INDEX

PAGE

Summons 1

Complaint 2

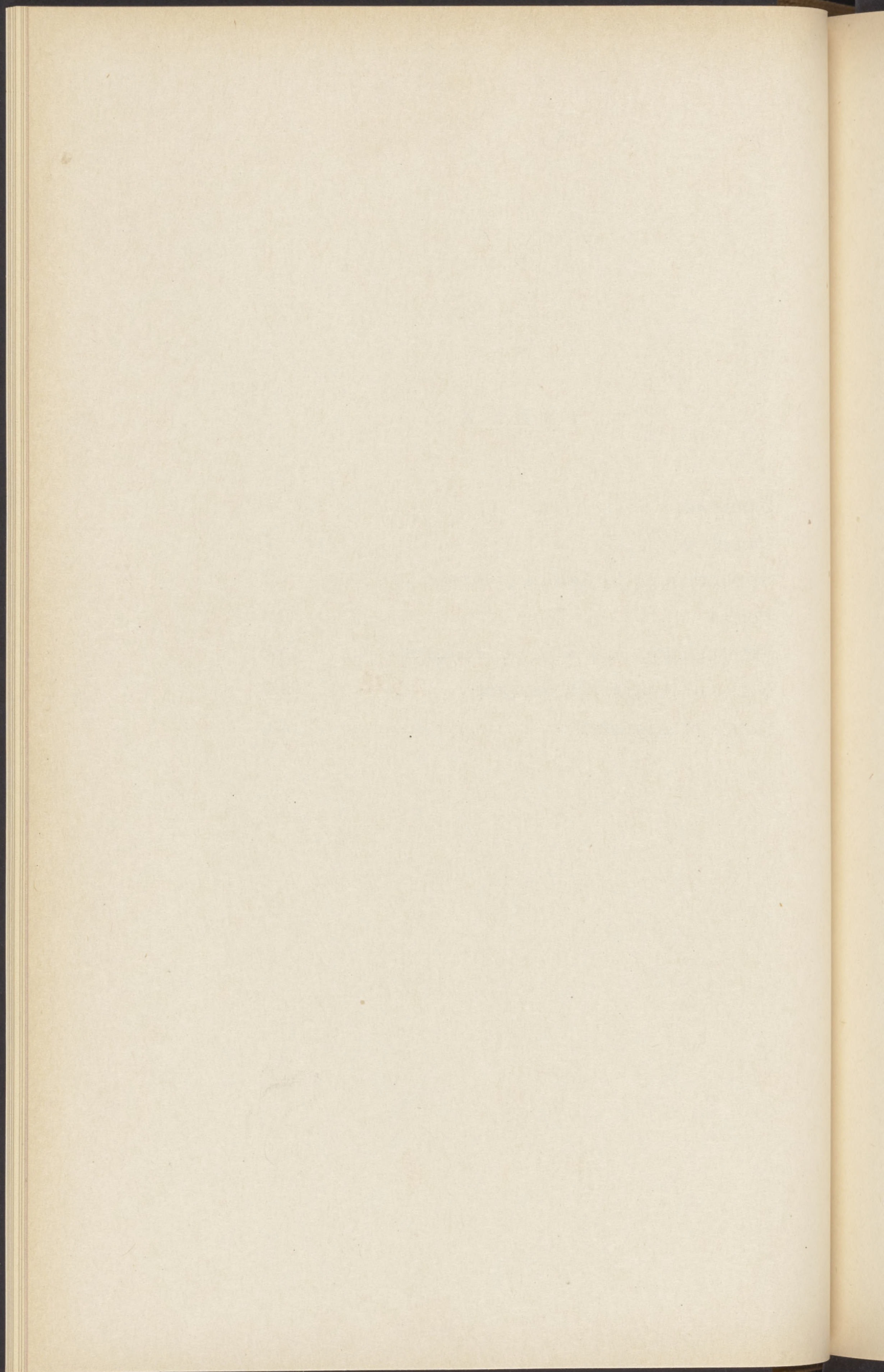
Stipulation As to Agreed Statement of Facts . . 9

Postea 19

Determination and Rule for Judgment 21

Notice of Appeal and Grounds 29

Notice of Argument 31



WRIT OF SUMMONS.

THE STATE OF NEW JERSEY TO LONG BRANCH KENNEL CLUB, INC. (A NEW JERSEY CORP.):

10

(Seal) You are summoned to answer the annexed complaint of Charles D. Hyman in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

Witness, THOMAS J. BROGAN, Chief Justice of the Supreme Court, at Trenton, this 25th day of September, nineteen hundred and thirty-four.

FRED L. BLOODGOOD,
Clerk.

CHARLES D. HYMAN,
Attorney.

30

COMPLAINT.

IN THE

SUPREME COURT OF NEW JERSEY.

MONMOUTH COUNTY.

10

CHARLES D. HYMAN, who sues as well for the COUNTY OF MONMOUTH as for himself, *Plaintiff,* v. LONG BRANCH KENNEL CLUB, INC. (a New Jersey Corp.), *Defendant.*	Action at Law. Complaint.

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Plaintiff, Charles D. Hyman, of the City of Atlantic City, County of Atlantic, State of New Jersey, says that:

30

1. He sues as a common informer under and by virtue of the provision of the "Act to Prevent Gaming," P. L. 1871, page 109, Rev. 1898, page 459, Compiled Statutes 2625, Section 8, as well for the County of Monmouth as for himself.

2. The defendant is Long Branch Kennel Club, Inc., a New Jersey corporation, having its principal office and place of business at Asbury Park, Monmouth County, New Jersey.

3. On September 8, 1934, and each and every day hereafter set forth, or a total of 3 days, to wit: on September 8, 10 and 11, 1934, the defendant did in the City of Long Branch, Monmouth County, New Jersey, publicly erect, set up, open, make and draw a lottery such as is prohibited by the valid and subsisting laws of this State.

10

4. The lottery aforementioned consists of the maintenance, conduct and sale by the defendant of a pool, book or pari-mutuel upon the result of each of a number of greyhound races upon each of said 3 dates at the place aforesaid at which place the defendant maintained and conducted a race-track for the running of greyhounds.

20

5. The method of operation of said lottery, pool, book or pari-mutuel was as follows:

(a) On each of the 3 dates above set forth the defendant did conduct a number of greyhound races at its said track and did print, issue and sell programs setting forth lists of the greyhounds participating in each such race, such program stating, *inter alia,* the name of each greyhound, its post position in the race, and attached thereto a mutuel, pool or book number;

30

(b) prior to each race upon each of the 3 dates above set forth at the aforementioned place the defendant did offer to barter and sell and did barter and sell to each of large numbers of persons cards, receipts or tickets in a lottery pool, book or pari-mutuel upon such race, and did deliver such tickets to the persons purchasing the same, each ticket setting forth the mutuel number of one of the greyhounds in such race, the price of $2.00 or $5.00 paid for same, and in indication of whether the pool ticket is sold and the bet made for the greyhound to win, place (finish second) or show (finish third) in the race;

(c) prior to each race upon each of the 3 dates above set forth at the aforementioned place the defendant did total, add together or pool the total amount paid for tickets upon such race and (after the deduction of a commission of 15% and the odd cents of all redistribution to be made exceeding a sum equal to the next lowest multiple of ten) did divide or redistribute the balance of said lottery, pool, book or pari-mutuel to the persons having purchased mutuel tickets upon the greyhound finishing the said race in the position indicated upon such tickets or better upon presentation of such tickets; persons having purchased tickets in such pool upon greyhounds not finishing such race in the first, second or third positions or in positions behind that indicated upon the ticket not receiving any part or portion of said lottery, pool, book or pari-mutuel nor any other money or thing of value in return for such tickets.

6. The sole determinants as to the amount to be paid or whether anything was to be paid by the defendant to any person purchasing a ticket or tickets in any of the aforementioned lotteries, pools, books or pari-mutuels were the result of the race upon which the lottery was made and the number of lucky win, place and show tickets sold therein.

10

7. On each of the said 3 dates, upon each race, at the place aforementioned, the defendant did sell the said tickets and receive the money therefor in consideration of its implied agreement to repay a sum of money determined as hereinbefore set forth to the purchasers thereof if any ticket or tickets in such lottery, pool, book or pari-mutuel should prove fortunate and the defendant did, upon the event of each race, pay over and redistribute each of the said lotteries or pools as hereinbefore set forth. 20

8. The acts of the defendant aforementioned upon each of the 3 said dates were prohibited by the valid and subsisting laws of this State, to wit:

Constitution as amended 1897, Article IV, Section VII, Sub-sec. 2:

> "No lottery shall be authorized by the Legislature or otherwise in this State, and no ticket in any lottery shall be bought or sold within this state, nor shall pool-selling, book-making 30 or gambling of any kind be authorized or allowed within this state, nor shall any gambling device, practice or game of chance now prohibited by law be legalized, or the remedy, penalty or punishment now provided therefor be in any way diminished."

"An Act for the Punishment of Crimes," P. L. 1898, page 809, Compiled Statutes 1764, Section 57:

"Any person who shall give, barter, sell or otherwise dispose of, or offer to give, barter, sell or otherwise dispose of, any ticket or tickets or any share or interest in any ticket or tickets
10 in any lottery, whether erected, set up, opened or made in this state or elsewhere, or the chance or chances of any such ticket or tickets; or who shall issue any policy or insurance or insure or receive any consideration for insuring for or against the drawing of any ticket or tickets, number or numbers, or any share or interest in any ticket or tickets, in any lottery, or shall receive any money, goods or thing in action, in consideration of any agreement to repay any
20 sum or sums of money, or to deliver any goods or thing in action, if any ticket or tickets, or any share of any ticket or tickets, in any lottery, shall prove fortunate or unfortunate, or shall be drawn or not drawn on any particular day, or in any particular order, or shall promise or agree to pay any sum of money, or deliver any goods or thing in action, or to do or forbear to do anything for the benefit of any other person or persons, upon any event or contingency de-
30 pendent on the drawing of any ticket or tickets, or any share of any ticket or tickets, or upon the drawing of any number or numbers in any lottery, shall be guilty of a misdemeanor."

