JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 12/80

BEFORE: The Hon. Mr. Justice Kerr, P. (Ag.)
The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Campbell, J.A. (Ag.)

BETWEEN	GOLDEN HORSE BETTING LIMITED	DEFENDANT/APPELLANT
AND	PHILLIP PALMER	PLAINTIFF/RESPONDENT

Dr. L. Barnett and Dr. A. Edwards for the Defendant/Appellant.

Mr. R. Codlin and Mr. E. Hall for the Plaintiff/Respondent.

February 17, 18 & 19

and

July 9, 1982

KERR, P. (Ag.):

This is an appeal from the judgment of White, J. delivered on 20th December, 1979, in favour of the plaintiff for $10,000 with costs to be agreed or taxed.

The appellant Company as its name suggests was at all material times bookmakers holding the necessary permits and licences under the Betting, Gaming and Lotteries Act (hereinafter referred to as the Act). The Company operated a branch shop at Race Course in the parish of Clarendon and their duly authorised agent there was a Mrs. Hamilton. To that shop the plaintiff went on Saturday, November 20, 1976, and sometimes between 10.30 - 11 a.m. placed bets as evidenced by vouchers Nos. 60037 and 60038 in form and manner in accordance with the Regulations made under the Act and published in the Jamaica Gazette Supplement of May 29, 1975 (hereinafter referred to as the Regulation(s)).

The vouchers were prepared and delivered to the plaintiff by Cecil Hamilton, the husband of the agent who was assisting her at that time. At or about the same time, Amos Palmer the plaintiff's brother, placed a bet on three of the horses selected by the plaintiff. His voucher was written up by Mrs. Hamilton. The bets were accumulators, - all the selected horses won. The plaintiff's accumulations amounted to $12,619.80 in the aggregate and Amos' to $3,271.80.

In due course Amos was paid but plaintiff was refused payment. The grounds for refusal according to Wayne Chin was to the effect that the procedure for acceptance of bets as laid down in the Company's Rules (hereinafter referred to as the Rule(s)) had not been complied with.

Evidence as to the procedure obtaining at branch shops was given by Wayne Chin, the Accountant and Security-Officer of the Company. On race day the agents at the various branches would be provided with clock-bags, voucher books and programmes. The vouchers which were in the form approved by the Regulations are in triplicate. The yellow original is given to the punter. The white duplicate is the copy to be placed in the clock-bag. The third copy is retained in the book. The clock-bag according to the witness Harold Anderson, Inspector attached to the Betting and Lotteries Commission is a locking device supplied by Bookmakers to their agents to secure the second copies of vouchers issued. These bags with vouchers enclosed are supposed to be locked at closing time - 12 noon - on Race Day (local racing). According to Chin before sending his bags to the betting shop the timer is set and attached to the bag. This device enables him to ascertain on opening the bag and examining the clock the time the bag was closed.

In the instant case the vouchers in relation to the plaintiff's bets were among those not enclosed in the clock-bag.

The following Rules of the Company are relevant to this procedure:

> "2. All offers are received by us on the distinct understanding that the Client will abide by these Rules. Whether or not the Client be in possession of our Rules, Leaflets or whether or not he has read these rules.
>
> 3. The writing of the Voucher by or on behalf of the Client shall when it shall have been signed by the Company's agent subject to Rule 10 be deemed to be the offer by the Client to us to accept the wager or bet therein written and shall not be deemed to be an acceptance by us of that wager or bet. The time of the offer shall be the time of the signing of the Voucher by our agent subject to Rule 10. The time of our acceptance of the offer of the bet shall be when the locked bag is unlocked at our head office provided that therein is found the security copy and the timing apparatus indicates that the locking of the Time Bag took place at or before the latest time fixed by our programme for the acceptance of offers to be in respect of any Race named in the bet written on the Voucher for the day's racing on which the security copy discloses the offer to bet is intended and the presence of the security copy in such circumstances shall 'ipso facto' be deemed to be acceptance of the offer.
>
> 6. The Voucher as written shall be the offer by the Client to make with us the bet therein written.
>
> 7. The Voucher is the only binding document of wager and in conjunction with these rules constitute the full terms and conditions covering the wager.
>
> 8. All locked bags shall be opened by us at our Head Office within 24 hours of receipt of same if the security copy is not present in the lock (sic) bag then no contract of wager shall exist between us and the holder of the voucher and in such circumstances upon presentation to us at our head office of the voucher within thirty (30) days we will repay the stake money.
>
> 9. A commission or bet once made cannot be altered or cancelled except by mutual consent.
>
> 10. No offer to bet shall be complete and capable of acceptance unless and until there shall have been deposited with us before or at the actual time of making the offer the appropriate amount of money staked according to the voucher. "

In a full and careful judgment White, J. considered, inter alia, the general principles in relation to a contracting party laying down conditions precedent to the acceptance of an offer, the incorporation of the company's Rules in the contract, the provisions of the Regulations and their effect on the transaction in the instant case.

Because before this Court the attorneys on both sides in their arguments were consistent with the stand which they took in the Court below, it is unnecessary to review in detail the arguments there.

White, J. found that there was no evidence to establish fraud, the bets were placed within the prescribed time (see Regulation 11 post), and that despite the plaintiff's plea of ignorance of the particular rules, certain of those rules were incorporated into the contract of wager. The learned trial judge in conclusion said:

> "In the final analysis, one of the factors bearing on the conclusion of this case is clarified by the provision in Regulations 10 and 11 of the Betting, Gaming and Lotteries Regulations, 1975, which I have already quoted. There it is enjoined what procedure should be followed by a book-maker or his agent when "bets are accepted by him." Certainly, this does not envisage a stage later than the time of the placing of the bets, at which time "the receiving and negotiation of bets" has crystallised and its effect cannot thereafter be deferred in dependence upon whether the bookmaker should approve the laying of the bets.
>
> " Another factor in the conclusion is that by the Rules of the defendant company, it undertook that its agent was under a duty to, and would, place the vouchers representing the punter's stake in the clock bag. Failure by the agent to do so is, in my view, a failure to perform a fundamental term of the contract which has effectively deprived the plaintiff of his winnings.
>
> " Although the claim is for $12,619.80, the amount recoverable as winnings is, by Clause 4 of each of the Vouchers, Exhibit 1, limited to $10,000. This limit applies to the maximum amount payable on the Voucher "and/or to any client, in respect of one day's racing."

The respondent by formal notice had challenged the quantum of the award on the following grounds:

> "That the learned trial judge having correctly found that the defendant/appellant had committed a breach of a fundamental obligation of a contract erred in law by holding that the defendant/appellant was entitled to rely upon a clause in the contract, by which the defendant/appellant's liability for the said breach was limited to $10,000.00.

"And that the plaintiff/respondent will in support of that ground rely on the following cases:
Suisse Atlantique Societe d'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale (1967) A.C. 1.
Farnworth Finance Facilities Ltd. v. Attryde (1970) 2 A.E.R. 774.
Harbutt's Plasticine Ltd. v. Wayne Tank and Pump Co. Ltd. (1970) 1 A.E.R. 225."

Before us he conceded, (quite rightly in my view) that the contention therein was not maintainable in the light of the recent decision of the House of Lords in Photo Production Ltd. v. Securior Transport Ltd. /1980/ 1 All E.R. 550 as applied by this Court in Supreme Court Civil Appeal, No. 57/78 - Harbour Cold Stores Ltd. (unreported) dated January 22, 1982 /post/.

For the appellant the following grounds were presented as raising fundamental questions of law.

"(i) The learned trial judge erred in law in holding that a bookmaker holds himself out as intending to pay winnings on whatever bets are laid with him without fraud on the part of the better in that the bookmaker clearly indicates that the transaction is subject to his rules.

(ii) The learned trial judge erred in law in holding that despite the rules of the appellant it remained liable by reason of the circumstances of the agency of the operator of the betting shop.

(iii) The learned trial judge erred in law in holding that Regulations 10 and 11 of the Betting, Gaming and Lotteries Regs. 1975 prevent the parties from submitting to terms of dealing which prevent acceptance under the law of contract from being deferred or made conditional on the fulfilment of specified conditions.

(iv) The learned trial judge erred in law in holding that failure of the agent to place the voucher in the clock-bag was a breach of a fundamental term of the contract, in that this begs the question of whether or not there was a contract and no such issue was raised in the trial. "

The questions arising may be summarised thus -

(1) Whether or not a contract came into being having regard to the terms of the appellant's rules.

(2) Whether or not the Regulations and in particular, Regulations 10 and 11, prevented a contracting party from stipulating that he should not be bound in the event certain conditions precedent were not met - in the instant case that the vouchers had not been duly locked in the clock-bag in the manner prescribed by his rules.

Dr. Barnett submitted that a party was free to specify the point at which his acceptance of an offer should materialise. Further, that a condition precedent had been stipulated by the rules and the condition precedent not having been fulfilled no binding contract came into being. He argued that Regulation 10 (2) prescribed the minimum procedures to be followed by a bookmaker in negotiating a bet but does not determine the contractual rights of the parties. The regulation does not prohibit a bookmaker from laying down conditions relating to the acceptance of bets. Against the background of the rules, the agent's acceptance of the bets did not create a binding contract - the agent's authority being only to receive bets. "Accept" as used in Regulation 10 should not be interpreted as effecting an "acceptance" capable of creating a binding contract.

Mr. Codlin in reply contended that the bookmaker's rule deferring acceptance was contrary to Regulation 11 and was therefore inoperative. He submitted that the respondent having placed his bets within the prescribed time and the procedures in Regulations 10 having been complied with there was a valid contract of wager. "Acceptance" in the regulations was used in a contractual sense. He contended that the cases of Chin v. Watson, etc. and Lyn v. Watson /post/ resting as they did on their particular facts and having regard to the Regulations then existing were distinguishable.

