THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 58

Section 2 Of The Gaming Act

REPORT

JANUARY 1977
The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

**The Commissioners are -**

- Mr. D.K. Malcolm, Chairman
- Mr. E.G. Freeman
- Professor R.W. Harding.

The Executive Officer of the Commission is Mr. C.W. Ogilvie, and the Commission's offices are on the 11th floor, R. & I. Bank Building, 593 Hay Street, Perth, Western Australia, 6000 (Telephone 25 6022).
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1.1 The Commission was asked to review s.2 of the *Gaming Act 1835*.

WORKING PAPER

2.1 The Commission issued a working paper on 23 February 1976. The names of those who commented on it are set out in Appendix I, and the paper itself is reproduced as Appendix II.

DISCUSSION AND RECOMMENDATIONS

General

3.1 The working paper contains a detailed discussion of the present law and practice (paragraphs 2 to 21), a summary of the law elsewhere (paragraphs 22 to 26) and a discussion of possible alternative reforms. The Commission has now completed its reconsideration of the questions at issue in the light of the comments received on the working paper.

Section 2 of the Gaming Act: recovery of gaming debt paid by security

3.2 The *Gaming Act 1835* is an English statute, which was adopted in Western Australia by an Ordinance passed in 1844 (7 Vict. No. 13). Under s.2 of the *Gaming Act 1835*, a person who has given a "note, bill or mortgage" (in this report called a "security") as security for, or in satisfaction of, a gaming debt and who actually pays to any "indorsee, holder, or assignee" of such security the money thereby secured, may recover that money from the person to whom he gave the security. A cheque is a "bill" within the meaning of the *Gaming Act*,¹ so that the section covers cheques drawn in payment of gaming debts. The reference to "indorsee, holder or assignee" in s.2 includes the person to whom the security was given.² Accordingly, if a cheque was given to a winner in satisfaction of a gaming debt, then whether the cheque is cashed by the winner or by a transferee of the winner, the loser can recover the value of the cheque from the winner.

¹ See *Sutters v Briggs* [1922] 1 AC 1.
² Ibid.
2 / Section 2 of the Gaming Act

3.3 The most practical example of the operation of s.2 of the Gaming Act 1835 occurs when a bookmaker accepts a cheque from a losing punter in payment of a gaming debt. If the punter honours the cheque but later changes his mind, he can sue the bookmaker for recovery of the value of the cheque. So also can the punter's personal representative or his trustee in bankruptcy. An action to recover the value of the cheque can be brought at any time within six years. 3 By contrast, if the losing punter had paid the bookmaker in cash, neither he nor his personal representative nor his trustee in bankruptcy could have recovered the money. 4

3.4 In Western Australia, most bookmakers' transactions are in cash. It is rare for a bet to be placed by cheque. However, in a significant number of cases bookmakers accept bets on credit (that is, "on the nod", without cash or cheque changing hands).

3.5 Settlement of credit bets usually takes place at Tattersall's Club in Perth. For the sake of convenience and security, some bookmakers, particularly where substantial sums are involved, often accept cheques in settlement of credit bets. The Commission understands that some prominent bookmakers may accept as much as twenty percent of their settlement receipts by cheque. Although bookmakers usually settle their losing bets in cash, some bookmakers sometimes pay by cheque those punters who are accustomed to settling their own bets by cheque.

3.6 Settlement of successful cash bets made on course may also take place at Tattersall's Club. Payment by the bookmaker, whilst usually in cash, may sometimes be by cheque. This is also true of settlements between bookmakers themselves, arising out of their "laying off" on course.

3.7 In its discussion so far, the Commission has mainly contemplated a situation where a losing punter, having settled with his bookmaker by cheque, subsequently decides (or his trustee in bankruptcy or personal representative so decides) to sue the bookmaker for recovery of the value of the cheque. Theoretically, however, a bookmaker who has settled with a punter (or another bookmaker) by cheque could also take advantage of s.2 of the Gaming Act, and sue to recover the value of that cheque. Of course, it would be unlikely that any bookmaker would in fact do so, since loss of licence to operate as a bookmaker and loss of permit to

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3 Limitation Act 1935, s.38.
4 See paragraph 3.9 below.
conduct his business on the racecourse would normally result from his doing so. The only sanction against a punter, however, is the process of "warning off" the racecourse. Such a sanction would only be effective against a punter who in fact wished to continue betting at a racecourse, and in any case would have no relevance to the position of the Official Receiver of the estate of a bankrupt punter or the personal representative of a deceased punter.

3.8 Actions under s.2 of the **Gaming Act** are rare in Western Australia, but the Commission was informed that there had been at least one. There have been at least four other cases over the years where actions have been threatened and, presumably, some kind of settlement reached. The question is a real one and a source of anxiety to bookmakers. In that the section gives a person who pays a betting debt by cheque a subsequent opportunity to "welsh", it seems that the provision is capable of working injustice.

All those who commented on the working paper were of the view that s.2 of the **Gaming Act** should be repealed. The Commission agrees with this view.

3.9 When the **Gaming Act 1835** was enacted, the law in England was that, by virtue of s.2 of a Statute passed in the reign of Queen Anne (the **Gaming Act 1710**), payment to the winner in cash of a gaming debt was recoverable. Accordingly, s.2 of the **Gaming Act 1835** was originally enacted to bring payment by cheque or other security broadly into line with payment by cash. However, it is doubtful whether s.2 of the **Gaming Act 1710** was ever in force in Western Australia. It seems to be generally assumed that it was not, and that cash payment of a gaming debt is and always has been in the same legal position as payment of any other wagering debt, that is, it is irrecoverable. If this is so, then it seems that the adoption by this State in 1844 of s.2 of the **Gaming Act 1835** was due either to a mistaken view of the state of the law in Western Australia, or to an inadequate appreciation of the rationale for the enactment in England of s.2 of that Act.