"An Act for the Punishment of Crimes," P. L. 1898, page 812, Compiled Statutes 1766, Section 65:

"Any person or corporation that shall habitually or otherwise, buy or sell what is commonly known as a pool, or any interest or share in any such pool, or shall make or take what is commonly known as a book, upon the running, pacing or trotting, either within or without this state, of any horse, mare or gelding, or shall conduct the practice commonly known as bookmaking and pool selling, or either of them, or shall keep a place to which persons may resort for engaging in such practice, or either of them, or for betting upon the event of any horse race, or other race or contest, either within or without this state, or for gambling in any form, or hiding, abetting or assisting therein, shall be guilty of a misdemeanor, and punished by a fine of not less than one thousand dollars, nor more than five thousand dollars, and by imprisonment in the state prison for not less than one year nor more than five years; and any corporation of this state convicted of offending against this section, shall be dissolved thereby, and its corporate franchise shall thereby become forfeited and void, without any other proceedings to that end."

"An Act to Prevent Gaming," P. L. 1871, page 109, Rev. 1877, page 458, Compiled Statutes 2625, Section 1:

"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."

9. Upon each of the aforementioned 3 dates defendant became liable to forfeit the sum of $2,000.00 or a total of $6,000.00 for all of such offenses, by virtue of the provision of "An Act to Prevent Gaming," P. L. 1871, page 109, Rev. 1877, page 459, Compiled Statutes 2625, Section 8:

> "No person shall, within this state, publicly
> 10 or privately, erect, set up, open, make or draw any lottery prohibited by the laws of this State; and any person who shall offend in the premises shall forfeit, for such every offense, two thousand dollars, to be recovered by action of debt, with costs, by any person who will sue for the same, in any court of record having cognizance thereof; and all penalties recovered under this section shall be appropriated one-half thereof to the use of the county in which prosecuted,
> 20 and the residue to the informer; and in every action instituted under this section, the inhabitants of the county where the same is instituted shall be competent to serve as jurors, and admitted as witnesses in any such action, notwithstanding their liability to taxation, or being interested."

10. That on September 8, 1934, the Vice-Chancellor, Charles M. Egan, of the State of New Jersey,
30 sitting at Jersey City, New Jersey, entered a decree holding that the Acts of 1934, Chapter 179 and Chapter 56, under which the defendant operated as aforesaid, are unconstitutional and void; and that the Chancellor of the State of New Jersey affixed his signature to this decree.

Plaintiff demands as penalty the total sum of $6,000.00 from the defendant to be appropriated as in the said statute provided.

CHARLES D. HYMAN,
Attorney for Plaintiff.

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STIPULATION AS TO AGREED STATEMENT OF FACTS.

(Filed Nov. 14, 1934.)

IN THE
SUPREME COURT OF NEW JERSEY.
MONMOUTH COUNTY.

20

CHARLES D. HYMAN, who sues as well for the COUNTY OF MONMOUTH as for himself, *Plaintiff,* v. LONG BRANCH KENNEL CLUB, INC. (a New Jersey Corp.), *Defendant.*	No. 87338. Action at Law. Stipulation as to Agreed Statement of Facts.

30

1. This stipulation by and between the parties to the above-entitled cause, by their respective coun-

sel, that the following is an agreed statement of facts and shall constitute a special case without trial to be argued and submitted to this Court upon said facts:

(a) The plaintiff, Charles D. Hyman, is a resident of Atlantic City, Atlantic County and State of New Jersey and the defendant is a New Jersey corporation having its principal office and place of business at Asbury Park, Monmouth County, New Jersey.

(b) Plaintiff sues as a "common informer" under and by virtue of the provisions of "An Act to Prevent Gaming," P. L. 1871, page 109, Rev. 1898, page 459, Compiled Statutes 2625, Section 8, as well for the County of Monmouth as for himself.

(c) On September 10, 1934, and for a total of 2 days thereafter, each and every day the defendant did in the City of Long Branch, Monmouth County, New Jersey, set up a racing track for the running of greyhounds. At such race-track, the defendant operated a pari-mutuel betting system. The method of operation of said pari-mutuel system was as follows:

(d) On each of the 2 dates above set forth the defendant did conduct a number of greyhound races at its said track and did print, issue and sell programs setting forth lists of the greyhounds participating in each such race, such program stating, *inter alia*, the name of each greyhound, its post

position in the race, and attached thereto a mutuel number;

(e) prior to each race upon each of the 2 dates above set forth at the aforementioned place the defendant did offer to barter and sell and did barter and sell to each of large numbers of persons cards, receipts or tickets in a pari-mutuel upon such race, and did deliver such tickets to the persons purchasing the same, each ticket setting forth the mutuel number of one of the greyhounds in such race, the price of $2.00 or $5.00 paid for same, and in indication of whether the mutuel ticket is sold and the bet made for the greyhound to win, place (finish second) or show (finish third) in the race; 10

(f) prior to each race upon each of the 2 dates above set forth at the aforementioned place the defendant did total, add together or pool the total amount paid for tickets upon such race and (after the deduction of a commission of 15% and the odd cents of all redistribution to be made exceeding a sum equal to the lowest multiple of ten) did divide or redistribute the balance of said pari-mutuel to the persons having purchased mutuel tickets upon the greyhound finishing the said race in the position indicated upon such tickets or better upon presentation of such tickets; persons having purchased tickets in such pool upon greyhounds not finishing such race in the first, second or third positions or in positions behind that indicated upon the tickets not receiving any part or portion of said pari-mutuel 20 30

nor any other money or thing of value in return for such tickets.

(g) The sole determinants as to the amount to be paid or whether anything was to be paid by the defendant to any person purchasing a ticket or 10 tickets in any of the aforementioned pari-mutuels were the result of the race upon which the pari-mutuel was made and the number of win, place and show tickets sold therein.

(h) On each of the said 2 dates, upon each race, at the place aforementioned, the defendant did sell the said tickets and receive the money therefor in consideration of its implied agreement to repay a sum of money determined as hereinbefore set forth 20 to the purchasers thereof if any ticket or tickets in such pari-mutuel should prove fortunate and the defendant did, upon the event of each race, pay over and redistribute each of the said pari-mutuels as hereinbefore set forth.

(i) The following section of the Constitution and Statutes of the State of New Jersey exist and pertain to this case and they are set out as follows:

Constitution as amended 1897, Article IV, Section 30 VII, Sub-sec. 2:

> (j) "No lottery shall be authorized by the Legislature or otherwise in this state, and no ticket in any lottery shall be bought or sold within this state, nor shall pool-selling, bookmaking or gambling of any kind be authorized

or allowed within this state, nor shall any gambling device, practice or game of chance now prohibited by law be legalized, or the remedy, penalty or punishment now provided therefor be in any way diminished."

"An Act for the Punishment of Crimes," P. L. 1898, page 809, Compiled Statutes 1764, Section 57: 10

(k) "Any person who shall give, barter, sell or otherwise dispose of, or offer to give, barter, sell or otherwise dispose of, any ticket or tickets or any share or interest in any ticket or tickets in any lottery, whether erected, set up, opened or made in this state or elsewhere, or the chance or chances of any such ticket or tickets; or who shall issue any policy of insurance or insure or receive any consideration for insuring for or 20 against the drawing of any ticket or tickets, number or numbers, or any share or interest in any ticket or tickets, in any lottery, or shall receive any money, goods or thing in action, in consideration of any agreement to repay any sum or sums of money, or to deliver any goods or thing in action, if any ticket or tickets, or any share of any ticket or tickets, in any lottery, shall prove fortunate or unfortunate, or shall be drawn or not drawn on any particular 30 day, or in any particular order, or shall promise or agree to pay any sum of money, or deliver any goods or thing in action, or to do or forbear to do anything for the benefit of any other person or persons, upon any event or contingency

dependent on the drawing of any ticket or tickets, or any share of any ticket or tickets, or upon the drawing of any number or numbers in any lottery, shall be guilty of a misdemeanor."

10 "An Act for the Punishment of Crimes," P. L. 1898, page 812, Compiled Statutes 1766, Section 65:

(1) "Any person or corporation that shall habitually or otherwise, buy or sell what is commonly known as a pool, or any interest or share in any such pool, or shall make or take what is commonly known as a book, upon the running, pacing or trotting, either within or without this state, of any horse, mare or gelding, or shall conduct the practice commonly known
20 as book-making and pool selling, or either of them, or shall keep a place to which persons may resort for engaging in such practice, or either of them, or for betting upon the event of any horse race, or other race or contest, either within or without this state, or for gambling in any form, or hiding, abetting or assisting therein, shall be guilty of a misdemeanor, and punished by a fine of not less than one thousand dollars, nor more than five thousand dol-
30 lars, and by imprisonment in the state prison for not less than one year nor more than five years; and any corporation of this state convicted of offending against this section, shall be dissolved thereby, and its corporate franchise shall thereby become forfeited and void, without any other proceedings to that end."

"An Act to Prevent Gaming," P. L. 1871, page 109, Rev. 1877, page 459, Compiled Statutes 2625, Section 1:

> (m) "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." 10

"An Act to Prevent Gaming," P. L. 1871, page 109, Rev. 1877, page 459, Compiled Statutes 2625, Section 8:

> (n) "No person shall, within this state, publicly or privately, erect, set up, open, make or draw any lottery prohibited by the laws of this state; and any person who shall offend in the premises shall forfeit, for such every offense, 20 two thousand dollars, to be recovered by action of debt, with costs, by any person who will sue for the same, in any court of record having cognizance thereof; and all penalties recovered under this section shall be appropriated one-half thereof to the use of the county in which prosecuted, and the residue to the informer; and in every action instituted under this action, the inhabitants of the county where the same is instituted shall be competent to serve as 30 jurors, and admitted as witnesses in any such action notwithstanding their liability to taxation, or being interested."

Acts of 1934, Chapter 56, "An Act concerning municipalities and authorizing and providing for the raising of emergency revenue therein."

1. "An emergency is hereby deemed and declared to exist in the financial affairs of the several municipalities of this State, and it appearing that increased municipal revenues can be obtained from the leasing of municipal auditoriums and arenas for the holding therein of
10 sporting events, it shall be lawful for the several municipalities, and they are hereby authorized, to lease and permit the use of such buildings, now owned and operated by them, but in no other place, for the conducting and operation of greyhound racing under the pari-mutuel system.

2. The governing body of the municipality is authorized, by resolution, to effectuate the purposes of this act, and such conduct and opera-
20 tion is hereby declared not to be gambling prohibited by law, and the governing body is further authorized and empowered to make such further rules and regulations as shall be necessary.

3. This act shall take effect June first, one thousand nine hundred and thirty-four, and shall expire by limitations on October first, one thousand nine hundred and thirty-six.

