GAMING AND WAGERING CONTRACTS

Part II

3. The History of the New Zealand Legislation

Between 1841 and 1881 there were enacted a number of Provincial[1] Ordinances[2] and Acts[3] which contained provisions relating to wagering and gaming, but it was not until the latter year that the first substantial,[4] and national, legislation on the subject was passed. That Act, The Gaming and Lotteries Act, 1881, was concerned principally to enact laws relating to gaming houses,[5] betting houses[6] and lotteries,[7] its main provisions being based upon sections in the English Gaming Act, 1845 (8 and 9 Vict., c. 109) and the Betting Houses Act, 1853 (16 and 17 Vict., c. 119). And also based on the English legislation were sections 33 and 34 of the 1881 Act, the first New Zealand enactments concerned with the legal status of wagering and gaming contracts.[8]

Section 33 of the Act is a copy[9] of s. 18 of the statute 8 and 9 Vict., c. 109 (1845),[10] the provision declaring all gaming or wagering contracts void and unenforceable. The New Zealand Parliamentary Debates of the period are silent on the specific reason for the inclusion of this provision in the colonial statute.[11] But they do disclose that

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1. There were, however, no Ordinances or Acts on Wagering and Gaming of the Legislative Council of New Zealand between 1840 and 1880, and nor were any enacted by the Legislative Councils of new Ulster and New Munster.
2. For example s. 2(6) and (7) of the Vagrant Ordinance, Session XIII, No. 62 (1861) of the Otago Provincial Council and s. 4(1) of the Police Ordinance, Session X, No. 1 (1858) of the Canterbury Provincial Council.
3. For example s. 1 of the Billiard Tables Act, Session XII, No. 1 (1864) of the Nelson Provincial Council; s. 2(17) of the Rural Police Act, Session XIX, No. 11 (1866) and s. 5(44) of the Auckland Municipal Police Act, Session XIX, No. 15 (1866) of the Auckland Provincial Council.
4. There were no gaming or wagering Acts or Ordinances as such, of the Provincial Councils, such enactments as were passed were contained in licensing and vagrancy legislation.
5. Sections 3-10.
6. Sections 11-15.
7. Sections 16-18.
8. The words "gaming and wagering contracts" are used here in a general sense. As later paragraphs show s. 34 and the proviso to s. 33 were not concerned with wagering and gaming contracts *per se*.
9. Only the layout, the section number and the introductory words in the two provisions are different. The English and New Zealand provisions are identical in all material respects.
10. See Part I, (1975) 8 V.U.W.L.R. 24.
11. Unlike the English Gaming Act, 1845, the New Zealand Act of 1881 was not preceded by a Select Committee, and the records of the Joint Statutes Revision Committee of the period have not survived.

wagering and gaming was a prominent and extravagant pastime in the young colony.[12]

When New Zealand became a British Colony it inherited, it seems, some of the English passion for extravagant gambling.[13] It was not surprising, therefore, that the colonial Legislature should look to the experience of its Imperial counterpart for solutions to this problem. And, in so doing, it was natural that it should also adopt the Imperial approach of dealing with gambling in a thoroughly trenchant manner. Indeed, legislation that did anything less than that would, as Sir William Fox observed at the time, 'be so much milk and water."[14] Between 1840 and 1881 there is only one reported New Zealand case in which an action was brought to recover money lost in a betting transaction.[15] The inclusion of a provision rendering gaming and wagering contracts void and unenforceable is therefore difficult to sustain on the basis of any specific, and existing, colonial need at the time. But to the extent to which such a provision operated to discourage gaming and wagering its enactment in 1881 was justified and, in any event, in the light of the English experience and the existence of the 1845 provision declaring gaming and wagering contracts void and unenforceable, an Act of a colonial legislature which lacked such a provision could hardly be seen to be dealing with the vice of gambling in a thorough manner. For these reasons the English provision was adopted in New Zealand, as it was also in all the Australian states.[16]

Although based, in large measure, upon the English Gaming Act 1845 the colonial Act did not, like the former Act, repeal either the earlier statutes concerned with gaming,[17] or those provisions in the Acts of Charles II (1664) and the Act of Anne (1710) which had not been "altered' by the Act of 1835.[18] Thus, following the 1845 Act, the

12. See e.g., (1881) 38 N.Z.P.D. 499; 39 N.Z.P.D. 436-7.
13. Parliamentary debates of the period disclose that principal concerns were sweepstakes and consultation, (1880) 35 N.Z.P.D. 258, (1881) 38 N.Z.P.D. 281-2; Art nions and Lotteries, (1880) 35 N.Z.P.D. 275, (1881) 38 N.Z.P.D. 281; Bookmakers — they are frequently referred to in most uncomplimentary language, e.g. (1881) 38 N.Z.P.D. p. 495; Gambling by youth (1881) 38 N.Z.P.D. 496; Gambling in clubs, (1882) 41 N.Z.P.D. 405. Particularly illustrative of this English inheritance are the Racecourse Reserve Ordinance, Sess. XI, No. 7 (1859), Canterbury Provincial Council, and the Ordinance Sess. XVII, No. 3 (1869), Sess. IV, No. 7 (1857), Session X, No. 3 (1863) of the Wellington Council relating to racecourse reserves for Manawatu, Hutt Park and Wairarapa respectively. But gambling was not the prerogative of the English settlers, and this was recognised in the 1881 Act ss. 9 and 10 of which specifically outlawed the Chinese games of fan-tan and pakapoo and houses kept for the playing of such games.
14. (1881) 38 N.Z.P.D. 469. The Hon. Mr. J. Sheehan on the other hand, complained that the Gaming & Lotteries Bill was too stringent (1881) 39 N.Z.P.D. 302.
15. *Dogherty* v. *Poole* (1875) 2 N.Z. Jur. (N.S.) 14. The case was pleaded on the statute of Anne (1710).
16. See W. V. J. Windeyer, Wagers, Gaming and Lotteries in Australia (1929), Chapt. II.
17. See Part I, (1975) 8 V.U.W.L.R. 35.
18. Ibid.

potential existed for quite substantial differences in the law relating to gaming and wagering contracts between the mother country and its colony. Those differences will be examined in some detail in later paragraphs when an attempt will be made to identify the scope of New Zealand gaming and wagering contract laws. But further differences in the law of the two countries were to occur before New Zealand gaming and wagering laws were settled in a consolidating Act in 1908,[19] and the circumstances giving rise to them are important in terms of understanding and interpreting the colonial legislation.

A principal objective of s. 18 of the English Gaming Act, 1845 was to protect the Courts from the degradation of being "engaged in ludicrous inquiries"[20] into gaming and wagering disputes. But despite the sweeping terms of the provision and the liberal construction given it by the Courts, in 1882 a crack in the legislative armour appeared.

Agency Betting

In 1881 the turf commission agent named Read, at the request of a better named Anderson, placed bets on certain races run at Ascot. To the knowledge of Anderson, there was a well established usage that a turf commission agent instructed by an employer to back a horse, backed it in his own name and became alone responsible to the layer of the odds or the person with whom the bet or bets were made. And, on the settling day after the event, the agent received or paid the winnings or losses, and then rendered his own account to his principal, paying to, or receiving from him, the balance of the money won or lost. But on this occasion, and for reasons that are irrelevant here, a dispute arose between the principal and agent and, in respect to some bets that had been lost, Anderson instructed Read that he was not to pay the winners. Read, however, was a professional turf commission agent and a member of Tattersal's Subscription Room for whom a default in the payment of winners could give rise to serious consequences, even loss of livelihood. Read therefore paid the winners and then brought an action to recover an amount of £175, being losses for which Anderson refused to reimburse him.[21]

The action came before Hawkins J. in the Court of Queens Bench and the plaintiff based his case on the principal/agent relationship. In reply, the defendant pleaded firstly that recovery of the losses was barred by s. 18 of the Gaming Act, 1845 and secondly that in any event the authority to pay the winners had been revoked before Read paid them. The learned udge rejected these contentions. The 1845 Act did not, he held, render wages illegal. It simply made "the law no longer available for their enforcement".[22] And, he later went on to hold that:[23]

19. The Gaming Act 1908.
20. Per Lord Ellenborough in *Squires* v. *Whisken* (1811), 3 Camp. 140, 141.
21. *Read* v. *Anderson* (1882) 10 Q.B.D. 100.
22. Ibid., 104.
23. Ibid., 105.

> . . . although the law will not compel the loser of a bet to pay it, he may lawfully do so if he pleases; and what he may lawfully do himself he may lawfully authorise anybody else to do for him; and if by his request or authority another persons pays his lost debts, the amount so paid can be recovered from him as so much money paid to his use.

In regard to the argument that the authority to pay the winners had been revoked Hawkins J. held that in the instant case an authority to pay the bets, if lost, was coupled with the employment, and although before the bet was made the authority to pay it could be revoked, the moment the employment was fulfilled by the making of the bet the authority to pay it, if lost, became irrevocable.[24] Accordingly, he entered judgment for the plaintiff Read.

On appeal[25] the reasoning and decision of Hawkins J. was upheld, but Brett, M.R. (dissenting) took a strong policy stand against allowing the law to be used to protect the business of a turf commission agent.[26]

And there was no denying the logic of this. How could the law consistently deny recognition to gaming and wagering contracts on the one hand, and then afford protection to the business of turf commission agent on the other. The problem facing the court ,however, was that although the transaction certainly came within the spirit of s. 18 of the 1845 Act it did not come within its express terms. In the later case[27] Lord Coleridge C.J. said that at the time *Read* v. *Anderson* was decided he entirely agreed with the dissent of the Master of the Rolls.

The business of Turf Commission Agent was clothed in legitimacy by *Read* v. *Anderson* and this was reinforced in 1884 when *Bridger* v. *Savage*[28] came before the same Court. In that case the agent had placed bets as instructed by his principal, and, although paid by the losers, had refused to pay the principal the winnings he held on his behalf. The principal sued, and the agent pleaded that the action was barred and the contract avoided by the Act of 1845. This case was closer to the terms of s. 18 than *Read* v. *Anderson* had been in that the principal was in fact bringing his action to recover 'a sum of money . . . alleged to be won upon a wager.'[29] However, the case raised a fundamental principle of the law of agency and the Court felt quite unable to allow the agent to benefit at his principal's expense. Bowen L.J. said:[30]

> Now with respect to the principle involved in this case, it is to be observed that the original contract of betting is not an illegal one, but only one which is void. If the person who has betted pays his bet, he does nothing wrong; he only

24. Ibid., 109.
25. *Read* v. *Anderson* (1884) 13 Q.B.D. 779.
26. Ibid., 781-2.
27. *Tatam* v. *Reeve* [1893] 1 Q.B. 44, 46.
28. (1885) 15 Q.B.D. 363.
29. s. 18 of the Gaming Act, 1845.
30. Ibid., 367-8.