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5 See working paper, paragraph 18.
6 Ibid.
7 If the payment was for £10 or more.
8 See the judgment of Viscount Birkenhead L.C. in *Sutters v Briggs* [1922] 1 AC 1 at 12.
9 See Windeyer, *Wagers. Gaming and Lotteries in Australia* at 131. See also paragraph 3.39 below where the Commission recommends that any doubt should be cleared up by enacting legislation declaring the **Gaming Act 1710** not to be in force in Western Australia.
10 Ibid., at 26-27.
3.10 Furthermore, s.2 of the *Gaming Act 1835* applies only to gaming, including a bet on a game. Wages on events other than games are not covered. For example, a bet as to the outcome of a game which has occurred at some time in the past is not a gaming bet, but merely a bet as to a state of fact, that is, a non-gaming bet. Thus the loser of a non-gaming bet, such as "I'll bet that Starglow won the Perth Cup in 1974", who pays his debt by cheque, cannot afterwards recover from the winner the value of the cheque. The commission cannot see any basis for differentiating gaming debts from other kinds of wagering debts.

3.11 Accordingly, the Commission recommends that s.2 of the *Gaming Act 1835* should be repealed.

**Gaming Act and Betting Control Act: right of winner to enforce a cheque or other security given in satisfaction of a gaming debt.**

3.12 Repeal of s.2 of the *Gaming Act 1835* would not have the consequence that the winner of a gaming bet could himself enforce a cheque or other security given by the loser in payment or satisfaction. The security would still remain unenforceable by the winner. A losing punter, for example, could stop payment of a cheque (that is, issue instructions to his bank not to payout when the cheque was presented to it), and the bookmaker would not be able to compel the punter or the bank to pay.

3.13 However, a third party to whom the winner had transferred the cheque could succeed in an action against the loser, though only if he were able to show that he had given value for it and had no notice of the original transaction (that is, that the cheque had been given to pay a gaming debt). To this extent the position in regard to gaming debts is stricter than in regard to other sorts of wagering debts. In the latter case a third party can enforce the cheque provided at some stage value had been given for it, and irrespective of whether the third party knew that it had originally been given in payment of a bet. The foregoing also represents the law with regard to the transfer of other negotiable instruments.

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11 Both s.1 of the *Gaming Act 1835*, which deems the security to have been given for an illegal consideration (see paragraph 4 of the working paper) and s.84I of the *Police Act 1892* (which makes the betting transaction void: see paragraph 3.17 below), would prevent the winner enforcing the security.

12 This is because s.1 of the *Gaming Act* deems the cheque to have been given for an illegal consideration: see paragraph 4 of the working paper.

13 This is because the transaction falls only within s.84I of the *Police Act*, which makes the transaction void but does not deem it to be illegal: see paragraph 12 of the working paper.
3.14 The Commission considers that the law with regard to the right to enforce a security given in payment or satisfaction of a gaming debt should be amended to provide that the winner, or a subsequent holder or transferee, should be able to enforce the security in the same way as securities given in normal commercial transactions can be enforced, provided that the betting transaction was lawful in the sense of being in accordance with the *Betting Control Act 1954*. Section 5(1) of that Act provides as follows:

"Notwithstanding any law to the contrary, persons may, in accordance with this Act, lawfully bet by way of wagering or gaming on races -

(a) on a race course during the holding at the race course of a race meeting; or

(b) at or in registered premises,

and their so doing does not of itself constitute a contravention of the law, and is not a ground for the race course or any part of it or the registered premises being deemed or declared to be, or to be used as, a common betting house or a common gaming house, or to be a common nuisance and contrary to the law."

The term "race" includes races of horses ridden or driven and greyhound races.¹⁴

3.15 This subsection is qualified by s.5(2) of that Act, which provides:

"No bet or transaction arising out of or in connection with a bet shall be enforceable at law."

The effect of this subsection was considered by F.T.P. Burt Q.C. (as he then was) in "Bets Under the Betting Control Act" 3 *UWALR* 334. He discussed whether the phrase "transaction arising out of or in connection with a bet" covered cheques or other securities given in connection with a bet. If it did, in his view such a security would be unenforceable not only as between the parties to the original bet but also in the hands of a third party, irrespective of whether he took in good faith and for value or not. He concluded, however, that as the policy of the *Betting Control Act* was to liberalise the law in relation to this type of betting, it was unlikely that the legislature intended such a consequence. In his view, s.5(2) should be read down so as to exclude cheques and other securities. However, even if the subsection effected no change in the law, the position would still be that a security given in respect of a bet under the *Betting Control Act*, being a security caught by s.1 of the *Gaming Act 1835*, could not be

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¹⁴ See s.4 of the *Betting Control Act 1954*, as amended by s.5 of the *Betting Control Act Amendment Act 1976*. 
enforced by the winner at all, and not even by a third party, unless, in the case of negotiable instruments, he could prove he took in good faith and for value without knowledge of the original transaction.\(^{15}\)

