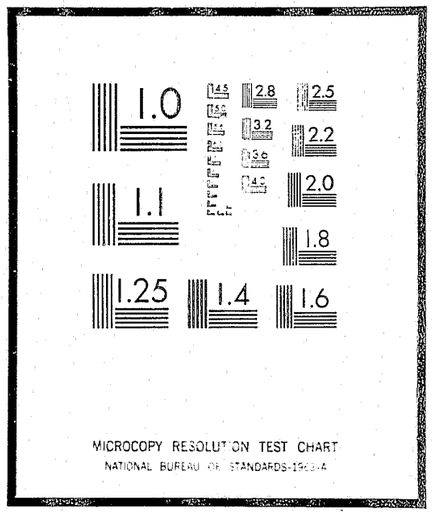

Cornell Law School

Gambling Project

THE DEVELOPMENT OF THE LAW OF GAMBLING:

The States

September 1, 1975

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Preface

This overall Report is the product of the combined efforts of students at the Cornell Law School, working under the supervision of Professor G. Robert Blakey. The following participated in the research and writing of the Report:

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Cornell Law School

September 1, 1975

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The Development of the Law of Gambling:

ALABAMA

P.B.P.

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Summary

¶1 Alabama was settled and developed after the War of Independence. In the frontier period, widespread gambling by rough adventurers flourished. Meanwhile, the few gambling prohibitions were laxly enforced by an unsympathetic local officialdom. As the state became dominated by those most interested in family pursuits, and as the power of the central government grew, gambling prohibitions multiplied and serious enforcement efforts were undertaken. By the beginning of the twentieth century, all gambling except that which was private and social had been criminally proscribed, either by statute or constitutional provision. This pattern has remained unchanged to date, although some legislators have recently shown interest in legalizing horse and dog racing under a parimutuel wagering system.

I. The Territorial Period: 1519 to 1819

¶2 The word "Alabama" is derived from a Choctaw Indian phrase, "alba ayamule," meaning "to make a clearing." Such a name seems appropriate for a state whose lush, semi-tropical climate has supported an agrarian economy from its original settlement.

¶3 Spaniards passed through Alabama in 1519 in search of gold and silver but effected no permanent settlements. The French set up a chain of forts in Alabama in the early 1700's

as part of a defense perimeter around their holdings farther west, along the Mississippi River. French settlement efforts were hindered by yellow fever, malaria, and Indian raids, which claimed a heavy toll of lives. A successful colony was, however, established on the site of what is today the city of Mobile.

¶4 In 1763, the Treaty of Paris ending the second Hundred Years War granted formal possession of southern Alabama to England. English efforts to encourage colonization of the area by a system of "homesteading" land grants to immigrants was only partially successful. At times, yellow fever epidemics killed off immigrants as fast as they came. During the Revolutionary War, the Alabama settlements remained loyal to King George, and were immune to ill effects from that conflict until the Spanish, America's ally, attacked and took Mobile in 1780 in hopes that they could keep it for themselves after the war.

¶5 Spain and the new American government both claimed the Alabama area until 1795, when a treaty formally gave Spain control of the settled areas in the south. The controversy was rekindled after the Louisiana purchase in 1803. Southern Alabama was now the only European holding in the area, and a significant American migration which started in the middle 1790's left a predominantly American community under foreign rule. Nonetheless, the Mississippi Territory, created in 1798 included what is today the state of Mississippi and only the northern and central parts of Alabama. These areas remained

almost totally under Indian control until 1814, and settlement efforts were scattered and small. Despite this fact, the laws of the Mississippi Territorial Legislature were declared to be legally binding in the entire territory.

A. Early Anti-Gambling Legislation

¶6 The Mississippi Territorial Legislature enacted wholesale prohibitions against gambling in 1807. All gambling obligations and contracts executed in whole or in part in consideration of anything staked in gambling were declared void. Obligations to reimburse or repay money knowingly lent for gambling purposes at the time or place of such play were also made unenforceable.[1] "Any wager whatever" was covered by this provision, but the list of activities specifically mentioned included betting upon cards, dice, gambling table games, horse races, cockfights and other sporting events.

¶7 The 1807 statute included criminal sanctions as well as civil measures. Those involved in wagers on card or dice games, or gaming table and bank games which took place in taverns, liquor stores, public houses or other open public places, could be fined ten dollars. Keepers of such "gambling places" drew a twenty dollar fine. Half of these fines went to the informer, the remainder was collected by the territory. Finally, those who kept or exhibited gaming tables, billiard tables, or faro banks were deemed vagrants and were subjected to a one month jail term plus the costs of such room and board. Such gambling devices were made subject to seizure

and destruction by law enforcement officials.[2] In 1810, the operation of unauthorized lotteries was forbidden. The heavy fine of one thousand dollars attached to this statute is probably evidence of the extent of the evil, for the territory was a frontier area, and the American frontier has always been noted for gambling.

¶8 It is unclear how effectively these laws were enforced. It can be inferred that some officials ignored them, however, from the adoption of a statute in 1811, which specifically declared that it was the duty of all judges and justices of the peace to destroy all tables set up for gambling purposes.[3] However, that same act also provided that nothing in the earlier acts punishing the gambling operators "shall be construed to extend to persons casually attending or adventuring at any gaming table but to those only who shall be the real or apparent owners or holders of such gaming tables..."[4]

¶9 In 1812, this distinction between social gamblers and professional gamblers and their accomplices was reinforced. A proviso added to the law voiding all gambling contracts stated that the law "...was not to be construed to prevent the evil practice of gambling."[5] In addition, the exhibiting of billiard tables for play was exempted from the penalties for keeping or exhibiting gaming tables as long as a license was obtained from the county clerk and a fee of one hundred dollars was paid.[6] On the other hand, the penalty for keeping, exhibiting or owning an interest in any gaming table, faro bank or unlicensed billiard table was subject to a fine of from one hundred to

two thousand dollars, unless he gave information on such activities to officials within six days from the time he gained knowledge of them. Finally, it was specifically made the duty of all judges and justices of the peace to see that those suspected of gaming violations were arrested.[7]

¶10 The year 1812 also saw the chartering of the Green Academy at Huntsville. This charter was the first which allowed an educational institution to raise money by holding a lottery.[8]

B. Enforcement Problems

¶11 There are no reported gambling cases in this period that comment upon how well the legislature's anti-gambling policy was carried out. Historical commentary, however, indicates that there was "...much rowdyism, drunkenness, gambling, murder and robbery..."[9] in the frontier towns of Alabama during the late 1790's. Indeed, Alabama had a race track several years before it became part of the Mississippi Territory.[10] During this "rough and ready" period, vigilante groups kept "law and order" in most of the state, for the territorial government provided little or no law enforcement. As the Spanish were very casual in their rule over the southern part of Alabama, it may safely be assumed that gambling also flourished there as well.

C. The War of 1812 and its Aftermath

¶12 During the War of 1812, the English used the

Spanish ports in the Alabama-Florida area for distributing supplies. To end this activity, the Americans attacked and captured Mobile in 1813, thereby making the United States and the Indian nations the only effective powers in the territory later to become Alabama. The English, however, formed alliances with several of the Indian nations, arming them and inciting them to attack the American forces. The Creek War of 1813-14 saw hard fighting and heavy losses on both sides. The war ended at Horseshoe Bend in 1814, with the victory of General Andrew Jackson's forces under William Weatherford. The treaty signed at Fort Jackson forced the Indians to cede almost one-half of their Alabama land to the United States government. The flood of settlers who entered this territory soon after 1814 caused more friction between the Indian nations and the government. Small battles erupted, and a series of defeats forced the Indians to cede massive land holdings to the United States. The victors as was their wont, planned to move all the Indians to a "permanent" Indian territory somewhere west of the Mississippi River. The Creeks, however, continued to control at least one-fifth of what is now the State of Alabama until 1832.

¶13 In 1817, Congress created a separate Alabama Territory and provided that all the laws in force in the old Mississippi Territory would remain in force until changed by the Alabama assembly. The first session of the Alabama Territorial Legislature met in 1817, and while it passed several laws dealing with internal improvements such as transportation and public

schooling, there were no laws effecting gambling. Consequently, the gambling prohibitions formerly enacted by the Mississippi Territorial Legislature remained in effect.

¶14 Indeed, the creation of a separate Alabama Territory seemed to have little effect on gambling in the area; gambling remained commonplace and no significant law enforcement efforts were undertaken. The existing law did not prohibit some forms of wagering. Horse races, for example, were not forbidden, although the winner of a racing bet could not enforce his agreement in court. This form of gambling was quite popular in Alabama, especially among the upper classes. One of the main events of the first Alabama Territorial Legislature was a visit by General Jackson who had come to Alabama to look after his land and to race his horses.[10]

¶15 Other forms of gambling, while illegal under the laws of the territory, were just as widely practiced. One writer states that cockfighting, playing cards, gambling and horse racing were popular pastimes of the rough frontier people of Alabama.

> Some village had gambling houses where the adventurous wagered their money on the races and on cards, faro, roulette, and other gambling devices. Officers of the law gave it no attention, for gambling in those days was considered respectable and men of the highest standing freely engaged in it and wagered large sums on the outcome of a race or the turn of a card.[11]

Another writer, who passed through the Alabama Territory in 1819, observed that people migrated to Alabama from every state in the Union and many of them were outlaws seeking to escape justice. This group combined with the poor to form a

class of people called "rowdies" who were "addicted to gambling, intemperance, profanity, fighting and in fact to every species of vice." This traveler noted that the wealthy, too, were fond of ease and recreation, "[t]he principle amusements [being] gambling, dancing, horse racing and cockfighting."[12]

II. The Formative Era: 1819 to 1900

A. State Authorized Lotteries

¶16 The status of statehood was achieved by Alabama in 1819. One of the first acts of the state legislature authorized certain named persons to operate a lottery to raise up to fifteen thousand dollars for the building of a Masonic Hall in Huntsville. The legislators, mindful of the corruption that could accompany private lotteries, also provided that the manager of the lottery had to post a thirty thousand dollar bond to insure that the drawing would take place within three years, and the prizes would be awarded within ninety days of the drawing.[13] It was the practice of the state to authorize private lotteries to raise funds for almost any worthwhile internal improvements. In 1820, the legislature authorized private lotteries to raise funds for the improvement of the navigability of rivers, and for building bridges and fraternal lodges.[14] The next year, lotteries were authorized for a bridge, a turnpike road, and two academies.[15]

¶17 At first, authorized lotteries were established with safeguards against corruption; soon lawmakers began to approve

lotteries without such precautions. For example, an 1821 law simply authorized all Masonic lodges to raise three thousand dollars by lottery.[16] Later, in 1836, the penalty for selling unauthorized lottery tickets was lowered from one thousand to five hundred dollars. The inevitable corruption resulted.

¶18 Lottery corruption was brought to the public's attention through an investigation of the state bank. The state bank had been the creation of the powerful Whig party, which dominated Alabama politics in the state's first two decades. The bank's directorship was controlled by the party which ran the bank for the benefit of the party and its supporters. Corruption and mismanagement led to the insolvency of several branches of the state bank. The fraudulent use of lottery funds placed in the state bank was uncovered, and the investigation swept the Democrats into office in 1841 on a reform platform. One of the reform statutes passed by the Democrats abolished all authorized lotteries and punished lottery operators, advertisers and their agents by fines from one hundred to five hundred dollars.[17]

¶19 By 1848, the state was again licensing lotteries, this time under a scheme which taxed lotteries and raffle operations.[18] Corruption again became a problem. William Garrett, a politician and author, writes, for example, that Gibson F. Hill, a member of the Alabama House of Representatives in 1853, pushed through the enactment of a bill to establish a lottery to raise funds for a Military and Scientific Academy. Garrett claims that "[t]he measure was fraught with mischief" and the promoters

all made a fortune.[19] About this time, the legislature again changed the fine for setting up or carrying on any lottery without legislative authority. Probably hoping to discourage illegal competition with revenue producing games, the lawmakers raised the maximum crime for this offense to two thousand dollars.

B. Sanctions Against Casino Gambling

¶20 The year 1821 saw the first Alabama law against a specific type of game. At the time, this game was known as the three ticket lottery or "three thimbles." Later in the West, however, it became known as the notorious confidence game, three card monte. The 1821 law provided that anyone who exhibited the game would be sentenced to the pillory for one hour a day for three days and fined from five hundred to two thousand dollars. The act specifically provided that the penalties did not apply to those who only casually bet on such games.[21]

¶21 Alabama began passing her own laws against casino type games in general in 1826, when the legislature made it unlawful for a court or any town or city government to issue any license to keep any table, bank or any other invention used for the purpose of gaming. Those who violated this provision could be fined from five hundred dollars to two thousand dollars and be imprisoned from two to twelve months. Judges were instructed to charge grand juries to enforce the act. Those who bet at any gaming table not heretofore licensed were to be

fined between twenty and five hundred dollars and were to remain in jail until the fine was paid.[22]

¶22 Two years later, Alabama enacted a set of anti-gambling statutes which form the bases of its present day law in the area. The 1828 laws generally reenacted and clarified existing law, including the 1807 provisions originally adopted by the Mississippi Territorial Legislature. Several important new provisions were added, however, to ensure better enforcement. Prosecutors were now empowered to compel persons to appear before and testify to grand juries regarding any knowledge they might have concerning violations of the act. In return, such informers were granted immunity for any violations of the act they had committed about which they were compelled to testify. Prosecutors were entitled to double fees for convictions under the 1828 act.

¶23 The 1828 act also changed the penalty for keeping, exhibiting or carrying on any table, bank or game to a fine of one thousand dollars or three months in jail if the fine were not paid. The fine for betting at the above tables, games, or banks was changed to from ten to one hundred dollars.[23]

¶24 In the next decade, the legislature enacted several laws against specific forms of gambling activities, laws which remain in force today. In 1830, betting on elections became a misdemeanor punishable by a fifty dollar fine.[24] Three years later, anyone maintaining himself by gambling was deemed a vagrant subject to a ten day jail term and a fine equal to the state's expenses arising out of his conviction.[25] By

1834, bank losses due to embezzlements by bank officers, directors and cashiers caused the legislature to require that all persons take an oath not to bet on any gaming table.[26] Finally, in 1836, it became a crime for mature persons to gamble with a minor, or allow a minor to gamble with another adult; the penalty was set at a fine of not less than five hundred dollars and six hours in the pillory.[27]

C. Judicial Activity

¶25 In 1838, the courts defined betting as follows:

> A bet is a wager; and the betting is complete, when the offer to bet is accepted. The placing of money, or as in this case, which is as its representative, on the gaming table, is such an offer; and if no objection be made by the player or owner of the table or bank, it is an acceptance of the offer, and the offence against the statute is complete, although from any cause whatever, the game should never be played out, and the shake be neither lost nor won. The offence which the act designed to punish, is betting, not the winning or losing.[28]

Thus, convictions for betting or operating a gaming table were made easier to obtain through court interpretation.

D. Public Places for Gambling

¶26 The first litigated issue under Alabama's gambling laws in this period concerned the definition of the term "public place," for playing with cards or dice in a public place was a crime, while playing such games in private was not. In general, the courts held that every building to which the public was admitted for the purpose of trade, either by an express or implied invitation, was considered

a "public house." Thus, a store house where drygood were sold,[29] and even the office of a justice of the peace[31] were held to be public places. Certain places that would rationally be included under such a definition, however, such as a lawyer's office or a doctor's office were found to be "private" because of the special circumstances surrounding the playing of cards in such places. In both cases, the activity occurred late at night with access limited only to the few people present.[32] Usually bedrooms were considered private places where it was not unlawful to play cards. A bedroom in a building that was partially used for business and was entirely under the control of one person, however, was not prima facie a private place.[33]

¶27 In general, Alabama courts were very reluctant to hold a private house or room "a public place." In Coleman v. State[34] the court, for example, held that the number of persons in a private home or room was not the determining factor in making such home or room a public place; the key factor was, instead, entry by people. Thus, if none could enter except by invitation, the house or room retained its private character, while if persons could enter without invitation or restraint, the room or house could be considered a public place. The issue of whether a place was public or private was usually left to the jury. However, in a few cases the courts themselves ruled that as a matter of law some places were not public places. For example, in 1857, the court held that a navigable river was not a highway and not a public place.[35] This was a fortunate ruling for the many river boats which plied Alabama's rivers in the 1850's. Actually floating hotels, these vessels came

complete with bars, gambling tables, and dance floors.[36]

E. Other Pre-Civil War Statutes

¶28 By 1852, the gambling laws had expanded to include a specific fine of from fifty to three hundred dollars against tavern keepers, proprietors of any public houses or unlicensed retailers of liquors who knowingly suffered any game to be played on their premises. In addition, the penalty for keeping or exhibiting any kind of gaming table was increased to a mandatory two years imprisonment.[37]

¶29 In 1852, white persons who played at cards with any slave or free Negroes were subjected to fines not less than fifty dollars and jailed for three to six months.[38] If this law was meant to keep blacks from learning the evil ways of gambling and sport, it was too little and too late. "They [slaves] were noisy spectators at horse races [some of them served as jockeys], cockfights, and dog fights, and the game of 'craps' was an institution peculiarly their own."[39]

¶30 Despite these comprehensive and tough laws, gambling was not eliminated, as notes of different travelers in the state between 1840 and 1850 indicate that gamblers were to be found in most cities.[40]

F. Horse Racing and Animal Contests

¶31 Horse racing and animal contests such as cockfights or dog fights were respectable, lawful forms of amusement in pre-Civil War Alabama. Betting on such events was not illegal,

for the law making it a crime to wager only applied to wagers made at gaming tables. "The Sport of Kings" was perhaps the most popular leisure pastime of the wealthy plantation owners and other men of means. Since these same men populated the ranks of the state's legislators, it is not hard to understand why this "gap" in Alabama's statutory scheme of gambling prohibitions was maintained. Indeed, the start of the racing season at Tuscaloosa was timed to coincide with the opening session of the legislature, so that the lawmakers could enjoy themselves during their first week of work.[41]

> Planters found relief from plantation responsibilities in politics, for which they had a passion, in fox hunting, horse racing, gaming and various forms of social intercourses. They had a passion for fine horses, and horse races were attended by gambling and dram-drinking for which they had a strong proclivity. Some clergymen took an active interest in the races and failed to see the impropriety of risking their money on their favorite steeds.[42]

¶32 The first law concerning horse racing was not enacted until 1848, and it did not attempt to control horse racing, but only to tax the sport for revenue purposes. A one percent tax on the value of race horses was levied, and a fifty dollar license fee was collected from race track operators.[43]

¶33 Horse racing on public roads, probably as a public safety measure, was made a misdemeanor in 1852,[44] but as late as 1895, horse racing wagers were still legal. By that year, however, the tide was beginning to turn. The economic panic of 1893 exacerbated the political decline of planter interests, which had supported horse racing. The panic and scandals

concerning governmental corruption strengthened the position of the bourgeois and development-oriented wing of the Democratic party which was, in general, fiscally conservative. Indeed, the end of gambling on horse racing was foreshadowed by a statute sponsored by this group, enacted in 1895. This law made it illegal to sell pool tickets and chances, or to make or accept any wagers on horse races, prize fights, baseball games, or any other contest held outside of the state.[45] The purpose of this statute was to destroy a thriving bookmaking industry, which relied on out-of-state contests, while at the same time to allow Alabama citizens to bet on local gambling events.

¶34 The statute was attacked in the courts in 1897 on the ground that its distinction between legal and illegal wagers acted to interfere with interstate commerce. The court denied that the act had such an effect, but went on to note that the state had the right to interfere with interstate commerce in order to protect the morals of its citizens. The method chosen to achieve such protection was held to be within the legislature's discretion.[46]

¶35 Three days after the announcement of this judicial decision, however, the legislature erased the distinction between in-state and out-of-state contests. It became illegal to sell or buy a pool, or to wager any money on any race, not matter where it was run, such activity being a misdemeanor.[47] This statute remains in force today, although the racing of horses itself is still legal, except on Sundays.[48] The keeping of cockpits or the running of cockfights was also

made illegal and today can draw a fine of between twenty and fifty dollars.[49]

G. Gambling Contracts

¶36 Since 1807, gambling contracts had been declared void in Alabama, and only three years after statehood the courts declared that the statute voided all gambling contracts, even those made on games not specifically named in the statute, such as horse racing.[50]

¶37 As early as 1832, however, the state courts had decided that a bona fide holder for value of a note given in consideration of a gambling debt could recover on the note.[51] The court reasoned that since the statute voiding gambling contracts was in derogation of the common law, it was to be strictly construed. Consequently, the endorsement of a note or contract already in existence, as payment for a gambling loss, was held not to be the making of a contract in consideration of losses at gambling, and such notes could be enforced even by the winner of a gambling venture.

¶38 The court overruled this case in the 1838 case of Roberts v. Taylor,[52] where the court found the endorsement of a note to be itself the making of a contract between the winner and the loser. The winner was, therefore, not actually attempting to enforce the rights of the original payor, but rather his own under a contract made "in consideration of gambling." The court went on to state:

> It is said that the parties are in pari delicto, and that the court should not interfere between them. We cannot think so. Between the professional gambler, and his deluded victims, there is a great inequality of guilt; but we do not decide on that principle solely. We hold that in all cases, as between the original parties, the courts will interfere, when the money has not actually been paid; and it may well admit of doubt, on principle, though the weight of authority is against it, whether, independent of all statutory regulation, even money won at play may not be recovered back.

¶39 A year later, the Alabama court followed the rule of the New York Courts, as laid down in Vischer v. Yates. That case held that a wagerer could recover his bet from the stakeholder as long as he demanded his money back before the stakeholder paid it over to the winner. Further, if the stakeholder paid the money over a demand for its return, he could be sued, and the loser could recover his losses from the stakeholder.[53]

¶40 In 1841, the legislature expanded the law in this area by allowing persons who lost money or goods at cards, dice or any other game to sue to recover the money or goods, provided that the suit was brought within six months of the loss. The court applied this statute to money lost at gambling on horse races, even though the law did not yet specifically cover that form of gambling.

¶41 The Alabama courts were also liberal in allowing losers of money at gambling to use courts of equity to avoid payment. In 1843, the court held that the loser of notes at gaming may file a bill in equity to restrain the transfer of the notes or a suit upon them at law to enforce payment.

Indeed, such a restraining order could be issued regardless of the method in which the winner had gained a legal interest in the note, e.g., whether the note had been endorsed by the loser, whether it had been passed to the winner by mere delivery, whether it had remained in the hands of the winner, or whether it had been transferred to a third party who had notice of the circumstances under which the note had been acquired.[54] That same year, it was held that even if the winner of a note or a third party who was aware of the gambling nature of the note had won an action at law to enforce payment of the note, the payor could go into a court of chancery and get an injunction against enforcement of the law decree.[55]

¶42 In 1845, the court did a partial about-face and declared that a note given in consideration of gambling was void, at law, in the hands of an innocent holder who gave valuable consideration for the note.

> The statute, in effect declares that is [the note given for gambling losses] never had a legal existence and makes it 'utterly void and of no effect, to all intents and purposes whatsoever.' And, indeed, if such were not the true construction of the statute, it would, in effect, be a dead letter, as such securities would always be found in the hands of innocent holders, for value.
>
> Such is the uniform tenor of the English decisions upon the state of 9 Anne., c. 14;...[56]

¶43 The court, however, goes on to say:

> Whatever may be the rule at law, we are satisfied, that in equity, the maker of a gaming security cannot have relief against an innocent holder, whom he had induced by his promise of payment, or by an assurance, that the note was valid, to invest his money in its purchase.[57]

This holding was limited to cases where the holder of the gambling security was induced to take the security by promises of the maker to honor it, promises which were made before the holder knew of the note's gambling origins. If a maker promised to honor the gambling security after the holder had gained knowledge of its illegality, the holder was not entitled to recover, since he no longer remained a holder without notice.

¶44 By 1852, the statute on wagering contracts had expanded to nine sections. The law now allowed anyone to sue to recover money or property lost at gambling as long as the action was commenced within one year from the date of loss and the recovery was for the use of the wife, child or next of kin of the loser. Creditors of the losing party could garnish the winner for the amount paid to him by the loser. Also, in any recovery or garnishment suit, the testimony of any of the parties could not be used against them in any criminal prosecution.[58]

H. Billiards

¶45 The third type of gambling that was legal in the frontier era was gambling on billiards. From 1811, it was declared legal to maintain a billiard table if the requisite license fee was paid. That fee started at one hundred dollars in 1811, went up to two thousand dollars in the 1820's, and then was reduced again in 1848 to fifty dollars.[59] The statutes authorizing the issuance of licenses for billiard, and later pool tables, said nothing about allowing wagering on

such tables. The court, however, in 1848, reversed a conviction for wagering at billiard tables, holding that it was absurd to read the statutes as allowing the use of pool and billiard tables while also subjecting those who bet on them to two years imprisonment. Such a reading, said the court, would put the legislature in the position of tempting citizens to commit a felony. The court further held that even though the licensing statute said the billiard or pool tables were to be licensed "for play" and not "for gaming," such a distinction was not intended by the framers of the statute.[60]

¶46 Apparently, this decision did not sit well with a number of legislators, for six years later, the authority to grant licenses for pool tables was rescinded. Exhibiting a pool table or betting on a pool game was made illegal, as was betting at billiards.[61] After 1854, then, only owning a billiard table, or playing billiards for amusement, remained legal.

I. Civil War and Reconstruction

(1) Sanctions against gambling

¶47 During the Civil War, the state government's attention was, of course, focused on the war effort, and little legislative attention was paid to gaming or wagering. The occupying federal forces also showed little interest in gambling laws or their enforcement. After the Civil War ended, however, most of the pre-war anti-gambling laws were reenacted in the 1866 code by the Reconstruction government. The 1866 code was the handiwork

of the military government that occupied Alabama from 1865 through 1868. Briefly, the new code's adoption meant that wagering on billiards, ten-pins, cards or dice, playing cards or dice in a public place, betting with a minor, knowingly renting property for gambling purposes, permitting a public house, inn or steamboat to be used for gambling purposes, or keeping or exhibiting a gaming table were illegal.[62]

(2) Gambling as a revenue source

¶48 Nevertheless, when the Radical Republicans came into power in 1865, they saw gambling as another potential source of revenue, the taxation of which could help rebuild the st In 1866, they levied fees of one-quarter of one percent on race horses, fifty cents on a pack of cards, five percent on the prizes or articles put up in raffles, one hundred dollars for race tracks and one hundred dollars per day for selling chances on unauthorized lotteries or gift enterprises, although this tax was supposedly not an authorization to conduct such businesses.[63] In 1868, the governor was authorized to appoint a commissioner of lotteries. The commissioner was to impose a one percent tax on the gross income of all lotteries, and the proceeds were to be paid into the school fund. In addition, a license to vend lottery tickets could be procured from the commissioner at a cost of one hundred dollars per month, and the commissioner had the power to arrest anyone engaged in an unauthorized lottery.[64]

¶49 The Radicals were dedicated to the expansion of

opportunities for education, to the providing of modern and efficient social services to Alabama's poor, especially to her black poor, and to the building of eleemysonary institutions, such as hospitals and prisons. Like most politicians of the time, however, many were also corrupt, although history until recently has exaggerated their corruption and minimized their extraordinary accomplishments. Gambling was a way to finance social services and also to line the pocket. The Radicals were dependent on the support of blacks and pre-War Whigs; when the Democrats terrorized the blacks and wooed the Whigs into their party, Radicalism was doomed. In 1874 the State was "redeemed" and a new constitution was drawn up. At the same time, the state's debts were reorganized. Adopted in 1875, the new constitution included a ban on lotteries. Under this ban, the legislature would have no power to authorize lotteries or gift enterprises. In fact, the legislature was required to pass laws prohibiting the sale of lottery and gift enterprise tickets, and all acts authorizing lotteries were made void.[65] This is the only state constitutional provision on gambling, and it is still in force today.

¶50 The legislature responded to its new constitutional duty by making it a misdemeanor to run a lottery, punishable by a fine of from one hundred to two thousand dollars.[66] The state Supreme Court subsequently defined a lottery as "... any scheme whereby one, in paying money or other valuable thing to another, becomes entitled to receive from him such a return in value, or nothing as some formula of chance

may determine."[67] Under this definition, the court held illegal only those schemes in which a valuable consideration was paid, either directly or indirectly, for a chance to draw a prize. Business promotions with gambling features were thus permitted. For example, a carnival owner was convicted under the lottery statute for distributing tickets free to persons who entered his show tent, and awarding prizes on the basis of those tickets. The court overturned this conviction, holding that no illegal lottery had occurred since no consideration was required to win a prize. The court specifically noted that the prizes may have been given to draw larger crowds with the expectation that they would buy medicines offered for sale at the show, but that such a benefit to the carnival owner was too remote to constitute legal consideration.

¶51 The Reconstruction governments' inclination to tax facilities that could be used for gambling, however, was at least partially shared by the Democratic administrations that succeeded them. In 1883, taxes of from one hundred dollars to two hundred dollars were levied against public race tracks. Twenty-five dollar fees were collected from bowling alley operators and those who kept billiard tables for public use, unless such tables were maintained in a bar room, in which case the tax was fifty dollars. A fifty dollar tax was levied on pool, bagatelle or jenny lind tables.[68] A year later, dealers in playing cards were required to pay a five dollar license fee,[69] and by 1907, there was a fifty dollar tax on dice kept in a bar room.[70] The fact

that the mere playing with dice in a public place such as bar room was an offense[71] did not seem to phase the legislators who enacted the two contradictory laws.

J. Public Places for Gambling

¶52 The recurring problem concerning the definition of the term "public place," as used in the anti-gambling statutes, was soon before the court, which adopted the following test: "Any house to which all may go night or day and indulge in gaming in its various forms, is a public house within the meaning of the statute."[72] Over the years, the courts have held backyards,[73] fields,[74] ferry boats,[75] a highway or places that can be seen from a highway so the fact of gaming can be observed[76] to be public places. The courts have retained their earlier position, however, that the mere act of playing cards is not a crime in itself. And since only the public playing of cards is criminal,[77] the playing of cards in a private residence with friends has been held to be immune from prosecution.[78]

K. Municipal Regulation

¶53 The question of the power of local governments to deal with gambling was settled in 1872, when it was held that cities have the power under their charters to restrain or prohibit gambling, but not the power to license gambling games.[79] In 1907, cities and towns were specifically given the power to suppress and restrain gambling, gambling tables and houses.[80] The courts upheld these provisions and interpreted them to

allow cities and towns to pass ordinances prohibiting gambling devices and then to proceed in equity to abate and condemn such devices as contraband.[81] These laws remain in force today, and incorporated cities and towns now are empowered to enforce the anti-lottery, slot machine and poolselling statutes.[82]

L. Judicial Activity: Slot Machines

¶54 As mentioned above, the pre-Civil War prohibition against keeping or operating a gambling table of any description was reenacted in 1866 and is in force today.[83] In 1888, the court held that since this statute was "aimed at the evil of gaming," there could be no exception for any place, public or private, where such table was kept.[84]

¶55 When gambling machines were introduced into the state, there were no specific laws making them or the practice of wagering on them illegal. Nevertheless, the courts were not going to allow this type of gambling to flouish in their state due to a legislative oversight. In an 1897 case,[85] the courts found that a trade machine, a slot machine that showed poker hands and was used for the selling of cigars, was an illegal lottery. The operation of the machine was held to constitute gambling by lot because consideration was paid for the chance to win a larger sum than that deposited, and because the machine determined the winner by chance. Later that year, the legislature corrected their oversight and made it a misdemeanor to set up or operate any wheel of fortune, slot machine, or any device of chance.[86]

¶56 Despite the strict penalties for both players and operators of casino type gambling, such activity still flourished in some cities in the state during the late 1880's. In an article on crime in Birmingham between 1871 and 1910, the author notes that "[m]urder, gambling, drunkenness and robberies were commonplace. Gambling houses ran wide open during most of this period, and, if there were sporadic efforts to clean them up, very little was ever accomplished."[87]

III. The Modern Era: 1900 to date

A. Professional Gambling: New Sanctions

¶57 Alabama's people in modern times have been primarily native born and Protestant. Most of the white population have their origins in nineteenth century settlers. Approximately one-third of all of Alabama's people are black. While it retains much of its early agrarian life-style, Alabama has made some impressive gains in manufacturing, particularly in the production of iron and steel. As Alabama's modern way of life has not radically changed from the past, so too its gambling laws have developed only slightly.

¶58 In 1909, laws were enacted declaring gambling places to be common nuisances which were enjoinable as such in equity actions commenced by the state. In addition, the use of electric bells, signals, dumb waiters or any other device to communicate with occupants of a gaming room became a felony subject to from one to five years imprisonment,

as did gambling in a locked room. Owners of such premises who willfully let them be equipped and used in this manner were also guilty of a felony. Police were authorized to break into such locked or barred premises, seize all gambling equipment and arrest all persons found therein.[88] The state has effectively used the courts' equity power of injunction to close down "social clubs" that are, in reality, gambling clubs for their members. These injunctions have permitted the state to close down the clubs and permanently padlock the buildings, even when the owners of the buildings had no knowledge that the buildings were being used for gambling purposes.[89]

¶59 Since 1909, prosecutors of gambling offenses have been allowed to show the defendant's reputation, or the reputation for gambling of those with whom he associates, as part of their proof.[90] A defendant's mere reputation as a gambler, however, standing alone, is not sufficient proof for a conviction.[91]

¶60 In addition, if a modern prosecutor can prove that a defendant is a professional gambler, then he is classified as a "vagrant" by the court. Penalties for such a conviction can include a fine up to five hundred dollars and imprisonment for up to one year.[92]

B. Promotions and Lotteries: Criminal and Civil Sanctions

¶61 In 1937, the court reversed its once permissive

position regarding lottery-like business promotions. Grimes v. State[93] involved the operation of "bank nights" at a movie house. The court prohibited such activity using the classic definition of a lottery, i.e. a scheme which involves a prize awarded by chance for consideration. The court went on to state:

> The very fact that it is a business enterprise intended to swell the receipts from paid admissions to the theater evidences an intention to garner a profit from the gift enterprise. For practical purposes the measure of the consideration moving to him is the excess of receipts from paid admissions on bank nights, over what they would have been for the entertainment in the absence of the bank night attraction.
>
> ...
>
> To the extent this gambling spirit is aroused in the community, the higher the gambling fever rises, the more successful the enterprise.
>
> ...
>
> That the prize may go to someone who has paid nothing does not negate the fact that many have paid for their chance. Because some have not been drawn into the gambling phase does not render it any the less a lottery, with whatever of evil it engenders, as to the large public who have paid.

Thus, the court banned most promotional schemes utilizing gambling in Alabama.

¶62 In the following year, the court held illegal premiums given to soft-drink purchasers on the basis of a figure from five cents to one dollar printed on the underside of the bottlecap. The court found the bottlecaps to be gambling devices and issued an injunction against the use and advertising of the premium bottlecaps under its equity power to abate such nuisances.[94]

¶63 Alabama courts have not been hesitant to use their equity power to abate gambling. Injunctions have readily been issued to stop the use of a house as a lottery center,[95] and the courts have frequently enforced laws calling for the condemnation of lottery paraphernalia and property used to transport such items.[96]

¶64 The courts distinguish, however, between civil nuisance suits brought by private individuals and those commenced by the state. When the State brings a suit to enjoin the use of property for gambling purposes, it merely has to show that it is in good faith in bringing the suit and that the property involved is being used for gambling.[97] A private individual must show that the property is being used for a lottery or other gambling purpose, and that irrepairable injury and damage peculiar to him has been caused by the public nuisance of gambling, before injunctive relief will be granted.[98]

¶65 At trials for operating illegal lotteries, the court has allowed the use of expert witnesses to describe the nature and use of lottery paraphernalia. Such witnesses must have considerable experience in the subject matter, such as having ten to fifteen years on the gambling squad, to qualify as experts.[99] The conclusions of a lay witness[100] or an inexperienced policeman[101] that a transaction or certain property was part of a lottery or gambling operation is inadmissable.

¶66 The courts have not held all give-aways to be lotteries, however. Those contest that involve some skill with the winner being picked on the basis of that skill have been held not to

be lotteries because the contest rules have eliminated the element of chance. For example, a contest which the court held to be legal was one where customers were asked to write, in twenty-five words or less, "why Pepsi-Cola hits the spot," and where the winner was awarded a cash prize on the basis of the originality, aptness and interest-provoking quality of his statement.[102]

¶67 In 1951, Alabama revised its anti-lottery laws. Today, the mere possession of lottery paraphernalia by anyone who has engaged in the operation of a lottery or numbers game within the past three years is illegal, and may draw a fine of one hundred to five hundred dollars and a jail term of up to twelve months.[103] Transportation of lottery paraphernalia, or the possession of the same, by a person convicted of operating a lottery within the past three years is a misdemeanor. The vehicle used may be forfeited to the state unless the owner of the vehicle had no knowledge of its illegal use.[104]

¶68 The state has retained many of its older laws on lotteries. Under present law, prosecutors may still grant immunity to compel testimony in lottery actions.[105] Those who operate or sell tickets to any lottery or gift enterprise, are still fined from between twenty-five and five hundred dollars on their first conviction and penalized with fines between one hundred and one thousand dollars and a jail term of six to twelve months on their third conviction.[106] In addition, persons or corporations who knowingly loan money to finance a lottery scheme may be fined up to one thousand dollars, see their loan declared void, and in the case of

corporations, lose their charters.[107]

C. Horse and Dog Racing

¶69 The question of whether the constitutional clause barring the authorization of lotteries also prevented the legislature from authorizing horse and dog races and an accompanying parimutuel wagering system has been answered differently by the state Supreme Court at different points in Alabama's history. In 1947, the court in a four to three opinion held that a parimutuel wagering system was a lottery and was thus banned by the constitution.[108] In a case heard thirteen years later, the court was evenly split three to three on the question.[109] By 1971, the court, by a vote of five to four, decided that the parimutuel system was not a device of chance but merely a way of counting the wagers. The system, therefore, did not determine the winner but only the amount of the purse, and the system was not a lottery prohibited by the constitution. In its opinion, which relied heavily on the Utah case of State Fair Assn. v. Green,[110] the court indicated that it might not even regard betting on dog races to be gambling, but rather contests of skill:

> As Justice Lawson pointed out in 1947, the winner of a dog race is note determined by chance. A significant degree of skill is involved in picking the winning dog, such factors as weight, paternity, trainer, position, past record, wet or dry track, etc. all must be considered by successful bettor. The fact that the parimutuel system of betting is used is not determinative of the winner, but the amount of the purse.[111]

D. Machine Gambling

¶70 For many years, the courts have been quite liberal in their definition of what constitutes an illegal slot machine. In Cagle v. State, the Court of Appeals found illegal a nickel slot machine which returned from two to twelve nickels or a five cent pack of gum for every nickel inserted, even though the machine always indicated what it would give on the next turn. The court held that the machine was a "device of chance" whose use was prohibited by law in Alabama.[112]

¶71 In 1931, the legislature passed a series of laws that were more effective in combatting what was perceived as the growing menace of mechanized gambling. Included was a definition of a mechanical gambling device, a definition which encompassed not only those machines that were used for gambling, but those which "could" be operated as gambling machines as well. These laws mandated that the county sheriff seize any gambling device in his county and required the local prosecutor to file a bill for the forfeiture and condemnation of the gambling device. If such devices were found to be used for gambling, they were to be ordered destroyed by the court. The law also provided for the disposition of the contents of any condemned gambling device, devised a method of appeal of the condemnation order, and increased the penalty for ownership, possession or operation of a gambling device.[113] The legislature's definition of what was not an unlawful machine or device included those which indicated what a player would receive prior to his depositing his money and thereby overruled the court's decision in Cagle v. State.[114]

¶72 In 1935, the condemnation provisions of the 1931 law were challenged on the grounds that under the statute the prosecution did not have to show that the appellant ever used or intended to use the device for gambling in order to seize it. The appellant, therefore, argued that he was being deprived of property without compensation in violation of due process of law. The court rejected this argument and stated that the intent of the statute was not only to suppress the use and keeping of gambling devices, but also to prohibit ownership of them, whether used for gambling purposes or not.

> The constitutional right which counsel suggest in brief is here violated is the due process provision, in that mere ownership or possession of a gambling device without an intention by the possessor to operate or conduct it, or permit it to be done, is property which cannot be condemned without just compensation. But the right here exercised is not that of eminent domain, but the police power of the state, by which it may, without compensation to the owner, cause the destruction of property (not take it for use), which is declared by valid legislation proper to promote the health, morals, or safety of the community, so that the owner is sufficiently compensated (though compensation is not necessary) by sharing in the general benefits resulting from the exercise of such power. Mugler v. Kansas, 123 U.S. 623, 8 S.Ct. 273, 31 L. Ed. 205.[115]

¶73 The courts have repeatedly upheld the power of the state to confiscate and destroy gambling devices under the 1931 statute, or as part of the court's equity powers.[116] The court has sometimes used the rationale that the law does not recognize as property those things which cannot be put to any legitimate use: therefore, it allows such things to be destroyed after a lawful seizure.[117] The court has also upheld the provision of the law that allows condemnation of machines that

were not used for gambling but which a trial judge is convinced could so be used.[118] Since the prosecutor is not required to prove the machine is a gambling device, but only must demonstrate that the machine could be used for gambling, the prosecution of gambling device seizure cases is not a difficult task.

¶74 Under this logic, the state was able to condemn pinball machines by showing that it was possible to gamble on the scores achieved on the machine. The court observed:

> We think it clear enough, from the language of this act, especially definition (d), that the law-making body deemed it necessary to prohibit all such machines and devices which could be operated as a game of chance, regardless as to whether there was a 'pay off' or not, in order to fully suppress the gambling evil. That this was within the police power of the State and violated no provision of the Constitution, either State or Federal...[119]

¶75 The owners of the pinball machines involved argued that there was no chance involved in playing the pinball machine, that since it was by design a game of skill, it could not possibly be used as a gambling device. The court, however, adopted the reasoning of the New York Court of Appeals in People v. Lavin,[120] holding:

> The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?
>
> ...
>
> Conceding for the moment that a player by careful practice might develop some degree of skill, yet we are persuaded that any such skill would be so thwarted by hazard that he could not, regardless of his skill, determine the outcome of the game. The element of chance, to our minds, very clearly predominates, and the machine represents a game of chance.[121]

E. Taxation of Gambling

¶76 The inconsistency inherent in taxing activities which were prohibited by criminal law did not seem to disturb the court. In 1938, the court held that while punchboards were illegal under state law, this fact did not prevent the state from requiring that a revenue stamp denoting payment of tax on such punchboards be attached to each punchboard. The court followed the lead of Judge Cooley in Youngblood v. Sexton,[122] reasoning that the revenue stamp tax did not authorize the operation of illegal punchboards, but merely imposed an occupational tax on them. Taxation and protection were held not to be reciprocal. Taxes were seen as merely a burden to support the government.[123]

¶77 The Alabama legislature went so far as to provide that the payment, owning, or possession of the federal wagering occupational stamp was prima facie evidence of gambling in any state prosecution for violation of gambling laws.[124] However, because of recent United States Supreme Court decisions, and the 1974 federal statute concerning a stamp tax on occupational wagering, it is doubtful whether this Alabama law remains legally valid or practically useful.

¶78 Today, bowling alleys and billiard rooms still require a license. The fee for bowling alleys is ten dollars per alley,[125] and the fee for billiard tables is to be set by the municipality which licenses them.[126] Twenty-two laws regulate the licensing and operation of billiard rooms. They include prohibitions against minors playing, gambling in a billiard room, serving

liquor therein and maintaining secret doors to exit therefrom. Betting on a billiard game is still prohibited and billiard room owners are required to post a one thousand dollar bond to ensure that all of these laws are obeyed. However, charitable, religious, fraternal, private clubs or associations, and organizations run by the state are exempt from these laws regulating billiard rooms.[127]

F. Gambling Obligations

¶79 The pre-Civil War statutes voiding gambling contracts and allowing the recovery of money lost at gambling were reenacted after the war and remain in force today.[128]

¶80 After the war, the courts continued to liberally interpret the recovery statute. In 1876, the court decreed that a person who lost money at gambling did not have to be the owner of the money in order to sue for its recovery. Rather, a mere bailor or trustee of the money could also sue for its return, as long as that person did so within the six months time limit.[129]

¶81 It has also been held that a lender, holding a negotiable instrument as security for a loan he knows to be gambling related, may not defend his interest in the courts. If the lender's title to the instrument is defective for reasons not related to the gambling onus, the lender may not gain rightful title to the note by arguing that he did not know of the defect when he accepted it as security. A lender who has knowledge of the unlawful purpose of this debtor is not seen to be the bona fide purchaser of the instrument.[130] In

1961, the Appeals Court softened this position somewhat by ruling that although loans which are knowingly made for gambling purposes were unenforceable, those made to pay antecedent gambling debts were recoverable by the lender.[131]

¶82 In 1883, the court in Lewis v. Burton[132] reaffirmed its earlier decisions allowing losers to sue stakeholders for the return of their money if: (1) said money had been paid to the winner before it was supposed to be paid under the gambling agreement, i.e. before the results were official, or (2) if the money was paid over to the winner after the loser had demanded its return.

¶83 In 1899, the court declared that notes given to purchase slot machines were void, even in the hands of an innocent purchaser for value. The court reasoned that while the sale of an article for use in gambling was not illegal, the plaintiff vendor in question had actively promoted the illegal use of the articles, and therefore became "particeps criminis," and unable to recover on the contract of sale. The court notes that the "...generally established rule, independent of statutes, is that contracts made in furtherance of gambling transactions, though not immediately involving a wager, are void, or against public policy."[133] The court then concludes:

> Illegality of consideration for negotiable paper, arising merely from its being offensive to public policy, does not affect the rights of an innocent holder for value; but the rule is otherwise when the instrument is made absolutely void by statute, as in contracts founded in whole or in part on a gambling consideration.
>
> But it is contended for the complainant that

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1 OF 12

> though the contract be contra bonos mores, as in furtherance of gambling, it is not a gambling contract, within the meaning of the annulling statute, and that, therefore, complainant should be protected, as an innocent holder of the notes. The moral principle which the contract offends is precisely that which the statute is designed to protect. The terms of the statute do not require its restriction to actual wagers, or to contracts made in settlement of betting losses. Such has not been its interpretation in this court. ...The policy of this statute is not to aid a loser, but to discourage gambling; and accordingly the courts are bound to exercise the jurisdiction, and to relieve, in proper cases, without imposing upon the party seeking it the usual condition of doing equity.[134]

¶84 In other decision interpreting the recovery statute, the court has held that the right to recover money paid on the void (gambling) contract is personal, and it survives the death of the plaintiff.[135] In addition, the court has held that any negotiable note, including a mortgage, that is given in consideration, in whole or in part, for gambling is void and the court will enjoin the foreclosure on a mortgage founded on gambling consideration.[136] Finally, the loser is entitled to interest on the money he recovers,[137] but the law does not authorize a loser of money at gambling to take the money back by force.[138]

G. Futures

¶85 In the area of futures contracts, the courts were forced to operate for several years without any specific guidance from the legislature. In 1891, the court defined an illegal futures contract and declared such contracts void under the statute making contracts founded on gambling

consideration void.

> When the parties agree at the time of making the contract, or the intent is that no property shall pass, or any delivery be made, but to pay the difference between the price agreed on and the market price at some future day, whatever may be the form of the contract, it is a wager upon the fluctuations of the market, and comes within the denunciation of the statute pronouncing all contracts founded in whole or in part on a gambling consideration void. Code, §1742. On the other hand, ownership or possession of the property at the time of making the contract is not essential to the validity of a contract for delivery at some future date, and if the parties understand and intend that the seller may have the option to deliver at any time before the maturity of the contract makes no difference. Courts will not presume that parties to a contract intended to violate the law; the intendment rather is in favor of their validity.[139]

Contracts to buy farm products not yet grown,[140] and option contracts to buy land at a certain price for a certain amount of time,[141] were, of course, declared valid.

¶86 In 1905, the court decided in order for a futures contract to be illegal both parties to the agreement must intend it to be a mere speculation on the future price, not involving actual delivery. If only one party intended the contract to be a speculation, it remained valid.[142]

¶87 In 1907, the legislature finally entered the picture and enacted several laws on futures contracts, most of which simply codified earlier court decisions. Futures contracts were defined and declared void, the money paid on such contracts was made recoverable and selling or dealing in futures contracts was made a misdemeanor, even if the contract was made in another state. In 1915, a failure to issue a

written statement of the sale of any commodity, stock or bond, within one day or demand for the same, was made prima facie evidence that the contract was an illegal one.[143]

¶88 In 1933, the courts established the presumption that the purchase of commodities or stock for future delivery was valid if made in accordance with the rules of an established exchange. This presumption would overcome a prima facie case that the contract was actually a gambling venture.[144]

IV. Conclusion

¶89 Alabama's gambling history has followed that of many other southern states. Early frontier permissiveness did not entirely subside until Reconstruction. The post-Reconstruction governments, however, used gambling to gain needed redevelopment revenue. Slowly, this position was abandoned in favor of a near total prohibition, which remains in force today. No major move in the direction of decriminalization seems imminent, although some pressure for legalization of horse racing is beginning to appear. However, since Alabama does not have a large budget, and the people of Alabama are of a conservative nature, the pressure will probably be unsuccessful.

(Shepardized through March 1975)

Footnotes

1. Act of Feburay 4, 1807, §1 Miss. Terr. Stat. of 1816, 176.
2. Act of February 4, 1807, §§2, 3 Miss. Terr. Stat. of 1816, 235.
3. Act of December 17, 1811, §2 Miss. Terr. Stat. of 1816, 238.
4. Id. §5.
5. Act of December 24, 1812, §3 Miss. Terr. Stat. of 1816, 196.
6. Act of December 21, 1812, §6 Miss. Terr. Stat. of 1816, 240.
7. Id. §§1-4.
8. A. Moore, History of Alabama, p. 320 (1934).
9. Id. at 130.
10. Id. at 66.
11. Id. at 112, 148.
12. Wyman, Justus, "Geographical Sketch of Alabama Territory," III Alabama Historical Society (1899), p. 121.
13. Acts of Alabama 1819, 98.
14. Acts of Alabama 1820, 34, 82 and 86.
15. Acts of Alabama 1821, 45, 54, 76 and 84.
16. Digest of the Laws of Alabama 1833, §6, 307.
17. Acts of Alabama 1842, 10.
18. Acts of Alabama 1847, 32-33. This law provided for a tax of five percent of the value of the property raffled.
19. W. Garrett, Reminiscences of Public Men in Alabama, p. 608-609 (1872).
20. Salomon v. State, 28 Ala. 83 (1856).
21. Acts of Ala. 1821, 26.
22. Digest of the Laws of Alabama 1833, §§13-16, 212.
23. Id. §§17-22, 212-213.

24. Id. §49, 109.

25. Id. at 438-39.

26. Digest of the Laws of Alabama 1833, 1836 Supplement, §2, 581.

27. Acts of Ala. 1836, no. 25, 24.

28. State v. Welch, 7 Porter at 465 (1838).

29. Huffman v. State, 29 Ala. 40 (1856).

30. Bentley v. State, 32 Ala. 596 (1858).

31. Burnett v. State, 30 Ala. 19 (1856).

32. McCauley v. State, 26 Ala. 135 (1855), and Clarke v. State, 12 Ala. 492 (1847).

33. Huffman v. State, 29 Ala. 40 (1856), and Arnold v. State, 29 Ala. 46 (1856).

34. 20 Ala. 51 (1852).

35. Glass v. State, 30 Ala. 529 (1857).

36. A. Moore, History of Alabama, at 307 (1934).

37. Code of Ala. 1852, §3249.

38. Code of Ala. 1852, §§3245, 3256.

39. A. Moore, History of Alabama, at 366 (1934).

40. "Alabama Review," Vol. 2, 5 (1949).

41. M. Clinton, Tuscaloosa Alabama, Its Early Days: 1816-1865, 79 (1958).

42. A. Moore, History of Alabama, 390 (1934).

43. Acts of Alabama 1848, §80, 24.

44. Code of Ala. 1852, §1180.

45. Code of Ala. 1896, §4810; presently, Code of Ala., Tit. 14, §278.

46. State v. Stripling, 113 Ala. 120, 21 So. 409 (1897).

47. Code of Ala. 1907, §§7002-05; presently, Code of Ala., Tit. 14, §§259-62. The punishment is a fine of from fifty dollars to five hundred dollars and possible jail term of up to six months.

48. Code of Ala., Tit. 14, §420.

49. Code of Ala., Tit. 14, §96.

50. Jordan v. Locke, 1 Minors Ala., Repts. 254 (1824).

51. Tindall v. Childress and May, 2 Stew. and Por. 250 (1832).

52. Roberts v. Taylor, 7 Porter at 256 (1838).

53. Wood v. Duncan, 9 Port. 227 (1839); see also Ivey v. Phifer, 11 Ala. 535 (1847).

54. Barker v. Callihan, 5 Ala. 708 (1843).

55. Cheatham v. Young, 5 Ala. 353 (1843).

56. Manning v. Manning, 8 Ala. at 142-43 (1845).

57. Id. at 144.

58. Code of Ala. 1852, §§1562-1570.

59. See State v. Moseley, 14 Ala. 392-93, for a short history of the laws on keeping billiard tables.

60. State v. Moseley, 14 Ala. 390 (1848); see also State v. Allaire, 14 Ala. 436 (1848).

61. Acts of Ala. 1853-54, no. 19, 20. See also Rodgers v. State, 26 Ala. 76 (1855).

62. Code of Ala. 1866, §§78-84.

63. Acts of Ala. 1865-66, 3-16. The old tax of one hundred dollars a year for licenses for billiard tables was also reenacted.

64. Acts of Ala. 1868, no. 185, §§1-13, 529.

65. Ala. Const., art. 4, §26 (1875); presently Ala. Const., art. 4, §65.

66. Code of Ala., §4446 (1876).

67. Yellow-Stone Kit v. State, 88 Ala. 196, 7 So. at 338 (1890).

68. Acts of Ala. 1882-83, 76, 78 and 79.

69. Code of Ala. 1887, §629(27).

70. Code of Ala. 1907, §2361(30).

71. Code of Ala. 1876, §4207; presently, Code of Ala., Tit. 14, §263.

72. Smith v. State, 52 Ala. 384, 388 (1875).

73. James v. State, 133 Ala. 208, 32 So. 237 (1902).

74. Henderson v. State, 59 Ala. 89 (1877).

75. Dickey v. State, 68 Ala. 508 (1881).

76. Lee v. State, 136 Ala. 31, 33 So. 894 (1903).

77. Johnson v. State, 75 Ala. 7 (1883).

78. Clopton v. State, 28 Ala. App. 533, 189 So. 779 (1939); see also Ingram v. State, 45 Ala. App. 108, 226 So.2d 169 (1969).

79. Schuster v. State, 48 Ala. 199 (1872).

80. Code of Ala. 1907, §1291; presently, Code of Ala., Tit. 27, §486.

81. Lee v. City of Birmingham, 223 Ala. 196, 135 So. 314 (1931).

82. Code of Ala., Tit. 14, §282.

83. Code of Ala., Tit. 14, §265. The penalties today include a fine of from two hundred dollars to five hundred dollars and a term of imprisonment of up to one year for the first offense and between two and five years for subsequent offenses.

84. Bibb v. State, 83 Ala. 84, 3 So. 711 (1888); see also Keife v. State, 14 Ala. App. 14, 70 So. 950 (1916), where keeping a poker table in a private club where the dealer got a take out from each pot for the benefit of the club, was held to violate the law against keeping a gaming table.

85. Loiseau v. State, 114 Ala. 34, 22 So. 138 (1897).

86. Code of Ala. 1907, §6998; presently, Code of Ala., Tit. 14, §276.

87. 3 The Alabama Review, 124, 128 (1950).

88. Laws of Ala., Spec. Sess. 1909, §§1-6, 183; see Code of Ala., Tit. 14, §§293-302.

89. Young v. State, 253 Ala. 312, 45 So.2d 29 (1950).

90. Thornhill v. State, 14 Ala. App. 647, 72 So. 297 (1916).

91. Hallmark v. State, 28 Ala. App. 416, 185 So. 908 (1939); see also Hallmark v. State, 29 Ala. App. 405, 198 So. 149 (1940).

92. Code of Ala., Tit. 14, §§437(6), (11), 438.

93. Grimes v. State, 235 Ala. 192, 178 So. at 74 (1937).

94. Try-Me Bottling Co. v. State, 235 Ala. 207, 178 So. 231 (1938).

95. Walker v. State ex rel. Baxley, 285 Ala. 315, 231 So. 2d 882 (1970).

96. Pike v. State, 269 Ala. 188, 112 So.2d 351 (1959).

97. Try-Me Bottling Co. v. State, 235 Ala. 207, 178 So. 231 (1938).

98. Dozier v. Troy Drive-In Theatres, 265 Ala. 93, 89 So.2d 537 (1956).

99. Richmond v. State, 28 Ala. App. 562, 189 So. 914 (1939).

100. Hallmark v. State, 28 Ala. App. 416, 185 So. 908 (1939). The court also held that whether a gambling scheme was a "lottery" was an ultimate issue to which no witness could testify.

101. Carr v. State, 46 Ala. App. 4, 237 So.2d 116 (1970); see also Code of Ala., Tit. 14, §320(1).

102. Minges v. Birmingham, 251 Ala. 65, 36 So.2d 93 (1948); but see Rep. Atty. Gen of Ala. 1936-38, 522, which held that schemes which gave away chances on prizes, involving the payment of consideration either directly or indirectly constitutes an illegal lottery.

103. Code of Ala., Tit. 14, §302(1); see also Smith v. State, 41 Ala. App. 487, 136 So.2d 907 (1961). Mere possession of lottery paraphernalia absent a prior conviction for running a lottery, carries no penalty.

104. Code of Ala., Tit. 14, §§302(2)-302(7).

105. Code of Ala., Tit. 14, §§272, 273.

106. Code of Ala., Tit. 14, §274.

107. Code of Ala., Tit. 14, §§279-281.

108. Opinion of the Justices, No. 83, 249 Ala. 516, 31 So.2d 753 (1947). Opinions in Alabama are given in response to questions submitted by legislators as to the constitutionality of proposed legislation.

109. Opinion of the Justices, No. 170, 272 Ala. 478, 132 So. 2d 142 (1961).

110. 68 Utah 251, 249 P.1016 (1926).

111. Opinion of the Justices, No. 205, 287 Ala. 334, 335, 251 So.2d 751, 753 (1971).

112. Cagle v. State, 18 Ala. App. 553, 93 So. 206 (1922). The Alabama court followed the Indiana decision of Furguson v. State, 178 Ind. 568, 99 N.E. 806 (1912), in rendering its decision.

113. Laws of Ala. 1931, 806; presently, Code of Ala., Tit. 14, §§283-292. The fine was increased to five hundred dollars and the jail term involved was stiffened as an offender could spend six months in the penitentiary.

114. See note 112, supra.

115. Hurvich v. State, 230 Ala. 578, 579-80, 162 So. 362, 363-64 (1935).

116. McGee v. State, 235 Ala. 354, 179 So. 258 (1939); Walker v. State ex. rel Baxley, 285 Ala. 315, 231 So.2d 882 (1970).

117. Roberts v. State, 253 Ala. 565, 46 So.2d 5 (1950).

118. One Penny Marble Machine v. State, 233 Ala. 678, 173 So. 91 (1937).

119. State v. One 5¢ Fifth Inning Baseball Machine, 241 Ala. 455, 458, 3 So.2d 27, 29 (1941).

120. 179 N.Y. 164, 71 N.E. 753 (1904).

121. 241 Ala. at 457-458, 3 So.2d at 28-29; see also White v. State, 35 Ala. App. 617, 51 So.2d 550 (1951). The latter case held that, even if a pinball machine had flippers, the element of chance still predominated, and the machine was therefore prohibited. However, in Hurvitch v. City of Birmingham, 35 Ala. App. 341, 46 So.2d 577 (1950) it was held that a "shooting gallery" required enough skill to remove it from the Baseball Machine ban. Perhaps the court's love for hunting and shooting explains the fine distinction.

122. 32 Mich. 406, 20 Am. Rep. 654.

123. Casmus v. Lee, 236 Ala. 396, 183 So. 185 (1938).

124. Code of Ala., Tit. 14, §§302(8) to 302(10).

126. Code of Ala., Tit. 14, §253.

127. Code of Ala., Tit. 14, §§237-258.

128. Code of Ala., Tit. 9, §§44-50.

129. Harris v. Brooks, 56 Ala. 338 (1876).

130. Lee v. Boyd, 86 Ala. 283, 5 So. 489 (1889).

131. Osborn v. Pointer, 41 Ala. App. 271, 128 So.2d 530 (1961).

132. Lewis v. Burton, 74 Ala. 317 (1883).

133. Kuhl v. McGally Universal Press Co., 123 Ala. 452, 457, 26 So. 535, 536 (1899).

134. Id. 123 Ala. at 458, 26 So. at 537.

135. Motlow v. Johnson, 151 Ala. 276, 44 So. 42 (1907); see also Motlow v. Johnson, 145 Ala. 373, 39 So. 710 (1905).

136. Alabama Bank and Trust Co. v. Jones, 213 Ala. 398, 104 So. 785 (1925).

137. Motlow v. Johnson, 151 Ala. 276, 44 So. 42 (1907).

138. Jackson v. State, 30 Ala. App. 468, 8 So.2d 590 (1942). The defendant was in fact convicted of larceny for taking back his winnings by force.

139. Wolffe v. Perryman, 93 Ala. 290, 9 So. 148 (1891); see also Baker v. Lehman, Weil and Co., 186 Ala. 493, 65 So. 321 (1914) for further elaboration on presumption that a contract, valid on its face, is a legal contract and the parties intend actual delivery of the commodity.

140. Gann v. W. R. Long and Sons, 2 Ala. App. 274, 56 So. 606 (1911).

141. Hanna et al. v. Ingram et al., 93 Ala. 482, 9 So. 621 (1891).

142. Hooper v. Nuckles, 39 So. 711 (1905).

143. Code of Ala., Tit. 9, §§29-40.

144. Fenner and Beane v. Olive, 226 Ala. 359, 147 So. 147 (1933).

Paragraph Index

The Development of the Law of Gambling:

ALASKA

N.A.S.

P.K.S.

M.L.G.

G.R.B.

Table of Contents

Summary

¶1 As a result of its small population and brief history, Alaska has witnessed only a little gambling case law or legislation. Alaska's policy on gambling has generally been a prohibitory one. In fact, the statutory provisions outlawing gambling that are in force today are largely those that appeared in Alaska's very first code of laws. The only major development in the state's gambling laws in this century occurred in 1960, when Alaska deviated from its anti-gambling stance to allow charitable organizations to conduct certain fund-raising activities which would otherwise be banned.

