GAMING AND WAGERING CONTRACTS

This is a two part article; in the first part the author traces the history of legislation relating to gaming and wagering contracts, and identifies the relevance of the early English statutes to our present law. In part two he will trace the history of the provisions in the Gaming Act 1908 on the subject, and will round the article off with an account of contemporary law of gaming and wagering contracts in New Zealand.

INTRODUCTION

1. The English Legislative History

Wagering and playing at games has long been a popular pastime of mankind, but during the eighteenth century, gaming and wagering in England was both widespread and extravagant.[1] Speculation was the order of the age in business,[2] and for pleasure, the hope of winning was too often preferred to the security and certainty of existing fortunes.[3] Anything, and everything that could be, was made the subject of a wager[4] and wagering contracts, like any other legal contracts, were enforceable in the Courts of Justice and, as the Law Reports disclose, actions on such contracts were constantly brought.[5] Whereas wagering was generally lawful[6] however, playing at games did not enjoy the same status under the law, as the effect of a succession of statutes from the reign of Richard II[7] had been to render most gaming (even of skill) unlawful; whether from the description of the game,[8] or the

1. The extent and extravagance of this wagering and gaming is well documented in J. Ashton, History of Gambling in England (1898, Rep. 1969).
2. It was, as Windeyer explained, " . . . an age which had commenced with a mania for such fantastic speculation as the South Sea Bubble and similar schemes". W. J. V. Windeyer, Wagers, Gaming and Lotteries in Australia. (1929), p. 8.
3. Vividly described by Blackstone, Commentaries, Book IV p. 171-2.
4. See Ashton, note 1, at pp. 150-184.
5. Per Hawkins J. in *Read* v. *Anderson* (1882) 10 Q.B.D. 100, 104; and see e.g. *Atherfold* v. *Beard* (1788), 2 T.R. 610 (a bet relating to a duty on hops); *March* v. *Pigot* (1771), 5 Burr 2802 (a wager as to whose father would live the longest); *Allen* v. *Hearn* (1785), 1 T.R. 56 (a wager on the event of an election); *Da Costa* v. *Jones* (1778), 2 Cowp. 729 (a wager as to the sex of a third person).
6. Some wagers were not enforceable, see note 16.
7. The statute 12 Rich. II, c. 6 (1388). It did not specifically declare gaming unlawful but rather directed that servants and labourers were to "have bows and arrows and use the same on Sundays and holidays and leave off all plays of tennis or football and other games called coits, dice, casting of the stone, kails and other such importune games."
8. E.g. the statutes 12 Geo. II, c. 28, s. 2 (1738), 13 Geo. II, c. 19, s. 9 (1739), 18 Geo. II, c. 34, s. 1 (1744).

circumstances[9] or places[10] in which, or the persons[11] by whom, the games were played. Consequently, as most gaming was unlawful, a party to a gaming contract was restricted in his legal remedies by the principle expressed in the maxim *in pari delicto potior est conditio possidentis;* the courts will not assist a plaintiff who cannot make out his case " . . . otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party".[12]

But whilst wagering was a popular pastime of Englishmen, their enthusiasm for it was not always shared by the Judges, whose attitude to it is reflected in the comment of Mansfield C.J. in 1811:[13]

> While we were occupied with these idle disputes, parties having large debts due to them, and questions of great magnitude to try, were grievously delayed.

In the same year an action brought on a wager on a cock-fight exasperated Lord Ellenborough who expressed the view that it tended 'to the degradation of Courts of Justice'. He went on;[14]

> It is impossible to be engaged in ludicrous inquiries of this sort, consistently with that dignity which it is essential to the public welfare that a court of justice should always preserve.

Only a year before, the same Judge had refused to try an action on a bet as to how the court would decide the question as to whether a person could be lawfully held to bail on a special original for a debt under a specified value. The report records[15] that

> Lord Ellenborough requested to see the record; and having perused it, he threw it down with much displeasure, saying,

---

9. E.g. the statutes 16 Car. II, c. 7, ss. 2 and 3 (1664), 9 Anne, c. 14, s. 5 (1710).
10. E.g. the statutes 33 Hen. VIII, c. 9, ss. 11, 12 (1541), 18 Geo. II, c. 34, s. 1 (1744).
11. E.g. the statutes 33 Hen. VIII, c. 9, s. 16 (1541), 9 Anne, c. 14, s. 6 (1710), 25 Geo. II, c. 36, s. 8 (1756).
12. Mellor J. in *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309, 314. Howard A. Street, Law of Gaming (1937) suggests however that " . . . at an early date claims for winnings at games were not uncommon [see *Sherbon* v. *Colebach* (1691, 2 Vent 157] but the records have not survived". In *Da Costa* v. *Jones,* note 5, when expressing concern over the enforceability of wagering contracts Lord Mansfield made the interesting comment; "Whether it would not have been better policy to have treated all wagers originally as gaming contracts, and so have held them void, is now too late to discuss . . . " This case is cited in 4 Halsbury's Laws of England (4th ed.) p. 8 as authority for the proposition that at common law "A gaming contract, however, appears always to have been unenforceable". But as it is not clear from the judgment whether Lord Mansfield was speaking of gaming contracts before or after legislation passed in 1710 and 1745 (see text) at note 35 et seq. which certainly prevented such actions in respect to the recovery of winnings of £10 or more at any one sitting, the authority is far from conclusive.
13. *Hussey* v. *Crickitt* (1811), 3 Camp. 168, 172.
14. *Squires* v. *Whisken* (1811), 3 Camp. 140, 141.
15. *Henkin* v. *Guerss* (1810), 2 Camp. 408, 409.

> I certainly will not try this cause . . . I sit here to decide points of law that arise incidentally before me, not to state my opinion upon any question submitted to me from idle curiosity . . .

In the latter half of the eighteenth century the courts actively sought to discourage actions on gaming and wagering contracts and many were struck down as being unenforceable because they were contrary to public policy.[16] But even this device did not wholly prevent these 'idle disputes' from taking up the time of the courts and it was not until the statute of 8 & 9 Vict., c. 109 in 1845 that actions on gaming and wagering contracts were significantly, though not completely, suppressed in England. That statute provided, inter alia:[17]

> That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made . . .

The 1845 Act followed a Select Committee on gaming[18] which was prompted in part by more than a decade of revelations in the press and courts of gaming on a scandalous scale throughout England.[19] Although a number of Acts in force outlawed certain games and rendered the keepers of gaming-houses subject to harsh penalties,[20] these had proven to be something of a dead-letter. Evidence given before the Select Committee confirmed what the papers had for many years been alleging, viz, that gaming-houses flourished on a grand scale throughout the country and the police lacked the necessary powers to put them

---

16. E.g. *Jones* v. *Randall* (1774), 1 Cowp. 37; *Atherfold* v. *Beard* (1788), *Da Costa* v. *Jones* (1778), *Allen* v. *Hearn* (1785) op. cit. note 5; and *Ditchburn* v. *Goldsmith* (1815) 4 Camp. 152; *Shirley* v. *Sankey* (1800) 2 Bos. & Pul. 130. In *Egerton* v. *Brownlow* (1853) 4 H.L.C. 1, 124, Parke B. observed that; " . . . the Courts have been . . . astute, even to an extent bordering upon the ridiculous, to find reasons for refusing to enforce them."
17. Section 18, The Gaming Act, 1845.
18. Select Committee on Gaming (1844). The report on the evidence given before the Committee is approximately 500 pages in length.
19. These revelations are well documented in Ashton, note 1; see especially chapters 8 & 9. Robert Baxter giving evidence before the Select-Committee told of 40 or 50 gaming houses in Doncaster in 1824 with men posted at their doors handing out cards to gentlemen passing by. One such card contained the inscription "To Noblemen & Gentlemen. Roulette. Bank £1,000. At Mason's (the tailor), Scott-Lane." See note 18, at page 85. The Police Supt. of St. James District told the Committee that although he had broken up 7 houses in his district there were still 15 or 16 in existence in 1844. See note 18, at p. 30.
20. Principally 18 Geo. II, c. 34, s. 1 (1744) (The Gaming Act, 1744); 25 Geo. II, c. 36, s. 8 (1751) (The Disorderly Houses Act, 1751); and see notes 8, 9, 10 and 11.

down.[21] The 1845 Act was, in consequence, principally concerned to enact laws relating to gaming and gaming houses.

