JAMAICA

IN THE COURT OF APPEAL

R.M. CIVIL APPEAL NO. 24/1969

BEFORE: The Honourable The President
The Honourable Mr. Justice Luckhoo, J.A.
The Honourable Mr. Justice Fox, J.A.

PARAMOUNT BETTING LTD. V BERTRAM BROWN

Mr. H. Edwards, Q.C., and Mr. W. Spaulding for the appellants
Mr. R.N. Henriques and Mr. N. Hill for the respondent.

November 3, 5, 6
December 2, 3, 4, 1970
February 26, 1971.

LUCKHOO, J.A.

This is an appeal from the judgment of a resident magistrate for the parish of Kingston who found for the plaintiff Bertram Brown on a claim for £43. 3/- as monies due and owing the plaintiff by the defendant Paramount Betting Ltd., in respect of two bets alleged to have been placed by the plaintiff with an agent of the defendant at one of its betting shops situate at Bog Walk in the parish of St. Catherine on a horse named Guinie Wind which finished first in the first race of the day at a race meeting held at Caymanas Park race track on March 25, 1967.

The plaintiff's claim was resisted on a number of grounds which included the allegation that the bets were effected in fraud of the defendant by reason of their having been made after the race had been run and the result known.

Two questions arise for determination in this appeal. The first is whether on the evidence adduced before the learned resident magistrate the defendant discharged the burden of proof required to show that the bet was effected by the plaintiff in fraud of the defendant. The second is whether a person effecting a betting transaction (not being a pool betting transaction) with a bookmaker in premises other than premises licensed under the

Betting, Lottery and Gambling Law 1965 (No. 34) for such a purpose can enforce the contract thereby made.

The evidence disclosed that the defendant, a licensed bookmaker, operated a licensed betting office at premises situate at Bog Walk through its authorised and registered agent Doris Hoo. The agent's husband Oswald Hoo operated a bar and a grocery in nearby premises and had his office in premises situate behind his grocery. All of these premises were apparently situate in one building. Doris Hoo employed two persons called pencillers to receive bets in the betting office and to prepare in relation thereto vouchers in duplicate in the prescribed form the original in each case to be delivered to the person making the bet. Oswald Hoo would also in his wife's name receive bets and prepare and deliver vouchers in relation thereto. He would receive the duplicate vouchers prepared and money taken by the pencillers in relation to bets placed through them and would after checking the money against the duplicate vouchers place the latter together with the duplicate vouchers in relation to bets placed through him in a bag provided by the defendant and fitted with a time lock mechanism which automatically told the time when the bag was locked. In relation to a race scheduled to start at 1.30 p.m. for example, the duplicate vouchers relating to bets placed on horses running in that race would have to be placed in the bag and the bag locked at a time not later than 1.29 p.m. The locked bag would be sent to the defendant in Kingston and winning bets would in due course be honoured by the appropriate amounts being sent by the defendant to the licensed betting office at Bog Walk for payment out to the persons who had made them. On March 25, 1967, the plaintiff, a detective constable attached to the Jamaica Constabulary Force and residing in Kingston went to Oswald Hoo's bar, being premises wherein spirituous liquors are sold, at Bog Walk some 26 miles away. While there he, and incidentally other persons in the bar, placed bets with the defendant through Oswald Hoo. According to the plaintiff he went to the bar at about 9.15 a.m. and at 9.30 a.m. he placed a bet of £1.0 with the defendant through Oswald Hoo on a horse Guinie Wind to win