I. Early History and the Codes of 1900

¶2 The huge peninsula of Alaska was first sighted by Western explorers in 1728 during an expedition under the leadership of Vitus Bering, a Dutchman in the employ of the Russian emperor. On Bering's second voyage in 1741, a landing was made. The name given to the area was Russian America. Bering's expedition had discovered the sea otter, whose skins soon became the most valuable and sought-after furs on the European market. As a result of this commercial success, expeditions set out to explore the Aleutian Islands, just off the Alaskan Continent, where sea otters, fur seals and blue foxes were reported to be abundant. In time, Russian trappers, in their efforts to gain these natural riches, had destroyed many inhabitants of the islands, enslaved others, and forced

the remainder to pay tribute. Chaos reigned during those early years in the Aleutians, as small bands of Siberian hunters robbed and murdered each other for furs.

¶3 Later in the eighteenth century, ships from Spain, England and France visited the shores of Alaska, and each country claimed sovereignty over the territory. In 1788, these conflicting claims almost resulted in a war between England and Spain. In view of the remoteness and inhospitable nature of the land, it is not surprising that despite the international rivalries, the territory was hardly settled. Although there were Russian settlements at Kodiak and Unalaska by 1788, most of the white men in Alaska were transient traders and hunters.

¶4 A trade monopoly called the Russian America Company was formed in 1799 by some Russian merchants, who hoped to promote the area for profit. The company thrived, the settlements increased, and by 1833, explorations of the interior had begun. With the onset of the bloody Crimean War in 1854, however, Russia's resources and attention were diverted from its interests in Alaska. While Russian fortunes in America began to wane, some Americans had already begun settling in Alaska. In 1859, negotiations were undertaken between Russia and the United States for the purchase of Alaska. These efforts, interrupted by the American Civil War, were not completed until 1867, when a price of $7,200,000 was agreed upon. The treaty, which was arranged by William Seward, the American Secretary of State, was not well received in

Congress. Alaska became known alternately as "Seward's Folly" or "Seward's Icebox". Neither ratification of the treaty nor the appropriation of necessary money were accomplished until a year later, and only after much bickering.

¶5 Following ratification of the treaty, Russian settlers received the option of remaining in Alaska or returning to their original home. Most of them chose to leave, while American settlers began to trickle in to replace them. Despite the increasing number of Americans in Alaska, Congress virtually ignored the territory. No provision was made for a civil government. First the army, and then the navy, provided the only law and order or protection Alaskan settlers were to know for several years.

¶6 A number of mining camps sprang up in the territory. Miners themselves policed the camps according to an informal code developed over the years.[1] In 1872, Congress recognized these miners' codes as having the force of law as long as they did not conflict with the Constitution or any federal statutes.[2] The miners' codes were the only semblance of effective law in Alaska until 1884. Even after that time, miners' meetings still provided civil remedies.[3] Perhaps this lack of formalized law may explain the relative scarcity of reported gambling cases in Alaska before the turn of the century.

¶7 Gold was discovered in Alaska in 1880 and the resulting influx of settlers built the towns of Juneau, Douglas and Treadwell near the mines. With the prospectors, too, came the usual full assortment of gamblers, saloon keepers and ladies

of the night. As the population increased, the need for an effective civil government became apparent. Congress responded by passing the Organic Act of 1884,[4] which provided that Alaska be given a governor, a U.S. marshall, a federal district court, and all other institutions necessary to establish the executive and judicial branches of local government. A provision establishing a legislature, however, was not enacted until 1912.

¶8 Congress thus retained the exclusive right to legislate for the new territory. Despite these Congressional measures, Alaska still had virtually no law at all. A solution to the problem was offered by Section 7 of the Organic Act, which stated that ". . . laws of the state of Oregon now in force are hereby declared to be the law in said district [Alaska], so far as the same may be applicable. . . ." Oregon was chosen over Washington because its law was thought to be more mature, more highly developed. In fact, however, the adoption of Oregon law caused problems rather than solved them, for it had not been compiled in writing for many years. What was "in force" in Oregon in 1884 could not readily be determined.[5]

¶9 The situation deteriorated to a point where not only the people, but also the different divisions of the district court, were unaware of what was supposed to be the law. Meanwhile, the fabulous gold lode at the Klondike in the Yukon was struck in 1896, and the population of Alaska was rapidly increasing. After the Klondike, the most important discovery of gold was at Nome in 1899. Finally, Congress appointed a

commission, under the chairmanship of Thomas H. Carter, to revise and compile the laws of Alaska. As a result of Carter's work, Congress adopted five codes for Alaska. In 1899, Congress approved Carter's penal code and code of criminal procedure.[6] In 1900, it passed the political and civil codes, and the code of civil procedure.[7] For the first time, Alaska had both an outline of government and a system of laws that was easily accessible to all.[8]

A. Carter's Penal Code: The First Gambling Laws

¶10 Carter's penal code contains Alaska's first gambling laws, which, with some additions, essentially remain the law in Alaska today. Each gambling provision in the code was taken directly from the Laws of Oregon.

¶11 The code contained several anti-lottery provisions, one of which forbade any person to promote or set up a lottery for the disposal of money or any valuable thing or to knowingly permit any lottery activity to be conducted on his or her property. The penalty was six months to a year in the penitentiary, three months to a year in jail, or a $100 to $1,000 fine.[9] Selling a lottery ticket, or possession of a ticket with intent to sell were punishable by three months to a year in jail or a $50 to $500 fine. If anyone had the misfortune of being convicted twice for either the promotion or selling offenses, he or she could be sentenced to from one to three years in the penitentiary.[10] Anyone who advertised a lottery in any way could receive one to six months in jail

or a $20 to $200 fine.[11] There apparently was some concern about swindlers, because it was made a separate offense to sell a ticket in a lottery known to be fictitious. Not only would a violator be subject to the stiffer penalty of one to three years in the penitentiary, but at trial, the defendant would have the burden of showing that the lottery did, in fact, exist.[12]

¶12 The code contained one provision against casino games. This section stated that any person who dealt, played, or conducted any of a long list of casino games or other games played with cards, dice, or some other device for money or its representative was guilty of a misdemeanor punishable by a fine of up to $500. The violator could be imprisoned until the fine was paid, with a $2.00 deduction made for each day spent in jail.[13]

II. From Carter's Codes to Statehood: 1900 to 1959

A. Organic Act of 1912

¶13 While the territory continued to expand, more importantly, Alaska began to acquire a larger population of permanent settlers, rather than transient prospectors and soldiers of fortune. Alaskans wanted to have control over the legislative functions of their government as the people of previous territories had been granted. Consequently, Congress passed the Organic Act of 1912,[14] which created in Alaska a territorial legislature, albeit one with restricted powers.

¶14 Many limitations were placed on the new legislature. Of particular interest here is part of Section 9 of the act which said

> . . . nor shall any lottery or the sale of lottery tickets be allowed; nor shall the legislature or any municipality interfere with or attempt in any wise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States marshal . . . and destroyed.

B. Municipal Regulation

¶15 Shortly after the new legislature was formed, a new compilation of Alaska's laws was published. Consistent with this limitation, the gambling laws are exactly the same as those in Carter's code.[15] The only addition was a provision passed by Congress in 1904 granting municipalities the power to define, prohibit and punish gambling.[16]

¶16 That provision was interpreted in Hornstein v. United States,[17] Alaska's first reported criminal gambling case. Hornstein had been convicted of gambling under the territorial statute for an offense committed in Nome. Pursuant to the authority granted by Congress, Nome had enacted its own anti-gambling ordinance. The defendant argued that his conviction was invalid on the ground that the United States had no jurisdiction over gambling offenses committed in Nome, since it was an incorporated town which had enacted its own ordinance. The court rejected this argument, finding no evidence that the United States intended to vest municipalities with exclusive jurisdiction over gambling offenses. Nor was

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the power conferred on municipalities repugnant to a reservation of power by the United States. Therefore, both the ordinance and the statute were in effect, and a conviction could be sought under either one.

C. Witnesses and Accomplices

¶17 The next criminal case went all the way to the United States Supreme Court. In Mason v. United States,[18] the defendant had been held in contempt of court for refusing to answer questions when he was summoned as a witness before a grand jury investigating gambling charges against several other individuals. The defendant maintained that he had a Fifth Amendment privilege against being compelled to answer questions such as, "[w]as a card game going on at the table at which you were sitting?". Affirming the lower court's contempt citation, the Supreme Court noted that under Alaska law, it is not illegal to sit where a card game is being played. Nor is it illegal to join in the game unless the game is being played for something of value. The Court declined to disturb the lower court's opinion that a direct answer would not put the defendant in any immediate danger of incriminating himself.

¶18 Apparently as a response to Mason and to avoid protracted litigation with reluctant witnesses in the future, the legislature, two years after the Mason decision, enacted a law declaring that no witness in a gambling case could refuse to testify on Fifth Amendment grounds. Such a witness, however, could not be prosecuted for any offense about which he testified.[19]

¶19 At the same time, several other additions were made to the gambling laws. For instance, it was declared that a person engaged in gambling was not an accomplice of any other participant, nor of the person conducting the game.[20]

D. Nuisance Law

¶20 In 1919, it was also recognized that a place where gambling was conducted or permitted was a common nuisance. A person who maintained, or aided and abetted such a nuisance was guilty of a misdemeanor punishable by a $100 to $500 fine and/or thirty days to six months in jail. The U.S. Attorney had the right to go to court to abate and enjoin a gambling nuisance. Once an injunction was obtained, any violator could be given a $100 to $500 fine or thirty days to six months in jail for contempt. It was stipulated, however, that no permanent injunction could issue before an individual was convicted of maintaining a nuisance.[21]

¶21 In 1944, the defendant in Patterson v. Jones[22] challenged the law providing a penalty for maintaining a gambling nuisance. He argued that it violated the part of the Organic Act limiting the legislature's power to act in the gambling area. More specifically, he claimed that the nuisance law interfered with the original anti-gambling provision of the Carter code. Since the Organic Act forbade the legislature to interfere with Congressional attempts to prevent and punish gambling, and since the Carter code was an act of Congress, the nuisance law, the defendant argued, must

fall. The court rejected this argument, finding that the Organic Act did not, indeed, bar the legislature from passing laws concerning gambling. The legislature was forbidden only to pass laws counter to the spirit and effect of Congressional acts. The intent of Congress in the Organic Act was to prevent the local legislature from legalizing gambling. The nuisance law had no such effect. To the contrary, it augmented the original law while providing another statutory means for suppressing gambling.

E. Gambling Devices

¶22 The court gave a broad interpretation to the anti-gambling statute in the case of United States v. Frodenberg.[23] Here, the defendant was charged with violating the gambling law by operating a device known as an "Advertoshare". An "Advertoshare" is a punchboard-type device, which contains a checker problem in each punch-hole. Upon paying ten cents for a punch, a player wins a prize if he or she can solve the particular checker problem within a specified amount of time. If not, the player receives ten cents credit toward the purchase of merchandise selected by the dealer. Although this scheme seems to resemble a lottery more than it does one of the casino-type games enumerated in the gambling law, the court, while first analyzing the scheme as a lottery, nevertheless held that it was a "device" within the meaning of the gambling law. Hence, a prosecution could be maintained under that provision. The court reached this

decision, even though the very same device had passed muster in the Supreme Courts of both Utah and Washington.[24] Here, the court felt that the ten cent credit was just "a dodge" and that even if the Advertoshare involved skill, it was still a game of chance within the law's proscription.

F. Compilation of 1933

¶23 A new compilation of Alaska's laws was issued in 1933. Once again, the original lottery laws of 1900 saw no change.[25] The basic anti-gambling provision remained the same, joined by the previously-discussed laws about witnesses, accomplices, and gambling nuisances.[26] A section providing for municipal prohibition of gambling houses was, however, included. In addition, the sections of the Organic Act limiting the legislature's power in the gambling area and providing for the confiscation of gambling implements were inserted in the 1933 compilation, although the original act itself was still in force.[27]

G. Compilation of 1949

¶24 The compilation of 1949 contained the same lottery and gambling laws as its predecessor.[28] One small, but interesting change was made in the title of the basic anti-gambling provision. Instead of the title "Gambling", the provision now bore the title "Dealing or Conducting Gambling Game".[29] Although the statute still considered playing an offense, the title change may have been a further indication that it was only the operators and not the players who would be sought.

¶25 Also included in the 1949 compilation were laws passed two years earlier imposing a tax on all coin-operated amusement devices, including slot machines and pinball machines. While the law explicitly stated that it did not in any way legalize gambling,[30] it did not state which of the devices taxed would be considered gambling devices. The tax law was expanded in 1949, when punchboards also became subject to the fees. Anyone not complying with the law would be guilty of a misdemeanor and subject to a $500 fine. Again, the tax law in no way meant to legalize gambling.[31]

H. Forfeiture of Gambling Implements

¶26 In United States v. Three Thousand Two Hundred and Thirty-Six Dollars,[32] the last gambling case decided before statehood, the question before the court was whether money could be considered a gambling implement and therefore be subject to forfeiture. The money, in this case, had been seized during a gambling raid, and it allegedly comprised the bank. The court noted that although some other jurisdictions differed on this point, it would follow the majority rule, which holds that money can be forfeited if it is an integral part of the gambling operation. The opinion stated that objects such as faro tables, roulette wheels, etc., which can have no purpose other than as gambling implements, may be seized and destroyed on the spot by the officer, unless he wishes to retain them as evidence. On the other hand, where the object seized, such as money, can be used in a

non-prohibitory activity, a libel in rem must be filed. It must be proved by the weight of the evidence that the object was used for gambling purposes in the context in which it was seized. Because this action is in rem and is completely separate from any criminal proceedings, the owner need not be convicted of gambling before the object can be forfeited. In this case, the action was dismissed because it was filed after the statute of limitations had run. The court said the statute starts running when the seizure occurs, even if the object is being held in custody as evidence.

I. Civil Transactions

¶27 There are only two gambling cases involving civil transactions reported from Alaska, both of which were decided early in the twentieth century. In McGinley v. Cleary,[33] the plaintiff and defendant became intoxicated in plaintiff's saloon one night and began to throw dice. The plaintiff did not fare well, for he signed over a one-quarter interest in the saloon to the defendant to pay his losses. Aghast at what he had done, the plaintiff began a suit in equity to cancel the deed for lack of consideration. The court ruled that there is no common law right to recover money paid on a gambling debt. It said that: "Equity will not become a gambler's insurance company." While recovery would be allowed under some circumstances, the court left the parties where it had found them.

¶28 The only other civil case, Greenland v. Mitchell,[34] involved a dispute between the parties to a building contract.

The plaintiff builders had agreed to construct a small building behind the defendant's saloon. After completion, the defendant accepted the building but refused to pay for it. The defendant said that the plaintiffs knew the building was to be used for illegal gambling purposes and therefore should not be allowed to recover on the contract. The court conceded the validity of the rule cited by the defendant but declined to apply it to this situation. Even if the plaintiffs did know of the defendant's intentions, the court reasoned, this was not such a furtherance of an illegal purpose as to void defendant's obligation. The defendant was not allowed to repudiate the contract and thereby secure an advantage from his own violation of the law.

¶29 By the time Alaska was admitted to statehood in 1959, it had a fairly complete body of anti-gambling statutes, but only the seven gambling cases had been reported.

III. Statehood: 1959 to Present

¶30 Alaska's constitution contains no gambling provisions. Because the restrictions imposed on the legislature by Section 9 of the Organic Act are no longer in effect, and since the constitution imposes no new limitations, the legislature is free to do as it sees fit.

¶31 Thus far, the legislature has legalized only certain charitable games. Alaskan legislators apparently have not looked to legalized gambling and lotteries as a potential

source of state revenue. Because more than 90 percent of Alaska's land is owned and administered by federal agencies, and Alaska's strategic location requires a considerable military force to be stationed within the state, more than half of the state's revenue comes from federal disbursements. The second largest source of state revenue is taxation imposed on income, motor fuel and property. The petroleum and gas industries, since 1957, have brought revenues to the state in excess of $100 million. This income has been derived from lease rentals and bonuses, production and conservation taxes, and royalties.

A. 1962 Compilation of Laws and Recent Revisions

¶32 In 1962, Alaska published the compilation of its laws which, as amended over the last twelve years, is still in effect. The lottery, gambling and nuisance laws were once again repeated unchanged. Similarly, the punchboard tax and the seizure law remained unchanged.[35] Changes reflected in the original 1962 compilation were the addition of the chapter on charitable games and the revision of the section on the taxing of coin-operated devices,[36] both of which will be given further attention below. In 1966, a law was passed declaring that an insurance policy which is executed as a wager is void. A policy is valid only if it protects an insurable interest of the policy-holder.[37] As a result of a 1972 revision of the municipal government chapter, municipalities no longer have a specific mandate to prohibit gambling. They do have the power

to regulate disorderly conduct and to condemn and abate public nuisances.[38] This act may still leave them with some power in the gambling area.

B. Pinball Machines as Gambling Devices

¶33 Most of the litigation since 1959 has revolved around the question of whether or not pinball machines are gambling devices subject to seizure and forfeiture. These cases have given the court an opportunity to discuss the meaning of "gambling" and "gambling implement". The first pinball case,[39] decided in 1962, concerned several machines equipped with meters to register the number of free games won by the players and a release button to reset the meter. In the establishment where the machines were located, the usual practice was for the player to exchange the number of free games accumulated for money. In holding these machines to be gambling devices, the court stressed that the definition of "gambling device" adopted in this case was only one of many possible definitions. The court said that a gambling device is

> . . . any tangible means, instrument or contrivance by which money may be lost or won as distinguished from the game itself. The device need not be intended solely for gambling purposes. However, if it is used in such a way that money may be lost or won as a result of its use, then it becomes a gambling implement and is subject to seizure and destruction. . . .[40]

The court declined to consider whether these machines would be gambling implements if the only prize was free plays instead of money. In other words, the court expressed no opinion as to whether these machines were gambling implements per se.

¶35 The supreme court, finally ruling on the question, agreed with the second court that such pinball machines are gambling devices per se. The court said the essential elements of gambling are consideration, chance and prize (the same elements which most jurisdictions hold to constitute a lottery):

> . . . one gambles when he pays a price for a chance to obtain a prize. A gambling implement is some tangible thing which is used or mainly designed or suited for gambling.[43]

The court found all three elements present. First, one must pay in order to play. Second, chance is present, for even if an element of skill is involved, the number of free games which can be won (the odds) is uncertain, and that uncertainty predominates. Finally, free plays, although they have no monetary value, are still prizes. Of prizes the court said:

> A prize is something offered or striven for in a contest of chance. . . . Whether or not one finds amusement or entertainment in playing a pinball machine, there is always something that he is striving to win by operation of chance, namely, free games. This is the prize. . . .[44]

¶36 The owner of the machines argued that the law imposing a tax on pinball machines recognized that such machines were not gambling devices per se. When the coin-operated devices tax law was revised in 1960, the devices were divided into three categories, each with a different tax rate. Class 1 consists of entertainment devices, such as jukeboxes, which clearly have nothing to do with gambling. Class 3 consists of gambling machines such as slot machines. Class 2, which

includes pinball machines, cannot be easily classified as a gambling or a not-gambling category. The definition reads:

> . . . "coin-operated device class 2" means a pinball machine . . . or other apparatus or device which operates by means of insertion of a coin, token, or similar object and which, by embodying the elements of chance or skill, awards free plays and which contains a device for releasing free plays and a meter for registering or recording the plays so released, or with a provision for multiple coin insertion for increasing the odds; . . .[45]

The court was not impressed with the owner's argument. It held a class 2 device to be a gambling implement per se. It reasoned that tax laws do not legitimate activities or devices which are otherwise illegal.

¶37 In 1966, apparently as a response to this case, the legislature passed a peculiar law which seemed to overrule the decision, but only for a period of three years. While the law added the words ". . . but free plays shall not be construed as a thing of value" to the class 2 definition, it also included a provision terminating itself in June, 1969.[46] Thus, the added words were later dropped, leaving the definition as it was before and presumably restoring State v. Pinball Machines[47] as good law.

C. Lotteries

¶38 In 1973, the supreme court decided Morrow v. State,[48] a case which appears to have important implications. It involved a defendant who was being prosecuted for selling a lottery ticket, because he had sold football cards as part of a football pool. The trial court dismissed the charge,

finding that football predictions are based on skill, and therefore, football pools are not lotteries. The superior court reversed, holding that the football card was a lottery ticket as a matter of law. The defendant appealed to the supreme court.

¶39 The court started from the position that consideration and prize were obviously present. The only questionable point was whether chance was present as well. There have been two approaches to this question. Some courts follow the "pure chance" doctrine, which holds that chance is not present unless no skill is involved. Other courts follow the "dominant factor" doctrine, which holds that a scheme is a lottery if chance dominates the distribution of prizes, even if some skill is involved. The Alaska court joined the "dominant factor" courts:

> The pure chance doctrine would legalize many guessing contests and other schemes, where only a small element of skill would remove such games from classification as lotteries. This could lead to large-scale evasion of the statutory purpose. In many instances, the gambling aspect of a lottery could be cleverly concealed so that ignorant and unwary persons would be enticed into participation before they became aware of the true nature of the scheme.[49]

¶40 The court outlined four requirements which must be met in order for skill to be considered dominant over chance. First, participants must have both a distinct possibility of exercising their skill and sufficient data upon which to make a judgment. Second, the skill must be possessed by the general class of participants, not by just a very few. If the

class is the general public, the skill must be one possessed by the average person. Third, the skill must sufficiently govern the result. It must control the final result, not just one part of a larger scheme. Finally, the standard of skill required must be known to the participants. Winners must be determined objectively.

¶41 No decision was made as to whether a football pool is dominated by skill or chance, because the court felt the defendant was entitled to a jury trial on this question. The court also said the state had the burden of proving that chance was predominant. It is clear that the court intended to set up a framework in which it would be possible to decide, with some consistency, future questions as to whether particular schemes are lotteries.

D. Exemption for Charitable Organizations

¶42 The Alaska legislature legalized certain charitable games by a law passed in 1960.[50] So far, this has been the limit of legalization. The law states that qualified organizations can receive a permit from the Commission of Revenue to conduct bingo, raffles, lotteries, ice classics, dog musher contests, fish derbies and contests of skill.[51] A qualified organization is a bona fide civic, service, religious, charitable, fraternal or educational organization which is non-profit and has existed continuously for five years prior to the application for a permit.[52]

¶43 The commissioner of revenue is empowered to make rules and regulations concerning permits, etc. He may examine the books and records of any permit holder.[53] Many other requirements for the issuance and maintenance of permits are spelled out in the law. For instance, it is required that the proceeds of any games be dedicated for charitable purposes within one year of their receipt. In addition, the law explicitly states that it does not authorize cards, dice, roulette wheels or any other implement primarily used for gambling.[54] It is clear that the legislature wished to provide a means by which socially useful organizations could receive additional funds, but at the same time, it attempted to minimize the possibility of abuse.

Conclusion

¶44 Alaska has maintained a consistent anti-gambling policy from its first laws of 1900 to the present day. Its lottery laws, prohibiting all lottery-connected activities, remain today as they were adopted in 1900. The anti-gambling law adopted in 1900 has also survived virtually intact, even though it appears to criminalize playing and social gambling. It has been enforced, however, apparently only against professional gamblers. Gambling implements have been subject to seizure since 1900. Gambling nuisance laws were eventually added as were laws protecting witnesses in gambling cases and declaring players not to be accomplices of one another. One step toward legalization of gambling has been taken; charitable games were authorized.

¶45 It does not appear that gambling has been a major concern in Alaska since the end of the gold rush days. At the present time, people and money are pouring into Alaska as construction of the huge oil pipeline ensues. It will be interesting to see if a new gambling policy arises as the pipeline workers seek recreation in their free time.

(Shepardized: Alaska through March 1975
Federal and others, through May 1975)

FOOTNOTES

1. F. Brown, Sources of the Alaska and Oregon Codes, Part II, 2 UCLA-Alaska L.R. 87, 89 (1973).

2. Act of May 10, 1872, ch. 152, 17 Stat. 91.

3. F. Brown, supra note 1, at 89.

4. Act of May 17, 1884, ch. 53, 23 Stat. 24.

5. F. Brown, supra note 1, at 90-91.

6. Act of March 3, 1899, ch. 429, 30 Stat. 1253.

7. Act of June 6, 1900, ch. 786, 31 Stat. 321.

8. While Carter's codes were, for the most part, copied from the Oregon compilation of 1854, the Oregon laws themselves were derived directly from the Revised Statutes of New York. F. Brown, Sources of the Alaska and Oregon Codes, Part I, 2 U.C.L.A.-Alaska L.R. 15, 26-27 (1972).

9. Carter's Annotated Alaska Codes, Part I, §135 (1900).

10. Id. Part I, §§136, 140.

11. Id. Part I, §137.

12. Id. Part I, §§138, 139.

13. Id. Part I, §152 (1900). The fact that a mere player may be prosecuted under this section was affirmed in State v. McDaniel, 20 Ore. 523, 26 P. 837 (1891), construing the comparable Oregon provision. Such a construction is binding on the Alaska courts. United States v. Frodenberg, 8 Alaska 251 (1930).

14. Act of August 24, 1912, ch. 387, 37 Stat. 512.

15. In the Compiled Laws of the Territory of Alaska (1913), the original lottery provisions (§§135-140 of Carter's code) became §§2015-2020 and the original gambling provision (§152 of Carter) became §2032.

16. Act of April 28, 1904, ch. 1778, §4, 33 Stat. 529; Compiled Laws of the Territory of Alaska, §627(10) (1913).

17. Hornstein v. United States, 155 F. 48, 2 Alaska Fed. 777 (9th Cir. 1907).

18. Mason v. United States, 244 U.S. 362, 37 S.Ct. 621, 61 L. Ed. 1198, 4 Alaska Fed. 571 (1917), affirming United States v. Mason, 5 Alaska 465 (1916).

19. Act of May 5, 1919, ch. 56, §1, [1919] Alaska Laws 173.

20. Id. at §2. This provision circumvents the rule that a conviction may not be had on the uncorroborated testimony of an accomplice. See Ex Parte Jackson, 6 Alaska 726 (1922) and Alaska Stat. §12.45.020 (1962).

21. Act of May 5, 1919, ch. 56, §§3,4 [1919] Alaska Laws 174-175.

22. Patterson v. Jones, 143 F.2d 531, 10 Alaska Fed. 398 (9th Cir. 1944), cert. denied, 323 U.S. 767, 65 S.Ct. 120, 89 L.Ed. 614 (1944).

23. United States v. Frodenberg, 8 Alaska 251 (1930).

24. D'Orio v. Startup Candy Co., 71 U. 410, 266 P. 1037 (1928); D'Orio v. Jacobs, 151 Wash. 297, 275 P. 563 (1929).

25. The lottery laws became §§4956-4961 of the Compiled Laws of Alaska (1933).

26. The gambling laws became §§4982-4986 of the Compiled Laws of Alaska (1933).

27. Compiled Laws of Alaska, §§2383(11), 475 (1933).

28. Alaska Compiled Laws Ann. (1949). §§65-13-1 to 65-13-6 concerned lotteries; §§65-13-15 to 65-13-19 concerned gambling and nuisance; §4-2-1 concerned the Organic Act (legislative limitation and seizure of gambling implements); §16-1-35(11) concerned municipal prohibition of gambling houses.

29. Compare Compiled Laws of Alaska, §4982 (1933) and Alaska Compiled Laws Ann. §65-13-15 (1949).

30. Alaska Compiled Laws Ann. §§48-3-1 to 48-3-8 (Source: Act of March 31, 1947, ch. 92, [1947] Alaska Laws 250).

31. Act of March 26, 1949, ch. 116, [1949] Alaska Laws 327.

32. United States v. Three Thousand Two Hundred and Thirty-Six Dollars, 167 F. Supp. 495 (D.C. Alaska 1958).

33. McGinley v. Cleary, 2 Alaska 269 (1904). This opinion is rather amusing. Among other things, the judge had to reassure the plaintiff and defendant that pari delecto did not mean "delectable pair" and was not meant to degrade them.

34. Greenland v. Mitchell, 3 Alaska 271 (1907).

35. Alaska Stat. (1962). §§11.60.010 - 11.60.060 concerns lottery laws; §§11.60.140 - 11.60.190 concerns gambling and nuisance laws; §11.45.040 concerns seizure; §§43.35.100 - 43.35.150 concerns punchboard tax.

36. Alaska Stat. (1962). §§05.15.010 - 05.15.210 concerns charitable games; §§43.35.010 - 43.35.090 concerns coin-op devices.

37. Alaska Stat. §21.42.070 (1962) (Source: Act of April 18, 1966, ch. 120, §1, [1966] Alaska Laws).

38. Alaska Stat. §29.48.035(a)(15) (1962). (Source: Act of June 12, 1972, ch. 118, §2 [1972] Alaska Laws).

39. Pin-Ball Machine v. State, 371 P.2d 805 (Alaska 1962).

40. Id. at 808.

41. State v. Pinball Machines, 2 Alaska Law Journal 24 (Super Ct., Feb., 1964).

42. State v. Pinball Machines, 3 Alaska Law Journal 36 (Super Ct., Mar., 1965).

43. State v. Pinball Machines, 404 P.2d 923,925 (Alaska 1965).

44. State v. Pinball Machines, 404 P.2d 923,926 (Alaska 1965).

45. Alaska Stat. §43.35.090(2) (1962) (Source: Act of April 18, 1960, ch. 142, §2, [1960] Alaska Laws 199).

46. Act of 1966, ch. 135, §§1,3, [1966] Alaska Laws (expired 1969).

47. State v. Pinball Machines, 404 P.2d 923 (Alaska 1965).

48. Morrow v. State, 511 P.2d 127 (Alaska 1973).

49. Id. at 129.

50. Alaska Stat., §§05.15.010 - 05.15.210 (1962) (Source: Act of March 7, 1960, ch. 27, [1960] Alaska Laws 22).

51. An ice classic, or ice pool, is a game of chance which is, no doubt, practiced in no state other than Alaska. Players guess how long it will take a body of ice to move a specified distance in a body of water. The closest guesser wins a prize. A dog musher contest involves a race of trained dog teams. A fish derby is a fishing contest with prizes given for catching fish. Alaska Stat., §05.15.210 (1962).

52. Alaska Stat. §05.15.210(15) (1962).

53. Alaska Stat. §§05.15.060, 05.15.070 (1962).

54. Alaska Stat. §§05.15.150, 05.15.180 (1962).

PARAGRAPH INDEX: Alaska

The Development of the Law of Gambling:

ARIZONA

M.Z.O.

M.I.R.

A.H.S.

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Summary

¶1 Gambling has never evoked strong moral or legal opposition in Arizona. In the early "wild west" period, gambling was legal if duly licensed, though the licensing process involved little regulation and even less enforcement. Twentieth century prohibitions have been enacted against only professional casino-type gambling and bookmaking, and penalties have generally remained minimal. Actual decriminalization has been limited to the establishment of a licensed on-track parimutuel betting system and an exemption to casino-gambling law which allows charitable and certain other non-profit organizations to run bingo games. Further decriminalization does not appear imminent.

I. Territorial Period

¶2 Coronado, searching for the "Seven Cities of Cibola", first claimed part of Arizona for Spain in 1540. Spain maintained its interest until it granted Mexico independence in 1822. The first Spanish settlement of the area was established by Franciscan missionaries in 1600. But constant Indian attack, and the Spanish government's interest in developing silver resources in Central America, caused the Spanish hold on the Arizona area to remain tenuous.

¶3 Mexican and American influence coexisted from the inception of Mexico's legal control of the Arizona area. For in 1824, when Mexico formally created the Territory of Nuevo

Mexico (which included Arizona), the first American trappers appeared on the Gila, Salt and Colorado Rivers. The outcome of the Mexican War saw the northern regions of Arizona ceded to the United States in 1848 with the treaty of Guadaloupe - Hidalgo. U. S. government surveys, however, showed that the best route for a transcontinental railroad included an area in the southern part of Arizona, and this region was purchased from Mexico in 1853.

¶4 By the Civil War the Arizona region was still desolate frontier. The first territorial census of the western part of New Mexico recorded only 6,482 inhabitants in 1860. Most of these settlers came either to reap the area's mineral harvest, or remained when their journey to the California gold fields was aborted.

¶5 Most of the settlers in the southern part of the state had emigrated from southern states, and they declared the area Confederate country in 1861, sending a delegate to the Confederate Congress. Loyalty in the territory was divided, and both the Union and the South officially claimed the territory. Early in the war, Confederate victories in New Mexico caused the Union army to abandon the Arizona rea, leaving the settlers at the mercy of Apaches and Mexican bandits. In 1862, however, the Union reoccupied Tucson, ending Confederate military domination.

A. The Howell Code

¶6 By 1863, Congress finally decided to grant Arizona

independent status as a recognized territory. 1863 also saw the arrival of William Howell. He found the territory's legal system in disarray and began a code of laws to replace those in force. In its first enactment, the first territorial legislature created a code commission, naming Howell its chairman. In 1864, the "Howell Code" became law. It adopted the common law to the extent that it was not repugnant to Arizona legal doctrine.[1]

¶7 Gambling was not prohibited by the Howell Code, but rather gaming tables and apparatus were subject to a $25 per month license fee.[2] Nominal fines accrued for keeping an unlicensed table[3] though somewhat stiffer penalties were demanded if liquor was served on the premises.[4] Players at unlicensed tables received even smaller fines than operators.[5] But minors were earnestly protected, as anyone allowing a child to play on a table could be fined up to $300 and be imprisoned for three months.[6] Public officials, perhaps to maintain at least the semblance of high moral standards, could lose their jobs if they associated themselves with liquor-serving, unlicensed houses, or if they played at unlicensed tables.[7]

¶8 This code must be read, however, in light of the history of Arizona in the last half of the nineteenth century. This was the mythical Wild West: law enforcement was almost universally ineffective. Indian uprisings continued unabated into the 1870's despite General Crook's victories and the attempt to collect the entire Apache nation into the San Carlos

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Reservation. Law and order was privately managed. In 1873, for example, a vigilante group called the Law and Order Society lynched four convicted murderers on one of Tucson's busiest streets. Stagecoach holdups were also commonplace. One such robbery which occurred in late 1875 between Phoenix and Florence netted the bandits $1,400. Any attempt, then, to outlaw gambling entirely, or even to impose meaningful sanctions on activity made illegal by the Code, would probably have been a futile gesture.

¶9 Though gambling received favorable treatment at the hands of Arizona's first lawmakers, lotteries were dealt with severely. The Bill of Rights, an early constitution accompanying the Howell Code, prohibited legislative authorization of any lottery or sale of lottery tickets.[8] In 1879, however, the legislature authorized the Arizona Development Corporation to conduct lotteries for twenty years, with ten percent of the proceeds dedicated to the construction of capital buildings and the support of the public schools. The governor himself served as commissioner.[9]

¶10 Although the act was promulgated in complete disregard of the Bill of Rights, apparently little or no legal challenge to the scheme surfaced. Press opposition was strong, however. One Phoenix newspaper protested: "What has been buried under a lot of public condemnation has been resurrected, and its decaying carcass again made to stink in the nostrils of honest men."[10]

B. Pre-Statehood Movements to Ban Gambling

¶11 In 1879 the legislature also enacted a law which on its face appeared to take a toughened attitude toward gambling. Unlicensed gambling could now receive up to a year in prison and a $3,000 fine,[11] and gambling was banned from the front room of the first floor of any building.[12] To make the act effective, witnesses were not excused from testifying on the grounds of self-incrimination,[13] and the District Attorney could pick up a $250 bounty for each conviction he assured.[14]

¶12 At the same time, under this statute municipalities were forbidden to prohibit, or in any way regulate, authorized gambling activities.[15] One historian said of the man who introduced the bill:

> This act was sponsored by the Hon. Fred G. Hughes of Tucson, who for many years previous to his death occupied his time in holding office and gambling. Professional gamblers and saloon-keepers wielded much influence during the 1880 decade in Arizona, and the successful politician of those days depended mostly on this element for support. Many of their names will be found on the membership roles of the territorial legislatures.[16]

In retrospect, it appears likely that this provision was really designed to protect pre-existing authorized gambling parlors from further competition. In any event, it was repealed two years after its enactment, and the more lenient regulatory scheme of the Howell Code was reactivated.[17]

¶13 During this period, the long-awaited transcontinental railroad was about to become a reality. The Southern Pacific

Railroad stood ready to extend its lines through the territory. In anticipation and as a further inducement, the same 1879 legislature authorized the of "a certain railroad" to evict any passengers found gambling.[18]

¶14 In the 1880's, such social forces slowly began to tame the Arizona territory. Yet things remained tough, especially in the early part of the decade. Indian raids around Phoenix became even more serious than they had been. It was in 1881 that the famous gunfight at the O.K. Corral took place in Tombstone. Stagecoach holdups continued to plague authorities; in 1883 the same line was robbed twice in one night, and a Wells Fargo messenger was killed.

¶15 But in 1886, Geronimo surrendered, and the Indian raids subsided. In 1887 the legislature acted to protect the public by prohibiting certain confidence games which fleeced the unwary.[19] Railroad conductors and brakemen were empowered to arrest gamblers without a warrant, and failure to do so constituted a misdemeanor.[20] Still, gambling itself remained all but untouched.

¶16 Indeed, some legislators tried to get another territorial lottery off the ground in 1887. The bill failed, but financial considerations, not moral outrage, were apparently responsible for its defeat

> . . . [T]he financial disaster which overtook some of those who promoted the "Arizona development" in the tenth legislature was not conducive to another trial of such a "get-rich-quick" scheme in Arizona. The bill was introduced and created some discussion, mostly ridicule.[21]

One correspondent's story (written under a pseudonym) recorded this irreverent observation on the lottery debates:

> A measure is being drawn up to establish a territorial lottery and its backers, like Colonel Sellers, say "there are millions in it." It stands no show, however, of going through, but should it become a law, all Arizona's Mexican population would go broke, but the territory would lose all the profit accruing from the scheme, in maintaining poor houses for their support.[22]

¶17 An undercurrent of discontent with the state of Arizona's gambling laws was gaining strength, and was manifested in repeated critical comments by Arizona governors in their inaugural messages.

¶18 In 1893, Governor Murphy's message to the territorial legislature recommended.

> A "High License" law, regulating the sale of intoxicating liquors and a repeal of the law licensing gambling in the territory and games of chance, and that statutory provision for "local option" on such subjects be enacted and substituted for the license law.[23]

Two years later Governor Hughes recommended that liquor sales be more strictly regulated, that gambling be prohibited, and that the sale of lottery tickets be made a crime.[24]

¶19 As the twentieth century opened, Arizona's people began to seek greater stability in their economic and family affairs. By now the census report for the territory showed 122,931 persons. The Arizona Rangers, a group modeled after the Texas Rangers, was formed to help assure law enforcement in the area. Statehood was in the air, and the call to end legalized gambling continued to gain support.

¶20 Even among settled businessmen and city-folk, however, an anti-gambling sentiment was far from universal. As an eastern reporter noted in a contemporary account of Arizona and New Mexico just before statehood:

> Gambling, to be sure, is open. The people in the towns believe that open games of roulette, poker, faro, keno, and craps, such as nightly draw crowds into the saloons, are necessary to lead miners, sheep herders, and other dwellers outside to spend their money in the centers of trade. But all newer communities make the same mistake, and it is far less objectionable to walk down the main street of Albuquerque or of Prescott, within the sound of the rattle of the roulette balls and within the sight of the small groups of gamblers, as the doors swing to and fro, than to walk down the bowry in New York. For these towns keep hidden some kinds of vice that New York obtrudes. The gambling is an evil, but it is as decently managed as open gambling can be.[25]

¶21 In 1907, however, Governor Kibbey renewed the call for gambling prohibitions, emphasizing that a changing population accompanying the growth of the territory required a new standard of morality:

> The time has come, it must appear to us all, when more care should be taken in our deportment than has been the rule in our earlier and ruder days. Cities, towns, and villages are growing up all over the Territory. Every year finds a larger number of children, whose education not alone in the schools, but in the formation of habits by association, example, and observation, demands a more careful consideration than was accorded to it when our towns and villages were the abodes of men chiefly, or of but few women and children.
>
> The rule that prevails among men in new communities, that each must stand or fall upon his own merits--that only the strong deserve to stand, and that to fall is the natural and deserved fate of the weak--might have much to commend it if the rule concerned men alone.

> But as we have progressed in population, as the Territory has become more and more the home of families, the fate of women and children has become involved and men themselves have assumed new social responsibilities, so that the old rule, if ever the right one, is not now applicable.
>
> I therefore recommend to you that you enact a law repealing the propvisions for licensing gambling, and making it unlawful for any person to maintain, conduct or permit gambling in any public place, or in or about any place where intoxicating liquors are sold, dispensed or permitted to be drunk, or in any other place to maintain, conduct, or permit such gambling for the purpose of gain or hire and for any person to gamble in any of said places.[27]

¶22 In 1907, the legislature finally repealed the provisions which permitted licensed gambling.[28] And in 1909 was adopted the Duffy Act, which still forms the core of Arizona gambling law. Punishments remained minimal, all offenses were misdemeanors[29] carrying maximum fines of $300 and/or imprisonment of not more than six months. Gambling itself, and conducting gaming by cards, dice,[30] slot machine, punchboard, or other device[31] were prohibited as well as all "banking or percentage games".[32] One who permitted or acquiesced to gambling in his or her establishment was also guilty of conducting the gaming.[33] The California Penal Code provisions,[34] which treated swindling games as larceny, were retained,[35] and lotteries continued to be subject to the same small fines.[36] Furthermore, political subdivisions were prohibited from licensing gambling activity.[37]

¶23 The 1909 legislation also contained provisions controlling "futures". Bucket shops were forbidden, and this provision has been incorporated in the present code. Again,

violations were considered misdemeanors, but the defendant carried the burden of proving that the subject matter of the contract was delivered, or that at the time of the contract, such delivery was genuinely intended.[38] Also, bucket shops could be enjoined through action by either the state or any citizen, and one could be convicted of illegal activity for even indirect involvement in such affairs.[39]

¶24 The only early court decision interpreting this statutory scheme can be found in the Supreme Court's Territory v. Schmidt decision[40] in 1910. Here the court refused to limit the scope of the provisions dealing with "permitting gambling" in one's establishment to professional gamblers. In later years, however, this court would refuse to construe such gambling statutes as broadly.

II. Modern Period

A. Early Developments

¶25 In 1911, Congress finally granted statehood to Arizona. A flurry of "civilized" reform followed soon thereafter. A law establishing an eight-hour work day for women was passed, prohibition was approved and dam construction to provide needed irrigation gained legislative consideration. Continuing economic progress brought serious labor problems to Arizona for the first time. In 1917, labor trouble in the mines saw 1200 striking I.W.W. members arrested, loaded into cattle cars, and deserted in the New Mexico desert by order of the governor in

the "Bisbee Deportation". And the legislature passed a law making it illegal for employers to use more than 20 percent alien labor on their pay rolls, only to have the law struck down by the U.S. Supreme Court.

¶26 Gambling law, however, did not undergo any significant changes. In 1918, the voters approved a referendum measure which readopted most of the 1909 Duffy Act. Only one significant structural adjustment was effected. This change caused participants in illegal gaming to suffer the same penalties as those responsible for conducting the games.[41] This provision is still the law today.

¶27 The prohibitions of the Duffy Act, however, were far from sweeping. Only certain gambling activities were reached, and punishments for violations were lenient. Most importantly, there was no specific prohibition against wagering unless it took place at a prohibited game or was accomplished by using a prohibited device. Likewise, only devices used in a few specified games were considered contraband.

¶28 Wagering on horse racing gave rise to court action, but existing gambling law was construed narrowly so as to preclude criminal liability. In McCall v. State (1916),[42] the defendant had been convicted of "carrying on a banking or percentage game played with cards, dice, or any other device" for conducting horse race wagering with a parimutuel device. The case was an "agreed case" in which an advisory opinion was sought, and the Attorney General himself submitted a brief urging reversal of the conviction. The court did reverse. It

held that since the game here was the horse racing, not the wagers themselves, the case did not present a "banking or percentage" game. Further, the court held that a parimutuel machine does not determine who wins or loses. Therefore, the operators of these machines who do not wager their own money, are not conducting gaming by use of a prohibited device. They are merely acting as stakeholders for the purpose of distributing the money risked by the bettors. Ownership of the machine itself was not illegal under the Duffy Act because its mere possession supposedly did not assure that illegal activities would take place. Witness Chief Judge Ross' rather lyrical concurring opinion: "A parimutuel machine is as innocuous in and of itself as a faro table without cards, a roulette table without ivory balls, a stein without beer, a goblet without wine."[43]

¶29 A very narrow construction of statutory gambling law was again chosen in a 1922 case, Ex Parte Gray.[44] Here the defendant candy store owner stood convicted of conducting a gambling game "by punchboard for money, checks, credits or things of value." He was caught operating a punchboard where customers purchased buttons and received candy if they uncovered the lucky numbers. In ruling that a conviction under this statute was improper, the court stated:

> It is contended by appellant that as the game is alleged to have been played for candy, and as candy is neither "money, checks, credits, or any other representative of value" within the meaning of the words as used in the section quoted that no offense is stated. We agree with this contention . . . The history of the

> enactment is persuasive to show that it was not intended by these words to prohibit the playing of these games for property when not used as a token of value. It is common knowledge that such games are usually played either for money, or for checks, credits, markers or tokens representing money, or value in the form of money, and we may assume that the practice of playing these games for property, which in itself has "value", was not sufficiently prevalent or of such potency for evil as to call for condemnation in the statute quoted.

¶30 The court went on to uphold this particular conviction by finding that since prize, consideration, and chance were present, the activity came within the state's lottery statute. At the same time, however, this decision may be used in defense of the sort of advertising schemes called "gift-enterprises" which arose in later years and which came to be prohibited in other states. In such contests, prizes would be offered to customers, using chance to determine the winners but demanding no extra consideration beyond the real cost of the items or services actually purchased. In any event, there are no Arizona cases in which prosecution has been brought against such promotional schemes.

¶31 The Depression did not hit Arizona hard. Extensive dam construction and expanded mining operations assured ample employment. Legislative action combating gambling virtually ceased until after the conclusion of the Second World War. But public pressure to curtail gambling activity persisted in this period, forcing law enforcement officials to resort either to civil actions under the old criminal nuisance statute, or to confiscation of gambling devices under the limited powers granted to them by existing legislation.

B. Horse Racing

¶32 In 1935, Arizona's first parimutuel law provided for state licensing of tracks and a state share in the gross receipts.[45] Wagering on races held within the confines of a licensed track was permissible, but betting outside of the legally authorized parimutuel system was forbidden. Off-track betting, however, remained untouched by legislative sanction. And after the tacit approval of the McCall case, off-track parimutuel machine wagering boomed. The only weapon that law enforcement could use against this activity was the criminal nuisance provision[46] which Arizona had previously adopted from the California code.[47] This provision made it a misdemeanor to maintain a nuisance, "the acts and punishment for which are not otherwise prescribed."

¶33 Engle v. State[48] (1939) was the first suit brought under this statute. Here the defendant was running an off-track betting office using odds worked by the parimutuel machines of out-of-state tracks. The court agreed that at common law horse race wagering offices were nuisances. But it noted that the conviction could be upheld only if the activity were not punishable under any other statute. The court therefore felt the need to deal with every gambling statute on the books before affirming the lower court.[49] In a companion case,[50] however, the court followed settled doctrine concerning standing in public nuisance cases to deny a private citizen's action to enjoin Engle's operation. The court held here that to challenge such activity a private citizen must

prove that he or she has suffered special damage different in kind from that to which the public-at-large was subjected. This holding, of course, acted to deny standing to all but a few possible litigants.

¶34 Nuisance was, of course, only considered a misdemeanor offense. Such a nominal sanction did little to deter high profit operations like Engle's, and they continued to flourish. In 1941, Engle was again the defendant in Engle v. Scott.[51] Here the court held gaming houses to be nuisances per se which the state could challenge without showing any damage. Furthermore, the state sought and won an injunction prohibiting Engle's operations. But the court qualified its decision by stating that the granting of such an injunction is a discretionary matter, and the state's motion had been acted upon in this case because all other remedies had failed.

¶35 In 1945, the parimutuel law was amended to declare making wagers outside of the on-track parimutuel system a misdemeanor.[52] And in State v. Pelosi[53] the court construed "making a bet" to include receiving a bet, i.e. bookmaking. This extension of the law, however, apparently did little to discourage the substantial bookmaking operations which continued to prosper in Arizona to the chagrin of law enforcement authorities.

¶36 By 1949, in State ex rel. Sullivan v. Phoenix Savings Bank and Trust, the court could no longer countenance the situation:[54]

> Bookmaking operations have gone on more or less continuously in Phoenix for many years

> as indicated by the long list of wagering cases included in the records of this court. We take judicial knowledge of the fact that as late as February of this year bookmaking operations were flourishing, and the Arizona Republic of Sept. 6, 1948, carried headlines of new raids on such establishments in Phoenix. As the author of the news article said concerning the recent series of raids aimed this time at tearing out the wire services in a desperate attempt to find some way to stop such activities, ". . . [the bookmaking racket] has been a constant headache to law enforcement officers for many years." This long history of "bookie" litigation in Arizona and the sporadic revival of horse-race-betting establishments give ample reason for the use of equity's power. . .

The court went on to hold that an injunction sought by the state against a public nuisance per se was not discretionary but obligatory on the court. The court observed:

> To follow a program of denial [of the injunction demanded] makes the courts unwitting but highly prized partners in crime against the laws of the state. Such action represents on the one hand an acknowledgment of the power to suppress the bookmaking racket but on the other a total blindness to the reality--the size and power of the adversary and the manifest need for the available weapon pleaded for by the state.

¶37 In 1949, the legislature also acted, stiffening penalties for off-track betting and bookmaking and placing the newly created state racing commission under a system of regulations which remain the law in Arizona today.[55]

¶38 The racing commission is composed of five members, appointed by the governor to serve without compensation.[56] The commission issues licenses, assigns racing dates, and regulates all horse and dog track activities.[57] The

commission may refuse to license an applicant who 1) "is not of good repute and moral character,"[58] 2) has committed a felony or crime involving moral turpitude,[59] 3) has been convicted of bookmaking,[60] or 4) should not be granted a permit because such an action would not be in the best interest of the state.[61] Dog tracks receive breakage plus 9 to 11 percent of the handle depending on the size of the county involved, and the state takes from 4 to 6 percent.[62] Horse tracks, where the present average daily handle exceeds $100,000, receive from 11 to 16 percent, depending on the size of the gross receipts, and the state gets from 2 to 7 percent.[63] All revenue derived by the state is paid over to the state treasurer who credits part of the sum to agriculture and horse breeding associations.[64]

C. Confiscation of Gambling Devices

¶39 By the 1930's, gambling devices were still not prohibited in toto, but rather became contraband only if specifically brought within statutes forbidding certain games.[65] Again, only small penalties were involved. In an attempt to limit the use of gambling devices, then, law enforcement officials began to claim the right to confiscate and destroy them. The courts, however, continued to follow a policy of strict judicial restraint by refusing to legitimize any remedy without specific legislation.

¶40 In State v. Fifteen Slot Machines[66] Justice Ross found that gambling devices which were seized without a warrant

could not be condemned, taken, or confiscated in the absence of statutory authorization:

> We have no law authorizing the sheriff to take possession of or seize gambling implements simply because they are such. He may arrest one violating the gambling law upon a warrant, or without a warrant if the offense is committed in his presence, but he cannot go out into his bailiwick and pick up gambling devices or other instruments or implements of crime . . . and thus confer jurisdiction on the court to order their destruction. Before that may be done, there must be legislation authorizing it.

¶41 In a companion case, State v. Gambling Equipment,[67] the seizure had taken place pursuant to a warrant. Nevertheless, Justice Ross denied state motions to destroy all of the equipment and ordered the return of any articles which might be used for non-gambling purposes, including cards, crap tables, and chairs. Equipment which could only be used exclusively for gambling could properly be seized and impounded by the state.

¶42 Conspiracy charges also proved an ineffective weapon against gambling devices. For in a 1948 action charging a conspiracy to operate slot machines, the supreme court held that a conviction, based upon the uncorroborated testimony of an accomplice, could not stand.[68]

¶43 When a forfeiture case arose in 1951, however,[69] the court virtually directed the legislature to enact seizure and destruction provisions, stating:

> That gambling is a social evil that eats at the very heart of public welfare and destroys moral and financial stability, does not authorize executive officers, nor the judiciary to order the destruction of devices used for

this purpose unless authorized by legislative act.

¶44 The legislature finally responded by providing that illegal lottery and gambling machines could be destroyed upon conviction.[70] All money seized was to go to the general fund of the city or county having jurisdiction.[71] And these remedies remain effective weapons against gambling today.

D. Recent Developments

¶45 In the 1950's and 1960's, manufacturing boomed in Arizona due to the combined effects of a favorable tax structure, low land and construction costs, abundant electric power and a good supply of skilled and unskilled labor. Phoenix and Tucson underwent phenomenal growth as centers for light industry, aircraft manufacture and computer technology. By 1970, the state's population had grown to 1,772,482 persons.

¶46 In recent years, Arizona has enacted provisions which have both tightened and relaxed control over various forms of gambling. An eavesdropping law permits wiretapping when there is probable cause that evidence of a gambling offense may be obtained.[72] And in 1971, professional bookmaking, an activity which once flourished under liberal Arizona law, was made a felony.[73] The Court of Appeals in State v. Cartright[74] put further bite into this provision in 1973 by holding that each separate acceptance, recording and registry of a bet by a professional bookie constitutes a separate offense. This decision also clarifies the statute's position on social wagering. The court observed:

> The legislature inserted the words "engaged . . . in the business" in order to differentiate between the so-called friendly type bet and the bet made with one, for instance, in the "bookmaking business". If one engages in the activity of accepting, recording, or registering a bet socially, no crime has been committed.

In 1972, the legislature again stiffened the penalties for betting on the results of a horse or dog race outside the parimutuel system, making such activity a felony.[75]

¶47 While the state appears to have "cracked down" on professional gambling, the lottery prohibition has become subject to an exception. Charitable, non-profit, fraternal and religious organizations may be licensed by the state tax commission to operate bingo games.[76] The commission regulates such activity,[77] and it may also license anyone, with or without a charitable design, to run games which do not exceed $300 in gross receipts.[78] Violation of this set of bingo provisions is a misdemeanor.[79]

E. Contractual Enforcement Policy

¶48 Actions aimed at enforcing gambling transactions are conspicuous by their absence throughout Arizona's history. The early common law enforced wagering contracts. At the same time, gambling had not been criminalized, and it was sanctioned only when it became a nuisance. Early on, however, Arizona adopted the common law as it existed in 1776[80] when not in conflict with state law.[81] Included in the common law is the Statute of Anne, enacted by Parliament in 1710. This provision voids all gambling contracts and forbids enforcement.

It also enables the loser to regain his or her losses within six months of the transaction in an action for debt, and allows any third party to maintain the same suit after passage of that half-year period and to share the judgment with the poor of the parish.

¶49 The status of the Statute of Anne as authority in Arizona law, however, must be viewed in light of a criminal system which was very slow to prohibit gambling activity, and which did so only in a piecemeal fashion. It may be argued, for example, that a legislative decision not to criminalize certain kinds of gambling while prohibiting others grants a degree of legal legitimacy to the untouched activities. Logically, then, if a policy of contract non-enforcement is not to be in conflict with Arizona law, it must only reach those transactions which are criminally forbidden. Assuredly, such a policy cannot be followed when the activity involved has been expressly immunized from criminal sanction by either the legislature or the courts. Friendly wagers, for example, are not prohibited in Arizona.[82] The state even allows an income tax deduction for losses incurred in legal wagering transactions.[83]

¶50 However, these comments on civil enforcement are largely conjectural, since Arizona's courts have yet to actually make a final ruling on the enforceability of gambling contracts.

Conclusion

¶51 The general leniency of Arizona gambling law can be traced to its "rough and tumble" territorial history when gambling was the standard behavior on the frontier. Economic progress and the increasing dominance of family life encouraged some prohibitions, but most gambling has been either tolerated or only lightly punished. Professional gambling has drawn most of Arizona's legislative wrath, with bookmaking singled out for particularly strict treatment. If state financial needs demand alternative measures for raising revenue, however, there appears to be no solid anti-gambling tradition in Arizona which would block legalized gambling schemes.

(Shepardized through May 1975)

Footnotes

1. Laws of Arizona, Code of 1864, (Howell Code), ch. LXI, Sec. 7.
2. Id., ch. 59, §1.
3. Id., ch. 59, §3. Fines were $25 - $150 plus the costs of the prosecution.
4. Id., §2. Fines were $50 - $300.
5. Id., §4.
6. Id., §5.
7. Id., §6.
8. Laws of Arizona, Code of 1864, Bill of Rights, art. 28.
9. Laws of 1879, Act No. 16.
10. "Phoenix Expositer", July 19, 1879, reprinted in Legislative History of Arizona 1864-1912, compiled by George Kelly, State Historian, 81 (1926).
11. Laws of 1879, Act No. 36.
12. Id., §7.
13. Id., §9. It was not until 1887 that the witness s testimony could not be used against him. Revised Statutes, 1887, ch. IX, 716.
14. Id., §10.
15. Id., §8.
16. Op. cit. Kelly, 78.
17. Laws of 1871, Act No. 48.
18. Laws of 1879, Act No. 37, §§8(12), 8(13).
19. Revised Statutes of 1887, Penal Code, Title 13 §838. This provision was taken from the California Code.
20. Revised Statute of 1887, Penal Code, Title 13, §§839,840.
21. Op. cit. Kelly, 126.

22. S. Gimlit, Silver Belt, February, 1887, quoted in id. Kelly, 129.

23. Id. Kelly, 161. Governor Murphy clearly represented those interests in the Territory that favored the stability which established business needs to prosper. His brothers had come to the Territory ten years before his formal appointment as Governor, and by 1892 they had built a large business empire. Chronology and Documentary Handbook of the State of Arizona, 14 (1972).

24. Id., 173.

25. Id., 91.

26. Joseph M. Kibbey, before his appointment as Governor, served on the same territorial supreme court and wrote several important decisions. Id. 17.

27. Op. cit., Kelly, 248.

28. Laws of 1907, ch. 1

29. These laws remain misdemeanors to date.

30. Ariz. Rev. Stat. Ann. §13-431 (1956) specifically prohibits faro, monte, roulette, lasquenet, rouge et noir, rondo, vingt-un, 21, poker, bluff, fan-tan, thaw, seven and one-half, chuck-a-luck, black jack, or similar games.

31. Ariz. Rev. Stat. Ann., §13-432 (1956).

32. Ariz. Rev. Stat. Ann., §13-435 (1956).

33. Ariz. Rev. Stat. Ann., §13-437 (1956).

34. Cal. Penal Code Ann., §332 (West 1970).

35. Ariz. Rev. Stat. Ann., §13-434 (1956).

36. Ariz. Rev. Stat. Ann., §13-436 (1956).

37. Ariz. Rev. Stat. Ann., §13-438 (1956).

38. Ariz. Rev. Stat. Ann., §44-1658 (1956).

39. Ariz. Rev. Stat. Ann., §44-1659 (1956).

40. Territory v. Schmidt, 13 Ariz. 77, 108 P. 246 (1910).

41. Laws of 1917, 12, ch. 71.

42. McCall v. State, 18 Ariz. 408, 161 P. 893 (1916).

43. Id. at 161 P. 896.

44. Ex Parte Gray, 23 Ariz. 461, 204 P. 1029 (1922).

45. Laws of 1935, ch. 79.

46. Penal Code of 1901, §333, Ariz. Rev. Stat. Ann., § 13-602.

47. Cal. Penal Code Ann., §372 (West 1970).

48. Engle v. State, 53 Ariz. 458, 90 P.2d 988 (1939).

49. The court found that the defendant's business was not controlled by the "banking or percentage game" provision, since no gaming device was used within the state. It also rejected coverage under the lottery prohibition, because horse racing was seen to be a game of skill rather than one of chance. It finally concluded its review of Arizona gambling legislation by noting that although the betting involved was gambling:

> . . . [G]ambling per se is not prohibited by our law. It is only certain specified forms of gambling that are forbidden, and it is only the keepers of houses where the particular forms are carried on who are punished.

50. Engle v. Clark, 53 Ariz. 472, 90 P.2d 994 (1939).

51. Engle v. Scott, 57 Ariz. 383, 114 P.2d 236 (1941).

52. Laws of 1945, ch. 85.

53. State v. Pelosi, 68 Ariz. 51, 199 P.2d 125 (1948). The case was later overruled in 247 P.2d for different reasons.

54. State ex rel. Sullivan v. Phoenix Savings Bank, 68 Ariz. 42,49, 198 P.2d 1018,1022 (1949).

55. Laws of 1949, ch. 61.

56. Ariz. Rev. Stat. Ann., §5-102, 5-103 (1956).

57. Ariz. Rev. Stat. Ann., §5-104 (1956).

58. Ariz. Rev. Stat. Ann., §5-108, A-1(b) (1956).

59. Id. A-1(e).

60. Id. A-1(f).

61. Id. A-1(h).

62. Ariz. Rev. Stat. Ann., §5-111 B (1956). In counties with populations exceeding 180,000, a dog track receives 9 percent of the handle, plus breakage, and the state takes 6 percent. In other counties, dog tracks receive 11 percent of the first $65,000 handled in a parimutuel pool, and 9 percent of the gross exceeding $65,000, plus breakage. The state receives 4 percent of the first $65,000, and 6 percent thereafter.

63. Ariz. Rev. Stat. Ann., § 5-111(c) (1956). Tracks receive 14 percent of the first $100,000 and 11 percent thereafter. The state takes 4 percent of the first $100,000 and 7 percent subsequently. If the daily handle is less than $100,000, the track takes 16 percent and the state gets 2 percent.

64. Ariz. Rev. Stat. Ann., § 5-113 (1956). Seven and one half percent goes to the Arizona County Fairs and Breeders Award Fund, 5 percent to the Arizona Coliseum and Exposition Fund, and 10 percent to the Livestock, Agriculture, and Breeders Award Fund.

