1907

*Feb. 19.
*March 13.

J. SAUNDERS AND OTHERS.....APPELLANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Disorderly house—Common betting house—Place for betting—Betting booth—Race-course of incorporated association —Crim. Code, 1892, *ss.* 197, 204—*Crim. Code*, 1906, *ss.* 227, 235.

A perambulating booth used on the race-course of an incorporated racing association for the purpose of making bets is an "office" or "place" used for betting between persons resorting thereto as defined in sec. 197 of the Criminal Code, 1892 (Crim. Code, 1906, sec. 227).

Sub-sec. 2 of sec. 204 of the former Code (now sec. 235) which exempts from the provisions of the main section (dealing with the recording or registering of bets, etc.), bets made on the race-course of an incorporated association does not apply to the offence of keeping a common betting-house. Girouard and Davies JJ. dissenting.

Judgment of the Court of Appeal (12 Ont. L.R. 615) affirmed, Girouard and Davies JJ. dissenting.

APPEAL from a judgment of the Court of Appeal for Ontario (1) affirming the conviction of the appellant by the police magistrate of Toronto for keeping a common betting house.

The appellants were operating as bookmakers at the annual spring meeting of the Ontario Jockey Club, an incorporated association. In a building near the public stand they had a number of booths on castors which they moved about the building or in fine

*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington, Maclennan and Duff JJ.

(1) 12 Ont. L.R. 615.

weather on the lawn in front for the purpose of making bets with persons attending the races. Having been convicted of the offence of keeping a common betting house the magistrate at their request, stated a case for the opinion of the Court of Appeal which contained the following:

"1. That the Ontario Jockey Club is a duly incorporated race association.

"2. That the common betting house herein referred to was opened, kept and used by the defendants during the actual progress of a race meeting.

"3. That the defendants kept a betting booth placed in that part of the grounds of the Ontario Jockey Club specially set apart for betting purposes.

"4. That such betting booth was opened, kept and used by the defendants for the purpose of betting with persons resorting thereto.

"5. That all the defendants were engaged in conducting the business of the said betting booth, which was leased by the defendant Saunders and under his immediate superintendence.

"6. That a very large number of bets were made by the defendants against certain horses winning the different races, with persons resorting to said booth.

"7. That in the enclosure specially set apart by the Ontario Jockey Club for betting purposes as aforesaid there are 36 betting booths, including the one above mentioned, known as two dollar books, which were leased to persons called bookmakers for the purpose of betting as aforesaid.

"8. That the defendants conducted and managed a betting booth as aforesaid during the whole of the race meeting, and the defendant Saunders paid there-

1907

SAUNDERS v. THE KING.

for and for the betting privilege the sum of $100 for each day.

"9. That the betting booths in question are of the following dimensions, six feet two inches in length, five feet two inches in width, and four feet seven and one-half inches high, and are equipped for the purpose of carrying on betting therein, and are supplied with castors so that in fine weather they may be moved from under the covered part of the betting section of the grounds to a distance of a few feet from the roof.

"10. The defendants' position was changed daily from booth to booth, there being a daily drawing for position among the bookmakers, but during each day these defendants occupied the same booth, where they made bets with persons resorting thereto.

"The questions submitted are:

"(*a*). Am I right in holding that a betting booth as aforesaid falls within the terms of section 197 of the Criminal Code as a house, office or other place?

"(*b*). Am I right in holding that the provisions of sub-section (2) of section 204 of the Criminal Code do not apply to the offence of which the defendants are found guilty?"

The Court of Appeal having affirmed the conviction the defendants appealed to the Supreme Court of Canada.

C. H. Ritchie K.C. and *Godfrey* for the appellants, contended that a wooden booth such as was used in this case was not an "office" or "place" for making and recording bets, under section 197 of the Criminal Code, 1892 (now sec. 227); and if it was it was within the exception of section 204 (now 235), being on the

course of an incorporated association citing Tremeear, Cr. Code, pp. 146, 152; *Stratford Turf Association* v. *Fitch*(1).

Cartwright K.C., Deputy Attorney-General, for the respondent, referred to *Powell* v. *Kempton Park Racecourse Co.*(2).

THE CHIEF JUSTICE.—This case comes before us by way of appeal from a judgment of the Court of Appeal for Ontario, which confirmed a conviction by the police magistrate for the City of Toronto on a case reserved for the opinion of that court.

A statement of the facts will be found in 12 Ontario Law Reports, page 615.

The offence with which the defendants were charged before the police magistrate was, as stated in the reserved case, that of keeping a disorderly house, to wit, a common betting house. Section 197 of the Criminal Code defines a common betting house as

> a house, office, or *other place* opened, kept or used for the purpose of betting between persons resorting thereto and the owner, occupier or keeper thereof.

Section 198 enacts that every one is guilty of an indictable offence and liable to one year's imprisonment who keeps a common betting house as hereinbefore defined.

It has been found as a fact by the police magistrate, admitted by all the judges below and not seriously denied by counsel for defendants at the argument here, that the betting booth used by the defend-

(1) 28 O.R. 579. (2) [1899] A.C. 143.

