

Horseracing in New York in the Progressive Era

Bennett Liebman

MOST PEOPLE REGULARLY involved with the sport of horseracing tend to be libertarian in nature. They, by and large, regard governmental intrusion as a combination of simplistic, paternalistic, and wrong-headed idiocy. At best, they see governmental regulation as a necessary evil. Racing people believe that government generally gets it wrong, and racing would much prefer—like Greta Garbo—to be left alone.

But there was one time in the history of horseracing in New York state when governmental intrusion was welcomed. For basically a two decade period from the early 1890s to the early 1910s, the courts in New York regularly ruled in favor of horseracing interests. The court system for a remarkable period of time regularly protected the racetrack industry from a series of attacks from progressive reformers and other anti-race horse gambling forces. Without this continuing protection, it is questionable whether horseracing would have survived in New York.

The period from the 1890s to the early 1910s was probably the height of the progressive movement in the United States. One of the elements of the progressive movement was a movement to curb vice, and gambling was one of the chief vices. “In the late nineteenth century, middle-class women and men crusaded against alcohol, pornography, prostitution and gambling.”¹ “State governments under pressure from progressives and rural constituents did try to bar or at least supervise horse racing and boxing.”² As a result, the sport of horseracing—with the exception of “cities outside Maryland and Kentucky”³—was largely banned.

The progressive years witnessed the apex of the prohibition of legal gambling. In 1897, there were 314 racetracks in the United States. By 1908, that number had dropped to 25.⁴ The *Chicago Tribune* noted that thoroughbred racing “is one of the few sports which must report loss of ground and setbacks resulting almost in decadence in the opening decade of the twentieth century.”⁵ “Racing has been wiped out in Illinois, New York, Missouri, Michigan, Indiana, Tennessee, Arkansas, Colorado, Louisiana, Texas, California, Washington, and the District of Columbia.”⁶ “By the early 1920’s, legal race betting had been eradicated from nearly every state.”⁷

Despite a blackout on horseracing in New York for approximately two and a half years from late 1910 through May of 1913, New York was able to emerge from the progressive era with its horseracing industry surviving. A number of New York’s more famous tracks—Sheepshead Bay, Brighton Beach, and Gravesend went under, but the sport itself continued. The story of this survival is a study of how the court system kept horseracing live in New York.

This is not to say that the litigants, the court system, and the Legislature were all acting with the best

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¹ MICHAEL MCGERR, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America 1870–1920* at 50 (Simon and Schuster 2003).

² HISTORICAL DICTIONARY OF THE PROGRESSIVE ERA, 1890–1920 at 382 (John D. Buenker & Edward D. Kantowicz eds., Greenwood Press, 1988).

³ *Id.*

⁴ WILLIAM H. P. ROBERTSON, *THE HISTORY OF THOROUGHbred RACING IN AMERICA 196* (Bonanza Books 1964).

⁵ Harvey T. Woodruff, *Sport of Kings Gets Blows*, CHI. TRIB., Apr. 30, 1911, at C3.

⁶ *Id.*

⁷ DAVID SCHWARTZ, *CUTTING THE WIRE GAMING PROHIBITION AND THE INTERNET 26* (University of Nevada Press 2005).

of intentions. There were collusive suits brought by gambling houses located outside racetracks to attack the gambling monopoly held by the racetracks.⁸ There were numerous allegations of legislators accepting bribes from racetrack interests. During the height of the legislative debates in Albany on horseracing, “money was actually made available for the purpose of buying senate votes.”⁹ The racetracks and the bookmakers spent huge amounts of money to influence legislation,¹⁰ and legislative agents of the racetracks offered substantial amounts of money to several senators to vote against legislation that was anti-racing.¹¹ One senator claimed that he had been given offers of \$12,000 and \$45,000.¹² Another claimed an offer of \$100,000.¹³

Regardless of the actors involved and their motives, the results are the same. The court system in New York State rescued the sport of horseracing.

THE PRE-1894 FRAMEWORK

New York thoroughbred horseracing in the 1880s was far and away the top racing in America.¹⁴ With racing at tracks such as Saratoga, Sheepshead Bay, Jerome Park, Gravesend, and Brighton Beach, nearly every major thoroughbred race was run in New York.

When Jerome Park¹⁵ first opened for racing in 1866, the *New York Times* reported that the “race-course has been made, which for beauty of location, easiness of access, and completeness in every single point cannot be surpassed or indeed equaled in the world.”¹⁶ It was the “national race course of America.”¹⁷

At the time of the opening of Jerome Park, the dominant form of wagering at racetracks was in the form of auction pools, often known as Calcuttas. In a Calcutta pool, the individual horses were auctioned to bettors. “Those participating in a ‘Calcutta’ bid for the right to ‘buy’ a particular horse. After the bidding is complete, each horse is awarded to the highest bidder. After the race is finished, the ‘owners’ of the win, place, and show entries are awarded proportional shares of the total money collected.”¹⁸

There were also French pools, using primitive nonelectronic equipment to provide for pari-mutuel payoffs. These were of limited interest to bettors of the late 19th century.¹⁹

Finally, there was bookmaking. Bookmaking was

of fairly recent vintage at racetracks, starting only after the Civil War.²⁰ Individual bookmakers set up for businesses at the tracks and posted odds on the horses, often on a chalkboard.²¹ Individual fans and bettors could choose to place wagers with these bookmakers.

The contours of the legal operation of the racetracks remained murky. The New York Constitution in the 1880s stated that all lotteries were illegal.²² In 1877, the Legislature had added a provision making poolselling and bookmaking a misdemeanor.²³ The enforcement of this provision seemed minimal. There was no mention of any other form of gambling in the state constitution.

This changed in 1887. The Legislature passed what came to be known as the Ives Pool law.²⁴ This legislation banned bookmaking and poolselling at locations outside racetracks and made them felonies.

⁸ See *What the Racing Men Will Do*, N.Y. TIMES, Aug. 29, 1895, at 10 (basically describing the workings of gambler Peter De Lacy). See also *DeLacey at Work Again*, N.Y. TIMES, Oct. 25, 1895, at 1 (“Thereafter a struggle between the race tracks and the pool rooms began which was reflected in ensuing legislation.”). Cf. *People ex rel. Collins v. McLaughlin*, 128 A.D. 599, 608 (N.Y. App. Div. 1908).

⁹ Robert F. Wesser & Charles Evans Hughes, *POLITICS AND REFORM IN NEW YORK 1905–1910* at 202 (Cornell University Press 1967).

