INDEX.

SUMMONS.

(SEAL) The State of New Jersey to John Eisele and Nathaniel King, co-partners trading under the firm name and style of Eisele & King.

You are summoned to answer the annexed complaint of George A. Sawin 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.

Witness William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this 14th day of May, nineteen hundred and twenty-one.

ENOCH L. JOHNSON,
Clerk.

LINTOTT, KAHRS & YOUNG,
Attorneys.

COMPLAINT.

George A. Sawin, residing in the City of Pittsburgh, in the State of Pennsylvania, complaining of the defendants, says:

First Count.

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1. That heretofore and at all the times hereinafter mentioned the defendants were and now are co-partners engaged in business as stockbrokers, in the City of Newark, County of Essex and State of New Jersey, under the firm name and style of Eisele & King.

2. That heretofore and in the month of January, 1919, the plaintiff deposited with the defendants certain stocks and bonds, valued at fifty thousand dollars (a list of which is hereunto annexed, made part hereof and here-
20 by expressly referred to as if herein set forth fully and at length), for the express purpose of enabling the plaintiff to carry on with the defendants speculations in stocks and bonds on margins, it being understood that the plaintiff and the defendants did not contemplate, intend or agree that the stocks or bonds purchased or sold should become or be treated as the stock of the plaintiff, but that the transactions were to be mere dealings and differences between prices, nor was it agreed
30 or intended that the defendants should ever deliver to the plaintiff the said stocks or bonds or that the plaintiff should ever actually pay therefor, and the plaintiff charges that no stocks were actually delivered to him, nor were any of the stocks or bonds alleged to have been bought by the defendants for or on account of the plaintiff, paid for by the plaintiff to the defendants, and it was agreed, and it was the arrangement between the plaintiff and the defendants that at the settlement a balance should be struck based on the profits or losses,
40 as the case might be, it being intended and agreed that

there was to be merely a settlement of differences between the parties, every transaction by the plaintiff with the defendants being on a marginal basis and the differences between the buying and selling prices being charged to the plaintiff or placed to his credit, as the case might be.

3. That the said defendants continued to carry on with the plaintiff speculations in stocks and bonds on margins as set forth in paragraph 2 hereof, up to and including the month of January, 1921, and that prior to and in the month of February, 1921, the defendants furnished to the plaintiff certain paper writings purporting to represent from time to time the losses or profits for and on account of the plaintiff and covering the period from January, 1919, to January, 1921.

4. That thereafter and on or about the first day of February, 1921, the plaintiff demanded of the defendants that they return to him the stocks and bonds mentioned and set forth in the annexed schedule or the value thereof, but the defendants refused and still refuse to return the same to the plaintiff.

5. That this suit is brought within six calendar months after the making of the last alleged sale or speculation by the defendants for and on behalf of the plaintiff, and is founded upon and brought pursuant to the provisions of an act entitled "An Act to Prevent Gaming," Compiled Statutes of New Jersey, Vol. 2, page 2625, and the various supplements thereto and acts amendatory thereof.

Plaintiff demands as damages the sum of fifty thousand dollars with interest from February 1, 1919.

SECOND COUNT.

The plaintiff demands of the defendants the sum of fifty thousand dollars ($50,000) for that, whereas, the said defendants in the month of January, 1921, and in the County of Essex, being indebted to the plaintiff in the sum of fifty thousand dollars ($50,000) for the price and value of goods sold and delivered by the plaintiff to the defendants at their special instance and request; and in the like sum of money for the price and value of goods bargained and sold from the plaintiff to the defendants at their special instance and request; and in the like sum of money for the price and value of work done and materials furnished and provided by the plaintiff at their special instance and request; and in the like sum of money lent from the plaintiff to the defendants for the use of the plaintiff and in the like sum of money for money paid by the plaintiff for the use of the defendants at their special instance and request; and in the like sum of money for interest due from the defendants to the plaintiff for the plaintiff having foreborn moneys due from the defendants to the plaintiff at the defendant's special instance and request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendants to the plaintiff on an account then and there stated between them; and the defendants afterwards to wit: on the day and year last aforesaid in the City aforesaid, in consideration of the premises respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request, yet the defendants disregarding and disregarded their promises and have not paid any of said sums of money or any part thereof; and in the like sum on a book account, a true copy of which is hereunto annexed, marked "Schedule A," and hereby expressly referred to as if herein set forth fully and at length.

Plaintiff demands as damages the sum of fifty thousand dollars ($50,000.00) with interest, from February 1, 1919.

LINTOTT, KAHRS & YOUNG,
Attorneys of Plaintiff.

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SCHEDULE A.

This action is brought within six calendar months after the making of the last alleged sale or speculation by the defendants and on behalf of the plaintiff, to recover the value of certain securities deposited with the defendants by the plaintiff in the month of January, 1919, which are hereinafter set forth fully and at length, and were placed with the defendants to carry on with the defendant speculations in stocks on margins with the understanding that the defendants did not contemplate, intend nor agreed that the stocks or bonds so purchased should be treated as the stocks of the plaintiff, but the transaction was mere dealings and differences between prices which continued up to and including the month of January, 1921.

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Stocks.

4	Southern Pacific	Common
30	Public Service, N.S.	"
5	Detroit Edison	"
11	United Gas Improvement	"
20	Curtiss Aeroplane	Preferred
13	Savage Arms	Common
49	American Telegraph & Telephone	"
10	Am. Agricultural Chemical	Preferred
10	Fairhaven Mills	"
7	Pullman Co.	Common
10	Anaconda Copper	"
10	Duquesne Light	Preferred
15	Consumers Chemical	"

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20	American Road Machinery	Preferred
20	Porto Rico Telephone	"

BONDS.

$1,000.00	Atlantic Paper & Pulp	6%	1926
500.00	Am. Tele. & Tel.	"	1925
1,000.00	Dom. of Canada	5½%	1933
3,000.00	Paterson & Passaic Elec.	5%	1949
1,000.00	Atchison, Topeka & Santa Fe	4%	1995
1,000.00	Chicago, Rock Island & Pacific	4%	1934
1,350.00	First Liberty United States	3½%	
250.00	" " " "	4½%	
450.00	Second " " "	4%	
250.00	" " " "	4¼%	
1,450.00	Third " " "	4¼%	
500.	Fourth " " "	4¼%	
600.00	Victory " " "	4¾%	

LINTOTT, KAHRS & YOUNG,
Attorneys.

To the within-named defendants:

TAKE NOTICE that if the within summons and complaint be served upon you personally and you intend to make defense, then you must file an affidavit of merits within ten days of such service and must file an answer within twenty days of such service; and that in default thereof, judgment will be entered against you.

LINTOTT, KAHRS & YOUNG,
Attorneys of Plaintiff.

ANSWER.

The defendants, John C. Eisele, residing in the City of Newark, County of Essex and State of New Jersey, and Nathaniel King, residing in said City, County and State, co-partners trading under the firm name and style of Eisele & King, answering the above complaint jointly, say: 10

First Defense to First Count.

1. They admit the allegations of paragraph 1 of the complaint herein.

2. Answering paragraph 2 of said complaint, defendants say that during the month of January, 1919, and from time to time thereafter, they purchased and sold stocks at the request of the plaintiff and as his agents and for his account. In the course of such purchases and 20 sales, defendants earned commissions thereon as such agents and advanced moneys to the plaintiff at his request, pursuant to an agreement made between the plaintiff and the defendants in which plaintiff agreed to deposit with the defendants collateral security for the payment of commissions earned by the defendants in such purchases and sales, and of said moneys so advanced with interest thereon. The stocks and bonds mentioned in said paragraph 2 and enumerated in the schedule thereto annexed, were deposited by the plaintiff with the defendants during the said month of January and from time to time thereafter, pursuant to the terms of said agreement and as security for the payment of such commissions and advancements with interest thereon. Under the terms of said agreement defendants are entitled to hold said stocks and bonds until said commissions and the moneys so advanced with interest thereon shall have been paid. Except as above specifically stated, the defendants deny each and every allegation contained in said paragraph two. 30 40

Answer.

3. Defendants deny each and every allegation contained in paragraph three of the said complaint.

4. Answering paragraph four of the complaint, the defendants say that on the first day of February, 1921, the plaintiff was and still is indebted to the defendants in a sum of money in excess of the value of the stocks and bonds mentioned in paragraph two of the complaint and enumerated in the schedule thereto annexed, for commissions on the purchase and sale of stocks by the defendants as the agent of the plaintiff, at his request and for his account, and for moneys advanced to the plaintiff by the defendants at his request and for his account in such purchase and sale of said stocks. The defendants on February 1, 1921, held said stocks and bonds mentioned in paragraph two of the complaint and enumerated in the schedule thereto annexed, as collateral security for such indebtedness, pursuant to the agreement mentioned in paragraph two hereof. Said indebtedness is still due and owing from the plaintiff to the defendants and defendants now hold said stocks and bonds as collateral security therefor, pursuant to said agreement. Except as above specifically stated, the defendants deny each and every allegation contained in said paragraph four.

5. Defendants deny each and every allegation contained in paragraph five of the complaint.

6. Defendants deny that the plaintiff is entitled to damages in the sum of $50,000 with interest from February 1, 1919, or in any other sum.

Second Defense to First Count.

7. On or about the twenty-first day of February, 1919, plaintiff requested defendants to act for him as his agents in the purchase and sale of stocks, bonds and other securities for his account and on his behalf, and at said time agreed to pay defendants the regular brok-

erage commissions on all stocks, bonds or other securities so purchased or sold by defendants as agents of plaintiff and for his account.

8. On or about said twenty-first day of January, 1919, and from time to time thereafter, plaintiff requested defendants to advance moneys on his behalf in payment for stock purchased by defendants as the agents of the plaintiff, at his request and for his account and for the purpose of securing delivery of stocks sold by defendants as the agents of plaintiff at his request and for his account, and agreed to repay to defendants upon demand all sums so advanced with lawful interest thereon.

9. On or about the twenty-first day of January, 1919, plaintiff agreed to deposit and keep on deposit at all times with the defendant sufficient stocks, bonds and other securities to fully secure to the defendants the payment on demand, of all commissions earned by defendants as aforesaid and of all moneys so advanced by defendants to the plaintiff at his request and for his account, together with lawful interest thereon.

10. Defendants on or about said twenty-first day of January, 1919, and from time to time thereafter, relying upon the above-mentioned promises and agreements made on the part of the plaintiff, purchased and sold stocks as plaintiff's agent at his request and for his account, and advanced to plaintiff at his request and for his account various sums of money in connection with such purchases and sales.

11. That every transaction between plaintiff and defendants was a transaction in which defendants acted solely as the agents of plaintiff for the purchase or sale of stocks at his request and on his behalf and in the course of which defendants advanced moneys for the benefit of plaintiff, at his request and on his behalf, as the purchase price of stocks purchased by him through defendants as his agents or for the purpose of securing

delivery of stocks sold by him through defendants as his agents; that all stocks were so purchased or sold and all moneys so advanced upon the understanding and agreement between the plaintiff and defendants that plaintiff would, upon demand, pay to defendants all sums of money advanced for him in the purchase of stocks and receive the stocks so purchased by him through defendants as his agents and would, upon like demand, make delivery of all stocks sold by him through defendants as his agents and receive from defendants the purchase price thereof or repay to defendants all sums advanced by them in making delivery for him at his request, of such stocks so sold as aforesaid and receive from defendants the purchase price thereof.

12. Plaintiff on said twenty-first day of January and from time to time thereafter, deposited with defendants stocks and bonds as collateral security for the payment on demand by plaintiff to defendants of all commissions earned by defendants in such purchases and sales of stocks as agents for plaintiff at his request and for his account, and for the repayment on demand by plaintiff to defendants of all moneys advanced by defendants to plaintiff at his request and for his account as aforesaid, together with lawful interest thereon, which said stocks and bonds so deposited as collateral security as aforesaid, are the stocks and bonds mentioned in paragraph two of said complaint, and enumerated in the schedule hereto annexed.

13. On February 1, 1921, plaintiff was indebted to defendants in a sum largely in excess of the value of the stocks and bonds mentioned in paragraph two of the complaint and enumerated in the schedule thereto annexed, for commissions earned by defendants as plaintiff's agents in purchases and sales of stocks at plaintiff's request and for his account, and for moneys advanced for plaintiff at his request and for his account in the pur-

chase and sale of such stocks as aforesaid, together with interest thereon.

