[HIGH COURT OF AUSTRALIA.]

DEFINA . . . . . APPELLANT;
DEFENDANT,

AND

KENNY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1946.

BRISBANE, *June* 18.

SYDNEY, *July* 30.

Latham C.J., Rich, Dixon and McTiernan JJ.

Gaming and Wagering—Credit bet on racecourse—Satisfactory acknowledgment indicating nature of bet—Unstamped betting ticket—Capacity of bookmaker to sue—The Racing and Coursing Regulation Acts 1930 *to* 1936 (*Q.*) (21 *Geo. V. No.* 27—1 *Edw. VIII. No.* 24), *s.* 22.

Section 22 of *The Racing and Coursing Regulation Acts* 1930 *to* 1936 (Q.) provides that a bookmaker who (having a permit under the *Racecourses Acts* 1923 to 1936) makes on a racecourse a bet with any person shall be deemed to have made a contract and may sue and be sued on such contract. The section further provides that "it shall be the duty of any bookmaker making any credit bet . . . to issue a stamped betting ticket or give any other satisfactory acknowledgment indicating the nature of the bet to the person with whom he makes the bet. . . . Provided that . . . such acknowledgment shall not be made by any unstamped betting ticket."

Held, by *Latham* C.J., *Dixon* and *McTiernan* JJ., that an oral statement by the bookmaker and a direction to his clerk to record the bet, both made in the presence of the bettor, did not constitute a satisfactory acknowledgment within the meaning of the section.

By *Rich* J. dissenting: The issue of a stamped betting ticket or other satisfactory acknowledgment is not made by the statute an indispensable condition of the right of action for the recovery of the bet and therefore what amounts to a satisfactory acknowledgment is a question that did not arise.

Decision of the Supreme Court of Queensland (Full Court), by majority, reversed.

APPEAL from the Supreme Court of Queensland.

Martin Joseph Kenny sued Frank Defina in the Supreme Court of Queensland for £500, being the amount of losing bets made by the defendant with the plaintiff, a bookmaker, holding a licence to carry on business as such under the Queensland Turf Club, Brisbane. The bets were made on 7th April 1945 at a race meeting held and conducted by the Brisbane Amateur Turf Club at Albion Park Racecourse, Brisbane. As the bets were made, the plaintiff repeated the bets and directed his clerk to record them in the book which was kept under *The Racecourses Acts* 1923 *to* 1936 (Q.) for income tax purposes. Evidence was given that, in respect of a bet of £50 made on a racehorse Jenny Rah, the defendant looked at the entry in the book kept by the plaintiff's clerk and checked the bet. At the trial, no evidence was called for the defence. *Webb* C.J. found that, in all the circumstances, there was a satisfactory acknowledgment of the bets and gave judgment for the plaintiff for £500 with costs. On the defendant appealing to the Full Court, the appeal was by a majority (*Philp* and *Mansfield* JJ.) dismissed (*Macrossan* S.P.J. dissenting except as to the bet on Jenny Rah).

From that decision, the defendant appealed to the High Court.

Jeffriess, for the appellant. Under s. 22 of *The Racing and Coursing Regulation Acts* 1930 *to* 1936 (Q.), a bet made on the racecourse with a bookmaker who has the prescribed permit is a contract which is not deemed to be null and void under the provisions of the *Gaming Act of* 1850 (Q.), and, provided the requirements of s. 22 (4) are fulfilled, the bookmaker may sue and recover. The bet made was a credit bet. As a stamped betting ticket was not issued, some satisfactory acknowledgment indicating the nature of the bet should have been given by the bookmaker to the bettor. Moreover it is the duty of the bettor to demand and receive from the bookmaker a stamped betting ticket or other satisfactory acknowledgment of the bet. The section contemplated by the words " give " and " receive " that something tangible would be handed by the bookmaker to the bettor. Something in the nature of the writing is contemplated which does not amount to a betting ticket. Under the regulations of 17th November 1927 made under *The Racecourses Act of* 1923 (Q.), which were the regulations in force when *The Racing and Coursing Regulation Act of* 1930 (Q.) came into force, all betting tickets had to be purchased by the bookmaker from the Commissioner of Taxes. By these regulations, the betting tickets must be in a certain form with certain printing thereon and numbered in consecutive order. Any writing is not a betting ticket within the meaning of these regulations and the unstamped betting ticket mentioned in the

