotland, with the following modifications and provisions:—

(1) The term "distress" shall mean poinding and sale.

The term "misdemeanour" shall mean a crime and offence.

(2) All offences or penalties under this Act and the principal Act shall be prosecuted and recovered before the sheriff of the county or his substitute in the sheriff court, at the instance of the procurator fiscal, or of any private person, under the provisions of the Summary Procedure Act, 1864,

and all the jurisdictions, powers, and authorities necessary for the purposes of this section are hereby conferred on the sheriffs and their substitutes.

(3) Every pecuniary penalty which is adjudged to be paid under this or the principal Act, shall be paid to the clerk of the court, and shall be by him accounted for and paid to the Queen's and Lord Treasurer's Remembrancer on behalf of Her Majesty.

(4) The thirteenth and fourteenth sections of the principal Act shall not apply to Scotland, but it shall be competent to any person who is convicted under this Act or the principal Act to appeal against such conviction to the High Court of Justiciary, in the manner prescribed by such of the provisions of the Act of the twentieth year of the reign of King George the Second, chapter forty-three, and any Acts amending the same, as relate to appeals in matters criminal, and by and under the rules, limitations, convictions, and restrictions contained in the said provisions.

Recommendations of the Committee.—The Select Committee of the House of Lords (1902) made the following recommendations with regard to the Betting Act, 1853:—

(i.) That in view of the uncertainty which has arisen since the decision of the Kempton Park case as to what constitutes a "place" within the meaning of the Act, further legislation should make it quite clear that bookmakers are prohibited from carrying on their business in public-houses or in any public place.

(ii.) That the meaning of "resorting thereto," that is, to a betting house, in sec. 1 should be extended so as to include persons making bets by correspondence or through an agent.

(iii.) That, if thought necessary, having regard to recent decisions, it should be made clear that it is an offence under sec. 1 for persons to use an office in the United Kingdom for obtaining the receipt of money elsewhere, whether within or without the United Kingdom, or for the proprietor of the office to permit such user.

(iv.) That sec. 7 should be extended so as to include the advertisement in this country of any betting-house within the meaning of the Act which is kept abroad.

It will be remembered that, having regard to recent decisions, recommendation iii. is unnecessary. See the notes to sec. 1, at p. 106.

Sec. 7 is dealt with in the next chapter.

CHAPTER III

CERTAIN RESTRICTIONS ON BETTING ADVERTISEMENTS

The Enactments Prohibiting Certain Betting Advertisements.—Restrictions on betting advertisements are contained in the three following provisions:—

Sec. 7 of the Betting Act, 1853.

Sec. 3 of the Betting Act, 1874.

Sec. 1 of the Betting and Loans (Infants) Act, 1892.

Betting Advertisements Prohibited by Act of 1853.—Sec. 7 of the Act of 1853 prohibits the publication of advertisements whereby it appears that any house, office, room, or place is opened, kept, or used either—

(1) For the purpose of making bets or wagers in either of the ways specified in sec. 1 of the Act, viz. (*a*) by physically resorting to the house, &c.; (*b*) by paying of a deposit—ready-money betting; or

(2) For the purpose of exhibiting lists for betting; or

(3) To induce any person to resort to the house, &c., for the purpose of making bets or wagers in either of the two ways.

The section also prohibits a person acting on behalf of the owner or occupier of any such house, &c., or on behalf of a person using the same, from inviting other persons to physically resort there for the purpose of making bets in either of the two ways.

It will be seen that this section merely applies to advertisements of a betting-house or place within the meaning of the Act of 1853. But it will be noted that it is an offence to publish or exhibit an advertisement whereby it appears that a house, &c., is used, &c., for the purpose of exhibiting

lists for betting, although it is not used, and it does not appear from the advertisement that it is used, for actual betting of any kind.

Betting Advertisements Prohibited by Act of 1874.—Sec. 3 of the Betting Act, 1874, prohibits the exhibition or publication of tipsters' advertisements—

(1) Offering to give information or advice as to betting of either of the two kinds mentioned in the Act of 1853, viz.—
  (*a*) By physically resorting to a house, office, room, or place opened, kept, or used contrary to that Act; or
  (*b*) Ready-money betting at such a house, office, room, or place.
(2) To induce any person to apply to any house, office, room, or place, or to any person to obtain such information or advice.
(3) Inviting any person to make or take any share in such betting.
(4) Offering, on behalf of another, to make any such bet or wager.