65. See note 44, supra.

66. State v. Fifteen Slot Machines, 45 Ariz. 118,120, 40 P.2d 748,749 (1935).

67. State v. Gambling Equipment, 45 Ariz. 112, 40 P.2d 746 (1935).

68. State v. Cassidy, 67 Ariz. 48, 190 P.2d 501 (1948).

69. In re 21 Slot Machines, 72 Ariz. 408, 414-15, 236 P.2d 733, 737-8 (1951).

70. Ariz. Rev. Stat. Ann., §13-439 A (1973 Supp.).

71. Ariz. Rev. Stat. Ann., §13-439 C (1973 Supp.).

72. Ariz. Rev. Stat. Ann., §13-1057 A (1973 Supp.).

73. Ariz. Rev. Stat. Ann., §13-440 (1973 Supp.).

74. State v. Cartwright, 20 Ariz. App. 94, 510 P.2d 405 (1973).

75. Ariz. Rev. Stat. Ann., §5-112 B (1956).

76. Ariz. Rev. Stat. Ann., §5-401 (1956).

77. Ariz. Rev. Stat. Ann., §5-401 (1956).

78. Ariz. Rev. Stat. Ann., §5-421 (1956).

79. Ariz. Rev. Stat. Ann., §5-410, 5-429 (1956).

80. John W. Masury & Son v. Bisbee Lumber Co., 49 Ariz. 443, 68 P.2d 679 (1937).

81. Ariz. Rev. Stat. Ann., §1-201 (1956).

82. See note 73, supra.

83. Ariz. Rev. Stat. Ann., §43-123-10 (1973 Supp.).

PARAGRAPH INDEX: Arizona

The Development of the Law of Gambling: ARKANSAS

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Table of Contents

Summary

¶1 Arkansas has generally maintained an anti-gambling policy. Its law has evolved through a series of legislative reactions to new games and devices designed to evade existing prohibitions. While suppression of gambling has long been linked with legislative efforts to raise state revenue, early enactments imposing fines and prison sentences have been supplemented with licensing requirements in an attempt to limit violations. Arkansas has never created the most widely adopted revenue raising device, the lottery.

I. The Territorial Experience: 1541 to 1836

¶2 "Arkansas" is an Indian word meaning "downstream people." It describes those people who settled in the south-central part of the United States, on the west bank of the Mississippi River. In 1541, a party of Spaniards led by Hernando de Soto spent nearly a year exploring this area in search of gold. Discovering no mineral wealth, Spain lost interest in the area. The next European exploration did not come until more than a century later, when, in 1673, Marquette and Joliet descended the Mississippi River to the northern part of what is now Arkansas. Nine years later, La Salle claimed the entire Mississippi Valley for France, naming it Louisiana.

¶3 The French carried on missionary work and Indian trade until 1762, when France ceded its territory west of the Mississippi to Spain. In 1800, Spain secretly ceded the land

back to France, but Spanish occupation continued until 1803, when the United States purchased Louisiana.

¶4 Arkansas became a district of the Missouri Territory by an act of Congress in 1812. In 1819, however, it was made a separate territory. That same year the first newspaper in Arkansas, the Arkansas Gazette, published its first issue. Two years later, the capital was moved from Arkansas Post to Little Rock. By 1832, work on the erection of a court-house and a jail had begun,[1] and the Sixth Session of the General Assembly had enacted legislation ". . . to prevent the evil practice of gaming."[2]

¶5 The first gambling law in 1829 declared all gambling contracts void, including loan agreements and other collateral contracts executed by parties who had knowledge that their dealings were connected to gambling. This provision specifically covered betting on a long list of events, but also reached ". . . any wager whatsoever."[3]

¶6 The 1829 statute also included criminal sanctions. All persons were prohibited from exhibiting gaming tables[4] or betting on games and cards,[5] with fines imposed upon conviction.[6] Penalties were also provided for owners and occupants ". . . of any house, out-house, or other building . . ." that exhibited gaming tables.[7] Imprisonment could result if anyone convicted of such violations failed to pay the fine assessed by the court.[8] Keepers or exhibitors of the games drew further penalties because the law deemed them to be "vagrants." Justices of the peace were required, by warrant, ". . . to order any gaming table to be seized and publicly burnt and destroyed."[9]

¶7 Other provisions were enacted to stimulate enforcement.

Prosecuting attorneys were entitled to receive twenty dollars for every gambling conviction they could secure, this fee to be levied out of the estate of the convicted violator.[10] By 1835, the Circuit Courts were given concurrent jurisdiction with the justices of the peace ". . . in all cases in which they (the justices) have jurisdiction of the offense of gaming . . . ."[11]

II. The Formative Era: 1837 to 1900

¶8 Settlement efforts in Arkansas advanced slowly. In this period, the eastern region of the area was little more than a vast swamp. Moreover, the national financial panic of 1837 hindered immigration and contributed to the collapse of Arkansas' two banks, which had been chartered to provide development capital. Thus, when Arkansas became the twenty-fifth state in 1836, its population barely reached the 50,000 residents necessary for statehood.

A. Early Legislation: A Mixed Approach

¶9 Legislative leaders in the early statehood period were concerned with the establishment of a viable financial foundation for Arkansas' government. This consideration may have been an important factor in the establishment of an 1845 act[12] which legalized the operation of billiard tables and ten-pin alleys upon payment of a twenty-five dollar fee to both the state and county treasurers.[13] Those refusing to pay the license fee could be convicted under a newly established misdemeanor fining unlicensed operators. Such violators could still be penalized

under the 1829 provisions, which prohibited betting at any game of billiards or ten-pins, or exhibiting such devices.[15]

¶10 This relaxation of gaming sanctions, however, did not bring about an attendant liberalization of anti-gambling prohibitions. In 1855, the legislature enacted a law which reiterated that anyone guilty of wagering any money, or any valuable thing, on any game of hazard or skill, would be subject to criminal prosecution, conviction, and fine.[16] This law also declared that an indictment could withstand a motion to dismiss merely by alleging the offense, without stating with whom the game was played.[17]

B. Civil War and Reconstruction

¶11 The Civil War and Reconstruction badly damaged Arkansas' economy and caused greater dependence than ever on cotton as a cash crop. Lawlessness and disorder continued to be a serious problem in the state until after the turn of the century. Numerous attempts were made to remedy this situation, but change came slowly. One federal judge, Isaac Parker, sitting at Fort Smith from 1875 to 1896, earned the title "hanging judge" because of the large number of murder convictions returned against train robbers and other fugitives in his jurisdiction. Gambling was also rampant in this period, and professional gamblers tended to be tough, ruthless characters.

¶12 Perhaps the most famous gambler in this period was George Devol. A writer for the Cincinnati Esquire described Devol as ". . . a terrible rough and tumble fighter . . . George was a great 'butter.' He could use his head with terrible effect. He

can kill any man living, white or black, by butting him."[18] For years, Devol feuded with a gang of ruffians known as the "Arkansas Killers," who dominated the towns of Helena and Napolean.[19] Other gangs controlled large areas of the state, making enforcement of any state laws close to impossible.[20]

¶13 Legislative activity in the gambling field continued as new substantive penalties were enacted, although their effect was questionable. An 1877 act made the exhibition of a keno device a misdemeanor, punishable by a two hundred dollar fine.[21] Special recognition of what was thought to be gambling's pernicious affect on children culminated in an act of 1891 providing that:

> If any person of full age shall be guilty of betting any money or any valuable thing, on any game of hazard or skill, or any game of any kind with any minor, he shall on conviction be fined in any sum not less than fifty, nor more than one hundred dollars.[22]

C. Defining Gambling: Skill and Risk

¶14 The Arkansas Supreme Court case of Mace v. State,[23] in 1893, offered the first judicial interpretation of the scope of the 1855 gambling statute.[24] Involving a bet on a baseball game, the case clearly indicated that the prohibition reached wagers on games of both skill and chance. The court dismissed an argument that betting on games of skill was not illegal by analogizing the effect of such activity to that of betting on cards. Places where any gambling occurs, the court observed:

> . . . furnish a resort for the congregation of the idle, thoughtless, and vicious, where they may gratify that inclination and disposition to gamble which is said to be implanted in man's

> nature, and which is most difficult to bring within the restraint of the law.[25]

The court then quoted Blackstone, who said that any form of gaming:

> . . . is an offense of the most alarming nature, tending by necessary consequence to promote public idleness, theft and debauchery among those of a lower class; and among those of superior rank it hath frequently been attended with sudden ruin and desolation, and an abandoned prostitution of every principle of honor and virtue.[26]

¶15 The court also explained that the legislature's decision to phrase the 1855 law in general terms was purposeful. It was aimed at professional gamblers seeking to evade the law by creating new games which technically differed from those which were specifically prohibited.[27] To support this position, the court cited a 1838 statute which instructed courts to construe gambling sanctions liberally so as to insure against such evasion.[28]

¶16 Justice Battle, however, dissented in Mace. He noted that in an earlier case,[29] the court had held that the 1855 statute did not apply to horse racing because it was a "sport" rather than a "game," within the meaning of that provision. It had found that the language of the statute required a bettor to have himself "played" the game involved in order to be convicted. Battle argued, then, by analogy, that Mace could not be convicted as baseball was also a "sport" and as one could no sooner "play" a baseball game than a horse race. Therefore, one could not be convicted under the statute for such a wager.

¶17 A second interpretation of the same law held that one could not be convicted under the statute unless one had risked

something of value on the chance of gaining a reward. Thus, when a defendant proved that he had paid nothing for the checks used in a banking game, the court ordered his acquittal.[31]

D. Gambling Contracts and the Loser's Recovery

¶18 With gambling contracts having already been declared void,[32] legislation was enacted in 1837[33] to protect losers and innocent third parties by allowing them to recover lost property in court. A loser, or his heirs, executors, administrators or creditors, could recover money or valuables lost at gambling if the action was commenced within ninety days of delivery.[34] No action, however, could be maintained against a third party to whom the winner had sold the disputed property.[35]

¶19 A stakeholder who delivered the stake to the winner upon culmination of the obligation determining event was protected from liability under this statute. However, where the stakeholder delivered in opposition to the express order of the loser not to do so, he was legally liable to the loser for the amount of the wager.[36] In any event, either bettor was allowed to revoke the stakeholder's authority to deliver money to the other party at any time before such delivery.[37]

III. The Modern Era: 1900 to date

¶20 Until World War II, the bulk of Arkansas' population remained in rural areas. Migration into the state continued to be minimal, and English, Scotch-Irish and Black families represented the vast majority of Arkansas' people. The economy

of the state continued to lag behind the rest of the South, and the Great Depression took a heavy toll of hardship in the state. Still, throughout these hard times, the Democratic party and a generally conservative ideology dominated Arkansas politics. Changes in the gambling law were enacted to ease state fiscal difficulties, but the general anti-gambling thrust of the was was not altered significantly.

A. Early Prohibitions and Enforcement Efforts

¶21 In the early years of the twentieth century, the legislature grappled with lawlessness and problems of law enforcement throughout the state. An important element in this battle was a two-decade attempt to suppress gambling and to sternly punish professional gamblers. In 1901, the legislature raised the fine for setting up, keeping, or exhibiting a gambling device to five hundred to one thousand dollars.[38] Those who owned or controlled buildings leased for gambling purposes, or where gambling took place with that person's permission, drew the same fines. Corporate owners were included among those liable for such offenses.[39]

¶22 The 1901 act also recognized that measures to insure good enforcement of the laws were required. While prior legislation offered monetary incentives to spur enforcement, the new law threatened criminal sanction for those who neglected their duty. A prosecuting attorney, city attorney or mayor who refused to cause the arrest of an alleged gambling violator could be fined from five hundred to one thousand dollars.[40] Further, if any of the officials accepted money from those involved in gambling to

insure immunity from the risk of conviction, he could be fined from one thousand to five thousand dollars.[41] In fact, the act even established a presumption of law that any gambling table or gambling device found or operated in any city or town of the state was operated with the knowledge of the mayor of that city or town.[42] In an appeal to civilian enforcement, the act authorized any citizen to file information against an alleged offender as well.[43]

B. Gambling Devices

¶23 The courts aided in the attack on gambling through judicial interpretation of the term "gambling device." In State v. Sanders,[44] the state Supreme Court held that a pool table was an unlawful gambling device, which could be destroyed in accordance with the "burning statute." The court stated that only instrumentalities which were designed exclusively for gambling could be summarily destroyed as being illegal per se. However, devices which were ". . . not necessarily intended solely for gambling purposes"[45] could also be destroyed as unlawful if it were proven that they were actually used in gambling activities.

¶24 The so-called "burning statute" made it a nuisance to operate publicly an instrumentality made solely for the purpose of gambling. It authorized the abatement of the nuisance by the destruction of the device. The Arkansas Supreme Court denied that this statute constituted a deprivation of property without due process of law in Garland Novelty Co. v. Stark.[46] The court observed:

> While the legislature would have no right to authorize the summary destruction of a house to prevent gaming or to prevent the illegal sale of liquor therein, it being unreasonable, oppressive, and unnecessary to resort to such measures for the prevention of crime, yet, if the nuisance be one that can be well abated in no other way, even the destruction of property so valuable as a house may be justified, as where its destruction is necessary to prevent the spread of fire or disease.

¶25 In time, the court further broadened the definition of "gambling device" to reach seemingly innocuous conduct. In 1930, the court found a machine which gave a package of mints and a varying number of extra game slugs in return for a nickel to be an illegal gambling device.[47] All that was necessary for a device to be considered illegal was the possibility that one could lose money or property playing it through the auspices of chance. Justice Butler found the baseball pinball machine involved to be such a device, stating:

> The machine under consideration is attractive to children, and the fact that they may sometimes secure the right to play an attractive game--(by chance) . . .--induces them to spend their nickels, not for the mints, but for the possibility of the game, and is gambling within the meaning of our statute.[48]

¶26 Later decisions of the court found such pinball machines, or "slot machines," to be gambling devices per se.[49] And, as Sheriff J. D. Mays of Phillips County learned in 1926, a sheriff could be suspended from office and indicted for knowingly failing to arrest exhibitors of illegal gambling devices because such slot machines were operated in his jurisdiction.[50]

C. Gaming Houses

¶27 Apparently, the laws forbidding the exhibiting, setting

up or keeping of gambling devices did not suppress gambling to the satisfaction of the legislature. For in 1913, it enacted an "emergency" measure, which it declared to be ". . . necessary for the immediate preservation of public peace, health, and safety."[51] Violation of this provision was no longer to be a mere misdemeanor, but a felony. Anyone who kept, operated, or was interested in keeping or operating a gambling house was, upon conviction, to be confined in prison for one to three years.[52] The core of the offense was maintaining a place where gamblers could find shelter.

D. Animal Racing and Betting

¶28 The early 1900's witnessed the enactment of a criminal sanction to reach betting on the outcome of a horse race. In 1907, all such betting, direct or indirect, by the selling or buying of pools or otherwise, was declared illegal,[53] whether the race took place in or out of the state.[54] The first offender drew a twenty-five dollar fine and the two-time violator a twenty-five to one hundred dollar exaction.[55] A third offense could bring a five hundred dollar fine and a prison term from thirty days to six months.[56] Every bet, wager, and sale or purchase of pools was declared a separate offense.[57] In addition, any sheriff, constable, or policeman who refused or neglected to arrest a violator and bring him to trial directly upon discovery of the offense could be convicted of nonfeasance in office, fined up to five hundred dollars, and removed from office.[58]

¶29 In the leading case of Fox v. Harrison,[59] an action was brought by the operator of a dog racing track to restrain the law

enforcement officials of Crittendon County from interfering with his business. The track operator alleged that he had spent $150,000 in preparation for the conduct of races and that thousands of people deserved to attend. He contended that the act of 1907 was aimed at horse racing rather than dog racing, and, moreover, that since dog racing was not specifically mentioned, it should be found to be a sport rather than a game of chance. The court denied both allegations and dismissed the complaint as being without equity.[60] The court felt constrained by considerations of public morals to hold that ". . . racing, whether by men, horses, dogs, or other animals, or by animals of one kind against those of another, is a game, and one who bets on such a race offends against the statute prohibiting betting on games."[61] Moreover, the court found a house maintained for taking bets or wagers to be a criminal nuisance.[62]

E. Futures Contracts and Bucket Shops

¶30 Early cases held that contracts for the apparent sale of commodities were unenforceable gaming ventures when the parties involved had no intention of delivering and accepting goods but rather were simply betting on the rise and fall of commodity market prices.[63] However, to protect innocent brokers, the undisclosed gambling intentions of two parties using the broker's services was not enough to invalidate the broker's contracts with those customers.[64]

¶31 In an attempt to clarify the situation, the legislature passed an act in 1929. The act prohibited bucket shops and futures gambling in stocks, cotton, grain and other commodities,

and declared under what circumstances dealings in futures would be legal in Arkansas.[65] The purpose of the act was to ensure that all contracts of sale for the future delivery of commodities would be made by a process of free exchange between parties in accordance with the rules of a newly established Board of Trade and the provisions of the United States Cotton Futures Act of 1916.[66] Only transactions so regulated, and made on the floor of a recognized public exchange, would be enforced in Arkansas courts. Those made elsewhere were declared null and void.[67]

¶32 The 1929 act, however, was more than a clarification of judicial interpretation. It involved a strong reaction to the commodity market crashes of the times, establishing criminal sanctions for gambling in futures. Anyone who knowingly entered into or assisted in making bucket shop contracts could be convicted of a felony, fined up to one thousand dollars and imprisoned for up to two years.[68] Corporations that executed such contracts could lose their charters of incorporation.[69] The fact that before 1929 such offenders were already arguably criminally liable for such activity under the general wagering laws underscores the seriousness with which the legislature viewed such activity.

F. Lotteries

¶33 As early as 1855, the then existing Constitution of Arkansas provided that "[no] lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed."[70] That Constitution was replaced by the second Reconstruction Constitution in 1868, which was itself negated by the Constitution of 1874.

This document, still in force today, continued many Reconstructionist additions, including the lottery provision.

¶34 While lottery activity was arguable covered by the general wagering statutes enacted in the eighteen hundreds, legislation in 1939 specifically made it unlawful for any person to keep a place for the sale of lottery tickets, to sell or otherwise dispose of such tickets, or to even possess them. Violators were guilty of a misdemeanor and could be fined from fifty to five hundred dollars.[71]

¶35 The Arkansas Court of Appeals defined the term "lottery" as a species of gaming where prizes were distributed by chance among persons who paid or agreed to pay consideration for the opportunity to obtain the prize.[72]

G. Search and Seizure

¶36 In Albright v. Karston,[73] the court handed down a landmark decision concerning the measures allowed the state in its battle against gambling. Here, an injunction was sought against the Arkansas State Police to prevent them from seizing property from a bookmaking establishment without the proper affidavit for a search warrant. The court refused to issue the requested order. The court observed:

> . . . we have a suitor who impliedly admits that he has been maintaining a public nuisance, and has been committing a felony in doing so, coming into a court of equity and asking that he be protected in his continued maintenance of this nuisance and in his continued commission of a felony . . . . A court of chancery is a court of conscience and can never be called into activity for the protection of an enterprise that is not only wrong in itself but made a felony by statute.[74]

¶37 A second case in 1943 further strengthened the hand of enforcement agencies. In Albright v. Muncrief,[75] an action was brought to recover two teletype machines which had been seized by the Arkansas State Police. The police contended that they were empowered to seize the machines because their owner was using them for bookmaking purposes. The court agreed with the police, conceding that although the machines were not gambling devices per se, they were seizable because they had been used in gambling activity. Anyone who purposefully adopted such devices for illegal purposes was said to have forfeited all property rights in them and they were therefore subject to summary seizure without a valid search warrant.[76]

¶38 Both of these cases remain good law today. However, in 1951, the court declined to extend the holding in Albright to make it a crime to possess gambling equipment such as was involved in that case, i.e. a device not per se illegal, but one merely "intended" to be used for gambling. To support a conviction, held the court, the equipment involved had to be actually "used" as a gambling device.[77]

¶39 The thrust of these search and seizure cases was somewhat undercut by legislation which decriminalized the possession and operation of many amusement devices. A 1939 act[78] distinguished lawful amusement games from those devices outlawed by prior legislation. It provided that all lawful amusement games were to be licensed and taxed in accordance with the Internal Revenue Code. By 1959, comprehensive legislation was enacted licensing and regulating the operation of amusement games and levying taxes thereon.[79] After the enactment of this statute, an owner,

operator, or leasee of such equipment could not forfeit his property as a public nuisance unless he had not obtained the proper license.[80]

H. Judicial Extension of Gambling House Prohibitions

¶40 The issue of the definition of a "gambling house" was placed before the court in 1951. The case may have little precedential effect, however, since overtones of racial discrimination are starkly suggested. In Colbert v. State,[81] Everett Colbert was convicted of operating a "place" of gambling. Under the Act of 1913,[82] the penalty for keeping a gambling "house" was conviction of a felony. The penalty for keeping a gambling "device," however, was conviction of a misdemeanor. Colbert was convicted as a felon for crap shooting in the woods, along with several Black companions, who had congregated with him. The dissent observed:

> I am unable to join the majority in solemnly declaring that our lawmakers intended that a few planks set up under the trees, and on which the game of "shooting dice" is played, should constitute a gambling house within the common sense meaning of that term.

I. Parimutuel Betting

¶41 By an act of 1935,[83] the Arkansas legislature legalized parimutuel betting, and, in the case of Longstreth v. Cook,[84] the statute weathered constitutional attack. In that case, parimutuel betting was distinguished from an illegal lottery on the ground that in horse racing, skill, rather than chance, was the determining factor.

¶42 By an act of 1957, however, known as the "Arkansas Horse Racing Law," the 1935 act was repealed and the Arkansas Racing Commission was established.[85] The commission was to have sole jurisdiction over the business and/or sport of thoroughbred horse racing in Arkansas whenever such racing was permitted for any stake, purse, or reward. While not necessarily limited to its enumerated powers, the commission has these statutory powers:

> (1) To grant franchises to conduct horse races;
> (2) To approve dates for each racing meet, and issue the necessary permits;
> (3) To issue licenses to horse owners, horse trainers, jockeys and jockeys' agents;
> (4) To collect and deposit in the State Treasury all fees for franchises and licenses, and all taxes and any other money due Arkansas in relation to horse racing;
> (5) To conduct hearings; and
> (6) To take such other action, not inconsistent with law, as it may deem necessary or desirable to supervise, and regulate, and to effectively control in the public interest, horse racing in Arkansas.[86]

¶43 In accordance with act, parimutuel wagering was authorized at licensed tracks.[87] However, wagering and conducting wagering operations outside of the approved method, at any licenses track are felonies.[88]

¶44 In 1957, the legislature also enacted the Arkansas Greyhound Racing Law,[89] giving the Racing Commission jurisdiction over greyhound racing under the same rules laid down for horse racing. Since that year, no changes have been made in the state's parimutuel betting system.

J. Gambling Information

¶45 An act of 1953 was created in response to a legislative fear that widespread gaming and bookmaking establishments could

be set up in the state, competing with licensed parimutuel betting, if then present laws were not clarified. The act forbade the transmission or receipt of information relating to any sports or games for the purpose of gaming, with numerous activities specifically mentioned.[90] Penalties under this provision, however, were expressly inapplicable to radio stations or newspapers disseminating such information as news, entertainment or advertising.[91] In addition, the law declared that any teletype, telegraph ticker tape or similar machine, used in the receipt or transmission of such gambling information, was to be considered a "gambling device."[92] This definition, of course, subjected such devices to summary search and seizure. Operators of such equipment came under earlier criminal sanctions as well. A commission conducting a legalized race meet was exempted from this provision.[93]

K. Hot Springs

¶46 On March 8, 1964, Wallace Turner of the New York Times introduced the country to the "biggest illegal gambling operation in the U. S.,"[94] Hot Springs, Arkansas. Turner reported that big time illegal gambling existed in the resort city of Hot Springs since the Civil War despite state prohibitory legislation. The enterprises flourished with the support of local citizens, as city business people seemed convinced that cessation of the gambling would cause serious economic consequences. Prosecution was blocked at the state and local level through working agreements between the three major casinos and Arkansas politicians. Indeed, a city ordinance taxed gambling operations in total disregard of a state ruling that such a tax was illegal,

and local gamblers paid the tax willingly. The total city revenue from gambling came to $140,000 yearly in the early sixties, and such taxes built the city auditorium in 1959.

¶47 Local gamblers and city officials claimed that Hot Springs gambling was not connected with national underworld syndicates, but federal officials believed otherwise. The Justice Department's efforts to prosecute local gamblers under the federal law forbidding the use of interstate commerce to further gambling failed in 1963. Federal officers could prove that some players in Hot Springs casinos had bought chips with out-of-state checks, and that these checks were sent through interstate commerce for payment. The federal judge presiding over the Hot Springs grand jury, however, blocked indictment through a questionable instruction which held that the law required proof that gambling profits had moved through interstate commerce.

¶48 Perhaps spurred by the New York Times article, the Arkansas House of Representatives passed a resolution calling for Hot Springs officials to close the illegal gambling.[95] A day after the House's action, Governor Faubus ordered the shut-down and warned that local disregard of his order would force him to bring in state police to accomplish the necessary enforcement. Hot Springs gambling establishments complied with the governor's order, but local officials quickly moved to establish a petition campaign aimed at legalizing Hot Springs gambling through passage of a November statewide referendum.[96] The referendum, in the form of a constitutional amendment, failed decisively.[97]

Conclusion

¶49 The 1960s and 1970s saw vast changes in Arkansas. For the first time, more citizens lived in urban areas than in rural parts of the state. Industry began to predominate over agriculture in the state's economy. The general economic underdevelopment of the state was also attacked through the use of local bond issues to attract industry, with promising results.

¶50 Yet many things have stayed the same. Ninety-nine percent of Arkansas' total population was born in the United States. Although a Republican held a term as governor, Democratic control of Arkansas politics looks as firm as ever. And the state's stance on gambling has also remained remarkably stable, as most of the early prohibitions of the late nineteenth and early twentieth centuries remain in force in their original form. In fact, the last legislative action in the field came in 1961, when the legislature strengthened the old anti-lottery law. This act authorized chancery courts to enjoin the operation of such activities as public nuisance, and raised the penalties for operators to a fine of one thousand to five thousand dollars and/or a prison term of up to two years.[98]

¶51 However, there are some indications that this stability may not last. For one thing, Arkansas shows some signs of becoming a Midwestern retirement mecca; presumably the outsiders, many from urban and ethnic backgrounds, may show less hostility to gambling than their more rural and fundamentalist fellow citizens. More importantly, recent Arkansas Governors, especially

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Dale Bumpers, have moved to expand social services, education, and welfare programs. While Arkansas has an income tax and assesses property tax at a somewhat higher rate than other southern states, the growing burden on the state's fiscal situation may lead to pressure from both the public and politicians for the "easy money" gambling might provide. The future of gambling in Arkansas, then, is uncertain.

(Shepardized through June 1975)

Footnotes

1. E. Trover and W. Swindlers, eds., Chronology and Documentary Handbook of the State of Arkansas, 8 (1972).
2. Act of November 10, 1829, §§ 1-13 (1829) Ark. Acts 9-13.
3. Id. § 1.
4. Id. § 2.
5. Id. § 2.
6. Id. §§ 3, 6.
7. Id. § 4.
8. Id. §§ 2, 3, 4, 6.
9. Id. § 5.
10. Id. § 10. The fine here was twenty-five dollars.
11. Act of October 23, 1835, §§ 1-3 (1835) Ark. Acts 8-9.
12. Act of January 8, 1845, §§ 1-4 (1845) Ark. Acts 74 (superseded by Ark. Stat. Ann. § 84-2501 to -2533 [1960]).
13. Id. § 2.
14. Id. § 3.
15. Id. § 3.
16. Act of January 22, 1855, § 1-2 (1855) Ark. Acts 270 (codified in Ark. Stat. Ann. § 41-2012 to -2013).
17. Id. § 2.
18. Herbert Ashbury, Sucker's Progress, 244 (1969 ed.).
19. Id. at 245-46.
20. Id. at 246-47.
21. Act of March 10, 1877, no. 71, § 1 (1877) Ark. Acts 70 (codified in Ark. Stat. Ann. § 41-2018 [1964]).
22. Act of February 5, 1891, no. 6, § 1 (1891) Ark. Acts 5 (codified in Ark. Stat. Ann. § 41-1111 [1964]).
23. Mace v. State, 58 Ark. 79, 22 S.W. 1108 (1893).

24. See note 10, supra. This was codified in Ark. Stat. Ann. § 41-2012 (1964).

25. See note 23, supra.

26. Id. at 82, 22 S.W. at 1108.

27. Id. at 83, 22 S.W. at 1109.

28. Revised Statutes of 1838, ch. 44, div. 6, Art. 3, § 13 (1968) (codified in Art. Stat. Ann. § 41-2017 [1964]).

29. State v. Rorie, 23 Ark. 726 (1861). In Fox v. Harrison, 28 Ark. 1189, 13 S.W.2d 808 (1929), Rorie was in effect overruled, the court holding that legislative action had made horse racing illegal per se.

30. See notes 16 and 17, supra.

31. Fagan v. State, 21 Ark. 390 (1860).

32. See note 2, supra.

33. Ark. Rev. Stat., ch. 68, § 1-8 (1837) (codified in Ark. Stat. Ann. §§ 34-1601 to -1608 [1962]).

34. Id. §§ 1 and 2, Ark. Stat. Ann. §§ 34-1601, 1602. These two sections were made inapplicable to turf races by id. § 3, Ark. Stat. Ann. § 34-1603.

35. Id. § 4, Ark. Stat. Ann. § 34-1604.

36. Jeffrey v. Ficklin, 3 Ark. 227 (1841).

37. Sicard v. Williams, 181 Ark. 1147, 29 S.W.2d 673 (1930).

38. Act of March 27, 1901, no. 67, § 1 (1901) Ark. Acts 114-16.

39. Id. § 2.

40. Id. § 3.

41. Id. § 4.

42. Id. § 6.

43. Id. § 5. This entire act, however, seems to have little remaining bite. No known case construed the statute. It was omitted from the new Arkansas Code of 1947.

44. State v. Sanders, 86 Ark. 353, 111 S.W. 454 (1908). In Albright v. Karston, 209 Ark. 348, 190 S.W.2d 433 (1945) the court refused to extend Sanders so as to allow the state to retain money seized during a gambling raid, relying on the absence of express statutory authority for such a seizure and retention.

45. Id. at 356, S.W. at 455.

46. Garland Novelty Co. v. Stark, 71 Ark. 13, 141, 71 S.W. 257, 258 (1902). Garland was reaffirmed unanimously in Furth v. State, 72 Ark. 166, 78 S.W. 759, 760 (1904).

47. Ranken v. Mills Novelty Co., 182 Ark. 561, 32 S.W.2d 161 (1930).

48. Id. at 563, 32 S.W.2d at 162.

49. See Stanley v. State, 194 Ark. 483, 107 S.W.2d 532 (1937). See also Steed v. State, 189 Ark. 389, 72 S.W.2d 542, 543 (1934).

50. Mays v. Robertson, 172 Ark. 279, 288 S.W. 382 (1926).

51. Act of March 11, 1913, no. 152, §§ 1-3 (1913) Ark. Acts 613-15 (codified in Ark. Stat. Ann. §§ 41-2001 to -2002 [1964]).

52. Id. § 1.

53. Act of February 27, 1907, no. 55, §§ 1-5 (1907) Ark. Acts 134-35 (codified in Ark. Stat. Ann. § 41-2030 to -2033 [1964]).

54. Id. § 1.

55. Id. & 2.

56. Id. § 2.

57. Id. § 2.

58. Id. § 4.

59. Fox v. Harrison, 178 Ark. 1189, 13 S.W.2d 808 (1929).

60. Id. at 1194, 13 S.W.2d at 809.

61. Id. at 1192, 13 S.W.2d at 809.

62. Id. at 1192-93, 13 S.W.2d at 809. The court relied here on the common law to find the keeping of a gambling house a criminal nuisance. This statement however was dicta.

63. Phelps v. Holdeness, 56 Ark. 300, 19 S.W. 921 (1892). Phelps lost much of its sting, at least for those dealing through a commodity exchange, in Johnston v. Miller, 67 Ark. 181, 53 S.W. 1052 (1899), when the court held that, where the rules of a futures exchange expressly provided for delivery of the commodity, the rules would be evidence that a "good faith" contract and not a gambling transaction was contemplated by the parties.

64. Browne v. Thorn, 260 U.S. 137 (1922). See also Mullinix v. Hubbard, 6 F.2d 109 (1925).

65. Act of March 27, 1929, no. 208, §§ 1-12 (1929) Ark. Acts 1024-30 (codified in Ark. Stat. Ann. § 68-1001 to -1009 [1957]).

66. Id. § 2.

67. Id. § 4.

68. Id. § 7.

69. Id. § 7.

70. Constitution of Arkansas, 1865, Article VIII, Section 6.

71. Act of March 9, 1939, no. 209, §§ 1-7 (1939) Ark. Acts 517-18 (codified in Ark. Stat. Ann. §§ 41-2024 to -2029 [1964]).

72. Burks v. Harris, 91 Ark. 205, 207, 120 S.W. 979, 980 (1909).

73. Albright v. Karston, 206 Ark. 307, 176 S.W.2d 421 (1943).

74. Id. at 312, 176 S.W.2d at 423.

75. Albright v. Muncrief, 206 Ark. 319, 176 S.W.2d 426 (1943). In Albright v. Karston, 209 Ark. 352, 190 S.W.2d 450 (1945) dicta suggests that the summary seizure approved in Muncrief applied only to gambling devices and not to wagered money. See footnote 44.

76. Two strong dissents were made to this holding. Justice McFadden had serious constitutional objections. He was concerned about the implications of the holding in light of an earlier decision which held that a citizen had no right to interfere with an officer seizing property upon a search warrant which was unlawfully obtained. Said the justice:

> The effect of these two cases together means that if an officer with a void search and seizure warrant takes the property of the citizen, the citizen cannot resist the officer at the time, and cannot later recover his property. Such a holding is so foreign to my ideas of the rights of citizens that I must and do disagree with the majority holding to that effect. Under the good intention of destroying the gambling racket, the majority may be setting up a precedent that undermines the constitutional guarantee of property.

77. Burnside v. State, 219 Ark. 596, 599, 243 S.W.2d 736, 739 (1951).

78. Act of March 9, 1939, no. 201, § 2 (1939) Ark. Acts 491-92 (codified in Ark. Stat. Ann. § 84-2611 [1960]).

79. Act of February 26, 1959, no. 120, §§ 1-13 (1959) Ark. Acts 336-41 (codified in Ark. Stat. Ann. §§ 84-2622 to -2632 [1960]).

80. Id. § 8.

81. Colbert v. State, 218 Ark. 790, 796, 238 S.W.2d 749, 752 (1951).

82. See note 54, supra.

83. Act of February 16, 1935, no. 46, §§ 1-26 (1935) Ark. Acts 90-112 (repealed, 1957).

84. Longstreth v. Cook, 215 Ark. 72, 220 S.W.2d 433 (1949). Longstreth was the subject of vigorous criticism by Chief Justice Griffin, concurring in Townes v. McCollum, 221 Ark. 920, 922, 256 S.W.2d 716, 717 (1953), and the court limited Longstreth somewhat in State Racing Commission v. Southland Racing Corp., 295 S.W.2d 617, 620, 226 Ark. 995, 1001 (1956) where the validity of the state's law making greyhound racing legal was tested. The court held that the burden was on those seeking a racing license to show that skill was involved in wagering on the dogs; if such a showing were not made, the law would be invalid under the Constitution as a lottery. Such a showing was a question of fact, the court said, and remanded the case for further consideration. The decision is somewhat hard to explain, since nothing in the Longstreth case would indicate that the establishment of the "skill" element in racing required extensive documentation. Perhaps the best explanation is that the judges, stuck with an unsatisfactory rationale in Longstreth, wished to atone to Fido for their cavalier treatment of Flicka.

85. Act of February 15, 1957, no. 46, §§ 1-33 (1957) Ark. Acts 145-67 (codified in Ark. Stat. Ann. §§ 84-2727 to -2756 [1960]).

86. Id. § 8.

87. Id. § 22.

88. Id. § 22.

89. Act of March 8, 1957, no. 191, §§ 1-30 (1957) (codified in Ark. Stat. Ann. §§ 84-2816 to -2842 [1960]).

90. Act of March 28, 1953, no. 355, §§ 1-5 (1953) Ark. Acts 1018-19 (codified in Ark. Stat. Ann. §§ 41-2034 to -2036 [1964]).

91. Id. § 1.

92. Id. § 2.

93. Id. § 3.

94. "Hot Springs: Gambler's Haven," Wallace Turner, N.Y. Times, March 8, 1964, 1:3.

95. N.Y. Times, March 28, 1964, 1:7.

96. N.Y. Times, March 29, 1964, 32:2.

97. N.Y. Times, Nov. 4, 1964, 6:3.

98. Act of February 6, 1961, no. 49, §§ 1-3 (1961) Ark. Acts 101-02 (codified in Ark. Stat. Ann. §§ 41-2037 to -2039 [1964]).

PARAGRAPH INDEX: Arkansas

The Development of the Law of Gambling:

CALIFORNIA

S.N.G.

R.F.D.

G.D.L.

Summary

¶1 Unlike many other states, where the emphasis was primarily statutory, the development of the law of gambling in California was an interesting blend of legislation and judicial activity. It was characterized by the early appearance of a rather large body of statutory law and judicial decisions, which substantially survived the test of time, and, except for a number of significant refinements, additions, and exceptions, remains in effect today. Broadly, California law prohibits all forms of gambling; the chief exceptions are on-track horse racing and games of skill (i.e., bridge, poker, etc.) not played as part of a house banking.

I. The Pre-Statehood Experience

¶2 The area now referred to as California was originally settled by the Spanish in the late 18th century. After Mexico won its independence from Spain in 1821, the area became a Mexican province. The United States, as a result of a series of events which included the Bear Flag Revolt of 1846 and the Mexican War, required the land as part of the Mexican Cession in 1848.[1]

¶3 Just prior to the signing of the treaty ending the Mexican War, gold was discovered near Sacremento, at the sawmill of John A. Sutter, and, almost immediately, one of the greatest migrations of all times, the California Gold

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Rush, was on. The fortune hunters came, like "the pale children of the feeble sun, / In search of gold through every climate run: / From burning heat to freezing torrents go, / And live in all vicissitudes of woe."[2] Only two years later, in 1850, California was admitted to the Union as a free state.

II. The Formative Era: 1850-1900

A. Lotteries and Casino-type Games

¶4 California is governed today under its second state constitution, adopted in 1879. Its first was prepared in the hectic days of 1849, just prior to statehood. The first legal expression on the issue of gambling was included in the constitution of 1849. Article 4, section 27 provided that: "No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed."[3]

¶5 Prior to California's admission to statehood, its society was politically and socially in turmoil. Robbery, murder, Indian forays, and the depredations of bandits were widespread. Even after statehood, California was beset by social unrest. Most of the population was concentrated in the northern mining districts and in boom cities like San Francisco. To the south, cattle raising predominated. The problem of maintaining peace and order was acute. Indeed, San Francisco attempted to meet the situation by forming vigilante committees in 1851 and 1856.

¶6 Nevertheless, efforts were made in early legislation to bring the frontier conditions of life, including gambling, under control. Statutory implementation of the constitutional policy against lotteries was immediately forthcoming. In 1851 legislation was enacted which prohibited all lotteries[4] and, except as otherwise provided, all "banking games, and games having a percentage."[5] The "exception" provisions of the enactment established a licensing system which basically authorized the operation of licensed gaming houses.[6]

¶7 This legislation, however, was short-lived. While the 1855 act which repealed and replaced the former lottery statute provided for no substantial changes,[7] a major shift in policy was evident in the terms of the enactment of the same year entitled "An Act to Suppress Gaming."[8] This statute abolished the licensing of gaming houses,[9] and made the keeping of gaming houses a criminal offense.[10]

¶8 Two years, later, on April 27, 1857, another anti-gambling provision was passed.[11] This statute declared that active participants in certain specified games would be guilty of a felony.[12] The prohibited games were faro, monte, roulette, Langsquenet, rouge et noir, or "any banking game played with cards, dice, or any other device, whether the same be played for money, checks, credit, or any representative of value."[13] In addition, it was made a misdemeanor by this legislation to bet "against said games"[14] or knowingly to permit such games to be conducted in one's house.[15] In 1860, however, legislation was passed, which modified the 1857 act to

the extent of making all illegal gaming activities misdemeanors where before, as noted above, some had been felonies.[16]

¶9 On April 24, 1861 the legislature passed a detailed lottery act which superceded all previous legislation in this area.[17] This act was basically penal in nature;[18] however, it also provided, inter alia, a definition of the terms "lottery"[19] and "lottery ticket,"[20] and a civil provision which declared that all "contracts, agreements, and securities, given, made or executed, for, or on account of, any lottery, shall be utterly void and of no effect."[21] This statute also allowed the purchaser of a lottery ticket to recover from the seller the sum of fifty dollars for each ticket so purchased.[22]

B. The Penal Code of 1872

¶10 In 1872 the first comprehensive California Penal Code was adopted.[23] This code, which was patterned after the New York Field Code,[24] remains, substantially, the law of California today.[25] Under the Penal Code of 1872, both lotteries[26] and gaming[27] were prohibited, but the chief import of the statute was contained in the provisions defining these terms. Section 319 defined "lottery" as:

> . . . any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it . . . upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.[28]

¶11 Three factors are necessary to constitute a lottery under this definition: 1) a prize, 2) distribution by chance, and 3) consideration.[29] In most cases, the first element, a prize, is not a problem. The second factor, however, is of greater significance, because the required presence of chance is not a formality. In one case, for example, People v. Carpenter,[30] the defendant had pretended to conduct a fair drawing at a theatre bank night, but had, in fact, palmed the ticket of a co-conspirator, which he then presented as the winning share. The court ruled that there was no lottery, since the element of chance had been removed by the defendant's fraud.[31]

¶12 The third element, consideration, has also been the subject of a not insubstantial amount of litigation. The California courts have generally taken a broad view of what constitutes consideration paid for a share in a lottery scheme. The courts have ruled, for example, that the requisite consideration need not be paid exclusively for the share in the scheme, but may also be advanced in exchange for something in addition to the chance.[32]

¶13 Under this definition, the following schemes have been found to constitute lotteries: theatre cash night,[33] "chain-letter" store,[34] "suit" club,[35] "pyramid" club,[36] game of "Tango",[37] and a free haircut raffle for customers of a barber shop.[38] In addition, the following were held not to be lotteries: an "unloaded slot machine" not in use as a gaming device,[39] a "bank night" where chances were given away to both

customers and non-customers,[40] any "gratuitous distribution of property by lot or chance,"[41] and trading stamps given with merchandise to customers by merchant.[42]

¶14 As related above, the Penal Code (as amended in 1885) prohibits gaming. The scope of the prohibition, however, is much more definite than this general language. Specifically, section 330 reads as follows:

> Every person who deals, plays or carries on, opens or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, tan, fan-tan, stud-horse poker, seven and a half, twenty-one, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or any other representative of value, is punishable . . .[43]

The specificity of this language is critical because, since gambling is not a common law crime, the only illegal gambling activities are those so characterized by statute. This point was made by the court in the case of Monterey Club v. Superior Court:[44]

> Playing at any game, even for money, is not of itself an offense at common law. The offense, if any, must be created by statute, and can only be punished as the statute directs. . . . The statutes of this state enumerate and define what games are inimical to public morals and welfare and should therefore be declared unlawful.[45]

¶15 Exactly what, then, did the court prohibit? There is obviously no problem with any of the games specifically enumerated in section 330. The key question, thus, is what activities were outlawed by the prohibition of "banking and

percentage games". In People v. Carroll[46] a banking game was declared to be:

> . . . [any] game conducted by one or more persons where there is a fund against which everybody has a right to bet, the bank being responsible for the payment of all funds, taking all that is won, and paying out all that is lost.[47]

Thus, a non-banking game which is not specifically prohibited by statute, e.g., draw poker,[48] is not prohibited under California law.[49]

¶16 Local governments, in the exercise of their police power,[50] may enact and enforce reasonable local gambling ordinances not in conflict with the general law in order to supplement the state Code.[51] It is under this power that municipalities may license establishments to conduct lawful gambling games, (i.e., those not explicitly prohibited by state law). This power also provides localities with the competence "to prohibit all games not denounced by the statute."[52]

C. The Civil Law

¶17 On the civil side of California jurisprudence, in 1855, "An Act to Suppress Gambling" was passed. In addition to the criminal penalties noted above, it provided that notes, mortgages, and other securities or conveyances in consideration of gambling winnings were to be void as between all but holders in good faith and without knowledge of the illegal taint.[53]

¶18 Closely related to the last point is a series of cases, beginning in 1851, which addressed the question of the validity and enforceability of gambling debts and contracts.[54] The

general rule which emerged from this litigation is one of judicial non-involvement: the courts will not recognize wagering contracts and will deny their protection to all parties concerned, regardless of whether they be winners or losers. The courts, in short, will not enforce gambling debts, but neither will they aid the loser who seeks to recover the losses which are the fruit of his folly.[55] Although the case of Bryant v. Mead[56] was the first to rule on this point, perhaps the best statement of the California rule appears in Justice Sanderson's opinion in Johnston v. Russell,[57] in which the general position and the principle exception to it are eloquently stated:

> If the parties to an illegal wager repent and desire to withdraw before the wager has been decided, let them be encouraged to do so by allowing them to recover their stakes from each other, or from the stakeholder, if one has been employed . . . No obstacle should be thrown in the way of their repentance, and if they retract before the bet has been decided, their money ought to be returned to them. But persons who allow their stakes to remain until after the bet has been decided, and the result has become generally known, are entitled to no such consideration. Their tears, if any, are not repentant tears, but such as crocodiles shed over the victims they are about to devour. To allow them to recover is not to reward repentance--not to promote the public good; for as to that, the mischief has already been done, but to reward hypocrisy and promote the private interests of such as are found willing to violate not only the law of the land, but the law of honor also. After the money has been lost and won, and the result generally known, neither party ought to be heard in a court of justice.[58]

119 In defining an "illegal wager" for purposes of the rule, the tendency of the California courts has been to follow

the general common law policy: the only wagers "illegal" in the sense of "unenforceable" are those involving a breach of the peace, those calculated to wound the feelings or affect the interests or character of third persons, and those contrary to good morals or sound public policy.[59] Inevitably, however, the court has found reason to fit individual gambling activity within this exception.[60] Under this approach, therefore, the exception has literally "swallowed the rule."[61]

¶20 The lottery provision of the 1879 Constitution was supplemented to provide that:

> . . . contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction.[62]

The constitutionality of this provision was sustained a few years later, when the United States Supreme Court in Otis v. Parker[63] ruled that it created no unconstitutional interference with the right of contract.

III. The Modern Era: 1900-1975

¶21 By the turn of the twentieth century, an extensive network of railways and telegraphs connected California with the eastern half of the nation and contributed to its growth in both wealth and population. At this time, California's agricultural industry began to diversify and grow, and its infant mining (i.e., other than gold) and manufacturing

industries began to develop and expand. Although its population and economy have experienced change, growth, and development in this century, California's gambling law for the most part has not. Its essentials developed prior to 1900. The gambling law of the state has undergone relatively few, and relatively minor refinements, since its inception.

A. Bookmaking and Horse Racing

¶22 In 1909, a provision prohibiting all forms of bookmaking activity in California was added to the Penal Code,[64] and it remains the law to the present day. The only exception to this general prohibition came about in 1933 when the state legislature secured, through the addition of article 4, §25a to the state constitution, the power to permit and to regulate horse racing and wagering thereon in California. Immediately, the legislature passed the "Horse Racing Act"[65] which created the Horse Racing Board and gave it the plenary power to supervise, license and regulate the conducting of horse racing meetings and on-track parimutuel wagering.[66] The stated purpose of the act was to provide for "the encouragement of agriculture and the breeding of horses in the State of California,"[67] and, as such, it provided that a percentage of each purse won by an animal bred in California was to be paid to the breeder[68] and that every "licensee shall run at least one race each racing day which shall be limited to horses foaled in California."[69]

¶23 While the Horse Racing Law has undergone numerous changes and recodifications, it reflects, in its present form,[70] no significant policy changes. The Horse Racing Law today is a complex body of regulations which cover every conceivable aspect of horse racing, licensing requirements, wagering, revenue, as well as several other miscellaneous categories. In short, on-track wagering on the outcome of horse races, although decriminalized, is heavily regulated.

¶24 The Horse Racing Law has generated some interesting litigation, particularly in the area of constitutional adjudication. In one case, In Re McKelvey,[71] the issue was whether the statute violated the Equal Protection Clause of the 14th Amendment by permitting wagering on horse racing but not permitting it on dog racing. The court upheld the challenged legislation, stating:

> The provisions under which petitioners were arrested are not in violation of the Fourteenth Amendment to the federal Constitution . . . The legislature is given broad discretion in classifying a subject of legislation and it is not necessary that the legislature include in any given law all the subjects which might be included within its provisions. All presumptions are in favor of acts passed by the legislature and the classifications made by the legislature will not be disturbed by the courts unless they are "actually and palpably unreasonable and arbitrary."[72]

¶25 A similar question was involved in People v. Sullivan,[73] where the constitutionality of the Horse Racing Act was again challenged on Equal Protection grounds. The challenge here concerned the classification that permitted wagering on track

while prohibited it elsewhere. The court held that the classification was both reasonable and constitutional.[74]

¶26 In 1966, the California Constitution was revised and in part renumbered. The provision granting the state legislature the power to regulate horse racing and wagering is now found in Article 4, §19(b). In Article 4, §19(a) is now found the general prohibition on lotteries within the state.

B. Mechanical Gambling Devices

¶27 Another provision, added to the Penal Code in 1911, and still the law today, makes the possession or control of any mechanical gaming device, including a slot machine, which determines winners by chance.[75] This second provision has accessioned a great deal of judicial interpretation on the issue of skill versus chance. While the courts have found that devices which are predominately games of skill "do not fall within the prohibition of the state gaming laws,"[76] the boundary between a game of skill and a game of chance has not always been readily apparent. Whether a particular game is one of chance or of skill is "largely factual"[77] and, therefore, a question for the trier of fact. In In Re Allen,[78] the basic test was announced in the majority opinion delivered by Chief Justice Gibson:

> It is the character of the game rather than a particular player's skill or lack of it that determines whether the game is one of chance or skill. The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game.[79]

Thus, although there is an element of chance in the game of bridge, it is classified as a game of skill, because skill is the dominant characteristic.[80]

C. Forfeiture Provisions

128 Under the language of section 2604 of the Penal Code, "no conviction of any person for a crime works any forfeiture of any property, except in cases in which a forfeiture is expressly imposed by law."[81] Under California gambling law only money and property offered for disposal in a lottery[82] and certain gaming machines and money contained therein[83] are, herefore, subject to forfeiture. Nevertheless, in Lee On v. Long,[84] the forfeiture power of the state was judicially extended in the gambling area. At issue was a certain sum of money "seized while in use in gambling games"[85] but admittedly, not subject to any express forfeiture provision. The court held that while it was proper to deny the county's petition for forfeiture, it was also proper for the court to deny its assistance to persons whose claim for relief must necessarily disclose an illegal purpose or object.[86] This holding can perhaps be compared with the equitable doctrine of "unclean hands." In his dissent, Justice Carter described what he termed the "legal paradox" of the holding:

> To say that that does not amount to a forfeiture is to deny the obvious. It cannot be denied that by such a holding the owners lose their property. The state has it and intends to keep it. It cannot obtain title to it by forfeiture proceedings but no doubt it will eventually make use of it. It

> cannot be left in limbo. . . . No one can prevent the state from using it as the only interested parties are the owners and they can do nothing. Hence it follows that the state may and will appropriate to its own use with impunity and a forfeiture is effected in violation of the express statutory provision to the contrary . . .[87]

Lee On remains good law.[88]

D. Criminal Procedure

¶29 Two issues of criminal procedure, both involving policemen, in the gambling area are appropriate to note. The first issue concerns the question of entrapment--i.e., when is the defense of entrapment available to a defendant in a prosecution under the gambling laws? The general rule is stated in People v. Cherry:[89]

> Conceding that when an officer indulges a person to commit a crime which he would not have done without such inducement, the law will not punish the person so lured into the crime . . . nevertheless, it is only where the intent originates with the officer and where the defendant is induced to commit a crime which was not contemplated by him, that such enticement or entrapment may be urged as a defense.[90]

Regarding the specific question of gambling prosecutions, the instant case goes on to point out that:

> Whereas here, the defendant by his own admissions was engaged habitually in the unlawful business of accepting and placing bets on horse races in violation of the law . . . then it cannot be said that appellant's purpose to commit the crime was the result of anything that the officers did or said.[91]

Thus, the position of the court is that, when the criminal intent is already present in the defendant (as witnessed by his habitually unlawful conduct), the solicitation of the officers does not induce the commission of the crime, but merely furnishes evidence of the defendant's unlawful activities.

¶30 The second procedural point, an evidentiary issue, concerns the use of policemen as expert witnesses in a gambling prosecution. The rule on this point is that a policeman, qualified by experience as an expert, is a competent witness to testify as to the character and meaning of betting slips, scratch sheets, racing forms and other similar materials introduced as evidence at the trial.[92]

E. The Civil Law

¶31 Although the general rule regarding the issue of the enforceability of gambling debts is that "the courts will not recognize such an illegal contract and will not aid the parties thereto, but will leave them where it finds them,"[93] a more recent California case has created an interesting exception concerning gambling and insolvency. In Tokar v. Redman,[94] the court, commenting on the issue, said:

> The playing of these games for money being illegal, the consideration for the payment of a gambling loss incurred in playing them, that is, the opportunity to win more than the amount wagered, is likewise illegal, and does not constitute a fair consideration for the monies paid [citations omitted] . . . It follows, therefore, that if a debtor, then being insolvent, gambles away his assets, or, being solvent, gambles away his assets and thus becomes insolvent, he has made a conveyance

> without fair consideration and his creditors may recover from the person who has received his money.[95]

The court uses "illegal" not in the sense of illegal as "criminal," i.e., in violation of one or more of the provisions of the Penal Code, but in the sense of illegal as "unlawful" under section 1667 of the Civil Code[96] which, as noted above, defines an unlawful contract as one which is contrary to express law, the policy of express law or to good morals.[97]

¶32 A closely related problem is the conflict of laws question which arises when a gambling contract, made lawfully under the jurisdiction of another state, is litigated in the courts of California, where such obligations would, in the normal case, be void. In Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc.,[98] the problem before the court was whether to enforce the foreign gambling contract for comity purposes, or to refuse enforcement for reasons of California public policy. Referring to California's statutory decriminalization of on track parimutuel wagering the court declared:

> All this leaves little room for California courts to be shocked or to prate of public morals or public policy when confronted with an application for relief upon a contract for the operation of a licensed gambling parlor within the State of Nevada. Such contract is one for the accomplishment of a legal objective, certainly not contrary to the public policy of Nevada and essentially not in conflict with that underlying the California Horse Racing Law . . . [it] plainly provided for the doing of lawful acts in a lawful manner . . . and cannot fairly be said to be opposed to the public policy of this state.[99]

The contract was held to be enforceable in the courts of California. This decision remains consistent with at least the

letter of the general conflicts rule in California (i.e., foreign contracts, although valid where made, are not enforceable in California if they are contrary to the public policy, welfare or moral standards of California),[100] since it holds merely that this type of contract is not contrary to the public policy of the forum.

¶33 Although a gambling house constituted a public nuisance at common law for the purposes of a criminal prosecution,[101] it does not necessarily follow under California law "that an equity action on behalf of the state might be maintained at common law to enjoin the operation of a gambling house."[102] In fact, the courts of California have refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of public nuisance legislation and, since a gambling house per se is not anywhere expressly declared a public nuisance, it simply cannot be enjoined; for example, a gambling house which created public health and safety hazards would be enjoinable under express California law.[104] Rather, it is to say that in this area of the law the courts must have statutory guidelines before they can act.

¶34 The constitutional ban on futures contracts, although sustained in the courts, was short-lived. In 1908, the provision was amended to read as follows:

> . . . [A]ll contracts for the purchase or sale of shares of the capital stock of any corporation or association without any intention on the part of one party to receive the shares, and contemplating merely the payment of differences between the contract and market prices on diverse days, shall be void . . .[105]

This amendment was, of course, necessary for the making of legitimate futures contracts, while continuing the onslaught against the real target of the legislature, wagering on bucketing contracts.

Conclusion

¶35 California's present public policy in the gambling area rests principally on practical considerations of potential anti-social consequences. There has never been a blanket prohibition of gambling in California, for, as discussed above, certain gambling games, not expressly prohibited by state or local law, are permitted. The law apparently seeks, in general, to suppress commercial gambling except when related to another endeavor, e.g., horse racing. Lotteries, banking games, and bookmaking are outlawed. Where the state has permitted some form of gambling, it has accompanied it with a detailed body of complex state regulation and control.

(Shepardized through May 1975)

Footnotes

1. See Treaty with Mexico, Feb. 2, 1848, Art. 5, 9 Stat. 922, 926 (1854), T.S. no. 207 (entered into force May 30, 1848).
2. Chatterton, Narva and Mored, 1.55.
3. Cal. Const., Art. 4, §27 (1849). In the 1879 Constitution, the provision prohibiting lotteries was contained in Art. 4, §26.
4. Cal. Stats., 1851, ch. 28. This statute provided criminal penalties for setting up a lottery and for selling lottery tickets and, further, provided for the forfeiture of all property offered as prizes in a lottery.
5. Cal. Stats, 1851, ch. 8, §1.
6. Id., ch. 8, §§2-7.
7. Cal. Stats., 1855, ch. 75.
8. Id., ch. 103.
9. Id., ch. 103, §7.
10. Id., ch. 103, §§1,2.
11. Cal. Stats., 1857, ch. 230.
12. Id., ch. 230, §1.
13. Id.
14. Id., ch. 230, §2.
15. Id., ch. 230, §5.
16. Cal. Stats., 1860, ch. 99.
17. Cal. Stats., 1861, ch. 229.
18. Id., ch. 229, §§1,5-10,12,15,16,18.
19. Id., ch. 229, §2.
20. Id., ch. 229, §3.
21. Id., ch. 229, §13.
22. Id., ch. 229, §19.

23. Cal. Penal Code, 1872.

24. Note: Jonathan F. Green, known throughout 19th century America as "Green, the Reformed Gambler" and Horace Greeley, the reformist newspaper man, were very influential in the passage of anti-gambling legislation which became part of the Field Penal Code. With the adoption of the Field Code in many states throughout the nation, the efforts of Green and Greeley produced unexpectedly far reaching consequences. See, Henry Chafety, Play the Devil, pp. 87-95 (N.Y., 1960).

25. See, Cal. Penal Code, pt. 1, title 9, chs. 9-10 (West, 1970).

26. Id., pt. 1, title 9, ch. 9. More specifically, the following activities were criminalized: setting up a lottery (§320); selling lottery tickets (§321); aiding lotteries (§322); keeping a lottery office (§323); advertising a lottery office (§323); insuring lottery tickets (§324); permitting one's building or vessel to be used for lottery purposes (§326); the Code also provided that property offered for disposal in a lottery was subject to forfeiture (§325).

27. Id., ch. 10.

28. Id., ch. 9, §319.

29. See, e.g., Cal. Gas Retailers v. Regal Petroleum Corp., 50 Cal. 2d 844,851, 330 P.2d 778,782 (1958); also, People v. Hecht, 119 Cal. App. 778,784, 3 P.2d 399,401 (1931).

30. People v. Carpenter, 141 Cal. App.2d 884, 297 P.2d 498 (1956).

31. Id. at 888.

32. See, Holmes v. Saunders, 114 Cal. App.2d 389, 250 P.2d 269 (1952)--newspaper subscription plus chance to win automobile; also, People v. Gonzales, 62 Cal. App.2d 274, 144 P.2d 605 (1944)--chances to "cash night" at theatre given only to those who paid to enter theatre. See also, People v. Carpenter, 141 Cal. App.2d 884, 297 P.2d 498 (1956)--shares for a theatre bank night were given away, however, to non-patrons as well as patrons; there was not sufficient consideration for the scheme to constitute a lottery as a result.

33. People v. Gonzales, 62 Cal. App.2d 274, 144 P.2d 605 (1944).

34. Niccoli v. McClelland, 21 Cal. App.2d 759, 65 P.2d 853 (1937).

35. People v. Hecht, 119 Cal. App. 778, 3 P.2d 399 (1931).

36. Reynolds v. Roll, 122 Cal. App.2d 826, 266 P.2d 222 (1954) cert. denied 348 U.S. 832, 99 L.Ed. 656, 75 Sup. Ct. 55 (1954).

37. People v. Babdaty, 139 Cal. App. 791, 30 P.2d 634 (1934).

38. 30 Cal. Op. Atty. Gen. 233.

39. Chapman v. Aggeler, 47 Cal. App.2d 848, 119 P.2d 204 (1941).

40. People v. Carpenter, 141 Cal. App.2d 884, 297 P.2d 498 (1956).

41. People v. Cardas, 137 Cal. App. 788, 28 P.2d 99 (1934).

42. Ex parte Drexel, 147 Cal. 763, 82 P. 429, 3 Ann. Cas. 878, 2L.R.A.N.S. 588 (1905). Mere possession of lottery equipment, however, is not prohibited; the statute is aimed at operation. Chapman v. Aggeler, 47 Cal. App.2d 848, 119 P.2d 204 (1941).

43. Cal. Penal Code, pt. 1, title 9, ch. 10, §330 (enacted 1872; amended 1885 and 1891).

44. Monterey Club v. Superior Court, 48 Cal. App.2d 131, 119 P.2d 349 (1941).

45. Id. at 148-149.

46. People v. Carroll, 80 Cal. 153, 22 P. 129 (1889).

47. Id. at 157-158.

48. Monterey Club v. Superior Court, 48 Cal. App.2d 131, 119 P.2d 349 (1941).

49. Indeed, in Gardena, California, clubs are licensed to conduct draw poker games.

50. See, Ex parte Tuttle, 91 Cal. 589, 27 P. 933 (1891).

51. Cal. Const., Art. 11, §11 (1879).

52. In Re Murphy, 128 Cal. 29, 60 P. 465 (1900).

53. Cal. Stats., 1855, ch. 103, §3.

54. See, for example, Bryant v. Mead, 1 Cal. 441 (1851); Fuller v. Hutchings, 2 Lab. 93 (4th Dist. S.F. Co. 1857); Johnston v. Russell, 37 Cal. 670 (1869); Gridley v. Dorn, 57 Cal. 78 (1880).

55. Id.

56. Bryant v. Mead, 1 Cal. 441 (1851). In this case Justice Bennett, while not overruling the common law rule of enforceability of gambling debts, extended the common law exception regarding wagers which are contra bonos mores and refused to enforce a gambling debt arising out of a lawful game of faro which had been conducted in a licensed gaming house. In this case, the exception literally "swallowed the rule"!

57. Johnston v. Russell, 37 Cal. 670 (1869).

58. Id. at 676. Note: In this case Justice Sanderson rejects the common law rule and adopts, as the better view, the so-called "New York Rule" as stated in Yates v. Foot, 12 Johns. (22 N.Y. Common Law Reports) 1 (1814). See also, Kyne v. Kyne, 16 Cal.2d 436, 106 P.2d 620 (1940).

59. See, Gridley v. Dorn, 57 Cal. 78, 40 Am. Rep. 110 (1880).

60. See, Bryant v. Mead, 1 Cal. 441 (1851); Gridley v. Dorn, 57 Cal. 78, 40 Am. Rep. 110 (1880); Hankins v. Ottinger, 115 Cal. 454, 47 P. 254, 40 L.R.A. 76 (1896).