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proviso is a document which would be a betting ticket under these regulations. The words "satisfactory acknowledgment" are to be read *ejusdem generis* with the words "betting ticket." An oral acknowledgment does not satisfy the requirements of the section nor does the entry in the betting book amount to an acknowledgment within the meaning of the section. In so far as the entry in the book is an acknowledgment, it is not given to the bettor. Unless the bookmaker complies with the requirements of s. 22, he is not entitled to recover the amount of the bet in any court.

Brown, for the respondent. The acknowledgment contemplated by s. 22 may be made by any confirmation, oral or otherwise, except that, under the proviso, an unstamped betting ticket may not be issued as an acknowledgment. It is difficult to comprehend anything in writing which would not amount to a betting ticket. The bookmaker's repeating the details of the bet amounts to an oral acknowledgment. The direction to the clerk to record the bet having been made in the presence and hearing of the bettor amounts to an acknowledgment. In s. 22, the word "issue" is used in connection with the words "betting ticket". The change of words denotes a change of intention. The written document is issued, but the acknowledgment is given. Therefore an oral acknowledgment is sufficient within the meaning of the section. As the bettor read the entry in the book, the entry was sufficient acknowledgment. The bets were made in the usual way and the acknowledgments given were satisfactory to the bettor and as the bettor was satisfied, therefore the acknowledgment is sufficient. Section 22 (4) has not been enacted for the purpose of protecting the revenue. The revenue is protected by *The Racecourses Acts* 1923 *to* 1936 (Q.) and not by *The Racing and Coursing Regulation Acts* (Q.). The legislature did not intend to prohibit the making of bets. It conferred on the bookmaker the capacity to sue where the bet was made on the racecourse.

Cur. adv. vult.

July 30. The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of Queensland dismissing an appeal against a judgment of *Webb* C.J. for £500 for the respondent Kenny, who was plaintiff in an action in which he sued for the recovery of the amount of losing bets made by the defendant Defina with him. Kenny is a registered bookmaker holding a permit under *The Racecourses Acts* 1923 *to* 1936 (Q.), s. 3, and the bets were made on a racecourse.

The Gaming Act of 1850 (Q.) (14 Vict. No. 9), s. 8, provides that contracts by way of gaming or wagering shall be null and void and that no suit shall be brought or maintained for recovering any sum of money or valuable thing alleged to be won upon them. This provision is modified by *The Racing Regulation Amendment Act* 1930 (Q.), s. 22, which provides in sub-s. (1) that any bookmaker having a permit under *The Racecourses Acts* (Q.) who makes on a racecourse a bet with any person shall be deemed to have made a contract with that person and that the bookmaker may sue such person on such contract and may be sued by him. Sub-section (3) provides that the section shall not apply in respect of any bet unless the bet was in fact made on a racecourse in respect of which the bookmaker had a permit. Section 22 (4), upon which the questions arising for decision depend, is as follows :—

"Moreover it shall be the duty of any bookmaker making any credit bet or any other bet on a racecourse to issue a stamped betting ticket or give any other satisfactory acknowledgment indicating the nature of the bet to the person with whom he makes the bet ; and in like manner it shall be the duty of any person making any credit bet or any other bet on a racecourse with a bookmaker to demand and receive from the bookmaker a stamped betting ticket or any other satisfactory acknowledgment of the bet and to give to the bookmaker such evidence as the bookmaker may demand indicating the nature of the bet made by the person with the bookmaker concerned.