> waives a benefit which the statute has given to him, and confers a good title to the money on the person to whom he pays it. Therefore when the bet is paid the transaction is completed, and when it is paid to an agent it cannot be contended that it is not a good payment for his principal. If not, how monstrous it would be that the agent who has received money which belongs to his principal, and which he received for his principal, and only on that account, should be allowed to say that the payment was bad and void.

In *Bridger* v. *Savage* the principal succeeded. But that case and *Read* v. *Anderson* did not meet with the unanimous judicial approval.[31] But in spite of judicial concern and dissatisfaction with principle established by *Read* v. *Anderson* it was not until 1892 that the Imperial legislature intervened. In that year it was enacted that:

> Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eighth and ninth Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.[32]

This enactment came under judicial scrutiny in the year it was passed in *Tatam* v. *Reeve*.[33] In that case, in response to a letter from the defendant, the plaintiff settled his, the defendant's, debts with four persons in the amount of £148. The defendant's letter did not disclose that the money was owed in respect of bets on horse races, but the court was of the view that in regard to that, "the plaintiff was not an ignorant person in the transaction."[34] The plaintiff sued to recover the amount paid and argued that the Act of 1892 did not touch the transaction between he and the defendant. That Act, he argued, meant to strike at transactions in which the person who paid money was a party, as agent, to the contract of gaming; and he, the plaintiff did not pay the money "under or in respect of" any contract rendered void by the 1845 Act. The court, however, rejected this contention; holding that the money was paid "in respect of" betting contracts.[35]

Although the Court of Appeal in *Tatam* v. *Reeve*[36] and subsequent

31. See e.g. *Cohen* v. *Kittle* (1889), 22 Q.B.D. 680, 683-4.
32. 55 Vict., c. 9, s. 1 (1892), the Gaming Act, 1892.
33. See n. 27, decided in November 1892.
34. Per Lord Coleridge, C.J., at p. 47.
35. But see *Hyams* v. *Stuart King* [1908] 2 K.B. 696, 715; *McDonald* v. *Green* [1951] 1 K.B. 594, 605; where it was said there must be knowledge on the part of the person paying that he is paying a betting debt. See also *O'Sullivan* v. *Thomas* [1895] 1 Q.B. 698, 700; *Burge v. Ashley & Smith Ltd.* [1900] 1 Q.B. 744, 750; *In re O'Shea; Ex parte Lancaster* [1911] 2 K.B. 981.
36. Note 27.

cases adopted a construction of the 1892 Act that was very much in sympathy with the legislative intent its limits were recognised in *De Mattos* v. *Benjamin*[37] in 1894. In that case the agent had laid bets on his principal's behalf and had been paid by the losing backers. However, he failed to deliver the winnings to his principal and the latter brought an action to recover them as money received, and held by the agent on his behalf. The agent pleaded that the principal's claim was caught by the Act of 1892 but Lord Coleridge C.J. rejected this contention saying, inter alia:[38]

> The Gaming Act 1892 enacts that which is reasonable and right. It makes illegal[39] all parts of the transaction included in its scope, including the act of a person who, as commission agent, effects an illegal contract . . . . But it does not enable a person who has received money on behalf of another to retain it for his own use. It does not go on to enact that if B receive money from A to pay over to C, B would be entitled to put it into his own pocket.

The purpose of the 1892 Act, stated in its simplest form was, therefore, to deprive contracts of agency and loan for gaming and wagering of such legal effect as would discourage the agents and lenders themselves, and *Bridger* v. *Savage* remained undisturbed. And this legislation, like the Acts of 1845 and 1853, also provided the basis for similar reform in New Zealand in the form of s. 2 of the Gaming Act, 1894.

The Colonial Act of 1894

The Explanatory Note to the Gaming Bill 1894 (N.Z.) states that the decision in *Read* v. *Anderson:*

> . . . and that in *Bridger* v. *Savage,* led to fresh developments in betting business of a most objectionable form, and the English Act was passed in 1892 for the purposes of putting a stop to it.[40] The New Zealand Courts have of late years seen many such cases, and it is a scandal that the Courts should be used for such purposes.

In the context of this explanation, s. 2 of the Gaming Bill, after adopting the language used in the English statute of 1892, then added the words:

> . . . and no action shall be brought or maintained to recover . . . any sum of money won, lost, or staked in any betting transaction whatever.

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37. (1894) 63 L.J. (Q.B.) 248.
38. Ibid., 249.
39. This is an error. The Act did not make the transactions illegal; merely unenforceable and void.
40. As *De Mattos* v. *Benjamin* was not decided until 1894 the New Zealand draftsman of the Bill may well have thought the 1892 Act (U.K.), prevented the *Bridger* v. *Savage* class of action.

The reason for the addition of these words lies, in part, in the expressed intention of the legislature in the Explanatory Note to meet the situation occurring in *Bridger* v. *Savage*[41] as well as that in *Read* v. *Anderson*. But why should the New Zealand legislature's concern with wagering and gaming predominate to the extent that it was prepared to allow a dishonest agent to keep his principal's winnings? The object, no doubt, was to discourage the public from resorting to such agencies, but in order to understand the legislative concern it is necessary to go back to the Act of 1881 and examine developments from that time.

Prior to the passing of the 1881 Act there was much debate in New Zealand as to whether the totalisator should be permitted to operate in the country . There was, in fact, strongly voiced opposition to it, principally because, as Sir William Fox said,[42] in the debates on the 1881 Bill:

> . . . It seemed a great mistake, when they were attempting to discourage the vice of gambling and were striking at the very root and foundation of those temptations which induced it, that they should leave a little sapling like this totalisator standing, which someday would probably be found to have grown into a large tree under the shadow of which vice flourished . . . You would never exterminate the race of cats by encouraging the breeding of little kittens.

However the totalisator survived but throughout the last two decades of the 19th century the business or occupation of bookmakers was under continual attack. Their presence in the community was viewed in New Zealand as a grave social evil[43] and in 1881 their activities were considerably curtailed by the Act of that year which created an offence, inter alia, of betting in any place in a way of business.[44] Unfortunately, however, although the totalisator was intended as an instrument for the suppression of bookmakers, it

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41. Note 30. This may be stating the contention at too high a level, but the inferance arising from the Explanatory Note is a strong one; i.e. that the 1894 Bill was designed to prevent actions of the *Bridger* v. *Savage* class.
42. (1881) 38 N.Z.P.D., 496. See (1880) 35 N.Z.P.D. 276 where an amendment to outlaw the totalisator was lost. Also (1881) 39 N.Z.P.D. 437; (1882) 41 N.Z.P.D. 402; ibid., 405; (1882) 43 N.Z.P.D. 117; for later complaints.
43. The general attitude to them at the time is very much deflected in the comment of the Hon. E. Wakefield that bookmakers were " . . . a lot of men who to all appearance had no right to be outside the walls of a goal." (1881) 38 N.Z.P.D. 498. And see Hon. R. J. Seddon (1894) 83 N.Z.P.D. 291.
44. The 1881 Act contained extensive provisions against betting houses and gaming houses, but the principal sections affecting bookmakers were s. 18 and s. 11. See, e.g. *Porter* v. *O'Connor* (1887) 5 N.Z.L.R. 257; *In re Selig & Bird* (1891) 9 N.Z.L.R. 315; *Barnett* v. *Henderson* (1892) 11 N.Z.L.R. 317; *Hyde* v. *O'Connor* (1893) 11 N.Z.L.R. 723; *Martin* v. *Campbell* (1892) 13 N.Z.L.R. 42; and *Paterson* v. *Campbell* (1894) 13 N.Z.L.R. 529.

subsequently proved to be the means of their survival.[45] The 1881 Act did not declare the business or occupation of a bookmaker unlawful[46] and, although by s. 46 of that Act racing clubs were permitted to operate totalisators at race meetings under licence, betting on the totalisator could only be done "by or through some person present on the spot immediately before the race is run."[47] At a time when only limited travel facilities were available this limitation on the totalisator gave rise to a public demand for off-course betting facilities — which the more enterprising bookmakers eagerly provided. Thus, as a consequence of the licensing of totalisators on race courses, private off-course betting agencies, and totalisator odds betting facilities were soon available throughout the country.[48] And from all accounts the business was quite extensive.[49] The difficulty for the legislature was aggravated by the fact that an agency business could provide a very effective cover for a bookmaking operation.[50]

The emergence of bookmakers in their new style as "totalisator agencies" was a principal (and perhaps exaggerated) concern when the 1894 Act was passed. It was this concern, and also the need to prevent bookmakers' activities from eating into the profits of the racing clubs,[51] that weakened the colonial legislature's respect for principles in the law of agency when it enacted s. 2 of the 1894 Act. That Act also took direct action against such activities, creating imprisonable offences in relation to betting totalisator odds and being employed as a totalisator agent.[52] But s. 2 did not confine itself to removing completely the element of legal obligation inherent in the agency business itself. It also excised those obligations from the relationship of stakeholder and depositor. for by the additional words actions to recover monies staked, as well as that won or lost, were prohibited.

And whilst the extension of s. 2 of the 1894 Act to prevent recovery in the *Bridger* v. *Savage* and *De Mattos* v. *Benjamin* situations raised not a voice in protest, its extension to avoid recovery of deposits from stakeholders did.[53] This change intended by the 1894 Act to the law of stakeholding was substantial. And once again, in order to understand the nature of the change and the reason for it, the previous law must be considered.

45. A not altogether unforeseen occurrence. In 1881 the Hon. R. Hursthouse said it was " . . . a clever mechanical invention to enable lazy bookmakers to make a living out of the unwary public." (1881) 38 N.Z.P.D. 497.
46. The business or occupation of a bookmaker was not declared unlawful until 1920, Gaming Amendment Act 1920, s. 2.
47. Described by Richmond, J. in *Paterson* v. *Campbell*, n. 44, 531.
48. The totalisator agency business was not illegal prior to the 1894 Act. *In re Selig & Bird, Paterson* v. *Campbell*, n. 44; betting at totalisator odds was not illegal per se, per Williams, J. in *Barnett* v. *Henderson*, n. 44, 318, but it was if done systematically in a way of business, *Porter* v. *O'Connor; Paterson* v. *Campbell; In re Selig & Bird*, n. 44.
49. See (1894) 83 N.Z.P.D., 288, 300.
50. In both *In re Selig & Bird* and *Paterson* v. *Campbell*, n. 44, there is more than a hint of this.
51. (1894) 83 N.Z.P.D. 286, 288-9.
52. Section 4 and 5 respectively.
53. See the complaint of the Hon. E. C. J. Stevens (1894) 83 N.Z.P.D., 177

The Law of Stakeholding

Prior to the Gaming Act, 1945 (U.K.) there was some uncertainty as to whether a depositor could demand the return of his stake from the stakeholder. In *Emery* v. *Richards*[54] the Court of Exchequer saw the stakeholder as a trustee for the parties to the wager and held that a deposit on a wager of less than £10 on the event of a foot race could not be demanded back from the stakeholder by the depositor, but must abide the event. In *Eltham* v. *Kingsman*,[55] on the other hand, the Court of Kings Bench was of the contrary view and saw the stakeholder simply as the depostor's agent. The same Court confirmed this view of the matter ten years later in *Hastelow* v. *Jackson*.[56] But s. 18 of the Act of 1845 to some extent resolved the conflict by avoiding all gaming and wagering contracts, and that provision specifically provided that no action could be brought:

> . . . for recovering any sum of money or valuable thing . . . which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.