But concern about gaming and gaming-houses also necessarily involved concern for the status of gaming and wagering contracts, because the policy behind the provisions of a number of earlier statutes had been to discourage gaming and wagering by relieving the players and betters of certain obligations incurred in the course of such activity.[22]

The first such Act was the statute 16 car II, c.7 (1664) entitled, "An Act against deceitful, disorderly, and excessive gaming." The purpose of this Act and the circumstances giving rise to it are clearly[23] revealed in the preamble, which reads;

> Whereas all lawful games and exercises should not be otherwise used, than as innocent and moderate recreations, and not as constant trades or callings to gain a living, or make unlawful advantage thereby; (2) and whereas by the immoderate use of them, many mischiefs and inconveniences do arise, and are daily found, to the maintaining and encouraging of sundry idle, loose and disorderly persons in their dishonest, lewd and dissolute course of life, and to the circumventing, deceiving, cousening and debauching of many of the younger sort, both of the nobility and gentry, and others to the loss of their precious time, and the utter ruin of their estates and fortunes, and withdrawing them from noble and laudable employment and exercises.

As the preamble suggests, this Act was aimed at both dishonest and excessive gambling. And, in relation to the latter, the provisions reveal a concern by the legislature for the ruinous practice of committing, by way of mortgage, one's estates and future income to the throw of a dice once ready money had run out. To rectify this s. 3 was enacted " . . . for the better avoiding and preventing of all excessive and immoderate playing and gaming for the time to come". That section provided, inter alia, that where any player of a game, or any better on the sides or hands of those playing;

---

21. See note 19, a page 30 where a Police Superintendent gave a vivid account to the Select Committee of the difficulties he faced in trying to enforce the gaming laws. See note 1 at p. 147.
22. The final prompting for the Select Committee was the revelation in *Smith* v. *Bond* (1843), 11 M. & W. 549, where parish officers had sought to put down gaming houses in the parish by bringing an action as a common informer to recover the gaming losses of others plus treble the value thereof, under s. 2 of the Statute 9 Anne, c. 14 (1710). The plaintiffs won a verdict for £3,508 — and the case resulted in the "Actions for Gaming Discontinuance Bill (1844)" coming before Parliament. The Bill was introduced into the House from the House of Lords on 10th February and a motion that a Select Committee be appointed was put four days later. (Journals of the House of Commons (1844) Vol. 99, pp. 24, 31.) The purpose of the 'Actions for Gaming Discontinuance Bill' was to prevent actions by common informers.
23. Per Lord Abinger C.B. in *Smith* v. *Bond*, note 22 at p. 557.

> . . . shall lose any sum or sums of money, or other thing or things so played for, exceeding the sum of one hundred pounds at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same, the party and parties who loseth or shall lose the said monies, or other thing or things so played or to be played for, above the said sum of one hundred pounds, shall not in that case be bound or compelled or compellable to pay or make good the same.

And by subs. (3) it was further provided;

> but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, recognizances, mortgages, conveyances, assurances, bonds, bills, specialties, promisses, covenants, agreements and other acts, deeds and securities whatsoever, which shall be obtained, made, given, acknowledged or entered into for security or satisfaction of or for the same or any part thereof, shall be utterly void and of none effect.

The section came under judicial scrutiny in a number of cases in the years immediately following its enactment and the inclination of the Judges, as revealed in the reports, was to construe it strictly in favour of the suppression of excessive gambling. In *Edgebury* v. *Rosindale*[24] the defendant and plaintiff ran their horses against each other for £100 and agreed to run again for £200 a few days later. On an action being brought by the plaintiff, the Court held that the contract was for more than £100 on "tick or credit", and said:[25]

> . . . the statute being made to suppress the use of excessive gaming, shall be construed in the most extensive manner that can be to answer to that end.

And, similarly in *Hudson* v. *Malin*,[26] a case where one played, one betted on the side and another lost to both, giving each bonds for £90 a piece, both bonds were held void under the statute although given to several persons, and although in respect to a game with one and a bet with another. The reason for the decision being that:[27]

> . . . the Judges will construe this statute as extensively as may be for suppressing of gaming.

But in *Hill* v. *Pheasant*[28] whilst the circumstances were similar to those in *Edgebury* v. *Rosindale* the Judges were unable to reach agreement. Defendant lost £80 to the plaintiff at gaming at one sitting and gave

---

24. (1673), 2 Lev. 94.
25. Ibid., at p. 94. Similarly in *Danvers* v. *Thistlethwaite* (1669), 1 Lev. 244 the defendant won a watch and £100 in a match. He accepted the watch, and a ticket for the money, in payment. The 1664 Act was held to apply.
26. (1676), 1 Freem. 432.
27. Ibid., at p. 432. The principle in *Hudson* v. *Malin* was applied in Noell v. *Reynolds* (1680), 1 Show. 185, but cf: *Stanhope* v. *Smith* (1697), 5 Mod. 351.
28. (1675), 1 Freem. 200.

a bond in that amount. He also agreed to meet and play again two days in the future. At that meeting he lost a further £60. The issue was whether the bond was avoided by the statute. Winham and Atkins J.J. were of the view that the Act applied there being a " . . . fraud apparent to elude the statute."[29] North C.J. and Ellis J. were however of a contrary view and distinguished *Edgebury* v. *Rosindale* as a case where £100 plus another race for £200 on "tick or credit", was the amount lost by the defendant. In *Hill* v. *Pheasant*, on the other hand, at most only £80 plus another meeting to play was involved, the two amounts being lost at two sittings.

Whilst these cases demonstrate that the Courts were prepared to adopt a construction of the statute that was particularly favourable to the realisation of the legislative intent — as revealed in the preamble[30] — it was too narrow in its scope to achieve its declared object of suppressing "excessive gaming". A principal deficiency in this regard was the failure of the Legislature to realise that fortunes are relative one to the other and whereas a loss of £100 to one man may prove to be excessive, to another it may not.[31] Indeed, a poor man might gamble away his whole estate on "tick or credit" without reaching the £100 limit. Also, the limitation of the application of the Act to betting or gaming on "tick or credit" was particularly unfortunate as the shameful case of *Firebrasse* v. *Brett*[32] clearly demonstrates. Sir Bazil Firebrasse "fell into play" with the defendant and Sir William Russell after a dinner at his home and lost to them £900 in ready money, which the defendant Brett succeeded in taking away with him. Sir Bazil, being somewhat inflamed with wine, then brought down a bag of guineas containing about £1,500. Brett won that also, and had it in his possession when it was seized from him by Sir Bazil and his servants as he was leaving. Sir Bazil brought an information against Brett for playing with false dice but Brett was acquitted. He then brought an action in trespass against Brett and prayed for relief against the debt. But the Court, whilst expressing strong dissapproval of such excessive gaming, merely contented itself with compromising the action and found no grounds for declaring the play unlawful.

A further flaw in this Act was its failure to recognise the force of "honour" in the lives of gentlemen. Section 3 of the statute, whilst rendering the securities etc. listed, void and unenforceable, also contained a provision that the winner of any amount within the statute should forfeit treble the value thereof, one moiety going to the King, the other to the informer. Of this provision, Blackstone wrote:[33]

---

29. Ibid., at p. 200.
30. In *Pope* v. *St. Leger* (1694), Carth. 322 however, the Court was not prepared to apply the Act where the Plaintiff's claim related to a sum of money won on a wager as to the rules of backgammon. The statute touched only the chance of play, not the rules of play.
31. Select Committee Reports, note 18 at p. 3 where this limitation in the Act is discussed.
32. (1687), 1 Vern 489.
33. Commentaries, Book IV, p. 172.