The rival contentions will now be considered.

Regulation 10 (2);

> "Every bookmaker's permit shall be subject to the following conditions and such other conditions as the Commission may stipulate in the permit:
>
> (1) .....
>
> (2) The holder of the permit shall -
>
> (a) prepare in triplicate in respect of all bets accepted by him -
>
> (i) on horse races held in Jamaica, vouchers in the form set out as Form No. 8 in the Schedule hereto;

(ii) on horse races held outside of Jamaica, vouchers in the form set out as Form No. 9 in the said Schedule hereto;

(b) deliver the original of each such voucher to the person making such bet;

(c) deliver to the Commission the duplicate copy of each such voucher together with a duplicate of the Returns of Bets and Levy and Bet Winnings Tax made to the Collector General in respect of such vouchers within fourteen days after the preparation of each such voucher and shall indicate on the duplicate of each winning voucher, the sum paid out in respect of that voucher;

(d) to keep the triplicate of each such voucher and make it available at all reasonable times for inspection by the Commission or by any person authorised in that behalf by the Commission;

(e) deliver to the Commission for inspection the receipt from the Collector General for the payment of levy or bet winnings tax or both within twenty-one days of the preparation of the voucher to which the payment relates.

Regulation 11:

"A bookmaker shall not in respect of any horse race accept bets on any such race, after the time prescribed for the acceptance of such bets. "

Regulations made and published in the Jamaica Gazette of 22nd May, 1974 prescribed the time during which licensed premises may be opened:-

"The Second Schedule to the Act is hereby amended by deleting paragraph 2 thereof and substituting therefor the following, as paragraph 2 -

'2. (1) The time during which licensed premises may be opened to effect betting transactions shall be: 7.00 a.m. to 9.30 a.m. and 4.30 p.m. to 7.30 p.m. Monday to Friday: 7.00 a.m. to 12.00 noon on Saturday, so, however, when horse racing is held in Jamaica on an approved racecourse on any weekday other than a Saturday, the time for opening shall be 7.00 a.m. to 12.00 noon on such day.

(2) Licensed premises shall be closed throughout Good Friday and every Sunday and at all other times (other than the times for opening specified in sub-paragrah (1)), and shall not be used for any purpose other than the effecting of betting transactions."

The Section replaced by these regulations merely provided:

> "The licensed premises shall be closed throughout Good Friday, and every Sunday, and at such other times, if any, as may be prescribed, and shall not be used for any purpose other than the effecting of betting transactions. "

What is a bet?

> "The essence of a bet is that on the determination of an event in one way the first party wins and the second loses. " Attorney General v. Luncheon and Sports Club Ltd., /1929/ A.C. 400 at p. 406.

> "In ordinary understanding a bet is made when one person stakes money or some other valuable thing against money or other valuable thing staked by another person upon the condition that the person whose prediction as to the result of a future uncertain event proves incorrect forfeits his stake to him whose prediction proves correct. " Police v. Thomas, /1966/ N.Z.L.R. 1008, per Wilson, J. at p. 1010.

> "The payment of a bet made and lost is not betting. The betting has been done before." Bradford v. Dawson, /1897/ 1 Q.B. at p. 311.

From these definitions it is clear that Regulations 10 and 11 which deal with the receiving and negotiating of bets and the formalities to be perfected "accepted" and its cognates must bear a contractual meaning.

Regulation 10 (3) reads:

> "The holder of the permit shall, if he authorises any person to receive or negotiate bets as his servant or agent, ensure that such servant or agent observes the foregoing conditions in like manner as if such servant or agent were the holder of the permit. "

In the light of these provisions it is untenable to say that an agent duly authorised in the form and manner provided by Regulation 16 is not empowered to accept bets and is in effect no more than a mere courier to convey the bets so placed to a place of acceptance - the head office of the company. The holder of a bookmaker's permit is expressly subject to the conditions imposed by the Regulations. It therefore lies not in the bookmaker's power to demote his duly authorised agent to a mere messenger. His obligations under the Regulations preclude him from so doing.

Accordingly despite the roll-up form of rule 3 when read and construed with Rule 8 it is clearly designed to treat the bets placed at the branch shops as mere offers. The Rules therefore conflict with Regulations 10 and 11 in the following respects:

(1) In making the agent a mere conduit for the bets placed at the branch shop.

(2) In making the head office of the company the place of acceptance of bets notwithstanding there was compliance with Regulation 10.

(3) In deferring the time for acceptance to the opening of the clock-bag which would be at a time outside the time prescribed by Regulation 11.

The consequences of these conflicts will be considered from two aspects:

(i) Whether it was open to the bookmaker to impose rules in conflict with Regulations 10 and 11.

(ii) What effect the existence of these rules have on the validity or enforceability as a contract of a bet placed in accordance with those Regulations?

Dr. Barnett had contended that the regulations did not compel the creation of a contract and he doubted whether despite its omnipotence, the legislature could legislate to this effect.

I am not unaware that it has been held that where the rights given in a statute have been only private rights, unless in addition there is a clause excluding a power of contract, such rights as far as they are personal rights, may be parted with or removed by contract or voluntary renunciation. Great Eastern Railway Co. vs. Goldsmid /1884/ H.L. (E) 9 A.C. 927 at pp.936-7.

However, it would seem otherwise where the act, in the public interest clearly sets out a course of conduct to be followed, and which it impliedly prohibits contracting to the contrary. Salford Guardians v. Dewhurst, /1926/ H.L. (E) A.C.P. 619.

The scheme of the act and the detailed procedures of the regulations are clearly indicative that the legislature intended to provide a comprehensive code and to place upon the bookmakers holding permits and licences under the act an inescapable obligation to comply with the procedures. Thus section 8 (2) provides:

> "Every betting office licence, bookmaker's permit or betting agency permit granted by the Commission shall be for such period and subject to such terms and conditions as may be specified therein, and may be renewed in such manner as may be prescribed. "

And Regulation 10 (supra) imposes specific conditions.

Section 5 (1) of the Act provides:

> "The function of the Commission shall be to regulate and control the operation of betting and gaming and the conduct of lotteries in the Island; and to carry out such functions as are assigned to it by or in pursuance of the provisions of this Act or any other enactment and, in particular, but without prejudice to the generality of the foregoing -
>
> (a) to examine, in consultation with such organisations and persons as it considers appropriate, problems relating to the operation of betting and gaming and the conduct of lotteries in the Island;
>
> (b) .....
>
> (c) .....

and Section 6 (1) -

> "The Minister may, after consultation with the Chairman of the Commission, give to the Commission directions of a general character as to the policy to be followed in the exercise or discharge of its functions in relation to any matter appearing to him to concern the public interest; and the Commission shall give effect to any such directions.

There are provisions for the application, grant of, suspension or revocation of licences and permits, power for the Commission to hold or cause to be held investigations with a view to suspension, variation or revocation of licences; to delegate functions and to hear and determine appeals in relation to the exercise of any delegated function.

Part III of the Act containing 11 sections is devoted to Betting and Bookmaking. The Act also deals and/or defines "pool betting", "starting prices", and "totalisator odds". From the terms and tenor of the Act it is clear that the legislature was concerned with the public interest not only in the matter of revenue but in protection of the betting public. By the dictates of the statute valid contracts of wager must comply with the procedures and neither bookmaker nor punter is free to act to the contrary.

In any event, the bookmaker is precluded from so doing because of his irrevocable obligations as a permit holder while in the case of the punter even if he had power to waive what is a condition in his favour the inference is inescapable that he could not have had in contemplation nor would he have agreed to the acceptance of his bet being deferred to a time that may very well be after the race was run. This would be contrary to the very nature of betting. Bets placed within the prescribed time and in accordance with Regulation 10 (2) if not rejected must be considered as accepted by closing time.

In so holding I must not be taken to mean that a bookmaker cannot by astute rules incorporate in his contract conditions exempting or limiting liability provided they are not in conflict with the Act and Regulations made hereunder. Indeed, the learned trial judge quite correctly gave effect to the rules limiting liability to $10,000. Here I am concerned with whether or not the bookmaker is competent to defer in the manner proposed by his rules in the instant case acceptance of a bet placed in accordance with Regulation 10 in a duly licensed betting shop with an agent duly authorised and within the prescribed time. I am constrained to answer this in the negative. Regulation 11 is so clear, concise, and conclusive that to escape its ambit there are special provisions for lay off bets. In that regard Regulation 2 provides:-

> "(i) .....
>
> (ii) .....
>
> (iii) at the time when the fresh bet was made the first bookmaker informed the second bookmaker that such fresh bets was made for the purpose of laying off his contingent liability; and
>
> (iv) where the bet relates to double or multiple events such fresh bet was made before the determination of the first event. "

In the instant case the offer and acceptance of the bet having been effected in accordance with the procedure specifically laid down in the regulations and within the prescribed time a binding contract had come into being. Accordingly the defendant company's rule amounted to a vain endeavour to undo what had been validly and correctly done.

As was said in Nicolene Ltd. v. Simmonds [1953] 1 Q.B. 543 at p. 551:

> "I take it to be clear law that if one of the parties to a contract inserts into it an exempting condition in his own favour, which the other side agrees, and it afterwards turns out that that condition is meaningless, or what comes to the same thing, that it is so ambiguous that no ascertainable meaning can be given to it, that does not mean that the whole contract is a nullity. It only means that the exempting condition is a nullity and must be rejected. It would be strange indeed if a party could escape from every one of his obligations by inserting a meaningless exception from some of them. "

In the circumstances and by parity of reasoning I hold that the rules seeking to defer acceptance of the respondent's bets in contravention of Regulation 11 must be considered as an ineffective addendum to the valid contract.

In so deciding I am not unmindful of the decisions in John Chin v. Watson's (Off Course Betting) Ltd. [1974] 12 J.L.R. p. 1431 and Eustace Lyn v. Watson's (Off Course Betting) Ltd. C.L. 1974/L003 unreported, cited and relied upon by the appellant's attorney.

