Monmouth Democrat Print, Freehold, N. J.

13

New Jersey
Court of Errors and Appeals.

THE STATE OF NEW JERSEY,
Def't in Error,
vs.
WILLIAM McCLEAN,
Plaintiff in Error.
} *In Error.*

BRIEF OF CHARLES HAIGHT, PROSECUTOR OF PLEAS FOR MONMOUTH COUNTY.

The defendant below, William McClean, on the second day of June, A. D. 1886, in the Monmouth Quarter Sessions, was convicted of the crime of keeping a disorderly house. The specific proof, both by affirmative evidence as well as admissions at the trial on the indictment, was, that the defendant, during the months of July, August and September, in the year 1885, at Monmouth Park race course, in Monmouth county, three days in each week during said months, engaged in the practice of bookmaking or betting on the horse races then and there taking place. The State refers your Honors to pages 7, 8 and 9, printed book, for a complete synopsis of the facts proved and admitted.

It is proper here, before we proceed to the consideration of the assignments of errors, to give your Honors a brief statement of facts, prior to the finding of any indictments against the bookmakers or betters at said horse race course.

His Honor, Judge Scudder, at the opening of the Monmouth Oyer and Terminer, October term, 1885, charged

the grand jury who found and presented about fifty indictments for bookmaking, as follows, viz.:

"The law is very plain. Any house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance, is a common gaming house and an indictable nuisance, and your duty is equally plain to indict and punish such offence against the law and public morals."

Also, "Pool selling is a species of gaming. It is within the legal definition of gaming, which is the staking of money on chance. It is betting and waging on the unlawful running of horses, and is indictable under our statute."

Racing is forbidden by section 55 and succeeding sections in our Crimes Act, with the proviso that this prohibiting section shall not apply to fairs or exhibitions of any agricultural or other incorporated society.

It is generally understood that the Monmouth Park Association claim "that they are within this proviso and are an incorporate society within the meaning of this statute;" but it appears that on May 17th, 1878, a certificate of incorporation of the Monmouth Park Association was filed in the County Clerk's office by certain gentlemen who were not residents of New Jersey, and, so far as I have been able to investigate the matter, this certificate is without authority or validity under our law. The maintaining of a race course without authority of law is an indictable offence. If the promoters of this race course depend upon either of the above named acts of incorporation, it is my opinion that they are in error and are violating the laws of our State.

The first assignment of error will be found in printed book, on page 13, and contains the pith of the defense, viz.: That the Judge below charged that:

(1). The *practice* of bookmaking or betting upon horse races is an *illegal* practice under the laws of this State.

(2). That the supplement to the Crimes Act, approved March 11th, 1880, P. L. page 185, did not modify or change the existing law against *gaming*. See printed book, pages 10 and 11.

The statute referred to reads as follows: "That all wagers, bets or stakes made to depend upon any *race* or *game*, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event, shall be unlawful." See Revision, 1877, page 458, act entitled "An Act to prevent gaming."

The habitual violation of that statute at any *place* of public resort subjects the offender to indictment as the keeper of a disorderly house, unless the said law of 1880, P. L. page 195, protects him against its provisions.

The law of 1880 changes the fifty-sixth § of the Crimes Act. That fifty-sixth § of the Crimes Act applied to any PERSON, who shall bet or wager upon the running, &c.; in other words, to *individual betting*, and an indictment drawn under that section would have expressed and set forth the date of the bet, the person who bet, and proof of a *single bet* would sustain a conviction under it. Therefore, all that the defendant in this case can claim is, that section fifty-six of the Crimes Act, as re-enacted in the law of 1880, is abrogated by substitution, and that an individual bet is no longer a CRIME punishable by indictment *ad personam*. The re-enacting section of the law of 1880, (§ 56) does not *legalize* what the act against gaming (see Revision, page 458, § 1) prohibited as *unlawful*. The *purpose* of the re-enactment of the fifty-sixth section of law of 1880, is to permit the making of a purse, &c. It may do away with the *crime* of making a single bet, but is silent as to whether it is still *unlawful*. The law does not favor repeals by implication. *Bishop on Statutory Crimes*, § 154, 2d Ed., and foot note 3; also § 155 and foot notes 1, 2 and 7.

The intent of the law of 1880, page 195, can be ascertained by reading section fifty-seven of the Crimes Act, Revision, page 239, and the re-enactment, verbatim, of the same section in the said law of 1880. Section fifty-seven makes a stakeholder a criminal, and so does the fifty-seventh section of the law of 1880, above referred to.

The second error assigned for reversal implies that an incorporated body can authorize betting upon horse races, to be carried on habitually, and that the court erred in

charging the contrary, and that any place of public resort wherein the *practice* of betting upon horse races is carried on habitually and as a business, is a public nuisance. See printed book, pages 13 and 14.

Are they incorporated under the laws of New Jersey?

The certificate of incorporation was filed May 17th, 1878. That certificate is void, because (1), No such law as that recited therein. (2), The objects as recited therein were expressly forbidden at that time by the statute against crimes. The certificate of Monmouth Park Association, Book A of Corporations, page 193, Monmouth County Clerk's Office, reads as follows:

"To the Clerk of the Court of Common Pleas of the County of Monmouth. The subscribers do hereby certify that they have formed and associated themselves into a company or society under the provisions of the act entitled 'An act concerning Corporations, for the purpose of improving the breed of horses and holding exhibitions of thereof.'"

There was no such act May 17th, 1878, as that referred to in that certificate for the purpose of improving the breed of horses, &c. The act referred to was approved March 3d, 1880. See P. L. 1880, page 93.

Hence they cannot be recognized as a corporation in New Jersey. See *Hill vs. Beach*, 1 *Beasley*, 31.

The question can be inquired into collaterally. See 7th *Vroom*, *p.* 254, *Booth vs. Wonderly*.

But if they are legally incorporated can said Association authorize and rent to persons boxes, booths or stands, for the purpose of *gaming*, &c.

First. Was the booth, box or stand rented by defendant of said Association a *place?* See 1st *Vroom*, page 102, *State vs. Williams*. On page 104 the Chief Justice says:

"Any *place* of public resort, whether an inn, a dwelling house, a store house, or any other building or garden, is a public nuisance in which illegal practices are habitually carried on," &c. See State of Case, printed book, page 8. The defendant was:

(1.) Lessee of the box and paid a rent to the Association.

(2.) It was boarded upon three sides.

(3.) He had full control of it.

(4.) He put up his placard in front of it on which was marked the amount and odds he wagered against each horse in the race.

(5.) The bet being made he was also the sole *stake holder* of every bet at the same place, viz.: his box or stall.

Second. Other methods of betting on horse races were carried on there under the same enclosure, viz.: Auction pools and combination pools. The French pools were also carried on there under an extension of the large enclosure. All four methods of betting were in the same general building and enclosure. See printed book, page 8, &c., full description.

The cases of the State vs. Wm. Lovell reported in 10th *Vroom*, pages 458, 459, &c. 460 are made a part of this case by consent of defendant.

In 10*th Vroom*, *State vs. Lovell*, *page* 464, *Judge Dixon says:*

"It was a disorderly house in another aspect. It was a public resort for persons to bet upon horse races and where the defendant held himself out as a stake holder of the money wagered." The mischievous *practice* of gambling upon horse races was what the law intended to reach.

(1.) A horse race is a game in this country and England.

Cheesum, et al, vs. The State, Vol. 8th, Blackford's, Indiana, reports, page 332, *decided in* 1846.

(2.) Betting on a horse race is gaming within the meaning of our statute, which provides for recovery back of money lost in gaming.

51 *Illinois R.* (*Freeman*) *Garrison, et al, vs. Duncan McGregor, page* 473. Also *Tantum vs. Strader*, 23 *Ill.* 493, (Especially decides that *horse racing* is *gaming*). It says:

"Gaming exists wherever a stake is laid on the chances of a game, and base ball and horse racing are games and so is any pooling scheme in betting therein. Game is very comprehensive and embraces every contrivance or institution which has for its object to furnish sport, recreation or amusement; let a stake be laid upon the chances

of the game, and we have gaming." See also 51 *Michigan R.* (1883) *The people vs. Frank Weitboff*, pages 203 and 214, decided by Judge Cooley, and the cases therein referred to.

(3.) Horse races have often been held games within the meaning of the Statute of Anne.

See Tantum vs. Strader, 23 *Ill.*, 493.
Mosber vs. Griffin, 51 *Ill.*, *page* 184.
Goodbaurn vs. Marley, *Strange*, 1159.
Baxton vs. Pye, *Wits*, 309.
Grace vs. McElroy, 1 *Allen*, 563.
Ellis vs. Beale, 18 *Maine*, 337.
Wilkinson vs. Tousley, 16 *Minn.*, 299.
McLean vs. Hoffman, 30 *Ark.*, 428.