> Yet it is proper that laws should be, and be known publicly, that gentlemen may consider what penalties they wilfully incur, and what a confidence they repose in sharpers; who, if successful in play, are certainly to be paid with honour, or, if unsuccessful, have it in their power to be still greater gainers by informing.

The failure of the 1664 Act to suppress significantly gaming[34] was recognised in the preamble to the Act which followed it, namely the statute 9 Anne, c. 14 (1710) entitled "An Act for the better preventing excessive and deceitful gaming".[35] The preamble read:

> Whereas the laws now in force for preventing the mischiefs which may happen by gaming, hath not been found sufficient for that purpose; therefore for the further preventing of all excessive and deceitful gaming, be it enacted . . .

This Act took a much more rigorous stand against gaming than did the 1664 Act and, in so doing it supplemented rather than replaced the earlier legislation.[36] The first section of the Act provided, inter alia, that

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

The terms of the Act, in relation to the nature of the games to which it applied were, like its precursor, comprehensive,[37] and it applied to games of skill and chance alike. It applied, for example, to a dog

---

34. See Ashton, note 1, at Chap. 2 where a survey of writings containing observations of gaming at the time reveal that it flourished on a grand scale in the last decade of the 17th century — even in the Royal Court.
35. It was expressly provided by s. 9 of the Act that it should not extend to prevent gaming in any of the Queen's palaces during her residence there.
36. It did not expressly repeal the statute 16 Car. II, c. 7, but clearly superseded the securities provisions. See Howard A. Street, op. cit. note 12, p. 379, note f, and at p. 380.
37. Per Lord Abinger C. B. in *Daintree* v. *Hutchinson* (1842), 10 M. & W. 85; *Sigel* v. *Jebb* (1819), 3 Stark 1.

coursing match,[38] cricket,[39] horse racing,[40] and foot races.[41] But in relation to money lent or advanced for betting or gaming the section, whilst avoiding the security, left open the important question as to the status of the contract of loan. In *Young* v. *Moore*[42] the view that found favour with the Court was that:[43]

> . . . as the statute hath made all securities for money won at play void, a'fortiori all parol contracts of this sort are void; and if the money had been paid to the plaintifl, the defendant, or any other person, might have recovered treble the sum and costs, so that this cannot possibly be a debt . . .

In *Barjeau* v. *Walmsley*,[44] however, an action brought by the plaintiff to recover 120 guineas he had lent to the defendant in a game of 5 guinea a time toss succeeded, the Court being of the view that:[45]

> . . . this was not a case within the Act, for there is not the word contract, as in the Statute of Ursury: and the word securities, as it stands in this Act, must mean lasting liens upon the estate. The Parliament might think there would be no great harm in a parol contract, where the credit was not like to run very high; and therefore confined the Act to written securities.

This conflict in the cases caused a deal of uncertainty[46] as to the scope of the provision and although the weight of authority favoured the view in *Barjeau* v. *Walmsley* a further Act in 1835[47] and a decision of the Court of Exchequer, *Applegarth* v. *Colley*[48] in 1842, subsequently swung the weight of judicial opinion in favour of the view expressed in *Young* v. *Moore*.

However, the Court in *Barjeau* v. *Walmsley* could be excused for believing that written securities encumbering estates was the principal concern of this legislation for the first section also provided.

---

38. *Daintree* v. *Hutchinson*, note 37.
39. *Walpole* v. *Saunders* (1825), 7 D. & R. 130; *Jeffreys* v. *Walter* (1748), 1 Wils. 220.
40. *Goodburn* v. *Marley* 2 Str. 1159, *Hyams* v. *Stuart King* [1908] 2 K.B. 696, 701.
41. *Parker* v. *Alcock* (1831), 1 You. 361.
42. (1757), 2 Wils. 67; supported in *M'Kinnell* v. *Robinson* (1838), 3 M. & W. 434.
43. Ibid., 67, 68.
44. (1746), 2 Str. 1249. Similarly in *Alcinbrook* v. *Hall* (1766), 2 Wils. 309; and *M'Allester* v. *Haden* (1800) 2 Camp. 438; *Robinson* v. *Bland* (1760), 1 W. BL. 234; *Wattenhall* v. *Wood* (1793), 1 Esp. 18.
45. Ibid., at p. 1249.
46. Per Rolfe B. in *Applegarth* v. *Colley* (1842), 10 M. & W. 723, 731-2.
47. The statute 5 & 6 Will. IV, c. 41 s. 1 (The Gaming Act, 1835). It repealed so much of the Acts of 1664 and 1710 as made the "note, bill, or mortgage . . . absolutely void" and provided instead that they "should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration."
48. (1842), 10 M. & W. 723, 732. Approved in *Moulis* v. *Owen* [1907] 1 K.B. 746; *Saxby* v. *Fulton* [1909] 2 K.B. 208; *Carlton Hall Club Ltd.* v. *Laurence* [1929] 2 K.B. 153, but c.f. *C.H.T. Ltd.* v. *Ward* [1965] 2 Q.B. 63, 79.

> . . . that where such mortgages, securities, or other conveyances, shall be of lands, tenements, or hereditaments, or shall be such as encumber or affect the same, such mortgages, securities, or other conveyances, shall enure and be to and for the sole use and benefit of, and shall devolve upon such person or persons as should or might have, or be entitled to such lands, tenements, or hereditaments, in case the said grantor or grantors thereof, or the person or persons so encumbering the same, had been naturally dead, and as if such mortgages, securities, or other conveyances, had been made to such person or persons so to be entitled after the decease of the person or persons so encumbering the same; . . .

The purpose of this provision was, of course, to provide protection for heirs-at-law and next-of-kin whose succession was jeopardised by an incumbents "false sense of honour". But it also severely penalised winners or lenders who took such securities, in complete disregard of the expectations of those entitled. The severity of this penalty and the nature of the evil the provision sought to combat is well illustrated by the circumstances and the decision in *Parker* v. *Alcock* decided in 1831.[49] Parker, in September 1824 engaged to run a foot race against one Metcalfe, for one mile, for £1,000, being £500 a side. Parker did not have the money but persuaded two others to provide the necessary financial backing. He also managed to persuade them, in their own names, and on behalf of themselves and Parker to place bets on the race in London. These amounted to £4,371. The race was run, and Parker lost, with the consequence that he and his backers became liable to pay an amount of nearly £5,000. On the day the race was run, Parker executed in favour of his backers a conveyance by way of mortgage securing to them the payment by him of £2,000 and interest. The conveyance was made in case they should lay side bets on the race on Parker's account to that amount. There was a further race in which Parker made some gains but he was indebted to divers other persons in large sums quite apart from the liability he incurred for the stake and bets on the footrace, and the following year he resolved to meet his liabilities by entering into an arrangement with his two backers. The arrangement was that they should pay Parker the sum of £3,000 and that he should, in consideration of that amount and the balance of the account respecting the footraces, convey his interest in his estates to them. This he did in August 1825. However, in 1831 the infant, the eldest son of Parker, filed a bill in the Exchequer Court stating, inter alia, that by virtue of the statute 9 Anne, c. 14:[50]

> the . . . mortgage and the conveyance, upon the execution thereof, enured to and for the use and benefit of, and devolved upon . . . [him]; and that he was entitled to the benefit of the same mortgage, and the sum of £2,000 and interest thereby

49. (1831), You. 361.
50. Ibid., 365.

> secured, in the same manner as if the mortgage had been made to him . . .

The defendants put in a general demurrer "for want of equity" but Lord Lyndhurst L.C.B. held, inter alia, that not only was the mortgage and the conveyance within the words of the Act but also that the plaintiff was entitled to an account of rents and profits of the estate in addition to a declaration of his rights.[51] The demurrer was dismissed.