3.16 It seems to the Commission that, if a betting transaction falls within s.5(1) of the Betting Control Act, there would be nothing contrary to currently accepted legislative policy in permitting a bookmaker or third party to enforce a security which a losing punter has given in payment or satisfaction of the debt. The Commission accordingly recommends that appropriate legislation be enacted to achieve this result. It would be necessary to provide that s.1 of the Gaming Act 1835 be amended so as not to apply to securities given in payment or satisfaction of bets under the Betting Control Act 1954.\(^{16}\) Section 84I of the Police Act 1892 would have to be similarly amended.\(^{17}\) This is necessary because that section, by declaring contracts by way of gaming or wagering to be void, would prevent a winner from enforcing a security given to him in satisfaction of a bet.\(^{18}\)

**Credit Betting**

3.17 Betting transactions can be lawful or unlawful. A bet is unlawful if it is in connection with a game the playing of which is illegal in itself under s.66(6) of the Police Act 1892\(^ {19}\) or ss.210(2)\(^ {20}\) or 212\(^ {21}\) of the Criminal Code, or if it is in connection with a game which, although not illegal in itself (for example, two-up), takes place in a common gaming house.\(^ {22}\) Otherwise, a bet is lawful. Lawful bets are of two kinds. First, there is a category of bets positively authorised by statute, such as bets under the Betting Control Act.\(^ {23}\) Second, there is

\(^{15}\) See paragraph 3.13 above.

\(^{16}\) The Commission considers that s.1 of the Gaming Act (as amended) should be re-enacted in an up-to-date form in the proposed Gaming and Wagering Act: see paragraph 3.39 below.

\(^{17}\) The Commission considers that it is inappropriate that a provision dealing with the consequences under the civil law of a betting transaction should be contained in the Police Act, and that the section (as amended) should be re-enacted in the proposed Gaming and Wagering Act: see paragraph 3.39 below.

\(^{18}\) The Commission appreciates that its later recommendation (see paragraph 3.23 below) that bets authorised by the Betting Control Act should be fully enforceable would itself imply that cheques or other securities in relation to such bets should be enforceable. However, the Commission wishes to avoid any possible anomaly whereby the debt itself would be enforceable in legal proceedings whilst the cheque or other security might not be.

\(^{19}\) This section makes it an offence to play or bet "at thimble-rig, or at or with any table or instrument of gaming, other than a totalisator lawfully permitted to be used, or at any unlawful game, or at any game or pretended game of chance in any public place, to which the public (whether upon or without payment for admittance) have or are permitted to have access."

\(^{20}\) Which concerns games where the chances of winning are unequal: see Windeyer at 125.

\(^{21}\) Which concerns unlawful lotteries.

\(^{22}\) Code, s.211; Police Act, ss.84 and 84A.

\(^{23}\) See paragraph 3.14 above.
a category of bets which, whilst not positively authorised by statute, do not contravene any statutory prohibition - for example, bets on a private game of bridge. At present, a winner cannot recover from the loser a debt arising out of a bet, whether the bet is lawful or unlawful, and whether the bet is or is not statutorily authorised. This is because of s.84I of the Police Act 1892, which provides:

"All contracts or agreements, whether by parol 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….."

Section 5(2) of the Betting Control Act, which provides that "No bet or transaction arising out of or in connection with a bet shall be enforceable at law", is to the same effect in relation to the bets to which it applies.24

3.18 The Commission is of the view that there should be no change in the law relating to the recovery of money owing in respect of unlawful bets, or in respect of lawful bets which are not authorised be statute. However, it considers that recovery should be possible if the bet was an authorised one within the Betting Control Act. The consequence of this would be that the winner would be able to sue the loser for money owing to him pursuant to such a bet. Implementation of this recommendation would not involve any extension of the range of lawful betting transactions.

3.19 The Commission recognises that this recommendation may appear to be inconsistent with a recommendation of the Western Australian Royal Commission into Gambling. In rejecting a proposal of the Western Australian Bookmakers' Association that the law of Western Australia be amended to provide that bets made by or with licensed bookmakers be exempt from the general rule that betting debts are not recoverable, the Royal Commission stated:

"Apart from the difficulty of proof of a bet made by a nod, we do not think that it is in the public interest to encourage credit betting.” 25

3.20 The Commission has pointed out26 that there already takes place, in this statutorily authorised sphere, a not insignificant amount of credit betting. The scope and amount of such

24 Ibid.
betting would mainly be governed by business expectations and understandings between the parties concerned. The Commission doubts whether amendment of the law would lead to any significant increase in credit betting. Bookmakers would be no more likely than at present to accept a bet "on the nod" from a punter unless he was well known to them and his credit established. At the same time, it seems anomalous that persons who are authorised by law to carry on business as bookmakers are not able to recover debts which arise in the ordinary course of their business.

3.21 In addition, the Commission would point out that, in a normal betting transaction under the Betting Control Act, the bookmaker himself in effect bets on credit. The punter typically places his bet in cash with the bookmaker before the race, receiving in exchange a betting ticket. The transaction is not one in which the stake money is put up in cash by both parties to the bet and held by a third party. The punter relies on the credit of the bookmaker. If the bookmaker loses and were to decide not to pay, the punter could not sue him for recovery of the money won. It is true that there are powerful sanctions against default by the bookmaker, but it would seem desirable also to give the punter a direct right of action against him. It would be unfair to provide the punter with a remedy whilst not at the same time providing the bookmaker with one.

3.22 As to the question of difficulty of proof referred to by the Royal Commission, this Commission acknowledges that there may be occasions when the absence of written evidence of the betting transaction will cause difficulties in the administration of the law. The same difficulties arise in a wide variety of ordinary business transactions, however - for example, bids at auctions and the placing of orders to purchase shares on the stock-market. Occasional difficulty of proof does not, in the Commission's view, provide in itself an answer to the question of whether the law should permit the recovery of money won on a statutorily authorised bet.