the first race of the day scheduled to start at 1.30 p.m. at a horse race meeting at Caymanas Park race track. Oswald Hoo left the bar and went outside in the direction of the licensed betting office. He returned and handed him a duplicate voucher in relation to that bet. At 9.45 a.m. while still in the bar he placed another bet with the defendant through Oswald Hoo on the same horse Guinie Wind to win the same race. On this occasion the amount of his bet was 10/-. Oswald Hoo left the bar and later returned with duplicate vouchers in relation to bets which had been placed by him and by other persons in the bar. On receiving his duplicate voucher he left the bar. He admitted that he never went into the licensed betting office at Bog Walk that day. Guinie Wind won the first race and on the following Monday he presented his duplicate vouchers to Oswald Hoo at the latter's grocery at Water Lane, Kingston, for payment. He did not receive payment. He gave as his reason for going to Oswald Hoo in Kingston for payment the fact that it was through Oswald Hoo he had placed these bets but admitted that he knew that the defendant generally sent money to honour winning bets to the licensed betting office at which the bets were placed. He also said that he did not know who operated the licensed betting premises at Bog Walk until he went to Oswald Hoo for payment of his winnings. Earlier, on Sunday March 26, 1967, according to Oswald Hoo Mr. Spaulding of the defendant company had taken to Doris Hoo cheque to cover the amount of winning bets sent by Doris Hoo on the previous day, and after explaining to her that the time mechanism on the bag containing vouchers for the first race on the previous day showed that that bag had been locked ten minutes after 1.30 p.m., he offered to hand over the cheque provided she signed a document to the effect that she owed him the money - presumably the amount of winnings in relation to bets placed on horses in the first race. Doris Hoo refused to sign such a document.

Oswald Hoo testified that he would accept bets placed with the defendant anywhere in the building - be they placed in grocery, bar or licensed betting office. He admitted accepting in the bar on March 25, 1967, bets of £10 and 10/- on Guinie Wind to win placed by

the plaintiff with the defendant and said that the vouchers in relation thereto as well as vouchers in relation to bets placed by other persons in the bar on that day between 9.30 a.m. and 10.30 a.m. were all prepared by him in his office. He said that he signed his wife's name as agent to these vouchers and at 1.25 p.m. by a clock moved from his grocery at Bog Walk to his office he placed all of the vouchers relating to bets placed through him and the pencillers in the defendant's bag and locked the bag. He admitted that all of the bets placed on Guinie Wind that day in the first race were placed through him and accounted for £555.10/- of the amount of £766 total for all bets placed that day. He also admitted that the amount of £555.10/- placed on Guinie Wind to win was covered by 20 vouchers whereas the amount of £111 taken in bets that day by the two pencillers were covered by 200 vouchers.

Evidence was given to the effect that the time mechanism on the bag, and time checker's watch were synchronised with the time as given by the Jamaica Telephone Company, Ltd. time service, the time mechanism on the bag being pre-set to 1.30 p.m. before the bag was sent by the defendant to the licensed betting office at Bog Walk and that the time mechanism on being checked against the time checker's watch on return from the agent Doris Hoo showed that the bag had been locked some 10 minutes after the pre-set time of 1.30 p.m. This was confirmed by comparison of the time shown on the time setter's watch with the time as shown by the defendant company's clock. They both showed the same time.

During the course of his evidence the plaintiff stated that he had first got a tip on Guinie Wind on Friday March 24, 1967 in Kingston where on that day he had placed bets of £2 and 10/- on Guinie Wind to win with the defendant at its East Queen Street licensed betting office and had again received a tip of Guinie Wind to win, on Saturday March 25, 1967, at Bog Walk. It was conclusively shown from an examination of the vouchers produced from the East Queen Street licensed betting office in relation to the first race run on March 25, 1967, that no such bets were placed by the plaintiff.

The learned resident magistrate in his memorandum of reasons for judgment referred to Oswald Hoo's admission that of £766 worth of bets placed on March 25, 1967, bets to an amount of £555.10/- were placed on Guinie Wind to win all of which were placed through Oswald Hoo. He concluded that Hoo was up to no good and this conclusion he said was an understatement. While finding that the plaintiff had lied about effecting bets at the defendant's East Queen Street betting office and that this lie went to the plaintiff's credit although he considered that the pattern of betting by the plaintiff appeared to be unusual and eccentric, the learned resident magistrate was unable to find that the defendant had discharged the burden of proof, which he described as a heavy one requiring strict proof, that there was a conspiracy between the plaintiff and Oswald Hoo to defraud the defendant. He made no finding as to whether the bag into which the relevant vouchers were put was locked after the scheduled time for the commencement of the first race. Indeed, he considered that it was none of the plaintiff's concern as to what time the vouchers were locked in the bag.