If the law reports can be relied upon as any guide, it would seem that this provision was only infrequently invoked although the writings of Ashton,[52] Blackstone[53] and others[54] suggest that the practice of encumbering estates to satisfy gambling debts was both frequent and ruinous. This provision was subsequently repealed, without explanation,[55] in 1835,[56] but its demise may well have been due to a realisation by the legislature that blood is indeed thicker than water, in that the "false sense of honour" that caused the parents ruin, probably also persuaded the expectant child that family honour and poverty were worthier objects than the protection afforded him by the Act.[57]

The limits of the first section of the Act of 1710 in relation to securities for loans for bets were recognised in *In re Lister, ex parte Pyke*[58] where it was held that there was no objection to loans to pay debts which had already been made and lost. The object of the provision was to discourage loans for betting and once the mischief was done, the bet having been made and the money lost, a loan to the loser to enable him to pay was an enforceable debt. Thus, could honour be preserved and perhaps the spirit of the Act avoided.[59]

In relation to securities for money or valuable things won at play or by wagers on games the 1710 Act virtually superseded that of 1664.[60] And, the deficiency in the earlier Act that had left the poor exposed[61]

---

51. The interest was an estate in fee simple. The issue as to whether the mortgagee was entitled to the return of the $2,000 advanced for betting was not resolved, Lord Lyndhurst L.C.B. holding that it was not necessary that an offer to repay the amount should appear on the face of the bill although "the Court may decree in that respect what it shall think proper." (p. 371).
52. Note 1. Throughout the book there are numerous instances cited.
53. Blackstone complained in his time that " . . . it is the gaming in high life, that demands the attention of the Magistrate; a passion to which every valuable consideration is made a sacrifice . . . " Commentaries, Book IV, p. 171.
54. Street, note 12, suggests at p. 386 that " . . . mortgages were frequently given as security for gaming debts."
55. The 1835 Act appears to have been passed without debate and the proceedings in Committee are not on record.
56. By the statute 5 & 6 Will. IV, c. 41 s. 3 (The Gaming Act, 1835).
57. See Blackstone, Commentaries, Book IV, p. 172, where he attacks this false sense of honour.
58. (1878), 8 Ch.D. 754.
59. In *In re Lister, ex parte Pyke* Jessel M.R. preferred this "very strict construction" because it was a penal statute. Ibid., at p. 757.
60. Note 36.
61. Note 31.

was remedied by providing that all such securities etc. were void regardless of their value.[62] But certainly the most effective protection was provided by s. 2 which provided, inter alia, that:

> any person or persons whatsoever, who shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting, in the whole, the sum or value of ten pounds, and shall pay or deliver the same, or any part thereof, the person or persons so losing, and paying or delivering the same, shall be at liberty, within three months then next, to sue for and recover the money or goods so lost, and paid or delivered, or any part thereof, with costs to suit . . .

This provision, whilst not specifically declaring bets or games for amounts of £10 or more illegal, effectively prevented actions to recover winnings. Or as Howard A. Street suggests, it "had the practical effect of making such claims useless."[63] And, if a loser was not mindful to recover his losses within the stipulated time the winner was still at risk because by the same section it was also provided that in such a case:

> . . . it shall and may be lawful to and for any person or persons, by . . . action or suit . . . to sue for and recover the same, and treble the value thereof, with costs of suit against such winner or winners . . .

By s. 5 it was provided that a person winning more than £10 at any time or sitting should be liable on conviction on indictment or by information to forfeit "five times the value of the sum or sums of money, or other thing so won . . . "

It was these provisions that prompted the action in *Smith* v. *Bond*[64] which ultimately created pressure for the Select Committee in 1844.[65] However, in spite of these apparently stringent provisions it was not clear whether the 1710 Act barred the recovery of winnings exceeding £10 but not exceeding £100 where the loser had not paid down his money at the time. If the money had not been paid down and it exceeded £100 at one time or sitting s. 1 of the statute 16 Car. II, c. 9 rendered the winnings irrecoverable. If, on the other hand the money was paid down it could be recovered by the loser with treble the value thereof under s. 2 of the statute of Anne. But there was something of a lacuna in the legislation because it did not specifically deal with the half-way situation where the money was neither paid down at the time nor a security given in respect of it. And, this issue was an important one because if between £10 and £100 in winnings at one time could be recovered by action a gamster could effectively frustrate the purpose of

62. s. 1.
63. Note 12, at p. 369.
64. Note 22.
65. Note 18.

the legislation by taking neither the money nor a security and giving credit on the understanding that the money won was to be paid at some time in the future. This dilemma was to give rise to a conflict in judicial opinion. In *Bristow* v. *James*[66] the right to recover was preferred, the court holding that s. 2 of the 1710 Act merely gave a statutory right to recover which did not render the action on the gaming contract ex delicto. However in *Daintree* v. *Hutchinson*[67] and *Thorpe* v. *Coleman*[68] the contrary view found favour. In the former case Lord Abinger held that an agreement to pay £100 on the result of (or default in) a coursing match was not recoverable because:[69]

> . . . The very object of the contract was to make the defendant pay that bet which, being for a sum of above £10, the Act intended to prohibit, and consequently rendered illegal. That being so, it is a contract which cannot be enforced . . .

Rolfe B. pointed to s. 5 of the Act of 1710 which provided that any person who shall at any one time win more than £10 without fraud was liable to forfeit five times the amount thereof. He was of the view that this provision was penal in nature and that, therefore, the contract was illegal and could not be enforced.[70] Although the view in *Daintree* v. *Hutchinson* is preferable, the authorities remain inconclusive.[71]

A further difficulty with s. 2 of the 1710 Act was in determining whether the amount won in contravention of the section was won at "any time or sitting".[72] This requirement had earlier given rise to some uncertainty after the Act of Charles II,[73] but it was overcome in part in 1744 when, by the statute 18 Geo. II, c. 34 it was provided that any person winning or losing at play or betting at any one time the sum or value of £10 or within 24 hours the sum or value of £20 committed an offence and was liable to a fine of five times the value of the sum so won or lost.[74] And, by s. 9 if any person offending against the section "discovered" any other person so offending, he was entitled to be discharged and indemnified from all penalties. Thus gaming or wagers within the meaning of the 1710 Act which amounted to or exceeded £20 in 24 hours were illegal and unenforceable whether at one sitting or not.[75]

---

66. (1797), 7 T.R. 257. Similarly in *Barjeau* v. *Walmsley* note 45..
67. Note 37.
68. (1845) 1 C.B. 990. Similarly *Applegarth* v. *Colley*, n. 48.
69. Ibid., at p. 99.
70. Ibid., at p. 100.
71. See text at note 37 et. seq., where its resolution is discussed in the context of contracts of loan. In *Applegarth* v. *Colley*, note 68 at p. 732 Rolfe B. was of the view that " . . . the statute of Anne, in connection with the 5 & 6 Will. IV, c. 41 must be taken to avoid all contracts for the payment of money won at play."
72. See, e.g. *Bones* v. *Booth* (1779), 2 W. BL. 1226.
73. See cases cited, notes 24 and 28.
74. s. 8, The Gaming Act, 1744.
75. s. 11 of the statute 18 Geo. II, c. 34 legalised horse racing for plates or prizes of £50 or upwards and this provision gave rise to considerable controversy as to whether the Acts of Charles II and Ann applied to such prizes (See Street, note 12 pp. 370-373).

But perhaps the most difficult problem arising out of the Acts of 1664 and 1710 concerned the status of securities avoided by those Acts after they had passed into the hands of innocent third parties. At first it was thought that the innocent holder might enforce the security[76] but subsequently the opposite view was to prevail, and in 1741 it was settled that securities avoided by statute were void even in the hands of innocent third parties.[77] In 1835 the statute 5 & 6 Will. IV, c. 41 was passed to remedy the injustice of this rule. That statute provided that so much of the Acts of 1664 and 1710 as avoided any note, bill or mortgage was repealed, and it enacted that such notes, bills or mortgages should instead, 'be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration'. By section 2 of the 1835 Act it was also provided that if any person who had made, drawn, given, or executed any such note, bill, or mortgage, were compelled by any indorsee, holder, or assignee, to pay the amount of money secured by it, he was deemed to have paid on account of the person to whom the security was originally given, and could recover that amount as a debt due and owing by that person to him. It will be necessary to return to this statute and examine it in more detail in later paragraphs.