3.23 Accordingly, the Commission recommends that the law be amended to permit recovery by either party on such bets. The Western Australian legal position would then correspond with that in Victoria, Queensland, New South Wales and Tasmania.

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26 See paragraph 3.4 above.
27 See paragraph 3.7 above.
28 See paragraph 3.19 above.
29 See s.16 of the Lotteries Gaming and Betting Act 1966 (Vic); s.16 of the Gaming and Betting Act 1912 (NSW); s.139(3) of the Gaming Act 1850 (Qld), and s.114 of the Racing and Gaming Act 1952 (Tas).
3.24 Implementation of the Commission's recommendation in this respect would involve not only the repeal of s.5(2) of the *Betting Control Act* but also the amendment of s.84I of the *Police Act*\(^\text{30}\) so as to provide that it would no longer apply to bets made under the *Betting Control Act*.

**Money lent for betting**

3.25 The law relating to the recovery of money lent for betting is anomalous and uncertain.

3.26 It appears that under the general law money\(^\text{31}\) lent in order that the borrower may make a non-gaming bet, or in order that the borrower may pay debts already incurred in respect of both gaming and non-gaming bets is recoverable by the lender, provided the bet is not an unlawful one.\(^\text{32}\)

3.27 The position in regard to money lent in order that the borrower may make a gaming bet is, however, obscure. It was held by the Divisional Court of the King's Bench in *Carlton Hall Club v Laurence*\(^\text{33}\) that money so lent was irrecoverable. The reason the Court gave for this decision was that, since securities given for reimbursing or repaying money knowingly lent or advanced for gaming were void as between the parties,\(^\text{34}\) the legislation must be taken to have impliedly provided that the loans themselves were irrecoverable.

3.28 The decision in *Carlton Hall Club v Laurence* was doubted in a subsequent decision of the English Court of Appeal.\(^\text{35}\) The actual decision in that case was based on the fact that the gaming transaction in question was void under the English *Gaming Act 1892*.\(^\text{36}\) However, Davies L.J., who delivered the judgment of the Court, went on to make the following statement obiter:

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\(^{30}\) As re-enacted in the proposed Gaming and Wagering Act: see paragraph 3.39 below.

\(^{31}\) That is, leaving aside the possible effect of s.5(2) of the *Betting Control Act 1954*: see paragraph 3.29 below.

\(^{32}\) See generally Windeyer, *Wagers, Gaming and Lotteries in Australia* at 61-64 and 67, and the cases referred to therein. See also W.E.D. Davies, "Recovery of Money lent for Gambling in Western Australia" 6 *UWALR* at 160.

\(^{33}\) [1929] 2 KB 153; [1929] All ER Rep 605.

\(^{34}\) Under s.1 of the *Gaming Act 1710* and s.1 of the *Gaming Act 1835*.

\(^{35}\) *C.H.T. Ltd. v Ward* [1963] 3 All ER 835.

\(^{36}\) The effect of this legislation is to prevent a third party who discharges the gambling debts of another from recovering in respect of such payment. There is no similar legislation in force in Western Australia.
"If the true nature of the transaction in the present case were that the plaintiffs had advanced money to the defendant for the purpose of lawful gaming, the plaintiffs would have been entitled to succeed". 37

3.29 A further ground for uncertainty in relation to money lent for certain kinds of gaming bets lies in the wording of s.5(2) of the Betting Control Act 1954. 38 According to W.E.D. Davies, 39 the general rule that a lender may recover money lent to pay a debt already incurred 40 in respect of a gaming bet does not apply to bets under the Betting Control Act, that is, bets on horse-races and greyhound races. 41 He argued that such a loan of money was a "transaction arising out of or in connection with a bet", and so not "enforceable at law". 42

3.30 It is open to question whether Davies' views on the Betting Control Act would ultimately prevail if put to the test in court proceedings. The present law in regard to money lent in connection with gaming bets is both obscure and anomalous. In the Commission's view, there is no ground for maintaining the distinction between loans relating to gaming bets and loans relating to other kinds of betting. The Commission considers that the law applicable to money lent in regard to all kinds of betting should be the same, namely that it should be recoverable if the bet was a lawful one, 43 and it recommends that appropriate legislation be enacted. 44 This would accord with the views of all those who commented on the discussion of this matter in the working paper. If the betting transaction was a lawful one, a lender should be given a right to recover money lent either to enable the borrower to bet with cash (and so to avoid betting on credit in relation to the other party to the bet) or to enable the loser to pay the winner.

3.31 Money knowingly lent to enable a person to make an illegal bet, or to enable a person to pay a debt arising out of an illegal bet, should remain subject to the existing general law. This would mean that the money would be irrecoverable, unless the parties were not in pari delicto. If, for example, the lender had been the victim of fraud or duress he would be able to recover on the same principles as apply to illegal contracts generally. 45

37 Ibid., at 842-843.
38 See paragraph 3.15 above.
39 In "Recovery of Money Lent for Gambling in Western Australia" 6 UWALR 160.
40 See paragraph 3.26 above.
41 See paragraph 3.14 above.
42 See paragraph 3.15 above.
43 See paragraph 3.26 above.
44 Such legislation could appropriately be included in the proposed Gaming and Wagering Act: see paragraph 3.39 below.
3.32 By the same token, if the borrower gives a cheque or other security to the lender in settlement of a loan for gaming or for payment of a gaming debt, the Commission considers that the cheque or security should be enforceable if the gaming was lawful. This should be provided for expressly in the proposed Gaming and Wagering Act recommended by the Commission.\footnote{See paragraph 3.39 below.}

**Settling horse-racing and dog-racing bets**

3.33 The Commission pointed out in paragraph 16 of the working paper that, while the matter was not beyond doubt, it appeared that the practice of settling racing bets at Tattersall's Club was in contravention of s.11(4) of the *Betting Control Act 1954* and s.45 of the *Totalisator Agency Board Betting Act 1960*. This is because it is an offence under the latter Act for a person to carry on business as a bookmaker unless he is licensed under the *Betting Control Act 1954* to carry on the business of a bookmaker in person upon a racecourse and carries on that business and bets (which includes settling bets) in accordance with that Act: s.45. The *Betting Control Act* enables a licensee to carry on the business of a bookmaker in person on a racecourse or at registered premises: s.11(4).