14. Plaintiff is still indebted to defendants for commissions earned and moneys advanced with interest thereon as stated in paragraph thirteen in a sum largely in excess of the value of the stocks and bonds mentioned in said paragraph two of the complaint and enumerated in the schedule thereto annexed. Under the terms of the aforesaid agreement defendants are entitled to retain possession of the said stocks and bonds as collateral security for the payment of said indebtedness until said indebtedness of plaintiff to defendants has been fully paid and discharged.

Third Defense to First Count.

15. More than six calendar months have elapsed since the payment and delivery by plaintiff to defendants of any of the stocks, bonds or other securities mentioned in the said complaint and enumerated in the schedule thereto annexed, by reason whereof the plaintiff's said action is barred by lapse of time.

Fourth Defense to First Count.

16. Plaintiff's cause of action in said first count set forth is based upon the terms and provisions of an act of the legislature entitled "An Act to Prevent Gaming," approved March 27, 1874. Plaintiff's suit was not brought within six calendar months after payment or delivery of the securities mentioned in said complaint and enumerated in the schedule thereto annexed as required by said act, by reason whereof said suit is barred by the limitation contained in said act.

Objection in Point of Law to First Count.

17. The defendants will object that the first count of the complaint discloses no cause of action in that the

said first count shows on its face that the stocks and bonds therein mentioned and enumerated in the schedule thereto annexed were paid and delivered to and deposited with the defendants during the month of January, 1919, more than six months prior to the institution of this suit; that by reason of said allegation the complaint shows on its face that this action is barred by the statute upon which it is based.

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First Defense to Second Count.

18. Defendants deny each and every allegation contained in the second count of the said complaint.

Second Defense to Second Count.

19. Defendants repeat paragraphs 7, 8, 9, 10 and 11 as a part of this defense.

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20. Plaintiff, on or about said twenty-first day of January and from time to time thereafter, deposited with defendants stocks and bonds as collateral security for the payment by plaintiff to defendants of all commissions earned by defendants in such purchases and sales of stocks as agents for plaintiff at his request and for his account, and for the repayment by plaintiff to defendants of all moneys advanced by defendants to plaintiff at his request and for his account as aforesaid, together with lawful interest thereon. Under the said second count of the complaint plaintiff is seeking to recover from defendants the said stocks and bonds so deposited as collateral security as aforesaid or the value thereof.

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21. Plaintiff is indebted to defendants for commissions earned by defendants as plaintiff's agents in the purchases and sales of stocks at plaintiff's request and for his account, and for moneys advanced for plaintiff at his request and for his account in the purchase and sale of such stocks as aforesaid, together with interest thereon,

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in a sum largely in excess of the value of the stocks and bonds deposited by plaintiff with defendants as aforesaid and enumerated in the schedule annexed to said complaint. Under the terms of the aforesaid agreement, defendants are entitled to retain possession of said stocks and bonds as collateral security for the payment of said indebtedness until said indebtedness of plaintiff to defendants has been fully paid and discharged.

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THIRD DEFENSE TO SECOND COUNT.

22. Plaintiff's cause of action in said second count of the said complaint set forth is based upon the terms and provisions of an act of the Legislature entitled "An Act to Prevent Gaming", approved March 27, 1874, and is brought to recover the value of certain stocks and bonds claimed by plaintiff to have been delivered to defendants to enable the plaintiff to engage with the defendants in speculations in stocks and bonds on margins. Plaintiff's suit was not brought within six calendar months after payment or delivery of said securities or any of them as required by said act, by reason whereof said suit is barred by the limitation contained in said act.

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Counter-claim.

COUNTER-CLAIM.

Defendants say, by way of counter-claim against the plaintiff that:

23. The statements in paragraphs 7, 8, 10 and 11 of this answer are made part of this counter-claim.

10 24. Plaintiff is indebted to defendants in the sum of $32,373.57, for commissions earned by defendants in the purchase and sale of stocks as the agents of plaintiff at his request and for his benefit, and for moneys advanced by defendants to plaintiff at his request and for his account in connection with the purchase and sale of stocks by defendants as plaintiff's agents as above set forth, with lawful interest thereon. Plaintiff has neglected and refused to pay to defendants the said sum of $32,373.57 or any part thereof although often requested by defendants so to do.

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Plaintiff demands $32,373.57 damages, with interest from June 17, 1921.

LINDABURY, DEPUE & FAULKS,
Attorneys of Defendants.

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POSTEA.

This case came on for trial before Judge Nelson Y. Dungan one of the Circuit Court Judges to whom the cases on the list of the December Term, 1922, of the Essex Circuit of the Supreme Court were referred for trial by the Justice of the Supreme Court holding the Essex Circuit, the above cause being one of the cases on said list. 10

At the trial the defendants moved to strike out the first count of the complaint pursuant to objection raised in the answer filed thereto on the ground that the said first count of said complaint disclosed no cause of action.

And the Court being of the opinion that said first count disclosed no cause of action, ordered that the same should be stricken out and that judgment of *non pros* on said count should be entered for the defendant and against the plaintiff, whereupon the plaintiff being unwillinng to proceed to trial on the second count alone submitted to a voluntary non-suit on said count. 20

NELSON Y. DUNGAN,
Circuit Court Judge.

Judgment actually entered February 2, 1923.

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NOTICE OF APPEAL.

To Lindabury, Depue & Faulks, attorneys of defendants:

TAKE NOTICE that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in the above-entitled cause striking out the first count of the complaint, and ordering judgment of *non pros* entered.

MERRITT LANE,
Attorney for Plaintiff.

Dated, February 10, 1923.

GROUNDS OF APPEAL.

The appellant states the following grounds of appeal in this case:

1. Because the Court ordered the first count of the complaint to be stricken out and judgment of *non pros* entered upon said count, upon the ground that the limitation contained in the 5th section of an act "An act to prevent gaming" extended by construction to an action brought under the 2nd section of said act upon which said section the first count was based, which was error.

MERRITT LANE,
Attorney for Appellant.

Dated, February 10, 1923.

Case noticed for March 7, 1923.

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SUMMONS.

Essex County Circuit Court

State of New Jersey to:

WALTER H. DICKENHORST and EMANUEL W. KAISER, co-partners trading as Dickenhorst & Co. GREETING: (SEAL)

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YOU ARE SUMMONED to answer the annexed complaint of David N. Shack, in an action at law, in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Circuit Court, at Newark, 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.

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WITNESS, WILLIAM S. GUMMERE, Judge of said Court, this 29th day of May, 1922.

JOHN H. SCOTT,
Clerk.

MERRITT LANE,
Attorney.

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COMPLAINT.

Plaintiff residing in the City of Newark, County of Essex, and State of New Jersey, says that:

First Count.

10 1. Defendants are and were at all times hereinafter mentioned in business in the City of Newark, assuming to act as stockbrokers, that is, assuming to act as a broker in the sale and purchase of shares of stock and bonds.

2. Between the 9th day of July, 1919, and the 31st day of January, 1920, David N. Shack paid and delivered to the said defendants the sum of $15,000 upon the event of a wager and bet forbidden by section 1 of an act to prevent gaming, revision of 1877, of the State of New Jersey, in this that while the said moneys were ostensibly 20 deposited as margins upon the purchase or sale of stock by the defendants for the said David N. Shack it was not contemplated or intended that the stock purchased or sold should become, or be treated as the stock of the said David N. Shack, nor was it contemplated that said stock should be actually taken up or delivered by the said David N. Shack, but, on the contrary, the real transaction was a mere dealing in differences between prices, that is, that the said David N. Shack would win or lose as the price of certain stock should rise or fall.

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3. Plaintiff demands judgment upon this count for $15,000 with interest from date.

Second Count.

1. Defendants are and were at all times hereinafter mentioned in business in the City of Newark, assuming to act as stockbrokers, that is, assuming to act as a broker in the sale and purchase of shares of stock and bonds.

2. Between the 3rd day of November, 1917, and the 40 1st day of June, 1921, Louis J. Fischbein paid and de-

livered to the said defendants the sum of $41,200 upon the event of a wager and bet forbidden by section 1 of an act to prevent gaming, revision of 1877, of the State of New Jersey, in this that while the said moneys were ostensibly deposited as margins upon the purchase or sale of stock by the defendants for the said Louis J. Fischbein it was not contemplated or intended that the stock purchased or sold should become, or be treated as the stock of the said Louis J. Fischbein nor was it contemplated that said stock should be actually taken up or delivered by the said Louis J. Fischbein, but, on the contrary, the real transaction was a mere dealing in differences between prices, that is, that the said Louis J. Fischbein would win or lose as the price of certain stock should rise or fall.

3. Upon the 5th day of May, 1922, the said Louis J. Fischbein assigned to the said plaintiff the said moneys so deposited by him as aforesaid together with all right of action which he may have to recover the same.

4. Plaintiff demands judgment upon this count for $41,200.

THIRD COUNT.

1. Defendants are and were at all times hereinafter mentioned in business in the City of Newark, assuming to act as stockbrokers, that is, assuming to act as a broker in the sale and purchase of shares of stock and bonds.

2. Between the 15th day of May, 1919, and the 13th day of December, 1919, Alfred Stahl paid and delivered to the said defendants the sum of $7,927 upon the event of a wager and bet forbidden by section 1 of an act to prevent gaming, revision of 1877, of the State of New Jersey, in this, that while the said moneys were ostensibly deposited as margins upon the purchase or sale of stock by the defendants for the said Alfred Stahl it was not

contemplated or intended that the stock purchased or sold should become, or be treated as the stock of the said Alfred Stahl nor was it contemplated that said stock should be actually taken up or delivered by the said Alfred Stahl, but, on the contrary, the real transaction was a mere dealing in differences between prices, that is, that the said Alfred Stahl would win or lose as the price of certain stock should rise or fall.

3. Upon the 3rd day of May, 1922, the said Alfred Stahl assigned to the said plaintiff the said moneys so deposited by him as aforesaid together with all right of action which he may have to recover the same.

4. Plaintiff demands judgment upon this count for $7,927.

FOURTH COUNT.

1. Defendants are and were at all times hereinafter mentioned in business in the City of Newark, assuming to act as stockbrokers, that is, assuming to act as a broker in the sale and purchase of shares of stock and bonds.

2. Between the 28th day of May, 1919, and September 8th, 1920, Emil Mautner paid and delivered to the said defendants the sum of $21,700 upon the event of a wager and bet forbidden by section 1 of an act to prevent gaming, revision of 1877, of the State of New Jersey, in this, that while the said moneys were ostensibly deposited as margins upon the purchase or sale of stock by the defendants for the said Emil Mautner it was not contemplated or intended that the stock purchased or sold should become, or be treated as the stock of the said Emil Mautner nor was it contemplated that said stock should be actually taken up or delivered by the said Emil Mautner, but, on the contrary, the real transaction was a mere dealing in differences between prices, that is, that the said Emil Mautner would win or lose as the price of certain stock should rise or fall.

3. Upon the 3rd day of May, 1922, the said Emil Mautner assigned to the said plaintiff the said moneys so deposited by him as aforesaid together with all right of action which he may have to recover the same.

4. Plaintiff demands judgment upon this count for $21,700.

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FIFTH COUNT.

1. Defendants are and were at all times hereinafter mentioned in business in the City of Newark, assuming to act as stockbrokers, that is, assuming to act as a broker in the sale and purchase of shares of stock and bonds.

2. Between the 21st day of September, 1917, and the 17th day of January, 1921, Emanuel Denholtz paid and delivered to the said defendants the sum of $4,400 upon the event of a wager and bet forbidden by section 1 of an act to prevent gaming, revision of 1877, of the State of New Jersey, in this, that while the said moneys were ostensibly deposited as margins upon the purchase or sale of stock by the defendants for the said Emanuel Denholtz it was not contemplated or intended that the stock purchased or sold should become, or be treated as the stock of the said Emanuel Denholtz nor was it contemplated that said stock should be actually taken up or delivered by the said Emanuel Denholtz, but, on the contrary, the real transaction was a mere dealing in differences between prices, that is, that the said Emanuel Denholtz would win or lose as price of certain stock would rise or fall.

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3. Upon the 3rd day of May, 1922, the said Emanuel Denholtz assigned to the said plaintiff the said moneys so deposited by him as aforesaid together with all right of action which he may have to recover the same.

4. Plaintiff demands judgment upon this count for $4,400.

MERRITT LANE,
Attorney for Plaintiff.

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MOTION ADDRESSED TO THE COMPLAINT.