The defendant in asking that the resident magistrate find a fraudulent conspiracy between the plaintiff and Oswald Hoo relied on the following matters:-

(i) the "pattern" of the bets described by the learned Resident Magistrate as eccentric;

(ii) the fact that through Hoo alone all 20 of the bets on Guinie Wind to win were placed whereas of the 200 vouchers prepared by the two pencillers none were placed on Guinie Wind to win;

(iii) a total amount of £555.10/- was placed on Guinie Wind to win in the first race of all bets totalling £766 for the day;

(iv) the plaintiff did not attend at the licensed betting shop at Bog Walk for payment of winnings but in fact went to Oswald Hoo's grocery at Water Lane in Kingston for payment when he well knew that money to pay willing bets was

generally sent by the defendant to the licensed betting shop;

(v) the evidence adduced on the part of the defendant that the time mechanism when checked after receipt from Doris Hoo showed that the bag was locked some 10 minutes after the time scheduled for the start of the first race;

(vi) the lie told by the plaintiff about bets placed on March 24, 1967, on Guinie Wind to win at the defendant's East Queen Street licensed betting office;

(vii) the fact that the bets placed by the plaintiff on Guinie Wind were placed with Oswald Hoo some 26 miles away from Kingston where the plaintiff resided.

All of these matters taken together in my view raised a strong probability of a fraudulent conspiracy on the part of the plaintiff and indeed of others on the one hand and Oswald Hoo on the other which was not counterbalanced by Oswald Hoo's statement that he placed the vouchers in the bag at 1.25 p.m. by his grocery clock and before learning of the result of the first race nor by the assertions of both the plaintiff and Oswald Hoo as to the hour of the day the bets were placed. While the accusation of fraudulent conspiracy is a grave one in a civil case the standard of proof necessary to sustain such an accusation is the civil standard of a preponderance of probability, the degree of probability required being commensurate with the occasion. (See Hornal v. Neuberger Products, Ltd. (1956) 3 All E.R. at p. 978 per Morris, L.J. approving the observations of Denning L.J. in Bater v. Bater (1950) 2 All E.R. at p. 4597.

If I am correct in holding that the defendant discharged the burden on him of proving a fraudulent conspiracy on the part of the plaintiff and Hoo to defraud the defendant that is sufficient to determine the appeal in favour of the defendant. However, it is necessary to consider the second point raised - as to the legality of the transactions - the Court having given Mr. Horace Edwards counsel who appeared for the defendant at the hearing of the appeal, leave to argue that point as an additional ground of appeal. Mr. Edwards' argument may be briefly summarised as follows. The evidence disclosed

that the bets were placed in premises other than a licensed betting shop, to wit in a bar, and as such are prohibited bets by virtue of the provisions of the Betting, Gaming and Lotteries Act, 1965 (No.34). It is therefore not competent for the plaintiff to sue upon contracts which are illegal. Mr. R. Henriques for the plaintiff on the other hand contends that even if it were conceded that the bets were effected in the bar that fact does not render the contracts illegal and the plaintiff may lawfully seek to enforce those contracts.

In order to appreciate the arguments advanced by counsel in support of their respective contentions it is necessary to refer to the state of the law as it affected betting transactions before the enactment of the Betting, Gaming and Lotteries Act, 1965 (No. 34) and to those provisions of that Act which appear to be relevant to the transactions now in issue. As Mr. Henriques correctly observed, at common law betting transactions were legal in Jamaica. The English Gaming Acts did not apply in Jamaica /see Parchment v Reynolds (1917) Clark's Repts. 15 and Watson v Sigarny 5 J.L.R. 1487. Under the Gambling Law, Cap 137 (enacted in 1898 and amended from time to time) betting in or upon any path, street, road or place to which the public had access or in any premises licensed to distil, manufacture, sell or possess rum or any intoxicating liquor (other than those premises expressly exempted) or in or at a common gaming house, was rendered illegal as unlawful gaming. The Gambling Law, Cap 137 was repealed by the 1965 Act and by s. 21 of that Act betting transactions are no longer included within the ambit of the definition of unlawful gaming. However Betting in a public place or street remains illegal by virtue of s. 5 of the 1965 Act. By s. 2 of the 1965 Act a "betting transaction" includes the collection or payment of winnings on a bet and any transaction in which one or more of the parties is acting as a book-maker". Section 4(1)(a) and s. 6 prohibit with certain specified exceptions the user of any premises for the purpose of pool betting. The betting transactions in this matter do not form any part of pool betting operations and so no more need be said about pool betting.