(4.) In criminal law the meaning of " Game " is a contrivance, arrangement or institution, designed to furnish sport, recreation or amusement. Webster's Dictionary under head of "*game.*"

(5.) A *game* is contrary to public policy, having in it the element of gain or loss, the staking of money or other valuable things upon the result of a game that would otherwise be lawful, and which comes within the condemnation of the criminal law. *See vol.* 1, *Rappelyea, and Lawrence's Law Dic.*, *page* 561, § 6.

It was a common gaming house and indictable.

Gaming is not of itself indictable at common law, but the keeping of a common gaming house is, and such houses have for a long period been held by the Courts to be necessarily injurious to public morals, and therefore indictable as nuisances. *See* 1 *Vr. page* 109, *State vs. Williams.* The same case holds that the procurer, the accessory before the fact, the aides and abettor, are all guilty as principals.

In that building some were habitually betting in French pools, others were betting in Auction pools, others were betting in Combination pools, others were betting in Books. The State holds that this babel of betting is condemned as injurious to public morals.

The doctrine in the case of *State vs. Williams* 1 *Vr.*, *page* 102, reaffirmed in case of *State vs. Hall*, 3 *Vr.*, *page*

158, is that any *place* is a public nuisance where practices resting under a statutory interdict are permitted.

In the case of State vs. Meyer, 12th *Vr.*, page 6, the Court held that a house in which unlawful sales of liquor are habitually made, is an indictable nuisance, although such violation was a breach of a city ordinance and punishable in the local Court. The point is that habitual violations of the statutory policy of the State constitute a corrupt and immoral practice, and subjects the place and keeper to indictment, although a single violation of law is not punishable as a common nuisance.

Third. The law of 1880, P. L., page 195, &c., is unconstitutional, because:

(1.) One object is embraced in the title.

(2.) Two totally distinct objects are legislated upon. In repealing section 56 of the Crimes Act and its re-enactment in the law of 1880, it violates paragraph 4, section 7 of Article IV. of the Constitution.

Section 56, of the Crimes Act, makes a bet or wager upon a race, a misdemeanor.

(3.) Section 56, of law of 1880, abolished the act of betting on a horse race as a crime.

(4.) Section 56 also legalized the making up of purses, &c., hence the same section operated upon two distinct and separate objects.

See 16th Vr., page 399, Grover vs. Trustees of Ocean Grove Camp Meeting Association.

Section 56 of law of 1880, above referred to, is unconstitutional, because:

Fourth. It is against public policy and the laws, for nearly a century.

The State refers your Honors to the laws of New Jersey, from 1797 to 1880, upon the subject of betting on horse races and

(1.) An act to prevent horse racing, passed February 15th, 1811. See laws of New Jersey, revision, 1703–1820. Page 550, section 3, reads as follows: "That all wagers and bets which shall be laid, betted or made on the racing, running, pacing, &c., of horses, shall be utterly void and of no effect."

Section 1 of that act reads as follows: "All racing, running, pacing or trotting of horses, &c., for money, goods and chattels, declared to be a *common* and *public nuisance*, and the authors, parties and abettors thereof shall be proceeded against by indictment." This act of January 15th, 1811, repeals the act of March 3d, 1797, concerning horse racing. By the act of January 15th, 1811, all wagers and bets are illegal.

(2.) All racing of horses for money is a *common* and *public nuisance*, and the persons concerned therein are indictable. The law stood thus until March 5th, 1835. Then March 5th, 1835, the legislature passed an act repealing sections 1, 2, 5, 6, 7, 8, 9 and 11 of the act of January 15th, 1811. March 19th, 1846, the Legislature passed an act repealing the act of January 15th, 1811, and the supplement thereto passed March 5th, 1835, and which act of March 19th, 1846, is still in force.

The 2d section of the act of March 19th, 1846, reads as follows: "And be it enacted, That if any person shall bet or wager upon the running, pacing or trotting of any horse, &c., or shall be concerned in making up any purse for any such money, &c., such persons shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine not exceeding $100, or imprisonment not exceeding 6 months, or both," &c.

The 6th section of the same act reads: "And be it enacted, That all wagers or bets which shall be laid or abetted or made on the running, &c., of any horses, &c., and all promises, agreements, notes, bill binds, contracts, judgments, mortgages or other securities drawn, entered into, &c., when the whole or any part of the consideration thereof shall be for money, goods, chattels or other thing won, laid or abetted on the running, &c., of any horses, &c., shall be *utterly void* and of *no effect.*"

(1.) That law made a bet or wager on a horse race a misdemeanor.

(2.) It also made the making up of any purse for money, a misdemeanor.

(3.) It made all wagers and stakes upon a horse race void.

The revision of 1877, § 56 of *Crimes Act*, page 237, punished betting upon a horse race as a misdemeanor. The Legislature on April 6th, 1871, passed an act entitled "A further supplement to an act entitled 'An Act to prevent gaming, passed Feb. 8th, 1797.'" The first section of that supplement reads as follows:

"That all wagers, bets or stakes made to depend upon any race or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or *contingent* event whatever, shall be *unlawful*, and all contracts for or on account of any money, or property, or thing in action so wagered, bet or staked, shall be void. Approved April 6th, 1871, page 109 of P. L.

The State also refers your Honors to the law passed March 27th, 1874, in Revision of 1874, page 304. Among its provisions is the law approved April 6th, 1811, above stated. The revision of 1877, page 458, contains the same provisions against all gaming as the revision of 1874.

Thus stood the law from 1797 to 1880, viz.:

(1). Betting upon a horse race was a misdemeanor.

(2). All bets were and are still unlawful and void.

(3). Gaming was unlawful, and by the rules of the common law relating to offenses against public morals, any house, *room*, or *place*, kept by any person for gain, to which persons resort for the purpose of betting on a game or gaming, is a common gaming house and an indictable nuisance.

Construction of words "gaming," "betting," &c., see *Bish. on Statutory Crimes*, 2*d Ed.*, §§ 858, 872 and 873.

A horse race depending upon training and blood may not be gaming, for chance is not the important factor that decides the contest, and they may even run for stakes or a prize under section 56 of law of 1880, page 195, but it is the *practice of betting* in which the judgment of the bettor is called into play that gives the bet the color of chance. Hence the practice of betting is immoral and against the policy of the law against gaming.

3*d Dutcher*, *Huncke vs. Francis*, page 63 of decision.

1*st Vroom*, 257, *Sutphen vs. Crozer.*

3*d Vroom*, 462, *Sutphen vs. Crozer.*

Keeping a common Gaming House is a common law offence.

1*st Bish. Crim. Law*, page 504, 7 ed., section 504.

Fifth. Stake holding indictable; defendant was also a stake holder. See:

Section 57 of *Crimes Act*, revision 1877, page 237.

Section 57 of law of 1880, page 195.

3*d Dutcher, Huncke vs. Francis, page* 57.

We respectfully submit that the judgment of the Court
10 below should be affirmed.

CHARLES HAIGHT,
Pros. of Pleas for State.

JOHN W. SWARTZ,
Counsel.

MacCrellish & Quigley, Printers, 16 E. State St., Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals.

NOVEMBER TERM, 1886.

WILLIAM McCLEAN,
Plaintiff in Error,

vs.

THE STATE OF NEW JERSEY,
Defendant in Error.

On Indictment.
Disorderly House.

POINTS AND AUTHORITIES OF PLAINTIFF IN ERROR.

The plaintiff in error was indicted, tried and convicted, before the Monmouth Quarter Sessions and a jury, for keeping a disorderly house within the grounds of The Monmouth Park Association. The indictment (*see Book of the Record, pages 3 and 4,*) contains the charge that the plaintiff in error *caused and procured* "*certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and there unlawfully, etc., and at unlawful times, as well in the night as in the day, to be and remain drinking, tippling, fighting, gambling, whoring,*" *etc.*

What the record of the trial shows he did, in fact, was to bet and wager money, habitually during the summer racing

season, upon the result of horse racing, within the grounds of the Association. Questions as to the legal propriety of the conviction upon *such a record*, containing charges (neither proved or attempted to be proved), as to procuring men and women of dishonest conversation, etc., to come together, fighting, tippling, *whoring*, etc., as well as questions as to the responsible control of the place in question, as constituting the plaintiff in error the keeper of a disorderly house, though raised upon the record, and now respectfully insisted upon before this Court as grounds of error, are not here made the subject of argument.

But the principal question important to be decided and settled upon this record, is, as to the effect of the legislation of March, 1880, upon the subject of wagering money upon horse racing, as done by the defendant below.

The State claims that, although this supplement to the Crimes Act exempted from indictment, as for a misdemeanor the act of betting upon races, and of course repeated acts of betting on races, yet that in *another form*, namely, in the form of keeping a disorderly house, the persons guilty of such habitual betting on races are properly indictable and punishable.

The defendant, on the contrary, claims that the design and just effect of that legislation was to *encourage* racing for money, "*when authorized by a Fair or Agricultural Society, or any incorporated body of this State, and within the exterior enclosure where the exhibitions of speed are to take place,*" and to exempt from all criminal prosecution, *in any form*, the wagering or betting of money upon the result of such racing.