3.34 The premises in Perth occupied by Tattersall's Club have not been registered under the *Betting Control Act* as premises in which a bookmaking business may be carried on.

3.35 All those who commented on this matter suggested that Tattersall's Club should be registered as a place at which settling may lawfully take place. Subject to any relevant Government policy, the Commission agrees with this view. The practice of settling bets there is convenient and has existed for many years. It is desirable, therefore, that it be regularised. If it is not, then apart from any other consideration the reforms recommended in this report may not apply to the transactions which take place there, since they may be held to be illegal transactions and thus ones which the courts will not enforce. An amendment to the *Betting Control Act* would be required, since the present effect of registration of premises under the Act is to enable all aspects of bookmaking to take place there, whereas the Commission's recommendation relates only to the settling of bets.
3.36 The W.A. Bookmakers’ Association suggested to the Commission that premises outside Perth, for example at Kalgoorlie, should also be registered as places where settlement could take place. The Commission recommends that this should be done. Acceptance of this suggestion would give to punters and bookmakers in those country centres which have regular race-meetings the same facilities for settling bets as they would have in Perth.

3.37 The Commission does not accept the view of the former Totalisator Agency Board, apparently endorsed by the Royal Commission into Gambling, that such a provision as is recommended in paragraphs 3.35 and 3.36 above would create a danger of an increase in off-course betting. As stated above, the Commission’s recommendation is that the only aspect of ”betting” which could lawfully be carried on at such registered premises would be that of settling.

3.38 The Commission considers that the registration function should be carried out by the Betting Control Board and not, as one commentator suggested, by the Minister for Police. It would be necessary that the Betting Control Board be given adequate powers to supervise settlement activities at any such registered premises to ensure that no abuse takes place.

**Proposed Gaming and Wagering Act**

3.39 The Commission regards it as inappropriate that a provision laying down rules as to the consequences under the civil law of gaming or wagering transactions should be contained in the *Police Act*. It would be preferable if s.84I of that Act, and s.1 of the *Gaming Act 1835* (both amended in accordance with the recommendations in this report) were re-enacted in a separate piece of legislation, which could be entitled ”The Gaming and Wagering Act”, and the Commission recommends accordingly. The proposed provision dealing with the recovery of money lent for betting should also be included in such legislation.

3.40 As part of the review of the law covering the matters discussed in this report, the Commission recommends that the Acts of 16 Car. II C.7 and 9 Anne C.14 (the *Gaming Act*

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48 This Board replaces the Totalisator Agency Board: see the *Betting Control Act Amendment Act 1976*. The function of registering premises for settling bets would be an extension of the function that the Board already has of registering premises at which betting may take place.
49 See paragraph 3.30 above.
Section 2 of the Gaming Act 1710 should be declared not to be in force in Western Australia.\textsuperscript{50} It is doubtful whether they are in force in this State but it seems desirable to clarify the matter.

\textsuperscript{50} See paragraph 14 of the working paper.
SUMMARY OF RECOMMENDATIONS

4.1 The Commission recommends that -

(a) section 2 of the Gaming Act 1835 should be repealed;  
   (paragraph 3.11)

(b) section 1 of the Gaming Act 1835 and s.84I of the Police Act 1892 should be amended so as no longer to apply to securities given in payment or satisfaction of bets authorised by the Betting Control Act;  
   (paragraph 3.16)

(c) the Betting Control Act 1954 should be amended so as to provide for the enforceability of bets authorised by that Act;  
   (paragraph 3.23)

(d) a provision should be enacted to provide for the recovery of money lent in regard to lawful betting and for the enforceability of securities given in connection with the repayment of money so lent;  
   (paragraphs 3.30 and 3.32)

(e) the Betting Control Act should be amended (subject to any relevant Government policy), to provide for Tattersall's Club in Perth and other appropriate premises to be registered as places where settling of bets authorised by that Act may take place;  
   (paragraphs 3.35 and 3.36)

(f) Section 1 of the Gaming Act 1835 and s.84I of the Police Act 1892 (as amended in accordance with this report) should be re-enacted in new legislation, which should include the proposed provision regarding recovery of money lent (see (d) above);  
   (paragraph 3.39)
(g) the Acts of 16 Car. II C.7 and 9 Anne C.14 should be declared not to be in force in Western Australia.

(paragraph 3.40)

(Signed) DAVID K. MALCOLM
Chairman

ERIC FREEMAN
Member

R.W. HARDING
Member

18 January 1977
APPENDIX I

List of those who commented on the working paper

Greyhound Racing Control Board (W.A.)
Liberal Party of Australia (W.A. Division)
Law Society of Western Australia
Police Department
W.A. Bookmakers’ Association (Inc)
Western Australian Trotting Association
Western Australian Turf Club
Burton R.H. (S.M.)
APPENDIX II

THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 58

Section 2 Of The Gaming Act

WORKING PAPER

FEBRUARY 1976
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## APPENDIX
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.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference are invited. The Commission requests that they be submitted by 28 April 1976.