1907

SAUNDERS v. THE KING.

The Chief Justice.

ants must be held upon the authorities *Powell* v. *Kempton Park Racecourse Co.*(1), and *Brown* v. *Patch*(2), to be a *place* within the meaning of section 197. The defendants were convicted by the police magistrate on the ground that to use such a betting booth as was described by the witnesses for the purpose of betting between persons resorting thereto, and the owner, occupier or keeper thereof, is an indictable offence under sections 197 and 198 of the Criminal Code. On a reserved case the conviction was upheld by the Court of Appeal for Ontario, Meredith J. and Garrow J. dissenting. It was not denied that the defendants used the booths in question for the purpose of betting with all comers, but it was put forward as a defence to the charge that the booths or moveable stands having been erected on the premises of an incorporated racing association to be used for the purpose of making bets during the actual progress of a race meeting brought the defendants within the proviso of section 204.

Section 204 declares every one guilty of an indictable offence, who:

(*a*) Uses or knowingly allows any part of any premises under his control to be used *for the purpose of recording or registering any bet or wager* or selling any pool; or

(*b*) Keeps, exhibits or employs in any part of any premises under his control any device or apparatus *for the purpose of recording any bet or wager*, etc.; or

(*c*) Becomes the custodian or depositor of any money * * * wagered; or

(*d*) Records or registers any bet or wager.

By sub-section 2 of section 204, it is expressly declared that the provisions of the section shall not extend to bets between individuals or to *bets made on*

(1) [1899] A.C. 143. (2) [1899] 1 Q.B. 892.

1907

SAUNDERS v. THE KING.

The Chief Justice.

the race-course of an incorporated association during the actual progress of a race meeting. These words were added as an amendment when the Criminal Code was enacted in 1892.

Bets between individuals are not illegal at common law and the provisions of this section do not extend to bets between individuals or to bets made on the race course of an incorporated association during the course of a race meeting. I quite agree that the amendment of 1892 was intended to reserve the race courses of incorporated associations as places where bets might be recorded and registered, and any apparatus or structures used for the more conveniently recording such bets or wagers provided this was done during the actual progress of a race meeting, were exempted from the operation of that section.

But to use a place for the purpose of recording or registering bets or wagers is something entirely different from using a place for the purpose of betting between persons resorting thereto and the owner or occupier thereof.

Bets between individuals or bets made on the race course of an incorporated association during the actual progress of a race meeting can be recorded in any place used for that purpose, but to keep a place whether within or without the grounds of a racing association for the purpose of betting whether during the progress of a race meeting or not, is an offence under section 197.

In my opinion two distinct and separate statutory offences are created by sections 197 and 204, and that which may be invoked successfully as a defence in one case cannot avail in the other. To keep a place for making bets which may be recorded at that place or

1907

SAUNDERS v. THE KING.

The Chief Justice.

elsewhere and to keep a place for recording bets wherever made are distinct and separate acts, each of which has been made an offence and each of which is declared to subject the offenders to a different penalty. The exception created by sub-section 2 of section 204 with respect to anything therein, does not apply to those places that are kept for the purpose of betting. I do not understand the rule of construction to be that all the sections of the Code dealing with nuisances are to be read together to see how they can be made to harmonize any more than the sections dealing with offences against the person or against property. Distinct and separate acts are by these sections declared to be common nuisances and the only question to be considered is: Do the facts proved in evidence support the charge as laid in each particular case?

No useful purpose can be served by going over the ground already covered by the Chief Justice of Ontario in the Court of Appeal. I quite agree with him that the intention of Parliament, which can only be gathered from the language it has used, was to exempt from the operation of section 204 betting on race courses controlled by incorporated associations during the actual progress of a race, but not to sanction the existence of betting houses on such race courses at such times and under such circumstances. Section 197 makes no exception; at all times and under all circumstances betting houses are prohibited and it is not for this court to introduce into this clause qualifying expressions which the legislature has not chosen to put there.

The appeal is dismissed with costs.

GIROUARD J. (dissenting).—I concur in the reasons given by Mr. Justice Davies for his dissent.

1907

SAUNDERS v. THE KING.

Davies J.

DAVIES J.—While I concur with the judgment of the Court of Appeal in their answer to the first question of the case submitted, that a betting booth such as that described in the case falls within the terms of section 197 of the Criminal Code as "a house, office, room or other place," I am not able to concur with the majority of that court in holding that the provisions of sub-section 2 of section 204 do not apply to the offences of which the defendants were found guilty so as under the circumstances and conditions to exempt them from liability to conviction.

Mr. Justice Osler concurred with the majority on this point considering himself bound by previous decisions of the same court, but without, as he himself says, being called upon to consider whether these decisions were sound or not. Apart from him the court was equally divided.

I concur in the conclusions reached by Garrow and Meredith JJ. that the conviction should be quashed on the ground that the provisions of sub-section 2 of section 204 must be read as applying to the offence of which the defendants were convicted.