On a literal interpretation the provision clearly prevented actions to recover deposits from stakeholders. But in *Varney* v. *Hickman*[57] it was held that that part of s. 18 relating to deposits applied only to the non-recovery by the winner of the stakes deposited by the other party, and it did not affect the right of a depositor to recover back his deposit if demanded from the stakeholder before he paid it over to the winner of the event. *Varney* v. *Hickman* was followed in *Hampden* v. *Walsh*.[58] In that case Cockburn C.J. explained[59] the nature of the relationship existing between a stakeholder, the winner of the event, and the depositor in the following terms:

> We cannot concur in what is said in Chitty on Contracts, 8th ed., p. 574, that 'a stakeholder is the agent of both parties or rather their trustee'. It may be true that he is the trustee of both parties in a certain sense, so that, if the event comes off and the authority to pay over the money by the depositor be not revoked, he may be bound to pay it over. But primarily he is the agent of the depositor, and can deal with the money deposited so long only as his authority subsists.

Diggle v. *Higgs*,[60] a decision of the Court of Appeal in 1877, and *Trimble* v. *Hill*,[61] a decision of the Judicial Committee on appeal from the Supreme Court, Sydney, in 1879, settled any doubts that might have existed after *Varney* v. *Hickman* and *Hampden* v. *Walsh*. A

54. (1945) 14 M. & W. 728.
55. (1818) 1 B. & Old. 683.
56. (1828) 8 B. & C. 221.
57. (1847) 5 C.B. 271.
58. (1876) 1 Q.B.D. 189.
59. Ibid., 194-5.
60. (1877) 2 Ex. D. 422.
61. (1879) 5 App. Cas. 342.

stakeholder was not a trustee of the parties to a wager; he was, and remained at all times, an agent of his depositor. His right to pay the winner was, therefore, dependent upon the subsistence of his principal's authority to pay. And if revoked before payment, a payment in defiance of the revocation of that authority would render him liable to the principal for the amount of the deposit.[62] But once the money was paid a subsequent revocation of the authority to pay was ineffectual. And in any case, s. 18 of the 1845 Act prevented an action by a winner to acquire the stakes as winnings — even if he was a depositor.[63] If a depositor, he could claim to recover his own stake only as a depositor, not as a winner.[64]

In England the principles of agency have survived the Gaming Acts. In New Zealand the position is confused. On the one hand, as later paragraphs will show, the legislature has subordinated the law of agency to its concern about the activities of bookmakers. On the other hand, as in England, the Courts have shown some reluctance to accept that it could have intended to do so. The issue still awaits an authoritative resolution. But there are two further matters which support the view that the legislature did not intend to allow the established principles of agency to operate between principal and betting agent in New Zealand. A drafting error in the 1881 Act, and an erroneous view of totalisator proprietors as mere stakeholders of the totalisator investor's wagers also contributed substantially to this change. The circumstances of these two factors were as follows.

As previously mentioned the principal provisions of the Colonial Act of 1881 were extracted from the Imperial Acts of 1845 and 1853 (The Betting Houses Act). Section 33 of the 1881 Act, which avoided all gaming and wagering contracts, was copied from s. 18 of the 1845 Act. But unfortunately, and I suggest, without realising the full implications of doing so, the draftsman of the New Zealand Act then copied s. 34 (of the 1881 Act) from s. 6 of the English Betting Houses Act, 1853. That provision read:

> 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 Betting Houses Act, 1853, s. 4, created offences of, inter alia, keeping premises, etc., for betting, that is for receiving money as a deposit on a bet, or for the consideration of an undertaking to pay any money on any event or contingency relating to horse races, fights, games, sports and exercises.[65] The sections creating these, and related

62. *Hampden* v. *Walsh* was an action recover a £500 deposit paid over in defiance of such a revocation, in *Trimble* v. *Hill* the action was brought to recover £200 on the same grounds.
63. See e.g. *Martin* v. *Hewson* (1855), 10 Ex. 737; cf. *Savage* v. *Madder* (1867), 36 L.J. (Ex) 178.
64. Per Cockburn, C. J. in *Hampden* v. *Walsh*, n. 58, 196-7.
65. By s. 1.

offences were, with inconsequential modifications, copied into the Colonial Act of 1881.[66] But s. 6 of the Betting Houses Act, 1853, in the context of that Act, was intended to do nothing more than recognise the distinction between being a party to a betting transaction and being a mere stakeholder — the former being the concern of the Act, the latter not. Thus, s. 6 clarified the stakeholder's position by declaring that he did not, as such, come within the provisions of the 1853 Act.

In all probability, the draftsman of the 1881 Act intended that s. 34 of that Act should have the same limited effect as s. 6 of the Betting Houses Act. But unfortunately it did not because the introductory words to the provision — "Nothing in this Act . . . " — also encompassed the avoiding provision, s. 33. It will be recalled that in England the equivalent of s. 33 of the New Zealand Act of 1881 was s. 18 of the Gaming Act 1845. The Betting Houses Act, 1853 did not contain such a provision. Thus, by inserting s. 6 of the Betting Houses Act, 1853 into the 1881 Act[67] the New Zealand draftsman effectively deprived the *Varney* v. *Hickman* line of authority of the essential basis for its application in New Zealand; — that is, s. 33, the avoiding provision. As a consequence, on a literal construction of these provisions, the conflict between *Emery* v. *Richards* which favoured the trusteeship element in stakeholder/depositor relations, and *Eltham* v. *Kingsman* which favoured the agency approach, survived in the Colony.

The only reported case in which the New Zealand Courts were called upon to decide the effect of s. 34 on s. 33 of the Act of 1881 was *Dark* v. *Island Bay Park Racing Company*.[68] In that case, which will be canvassed in more detail in later paragraphs, the issue was whether a depositor was entitled to recover his winnings from the stakeholder.[69] Counsel for the depositor argued that the transaction did not come within s. 33 of the Act and under s. 34 the winner was entitled to recover.[70] The Court was, therefore, faced squarely with

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66. s. 1 of the Betting Houses Act, 1853 became s. 11 of the 1881 Act, and s. 4 of the former Act became s. 14 of the latter. The provisions are stated in the text in general terms only. They were quite comprehensive provisions in the relevant Acts which also created related offences.
67. Section 6 of the Betting Houses Act, 1853 was also adopted by the Australian States. But interestingly enough New South Wales (s. 48 (3), Gaming and Betting Act, 1912); Victoria (s. 101 Police Offences Act, 1915); and Tasmania (s. 11, Suppression of Public Betting and Gaming Act, 1896) confined its operation to the provisions concerned with the suppression of betting houses. South Australia (s. 68 Lottery and Gaming Act, 1917) and Western Australia (s. 9 Police Act Amendment Act, 1893 (No. 1)) made the same mistake as New Zealand.
68. (1886) 4 N.Z.L.R. 301.
69. It will be the writer's contention in later paragraphs that the finding that the defendant was a stakeholder of money deposited pursuant to a wagering contract was erroneous.
70. He also argued that the defendant was an agent, and not a stakeholder. But the argument is, perhaps, only briefly reported. The defendant was not called upon to reply. N. 68, 301-2.)

the question as to the relationship between ss. 33 and 34. But Richmond J. side-stepped the issue, saying:[71]

> The present action . . . is certainly nothing less than an action to enforce an agreement made between the depositors — it is to carry the agreement into effect by an action against the stakeholder. Therefore the case, in my opinion, falls apart from the conditions at the end of the Act, and falls within the enactment of s. 33, which says that all wagering agreements are null and void . . . they cannot be enforced in a Court of Justice.

It is important, however, to recognise that this was an action to recover winnings, and not simply an action to recover Dark's own deposit from the stakeholder. If the action had been of the latter kind the decision may well have gone the other way.[72] But regardless of whether it was an action to recover winnings, or a successful action to recover a deposit, in either case such a conclusion flew in the face of the legislation. Richmond J. resolved the difficulty of applying s. 34 by giving it no application at all; it was, in effect, a judicial revocation of a legislative enactment,[73] and one which the legislature itself ratified when it repealed s. 34 in 1894.[74] But recognition, perhaps, of the drafting error in inserting s. 34 in the 1881 Act in the first place, was not the only reason for the repeal of the section.

In the Parliamentary debates on a proposed amendment in relation to sweepstakes and advertising in 1887 there is comment by The Hon. G. McLean in the Legislative Council, that:[75]

> . . . The Judges of the Supreme Court and the Resident Magistrate have decided that if a person investing his money in the totalisator demands the return of his money he can get it back; and I presume that the Council will not object to pass a measure remedying this flaw in the existing legislation . . .

The only case on record about that time was *Dark* v. *Island Bay Park Racing Company* which was decided by Richmond J. in the Wellington Supreme Court in March, 1886. And it is submitted that although it was not that case, that the Hon. W. Montgomery referred to in the above quotation, the case does illustrate the point. It raised the

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71. Iibid., 302.
72. It was a policy decision which Richmond, J. justified with the words " . . . No doubt the object of the Legislature in providing that these matters should not be the subject of an action was to save the time and dignity of the Court, for dignity could scarcely be preserved in the investigation of the absurd disputes arising out of betting transactions." Idem. But it was decided after *Read* v. *Anderson* and *Bridger* v. *Savage* which must have swung the balance in favour of the depositor.
73. It may well be, although the report is silent on the point, that Richmond, J. was not unaware of the draftsman's error.
74. By s. 7, The Gaming Act, 1894.
75. (1887) 58 N.Z.P.D. 258. He was referring to a case in Dunedin. But this is the only reference the writer can find to it.

issue of the status of the racing club as licensee of the totalisator. Richmond J. said:[76]

> It appears to me to be beyond all controversy that the present action is brought to enforce a wagering contract. The totalisator is described in section 8 of the Act as an instrument of gaming and wagering, and as such the use of it is generally prohibited and subjected to penalty and forfeiture . . . It is quite plain that the instrument is treated by the Act as an instrument for gaming and wagering, and I do not see any difficulty in saying who were the layers of the wagers affected by the instruments. It is perfectly plain, I think, that the depositor in the totalisator backs the horse he selects, against the field. That is the wager, and it is laid with the backers of the other horses — whether the layers of the wager are known to one another or not signifies nothing — and those who are working the machine are the stakeholders.