To David H. Shack, plaintiff, or Merritt Lane, Esquire, his attorney:

SIR:

TAKE NOTICE, that I shall apply to his Honor, Worrall F. Mountain, one of the Judges of the Essex County Circuit Court, at his chambers, in the Court House, in the City of Newark, New Jersey, on Friday, the twenty-third day of June, 1922, at 2:00 o'clock in the afternoon, or as soon thereafter as counsel can be heard, for an order to strike out the complaint by you filed in the above-stated cause, for the following reasons, viz:

1. That the complaint shows that the suit was not brought within six calendar months after payment or delivery of the moneys sued for which is required by Section 5 of "An Act to Prevent Gaming," Revision of 1877, of the Laws of the State of New Jersey.

2. That the complaint shows the proceeding is instituted under Section 1 of an act, entitled, "An Act to Prevent Gaming," Revision of 1877, of the Laws of the State of New Jersey, and shows that the suit was not brought within six calendar months after the dates when payment or delivery of the moneys were alleged to have been made and therefore the action, if any, therein set forth is barred by the limitation provision contained in an act, entitled, "An Act to Prevent Gaming," Revision of 1877, of the Laws of the State of New Jersey, which provides that any suit brought under Section 1 of "An Act to Prevent Gaming," Revision of 1877, of the Laws of the State of New Jersey, shall be brought within six calendar months of payment or delivery of the moneys sued for.

3. That the complaint (and each count therein contained) shows that the action, if any, therein set forth is barred by the limitation provision contained in Section 5

of an act, entitled, "An Act to Prevent Gaming," Revision of 1877, of the Laws of the State of New Jersey.

4. That the complaint does not set forth a cause of action.

5. That the complaint does not set forth a cause of action against the defendant, Emanuel W. Kaiser, in that it does not show that the moneys sued for were delivered or deposited with the defendant, Emanuel W. Kaiser, upon a wager or bet on an event prohibited by any law of the State of New Jersey.

6. That the complaint does not set forth a cause of action against the defendant, Emanuel W. Kaiser, in that it does not show that the moneys sued for or any part thereof were delivered to the defendant, Emanuel W. Kaiser.

7. That the complaint does not set forth a cause of action against the defendant, Emanuel W. Kaiser, in that it does not show that the defendant, Emanuel W. Kaiser, was the winner or stake-holder of the moneys sued for as the result of a wager or bet or an event prohibited by any law of the State of New Jersey.

8. That the said complaint does not set forth a cause of action against the defendant, Emanuel W. Kaiser, in that it does not show any express agreement between the plaintiff (or his assignors) and the defendant, Emanuel W. Kaiser, that the moneys sued for were deposited with the defendant, Emanuel W. Kaiser, on a wager or bet prohibited by "An Act to Prevent Gaming," Revision of 1877, of the Laws of the State of New Jersey.

9. That the complaint does not set forth a cause of action against the defendant, Emanuel W. Kaiser, in that it does not show the exact dates when the moneys sued for were delivered to the defendant, Emanuel W. Kaiser; the amounts delivered in each instance to the defendant, Emanuel W. Kaiser, and does not show in each instance that there was an agreement with the defendant, Emanuel

W. Kaiser, that the moneys so delivered were delivered to him as winner or stake-holder, on an express wager or bet on an event prohibited by any law of the State of New Jersey.

Respectfully,

10 WILLIAM & BEN HARRIS,
Attorneys for Defendant,
Emanuel W. Kaiser, appearing only for
the purposes aforementioned.

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NOTICE OF MOTION.

Please Take Notice that on Saturday, the twenty-fourth day of June, A. D. 1922, at ten o'clock in the forenoon (daylight saving time), or as soon thereafter as counsel can be heard, I shall apply to the Honorable Worrall F. Mountain, Judge of the Essex County Circuit Court, at the Court House, in the City of Newark, for an order striking out the first count of the complaint filed herein, on the ground that suit was not brought by the said David H. Shack within six calendar months after payment or delivery by him of the sum of money therein referred to, and that said claim is barred by the Statute of Limitations applicable to the act under which said complaint is brought.

And for an order striking out the second count of the complaint filed herein, on the ground that suit was not brought by the said Louis J. Fischbein within six calendar months after payment or delivery by him of the sum of money therein referred to, and that suit by the said David N. Shack was not instituted within six calendar months from and after the expiration of the time allowed the said Louis J. Fischbein to prosecute for the same, and that said claim is barred by the Statute of Limitations applicable to the act under which said complaint is brought. Upon this application I will rely on the affidavit of Walter H. Dickenhorst, dated June 15th, 1922, served herewith.

And for an order striking out the third count of the complaint filed herein, on the ground that suit was not brought by the said Alfred Stahl within six calendar months after payment or delivery by him of the sum of money therein referred to, and that suit by the said David N. Shack was not instituted within six calendar months from and after the expiration of the time allowed the said Alfred Stahl to prosecute for the same, and that said claim is barred by the Statute of Limitations applicable to the act under which said complaint is brought.

And for an order striking out the fourth count of the complaint filed herein, on the ground that suit was not brought by the said Emil Mautner within six calendar months after payment or delivery by him of the sum of money therein referred to, and that suit by the said David N. Shack was not instituted within six calendar months from and after the expiration of the time allowed the said Emil Mautner to prosecute for the same, and that said claim is barred by the Statute of Limitations applicable to the act under which said complaint is brought.

And for an order striking out the fifth count of the complaint filed herein, on the ground that suit was not brought by the said Emanuel Denholtz within six calendar months after payment or delivery by him of the sum of money therein referred to, and that suit by the said David N. Shack was not instituted within six calendar months from and after the expiration of the time allowed the said Emanuel Denholtz to prosecute for the same, and that said claim is barred by the Statute of Limitations applicable to the act under which said complaint is brought.

JOHN W. PALMER,
Attorney of Defendant,
Walter H. Dickenhorst.

To Merritt Lane, Esq.,
Attorney of Plaintiff,
196 Market St., Newark, N. J.

AFFIDAVIT.

ESSEX COUNTY CIRCUIT COURT.

DAVID N. SHACK, *Plaintiff,* *vs.* WALTER H. DICKENHORST and EMANUEL W. KAISER, co-partners trading as Dickenhorst & Co., *Defendants.*	*Action at Law.* *Affidavit.*

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

WALTER H. DICKENHORST, of full age, being duly sworn according to law, on his oath deposes and says:

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I am one of the defendants herein, and have been engaged in the business of broker in the sale and purchase of shares of stock and bonds in the City of Newark for upwards of ten years past. In the month of November, 1917, I had my first dealings with Louis J. Fischbein, and from that time down to the end of April, 1921, he paid to the firm of Dickenhorst & Company at various times various sums of money on account of stocks and bonds which I would buy or sell for his account at his request. The last payment of money which he made to the said firm of Dickenhorst & Company was on April 29th, 1921, at which time he paid the sum of $5.77, which was a final payment on ten shares of stock of National Railways of Mexico, second preferred, which stock was actually delivered to him by the firm of Dickenhorst & Company, and for which I now hold his receipt, ready to be produced at the hearing of the motion to strike out the complaint in this cause. Said receipt bears date of April 29th, 1921, and covers certificate P-87387 for these ten shares. Previous to that

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transaction, his last payment had been in the amount of $27.00 on April 22nd, 1921, which sum was to apply on his debit balance at that time.

Previous to the above, he paid the sum of $100.00 on February 16th, 1921, which was to apply on his account. On February 14th, 1921, there was delivered to him by Dickenhorst & Company twenty shares of stock of the National Railways of Mexico, second preferred, covered by certificates P-88290 and P-88291, for ten shares each, for which I hold his receipt and am ready to produce the same at the hearing of the motion to strike out the complaint in this cause. On that date he paid to said firm the sum of $135.00, which was in full payment of these twenty shares.

I am familiar with the accounts of Dickenhorst & Company, and am and have been the active head of that firm and am familiar with its books, and the above information is taken from the books of that firm, and shows that between the third day of November, 1917, and the first day of June, 1921, the last payments made to the firm of Dickenhorst & Company by Louis J. Fischbein were these payments of $135.00 on February 14th, 1921; $100.00 on February 16th, 1921; $27.00 on April 22nd, 1921, and $5.77 on April 29th, 1921.

The summons and complaint in this case was served upon me on May 31st, 1922.

WALTER H. DICKENHORST.

Sworn to and subscribed before me
this 15th day of June, A. D. 1922.

WILHELMINA HAGNEY,
Notary Public.

Commission expires April 19th, 1925.

ORDER.

Defendants having moved to strike out the complaint filed in the above matter on the grounds among others that it disclosed no cause of action and that said complaint on the face thereof shows that plaintiff's action if any has been barred by the Statute of Limitations provided for in the 5th section of an act entitled, "An Act to Prevent Gaming," of this state; and this matter coming on for argument in the presence of John W. Palmer, Esq., attorney for defendant, W. H. Dickenhorst; William Harris, Esq., attorney for defendant, E. W. Kaiser, and Merritt Lane, Esq., attorney for plaintiff, David N. Shack, and it appearing to the Court that this action purports to be founded upon section 2 of an act entitled "An Act to Prevent Gaming," of the statutes of the State of New Jersey; and it further appearing to the Court that the complaint herein on the face thereof shows that said action, if any, was commenced more than six months after the accrual thereof, if any; and the Court being of opinion that the limitation provided for in the 5th section of said act applies to the second section of said act and that, therefore, this action, if any, has been barred by said limitation contained in the said 5th section of the said act; and the argument of counsel having been heard on this motion and the Court being of the opinion that the complaint is not well founded in law.

It is, on the 27th day of January, 1923, ORDERED that said complaint be and is hereby stricken out with costs for the reason aforesaid and the plaintiff not applying for leave to file an amended complaint, it is ORDERED AND ADJUDGED that a judgment of *non pros.* be entered in favor of the defendants and against the plaintiff with costs.

WORRALL F. MOUNTAIN,
Judge.

Judgment of *non pros.* actually entered this 27th day of January, 1923.

On motion of William Harris, attorney for defendant, Emanuel W. Kaiser, and John W. Palmer, attorney for Walter H. Dickenhorst.

10 WORRALL F. MOUNTAIN,
Judge.

NOTICE OF APPEAL.

To John P. Palmer and William and Ben Harris, attorneys for defendants:

TAKE NOTICE that the plaintiff appeals to the Court of
20 Errors and Appeals from the whole of the judgment entered in the above-stated cause.

MERRITT LANE,
Attorney for Plaintiff.

Dated: January 30, 1923.

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GROUNDS OF APPEAL.

The appellant states the following grounds of appeal in this case:

1. Because the Court granted the motion of the defendants to strike out the complaint, and for judgment of *non pros.* upon the ground that the limitation provided for in section 5 of an act "An Act to Prevent Gaming," applied by construction to section 2 of the same act under which the suit was brought, and that therefore no cause of action was disclosed by the complaint, which was error.

MERRITT LANE,
Attorney for Appellant.

Dated: January 30, 1923.

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Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

DAVID N. SHACK, *Plaintiffs-Appellants,* *vs.* WALTER H. DICKENHORST and EMANUEL W. KAISER, co-partners, trading as DICKENHORST & Co., *Defendants-Appellees.*	*On Appeal from Judgment Dismissing Complaint.* Heard below before Mountain, *J.*, at the Essex Circuit Court.
GEORGE A. SAWIN, *Plaintiff-Appellant,* *and* JOHN C. EISELE and NATHANIEL KING, co-partners, trading under the name and style of EISELE & KING, *Defendants-Appellees.*	*On Appeal from Judgment Dismissing Complaint.* Heard below before Dungan, *J.* Appeal from New Jersey Supreme Court, Essex Circuit.

BRIEF OF APPELLANTS.

Statement.

One brief will be filed in the above-entitled causes for the reason that there is the single question of law involved in each case.

The question is whether the proviso contained in section 5 of An Act to Prevent Gaming, 2 C. S. of N. J. 2624 that a suit under that section must be brought within six calendar months "after payment or delivery as aforesaid" is to be applied by construction to suits brought under section 2 of the same act.

It is conceded that each suit is brought under the provisions of section 2. The charge in each is that the moneys or property were deposited by the plaintiffs with defendants upon the event of a wager or bet prohibited by section 1 of the act, and that the moneys so deposited are retained by the persons with whom they are deposited.

Motions to strike the complaints were made below in each case, and the courts held that by construction the limitation provided for a suit under section 5 applied to a suit under section 2.

ARGUMENT.

