

WAGERING AND GAMING CONTRACTS

IN NEW ZEALAND

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Corrigenda

- Para. 2.06 Delete the words "The Chief" at the bottom of the third page and substitute "The Learned Lord".
- Para. 4.02 The first page has been bound in error before the succeeding page.

ABSTRACT OF THESIS

The law of gaming and wagering contracts in New Zealand has a long and complex history which pre-dates the birth of this nation by almost two centuries. The Gaming Act 1908 (N.Z.) is a consolidating statute, but ss.69, 70 and 71, the enactments having specific application in this area, fall **far** short of providing a complete code of the law. English statutes enacted in the reigns of Charles II (1664)<sup>1</sup>, Anne (1710)<sup>2</sup> and William IV (1835)<sup>3</sup> have always been, and continue to be in force in this country, and indeed, their survival here has been more complete than in England where many of their provisions have been excised by the process of legislative repeal.<sup>4</sup> The New Zealand law of gaming and wagering contracts is very much a

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1. 16 Car. II, c.7 (1664).
  2. 9 Anne, c.14 (1710).
  3. 5 & 6 Will. IV, c.41 (1835).
  4. Provisions in the Acts of 1664 and 1710 were modified by the Act of 1835 and those that were untouched by that modification were repealed in England by the Gaming Act, 1845 (8 & 9 Vict., c.109). And the second section 2 of the 1835 Act was repealed by s.1 of the Gaming Act, 1922, but none of those repeals were carried into the New Zealand law.

product of the English experience for the English enactments in force here are in turn supplemented by New Zealand provisions which have been largely copied from English Gaming Acts of 1845<sup>5</sup> and 1892.<sup>6</sup> But the New Zealand Legislature has not been completely lacking in imagination. Section 71 of the Gaming Act 1908 (N.Z.) has no counterpart in the English statutes, and sections 69 and 70 of the New Zealand Act both contain subtle, but significant differences, to their English equivalents.

However, although New Zealand law in this area is modelled on that of England, there the similarity ends. English law in existence and applicable to the circumstances of the Colony of New Zealand on the 14th of January 1840 was declared to be in force in New Zealand by the English Laws Act, 1858 (N.Z.). That Act did not, however, apply subsequent English enactments, and substantial reforms to the law of gaming and wagering contracts effected by the gaming Act, 1845 (U.K.) were not adopted in New Zealand until the colonial Gaming and Lotteries Act was enacted in 1881. The English Act of 1845 replaced the gaming contract provisions of the Act of Anne (1710) and repealed all but those securities provisions of that Act that had been modified by the Gaming Act, 1835 (U.K.)

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5. Notably s.18 of the Gaming Act, 1845 (8 & 9 Vict., c.109).

6. The Gaming Act, 1892 (55 Vict., c.9).

Thus, within a period of five years from the inception of the colony, New Zealand was applying English gaming laws that were more than two centuries old whilst the English Courts were faced with the prospect of construing a brand new Act. Thirty six years later the colonial legislature adopted verbatim the contract provisions in the Imperial Act of 1845. But by an apparent over-sight the colonial draftsman failed to effect the substantial repeals of the Acts of 1664 and 1710 the English Act had done. But that was only the first of the colonial errors. A further English Act in 1892<sup>7</sup> was copied and enacted by the colonial legislature in 1894<sup>8</sup> but with an appendage that demonstrated that the New Zealand legislature had not fully understood the full import of the English measure. This created difficulties of interpretation which were only compounded by a further error of the draftsman of the 1881 Act when he mistakenly copied s.6 of the Betting Houses Act 1853 (U.K.)<sup>9</sup> into s.34 of the former Act without realising the significance of doing so. The 1894 Act also introduced what is now s.71 of the 1908 Act, a provision the reason for the enactment of which has remained unexplained to the present day.

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7. Ibid.

8. s.2 of the Gaming Act, 1894.

9. 16 & 17 Vict., c.119 (1853).

When a consolidation of the Colonial Acts was effected by the Gaming Act 1908 the law of gaming and wagering contracts was already in a state of considerable confusion. That confusion was, of course, carried into that Act, but it did not end there and indeed can be said to have gained a new dimension when, as recently as 1970, the New Zealand legislature enacted the Illegal Contracts Act.

The New Zealand law of gaming and wagering contracts is largely a product of misunderstandings and errors that occurred when legislative attempts were made to re-enact and effect modifications of the English statutes in this country. In this work the writer seeks to identify the points of departure and to find a rational basis for the law of gaming and wagering contracts and this investigation proceeds in the context of a recognised need for proposals for reform. To this end, in chapters 1 and 2 the social climate in which the Acts of 1664, 1710, 1835 and 1845 are enacted, and their purpose and scope, is identified. In chapter 3 the case for the proposition that the Acts of 1664, 1710 and 1835 are in force in New Zealand is made out and this is followed in chapter 4 by an attempt to explain the motivation behind the enactment of the colonial Acts of 1881 and 1894. Included in this chapter is an outline of the difficulties inherent in both the language of these Acts, and the construction applied to them by the Courts. Chapter 5 is devoted to ascertaining the actual scope of the law of gaming and wagering contracts in New Zealand today and in the penultimate

chapter the impact upon, and the implications for that law, of the Illegal Contracts Act 1970 is discussed. Each section is, where appropriate, accompanied by specific proposals for reform, and those proposals are brought together in summary form in chapter 7.

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CHAPTER 1

THE ACTS OF CHARLES II (1664),  
ANNE (1710) AND WILLIAM IV (1835)

[1.01] Gaming (or Gambling)<sup>1</sup> and Wagering (or Betting)<sup>2</sup>

Gaming has been defined as:

"... playing at any game [whether of chance or skill and whether lawful or unlawful] for stakes - that is to say, for money or money's worth, to be obtained by the winner from the loser ..."<sup>3</sup>

Wagering, on the other hand, is a quite different species of activity, an accurate description of which cannot be shortly stated. And whilst in later chapters it will be necessary to examine the legal elements of wagering and betting in some

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1. The terms "gaming" and "gambling" are invariably treated as being synonymous and they will be so regarded in this work. For interesting commentaries on the usage of the terms see Oakes v. Edwards [1918] N.Z.L.R.746; Fuller v. Fouhy (1905) 24 N.Z.L.R.753; Marshall v. Green (1906) 26 N.Z.L.R. 161; in Weathered v. Fitzgibbon [1925] N.Z.L.R. 331, 333 the use of the terms was accurately identified by Salmon J. in the comment "...Gaming - or, to use a more popular equivalent, gambling - means ..."
  2. The terms "wager" and "bet" are often used synonymously but their meaning can vary according to their use in particular statutes. See e.g. 4 Halsbury's Laws of England (4th ed.) p.3, para.1. The distinction alluded to there is not important in New Zealand where the terms "bet" and "wager" are used interchangeably. It will be demonstrated in later paragraphs that it is, however, important to distinguish between a wager (or bet), and a wagering (or betting) contract.
  3. Per Salmon J. in Weathered v. Fitzgibbon, note 1, at p.333; and see Lockwood v. Cooper [1903] 2 K.B. 428 and further cases cited Vol.4 Halsbury's Laws of England (4th ed.), p.4, para.2, footnote 1.

detail<sup>4</sup> for present purposes a wager might be sufficiently described as arising when:

"... two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake."<sup>5</sup>

Thus, and generally speaking, where the participants in a game of cards (or any other game) hazard money on the result of the game they are gaming, whilst bystanders who hazard their fortunes on the result are betting or wagering on the game. But a wager need not, of course, be on the result of a game, and nor need the contingency necessarily be, as Hawkins J. described it, a "future uncertain event"; it suffices if the participants have risked their stakes to the accuracy of their memories or knowledge of the details of a past event.

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4. Especially in the context of wagering contracts, post, chapt.4.
  5. Per Hawkins J. in Carlill v. Carbolic Smoke Ball Company [1892] 2 Q.B. 484, 490.

[1.02] Wagering and Gaming in England

Although wagering and gaming have long been popular pastimes of mankind<sup>1</sup> there is clear evidence that in seventeenth and eighteenth century England they were particularly widespread, extravagant and ruinous practices. Blackstone identified gaming as:

"... an offence of the most alarming nature; tending by necessary consequence to promote public idleness, theft and debauchery among those of a lower class: and, among persons of a superior rank, it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honour and virtue, and too often hath ended in self-murder."<sup>2</sup>

And earlier, Charles Cotton, writing in 1674,<sup>3</sup> also complained about the extent of wagering and gaming in his time. He identified a class of gamesters (he called Rooks) who made it their profession to

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1. The universality and antiquity of gambling is the subject of an interesting account in the first chapter to the History of Gambling in England, John Ashton (1898).
  2. Blackstone, Commentaries, book IV, p.171, first published in 1769.
  3. The Compleat Gamester. Parts of this book were in fact published anonymously in 1669 under various titles such as "The Nicker Nicked", and "The Cheate of Gaming Discovered". See also Richard Seymour, Compleat Gamester (1734) which drew heavily on Cotton's book.

fleece the young gentlemen, cashiers and apprentices in gaming houses and clubs. These places he called "hells" and "ordinarys", and speaking of their occupants and their habits he wistfully observed:

"... an ordinary serves as a nursery for Tyburn; for if any one will put himself to the trouble of observation, he shall find that there is seldom a year wherein there are not some of this gang [of Rooks] hang as precious jewels in the ear of Tyburn. Look back and you will find a great many gone already, God knows how many are to follow."<sup>4</sup>

Cotton describes the gambling dens of that time as places of continual drinking and brawling where the difference between the rich and poor hung simply on the throw of a dice. They were places where men lost their estates and won them again, but could not be content until they had lost them again irrecoverably. But the extent and nature of gaming in Cotton's time, and the impression it made upon him, are best measured by his colourful description of gaming itself. He describes it as:

"... an enchanting witchery, gotten betwixt idleness and avarice: an itching disease, that makes some scratch the head, whilst others, as if they were bitten by a Tarantula, are laughing themselves to death: or lastly, it is a paralytical distemper,

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4. Ibid., at p.3.

"which seizing the arm the man cannot choose but shake his elbow. It hath this ill property above all other vices, that it renders a man incapable of prosecuting any serious action, and makes him always unsatisfied with his own condition; he is either lifted up to the top of mad joy with success, or plunged to the bottom of despair by misfortune, always in extremes, always in a storm; this minute the gamester's countenance is so serene and calm, that one would think nothing could disturb it, and the next minute so stormy and tempestuous that it threatens destruction to itself and others; and as he is transported with joy when he wins, so losing he is tossed upon the billows of a high swelling passion, till he hath lost sight of both of sense and reason."<sup>5</sup>

So extensive was gaming during the seventeenth century that in 1714 Theophilus Lucas was able to write a book on the lives of the gamesters.<sup>6</sup> With few exceptions, the gamesters who attracted his attention ended their lives in the most wretched circumstances, many by their own hands. Their backgrounds were varied, however, some coming from rich, middle class as well as the very poorest families. Few made their fortunes, and those who did not, visited their ruination on their wives and children - as well as themselves. And occasionally, when every other vestige of property and honour had been stripped away by a run of exceptionally bad luck an English wife could find her self the stake for play. Steinmetz asserts that there was a

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5. Ibid., at p.1.

6. Lives of the Gamesters (1714), reprinted in Games and Gamesters of the Restoration.

tradition of such stakes having been laid and lost in England.<sup>7</sup> And in support of his claim he alludes to a remarkable case on record as having occurred in 1665 - during the Plague of London.<sup>8</sup> The story is too good to pass by. In that year Captain Disbrowe of the King's body-guard lost a considerable sum of money to 'a notorious debauchee, a gambler and a bully, named Sir Paul Paravicin'. When Disbrowe had exhausted his resources Paravicin alluded to Disbrowe's wife and explained, "I mentioned your wife, Captain Disbrowe, not with any intention of giving you offence, but to show you that, although you have lost your money, you have still a valuable stake left."<sup>9</sup> The key to the Captain's wife's abode was produced and thrown on the table, the Knight hazarding all his winnings against the foolish soldier's disgraceful pledge. When the dice stopped rolling Disbrowe had lost all. But on Paravicin calling upon the former's wife to collect he found her touched by the plague. So a duel settled the debt - and the Captain's life; but whilst his wife's honour survived the game she too lost her life - to the plague.

During the eighteenth century gaming took on an air of respectability in and around London with the emergence of a number of 'Gentlemen's

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7. Andrew Steinmetz, *The Gaming Table* (1870) Vol.1, p.45.

8. *Ibid.*

9. *Ibid.*, at p.46.

Clubs'.<sup>10</sup> But as Steinmetz reveals in his writings of the 'goings on' in these places, they were responsible for the rape of many a noble fortune. In Brooke's Club in St. James's Street the lowest stake was £50 - a considerable sum at that time - and a young gentleman could commonly expect to win or lose £10,000 during an evening's play. White's Club was famous for both gaming and betting. Lord Lyttleton, writing to Dr. Doddridge in 1750 said of White's:

"The Dryads of Hogley are at present pretty secure, but I tremble to think that the rattling of a dice-box at White's may one day or other (if my son should be a member of that noble academy) shake down all our fine oaks. It is dreadful to see, not only there, but almost in every house in town, what devastations are made by that destructive fury, the spirit of play."<sup>11</sup>

But White's fame, or perhaps its infamy, arose also from a record of the bizarre bets made there. Literally everything was made the subject of a bet - and occasionally to the detriment of the subject. Such bets became legends. For example one day a man collapsed at the door of White's establishment and on his being carried inside odds were immediately offered - was he dead or not? And when some humane

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10. Discussed by Steinmetz, note 7, Vol. II, Chapter VI; White's and Brooke's were the most famous of the 18th century clubs, whilst Crockford's, established in 1827 was the most famous of them all. See also Ashton, note 1, Chapter VI.

11. Quoted in Steinmetz, *ibid.*, at p.181.



bystander proposed to bleed the poor unfortunate, he was over-ruled because to do so would destroy 'the fairness of the bet'. The fate of the victim is not known. But in a similar incident an unfortunate waiter in a Westminster tavern who collapsed in a fit whilst serving some 'young men of distinction' was denied medical assistance:

"... since, by the tenor of the bets, he was to be 'left to himself' and he died accordingly."<sup>12</sup>

And even murder was legitimised by a wager. In 1744 a White's member bet £1500 that a man could live 12 hours under water. He then hired a 'desperate fellow' and sunk him in a ship by way of experiment. Neither the ship nor the man re-appeared, but undeterred the better was to find another man and ship, and try again.<sup>13</sup>

From all accounts betting was as ruinous in England as gaming. During the reign of Elizabeth I horse-racing flourished and is said to have been carried to such an excess that many of the nobility were ruined.<sup>14</sup> Charles II gave plates each valued at 100 gns during his reign, and gave

12. These two instances are recorded by Steinmetz, *ibid.*, at pp.182-183.

13. *Ibid.*

14. The history of racing in England has been traced in a two volume work by James Rice, *History of the British Turf* (1879). See also Steinmetz and Cotton, *supra*, and John Ashton, *The History of Gambling in England* (1898).

considerable encouragement to the sport - as he did to all forms of gambling. During the eighteenth century betting on races was extremely heavy. Lord Foley is said to have lost an estate of £1,800 a year and £100,000 in ready money at Newmarket, Ascot and Epsom, and Charles James Fox, whose gaming exploits are legend, squandered a number of fortunes there.<sup>15</sup> The extravagance of his betting is demonstrated by two of the many examples cited by Steinmetz. At a Newmarket meeting in 1772 he won £16,000 whilst on the same course at a meeting in 1789 he won not less than £50,000. And Fox was ruined by his betting and gaming? So consistent was his indebtedness to the 'Jew money-lenders' his backroom was known as, and called by him, his 'Jerusalem Chamber'.<sup>16</sup>

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15. Anecdotes of Fox's career on the courses and at the gaming tables are detailed by Steinmetz, note 7, at p.307 ff. and Vol.2, p.355 ff.

16. Ibid., Vol. 1 at p.309.

[1.03] The Act of Charles II (16 Car.II, c.7 (1664)).

Whereas wagering was generally lawful in England prior to the 19th century,<sup>1</sup> playing at games did not enjoy the same status under the law. The effect of a succession of statutes from the reign of Richard II<sup>2</sup> was to render most gaming (even of skill) unlawful; whether from the description of the game,<sup>3</sup> or the circumstances<sup>4</sup> or places<sup>5</sup> in which, or the persons<sup>6</sup> by whom, the games were played. But, as demonstrated in the previous paragraph, that did not restrain the gambling instincts of Englishmen.

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1. But as later paragraphs will show not all wagers were enforceable.
2. The statute 12 Rich.II, c.6 (1388). It did not specifically declare gaming unlawful but rather directed that servants and labourers were to "have bows and arrows and use the same on Sundays and holidays and leave off all plays of tennis or football and other games called coits, dice, casting of the stone, kails and other such importune games."
3. For example the statutes 12 Geo.II, c.28, s.2, (1738), 13 Geo.II, c.19, s.9 (1739), 18 Geo.II, c.34, s.1. (1744).
4. For example the statutes of 16 Car.II, c.7, ss.2 and 3 (1664), 9 Anne, c.14, s.5 (1710).
5. For example the statutes 33 Hen.VIII, c.9, ss. 11, 12 (1541), 18 Geo.II, c.34, s.1 (1744).
6. For example the statutes 33 Hen.VIII, c.9, s.16 (1541), 9 Anne, c.14, s.6 (1710), 25 Geo.II, c.36, s.8 (1756).

Gambling was so excessive in 1664 that Charles II,<sup>7</sup> an inveterate gambler himself, was moved to enact legislation to deal with the ruinous consequences of excessive gambling.

That legislation, the statute 16 Car.II, c.7 (1664) was intituled "An Act against deceitful, disorderly, and excessive gaming", and its purpose and the circumstances giving rise to it are clearly revealed in the preamble, which reads:

"Whereas all lawful games and exercises should not be otherwise used, than as innocent and moderate recreations, and not as constant trades or callings to gain a living, or make unlawful advantage thereby: (2) and whereas by the immoderate use of them, many mischiefs and inconveniences do arise, and are daily found, to the maintaining and encouraging of sundry idle, loose and disorderly persons in their dishonest, lewd and dissolute course of life, and to the circumventing, deceiving, couzening and debauching of many of the younger sort, both of the nobility and gentry, and others to the loss of their precious time, and

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7. The following extract from the diary of John Evelyn dated 6.1.1662 is quoted by C.H. Hartman in his introduction to Games and Gamesters of the Restoration at p.X.

"This evening, according to custom, His Majesty opened the revells of that night by throwing the dice himself in the privy chamber, where was a table set on purpose, and lost his £100. (The year before he won £1,500). The ladies also played very deep. I came away when the Duke of Ormond had won £1,000 and left him still at passage, cards and etc. At other tables, both there and at ye Groom-porter's, observing the wicked folly and monstrous excess of passion amongst some losers: sorry I am that such a wretched custom as play to that excess should be countenanced in a Court which ought to be an example of virtue to the rest of the Kingdom."

"the utter ruin of their estates and fortunes, and withdrawing them from noble and laudable employment and exercises."

As the preamble suggests, this Act was aimed at both dishonest and excessive gambling. And, in relation to the latter, the provisions reveal a concern by the legislature for the ruinous practice of committing, by way of mortgage, one's estate and future income to the throw of a dice once a player's ready money had run out. To rectify this s.3 was enacted "... for the better avoiding and preventing of all excessive and immoderate playing and gaming for the time to come". That section provided, inter alia, that where any player of a game, or any better on the sides or hands of those playing:

"... shall lose any sum or sums of money, or other thing or things so played for, exceeding the sum of one hundred pounds at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party and parties who loseth or shall lose the said monies, or other thing or things so played or to be played for, above the said sum of one hundred pounds, shall not in that case be bound or compelled or compellable to pay or make good the same."

And by subsection (3) of s.3 it was further provided:

"but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements and other acts, deeds and securities whatsoever, which shall be obtained, made, given, acknowledged or entered into for security or satisfaction of or for the same or any part thereof, shall be utterly void and of none effect."

Section 3 of the 1664 Act came under judicial scrutiny in a number of cases in the years immediately following its enactment and the inclination of the Judges, as revealed in the reports, was to construe it liberally in favour of the suppression of excessive gambling. In Edgebury v. Rosindale<sup>8</sup> the defendant and plaintiff ran their horses against each other for £100 and agreed to run again for £200 a few days later. On an action being brought by the plaintiff the Court held that the contract was for more than £100 on "tick or credit", and said:

"... the statute being made to suppress the use of excessive gaming, shall be construed in the most extensive manner that can be to answer to that end."<sup>9</sup>

And, similarly in Hudson v. Malin,<sup>10</sup> a case where one played, one betted on the side and another lost to both giving each bonds for £90 a piece, both bonds were held void under the statute although given to several persons, and although in respect to a game with one and a bet with another. The reason for the decision being that:

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8. (1673), 2 Lev.94.
  9. Ibid., at p.94. Similarly in Danvers v. Thistlethwaite (1669), 1 Lev.244 the defendant won a watch and £100 in a match. He accepted the watch, and a ticket for the money, in payment. The 1664 Act was held to apply.
  10. (1676), 1 Freem.432.

"... the Judges will construe this statute as extensively as may be for suppressing of gaming."<sup>11</sup>

But in Hill v. Pheasant<sup>12</sup> whilst the circumstances were similar to those in Edgebury v. Rosindale the Judges were unable to reach agreement. The defendant lost £80 to the plaintiff at gaming at one sitting and gave a bond in that amount. He also agreed to meet and play again two days in the future. At that meeting he lost a further £60. The issue was whether the bond was avoided by the statute. Winham and Atkins JJ. were of the view that the Act applied there being a "... fraud apparent to elude the statute".<sup>13</sup> North C.J. and Ellis J. were, however, of a contrary view and distinguished Edgebury v. Rosindale as a case where £100 plus another race for £200 on "tick or credit" was the amount lost by the defendant. In Hill v. Pheasant on the other hand, at most only £80 plus another meeting to play was involved, the two amounts being lost at two sittings.

Whilst these cases demonstrate that the Courts were prepared to adopt a construction of the statute that was particularly favourable to the realisation of the legislative intent - as

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11. Ibid., at p.432. The principle in Hudson v. Malin was applied in Noell v. Reynolds (1680), 1 Show.185, but cf. Stanhope v. Smith (1697), 5 Mod.351.

12. (1675), 1 Freem.200.

13. Ibid., at p.200.

revealed in the preamble -<sup>14</sup> it was too narrow in its scope to achieve its declared object of suppressing "excessive gaming". A principal deficiency in this regard was the failure of the Legislator to realise that fortunes are relative one to the other and whereas a loss of £100 to one man may prove to be excessive, to another it may not.<sup>15</sup> Indeed, a poor man might gamble away his whole estate on "tick or credit" without reaching the £100 limit. Also, the limitation of the application of the Act to betting or gaming on "tick or credit" was particularly unfortunate as the shameful case of Firebrasse v. Brett<sup>16</sup> clearly demonstrates. Sir Bazil Firebrasse "fell into play" with the defendant and Sir William Russell after a dinner at his home and lost to them £900 in ready money, which the defendant Brett succeeded in taking away with him. Sir Bazil, being somewhat inflamed with wine, then brought down a bag of guineas containing about £1,500. Brett won that also, and had it in his possession when it was seized from him by Sir Bazil and his servants as he was leaving. Sir Bazil brought an information against Brett for playing with false dice but Brett was acquitted. He then brought an action in trespass against Brett and prayed for relief against the debt.

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14. In Pope v. St.Leger (1694), Carth.322 however, the Court was not prepared to apply the Act where the plaintiff's claim related to a sum of money won on a wager as to the rules of backgammon. The statute touched only the chance of play, not the rules of play.
15. Select Committee on Gaming Report, 20th May 1844, p.V, where this limitation in the Act is discussed.
16. (1687), 1 Vern.489.



But the Court, whilst expressing strong disapproval of such excessive gaming, found no grounds for declaring the play unlawful.

But perhaps the most substantial flaw in this, and subsequent gaming statutes, was their failure to recognise the force of "honour" in the lives of gentlemen - and the lack of it in the lives of those who, like vultures, hovered over the fortunes of the former - with dice in hand. Section 3 of the Act of 1664 contained a provision that the winner of any amount within the statute should forfeit treble the value thereof, one moiety going to the King, the other to the informer. But as Blackstone observed, with reference to this provision:

"Yet it is proper that laws should be, and be known publicly, that gentlemen may consider what penalties they wilfully incur, and what a confidence they repose in sharpers; who, if successful in play, are certain to be paid with honour, or, if unsuccessful, have it in their power to be still greater gainers by informing."<sup>17</sup>

This so called 'honour' was apparently an extremely strong force in the lives of many gamblers. Tacitus, writing of the ancient Germans and the extent to which they were bewitched with the spirit of gambling said:

"They addict themselves, to dice (which is wonderful) when sober, and as a serious employment; with such a mad desire of winning or losing, that, when stript of everything else, they will stake at last their liberty and their very selves. The

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17. Commentaries, Book IV, p.172.

"loser goes into a voluntary slavery, and though younger and stronger than his antagonist, suffers himself to be bound and sold. And this perseverance in so bad a cause they call the point of honour: ea est in re prava pervicacia, ipsi fidem vocant."<sup>18</sup>

Alluding to this Blackstone cynically suggested:

"One would almost be tempted to think Tacitus was describing a modern Englishman"<sup>19</sup>

Andrew Steinmetz refers to some amusing anecdotes in the life of Charles James Fox, which, beneath the humour, convey at least an impression of the part that honour was expected to play in a gambler's affairs:

"...Fox had a gambling debt to pay to Sir John Slade. Finding himself in cash, after a lucky run at Faro, he sent a complimentary card to the Knight, desiring to discharge the claim. Sir John no sooner saw the money than he called for pen and ink, and began to figure. 'What now?' cried Fox. 'Only calculating the interest,' replied the other. 'Are you so?' coolly rejoined Charles James, and pocketed the cash, adding - 'I thought it was a debt of honour. As you seem to consider it a trading debt, and as I make it an invariable rule to pay my Jew-creditors last, you must wait a little longer for your money.' ... On another occasion he won about £8000; and one of his bond-creditors, who soon heard of his good luck, presented himself and asked for payment. 'Impossible, sir,' replied Fox; 'I must first discharge my

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18. De Mor. Germ. c.24; cited in Blackstone, Commentaries, Book IV, p.172.

19. Ibid.

"debts of honour.' The bond-creditor remonstrated, and finding Fox inflexible, tore the bond to pieces and flung it into the fire, exclaiming - 'Now, sir, your debt to me is a debt of honour.' Struck by the creditor's witty rejoinder, Fox instantly paid the money."<sup>20</sup>

This idea of a gaming debt as a 'debt of honour' was hardly calculated to ensure the attainment of the objectives of the Act of Charles II. Indeed, in the absence of provisions creating specific penal offences of excessive gaming, an element of 'dishonour' was inherent in any resort to or use of the shield provided by the Act.

[1.04] The Act of Anne (9 Anne, c.14 (1710)).

The failure of the 1664 Act to significantly suppress gaming was recognised in the preamble to the Act which followed it, namely the statute 9 Anne, c.14 (1710), entitled "An Act for the better preventing excessive and deceitful gaming."<sup>1</sup> The preamble read:

"Whereas the laws now in force for preventing the mischiefs which may happen by gaming, hath not been found sufficient for that purpose; therefore for the further preventing of all excessive and deceitful gaming, be it enacted..." etc.

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20. The Gaming Table, Vol.1 at p.320-321.

1. Interestingly enough it was found necessary to provide, by s.9 of the Act, that it should not extend to prevent gaming in any of the Queen's palaces during her residence there.

This Act took a much more rigorous stand against gaming than did the 1664 Act and, in so doing, it supplemented rather than replaced the earlier legislation.<sup>2</sup> The first section of the Act provided, *inter alia*, that

"... all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities, shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent, or advanced for such gaming or betting, aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting, as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; any statute, law, or usage to the contrary thereof in any wise notwithstanding..."

The terms of the Act, in relation to the nature of the games to which it applied were, like its precursor, comprehensive,<sup>3</sup> and it applied to games of skill and chance alike. It applied, for

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2. It did not expressly repeal the statute 16 Car. II, c.7, but clearly superseded the securities provisions. See Howard A. Street, *The Law of Gaming* (1937), p.379, note f, and at p.380.
  3. Per Lord Abinger C.B. in Daintree v. Hutchinson (1842), 10 M. & W. 85; Sigel v. Jebb (1819), 3 Stark 1.

example, to a dog coursing match,<sup>4</sup> cricket,<sup>5</sup> horse racing,<sup>6</sup> and foot races.<sup>7</sup> But in relation to money lent or advanced for betting or gaming the section, whilst avoiding the security, left open the important question as to the status of the contract of loan. In Young v. Moore<sup>8</sup> the view that found favour with the Court was that:

"... as the statute hath made all securities for money won at play void, a'fortiori all parol contracts of this sort are void; and if the money had been paid to the plaintiff, the defendant, or any other person, might have recovered treble the sum and costs, so that this cannot possibly be a debt..."<sup>9</sup>

In Barjeau v. Walmsley,<sup>10</sup> however, an action brought by the plaintiff to recover 120 guineas he had

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4. Daintree v. Hutchinson, *ibid.*
  5. Walpole v. Saunders (1825), 7 D. & R. 130; Jeffreys v. Walter (1748), 1 Wils. 220.
  6. Goodburn v. Marley, 2 Str.1159; Hyams v. Stuart King [1908] 2 K.B.696, 701.
  7. Parker v. Alcock (1831), 1 You. 361.
  8. (1757), 2 Wils.67; and supported in M'Kinnell v. Robinson (1838), 3 M. & W. 434.
  9. *Ibid.*, at p.67-8.
  10. (1746), 2 Str.1249. Similarly in Alcinbrook v. Hall (1766), 2 Wils.309; M'Allester v. Haden (1800), 2 Camp.438; Robinson v. Bland (1760), 1 W.Bl.234; Wettenhall v. Wood (1793), 1 Esp.18.

lent to the defendant to enable him to continue in a game of 5 guinea a time toss succeeded, the Court being of the view that:

"... this was not a case within the Act, for there is not the word contract, as in the Statute of Usury: and the word securities, as it stands in this Act, must mean lasting liens upon the estate. The Parliament might think there would be no great harm in a parol contract, where the credit was not like to run very high; and therefore confined the Act to written securities."<sup>11</sup>

This conflict in the cases caused a deal of uncertainty<sup>12</sup> as to the scope of the provision and although the weight of authority favoured the view in Barjeau v. Walmsley a further Act in 1835<sup>13</sup> and a decision of the Court of Exchequer, Applegarth v. Colley<sup>14</sup> in 1842, subsequently swung the weight of judicial opinion in favour of the view expressed in Young v. Moore.

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11. Ibid., at p.1249.

12. Per Rolfe B. in Applegarth v. Colley (1842), 10 M. & W. 723, 731-2.

13. The statute 5 & 6 Will.IV, c.41, s.1. (The Gaming Act, 1835). It repealed so much of the Acts of 1664 and 1710 as made the "note, bill, or mortgage ... absolutely void" and provided instead that they "should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration."

14. Note 12; approved in Moulis v. Owen [1907] 1 K.B.746; Saxby v. Fulton [1909] 2 K.B.208; Carlton Hall Club Ltd. v. Laurence [1929] 2 K.B.153, but cf. C.H.T.Ltd. v. Ward [1965] 2 Q.B.63, 79.

However, the Court in Barjeau v. Walmsley could be excused for believing that written securities encumbering estates were the principal concern of this legislation for the first section also provided:

"... that where such mortgages, securities, or other conveyances, shall be of lands, tenements, or hereditaments, or shall be such as encumber or affect the same, such mortgages, securities or other conveyances, shall enure and be to and for the sole use and benefit of, and shall devolve upon such person or persons as should or might have, or be entitled to such lands, tenements, or hereditaments, in case the said grantor or grantors thereof, or the person or persons so encumbering the same, had been naturally dead, and as if such mortgages, securities, or other conveyances, had been made to such person or persons so to be entitled after the decease of the person or persons so encumbering the same; ..."

The purpose of this provision was, of course, to provide protection for heirs-at-law and next-of-kin whose succession was jeopardised by an incumbents "false sense of honour". But it also severely penalised winners or lenders who took such securities, in complete disregard of the expectations of those entitled. The severity of this penalty and the nature of the evil the provision sought to combat is well illustrated by the circumstances and the decision in the case of Parker v. Alcock & Others decided in 1831.<sup>15</sup> Parker, in September 1824 engaged to run a foot race against one Metcalfe, for one mile, for £1000, being £500 a side. Parker did not have the money but persuaded two others to

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15. (1831), You. 361.

provide the necessary financial backing. He also managed to persuade them, in their own names, and on behalf of themselves and Parker, to place bets on the race in London. These amounted to £4,371. The race was run, and Parker lost, with the consequence that he and his backers became liable to pay an amount of nearly £5000. On the day the race was run, Parker executed to his backers a conveyance by way of mortgage for securing to them the payment by him of £2000 and interest. The conveyance was made in case they should lay side bets on the race on Parker's account to that amount. There was a further race in which Parker made some gains, but he was indebted to divers other persons in large sums of monies quite apart from the liability he incurred for the stake and bets on the footrace, and the following year he resolved to meet his liabilities by entering into an arrangement with his two backers. The arrangement was that they should pay Parker the sum of £3000 and that he should, in consideration of that amount and the balance of the account respecting the footraces, convey his interest in his estates to them. This he did in August 1825. However, in 1831 the infant, and eldest son of Parker, filed an equity Bill in the Court of Exchequer stating, inter alia, that by virtue of the statute 9 Anne c.14:

"the ... mortgage and the conveyance, upon the execution thereof, enured to and for the use and benefit of, and devolved upon ... [him]; and that he was entitled to the benefit of the same mortgage, and the sum of £2000 and interest thereby secured, in the same manner as if the mortgage had been made to him ..."<sup>16</sup>

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16. Ibid., at p.365.



The defendants put in a general demurrer "for want of equity" but Lord Lyndhurst L.C.B. held, *inter alia*, that not only were the mortgage and the conveyance within the words of the Act but also that the plaintiff was entitled to an account of rents and profits of the estate in addition to a declaration of his rights.<sup>17</sup> The demurrer was dismissed.

If the law reports can be relied upon as any guide, it would seem that the Statute of Anne was only infrequently invoked although the writings of Ashton, Blackstone, Cotton and others<sup>18</sup> suggest that the practice of encumbering estates to satisfy gambling debts was both frequent and ruinous. The provision was subsequently repealed, without explanation,<sup>19</sup> in 1835,<sup>20</sup> but its demise may well

17. The interest was an estate in fee simple. The issue as to whether the mortgagee was entitled to the return of the £2000 advanced for betting was not resolved, Lord Lyndhurst L.C.B. holding that it was not necessary that an offer to repay the amount should appear on the face of the bill, although "the Court may decree in that respect what it shall think proper." (*Ibid.*, at p.371).
18. *Supra*, para.1-02; particularly see Blackstone who complained in his time that "... it is the gaming in high life, that demands the attention of the Magistrate; a passion to which every valuable consideration is made a sacrifice ...". *Commentaries*, Book IV, p.171; and Street, note 2, suggests at p.386 that "...mortgages were frequently given as security for gaming debts."
19. The 1835 Act appears to have been passed without debate and the proceedings in Committee are not on record; see note 20.
20. By the statute 5 & 6 Will.IV, c.41, s.3 (The Gaming Act, 1835).

have been due to a realisation by the legislature that blood is indeed thicker than water, in that the "false sense of honour" that caused the parents ruin, probably also persuaded the expectant child that family honour and poverty were worthier objects than the protection afforded him by the Act.

The limits of the first section of the Act of 1710 in relation to securities for loans for bets were recognised in In re Lister, ex parte Pyke<sup>21</sup> where it was held that there was no objection to loans to pay debts which had already been made and lost. The object of the provision was to discourage loans for betting and once the mischief was done, the bet having been made and the money lost, a loan to the loser to enable him to pay was an enforceable debt. Thus, could honour be preserved and perhaps the spirit of the Act avoided.<sup>22</sup>

In relation to securities for money or valuable things won at play or by wagers on games the 1710 Act virtually superseded that of 1664. And, the deficiency in the earlier Act that had left the poor exposed<sup>23</sup> was remedied by providing that all such securities etc. were void regardless of their value.<sup>24</sup>

21. (1878), 8 Ch.D. 754.

22. In In re Lister, ex parte Pyke Hessel M.R. preferred this "very strict construction" because it was a penal statute. Ibid., at p.757.

23. By the £100 limit, which effectively confined the protection afforded by the Act to the rich and middle class.

24. s.1.

But certainly the most effective protection was provided by s.2 of the Act which provided, inter alia, that:

"any person or persons whatsoever, who shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the the whole, the sum or value of ten pounds, and shall pay or deliver the same, or any part thereof, the person or persons so losing, and paying or delivering the same, shall be at liberty, within three months then next, to sue for and recover the money or goods so lost, and paid or delivered, or any part thereof, with costs of suit ..."

This provision, whilst not specifically declaring bets or games for amounts of £10 or more illegal, effectively prevented actions to recover winnings. Or as Howard A. Street suggests, it "had the practical effect of making such claims useless."<sup>25</sup> And, if a loser was not mindful to recover his losses within the stipulated time the winner was still at risk because by the same section it was also provided that in such a case:

"... it shall and may be lawful to and for any person or persons, by ... action or suit ... to sue for and recover the same, and treble the value thereof, with costs of suit against such winner or winners..."

By s.5 of the same Act it was further provided that a person winning more than £10 at any time or sitting should be liable on conviction on indictment

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25. See note 2, at p.369.

or by information to forfeit "five times the value of the sum or sums of money, or other thing so won ..."

It was these provisions that prompted the action in Smith v. Bond,<sup>26</sup> a case which ultimately created pressure for a Select Committee on Gaming in 1844.<sup>27</sup> However, in spite of these apparently stringent provisions it was not clear whether the 1710 Act barred the recovery of winnings exceeding £10 but not exceeding £100 where the loser had not paid down his money at the time. If the money had not been paid down and it exceeded £100 at one time or sitting s.1. of the statute 16 Car.II, c.9 rendered the winnings irrecoverable. If, on the other hand the money was paid down it could be recovered by the loser with treble the value thereof under s.2 of the statute of Anne. But there was something of a lacuna in the legislation because it did not specifically deal with the half-way house situation where the money was neither paid down at the time nor a security given in respect of it. And, this issue was an important one because if between £10 and £100 in winnings at one time could be recovered by action a gamester could effectively frustrate the purpose of the legislation. That is, by taking neither the money nor a security and giving credit on the understanding that the money won was to be paid at some time in the future. This dilemma was to give rise to a conflict in Judicial opinion.

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26. See post, Chapter 2.

27. Ibid.

In Bristow v. James<sup>28</sup> the right to recover was preferred, the court holding that s.2 of the 1710 Act merely gave a statutory right to recover which did not render the action on the gaming contract ex delicto. However in Daintree v. Hutchinson<sup>29</sup> and Thorpe v. Coleman<sup>30</sup> the contrary view found favour. In the former case Lord Abinger held that an agreement to pay £100 on the result of (or default in) a coursing match was not recoverable because:

"... The very object of the contract was to make the defendant pay that bet which, being for a sum of above £10, the Act intended to prohibit, and consequently rendered illegal. That being so, it is a contract which cannot be enforced ..."<sup>31</sup>

Rolfe B pointed to s.5 of the Act of 1710 which provided that any person who shall at any one time win more than £10 without fraud was liable to forfeit five times the amount thereof. He was of the view that this provision was penal in nature and that, therefore, the contract was illegal and could not be enforced.<sup>32</sup> Although the view in Daintree v. Hutchinson is preferable the authorities

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28. (1797), 7 T.R.257. Similarly in Barjeau v. Walmsley note 10.

29. Note 3.

30. (1845), 1 C.B.990. And see similarly Applegarth v. Colley, note 12.

31. *Ibid.*, at p.99.

32. *Ibid.*, at p.100.

remain inconclusive.<sup>33</sup>

A further difficulty with s.2 of the 1710 Act was in determining whether the amount won in contravention of the section was won at "any time or sitting".<sup>34</sup> This requirement had earlier given rise to some uncertainty after the Act of Charles II,<sup>35</sup> but it was overcome in part in 1744 when, by the statute 13 Geo.II, c.34 it was provided that any person winning or losing at play or betting at any one time the sum or value of £10 or within 24 hours the sum or value of £20 committed an offence and was liable to a fine of five times the value of the sum so won or lost.<sup>36</sup> And, by s.9 if any person offending against the section "discovered" any other person so offending, he was entitled to be discharged and indemnified from all penalties. Thus gaming or wagers within the meaning of the 1710 Act which amounted to or exceeded £20 in 24 hours were illegal and unenforceable whether at one sitting or not.<sup>37</sup>

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33. In Applegarth v. Colley, note 12, at p.732, Rolfe B was of the view that "...the statute of Anne, in connection with the 5 & 6 Will.IV, c.41 must be taken to avoid all contracts for the payment of money won at play."

34. See, for example, Bones v. Booth (1779), 2 W.B1.1226.

35. See, for example, Edgebury v. Rosindale (1673), 2 Lev.94; Hill v. Pheasant (1675), 1 Freem.200.

36. Section 8, The Gaming Act, 1744.

37. s.11 of the statute 13 Geo.II, c.34 legalised horse racing for plates or prizes of £50 or upwards and this provision gave rise to considerable controversy as to whether the Acts of Charles II and Anne applied to such prizes, see Street, note 2, pp.370-373.

[1.05] The Gaming Act, 1835 (5 & 6 Will.IV, c.41 (1835))

The most difficult problem arising out of the Acts of 1664 and 1710 concerned the status of securities avoided by those Acts after they had passed into the hands of innocent third parties. At first it was thought that the innocent holder might enforce the security. In Hussey v. Jacob<sup>1</sup> the plaintiff sued on a bill for 120 gns he obtained in satisfaction of a debt incurred by the drawer in a game of hazard. The players had played upon tick and credit without ready money. The defendant pleaded the Act of Charles II, whilst the plaintiff argued that it would endanger the credit of bills of exchange to the detriment of the public trade of England - both domestic and foreign - if they could be defeated by such a collateral matter. But Chief Justice Holt, whilst rejecting the applicability of that contention to the facts of the particular case, said:

"... as to the inconveniency concerning trade, there can be none in this particular case; because the bill is gone no further than to the first hands, (viz) to the hands of the plaintiff Hussey who won the money; and so no damage could here accrue to any person but to him who is certainly a person within the statute. But if this bill had been negotiated and indorsed to any other person for value received, then it might have another consideration."<sup>2</sup>

Judgment was accordingly entered for the defendant.

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1. (1696), Carth.356.

2. Ibid., at p.357.

In Bowyer v. Bampton,<sup>3</sup> however, a different view of the matter was taken. The plaintiff brought his action on several promissory notes given by the defendant to one John Church for money advanced by Church to the defendant to enable him to game with dice. Church had knowledge that the money was to be used to that end. But when he, Church, endorsed them to the plaintiff for a full and valuable consideration the plaintiff was not privy to, and nor did he have any notice that, the notes were given for money lent for the purpose of gaming. The court was of the view that though it was of some inconvenience to an innocent man, s.1 of the Act of Anne prevailed and the bills were void,<sup>4</sup> and the statement quoted above by Holt C.J. was expressly referred to for the purpose of dissenting from it.<sup>5</sup> Bowyer v. Bampton settled the law on this question. Securities avoided by statute were void even in the hands of innocent third parties. In 1835 the three section statute 5 & 6 Will.IV, c.41 was passed to remedy the injustice of this rule. That statute provided that so much of the Acts of 1664 and 1710 as avoided any note, bill or mortgage was repealed, and it enacted that such notes, bills or mortgages should instead, 'be deemed

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3. (1741), 2 Str.1155.