Now having regard to the finding in the case that s. 33 of the Act applied to a claim for winnings against a stakeholder, the view that the operators of the totalisator were stakeholders of the betters' deposits could give rise to quite inconvenient consequences, especially if the action against the stakeholder was brought to recover a better's deposit. This is because the odds are not fixed and an investor on the totalisator knows that the dividend paid is determined by the total amount invested on the race, the horses upon which it is invested, the winner/s of the race and the amount the club may deduct as a percentage of the total investment for operating the machine. But if, as Richmond J. suggests in *Dark* v. *Island Bay Park Racing Company* investors on a totalisator are wagering with each other and the proprietors of the totalisator is merely the stakeholder then, on the authority of the *Hampden* v. *Walsh, Diggle* v. *Higgs,* and *Trimble* v. *Hill* line of authority a depositor could demand, and indeed sue for, a return of his deposit. Thus, the odds on a totalisator dividend are subject to the further contingency of the integrity of an investor's fellow investors.

It is the writer's contention, however, that Richmond J. in *Dark* v. *Island Bay Park Racing Company* misunderstood the legal nature of both totalisator investments and wagering contracts. In this report it is suggested that the English authorities are clearly against Richmond J's. reasoning.

In a carefully considered statement Hawkins J. defined a wagering contract in *Carlill* v. *Carbolic Smoke Ball Company*[77] as, inter alia:

> . . . a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon

76. Note 68, 302.
77. [1892] 2 Q.B. 484, 490. Although decided subsequent to *Dark's* case, this decision was based on a consideration of cases decided before 1886.

> the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake.

This definition was adopted with approval by the Court of Appeal in *Ellesmere* v. *Wallace*.[78] And, Lord Denning M.R. in *Tote Investors Ltd.* v. *Smoker*[79] said he would not like to treat it as a rigid definition:

> . . . but it does bring out this feature: it is essential that each party may either win or lose. If one party can neither win nor lose, then it is not 'gaming' or 'wagering' . . .

The same issue was before the House of Lords in *Attorney-General* v. *Luncheon and Sports Club, Ltd.*[80] In that case "gambling transactions" were carried on through the instrumentality of the totalistor. The issue in the case was whether investments on the club's totalistors attracted betting duty in respect of wagers on horse races, under s. 15 of the Finance Act, 1926. The House of Lords held that they did not because the investments did not constitute wagers or bets between the investors and the club. Lord Buckmaster said, inter alia:[81]

> A bet is something staked to be lost or won on the result of a doubtful issue, but no doubtful issue affects the respondents — they neither win nor lose on any such chance.

And Lord Blanesburgh said,[82] inter alia:

> I am doubtful indeed whether they [the rules affecting betting on the club's totalisator] connote the making of any bets at all either between pool members individually or between losing pool members on the one hand and winning pool members on the other.

The conclusion of the English cases is that betting on the totalisator, although "betting of a sort"[83] does not constitute betting with the proprietors of the machine.[84] And, although there is no conclusive authority that such investments do not constitute betting between the investors inter se, there is judicial opinion to that effect.[85] But importantly, for the English Courts, investments on the totalisator, although bets, are not wagering contracts in terms of the avoiding provision.[86]

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78. [1929] 2 Ch. 1, 24, 33, 48-9.
79. [1968] 1 Q.B. 509, 516.
80. [1929] A.C. 400.
81. Ibid., 405.
82. Ibid., 407.
83. Per Humphreys J. in *Everett* v. *Shand* [1931] 2 K.B. 522, 533.
84. The Scottish view is to the contrary; see *Strathern* v. *Albion Greyhounds* [1933] S.C. (J.) 91.
85. Lord Blanesburgh in *Attorney-General* v. *Luncheon Sports Club*, n. 80, at 407. The head note to the report inaccurately states that "bets were made inter se." But this apparently was based on a statement of Lord Buckmaster at p. 405 that the contracts were entered into between the investors through the club.
86. Lords Denning, M.R. and Wilberforce in *Tote Investors Ltd.* v. *Smoker* were both careful to confine their conclusions to wagering contracts in the context of the avoiding provision.

Richmond J. decided *Dark* v. *Island Bay Park Racing Company* without resort to authority and without argument from the respondent.[87] And, no attempt was made by the learned Judge to analyse the ingredients of a wagering contract and relate them to totalisator betting. The decision in the case was simply a product of the Judge's revulsion against totalisator betting. But in spite of these weaknesses in the judgment and of the qualified legislative approval of totalisator betting in the 1881 Act,[88] *Dark's* case has consistently enjoyed judicial approval even to the present day.[89] For later courts, however, the task of following *Dark* v. *Island Bay Park Racing Company* was made easier. For, what Richmond J. left unsaid in that case was revealed for them ten years later in the "articulated major premiss" of Denniston J. in *Pollock* v. *Saunders*. He said:[90]

> The Gaming and Lotteries Act is intituled 'An Act for the Supression of the Gaming and Betting-houses, and for the more effectual Abolition of Lotteries.' In it it is incidentally provided that those using the totalisator under the very limited and restricted conditions imposed shall not be liable to the penalties and forfeitures enacted in respect of all other public wagering and gambling. The totalisator, though not actually banned, is certaintly not blessed. It remains what it was before the Act—an instrument for betting and gambling—practices tolerated by the law but not recognised by its Courts. It seems extravagant to invoke in favour of this half-contemptuous concession a restriction on private rights established for the protection of the laudable and necessary pursuits of trade and commerce.

In that case the court was responding to an argument by the plaintiff, a professional bookmaker, that the use of a licensed totalisator on a racing club's ground during a race meeting gave the public a right to enter, such that the club's private property ceased to be *juris privati*.[91] This contention was, of course, rejected.

The readiness[92] with which this statement of Denniston J. has been accepted in later cases discloses a reluctance by the New Zealand

87. The respondent was not called upon to reply, and the appellant did not argue it was not possible to construct a wagering contract from totalisator transactions. He merely asserted that the persons working the totalisator were agents, although not stakeholders. This tends to suggest a concession on the appellant's part that the investors were betting inter se.
88. Qualified, because only licensed totalisators were lawful.
89. See e.g. *Police* v. *Pools (N.Z.) Ltd.* [1962] N.Z.L.R. 854, 858; *Police* v. *Steele* [1964] N.Z.L.R. 492, 494; *Racing Enter-Prizes Ltd* v. *Police* [1970] N.Z.L.R. 307, 311, where *Dark* v. *Island Bay Park Racing Company* is expressly approved.
90. (1897) 15 N.Z.L.R. 581, 589-90.
91. The argument was based on the principle laid down by Hale in his treatise De Portibus Maris, Hargrave's Law Tracts, 77.
92. For example MacGregor J. in *Goggin* v. *Young* [1928] N.Z.L.R. 753; Haslam J. in *In re Richardson; Official Assignee* v. *T.A.B.* [1959] N.Z.L.R. 481. But cf. Hutchison J., in *Official Assignee* v. *T.A.B.* [1960] N.Z.L.R. 1064,1087.

courts to accept totalisator betting as conduct worthy of legal recognition. In *Official Assignee* v. *T.A.B.*[93] the Court of Appeal upheld the decision in *Dark* v. *Island Bay Park Racing Company* but the two Judges who alluded to the nature of the contract involved came to their conclusions on different grounds. Greeson P. said:[94]

> I think the current of authority requires one to regard betting on the totalisator as a multipartite agreement between numerous parties divided into groups who bet to win or lose according as the uncertain event does or does not happen.

Cleary J., however, looked to provisions in the Gaming Act which identified the totalisator as an "instrument for gaming or wagering",[95] and as "the instrument for wagering or betting known by that name."[96] The Act, he observed, spoke of "purchasing any ticket or making any bet in connection with the working of a totalisator"[97] and consequently, he held:[98]

> . . . whether the betting be with the totalisator proprietor or by the investors inter se, the claim . . . is to recover money lost in a betting transaction.

With *Official Assignee* v. *T.A.B.* the opportunity to reconsider *Dark's* case was lost, and in 1973 Cooke J. in *Economou* v. *MacDonald and Others*[99] was able to conclude:

> . . . that the concept of mutual betting must now be regarded as authoritatively settled in New Zealand.

But the complication that arose in *Dark's* case has remained, i.e. does a totalisator investor have the capacity to repudiate the totalisator proprieor's authority to pay his deposit to the winner and demand its return. In *Official Assignee* v. *T.A.B.*, Cleary J., the only Judge to refer to the question said:

> "It seems to me to be plain . . . that if the totalisator can be called a stakeholder at all it is a stakeholder of an unusual kind, because it cannot be in the position of an ordinary stakeholder whose authority to pay over the stakes may be countermanded."[100]

But in *Harrison & Others* v. *Greymouth Trotting Club (Inc.) & Others*[101] Casey J. was of the contrary view.

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93. Ibid.
94. Ibid., 1075.
95. The Gaming Act 1908, s. 8 (2).
96. Ibid., s. 50 (8).
97. Ibid., s. 53.
98. [1960] N.Z.L.R. 1064, 1082. In this respect the English position is no different. See e.g. Lord Wilberforce in *Tote Investors Ltd.* v. *Smoker*, n. 79 at 518 — the same considerations did not move him towards the view that there was therefore a wagering contract.
99. Unreported, Supreme Court, Hamilton, 13 August 1973. The claim related to a jackpot of $831,564.70.
100. Note 92 at 1083.
101. Unreported, Supreme Court Greymouth, 28 May 1975.

Ironically, however, this dilemma remains only because the courts have failed to recognise that it had its origins in *Dark's* case and was resolved by the legislature in the 1894 Act. There was open to the legislature then two possible courses of action. Either it could legislate in favour of the view that an investment on the totalisator did not amount to a wagering contract.[102] Or, it could simply repudiate any right that then existed to recover deposits from a stakeholder. And, consistently with the expressions of real concern during Parliamentary debates at the time[103] about the extent of totalisator betting, the latter course was adopted; s. 2 of the 1894 Act specifically providing, inter alia, that no action could be brought to recover any sum of money

> 'won, lost, *or*[104] staked in any betting transaction whatever."