The action of the courts below was based upon the *obiter* of Vice-Chancellor Garrison in *Blessing* v. *Smith*, 74 N. J. E. 593, which in turn rested upon the *obiter* of Chancellor Magie in *Meyers* v. *Fridenberg*, 70 N. J. E. 3. In the Fridenberg case the Chancellor, after holding that the right of the complainant under section 5 was barred by the limitation, said:

> "But an action is also given by second section of the Gaming act, and there is no expressed limitation of the time within which such action may be brought. It is contended that the proviso to section 5, limiting actions, is equally applicable to the action provided for by section 2. I deem it unnecessary to determine whether this contention can prevail; for, assuming that this bill is founded upon a cause of action such as is given by section 2, and that the lapse of time has not barred the complainant, I think that the bill exhibits complainant's claim as one for which he has a complete remedy at law."

The statute took its present form in the Revision of 1874, approved March 27th, 1874, and appears in that form in the Revision of 1877, page 458.

The revision was based upon the provisions of the act of February 8th, 1797, Nixon's Digest, page 367, star page 313, and the supplement to that act of April 6th, 1871, laws of 1871, page 109.

The act of February 8th, 1797, Nixon's Digest, page 367, by its first section prohibited certain kinds of gambling. By its second section it made invalid promises and agreements, etc., made in connection with certain kinds of gambling. By its third section it voided conveyances made in consideration or to secure moneys won, lent or advanced for the purpose of gambling. By its fourth section it provided that it should be lawful for any person who should lose "any money, goods, chattels, or other valuable thing, by playing cards, dice, billiards, tables, tennis, bowls, shuffle-board, or other game or games or by betting on the sides or hands of such as they do play at any game or games, or by betting at cock-fighting or other sport or pastime, and shall pay or deliver the same, or any part thereof, *to the winner or winners, or other person for his or their use, or on his or their behalf,* to use for and recover the money, or value of the thing or things so lost and paid, or delivered or any part thereof *from the respective winner or winners,* with costs of suit, by action of debt, * * *" and this section contained the proviso that "such suit shall be instituted within six calendar months after losing and payment, or delivery as aforesaid."

By section five it was provided that if the person who lost such money should not sue within the six calendar months then an action might be brought by a common informer.

Section 4 does not give a remedy against a stakeholder. Its provisions do not come into play until there shall have been paid or delivered money or property upon the event of a wager "to the winner or winners, or other person for his, or their use, or on his or their behalf," and the action is given against "the respective winner or winners." The section clearly contemplated moneys or property paid *after* the determination of the event of the wager. The statute, by sections 2 and 3, went into detail with respect to the voiding of agreements, conveyances, etc., made to secure moneys, etc., played, laid or bet and

there is no suggestion that the legislature intended to provide for an action against a stakeholder.

By an act to prevent horse racing, of February 15th, 1811, p. 550, Elmer's Digest, p. 224, horse racing was made illegal and an action was given to the loser "to recover from the winner or his agent." The suit was limited to six months.

The Supreme Court in *Moore* v. *Trippe,* 20 N. J. L. 263, held that a suit might be brought under this statute against a stakeholder but this was after the event of the race had been decided and the stakeholder must have been considered as the "agent" of the winner.

Subsequently the act to prevent horse racing approved March 9th, 1846, was passed, Nixon's Digest, p. 369, star page 315, which made all horse racing illegal and provided for a penalty. It made all wagers or bets, agreements, contracts, mortgages, given or granted, as part of the consideration, etc., invalid but gave no express action to the loser to recover moneys lost.

Nevertheless the Supreme Court by a divided court, in *Huncke* v. *Francis,* 3 Dut. 55, held that money bet on the event of a horse race, and deposited in the hands of a stakeholder, might be recovered back by the depositor, if demanded before it is paid over to the winner.

This case was followed by the Supreme Court in *Sutphin* v. *Crozer,* 30 N. J. L. 257, but was overruled by the Court of Errors and Appeals in *Sutphin* v. *Crozer,* reversing the Supreme Court, 32 N. J. L. 462, and there was no determination or any intimation that under the provisions of section 4 of the General Gaming Act, Nixon's, star page 313, p. 367, recovery could be had from a stakeholder.

It is insisted that section 4 clearly contemplates by its terms the recovery of money actually lost upon the event of a wager the action being given expressly against the winner or winners and the action being given to a person who has paid or delivered the same to "the winner or winners or other person for his or their use."

With the legislation and the judicial construction thereof in this situation the legislature passed the supplement to the act of February 8th, 1797, of 1871, P. L. 109, and by that act, by its first section, made illegal *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 of any kind.

By section 2 it gave to the persons who should pay, deliver or deposit any money, property or thing in action, upon the event of any wager or bet prohibited by the act, a right to sue for and recover the same of the winner or person to whom the same should be paid or delivered or of the stakeholder or other person in whose hands the same should be deposited, or any part thereof. This act contained no limitation whatever.

Thereafter the revision of 1874 was passed.

The revisors, acting under the authority of the act of 1871, page 88, included in the revision section 1 of the act of 1871, page 109, making all wagers, etc., illegal, section 2 providing that any person who shall pay, deliver or deposit any money or property upon the event of any wager or bet may sue for and recover the same of the winner or person to whom the same shall be paid or delivered or of the stakeholder, and they likewise included section 4 of the act of 1797, changing its language, apparently with the purpose of broadening its effect, but retaining in it the limitation.

In the attempt to broaden the effect of section 4 of the act of 1797 the revisors produced a result in section 5 of the revision of 1874 which is not at all clear. The original section 4 provided for an action to persons who should have lost moneys or property upon the event of a wager upon certain events. The revisors broadened this by providing for a cause of action to a person who should have lost any money, etc., "in violation of the first section of this act," referring to the first section of the revision of 1874, which made all wagers illegal, and which was the first section of the supplement of 1871 to the

original gaming act of 1797. They then provided that the cause of action should be to such a person who "shall lose * * * and shall pay or deliver the same or any part thereof to the winner, or to any person to his use, or to a stakeholder" importing into section 4 the word "stakeholder," but by the very terms of section 5 the cause of action still is one given to a person who shall lose *and* shall pay. One must have lost before one comes within the class to which a cause of action is given under section 5. It is true that a cause of action is given to recover the moneys from said winner or from said depository or from said stakeholder "whether the same has been delivered or paid over by said stakeholder or not," but this does not alter the fact that the event of the wager must have been determined before an action can be brought under section 5.

The course of this legislation was briefly sketched by Chief Justice Magie in the Court of Errors and Appeals in *Hensler* v. *Jennings,* 62 N. J. L. 209, and he said at page 212:

> "The purpose for which the provisions of both sections relating to stakeholders' liability were included in the act would seem to cover a liability to an action for money deposited upon an illegal wager, in case the event on which it was to depend never came off and so the wager was never decided. Such a liability would not arise under section 5, but would under section 2. Perhaps there were other reasons for the inclusion of both provisions."

This Court in *Van Pelt* v. *Schauble, et als.*, 68 N. J. L. 638, speaking through Mr. Justice Dixon, referring to section 2 of the revision of 1874, the present section 2 of an act to prevent gaming, 2 C. S. of N. J., p. 2624, said:

> "This provision does not create the right or chose in action on which the permitted suit is founded. Its legal effect is merely to remove the disability under which the judicial rule placed the plaintiff, so that the court would hear him as if he were free from blame. Thus exculpated, and his

> title to the money received by the defendants remaining unaffected by their act in paying it away, the plaintiff can enforce his claim on the same principle and in the same manner as if the unlawful agreement were still unexecuted."

The revisors appointed under the provisions of the act of 1871, p. 88, had no power to create new law and the construction of the revision must be governed by the legislation as it existed at the time of the adoption of the revision.

> *Leonard* v. *Leonia Heights Land Co.*, 81 N. J. Eq. 489.

The effect of the decisions is, in the instant cases, to read into section 2 of the supplement of 1871, p. 109, the limitation contained in section 4 of the original act of 1797, to which the act of 1871 was a supplement.

Now, it is insisted that the act of 1871 is a complete piece of legislation. It is true it is termed a supplement to the act of 1797 but it is not an amendment to that act. Had the act of 1797 contained any general limitation a different question might be presented. But by section 4 of that act a certain cause of action is provided for with a limitation but that limitation is expressed in a proviso. By section 5 of that act a certain other cause of action is created with a certain other limitation and that limitation expressed in a proviso. By sections 2 and 3 of the act certain agreements, conveyances, etc., are declared to be void with no limitation provided with respect to the bringing of actions to declare them void.

The act was circumscribed in its effect, because it applied only to particular forms of gambling, and it was likewise circumscribed with respect to the persons who could bring any suit, and the persons against whom suits might be brought. It created no cause of action in a person until he should have lost the moneys and gave no right of action against a stakeholder.

The supplement of 1871 was new legislation. It denounces in its first section all forms of wagers, and by

its second section it gives a cause of action to any person who should have paid any money to any person who should have parted with property with respect to a wager, whether the money or property should have been lost or not, and it gives a cause of action not only against the winner but likewise against the stakeholder, whether the stakeholder should have paid the money over or not.

It did not provide for any limitation.

To the extent that the supplement of 1871 is inconsistent with the original act of 1797 the provisions of the original act of 1797 must be considered as repealed.

Tamlin v. *Hildreth,* 65 N. J. L. 438;
Roche v *Mayor*, 40 N. J. L. 257.

If it be the fact that section 2 of the act of 1871 provides for a cause of action for every conceivable cause that was provided for by section 4 of the original act of 1797 the result is that section 4 of the original act of 1797 became inoperative as the act of 1871 was the later legislation.

In view of the fact that in the legislation of 1797 the limitations upon the causes of action were expressed in the sections creating the causes of action (I have used the words "creating the cause of action" although they improperly describe what was accomplished in the light of the decision of this Court in *Van Pelt* v. *Schauble*) it is fair to assume that had the legislature intended when it created the cause of action (a much broader provision) in the supplement of 1871 to impose a limitation (other than the general limitation provided by the statute of limitations), it would have provided for that limitation in the section creating the cause of action as it had in the legislation of 1797.

Again I advert to the fact that the legislation of 1797 contains no general limitation.

There are many reasons which may have induced the legislature to omit from the provisions of section 2 of the act of 1871 the limitation contained in section 4 of the act of 1797.

Under section 4 of the act of 1797 a suit could not be brought except against the person who should have lost money and the legislature speaking in 1797 might have assumed that it was fair to limit such a cause of action to six months after the money should have been paid over.

By the legislation of 1871 a cause of action is given against a stakeholder and is given to a person who shall deposit any money before the event of the wager shall have been determined, and it needs no argument to show that there is no fair reason why so long as moneys are in the hands of a stakeholder, they should not be recovered within any length of time. Now, it is true that by the legislation of 1871 a suit may likewise be brought against the loser after the money shall have been paid over and against the stakeholder after the money shall have been paid over, and it may be argued that the same reasons which led the legislature in 1797 to have included in section 4 of the limitation of six months should have induced the legislature in 1871, so far as the cause of action created by section 2 of the act of 1871 is similar to the cause of action created by section 4 of the act of 1797, to have included the same limitation. But the legislature had before it three courses which it might have pursued had it intended to so do. First, it might have amended section 4 by including in section 4 the new causes of action created by section 2 in which event it would have subjected the causes of action to the same limitation contained in section 4. Second, it might have so drafted section 2 as to provide for causes of action not contemplated by section 4 of the act of 1797, in which event it would have left the limitation of six months upon all causes of action created by section 4 of the act of 1797, and would have created a new cause of action without limitation. Third, it might have included in section 2 of the act of 1871 a limitation similar to that included in section 4 of the act of 1797, in which event it would have subjected the causes of action provided for in section 2 of the act of 1871, both those newly created and those

already existing, to the same limitation as provided in the act of 1797, to wit: six months.

But it did neither of these things. It adopted section 2 of the act of 1871 covering situations not covered by section 4 of the act of 1797 as well as matters covered by section 4 of the act of 1797, and provided for no limitation. Why it did this is not material. But it is significant that the trend of legislation shows that the feeling against gambling had steadily risen in the State, and more drastic legislation was being adopted as time went on, and it may well be that the legislature in 1871 conceived that in view of the general sentiment public policy required that actions created or permitted to be brought under the gaming act should be subject to no limitation except that provided by the general act concerning limitations.

Examining section 4 of the act of 1797 in connection with section 2 of the act of 1871 it is clear that by its terms the limitations could not apply to the entire cause of action created by section 2 of the act of 1871.