4. Ibid.

5. The statement of Holt C.J. in Hussey v. Jacob is also alluded to by Lord Mansfield in Lowe v. Waller (1781), 2 Dougl.736, 743 where he said:  
 "Now, as to gaming, the case of Bowyer v. Bampton is a direct and solemn authority. The decision was after two arguments; and Lee, Chief Justice, observed, that what Lord Holt had said, in Hussey v. Jacob, was extra-judicial, and that he had seen a report, wherein notice was taken, that all the learned part of the Bar wondered at it."



and taken to have been made, drawn, accepted, given, or executed for an illegal consideration'. By section 2 of the 1835 Act it was also provided that if any person who had made, drawn, given, or executed any such note, bill, or mortgage, were compelled by any indorsee, holder, or assignee, to pay the amount of money secured by it, he was deemed to have paid on account of the person to whom the security was originally given, and could recover that amount as a debt due and owing by that person to him. It will be necessary to return to this statute in a later chapter<sup>6</sup> in order to identify and explain some problems of interpretation that arose after a further Gaming Act was enacted in 1845.<sup>7</sup> But it is convenient to allude at this point in a general way to a number of matters that help identify the scope of, and policy behind, the 1835 statute.

A curious lacuna appears in the 1835 Act. For whilst it purports to remedy the injustice to innocent holders for value of securities avoided by the Acts of Charles II and Anne, in fact the only securities referred to in the Gaming Act 1835 are bills, notes and mortgages. As Street suggests,<sup>8</sup> the statute has been interpreted, and "not without a show of authority", as applying to all the securities embraced by the Act of Anne. That is, to bills, notes and mortgages, as well as "bonds, judgments, ... or other securities or conveyances whatsoever".<sup>9</sup> But the better view, as

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6. Post, chapter 7.

7. The Statute, 8 & 9 Vict., c.109, The Gaming Act, 1845.

8. The Law of Gaming (1937) at p.384-5.

9. Section 1 of the Act of Anne. See also s.3 of the Act of Charles II.

Street explains, is that the Act should be confined to its express terms.<sup>10</sup> However the 1835 Act applies only to securities given in circumstances within the Acts of Charles II and Anne. Thus, whilst securities given for debts incurred in gaming or bets on games are included, straight wagers are not.<sup>11</sup> And the games embraced by the Act are those enumerated in the Act of Charles II.<sup>12</sup>

The general purpose and effect of s.1 of the Act of 1835 was identified by Fletcher Moulton L.J. in Hyams v. Stuart King<sup>13</sup> when he said, speaking of a security in the form of a cheque in that case, that the Act of 1835 declared that such securities:

"... instead of being void, should be deemed to have been given for an illegal consideration. This amendment of the law [by the Act of 1835] protected innocent holders for value, while it left the parties to the transaction and any holder taking such a cheque with notice of the nature of the

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10. The term 'bills' in the 1835 Act does, however, include cheques, see e.g. Moulis v. Owen [1907] 1 K.B.746; Sutters v. Briggs [1922] A.C.1.

11. Because, it will be recalled, the Acts of 1664 and 1710 concerned themselves only with gaming and bets on the sides of the hands of those playing.

12. That is, those enumerated in the Act of 1664 and 1710. They include: cards, dice, tables, tennis, bowles, skittles, shovel-board, cockfighting, horse races, dog races, foot races, "...or other game or games whatsoever." See Vol.18 Halsbury's Laws of England, (3rd ed.) p.179, note t; and Vol.4 of the 3rd edition p.77, note 2.

13. [1908] 2 K.B.696.

"original consideration in the same position as they had been under the statute of Anne."<sup>14</sup>

And s.2 of the Act of 1835 was designed to ensure that the amendment to the law effected by s.1 was, as Viscount Birkenhead explained in Sutters v. Briggs<sup>15</sup>:

"... without prejudice to the rule that the loser of a bet could recover from the winner the amount paid by him in relation thereto [under s.2 of the Act of Anne]."<sup>16</sup>

[1.06] Conclusion on the Acts of Charles II (1664), Anne (1710) and Will.IV (1835)

The early statutes generated a considerable volume of litigation which, unfortunately, too often added to uncertainty rather than clarity in the law. The cases, as well as the confusion, are well

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14. Ibid., at p.714; and see the almost identical statement to the same effect by the same Lord Justice in Moulis v. Owen, note 10 at p.762; and Bankes L.J. in Dey v. Mayo [1920] 2 K.B.346, 355. And see also Fitch v. Jones (1855), 24 L.J. Q.B.293, 295 where the burden of proof in cases falling under this section is explained. Lord Campbell C.J. said, where fraud or illegality is established, there is "... a presumption of law that there was no consideration ... This presumption ... must be rebutted by the holder [of a cheque] showing affirmatively that he gave value ... But when there is a mere absence of consideration no such presumption arises, and therefore there is no occasion for the plaintiff to rebut it."

15. [1922] A.C.1.

16. Ibid., at p.11.

documented by Howard A. Street.<sup>1</sup> But in this work, the writer has concentrated only on those cases that are helpful in conceptualising the broad policy objectives, the operation of, and the deficiencies inherent in the statutes of Charles II and Anne. The contemporary importance of these Acts and those of 1835 and the later Act of 1845 will emerge more clearly in later paragraphs, where the extent to which these statutes have application to New Zealand Wagering and Gaming Laws will be examined.

But the essential feature of the Acts of 1664 and 1710 was their policy objective which, as expressed in their titles, was to prevent excessive gaming and provide relief from its consequences to losers. In each Act not only were the contracts and securities caught by them rendered void and unenforceable, but in addition the winners or assignees, etc. were subjected to certain penalties. The intention, therefore, was clearly to render the legal obligations unenforceable in order to put down gaming rather than to simply relieve the courts of the indignity of trying disputes arising out of gaming and wagering. But even as instruments for the suppression of gaming they were far from successful because it is clear from the writings of the historians of gaming in England already mentioned that gaming was very prevalent after those Acts. But perhaps, as Blackstone observed:

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1. Law of Gaming (1937).

"... careful has the legislature been to prevent this destructive vice: which may show that our laws against gaming are not so deficient, as ourselves and our Magistrates in putting those laws in execution."<sup>2</sup>

But whilst laws against gaming may have been sufficient - if enforced - neither the Acts of 1564 or 1710 provided any real protection against the destructive effect of betting.<sup>3</sup> Only bets on those games specified in the Acts were by statute rendered unenforceable so that except in so far as the Judges were able to employ suitable 'subterfuges, contrivances and evasions'<sup>4</sup> to avoid it, most wagers were enforceable in the courts. Not surprisingly, the Legislature in the Gaming Act, 1845, adopted more sweeping language in its provision dealing with gaming and wagering contracts.

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2. Commentaries, Book IV, p.173-4.
  3. Because they only applied to games and bets on games.
  4. Per Lord Campbell in Ramloll Thackoorseydass v. Soojumnul (1848), 6 Moore P.C.300, 310 (Bombay).

## CHAPTER 2

### THE GAMING ACT, 1845

#### [2.01] Gaming - The Problem before the Act

The Acts of 1664 and 1710 did little to suppress gaming in England. In the early years of the 19th century gaming and wagering reached almost epidemic proportions. Writing in 1870, Andrew Steinmetz<sup>1</sup> said:

"No nation has exceeded ours in the pursuit of gaming. In former times - and yet not more than 30 or 40 years ago - the passion for play was predominant among the highest classes.

Genius and abilities of the highest order became its votaries; and the very framers of the laws against gambling were the first to fall under the temptation of their breach! The spirit of gambling pervaded every inferior order of society. The gentleman was a slave to its indulgence; the merchant and the mechanic were the dupes of its imaginary prospects; it engrossed the citizen and occupied the rustic. Town and country became a prey to its despotism. There was scarcely an obscure village to be found wherein this bewitching basilisk did not exercise its powers of fascination and destruction.

Gaming in England became rather a science than an amusement of social intercourse. The 'doctrine of chances' was studied with an assiduity that would have done honour to better subjects; and calculations were made on arithmetical and geometrical principles, to determine the degrees of probability attendant on games of mixed skill and chance, or even on the fortuitous throws of dice. Of course, in spite of all calculations, there

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1. The Gaming Table (1870), Vol.I.

"were miserable failures - frightful losses. The polite gamester, like the savage, did not scruple to hazard the dearest interests of his family, or to bring his wife and children to poverty, misery, and ruin."<sup>2</sup>

By 1820 there were estimated<sup>3</sup> to be upwards of 50 gaming houses and clubs - or "Hells" as they were commonly called - in London alone, and there was a graduated scale of establishment to cater for the needs of all - from the highest Peers of the Realm to the lowest highwayman, burglar and pickpocket.<sup>4</sup> Steinmetz asserts that "thousands upon thousands" were ruined in these establishments in the vicinity of St. James's Square, and the victims came from all walks of life. He concludes:

"It was gambling, and not the burdens of the long war, nor the revulsion from war to peace, that made so many bankruptcies in the few years succeeding the Battle of Waterloo. It was the plunderers at gaming tables that filled the gazettes and made the gaols overflow with so many victims."<sup>5</sup>

But not all were losers; Crockford's Club, established in 1827 - and undoubtedly the most noble of the gambling 'hells' - netted its owner a fortune. Indeed it made Crockford, a fishmonger, into a

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2. Ibid., at pp.24-25.
  3. Ibid., at p.122.
  4. Ibid.
  5. Ibid., at pp. 128-9.

millionaire.<sup>6</sup> But at what cost to others? Some idea of the nature and extravagance of gambling at the beginning of the 19th century is provided by the following notices from the Morning Post quoted in John Ashton's book:

"5 April 1805. The sum lately lost at play by a lady of high rank is variously stated. Some say it does not amount to more than £200,000, while others assert that it is little short of £700,000. Her Lord is very unhappy on the occasion, and is still undecided with respect to the best mode to be adopted in the unfortunate predicament."

"30 June 1806. The Marquis of H----- is said to have been so successful at play, this season, as to have cleared £60,000. The Earl of E----- has won upwards of £50,000, clear of all deductions. A Right Reverend is stated to be amongst those who are minus on this occasion."

8 July 1806. A certain Noble Marquis, who has been very fortunate, this season, in his gaming speculations, had a run of ill-luck last week. At one sitting his Lordship was minus no less a sum than thirteen thousand pounds!"

"15 July 1806. The noble Marquis, who has been so great a gainer this season, at hazard, never plays with anyone, from a PRINCE, to a Commoner, without having the stakes first laid on the table. His lordship was always considered as a sure card, but, now, his fame is established, from the circumstances of his having cleared £35,000, after deducting all his losses for the last six months."<sup>7</sup>

And these are only a few of the hundreds of examples cited by Ashton.

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6. Steinmetz, note 1 at pp. 186-7. And see Ashton, The History of Gambling in England (1898), Chapt.6.

7. Ibid., at p.92.



In 1822 the Legislature made a half-hearted attempt to interfere by enacting the statute 3 Geo.IV, c.114 in which keeping a common gaming house was designated an 'aggravated misdemeanour' punishable by imprisonment with hard labour. And by a later statute, the Police Act, 1839 (2 & 3 Vict., c.47,) s.48 the police were given power to forcibly enter such premises for the purpose of seizing implements and evidence of gaming. The proprietors and their assistants were, by the same Act, liable to penalties varying from a fine of £100 to imprisonment with hard labour for a period of up to six months. But these provisions were of little effect. Occasionally prosecutions were brought. Ashton draws on a quotation from *The Times* dated January 24 1833 in which the trial of four gaming house keepers is referred to.<sup>8</sup> The prosecution followed upon a complaint that a servant had stolen his employer's money and lost £120 of it in "The Hells in the Quadrant". In that case 27 such places were alleged to have been operating in St.James's Parish. And whilst the police had managed to close two of them, three new ones had opened in the same time. So their numbers increased, rather than reduced. The defendants in that case went to jail, but as defence counsel lamented they were only small operators:

"He would advise the parish officers [who brought the prosecution] to go to Crockford's, not far distant from the house in question, where they would find lords and peers of the realm at play."<sup>9</sup>

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8. *Ibid.*, at p.133.

9. *Idem.*

But the Parish officers did not heed counsel's advice.<sup>10</sup> And the 'Hells' of London continued to weather a storm of public protest<sup>11</sup> for a further ten years

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10. Crockford maintained the proprietorship of his club until 1840, at which time he retired. The club 'tottered to its fall' shortly after, and the premises became The Wellington Restaurant. Steinmetz, note 1, Vol. II, at p.186.
11. Ashton, note 6, in chapter 9, quotes extensively from daily papers and periodicals at that time. They describe the horror of the 'Hells' in quite unmistakable language. For example, the following description appears in Frazer's Magazine, August 1833: "The generality of the minor gambling houses are kept by prize-fighters and other desperate characters, who bully and hector the more timid out of their money by deciding that bets have been lost when, in fact, they have been won. Bread, cheese and beer are supplied to the players, and a glass of gin is handed, when called for, gratis. To these places thieves resort, and such other loose characters as are lost to every feeling of honesty and shame: a table of this nature in full operation is a terrific sight; all the bad passions appertaining to the vicious propensities of mankind are portrayed on the countenances of the players. An assembly of the most horrible demons could not exhibit a more appalling effect; recklessness and desperation overshadow every noble trait which should enlighten the countenance of a human being. Many, in their desperation, strip themselves, on the spot, of their clothes, either to stake against money or to pledge to the table keeper for a trifle to renew their play; and many instances occur of men going home half naked, having lost their all. They assemble in parties of from forty to fifty persons, who probably bring, on an average, each night, from one to twenty shillings to play with. As the money is lost the players depart, if they cannot borrow or beg more; and this goes on sometimes in the winter season, for fourteen to sixteen hours in succession; so that from 100 to 140 persons may be calculated to visit one gambling table in the course of a night." (Ibid., at pp.137-8.)

until the revelations in the case of Smith v. Bond,<sup>12</sup> and the legislative action that followed it, finally sealed their doom.

[2.02] Smith v. Bond

Although the Acts of Charles II (1664) and Anne (1710) were unmitigated failures as instruments for the suppression of excessive gambling, they did ultimately, and in an indirect way, contribute substantially to the civilisation of gaming in England. But the direct motivation for reform was provided by the action brought in Smith v. Bond.<sup>1</sup>

In 1842 the Parish of St. George, Hanover Square, was literally swarming with gambling 'hells'. Prior to that year the parish officers had tried, but had been quite unable to put them down.<sup>2</sup> One such establishment was the Minor St. James's Club captained, from all accounts, by a gentleman named Bond. But, as Ashton describes those premises:

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12. The actual gaming case was never reported, but see Smith v. Bond (1843), 11 M. & W. 326 and 549.

1. The case is not reported, but John Ashton in the *History of Gambling in England* (1898) alludes to the circumstances of the case at pp. 139-140. And see *supra*, para. 1, note 12.
2. The Hon. Richard Mayne, Commissioner of the Metropolitan Police told the Select Committee on Gaming on 28.2.1844, para. 163, p. 15, *Minutes of Evidence*, that the police had been quite unable to persuade residents in the parish of St. James's to come forward and give evidence against gaming house proprietors and this had made police action against such establishments extremely difficult.

"... there was not the least pretence for calling it a club; anybody went there to play with hardly the formality of a first introduction."<sup>3</sup>

In an attempt to bring this establishment down the parish officers resolved to bring a qui tam action against Bond in relation to certain losses suffered by some of his clients. Their design was facilitated by Thomas Smith, a disgruntled ex-employee of Bond's<sup>4</sup> who was able to describe to Lord Abinger and a special jury at Middlesex how Bond's establishment did a thriving trade at the tables - especially at French Hazard. One 'Bredell had lost £200, Mr Fitzroy Stanhope £50, the Marquis of Conyngham £500 on each of two separate occasions, Lord Cantalupe £400, and other noblemen and gentlemen various sums.'<sup>5</sup> The action was brought by Smith against Bond under s.2 of the Act of Anne (1710). That is, to recover the money the house had won at play from these people, and 'treble the value thereof'. The form of the counts in the plaintiff's declaration read as follows:

"A.B. [that is the nobleman or gentleman who lost], in the parish of St. George, Hanover Square, in the county of Middlesex, by playing with the defendant at dice, at a certain game called French hazard, lost to the defendant, at one sitting, contrary to the statute, and the defendant [Bond, the keeper of the club] won of the said A.B. the sum of £207; which said sum of money

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3. Note 1, at p.139.

4. Peter Cloves, a better of twenty years standing, alluded to this in his evidence before the Select Committee on Gaming, note 2, at p.156.

5. Note 1, at p.139.

"the said A.B. then and there paid to and the same was then and there accrued to the plaintiff, who sued for himself and the poor of the said parish of St. George, Hanover Square, to receive of the defendant the said sum of money so lost, and treble the value thereof."<sup>6</sup>

Unfortunately Lords Conyngham and Cantalupe and Mr Stanhope declined the opportunity to publicly disclose their losses, -- and their gambling instincts<sup>7</sup> but in all other respects the action was successful. The Lord Chief Baron entered judgment against Bond in the amount of £3,508. This amount was not high when considered in terms of the profits the evidence disclosed Bond had made from the losses of others, but a firm precedent had been set. The parish officers now had a weapon they could use against gaming house keepers. For the future, a gaming house proprietor's profits from winnings might indeed measure but a third of his losses.

The decision in Smith v. Bond prompted further actions of a similar kind and in 1844 the House of Lords sought the concurrence of the House of Commons in an 'Actions for Gaming Discontinuance Bill'. This Bill was entitled:

"An Act to discontinue certain Actions under the Provisions of several statutes for the Prevention of Excessive Gaming, and to prevent for the future the bringing of such Actions."<sup>8</sup>

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6. Details of the counts are reported in Smith v. Bond (1843) 11 M. & W. 549.
  7. They did not appear and give evidence.
  8. Journals of the House of Commons (1844), Vol. 99, p. 24.

The Bill was accompanied by allegations of fraud in the bringing of such actions, and even of vexatious litigation.<sup>9</sup> Indeed, Smith v. Bond was a case of the former kind. Under s.17 of the statute 1 & 2 Will.IV, c.39 (1831) an attorney could be ordered by a Court or Judge to disclose, in writing, the profession, occupation, or quality and place of abode of the plaintiff in an Action. A failure to do so was a contempt of the court. Such an order was obtained in Smith v. Bond, and the plaintiff, Thomas Smith, had his attorney file an account in which he, Smith, was described as "... an artist, and resides at No.32 Chappel Street, Grosvenor Square". Bond discovered that these particulars were false and he subsequently sought an attachment against Smith for this fraud on the Court.<sup>10</sup> Such was the frequency or incidence of this type of occurrence that the House of Commons sought an account from the Courts of the instances upon which this occurred.<sup>11</sup> The records do not, however, disclose to what effect.

The Actions for Gaming Discontinuance Bill did not, or at least did not initially, achieve all its framers hoped for. It met with opposition and amend-

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9. Ibid.

10. Smith v. Bond (1843) 11 M.& W.326. The action was brought against the plaintiff whilst the statute placed the obligation - and punishment for contempt for failing to honour it - upon the attorney. The court considered the plaintiff would be liable if he wilfully misled or caused his attorney to file a false account - but did not finally decide the point. Chief Baron Pollock thought the ends of justice would be sufficiently served by discharging Smith but with an order that he meet the costs of Bond's application.

11. Note 8.

ment in the House, so that when it did subsequently receive the Royal Assent, it purported only to stay proceedings under the relevant provisions of the Acts of Charles II (1664) and Anne (1710) for a period of three months.<sup>12</sup>

On the 2nd July 1844 a further Actions for Gaming Discontinuance Bill was introduced into the House,<sup>13</sup> the purpose of this Bill being to extend the period by which proceedings had been stayed by its predecessor. This Bill succeeded,<sup>14</sup> but not without some interesting and revealing side issues. After the Bill was introduced Charles Henry Russell, a solicitor, petitioned the House to be heard against it being passed.<sup>15</sup> A vote was taken on whether Russell's petition, and evidence, should be referred to a Committee on the Bill. But objection was taken to the votes of Lord George Bentick, the Member for Lynn and Mr Gregory, the Member for Dublin.<sup>16</sup> They were, it was asserted, defendants in some of the Actions to which the Bill referred. However Lord George Bentick assured the House that, assuming the Bill was passed, he would not plead it; and Mr Gregory replied that he had never been served with any processes in any of the said actions. Consequently both votes were allowed.

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12. 7 & 8 Vict., c.3 (1844).

13. Note 8, at p.461.

14. 7 & 8 Vict., c.58 (1844).

15. Note 13, at p.467.

16. Ibid., at p.486.

The circumstances that prompted the Actions for Gaming Discontinuance Act are revealed in the evidence of a solicitor named James Thomas Russell<sup>17</sup> before the Select Committee on Gaming in July 1844. Those circumstances also explain why it was found desirable to repeal s.2 of the Act of Anne (1710) when the Gaming Act of 1845 was enacted.<sup>18</sup>

The solicitor, Russell, claimed in his evidence that he had acted in his professional capacity for a party who was bringing common informer actions under the Act of Anne (1710) against winning gamblers. He said that he was leaving his office one morning when the party, (whose identity he refused to divulge as being a matter upon which he was sworn to secrecy) enquired whether qui tam actions could be brought under s.2 of the Act of Anne (1710) to recover money won (and treble the value thereof) by betting on horse races. Russell obtained counsel's opinion<sup>19</sup> and subsequently advised the enquirer such actions could be brought. He was then instructed to commence proceedings; the unknown client stating that his object was solely to prevent excessive gambling. The Committee, however, obviously did not believe Russell. He was questioned closely about a robbery he and his

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17. The Charles Henry Russell who petitioned the House of Commons to be heard against the Actions for Gaming Discontinuance Bill was said by James Thomas Russell to be his brother (in his evidence before the Select Committee on Gaming, note 2, 8th July 1844, para.958, p.145).

18. By s.15, Gaming Act, 1845 (8 & 9 Vict., c.109).

19. Because he entertained some doubt whether bets on racing were within the Act. Smith v. Bond was brought in relation to losses on a game of French hazard.



brother were suspected of being involved in.<sup>20</sup> His answers to those questions were unsatisfactory. He admitted his brother was cited as plaintiff in the qui tam actions - and accordingly was to receive a proportion of any money so obtained. But he tried to explain that by saying:

"... Having determined to bring these actions, the necessary thing to be considered was, where we could find a plaintiff with whom there would be no chance of the defendants endeavouring to compromise or tamper with him. It then occurred to me I might make my brother the plaintiff. I knew his character was already so tainted that merely bringing these actions could not in any way injure him, and at the same time he was a party I knew they could not induce to stop these actions..."<sup>21</sup>

Russell later said he did not know the name of the mysterious client instructing him. He claimed the latter 'kept it most studiously' from him, although he endeavoured on a number of occasions to ascertain it. But the strong inference behind the line of questions directed at Russell was that he, Russell, and his brother, having been unsuccessful at robbery, then

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20. An amount of £2000 and £900 in securities and bank notes were stolen from the Berkley Club in St. James's Square. It comprised the bank for games carried on there. Some of the property was found in Russell's possession. His brother, Charles Henry Russell was suspected of being a party to the crime. There were five pages of questions directed at Russell on his and his brother's involvement in this affair. (Minutes of the Evidence before the Select Committee on Gaming, *ibid.*, note 2, 8th July 1844, paras.1011-1077, pp.148-152).

21. *Ibid.*, at para. 1121, p.156.

turned their hand to making a business out of qui tam actions. A number of such actions had been, or were about to be commenced by him when the Actions for Gaming Discontinuance Act, 1844 (No.1) was enacted. One such action was brought against a Mr Harry Hill<sup>22</sup> to recover a penalty for winning a bet of £3000 on a horse-race. That bet was for £20,000 to £3000 against a horse called Gaper. The horse incidentally belonged to Lord George Bentick. Hill subsequently sought, and obtained refuge behind the Act. A further action was brought against Lord Eglintoun for undisclosed bets,<sup>23</sup> and four such actions were brought by Russell against the millionaire-owner of Crockford's Club; -- for about £800,000.<sup>24</sup> A further action was against Lord George Bentick. Asked what he had sued the noble Lord for Russell coolly replied, "upwards of £100,000."<sup>25</sup> With that revelation the Committee directly proposed to Russell that it was his action in point of fact; but he again denied it. And later, the following question with the answer it elicited appear in the transcript of the evidence:

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22. This, and the subsequent actions were admitted by Russell in his evidence, *ibid.*, at pp.154-155.

23. Russell said it was proposed to risk £5000 to £6000 on the action against Lord Eglintoun which suggests the amount involved was substantial.

24. Crockford gave evidence before the Committee and gave this estimate of the amounts involved. Minutes of Evidence, 28th March 1844, para.2813, at p.180.

25. Note 17, para.1112, at p.155.

Chairman: "Do you believe that the person who is bringing these actions, upon your Oath, is only bringing the actions for the purpose of preventing excessive gaming, or do you think he is looking at all to part of the penalties?"

Russell: "I have no hesitation in saying that he is now looking for part of the penalties. I should mention that the original intention of this party, as I believe, in bringing these actions, was merely for the purpose of suppressing the system: and in the course of our inquiries into these cases we discovered the proof by which a large sum of money might be made by bringing these actions, so that the party might not only put down the system but make it exceedingly profitable to himself. It was a speculation that struck me might be very lucrative to him. I had seen the Report in the Times of the 8th December 1842, three or four Days after Smith and Bond was tried, in which the editor of the newspaper recommended it to parties, as a profitable speculation, to bring qui tam actions against those parties, stating that such speculation would be profitable to himself and the public benefited, and it urged on people to bring these actions."<sup>26</sup>

Although incidentally the consequence of the common informer actions was to suppress gambling, an intolerable situation had also presented itself. Known gamblers were being harrassed by opportunists with little other interest in the proceedings than the gain to be made from them. And apart from proceedings openly brought the common informer action also presented a real opportunity for blackmail.<sup>27</sup> Winnings of £20,000 and more were not uncommon: and

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26. Ibid., para.1167, at p.159.

27. Note 24, para.2644, at p.173. Although he did not specifically claim he had been blackmailed.

a threat to seek that amount plus treble the value could prove quite ruinous - even to a man of substance. And on top of that was the unsavoury publicity that accompanied such actions. Crockford advised the Select Committee that he himself had endured such a threat in 1824. He said:

"A nest of informers came about me, and wanted to take £20,000, and then £10,000, and I met it in court, and they would not meet me, and so it was all over."<sup>28</sup>

It was not surprising therefore that these recovery and penalty provisions of the 1710 Act were repealed when the Gaming Act of 1845 was enacted. And the motivation for that reform arose out of the case Smith v. Bond.

[2.03] Wagering - The Problem before the Act

The speculative spirit that pervaded the business and social life of eighteenth century England also brought with it an increase in wagering. Virtually anything and everything that could be was made the subject of a wager.<sup>1</sup> In 1844 the Select Committee on Gaming observed:

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28. Ibid.

1. John Ashton, *The History of Gambling in England* (1898) devotes a chapter to extraordinary wagers. (Chapt.12)

"In the last century the practice of betting was much more common in this country than it is now; bets about disputed facts and upon future events were things of daily occurrence, and a wager was proverbially known to be an Englishway of settling a controversy."<sup>2</sup>

The persistence of this speculative trait in the English character during the period is well illustrated by an amusing anecdote re-told by Ashton.<sup>3</sup> In the course of a debate in the House of Commons Mr Pulteney charged Sir Robert Walpole with mis-quoting Horace. The Prime Minister wagered that he had not done so; the odds were settled, and the Clerk of the House was prevailed upon to adjudicate. He decided the matter in favour of Pulteney's assertion upon which Sir Robert tossed a guinea across the floor of the House. Mr Pulteney graciously pocketed his winnings and wryly observed 'that it was the first public money he had touched for a long time'. No place was too sacred or occasion too important to avoid the distraction of such trivia.

There was, however, an ugly side to wagering as there was to gaming. The extravagance reflected in wagering in England has already been alluded to.<sup>4</sup> It was as ruinous as gaming, especially during the 17th and 18th centuries when the 'sport of kings' provided opportunity for gross speculation by noble and common fools alike. James Rice unwittingly

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2. Report of the Select Committee on Gaming, 20th May 1844, p.V.

3. Note 1, at p.156.

4. Supra, chapter 1; para.2, chapter 2.

attests to that in his two volume work on the history of the English turf.<sup>5</sup> And whilst that topic is beyond the scope of this work it cannot be passed by without recording a particular, and further aggravation of which a writer in *The Quarterly* complained in 1834. He said:

"Doncaster, Epsom, Ascot, and Warwick, and most of our numerous race-grounds and race-towns, are scenes of destructive and universal gambling among the lower orders, which our absurdly lax police never attempt to suppress; and yet, without the slightest approach to an improperly harsh interference with the pleasures of the people, the Roulette and E.O. tables, which plunder the peasantry at these places for the benefit of travelling sharpers ..."<sup>6</sup>

Steinmetz made a similar observation of race meetings at Newmarket. There:

"Every object that met the eye was encompassed with gambling -- from the aristocratic Rouge et Noir, Roulette, and Hazard, down to Thimble-rig, Tossing, and Tommy Dodd. Every hour of the day and night was beset with gambling diversified; in short, gambling must occupy the whole man, or he was lost to the sport and spirit of the place. The inhumanity of the cock-pit, the iniquitous vortex of the Hazard table, employed each leisure moment from the race, and either swallowed up the emoluments of the victorious field, or sank the jockey still deeper in the gulf of ruin."<sup>7</sup>

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5. (1879).

6. Quoted by Andrew Steinmetz, *The Gaming Table* (1870), Vol.1, p.133.

7. *Ibid.*, Vol.II, p.364-5.

There was, in addition, another socially harmful side to wagering that did not occur with gaming. It arose as a consequence of thoughtless speculations on the private affairs of others. Whilst wagers were enforceable in the Courts of Justice, intimate and personal matters in the lives of innocent third parties could be exposed to the public gaze by the simple expedient of making them the subject of a wager. The writer has not discovered any cases where a wager and its enforcement were deliberately used as a device for invading the privacy of another person;<sup>8</sup> but instances certainly occurred where such

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8. In Coxe v. Phillips (1729), C.T.Hard.238 a fictitious debt was constructed for the purpose of raising an issue that an innocent third party said was intended to 'burden him with actions'. The plaintiff sued on a promissory note given to him by the defendant to which she pleaded she was married to a man named Muilman. The plaintiff said the marriage was void, the defendant said it was good, Muilman complained the action was fictitious and intended to harm him. Lord Hardwicke C.J. upheld Muilman's right to complain and the complaint for '...though the verdict, if it had passed against him, could not have been given in evidence against him, not being a party to the suit, yet it is a prejudice to a man to have the report of a verdict that he is married in this way ... it is incumbent on Courts of Justice to keep the streams of justice clear, or they will be made use of as means of scandal.' (Ibid.) The same principle would protect innocent third parties where wagers were constructed for the same purpose. See e.g. Lord Mansfield in Da Costa v. Jones infra.

invasions were a shameful consequence.<sup>9</sup> Limitations on such actions were imposed by the Courts.<sup>10</sup> But they were not always effectual in protecting innocent parties as the extraordinary case of Da Costa v. Jones<sup>11</sup> shows.

Da Costa v. Jones was, as Lord Mansfield described it, a case which "made a great noise all over Europe"<sup>12</sup> and one in which the proceedings, and the way they were conducted, were "a disgrace to judicature".<sup>13</sup> It

9. Ditchburn v. Goldsmith (1815),<sup>4</sup> Camp.152 (a bet on the chastity of a woman) and Da Costa v. Jones (1778) *infra.*, (a bet on the sex of a third person) were perhaps the worst of the litigated wagers. Walpole refers in a letter to a bet of this nature which does not appear to have found its way into the Reports. "Dec.19, 1750. There has been a droll cause in Westminster Hall: a man laid another a wager that he produced a person who should weigh as much again as the Duke [Cumberland]. When they had betted they recollected not knowing how to desire the Duke to step into a scale. They agreed to establish his weight at twenty stone, which, however, is supposed to be two more than he weighs. One Bright, was then produced, who is since dead, and who, actually, weighed forty-two stone and a half. As soon as he was dead, the person who had lost, objected that he had been weighed in his clothes, and though it was impossible that his clothes could weigh above two stone, they went to law. There were the Duke's twenty stone bawled over a thousand times; but the righteous law decided against the man who had won." (Quoted in Ashton, note 1 at pp. 157-8)

10. *Infra.*

11. (1778), 2 Cowp.729.

12. *Ibid.*, at p.734.

13. *Ibid.*, at p.735.



arose out of a wager between two indifferent parties - a surgeon and a broker and underwriter - as to the true sex of the famous transvestite, the Chevalier D'Eon.<sup>14</sup> The Chevalier had formerly been Ambassador to England and Russia from the Court of France and his conduct and dress, both in England and France, had prompted speculation as to his true sex.<sup>15</sup> The parties entered into their wager in 1771 and the surgeon brought his action before Lord Mansfield and a jury in 1777. At the hearing counsel for the defendant objected that the plaintiff ought not to recover as his claim was founded on a question tending to the introduction of indecent evidence. Lord Mansfield over-ruled the objection - but later regretted that he had done so. When the defendant's counsel subsequently moved to arrest judgment on the objection upon the record, the learned Judge said:

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14. The Report records that the bet was made on the 4th October 1771 when, in consideration of the plaintiff then and there paying him the sum of 75 gns. the defendant undertook to pay the plaintiff £300 in case the Chevalier should at any time prove to be a female. And "there were other general accounts for money lent, money laid out and expended for the use of the defendant, and money had and received by the defendant to the use of the plaintiff." Ashton states the total amount involved in the claim was £700 and it arose from a wager 6 years prior to the action in which the broker "received premiums of fifteen guineas per cent., for every one of which he stood engaged to return one hundred guineas, whenever it should be proved that the Chevalier D'Eon was, actually, a woman." *Ibid.*, at p.159.
15. An account of the Chevalier's adventures and the extraordinary events that prompted him to adopt the life style of a woman are detailed in Antonia White's translation of *Memoirs of the Chevalier D'Eon*, (1970).

"I own I was sorry, that the answer given to the objection made at the trial ... had been so hastily given way to by me. I was sorry that the nature of the action had not been more fully considered. I was sorry for another thing, that the witnesses who were subpoenaed had not been told they might refuse to give evidence if they pleased. But no objection was made on their behalf by the counsel for the defendant, nor did any of themselves apply for protection, or hesitate to answer. I have since heard that many of them were confidential persons, servants, and others employed in the way of their profession and business. Had any of them demurred, it would have opened the nature of the action. That two men by laying a wager concerning a third person, might compel his physicians, relations, and servants, to disclose what they knew relative to the subject matter of that wager, would have been an alarming proposition: the bare stating of it would have startled. Indeed, the objection being put upon the general crude ground of the cause leading to indecent evidence, and not upon the special nature of this case, did not strike me."<sup>16</sup>

And he later concluded:

"... the present case is indecent in itself, and manifestly a gross injury to a third person, therefore, ought not to be endured."<sup>17</sup>

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16. Note 11, at p. 734.

17. Ibid., at p. 736. Between these two statements he said: "Would a Court of Justice try ... a wager that an unmarried woman has had a bastard? Would you try that? Would it be endured? Most unquestionably it would not." Ibid., at p. 735. That was exactly the wager in Ditchburn v. Goldsmith, note 9, in 1815 and as Lord Mansfield predicted, it was not endured. The Court refused to hear the matter.

The Rule for arresting judgment in Da Costa v. Jones was made absolute; however, that was after the damage was done.

The incredible circumstances and proceedings in this case can, it is suggested, only be explained in terms of recognition at that time of a certain misconceived honour - and perhaps even social respectability - accorded such wagers at that time. Why, for example, did a surgeon and a broker even bother with such an action?<sup>18</sup> It was not motivated by malice against the Chevalier because the Court accepted that it was a fair and bona fide wager entered into 'without the smallest intention of affecting the Chevalier D'Eon in the slightest degree'.<sup>19</sup> The answer is probably, at least on the plaintiff's part, that he regarded the wager as an honourable transaction, and one upon which he should entertain no scruple about pleading. Lord Mansfield expressed abhorrence at the transaction, both during and after the trial, and regretted that the parties had not settled it outside the Courts of Justice. But he suggested to the jury any indecency in the proceeding arose rather from the unnecessary questions asked of witnesses than from the case itself. And the jury's dilemma, he instructed them, was simply to decide who had won the wager. The evidence given was as

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18. The amount £700, may of course have motivated it. The terms of the wager suggested by Ashton mean that the plaintiff must have paid the broker in excess of 100 gns. - a sum which he was no doubt anxious to recover in view of the evidence he then possessed.

19. Note 11, at p. 731.

extraordinary as the case itself. The principal witnesses for the plaintiff, (who asserted D'Eon was a woman) were, of all people, a surgeon who had attended the Chevalier, and a certain gentleman, M. de Morande.<sup>20</sup> The surgeon stated that 5 years previously he was summoned in his professional capacity to examine the Chevalier as 'she' laboured under a disorder 'which rendered an examination of the afflicted part absolutely necessary'. The Chevalier was, he asserted, certainly a woman. M. de Morande's evidence was just as compelling:

"He swore that, so long ago as the 3rd July 1774, the Chevalier D'Eon made a free disclosure of her sex to the witness. That she had even proceeded so far as to display her bosom on the occasion. That, in consequence of this disclosure of sex, she, the Chevalier D'Eon, had exhibited the contents of her female wardrobe, which consisted of sacques, petticoats. and other habiliments calculated for feminine use. That, on the said 3rd day of July 1774, the witness paid a morning visit to the Chevalier D'Eon, and, finding her in bed, accosted her in a style of gallantry respecting her sex. That, so far from being offended with this freedom, the said Chevalier desired the witness to approach nearer to her bed, and then permitted him to have manual proof of her being, in very truth, a woman."<sup>21</sup>

It is difficult to imagine, that, in ordinary circumstances, Lord Mansfield could have failed to understand the nature of the case (as he later claimed) when this evidence was unfolding. It is suggested

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20. The evidence given at the trial is recalled by Ashton, note 1, at pp.159-162.

21. Ibid., at p.160.

that his apology to Cheavlier D'Eon, for that is what it was, given on the motion for arrest of judgment, was the product of reflection and hindsight. It followed seven months after trial<sup>22</sup> - during which time the 'great noise' all over Europe of which the learned Judge spoke was taking place. The wager, that noble English expedient for 'settling a controversy' had brought disgrace on its most enthusiastic patron. And the courts had provided the venue for it so doing. This case, its facts and the proceeding, made a mockery of English Justice. And it did not end with the trial. Counsel for the defendant called no evidence, and made no attempt to disprove the plaintiff's assertion that the Chevalier D'Eon was a woman. Indeed he, in effect, conceded the point, and confined himself to allegations of fraud based upon the consideration that:

"... the plaintiff had taken advantage of his client, being in possession of intelligence that enabled him to lay with greater certainty, although with such great odds on his side; that the plaintiff, at the time of laying the wager, knew that the Court of France treated with the Chevalier, as a woman, to grant her a pension; and that the French Court must have had some strong circumstances to imbibe that idea..."<sup>23</sup>

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22. The trial commenced on the 1st July 1777, the motion to arrest judgment on Sat., 31 Jan.1778.

23. Idem. Lord Mansfield replied to this argument by exemplifying a wager made in his own presence about the dimensions of the Venus de Medicis for £100 - in which one party disclosed he had actually measured it himself; the other retorting that he had also done so. There was, he directed the jury, no fraud in that; Ashton, note 1 at p.161.

Lord Mansfield too, seems to have personally concluded that the Chevalier was a woman. He carefully avoids, in his judgment on the motion for arrest of judgment, identifying the Chevalier D'Eon with either sex. But he does make the following interesting observation:

"We then come to the present case, which is shortly this: Here is a person who appears to all the world to be a man; is stated upon the record to be 'Monsieur Le Chevalier D'Eon' has acted in that character in a variety of capacities; and has his reasons and advantages in so appearing."<sup>24</sup>

The jury brought in a verdict for the plaintiff and thus accepted his evidence that the Chevalier D'Eon was a woman. Yet on D'Eon's death in England at Bloomsbury at the age of 83 in 1810 it was observed that he was, without a shadow of a doubt, a man!<sup>25</sup>

Da Costa v. Jones was, in almost every particular, an incredible case. The wager, the social standing of the parties, the proceeding, the evidence, the verdict and even Lord Mansfield's apology, read almost as some fictional account or some colourful creation from a jester's imagination. And the final revelation on the Chevalier's death operated only to turn the whole proceeding and its conclusion into a ridiculous farce.

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24. Note 11, at pp.735-6.

25. There was so much speculation as to the Chevalier's sex that no less than five distinguished persons viewed the body and certified his sex. *Memoirs of the Chevalier D'Eon*, note 15 at p.311.

But whilst the case itself is not rich in legal principle, the lesson it teaches justifies the extended treatment accorded it here. It establishes, in a rather glaring way, the undesirability of the courts involving themselves in adjudicating on speculations between persons with only a trivial interest in the subject matter in dispute. It also bears witness to the impossibility of the courts achieving any greater prospect of certainty in their conclusion should they attempt to do so, than have the parties to the wager themselves. A point which, as later paragraphs show, did not escape the notice of the Select Committee on Gaming in 1844.

[2.04] The Attitude of the Courts to Actions on Wagers -  
Before the Act

As a consequence of the early statutes<sup>1</sup> placing restrictions on games and gaming, most gaming contracts were unenforceable in the courts.<sup>2</sup> Parties to gaming

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1. Supra, para [1.03].
  2. This is, of course, a generalisation. There is a lack of consistency in the early cases. Howard A. Street, *Law of Gaming* (1937) concludes that claims for winnings on games were not uncommon in early times - although the records have not survived. (But see *Sherbon v. Colebach* (1691), 2 Vent.175.) In *Da Costa v. Jones* supra, when expressing concern over the enforceability of wagering contracts, Lord Mansfield made the interesting comment: "Whether it would not have been better policy to have treated all wagers originally as gaming contracts, and so have held them void, is now too late to discuss..." This case is cited in Halsbury's *Laws of England* (4th ed.) Vol.4, p.8 as authority for the proposition that at common law "A gaming contract, however, appears always to have been unenforceable." However, as it is not clear

contracts were, therefore, restricted in their legal remedies by the principle expressed in the maxim in pari delicto potior est conditio possidentis: the courts will not assist a plaintiff who cannot make out his case "... otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party".<sup>3</sup> This restriction on the enforceability of gaming contracts did not, however, apply to wagers<sup>4</sup> and they were, in principle, enforceable in the courts.

In the latter half of the eighteenth century, however, the Courts actively sought to discourage<sup>5</sup> actions on gaming and wagering contracts and many were struck down as being unenforceable because they were

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from the judgment whether Lord Mansfield was speaking of gaming contracts before or after legislation passed in 1710 and 1745 (discussed supra, chapt.1) which certainly prevented such actions in respect to the recovery of winnings of £10 or more at any one sitting, the authority is far from conclusive.

3. Per Mellor J. in Taylor v. Chester (1869), L.R.4 Q.B.309, 314.
4. Except of course wagers on the side of the hands of those playing, supra, chapt.1.
5. Even, Windeyer suggests, by forcing such cases to the bottom of the lists. The Law of Wagers, Gaming and Lotteries in Australia (1929) at p.10. He does not, however, refer to any sources on this point although, as subsequent paragraphs demonstrate, it is perhaps a fair inference to be drawn from the attitude of the Judges. And in Egerton v. Brownlow (1853) 4 H.L.C.1, 124 Parke B. observed that; "... the Courts had been ... astute, even to an extent bordering upon the ridiculous, to find reasons for refusing to enforce them."



contrary to public policy.<sup>6</sup> But even this device did not wholly prevent these disputes from taking up the time of the courts and complaints were frequently made by the judges against actions on wagers. In Henkin v. Gerss<sup>7</sup> a wager was laid in the amount of £300 on how the courts would decide the issue as to whether a person could be lawfully held to bail on a special original for a debt under £40. The report records that:

"Lord Ellenborough requested to see the record; and having perused it, he threw it down with much displeasure, saying, - I certainly will not try this cause... I sit here to decide points of law that arise incidentally before me, not to state my opinion upon any question submitted to me from idle curiosity... If any legal question could be raised in this manner for judicial

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6. In Jones v. Randall (1774), 1 Cowp.37 appears the earliest clear statement of this principle being applied to wagers. The wager was upon "whether a decree of the Court of Chancery would be reversed or not on appeal to the House of Lords." The defendant entered into the wager to protect himself, as the appellant in the case before the House of Lords, from the consequences of an adverse judgment. Lord Mansfield held, however, that as the wager was not contrary to principles of morality or sound policy it was enforceable. In Gilbert v. Sykes (1812), 16 East, 150 a bet on the life of Napoleon Bonaparte was held to be unenforceable as it might tend to encourage assassination - or even weaken the patriotism of a British subject. A bet to maintain bachelorhood for six years was held unenforceable in Hartley v. Rice (1808), 10 East.22 as were speculations on the public revenue Atherfold v. Beard (1788) 2 T.R.610; the result of elections Allan v. Hearn (1785), 1 T.R.56; the chastity of a woman Ditchburn v. Goldsmith (1815), 4 Camp.152; and the sex of a third person Da Costa v. Jones (supra).
7. (1810), 2 Camp.408.