In the former case Rowe, J. (as he then was) had to interpret and give effect to the following rule of the defendant's company - which rule he held had been incorporated as a term in the contract:

> "No bet will be regarded as such or as having been accepted until it has been locked in the timing apparatus supplied by us before the set time of the race(s) and before the result(s) of the specified events are known. "

I have had the benefit of reading the draft judgment of Campbell, J.A. (Ag.) and note his comparative analysis of that case with the instant case. I commend him for his industry. For the purpose of distinction I am content to make the following observations:

In Chin's case two broad questions arose for determination:

(1) Was the rule incorporated as a term of the contract?

(2) If it was did it exempt the defendant from liability?

The learned judge answered both questions in the affirmative.

On the face of it Watson's rule 2 differs substantially in tenor and intendment from the rules in this case. Secondly, it is not in conflict with the then existing regulations. Thirdly, it contemplates the bet being accepted before the start of the race.

In fact Rowe, J. was not called upon to determine whether or not the rule was in conflict with any of the current regulations. Had the question arisen experienced and concerned with the practicalities of the law as he obviously was, it is unthinkable that he would have held that a bookmaker was competent to defer acceptance of a bet until after the horses had passed the post.

In Lyn's case before Wilkie, J. the defence, as accepted by the trial judge, was to the effect that the plaintiff in laying his bet contravened a rule of the company which provided that bets would not knowingly be accepted from members of the company's organisation. The defendant acted in collusion with his wife who was at the time employed to the company and the bets were placed at the betting agency managed by her. On this ground he quite correctly, in my view, gave judgment for the defendant.

It was pleaded in the alternative that under the company's rules, the defendant had exercised his right to refuse and disqualify any investment if the defendant was not satisfied with the bona fides of the bet. Wilkie, J. found against the plaintiff's plea of ignorance that the company's rules were incorporated into the contract. In dealing with the alternative contention he applied the "rule of law theory" that an exemption clause did not cover a fundamental breach.

In view of his decision on the first limb of the defence his treatment of this aspect in which he decided against the defence must be considered as obiter. In any event Lyn's case ante-dated the decision of this Court in the Harbour Cold Stores Ltd. case (supra). In the light of this later case the "rule of law theory" can no longer be regarded as a principle of general application. As was held

in Photo-Production Ltd. v. Securicor Transport Ltd, /1980/ 1 All E.R. at p. 556 and quoted with approval in the Harbour Cold Stores Ltd. case:

> "There was no rule of law by which an exception clause in a contract could be eliminated from a consideration of the parties' position when there was a breach of contract (whether fundamental or not) or by which an exception clause could be deprived of effect regardless of the terms of the contract, because the parties were free to agree to whatever exclusions or modification of their obligations they choose and therefore the question whether an exception clause applied when there was a fundamental breach, breach of a fundamental term or any other breach turned on the construction of the whole of the contract including any exception clause, and because /per Lord Diplock/ the parties were free to reject or modify by express words both their primary obligations to do that which they had promise and also any secondary obligations to pay damages arising on breach of a primary obligation. "

In the instant case, because of my interpretation of the relevant rules and my views on the effect of their conflict with the Regulations this question does not arise for determination.

I now turn to the alternative submission of respondent's atterney. It is in effect that the appellant cannot by failing to do what was necessary to bring the contract into being rely on that failure to prevent the formation of the contract, that by the appellant's rules - Rules 54 and 55 - a duty is on the agent to place the copies of the vouchers in the clock-bag and failure by the agent so to do could not be relied on as preventing the formation of the contract.

He relied on, the case of McKay v. Dick /1881/ A.C. p.251.

Dr. Barnett's sharp and pointed reply was to the effect that that case was concerned with performance in and not formation of a contract. I am in agreement with this. Mr. Codlin reads too much into McKay v. Dick. In that case:-

> "By a written contract A. agreed to buy of B. a digging machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened-up face" at the C. railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the "C." cutting and tried at a face not a "properly opened-up" one, and breaking down, after a few days work, A. refused to give it any further trial or to pay the price of the machine."

It was held that -

> "If, in a case of contract of sale and delivery, which makes acceptance of the thing sold and payment of the price conditional on a certain thing being done by the seller, the buyer prevents the possibility of the seller fulfilling the condition, the contract is to be taken as satisfied."

As Lord Blackburn put it at p. 263:-

> "I think I may safely say, as a general rule, that where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."

Although in the judgment the principle is enunciated in the didactic style of the period it is nevertheless clear and consonant with good sense. It is in effect that where there is a contract of executory consideration - i.e. with outstanding obligations to be performed by either party - and a step to be taken by one party in pursuit of performance is dependent on the other paving the way, the party who fails to take the initial action cannot rely on his failure as a ground for repudiating the contract. The proposition, therefore, rests on the existence of a valid contract and is relevant to cases in which there are inter-dependent acts of performance.

There remains Dr. Barnett's alternative argument that if the acceptance of the bet is contrary to Regulation 11 then the contract would be illegal and consequently unenforceable. This is like

a gambler's last desperate throw of the dice. The position taken up by the respondent is that there was a valid contract made in accordance with the relevant regulations; while that of the appellant was that no contract had come into being because the conditions for acceptance as prescribed by the rules had not been met. Those diametrically opposed positions do not admit of any via media. In the circumstances, the question of there being an illegal contract based upon acceptance of a bet after the prescribed time does not arise for determination.

For these reasons I would dismiss the appeal and affirm the judgment of the court below.

ROWE J.A.

On December 20, 1979, White J. (as he then was) gave judgment in favour of the Respondent in the sum of $10,000.00 with costs to be agreed or taxed on a claim which alleged that the respondent had placed two winning bets with the appellant through its accredited agent and that the respondent had refused to honour the bet and pay the winnings. The two questions raised on appeal were firstly as to whether a contract of wager came into being having regard to the appellant's rules and secondly as to whether the provisions of the Betting Gaming and Lotteries Regulations prevented the contracting parties from stipulating that they should not be contractually bound except where the betting vouchers had been locked in the clock bag by a certain time and dealt with according to the bookmaker's rules.

The appellant, the holder of a bookmaker's permit under the provisions of the Betting, Gaming and Lotteries Act, 1965, was on November 20, 1976 carrying on business at its Head Office in Kingston and at branches throughout the Island. It had a branch office at Race Course in Clarendon and its agent there was Mrs. Norma Hamilton and it appears she was assisted by her husband Cecil Hamilton. The appellant contended that in the course of its business it formulated certain rules which it displayed in its betting office at Race Course and the vouchers which it issued to punters made specific reference to the fact that the transaction was governed by the company's rules. The learned trial judge in his written judgment said:-

> "I accept that the Rules were displayed in the Betting Shop, at the material time, in such a way that as a regular punter the plaintiff would have long been conversant with those Rules."

The vouchers which the respondent said he received from Cecil Hamilton on November 20, 1976 when he placed two accumulator bets for $40.00 and $25.00 respectively, apart from referring to the fact as to where the appellant's rules could be found and to a limitation of

liability to a sum of $10,000.00 in stated circumstances contained the following provisions:-

> "1. All bets are made subject to our rules and to amendments or additions thereto made by us and published before the date of the bet in any daily newspaper and these rules and such amendments and additions govern all wagers between our patrons and ourselves.
>
> 2. All bets made at our branches or agencies are subject to our rules, and to conditions governing bets made at our branches or agencies."

When recourse is had to the Rules of which notice is given on the voucher it is found that Rules 2, 3 and 6 contain the following provisions:-

> "2. All offers are received by us on the distinct understanding that the Client will abide by these Rules whether or not the Client be in possession of our Rules Leaflets or whether or not he has read these Rules.
>
> 3. The writing of the voucher by or on behalf of the Client shall when it shall have been signed by the Company's Agent subject to Rule 10 be deemed to be the offer by the Client to us to accept the Wager or Bet therein written and shall not be deemed to be an acceptance by us of that wager or bet. The time of the offer shall be the time of the signing of the voucher by our agent subject to Rule 10. The time of our acceptance of the offer of the bet shall be when the Locked Bag is unlocked at our head office provided that therein is found the security copy and the Timing Apparatus indicates that the locking of the time Bag took place at or before the latest time fixed by our programme for the acceptance of offers to be in respect of any Race named in the bet written on the voucher for the day's racing on which the security copy discloses the offer to bet is intended and the presence of the security copy in such circumstances shall 'ipso facto' be deemed to be acceptance of the offer.
>
> 6. The voucher as written shall be the offer by the client to make with us the bet therein written. Any assistance which our servants agents or employees may give to Clients for this purpose shall be deemed to be a service performed gratuitously for the Client at the Client's request. It is the sole responsibility of the Client to ascertain that his requirements have been accurately recorded to his satisfaction by carefully checking the voucher by whomsoever written and the handwriting on the voucher for all purposes of the contract of wager between the Client and ourselves be then accurately to set out the offer

> "to be which he makes with us. It is a term and condition of the proposed contract that in accepting the voucher the Client warrants to us that it accurately expresses the bet which he offers to make."