It will be seen that the only tipsters' advertisements which are prohibited are those dealing with betting by persons physically resorting to a house, &c., opened, kept, or used contrary to the Act of 1853, and those dealing with ready-money betting at such a house.

Restricted Nature of Prohibitions on Betting Advertisements.—But for the case of *Cox* v. *Andrews* (1883), 12 Q. B. D. 126 (see p. 146), the section might be read as merely prohibiting advertisements as to betting by physically resorting to *any* house and ready-money betting. But that case makes it clear that the Act of 1874 only applies to advertisements as to those kind of bets made at a house, &c., *opened, kept, or used* contrary to the Act of 1853. We do not consider that the decision in *Stott* v. *Renton* (1907), S. C. (J) 88,

shows that a different construction has been put upon the Act in Scotland. The facts in that case show clearly that the advertisement there was with reference to a house kept for one of the purposes prohibited by sec. 1 of the Act of 1853—ready-money betting. For the prosecution, therefore, to succeed under either sec. 7 of the Act of 1853 or sec. 3 of the Act of 1874 they must show that the advertisement relates to a house, office, room, or place opened, kept, or used contrary to sec. 1 of the Act of 1853.

Circulars and Newspapers in the Open Post not stopped by the Post Office.—The postal authorities are in the habit of examining documents sent by the open post (unclosed). But Sir Robert Hunter, solicitor to the Post Office, informed the Select Committee of the House of Lords on Betting that the Postmaster-General stopped all papers found in the open post relating to lotteries; but he did not stop any telegrams or any circulars or newspapers found in the open post relating to betting or coupon competitions. And he gave as a reason for this that it was impossible to issue instructions to postal or telegraph clerks which would enable them to distinguish between legal and illegal betting advertisements.

Sending Betting Advertisements to Infants.—Sec. 7 of the Betting and Loans (Infants) Act, 1892, prohibits the sending of certain betting advertisements to persons whom the sender knows to be an infant. But by sec. 3 of the Act, if the advertisement is sent to persons at a college, school, or other place of education, or to a person at an address in a university town which the sender knows is that of a house or residence at which undergraduates are permitted by the authorities to reside, in any of these cases the sender is to be deemed to have known that such person was an infant, unless he proves that he had reasonable grounds for believing the person to be of full age. By sec. 1 (2) the person named in the circular as the payee of money, &c., is to be

deemed to have sent it unless he proves that he had not consented to be so named.

We now set out these sections, and the other sections necessary to understand them, with notes.

Penalty on Persons Exhibiting Placards or Advertising Betting-Houses.—By sec. 7 of the Betting Act, 1853—

Any person exhibiting, or publishing, or causing to be exhibited or published any placard, handbill, card, writing, sign, or advertisement whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers, in manner aforesaid, or for the purpose of exhibiting lists for betting, or with intent to induce any person to resort to such house, office, room, or place for the purpose of making bets or wagers, in manner aforesaid, or any person who, on behalf of the owner or occupier of any such house, office, room, or place, or person using the same, shall invite other persons to resort thereto for the purpose of making bets or wagers, in manner aforesaid, shall, upon summary conviction thereof before two justices of the peace, forfeit and pay a sum not exceeding thirty pounds, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the non-payment of such penalty and costs, or in the first instance, if to such justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding two calendar months.

This section will appear more clear if written in column:—

"Any person exhibiting, or
publishing, or
causing to be exhibited or published, any placard, handbill, card, writing, sign, or advertisement whereby it shall be made to appear that any house, office, room, or place, is opened, kept, or used
for the purpose of making bets or wagers in manner aforesaid, or
for the purpose of exhibiting lists for betting, or
with intent to induce any person to resort to such house, office, room, or place for the purpose of making bets or wagers in manner aforesaid, or

any person who, on behalf of the owner or occupier of any such house, office, room, or place, or person using the same, shall invite other persons to resort thereto for the purpose of making bets or wagers in manner aforesaid, shall upon summary conviction thereof," &c.