"determination, the inconvenience would be intolerable; and I consider the attempt extremely indecent."<sup>8</sup>

A particular complaint was that actions on wagers were consuming the valuable time of the courts. In a case in 1811 Mansfield C.J. complained:

"While we were occupied with these idle disputes, parties having large debts due to them, and questions of great magnitude to try, were grievously delayed."<sup>9</sup>

And in the same year an action brought on a wager on a cock-fight exasperated Lord Ellenborough who expressed the view that it tended 'to the degradation of Courts of Justice'. He went on:

"It is impossible to be engaged in ludicrous inquiries of this sort, consistently with that dignity which it is essential to the public welfare that a court of justice should always preserve."<sup>10</sup>

[2.05] Report of the Select Committee on Gaming (1844)

As previously indicated the establishment of the

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8. Ibid., at p.409.
9. Hussey v. Crickitt (1811),  
3 Camp.168, 172.
10. Squires v. Whisken (1811),  
3 Camp.140, 141.

Select Committee on Gaming<sup>1</sup> followed the need for legislative intervention to put an end to the opportunist qui tam actions brought by common informers after Smith v. Bond.<sup>2</sup> However, although that was clearly the motivation for the Select Committee, that is not altogether apparent from the Order of Reference which was:

"... to inquire into the existing statutes against gaming of every kind; to ascertain to what extent these statutes are evaded; to consider whether any and what amendments should be made in such Statutes; and to report their opinion thereupon to the House."<sup>3</sup>

The Committee specifically alluded in its Report to the fact that any inquiry into the suspended qui tam actions was outside the scope of the Order of Reference. But interestingly, and although it claimed not to have carried out such an inquiry, the solicitor Russell was in fact subjected to quite rigorous cross examination on the matter of his suspended qui tam actions. Indeed, he eventually found it necessary to seek refuge behind a claim of professional privilege.<sup>4</sup>

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1. Supra, para.[2.02]. The motion for the Select Committee was moved on 14th February 1844, just 4 days after the Actions for Gaming Discontinuance Bill (No.1) 1844 was introduced into the House. Journals of the House of Commons (1844) Vol.99, pp.24, 31.
  2. Supra.
  3. P.II of the Report of the Select Committee on Gaming, 16th February 1844.
  4. Which the Committee, incidentally, appeared reluctant to grant. Paras.1508-1523 of the Minutes of Evidence/. The Select Committee subsequently obtained Counsel's opinion which upheld Russell's right to refuse to disclose communications made to him by his client.

/ of 15th July 1844

The transcript of the evidence given before the Select Committee on Gaming runs into almost 500 pages of close type, whilst the Report itself occupies only 6 pages.<sup>5</sup> And although the recommendations in the report are brief and in very general terms, they are particularly constructive.

The Committee thought that many of the earlier statutes on gaming and betting were obsolete, and 'unsuited to the spirit of the age' as being quite at variance with the habits, manners and opinions of the 19th century.<sup>6</sup> In particular the view was expressed that the practice of wagering was so deeply rooted in the habits of the nation at that time that the imposition of pecuniary penalties (by *qui tam* actions or otherwise) was repugnant to the general feelings of Englishmen. And this was particularly so in relation to any purported application of the Act of Anne (1710) to bets on horse races. But the continued legal adjudication of wagers was dissented from. The Report reads:

"The Law of England considers wagers in general as legal contracts; and the winner of such a wager can, therefore, enforce his claim in a Court of Law.

The law of Scotland is different in this respect; and the courts in that part of the United Kingdom have held, 'that they were

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5. Recommendations made to the House from time to time during the course of the Committee's inquiry are brought together in the final report of the 20th May 1844.
  6. *Ibid.*, at p.IV.

"instituted to try adverse rights, and not to determine silly or impertinent doubts or enquiries of persons not interested in the matters in question;" and they have decided 'that their proper functions are to enforce the rights of parties arising out of serious transactions, and not pay regard to sponsiones ludicrae'.

The Scotch (sic) Courts have, therefore, declined to take cognizance of claims for money won by wagers; and your Committee recommend that the Law of England should in this respect be assimilated to the practice in Scotland. If private individuals choose to make wagers with each other, there seems to be no good reason why they should be prevented from doing so, or why they should be punished for so doing; but neither, on the other hand, does there seem to be any sufficient reason why the valuable time of the Courts of Law should be consumed by adjudicating disputes which may arise between individuals in consequence of such wagers. Such disputes appear to be of the nature of private differences, which, not turning upon the construction of any law or statute, are matters for private settlement rather than for legal adjudication; and such disputes must frequently involve the statement of a variety of trifling details, little suited to the dignity of a Court of Law, and as to which such Court could have no peculiar competence to judge."<sup>7</sup>

It was accordingly recommended that:

"... the Courts of Law should be entirely relieved from the obligation of taking cognizance of claims for money won by wagers of any kind. Persons wagering together should be left to take their chance as to getting from the party with whom they have wagered the money which they may have won."<sup>8</sup>

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7. Ibid., at pp. 5-6.

8. Idem.

No specific recommendations to the same end were made in relation to gaming contracts. But as the law then in existence rendered most gaming contracts illegal and unenforceable, one can only assume that the committee considered that the status quo in that regard was to be maintained. But the statutes imposing penalties for playing at games were criticised and their repeal recommended; - principally because those laws were of a political character the motive for which had long ceased to exist. Also many of the games prohibited were conducive to health as well as amusement.<sup>9</sup> However, the keeping of common gaming houses came under attack and the Report indicates the Committee's pleasure in observing that 17 gaming houses in the Metropolitan Police District had, a few days prior to the 20th of May 1844, been closed by Police raids.<sup>10</sup> Gambling booths on race courses were also criticised as being an undesirable accompaniment to racing, but the following important observation was made with regard to racing generally:

"Your Committee would be sorry to appear to discourage horse-racing; that sport has long been a favourite one of all classes of the British Nation both at home and abroad, and it has been systematically encouraged by the Government by means of numerous plates annually given by the Crown to be run for, with a view to the important object of keeping up, by the competition of private individuals, and without any other charge to the Government, an improved breed of horses throughout the country."<sup>11</sup>

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9. Ibid., at p.IV.

10. Ibid., at p.VII.

11. Ibid., at p.VIII.

The Select Committee on Gaming placed horse racing on a different plane to all other forms of gaming. The above quotation appears at the end of the Report and thus, I suggest, qualifies the earlier observations made in relation to transactions in the nature of wagering contracts or gaming on horse races that gave encouragement to the sport. This interpretation of the Select Committee's intention is reinforced by its earlier observation that the Act of Anne (1710) should not operate to catch or penalise transactions arising out of horse racing.

The tenor of the Select Committee's Report was that virtually the whole of the existing laws of gaming and wagering required updating. And that was to be achieved by the repeal of the earlier statutes relating to gaming; the repeal of the Acts of Charles II (1664) and Anne (1710); the enactment of provisions rendering wagering contracts unenforceable in the Courts; and some modification and extension of laws prohibiting gaming on certain premises and places. These recommendations were shortly acted upon by the legislature when it enacted the Gaming Act, 1845.

[2.06] Section 18, Gaming Act, 1845

The principal concern of the Act of 1845 was to put down gaming houses<sup>1</sup> and most of its provisions were designed to that end. Games of skill, however, enjoyed a change of status for, as the Select Committee on Gaming recommended, the statute 33 Hen.VIII, c.9 was repealed.<sup>2</sup> And also, by s.15 the Act of Charles II (1664) and the penal provisions of the Act of Anne (1710) - that is, so much of that Act as was not altered by 5 & 6 Will.IV, c.41<sup>3</sup> - were also repealed. The recommendation that wagering contracts be rendered unenforceable in the Courts was given effect to by s.18 of the Act which provided, inter alia:

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1. Although betting houses escaped the attention of the legislature in 1845 they were subsequently subjected to similar controls to those applied to gaming houses when the Betting Houses Act was enacted in 1853. (16 & 17 Vict., c.119.)
  2. By s.1, Gaming Act, 1845. Importantly so much of the provisions of the Act of 33 Hen.VIII as made the playing of games of skill "... such as bowling, coytting, cloychcayls, half bowl tennis, or the like ..." were repealed. Thus, after the 1845 Act the mere playing of games of pure skill no longer attracted penal liability.
  3. That is, s.1 by which all securities etc. given for gaming debts (or bets on the side) survived, but in the form as modified by the Act of 1835.



"That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made ..."

The policy of this enactment was, as Lush J explained in Haigh v. Town Council of Sheffield<sup>4</sup> to treat:

"... the ordinary practice of betting and wagering [and gaming] ... as a thing of neutral character, not to be encouraged, but on the other hand, not to be absolutely forbidden; and it left an ordinary bet a mere debt of honour, depriving it of all legal obligation, but not making it illegal."<sup>5</sup>

The Act was concerned, therefore, to render wagering and gaming contracts unenforceable - but not illegal. Thus a payment by the loser to the winner of a bet operated to confer a good title to the money on the latter whilst the former, by the payment over, lost or waived a benefit which the statute conferred upon

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4. (1875), L.R.10 Q.B.102.

5. Ibid., at p.109; and see similarly Hawkins J in Read v. Anderson (1882), 10 Q.B.D.100, 104-5.

him.<sup>6</sup>

The general nature of gaming and wagering contracts has already been alluded to<sup>7</sup> and in later chapters it will be necessary to examine particular elements of these contracts in some detail. At this point, however, it is necessary to indicate in a general way, the scope of s.18 of the 1845 Act.

The first limitation on the operation of the provision is that it applies only to wagering and gaming contracts. As to the former, as Hawkins J explained in Carlill v. Carbolic Smoke Ball Company<sup>8</sup> it is not easy to define with precision the narrow line of demarcation between wagering and ordinary contracts. Indeed, at best, the most satisfactory 'definitions' are, in the end, little more than descriptions. The best two such descriptions are those of Hawkins J himself in the Carbolic Smoke Ball Company<sup>9</sup> and an earlier 'definition' attempted by Cotton L.J. in Thacker v. Hardy.<sup>10</sup> The Chief

6. Bowen L.J. in Bridger v. Savage (1885) 15 Q.B.D.363, 367-8. Voidability also operates however for the courts benefit and it may refuse, of its own motion, to enforce payment of a bet, Lockett v. Wood (1908), 24 T.L.R.617 or may strike out a statement of claim as disclosing no reasonable cause of action if the plaintiff's claim is for money due in respect of wagering and gaming transactions. Kershaw v. Siever (1904), 21 T.L.R.40.
7. Chapter [1.01].
8. [1892] 2 Q.B.484, 490.
9. Ibid., Hawkins J's definition will be examined further in chapter 4, when totalisator betting will be discussed.
10. (1878), 4 Q.B.D.685.

Justice said:

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature - that is to say, if the event turns out one way A will lose, but if it turns out the other way he will win."<sup>11</sup>

Hawkins J suggested in his definition that the event in issue between the parties must be 'a future uncertain event'<sup>12</sup> but this cannot, with respect, be accepted without material qualification. The phrase is accurate only if the words 'future event' are confined to the actual contingency upon which the result of the bet is to be decided. For example a wager as to which horse won a certain race ten years previously is a contest as to the accuracy of the memory or knowledge of the parties to it. The 'future uncertain event' therefore, is who is correct rather than which horse in fact won the race. And the 'uncertainty' is something which exists between the parties, rather than in fact.<sup>13</sup> For Hawkins J the essence of a wagering contract was that either party may under it, either win or lose. And:

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11. Ibid., at p.695.

12. Note 8 at p.490.

13. For further discussion on this point see 18 Halsbury's Laws of England, (3d) p.171 note (1).

"If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract."<sup>14</sup>

This statement has been interpreted as meaning that not only must each party be liable to win or lose, but also that there can only be two parties to a wagering contract.<sup>15</sup> It is, however, a point of view that has not won universal acceptance,<sup>16</sup> and will be examined in detail in a later chapter.<sup>17</sup> Suffice to say at this point that the idea that each party must either win or lose has, in England, been held essential to the existence of a wagering contract,<sup>18</sup> whilst the need for only two parties has found considerable support,<sup>19</sup> but awaits con-

14. Note 8 at p.491.

15. Note 13 at p.170.

16. It has not been accepted in New Zealand where multipartite wagering contracts have been upheld. *Infra*, chapter 4.

17. *Ibid.*

18. Ellesmere v. Wallace [1929] 2 Ch.1; Tote Investors Ltd. v. Smoker [1968] 1 Q.B.509.

19. Russell L.J. in Ellesmere v. Wallace was emphatic on this point. He said: "The truth is that you cannot have more than two parties or two sides to a bet. You may have a multipartite agreement to contribute to a sweepstakes... but you cannot have a multipartite agreement for a bet unless the numerous parties are divided into two sides, of which one wins or the other wins, according to whether an uncertain event does or does not happen". *Ibid.*, at p.52; and Lord Pearson in Tote Investors Ltd. v. Smoker, said: "... It has been firmly established by the decisions that only a contract involving a bilateral chance [as opposed to a unilateral chance] is a contract by way of gaming or wagering within the meaning of section 18". Note 18 at p.520, but Lords Denning and Wilberforce in the same case preferred to leave that point open, pp.516, 518.

firmation.<sup>20</sup>

A further essential element of a wagering contract identified by Hawkins J was that the parties to the bet should have no other interest in the transaction than the stake or stakes at risk. In his view the two parties to the bet:

"... mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose,<sup>\*</sup> there being no other real consideration for the making of such contract by either of the parties."<sup>21</sup>

The purpose of this element in Hawkins J's definition was to enable a distinction to be drawn between wagering contracts and contracts of insurance. It has been said that 'insurances are only a species of wager'<sup>22</sup> but this ignores the motivation of the parties to a contract of insurance which is, to provide against the possibility of loss rather than to

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\* My emphasis

20. Ibid.

21. Note 8 at p.490-1.

22. The authorities in support of this view are collected by W.J.V. Windeyer, *The Law of Wagers, Gaming and Lotteries in Australia* (1929), p.95, the phrase in inverted commas appears in Bentham, *Principals of Penal Law*, Part III, Chapt.6.

speculate for gain.<sup>23</sup> A policy of insurance is therefore not a wagering contract and is distinguishable as such by the insured's insurable interest. The interest may vary according to the nature of the policy or the risk. In fire, marine<sup>24</sup> and similar

23. In Wilson v. Jones (1867), L.R.2 Ex.139, an often quoted authority for the proposition, Blackburn J stated it thus: "I apprehend that the distinction between a policy and a wager is this: a policy is, properly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to...[the interest being] that if the event happens the party will gain an advantage, if it is frustrated he will suffer a loss". Ibid., at p.150-1.
24. Transactions in the form of marine insurance provided a form of wagering in England in the 18th century. The preamble to the statute 19 Geo.II, c.37 The Marine Insurance Act 1745-6 which was enacted to put an end to the practice, records: "that the making assurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices...[including the introduction of] a mischievous kind of gaming or wagering, under the pretence of assuring the risk on shipping and fair trade..." Originally contracts of marine insurance were encouraged by protection afforded them at common law even where the insured had no interest in the cargo. If the policy was expressly made "interest or no interest"; "without further proof of interest than the policy itself"; or "without benefit of salvage to the insurer" the policy was known as a 'p.p.i. or honour or wager policy' and was enforceable without proof of interest on the part of the insured, the policy being the proof of interest. At first the common law discouraged such policies but as they were beneficial and a convenience to merchants they were enforceable. The Sadlers Co. v. Badcock and Others (1743) 2 Atk.554, 556. But if the policy was not made p.p.i. it was deemed a contract of indemnity and the assured could not recover without proof of interest, Lucena v. Craufurd (1806), 2 Bos.& P.N.R.269. P.p.i. poli-

types of insurance for example, the policy is in the nature of a contract of indemnity.<sup>25</sup> In the case of life insurance,<sup>26</sup> on the other hand, the contract is based upon an interest which the policy holder has in the life assured.<sup>27</sup> It is only this insurable interest that distinguishes insurance from wagering

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cies lent themselves to wagering as no proof of interest in the cargo - or even its existence was necessary. The Marine Insurance Act, 1745-6 prohibited p.p.i. policies and all other policies by way of wagering and gaming on British Ships and cargoes etc. The history of this legislation and subsequent Marine Insurance Acts is discussed 22 Halsbury's Laws of England (3d ed.) pp.106-107.

25. In the case of fire insurance the assured must have an insurable interest in the property insured. The Sadlers Company v. Badcock, *ibid.*
26. Like marine insurance, insurances on the lives of others by disinterested parties was subjected to statutory control prior to the enactment of the Gaming Act, 1845. See Life Insurance Act, (1774), 14 Geo.III, c.48 in which it was prohibited to make insurances on the life or lives of persons where the person for whose benefit the policy was made had no interest in the life insured, or to wager or game on such lives.
27. A risk of pecuniary loss to the person taking out the policy over the others' life is sufficient to give him an interest in that life, Halford v. Kymer (1830), 10 B.& C.724; persons in the relation of husband and wife each have an interest in each others lives Griffiths v. Fleming [1909] 1 K.B.805; and a creditor has an interest in the life of his debtor to the extent of the debt provided it is an enforceable debt. These obvious cases are inserted simply to illustrate the nature of the interest referred to in the 1774 Act. The concept of insurable interest is a complex one an examination of which far exceeds the writer's expectations for this work.

contracts. Without it, what is ostensibly a contract of insurance would fall within s.18 of the Gaming Act, 1845 as a wagering contract.

A distinction similar to that drawn between contracts of insurance and wagers must also be recognised between the latter and speculative commercial transactions. Of particular importance in this regard are transactions in the nature of speculations on the Stock Exchange. The law has been careful to draw a distinction between commercial speculations and gambling, and the principle enunciated by Lord Herschell in 1895 in the Privy Council decision of Forget v. Ostigny<sup>28</sup> continues to operate to the present day. In that case the appellant, a stock broker and member of the Montreal Stock Exchange was employed to make actual contracts of purchase and sale of shares on the defendant's behalf on commission. In each case the purchase and sale of the shares was accompanied by delivery and payment on behalf of the principal, but the latter's object, to the knowledge of the broker, was speculation and not investment. In the lower courts the appellants claim to recover the sum of \$1926.87 owing to him by the respondent in respect of these transactions failed on the ground that the money was owing under a 'gaming contract'. The Appeal to the Judicial Committee succeeded, however, Lord Herschell L.C. saying:

"It may well be that the appellant was aware that in directing a purchase to be

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28. [1895] A.C.318.



"made the respondent did not intend to keep the shares purchased, but to sell them when, as he anticipated would be the case, they rose in value; that his object was not investment but speculation. To enter into such transactions with such an object is sometimes spoken of as 'gambling on the Stock Exchange'; but it certainly does not follow that the transactions involve any gaming contract. A contract cannot properly be so described merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value and with the intention of realizing a profit by its resale. Such dealings are of everyday occurrence in commerce. The legal aspect of the case is the same whatever be the nature of the commodity, whether it be a cargo of wheat or the shares of a joint-stock company."<sup>29</sup>

But if the transaction is not a sale and purchase of shares but is simply an agreement by the parties to pay differences occurring in the price of shares at a future time it is a contract by way of wagering.<sup>30</sup> During the 18th century and the speculative

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29. *Ibid.*, at p.323.

30. *Ashton v. Dakin* (1859), 7 W.R.384,385. Sometimes called "differences" or "time bargains". Both parties must however intend merely to gamble in "differences". If one contemplates a bona fide sale and purchase it is not a wager, *Universal Stock Exchange v. Strachan* [1896] A.C. 166; *Grizewood v. Blane* (1851) 11 C.B.526. Generally therefore, transactions with brokers will not be wagers, see e.g. *Thacker v. Hardy* (1878) 4 Q.B.D.685,695; *Forget v. Ostigny*, note 28; and *Universal Stock Exchange v. Strachan*, *supra*, even where, as in *Forget v. Ostigny* the broker knows his principal is only speculating. But a broker may be an agent in a wagering transaction *Cooper v. Neal* (1878) 27 W.R.159 or may become a party to a difference trans-

frenzy generated by schemes such as the "South Sea Bubble" difference transactions in stocks, and option contracts, created so much mischief that legislation was passed to outlaw them.<sup>31</sup>

By the simple expedient of not defining a wagering and gaming contract the draftsman of s.18 of the Gaming Act, 1845 was able to exclude the element of chance in many business and commercial transactions from the operation of the section without the necessity for detailed and complicated legislation. In that context, therefore, the section can be more readily understood as an expression of the legislative intent or policy, than a statement of 'the law'. And whilst insurance and broking transactions provide obvious examples justifying this type of approach, a similar situation is provided by ordinary commercial transactions. For example in Croftan v. Colgan<sup>32</sup> the sale of a racehorse for a stipulated sum plus one half of

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action, Wood v. Fevez (1898), 14 T.L.R.492; Thacker v. Hardy at p.694. As to the evidence the court will have regard to in determining whether it is a genuine sale and purchase as opposed to a wager, see In re Gieve [1899] 1 Q.B.794; Shaw v. Caledonian Railway Co. (1890), 17 R (Ct.of Sess.) 466,475; Ex parte Phillips and Marnham; re Morgan (1860), 2 De G.F. & J.634.

31. 7 Geo.II, c.8, 10 Geo.II, c.8<sup>(1734)</sup> known as 'Barnard's Act'. It was repealed in 1860 by 23 & 24 Vict., c.28. Its application was limited to dealings in public or joint stock or other public securities which confined its operation considerably. Williams v. Trye (1854), 18 Beav.366.
32. (1859), 10 Ir.C.L.R.133.

any winnings it might make within a specified period is an acceptable, and indeed honest mode of settling the purchase price whereas in Brogden v. Marriott<sup>33</sup> an agreement whereby the price was to be £200 provided the animal trotted eighteen miles in one hour within one month - and one shilling if it did not - raised a clear implication of an intention to wager on the horse's capacity by the parties. The distinction between the two cases lies, of course, simply in the intention of the parties to the contracts as manifested in these cases by their bargains. And, in the law of gaming and wagering contracts as in the general law of contract, that issue of fact is resolved by having regard to the substance, rather than the form of the transaction in issue.<sup>34</sup> This is particularly so in insurance (and stock broking transactions) as previous paragraphs demonstrate, where, (as in the case of the former) objective criteria designated as an 'insurable interest' supplies a working test by means of which the real motives of the parties which may be too obscure for judicial enquiry are to be gauged.<sup>35</sup>

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33. (1836), 3 Bing.N.C.88. Similarly in Coombes v. Dibble (1866), L.R.1 Exch.248 where two persons agreed to race their horses against each other, the winner to take them both.

34. Carlill v. Carbolic Smoke Ball Co. [1892] 2 Q.B. 484, [1893] 1 Q.B.256. As to annexed stipulations to the contract see Thacker v. Hardy (1878) 4 Q.B.D.685; and severability of wagering terms Rourke v. Short (1856), 5 E.& B.904.

35. The view adopted by the learned author in Vol.18 Halsbury's Laws of England (3d ed) p.170, fn(d).

[2.07] The Proviso to s.18

It will be recalled that an important qualification on the recommendations of the Select Committee on Gaming was that nothing in its report was to be interpreted as appearing to discourage horse racing.<sup>1</sup> And, it has also been suggested by the writer that that qualification was intended to apply also to the Select Committee's recommendation that all wagering contracts should be rendered unenforceable.<sup>2</sup>

There are, however, wagering contracts on horse races which result in no tangible benefit being given to the sport. For example, a wager on the side of a race by two parties with no other interest in the event but the bet. Indeed, even if the two parties were owners running their horses against each other, the wager would promote only a limited benefit for racing; that is, racing as an enterprise tending to encourage improved breeds of horses.<sup>3</sup> But subscriptions to prizes or plates to be won by the winners of horse races or other sports do provide positive encouragement to improved performances, whether by breeding, training or any other means. And this distinction and the public benefit that accrues from recognition of it is reflected in the proviso to s.18 of the Gaming Act, 1845 which reads:

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1. Supra, para. 5.
  2. Ibid.
  3. The factor recognised by the Select Committee (idem.) as the justification for giving continued encouragement to horse racing.

"Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

It will be convenient to examine this proviso in more detail in a later chapter<sup>4</sup> and it is sufficient to say at this point that whilst at first the courts had some difficulty in distinguishing between transactions in the form of wagers on the one hand and those that were contributions towards plates and prizes to be awarded to the winner on the other,<sup>5</sup> it became settled<sup>6</sup> that the proviso was only:

"... intended to meet the case of bona fide contributions to a prize to be given to the winner in some lawful competition, but not to money deposited by way of wagers."<sup>7</sup>

Thus a wager on a race by two otherwise disinterested betters or indeed a wager by two owners as to whose horse could run the faster<sup>8</sup> are not within the proviso:

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4. Chapter 4.
  5. See e.g. Batty v. Marriott (1848), 5 C.B.818.
  6. Diggle v. Higgs (1877), 2 Ex.D.422.
  7. *Ibid.*, at p.423, per Cockburn C.J.
  8. In Batty v. Marriott for example, the two parties deposited their stakes with a stakeholder to abide the result of a footrace between them. The finding in that case that the transaction was saved by the proviso from the avoiding provisions was over-ruled by the Court of Appeal in Diggle v. Higgs.

whilst contributions to a prize or plate to be given to the winner or winners are. The terms of the proviso do not, of course, provide a test by which the demarcation line between wagers and contributions to the winner's prize can be drawn. This, as in the case of all contracts, must be drawn by the courts accordingly as the intentions of the parties as manifested by the terms or substance of their bargain indicate that the contract was, or was not a contract by way of wagering or gaming.

[2.08] Conclusion on Section 18, Gaming Act, 1845

In respect to the law of gaming and wagering contracts s.18 of the Gaming Act, 1845, effected a complete reform of the English law. In this chapter the pre-history and general scope of the section has been identified. In later chapters its application in particular cases will be examined in more detail and some attempt will be made to indicate the extent to which the provision has provided, and continues to provide, a rational basis for dealing with wagering and gaming contracts.

The 1845 Act and subsequent English statutes did not have application in New Zealand. But the 19th century English Acts were to provide the basis for New Zealand law on this subject. The English statutes enacted after 1845 will later be examined in the context of discussion on New Zealand statutes. And in the next chapter it will be necessary to examine the extent to which English laws applied to the infant Colony of New Zealand. The conclusion reached in that chapter makes it desirable to emphasise again the three important changes to English law made by the Gaming Act, 1845. The first was that it repealed

many of the earlier statutes that had made the playing at games - even games of skill - unlawful, so that, in regard to the in pari delicto doctrine and gaming and wagering contracts, its scope was considerably narrowed. Secondly, by s.15 it repealed the Act of 1664 and so much of the Act of 1710 as was not amended by the 1835 Act. And thirdly, it extended the policy of discouragement that had featured in the earlier Acts by avoiding all gaming and wagering contracts, whilst at the same time acknowledging the need to draw a distinction between wagering and gaming contracts and contributions or subscriptions to prizes for horse racing and other sports.

## CHAPTER 3

THE APPLICATION OF ENGLISH  
LAWS IN NEW ZEALAND[3.01] General Principles

The principles governing the introduction of English law into "uninhabited" countries "discovered and planted" by English subjects were well developed and known when New Zealand became a British Colony in 1840.<sup>1</sup> Those principles are stated in the following observation of Sir William Blackstone, which was approved of and quoted by Lord Watson, when delivering the judgment of the Privy Council in Cooper v. Stuart:<sup>2</sup>

"It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (Salk.III.666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property

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1. Discussed at length in the New South Wales Supreme Court by Chief Justice Forbes in 1833 in McDonald v. Levy (1833), 1 Legge 39, 51 ff. and again in R v. Maloney (1836), 1 Legge 74, 76 ff.
  2. (1889), 14 App.Cas.286, 291; also approved by the Privy Council in Jex v. McKinney in the same report p.77, 82; and see R v. Vaughan (1769), 4 Burr.2494; Campbell v. Hall (1774), Lofft 655.



"of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance of the established Church, the jurisdiction of spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King in Council: the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother country."<sup>3</sup>

In relation to Imperial statutes coming into existence after the time of discovery and settlement by English subjects, they did not extend to the Colonies unless they purported to do so "expressly";<sup>4</sup> or unless it was "necessarily implied"<sup>5</sup> that they should; or unless they were adopted into the law of a Colony by the Colonial Legislature.<sup>6</sup>

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3. Commentaries, Book 1, p.107.
  4. Per Lord Blackburn in the Lauderdale Peerage Case (1885) 10 App.Cas.692, 745. Johnston v. George [1927] N.Z.L.R.490, 495. See Craies on Statute Law, 6th edition (1963) Chapt.18.
  5. Per Lord Hobhouse in Callender Sykes & Co. v. Colonial Secretary of Lagos and Davies [1891] A.C.460, 465; and see Re Eades [1917] 2 W.W.R.65, 33 D.L.R.335.
  6. Cooper v. Stuart supra, especially at p.291.

[3.02] The English Laws Act, 1858

In the case of New Zealand it was not entirely clear what English law existed when the Colony was "discovered and planted"<sup>1</sup> by English subjects because the date on which that event took place could not be fixed with any degree of certainty. The relevant sequence by which British sovereignty was extended over New Zealand was that: on the 15th June 1839 the territory was purportedly<sup>2</sup> annexed to the Colony of New South Wales; on the 30th July in the same year Captain William Hobson was Commissioned Lieutenant-Governor; on the 30th January 1840 Hobson "declared and proclaimed" that he had, on the 14th day inst. taken the accustomed oath of office.<sup>3</sup> In 1858 it was held by Acting Chief Justice Stephen that as New Zealand was annexed to the Colony of New South Wales the English law in existence and in force in New Zealand was such English law as was in existence when the Colony of New South Wales was settled.<sup>4</sup> This decision gave rise to doubts which the Legislature sought to remove by passing the English Laws Act the same year.<sup>5</sup> That Act declared that:

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1. New Zealand was not of course "discovered" by British subjects, and indeed settlement was, prior to 1840, haphazardly achieved.
  2. I say purportedly because, as one writer has observed, the geographical extensions to the Commission of the Governor of New South Wales by which the annexation was effected, did not in fact include the whole of the territory of New Zealand. See N.A. Foden, *Constitutional Developments of New Zealand 1839-1849* (1938).
  3. The historical sequence of events and their implications are expounded and explained by Foden.
  4. An unreported case referred to in *Wi Parata v. Bishop of Wellington* (1878) 3 N.Z.Jur.(N.S.) S.C.72, 78.
  5. The English Laws Act, 1858.

"The laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly."

The purpose of this measure was simply to fix the date "which should be considered in ...[the] Courts as the foundation of the Colony".<sup>6</sup> That is, the effect of that declaratory legislative act was to identify the date at which English law was to be in existence if it was to apply in the Colony in terms of the principles stated by Blackstone.

### [3.03] The Applicability Doctrine

The English Laws Act left it to the Courts to determine, without legislative guidance, the matters they should take into account in determining whether any particular English law was "applicable to the circumstances of the ... Colony". And, as subsequent cases revealed, the determination of that question was often fraught with serious difficulties. But from the start the Courts preserved a degree of flexibility that left the exercise of judicial discretion in such cases relatively unfettered. Some insight into this

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6. See note 96; The English Laws Act, 1858 recited in the preamble that; "... doubts have now been raised as to what Acts of the Imperial Parliament passed before the 14th day of January, 1840, are in force in the said Colony..." and then went on to remove those doubts by identifying the 14th day of January 1840 as the relevant date.

approach and the reason for it is revealed in the following extract from the judgment of Johnston J in King v. Johnston,<sup>1</sup> he said:

"I purposely abstain from attempting to define the words "applicable" and "circumstances" in the English Laws Act, because it is impossible to foresee all the combinations which may arise to throw doubts upon their construction; and any definition which may be given at present might afterwards affect a case which, if foreseen, might have presented a ground for modifying the definition. It seems to me, however, that it will be necessary to limit the terms by confining them to such "circumstances" and such "applicability" as the Court can judicially notice."<sup>2</sup>

The principal issue in King v. Johnston was whether s.23 of the statute 2 Geo.II, c.23 (1728) requiring attornies in England to deliver a signed bill one month before action was applicable to the circumstances of New Zealand on the 14th day of January 1840. The defendant's contention in the case involved the proposition that as there were no attornies<sup>3</sup> in (physical) existence in the Colony at the relevant date, it could not be urged that when persons did commence business as attornies

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1. (1859) 3 N.Z.Jur. (N.S.) S.C.94.
  2. Ibid., at p.95.
  3. The defendant's contention in the case was illustrated by the hypothesis that if there were no carriers, or no infants in the Colony at the relevant date, and they subsequently came, "it could not be urged ...[then] the English Law as to carriers or infants would not apply". Ibid., at p.95.

the English laws applicable to that profession would not apply. Johnston J. rejected this argument as being founded upon a fallacious use of the words "circumstances" and "applicable". He went on to say:

"The right test of "applicability" and "circumstances" cannot be, whether on a given day the particular law could be actually applied to any person or thing in the Colony; for if it were, it might be insisted that if there did not happen to be a bill of exchange falling due on the given day in the Colony, the law of England as to the presentment of bills of exchange was not applicable to the circumstances of the Colony on that day; and other similar results, as inconvenient or absurd, would arise, which never could have been contemplated..."<sup>4</sup>

The learned Judge then went on to hold that the enactment in question was not applicable to the circumstances of the Colony because:

"... at the date in question, there not only was no solicitor or attorney in existence in New Zealand to whom the English law could be applicable in New Zealand, but there could not then be any such person under the "circumstances" of the Colony, as there was not then any Supreme Court in existence, and it required the creative power of the Legislature of New Zealand to bring both the Court and the practitioner into existence; and that legislation certainly altered the "circumstances" of the Colony in a material particular."<sup>5</sup>

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4. Ibid., at p.95.

5. Ibid., at p.96.

The "circumstances" and "applicability" of which the Court could take judicial notice was identified in King v. Johnston as the legislative act necessary to establish both the Court and the practitioner in the Colony. A similar approach was adopted in New South Wales in R v. Schofield.<sup>6</sup> In that case the issue was whether the statute 18 Geo.II, c.34, s.8<sup>7</sup> was applicable to the Colony of New South Wales. This enactment provided, inter alia, that a winner of £10 at any one time, or £20 within the space of 24 hours, at any game or wager on a game, was liable to be "fined five times the value of the sum so won...; which fine (after such charges as the court shall judge reasonable allowed to the prosecutors...etc.) shall go to the poor of the parish ..." Forbes C.J. held that the statute was inapplicable to the Colony of New South Wales. He held that the imposition of the penalty and its appropriation were not severable, and that as there were no legal poor in the Colony there was:

"... a want of some legislative modification to carry this salutary law into effect."<sup>8</sup>

The Court recognised that there were voluntary associations of benevolent subscribers to institutions for affording casual relief to the poor or infirmed in New South Wales. But there were no parochial paupers maintained out of parish rates,

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6. (1838), 1 Legge 97.

7. The Gaming Act, 1744.

8. Note 6 at p.100.

levied by law, and which were distributed and managed by guardians and overseers appointed by lay payers as in England.<sup>9</sup> Similarly, Stephen J in Ex Parte Lyons ; In re Wilson<sup>10</sup> held that the English bankruptcy law contained in 6 Geo.IV, c.16 (1825) was not in force in New South Wales because the officers by whom it was to be carried into effect, i.e. Commissioners appointed by the Lord Chancellor, were not in existence there. And, in addition, the Colonial Legislature had not, at the relevant date in 1828, authorised any Commissioners to demand or be paid fees.<sup>11</sup> It required legislative and administrative machinery, which in the circumstances of the Colony in 1828<sup>12</sup> did not exist, to carry the relevant provision into effect. In Quan Yick v Hinds<sup>13</sup> a decision of the High Court of Australia, it was also held that where an enactment gave a right of appeal to a person convicted, to a Court<sup>14</sup> that was not in existence<sup>15</sup> in the Colony of New South Wales in 1828, that:

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9. Ibid., at p.100.

10. (1839), 1 Legge 140.

11. Ibid., at p.141-2.

12. The relevant date being the 25th July 1828 by 9 Geo.IV, c.83 s.24. (The New South Wales Act).

13. (1905) 2 C.L.R.345, 367.

14. The Court of Quarter Sessions.

15. In Mitchell v. Scales (1907), 5 C.L.R.405, 409, the Court acknowledged that it was mistaken on this point and that there was in fact a law as to Courts of Quarter Sessions in force in New South Wales at the relevant date. However, it is submitted that the reasoning in Quan Yick v. Hinds apart from the mistake, is good. In Mitchell v. Scales, on the same provision, the decision was the same on other grounds.

"... is ... of itself sufficient to show that the provision ...[was] not suitable to the circumstances of the Colony."<sup>16</sup>

The reasoning in Ex Parte Lyons; In re Wilson was adopted by the High Court in Quan Yick v. Hinds<sup>17</sup> and it is submitted that the Australian decisions support the reasoning of Johnston J in King v. Johnston. However, it is recognised that the Australian Courts were not applying the same test, of being "applicable to the circumstances of the ... Colony", as the New Zealand Court. For the Courts in R v. Schofield, Ex parte Lyons; In re Wilson and Quan Yick v. Hinds, the test to be applied was that derived from the statute 9 Geo.IV, c.83 (1828) (commonly referred to as the New South Wales Act); - the Australian equivalent of the English Laws Act, 1858. That Act provided, inter alia, that the laws and statutes in force in England at the date of its passing (25th July 1828), were to be:

"... applied in the administration of justice in the Courts of New South Wales and Van Dieman's Land respectively so far as the same can [reasonably]<sup>18</sup> be applied."<sup>19</sup>

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16. Per Griffith C.J., note 13 at p.365.

17. By Barton J, note 13 at p.367-8.

18. The Courts construed the statute by inserting the word "reasonably" before the phrase "be applied". Wicker v. Hume (1858), 7 H.L.C.124; Quan Yick v. Hinds, note 13, especially the judgment of Chief Justice Griffith; Jex v. McKinney supra, para 1, note 2.

19. S.24.



Thus, whereas the Australian Act related the question of applicability specifically to the administration of justice, under the New Zealand Act it was simply a factor in "the circumstances of the ... Colony" the Courts could take into account.

There was, it is conceded, a fundamental distinction between the terms of the statute 9 Geo.IV, c.83 (the New South Wales Act) and those used in English Laws Act, 1858. In Whicker v. Hume<sup>20</sup> the Lord Chancellor said that the Australian Act "applied only to the laws regulating the administration of justice"<sup>21</sup> But, as Griffith C.J. pointed out in Quan Yick v. Hinds<sup>22</sup> in reference to the Australian Act:

"the real question in every case is whether the [English] law or Statute in question extends to and is in force in the Colony."<sup>23</sup>

And, in resolving that question, it was pertinent to determine whether the English law under examination was "suitable or unsuitable in its nature to the needs of the Colony",<sup>24</sup> which was another,

20. Note 18.

21. Ibid., at p.149.

22. Note 13.

23. Ibid., at p.354.

24. Ibid., at page 356 and per Barton J at page 370; per Lord Watson in Cooper v. Stuart (1889), 14 App.Cas.286, 293 and 294.

and quite independent question<sup>25</sup> from whether it was "intrinsically incapable of application owing to the condition of the laws and institution of the Colony".<sup>26</sup> Thus, in spite of this fundamental distinction in terminology, the Australian Courts were still bound to consider the suitability of the statute in issue to the general circumstances of the Australian Colonies.

But whilst the New Zealand and Australian courts have sought to achieve some meaningful clarification of the "applicability" doctrine, the same is unfortunately not true of the Canadian courts. In that jurisdiction the tests proposed for its application are as vague as the term "applicable" itself. For example, in Makoweki v. Yachimyc<sup>27</sup> the construction of s.11 of the North-West Territories Act, R.S.C.1906, C.62 was in issue. That section provided, inter alia:

"Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July, 1870,<sup>28</sup> shall be in force in the Territories in so far as the same are applicable to the Territories,..."

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25. Note 13 per Griffith C.J. at p.356; and Forbes C.J. in R v. Maloney (1836), 1 Legge 74, 77.

26. Ibid..

27. [1917] 1 W.W.R.1279, 34 D.L.R.130 (C.A.).

28. For a discussion of the history of the application of English Laws in the territories included by King Charles II in the Hudson's Bay Company's Charter, see Walker v. Walker [1919] A.C.947; Board v. Board [1919] A.C.956 and the annotator's note to this case in [1919] 48 D.L.R.7.

Stuart J said that the applicability of English statutes to Canadian conditions under this provision depended not on an opinion as to "their wisdom and good policy", but rather upon an opinion as to their "workability"<sup>29</sup> in the Territories at the relevant date. And by "workability" he meant workable in the sense that the common or statute law of England was not for the colonists "obviously inconsistent with their new situations".<sup>30</sup> But in the later case of R v. Cyr<sup>31</sup> the same Judge made it clear that the phrase "obviously inconsistent" was to be understood in a very loose sense. He said:

"In my opinion ... the Courts of this Province are not in every case to be held strictly bound by the decisions of the English Courts as to the state of the Common law of England in 1870. We are at liberty to take cognizance of the different conditions here, not merely physical conditions, but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question."<sup>32</sup>

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29. Ibid., at p.147. (D.L.R.)
30. Idem., and see Halliburton C.J. in Uniacke v. Dickson James 287 cited by Stuart J. In other cases the word "applicable" has simply been interpreted as meaning "suitable" or "properly adapted to the condition of the country" without further elaboration. See e.g. Brand v. Griffin (1908) 9 W.L.R.427; Fraser v. Kirkpatrick (1907) 5 W.L.R.287; and Miller Morse Hardware Co. v. Smart [1917] 3 W.W.R.1113, 38 D.L.R.171.
- 31 [1917] 3 W.W.R.849, 29 C.C.C.77, 38 D.L.R.601.
32. Ibid., at p.610 (D.L.R.).

Thus social and physical conditions as well as public attitudes were relevant for determining not only whether the English law in question applied in Canada, but also, and assuming it did, for the purpose of determining what that law was. In Makoweki v. Yachimyc Stuart J recognised that by so doing the courts in Canada were "in effect legislating"<sup>33</sup> and he added:

"If we are practically legislating, we are really perhaps legislating for England rather than Alberta."<sup>34</sup>

In New Zealand and Australia the existence or non-existence in the colonies on the relevant dates of the legislative and administrative machinery necessary to enforce or apply English laws has been largely determinative of their applicability. But in Canada even these notions have not been given the same force. In an extensive judgment in Sheppard v. Sheppard<sup>35</sup> in 1906 Martin J explained that conditions in the Canadian colonies were so exceptional that the existence of the necessary administrative and legislative machinery for the application and enforcement of English laws could not possibly be a precondition to their applicability. If they were, he explained, every one of the convictions entered in the early criminal trials for offences

33. Note 27 at p.146. (D.L.R.)

34. Ibid..

35. (1908) 13 B.C.R.486.

against the common law and English statutes were illegal because, not only could a jury not be summoned on the relevant date according to the formalities prescribed and essential for trials in English Courts, but often the requisite number of jurors was not available.<sup>36</sup> In consequence, and to avoid an absurdity, English law and the machinery for its enforcement were substantially modified; rather than held to be inapplicable in the exceptional geographic, climatic and social conditions prevailing in the North American Colonies.