The respondent, who, on the judge's finding knew of the appellant's rules, said he purchased his bets between 10.30 and 11.00 a.m. on November 20, 1976 and the judge so found. Incidentally his brother said he too purchased bets at this betting office at the same time on the same day (but from Norma Hamilton) and on the same horses in the same races as did the respondent. His voucher was found in the appellant's clock bag when it was opened at the head office and that brother was paid his considerable winnings without demur. As the appellant's rules indicate, the system which the appellant devised to conduct betting operations at branch offices was that bets having been written up in the prescribed form, one copy would go to the punter, one would remain in the voucher book and one copy would be placed in the clock bag and this bag would be locked and sent to Head Office. The purpose of the clock bag is self evident. The person accepting the risk wishes to ensure that bets are not made by venal persons after the results of the races are known. The clock will tell the time that the bag was locked and place beyond argument the time before which a bet found therein must have been made. On this November 20, 1976, the appellants clock bag collector came to him between 2.30 and 3.00 p.m. with the clock bag from Race Course and also handed over a large number of 'white copies' which according to his security system ought to have been in the clock bag. Mr. Wayne Chin who gave evidence for the appellant before White J. said he was not impressed with the demeanour of the Collector who handed over the locked clock bag together with the loose vouchers and so he made a quick search through the loose unsecured vouchers. He came upon the two large bets of the respondent which were in fact the largest of all the bets inside or outside of the bag. By the time the clock bag reached him all the four races covered by the respondent's bets had already been run. Mr. Chin's evidence was that he had in force

ancillary procedures which although not provided for by the company's rules were intended to meet exceptional circumstances where an agent omitted or neglected to place a voucher in the clock bag when he ought to have done so. He outlined these procedures and said that in the instant case the agent did not make use of any of those supplementary procedures and consequently he could not be satisfied that the respondent's bets were made in the prescribed time and relying upon the provisions of the appellant's rules he refused to honour the bets.

Dr. Barnett submitted that a party is free to specify the time at which his acceptance of an offer should become effective and that a party may stipulate the conditions precedent to his acceptance becoming effective. This proposition was accepted by White J. when he said:

> "Of course I am aware that one party may state a condition as to where acceptance is to be deemed effective. Such a case was Robophone Facilities Limited (1966) 1 W.L.R. 1428."

As Mr. Codlin did not dispute this proposition of law I can pass on with the comment that Lord Denning M.R. thought that on the facts of the Robophone case, referred to in the judgment of White J. there was no concluded contract. Dr. Barnett further submitted that there cannot be a concluded contract formed at a point of time earlier than that stipulated for by the person accepting the offer as the effective time of his acceptance. In his view once White J. found that the company's rules were applicable, in that the parties were aware of their provisions, it followed that the appellant had sufficiently indicated that it would not accept the offer unless the voucher was placed in the clock bag and found within it when it was opened at the Head Office. He argued that having regard to the facts, the legal result of the judge's finding was that a condition precedent had been stipulated for by the terms of the appellant's rules and there was no binding contract in existence as that condition precedent had not been fulfilled:

Another line of attack was mounted on the trial judge's judgment. The judge relied upon Regulations 10 and 11 of the Betting Gaming and Lotteries Regulations 1975 to say:

> "There it is enjoined what procedure should be followed by a bookmaker or his agent when 'bets are accepted by him.' Certainly, this does not envisage a stage later than the time of the placing of the bets, at which time, 'the receiving and negotiation of bets' has crystallised and its effect cannot thereafter be deferred in dependence upon whether the bookmaker should approve the laying of the bets."

As to this part of the judgment of White J., Dr. Barnett submitted that Regulation 10 (2) of the Betting Gaming and Lotteries Regulations 1975 which prescribes the procedure which should be followed by a bookmaker in negotiating bets do not determine the contractual rights of the parties nor does it prohibit the bookmaker from laying down conditions as to when his acceptance of the contract of wager should become effective. According to Dr. Barnett, the Regulation seeks to ensure that proper records are kept of betting transactions for the primary purpose of protecting the revenue. Furthermore he argued that if the effect of the Regulation was to prohibit an offer or acceptance being made on the terms set out in the appellant's rules the effect would be that no valid contract came into existence as the statute did not set out to write in implied terms in the contract of wager, as for instance is done in the Sale of Goods Act.

Mr. Codlin's submissions may be summarized thus:

> "(a) Wagering contracts in Jamaica are governed by the Betting Gaming and Lotteries Act and the Regulations made thereunder especially Regulations 10 and 11 of the 1975 Regulations.
>
> (b) Such rules of the appellant which might have been applicable to the contract of wagering as are inconsistent with the statutory Regulations are void and inoperative.
>
> (c) The evidence makes it clear that so soon as Regulations 10 and 11 were complied with on November 20, 1976, a binding agreement came into force.

(d) "Even if rule 3 of the appellant's rules were applicable to the instant case the applicant could not by his own wilful act or negligence or that of his agent, fail to perform an important term in the agreement and then rely on that failure as a defence,"

and for this final submission he relied upon the decision in McKay v. Dick (1881) 6 A.C. 251.

Regulation 10 (2) and 10 (3) of the Regulations of 1975 made by virtue of the Betting Gaming and Lotteries Act provide:-

"Every bookmaker's permit shall be subject to the following conditions and such other condtitions as the Commission may stipulate in the permit."

(2) The holder of the permit shall:

"(a) prepare in triplicate in respect of all bets accepted by him:

(i) on horse races held in Jamaica, vouchers in the form set out as Form No. 8 in the Schedule hereto;

(ii) on horse races held outside of Jamaica, vouchers in the form set out as Form No. 9 in the said Schedule hereto;

(b) deliver the original of each such voucher to the person making such bet;

(c) deliver to the Commission the duplicate copy of each such voucher together with a duplicate of the Returns of Bets and Levy and Bet Winnings Tax made to the Collector General in respect of such vouchers within fourteen days after the preparation of each such voucher and shall indicate on the duplicate of each winning voucher, the sum paid out in respect of that voucher;

(d) keep the triplicate of each such voucher and make it available at all reasonable times for inspection by the Commission or by any person authorised in that behalf by the Commission;

(e) deliver to the Commission for inspection the receipt from the Collector General for the payment of levy or bet winnings tax or both within twenty-one days of the preparation of the voucher to which the payment relates."

"(3) The holder of the permit shall, if he authorises any person to receive or negotiate bets as his servant or agent, ensure that such servant or agent observes the foregoing conditions in like manner as if such servant or agent were the holder of the permit."

Then Regulation 11 prescribes:

> "11. A bookmaker shall not in respect of any horse rac accept bets on any such race, other than laid off bets, after the time prescribed for the acceptance of such bets."

A fair construction of Regulations 10 (2), 10 (3) and 11 of the Betting Gaming and Lotteries Regulations quoted above would lead to the clear conclusion that an oral bet would be unenforceable and equally unenforceable would be a bet made after the results of a race had become known. There is nothing in those Regulations to indicate that a bookmaker may not make his own rules to regulate and facilitate the conduct by him of the business of bookmaking, a highly speculate venture, and one which human experience shows to be productive of elaborate frauds usually hatched by men with an itch to obtain the golden egg and the goose as well. The two cases decided in Jamaica and referred to in the judgment of White J. and again cited before us viz: John Chin v. Watson's (Off Course Betting) Ltd Cl. 1152/72 February 1974; and Eustace Lyn v. Watson's (Off Course Betting Ltd Cl. 1974/L003, proceded on the basis that the bookmaker could make rules binding on the punter. In the case of John Chin, the rule which was upheld by the Court made provision that the voucher should be enclosed in the clock bag. When the clock bag was opened at the bookmaker's Head Office no voucher was found therein to match the one produced by the plaintiff and so he lost his case. In Eustace Lyn's case, there was a rule which provided th t no member of the bookmaker's organization or of that member's immediate family should place a bet with that bookmaker. In defiance of that rule the plaintiff placed a bet with his wife, an employee of the bookmaker, and he too lost his action and his claim to recover the amount which the "winning voucher" purported to show. In neither case was the point raised that the bookmaker's rules were ultra vires the provisions of the Regulations which were substantially similar to those contained in Regulations 10 and 11 of the 1975 Regulations quoted herein.

In enacting Regulations under the Betting, Gaming and Lotteries Act, did the legislature intend to set up a statutory regime which would limit regulate and control the incidence, meaning and application of the terms "offer" and "acceptance" in a wagering contract? If this were the intention of the legislature I would expect to find the clearest possible language to that effect firstly in the enabling statute and secondly in the Regulations themselves. I would expect to find words to the effect that when the punter had nominated the horses in a horse-race, paid over his stake money and received from the bookmaker or his agent the appropriate receipt the contract of wager would be deemed to come into force. Such a deeming provision would over-ride the actual intention of the parties if either or both of them had intended that the offer should have been left open for acceptance at some future but determinate time. I find no such enabling provision in the Betting, Gaming and Lotteries Act and no deeming section in the Regulations made thereunder.

I turn to consider whether by necessary implication the regulatory provisions should be construed as containing this deeming provision. Regulation 10 contains the conditions which are to be attached to the Bookmaker's permit and the protection which is offered to a punter is that he must be given a written receipt for the money staked with the bookmaker, and if the bookmaker acts through an agent, he too, must issue such a receipt. Read in that way, Regulation 10 does not interfere with the freedom of the parties to determine the other incidences relating to the formation of the contract of wagering.

In the instant case the appellant made Rules by virtue of which the bookmaker's agent's authority was limited to writing up the vouchers, acting in that regard as the agent of the punter and the agent was charged with placing the bets in a clock bag, locking the clock bag with the timing device and forwarding that clock bag to the Head Office of the bookmaker. That was how the respondent, on the findings of the learned trial judge, expected the agent to act and in my view, the inescapable result of the learned trial judge's finding in that regard, is that in

the contemplation of the respondent he would only be entitled to be paid if his winning voucher was found to be in the locked clock bag when it was opened at the appellant's Head Office. Consequently, I am constrained to hold that as there is no deeming provision in the statute or the regulations made thereunder which would defeat the express terms of the arrangement come to between the respondent and the appellant and which could elevate into a binding agreement at the moment the receipt was prepared, something which the parties then contemplated to amount to no more than an offer, capable of acceptance in a stated manner by the bookmaker sometime in future, there was never a concluded contract between these parties.