30 Acts of 1934, Chapter 179, "An Act concerning greyhound or dog racing and providing for the regulation thereof."

1. "No person or corporation shall hereafter maintain any race track for the racing of greyhounds, whippets or like dogs, nor shall

any person or corporation race greyhounds, whippets or like dogs in public unless such person or corporation shall first obtain a license therefor from the State Racing Commission, which Commission was authorized and created under chapter three hundred and thirty-three of the laws of one thousand nine hundred and thirty-three. 10

2. The annual fee to be paid to the State Racing Commission for such license shall be five hundred dollars ($500.00).

3. The State Racing Commission is hereby empowered to make all necessary rules and regulations for the conduct of racing under the licenses issued by it and may suspend or revoke such licenses, after hearing, for failure to obey such rules and regulations. The Court of 20 Chancery is empowered to enforce the orders of the Commission by injunction or other order.

4. Inasmuch as a financial emergency exist, in this State whereby municipalities and other political subdivisions of the State are unable to collect their taxes and for the purpose of assisting such municipalities and such subdivisions where dog racing may be allowed, the Racing Commission may permit the use of the 30 pari-mutuel system under such terms as they may prescribe and wherein a portion of the profits are to be paid to the municipalitiy for the support thereof.

5. The Commission in issuing a license shall

give preference to the application of a person or corporation which had on or before April twenty-fourth, one thousand nine hundred and thirty-four entered into an agreement with a municipality for dog racing in a municipal auditorium or arena.

10 6. Any person or corporation who shall violate any of the provisions of this act shall be guilty of a misdemeanor.

7. This act shall take effect immediately."

2. Each party waives the right to file further pleadings, motion or rulings prior to judgment upon the statement of facts herein set forth.

3. Each party reserves the right to appeal from 20 the judgment and rulings of this Court upon questions of law in the case.

4. The defendant abandons and withdraws its motion to strike the plaintiff's complaint.

Charles D. Hyman,
Attorney for Plaintiff.
Tumen and Tumen,
Attorneys for Defendant.

Dated: Nov. 13, 1934.

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POSTEA.

(Filed Jan. 2, 1935.)

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY. 10

CHARLES D. HYMAN, who sues as well for the COUNTY OF MONMOUTH as himself, *Plaintiff*, v. LONG BRANCH KENNEL CLUB, INC., a New Jersey corporation, *Defendant*.	Postea.

20

Action at Law. Determination and rule for judgment.

30

For the plaintiff, CHARLES D. HYMAN, *pro se* (MILFORD J. MEYER, of the Philadelphia Bar, of counsel).

For defendant, TUMEN & TUMEN (DAVID H. DAVIS).

LAWRENCE, C. C. J.:

This case was submitted to the Court, at the Monmouth Circuit, without a jury, by consent, on a filed stipulation of facts. It is in form a *qui tam* action, sounding in debt, in which plaintiff as a common informer seeks to recover of defendant, for himself as well as the County of Monmouth, the penalty
10 prescribed by Section 8 of "An Act to prevent gaming" (Rev. 1877, p. 459; C. S. 2625). It is a companion suit to one between the same parties submitted to the Court, without a jury, under a similar state of facts, at the same time, the decision in which controls the present suit as well and for the same reasons. (See Clerk's file No. 87339.)

Judgment may accordingly be entered in favor of defendant and against the plaintiff.

LAWRENCE,
20 *Judge.*

30

DETERMINATION AND RULE FOR JUDGMENT.

(Filed Jan. 2, 1935.)

NEW JERSEY SUPREME COURT.
MONMOUTH COUNTY.

10

CHARLES D. HYMAN, who sues as well for the COUNTY OF MONMOUTH as for himself, *Plaintiff,* v. LONG BRANCH KENNEL CLUB, INC., a New Jersey corporation, *Defendant.*	Postea. (Clerk's file No. 87339.)

20

Action at Law. Determination and rule for judgment.

30

For plaintiff, CHARLES D. HYMAN, *pro se* (MILFORD J. MEYER, of the Philadelphia Bar, of counsel).

For defendant, TUMEN & TUMEN (DAVID H. DAVIS).

Lawrence, C. C. J.:

This case was submitted to the Court, at the Monmouth Circuit, without a jury, by consent, on a stipulation of facts. It is in form a *qui tam* action, sounding in debt, in which plaintiff as a common informer seeks to recover of defendant, for himself as well as the County of Monmouth, the penalty
10 prescribed by Section Eight of "An Act to prevent gaming" (Rev. 1877, p. 459; C. S. 2625), which as pertinent reads as follows:

> (n) "No person shall within this state, publicly or privately, erect, set up, open, make or draw any lottery prohibited by the laws of this state; and any person who shall offend in the premises shall forfeit for every such offense two thousand dollars to be recovered by action of debt, with costs, by any person who will sue
> 20 for the same, in any court of record having cognizance thereof, and all penalties recovered under this section shall be appropriated one-half to the use of the county in which the action or actions for the recovery thereof shall have been prosecuted, and the residue to the informer * * *."

Constitutional and statutory provisions pleaded as existing and as pertaining and applicable to the
30 case include: Article IV, Section VII, Sub-sec. 2, of the State Constitution, as amended in 1897:

> (j) "No lottery shall be authorized by the Legislature or otherwise in this state, and no ticket in any lottery shall be bought or sold within this state, nor shall pool-selling, book-

making or gambling of any kind be authorized or allowed within this state, nor shall any gambling device, practice or game of chance now prohibited by law be legalized, or the remedy, penalty or punishment now provided therefor be in any way diminished,"

also Section One of the Act to prevent gaming, *supra*: 10

(m) "That all wagers, bets or stakes made to depend upon any race or game, or upon gaming by lot or chance, or upon any lot, chance casualty, or unknown or contingent event, shall be unlawful";

and Sections 57 and 65 of "An Act for the punishment of crimes," P. L. 1898, pages 809, 812; C. S. 1764, 1766, prohibiting lotteries and pool selling, declaring them to be misdemeanors and providing punishment therefor. 20

The stipulation of facts recites that on July 31, 1934, and for a total of thirty-eight days thereafter, defendant did in the City of Long Branch, in Monmouth County, set up and maintain a racing track for the running of greyhounds and did there operate a pari-mutuel betting system, the method of which was as follows: on each of the dates in question, defendant conducted a number of greyhound races 30 at its track, and did print, issue and sell programs setting forth lists of the greyhounds participating in each race, the name of the dog being given, its "post" position in the race and attached thereto a mutuel number; that prior to each race on the dates

mentioned, defendant did offer, barter and sell to each of a large number of persons cards, receipts or ticket in a pari-mutuel upon such race and delivered such tickets to persons purchasing them, each ticket setting forth the mutuel number of one of the greyhounds in a race, the price of $2 or $5 paid for such ticket, and an indication of whether
10 the ticket was sold and the bet made for the greyhound to "win, place (finish second) or show (finish third)" in the race.

The stipulation further recites that defendant did then total upon each race, or add together and pool, the amount paid for tickets, and (after deducting a commission of 15% and the odd cents of all redistribution to be made exceeding a sum equal to the lowest multiple of ten) did divide or redistribute the balance of said pari-mutuel to the persons having
20 purchased tickets upon the greyhound finishing the race in the position indicated upon such tickets, or to the bettor, upon presentation of such tickets; persons having purchased tickets in such pool upon greyhounds not finishing the race in first, second or third positions, or in positions behind that indicated on the ticket, not receiving any part or portion of the pari-mutuel, nor any other money or thing of value in return for such tickets. The sole determinant as to the amount to be paid, or whether
30 anything was to be paid by defendant to any person purchasing a ticket in any of the pari-mutuels was the result of the race upon which the bet was made and the number of the "win, place or show" tickets sold therein.

It may be said in passing that the Supreme Court

in State v. Lovell, 39 N. J. L. 458, 463, held that a system of betting such as that set forth in the stipulation is within the category of a lottery, so that it would appear that defendant carried on and conducted a lottery in violation of Section Eight of the Gaming Act, as cited, and subjected itself to the penalties therein provided, unless permitted to do so or protected by certain Acts of the Legislature 10 passed in the sessions of 1933 and 1934. And this is its defense.

It pleads the Act entitled, "An Act to repeal Section Eight of an Act entitled 'An Act to prevent gaming' (Revision of 1877), approved March twenty-seven, one thousand eight hundred and seventy-four," P. L. 1933, p. 1093, Chap. 391, which repealer relates to the section under which the present suit is brought; and Chapters 56 and 179 of the Laws of 1934, which purport to permit the 20 leasing of public buildings and other places in which may be conducted and operated greyhound racing under the pari-mutuel system, and the licensing of persons or corporations by the State Racing Commission to operate and maintain tracks therefor and to permit the use of the pari-mutuel system of betting, which was declared thereby not to be gambling prohibited by law.

Defendant contends that its conduct was under legislative sanction, therefore, and since the stat- 30 utes in question had not been declared unconstitutional by the court of last resort at the time, it cannot be subjected to the penalty provided by Section Eight of the Gaming Act, which section had been in terms repealed. In other words, it rests

its case on Lang v. Bayonne, 74 N. J. L. 455, where it was said that "Every law of the Legislature, however repugnant to the Constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the bar of private judgment, and, if thought unconstitutional, resisted, but must be received and obeyed as, to all 10 intents and purposes, law until questioned and set aside by the courts"; and (at page 459) it was pointed out that cases to the contrary fail to recognize the right of the citizen, which is to accept the law as it is written, and not to be required to determine its validity, since the latter is no more the function of the citizen than is the making of the law; also Texas Company v. The State of Arizona (254 Pac.), 53 A. L. R. 258, in which the question as to whether a citizen is liable for a penalty be- 20 cause he has in good faith followed the provisions of a law which on its face was duly made, when those parts under which he acted are afterwards held to be unconstitutional, was answered in the negative. Likewise Overpeck Land Corp. v. Ridgefield Park, 104 N. J. L. 402, 404.

In behalf of plaintiff, it was argued, however, that the principle enunciated in Lang v. Bayonne, *supra,* involved a question of public policy relating to the administrative acts of *de facto* officers in municipal 30 government, the statutory authority under which they had acted having thereafter been declared unconstitutional; while here the rule is not applicable in the sense in which it was there applied, in that defendant claims to have had the right to engage in conduct inhibited by a provision of the funda-

mental law of the State under legislative permission in direct conflict with it.