I agree with Garrow J. when he says:

> The proper construction in a word is in my opinion to hold that sections 197-198 have no application to the case of betting carried on upon the race-course of an incorporated association during the actual progress of a race meeting whether or not such betting takes place within or without doors or in any particular "house, office, room or other place," so long as it is within the boundaries of the race course and so long as the betting is confined to the races then in progress upon that race course.

The history of the two sections 197 and 198 and of section 204 of the Criminal Code, so far as it seems desirable to know it for the purposes of this argument, is that section 204 formed a part of the criminal

1907

SAUNDERS v. THE KING.

Davies J.

law for years before 1892 when the Code was enacted but without the latter words of the exempting subsection on which this controversy turns, namely, betting when "made on the race course of an incorporated association during the actual progress of a race meeting." These words were added to section 204 at the time the Code was enacted and sections 197 and 198 were also then for the first time introduced into our criminal law.

These two new sections 197 and 198 define a common betting house and declare it to be illegal and a disorderly house.

It is a defined place

> opened, kept or used for the purpose of betting between persons resorting thereto and the owner, occupier or keeper, or opened, kept or used for the purpose of any money being received or on behalf of any such person as and for the consideration of any bet on any race, etc.

The object and purpose of Parliament in enacting the several sections of the Criminal Code under review was no doubt the suppression of betting and poolselling between professional bookmakers and poolsellers and their patrons. To that end sections 197 and 198 defining and penalizing the keeping of a common betting house *for the purpose* of betting or *for the purpose* of receiving any money by the keeper of such house for or in connection with any bet were no doubt introduced into the Code when it was passed in 1892. To more effectually insure the carrying out of the same objects section 204 of the then criminal law was retained penalizing the using of any part of any premises under his control by any one for the purpose of recording any bet or wager or for the purpose of becoming the custodian or depositary of any money staked or wagered upon the result of any election, race

or trial of skill or endurance, but it was so retained with an additional and important exemption added. That exemption included three specific kinds of betting even when done by the class of persons struck at in the penalizing parts of the section. First, betting when the bet or stake was payable to the *winner* of any race or game, or to the *owner* of any horse engaged in a lawful race, and not to the bookmaker or poolseller; secondly, betting between individuals. These still remained perfectly lawful. So long as the person struck at (the poolseller or bookmaker using a defined place to carry on his calling) was not a party to the bet or a possible beneficiary of the bet, so long as the practices by or through which such person carried on his calling which Parliament aimed to suppress were not involved, neither the bet or anything incidental to it was prohibited; and, thirdly, introduced for the first time as an exemption, betting

made on the race course of an incorporated association during the actual operation of a race meeting.

This latter exemption covered bookmakers as well as other individuals and left betting with bookmakers and poolsellers using premises under their control to record bets and to receive stakes, legal, when carried on within the limitations specified in the exempting words.

But if the substantive act of using part of any premises to receive deposits or stakes of a bet as well as to record such bet or any number of such single bets were thus permitted when done at the special places, times and on the races specified in the exemption, how can it be contended successfully that any other necessary or ordinary incident or act in the carrying on of

1907

SAUNDERS v. THE KING.

Davies J.

the main substantive thing permitted such as holding himself out at a particular place for the purpose of doing the act, continued to be an offence?

It must be conceded that the using of a part of the race premises such as a betting booth or house for the purpose of recording bets and there receiving stakes and deposits or the money representing the bets upon the result of any race when the betting and recording and money received were all done and happened on the race course of an incorporated association during the actual progress of a race meeting and with reference alone to one of the races at that meeting was permitted by sub-section 2 of section 204. Now what are these limited acts as to time, place and event so permitted and not prohibited but the keeping of a common betting house, on the race-course but exclusively for the races being run there.

I think for the purpose of construing the exemption clause the three sections must be read together, and that so far as that exemption clause extends to sanction or allow any act which otherwise would be illegal it must be read as covering that act even if the act is made an offence by both sections.

In my opinion the special privilege or permission conceded by the sub-section to carry on betting in a special place at a special time and with reference to special races, necessarily permitted all acts ordinarily essential to the carrying out of the substantial purpose.

If the amendment made to the exempting sub-section contemporaneously with the introduction of the new sections 197 and 198 penalizing the common betting house did not operate to exempt betting made and recorded at such house or place when confined within

the limitations expressed in the amendment then it appears to me to be quite meaningless because all betting made between individuals had already been exempted as also all bets which were payable to the owner of the horse racing. The only effect of the amendment could be to extend the sanction of the clause to betting at the common betting house made between the keeper of the house and outside parties when erected on the race grounds and which betting was confined within the special limitations expressed in the amendment.

Keeping a house or place for the purpose of betting between persons who resort thither to bet with the keeper of such house or place is an indictable offence within section 197 of the Code, but it is not such an offence when it is kept on the grounds of an incorporated race association and the sole and exclusive purpose for which it is kept is for the special classes of betting defined and limited by the sub-section of 204.

I would, therefore, allow the appeal and answer the first question of the case submitted in the affirmative and the second in the negative.

IDINGTON, MACLENNAN and DUFF JJ. agreed with the Chief Justice.

Appeal dismissed.