More closely stating the defendant's proposition, it is that the designed striking out, by the Legislature, in that supplement to the Crimes Act, of the words, "*if any person shall bet or wager upon the running, etc., of any horses, etc.*, when taken in connection with the subsequent sections of that supplement, authorizing the State's incorporated bodies to "*contribute and collect*" money, etc., to be run for by horses; and with the cotemporaneous legislation allowing three or more persons to associate themselves together "*to carry on exhibitions for the encouragement of competition in the breeding of*

L. 1880
p. 93

stock and the development of speed in horses," stripped the betting in question of all *criminal* taint or complexion.

The act of March 11th, 1880, is not accurately printed in our Public Laws (*L. pages 196, etc.*), but the certified copy from Secretary of State reads as follows:

CHAPTER CXLVII.

Supplement to an act entitled "An Act for the punishment of crimes" (Revision), approved March twenty-seventh, one thousand eight hundred and seventy-four.

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*, That the fifty-sixth section of the act to which this is a supplement, and which reads as follows:

"56. *And be it enacted*, That if any person *shall bet or wager upon the running, pacing or trotting of any horses, mares or geldings*, or shall be concerned in making up any purse for any such running, pacing or trotting, such person shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding six months, or both, at the discretion of the court," shall be amended so that the same shall read as follows:

56. *And be it enacted*, That if any person *not authorized by any agricultural society or incorporated body of this State* shall be concerned in making up any purse for any running, pacing or trotting of any horse or horses, mares or geldings, such person shall be guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding six months, or both, at the discretion of the court.

2. *And be it enacted*, That the fifty-seventh section of the act to which this is a supplement, and which reads as follows:

"57. *And be it enacted*, That if any person shall be a stakeholder of any sum of money or other thing betted, staked or wagered upon any such running, pacing or trotting, or shall cause to be printed or set up, any paper or other thing notifying or advertising any such running, pacing or trot-

ting, or shall be the rider or driver of any horse, mare or gelding in any race, of either running pacing or trotting, such person shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding six months, or both, at the discretion of the court," shall be amended so that the same shall read as follows:

57. *And be it enacted*, That if any *such* person shall be a stakeholder of any sum of money or other thing betted, staked or wagered upon any such running, pacing or trotting, or shall cause to be printed or set up any paper or other thing, notifying or advertising any such running, pacing or trotting, or shall be the rider or driver of any horse, mare or gelding in any race of either running, pacing or trotting, such person shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding six months, or both, at the discretion of the court.

3. *And be it enacted*, That the fifty-eighth section of the act to which this is a supplement, and which reads as follows:

"58. *And be it enacted*, That if any person shall contribute or collect, or shall ask any other person to contribute or collect any money, goods or chattels, to make up a purse, plate or other thing to be run, paced or trotted for by any horse, mare or gelding at any place in this State, such person shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding six months, or both, at the discretion of the court," shall be amended so that the same shall read as follows:

58. *And be it enacted*, That if any *such* person shall contribute or collect, or shall ask any other person to contribute or collect any money, goods or chattels, to make up a purse, plate or other thing to be run, paced or trotted for by any horse, mare or gelding, at any place in this State, such person shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding six months, or both, at the discretion of the court.

4. *And be it enacted*, That section fifty-nine of the act to which this is a supplement, and which reads as follows:

"59. *And be it enacted*, That if any person or persons shall let or rent his, her or their land for the purpose of a race-course for the running, pacing or trotting any horses, mares or geldings, or shall knowingly suffer any such running, pacing or trotting upon lands belonging to him, her or them, or of which he, she or they may be in possession, such person or persons shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, at the discretion of the court," shall be amended so that the same shall read as follows:

59. *And be it enacted*, That if any person or persons shall let or rent his, her or their land for the purpose of a race-course for the running, pacing or trotting any horses, mares or geldings, or shall knowingly suffer any such running, pacing or trotting upon lands belonging to him, her or them, or of which he, she or they may be in possession, such person or persons shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, at the discretion of the court; *provided, however, that this section shall not apply to fairs, agricultural societies, or any incorporated body of this State.*

5. *And be it enacted*, That no person or persons shall make up any purse, plate or other thing for any running, pacing or trotting of any horses, mares or geldings, or contribute or collect, or ask any other person to contribute or collect, any money, goods or chattels, to make up any purse, plate or other thing to be run, paced or trotted for by any horse, mare or gelding, at any place in this State, *except when authorized by a fair or agricultural society or any incorporated body of this State, and within the exterior enclosure where the exhibitions of speed are to take place;* and any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding six months, or both, at the discretion of the court.

6. *And be it enacted, That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed, and this act shall take effect immediately.*

Approved March 11th, 1880.

I.

It must be conceded by the State that the striking out from our criminal statutes of the words "*shall bet or wager upon the running, pacing or trotting of any horses, mares or geldings,*" was not an *accident*, but was *designed* by the Legislature as an *important change* in the criminal law on that subject.

It is a well-settled rule of statutory construction that "when one act is framed from another, *some parts being omitted*, the parts omitted are not to be revived by construction, but are to be considered as *annulled*. To hold otherwise would be to *impute to the Legislature gross carlessness or ignorance*, which is altogether inadmissible," and the Court is not at liberty to suppose that the omission was by mistake.

Ellis vs. *Paige*, *1 Pick. 45.*
Pearce vs. *Atwood*, *13 Mass. 349.*
Nichols vs. *Squire*, *5 Pick. 169.*
Com. vs. *Kimball*, *21 Pick. 376.*
Bartlett vs. *King*, *12 Mass. 545.*
The King vs. *Davis*, *1 Leach's Cases 306.*
State, *Roche*, *Pros.*, vs. *Jersey City*, *11 Vr. 257.*
Bracken vs. *Smith*, *12 Stew. 169.*

The above-quoted act did not simply amend and change the existing criminal law on the subject of horse racing for money, but section 5 made special exceptions in favor of persons collecting or contributing money to be run for by any horse, when such persons were "*authorized by any incorporated body of this State*," and section 6 repealed all acts *inconsistent* with the act in question.

Now the rule is that "general legislation, on a particular subject, must give way to special legislation on the same subject."

State vs. *Morristown, 4 Vr. 61.*
State vs. *Clarke, 1 Dutch. 54–57, and cases cited on last page.*
State vs. *Jersey City, 11 Vr. 257.*
Bracken vs. *Smith* (*supra*).

This omission was "*a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded, is discarded.*

II.

This *discard*, by this statute, of the words making the betting of money on horse racing criminal, must be held to change the common law, too, where it conflicts.

Such *express discarding* from the body of the statute of prohibitory words, means that that *kind* of betting is not prohibited by law. It is a legislative *recognition* of it. It removed a previous legislative condemnation of such betting.

But if the Common law was unaffected by the statute

Repeated acts of betting on horse races, as done by the defendant, are not com at *common law* indictable.

James et al. vs. *State, 63 Maryl. 253.* (253)
Com. vs. *Avery, 14 Bush 639.*
Judge Coolly, 2 Black. Com., p. 172, note 19; 1 Bish. Crim. Law, § 504.

This was not the keeping of a common gaming house within the meaning of the common law (*Hawk. C. 1, c. 75, § 6*), or within the meaning of our Supreme Court in the case of *The State* vs. *Williams, 1 Vr. 109.* Justice Elmer said "that gaming is not of itself indictable at common law, but the keeping of a common gaming house is."

Now, *what is the keeping of a common gaming house?* The keeping of a common gaming house necessitates the use of *implements*, *devices* or *apparatus*, such as dice, backgammon, &c., but *horses* are not such implements any more than game cocks, and they have been decided not to be.

Coolidge vs. *Choate et al., 11 Metc. 79–82.*

It is a great perversion of language to call a horse race a "gambling device," or a game of chance.

State vs. *Borie*, *23 Ark. 726–8.*
Com. vs. *Shelton*, *8 Gratt. 592–598.*
Harless vs. *U. S.*, *1 Morris (Iowa) 169.*

In the case of *Harless* vs. *U. S.*, it was held that an indictment for betting and horse racing cannot be sustained under the act against *gaming*. Horse racing is not a game of chance. The Court say (*pp. 172, 173*):

"But it is contended that horse racing is a game of chance, and that, therefore, the case is brought within the statute. The argument used in this case, if sound, would prove that perhaps every uncertain event was a game of chance. Not only would every *game* be of this description, but all the uncertainties with which this world is crowded become games of chance. If this was the view of the legislature, why did they not use different language? If they intended to include in one sweeping phrase everything but mathematical calculations (for everything else is more or less mixed up with uncertainties), they certainly used most extraordinary language.