¹⁰ *Racing Probe Continues*, N.Y. TRIB., Dec. 1, 1910. See also Steven A. Riess, *Sport and Machine Politics in New York City, in SPORT IN AMERICA FROM WICKED AMUSEMENT TO NATIONAL OBSESSION* 175 (David Kenneth Wiggins ed. 1995).

¹¹ *Racing Probe Continues*, *supra* note 10; Riess, *supra* note 10, at 175.

¹² *Racing Probe Continues*, *supra* note 10; Riess, *supra* note 10, at 175.

¹³ Riess, *supra* note 10, at 203. See also *Bid of \$100,000 for Vote, Travers Says*, N.Y. TRIB., Nov. 19, 1910, at 1; *F.J. Gardner Indicted on Foelker’s Word*, N.Y. TRIB., Oct. 15, 1910, at 1.

¹⁴ DAVID G. SCHWARTZ, *ROLL THE BONES* 333 (Gotham Books 2006).

¹⁵ When it first opened, Jerome Park was located in Westchester county. The property, after annexation, is now situated in Bronx county. It became a reservoir after 1894.

¹⁶ *Sporting Matters*, N.Y. TIMES, Sept. 24, 1866, at 8.

¹⁷ *The End of Jerome Park*, N.Y. TIMES, Dec. 30, 1894, At 20.

¹⁸ Schwartz, *supra* note 14, at 216.

¹⁹ French pools were described in some detail in *Reilly v. Gray*, 28 N.Y.S. 811, 812 (1894).

²⁰ Schwartz, *supra* note 14, at 333.

²¹ *Id.* at 334.

²² N.Y. Const. of 1846, art. 1, § 10. The anti-lottery provision had been added at the constitutional convention of 1821.

²³ L. 1877, ch. 178.

²⁴ L. 1887, ch. 479. Legislation in New York was often named after the sponsor and/or sponsors of the legislation. In this case, the legislation was sponsored by Assemblyman Eugene S. Ives.

At racetracks themselves, poolselling would be authorized. The bill became law after Gov. David Hill refused to sign or veto the legislation, thereby permitting the bill to become a law without his signature. Hill, however, determined that the bill deserved a trial even though he could not commit himself to either the proponents or opponents of the legislation.²⁵

The Ives Pool law helped to create two distinct classes of enemies for horseracing: those individuals opposed totally to gambling and the individuals who ran gambling houses away from racetracks. These individuals running nonracetrack gambling houses believed that they had been improperly singled out with the racetracks given a monopoly on legal wagering. The opponents of gambling in general tried political action. The gaming house proprietors were more likely to seek court action.

The contours of the Ives Pool law were determined in the case of *Brennan v. Brighton Beach Racing Ass'n*.²⁶ The plaintiff-bettor in the *Brennan* case went to court against a racing association to obtain a payment on a winning bet. The racing association had argued that the bet was unenforceable. The court held differently finding that, under the Ives Pool law, the wagers at the racetrack were enforceable.

The court found that the intention of the Legislature must have been to legalize such sales. They are neither condemned nor forbidden, but they are regulated; and, when this regulation was in this way prescribed, it must have been intended by the law that the sales might be made, if that was done, within the restrictions of these regulations. There would have been no reason nor sense in declaring that the poolselling should be confined within the period mentioned, and at the place designated, unless it was intended to sanction the right of the association to make the sales.

After the *Brennan* decision, the opponents of the Ives Pool law attempted to prove that the law was unconstitutional. Aspects of horseracing such as pool wagering and contributing entry fees that were to be added to purse moneys constituted lotteries that were in violation of the state's constitutional provision barring lotteries.

An early effort to find the Ives Pool law unconstitutional was unsuccessful in *De Lacy v. Adams*.²⁷ The defendant in the case ran a gambling house away from the track. The lessor of the property sought an injunction to restrain the defendant from

carrying out his gambling business. The defendant argued that the Ives Pool law was unconstitutional. The court would not rule on the constitutionality of the law. The court held that a court of equity could not assume jurisdiction to determine a constitutional question upon a mere motion, as all the necessary facts were not before the court.

More direct attacks on the law followed. Some of these attacks came from Peter DeLacy, who had been the defendant/gambler in the case of case of *DeLacy v. Adams*. According to De Lacy,

This issue will not be settled until the courts decide whether or not gambling is a crime. That is what I am after and I will not give up until the question has been determined. If it is not a crime, are the racetracks to have a monopoly of it, or are some of the rest of us to be allowed to follow it as a legitimate business?²⁸

The attacks on the law were of mixed success. In *Irving v. Britton*,²⁹ the court found that the Ives Pool law was unconstitutional. Poolselling was clearly a lottery.³⁰ It involved a distribution of property for which the participants paid some consideration, and which was determined by chance.³¹ "Being a species of gambling, so extensive in its influence and so fatal in its effect, the people, by provision in the organic law of government, forbid its presence or operation within the limits of the state."³²

A similar result was reached in *Luddington v. Dudley*.³³ The court in *Luddington* simply rested its decision on the decision in *Irving v. Britton*.³⁴ The court noted additionally in *Luddington* that the decision not to enforce the collection of winning wagers could also have been upheld on an alternate ground that would not have reached the issue of the

²⁵ *The Pool Bill a Law*, N.Y. TIMES, May 26, 1887, at 5.

²⁶ 9 N.Y.S. 220 (Sup. Ct. 1890)

²⁷ 3 Misc. 432 (N.Y. Super. Ct. 1893).

²⁸ *I'm a Gambler, Says DeLacy*, BROOKLYN DAILY EAGLE, May 29, 1894, at 1.

²⁹ 8 Misc. 201 (C.P. 1894).

³⁰ *Id.* at 205.

³¹ *Id.* at 202-203.

³² *Id.* at 203.

³³ 9 Misc. 700 (N.Y.C.P. 1894).