It has been said that the granting of a right or privilege to individuals, under an obviously unconstitutional act, affords no protection to those who use or exercise it, as this does not embrace solely an administrative or public function, performed under invalid legislation, which public policy requires 10 should be sanctioned or approved by judicial action when brought in question. In Norton v. County of Shelby, 118 U. S. 425, there is the expression that "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." See also Chicago I. & R. Co. v. Hackett, 228 U. S. 559; and Cf. Flaucher v. Camden, 56 N. J. L. 244, overruled in Lang v. Bayonne (p. 463). 20

It is apparent that these decisions and those in the cases cited by counsel for defendant, especially in Lang v. Bayonne, in our own court of last resort, are not in harmony, and while it is argued that the latter should not be regarded as applicable to the present litigation, it is not so clear that this is so, in view of its criticism of Norton v. County of Shelby and Flaucher v. Camden. In any event, until the Court of Errors and Appeals so limits its application, which it has not yet done, the trial 30 Court does not feel at liberty to do so, for this reason: "The interpretation given to a statute or constitutional provision by a court of last resort is binding on all departments of the government, including the Legislature; and a decision by such a

court that a statute is unconstitutional has the effect of rendering such statute null and void from the date of its enactment, and not only from the date on which it is judicially declared unconstitutional. But a decision that a statute is unconstitutional, to be effective, must be distinct and positive. And if a decision declaring a statute unconstitutional is
10 based on stipulated facts, the decision does not wipe the act from the books, but merely denies its efficacy as to the party before the Court who has admitted the existence of a state of facts as to which in the opinion of the Court the statute is unconstitutional" (12 C. J., 800, Sec. 228); but where, as here, recovery is sought for the violation of a penal statute, in a *qui tam* action, by one who does not represent himself alone, and a doubt, arising on constitutional grounds, exists as to whether the violation of such
20 statute has been sufficiently shown to justify the imposition of the penalty, it would appear to be the better practice to deny a recovery. This conclusion is reached in view of the holding and the discussion germane to the present suit in Lang v. Bayonne, *supra*. Judgment may accordingly be entered in favor of defendant and against plaintiff.

LAWRENCE,
Judge.

30

NOTICE OF APPEAL AND GROUNDS.

(Filed Jan. 5, 1935.)

IN THE
SUPREME COURT OF NEW JERSEY.
MONMOUTH COUNTY.

10

CHARLES D. HYMAN, who sues as well for the COUNTY OF MONMOUTH as for himself, *Plaintiff,* v. LONG BRANCH KENNEL CLUB, INC. (a New Jersey Corporation), *Defendant.*	Action at Law. Notice of Appeal and Grounds. No. 87338.

20

To Tumen & Tumen, Esquires, Attorneys for Defendant:

30

Take notice that the plaintiff in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the New Jersey Supreme Court erred in entering judgment for the defendant.

2. Because the New Jersey Supreme Court erred in determining that judgment should be entered in favor of defendant and against plaintiff.

10 3. Because the New Jersey Supreme Court erred in determining that Chapters 179 and 56 of the Laws of 1934 absolved the defendant of liability for the penalties alleged in the complaint.

4. Because the New Jersey Supreme Court erred in not determining that Chapters 179 and 56 of the Laws of 1934 are unconstitutional.

5. Because the New Jersey Supreme Court erred in not determining that the decision of the Chancellor in the case of The New Jersey Racing Commission v. Atlantic Kennel Club removed any immunity of the defendant for violation of the gaming statutes subsequent thereto.

20

CHARLES D. HYMAN,
Attorney pro Plaintiff.
ALEXANDER BLATT,
Of Counsel.

Dated: Jan. 4, 1935.

30

[ENDORSED]

Service of a copy of the within notice acknowledged this 4th day of January, 1935.

Tumen & Tumen.

NOTICE OF ARGUMENT.

(Filed Jan. 15, 1935.)

IN THE
COURT OF ERRORS AND APPEALS
OF NEW JERSEY. 10

Between CHARLES D. HYMAN, who sues as well for the COUNTY OF MONMOUTH as for himself, *Plaintiff-Appellant,* and LONG BRANCH KENNEL CLUB, INC. (a New Jersey Corp.), *Defendant-Respondent.*	Notice of Argument.

20

Sirs:

Take notice that the argument of the appeal in the above-entitled cause will be brought on at the next term of the Court of Errors and Appeals, to be held at the State House, at Trenton, on the 5th day of February, 1935, at the hour of eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard. 30

CHARLES D. HYMAN,
ALEXANDER BLATT,
Solicitors for and of Counsel with Plaintiff-Appellant.

Dated: January 14th, 1935.
To Tumen & Tumen, Esquires, Attorneys for Defendant.

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10 [Endorsed]

Service of a copy of the within notice acknowledged this 11th day of January, 1935.

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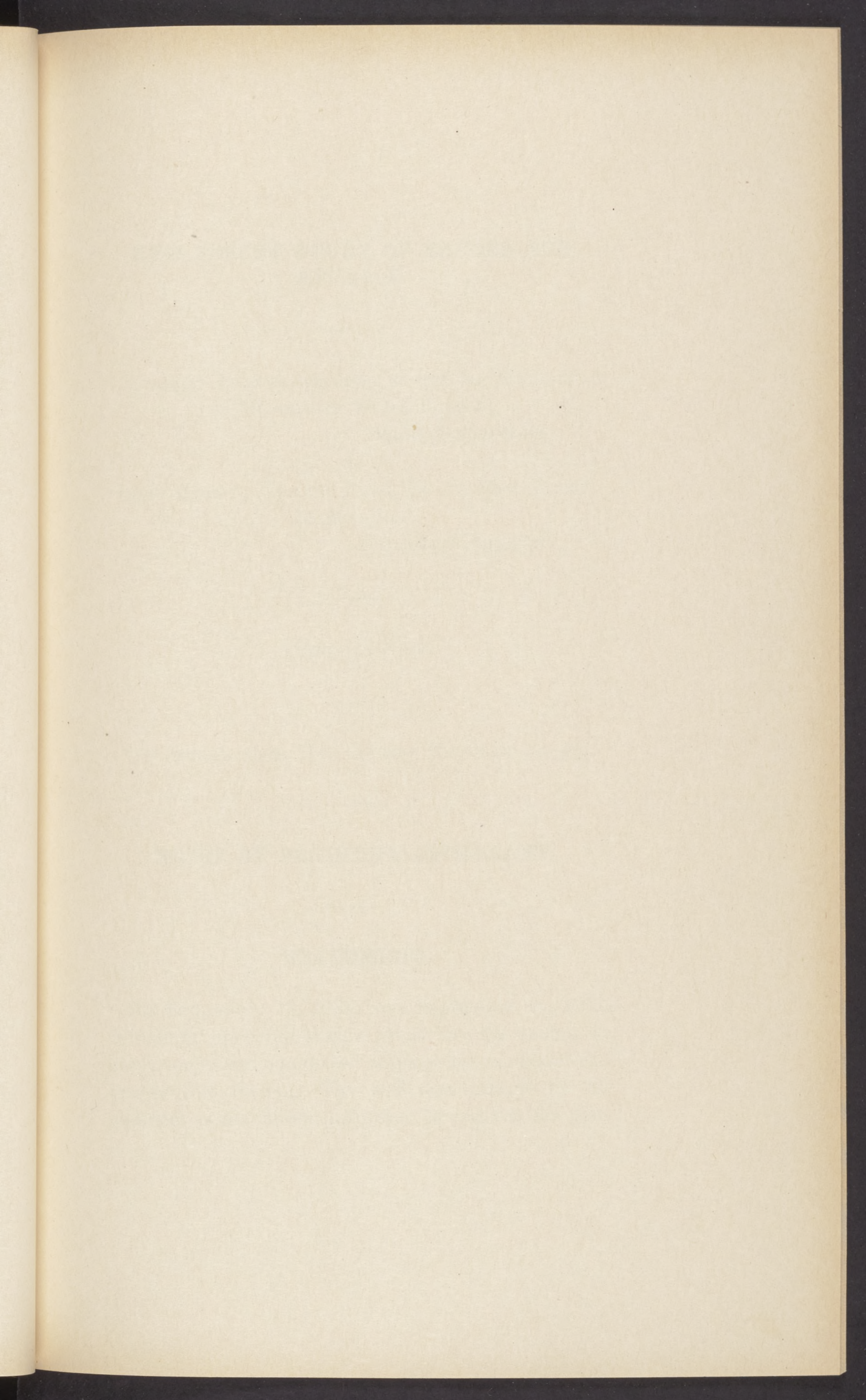
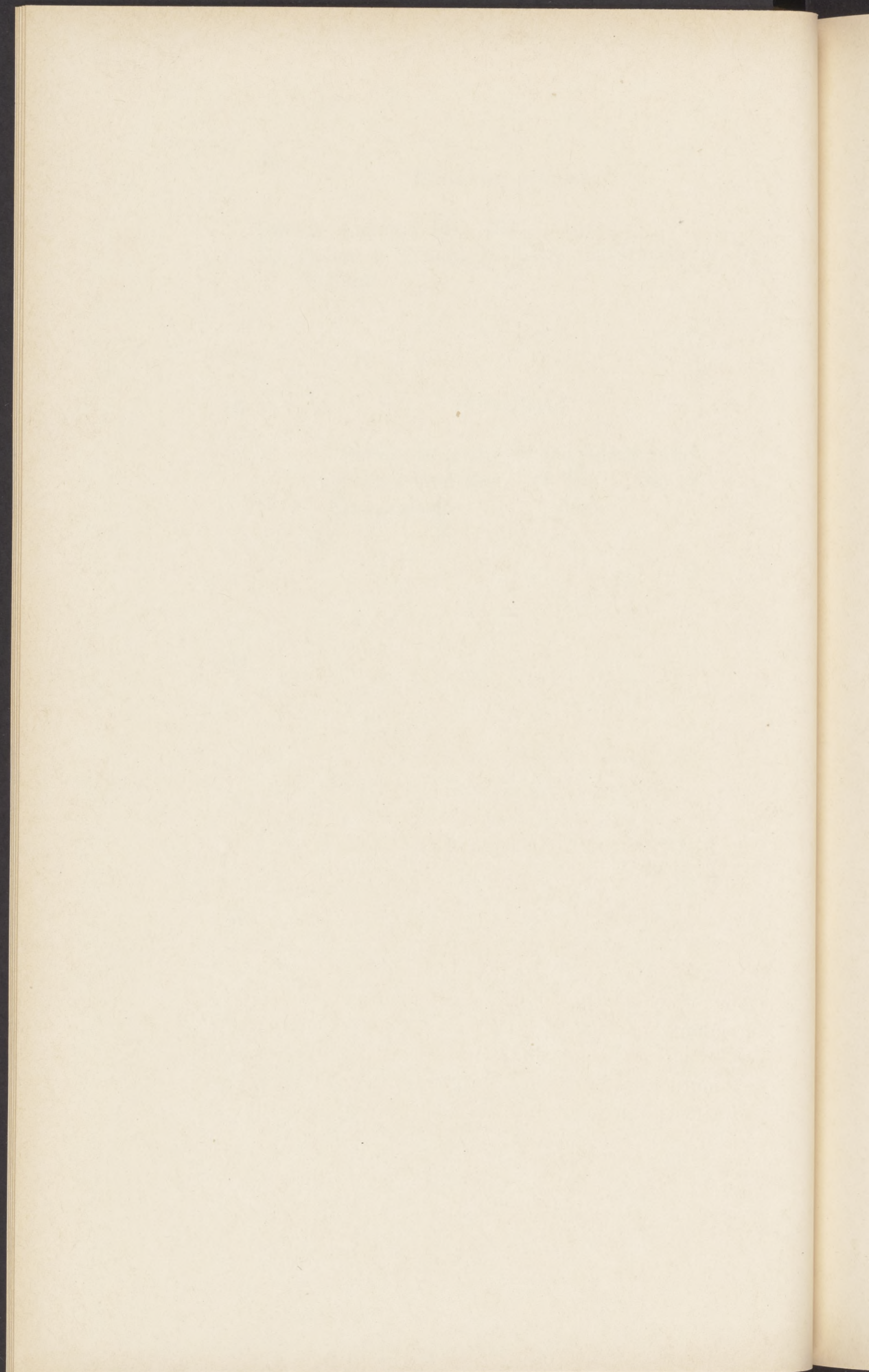




NEW JERSEY COURT OF ERRORS AND APPEALS.

