THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 58

Section 2 of The Gaming Act

WORKING PAPER

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INTRODUCTION

The Law Reform Commission has been asked to review s.2 of the *Gaming Act 1835*.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

TERMS OF REFERENCE

1. "To review s.2 of the *Gaming Act 1835*."

loser gave the bill in settlement of his gaming debt. When the *Gaming Act 1835* was enacted, the law in England was that, by virtue of 9 Anne C.14, direct payments to the winner were recoverable: see para. 14 below. Hence in his view s.2 of the 1835 Act was so drawn as to make it clear that this position still obtained in the case of payment by a bill.

The Act of 9 Anne C.14 had been repealed in England in 1845, when the Gaming Act of that year was passed. However, possibly due to inadvertence, s.2 of the *Gaming Act of 1835* was left untouched, so that if a loser paid a gaming debt by cheque he could recover the amount, but not if he paid by cash: see para. 11 below.

The result of the decision in *Sutters v. Briggs* was that trustees in bankruptcy and executors of gamblers "had made available to them a new field of assets, and persons who paid their debts of honour by cheque did so with the full knowledge that they could later recover the amount, if an alteration in their financial position should cause a revision of their sense of honour": Windeyer, 79.

Shortly after the decision in *Sutters v. Briggs*: s.2 of the *Gaming Act 1835* was repealed in England: see para. 23 below.

8. Actions under s.2 of the *Gaming Act* are rare in Western Australia, but the Commission was informed there has been at least one. There have also been at least two cases in which the Official Receiver threatened to sue a bookmaker to recover gaming debts paid by cheque. However, in neither case was the matter pursued. An Official Receiver would not normally sue in these circumstances if he felt it was unjust to do so, but a private trustee may take a different attitude. (As to the duty of the Official Receiver to act fairly see *Re Docker; Ex parte Official Receiver; Blackmore (Respondent)* (1938) 10 ABC 97 (Fed. Ct. of Bkpcy)). There have also been at least two actions threatened over the years by persons other than trustees in bankruptcy, e.g. executors of deceased estates.

Other statutes

9. So that s.2 of the *Gaming Act 1835* can be seen in context, paras. 10 to 14 below refer briefly to the effect other provisions in force in this State have on gaming contracts.

The Police Act

10. Section 84I of the *Police Act 1892* provides as follows -

> "All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void, and no action or 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: Provided always, that this provision shall not be deemed to apply to any subscription, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner of any lawful game, sport, pastime, or exercise."

11. Under this section, which applies to all gaming and wagering contracts whether or not they are wagers on games, a winner cannot sue the loser for payment. However the section does not enable a loser, if he has paid the winner in cash, to recover the amount from the winner: *Windeyer*, 26; see also *Bechtel v. Nicholls* (1904) 7 WALR 83. Section 84I of the *Police Act* is subject to s. 84E of that Act, under which money paid to an owner of a betting house by way of a bet is recoverable.

The prohibition in s. 84I of the *Police Act* against suing the stakeholder is against the winner suing for the amount won. It does not prevent the party who deposited the stake suing for its return: see *Bechtel v. Nicholls* (1904) 7 WALR 83. He may do so provided he demands the return of the stake before it has been paid over to the winner: ibid.

Section 84I of the *Police Act* appears to be subject to s. 84F, which states -

> "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 ambit of the section is uncertain. In respect of the events to which it applies, it could be construed so as to negate the prohibition in s.84I against the winner suing the stakeholder for the money won. In *Windeyer's* opinion (p.39), the inclusion of s. 84F is the result of a careless consolidation. The original English provision applied only to betting houses.

for the payment of horse-racing wagers. Prior to 1954 money lent for the payment of wagering debts already incurred was recoverable in Western Australia, whether the wager was a gaming or non gaming wager. Davies argued that the effect of s. 5(2) appears to be that as a loan of money to pay debts incurred in wagers on horse-racing is a "transaction arising out of or in connection with a bet", such a loan cannot since 1954 be recovered.

Davies also pointed out another possible anomaly in the law relating to money lent for wagering. In contrast to non gaming wagers, money lent for someone to participate in a gaming wager is irrecoverable: see *Carlton Hall Club v. Laurence* [1929] 2 KB 153.

The law in the absence of case authority is uncertain. This is undesirable and should be clarified by legislation in conjunction with other recommendations arising out of this project.

9 Anne C.14

14. In addition to making void all securities given for gaming debts (see para. 4 above), the English *Gaming Act 1710* (9 Anne C.14), provided in s.2 that persons who lost ten pounds or more at play at any one time were entitled to recover it within three months from the winner. The section went on to provide that if the loser did not sue, any other person may do so and recover three times the amount, but one half of what he recovered must be paid to the "poor of the parish where the offence [was] committed". In contrast to New South Wales it appears that there has been no express repeal of this provision in this State. In Windeyer's opinion it is doubtful whether it was ever in force in this State: p.131. However there does not appear to be any reported decision directly in point.

course. However the Commission understands that in some cases bookmakers are prepared to accept bets on credit.