³⁴ *Id.*

constitutionality of the Ives Pool law. That alternate holding would have been based on the fact that while the Ives Pool law decriminalized wagering at the racetracks, it did not make these wagers enforceable.³⁵

On the other hand, in *Reilly v. Gray*,³⁶ the state Supreme Court in Madison County found that the varieties of wagering at racetracks did not constitute an illegal lottery. Viewing the totality of New York state legislation on lotteries and betting that at the time the state constitutional provision had been enacted,³⁷ betting on a horse race was not considered to be a lottery.³⁸

A result similar to *Reilly v. Gray* was also achieved in the case of *In re Dwyer*.³⁹ In the *Dwyer* case, Peter De Lacy had Phillip Dwyer, the president of the Brooklyn Jockey Club, arrested for running a sweepstakes race. Under the conditions of the race, the owners of horses put up entry fees. They raced for a stake that was composed (in part or in toto) by the entry fees. Thus, the complainant argued that the sweepstakes had all the essential ingredients of a lottery: consideration, chance, and a reward. Judge Gaynor saw the case otherwise. Not only did he utilize the same distinction between lotteries and betting and gaming generally that was noted in *Reilly v. Gray*, but he stated that nobody at the time of the state constitutional convention of 1821 “ever thought of a horse race for a stake being a lottery, and no such suggestion seems ever to have been made until now.”⁴⁰ He also noted that a horse race rather than being determined by luck was a “contest of skill, endurance and speed upon which the stake depends.”⁴¹

Judge Gaynor concluded his opinion by stating, “Racing horses for stakes may be bad, but unlawful arrests are worse. The arrest and detention of the defendant was unwarranted. It was an exercise of arbitrary power, and history teaches that we have more to fear from arbitrary power than from all species of gambling combined.”⁴²

CONSTITUTIONAL CHANGES OF 1894

Before the attacks on the constitutionality of the Ives Pool law reached New York’s highest court, the constitutional situation regarding gambling changed radically. At the state constitutional convention held in 1894, the language governing the illegality of lotteries was markedly changed. This

change was then approved by the voters at the general election in November of 1894 and went into effect on Jan. 1, 1895.⁴³

The change was based on general delegate disapproval of the policy of the Ives Pool law’s authorization of legalized gambling.⁴⁴ As one delegate stated,

If gambling is wrong at certain times of the year, and in all but certain places, it is wrong all the time and everywhere. It is an absurd anomaly to have an open and closed season for a practice which the best thought declares an evil and which is legally a crime.⁴⁵

The delegates by a vote of 109–4⁴⁶ renumbered Art. 1, § 10⁴⁷ and added a provision that banned a “lottery or the sale of lottery tickets, pool-selling, book-making or any other kind of gambling.”⁴⁸ Under the newly enacted provision, “the legislature

³⁵ *Id.* See concurring opinion of Judge Bischoff in *Irving*, 8 Misc. 201, 206–10. That conclusion would have represented a clear disagreement with the decision in the *Brennan* case.

³⁶ See *Reilly*, 28 N.Y.S. 811.

³⁷ In 1821 and 1846.

³⁸ *Reilly*, 28 N.Y.S. at 816.

³⁹ 14 Misc. 204 (N.Y. Sup. Ct. 1894).

⁴⁰ *Id.* at 206.

⁴¹ *Id.* at 205.

⁴² *Id.* at 208. Judge Gaynor was eventually elected mayor of New York City. In the course of his election bid, it was charged that he had actively worked with racetrack interests in support of their litigation interests against legislation passed in 1908. See generally, *Elder Backs Ivins in Accusing Gaynor*, N.Y. TIMES, Oct. 14, 1909, at 2; *Elder Backs Up Ivins*, N.Y. TRIB., Oct. 14, 1909, at 1. The accusations against Judge Gaynor were in reference to the case of *People ex rel. Sterling v. Nassau County*, 60 Misc. 326 (N.Y. Sup. Ct. 1908).

⁴³ Section 9 of article 1 of the new Constitution went into effect January 1, 1895, and forever forbade pool selling, book making, or any other kind of gambling within the state. This abrogated the provisions of the ‘Ives Pool Law,’ which permitted pool selling, book making and gambling at certain times and places.

People v. Cleary, 13 Misc. 546, 550 (N.Y. Ct. Sess. 1895).

⁴⁴ CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 49 (Lawyer’s Co-Operative Publishing Company 1906).

⁴⁵ *Id.* See generally the debate at pages 1079–1088 and 1110–1131 of Vol. IV of the Revised Record of the 1894 Constitutional Convention.

⁴⁶ Lincoln, *supra* note 44, at 51.

⁴⁷ It became art. 1, § 9.

⁴⁸ See generally ROBERT ALAN CARTER, NEW YORK STATE CONSTITUTION: SOURCES OF LEGISLATIVE INTENT, (Fred B. Rothman & Co. 1988).

shall pass appropriate laws to prevent offenses against any of the provisions of this section." The new provision impliedly repealed the Ives Pool law.⁴⁹

THE PERCY-GREY LAW

If the delegates to the constitutional convention though they were ending race horse gambling in New York, they were sadly mistaken. The Legislature in 1895 passed the Percy-Grey law,⁵⁰ which was in many ways similar to the Ives Pool law. The law criminalized poolselling, bookmaking, and lotteries away from racetracks. At racetracks, which had to be licensed under this law, these types of wagers were not criminalized. Instead, the exclusive penalty for a wager at a licensed racetrack was forfeiture of the wager. Section 17 of the Percy-Grey law stated,

Any person who, upon any race course authorized by or entitled to the benefits of this act, shall make or record, directly or indirectly, any bet or wager on the result of any trial or contest of speed or power of endurance of horses taking place upon such race course, *shall forfeit the value of any money or property so wagered, received or held by him, to be recovered in a civil action by the person or persons with whom such wager is made, or by whom such money or property is deposited. This penalty is exclusive of all other penalties prescribed by law for the acts in this section specified, except in case of the exchange, delivery or transfer of a record, registry, memorandum, token, paper, or document of any kind whatever as evidence of any such bet or wager, or the subscribing by name, initials or otherwise, or any record, registry or memorandum in the possession of another person of a bet or wager, intended to be retained by such other person or any other person as evidence of such bet or wager.*⁵¹

In this way, the law was similar to the alternate holding of the Luddington case.⁵² Wagers placed at licensed racetracks would be unenforceable. They would, not, however, be criminal.

The anti-racetrack forces soon challenged the Percy-Grey law. Initially in the case of *Dudley v.*

Flushing Jockey Club,⁵³ the law was found unconstitutional. In this case, the plaintiff claimed that he had won a sweepstakes race. The defendant, the owner of the track, refused to pay him. The Percy-Grey law purported to legalize sweepstakes races. The court, however, found that the law was unconstitutional. Paying a fee for the entry of the horse, followed by receiving a prize for winning the race, and having the race decided by chance⁵⁴ mean that the sweepstakes race was gambling. Since the amended constitution banned any kind of gambling, the provision of the Percy Grey law authorizing sweepstakes was unconstitutional.⁵⁵

Nonetheless, this decision was eventually dismissed. Intervening parties alleged that the horseracing contest was fictitious and that the horse race in question was a pretended contest. A referee was appointed who found that the case was, in fact, collusive. Based on the referee's report, the decision in the *Dudley* case was withdrawn.⁵⁶

With the termination of the *Dudley* cases, the legitimate cases involving the Percy-Grey law went into court. There were different tracks for these cases. One issue involved the legality of the sweepstakes provision of the law. The other involved the legality of the provision under which the only penalty for gambling at a racetrack was forfeiture of the wager.

