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MORE ANOMALIES IN THE LAW OF WAGERING CONTRACTS.

In the CANADIAN BAR REVIEW for December, 1930,[1] Mr. George H. Ross, K.C., of Calgary, bewails the existing confusion in the law relating 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." His plight is, however, not nearly so pitiable as that of a lawyer in Ontario, who has to find the law in a consolidated statute[2] composed partly of ancient English statutes, sufficiently altered to increase the difficulty of applying English cases decided on the original statutes, and partly of some, but not all, of the modern English statutes. Like his English *confrères* he has to distinguish wagers on "games or pastimes" from other wagers, because the parliaments of Charles II. and Anne had dealt only with the former, and has to distinguish the position of the transferee of a bill or note which was originally drawn or negotiated for an illegal consideration from that of the transferee of a bill or note which was originally drawn or negotiated without consideration, because the British Parliament in the reigns of William IV. and Victoria so legislated. In addition the Ontario lawyer must advise a client that the loser of a wager may in two cases recover back the amount lost, notwithstanding that the British Parliament in the reign of Victoria had legislated away the right of recovery in one case before the Ontario Legislature had enacted it, and that in the other case the British Parliament in the reign of George V has subsequently legislated away the right of recovery.

If the Ontario lawyer rashly attempted to make a client understand the actual state of the law in its various phases, and pointed

[1] 8 C.B. Rev. 718.
[2] R.S.O. 1927, c. 260.

out that in England the existing state of things is the more or less accidental result of a series of statutes ranging from Charles II to George V, but that in Ontario the same law, with some haphazard differences of substance, and some differences of form, has been solemnly revised by a commission and solemnly re-enacted by the Legislature, the client would inevitably be driven to the conclusion that the lawyers and law-makers of Ontario have perversely made the law complicated.

If any reader is inclined to think that the foregoing statement is exaggerated, I invite him to consider the following outline of the English law as compared with the Ontario law.

1. The English statutes 9 Anne, c. 14(19), 5 & 6 Will. 4, c. 41, and 8 & 9 Vict., c. 109, hereinafter referred to, may, by virtue of the Short Titles Act, 1896, 59 & 60 Vict., c. 14, be respectively cited as the Gaming Act, 1710, the Gaming Act, 1835, and the Gaming Act, 1845.

For an elaborate discussion of these statutes, as well as the earlier statute of 1664, 16 Car. 2, c. 7, and the Gaming Act, 1892, and many other statutes, see Coldridge and Hawksford, Law of Gambling, 2nd. ed., London, 1913. As to the history and effect of the gaming legislation in England, see also the dissenting judgment of Fletcher Moulton, L.J., in *Moulis* v. *Owen*;[3] *cf. Saxby* v. *Fulton*;[4] *Sutters* v. *Briggs*.[5]

The statute of Charles II, as modified by the statute of Anne, was introduced in Upper Canada as a result of the general adoption of the law of England in 1792. *Bank of Toronto* v. *McDougall*.[6] In 1902, s. 1 of the statute of William IV was, in effect, introduced by statute in Ontario, by the enactment of a new section composed partly of s. 1 of the statute of Anne, and partly of s. 1 of the statute of William IV; s. 2 of the statute of William IV was adopted; ss. 2 and 4 of the statute of Anne were re-enacted; and the statute of Charles II was repealed. (2 Ed. 7, c. 1; 2 Ed. 7, c. 13; R.S.O. 1897, vol. 3, c. 329, and Appendix A).

As to the gaming legislation of Ontario down to 1902, as compared with the English legislation, see an article by Dr. N. W. Hoyles, K.C., in 22 Canadian Law Times 377 (November, 1902).

In 1912 the Ontario law was amended by the adoption of s. 18 of the Gaming Act, 1845, and s. 1 of the Gaming Act, 1892, and by

[3][1907] 1 K.B. 746, at pp. 759ff.
[4][1909] 2 K.B. 208.
[5][1922] 1 A.C. 1.
[6](1877) 28 U.C.C.P. 345.

some revision of the language of the statute of 1902, including the insertion of the word "agreement" before the word "note" in the section which, as already noted, was composed partly of a section of the statute of Anne and partly of a section of the statute of William IV. (2 Geo. 5, c. 56; R.S.O. 1914, c. 217; R.S.O. 1927, c. 260).

2. The Gaming Act, 1710 (9 Anne, c. 14 in Ruffhead's edition; 9 Anne, c. 19, in the Revised Statutes), s. 1, provided as follows:

> 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 . . .

(a) A statute of 1664, 16 Car. 2, c. 7, which was chiefly directed against dishonest or fraudulent gaming, contained a more particular enumeration of games and pastimes, namely, cards, dice, tables, tennis, bowls, skittles, shovel board, cock fightings, horse races, dog matches, foot races, "or other pastimes, game or games whatsoever," but "the authorities show that the same kinds of games were covered by the statute of Anne as by the statute of Charles II." *Woolf* v. *Hamilton*.[7]

(b) The statute of Charles II rendered void the contract of wagering on any game or pastime in any case where a person lost more than £100 at any one time or meeting. The statute of Anne, s. 2, reduced to £10 the amount which was not recoverable if paid over in settlement of a wager on a game or pastime, and conferred on a person who lost more than £10 at any one time or sitting, and who paid over the money lost, or any part thereof, to recover back the money paid. This provision of the statute of Anne remained in force in England until it was repealed by the Gaming Act, 1845. It was adopted in Ontario in 1902, and appears in R.S.O. 1927, c. 260, s. 3.

