THE ENFORCEABILITY OF WAGERS IN NEW BRUNSWICK

Gaming and wagering have been enjoyed (on the part of the successful participants in any event) by people the world over for many ages. The elements of risk and uncertainty in such transactions have appealed to the side of human nature that enjoys the possibility of realizing something for little or no effort on their part. Wagering has not only been entered into for trifling amounts and for pleasure, but also for large sums and as a matter of business.

"Wager" was defined by Hawkins J. in **Carlill v Carbolic Smoke Ball Co.** (1) in the following words: "(a transaction) . . . by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that dependent on the determination of that event one shall win from the other, and that the other shall pay or hand over to him a sum of money or other stake, neither of the contracting parties having any other interest in that contract than the sum or stake he will win or lose, there being no other real consideration for the making of such contract by either of the parties." Strictly speaking, such a wager as just defined was probably at first an honourable transaction between parties and nothing more – one that if not honoured by one party would bring little more than moral condemnation from the other. Support for this view is found in the past and present attitudes of the law as treating a wager as something rather personal between the parties to it – an agreement not to be enforced by a court but merely to be honourably upheld by the parties.

However, changes have taken place. The honour side of the wager was not altogether extinguished as being outdated phase of the transaction, but was in many cases relegated to the background when purely mercenary considerations began to occupy the minds of wagerers. The commercial and contractual aspects of gaming began to rear hitherto unthought of heads, the successful party beginning to question whether he could not enforce his "debt of honour" by some means other than by a simple appeal to the character of the losing party. Those arbiters of social custom, the Courts, were eventually resorted to, and it is their pronouncements on the enforceability of wagers, as well as legislative pronouncements on the question, that must be examined to ascertain the present state of the law in New Brunswick. It is proposed to deal principally with wagers between individuals rather than gambling covered by the Criminal Code, lotteries, etc.

To appreciate New Brunswick's position one must first have regard to the English decisions and statutes which have had an effect on the development of our wagering law. The pronouncements of

1. (1892) 2 Q. B. 484

the English courts on wagering stemmed largely from their doctrine of public policy. Gaming in many instances was looked upon as contrary to public policy. When English courts first adjudicated on the matter, however, wagers were assumed to be valid, with scarcely a dissenting murmur. Lord Campbell in the **Ramloll** case (2) of 1848 stated the common law position to be that " . . . an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy." In **Sherbon v Colebach** (3), a case tried in the reign of William and Mary, an action in indebitatus assumpsit for £20 won by the plaintiff in a game of chance was upheld. It is amusing to note that the Court, apparently in all seriousness, stated that the declaration "might be as well as an indebitatus pro opere et labore."

The time came, however, when the English bench repented of its lenient stand towards wagers, and in seeking to suppress what they had once upheld sometimes went to ridiculous lengths. A prime example of their abstruse reasoning is found in the 1818 case of **Eltham v Kingsman** (4), in which one carriage proprietor made a wager with another that a certain person would choose to go to the assembly rooms in his carriage rather than the other's. In suing to enforce his winning (the honour system having somehow gone astray) the successful carriage proprietor was told that the wager was void because it tended to abridge the freedom of one of the public to choose his own conveyance and to be exposed to " . . . the inconvenience of being importuned by rival coachmen." Similarly a wager on the (length of) life of the Emperor Napoleon was void because it gave the plaintiff an interest in keeping the king's enemy alive, and the defendant an interest in bringing about his death by other than lawful warfare (5). This stiffening attitude of the court was not free from criticism however, for Lord Campbell in the **Ramloll** (2) case stated that he looked with "concern and almost with shame" on such subterfuges and contrivances with which judges in England sought to evade what the learned judge thought a clear rule of common law.

But further changes in the original tolerant attitude were forthcoming, this time in the form of legislative enactments. As pointed out by Cockburn C. J. in **Hampden v Walsh** (6) (a case by the way in which an English gentleman refused to accept the findings of explorers that the world was really round and not flat), the broad common law rule that a wagering contract was a legal and therefore enforceable contract was altered by various statutes so that many forms of betting and wagering became stamped with illegality, with

2. Ramloll Thackoorseydass v Soojumnull Dhondmull (1849) 6 Moo. P. C. 300; 13 E. R. 699, 18 E. R. 729
3. 86 E.R. 377
4. (1818) 1 B & Ald. 683; 106 E.R. 251
5. Gilbert v Sykes (1812) 16 East 150; 104 E.R. 1045
6. (1876) 1 Q.B.D. 189

the result that a winner could no longer maintain an action for non-payment. Even the few types of wagers that were beyond the scope of these earlier statutes were often unenforceable due to the continuance of the bench's crusade to suppress gambling, and ample grounds under the head of "matters of a frivolous nature" were found to bar a winner from succeeding in realizing on his winnings.