The Court of Appeals made its decisions in these two cases on the same day in 1897. In both cases, the court found that the Percy-Grey law was constitutional.

In *People ex rel. Lawrence v. Fallon*,⁵⁷ the court found that the sweepstakes racing authorized by the Percy-Grey law was valid. This case had proceeded along the lines of the previous *Dwyer* case.⁵⁸ The president of the Westchester Racing Association has

⁴⁹ WILLIAM H. SILVERNAIL, *THE PENAL CODE AND CODE OF CRIMINAL PROCEDURE OF THE STATE OF NEW YORK* 373 (W. C. Little & Co.1900). See also *People v. Cleary*, 13 Misc. 546, 550-551 (N.Y. Ct. Sess. 1895).

⁵⁰ Ch. 570, .L. 1895.

⁵¹ *Id.* (Emphasis added).

⁵² See *Luddington*, 9 Misc. 700.

⁵³ 14 Misc. 58 (N.Y.C.P. 1895).

⁵⁴ *Id.* at 60.

⁵⁵ *Id.*

⁵⁶ *Judson v. Flushing Jockey Club*, 14 Misc. 562 (N.Y.C.P. 1895).

⁵⁷ 152 N.Y. 12 (1897).

⁵⁸ See *In re Dwyer*, 14 Misc. 204

been arrested for conducting a lottery based on the use of sweepstakes races and for other violations of the gambling laws. He was accused of conducting a lottery and conducting poolselling or bookmaking. The final issue was whether the sweepstakes constituted illegal gambling under the 1894 constitutional amendment.

The court first disposed of the lottery issue. It stated,

A race or other contest is by no means a lottery simply because its result is uncertain, or because it may be affected by things unforeseen and accidental. When this statute against lotteries was passed the legislature not only defined the meaning of the term, which cannot be fairly said to include a test of speed or endurance of horses for prizes or premiums, but it at the same time passed a statute relating to the racing of horses, which shows that such a contest was not intended to be included among the offenses which should be punishable under the statute against lotteries.⁵⁹

The court also found no evidence that the laws against poolselling or bookmaking had been violated.⁶⁰ That left the question of whether the sweepstakes system constituted unlawful gambling under the state constitution. The court noted that if the sweepstakes system constituted illegal gambling, then the Percy-Grey law would be unconstitutional. The court, however, found that the sweepstakes system did not constitute gambling. The parties paid an entrance fee that went to the general treasury of the racing association. Out of its general treasury funds, the racing association was to pay the purses for the sweepstakes race. As the court viewed this overall transaction, this was not "a race where the stake is contributed by the participants alone."⁶¹ As such, it was not a bet or a wager but constituted a "prize offered by one not a party to the contest."⁶² Therefore, the provisions of the Percy-Grey law authorizing sweepstakes racing did not constitute gambling and did not violate the constitution.

In the case of *People ex rel. Sturgis v. Fallon*,⁶³ the Court of Appeals dealt with the issue of the wagering conducted at the racetracks and whether the absence of a criminal penalty for such activity violated the state constitution. The court summarized the issue by finding that, under the Percy-Grey law,

all the offenses there named are made felonies or misdemeanors, with the single exception that a person who, upon a race course and at a race authorized by chapter 570, shall make or record a bet or wager on the result of a contest taking place thereon, shall forfeit the value of the money or property so wagered, to be recovered in a civil action by the person with whom such wager is made, or by whom such property is deposited, and this penalty is made exclusive of all others, unless in certain excepted cases mentioned.⁶⁴

The court found that the defendant in the case was only involved in gambling at a licensed race course. That left the issue as to whether the exclusive penalty of a civil action for forfeiture of a wager was an authorized penalty under the constitution. The court believed that the constitution left the determination of a proper penalty for illegal gambling to the Legislature:

The Constitution in express terms reposed in the legislature the power, and imposed upon it the duty of passing such laws, thus clothing it with the right to consider and determine for itself what laws were appropriate and should be passed to carry it into effect . . . It being in a degree appropriate, we are aware of no principle of constitutional law which would authorize this court to condemn it as invalid or unconstitutional, because, in our opinion, some more effective or more appropriate law might have been devised and enacted.⁶⁵

"The determination of the degree of punishment or the extent of the penalty is vested in the legislature and not in the courts,"⁶⁶ and therefore the exclusive penalty provision in the Percy-Grey law was constitutional.

⁵⁹ *Lawrence*, 152 N.Y. at 17. The treatment of this issue was similar to the analysis of Judge Gaynor in the *Dwyer* case.

⁶⁰ *Id.* at 18.

⁶¹ *Id.* at 19.

⁶² *Id.*

⁶³ 152 N.Y. 1 (1897).

⁶⁴ *Id.* at 7.

⁶⁵ *Id.* at 10–11.

⁶⁶ *Id.* at 12. *Cf.* *People ex rel. Weaver v. Van De Carr*, 150 N.Y. 439 (1896).

For close to a decade, the Court of Appeals decisions on the Percy-Grey law kept racetrack wagering alive and healthy in New York. The court in 1902 refused to revisit its decision in the *Sturgis* case,⁶⁷ and until the middle of the first decade of the 20th century, there were few serious efforts to amend and tighten the Percy-Grey law.