Assuming, however, that Mr. Codlin's submissions are correct that in so far as the appellant's rules are in conflict with Regulations 10 and 11, the rules are to that extent void and inapplicable, could the result be, that contrary to the factual situation and the expectation of the parties, a contract would nevertheless come into existence? I am attracted to the argument of Dr. Barnett that a statute may say that on the eventuality of certain things an obligation by one to pay to another can come into being, but that would be by virtue of the statutory obligation and not under a contractual obligation which by definition requires offer and acceptance among other things. I agree with Dr. Barnett that there is nothing in the regulations which go so far as to create a statutory obligation to pay provided regulation 10 is complied with, and the nominated horse is declared the winner. Regulations 10 and 11 were made under section 43 (now section 65) of the Betting, Gaming and Lotteries Act, the provisions of which section are:

> "65 (1). The Commission, subject to the approval of the Minister responsible for finance, may make regulations generally for the better carrying out of the objects and purposes of this Act and in particular but without prejudice to the generality of the foregoing may make regulations -

"(a) prescribing the form and manner in which applications shall be made for any permit or licence which may be granted under this Act and the forms of such permits and licences;

(b) prescribing the circumstances in which and the persons by whom fees shall be paid, the amount of such fees and the disposal thereof;

(c) prescribing any other matter or thing which may be or is required by this Act to be prescribed;

(d) amending or replacing the Second and Third Schedules."

This action has not been founded on the breach of any statutory obligation but upon an agreement allegedly arrived at between the appellant and the respondent. From whatever angle one approaches the question, my firm view is, that the language of regulations 10 and 11 do not compel me to say that in every case of betting once those regulations have been complied with a contract of wager comes into existence. Indeed as Dr. Barnett said, for the bookmaker's neglect to conform to the terms and conditions of his permit, the redress provided by the statute is disciplinary proceedings and disciplinary penalties.

The appellant, in his Bookmaker's Rules 53 - 55 provided as under:-

"53. Each offer received by the agent must be recorded in writing on a voucher supplied to him by the Company.

54. The agent must deposit all Security Copy vouchers in the locked bag supplied by the Company on or before the time stated in our programme (See Rule 3)

55. The agent must lock the security Copy Voucher at a time prior to the time of the Race as stated in Rule 55 (sic) and must ensure that the timing aparatus is in proper working order (See Rule 3)"

Based on these Rules, Mr. Coffin submitted that there was an implied term in the agreement between the agent and the punter that the agent would do nothing to prevent a voucher issued in accordance with Regulation 10 from being placed in the clock bag and the failure of the bookmaker through the agent to place the voucher in the clock bag does not dis-entitle the punter from receiving the fruits of his bet. For this submission he

relied upon paragraph 788 of the Twenty-fourth Edition of Chitty on Contracts and Mackay v. Dick (1881) 6 A.C. 251.

Under the heading "Prevention of Performance" the learned authors of Chitty on Contracts at paragraph 788 says in part:

> "The court will readily imply into any contract a term that neither party will, by his own act or default, prevent performance of the contract ..... Further where it appears that both parties have agreed that something shall be done which cannot effectively be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there be no express words to that effect."

and Mackay v. Dick (supra) is relied upon for the proposition.

That was a case in which, by a written contract Mackay agreed to buy from Dick a digging machine, if it fulfilled certain conditions, one of which was that it should be capable of excavating a given quantity of clay in a fixed time on a "properly opened up face" at the C. railway cutting. The machine failed at another cutting to excavate the required quantity, and on its being removed to the C. cutting and tried at a face not a "properly opened-up" one, and breaking down, after a few days work, Mackay refused to give it any further trial or to pay the price of the machine. At page 270 of the Report, Lord Watson said;

> "The Respondents were only entitled to receive payment of the price of the machine on the condition that it should be tried at a proper working face provided by the appellant, and that on trial it should excavate a certain amount of clay or other soft substance within a given time. They have been thwarted in the attempt to fulfil that condition by the neglect or refusal of the appellant to furnish the means of applying the stipulated test; and their failure being due to his fault, I am of opinion that, as in a question with him, the they must be taken to have fulfilled the condition.

And so Mr. Codlin argued, since it was the agent's duty to place the vouchers in the clock bag and the learned trial judge found that the bet was made within the prescribed time, in a question between the appellant and the respondent, it must be taken that the condition of the voucher being placed in the clock bag was fulfilled. On the other hand, Dr. Barnett countered powerfully that the real distinction between the instant case and that of Mackay v Dick is that in that case there was a concluded contract of sale; delivery of the machine had been made; and the issue was as to whether the appellant was bound to pay the price.

I accept as good law Dr. Barnett's submission that a person cannot sue in contract for a failure by another to enter into that very "contract" being sued upon. If there has never been a contract of any kind between the parties there can be no action for breach of contract. The learned trial judge found that the rules of the appellant quoted above were within the knowledge of the parties and these rules indicated the basis on which the appellant would accept the punter's bet. There was no room here for an implied term as it would of necessity have to be contradictory of the express terms contained in the bookmaker's rules, which rules were common to the knowledge of both parties.

Whether the appellant's rules were inequitable or iniquitous must be beside the point if the respondent with knowledge of them placed bets with the appellant under their terms.

It cannot be gainsaid that there was no consensual acceptance in the instant case. The basis on which the appellant would accept was known to the respondent and as I have tried to show herein there was no room for attributing to the bookmaker an acceptance in contract which he did not intend. I can with facility adopt Dr. Barnett's final submission which is that if the appellant's rules are not in conflict with the regulations under the Betting, Gaming and Lotteries Act then its acceptance of the respondent's offer of a wager was validly postponed and as the

events transpired it was never accepted. If on the other hand the book-maker's rules are in conflict with the statutory regulations then the acceptance which he purported to defer was invalid and for that reason no contract came into being.

I would allow the appeal and enter judgment for the appellant with costs to be agreed or taxed.

CAMPBELL, J.A. (Ag.):

This is an appeal against the judgment of White, J. (as he then was) given on December 20, 1979, in which he ordered the appellant, a bookmaker to pay to the plaintiff the sum of J$10,000.00 won on bets placed with it.

On Saturday, November 20, 1976, Phillip Palmer the respondent who was a farmer and minibus operator residing at Gimme-Me-Bit in the parish of Clarendon staked a total of J$65.00 on two sets of race horses at the appellant's betting office at Race Course in the aforesaid parish. He placed his bets before 12 noon, and on payment by him of the stake money was given two vouchers on which were recorded particulars of his bets. The respondent won on each of the vouchers but was refused payment in consequence whereof he sued the appellant and recovered judgment against it.

At the trial the appellant timorously sought to justify non-payment on the ground of suspected fraud by the respondent and or collusion with the appellant's agent. On a more confident ground it however justified the non-payment because as it asserted, the facts established conclusively that no contract had been concluded with the respondent hence there was no resultant liability to pay. The appellant contended that it had rules regulating betting transactions with its patrons of which the respondent had knowledge. The rules expressly provided that all patrons in entering into betting transactions with the appellant agreed that the rules would govern the transaction and be incorporated as a term in the contract constituted by the betting transaction. Rule 3 of its rules expressly provides that the writing up and signing of a voucher by the appellant or its agent or servant on behalf of a bettor is deemed to be merely an offer by the bettor to enter into a betting contract. This offer is only accepted in point of time when the duplicate copy of the voucher which has been so written up has been received by it in a locked bag complete with timing apparatus at its head office. In the respondent's case the duplicate vouchers were not received in the locked bag albeit received at the head office.

The condition precedent to acceptance so to effectuate a concluded betting transaction was thus never fulfilled hence there never was any concluded bet whereunder the appellant could be called upon to pay.

The learned trial judge in delivering judgment for the respondent made the following findings of fact:

1. The respondent did place his bet between 10.30 a.m. and 11.00 a.m. on November 20, 1976 which was within the time prescribed in the schedule to the Betting, Gaming and Lotteries Act 1965 (hereinafter called the Act) and Regulation 11 of the Betting, Gaming and Lotteries Regulations 1975 (hereinafter called the Regulations) made under the Act.

2. The bet was placed in circumstances where there was no fraudulent collusion with any person employed in the appellant's betting office.

3. The appellant in receiving the bets complied with Regulations 10, 11 and 13 of the Regulations.

On the basis of these facts the learned trial judge after considering the relevant Regulations, the Rules of the appellant, and a number of decided cases concluded thus:

> "In the final analysis, one of the factors bearing on the conclusion of this case is clarified by the provision in Regulations 10 and 11 of the Betting, Gaming and Lotteries Regulations, 1975, which I have already quoted. There it is enjoined what procedure should be followed by a bookmaker or his agent when "bets are accepted by him." Certainly, this does not envisage a stage later than the time of the placing of the bets, at which time "the receiving and negotiation of bets" has crystallised and its effect cannot thereafter be deferred in dependence upon whether the bookmaker should approve the laying of the bets.
>
> Another factor in the conclusion is that by the Rules of the defendant company, it undertook that its agent was under a duty to, and would, place the vouchers representing the punter's stake in the clock bag. Failure by the agent to do so is, in my view, a failure to perform a fundamental term of the contract which has effectively deprived the plaintiff of his winnings."

The appellant appealed on eight grounds. However Dr. Barnett in his submission before us concentrated on the last four grounds the determination of which he stated quite correctly would be conclusive of the issues raised in the appeal. It should however be said in passing, that the first four grounds were based more so on comments made by the learned trial judge in the course of his reasoning rather than on specific

findings of fact. If these comments had any effect at all it was in steeling the learned trial judge against the assertion of the appellant that its rules determined the issue in its favour.