It is clear that by the provisions of section 4 the words "within six calendar months after losing and payment, or delivery as aforesaid," refer to the losing and payment or delivery by the losers, after losing, to the winner. It so states. The delivery referred to in that section is not to a stakeholder, but the word "delivery" is used to refer to property other than money and the limitation is "after losing *and* payment." Now, turning to section 2 of the Act of 1871, we find that there is a cause of action created in favor of a person "who shall pay, deliver or deposit any money or property or thing in action, upon the event of any wager or bet herein prohibited, or which is or shall be prohibited by any law of this State" to sue for and recover from the stakeholder, etc.

How can it be contended that the words of the provision of section 4 providing for a limitation of six months "after losing and payment, or delivery as aforesaid,"

can refer to the deposit of money or property upon the event of a wager with a stakeholder when that situation is not in anywise contemplated by section 4 of the act of 1797.

If the limitation provided for by section 4 of the Act of 1797 applies to the causes of action created by section 2 of the Act of 1871, from what point of time does the six months provided by section 4 of the Act of 1797 run? Does it run from the time the moneys or property are deposited upon the event of the wager, whether the wager be lost or not? It does not say so, and it would be unfair that it should. Does it run from the time that the stakeholder pays over to the winner the money or property deposited? It does not say so. From what point of time does it run with respect to the newly created causes of action?

It is significant that the Act of 1871 is not an amendment to the Act of 1797, but a supplement thereto. There is a great distinction between an amendment and a supplement.

It was contended in *Bradley & Currier Co.* v. *Loving,* 54 N. J. L. 228, and *State* v. *Hancock,* 54 N. J. L. 393, that a supplement to an act must comply with the constitutional provisions with respect to amendments. But the Supreme Court held otherwise and Chief Justice Beasley in the Loving case, at p. 228 of 54 N. J. L., said, referring to supplements:

> "Such statutory enactments must be regarded as complete in themselves, and, consequently, as unprohibited."

Now, regarding the supplement of 1871 is complete in itself, we find no limitation.

No words of limitation or other words can be read into the supplement by implication.

In *Re Estate of Henry R. White,* 87 N. J. E. 607, reversing the Court of Chancery, 87 N. J. E. 294, this Court, speaking by Mr. Justice Swayze, refused to read

into an amendment of sections 168 and 169 of the Orphans' Court Act words which were contained in the original act, and which had been read into the amendment by the Court below because of an apparent *casus omissus*. Mr. Justice Swayze said, at p. 608:

> "It is always dangerous to read words into a statute that are not there, as we said in Blanz *v.* Erie Railroad Co., 84 N. J. L. 35. It can rarely, almost never, be done, and only when it plainly effectuates the legislative intent and is, as in that case, within a possible construction of words actually used."

The supplement of 1871 being complete in itself if it covered the entire field took the place of and repealed by implication the provisions of section 4 of the Act of 1797.

In *Tomlin* v. *Hildreth,* 65 N. J. L. 438, the Supreme Court held that the second section of an act for the limitation of actions, March 27, 1874, was impliedly repealed by the supplement to that act, approved March 24, 1896, with respect to the causes of action covered by the supplement, the Court saying (p. 446):

> "It is impossible to hold that section 2 of the act of March 27, 1874, which limits the right to institute a suit for false imprisonment to four years after the cause of action accrued, is still in force, in the case of a subsequent statute which limits actions accruing for personal injuries caused by the wrongful act of any person or corporation to within two years from the date that the cause of action accrued. If the actions specifically mentioned in section 2 of the act of March 27, 1874, are such (as they undoubtedly are) as arise from the wrongful act of another person, then the statute of 1896 applies and repeals by implication section 2 of the act of 1874, in so far as that section allows four years after the cause of action accrues within which to commence suit."

This case is analogous to that at bar. It dealt with limitations. The cause of action described in the sup-

plement was broader than the cause of action in the original act. Nevertheless, in as much as the cause of action in the original act was included within the language of the cause of action described in the supplement the limitation prescribed by the supplement was held to apply.

So in the case at bar. The cause of action described in section 4 of the Act of 1797 is within the language of the supplement of 1871. There being no limitation prescribed by the supplement of 1871, it must be assumed that the legislature intended that the general act concerning limitations should apply. The absence of a provision for limitation in the supplement amounts to a declaration that there should be no limitation except that prescribed by the general act. Following the Tomlin case the limitation prescribed by the supplement, which is no limitation, must be applied, and the provisions of section 4 of the Act of 1797 must be considered as repealed.

But irrespective of this, in as much as the supplement of 1871 was much broader than the act of 1797, it must be considered as an announcement of a general rule of policy by the legislature and to the extent that it is inconsistent with preceding legislation the preceding legislation must be considered as repealed by implication.

> *Tomlin* v. *Hildreth,* 65 N. J. L. 438, at p. 447, and cases cited;
>
> *McCulley* v. *Elizabeth,* 66 N. J. L. 555.

In *Roche* v. *Mayor, &c., of Jersey City,* 40 N. J. L. 257, the Supreme Court says:

> "Every statute must be considered according to what appears to have been the intention of the legislature, and even though two statutes relating to the same subject, be not, in terms, repugnant or inconsistent, if the later statute is clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the earlier act. The rule does not rest strictly upon the ground of repeal by implication,

> but upon the principle that when the legislature makes a revision of a particular statute, and frames a new statute upon the subject matter, and from the framework of the act it is apparent that the legislature designed a complete scheme for this matter, it is a legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is discarded. It is decisive evidence of an intention to prescribe the provisions contained in the later act as the only ones on that subject which shall be obligatory."

I think, therefore, it is clear that, prior to the adoption of the revision of 1874, the provisions of section 2 of the supplement of 1871 were effective to the exclusion of the provisions of section 4 of the Act of 1797, and there was no limitation for the causes of action prescribed by section 2, within which section the causes of action in the case at bar fall except the general limitation.

Did the adoption of the revision change the situation?

I have already considered the provisions of the revision.

It is impossible to determine why it was that the revisors included both sections in the revision.

Hensler v. *Jennings,* 62 N. J. L. 209.

I have already indicated that by attempting to insert language in section 5 which would make it apply to a stakeholder they make the section unintelligible. Even as changed the section only applies in case one should have actually lost money. It is still apparently as narrow as it was when it was section 4 of the Act of 1797, so far as this is concerned. It has been extended to apply to the loss of any money in violation of section 1 of the Act of 1871 and to a stakeholder after money should have been lost. But the revisors also included section 2 as it appeared in the supplement of 1871. Section 2 is the later and the broader act. Is there any more warrant to read by implication the limitation contained

in section 5 of the present act into section 2 of the present act than there was to read by implication the limitation prescribed by section 4 of the Act of 1797 into section 2 of the supplement of 1871. I can conceive of no reason.

Under the Act of 1871, p. 88, the revisors were given power to revise, simplify, arrange and consolidate all the public acts of the legislature of this State which are general and permanent in their nature and which shall be in force at the time such commissioners shall make their final report. It is further provided:

> "Provided, that no changes shall be made in the phraseology or distribution of the sections of any statute that has been the subject of judicial decision by which the construction thereof, as established by such decision, shall or can be impaired or affected."

By the Act of 1874, Revised Statutes, p. 832, approved March 7, 1874, certain acts which had been revised were repealed. The supplement of 1871 to the Act of 1797 was not one of those repealed. Volume 5, C. S. App. B, p. 5971.

It is clear that there was no intent on the part of the legislature to confer upon the revisors' power to adopt new law. Their powers were to revise, simplify, arrange and consolidate.

It seems that instead of simplifying or revising the law with respect to gaming in the particular with which we are dealing they contented themselves with consolidating. The inclusion of section 2 of the supplement of 1871 and section 4 of the original Act of 1797, notwithstanding the changes in section 4, is a pure matter of consolidation. That being so, in construing the two sections there is nothing to do except to adopt the construction which would have been adopted had there been no consolidation or revision.

This Court, speaking by Mr. Justice Swayze in *Leonard* v. *Leonia Heights Land Co.*, 81 N. J. E. 489, said:

> "The act is a revision of pre-existing legislation, and the intent to change the law in a revision must

be clear. State *v.* Lang, 75 N. J. L. 502, 511; Trenton *v.* Standard Fire Insurance Co., 77 N. J. L. 757, 760; Newark *v.* Tunis, 81 N. J. L. 45, 47, affirmed 82 N. J. L. 461. Good illustrations of the practical application of the rule are to be found in Re Murphy, 23 N. J. E. 180; Campbell *v.* Hale, 25 N. J. L. 324; Clement *v.* Kaighn, 15 N. J. E. 47; Knight *v.* Freeholders of Ocean, 49 N. J. L. 485, 487, 488; O'Hara *v.* National Biscuit Co., 69 N. J. L. 198.

Applying the construction which would have to be placed upon the legislation as it existed prior to the revision to the statute as revised it is clear that the only limitation prescribed, so far as a cause of action covered by section 2 is concerned, is the limitation prescribed by the general act.

It is respectfully submitted that in both cases the judgment should be reversed.

Respectfully submitted,

JOSEPH F. KAHRS,
MERRITT LANE,
Attorneys and of Counsel with Appellants.

New Jersey Court of Errors and Appeals.

GEORGE A. SAWIN,
Plaintiff-Appellant,

vs.

JOHN C. EISELE and NATHANIEL KING,
co-partners, trading under the name
and style of EISELE & KING,
Defendants-Appellees.

BRIEF OF APPELLEES.

Statement.

The sole question presented by this appeal is whether the limitation contained in Section 5 of the act entitled, "An Act to Prevent Gaming", 2 Comp. Stat. 2624, applies to similar actions under Section 2 of the same act. Circuit Judge Nelson Y. Dungan held the limitation applicable and struck out the complaint and appeal has been taken from the judgment of *non pros* entered on his order.

Argument.

Section 2 of the above mentioned act entitled, "An Act to Prevent Gaming" provides as follows:

> "2. That any person who shall pay, deliver or deposit any money, property or thing in action, upon the event of any wager or bet herein prohibited, or which is or shall be prohibited by any law of this state, may sue for

and recover the same of the winner, or person to whom the same shall be paid or delivered or of the stakeholder, or other person in whose hands the same shall be deposited, or any part thereof, whether the same shall have been delivered or paid over by such depositary or stakeholder or not, and whether any such wager is lost or not."

Section 5 of the same act provides as follows:

"5. That if any person shall lose any money, goods, chattels or other valuable thing, in violation of the first section of this act, and shall pay or deliver the same or any part thereof to the winner, or to any person to his use, or to a stakeholder, it shall be lawful for such person to sue for and recover said money, goods, chattels, or other valuable thing, from said winner or from said depositary, or from said stakeholder, whether the same has been delivered or paid over by said stakeholder or not, with costs of suit, in an action of debt, founded on this act, in any court of this state having cognizance thereof; in which action it shall be sufficient to declare for so much money had and received for the plaintiff's use, without setting forth the special matter; provided, that such suit shall be brought within six calendar months after payment or delivery as aforesaid."

It will be readily seen from a comparison of the language of these two sections that they cover substantially the same ground. Both sections permit the person who has lost money or property paid or delivered upon the event of an unlawful wager to sue for and recover the same, and both sections authorize such recovery as against the winner, the depositary or the stakeholder. Both sections extend this remedy as against a stakeholder whether or not the money or property shall have been delivered or paid to the winner by such stakeholder. The only possible difference between the scope of

the two sections is that Section 2 authorizes an action whether the wager has been lost or not while Section 5 apparently does not authorize an action thereunder unless the money or property paid or deposited has been lost. In all other respects, namely: the character of the action, the measure of the recovery, the persons against whom the action may be prosecuted and in case of loss, the circumstances under which it may be prosecuted, the statutory provisions are identical.

Section 5 contains the proviso which is not found in Section 2 namely: "provided that such suits shall be brought within six calendar months after payment or delivery as aforesaid."

We respectfully submit that the limitation contained in this proviso applies with equal force to actions brought under section 2 of the act.

Although the statute has been in effect in its present form since 1874, this question seems not to have been definitely determined.

In *Meyers* v. *Fridenberg,* 70 N. J. E. at page 3, Chancellor Magie suggested that the proviso to Section 5, which contains the limitation, was equally applicable to actions instituted under section 2 but stated that he considered it unnecessary to determine that question because he had concluded that the bill of complaint in that case must be dismissed on other grounds.