EFFORTS TO AMEND PERCY-GREY

Significant legislative efforts to change the Percy-Grey law started to begin to develop starting in 1905. Initially, the efforts seemed to focus around poolroom gambler Peter De Lacy. As part of their fight against arrests for gambling, the poolroom proprietors began to focus on the Percy-Grey law. "One law for August Belmont and another for Peter De Lacy was the burden of their plait and today 'no poolrooms, no racetrack betting' is their slogan."⁶⁸ Mayor McClellan of New York City indicated that he was "looking into the laws governing racetrack bookmaking."⁶⁹

By 1906, many churches had joined the fight against Percy-Grey, and significant legislation was introduced to end racetrack gambling. The Cassidy-Lansing bill was introduced to end racetrack gambling.⁷⁰ Sen. Cassidy stated that "the intent and letter of the constitution were violated by the Percy-Grey law."⁷¹ He stated, "We might just as well toss the constitution out of the window, impotent as a rope of sand to check the sea, if we are not to be bound by the organic law of the state."⁷² Public moralist Anthony Comstock "declared that the Percy-Grey law was only a legalized violation of the constitution. He declared that gambling was the worst form of ordinary immorality."⁷³ Nonetheless, it was clear early in 1906 that the anti-racetrack legislation had "almost no chance for passage."⁷⁴

The attacks on Percy-Grey expanded in the next legislative session. New York County District Attorney William Travers Jerome joined the fight against the law. The district attorney stated:

The Legislature did enact appropriate laws in all respects save one. It willfully and deliberately enacted a law known as the Percy-Gray law, and surrounding its enactment there were the gravest scandals. The law was so framed that while nominally it imposes a penalty, and was enacted in obedience to the new constitu-

tion, it was craftily and designedly framed so as to permit gaming on racetracks in this state. The result of it has been that on one side of a barbed wire fence a man commits a felony if he does certain acts, while on the other side of the same fence the same acts are perfectly innocent and legal.⁷⁵

Jerome had his bill introduced early in the 1907 legislative session,⁷⁶ but there was no indication where newly elected reform Gov. Charles Evans Hughes stood on the issue of racetrack gambling.⁷⁷ Throughout the 1907 session, the anti-racetrack forces "received no support from the state administration."⁷⁸ Gov. Hughes's administration in 1907 had been far busier in fighting other reform issues involving regulation of insurance and utilities.⁷⁹

HUGHES JOINS THE FIGHT

1908 was a different year for racing and Gov. Hughes. The governor made the determination that racetrack gambling under the Percy-Grey law was a violation of the constitution. He accordingly led a near-crusade against gambling. The governor squared off against Percy-Grey with his annual message. He stated, "The Constitution makes no exception of race tracks. I recommend that the Legislature carry out the clear direction of the people without discrimination."⁸⁰ He did not stop until Percy-Grey was repealed.

Hughes's admirers believed that "it was characteristic of his high sense of personal rectitude that he believed that, when the New York Constitution

⁶⁷ *People v. Stedeker*, 175 N.Y. 57, 61 (1903).

⁶⁸ *To Fight Racetracks*, N.Y. TIMES, May 22, 1904, at 1.

⁶⁹ *Id.*

⁷⁰ See S. Introduction Bill 719, Assembly Introduction Bill 719 (N.Y.).

⁷¹ *Attack Race Gambling*, N.Y. TRIB., Mar. 8, 1906, at 1.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Racing's Friends Rally*, N.Y. TRIB., Mar. 15, 1906.

⁷⁵ *Gambling in Danger*, N.Y. TRIB., Nov. 17, 1906.

⁷⁶ See S. Introduction Bills 108 and S. 109 and A. 178 and 179 (N.Y.).

⁷⁷ *Blow at Racetrack*, N.Y. TRIB., June 14, 1907 At 1.

⁷⁸ Wesser & Hughes, *supra* note 9, at 190.

⁷⁹ *Id.* at 124-181.

⁸⁰ Public Papers of Gov. Hughes, Annual Message, at 26 (1908).

said: 'nor shall . . . any . . . kind of gambling hereafter . . . be allowed within this State,' the Constitution meant just what it said. His consequent attack on the fashionable bookmakers at salubrious Saratoga made him much disliked by those genial persons who think that disagreeable laws are passed in order to be ignored."⁸¹

He made numerous speeches and helped organize progressives and church leaders against racetrack gambling.⁸² The state Assembly quickly passed the Agnew-Hart bill, and the issue was then presented to the state Senate. The Senate was in the early spring of 1908 composed of 51 districts. There was one vacancy. When the Agnew-Hart bill first came up for a vote, it was defeated by a tie vote of 25–25.⁸³

This loss did not deter Hughes. He called for a special election for the vacant Senate seat.⁸⁴ He campaigned hard for the Republican candidate who was opposed to Percy-Grey. That candidate was elected. Then, Hughes called for a special session of the Legislature where the Agnew-Hart legislation would be brought up.⁸⁵ Again, the legislation was passed easily in the Assembly. The Senate again was more troublesome, but with an ailing anti-racetrack gambling senator making a dramatic appearance, the Agnew-Hart bill passed the upper house by a vote of 26–25.⁸⁶

TESTING AGNEW-HART

The Agnew-Hart legislation did two things. There were two bills that were part of the legislation. The first repealed the special provisions providing only a civil penalty for racetrack gambling.⁸⁷ The second made bookmaking and poolselling misdemeanors everywhere, rather than felonies.⁸⁸ Thus, bookmaking or poolselling at the tracks—just like poolselling and bookmaking away from the tracks—would be a misdemeanor.

The passage of the legislation clearly placed the racetrack forces at a disadvantage. Poolselling was pretty well defined, and by their very nature, Calcutta pools and French pools had to be offered not to individuals but to groups of people. There was no arguable need for a written record to find someone guilty of poolselling. There was no way to rescue poolselling from the Agnew-Hart legislation. It had to be viewed as public gambling. Agnew-Hart however, did not make any changes in the law defin-

ing bookmaking. That definition remained unchanged under the Agnew-Hart laws.⁸⁹

What occurred soon after the passage of the legislation were a series of major battles between the opponents and proponents of Agnew-Hart.

The opponents tried to claim that Agnew-Hart bill did not properly pass the Legislature. The opponents claimed that the apportionment law under which the Senate had 51 members was unconstitutional. This effort was unsuccessful.⁹⁰

The proponents of the legislation tried to find that advance information on horse races—the names of the runners, the jockeys, the distance of the races, and the scratches, etc.—were illegal gambling devices. The courts dismissed the contention that this advance information constituted a gambling device or apparatus.⁹¹

The basic thrust of the opponents of Agnew-Hart, however, was to establish that certain styles of gambling on horseracing did not constitute the crime of bookmaking. Accordingly, a series of cases on the scope of bookmaking made their way through the court system. The first case involved wagering at the Brooklyn Jockey Club at Gravesend soon after the Agnew-Hart legislation passed.

The defendant Collins was arrested for accepting an oral bet at the racetrack. The prosecution argued that a wager at a racetrack, accompanied by receipt of money after the event on which the bet was made had been concluded, was the crime of bookmaking. At the Supreme Court level, the charges against the defendant were dismissed.⁹² The judge noted that the laws defining bookmaking had not changed since 1895.⁹³ All that had been changed were the

⁸¹ Zechariah Chafee Jr, *Charles Evans Hughes*, 93 PROC. AM. PHILOSOPHICAL SOC'Y 267, 269 (June 10, 1949).