61. During this period legislation was enacted which gave support to this position. Section 1667 of the Civil Code (enacted 1872) defined an unlawful contract as one contrary to an express provision of law, or contrary to the policy of express law, although not expressly prohibited, or otherwise contrary to good morals.

62. Cal. Const., Art. 4, §26 (1879).

63. 187 U.S. 606, 23 Sup. Ct. 168, 47 L.Ed. 323 (1903), affirming Parker v. Otis, 130 Cal. 322, 62 P. 571, 92 Am. St. R. 56 (1900).

64. Cal. Penal Code, §337a (West, 1968).

65. Cal. Stats., 1933, ch. 436; Cal. Stats, 1933, ch. 769. Note: This act has been recodified and is presently Cal. Bus. and Prof. Code, Division 8, ch. 4 (West, 1964 and Supp., 1973).

66. Id.

67. Cal. Stats., 1933, ch. 769, §4.

68. Id.

69. Id.

70. Cal. Bus. and Prof. Code, Division 8, ch. 4 (West, 1964 and Supp., 1975).

71. In Re McKelvey, 19 Cal. App.2d 94, 64 P.2d 1002 (1937).

72. Id. at 96.

73. People v. Sullivan, 60 Cal. App.2d 539, 141 P.2d 230 (1943).

74. Id.

75. Cal. Penal Code, pt. 1, title 9, ch. 10, §330a (West, 1968). See also, §§330b; 330c; 330.1; 330.2; 330.3; 330.4; 330.5; and 330.6. These last sections are more recent legislative enactments designed to clarify and supplement §330a.

76. Knowles v. O'Connor, 226 Cal. App.2d 31,33 71 Cal. Rptr. 879 (1968).

77. Williams v. Justice Court, 230 Cal. App.2d 87,97, 40 Cal. Rptr. 724,731 (1964).

78. In Re Allen, 59 Cal.2d 5, 27 Cal. Rptr. 168, 377 P.2d 280 (1962).

79. Id. at 6.

80. In Re Allen, 59 Cal.2d 5, 27 Cal. Rptr. 168, 377 P.2d 280 (1962).

81. Cal. Penal Code, pt. 3, title 1, ch. 3, §2604 (West, 1970).

82. Cal. Penal Code, pt. 1, title 9, ch. 9, §325 (West, 1970).

83. Cal. Penal Code, pt. 1, title 9, ch. 10, §§335a,330.3 (West, 1970).

84. Lee On v. Long, 37 Cal.2d 499, 234 P.2d 9 (1951), cert. denied, 347 U.S. 947, 96 L.E. 704, 72 Sup. Ct. 553 (1952).

85. Id. at 500.

86. Lee On v. Long, 37 Cal.2d 499, 234 P.2d 9 (1951).

87. Id. at 508 (Carter, J. dissenting).

88. See, for example, Reynolds v. Roll, 122 Cal. App.2d 826, 266 P.2d 222 (1954).

89. People v. Cherry, 39 Cal. App.2d 149, 102 P.2d 546 (1940).

90. Id. at 152-153.

91. Id. at 153.

92. People v. Newman, 24 Cal.2d 168, 148 P.2d 4, 152 A.L.R. 365 (1944).

93. Kyne v. Kyne, 16 Cal.2d 436,438, 106 P.2d 620 (1940).

94. Tokar v. Redman, 138 Cal.App.2d 350, 291 P.2d 987 (1956).

95. Id. at 354.

96. Cal. Civil Code, pt. 2, title 4, §1667 (West, 1973).

97. Id.

98. Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc., 194 Cal. App.2d 177, 14 Cal. Rptr. 805 (1961).

99. Id. at 182. Query: can this case be read as holding that all gambling obligations, not directly in violation of express law, are within the perimeters of California public policy and, hence, enforceable? In other words, is a draw poker debt incurred in Gardena now enforceable in the courts of California? The courts have not yet adopted this view but the instant case could certainly be cited in favor of that argument.

100. See, 12 Cal. Jur.3d, Conflict of Laws §8, and the cases therein cited.

101. People v. Lim, 18 Cal.2d 872,876, 118 P.2d 472 (1941), and the cases therein cited.

102. People v. Lim, 18 Cal.2d 872,876, 118 P.2d 472 (1941).

103. Id. at 881.

104. Id. at 882.

105. Cal. Const., Art. 4, §26.

PARAGRAPH INDEX: California

The Development of the Law of Gambling:

COLORADO

P.C.H.

R.F.D.

G.R.B.

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Summary

¶1 The development of the law of gambling in Colorado is a fascinating story. Its frontier period saw widespread gambling, particularly in casinos. Constitutional and legislative efforts were made to regulate or outlaw it, and these efforts received support in the courts, but general enforcement awaited economic and social development. Substantial reforms, including partial decriminalization, were enacted recently. Today, professional gambling is comprehensively outlawed, while private, social gambling is untouched. Authorized public gambling is limited to parimutuel racing, bingo and raffles.

I. The Frontier Experience

¶2 Colorado is a Spanish word; it means reddish, rosy or colorful, and it is the name that the early Spanish explorers gave to the land in the region which is today the State of Colorado. Early European authority in the eastern area of what is not Colorado, however, was exercised by the French. Other parts of the state were nominally Spanish. But when the English won the French-Indian war, France retired from the American colonial scene, and in 1763, all of the land that is now eastern Colorado was ceded to Spain as England's ally.

¶3 Events, though, turned around in 1800. Napoleon induced Spain to cede back the great Louisiana Territory to France. Three years later, France sold it to the United States. For a while, then, the state was nominally shared by Spanish and American interests, interests that were often at odds. In 1821, Mexico achieved its independence from Spain, and an era

of friendliness with the United States threw open the entire area to hunting and trapping, undertaken to meet the fashion dictates of the day for beaver hats.

¶4 A leader in the fur-gathering business was General William Ashley, who organized a fur-gathering band called the Rocky Mountain Fur Company. Probably his most enduring contribution to the culture of the West was his inauguration of the custom of the rendezvous. In July of each year at a predetermined site, all of the trappers and traders met to exchange skins and furs gathered in the winter and spring. For several days, while a whole year's business was transacted, celebration and merriment were in order.

> Horse races, gambling, drinking, dancing, storytelling, and swapping Indian wives were as much a part of the rendezvous as was the barter of beaver. Often the mountain men, who were an improvident, carefree lot, would lose the result of a whole year's grueling work in a few days of a riotous rendezvous.[1]

¶5 The trapping era came to a close by the end of the late 1830's with the depletion of the beavers and the invention of the silk top hat. While the end of the fur trade saw an end to the rendezvous, the custom itself died only slowly. For the new era saw something like its continuation or revival in the combination gambling casino, saloon and bordello which was to become so characteristic of the western mining camp and cow town.

¶6 In 1846, the Mexican War broke out. It lasted for two years, and its official end occurred in 1848, when the Treaty of Guadalupe-Hidalgo was signed. The United States then formally

gained its whole southwestern region. Two-thirds of the present state of Colorado changed hands at that time.

¶7 By 1850, however, the old days were dying. There was no more talk of trapping beaver or shooting buffalo, an enterprise which flourished for a while after the decline of the beaver trade. Now the talk was all about '49ers looking for gold in California, new settlers and the possibility of a transcontinental railroad. In 1851, Horace Greeley, trenchant editor of the New York Tribune, published John Soule's article, "Go West, Young Man, Go West." Many followed this advice, but few settled in the Colorado area; it was little more than a place to pass through.

¶8 This situation changed dramatically in 1859 with the discovery of gold in the Pikes Peak region. Gold seekers flocked into the state, and only a step behind them came the gamblers who saw to it that the average miner did not remain too long burdened with his wealth.[2]

A. Early Legislation

¶9 In 1859, the settlers of Pikes Peak country, without the approval of Congress, set about the establishment of the Territory of Jefferson, in what was then formally the Kansas Territories. As an early revenue measure, its General Assembly enacted Colorado's first law on gambling, which provided, inter alia, for a licensing scheme and levy of two dollars and fifty cents per month on each table or appliance used for gambling. Failure to obtain a license or pay the prescribed tax could have resulted in a fine of from twenty to two hundred dollars.[3] In 1860, the

City of Denver seceded from the Territory of Jefferson and set up "The People's Government of the City of Denver." Following the general tone of the law set down by its predecessor, the People's Government legalized the operation of three-card monte.[4] One member of the Legislative Council, however, resigned in protest, and honest residents raised such an uproar that the ordinance was soon repealed.[5]

¶10 During the spring of 1859, upwards of 50,000 people reached the Colorado area. Spring blizzards in the Rockies made it difficult to verify the reports of gold finds. In June, three reputable journalists arrived from the East: Horace Greeley of the New York Tribune, A. D. Richardson of the Boston Journal, and Henry Villard of the Cincinnati Commercial. Their joint report was instrumental in the development of the Colorado mining boom.

¶11 The year 1861 brought two significant events -- formal government and the outbreak of the Civil War. It was obvious to all that the self-styled Territory of Jefferson had to go.

> [I]t had been unable to function with any real backing, and problems of law and order had been settled by local miners' courts, people's courts, and claim clubs, informal organizations set up by miners, townspeople, and farmers to record claims and boundaries and to perform rudimentary functions of policing.[6]

¶12 Pikes Peak country applied for formal territorial status in 1861, and the organic act of the Territory of Colorado was approved by Congress on February 28, 1861.[7] Eight months later the Legislative Assembly passed Colorado's first anti-gambling statute aimed exclusively at games and wagers in which an element of cheating, trickery or fraud was present.[8] The act made it

a crime for any person to "deal or play at or make any bet or wager for money or other thing of value at any of the games commonly known or called Three-Card Monte, the Strap Game, Thimble, The Patent Safe Game, or any other game of similar character,"[9] or to induce, or attempt to induce any person to make a bet or wager at any such game.[10] It also prohibited the keeper of any house knowingly to permit a person within such house

> to deal or play at any of the games mentioned in the preceding section, or any game of similar character, or any game or games of cards, roulette, dice, or any other games where fraud or cheating is practiced or where loaded dice or marked or waxed cards are used...[11]

¶13 During the Civil War, Colorado experienced troubled times. Many of the settlers returned to their homes in the East to enlist in the war. Mining fell as the ore produced required complex refractory processing. Finally, the Plains Indians chose that time to revolt. Colorado did not see good times again until the end of the war and the coming of the railroads.

¶14 Indeed, when the railroad finally arrived in the 1870's, it brought the engines of social change. The coming of the railroad created new towns and fostered the establishment of agriculture settlements called "colony towns." The most famous of these, "Greeley," was named for Horace Greeley, who organized and planned it. Ultimately, these settlements changed the frontier cow town and mining camp character of the state.

B. Gambling Houses

¶15 In the 1860's, however, Colorado continued to struggle

with the supposed basic demands of civilization. In 1864, a law entitled "An Act to Suppress Gambling and Gambling Houses,"[12] was passed by the territorial legislature. The statute, however, did not create a blanket prohibition against gambling. Instead, it prohibited the keeping of gaming houses[13] and gaming for money at such places.[14] The statute also provided for the seizure and destruction of all gambling implements and devices found in any such gambling house.[15] All notes, securities and contracts in consideration of gambling profits or losses were also made "absolutely void and of no effect."[16]

C. The Act of 1866

¶16 An Act,[17] adopted in 1866, considerably broadened the 1864 law. The new Act consisted of twelve sections. As to the offenses created, the conduct prohibited and the penalties enumerated, it remained Colorado's basic gambling law for a period of 105 years.[18] In 1971, the legislature passed comprehensive legislation, based, in large part, on the Model Gambling Act, proposed by the National Conference on Uniform State Laws in 1952.

¶17 The 1866 Act contained a wide-reaching prohibition of gambling. As Justice White's majority opinion in Everhart v. The People[19] observed:

> When we bear in mind the purpose of the act as expressed in its title, the enumerated things proscribed, it is clear that the law intends to, and does, prohibit every place commonly used or occupied for gambling of any character whatsoever, and the keeping and exhibiting of any instrumentality to be used for gambling and winning, betting or gaining money or other property upon the

result of any game, and likewise the practice of gambling.[20]

The Act specifically banned keeping a place used for gambling,[21] being a common gambler,[22] gaming for money or betting upon the result of a game,[23] and inducing a minor to gamble.[24]

D. Judicial Interpretation

¶18 In the years following, the focus of legal attention shifted to the Colorado Supreme Court, which provided applications, definitions and interpretations of these basic statutory provisions. In Boughner v. Meyer,[25] Chief Justice Thatcher stated that the word "gaming" extended to "'physical contests, whether of man or beast, when practiced for the purpose of deciding wagers, or for the purpose of diversion, as well as to games of hazard or skill, by means of instruments or devices.'"[26] In Everhart v. The People, "gaming" has also been defined to include "the risking of money or anything of value between two or more persons, on a contest of either chance, skill or hazard, where one must be the loser and the other the gainer."[27]

¶19 Gambling "device or apparatus" used in connection with the prohibition against "common gamblers"[28] was broadly construed. Essential to a finding of "gambling paraphernalia" was the presence of a "game played and something of value bet."[29] A device or apparatus was anything that served as "a means to a certain end."[30] The end was a bet or wager. A related issue concerned the definition of a per se "gambling device," something which must, of necessity, be a gambling device. The court declared that an object is a gambling device per se where gambling

is "the only use to which it could reasonably be devoted."[31]

E. Seizure of Gambling Devices

¶20 The 1866 Act went beyond prohibitions and penalties. One provision dealt with seizure of gambling related property and made it the duty of law enforcement officials to "seize and take" any gambling device and convey it to a county judge; if the judge ascertained that the device was used or kept for purposes of gambling, it was his duty to destroy it.[32]

¶21 The scope of the seizure and destruction provision was explained in Stanley-Thompson Co. v. The People:[33]

> The keeping and use of these devices being prohibited by statute, they are a common nuisance...
>
> We regard the words "used or kept," not as describing the status of the devices as to use or otherwise at the time of seizure, but as descriptive of a class composed of things which are commonly used or kept for gambling.
>
> If an instrument falls within that class, it is subject to the statute.[34]

The court went on to hold that the statute did not authorize an unconstitutional taking of property without due process of law.[35]

F. Debts

¶22 The 1866 Act, echoing and extending earlier law, also declared that all contracts made in furtherance of gaming transactions were "utterly void and of no effect."[36] Although the statute directly concerned only contracts in consideration of gaming transactions, the supreme court soon extended its

nullification to all wagering contracts. In Eldred v. Malloy,[37] the court declared a wager on the speed of railroad construction void. In his opinion for the court, Justice Belford declared:

> ...I can see no difference in principle in the bet that the faro dealer will turn up a jack the next turn and the bet that the railroad will be built to Table Mountain in so many days.[38]

¶23 The Colorado courts have continued to follow a strict "hands-off" policy regarding gambling contracts. While they refuse to enforce the claim of the winner, they also refuse to aid the loser who seeks to recover his squandered gold.[39] An exception to this rule, however, was recognized in the situation where one of the parties called off the wager and sought to recover his stake before the transaction had been executed. Here the courts held that they would assist the bettor in the recovery of his property.[40] In Maher v. Van Horn[41] the general rule and the exception were eloquently stated:

> Between the parties to a wagering contract, the law, from reasons of sound public policy, will not interfere in aid of either to secure an enforcement of the contract, or a recovery from the stakeholder after the execution of the contract of the deposit made with him by either party to the wager. Fisher v. Hildreth, 117 Mass. 558.
>
> They are in pari delicto, and cannot ask the court to recognize an agreement which the law declares to be immoral and unlawful. The right of a party to maintain an action of this character, and to recover from a stakeholder, before payment, the amount deposited by him, is based upon the fact that the stakeholder is not a party to the illegal contract, and is not in pari delicto; that he is the mere bailee, or agent, of the parties to hold money, the title to which has not been changed. The plaintiff in such a case cannot seek nor have a recovery upon a promise,

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> which within the policy of the law, is a void promise, but upon the ground that he elected to repudiate and rescind an unlawful contract, revoked the authority of the bailee and recalled his money before it was paid over under the terms of the illegal agreement.[42]

¶24 An additional exception was recognized when the money lost was not owned by the person who gambled it away, but by a third person, who entrusted it to him for safekeeping. The third party is allowed to recover his money from the winner-defendant because he is not in pari delicto with him.[43]

¶25 The Colorado Supreme Court also had to face the situation that arises when a gambling contract, valid under the laws of the jurisdiction in which it was made, is litigated in a different forum. In Sullivan v. German National Bank,[44] the court enforced such a contract holding that

> ...the general rule as expressed by the more modern authorities is that the law of the foreign state should control and should be enforced unless it is clearly against good morals, or repugnant to the positive institutions of the state in which enforcement is sought. We are by no means prepared to say that this case, turning as it does upon the endorsement of negotiable paper whereby the rights of innocent purchasers were affected, is such a case.[45]

G, Early Enforcement of the Gambling Laws

¶26 As noted above, the 1866 Gaming Act served as the principal expression of Colorado gambling law until quite recently. Early implementation of the gambling act, however, was minimal. It was, "...in short, decades...before it was enforced."[46] In Denver, for example, one Ed Chase, a professional gambler and City Alderman, operated a respectable gambling house with virtual immunity for a period of 35 years; he consequently

became one of the richest men in Colorado. Denver, in fact, "retained many of its frontier characteristics for more than half a century, and except for a few brief periods of suppression, was a widespread gambling town until the early 1920's."[48]

¶27 Denver's wide open character was not unique. Denver grew in the 1850's on gold and cattle. Leadville grew in the 1870's and '80's on silver. Life in Leadville was aptly described by Carlyle Channing Davis, who later published the Leadville Chronicle. He arrived in Leadville in January of 1879:

> The scene unfolded was unlike anything I ever before have seen...Every other door seemed to open upon a saloon, dance hall or gambling den... Chief among the places I visited was Pap Wynon's combination concert and dance hall, with every game of chance known to the fraternity in full blast -- faro, beano, roulette, stud poker, pinochle and what not... Here, perhaps, were a score of girls and women of the underworld... They were attired in more or less picturesque and fantastic garb, some wearing little surplus apparel of any description, and were dancing with bearded bull-whackers, uncouth delvers in the mines...[49]

¶28 Leadville's rush days of the 1870's and '80's were rivaled by rush days of the 1890's at a settlement called Creede. By February, 1892, thirty saloons were in full blast, night and day, and the number grew to seventy-five through the year. A number of infamous men were attached to the settlement. Bat Masterson ran a saloon with gambling rooms. Bob Ford, that dirty little coward who killed Mr. Howard, ran a combination casino, saloon and bordello. In fact, it was in the Creede area that Ford finally met his Maker at the hands of one Edward O'Kelley.

¶29 The lack of law enforcement in Colorado must be put into perspective; it was not limited to the gambling field. Colorado's

mining laws, for example, were widely ignored. In the early 1900's

> ...sheriffs were bought off, safety regulations were ignored, and the number of fatalities was appalling. It was claimed that five hundred miners lost their lives in Los Animos County alone because of inadequate safety precautions.[50]

¶30 Colorado was the scene of the infamous Ludlow Massacre, where National Guard troops, in the interest of Colorado Fuel and Iron Company, killed six men, two women, and eleven children in a ruthless attack on a striker's tent camp at a mine site. President Wilson finally had to call in the United States Army to disarm everyone -- strikers and guards alike.

¶31 Even when the anti-gambling laws were enforced, however, the penalties were slight. The penalty for simple gambling was a de minimis fine.[51] The maximum sanction for operating a gambling house, for example, was a fine of $500 and 30 days in jail,[52] while the most severe penalty, a fine of only $500 and no more than one year in jail, was provided for conviction of being a common gambler.[53]

H. Lotteries

¶32 Nevertheless, Colorado's declared anti-gambling policy was expanded, even if it was not widely enforced. Following the trend of numerous other states, the 1876 Constitution included an express prohibition against any form of lotteries.[54] This constitutional provision, the first expression of the law of the state on lotteries, not only spelled out the prohibition, but also imposed on the legislature an affirmative duty to pass laws to ensure that it was effectively enforced.[55] The

constitution provided that:

> The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State.[56]

¶33 Pursuant to the constitutional mandate, the legislature, in 1881, enacted "An Act Concerning Lotteries; Prohibiting the Advertisement and Sale of Lottery Tickets, and Prescribing Penalties Therefor."[57] The Act, which remained substantially in effect until 1971,[58] made it unlawful for any person, association of persons, or corporation to engage in or promote any lottery or gift enterprise of any nature.[59] The sale of lottery tickets within the state was prohibited[60] as was the advertisement of a lottery scheme.[61] The purchaser of a lottery ticket was declared "in all respects...a competant witness to prove any offense under this act."[62] Violations of the act's provisions were, however, misdemeanors, and its penalties, too, were relatively light.[63]

¶34 The 1881 statute left "lottery" undefined. The probable reason was explained by Justice Alter in Bills v. People:

> We recognize that it is difficult to state a definition of the terms "lottery" and "gift enterprise." ...It is no sooner undertaken than some ingenious person evolves some scheme not quite within the letter of the definition given, for the purpose of evading the lottery statutes.[64]

Nevertheless, three elements were generally deemed necessary to constitute a lottery: (1) a right had to be purchased; (2) the right had to be a contingency to receive something greater than that which was purchased; and (3) the contingency had to depend on lot or chance.[65] In general terms, a lottery came to be

defined "as a scheme in which a valuable consideration is paid directly or indirectly for a chance to draw a prize."[66]

¶35 Early Colorado decisions dealt largely with possible exceptions to the general scope of the statute. In 1893, the supreme court held that a gratuitous distribution of business cards which entitled the holders to a chance on a piano whether individuals purchased goods from the donor or not, was not a prohibited lottery or gift enterprise, since no valuable consideration had to be paid, directly or indirectly, for the share in the scheme.[67] The court observed:

> The gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and no consideration is derived directly or indirectly from the party receiving the chance, does not constitute the offense. In such case the party receiving the chance is not induced to hazard money with the hope of obtaining a larger value, or to part with his money at all; and the spirit of gambling is in no way cultivated or stimulated, which is the essential evil of lotteries, and which our statute is enacted to prevent.[68]

The Colorado Supreme Court thus adopted the "flexible participation lotteries"[69] theory, following the early lead of Alabama.[70]

¶36 Giving trading stamps with the purchase of goods was also held not to constitute a gift enterprise.[71] The court found that "the element of chance [was] wholly lacking"[72] in the trading stamp scheme; thus, it was not a lottery or gift enterprise.

II. The Modern Era

¶37 Colorado has undergone significant changes in its population and economy during the twentieth century. Mining,

while still important, gave way to agriculture, and since the 1940's manufacturing and tourism have evolved as two major sources of state income. Colorado's population has quadrupled since 1900 and is now well over two million. Almost eighty percent of the inhabitants live in urban areas.

A. Cruelty to Animals

¶38 The gambling and lottery law of Colorado remained substantially intact until 1971, when the Model Gambling Act repealed and superseded previous laws. Nevertheless, additions and modifications were made. In 1905, "An Act For The Protection of Dumb Animals"[73] won approval. It made it unlawful for any person

> ...to cause, procure, encourage, aid or abet any dumb animal to fight or engage in combat, or to cause, procure, encourage, aid or abet, or to be set down or released, any captive dumb animal to be shot at or for dogs to pursue or to be in any manner injured, frightened or harrassed for sport or amusement or upon a wager or for the purpose or result of making bets upon the progress or result of such fight...[74]

Willful spectators and those merely betting on the animal fight were punishable, under the express terms of the act, as principles.[75]

B. Local Regulation

¶39 Penalties under state law continued to be minimal. Dissatisfaction with state law, therefore, inevitably led local units of government to take up the slack. Colorado law has long given the localities police power to enact ordinances to suppress gaming and gambling houses.[76] One such local endeavor was a

Denver ordinance, passed in 1950, which prohibited gambling and made violators subject to penalties ten times as great as those under existing state law.[77] In Woolverton v. Denver[78] the validity of the ordinance was upheld by the Colorado Supreme Court. The majority observed:

> That the state of Colorado has depended upon the cities to adopt ordinances prohibiting and punishing gambling is disclosed not only by §139-32-1(52) [legislative grant of power] but also by the fact that the state statute on this subject prescribes highly inadequate remedies. The minimum fine is $50 and the maximum $150. No jail sentences are prescribed. No doubt the professional gambler would submit without complaint to the payment of such a fine on a regular basis, regarding it as nothing more than a modest fee, and would not be deterred by penalties. This manifests clearly that the state has asserted no interest to pre-empt or monopolize this field.[79]

At the same time, local units of government were not free to enact laws which would conflict with the state statute; they could not attempt to legalize gambling in their city.[80]

C. Horseracing

¶40 The 1866 Act comprehensively outlawed "gaming." It was not until 1913, however, in Everhart v. People,[81] that a horseracing prosecution was brought to the supreme court. The defendant defended on a theory of desuetude. The court rejected the defense and reasoned:

> ...[I]t is said that prior to this prosecution, neither lawyer nor layman considered acts like those of the plaintiff in error [making book on horseraces] as being within the prohibition of the statutes. However that may be, it does not subtract from the legal meaning of the words used in the legislation

> which corresponds precisely with the historical and popular meaning. It is a matter of common knowledge that many laws are enacted which lie dormant, in whole or in part, for years. We know of no court, however, that has held that things clearly within the letter and spirit of the act are excluded from the operation thereof because of such desuetude. The judgement of conviction is affirmed.[82]

¶41 Bookmaking on horseracing remained prohibited until 1948, when the Colorado General Assembly passed an act authorizing, regulating, and providing for the licensing of horse and dog racing with parimutuel wagering.[83] The act was submitted to the people at the general election held November 2, 1948, and passed by a margin of 238,391 to 183,292. A three-member racing commission was established and its duties spelled out:

> The commission shall make reasonable rules and regulations for the control, supervision, identification and direction of applicants and licensees, including regulations providing for the supervising, disciplining, suspending, fining and barring from racing of all persons required to be licensed by this article, and for the holding, conducting, and operating of all races, race meets, and race tracks conducted pursuant to this article. It shall announce the place, time, number of races per day and duration of race meets,...[84]

¶42 The statute also regulates the take of the licensee[85] and the state[86] and declares that it "shall be unlawful to conduct pool selling or bookmaking, or to circulate handbooks, or to bet or wager on any race meet licensed under the provisions of this article other than by parimutuel method."[87]

D. Constitutional Questions

¶43 The constitutionality of Colorado's racing law was challenged in Ginsburg v. Centennial Turf Club,[88] where the

argument was made that parimutuel wagering violated the state's constitutional prohibition of lotteries and gift enterprises. In upholding the constitutionality of the enactment, the Supreme Court observed:

> In Colorado a "lottery" or "gift enterprise" cannot be authorized by law. However, there is no prohibition in our constitution which prevents the legislature, or the people, from authorizing certain forms of gambling. It unquestionably is true that all lotteries and gift enterprises are forms of gambling, but it does not follow that all gambling is a "lottery" or "gift enterprise," as those terms are defined in law.[89]

¶44 In another case, Smaldone v. People,[90] the defendant challenged Colorado law, contending that the state, by allowing certain forms of gambling but prohibiting others, denied him equal protection of the law. The supreme court rejected the argument, finding that there was no denial of equal protection as long as the statute under which charges of gambling were made applied equally to all persons and made no classifications or distinctions, even though other types of gambling were allowed.[91]

E. Bingo and Raffles

¶45 In 1958, the voters of Colorado approved, by a margin of 244,929 to 235,482, a constitutional amendment, which provided the legislature with a narrowly defined power to authorize and license bingo and raffles.[92] The result was the Bingo and Raffles Law,[93] which is a code of the rules and regulations governing the licensed activities.

F. The Act of 1971

¶46 As noted above, in 1971, the Colorado General Assembly

passed a comprehensive gambling act, patterned substantially after the Model Gambling Act, proposed by the National Conference on Uniform State Laws in 1952.[94] The declared purpose of the new act is five-fold. As embodied in the preamble, these purposes are:

> (1) Recognizing the close relationship between professional gambling and other organized crime, to restrain all persons from seeking profit from such gambling activities in the state;
>
> (2) To restrain all persons from patronizing such activities when conducted for the profit of any person;
>
> (3) To safeguard the public against the evils induced by common gamblers and common gambling houses;
>
> (4) To preserve the freedom of the press; and
>
> (5) To avoid restricting participation by individuals in sport and social pastimes which are not for profit, do not affect the public, and do not breach the peace.[95]

¶47 The 1971 Act repealed all previous legislation and substituted comprehensive new provisions. Generally, the main thrust of the reform is to direct the state's continued policy of prohibition at the most serious offenders. To accomplish this goal the act makes an effort to distinguish three different types of gamblers: (1) the professional gambler;[96] (2) the common gambler;[97] and (3) the social or casual gambler.[98]

¶48 Professional gambling is punishable as a misdemeanor[99] (if it is a repeated offense, it is a felony);[100] while gambling is a petty offense,[101] and private social gambling is legal.[102]

¶49 The 1971 Act makes it unlawful to own, manufacture, sell, transport, or possess a gambling device, knowing that it is to be used in professional gambling,[103] or to maintain,

own, lease or aid in the maintenance of gambling premises.[104] In general, the penalties dealing with gambling devices are greater than those dealing with gambling premises and there is also a provision in each section to deal with the repeat offender.[105] In addition, a provision was added to §40-10-105 making it unlawful to possess a gambling record.[106] This provision was in reaction to a 1962 case, which held that a record of bets made at an earlier time, together with papers containing the names of persons who had made bets and the amount of money wagered as well as a copy of the daily racing form did not constitute "devices or apparati to win or gain money or other property" within former coverage of Colorado's gambling act.[107]

¶50 To facilitate enforcement, §40-10-104 of the 1971 Act makes all gambling devices, records and proceeds subject to seizure by any police officer and confiscation and destruction by a court of competent jurisdiction.[108] Gambling proceeds[109] are also to be forfeited to the state and turned over to the state's general fund.[110] Finally, the new Act makes it unlawful for any person knowingly to transmit or receive gambling information by telephone, telegraph, radio, semaphore or other means, or to knowingly install or maintain such equipment.[111]

¶51 The 1971 Act, of course, specifically exempts from its terms Colorado's laws relating to parimutuel wagering and the Bingo and Raffles Law;[112] bona fide contests of skill, speed, strength, or endurance in which awards are made only to the entrants or the owners of the entries;[113] bona fide business transactions which are valid under the law of contracts;[114] and private social gambling.[115]

Conclusion

¶52 The development of gambling law in Colorado has been shaped, in large part, by the state's frontier experience. No effort was made to regulate gambling during the early years of Colorado's settlement. Trappers and traders felt little need for regulation of any type. When gold brought fortune seekers to the area, the one expressed need was to protect people from being cheated or defrauded. As the population increased and new towns grew up, the combination casino-saloon-bordello was considered antithetical to a civilized way of life. Legislation was passed to outlaw gambling. Municipalities were empowered to further regulate against such vices. The constitution was written to prohibit lotteries. Yet in spite of the legislative bans and judicial willingness to construe those bans broadly, the frontier character of the state was such that there was little actual enforcement of the anti-gambling laws until well into the twentieth century. Serious enforcement did not come until Colorado's economic emphasis changed from mining to agriculture.

¶53 In recent decades, Colorado has become more urbanized, and the economy has shifted toward manufacturing and tourism. At the same time, the state has not divested itself of its frontier heritage, which underlays the varied enforcement of past gambling laws. The seeming result of these factors has been a liberalization of the anti-gambling policies. By popular vote, state regulated horseracing and on-track betting are now permitted. A similar vote amended the Colorado constitution, and the legislative immediately legalized bingo and raffles conducted under state regulation. The most recent legislation brings the full force

of the law to bear on professional gambling but leaves private social gambling untouched.

(Shepardized through May 1975)

Footnotes

1. C. Bancroft, Colorful Colorado: Its Dramatic History 22 (1959).

2. F. Parkhill, The Law Goes West, p. 83 (1956).

3. Act of November 25, 1859, ch. 26, §§2-10, [1860] Provisional Laws of Jefferson Territory 234-235 (repealed 1861).

4. F. Parkhill, supra note 2, at 83.

5. H. Asbury, Sucker's Progress 55-56 (1969).

6. C. Bancroft, supra note 1, at 46.

7. Act of February 28, 1861, ch. 59, §§1-17, 12 Stat. 172.

8. Act of November 5, 1861, §§112-113 [1861] Colo. Laws 313-314 (appears to have been superseded by the more comprehensive Act of January 20, 1866, infra note 17).

9. Id. at §112.

10. Id.

11. Id. at §113.

12. Act of March 2, 1864, §§1-8, [1864] Colo. Laws 96-98 (repealed 1866). The City of Denver was excepted from the effects of this act by Act of February 9, 1815, §§1-2, [1865] Colo. Laws 72 (repealed 1866). Denver was permitted to license gambling houses.

13. Act of March 2, 1864, §1, [1864] Colo. Laws 96 (repealed 1866).

14. Id. at §2.

15. Id. at §6.

16. Id. at §3.

17. Act of January 20, 1866, §§1-12, [1866] Colo. Laws 56-60 (repealed 1971).

18. See Colo. Rev. Stat. Ann., §§40-10-1 to 40-10-13 (1963) (repealed 1971).

19. Everhart v. The People, 54 Colo. 272, 130 P. 1076 (1913).

20. Id. at 280, 130 P. at 1079-80.

21. Act of January 20, 1866, §1 [1866] Colo. Laws 56-57 (repealed 1971).

22. Id. at §2. This section provided:

> That if any person shall keep or exhibit any gaming table, establishment, device or appartus to win or gain money or other property, or shall aid, assist, or permit others to do the same, or if any person shall engage in gambling for a livelihood, or shall be without any fixed residence and in the habit and practice of gambling, he shall be deemed and taken to be a common gambler,...

23. Id. at §3.

24. Id. at §4.

25. Boughner v. Meyer, 5 Colo. 71, 40 Am. Rep. 139 (1879).

26. Id. at 74, 40 Am. Rep. at 140, citing Tatman v. Strader, 23 Ill. 493; Shopshire v. Glascock et al., 4 Mo. 536; Boynton v. Curle, 4 Mo. 599.

27. Everhart v. The People, supra note 19, at 277, 130 P. at 1079.

28. See note 22 supra.

29. Everhart v. The People, supra note 19, at 281, 130 P. at 1080; see also Wolfe v. People, 90 Colo. 102, 6 P.2d 927 (1931).

30. Everhart v. The People, supra note 19, at 282, 130 P. at 1080.

31. Kite v. The People, 32 Colo. 5, 10. 74 P. 886, 888 (1903) (roulette wheel is gaming device per se). For subsequent cases generally following these principles, see MacArthur v. Wyscover, 120 Colo. 525, 211 P.2d 556 (1949); Gambling Devices v. People, 110 Colo. 82, 130 P.2d 920 (1942) (pinball machine is a gambling device).

32. Act of January 20, 1866, §9, [1866] Colo. Laws 58-59 (repealed 1971).

33. Stanley-Thompson Co. v. People, 63 Colo. 456, 168 P. 750 (1917).

34. Id. at 459, 168 P. 751.

35. Id. See also Newman v. The People, 23 Colo. 300, 47 P. 278 (1896).

36. Act of January 20, 1866, §5, [1866] Colo. Laws 57 (repealed 1971). This applies even to innocent purchasers for value and without notice of the illegal consideration; see Act of January 20, 1866, §6, [1866] Colo. Laws 57 (repealed 1971); also, Boughner v. Meyer, 5 Colo. 71, 40 Am. Rep. 139 (1879). In Western National Bank v. State Bank, 18 Colo. App. 128, 130, 70 P. 439, 440 (1902), Wilson, P.J., indicates that

§§5 and 6 of the above act were "taken literally from the statute of Illinois" (See Ill. Rev. Stat., ch. 38, §§131, 136 [1874]); also, note similarity to 9 Anne, ch. 14).

37. Eldred v. Malloy, 2 Colo. 320, 25 Am. Rep. 752 (1874).

38. Id. at 322, 25 Am. Rep. at 753.

39. Mahrer v. Van Horn, 15 Colo. App. 14, 60 P. 949 (1900).

40. Id.; see also Corson v. Neatheny, 9 Colo. 212, 11 P. 82 (1886).

41. Mahrer v. Van Horn, supra note 39.

42. Id. at 18, 60 P. at 950-51.

43. Pierson et al. v. Fuhrmann, 1 Colo. App. 187, 27 P. 1015 (1891); also, Lacey v. Bentley, 39 Colo. 449, 89 P. 789 (1907).

44. Sullivan v. German National Bank, 18 Colo. App. 99, 70 P. 162 (1902).

45. Id. at 105-106, 70 P. at 164. The court left open the question of whether it would enforce the contract if the plaintiff were not an innocent purchaser.

46. F. Parkhill, supra note 2, at 83.

47. Id.

48. Herbert Asbury, Sucker's Progress 329 (1969).

49. C. Bancroft, supra note 1, at 80-81.

50. Id. at 105.

51. Act of January 20, 1866, §3, [1866] Colo. Laws 56 (repealed 1971); the fine was from fifty to one hundred and fifty dollars.

52. Id. at §1.

53. Id. at §2.

54. Colo. Const., art. 18, §2 (1876) (amended 1959).

55. Id.

56. Id.

57. Act of February 12, 1881, §§1-9, [1881] Colo. Laws 178-181 (repealed 1971).

58. See Colo. Rev. Stat. Ann., §§40-16-1 to 40-16-8 (1963) (repealed and superseded 1971).

59. Act of February 12, 1881, §§1-2, [1881] Colo. Laws 178-179 (repealed 1971).

60. Id. at §5.

61. Id. at §§3-4.

62. Id. at §8.

63. Id. at §§1-5.

64. Bills v. People, 113 Colo. 326, 334-335, 157 P.2d 139, 140-41, (1945).

65. See, e.g., Denver v. Frueauff, 39 Colo. 20, 36, 88 P. 389, 394 (1906).

66. Bills v. People, supra note 64, at 333, 157 P.2d at 142.

67. Cross v. The People, 18 Colo. 321, 32 P. 821 (1893).

68. Id. at 324-325, 32 P. at 822.

69. See generally F. Williams, Flexible Participation Lotteries (1938).

70. Id. at 122. The leading case on the subject is Yellowstone Kit v. State, 88 Ala. 196, 7 So. 338, 16 Am. St. R. 38 (1890); thus, flexible participation schemes are sometimes referred to as "Yellowstone Kit Lotteries."

71. Denver v. Frueauff, 39 Colo. 20, 88 P. 389 (1906). The Colorado legislature subsequently banned the issue of all trading stamps. Act of April 20, 1917, ch. 147, §1, [1947] Colo. Laws 529 (repealed and superseded 1971).

72. Id. at 37, 88 P. at 394.

73. Act of April 11, 1905, [1905] Colo. Laws 187; substantially in effect to date, Colo. Rev. Stat. Ann., §18-9-204.

74. Id. at §1.

75. Id. at §2.

76. See Colo. Rev. Stat. Ann., §31-12-101(52) (1974).

77. Denver Colorado Revised Municipal Code, §821.1 (1950).

78. Woolverton v. Denver, 146 Colo. 247, 361 P.2d 982 (1961). Note: other points of this case were overruled in 174 Colo. 468; but this ruling does not affect the point made here.

79. Woolverton v. Denver, supra note 78, at 261, 361 P.2d at 989.

80. See Vick v. People, 166 Colo. 565, 445 P.2d 220 (1968), cert. denied, 394 U.S. 945, 89 S. Ct. 1273, 22 L.E.2d 477 (1969).

81. Everhart v. People, 54 Colo. 272, 130 P. 1076 (1913).

82. Id. at 284, 130 P. at 1081.

83. Act of 1947, ch. 256, [1947] Colo. Laws 709-717; passed by the voters of Colorado on November 2, 1948; recorded again after passage at Act of 1949, ch. 207, [1949] Colo. Laws 581-588; amended by Act of January 24, 1949, ch. 208, [1949] Colo. Laws 589-590, and by Act of April 4, 1949, ch. 209 [1949] Colo. Laws 591. As revised, it is in effect to date at Colo. Rev. Stat. Ann., §§12-60-101 to 12-60-113 and 12-60-115 (1974). Subsequent textual references will only be made to sections of Colorado Revised Statutes Annotated (1974).

84. Colo. Rev. Stat. Ann., 12-60-105 (1974).

85. Id. at 12-60-111 (1974).

86. Id. at 12-60-110.

87. Id. at 12-60-111.

88. Ginsberg v. Centennial Turf Club, 126 Colo. 471, 251 P.2d 926 (1952).

89. Id. at 477, 251 P.2d at 929.

90. Smaldone v. People, 173 Colo. 385, 479 P.2d 973 (1971).

91 Id.

92. Colo. Const. art. 18 §2 (as amended Nov. 4, 1958).

93. Act of April 29, 1959, ch. 228, [1959] Colo. Laws 716-731; Colo. Rev. Stat. Ann., §§12-9-101 to 12-9-112 (1974). A proposed constitutional amendment was placed on the ballot in 1972 to authorize the creation of a privately run statewide lottery. The measure was defeated by the voters of Colorado primarily because it was thought that the state would receive too little revenue to make it worth its while.

94. Act of June 2, 1971, ch. 121, §§40-10-101 to 40-10-108, [1971] Colo. Laws 477-479; Colo. Rev. Stat. Ann., §§18-10-101 to 18-10-108 (1974). Subsequent textual references will only be made to sections of Colorado Revised Statutes Annotated (1974).

95. Colo. Rev. Stat. Ann., §18-10-101 (1974).

96. "Professional gambling" is defined at Colo. Rev. Stat. Ann. §18-10-102 (8) (1974) as:

> (a) Aiding or inducing another to engage in gambling, with the intent to derive a profit therefrom; or
> (b) Participating in gambling and having, other than by virtue of skill or luck, a lesser chance of losing or a greater chance of winning than one or more of the other participants.

97. Colo. Rev. Stat. Ann., §18-10-102 (2) (d) defines "social gambling" as:

> Any game, wager, or transaction which is incidental to a bona fide social relationship, is participated in by natural persons only, and in which no person is participating, directly or indirectly, in professional gambling.

99. Colo. Rev. Stat. Ann., §18-10-103 (2) (1974). The maximum sentence for conviction of a class 1 misdemeanor is 2 years and $5,000. See Colo. Rev. Stat. Ann., §18-1-106 (1974).

100. Colo. Rev. Stat. Ann., §18-10-103(2) (1974). A class 5 felony carries a maximum penalty of 5 years imprisonment and a $15,000 fine. See Colo. Rev. Stat. Ann., §18-1-105 (1974).

101. Colo. Rev. Stat., §18-10-103 (1974). A class 1 petty offense carries a maximum sentence of six months imprisonment and a $500 fine. See Colo. Rev. Stat. Ann., §18-1-107 (1974).

102. Colo. Rev. Stat., §18-10-102(2)(d) (1974).

103. Id. at §18-10-105.

104. Id. at §18-10-107. This same section declares gambling premises to be common nuisances "which shall be subject to abatement as provided by law."

105. Id. at §§18-10-105(2) and 18-10-107(2).

106. "Gambling Record" is defined at Colo. Rev. Stat. Ann., §18-10-102(7) (1974) as:

> ...any record, receipt, ticket, certificate, token, slip, or notation given, made, used, or intended to be used in connection with professional gambling.

107. People v. Wells, 150 Colo. 540, 374 P.2d 706 (1962).

108. Colo. Rev. Stat. Ann., §18-10-104 (1974).

109. "Gambling proceeds" are "all money or other things of value at stake or displayed in or in connection with professional gambling." Colo. Rev. Stat. Ann., §18-10-102(6) (1974).

110. Colo. Rev. Stat. Ann., §18-10-104 (1974).

111. Id. at §18-10-106(1).

112. Id. at §18-10-108.

113. Id. at §18-10-102(2)(a).

114. Id. at §18-10-102(2)(b).

115. Id. at §18-10-102(2)(d).

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Table of Contents

Summary

¶1 For most of its history, Connecticut followed a strict anti-gambling policy. In the colonial period, gambling as well as simple gaming were banned. The early statehood period saw the basic gambling prohibitions extended into new areas. Only in the last three decades has this policy changed. First, local municipalities were empowered to license certain bingo games, raffles, and merchandising schemes. Recently, a state lottery and a state parimutuel and off-track betting system were authorized. Social gambling has also been decriminalized. At the same time, the state has reaffirmed its determination to fight organized illegal gambling.

I. The Colonial Experience

¶2 In 1614, the Connecticut River valley was first explored by a Dutch agent, Adrian Block. The first settlement in the area was made in 1633 by Englishmen under the banner of the Massachusetts Bay Company. By 1636, the United Colony of Connecticut, including the Hartford and Winsor settlements, had been established. The Pequot Indian War inhibited further expansion for a time, but by 1638, the hostilities had ended, and Connecticut Colony adopted its Fundamental Orders, the first document produced in the colonies that resembled a written constitution.

¶3 The New Haven colonial union, which maintained its separation from the other colonial groups in Connecticut until

they united in 1665, produced the first known local act against gambling. In 1639, these laws prohibited the playing of shuffleboard or any other unlawful gaming at innhouses. The innkeeper was fined twenty shillings for this offense, and each player received a five shilling fine. In addition, if any of these games were played for money, twice the amount wagered was to be forfeited, with one half this sum going to the person who brought the charges.[1]

A. Gaming Laws

¶4 These early English colonies considered themselves Englishmen, subject to English law. The reference to "other unlawful games" in the 1639 New Haven law thus refers to games prohibited under British statute. By this time, England had outlawed gambling on games of bowling, tennis and cards or dice in a common house.[2] The New Haven law, of course, prohibits the mere playing of these games in certain public places, as well as the playing of such games for money. The reason for this difference may lie in the Puritan background of most early Connecticut colonists. To the staunch Puritan, salvation could only be obtained through hard work, and anything which might distract men away from their labors was to be condemned. The bond between church and state in Connecticut colonies of this period is evidenced by a provision of the 1650 Code of the United Connecticut Colonies which provided that every adult be taxed to support the church, that public officials had a duty to enforce such a levy, and that no new church was to be

formed without the consent of the general court. This code also denounces gambling, penalizing shuffleboard in houses of common entertainment and the playing of any unlawful game. These activities were banned because they prompted "...much precious time to be spent unfruitfully..."[3]

¶5 The New Haven law of 1639 relied upon a bounty system to ensure enforcement. Here, a bounty was awarded to the informer against those who violated the gaming laws. Since there were no public prosecutors at this time, this system not only motivated people to inform, but actually compensated them for the time and trouble expended in judicially assuring their statutory reward, that is, in prosecuting the case.

¶6 In 1662, a royal charter was granted to the United Connecticut colonies. In 1665, the New Haven groups joined this union, but only after much protest. This charter assured the new Connecticut colony a separate status and freedom from the Massachusetts and New York colonies. The 1662 royal charter also made no reservations of royal legislative and judicial control over the colony, and as time went on, the colony assumed an increasingly independent attitude toward England and its laws. During the period just prior to the Revolution, a dual system of law developed. In areas more loyal to the King, English law was enforced while colonial law supplemented this body of rules. Where independence agitation was strongest, colonial law was enforced, and only certain favored English statutes were recognized. In the area of gambling legislation, there was not much divergence to the effect of these two policies, because the gambling laws were based on positions

largely common ground to both England and the colonies. If anything, colonial law treated gambling more stringently.

¶7 In 1673, the Connecticut general assembly and the royal governor enacted a code for the colony. Among the statutes then enacted was a law which prohibited the playing of shuffleboard, cards, dice, and tables anywhere, fining each player and the owner of the house where the game was discovered twenty shillings. Again, a bounty system was employed to aid enforcement, with one-third of the fine going to the parties that discovered the offense, and the rest becoming the property of the government.[4]

B. Lotteries

¶8 In 1699, England declared all lotteries to be enjoinable public nuisances and revoked all royal licenses for the operation of such schemes.[5] In 1728, the colony also passed a law which aimed at suppressing lotteries. Under this provision, anyone who ran a lottery, sold a lottery ticket, or advertised such activity forfeited the goods or currency offered as a prize. One half of this sum could be claimed by the person who prosecuted the action, and the remainder went to the state.[6]

C. Debts

¶9 In 1710, the English Parliament passed the Statute of Anne, which included comprehensive civil remedies against gambling.[7] All gambling obligations, as well as all negotiable instruments granted in consideration of gambling debts, were

declared void. Actions for the recovery of losses by the loser and by any other person after the passage of a certain length of time were also established.

¶10 Several years later, Connecticut enacted "...an act for suppressing rogues and vagabonds...," which included in its scope those who idled their time or practiced unlawful games. Such persons drew an interesting punishment. They were stripped to the waist and flogged fifteen times and then ordered to leave town.[8] In 1744, Britain criminally sanctioned both gambling houses and the game of roulette.

¶11 In 1769, the colony enacted its last set of gambling laws in the pre-Revolutionary period. These laws affirmed the earlier anti-gambling acts. They also went on to prohibit the selling of cards and the keeping of all implements used in gambling, including billiard tables, coytes, keils and loggets. The fine for keeping such implements was the most stringent yet enacted in the colony, and the playing of outlawed games also received increased penalties. In addition, although lotteries were still generally declared illegal, lotteries sanctioned by the general court of Connecticut were permitted. Outlawed schemes saw their prizes forfeited with one-half of that amount granted to the discoverer of the offense and one-half retained by the colony.[9]

¶12 On the eve of revolution, Connecticut was a relatively mature colony; its population came close to two hundred thousand persons. During the War, British raids into Connecticut were frequent, in an effort to destroy provisions assembled in the colony for the Continental Army. Nevertheless, Connecticut, unlike some of the other colonies, was not devastated. Governor

Trumball Sr. was the only colonial governor to serve throughout the War. Its people and its laws survived largely intact. Indeed, at the close of hostilities, the colony's population reached two hundred and eight thousand.

III. The Formative Era: 1776 to 1895

A. Early Statutory Prohibitions

¶13 Connecticut's first book of statutes restated many colonial gambling provisions. The playing of most games and all wagering on such activity remained illegal. Playing cards, dice tables and billiards drew specific statutory rebuke.[10] Selling cards and possession of gambling implements by a tavern or inn proprietor continued to be prohibited.[11] One act prevented money, land or goods from being disposed of by wagers, shooting or any similar adventures. Lotteries for the sale of goods, land or money, without the permission of the general court, continued to be banned.[12] Finally, the 1789 statutes included a new provision, which prohibited wagering on horse racing or racing for stakes. The penalties for this offense were the forfeiture of the horses and a fine, levied against each bettor, of either forty shillings or the amount wagered, whichever was the higher sum.[13] Sanctions against gambling still excluded imprisonment, although jail sentences were, at that time, handed down for offenses which were thought to be more serious.

¶14 Despite the general anti-gambling policy of the state, authorized lotteries existed in this period. It is unclear

whether the state received a percentage of the profits from lotteries it approved, or whether it charged a license fee for the privilege of conducting these schemes. It appears that there was some financial gain for the state, however, for in 1796, the state enacted a law the obvious purpose of which was to protect an important source of public revenue. This statute imposed a seven dollar fine upon those who bought lottery tickets issued by other states. It also provided that there could be no appeal from a lower court lottery conviction.[14] In 1808, the scope of such anti-lottery legislation was again expanded. The seven dollar fine now included those who sold unauthorized lottery tickets, with each ticket sold constituting a separate offense.[15]

¶15 In 1797, the state legislature enacted civil provisions on gambling similar to English legislation in force in the colonial period.[16] Wagers and all securities, contracts or loans based upon gambling transactions were declared void and unenforceable. Anyone who lost more than one dollar through gambling could sue within three months of the loss to recover. Further, a plaintiff need only have alleged that he or she lost a certain amount of money to another through gambling to state a proper cause of action. If the winner involved did not then defend the action, a default judgment was automatically entered against him. Those who chose to protect their rights in court, however, did not open themselves to criminal prosecution by their defense, because no evidence brought out by defendants in these civil actions could be used against them criminally. After the three month period expired, any third party could sue the gambling winner and recover three times the amount

won, part of the money going to the plaintiff and the remainder going to the county in which the suit was brought.[17] The third party suit provision was deleted from this statute in 1918, and a few minor language changes were made from time to time. In essence, however, this 1797 statute remains in force in Connecticut today.

¶16 In 1805, the general anti-gambling sanctions were stiffened. A statute enacted in this year held that anyone who won or lost any money in any game could be fined twice the amount of the wager.[18] It also provided that any two justices of the peace, on information from an officer or selectman, could issue warrants for the search, seizure and destruction of any billiard or E.O. table found in the place for which the warrant was issued. Ownership in any faro bank, or any other bank established or used for gambling purposes, was prohibited. In addition, those arrested for gambling were required to post a one hundred dollar bond to ensure their good behavior until the end of the next court session.[19]

¶17 In 1808, the horse racing prohibition was expanded to include a thirty dollar fine for any stakeholder, advertiser or jockey connected with a race horse where wagering took place. The bounty provision of the earlier law, however, were dropped. The earlier anti-lottery laws were reaffirmed, and the provision which forbade an appeal from certain convictions was extended to cover all lottery offenses.[20]

¶18 The War of 1812 was unpopular in New England. Connecticut and other New England states, fearing direct attacks upon their territories, refused to send troops out of the state to fight

Great Britain. Indeed, the British blockaded New London and bombarded Stonington in 1813. The Hartford Convention, which included delegates from Connecticut, Massachusetts and Rhode Island, attempted to focus criticism on the war by proposing a revision of the Federal Constitution. Such a revision would offset the political dominance of Southern states, limit the number of new states being admitted, and restrict the power of of the national government is to declare war or impose embargoes. The convention bred a national reaction that was both adverse and widespread.

¶19 In Connecticut, the period following the War of 1812 was a time of great social and political change. The years 1817. and 1818 brought important reforms. One such reform further severed chruch and state. All Christian denominations were granted full civil and political rights. Likewise, the state Congregational churches were disestablished, and a new constitution prohibited state aid to any denomination. Another reform fostered the textile industry, for tax relief benefited both employers and employees involved in that trade. By 1820, the population of Connecticut had risen to a total of over 275,000 persons.

¶20 The force of the state's anti-gambling policy, however, did not weaken. In 1821, the lottery law was again amended to levy a fifty dollar fine on anyone who opened a shop or office for the selling of unauthorized tickets, or who printed or published such tickets.[21] This new statute overlapped with the 1808 provision, still on the books in 1821, which imposed a seven dollar fine on each lottery ticket sale.[22] Such

complications, however, are commonly found in early Connecticut gambling law. The legislature seems to have resorted to this kind of double criminalization when past law was not being fully enforced, when earlier penalties were thought to be too lenient, or when court interpretations narrowed the effect of existing law. Most of the overlapping can be attributed to a desire of the legislature to underline its objection to particular offenses which were covered earlier in a more general statute.

¶21 The court provided its first interpretation of gambling legislation in 1823. In Terry v. Olcott,[23] it limited the scope of the statute which voided gambling contracts and securities. The court held that a bona fide receiver of a negotiable instrument, who obtained the note for value and without notice that it was the product of an illegal lottery, could sue to collect the value of the instrument.

¶22 The next major set of gambling laws, enacted in 1834 and 1835, increased the severity of earlier sanctions. The penalties for running unauthorized lotteries rose to fines of $20 to $100 and jail terms of from sixty days to one year. Likewise, persons who sold unauthorized lottery tickets were subject to a $50 to $300 fine and the same prison term.[24] For the first time, horse racing purses and wagers were declared forfeited to the state upon seizure, as were the horses involved in such contests. Such seizures could be carried out up to six months after the race.[25]

¶23 The laws of 1834 also increased search and seizure power in gambling generally. Upon the complaint of a grand juror or

two persons of good character, a judge could issue a warrant which authorized the entry into any house thought to be a gaming house, the arrest of any players found therein, and the seizure of any equipment used for gaming discovered in the raid.[26]

¶24 Finally, 1835 legislation discontinued the practice of offering a bounty or reward of one-hold the fine collected to those who informed or prosecuted lottery and other gambling offenses, for such a stipulation was no longer included in the Public Statutes. Whether this change was due to the inefficacy of such an enforcement system, the advent of full-time prosecutors, a desire by the state to keep all money involved, or a combination of these factors remains uncertain.

¶25 In 1842, the court handed down the landmark decision of Wheeler v. Spencer,[27] which held that wagering contracts were void by the force of both the common law and statutory provisions. The plaintiff, a lower, was held not to be particeps criminis, nor in pari delicto with the defendant, a winner; he could, therefore, the court held, sue to recover money lost in gambling. Further, any wagerer could instruct a stakeholder not to pay the winner. If the stakeholder paid the winner, after receiving such instructions, the loser could secure a recovery of the losses involved plus interest and court costs.

¶26 The court in Wheeler relied heavily on two major cases. It followed the logic of Lord Mansfield in the 1793 English decision, Cotton v. Thurland,[28] where he rejected the argument that since wagers were illegal and immoral, no action would lie to recover gambling losses.

¶27 Chief Judge Kent's New York decision in Visher v. Yates[29] was also cited variably in Wheeler. Visher forcefully argued that a loser should be able to recovery from a stakeholder. For, if recovery was not allowed, either the stakeholder would keep the money or the winner, because he had an equitable claim to it, would receive the full benefit of the wager, and the court, through inaction, would actually be enforcing an illegal contract. Wheeler also stood for the proposition that betting on elections was illegal contract. Wheeler also stood for the proposition that betting on elections was illegal, although the legislature did not specifically prohibit such activity until 1854.

¶28 Connecticut's ethnic homogeneity was broken in the mid-19th century. While the colonial period witnessed settlement by primarily Englishmen, a heavy Irish immigration occurred in the late 1840's, spurred by near-famine conditions in Ireland. In addition, growing industrialization in Connecticut produced a large demand for factory labor and thus provided additional stimulus for immigration.

¶29 Despite these changes, anti-lottery sentiment grew. By 1834, the Connecticut legislature had ceased licensing, and thereby authorizing, lotteries. In 1849, all lotteries were prohibited.[30] On the other hand, the legislature in the same year permitted the possession of bowling and billiard equipment, when such activity was licensed by the municipality involved. It also declared that it was no longer illegal merely to sell a pack of cards.[31]

¶30 In 1854, the law concerning the bonding of those arrested

for gambling violations was modified. Now two bonds were required. One still was meant to insure good behavior, i.e., no arrests or convictions for gambling offenses before or during trial. The other went to guarantee appearance for trial.[32]

¶31 The next statutory revision came in 1866. Keeping dogs, cocks or other animals for fighting or sporting events was prohibited; the statute also prohibited mere attendance at such events.[33] A heavy penalty was provided for knowingly leasing a house for gambling purposes.[34] Police officers received the right to use violence to gain entry to premises for which they had search warrants for gambling equipment, if they were not let in after announcing their office and their purpose.[35] Both of these statutes remain in force today. In addition, witnesses called by the state in gambling cases were no longer excused from testifying on the grounds that the evidence they gave might incriminate them. Such persons were now required to testify, but were given transactional immunity in return.[36] This law remained in force until 1969, when it was replaced by a general immunity statute. Finally, the 1866 statute included a law which penalized keeping open any gaming operation on Sundays.[37]

B. Liberalization of Gambling Sanctions

¶32 In 1875 statutory revision brought with it an important liberalization of Connecticut's gambling laws. Some new prohibitions were enacted. For example, all leases for premises used for gambling purposes were declared void.[38] Selling boxes

to minors was forbidden where consideration for the sale included the chance of obtaining any article of value which might be contained in the box.[39] Gambling on public conveyances drew stringent penalties.[40] In addition, gambling contests using animals gained a further criminal sanction, as fines were allocated for keeping or using any premises for such activity.[41]

¶33 Many existing statutes, however, were repealed. These included laws extending criminal liability to heads of families who were allowed gambling in their houses and to tavern or inn keepers who kept gambling implements on their premises. Laws requiring municipal licenses for billiard tables, bowling and skittel equipment were also invalidated. Finally, the fine for playing at any game for anything of value was reduced to a mere five dollars.[42]

¶34 By 1875, then social gaming and the mere ownership of games which could be used both for social recreation and gambling were legal. Social gambling incurred only a small fine. Only certain kinds of gambling and the operation of gambling establishments and schemes drew stringent criminal sanctions.

¶35 This change in Connecticut's gaming and gambling laws came about at the same time that the state's economy began to rely more on industrial rather than agricultural concerns. By 1875, a majority of the state's work force lived in urban instead of rural areas. In addition, the expanded labor needs of an increasingly industrialized society had begun to draw heavy Catholic emigration from eastern and southern Europe.

c. Important Court Interpretations

¶36 Court activity in the gambling field increased during this period. In 1870, Terry v. Olcott was overturned. Terry had allowed a bona fide purchaser of a negotiable instrument, who had no knowledge that the note was the product of illegal gambling, to recover the value of the note through court action. In Conklin v. Roberts,[43] however, the court held that adherence to the Terry doctrine contravened the state's public policy against gambling. The court reasoned that a winner of a wager need only transfer the note to an innocent third party to enjoy the fruits of his or her illegal victory.

¶37 Another lottery case, Funk v. Gallivans,[44] offered an important ruling. The plaintiff and defendant in this case were both lottery ticket holders. The defendant claimed a prize with what appeared to be the winning ticket. The plaintiff, however, sued the defendant for that prize, arguing that he was the rightful victor. The court did not allow recovery, although it upheld the right of a loser to recover from a winner or a stakeholder. The court held that persons who brought suits like that involved in Funk would be considered in pari delicto with the other gamblers in the suit. The law would not enforce such an illegal contract but would leave the parties where it found them. Connecticut statutory recovery provisions could thus be only to negate the effects of a gambling transaction, not to police such agreements for fairness. The court went on to state that a contract to do anything prohibited by statute was void.

¶38 In 1880, the first of a series of cases dealing with

gambling in the stock and commodities markets was decided. Hatch v. Douglass[45] held that buying and selling stock on a margin did not constitute gambling as long as the brokers actually purchased the stock. A contract was not to be held void or illegal just because it was speculative. An agreement, however, which provided solely for the payment of the difference between the price of stock at one point in time and the price of the same security at some pre-determined future date was seen to be a void and illegal gambling contract.