Section 4(1)(b) prohibits with certain exceptions (as are provided in s. 4(2) and section 9) the user by a person of any premises for the purpose of effecting betting transactions by that person with persons resorting to those premises and s. 4(3) makes it an offence for any person who, for any purpose connected with the effecting of a betting transaction, resorts to any premises which are being used in contravention of s. 4(1). By s. 4(4) for the purposes of s. 4(3), proof that any person was on any premises while they were being used as mentioned in s. 4(3) shall be evidence that he resorted to those premises for such a purpose as is so mentioned unless he proves that he was on the premises for bona fide purposes which were not connected with the effecting of a betting transaction. One of the exceptions to the operation of s. 4(1)(b) is provided by s. 9 whereby the former does not apply if there is for the time being in force in relation to premises a betting office licence authorising the holder to use those premises as a betting office, and those premises are used for effecting betting transactions with or through the holder of the licence or any servant or agent of his. Section 10 of the Act provides for the management and conduct of licensed betting offices in accordance with the rules set out in the second schedule to the Act. Section 38 of the 1965 Act should also be mentioned. That section provides for the issue of a search warrant for the search by any constable of premises where there is reasonable ground for suspecting that an offence under the Act is being or about to be committed on those premises and the authorisation under the warrant to seize and remove any document, money or valuable thing, instrument or other thing found on the premises which the constable has reasonable cause to believe may be required as evidence for the purposes of proceedings in respect of any such offences. On a conviction under s. 4, any document, money or valuable thing, instrument or any other thing whatsoever belonging to the convicted person which the court is of opinion were used or intended to be used in any way in contravention of the Act may be ordered by the court to be forfeited.

It will be observed that the law does not forbid betting itself. What is forbidden is the use of premises, other than licensed betting offices or such premises as come within the ambit of s. 4(2), for conducting the business of a betting shop. It can hardly be denied that premises which are being used as a bar or public house would be premises in which it is forbidden by the law to carry on the business of a betting shop. What Hoo did on March 25, 1967 was to carry on the business of a betting shop at premises wherein he was at all material times carrying on the sale of spirituous liquors and the plaintiff must have been fully aware of this when he placed his bets with Hoo. Indeed, he said he was drinking beer on that occasion. The question is whether the betting transactions therein effected are enforceable by the plaintiff. Mr. Henriques in urging that they are enforceable contends that an examination of the statute reveals that its provisions are intended essentially as a revenue measure and only incidentally protects the interest of the public. He pointed out that s. 1(2) of the Betting, Gaming and Lotteries (Amendment) Act, 1965 (No. 37 of 1965) provided that s. 4 of the principal Act (no. 34 of 1965) shall have effect on the date which s. 17 (which relates to contributions payable as a levy in respect of levy periods) comes into operation and concludes therefrom that the intention of the legislature was to set up a scheme of revenue collecting and not to make betting illegal. He urged that until section 17 came into operation, any person could carry on the business of a betting shop without committing an offence and submitted that the sections in the Act relating to betting were designed to provide for persons placing bets with bookmakers to do so in licensed premises so that revenue collectors might collect revenue.

The Betting, Gaming and Lotteries Act, 1965 (No. 34 of 1965) is an Act as the long title thereto states to provide for the regulation of betting, gaming and lotteries and for matters incidental thereto. It is modelled on some of the provisions contained in the English Betting, Gaming and Lotteries Act, 1960.

The local enactment is arranged into some seven parts. Part I deals with preliminary matters and includes in addition to the short title, interpretation section and a definition of pool betting. Part II deals with betting and bookmaking and it is this part which is of direct relevance in resolving the point at issue. This part includes sections dealing with licensed betting offices, bookmakers and betting agency permits and matters pertaining to race courses and tracks. Part III deals with the power of the Minister of Finance to establish schemes of monetary contributions from bookmakers payable as a levy and for the payment of and accounting for the levy. Part IV deals with pool betting duty and the payment of and accounting for that duty. Part V deals with unlawful gaining. Part VI deals with lotteries. Part VII contains general provisions relating to such matters among others as search warrants, special powers of the court and police, penalties, mode of trial for offences under the Act, and the making of regulations. There are a number of schedules to the Act including one dealing with bookmaker's permits, betting agency permits and betting office licences and another setting out under the title The Licensed Betting Office Rules, 1965 rules for the conduct of licensed betting offices. These rules clearly indicate the concern of the legislature for the protection of persons attending licensed betting offices from being importuned by the bookmaker directly or indirectly into entering into betting transactions. Section 10(5) of the Act prohibits under penalty the publication, save in the manner as may be prescribed on premises giving access to a licensed betting office, of any advertisement - (a) indicating that any particular premises are a licensed betting office; or

(b) indicating where any such office may be found; or

(c) drawing attention to the availability of, or to the facilities afforded to persons resorting to such offices.