Charles D. Hyman, who sues as well for the County of Monmouth as for himself,

Plaintiff-Appellant,

v.

Long Branch Kennel Club, Inc., a New Jersey corporation,

Defendant-Appellee.

Action at Law.

On Appeal from New Jersey Supreme Court.

BRIEF OF PLAINTIFF-APPELLANT.

STATEMENT.

On September 10, 1934, and September 11, 1934, defendant operated a race track for the racing of greyhounds and conducted betting thereat under the pari-mutuel system. This suit was brought by the plaintiff as a common informer to recover the pen-

alties imposed by Section 8 of the Gaming Statute. The defendant claims immunity under color of the 1934 Acts of Legislature, Chapters 56 and 179. The plaintiff claims these Acts to be unconstitutional, and so heretofore declared; *The State Racing Commission v. Atlantic Kennel Club, et al.* (not reported).

The parties stipulated the relevant facts and submitted the case for decision without trial to the Circuit Court Judge of the county wherein the venue was laid, sitting as a Supreme Court Commissioner (State of Case, page 9). The said Commissioner in an opinion filed entered judgment in favor of the defendant and against the plaintiff (State of Case, page 19).

The decision of the Commissioner follows a more comprehensive opinion filed by him in a companion case between the same parties (State of Case, page 21).

The plaintiff assigns (State of Case, page 29) that the 1934 Acts of Legislature, Chapters 56 and 179, are unconstitutional and that they provide no immunity to the defendant. It therefore becomes the duty of this Court to determine whether the said Acts of Legislature are consistent with the Constitution of the State of New Jersey and whether they provided immunity for the acts of the defendant, and if not, then to reverse the judgment of the Supreme Court and enter judgment for the plaintiff and against the defendant.

AUTHORITIES AND ARGUMENT.

All of the grounds of appeal urged here may well be considered together. Each relates to a phase of the same problem, the vital points of which are considered *seriatim.*

1. Defendant Conducted a Lottery.

No extensive consideration of the business of the defendant need be given. The operation of the pari-mutuel system, otherwise known as the "French Pool," has been judicially considered and held to be a lottery within the meaning of the statutes prohibiting such acts:

State v. Lovell, 39 N. J. Law, 458, 463.

2. The Lottery Was Illegal.

The Constitution, as amended in 1897, Article IV, Section 7, paragraph 2, provides:

> "No lottery shall be authorized by the Legislature or otherwise in this State, and no ticket in any lottery shall be bought or sold within this State, * * * "

The statutes in force are the following:

(1) "An Act for the Punishment of Crimes," P. L. 1898, page 809, Compiled Statutes 1764, Sec-

tion 57; concerning the sale of lottery tickets (State of Case, page 6).

(2) "An Act for the Punishment of Crimes," P. L. 1898, page 812, Compiled Statutes 1766, Section 65; concerning book-making, pool-selling and race track gambling (State of Case, page 7).

(3) "An Act to Prevent Gambling," P. L. 1871, Rev. 1877, page 458, Compiled Statutes 2623, Section 1; concerning betting (State of Case, page 7).

There can be no question that the acts of the defendant were in direct violation of each of the quoted statutes.

3. The Gaming Law Imposes the Penalty.

The provision of the Act of the Legislature by virtue of which this action is brought is

"An Act to Prevent Gaming," P. L. 1871, page 109, Rev. 1877, page 459, Compiled Statutes 2625, Section 8 (State of Case, page 8):

> "No person shall, within this State, publicly or privately, erect, set up, open, make or draw any lottery prohibited by the laws of this State; and any person who shall offend in the premises shall forfeit, for every such offense, two thousand dollars * * * "

The language of this Act is too plain to admit of doubt that, if it was in effect when the defendant operated, the penalties sued for were incurred.

4. The Law is Still in Force.

By an Act passed September 5, 1933, Chapter 391, the Legislature attempted to repeal Section 8 of the Gaming Act, *supra,* but that the repealer is unconstitutional and void is hardly open to question. It was so declared by the Court of Common Pleas of Union County on November 20, 1933, in

Silberman v. Skouras Theatres Corp., 11 Misc. 907, 169 A. 170,

a decision from which no appeal was ever taken.

Although not a binding precedent upon this Court, the cited decision so fully discusses the subject that little could be gained by enlarging upon it. The learned Common Pleas Judge clearly indicates that Section 8 provides a remedy, a punishment and a penalty which the Legislature cannot diminish.

5. The Racing Acts of 1934 are Unconstitutional.

The legislative Acts by virtue of which the defendant claims color of authority for its violations are

"An Act concerning municipalities and authorizing and providing for the raising of emergency revenue therein," approved March 27, 1934, being Chapter 56, P. L. 1934 (State of Case, page 15), and

"An Act concerning greyhound or dog racing and providing for the regulation thereof," approved May 8, 1934, being Chapter 179, P. L. 1934 (State of Case, page 16).

In the passage of these Acts the Legislature made the gesture of declaring the use of the "pari-mutuel" system of betting at dog races not to be "gambling prohibited by law."

In so doing it attempted to justify an admittedly void statute by suggesting the great good it would do to municipalities in distress. Even the worthy but unlawful object of the statute has failed. The small rentals received by the municipalities multiplied tens and hundreds of times could not approximate the untold loss suffered by storekeepers, merchants, hotel keepers and amusement concerns because of the race tracks during the past summer. The profits of the tracks have gone to the kennel club operators. The crowning ignominy of the situation was the refusal of track operators to pay taxes to the State because of the unconstitutionality of the statutes under which they operated (*The State Racing Commission case, supra*).

That the Acts in question in this respect clearly violated the express provision of the above-quoted paragraph of the Constitution is beyond cavil. The "people's document" needs no interpretation where it is clear and unambiguous. No finer exposition of the principle of constitutional limitation involved can be found than in

State v. Wrightson, 56 N. J. Law, 126, 206,

quoting from

1 *Cooley, Constitutional Limitations,* 84, 85.

At page 208, Justice Depue says:

"Where no ambiguity or doubt appears in

the law, the same rule obtains here as in other cases that the Court shall confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the lawmakers."

And again at pages 211, 212:

"Nor are we without precedents directly affirming the domination of the Constitution, notwithstanding long usage and practical construction to the contrary and the most conclusive arguments *ab inconvenienti.* I refer to Dred Scott v. Sanford, 19 How. 393, and Hepburn v. Griswold, 8 Wall. 603. In the first of these cases the federal court, in 1856, decided that the eighth section of an Act of Congress passed in 1820, and known as the Missouri Compromise Act, which prohibited slavery in all that part of the territory ceded by France under the name of Louisiana, lying north of the line of thirty-six degrees and thirty minutes, not included within the limits of Missouri, was unconstitutional and void, notwithstanding the fact that the Act was designed as a final settlement of the agitation of the slavery question, and a State had been admitted into the Union under its provisions, and that Congress, from its first session down to the year 1848, had repeatedly exercised the power which was denied by that decision, and notwithstanding the doctrine of a

practical construction continued through a long series of years, was invoked by the dissentient Judges. The keynote of that decision is expressed by the Chief Justice (at p. 426) in these words: 'No one, we presume, supposes that any change in public opinion or feeling should induce the Court to give the words of the Constitution a more liberal construction than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended, but while it remains unaltered it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the government and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.' Whatever criticisms were made upon the result of this decision or its policy, in the discussions that followed its promulgation, the soundness of the

doctrine of the supremacy of the Constitution wherever invoked, so forcibly expressed by the Chief Justice, has never been denied or impugned.

"In Hepburn v. Griswold, Acts of Congress passed in 1862 and 1863, making treasury notes of the United States a legal tender for debts, were in 1869 declared to be unconstitutional. This decision was subsequently overruled in the Legal Tender Cases, 12 Wall. 457. But in both of these cases the Court rested its opinion on the language in which the constitutional grant of power to Congress was expressed. In the decision of the latter case, Mr. Justice Strong, in delivering the opinion of the Court, refers to the situation of the country at the time these Acts were passed and the 'great business derangement, widespread distress and rank injustice' that would result if these Acts were held to be invalid; but he adds: 'The consequences of which we have spoken, serious as they are, must be accepted if there is a clear incompatibility between the Constitution and the Legal Tender Acts.' "

> *In re Hague,* 105 N. J. Eq. 134, 139 (104 N. J. Eq. 31, 49):

"The Constitution should be strictly adhered to. Departure therefrom at the whim of partisans would tend to circumvent the interdicts and requirements of that glorious instrument upon which the public weal and the liberty and security of our citizens is founded."

The history of the adoption of the Amendment of 1897 is too well known to be here rehearsed. Suffice it to note that it is dwelt with at length in

Kull: A History of New Jersey, Vol. III;

And in

Lee: New Jersey as a Colony and State, Chapter 10.