The essential feature of the Acts of 1664 and 1710 was their policy objective which, as expressed in their titles, was to prevent, inter alia, gaming and excessive gaming. In each Act not only were the contracts and securities caught by them rendered void and unenforceable, but in addition the winners or assignees, etc. were subjected to certain penalties. The intention, therefore, was clearly to render the legal obligations unenforcable in order to put down gaming rather than to relieve the courts of the indignity of trying disputes arising out of gaming and wagering. But even as instruments for the suppression of gaming, they were far from successful because it is clear from the writings of Ashton and Blackstone, that gaming was very prevalent even after those Acts. But perhaps, as Blackstone observed:[78]

> . . . careful has the legislature been to prevent this destructive vice: which may show that our laws against gaming are not so deficient, as ourselves and our Magistrates in putting those laws in execution.

But whilst laws against gaming may have been sufficient — if enforced — neither the Acts of 1664 or 1710 provided any real protection against the destructive effect of betting.[79] Only bets on those games specified in the Acts were rendered unenforceable so that, except in so far as the judges were able to employ suitable "subterfuges, contrivances and evasions"[80] to avoid it, most wagers were unforceable in

---

76. *Hussey* v. *Jacob* (1696), Carth 356.
77. *Bowyer* v. *Bampton* (1741), 2 Str. 1155.
78. Commentaries, Book IV p. 173-4.
79. They extended only to bets on games being played.
80. Per Lord Campbell in *Ramloll Thackoorseydass* v. *Soojumnull* (1848), 6 Moore P.C. 300, 310 (Bombay).

the courts. Not surprisingly, the Legislature in 1845 adopted more sweeping language in s. 18, the provision rendering gaming and wagering contracts void and unenforcable. The policy of that Act was, as Lush J. explained in *Haigh* v. *Town Council of Sheffield*,[81] to treat:

> . . . the ordinary practice of betting and wagering . . . as a thing of neutral character, not to be encouraged, but on the other hand, not to be absolutely forbidden; and it left an ordinary bet a mere debt of honour, depriving it of all legal obligation, but not making it illegal.[82]

In respect to gaming and wagering contracts, the 1845 Act effected three important changes in English law. The first was that it repealed many of the earlier statutes that had made the playing at games — even games of skill — unlawful, so that, in regard to the *in pari delicto* doctrine and gaming and wagering contracts, its scope was considerably narrowed.[83] Secondly, by s. 15 it repealed the Act of 1664 and so much of the Act of 1710 as was not amended by the 1835 Act.[84] And thirdly, it extended the policy of discouragement that had featured in the earlier Acts by avoiding all gaming and wagering contracts.[85] The 1845 Act effected a complete reform of the law affecting wagering and gaming contracts.

The early statutes generated a considerable volume of litigation which, unfortunately, too often added uncertainty, rather than clarity in the law. The cases, as well as the confusion, are well documented by Howard A. Street.[86] But in this work, the writer has concentrated only on those that are helpful in conceptualising the broad policy objectives, the operation of, and the deficiencies inherent in the statutes of Charles II and Anne. The contemporary importance of these Acts and those of 1835 and 1845 will emerge more clearly as we proceed later to examine the extent to which these statutes have application to New Zealand wagering and gaming laws.

---

81. (1874) L.R. 10 Q.B. 102.
82. Ibid., at p. 109. See also Hawkins J. in *Read* v. *Anderson* (1882) 10 Q.B.D. 100, 104-5.
83. Sections 1 and 15. Importantly so much of the provisions of the statute 33 Hen. VII, c. 9 which made playing at games of skill " . . . such as bowling, coyting, cloyshcayls, half bowl tennis, or the like "unlawful, was repealed. Thus, after the 1845 Act games of skill no longer attracted penal liability.
84. By s. 15 the provisions, inter alia, of the statutes 16 Car. II, c. 7 and such of 9 Anne, c. 14 as were not amended by 5 & 6 Will. 4, c. 41 were repealed, but s. 2 of the statute 5 & 6 Will. 4, c. 41 was not repealed in England until 1922.
85. Section 18. One of the principal effects of s. 18 was, as Sir Montague E. Smith said in *Trimble* v. *Hill* (1879) 5 App. Cas. 342, 344 "[to abolish] . . . the distinction between legal and illegal wagers, which had frequently raised vexed questions for the consideration of the courts".
86. Note 12.

2. The Application of English Laws in New Zealand

The principles governing the introduction of English law into "uninhabited" countries "discovered and planted" by English subjects were well developed and known when New Zealand became a British Colony in 1840.[87] Those principles are stated in the following observation of Sir William Blackstone, which was approved of and quoted by Lord Watson, when delivering the judgment of the Privy Council in *Cooper* v. *Stuart*;[88]

> It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (Salk III. 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony; such, for instance, as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance of the established Church, the jurisdiction of spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King in Council; the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother country.[89]

In relation to Imperial statutes coming into existence after the time of discovery and settlement by English subjects, they did not extend to the Colonies unless they purported to do so "expressly";[90] or unless it was "necessarily implied"[91] that they should; or unless they were adopted into the law of a Colony by the Colonial Legislature.[92] In the case of New Zealand, however, it was not entirely clear what English

---

87. Discussed at length in the New South Wales Supreme Court by Chief Justice Forbes in 1833 in *MacDonald* v. *Levy* (1833), I Legge 39, 51 et. seq; and in *R* v. *Maloney* (1836), 1 Legge 74, 76 et. seq.
88. (1889) 14 App. Cas. 286, 291; also approved by the Privy Council in *Jex* v. *McKinney* ibid., p. 77, 82.
89. Commentaries, Book 1, p. 108.
90. Per Lord Blackburn in the *Lauderdale Peerage Case* (1885) 10 App. Cas. 692, 745; *Johnston* v. *George* [1927] N.Z.L.R. 490, 495. See Craies on Statute Law, (6th ed. 1963) Chapt. 18.
91. Per Lord Hobhouse in *Callender Sykes & Co.* v. *Colonial Secretary of Lagos and Davies* [1891] A.C. 460, 465.
92. *Cooper* v. *Stuart*, note 88, especially at p. 291.

law existed when the Colony was "discovered and planted"[93] by English subjects because the date on which that event took place could not be fixed with any degree of certainty. The relevant sequence by which British sovereignty was extended over New Zealand was that; on the 15th June 1839 the territory was purportedly[94] annexed to the Colony of New South Wales; on the 30th July in the same year Captain William Hobson was Commissioned Lieutenant-Governor; on the 30th day of January 1840 Hobson "declared and proclaimed" that he had, on the 14th day inst. taken the accustomed oath of office.[95] In 1858 it was held by Acting Chief Justice Stephen that as New Zealand was annexed to the Colony of New South Wales the English law in existence and in force in New Zealand was such English law as was in existence when the Colony of New South Wales was settled.[96] This decision gave rise to doubts which the Legislature sought to remove by passing the English Laws Act the same year.[97] That Act declared that:

> The laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly.

The purpose of this measure was simply to fix the date "which should be considered in . . . [the] Courts as the foundation of the Colony".[98] That is, the effect of that declaratory legislative act was to identify the date at which English law was to be in existence if it was to apply in the Colony in terms of the principles stated by Blackstone.

