ANOMALIES IN THE LAW OF WAGERING CONTRACTS.

Some anomalous situations arise in the law applicable to wagering contracts in those provinces which have not enacted legislation on the subject but rely on the English law or on statute copied from early English enactments.

Wagers prohibited by The Criminal Code or by the common law are illegal. And since any contract which tends to aid an illegal purpose is itself illegal, money knowingly lent to enable a person to make a wager which is within the prohibition of the Code or the common law cannot be recovered, because it is lent for the purpose of accomplishing an illegal object. *M'Kinnell* v. *Robinson*.[1] The purpose of this article however is not to discuss wagers which are illegal but to discuss the rights of the parties to wagers which are not illegal but merely null and void, and to discuss the rights of a person to recover money lent to wager on a wagering contract which is not illegal, but null and void only.

By the common law an action could be maintained on a wager if it were not injurious to the interests or feelings of third persons, and did not lead to indecent evidence, and was not contrary to public policy; and this was true although the parties had no interest in the subject of the wager other than that which was created by the wager itself. *Thackoorseydass* v. *Dhondmull*.[2]

The common law, however, has been altered by numerous English statutes enacted from time to time to discourage wagering contracts by nullifying any obligations that arise under them. The numerous amendments are largely responsible for the confusion existing in the law as it now stands.

AS BETWEEN THE PARTIES TO A WAGER.

1. By the English Gaming Act 1710, sec. 1, as amended by The Gaming Act 1835 "all notes, bills, bonds, judgments, mortgages or other securities or conveyances whatsoever" given for the payment of money won by betting on any game are to be deemed to have been given for an illegal consideration.

By section 2 of the Act of 1835 if the drawer of any such note, bill or security should actually pay to a holder or assignee the

[1] 3 M. & W. 434.
[2] 6 Moore P.C. 300.

amount of money thereby secured, the money so paid is deemed to have been paid for and on account of the person to whom the bill or security was given and is recoverable by action at law.

Now a check cashed by the winner at his bank or deposited for collection and collected by the bank is a bill paid to a holder within the meaning of the Act and the loser can recover the amount of it from the winner. *Sutters* v. *Briggs.*[3]

On the other hand all agreements by way of wagering are null and void; and no action can be maintained for the recovery of any sum of money alleged to be won upon any wager. The English Gaming Act 1845, sec. 18. Hence any money lost in a wager and paid over by the loser cannot be recovered from the winner.[4]

Consequently, when a person who has lost a wager pays it by cash he cannot recover the amount of it from the winner; but if he pays it by cheque he may recover the amount of it from the winner.

2. As a general rule a wager is not illegal, although it is null and void, and is not enforceable. It is merely a debt of honour; the actual payment of it is not unlawful. A check or other security given for the amount of it is deemed to have been given "for an illegal consideration" The Gaming Acts of 1710 and of 1835. In law it is given for no consideration inasmuch as it is given in discharge of an obligation which does not exist. If however another and distinct legal consideration can be established recovery of the amount will be allowed if a claim can be established without resorting to the illegal consideration. An extension of time for payment is not enough; to give time for a payment that can at no time be enforced is no consideration at all. An undertaking not to disclose the default of the debtor even though it is obtained by a threat to disclose, is a sufficient consideration. An actual forbearance to exercise any legal right in consideration of the promise to pay is enough; but the right must be a legal one. It follows that in order to succeed the plaintiff must establish that a new and genuine contract was arrived at whereby the defendant promised to pay the sum of money in consideration of the plaintiff not disclosing his default or for some other legal benefit to the promisor or detriment of the promisee. The usual thing is for the winner to threaten to disclose the default of the loser to the betting fraternity if the bet is not paid. The loser, rather than be discredited among his friends, promises to pay at some time in the future and in consideration

[3] [1922] 1 A.C. 1.
[4] *Coombes* v. *Dibble*, L.R. 1 Exch. 248; *Seely* v. *Dalton*, 36 N.B. 442.

therefor the winner agrees not to disclose his default. The consideration in such a case is sufficient to support the promise so that the winner may recover from the loser on the new consideration. A leading case on the subject is *Hyams* v. *Stuart King*.[5]

Consequently, a wager cannot be recovered as such; but it may be recovered if there is a fresh consideration therefor.

AS TO MONEY LENT.

3. There is no enactment making money lent for the purpose of wagering void, illegal, or for any reason not recoverable; wagers are not illegal, but null and void only The Gaming Act 1845, sec. 18. It follows that money lent for the purpose of making wagers without any security being taken can be recovered.[6]

"All notes, bills, bonds, judgments, mortgages or other securities or conveyances" given for the repayment of money won on any game or knowingly lent to bet "on any game whatsoever" are deemed to have been given "for an illegal consideration" and are not recoverable. This is the joint effect of the Gaming Act 1710 and The Gaming Act 1835. A check is a bill within the meaning of the enactment. *Sutters* v. *Briggs* (*supra*).

Can one ignore the cheque or other security given by the loser and maintain action for the debt? The authorities on this point, are not in agreement.

Some of the cases hold that by necessary implication the statute makes void not only the security but also the promise to repay which supports it. The leading case supporting this view is *Applegarth* v. *Colley*[7] in which Rolfe, B., said at p. 732:

> It is impossible to impute to the legislature an intention so absurd, as that the consideration should be good and capable of being enforced, until some security is given for the amount, and then that by the giving of the security the consideration should become bad.

This case was followed by a Divisional Court in *Carlton Hall Club* v. *Laurence*.[8]

Other cases hold that Parliament voided the security only and that the promise to pay is enforceable.[9] In *Saxby* v. *Fulton*, Buckley, L.J., said at p. 228, that the mischief of betting with the money

[5] [1908] 2 K.B. 696.
[6] *Wettenhall* v. *Wood*, 1 Esp. 18; *Saxby* v. *Fulton*, [1909] 2 K.B. 208, where the English cases are reviewed.
[7] 10 M. & W. 723.
[8] [1929] 2 K.B. 153.
[9] *Robinson* v. *Bland*, 1 W. Bl. 256; *Rose* v. *Collinson*, 12 W.L.R. 648; *Saxby* v. *Fulton* (*supra*).

in one's pocket was not very great, but that the giving of a promissory note or encumbering one's estate at play was a very serious mischief and therefore all such securities given for sums lost, whether in lawful or unlawful games, were alike voided.

A perusal of these cases and the discussion therein contained on the many conflicting decisions will show that the question as to whether or not the promise can be enforced is still in doubt.

Consequently money lent to wager may be recovered if no note, bill, check or other security was given for it; but if a note, bill, check or other security was given, the security is bad and possibly the debt is bad too.

4. It is to be noted that The Gaming Act 1710 as amended by The Gaming Act 1835 only applies to wagers "on any game whatsoever." It has been held to apply to a foot race, *Lynall* v. *Longbotham.*[10] It would not apply to a wager on the result of a race already run, as such a wager would not be on a game, but on a naked fact. *Pugh* v. *Jenkins.*[11]

Consequently money lent to wager on the result of, a race about to be run cannot be recovered; but money lent to wager on the result of a race already run may be recovered.

The foregoing should suffice to demonstrate that the existing law of wagering contracts is not logical or free from ambiguity

Calgary, Alberta. GEORGE H. ROSS.

[10] 2 Wils. K.B. 36.
[11] 1 Q.B. 631.