The four grounds of appeal argued were in summary that the learned trial judge erred:

1. In holding that a bookmaker holds himself out as intending to pay winnings on whatever bets are laid with him without fraud on the part of the bettor when the bookmaker on the contrary clearly indicates that he holds himself out as transacting only in accordance with his rules;

2. In holding that despite the rules of the appellant to the contrary, it remained liable by reason of the circumstances of the agency of the operator of the betting shop;

3. In holding that Regulations 10 and 11 of the Betting, Gaming and Lotteries Regulations 1975 prevented the parties from submitting to terms of dealings which deferred acceptance under the law of contract or made it conditional on the fulfilment of specified conditions;

4. In holding that failure of the agent to place the vouchers in the clock bag was a breach of a fundamental term of the contract in that this begs the question of whether or not there was a contract and no such issue relating to a breach of a fundamental term of the contract was raised at the trial.

Dr. Barnett in summarising the issues raised, particularly in relation to Grounds 1, 2, and 3 said that they turned on two questions firstly, did a contract come into being having regard to the terms of the appellant's rules, and secondly did the provisions of the Regulations prevent the contracting parties from stipulating that they should not be contractually bound except where betting vouchers had been locked in the clock bag by a certain time and dealt with in the manner prescribed by the appellant's rules.

The second question as formulated by Dr. Barnett raises a hypothetical issue namely whether after a contract has come into being the contracting parties may consistently with the Regulations validly stipulate that notwithstanding the undoubted existence of a valid contract, laibility thereunder is not to arise until some additional prescribed preconditions have been fulfilled. This is not the issue before us. What

is in issue is whether the Regulations on a proper interpretation preclude the appellant from making rules the binding effect of which would be to defer the time contemplated by the Act and Regulations as the time of acceptance of a bet for effectuating a binding contract.

It is appropriate at this point to state the relevant Regulations:

"Regulation 2 (1) (b):

A bet or any part thereof shall be regarded as "laid off" if and only if -

(i) the bookmaker accepting the bet (in these Regulations referred to as "the first bookmaker") transfers the contingent liability of the bet ... to another bookmaker .... by means of a fresh bet made by the first bookmaker with the second bookmaker;

(ii) the second bookmaker has accepted such fresh bet while carrying on business as a bookmaker."

"Regulation 10:

Every bookmaker's permit shall be subject to the following conditions and such other conditions as the Commission may stipulate in the permit -

(1) .....

(2) The holder of the permit shall -

(a) prepare in triplicate in respect of all bets accepted by him -

(i) on horse races held in Jamaica, vouchers in the form set out as Form No. 8 in the Schedule hereto.

(ii) .....

(b) deliver the original of each such voucher to the person making such bet;

(3) The holder of the permit shall, if he authorises any person to receive or negotiate bets as his servant or agent, ensure that such servant or agent observes the foregoing conditions in like manner as if such servant or agent were the holder of the permit."

(Emphasis mine).

"Regulation 11:

A bookmaker shall not in respect of any horse race accept bets on any such race, other than laid off bets, after the time prescribed for the acceptance of such bets."

"Regulation 13:

(1) Every betting voucher issued by a bookmaker shall be in the form prescribed by the Regulations.

(2) Betting vouchers shall be in triplicate and bound in books ....."

Dr. Barnett submits that contracting parties have the right as between themselves to stipulate the point in time at which an offer shall be taken as accepted. In the present case he says, the appellant has stipulated in Rule 3 of its rules, which on the evidence is known to the respondent, that the acceptance of a bet, the offer of which is made to its agent or servant, shall be at its head office and shall arise only on the fulfilment thereat of certain prescribed preconditions. Rule 3 pruned for relevancy states:

> "The writing of the Voucher by or on behalf of the Client shall when it shall have been signed by the Company's Agent ..... be deemed to be the offer by the Client to us to accept the Wager or Bet therein written ..... The time of our acceptance of the offer of the bet shall be when the Locked Bag is unlocked at our head office provided that therein is found the security copy and the Timing Apparatus indicates that the locking of the Time Bag took place at or before the latest time fixed by our programme for the acceptance of offers ..... in respect of any Race named in the bet written on the Voucher ..... and the presence of the security copy in such circumstances shall 'ipso facto' be deemed to be acceptance of the offer."

Developing further his submission, Dr. Barnett stated that Rule 3 was incorporated in the proposed contract between the appellant and the respondent because the latter was aware of Rule 2 which states that:

> "All offers are received by us on the distinct understanding that the Client will abide by these rules ....."

The respondent Dr. Barnett submits, undertook to abide by the preconditions for acceptance of his offer of bet which were that (a) the duplicate voucher or secuirty copy must be deposited by the appellant's agent in a "clock bag"provided for that purpose by the appellant, (b) the clock bag must be locked by the agent before the expiration of the time prescribed in the schedule to the Act so to comply with Regulation 11 and (c) the clock bag containing the security

voucher must be dispatched to and received at the head office of the appellant. On fulfilment of these preconditions, but only then is there deemed to be an acceptance of the respondent's offer. These preconditions were not satisfied because the security copies of the respondent's vouchers were never in the clerk bag. No acceptance of the offer to bet was therefore possible and there was in fact no acceptance. No contract came into being and so there was no liability to pay.

Contrary to the learned trial judge's construction of Regulation 10, Dr. Barnett submitted that it was merely procedural and directory. It does not seek to determine the contractual rights of the parties nor does it impliedly prohibit stipulations such as those contained in Rule 3. Regulation 10 in providing for vouchers to be prepared in triplicate and for delivery of the original to the bettor seeks merely to provide proper records of betting transactions primarily for revenue purposes.

Mr. Codlin for the respondent rested his submission on the fact that the learned trial judge had found that the respondent in proffering his bet, had done so within the prescribed time. He had paid the correct stake money to the appellant's agent. He had received the original betting voucher. There was due compliance by the appellant with Rules 10, 11 and 13 of the Regulations.

On these facts Mr. Codlin submitted that there was a concluded contract of wager. The Act and Regulations were, he says, designed to provide a code for regulating betting. This was done inter alia by regulating how the business of bookmaking is to be conducted and how contracts of wagers are to be effected. In this respect Regulation 10 prescribed how a wagering contract was to come into being, while the Act and Regulation 11 prescribed the time within which alone such contracts can be made. In so far as Rule 3 of the appellant's rules are inconsistent with Regulation 10 or Regulation 11 or both it must be disregarded as inoperative because Rule 3 like all the other rules are subject to the Act and Regulations. The words "accepted" and "accept"

in Regulations 10 and 11 are he submits, clearly consonant with the concept of "acceptance" in the law of contract. Thus the Act and these Regulations prescribe the mode of contracting and by the clear words of Regulation 10 a contract is concluded with the delivery of the original voucher to the bettor, fraud excepted, and subject of course to fulfilment of any other statutory preconditions such as that prescribed in Regulation 11 and of such of the rules of the appellant which are not inconsistent with the Act and Regulations.

Dr. Barnett in reply to these submissions stated in bold language that not even the legislature with its relative omnipotence can by legislation create a contract since this by its very nature is the product of the volition of the prospective contracting parties. The Act and the Regulations can undoubtedly make payment of a bet obligatory but the legislature is distinctly impotent to create a contract by legislation. Further, the word "accept" in Regulations 10 and 11 is used loosely and is not equivalent to the terminology of contract.

Dr. Barnett's submission that the legislature despite its relative omnipotence cannot by legislation create a contract appears ambiguous. If he means that the legislature cannot by legislation compel parties to enter into a contract he is undoubtedly correct. If however he means that the legislature cannot prescribe that parties who of their own free volition desire to enter into a contract must do so in a particular form and within a particular time then his submission is not well founded.

Mr. Codlin's submissions are predicated on the Act and Regulations being imperative while Dr. Barnett contends they are directory only. If they are imperative their prescriptions must be complied with exactly and the parties are not permitted to contract out of any of the prescriptions. On the other hand if they are merely directory, substantial compliance will suffice and the parties may legally contract out of any of the prescriptions while ensuring substantial compliance.

The starting point therefore is to determine whether the Act

and Regulations are imperative or merely directory.

The Act speaks in imperative terms as illustrated hereunder:

Section 5(1):- Provides that the functions of the Commission (Betting, Gaming and Lotteries Commission established under Section 4) shall be to regulate and control the operation of betting and gaming and the conduct of lotteries in the island.

It is to be noted that by Section 2, "functions" include powers and duties.

Section 19: - Provides that no person shall act as a bookmaker on his own account unless he is the holder of a bookmaker's permit granted under Section 8(1) and subject to the conditions which may be prescribed pursuant to Section 8(2).

By Section 2 a bookmaker is a person who on his own account or as a servant or agent of another carries on the business of receiving or negotiating bets at declared odds.

Section 21: - Provides that betting transactions shall be effected only at premises licensed as betting offices. This is reinforced by the provisions of Sections 16 and 17. The former section prohibits the use of any premises for betting transactions unless it is licensed, the latter prohibits betting in a street or public place.

Section 22: - Prescribes that a licensed betting office shall be managed in accordance with the conditions specified in the licence and the rules set out in the Second Schedule. These rules prescribe inter alia that licensed betting offices shall be opened for effecting betting transactions only during the hours and on the days specified in the said Schedule.

Section 65: - Empowers the Commission to make regulations subject to the approval of the Minister responsible for finance for the better carrying out of the objects and purposes of the Act. Such regulations shall be subject to negative resolution by the House of Representatives.

A consideration of these provisions discloses that in a peremptory manner the Act requires betting transactions to be effected only in licensed betting offices within prescribed times with a bookmaker who has been granted a bookmaker's permit or with his authorised servants or agents. Contravention of any of these provisions constitutes an offence.

The Act has as its intention the conferring of legal validity to certain wagering contracts effected in accordance with its provisions which without legislative intervention would be illegal and void. The Act is thus a public policy Act and this is put beyond doubt when one considers Section 6(1) which states:

> "The Minister may, after consultation with the Chairman of the Commission, give to the Commission directions of a general character as to the policy to be followed in the exercise or discharge of its functions in relation to any matter appearing to him to concern the public interest; and the Commission shall give effect to any such directions."