Any bookmaker who shall issue a stamped betting ticket in respect of a credit bet shall not be required to include in the return verified by statutory declaration as prescribed by paragraph (ii) of subsection three of section four of ' The Racecourses Acts, 1923 to 1936 ' any such credit bet in respect of which a stamped betting ticket has been issued :

Provided that, where an acknowledgment of any such credit bet is made other than by means of a stamped betting ticket, such acknowledgment shall not be made by any unstamped betting ticket."

The question which arises is whether satisfactory acknowledgments were given to the defendant Defina in respect of the nine losing bets upon which the plaintiff sued.

The defendant called no evidence. The evidence for the plaintiff, which was accepted by the learned trial judge, shows that the bets were made by word of mouth on a racecourse. The bettor inquired the odds, the bookmaker accepted the bets, and in the presence of the bettor told his clerk to record the bets in his betting book. The clerk entered the bets in the betting book. In one case (a bet on

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Jenny Rah) the bettor inspected the betting book and saw the entry made by the clerk.

The Full Court unanimously held that a " satisfactory " acknowledgment must be an acknowledgment which was held by a court to be satisfactory, and not merely an acknowledgment which was accepted by the parties as satisfactory. The object of the section is to protect the public in its dealings with bookmakers and to control the business of bookmakers in the interests of the revenue. A bookmaker is bound to pay a betting tax on cash and credit bets under *The Racecourses Acts* 1923 *to* 1936 (Q.), s. 4, and the provisions of s. 22 of *The Racing Regulation Amendment Act* (Q.), enabling a bookmaker to sue for losing credit bets and a bettor to sue for winning credit bets, constitute part of a system of securing a complete record of transactions so as to ensure due payment of bets and to secure payment of the full amount of tax due. The decision of the Full Court upon the meaning of the word " satisfactory " was not challenged upon the appeal and, in my opinion, it was clearly right.

The learned Chief Justice held that a satisfactory acknowledgment was given in respect of all the bets. In the Full Court, *Macrossan* S.P.J. held that a satisfactory acknowledgment was given to the bettor in the case of a bet on Jenny Rah, consisting in the entry in the betting book, plus the inspection thereof by the bettor, but that there was no satisfactory acknowledgment in the other cases where, though the entries were made, the bettor did not inspect them. *Philp* J., with whom *Mansfield* J. agreed, held that satisfactory acknowledgments were given in the case of each bet, the acknowledgments consisting in the oral directions to the clerk to record, and the recording of, the bet in the betting book which the bookmaker was required to keep under regulations made under *The Racecourses Acts* (Q.). This procedure resulted in " the creation of evidence to the knowledge of the bettor " and satisfied the requirements of s. 22 (4). The contention of the appellant that a satisfactory acknowledgment must be in writing delivered to him was rejected on the ground that any writing recording the particulars of a bet other than a stamped betting ticket would itself be an unstamped betting ticket the issue of which was prohibited by the proviso at the end of s. 22 (4) of *The Racing Regulation Amendment Act* (Q.).

The appellant contended that if, in the case of a credit bet, a stamped betting ticket was not given to the bettor, the section required some other acknowledgment, that is, some admission by the bookmaker that the bet had been made by him so as to " indicate the nature of the bet," and that this could only be done by something in writing given to the bettor. The respondent contended before this

Court that the direction to the clerk to record the bet was a satisfactory acknowledgment given to the bettor, whether or not an entry was made in the betting book in pursuance of that direction. Alternatively, it was contended that such a direction plus the entry, or plus the entry and plus inspection by the bettor, was such an acknowledgment.