Before leaving this section, a further matter in the history of the New Zealand legislation requires some consideration. When s. 18 of the Imperial Act of 1845 was enacted whereby gaming and wagering contracts were avoided and rendered unenforceable, that provision was followed by the words:

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

This proviso, with some inconsequential alteration, was carried into s. 33 of the Colonial Act of 1881, and its purpose was intended to protect from the avoiding section arrangements whereby the winner of a lawful game, etc., was to benefit from contributions or subscriptions deposited or promised for that purpose. In relation to horse-racing this policy was important, because improvement of breeds and indeed participation in the sport required a guarantee of reasonable stakes. And, to that end, contributions or plates were frequently offered by the Crown and racing clubs.[105] But although the policy, and indeed the express terms of the proviso are clear the Courts soon found great difficulty in applying it.

The first case in which the proviso came under judicial scrutiny

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102. That is, follow the English approach.
103. Section 6 of the 1894 Act is a reflection of this concern. It provides, inter alia, that totalisator licenses were to be reduced by $\frac{2}{3}$ of the number issued in the 12 month period 1st August 1892 to 31 July 1893.
104. Emphasis added.
105. The early history is outlined by James Rice, History of the British Turf, Vol. 1 (1897). In a Report, Select Committee on Gaming, 20 May 1844, p. VIII the importance of the practice is recognised as worthy of protection. It records, "Your Committee would be sorry to appear to discourage Horse-racing; that sport has long been a favourite one of all classes of the British Nation both at home and abroad, and it has been systematically encouraged by the Government by means of numerous plates annually given by The Crown to be run for, with a view to the important object of keeping up, by the competition of private individuals, and without any other charge to the Government, an improved breed of horses throughout the country."

was that of *Batty* v. *Marriott*.[106] In that case two men each deposited £10 with a stakeholder to abide the event of a footrace between them. In substance the arrangement between the two amounted to a wager as to who could run the faster and the element of 'contribution or subscription' in terms of the proviso was, to say the least, tenuous. However, whilst it was recognised that 'if two persons only run their horses one against the other for a sum of money that is clearly a wager',[107] the Court considered that the arrangement in the case was not within the enacting section and was saved by the proviso. In the subsequent case of *Diggle* v. *Higgs*[108] the case of *Batty* v. *Marriott* was over-ruled, the Court of Appeal holding, in the words of Cockburn C.J. that[109] the:

> . . . proviso was intended to meet the case of bona fide contributions to a prize to be given to the winner in some lawful competition, but not to money deposited by way of wagers.

Having regard to the object of the avoiding provision *Diggle* v. *Higgs* made sense. The promotion of horse-racing and lawful sports and games is one thing, giving legal recognition to wagers on those games quite another. But, as previously mentioned, when the 1881 Act was passed s. 6 of the Betting Houses Act, 1853 was enacted as s. 34 of the former Act. The literal effect of this, it has been contended, was to prevent the application of the avoiding provision to stakeholding. The conjunction of s. 34 with the proviso to s. 33 was, in essence, to increase the scope of the principle expressed in the proviso. The former provision literally legislated in favour of the principle in *Batty* v. *Marriott* thus throwing doubt on the applicability of *Diggle* v. *Higgs* in the Colony. Section 34 was repealed, it is submitted, partly in recognition of that error. But the New Zealand legislature went further. The proviso to s. 33 had, in England, caused no end of difficulty[110] and perhaps, for that reason, it also was repealed in New Zealand by s. 7 of the Gaming Act, 1894. And, to remove any doubts as to what was intended it was further provided that:

> " . . . no action shall be brought or maintained in any Court of law for recovering any sum of money or valuable thing alleged to be won by way of stakes or prize on any event or contingency relating to any horse-race, or other race, game, sport, or exercise."[111]

The provisions of the 1881 and 1894 Acts were subsequently brought together in a consolidating Act, the Gaming Act 1908. That Act is in force today. The transposition of the sections is as follows:

106. (1848) 5 C.B. 818.
107. Ibid., 829 per Wilde C. J.
108. Note 60.
109. Ibid., 428.
110. See Street, Law of Gaming, pp. 542-544. *Batty* v. *Marriott*, he observes, was "either accepted or distinguished for twenty-nine years" before it was over-ruled by *Diggle* v. *Higgs* in 1877.
111. By s. 7 Gaming Act, 1894.

Gaming and Lotteries Act 1881	Gaming Act 1908
s. 15	s. 38
s. 33	s. 69
Gaming Act 1894	
s. 2	s. 70
s. 7	s. 71

4. The Scope of the Law of Gaming and Wagering Contracts in New Zealand

The performance of the New Zealand legislature on the law of gaming and wagering contracts has been far from satisfactory. In the 1881 Act we find legislation characterised by uncertainty and error whilst the 1894 Act created more difficulties than it solved — difficulties which remain with us today by virtue of the consolidating statute, the Gaming Act 1908.

The law of gaming and wagering contracts in England has been extensively covered by other writers[112] and as the New Zealand legislation is largely copied from the Imperial statutes much of what has been said by those writers is applicable in New Zealand and will not be recanvassed here. In this work the scope of the law of gaming and wagering contracts in New Zealand will be identified in the context of identifying the significant points of departure from English law and the effect of that departure on New Zealand law. In so doing it will be convenient firstly to critically examine the construction applied to the existing provisions in the Gaming Act 1908 and then to determine the application of the Acts of Charles (1664), Anne (1710) and William (1835) in this jurisdiction today.

(i) Sections 67 and 71, Gaming Act 1908

There are two essential differences between the New Zealand avoiding provision, s. 69 and its counterpart, s. 18 of the Gaming Act, 1845. The first is that whereas the Imperial provision still retains the proviso exempting actions for the recovery of prizes, or subscriptions to prizes to be awarded to the winners of lawful games, etc., this was repealed in New Zealand by the Gaming Act, 1894.[113] And the second is that as previously outlined, the English courts have adopted a narrower definition of a wagering contract than have the New Zealand Courts. The second such difference has already been discussed, the first requires further examination.

The repeal of the proviso to s. 69 (then s. 33 of the Gaming and Lotteries Act, 1881) was accompanied by the enactment of s. 71 (then s. 7 of The Gaming Act, 1894). It has been suggested that one reason for the repeal of the proviso was to avoid the difficulty created by

112. The Law of Gaming (1937) by Howard A. Street is the most comprehensive on gaming and wagering contracts, but the topic also attracts attention in leading Contract texts.
113. Section 7, Gaming Act, 1894.

Batty v. *Marriott*[114] which was compounded in New Zealand by the erroneous inclusion of s. 34 of the 1881 Act. But something more was obviously involved because *Batty* v. *Marriott* was over-ruled by *Diggle* v. *Higgs* in 1877 so that the difficulty created by the former case was largely resolved before the 1894 Act was passed. All that was required, therefore, on the part of the colonial legislature was to repeal s. 34 of the 1881 Act and leave the proviso intact if its only concern was *Batty* v. *Marriott*. Why did it go the further step of repealing the proviso and enacting s. 71? The answer, it is suggested, is revealed in part, in the following statement of Hosking J. in *Patterson* v. *Wolland*,[115] when he said, speaking of s. 71:

> The enactment in question is introduced not for the benefit of racing clubs or persons who offer money or other pecuniary prizes on the prohibited events,[116] but on public grounds, and so that the aid of the State by the medium of an action in its Courts shall not be lent for the recovery of the money or prizes won.

It was, therefore, held to be legislative policy to include actions for the recovery of money or prizes by the winner of the relevant event within the scope of the unenforceability principle. It is important to note ,however, that Hosking J. was careful to confine the provisions operation to actions brought by the winner to recover his prize because the section does not encompass actions by betters on the side of the event to recover their winnings.[117] And, in order to determine whether the action is to recover betting winnings, as opposed to money won by way of a prize (or stakes) by the winner of the event, the principle in *Diggle* v. *Higgs* applies the consequence of its application being reversed. That is, is it an action to recover:

> a prize to be given to the winner in some[118] competition, but not money deposited by way of wagers.[119]

If the latter, it falls within the category of a wagering contract in s. 69 and if the former, then although it may also be a gaming contract under s. 69 it is nevertheless unenforceable under s. 71.

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114. Note 106.
115. (1915) 34 N.Z.L.R. 746, 747.
116. The phrase "prohibited events" is with respect ,inappropriate; "relevant events" would have been more suitable. But this mis-description is indicative of the colonial reluctance to see any form of gaming or betting for money as worthy of legal recognition.
117. See, Cooke J. in *Economou's* case, note 99 at p. 27; *Mitchell* v. *Beck* (1913) 32 N.Z.L.R. 1279, *Willson* v. *Hogarth* [1927] N.Z.L.R. 332, 335 and *Bhana* v. *Barriball* [1973] 1 N.Z.L.R. 616, 622 support this view.
118. The word "lawful" has been omitted because, although it appeared in the proviso under consideration in *Diggle* v. *Higgs* it does not appear in s. 71. It is a relevant omission because if it was contained in s. 17 it could give rise to a situation where actions to recover a prize in an unlawful game or race fell within the terms of the Illegal Contracts Act 1970 (see s. 7 of that Act) whereas in the case of lawful activity s. 71 is conclusive. See e.g. *Wilson v. Hogarth,* note 117.
119. Note 60.