The Regulations in providing a code for the regulation of betting transactions equally speak in imperative language. They were made, with the approval of the Minister responsible for finance to facilitate the due performance by the Commission of its imperative duty which under the Act is to regulate and control the operation of betting in Jamaica. The Regulations notwithstanding approval of the Minister had to be further approved by the House of Representatives in the manner provided for. Thus if the Regulations in speaking in imperative language were, for this reason, inconsistent with the spirit and intention of the enabling Act the House of Representatives would, it may be reasonably assumed have voiced its disapproval by a negative resolution.

I therefore construe the Act and Regulations as imperative and not merely directory.

Dr. Barnett's further submission that in Regulation 10 the word "accepted" is used in only a loose sense and not in the terminology of contract and that it is also in this loose sense that the word "accept" is used in Regulation 11 is not soundly based. This submission if valid would imply that the word accept is used in different senses in the Regulations.

There is a presumption that a word has the same meaning wherever it is used in a statute unless it is used in sections which as regards the matters with which they deal are distinctly different the one from the other. A similar presumption would apply to Regulations. In the

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present Regulations the word accept or a variation thereof is used in Regulation 2 (1) (b) in defining "laid off" bet. This Regulation says that a bet is a "laid off" bet if the first bookmaker "accepting" the bet transfers the contingent liability of the bet to another bookmaker by means of a fresh bet made with the second bookmaker which the latter "accepts" while carrying on business as a bookmaker. There cannot be any doubt whatever that the words "accepting" in reference to the first bookmaker and "accepts" in reference to the second bookmaker are used in the terminology of contract. It is manifestly so because Regulation 2 (1) (b) says in effect that the first bookmaker in accepting the bet (which would be from the bettor) incurs a contingent liability to pay. This contingent liability no doubt depends on the outcome of the event. It is this contingent liability arising from the first bookmaker's acceptance of the bet which he seeks to underwrite by "laying off" the bet with another bookmaker who accepts it in the course of his business of receiving and negotiating bets. The word "accepting" can have no other meaning than accepting to effectuate a binding contract otherwise no contingent liability could arise. Regulation 10 speaks of the very bet on the acceptance of which by a bookmaker he thereafter "lays off" with another bookmaker. It is to this bet that there is affixed a contingent liability to pay. This can be so only on the basis that the word "accept" in Regulation 10 means "accept" in the terminology of contract. Regulation 11 merely states that the phenomena of a betting contract concluded in compliance with Regulation 10, if it is to be invested with the attributes of a contract, must additionally have been accepted within the time prescribed by the rules contained in the Second Schedule to the Act.

The Regulations like the Act being mandatory, and the words "accepted" and "accept" used therein being consistent with the terminology of contract, Rule 3 if it is to be operative must be consistent with these Regulations. Alternatively if Rule 3 is inconsistent it must be shown affirmatively that the respondent notwithstanding the inconsistency is competent to contract thereunder so waiving his

rights under the Act and Regulations. If the respondent is incompetent to waive his rights under the Act and Regulations then Rule 3 to the extent of its inconsistency will be inoperative and will not accordingly be incorporated in the betting transaction between the respondent and the appellant.

It is not necessary to determine whether Rule 3 is inconsistent with Regulations 10 and 11 and if so, whether the respondent, who had knowledge of it, can be taken to have contracted out of the benefit of the Act and Regulations.

Rule 3 provides in effect that the delivery of the original betting voucher to the respondent by the appellant's agent within the time prescribed for betting and after the respondent has paid his stake money is not an act evidencing the acceptance of the respondent's offer of the bet because by this rule the appellant's agent to the knowledge of the respondent is not competent to accept a bet on behalf of the appellant so to effectuate a contract. The agent merely reduces the offers into writing on vouchers in triplicate, deposits the duplicate voucher in the clock bag, locks the clock bag on the expiration of the time prescribed by the rules in the Second Schedule to the Act, dispatches the offers in the locked clock bag to the appellant's head office where and when if the clock bag is found intact with the duplicate voucher therein, the respondent's offer is deemed ipso facto accepted.

By Rule 8 it is provided that all locked bags shall be opened at the head office within twenty-four hours of the receipt of the same and if the duplicate voucher is not present in the locked bag then no contract of wager shall exist between the appellant and the respondent. These rules when read together:

(1) Contravene Regulation 10(3) since the appellant seeks to make its agent merely a collector and dispatcher of offers instead of an agent receiving and negotiating bets as fully and completely as if he was the holder of the permit.

(2) Contravene the "licensed betting offices rules" contained in the Second Schedule to the Act and Regulation 11 since they seek to extend the time for effecting betting transactions that is to say for accepting bets by twenty-four hours or more from the deadline prescribed in the rules contained in the said Second Schedule.

The appellant, in relying on Rules 3 and 8 would not only be contravening the Act and Regulations, but in addition would not be receiving and negotiating bets. The appellant by Rule 8 claims the right to open its clock bag not immediately on receipt at its head office but at any time within twenty-four hours of the receipt thereof. The clock bag is locked and dispatched only after the expiration of the prescribed time for effecting betting transactions. At the time of its receipt at head office and/or the opening thereof as permitted by Rule 3, the outcome of the race which is the event on which the offer to bet is made, could well have been known before the deemed acceptance. Thus the appellant would be asserting a right to accept an offer which in contract law had ceased to exist at the time of the purported acceptance due to the disappearance of the implied condition on which the said offer was made, namely that at the time when the bet is accepted neither party should know the outcome of the event on which they are betting.

In Financing Limited v. Stimson (1962) 3 All E.R. 386 the facts were that:

> "The defendant on March 16 saw at the premises of a dealer a motor car advertised for £350. As he wished to purchase it on hirepurchase, he signed a form given to him by the dealer which was that of the plaintiffs, a finance company. The form stated "This 'agreement' shall be binding on the plaintiffs only upon signature on behalf of the plaintiffs." The defendant paid the first instalment of £70 on March 18 and took away the car. On March 20, the defendant being dissatisfied with the car returned it to the dealer. On March 24 the car was stolen from the dealer's premises but was recovered badly damaged. On March 25, in ignorance of these facts the plaintiffs signed the 'agreement' and on their subsequent discovery of what had happened they sold the car for £240 and sued the defendant for breach of the hire-purchase contract to recover the balance."

The Court of Appeal in giving judgment for the defendant said that at the time when the plaintiffs signed the "agreement" which in truth was an offer by the defendant to make a contract with the plaintiffs, the subject matter, namely the car, was not in substantially the same state as at the moment when the offer was made which was an implied condition of the offer.

Donovan L.J. said at page 390:

> "Who would offer to purchase a car on terms that if it were severely damaged before the offer was accepted, he the offeror would pay the bill? ..... The county court judge held that there must be implied a term that, until acceptance, the goods would remain in substantially the same state as at the date of the offer; and I think that this is both good sense and good law."

In the instant case it equally could be asked whether the respondent would want to pay the stake money, or legally should be made to pay it when at the time of the deemed acceptance by the appellant the transaction had ceased to be a wager due to the outcome of the race having ceased to be contingent.

For the reasons given, Rule 3 contravenes and is inconsistent with Regulations 10 and 11 and in addition is capable of creating a situation where no contract could ever be effected between the appellant and its clients.

I must now consider whether notwithstanding that Rule 3 contravenes and is inconsistent with the Regulations, it can be held to be binding on the respondent. This will be so only if the respondent is competent to waive the beneficial protection of the Act and Regulations. There is a rule of law that where a statute provides for certain requirements to be observed for the benefit of or for the protection of an individual in his private capacity the individual may waive or agree to waive the advantage of the statute provided that in doing or agreeing to do so, he does not infringe any public policy. It is by application of this rule that there can be a waiver of Limitation Acts. However where the statute imposes the requirements in the public interest then notwithstanding that they are equally designed to provide a benefit or afford protection to an individual in his private capacity, the latter cannot contract out of or agree to contract out of the due observance by any person of the statutory requirements. In Salford Guardians v. Dewhurst (1926) H.L. (E) A.C. 619 the facts were as follows:

The respondent (Dewhurst) was an officer in the appellants' employment from February 10, 1908 to May, 1922 when he retired on account of ill health and became entitled to a superannuation allowance

under Section 3 of the Poor Law Officers' Superannuation Act 1896. During the last five years of his service the respondent received in addition to his salary an annual amount described as war bonus. Pursuant to the provisions of the Act there was a percentage deduction towards superannuation made from the respondent's salary but none was made from the war bonus. The payment of the war bonus was the subject of two circulars which informed the respondent that no deduction for superannuation purposes would be made from the bonus and that the bonus payments were not 'emoluments' within the meaning of the Act and would not rank in the calculation of any superannuation benefits. The circulars intimated that if no objection to the contrary was forthcoming it would be assumed that the respondent had accepted the terms on which the bonus was being paid. The respondent took no exception to the circular. In computing the respondent's superannuation allowance the appellants disregarded the bonus and based their computation on his salary alone. The respondent tendered to the appellants the total amount which would have been deducted over the years on the bonus payments and insisted that the superannuation allowance should be calculated on the basis of his salary and bonus taken together as these constituted his emoluments. On the refusal of the appellants to acquiesce in the demand the respondent sought a declaration to that effect. Astbury, J. held that as the Act contained no express prohibition against contracting out, the respondent had power to contract himself out. On appeal by the respondent the Court of Appeal held that upon the construction of the Act the respondent had no power to contract himself out.

The appellants appealed to the House of Lords which in affirming the decision of the Court of Appeal held by a majority of four, (Lord Summers dissenting) that upon the construction of the Act, it was not open either to the guardians or to their officers or servants to contract themselves out of the statutory obligations and rights respectively imposed or conferred upon them by the Act. (Emphasis mine).