(c) As regards money knowingly lent or advanced for gaming, the statute of Anne expressly makes void the security, but says nothing about the contract of loan. In some cases it has been held

[7] [1898] 2 Q.B. 337, at pp. 338-339.

that the consideration for the security is not avoided, and in others it has been held that the statute by implication avoids the consideration as well as the security. As Mr. Ross has pointed out,[8] the latest case, *Carlton Hall Club* v. *Lawrence*,[9] supports the latter view. The fact that the meaning of a statute of 1710 should still be open to argument in 1929, on an elementary point, is eloquent.

(d) As to security given either for the payment of lost bets or for the repayment of money lent for gaming, the law was changed by the statute of 1835, next to be noticed.

3. The Gaming Act, 1835 (5 & 6 Will. IV. c. 41), s. 1, provided that so much of the statutes of Charles II and Anne

> 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 several hereinbefore 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.

(a) The effect of the foregoing amendment is to enable a holder in due course of a negotiable security given for payment of a wager on a game or pastime to recover from the loser, whereas under the statute of Anne the security, even in the hands of a holder in due course, was absolutely void as against the loser, though not as against any other party: *Bowyer* v. *Bampton*.[10] As already noted, s. 1 of the statute of William IV was, in effect, adopted in Ontario in 1902, and it now appears as R.S.O. 1927, c. 260, s. 1.

(b) The object of s. 1 of the statute of William IV being rather to protect the holder in due course than to make the loser liable to pay, it was, by s. 2, enacted in effect, that if the loser should make, draw, give or execute any note, bill or mortgage which under the earlier statutes would be void, but which under the statute of William IV would be deemed to be made, etc., for an illegal consideration, and if the loser should pay the money or any part thereof to the endorsee, holder or assignee, then the amount so paid should be deemed to be paid for and on account of the winner, and should be deemed to be a debt owing by the winner to the loser, and should accordingly be recoverable by the loser from the winner.

When this s. 2 of the statute of William IV was passed in England, there also existed, under s. 2 of the statute of Anne, a right on the part of a person who had lost more than £10 at one time or sit-

[8] 8 C.B. Rev. 718, at pp. 720-721.
[9] [1929] 2 K.B. 153, where the cases are reviewed.
[10] (1741) 2 Stra. 1155.

ting to recover back money paid over. The older provision was repealed in England in 1845, as already noted, and the later provision was repealed in England in 1922, in consequence of the decision in *Sutters* v. *Briggs*.[11] As already noted, the older provision was adopted and is retained in Ontario, and in 1902 the later provision was adopted in Ontario and now appears in R.S.O. 1927, c. 260, s. 2.

4. The Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 18, provides as follows:

> 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 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 enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise.

(a) This section was adopted in Ontario in 1912, and now appears as R.S.O. 1927, c. 260, s. 4.

(b) The section makes void all contracts of gaming or wagering, and not merely the wagers on games or pastimes to which the earlier statutes related.

(c) The statute of 1845 also (by s. 15) repealed the statute of Charles II and so much of the statute of Anne as was not amended by the statute of William IV. It left untouched the last mentioned statute, as to securities given for payment of lost bets or for repayment of money lent for gaming, but took away the right conferred by the statute of Anne upon a loser of recovering back money paid to a winner in a case where more than £10 had been lost at any one time or sitting—a right which has, however, been preserved in Ontario, as already noted.

(d) The joint effect of the statutes of 1835 and 1845 is that while all contracts of gaming or wagering are void, wagers must still be divided into two classes as regards the consideration for securities given for payment of lost bets. A security given for payment of a wager on a game or pastime is under the statute of 1835 deemed to be given for an illegal consideration, and therefore is void unless it is a negotiable instrument in the hands of a holder in due course. A security given for payment of any other wager is given simply for

[11] [1922] 1 A.C. 1.

no consideration, and may therefore be valid in the hands of a third party being a holder for value.

5. The Gaming Act, 1892 (55 & 56 Vict. c. 9), s. 1, provides as follows:

> 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 Gaming Act, 1845], 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 to recover any such sum of money.

(a) The foregoing provision was adopted in Ontario in 1912, and now appears as R.S.O. 1927, c. 260, s. 5.

6. It further appears that in some countries a quiet game of "skittles" or "shovel board," or even of baccarat or *chemin de fer*, is not discouraged by legislation, and that the loser can there be compelled by legal proceedings to pay the amount of his losses at gaming. Hence nice questions of conflict of laws, as witness, *Robinson* v. *Bland*,[12] *Moulis* v. *Owen*,[13] and *Saxby* v. *Fulton*,[14] in which it cannot fairly be said that entirely satisfactory conclusions have been reached.[15] It is perhaps to be expected that some day Canadian courts also will have to deal with some problems of conflict of laws arising out of the existing differences between the gaming law of one province and that of another or between the law of one province and the law of England or some other country.

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[12](1760) 2 Burr. 1077; 1 W. Bla. 234, 256.
[13][1907] 1 K.B. 746.
[14][1909] 2 K.B. 208.
[15]My own attempt to discuss these cases, and the law relating to wagers so far as it affects negotiable instruments, is to be found in *Banking and Bills of Exchange*, 4th ed., 1929, pp. 661-662; 841-846.