The application of s. 71 was further limited by Williams J. in *Mitchell* v. *Beck*[120] when he said the provision applies only to money won where it has not been paid to the winner.[121] In that case the owner of a horse had agreed to pay its trainer and lessee half the stakes won by the animal in races.[122] The owner having been paid an amount won by way of stakes Williams J. held that s. 71 did not preclude the trainer from sueing to recover his half-share. And in *Bhana* v. *Barriball*[123] Wilson J. held that if the winnings have been paid to the agent of a partnership, (or a fortorori, the winner's agent), s. 71 does not bar an action by the principal to recover the winnings from the agent. In that case the principle established by *Bridger* v. *Savage* and *De Mattos* v. *Benjamin* weighed heavily with the Judge.[124] And although the section would literally exclude such an action, the Court was reluctant to entertain the idea that the law would prevent a principal from recovering from a dishonest agent. *Bridger* v. *Savage* was based on an interpretation of the English equivalent of s. 69. And having regard to the fact that s. 71 is associated (by its terms and time of its enactment), with the repeal of the proviso to s. 69, it is submitted that its qualification by the *Bridger* v. *Savage* rule is justified.[125]

However, the presence of s. 71 in the Gaming Act 1908 and the repeal of the proviso to s. 69 has extended the scope of the unenforceability concept in New Zealand beyond the boundaries of gaming and wagering contracts. It is true that the owner of a horse, or a competitor, who enter in an event for stakes or prizes are gaming in a sense, but they may not be gaming in the way that has traditionally been the concern of the legislation, that is by:

> playing at any game [whether of chance or skill] for stakes — that is to say, for money or money's worth, to be obtained by the winner from the loser.[126]

Thus, in the cases where a horse owner or a competitor have not themselves hazarded stakes on the event, to preclude a legal remedy to recover their winnings or prize is, with respect, to move outside the

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120. Note 117.
121. Ibid., 1280. Upheld in *Wilson* v. *Hogarth,* note 117, 334-5 and *Economou's* case note 99 at 27.
122. Cf. *Wilson* v. *Hogarth,* note 117 where *Mitchell* v. *Beck* was applied in relation to the stakes won and paid to the owner, but the action to recover winnings of bets made on the races failed even though that money had been paid to the owner. In relation to the latter monies the bets were made by the owner as agent of the trainer — and was unlawful under s. 52 and 53 of the Gaming Act 1908.
123. Note 117.
124. Ibid., 621. His comment on these cases was not confined to discussion on s. 71 and only *Bridger* v. *Savage* was cited in relation to the latter section.
125. *De Mattos* v. *Benjamin* did not, of course, refer to s. 69 but rather to what is now contained in s. 70 of the Gaming Act 1908. However, although on different sections the rational behind the principle in the two cases is the same.
126. Per Salmon J. in *Weathered* v. *Fitzgibbon* [1925] N.Z.L.R. 331, 333; *Lockwood* v. *Cooper* [1903] 2 K.B. 428, 431 and see the cases cited 4 Halsbury's Laws of England (4th ed.) para 2, footnote 1.

area of concern and go beyond the philosophy of the gaming Acts. Yet this is exactly what s. 71 does, and was intended to do. In this age of the professional sportsman operating in an international arena it is surely too much to expect that he should write off his inability to recover his with-held winnings (by which to recoup his not unconsiderable expenses) to the cost of the loss of his amateur status. And disappointment may well turn to anger with the realisation that he is frustrated by a product of the Victorian era which emerged, even at that time, without explanation or justification.[127] In the writer's view the legislature should now return to the good sense of s. 18 of the Gaming Act, 1845 by repealing s. 71 and re-enacting the proviso to the former provision, in s. 69 of the Gaming Act 1908.

(ii) Section 70, Gaming Act 1908

As previously outlined this provision was copied from the English Act of 1892 which was designed to overcome the effect of *Read* v. *Anderson*. But, it has been asserted, the New Zealand Legislature was not content to stop there and added to the provision for the purpose of repudiating for the colony the effect of *Bridger* v. *Savage* also. The meaning of the colonial appendage, namely the words:

> or any sum of money won, lost, or staked in any betting transaction whatever

has not yet been conclusively determined by the New Zealand Courts.[128] But it has caused considerable difficulty.

In *Sharp* v. *Morrison*[129] the plaintiff deposited £50 with a stakeholder to abide the result of a forthcoming election in the Stratford electorate. His candidate lost, but believing there were irregularities in the election, the plaintiff repudiated the stakeholder's authority to pay the winners and demanded a return of his deposit. The defendant argued the concluding words of s. 70 debarred the plaintiff from recovering, but the Magistrate held the words:[130]

> . . . 'money staked in any betting transaction whatever' in s. 70 have exactly the same meaning as the words of s. 69, 'money deposited in the hands of any person to abide the event on which any wager has been made'

Edwards J., on appeal, upheld this view and concluded:[131]

> If the concluding words of s. 70 have any effect at all it is to remove the doubt, if there is a doubt, whether the earlier

127. This may be too strong in view of the fact that the records of the Joint Statutes Revision Committee have not survived. But the addition of this provision did not prompt any discussion in the House or the Council.
128. The only Australian Statute in which the words in issue appear is s. 33, the Suppression of Gambling Act 1895 (Queensland). The only case mentioned in the reports on the provision is *Campbell v. Riley* (1899), 9 Q.L.J. (N.C.) 124 which is only a brief note and unhelpful.
129. [1921] N.Z.L.R. 254.
130. Ibid., 256.
131. Ibid., 257.

> part of the same section is sufficient to prevent the loser of a wager, whose stake has been paid over to the winner, from recovering it back from him.

The learned Judge concluded that the inclusion of the word "lost" in the provision removed that doubt by preventing the loser from recovering. Thus, in his view, the concluding words in the provision really added nothing but clarity to the meaning of the basic English provision. In *Harrison* v. *Greymouth Trotting Club (Inc.)*[132] Casey J. followed this reasoning, saying:[133]

> . . . I prefer to follow Edwards J. and preserve the long-standing interpretation of s. 69, whereby a bettor (sic) who repents in time can recover from the stakeholder by revoking his authority. To hold otherwise would enable a dishonest stakeholder to retain the funds against all claimants, and might actually encourage gaming by making it more certain for a winner to collect from the stakeholder, since the loser would be precluded in any circumstances from getting his money back.

In *Johnston* v. *George*,[134] however, Skerrett C.J. was of the contrary view. He considered that the last words of s. 70 had no relation to the subject-matter dealt with in the first part and he went on to say:[135]

> I am inclined to the opinion that these words only apply to cases where the sum of money won, lost, or staked in the betting transaction has not been paid over to the winner.

In *Official Assignee* v. *T.A.B.*[136] Cleary J. criticised this statement because he could not imagine a situation in which there is a claim to recover money "lost" as opposed to being 'staked" in a betting transaction. But, with respect, there is nothing improper in calling money "won" or "lost" after the event before the winner is paid and whilst the money remains in the hands of the stakeholder. And, before the event, money in the hands of the stakeholder is simply "staked". Perhaps in recognition of this possibility Cleary J. concluded:[137]

> The tentative view expressed by Sir Charles Skerrett C.J. is at variance with what was said by Edwards J. in *Sharp* v. *Morrison* . . . but, while I think Edwards J. there gave the word 'lost' its natural meaning, the question whether the decision that the stake was recoverable may some day call for further consideration.

In *Bhana* v. *Barriball*[138] the action was brought to effect recovery of a sum paid to the agent of a partnership of which plaintiff contended he was a member. After referring to the criticism of Cleary J. levelled

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132. Note 101.
133. Ibid., 7.
134. [1927] N.Z.L.R. 490.
135. Ibid., 505.
136. Note 92, p. 1082.
137. Ibid.
138. Note 117.

at the dicta of Skerrett C.J. in *Johnston* v. *George* Wilson J. also found difficulty with the conclusion of Edward J. in *Sharp* v. *Morrison* that the concluding words of s. 70 had the same meaning as the corresponding words in s. 69. Because:[139]

> If so, it is odd that the addition should have been made in s. 70 rather than s. 69. The reason may be that it was intended to apply to both sections.

But then, like Edwards J., he went on to hold that the concluding words were to make it plain that the bar to recovery exists irrespective of the result of the betting transaction involved. And just as Edwards J. felt quite unable to accept that the legislature could have intended by the concluding words to s. 70 to interfere with the depositor's right of repudiation and recovery back from his stakeholder, Wilson J. felt similarly about the winner's right to recover his winnings in the hands of his agent. He held:[140]

> An action for money won [that has been paid to the winner's agent] is, in my opinion, in the same position with regard to the concluding words of s. 70 as with regard to s. 69 and the decision in *Bridger* v. *Savage* applies equally to both provisions.

With respect, this flies in the face of the clear words of the section and is, unfortunately, inconsistent with the expressed intention in the Explanatory Note to the Gaming Bill 1894 to legislate against *Bridger* v. *Savage*. As to this latter point, the learned Judge may not have known that. But unlike s. 69, s. 70 was enacted for the express purpose of dealing with agency betting. If the legislature had intended no more that was suggested in *Morrison* v. *Sharp*, *Harrison & Others* v. *Greymouth Trotting Club (Inc.)* and *Bhana* v. *Barriball* surely it would have used the words "money won, lost, *and* staked in any betting transaction whatever." But it did not, and the word staked stands alone and operates regardless of the result of the event.

In *Official Assignee* v. *T.A.B.* counsel for the appellant argued that the concluding words of s. 70 should be confined to the "tripartite" situations to which the first part of the section related. Cleary J. however disagreed, for to do so would limit the generality which the words bear in their ordinary meaning "without . . . any justification for doing so."[141] With respect, there is every reason for doing so. In *Sharp* v. *Morrison* Edwards J., after confining the meaning of the added words to s. 70 to that already given to those concerning deposits with stakeholders in s. 69, then went on to say:[142]

> The other classes of action forbidden by the concluding words of s. 70 — namely, actions by the winner of a bet against the loser, and actions for the recovery of stakes, as stakes, from

139. Ibid., 622.
140. Idem.
141. Note 92, 1082.
142. Note 129, 257.

> the stakeholder — are forbidden also by s. 69. So far as actions by these classes are concerned, the concluding words of s. 70 are mere surplussage.

Thus, having regard to the interpretation given by the learned Judge to the word "staked", the conclusion in the judgment must surely be that *all* the added words 'are mere surplussage", — a rather unsatisfactory result. And, whilst acknowledging that it is impossible to avoid some over-lap between s. 70 and s. 69 it is the writer's contention that the words in question only have meaning when confined to the context in which they appear, that is, tripartite situations. And in that context, they are capable of, and should be accorded a literal construction. Thus actions by depositors to recover their losses, winnings or deposits from the stakeholder are barred, as they are also by a principal against his agent.

The concluding words of s. 70 have, however, failed to elicit from the Courts the response sought by the legislature. But this is not surprising. The idea that an agent should be permitted to steal his principal's winnings, or that a stakeholder should have licence to ignore his depositor's instructions is difficult to reconcile with reason and justice. It is small wonder, therefore, that the New Zealand Courts have relegated the possibility that the Legislature could have intended to allow it, to the level of the inconceivable. And I have no doubt, that even the knowledge that the Explanatory Note to the Gaming Bill 1894 specifically includes the *Bridger* v. *Savage* doctrine within the scope of the actions the Bill sought to render unenforceable, will not prevent our Courts from resisting that conclusion.