Viscount Cave, L.C. in delivering his opinion at page 625 said:

> "Can the guardians by any action exclude the application of this statute to any of their officers? If they can, then the guardians have a ready way of relieving themselves from the burden imposed by the statute. In that case they can either before appointing a particular officer or servant, or before consenting to an increase of his remuneration, require him to agree with them that this particular statute shall not apply; indeed they could make it their general practice before appointing any officer to make it a condition that he shall not be entitled to pension. I do not doubt that, if a board adopted that practice, they would find persons who would accept employment on those terms and would enter into an agreement that the Act shall not apply. If that is so, then it is in the option of boards of guardians to determine whether or not this statute shall apply and they can (as one of the learned Lords Justices said) make the statute a dead letter. I cannot think that that was the intention of Parliament. It rather appears to me that by using the imperative terms to which I have referred, Parliament has indicated an intention that the Act shall apply, notwithstanding any agreement to the contrary to every board of guardians and to every officer or servant of such a board."

I respectfully approve and adopt mutatis mutandis the opinion expressed by Viscount Cave (supra) in construing the Act in the present case. The imperative terms of the provisions of the Act, the power given to the Minister to give general directions as to policy in the public interest and the requirement that Regulations even though approved by the Minister should be submitted to the House of Representatives are clear manifestations of legislative intention to provide a compulsory statutory framework within which alone betting transactions may legally be entered into. The aim and object of the Act would not be achieved unless betting transactions were effected in the manner prescribed by the Regulations. It is not legally competent for bookmakers by their rules to provide that the time within which betting transactions are to be concluded shall extend beyond the times prescribed by the rules in the Second Schedule to the Act and by Regulation 11.

Dr. Barnett in his submission invited us to consider Supreme Court decisions in C.L. 1155/72 John Chin v. Watson's (Off Course) Betting Limited delivered in February 1974 and C.L. 1974/L003 Euston Lyn v. Watson's (Off Course) Betting Limited both unreported as persuasive authorities laying down that rules analogous to the present

Rule 3 could legally be incorporated in contracts of betting between a bookmaker and his respective clients.

In Euston Lyn v. Watson's (Off Course) Betting Limited (supra), Wilkie, J. had to determine whether winning bets placed by the plaintiff with his wife who was the agent of the defendant were disaqualified because the bets were made in contravention of a rule of the defendant which expressly prohibited the acceptance of bets from persons who were part of the defendant's organisation. The learned trial judge found that the plaintiff was bound by this rule. It was known to him and was accordingly incorporated in his betting contract with the defendant. The learned trial judge having found that the plaintiff was a part of the defendant's organisation, the bets were by the said rule invalid.

The learned trial judge went on to consider Rule 2 of the defendant's rules which stipulated that:

> "No bet will be regarded as such or as having been accepted until it has been locked in the timing apparatus supplied by us before the set time of the race(s) and before the result(s) of the specified events are known."

He construed this rule as meaning that the contract of wager is concluded when the bet, presumably the copy voucher of the bet, is locked in the timing bag before the end of the prescribed time. What the learned trial judge here said was clearly obiter being unnecessary for the determination of the issue raised namely the validity of a bet placed by a person who was disqualified by the company's rules from placing bets with it.

In John Chin v. Watson's (Off Course) Betting Limited (supra), Rowe, J. (as he then was) had for determination the issue whether the plaintiff ought to be paid for successful bets placed by him with the defendant's agent in circumstances where the duplicate voucher of the bet was not found in the clock bag.

The learned trial judge was of the view, that the determination of the issue depended on whether Rule 2 of the defendant's rules was incorporated in the betting contract between the plaintiff and the

defendant. Rule 2 is the same as that recited in Euston Lyn's case (supra). From the reasoning of the learned trial judge and from his summation of the submissions of the attorneys for the respective parties, no issue was raised on whether Rule 2 of the defendant's rules was inoperative as being in conflict with the Act and the relevant Regulations. The case proceeded solely on the basis that there could be an incorporation of Rule 2 provided it was satisfactorily established that the plaintiff had knowledge of the rule. Thus the learned trial judge delivered himself thus:

> "The point which has given me concern is whether the defendant can properly rely on the Rules which is headed "Off Course Betting (1955) Limited Rules." The plaintiff has said he did not read the Rules and consequently he cannot be heard to say that he was misled by the caption. Had he read the rules and made a conscious decision not to abide by them on the ground that they were not the Rules of the defendant, one would have expected him to ask the agent where are the Rules ("Our Rules") which the voucher proclaims are on display in the betting office. There is no doubt as to what the reply would be. I can find no authority to assist me to resolve this matter. I hold that the plaintiff was well aware, as he admitted at one stage of his evidence, that the practice at the Tower Isle branch office of the defendant was that bets should be locked in the clock bag before the running of the race and before the results were known, and I further hold that Rule 2 of the Rules headed "Off Course Betting (1955) Ltd. Rules" which were exhibited in that betting office was incorporated with and formed part of the contract between the plaintiff and the defendant."

The above decision is undoubtedly consistent with the principle of contract law that in the absence of statutory prohibition express or implied a party to a contract is free to specify the point in time at which, or the pre-conditions subject to the fulfilment of which, his acceptance of an offer will materialise. At the time when this decision was rendered, the operative Licensed Betting Offices Rules 1965 contained no provision prescribing the times each day within which licensed premises were to be opened to effect betting transactions. It was therefore unnecessary to have in the Betting, Gaming and Lotteries Regulations, 1965 a regulation comparable to Regulation 11 of the 1975 Regulations. Regulation 11 of the 1975 Regulations only became necessary when the Licensed Betting Offices Rules

1965 in the Second Schedule to the Act were amended beginning with the amendment dated 11th April, 1974 (Gaz. Supp. 1974) to prescribe the times of day within which licensed betting offices may lawfully be opened and remain open for business. Thus in the above decision any issue as to whether Rule 2 would be capable of being incorporated in a betting contract if it was found to be inconsistent with Regulations prescribing a code for the conduct of betting transactions would be hypothetical as there was no prescribed time laid down within which bets were to be received or negotiated. This decision as well as that in Euston Lyn (supra) are clearly distinguishable from the issue which was before the learned trial judge in the present case.

In the present case the learned trial judge rightly viewed the issue as that of determining the validity of Rule 3 of the appellant's rules within the context of Regulations 10 and 11. He concluded that the Regulations did not envisage the acceptance of a bet at a time later than the time prescribed by the Regulations. He accordingly held that Rule 3 would not be binding on the respondent to the extent that it sought to defer acceptance of a bet to effectuate a binding contract beyond the time prescribed by the Act and Regulations. In this I agree with him.

The appellant can neither directly contract out of the prescriptions of the Act and Regulation nor can he do so indirectly by making rules circumscribing the authority and competence of his agent to effect betting transactions as completely and effectually as he himself guided by the Act and Regulations could have done. Rules 3 and 8 of the appellant's rules are void and inoperative to the extent that they are inconsistent with the Act and the Regulations in seeking to defer the formation of the contract of betting beyond the time statutorily prescribed.

The requirement in the appellant's rules that the duplicate or security voucher of a bet should be placed in the clock bag before the expiration of the time prescribed in the Act and Regulations as a condition precedent to liability being incurred under the bet, is not

the issue before us and was not the issue at the trial. I therefore express no opinion thereon. What was in issue was whether a contract could be held to have come into being "eo instanti" with compliance by the parties with Regulations 10 and 11 notwithstanding that Rule 3 of the appellant's rules prescribes that acceptance only materialises when the duplicate betting vouchers are received at the appellant's head office which would be after the time for accepting bets prescribed by the Act and Regulations. On this issue the learned trial judge found, and I agree with him that the contract of betting is concluded when the offer of a bet is accepted at a licensed betting office by the appellant or his servants or agents within the time prescribed by the Act and Regulations.

The grounds of appeal based on the non consummation of a contract fail for the reasons given.

Mr. Codlin for the respondent submitted as an alternative to his main submission that even if Rule 3 of the appellant's rules could legally be incorporated in contracts between the appellant and its clients any such contract was subject to an implied term that the appellant would use all reasonable care and diligence to ensure that the relevant duplicate betting vouchers are placed in the clock bag after Regulations 10 and 11 were complied with. Thus he submitted that if the placing of the duplicate vouchers in the clock bag was a condition precedent to the acceptance of bets and the failure to perform this condition precedent was due to a wilful or negligent act on the part of the appellant or its agent, the appellant, could not rely on this failure to deprive a client of the benefit of a winning bet. Mr. Codlin cited to us MacKay v. Dick (1881) 6 A.C. 251 in support of this proposition. Dr. Barnett in reply, rightly distinguished MacKay v. Dick (supra) from the present issue.

In my view MacKay v. Dick (supra) is not relevant to the issue raised in this appeal. It is of no assistance because the principle stated therein rests on a valid contract having been entered into one of the terms of which being that the liability of the

purchaser to accept delivery of the thing sold and to pay the purchase price, would depend on certain things being done by the seller. If in such circumstances, the purchaser himself disables or frustrates the efforts of the seller to perform the condition precedent to the acceptance of delivery of the goods by him, he cannot rely on the failure of the seller to perform so to avoid the contract. Mr. Godkin was here confusing the obligation to accept goods under a contract, with acceptance as a necessary and integral part of the process of concluding a contract.

Whether the appellant can validly stipulate that no liability under its wagering contracts will be recognised by it unless the duplicate voucher is placed within time in its clocking bag is, as I have already said not the issue before us. I have already refrained from expressing any opinion thereon. I further refrain from expressing any opinion on the related issue of a failure by the appellant's agent or servant to place a duplicate voucher in the clocking bag.

In conclusion and for the reasons given I am of the view that the learned trial judge was right in giving judgment for the respondent on the ground that the contract of wager was complete with the acceptance of the bet under Rule 10 within the time prescribed by the Act and Regulations.

I would dismiss the appeal.