Strictly speaking, what Martin J said of the legislative and administrative machinery for the application of English law in British Columbia and the North West Territories was also true in early New Zealand and Australia. But there is, however, a different emphasis apparent in the Canadian cases; an emphasis that manifests itself in a greater willingness to apply and modify English law rather than reject it as inapplicable. And this approach has been approved of for the Canadian Provinces and Territories by the Judicial Committee in Watts v. Watts,<sup>37</sup> an opinion that was again reinforced in 1919 in Walker v. Walker.<sup>38</sup> The extent of

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36. Ibid., at p.507-8. In that case s.2 of the English Law Act (Revised Statutes of British Columbia c.115) provided that: "The Civil laws of England as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, shall be in force in all parts of British Columbia..."

37. [1908] A.C.573 and see also R v. Hall [1941] 2 W.W.R.245, 252.

38. Note 27; and see Board v. Board referred to in the same footnote.

the difference between this and the approach of the New Zealand and Australian Courts to the applicability doctrine is substantial, and materially limits the extent to which decisions on this question in the Canadian jurisdiction have relevance in New Zealand.

[3.04] The Application of Particular Provisions of English Statutes

In Ruddick v. Weathered<sup>1</sup> Prendergast C.J. said, inter alia:

"... the [English Laws] Act was passed not only to declare what the law was to be deemed to be in the future, but also to remove doubts as to the past..."<sup>2</sup>

He considered the scope and object of the New South Wales Act was different to that of the English Laws Act, saying:

"On reference to that Act [the New South Wales Act] it will be seen that the object of the Act was to provide machinery for the administration of justice, not to enact laws to be administered"<sup>3</sup>

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1. (1889), 7 N.Z.L.R.491.
  2. Ibid., at p.494.
  - 3, Ibid., at p.493.

It is submitted, however, that although the difference between the two Acts recognised by Prendergast C.J. clearly exists, as Whicker v. Hume<sup>4</sup> and Quan Yick v. Hinds<sup>5</sup> also show, it is a difference which does not necessarily distinguish New Zealand and Australian cases on the general issue of applicability of English Laws. However, in relation to English gaming legislation, this difference in the expressed scope of the two Acts referred to, does explain, and justify what may be seen as a significant difference in approach to an important issue relating to the applicability of particular, as opposed to general, provisions of English statutes in the two countries; that is, particular provisions of those statutes, as distinct from the statutes themselves taken as a whole.

In Quan Yick v. Hinds, Griffith C.J. said, of this issue:

"... if the general provisions of a Statute were not unsuitable to the conditions of the Colony the mere fact that some minor or severable provisions could not come into operation owing to local circumstances is not a sufficient reason for denying the applicability of the Statute as a whole. On the other hand, if the general provisions of a Statute were inapplicable, it would seem to follow that it is not competent to select a particular provision of the Statute,

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4. Para.3, note 18.

5. Para 3, note 13.

"which if it stood alone might be applicable, and to say that it is therefore applicable ..."<sup>6</sup>

In New Zealand, however, in applying the English Laws Act, the Supreme Court adopted a quite contrary approach. In King v. Johnston, Johnston J said:

"I am by no means prepared to say that a single provision in an English statute in force on the day so often mentioned, might not be operative in New Zealand, although the whole of the rest of the statute was obviously and unquestionably inapplicable; but still the context may be looked at for the purpose of testing the applicability of the particular provision."<sup>7</sup>

The learned Judge subsequently re-affirmed this view of the matter nineteen years later in Highett v. McDonald.<sup>8</sup> In that case, after stating that he saw no reason for doubting his earlier view, he went on to say:

"I think, in dealing with this question, we must suppose that we have lying open before us the whole common law and statute law of England in force on the terminal day;

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6. Para.3, note 13 at p.364. He re-affirmed this view in Mitchell v. Scales para.3, note 15 at p. 411, a judgment with which Barton J in the same case "entirely" agreed. (p.414). Isaacs J in Mitchell v. Scales preferred to express no opinion on the matter. See also Miller v. Major (1906), 4 C.L.R.219; cf. Delohery v. Permanent Trustee Co. (1904) 1 C.L.R.283.

7. Para.3, note 1, at p.96.

8. (1878) 3 N.Z.Jur. (N.S.) 102.



"and of that great body of law, every provision which was then applicable to the circumstances of the Colony is to be deemed to have been solemnly adopted and legislatively declared to be the law of the Colony by the Legislature of the Colony at a time when it had been fully empowered by the Imperial Parliament to make its own laws. And it seems to me that with respect to the statute law of England the question is not whether the whole of a particular statute, or chapter of a statute, can be applied in the Colony, but whether the particular enactment, duly interpreted and construed by the context and the preamble of the Act, is capable of being applied or not."<sup>9</sup>

In Highett v. MacDonald the issue for the Court's determination was whether s.12 of the statute 24 Geo.II, c.40 (1750) (The Tippling Act) was in force in New Zealand. That section declared that no action could be brought for the recovery of a debt for spirituous liquors unless contracted for at one time to the amount of twenty shillings. The particular provision in issue was to some extent out of context in The Tippling Act which, as the preamble declared, was enacted principally for the purpose of raising revenue duties on spirits. In addition, the statute as a whole, as the Court acknowledged, was of a local character and may not have been applicable to the circumstances of New Zealand.<sup>10</sup>

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9. Ibid., at p.104.

10. Ibid., at p.105; In King v. Johnston para.3, note 1 at p.96, the Court held that the great majority of the Act's provisions were "clearly inapplicable" but did not feel that the enactment in issue was inapplicable to the Colony on that account.

But the provision was "evidently and professedly passed for the purpose of protecting public morals" and on that account was part of the law which colonists would carry with them to a new country.<sup>11</sup> Johnston J held:

"Now provisions for the maintenance of public morality and the preservation of the public peace are in their general nature applicable to all Colonies, and unless they are necessarily connected with some circumstance or condition which renders them clearly inapplicable, it would appear that they ought to be treated as part of the law of the Colony. Now suppose the statute in question had been intituled "An Act to suppress drunkenness", and had recited in its preamble that it was "desirable to put down or diminish drunkenness among the community", and had gone on to enact, as a remedy tending to effect this object, that persons who gave credit for less than 20s worth of spirits at one time should not be entitled to recover the debt, could it be doubted that this was an enactment applicable to the circumstances of the Colony? If so, can it make any real difference in the case that the Act of 24 George II, c.40, was chiefly dedicated to provisions for raising revenue from duties on spirits, ..."<sup>12</sup>

Accordingly, the learned Judge held that although the statute taken as a whole may not have been applicable to the circumstances of the Colony the particular provision was.

For reasons alluded to earlier the Canadian approach to the application of particular provisions

11. Ibid., at p.105.

12. Idem.

of statutes is similar to that adopted by Johnston J in the New Zealand Supreme Court. In Fraser v. Kirkpatrick<sup>13</sup> the issue was whether provisions of the English Debtors Act, 1869 were in force in the North West Provinces. The relevance of an argument advanced that some of the provisions in the Act in question could not be applied was cursorily dismissed by Harvey J with the comment:

"... it is not a question of whether the Debtors Act as a whole is in force, but whether certain provisions of it which constitute part of the law of England are applicable and so in force ..."<sup>14</sup>

And in Sheppard v. Sheppard<sup>15</sup> Martin J held that where a provision in a statute applicable in principle was wholly impossible of application to the conditions of the new Colony, that did not mean that the statute had to be rejected, but only that the provision in question should be dispensed with.<sup>16</sup>

It is submitted that the Australian Courts took a narrower view of the applicability of particular provisions in English statutes because the test of applicability in that jurisdiction was expressly related to the administration of justice. And, in that context, the general purport of the statute as

13. (1907) 5 W.L.R.287.

14. Ibid., at p.289.

15. (1908) 13 B.C.R.486.

16. Ibid., at p.511; and see similarly Ellis C.C.J. in R v. Hall [1941] 2 W.W.R. 245.

a whole was a factor which, necessarily, attracted considerable attention. But, as Forbes C.J. said as early as 1838 in R v. Maloney:<sup>17</sup>

"... It has always been, and must ... always be, a preliminary point to adjust, whether the Act of Parliament, intended to be applied, is applicable to the condition and circumstances of the Colony, ..." <sup>18</sup>

Thus, in relation to this first step of resolving the suitability of English law to the Australian Colonies, the decisions of the Australian Courts are as applicable here as our own, because in this regard, it is submitted both the English Laws Act 1858 and the New South Wales Act were merely affirmative of the common law.<sup>19</sup>

[3.05] Statutes of a Local or Political Character

Under the common law principles referred to in previous paragraphs it was anticipated that colonists carried with them to the new country the great bulk of English law then in existence. But there were exceptions, as Blackstone acknowledged when he said:

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17. (1836), 1 Legge, 74.

18. Ibid., at p.77.

19. Per Forbes C.J. in R v. Maloney, *ibid.*, at p.77, cf. Prendergast C.J. in Ruddick v. Weathered para.4, note 1.

"The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), ... and a multitude of other provisions are neither necessary nor convenient for them and therefore are not in force."<sup>1</sup>

These exceptions were to be found in laws of local policy,<sup>2</sup> that is, laws

"that grew out of local circumstances and ... [were] and ... [were] meant to have a merely local operation."<sup>3</sup>

In the case of Whicker v. Hume the House of Lords held that the statute 9 Geo.II, c.36 (1735) (The Mortmain Act) was inapplicable to the circumstances of the Colony of New South Wales because it was wholly political<sup>4</sup> in its character and designed to deal with an evil that was peculiar to the Mother Country. There was no evidence, it was held, that the mischief the Act was intended to remedy, i.e. the increase in the disherison of heirs by giving property to charitable uses, was at all an evil that was felt, or likely to be felt in the colonies.<sup>5</sup>

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1. Commentaries, book 1, p.107.
  2. Per Lord Chelmsford C.J. in Whicker v. Hume, para.3, note 18 at p.150.
  3. A statement from the judgment of Sir William Grant in Att-Gen. v. Stewart (1817) 2 Mer.143 and cited by Lord Chelmsford in Whicker v. Hume para.3, note 18 at p.150.
  4. Para.3, note 18, and see similarly Jex v. McKinney (1889), 14 App.Cas.77.
  5. Para.3, note 18, p.161.

The distinction recognised in the cases, is between laws of purely local and those of general application. The latter class being invariably found to be suited to the conditions of a new colony.

The Canadian Courts have had some difficulty in filtering out English laws that were wholly political and intended to remedy purely local mischiefs. The 'Mortmain Act' is a case in point. In Doe d. Anderson v. Todd<sup>6</sup> Robinson C.J. held that it was in force in Ontario, but only because the Legislature in enacting other laws in the Province had assumed, ex abundanti cautela, that the 'Mortmain Act' was in force there. Thirty-one years later in Whitby Corporation v. Liscombe<sup>7</sup> the Ontario Court of Appeal also upheld that view. But it did so principally because the decision in Doe d. Anderson v. Todd had been accepted for too long and had, for too long a period governed titles to land in the Province to be interfered with - except by the Legislature.<sup>8</sup> These Ontario decisions, rather than the reasons given for them, subsequently influenced the Manitoba Supreme Court and in Law v. Acton<sup>9</sup> Richards J followed the Ontario

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6. (1845), 2 U.C.Q.B.82.

7. (1876), 23 Gr.1.

8. In Macdonell v. Purcell (1893) 23 Can.S.C.R.101 Doe d. Anderson v. Todd and Whitby Corporation v. Liscombe were accepted as settling the law of Ontario on this question.

9. (1902) 14 Man.L.R.246.

cases and held the 'Mortmain Act' to be in force in Manitoba also. But in that case the Judge completely over-looked the principles enunciated in Attorney-General v. Stewart and Whicker v. Hume.<sup>10</sup> In Re Estate of Fenton<sup>11</sup> Galt J felt bound to follow Law v. Acton for the same reason the Ontario Court of Appeal followed Doe d. Anderson v. Todd, but on appeal the Manitoba Court of Appeal<sup>12</sup> over-ruled Law v. Acton holding that it was quite inconsistent with Attorney-General v. Stewart and Whicker v. Hume.

[3.06] Laws for the Maintenance of Public Morality

As Johnston J recognised in Hihett v. MacDonald,<sup>1</sup> laws "for the maintenance of public morality are in their general nature applicable to all Colonies, ... unless they are necessarily connected with some circumstance or condition which renders them clearly inapplicable."<sup>2</sup> And laws for the suppression of gambling have long been recognised as laws "for the maintenance of public morality" in this context. In Attorney-General of New South Wales v. Edgley<sup>3</sup> Chief Justice Darley held, in relation to the

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10. Supra, para. 3.

11. (1920) 51 D.L.R.694.

12. Re Fenton Estate (1920) 53 D.L.R.82; and see Meanwell v. Meanwell [1941] 1 W.W.R.474, [1941] 2 D.L.R.655 for the present position in Manitoba. In that case it was held that the English Act for the Prevention of the Marriage of Lunatics (15 Geo.II, c.30 (1742)) was a purely local Act passed to deal with a local situation in England.

1. Para.4, note 8.

2. Supra, para.1.

3. (1888) 9 N.S.W.L.R.157,

statute 42 Geo.III c.119 (1802), an Act declaring private lotteries common public nuisances:

"... looking at the object of the Act, which we have already seen to be the preservation of morality and the protection of the unwary, we can see nothing in the Act or the circumstances of the colony which would render it inapplicable."<sup>4</sup>

And in Quan Yick v. Hinds<sup>5</sup> O'Connor J said:

"It cannot, I think, be doubted that the English laws prohibiting lotteries came into force in New South Wales on the passing of 9 Geo.IV c.83. They were, like the laws against gambling and wagering, of general application, and intended to safeguard the moral well-being of the community, and there would appear to be no reason why they should not have been in force from the very beginning of the settlement."<sup>6</sup>

But by far the most positive statement on the general application of gaming laws in the colonies is to be found in the judgment of Richmond J in Elliott v. Hamilton<sup>7</sup> when he said:

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4. Ibid., at p.160.
  5. Supra, para.3, note 13.
  6. Ibid., at p.378; but cf. Beck J in a decision of the Alberta Supreme Court in R v. Hung Gee (1913) 13 D.L.R.44, 46 who was of the view that the English statutes relating to lotteries and common gaming houses contained provisions "... which indicate them to be directed to local and temporary abuses ... which are incapable of being carried out in the colonies."
  7. (1874), 2 N.Z.Jur.95.



"According to the principle of the common law, as declared by the English Laws Act, 1858, the laws of England, as they existed at the date of the foundation of the colony, are in force here, so far as they are applicable to the circumstances of the colony, and have not been altered by subsequent legislation. As regards a good deal of the English legislation of the last century and a half directed against the practice of gambling, it might no doubt be argued that it is little suited to the necessities or the temper of a colonial population like our own, and that prohibitions openly disregarded and penalties never enforced would be better removed from the Statute Book. These reasons, however, are such as should be addressed to the legislator rather than to the Judge; and they apply with equal, or nearly equal, force to the mother-country and the colonies. Regarding the matter from a purely legal point of view, I can see no reason why the Statute against lotteries, 10 and 11, William III, chap.17, should not extend to New Zealand. It has nothing of a local character, but forms part of the general criminal law of England. As such, it is just as much in force here as any other part of English criminal law."<sup>8</sup>

[3.07] The Acts of 1664, 1710, 1835 and 1845

The conclusion to be drawn from these comments of both New Zealand and Australian Judges is that the English Laws relating to wagering and gaming were prima facie applicable to the circumstances of the colonies unless there was something in the circum-

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8. Ibid., at p.95.

stances of a particular Colony to render them inapplicable.

In relation to the statute 8 and 9 Vict., c.109 (1845) it did not expressly apply to the colonies and nor is there anything in the Act to suggest that it was necessarily implied that it should. As it was enacted after the 14th day of January 1840 it did not therefore apply to New Zealand, and neither did its repeal of the provisions of the statutes of Charles (1664) and Anne (1710).<sup>1</sup>

As to the Act of Charles II (1664), the preamble to that statute confirms it as an Act for maintaining public morals and there is nothing to suggest that it was intended to deal with a purely local mischief. Nor is there anything in the Act which would render enforcement of it in New Zealand difficult or impossible. It was applied without argument by the New South Wales Supreme Court in Chambers v. Perry (1847)<sup>2</sup> where Dickson J held that an action to recover £250 on a horse race, the amount not being paid down at the time, was unenforceable. There appears, however, to have been no reported cases in which this provision has been applied in New Zealand or Canada.

In relation to the Act of Anne (1710), the first section is clearly applicable in New Zealand for the same reasons advanced in respect to the Act of

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1. See the reasoning of Skerrett C.J. in Johnston v. George [1927] N.Z.L.R.490, 502.

2. (1847), 1 Legge 430.

Charles II (1664). That section was, of course, modified in 1835 by the Act of Will.IV and both Acts must therefore be considered together. In Official Assignee of Matene Mita v. Johnston<sup>3</sup> Cooper J unequivocally held that:

"The statutes 9 Anne, c.14, and 5 & 6 Will.IV, c.41 are in force in New Zealand."<sup>4</sup>

And in Johnston v. George,<sup>5</sup> which like Official Assignee of Matene Mita v. Johnson, was also on the first section of the Act of Anne as modified by the 1835 Act, Skerrett C.J. treated the provisions of those Acts as in force here. But in Official Assignee v. Totalisator Agency Board<sup>6</sup> although Counsel for the appellant contended that the Act of Anne was in force in New Zealand (in 1960), the Court did not find it necessary to decide the point.

It is suggested that the first section of the Act of Anne (1710) and the modifying Act of Will.IV (1835) are both in force in New Zealand. There is nothing in these provisions rendering them inapplicable and the weight of authority is in support of that conclusion. Hihett v. McDonald<sup>7</sup> - both the

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3. [1918] N.Z.L.R.373.

4. Ibid., at p.374.

5. Note 1.

6. [1960] N.Z.L.R.1064, a Court of Appeal decision.

7. Para.4, note 8.

reasoning and the decision - on an analogous provision, also supports that view, as does the New South Wales case of Chambers v. Perry<sup>8</sup> on the Act of Charles II, (1664). The Canadian decisions also support this view, there being a long line of authorities in that jurisdiction where the first section of the Act of Anne has been applied, or been assumed to have applied, without argument.<sup>9</sup>

In Dogherty v. Poole (1875),<sup>10</sup> a Magistrate's Court decision, an action brought by the loser of a wager of a game under s.2 of the Act of Anne (1710) succeeded. In that case it was strongly argued by the defendant that that provision of the Act was not in force in New Zealand because, in relation to actions by informers, it required part of the penalty to be disbursed to the "poor of the parish". This contention is, of course, supported by R v. Schofield<sup>11</sup> and Ex parte Lyons; In re Wilson.<sup>12</sup> But it was

8. Note 54.

9. See e.g. Rose v. Collinson (1910) 12 W.L.R.648, 16 C.C.C.359; Miller v. Martin [1923] 1 W.W.R.64; Carr Bros. v. Abbs [1939] 1 W.W.R.249; In re Summerfeldt v. Worts (1886), 12 O.R.48; Hammer v. Finkelstein [1931] 1 W.W.R.769, [1931] 2 D.L.R.738; Goggins v. Morrison [1925] 2 W.W.R.75, [1925] 2 D.L.R.1203; Le Blanc v. Thomas (1932), 5 M.P.R.410; Kadiuk v. Pawluk (1958), 25 W.W.R.321, 14 D.L.R. (2d) 409; and on the Act of 1835 see further Windsor Hotel Co. v. Silverman [1935] 1 D.L.R.616.

10. (1875), 2 N.Z.Jur. (N.S.) 14.

11. Para.3, Note 6.

12. Para.3, note 10.

rejected by the Resident Magistrate who held that the action was based solely on the first part of the section which gave a remedial proceeding to the loser. He went on to say:

"... I see no reason why that part of the statute, at any rate, is not law in New Zealand. The second part of the statute is of a penal character; but I need not give any opinion upon whether that is law here."<sup>13</sup>

Although the Magistrate referred to the "second part of the statute", in the context, his remarks relate also to the second part of the section. That part, is clearly severable from the first part, in that whereas it, the second part, gives a cause of action to common informers, the first part gives it to the winner. Thus, the cases of R v. Schofield, Ex parte Lyons; In re Wilson are in point but distinguishable as regards severability of the first part of the section. And, there being no apparent reason to require a finding to the contrary, the first part of s.2 is clearly applicable in New Zealand; although the common informers right of action is, I suggest, not.

The writer's conclusion, therefore, is that the relevant provisions of the Acts of Charles II (1664), Anne (1710) and William IV (1835) relating to gaming and wagering contracts applied, and continue to apply in New Zealand, except to the extent that they have

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13. Note 10, at p.14.

been repealed or modified by the New Zealand Legislature. Up to the present time they have not been expressly repealed for New Zealand<sup>14</sup> and nor have they, in the writer's view, been rendered inapplicable by the process of implied repeal. But the resolution of that question must be left for later chapters when New Zealand legislation will be examined.

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14. The penal provisions have, however. See s.9 of the Crimes Act 1961 (s.6, The Criminal Code Act, 1893).

CHAPTER 4THE HISTORY OF NEW ZEALAND  
LEGISLATION ON GAMING  
AND WAGERING CONTRACTS[4.01] Introduction

The principle of law identified by Blackstone that carried English law into British Colonies was principally concerned to meet the immediate needs of the colonists. And their needs could only be met by recognising (as that principle does), that men's nature, their habits and instincts, do not change overnight or with a journey to the far side of the world. The early colonists brought more to New Zealand than themselves and their laws. They brought a way of life - and one that had been significantly dominated for centuries by the particular speculative trait referred to in chapters one and two of this work. They brought the games, practices and traditions of the time which were a manifestation of that speculative trait.

As later paragraphs disclose, and perhaps not surprisingly, the British were no less extravagant in their wagering and gaming in New Zealand than they had been in England. At first English gaming laws in force in the colony (supplemented by fragmented provincial legislation) provided some measure of control. But English laws on wagering and gaming were hopelessly inadequate and outmoded even in England in 1840 and, it will be recalled, during and after 1845 they were substantially reformed.

[4.02] The Gaming and Lotteries Act, 1881

Between 1841 and 1881 there were enacted a number of Provincial<sup>1</sup> Ordinances<sup>2</sup> and Acts<sup>3</sup> in New Zealand which contained provisions relating to wagering and gaming, but it was not until the latter year that the first substantial<sup>4</sup> and national, legislation on the subject was passed. That Act, The Gaming and Lotteries Act, 1881, was concerned principally to enact laws relating to gaming houses,<sup>5</sup> betting

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1. There were, however, no Ordinances or Acts on Wagering and Gaming of the Legislative Council of New Zealand between 1840 and 1880, and nor were any enacted by the Legislative Councils of the New Ulster and New Munster.
  2. For example s.2(6) and (7) of the Vagrant Ordinance, Session XIII, No.62 (1861) of the Otago Provincial Council and s.4(1) of the Police Ordinance, Session X, No.1 (1858) of the Canterbury Provincial Council.
  3. For example s.1 of the Billiard Tables Act, Session XII, No.1 (1864) of the Nelson Provincial Council; s.2(17) of the Rural Police Act, Session XIX, No.11 (1866) and s.5(44) of the Auckland Municipal Police Act, Session XIX, No.15 (1866) of the Auckland Provincial Council.
  4. There were no gaming or wagering Acts or Ordinances as such, of the Provincial Councils, such enactments as were passed were contained in licensing and vagrancy legislation. Interestingly, during the Maori wars era it was found expedient in the Nelson Province to encourage one form of gaming. The Rifle Prize Act, 1860 (Session VII, No.3) was passed to encourage competence with the rifle in the Province. There is something of a flavour of the English statutes on gaming passed during the reigns of Richard II and Henry VIII in the terms of the preamble which reads: "Whereas it is expedient to promote the use of the Rifle by the inhabitants of the Province of Nelson, as a means of defence against invasion ..."
  5. Sections 3-10.



After 1845, therefore, it became necessary for the colonial legislature to consider similar reforms in New Zealand. In the course of this some differences in the laws of England and New Zealand occurred. These in turn promoted more pronounced differences as the Courts and Legislature reacted to the gamesters' attempts to draw subtle distinctions between their schemes and the prohibitions in the Acts. But even allowing for these differences, gaming and wagering practices in New Zealand were very much a reflection of the colonists' impression of such practices "back Home". Not unnaturally, it was to England that the early law reformers looked for solutions to social problems caused by these practices, as they occurred in the young colony. As a result, English gaming and wagering laws of the period are very much mirrored in the 19th century colonial Acts; indeed so much so that the history of the colonial legislation is to be found principally in the Imperial experience, and the title of this chapter must therefore be read with that qualification in mind.

houses<sup>6</sup> and lotteries,<sup>7</sup> its main provisions being based upon sections in the English Gaming Act 1845 (8 and 9 Vict., c.109) and the Betting Houses Act, 1853, (16 and 17 Vict., c.119). And also based on these English Acts were sections 33 and 34 of the 1881 Act, the first New Zealand enactments concerned with the legal status of wagering and gaming contracts.<sup>8</sup>

Section 33 of the 1881 Act is a copy<sup>9</sup> of s.18 of the statute 8 & 9 Vict., c.109 (1845),<sup>10</sup> the provision declaring all gaming or wagering contracts void and unenforceable. The New Zealand Parliamentary Debates of the period are silent on the specific reason for the inclusion of this provision in the colonial statute.<sup>11</sup> But they do disclose that wagering and

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6. Sections 11-15.
  7. Sections 16-13.
  8. The words "gaming and wagering contracts" are used here in a general sense. As later paragraphs show s.34 and the proviso to s.33 were not concerned with wagering and gaming contracts per se.
  9. Only the layout, the section number and the introductory words in the two provisions are different. The English and New Zealand provisions are identical in all material respects.
  10. Supra, chapt.2.
  11. Unlike the English Gaming Act, 1845, the New Zealand Act of 1881 was not preceded by a Select Committee, and the records of the Joint Statutes Revision Committee of the period have not survived.

gaming was a prominent and extravagant past-time in the young colony. In 1881 the Hon. T. Dick advised the House that there was more gambling in the colony than some Honourable members realised:

"... It had been calculated that in Dunedin at least £100,000 a year changed hands in gambling transactions, and the gentleman who made that calculation stated that Christchurch was even worse, so that they [the honourable members] might reckon that between a quarter and a half a million of money changed hands in the course of a year in gambling - a most useless and unprofitable manner of spending money ..."<sup>12</sup>

and the Hon. W. Robinson advised members that:

"... he knew that bets amounting to thousands and tens of thousands of pounds were now pending on coming events."<sup>13</sup>

When New Zealand became a British Colony it inherited, it seems, some of that English passion for extravagant gambling of which John Ashton wrote.<sup>14</sup>

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12. (1881) 38 N.Z.P.D.499.

13. (1881) 39 N.Z.P.D.437.

14. Parliamentary debates of the period disclose that principal concerns were sweepstakes and consultations, (1880) 35 N.Z.P.D.258, (1881) 38 N.Z.P.D.281-2; Art Unions and Lotteries, (1880) 35 N.Z.P.D.275, (1881) 38 N.Z.P.D.281; Bookmakers - these are frequently referred to in most uncomplimentary language, e.g. (1881) 38 N.Z.P.D.495; Gambling by Youth (1881) 38 N.Z.P.D.496; Gambling in Clubs (1882) 41 N.Z.P.D.405. Particularly illustrative of this English inheritance are the Racecourse Reserve Ordinance, Sess.XI, No.7 (1859), Canterbury Provincial Council, and the Ordinances Sess. XVII, No.3 (1869), Sess.IV, No.7 (1857), Sess.X, No.3 (1863) of the Wellington Provincial Council

It was not surprising, therefore, that the colonial Legislature should look to the experience of its Imperial counterpart for solutions to this problem. And, in so doing, it was natural that it should also adopt the Imperial approach of dealing with gambling in a thoroughly trenchant manner. Indeed, legislation that did anything less than that would, as Sir William Fox observed at the time, "be so much milk and water".<sup>15</sup> Between 1840 and 1881 there is only one reported New Zealand case in which an action was brought to recover money lost in a betting transaction.<sup>16</sup> The inclusion of a provision rendering gaming and wagering contracts void and unenforceable is therefore difficult to sustain on the basis of any specific, and existing, colonial need at the time. But to the extent to which such a provision operated to discourage gaming and wagering its enactment in 1881 was justified and, in any event, in the light of the English experience and the existence in England of the 1845 provision declaring gaming and wagering contracts void and unenforceable, an Act of a colonial legislature which lacked such a provision could

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relating to racecourse reserves for Manawatu, Hutt Park and Wairarapa respectively. But gambling was not the prerogative of the English settlers, and this was recognised in the 1881 Act ss.9 and 10 of which specifically outlawed the Chinese games of fan-tan and pa-ka-poo and houses kept for the playing of such games.

15. (1881) 38 N.Z.P.D.496. The Hon. Mr J. Sheehan, on the other hand, complained that the Gaming & Lotteries Bill was too stringent (1881) 39 N.Z.P.D.302.
16. Dogherty v. Poole (1875) 2 N.Z.Jur.(N.S.)14. The case was pleaded on the statute of Anne (1710).

hardly be seen to be dealing with the vice of gambling in a thorough manner. For these reasons the English provision was adopted in New Zealand, as it was also in all the Australian states.<sup>17</sup>

Although based, in large measure, upon the English Gaming Act 1845 the colonial Act did not, like the former Act, repeal either the earlier statutes concerned with gaming,<sup>18</sup> or those provisions in the Acts of Charles II (1664) and the Act of Anne (1710) which had not been altered by the Act of 1835.<sup>19</sup> Thus, following the 1845 Act, the potential existed for quite substantial differences in the law relating to gaming and wagering contracts between the mother country and its colony. Those differences will be examined in some detail in later paragraphs when an attempt will be made to identify the scope of New Zealand gaming and wagering contract laws. But further differences in the law of the two countries were to occur before New Zealand gaming and wagering laws were settled in a consolidating Act in 1908,<sup>20</sup> and the circumstances giving rise to them are important in terms of understanding and interpreting the colonial legislation.

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17. New South Wales, Gaming and Betting Act, 1912, s.16; South Australia, Lottery and Gaming Act, 1917, s.27; Victoria Polices Offences Act, 1915, s.96; Queensland Gaming Act, 1850, s.8; Western Australia, Police Act Amendment Act, 1893 (No.1), s.12; Tasmania, Gaming Act, 1891, s.16. See W.V.J. Windeyer, *Wagers, Gaming and Lotteries in Australia* (1929), Chapt.II.

18. See *supra*, chapt.2.

19. *Ibid.*

20. The Gaming Act 1908.

[4.03] Read v. Anderson

A principal objective of s.18 of the English Gaming Act, 1845 was to protect the Courts from the degradation of being "engaged in ludicrous inquiries"<sup>1</sup> into gaming and wagering disputes. But despite the sweeping terms of the provision and the liberal construction given it by the Courts, in 1882 a crack in the legislative armour appeared.

In 1881 a turf commission agent named Read, at the request of a better named Anderson, placed bets on certain races run at Ascot. To the knowledge of Anderson, there was a well established usage that a turf commission agent instructed by an employer to back a horse, backed it in his own name and became alone responsible to the layer of the odds or the person with whom the bet or bets were made. And, on the settling day after the event, the agent received or paid the winnings or losses, and then rendered his own account to his principal, paying to, or receiving from him, the balance of the money won or lost. But on this occasion, and for reasons that are irrelevant here, a dispute arose between the principal and agent and, in respect to some bets that had been lost, Anderson instructed Read that he was not to pay the winners. Read, however, was a professional turf commission agent and a member of Tattersall's Subscription Room for whom

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1. Per Lord Ellenborough in Squires v. Whisken (1811), 3 Camp. 140, 141.

a default in the payment of winners could give rise to serious consequences. Even loss of livelihood. Read therefore paid the winners and then brought an action to recover an amount of £175, being losses for which Anderson refused to reimburse him.<sup>2</sup>

The action came before Hawkins J in the Court of Queens Bench and the plaintiff based his case on the principal/agent relationship. In reply, the defendant pleaded firstly that recovery of the losses was barred by s.18 of the Gaming Act, 1845, and secondly that in any event the authority to pay the winners had been revoked before Read paid them. The learned Judge rejected these contentions. The 1845 Act did not, he held, render wagers illegal. It simply made "the law no longer available for their enforcement".<sup>3</sup> And, he later went on to hold that:

"... although the law will not compel the loser of a bet to pay it, he may lawfully do so if he pleases; and what he may lawfully do himself he may lawfully authorise anybody else to do for him, and if by his request or authority another person pays his lost debts, the amount so paid can be recovered from him as so much money paid to his use."<sup>4</sup>

In regard to the argument that the authority to pay the winners had been revoked Hawkins J held that in the instant case an authority to pay the bets, if

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2. Read v. Anderson (1882) 10 Q.B.D.100.

3. Ibid., at p.104.

4. Ibid., at p.105.

lost, was coupled with the employment, and although before the bet was made the authority to pay it could be revoked, the moment the employment was fulfilled by the making of the bet the authority to pay it, if lost, became irrevocable.<sup>5</sup> Accordingly, he entered judgment for the plaintiff Read.

On appeal<sup>6</sup> the reasoning and decision of Hawkins J was upheld, but Brett M.R. (dissenting) took a strong stand against allowing the law to be used to protect the business of a turf commission agent. He said:

"... it has been contended ... the law puts it into the plaintiff's power to enforce payment by the defendant of the amount of the bet, because unless it is paid the plaintiff will suffer a loss in his business; but the plaintiff's business, although it may not be illegal, is directly objected to by the law, and the contracts made by him in his business cannot be enforced: it is a business of which the law ought not to take notice, and therefore the inconvenience and the loss, which the plaintiff may suffer in his objectionable business, form no ground for an action for revoking an authority which the principal ought not to have given. The cases, in which an authority cannot be revoked, ought to be confined to those cases in which the agent will upon revocation suffer what the law deems to be an injury."<sup>7</sup>

There was no denying the logic of the objection of the Master of the Rolls. How could the law consist--

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5. Ibid., at p.109.

6. Read v. Anderson (1884) 13 Q.B.D.779.

7. Ibid., at p.781-2.



ently deny recognition to gaming and wagering contracts on the one hand, and then afford protection to the business of a turf commission agent on the other. The problem facing the court, however, was that although the transaction certainly came within the spirit of s.18 of the 1845 Act it did not come within its express terms. In a later case<sup>8</sup> Lord Coleridge C.J. said that at the time Read v. Anderson was decided he entirely agreed with the dissent of the Master of the Rolls, and he thought the case:

"... really cut at the root of the value and principle of the statute, because it was a decision that if you employed somebody else to do that which you could not, so as to make it effectual at law, do yourself, you could in effect make a good contract in respect of a gaming debt."<sup>9</sup>

[4.04] Bridger v. Savage

The business of Turf Commission Agent was clothed in legitimacy by Read v. Anderson and this was reinforced in 1884 when Bridger v. Savage<sup>1</sup> came before the same court. In that case the agent had placed bets as instructed by his principal, and, although paid by the losers, had refused to pay the principal the winnings he held on his behalf. The principal sued, and the agent pleaded that the

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8. Tatam v. Reeve [1893] 1 Q.B.44.

9. Ibid., at p.46.

1. (1885) 15 Q.B.D.363.

action was barred and the contract avoided by the Act of 1845. This case was closer to the terms of s.18 than Read v. Anderson had been in that the principal was in fact bringing his action to recover 'a sum of money ... alleged to be won upon a wager'.<sup>2</sup> However, the case raised a fundamental principle of the law of agency and the court felt quite unable to allow the agent to benefit at his principal's expense. Bowen L.J. said:

"Now with respect to the principle involved in this case, it is to be observed that the original contract of betting is not an illegal one, but only one which is void. If the person who has betted pays his bet, he does nothing wrong; he only waives a benefit which the statute has given to him, and confers a good title to the money on the person to whom he pays it. Therefore when the bet is paid the transaction is completed, and when it is paid to an agent it cannot be contended that it is not a good payment for his principal. If not, how monstrous it would be that the agent who has received money which belongs to his principal, and which he received for his principal and only on that account, should be allowed to say that the payment was bad and void."<sup>3</sup>

In Bridger v. Savage the principal succeeded. Five years later, Cohen v. Kittell,<sup>4</sup> a further case involving a turf commission agent was brought. In that case the principal had employed the agent to bet on commission, but the agent failed to make certain bets pursuant to his principal's instructions.

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2. S.18 of the Gaming Act, 1845.

3. *Ibid.*, at p.367-8.

4. (1889) 22 Q.B.D.680.

The principal sued the agent for breach of contract claiming as damages the excess of gains over losses which the defendant should have received had the bets in question been made. In the lower court the jury found a verdict for the principal. But on appeal Huddleston B and Manisty J found for the agent on the grounds that in spite of what was held in Read v. Anderson and Bridger v. Savage, if in fact the bets had been placed, and won, and the loser had refused to pay, the effect of the statute of 1845 must have been to leave him without any legal remedy. Under that Act such a contract was null and void and, applying ordinary principles of agency, the success of the principal's action depended upon him being able to show that he could have recovered under the contract his agent negligently failed to make on his behalf.<sup>5</sup> But at the root of Mr Justice Manisty's objection to the claim was his belief that there had already been a considerable, and undesirable erosion of the principles and objectives of the 1845 legislation. He regretted the decision in Read v. Anderson and personally preferred the dissent of the Master of the Rolls.<sup>6</sup> The decision in that case,

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5. "... It is sufficient to say that the effect of statute 8 & 9 Vict., c.109, s.18, being to render bets irrecoverable at law, a principal can suffer no real loss through the refusal of his agent to make bets on his account."  
Per Manisty J at p.684.

6. It seems clear from the terms used by the learned Judge at p.684 that he would not have followed Read v. Anderson if it had not been binding on him. He did not agree that the mere "inconvenience of exclusion from Tattersall's" provided any justification for allowing the agent to recoup in that case.

and that of Bridger v. Savage had, in his view, had serious social consequences. He said:

"... this statute, ... as the preamble shows, was to add to the strictness of the law with respect to gambling. Since the Act passed, however, and in consequence, as I cannot but think, of some of the decisions upon it, the practice which it was intended to discountenance has greatly increased, and that with results of a most disastrous character, as regards both horseracing and transactions in stocks."<sup>7</sup>

[4.05] The Gaming Act, 1892 (U.K.)

In spite of judicial concern and dissatisfaction with the principle established by Read v. Anderson<sup>1</sup> it was not until 1892 that the Imperial legislature intervened. In that year it was enacted that:

"Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eighth and ninth Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."<sup>2</sup>

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7. Ibid., at p.683.

1. Supra, para.3.

2. 55 Vict., c.9, s.1 (1892), The Gaming Act, 1892.

This enactment came under judicial scrutiny in the year it was passed in Tatam v. Reeve.<sup>3</sup> In that case, in response to a letter from the defendant, the plaintiff settled his, the defendant's, debts with four persons in the amount of £148. The defendant's letter did not disclose that the money was owed in respect of bets on horseraces, but the court was of the view that in regard to that, "the plaintiff was not an ignorant person in the transaction."<sup>4</sup> The plaintiff sued to recover the amount paid and argued that the Act of 1892 did not touch the transaction between he and the defendant. That Act, he argued, meant to strike at transactions in which the person who paid money was a party, as agent, to the contract of gaming; and he, the plaintiff did not pay the money "under or in respect of" any contract rendered void by the 1845 Act. The court, however, rejected this contention. Wills J was of the view that, under the Act:

"I do not think it makes any difference whether the plaintiff knew, or did not know, that the payments he made were in payment of bets; because, if those payments were made 'in respect of' betting contracts, he is brought within the very words of the Act."<sup>5</sup>

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3. [1893] 1 Q.B.44, decided in November 1892, approved by the Court of Appeal in Saffery v. Mayer [1901] 1 K.B.11.
  4. Per Lord Coleridge C.J. at p.47.
  5. Ibid., at p.48. But see Hyams v. Stuart King [1908] 2 K.B.696, 715; MacDonald v. Green [1951] 1 K.B.594, 605; where it was said there must be knowledge on the part of the person paying that he is paying a betting debt. Wills J went too far in this statement.

Two years later, in O'Sullivan v. Thomas<sup>6</sup> it was argued that the 1892 Act effected a change in the law so that a right, which previously existed to recover deposits from stakeholders before they had paid the winners,<sup>7</sup> had been taken away. In that case the depositor had demanded the return of his deposit after the event but before the stakeholder had paid the winner. The stakeholder refused to comply and paid the winner in the face of the plaintiff's demand. The latter sued to recover his deposit and, as the law stood prior to the 1892 Act he was clearly entitled to succeed. The issue in the case was simply whether the money deposited by the plaintiff could be said to be a "sum of money paid" under the Act, that is, a sum of money paid by the plaintiff. Wills J, after observing that the case depended on the court's impression as to the meaning of the language used in the section, found for the plaintiff. An "opposite construction" he held:

"... would make the Act of Parliament, which certainly was not passed out of sympathy with the betting fraternity, their charter. ... the Act was not conceived with the view of affording legal facilities to betting men to enable them to carry out their betting operations by the aid of the Courts of Law."<sup>8</sup>

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6. [1895] 1 Q.B.698.

7. Hampden v. Walsh (1876) 1 Q.B.D.189;  
Diggle v. Higgs (1877) 2 Ex.D.422.

8. *Ibid.*, at p.700.

Wills J held that the word "paid" must be "given its prima facie meaning of paid out and out", and it was not applicable to money deposited for the purpose of paying a third party. O'Sullivan v. Thomas was upheld by the Court of Appeal a few years later in Burge v. Ashley & Smith, Ltd.<sup>9</sup>, a case on identical material facts.<sup>10</sup> There, Collins L.J. confirmed the "impression" of Wills J of the 1892 Act in the earlier case. He said that although:

"... the words [of the 1892 Act] looked at by themselves might cover the case ... I think we have to consider something more than mere words."<sup>11</sup>

Tatam v. Reeve involved a situation where the plaintiff paid the defendant's gaming debts. In In re O'Shea; Ex parte Lancaster<sup>12</sup> instead of paying O'Shea's debts, Lancaster guaranteed a bank overdraft at the former's bank to enable O'Shea to pay the debts himself.<sup>13</sup> The Court of Appeal held that a loan to enable another to pay a betting debt was not a transaction which fairly fell within the terms of the 1892 Act and was accordingly a good debt to support a petition in bankruptcy. Tatam v. Reeve was

9. [1900] 1 Q.B.744.

10. As Collins L.J. observed the case was "virtually an appeal from the decision in O'Sullivan v. Thomas", *ibid.*, at p.749, see also A.L.Smith L.J. at p.746.

11. *Ibid.*, at p.750.

12. [1911] 2 K.B.981.

13. There was also an earlier loan for £1,000 and an overdraft guarantee for £1,000, but only the £500 overdraft guarantee is relevant here.

distinguished. But in MacDonald v. Green<sup>14</sup> the same court explained In re O'Shea; Ex parte Lancaster as a case where there was an intention, but not an express contractual stipulation that the borrower should discharge his betting debts. If there was a contractual stipulation<sup>15</sup> that the money was to be applied in payment of betting debts - as there was in MacDonald v. Green - then the lender is, in substance, paying the debtor's losses, and the loan is a payment in respect of a betting debt which is avoided by the 1892 Act.

In re O'Shea; ex parte Lancaster was decided by giving a literal interpretation to the terms of the 1892 Act. In O'Sullivan v. Thomas, Burge v. Ashley & Smith, Ltd. and MacDonald v. Green, however, the courts were more concerned with the objective of the legislation than its express terms. In each case, on a literal construction being adopted the decision must have gone the other way. But in O'Sullivan v. Thomas and Burge v. Ashley & Smith, Ltd. the lesson of Read v. Anderson was fresh in the memory of the judges who were perhaps more conscious of the meaning in the comment of Blackstone that:

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14. Note 5.