⁸² MERLO J. PUSEY, *CHARLES EVANS HUGHES* 226–227 (The MacMillan Company 1951).

⁸³ *Racing Bills Are Defeated*, N.Y. TIMES, Apr. 9, 1908, at 1.

⁸⁴ See Public Papers of Gov. Hughes, *supra* note 80, at 6.

⁸⁵ *Id.* at 53.

⁸⁶ *Hughes Signs Racing Bills*, N.Y. TIMES, June 12, 1908, at 1; L. 1908 chs. 570–571.

⁸⁷ Ch. 506, L. 1908.

⁸⁸ Ch. 507, L. 1908.

⁸⁹ *Id.*

⁹⁰ *People v. Coney Island Jockey Club*, 68 Misc. 302, 304–305 (N.Y. Sup. Ct. 1910)

⁹¹ *People v. Engeman*, 129 A.D. 462 (N.Y. App. Div. 2d Dept. 1908), *aff'd* 195 N.Y. 591 (1909).

⁹² *People ex rel. Collins v. McLaughlin*, 60 Misc. 306 (N.Y. Sup. Ct. 1908).

⁹³ *Id.* at 306.

exemptions from the criminal law.⁹⁴ The court found that the law did not criminalize the mere act of betting. All that was criminalized at the racetrack was the “receipt, registering, recording or forwarding” of the wager.⁹⁵ The bet itself and the transfer of money based on the subject matter event of the bet were not covered by the crime of bookmaking.⁹⁶

A similar result occurred in the case of *People ex rel. Sterling v. Nassau County*.⁹⁷ This case seems likely to have been arranged by the opponents of Agnew-Hart. It did not directly involve horseracing, and it was assigned to Judge Gaynor, the preferred judge of the racetrack forces. Sterling was charged with making and recording a bet on a card in conjunction with a game of golf that he was playing with his fellow bettor.

Judge Gaynor found that “this was no crime.”⁹⁸ The law was never intended to reach ordinary betting. All that the Agnew-Hart bill did was to make the existing bookmaking laws apply inside a racetrack.⁹⁹

While this may have been a golf case, Judge Gaynor made certain that its essential point was not limited to the game of golf. He wrote:

An ordinary bet is not a crime, whether made in your parlor, or on a golf links or a race track, nor is the making of a note or memorandum thereof; but if you hold yourself out to bet and bet with all comers, or generally, or become the general recorder of such bets, or of bets between others, you are guilty of a crime.¹⁰⁰

So under the Sheppard case, betting was legal and could be accompanied with a note or memorandum of the bet.

The *Collins* case was appealed to the Appellate Division. The Appellate Division affirmed the holding of the trial court in *Collins* that oral betting did not constitute the crime of bookmaking.¹⁰¹

The Appellate Division found only one New York statute—on the subject of boxing bets—that made oral wagering a crime.¹⁰² The only effect of the Agnew-Hart legislation was to remove the exclusive civil penalty provision that had previously exempted racetrack bookmaking from criminal action.¹⁰³ It did not make oral wagering a crime. The court decided that oral betting was not a crime since New York’s statutory scheme was “aimed at the stakeholder, the bookmaker and the poolseller.”¹⁰⁴

The very similar case of *People ex rel. Lichten-*

*stein v. Langan*¹⁰⁵ was also appealed to the Second Department. The court in the *Lichtenstein* case affirmed the lower court decision that oral betting at a racetrack was not a crime based on its decision in the *Collins* case.

The case of *People ex rel. Jones v. Langan*¹⁰⁶ was also appealed to the Second Department. In that case, the alleged bookmaker/defendant “was willing to bet with the said persons against the horses on the result of races then there to be run by such horses, and did bet 500 to \$ 200 with a person named that a certain horse would lose.”¹⁰⁷ In short, the defendant quoted odds to a number of bettors. There was no writing. In a unanimous decision written by Judge Gaynor, the court ruled for the defendant. Judge Gaynor wrote:

There can be no book-making without writing or recording. The word in betting, and as used in the Penal Code, implies the use of a book, or sheets of paper, or a bulletin board, or some such thing. This is the genesis of the word. It is not necessary to enter upon a precise definition, no facts of writing or recording being alleged.¹⁰⁸

The prosecution appealed all three Appellate Division decisions to the New York Court of Appeals. The court in late 1909 issued a decision affirming the Appellate Division. The Court of Appeals in the *Lichtenstein* case affirmed the Appellate Division and ruled that oral wagering—wagers made without any written record—did not constitute bookmak-

⁹⁴ *Id.*

⁹⁵ *Id.* at 309.

⁹⁶ *Id.*

⁹⁷ 60 Misc. 326 (N.Y. Sup. Ct. 1908). Judge Gaynor had been the judge in *Dwyer*, 14 Misc. 204.

⁹⁸ 60 Misc. 326.

⁹⁹ *Id.* at 327

¹⁰⁰ *Id.*

¹⁰¹ *People ex rel. McLaughlin v. Collins*, 128 A.D. 599 (N.Y. App. Div. 2d Dept. 1908).

¹⁰² *Id.* at 614

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 615

¹⁰⁵ 132 A.D. 937 (N.Y. App. Div. 2d Dept. 1909). Judge Gaynor was part of the panel at the Appellate Division that decided the *Lichtenstein* case.

¹⁰⁶ 132 A. D. 393 (N.Y. App. Div. 2d Dept. 1909).

¹⁰⁷ *Id.* at 394

¹⁰⁸ *Id.*

ing.¹⁰⁹ The question presented before the court was strictly on the issue of oral wagers. The allegation against the defendant “by the district attorney is that he was engaged in bookmaking; that the laying of odds and orally announcing them constituted bookmaking within the meaning of the statute.”¹¹⁰

The court, in a decision by Judge Haight, found that “bookmaking has come to be regarded as specially vicious and demoralizing to the public.”¹¹¹ The evils of bookmaking were due to the ability of bookmakers to prepare schedules under which they could be insured of a profit:

This was the scheme under which bookmakers were enabled to induce men, women and persons of immature years to part with their money, thus enabling the bookmaker to reap great profits out of the public and to become the chief supporters of the races. This is the evil which the legislature sought to prevent.¹¹²

The court believed that, of necessity, this scheme required a record. Without a written record, “very few bets could be taken.”¹¹³ “The masses could not be drawn into the scheme and their money obtained without some writing or entry that they could rely upon.”¹¹⁴

The court, in light of the fact that ordinary betting had not been considered criminal, found that “the laying of odds standing alone does not, therefore, constitute a crime.”¹¹⁵ It concluded by stating:

The vice of bookmaking chiefly consists in soliciting and in the inducing the public to take chances in the carefully figured and planned scheme of the bookmaker, and this, in order to be profitable to him, requires the writing out of the list of the odds laid on some paper or material so that they can be seen by those who are solicited to invest.¹¹⁶

Chief Judge Cullen, while concurring in Judge Haight’s decision, wrote a separate concurrence finding that gambling is a crime “only where it is accompanied by record, registry or the use of some part of the paraphernalia of professional gamblers, except in the case of poolselling, where probably no writing or record is necessary to constitute the crime.”¹¹⁷ The overall question of “whether the plan adopted to suppress the evil is an efficacious one or not is solely for the legislature.”¹¹⁸

There was a dissent by Judge Vann. He found that the writing was simply an incident of the crime of bookmaking. It was not a necessary element. “Engaging in the business of public gambling by quoting and laying insidious odds to a multitude of people was the evil aimed at, not the making of a record of the business which is comparatively innocent.”¹¹⁹

The *Jones* case¹²⁰ was affirmed based on the decision in *Lichtenstein*. The appeal was dismissed in the *Collins* case where the district attorney took no “responsibility for the preparation of the information upon which the warrant against the defendant was issued, and asserts that he is compelled to make this a test case relating to such important act against his protest.”¹²¹

Three years later, in the case of *People v. Lambix*,¹²² the Court of Appeals added an additional gloss to the decision in *Lichtenstein*. Under the Agnew-Hart law, the defendant, an alleged bookmaker, made a bet with another party. The defendant accepted a memorandum of the transaction from the other bettor. The mere receipt of a memorandum from a bettor by the alleged bookmaker was insufficient to constitute the crime of bookmaking.¹²³

THE 1910 LEGISLATIVE ACTION

The state Legislature very quickly went back to work to respond to the decision in the *Lichtenstein* case. It started with Gov. Hughes in his 1910 annual message. While gambling was a minor part of his 1910 message, Hughes said,

In view, however, of the efforts that have been made to evade the statute and despite its pro-

¹⁰⁹ *People ex rel. Lichtenstein v. Langan*, 196 N.Y. 260 (1909)

¹¹⁰ *Id.* at 264.

¹¹¹ *Id.* at 265.

¹¹² *Id.*

¹¹³ *Id.* at 266

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 267.

¹¹⁸ *Id.* at 268.

¹¹⁹ *Id.* at 269

¹²⁰ *People ex rel. Jones v. Langan*, 196 N.Y. 551 (1909).

¹²¹ *People ex rel. Collins v. McLaughlin*, 194 N.Y. 556, 557 (1909).

¹²² 204 N.Y. 261 (1912).

¹²³ *Id.* at 264.

hibitions to continue the business of bookmaking, either without recording in the usual way or with records so concealed as to make detection difficult, I recommend that the law be amended so as to penalize the practice of bookmaking, even though there be no record.¹²⁴

The Legislature quickly went to work to implement the Hughes recommendations.¹²⁵ What came to be known as the Agnew-Perkins legislation reversed the *Lichtenstein* case by explicitly stating that a writing was not necessary for an offense to constitute the crime of bookmaking. It also removed any legal protections that had been accorded to the trustees of a racing association. Previously, the trustees were not liable for illegal gambling at their tracks “provided signs were posted warning patrons against gambling and special policemen were kept at the tracks.”¹²⁶

The legislation passed both houses easily.¹²⁷ Before the legislation was signed, Gov. Hughes held a public hearing providing all sides of the Agnew-Perkins legislation an opportunity to express their views.¹²⁸ Speaking for the Jockey Club, attorney Joseph Auerbach argued that the bills were an unwarranted interference with personal liberty and were ambiguous.¹²⁹ He stated, “The little minimized betting which there now is might better go on than that such scandalous laws should go on the statute books.”¹³⁰ Auerbach was confronted by Gov. Hughes on the personal liability for trustees question. Auerbach had to admit that the immunities given to racetrack directors were not given to directors of other sporting organizations.¹³¹ On June 15, 1910, Gov. Hughes signed the Agnew-Perkins legislation.¹³²

The 1910 Agnew-Perkins legislation actually consisted of four bills. One part ended the personal immunity for the directors and trustees of racing associations.¹³³ A second bill expanded the definition of a betting or gambling establishment to include “any other enclosure or place” used for gambling.¹³⁴ A third responded directly to the Court of Appeals decision by stating that bookmaking did not require any writing.¹³⁵ The fourth provision repealed the taxes on the gross receipts of racing associations.¹³⁶

The provisions governing oral bookmaking and limiting the liability for the directors and trustees of racing associations did not go into effect until Sept. 1, 1910. Racing continued until that date, but ended

in New York after the races at Saratoga on Aug. 31, 1910.¹³⁷

THE BLACKOUT

After the effective date of the Agnew-Perkins legislation, racing came to a halt in New York State. No attempts were made to revive racing in the rest of 1910 and 1911. By that time, Gov. Hughes had left Albany and had become a member of the United States Supreme Court.

In 1912, a steeplechase meeting—the United Hunts meeting—took place at Belmont Park. Out of this meeting, a test case developed. A patron at the track did

willfully and privately make several bets or wagers on the result of each of said contests, the said bets or wagers being made by him orally and without the use of paraphernalia or writing, but a note or memorandum of each of said bets or wagers was then and there prepared and written by the opposite party to each of said bets or wagers, stating the name of the horse upon which the particular bet or wager was made and the amount thereof.¹³⁸

To the court, the issue was:

Do these words “with or without writing” so change the law forbidding book-making as to

¹²⁴ Public Papers of Gov. Hughes, 1910 Annual Message, at 44.

¹²⁵ *Stirred by Hughes*, WASH. POST, Jan. 6, 1910, at 1.

¹²⁶ *Racing Bills Signed*, N.Y. TRIB., June 16, 1910, at 2.

¹²⁷ *Oral Betting Hit in Solar Plexus*, CHI. TRIB., Apr. 21, 1910, at 9; *Death Blow Given Racing*, CHI. TRIB., May 5, 1910, at 13.

¹²⁸ *Hughes Trips Auerbach*, N.Y. TRIB., June 4, 1910, at 4.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See *Racing Bills Signed*, *supra* note 126.

¹³³ Ch. 486, L. 1910.

¹³⁴ Ch. 487, L. 1910.

¹³⁵ Ch. 488, L. 1910.

¹³⁶ Ch. 498, L. 1910.