Copies of the paper are being sent to the -

Chief Justice and Judges of the Supreme Court
Citizens Advice Bureau
Commissioner of Police
Greyhound Racing Control Board
Institute of Legal Executives
Judges of the District Court
Law School of the University of W.A.
Law Society of W.A.
Lotteries Commission
Magistrates' Institute
Official Receiver in Bankruptcy
Perpetual Executors, Trustees & Agency Co. (W.A.) Ltd.
Public Trustee
Solicitor General
Tattersall's Club W.A.
Totalisator Agency Board
Under Secretary for Law
W.A. Bookmakers' Association
W.A. Trotting Association
W.A. Trustee Executor & Agency Co. Ltd.
W.A. Turf Club
Law Reform Commissions and Committees with which this Commission is in correspondence.

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and to submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.
TERMS OF REFERENCE

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

THE LAW AND PRACTICE IN WESTERN AUSTRALIA

The Gaming Act 1835

2. The Gaming Act 1835 is an English Statute, which was adopted in Western Australia in 1844 by 7 Vict. No. 13. The relevant portions of the Gaming Act 1835 are set out in the Appendix. Under s.2 of the Gaming Act, a person who has given a "note, bill or mortgage" (in this working paper called a "security") in payment of a gaming debt (including a bet on a game) and who actually pays to any "indorsee, holder, or assignee" of such security the money thereby secured, may recover that money from the person to whom he gave the security. A cheque is a bill within the meaning of the Gaming Act (see Sutters v. Briggs [1922] 1 AC 1) so that s.2 covers cheques drawn in payment of gaming debts.

3. Section 2 of the Gaming Act 1835 deals only with securities given for gaming debts as opposed to gambling debts generally. The games referred to are any games or pastimes whatever, whether of skill or chance, including cards, dice, tennis, bowls, horse-races, dog races, foot races and cricket: see Windeyer - The Law of Wagers, Gaming & Lotteries in Australia, 73. Securities given for wagers on events other than games are thus not within the ambit of the Act. These would include, for example, wagers on which year a particular footballer had won the Sandover Medal or which is the tallest building in Perth.

4. Prior to the enactment of the Gaming Act 1835, a security given for gaming or for repaying any money knowingly lent for the purpose of gaming, was absolutely void: 16 Car. II, C.7 s.3: 9 Anne C.14, s.1. The relevant portions of these Acts are set out in the Appendix. The consequence was that not only was such a security valueless in the hands of the winner, but it was also valueless in the hands of a subsequent holder or assignee, even though he was a purchaser for value, without notice of the original consideration. The avoidance of such securities in the hands of third parties was, according to the words of the preamble to the Gaming Act 1835, "often attended with great hardship and injustice". Hence s.1 of the Gaming Act 1835 declared that, instead of such a security being void, it was to be deemed to
have been given for an illegal consideration. As between the original parties to the transaction it makes no difference whether a security is declared to be void, or declared to be given for an illegal consideration. However, it could make a difference to a subsequent holder or assignee, who can in the latter case sue the person who originally gave the security if he can prove that he, or some previous holder, gave value for the security without any notice of the original illegal consideration: Woolf v. Hamilton [1898] 2 OB 337.

5. If s.2 of the Gaming Act 1835 had not also been enacted, the effect of s.1 would have been that the interests of third parties would have been protected, but at the expense of the person who originally gave the security. It would have meant that, although the winner could not have enforced the security himself, he could have obtained the benefit of the security by transferring it for value to a third party, who would then have been entitled to enforce it, provided he had had no notice of the fact that it had been given in respect of a gaming debt. However, under s.2, if the third party enforces the security the loser can recover the amount of the payment from the winner. As far as the winner is concerned, in the event of a dispute, the security is absolutely worthless. He cannot enforce it himself, nor can he hope to obtain a benefit from it by transferring it for value to a third party. (The same position would also apply to a person to whom a borrower gave a security in respect of money knowingly lent for gaming: see para. 4 above).

6. However, this is not the only effect of s.2 of the Gaming Act 1835. The section refers to any indorsee, holder or assignee, and its operation is not restricted to holders for value or without notice. It includes the person to whom the security was originally given: Sutters v. Briggs [1922] 1 AC 1. If the loser honours the security he can later recover the amount from the winner. The most practical example of this is where a bookmaker accepts a cheque from a losing punter. If the punter honours the cheque but later changes his mind he can sue the bookmaker for recovery of the value of the cheque. Such an action to recover can be brought within six years: see Limitation Act 1935, s.38. By contrast, if the loser had paid the bookmaker in cash, he could not have recovered the money: see para. 11 below.

7. The full effect of s.2 was apparently not generally appreciated until the House of Lords decision in Sutters v. Briggs (supra). In that case, the Lord Chancellor, Viscount Birkenhead, said (at p.12) that the Gaming Act 1835 was intended only to benefit third parties who had become holders of void bills. It was not intended to benefit the person to whom the
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.
12. Leaving aside s.84F, the effect of which is in doubt, since 84I makes all contracts by way of gaming or wagering void, securities given for such debts are given for no consideration. Thus, as between the parties, the security if dishonoured is valueless. As regards remote parties, however, if the security is not given for a gaming debt (as to which, see para. 4 above), it may be quite good provided that at some stage value has been given for it. If A gives B a cheque in satisfaction of a non-gaming bet (for example a wager on who is going to win the Sandover medal), B cannot succeed in an action on the cheque against A; but if B endorses the cheque to C for valuable consideration, C can maintain an action against the maker: see Windeyer, 76, and the cases referred to therein. The security was given for a void but not illegal consideration, and the disability is removed once consideration is given: ibid.