¶39 In 1905, the court held that a bona fide contract for an option, was not gambling. If, however, such an agreement was merely a cover for paying a price differential between the value of a security at two points in time, it would be declared illegal as gambling.[46] Two years later, the legislature acted in this area, prohibiting the operation of bucket shops and the sale of futures.[47]

D. Return to Strict Prohibitions

¶40 The 1888 revision of the gambling laws significantly limited the light treatment afforded to social gambling a decade earlier. Social gaming remained legal at the state level, but playing at any game for valuables once again drew fairly stringent penalties.[48] The keeping or frequenting of any place for the purpose of gambling was also severely handled.[49] Municipalities were empowered to pass their own ordinances to suppress all types of gaming and gambling.[50] The granting of liquor licenses to any person keeping a gambling house of any description was forbidden,[51] and gaming within two miles of

any religious assembly without the permission of those involved was prohibited.[52] Those who drew lottery tickets, i.e., selected the winning numbers, were now penalized as well as those who operated or bought tickets for such events.[53]

¶41 The only lessening of gambling prohibitions in the 1888 statutes involved a modification of the horse racing laws. Those who made up a purse in a horse race, or those who advertised or rode in such a contest where wagers were placed, were no longer subject to criminal liability. In addition, the horses involved in the race were no longer subject to forfeiture by the state. Only those who wagered on the outcome of such events or acted as stakeholders for the bettors could still be prosecuted.[54]

¶42 In 1891, the court upheld the municipal provisions of the 1888 law which permitted local suppression of gambling.[55] The court also held, however, that a person could not be punished by both the state and the town for the same activity.[56]

¶43 In 1893, the legislature made it a crime to transmit money out of the state for gambling purposes, even if the gambling was legal in the state to which the funds were sent. A 1895 case brought under this statute, however, somewhat restricted its scope. Here, the court held that in order to obtain such a conviction, the prosecution must show that the defendant had knowledge of thepurpose for which the money was to be used.[57]

III. The Modern Era: 1895 to date

¶44 At the turn of the century, Connecticut began to establish itself as a leader in the area of industrial reform. Employment of children under thirteen years of age was prohibited. The factory inspection act, one of the pioneer steps toward industrial safety, was adopted. And in 1895, state law affirmed the right of employees to join labor unions and created a state board of mediation and arbitration. The blacklisting of those employees who joined unions was prohibited.

A. Early Developments

¶45 A 1902 statutory revision also added two important new anti-gambling provisions. Slot machines were outlawed as lotteries, and maintaining or frequenting places where policy or pool selling was conducted became illegal.[58] Doctor John Drzazga offers a partial explanation as to why the legislature acted to specifically outlaw these activities, which were arguably already prohibited by the general lottery statute. Drzazga explains that "...where general words of prohibition follow[ed] an enumeration of particular games or devices which [were] prohibited, such general words...[were] construed ejusdem generis with the games or devices which [were] specifically named."[59] Since Connecticut's anti-lottery laws specifically referred to "lotteries", the legislature may have felt that these new games would not be covered by the existent prohibitions. For slot machines and policy schemes varied slightly from a standard lottery in that the winning numbers of these contests

were not drawn, but were instead furnished by the total numbers of external activities or sports scores.

¶46 In this same period, Connecticut courts departed from the doctrine espoused by most other state courts by declining to declare gambling houses to be public nuisances.[60] In the same case, however, the court upheld the statute that made suppliers of gambling equipment or facilities, who knew that their efforts would further illegal pool selling activities, guilty of assisting in the maintenance of the operation.

¶47 By 1911, the progressive movement made additional significant political advances in Connecticut. Several reform statutes were enacted, including those which established a state civil service, a fifty-five hour maximum work week, workmen's compensation, bank examinations and a department of labor and factory inspection.

¶48 In 1918, sports betting had become a major problem in the state. The legislature reacted by enacting prohibitions against buying or selling baseball or football pools and selling or leasing space or equipment for such pool selling. In addition, police officers were now empowered to arrest anyone who possessed gambling devices and to seize such equipment without a warrant. They were also specifically allowed to search anyone named in a warrant involving gambling devices or records.[61] In 1925, wagering on boxing or wrestling events was specifically forbidden.[62]

¶49 After years of largely uninterrupted anti-gambling enactments, the first legislative decriminalization in the gambling area came in 1930.[63] Here, a statute provided that

games of chance in certain West Haven amusement parks, with charges of ten cents or less and prizes of five dollars or less per game, were no longer to be considered gambling.

¶50 In 1930, the legislature also specifically overruled the 1870 Conklin case[64] by excluding bona fide note holders from the law voiding all securities and contracts based upon gambling.[65] This statute remains in force today.

B. Gambling Devices

¶51 In the 1930's, federal courts in Connecticut wrestled with the definition of the term "gambling machine or device" in Connecticut law. Mint-vending machines which released candy and humorous aphorisms upon the deposit of a coin were held by the Second Circuit to be gambling devices. The machines involved also contained revolving cylinders which sometimes delivered tokens for further operation of the amusement feature. The moral overtones of the decision were unmistakable in the court's reasoning:

> The value of these witty saying or phophecies whether small or great is of no consequence. The value is not necessarily measured in currency. As the number of readings which a player receives is dependent upon the number of tokens received, the element of chance is always present. Combining the element of chance with the inducement of receiving something for nothing results in gambling.66

Thus, the usual components of prize, chance and consideration were altered somewhat by this ruling. Even a minimal prize would be enough to result in a seized machine being declared a gambling device. The mint-vending machines in this case could be easily altered to dispense nickels instead of tokens, or money could be awarded on the basis of such tokens. The

judge may have been reacting to the hidden reality of the situation, then, in his effort to ban the machine's operation.

¶52 Only three years later, a federal district court partially altered the earlier decision by holding that such machines could be seized only when they were actually converted into gambling devices which distributed coins as prizes. Again, however, the factual context of the case is important. While the dicta in the decision states that a machine cannot be confiscated as a gambling device simply because it can be converted to promote gambling, the court relied heavily on the fact that the machine in question was a non-convertible type.[67]

C. Further Judicial Activity

(1) Futures

¶53 In 1932, the State Supreme Court handed down a crucial decision which interpreted the futures prohibition. In Brown v. Canty,[68] the court held that the state would have to prove that both parties to a commodities or stock purchase contract intended the agreement to be a gambling contract if a conviction for dealing in futures was to be secured.

(2) Pinball machines

¶54 In the late 1930's, state courts also considered whether pinball machines were to be classified as illegal gambling devices. State v. Northrop[69] held that pinball machines were not slot machines under Connecticut law. The court went on to state, however, that pinball games which offered prizes were illegal gambling devices because such games were primarily

games of chance rather than skill. Later decisions partially reversed the Northrop ruling by declaring pinball machines used for gambling purposes to be covered by the slot machine prohibition,[70] and by holding that merely giving away free plays on such machines for certain scores did not constitute gambling.[71]

(3) Promotions

¶55 The state's anti-lottery laws came into play in a new context in 1938 in the case of State v. Doraw.[72] Free promotional activities, or "bank-nights," were banned as lotteries. On "bank-nights," customers and non-customers could sign up to participate in a free drawing to be held at the end of a movie. Winning numbers were announced both inside and outside the theatre. The winner had three minutes to collect a twenty-five dollar prize, and non-customers were granted admission to the theatre to claim their winnings. The court held that even this "free" lottery was prohibited by the state anti-lottery law. The strong moral feelings of the justices deciding the case were clearly evidenced in the decision:

> Nothing can be said from the standpoint of public morals in defense of this plan. It is true that under it no persons risk any money of their own aside from the fact that no doubt by it many persons are induced to attend the theater when otherwise they would not. The evil of gambling and like practices is not by any means confined to the impoverishment and squandering of the money which directly results from making a wager. In Iris Amusement Corp. v. Kelly, 366 Ill. 256, 8 N.E. 2d 648, the court said (at 267): "In this scheme there is present every element of the evils attendant upon mass gambling. A small stake concealed within the price of admission gives its

chance for a large prize, which may become large enough to arouse intense cupidity; there is the excitement of drawing a lucky number with the attendant exultation for one fortunate individual; there is depression and disappointment for a thousand losers, many of whom must think enviously of what they could do with so much money had they won it, and there is the constant temptation to continue to play in the hope of winning. We have thus created cupidity, envy, jealousy and temptation--the very things sought to be avoided by that enlightened public policy of most of the world which has outlawed lotteries."

The evil which arises out of such practices is that it fosters in men and women a desire to gain profit, not by their own efforts, not as a reward for skill or accomplishment, but solely by the lucky turn of chance, that it encourages in them the gambling instinct and that it makes it appeal to the baser elements in their nature. The defendant suggests as one reason for the unusual popularity of Bank Night "accumulative award," but the very fact that because of it large sums are at times awarded intensifies such evils as inherent in the plan. It is designed solely to serve the selfish ends of the owners of the theaters who operate it.

(4) Civil recover actions

¶56 In 1939, it was held that a defendant in a recovery action could not offset the sum of the plaintiff's losses by the sum of that party's winnings, which the defendant had not yet collected. The court reasoned that to allow such an offset would defeat the purpose of the statute, i.e., to discourage gambling. In addition, the court argued that by recognizing the validity of the offset, the court would actually be giving a legal effect to an illegal contract.[73]

(5) Evidentiary issues

¶57 In 1941, the court held that to secure a conviction under the statute which prohibited keeping a place for gambling purposes,[74] the prosecution had to prove more than a single

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instance of gaming. The premises had to be shown to be frequently and customarily used for gaming.[75]

¶58 A year later, however, the court eased the burden somewhat on law enforcement officials. The case involved a prosecution under the statute which forbade registering bets on horse races.[76] The court held that the presence of police while a bet was being registered was unnecessary to support a conviction. Instead, circumstantial evidence, such as racing sheets, betting slips, and money, was enough to permit sending the case to the jury. In addition, a conspiracy conviction could be sustained under the same statute, even though no formal agreement was proven, if the mutual criminal purpose of the indicted parties was shown.[77] Another case following this line of reasoning held that the Wharton rule did not apply to the charge of conspiracy to violate state gambling laws, and that circumstantial evidence could uphold such a charge. In addition, conspiracy to operate illegal gambling enterprises and the actual operation were held to constite separate offenses.[78]

¶59 Bookmaking convictions were again made more probable by a 1949 decision. Here, the evidence included telephone calls of numerous persons who placed calls with an answeror using the defendant's telephone, plus other circumstantial evidence seized upon arrest, including several blank pads of paper. Such evidence was held to be enough to justify the condlusion that the defendant was engaged in illegal bookmaking.[79] The court's admission of the telephone calls as evidence that bets were placed is important, for to exclude such evidence as hearsay would fatally weaken many bookmaking cases.

(6) Confiscation of gambling funds

¶60 In 1963, the trend toward easing the burden on law enforcement officials in the gambling area was partially reversed. Money seized in gambling raids could be used as evidence at trial. After trial, however, the funds had to be returned, unless they were seized upon a warrant, in which case the state could bring a civil action to condemn the money. In effect, the statute allowing warrantless seizure of money used in gambling was held not to authorize confiscation as well.[80] Often this meant that convicted gamblers would gain a fine of twenty-five dollars and then would be free to collect thousands of dollars of "evidence" from the police.

¶61 This rule was reversed, however, two years later. Over five thousand dollars was seized by police from a numbers runner who was on his way to pay a winner. The court held that neither the winner nor the runner could recover the money, because allowing such recovery would constitute the enforcement of an illegal gambling contract. Only those who lost in a gambling scheme could use the courts to recover their losses.[81]

(7) Other notable decisions

¶62 In 1947, the court held that a gambling debt, legally enforceable in the state where it was made, could not be enforced in Connecticut. The court argued that such enforcement would contravene the long-held public policy against gambling in the state.[82] In another 1947 case, the court upheld the power of the State Liquor Control Commission to order the removal

of any gambling equipment from the premises it licensed and to revoke the liquor license for non-compliance.[83]

D. New Statutory Prohibitions

¶63 The 1949 statutory revision contained new laws which forbade the offering or accepting of a bribe which involved a sports player. Bribes to change the winner of a contest, or simply to lower the margin of victory, were also covered.[84] Promoting, attending or participating in any endurance contest lasting more than four hours was prohibited.[85] Finally, judges were empowered to issue warrants specifically for the seizure of billiard tables used in gambling.[86]

E. Statutory Decriminalization

¶64 The Great Depression hit Connecticut hard. Natural disaster accompanied and exacerbated financial ruin, as numerous hurricanes and record floods demolished large parts of the state. A labor strike at Middleton's large Remington Rand plant ran from 1936 to 1940. Troubled Bridgeport citizens, who demanded a more sensitive governmental response to their problems, elected a Socialist mayor and board of aldermen in 1933.

¶65 The post-war economic boom helped ease economic troubles, but the fiscal position of the state government improved only slowly. With new recessions in the mid-1950's and the early 1970's, the state treasury became heavily burdened. Since both major political parties opposed a state income tax, legalized gambling seemed to offer an acceptable alternative.

¶66 The move toward partial decriminalization, however, first came as early as 1939. This statute authorized charitable and civic organizations to run bingo games for merchandise prizes. Voter approval, however, was necessary before such games could be operated in any municipality.[87]

¶67 In 1955, bazaars and raffles were also authorized under similar qualifications.[88] In addition, a 1958 statute overruled court decisions which had banned promotional lotteries. All retail operations, except grocery stores, were authorized to run such contests.[89] The grocery store exception was itself undermined, however, in a 1966 court decision, which held that a supermarket was not a retail grocery store within the meaning of the statute.[90]

¶68 1971 and 1972 saw dramatic changes in the state's gambling laws. Limited decriminalization for social or business purposes developed into a major effort to obtain new sources of state revenue. A state lottery was authorized, and a state commission was established to operate a parimutuel betting system on horse and dog races and jai alai.

¶69 State financial problems provided the major impetus for this change. In 1938, the state had its first bonded indebtedness. A sales tax was introduced in 1947. By 1970, it had reached 7-1/2 percent, the highest level in the nation. Even with the sales tax, the state was approximately four hundred million dollars in debt in 1971, largely due to deficit spending and a state medical school construction scandal that cost the Connecticut treasury close to ninety million dollars The state's voters, however, continued to oppose a state

income tax. This forced Governor Meskill to advance a capital gains tax and a system of legalized gambling to keep the state's finances in the black.

¶70 Legislative reapportionment may also explain why Connecticut adopted gambling as a revenue source much later than some of its neightboring states. From 1818 to 1965, the lower house of the Connecticut legislature was filled on the basis of an apportionment system devised in 1818. Under this system, every town incorporated before 1818 sent two legislators to Hartford, and each municipality incorporated after that date sent one. As Connecticut changed from a rural agricultural to an urban industrial state, this system became more and more inequitable. The imbalance in the lower house was exacerbated by the fact that the upper house remained apportioned on the basis of 1903 population figures. The result of these problems saw a rural/conservative minority mostly of Anglo-Saxon origin controlling the state legislature in opposition to a population which was more liberal, urban and predominantly eastern European in origin.

¶71 In 1965, in response to a U.S. Supreme Court decision, the state reapportioned the legislature. More liberal elements then gained control of the state's political machinery, and they were more disposed to consider gambling as a revenue source. There is a bit of irony here, however. While a liberal Democratic legislature approved the establishment of a state gambling system, it was a conservative Republican governor who proposed it. Not one of the Democratic governors had proposed such legislation.

¶72 Connecticut law today authorizes the Commission on Special Revenue to set up a state lottery division and a state racing division for the supervision and licensing of horse racing, dog racing and jai alai. The commission also is empowered to set up parimutuel betting systems and off-track betting (O.T.B.) on races which take place within and outside of the state.[91] The commission has the power to set up regulations to govern such activities, and can levy fines of up to $5,000 or revoke licenses for violations.[92] To expedite its judicial functions, the commission may conduct investigations, subpoena witnesses, administer oaths, take testimony, and call upon other state agencies to assist in enforcing its regulations. No commissioner or commission employee is allowed to have any interest in any of the gambling operations. Finally, the commission is responsible for licensing all concessions at legal gambling activities, scheduling races, keeping public records of all its proceedings and filing a report to the governor annually.

¶73 The racing and frontons, and their parimutuel betting, are to be run by private individuals or corporations under license from the commission. Originally, the state and the private operator were to equally split a 17 percent handle plus breakage. Apparently, this was not enough to induce private concerns to involve themselves in such enterprises. Consequently, the law was changed in 1973.[93] The new law provides for a sliding-scale tax in which the state takes a larger percentage of the handle as more money is wagered. Private profit is thus increased.

¶74 Originally, the commission was to operate all O.T.B. facilities, but a new law[94] allows the commission to contract with private concerns to run O.T.B., with compensation for these private concerns to come from the state's 17 percent handle on O.T.B. parimutuel operation. Municipalities must approve the presence of O.T.B. facilities before the commission may establish them in that community.

¶75 The state lottery is the only state-run gambling enterprise in operation in Connecticut today. Lottery tickets may be sold anywhere the commission deems publicly convenient, but no private agent may be in the sole business of selling lottery tickets. The commission is empowered to determine the amount of compensation to be paid to ticket-sellers, the price of the tickets and the percentages of money collected which are to be paid out in prizes and retained by the state to cover expenses and accumulate as revenue.[95] From time to time, the commission turns over the profits from all lottery and parimutuel betting operations to the state treasurer for use in the general fund. The books and records of every licensee of the commission is to be audited annually by the tax commissioner. The law also declares that anyone who allows a minor to gamble through either the parimutuel or lottery system, or who alters or counterfeits lottery or parimutuel tickets, is guilty of a class A misdemeanor.[96] Further, Connecticut modified its anti-lottery laws in 1972, to allow the possession of five or less legally sanctioned out-of-state lottery tickets, and finally repealed altogether even this slight prohibition in 1973.[97]

F. New Criminal Sanctions

¶76 In 1973, the state also repealed many of its specific gambling prohibitions, substituting in their place a Model Anti-Gambling Act patterned after the A.B.A.'s 1952 Model Anti-Gambling Act. This act makes all organized, professional gambling a misdemeanor, while it excludes all state-approved and social wagering among friends from criminal sanction.[98]

¶77 This statute defines "gambling" as risking anything of value for gain, contingent in whole or part upon lot, chance, or the operation of a gambling device. "Professional gambling" is accepting or offering to accept, for profit, anything of value risked in gambling or any claim or interest. The statute provides that any person who solicits or engages in gambling, outside of a social relationship with persons who are not professional gamblers, is guilty of a class B misdemeanor.[99] In other words, the person who gambles with a professional gambler, or at a gambling machine, commits a criminal act and is punishable along with a person who runs the gambling. All gambling devices are declared to be common nuisances, and no property rights exist in any gambling equipment. The statute permits all money, prizes and equipment connected with gambling to be seized upon detection by any peace officer and to be forfeited to the state.[100] Anyone who knowingly leases equipment or space for gambling purposes, or knowingly transmits or receives gambling information, is guilty of a class A misdemeanor. All gambling premises are classified by this law as common nuisances subject to abatement by injunction, and under this statute any place adjudged to be a

gambling premises may lose all its state and municipal licenses and permits. Finally, the act exempts all state-run or licensed gambling from its provisions.

¶78 Despite the new act, several old gambling statutes remain in force. Gambling within 1,000 feet of any fairground,[101] giving animals as gambling prizes,[102] wagering on boxing or wrestling events,[103] and fortune telling,[104] are still prohibited. In addition, the law continues to require a person who is arrested for gambling to post two $100 bonds, one to assure his or her appearance for trial, and the other to assure good behavior prior to and during the trial.[105]

¶79 Enforcement of these sanctions is aided by two recently enacted provisions. In 1969, the legislature acted to permit a prosecuting attorney to get a judicial grant of transactional immunity for witnesses in gambling cases.[106] In 1971, a wiretapping and electronic surveillance law, similar to the Federal wiretap statute, was enacted.[107] It allows state attorneys to apply to a panel of state judges for court ordered wiretaps in order to investigate offenses involving gambling and other crimes.

G. Actual Enforcement of Criminal Gambling Laws

¶80 Connecticut's strengthening of its laws against illegal organized gambling, and the increased severity of sentences handed out for such violations in the last several years, have largely been due to the efforts of the Governor's Committee on Gambling. The committee's purpose is not "... to pass judgment on whether gambling in all its forms is undesirable...," but rather to focus on "...the largest

source of revenue for the criminal cartels...," illegal organized gambling..

¶81 The committee was formed by Governor John Dempsey, in 1965, in response to remarks made from the bench by C. J. Timbers of the United State District Court of Connecticut. Judge Timbers made his comments on February 8, 1965, after hearing forty-nine gambling cases. He noted that while the state police were doing a courageous job against organized gambling rings in the state, a lack of local police action and a preponderance of light sentences in this area were common. The committee sponsored symposiums and conferences, involving judges, prosecutors and law enforcement officials to stress the seriousness of gambling offenses and the need for stricter and more uniform sentencing. During the period from mid-1964 to early 1968, the percentage of convicted gambling offenders who were jailed increased from ten percent to thirty percent. In addition, the percentage of jail sentences over thirty days increased from 26 percent to 39 percent. In the same time period, the percentage of offenders receiving only fines dropped from 67 percent to 32 percent, and the proportion of fines over $100 rose from 25 percent to 67 percent.[108] The committee also recommended the passage of the immunity and wiretap statutes.

H. Civil Provisions

(1) Recovery

¶82 Connecticut statutory law still provides that one can bring a civil action to recover losses arising from payment of gambling debts,

if done within three months of the payment of such debts.[109] On its face, the law could be used to recovery losses that result from state run or licensed gambling operations or from social gambling, since the statutes permitting such activity do not specifically exempt it from this civil remedy. However, the general rule that resolves conflicts between two statutes in favor of the one most recently enacted seems to assure that a loser at a state run or licensed gambling operation could not sue to recover his or her money. Social gambling is not authorized by the state but has merely been decriminalized. An argument that the legislature did not intend to exclude this type of gambling from the reach of civil recovery actions may therefore still be made. No reported cases yet speak to this issue.

(2) Conflict of laws

¶83 The traditional rule in Connecticut that all wagering contracts are void and not enforceable in the court remains unchallenged. The rule that Connecticut courts must refuse to enforce gambling claims that were legally entered into out of state also remains the law. Nevertheless, these old rules may be based on policy considerations which are no longer valid, given the recent legislative policy changes in this area. For example, the court in Ciampittiello v. Compitello[110] followed the rule that enforcement of such claims would be disallowed when it was "distinctly pernicious" to such public policy, or when it "...would violate some fundamental principle of justice, some prevalent conception of good morals, some

deep-rooted tradition of commonweal." Enforcement was denied because it would "...contravene the ancient and deep-rooted public policy of this state..." against all forms of gambling. While the rule of this case was recently followed in Hilton of San Juan, Inc. v. Lateano,[111] the fact situation involved a debt arising from professional casino gambling, which remains illegal in Connecticut. It seems unlikely that a legal debt arising from lottery or parimutuel betting activities out of state would not be enforced today by the courts of a state which authorizes just such events.

V. Conclusion

¶84 Since its colonial days, Connecticut maintained a fairly strict anti-gambling policy. Only severe fiscal pressures forced it to turn to legalized gambling as a major source of revenue. The amount of funds gleaned through these activities, however, has not been as high as had been expected, and in 1975, still new tax measures were necessary to balance the state's budget. Continuing financial troubles probably will stabilize legalized gambling as a Connecticut institution. But public concern over illegal organized gambling will probably also maintain the state's strict policies in that area. An extension of decriminalization in the gambling area probably will not be forthcoming until the profitability of the parimutuel and O.T.B. systems can be established.

(Shepardized through June 1975;
Cases through May 1973;
Statutes through 1974 Supp.)

Footnotes

1. Blue Laws, True and False, Trumball, ed., (1876) 224.

2. 33 Henry VIII, ch. 9 (1541) and 2 and 3 Phillip and Mary, ch. 9 (1554)--Statutes at Large (Great Britain), vol. II, 307, 492.

3. Blue Laws of Connecticut, The Code of 1650, (S. Andrus ed. and pub.) (1823?) 48.

4. Connecticut Book of General Laws (1673) 26.

5. 10 William III, ch. 23, (1698)--Statutes at Large (Great Britain) Vol. IV, 15 (listed as 10 & 11 William III, ch. 17).

6. Connecticut Acts and Laws (1716-1749) 351.

7. 9 Anne ch. 14 (1710)--Statutes at Large (Great Britain) Vol. IV, 463.

8. See note 6, supra at 239.

9. Acts and Laws of His Majesty's English Colony of Connecticut in New England in America (1769) 81, 142.

10. Acts and Laws of Connecticut 88 and 348 (1786). A fine of twenty shillings for each offender, as well as for the head of every family who consented to the playing of such games in his house, was established.

11. Id. 89. The fine here was forty shillings, and again, one half of the fine went to the person giving information of the offense. Possession of billiard tables by anyone was also forbidden. Id. at 348.

12. Id. 135. The penalty for violating this law was forfeiture of the prizes of the lottery, with one half of the money so realized going to the citizen who prosecuted the offense.

13. Id. 97.

14. Acts and Laws of Connecticut, 284 (1796).

15. Public Statute Laws of Connecticut 476 (1808). Again, one half of the fines collected went to those who prosecuted the violations.

16. See note 7, supra.

17. Public Statute Laws of Connecticut Title 80, ch. 2 §§1-4 (1808).

18. Id. ch. 3, §1.

19. Id.

20. Id. Title 87, §1.

21. Public Statute Laws of Connecticut 110-111 (1821).

22. Id. Title 20, §§74, 75, 76.

23. Terry v. Olcott, 4 Conn. 442 (1823).

24. Public Statute Laws of Connecticut Title 20, §93 (1838) at 165. The fact that stiffer penalties accrued to those who sold unauthorized tickets bolsters our earlier conclusion that the state received revenue from authorized lotteries. The extra fines, then, represent a revenue protection device.

25. Id. §97, 166.

26. Id. Title 20, Act of 1834, §2, at 183.

27. Wheeler v. Spencer, 15 Conn. 28 (1842).

28. Cotton v. Thurland, 5 Durn. & E. 405, 101 E.R. 227 (1793).

29. Visher v. Yates, 11 Johns Rep. 23 (N.Y. 1814).

30. Statutes of Connecticut Title 6, ch. 8, §§95, 96 (1849) at 241.

31. Statutes of Connecticut Title 6, ch. 8, §§105, 106 (1849) at 245.

32. Statutes of Connecticut Title 22, §5 (1854) at 575.

33. General Statutes of Connecticut Title 12, §§162, 163 (1866) at 271. A $7 fine could be collected for attending such events.

34. Id. §135, at 267. A fine of $500 or six months imprisonment was provided for this violation.

35. Id. Title 56, §11 at 672.

36. Id. Title 12, §233 at 286.

37. Id. Title 52, §5 at 646. This is another instance where prohibitions overlapped, as running a gambling operation was already illegal regardless of the day of the week in which a place was open to the public.

38. General Statutes of Connecticut Title 19, ch. 17, §7 (1875) at 492.

39. Id. Title 20, ch. 9, §7 at 516. The fine for this offense was $100, and a possible jail term of six months could also be handed down under this provision.

40. Id. §11 at 517. A violator of this provision could be fined up to $200 and jailed for one to six months.

41. Id. §§12 and 20 at 517. This offense could draw a fine of $60 to $200.

42. Id. §12.

43. Conklin v. Roberts, 36 Conn. 461 (1870).

44. Funk v. Gallivans, 49 Conn. 124 (1881).

45. Hatch v. Douglass, 48 Conn. 116 (1880).

46. Wiggin v. Federal Stock and Grain Co., 77 Conn. 507, 59 A. 607 (1905).

47. General Statutes of Connecticut §6497 (1918).

48. General Statutes of Connecticut, §2559 (1877). A maximum fine of $100 could be levied, and a six month jail term could be handed down as well.

49. Id.

50. Id. §2573.

51. Id. §3074.

52. Id. §2074.

53. Id. §§2568-2572.

54. Id. §2552.

55. State v. Carpenter, 60 Conn. 97, 22 A. 497 (1891).

56. State v. Flint, 63 Conn. 248, 28 A. (1873).

57. State v. Falk, 66 Conn. 250, 33 A. 913 (1895).

58. General Statutes of Connecticut, Revision of 1902, §§1394, 1403 and 1359. The maximum penalty for violating the policy or pool law was a $100 fine and one year in jail.

59. Drzazga, J. Wheels of Fortune, copyright 1963, 190.

60. State v. Scott, 80 Conn. 317, 68 A. 258 (1907).

61. General Statutes of Connecticut, §§6324, 6435 (1930).

62. Id. §2216.

63. Id. §2303.
64. See note 43, supra.
65. General Statutes of Connecticut, §4738 (1930).
66. Green v. Hart, 41 F.2d 855, 856 (2nd Cir. 1930).
67. Mills Novelty Co. v. Farrell, 3 F. Supp. 555 (1933).
68. Brown v. Canty, 115 Conn. 226, 161 A. 91 (1932).
69. State v. Northrop, 3 Conn. Supp. 374 (1936).
70. Farine v. Kelly, 147 Conn. 444, 162 A.2d 517 (1960).
71. Crystal Amusement Corp. v. Northrop, 19 Conn. Supp. 498, 118 A.2d 467 (1955).
72. State v. Dorau, 124 Conn. 160, 163, 198 A. 573, 574 (1938).
73. Macchio v. Breuning, 125 Conn. 113, 3 A.2d 670 (1939).
74. General Statutes of Connecticut, §6320 (1930).
75. State v. Cieri, 128 Conn. 149, 20 A.2d 733 (1941).
76. General Statutes of Connecticut, §6280 (1930).
77. State v. Rich, 129 Conn. 537, 29 A.2d 771 (1942).
78. State v. Faillace, 134 Conn. 181, 56 A.2d 167 (1947).
79. State v. Tolisano, 136 Conn. 210, 70 A.2d 118 (1949).
80. State v. Rosarbo, 2 Conn. Cir. Ct. 399, 199 A.2d 575 (1963).
81. Cotto v. Martinez, 27 Conn. Supp. 232, 217 A.2d 416 (1965).
82. Ciampittiello v. Campitello, 134 Conn. 51, 54 A.2d 669 (1947).
83. Ciglar v. Patterson, 14 Conn. Supp. 491 (1947).
84. General Statutes of Connecticut §§8664 and 8665 (1949).
85. Id. §8663.
86. Id. §8656.
87. Conn. Gen. Stat. Ann. §7-169, et seq. (1972).
88. [1955] Supp. to Conn. Gen. Stat. §291d.

89. General Statutes of Connecticut (1958), §53-290. This law was repealed to allow the State Lottery. Conn. Pub. & Spec. Acts (1973), Pub. Act. No. 73-455, §9. See note 95, infra.

90. State v. Harrington, 3 Conn. Cir. Ct. 674, 233 A.2d 316 (1966).

91. Conn. Gen. Stat. Ann., §§12-557 to 12-578 (1958) as amended by Conn. Pub. & Spec. Acts (1974), Pub. Act No. 74-39.

92. Conn. Pub. & Spec. Acts (1973), Pub. Act No. 73-260.

93. Conn. Pub. & Spec. Acts, (1973) Pub. Act. No. 73-401. The handle remains at 17 percent. For horse racing, the state tax (take out) is 3 percent on the first $100,000 bet, and increases up to 8-1/2 percent on amounts over $1,000,000. For dog racing, the tax is 5-1/2 percent on the first $150,000 in the betting pool, increasing to 8 percent on amounts over $450,000. For jai alai, the tax is a straight 5 percent on the totals wagered. The state and the private operator still split the breakage evenly split the breakage evenly between themselves.

94. Conn. Pub. & Spec. Acts (1973), Pub. Act No. 73-344.

95. Conn. Pub. & Spec. Acts (1973), Pub. Act No. 73-235.

96. Conn. Pub. & Spec. Acts (1973), Pub. Act No. 73-236.

97. Gen. Stats. of Conn. §§53-298 and 53-298a (1956, Rev. to 1972). This law was repealed by Conn. Pub. & Spec. Acts, (1973) Pub. Act. No. 73-455 §9.

98. Conn. Pub. & Spec. Acts (1973). Public Act No. 73-455. Connecticut's Model Anti-Gambling Act is almost a verbatim copy of the first seven sections of the model anti-gambling act drafted by the American Bar Association Commission On Organized Crime in its San Francisco conference on September 8-13, 1952. This origin accounts for the act's emphasis on the organized aspects of illegal gambling. Section 8 of the ABA draft on witness immunity was not adopted because it is covered in another statute (Conn. Gen. Stat. Ann. [1975 Supp.]). Section 9 on restrictions on political subdivisions and Section 10 on severability of the ABA draft were not adopted in the Connecticut Act.

99. Id.

100. Id. The owner who shows good cause why his or her property so seized should not be forfeited may avoid forfeiture.

101. Conn. Gen. Stat. Ann. §§22-121 and 22-123, (1956). Approved bingo, raffles and bazaars are excepted from this statute, as amended (1975 Supp.).

102. Conn. Gen. Stat. Ann. §53-250 (1958).

103. Conn. Gen. Stat. Ann. §19-330 (1958) as amended (1975 Supp.).

104. Conn. Gen. Stat. Ann. §53-270 (1958) as amended (1975 Supp.). Fortune telling is apparently considered gambling on the possibility of learning about future events.

105. Conn. Gen. Stat. Ann. §54-68 (1958).

106. Conn. Gen. Stat. Ann. §54-47a (1975 Supp.).

107. Conn. Gen. Stat. Ann. §54-41a et seq. (1975 Supp.). See also Title III, Omnibus Crime Control and Safe Street Act of 1968. 18 U.S.C.A. 2510, et seq.,(1971 ed.).

108. Unfortunately, we do not have statistics on the severity of sentencing past March 31, 1968, and it is too early to accurately assess the impact of the more uniform penalties of the Model Anti-Gambling Act passed in January of 1973.

109. Conn. Gen. Stat. Ann. §52-554 (1972).

110. Ciampittiello v. Campitello, supra, note 82.

111. Hilton of San Juan, Inc. v. Lateano, 6 Conn. Cir. Ct. 680, 305 A.2d (1972).

Paragraph Index

The Development of the Law of Gambling:

DELAWARE

J.C.L.
C.A.B.
D.F.D.
G.R.B.

Table of Contents

Summary

¶1 The law of gambling has enjoyed a varied, if undramatic, history in Delaware. Few outbreaks of vigorous public or legislative sentiment either for or against gambling have punctuated the generally quiet periods of partial legalization, absolute prohibition, and then gradual decriminalization, which the state has seen. Until late in the Nineteenth Century, wagers and lotteries were held legal, while horse racing and other sports involving betting were banned. With the 1897 constitution and the turn of the century came restrictive laws prohibiting all forms of gambling, although even at that time social gambling was never prosecuted. In recent years, however, the pattern of prohibition has gradually reversed, so that Delaware now permits pari-mutuel horse racing, charity bingo, and, recently, attempted to operate a state lottery. Proposals for a new state constitution which would eliminate all references to gambling have even been advanced, but these proposals have not yet gained sufficient support for the change to be implemented.

I. The Colonial Experience: 1492-1776

¶2 European exploration of the territory now known as Delaware began with separate expeditions into two areas of the state. When the English explorer Captain John Smith visited several villages of the Nanticoke Indians in 1607,

he sailed up the Chesapeake Bay and the Nanticoke River to enter what is now the southern portion of Delaware.[1] Two years later, another Englishman, Henry Hudson, explored the northern region of the peninsula when he searched the Delaware and Hudson Rivers looking for a direct route to the Far East for his employer, the Dutch East India Company.

¶3 In 1910, another Englishman, Captain Samuel Argall, named the bay and river for the governor of Virginia, Thomas West, the Lord de la Warr. The Dutch, however, continued to call the Delaware River the "South" River, the Hudson being the "North" River, and the name "Delaware" did not become current until 1776.[2]

A. Dutch and Swedish Settlement

¶4 By 1614, the Dutch had established their New Amsterdam on the island of Manhattan, from which they dispatched trading parties to barter for pelts with the Nanticoke and Lenni-Lenape tribes in Delaware. In the late 1620's, the newly-formed Dutch West India Company interested groups of investors and settlers in colonizing the Delaware area. The first settlement was built in 1631 at Zwaanendall, now the site of Lewis, by 28 whalers and farmers. An Indian massacre, however, totally destroyed that village the following year.

¶5 Although the Dutch temporarily abandoned attempts to colonize Delaware and concentrated on New Amsterdam instead, Swedish interest in overseas ventures grew. A combination of Dutch and Swedish funds created the New Sweden Company, which

retained Peter Minuit, a former governor of the New Netherlands and a member of the Dutch West India Company, to lead an expedition of Swedish settlers and soldiers into the Delaware area. In 1638, this group founded the first permanent Delaware settlement at Fort Christina, now the site of Wilmington. For several years, colonists from both Sweden and Finland poured into the area, until internal troubles in Sweden forced it to all but abandon the struggling colony for a period of ten years. This reawakened Dutch interest in Delaware and enabled Peter Stuyvesant, the governor of New Amsterdam, to gain a strategic superiority over the Swedes by building Fort Casimir at the mouth of the Delaware River near the modern location of New Castle. In retaliation, the Swedes sent a large contingent of new colonists to capture the Dutch encampment in 1654. Their victory was short-lived, however. An angry Stuyvesant promptly dispatched a force powerful enough to capture both Fort Casimir and Fort Christina, bringing the Delaware region once again under Dutch control by 1655.

B. British Control and Immigration

¶6 The English, meanwhile, regarded the sparring Dutch and Swedes as intruders into British territory. In 1663, King Charles II granted to his brother James, the Duke of York, all the land from Connecticut to the Delaware Bay. The English fleet sent to secure the grant established control over Delaware in 1664, when the Dutch relinquished all of the

New Netherlands. Only once, in 1673, did the Dutch manage to regain control, but they were expelled again a single year later by the English, whose dominion over Delaware continued unchallenged until the American Revolution.

¶7 For eighteen years, the Duke of York ruled the entire Delaware River region, extending into what is now Pennsylvania, through an appointed commander. During this period, the colony instituted its first courts, at New Castle, Whorekill (Lewis), and, in 1680, at Dover.[3] Although these courts administered the English common law, they apparently accorded no special treatment to gamblers and reported no cases concerning gambling until 1700. In fact, histories of early Delaware conspicuously omit all mention of gambling. The nature of the population was undoubtedly the reason for this apparent nonexistence. Most of the colonists were Swedish, Dutch, or Finnish, given to hard work and unlikely to wager away the fruits of their toil. William Penn characterized them as "a plain, strong, industrious People."[4] A few stories of drunkenness are the only evidence of excess among Delaware colonials.[5]

¶8 The character of the Delaware population changed radically after William Penn assumed ownership and control over Delaware in 1681.[6] Known at that time simply as the "lower counties," or the "Territory," Delaware experienced a great wave of immigration. What had been a tenuous, barely self-supporting settlement became a thriving center for exports, as Quaker and other English groups led the way for

the large numbers of Presbyterian Scotch-Irish who immigrated in the early eighteenth century. Numerous slaves were brought into the colony during the same period. By 1700, the population was dense enough to give rise to problems of rowdiness. The first gambling-related law to be passed in the territory incorporated common-law prohibitions to penalize "riotous and unlawful sports and games."[7] The penalty for this offense was twenty shillings, or ten days' imprisonment at hard labor in the house of correction.

C. Colonial Gambling Legislation

¶9 In 1704, the three lower counties had won the right to set up their own assembly, although it was still to be nominally under the authority of Penn and the Crown.[8] This legislature concerned itself mainly with revenue bills, but it found time before the Revolution to enact three laws relating to gambling. These laws did not prohibit gambling per se, but they left it subject to traditional common-law restrictions.[9] No cases regarding the law of gambling were published until 1800. The first of these statutes was enacted in 1740 and condemned "corrupt or unlawful gaming with cards, dice, or at other games" in taverns.[10] Although the statute varied in form through the years, the specific prohibition against gambling at places where liquor was sold persisted until the 1935 code revision,[11] at which time it was eliminated. The penalties for violation were twenty shillings for a first offense, forty shillings to five pounds for a second offense, and the complete suppression

of the offending public house for three years for all subsequent offenses.

¶10 Unlike its more explicit predecessor, the second law enacted during this period was aimed at the more general goal of "suppressing idleness, drunkenness, and other debaucheries."[12] It was passed in 1764, but was allowed to expire soon thereafter. This act apparently prohibited gambling along with other "debaucheries," because other acts under the same title prohibited gambling at assemblies where liquor was sold.[13] No text of the early statute survives to verify this assumption, however.

¶11 The last gambling measure endorsed by the colonial legislature was an act for "restraining and preventing lotteries."[14] Its preamble articulates the manifold evils that the new law was designed to combat:

> Whereas lotteries in general are pernicious and destructive to frugality, industry, trade and commerce, are introductive of idleness and immorality, and against the common good and welfare of a people; and whereas lotteries for the disposal of private property at an over-rated value, for the sole benefit of the proprietors, and other selfish and illaudable purposes, have lately been set up and drawn in these counties, and are becoming very frequent...[15]

Given these conditions, the act continued, lotteries had to be eliminated.

¶12 Actually, the new law went far beyond the elimination of lotteries. It also prohibited games and devices like lotteries, whether "by dice, lots, cards, balls, tickets, or any numbers or figures, or in any other manner or way whatsoever."[16] The penalty for principals was a fine of £500.

victims, advertisers, managers, and accessories forfeited £10 upon conviction.[17] The only exceptions recognized were for "state-lotteries, erected and licensed by act of Parliament in Great Britain" and lotteries previously begun in the colonies.[18] Although the same kind of law would resurface in Delaware, this particular enactment had a limited effective life. With the coming of the Revolution, lotteries were permitted again, this time for public financing.[19]

II. The Formative Era: 1776-1890

¶13 Delaware played an important role in inter-colonial affairs prior to the American Revolution, and continued to do so in the following years. Three of the state's delegates protested the Stamp Act at the New York Congress of 1765, and the state had four representatives in the Continental Congress of 1774 at Philadelphia. John Dickinson of Dover authored Letters from a Farmer, published in the Pennsylvania Chronicle, which outlined the issues in the controversy with Great Britain. In 1774, following the fateful Boston Tea Party, the people of Delaware contributed to aid the city of Boston. In the spring of 1775, fighting broke out in Massachusetts and the Delaware General Assembly agreed to shoulder its share of the burden of supporting the Continental Army; by January of 1776, the first Delaware regiment had reported for duty. In March of the same year, a local fleet of oar-powered gunboats drove two British men-of-war out of the Delaware River. Finally, on June 15,

1776, the Delaware Assembly responded to a resolution of the Continental Congress urging severance from royal allegiance[20] by suspending government under the Crown and directing all state officials to carry on in the name of the three counties.[21]

A. The Revolutionary Period

¶14 During the entire Revolutionary period, a strong minority of loyalists, particularly in the more southerly, remote counties of Sussex and Kent,[22] produced a division of opinion among the area's residents over the question of independence. Delaware's two representatives in Philadelphia found themselves in disagreement over the matter in July of 1776, and it was only the dramatic arrival of a third delegate, who cast the tie-breaking vote, which enabled the colonies to present a united front for freedom in the Declaration of Independence. Two months later, on September 20, 1776, the three counties became the State of Delaware and framed the state's first constitution,[23] which contained no mention of gambling.

¶15 It is perhaps symptomatic of the moderation and conservatism often attributed to Delaware that it was among the last to embrace total separation from England. One commentator characterized the state as follows:

> With a small population and an almost wholly agrarian civilization, and without western lands to bring dreams of an expanding, independent commonwealth, Delaware, conscious of its weakness, was unlikely alone to take precipitate action to part from the British empire. Its part, instead, was to wait upon its sister colonies and join them in any action it approved.[24]

Although Delaware was not the first state to bring about revolution, it was the first to ratify the Constitution, which called for a close-knit union of the rebellious states.[25] The state might thus be seen as a community of deliberate citizens, slow to take drastic action but quick to support fully any radical move found essential.

B. Gambling Legislation in Early Statehood

¶16 Between 1776 and 1779, the year it ratified the Articles of Confederation,[26] the Delaware Assembly passed one law connected with gambling, to supplement an act reaffirming all pre-Revolutionary laws not expressly overruled or inconsistent with current legislation.[27] The new enactment did not prohibit any form of gambling; it simply made it a felony to counterfeit tickets for the public lottery authorized by Congress to finance the war.[28] The sentence was death. This early reference to gambling presaged an era of relatively active regulation of that pastime.

(1) Horse racing

¶17 The "idleness, vice, and immorality" decried in colonial legislation suffered attack again under the watchful eyes of the young legislature. In the minds of early Delawarans, these social ills were promoted "to the great prejudice of religion, virtue, and industry" when tavern keepers and other persons held horse races, foot races, cock fights, shooting matches, and other contests in the hope of

disposing of liquor through sale or otherwise--as prizes and bet payoffs.[29] To end this practice, the Delaware Assembly prohibited both the promotion or encouragement of such contests and the sale of alcoholic drinks to such assemblies. There was to be a £10 fine for every separate offense, with complete suppression of the public house if the offender was a tavern-keeper.

¶18 Two cases from the 1800's interpreted this law to prohibit the activities themselves, regardless of whether any drinking or gambling actually took place. State v. Tumlin,[30] an 1818 case in the Court of Common Pleas, established that the 1786 law would be given the broadest reading, so that horse racing was indictable in its own right.

¶19 In the second case, State v. Blackiston,[31] the court held that the legislature's intention in enacting the statute was to eliminate racing as well as the promotion of liquor. Horse racing alone was punishable, the court held, because of its potential for inciting drinking and gambling. Each defendant in the case was fined £10.[32]

¶20 Only two other cases lent guidance in the application of these horse racing statutes. The first, an 1835 case,[33] suggests that the enforcement of the anti-racing legislation had become so lax that the court would have agreed to enforce a properly-decided bet on a horse race, although the court declined to honor the bet in the case at hand because the judges of the race had disagreed on the winner.

¶21 However, the dictum in this case appears to be an

aberration, for it has not been cited as an authority elsewhere. In Ross v. Green,[34] decided only ten years later, the court held that a wager on a horse race held outside the state was not illegal, indicately implicitly that domestic racing was illegal. Certainly, the statutes point in that direction. The 1829 and 1852 revised statutes, with their later versions,[35] all forbade horse racing in language similar to that which had already been construed to punish horse racing under the original law of 1786.[36]

¶22 Later enactments following the 1786 law added betting to the list of alternative offenses and exempted regularly-licensed tavern keepers from the liquor sale prohibition.[37] This line of laws and cases, such as it was, constituted the major authority against horse racing until the sport was partially decriminalized almost two centuries later.

(2) Lotteries

¶23 While the horse racing laws became more prohibitive, the decriminalization and utilization of lotteries proceeded apace. In 1787, just before Delaware ratified the Constitution, a private law to settle the accounts of the "Wilmington lottery" was passed.[38] Four years later, the Delaware Assembly approved the first of many lotteries for the financing of public works.[39] Its purposes were "fitting up, and preparing, chambers in the new Court House in the town of Dover" for occupancy by the Delaware General Assembly and, to the extent of any surplusage over the costs of that activity, the completion

of the Court House itself.[40] This law set the pattern for subsequent lottery administration. It required that the appointed managers advertise the lottery scheme in the Delaware Gazette and in one of the Philadelphia papers as soon as the scheme was finalized. The drawing was to be held on a certain date, provided that sufficient tickets had been sold to finance the construction. If funds were still insufficient, the drawing was to be postponed until the tickets were finally sold. The managers were allotted ten percent of the proceeds "for their trouble." There was a nine-month period after the drawing in which "[f]ortunate adventurers" could claim their winnings.

¶24 However, problems arose in promoting this lottery, and when the appointed date came the drawing could not be held. Because of the Assembly's fear that "a considerable number of the tickets are as yet unsold, and the sale greatly impeded by an apprehension entertained by many that the lottery will never be drawn,"[42] it passed a supplementary statute which guaranteed that the drawing would take place on December 5, whether all the tickets had been sold or not. Unsold tickets were to be drawn on behalf of the state, whose coffers would also supply any deficit.[43]

¶25 Apparently, confidence was restored, for a forest of lotteries soon sprouted from this seedling. Lotteries were approved in 1794 for piers in New Castle;[44] in 1795 for the Sussex "gaol";[45] in 1797 for a "cotton manufactory";[46] in 1808 for a Roman Catholic church in New Castle;[47] in 1809

for Wilmington College;[48] in 1810 for Dover Academy;[49] in 1811 for a turnpike,[50] for Wilmington College again,[51] and for the English school house and market house of Newark;[52] in 1812 for a Masonic hall in Wilmington[53] and for St. John's lodge, as well as for a library in New Castle,[54] a bridge,[55] and a grammar school in New Castle.[56]

126 After this high water mark, enthusiasm for lottery enactments began to subside as their evils became apparent once again. Although they continued to be authorized by the Assembly, popular sentiment was against them: for example, the fledging labor movements of the 1820's and 1830's demanded their abolition.[57] At the constitutional convention which prepared the 1831 Delaware constitution, the prohibition of lotteries was proposed, but defeated.[58] In the first compilation of Delaware statutes, however, one of the three provisions dealing with gambling banned all but Assembly-authorized public lotteries and indicated disapproval of lotteries for the sale of private property,[59] one of the major concerns of the 1772 lottery prohibition act. The new law imposed stiff fines of $500 to $10,000 and jail terms not to exceed three years. Specifically exempted from coverage were foreign lotteries related to schemes authorized by the Assembly.[60]

127 In 1833, the Assembly again altered its approach by deciding to require licenses for holding lotteries, instead of individual legislative approval for each drawing.[61] These licenses cost $100 per drawing and were valid for a year. They restricted the sale of tickets to stands or shops, with

violators to forfeit $20 for each ticket sold unlawfully. Half of the fine would go to any informer aiding in bringing the offender to justice. Despite this new regulation, some lotteries, such as the lottery "for the benefit of Sussex County" of 1835,[62] continued to be established by the old method of specific legislation.

¶28 Anti-lottery opinion continued to build during the 1830's, and in 1841 a new law was passed further restricting this form of gambling. Its preamble acknowledged that lotteries currently under contract could not be prohibited, but stated that they would be regulated and subjected to a $10 fee per drawing and a $50 fee for every lottery plan filed with the legislature.[63] Authorization was withdrawn for all lottery plans yet to be made or awaiting contract negotiations.[64]

¶29 This law provoked one of the few constitutional arguments in the Delaware casebooks on the subject of gambling laws. State v. Phalen[65] involved a lottery authorized by the Assembly in 1827 for the construction of an academy, a masonic hall, and an Episcopal Church in Georgetown.[66] The court found that a fee required of the lottery managers by the 1841 act violated a contract concerning the lottery which had been concluded by the parties two years before. This was an encroachment upon the U.S. Constitution.[67] The chancellor did, however, express admiration for the object of the 1841 act, which was, he observed, "to restrain the too-frequent drawing of these lotteries, which ha[s] become [as] frequent

as six times or more in a week."[68]

¶30 Three years later, the courts also applied this law and its older companion, the 1833 licensing act,[69] to a New Jersey lottery scheme which exported tickets to a duly-licensed Delaware retailer.[70] The foreign scheme was upheld as a legal contract, since the tickets were authorized by New Jersey and the foreign wholesale dealers were not required to submit to Delaware licensing and fee regulation.

¶31 Following these cases, the scene of the lottery battle once again shifted back to the legislature. In an 1852 compilation of revised statutes, the legislature included two lottery-related provisions: one codified the 1833 licensing law[71] and repealed all permissive lottery statutes,[72] and the other made it a misdemeanor to carry on a lottery without special permission from the General Assembly.[73] It also retained the penalties outlined in the 1829 code.[74]

¶32 Following these statutes, however, Delaware lottery law appeared somewhat inconsistent: all lotteries not conducted in compliance with the 1833 Licensing scheme were forbidden, yet the 1833 provision required the General Assembly to approve a lottery even if it had not complied with the terms of this scheme. The constitutional convention which met the next year tried to eliminate the inconsistency by proposing an anti-lottery section. Like two subsequent attempts,[75] however, this effort failed. The need for improvement of state services was so pressing that lotteries, a seemingly reliable source of public revenue, were retained. One commentator has noted:

> Between 1852 and the Civil War, while political feeling ran high, the laws passed by the general assembly reflected chiefly the activity of those years to improve the means and routes of transportation, the streets of towns, and other public improvements. Charters were granted to many small railroads and every session dealt with roads, bridges, draining of marshes, opening channels in creeks, and incorporation of a number of steamboat and navigation companies. Many new school districts were created. Banks and educational and beneficial organizations were chartered. Interest in the reform of the fundamental law, which continued, procured the passage in 1855 of a proposal to amend the constitution to forbid lotteries. It failed of ratification at the next session and by 1859 interest in public improvements so dominated the legislature that an act for their encouragement authorized the preparation and drawing of lotteries for the next twenty years to pay for railroads, building academies, improving navigation, and similar projects.[76]

Although in the mid-1800's enthusiasm ran high for lotteries benefiting the state, Delaware's legislators took steps to restrict unauthorized or private ventures. Three laws passed in 1861 prohibited unauthorized sales in general,[77] unauthorized sales without a license,[78] and the introduction of out-of-state lottery tickets or schemes.[79] The third codification of the Delaware laws in 1874 simply retained the provisions of the 1852 code.[80]

(3) Other forms of gambling

¶33 Lotteries and horse racing occupied a disproportionate amount of attention in the Nineteenth-Century gambling legislation of Delaware, but other forms of gambling also concerned both court and assembly. Betting and gaming at taverns, prohibited in colonial times,[81] were condemned after the Revolution as well. The post-Revolution enactment,[82] passed in 1827 and included in the 1829 Revised Statutes and

subsequent codes,[83] forbade a tavern keeper from permitting "any game whatever for money, liquor or other thing, or upon which money, liquor or other thing shall be betted, to be played in his or her house."[84] Penalties for offenders ranged from $10 for a first offense to $30 and revocation of license for three years for a third or subsequent offense. Later, the law was held also to ban the use of bowling alleys connected to taverns, where players risked the price of the game.[85] This ban was incorporated into the 1852 code.[86]

¶34 Wagers in general also received close attention at this time, especially in the courts. The first important case, Polk v. Coston,[87] was decided in 1800. It arose when the plaintiff purchased some hogs at the market and the defendant bought a bull. The defendant proposed a coin toss, with the winner to take all the animals. He let plaintiff toss while he called, "Heads I win, tails you lose." The coin fell tails up, and before the plaintiff could realize his folly, the defendant plied him with liquor until he allowed defendant to sell his hogs to a third party, who promptly carried them off.[88] Needless to say, Chief Justice Johns found the wager fraudulent and void, and restored the property to the plaintiff.

¶35 The arguments in Polk implied that non-fraudulent wagers would be enforced by the Delaware courts, and this was borne out by the next case on the subject. In Porter v. Sawyer,[89] Chief Justice Clayton summarized the existing rules in his charge to the jury:

> ... as a general proposition, it was lawful to bet. Contracts of this kind may be entered into and the obligations arising from such contracts must be enforced by courts and juries if they be not such as to affect the good of society, corrupt public morals or infringe upon the private rights or feelings of third persons.[90]

The Porter bet was not enforced only because the jury decided that a wager on a pending election was indeed of a type to "affect the good of society and corrupt public morals."

¶36 Later cases and statutes followed the Porter lead on election wagers. In Gardner v. Nolen,[91] the court invalidated an election wager even though it had been made after the closing of the polls, apparently considering the practice in toto contrary to public policy. This point was made again in Dewees v. Miller,[92] where the holding echoed Porter in its willingness to enforce any wager "as at common law" so long as it was not prohibited by law, against public policy, or calculated to affect the interest, character, or feelings of third parties. A year after Dewees, a general prohibition against betting at any time on election results appeared in the 1852 Revised Statutes.[93] This provision made the stakeholder a competent witness against the bettor and vice versa, and it subjected bettors to a fine double the amount of the bet, payable to whomever brought suit. The stakeholder was to be liable to the same degree if he had paid over the stake. The 1852 law survived in Delaware's codes until it found a place in the current constitution.[94]

¶37 The general legal toleration of wagers not identifiably contrary to public policy continued into the 1870's. The 1870

case of Griffith v. Pearce[95] reasserted the principles of Dewees. But only two years later a new attitude began to form. In Gardner v. Grubb,[96] the court denied that any action for money had and received could lie before a justice of the peace to collect money won on a bet. This case represented the first wave in the turning tide against gambling, which took twenty years to completely flood Delaware law.[97]

¶38 Gaming at dice and cards was another matter. As early as 1795, it was illegal to "game, play, or dance" or engage in sports on Sunday.[98] Although part of this general statute was soon absorbed by the anti-racing statutes,[99] and the prohibition against gaming at taverns covered most of the rest of it,[100] the Assembly passed a more comprehensive law to combat specific types of gaming in 1857. This law punished any person who kept or exhibited a "gaming table, faro bank, sweat cloth, roulet table, or other device under any denomination, at which cards, dice or any other game of chance is played for money, or other things of value."[101] It also introduced the concept of complicity into the crime of gaming by punishing partners and other persons "concerned in interest" in the same fashion as the device owners. Each offender was subject to a fine of not less than $100 nor more than $1,000, or if the offender could not pay, to a prison term of not less than one nor more than twelve months. In addition, the law provided for the seizure and destruction of the offending table or device, the donation of any stakes to the poor of the county in which the misdemeanor occurred, and the punishment of anyone who

furnished a room for consideration knowing that gambling was to take place in it. Anyone who furnished facilities to gamblers was subject to a fine of not less than $10 nor more than $20, or, in default, to a jail term of one to three months. Soon after enacting the original prohibition, the legislature added betting on prize-fights to the list of misdemeanors, and it became illegal "to promote, encourage, aid in, assist at, be engaged in, or hold the stakes" at such a fight.[102]

¶39 As the prize-fight statute illustrates, stakeholders received sporadic attention in Delaware's attempts to restrict gambling. In the 1935 Jacobs case,[103] a stakeholder who paid over a bet to his own designated winner without waiting for a decision from the judges of the horse race was held liable to the "loser." The 1852 code, in discouraging election bets, made the stakeholder a competent witness against bettors.[104] A separate provision subjected a stakeholder to the same forfeiture penalties as a principal if the former paid over the stakes.[105] The bettors were competent witnesses against the stakeholder. The rising tide of anti-gambling sentiment in the 1870's grew to such proportions that it directed itself against a stakeholder in Pearce v. Provost.[106] Although the court declined to decide on the enforceability of consensual delivery of stakes, it ruled against a stakeholder who had not obtained the loser's consent before paying over the stake.

III. The Modern Era: 1890-1975

¶40 Modern Delaware ultimately emerged from the cautiousness and conservatism which had characterized its earlier days, though the change did not come all at once. Just as the state had warily resisted severance from Britain nearly a century earlier, during the Civil War it stubbornly refrained from actively supporting either side. While refusing to take the radical step of seceding from the union, the state nonetheless refused to abolish slavery until forced to do so by federal law, and did not ratify the thirteenth and fourteenth amendments until 1901.[107]

A. Entering the Modern World

¶41 Despite this tradition, signs of change began to show themselves in the state as the turn of the century drew near. In 1894 Wilmington's largest newspaper, the Every Evening, reported that city's entrance into the bustle of modern life as follows:

> The modern or newer Wilmington is a creation of the past twelve or fifteen years. Before that time there was no street paving in the city other than the unsightly cobblestone; there was no public sewage system, no electric railway nor electric street illumination; for its [sic] daily food supply the citizen paid a heavy tax to the Philadelphia middleman; the death rate was double what it is now; there was no free public library; the public stood uncomplainingly under the lash of a most execrable health system; there was no garbage crematory; there were no hospitals; public spirit or enterprise in its modern, wider sense was unknown; the press was just emerging from its older state to one of influence as a recognized power among the people; nothing, outside the acquirements

> of a restricted few, existed of music nor of dramatic taste; and the people generally took little interest in public affairs.[108]

¶42 The economy of the town was booming. As our chronicle of the times reports, Wilmington in 1894 was

> ... the most important manufacturing city of its size in the United States. Wilmington can well boast of her manufacturing establishments, the products of which are known and find a market in every civilized country in the world. Here are located the largest iron shipyards in the United States, while in the manufacture of machinery, powder, cars and car wheels, matches, morocco, paper, wood pulp, flour, carriages, and minor articles, she ranks among the first of American cities.[109]

Moreover, Wilmington was soon to become the "chemical capital" with the 1902 incorporation and consequent development of E. I. du Pont de Nemours and Company. Meanwhile downstate, the agricultural heartland of Delaware was turning from wheat to truck crops and prospering in similar fashion. Though Delaware ranked forty-seventh among the 48 states in 1910 in population and land area,[110] its residents had little reason to complain.

¶43 The labor needs of the Delaware economy attracted a new wave of immigrants to the state, although they tended to arrive in small groups destined to man the factories and, to a lesser extent, the fields. The 1890's saw the influx of Italians, Poles, and Jews, while the Twentieth Century brought people of Ukrainian and Greek origins. The traditionally Protestant population of Delaware now had to accomodate large Catholic, Jewish, and Orthodox Catholic minorities.[111]

B. Modern Treatment of Gambling

¶44 In 1893, a new revision of the 1853 code was released, changing relatively few of the gambling statutes. Two new areas were covered.[112] An "Act for the Protection of Minors,"[113] punished those who, having been compensated directly or indirectly for the use of their premises for gaming, permitted a minor to be present, unless such minor was a member of their own family or accompanied by his parent or guardian. In other provisions, general police power statutes revived and amended the old tavern prohibitions against "gambling of any kind, under any pretense whatever."[114] Violators automatically lost their tavern licenses for two years and had to pay a $50 to $100 fine as well.

(1) Social gambling and gambling devices

¶45 The 1893 code, although not notably different from its precursors, generated a certain amount of litigation. Most actively debated was the 1857 law, carried forward through the 1873 revision, which punished both principals and accomplices for exhibiting gaming devices.[115] In 1893, a Delaware court held that the jury must decide whether an owner who rented a room to a "social club" which played card games for money could be prosecuted under the statute as a party "concerned in interest." The jury found him guilty.[116] Fourteen years later, the court, seeing that such extensions of the law could get out of hand, held that a floor, although employed as a site for gambling, was not a "gambling device."[117]

¶46 In 1914, the purpose of the 1857 law was defined in State v. Panaro,[118] a leading case in the "device" and social gambling areas. In that decision, the court held that the statute did not prohibit gambling per se, but was

> ... designed rather to reduce the opportunities and discourage the facilities for gambling. There is nothing in this statute which makes it unlawful for four men to play cards for money upon a table, nor does it make it unlawful for the owner of a table to permit it to be used for card playing for stakes, when the table is neither kept nor exhibited for that purpose. The object of the statute, as its title indicates, is "the suppression of gambling," and the particular method chosen by the legislature to attain this end was to prevent and prohibit the keeping of gambling tables and devices, under circumstances of notoriety and opportunity, which would induce or enable men the more readily to gamble.[119]

Further consideration of the issue led the court to conclude that the enactment was constitutional. It fell within the police power of the state even insofar as it penalized those persons merely concerned in interest, but not necessarily financially interested, in the outcome of the game.[120]

¶47 The same statute found its way into the 1915 Revised Statutes and the 1935 and 1953 codes,[121] and additional causes proliferated. In 1920, the Delaware court, relying on Panaro, distinguished poker playing at a social gathering (permissable) from poker playing at a table exhibited to invite gambling, even if it was at a residence (impermissable).[122] In addition, the court extended the statute's reach to keepers of tables who never actually used them personally. Some years later, this well-litigated law withstood a constitutional challenge on due process grounds when the court held that the statute

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was not "vague and uncertain" by the standards of either the federal or state constitutions.[123] This holding has been reaffirmed by a recent decision.[124] Finally, in 1950 a Delaware court proclaimed, in State v. Delaware Novelty House, Inc.,[126] that the statute would be interpreted broadly, in accordance with legislative intent, to penalize not just those devices enumerated, but also any "other gambling device of any kind whatsoever." Under this reading of the statute, a punch board used for gambling would come within the statutory prohibition.