When s. 22 (4) came into operation in 1930, *The Racecourses Act of* 1923 (Q.) provided (as it still does) for the issue of permits to bookmakers (s. 3) and for the payment of a stamp duty on betting tickets (s. 4 (1)). Section 4 (3) provided :—

" Any bookmaker who makes a bet shall—

(i) In the case of cash bets, forthwith issue to the person with whom he bets a betting ticket duly stamped ;

(ii) In the case of credit bets, furnish to the Commissioner within seven days after the last day of each month a return, verified by statutory declaration, showing the total number of such bets made by such bookmaker during the said month, and accompanied by payment of a sum equal to the amount which such bookmaker would have paid in stamp duty if he had issued a betting ticket in respect of each of such bets in the place where such bets were made."

Regulations made under *The Racecourses Act* (Q.) on 17th November 1927 were in force in 1930, when *The Racing Regulation Amendment Act* (Q.) was passed and, with some amendments which are immaterial for present purposes, have been re-enacted. Regulation 5 provides that no bookmaker shall issue any betting ticket except a betting ticket which he has purchased from the Commissioner or a Deputy Commissioner, or a Clerk of Petty Sessions, and that every such betting ticket shall have printed thereon the number of the ticket, and shall have impressed thereon the amount of stamp duty payable. Regulation 6 provides that any bookmaker shall issue betting tickets in proper consecutive order and shall have the bookmaker's name printed on the face thereof in letters not less than one-quarter of an inch in height and width by metal type in a printing press registered in accordance with the provisions of *The Printers and Newspapers Act of* 1914 (Q.). Regulation 14 provides that particulars of every cash bet made by a bookmaker on a racecourse shall be entered by him or his clerk in his betting book opposite the number of the ticket used in respect of such bet, and that in the case of a credit bet such particulars shall be entered by him or his clerk opposite the name of the backer. It is also provided that the betting book shall be produced by the bookmaker to the Commissioner or other officers when required.

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I agree with *Philp* J. that there are difficulties in interpreting s. 22 (4), but I think that they are capable of solution when s. 22 (4) of *The Racing Regulation Amendment Act* (Q.) is read as intended to operate within the system established by the other legislation to which it refers and upon which it is dependent. The provisions of *The Racecourses Acts* (Q.) and of the regulations thereunder require that in the case of cash bets the bookmaker must issue a stamped betting ticket (*The Racecourses Act* (Q.), s. 4 (3)) and enter particulars of the bet in his betting book (reg. 14). In the case of credit bets, the bookmaker must enter the particulars of the bet in his betting book (reg. 14), either issue a stamped betting ticket or give a satisfactory acknowledgment which is not an unstamped betting ticket (*The Racing Regulation Amendment Act* (Q.), s. 22 (4)), and furnish a return with respect to credit bets to the Commissioner (*The Racecourses Act* (Q.), s. 4 (3) (ii)).

These provisions clearly contemplate that an " acknowledgment " of a credit bet which is not a stamped betting ticket may lawfully be given, and therefore that such an acknowledgment is not an unstamped betting ticket the giving of which as an acknowledgment is prohibited by the proviso to s. 22 (4). In the case of any particular bookmaker, it appears to me that there can be no difficulty in distinguishing between, on the one hand, his betting tickets purchased from the proper official, numbered, with his name printed on them as required (reg. 6) and, on the other hand, other writings or records issued by the bookmaker indicating the nature of a credit bet. A memorandum of some kind given by the bookmaker stating the particulars of a credit bet is not only not prohibited by the legislation as being an unstamped betting ticket, but is positively required by the legislation where a stamped betting ticket is not issued.

A satisfactory acknowledgment under s. 22 (4) must be something which " indicates the nature of the bet " and which is *given* to the person with whom the bet is made. Further, it is something which it is the duty of the person who makes the bet to " demand and *receive* " from the bookmaker. It follows, in my opinion, from this provision that an oral statement or admission that a bet has been made is not a satisfactory acknowledgment within the section—it is not given to or received by the bettor so as to be something which he can produce as evidence of the bet. Unless compliance with sub-s. (4) of s. 22 results in the creation of such evidence, the addition to the law made by that provision would produce no effect. It would add nothing to the requirements of the law as they previously existed. It is plain that the actual making of a wager is not an " acknowledgment " of the wager. The direction to the clerk to