While it is true that advantage is taken in the Act to enact revenue producing provisions it is at least equally the case that the protection of the betting public is specifically sought to be ensured and not only incidentally so.

The Law indeed is similar in its scope and purpose to the law relating to moneylending both in England and locally. In Jamaica betting, like lending money at interest in England since the disappearance of the Usury Acts in 1854, is not illegal. It might be helpful therefore in deciding the question now in issue to have regard to the approach taken by courts in England in deciding whether or not a contract made in contravention of a provision s. 2(1)(b) in the English Moneylenders Act, 1900, which forbade a moneylender from carrying on moneylending business otherwise than at his registered address, made the contract void. Section 2(2) of the 1900 Act provided that breach of s. 2(1)(b) of that Act rendered the offending moneylender liable to a penalty on summary conviction therefor. In Cornelius v Phillips (1918) A.C. 199, where the moneylender effected a moneylending transaction at an address other than his registered address in contravention of s. 2(1)(b) of that Act the question arose whether that contravention of the statute rendered the transaction void or merely subjected the moneylender to a penalty, Lord Finlay L.C., had this to say ([1918] A.C.) at p. 205 -

> "It is admitted on all hands, and indeed could not be disputed, that a statutory prohibition avoids any transaction in contravention of the prohibition, as the transaction is unlawful, and any contract which forms part of it is void and can confer no rights. The Act of 1900 by section 2, subsection 1, provides that a money-lender shall carry on a moneylending business at his registered address and at no other address, and to do so is therefore an unlawful act."

Viscount Haldane in dealing with the effect of the wording of s. 2(1)(b) of the Act puts the matter in this way ([1918] A.C.) at p. 211 -

"These words do not appear to be ambiguous. They enact that a money-lender shall carry on his business at his registered address and at no other address. So standing they are clear, and they prohibit, and therefore make void, any contract which contravenes them. That there is a subsequent subsection which makes a contravention by the money-lender a criminal offence makes no difference. There might have been inserted in the statute a special context which would have modified the application of the general rule, but there is nothing in the actual context to exclude the oridinary result which follows in law when a statutory prohibiton is disregarded."

Lord Dunedin at p. 213 of the same report said -

"Section 2, subsection 1(b) seems to me to prohibit the contract, though it is expressed in words which apply directly to the contractor rather than to the contract".

Lord Parmoor at p. 219 after referring to s. 2(1)(b), (2) of the Act said -

"The result is that the transaction under consideration in this appeal is prohibited by statute and renders the money-lender liable to a fine on conviction under the Summary Jurisdiction Acts. The principle of law applicable has been accurately expressed by Farwell, L.J. that a contract which is expressly forbidden and made criminal by Act of Parliament can give no course of action to a party who seeks to enforce it."

Lord Atkinson expressed a similar view. It was therefore the unanimous view of the House of Lords in that case that the effect of s. 2(1)(b) of the Act was to avoid the transaction. Incidentally, both the Lord Chancellor and Lord Parmoor disagreed with the view expressed by Lord Mersey in Whiteman v Sadler (1910) A.C. 514 that there was no express prohibition in s. 2(1)(b) of the Act, and pointed out that that provision was not in issue in the case and that Lord Mersey's view was not concurred in by the other Law Lords in the case.