(2) Lotteries

¶48 In 1897, just before the modern series of gambling-device cases began, Delaware citizens ratified a new constitution under which the hopes of the state's lottery prohibitionists were realized at last. The pertinent provision stated, "The sale of lottery tickets, pool selling and all other forms of gambling are prohibited in this State."[127] Another constitutional provision outlawed betting on election results.[128]

¶49 The 1897 lottery ban, along with its subsequent enabling legislation, inspired a great deal of prosecution and litigation. In 1911, a Delaware court held that baseball pools were prohibited as lotteries, although, oddly enough, it invoked the 1893 revised code, not the constitution.[129] A lottery had been defined as "a scheme for the distribution of money or prizes for chance," and the court eschewed the notion

that such schemes were "limited to the sale of tickets [or] to the terms of promises printed or written upon them."[130] Six years later, a Delaware superior court branded as a lottery a scheme in which bank clearing numbers were used to award an article worth $25 to one who bought a "chance" for $.50.[131] In 1939 a case prosecuted directly under the constitutional provisions arose.[132] The court listed the essentials of a lottery as a prize, chance, and a consideration. It determined that a "bank night" scheme, in which a theater gave a cash prize to a person whose name was drawn from a list of patrons and others who had not entered the theater, to be a lottery. The holding was reaffirmed in 1960.[133]

150 Meanwhile, the 1915 revised code had given the state more elaborate anti-lottery authority. In four consecutive sections, it prohibited disposing of lottery tickets, introducing or vending foreign lottery tickets, being concerned in interest in lottery policy writing or vending, and letting premises for the same.[134] The 1935 and 1953 codes retained these provisions.[135] In 1960, State v. Martin[136] reaffirmed that to be guilty an offender need only be "concerned in interest" with the selling of lottery slips or tickets. The next year, another case upheld the conviction of a defendant who had merely accepted a third party's money, even though no ticket or receipt had been issued.[137] As recently as 1972[138] a Delaware court held that proof of the actual sale of lottery policies is not necessary to prove that a defendant was concerned in interest in lottery

policy writing.

¶51 Despite this historical trend against lotteries, interest in decriminalizing them to keep pace with neighboring states which seemed to be reaping large profits from public lotteries grew steadily in the late 1960's and early 1970's. A constitution proposed in 1970[139] would have eliminated all mention of gambling from its articles, but it failed to gain the necessary two-thirds vote from two consecutive legislative sessions. In 1971 a resolution was passed to amend article two, section seventeen of the existing constitution to permit state-controlled lotteries for the purpose of raising funds,[140] and in 1973 the amendment became law.[141] Enabling legislation the next year set up a state-operated lottery administered by a lottery director. The prizes were exempted from state and local taxation, and the sale of tickets began in the spring of 1975, but because of sagging sales, it had suspended operation by April of that year.[142]

(3) Horse racing and other forms of gambling

¶52 Constitutional amendments in Delaware decriminalized horse racing with pari-mutuel betting at certain racetracks in 1935[143] and bingo for the benefit of charities and non-profit organizations in 1957.[144] Legislation and litigation concerning other forms of gambling has remained sparse, however, and their history is not as colorful as that of lotteries.

¶53 Delaware's 1897 constitution had prohibited all forms of gambling. Although this ban was generally construed not

to preclude social gambling,[145] many forms of objectionable activity received strict treatment in the statutes, particularly in the 1915 code revision and in subsequent versions. The 1915 code was the first to collect most of the anti-gambling statutes and arrange them under the article dealing with general police powers, a procedure followed in the 1935 and 1953 revisions. In addition, three new penalties were codified. The first was a 1907 law imposing a penalty of $5 to $20, or, in default, ten to thirty days in jail, for participation in a crap game.[146] Suspected violators could be arrested without a warrant. Another law forbade the keeping of books or devices for recording bets on contests of skill, speed, or endurance.[147] Those who were concerned in interest or who received money earned identical penalties with the principal: $100 to $2,000, or, in default, three months to two years in jail. The third of the new provisions prohibited the keeping, management, maintenance, or exhibition of slot machines on pain of a $50 maximum fine or a thirty-day maximum sentence.[148] A case interpreting this statute held that metal discs adapted to fit the slot machine and accepted by the machine owner in payment for merchandize would qualify as coins under the wording of the statute.[149]

154 The 1935 code preserved these laws virtually intact. Its only innovations concerned enabling and regulating legislation adopted for the 1935 constitutional amendment allowing pari-mutuel betting.[150] The 1953 code, however, did introduce some significant changes. That revision changed

the penalties for the older offenses--those involving lotteries, gambling devices, slot machines, and craps--to achieve uniformity. A first offense would bring a fine of no more than $500 and/or six months imprisonment; a second offense, no more than $3,000 and/or one year; and subsequent offenses, penalties of up to $5,000 and/or three years.[151] Keeping a gambling house became a crime for the first time, subject to the same penalties.[152] Betting in general and keeping records for betting were specifically outlawed.[153]

¶55 Two other areas of gambling practice were declared illegal: the dissemination of illicit gambling information, and the creation of obstructions barring police entry into places used for gambling. Using a private wire service for the dissemination or receipt of gambling information carried penalties of prosecution costs plus $500 to $5,000 and/or twelve month's imprisonment.[154] Written into the statute was a statement that this law was a valid exercise of state police power and was to be construed liberally in favor of the state. One of its sections declared that wire services could revoke misused service contracts without legal liability.[155] This section had to be amended, however, after dicta in the 1960 case of Tollin v. Diamond State Telephone Company[156] suggested that the provision for wire service cut-off without proper notice and hearing would probably be unconstitutional under federal and state due-process guarantees. In Tollin, the Delaware Court of Chancery deemed a full investigation and a showing of illegality to be necessary before the court could

uphold the pre-emptory cutting off of service.

156 Legislation was also adopted which prescribed measures for defining "obstructions" to alleged gambling parlors, for serving notice upon the owner, and which enabled police to lawfully remove such obstructions.[157] If a second obstruction appeared on the premises within two years, a lien for not less than $250 was placed on the property. A third offense within two years brought a lien of $500 to $1,000 against the property, or a year's imprisonment.

157 As mentioned above, betting was made a crime by a 1951 amendment to the 1935 code.[158] This section of the code, along with a companion provision on numbers writing, gave rise to much prosecution and litigation. A lottery statute was christened the "Numbers Writers' Statute,"[159] and the betting statute became popularly known as the "Bookmakers' Statute."[160] Under the joint authority of these provisions, a number of prosecutions came before the Delaware courts. A 1951 case held that gambling statutes, as criminal laws, were to be strictly construed against the state.[161] In the same case, police officers had answered the telephone at a bookmaker's while proceeding with a lawful search. Due to prevailing statutory construction on this point, the court refused to admit evidence of incriminating statements heard by the police. In another leading case, State v. Fossett,[162] the court upheld the confiscation of money which formed an integral part of a bookmaking operation, even though the forfeiture might constitute a double penalty (forfeiture on

top of a fine or sentence). The statute authorizing confiscation[163] was not, in the court's view, a penalty provision, but rather a law meant to obliterate illegal gambling.

¶58 The same "Bookmakers' Statute" was later challenged for unconstitutional vagueness, but that claim was rejected, and the statute stood.[164] Moreover, a 1960 case prosecuted under that section upheld the introduction of an expert witness, a vice squad sergeant, who was to testify that numbers on the edges of certain dollar bills represented the records of horse race "reverse bets," illegal at all race tracks, in the amount of the bill on which they were recorded.[165] The most recent case to emerge in the area acknowledged the close interrelationship of numbers and bookmaking and authorized prosecution under either statute on the same facts.[166]

¶59 Two other areas received attention in the 1953 revised code. The elections statutes penalized stakeholders for paying over election bet stakes.[167] The penalty was double the amount of the bet, payable to whomever brought suit. As in the old versions of this law, either of the bettors was made a competent witness against the stakeholder. The other section of the 1953 code which carried penalties for gambling was enacted in 1962. This amendment added illegal gambling to the list of noxious activities which characterized a nuisance and provided for permanent injunction and contempt remedies.[168]

¶60 Proposals have gained support of late for a new Delaware constitution which would omit all mention of gambling

and leave its regulation to the statutes. According to a state source, the effort continues, although the 1974 attempt fell two votes short of ratification.[169]

Conclusion

¶61 The history of gambling laws in Delaware conforms to the familiar pattern of states in the Northeast. The religious beliefs of Delaware's first settlers determined its early laws and practices. Gambling presented no problem, for it was not engaged in. As the colony grew, its population changed, and public policy came to reflect the judgment that various forms of gambling were harmful. Only private social gambling remained untouched. Delaware also made use of lotteries to raise public revenue, but the people's judgement ultimately went against them.

¶62 Modern Delaware has seen industrialization, urbanization, and the influx of new immigration. It has also experienced the partial decriminalization of gambling, first in horse racing, and, more recently, in lotteries.

¶63 Delaware is unique, however, in that its state-run lottery failed soon after its inception. What this portends for the future of the decriminalization movement remains to be seen. The state, small in population and revenue needs, has been willing to levy a full range of taxes, including an income tax. Experience with the failure of a form of legalized gambling as a revenue measure may well discourage

Delaware from experimenting with gambling in the future.

(Shepardized through January 1975)

Footnotes

1. Weslager, The Indians of Delaware, in 1 Delaware: A History of the First State, 31, 47 (H. Reed ed., 1947) [hereinafter cited as REED].

2. Rockney, Early Relations of Delaware and Pennsylvania, 7 Historical and Biographical Papers of the Historical Society of Delaware, no. II, at 1 (new series, 1930).

3. Reed, Colonial Beginnings, in 1 REED, 63, 73.

4. A. Myers, Narrators of Early Pennsylvania, West New Jersey, and Delaware, 237 (1912). William Penn was granted the entire territory of Pennsylvania and Delaware in 1681 by the king.

5. See Reed, supra, note 3.

6. See supra, note 4. From the beginning of his tenure as "Proprietor and Governor" of Pennsylvania and Delaware, Penn established a respresentative government. Some authorities suggest that the first two Assemblies were not representative in nature, because they could not originate legislation. They were, however, elected bodies, and they did possess power to reject the proposals of the Council. The Assembly was composed of equal numbers of representatives from Pennsylvania ("the province") and from Delaware (the "territories"). For a detailed discussion of the representative government inaugurated by Penn, see Rodney, supra, note 2, at 10-16.

7. Laws of --------, ch. 51A, 1 Delaware Laws 119 (1797).

8. One commentator dates the semi-autonomy of Delaware from 1701 (Monroe, Revolution and Confederation, in 1 REED 79, 95). The more commonly accepted view places the significant date at the time when the first Delaware Assembly met, in 1704. For the authoritative version of Delaware's efforts to free herself from annexation to Pennsylvania, see Rodney, supra note 2, at 9-32.

9. See notes 10-19 infra and accompanying text.

A catch-all common-law provision has always been standard in Delaware statutory codes. Typical of these enactments is the current one:

> Whoever commits or is guilty of an assault, battery, cheat, conspiracy, nuisance or any other offense indictable at common law for which punishment is not specifically prescribed by Statute shall be fined in

such amount, or imprisoned for such term, or both, as the court, in its discretion, may determine. (Del. Code Ann., tit. 11, §105 [1953])

It should be noted that, despite Delaware's extensive self-government, colonial laws up to the time of the American Revolution continued to be enacted in the names of Penn and his successors. See, e.g., Law of ------, 1772, ch. 208a, 1 Delaware Laws 504.

10. Law of ---------, 1740, ch. 65a, 54, 1 Delaware Laws 193 (1797).

11. For a tracing of the progression of these statutes through Delaware Law, see Del. Rev. Laws, Taverns, ch. 2 §1 (1829); Del. Rev. Stat., ch. 53, §6 (1852); Law of April 10, 1873, ch. 418, §15, 14 Delaware Laws 397; Del. Rev. Stat., ch. 53 (1874); Del. Rev. Stat., ch. 53 (1893); Del. Rev. Code, §166 (1915).

12. Law of ----------, 1764, ch. 182a, 1 Delaware Laws 408. It was listed in the first version of the Delaware Laws as simply "expired."

13. See, e.g., Law of June 24, 1786, ch. 1406, 2 Delaware Laws 866; Law of February 2, 1802, ch. 104, 3 Delaware Laws 230. These statutes have been variously encoded. See, e.g., Del. Rev. Laws, Crimes and Misdemeanors, ch. 5, §1 (1829); Del. Rev. Stat., ch. 51, §3 (1852); Del. Rev. Stat., ch. 51, §3 (1874); Del. Rev. Stat., ch. 51, §3 (1893); Del. Rev. Code, §3438 (1915); Del. Rev. Code §3898 (1935); Del. Code Ann., tit. 28, §904 (1953).

14. Law of June 13, 1772, ch. 208a, 1 Delaware Laws 504.

15. Id., preamble.

16. Id. at 51

17. Id. §§2, 3.

18. Id. §§3, 5.

19. See notes 38-83 infra and accompanying text.

20. Monroe, supra, note 8, at 106, quoting Journals of the Continental Congress, 342-58 (W. Ford, et. al., eds., 1904-37).

21. Law of February 22, 1777, ch. 26, 2 Delaware Laws 595. See Monroe, supra note 8, at 106-07.

22. See generally Hancock, The New Castle County Loyalists, 4 Delaware History 315 (1951); H. Hancock, The Delaware Loyalists (1940).

23. Delaware Constitution (1776).

24. Monroe, supra note 8, at 96.

25. Id.

26. Although Delaware sent representatives to Congress under the Articles of Confederation, it delayed formally ratifying that document until 1779 because it hoped to secure rights to western lands--an objective the state finally abandoned for practical reasons. Monroe, supra note 8, at 114.

27. Law of February 22, 1777, ch. 2B, 2 Delaware Laws 595.

28. Law of February 22, 1777, ch. 4B, §6, 2 Delaware Laws 601. Other public lotteries must have been permitted in the same period, since a private act was passed in 1787 for "the settlement of the accounts of the Wilmington lottery," Law of February 3, 1787, ch. 151B, 2 Delaware Laws 894. A year later this act was renewed, Law of February 2, 1788, ch. 173B, 2 Delaware Laws 92.

29. Law of June 24, 1786, ch. 140B, 2 Delaware Laws 866.

30. 1 Del. Cas. 550 (C.P. 1818), (from Clayton's Notebook 59). The report of this case is so brief that the reasoning is impossible to follow.

31. 2 Del. Cas. 229 (Qtr. Sess., undated). The arguments in this case were presented in a more complete form than in the preceding case, possibly because the case was before a higher court. The court relied on the preamble to the statute for its construction, id. at 230.

32. Id. at 230.

33. Jacobs v. Walton, 1 Del. (1 Harr.) 496 (Super. Ct., 1835). In this case the stakeholder for a bet on a horse race paid out money to a bettor even though the race's outcome was in doubt. Upon the suit of the other bettor, the court held that the stakeholder was liable to the plaintiff for his share of the stake. The implication of the decision, as noted in the text, was that a rightful winner could claim the entire stake.

34. 4 Del. (4 Harr.) 308 (super. Ct., 1845).

35. Del. Rev. Laws, Crimes and Misdemeanors, ch. 5, §1, ¶80 (1829); Del. Rev. Stat., tit. 8, ch. 51, §3 (1852). See note 13, supra.

36. See notes 30-32, supra, and accompanying text.

37. See the statutes cited in note 13, supra.

38. Law of February 3, 1787, ch. 151B, 2 Delaware Laws 894. See note 28, supra.

39. Law of January 29, 1791, ch. 220B, 2 Delaware Laws 999.

40. Id.

41. Id. §4.

42. Law of October 26, 1971, ch. 238B, 2 Delaware Laws 1023.

43. Id. The following year, Delaware ratified its second state constitution. Like the first, it contained no reference to gambling.

44. Law of February 7, 1794, ch. 60C, 2 Delaware Laws 1189.

45. Law of February 7, 1795, ch. 82C, 2 Delaware Laws 1214.

46. Law of June 3, 1797, ch. 140C, 2 Delaware Laws 1366.

47. Law of February 3, 1808, ch. 73, 4 Delaware Laws 227.

48. Law of January 11, 1809, ch. 79, 4 Delaware Laws 237.

49. Law of January 23, 1810, ch. 108, 4 Delaware Laws 304.

50. Law of January 21, 1811, ch. 134, 4 Delaware Laws 349.

51. Law of February 3, 1811, ch. 162, 4 Delaware Laws 465.

52. Act of February 1, 1811, ch. 173, 4 Delaware Laws 484.

53. Law of February 8, 1812, ch. 175, 4 Delaware Laws 487.

54. Law of February 8, 1812, ch. 184, 4 Delaware Laws 511.

55. Law of February 8, 1812, ch. 190, 4 Delaware Laws 517.

56. Law of February 8, 1812, ch. 192, 4 Delaware Laws 519.

57. Laurer, Labor in Delaware, in 2 REED 551, 553.

58. Eckman, Constitutional Development, 1776-1897, in 1 REED 283, 301. The mention of gambling in the 1831 constitution was in relation to a jurisdictional matter, empowering the General Assembly to grant to inferior courts jurisdiction over criminal cases, especially "assaults and batteries, keeping without a license a public house of entertainment...

nuisances, horse racing, cock fighting and shooting matches..." Delaware Constitution, art. 6, §15 (1931). Although gambling was not explicitly mentioned, the list given contained the same activities involved in most of the gambling cases in the state's early history.

59. Del. Rev. Stat., Crimes and Misdemeanors, ch. 5, §1, ¶70 (1829).

60. See notes 15-18, supra.

61. Law of February 4, 1833, ch. 247, 8 Delaware Laws 276.

62. Law of February 13, 1835, ch. 368, 8 Delaware Laws 399.

63. Law of February 20, 1841, ch. 364, §§1, 2, 9 Delaware Laws 425.

64. Id. §3.

65. 3 Del. (3 Harr.) 441 (Ct. Err. & App., 1842).

66. Law of ----------, 1827, ch. 7, Delaware Laws 131.

67. U.S. Constitution, art. I, §10: "No state shall... pass... any... Law impairing the Obligation of Contracts."

68. 3 Del. (3 Harr.) at 445.

69. Law of February 4, 1833, ch. 247, 8 Delaware Laws 276. See note 63, supra, and accompanying text.

70. James G. Gregory and Co. v. Bailey's Administrator, 4 Del. (4 Harr.) 256 (Ct. Err. and App., 1845).

71. Del. Rev. Stat., tit. 8, ch. 51, §12 (1852).

72. One exception to this repeal was an earlier enactment authorizing a lottery "for the benefit of the state of Delaware," Act of February 7, 1852, ch. 635, 10 Delaware Laws 643. This provision authorized lotteries to raise revenues of up to $100,000 for bridge construction and other public works.

73. Del. Rev. Stat., tit. 20, ch. 132, §1 (1852).

74. Del. Rev. Laws, Crimes and Misdemeanors, ch. 5, §1, ¶70 (1829). These penalties included a fine of from $500 to $10,000, and a prison term not to exceed three years. Foreign lotteries conducted jointly with authorized Delaware lotteries were excepted. See note 62, supra, and accompanying text.

75. The later unsuccessful attempts to declare lotteries unconstitutional were in 1855 (Act of March 2, 1855, ch. 283, 11 Delaware Laws 310) and 1862 (Act of February 7, 1862, ch. 225, 12 Delaware Laws 251).

76. Eckman, supra, note 60, at 301-02. The pro-lottery law cited is the Law of January 26, 1859, ch. 507, §2, 11 Delaware Laws 594.

77. Law of February 19, 1861, ch. 33, 12 Delaware Laws 47. The penalties were $100 for a first offense or, in default, one month's imprisonment. For second and subsequent offenses, the sentence was $100 and one to two months' imprisonment.

78. Law of March 6, 1861, ch. 98, 12 Delaware Laws 155. Violators suffered $20 and thirty days or less in jail for each ticket sold without a license. Licenses were repriced in section two to $300 a year. The same $20, thirty-day penalty went to persons impersonating licensed lottery officers. The latter were required to display their licenses prominently at their stands or stores. Id. §§5-6.

79. Law of February 20, 1861, ch. 35, 12 Delaware Laws 48. The penalty was a fine of from $100 to $500 and the costs of prosecution, one half to go to the informer.

80. Del. Rev. Stat., tit. 8, ch. 51, §12; Del. Rev. Code, tit. 20, ch. 132, §1 (1874).

81. See note 10, supra, and accompanying text.

82. See note 11, supra.

83. Del. Rev. Laws, Taverns, ch. 2, §1 (1829).

84. Id.

85. State v. Records, 4 Del. (4 Harr.) 554 (Gen. Sess., undated).

86. Del. Rev. Stat., tit. 20, ch. 132, §2 (1852).

87. 1 Del. Cas. 276 (Sup. Ct. 1800) (from Wilson's Red Book 308).

88. Id. at 276-77.

89. 1 Del. (1 Harr.), 517 (Super. Ct., 1835).

90. Id. at 518.

91. 3 Del. (3 Harr.), 420 (Super. Ct., 1842).

92. 5 Del. (3 Harr.), 347 (Super. Ct., 1851).

93. Del. Rev. Stat., tit. 4, ch. 16, §13 (1852).

94. Delaware Constitution, art. 5, §7 (1897). See also Del. Rev. Stat., tit. 4, ch. 16, §13 (1874).

95. 10 Del. (4 Houst.), 209 (Super. Ct., 1870).

96. 10 Del. (4 Houst.), 448 (Super. Ct. 1872).

97. See part III.B., infra.

98. Law of February 6, 1795, ch. 78C, §4, 2 Delaware Laws 1209. The penalties were $4 or, in default, twenty-four hours in jail.

99. See notes 33-37, supra, and accompanying text.

100. See notes 84-87, supra, and accompanying text.

101. Law of March 4, 1857, ch. 454, §1, 11 Del. Laws 515; Del. Rev. Stat., tit. 20, ch. 132, §7 (1874); Del. Rev. Code, tit. 20, ch. 132, §7 (1893).

102. Law of March 15, 1865, ch. 546, 12 Delaware Laws 623; Del. Rev. Stat., tit. 20, ch. 132, §7 (1874).

103. Jacobs v. Walton, 1 Del. (1 Harr.), 496 (Super. Ct., 1835). See note 33, supra, and accompanying text.

104. Del. Rev. Stat., tit. 4, ch. 16, §13 (1852); see note 95, supra, and accompanying text.

105. Del. Rev. Stat., tit. 4, ch. 16, §14 (1852).

106. 10 Del. (4 Houst.), 467 (Super. Ct., 1873).

107. 7 Encyclopedia Britannica 191 (1965).

108. Hancock, Delaware, 1865-1914, in REED, supra, note 1, at 183, 190, quoting Every Evening, History of Wilmington, 50 (1894).

109. Delaware State Directory, 1894, at 353.

110. Hancock, supra note 110, at 201.

111. 8 Encyclopedia Britannica 652 (1964).

112. According to two writers, if the 1890's were "gay" in Delaware, it was with the most innocent of activities, and certainly none of the wildness or decadence associated with that period in other locales. See Hancock, supra note 104, at 189, quoting A. Grier, This Was Wilmington 44-48 (19--).

113. Law of April 21, 1887, ch. 237, 18 Delaware Laws 453; Del. Rev. Code, tit. 20, ch. 131, §7 (1893).

114. Del. Rev. Code, tit. 8, ch. 53, §17 (1893); Law of April 26, 1893, ch. 646, 19 Delaware Laws 760.

115. See note 103, supra, and accompanying text.

116. State v. Fountain, 15 Del. (1 Marv.), 532, 41 A. 195 (Gen. Sess., 1893).

117. State v. Hamilton, 22 Del. (6 Penn.), 433, 67 A. 836 (Gen. Sess., 1907).

118. 28 Del. (5 Boyce) 230, 91 A. 1000 (Gen. Sess., 1914).

119. Id. at 232, 91 A. at 1000. Judge Wooley neglected to consider the effects of the general gambling ban placed by the 1897 constitution, Delaware Constitution, art. 2, §17 (1897). It could be argued, however, that the implicit effect of that provision was merely to prohibit previously-unrestricted public gambling, and to leave unregulated private gambling to the regulatory whim of the legislature.

120. Id. at 233, 91 A. at 1001.

121. Del. Rev. Code, §3568 (1915); Del. Rev. Code, §4058 (1935); Del. Code Ann., tit. 11, §666 (1953).

122. State v. Titleman, 30 Del. (7 Boyce) 443, 108 A. 92 (Gen. Sess., 1920).

123. State v. Caruso, 42 Del. (3 Terry) 310, 32 A. 771 (Gen. Sess., 1942).

124. State v. DiMaio, 55 Del. (5 Storey) 177, 185 A.2d 269 (Super. Ct., 1962).

125. 45 Del. (6 Terry) 357, 74 A.2d 83 (Gen. Sess., 1950).

126. Del. Rev. Code, §4058 (1935); see note 123, supra.

127. With amendments, this constitution is still in effect, although attempts to rewrite it have been underway since 1970.

128. Delaware Constitution, art. 5, §7 (1897).

129. State v. Sedgwick, 25 Del. (2 Boyce) 453, 81 A. 472 (Gen. Sess. 1911).

130. Id. at 456, 81 A. at 473.

131. State v. Gilbert, 29 Del. (6 Boyce) 374, 100 A. 410 (Super. Ct., 1917).

132. Affiliated Enterprises, Inc. v. Waller, 40 Del. (1 Terry) 28, 5 A.2d 257 (Super. Ct. 1939).

133. The same theory was reaffirmed in State v. Eckerd's Suburban, Inc., 53 Del. (3 Storey) 103, 164 A.2d 873 (Sup. Ct. 1960).

134. Del. Rev. Code, §§3564-67 (1915).

135. Del. Rev. Code, §§4054-57 (1935); Del. Code Ann., tit. 11, §§661-64 (1953).

136. 52 Del. (2 Storey) 561, 163 A.2d 256 (Super. Ct. 1960).

137. Pepe v. State, 53 Del. (3 Storey) 417, 171 A.2d 216 (Sup. Ct.), cert. denied 368 U.S. 31 (1961). See also Pepe v. Anderson, 205 F. Supp. 313 (D. Del. 1962).

The Delaware lottery cases have consistently borne a close resemblance to numbers writing cases, although that offense was not specifically established as a distinct and separate crime until 1935, Law of March 27, 1935, ch. 220, 40 Delaware Laws 708; Del. Code Ann., tit. 11, §669 (1953).

138. Donlon v. State, 293 A.2d 575 (Del. Sup. Ct. 1972).

139. Law of July 24, 1970, ch. 772, 57 Delaware Laws 2328.

140. Law of August 5, 1971, ch. 312, 58 Delaware Laws 989.

141. Law of June 25, 1973, ch. 143, 59 Delaware Laws ---.

142. Law of May 31, 1974, ch. 348, 59 Delaware Laws ---. "Delaware Halts Sagging Lottery," New York Times, April 13, 1975, p. 41, col. 1.

143. Law of June 1, 1945, ch. 1, 40 Delaware Laws 4.

144. Law of May 1, 1957, ch. 61, 51 Delaware Laws 88 (adding Delaware Constitution, art. 2, §17A).

145. The leading case is State v. Panara, 28 Del. (5 Boyce) 230, 91 A. 1000 (Gen. Sess. 1914). See notes 114-15 supra and accompanying text. The legality of all social gambling which does not violate one of the specific prohibitions, such as the "gambling device" law, was reiterated in State v. Carbone, 49 Del. (10 Terry) 577, 121 A.2d 909 (Super. Ct. 1956). The court in the latter case also declared that persons whose participation in a

charity carnival permitting some gambling was entirely voluntary were not liable to criminal prosecution. The The court suggested in dicta that firemen who held a carnival and hired professional gamblers--this may be the only mention of "professional" gamblers in Delaware case history--might be penalized if they were members of the organization to which the funds went. In response, the Delaware legislature adopted a constitutional amendment to article II, permitting bingo for charities and other non-profit organizations, Delaware Constitution, art. 2, §17A; see note 140, supra.

146. Law of March 21, 1907, ch. 255, 24 Delaware Laws 688; Del. Rev. Code, §3570 (1915).

147. Law of April 6, 1895, ch. 41, 20 Delaware Laws 51; Del. Rev. Code §3572 (1915). The law was modified by the 1935 pari-mutuel horse-racing enabling act. See note 152 infra.

148. Law of February 18, 1901, ch. 215, 22 Delaware Laws 506; Del. Rev. Code, §3574 (1915).

149. State v. Kelleher, 32 Del. (2 W.W. Harr.) 559, 127 A. 503 (Gen. Sess. 1924).

150. Law of February 6, 1935, ch. 112, 40 Delaware Laws 385; Del. Rev. Code §5510 (1935). These sections were included in the 1953 code. Del. Code Ann., tit. 28, §§361-67 (1953). Other authority on horse racing prohibits night racing (28 Del. Code Ann., tit. 28, §§341-42 (1953)), permits racing in Kent County (Id. §§401-403, 441-47), and permits harness racing (Id. §§551-55).

151. Del. Code Ann., tit. 11, §§661-70 (A) (1953 and 1970 Supp.).

152. Law of January 28, 1953, ch. 494, 28 Delaware Laws 1282; Del. Code Ann., tit. 11, §665 (1953). Except for the gambling-house provision was present in the 1935 Code, Del. Rev. Code, §4061 (1935).

153. Law of June 5, 1951, ch. 289, 48 Delaware Laws 740; Del. Code Ann., tit. 11, §669 (1953).

154. Law of January 28, 1952, ch. 493, §§2-5, 48 Delaware Laws 1280; Del. Code Ann., tit. 11, §§671-77 (1953).

155. Law of January 28, 1952, ch. 493, §4, 48 Delaware Laws 1280; Del. Code Ann., tit. 11, §675. This provision was amended in 1968, but not significantly altered: Law of July 5, 1968, ch. 395, 56 Delaware Laws 1710; Del. Code Ann., tit. 11, §675 (Supp. 1970).

156. 39 Del., ch. 350, 164 A.2d 254 (1960).

157. Law of January 22, 1952, ch. 490, 48 Delaware Laws 1274; Del. Code Ann., §678-86 (1953). The origin of the obstructions legislation is the Law of March 4, 1857, ch. 454, 11 Delaware Laws 515, a prohibition against gambling devices and keeping a gaming house.

158. Law of June 5, 1951, ch. 209, 48 Delaware Laws 740; Del. Code Ann., §669 (1953).

159. Del. Code Ann., tit. 11, §662 (1953). This statute was titled "Being concerned in interest in lottery policy writing or vending," but was popularly known as the "Numbers Writers' Statute." Rossitto v. State, 291 A.2d 290, 291 (Del. Sup. Ct. 1972). Similarly, the statute dealing with the recording of bets at a premises maintained for that purpose (Del. Code Ann., tit. 11, §669 (1933); see note 162, infra) has been known as the "Bookmakers' Statute," 291 A.2d at 291.

160. Del. Code Ann., tit. 11, §669 (1953).

161. Tollin v. State, 46 Del. (3 Terry) 120, 178 A.2d 810 (Gen. Sess. 1951).

162. 50 Del. (11 Terry) 460, 134 A.2d 272 (Super. Ct. 1957).

163. Del. Code Ann., tit. 11, §669 (1953).

164. State v. DiMaio, 55 Del. (5 Storey) 177, 185 A.2d 269 (Super. Ct. 1962). This case also upheld the constitutionality of seizure in the devices area. See note 120, supra, and accompanying text.

165. Rossitto v. State, 234 A.2d 438 (Del. Sup. Ct. 1967).

166. Rossitto v. State, 291 A.2d 290 (Del. Sup. Ct. 1972).

167. Del. Code Ann., tit. 15, §5164 (1953).

168. Law of April 26, 1962, ch. 360, 53 Delaware Laws 920; Del. Code Ann., tit. 10, §7101 (Supp. 1970).

169. See notes 141-44, supra, and accompanying text.

Paragraph Index

The Development of the Law of Gambling:

THE DISTRICT OF COLUMBIA

P.K.S.

R.M.S.

D.F.D.

G.D.L.

Table of Contents

Summary

¶1 The development of the law of gambling in the District of Columbia has paralleled that of the nation. During the early 19th century when lotteries were fashionable, the District of Columbia became a center for ticket sales. Later, when gambling halls followed settlers into the Midwest and West, Washington became the hottest gambling town in the East. Finally, just as reform movements elsewhere first sought to prohibit gambling legislatively, and then to secure the enforcement of the prohibition, so too did the District of Columbia. Today, gambling in all its forms is outlawed by a patchwork of old statutes. No forms of gambling have been decriminalized.

Introduction

¶2 The territory that is now the District of Columbia originally was part of Maryland and Virginia. The government of the District of Columbia, despite that original organization, however, has never enjoyed powers as broad as those vested in the governments of individual states.[1] In 1889, the United States Supreme Court aptly described the District as "a qualified State" whose sovereign power "is not lodged in the corporation of the District of Columbia, but in the government of the United States. Its supreme legislative body is Congress." Crimes committed in the District are,

therefore, crimes against the United States.[2] The history of the District's legal status, however, is a good deal more complicated than this simple analysis seems to indicate.

¶3 The District of Columbia was formally created in 1801 as the nation's Capitol from lands carved out of Virginia and Maryland. The 1801 Act provided that the laws of these states should continue in force in the respective areas ceded by them. Likewise, its two municipal governments, Washington and Georgetown, were to continue intact.[3] The Virginia portion was ceded back in 1846,[4] and the laws of the District were unified, although the two chartered cities remained with their own distinct ordinances. The application of British common law in the states as mere persuasive authority had been settled long before,[5] but its place in the law of the District of Columbia remained in doubt until an act passed in 1901 finally declared that:

> The Common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty . . . shall remain in force except insofar as the same are inconsistent with, or are replaced by, subsequent legislation of Congress.[6]

¶4 Thus, Mr. Justice Douglas observed several years ago that the law of the District "is a compendium of a variety of laws drawn from various sources,"[7] including (1) the principles and maxims of equity as they existed in England and in the colonies in 1776, (2) the common law of England, (3) the laws of Maryland and Virginia as they existed on February 27, 1801,[8] (4) the acts of the Legislative Assembly

created in 1871 but dismissed three years later, and (5) all acts of Congress applicable to the District.[9]

¶5 Today, although all of the present gambling laws are collected in the District of Columbia Code, the original statutes are found primarily in riders to federal statutory material and in the confused mixture of laws received from Virginia, Maryland, Great Britain, and the common law. Authoritative interpretations of these laws have been made, successively, by the United States Court of Appeals for the District of Columbia and currently by the District of Columbia Court of Appeals.[10]

I. The Early Experience: To 1831

¶6 From 1801 to 1831 the gambling law of the District of Columbia consisted of relatively discrete statutory prohibitions supplemented by principles of the common law.

A. Early Anti-Gambling Statutes

¶7 From the District's very beginning, an anti-gambling attitude, inherited from Maryland, was written into law. A 1792 Maryland Act had forbidden the sale of tickets in lotteries not approved by the Maryland legislature,[11] and a 1797 Act prohibited the keeping of gambling tables in taverns or in houses occupied by retailers of wines and spirits.[12]

¶8 The two cities within the District, Georgetown and Washington, continued to enact municipal anti-gambling

ordinances after the creation of the District. An 1806 Georgetown bylaw prescribed a $20 fine for keeping a public gaming table or device.[13] An 1802 Act by Congress authorized the Washington City Council to take measures to "restrain or prohibit gambling,"[14] and the Council in 1809 accordingly prohibited the keeping of faro tables.[15]

¶9 Such measures, however, hardly sufficed to limit the gambling itch felt by Washingtonians and their many visitors. Though Washington remained a small town in its first decades, disappointing the government's hope that the city would become a major metropolitan area, it did experience a large influx of visitors in the early 19th century, and tourism quickly became its leading industry. Tourists, of course, must be entertained, and in 1830 an exasperated City Council passed a more comprehensive bylaw:

> No E.O., A.B.C., L.S.D., faro, rolly-bolly, shuffleboard, equality table, or other device, to be used with cards, balls, dice, coin, or money, or any other game of hazard (except the game of billiards upon licensed billiard tables) for the purpose of playing, or gaming for money or anything in lieu thereof, shall be set up, kept, or exhibited in any part of this city, under a penalty of fifty dollars for every day or less time that such [device] shall be so kept or exhibited.[16]

¶10 The common law was also used to try to suppress gambling during the District's early years. The principle that gaming houses are indictable as common nuisances was recognized as early as 1803.[17] In 1830, one Jacob Dixon sought reversal of his conviction for keeping a house in which faro was played, on the ground that faro playing was not a

crime at common law. Chief Justice Cranch affirmed the conviction, explaining that the essence of the offense was not the private vice but the public inconvenience:

> Hawkins (book 1, ch. 75, §1) says ". . . all common gaming houses are nuisances in the eye of the law;" not only because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood . . .
>
> . . . . It has been said, in argument, that if the law be so, every man who has a whist party at his house is liable to be prosecuted and punished for a nuisance. But the distinction is broad and palpable. To become a common nuisance, it must be a common gaming house, kept for lucre and gain, holding out allurement to all who are disposed to game, and kept for that purpose.[18]

¶11 Washington, however, had become a gambling town, and these earlier restrictions were generally ignored by the law enforcement agencies.

B. Lotteries

¶12 While sporadic efforts were made to suppress the more common forms of gambling, the outstanding phenomenon of the 18th and early 19th centuries was the disproportionate volume of legal gambling in the form of lotteries. As one history of gambling in the District notes:

> The District of Columbia had a special experience with lotteries. It was the Federal capital before it was a city and the finance of grandeur created problems.[19]

¶13 In 1792, Congress had authorized a lottery to finance important projects in the planned capital for which ordinary revenues might prove insufficient. As historian John Samuel

Ezell remarked: ". . . [T]he day of insufficiency soon dawned."[20] The National Lottery got underway in 1793 with the appointment of architect, economist, and real estate speculator Samuel Blodget as lottery agent. Blodget proposed to sell 50,000 tickets throughout the country at $7 each, promising 16,000 prizes: a grand prize of a $50,000 hotel, and cash prizes from $10 to $20,000. Blodget's lottery was slow to catch on, however, since American citizens in the 1790's were inundated on all sides by tickets for a variety of lotteries. Rumors quickly spread to the effect that the more valuable prizes had not been put in the wheel, and Blodget was forced to pledge his real and personal property to guarantee payment of the prizes. By 1798, with the hotel not yet completed, the grand prize winner brought suit against Blodget, and Blodget's property was sold to satisfy the adverse judgment.[21]

¶14 Public opinion had, for the moment, turned against lotteries. The transplanted English journalist William Cobbett commented on the Blodget affair:

> Have you an itching propensity to turn your wit to advantage? Make a lottery. A splendid scheme is a bait that cannot fail to catch the gulls. Be sure to spangle it with rich prizes: the fewer blanks--on paper--the better; for on winding up the business, you know, it is easy to make as many blanks as you please. Witness a late lottery on the Potowmack. The winding up, however, is not absolutely necessary. . . . The better way is to delay the drawing; or should it ever begin, there is no hurry about the end, or rather, let it have no end at all.[22]

¶15 The unfortunate end to the Blodget affair, however, was far from the end of lotteries in the District of Columbia. On the contrary, while other forms of gambling were being

outlawed, lotteries were being held more frequently than ever. In 1812, the Municipal Charter authorized lotteries, provided the amount to be raised in each year did not exceed $10,000 and provided the President of the United States approved the object to be benefitted. Drawings were held to construct public schools in 1812, a penitentiary in 1814, and a city hall in 1815.[23]

¶16 This second wave of lotteries proved to be a municipal nightmare, and two cases arising from lottery problems went all the way to the Supreme Court. In 1812, Congress agreed with the State of Maryland to authorize a lottery in order to finance the construction of a canal between the District of Columbia and Maryland. Ticket sales for the lottery continued in surrounding states for several years. In 1820, Virginia passed a law outlawing the sale of chances not authorized by the Virginia legislature, but the promoters of the lottery, confident of the power of their congressional license, continued to sell tickets in Virginia. The Virginia authorities, who were not so confident of the scheme's legitimacy, promptly arrested them, and the lottery holders appealed their convictions to the Supreme Court. The famous case of Cohens v. Virginia[24] is best remembered for its affirmation of the Supreme Court's appellate jurisdiction, but the actual holding of the case, long forgotten by many scholars, was that the congressional license did not authorize ticket sales in states where such sales were otherwise prohibited.

¶17 A second Supreme Court case arose when a lottery franchise agent, a Mr. Gillespie of New York, defaulted on the prizes for a lottery conducted for the purpose of financing the building of two public schools, a penitentiary, and a town hall. One of the winners brought suit, and the Supreme Court in Clark v. Corporation of Washington[25] dealt the city another blow, holding it directly liable to the disappointed prizewinners. The city was forced to sell stock to pay all the claims which followed this case. Ezell observed:

> [T]his suit alone cost more than $200,000! Needless to say, there were no more lotteries instituted in the District of Columbia.[26]

¶18 The District, however, remained a center of lottery activity. Vendors for lotteries from all over the nation proliferated. In 1832, the licensing of ticket sellers was instituted. In 1827, the sale of tickets for lotteries not authorized by a particular state was forbidden. It was not until 1842, however, when most states had already taken the step, that lotteries were entirely prohibited in the District of Columbia.[27]

II. The Formative Era: 1831-1901

A. Gaming and Gambling Houses

¶19 1831 brought the first congressional effort to establish comprehensive criminal laws for the District of Columbia. Among the provisions of the Penitentiary Act of 1831 was one forbidding "keeping a faro bank or other common

gaming table." A penalty of imprisonment and labor for one to five years was prescribed, and offenders called to testify were granted immunity from prosecution.[28]

¶20 From the first, enforcement of the gambling-table prohibition could not be called zealous. In 1835, the circuit court held that exhibition of a "sweat-cloth" (a device used in betting booths set up at horse races) for a single day's duration did not amount to "keeping."[29] In a concurring opinion, Justice Thurston, though striking out at the destructive evils of continual gambling, disparaged the prosecution's efforts literally, and hypocritically, to construe the law so as to curtail this "poor man's" festival gambling:

> Congress has tolerated the principal vice, horse racing. It is hardly presumable they would have left this higher quarry and struck at the humbler sweat-cloth. . . . Do you believe that Congress meant, under this short, but sure magic word "keeping," for magic it is indeed, if it has such wonderful efficacy to put down, so suddenly, this ancient usage, "more honored," it is true, "in the breach than the observance," this petty gambling, confined to the poor, the ignorant, during a few days, at most, of an annual celebration; when, from long habit, and the indulgence of the laws, until now, a general relaxation of manners have been permitted and tolerated during such celebration; like the Saturnalia at Rome. . . . Are we reformers, or are we judges, to administer the law as it is, and not as we think it ought to be, to the poor and rich with equal hand; and leave reformation to be worked out where alone it can and ought to be, by the wisdom of the laws, or the spread of knowledge and diffusion of learning, or by the influence of moral and religious instruction, by the minister of religion?[30]

¶21 The problem, however, was more pervasive than that one-shot, Saturnalian adventure assumed by Justice Thurston. With the demise of public lotteries, private lotteries, played predominantly by the poor, persisted in the District. Following the burning of the city by British troops in 1814, Congress authorized only niggardly appropriations for purposes of rebuilding, and the city continued to be underdeveloped and populated by the poor and the transient.

¶22 Taking aim at the private lotteries, an 1842 Act made it unlawful to keep a place of business for the sale of tickets or to offer for sale tickets or ticket shares. A penalty of not more than one year nor less than six months imprisonment and/or a fine of $100 to $1,000 (half to be retained by the informer) was prescribed.[31] Contracts for the sale of tickets were declared void, and the buyer was allowed to recover the price as money paid on a void consideration.[32]

¶23 Another statute which was used, but not vigorously, to suppress gambling in the District was the English Statute of Anne, which had been in effect in Maryland in 1801 and was thus received as part of its law by the District of Columbia.[33] All debts which arose from the "playing at any game whatsoever, or by betting on the sides or hands of persons who play" were declared void, as were those arising out of laws made for gambling purposes. The loser of £10 or more was given a cause of action against a winner already paid. If the loser failed to sue within three months, any person could do so. Such a plaintiff could recover treble damages, half for himself and

half for support of the poor. Winning £10 or more by fraud was made a crime, punishable by forfeiture of five times the amount won. Still other provisions prescribed a penalty for assault on account of gambling and limited the power of equity courts to decree payment of wagers.

¶24 The statute was recognized as applicable to billiard winnings[34] and gambling winnings generally,[35] but since it dealt with betting on "games" many kinds of wagers were enforced in accordance with the rule that fair wagers are recoverable unless offensive to public policy.[36]

¶25 With minor changes,[37] the Statute of Anne is still in the District's Civil Code today.

¶26 Popular as gambling was with the masses in the 19th century, it was not, as far as social Washington was concerned, exclusively a poor man's pastime. On the contrary, open gambling in fashionable gaming houses was widespread in the capital through the middle years of the century. Many of the nation's respected statesmen were acknowledged gamblers.[38] Perhaps the most famous gambling establishment in the District of Columbia was Edward Pendleton's Palace of Fortune which opened in 1837 and closed with his death in 1858. It was frequented by the most fashionable and powerful men of the nation. "Lobbyists as well as politicians habituated the Palace of Fortune, and were always delighted at a chance to lend cash to a legislator, who went broke fighting the tiger. Such debts were conveniently forgotten as bills the lobbyists were promoting went to the floor of Congress."[39] Pendleton

himself became one of the city's most prominent permanent residents. "He gained impeccable connections in Washington society, was close to the rich and powerful who pulled the strings behind the political scene."[40] In fact, when he died, "several leading democrats were pallbearers at the funeral and the President [Buchanan] attended."[41]

¶27 Pendleton's death signalled an end to an era in Washington. With the advent of the Civil War and the inundation of the District of Columbia with military personnel, General L. C. Baker, chief of the Secret Service, decided it was high time the long-ignored gambling statutes be enforced. It was in the interest of the war effort, he reasoned, to see that they were obeyed. His campaign caused quite an uproar among the more distinguished patrons, and President Lincoln sent for him and asked why he was stirring up such a tempest. Reports an historian of the period:

> General Baker pointed out the ruinous effect gambling was having on prominent civilians and military officials and asked for a free hand to smash this vice in Washington. Lincoln, a penny-ante card player from his flatboat days, had to agree, and Baker left him with the understanding that the government would not meddle in his drive to clean up the city.[42]

This he accomplished in short order.

¶28 One of the reasons often cited for the early failure to enforce effectively the gambling provisions was that the stiff penalties prescribed prevented jury convictions. An early 19th century city ordinance, for example, (c. 1812) specified a very strict two-to-eight year prison sentence for

running a gambling house. Consequently, juries were reluctant to convict; and in the very few cases of conviction, presidential pardons were forthcoming.[43]

¶29 Thus, it was not until 1878, when Congress lowered the prescribed penalties and eliminated the informer provision,[44] that the courts showed a willingness to treat the violation seriously.

¶30 The somewhat more lax treatment of gambling following General Baker's campaign coincided with a tremendous influx of new poor. During the Civil War the population of Washington had doubled as the city at once became the principal supply depot for the army of the Potomac, a great hospital center, and the source of sought-after government weapons contracts. After the Emancipation Proclamation towards the end of the war, about 40,000 former slaves from Maryland, Virginia, and points south poured into Washington, bringing with them social and economic problems. Poorly educated, the new residents of Washington were particularly subject to the temptations of private gambling. In the later decades of the century, in response to new pressures, Congress acted to tighten the laws.

¶31 An 1883 "Act more effectually to suppress gaming in the District of Columbia" made it unlawful to keep any table or device "designed for the purpose of playing any game of chance for money or property," or to permit or induce anyone to play at such a device. Violators were punished by imprisonment for up to five years. The Act also punished those in control of premises where gambling devices were kept

(maximum: one year, $500) and the playing of three-card monte and other confidence games (maximum: five years hard labor, $1,000).[45]

¶32 Congress was making clear its belief that all forms of gambling were evil. The 1883 Act defined "gaming table" as any device at which money was wagered. The courts were directed to construe the law liberally "so as to prevent the mischief intended to be guarded against."[46]

¶33 The courts obeyed the congressional mandate. In an 1895 case, Miller v. United States,[47] the court declared that a booth used for taking bets on horse races was a gambling device within the meaning of the Act:

> The definition of a gaming table under the statute does not involve the ordinary mechanical definition of a table . . .[48]

The finding that betting on horse racing is a game of chance was essential to the holding:

> It has from an early time been held that a horse race is a game of chance, and so is a game of baseball, and so a foot race, where wagers have been made upon them.[49]

¶34 In 1888, betting on races, elections, and athletic and other contests was made unlawful in the cities of Washington and Georgetown. A fine of $25 to $100, or imprisonment for up to ninety days, or both, was prescribed.[50] In 1891, the prohibition was extended to the area within one mile of the two cities' limits (but still within the District), and the maximum fine raised to $500.[51]

B. Gift-Enterprises

¶35 In the last decades of the 19th century, gambling in Washington had been severely curtailed. This phenomenon, however, was just a reflection of a nationwide trend of efforts to eliminate perceived social vices.[52] As Mr. Justice Hagner wrote of lotteries in 1890:

> Although formerly permitted by law, and even encouraged, public opinion for nearly half a century almost everywhere in this and all civilized countries has recognized lotteries as fruitful sources of unmitigated mischief; as a cunning scheme by which crafty knaves plunder the silly and credulous; destructive of thrift and honest industry and pandering to idleness and vice. . . . The keeping of a shop within this District for the sale of lottery or policy tickets, is something affecting the entire country.[53]

¶36 A good illustration of the judicial thinking that dominated the formative era is the story of the "gift-enterprise." In the closing decades of the century, the full weight of the law was brought to bear on this child of the lottery age, a species of sales promotion widely accepted today.

¶37 In 1871, the District of Columbia Legislative Assembly mandated the licensing of gift-enterprise businesses.[54] Congress repealed this scheme in 1873 and declared such businesses unlawful, operation thereof to be punished by a maximum $1,000 fine or imprisonment for six months to one year, or both.[55]

¶38 The Appeals Court, following Congress' lead, demonstrated uncharacteristic fervor in attacking this species of gambling. In 1899, Joseph A. Sperry, owner of a trading

stamp company, came before the Court to appeal his conviction under the gift-enterprise law. Sperry and his co-defendant, a District of Columbia retailer, maintained that the law was an intolerable restraint on freedom of trade. Justice Shepard[56] "turned the tables" on Sperry, declaring that it was his business, not the statute, which was the intolerable restraint:

> With no stock in trade but . . . the necessary books and so-called premiums . . . they have intervened in the legitimate business carried on in the District of Columbia between seller and buyer, not for the advantage of either, but to prey upon both. . . . Other merchants and dealers who can not enter [the promotion] must run the risk of losing their trade or else devise some other scheme to counteract the adverse agency.[57]

¶39 In 1902, Justice Shepard declared unlawful a promotion involving the exchange of cereal box coupons for premiums.[58] In 1910, he resumed the battle against trading stamps:

> The whole country is now agitated by the increased cost of living that has grown to alarming proportions. . . . While there is difference of opinion as regards the chief source, all concur in the opinion that every introduction of superfluous middlemen, and consequently unnecessary charges between producer and consumer, undoubtedly contribute[s] to swell the stream to overflowing.[59]

Dissenting, Justice Van Orsdel recalled that the evil perceived by Congress was gambling and not retail competition. A trading stamp operation, he argued, did not amount to gambling. The element of chance was absent: "Every stampt exchanged has a fixed value."[60]

¶40 Van Orsdel's arguments, however, were to no avail. Even the Supreme Court of the United States, in this age of anti-gambling feeling, agreed with the Shepard approach toward trading stamps.[61]

¶41 Gift-enterprise operators fared no better, even after the end of Justice Shepard's tenure on the bench. In 1918, in one of the last significant gift-enterprise cases, Chief Justice Smyth declared unlawful a newspaper contest involving the awarding of gift points to advertisers and their customers:

> It is urged that if the scheme is condemned, an athletic contest for a prize, or a contest for a Rhodes Scholarship, or one for the best breed of horses, or any like contest, must also be prohibited. Not at all. Such contests lack the vice which impel disapproval of an enterprise like the one in question. They have no tendency to "lure to improvidence;" they lack the seduction and evil of the other scheme. Instead they induce to efforts of great benefit and merit.[62]

C. Bucketing

¶42 Public policy arguments similar to these used in the anti-gift-enterprise drive were used to suppress "bucket-shops." In 1883, Justice Hagner refused to endorse a bucket-shop transaction, holding it contrary to public policy:

> All observers agree that the inevitable effect of such dealings is to encourage wild speculations; to derange prices to the detriment of the community; to discourage the disposition to engage in steady business or labor, where the gains, though sure, are too slow to satisfy the thirst for gaining when once aroused; and to fill the cities with the bankrupt victims of such disasters as any "Black Friday" may develop.[63]

¶43 In 1909, Congress outlawed "bucketing" in the District. The offense was defined as the making of or offering to make any contract for sale of securities or commodities on credit or margin, in which at least the seller does not intend bona fide delivery. Stiff penalties were prescribed including, in the case of corporations, equitable proceedings to dissolve (if domestic) or restrain (if foreign) the corporation. Those who "communicate, receive, exhibit, or display" price quotations with intent to violate the law were also punished.[64] The evil perceived by Congress was described in the House debate on the bill:

> Mr. Campbell, Kan.: . . . . Thousands of industrious men, through no fault of theirs, have been thrown out of employment because other men gambled on the differences in the prices of the property they produced or worked with . . . Why, Mr. Speaker, to the actual investor and to the man who speculates on his best judgment, the dividends paid by a concern would largely control him in the price he would pay for its stocks or bonds, and yet it is actually true that on the stock exchanges in Wall Street and elsewhere in the country the prices of stocks and bonds are not controlled by this standard of value. . . . The influence of these gambling prices upon the business of the country can not be anything but bad.[65]

¶44 Washington had come far. In the 1850's the nation's leaders had been among the most prominent gamblers in town, but, by the first decade of the 20th century, the margin buying of otherwise legitimate securities was vigorously denounced on the floors of Congress. On the surface, at least, a profound change had come over Washington during this period.

III. The Modern Era: 1901 to 1975

A. Numbers

¶45 By the turn of the century, gambling houses in Washington were only memories. The various prohibition groups had succeeded in driving the vice underground. There the many forces reorganized in less garrish fashion, catering mostly to the ghetto dwellers, who had become the majority of Washington's citizens. Numbers eventually emerged as the new game. All that was needed was a newspaper, a tablet, and a pocket full of money. It was practically impossible to suppress. In fact, the "runner" or "writer" was widely seen as a local hero: generous, affable, and, most importantly, very successful.[66]

¶46 Thus, well into the 20th century, gambling in the District of Columbia had become a highly organized enterprise, popular especially among the lower classes of the urbanized populace. Like any other well-managed business, it had become adaptable, innovative, and hence more profitable. As a result, the courts in the District of Columbia and Congress had to transform District of Columbia lottery law into District of Columbia numbers law.

¶47 In 1936, the District of Columbia Appeals Court, in an opinion by Justice Van Orsdel, held the numbers game a lottery:

> The fundamental point is that in each case there is the offering of a prize, the giving of a consideration for an opportunity to win the prize, and the awarding of the prize by chance. [emphasis added][67]

In 1938, Congress took up the battle, declaring the knowing

possession of number slips to be unlawful.[68] In 1953, possession was made prima facie evidence of knowing possession.[69] In addition, in 1953, a potential loophole[70] was closed with amendment of the statute to encompass possession of tickets "either current or not current," as well as of all other records, receipts, etc.[71] While consideration is an essential element of a lottery, it is clear that a prosecution for possession of numbers slips required no showing that a consideration was ever received.[72] Even the possession of "cut cards" (listing of number which "hit" more frequently than others and for which odds are reduced) is today unlawful.[73]

148 Under present law, lottery operation and ticket sales are punished by fines up to $1,000 and imprisonment up to three years, or both.[74] The keeping of premises used for ticket sales is punished by fines from $50 to $500 or imprisonment up to one year, or both.[75] All things of value (including money) used in conducting any lottery are subject to seizure and, in a libel action brought by the District, to forfeiture.[76]

B. Gambling Devices and Bookmaking

149 Since the thrust of the District's gambling legislation has been primarily the concentration on banning gaming devices,[77] the focus of its court decisions has necessarily been on defining terms like "devices" and determining the extent of the prohibitions included in the statutes. The gambling table/device prohibition has been applied to a

variety of instrumentalities. A gambling device, one court held, is an instrument which induces one to risk property "upon an event, chance or contingency in the hope of the realization of gain."[78] A mint vending machine randomly dispersing tokens exchangeable for "fortunes" is a gambling device;[79] so is a "claw machine" with which a player tries to pick up prizes enclosed in a glass cage since "on the whole . . . chance predominate[s] over skill or [is] present in such manner as to thwart the exercise of skill."[80] A pinball machine awarding only "free plays" is not a gambling device, since it affords no real hope of financial gain.[81] Under present law, the keeping of any gambling table or device for gaming is punishable by up to five years imprisonment[82] and by forfeiture of the device.[83]

¶50 In the District of Columbia bookmaking on any athletic contest or sporting event is treated as only a misdemeanor, punishable by a maximum $1,000 fine and one year imprisonment.[84] On the other hand, the keeping of a gambling table or device has always been punished severely. As a result, bookmakers have often been prosecuted under the more severe gambling table statute. In 1951, however, in Plummer v. United States,[85] the Appeals Court, in an opinion by Judge Prettyman, established a limit on such prosecutions. The court held that the word "table" contemplates a physical device or contrivance:

> An accused cannot be guilty of keeping a gaming table if he merely took a bet; he cannot be convicted of a felony if the sum total of the evidence is that he committed a misdemeanor.[86]

Though bookmaking on sports events may be only a misdemeanor, corrupting sports by tampering with the participants or the outcome is a far more serious offense, punishable by a stiff one to five years in prison and up to $10,000 in fines.[87]

¶51 Prosecution of bookmakers for keeping premises used for gambling (also a felony) continues. In 1906, the Appeals Court acknowledged that a defendant need not have had permanent possession of the premises; it is sufficient that he be a lessee, keeper, agent, servant, or anyone else with "some right of power over or in the premises."[88] Circumstantial evidence, if substantial, is viewed with favor. As Justice Groner remarked in Beard v. United States, a 1936 case:

> This is a case like that of men found at midnight at a blockade still in full operation, located in the depths of a swamp. Their presence at the place of the crime may be accidental and innocent, but the inference is that it is not, and calls for explanation; and, if they offer none and the jury convict, an appellate court would not be justified [in] saying that the inference is not sufficient to sustain the conviction.[89]

The prosecution need not prove that betting took place or that money passed on the premises: "[t]he gravamen of this felony is furnishing the facilities for gaming activities."[90] The premises need not be open to the public. An office from which bookmaking is coordinated by telephone is construed as within the meaning of "gambling premises."[91]

¶52 In cases involving wagering transactions, the courts of the District have been presented with a problem of conflict

of laws. In Hamilton v. Blankenship,[92] a 1963 case, the transaction involved was a loan made in Maryland for purposes of lawful betting. The Appeals Court affirmed a lower court holding that a District of Columbia court will not enforce a gambling transaction, regardless of its validity in the locus contractus, since it is opposed to the public policy against enforcement which finds expression in the District's Code.

¶53 Since persons such as number players, rare bettors, and others are mentioned with particularity in the District's Code, there is no need for the prosecution to rely on the law of conspiracy and complicity to obtain gambling convictions in the District of Columbia, as is the case in some states. Furthermore, the presence and employment of a person in a gambling establishment were themselves criminalized in 1953.[93] The law of complicity, however, is still significant for evidentiary purposes. In 1914, Justice Van Orsdel in the case of Paylor v. United States,[94] however, held that bettors are not accomplices of one another:

> To establish the relation of accomplice, two or more persons must unite in a common purpose to do an unlawful act. When two persons wager on the result of a certain event, the purpose of each is diametrically opposed to that of the other. . . . It could be asserted with equal force that two persons engaged in fighting a duel are accomplices. While each is violating the same law, they are not engaged in a common purpose to kill a common antagonist, but in a distinct and separate purpose of killing each other.[95]

Thus, uncorroborated testimony of one party to a wager may be used to convict the other party.

¶54 Where the tool of conspiracy is used, such prosecutions in the District of Columbia prior to 1970 were brought under 18 U.S.C. §371. Today, however, the District of Columbia Code punishes those who conspire to commit a criminal offense, provided an overt act pursuant to the conspiracy is committed.[96] A fine of up to $1,000 or five years imprisonment, or both, is prescribed except in cases where the object of the conspiracy is punishable by less than five years, in which case the punishment for the conspiracy cannot exceed that for the substantive crime itself.

¶55 The so-called Wharton rule appears to have no application in the District of Columbia gambling cases, at least not to cases involving lotteries. In 1956, the Court of Appeals, in an opinion by Judge (now Chief Justice) Burger, held that, "There is no logical necessity for a plurality of agents in order to violate the lottery laws."[97]

¶56 The District's Code also provides some important aids for enforcing the gambling statutes. Specific provision is made for interception of wire and oral communications to provide evidence of gambling offenses.[98] There is also a provision for grants of immunity from prosecution for witnesses in gambling cases in which personally-incriminating testimony is sought. Such grants are within the discretion of the United States Attorney "in the public interest."[99]

¶57 Likewise, the Code is explicit in authorizing search warrants, using the accepted judicial channels, if there is the belief, or good cause to believe, that gaming or lottery

devices, apparatus, records, or money wagered are contained on the premises. In a 1957 case, the District Court defined the necessary probable cause for issuance of a warrant as something less than sufficient evidence to convict, but more than that established by regular visits of a renowned numbers writer to premises owned by an individual who had twice previously been arrested for a numbers operation.[100]

¶58 In apparent conflict, however, an 1862 statute still on the books authorizes search and arrest, without the normal judicial approval, in cases involving gambling houses, houses of prostitution and premises used for the deposit or sale of lottery tickets.[101] The law stipulates merely that one member of the police force, or two members of the involved household, shall report in a signed statement that there are good grounds for believing that a house, room, or premises within the police district is kept or used for gambling, prostitution, or the deposit or sale of lottery tickets. Then, the major or superintendent of police can authorize a police entry and arrest of all persons offending the law and seizure of all the gaming implements (to be turned over to the Board of Commissioners for disposal).