¹³⁷ See *All Betting Is Against the Law*, N.Y. TIMES, Sept. 2, 1910, at 5. See also *Hildreth's Novelty Wins Futurity*, N.Y. TRIB., Sept. 1, 1910, at 5 (“The end had come—not only the end of a most successful meeting, a most stimulating day, but the end of racing for the season in New York State.”).

¹³⁸ *People ex rel. Shane v. Gittens*, 78 Misc. 7, 8 (N.Y. Sup. Ct. 1912).

constitute a crime of the acts with the commission of which relator is charged, acts which, prior to 1910, did not constitute the crime of book-making under the decision of the Court of Appeals in the case of *People ex rel. Lichtenstein v. Langan*, or do these acts constitute betting only which has never been made a crime in this state, excepting betting upon the result of a prize fight which is a misdemeanor?¹³⁹

The court found that the defendant did not engage in any public gambling, and there was no allegation that the defendant was a professional gambler.¹⁴⁰ Based on these facts, the court concluded that there was no violation of the statute against bookmaking.

The court also concluded that knowledge of illegal gambling was necessary in order to hold the trustees of a racing association liable for permitting gambling.¹⁴¹ The court rejected the notion that the case itself was collusive in nature.¹⁴²

On appeal, the Second Department unanimously affirmed the Supreme Court decision without opinion resting its determination on the decision of the Supreme Court justice.¹⁴³ The Court of Appeals dismissed the appeal of the case finding that the appeal had not been properly taken in the name of the People.¹⁴⁴

Based on the Appellate Division decision, racing restarted in New York on May 30, 1913, at Belmont Park.¹⁴⁵ The Brooklyn tracks—Gravesend, Brighton Beach, and Sheepshead Bay—never recovered from the blackout and did not reopen. Racing was only conducted at Belmont Park, Aqueduct, Saratoga, Jamaica, and the Empire City track in Yonkers.

There was one additional legal episode following the resumption of racing. The Hearst newspapers made an effort to probe that illegal gambling was taking place at the reopened tracks.¹⁴⁶ In *People v. Laude*,¹⁴⁷ the issue arose as to what constituted bookmaking under the Agnew-Perkins legislation of 1910. While oral bookmaking was now banned, the prosecution needed evidence to “show that the accused belongs to the class of common gamblers, professional gamblers—whose operations are conducted upon the scheme known as bookmaking.”¹⁴⁸ In the absence of such evidence of professional gambling, the prosecution against the defendants was dismissed.

THE AFTERMATH

Without any Charles Evans Hughes to lead the fight against racetrack gambling, any efforts to further restrict gambling in New York were bound to fail. As a practical matter, the oral bookmaking system, established pursuant to court decisions, reigned in New York for the next two decades. Under this system, horseracing continued to exist in New York. While racing did not prosper, it was able throughout those years to limp along and survive.

One article described the system thusly: “Bookmakers’ stands now are all gone. So have the bookmakers . . . Now they are merely layers of odds with men who think they can pick the winners of various races, and are willing to back their beliefs with cold cash . . . So ‘oral betting’ has taken the place of the old-fashioned bookmaking.”¹⁴⁹

The oral betting system continued to exist until 1934. Just before the horseracing season commenced in 1934, the Legislature passed the Crawford-Breitenbach bill, which returned opened bookmaking to New York.¹⁵⁰ It was basically a return of the Percy-Grey law under which betting at licensed racetracks on live racing was decriminalized.¹⁵¹

Bryan Field, the regular racing writer for the *New York Times*, did not have much nostalgia for the oral betting years. He found that the entire law was a farce. It was hypocritical and unpopular and awkward.¹⁵² Betting had been on credit. Winnings would be paid after the races or the next day. All

¹³⁹ *Id.* at 12.

¹⁴⁰ *Id.* at 13.

¹⁴¹ *Id.* at 14.

¹⁴² *Id.* at 15.

¹⁴³ *People ex rel. Shane v. Gittens*, 155 A.D. 921 (N.Y. App. Div. 2d Dept. 1913). See also *Oral Bets On track Upheld By Court*, N.Y. TIMES, Feb. 22, 1913.

¹⁴⁴ *People ex rel. Shane v. Gittens*, 209 N.Y. 527 (1913).

¹⁴⁵ Robertson, *supra* note 4, at 213.

¹⁴⁶ *Lost Hearst Cash on Belmont Races*, N.Y. TIMES, June 20, 1913, at 18.

¹⁴⁷ 81 Misc. 256, 260 (N.Y. County Ct. 1913). See also *Bookmaking Not Shown*, N.Y. TIMES, June 25, 1913, at 9.

¹⁴⁸ *Id.* at 261.

¹⁴⁹ *Laying the Odds at Belmont Park*, N.Y. TIMES, May 31, 1914, at S5.

¹⁵⁰ Ch. 233. L. 1934. Cf. *Beach v. Queens County Jockey Club*, 164 Misc. 363 (N.Y. Sup. Ct. 1937).

¹⁵¹ *Thousands Crowd Betting Ring, Swamping Jamaica Bookmakers*, N.Y. TIMES, Apr. 22, 1934, at 1.

¹⁵² Bryan Field, *Ends a Farcical System*, N.Y. TIMES, Apr. 18, 1934, at 18.

strangers had to be introduced to bookmakers before they could bet. Numerous players—not generally the bookmakers—“welched” on their bets.¹⁵³ It was not a good system, but it was a legal system. Field was not sad to see the oral betting system end.

With the passage of the Crawford-Breitenbach bill, there now was little need for the court system to help save racing. Horseracing in New York prospered for many years after the return of the quasi-legal bookmakers followed by the introduction of pari-mutuel wagering in New York in 1940. Few legislators after 1934 were pressing seriously for an end to racetrack gambling.

Yet, during the progressive era, the years when racetrack betting was under siege, the New York courts continually stepped in to protect horseracing and gambling from progressive forces. The courts initially split on the issue of whether horse race gambling constituted an illegal lottery. Subsequently,

the courts read the anti-gambling provisions added by the state constitution narrowly so that sweepstakes racing would be permitted, and no criminal penalties need be authorized for racetrack gambling. During the Hughes governorship, the courts found that oral bookmaking was not criminal conduct. Finally, after oral bookmaking had been outlawed by the Legislature, the courts found that bookmaking required proof that the accused party was a professional gambler. This is an extraordinary record of protecting gambling at racetracks in New York, and it is doubtful, that without this level of court protection, the New York horseracing industry could have thrived or whether it would even be in existence today.

¹⁵³ *Id.*