"Penal statutes must not be construed to embrace cases not clearly within their provision. The word *game* does not embrace all uncertain events, nor does the expression '*games of chance*' embrace all *games*. As generally understood, games are of two kinds, games of chance and games of skill. Besides there are trials of strength, trials of speed, and various other uncertainties which are perhaps no games at all, certainly they are not *games of chance*. Among this class may be ranked a *horse race*. It is as much a game for two persons to strive which can raise the heaviest weight or live the longest under water, as it is to test the speed of two horses.

"It is said that a horse race is not only uncertain in its result, but is often dependant upon accident. So is almost every transaction of human life, but this does not render them games of chance. There is a wide difference between *chance* and *accident*. The one is the intervention of some

* There is no case to be found in England prior to the Statutes of *16 and 17 Vict., Chap. 119* (expressly declaring betting houses to be common gaming houses), which holds that places where betting upon horse races, or other events of that nature, were carried on were common gaming houses.

The case of *Doggett* vs. *Catterns*, *19 C. B. (N. S.) 264, *765, 34 L. J. C. P. 159*, was founded upon this English statute, and it was held by the Exchequer Chamber, reversing the judgment of the Common Pleas, " *That the habitual use of a spot in a public park for the receiving of deposits to return a larger sum on the contingency of a particular horse winning a race, is not the using of a "place" for such purpose, within the 16th and 17th Vict., C. 119, s. 1.*

This case is cited particularly to show that the conviction of the defendant was sought *solely upon the strength of the English statute* above cited, and *not upon the strength of the common law.* The Court found for defendant.

The subsequent cases of *Shaw* vs. *Morley*, *3 L. R. Exch. 137; Eastwood* vs. *Miller*, *9 L. R. Q. B. 440; Bows* vs. *Fenwick*, *9 L. R. C. P. 339; Haigh* vs. *Sheffield*, *10 L. R. Q. B. 102*, were all founded expressly on this statute.

If, at common law, the repeated acts of betting on races in a certain place constituted the keeping of a disorderly house, or a common gaming house, it is a very strange fact that no reported case can be found, from the year books down, of such convictions. There is no doubt that in England, from the earliest times, horse racing and betting thereon have been constantly practiced.

It is wholly incredible that there would have been no prosecutions founded in such practices before the Statutes of Victoria (which are quite recent), if the common law pronounced the places where such betting was done disorderly houses.

It is true that in *Rex* vs. *Roquier et al., 1 Barn. and Cress. 117* [*272*], which was an indictment for keeping a common gaming house for lucre in the playing of a game called "Rouge et noir," one of the judges said that the playing for *large and excessive sums of money* would of itself make any game unlawful, but he placed such conclusion expressly upon the *language of the indictment* in that case, which averred that defendants had permitted persons to play there for *divers large and excessive sums of money*, because the statute of *9 Anne, C. 14, s. 2*, made playing at any game unlawful if more than £10 should be lost.

There are certainly no analogies between that case and the present.

COPY OF STATUTE 33 HENRY 8TH, C. 9, PAGE 309, SEC. 11.

"Be it also enacted by the authority aforesaid, That no manner of person or persons, of what degree, quality or condition soever he or they be, from the feast of the nativity of St. John Baptist now next coming, by himself, factor, deputy, servant or other person, shall, for his or their gain, lucre or living, keep, have, hold, occupy, exercise or maintain any *common house*, alley or *place of bowling, coyting, coythcayls, half bowl, tennis, dicing table or carding or any other manner of game prohibited by any estatute heretofore made, or any unlawful new game now invented or made, or any other new unlawful game hereafter to be invented*, found, had or made, upon *pain to forfeit and pay* for every day keeping, having or maintaining, or suffering any such game to be had, kept, executed, played or maintained within any such house, garden, alley or other place, contrary to the form and effect of this *estatute, forty shillings.*"

Section 14 provides methods of arrest and punishment of those playing *such games.*

The expression used in the cases of "Common gaming houses" originated in this act of *33 Henry 8th*, above recited, and the *games* there intended to be prohibited were "*inventions*" and *devices* or *implements* which constitute games in the popular sense.

The effort of the prosecution in the case of *The people* vs. *Jackson, 3 Denio 102*, was to convict defendant of keeping a common gaming house—a disorderly house—charging him with selling tickets in lotteries unauthorized by law, but the Supreme Court of New York quashed the indictment, and held that, although the business was *illegal*, yet, that the manner of the sales of tickets did not lead to *breaches of the public peace.*

The principle to be extracted from this case should be held to exempt this defendant from indictment.

Suppose that in the Jackson case it had appeared that the purchase of lottery tickets had been accomplished by sales to the highest bidders (but without disorder), instead of "*behind screens and in corners*" (page 102), could that Court have reached a different result? It is fair to assume that

the judgment of that Court in that case did not turn upon the *precise manner* of the sales of tickets, for if so, no principle is to be extracted from the decision; but that acts void in themselves and parts of an illegal business, if not expressly prohibited by law, and *not connected with breaches of the peace*, did not make the place of such acts a disorderly house.

The State does not pretend there was any disorder or breaches of the peace, and it is respectfully submitted that the wagering in question is to be regarded as if done "*behind screens and in corners*" *and in quiet order.* The facts are all in, and this Court will not assume there was disorder. The question here is, did the acts of the defendant, if done *in a quiet and private manner*, constitute him the keeper of a disorderly house?

unlooked for circumstance to prevent an expected result, the other is the uncalculated effect of mere luck. The shot discharged at random strikes its object by chance; that which is turned aside from its well directed aim by some unforeseen circumstance misses its mark by accident. In this case, therefore, we reasonably feel disappointed, but not in the other, for blind uncertainty is the chief element of chance. In fact, pure chance consists in the entire absence of all the means of calculating results, accident in the unusual prevention of an effect naturally resulting from the means employed. That the fleetest horse sometimes stumbles in the race course and leaves the victory to its more fortunate antagonist is the result of accident, but the gambler, whose success depends upon the turn of the cards or the throwing of the dice, trusts his fortune to chance.

"It is said that there are strictly few or no games of chance, but that skill enters as a very material element in most or all of them. This, however, does not prevent them from being games of chance within the meaning of the law. There are many games the result of which depends entirely upon skill. Chance is in no wise resorted to therein. Such games are not prohibited by the statute. But there are other games, which although they call for the exercise of much skill, still there is an intermingling of chance. The result depends, in a very considerable degree, upon sheer hazard. These are the games against which the statute is directed, and horse racing is not included in that class. We think, therefore, the indictment in this case charged no indictable offence against the defendants below, and that the judgment below should therefore be reversed, which is accordingly done."

The Mass. Court in construing their statute authorizing the seizure of "any gaming apparatus or implements used, or kept and provided to be used, in unlawful gaming in any gaming house," say: "No one, we apprehend, ever did or ever would call a living animal an apparatus. As to the word implements the Court say that it does not appear that it has ever been used to denote animals or beings having life. *We are, therefore, of the opinion that the words implements*

of gaming were not intended to include fighting cocks *or any animal or being having life.*"

And the Maryland Court of Appeals, in the case of *James et al.* vs. *State, 63 Md. 253*, in deciding the question whether horse races were games of chance and appellants were keeping gaming tables, said: "*If by any singular subtlety of discourse a horse race could be shown to be a game of chance, by the same reason we must hold that it was played on the race-course, and that the horses were the players.*"

In order to constitute the keeping of a "*common gaming house*," in either the popular or legal sense, there must be something more than betting done. There must be *implements* used. Under the broad claim that the mere wagering of money on the results of horse racing constitutes the place of such wagering a *common gaming house*, every stock exchange in our cities is a common gaming house. In all of them the deposits of stock margins dependent on the fluctuations, up or down, of the minute or the hour, are but the bets and wagers of the depositor. They are in no sense *investments*, and they differ in no *principle* from bets on the result of horse racing; the amount of the *hazard* is greater —is millions often, instead of hundreds, and the injury, if an injury, in the end, is much deeper in its effects and consequences. It follows that the *nature* of the wagering did not make the place a common gaming house. Again, there was nothing in the *mode* or *manner* in which the acts of the defendant were done to constitute a disorderly house. There is no pretense in this record, or in fact, that there was any *disorder* or *disturbance* of the peace, or that any neighborhood was *affected* by noise, &c.; the place in question is far removed from any neighbors. See particularly *James et al.* v. *State, 63 Md. 263.*

From the above, it is plain that the conviction of the defendant, based upon the ground of his keeping a *common gaming house*, can not stand.

III.

This conviction is sought to be put upon another ground, that repeated violations of the general act to prevent gaming, (*Rev. p. 458, Sec. 1,*) by the defendant, constituted him the keeper of a disorderly house.

Here the State contends that practices which are unlawful in the sense merely of being invalid or unenforceable by suit, are sufficient of themselves to make those doing them keepers of disorderly houses.

This is a very important question, because, under this claim, every banking house where more than the legal rates of interest are continually taken, every railroad office where more than the lawful schedule of freights or fares are demanded, or where contracts of any kind against public policy are habitually made, are *indictable as disorderly houses.*

On the contrary of this claim, we contend that the violations of merely statutory civil regulations, not partaking of any criminality, and not punishable by *fine*, do not constitute the keeping of a disorderly house.

