RECOVERY OF MONEY LENT FOR GAMBLING IN WESTERN AUSTRALIA.

Mr. F. T. P. Burt, Q.C., has argued[1] that section 5 (2) of the Betting Control Act 1954[2] has made no alteration in the previously existing law. Mr. Burt confined his argument to the effect of the sub-section on the enforceability of securities in respect of a gaming transaction; it is submitted, however, that the sub-section *has* altered the law relating to the recovery of money lent for gambling and *has* altered the position of an agent who pays his principal's gambling debts. (The law on these matters in Western Australia differs materially from the law in England, as the (English) Gaming Act 1892[3] has not been adopted in this State).

The contract of loan may arise in one of four ways:—

(i) Money is lent in order that the borrower may make a gaming wager.

(ii) Money is lent in order that the borrower may make a non-gaming wager.

(iii) Money is lent in order that the borrower may pay debts incurred in gaming wagers.

(iv) Money is lent in order that the borrower may pay debts incurred in non-gaming wagers.

In the first case the law in Western Australia is the same as in England; money which is lent in order that the borrower may make a gaming wager cannot be recovered, and it matters not whether the game be legal or illegal. It has long been established that money lent for wagering on an illegal game is irrecoverable at common law,[4] and in *Carlton Hall Club v. Laurence*[5] it was held that money lent for gaming is irrecoverable, whether the game be legal or illegal. The decision of the Divisional Court in *Carlton Hall Club v. Laurence* was based on the combined effect of the (English) Gaming Acts of 1710[6] and 1835,[7] and is therefore applicable in Western Australia as well as in England.

1 Bets under the Betting Control Act: 3 U. WEST. AUST. ANN. L. REV. 334.
2 No 63 of 1954.
3 55 & 56 Vict., c. 9.
4 McKinnell v. Robinson, (1838) 3 M. & W. 434, 150 E.R. 1215.
5 [1929] 2 K.B. 153.
6 9 Anne, c. 14; reprinted in THE STATUTES REVISED (3rd ed., 1950) 506 as 9 Anne, c. 19.
7 5 & 6 Will. IV, c. 41, adopted in Western Australia by 7 Vict., No. 13.

There are no judicial decisions as to whether or not money lent in order that the borrower may make a non-gaming wager can be recovered; but it is submitted that, in Western Australia at any rate, such loans are recoverable.[8] Wagers were never illegal at common law and section 12 of the Police Act Amendment Act 1893,[9] which reproduces section 18 of the (English) Gaming Act 1845,[10] does not make wagers illegal but merely renders them unenforceable at law. As was said by Hawkins J. in *Read v. Anderson*[11]:—

> "At common law wagers were not illegal, and before the passing of 8 & 9 Vict. c. 109 actions were constantly brought and maintained to recover money won on them. The object of 8 & 9 Vict. c. 109 (passed in 1845) was not to render illegal wagers which up to that time had been lawful, but simply to make the law no longer available for their enforcement, leaving the parties to pay them or not as their sense of honour might dictate."

Since the purpose for which the money is lent is not unlawful, there is no reason why the loan itself should not be recovered. *Carlton Hall Club v. Laurence*[12] is not in point, as the decision in that case was based on the effect of the (English) Gaming Acts of 1710 and 1835 which specifically refer to gaming wagers.

Prior to 1954 money lent for the payment of wagering debts was recoverable in Western Australia, whether the wager was a gaming or a non-gaming wager; the position being the same as in England prior to 1892.[13] In England money lent in order to repay gambling debts is not recoverable by virtue of the (English) Gaming Act 1892.[14] This is so whether the money is paid direct to the winner[15] or to the loser;[16] in the latter case, however, there must be a definite agreement, express or implied, that the money is to be used to pay off gambling debts; if there is no such obligation the loan is recoverable.[17] As these

8 The position in England, after the passing of the Gaming Act 1892, is not clear: See Carney v. Plimmer, [1897] 1 Q.B. 634.

9 No. 10 of 1893.

10 8 & 9 Vict., c. 109.

11 (1882) 10 Q.B.D. 100, at 104; affirmed by the Court of Appeal, (1884) 13 Q.B.D. 779.

12 [1929] 2 K.B. 153.

13 *Ex parte* Pyke, (1878) 8 Ch. D. 754.

14 55 & 56 Vict., c. 9.

15 Tatam v. Reeve, [1893] 1 Q.B. 44; Woolf v. Freeman, [1937] 1 All E.R. 178.

16 MacDonald v. Green, [1951] 1 K.B. 594.

17 *Re* O'Shea, [1911] 2 K.B. 981; MacDonald v. Green, [1951] 1 K.B. 594, at 605-6 *per* Denning L.J.

decisions were based on the effect of the (English) Gaming Act 1892, they are not applicable in Western Australia. The position in Western Australia, therefore, was the same as in England prior to 1892, when money lent for the purpose of paying existing wagering debts was recoverable.

The Betting Control Act 1954[18] has altered the law relating to the recovery of money lent for the payment of wagering debts when the wagers were made on horse-racing. Section 5 (2) of that Act provides:—"No bet or transaction arising out of or in connection with a bet shall be enforceable at law." A bet is defined in section 4 of the Act as a wager on a race, and a race is defined in the same section as a horse-race, be the horse ridden or driven. Clearly the loan of money which is made in order that the borrower may pay debts incurred in wagers on horse-racing is "a transaction arising out of or in connection with a bet" and cannot be recovered. Presumably, by analogy with the English decisions on the (English) Gaming Act 1892, such a loan would be recoverable if there was no obligation upon the borrower to use the money to pay off his horse-racing debts.

Section 5 (2) of the Betting Control Act 1954 has also altered the position of an agent who pays his principal's gambling debts. It was held in *Read v. Anderson*[19] that when an agent pays to the winner money which his principal has lost on a wager he may recover that sum from his principal.

The effect of this decision was reversed in England by the (English) Gaming Act 1892, but remained good law in Western Australia until 1954. The position now in Western Australia is that an agent who pays his principal's gambling debts may recover the money paid from his principal unless the wager on which the money was lost was made on a horse-race, in which case the agent cannot recover the money, as the contract of agency is "a transaction arising out of or in connection with a bet."

In these two important respects, therefore, it is submitted that the law *has* been altered by the Betting Control Act 1954.

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18 No. 63 of 1954.
19 (1884) 13 Q.B.D. 779.

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