"*For the purpose of making bets or wagers in manner aforesaid.*"

The Kind of Advertisements Prohibited.—That is, in any of the ways specified in sec. 1 of the Act (see p. 85). The "making of bets" is not limited to the class of betting described in the first branch of the section—betting with persons physically resorting to the house, office, room, or place. It includes the receipt of deposits, *i.e.* ready-money betting. *Hawke* v. *Mackenzie* (No. 1) (1902), 2 K. B. 225; *Stoddart* v. *Argus Printing Co.* (1901), 2 K. B. 470 (dissented from).

Advertisement must Itself Show it is Within Prohibited Classes.—For an advertisement to come within the terms of the section, it must appear by reasonable inference from the advertisement itself that it refers to one of the two classes of betting transactions prohibited or rendered illegal by sec. 1 of the Act. This did not appear from the following advertisement:—

"TOPPING & SPINDLER,
Flushing, Holland.
The Derby, Ascot Stakes, Royal Hunt Cup,
Northumberland Plate, and the Continental Sportsman,
Also Year Book and Ready Reckoner,
Free on receipt of address.

Telegraphic instructions can be sent to London.
All letters to be addressed:
TOPPING & SPINDLER,
Flushing, Holland.
Postage, 2½d. *Postcards*, 1d."

(*Ashley and Smith, Ltd.* v. *Hawke* (1903), 67 J. P. 361; 89 L. T. 538).

Per Lord Alverstone, C.J.: "I think that if the case is one in which the advertisement, reasonably understood by the person by whom it is read, indicates one of the two offences prohibited by sec. 1, then the offence under sec. 7 is complete, and no newspaper proprietor can properly plead ignorance because he did not himself make inquiry as to what the advertisement indicated."

Evidence therefore of what the publishers mean by a betting advertisement is immaterial. The question is, What would the reader take it to mean? Does it appear from the advertisement that a house, &c., is opened, &c., for the purpose of making bets in either of the ways prohibited by sec. 1, or for the other purposes mentioned in sec. 7? As to whether the house advertised is opened, &c., for the purpose of making bets in either of the ways prohibited by sec. 1, see the last chapter, *passim.*

Appeal.—Any person summarily convicted under the section may appeal to Quarter Sessions (see sec. 13 of the Act of 1853, at p. 134). And a case may be stated for the High Court on a point of law, see sec. 33 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

"*Two calendar months.*"

No Trial by Jury.—The defendant cannot claim to be tried by jury (see sec. 17 of the Summary Jurisdiction Act, 1879).

Betting Advertisements Prohibited by Act of 1874—Preamble to Act of 1874.—

By an Act to amend the Act of sixteenth and seventeenth Victoria, chapter one hundred and nineteen, intituled "An Act for the Suppression of Betting Houses."[1]

[1] The Betting Act, 1874 (see sec. 1, *infra*) (37 & 38 Vict. c. 15).

Whereas it is expedient to amend the Act of the session of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and nineteen, intituled "An Act for the Suppression of Betting Houses," and to extend the provisions of such Act to Scotland:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lord's spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

The preamble is repealed by the Statute Law Revision (No. 2) Act, 1893 (56 & 57 Vict. c. 54).

Act to be Construed with 16 & 17 Vict. c. 119—Short title.—By sec. 1.

This Act shall be construed as one with the Act of the session of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and nineteen, intituled "An Act for the Suppression of Betting Houses" (in this Act referred to as the principal Act), and the principal Act and this Act may be cited together as the Betting Acts, 1853 and 1874, and each of them may be cited separately as the Betting Act of the year in which it was passed.

Acts to be Construed as One.—Accordingly, the right of appeal under sec. 13 and the other provisions of the principal Act are incorporated.

Commencement of Act.—By sec. 2—

This Act shall not come into operation until the thirty-first day of July one thousand eight hundred and seventy-four.

This section is repealed by the Statute Law Revision (No. 2) Act, 1893 (56 & 57 Vict. c. 54).