In *Blessing* v. *Smith,* 74 N. J. E. 593, Vice Chancellor Garrison said, at page 595:

> "The situation is closely analogous to that dealt with in the case of *Meyers* v. *Fridenberg, Supra.* If the action is by virtue of the 5th section of the act it is barred by lapse of time; if by virtue of the 2nd section, the limitation by construction may apply thereto also, and the action similarly be barred."

The question to be determined, as in all cases of statutory construction, is what was the intention of

the legislature when it passed the act in question? It is apparent that the general purpose of the act is the suppression of gambling.

By the first section all wagers, bets or stakes are declared to be unlawful. By the third section, all promises, agreements, notes, bills, bonds, etc., the whole or any part of the consideration of which is for money, etc., won or betted in violation of the first section are declared to be void. By the fourth section conveyances based on a similar consideration are declared to vest the estate conveyed in the heir or legal representatives of the grantor or vendor. By the seventh section provision is made for a bill of discovery in equity for the purpose of discovering the money or other things won, paid or deposited on an illegal wager. The eighth and ninth sections deal with lotteries.

The second and fifth sections are the only provisions which permit a party to an illegal bet to recover the money wagered. Were it not for the provisions of the last mentioned sections the action of such a party would be barred by the application of the maxim *in pari delicto potior est defendentis conditio.* The evident purpose of the legislature in enacting Sections 2 and 5 was to discourage illegal wagers by permitting the parties to such wagers, either before the happening of the event or after the wager had been lost, to recover the amount thereof from the stakeholder or from the winner. The benefit conferred upon the persons who should bring the action under these sections was not the purpose of the legislation but was merely incidental to the public purpose which the legislature had in view.

While the statutes are not technically penal in character the liability which they impose is much the same in substance for they make a stakeholder who may have paid or delivered the subject-matter of the bet to the winner pursuant to the request of

the loser liable to an action at the suit of the loser. In fact the statute goes farther than this for section 6 provides as follows:

> "6. That if the person who shall lose and pay such money, or lose and deliver such thing or things as aforesaid, shall not, within the time aforesaid, really and *bona fide,* and without covin or collusion, sue, and with effect prosecute for the money or other thing or things so lost and paid, or delivered, it shall and may be lawful for any other person, by any such action as aforesaid, to sue for and recover the same, with costs of suit from such winner, depositary or stakeholder as aforesaid; the one moiety to the use of the state; provided, that such suit shall be instituted within six calendar months from and after the expiration of the time limited in the preceding section for the loser to prosecute for the same."

Under this section a depositary or stakeholder may be sued by a common informer in case the loser fails to sue within six months.

Counsel for the appellant traces the history of gaming legislation in this state and shows that section 5 of the present gaming act originated in the act to prevent gaming passed in 1797 (Nixon's Digest, p. 367), and that section 2 of the present act was originally a part of the supplement to the act of 1797 passed in 1871 (P. L. 1871, p. 109). He calls attention to the fact that the provisions of section 2 of the supplement of 1871 were broader than the provisions of section 4 of the original act of 1797 and included within its purview every cause of action that was covered by the original section 4. He bases two conclusions on these facts.

First: That section 2 of the supplement of 1871 superseded and repealed by implication section 4 of the original act of 1797.

Second: That the revision of 1874 (the present act) is merely a consolidation of existing legisla-

tion and that section 4 of the original act of 1797 having been superseded by section 2 of the supplement acquired no new life by virtue of its reenactment with substantial change of phraseology in the present revision.

We submit that both of these conclusions are erroneous.

(a) *Section 2 of the supplement of 1871 did not repeal section 4 of the original act of 1797.*

It is significant that the act of 1871 was not an independent act but was a supplement to the earlier act and that it contained no repealing clause.

In *State* v. *Hancock,* 54 N. J. L. 393, one of the cases cited by appellant, the Supreme Court, speaking of the contention made in that case that the statute there under consideration did not comply with the constitutional provision concerning the form of an amendment to an act, said, at page 397:

> "Besides it may well be doubted whether this prescription of the fundamental law can in any case be operative as between a statute and its supplement; for by such a relationship the statutes are unified in substance and effect, so that, of necessity and in the absence of all expression for that purpose, the appropriate section of the two laws being thus blended must co-operate and interact so as to affect the legislative purpose."

Applying this rule of law to the act of 1797 and Section 2 of the supplement of 1871 as they existed prior to the revision, it becomes necessary to consider these two sections as though they were blended together and as thus blended formed the law of this state on the subject giving to all of the provisions of each full effect and operation. In this way the limitation contained in section 4 of the original act which limited the only action which

could be brought under that act by a party to an illegal wager would apply with equal force and effect to the extension of that action provided by the supplement of 1871, the operation of section 2 of the supplement when blended with section 4 of the original act being merely to extend the scope of the action originally granted.

In *Van Riper* v. *Essex Public Road Board,* 38 N. J. L. 23, the Supreme Court held that an act and its supplement are to be construed as one law so that the terms of the act may, in their connection with the supplement, have a broader meaning than they originally possessed.

See also *United N. J. Railroad & Canal Co.* v. *Parker,* 75 N. J. L. 771 (Court of Errors and Appeals).

If the construction contended for by the appellant shall be adopted, however, it would be necessary to hold that the supplement of 1871 superseded and by implication repealed not only section 4 of the act of 1797 which, as above stated, was re-enacted with substantial changes as section 5 of the present act but also section 5 of the act of 1797 which was re-enacted also with substantial changes as section 6 of the present act.

This section (Section 5 of the act of 1797) conferred upon a common informer the right to bring an action for the recovery of the subject-matter of the wager against the winner at any time within six months after the expiration of the time limited in section 4 for the loser to prosecute a suit. If, therefore, section 2 of the act of 1871 superseded and by implication repealed section 4 of the act of 1797 but left section 5 unaffected the absurd result would follow that the loser might sue and recover the sum lost at any time within six years after paying or depositing the same but that in case the loser did not sue within six months a com-

mon informer might sue and recover against the winner.

We submit that there is no basis for the contention that the act of 1871 repealed or in any way modified section 5 of the original act of 1797. If this is true it must necessarily follow that it did not repeal section 4, as these two sections are intended to operate together. To decide otherwise would be to give to the acts the absurd construction above suggested. Implied repealers are not favored. The presumption is, as above stated, that an act and its supplement must be construed together so that all parts of it may be given effect. It is only when this cannot be done that the doctrine of implied repealer is applicable.

(b) *Section 4 of the original act of 1797 was re-enacted with substantial change of phraseology in the revision of 1874 and even though repealed by implication by the supplement of 1871 acquired new life and vitality by virtue of such re-enactment.*

A comparison of Section 4 of the act of 1797 with section 5 of the revision of 1874 (the present act) shows that the legislature radically changed the provisions of section 4 so as to broaden its scope and clearly demonstrates that it intended that such sections as so changed should be an effective part of the revised act.

Section 4 of the Act of 1797 is as follows (Nixon's Digest, p. 313):

> "4. It shall and may be lawful for any person who shall lose any money, goods, chattels, or other valuable thing, *by playing at cards, dice, billiards, tables, tennis, bowls, shuffle-board, or other game or games, or by betting on the sides or hands of such as do play at any game or games, or by betting at cock-fighting,*

or other sport or pastime, and shall pay or deliver the same, or any part thereof to the winner *or winners,* or other person for his *or their* use, *or on his or their behalf,* to sue for and recover the money, or value of the thing or things so lost and paid, or delivered, or any part thereof, from the respective winner or winners, with costs of suit, by action of debt, founded on this act, in any court of record in this state having cognizance thereof; in which action it shall be sufficient for the plaintiff or plaintiffs in the moneys so lost and paid, or to the value of the thing or things so lost and delivered for so much money had and received by such defendant or defendants, to the plaintiff's use, whereby an action hath accrued to the plaintiff or plaintiffs, according to the form of this act, without setting forth the special matter; provided, that such suit shall be instituted within six calendar months after *losing* and payment, or delivery as aforesaid."

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Section 5 of the revised act of 1874, 2 Comp. Stat. 2624, is as follows:

"5. That if any person shall lose any money, goods, chattels or other valuable thing, *in violation of the first section of this act,* and shall pay or deliver the same or any part thereof to the winner, or to any person to his use, *or to a stakeholder,* it shall be lawful for such person to sue for and recover said money, goods, chattels, or other valuable thing, from said winner, *or from said depositary, or from said stakeholder, whether the same has been delivered or paid over by said stakeholder or not,* with costs of suit, in an action of debt, founded on this act, in any court of this state having cognizance thereof; in which action it shall be sufficient to declare for so much money had and received for the plaintiff's use, without setting forth the special matter; provided, that such suit shall be brought within six calendar months after payment or delivery as aforesaid."

By a comparison of the two sections the following material changes will be observed.

1. The original section 4 gave a right of action only to any person who should lose any money, goods, chattels, or other valuable thing, *by playing at cards, dice, billiards, tables, tennis, bowls, shuffle-board, or other game or games, or by betting on the sides or hands of such as do play at any game or games, or by betting at cock-fighting, or other sport or pastime,* while section 5 of the revision gives such action to any person who shall lose any money, goods, chattels, or other valuable thing *in violation of the first section of the act* (i. e., *on any wager, bet, or stake, 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.* See Section 1, 2 Comp. Stat., page 2623). By this change the scope of section 5 was made as broad, so far as the character of the wager was concerned, as the scope of section 2 and as so changed it covers every conceivable kind of wagers whereas in the original act it had covered only the games therein enumerated or others of like kind.

2. The original act only authorized an action where the money or property lost had been paid or delivered to the *winner or winners or other person for his or their use or on his or their behalf.* Section 5 of the revised act gives a right of action where the money or thing has been paid or delivered to the winner or any person to his use *or to a stakeholder.* This change is significant in view of the fact that money or property paid or delivered to a stakeholder is invariably paid or delivered before and not after the happening of the event upon which the wager depends. Any payment made after the happening of the event would be paid to the winner or to some person to his use while a pay-

ment to a stakeholder is made before the winner has been ascertained.

3. Section 4 of the act of 1797 authorized the recovery of the money or value of the property *from the respective winner or winners.* Section 5 of the revision authorizes the recovery "from said winner or from said *depositary or from said stakeholder whether the same has been delivered or paid over by said stakeholder or not.*" This change is like wise significant for under the provisions of section 4 of the original act of 1797 no recovery could be had against a stakeholder, *Sutphin* v. *Crozer,* 34 N. J. L. 462. This case did not construe the gaming act of 1797, as suggested by counsel for appellant, as it arose under a statute relating to horse racing. Its doctrine would, however, apply by analogy, while under section 5 of the revision recovery could be had against a stakeholder even though he had paid the subject-matter of the wager to the winner.

The limitation contained in section 4 of the act of 1797 was in this language: "provided that such suit shall be instituted within six calendar months after *losing* and payment or delivery as aforesaid."

The proviso in section 5 of the revision of 1874 is as follows: "provided that such suits shall be brought within six calendar months after payment or delivery as foresaid."

We submit that these changes in the act are abundant proof of the fact that the legislature did not regard section 5 of the revision of 1874 as meaningless language which had been entirely superseded by section 2 of the same act.

We do not dispute the soundness of the general rule relied upon by the appellant and which is clearly stated by Mr. Justice Swayze in *Leonard* v. *Leonia Heights Land Co.,* 81 N. J. E. 489. We respectfully submit, however, that this rule has no application if the intent to change the law in the

revision by a change in the phraseology in the pre-existing acts clearly appears.