The opinions of the Law Lords in Cornelius v Phillips (ubi sup.) in dealing with the provisions of s. 2(1)(b) of the 1900 Act clearly indicate that as a general rule breach of a statutory

prohibition which relates to the effecting of a transaction renders the transaction itself void and incapable of conferring any rights. In my view those opinions are directly in point in the instant case where there was a breach of a statutory prohibition of a like nature relating to the effecting of the two betting transactions. Those transactions would thereby be rendered void and incapable of conferring any rights, either upon the bookmaker or the bettor. Mr. Henriques sought to distinguish the case of Cornelius v Phillips (ubi.sup.) from the instant case by contending that in the former the statute was enacted for the protection of the public from usury at excessive rates whereas in the latter the law was enacted as a revenue measure. As has already been pointed out the protection of the public from sharp practices or blandishments of bookmakers or their agents is one of the objects of the law. Again Mr. Henriques sought to argue that there was no evidence that the plaintiff knew that the bar was not a place licensed under the law as a betting shop and that even if there was such evidence it did not follow that the transactions effected were unenforceable by the plaintiff. He cited a number of cases which dealt with the principles relating to the enforceability of contracts affected by illegality. There is abundant evidence that the plaintiff was well aware that the premises to which he had gone was a bar and not a licensed betting shop. That consideration apart, the matter is concluded by noticing that the very formation of a contract is forbidden and the contract is therefore illegal and void if it (the formation) is to take place in a prohibited place and it makes no difference, in point of law, whether the statute has for its purpose the protection of the revenue or otherwise.

Another reason why the betting transactions in this case are in themselves illegal is that they contravene the provisions of s. 5 of the Law which prohibits betting in a public place. It seems quite clear than when premises are actually being used as a bar, as these premises were at all material times, they are a place to which the public have access and thus a public place. See R v Mapstone (1964) 1 W.L.R. 623.

It was also contended on behalf of the appellants that Oswald Hoo acting at all times in the capacity of a penciller for Doris Hoo, the holder of a betting agency permit was at no time agent of the appellants for the receipt of bets when he received bets in the bar as he did not receive the plaintiff's bets in a licensed betting office (see the proviso to s. 8(1) of the law) occupied by the holder of a bookmaker's permit or a betting agency permit. In view of the conclusions I have reached on the other points argued on behalf of the appellant it is not necessary to express an opinion on this point.

I would allow the appeal. I would set aside the judgment of the learned resident magistrate and enter judgment for the defendants with their costs in the court below and in this court.

FOX, J.A.

The Plaintiff is a detective in the Jamaica Constabulary Force. In March, 1967 he was stationed at the Criminal Investigation Department, Central Kingston, and lived at Deanery Road, Vineyard Town, Kingston. He brought this action in the Resident Magistrate's Court, Kingston, against the defendant, a licensed bookmaker, to recover the sum of £45.3/- being the proceeds of two wagers which, as alleged in his statement of claim, had been placed on 25th March, 1967 with an agent of the defendant at its betting shop at Bog Walk, Saint Catherine. In support of his case the Plaintiff gave evidence to the following effect. On 25th March, 1967, a Saturday, he was not on duty. He went to Bog Walk from Kingston early in the morning of that day on private business. At about 9.30 a.m. he was in the bar section of a grocery shop at Bog Walk operated by Oswald Hoo with the assistance of his wife. Mrs. Hoo was in the grocery part of the shop. She was the licensed agent of the defendant in respect of a betting shop situated on the same premises, but separate and distinct from grocery and bar. The Plaintiff said that as the result of a tip given to him by a boy in Bog Walk, he placed two bets to win with Oswald Hoo on a horse "Guinie Wind", which was slated to run in the first race at a meeting at Caymanas Park later that day. The first bet was made at 9.30 a.m. for £10, and the second bet at 9.45 a.m. for 10/-. Hoo received these amounts in the bar. On each occasion Hoo left the bar and went outside towards the betting shop, returning first with the voucher for £10 bet, and later the voucher for the 10/- bet. Other persons who were in the bar placed bets with Hoo. They passed money to him in the bar and received vouchers from him subsequently. The Plaintiff said that he left the bar shortly after receiving the voucher for his second bet of 10/-. He completed his private business in Bog Walk at about 10.30 a.m. and returned to Kingston at 2.00 p.m. "Guinie Wind" won the race. On Monday 29th March, he presented the two vouchers he had bought in Bog Walk to Hoo at his business premises at 107 Water Lane, Kingston, but was

not paid his winnings. He then went to the head office of the defendant company at Barry Street, Kingston and spoke with Mr. Frank Spauldings, a director of the company. After examining his vouchers, Mr. Spauldings told him that the winnings of his bets as well as other bets effected at the betting shop on the day were not being paid because the bag had been "locked late". This bag is of a special kind. It is equipped with a clock which records the hour at which the bag is locked. All vouchers for bets placed at the betting shops should have been locked in this bag prior to the hour of 1.30 p.m. which was the time for the running of the first race at Caymanas Park on the 27th March. The Plaintiff said that he did not believe Mr. Sapuldings. He was not certain that the bag was locked late, and as a consequence he had filed suit.