_Betting Control Act_

13. Reference should also be made to s. 5(2) of the _Betting Control Act 1954_, although its effect is somewhat uncertain.

This subsection provides that "no bet or transaction arising out of or in connection with a bet shall be enforceable at law." A bet is defined in that Act to mean a wager on a race of any kind which involves horses whether ridden or driven. A bet, therefore, is a gaming contract restricted to horse racing.

The effect of the subsection was considered by F.T.P. Burt Q.C. (as he then was) in "Bets under the Betting Control Act" 3 _UWALR_ 334. The learned author discussed whether the phrase "transaction arising out of or in connection with a bet" covered cheques or other securities given in connection with a bet. If so, in the author's view, such a security would be unenforceable not only as between the parties to the original bet but also in the hands of a third party, irrespective of whether he took in good faith or not. The author concluded, however, that as the policy of the _Betting Control Act_ was to liberalise the law in regard to this type of betting, it was unlikely that the legislature intended such a consequence. In his view, s.5(2) should be read down so as to exclude securities. His general conclusion was that the subsection effected no change in the law.

However, according to W.E.D. Davies in "Recovery of Money Lent for Gambling in Western Australia", 6 _UWALR_ 160, the subsection did amend the law so far as recovery of money lent
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.

The same degree of uncertainty surrounds the application of a similar provision in 16 Car. II, C.7.

The practice in Western Australia

*Settlement of horse-racing bets*

15. In Western Australia most bookmakers' transactions are in cash. The Commission has been informed that it is rare for a person to offer a bookmaker a cheque for a bet on the
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 bookmakers, about twenty percent of their receipts are by cheque. Although bookmakers themselves usually pay cash in settlement of their debts the Commission has been informed that larger bookmakers may sometimes pay by cheque those punters who are accustomed to settling their own bets by cheque. As bookmakers in the year 1973-74 had a turnover of approximately $54,000,000 the dimension of the problem under consideration may be appreciated.

16. While the matter is not beyond doubt, the settlements which take place at Tattersall's Club appear to be in contravention of the Betting Control Act 1954, s.11(4)(a) and the Totalisator Agency Board Act 1960, s.45. Thus the act of paying a cheque to or receiving one from a bookmaker in Tattersall's Club could be held to be technically illegal. The civil consequences of this are that even if all other restrictions on unenforceability of cheques and other securities were repealed (see para. 19 below), a cheque given in such circumstances may still be unenforceable by or against the bookmaker because it was given for an illegal consideration: see Cheshire & Fifoot Law of Contract 3rd Aus. ed. 376-377. Accordingly, to avoid this difficulty any amendments to make cheques enforceable (see paras. 32 to 34 below) would have to make appropriate provision as to where settlement could legally take place.

17. The Commission understands that the number of defaulting punters is not very large. While the number varies from bookmaker to bookmaker, on the average, each bookmaker would probably only have four to five defaulters for amounts of perhaps two or three hundred dollars per defaulter. Cheques given on settlement are rarely dishonoured. The principal situation in which a cheque may be dishonoured is where a settlement takes place at the racecourse of debts arising from a previous meeting. The punter may wish to continue betting on credit and will write a cheque to deceive the bookmaker into continuing his credit. Apart from this situation there would be little point in a punter writing a cheque he will not honour. If he does not wish to pay his gaming debts he can simply refuse to do so: see para. 11 above.
Sanctions against default

18. It may be useful to set out at this point some of the sanctions against defaulting. If a bookmaker defaults the Totalisator Agency Board may cancel his licence (see the Betting Control Regulations 1955, Reg. 58) or the Turf Club or Trotting Association, as the case may be may cancel his permit to conduct his business on the racecourse. In addition, the bond (see Betting Control Regulations 1955, Reg. 34) which bookmakers are required to deposit, may be estreated by the Board.

If a punter defaults, the bookmaker may advise the appropriate racing body who may then ban the punter from going on to a racecourse - a process known as "warning off": see W.A. Turf Club By-laws, By-laws 76(e) and 85; W.A. Turf Club Rules of Racing, Rule 192 and W.A. Trotting Association Act, s.10.

The Commission’s enquiries reveal that less than a dozen people are warned off each year for defaulting. A punter who has been warned off for defaulting would be unlikely ever to repay the money owing and bookmakers are therefore reluctant to take this step if there seems to be any possibility of eventually being paid.

Other forms of gambling

(i) Gaming

19. In Western Australia there is also considerable illegal gaming, i.e. either illegal because conducted in common gaming houses (see The Report of The Royal Commission into Gambling (1974), para. 6.4) or illegal in itself because the game is contrary to the Police Act 1892, s.66(6). Examples of illegal gaming are baccarat, manila, stud poker and two-up. In two-up for example there is both gaming by those actually playing and side bets which are wagers on a game. The Commission doubts whether cheques or other securities are used to settle such debts although it has not specifically enquired into the matter.

The repeal of the Gaming Act 1835 and of s.84I of the Police Act (see para. 31 below), would only make enforceable those gaming contracts which were in all other respects lawful (and thus securities given in respect of them). Gaming contracts which were illegal would still be
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 would be able to enforce them.