On the other hand the terms of the English Gaming Act, 1892 have enabled the Courts in that jurisdiction to maintain an even balance between what is just and unjust, having regard to the philosophy and purpose of the legislation. To achieve that balance in New Zealand, and also in order to overcome the confusion that the concluding words of s. 70 even yet hold for the future, their repeal is recommended.[143]

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143. Prior to 1971 s. 70 would, in any event, have had a limited application because by s. 5 of the Gaming Act 1894 (s. 52 of the Gaming Act 1908) it was an offence to act as an agent or to employ any person to act as such agent, for the purpose of making bets, etc. on a totalisator. But that provision was repealed by the Racing Act 1971, and was not re-enacted in the repealing statute. By s. 2 of the Gaming Amendment Act 1920 however the business or occupation of a bookmaker was declared unlawful and by s. 3 of that Act it was made an offence to make a bet with a bookmaker. In s. 2 of the Gaming Act 1908 where "bookmaker" is defined it includes a person who carries on *business* as a turf commission agent. In such cases, therefore, the contract between the principal and agent is unlawful and cannot be enforced unless the principal or agent can obtain relief under s. 7 of the Illegal Contracts Act 1970. See, e.g. *Sumner* v. *Solomon* [1908] S.A.L.R. 20, *Wilson* v. *Hogarth* note 117. In cases where the agency is lawful but the contract entered into for the principal is not see *Tenant* v. *Elliott* (1797), 1 Bos & P. 3; *Bousfield* v. *Wilson* (1846), 16 M. & W. 185; *Farmer* v. *Russell* (1798), 1 Bos & P. 296; but cf. *Booth* v. *Hodgson* (1795), 6 Term Rep. 405; *Nicholson* v. *Gooch* (1856), 5 E. & B. 999.

In *Official Assignee* v. *T.A.B.* after quoting the passage of Denniston J. in *Pollock* v. *Saunders* Hutchinson J. expressed the view that the position in relation to totalisator betting is now "vastly different"[144] as regards transactions with the T.A.B. He said, of Denniston J's. remarks:[145]

> " . . . the sentence 'The totalisator, thought not actually banned, is certainly not blessed' is not applicable in relation to the operations of the Totalisator Agency Board, nor is the expression 'this half-contemptuous concession.'
>
> It is not necessary for me to go so far as to say that the provisions of the 1949 amending Act [which created the T.A.B.] impliedly repeal ss. 69 and 70 of the Gaming Act so far as concerns the operations of the Board. But, if it should be said that that would necessarily be so if my view were correct, I do not shrink from that."

But this view stands in isolation, and a change in the law is unlikely to be easily achieved. In 1971 the Legislature placed the seal of approval on the view that has found favour with the majority of the Judiciary by enacting s. 103 of the Racing Act.[146] That provision provides, inter alia, that no action shall be brought or maintained to recover any money won, lost or bet on any licensed totalisator.

(iii) Section 38, Gaming Act 1908

As previously indicated this provision was copied verbatim into the colonial Act of 1881[147] from s. 5 of the Betting Houses Act, 1853. And, in the context of those Acts it complemented some rather complicated legislation designed, and intended, to prevent the using of a particular place by persons skilled in gambling for the purpose of:[148]

> . . . luring the ignorant and imprudent to the ruinous courses to which the vice of gambling too frequently leads. It was intended to present every obstacle to the professed gamester using a place for exercising his vocation.

Because of the unhappy choice of words in the introduction to this provision the scope of its application is not readily apparent. In s. 38 of the Gaming Act 1908 the provision commences:

> Any money or valuable thing received by any person as[149] aforesaid as a deposit on any bet, or[150] as for the considera-

144. Note 92.
145. Ibid., 1087.
146. The Racing Act 1971 replaced those provisions in the Gaming Act 1908 relating to racing, totalisators and the Totalisator Agency Board.
147. Section 15, Gaming and Lotteries Act, 1881.
148. Per Earle, C.J. in *Dogget* v. *Catterns* (1864), 17 C.B. (N.S.) 669, 676-7.
149. The word "as" was added by the New Zealand draftsman in the Gaming and Lotteries Act, 1881.
150. In the Betting Houses Act, 1853 and the Gaming and Lotteries Act, 1881 the provision read, " . . . or as or for the consideration." It is submitted the change is not material.

> tion for any such assurance, undertaking, promise, or agreement as aforesaid . . .

In the Betting Houses Act, 1853 these words raised the issue as to whether the words "any person as aforesaid" referred back only to deposits received by the persons referred to in the preceding s. 4, or whether they were wide enough to refer to transactions arising from conduct made illegal by ss. 1, 2 and 3 also.[151] In *Doggett* v. *Catterns*[152] the majority in the Court of Exchequer Chamber favoured the view that the scope of s. 5 was confined to transactions legislated against in s. 4. But in *Powell* v. *Kempton Park Racecourse Company*[153] the House of Lords cast doubt on this; the Lord Chancellor the Earl of Halsbury L.C., in whose judgment the majority concurred[154] said, in relation to ss. 1 to 4 of the Betting Houses Act, 1853:[155]

> The offence, whatever it is, is created by ss. 1 and 2. The other sections in the Act apply as corollaries from the commission of the offence . . .

In his view s. 4 was merely ancillary to the penal provisions ss. 1 and 2 so that, therefore, the scope of s. 5 was wide enough to encompass transactions falling within each of the preceding sections. The dilemma posed by these two conflicting views followed s. 5 of the Betting Houses Act, 1853, into the colonial Act of 1881, but when the New Zealand legislation was consolidated in the Gaming Act 1908 the draftsman was careful to ensure contextual consistency between s. 38 and the two preceding sections so that the conflict between *Doggett* v. *Catterns* and *Powell* v. *Kempton Park Racecourse Company* was thereby avoided for New Zealand.[156]

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151. The issue was of some significance because s. 4 of the Betting Houses Act, 1853 was drafted in narrower terms than the preceding sections in that it did not refer to persons using any premises or place for the purpose of receiving, inter alia, deposits on bets. The concept of imposing liability on the users of premises in the context of the Betting Houses Act, 1853 in itself raised the question as to whether the object of the Act was to attack the business of betting generally, or whether it was simply intended to impose sanctions against persons in control or occupation of premises used for such a business. In *Powell* v. *Kempton Park Racecourse Co.* [1899] A.C. 143, the House of Lords favoured the latter approach the Lord Chancellor saying, inter alia: "There must be a business conducted, and there must be an owner, occupier, manager, keeper, or some person who, if these designations do not apply to him, must nevertheless be some other person who is analogous to and is of the same genus as the owner, keeper, or occupier . . . " (ibid., 161). This case specifically over-ruled *Hawke* v. *Dunn* [1897] 1 Q.B. 579 where Hawkins J. had gone to some trouble to establish the wider construction as the correct one. A discussion of the ramnifications of the House of Lords test is, however, beyond the scope of, and unnecessary to, a discussion of s. 38 of the New Zealand Act.
152. Note 148.
153. Note 151, and see also *Vogt* v. *Mortimer* (1906), 22 T.L.R. 763.
154. Lords Watson, MacNaghten, Morris, Shand and James of Hereford agreed, whilst Lords Hobhouse and Davey dissented.
155. Note 151, p. 165.
156. The conflict was to some extent alleviated by s. 26 of the Gaming and Lotteries Act Amendment Act, 1907 which complemented s. 15 of the 1881 by providing a similar right of recovery by depositors in relation

As to the nature of the action available under s. 38, in *Lennox* v. *Stoddart; Davis* v. *Stoddart*[157] the defendant argued that the plaintiff's case (under s. 5 of the Betting Houses Act, 1853) was in respect of a contract by way of gaming and wagering which was void under the Acts of 1845 and 1892 (U.K.). The Court rejected this contention holding:[158]

> The plaintiff who sues under s. 5 is not . . . in any sense suing on the gaming contract or on any term of it, either express or implied, but in respect of a statutory right conferred by the section.

(iv) The Acts of Charles II (1664) — Anne (1710) and William IV (1835) in New Zealand

As previously suggested, the relevant provisions of the Acts of Charles II, Anne and William IV which applied in New Zealand on and after the 14th day of January, 1840, continued to apply except to the extent that they have subsequently been expressly or impliedly repealed (or modified) by the New Zealand Legislature. Up to the present time they have not been expressly repealed.[159] And, it has earlier been asserted, they have never been rendered inapplicable by the doctrine of implied repeal. It remains to justify that assertion.

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to monies received as deposits on bets, etc., in any street. The term "street" included enclosed and unenclosed land (s. 25 (4)). And, perhaps in recognition of the questions that the statement of the Earl of Halsbury raised when he spoke of other persons "analagous to . . . and of the same genus as the owner, keeper, or occupier", s. 14 of the 1907 amending Act provided, inter alia, that a person . . . "who acts as, or as if he were the occupier or person having the care or management of any house, office, room, or place shall be deemed . . . to be the occupier thereof, whether he is the real occupier thereof or not." Section 26 of the 1907 amending Act (which became s. 25 of the Gaming Act 1908) was repealed by s. 2 of the Gaming Amendment Act, 1910. The 1907 and 1910 amendments have a rather complex history, but suffice here to say that the former Act introduced the notion of on-course licensed bookmakers (s. 35) and the principal provisions of the Act were designed to that end, i.e. to discourage off-course betting, in the case of s. 26. But by 1910 legislative patience with the bookmaker (many of whom were cheats and criminals) ran out and the repeal of s. 26 followed incidentally, with the repeal of the principal provision in the 1907 amending Act, which had introduced the licensed bookmaker. Section 14 of the 1907 amending Act survives however as s. 13 of the consolidating Act. In the 1908 Act the concept of "a person using any premises or place" which had occurred in the English Betting Houses Act and s. 13 of the Colonial Act of 1881 was dropped. Liability was thereby confined to persons having the relevant status referred to by the Lord Chancellor in *Powell* v. *Kempton Park Racecourse Co.* This was consistently adhered to in all the preceding sections to which s. 38 could apply, i.e. s. 36 and 37; and because s. 37 mirrors s. 36 in the relevant particulars the scope of s. 38 is not increased by argument that it refers back to s. 36.

157. [1902] 2 K.B. 21.
158. Ibid., 36 per Romer L.J.
159. The Acts of Charles II (1664) and Anne (1710) were, however, repealed and modified by the Act of William IV (1835).

The considerations which weigh in determining whether there is a repeal by implication raise a presumption against it occurring in any particular case. They are identified in the following often quoted statement of A. L. Smith J. (as he then was) in *Kutner* v. *Phillips*.[160] He said:

> . . . a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim, *Leges posteriores contrarias abrogant* . . . applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless these is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together.

Consequently, as O'Leary C.J. observed in the Court of Appeal in *O'Meara* v. *Westfield Freezing Co. Ltd.*,[161] a repeal by implication is never favoured:[162]

> . . . and must not be imputed to the Legislature without necessity or strong reason to be shown by the party imputing it.