Penalty on persons Advertising as to Betting.—By sec. 3—

Where any letter, circular, telegram, placard, handbill, card, or advertisement is sent, exhibited, or published,—

(1) Whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information or advice for the purpose of or with respect to any such bet or wager, or any such event or contingency as is mentioned

in the principal Act, or will make on behalf of any other person any such bet or wager as is mentioned in the principal Act; or,

"*As is mentioned in the principal Act.*"—This Act only has reference to such bets as are mentioned in the Betting Act, 1853—that is to bets made in a house, office, room, or place kept for betting with persons physically resorting thereto or for ready-money betting. See the notes to sec. 1 of the Act of 1853 at p. 85 (*supra*). *Cox* v. *Andrews* (1883), 12 Q. B. D. 126. But see *Stott* v. *Renton* (1907), S. C. (J.) 88, and p. 147 (*infra*), and p. 140 (*supra*).

Accordingly, in England the following advertisement was held not to come within the Act: "To our readers: special and important.—'Centaur' scored his first success of the season when he gave Knight of Burghley for the Lincoln Handicap last Tuesday. Our correspondent will use every effort to follow up his success, and those of our readers who want the most reliable and latest news from Northampton next week should not fail to avail themselves of 'Centaur's' wire finals, sent direct from the course. They may rely on having something as good for the two principal events next week as they had in Knight of Burghley last Tuesday. 'Centaur's' finals cost but half-a-crown each, or the two days' racing five shillings, for which post-office orders or stamps must be sent to Mr. W. H. Cox, 17 Southampton Street, Strand, London. The subscription to 'Centaur's' wire finals for the season, which includes all the principal races, is £3, 10s." *Cox* v. *Andrews* (*supra*).

The Kind of Advertisements Prohibited.—The proprietor of a newspaper published in it advertisements by persons offering to give information as to the probable winners of football matches dealt with in coupon competitions conducted by a person resident abroad, the coupons for which were printed as part of the advertisement, and were to be obtained at the office of the newspaper. It was held that the proprietor could be convicted under sec. 3 (1) of the Betting Act, 1874 (*Hawke* v. *Mackenzie* (No. 2) (1902), 2 K. B. 225; *Rex* v.

Stoddart (1907), 1 K. B. 177 (approved); *Stoddart* v. *Argus Printing Co.* (1907), 2 K. B. 470 (disapproved). The case of *Hawke* v. *Mackenzie* (No. 2), *supra*, was one of an advertisement dealing with ready-money betting. See sec. 1 of the Act of 1853.

Sec. 3 of the Act of 1874 continues as follows:—

> (2) With intent to induce any person to apply to any house, office, room, or place, or to any person, with the view of obtaining information or advice for the purpose of any such bet or wager, or with respect to any such event or contingency as is mentioned in the principal Act; or,
>
> (3) Inviting any person to make or take any share in or in connection with any such bet or wager;
>
> every person sending, exhibiting, or publishing, or causing the same to be sent, exhibited, or published, shall be subject to the penalties provided in the seventh section of the principal Act with respect to offences under that section.

In Scotland a complaint that, contrary to secs. 1, 3, and 7 of the Betting Act, 1853, and secs. 3 and 4 of the Betting Act, 1874, M. did cause or procure A. to exhibit and publish, and the said A. did exhibit and publish "two handbills or advertisements by W. and A. Dew, Flushing, Holland, by which handbills or advertisements the foresaid persons were invited to make with the said W. and A. Dew, or take a share in or in connection with bets or wagers on certain football matches," contains a relevant charge, although the handbills and advertisements did not set forth that M. and A. either for themselves or on behalf of any one else were to receive any valuable consideration for the purpose of betting. *Agnew* v. *Morley* (1909), S. C. (J.) 41 (Court of Justiciary).

In Scotland a conviction under this sub-section was supported, although the circular did not invite persons to physically resort to the address given therein for the purpose of betting, or state that the bets would be accepted at that address; and the circular asked people not to resort there (*Stott* v. *Renton* (1907), S. C. (J.) 88). But it appears from

the facts of this case that the advertisement related to ready-money betting at a house.

"*Penalties provided in the seventh section of the principal Act*" (see p. 142).—A fine not exceeding £30 and costs, or imprisonment, with or without hard labour, for two calendar months.