The substantial defence at the trial was based on the contention that the bag had been locked ten minutes later than the time when it should have been locked. Evidence was adduced of Noel Lyn, the time operator of the defendant company who was responsible for the despatch of bags to the various betting shops in the Island operated by the company, and for the examination of the time locks on these bags when they were returned to the Company. The witness who had received the bag from the betting shop at Bog Walk at about 2.00 p.m. that day and taken it to the office of the Company at Spanish Town, also testified to that effect. If believed, the evidence of these two witnesses was capable of sustaining the basic contention of the defence. But challenging this evidence, and in direct conflict with it, was the evidence of Oswald Hoo. Called in support of the plaintiff's case, Hoo maintained that he had put all the vouchers in the bag at 1.25 p.m. and had locked it himself five minutes before the start of the first race. Under cross examination, Hoo was shown all the vouchers for bets placed at the betting shop on 27th March, and forced to admit that of the entire amount of these bets, agreed by him to be £766, he had transacted only those which had picked "Guinie Wind" to win. Hoo conceded also that the bets on

"Guinie Wind" to win were covered by twenty vouchers totalling £555.10/-, and that the two "pencillers" who had been employed in the betting shop had transacted bets covered by two hundred vouchers totalling £111, none of which recorded a bet on "Guinie Wind" to win. The printed record exhibits an error which is apparently arithmetical. The two "pencillers" were called by the defence. They agreed that between them they had sold bets totalling £111. Consequently, it is either that Hoo sold bets on "Guinie Wind" to win totalling £655, and not £555.10/-, or that the total amount of the bets sold was £666.10/- and not £766. But this apparent error in the record does not affect the critical matter which was presented to the Magistrate for consideration. The inescapable facts are,

(1) The value of the bets sold by Hoo was five or six times higher than the value of the bets sold by the two pencillers.

(2) These bets were transacted in the bar and not in the betting shop.

(3) The bets by Hoo were covered by 20 vouchers as against the 200 vouchers which were referrable to the bets made with the pencillers.

(4) Hoo transacted <u>all</u> the bets on "Guinie Wind" to win and no other bets.

(5) The pencillers transacted no bets on "Guinie Wind" to win.

In his reasons for judgment, the Magistrate described these as "cold hard facts that admitted of no denial," and he concluded that "Hoo (to indulge in an understatement) had been up to no good". The Magistrate did not state the respect in which Hoo had been up to no good. Since he was not on trial for defrauding the defendant, the Magistrate seemed to have been content to infer that however base his conduct may have been, and whatever the nature of this conduct, it had no bearing upon proof of the existence of the conspiracy between himself and the plaintiff to defraud the defendant which had been set up in answer to the claim. The Magistrate also thought that it was pointless to record a finding as to the time when the bag was

in fact locked, and although he regarded Lyn's evidence as "enlightening and of much academic interest," he judged that it was of no assistance in "tieing in" the plaintiff in the alleged fraud, because a bettor was under no "duty to stand guard over a defendant's agent to insure that he locks the voucher bag in time". In the result, the Magistrate excluded fraud in the making of the bets and held that they were valid.