The English Laws Act left it to the courts to determine, without legislative guidance, the matters they should take into account in determining whether any particular English law was "applicable to the circumstances of the . . . Colony". And, as subsequent cases revealed, the determination of that question was often fraught with serious difficulties. But from the start the courts preserved a degree of flexibility that left the exercise of judicial discretion in such cases relatively

---

93. New Zealand was not of course "discovered" by British subjects, and indeed settlement was, prior to 1840, haphazardly achieved.
94. "Purportedly" because, as one writer has observed, the geographical extensions to the Commission of the Governor of New South Wales by which the annexation was effected, did not in fact include the whole of the territory of New Zealand. See N. A. Foden, Constitutional Developments of New Zealand 1839-1849 (1938).
95. The historical sequence of events and their implications are explained by Foden, idem.
96. An unreported case referred to in *Wi Parata* v. *Bishop of Wellington* (1878) 3 N.Z.Jur. (N.S.) S.C. 72, 78.
97. The English Laws Act, 1858.
98. Note 96; The English Laws Act, 1858 recited in the preamble, " . . . doubts have now been raised as to what Acts of the Imperial Parliament passed before the 14th day of January, 1840, are in force in the said Colony . . . " and then went on to remove those doubts by identifying the 14th day of January 1840 as the relevant date.

unfettered. Some insight into this approach and the reason for it is revealed in the following extract from the judgment of Johnston J. in *King* v. *Johnston*,[99] where he said:

> I purposely abstain from attempting to define the words "applicable" and "circumstances" in the English Laws Act, because it is impossible to forsee all the combinations which may arise to throw doubts upon their construction; and any definition which may be given at present might afterwards affect a case which, if forseen, might have presented a ground for modifying the definition. It seems to me, however, that it will be necessary to limit the terms by confining them to such "circumstances" and such "applicability" as the Court can judicially notice.[100]

The principal issue there was whether a 1728 statute requiring attornies in England to deliver a signed bill one month before action, was applicable to the circumstances of New Zealand on the 14th day of January 1840. The defendant's contention involved the proposition that if there were no attornies[101] in (physical) existence in the Colony at the relevant date, it could not be urged that when persons did commence business as attornies, the English laws applicable to that profession would not apply. Johnston J. rejected this argument as being founded upon a fallacious use of the words "circumstances" and "applicable". He went on to say:[102]

> The right test of "applicability" and "circumstances" cannot be, whether on a given day the particular law could be actually applied to any person or thing in the Colony; for if it were, it might be insisted that if there did not happen to be a bill of exchange falling due on the given day in the Colony, the law of England as to the presentment of bills of exchange was not applicable to the circumstances of the Colony on that day: and other similar results, as inconvenient or absurd, would arise, which never could have been contemplated . . .

He held that the enactment was not applicable because[103]

> . . . at the date in question, there not only was no solicitor or attorney in existence in New Zealand to whom the English law could be applicable in New Zealand, but there could not then be any such person under the "circumstances" of the Colony, as there was not then any Supreme Court in existence, and it required the creative power of the Legislature of New Zealand to bring both the Court and the practitioner into existence; and

---

99. (1859) 3 N.Z. Jur. (N.S.) S.C. 94.
100. Ibid., at p. 95.
101. The defendant's contention was illustrated by the hypothesis that if there were no carriers, or no infants in the Colony at the relevant date, and they subsequently came, "it could not be urged . . . [then] the English Law as to carriers or infants would not apply". Idem.
102. Ibid., at p. 95.
103. Ibid., at p. 96.

> that legislation certainly altered the "circumstances" of the Colony in a material particular.

The "circumstances" and "applicability" of which the Court could take judicial notice was identified in *King* v. *Johnston* as the legislative act necessary to establish both the Court and the practitioner in the Colony. A similar approach was adopted in New South Wales in *R.* v. *Schofield*.[104] In that case the issue was whether the statute 18 Geo. II, c. 34, s. 8[105] was applicable to New South Wales. It provided that a winner of £10 at any one time, or £20 within the space of 24 hours, at any game or wager on a game, was liable to be "fined five times the value of the sum so won . . . ; which fine (after such charges as the court shall judge reasonable allowed to the prosecutors . . . etc.) shall go to the poor of the parish . . . " Forbes C.J. held that the statute was inapplicable to the Colony of New South Wales. He held that the imposition of the penalty and its appropriation were not severable, and that as there were no legal poor in the Colony there was:[106]

> . . . a want of some legislative modification to carry this salutary law into effect.

The Court recognised that there were voluntary associations of benevolent subscribers to institutions for affording casual relief to the poor or infirmed in New South Wales. But there were no parochial paupers maintained out of parish rates, levied by law, and which were distributed and managed by guardians and overseers appointed by lay payers as in England.[107] Similarly, Stephen J. in *Ex Parte Lyons — In re Wilson*[108] held that the English bankruptcy law contained in 1828 statute was not in force in New South Wales because the officers by which it was to be carried into effect, i.e. Commissioners appointed by the Lord Chancellor, were not in existence there. And, in addition, the Colonial Legislature had not, in 1828, authorised any Commissioners to demand or be paid fees.[109] It required legislative and administrative machinery, which in the circumstances of the Colony in 1828[110] did not exist, to carry the relevant provision into effect. In *Quan Yick* v. *Hinds*[111] the High Court of Australia held that where an enactment gave a right of appeal to a person convicted, to a Court[112] that was not in existence[113] in the Colony of New South Wales in 1828, that:[114]

104. (1838), 1 Legge 97.
105. 18 Geo. II c. 34. See text at note 74.
106. Note 4, at p. 100.
107. Ibid., at p. 100.
108. (1839), 1 Legge 140.
109. Ibid., at p. 141-2.
110. The relevant date being the 25th July 1828 by 4 Geo. IV, c. 83 s. 24. (The New South Wales Act).
111. (1905) 2 C.L.R. 345, 367.
112. The Court of Quarter Sessions.
113. In *Mitchell* v. *Scales* (1907) 5 C.L.R. 405, 409, the Court acknowledged that it was mistaken on this point and that there was in fact a law as to Courts of Quarter Sessions in force in New South Wales at the relevant date. However, it is submitted that the reasoning in *Quan Yick* v. *Hinds*, apart from the mistake, is good. In *Mitchell* v. *Scales*, on the same provision, the decision was the same on other grounds.
114. Per Griffith C.J., note 111 at p. 365.

> . . . is . . . of itself sufficient to show that the provision . . . [was] not suitable to the circumstances of the Colony.

The reasoning in *Ex Parte Lyons. In re Wilson* was adopted by the High Court in *Quan Yick* v. *Hinds*[115] and it it submitted that the Australian decisions support the reasoning of Johnston J. in *King* v. *Johnston.* However, it is recognised that the Australian Courts were not applying the same test, of being "applicable to the circumstances of the . . . Colony", as the New Zealand Court. For the Courts in *R* v. *Schofield, Ex parte Lyons, In re Wilson* and *Quan Yick* v. *Hinds,* the test to be applied was that derived from the statute 9 Geo. IV, c. 83 (1828) (commonly referred to as the New South Wales Act); — the Australain equivalent of the English Laws Act, 1858. That Act provided, inter alia, that the laws and statutes in force in England at the date of its passing (25th July 1828), were to be:

> . . . applied in the administration of justice in the Courts of New South Wales and Van Dieman's Land respectively so far as the same can [reasonably][116] be applied.[117]

Thus, whereas the Australian Act related the question of applicability specifically to the administration of justice, under the New Zealand Act it was simply a factor in "the circumstances of the . . . Colony" the Courts could take into account.

There was, it is conceded, a fundamental distinction in the terms of the New South Wales Act as compared with those used in English Laws Act, 1858. In *Whicker* v. *Hume*[118] the Lord Chancellor said that the Australian Act "applied only to the laws regulating the administration of Justice."[119] But, as Griffith C.J. pointed out in *Quan Yick* v. *Hinds*[120] in reference to the Australian Act:[121]

> the real question in every case is whether the [English] law or Statute in question extends to and is in force in the Colony.