Appeal—No Right to be Tried by Jury.—An appeal lies to Quarter Sessions (see sec. 13 of the Act of 1853 and sec. 1 of this Act). In the case of a fine or imprisonment, a case may be stated for the High Court on a point of law (see sec. 33 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49)). The defendant cannot claim to be tried by a jury (see sec. 17 of the Summary Jurisdiction Act, 1879).

For sec. 4 of this Act, being an extension of the two Acts of 1853 and 1874 to Scotland, see p. 137.

The Betting and Loans (Infants) Act, 1892.—

An Act to render penal the inciting infants to betting or wagering or to borrowing money.[1]

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:

Persons sending Documents to an Infant inciting to Betting Guilty of a Misdemeanour.—By sec. 1 (1)—

If any one, for the purpose of earning commission, reward, or other profit, sends or causes to be sent to a person whom he knows to be an infant any circular, notice, advertisement, letter, telegram, or other document which invites or may reasonably be implied to invite the person receiving it to make any bet or wager, or to enter into or take any share or interest in any betting or wagering transaction, or to apply to any person or at any place, with a view to obtaining information or advice for

[1] The Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4). See sec. 8.

the purpose of any bet or wager, or for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on, he shall be guilty of a misdemeanour, and shall be liable, if convicted on indictment, to imprisonment, with or without hard labour, for a term not exceeding three months, or to a fine not exceeding one hundred pounds, or to both imprisonment and fine, and if convicted on summary conviction, to imprisonment, with or without hard labour, for a term not exceeding one month, or to a fine not exceeding twenty pounds, or to both imprisonment and fine.

The section will be more clearly understood if read in column:—

"If any one,
for the purpose of earning commission, reward, or other profit,
sends or causes to be sent
to a person whom he knows to be an infant
any circular, notice, advertisement, letter, telegram, or other document which
invites or may reasonably be implied to invite
the person receiving it
to make any bet or wager, or
to enter into or take any share or interest in any betting or wagering transaction, or
to apply to any person or at any place, with a view to obtaining information or advice
for the purpose of any bet or wager, or
for information as to any race, fight, game, sport, or other contingency upon which betting or wagering is generally carried on,
he shall be guilty of a misdemeanour," &c.

"*Person whom he knows to be an infant.*"—As to proof of knowledge where the infant is at a university, college, school, or other place of education, see sec. 3 (*infra*), at p. 151.

Penalties.—If convicted of the misdemeanour on indict-

ment the penalties are imprisonment, with or without hard labour, for a term not exceeding three months, or a fine not exceeding £100, or both.

If convicted on summary conviction the penalties are imprisonment, with or without hard labour, for a term not exceeding one month, or a fine not exceeding £20, or both.

Appeal.—If the conviction is on indictment, an appeal or an application for leave to appeal will lie to the Court of Criminal Appeal. See sec. 3 of the Criminal Appeal Act, 1907 (Ed. VII. c. 23).

If the conviction is on summary conviction, and the defendant is ordered to be imprisoned, an appeal will lie to Quarter Sessions. See sec. 19 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). But if the defendant is merely fined, there is no appeal to Quarter Sessions. Whether the defendant is fined or imprisoned, a case may be stated for the opinion of the High Court on a point of law. See sec. 33 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). And where the defendant is fined by a police court magistrate more than £3, an appeal lies to Quarter Sessions. See sec. 50 of the Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71). The defendant, if proceeded against summarily, cannot claim to be tried by a jury. See sec. 17 of the Summary Jurisdiction Act, 1879 (42 and 43 Vict. c. 49).

Person Named in Circular, &c., as Payee of Money, &c., to be Deemed to have sent it unless he Proves Non-Consent to be Named.—By sec. (1) 2—

If any such circular, notice, advertisement, letter, telegram, or other document as in this section mentioned, names or refers to any one as a person to whom any payment may be made, or from whom information may be obtained, for the purpose of or in relation to betting or wagering, the person so named or referred to shall be deemed to have sent or caused to be sent such document as aforesaid, unless he proves that he had not consented to be so named, and that he was not in any way a party to, and was wholly ignorant of, the sending of such document.

Sec. 2 has no relation to betting.