Settlement of many of the larger bets made on the racecourse, whether by cash or on credit, takes place at Tattersall's Club, as do adjustments between bookmakers themselves. For the sake of convenience some bookmakers, particularly where large sums are involved, accept cheques from punters whom they trust in settlement of credit bets. In the case of some larger

Sanctions against default

18. It may be useful to set out at this point some of the sanctions against defaulting. If a

unenforceable: see Cheshire & Fifoot *Law of Contract* 3rd Aus. ed. 359 ff. Presumably therefore cheques and other securities given in payment of such debts would also be unenforceable between the parties. However a third party who took bona fide and for value

England

23. The decision in *Sutters v. Briggs* (see para. 7 above) led in England to the passing of the *Gaming Act 1922*, which repealed s.2 of the *Gaming Act 1835*.

Section 1 of the *Gaming Act 1835* remains in force, so that securities given for gaming debts are deemed to have been given for an illegal consideration: for the effect of this see para. 4 above. All contracts by way of gaming or wagering are void: s.18 of the *Gaming ct 1845*. This section is identical with s.84I of the *Police Act 1892* of this State: see para. 10 above.

However, in the special case of gaming on premises licensed under the *Gaming Act 1968*, cheques which are cashed or used to buy tokens are enforceable provided they are not post-dated and the equivalent amount in cash or tokens have been given for them: *Gaming Act 1968*, s.16.

Australia and New Zealand

24. South Australia is the only other Australian State in which both sections 1 and 2 of the *Gaming Act 1835* are still in force. However, a provision similar to s.1 is in force in Victoria (see *Instruments Act 1958*, s.14) and in Queensland (see *Mercantile Law Act 1867*, s.43), but not in New South Wales or Tasmania.

Section 2 of the *Gaming Act 1835* has never been in force in New South Wales, Tasmania or Queensland, nor has any equivalent. Victoria repealed its equivalent of s. 2 (*Instruments Act 1915*, s.112) by its *Gaming Act 1922*.

Both sections 1 and 2 of the *Gaming Act 1835* are in force in New Zealand. However because bookmaking is illegal in New Zealand the court has refused to allow a bookmaker to recover the value of a cheque given by him on the grounds that it will not assist in the enforcement of rights arising out of an illegal (in this context criminal) contract: *Johnston v. George* [1927] NZLR 490.

25. Some of these jurisdictions specifically exempt bets with bookmakers from some of the provisions dealing with gaming contracts. In Victoria (*Lotteries Gaming and Betting Act*

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bet on the result of a bridge competition (which is a gaming wager), was indulging in a more undesirable activity or in need of greater protection from his own folly than one who bet on which year a particular horse had won the Melbourne Cup (which is a non gaming wager).

29. The repeal of s.2 of the *Gaming Act* alone would mean that securities for a gaming debt were still dealt with differently by the law from those for non gaming wagers. A security given for gaming or a gaming wager would, under s.1 of the *Gaming Act 1835*, be deemed to have been given for an illegal consideration so that a third party could enforce it only if he proved that he had given value for it without notice of the original transaction: see para. 4 above. In the case of a non gaming wagers the disability is removed if consideration has been given for it: whether the third party had or had not notice that the security was given for a wager is immaterial. In the case of bills of exchange, it is sufficient if the third party is a holder in due course, and the onus of proving that the holder is not a holder in due course, or that he does not derive title through one, is on the defendant: *Bills of Exchange Act* (Com.) s.35.

Repeal of the Gaming Act 1835 as a whole

30. To distinguish in any general way between securities given for gaming debts and those given for other betting debts does not seem justifiable. The Western Australian Royal Commission into Gambling recommended that the whole of the *Gaming Act 1835* should be repealed (see Report, para. 31) together with the Act of 9 Anne C.14. However only the remainder of 9 Anne C.14 relating to the recovery of debts paid by cash needs to be repealed (see para. 14 above). The part of the Act dealing with securities was repealed by the *Gaming Act* of 1835: see appendix below.

If the *Gaming Act* as a whole were repealed the law as to securities given in respect of gaming and non gaming wagers would be identical: in neither case could the winner sue on the security, but in both cases a third party who gave value for the security could do so.

Mr. Justice Burt in his article on the *Betting Control Act 1954* (see para. 13 above) said he regarded it as surprising that the *Gaming Act 1835* was not repealed, "at least so far as bets validly made under the [Betting Control] Act were concerned".

would depend on the - from the loser's point of view - fortuitous fact that it had been transferred for value to a third party: see para. 4 above. It would mean that a gambling debt would continue to be unenforceable as such, but that if the loser chose to give the winner a security, the winner could enforce it. The present legal position of cheques appears to create the greatest practical problem, and most people would regard payment by cheque as, in fact, a form of cash payment.