An early English statute on gaming was passed in the reign of Henry VIII, in the year 1541 (7), entitled "The Bill for the Maintaining Artillery and the Debarring of Unlawful Games". By this enactment the law's stiffening attitude towards gaming in general is shown, for by section eleven several named classes of people such as apprentices, labourers, and fishermen were forbidden from a set time to play at tables, tennis, dice, cards, bowls, etc. under pain of a twenty shilling forfeit for each time apprehended doing so. Public gaming was restricted by the further provision forbidding under pain of fine any playing at bowls outside their own gardens or orchards.

By the later and for our purposes much more important statute of 9 Anne, C. 14, passed in the year 1710, all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn or entered into or executed by any persons 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, dicetables, etc. etc., or for the reimbursing or repaying any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play to any person(s) so gaming, "shall be utterly void, frustrate, and of none effect to all intents and purposes whatsoever . . . " This statute of Anne drastically changed the common law, for broadly speaking, securities given for gaming debts could not now be legally enforced. Such securities were rendered worthless by this enactment which declared them utterly void. The statute was well intituled "An Act for the Better Preventing of Excessive and Deceitful Gaming."

In order to better carry out the purpose of this 1710 Act, several further enactments were made, such as 12 Geo. 2, 28 1738, until in 1835 it was amended by 5 & 6 Wm. 4, 41. A significant change took place, for now the securities given in respect of wagering transactions are not deemed to be ". . . void, frustrate, and of none effect" but are deemed to have been given for illegal consideration. This amendment would appear to brand a wagering transaction with actual illegality, whereas formerly it had been more or less neutral in character.

Then in 1845 came 8 & 9 Victoria, C. 109, "The Gaming Act", which is still the governing law in England. The relevant section is as follows:

7. 33 Hen. 8, C. 9 (Imp.)

> S. 18. All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void; and 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 . . .

Contained in the section also is a saving clause concerning subscriptions, etc., in respect of lawful games. By this Act the common law position was relegated to oblivion, for not only are the securities of the Statute of Anne unenforceable, but also any contract or agreement, parole or otherwise, arising by way of gaming or wagering.

A further act introduced by Lord Herschell in 1892 (8) had the effect of amending the powerful 1845 statute with this result: that where A had paid money at B's request to persons to whom B was indebted because of lost wagers, A had no recourse against B for the monies so paid on his behalf.

Though subsequent enactments on the subject of gambling and wagering have been passed by the English legislature, the general effect of the 1845 Statute remains unimpaired; accordingly a brief summation by Halsbury (9), founded largely on that Act, states the English position on the subject of wagers: "All contracts by way of gaming or wagering are void, and no action can be brought by the winner of a wager either against the loser or the stakeholder to recover what is alleged to be won. This applies both to wagers upon games and to those upon other events. All alike are void, and, though not illegal, are of a neutral character, giving rise neither to rights or liabilities."

The English courts and Parliament have thus attempted with their respective machineries to discourage gambling, by driving a winner of a bet back to reliance on the loser's honour for realization of the sum won (a procedure somewhat tainted with risk). What is the position in New Brunswick with respect to wagers? There appears to be a dearth of case law on the question, but such authorities as exist suggest that New Brunswick's common law position accords with that of England, for in **Bailey v McDuffee** (10) the Court remarked that gaming, which included wagering, had by common law been legal, unless contrary to the principles of morality and sound policy – a statement similar to the English view as expressed in the **Ramloll** case (2). The Court went on to say that statutory enactments had subsequently changed the common law position.