¶59 Although there are no sentencing procedures whereby the distinction between syndicate and small time operators can be made with appropriate sentences to each, most of the penal provisions do separate first offenses from second and subsequent offenses, prescribing much harsher penalties for the recidivist.

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Conclusion

¶60 The development of gambling and the gambling laws in the District of Columbia form a pattern similar to that which can be traced in most urban areas, except that the decriminalization movement has not gained even partial ground.[102] Historic changes have taken place both in the kinds of games played and in the types of persons who have been involved.

(Shepardized through May 1975)

Footnotes

1. The years 1871-1874 constituted an historical exception. During those years Congress vested the District with full legislative powers and authority, subject only to the ultimate veto of Congress. For a discussion of the status of the District of Columbia government, see Metropolitan Railroad Co. v. District of Columbia, 132 U.S. 1 (1889).

2. Metropolitan Railroad v. District of Columbia, supra note 1, at 9.

3. Act of February 27, 1801, ch. 15, §1, 2 Stat. 103.

4. Act of July 9, 1846, ch. 35, 9 Stat. 35.

5. Judicial decisions of British courts are accepted as indicative of the common law in this country, but no American court is bound by those decisions, whether made before or after the American Revolution. For pertinent discussions, see, e.g., Seymour v. McAvoy, 121 Cal. 438, 53 P. 946 (1898); Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278, 62 A.L.R. 858 (1928); Dudrow v. King, 117 Md. 182, 83 A. 34 (1912).

6. Act of March 3, 1901, ch. 854, §1, 31 Stat. 1189; D.C. Code §§49-301.

7. Universal Interpretive Shuttle Corporation v. Washington Metropolitan Area Transit Commission, 393 U.S. 186, 196 (1968).

8. See Act of March 3, 1901, supra note 6. Included in the Maryland laws received by the District is a reception statute regarding British law which assumes (a) all common law up to 1770, (b) all British statutes enacted prior to the first settlement in Maryland (1633), and (c) all British statutes enacted between the settlement and the American Revolution (1633-1776) which had already been introduced into Maryland law by judicial decision. See the Maryland Declaration of Rights (1776) §3, reprinted in 1 D.C. Code Encycl. Ann. 28-34 (1967), and the Maryland Constitution Art. 5 (1867, 1970).

9. See note 1, supra.

10. Prior to 1971 the court of last resort in the District of Columbia was the United States Court of Appeals for the District of Columbia, formerly known as the Supreme Court of the District of Columbia. The District of Columbia

Court of Appeals, formerly known as the Municipal Court of Appeals, served as an intermediate appellate tribunal. In 1970, however, the District of Columbia Court Reorganization Act, Act of July 29, 1970, Pub. L. No. 91-358, 84 Stat. 475, made the District of Columbia Court of Appeals the District's highest court. Its orders can be reviewed by the United States Supreme Court but not by the United States Court of Appeals for the District of Columbia, though decisions by the latter court prior to February, 1971 will be followed unless determined otherwise en banc. M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C.App. 1971).

For a good summation of the labyrinth of District of Columbia laws, see James S. Easby-Smith's comments in "History of Code Compilation in the District of Columbia," 1 D.C. Code Encycl. Ann. 1, 2 (1965).

11. Md. Acts 1792, ch. 58, 1 Dorsey's Laws 288, cited in Hawkins v. Cox, 11 F. Cas. 878 (No. 6,243) (C.C.D.C. 1819).

12. Md. Acts 1797, ch. 110, §2, cited in United States v. Dixon, 25 F. Cas. 872 (No. 14,970) (C.C.D.C. 1830).

13. Georgetown bylaw of March 7, 1806, cited in United States v. Wells, 28 F. Cas. 521 (No. 16,662) (C.C.D.C. 1812).
Georgetown, which was chartered by the Maryland legislature in 1751, remained an independent city until 1895.

14. Act of May 3, 1802, ch. 53, §7, 2 Stat. 195.

15. Washington bylaw, August 16, 1809, cited in Washington v. Strother, 29 F. Cas. 356 (No. 17,233) (C.C.D.C. 1824).

16. Washington bylaw, January 12, 1830, §1. Cited in Hall v. Washington, 11 F. Cas. 278 (No. 5,953) (C.C.D.C. 1836); Dixon v. Washington, 7 F. Cas. 766 (No. 3,935) (C.C.D.C. 1830).

17. United States v. Ismenard, 26 F. Cas. 554 (No. 15,450) (C.C.D.C. 1803).

18. United States v. Dixon, supra note 12, at 874-75.

19. Washington Lawyers' Committee for Civil Rights Under Law, Legalized Numbers in Washington, 11 (1973).

20. J. Ezell, Fortune's Merry Wheel, 102 (1960).

21. Id. at 104.

22. Id. at 105.

23. Id. at 105-6.

24. 19 U.S. (6 Wheat.) 264 (1821).

25. 25 U.S. (12 Wheat.) 40 (1827).

26. Ezell, supra note 20, at 107-08.

27. Id. at 108.

28. Act of March 2, 1831, ch. 37, §§1, 12; 4 Stat. 448.

29. United States v. Smith, 27 F. Cas. 1155 (No. 16,329) (C.C.D.C. 1835).

30. Id. at 1156-57.

31. Act of August 31, 1842, ch. 282, §§1, 2; 5 Stat. 578.

32. Id. §3.

33. 9 Anne ch. 14 (1710), referred to in Emerson v. Townsend, 73 Md. 224, 20 A. 984 (1890). See also La Fontaine v. Wilson, 185 Md. 673, 45 A.2d 729, 162 A.L.R. 1218 (1945).

34. Sardo v. Fongeres, 21 F. Cas. 490 (No. 12,358)(C.C.D.C. 1829).

35. McGunnigle v. Simmes, 16 F. Cas. 145 (No. 8,817)(C.C.D.C. 1847).

36. Fleming v. Foy, 9 F. Cas. 262 (No. 4,862)(C.C.D.C. 1834). One case, an exception to the general rule, held that a wager on an election, notwithstanding the fact that neither of the wagering parties was a qualified voter, could not be recovered since the bet was against public policy. Denney v. Elkins, 7 F. Cas. 464 (No. 3,790) (C.C.D.C. 1831).

37. $25 has been substituted for the £10, and the assault provision has been removed to the penal section of the code. See D.C. Code Encycl. Ann. §§16-1701-04 and 22-508 (1973). Another change came in 1899 with the Negotiable Instrument Act, Act of January 12, 1899, ch. 47, 30 Stat. 785. The law enabled bona fide purchasers without notice to enforce notes otherwise void under the Statute of Anne. The provision reversed the result of Lulley v. Morgan, 21 D.C. 88 (1892). See generally Wirt v. Stubblefield, 17 App. D.C. 283 (1900).

38. "The highest officials of the nation were usually men willing to bet against the odds." H. Chafetz, Play the Devil, 179 (1960). Included in this category were men such as Henry Clay, Daniel Webster, General Winfield Scott, Humphrey Marshall, William Learned Marcy, and Andrew Jackson. Id., §3, ch. 1.

39. Id. at 182.

40. Id. at 181.

41. Id. at 182.

42. Id. at 255.

43. It is reported that this ordinance remained on the books thirty years before a conviction was obtained. In 1861, President Lincoln pardoned the sentenced offender, stating that the penalty was "far too severe for the offense." Likewise, President Grant opened the door for another offender a decade later. Legalized Numbers in Washington, supra note 19, at 15.

44. Act of April 29, 1878, ch. 68, 20 Stat. 39.

45. Act of January 31, 1883, ch. 40, §§1-3, 22 Stat. 411.

46. Id., §4.

47. 6 App. D.C. 6 (D.C. Cir. 1895).

48. Id. at 12.

49. Id. at 14.

50. Act of April 26, 1888, ch. 204, 25 Stat. 94.

51. Act of March 2, 1891, ch. 497, 26 Stat. 824. The confusing congressional practice of legislating for specific areas of the District became obsolete with the repeal of the city charter and the adoption of a District-wide code at the turn of the century.

52. The emerging alliance of business and religion at a time of rapid growth in the United States has been given credit by some commentators for the dramatic groundswell of vice legislation in the late 19th and early 20th centuries. See Legalized Numbers in Washington, supra note 19, at 16-17.

53. United States v. Green, 19 D.C. (8 Mackey) 230, 241 (1890).

54. Act of D.C. Leg. Ass., August 23, 1871 .

55. Act of February 17, 1873, ch. 148, 17 Stat. 464.

56. Seth Shepard was a prominent member of the Texas bar before his appointment to the District of Columbia court in 1893. An active Democrat, he was a lifelong fighter against "paternalism in government." His beliefs led him

to oppose vigorously the prohibition and free silver movements in Texas. 9 Dictionary of America Biography, 74 (1964).

57. Lansburgh v. District of Columbia, 11 App. D.C. 512, 531 (D.C. Cir. 1897).

58. Sheedy v. District of Columbia, 19 App. D.C. 280 (D.C. Cir. 1912).

59. District of Columbia v. Kraft, 35 App. D.C. 253, 268, cert. denied, 218 U.S. 673 (1910).

60. Id. at 270 (dissenting opinion).

61. In re Gregory, 219 U.S. 210 (1911). Justice Charles Evan Hughes held for the Court that a trading stamp promotion was a gift-enterprise, citing a definition of "gift-enterprise" which included an element of chance.

62. Corporate Organization and Audit Co. v. Hodges, 47 App. D.C. 460, 466 (D.C. Cir. 1918).

63. Justh v. Holliday, 13 D.C. (2 Mackey) 346, 348-49 (D.C. Sup. Ct. 1883).

64. Act of March 1, 1909, ch. 233, 35 Stat. 670; D.C. Code Encycl. Ann. §§22-1509-1512 (1967).

65. 43 Cong. Rec. 217-18 (1908).

66. Legalized Numbers in Washington, supra note 19, at 35.

67. Forte v. United States, 65 App. D.C. 355, 359, 83 F.2d 612 (D.C. Cir. 1936).

68. Act of April 5, 1938, ch. 72 §2, 52 Stat. 198; D.C. Code Encycl. Ann. §22-1502 (1967).

69. Act of June 29, 1953, ch. 159, §206(a), 67 Stat. 95. Such a statute is constitutional. See Ferguson v. United States, 123 A.2d 615 (D.C. Mun. App. 1956); aff'd 99 App. D.C. 331, 239 F.2d 952 (D.C. Cir. 1956); cert. denied 353 U.S. 985 (1957).

70. See Smith v. United States, 70 App. D.C. 255, 105 F.2d 778 (D.C. Cir. 1939).

71. Act of June 29, 1953, supra note 69.

72. Ferguson v. United States, supra note 69.

73. Bailey v. United States, 223 A.2d 190 (D.C. App. 1966).

74. D.C. Code Encycl. Ann. §22-1501 (1967).

75. Id., §22-1503.

76. Id., §22-1505.

77. With the exception of one prohibition against bookmaking and poolmaking on the result of athletic contests. D.C. Code Encycl. Ann. §22-1508 (1967).

78. Washington Coin Machine Association v. Callahan, 79 App. D.C. 41, 42, 142 F.2d 97 (D.C. Cir. 1944).

79. White v. Hesse, 60 App. D.C. 106, 48 F.2d 1018 (D.C. Cir. 1931).

80. Boosalis v. Crawford, 69 App. D.C. 141, 143, 99 F.2d 374 (D.C. Cir. 1938).

81. Washington Coin Machine Association v. Callahan, supra note 78.

82. D.C. Code Encycl. Ann. §22-1504 (1967).

83. Id., §22-1505.

84. Id., §22-1508.

85. Plummer v. United States, 88 App. D.C. 244, 189 F.2d 19 (D.C. Cir. 1951).

86. Id. at 248, 189 F.2d at 23.

87. D.C. Code Encycl. Ann. §22-1513 (1967).

88. Nelson v. United States, 28 App. D.C. 32, 36 F.2d (D.C. Cir. 1906).

89. Beard v. United States, 65 App. D.C. 231, 238, 82 F.2d 837, (D.C. Cir. 1936).

90. Sesso v. United States, 77 App. D.C. 35, 36; 133 F.2d 381, (D.C. Cir. 1942).

91. Silverman v. United States, 107 App. D.C. 144, 275 F.2d 173 (1960), rev'd on other grounds, 365 U.S. 505 (1961).

92. 190 A.2d 904 (D.C. App. 1963).

93. Act of June 29, 1953, ch. 159, §208, 67 Stat. 97, codified as D.C. Code Encycl. Ann. §22-1515 (1967).

94. 42 App. D.C. 428, cert. denied 235 U.S. 704 (1914).

95. Id. at 429.

96. D.C. Code Ann. §22-105a (1973).

97. Woods v. United States, 99 App. D.C. 351, 355, 240 F.2d 37 (D.C. Cir. 1956), cert. denied, 353 U.S. 941 (1957).

98. D.C. Code Ann. §23-546 (1973).

99. D.C. Code Encycl. Ann. §22-1514 (1967).

100. United States v. Price, 149 F.Supp. 707 (D.C.D.C. 1957).

101. D.C. Code Encycl. Ann. §4-145 (1967) from the Act of July 16, 1862, ch. 181, §3, 12 Stat. 579. Though the constitutionality of this law has never been challenged, its effectiveness was sharply limited by dicta in a 1950 case:

> [A]ny act of the Congress purporting to permit the invasion of homes by police officers without warrants except under the established exception of unavoidable crisis . . . would be wholly void.

District of Columbia v. Little, 85 App. D.C. 242, 248 (1950). The Act has been construed as defining the extent to which police officers in 1862 could enter a house to arrest on probable cause. See Smith v. United States, 103 App. D.C. 48, 60-61 (1958).

102. A comprehensive study of the numbers game and a proposal for legislation has been prepared by the Washington Lawyers' Committee for Civil Rights Under Law. Legalized Numbers in Washington, supra note 19.

PARAGRAPH INDEX: District of Columbia

The Development of the Law of Gambling:

FLORIDA

M.I.R.

M.Z.O.

A.H.S.

Table of Contents

Summary

¶1 Florida's position on gambling has changed frequently. Periods marked by fairly tough anti-gambling legislation were interspersed with those when certain forms of gambling were licensed to produce public revenue. Lotteries were authorized from 1828 until 1868, when they were banned through constitutional and legislative action. Casino gambling was licensed from 1879-1895, until it, too, was outlawed. Depression schemes in the 1930's included the licensing of slot machines and the establishment of a parimutuel wagering system for horse racing, dog racing and jai alai frontons. The parimutuel system is still in existence, and non-profit organizations are now allowed to run bingo and guest games. Stiff prohibitions enacted by the legislature, in reaction to rampant violation of the gambling law in the 1950's, remain in force today.

I. The Formative Era: To 1895

¶2 Florida, the "sunshine state", is situated in the extreme southeastern corner of the United States, and receives more sunlight than any other state east of the Mississippi River. The history of this state comprises a colorful chapter in American history.

¶3 In its early period, no less than four countries laid claim to Florida. In 1513, Ponce de Leon discovered Florida

for Spain while searching for the "fountain of youth". By 1565, Spain had established St. Augustine, the first permanent settlement in what is now the United States. French Huguenots seeking religious freedom, soon clashed with the Spanish missionaries who had come to "civilize" the area. And in 1702, Governor Moore of South Carolina captured and sacked St. Augustine. The Spanish held on, however, until late in the 1700's, when Florida was ceded to Britain. Twenty years later, Florida reverted back to Spain. Finally, in 1821, Spain ceded Florida to the United States, and Andrew Jackson was appointed its military governor.

¶4 Under the American flag, Florida's economy grew rapidly. Thousands of settlers poured into the state to claim land for themselves. Cotton, which was produced under the slave plantation system, was the state's mainstay. By 1830, 35,000 people called Florida their home.

A. The Development of Criminal Sanctions

¶5 The first gambling statutes, enacted in 1828 by the territorial legislature, authorized the trustees of the newly formed Union Academy to raise $1,000 for its benefit by a lottery.[1] This revenue-raising device proved most successful, and it was used for the next forty years to provide many public improvements, including the construction of government buildings and the maintenance of public education.

¶6 Other forms of public gambling did not receive such favorable treatment. In 1829, Florida passed a law which

"received" many provisions of the common law of England. One such provision made gambling houses indictable as public nuisances.[2] Another British statute received by Florida dates back to 1664. This act prohibited all gambling activity which involved "fraud, shift, consenage, circumvention, etc." It provided that all money won by such fraudulent practices would be forfeited, one portion going to the King, and the other half to the victim of the scheme.[3] A 1711 Act of Parliament, aimed at excessive and deceitful gambling, also became the law of Florida in 1829.[4]

¶7 The received statutes offered civil remedies to the gambling problem. In 1832, the legislature enacted the first criminal sanctions.[5]

¶8 Prohibitions enacted in 1832 placed their emphasis on punishing those who ran gambling establishments as a business, rather than on those who merely gambled. Operating a gambling house was classified as a misdemeanor. A person convicted under this statute could be fined up to $500, and could be incarcerated for up to six months.[6] However a mere gambler was liable only for a fine of $200.[7] The strategy of closing down the gambling headquarters to control gambling was also applied to other perceived social evils, including tippling houses, lewd houses and disorderly houses. Florida thus singled out for punishment the ostensible "victimizers" while letting the supposedly "innocent" victim of immoral behavior off.

¶9 By 1839, however, these provisions were apparently deemed ineffective by territorial lawmakers, and the penalties were made more severe. The maximum fine for maintaining gambling tables, and therefore, a gambling establishment, now stood at $2,000.[8] Also in 1839, prosecutors were granted the power to immunize witnesses in gambling cases in the hopes of facilitating conviction. No longer could such witnesses refuse to testify on the grounds of self-incrimination.[9] Finally, the legislature sought to encourage better enforcement of existing law by providing that the district attorney receive $25 from every defendant convicted in a gambling prosecution.[10]

¶10 Only one case was reported under the 1839 law. It involved Clem Murray, a Negro slave, who was convicted of gambling. The court overturned the conviction, ruling that the law did not pertain to slaves, because they were not included in the term "person" as defined by the statute. The court observed:

> The legislative enactments of our State prohibit the slave from acquiring or holding property, and from being and living alone and without being under the charge of some white person. The same may be said of a slave playing and betting at any gaming table, or in any gambling house, etc. He cannot, he has nothing to bet with; the money is not his, and if he should lose, his master could claim it; if he won, his winnings belong to his master. Thus we think it is not in the nature of things that the slave could commit the offence laid in the indictment, unless the statute expressly enacts such acts of theirs shall be an offence against the law.[11]

¶11 The 1830's and 40's were still rough frontier days in Florida. The Seminole War lasted from 1835 to 1842, and about

1,500 soldiers and settlers were killed in battles the bloodiness of which would long be remembered. By 1845, however, Floridians had won statehood. The leadership of the state at this time was drawn primarily from the lawyer-planter aristocracy, most of whom were natives of Virginia, North Carolina, South Carolina and Georgia. By the time of statehood, 66,000 people lived in Florida.

¶12 The system of authorized lotteries began to engender serious side effects as well as important revenue. A 1935 lottery case, Lee v. City of Miami,[12] describes and characterizes early lottery schemes and their effects in these terms:

> The Legislature would first grant a charter to a lottery company for a period of years in consideration of a stipulated sum in cash, annual payment of further sum, and a percentage of the receipts from the sale of tickets. . . . Money, lands, and merchandise of all kinds were distributed by such lotteries. Under these charters lottery companies devised every scheme and device to ensnare the public, regardless of age, class, or station. Through them the gambling, cheating spirit became dominant and their
> like a plague throughout the country.

¶13 In this same period, other states had similar problems with authorized lotteries. The United States Supreme Court spoke out against them in the 1850 case of Phalen v. Virginia.[13] The court observed:

> Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community: it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.

¶14 Legislative reform in this area, however, would have to await the end of the Civil War. By 1860, nearly 45 percent of Florida's population were Negro slaves. Florida withdrew from the Union in 1861 and prevented Federal troops from taking the state capital until as late as 1865. Congressional Reconstruction began in 1867. Reconstruction was a time of turmoil, with progressive Republicans vying with sometimes violent reactionaries, for control of the state, and with that control the chance to determine the shape of race relations in the state.

¶15 The Republicans drew up a progressive constitution in 1868. This document made the first provision for a uniform state system of free schools, established an enlightened criminal code, and provided protection for workers. The Constitution also banned all lotteries. The legislature acted in the same year to label lotteries as "offenses against public policy".[14] "Lottery" was defined by this law as a disposal of property based on chance, lot, or dice where the element of chance is an inducement to participate. Promoters of lotteries, operators of lotteries, or agents of those who ran lotteries could be fined up to $2,000.[15] Lottery advertisers could receive a $100 fine for each offense.[16]

¶16 Other gambling reforms were also enacted in the late 1860's. Racing grounds and lotteries, along with tippling houses, gaming houses, houses of ill-fame, and theatricals, were declared common nuisances by the legislature.[17] An 1868 law concerning vagrants and tramps authorized the commitment

of these "unsavory persons" to a county jail for up to six months and allowed their apprehension without warrant. Listed among those classified as vagrants were: beggars, drunkards, and players of unlawful games.[18] Finally, another 1868 law prohibited betting on the outcome of elections, making the offense a misdemeanor.[19]

¶17 In 1872, the legislature extended the received British prohibition against deceitful gambling[20] by outlawing fraudulent gambling which involved sleight-of-hand tricks, three-card monte, and all other deceptive devices. This kind of activity was defined as larceny, and was punished as such.[21]

B. Licensed Gambling

¶18 Reconstruction ended in Florida later than in most states; while most Southern states were free of "Yankee rule" by 1870, the last troops were not removed from Florida until 1877, as a result of the Compromise of 1876 that gave Rutherford B. Hayes the Presidency. New bourgeois elements, with some old aristocrats, soon began to assert control over Florida politics, and one of the most serious problems facing them was unstable governmental finances. Further gambling prohibitions were enacted by the first post-Reconstruction legislature.[22] But in 1879, with an eye toward raising needed revenue, the legislature moved to decriminalize many forms of gambling.

¶19 According to the 1879 law, gambling establishments could legally maintain billiard, keno, pool tables or wheels

of fortune if a $100 license fee was paid yearly for each table.[23] This licensing scheme, however, carried with it certain restrictions. Allowing minors and mentally incompetent persons to play at gambling games drew a $100 fine and could result in the forfeiture of the operator's license.[24] Also, a local option law accompanied the licensing scheme. This statute empowered city and town councils to suppress all houses of ill fame, lotteries or gaming houses, and to authorize the destruction of all gambling instruments.[25]

¶20 By 1880, Florida's population had reached 269,000. Nevertheless, Florida was still in many ways a frontier region, the last real frontier on the Eastern seaboard. No city contained more than 10,000 people. This period marked the beginning of a thriving tourist trade, and many felt that legal gambling halls could help develop this industry.

¶21 In 1881, the state supreme court had before it the licensing system. The indictment in Overby v. State[26] charged that the defendant "unlawfully did keep and maintain a certain common gambling house . . . and in said common gambling house, for lucre and gain . . . there unlawfully and wilfully did cause and procure diverse idle and evil disposed persons to frequent and come to play together at a certain game called keno." The court set aside the defendant's conviction. It held that where a license was obtained, no criminal conviction could be sustained.

¶22 In 1881, the legislature strengthened its earlier statute outlawing unlicensed gambling houses by increasing the maximum fine upon conviction to $1,000.[27]

¶23 In 1887, the legislature went further by adding a possible prison term of three years to this already severe penalty.[28] The 1887 law also provided that agents, clerks and servants of unlicensed gambling house operators could be prosecuted as principals.[29]

¶24 In the same year, gambling devices were designated prima facie evidence of gambling activity.[30] Police officers were also authorized to seize all apparatus of this kind and publically destroy it upon the conviction of its owner.[31] To facilitate the gathering of gambling evidence, police officers who had a reasonable belief that gambling was occurring inside a building could enter with all necessary force without first obtaining a warrant.[32]

¶25 By 1895, the tide of public opinion had turned against licensed gambling. The 1881 and 1887 gambling house statutes were now made applicable to every wagering establishment. Participants in card, keno, roulette games, or other games of chance could also be punished by fines of up to $100 and be incarcerated for up to ninety days.[33] At the same time, setting up a lottery became a felony drawing extremely stringent penalties.[34] Other forms of participation in a lottery scheme were also made felonies, carrying somewhat lighter penalties.[35] To further discourage lotteries, the law

provided that all prizes and ticket proceeds would be forfeited to the state when seized.

II. The Modern Era: 1896 to Date

A. Strengthening Early Prohibitions

¶26 By 1900, Florida's population had reached a half million residents. Populism became a powerful movement in the early part of the century, and a governor somewhat sympathetic to the agrarian rebels, Napoleon Bonaparte Broward, pushed through many progressive legislative reforms.[36] Gambling legislation, too, continued to be enacted from time to time throughout this period.

¶27 In 1895, the legislature banned prize fights where either betting took place on the result, or an admission fee was charged. The language of the statute makes it clear that, although one purpose of the law was to prevent a form of gambling, professional boxing itself was seen as an evil that must be punished. The offense was, therefore, classified as a felony, and all stakeholders, counselors, seconds or advisors were declared principals in the offense.[37] Over the years, however, a number of civic and charitable groups have been exempted from the reach of this statute.[38] The kind of groups involved, though, have sponsored mostly amateur boxing for an admissions fee. Professional prize fights are still banned in Florida today.

¶28 The first major judicial development in this period came in Toll v. State,[39] decided in 1898. This case

illustrates the broad construction given to gambling house legislation. Here, the court stated that a conviction under these laws would be upheld, even if the room mentioned in the indictment might be used for other purposes besides gambling, and even if it was principally used to attain some lawful object. The court said that any room could properly be labeled a "gaming room" if games for money were played there, or if it were maintained for the purpose of gambling.

¶29 In the early 1900's, the great popularity of billiard and pool halls caused the legislature to attempt to deal with their influence on the citizenry. In 1903, a special law was enacted making it illegal to gamble at a licensed billiard or pool table.[40] Four years later, the owners of these tables were given notice that it was unlawful to permit minors or females to play at these games in any place where liquor was sold. Violators drew prison terms, and could also lose their liquor license.[41] This law no longer applies to women, but minors are still forbidden to "visit or loiter" in pool or billiard halls. Proprietors who are lax in their enforcement of these rules may be fined and jailed.[42]

¶30 A 1905 statute extended the old vagrancy law to include in its scope : rsons who kept gambling houses, and those who frequented these establishments.[43] Speculative commodity transactions also came under legislative scrutiny, as futures transactions were outlawed in 1907.[44] Under this law, anyone who contracted to buy or sell a commodity, with no good-faith intention to actually deliver or receive the goods, was guilty

of dealing in futures. Such contracts were illegal in Florida even if they were made out of the state, and parties to them were subject to prosecution. Non-delivery was held to be prima facie evidence of a violation, but the law did not reach legitimate stock transactions.

¶31 In 1917, the legislature added a new weapon to its anti-gambling arsenal. Now, a civil remedy was provided by a nuisance statute. This law empowered the courts to enjoin the maintenance of any place "which becomes injurious to the morals and manners of the people," or any place where people engaged in games of chance, in violation of the law.[45] Also, the use of an entire structure, including its fixtures, could be enjoined when the building was judicially held to be a nuisance. Several years later, bucket shops, the headquarters of futures transactions, were outlawed.[46] The original anti-futures legislation was repealed in 1951, in favor of a law whereby all commodity dealings were to be executed according to the rules of a legitimate stock exchange.[47] Bucket shops, however, remain illegal today.

¶32 This period also witnessed the adoption of legislation which authorized the formation of corporations to run state fairs and expositions. The purpose of this statute was economic, educational and recreational. Therefore, any authorized corporation which "organized, supervised, conducted or permitted any game of chance, lottery, betting or other act in violation of the criminal laws of the state," forfeited its charter.[48]

¶33 During World War I, Florida continued to be a great training center for the military services. After the war, a real estate boom developed. Property prices sky-rocketed as speculators made quick fortunes in urban areas, especially in Miami.[49] Cities grew rapidly, but the majority of Florida's population still lived in rural areas. Agriculture diversified significantly and economic progress seemed inevitable. Counties and municipalities passed bond issue after bond issue, as inflated land prices artificially increased the real estate tax base.

¶34 In this era, the court handed down an important decision concerning gambling on horse races, a decision which capped a long period of judicial and legislative activity with regard to "contests of skill". Before the turn of the century, betting on contests of skill had been legal. Legislative action in the 1890's, however, first outlawed such wagers, and then legalized them again. The court, on its part, disagreed with the legislature's second thoughts. In the 1897 case of McBride v. State[50] the court adopted Judge Caruther's definition of gambling, as expressed in Bell v. State: "Gaming is an agreement between two or more people to risk money on a contest of chance of any kind, where one must be the loser and the other [the] gainer." It went on, however, to amplify this definition with the following observation:

> The consensus of the better opinions is that wagering, betting, or laying of money or other things of value upon the transpiring of any event, whatsoever, whether it be upon the result of a game of chance or upon a

> contest of skill, strength, speed, or endurance is gaming or gambling within the meaning of these acts.[51]

¶35 The legislature did not respond quickly to this prodding. But in 1909, it again banned wagering on contests of skill, such as dog or horse racing.[52] Under this law, bettors could receive a punishment of up to six months in prison and a $500 fine. The 1927 Florida Supreme Court decision, Pompano Horse Club v. State[53] ruled that wagering on horse races was gambling, and therefore, was repugnant to the public welfare. Such activity was a nuisance, enjoinable under the state's police power. An injunction against the premises where gambling was carried on was not considered by the court to deprive the defendant of equal protection, nor of property without due process of the law. Further, the court let it be known that it would uphold any new reasonable legislative measures to suppress the public evil of gambling.

¶36 The tide was soon to turn against this anti-gambling posture. The depression hit Florida early, when two great hurricanes slashed the Miami-Fort Lauderdale area in 1928. Real estate sales declined, and bankruptcies abounded. Land which once drew incredibly high prices could now be purchased for back taxes. Florida's municipalities could find but few buyers for their bond offerings. And with a constitution that forbade a state income tax, the state began to look for new revenue measures with which to fund governmental services.[54]

B. Licensed Gambling: Horse Racing and Slot Machines

¶37 In 1931, the legislature again legalized betting on contests of skill. This time it set up a licensed, on-track parimutuel wagering system at horse and dog racing tracks and jai alai frontons.[55] Revenue is still raised from this system through a tax on the sale of each ticket of admission sold,[56] a tax on the total contributions made to the parimutuel pool, and a separate license fee. Other revenue comes from the annual licensing fees paid by track operators and the occupational license taxes paid by track employees.[58] One final provision of this statute requires the operators of meets or frontons to hire 85 percent of their employees from the ranks of Florida's citizenry.[59]

¶38 The considerable revenue gathered from the parimutuel system is divided equally between the counties and is to be used for educational and other "authorized" uses.[60] A small share of this money is specifically earmarked for the state's old age assistance fund. After the state and the track have taken their respective cuts, the remainder of the parimutuel pool is then distributed to the winners.[61] Any unclaimed money is used by the state for the support of public schools.[62]

¶39 To supervise this legislative plan, a state racing commission was established. This commission issued permits to tracks and frontons and enforced enacted regulations.[63] In 1973, these responsibilites were transferred to the Department of Business Regulation, Division of Parimutuel Wagering.[64] Permits are now issued by the governing board, but to become

effective, they must be ratified by a majority of the electors.[65] Jai alai frontons are exempt from this elector-ratification requirement.

¶40 To protect the public welfare, the 1931 legislature drafted strict regulations to be administered by the commission. These regulations are still in force today. No minors may attend racing meets. No meets may be held on Sundays. No gambling outside the parimutuel system and no alcohol are allowed at tracks or frontons.[66] No convicted felon, bookmaker, or one who associates with known bookmakers or criminals may hold a horse, dog, or jai alai permit.[67] Anyone found "conniving to prearrange the results of any race," may be convicted of a felony.[68]

¶41 Track and fronton operators are also subject to certain other regulations established by the 1931 legislature. For example, a horse racing track may only operate 50 days per year, while a dog racing facility may operate for 90 days. Also, a limited number of charity days may be announced.[69] Finally, after a racing meet is in operation, a petition signed by 20 percent of the electors can mandate a referendum on the question of revoking the operator's license.[70]

¶42 The 1931 legislature, however, took no action in the field of off-track betting. Such activity remained subject to the early sanctions against gambling on contests of skill. Further, anti-bookmaking statutes would be enacted later when it became clear that the old laws could not deal with the scope of modern problems in this area.[71]

¶43 The parimutuel betting system was a successful revenue producing measure. In fact, it is now estimated that the parimutuel taxes are the sixth largest revenue producer for the state's general fund.[72] Another depression measure, however, was not as profitable or long-lived.

¶44 In 1935, two provisions pertaining to slot machines were enacted. The first legalized the operation of slot machines and coin-operated gambling devices.[73] It provided, however, that lawful operation of these machines could be terminated in any county where a majority of electors so decided.[74] The second statute forbade the operation of such machines within three hundred feet of any public school or church, unless the machines were located inside a hotel.[75]

¶45 Judicial reaction to these provisions was unfavorable. Provisions restricting gambling were sustained. In State v. Lee, the court upheld the constitutionality of the restrictions on location of slot machines. It explained its holding by noting that the purpose behind the law was valid. "Protecting children who attend public schools from the temptation of gambling with what little they have," and protecting churches from noise and rowdyism often associated with public gambling, was well within the state's police power to enact reasonable public welfare measures.[76]

¶46 On the other hand, the court greeted the legalization with hostility. In Ecales v. Stone, for example, the court criticized this legislation in a decision which outlined the effects of the scheme and public and legislative reactions to it.

> Within two years the operation of slot machines in Florida had become so obnoxious to the citizens of this State that the people of a great majority of the counties in the State had voted overwhelmingly to prohibit the operation of all slot machine devices licensed under the 1935 Act being operated thereafter in their respective counties, and a great majority of the members of the legislature of 1937 were pledged to their constituency to enact laws which would abolish the operation of slot machines in Florida. The opposition to slot machines was the direct result of the baneful and destructive effect which the operation of those machines had had upon the morals of the people of Florida of all ages and classes. It is a matter of common knowledge, of which we must take judicial cognizance, that the lure to play the slot machine had become so great as to undermine the morals of many and to lead to the commission of or the indulgence in vices and crime to procure the coins with which to play the machines.
>
> So the legislature of 1937 carried out the mandate of the majority of the people of the State, and the members their pledges to their constituency, to pass acts which would prohibit the operation of coin-operated gambling devices in this State and enacted Chapter 18143.[77]

¶47 The 1937 law criminalized the operation of slot machines, but the problem of what machines were covered by the law remained.[78] An early slot machine case, Kirk v. Morrison,[79] decided before the 1935 legalization, set forth a definition: "A slot machine is a gambling device where its operation is such that the player in any event will receive something, but stands a chance to win something in addition." According to this opinion, a slot machine becomes a prohibited gambling device only when it is constructed and operated in a way which combines the element of chance with the inducement of being able to receive something for nothing.

> In some states every "slot machine" is by statute to be deemed a gambling device. But in states such as ours, where no such statutory definitions exist, the use to which a "slot machine" is put, or designed to be put, must determine its character as a device for gaming or gambling.

¶48 This holding was in accord with a previous published opinion of Attorney General Fred A. Davis, who wrote:

> You will understand that there is no law in Florida prohibiting the operation of slot machines merely because they are slot machines. It is only when they are gambling devices that they are unlawful.
>
> You will of course understand that a person can gamble on everything from the birth of a baby to the burial of a corpse. And while the birth of a baby and the burial of a corpse may in themselves be perfectly legitimate, persons who gamble on the same might still lay themselves liable to the law.[80]

¶49 This early definition of the term "gambling device" apparently became the accepted interpretation of the scope of the 1937 statute, and this notion was directly written into a 1941 confiscation statute aimed at facilitating enforcement of the 1937 law. Under this law, arresting officers were authorized to take custody of gambling apparatus to be used as evidence, when arresting a person for violation of the slot machine prohibition.[81] Upon conviction of the arrested party, the judge could declare all the gambling devices seized to be forfeited, and he might direct their destruction.[82] In conjunction with this provision, another section of the 1941 law declared that no property rights exist in any gambling device or apparatus.[83]

¶50 Two additional civil provisions were also enacted in 1937 to help curtail slot machine operations. The first declared houses where illegal gambling devices were used to be common nuisances. It also subjected the building involved to a statutory lien, which enabled authorities to sell it in order to pay all the fines assessed against the gambling house operator.[84] The second provision empowered any citizen to bring an action to enjoin the nuisance.[85]

C. Lotteries and Promotions

¶51 Court activity in the 1930's focused upon the interpretation of the lottery laws in prosecutions of promotional schemes. Deciding which games are lotteries had long been a complicated problem. The courts agreed that the basic essentials of a lottery were prize, chance and consideration.[86] Application of this simple definition, however, proved more difficult.

¶52 In Lee v. City of Miami,[87] decided in 1935, the court explained that the primary test of whether a game was a lottery depended on whether or not "the vice of it infected the whole community or county, rather than individual units of it." Only when a scheme became a pervasive problem could it be defined and prosecuted as a lottery. Courts have had to grapple with this elusive test frequently to determine whether or not the game at issue is prohibited. Luckily, however, the court in Lee also invited legislative aid to help handle the problem. For the court held that the legislature had the power to

include or exempt games from the lottery ban by statutorily defining them. The court observed.

> The Constitution of Florida is a limitation of power, and, while the legislature cannot legalize any gambling device that would in effect amount to a lottery, it has inherent power to regulate or prohibit any other form of gambling, such distinctions being well defined in the law.

¶53 The legislature accepted this invitation. It declared chain letters,[88] pyramid clubs, bolita and punch boards[89] to be included in the lottery prohibition. Retailers, however, have been permitted to give away merchandise by lot, if the gifts are free, and are used solely for advertisement.[90] Game promotions in connection with the sale of consumer goods and services are also exempted from the lottery prohibition, but only when conducted under the supervision of the State Department of Legal Affairs.[91] Also, very recent legislation allows non-profit organizations to conduct games of Bingo and Guest.[92]

¶54 The Florida lottery laws were originally enacted to effectuate a total constitutional prohibition.[93] It has been argued that the state's efforts to outlaw lotteries have mainly been attempts to go after major operators, the lottery promoter or ticket printer, rather than the players. Accordingly, the standard of evidence differs for the promoter and the citizen who buys one lottery ticket, as does the severity of punishment. This distinction was illustrated in La Russa v. State, a 1940 case, which held that ticket printers may be convicted if any lottery tickets are found in

their possession. Lottery players, on the other hand, must possess tickets for a lottery yet to be played before they may be found guilty. The court observed:

> The State is not interested in prosecuting its citizens for the mere possession of lottery tickets, but is primarily interested in the prevention of gambling; and the possession of a live lottery ticket, and a live lottery ticket only, represents that interest in a gambling device which the State is seeking to quell. In the printing of lottery tickets a different situation arises. It is highly improbable that any person, in a sound state of mind, would print or set up the type to print tickets in a lottery that had already been played. By its very nature the printing of such tickets is a looking to the future. The very object of the printing is yet to be accomplished.[94]

¶55 Also, the Florida lottery laws provide that money and prizes connected with lotteries are to be forfeited to the state.[95] This includes property to be disposed of in a lottery, the prizes, and the ticket proceeds. In Boyle v. State,[96] the court ruled that this forfeiture statute must be strictly construed. In that case, the money seized on a crap table during a gambling raid was not to be forfeited as it was not property to be disposed of by chance, or money won as a prize in a lottery.

D. Recent Developments

¶56 The other major judicial development in this period overturned a part of the 1887 law under which police officers could enter and search for contraband gambling devices. In Thurman v. State[97], decided in 1934, the court observed:

> But as this statute authorizes a forcible entry without a search warrant, of "any house," whether dwelling house or any other sort of house, and upon "good reason to believe" rather than upon "probable cause supported by oath or affirmation," our conclusion is that 7664 of the Compiled General Laws is in conflict with 22 of the Declaration of Rights of our state constitution and must therefore be held null and void.

¶57 The Second World War did much to spur Florida's economy. The tourist trade blossomed in the early post-war period, and advances were made in agriculture, especially citrus and cattle raising industry, and national defense work. Florida's population increased by 46 percent from 1940 to 1950, totaling 2,771,000 residents by 1950. Urban and suburban growth progressed rapidly, especially in South Florida. A 3 percent limited sales tax was found necessary to meet increased demands upon public services.

¶58 By 1950, however, more sinister developments had also taken place in Florida. In this regard, one law review article noted the following:[97]

> To an unparalleled degree post-war America has seen the eye of public attention focused on the growth of organized crime. In the forefront of this discouraging picture stands the sinister ogre of illegal gambling, with particularly sharp adverse criticism directed toward activities within the State of Florida. Public reaction to disclosures of the pattern of illegal action has prodded lawmakers, both state and federal, to enact legislation designed to place new weapons in the public arsenal with which to combat that group which operates in disregard of current morality and laws.

¶59 The legislature's first response to this situation was aimed at telegraph services. A 1949 statute made it unlawful

for any public utility knowingly to furnish wire services for gambling uses. Such use of any wire service, public or private, was made a nuisance subject to abatement, and this remedy was specifically enacted as an addition to any other remedies provided by law. All contracts for the use of private wire systems were required to declare the customer's purpose for purchasing the service. Such agreements became prima facie illegal if the communication of gambling information was intended or carried out thereunder.[98] The stated purpose of this statutory scheme was to curtail illegal bookmaking activities. It remains on the books today.[99]

¶60 Other anti-bookmaking provisions were enacted in 1951. One such statute made it a felony for any person to transmit racing information for illegal gambling purposes.[100] This action was sustained as a reasonable exercise of the state's police power in State v. Ucciferri.[101] Public places where bookmakers operated could be stripped of their communication facilities, and their beverage hotel licenses.[102] Also, it became the duty of public utilities to provide authorities with all the reasonable means necessary to ascertain if their facilities were being used to violate the gambling laws.[103] Finally, the transmission of any racing information, even for legal purposes, was strictly regulated.[104]

¶61 Florida's lawmakers also turned to the general subject of gambling in 1951. One statute enacted in that year allowed the suspension or revocation of hotel licenses for knowingly allowing space to be used for gambling.[105] The state also

adopted a very common southern strategy for curtailing gambling, a strategy which permitted the recovery of gambling losses through a civil suit.[106]

¶62 The historical background of Florida's recovery statute is similar to that found in many other states. Most United States courts disregarded the early British common-law provisions which enforced gambling contracts. In general, American courts would not entertain any suits based upon gambling contracts because they were held to be against public policy. Therefore, a loser could recover his money only if the state involved enacted a statute allowing him to do so. As early as 1829, Florida officially received a British statute which accomplished this result,[107] but no cases are reported which utilized it. The new recovery law, however, did more than simply re-enact the old provision. It set up a more modern and comprehensive scheme directly aimed at 20th century problems.

¶63 First, this statute reaffirms an established judicial doctrine by declaring all gambling contracts to be void, except those involved in authorized transactions, such as parimutuel wagers.[108] Then it sets out a recovery scheme. Within 90 days a suit may be brought to recover twice the money lost in a game, one half going to the loser and one half to the state.[109] If the loser fails to bring suit within this period, an extension period is granted in which the dependents of the loser may sue.[110] To expedite recovery, the plaintiff is entitled to writs of attachment, garnishment, and

replevin,[111] and the loser's testimony in such an action may not be used against him in later prosecutions.[112] The state's attorneys are given special responsibilities in these recovery actions to execute the judgments involved.[113] Further, the list of persons amenable to this kind of suit is extensive. It includes anyone who was directly or indirectly involved in the gambling transaction.[114]

¶64 One problem has been raised concerning this statute, a problem which remains unresolved to date. The intent of the law was clearly to inhibit gambling by allowing losers to recover from professional gamblers. But it remains unclear whether a professional gambler may use the statute to regain his losses, and thereby be protected by the immunity provisions. The situation is further confused by a new law repealing the provision of the law giving the loser a cause of action to recover gambling debts, perhaps in response to the Sandy case discussed infra, but keeping all other sections of the bill intact. Presumably, a loser may now replevin his lost goods in preparation for suit under a cause of action no longer allowed by law. The status of a loser's right to recover in Florida is thus in legal limbo. Apparently in response to what was perceived to be a bad decision of the state's highest court, the legislature undertook a reconsideration of the law. The results can only be called confusing. However, it can be hazarded that the repeal of the cause of action may be taken as an indication of legislative intent to do away with the whole body of laws related to that

cause of action. This follows logically, but may not be the interpretation given the legislature's action by the courts.

¶65 One recent case which involved this statute arose when a Nevada hotel sued a Floridian. The man had written a check to the hotel for money which had been advanced to him so that he could gamble at the hotel's casino. The Floridian defended this suit by alleging that the hotel knew of the use to which the money would be put. He argued that the hotel was simply a party to a void contract, and therefore could not enforce the debt. The court agreed, interpreting the recovery law:

> The clear language of this act provides that a check given for the repayment of the money lent or advanced at the time of a gambling transaction for the purpose of being wagered is void. A gambling obligation although valid in the state where created cannot be enforced in Florida because it is contrary to public policy.[115]

This decision seems to mean, unless the repealer leads to a different ruling, that a Floridian with out-of-state gambling debts may use his home state as a sanctuary, and there remain untouched by irate gaming creditors.

¶66 In 1955, the legislature outlawed a series of games which arguably were already covered by existing law. The statute was probably designed to fill some gaps in older prohibitions, and also to restate powerfully a strict anti-gambling legislative policy. Included in the prohibition were roulette wheels, equipment for faro, crap or chemin de fer, chuck-a-luck wheels, bolita equipment, and all other gambling devices.[116] Those operating such equipment, and

those playing the games, became subject to fines and imprisonment. The statute restated the 1941 law by providing for confiscation of these devices and declaring any property right in these articles void. Finally, law enforcement agents who violated these provisions could be fined up to $1,000 and be imprisoned for up to one year.[117]

¶67 These provisions today exist side-by-side with the updated version of the 1832 and 1839 laws against gambling houses. The present statute applies to anyone who directly or indirectly allows another person to gamble on his premises. This includes agents, employees, and those who lease the premises, all of whom are punished as principals.[118] The offense of maintaining a gambling house is a continuing one which can be committed by a single act or by successive acts extending over a long period of time.[119] Permitting minors to play within one's gambling house draws another severe punishment.[120]

¶68 The 1960's and 70's have brought vast changes to Florida. Blacks have advanced somewhat in the state's social, political and economic structure, though not without a struggle. The tourist trade has shown an increase after a threatening decline, higher education has improved, and until recently, the state has continued to diversify economically, with a rise in per capita personal income.

¶69 Significant legislative and judicial activity in the gambling field, however, has been nil. The only statute of note is a 1972 law which authorized any licensed track to

conduct benefit performances for the Bicentennial Commemoration Trust Fund.

Conclusion

¶70 In the early years, Florida seemed to disapprove of gambling, but licensed it as a necessary evil when the state's financial position became untenable. The practice of lottery authorization was ended by a reform-minded Reconstructionist legislature just after the Civil War. But as soon as Reconstruction ended, and older elements again took the reins of a battered economy, casino gambling was licensed for the first time. This system was only outlawed at the turn of the century. The Depression again brought with it gambling revenue schemes. The parimutuel system has survived and has become an invaluable source of revenue. The slot machine ploy, however, only lasted two years.

¶71 By 1950, however, a powerful gambling establishment had developed in Florida, an establishment which threatened to gain serious political influence and to curtail a growing tourist industry. The legislature responded with harsh penalties that remain in effect today. Serious economic difficulties, given the constitutional ban of state income taxation, could lead to renewed efforts at decriminalization. But a wary legislature might choose to attempt a constitutional amendment before again inviting extensive organized crime activity in the state.

¶72 Even currently-legal gambling may soon be the subject of reexamination. Recently, Hialeah Race Track, once the pride of the Florida turf circuit, has been experiencing

financial difficulties caused in part by the expansion of the racing season at other tracks and the bite taken out of the track's handle by state and federal taxes on wagers and admissions. If Hialeah closes, the effect on Florida gambling policy could be noticeable. Certainly, it could be expected that the method by which racing dates are assigned will be reexamined, and the chimerical hope that racing can be a source of easy income will also have to undergo public scrutiny as the paradox becomes clear: the higher the taxes on gambling, the less the revenue, for taxes drive customers and bettors away from legal on-track betting to off-track betting; tracks then close, and revenues are reduced further. How Florida deals with this problem may be of immense importance both for the friends and foes of legalization.

¶73 Moreover, recent trends in Florida indicate that a massive reexamination of gambling is under way. Since 1971, attempts have been made to codify existing law, and to weed out laws, such as those giving a gambling loser the right of recovery, that seem inconsistent with changing public attitudes. The result of all these changes is unclear, but there is evidence that Florida may be entering a new era of gambling legislation.[121]

(Shepardized through June 1975)

Footnotes

1. Acts of 1828, 279.
2. Bishop, Criminal Law §1135 (9th ed. 1923); 5 U. Fla. L. Rev. 186 (1952).
3. 16 Charles II, ch. 7, §3.
4. 18 George II, ch. 34, §3 (1711).
5. Laws of 1832, No. 55, §§45 and 46, 70 in Duval's Compilation of the Laws of Florida at 113 (1839).
6. Id. §45, 70.
7. Id. §46, 70.
8. Acts of 1839, No. 1, §1, 5.
9. Id. §5.
10. Id. no. 1, §3, 5.
11. Murray, a Slave v. State, 9 Fla. 246, 253 (1839). The court noted that slaves might be included in the word "person" if statutory interpretation showed that the legislative intent was to include slaves among those made liable by the statute. The court held that in this case the legislature did not intend to reach slave gambling under the statute, id. at 250.
12. Lee v. City of Miami, 163 So. 486,489, 121 Fla. 93,99-100.
13. Phalen v. Virginia, 8 How. 163, 168, 49 U.S. 163, 168, 12 L.E. 1030, 1033 (1850).
14. Laws of 1868, ch. X, 101.
15. Id. §1 at 101-102.
16. Id. §5 at 102.
17. Id. §§8 and 9, at 103. These sections applied to race grounds only.
18. Laws of 1868, ch. 8, §24 at 99.
19. Id., ch. 12 §8 at 106.

20. See note 4, supra.

21. Laws of 1872, ch. XLIV, §52, 227.

22. Laws of 1878, ch. 1637, subch. 8, §20. In 1878, for example, engaging in gaming within one mile of any religious camp or field meeting was punished by a fine of $20 for each offense.

23. Laws of 1879, ch. 3099, §11,2.

24. Id. ch 3145, no. 47, 83.

25. Id., ch. 3163, §1.

26. Overby v. State, 18 Fla. 178,179 (1881).

27. Laws of 1881, ch. 3277, no. 59, 83 in McClellan's Digest of the Laws of Florida, at 405, §6 (1881).

28. Laws of 1887, ch. 3764, no. 84, §1 in Revised Statutes of Florida art. 17, 827 (1892).

29. Id. §2, 827.

30. Laws of 1887, ch. 3764, no. 84, §4 in Revised Statutes, id. at 828.

31. Id. §5, Revised Statutes at 828.

32. Id. §6, Revised Statutes at 828.

33. Laws of 1895, 364, in Revised Statutes of Florida, §3951, 950 (1903).

34. Id. at 137; Revised Statutes, §3953, 951 (1903). Under this statute, a fine of up to $5,000, and a prison term of up to ten years could be handed down.

35. Id. at 138, Revised Statutes, §3954, §3955 at 952 (1903). The fine was $3,000, and the prison term could be five years in length if one printed tickets for a lottery, aided or abetted in the printing of tickets or advertised. However, those who participated in a lottery were subject to a fine up to $100 and three months in jail.

36. Broward was an interesting and colorful figure. An orphan, he worked as a logger, a farm hand, a seaman, a gun runner to the Cubans, a member of the Florida House of Representatives, the sheriff of Duval County and a United States senator, before becoming Governor.

37. Laws of 1895 at 163, in Revised Statutes of Florida, §3622 at 884.

38. Fla. Stats. Ann. §548. The exempted groups are the American Legion, the Disabled American Veterans, the Veterans of Foreign Wars of the U.S., the Spanish-American War Veterans, the Florida National Guard, the Y.M.C.A., the Jaycees, the Knights of Columbus, any College in an amateur athletic association, and the Circulo Cubano Club (charitable organization).

39. Toll v. State, 23 So. 942, 40 Fla. 169 (1898).

40. Laws of 1903, ch. 5106, §36, at 13.

41. Laws of 1907, ch. 5597, §8.

42. Fla. Stats. §849.06 (1941). Fines can run up to $1,000 and imprisonment can extend up to one year.

43. Laws of 1905, ch. 5419, §1; Florida Compiled Laws Annotated, §3570, 1770 (1914).

44. Laws of 1907, ch. 5680, §1; Florida Compiled Laws Annotated, §3713h, 1805 (1914).

45. Laws of 1917, ch. 7367, §1, 216.

46. Laws of 1923, ch. 9334, §1 at 416.

47. Laws of 1951, ch. 26,774, §1 at 551.

48. Laws of 1917, ch. 7387, §11 at 256.

49. Among those involved in promoting the "boom" was William Jennings Bryan.

50. McBride v. State, 39 Fla. 442,447, 22 So. 711,712 (1897). In Kirk v. Morrison, 146 So. 215, 108 Fla. 215 (1933) it was held that the purpose of the Florida law prohibiting gaming houses (Fla. Comp. Gen. Law 1927, §7657) was not to prohibit gambling per se, but only the keeping of gaming houses or gaming apparatus, thus limiting somewhat the scope of McBride and continuing the distinction noted earlier between professional gambling (which was frowned upon) and gamblers, who were not.

51. Id. 713, 39 Fla. at 448.

52. Laws of 1909, ch. 5959, at 157.

53. Pompano Horse Club v. State, 111 So. 801, 93 Fla. 415 (1927). Pompano, of course, has been overruled by the legalization of parimutuel betting. It has effect as a statement of nuisance law.

54. The 1885 Constitution in effect in 1930 is still in force today, though numerous amendments have been adopted. The anti-income tax clause is still in effect.

55. Laws of 1931, ch. 14,832, 679.

56. Fla. Stats. §530.16. Each track or fronton pays a 15 percent tax on the admission price paid by each spectator.

57. Id. Each track or fronton pays a three percent tax on the total contributions made to the pool. Horse racing meet operators must pay yet an additional four and a half percent tax, while dog racing meets are taxed four percent and jai alai frontons must pay two percent.

58. Id. §530.16.

59. Fla. Stat. Ann. §550.10 from Laws, 1935, c.17276, §9.

60. Id. §550.13 and §550.131.

61. Id. §550.16. A revision of the law in 1972 increased the permissible "take" of the track and the state from 1770 to 1970 on horse racing, while maintaining a 17 percent rate on grayhound racing. Laws, 1972, c. 72-129, §1.

62. Id. §550.164(3).

63. Id. §550.01 and Laws of 1935, ch. 17,276 §1. Since 1935 the functions of the commission have been performed by various departments of the state government.

64. Laws of 1971, ch. 71-98, §1 made the transfer. See note 84, infra.

65. Fla. Stats. Ann. §§550.05 and 550.06.

66. Id. §550.04. Also, no fronton can be located within 1,000 feet of any church or public school. Fla. Stats. §551.11.

67. Id. §550.181.

68. Id. §550.24.

69. Id. §550.08. The "charity day" at horse tracks must be used to supply scholarships for use at state universities. At dog tracks the charitable races may not induce the use of greyhounds, but must be "mutt days". See Fla. Stat. Ann. 550.14.

70. Id. §550.18.

71. Id. §849.24; Laws 1957, ch. 57-179, §2; §849.25, Laws 1951, ch. 26,847, §§1-3.

72. Dauer, M. Should Florida Adopt the Proposed Constitution? 26 (1968).

73. Laws of 1935, ch. 17,257, §§1 and 12, 1085.

74. Laws of 1935, ch. 17,257, §12A, 1090.

75. Id. §12.5, 1090.

76. State ex rel. Barrett v. Lee, 166 So. 565,566, 123 Fla. 252,255 (1936).

77. Eccles v. Stone, 134 Fla. 113, 120-121, 183 So. 628, 631 (1938).

78. Laws of 1937, ch. 18,143, §§1-12, 1909.

79. Kirk v. Morrison, 146 So. 215, 216, 217, 108 Fla. 144, 146, 148 (1933).

80. Opinion of Atty. General, 1929-1930, 381.

81. Fla. Stats. Ann. §849.17; Laws 1937, ch. 18143, §4.

82. Id. §849.18; Laws 1937, ch. 18143, §5.

83. Id. §849.19.

84. Laws of 1937, ch. 18,143, §7, 911.

85. Id. §8 at 912.

86. Little River Theater Corp. v. State, 135 Fla. 854, 185 So. 855 (1939).

87. Lee v. City of Miami, 163 So. 486, 490, 121 Fla. 93, 102, 103. In a long dissenting opinion, Judge Buford argued that slot machines were prohibited by the anti-lottery provision of the Constitution; he therefore believed that the statute in question could not authorize any such machines to operate as they constituted a lottery. The court disagreed holding the machine at issue in the case not part of a "lottery" scheme.

88. Laws of 1949, ch. 25,096, at 175.

89. Laws of 1963, ch. 63-553.

90. Id.

91. Fla. Stats. Ann. 849.092, Laws 1963, ch. 63-553, §1, Laws, 1971, ch. 71-287, §1. Only certain licensed businesses are exempted--most notably retail stores. See Fla. Stat. Ann. §205.482 and §208.01 for a list of businesses permitted to promote their business by use of lottery-like games. The games are strictly limited to certain purposes, and must be conducted in a prescribed manner.

92. Laws of 1971, ch. 71-304.

93. Jarrell v. State, 135 Fla. 736, 744, 185 So. 873, 877 (1939).

94. La Russa v. State, 152 Fla. 504, 509, 196 So. 302, 304 (1940).

95. Fla. Stats. Ann. §849.12.

96. Boyle v. State, 47 So.2d 693 (1950).

97. "Recovery of Gambling Losses," 5 U. Fla. Rev. 185 (1952); Thurman v. State, 156 So. 484, 488, 116 Fla. 426, 436-437 (1934).

98. Laws of 1949, ch. 25,016, §§2 and 3.

99. Fla. Stats. Ann. §365.02, §365.03.

100. Laws of 1951, ch. 26,722, §§1-5.

101. State v. Ucciferri, 61 So.2d 374 (1954).

102. Fla. Stats. §§365.07, 64.11-64.15, 823.05 (1951).

103. Laws of 1951, ch. 26,730.

104. Id. ch. 26,722.

105. Id. ch. 26,939.

106. Fla. Stats. §849.27; Laws of 1951, ch. 26543, §2. This law was recently repealed by Laws 1974, ch. 74-382, §26.

107. 16 Charles II, ch. 7, §2.

108. Fla. Stats. §849.26, Laws 1951, ch. 26543, §1.

109. Id. §849.27. Repealed by Laws of 1974, ch. 74-382, §26.

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110. Id. §849.28. Repealed by Laws of 1974, ch. 74-382, §26. The repeal was perhaps in response to Young v. Sands, infra note 115.

111. Id. §849.30. Surprisingly, this section, and the sections mentioned infra, note 111, 112, 113, 114 were not repealed by the 1974 law. The status of the law is thus much in doubt.

112. Id. §849.31.

113. Id. §849.32.

114. Id. §849.29.

115. Young v. Sand, Inc., 122 So.2d 618,619 (1960). See also Dorado Beach Hotel Corp. v. Jernigan, 202 So.2d 830 (1967) for an identical result. That case involved a Puerto Rican casino and a Floridian.

116. Laws of 1955, ch. 29,665, §1. (Fla. Stats. §849.231).

117. Laws of 1955, ch. 29,665, §2. (Fla. Stats. §849.232).

118. Fla. Stats. Ann. §849.01.

119. Freed v. State, 100 Fla. 900, 130 So. 459 (1930).

120. Fla. Stats. §849.04. The maximum penalty for this offense is a $5,000 fine and up to five years in prison. See Fla. Stats. §849.01. Gambling carries the same penalty now as gambling with minors. See Laws 1971, ch. 71-136, §§1059, 1060.

121. For instance, a new law makes political contributions by horse track and dog track operators legal, an astonishing piece of legislation after Watergate. See Acts, 1974, ch. 74-19, at 24.

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The Development of the Law of Gambling:

GEORGIA

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Table of Contents

Summary

¶1 Since its early colonial period, Georgia has maintained a consistent anti-gambling policy. Early practices of licensing lotteries and the selling of futures to obtain revenue were short-lived. In the modern period, the legislature has periodically redefined the state's gambling prohibitions so that they adequately covered new forms of gambling activity designed to escape existing sanctions. These efforts culminated in 1968, when the legislature repealed all gambling statutes then on the books, and enacted a new gambling code designed to deal with modern problems.

I. The Colonial Experience

¶2 Georgia was named in honor of King George II, who granted a charter for the creation of the new colony in 1732. The project was designed to create a military buffer zone between the Spanish frontier and the established British colonies and to provide a refuge for destitute Englishmen and persecuted European Protestants. James Oglethorpe, the first governor of the colony, established the first beach-head where Savannah now stands in 1733. Within the next four years, new settlements were undertaken by Bavarian, Moravian and Scottish Protestants. By 1742, Oglethorpe had checked the Spanish military threat to the colonies in the battle of Bloody Marsh. Further emigration came mainly from the other settled colonies, and, to date, an overwhelming majority of Georgia's white population are of Anglo-Saxon and Protestant lineage.

A. Acts of 1764 and 1765

¶3 While the First Colonial Assembly met in 1751, the first laws concerning lotteries and gaming were not enacted until 1764.[1] One learns from later Georgia Supreme Court opinions, however, that even before statutory action was taken, the common law was used as a vehicle for the regulation of certain of these activities. The keeping of a gaming house was thought to corrupt public morals and cause financial misfortune.[2] Gaming and lotteries were denounced as contrary to public policy, though the court felt that, unhappily, existing law reached only the sellers, and not the buyers, of lottery tickets.[3] Because parties who engaged in immoral acts at common law were denied judicial relief in controversies arising out of such activity,[4] it is probable that by 1764, courts of equity had closed their doors to wagering contract actions.[5]

¶4 The 1764 and 1765 acts reflected much of this common law doctrine, and were modeled, for the most part, on the earlier British legislative attempts to combat gambling.[6] Lotteries and gaming, the act's introductory language stated, caused ". . . great mischiefs . . . both to trade and the community in general," allowing persons of loose character to support themselves dishonestly and to draw the young toward ruin and idleness.[7]

¶5 Generally, the statute offers civil remedies to the problem. All gaming contracts and all sales finalized through participation in games of chance were voided, and all notes of any kind, or encumbrances on land given to secure or fulfill

certain gambling debts were also invalidated. Valuables lost through gambling could be recovered using normal civil remedies available at common law. Likewise, lost money could be recovered by the loser in an action for debt for six months following the transaction. After that period, anyone who had knowledge of the bet could sue the victor for any money which had changed hands, one half of the recovered sum going to the informer, while one half was to be donated to the poor of the parish in which the gaming occurred. These recovery provisions, of course, negated the common law doctrine which refused standing to sue to anyone who had engaged in such "immoral" acts.[8] The statute also included a discovery provision, invocable by anyone in a recovery action, which compelled the winner to account for the sum he received through his gaming enterprises.