The principal concerns of the Acts of 1664, 1710 and 1835 were firstly, to provide relief from the obligation arising out of specified securities given, granted, drawn or entered into in respect of certain gaming or betting transactions;[163] secondly, (in the case of the Act of 1835) to enable the drawer, giver or executor of those securities to recover any money actually paid by him in satisfaction thereof to any indorsee, holder or assignee of such a security the amount so paid, from the person to whom that security was originally given;[164] thirdly, (in the case of the Act of 1710) to provide the loser of £10 or more "at any time or sitting" with a cause of action whereby to recover his paid losses from the winner;[165] and finally, to establish *qui tam* actions by common informers,[166] and to subject the winners of any such amount to penal sanctions.[167] In relation to the provision of the 1710 Act establishing *qui tam* actions by common informers, it has already been demonstrated that it was not applicable to the circumstances

160. [1891] 2 Q.B. 267, 271-2, adopted in New Zealand by the Full Court in *Weston* v. *Frazer* [1917] N.Z.L.R. 549, and the Court of Appeal in *O'Meara* v. *Westfield Freezing Co. Ltd.* [1947] N.Z.L.R. 253; and more recently in *Kidd* v. *Markholm Construction Co. Ltd. & Others* [1970] N.Z.L.R. 867 (C.A.) and *Police* v. *Hicks* [1974] 1 N.Z.L.R. 763.
161. Ibid., 268.
162. A statement from Broom's Legal Maxims, 10th Ed., 348 adopted by O'Leary C.J. in *O'Meara's* case, ibid., 268.
163. S. 3 of the Act of Charles II (1664); s. 1 of Anne (1710) and William IV 1835).
164. Section 2, ibid.
165. Idem.
166. Idem.
167. Idem.

of New Zealand in 1840 and was, therefore, never in force in New Zealand. As to the remaining concerns of the early Acts the relevant provisions of each must now be examined in turn and considered in the light of the subsequent enactments of the New Zealand legislature to determine whether there is any, or a sufficient degree of inconsistency or repugnancy to invoke the doctrine of implied repeal.

As to the first:

The provisions of the Acts of 1664 and 1710 which avoided securities[168] given or entered into in satisfaction of gambling debts or bets on games (or for the reimbursement of "any money knowingly lent or advanced for such gaming or betting") caused considerable hardship to innocent holders when their voidness, even in the hands of those innocent third persons, was confirmed in *Bowyer* v. *Bampton*.[169] As a consequence of that rule, s. 1 of the 1835 statute was enacted to provide relief to such persons, it provided:

> That so much . . . [of the Acts of 1664 and 1710] . . . as enacts that any note, bill, or mortgage which if this Act had not been passed would, by virtue of the said . . . 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 . . . 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: . . .

The general purpose and effect of this provision was identified by Fletcher Moulton L.J. in *Hyams* v. *Stuart King*[170] when he said, speaking of a security in the form of a cheque[171] in that case that, the Act of 1835 declared that such securities:[172]

> . . . instead of being void, should be deemed to have been given for an illegal consideration. This amendment of the law [by the Act of 1835] protected innocent holders for value, while it left the parties to the transaction and any holder

168. As to the securities covered by the Act of 1835 see *Fitch* v. *Jones* (1855), 24 L.J.Q.B. 293; *Barkworth* v. *Grant* (1909), 25 T.L.R. 722, 26 T.L.R. 165; Street, Law of Gaming (1937) pp. 384-394.
169. Discussed in Part I, (1975) 8 V.U.W.L.R. 34. But see *Pollock* v. *Paterson & Co.* (1900) 19 N.Z.L.R. 94 where Stout C.J. supports a return to the pre-1835 Act position.
170. [1908] 2 K.B. 696.
171. See e.g. *Hyams* v. *Stuart King*, supra; *Moulis* v. *Owen* [1907] 1 K.B. 746; *Sutters* v. *Briggs* [1922] A.C. 1; confirming earlier authorities on this point that the provision extended to cheques.
172. Ibid., 714; an almost identical statement by the same Lord Justice appears in *Moulis* v. *Owen* ibid., 762; and by Bankes L.J. in the later case of *Dey* v. *Mayo* [1920] 2 K.B. 346, 355; and see *Sutters* v. *Briggs* ibid.

> taking such a cheque with notice of the nature of the original consideration in the same position as they had been under the statute of Anne.

The combined effect of these provisions of the Acts of 1664, 1710 and 1835 was, therefore, to attack the securities given for certain gaming and betting debts rather than the gaming or betting contract itself;[173] although they consequently avoided the contracts of loan arising therefrom and rendered the gaming or betting itself illegal. Also, the Acts of 1664 and 1710 did not avoid securities given for betting contracts *per se*. Their concern was with gaming, not betting, and indeed not even gaming *per se*, but excessinv gaming. And excessive gaming is revealed in the Act as occurring where securities rather than ready cash are passed in such transactions, or in repayment of loans obtained for them or where, on another plane, ready cash amounting to £10 or more is lost by a player or better on the game at any one time or sitting. There is, therefore, a clear distinction between the legislative purpose of the Acts of 1664, 1710 and 1835, and the general avoiding provision of the later English Gaming Act, 1845. (s. 69 of the Gaming Act 1908 (N.Z.)). And they were certainly so regarded in the English Act of 1845 which, whilst enacting for first time the corresponding avoiding provision contained in s. 69 of the Gaming Act 1908 (N.Z.), left in force so much of the Acts of 1664 and 1710 'as was not altered' by the Act of 1835; the latter Act itself continuing to apply.[174]

As to the second:

The right of action against the winner of a game or a better on the side to recover money actually paid by him in satisfaction of any specified security given to the winner in satisfaction of that debt was conferred (for the first time) by s. 2 of the statute of 1835 which provides:

> 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 . . . [Acts of 1664 and 1710 . . .] 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

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173. Whilst s. 3 of the Act of 1664 did, however, avoid the contract of gaming or betting the Act of 1710 did not.

174. In *Cox and Walsh* v. *Burton and Another* [1933] N.Z.L.R. 249 and *Pollock* v. *Paterson & Co.*, note 169, although the Act of 1835 was not in issue, the Court treated it as being in force in New Zealand. In *Official Assignee of Matene Mita* v. *Johnston* [1918] N.Z.L.R. 373 Cooper J. held that the 1835 Act was in force in New Zealand. See also *Johnston* v. *George* [1927] N.Z.L.R. 490.

> 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 . . .

At the time this provision was enacted s. 2 of the Act of Anne (1710) was still in force; it provided the loser of £10 or more at any time or sitting with a right of action against the winner to recover any money paid in satisfaction of that debt. And, as Viscount Birkenhead L.C. succinctly explained in *Sutters* v. *Briggs*:[175]

> . . . the intention of Parliament, expressed in s. 2 of the Act of 1835, was to make it clear that the amendment of the law affected by s. 1 [of that Act] was without prejudice to the rule that the loser of a bet could recover from the winner the amount paid by him in relation thereto [under s. 2 of the Act of Anne (1710)].

Following this decision s. 2 of the Gaming Act, 1835 was quickly repealed in England.[176] But it was repealed because it was repugnant to conditions prevailing there at the time,[177] and, although seen as inconsistent with the policy behind s. 18 of the 1845 Act, it was not inconsistent with or repugnant to its terms. Throughout the years of uncertainty about the proper construction of s. 2 the courts never doubted that it could stand and be applied alongside s. 18 of the later Act.

In *Johnston* v. *George*[178] Skerrett C.J. rejected a contention that the Act of 1835 had been impliedly repealed in New Zealand by the provisions of the Gaming Act 1908. It was argued, inter alia, that s. 2 of the former Act could not stand with s. 70 of the latter — which prevented recovery of 'any sum of money won, lost or staked in any betting transaction whatever." The Chief Justice said:[179]

> The important distinction between the two provisions is that the Imperial statute [s. 2 of the Act of 1835] has no application until the person who gave the security has paid the money thereby secured to some holder, endorsee, or assignee of the security. The New Zealand statute relates to money won, lost, or staked in a betting transaction, and does not concern itself with any security given in respect of the transaction or with payment of the money thereby secured. The two sections deal with entirely distinct phases of a gaming or betting transaction.

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175. Note 171, 11.
176. Gaming Act, 1922 s. 1.
177. That is, the conditions that allowed the existence of professional bookmakers and licensed betting shops.
178. Note 174.
179. Ibid., 505.

As to the third:

The only provision in the Gaming Act 1908 which could possibly support a contention that s. 2 of the Act of Anne (1710) was impliedly repealed by the New Zealand Legislature is s. 70; and specifically the concluding words of that provision which prevent actions for the recovery of "any sum of money won, lost, or staked in any betting transaction whatever." On a literal construction of those words, the statement of Skerrett C.J. in *Johnston* v. *George* above, would, if applied to the terms of s. 2 of the Act of Anne (1710) and s. 70 of the Gaming Act 1908, render the provisions inconsistent with and repugnant to each other. But this inconsistency or repugnancy would arise only in some cases because s. 2 of the Act of Anne (1710) is a special Act whilst the provision in the Gaming Act 1908 is in general terms. The latter Act is concerned in s. 70 with all betting whilst the former is concerned only with specified games and bets on those games in certain circumstances. It is therefore, necessary to find "necessary inconsistency in the two Acts standing together"[180] to bring the doctrine of implied repeal into play. Whether that "necessary inconsistency" exists is a matter upon which different minds may come to different conclusions.[181] In the absence of previous authority the conclusion that that inconsistency does not exist is tenable, and in the writer's view, the more probable. However, it is not necessary to come to a conclusion on this point because the construction of s. 70 necessary to create any difficulty about the status of s. 2 of the Act of Anne (1710) cannot be sustained.

It has already been shown that the New Zealand courts have not yet settled the proper construction to be applied to the concluding words of s. 70. It has also been demonstrated that unless a literal construction of those words is avoided, and unless their application is confined to "tripartite" betting, absurdity results. And, in that context the word "lost" in s. 70 means "lost" and still in the possession of a stakeholder or the loser's agent before the winner has been paid. On that construction inconsistency between the Act of Anne (1710) and s. 70 of the Gaming Act 1908 does not exist, because whilst an action under the former Act is to recover money paid to the winner by the loser, s. 70 merely bars recovery by the loser of a bet in respect of money deposited with a stakeholder or paid to his agent, and whilst it is still in the stakeholder or agent's possession.

R. A. MOODIE

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180. The test propounded by A. L. Smith J. in *Kutner* v. *Phillips*.
181. Although there is no logical certainty in the application of the doctrine the New Zealand Full Court and Court of Appeal decisions in *Weston* v. *Frazer; O'Meara* v. *Westfield Freezing Co. Ltd.;* and *Kidd* v. *Markholm Construction Co. Ltd.*, note 160 reveal a high degree of consistency and agreement by the Judges in its application, but cf. *Metzger* v. *Mathieson* (1909) 12 G.L.R. 25 and *Weston* v. *Frazer*.

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