And, in resolving that question, it was pertinent to determine whether the English law under examination was "suitable or unsuitable in its nature to the needs of the Colony,"[122] which was another, and quite independent question[123] from whether it was "intrinsically incapable of application owing to the condition of the laws and institutions of the

---

115. By Barton J., note 111 at p. 367-8.
116. The Courts construed the statute by inserting the word "reasonably" before the phrase "be applied". *Wicker* v. *Hume* (1858), 7 H.L.C. 124; *Quan Yick* v. *Hinds,* note 111, especially the judgment of Chief Justice Griffith; *Jex* v. *McKinney,* note 88.
117. Section 24.
118. Note 116.
119. Ibid., at p. 149.
120. Note 111.
121. Ibid., at p. 354.
122. Ibid., at p. 356 and per Barton J. at p. 370; per Lord Watson in *Cooper* v. *Stuart* (1889), 14 App. Cas. 286, 293 and 294.
123. Note 111 per Griffith C.J. at p. 356; and Forbes C.J. in *R* v. *Maloney,* note 87 at p. 77.

Colony."[124] Thus, in spite of this fundamental distinction in terminology, the Australian Courts were still bound to consider the suitability of the statute in issue to the general circumstances of the Australian Colonies.

In *Ruddick* v. *Weathered*[125] Prendergast C.J. said,[126]

> . . . the [English Laws] Act was passed not only to declare what the law was to be deemed to be in the future, but also to remove doubts as to the past . . .

He considered the scope and object of the New South Wales Act differed from the English Laws Act, saying:[127]

> On reference to that Act [the New South Wales Act] it will be seen that the object of the Act was to provide machinery for the administration of justice, not to enact laws to be administered.

It is submitted, however, that although this difference between the two Acts clearly exists, as *Whicker* v. *Hume*[128] and *Quan Yick* v. *Hinds*[129] also show, it is a difference which does not necessarily distinguish New Zealand and Australian cases on the general issue of applicability of English laws. However, in relation to English gaming legislation, this difference in the expressed scope of the two Acts referred to, does explain, and justify, what may be seen as a significant difference in approach to an important issue relating to the applicability of particular, as opposed to general, provisions of English statutes in the two countries; that is particular provisions of those statutes, as distinct from the statutes themselves taken as a whole.

In *Quan Yick* v. *Hinds*, Griffiths C.J. said, of this issue:[130]

> . . . if the general provisions of a Statute were not unsuitable to the conditions of the Colony the mere fact that some minor or severable provisions could not come into operation owing to local circumstances is not a sufficient reason for denying the applicability of the Statute as a whole. On the other hand, if the general provisions of a Statute were inapplicable, it would seem to follow that it is not competent to select a particular provision of the Statute, which if it stood alone might be applicable, and to say that it is therefore applicable . . .

---

124. Idem.
125. (1889), 7 N.Z.L.R. 491.
126. Ibid., at p. 494.
127. Ibid., at p. 493.
128. Note 116.
129. Note 111.
130. Note 111 at p. 364. He re-affirmed this view in *Mitchell* v. *Scales* note 113 at p. 411, a judgment with which Barton J. in the same case "entirely" agreed (p. 414). Isaacs J. in *Mitchell* v. *Scales* expressed no opinion on the matter. See also *Miller* v. *Major* (1906), 4 C.L.R. 219; cf. *Delohery* v. *Permanent Trustee Co.* (1904) 1 C.L.R. 283.

In New Zealand, however, in applying the English Laws Act, the Supreme Court adopted a quite contrary approach. In *King* v. *Johnston*, Johnston J. said:[131]

> I am by no means prepared to say that a single provision in an English statute in force on the day so often mentioned, might not be operative in New Zealand, although the whole of the rest of the statute was obviously and unquestionably inapplicable; but still the context may be looked at for the purpose of testing the applicability of the particular provision.

Nineteen years later in *Highett* v. *McDonald*[132] the same Judge saw no reason to doubt his earlier view, and said:[133]

> I think, in dealing with this question, we must suppose that we have lying open before us the whole common law and statute law of England in force on the terminal day; and of that great body of law, every provision which was then applicable to the circumstances of the Colony is to be deemed to have been solemnly adopted and legislatively declared to be the law of the Colony by the Legislature of the Colony at a time when it had been fully empowered by the Imperial Parliament to make its own laws. And it seems to me that with respect to the statute law of England the question is not whether the whole of a particular statute, or chapter of a statute, can be applied in the Colony, but whether the particular enactment, duly interpreted and construed by the context and the preamble of the Act, is capable of being applied or not.

In *Highett* v. *MacDonald* the issue was whether s. 12 of the Tippling Act 1750, was in force in New Zealand. It declared that no action could be brought for the recovery of a debt for spiritous liquors unless contracted for at one time to the amount of twenty shillings. The particular provision in issue was to some extent out of context in The Tippling Act which, as the preamble declared, was enacted principally for the purpose of raising revenue duties on spirits. In addition, the statute as a whole, as the Court acknowledged, was of a local character and may not have been applicable to the circumstances of New Zealand.[134] But the provision was "evidently and professedly passed for the purpose of protecting public morals" and on that account was part of the law which colonists would carry with them to a new country.[135] Johnston J. held:[136]

---

131. Note 99 at p. 96.
132. (1878) 3 N.Z. Jur. (N.S.) 102.
133. Ibid., at p. 104.
134. Ibid., at p. 105; In *King* v. *Johnston* note 99 at p. 96, the Court held that the great majority of the Acts provisions were "clearly inapplicable" but did not feel that the enactment in issue was inapplicable to the Colony on that account.
135. Ibid., at p. 105.
136. Idem.

> Now provisions for the maintenance of public morality and the preservation of the public peace are in their general nature applicable to all Colonies, and unless they are necessarily connected with some circumstance or condition which renders them clearly inapplicable, it would appear that they ought to be treated as part of the law of the Colony. Now suppose the statute in question had been intituled "An Act to suppress drunkenness", and had recited in its preamble that it was "desirable to put down or diminish drunkenness among the community", and had gone on to enact, as a remedy tending to effect this object, that persons who gave credit for less than 20s worth of spirits at one time should not be entitled to recover the debt, could it be doubted that this was an enactment applicable to the circumstances of the Colony? If so, can it make any real difference in the case that the Act of 24 George II, c. 40, was chiefly dedicated to provisions for raising revenue from duties on spirits . . .

Accordingly, he held that although the statute taken as a whole may not have been applicable to the circumstances of the Colony, the particular provision was.

It is submitted that the Australian Courts took a narrower view of the applicability of particular provisions in English statutes because the test of applicability in that jurisdiction was expressly related to the administration of justice. And, in that context, the general purport of the statute as a whole was a factor which, necessarily, attracted considerable attention. But, as Forbes C.J. said as early as 1838 in *R* v. *Maloney*,[137]

> . . . It has always been, and must . . . always be, a preliminary point to adjust, whether the Act of Parliament, intended to be applied, is applicable to the condition and circumstances of the Colony . . . [138]

Thus, in relation to this first step of resolving the suitability of English law to the Australian Colonies, the decisions of the Australian Courts are as applicable here as our own, because in this regard, it is submitted, both the English Laws Act, 1858 and the New South Wales Act were merely affirmative of the common law.[139]

Under the common law principles referred to in previous paragraphs it was anticipated that colonists carried with them to the new country the great bulk of English law then in existence. But there were exceptions, as Blackstone acknowledged when he said;[140]

> The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police

137. Note 87.
138. Ibid., at p. 77.
139. Per Forbes C.J. in *R* v. *Maloney*, note 87 at p. 77; cf. Prendergast C.J. in *Ruddick* v. *Weathered*, note 125.
140. Commentaries, Book 1, p. 107.

> and revenue (such especially as are enforced by penalties), . . . and a multitude of other provisions are neither necessary nor convenient for them and therefore are not in force.

These exceptions were to be found in laws of local policy,[141] that is, laws

> that grew out of local circumstances and . . . [were] and . . . [were]) meant to have a merely local operation.[142]

In *Whicker* v. *Hume* the House of Lords held that the Mortmain Act 1735 was inapplicable to the circumstances of the Colony of New South Wales because it was wholly political[143] in its character and designed to deal with an evil which was peculiar to the Mother Country. There was no evidence, it was held, that the mischief the Act was intended to remedy, i.e. the increase in the disherison of heirs by giving property to charitable uses, was at all an evil which was felt, or likely to be felt, in the colonies.[144] The distinction recognised in the cases, is between laws of purely local and those of general application, the latter class being invariably found to be suited to the conditions of a new colony.