As was said by Mr. Justice Haines in *State* v. *Hale,* 25 N. J. L. 324, at page 328:

> "It may be true, as intimated by the Chief Justice, in the *Matter of Thomas Murphy,* 3 Zab. 192, that where two or more statutes, whose meaning is plain, or whose construction has been long settled, are consolidated into one, without change of phraseology, the same construction should be given to the consolidated act as was given to the original statutes.
>
> *"But then it must clearly appear to have been the intention of the legislature merely to consolidate, and not to change, the former statutes. If there is a change of phraseology, and a clear intention manifested to alter the statutes, no such rule can be applied."*

In *State* v. *Lang,* 75 N. J. L. 502, at 511, this court, speaking by Mr. Chief Justice Gummere, said:

> "It is, however, familiar law that in construing a revision of statutes made by the consolidation of previous acts of the legislature the same meaning should be given to such constituent statutes in their new setting that was accorded to them when enacted, unless a different legislative intent is plainly apparent. *Clement* v. *Kaighn,* 2 McCart. 47; *State* v. *Anderson,* 11 Vroom, 224; *Smith* v. *Regan,* 25 *Id.* 167; *In Re Murphy,* 3 Zab. 180; *Fries* v. *Hendrickson,* 16 Vroom, 555; *O'Hara* v. *Biscuit Company,* 40 *Id.* 198, 202; *State* v. *Hoffman, supra.*
>
> *"Where such consolidation results in a legislative fiat that differs materially from the mandate of the original statutes, the purpose of the legislature to substitute such later expression of its will for the earlier one is plainly apparent."*

Another fact of significance concerning the revision is that section 6 which, as has above been

stated, was originally enacted as section 5 of the act of 1797 was in the revision extended in its scope so as to make it correspond with the enlarged section 5 both by authorizing an action against a stakeholder under that section and by the extension of its provisions to include any wager made unlawful by section 1 of the revision. In fact, the inclusion at all of this section in the revision (Section 6) refutes the appellant's argument that section 5 and the limitation therein contained is now inoperative for, as above stated, the whole purpose of section 6 is to give a right of action to a common informer after the period fixed by section 5 within which the loser may sue has expired.

While both section 2, section 5 and section 6 have received consideration by our courts it has never been suggested that section 5 had been rendered meaningless by section 2 or that it was no longer operative. In fact, this court in *Hensler* v. *Jennings,* 62 N. J. L. 209, at page 213, stated that the liability of a stakeholder under section 2 arose upon his receipt of the stakes on the illegal wager and intimated that he might not be relieved from liability even by a return of the stake without suit because under the provisions of section 6 the stakeholder, if not sued by the loser, might be sued by a common informer. This case treats sections 2, 5 and 6 as equally effective portions of the act.

We respectfully submit that sections 2 and 5 of the revision must be construed together and that a reasonable construction of the whole act should be adopted. The provisions of section 5 cannot be disregarded.

If, therefore, the appellant's contention that the limitation contained in section 5 has no application to the cause of action mentioned in section 2 be sustained we have the absurd situation that by section 2 of the act the legislature confers upon the loser of an illegal wager the right to come into

court at any time within six years and recover the amount of the wager from the stakeholder or from the winner, while in section 5 of the same act the legislature confers upon the same loser the same right except that it must be exercised within six months after the payment of he wager.

It would be absurd to hold that the loser of a wager if he bases his cause of action upon section 5 must sue within six months or be forever barred but that if he saw fit to invoke the provisions of section 2 he might institute the same kind of action based upon the same cause at any time within six years. It would, we submit, be even more absurd to hold that a stakeholder or winner might be sued by a common informer under section 6 in case six months had elapsed after the payment of the money and no suit had been commenced by the loser and might also, *notwithstanding such recovery by a common informer against him,* be sued by the party to the wager under section 2 at any time within six years after the deposit of the money. If the construction contended for by the appellant shall be adopted both of these absurdities will exist.

A construction of a statute which will lead to absurd results should not be adopted if it is possible to give to the act a reasonable interpretation.

Jensen v. *Woolworth Co.,* 92 N. J. L. 529.
Moore v. *Johnson,* 85 N. J. L. 40.

We respectfully submit that a reasonable construction of this act may be had by regarding sections 2 and 5, which are the only sections of the act which permit the institution of a suit by a party to an illegal wager, as both subject to the limitation which appears in section 5 but which is, we respectfully submit, a general limitation prescribed for all suits brought under the Gaming Act where the plaintiff is suing to recover money paid or deposited on account of an illegal wager.

The appellant, however, insists that by the provisions of section 4 of the act of 1797 the words "*after losing* and payment or delivery as aforesaid" refer to the losing and payment or delivery by the loser to the winner. However this may be, we are not now concerned with section 4 of the act of 1797 but with section 5 of the act of 1874. By this section the payment or delivery referred to is not a payment or delivery *after losing* for the payment or delivery contemplated by section 5 may be made to *a stakeholder*. A stakeholder is defined, in 36 Cyc., page 813, as "a mere depositary of both parties to a wager for the money deposited by them, respectively, with a naked authority to deliver it over on the proposed contingency". See similar definitions in Anderson's Law Dictionary and Boubier's Law Dictionary. Payment to a stakeholder, therefore, is invariably made before the happening of the contingency and not afterward. That payment before the loss is within the contemplation of section 5 as it now exists also appears from the fact that recovery against the depositary or stakeholder is authorized "*whether the same has been delivered or paid over by said stakeholder or not*".

This shows that the payment under this section means payment to or deposit with the stakeholder and that the action may be brought *although payment has not been made to the winner*. This further appears from the fact that in section 5 as re-enacted the limitation is made to run from payment or delivery of the subject-matter of the wager and not from "*losing* and payment or delivery" as in the original section 4.

The very features of the act, therefore, upon which counsel for appellant relies to show that the section cannot apply to the deposit of money or property upon the event of a wager are the ones which were changed when the section was re-enacted.

Conclusion.

We respectfully submit that a construction of the act which will make the limitation in section 5 applicable to section 2 as well is in accord with the general purpose of the act, is in line with the legislative policy as shown in similar acts and is the only construction which will avoid absurdity.

The original gaming act of 1797 was taken from the Statute of 9 Anne Chapt. 14 (see *Boswell, qui tam, &c.,* v. *Robinson,* 33 N. J. L. 273, bottom of p. 277), which prescribed a three months' limitation. The only other similar act which we have found in this state is in Elmer's Digest, page 224, Section 13, which permits the loser of a wager on a horse race to sue for and recover the amount lost, but such action must be brought within six months.

The substantially penal character of the act at least so far as its operation touches a stakeholder who may have paid over the amount of the wager before the institution of the suit against him and who is within both sections 2 and 5 readily accounts for the brief limitation which the legislature has invariably fixed for actions of this kind. We know of no legislation which permits the bringing of a similar action without fixing a short limitation.

The fact that the party who, by the statute, is permitted to bring the action is equally guilty with the stakeholder or winner, furnishes an additional reason why the right granted to him, not for his benefit, but for the public good, should be promptly exercised, if exercised at all.

To construe the statute so as to make the limitation inapplicable to section 2 would not only make the act inconsistent with itself but would defeat the legislative policy above referred to, while if the limitation is construed as applicable to all actions brought by a party to an illegal wager

whether under section 2 or section 5 the whole act will be harmonious and the salutary policy of short limitations in actions of this character will be perceived.

It is respectfully submitted that the judgment of the court below should be affirmed.

LINDABURY, DEPUE & FAULKS,
Attorneys of Defendants-Appellees.

WALTER D. BARKER and
JOSIAH STRYKER,
Of Counsel.

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Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

DAVID N. SHACK, *Plaintiff-Appellant,* *vs.* WALTER H. DICKENHORST and EMANUEL W. KAISER, co-partners, trading as DICKENHORST & Co., *Defendants-Appellees.*	*Action at Law.* *On Appeal from Judgment Dismissing Complaint.*

BRIEF OF WALTER H. DICKENHORST, Defendant-Appellee.

Statement.

Under date of May 31, 1922, there was served on Walter H. Dickenhorst, a summons and complaint in the Essex County Circuit Court at the suit of David N. Shack, which complaint contained five counts covering transactions which it is alleged five different people had with the defendant Dickenhorst, and which suit was brought by the plaintiff Shack as assignee, in which approximately $90,000 damages were demanded. The complaint alleges that the money was delivered over to the defendants "Upon the event of a wager and bet forbidden by Section 1 of an act to prevent gaming, Revision of 1877." Subsequently a motion was addressed to the complaint (p. 9, State of Case), on the ground that these claims were barred by the statute of limitations applicable to the act under which the complaint was brought, and upon bringing on the motion it was determined by Judge Mountain that the action was barred by the lapse of time. It is for the purpose of reviewing that decision that this appeal is being prosecuted.

ARGUMENT.

At the outset the defendant Dickenhorst respectfully submits that the only point before this Honorable Court at this item is a review of the correctness or incorrectness of the ruling of Judge Mountain that the cause of action as stated and set out in the complaint is barred by the lapse of time applicable to an action such as the complaint expressly limits itself to. The brief of the plaintiff-appellant consists of a very complete review of the history of the gaming act and states reasons why, in the opinion of the author, the limitation contained in Section 5 of that act does not apply to Section 2, but with that history and with that reasoning the defendant Dickenhorst is not concerned, because the complaint in this case is not brought under Section 2, but is expressly stated at five different places in the complaint as being brought under "Section 1 of an act to prevent gaming, Revision of 1877," and therefore the sole point for consideration is whether or not an action brought under Section 1 is barred by the lapse of time when it shows on its face that the last transaction between the parties took place more than a year before that complaint was filed.

Section 1 reads:

> "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."

Section 5 provides:

> "That if any person shall lose any money, goods, chattels or other valuable thing, in violation of the first section of this act, and shall pay or deliver the same or any part thereof to the winner, or to any persons to his use, or to a stakeholder, it shall be lawful for such person to sue for and recover said money, goods, chattels, or other valuable thing, from said winner * * * provided, that such suit shall be brought within six calendar months after payment or delivery as aforesaid."

There can therefore be no uncertainty as to the time within which actions brought by reason of a violation of Section 1 must be prosecuted, as the language is very clear and unambiguous, and a discussion as to whether or not the action would have been barred if it had been brought under Section 2 is entirely immaterial. It is true that Section 2 of that act provides that any person who shall pay any money upon the event of any wager or bet may sue for and recover the same of the winner, whether such wager be lost or not, and contains no limitation as to the time within which suit must be brought, but the plaintiff's complaint was not brought under Section 2, and in each count he limited himself to a violation of Section 1. Therefore, Section 5 expressly providing that suits brought in violation of Section 1 must be brought within six months, the defendant moved to strike out the complaint, and it was on that motion and on that complaint that the ruling of Judge Mountain was made, and that ruling only is under review.

If this had been an action brought under Section 2 there is no gainsaying the fact that with that section containing no limitation as to time it might well be argued that an action brought under that section would not be barred within the time that an action bought under Section 1 would be barred, but we have no such case, and therefore that question is entirely beside the point, nor do we conceive that it is before this Honorable Court for consideration or determination on this present appeal.

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New Jersey Court of Errors and Appeals

DAVID N. SHACK, *Plaintiff-Appellant,* *and* WALTER H. DICKENHORST and EMANUEL W. KAISER, co-partners trading as DICKENHORST & CO., *Defendants-Appellees.*	*Reply Brief of Appellant.*
GEORGE A. SAWIN, *Plaintiff-Appellant,* *and* JOHN C. EISELE and NATHANIEL KING, co-partners trading under the name and style of EISELE & KING, *Defendants-Appellees.*	

1. REPLY TO BRIEF OF WALTER H. DICKENHORST.

Counsel takes the view that, because the complaint alleges that the wager was illegal under the provisions of section 1 of the "Act to prevent gaming", 2 C. S. of N. J. 2623, the action must be under section 5 because section 5 specifically refers to a cause of action "if any person shall lose any money, etc., in violation of the first section of the act and shall pay, etc." Counsel says, page 3 of his brief, "It is true that section 2 of that act (the act to prevent gaming) provides that any person who shall pay any money upon the event of any wager or bet may sue for and recover the same of the winner, whether such wager be lost or not, and contains no limitation as to the time within which suit must be brought but the plaintiff's complaint was not brought under section 2, and in each count he limited himself to a violation of section 1."

Counsel overlooks that section 2 of the act to prevent gaming specifically provides that any person who shall pay, deliver or deposit any money, property or thing in action, upon the event of any wager or bet *herein* prohibited, or which is or shall be prohibited by any law of this state *may*, etc.

Section 2 contains no prohibition. The "herein prohibited" refers, of course, to that section of the act which contains a prohibition, and that section is section 1 which makes unlawful all wagers.

An action is therefore expressly given by section 2 to a person who shall deposit money upon the event of a wager prohibited by section 1.

Counsel also overlooks that section 2 of the Act to Prevent Gaming as now constituted is section 2 of the supplement to the Act to Prevent Gaming, of 1871, P. L. 109, and that section 1 of the present Act to Prevent Gaming is section 1 of the supplement.

Even without going into the history of the act to hold that section 5 is the exclusive remedy is case of a wager in violation of section 1 would be to ignore the words in section 2 "herein prohibited" and would likewise be to deprive the person who should have deposited moneys upon the event of a wager, the wager not yet having been decided, of any remedy, for section 5 does not cover such a contingency, and that would be to prevent any person whomsoever, who had deposited money upon the event of a wager, the wager not yet being decided, of any remedy, for section 1 is all embracing and covers all wagers of every nature, kind and description.