It must be admitted that the effect of the above-copied legislation of March 11th, 1880, was to strip the act of betting on horse races of all *criminal* quality. It was certainly *inconsistent* with that act that any prior statute should stand on our statute books giving to betting upon horse racing an *indictable* or *penal* nature. *After* that act of 1880, betting on horse racing had no *criminal* consequence. It, at most, left the *contract* unenforceable and *void.*

So that the question confronts us squarely now whether the making, in a certain house, of repeated *void* or unlawful contracts, mounts up, by *mere repetition*, to the crime or misdemeanor of a disorderly house.

Lord Mansfield did not think so. In *Rex* vs. *McDonald*, *3 Burr. 1645*, he quashed such an indictment, which charged one with converting a house into a hospital for taking in and delivering lewd, idle and disorderly unmarried women, "who, after their delivery, went away and deserted their children, whereby the children became chargeable to the parish."

The English Statute made it unlawful for children to be made thus chargeable to the parish.

But Lord Mansfield said: "By what law is it *criminal* to deliver a woman when she is with child?" Evidently in his mind the violations of law for which a house could be rendered *disorderly*, were not those of merely civil regulations, but must have a *criminal* complexion, and the acts done therein must be those to which the statute affixed a *punishment by indictment.*

It is not enough for the Court to say they *tend* toward a public evil. Our Supreme Court, in *State* vs. *Hall, 3 Vr. 164*, say that it is a "very great extension of the judicial province," and "an innovation which would be attended with many evils," for the judiciary to pass on the lawfulness or criminality of the resorts of idleness (of various kinds) *by the criterion of what may seem to be the tendency of each toward public evil.*

And it was distinctly held (page 164) "that a house or place kept by the owner with a view to profit, for the practice of public amusements, *not in themselves prohibited by law, cannot be held to be a nuisance*, unless such consequence attach from the mode in which it is kept, "and that if such games have a tendency to produce idleness and immorality, the application for an appropriate remedy must be made to the *legislative* and not to the judicial department."

Since the statute of 1880, betting on horse racing is not *prohibited* by law in the sense that word "prohibit" has been used by our courts.

So in the case of the *State* vs. *Meyer*, decided by our Court of Errors finally, in *13 Vr. 145*.

The Court took pains to state in the opinion that the acts complained of (being habitual sale of liquor on Sunday, in the city of Newark), were violations of the *law of the State*, which prohibited, by *indictment as for a misdemeanor*, such sales. (*See Crimes Act, Rev., page 238, Section 61.*)

A careful reading of the language of our judges in deciding these cases will show that the expressions there used in respect to the "illegal" or "unlawful or prohibited practices" which must go to make a disorderly house, pre-sup-

poses practices made *criminal* by statute, or those at least to which some *fine* in money is by law attached.

Thus in the Kentucky case of *Smith* vs. *Com.*, *6 B. Monroe*, *23*, the Courts of that State held that the keeping of a house at which spirituous liquor was habitually sold to slaves, constituted a public nuisance. But, by the statute of Kentucky, each act of selling was *punishable with a fine by indictment.* Each act was not simply "unlawful," but was made *criminal.* And that Court said, that "though the single offence may be punished only by a *specific fine* (like fornication), the keeping of a house where these offences are habitually encouraged and indulged, is an offense of a much higher grade." This case is a clear illustration of the distinction now taken between our statute concerning gaming and the Kentucky statute on which above decision was founded.

It is respectfully submitted that there is no force in the position of the State, that the general act to prevent gaming can sustain the conviction of the defendant.

IV.

The only ground left to the State, if the above reasoning be correct, on which this conviction can be claimed to rest, is that betting or "book-making" on horse races is *immoral.*

The first and most obvious answer to this is that the popular voice, as expressed by our Legislature in 1880 (and ever since that time), *has struck out from our statute books all condemnation of it in a criminal sense.*

Is it for our Courts to pronounce that immoral, and, therefore, indictable in another form, which our legislators have discarded and dismissed from our crimes act?

Even the common law, as above shown, did not pronounce it immoral or criminal. It may be *trifling* and *wasteful*, but is it to be classed as immoral? If yes, then there is open before us a wide range of immoralities.

The daily, hourly, constant, never-ceasing speculations on margins in the stock markets and grain exchanges of this country and the world, are vast springs and sources of

immoralities, and the colossal buildings in which the business of modern times is conducted are disorderly houses and public nuisances.

If this defendant be guilty, under this indictment, in the face of this legislative declaration wiping away such criminality from the former law, then, under this record, it can be well claimed that the gentlemen who have placed the building there, and granted this defendant the privilege he exercised in it, are equally guilty in the eye of the law.

It is but just to them to say that, if so, they have been deceived in their common sense understanding of this legislation of 1880, and of the true intent of that Legislature. Under its friendly impulse they have invested large amounts of money in the breeding of horses, in the procuring of best of blood and bone for such breeding, from all parts of this country, and from the other side of the ocean. Not only this, but in [redacted] the facilities of travel to those who admire and enjoy these exhibitions of speed, large sums of money have been expended in building [redacted] accommodations, in constructing and enlarging railroads, and in the various other directions suitable to a business encouraged by law.

Was this a *strained* construction of these laws of 1880 on their part?

Was it not rather in harmony with the sentiment of all our courts on the construction of criminal statutes?

I quote from the language of the Maryland courts, reported in case of *James et al.* v. *State*, *63 Md. 253:* "It is not consistent with the just and benign spirit of our law to give to a criminal statute an interpretation which can be maintained only by a keen and scholastic ingenuity. The meaning of the law which consigns a man to prison, or deprives him of his property, should be *plain* and *obvious*, and easily understood by an ordinary capacity."

W. H. VREDENBURGH,
Of Counsel with Plaintiff in Error.

To use the very words of our own decision 11 Vt 25
It was to them "decisive evidence of an intent
to prescribe the provisions contained in the last
act as the only ones on that subject which
should be obligatory."

MacCrellish & Quigley, Printers, 16 East State Street, Trenton.

New Jersey Supreme Court.

WILLIAM McCLEAN,
Plaintiff in Error,

vs.

THE STATE OF NEW JERSEY,
Defendant in Error.

WRIT OF ERROR.

New Jersey, to wit: The State of New Jersey to the [L. S.] Judges of the Court of General Quarter Sessions of the Peace, in and for the county of Monmouth, Greeting:

Forasmuch as in the record and process as also in giving judgment in a certain indictment found in our Court of Oyer and Terminer and General Jail Delivery, made against William McClean of a certain misdemeanor, whereby the said William McClean is charged with having unlawfully kept and maintained a certain common, ill-governed and disorderly house in the township of Eatontown, in the county aforesaid (*pro ut* the said indictment), and which indictment against the said William McClean was ordered to be delivered to our Clerk of our Court of General Quarter Sessions of the Peace, in and for the county of Monmouth, and was therein duly filed and entry made, and the said Court, on process issued, heard and determined, and whereof

the said William McClean, by a certain jury of the county aforesaid, thereupon between us and the said William McLean is convicted of having unlawfully kept and maintained a certain common, ill-governed and disorderly house in the township of Eatontown, in the county aforesaid, as is said, manifest error hath intervened to the great damage of the said William McLean, as by his complaint we are informed.

We being willing that the said errors, if any there be, should be duly corrected and full and speedy justice done to the said William McLean in this behalf, do command you that if judgment be thereon given, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching and concerning the same, to our Justices of our Supreme Court of the State of New Jersey, on the seventh day of June instant, together with this writ, in order that the said record and proceedings, being inspected, we may further cause to be done thereupon, for correcting said error, what of right and according to the laws and customs of this State ought to be done.

Witness Mercer Beasley, Esquire, Chief Justice of our Supreme Court aforesaid, at Trenton, the second day of June, in the year of our Lord one thousand eight hundred and eighty-six.

VREDENBERGH & PARKER,
Attorneys.

BENJ. F. LEE,
Clerk.

The answer of the Judges of the Court of General Quarter Sessions of the Peace in and for the county of Monmouth: The record and proceedings, the judgment, order and proceedings within named, with all things concerning the same, to the Supreme Court of the State of New Jersey, within specified, at the day and place within contained. We certify in a certain schedule to this writ annexed, as within we are commanded.

A. WALLING, JR.,
C. A. BENNETT,
S. T. HENDRICKSON,
Judges.

Returnable June 7th, 1886.

VREDENBERGH & PARKER,
Attorneys.