It is evident that "history repeats itself" and that the past generation, vividly oppressed with the corruption of Guttenberg and Gloucester, expressed their sovereign power in this amendment to prevent the recurrence of similar events; the very acts of the defendant that we here question. **Today it is of prime concern to the great majority of the people of this great State to have their rights of sovereignty reaffirmed by this, their highest court. in the declaration that the Acts of 1934 are unconstitutional and void.**

6. The Defendant Has No Claim for Immunity.

The defendant herein does not seriously attempt to uphold the constitutionality of the Acts of 1934. Rather, it relies upon a claim for immunity by virtue of the color of authority which it claims those Acts of Legislature lent to its operations,

Lang v. Bayonne, 74 N. J. Law, 455:

"Every law of the Legislature, however repugnant to the Constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned at the

> bar of private judgment, and, if thought unconstitutional, resisted, but must be received and obeyed as to all intents and purposes law until questioned in and set aside by the courts. This principle is essential to the very existence of order in society."

Under the language of the cited decision it is the burden of the defendant not only to show the existence of a statute possibly relevant to his action but that the statute (1) sets forth a rule of law which he has followed and in doing so has not violated any other valid and subsisting law and (2) that the statute has not been "set aside by the courts." We respectfully submit that it is not immune for its violations of the law because

(a) The Acts of 1934 do not Authorize Lotteries.

The purport of the Acts of 1934 was to declare that the use of the pari-mutuel system at dog tracks was not "gambling prohibited by law." In such declaration the legislative intent must be held to be an attempt to repeal such prior Acts as were inconsistent with the terms of its enactments although no specific provision for repeal is made.

It is the established principle of law that a repealing Act must, insofar as possible, be construed as cumulative with or supplementary to, existing statutes.

> "Implied repealers are not favored in the law. The question is one of legislative intent

in each case. When the later statute is not necessarily repugnant to the former, but on a fair construction may be treated as cumulative or supplementary, so that both Acts may stand together, the intent to repeal is not implied from the fact that the later legislative provision differs from the earlier.''

Hotel Registry Realty Corp. v. Stafford, 70 N. J. Law, 528 (p. 536);
Winne v. Cassale, 100 N. J. Law, 291;
Borquist v. Ferris, 112 N. J. Eq. 557.

The Acts in force when this abortive attempt at repeal was made were Section 65 of the Crimes Act, *supra*; Section 1 of the Gaming Act, *supra,* and Section 57 of the Crimes Act. The first question to be determined, then, is whether the Acts of 1934 lent any color of repeal of these prior enactments. Can any of these sections survive side by side with the Acts of 1934?

It is of primary importance to note that Section 1 of the Gaming Act prohibits ''gaming by lot or chance,'' and that Section 65 of the Crimes Act refers to ''gambling in any form,'' but that Section 57 of the Crimes Act in no way refers to ''gaming or gambling,'' the subject of the repealer. If there be a recognized difference between gaming or gambling as treated in the repealer and lotteries as treated in Section 57 then certainly no color of repeal of this last section can be claimed.

The Constitution itself, in the paragraph under consideration, recognizes the definite distinction between ''gambling'' on the one hand and ''lotteries''

on the other. In separate and distinct clauses it provides for each. "No lottery shall be authorized * * * and no ticket in any lottery shall be bought or sold * * * **nor shall** * * * gambling of any kind be authorized * * * ."

The Legislature also has recognized the clear distinction in its adoption in the Compiled Statutes of two separate sections, 57 dealing with lotteries and 65 dealing with gaming.

The distinction has also been recognized by the Supreme Court in

Dombrowski v. State, 111 N. J. Law 546,

where it is held that (p. 547):

> "Section 57, 58 and 59 * * * treat as high misdemeanors offenses connected with a lottery or lottery policy game. * * * Gaming, betting generally, horse racing for money and so on are mere misdemeanors."

Now had the Legislature of 1934 desired to lend color to the act of conducting a "lottery" in addition to acts prohibited as "gambling," its repealer need merely have said that the use of the pari-mutuel system was "declared to be legal" or that its operation was "declared not to be gambling or a lottery." **But it did not say so. Section 57 could stand side by side with the Acts of 1934 and present no conflict.**

It must be borne in mind that we are here concerned only with a plea of immunity under an unconstitutional Act. Suppose that a Legislature should declare that driving a motor vehicle at 60 miles per hour is reckless driving and a misdemeanor and by

subsequent enactment that the same action is negligence in law. Later it declares that driving 60 miles per hour is "not reckless driving prohibited by law." Does a person then operating a vehicle at 60 miles per hour do so under color or belief that his act is not negligence in law? Has the implied repealer color of repeal of the negligence statute? Certainly it has not.

In passing it may be well to note the defendant's argument in the court below that the abortive repealer of 1933 also lent color of authority to it despite the judicial declaration of its unconstitutionality. In this regard defendant argues that it might rely upon the repealer until the highest appellate court passes upon it.

It is apparent that if this argument carries any weight, its result must be constitutional nullification. It is the duty of an inferior court to declare unconstitutional any Act of Legislature which patently violates the supreme law of the State. It is evident that the more flagrant the violation, the more certain its declaration as unconstitutional by an inferior court; and the more unlikely that such decision would be taken for review to the appellate courts. Were there merit in the defendant's position, the Acts of Legislature most unquestionably violating the Constitution would continue indefinitely to lend color of authority and immunity to all persons despite continual declaration by the inferior courts that they were void and ineffective. The limitation upon its power to save harmless him who follows it is expressed in the *Lang* case, *supra* (page 463):

"In my judgment the same public policy * * * justifies his obedience to every * * * law which the Legislature has seen fit to enact, **until such law has been judicially declared to be invalid.**"

and again (page 460):

"In my opinion the provisions of a solemn act of the Legislature, **so long as it has not received judicial condemnation,** are as binding upon the citizens as is the judgment of a court rendered against him **so long as it remains unreversed.**"

We further respectfully suggest that the repealer of 1933 **could lend no color of authority for defendant's acts for it in no way deals with their legality or illegality.** It purports to affect only a remedy or punishment provided by other statutes which it does not attempt to modify. It is hardly conceivable that defendant's learned counsel will argue that the defendant relied in its actions upon the fact that a penalty (one of two prescribed punishments) for its actions had been repealed although the illegality of its action remained.

(b) The Immunity of the Lang Case is Inapplicable.

Solely for the sake of completeness in this presentation we respectfully suggest that the ruling and decision in

Lang v. Bayonne, 74 N. J. Law 455,

should not be extended to cases such as the instant one. Rather than exhaust the question counsel suggest the following differentia which should be controlling:

1—the Lang case involved a question of public office;

2—the decision is properly founded upon public policy protecting public officers;

3—the decision did not concern, as here, a mandatory and self-executing provision of the Constitution;

4—the decision did not concern a repealing or amending Act of Legislature;

5—its application to all statutes inevitably leads to the opening of an avenue of constitutional nullification by a Legislature bent upon a particular unconstitutional purpose.

It may be of more than passing interest to note also that there is nothing in the Lang decision referring to that class of statutes which permit the doing of voluntary acts otherwise illegal. On the contrary it deals only with statutes which impose affirmative duties and obligations or affirmatively require restraint from doing acts. The distinction is real, for there is no law requiring the individual

to act under a statute which merely permits such action but imposes no penalty for failure to do so.

(c) The 1934 Acts Were Declared Invalid Prior to the Offenses of the Defendant.

On September 8, 1934, the Chancellor of New Jersey entered a decree in the case of

> *The State Racing Commission v. Atlantic Kennel Club, et al.* (not reported, full copy appended to this Brief of Argument)

in which the 1934 Acts in question were declared to be unconstitutional and void. The offenses of the defendant forming the basis of this suit were committed on September 10 and 11, 1934.

IF ANY IMMUNITY EXISTED FOR SIMILAR ACTIONS PRIOR TO THE DECISION OF THE CHANCELLOR, CERTAINLY THAT IMMUNITY WAS REMOVED BY THE EXPRESS AND DIRECT ADJUDICATION THEREIN.

The defendant's sole contention upon this phase of the case in the court below was that the decree in Chancery was invalid. The plaintiff herein is no more concerned with the validity of the decree than the defendant is with the constitutionality of the Acts of 1934. If it was valid (and there can be no question that it is) then the defense falls; if invalid by the same token that defendant claims immunity under color of an invalid statute it cannot claim protection from the mandate of a judicial decision. It is upon the horns of a dilemma. In

this connection one of the principle decisions relied upon by the defendant in the court below is of material interest as supporting the plaintiff's contention:

Lutwin v. State, 97 N. J. Law 67.

The defendant, charged with violation of Section 66 of the Crimes Act, pleaded the repeal of that statute by the Act of 1921 which had been adjudged constitutional by the Supreme Court; that subsequent to his violation the Court of Errors and Appeals adjudged the 1921 Act unconstitutional; but that he acted under color of the repealer and the decision of the Supreme Court. Although declaring that the 1921 Act had not been declared unconstitutional, this Court declared that the citizen could rely upon the Supreme Court decision. The converse of the proposition so stated must be true, namely that any immunity granted by the color of a statute prior to its being declared void must fall when a court of competent jurisdiction declares it to be violative of the supreme law of the land. It does not qualify this statement to suggest that should the decision of that court be reversed acts done violative of its ruling would be immunized for such acts would be directly authorized by the statute finally declared to be valid.

In point of fact it is the judicial decision which has greater effect even than the statute of the legislature. It is consistently held that the effect of judicial decision is not even curbed by the restraint

upon *ex post facto* or retroactive enactments or rulings.

Ross v. Oregon, 227 U. S. 150;
Calder v. Bull, 3 Dallas 386.

Were the ruling of this Court to be contrary to the suggested view, we stand upon the brink of constitutional nullification. No power is given this Court to pass upon the validity of statutes until a proper case presenting the issue is properly brought here. Few of the statutes in force in the State have been reviewed in any court. A few, patently unconstitutional, are so declared by the lower courts; and the more patent the constitutional violation, the less probable an appeal to this Court. In criminal cases immunity under color of an invalid repealing statute is recognized in this State under the doctrine of

Lang v. Bayonne, supra.

Hence conviction of a defendant is impossible unless *nisi prius* refuses to follow *Lang*. But the law provides no right of appeal by the State. The appellate courts, therefore, rarely and then only on anomalous occasions can pass upon the validity of a criminal repealing statute although it may be directly violative of the Constitution. The sole safeguard is the right of the lesser courts to declare statutes unconstitutional and a reasonable rule that immunity under the statute falls with such declaration. Such was the view of this Court in the *Lang* case as we read it.

SUMMARY.

We respectfully submit therefore:

(1) That defendant's acts constituted a lottery prohibited by law;

(2) that it incurred penalties of $4000—imposed by the statute;

(3) that it claims immunity under Acts of Legislature which are unconstitutional;

(4) that it has no valid claim for immunity;

(5) that the judgment of the New Jersey Supreme Court should be reversed and judgment here entered for the plaintiff for the penalties incurred, to wit: $4000—with interest from September 11, 1934.

