THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 58

Section 2 of The Gaming Act

WORKING PAPER

FEBRUARY 1976

CONTENTS

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.l. 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 QB 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 undesirable activity or in need of greater protection from his own folly than one who bet on which year a particular horse had won the Melbourne Cup (which is a non gaming wager).

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

Repeal of the Gaming Act 1835 as a whole

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 The Western Australian Royal Commission into Gambling recommended that the whole of the *Gaming Act 1835* should be repealed (see Report, para. 31) together with the Act of 9 Anne C.14. However only the remainder of 9 Anne C.14 relating to the recovery of debts paid by cash needs to be repealed (see para. 14 above). The part of the Act dealing with securities was repealed by the *Gaming Act* of 1835: see appendix below.

If the *Gaming Act* as a whole were repealed the law as to securities given in respect of gaming and non gaming wagers would be identical: in neither case could the winner sue on the security, but in both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

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*Betting Control Act 1954* (see para. 13 above) said he regarded it as surprising that the *Gaming Act 1835* was not repealed, "at least so far as bets validly made under the [Betting Control] Act were concerned".

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

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

(para. 30)

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

(para. 31)

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

(paras. 32 to 34)

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

(i) public, regulated, forms of gambling;

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

(paras. 31 and 34)

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

(paras. 13 and 35)

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

(paras. 15 and 16)

APPENDIX

16 Car. II C.7

An Act against deceitful, disorderly, and excessive gaming.

...

III. And for the better avoiding and preventing of all excessive and immoderate playing and gaming for the time to come; (2) be it further ordained and enacted by the authority aforesaid, That if any person or persons shall....play at any of the said games, or any other pastime, game or games whatsoever (other than with and for ready money) or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, or other thing or things so played for, exceeding the sum of one hundred pounds at anyone time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party and parties who loseth or shall lose the said monies, or other thing or things so played or to be played for, above the said sum of one hundred pounds, shall not in that case be bound or compelled or compellable to pay or make good the same; (3) but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements and other acts, deeds and securities whatsoever, which shall be obtained, made, given, acknowledged or entered into for security or satisfaction of or for the same or any part thereof, shall be utterly void and of none effect: …

9 Anne C.14

An Act for the better preventing excessive and deceitful gaming.

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

Gaming Act 1835

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.