STATE OF NEW JERSEY }
MONMOUTH COUNTY, } *ss.*

BE IT REMEMBERED, That at a Court of Oyer and Terminer and General Jail Delivery held at Freehold, in and for the said county of Monmouth, on the first Tuesday of October, in the year of our Lord one thousand eight hundred and eighty-five, before Edward W. Scudder, Esquire, one of the Associate Justices of the Supreme Court of Judicature of the State of New Jersey, and Alfred Walling, Jr., Charles A. Bennett and Samuel T. Hendrickson, Esquires, Judges of the Inferior Court of Common Pleas, in and for said county of Monmouth, according to the form of the statute in such case made and provided by the oaths of

Arthur Wilson,
William S. Crawford,
Charles O. Hudnut,
John I. Thompson,
Charles Allen,
William R. Stevens,
Caleb T. Bailey,
Edward Martin,
Samuel W. Morford,
John V. N. Willis,
Hal Allaire,
George Campbell,
Edward H. Emmons,
William L. Conover,
John Van Mater,
Edward A. Vanderveer,
James M. VanBrackle,
Peter V. Hyer,
Dr. Edward Taylor,
William Van Mater,
Thomas L. Worthley,
Nelson E. Buchanan,
Charles W. Butcher,

good and lawful men of said county of Monmouth, then and there duly summoned, and then and there duly sworn and charged to inquire in behalf of the State of New Jersey, in and for said county of Monmouth, it is presented in manner and form following, to wit:

MONMOUTH COUNTY, to wit:

The grand inquest of the State of New Jersey, and for the body of the county of Monmouth, upon their respective oath present, that William McClean, late of the township of Eatontown, in the said county of Monmouth, on the first day of January, in the year of our Lord one thousand eight hundred and eighty-four, and on divers other days and times,

between that day and the day of taking this inquisition, with force and arms at the township aforesaid, in the county aforesaid, and within the jurisdiction of this court, unlawfully did keep and maintain a certain common ill-governed and disorderly house; and in the said house, for his own lucre and gain, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and on the said other days and times, there unlawfully and willingly did cause and procure to frequent and come together, and the said men and women, in the said house of him, the said William McClean, at unlawful times, as well in the night as in the day, then and on the said other days and times, there to be and remain, drinking, tippling, fighting, gambling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet does permit; to the great damage and common nuisance of all the citizens of the State of New Jersey, there inhabiting, being, residing and passing, to the evil example of all others in like case offending, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same.

CHAS. HAIGHT,
Prosecutor of the Pleas.

And afterward, to wit, on Monday, the second day of November, in the year of our Lord one thousand eight hundred and eighty-five, at a session of the Court of Oyer and Terminer and General Jail Delivery aforesaid, being as yet of the term of October aforesaid, before the Honorable Edward W. Scudder, Esquire, Justice as aforesaid, and Alfred Walling, Jr., Charles A. Bennett and Samuel T. Hendrickson, Esquires, Judges of the Inferior Court of Common Pleas aforesaid, at Freehold aforesaid, in the County of Monmouth aforesaid, it is by the Court ordered that all indictments triable by the Court of General Quarter Sessions of the Peace, be handed down to that Court.

Whereupon, on Tuesday, the eighteenth day of May, in the year of our Lord one thousand eight hundred and eighty-six, at a Court of General Quarter Sessions of the

Peace, at Freehold aforesaid, in the County of Monmouth aforesaid, as yet of the term of January aforesaid, before Alfred Walling, Jr., President Judge, Charles A. Bennett and Samuel T. Hendrickson, Esquires, Judges of the Inferior Court of Common Pleas aforesaid, here cometh the said William McClean, who, being brought to the bar here in his proper person by Theodore Aumack, Esquire, Sheriff of the County of Monmouth aforesaid, to whom he is also here committed, and having heard the indictment read, and forthwith being commanded of and concerning the premises in the said indictment above specified, and charged him how he will acquit himself thereof, says he is not guilty thereof, and thereof for good and evil he puts himself upon the country.

And Charles Haight, Esquire, Prosecutor of the Pleas for said County of Monmouth, who prosecutes for the State of New Jersey, doth the like.

Therefore, let the said indictment be continued until Friday, the twenty-eighth day of May, in the year of our Lord one thousand eight hundred and eighty-six, and a jury thereupon come here before the Judges aforesaid, at Freehold aforesaid, in the County of Monmouth aforesaid, on Friday, the twenty-eighth day of May, in the year of our Lord one thousand eight hundred and eighty-six, as yet of the term of May aforesaid, of twelve good and lawful men, each of whom shall be a citizen of this State, and resident within the County of Monmouth aforesaid, above the age of twenty-one years, and under the age of sixty-five years, by whom the truth of the matter may be better known, and who are not of kin to the said William McClean, to recognize upon their oaths whether the said William McClean be guilty of Disorderly House in the indictment aforesaid specified, or not guilty, because as well, the said Charles Haight, Prosecutor of the Pleas for the said County of Monmouth aforesaid, who prosecutes for the State of New Jersey aforesaid in that behalf, as the said William McClean, have put themselves upon the said jury, and the same day is given to the parties aforesaid, at the same place, at which time, that is to say on Friday, the twenty-eighth day of May, in the year of our Lord one thousand eight hundred and eighty-six, being

as yet of the term of May aforesaid, before the Judges aforesaid, here cometh as well the said Charles Haight, Prosecutor of the Pleas aforesaid, who prosecutes as aforesaid, as the said William McClean, who, being brought to the bar here in his proper person by the said Sheriff of the County aforesaid, and the jurors of the said jury by the Sheriff of the County aforesaid, for this purpose are panelled and returned, that is to say:

1, Thomas O'Hara,
2, Joseph R. Walling,
3, Charles R. Matthews,
4, Edward Hendrickson,
5, Charles M. Tilton,
6, Wm. Strickland,
7, James Barkalow,
8, George M. Davison,
9, Henry C. Gravatt,
10, Wm. H. H. Williams,
11, Harry Appleby,
12, Franklin Osborn,

being called, come: who, being chosen, tried and sworn to speak the truth of and concerning the premises, and thereupon the trial of the said issue commenced before the said Court and jury, and the evidence being closed and counsel heard, the said issue, after a charge from the said Court, was submitted to the said jury, and the said jury in charge of the officers of said Court, duly sworn for that purpose, were taken to a private room to consider on their verdict, and afterward, on the same day aforesaid, at Freehold aforesaid, the said jury returned into and before said Court, in charge of said officers, sworn as aforesaid, to keep them in charge, and then and there, in the presence of said Prosecutor of the Pleas, Charles Haight, and of the said William McClean, do say on being asked, in due form, that they have agreed on their verdict, and by their foreman further say "that they find the defendant guilty of disorderly house, as he stands charged in the indictment."

Whereupon it is ordered that the verdict and proceedings be recorded and defendant be remanded.

And thereupon the said William McClean, on the second day of June, in the year of our Lord one thousand eight hundred and eighty-six, being produced in and before the Court at Freehold, aforesaid:

It is ordered and adjudged by the Court that the defendant pay a fine of $350.00, and to stand committed till the fine and costs be paid.

Judgment signed this 2d day of June, A. D. 1886.

A. WALLING, JR.,
P. Judge Ct. of Common Pleas.
C. A. BENNETT,
Judge Ct. of Common Pleas.
S. T. HENDRICKSON,
Judge Ct. of Common Pleas.

MONMOUTH QUARTER SESSIONS.

APRIL TERM, 1886.

THE STATE OF NEW JERSEY
vs.
WILLIAM MCCLEAN, Defendant.
} On Indictment for keeping a Disorderly House.

Be it remembered, that on the twenty-eighth day of May, eighteen hundred and eighty-six, at the Court of General Quarter Sessions of the Peace, in and for the county of Monmouth, before His Honor Alfred Walling, President Judge, and Judges Charles A. Bennett and Samuel T. Hendrickson of said court, the issue of traverse joined in the above cause on a plea of not guilty by the said defendant to the indictment against him (*pro ut* the same), came on to be tried by a jury for that purpose duly empaneled and sworn, and the following facts were proved by the State:

That defendant was engaged on the Monmouth Park Association's grounds at Eatontown, in said county of Monmouth, during the months of July, August and September, in the year eighteen hundred and eighty-five, on all days during that season in which races were held, in what is termed "book-making" or betting. That the defendant paid a compensation to the Monmouth Park Association for

the privilege of using a box within the covered enclosure of said Association. This box was large enough to allow two or three men to stand in it, and had a desk and sometimes a chair in it, but was not attached or fastened to the floor; was movable and was elevated above the floor about eighteen inches; was entered from the rear end, which had sometimes a gate to close the entrance, and was sometimes without a gate. The other two sides and front were boarded up about three feet high, and the said box or booth was under the sole control of defendant as lessee of the same for aforesaid book-making or betting purposes. No particular stand of the number used there was used by the defendant, except for a day at a time. There were about of these boxes, which were occupied by others engaged in same occupation as the defendant. These were situated on the west and north side of an enclosure or shed under the grand stand, which shed was open on the west, north and east sides to the other grounds of said association, and opened on the south into the restaurant and other rooms in the grand stand building. The auction and French pool stands were under extensions of the same covered shed, but distant about fifty feet to the north and east of these boxes. It was not proved or claimed by the State that defendant was engaged or concerned in selling pools. What the defendant did was to stand with a placard over the box he occupied on which was written or marked the odds he was willing to wager against any particular horse winning in the races about to be run on the course on said grounds (which course was about one hundred yards distant from the place where defendant was engaged). If any person desiring to bet deposited or paid defendant the amount intended to be wagered, naming the horse he chose, the defendant gave him a card on which was written or printed the name of defendant, the number of the card, the odds wagered, and the name of the horse. The defendant was both a better and the sole stakeholder of his bets. After the race was over, if the horse so chosen won the race, the defendant paid to the person who held the card the amount wagered by defendant against that horse and appearing on that card, as well as the money bet by the winner holding the card.