15. Denning L.J. at p.606 considered that it did not matter "whether the stipulation is express or implied or to be inferred from the circumstances". But Cohen L.J. and Asquith L.J. decided the case on the basis of the stipulation having been in express terms, *ibid.*, pp.602, 605.



"... particular descriptions [in statutes] will ever be lame and deficient ... the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another."<sup>16</sup>

[4.06] De Mattos v. Benjamin

Although the Court of Appeal in Tatam v. Reeve and subsequent cases adopted a construction of the 1892 Act that was very much in sympathy with the legislative intent its limits were recognised in De Mattos v. Benjamin<sup>1</sup> in 1894. In that case the agent had laid bets on his principal's behalf and had been paid by the losing backers. However, he failed to deliver the winnings to his principal and the latter brought an action to recover them as money received, and held by the agent on his behalf. The agent pleaded that the principal's claim was caught by the Act of 1892 but Lord Coleridge C.J. rejected this contention saying, inter alia:

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16. Commentaries, book IV, p.173. In a later case, MacDonald v. Green, Lord Denning left no doubt why he decided against the plaintiff lender, who was the Managing Director of a Company carrying on business as bookmakers and commission agents. For to decide the case in his favour, he considered: "... should present bookmakers with a means of evading the Gaming Acts. ... All that a bookmaking company would have to do [to avoid the 1892 Act] would be to send a messenger to the backer, with a cheque drawn by the managing director in favour of the backer and a draft letter prepared ready for signature, and get both back, the cheque endorsed and the draft letter signed." Note 13, at p.605.

1. (1894) 63 L.J. (Q.B.) 248.

"The Gaming Act 1892 enacts that which is reasonable and right. It makes illegal [2] all parts of the transaction included in its scope, including the act of a person who, as commission agent, effects an illegal contract ... But it does not enable a person who has received money on behalf of another to retain it for his own use. It does not go on to enact that if B receives money from A to pay over to C, B would be entitled to put it into his own pocket."<sup>3</sup>

The purpose of the 1892 Act, stated in its simplest form was, therefore, to deprive contracts of agency and loan for gaming and wagering of such legal effect as would discourage the agents and lenders themselves, and Bridger v. Savage remained undisturbed. And this legislation, like the Acts of 1845 and 1853, also provided the basis for similar reform in New Zealand in the form of s.2 of the Gaming Act, 1894.

[4.07] The Gaming Act, 1894 - Agency Betting and Stakeholding:

The Explanatory Note to the Gaming Bill 1894 states that the decision in Read v. Anderson:

"... and that in Bridger v. Savage, led to fresh developments in betting business of a most objectionable form, and the English Act was passed in 1892 for the purpose of putting a stop to it. The New Zealand Courts have of late years seen many such cases, and it is a scandal that the Courts should be used for such purposes."

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2. This is an error. The Act did not make the transactions illegal, merely unenforceable.
  3. Ibid., at p.249.

In the context of this explanation, s.2 of the Gaming Bill, after adopting the language used in the English statute of 1892, then added the words:

"... and no action shall be brought or maintained to recover ... any sum of money won, lost, or staked in any betting transaction whatever."

The reason for the addition of these words lies in part in the expressed intention of the legislature in the Explanatory Note to meet the situation occurring in Bridger v. Savage<sup>1</sup> as well as that in Read v. Anderson.<sup>2</sup> But why should the New Zealand legislature's concern with wagering and gaming predominate to the extent that they were prepared to allow a dishonest agent to keep his principal's winnings? The object, no doubt, was to discourage the public from resorting to such agencies, but in order to understand the legislative concern it is necessary to go back to the Act of 1881 and examine developments from that time.

Prior to the passing of the 1881 Act there was much debate in New Zealand as to whether the totalisator should be permitted to operate in the country. There was, in fact, strongly voiced opposition to it, principally because, as Sir William Fox said, in the debates on the 1881 Bill:

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1. Supra, para.4. This may be stating the case too high. But there is a strong inference arising out of the statement in the Explanatory Note that the 1894 Bill was intended to prevent actions of the Bridger v. Savage class.
  2. Supra, para.3.

"... It seemed a great mistake, when they were attempting to discourage the vice of gambling and were striking at the very root and foundation of those temptations which induced it, that they should leave a little sappling like this totalisator standing, which someday would probably be found to have grown into a large tree under the shadow of which vice flourished ... You would never exterminate the race of cats by encouraging the breeding of little kittens."<sup>3</sup>

However, the totalisator possessed three important advantages to a legislator concerned to put down gaming and wagering. Firstly, the history of gaming and wagering in England and other parts of the world had clearly shown that it was quite impossible to stamp out this form of activity completely, and the totalisator did provide a means by which limited and controlled facilities could be provided to enable the public to indulge its irrepressible appetite for wagering.<sup>4</sup> Secondly, the totalisator permitted a form of indirect taxation on the profits from wagering in the sense that it enabled money to be channelled into the racing clubs so that they could improve their facilities and prizes and thereby foster improved breeding and importing of racing stock.<sup>5</sup> Thirdly, and most importantly, it might discourage those 'men who had very much the appear-

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3. (1881) 38 N.Z.P.D.496. See (1880) 35 N.Z.P.D. 276 where an amendment to outlaw the totalisator was lost. Also (1881) 39 N.Z.P.D.437; (1882) 41 N.Z.P.D.402; *ibid.*, 405; (1882) 43 N.Z.P.D. 117; for later complaints.

4. (1880) 35 N.Z.P.D.258; also (1885) 52 N.Z.P.D. 100 and 102; (1894) 83 N.Z.P.D.287.

5. (1885) 52 N.Z.P.D.101; (1894) 83 N.Z.P.D.286.

ance of vultures, ... looking out for prey'; the bookmakers.<sup>6</sup>

Throughout the last two decades of the 19th century the business or occupation of bookmakers was under continual attack. Their presence in the community was viewed in New Zealand as a grave social evil<sup>7</sup> and in 1881 their activities were considerably curtailed by the Act of that year which created an offence, inter alia, of betting in any place in a way of business.<sup>8</sup> Unfortunately, however, although the totalisator was intended as an instrument for the suppression of bookmakers, it subsequently proved to be the means of their survival.<sup>9</sup> The 1881 Act did not declare the business or occupation of a bookmaker unlawful<sup>10</sup> and, although

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6. The Hon. Mr T. Dick (1881) 38 N.Z.P.D.495, and also (1880) 35 N.Z.P.D.275; (1881) 38 N.Z.P.D.196-7.
  7. The general attitude to them at the time is very much reflected in the comment of the Hon. E. Wakefield that bookmakers were "...a lot of men who to all appearance had no right to be outside the walls of a gaol". (1881) 38 N.Z.P.D.498. And see Hon. R. J. Seddon (1894) 83 N.Z.P.D.291.
  8. The 1881 Act contained extensive provisions against betting houses and gaming houses, but the principal sections affecting bookmakers were s.18 and s.11. See, e.g. Porter v. O'Connor (1887) 5 N.Z.L.R.257; In re Selig & Bird (1891) 9 N.Z.L.R.315; Barnett v. Henderson (1892) 11 N.Z.L.R.317; Hyde v. O'Connor (1893) 11 N.Z.L.R.723; Martin v. Campbell (1892) 13 N.Z.L.R.42; and Paterson v. Campbell (1894) 13 N.Z.L.R.529.
  9. A not altogether unforeseen occurrence. In 1881 the Hon. R. Hursthouse said it was "... a clever mechanical invention to enable lazy bookmakers to make a living out of the unwary public". (1881) 38 N.Z.P.D.497.
  10. The business or occupation of a bookmaker was not declared unlawful until 1920, Gaming Amendment Act 1920, s.2.

by s.46 of that Act racing clubs were permitted to operate totalisators at race meetings under licence, betting on the totalisator could be done "by or through some person present on the spot immediately before the race is run".<sup>11</sup> At a time when only limited travel facilities were available this limitation on the totalisator gave rise to a public demand for off-course betting facilities - which the more enterprising bookmakers eagerly provided. Thus, as a consequence of the licensing of totalisators on race courses, private off-course betting agencies and totalisator odds betting facilities were soon available throughout the country.<sup>12</sup> And from all accounts the business was quite extensive. In 1894 the Hon.Capt. W.R.Russell asked the House:

"... do they [Honourable Members] realise that for every man going before them [at the totalisator windows] there are at least ten, and there may be a hundred, who have invested money in the private "tote", of which they see nothing? Do they know that "tote" shops are numerous - I will not say in almost every tobacconist's shop - that would be unjust - but in every town in New Zealand, and that for every pound put on the totalisator there are tens that do not go through the total-

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11. Described by Richmond J. in Paterson v. Campbell note 8, at p.531.

12. The totalisator agency business was not illegal prior to the 1894 Act, In re Selig & Bird, Paterson v. Campbell note 8; betting at totalisator odds was not illegal per se, per Williams J. in Barnett v. Henderson note 8, at p.318, but it was if done systematically in a way of business Porter v. O'Connor, Paterson v. Campbell, In re Selig & Bird note 8.

"isator ... Do they know that for every pound that goes through the machine ten pounds go to the pockets of the book-makers."<sup>13</sup>

And the Hon. Sir Robert Stout advised the House that he had received information that there were (in 1894):

"... men in this colony who are making from £1,000 to £2,000 a year by "tote" betting. I think that is very bad. I have a list which was given to me, showing that there must be at least something like £50,000 to £60,000 a year made by "tote" betters in this colony outside of the totalisator altogether."<sup>14</sup>

Contrary to the legislatures intention, the totalisator had, in fact, proven to be the book-makers salvation. And, for those who disliked the agency business, a totalisator agency could provide a very effective cover for a bookmaking operation which contravened the provisions of the 1881 Act.<sup>15</sup>

The emergence of bookmakers in their new style as "totalisator agencies" was a principal (and perhaps exaggerated) concern when the 1894 Act was passed. It was this concern, and also the need to prevent bookmakers activities from eating into the

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13. (1894) 83 N.Z.P.D.288.

14. (1894) 83 N.Z.P.D.300.

15. In both In re Selig & Bird and Paterson v. Campbell, note 8, there is more than a hint of this.

profits of the racing clubs,<sup>16</sup> that weakened the colonial legislatures respect for principles in the law of agency when it enacted s.2 of the 1894 Act. That Act also took direct action against such activities, creating imprisonable offences in relation to betting totalisator odds and being employed as a totalisator agent.<sup>17</sup> But s.2 did not confine itself to removing completely the element of legal obligation inherent in the agency business itself. It also excised those obligations from the relationship of stakeholder and depositor, for by the additional words actions to recover monies staked, as well as that won or lost, were prohibited.

The extension of s.2 of the 1894 Act to prevent recovery in the Bridger v. Savage and De Mattos v. Benjamin situations raised not a voice in protest. But its extension to avoid recovery of deposits from stakeholders did. The Hon. E.C.J. Stevens complained in the Legislative Council:

"It was ... proposed by this Bill to do away with all trusteeship that any stakeholder had got in regard to all stakes which were offered, and in cases which the law itself declared to be lawful games or races. It took away the rights of the individual who won the stakes. It absolutely took away the responsibility on the part of the individual who was entrusted with the stakes, and who was practically the trustee. It took away the responsibility of the stakeholder to make good the money which he held in his hands. He did not know whether it was to be considered a proper way of deal-

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16. (1894) 83 N.Z.P.D.286; *ibid.*, 288-9.

17. Sections 4 and 5 respectively.



"ing with moneys received and those who held them as trustees, but it seemed to him to be one of the most revolutionary proposals it was possible to conceive ... He thought ... persons winning stakes in a fair and open fashion were perfectly entitled to demand payment."<sup>18</sup>

The change effected by the 1894 Act in relation to stakeholding was substantial. And once again, in order to understand the nature of the change and the reason for it the previous law must be considered.

Prior to the Gaming Act, 1845 there was some uncertainty as to whether a depositor could demand the return of his stake from the stakeholder. In Emery v. Richards<sup>19</sup> the Court of Exchequer held that a deposit on a wager of less than £10 on the event of a foot race could not be demanded back from the stakeholder by the depositor, but must abide the event. In Eltham v. Kingsman<sup>20</sup> on the other hand the Court of Kings Bench was of the contrary view, and the same Court confirmed this view of the matter ten years later in Hastelow v. Jackson<sup>21</sup> But s.18 of the Act of 1845 to some extent resolved the conflict by avoiding all gaming and wagering contracts, and that provision specifically provided that no action could be brought:

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18. (1894) 83 N.Z.P.D.177.

19. (1845) 14 M.& W.728.

20. (1818) 1B & Ald.683.

21. (1828) 8 B.& C.221.

"... for recovering any sum of money or valuable thing ... which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."<sup>21</sup>

On a literal interpretation the provision clearly prevented actions to recover deposits from stakeholders. But in Varney v. Hickman<sup>22</sup> it was held that that part of s.18 relating to deposits applied only to the non-recovery by the winner of the stakes deposited by the other party, and it did not affect the right of a depositor to recover back his deposit if demanded from the stakeholder before he paid it over to the winner of the event. Varney v. Hickman was followed in Hampden v. Walsh.<sup>23</sup> In that case Cockburn C.J. explained the nature of the relationship existing between a stakeholder, the winner of the event and the depositor in the following terms:

"We cannot concur in what is said in Chitty on Contracts, 8th ed., p.574, that 'a stakeholder is the agent of both parties, or rather their trustee'. It may be true that he is the trustee of both parties in a certain sense, so that, if the event comes off and the authority to pay over the money by the depositor be not revoked, he may be bound to pay it over. But primarily he is the agent of the depositor, and can deal with the money deposited so long only as his authority subsists."<sup>24</sup>

Diggle v. Higgs,<sup>25</sup> a decision of the Court of Appeal

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22. (1847) 5 C.B.271.

23. (1876) 1 Q.B.D.189.

24. Note 23, at p.194-5.

25. (1877) 2 Ex.D.422.

in 1877, and Trimble v. Hill,<sup>26</sup> a decision of the Judicial Committee on appeal from the Supreme Court, Sydney, in 1879 settled any doubts that might have existed after Varney v. Hickman and Hampden v. Walsh. A stakeholder was not a trustee of the parties to a wager, he was, and remained at all times, an agent of his depositor. His right to pay the winner was, therefore, dependent upon the subsistence of his principal's authority to pay. And if revoked before payment, a payment in defiance of the revocation of that authority would render him liable to the principal for the amount of the deposit.<sup>27</sup> But once the money was paid a subsequent revocation of the authority to pay was ineffectual. And in any case, s.18 of the 1845 Act prevented an action by a winner to acquire the stakes as winnings - even if he was a depositor.<sup>28</sup> If a depositor, he could only pursue to recover his own stake as a depositor, but not in the capacity of winner.<sup>29</sup>

The decisions allowing repudiation and recovery back before the stakeholder had executed his authority can be justified on the basis that after repudiation the money ceases to abide the event and becomes money of the depositor in the hands of the stakeholder

26. (1879), 5 App.Cas.342.

27. Hampden v. Walsh was an action to recover a £500 deposit paid over in defiance of such a revocation, in Trimble v. Hill the action was brought to recover £200 on the same grounds.

28. See e.g. Martin v. Hewson (1855) 10 Ex.737, cf. Savage v. Madder (1867) 36 L.J. (Ex) 178.

29. Per Cockburn C.J. in Hampden v. Walsh note 23, at pp.196-7.

without any good reason for the latter retaining it.<sup>30</sup> But as Lord Esher M.R. observed in Strachan v. Universal Stock Exchange (No.2) those decisions are "an encroachment on the plain words"<sup>31</sup> of s.18 of the 1845 Act and are acceptable only because they are "agreeable to [the] mind."<sup>32</sup> They were, in other words, policy decisions and stand, like Read v. Anderson,<sup>33</sup> Bridger v. Savage<sup>34</sup> and O'Sullivan v. Thomas<sup>35</sup> as monuments to a judicial reluctance to accept that the legislature could have intended to place its concern about the vice of gambling above the integrity of the law of agency. In England the principles of agency have survived the Gaming Acts.<sup>36</sup> In New Zealand the position is confused. On the one hand, as later paragraphs will show, the legislature has subordinated the law of agency to its concern about the activities of bookmakers. On the other hand, as in England, the Courts have shown some reluctance to accept that it could have intended to do so. The issue still awaits an authoritative resolution. But there are two further matters which support the view that the legislature did not intend to allow the established principles of agency to

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30. Per Kay L.J. in Strachan v. Universal Stock Exchange Ltd., (No.2) [1895] 2 Q.B.697, 702-3.

31. *Ibid.*, at p.699.

32. *Idem.*

33. *Supra*, para.3.

34. *Supra*, para.4.

35. [1895] 1 Q.B.698.

36. See, 4 Halsbury's Laws of England (4th ed.) paras.21-23, 26, 30-31 on Betting.

operate between principal and betting agent in New Zealand. A drafting error in the 1881 Act, and an erroneous view of totalisator proprietors as mere stakeholders of the totalisator investor's wagers also contributed substantially to this change. The circumstances of these two factors were as follows.

As previously mentioned the principal provisions of the Colonial Act of 1881 were extracted from the Imperial Acts of 1845 and 1853 (The Betting Houses Act).<sup>37</sup> Section 33 of the 1881 Act, which avoided all gaming and wagering contracts, was copied from s.18 of the 1845 Act. But unfortunately, and, it is suggested without realising the full implications of doing so, the draftsman of the New Zealand Act then copied s.34 (of the 1881 Act) from s.6 of the English Betting Houses Act, 1853. That provision read:

"Nothing in this Act contained shall extend to any person receiving or holding any money or valuable thing by way of stakes or deposit to be paid to the winner of any race or lawful sport, game, or exercise, or to the owner of any horse engaged in any race."

The Betting Houses Act, 1853 created offences of, inter alia, keeping premises etc. for betting, that is for receiving money as a deposit on a bet,<sup>38</sup> or for the consideration for an undertaking to pay any money on any event or contingency relating to horse races, fights, games, sports and exercises.<sup>39</sup> The sections

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37. Supra, para.2.

38. s.4.

39. s.1.

creating these, and related offences were, with inconsequential modifications, copied into the Colonial Act of 1881.<sup>40</sup> But s.6 of the Betting Houses Act, 1853, in the context of that Act, was intended to do nothing more than recognise the distinction between being a party to a betting transaction and being a mere stakeholder - the former being the concern of the Act, the latter not. Thus, s.6 clarified the stakeholders position by declaring that he did not, as such, come within the provisions of the 1853 Act.

In all probability, the draftsman of the 1881 Act intended that s.34 of that Act should have the same limited effect as s.6 of the Betting Houses Act. But unfortunately it did not because the introductory words to the provision - "Nothing in this Act ..." - also encompassed the avoiding provision, s.33. It will be recalled that in England the equivalent of s.33 of the New Zealand Act of 1881 was s.18 of the Gaming Act 1845. The Betting Houses Act, 1853 did not contain such a provision. Thus, by inserting s.6 of the Betting Houses Act, 1853 into the 1881 Act<sup>41</sup> the New Zealand draftsman effectively deprived

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40. s.1 of the Betting Houses Act, 1853 became s.11 of the 1881 Act, and s.4 of the former Act became s.14 of the latter. The provisions are only stated in the text in general terms. There were quite comprehensive provisions in the relevant Acts which also created related offences.

41. s.6 of the Betting Houses Act, 1853 was also adopted by the Australian States. But interestingly enough New South Wales (s.48(3), Gaming and Betting Act, 1912); Victoria (s.101 Police Offences Act, 1915); and Tasmania (s.11 Suppression of Public Betting and Gaming Act, 1896) confined its operation to the provisions concerned

the Varney v. Hickman<sup>42</sup> line of authority of the essential basis for its application in New Zealand; - that is, s.33, the avoiding provision. As a consequence, on a literal construction of these provisions, the conflict between Emery v. Richards<sup>43</sup> which favoured the trusteeship element in stakeholder/ depositor relations, and Eltham v. Kingsman<sup>44</sup> which favoured the agency approach, survived in the colony.

The only reported case in which the New Zealand Courts were called upon to decide the effect of s.34 on s.33 of the Act of 1881 was Dark v. Island Bay Park Racing Company.<sup>45</sup> In that case, which will be canvassed in more detail in later paragraphs, the issue was whether a depositor was entitled to recover his winnings from the stakeholder.<sup>46</sup> Counsel for the depositor argued that the transaction did not come within s.33 of the Act and under s.34 the winner was

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with the suppression of betting houses. South Australia, (s.68 Lottery and Gaming Act, 1917) and Western Australia, (s.9 Police Act Amendment Act, 1893 (No.1)) made the same mistake as New Zealand.

42. Note 22.

43. Note 19.

44. Note 20, as supported by Hastelow v. Jackson note 21.

45. (1886) 4 N.Z.L.R.301.

46. It will be the writer's contention in later paragraphs that the finding that the defendant was a stakeholder of money deposited pursuant to a wagering contract was erroneous.

entitled to recover.<sup>47</sup> The Court was, therefore, faced squarely with the question as to the relationship between ss.33 and 34. But Richmond J side-stepped the issue, saying:

"The present action ... is certainly nothing less than an action to enforce an agreement made between the depositors - it is to carry the agreement into effect by an action against the stakeholder. Therefore the case, in my opinion, falls apart from the conditions at the end of the Act, and falls within the enactment of s.33, which says that all wagering agreements are null and void ... they cannot be enforced in a Court of Justice."<sup>48</sup>

It is important, however, to recognise that this was an action to recover winnings, and not simply an action to recover Dark's own deposit from the stakeholder. If the action had been of the latter kind the decision may well have gone the other way.<sup>49</sup> But regardless of whether it was an action to recover

47. He also argued that the defendant was an agent, and not a stakeholder. But the argument is, perhaps, only briefly reported. The defendant was not called upon to reply. Note 45 at p.301-2.

48. Ibid., at p.302.

49. It was a policy decision which Richmond J justified with the words "... No doubt the object of the Legislature in providing that these matters should not be the subject of an action was to save the time and dignity of the Court, for dignity could scarcely be preserved in the investigation of the absurd disputes arising out of betting transactions." Ibid., at p.302. But it was decided after Read v. Anderson and Bridger v. Savage which must have swung the balance in favour of the depositor.



winnings, or a successful action to recover a deposit, in either case such a conclusion flew in the face of the legislation. Richmond J resolved the difficulty of applying s.34 by giving it no application at all; it was in effect, a judicial revocation of a legislative enactment,<sup>50</sup> and one which the legislature itself ratified when it repealed s.34 in the 1894 Act.<sup>51</sup> But recognition, perhaps, of the drafting error in inserting s.34 in the 1881 Act in the first place, was not the only reason for the section's repeal. It was also prompted by a concern to remove what may well have been regarded as an anomaly in the law in respect to totalisator betting.

[4.08] The Gaming Act, 1894 - Totalisator Betting

When the Hon. William Montgomery moved the second reading of the 1894 Bill he said, inter alia, of s.2 and the repeal of s.34:

"There was a case a short time ago, which was assumed to be of considerable importance, which came before the Court in one of the provincial districts, and which afterwards was referred to the Court of Appeal. There was then seen to be a good deal of doubt as to what the law was, and this Bill now proposed to make it clear."<sup>1</sup>

There is no record of such a case being decided on the point near or at that time. But in the debates on a proposed amendment in relation to sweepstakes and advertising in 1887 there is a similar comment. The Hon. G. McLean said then, in the Legislative Council:

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50. It may well be, although the report is silent on the point, that Richmond J was not unaware of the draftsman's error.

51. By s.7, The Gaming Act, 1894.

1. (1894) 83 N.Z.P.D.177.

"... The Judges of the Supreme Court and the Resident Magistrate have decided that if a person investing his money in the totalisator demands the return of his money he can get it back; and I presume that the Council will not object to pass a measure remedying this flaw in the existing legislation ..."<sup>2</sup>

The only case on record about that time was Dark v. Island Bay Park Racing Company<sup>3</sup> which was decided by Richmond J in the Wellington Supreme Court in March 1886. And it is submitted that although it was not that case, that the Hon. W. Montgomery referred to in the above quotation, the case does illustrate the point. In Dark's case the plaintiff Dark had backed a certain horse at the defendant club's totalisator during a January meeting. Unfortunately the horse in question ran a dead-heat with another horse and the club refused to pay any dividends on that race and ordered that it be re-run. The re-run was won by another horse and Dark brought an action to recover the £2.2s dividend he alleged he was entitled to on the result of the first race. In the Lower Court the Magistrate non-suited the plaintiff holding, that by virtue of s.33 of the Gaming and Lotteries Act, 1881 the contract was not enforceable. The case raised the issue of the status of the racing club as licensee of the totalisator. Richmond J said:

"It appears to me to be beyond all controversy that the present action is brought to enforce

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2. (1887) 57 N.Z.P.D.258. He was referring to a case decided in Dunedin at that time. But this is the only reference to it now in existence.

3. (1886) 4 N.Z.L.R.301.

"a wagering contract. The totalisator is described in section 8 of the Act as an instrument of gaming and wagering, and as such the use of it is generally prohibited and subjected to penalty and forfeiture ... It is quite plain that the instrument is treated by the Act as an instrument for gaming and wagering, and I do not see any difficulty in saying who were the layers of the wagers affected by the instruments. It is perfectly plain, I think, that the depositor in the totalisator backs the horse he selects, against the field. That is the wager, and it is laid with the backers of the other horses - whether the layers of the wager are known to one another or not signifies nothing - and those who are working the machine are the stakeholders."<sup>4</sup>

Now having regard to the finding in the case that s.33 of the Act applied to a claim for winnings against a stakeholder, the view that the operators of the totalisator were stakeholders of the betters' deposits could give rise to quite inconvenient consequences, especially if the action against the stakeholder was brought to recover a better's deposit.

Speaking of the nature of the totalisator in Tollet v. Thomas<sup>5</sup> Cockburn C.J. said:

"Thus, with ingenuity worthy to be employed in a better cause, it was contrived that each person, who was induced to bet, might see at a glance what was the amount of the odds offered if he bet on any particular horse; but (and this is material to be observed), the state of the odds was liable to change before the race was run ...

The person therefore who, by means of this machine, is induced to part with his half-

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4. Ibid., at p.302.

5. (1871) 6 L.R.Q.B. 514.

"crown, does so on a speculation, his chance of remuneration depending on two events: one, namely, whether his horse wins, determining whether he shall get back anything; the other, namely, how many other gamblers shall have deposited their half-crowns, and on what ...[horses], determining how much he shall receive in the event of his winning."<sup>6</sup>

Thus, the odds are not fixed and an investor on the totalisator knows that the dividend paid is determined by the total amount invested on the race, the horses upon which it is invested, the winner/s of the race and the amount the club may deduct as a percentage of the total investment for operating the machine. But if, as Richmond J suggests in Dark v. Island Bay Park Racing Company investors on a totalisator are wagering with each other and the proprietor of the totalisator is merely the stakeholder then, on the authority of the Hampden v. Walsh, Diggle v. Higgs, and Trimble v. Hill line of authority a depositor could demand, and indeed sue for, a return of his deposit. Thus, the odds on a totalisator dividend are subject to the further contingency, the integrity of an investor's fellow investors.

It is the writer's contention, however, that Richmond J in Dark v. Island Bay Park Racing Company misunderstood the legal nature of both totalisator investments and wagering contracts.

In a carefully considered statement Hawkins J defined a wagering contract in Carlill v. Carbolic

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6. Ibid., at p. 519. See also Hanworth M.R. in Attorney-General v. Racecourse Betting Control Board [1935] 1 Ch.34, 52.

Smoke Ball Company<sup>7</sup> in the following terms:

"... a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract."<sup>8</sup>

This definition was adopted with approval by the Court of Appeal in Ellesmere v. Wallace,<sup>9</sup> and Lord Denning M.R. in Tote Investors Ltd. v. Smoker<sup>10</sup> said he would not like to treat it as a rigid definition:

"... but it does bring out this feature: it is essential that each party may either win or lose. If one party can neither win nor lose, then it is not 'gaming' or 'wagering'..."<sup>11</sup>

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7. [1892] 2 Q.B.484. This definition, although given subsequent to Dark's case was, however, based on a consideration of cases decided before 1886. See *supra*, chapter 2.
8. *Ibid.*, at pp.490-1. And see Cotton L.J. in Thacker v. Hardy (1878) 4 Q.B.D.685, 695.
9. [1929] 2 Ch.1, 24, 33, 48-9.
10. [1968] 1 Q.B.509.
11. *Ibid.*, at p.516.

In that case Tote Investors Ltd. brought an action against Smoker to recover £23.13.8d. owed by her to them following credit betting transactions in which she placed bets to that amount on the totalisator. The defendant argued that the contracts by which the debt was incurred were wagering contracts avoided by s.18 of the Gaming Act, 1845. However, the Court rejected this contention. Lord Wilberforce said:

"Now it is true that this contract or transaction may be described as a transaction of betting. It is so described in fact in the Betting, Gaming and Lotteries Act of 1963 which consolidated some earlier legislation and which in terms refers to transactions with the totalisator as involving bets. It is equally true, as the defendant pointed out, that in a number of contexts, including legal dictionaries, betting is equated with wagering. However, the question we have to answer here is whether betting with the totalisator can be considered and ought to be considered\* wagering within the meaning of the section in the Act of 1845. Now, without accepting every word and every element in the definition by Hawkins J in the Carlill case, that element in the definition, which says that it is essential to a wagering contract that each party may under it either win or lose, does seem to me one which has been supported by authority from which it is impossible that we should depart ... [On those authorities] I think we have to regard the position as being that the totalisator, as the result of transactions with it, is incapable of either winning or losing and therefore not engaging in a wagering transaction."<sup>12</sup>

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\* My emphasis

12. Ibid., at p.518.

The authorities to which Lord Wilberforce referred were Ellesmere v. Wallace and the decision of the House of Lords in Attorney-General v. Luncheon and Sports Club, Ltd.<sup>13</sup> In that case "gambling transactions" were carried on through the instrumentality of the totalisator. The issue in the case was whether investments on the club's totalisators attracted betting duty in respect of wagers on horse races, under s.15 of the Finance Act, 1926. The House of Lords held that they did not because the investments did not constitute wagers or bets between the investors and the club. Lord Buckmaster said, inter alia:

"A bet is something staked to be lost or won on the result of a doubtful issue, but no doubtful issue affects the respondents - they neither win nor lose on any such chance."<sup>14</sup>

And Lord Blanesburgh said, inter alia:

"I am doubtful indeed whether they [the rules affecting betting on the club's totalisator] connote the making of any bets at all either between pool members individually or between losing pool members on the one hand and winning pool members on the other."<sup>15</sup>

The conclusion of the English cases is that betting on the totalisator, although "betting of a sort"<sup>16</sup> does

13. [1929] A.C.400.

14. Ibid., at p.405.

15. Ibid., at p.407.

16. Per Humphreys J in Everett v. Shand [1931] 2 K.B. 522, 533.

not constitute betting with the machine.<sup>17</sup> And, although there is no conclusive authority that such investments do not constitute betting between the investors inter se, there is judicial opinion to that effect.<sup>18</sup> But importantly, for the English Courts investments on the totalisator, although bets are not wagering contracts in terms of the avoiding provision:<sup>19</sup>

Richmond J decided Dark v. Island Bay Park Racing Company without resort to authority and without argument from the respondent.<sup>20</sup> And no attempt was made by the learned Judge to analyse the ingredients of a wagering contract and relate them to totalisator betting. The decision in the case was simply a product of the Judge's revulsion against totalisator betting. But in spite of these weaknesses in the judgment and in spite of the

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17. The Scottish view is to the contrary, see Strathern v. Albion Greyhounds [1933] S.C.(J) 91.
  18. Lord Blanesburgh in Attorney-General v. Luncheon Sports Club, note 13, at p.407. The head note to the report inaccurately states that "bets were made inter se". But this apparently was based on a statement of Lord Buckmaster at p.405 that the contracts were entered into between the investors through the club.
  19. Lords Denning M.R. and Wilberforce in Tote Investors Ltd. v. Smoker were both careful to confine their conclusions to wagering contracts in the context of the avoiding provision.
  20. The respondent was not called upon to reply, and the appellant did not argue it was not possible to construct a wagering contract from totalisator transactions. He merely asserted that the persons working the totalisator were agents, although not stakeholders. This tends to suggest a concession on the appellant's part that the investors were betting inter se.



qualified legislative approval of totalisator betting in the 1881 Act;<sup>21</sup> Dark's case has consistently enjoyed judicial approval even to the present day.<sup>22</sup> For later courts, however, the task of following Dark v. Island Bay Park Racing Company was made easier. For, what Richmond J left unsaid in that case was revealed for them ten years later in the 'articulated major premiss' of Denniston J in Pollock v. Saunders.<sup>23</sup> He said:

"The Gaming and Lotteries Act is intituled 'An Act for the Suppression of Gaming and Betting-houses, and for the more effectual Abolition of Lotteries'. In it it is incidentally provided that those using the totalisator under the very limited and restricted conditions imposed shall not be liable to the penalties and forfeitures enacted in respect of all other public wagering and gambling. The totalisator, though not actually banned, is certainly not blessed. It remains what it was before the Act - an instrument for betting and gambling - practices tolerated by the law but not recognised by its Courts. It seems extravagant to invoke in favour of this half-contemptuous concession a restriction on private rights established for the protection of the laudable and necessary pursuits of trade and commerce."<sup>24</sup>

In that case the court was responding to an argu-

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21. Qualified, because only licensed totalisators were lawful.
22. See e.g. Police v. Pools (NZ) Ltd. [1962] N.Z.L.R. 854, 858; Police v. Steele [1964] N.Z.L.R. 492, 494; Racing Enter-Prizes Ltd. v. Police [1970] N.Z.L.R. 307, 311; where Dark v. Island Bay Park Racing Company is expressly approved of.
23. (1897) 15 N.Z.L.R. 581.
24. *Ibid.*, at p. 589-90.

ment by the plaintiff, a professional bookmaker, that the use of a licensed totalisator on a racing club's ground during a race meeting gave the public a right to enter, such that the club's private property ceased to be juris privati.<sup>25</sup> This contention was, of course, rejected.

The readiness<sup>26</sup> with which this statement of Denniston J has been accepted in later cases discloses a reluctance by the New Zealand courts to accept totalisator betting as conduct worthy of legal recognition. In Official Assignee v. T.A.B.<sup>27</sup> the Court of Appeal upheld the decision in Dark v. Island Bay Park Racing Company but, the two Judges who alluded to the nature of the contract involved came to their conclusions on different grounds. Gresson P said:

"I think the current of authority requires one to regard betting on the totalisator as a multipartite agreement between numerous parties divided into groups who bet to win or lose according as the uncertain event does or does not happen."<sup>28</sup>

Cleary J, however, looked to provisions in the Gaming

25. The argument was based on the principle laid down by Hale in his treatise De Portibus Maris, Hargrave's Law Tracts, 77.

26. For example MacGregor J in Goggin v. Young [1928] N.Z.L.R.753, 757; Haslam J in In re Richardson; Official Assignee v. T.A.B. [1959] N.Z.L.R.481. But cf. Hutchison J in Official Assignee v. T.A.B. [1960] N.Z.L.R.1064, 1087.

27. Note 26.

28. Ibid., at p.1075.

Act which identified the totalisator as an "instrument for gaming or wagering",<sup>29</sup> and as "the instrument for wagering or betting known by that name".<sup>30</sup> The Act, he observed, spoke of "purchasing any ticket or making any bet in connection with the working of a totalisator"<sup>31</sup> and consequently, he held:

"... whether the betting be with the totalisator proprietor or by the investors inter se, the claim ... is to recover money lost in a betting transaction."<sup>32</sup>

With Official Assignee v. T.A.B. the opportunity to reconsider Dark's case was lost, and in 1973 Cooke J in Economou v. MacDonald and Others<sup>33</sup> was able to conclude:

"... that the concept of mutual betting must now be regarded as authoritatively settled in New Zealand."<sup>34</sup>

But the complication that arose with Dark's case

29. The Gaming Act 1908, s.8(2).

30. Ibid., s.50(8).

31. Ibid., s.53.

32. Ibid., at p.1082. In this respect the English position is no different. See e.g. Lord Wilberforce in Tote Investors Ltd. v. Smoker, note 10, at p.518 - the same considerations did not move him toward the view that there was therefore a wagering contract.

33. An unreported judgment, Supreme Court, Hamilton, 13th August 1973. The claim related to a jackpot of \$831,564.70.

34. Ibid., at p.26-7.

remained. Vis, did a totalisator investor have the capacity to repudiate the totalisator proprietor's authority to pay his deposit to the winner and demand its return? In Official Assignee v. T.A.B. Cleary J the only Judge to refer to the question said:

"It seems to me to be plain ... that if the totalisator can be called a stakeholder at all it is a stakeholder of an unusual kind, because it cannot be in the position of an ordinary stakeholder whose authority to pay over the stakes may be countermanded."<sup>35</sup>

But in Harrison & Others v. Greymouth Trotting Club (Inc.) & Others<sup>36</sup> Casey J was of the contrary view.

Ironically, however, this dilemma remained only because the courts failed to recognise that it had its origins in Dark's case and was resolved by the legislature in the 1894 Act. There was open to the legislature then two possible courses of action. Either it could legislate in favour of the view that an investment on the totalisator did not amount to a wagering contract,<sup>37</sup> or it could simply repudiate any right that then existed to recover deposits from a stakeholder. And, consistently with the expression of real concern during the Parliamentary debates at the time<sup>38</sup> about

35. Note 26, at p.1083.

36. An unreported judgment, Supreme Court, Greymouth, 28th May 1975.

37. That is, follow the English approach.

38. Section 6 of the 1894 Act is a reflection of this concern. It provides, inter alia, that totalisator licenses were to be reduced by 2/3rds of the number issued in the 12 month period 1st August 1892 to 31st July 1893.

the extent of totalisator betting, the latter course was adopted; s.2 of the 1894 Act specifically providing, inter alia, that no action could be brought to recover any sum of money "won, lost, or\* staked in any betting transaction whatever".<sup>39</sup>

[4.09] The Gaming Act, 1894 - Prizes for Games, Sports and Exercises

When s.18 of the Imperial Act of 1845 was enacted whereby gaming and wagering contracts were avoided and rendered unenforceable, that provision was followed by the words:

"Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise."

This proviso, with some inconsequential alteration, was carried into s.33 of the Colonial Act of 1881, and its purpose was intended to protect from the avoiding section arrangements whereby the winner of a lawful game, etc., was to benefit from contributions or subscriptions deposited or promised for that purpose.<sup>1</sup>

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\* My emphasis

39. See *infra*, chapt.5, para.3.

1. Diggie v. Higgs (1877) 2 Ex.D.422; Ellesmere v. Wallace, [1929] 2 Ch.1; cf. Batty v. Marriott (1848) 5 C.B. 818.

In relation to horse-racing this policy was important, because improvement of breeds and indeed participation in the sport required a guarantee of reasonable stakes. And, to that end, contributions or plates were frequently offered by the Crown and racing clubs.<sup>2</sup> But although the policy, and indeed the express terms of the proviso are clear the Courts soon found great difficulty in applying it.

The first case in which the proviso came under judicial scrutiny was that of Batty v. Marriott.<sup>3</sup> In that case two men each deposited £10 with a stakeholder to abide the event of a footrace between them. In substance the arrangement between the two amounted to a wager as to who could run the faster and the element of 'contribution or subscription' in terms of the proviso was, to say the least, tenuous. However, whilst it was recognised that "if two persons only run their horses one against the other for a sum of money that is clearly a wager",<sup>4</sup> the Court considered that the arrangement in

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2. The early history is outlined by James Rice, *History of the British Turf*, Vol.1 (1879). In a Report, Select Committee on Gaming, 20 May 1844, p.VIII the importance of the practice is recognised as worthy of protection. See *supra*, chapt.2, para.5.
  3. Note 1.
  4. *Ibid.*, at p.829 per Wilde C.J.

the case was not within the enacting section and was saved by the proviso. In a subsequent case of Diggle v. Higgs<sup>5</sup> the case of Batty v. Marriott was over-ruled, the Court of Appeal holding, in the words of Cockburn C.J. that the:

"... proviso was intended to meet the case of bona fide contributions to a prize to be given to the winner in some lawful competition, but not to money deposited by way of wagers."<sup>6</sup>

Having regard to the object of the avoiding provision Diggle v. Higgs made sense. The promotion of horse-racing and lawful sports and games is one thing, giving legal recognition to wagers on those games quite another. But, as previously mentioned, when the 1881 Act was passed s.6 of the Betting Houses Act, 1853 was enacted as s.34 of the former Act. The literal effect of this, it has been contended, was to prevent the application of the avoiding provisions to stakeholding. The conjunction of s.34 with the proviso to s.33 was, in essence, to increase the scope of the principle expressed in the proviso. The former provision literally legislated in favour of the principle in Batty v. Marriott thus throwing doubt on the applicability of Diggle v. Higgs in the Colony. Section 34 was repealed, it is submitted, partly in recognition of that error. But the New Zealand legislature went further. The proviso to s.33 had, in England, caused no end of

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5. (1877) 2 Ex.D.422.

6. *Ibid.*, at p.428. Discussed also supra, chapt.2, para.7.

difficulty<sup>7</sup> and perhaps, for that reason, it also was repealed in New Zealand by s.7 of the Gaming Act, 1894. And, to remove any doubts as to what was intended it was further provided that:

"... no action shall be brought or maintained in any Court of law for recovering any sum of money or valuable thing alleged to be won by way of stakes or prize on any event or contingency relating to any horse-race, or other race, game, sport, or exercise."<sup>8</sup>

This provision was not in the Gaming Bill 1894 when it was first introduced into the House. The records disclose that it was only inserted in the Bill after it had emerged from the Joint Statutes Revision Committee, and before it went to the Legislative Council. The records of the Committee have not survived, and the Parliamentary Debates are silent on the reason for its inclusion in the Act. There were no New Zealand decisions on the proviso to s.33 and, although as previously observed, similar errors in relation to the enactment of s.34 occurred in the Australian states, the earliest reported decisions in which the problem was recognised there, was decided in March 1895.<sup>9</sup>

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7. Howard A. Street, Law of Gaming (1937) at pp. 542-544 observes that Batty v. Marriott was "either accepted or distinguished for twenty-nine years" before it was over-ruled by Diggle v. Higgs in 1877.

8. By s.7 Gaming Act, 1894.

9. Dalley v. Harding (1895) 16 A.L.T.175.



[4.10] Conclusion

This survey of the history of the legislation would not be complete without mention of a final provision relating to wagering contracts. By s.15 of the 1881 Act it was provided that money deposited with persons contrary to the provisions of the Act:

"... shall be deemed to have been received to or for the use of the person from whom the same was received, and such money ... shall be recovered accordingly with full costs of suit in any Court of competent jurisdiction."

The implications of this provision will be examined in later paragraphs, suffice it to say at this point that it, like many of the provisions of the Act was based on earlier English legislation<sup>1</sup> and that it must not be overlooked when considering generally the law relating to gaming and wagering contracts.

The provisions of the 1881 and 1894 Acts were subsequently brought together in a consolidating Act, the Gaming Act 1908. That Act is in force today. The transposition of the sections is as follows:

Gaming and Lotteries Act 1881	Gaming Act 1908
s.15	s.38
s.33	s.69
Gaming Act 1894	
s.2	s.70
s.7	s.71

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1. s.15 of the Gaming and Lotteries Act, 1881 was copied from s.5 of The Betting Houses Act, 1853.

CHAPTER 5THE SCOPE OF THE LAW OF  
GAMING AND WAGERING CONTRACTS IN  
NEW ZEALAND[5.01] Introduction

The performance of the New Zealand legislature in relation to the law of gaming and wagering contracts has been far from satisfactory. In the 1881 Act we find legislation characterised by uncertainty and error whilst the 1894 Act created more difficulties than it solved - difficulties which remain with us today by virtue of the consolidating statute, the Gaming Act 1908.