For the purpose of testing the sufficiency of the Maigstrate's considerations, and the validity of his conclusions, it is important to bear in mind the nature of the burden of proof which was upon the defence to establish the allegation of fraudulent conspiracy. This was a civil action, and although the commission of a crime was being alleged, this was sufficiently established on a predominance of probability. Hornal v Neuberger Products Ltd. [1956] 3 All.E.R. 970 Re Dellones Will Trusts, Lloyds Bank Ltd. v Institute of Cancer Research [1964] 1 All. E.R. 771. The Magistrate had only to be "reasonably satisfied": his mind need not "attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge". Rejfek v McEhoy (1965), 39 A.L.J.R. 177 at 178. But the amount of evidence which is required to tilt the balance of probability towards proof of any fact in a civil case is not fixed. It varies with the subject matter and the circumstances of each case. When criminal conduct is alleged against a person, the antecedent improbability of his guilt is "a part of the whole range of circumstances which have to be weighed in the scale when deciding as to the balance of probabilities" (vide Morris L.J. in Hornal's case at 978 ibid). The criminal conduct alleged in this case was a fraudulent conspiracy between Hoo and the plaintiff, and it is obvious that a conclusion that Hoo had been up to no good, without further analysis, was an inadequate description of particular circumstances which plainly fell within the range of the circumstances to be weighed. The Magistrate should have gone further. He should have compelled himself to define the respects in which Hoo had been up to no good. Hoo was clearly untruthful and dishonest. His evidence was therefore incapable

of contradicting Lyn's statement that the bag had been locked ten minutes late. Having regard to the favourable impression which Lyn seemed to have made upon the Magistrate, it is reasonable to think that if he had recognized the importance of doing so, the Magistrate would not have hesitated to record a finding that the bag was indeed locked late. The Magistrate should then have proceeded to identify the probable nature of Hoo's dishonesty. In the context of the events described by the evidence, and in terms of the suggestion which had been put to Hoo and the plaintiff, Hoo had most likely been "up to no good" by including among the valid bets placed with the pencillers, bets which he himself had effected on "Guinie Wind" to win after the first race was run and the result ascertained. The critical question which would now have presented itself to the Magistrate for a decision was whether the plaintiff's two bets were included amongst these fraudulent bets. The Magistrate noticed the circumstances in which they were made, and thought that the "pattern of betting" appeared "unusual and eccentric", but that this was "not in itself indication of fraud". He went on to refer to a bet of £2 to win and 10/- to place on Guinie Wind which the plaintiff alleged he had made the previous day, Friday, March 24th, at the betting shop of the defendant at East Queen Street, Kingston. The batch of vouchers for bets taken at that shop that day had been shown to the plaintiff who was obliged to confess that he could find no trace of his winning voucher. After a careful scrutiny of these vouchers, and a consideration of the evidence of the clerk by whom they had been produced, the Magistrate stated that he "entertained no doubt that no such bet had been placed by the plaintiff". The Magistrate asked, "why the fabrication?" and answered "frankly I cannot say, neither could I draw any safe inference from it. However it most certainly went to credit, but does a man who lies about a fictitous incident at East Queen Street on the 24th automatically become a fraudulent conspirator to an act at Bog Walk on the following day?"

In the light of what I have stated above as to the nature of the burden of proof in a civil case, it is immediately apparent

that the Magistrate misdirected himself in this respect. The inferences which he was required to draw from his primary findings of fact were neither 'safe' inferences nor those which arose 'automatically', but inferences which were "reasonably probable". Also, the question was not whether any particular fact or inference "in itself" indicated fraud, but whether the cumulative effect of all the incriminating facts and inferences established fraud. To decide this, the incriminating facts and inferences had to be balanced against those other facts and inferences, including the improbability of guilt, which tended towards innocence. It is this formidable hurdle, the improbability of a person's guilt, which has caused it to be said that fraud must be strictly proved, but this should not be allowed to obscure the rule that in a civil action, all issues, including an allegation of criminal conduct, are decided on a preponderance of probability. It would seem that in the course of the reflections of the Magistrate the rule was so obscured. As a result, the Magistrate misconceived the nature and the extent of the burden of proof placed upon the defendant by the law, and erred in his assessments on the evidence.

This Court is in as good a position as the Magistrate to draw inferences from established facts. Benmax vs Austin Motor Car Co. Ltd. [1955] 1 All.E.R. 326. In my view, the only inference which is reasonably probable from the unmistakable picture which emerges upon proper analysis of the evidence is that the two bets made by the plaintiff were effected pursuant to a fraudulent conspiracy between Hoo and himself. The claim should have been disallowed on this ground. I have read and considered the judgment of my brother Luckhoo J.A. and agree entirely with his treatment of the difficult subject of the legality of the transactions. I would therefore allow the appeal.

The President

I agree with the judgment of my learned brother Luckhoo.

The appeal is allowed. judgment in the court below set aside and judgment entered for the defendants with costs. Costs in this Court to the appellant in the sum of $40.00.