(ii) **Lotteries**

20. It is doubtful whether all lotteries are games (but note - *Windeyer*, p.214 seems to suggest they are) but in any case some undoubtedly are - for example, bingo. In the case of lotteries conducted by or under the approval of the Lotteries Commission there is impliedly a statutory obligation to pay the winner (see *Lotteries (Control) Act 1954*, s.6) and the law as to unenforceability of gaming wagers would not apply. However, many illegal lotteries are conducted in this State particularly by sporting clubs and non-profit associations, and include simple raffles and sweeps on the Melbourne Cup: see *The Report of The Royal Commission into Gambling*, para. 64. Such contracts would presumably be unenforceable as being contracts made in breach of a statute: see para. 19 above. Hence a cheque or other security given in respect of an illegal lottery would also be unenforceable as between the parties. If the lottery was a game then the *Gaming Act 1835* would presumably also apply.

(iii) **Totalisator betting**

21. The Totalisator Agency Board is obliged by statute to pay dividends: *Totalisator Agency Board Betting Act 1960*, s.22. A punter would apparently by inference be entitled to sue for his dividend: see s.23(3), The Board cannot accept credit bets: see *Totalisator Agency Board Betting Act* s.33. However, if, as is extremely unlikely, a credit bet was accepted, for example on a telephone account, the *Gaming Act 1835* and s.84I of the *Police Act* would still apply to any cheque or other security given in satisfaction of it: see paras. 2 to 12 above.

**THE LAW ELSEWHERE**

22. As in this State, the law elsewhere as to civil liability for gaming and wagering contracts is contained in a number of different statutes. In some jurisdictions their effect appears uncertain, though not to the extent of the situation in Western Australia.
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*...
1966, s.16), Queensland (Gaming Act 1850, s.139(3)), New South Wales (Gaming and Betting Act 1912, s.16) and Tasmania (Racing and Gaming Act 1952, s.114) such contracts are expressly made enforceable. In Victoria (Instruments Act 1958, s.14) cheques and other securities given in respect of such contracts are specifically exempted from the provision equivalent to s. 1 of the Gaming Act 1835.

26. Tasmania is unique in Australia in having a licensed casino - the Wrest Point Casino. Under s.8 of the Wrest Point Casino Licence and Development Act 1968 it is lawful to play in the Casino. The Act does not give any new causes of action save that the holder of a casino licence (but not the gambler) can be sued for money won, gaming loans or upon cheques or other instruments: see Wrest Point Casino Licence and Development Act s.8(2).

POSSIBLE ALTERNATIVE REFORMS

27. Whilst there are various alternative ways of rationalising the law, it seems highly desirable that at the very least the present complexity, fragmentation and uncertainty of the present situation should be resolved. The following paragraphs discuss the consequences of various possible amendments to the laws on gaming and wagering. The Commission has not confined itself to s.2 of the Gaming Act 1835, for it seems desirable to canvass somewhat wider issues. The Commission has come to no final views on what should be done, and invites comment.

Repeal of s.2 of the Gaming Act 1835

28. It could be argued that s.2 of the Gaming Act 1835 is difficult to justify nowadays. It was enacted at a time when gaming of any sort was discouraged by the legislature, and when even payments in cash by the loser to the winner could be recovered: see para. 14 above.

There seems no sound reason for continuing to distinguish between gaming and non gaming wagers by providing that any payment by cheque or other security can be recovered if a gaming wager is involved, but cannot be recovered if payment is for a non gaming wager. Whatever may have been the situation in earlier times, gaming or gaming wagers would not now be generally considered to be much more undesirable than other forms of wagering. For example, no one would consider a person who played bridge for money (which is gaming) or
bet on the result of a bridge competition (which is a gaming wager), was indulging in a more undesir able 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".
The Royal Commission appears to have considered that the repeal of the Acts of 1710 and 1835 would make securities enforceable in the hands of the winner. However, it seems that s.84I of the Police Act (as well as possibly the Betting Control Act 1954) would still prevent the winner enforcing a security, unless possibly in a case to which s.84F applied: see paras. 10 to 13 above.

**Repeal of the Gaming Act 1835 and s.84I of the Police Act**

31. A further alternative is to repeal s.84I of the Police Act 1892 as well as the Gaming Act 1835. Provided that the contract was not entered into in the course of illegal gaming (see para. 19 above) a winner could sue the loser directly, and enforce any security given for the debt. This alternative was not advocated by the Royal Commission into Gambling: see Report, para. 31. That Commission thought it was not in the public interest to encourage credit betting.

Any amendment to the law could perhaps draw a distinction between public, regulated, forms of gaming such as betting on horse races and private gaming such as friends playing cards for money. It is arguable that contracts entered into in the course of a lawful business such as that of a registered bookmaker should be treated differently from those entered into between private persons. In the former case it might be desirable to make contracts enforceable while in the latter they could simply be left to the party's sense of honour.

**Special provision for securities**

32. Another alternative is to repeal the Gaming Act 1835, to retain s.84I of the Police Act, but to provide that a security given for a gambling debt (whether gaming or non gaming) should be enforceable in the same way as a security for any other debt. If this were done, the law would, in effect, treat securities on the same terms as cash (except, of course, that any defence not based on the fact that a security was given for a gambling debt, e.g. infancy, would still be available). This is in effect a similar proposal to that made by the Royal Commission into Gambling: see para. 30 above.

33. The Commission considers that this alternative has much to commend it. It would avoid the present situation in regard to gaming debts, namely that enforceability of a security
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.1 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 same 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

An Act to amend the Law relating to Securities given for Considerations arising out of Gaming, Usurious and certain other Illegal Transactions.

WHEREAS by an Act passed in the sixteenth year of the reign of his late Majesty King Charles the Second, ... it was enacted, that all and singular judgments, statutes, recognisances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, which should be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for any money or
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.