The manner of conducting the pools it was agreed by defendant's counsel (while he objected to its materiality or relevancy to the present issue,) was similar to the facts stated in the case of the *State* vs. *William Lovell*, reported in *10 Vroom's Reports, pages 458, 459 and 460.*

After proving these facts the State rested.

Thereupon the defendant, through his counsel, offered in evidence—

1. The certificate of incorporation of the Monmouth Park Association (*pro ut* the same).

2. A certificate of increase of capital stock (*pro ut* the same).

3. Deeds of the lands in possession of the said Association (*pro ut* the same).

4. Receipts for taxes for the year 1884, paid to the State and to the township of Eatontown (*pro ut* the same).

The defendant then offered himself as a witness, and testified that he was authorized by the Monmouth Park Association to engage in the said occupation of "book-making" or betting at the place stated in the previous proofs, which was within the exterior enclosure where the exhibitions of speed and racing took place, and paid a compensation to it for that privilege, and that he did so engage in said "book-making" or betting during the racing season of 1885, July, August and September, three days of each week. The defendant also testified that he had no control or management as to the persons who came in or went out of said room where he was engaged.

It is agreed by said parties, through their counsel, that the above is a correct statement of the facts in evidence in above cause, and that the same be made a part of the record.

CHAS. HAIGHT,
Prosecutor of Pleas.

W. H. VREDENBERGH,
Of Counsel with Defendant.

JUDGE'S CHARGE.

GENTLEMEN OF THE JURY—I regret that I have not had the opportunity to prepare my charge, but as it is desirable to close the case now, I will submit it without delay.

I shall be careful to present the case so that no injustice will be done either side, and in such a way that the legal rights of the defendant can be fully preserved notwithstanding we have no stenographer. The case will be best understood if we direct your attention first to the facts.

These are not disputed, and we can present them in connected statement without prejudice.

It appears from the evidence that at Eatontown, in this county, there is a public race-course known as Monmouth Park.

This race-course is owned and managed by an association known as the Monmouth Park Association.

A question has been raised as to the legal status of this association, but we instruct you that for the purposes of this trial the association may be considered as an incorporated body of this State. Upon the grounds of this race-course are various buildings, one of which is known as the grand stand.

In a lower room of this grand stand, or an extension of the grand stand, is a large room designed and used for the purpose of carrying on book-making, which is nothing more nor less than betting. In this room, during the racing days of the season of 1885, this defendant and various other persons, carried on this book-making or making of bets upon the horse races which were run at the time upon this public race-course. The defendant was authorized to carry on this business of betting by said association, and he and these other persons did carry it on from day to day as a business in this place during the racing season of 1885.

The defendant paid a rent or fee to the association for the privilege of carrying on this betting business in this room in question. The race-course in question and the room wherein this betting was carried on are places of public resort, the public being invited to go there, and every one

having the right to do so upon the payment of the usual admission fee. The place was largely frequented during the whole racing season.

These are the main facts. As we have said, there is no dispute as to these facts, and we have simply to state the law applicable to the case as presented. The law applicable to this case is found in the following extract from the case of the *State* vs. *Williams*, *1 Vroom*, *page 104*:

"Any place of public resort, whether an inn, a dwelling-house, a store-house, or any other building, or garden, is a public nuisance in which illegal practices are habitually carried on."

The defendant insists that the rule of law referred to has no application to this case for two reasons:

First, Because the practice of book-making or betting upon horse races, is not an illegal practice under the laws of this State. The defendant claims that since the enactment of the supplement to the Crimes Act, *P. Law*, *1880*, *p. 195*, betting upon horse races is not prohibited by nor in violation of any statute of this State. As to this claim we instruct you that the provisions of the General Act to prevent gaming, *Rev. p. 458*, were in no wise modified or changed by the enactment of the supplement to the Crimes Act approved March 11, 1880, *P. L. 1880*, *P. 195*, and that betting upon horse races is a practice in contravention of the provisions of this General Act to prevent gaming.

Second, The defendant claims that the practice of betting upon horse races is not a criminal practice and that the illegal practices which constitute a place of public resort a public nuisance must be of a criminal nature.

As to this second point, we instruct you that betting upon horse races, even by persons authorized by an incorporated body of this State, is an illegal practice under the laws of this State, and that any place of public resort wherein the practice of betting upon horse races is carried on habitually and as a business is public nuisance.

The defendant further insists that if the place in question, under the facts presented, was a public nuisance during the racing season of 1885, the defendant cannot be convicted because he had no control of the place.

In crimes of this character the procurer, the accessory before the fact, the aider and the abbettor are all guilty as principals.

The facts show that the defendant was present engaged in carrying on the very business and practices which constituted the place a public nuisance.

He paid a rent or fee for the privilege of carrying on this betting business there, and under that privilege he did carry it on.

These facts establish his participation in and connection with the illegal practices of the place, and he is guilty in the form charged of the offence of maintaining a public nuisance.

There is but one count in the indictment, and your verdict will be in the general form, guilty if you convict, not guilty if you acquit the defendant.

Thereupon the defendant's counsel excepted to that part of the said charge wherein said Court charged the jury as follows:

"Betting upon a horse race is an illegal practice, and the amendment or supplement to the crimes act, approved March 11th, 1880 (*P. L. 1880, p. 195*), in no wise modified or changed the provisions of the general act to prevent gaming." (*Rev. p. 458*).

To which charge the defendant prayed a bill of exceptions, which is allowed by the Court, and is signed and sealed accordingly.

A. WALLING, JR., *P. J.* [L. S.]

Defendant also excepted to that part of said charge wherein said Court charged the jury as follows:

"That betting upon horse races, even by persons authorized by an incorporated body of this State, is an illegal practice under the laws of this State, and that any place of public resort wherein the practice of betting upon horse races is carried on habitually and as a business, is a public nuisance, and they could find him (defendant), under this indictment, guilty of keeping a disorderly house."

To which charge the defendant prayed a bill of exceptions which is allowed by the Court, and is signed and sealed accordingly.

A. WALLING, JR., *P. J.* [L. S.]

Defendant also excepted to that part of said charge wherein said Court charged as follows:

"The facts show that the defendant was present engaged in carrying on the very business and practices which constituted the place a public nuisance. He paid a rent or fee for the privilege of carrying on this betting business there, and under that privilege he did carry it on. These facts establish his participation in and connection with the illegal practices of the place, and he is guilty, in the form charged, of the offence of maintaining a public nuisance."

To which charge the defendant prayed a bill of exceptions, which is allowed by the Court, and is signed and sealed accordingly.

A. WALLING, JR., *P. J.* [L. S.]

ASSIGNMENT OF ERRORS AND JOINDER.

Afterwards, that is to say, on the ' day of June, A. D. eighteen hundred and eighty-six, in the Supreme Court of New Jersey, came the said William McClean, plaintiff in error, by Vredenbergh & Parker, his attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict and judgment aforesaid, there is manifest error in this, to wit:

That the testimony having been concluded and the respective parties having rested their cause, the said Court of Quarter Sessions did charge the said jury that betting upon a horse race is an illegal practice, and the amendment or supplement to the Crimes Act, approved March 11, 1880 (*P. L., 1880, p. 195*), in no wise modified or changed the provisions of the General Act to prevent gaming. (*Rev., p. 458.*)

There is also manifest error in this, that said Court did further charge said jury that betting upon horse races, even by persons authorized by an incorporated body of this State, is an illegal practice under the laws of this State, and that

any place of public resort wherein the practice of betting upon horse races is carried on habitually and as a business, is a public nuisance, and they could find him (defendant), under this indictment, guilty of keeping of disorderly house.

There is also manifest error in this, that said Court did further charge said jury that the facts show that the defendant was present engaged in carrying on the very business and practices which constituted the place a public nuisance. He paid a rent or fee for the privilege of carrying on this betting business there, and under that privilege he did carry it on. These facts establish his participation in and connection with the illegal practices of the place, and he is guilty in the form charged of the offence of maintaining a public nuisance.

There is also manifest error in this, to wit: That by the record aforesaid it appears that the verdict of the jury and the judgment of said Court was against said defendant, and that he, this defendant, was guilty as he stood charged in the indictment, and the judgment of the said Court of Quarter Sessions thereon was that the said defendant pay a fine of three hundred and fifty dollars, and stand committed till the fine and costs be paid, whereas, by the law of the land, the said verdict and judgment ought to have been in favor of said defendant, and that he was not guilty of the crime charged in said indictment.