record the bet, even if made in the presence of the bettor, is not, in my opinion, an acknowledgment given to the bettor. The making of such a record (always made by the bookmaker's clerk, as the evidence shows, upon direction from the bookmaker) was necessary under *The Racecourses Act of* 1923 (Q.) before there was any legislation requiring an acknowledgment as an alternative to a stamped betting ticket in the case of a credit bet. Further, the fact that the bettor inspects the betting book (which remains in the possession of the bookmaker) cannot, in my opinion, make an acknowledgment out of what would otherwise not be an acknowledgment, and it cannot amount to the giving by the bookmaker to the bettor of any acknowledgment in respect of a bet.

In my opinion, therefore, no satisfactory acknowledgments of any of the bets were given to the defendant in the present case, the requirements of s. 22 (4) were therefore not satisfied, and the bookmaker was therefore not entitled to sue on the wagering contracts. The appeal should be allowed, the order of the Full Court set aside, and judgment entered for the defendant with costs of the action, of the appeal in the Supreme Court and in this Court. The defendant has succeeded upon a technical defence and, though it is plain that he has no merits, is entitled to his costs.

RICH J. The controversy in this case arises from the difficulty in the interpretation of s. 22 of *The Racing Regulation Amendment Act of* 1930 (Q.). This section introduced an innovation in the law relating to wagers. Formerly at common law wagers were not illegal and actions were brought and maintained to recover money won upon them. But in 1845, by s. 18 of 8 & 9 Vict. c. 109 (Imp.), betting contracts were made null and void and money won under them was not recoverable. The legality of wagering contracts was not affected, but the law was no longer available for their enforcement and the parties to them were left to pay wagers or not as their sense of honour might dictate : *Read* v. *Anderson* (1). This section was reproduced in Queensland by *The Gaming Act of* 1850, 14 Vict. No. 9, s. 8. The innovation to which I have referred was made by s. 22 of *The Racing Regulation Amendment Act of* 1930 (Q.). This in terms provides by sub-s. (1) that a licensed bookmaker, who makes a bet on a racecourse with any person, shall be deemed to have made a contract with him, on which either party may sue and be sued, and such a contract shall not be deemed to be null and void. Sub-section (4) provides that it shall be the duty of a bookmaker making a racecourse bet to " issue a stamped betting ticket or give any other

(1) (1882) 10 Q.B.D. 100, at pp. 104, 105 ; (1884) 13 Q.B.D. 779.

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satisfactory acknowledgment " of the bet to the other party, and the duty of the other party to demand and receive such a ticket or acknowledgment, and to give to the bookmaker such evidence of the bet as he may demand. Thus, the bookmaker must give and the other party must demand an acknowledgment of the bet, but the latter need not give the bookmaker evidence of it unless the bookmaker so demands. Compliance with the provisions of sub-s. (4) is not in terms made a condition of the validity or actionability of betting contracts which are made both valid and actionable by sub-s. (1) ; and I can see nothing in sub-s. (4) to justify an implication of intention to make such compliance a condition. A heavy penalty is imposed for a non-compliance by s. 28 ; but whether the purpose of sub-s. (4) is to benefit the revenue or to encourage betting at racecourses by ensuring that bookmakers at any rate shall be compelled to provide evidence to facilitate the recovery from them of their betting losses does not appear. The view has been expressed that the condition should be implied. But, to adopt the language of *James* L.J. in *In re Sneezum* ; *Ex parte Davis* (1), " that is a provision which might perhaps be very properly made by the Legislature; but, to my mind, to insert it in this way by implication would not be to construe the Act of Parliament, but to alter it ; it might be to improve it, according to the view which some persons take of the matter, but it would certainly be altering the Act of Parliament, and enlarging still further the provisions which the Legislature has thought fit to make with respect to such contracts." There being, in my opinion, nothing to prevent a racecourse bet from being proved in an action by evidence other than that provided for by sub-s. (4), it is unnecessary in the present appeal to determine exactly what is, and what is not, sufficient to satisfy the requirements of that sub section.