The law of gaming and wagering contracts in England has been extensively covered by other writers<sup>1</sup> and as the New Zealand legislation is largely copied from the Imperial statutes much of what has been said by those writers is applicable in New Zealand and will not be re-canvassed here. In this work the scope of the law of gaming and wagering contracts in New Zealand will be identified in the context of ascertaining the significant points of departure from English law and the effect of that departure on New Zealand law. In so doing it

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1. The Law of Gaming (1937) by Howard A. Street is the most comprehensive on gaming and wagering contracts, but the topic also attracts varying degrees of attention in the leading Contract texts. The position in New Zealand is discussed in Cheshire and Fifoots Law of Contract, (4th N.Z. ed.) 1974.

will be convenient firstly to critically examine the construction applied to the existing provisions in the Gaming Act 1908 and then to determine the application of the Acts of Charles (1664), Anne (1710) and William (1835) in this jurisdiction today.

[5.02] Sections 69 and 71, Gaming Act 1908

There are two essential differences between the New Zealand avoiding provisions, s.69 and its counterpart, s.18 of the Gaming Act, 1845. The first is that whereas the Imperial provision still retains the proviso exempting actions for the recovery of prizes, or subscriptions to prizes to be awarded to the winners of lawful games, etc., this has been repealed in New Zealand by the Gaming Act, 1894.<sup>1</sup> And the second is that as previously outlined, the English courts have adopted a narrower definition of a wagering contract than have the New Zealand Courts.<sup>2</sup> The second such difference has already been discussed, the first requires further examination.

The repeal of the proviso to s.69 (then s.33 of the Gaming and Lotteries Act, 1881) was accompanied by the enactment of s.71 (then s.7 of The Gaming Act, 1894). It has been suggested that one reason for the proviso's repeal was to avoid the difficulty created by Batty v. Marriott<sup>3</sup> which was compounded in New

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1. Section 7, Gaming Act, 1894.
  2. Supra, Chapt.4, para.8.
  3. (1848), 5 C.B.818. Discussed supra, Chapt.4, para.9.

Zealand by the erroneous inclusion of s.34 of the 1881 Act. But something more was obviously involved because Batty v. Marriott was over-ruled by Diggle v. Higgs<sup>4</sup> in 1877 so that the difficulty created by the former case was largely resolved before the 1894 Act was passed. All that was required, therefore, on the part of the colonial legislature was to repeal s.34 of the 1881 Act and leave the proviso intact if its only concern was Batty v. Marriott. Why did it go the further step of repealing the proviso and enacting s.71? The answer, it is suggested, is revealed in part, in the following statement of Hosking J in Patterson v. Wolland,<sup>5</sup> when he said, speaking of s.71:

"The enactment in question is introduced not for the benefit of racing clubs or persons who offer money or other pecuniary prizes on the prohibited events, [<sup>6</sup>] but on public grounds, and so that the aid of the State by the medium of an action in its Courts shall not be lent for the recovery of the money or prizes won."<sup>7</sup>

It was, therefore, the policy to include actions for the recovery of money or prizes by the winner of the relevant event within the scope of the unenforceability principle. It is important to note, however, that

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4. (1877), 2 Ex.D.422.

5. (1915) 34 N.Z.L.R.746.

6. The phrase "prohibited events" is with respect, inappropriate. "Relevant events" would have been more suitable. But this mis-description is indicative of the colonial reluctance to see any form of gaming or betting for money as worthy of legal recognition.

7. Ibid., at p.747.

Hosking J was careful to confine the provision's operation to actions brought by the winner to recover his prize because the section does not encompass actions by betters on the side of the event to recover their winnings.<sup>8</sup> And, in order to determine whether the action is to recover betting winnings, as opposed to money won by way of a prize (or stakes) by the winner of the event, the principle in Diggle v. Higgs applies the consequence of its application being reversed. That is, is it an action to recover:

"a prize to be given to the winner in some .[9]  
 competition, but not money deposited by way  
 of wagers."<sup>10</sup>

If the latter, it falls within the category of a wagering contract in s.69 and if the former, then although it may also be a gaming contract under s.69 it is nevertheless unenforceable under s.71.

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8. See, Cooke, J in Economou's case, unreported, Supreme Court, Hamilton, 13th August 1973, at p.27. Mitchell v. Beck (1913) 32 N.Z.L.R.1279, Wilson v. Hogarth [1927] N.Z.L.R.332, 335, and Bhana v. Barriball [1973] 1 N.Z.L.R.616, 622 support this view.
9. The word "lawful" has been omitted because, although it appeared in the proviso under consideration in Diggle v. Higgs it does not appear in s.71. It is a relevant omission because if it was contained in s.71 it could give rise to a situation where actions to recover a prize in an unlawful game or race fell within the terms of the Illegal Contracts Act 1970 (see s.7 of that Act) whereas in the case of lawful activity s.71 is conclusive. See, e.g. Wilson v. Hogarth note 8.
10. Note 4, at p.428.

The application of s.71 was further limited by Williams J in Mitchell v. Beck<sup>11</sup> when he said the provision applies only to money won where it has not been paid to the winner.<sup>12</sup> In that case the owner of a horse had agreed to pay its trainer and lessee half the stakes won by the animal in races.<sup>13</sup> The owner having been paid an amount won by way of stakes Williams J held that s.71 did not preclude the trainer from suing to recover his half-share. And in Bhana v. Barriball<sup>14</sup> Wilson J held that if the winnings have been paid to the agent of a partnership, (or a fortiori the winner's agent), s.71 does not bar an action by the principal to recover the winnings from the agent. In that case the principle established by Bridger v. Savage<sup>15</sup> and De Mattos v. Benjamin<sup>16</sup> weighed heavily with the Judge<sup>17</sup> and although the section would liter-

11. Note 8.

12. Ibid., at p.1280. Upheld in Wilson v. Hogarth note 8, at p.334-5, and Economou's case note 8, at page 27.

13. Cf. Wilson v. Hogarth note 8, where Mitchell v. Beck was applied in relation to the stakes won and paid to the owner, but the action to recover winnings of bets made on the races failed even though that money had been paid to the owner. In relation to the latter monies the bets were made by the owner as agent of the trainer - and was unlawful under s.52 and 53 of the Gaming Act 1908.

14. Note 8.

15. Supra, Chapt.4, para. 4.

16. Supra, Chapt.4, para. 6.

17. Ibid., at p.621. His comment on these cases was not confined to discussion on s.71 and only Bridger v. Savage was cited in relation to the latter section.

ally exclude such an action, the Court was reluctant to entertain the idea that the law would prevent a principal from recovering from a dishonest agent. Bridger v. Savage was based on an interpretation of s.69. And having regard to the fact that s.71 is associated (by its terms and the time of its enactment), with the repeal of the proviso to s.69, it is submitted that its qualification by the Bridger v. Savage rule is justified.<sup>18</sup>

However, the presence of s.71 in the Gaming Act 1908 and the repeal of the proviso to s.69 has extended to scope of the unenforceability concept in New Zealand beyond the boundaries of gaming and wagering contracts. It is true that the owner of a horse, or a competitor, who enters in an event for stakes or prizes is gaming in a sense, but he may not be gaming in the way that has traditionally been the concern of the legislation, that is by:

"playing at any game [whether of chance or skill] for stakes - that is to say, for money or money's worth, to be obtained by the winner from the loser."<sup>19</sup>

Thus, in cases where a horse owner or a competitor has not himself hazarded stakes on the event, to

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18. De Mattos v. Benjamin did not, of course, refer to s.69 but rather to what is now contained in s.70 of the Gaming Act 1908. However, although on different sections the rationale behind the principle in the two cases is the same.

19. Per Salmond J in Weathered v. Fitzgibbon [1925] N.Z.L.R.331, 333; Lockwood v. Cooper [1903] 2 K.B. 428 and see the cases cited 4 Halsbury's Laws of England (4th ed.) p.4, para.2, fn.1.

preclude a legal remedy to recover his winnings or prize is, with respect, to move outside the area of concern and go beyond the philosophy of the gaming Acts. Yet this is exactly what s.71 does, and was intended to do. In this age of the professional sportsman operating in an international arena it is surely too much to expect that he should write off his inability to recover his with-held winnings (by which to recoup his not inconsiderable expenses) to the cost of the loss of his amateur status. And disappointment may well turn to anger with the realisation that he is frustrated by a product of the Victorian era which emerged, even at that time, without explanation or justification.<sup>20</sup> In the writer's view the legislature should now return to the good sense of s.18 of the Gaming Act, 1845 by repealing s.71 and re-enacting the proviso to the former provision, in s.69 of the Gaming Act, 1908.

[5.03] Section 70, Gaming Act 1908

As previously outlined this provision was copied from the English Act of 1892 which was designed to overcome the effect of Read v. Anderson. But, it has been asserted, the New Zealand Legislature was not content to stop there and added to the provision for the purpose of repudiating for the colony the effect of Bridger v. Savage also. The meaning of

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20. This may be too strong in view of the fact that the records of the Joint Statutes Revision Committee have not survived. But the addition of this provision did not prompt any discussion in the House or the Council.



the colonial appendage, namely the words:

"or any sum of money won, lost, or  
staked in any betting transaction what-  
ever"

has not yet been conclusively determined by the  
New Zealand Courts.<sup>1</sup> But it has caused consider-  
able difficulty.

In Sharp v. Morrison<sup>2</sup> the plaintiff deposited  
£50 with a stakeholder to abide the result of a  
forthcoming election in the Stratford Electorate.  
His candidate lost, but believing there were irreg-  
ularities in the election the plaintiff repudiated  
the stakeholder's authority to pay the winners and  
demanded a return of his deposit. The defendant  
argued the concluding words of s.70 debarred the  
plaintiff from recovering, but the presiding Magis-  
trate held the words:

" 'money staked in any betting transaction  
whatever' in s.70 have exactly the same  
meaning as the words of s.69, 'money  
deposited in the hands of any person to  
abide the event on which any wager has  
been made' ".<sup>3</sup>

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1. The only Australian Statute in which the words in  
issue appear is s.33, The Suppression of Gambling  
Act 1895 (Queensland). The only case mentioned in  
the reports on the provision is Campbell v. Riley  
(1899), 9 G.L.J.(N.C.)124 which is, unfortunately,  
only a brief note on the case and quite unhelpful.
  2. [1921] N.Z.L.R.254.
  3. Ibid., at p.256.

Edwards J, on appeal, upheld the Magistrate's view and concluded as a consequence that the case came directly within the authority of O'Sullivan v. Thomas<sup>4</sup> and Burge v. Ashley & Smith, Ltd.<sup>5</sup> And he went on to say:

"If the concluding words of s.70 have any effect at all it is to remove the doubt, if there is a doubt, whether the earlier part of the same section is sufficient to prevent the loser of a wager, whose stake has been paid over to the winner, from recovering it back from him."<sup>6</sup>

The learned Judge concluded that the inclusion of the word "lost" in the provision removed that doubt by preventing the loser from recovering. Thus, in the view of Edwards J, the concluding words in the provision really added nothing but clarity to the meaning of the basic English provision. In Harrison & Others v. Greymouth Trotting Club (Inc.) & Others<sup>7</sup> Casey J followed this reasoning, saying:

"I prefer to follow Edwards J and preserve the longstanding interpretation of s.69 whereby a bettor who repents in time can recover from the stakeholder by revoking his authority. To hold otherwise would enable a dishonest stakeholder to retain the funds against all claimants, and might actually encourage gaming by making it more certain for a winner to collect from the stakeholder, since the loser would be precluded in any circumstances from getting his money back."<sup>8</sup>

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4. [1895] 1 Q.B.698, discussed supra, chapt.4, para.5.
  5. [1900] 1 Q.B.744, discussed supra, chapt.4, para.5.
  6. Ibid., at p.257.
  7. Unreported, Supreme Court, Greymouth, 28 May 1975.
  8. Ibid., at p.7 of the judgment.

In Johnston v. George,<sup>9</sup> however, Skerrett C.J. was of the contrary view. He considered that the last words of s.70 had no relation to the subject-matter dealt with in the first part and he went on to say:

"I am inclined to the opinion that these words only apply to cases where the sum of money won, lost, or staked in the betting transaction has not been paid over to the winner."<sup>10</sup>

In Official Assignee v. Totalisator Agency Board<sup>11</sup> Cleary J criticised this statement because he could not imagine a situation in which there is a claim to recover money "lost" as opposed to being "staked" in a betting transaction. But, with respect, there is nothing improper in calling money, "won" or "lost" after the event, but before the winner is paid and whilst the money remains in the hands of the stakeholder. And, before the event, money in the hands of the stakeholder is simply "staked". Perhaps in recognition of this possibility Cleary J concluded:

"The tentative view expressed by Sir Charles Skerrett C.J. is at variance with what was said by Edwards J in Sharp v. Morrison ... but, while I think Edwards J there gave the word 'lost' its natural meaning, the question whether the decision that the stake was recoverable may some day call for further consideration."<sup>12</sup>

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9. [1927] N.Z.L.R.490.

10. Ibid., at p.505.

11. [1960] N.Z.L.R.1064, 1082.

12. Ibid.

In Bhana v. Barriball<sup>13</sup> the action was brought to effect recovery of a sum paid to the agent of a partnership of which the plaintiff contended he was a member. After referring to the criticism of Cleary J levelled at the dicta of Skerrett C.J. in Johnston v. George Wilson J also found difficulty with the conclusion of Edwards J in Sharp v. Morrison that the concluding words of s.70 had the same meaning as the corresponding words in s.69. Because:

"... If so, it is odd that the addition should have been made in s.70 rather than s.69. The reason may be that it was intended to apply to both sections."<sup>14</sup>

But then, like Edwards J, he went on to hold that the concluding words were to make it plain that the bar to recovery exists irrespective of the result of the betting transaction involved. And just as Edwards J felt quite unable to accept that the legislature could have intended by the concluding words to s.70 to interfere with the depositor's right of repudiation and recovery back from his stakeholder, Wilson J felt similarly about the winner's right to recover his winnings in the hands of his agent. He held:

"An action for money won [that has been paid to the winner's agent] is, in my opinion, in the same position with regard to the concluding words of s.70 as with regard to s.69 and the decision in Bridger v. Savage applies equally to both provisions."<sup>15</sup>

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13. [1973] 1 N.Z.L.R.616.

14. Ibid., at p.622.

15. Idem.

With respect, this flies in the face of the clear words of the section and is, unfortunately, inconsistent with the expressed intention in the Explanatory Note to the Gaming Bill 1894 to legislate against Bridger v. Savage. As to this latter point, the learned Judge could not have known that. But unlike s.69, s.70 was enacted for the express purpose of dealing with agency betting. If the legislature had intended no more than was suggested in Morrison v. Sharp, Harrison & Others v. Greymouth Trotting Club (Inc.) and Bhana v. Barriball surely it would have used the words "money won, lost, and staked in any betting transaction whatever". But it did not, and the word staked stands alone and operates regardless of the result of the event, so that in this jurisdiction O'Sullivan v. Thomas and Burge v. Ashley & Smith, Ltd. in relation to stakeholding; and Bridger v. Savage and De Mattos v. Benjamin in relation to agency betting, do not apply.

In Official Assignee v. Totalisator Agency Board Counsel for the appellant argued that the concluding words of s.70 should be confined to the "tripartite" situations to which the first part of the section related. Cleary J however disagreed, for to do so would limit the generality which the words bear in their ordinary meaning "without ... any justification for doing so".<sup>16</sup> With respect, there is every reason for doing so. In Sharp v. Morrison<sup>17</sup> Edwards J, after confining the meaning of the added words to s.70 to that already given to those concerning deposits with stakeholders in s.69, then went on to say:

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16. Note 11, at p.1082.

17. Note 2.

"The other classes of action forbidden by the concluding words of s.70 - namely, actions by the winner of a bet against the loser, and actions for the recovery of stakes, as stakes, from the stakeholder - are forbidden also by s.69. So far as actions by these classes are concerned, the concluding words of s.70 are mere surplussage."<sup>18</sup>

Thus, having regard to the interpretation given by the learned Judge to the word "staked", the conclusion in the judgment must surely be that all the added words "are mere surplussage", - a rather unsatisfactory result. And, whilst acknowledging that it is impossible to avoid some over-lap between s.70 and s.69 it is the writer's contention that the words in question only have meaning when confined to the context in which they appear, that is, tripartite situations. And in that context, they are capable of, and should be accorded a literal construction. Thus actions by depositors to recover their losses, winnings or deposits from the stakeholder are barred, as they are also by a principal against his agent.

The concluding words of s.70 have, however, failed to elicit from the Courts the response sought by the legislature. But this is not surprising. The idea that an agent should be permitted to steal his principal's winnings, or that a stakeholder should have licence to ignore his depositor's instructions is difficult to reconcile with reason and justice. It is small wonder, therefore, that the New Zealand Courts have relegated the possibility that the legislature could have intended to allow it, to the level of the

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18. Ibid., at p.257.

inconceivable. And, it is suggested, even the knowledge that the Explanatory Note to the Gaming Bill 1894 specifically includes the Bridger v. Savage doctrine within the scope of the actions the Bill sought to render unenforceable, will not prevent our Courts from resisting that conclusion.

On the other hand the terms of the English Gaming Act 1892 have enabled the Courts in that jurisdiction to maintain an even balance between what is just and unjust, having regard to the philosophy and purpose of the legislation. To achieve that balance in New Zealand, and also, in order to overcome the confusion that the concluding words of s.70 even yet hold for the future, their repeal is recommended.<sup>19</sup>

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19. Prior to 1971 s.70 would, in any event, have had a limited application because by s.5 of the Gaming Act 1894 (s.52 of the Gaming Act 1908) it was an offence to act as an agent, or to employ any person to act as such agent, for the purpose of making bets etc. on a totalisator. But that provision was repealed by the Racing Act 1971, and was not re-enacted in the repealing statute. By s.2 of the Gaming Amendment Act 1920, however, the business or occupation of a bookmaker was declared unlawful and by s.3 of that Act it was made an offence to make a bet with a bookmaker. In s.2 of the Gaming Act 1908 where "bookmaker" is defined it includes a person who carries on business as a turf commission agent. In such cases, therefore, the contract between the principal and agent is unlawful and cannot be enforced unless the principal or agent can obtain relief under s.7 of the Illegal Contracts Act 1970. See, e.g. Sumner v. Solomon [1908] S.A. L.R.21, Wilson v. Hogarth [1927] N.Z.L.R.332. In cases where the agency is lawful, but the contract entered into for the principal is not, see Tenant v. Elliott (1797), 1 Bos & P.3; Bousfield v. Wilson (1846) 16 M. & W.185; Farmer v. Russell (1798), 1 Bos & P.296; but cf. Booth v. Hodgson (1795), 6 T.R.405; Nicholson v. Gooch (1856), 5 E. & B.999. As to the application of the Illegal Contracts Act 1970 see *infra*, chapt.6.

[5.04] Section 38, Gaming Act 1908

As previously indicated this provision was copied verbatim into the colonial Act of 1881<sup>1</sup> from s.5 of the Betting Houses Act, 1853. And, in the context of those Acts it complemented some rather complicated legislation designed, and intended, to prevent the:

"... luring [of] the ignorant and imprudent to the ruinous courses to which the vice of gambling too frequently leads. It was intended to present every obstacle to the professed gamester using a place for exercising his vocation."<sup>2</sup>

Because of the unhappy choice of words in the introduction to this provision the scope of its application is not readily apparent. In s.38 of the Gaming Act 1908 the provision commences:

"Any money or valuable thing received by any person as [<sup>3</sup>] aforesaid as a deposit on any bet, or [<sup>4</sup>] as for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid ..."

In the Betting Houses Act, 1853 these words raised the issue as to whether the words "any person as aforesaid"

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1. s.15 Gaming and Lotteries Act, 1881.
  2. Per Earle C.J. in Dogget v. Catterns (1864), 17 C.B. (N.S.) 669, 676.
  3. The word "as" was added by the New Zealand draftsman in the Gaming and Lotteries Act, 1881.
  4. In the Betting Houses Act, 1853 and the Gaming and Lotteries Act, 1881 the provision read, "... or as for the consideration". It is submitted the change is not material.



referred back only to deposits received by the persons referred to in the preceding section, i.e. s.4, or whether they were wide enough to refer to transactions arising from conduct made illegal by ss.1, 2 and 3 also.<sup>5</sup> In Doggett v. Catterns<sup>6</sup> the majority in the Court of Exchequer Chamber favoured the view that the scope of s.5 was confined to transactions legislated against in s.4. But in Powell v. Kempton Park Racecourse Company<sup>7</sup> the House of Lords cast doubt on this. In that case, the Lord Chancellor the Earl of Halsbury L.C., in whose judgment the majority concurred<sup>8</sup> said,

5. The issue was of some significance because s.4 of the Betting Houses Act, 1853 was drafted in narrower terms than the preceding sections in that it did not refer to persons using any premises or place for the purpose of receiving, inter alia, deposits on bets. The concept of imposing liability on the users of premises in the context of the Betting Houses Act, 1853 in itself raised the question as to whether the object of the Act was to attack the business of betting generally, or whether it was simply intended to impose sanctions against persons in control or occupation of premises used for such a business. In Powell v. Kempton Park Racecourse Co. [1899] A.C.143, the House of Lords favoured the latter approach, the Lord Chancellor saying, inter alia: "There must be a business conducted, and there must be an owner, occupier, manager, keeper, or some person who, if these designations do not apply to him, must nevertheless be some other person who is analogous to and is of the same genus as the owner, keeper or occupier..." (ibid., at p.161). This case specifically over-ruled Hawke v. Dunn [1897] 1 Q.B.579 where Hawkins J had gone to some trouble to establish the wider construction as the correct one. A discussion of the ramifications of the House of Lords test is beyond the scope of, and unnecessary to, a discussion of s.38 of the New Zealand Act.
6. Note 2.
7. Note 5, and see also Vogt v. Mortimer (1906) 22 T.L.R.763.
8. Lords Watson, MacNaghten, Morris, Shand and James of Hereford agreed, whilst Lords Hobhouse and Davey dissented.

in relation to ss.1 to 4 of the Betting Houses Act, 1853:

"The offence, whatever it is, is created by ss.1 and 2. The other sections in the Act apply as corollaries from the commission of the offence ..."<sup>9</sup>

In his view s.4 was merely ancilliary to the penal provisions ss.1 and 2 so that the scope of s.5 was wide enough to encompass transactions falling within each of the preceding sections. The dilemma posed by these two conflicting views followed s.5 of the Betting Houses Act, 1853, but when the New Zealand legislation was consolidated in the Gaming Act, 1908 the draftsman was careful to ensure contextual consistency between s.38 and the two preceding sections so that the conflict between Doggett v. Catterns and Powell v. Kempton Park Racecourse Company was thereby avoided for New Zealand.<sup>10</sup>

9. Note 5, at p.165.

10. The conflict was to some extent alleviated by s.26 of the Gaming and Lotteries Act Amendment Act, 1907 which complemented s.15 of the 1881 by providing, similarly, in relation monies received as deposits on bets, etc., in any street. The term "street" included enclosed and unenclosed land (s.25(4)). And, perhaps in recognition of the question that the statement of the Earl of Halsbury raised when he spoke of other persons "analogous to ... and of the same genus as the owner, keeper, or occupier", s.14 of the 1907 amending Act provided, inter alia, that a person ... "who acts as, or as if he were the occupier or person having the care or management of any house, office, room, or place shall be deemed ... to be the occupier thereof, whether he is the real occupier thereof or not". Section 26 of the 1907 amending Act (which became s.25 of the Gaming Act 1908) was repealed by s.2 of the Gaming Amendment Act, 1910. The 1907 and 1910 amendments have a rather complex history, but suffice here to say that the former Act introduced the notion of on-

As to the nature of the action available under s.38, in Lennox v. Stoddart; Davis v. Stoddart<sup>11</sup> the defendant argued that the plaintiff's case (under s.5 of the Betting Houses Act, 1853) was in respect of a contract by way of gaming and wagering which was void under the Acts of 1845 and 1892 (U.K.). The Court, however, rejected this contention holding:

"The plaintiff who sues under s.5 is not ... in any sense suing on the gaming contract or on any term of it, either express or implied, but in respect of a statutory right conferred by the section."<sup>12</sup>

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course licensed bookmakers (s.35) and the principal provisions of the Act were designed to that end, i.e. to discourage off-course betting in the case of s.26. But by 1910 legislative patience with the bookmakers (many of whom were cheats and criminals) ran out and the repeal of s.26 followed incidentally, with the repeal of the principal provisions in the 1907 amending Act which had introduced the licensed bookmaker. Section 14 of the 1907 amending Act survives however as s.13 of the consolidating Act. In the 1908 Act the concept of "a person using any premises or place" which had occurred in the English Betting Houses Act and s.13 of the Colonial Act of 1881 was dropped. Liability was thereby confined to persons having the relevant status referred to by the Lord Chancellor in Powell v. Kempton Park Racecourse Co. This was consistently adhered to in all the preceding sections to which s.38 could apply, i.e. s.36 and 37; and because s.37 mirrors s.36 in the relevant particulars the scope of s.38 is not increased by argument that it refers back to s.36.

11. [1902] 2 K.B.21.

12. *Ibid.*, at p.36 per Romer L.J.

[5.05] The Application of the Acts of Charles II (1664),  
Anne (1710) and William IV (1835) in New Zealand Today

As previously suggested, the relevant provisions of the Acts of Charles II (1664), Anne (1710) and William IV (1835) which applied in New Zealand on and after the 14th day of January 1840, continued to apply except to the extent that they have subsequently been expressly or impliedly repealed (or modified) by the New Zealand legislature.<sup>1</sup> Up to the present time they have not been expressly repealed.<sup>2</sup> And, it has earlier been asserted,<sup>3</sup> they have never been rendered inapplicable by the doctrine of implied repeal. It remains to justify that assertion.

The considerations which weigh in determining whether there is a repeal by implication raise a presumption against it occurring in any particular case. They are identified in the following often quoted statement of A.L. Smith J (as he then was) in Kutner v. Phillips.<sup>4</sup> He said:

"... a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, Leges posteriores contrarias abrogant ... applies. Unless two Acts are so plainly

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1. Supra, Chapt.3, para.7.
  2. Except to the extent that the Acts of Charles II (1664) and Anne (1710) were repealed and modified by the Act of William IV (1835).
  3. Supra, Chapt.3, para.7.
  4. [1891] 2 Q.B.267.

"repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together."<sup>5</sup>

Consequently, as O'Leary C.J. observed in the Court of Appeal in O'Meara v. Westfield Freezing Co. Ltd.,<sup>6</sup> a repeal by implication is never favoured:

"... and must not be imputed to the Legislature without necessity or strong reason to be shown by the party imputing it."<sup>7</sup>

The principal concerns of the Acts of 1664, 1710 and 1835 were firstly, to provide relief from the obligation arising out of specified securities given, granted, drawn or entered into in respect of certain gaming or betting transactions;<sup>8</sup> secondly, (in the case of the Act of 1835) to enable the drawer, giver or executor of those securities to recover any money actually paid by him in satisfaction thereof to any

5. Ibid., at pp.271-2. Adopted in New Zealand by the Full Court in Weston v. Frazer [1917] N.Z.L.R.549, and the Court of Appeal in O'Meara v. Westfield Freezing Co.Ltd. [1947] N.Z.L.R.253; and more recently in Kidd v. Markholm Construction Co.Ltd.& Others [1970] N.Z.L.R.867 (C.A.) and Police v. Hicks [1974] 1 N.Z.L.R.763.
6. Ibid., at p.268.
7. A statement from Broom's Legal Maxims, 10th Ed.348 adopted by O'Leary C.J. in O'Meara's case, ibid., at p.268.
8. s.3 of the Act of Charles II (1664), s.1 of Anne (1710) and William IV (1835).

indorsee, holder or assignees of such a security the amount so paid, from the person to whom that security was originally given;<sup>9</sup> thirdly, (in the case of the Act of 1710) to provide the loser of £10 or more "at any time or sitting" with a cause of action whereby to recover his paid losses from the winner;<sup>10</sup> and finally, to establish qui tam actions by common informers,<sup>11</sup> and to subject the winners of any such amount to penal sanctions.<sup>12</sup> In relation to the provision of the 1710 Act establishing qui tam actions by common informers it has already been demonstrated that it was not applicable to the circumstances of New Zealand in 1840 and was, therefore, never in force in New Zealand. As to the remaining concerns of the early Acts the relevant provisions of each must now be examined in turn and considered in the light of the subsequent enactments of the New Zealand legislature to determine whether there is any, or a sufficient degree of inconsistency or repugnancy, to invoke the doctrine of implied repeal.

As to the first:

The provisions of the Acts of 1664 and 1710 which avoided securities<sup>13</sup> given or entered into in satis-

9. s.2.

10. s.2.

11. s.2.

12. s.5.

13. As to the nature of the securities within the scope of the Act of 1835, see Fitch v. Jones (1855), 24 L.J.Q.B.293; Barkworth v. Grant (1909) 25 T.L.R.722, 26 T.L.R.165; and Howard A. Street, Law of Gaming (1937), at pp.384-394.

faction of gambling debts or bets on games (or for the reimbursement of "any money knowingly lent or advanced for such gaming or betting") caused considerable hardship to innocent holders when their voidness, even in the hands of those innocent third persons, was confirmed in Bowyer v. Bampton.<sup>14</sup> As a consequence of that rule s.1 of the statute 5 & 6 Will.IV, c.41 (1835) was enacted to provide relief to such persons. That section provided:

"That so much ... [of the Acts of 1664 and 1710] ... as enacts that any note, bill or mortgage which if this Act had not been passed would, by virtue of the said ... Acts or any of them, have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration, and the said ... Acts shall have the same force and effect which they would respectively have had if instead of enacting that any such note, bill, or mortgage should be absolutely void, such Acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration: ..."

The general purpose and effect of this provision was identified by Fletcher Moulton L.J. in Hyams v. Stuart King<sup>15</sup> when he said, speaking of a security in the form of a cheque<sup>16</sup> in that case that, the Act of 1835 declared

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14. Discussed supra, Chapt.1, para.5. But see Pollock v. Paterson & Co. (1900) 19 N.Z.L.R.94 where Stout C.J. appears to support a return to the pre-1835 Act position.

15. [1908] 2 K.B.696.

16. See e.g. Hyams v. Stuart King, supra; Moulis v. Owen [1907] 1 K.B.746; Sutters v. Briggs [1922] A.C.1; confirming earlier authorities that the provision extended to cheques.

that such securities:

"... instead of being void, should be deemed to have been given for an illegal consideration. This amendment of the law [by the Act of 1835] protected innocent holders for value, while it left the parties to the transaction and any holder taking such a cheque with notice of the nature of the original consideration in the same position as they had been under the statute of Anne."<sup>17</sup>

The combined effect of these provisions of the Acts of 1664, 1710 and 1835 was, therefore, to attack the securities given for certain gaming and betting debts rather than gaming or betting contract itself;<sup>18</sup> although they consequentially avoided the contracts of loan arising therefrom and rendered the gaming or betting itself illegal.<sup>19</sup> Also, those Acts (of 1664 and 1710), did not avoid securities given for betting contracts per se. Their concern was with gaming, not betting, and indeed not even gaming per se, but excessive gaming. And excessive gaming is revealed in the Act as occurring where securities rather than ready cash are passed in such transactions, or in repayment of loans obtained for them or where, on another plane, ready cash amounting to £10 or more is lost by a player or better on the game at any one time

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17. Ibid., at p.714; an almost identical statement by the same Lord Justice appears in Moulis v. Owen, *ibid.*, at p.762; and by Bankes L.J. in the later case of Dey v. Mayo [1920] 2 K.B.346, 355; and see Sutters v. Briggs, *ibid.*

18. Whilst s.3 of the Act of 1664 did, however, avoid the contract of gaming or betting the Act of 1710 did not.

19. *Supra*, Chapt.1, para.4.



or sitting. There is, therefore, a clear distinction between the legislative purpose of the Acts of 1664, 1710 and 1835, and the general avoiding provision of the later English Gaming Act, 1845. (s.69 of the Gaming Act 1908 (N.Z.)). By the express terms of that latter provision it is the contract of gaming or wagering itself that is avoided, and the provision extends to all such contracts, not just to games or bets on games. The courts have recognised some overlap in these provisions. For example, in Browne v. Bailey,<sup>20</sup> Darling J concluded, in relation to an action on a cheque for betting losses:

"whether the cheque here was affected by the earlier statutes or not, it certainly was within 8 & 9 Vict., c.109, so far as the bets were concerned; for it simply summed up the result of the bets, and was clearly a contract in writing by way of gaming or wagering."<sup>21</sup>

But this overlap does not render the security provisions of the earlier Acts "so plainly repugnant" to the general avoiding provision in the later Act that effect cannot be given to both at the same time. Rather than being repugnant to, or inconsistent with, each other, the earlier and later Acts are complementary. And they were certainly so regarded in the English Act of 1845 which, whilst enacting for the first time the avoiding provision contained in s.69 of the Gaming Act 1908 (N.Z.), left in force so much of the Acts of 1664

20. (1908); 24 T.L.R.644.

21. *Ibid.*, at p.645. And see Applegarth v. Colley (1842) 10 M. & W.723, 732 where Rolfe B concludes that the consequence of the Act of 5 & 6 Will.IV., c.41, was that "all contracts for the payment of money won at play" were avoided.

and 1710 'as was not altered' by the Act of 1835; the latter Act itself continuing to apply.<sup>22</sup>

As to the second:

The right of action against the winner of a game or a better on the side to recover money actually paid by him in satisfaction of any specified security given to the winner in satisfaction of that debt was conferred (for the first time) by s.2 of the statute of 1835. That section provides:

"That in case any person shall, after the passing of this Act, make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the ... [Acts of 1664 and 1710...] declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt and owing from such last named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law ..."

At the time this provision was enacted s.2 of the Act of Anne (1710) was still in force. That provision provided the loser of £10 or more at any time or

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22. In Cox and Walsh v. Burton and Another [1933] N.Z.L.R.249 and Pollock v. Paterson & Co., note 14, although the Act of 1835 was not in issue the court treated it as being in force in New Zealand. In Official Assignee of Matene Mita v. Johnston [1918] N.Z.L.R.373, Cooper J held that the 1835 Act was in force in New Zealand. See also Johnston v. George [1927] N.Z.L.R.490.

sitting with a right of action against the winner to recover any money paid in satisfaction of that debt. By s.3 of the Act of 1664 and s.1 of the Act of Anne (1710) securities given in satisfaction of gaming debts, or bets on games, were void. By this combination of provisions a losing gamester was extricated from the web of legal obligations arising out of excessive gambling transactions even where he had purported to honour them by payments of money or the giving of securities. In this context, and in the light of the relief afforded to innocent holders for value of securities afforded by s.1 of the Act of 1835, s.2 of that Act maintained consistency with the policy of the Acts of 1664 and 1710 by ensuring that a loser who paid his winner by, for example, cheque, was not in a worse position than if he had paid by cash. Prior to the 1835 Act the cheque involved the drawer in no legal obligations either to the payee or subsequent holders - even holders for value. After that Act, however, whilst the drawer was liable on his cheque under s.1 to innocent holders for value, he could seek re-imbusement of any amount paid in discharge of that liability by bringing an action against the payee under s.2. Prior to the 1835 Act, because they were void, relief from obligations arising out of securities given for gaming was afforded the loser at the expense of, in some cases, innocent third parties. By s.2 of that Act that relief was preserved - but at the expense of the winner.

Read and understood in its historical context the terms of s.2 of the Act of 1835 were clear. But after the enactment of s.18 of the Gaming Act, 1845 the logical consistency in the policy of the legislature that had prevailed before became distorted by

the failure of the draftsman of the 1845 Act to repeal s.2 of the 1835 Act. This arose because, whilst the 1845 Act repealed s.2 of the Act of 1710 - thus preventing in the future recovery of money paid to the winner by the loser, - it left s.2 of the 1835 Act intact. As a consequence money paid to the winner in discharge of the debt could not be recovered but money paid in satisfaction of a security given for the same debt could. This distortion in the legislative policy caused some confusion in the application and interpretation of s.2 which was aggravated by the failure of the courts to recognise the historical context in which the provision was enacted. And this was further aggravated in cases where the distortion between the Acts of 1845 and 1835 was the greatest, that is, when the holder of a security given for a gambling debt was the winner himself - or his banker. The difficulty in which the courts found themselves is demonstrated by the facts and judgment of Channell J in Nicholls v. Evans<sup>23</sup> decided in 1913.

In Nicholls v. Evans the plaintiff sued under s.2 to recover money paid to the defendant's bankers in satisfaction of five cheques given to the defendant for racing debts. The cheques were crossed by the drawer and made payable to the defendant or to his order. The plaintiff contended that the defendant was a "holder" under the section or, alternatively the bank was an "indorsee" or a "holder for value". Channell J rejected the latter contention saying that the bankers acted in the "character of agents for

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23. [1914] 1 K.B.118.

collection merely"<sup>24</sup> and not in the "character of holders in their own right".<sup>25</sup> But the contention that the defendant was a "holder" was more difficult because clearly he was, unless the legislature in using that term in s.2 intended it only to apply to a holder other than the original payee. That is, a person other than the winner. There is nothing in the provision to indicate that that was the legislature's intention. But Channell J resolved that it was, saying:

"I do not think there is any real doubt about this case. I start with this, that, as a rule, bets are void, and a security given in respect of a bet is given without consideration; but the Gaming Act, 1835, has introduced a new matter and made such securities not merely void but illegal. If a person makes a bet and, having lost, pays it in cash he cannot recover it back. That, I think, is agreed. If that is the case, it seems somewhat ridiculous that the fact that the bet is paid, not in cash, but by the machinery of a cheque, should make any difference. It seems to me that where the cheque is the mere machinery of payment the position between the parties is exactly the same as if the money had been paid in cash."<sup>26</sup>

The learned Judge held that a "holder" under the section was a person with a "distinct" title from the original payee because, applying the logic of the reasoning behind his earlier remarks in the above quotation:

"... if ... the payee has been paid, there is no conceivable reason why the drawer should recover back the amount."<sup>27</sup>

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24. Ibid., at p.121.

25. Idem.

26. Ibid., at p.120.

27. Ibid., at p.121.

In the later case of Dey v. Mayo<sup>28</sup> Bankes and Scrutton L.JJ in the Court of Appeal were similarly of the view that s.2 of the Act of 1835 was not intended:

"... to make any alteration in the rule of law which provides that a person who pays money to another with full knowledge of the facts cannot recover it back."<sup>29</sup>

But whilst the Court of Appeal was not prepared to accept that a payee of a cheque was a "holder" under the section it did concede that even if the defendant's banker merely received the cheque for collection it was a holder, although not a holder in due course. Bankes L.J., however, concluded that if the bank was known to the drawer to be acting merely as the collection agent of the payee any payment made to it in that capacity could not be regarded, for the purposes of s.2, in any other light than a payment to the payee.<sup>30</sup> Scrutton L.J., whilst not expressing any opinion on the effect of knowledge by the drawer that the holder is a bare agent<sup>31</sup> concluded:

"... I do not see my way to put any limitations on the general words 'any indorsee' or 'holder' except the words 'not being the payee', and in particular I hold them to include an agent of the payee who has had

28. [1920] 2 K.B.346.

29. Ibid., Bankes L.J. at p.356; and Scrutton L.J. at p.360 said "... it was not intended to improve the position of the gambling payee, by giving him an easy way of recovering a gaming debt". And see also Atkin L.J. at p.364.

30. Ibid., at p.356.

31. Ibid., at p.362.

"conferred on him by indorsement in blank and delivery a title to sue on the cheque as holder, though he has given no value for the cheque and is not a holder in due course."<sup>32</sup>

Whilst supporting the view of the majority that "holder" under the provision "probably" did not include the winner himself,<sup>33</sup> Atkin L.J. recognised that s.2 of the Act of 1710 gave the loser a right to recover £10 or more paid to the winner at the time the Act of 1835 was passed and concluded:

"... in view of the previous legislation [the Act of 1710], there seems to me no inherent improbability in a right of suit being given to the loser where he has paid the winner himself upon a note or bill, and I should prefer to reserve the point."<sup>34</sup>

The judgments in Dey v. Mayo, apart from that of Atkin L.J., contained tortuous reasoning designed to support the impossible conclusion that the Acts of 1835 and 1845 reflected a consistent legislative policy on the rights of a loser vis-a-vis the winner. After the repeal of the second section of the Act of Anne (1710), that consistency did not exist. And Channell J's conclusion that payment of a gaming debt in cash rendered the sum paid irrecoverable, whilst correct after the Act of 1845, was clearly wrong at the time the Act of 1835 was enacted because at that time s.2

32. Idem.

33. Ibid., at p.365. Atkin L.J. did not decide this point but decided that in any event, on the facts of the case the bankers were "holders" of the cheques under the section.

34. Idem.

of the Act of Anne (1710) was still in force.

The fallacy of the reasoning behind the decisions in Nicholls v. Evans and Dey v. Mayo was exposed by the House of Lords in 1921 in the case of Sutters v. Briggs.<sup>35</sup> In that case, in what must have been regarded as a "dooms day" decision by the English betting fraternity the law Lords placed a construction on s.2 which recognised its historical context and held that the "holder" of a note or bill under that provision included the original payee as well as a banker who merely received it for collection. This was so because, as Viscount Birkenhead L.C. succinctly explained:

"... the intention of Parliament, expressed in s.2 of the Act of 1835, was to make it clear that the amendment of the law effected by s.1 [of that Act] was without prejudice to the rule that the loser of a bet could recover from the winner the amount paid by him in relation thereto [under s.2 of the Act of Anne (1710)]"<sup>36</sup>

Following the decision in Sutters v. Briggs s.2 of the Gaming Act, 1835 was quickly repealed in England.<sup>37</sup> But it was repealed because it was repugnant to the situation prevailing in England which allowed the existence of bookmakers and licensed betting shops.<sup>38</sup> And,

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35. Note 16.

36. *Ibid.*, at p.11. But even after Sutters v. Briggs doubts about the correct construction of s.2 lingered on. See Street, note 13, at p.411.

37. Gaming Act, 1922, s.1.

38. And, of course, to allow recovery from a bookmaker or betting shop at that time would have been quite inconsistent with the reality of that situation.



although it was seen as inconsistent with the policy behind s.18 of the 1845 Act, it was not inconsistent or repugnant to its terms. Throughout the years of uncertainty about the proper construction of s.2 the courts never doubted that it could stand and be applied alongside s.18 of the later Act.

In Johnston v. George<sup>39</sup> Skerrett C.J. rejected a contention that the Act of 1835 had been impliedly repealed in New Zealand by the provisions of the Gaming Act 1908. It was argued, inter alia, that s.2 of the former Act could not stand with s.70 of the latter - which prevented recovery of "any sum of money won, lost or staked in any betting transaction whatever." The Chief Justice said:

"The important distinction between the two provisions is that the Imperial statute [s.2 of the Act of 1835] has no application until the person who gave the security has paid the money thereby secured to some holder, endorsee, or assignee of the security. The New Zealand statute relates to money won, lost, or staked in a betting transaction, and does not concern itself with any security given in respect of the transaction or with payment of the money thereby secured. The two sections deal with entirely distinct phases of a gaming or betting transaction."<sup>40</sup>

This is, with respect a correct statement of the position. But a question must now arise as to the relevance of this type of paternalistic legislation to circumstances prevailing in New Zealand today, and because any discussion of that question necessarily

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39. Note 22.

40. Ibid., at p.505.

involves a consideration of the terms of s.2 of the Act of Anne (1710) it will be convenient to consider the issue of the implied repeal of that provision first.<sup>41a</sup>

As to the third:

The only provision in the Gaming Act 1908 which could possibly support a contention that s.2 of the Act of Anne (1710) was impliedly repealed by the New Zealand Legislature is s.70; - and specifically the concluding words of that provision which prevent actions for the recovery of "any sum of money won, lost, or staked in any betting transaction whatever." On a literal construction of those words, the statement of Skerrett C.J. in Johnston v. George quoted above would, if applied to the terms of s.2 of the Act of Anne (1710) and s.70 of the Gaming Act 1908, render the provisions inconsistent with and repugnant to each other. But this inconsistency or repugnancy would only arise in some cases because s.2 of the Act of Anne (1710) is a special Act whilst the provision in the Gaming Act 1908 is in general terms. The latter Act is concerned in s.70 with all betting whilst the former is concerned only with specified games and bets on those games in certain circumstances. It is therefore necessary to find "necessary inconsistency in the two Acts standing together"<sup>41</sup> to bring the doctrine of implied repeal into play. Whether that "necessary inconsistency" exists is a matter upon which different

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41. The test propounded by A.L. Smith J in Kutner v. Phillips, note 4.