Therefore, the said plaintiff in error prays that the judgment and proceedings aforesaid, by reason of the errors aforesaid, and of the many errors appearing in the record and proceedings aforesaid, may be reversed, annulled and for nothing holden.

VREDENBERGH & PARKER,
Attorneys for Plaintiff in Error.

And hereupon afterwards, to wit, on the day of June, eighteen hundred and eighty-six, the said State of New Jersey, by Charles Haight, Esquire, its Prosecuting Attorney, comes into court and says that there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, and he prays here that the Court

here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, &c.

CHAS. HAIGHT,
Att'y of Def't in Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM MCCLEAN,
Plaintiff in Error,
vs.
THE STATE OF NEW JERSEY,
Defendant in Error.

WRIT OF ERROR.

[Filed July 6th, 1886.]

New Jersey, to wit: The State of New Jersey to our Justices of our Supreme Court, Greeting:

[SEAL] Because in the record and proceedings, and also in the giving of judgment in a plaint which was in our said Supreme Court, before you, between William McClean, the plaintiff in error therein, and the State of New Jersey, defendant in error therein, on a writ of error issued out of our Supreme Court to the Judges of the Court of General Quarter Sessions of the Peace in and for the County of Monmouth directed, as is said, manifest error hath intervened, to the great damage of the said William McClean, as by his complaint we are informed.

We being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be thereupon given, then you send distinctly and openly, under your seal, the record and proceedings and plaint aforesaid, with all things touching and concerning the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the first Tuesday of July next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be done thereupon, for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the Seventeenth day of June, in the year of our Lord one thousand eight hundred and eighty-six.

HENRY C. KELSEY, *Clerk.*

VREDENBURGH & PARKER, *Attorneys.*

The Answer of the Justices of the Supreme Court of New Jersey within named: The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals in a certain schedule to this writ annexed, as within we are commanded.

M. BEASLEY, *C. J.*

JUDGMENT.

NEW JERSEY SUPREME COURT.

As yet of the June term A. D. eighteen hundred and eighty-six.

Witness, MERCER BEASLEY, ESQUIRE,
Chief Justice,
BENJ. F. LEE,
Clerk.

NEW JERSEY, *ss.*—The State of New Jersey sent to the Judges of the Court of General Quarter Sessions of the Peace of the County of Monmouth, its writ, in these words, to wit:

[The record of the Court of General Quarter Sessions of the Peace and of the Supreme Court of the State of New Jersey, prior to July 1st, 1886, the date of signing of judgment of said Supreme Court, will be found in printed book on pages 1 to 15, inclusive.]

But because our said Supreme Court, now here, are not yet advised what judgment to give of and upon the premises, a day is given to the parties aforesaid, to wit, until the day of June, A. D. eighteen hundred and eighty-six, to hear the judgment of the said Court thereupon.

At which day, before said Court at Trenton, come the parties aforesaid, by their attorneys aforesaid.

Whereupon all and singular the premises being seen, and by the Court now here fully understood, and as well the record and proceedings aforesaid, and the judgment given in form aforesaid, as the matters aforesaid by the said William McClean, above, for error assigned, being diligently examined and inspected, and mature deliberation being thereupon had, it appears to our said Court now here, that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, ~~and that said writ of error should be dismissed~~.

Therefore, it is considered that the judgment aforesaid, in form aforesaid given, be in all things affirmed, and stand in full force and effect, the said causes and matters above for error assigned in anywise notwithstanding.

And it is further considered that the said The State of New Jersey do recover against the said William McClean, as well its damages aforesaid as also dollars and cents for its damages, double costs and charges which it hath sustained and expended by reason of the delay of execution of the judgment aforesaid, on pretense of prosecuting the said writ of error, by our said Supreme Court, now here adjudged to the said The State of New Jersey, and with its assent, according to the form of the statute in such case made and provided.

Judgment signed this first day of July, A. D. eighteen hundred and eighty-six.

M. BEASLEY,
Chief Justice.

I, Benj. F. Lee, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment in above stated cause as the same remains of record in my office.

In testimony whereof, I have hereto set my hand and the seal of said Court, at Trenton, this [SEAL.] second day of July, A. D. eighteen hundred and eighty-six.

BENJ. F. LEE,
Clerk.

ASSIGNMENT OF ERRORS.

Afterwards, that is to say, on the sixth day of July, A.D. eighteen hundred and eighty-six, in the Court of Errors and Appeals of the State of New Jersey, in the last resort in all causes, comes the said William McClean, plaintiff in error, by Vredenburgh and Parker, his attorneys, and says that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and also in giving the verdict and judgment aforesaid, and also in the giving of judgment in the Supreme Court of the State of New Jersey as aforesaid, there is manifest error in this, to wit:

First. Because the said Supreme Court decided that betting upon a horse race is an illegal practice, and the amendment or supplement to the Crimes Act, approved March 11th, 1880 (*P. L. 1880, p. 195*), in nowise modified or changed the provisions of the general act to prevent gaming (*Rev. p. 458*).

Second. Because the said Supreme Court decided that betting upon horse races, even by persons authorized by an incorporated body of this State, is an illegal practice under the laws of this State, and that any place of public resort wherein the practice of betting upon horse races is carried on habitually and as a business, is a public nuisance, and that any person so maintaining a place of public resort in the manner aforesaid, is guilty of keeping a disorderly house.

Third. Because the said Supreme Court decided that the facts showed that the defendant was present engaged in carrying on the very business and practices which constituted the place a public nuisance. That he paid a rent or fee for the privilege of carrying on this betting business there, and under that privilege he did carry it on. And that these facts establish his participation in and connection with the illegal practices of the place, and that he is guilty

in the form charged of the offence of maintaining a public nuisance.

Fourth. Because, by the record aforesaid, it appears that the said Supreme Court by its judgment affirmed the judgment of the Court of General Quarter Sessions of the Peace of the County of Monmouth, against said defendant, which said judgment was that the said defendant was guilty as he stood charged in the indictment, and that said defendant pay a fine of three hundred and fifty dollars, and stand committed until the fine and costs be paid, whereas, by the law of the land, the said judgment of said Court of General Quarter Sessions of the Peace should have been reversed.

~~*Fifth.*~~ Because, the testimony having been concluded and the respective parties having rested their cause, the said Court of General Quarter Sessions of the Peace did charge the jury that "betting upon horse races, even by persons authorized by an incorporated body of this State, is an illegal practice under the laws of this State, and that any place of public resort wherein the practice of betting upon horse races is carried on habitually and as a business, is a public nuisance, and they could find him (defendant), under this indictment, guilty of keeping a disorderly house," to which proposition so charged counsel for defendant was allowed an exception, and the said Supreme Court refused to reverse on said exception.

~~*Sixth.*~~ Because the said Court of General Quarter Sessions of the Peace did further charge said jury that the facts show that the defendant was present engaged in carrying on the very business and practices which constituted the place a public nuisance. He paid a rent or fee for the privilege of carrying on this betting business there, and under that privilege he did carry it on. These facts establish his participation in and connection with the illegal practices of the place, and he is guilty in the form charged of the offense of maintaining a public nuisance, to which proposition so charged, counsel for the defendant was allowed an excep-

tion, and the said Supreme Court refused to reverse on said exception.

Eighth.

~~Seventh~~. Because that by the record aforesaid, it appears that the verdict of the jury and the judgment of said Court of General Quarter Sessions of the Peace was against said defendant, and that he (this defendant) was guilty as he stood charged in the indictment, and the judgment of said Court of Quarter Sessions was that the said defendant pay a fine of three hundred and fifty dollars, and stand committed till the fine and costs be paid, whereas, by the law of the land, the said verdict and judgment ought to have been in favor of said defendant, and that he was not guilty of the crime charged in said indictment.

Ninth.

~~Eighth~~. Because by the judgment of said Courts and the record thereof, the said defendant stands convicted of having, for his own lucre and gain, procured to come together certain persons of evil name and fame and dishonest conversation at unlawful times, as well in the night as in day, at said house, and did unlawfully and wilfully permit such persons there to be and remain drinking, tippling, fighting, gambling, whoring and misbehaving themselves; whereas said defendant should have been acquitted of said charge.

Therefore, the said plaintiff in error prays that the judgment and proceedings aforesaid, by reason of the errors aforesaid, may be reversed, annulled and for nothing holden.

VREDENBURGH & PARKER,
Attorneys for Plaintiff in Error.

JOINDER IN ERROR.

And hereupon afterwards, to wit, on the sixth day of July, eighteen hundred and eighty-six, the said State of New Jersey, by Charles Haight, Esquire, its prosecuting attorney, comes into court and says that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays here that the Court here may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid assigned for error, and that the judgment aforesaid, in the manner aforesaid given, may in all things be affirmed, &c.

CHARLES HAIGHT,
Att'y of Def't in Error.