There is therefore nothing to justify a disturbance of the judgment of the learned judge of first instance, and the appeal should be dismissed.

DIXON J. It is, I think, fruitless to speculate what kind of acknowledgments the legislature had in mind, besides stamped betting tickets and unstamped betting tickets, in referring, in sub-s. (4) of s. 22 of *The Racing Regulation Amendment Act of* 1930 (Q.), to " any other satisfactory acknowledgment indicating the nature of the bet." Any voucher given for the bet inscribed with a sufficient indication of its nature might properly be called a betting ticket. But it is clear that the possibility of giving

(1) (1876) 3 Ch. D. 463, at p. 472.

and receiving other sorts of acknowledgments was contemplated. Perhaps the object of providing expressly for the allowance of other forms of acknowledgment was merely to give room for the development by bookmakers and their clients of some new practice to fulfil the demands of the legislation, if bookmakers preferred not to issue for a credit bet a betting ticket, a betting ticket which must bear a revenue stamp. Acknowledgments in a written, printed or material form may be imagined which could not be called "tickets." For instance, if the bookmaker initialled an entry of the bet in the racebook of the man making it, the former would "give" and the latter would "receive" an acknowledgment in a form which could not be described as a betting ticket.

But what does seem to be quite clear on the face of sub-s. (4) is that if a ticket is not used, that is a stamped betting ticket, then to satisfy its provision something must be done between the two parties to the bet which amounts to the giving of an acknowledgment thereof by the bookmaker to the other party and the receiving of an acknowledgment by him.

It is evident that the purpose of this particular requirement is to avoid doubt or dispute as to the making of the bet and as to its nature. The legislature, having decided that credit bets should be recoverable as ordinary civil debts, was not prepared to set the parties at large as to how they should evidence the transaction. To do so might encourage false, ill-founded or uncertain claims. I cannot think that a mere oral acknowledgment is enough to satisfy the sub-section. The words of the provision distinguish between the making of the bet and the acknowledgment. The primary form of acknowledgment is the betting ticket and the alternative form must be "demanded," "given" and "received." All these words, as well as the association with the words "issue a stamped betting ticket," point to an acknowledgment in a material form.

Nor am I able to adopt the view that the writing of the bet in the special book prescribed is enough. It may be conceded that it is or may be a satisfactory record, but, in my opinion, it is essentially a record of the bookmaker and it cannot be said that anything in the nature of an acknowledgment is "given" by him to the client, or that the client "receives" any such thing.

To add that the entry was made in pursuance of an open announcement or instruction to the clerk making it, made or given by the bookmaker in the presence of the party making the bet with him, cannot alter the character of the record and neither those facts nor the fact that the client inspected the record, in the case in which he did so, can convert it into an acknowledgment given to him. The

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bookmaker placed nothing in his possession or at his command; nothing passed to him; he received nothing as an acknowledgment. It was not denied that, unless there is a compliance with sub-s. (4), there cannot be a recovery under sub-s. (2) of s. 22, and I think it was rightly not denied.

For these reasons, I am of opinion that the appeal should be allowed and that the judgment and order of the Supreme Court should be discharged and that in lieu thereof judgment in the action should be entered for the defendant. The unmeritorious character of the defendant's case is, I think, no ground for refusing him his costs of the proceedings in which he has succeeded.

McTIERNAN J. In my opinion, the appeal should be allowed.

I have had the opportunity of reading the judgment of the learned Chief Justice of this Court and agree with the reasons there stated, and have nothing to add.

Appeal allowed with costs. Order of Full Court set aside. Judgment for defendant with costs of action and of appeal to Supreme Court.

Solicitors for the appellant, *Stephens & Tozer.*
Solicitor for the respondent, *P. F. Scanlan.*

B. J. J.