41a. The question of the relevance of this legislation in New Zealand today will be discussed in detail, infra, chapt.7.

minds may come to different conclusions.<sup>42</sup> In the absence of previous authority the conclusion that that inconsistency does not exist is tenable, and in the writer's view, the more probable. However, it is not necessary to come to a conclusion on this point because the construction of s.70 necessary to create any difficulty about the status of s.2 of the Act of Anne (1710) cannot be sustained.

It has already been shown that the New Zealand courts have not yet settled the proper construction to be applied to the concluding words of s.70.<sup>43</sup> It has also been demonstrated that unless a literal construction of those words is avoided, and unless their application is confined to "tripartite" betting, absurdity results.<sup>44</sup> And, in that context the word "lost" in s.70 means "lost" and still in the possession of a stakeholder or the losers agent before the winner has been paid. On that construction inconsistency between the Act of Anne (1710) and s.70 of the Gaming Act 1908 does not exist. Because whilst an action under the former Act is to recover money paid to the winner by the loser, s.70 merely bars recovery by the loser of a bet in respect

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42. Although there is no logical certainty in the application of the doctrine the New Zealand Full Court and Court of Appeal decisions in Weston v. Frazer; O'Meara v. Westfield Freezing Co.Ltd.; and Kidd v. Markholm Construction Co.Ltd., note 5, reveal a high degree of consistency and agreement by the Judges in its application, but cf. Metzger v. Mathieson (1909) 12 G.L.R.25 and Weston v. Frazer, *supra*.

43. *Supra*, para. 3.

44. *Ibid*.

of money deposited with a stakeholder or paid to his agent, and whilst it is still in the stakeholder's or agent's possession.<sup>45</sup>

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45. A view shared by Skerrett C.J. in Johnston v. George, see supra, para.3.

## CHAPTER 6

### GAMING AND WAGERING CONTRACTS AND THE ILLEGAL CONTRACTS ACT 1970

#### [6.01] Introduction

On October 24th 1969 the Contracts and Commercial Law Reform Committee reported to the Minister of Justice a need to introduce legislation to reduce the harsh consequences flowing from illegality in contract.<sup>1</sup> The Committee brought to the Minister's attention a number of cases in which the law at that time had forced the courts into unfair and harsh determinations against parties who had been guilty of nothing more heinous than technical breaches of the law.<sup>2</sup> And the courts had not been insensitive to the feelings of the parties who had been frustrated in their efforts to realise on their intended bargains. The Committee was able to support its claim for a need for change to the law with a number of hints to the Legislature for such action from the

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1. Report of the Contracts and Commercial Law Reform Committee on the Law Governing Illegal Contracts, 24th October, 1969. The Report was prompted by a request made to the Committee in 1966 by the Minister of Justice to examine this area of the law.
2. Dromorne Linen Co.Ltd. v. Ward [1963] N.Z.L.R.614; Berrett v. Smith [1965] N.Z.L.R.460; Carey v. Hastie [1968] N.Z.L.R.276.

judiciary.<sup>3</sup> Typical of these was that of McCarthy J only a year earlier in Carey v. Hastie when he said:

"There are few areas in the law of contract which cause more trouble than that of illegality, and it may be, as some writers urge, that the time has come when the Legislature might look carefully at this subject and consider doing something to remove the over-severe consequences which sometimes flow from a breach of one of the less important of the very large number of regulations which a managed welfare State seems to require. But until that is done, we have to apply the law as it is."<sup>4</sup>

In that case a carpenter who had carried out certain alterations to a building without a permit required by the Auckland City By-laws was unable to recover his contract price. His failure to obtain the permit before commencing the work had tainted the contract with illegality such that he was unable to enforce it. Like McCarthy J in the Court of Appeal, Speight J in the Supreme Court regretted the conclusion that the law of illegality in contract forced him to adopt in the case.<sup>5</sup> It was a matter of concern to him that the party who had enjoyed the benefits of the work done under the contract was then able to avoid his responsibility to pay for it by a plea of illegality. But in this respect the case was quite unexceptional.

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3. Todd v. Parker [1953] N.Z.L.R.39, 47-8; Griffiths v. Ellis [1958] N.Z.L.R.840, 858; Cotton v. Central District Finance Corporation Ltd. [1965] N.Z.L.R.992, 997; Carey v. Hastie note 2, at p.282.

4. Note 2 at p.282.

5. *Ibid.*, at p.278.

It was simply one of hundreds in which the doctrine of illegality had achieved injustice and a grotesque result.

The Contracts and Commercial Law Reform Committee presented its proposals for reform to the Minister of Justice in the form of a draft bill. And the terms of this, with only minor alteration, were adopted by the Legislature and enacted as the Illegal Contracts Act 1970.<sup>6</sup>

But although the title to the Illegal Contracts Act 1970 tends to suggest a codification of the doctrine of illegal contracts, it is important to recognise the limits of the reform sought by the framers of the draft bill. It certainly was not intended to provide a complete code, and the scope of the reform anticipated by it was more in the nature of a procedural than a substantive change. That is, the Act is concerned to modify the barrier to enforcement existing in an illegal contract, and does not, with minor exceptions, attempt to resolve the perhaps more difficult questions of definition and distinction presented by the concepts of illegality and voidness themselves.<sup>7</sup> The Contracts and Commercial Law Reform Committee was asked to examine the results flowing from illegal contracts with a view to "a restatement of the law which would produce the

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6. For a discussion of the main variations see M.P. Furmston, (1972) 5 N.Z.U.L.R.151.

7. See para.2, *infra*. The Act has been criticised on this account by M.P. Furmston, *ibid*.

greatest measure of fairness."<sup>8</sup> The Committee interpreted the expression "restatement" as embracing "ameliorative change"<sup>9</sup> and the product of its deliberations, that is, the Illegal Contracts Act 1970, must therefore be understood with this qualification in mind.

A detailed exposition of the operation of the Illegal Contracts Act 1970 is beyond the scope of this work, but as that Act is new, and has a particular relevance to the law of gaming and wagering contracts, some effort will be made to identify the objects, as well as the achievements of this legislation. A more extensive discussion than might otherwise be required is also justified on the ground that the Illegal Contracts Act 1970 compels attention as a possible instrument of reform in this area; and, the close association enjoyed by gaming and wagering contracts and illegal contracts over the past two centuries - at least in the minds of judges, lawyers and legislators - provides an added justification for this approach.

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8. Note 1, at p.1.

9. Ibid.



[6.02] An Illegal Contract under the Act

That the Act is an instrument of limited reform is particularly emphasised by the definition of an illegal contract in s.3. It provides:

"'Illegal Contract' defined - Subject to section 5 of this Act, for the purposes of this Act the term 'illegal contract' means any contract that is illegal at law or in equity\*; whether the illegality arises from the creation or performance of the contract; and includes a contract which contains an illegal provision, whether that provision is severable or not."

This definition relies, of course, on existing law for the determination of illegality in respect to any particular contract<sup>1</sup> but in the area of illegal performance and severance some tidying up is achieved. The doctrine of severance is abolished in favour of the remedies available to a party to an illegal contract conferred by s.7 of the Act<sup>2</sup> and an attempt has been made to legislate a formula for dealing with contracts which, whilst ex facie legal, have been illegally performed. In relation to the latter, s.3 must be read with s.5 of the Act, which provides:

"5. Breach of enactment - A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach

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\* My emphasis

1. Discussed Chapt.3, Cheshire and Fifoot's Law of Contract (4th N.Z. ed.) by Prof. J.F.Northey, for a full discussion of this.
2. Discussed infra.

"of any enactment, unless the enactment expressly so provides or its object clearly so requires."

In the draft bill prepared by the Contracts and Commercial Law Reform Committee s.5 contained a second clause which does not appear in the Illegal Contracts Act 1970. That clause read:

"A contract the object of which or any provision of which is the doing of an act that is prohibited by any enactment shall be illegal, unless the enactment otherwise provides or its object otherwise requires."<sup>3</sup>

This deleted clause, together with what now appears as s.5 of the Act was intended by the Contracts and Commercial Law Reform Committee to legislate the approach to an illegal performance of a contract ex facie legal adopted by Devlin J in St. John Shipping Corporation v. Joseph Rank, Ltd.<sup>4</sup> In that case the plaintiff conveyed a cargo of wheat from America to England in its ship which, when bunkered with the fuel necessary for the journey, submerged the "load line" contrary to the provisions of The Merchant Shipping (Safety and Load Line Conventions) Act, 1932. For that offence the master of the vessel was fined £1,200. The freight earned by the excess wheat was £2,295 and the defendants, who were indorsees of bills of lading in respect of some of the cargo withheld £2,000 of the total freight contracted to be paid by

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3. Clause 5(2) of the draft bill.

4. [1957] 1 Q.B.267; also the similar approach adopted in New South Wales in Hayes v. Cable (1961) 62 S.R. (N.S.W.) 1.

them - even though the cargo was delivered safely. The contract for the carriage of the wheat was ex facie lawful but the defendants contended that the plaintiff's breach of the Merchant Shipping (Safety and Load Line Conventions) Act, 1932 made it illegal and unenforceable. Before examining the way in which Devlin J dealt with this contention the general principles relating to the effects of illegality in contract need first to be identified.

At common law an agreement to commit a crime or a tort is illegal and unenforceable.<sup>5</sup> Similarly, certain contracts which are categorised as contrary to public policy, are unenforceable.<sup>6</sup> A contract, lawful in itself, is also illegal if entered into with the object that the law will be violated in its performance. In such cases the key to unenforceability is to be found in the proved intention of the parties. But if the performance of the contract necessarily involves the commission of an unlawful act it is illegal and unenforceable, even where the parties are ignorant of the law that makes it unlawful.<sup>7</sup> But what

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5. Bigos v. Bousted [1951] 1 All.E.R.92; Scott v. Brown, Doering, McNab & Co. [1892] 2 Q.B.724; Brown, Jenkinson & Co.Ltd. v. Percy Dalton (London) Ltd. [1957] 2 Q.B.621; for the tort of inducing breach of contract see British Homophone Ltd. v. Kunz and Crystallate Gramophone Record Manufacturing Co.Ltd. (1935) 152 L.T.589.
  6. Discussed Cheshire and Fifoot, note 1, and pp. 266-289, Vol.9 Halsbury's Laws of England (4th ed.).
  7. See the obiter statement of Blackburn J in Waugh v. Morris (1873) L.R.8 Q.B.202, 208; and Denning M.R. in J.M. Allan (Merchandising) Ltd. v. Cloke [1963] 2 Q.B.340, 348.

of a contract that is ex facie lawful and is performed illegally as in St. John Shipping Corporation v. Joseph Rank, Ltd.?<sup>8</sup> There is no difficulty when the parties intend to perform the contract unlawfully, in such a case they cannot enforce it.<sup>9</sup> And if one only of the parties<sup>10</sup> intends to perform the contract unlawfully he is barred from enforcing it; but a party who is not implicated or did not participate in the illegality is not debarred.<sup>10</sup> In St. John Shipping Corporation v. Joseph Rank, Ltd. a breach of the Merchant Shipping (Safety and Load line Conventions) Act, 1932 was not anticipated or intended by either party at the time the contract was entered into, and it was not alleged that the infringement of the Act by the plaintiff was deliberate.<sup>11</sup> The defendant could not, therefore, establish against the plaintiff an intention such as would preclude it from recovering but contented itself instead with alleging that the unlawful act itself, in the performance of the contract, was sufficient to debar recovery. Devlin J rejected this contention saying:

"There are two general principles [relating to illegal contracts]. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable.

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8. Note 4.

9. Supra.

10. Ashmore, Benson, Pease & Co. Ltd. v. A.V. Dawson Ltd. [1973] 2 All.E.R.856; Anderson Ltd. v. Daniel [1924] 1 K.B.138, 149; B and B Viennese Fashions v. Losane [1952] 1 All.E.R.909, 913; J.M. Allan (Merchandising) Ltd. v. Cloke note 7, at p.261.

11. Note 4, at p.283.

"The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it ... The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable."<sup>12</sup>

The learned Judge then went on to explain that in determining whether a contract was expressly or impliedly prohibited by statute it was necessary to look at its performance, as well as its terms. He said:

"... whether it is the terms of the contract or the performance of it that is called in question, the test is just the same: is the contract, as made or as performed, a contract that is prohibited by the statute."<sup>13</sup>

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12. Ibid.

13. Note 4, at p.284.

And, the test to be applied in determining whether a contract is impliedly prohibited requires one to consider the true effect and meaning of the statute to ascertain whether it means to prohibit the class of contracts to which the contract under consideration belongs. But:

"A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication, or 'necessary inference' ..., that the statute so intended. If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication."<sup>14</sup>

Devlin J urged caution in finding an implied prohibition where some regulatory law in the commercial sphere was unwittingly broken. Unless there was a clear implication to that effect the courts should not readily interfere with the rights and remedies of the ordinary law of contract, and in determining whether there is such an implication it was proper to have regard to the consequences and inconveniences that might flow from it. The finding in St. John Shipping Corporation v. Joseph Rank Ltd. was, therefore, that although there had been illegality in the performance of the contract the Merchant Shipping (Safety and Load Line Conventions) Act, 1932 did not impliedly prohibit the carriage of goods.

The approach in St. John Shipping Corporation v.

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14. Note 4, at p.288.

Joseph Rank Ltd. was contrasted with, and preferred by, the Contracts and Commercial Law Reform Committee, to that adopted by the New Zealand Courts to a breach of s.25 of the Land Settlement Promotion and Land Acquisition Act 1952 prior to a decision of the Court of Appeal in Joe v. Young.<sup>15</sup> That section provided that transactions entered into in contravention of the Act "shall be deemed to be unlawful and shall have no effect."<sup>16</sup> Prior to Joe v. Young the courts, for all practical purposes,<sup>17</sup> interpreted that phrase as meaning "shall have no effect otherwise than as an unlawful transaction."<sup>18</sup> Thus, the rule in Scarfe v. Morgan<sup>19</sup> and Alexander v. Rayson<sup>20</sup> applied. Under this rule the illegality in a contract of lease does not prevent a legal or equitable title passing from the landlord to the tenant but the necessity to plead or explain the illegality prevents the landlord from seeking the aid of the courts to recover possession

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15. [1964] N.Z.L.R.24.
  16. S.25(4) Land Settlement Promotion and Land Acquisition Act 1952; its precursor was s.46 of the Servicemen's Settlement and Land Sales Act 1943.
  17. There was some reluctance to accept an interpretation based on a finding that the words "and shall have no effect" were mere surplusage, see e.g. Fair and Hay JJ in Watson v. Miles [1953] N.Z.L.R.958.
  18. Per Gresson J in Watson v. Miles, note 17 at p.972.
  19. (1838), 4 M. & W.270.
  20. [1936] 1 K.B.169.

of his land.<sup>21</sup> The Court of Appeal in Joe v. Young, however, disapproved of this approach and held that the words "shall have no effect" in s.25 of the Land Settlement Promotion and Land Acquisition Act 1952 must be given effect to in accordance with their ordinary meaning, and consequently, a leasing in contravention of the provisions of the Act did not preclude the owner from bringing an action to recover possession of its land - because the contract of lease was not only unlawful, but was of no effect to pass any title to the tenant. The owner's claim for possession therefore rested solely on his legal ownership and did not require an explanation of the illegality in the contract of lease.<sup>22</sup>

It is, however, difficult to see upon what basis the approach in the pre-Joe v. Young cases can be contrasted with that adopted in St. John Shipping Corporation v. Joseph Rank Ltd. Both before and after<sup>23</sup> Joe v. Young the New Zealand courts have never doubted that contracts in breach of s.25 of the Land Settlement Promotion and Land Acquisition Act 1952 are, by "a clear implication, or necessary inference"<sup>24</sup>

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21. But cf. Bowmakers Ltd. v. Barnet Instruments Ltd. [1945] K.B.65 where the owner of bailed chattels was treated with more favour by the court.

22. This rule formed the basis of the decision in Bowmakers case, *ibid.*; and see Hayes v. Sutherland [1959] N.Z.L.R.1377; Mansion House (Kawau) Ltd. v. Stapleton [1948] N.Z.L.R.1015; Allan v. Reid [1951] N.Z.L.R.338.

23. The later cases are discussed *infra*, para.4.

24. The words used by Devlin J in the St. John Shipping Corporation case *supra*, note 14.



prohibited by the section. Indeed, their prohibition is the very object of the legislation. As an example of a different approach, therefore, the Committee's selection of the pre-Joe v. Young cases was unfortunate. It would perhaps have been better to explain clause 5 of the bill as simply acknowledging a preference for a more rational attitude to illegal performance as demonstrated by St. John Shipping Corporation v. Joseph Rank, Ltd. The confusion evident in the contrast between the two types of approach selected by the Committee in its explanation of clause 5 of the draft bill also manifests itself in paragraph 2 of that clause.<sup>24a</sup> One commentator placed the emphasis on the concluding words to paragraph (2) and said:

"It will be seen that although the antithesis between subsections (1) and (2) is elegant, the effect of subsection (2) would, in fact, be to expand greatly the scope of statutory illegality."<sup>25</sup>

The basis for this conclusion was that there would be very few enactments in existence which would 'otherwise provide' or whose 'object otherwise requires' that the contract be legal. It is not surprising that the Committee's intention was misunderstood in this way, for by drafting paragraphs (1) and (2) in the same clause the distinction between Devlin J's two classes of contract in St. John Shipping Corporation v. Joseph Rank Ltd.<sup>26</sup> becomes blurred. In paragraph (1) the second class in which illegal performance is a gratuitous consequence of the parties' transaction

24a. Quoted supra.

25. M.P. Furmston (1972) 5 N.Z.U.L.R.151, 158.

26. Supra.

is dealt with; whereas paragraph (2) purports to have nothing to do with performance but falls to be considered in the light of the parties' intention at the time the contract was entered into.<sup>27</sup>

In view of the definition of an "illegal contract" in s.3 of the Act it is difficult to understand the need the Committee appears to have felt for inserting paragraph (2) in clause 5 of the draft bill. It would have made more sense in clause 3, but in any event it made no change to the law, and perhaps in recognition of this it was never inserted in the Act.

It is suggested that s.5 of the Illegal Contracts Act 1970, whilst making no substantive change to the law, does achieve some useful clarification of it. However, for its object to be clearly understood the spirit of Devlin J's judgment in St. John Shipping Corporation v. Joseph Rank, Ltd. must also be had regard to and recognised. The section as it stands achieves what its framers hoped for; although incidentally it may have been desirable to insert the word "only" after "performance" when paragraph (2) of clause 5 was rejected by the legislator. The provision does not, of course, provide a precise formula for dealing with cases of illegal performance; but it does provide a useful cushion<sup>28</sup> against the ever increasing burdens imposed in every sphere of human endeavour by the legislative control and regulation syndrome that has characterised the 20th century. It will be necessary to return again to this provision in order to examine its application to the wagering and gaming laws.

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27. In which context ignorance of the law is, of course, irrelevant.

28. R.J. Sutton [1972] Recent Law, 28, 32 would disagree with the conclusion. It remains to be seen whether the New Zealand Courts will apply a more liberal approach than e.g. in Carey v. Hastie [1968] N.Z.L.R.276.

In regard to the abolition of the doctrine of severance, as previously indicated this was necessary in order to achieve the reform provided for in s.7 of the Act. This will be discussed further in the following paragraph, but at this point the need to abolish the doctrine can be succinctly, and clearly, explained by quoting paragraph 12 of the Contracts and Commercial Law Reform Committee's report. It reads:

"At present, the courts have the power in certain cases to assist the parties to an illegal contract by severing and discarding the illegal portions of it, so that the legal parts remaining can be enforced. This power can sometimes work injustice in that the enforcement of only a part rather than the whole can have the effect of distorting the parties' bargain. It seems to us, however, that the need for the remedy will disappear if the larger reforms we recommend [in ss.6 & 7 of the Act] are adopted. Under these the courts will have a much wider discretion to enforce or not enforce the contract (including the illegal portions of it) whether in whole or in part. We therefore recommend in clause 3 of our draft statute that contracts should be treated as illegal whether the illegal provisions in them are severable or not."

[6.03] The Remedy for Illegality in Contract Proposed by the Act

As previously indicated, the Illegal Contracts Act 1970 was a reaction against the often too severe consequences that flowed from the application of the doctrine of illegality in contract<sup>1</sup> - especially

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1. Supra, para.1.

where its application was attracted by a purely gratuitous breach of one of the multitude of regulatory provisions "which a managed welfare State seems to require".<sup>2</sup> But whilst statutory illegality was the principal concern, the reform effected by the Act extends also to common law illegality.<sup>3</sup>

The emphasis in the Act, however, is on substituting the non-enforceability concept of the common law with a more flexible approach to dealing with contracts tainted with illegality. This is achieved in ss.6 & 7 of the Act, the purposes of which were explained by the Contracts and Commercial Law Reform Committee in the following terms:

"Any general reform should, in our view, have the effect of making such contracts as are illegal, of no effect, so that no rights will pass under them and the position of the parties will be the same as if the illegal contract had never been entered into (clause 6 of the draft statute [s.6 of the Act]). We would qualify this rule, however, by giving to the courts a discretion to order that, notwithstanding the illegality, the contract be enforced in whole or in part.

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2. Per McCarthy J in Carey v. Hastie [1968] N.Z.L.R. 276, 286; this passage was adopted by McMullin J in Dreadon v. Fletcher Development Co. [1974] 2 N.Z.L.R.11, 19 who said, of the policy behind the Act: "It was the need 'to remove the over-severe consequences which sometimes flow from a breach of one of the less important of the very large number of regulations which a managed welfare state seems to require' ... and not so much to deal with the consequences of common law illegality that the Illegal Contracts Act was enacted."
  3. See e.g. the definition of an illegal contract in s.3 which encompasses a contract that is illegal "at law or in equity".

"We would make this exception because we recognise that there may be circumstances where it may be impossible or unjust that the parties should be restored to their original position. We therefore make the recommendations set out in clause 7 of the attached draft statute [s.7 of the Act]."

Sections 6 and 7 of the Illegal Contracts Act 1970 provide as follows:

"6.(1) Notwithstanding any rule of law or equity to the contrary, but subject to the provisions of this Act and of any other enactment, every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract:

Provided that nothing in this section shall invalidate -

- (a) Any disposition of property by a party to an illegal contract for valuable consideration; or
- (b) Any disposition of property made by or through a person who became entitled to the property under a disposition to which paragraph (a) of this proviso applies -

if the person to whom the disposition was made was not a party to the illegal contract and had not at the time of the disposition notice that the property was the subject of, or the whole or part of the consideration for, an illegal contract and otherwise acts in good faith.

(2) In this section the term 'disposition' has the meaning assigned to that term by section 2 of the Insolvency Act 1967."

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4. Para.11, Report of the Contracts and Commercial Law Reform Committee on Illegal Contracts. The Committee also made specific proposals in relation to contracts in restraint of trade. A discussion of those proposals is beyond the scope of this work, but see s.8 of the Illegal Contracts Act 1970.

"7.(1) Notwithstanding the provisions of section 6 of this Act, but subject to the express provisions of any other enactment, the Court may in the course of any proceedings, or on application made for the purpose, grant to

- (a) Any party to an illegal contract; or
- (b) Any party to a contract who is disqualified from enforcing it by reason of the commission of an illegal act in the course of its performance; or
- (c) Any person claiming through or under any such party -

such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just.

(2) An application under subsection (1) of this section may be made by -

- (a) Any person to whom the Court may grant relief pursuant to subsection (1) of this section; or
- (b) Any other person where it is material for that person to know whether relief will be granted under that subsection.

(3) In considering whether to grant relief under subsection (1) of this section the Court shall have regard to -

- (a) The conduct of the parties; and
- (b) In the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof; and
- (c) Such other matters as it thinks proper;

but shall not grant relief if it considers that to do so would not be in the public interest.

(4) The Court may make an order under subsection (1) of this section notwithstanding that the person granted relief entered into the contract or committed an unlawful act or unlawfully omitted to do an act with knowledge of the facts or law giving rise to the illegality, but the Court shall take such knowledge into account in exercising its discretion under that subsection.

"(5) The Court may by any order made under subsection (1) of this section vest any property that was the subject of, or the whole or part of the consideration for, an illegal contract in any party to the proceedings or may direct any such party to transfer or assign any such property to any other party to the proceedings.

(6) Any order made under subsection (1) of this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit.

(7) Subject to the express provisions of any other enactment, no Court shall, in respect of any illegal contract, grant relief to any person otherwise than in accordance with the provisions of this Act."

These provisions have been applied in a number of cases since the statute was enacted and whilst s.6 has caused little difficulty two main issues have arisen in the construction of s.7. The first was perhaps predictable in that it relates to the matters the court should have regard to in exercising its discretion under s.7(1) to grant relief to a party to a contract rendered of no effect by s.6; the second relates to the construction to be applied to the words "but subject to the express provisions of any other enactment" in subsection (1) of s.7. As the second issue has important ramifications for the application of the Illegal Contracts Act to gaming and wagering contracts it will be convenient to deal with each in turn under separate headings.

[6.04] The Scope of the Discretionary Relief Available under the Act

As Wild C.J observed<sup>1</sup> in Combined Taxis Co-operative Society Ltd. v. Slobbe<sup>2</sup> the power given to the courts to grant relief from the consequences of illegality imposed by s.6 of the Act "is of the most plenary character".<sup>3</sup> And the nature of the relief available extends beyond variation or validation of the contract in whole or in part in that it may be for any particular purpose "or otherwise howsoever as the Court in its discretion thinks fit".<sup>4</sup> The relief available is exceptionally wide. But the power to grant relief is qualified in subsection (3) by a number of factors which must be considered by the Courts. The first is the conduct of the parties.<sup>5</sup> In this regard the fact that the parties have acted in perfect good faith and were

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1. In response to a submission by Counsel for the Plaintiff.
  2. [1972] N.Z.L.R.354.
  3. Ibid., at p.362.
  4. S.7(1) of the Act.
  5. In Morgan v. Beck and Pope (Unreported Judgment of Quilliam J, at Wellington, 2nd September 1974) a plea by a non-party to an illegal contract that an application, for validation of a contract, should have been made by the plaintiff to overcome the consequences of an illegality arising from the non-party's negligence was rejected. Quilliam J said: "... I am not prepared to say that the prospects of a successful application were such as to mean that the Plaintiff, in the exercise of his duty to mitigate his loss, should have embarked upon such an unpromising venture" (at p.10).



not conscious of any infringement of the law has been held material.<sup>6</sup> Similarly, where the illegality has arisen as an administrative oversight or through the negligence of the party's professional adviser, the Courts have granted relief against the operation of s.6.<sup>7</sup> The motive of the party seeking refuge in the application of s.7 is also of particular relevance. In one case the applicant failed because to grant relief would have resulted in the success of an arrangement which was adopted as 'an ingenious device to defeat the operation of the Regulations for ... profit'.<sup>8</sup> And there has also been a marked reaction against parties who, having entered into a contract of sale or given an option to purchase, then seek to invalidate the agreement in order to obtain the bene-

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6. Per Wild C.J. in Combined Taxis Co-operative Society Ltd. v. Slobbe, note 2, at p.361; in R.D. Bull Ltd. v. Broadlands Rentals Ltd. [1975] 1 N.Z.L.R.304 the defendant's knowledge of the illegality (he adopted a device to defeat the operation of the regulation in issue) operated against him; whilst the plaintiff, an 'unsophisticated individual [who] ... did not know that the transaction was illegal' succeeded (at p.309); and see Dreadon v. Fletcher Development Co.Ltd. [1974] 2 N.Z.L.R.11. But knowledge that the law is being breached does not disbar from relief, see subs.4.
  7. Dreadon v. Fletcher Development Co.Ltd., note 6; Henderson v. Ross (Unreported Judgment of Beattie J, at Rotorua, undated, ref.A.No.18/75); and see also Teh v. Fraser (Unreported Judgment of Speight J, at Whangarei, December 17th 1974), where this course was not available for other reasons; Coburn v. Harding (Unreported Judgment of Wild C.J, at Auckland, 23rd October 1974).
  8. R.D. Bull Ltd. v. Broadlands Rentals Ltd., note 6 at p.309.

that the plaintiff had contravened the provisions of the Moneylenders Act 1908. The consequence of that breach was that the contract of loan was illegal.<sup>2</sup> The plaintiff sought relief from the illegality under, inter alia, s.7 of the Illegal Contracts Act 1970 and, in that context, Wild C.J. made the following observation concerning the introductory words to s.7(1):

"... the power given by s.7(1) is 'subject to the express provisions of any other enactment'. The enactment relevant here is ... the Moneylenders Act 1908 and its amendments. If that Act expressly declared a contract of the kind here in issue to be illegal or void the words just quoted would, in my opinion, preclude the Court from exercising the power given by s.7(1) to grant relief by way of validating it. But the Moneylenders Act 1908 contains no express provision that a contract made by an unregistered moneylender is illegal or void. That consequence is Judge-made law. Accordingly, in my judgment the Court may validate this contract."<sup>3</sup>

When the case went on appeal to the Court of Appeal<sup>4</sup> that Court did not find it necessary to express any concluded view of the Chief Justice's opinion on

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2. The interest rate was 6.1/2% per annum flat. This represented a true interest rate of over 10% and under the Moneylenders Act 1908 the plaintiff, who carried on the business of lending money was required to be licensed. The absence of a Moneylenders licence rendered the contract illegal and void; Ansford v. New Plymouth Finance Co.Ltd. [1933] N.Z.L.R.209 applied; ibid., at p.359.
  3. Note 1, at p.360.
  4. [1973] 2 N.Z.L.R.651.

this matter<sup>5</sup> but one commentator was moved to suggest:

"It is to be hoped that this dictum will be reconsidered by the courts as it appears to have been the intention of the Act that the powers in s.7 would only be abridged if the invalidating provision actually specifies the consequences of illegality or avoidance in the particular case."<sup>6</sup>

This view was also shared by McMullin J a few months later in Dreadon v. Fletcher Development Co.Ltd.<sup>7</sup> In that case s.25(4) of the Land Settlement Promotion and Land Acquisition Act 1952 was under consideration. That section provided that certain transactions which contravened or did not comply with the requirements of that Act, "shall be deemed to be unlawful and shall have no effect." It was argued that the effect of the use of these words by the Legislature was that s.7 of the Illegal Contracts Act 1970 did not apply to validate transactions under the Land Settlement Promotion and Land Acquisition Act 1952. In support of that contention the passage quoted above from the Judgment of Wild C.J. in Combined Taxis Co-operative Society Ltd. v. Slobbe<sup>8</sup> was relied upon. But McMullin J was of the view that if the words 'subject to the express provisions of any other enactment' in s.7(1)

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5. Ibid., at p.652.

6. [1973] 1 Aust.Bus.L.R. 94, 95.

7. [1974] 2 N.Z.L.R. 11.

8. Note 1.

were given that construction the remedial effects of the provision would be largely lost in that its application would be confined to those contracts which are illegal at common law.<sup>9</sup> He later concluded:

"Section 6 provides that every illegal contract shall be 'of no effect' and s.7 provides that, notwithstanding the express provisions of s.6, the Court may grant relief in the case of an illegal contract, inter alia, by its validation in whole or in part. In my respectful opinion, the words 'subject to the express provisions of any other enactment' in s.7 of the Illegal Contract [sic] Act do no more than recognise the right of the Legislature in the enactment of a particular statute to treat the contravention of that statute as being without remedy so as to preclude the invocation of the benevolence of s.7, but they do not otherwise prevent its application, unless there is a specific direction to the contrary."<sup>10</sup>

Thus, in the first two reported cases in which the courts were called upon to construe the phrase 'subject to the express provisions of any other enactment' quite different conclusions were reached. But whilst the construction preferred by Wild C.J. in Slobbe's case was considerably narrower than that adopted by McMullin J, it was not, perhaps, as narrow as the latter suggested. The effect of the Chief

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9. Note 7, at p.19. The remedial effects of the Illegal Contracts Act 1970 would, he considered, be largely lost because the object of the Act was the other way, i.e., to relieve the consequences of statutory illegality rather than common law illegality. But see *infra*.

10. *Ibid.*, at pp.19-20.

Justice's construction did not simply confine the operation of s.7(1) to contracts illegal at common law. Indeed Slobbe's case itself raised statutory illegality, not common law illegality and s.7(1) was held to be applicable. It depends, of course, on what one means by 'statutory' and 'common law' illegality. In Slobbe's case the illegality arose from a breach of the Moneylenders Act 1908. And, although that consequence was, as Wild C.J. observed, a product of "Judge made law"<sup>11</sup> (and did not occur as the expressed intention of the statute), it was an example of the type of statutory illegality the Contracts and Commercial Law Reform Committee specifically had in mind to provide relief against. In its report,<sup>12</sup> the Committee placed contracts illegal at common law and contracts illegal by statute into two separate categories and dealt with each in turn. Under a section headed 'Contracts Illegal at Common Law'<sup>13</sup> it acknowledged a category of common law illegality arising from contracts to commit illegal acts, - which includes, of course, acts illegal under statute law. But in a separate section headed 'Contracts Illegal by Statute'<sup>14</sup> the circumstances in which statutory illegality can arise are identified, and attract the following observations:

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11. Note 1, at p.360.

12. Report of the Contracts and Commercial Law Reform Committee on the Law Governing Illegal Contracts, 24.10.69.

13. Ibid., at p.5.

14. Note 12, at p.6.

"The type of illegality which today gives most cause for concern\* is that brought about by the effect of statutes, regulations and bylaws. The trend in modern times towards increasing the degree of control exercised by the State and local government over the everyday concerns of the community has led to a wide proliferation of possible offences and a consequent growth in the number of ways in which, potentially, contracts may be effected [sic] by illegality. Measures to control dispositions of land, safety on the highways, the construction of buildings, the sale of such commodities as food, tobacco and fertilizers and the loading of ocean-going vessels have all had the effect of rendering contracts illegal."<sup>15</sup>

In the examples cited in this passage the illegality arises from a breach of a statute, regulation or bylaw but it is clear that the Committee specifically had in mind cases such as Carey v. Hastie. This view is supported by the Committee's reference earlier in the report, in a section headed 'The Need for Reform'<sup>16</sup> to cases such as Griffiths v. Ellis,<sup>17</sup> Berrett v. Smith,<sup>18</sup> Fenton v. Scotty's Car Sales Ltd.<sup>19</sup> and Dromorne Linen Co. Ltd. v. Ward.<sup>20</sup> These cases were all in the Carey v. Hastie mould, that is, the contracts were unenforceable as being

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\* My emphasis

15. Ibid., para.7, p.6.

16. Note 12, at pp.1-4.

17. [1958] N.Z.L.R.840.

18. [1965] N.Z.L.R.460.

19. [1968] N.Z.L.R.929.

20. [1963] N.Z.L.R.614.

void or illegal under the common law because of a breach of a statute, regulation or bylaw.

It is submitted that the opinion expressed by Wild C.J. in Slobbe's case does not necessarily result in the remedial effects of s.7(1) being 'largely lost' as McMullin J suggested in Dreadon<sup>22</sup> But in a later case<sup>23</sup> the Chief Justice changed his position on the matter and adopted the view of McMullin J. He felt obliged to do so because of support for McMullin J's view expressed by Chilwell J in R.D. Bull Ltd. v. Broadlands Rentals.<sup>24</sup> In that case the issue was whether regulation 10 of the Hire Purchase and Credit Sales Stabilisation Regulations 1957<sup>24a</sup> which rendered transactions entered into in violation of the regulations void, was an express provision that would exclude the operation of s.7(1) of the Illegal Contracts Act 1970. Chilwell J held, inter alia:

"In Dreadon's case McMullin J held that the addition of the words 'and shall have no effect' following the word 'unlawful' in s.25(4) of the Land Settlement Promotion and Land Acquisition Act 1952 did not preclude the application of s.7 to the contravention of that statute. In my respectful opinion that judgment is clearly right. For the same reasons which persuaded McMullin J [in the passage quoted supra] it is my judgment that the use of the word 'void' in reg.10

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21. Supra.

22. Supra.

23. Coburn v. Harding. Unreported Judgment, Auckland, 23.10.74.

24. [1975] 1 N.Z.L.R.304.

24a.S.R. 1957/170, reprinted S.R.1974/246.

"does not preclude the Court from applying s.7 of the Illegal Contracts Act 1970 in the present case."<sup>25</sup>

The phrase 'shall be deemed to be unlawful and shall have no effect' in s.25(4) of the Land Settlement Promotion and Land Acquisition Act 1952 was also again before the Court in Teh v. Frazer<sup>26</sup> and Speight J, whilst expressing some reservations<sup>27</sup> about the application of s.7(1) of the Illegal Contracts Act 1970 to transactions invalidated by s.25(4), dealt with the case on the assumption that relief under the latter Act was available. And, if a seal of approval was necessary for the approach adopted in Dreadon, it was provided by Beattie J in Henderson v. Ross,<sup>28</sup> a further case involving s.25(4) of the Land Settlement Promotion and Land Acquisition Act 1952. There the Judge expressly approved of and adopted McMullin J's reasoning and conclusion and then went on to say:

"... Mr Tompkins urged that the meaning of 'subject to the express provisions of any other enactment' must be regarded against the whole of s.7. Thus read, it is submitted that the Court may grant relief subject to an express provision to the contrary against the granting of relief. It does seem that looked at in this way, the parts fall into place, and there is no collision between s.7(1) and s.25(4) because

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25. Ibid., at p.308.

26. Unreported Judgment, Whangarei, 17.12.74.

27. At p.6, discussed infra.

28. Unreported, Rotorua, February 1976.



"the latter section places no restriction on the granting of relief. The words 'shall have no effect' in s.25(4) fall short of limiting the grant of relief. This interpretation in my opinion fits precisely within the comments of McMullin J in Dreadon's case ... when he said: 'unless there is a specific direction to the contrary' I respectfully adopt his reasoning and the approach of Chilwill [sic] J in Bull's case where he was prepared to grant relief unless there was an express provision precluding him from doing so."<sup>29</sup>

Although the weight of judicial opinion is overwhelmingly in support of the view that a 'void and of no effect' clause in a particular enactment does not exclude the application of the relief available under s.7(1) of the Illegal Contracts Act 1970 the matter is by no means concluded at this point of time. R.D. Bull Ltd. v. Broadlands Rentals Ltd., Coburn v. Harding and Henderson v. Ross are currently under appeal to the Court of Appeal. It is respectfully suggested, however, that the obiter opinion expressed by the Chief Justice in Slobbe's case is preferable to the approach that has found favour with the majority in the Supreme Court. A principal weakness in the approach suggested by the Chief Justice is, of course, that it is out of sympathy with the not infrequently expressed desire of the courts to be rid of the forced, and consequently often unjust, conclusions that the illegality doctrine has produced. It has admittedly in the past too often worked injustice, and would have done if, for example, it was applied in Henderson v. Ross. But occasionally the legislature has preferred that

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29. Ibid., at p.16.

result and has specifically invoked the illegality doctrine - and more - by inserting 'void and of no effect' clauses in particular enactments. Indeed, this was expressly recognised by the Contracts and Commercial Law Reform Committee when it said, on the last page of its report:

"Although the proviso to regulation 10 of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 probably does less than justice between the parties, its swinging effect has the consequence that these regulations are largely observed by retailers and finance companies despite minimal governmental policing."<sup>30</sup>

The proviso to which the Committee referred enables a buyer or hirer of goods under an agreement rendered void by regulation 10, to recover all money paid and the value of any consideration given by him under the agreement; even where, as often is the case, he has enjoyed quite extensive use of the property purportedly hired or purchased. This can, of course, result in considerable loss and hardship to the vendor or bailor, whilst at the same time conferring a quite unmeritorious windfall on the purchaser or bailee.<sup>31</sup> In R.D. Bull Ltd. v. Broadlands Rentals Ltd. Chilwell J held that the terms of the proviso constituted an express provision which barred the granting of relief under s.7(1) of the Illegal Contracts Act 1970; but the regulation itself, in avoiding the contract, did not.<sup>32</sup> With respect this

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30. Note 12, para.13.

31. See e.g. Credit Services Investments Ltd. v. Evans [1974] 2 N.Z.L.R.683.

32. Note 24, at p.310.

results in a complete distortion of what the legislature intended by those provisions. The proviso was enacted to provide relief for a purchaser or bailee against the consequences of voidability enacted in the regulation itself. This is clear from its terms. There is no express provision in it preventing the application of s.7(1) of the Illegal Contracts Act 1970, it is simply a qualification on the voidness of any agreement entered into to which it applies. Or, to put it another way, it simply 'creates a somewhat drastic remedy'<sup>33</sup> in the purchaser or bailee's favour, and operates to provide relief against the legislatively expressed consequence of illegality under the regulation itself. It is, with respect, that expressed consequence that bars the operation of s.7(1) of the Illegal Contracts Act 1970, and not the terms of the proviso. This construction is in accordance with the observation of Richmond J in Grey v. Kingsway Autos Ltd.<sup>34</sup> as to the 'ordinary purpose' of a proviso in a section. It is, he said:

"... to make further provision of some kind as regards the same subject matter as has already been dealt with in the earlier words of the section or regulation."<sup>35</sup>

The only further provision made in the proviso to regulation 10 is to provide one form of relief for the buyer or

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33. Per Richmond J in Credit Services Investments Ltd. v. Evans note 31, at p.696.

34. [1973] 2 N.Z.L.R.625.

35. *Ibid.*, at p.633.

bailee under an agreement. There is nothing in the terms of the proviso to suggest that that is the only relief available to him. Nor is there anything to suggest, either expressly or by implication, that the bailor or vendor is to be deprived of any other form of relief that may be available to him under any other enactment. For example, to allow the seller to recover compensation for the use of a vehicle from the purchaser under s.7(1) of the Illegal Contracts Act 1970 would in no way contradict either the spirit or the express words of the proviso, - under which the purchaser is permitted to recover any money paid by him under the agreement of sale as a debt due to him by the seller.

One hesitates to suggest that the courts have arrived at an absurd result by a process of statutory interpretation, but at the very least, the construction applied to regulation 10 of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 and its proviso has tended to heap injustice upon injustice. There is, in addition, however, a further and indeed more serious objection to the refusal of the Supreme Court to give effect to the express "void and of no effect" clauses in particular enactments. It is contained in the following reservation of Speight J in Teh v. Frazer concerning the clause in s.25(4) of the Land Settlement Promotion and Land Acquisition Act 1952. He said:

"I begin to query whether or not the Illegal Contracts Act does apply to cases of this sort. I am aware that McMullan J in Dreadon v. Fletcher Development Co.Ltd. ... has held that it does, but that was on an argument relating to the use of the words 'and of no effect'. There is a question

"in my mind whether or not the Illegal Contracts Act is a general statute and s.25 of the Land Settlement Act is a special provision providing particular relief in its special category of 'deemed illegality' and hence may be 'an express provision in another enactment.'" <sup>36</sup>

This, with respect, points to an irresistible conclusion in regard to the relationship between "void and of no effect" clauses and the qualifying words in s.7(1) of the Illegal Contracts Act 1970.

A large question mark presently hangs over the construction of the words 'subject to the express provisions of any other enactment' in s.7(1) of the Illegal Contracts Act 1970, and it is, unfortunately, in the context of this uncertainty, that the relationship between the Illegal Contracts Act and the Gaming Act 1908 must now be considered.

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36. Note 27.

[6.06] The Application of the Act to Gaming and Wagering Contracts

It has previously been demonstrated that the construction applied to the words 'subject to the provisions of any other enactment' in s.7(1) of the Illegal Contracts Act 1970 has caused serious difficulties when applied to regulation 10 of the Hire Purchase and Credit Sales Stabilisation Regulations 1957. Those difficulties, however, seem almost trivial when that same construction is applied to the statutory provisions concerning gaming and wagering contracts and related transactions. The result is absolute chaos.