As Johnston J. recognised in *Highett* v. *MacDonald*,[145] laws "for the maintenance of public morality . . . are in their general nature applicable to all Colonies, . . . unless they are necessarily connected with some circumstance or condition which renders them clearly inapplicable."[146] And laws for the suppression of gambling have long been recognised as laws "for the maintenance of public morality" in this context. In *Attorney General of New South Wales* v.*Edgley*[147] Chief Justice Darley held, in relation to the statute 42 Geo. III c. 119 (1802), an Act declaring private lotteries common public nuisances;

> . . . looking at the object of the Act, which we have already seen to be the preservation of morality and the protection of the unwary, we can see nothing in the Act or the circumstances of the colony which would render it inapplicable.[148]

And in *Quan Yick* v. *Hinds*,[149] O'Connor J. said;

> It cannot, I think, be doubted that the English laws prohibiting lotteries came into force in New South Wales on the passing of 9 Geo. IV c. 83. They were, like the laws against gambling and wagering, of general application, and intended to safeguard

---

141. Per Lord Chelmsford C.J. in *Whicker* v. *Humes*, note 116 at p. 150.
142. A statement from the judgment of Sir William Grant in *Att-Gen.* v. *Stewart* (1817) 2 Mer. 143 adopted by Lord Chelmsford in *Whicker* v. *Hume*.
143. Note 116, and see similarly *Jex* v. *McKinney and others*, note 88.
144. Note 116, p. 161.
145. Note 132.
146. Idem.
147. (1888), 9 N.S.W.L.R. 157.
148. Ibid., at p. 160.
149. Note 111.

> the moral well-being of the community, and there would appear to be no reason why they should not have been in force from the very beginning of the settlement.[150]

But by far the most positive statement on the general application of gaming laws in the colonies is to be found in the judgment of *Richmond J.* in *Elliott* v. *Hamilton*[151] when he said;

> According to the principle of the common law, as declared by the English Laws Act, 1858, the laws of England, as they existed at the date of the foundation of the colony, are in force here, so far as they are applicable to the circumstances of the colony, and have not been altered by subsequent legislation. As regards a good deal of the English legislation of the last century and a half directed against the practice of gambling, it might no doubt be argued that it is little suited to the necessities or the temper of a colonial population like our own, and that prohibitions openly disregarded and penalties never enforced would be better removed from the Statute Book. These reasons, however, are such as should be addressed to the legislator rather than to the Judge; and they apply with equal, or nearly equal, force to the mother-country and the colonies. Regarding the matter from a purely legal point of view, I can see no reason why the Statute against lotteries, 10 and 11, William III, chap. 17, should not extend to New Zealand. It has nothing of a local character, but forms part of the general criminal law of England. As such, it is just as much in force here as any other part of English criminal law.[152]

The conclusion to be drawn from these comments of both New Zealand and Australian Judges is that the English Laws relating to wagering and gaming were prima facie applicable to the circumstances of the colonies unless there was something in the circumstances of a particular colony to render them inapplicable.

The statute 8 and 9 Vict., c. 109 (1845) did not expressly apply to the colonies and nor is there anything in the Act to suggest that it was necessarily implied that it should. As it was enacted after the 14th day of January 1840, it did not therefore apply to New Zealand, and neither did its repeal of the provisions of the statutes of Charles (1664) and Anne (1710).[153]

As to the Act of Charles II (1664), its preamble confirms it as an Act for maintaining public morals and there is nothing to suggest that it was intended to deal with a purely local mischief. Nor is there anything in the Act which would render enforcement of it in New

150. Ibid., at p. 378.
151. (1874), 2 N.Z.Jur. 95.
152. Ibid., at p. 95.
153. See the reasoning of Skerrett C.J. in *Johnston* v. *George* [1927] N.Z.L.R. 490, 502.

Zealand difficult or impossible. It was applied without argument by the New South Wales Supreme Court in *Chambers* v. *Perry* (1847)[154] where Dickson J. held that an action to recover £250 on a horse race, the amount not being paid down at the time, was unenforceable. There appears, however, to have been no reported cases in which this provision has been applied in New Zealand.

In relation to the Act of Anne (1710), the first section is clearly applicable in New Zealand for the same reasons advanced in respect to the Act of Charles II (1664). That section was, of course, modified in 1835 by the Act of Will. IV and both Acts must therefore be considered together. In *Official Assignee of Matene Mita* v. *Johnston*[155] Cooper J. unequivocally held that;

> The statutes 9 Anne, c. 14, and 5 & 6 Will. IV, c. 41 are in force in New Zealand.[156]

And in *Johnston* v. *George*,[57] which like the case just mentioned, was also on the first section of the Act of Anne as modified by the 1835 Act, Skerrett C.J. treated the provisions of those Acts as in force here. But in *Official Assignee* v. *Totalisator Agency Board*[158] although the appellant contended that the Act of Anne was in force in New Zealand (in 1960), the Court did not find it necessary to decide the point.

It is submitted that the first section of the Act of Anne (1710) and the modifying Act of Will. IV (1835) are both in force in New Zealand. There is nothing in these provisions rendering them inapplicable and the weight of authority is in support of that conclusion. *Highett* v. *McDonald*[159] — both the reasoning and the decision — on an analogous provision, also supports that view, as does the New South Wales case of *Chambers* v. *Perry*[160] on the Act of Charles II, (1664).

In *Dogherty* v. *Poole* (1875),[161] a Magistrate's Court decision, an action brought by the loser of a wager of a game under s. 2 of the Act of Anne (1710) succeeded. It was strongly argued by the defendant that that provision of the Act was not in force in New Zealand because, in relation to actions by informers, it required part of the penalty to be disbursed to the "poor of the parish". This contention is supported by *R.* v. *Schofield*[162] and *Ex parte Lyons; In re Wilson.*[163] But it was rejected by the Resident Magistrate who held that the action was based solely on the first part of the section which gave a remedial proceeding to the loser. He went on to say:[164]

---

154. (1847), 1 Legge 430.
155. [1918] N.Z.L.R. 373.
156. Ibid., at p. 374.
157. See note 153.
158. [1960] N.Z.L.R. 1064, a Court of Appeal decision.
159. Note 132.
160. Note 154.
161. (1875), 2 N.Z.Jur.(N.S.) 14.
162. Note 104.
163. Note 108.
164. Note 161, at p. 14.

> . . . I see no reason why that part of the statute, at any rate, is not law in New Zealand. The second part of the statute is of a penal character; but I need not give any opinion upon whether that is law here.

Although the Magistrate referred to the "second part of the statute", in the context, his remarks relate also to the second part of the section. That part, is clearly severable from the first part, in that whereas the second part gives a cause of action to common informers, the first part gives it to the winner. Thus, the two cases just cited are in point but distinguishable in relation to the applicability of the final part of the section. And, there being no apparent reason to acquire a finding to the contrary, the first part of s. 2 is clearly applicable in New Zealand; although the common informers right of action is, it is suggested, not.

The writer's conclusion, therefore, is that the relevant provisions of the Acts of Charles II (1664), Anne (1710) and William IV (1835) relating to gaming and wagering contracts applied, and continue to apply in New Zealand, except to the extent that they have been repealed or modified by the New Zealand Legislature. Up to the present time they have not been expressly repealed for New Zealand[165] and nor have they, in the writer's view, been rendered inapplicable by the process of implied repeal. But the resolution of that question must be left for the next section when New Zealand legislation will be examined.

R. A. MOODIE*

165. The penal provisions have, however. See s. 9 of the Crimes Act 1961 (s. 6, The Criminal Code Act, 1893).

* LL.B(Hons). Senior Lecturer in Law, Victoria University of Wellington.