Respectfully submitted,
CHARLES D. HYMAN,
Attorney Pro Se.
ALEXANDER BLATT,
MILFORD J. MEYER,
Of Counsel with Plaintiff-Appellant.

We hereby certify that cases cited from other than official reports are not reported to date therein.

Charles D. Hyman,
Alexander Blatt,
Milford J. Meyer.

APPENDIX.

DECREE DISMISSING BILL OF COMPLAINT.

(Filed Sept. 8, 1934.)

IN CHANCERY OF NEW JERSEY.

Between THE STATE RACING COMMISSION, *Complainant,* and ATLANTIC KENNEL CLUB, a corporation, and the CITY OF ATLANTIC CITY, a municipal corporation, *Defendants.*	On Bill, &c. Decree Dismissing Bill of Complaint.

This matter coming on to be heard in open Court in the presence of William F. Burke, Esq., of counsel with the complainant, and David Green, Esq., of counsel with the defendant, Atlantic Kennel Club, pursuant to an order to show cause heretofore made herein by this Court on September 6, 1934, and defendant, Atlantic Kennel Club, having moved to dis-

miss the bill of complaint, and the Court having heard the arguments of the respective counsel, and having considered the matter, and the Court being satisfied that the use of the pari-mutuel system constitutes pool-selling, book-making and gambling, and is illegal, and being satisfied that an Act of the Legislature of the State of New Jersey, entitled, "An Act concerning municipalities and authorizing and providing for the raising of emergency revenue therein," approved March 27, 1934, being Chapter 56, P. L. 1934, and *and* Act of the Legislature of the State of New Jersey, entitled, "An Act concerning greyhound or dog racing and providing for the regulation thereof," approved May 8, 1934, being Chapter 179, P. L. 1934, and each of them, are contrary to the provisions of the Constitution of the State of New Jersey, more particularly the provisions of paragraph two, Section seven, Article four thereof, and the Court being satisfied that the said Acts and each of them are unconstitutional and void for the reason that they provide for and attempt to authorize and regulate pool-selling, book-making and gambling at race tracks for the racing of greyhounds, whippets or like dogs, and that because of the illegality of the use of such pari-mutuel system, and because of the unconstitutionality of said Acts and each of them, complainant is not entitled to the relief prayed for.

It is on this seventh day of September, 1934,

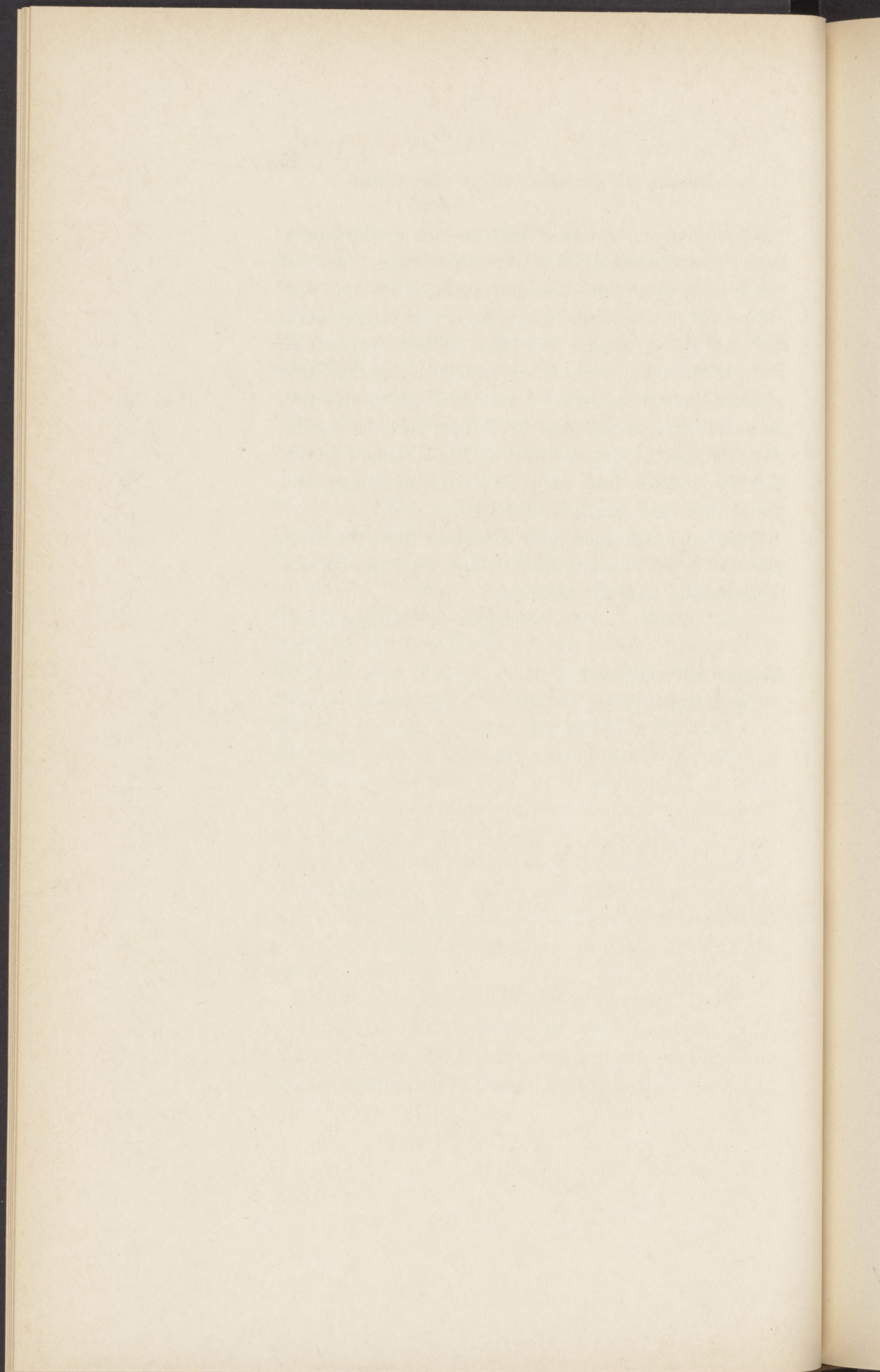
Adjudged and Decreed that the use of the parimutuel system constitutes pool-selling, book-making and gambling and is illegal, and it is further

Adjudged and Decreed that an Act of the Legislature of the State of New Jersey, entitled, "An Act concerning municipalities and authorizing and providing for the raising of emergency revenue therein," approved March 27, 1934, being Chapter 56, P. L. 1934, and an Act of the Legislature of the State of New Jersey, entitled, "An Act concerning greyhound or dog racing and providing for the regulation thereof," approved May 8, 1934, being Chapter 179, P. L. 1934, and each of them, are unconstitutional and void, and it is further

Ordered, Adjudged and Decreed that the complainant's bill of complaint be and the same hereby is dismissed without costs.

Luther A. Campbell,
C.

Respectfully advised,
Charles M. Egan,
V. C.



NEW JERSEY COURT OF ERRORS AND APPEALS

Charles D. Hyman, who sues as well for the
County of Monmouth, as for himself,
Plaintiff-Appellant.

—vs.—

Long Branch Kennel Club, Inc., a New
Jersey corporation,
Defendant-Appellee.

Action at Law

On Appeal from New Jersey Supreme Court.

BRIEF OF DEFENDANT APPELLEE

INTRODUCTION

The plaintiff herein bases his case upon the proposition: first; that the defendant conducted a lottery in violation of the provisions of the Constitution of the State of New Jersey; second; that the racing acts of 1934 (Chapters 56 and 179) are unconstitutional;

and third; that, in any event, the 1934 acts heretofore referred to were declared invalid prior to the offenses of the defendant by reason of the decree of the court of Chancery entered on September 8th, 1934, in the case of

State Racing Commission vs. Atlantic
Kennel Club, et al

The court is respectfully asked to take judicial notice of the circumstances surrounding the above case and the facts concerning the same. Under Chapter 179, the State Racing Commission was given certain powers to regulate the operation of greyhound tracks, including therein, the power to levy taxes, said taxes being set by the Commission as three percent of the gross sum handled by the track. The Atlantic Kennel Club, which had theretofore received a license from the State Racing Commission, and was, by virtue thereof operating a track at Atlantic City, failed to pay the taxes so imposed, and thereupon, the Commission filed its bill in the Court of Chancery against the Kennel Club and the City of Atlantic City, the lessor of the premises upon which the track was so operated, seeking an order restraining the said operation until such taxes were paid. Upon the return day, the defendant, the Atlantic Kennel Club, appeared before Vice Chancellor Egan and denied the jurisdiction of the Court of Chancery to give the relief sought for, on the ground that the said racing acts of 1934 were unconstitutional in that they violated Article 4, Section 7, of the Constitution as amended in 1897. The State Racing Commission, agreed with no argument with the proposition of unconstitutionality and consented to the entry of a decree declaring the said acts unconstitutional.

It is upon this decree, one by stipulation, so to speak, that the plaintiff herein bases its argument that the said acts have been declared invalid.

Brief of Defendant Appellee

The defendant will argue herein— (1) That the said acts are to be given full legal force and credence until declared unconstitutional by a court of proper jurisdiction in a manner distinct and positive, in a proceeding brought for the purpose of testing constitutionality; (2) That the constitutionality of these acts have not as yet been decided in that manner by the courts of this State; and, therefore, (3) That the said acts are still valid and subsisting in the statute books of this State; (4) That the question of constitutionality of these acts is not before the court for determination in the instant matter; (5) That the plaintiff has failed to prove his case by a fair preponderance of the evidence, and finally, therefore, (6) in view of the above, that the learned court below was correct in finding for the defendant.

ARGUMENT

I— The Racing Acts of 1934 Are Still Valid And Subsisting.

It is the recognized doctrine in this State, and indeed one which has been adopted by most jurisdictions, that "Every law of the legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law. It cannot be questioned in the bar of private judgment, and if thought unconstitutional, resisted, but must be received and obeyed as, to all intents and purposes, law until questioned in and set aside by the courts."

Lang vs. Bayonne— 74 N.J.L. 455.

It therefore follows that the defendant was justified in its conduct and could not be penalized for acting in pursuance to the provisions of the said acts, unless and until the said acts were declared unconstitutional in such legal manner as to make the said declaration binding upon the defendant.

The proposition has been stated in another manner in the case of:

Texas Company vs. State of Arizona—
254 Pacific 1060— 53 A.L.R. 258.