The only case in which the relationship between the Gaming Act 1908 and the Illegal Contracts Act 1970 has been considered is Harrison & Others v. Greymouth Trotting Club (Inc.) & Others.<sup>1</sup> In that case Casey J made the following observation concerning the application of s.7(1) of the Illegal Contracts Act 1970 to gaming and wagering contracts:

"I now turn to the request by the Plaintiffs for an order validating the contracts under the provisions of s.7 of the Illegal Contracts Act 1970 to give them the right to sue for a share in the pool. This Act refers only to 'illegal' transactions and may not apply to those which have been simply declared to be 'null and void' by the legislature. I refer to the comments of the learned editor of Cheshire & Fifoot's Law of Contract (4th New Zealand Edition) at p.286 where he concludes that the Act does make and intend a

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1. Unreported, Supreme Court, Greymouth, 28th May 1975. Discussed supra, chapter 4, para.8, and chapter 5, para.3.

"distinction between those contracts which are illegal, and those which are merely void and unenforceable and I am inclined to agree with his views. But assuming that the Illegal Contracts Act did apply, I would require far more compelling reasons than I have been given before exercising a discretion under s.7 to validate transactions discouraged by the Gaming Act, having regard to s.7(3) and the over-riding proviso about public interest."<sup>2</sup>

The writer cannot, with respect, agree with the learned Judge's observation that the transaction in question was 'discouraged by the Gaming Act': even allowing for the fact that it might be said that the 'accumulator jackpot' in that case was tainted with illegality.<sup>3</sup> But even leaving that matter aside, the statement quoted from the judgment contains a generalisation which is, on closer analysis, quite unsupportable. The distinction between 'void' and 'illegal' contracts and the consequence of that distinction for the application of the Illegal Contracts Act 1970 itself is not dissented from.<sup>4</sup> But what is rejected is the idea that that distinction necessarily determines the question of the application of the Illegal Contracts Act 1970 to gaming and wagering contracts. The first error in the statement is in lumping gaming contracts

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2. Ibid., at pp.8-9.

3. The particular jackpot was run on the basis that a terminating jackpot would occur at a future time. In fact, at the time the jackpot in question was held, the requisite authority for the terminating jackpot had not been obtained. See p.2 of the judgment.

4. But see, supra para.1 and footnote 7 where the difficulty inherent in this distinction is recognised; and [1975] Recent Law, pp.340-1 where the application of the Act to 'void' as opposed to 'illegal' contracts is further discussed.

and wagering contracts together and speaking of them as a single entity. The relevance of that error will emerge more clearly below in the discussion of the second error (which arises in consequence of the first) which relates specifically to the relationship between the avoiding provisions in the Gaming Act 1908 and the Illegal Contracts Act 1970.

In ss.69 and 70 of the Gaming Act 1908 certain contracts are declared to be 'null and void' and this concept is followed in those provisions with the further declaration that in respect to some contracts 'no action shall be brought or maintained in any Court for recovering money' and etc.. This express prohibition on the bringing of actions is also contained in s.71. It is clear that the interpretation given to the words 'subject to the express provisions in any other enactment' in s.7(1) of the Illegal Contracts Act 1970 would not operate to exclude the relief available under that provision from applying to gaming and wagering contracts which are only declared to be 'null and void'.<sup>5</sup> But what of the prohibition contained in the phrase 'no action shall be brought or maintained in any Court for recovering money' and etc.? And, does it make any difference where that prohibition accompanies a declaration that the contract in question is 'null and void'?

In Varney v. Hickman<sup>6</sup> the relationship between the avoiding words and those prohibiting the bringing of

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5. Discussed supra, para.5.

6. (1847), 5 C.B.271; and see Moon v. Durden (1848) 2 Ex.22.



actions in the English equivalent of s.69 of the Gaming Act 1908 (s.18, Gaming Act, 1845) were in issue, and Maule J held:

"The first branch of the section declares the contract to be null and void; the second prevents the winner from bringing an action to recover the amount of the bet from the loser ... It is certainly true that the second branch is involved in the first; that is to say, that, if the section had stopped at the end of the first branch, it would have followed that no action could be brought to enforce a contract so declared to be void. But I apprehend there is nothing unusual in an Act of Parliament stating a legal consequence in that way."<sup>7</sup>

This view of the relationship between the two parts of the section found favour with the Court of Appeal in Diggle v. Higgs.<sup>8</sup> There Lord Cairns L.C. suggested that this construction made 'one member of the section in unison with the other',<sup>9</sup> whilst Bramwell L.J. concluded that the words 'no suit shall be brought for recovering money won upon a wager' were unnecessary and could have been left out of the statute.<sup>10</sup> The consequence of this interpretation was, of course, to render the second limb of the section tautologous. However, in Hill v. William Hill (Park Lane) Ltd.<sup>11</sup> the House of Lords took a different view and held that,

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7. Ibid., at p.280.

8. (1877) 2 Ex. D.422; but Cockburn C.J. expressed reservations about its correctness (at p.428). See also Hyams v. Stuart King [1908] 2 K.B.696.

9. Ibid., at p.428.

10. Note 8, at p.429.

11. [1949] A.C.530.

whilst the second limb of the section is superfluous in relation to agreements rendered null and void by the first, the words of the second limb:

"... are quite general and when read in their ordinary meaning they extend to any action to recover money alleged to be won on a wager."<sup>12</sup>

Consequently, whilst the application of the first limb of the section is confined to rendering the wagering and gaming contract itself unenforceable, the second limb operates to render unenforceable subsequent agreements involving different considerations but which are, in substance, agreements to recover money alleged to be won on a wager.

But whilst the House of Lords rejected Maule J's view that the second limb of the section said nothing more than had already been provided for in the first limb, it did not dissent from the simple proposition that, at least in some cases, the words 'no action shall be brought or maintained in a Court' identified a consequence of the declaration in the first limb that rendered a contract 'null and void'. For example, Lord Greene said:

"Under the first branch the agreement is a nullity before the race is run. The second branch assumes the race to have been run and the bet to have been lost. [<sup>13</sup>] It is true that the language of the second branch would

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12. Per Lord Greene, *ibid.*, at p.552.

13. And a new and subsequent agreement entered into to secure payment to the winner of the amount owing by the loser.

"prohibit the bringing of an action upon a wager which had been won. To that extent I agree that it covers ground already adequately covered by the first branch."<sup>14</sup>

Similar observations are to be found in the judgments of Viscount Simon<sup>15</sup> and Lord MacDermott.<sup>16</sup> However, for the majority of the Law Lords the words prohibiting the bringing of actions were, in that context, merely stating the procedural consequences of the voidness in a contract the courts aid was sought to enforce. But the prohibition against the action and the consequence of voidness of the contract did not necessarily mean the same thing. For, as Lord MacDermott said:

"... the expression 'no suit shall be brought or maintained' confronts the would-be suitor with a higher obstacle than that which has to be met by one whose claim is defective only in that it is based on a transaction of no legal effect."<sup>17</sup>

The 'higher obstacle' in the former case is presented by the legislatively expressed prohibition of the action, which may be contrasted with the consequences of declaring an intended bargain a nullity in the latter. The prohibition of the action will apply whether or not the contract is void, but in the absence of such a prohibition the voidness of the agreement is fundamental to its unenforceability.

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14. Note 12.

15. Note 11, at p.549 and p.551.

16. Note 11, at p.577.

17. Ibid.

This distinction is clearly illustrated by the early decisions on the English Statute of Frauds.<sup>18</sup> S.4 of that statute provided, inter alia, that 'no action shall be brought' upon certain contracts. In Carrington v. Roots<sup>19</sup> Lord Abinger held that the effect of these words was to render a contract to which they applied 'altogether void'.<sup>20</sup> However in Leroux v. Brown<sup>21</sup> this rigorous interpretation was abandoned and the words in question were confined to simply imposing a procedural limitation on the enforcement of the contract. Consequently, only the enforceability and not the validity of the contract was affected.<sup>22</sup> Also, although the language of the section in the Statute of Frauds appears to impose an express prohibition on the bringing of actions this is not so, as the procedural barrier to enforcement exists only for the defendant's benefit and he may waive it if he wishes.<sup>23</sup> In this latter respect a difference exists between

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18. 29 Car.2, c.3 (1667).

19. (1837), 2 M. & W. 248.

20. Ibid., at p.255.

21. (1852), 12 C.B.801.

22. See also Maddison v. Alderson (1883) 8 App.Cas.467; Delaney v. Smith (T.P.) Ltd. [1946] K.B.393.

23. Code of Civil Procedure, R.142; discussed in Cheshire and Fifoot's Law of Contract, (4th N.Z. ed.), p.175.

the construction applied to the Statute of Frauds and that applied to the avoiding and unenforceability provisions of the gaming Acts. In the case of the latter the Courts have repeatedly held that the barrier to enforcement exists whether or not the defendant pleads it.<sup>24</sup> In this sense the gaming Acts impose a 'higher obstacle' to enforcement than the Statute of Frauds. Whether or not this follows as a consequence of the voidness of those contracts or from the express declaration of the legislature that 'no action shall be brought' - or indeed a combination of both - is not clear. The resolution of this question is, however, crucial. For upon it rests the resolution of the further and all important question as to whether the gaming Act provisions raise a 'higher obstacle' to the enforcement of the contracts to which they apply, than the concept of voidness itself; - that is, a 'higher obstacle' to enforcement than that which the Supreme Court has presently held to be insufficient to exclude relief under s.7(1) of the Illegal Contracts Act 1970.<sup>25</sup> The answer to all this rests largely on the nature and extent of the relationship between the first and second limbs of s.69 of the Gaming Act 1908 (s.18 of the Gaming Act, 1845 (U.K.)) after Hill v. William Hill (Park Lane) Ltd.

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24. Kershaw v. Siever (1904) 21 T.L.R.40; Lockett v. Wood (1908) 24 T.L.R.617; Patterson v. Wolland (1915) 34 N.Z.L.R.746; Economou v. MacDonald & Others, unreported judgment of Cooke J, Hamilton, 13.8.73.

25. For the reasons explained in para.5.

When Hill v. William Hill (Park Lane) Ltd. and the cases preceding it were decided it was unnecessary to distinguish and exclude from the operation of the second limb of the English equivalent of s.69 of the Gaming Act 1908 those transactions which were rendered null and void by the first. Consequently there is a certain looseness in the language of the judgments of those cases which is open to the interpretation that the words expressly prohibiting the bringing of actions in the section may, (albeit unnecessarily) apply to all contracts avoided by the 'null and void' clause. That is in addition to applying to contracts which are not themselves gaming and wagering contracts. In Diggle v. Higgle<sup>26</sup> Lord Cairns L.C. said:

"The section [s.18 of the Gaming Act, 1845 (U.K.)] amounts to this: all contracts by way of gaming and wagering are null and void; and then, dealing with those contracts, it says that no action shall be brought with respect to them: that is to say, all gaming contracts are void, and the winner of the game or wager shall not maintain a suit against his antagonist or the stakeholder."<sup>27</sup>

That statement was obiter, as was also the statement quoted above from the judgment of Maule J in Varney v. Hickman. But it did receive approval from Viscount Jowitt L.C.<sup>28</sup> and Lord Radcliffe<sup>29</sup> in Hill v. William Hill (Park Lane) Ltd.<sup>30</sup> And although the House of

26. Note 8.

27. Ibid., at pp.427-8.

28. Note 11, at p.544.

29. Note 11, at p.580.

30. Viscount Jowitt L.C. and Lord Radcliffe with Lord Oaksey delivered dissenting judgments.

Lords dissented from this view and held that the second limb of s.69 contained language that extended its operation beyond the contracts referred to in the first limb, it has not yet been decided whether the language of the second limb embraces all contracts falling within the first limb. And, the question still remains unanswered as to whether in adopting the words 'and no action shall be brought or maintained in any Court' the legislature intended to place a 'higher obstacle' (to use Lord MacDermott's language) against the enforcement itself of an agreement caught by the second limb than that accorded contracts merely declared to be null and void.

It is the writer's contention that following the decision in Hill v. William Hill (Park Lane) Ltd., in which the second limb of the section was accorded a meaning of its own, it is no longer possible to argue that all contracts caught by the 'null and void' clause are also, albeit unnecessarily (at least prior to the Illegal Contracts Act 1970), unenforceable as being contracts which the legislature has directly prohibited actions upon. Only those which are expressly within the language of that prohibition are in that position; and, in this regard, it is clear that the language of the second limb of the section does not apply to gaming contracts per se. But does this have any significance? The answer to that question depends upon the nature of the obstacle presented to an intended litigant by the words 'no action shall be brought or maintained in any Court' etc.. That is, it depends upon whether or not those words constitute an express provision which would exclude the availability of relief under the Illegal Contracts Act 1970. It is contended it does not.

Prior to Hill v. William Hill (Park Lane) Ltd.

the construction applied to s.18 tended to render the second limb of the section superfluous unless some added obstacle to enforcement per se could be found in its terms. The courts preferred the construction which rendered the second limb tautologous. And in the House of Lords decision itself the words of the second limb are not interpreted as imposing any 'higher obstacle' to enforcement than the first limb beyond encompassing a wider range of contracts. Indeed the decision itself, and the language throughout the majority judgments support the proposition that the legislature intended, by the language of the second limb, to apply the same degree of unenforceability as that imposed by the first.<sup>31</sup> This emerges clearly from the following observation of Lord Normand when he said:

"The purpose of this part of s.18 [the second limb] is not to strike a second and an unnecessary blow at contracts and agreements already stricken with nullity [by the first limb], but to strike at any suit for recovering money or valuables won by wagering. The language is appropriate for that purpose and it is a purpose which is a logical sequel and reinforcement of the first branch of the section. The legislature cannot have been unmindful that a provision making gaming and wagering contracts and agreements null and void might be rendered nugatory by additional promises or covenants given or entered into for security or in satisfaction of money lost by gaming and wagering. The preamble to the Act of 1845 shows that such supplementary promises and covenants were familiar to Parliament."<sup>32</sup>

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31. Notes 14, 15 and 16.

32. Note 11, at p.565.



This observation is consistent with what was said by Lush J in Haigh v. Town Council of Sheffield<sup>33</sup> concerning the policy behind the English enactment. It was, that learned Judge explained, to treat betting and wagering as a thing of neutral character, not to be encouraged, but on the other hand, not to be absolutely forbidden, and:

"it left an ordinary bet a mere debt of honour, depriving it of all legal obligation, but not making it illegal."<sup>34</sup>

In s.70 of the Gaming Act 1908 the prohibition against the bringing of actions is expressly applied to contracts rendered 'null and void' also. But that provision was enacted in 1894 when the construction applied to s.18 of the English Act was to similar effect. It is suggested therefore that in relation to both ss.70 and 71 of the Gaming Act 1908 the same construction is to be applied to words giving rise to unenforceability, as are applied to those to the same effect in s.69. Consequently, the express prohibition against bringing or maintaining actions expressed in ss.69, 70 and 71 of the Gaming Act 1908 do no more than render the agreements to which each refers unenforceable and do not constitute an expressed intention by the legislature to exclude the relief available under s.7(1) of the Illegal Contracts Act 1970. Or, to use the language of Beattie J in Henderson v. Ross<sup>35</sup> there is 'no express provision ...

33. (1875), L.R.10 Q.B. 102; discussed supra, chapt.2, para.6.

34. Ibid., at p.109.

35. Quoted supra, para.5.

against the granting of relief' in these provisions of the Gaming Act 1908.

In Harrison & Others v. Greymouth Trotting Club (Inc.) & Others<sup>36</sup> Casey J referred to gaming and wagering contracts as being transactions that had been 'simply declared to be null and void'<sup>37</sup> as opposed to being 'illegal'. It has previously been conceded<sup>38</sup> that if that was the case the Illegal Contracts Act 1970 would not apply to gaming and wagering contracts. However, although ss.69 and 70 of the Gaming Act 1908 do no more than declare the contracts referred to in those provisions null and void and unenforceable, the effect of a number of other enactments is to render most gaming contracts and many betting contracts illegal. For example s.9 of the Gaming Act 1908 declares certain Chinese games to be games of chance and by s.10 games of chance are declared to be unlawful games. Provisions outlawing common gaming houses are to similar effect and there are many provisions in the Act which taint certain betting contracts with illegality. For example s.26 creates offences relating to betting on sports grounds; s.27 punishes certain bets made in factories; the Gaming Amendment Act 1910, s.2, creates the offence of street betting; and the Amendment Act of 1920 makes it an offence to bet with a bookmaker. These represent only a sample of the many provisions in the Act itself which taint gaming and wagering contracts with illegality. But there are other complications.

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36. Note 1.

37. Note 2.

38. Supra.

The framers of the English Gaming Act, 1845 were careful to repeal the Act of 33 Hen.VIII, c.9 (1541) which had the effect of declaring most games, even of skill unlawful, whereas the framers of the New Zealand Act did not.<sup>39</sup> It is arguable that that Act is still in force in New Zealand.<sup>40</sup> Worse still, the provisions of the Acts of Anne (1710)<sup>41</sup> and Charles II (1664)<sup>42</sup> are clearly in force in New Zealand<sup>43</sup> and, if the views expressed in Applegarth v. Colley,<sup>44</sup> Daintree v. Hutchinson<sup>45</sup> and Thorpe v. Coleman<sup>46</sup> are correct, then contracts avoided by those enactments are illegal as well as void.<sup>47</sup> Consequently, games for £10 or more 'at any time or sitting' or bets on 'the sides or hands of such as do play'<sup>48</sup> are illegal, and relief under s.7(1) of the Illegal Contracts Act 1970 may be available to parties to such contracts (unless the public interest otherwise requires). But games or bets on games for less than that amount are not illegal and therefore do not satisfy the basic requirement for the application of the Illegal Contracts Act

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39. Discussed supra, chapter 1, para.3.

40. If the tests identified in chapter 3 are satisfied.

41. 9 Anne, c.14.

42. 16 Car.II, c.7.

43. Discussed chapter 3, and chapter 5, para.5.

44. (1842), 10 M.& W. 723.

45. (1842), 10 M.& W. 85.

46. (1845), 1 C.B. 990.

47. Discussed supra, chapter 1, para.4.

48. S.2 of the Act of Anne (1710).

1970. That result is, of course, a complete distortion - and even reversal - of what the legislature intended when enacting the Acts of 1664 and 1710. But there are further complications, and perhaps a saving provision. S.2 of the Act of Anne (1710) only applies where the loss on the game of £10 or more is paid or delivered to the winner. The provision then goes on to provide that the loser may:

"sue for and recover the money or goods so lost, and paid or delivered, or any part thereof, from the ... winner ... with costs of suit, by action of debt founded on this act..."

The similarity between the language in this provision and that contained in the proviso to regulation 10 of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 is unmistakable and it is difficult to avoid the conclusion that the reasoning in R.D. Bull Ltd. v. Broadlands Rentals Ltd.<sup>49</sup> would apply in such a case to exclude the courts' power to invoke the benevolence of s.7(1) of the Illegal Contracts Act 1970 in either party's favour. The consequence of this is absolute chaos. Games for amounts in excess of £100 for which, for example, a promissory note or credit is given by the loser to the winner, are illegal under the Act of Charles II (1664).<sup>50</sup> But s.2 of the Act of Anne (1710) does not apply because the money lost is not paid down at the time. The winner could therefore sue on the gaming contract to recover his winnings

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49. Discussed supra, para.5.

50. Because by s.1 of the Gaming Act, 1835 (U.K.) the note is deemed to have been given for an illegal consideration. See supra, chapter 1.

under s.7(1) of the Illegal Contracts Act 1970. But if the money is paid down at the time he is liable to the loser for the amount paid, plus treble the value thereof and cannot seek relief under the Illegal Contracts Act.<sup>51</sup> The only saving against this absurd result is the provision in s.7(3)(c) of the Illegal Contracts Act 1970 which excludes relief where to grant it 'would not be in the public interest'. Again, if the loser gives a cheque for the amount lost in the above example and subsequently pays any part of the money secured to any assignee or indorsee, under s.2 of the Gaming Act, 1835 (U.K.) he may recover that amount as 'a debt due and owing' from the payee. Consequently the reasoning in R.D.Bull Ltd. v. Broadlands Rentals Ltd. would probably operate to prevent the application of s.7(1) of the Illegal Contracts Act 1970. To add to, but by no means complete, the difficulties involved in attempting to apply the Illegal Contracts Act 1970 to this myriad of provisions concerned with gaming and wagering are the qualifications on the application of the Acts of 1664 and 1710. They only apply to games and wagers on games, and in addition operate only where the amounts in question are lost at any one time or sitting.

A basis for distinguishing between the provisions of the proviso to s.10 of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 and s.2 of the Gaming Act, 1835 (U.K.) may be found in the fact that

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51. S.2. of the Act of Anne (1710)

whereas the former establishes the debt in favour of, for example, the purchaser under an agreement at the time it is entered into, s.2 of the latter Act requires something further to be done and the debt arises from neither the gaming contract nor the security. It arises in favour of the drawer of the security only after he has made a payment in discharge of the obligations he has incurred by it. This can give rise to a strange result if the reasoning in R.D.Bull Ltd. v. Broadlands Rentals Ltd. is applied to s.2. For example where the drawer of a cheque does not pay money to a subsequent holder in satisfaction of a security given to the winner of a game (within the Acts of 1664 and 1710) it is arguable that s.2 would not operate to preclude the winner from suing on the security because, at the time the action is brought the loser has not made a payment such as would enable s.2 of the Act of 1835 to apply. He could, of course, make such a payment after the proceedings are commenced but before they are concluded, in which event he would then have a good cause of action against the winner under that section to recover the amount paid. That result may compel a distinction to be drawn between these two provisions. This same distinction cannot, however, be drawn between the terms of the proviso to regulation 10 of the Hire Purchase and Credit Sales Stabilisation Regulations 1957 and s.38 of the Gaming Act 1908.<sup>52</sup> The terms of this provision are on all fours with the former and would therefore exclude the application of relief under the Illegal Contracts Act 1970 from the betting transactions to which it refers. Perhaps ironically,

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52. Discussed supra, chapter 5, para.4.

the partners in a betting agency which offends against s.37 of the Gaming Act 1908 are not excluded from seeking relief from the consequences of illegality under the Illegal Contracts Act 1970 in respect to obligations arising between the partners, but relief is excluded as between the partnership and its clients. The object of ss.37 and 38 would clearly have been to deny relief in both circumstances. Worse still, if the agency is not operating contrary to s.37 of the Act, relief under s.7(1) of the Illegal Contracts Act 1970 is available as between the agency and a client because the terms of s.70 of the Gaming Act 1908 do not expressly exclude it.

[6.07] Conclusion

The application of the Illegal Contracts Act 1970 to transactions within the scope of the gaming laws remains complicated and uncertain. It would indeed have been better if the opportunity for the application of that statute to such laws had never been presented in the first place. It is to be hoped that some of these difficulties will be resolved when the trilogy of cases referred to earlier reach the Court of Appeal. In the meantime, it would be futile to do more than identify the problems associated with the application of the Illegal Contracts Act 1970 to the gaming and wagering legislation. The problem is, of course, one of statutory interpretation. But in each case all the statutes must be carefully considered and broad generalisations such as that contained in Casey J's judgment in Harrison & Others v. Greymouth Trotting Club (Inc) & Others<sup>1</sup> are, with respect, quite unhelpful.

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1. Supra.

CHAPTER 7

## REFORM

[7.01] Introduction

The history of the English experience demonstrates that whilst gaming and wagering each do have some social and recreational value, they are also productive of much mischief if allowed to be carried to excess. Indeed, if history provides any guidance as to future needs enactments on gaming and wagering will be with us for many centuries to come. The existence of an infatuation with speculation in the characters of many - coupled with the inability of some to resist the temptation to exploit it, will continue to provide the necessary justification for these laws. The law of gaming and wagering contracts is a small, but important part of this body of law. And, it exists for a purpose which requires that it can be readily seen as an integrated part of the whole. That purpose and the extent to which this integration has been achieved have been discussed in the preceding chapters. Certain weaknesses, particularly in the New Zealand legislation, which point to a need for legislative clarification and amendment have been revealed. In this chapter those weaknesses will be briefly alluded to again in the context of a summary of proposals for reform.



[7.02] The Unenforceability Doctrine -- Gaming and Wagering Contracts and Securities

Prior to the enactment of s.18 of the Gaming Act, 1845 (U.K.) the laws affecting the enforceability of gaming and wagering contracts, and securities given for gaming, lacked a consistent policy basis. There is a strong element of paternalism behind the Acts of Charles II (1664) and Anne (1710) and this is coupled with a concern for public morals. The courts, on the other hand, often based their reluctance to enforce wagering contracts on considerations of judicial convenience and, in some cases, simple moral outrage. S.18 of the Gaming Act 1845 introduced coherence as well as rationality into this area of the law by adopting a concept of unenforceability that was able to accommodate each of these concerns, without necessarily being identified or justified by any one of them. A strong element of paternalism remained, however, with the retention in England of the Gaming Act, 1835. But that element too, was significantly reduced, by the repeal of s.2 of the latter Act in 1922.

The case for the retention of the operation of an unenforceability doctrine in this area of the law has, it is submitted, been clearly made out by the history of gaming and wagering canvassed earlier in this work. But to avoid inconsistency and achieve clarity in the law it should be applied for its own sake and its application should, in addition, be confined to transactions arising from gaming and wagering. This second contention will be examined later in paragraphs three and four; the first calls for further analysis here.

The provisions of the Acts of 1664, 1710 and 1835 were designed to discourage excessive gaming by placing the winner in a position of total insecurity in relation to money won or securities obtained in consequence of such activity. But, having regard to the extent of the gambling and betting that occurred in England after those Acts came into force the only conclusion open is that they failed to achieve their declared objectives. The policy behind s.18 of the English Act of 1845 differed markedly from that behind the Acts which preceded it. For whilst the concept of unenforceability was admittedly invoked by the legislature in the Acts of 1664 and 1710, the latter Act had concentrated on providing relief by penal actions, and actions by the loser against the winner to recover his losses rather than on the principle of unenforceability per se. And this was continued even in the 1835 Act in s.2, the principal object of which, it has been suggested,<sup>1</sup> was to maintain consistency with s.2 of the Act of Anne (1710). The Act of 1845, however, was concerned only to remove the element of legal obligation from gaming and wagering contracts. That is, the intention behind that Act was to continue the earlier policy of discouraging gaming and wagering by invoking the doctrine of unenforceability alone. But it is probably true, as the judgment of Maule J in Varney v. Hickman<sup>2</sup> suggests, that when enacting s.18 of the 1845 Act the legislature saw the implementation of the principle of unenforceability principally, and probably solely,

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1. Supra, chapt.5, para.5.

2. Discussed supra, chapt.6, para.6.

in terms of the voidability of the gaming and wagering contract itself.

The tendency that this construction had to limit the scope of the unenforceability concept is demonstrated by the case of Hyams v. Stuart King.<sup>3</sup> There a bookmaker who was indebted to another bookmaker as a consequence of certain betting transactions was unable to pay his debts. But he subsequently agreed to pay them in consideration that the other should refrain from injuring his business by declaring him a defaulter. Although this subsequent agreement was, in substance, merely a repetition of the obligation arising from the wagering contract, the Court of Appeal held that it was not a wager, but was a new contract designed to avoid the consequences of the void contract; and, as such, was enforceable.<sup>4</sup> But in the later case of Hill v. William Hill (Park Lane) Ltd.<sup>5</sup> the unenforceability doctrine emerged as a much richer concept in the context of s.18 of the 1845 Act. There on materially similar facts the contract was held unenforceable. The House of Lords held that the language of the first branch of the section was entirely different to the second branch which was concerned to prevent recovery not only of money won on a wager but also, the recovery of money "alleged to be won on a wager". And in determining whether

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3. [1908] 2 K.B.696.

4. But see the strong dissent of Fletcher Moulton L.J. (p.711 et seq.) a view which subsequently prevailed in the House of Lords in Hill v. William Hill (Park Lane) Ltd. [1949] A.C.530.

5. *Ibid.*, discussed supra, chapt.6, para.6.

there is merely additional promises to pay money owing under a gaming or wagering contract the court will look to the "reality of the transaction and come to a finding as to what the true intention [behind the agreement] was".<sup>6</sup> In that regard, it is relevant to enquire whether, if the promise was fulfilled, "the debt of honour is to be regarded as discharged"; a question, the resolution of which will depend on circumstances as variable as the facts of each particular case.<sup>7</sup>

The House of Lords in Hill v. William Hill (Park Lane) Ltd. took the doctrine of unenforceability in the context of the gaming Acts to its extreme limits;<sup>8</sup> and applied it for its own sake, as distinct from applying it as a consequence of a finding on the niceties of the law of gaming and wagering contracts. This was a significant change of emphasis, and although the groundwork for it was laid forty years earlier in the powerful dissenting judgment of Fletcher Moulton L.J. in Hyams v. Stuart King, in view of the approach of the majority in Hyams v. Stuart King and the preceding cases, it is perhaps not going too far to suggest that with this change in emphasis emerged a new policy base to the law of gaming and wagering

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6. Per Lord MacDermott, note 4, at p.574.

7. Ibid.

8. But, as Lord Greene observed, at p.559, even the application of the very broad test proposed in that case would not ensure that every such agreement would be unenforceable. Obvious evasions would, but see Cheshire and Fifoots Law of Contract (4th N.Z. ed. 1975), at p.273-4 where the problems inherent in applying the test are discussed.

contracts itself. It has been suggested that the failure of the draftsman of the 1845 Act to repeal s.2 of the Act of 1835 with s.2 of the Act of Anne (1710) created inconsistency between s.2 of the Act of 1835 and s.13 of the Gaming Act, 1845. But that inconsistency existed because the concept of unenforceability, as understood prior to the decision in Hill v. William Hill (Park Lane) Ltd., was too narrow to permit the rational co-existence of the two provisions. It is the writer's thesis, however, that if the concept of unenforceability per se is accepted as the policy basis of the law of gaming and wagering contracts, those provisions can stand together without s.2 of the Act of Anne (1710).

The same concept of unenforceability should, it is submitted, be applied to securities given for gaming and wagering debts. Consequently, where a gaming or wagering debt is discharged by the payment of money that is a complete discharge of the debtor's liability and no further liability or obligation is incurred by him. Thus, the doctrine of unenforceability would preclude - or perhaps more accurately not require - any redress by the debtor against the winner; and indeed, the existence of the right of recovery provided at present in New Zealand by s.2 of the Act of Anne (1710) would conflict with that principle. It should therefore be repealed. But the giving of securities in discharge of gaming and wagering debts gives rise to new liabilities and obligations which a recipient might require the assistance of the law to enforce. For example, there may be insufficient funds in the account of the drawer to meet his cheque or he may renege on or dispute the assignment by deed of mortgage. To enable the winning payee or mortgagee, as the case may be, to enforce

the security by an action in the courts is, in substance, to allow him to enforce the gaming or wagering debt in respect of which the security was given. And because that could arise in the case of some securities, (or perhaps more accurately in particular cases) all securities must fall within the ambit of the unenforceability doctrine if consistency is to be achieved.

It is, however, too easy to move from the concept of unenforceability to a consideration of questions of justice and morality. And it is important therefore to recognise that the unenforceability doctrine rests solely on the principle that the law will not lend its assistance to the winner to enforce the original debt, rather than because of any felt need to protect the loser's estate from being dissipated by excessive gaming and wagering (as was the policy behind the Acts of Charles (1664) and Anne (1710)). Applying this pure concept of unenforceability to the Act of 1835 what emerges in relation to s.1 is that the obligations and liabilities established by a security given or executed by the loser of a game or bet on a game are extinguished inter partes by the consideration for the security being declared illegal. But on the other hand the complicated web of legal rights that might arise by the subsequent possession of, or assignments to innocent third parties are preserved. And then, any advantage that the winner might enjoy as a consequence only of the necessity to preserve the rights of innocent third parties is removed by allowing the loser to recover under s.2 only what he, the loser, has been obliged to pay in the discharge of his obligations under the security.

To give effect to this concept of unenforceability,

the following changes to the law are recommended:

1. That the English gaming and wagering statutes in force in New Zealand be repealed.
2. That ss. 1 and 2 of the Gaming Act, 1835 (U.K.) be enacted in a New Zealand statute on gaming and wagering, but with the following modifications, namely:
  - (a) That the language of those provisions be modernised, and
  - (b) That they be extended to apply to securities given for all gaming and wagering contracts.
3. That s.69 of the Gaming Act 1908 be repealed and substituted by a provision in the following terms; namely:

69(1) All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void.

(2) No action shall be brought or maintained in any court for recovering any sum of money or valuable thing alleged to be won upon any game or wager, or which has been deposited in the hands of any person to abide the event of any game, or the event on which any wager has been made.

(3) In determining whether an action brought is to recover a sum of money or valuable thing alleged to have been won on any game or upon any wager under subsection (2) of this section the court shall have regard to the intention of the parties

as disclosed by the circumstances of the case and any arrangements, agreements or undertakings entered into or given by them, whether between the parties themselves, or between the parties or any one of them and any other person.

Note: The reforms necessitated by the Illegal Contracts Act 1970 will be discussed in paragraph 5 infra.



[7.03] The Unenforceability Doctrine -  
Totalisator Betting

To deny legal recognition to legislatively legitimised gambling in the form of totalisator betting is, today, quite unrealistic. Horse racing, the totalisator and the Totalisator Agency Board are now part of the New Zealand way of life. They are a part of our culture, indeed, a part of our inherited culture. And as such, they, by virtue of the stand taken against totalisator betting in New Zealand, have been denied recognition by our Courts without any good reason for doing so. But the totalisator has been particularly sensitive to criticism and has fallen easy prey to the high minded sentiments expressed against it in both the Courts and legislature. Reason requires, however, that we return to reality and accord legal recognition to contracts arising out of betting by means of licensed totalisators. To do this legislative action will be required. But it is necessary if we are to avoid in the future, the spectacle of, for example, an \$831,564.70 claim being dismissed with this sort of judicial apology:

"This decision will be a disappointment to the plaintiff and the other members of the Paramount syndicate. One can only hope that it will be some consolation to them to reflect that they are joining, albeit in a rather spectacular way, the ranks of countless followers of the Turf who must have been deprived of winnings over the centuries by the results of protests."<sup>1</sup>

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1. Per Cooke J in Economou's case at p.33, discussed supra, chapt.4, para.8.

Cold comfort indeed, for those who look to the ordinary courts of the land for the resolution of disputes arising out of lawful, and what must now qualify as socially acceptable, activity. Fortunately, in that case, the learned Judge demonstrated humanity and lessened the plaintiff's frustration by showing that, in any event, the claim failed on the merits.

In Official Assignee v. Totalisator Agency Board<sup>2</sup> after quoting a passage from the judgment of Denniston J in Pollock v. Saunders<sup>3</sup> Hutchison J expressed the view that the position in relation to totalisator betting was now "vastly different"<sup>4</sup> as regards transactions with the Totalisator Agency Board. He said, of Denniston J's remarks:

"... the sentence 'the totalisator, though not actually banned, is certainly not blessed' is not applicable in relation to the operations of the Totalisator Agency Board, nor is the expression 'this half-contemptuous concession.'

It is not necessary for me to go so far as to say that the provisions of the 1949 amending Act (which created the T.A.B.) impliedly repeal ss.69 and 70 of the Gaming Act so far as concerns the operations of the Board. But, if it should be said that that would necessarily be so if my view were correct, I do not shrink from that."<sup>5</sup>

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2. [1960] N.Z.L.R.1064; discussed supra, chapt.4, para.8.
  3. (1897) 15 N.Z.L.R.581, 589-90. Discussed and quoted supra, chapt.4, para.8.
  4. Note 2, at p.1086.
  5. Note 2, at p.1087.

A distinction between on-course totalisator betting, and betting through the Board, is implicit in the learned Judge's remarks. But he was considering the matter in legal terms, i.e. his view was based on a consideration of the terms of the 1949 amending Act.<sup>6</sup> But considered in social and economic terms, why draw the distinction? Although the view of Hutchison J stands alone among those expressed by his brother Judges it is, with respect, one which accords with reality.

But a change in the law is unlikely to be easily achieved. In 1971 the Legislature placed the seal of approval on the view that has found favour with the majority of the Judiciary by enacting s.103 of the Racing Act.<sup>7</sup> That provision provides, inter alia, that no action shall be brought or maintained to recover any money won, lost or bet on any licensed totalisator.

In 1844, the Select Committee on Gaming in England, after recognising that gaming laws generally had failed to keep pace with "the habits, manners, and opinions of the present day"<sup>8</sup> recommended quite substantial changes. And whilst wagering contracts were included in the Committee's category of things requiring change, it was of the opinion that the imposition of penalties

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6. The Gaming Amendment Act 1949 by which the Totalisator Agency Board was established.
  7. The Racing Act 1971 replaced those provisions in the Gaming Act 1908 relating to racing, totalisators and the Totalisator Agency Board.
  8. Report of the Select Committee on Gaming, 20th May 1844 p.v.

for wagering was quite repugnant to the general feelings of Englishmen and would be looked upon "as an arbitrary interference with the freedom of private life".<sup>9</sup> The Committee was of the view that wagering in general should be free and subject to no penalty, it did not consider that it was a matter which ought to be adjudicated upon by the Courts. But this was not just a subjective view involving elements of sentiment and emotion against gaming and wagering. It was based upon more substantial grounds. The Committee said, *inter alia*:<sup>10</sup>

"If private individuals choose to make wagers with each other, there seems to be no good reason why they should be prevented from doing so, or why they should be punished for so doing; but neither, on the other hand, does there seem to be any sufficient reason why the valuable time of the Courts of Law should be consumed by adjudicating disputes which may arise between individuals in consequence of such wagers. Such disputes appear to be of the nature of private differences, which, not turning upon the construction of any Law or Statute, are matters for private settlement rather than for legal adjudication; and such disputes must frequently involve the statement of a variety of trifling details, little suited to the dignity of a Court of Law, and as to which such Court could have no peculiar competence to judge."<sup>11</sup>

This observation of the Select Committee on Gaming on the nature of wagers must now be qualified by the one hundred and thirty years of history that have influenced and altered 'habits, manners, and opinions'

9. *Ibid.*

10. Discussed further *supra*, chapt.2, para.5.

11. Note 8, at p.V-VI.

from then to the present day. Can it now be said that wagers on horse races per medium of licensed totalisators are sponsiones ludicrae; that they may give rise to differences which do not turn upon the construction of any law or statute; or that they are simply matters for private settlement involving statements of trifling details as to which a Court could have no peculiar competence to judge? Surely not. In this age of the photo finish, and the multitude of statutes, regulations, rules and bodies which control the practical details as well as the administration of the racing business<sup>12</sup> the resolution of disputes is a matter of considerable legal complexity rather than personal opinion.<sup>13</sup> And racing is no longer dominated by the habits and vulgarities of the rude, the ignorant, and the corrupt.<sup>14</sup> In New Zealand

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12. The New Zealand Racing Authority established and appointed by the Racing Act 1971 exercises general superintendence over racing in New Zealand. The Racing Conference, the Trotting Conference and the Greyhound Racing Association (Inc.) are also given statutory recognition and status under that Act which, in addition, reconstituted the Totalisator Agency Board. A purview of the functions and authority of these bodies is beyond the scope of this work but suffice to say they dominate an established hierarchy that controls every detail of racing and the betting business (on and off course) in New Zealand today.
13. See e.g. the first part of Cooke J's judgment in Economou's case, note 1, where he adjudicated upon the merits of the plaintiff's claim, and contrast this with the judgment of Richmond J in Dark v. Island Bay Park Racing Co. (1886) 4 N.Z.L.R. 301.
14. Racing in the 19th century did, of course, have a respectable following, including Royalty. But the racing business frequently convulsed with scandals arising from the activities of sharpers, dishonest owners and jockeys and the extravagances of the rich and poor alike. Discussed, J. Rice, History of the British Turf, Part I (1879).

it is the domain of a limited private enterprise that is dominated by the State. Indeed private enterprise enjoys a lesser role here than in England, for the on-course bookmaker cannot operate here and off-course betting is monopolised by the Totalisator Agency Board.<sup>15</sup> The neighbourhood betting shop is unknown.

The New Zealand reluctance to entertain actions arising out of licensed totalisator betting is a product of sentiment and emotion against gaming and wagering. That was not the basis upon which the un-enforceability concept appealed to the Select Committee on Gaming in 1844. On the grounds stated by the Committee a general avoidance provision such as s.69 is justified. But in circumstances where a denial of the right to legal process cannot be so justified the Courts and the Legislature are, with respect, abdicating their responsibilities. Such is the position in New Zealand in regard to totalisator betting and it is accordingly recommended:

1. That s.103 of the Racing Act 1971 be repealed.
2. That totalisator betting be expressly defined in s.2 of the Gaming Act 1908 so as to encompass betting on all licensed totalisators, whether directly, or through the agency of the Totalisator Agency Board; and that that definition be followed by a proviso declaring

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15. Importantly, betting on credit on the totalisator is forbidden in New Zealand. See s.100(2)(b) Racing Act 1971, but of course money may be borrowed or even stolen for the purpose of making bets.

that bets on the totalisator do not constitute gaming or wagering contracts within the meaning of the Act.

3. That the words "... or any sum of money won, lost, or staked in any betting transaction whatever" be repealed from s.70 of the Gaming Act 1908.

Note: The reform recommended in (3) above effects two remedies. Firstly it resolves the difficulty alluded to in chapter 4, paragraph 7 and chapter 5, paragraph 3, and secondly it prevents the reform recommended in (2) above from being frustrated by a finding that totalisator betting is caught by the words "any betting transaction whatever" in the repealed phrase.

[7.04] The Unenforceability Doctrine - and Plates and Prizes to be Awarded to the Winners of Horseraces, Games, Sports Pastimes or Exercises

S.71 of the Gaming Act 1908 which prevents actions from being brought for recovering any sum of money or valuable thing alleged to be won by the winners of horse races, races, games, sports or exercises was discussed in detail in chapters 4<sup>1</sup> and 5<sup>2</sup>. It was suggested in chapter 5

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1. Para.9.
2. Para.3.

that the promotion of horse racing and other lawful sports and games can be clearly distinguished from gaming and wagering and that by enacting s.71 the legislature had moved outside the area of concern, and went beyond the philosophy of the gaming Acts.

Accordingly, it is recommended that s.71 of the Gaming Act 1908 be repealed, and in addition, to remove any doubts as to what was intended, that the proviso to s.18 of the Gaming Act 1845 (U.K.) be re-enacted<sup>3</sup> with s.69 of the New Zealand Act.

[7.05] The Illegal Contracts Act 1970

It has been demonstrated in chapter six that the relief available under s.7(1) of the Illegal Contracts Act 1970 is not available in the case of contracts which are merely void. This being so, an anomaly is created if that provision is allowed to operate where a gaming or wagering contract is tainted with illegality in consequence of a contravention of one of the penal provisions of the gaming Acts. Accordingly, in the light of the uncertainty existing as to the correct interpretation of s.7(1) of the Illegal Contracts Act 1970, it is recommended that the operation of that provision be excluded from extending to gaming and wagering contracts by an express provision in the Gaming Act 1908. And, in keeping with the proposed concept of unenforceability in paragraph one

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3. It was repealed from that provision by the Gaming Act, 1894. See chapt.5, para.2.



of this chapter it is recommended that that exclusion be expressly<sup>1</sup> applied also to securities the consideration for which is illegal under the terms of what is now ss.1 and 2 of the Gaming Act 1835 (U.K.)

[7.06] Conclusion

The amendments above excepted, it is recommended that the remaining portions of ss.69 and 70 of the Gaming Act 1908 be retained. The consequence of this, of course, having regard to the amendment proposed in relation to totalisator betting, is that the New Zealand Act is brought largely into line with the English Acts of 1835, 1845 and 1892, (and the decisions of the English courts thereon).

This, the writer's research commends as the most sensible solution.

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1. The writer acknowledges, however, that it is arguable that s.2 of the Act of 1835 already has that effect. What is required therefore is an exclusion clause specifically identifying s.7(1) of the Illegal Contracts Act 1970.

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