Knowledge of Infancy Presumed in Certain Cases.—By sec. 3—

If any such circular, notice, advertisement, letter, telegram, or other document as in the preceding sections or either of them mentioned is sent to any person at any university, college, school, or other place of education, and such person is an infant, the person sending or causing the same to be sent shall be deemed to have known that such person was an infant, unless he proves that he had reasonable ground for believing such person to be of full age.

"At any University."—A circular is not sent to a person at a university within the meaning of the section if it is sent to a person at an address in a university town, unless the sender knows that the address is that of a house at which undergraduates are permitted to lodge by the authorities (*Milton* v. *Studd* (1910), 2 K. B. 118).

Per Bray, J.: "In my opinion the section should be read thus: 'If any such circular is sent to any person at an address in a university town which would suggest that the sender knew that the person to whom it was sent is a member of the university and such person is an infant, the person sending the same shall be deemed to have known that such person was an infant.' . . . If the letter is addressed to Trinity College, Cambridge, that is, of course, enough without more. But if it be sent to a private house, the sender must have known it to be a licensed lodging-house."

Per Channell, J.: "Those words must, I think, mean 'sent to a person at an address which the sender knows to be part of a university.'"

Per Lord Alverstone, C. J. (dissenting): "I quite accept my brother's view that they"—the words—"are descriptive of the place to which the letter is to be sent. But to my mind it is enough that it should be sent to a place which is in fact part of a university, and that it is not necessary to show that the sender knew that it was so."

Secs. 4 and 5 have no relation to betting.

Person Charged a Competent Witness.—By sec. 6—

In any proceeding against any person for an offence under this Act such person and his wife or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.

See the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36).

Application to Scotland.—By sec. 7—

In the application of this Act to Scotland:

The word "infant" means and includes any minor or pupil;

The word "indictment" has the same meaning as in the Criminal Procedure (Scotland) Act, 1887;

The expression "summary conviction" means a conviction under the Summary Jurisdiction (Scotland) Acts.

Short Title.—By sec. 8—

This Act may be cited as the Betting and Loans (Infants) Act, 1892.

Recommendations of the Betting Committee as to Betting Advertisements.—The Select Committee of the House of Lords on Betting (1902) made the following observations on betting advertisements in their report:—

9. The Committee cannot condemn too strongly the advertisements of sporting tipsters and others which appear in the columns of many newspapers. The Committee believe that such advertisements are a direct inducement to bet, and that much of the news which they profess to give could only have been obtained by inciting persons employed in racing stables to divulge secrets. The Committee are therefore of the opinion that all such advertisements are highly objectionable.

10. The Committee would point out that in France advertisements of this character are forbidden by law, and several witnesses have urged that repressive legislation on the same lines should be introduced into this country. The Committee are of opinion that all such advertisements, as also betting circulars and notices, should be made illegal.

24. The Committee further recommend that the Betting Act of 1874 should be extended to the advertising of information or advice to be obtained from any person or at any place, though it may not come within the description of a betting-house within sec. 1 of the Act of 1853, and whether within or without the United Kingdom.

30. It has been suggested in evidence before the Committee that powers should be given to the Postmaster-General and his principal assistants in Scotland and Ireland to open all letters supposed to contain coupons or betting circulars sent from abroad.

In this connection the Committee have received valuable evidence from Mr. Lamb, C.B., C.M.G., and Sir Robert Hunter, on behalf of the Postmaster-General, which makes it impossible for them to recommend the proposed suggestion.

31. The Committee are, however, of the opinion that the same power as the Postmaster-General already possesses to stop letters sent in the open post relating to lotteries should be given to him to stop circulars relating to coupon competitions, or advertisements of betting commission agents and sporting tipsters.

32. The Committee do not consider that it would be possible for the Postmaster-General to make any distinction between the facilities afforded to betting telegrams and other telegrams.

The Committee also made the following recommendation :—

25. The Committee recommend that the Betting and Loans (Infants) Act, 1892 (Lord Herschell's Act) should be extended to ready-money betting with infants—that is to say, the receipt of money from an infant as consideration for a bet to be made with such infant.

No legislative action has followed on these recommendations.

INDEX

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

W

Printed by Ballantyne, Hanson & Co.
Edinburgh & London