34. A possible variation of the proposal in para. 32 above would be to provide that the only securities to be enforceable would be cheques which have not been post-dated. A further variation would be to confine the amendment to cheques given by or to a licensed bookmaker in respect of a bet made on a racecourse, as has been done in Victoria: see para. 25 above. This would be one way of implementing the tentative argument in para. 31 that some distinction could be drawn between public and private gaming.

Money lent for gaming or wagering

35. The above discussion has been in terms of the enforceability of contracts and securities as between the winner and the loser, and third parties deriving title from the winner. However the *Gaming Act 1835* applies also to repayment of money lent for gaming and .the *Betting Control Act 1954* may affect the position (see para. 13 above). It may nowadays be thought unfair that the lender should be placed in the same position as the winner. The Commission would welcome comment on whether any restrictions on enforceability should apply between lender and borrower.

QUESTIONS FOR DISCUSSION

36. (a) Should s.2 of the *Gaming Act 1835* be repealed (i.e. should a loser who has honoured a cheque or other security given by him for a gaming debt be barred from afterwards recovering the value of the cheque from the winner)?

(paras. 28 and 29)

(b) Should both s.l and s.2 of the *Gaming Act 1835* be repealed (i.e. should a cheque or other security given for a gaming debt be treated by the law in the

same way as that given for a non gaming debt, namely, unenforceable by the winner, but enforceable by a third party who gives value for it)?

(para. 30)

(c) Should both ss. 1 and 2 of the *Gaming Act 1835*, and s.84I of the *Police Act* be repealed (i.e. should a winner be able to enforce any gaming or wagering contract, and any security given for it)?

(para. 31)

(d) Should the *Gaming Act 1835* be repealed, and s.84I of the *Police Act* retained, but a provision enacted to provide that a security given for a gaming or wagering debt be enforceable?

(paras. 32 to 34)

(e) Should any of the above alternatives be confined to -

(i) public, regulated, forms of gambling;

(ii) to cheques or other securities given in respect of a bet made with a bookmaker?

(paras. 31 and 34)

(f) Should any restrictions on enforceability apply as against a person who knowingly lends money for gaming or wagering?

(paras. 13 and 35)

(g) Should the law as to where settlement of bets with licensed bookmakers can lawfully take place be changed?

(paras. 15 and 16)

APPENDIX

16 Car. II C.7

An Act against deceitful, disorderly, and excessive gaming.

...

III. And for the better avoiding and preventing of all excessive and immoderate playing and gaming for the time to come; (2) be it further ordained and enacted by the authority aforesaid, That if any person or persons shall....play at any of the said games, or any other pastime, game or games whatsoever (other than with and for ready money) or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, or other thing or things so played for, exceeding the sum of one hundred pounds at anyone 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; (3) 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: …

9 Anne C.14

An Act for the better preventing excessive and deceitful gaming.

Be it enacted 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 as 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;…

Gaming Act 1835

other thing lost at play or otherwise as in the said Acts respectively is mentioned, or for any part thereof, should be utterly void and of none effect: And whereas by an Act passed in the ninth year of the reign of her late Majesty Queen Anne, ... it was enacted, that from and after the several days therein respectively mentioned 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 should 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 did game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as 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 should, during such play, so play or bet, should be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; ...And whereas securities and instruments made void by virtue of the several hereinbefore recited Acts...are sometimes indorsed, transferred, assigned, or conveyed to purchasers or other persons for a valuable consideration, without notice of the original consideration for which such securities or instruments were given; and the avoidance of such securities or instruments in the hands of such purchasers or other persons is often attended with great hardship and injustice: for remedy thereof be it enacted...that so much of the hereinbefore recited Acts...as enacts that any note, bill, or mortgage shall be absolutely void, shall be and the same is hereby repealed; but nevertheless every note, bill, or mortgage which if this Act had not been passed would, by virtue of the said several lastly herein- before mentioned 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 several 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: Provided always, that nothing herein contained shall prejudice or affect any note, bill or mortgage which would have been good and valid if this Act had not been passed.

2. And be it further enacted, 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 hereinbefore recited Acts...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 due 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 in any of His Majesty's courts of record.

Note: 1. The preamble to the 1835 Act refers to securities generally, but its enacting words mention only "notes, bills, or mortgages". Although the Act omits the words "bonds" and "judgments" and "other securities" which had appeared in the earlier Acts, it appears that bonds, judgments and other securities are within the operation of the Act: see *Windeyer*, 74.

2. Only those parts of the 1835 Act which deals with securities given for gaming debts are reproduced here. The Act also covers securities given in breach of earlier Acts to control interest rates and usury, securities given by bankrupts and securities given for the ransoming of ships and seamen.