"Is a citizen liable for a penalty because he has, in good faith, followed the provision of a law which on its face was duly enacted, when those parts under which he acted are afterwards held to be unconstitutional?" The answer to the qeustion thus propounded is in the negative and the reasoning therein is based upon the opinion of our court in Lang against Bayonne The said doctrine has further been followed in the case of:

State of Iowa vs. O'Neil— 126 N. W. 454—
33 L.R.A. — New Series — 788

wherein it is said that "respect for law, which is the

most cogent force in prompting orderly conduct in a civilized community, is weakened, if men are punished for acts which, according to the general consensus of opinion, they are justified in believing to be morally right and in accordance with the law."

Our own Supreme Court in the case of:

Lutwin, et al vs. State— 97 N.J.L. 67

said "to punish one for doing an act apparently lawful at the time, because he could not correctly forsee the possible judgment at another court, would be akin to methods applied during the times of the Inquisition."

It therefore follows very obviously that the defendant had a clear and unquestioned right, at least until the date of the decree entered in the Court of Chancery, to rely upon the statutes in our books, and to accept the same at face value.

The plaintiff argues that the acts of 1934 do not authorize lotteries, that the defendants' conduct amounted to the operation of a lottery, that a lottery is illegal by reason of being in violation of the Constistution, and that, therefore, the defendant has no claim for immunity. To uphold the plaintiff in this argument would result in the adoption, by the courts of this State, of a doctrine which is pernicious and inimical to the best interests of the State and the citizens thereof, and the creation of a chaotic condition wherein a citizen could obey a statute and rely thereon, only at his peril, because he would be required to determine the validity of each act under which he intended to proceed. Such determination of the validity of statutes is no more the function of the citizen than is the making of the law, as has been stated in the cases above cited.

In the instant case, the plaintiff argues that while the acts of 1934 on their face permitted the use of the

pari-mutual system at greyhound tracks, and declared that the same was not gambling prohibited by law, any such operation at such tracks was illegal and subjected such operators to civil and criminal penalties, because the acts did not speak of lotteries. Clearly, the intent of the legislature was to allow such operation without subjecting the operators to civil or criminal penalties Any other conclusion is a mere quibble on words. It would, indeed, result in an outrageous condition to decide that the legislature adopted these acts apparently plain and obvious on their face, which called for State supervision, for the obtaining of a license from a State agency, and for the payment of taxes to the State, and that as a result of complying with the said acts in the manner provided therein, the said operators were guilty of a commission of a crime. Such reasoning would make the State of New Jersey particeps criminis.

This being so, the Court is faced with the problem of determining the validity and effect of the decree of the Court of Chancery insofar as the same applies to the defendant herein. The plaintiff takes the position that if any immunity existed for similar actions, prior to the decision of the Chancellor, certainly that immunity was removed by the express and direct adjudication therein. It is the contention of the defendant herein that such decree was not an **express** and **direct** adjudication so as to be binding upon the defendant in accordance with the established law and precedent of this State. As the learned Court below has well said in its Determination and Rule for Judgment (State of Case, Page 21, at Pages 27 and 28) "The interpretation given to a statute or constitutional provision by a court of last resort is binding on all departments of the government, including the Legislature; and a decision by such a court that a statute is unconstitutional has the effect of rendering such statute null and void from

the date of its enactment, and not only from the date on which it is judicially declared unconstitutional **But a decision that a statute is unconstitutional, to be effective, must be distinct and positive. And if a decision declaring a statute unconstitutional is based on stipulated facts, the decision does not wipe the act from the books, but merely denies its efficacy as to the party before the Court who has admitted the existence of a state of facts as to which in the opinion of the Court the statute is unconstitutional."** (12 C. J. 800 Section 228).

It is argued, therefore, by the defendant herein, that the proceeding in the Court of Chancery was not such as could result in a distinct and positive decision as to the constitutionality of the acts in question, and that the decree of the Court of Chancery is, for that reason, not binding upon this defendant. The Court is respectfully asked to take judicial notice of the record in the case in which this decree was entered, which will show that the said decree was based on stipulated facts and consent of the parties thereto.

As corroborative of this position taken by the defendant, the Court is herewith asked to take cognizance of a writ of certiorari filed in our Supreme Court by one Walter Reade against this defendant and others, the object of which writ is to test the constitutionality of the said acts. The said writ was returnable after the decree of our Court of Chancery on September 8th, 1934, and the Supreme Court did not dismiss the same on the ground that it treated of subject matter which was merely academic by reason of the decree of the Court of Chancery, but on the contrary ordered that all parties in interest be made parties defendant and set the said writ down for argument in the January, 1935 Term. Such argument has, as yet, not been heard. The Supreme Court has always taken the position that

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it will not decide matters already decided by a court of competent jurisdiction and therefore, only of academic interest, and we are therefore, irresistibly impelled to the conclusion that the constitutionality of these acts is still a very moot question in our courts and that the decree of the Court of Chancery has certainly not been recognized up to the present time by the Supreme Court as disposing of the question. If this be so, how then can our courts consistently and justifiably decide that a citizen, unversed in the niceties of the law and the pitfalls of constitutionality, shall be penalized for acting thereunder?

It is the further contention of the defendant that the constitutionality of these acts is not involved in the instant case. Such argument is not to be interpreted as an admission of the unconstitutionality of the acts in question as the defendant herein is prepared to argue that question at the proper time and place before the Supreme Court in the writ of certiorari now pending.

In summation of the arguments thus advanced, the defendant herein says:

1 That it had a right to accept the said statutes at face value and to act thereunder.
2 That the decree of the Court of Chancery is ineffectual insofar as this defendant is concerned and has no binding effect upon it.
3 That no court of proper jurisdiction in this State has, as yet, rendered a distinct and positive decision as to the constitutionality of the said acts in a proper proceeding brought for that purpose, and therefore,
4 That insofar as this defendant is concerned, the said acts are valid and subsisting at the present time.

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II— The Plaintiff Has Not Proved His Case.

Under the laws and precedents established in this State, it is the duty of a plaintiff to establish his case by a preponderance of the evidence. In the instant case, since the same was submitted to the court on stipulated facts, this means that the court had to be satisfied by a preponderance of the evidence.

This action is in form a qui tam action, sounding in debt, in which the plaintiff, as a common informer, seeks to recover of the defendant for himself, as well as the County of Monmouth, the penalty prescribed by Section 8 of "An Act to Prevent Gaming" (Revision 1877, Page 459— Compiled Statutes, Page 2625). This section had in terms been repealed (Pamphlet Laws 1933, Chapter 391, Page 1093). Plaintiff argues that the repealer in question is unconstitutional and void and that that proposition is hardly open to question. He bases his argument upon the decision of the Court of Common Pleas of Union County in

Silberman vs. Skouras Theatres Corp. 11 Misc. 907, 169 A. 170.

Plaintiff admits that such decision is not a binding precedent upon the Court which heard this matter below, or this Court. The defendant does not intend to argue the correctness of such decision at this time, but merely points out that the learned court below, in deciding the instant case, upon whom such decision was not binding, had its doubts as to the same and based its decision in part upon the fact that such doubt existed. Such decision of unconstitutionality by the Court of Common Pleas of Union County is of course subject to the criticism that it was not distinct and positive in a direct proceeding testing constitutionality and therefore its decision, in the same manner as the decree of the Court of Chancery, is not binding upon this defendant. If this be the case, plaintiff's case must fall and the defendant cannot be subjected to any penalty.

It should be borne in mind that the within action, while of a civil nature insofar as it only seeks money damages, is based upon a violation of the Crimes Act of this State and is to that extent quasi criminal in nature. Cold logic dictates that the plaintiff cannot prevail herein unless the defendant has committed a crime and there can be no crime committed without an intent to do so. Can it be said in view of the facts cited above, that the court must find that there was an intent on the part of the defendant to commit a crime? The Supreme Court has, in the cases of

State vs. O'Donnell— 153 Atl. 698 and
State vs. Hoffman— 153 Atl. 699

which cases involve section 65 of the Crimes Act. forbidding the keeping of places to which persons resorted for the purpose of betting upon horse races, decided that the intent of the keeper is essential to guilt and that the existence of such essential fact upon which the guilt of the defendant is predicated, must be proven beyond a reasonable doubt. The Supreme Court reversed convictions in both the above cases because of violation of this doctrine. Shall we then, in the instant case, penalize the defendant who acted by virtue of and under the sanction of existing law? Further, shall he be penalized by reason of a decree of the Court of Chancery so open to question and doubt that in its self same form it remains for the Supreme Court to decide it? In the defendant's mind, these questions admit of only one possible answer.

The Court below in determining the within matter said in its Determination and Rule for Judgment, (State of the Case, Page 21, at Page 28) "a doubt exists as to whether the violation of such statute has been sufficiently shown to justify the imposition of the penalty." To doubt, as has well been said, is to deny.

Can it be said in view of the determination below, that the plaintiff has proved his case by a preponderance of the evidence, or to put the matter somewhat differently, that the plaintiff satisfied the Court below sitting as a jury that the defendant herein committed a crime with the intent so to do. This is a factual proposition and for that reason there should be no reversal herein, unless the Court below erred so grievously that, as a matter of law, no decision could be arrived at, except a verdict for the plaintiff. Certainly there was no proof in this case, of any intent on the part of the defendant, and if it were to be found, it must be found from the facts themselves as stipulated. The Court may well take judicial notice of the fact that the instant matter was not tried before a jury and that the factual question presented was in the hands of a learned and astute jurist.

SUMMARY

We respectfully submit therefore

1. That the acts of 1934 are valid and subsisting.
2. That the plaintiff has failed to prove his case.
3. That the judgment of the New Jersey Supreme Court should be sustained.

Respectfully submitted,

TUMEN & TUMEN
JONAS TUMEN
of Counsel

INDEX

Notice of Appeal 1

[illegible] of Service of Notice and Grounds of Appeal .... [illegible]

Transcript of Clerk's Docket .... [illegible]

[illegible] .... [illegible]

Notice of [illegible] .... [illegible]

Demand for Trial by Jury .... [illegible]

Certificate of Clerk .... [illegible]

[illegible] of [illegible] .... [illegible]

[illegible] of Judge .... [illegible]

Certificate of Stenographer .... [illegible]

[illegible] Record .... [illegible]

Notice of Appeal .... [illegible]

Grounds of Appeal to Supreme Court .... [illegible]

[illegible] of Determinations .... [illegible]

Opinion of Supreme Court .... [illegible]

Order of Reversal .... [illegible]