One of the earliest of these was passed in 1786 (11) and set the style for subsequent New Brunswick gaming statutes. By this Act, "for the more effectually preventing and suppressing Gaming of every kind," all notes, bills, bonds, mortgages or other securities or

8. 55 & 56 Vict., C. 9 (Imp.)
9. Vol. 15, p. 475, s. 872
10. (1878) 18 N.B.R. 26
11. 26 Geo. 3, C. 26 (N.B.)

conveyances whatsoever entered into, where the whole or any part of the consideration be for any money or any valuable thing, won by gaming or playing at cards, dice, etc., "shall be utterly void, frustrate and of none effect, to all intents and purposes whatsoever." This provision re-echoes the Statute of Anne both in spirit and language. By section two of the Act, a plaintiff was to suffer non-suit if he brought action in any Court of Judicature in the Province for any sum of money, when it should appear that the cause of action "accrued by or in consequence of a wager or gaming bet", and the defendant in such an action should have full costs. Section three was important from the loser's standpoint, for it provided that where any person within twenty-four hours or at any one meeting or sitting lost more than twenty shillings to one or more persons, or goods valued at more than twenty shillings, and paid the sum lost or any part thereof to the winner, he could within one month sue for and recover such payment from the winner or winners. This section has been substantially re-enacted down to the present gaming statute, with appropriate currency changes.

In 1854 the 1786 Act was repealed (12) and a modified statute (13) substituted, which with slight variation has become the statutory law of New Brunswick today. Section one reads as follows:

> All instruments for the payment or securing the payment of money, performance of engagements, or conveyance of any estate, real or personal, founded upon, arising out of, or connected with any gambling transaction, shall be void; but the wife and heirs of any person making any such instrument affecting such estate, shall be entitled to the same, whether mortgaged or otherwise, as if such person were naturally dead.

The Act goes on to treat in almost identical language with that of the repealed statute, with the right of the loser to recover what he had lost within twenty-four hours or at any one sitting provided suit was brought within a month, and the final provision deals, as did the 1786 Act, with parents, masters, and guardians recovering monies won from their infant charges. However, the Act contains no section similar to section two of the 1786 Statute which automatically non-suited a plaintiff suing on a wager. The question of whether a purely verbal wager can be enforced by the winner seems therefore to be open. It scarcely seems likely that the legislature intended to revert to the common law position in regard to oral wagers, particularly when one considers that a loser may under the conditions outlined recover money lost; but because of the withdrawal of the 1786 "non-suit" provision there is reason for doubting whether all wagers are unenforceable in New Brunswick. Some oral wagers may be unaffected by the Gaming Act; if so, they would be governed by the common law, and as late as 1904 in the New Brunswick case of **Seeley v Dalton** (14), there was dictum to the effect that a wager is not an illegal transaction.

12. Repealed by C. 162 of the 1854 Acts.
13. Revised Statutes of New Brunswick (1854) C. 103 (N.B.)
14. (1904) 36 N.B.R. 442

C. 103 of 1854 was enacted again as C. 87 of the Consolidated Statutes of New Brunswick, 1877, then as C. 145 of 1903's Consolidated Statutes, and with minor changes as C. 156 of the Revised Statutes of 1927. No further amendments have been made to date.

This province's legislation on the enforceability of wagers does not go to the same extent as that of England. All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void, with no suit to be brought to enforce them – this is the English position under the 1845 Act. With the exception of the repealed 1786 Statute, New Brunswick has confined its enactments to instruments only, except for the loser's limited right to recover losses. The result is that our legislation accords more with the English Statute of Anne before its amendment by 5 & 6 Wm. 4, C. 41. Indeed, one New Brunswick judge stated as late as the year 1932 that 9 Anne C. 14 as amended is in force in the province (15). With respect, this statement may be open to question in view of the fact that our Gaming Act seems to cover the same ground.

The position of a stakeholder in New Brunswick appears to be substantially the same as in England. In the English case of **Hastelow v Jackson** (16) it was stated that where parties pay money to a stakeholder to abide the event wagered on, they may recover their respective deposits from the stakeholder if it has been paid over by him to one of the parties against the other depositor's wishes as expressed before the payment, or if the event for which the deposit was made has not occurred. In **Kinney v Stubbs** (17), a New Brunswick case, the plaintiff was permitted to recover the deposit from a stakeholder when the horse race for which the money had been deposited was not run. But there is no reported case in this province in which the winner of a wager has recovered from the stakeholder the loser's deposit as well as his own.

On reviewing New Brunswick's position regarding wagers, it seems that there are some types of wagers not provided for by our statute. It will be necessary to have a strong court decision or legislative pronouncement before this uncertainty be resolved.

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15. McLatchy Co. Ct. Judge in Leblanc v Thomas (1932) 5 M.P.R. 401
16. (1828) 108 E.R. 1026
17. (1858) 9 N.B.R. 126