Upon the complaint there is no remedy under section 5, for the pleader has not alleged a loss and this is a *sine qui non* for relief under section 5.

The complaint as drawn states a cause of action within section 2 and not within section 5.

2. REPLY TO BRIEF OF EMANUEL W. KAISER.

The answer to the contention of counsel that the language of the Chancellor in *Meyers* v. *Friedenberg,* 70 N. J. E. 3 upon the subject matter under discussion is not *obiter* is in the language of the Chancellor quoted in appellee's brief: "It is contended that the proviso to section 5, limiting actions, is equally applicable to the action provided for by section 2, I deem it unnecessary to determine whether this contention can prevail."

The answer to the contention of counsel for appellee that the language of Vice-Chancellor Garrison in *Blessing* v. *Smith,* 74 N. J. E. 593 is not *obiter* is in the language of Vice-Chancellor Garrison quoted in appellee's brief:

> "If the action is by virtue of the fifth section of the act it is barred by lapse of time; if by virtue of the second section, the limitation by construction *may* apply thereto also, and the action similarly be barred."

On page 5 of appellee's brief counsel says: "Both of these cases (the Friedenberg and Blessing cases) seemed to be disposed of by the Court on the theory that they were within the language of the 5th section and being so, were barred by lapse of time. In both of these cases, however, it was contended that, assuming that lapse of time did bar said actions under the 5th section, a similar action was given under the 2nd section which contains no express limitation." In answer to that, the Court said that this limitation in the 5th section *would* apply by construction to the 2nd section."

The Court in neither case said that the limitation in the fifth section of the act would apply by construction to the second section; neither was a case decided upon the theory that it was within the language of the fifth section and being so was barred by lapse of time. In each case the decision was based upon the ground, in the language of the Chancellor in the Friedenberg case: "I think that the bill exhibits complainant's claim as one

for which he has a complete remedy at law", and in the language of Vice-Chancellor Garrison in the Blessing case: "In any event there seems to be a complete and adequate remedy at law and no necessity for the intervention of a court of equity."

Counsel devotes considerable space to contending that under the fifth section of the act as it now exists there may be a recovery from a stakeholder before the event of the wager shall have been determined. But he ignores the language of the act (p. 5 of appellant's brief) and likewise ignores the language of Chief Justice Magie in this Court in *Hensler* v. *Jennings,* 62 N. J. L. 209 at p. 212:

> "The purpose for which the provisions of both sections relating to stakeholders' liability were included in the act would seem to cover a liability to an action for money deposited upon an illegal wager, in case the event on which it was to depend never came off and so the wager was never decided. Such a liability *would not* arise under section 5, but would under section 2."

Counsel says that in order that the construction put upon the act by this Court in the Hensler case can be applied the section should have contained a provision, in his language, page 8—"If, as appellant contends, the Legislature intended the wager to be determined before payment, why doesn't the proviso say: 'after loss and payment, or delivery as aforesaid' as did the proviso in the 4th section of the act of 1797."

Why the legislature altered the language of the proviso in the 5th section we do not know. But that alteration of the language of the proviso could not have been deemed sufficient by this Court in the Hensler case to ignore the very words of that provision of the 5th section which gives the cause of action which are that if any person "shall lose any money, goods, chattels or other valuable thing, in violation of the first section of this act, *and shall pay or deliver the same or any part thereof to the winner, or to, etc.*"

We have considered the language of this section on page 5 of the original brief. It is quite true that the revisors by injecting the words "stakeholders" have introduced a discordant element into this section but the section must be construed with regard to all its parts and with regard to its history and the most logical construction that can be placed upon it is that the intent of the revisors was to give an action against a stakeholder who held money after the wager had been decided, where the stakeholder had not paid the money over to the winner, but under that section, by its express terms, the action could not be brought against the stakeholder until after the wager had been determined.

Such is the construction put upon it by this Court in the Hensler case.

Counsel on page 7 of his brief, after properly designating the act of 1871, P. L. 107, as a supplement to the act of 1797 has then treated it as an amendment and has stated: "This amendment," etc.

The act of 1871, P. L. 109, was not an amendment of the act of 1797 and a supplement is not to be construed as an amendment. It is independent new legislation which may wholly or in part supersede existing legislation including the legislation to which it is a supplement but in no sense is it to be considered as an amendment.

As the Court said in *Bradley & Currier Co.* v. *Loving,* 54 N. J. L. 228 and *State* v. *Hancock,* 54 N. J. L. 393, referring to supplements:

> "Such statutory enactments must be regarded as complete in themselves, and, consequently, as unprohibited."

3. REPLY TO BRIEF OF EISELE & KING.

The brief of counsel for appellee, Eisele & King, is substantially a direct answer to the brief of appellants, and there is little new suggested not discussed in appellant's brief.

Counsel considers the purpose of the legislature in adopting the act to prevent gaming, revision of 1874, and states that it is the general purpose of the act to suppress gambling. That is true. But the purpose of the legislature in adopting the revision was to consolidate the laws and for the purpose of the legislature in adopting the sections which now form a part of the revision we must go back to the inception of those sections. Counsel treats the act as penal in character. We do not think that it is. This Court in *Van Pelt* v. *Schauble,* 68 N. J. L. 638, referring to section 2 of the act, held that because of the illegality of the transaction the title to the money remained in the depositor and "Consequently, when the depositary receives money upon such an unlawful agreement, he holds it without any other right or duty respecting it than the the duty of returning it on demand to its lawful owner, the depositor."

This Court then said that because of a rule of judicial procedure, *in pari delicto, potior est defendentis conditio* the depositor could not recover, and that the effect of the statute was simply to avoid that rule.

This Court cited, with approval, *Meech* v. *Stoner,* 19 N. Y. 26.

In that case the Court of Appeals of New York said:

> "If the statute had not given an action to recover money lost at play, it is quite certain that on the general principles of law a suit for such a purpose could not be maintained. The winner's exemption from suit and recovery would not result, however, from any title in himself to the money or thing won and received by him. On the contrary, the whole transaction being unlawful, he is bound in

> conscience to make restoration, and would be bound in law to do so, but for a peculiar maxim having the force of law, and according to which the courts withheld their remedial processes from each of the offending parties. * * * Thus the parties are left where the law finds them, and the defendant prevails, not upon his own merits or title, but because the plaintiff is deemed unworthy to be heard in the particular case. * * * The right in such a case rests upon the illegality and the voidness of the transaction; upon the absence of any just or legal title in the defendant to the money or thing in controversy. * * * To take money from a person by gaming is, in a just sense, a wrong done to his estate. It subtracts from the means of paying his creditors, and in case the person dies, it diminishes the fund which ought to go in a course of distribution to the widow and next of kin. Such a cause of action, according to all the analogies of the law, is capable of transmission and assignment."

The Court then referred to following sections then under consideration which gave a right of action to the overseers and, mentioning the fact that, under the statute, the overseers might recover the amount of money lost "together with treble the said sum or value", said:

> "This action is not like that of the loser, based upon the duty of restoring the money won, but is for a penalty intended to repress the vice of gaming. The statute first provides for restitution between the parties, if claimed within a short period of time; if not so claimed, then the penalty attaches in favor of the overseers."

Under our statute the action given to the common informer is for the loss, but in any event the fact that there is a penalty contained in the act does not make the entire act penal in character.

It is not penal. It is remedial. The New York Court said it simply provided a means by which the loser may require the winner to do that which in conscience he should do, to wit, return the money, to which money the winner has no title.

Notwithstanding the language of the Chief Justice in *Bradley & Currier Co.* v. *Loving,* 54 N. J. L. 228, 229, in considering the distinction between supplements and amendments to an act "such statutory enactments must be regarded as complete in themselves, and, consequently, as unprohibited", counsel has taken the language of the same Chief Justice in *State* v. *Hancock,* 54 N. J. L. 397, "for, by such a relationship (a supplement to the statute) the statutes are unified in substance and effect, so that, of necessity and in the absence of all expression for that purpose, the appropriate section of the two laws being thus blended must co-operate and interact so as to effect the legislative purpose," to indicate, as we understand his argument, practically that the supplement must be considered as an amendment.

In the same case the Chief Justice said:

> "The act criticised does not, in the constitutional sense, amend the statute to which it is a supplement, and, of course, there can be no pretence that it in any degree revives it. * * * The original act is complete and perfect as to its purposes; it needs no amendment, and none has been essayed; it arranges for the prosecution of recognizances forfeited in the Oyer and Terminer, the supplement for these forfeitures in the Sessions; these legal schemes are several and distinct."

Van Riper v. *Essex Public Board,* 38 N. J. L. 23 opinion by Chief Justice Beasley in the Supreme Court does not apply. In that case the supplement which was under discussion had the effect of bringing within the operation of the main act another object. The question was whether the mode of procedure, no other mode of procedure covering the situation being prescribed by the supplement, prescribed in the main act, should apply and the Court held that this was so stating:

> "Manifestly, it was the legislative purpose to apply the old procedure, so far as it was left unrepealed, to the new project, and both the original act and its supplement must be construed in the light of this purpose."

But in the case at bar the supplement of 1871 not only broadened the effect of the old act by making all wagers illegal but by its second section it created a cause of action separate and distinct from the cause of action created by the old act.

It is true that in *Central R. R. Co.* v. *State Board of Assessors,* 75 N. J. L. 771, at p. 778, this Court, speaking through the present Chief Justice. said:

> "The supplement, however, is plainly not an independent enactment, but a mere amendment of the act of 1884, making no change whatever in that act, as has already been pointed out, except by * * * etc."

And it is likewise true that this Court held in that case that a supplement to an existing statute is not to be examined as an independent act but is to be considered as a part of the statute upon which it is engrafted and that this Court repeated this in *Eastwood* v. *Russell,* 81 N. J. L. 672, but the Court did not in either of these cases intimate that if the terms of the supplement being the later legislation, were inconsistent with the provisions of the original act the provisions of the original act so inconsistent would remain in effect.

Nor did the Supreme Court, speaking through the present Chief Justice in *Spencer* v. *Middlesex Tax Board,* 95 N. J. L. 5, at p. 8 so indicate. In that case all that the Court said was that the supplement "became engrafted upon the original act."

We concede that the legislation is to be construed as a whole and we concede that the supplement must be engrafted upon the original act but we urge that where the supplement is inconsistent with the original act the later legislation must prevail, and we urge that sections 1 and 2 of the supplement of 1871 are complete in themselves. They define an illegal contract and they give a cause of action. Nothing more is needed. If the legislature had intended the cause of action to be the same cause of action as that prescribed under section 4 of the act of 1797 it would have amended that section.

We do not contend that the supplement of 1871 superseded and by implication repealed section 5 of the act of 1797, which is now section 6 of the present act. That section provided for a suit by a common informer for a cause of action now covered by section 6 and applied only in a case where there had been an actual loss, a contingency provided for by section 4.

Section 5 of the act of 1797 was re-enacted by section 6 of the present act. The present section 6 gives the right to a common informer only in case there has been a loss. The section provides that if the person *who shall lose and pay such money, or lose and deliver such thing or things as aforesaid shall not, etc.* No suit can be brought by a common informer under this section where the money has been deposited with a stakeholder and there has been no loss. Such a suit may be brought under section 2 by the person who has made the deposit.

We have already mentioned the contention of counsel with respect to the scope of the present section 5 which seems to be that under that section suit may be brought against a depositary or stakeholder prior to loss.

This construction is opposed to the very words of the statute and to the decision of the Court in *Hensler* v. *Jennings,* 62 N. J. L. 209.

It is true that section 5 of the act of 1797 was enlarged in the present section 6, but although the word "stakeholder" was inserted in section 6 nevertheless the language was left which did not permit a suit to be brought until after loss. The effect of putting in the word stakeholder was to permit a suit against a stakeholder who, after loss, still held the wager.

Whatever may be the results from the act of the revisors there is nothing, we urge, in the words of the statute or in the history of the legislation which indicates that it was the legislative intent to insert in section 2 of the supplement of 1871, which is section 2 of the present act, the proviso containing the limitation in section 4 of

the act of 1797, which is section 5 of the present act, and we have attempted on page 8 of the original brief to indicate some of the reasons which may have led the legislature to make the differentiation.

Respectfully submitted,

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Of Counsel with Appellants.