¶6 There were only two expressly criminal provisions in the gaming law. Even here, however, the act seemed to rely solely upon rewarding private attorneys general to insure enforcement. First, the statute exacted a five hundred pound fine for certain offenses. One half of the fine was payable to any informer who could prove the offense (again through an action of debt), while the other half of the bounty went to the crown. Persons convicted who could not pay the five hundred pounds could be imprisoned for up to twelve months or until they could pay the fine. Second, incidents of fighting or challenges to fight that arose from gambling disagreements were disallowed by the statute. Persons found guilty of such infractions were fined twenty pounds and could be imprisoned up to six months without bail.

¶7 The discovery provision of the statute underlines the act's reliance upon civil remedies to the gaming problem. Gamblers who truthfully divulged the amount of their winnings and reimbursed suing losers in full were indemnified from any criminal penalty.

¶8 Lotteries presumably were seen to be more dangerous than simple gaming, as they were covered by both criminal and civil remedies. Criminal sanctions were imposed on anyone who set up a lottery, advertised a lottery, or sold lottery tickets. The types of schemes prohibited were those effected by use of "dice, lots, cards, numbers or figures." The recovery statute, too, covered schemes which involved ". . . gaming or playing at cards, dice, tables, bowls, or other game or games, bet or bets, chance or chances."[9] None of these activities seemed serious enough to warrant direct criminal prosecution by the crown, save when they led the players to the dueling field.

¶9 The Revolution, which followed on the heels of the passage of this act, suspended most legislative social reform. While Stamp Act riots broke out in Savannah in 1766, the colony remained divided in its loyalty to the Corwn for some time. Georgia, for example, declined the invitation to send delegates to the First Continental Congress in 1774. In 1775, the conflict between revolutionary and loyalist forces spread; in May of that year, Georgia sent a delegate to the Second Continental Congress. Georgia became a major revolutionary battleground by 1778, with Savannah retaken by the British in 1779 and held by them until the end of the War in 1782. By 1788, Georgia had ratified the new Constitution. Its own state

constitution, adopted in 1789, provided for a strong executive and a two-house legislature. By 1790, the first federal census put the Georgia population at 82,548. Most of this number were White. In 1797, in Georgia, Eli Whitney invented the cotton gin, an instrument which was to quickly change the state's racial population balance and radically affect its political history.

II. The Formative Era: Legislative Dominance

A. Lotteries: Early Authorization

¶10 The new state government was, from its earliest days, faced with troublesome financial responsibilities that demanded immediate action. In response to the problem, the legislature chose to restrict somewhat the force of the 1764-65 gaming statute for revenue-gaining purposes. Nonetheless, the statute remained on the books for close to another century.

¶11 Seventeen ninety-six saw the first of nearly fifty lotteries authorized by the legislature for public purposes. These lotteries were to be run by commissioners appointed by the Assembly.[10] The purpose of the first lottery was to erect a pier at Augusta.[11] Among the purposes of later lotteries were: (1) to allow a jeweler to sell his wares by lottery when circumstances made other methods impossible,[12] (2) to establish poorhouses and hospitals,[13] (3) to rebuild a church,[14] and to build (4) bridges,[15] (5) academies,[16] (6) court houses,[17] (7) monuments,[18] (8) turnpikes,[19] and even (9) a woolen factory to be run for profit by private individuals.[20] By 1814,

however, after only ten of these schemes had been undertaken, security bonds worth twice or three times the expected profit of each lottery were demanded of the lottery commissioners, probably to insure against the chicanery which had occurred in the first few enterprises.[21]

¶12 In 1803, the legislature began to authorize a series of lotteries for yet another "public purpose," to distribute land gained from the Creeks who, after much dispute between the state and federal governments, were "removed" from Georgia.[22] In this scheme, parcels of land were offered by lottery, with each winner paying fifteen to twenty dollars for title to about two hundred acres.[23]

B. Gambling

¶13 To regulate gambling other than lotteries, the legislature imposed yet another civil remedy in 1801.[24] Insolvent debtors were first offered the relief of a discharge, thereby, for the most part, avoiding possible imprisonment for failure to pay their debts. There remained, however, one important proviso--anyone who had lost a sum of one hundred dollars at any one sitting, or a total of three hundred dollars through any species of gaming within twelve calendar months of the filing of his discharge petition was not entitled to any benefits under the act.

¶14 Gambling became the object of multiple criminal sanctions in 1816 with the enactment of the first Penal Code. Maintaining a disorderly house, which encouraged gaming, as well as

maintaining a gaming house or room were brought under direct criminal sanction.[25] The code likewise covered any game the purposes of which was to facilitate the exchange of money or valuables by chance.[26] Further, playing at any game which was or could be used for the purpose of betting was made an offense, with cards, dice, checks and billiards specifically prohibited. Again, private gaming and gambling seemed to be less heinous than professional pursuits, for the maximum fine for such activity was only fifty dollars to five hundred dollars. One half of fines imposed by this act were paid to an informer; the state once more depending on private action to enforce the public laws. Specifically exempted from the act's coverage was playing at activities such as horse racing, wrestling and any other ". . . peaceable and civil athletic exercise . . . ."[27]

¶15 The section of the act perhaps most indicative of the new legislative concern with gambling was the provision which made it lawful for police officers to break into rooms or houses suspected of closeting gambling where ". . . it is commonly known . . ." that gambling frequently occurred. Police officers could seize any relevant evidence of the crime and arrest any participants found.[28] The code also punished, as a separate offense, those persons found cheating or financially backing swindlers in cards, dice or any other game, with a mandatory fine of five times the amount of the dishonest winnings and imprisonment at hard labor at the discretion of the jury.[29]

¶16 The 1817 code kept the 1816 provisions intact. Nevertheless, it made the handing down of all punishments at the discretion

of the court rather than the jury.[30] By 1829, the legislature recognized that the 1817 effort was inadequate to control gambling.[31] Sections of the 1817 code concerning the keeping of gambling houses, tables, and betting itself were modified to include several specifically enumerated games the only purpose of which was, by design, to accommodate betting. It is probable that these games involved the devices usually utilized by professional gamblers of the day. A new provision outlawing the keeping of a gambling table was added. At the same time, two provisions of the 1817 code were dropped. The first made it theoretically possible for persons to be prosecuted for simply playing at a game without betting. The second was the now unnecessary "athletic event" proviso.

¶17 Acts of 1829 further delineated the relative seriousness of gambling infractions. While those persons convicted of the simple "playing and betting" offense suffered only a fine of twenty to one hundred dollars, persons convicted of keeping gambling houses or tables, by themselves or through agents, received the more stringent punishment of imprisonment of one to five years at hard labor. The prosecution of gambling offenders was aided by a provision which allowed any witness to gambling acts who had bet or played to be compelled to testify against others who had been indicted. Nothing such witness said could be used against him or her except in a perjury action. Still, this immunizing scheme could theoretically lead to a prosecution of the witness through the vengeful testimony of the other perpetrators. This provision, withstood constitutional attack.[32]

¶18 In 1833, the legislature again thought better of its latest efforts in the gambling area. The punishment for keeping a gambling house was somewhat reduced, the provision now calling for a fine of up to five hundred dollars and imprisonment for up to three months. While the gambling table offense carried the same fine, imprisonment was for up to six months. Perhaps this distinction in degree of punishment stemmed from a recognition that keeping a gambling table required active involvement in the enterprise, while the gaming house provision could catch anyone who simply permitted others to gamble, with knowledge, in a room he or she controlled.[33]

C. Lotteries: Movement Toward Prohibition

¶19 During this period, the legislature continued to grapple with the lottery problem. In 1821, under the guise of a taxation provision, the legislature made it unlawful to open an unauthorized lottery office and instituted a one hundred dollar fine for every ticket sold. The proceeds of the fines were to go to the benefit of the free school fund.[34]

¶20 In 1830, a tax was assessed against all unauthorized vendors of lottery tickets in the amount of $ .34 1/4 on every one hundred dollars of lottery tickets sold, with the normal civil penalties available for nonpayment of the tax.[35] There is no reported case law that decides whether this tax provision immunized anyone who paid it from prosecution under the old 1764-65 statute, still on the books in 1830. An analogous case concerning futures contracts, and analyzed below, implies that this revenue measure did have a decriminalizing effect.[36]

¶21 Nevertheless, the tax was repealed by a provision of the 1833 code which strengthened the old law against lotteries.[37] This provision stated that anyone

> . . . in any way concerned in the selling of lottery tickets, the advertizing of such schemes, or the managing, conducting, carrying on, or drawing of any lottery, or device in the nature of a lottery, or . . . an agent in procuring or supplying lottery tickets . . .

was fined five hundred to one thousand dollars and imprisoned for up to six months. The criminal sections of the 1764-65 act, excluding the fighting provision, were thus repealed by inclusion in the new act, but the civil remedies of the older law were left intact. Again, lotteries authorized by the state assembly for public purposes were left untouched.

D. Slavery, Civil War, and Gambling Legislation

¶22 By the late 1830's, slavery had been firmly established in Georgia's agricultural system, and gambling between whites and blacks became subject to criminal sanction. The 1837 legislature acted to punish white men who gambled with free or enslaved Negroes by a one to five year prison term at hard labor.[38] The maximum term of imprisonment was changed several times over the few years following the original enactment. As the national controversy over slavery began to flare, however, the punishment section became more complex. In 1847, the first offense of this kind was made to carry a fine not to exceed one thousand dollars and imprisonment of up to six months, while conviction upon the second offense carried the one to four year term of imprisonment at hard labor.[39]

123 Preoccupation of the legislature with political issues which eventually precipitated the Civil War did not entirely stifle debate over the gambling issue. While the gaming statutes remained essentially intact, certain exceptions were added, including the prohibition of certain specified games and tables, the addition of catch-all phrases to cover games not yet devised, and occasional revision of penalties.[40] In 1858, managers of authorized lotteries were taxed one thousand dollars annually,[41] and were penalized by a fine of three times that figure if they did not properly pay the assessment.[42] By the end of that year, the legislature acted to repeal all laws which had theretofore authorized lotteries for public purposes.[43] And by 1860, the punishment for carrying on an unauthorized lottery was again changed to increase the 1833 sanctions by adding to them one hundred dollars exaction for each ticket sold, to be collected by the tax commissioner through a civil action. By 1860, the gambler proviso to the insolvent debtor discharge statute had been dropped.[44] Finally, 1861, the legislature enacted a law punishing the act of gambling with minors with imprisonment at the discretion of the court.[45]

124 The Civil War abated most legislative action not directly related to the war effort. Sherman's march through Georgia, the food basket of the Confederacy, severly damaged Georgia's economic stability. The aftermath of the War brought with it state legislatures dominated by Republican Reconstructionist forces, including carpetbaggers. Ousted from power were most of those people who had served in any Confederate posts, including

most of those who sat in the Georgia State Legislature ~~during the~~ 1850s and through the War.

¶25 The reform-oriented legislature remodeled the whole Penal Code. As a result, each existing gambling infraction reduced to a misdemeanor. Conviction for such a crime carried a fine not to exceed five hundred dollars, imprisonment for up to six months, and/or a term of up to one year's imprisonment at hard labor.[46] The penalty for selling lottery tickets became a mandatory five hundred dollar fine and six months in jail,[47] and the selling of tickets in a gift enterprise was prohibited, with graduated penalties for first and second offenses, a one thousand dollar fine and a six month prison sentence as the stiffest penalty.[48] Gambling with minors, post office clerks and bank officers was forbidden, while anyone allowing minors to play at billiards or ten-pins could be fined up to one hundred dollars and imprisoned for up to twenty days.[49] Renting a room or house for the purpose of gambling was retained as a separate misdemeanor.[50] And those persons keeping pool tables, billiard tables, ten-pin alleys, or any other game for public play not prohibited by law, i.e. not for the purpose of gambling, were taxed from twenty to twenty-five dollars per year for the privilege of maintaining their businesses.[51]

¶26 The Reconstructionist legislature also attacked other social evils, including making overcharging on a railroad ticket a criminal offense.[52] The post-War legislature also dropped the "gambling with Negroes" statute all together.

¶27 Like the post-War legislature, the Constitutional

convention of 1868 was dominated by Republicans. Constitutionally enacted reforms included the prohibition of whipping as a punishment for crimes, the establishment of mechanics' and laborers' liens upon the property of their employers for labor performed or material furnished, and the reduction of the voting residency requirement.[53] Section 23 of the constitution concerned lotteries. It read: "No lottery shall be authorized, or sale of lottery ticket allowed in this State, and adequate penalties for such shall be provided by law."[54]

III. The Modern Era: Judicial and Legislative Interplay Toward More Efficient Control

128 Throughout the first century of Georgia'a history, its courts did little to define the scope of gambling law. By 1857, the Georgia Supreme Court began to interpret statutory law, especially the 1764-65 civil and contractual provisions. It also began to extend the common law doctrine disallowing standing to sue on contracts viewed as illegal, immoral or against public policy to conduct which was not directly covered by legislative sanction. The Court was most active in the period from 1880 to 1920, during which time it interpreted the criminal statutes to include practices previously considered to be legal. It seemed to actively prod the legislature into taking action to criminalize certain widespread activity. Indeed, throughout this period, it is necessary to view the actions of the Court and the legislature in a strictly chronological sequence in order

to appreciate fully the interplay between these two branches of government, an interplay which slowly produced Georgia's gambling law and policy.

A. Extension of Statutory Law through Judicial Interpretation

¶29 In 1857, the Georgia Supreme Court took its first stand on the gambling issue. In Alford v. Burke,[55] it dealt with the demand of one party to a wagering contest for the return of his money from a stakeholder. The demand occurred before the event wagered on took place. The stakeholder argued that the court should not intervene in such illegal dealings to help a gambler get his money back. The "winner" of the wager entered the suit to claim that he was properly entitled to the funds involved. The court held that a stakeholder had no legally discernable interest in a contract. In a legal agreement, or one he honestly believed to be legal, he was obliged to pay over the money entrusted to him when the proper contractual conditions were fulfilled. But on an illegal, immoral or criminal contract, which he knew to be illegal, he was bound to repay any money he had received from either party upon demand and would be held liable for those sums by the courts if he refused to repay. Thus, the court extended the reach of the 1764-65 recovery-back provisions in the gaming context and acted to undermine the reliability of payment that the use of a stakeholder had previously insured. By 1860, the legislature had concurred in the Court's ruling by codifying its holding in Alford.[56]

¶30 In 1859, through its holding in Scott v. State,[57] the Court again stretched the scope of the statutory law. Here, the defendant was seen gambling at a home which he had previously rented to another. But either the authorities could not convict him under the gambling prohibition per se, or they wanted to convict him of a more serious offense, because they tried him for "keeping a gaming house." Here, even though the original rental was for legal purposes, the Court upheld a charge to the jury that ". . . if the house was in the defendant's possession when the gambling took place in it, with his consent, he was guilty."[58] The Court therefore held that consenting to gambling in a house over which one has any legal right equals the keeping of an illegal gaming house.[59]

¶31 In Warren v. Hewitt,[60] in dicta, the court stated that since gambling contracts were illegal, such agreements would not be enforced by law; and thus, someone who lent money to a gambler could recover back the amount from his creditor through legal process. This statement of the law, however, was strictly qualified by the Court's 1901 holding in Singleton v. Bank of Monticello.[61] There, the Court stated:

> Though mere knowledge by a lender of money that the borrower intends to use it for an illegal or immoral purpose will not prevent recovery of the money loaned, yet if the lender in any manner aids the borrower in carrying into effect the unlawful design, or participates therein, he can not recover.

¶32 The Singleton holding followed the trend set by two cases decided in 1892 and 1894, cases in which the Court extended the coverage of the prohibitions against the keeping of gaming tables

and houses to anyone in any way connected with those operations.[62] In turn, these three cases led, in 1905, to Groves v. State.[63] Having loaned money to another party for the express purpose of maintaining a gaming house, the defendant was found liable of a criminal infraction along with the actual proprietor. Once again, the Court, through statutory interpretation, extended the reach of the criminal sanction so as to catch in the net those persons attempting to avoid prosecution through technical arguments.

¶33 In 1898, the Court in West v. Sanders[64] reached insurance companies attempting to dress wagering contracts in legal attire. The Court held illegal as a gaming contract an agreement between an insurer-beneficiary and an insurance company, an agreement in which the company would pay to the beneficiary a bonus over the amount of premiums paid if some third person, unrelated to either contractual party, lived past a certain date. The Court refused to enforce the provisions of this "life" insurance policy, finding it to be no more than a bet.[65]

¶34 Meyer v. State[66] concerned the application of the lottery law to a merchant's scheme which gave a designated class of customers the right to a free chance at a prize along with the merchandise they had purchased. While the court implied that no direct risk to the customer was necessary, to uphold this indictment, it left undefined until 1903 the key elements constituting a lottery. In Equitable Loan Co. v. Waring,[67] the court pierced through the form of a bonding scheme to find a wager. In so doing, it defined the necessary elements of a gaming contract to be (1) a prize, (2) a consideration, and

(3) chance. The prize need be only anything of value gained. The fact that each of the "players" involved was sure to get something, ". . . or even gets the value of what he pays, will not save the scheme or make it legal," said the Court.[68] Likewise, ". . . the consideration need not be great . . . . Sometimes the attracting of customers to one's business or other benefit to the person conducting the scheme, is held to be sufficient, although no money is paid directly for the ticket, lot, or chance, but it purports to be given." The Court's decision in DeFlorin v. State[69] condemned gift enterprise offenses with the same reasoning.

¶35 The cumulative effect of these cases theoretically could have eliminated "contest"-oriented business advertising schemes of almost any design. But in 1907, an evenly split Georgia Supreme Court attempted to clarify existing law. Russell v. Equitable Loan and Security Co.[70] was a plurality opinion in which, by operation of a Georgia law covering the occurence of a plurality opinion, the "opinion of the Court" was designated as that which opposed the infliction of the criminal sanction. The opinion adopted what has been called "absence of human design" test, whereby to bring a scheme under coverage of the lottery and gift enterprise laws, it must be shown that the scheme was made ". . . in pursuance of a plan involving uncertainty."[71] The court said:

> . . . if the result in a given transaction could be accomplished or foretold by the exercise of skill or foresight, its ascertainment would not be attributed to chance, but to the exercise of skill and foresight, and consequently to design.

> Chance and design are exactly opposite, and the presence of either will exclude the other. Where design enters into the transaction, it immediately partakes of the nature of a contract and will be governed by other principles. In the gaming sense, there is no chance whatever where either party has means of knowing the result at the inception of the wager. There can be fraud, but not chance . . . if success in a guessing contest depends upon an exercise in judgement and the power of calculation, there can be no lottery . . . .

Such activities as betting on a horse race, offering a prize for guessing the winning horse, guessing the weight of soap or rewarding the person who sent in the best name for a town were all seen as depending, at least in part, on skill or design. They were, therefore, outside of the scope of the state's statutory gambling prohibitions.

¶36 While an opinion from an evenly split court does not necessarily bind lower courts to its theory, it was clear by 1917 that the Russell reasoning represented the doctrine generally followed in Georgia. Georgia courts now accepted the "absence of design" test in such cases as Forbes Drug Co. v. Bernard Manufacturing Co.,[72] which held legal a plan thus described by the court:

> . . . the plaintiff was to write to 150 persons, whose names were furnished by the defendant, to induce them to form clubs of 10, who would make cash purchases at defendant's place of business and receive from the defendant vote coupons, representing the amounts of their purchases, which could be voted for contestants for prizes furnished by the plaintiff, and the lady receiving the highest number of votes was to receive the piano as a prize.[73]

B. Judicial-Legislative Conflict over Proper Scope of Gambling Prohibitions

¶37 The "popularity contest" described in Forbes was, in the 1880-1920 period of court activity in the gambling area, one of the issues over which the court and the legislature clashed. The Forbes case was a contract action where the plaintiff, who marketed and ran the scheme, sue a commercial concern for its contractually agreed upon fee. The defendant countered that the contract must not be enforced by a court because of its alleged illegal wagering character. Thus, the court's decision in Forbes touched only upon a civil matter, the legality of a contract. It did not directly affect the law adopted by the legislature in 1916, just one year before, which criminalized these so-called "popularity" contests as misdemeanors.[74]

¶38 However, Russell represented the clear hand of the court's thinking and, the court, when faced with a criminal prosecution under this statute, found a way to strike it down. The statute's exemption of newspapers with a daily circulation of less than four thousand readers was its vital flaw. The court disposed of the entire statute calling its coverage an unconstitutional denial of equal protection to other concerns desirous of utilizing such an advertising plan.[75] The legislature, on its part, made no attempt to restructure and reenact the law, nor was criminal prohibition of such activity ever reconsidered.

¶39 Another court-legislature battle in the gambling field was the "futures" controversy. The court took the lead in cases such as Warren v. Hewitt[76] in 1872. There, though in dicta, the

court argued that "futures" grain contracts were gaming contracts, and therefore illegal. Such contests were defined as agreements to buy and sell grain, with the seller having the option, or the original intention, to pay the buyer the difference between the contract price and the market price at the date fixed for delivery, rather than deliver the promised commodity.

¶40 In Cunningham v. The National Bank of Augusta,[77] a suit by a bank on a promissory note connected with dealings in futures, the court directly held futures contracts to be illegal under the 1764-65 gaming law. Even though the bank was seen to be a bona fide purchaser without notice of the illegality of the contract, the court disallowed its claim. For the first time, the court actively prodded the legislature to respond to what it perceived to be a serious social problem:

> If this is not a speculation on chances, a wagering and betting between the parties, then we are unable to understand the transaction. A betting on a game of faro, brag, or poker cannot be more hazardous, dangerous, or uncertain. Indeed, it may be said that these animals are tame, gentle and submissive compared to this monster. The law has caged them and driven them to their dens; they have been outlawed, while this ferocious beast has been allowed to stalk about in open mid-day, with gilded signs and flaming advertisements, to lure the unhappy victim to its embrance of death and destruction. What are some of the consequences of these speculations on "futures"? . . . growing directly out of these practices . . . have been bankruptcies, defalcations of public officers, embezzlements, forgeries, larcenies and death.

¶41 Throughout the next decade, the court continued its attacks on futures, using the civil means open to it.[78] Yielding more to financial demands than to the more value-oriented concerns

of the court, the legislature began to tax dealers in futures in 1882.[79] By 1904, this license tax was up to one thousand dollars per annum. In the 1905 case of Miller v. Shropshire,[80] the court, perhaps once again trying to provoke the legislature, found itself obliged to enforce the contracts of those futures dealers who paid such taxes. The court stated:

> The licensing of the business of speculating in "futures" does not necessarily imprint sovereign approval upon that occupation, but it enables persons who are thus permitted to engage in the business to escape the consequences which would insue were they warned not to pursue their calling upon penalty of being subjected to a deterring penalty . . . it may not be equally apparent that the interests of the commonwealth are best served by sending gamesters to the chain gang and licensing the professional speculator to open a place of business and invite the public at large to call upon him and place their bets on the probable rise and fall of the stockmarket. But be this as it may, the General Assembly . . . has for many years pursued, this definite business policy, and we can not defeat it.[81]

¶42 Reacting to Miller, the legislature one year later prohibited, as a misdemeanor, the establishment, maintenance, or operation of a futures office and the dealing in futures per se.[82] Nevertheless, the provision taxing futures offices was left on the books. Thus, it was the job of the courts to clear up the contradiction, and they did in Anderson v. State,[83] by declaring the later criminal act pro tanto to repeal the revenue measure.

¶43 On the subject of horse racing, the court made its own law through a joint interpretation of the gambling house provisions and the common law. The court in Thrower v. State[84] reasoned that the gaming house statutes were aimed at the place, not at

individual players or particular games played therein. Gaming houses were illegal as public nuisances at common law, even when courts thought that gambling itself did not oppose public policy, for such places had the tendency to ". . .corrupt morals and ruin fortunes." The court in Thrower reasoned:

> The game might be harmless, or if in private, only the immediate actors would be affected, but when the public were invited, when there were always present those ready and anxious to stake, when the gains of one excited others to participate, when the pride of public success stimulated the winner, and the loser attempted to hide the mortification of defeat by a bold front until the last coin was gone, the law was bound to interfere.[85]

Thus, places where people could bet on horse races were held unlawful. Jones v. State,[86] decided the following year, extended this holding to cover places where players would place bets by telegraph with people in other states, if done in a place where an agent of the out-of-state party held money wagered and paid winnings to the lucky bettors.

¶44 Also in 1904, the court chided the legislature into action concerning betting on elections. As far back as 1857, in Leverett v. Stegal,[87] the court had found unenforceable contracts involving election wagers, warning:

> If there be any class of gambling contracts which should be frowned upon more than another, it is bets on elections. They strike at the foundation of popular institutions, corrupt the ballot box, or what is tantamount to it, interfere with the freedom and purity of elections, and there is no security for the performance of our government.[88]

In McLennan v. Whiddon,[89] the court directly called for the legislature to ". . . make betting on elections a penal

offense"[90] and underlined the dangerousness of legislative inactivity. Finally in 1910, the legislature acted to criminalize such activity.[91]

C. Renewed Legislative Dominance

¶45 During the 1880-1920 period, the legislature itself was not inactive. In 1877, it made the "carrying on" of a lottery and the mere "spinning" of a lottery wheel separate misdemeanors.[92] In 1889, it made a separate offense of advertising a lottery, with the appearance of such an advertisement prima facie proof of the guilt of the publisher or the owner of the publication involved.[93] Cockfighting, too, was criminalized in 1889. Punished were those persons setting up the contests, keeping places where cockfights were held, and betting thereon.[94] Eighteen sixty five had seen the professional brought under the statute making vagrancy a misdemeanor.[95] And the legislature, in 1909, imposed a criminal sanction on the issuing of trading stamps, with the purchase of merchandise, which entitled the holder ". . . to receive from some other person . . . than the vendor, any indefinite or undescribed thing, the nature or value of which was unknown to the purchaser at the time of the purchase . . . ."[96]

¶46 On the civil side, in 1873, the legislature made gambling with minors criminal, and by 1883 parents of a minor son were given cause of action against those who enticed their child into gambling.[97] And by 1914, railroad agents had the right to eject from their trains, anyone found gambling thereon.[98]

¶47 During the next thirty years, judicial and legislative

activity in the gambling area virtually ceased. In 1936, the Court of Appeals upheld the conviction of the proprietor of a "penny arcade' type of establishment because he awarded prizes to winners of his games. The court took this stance even though there existed a statute aimed at taxing all gaming machines used in the manner alleged in this case.[99] It rejected the analysis offered in Miller with regard to statutory interpretation in the futures context.[100]

148 It was not until after World War II that the legislature again took up the gambling issue. In 1945, it declared all vehicles used to transport lottery and gaming devices to be contraband, specifically prohibiting their illegal operation and authorizing their seizure and sale. At first the proceeds of the sale were to be used to defray the costs of the seizure-sale undertaking, with one third of the remainder going to the police officer involved, if he was not normally paid a salary, although salaried officers might also keep the proceeds from the seizure if local counties so provided, and the rest going to the county. Of course, the impending date of sale had to be advertised for thirty days, so that anyone with an interest in the device could claim it. But the provision also stated that, in light of the nature of the transported gambling machines, any person exercising due care should have known that the devices were used in violation of the law and would thus be held criminally liable for such use. Therefore, claims under this statute were unlikely.[101]

149 Two years later, the legislature attacked the problem of betting on athletic events. Betting or soliciting bets on athletic contests was made a misdemeanor.[102] Giving or promising

a bribe to a participant in return for any attempt by that player to lose, or to limit his team's margin of victory, was made a felony punishable by imprisonment from five to twenty years.[103] Soliciting and accepting such bribes opened players to the same criminal sanction.[104]

¶50 Nothing more of import was enacted until 1966, when the legislature enacted a statute which allowed the possession of federal wagering stamps and payment of other federal wagering taxes under 26 U.S.C. 4411 and 4412 to constitute prima facie evidence of guilt under state gambling laws in a state criminal prosecution.[105] The United States Supreme Court, however, negated the force of these provisions in Marchetti v. United States,[106] and they were dropped from the Georgia code in 1968.

D. A New Criminal Code

¶51 A complete revision of Georgia's criminal code, undertaken in 1968, included a reworking of the gambling and lottery statutes. Finalized in 1970, changes in the gambling area relied primarily upon the adoption of several amendments aimed at rewording and thereby clarifying some of the provisions. While there is, as yet, no significant case under the new statutes, the official commentary, citing the vagueness and extreme complexity of the old gambling law matrix, explains the reasoning behind the legislature's reform. In fact, the new law seems, for the most part, merely to rearrange old statute law in a more rational scheme and to codify already accepted court-made doctrine. Still, it incorporates several important innovations.[107]

¶52 The new statute defines a bet ". . . an agreement that, dependent upon chance even though accompanied by some skill, one

stands to win or lose something of value." Thus, the Russell "absence of design" test is seemingly rejected, and gift enterprises such as those in Russell and Forbes, supra, may come under criminal sanction.

¶53 As in the old law, however, this new definition still specifically exempts rewards won wholly through skill in athletic contests as well as bona fide insurance contracts. "Gambling place," "gambling device," and "lottery," the latter including "gift enterprise," are also specifically defined.[108] Although reclassified as misdemeanors, the prohibitions against ordinary gambling and betting on elections and athletic contests remain.[109] A new provision entitled "Commercial gambling" operates to prohibit more efficiently the futures, gambling house and lottery promotion offenses. It includes as well the selling of chances on athletic events and elections. Such professional gambling realizes a more serious penalty, that of a misdemeanor of a high and aggravated nature.[110]

¶54 The new section on the "keeping of a gaming place" covers the cases where an owner himself maintains the establishment, or where he rents for that purposes, but enacts no new prohibitions per se.[111] On the other hand, while the past code criminalized only lottery advertising, now the advertisement of any commercial gambling is prohibited.[112]

¶55 A section criminalizing the communication of gambling information represents the enactment of a new felony offense, punishable by one to five years imprisonment and a fine of up to five thousand dollars. It covers the maintenance and installation of communication equipment for gambling purposes,

and, as the comments note, it forms a catch-all provision with specific regulatory power and enforcement falling to the State Public Service Agency. Those persons whom the provision aims at "catching" are the middlepersons or agents in gambling schemes who cannot be directly caught by any other sections.[113] Of course, the Palmer and Henderson decisions[114] arguably had already extended the old gambling house, gaming table and renting provisions to such activity. But in the new code the legislature hoped to ensure full coverage by clarifying any ambiguity.

¶56 A new section on gambling devices or equipment pulls together all the old law on the manufacturing, possession and transfer of gambling devices. It combines case law which held the mere possession of devices such as slot machines to be a violation of the gaming table statute[115] with the newer statutes against transporting such articles. Violation of this statute is punishable as a misdemeanor of a high and aggravated nature.[116]

¶57 Carried over almost intact from the old law are sections covering the seizure and destruction of gambling devices, the seizure of vehicles used in transporting such equipment, and bribery in athletic events.[117] A section allowing the seizure of gambling funds or other things of value used in gambling, however, broaches new ground.[118] No other statute had ever authorized such an action, and only one case touched the issue. That case held that money found in seized slot machines was not itself contraband which must be destroyed, as were the machines themselves, but was, rather, the property of the owner of the devices, whether or not he was convicted under the gambling statute.[119] Under the new statute, the seized funds inured to

the county in which the money was taken.

¶58 As the legislature enacted the new code in 1968, it repealed, as unnecessary to efficient gambling control, the several surviving sections of the old law involving cheating, allowing minors to roll ten-pins, cockfighting, gambling with minors and gambling with post office clerks and bank officers. The 1764-65 provisions voiding gambling contracts and allowing civil recovery of gambling losses remained virtually intact,[120] and the public nuisance provision, though historically seldom used in the gambling context, remained applicable in the gaming house context.[121]

¶59 Another section of the 1971 Georgia Criminal Code, however, strengthened the specific gaming provisions by attempting to facilitate better enforcement. This statute allows police officers to use wiretapping to detect gamlbing offenses when there is probable cause that such activity is taking place, and a judge so convinced issues the proper investigative warrant.[122]

¶60 With the recent streamlining of the new criminal code, it still remains to be seen how efficiently Georgia's gambling law meets its age-old objective: to abolish all forms of professional gambling and to discourage private gambling as well. If the new code does no more than clarify the conflicting and fragmented old law, however, it accomplishes a long-needed improvement.

Conclusion

¶61 Since the years before the Revolution, Georgia's Protestant population demanded strict laws against gambling. Professional gambling was always thought to be more serious than private betting, with private activity punished less severely. Athletic contests were always exempt from criminal sanction, even when prizes were offered. For the most part, Georgia's gambling law developed through both judicial and legislative action aimed at closing gaps in the law which were exploited by clever gamblers.

¶62 The legislature, however, bent the rules when it needed more tax revenue or a method to distribute land. The authorized lottery was the first example of an "immorality" tax, but duties on futures and pinball machines showed the same bending of morality when the fisc was in danger. Actually, a close look at judicial-legislative interaction from 1880 to 1920 shows the court stepping in where large-scale private business interests seemed to block any legislative sanctions. The futures trade and the horse racing parlor business offer the best examples here.

¶63 The 1971 criminal code represents an extension of other post-World War II legislative efforts designed mainly to strengthen the reach of the criminal sanctions against gambling by giving law enforcement agencies more tools with which to implement enforcement. In addition, the code aimed to clarify existing law and simplify the questions left open for adjudication.

¶64 The practical effect of the new code is yet to be felt. But one can be certain that if the target has been missed in

any way, the legislature will try again, revamping its concepts as new gambling schemes beyond the reach of existing prohibitions are developed.

(Shepardized through June 1975)

Footnotes

1. Acts of 1764, vol. i at 248; Acts of 1765, vol. i at 253 in Prince's Digest of the Laws of Georgia, at 580-582 (1837).

2. Thrower v. State, 117 Ga. 753, 755, 45 S.E. 126, 127 (1903).

3. Roney v. Crawford, 135 Ga. 1.3, 68 S.E. 701, 702 (1910). This case is really a rather complicated stock fraud swindle in which the plaintiff sought to recover money from a company that bought worthless debentures. The court held that the company buying the debentures may have been participating in a "lottery" but, if so, the law did not make the buyer of a lottery chance liable for his foolishness. The case was decided on grounds.

4. Alford v. Burke, 21 Ga. 46, 48 (1857).

5. See note 2, supra.

6. 13 and 14 Anne (1710), Statutes at large, vol. 4 at 463 (1768).

7. See note 1, supra.

8. Arnold and Dubose v. Ga. R.R. and Banking Co., 50 Ga. 304 (1873). This case was concerned with illegal freight charges made by a railroad but has an interesting discussion of the effect of statutorily created illegality on standing to sue on an illegal contract.

9. See note 1, supra (emphasis added).

10. Act of 1796, vol. i, p. 136, collected in Prince's Digest of the Laws of Georgia; p. 976 (1837).

11. Id., Prince at p. 976. All the private lotteries ever authorized are collected in Prince at p. 976.

12. Act of 1802, vol. 2, at 96 in Prince at 976. The act was for the benefit of one H. Rice, who had unsold watches on hand.

13. Act of 1804, vol. ii, at 180; 1815, vol. iii, 830, Prince at 976.

14. Act of 1808, vol. ii, 430, listed in Prince at 976.

15. Acts of 1831 at 151, listed in Prince at 976.

16. Act of 1804, vol. ii, at 213; 1808, vol. ii, 493, 1817, vol. ii, 475; 1820, vol. iv, 611; 1824, vol. iv, 5; 1825, vol. iv, 20; 1827, vol. iv, 276; 1826, vol. iv, 276; 1827, vol. iv, 48; and 1828, vol. iv, 52, 54, all listed in Prince at 976.

17. Acts of 1830 at 221.

18. Act of 1826, vol. iv, at 277, listed in Prince, at 976.

19. Act of 1826, vol. iv, at 276, listed in Prince, at 976.

20. Acts of 1814, No. 353, listed in Prince at 976.

21. Id., vol. iii, at 302, listed in Prince at 976.

22. Acts of 1803, No. 107, listed in Prince at 976.

23. M. Frech, Chronology and Documentary Handbook of the State of Georgia, 15.

24. Act of 1801, vol. ii, 21, in Prince, Digest of the Laws Georgia, at 287 (1839).

25. Acts of 1816, p. 184. This was part of the first comprehensive Penal Code enacted in Georgia. All the gaming provisions were collected in the Tenth Division of the Penal Code. These infractions were punishable by fine and imprisonment at the discretion of the jury.

26. Id. at 184, § 8 and 10.

27. Id. at 184, § 11.

28. Id. at 185, § 13.

29. Acts of 1816 at 188, § 3. The sentence was made totally indeterminate to be set by the jury.

30. Lamar's Compilation of the Laws of the State of Georgia at 643.

31. Acts of 1829 at 280.

32. Kneeland v. State, 62 Ga. 395 (1879) upheld the validity of the law. In Wheatley v. State, 114 Ga. 175, 3952, 877 (1901) four judges of the Supreme Court, a plurality, wished to override the case, but the concurrence of five justices is required by law before a statute can be declared unconstitional.

The Georgia Court of Appeals in Jenkins v. State, 14 S.E.2d 595 (1941) treated Kneeland as something of a dead letter, although the court noted that, as Kneeland was not in point, the discussion of the case in Jenkins was mere dicta.

33. Digest of the Laws of the State of Georgia, Prince at 646 (1837).

34. Forster's Digest of Laws of the State of Georgia, Tax Act of 1820, at 332 (1831).

35. Acts of 1830 at 201.

36. Miller v. Shropshire, 124 Ga. 829, 53 S.E. 335 (1905).

37. Acts of 1833 at 128. This was part of a general repealer provision in the new lottery law of 1833.

38. Hutchkiss Statute Law of the State of Georgia, 745 (1838); Acts of 1838, at 107.

39. Clark, Cobb and Irwin, Code of the State of Georgia, at 880, § 4504 (1861).

40. Clark, Cobb and Irwin, Code of the State of Georgia, 861, 862, § 4425 (1861).

41. Acts of 1858 at 104.

42. Clark, Cobb and Irwin, The Code of the State of Georgia, 152 § 880 (1873); Acts of 1858 at 104.

43. Cobb's Statutes and Forms of the State of Georgia, at 780 (1859); Act of December 11, 1858.

44. Clark, Cobb and Irwin, Code of the State of Georgia, 148 (1861).

45. Id. at 862, § 4426.

46. Clark, Cobb and Irwin, Code of the State of Georgia, at 820, 782 § 4541 and § 4310 (1873).

47. Id. at 821, § 4548, Acts of 1869, 144.

48. Id. at 820, 821.

49. Clark, Cobb and Irwin, Code of the State of Georgia, p. 820, 821, §§ 4543-4544 (1873); Acts of 1869, p. 145.

50. Clark, Cobb and Irwin, Code of the State of Georgia, p. 819-820, §4538 (1873).

51. Acts of 1869 at 159.

52. Acts of 1865-66 at 237.

53. Saye, Albert Berry, A Constitutional History of Georgia: 1732-1968, 269.

54. Constitution of the State of Georgia, § 23 (1868).

55. Alford v. Burke, 21 Ga. 46 (1857).

56. Clark, Cobb and Irwin, Code of the State of Georgia, p. 528, § 2809 (1861).

57. Scott v. State, 29 Ga. 263 (1859).

58. Id. at 265.

59. See also Stevenson v. State, 83 Ga. 575, 10 S.E. 234 (1889). The validity of Stevenson was questioned in Maley v. Dixon, 127 Ga. App. 151, 158 (1974) although Stevenson was not in point in that civil action.

60. Warren v. Hewitt, 45 Ga. 501 (1872).

61. Singleton v. Bank of Monticello, 113 Ga. 527, 38 S.E. 964 (1901).

62. Palmer v. State, 91 Ga. 152, 16 S.E. 937 (1892); Henderson v. State, 22 S.E. 537, 95 Ga. 326, 328 (1894); see also White v. State, 127 Ga. 273, 56 S.E. 425 (1906).

63. Groves v. State, 123 Ga. 570, 51 S.E. 627 (1905). The holding here may not be so broad; it could be argued that the court required a loan "plus" some other activity for connection with the maintenance of the house for conviction. The opinion is short and somewhat confusing.

64. West v. Sanders, 104 Ga. 727, 31 S.E. 727 (1898).

65. See also Exchange Bank of Macon v. Loh, 104 Ga. 446, 31 S.E. 459 (1898).

66. Meyer v. State, 112 Ga. 20, 37 S.E. 96 (1900).

67. Equitable Loan Co. v. Waring, 117 Ga. 599, 44 S.E. 320 (1903).

68. Id. at 609, 44 S.E. 324-325.

69. DeFlorin v. State, 121 Ga. 593, 49 S.E. 699 (1904).

70. Russell v. Equitable Loan and Security, 129 Ga. 154, 161, 58 S.E. 881, (1907). However, the Court of Appeals refused to extend the Russell principle to the wagering of bets on baseball games. The court held that, while the outcome of a ball game is determined by the skill of the players, the outcome of a bet on that game is determined by chance. The distinction is artfully drawn. See Palmer v. State 75 Ga. App. 789, 44 S.E.2d 567 (1947).

71. Id. at 161, 58 S.E. 885.

72. Forbes Drug Co. v. Bernard Manufacturing Co., 20 Ga. App. 270, 92 S.E. 1009 (1917).

73. Id. at 271, 92 S.E. 1009.

74. Acts of 1916 at 155.

75. Commercial Security v. Lee et al., 148 Ga. 597, 97 S.E. 516 (1918).

76. Warren v. Hewitt, 45 Ga. 501 (1872).

77. Cunningham v. National Bank of Augusta, 71 Ga. 400, 403, 404 (1883).

78. Lawton v. Blitch, 83 Ga. 663, 10 S.E. 353 (1889); Moss v. Exchange Bank of Macon, 102 Ga. 808, 30 S.E. 270.

79. Acts of 1882-3 at 34-37; in § 5 of Act of December 9, 1882.

80. Miller v. Shropshire, 124 Ga. 829, 53 S.E. 335 (1905).

81. Id. at 831, 832, 53 S.E. 336.

82. Acts of 1906 at 95.

83. Anderson v. State, 2 Ga. App. 1, 58 S.E. 401 (1907).

84. Thrower v. State, 117 Ga. 753, 45 S.E. 126 (1903). Thrower has been read very broadly; thus, it is not necessary for people to congregate in a gaming house; the mere presence of a gambling operation staffed by a single bookie and doing business by phone has been held to be a "gaming house" within the terms of the statute. Friedman v. State, 64 Ga. App. 405 (1941).

85. Id. at 755, 45 S.E. 127.

86. Jones v. State, 120 Ga. 185, 47 S.E. 561 (1904).

87. Leverett v. Stegal, 23 Ga. 257 (1857).

88. Id. at 258.

89. McLennan v. Whiddon, 120 Ga. 666, 48 S.E. 201 (1904).

90. Id. at 670, 48 S.E. 203.

91. Acts of 1910 at 133.

92. Acts of 1877 at 112. The penalty was fixed at up to one year in prison with a fine of $500-$1000.

93. Acts of 1889 at 187.

94. Acts of 1889 at 164; Acts of 1890 at 225. The latter act simply changed the code number of the cockfighting prohibition.

95. Acts of 1865 at 234.

96. Acts of 1909 at 153, 154.

97. Code of Georgia 1882, Bleckley, § 3011 at 755; Acts of 1873 at 37, 38. The Code provision gave parents a cause of action under the law of 1873 which prohibited gambling with minors.

98. Parks Annotated Code of Georgia, 1914, vol. 2, Civil § 2750. This provision gave carriers the right in general to eject those of "bad" character from trains or other common carriers.

99. Act of 1935 at 11, § 3; see paragraph 47a.

100. Keeney v. State, 54 Ga. App. 239, 187 S.E. 592 (1936); see note 76 and accompanying text supra.

101. Acts of 1945 at 351.

102. Acts of 1947 at 1139, 1140.

103. Acts of 1947 at 1139, 1140; Acts of 1952 at 303, 304. The Act of 1952 increased penalties, from one to five years to five to twenty years.

104. Id., Acts of 1947 at 1139, 1140.

105. Acts of 1966 at 559, 560, 561.

106. Marchetti v. U. S., 390 U.S. 39, 19 L.E.2d 889, 88 S.C. 697 (1968).

107. Acts of 1968 at 1249, 1317-1322; Acts of 1969 at 857, 866; Acts of 1970 at 236, 238-240; Georgia Criminal Code of 1971, §§ 26-2701 - 26-2712.

108. 1971 Criminal Code, § 26-2701. Acts, 1968, pp. 1249, 1317.

109. Id. at § 26-2702, Acts 1968, pp. 1249, 1318; Acts, 1970, p. 690.

110. Id. at § 26-2703, Acts 1968, pp. 1249, 1270, p. 236, 238.

111. Id. at § 26-2704, Acts 1968, pp. 1249, 1319; Acts 1970, pp. 236, 239.

112. Id. at § 26-2705, Acts 1968, pp. 1249, 1319; Acts 1970, pp. 236, 240. Like commercial gambling and running a gambling house, advertising a gambling house is a misdemeanor of a "high and aggravated nature" punished by up to one year in jail and a $5000 fine.

113. Id. at § 26-2706, Acts 1968, pp. 1249, 1320.

114. See note 60, supra.

115. Mims v. State, 88 Ga. 458, 14 S.E. 712 (1891); Brown v. State, 40 Ga. 689 (1870); Miller v. State, 94 Ga. App. 259, 94 S.E.2d 120 (1956).

116. 1971 Criminal Code § 26-2707, Acts 1968, pp. 1249, 1320; Acts 1969, pp. 857, 866; Acts 1970, pp. 236, 240.

117. Id. at §§ 26-2708, Acts 1968, pp. 1249, 1320; Acts 1969, pp. 857, 866; 26-2710, Acts 1968, pp. 1249, 1321; 26-2711, Acts 1968, pp. 1249, 1322; and 26-2712, Acts 1968, pp. 1249, 1322.

118. Id. at § 26-2709, Acts 1968, pp. 1249, 1320; 1969, pp. 857, 866. The constitutionality of the seizure provision has been challenged, but a three-judge district court dismissed the petition for declaratory relief for lack of ripeness. Baxter v. Strickland, 381 F.Supp. 487 (N.D.Ga. 1974).

119. Chappel v. Stapleton, 58 Ga. App. 138, 198 S.E. 109 (1937).

120. See notes 6, 7, and 8, supra.

121. Ga. Code Ann. § 72-103; Gullat v. State ex rel Collins, 169 Ga. 538, 150 S.E. 825 (1929). Gullat held that maintaining a house for betting on greyhound racing was a "public nuisance" and therefore illegal, even in the absence of express statutory authorization for the holding.

122. 1971 Criminal Code, § 26-3004; Acts of 1968 at 1249, 1328.

PARAGRAPH INDEX: Georgia

The Development of the Law of Gambling:

HAWAII

E.F.R.

R.F.D.

A.H.S.

C.H.L.

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Summary

¶1 The development of the law of gambling in Hawawi is a straightforward story. Under the early constitutional monarchs, gambling was uniformly prohibited. Modest decriminalization by Queen Liliuokalani in 1892 was nullified by the provisional government's laws of 1893-94, which remained intact until the 1970's. In 1972, Hawaii enacted a new penal code which decriminalized social gambling, but otherwise continued the traditional anti-gambling policy.

I. The Formative Era: The Constitutional Monarchy

¶2 Before its contact with European culture at the end of the 18th century, the history of Hawaii was to be found in the oral tradition of a people who had no written language. Consequently, little is reliably known about this period. It is known, however, that Hawaii was at this time immersed in a feudalistic system. The nobility and the priesthood made up the ruling class, which was economically supported by the efforts of laborers, farmers, and fishermen. Hawaiian religious beliefs, too, tended to support the social and economic order.

¶3 The first Westerner to visit Hawaii was the English explorer, Captain James Cook, who sailed into the area in 1778. By 1810, modern weaponry, foreign trade, and alliances with powerful foreign interests allowed Kamechameha I to

establish a unified monarchy. Contact with the outside world, little by little, ultimately resulted in the decimation of the native culture. Even before American missionaries arrived in the 1820's, the Hawaiians themselves had discarded the old law and their polytheistic religion. By 1840, Hawaii was officially a Christian nation. The missionaries, at first largely New England Congregationalists, exerted great influence on the life and law of Hawaii. During the 1840's, American political pressure on the British and the French helped stabilize Hawaii as an independent state.

A. Early Gambling Laws

¶4 Early Hawaiian gambling laws, reflecting the teachings of the missionaries, were quite simple. They succinctly prohibited persons from gambling, in just so many words.[1] The motivation behind these early laws is revealed by the preamble of the 1842 gambling law:

> Whereas there are many people who neglect profitable business, which would be of advantage to themselves, their children and the country, and spend their time in employments which waste their property and do injury to their children, it therefore becomes the duty of the law to ward off these evils and seek to promote the greatest good. These are the reasons for enacting the following [gambling] law....[2]

¶5 By 1850, Hawaii produced its first penal code, which continued a straightforward anti-gambling policy.[3] The code provided that "[w]hoever by playing at cards or any other game wins or loses any sum of money or thing of value is guilty of gaming."[4] Subsequent amendments altered the penalties

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attached to this section, but they never exceeded a $100 fine and a sixty day prison term at hard labor.[5]

¶6 Trade with American concerns continued to expand in the 1860's. The 1875 Reciprocal Trade Agreement opened the large Oregon and California produce markets to Hawaiian farmers, and the subsequent boom in the sugar industry tied Hawaii inextricably to the United States. Increased demands for labor, epidemics, and the resultant influx of foreigners furthered the rapid decline of the native population. The monarchy reacted to this crisis by abrogating the existing democratic constitution and taking more direct control over the government. Monarchical abuses, however, led to a bloodless revolution in 1887 led by business and professional forces, and King Kalakua was compelled to promulgate a new liberal constitution.

¶7 Gambling law, however, continued along its early path. In 1884, persons merely present in a place where such games were conducted--even visitors--were subjected to criminal penalties.[6] In 1885, Hawaii's court reacted to the American lottery craze by construing the phrase "any other game" in the 1850 law to include lotteries.[7]

¶8 In 1886, however, Hawaii enacted a separate lottery statute.[8] This statute penalized persons who provided prizes for a lottery or scheme of chance with a $500 fine.[9] Organizers and operators of a lottery or a scheme of chance, as well as ticket sellers, buyers, and possessors, were subject to a $500 fine, and a six month prison term upon

conviction for a second offense.[10] Possessors of tools, devices, implements, or tickets used in connection with a lottery or banking game were also subjected to criminal liability under the statute.[11] Subsequent decisions indicated that these provisions were effective against both numbers runners[12] and lottery ticket sellers.[13]

¶9 The 1886 lottery statute contained two exceptions to the general prohibition against lotteries. The Minister on the Interior could license a lottery or raffle for paintings, literature, models, and specimens. In addition, agricultural and horticultural associations could conduct activities to improve the breed of poultry by raffling specimens at shows.[14]

¶10 Other methods of controlling gambling focused on activities licensed by the government. Innkeepers and holders of liquor licenses were subjected to fines for permitting gaming on their premises.[15] Keepers of billiard tables and bowling alleys could also draw light fines for allowing such activity at their places of business.[16] In 1869, any house where gambling was permitted was labeled a disorderly house, and keepers of such houses drew penalties upon conviction.[17] In the same year, a statute was enacted declaring common gambling houses to be common nuisances.[18] Those who maintained such sanctioned places drew fines and prison sentences.[19]

B. Early Civil Provisions

¶11 The law of gambling obligations also evolved in this period. An 1869 statute allowed persons who lost money, or other valuables, by playing or betting on cards and other

games to sue the winner for their losses.[20] Another provision enabled anyone to sue the winner for three times the amount lost at gambling if the loser did not sue within three months of the loss.[21] The recovery was then divided evenly between the successful plaintiff and the public schools.[22] All notes, contracts, or other agreements, whose consideration stemmed from gambling transactions, were declared void.[23] Bona fide holders without notice, however, could enforce such obligations.[24] Land which was the subject of gambling contracts passed to the party who would be entitled to it if the grantor suffered a natural death.[25] Finally, witnesses in gambling obligation suits, other than the plaintiff and the defendant, were required to testify but were granted immunity from criminal prosecution.[26]

¶12 Court decisions extended the reach of these provisions to situations where their applicability was questionable. In Agnew v. McWayne,[27] the court allowed the plaintiff to recover his bet from the stakeholder involved. The court issued no holding, however, as to whether the gambling obligations statute directly reached the activity of horse racing or stakeholders as a class. The court observed:

> [I]t seems to us in the case at bar it is not necessary to consider if a bet paid on the event of a race could be recovered from the winner by force of the statute. The plaintiff's stake had not been paid over, but was in the hands of the stakeholder, the defendant... "The stakeholder is a mere depository of both parties for the money deposited by them respectively with a naked authority to deliver it over on the proposed contingency. If the authority is actually

> revoked before the money is paid over, it remains a naked deposit to the use of the depositor," is the language of Chief Justice Shaw in Ball v. Gilbert g., trustee, 12 Met., 403....Such being the attitude of the stakeholder, if he refuses to return stakes to either party recalling his deposit, the demand may be enforced in an action for money had and received.[28]

C. Authorized Lotteries

¶13 While the new-found moral tradition condemned gambling, the need to raise revenue fostered exceptions. In 1892, Queen Liliuokalani granted exclusive franchises to conduct lotteries to six private individuals.[29] The franchises were good for twenty-five years and were designed to generate $500,000 of revenue per year.[30] The revenue was to be used for construction of an ocean cable to an American telegraph system, development of railroads, improvements of harbors, construction of roads, bridges, and wharves, and encouragement of industry, tourism, and immigration.[31] The grantees were allowed to conduct their businesses tax-free.[32] The exclusive franchises were protected by heavy penalties for those who dealt in unauthorized lottery tickets.[33] But Queen Liliuokalani's regime did not last long past the date when the lotteries were authorized, and the scheme fell with her government.[34]

II. The Modern Era: 1893 to date

¶14 In 1893, a revolution occurred in reaction to the Queen's attempt to replace Hawaii's liberal constitution with

a despotic document. The revolutionists were secretly backed by the Harrison administration, and the Queen's supporters were intimidated by troops from the U.S.S. Boston, which landed to protect American lives and property. An annexation treaty was proposed in 1893, but it failed to be approved by the Senate. In 1894, President Cleveland initiated an investigation of American involvement in the revolution, and it discovered wrongdoing. Cleveland then attempted to force the Queen's reinstatement, but the new provisional government rejected his efforts. The provisional government stayed in office, electing Sanford B. Dole as its President. It went on to correct many abuses of the previous legislature and monarchy.

¶15 American annexation finally took place in 1898, due in part to the expansionist mood of a Congress, which was then involved in the Spanish-American War. But as early as 1893, the provisional government moved to restructure Hawaii's gambling law. It repealed the lottery law,[35] voided the criminal gambling provisions of the old code, and enacted a new set of prohibitions which survived until 1972.[36]

A. The Gambling Law of 1893

¶16 The 1893 prohibitions against gaming were aimed at three classes of people. Persons who actually participated in "any banking or percentage game" for things of value, or "any other game in which money or anything of value is won or lost," constituted the first class. Persons who merely bet on these

games, and those present when such activities occurred, represented the others affected by the new statute.[37] All three offenses were misdemeanors, punishable by a $1000 fine or one year's imprisonment at hard labor, or both.[38]

¶17 The 1893 gaming law also included a general provision against lotteries.[39] Persons who prepared, conducted, or assisted in the maintenance of a lottery were declared guilty of misdemeanors.[40] Those who bought, sold, or possessed any ticket, chance, share, or interest in a lottery were also penalized.[41] Both offenses carried with them a possible fine of up to $1000 or one year's imprisonment at hard labor, or both.[42] The statutory definition of a lottery established in the 1893 statute was far-reaching. It covered many games of chance as well as business promotions of any kind:

> A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or any interest in such property upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, che fai pakapio, gift enterprise or by whatever name the same may be known.[43]

¶18 Two other enactments reinforced Hawaii's anti-lottery policy. A provision of the Hawaiian Constitution of 1894 included a clause declaring that "...no lottery shall be authorized in this Republic, nor shall the sale of lottery tickets be allowed."[44] The Organic Act of 1900, which achieved Territorial status for Hawaii, also stated that no lottery or sale of lottery tickers would be allowed.[45]

¶19 The 1893 laws of the provisional government prohibited owners and lessors of property from knowingly permitting their houses or vessels to be used for lotteries or illegal games.[46] Witnesses of any gambling violation were required to testify on penalty of a misdemeanor conviction[47] but were granted immunity from criminal prosecution.[48] Finally, all property offered for sale or distribution contrary to the gambling laws was to be forfeited to the territorial government.[49] In 1911, cities and counties received the right to receive forfeited property.[50] All such property could be used as evidence in gambling prosecutions.[51] In 1935, a statute was enacted which provided for the recovery of forfeited property by owners who could establish that they were not involved in the discovered gambling.[52]

¶20 In 1896, a new section was added to the gambling laws, subjecting persons who bet or gambled on horse races, boat races, ball games, bicycle races, or other athletic contests to a misdemeanor charge.[53] In 1898, Hawaii attempted to exercise control over gambling through its licensing activities. Liquor licensees who permitted gambling on their premises risked heavy fines and imprisonment, as well as license revocation.[54] Persons convicted of gambling could not obtain a license for a billiard or bowling establishment.[55] A similar provision remains in effect today.

¶21 Trading stamp enterprises were also outlawed during the territorial period. The original 1905 prohibition was comprehensive, applying to even those schemes where every

purchaser received the same gift of value.[57] Subsequent litigation, however, confined the prohibition to non-uniform gift enterprises or schemes of chance, the broader prohibition being ruled unconstitutional.[58]

¶22 In 1909, persons who exposed gambling implements to view, in a place which was structured so as to impede the entrance of the police, were declared guilty of a misdemeanor. Three or more persons had to be present in the gambling establishment at the time of the arrest to support a conviction, and all such persons could themselves be charged with misdemeanors.[59]

B. Case Law Developments: Early 1900's

¶23 The early 1900's witnessed the first major judicial activity in the area of gambling. In 1905, Territory ex rel. County of Oahu v. Whitney held that the territory could authorize counties to pass local police ordinances suppressing gambling.[60] Counties maintain that power in Hawaii today.[61]

¶24 In Territory v. Apoliona, the court interpreted the phrase "any other game" in the 1893 gaming statute to include the seven-eleven dice game. The court stated:

> It is contended on behalf of the defendants that in order to support a conviction it was necessary to show that the game testified to was a banking or percentage game. This contention is without merit. The language of the statute plainly includes within its prohibition every "other game in which money or anything of value is lost or won," irrespective of whether or not it is a banking or percentage game.[63]

The scope and meaning of the 1894 lottery provisions[64] were also clarified. In Territory v. Furomori it was decided that lottery ticket buyers could not be convicted of assisting in the maintenance of a lottery, but could only be prosecuted for the one offense which directly prohibited such purchasing activity.[65] Territory v. Beeson held that slot machines constituted lotteries, citing the all-inclusive definition noted above.[66]

¶25 In the mid-1920's, the court also interpreted the 1893 provision which penalized owners and lessors who knowingly permitted their premises to be used for gambling purposes. In Territory v. Harada, mere control or occupation of the premises involved was deemed insufficient to sustain a conviction under this statute. The accused must actually own or rent the premises in which gambling has been permitted.[67] Territory v. Aki made it clear that the owner or lessor must have actual knowledge of the occurrence of gambling on his premises. The jury may consider, however, what a prudent man would have known about his own premises in deciding whether or not the defendant knew of the gambling.[68]

¶26 Hawaii's first territorial years were difficult. The loss of revenue from custom duties caused Hawaii to create one of the first workable income tax laws. As time went on, Americans began to show an increasing interest in the islands. Many emigrated to Hawaii, and others invested in sugar and pineapple plantations, products which soon became central to the territory's economy. By the time of the Japanese attack

on Pearl Harbor, Hawaii had been established as an important American military base protecting the Pacific coast from foreign attack. During the war, Hawaii became an armed camp from which American forces directed their fight against the Japanese. Although thousands of Hawaiians fought with the allies on the European front, concerns about the large numbers of Hawaiians of mainland Chinese or Japanese origins blocked statehood for years after the war.

C. 1950's: A New Period of Judicial Activism

¶27 The 1950's brought a wave of court decisions in the gambling area, interpreting old law to meet modern challenges. Territory v. Tsutsui[69] held that a game dependent on skill rather than chance was covered by the 1893 gaming prohibition through the statutory phrase "any other game." The court observed:

> Territory v. Apoliona...points out that to come within such statute a gambling [game] need not be a banking or percentage game and, we may and, need not be dependent upon chance rather than skill. Betting on a game is prohibited and penalized.[70]

¶28 Territory v. Sur[71] took up the elements of skill and chance in the context of Hawaii's lottery prohibition. The court concluded that in order to be prohibited, a lottery-type scheme must not only involve an element of chance, but chance must predominate over skill in ascertaining who wins and who loses:

> Precedents interpreting these gambling schemes all recognize the necessity of determining, in order to constitute a

> lottery, the presence of the three requisite elements of prize, consideration and chance; and of further determining whether the element of chance predominates over skill in any particular scheme....In the absence of any one of these, the scheme is held not to constitute a lottery. By what name a particular scheme is designated is immaterial, the test being whether it presents the common factors of prize, consideration and chance, and the predominance of chance over skill.[72]

Sur, in holding that the poolselling scheme in question was prohibited by the lottery statute, set out a liberal test to determine whether or not chance predominated over skill in any particular indicted activity:

> It may well be contended that the skill of the wagerer himself in the selection of winners predominates in schemes such as here presented. We are, however, of the opinion that the amount which the bettor will receive, if he succeeds in selecting all the winners, is exclusively dependent upon chance. The factor of odds, as we conceive it, need not be advertised, or even be an expressed condition of the wager. In the instant scheme, the selection of the opposing teams, and the "Pick--Winners...--Points" constitutes the so-called odds which set not only the chance of winning the wager, but also determine the amount of winnings, thus establishing the scheme as one predominantly of chance and not of skill.[73]

¶29 A similar test was later used in Territory v. Pierce. There, the court made it clear that it was not interested in the skillfully disguised name of the scheme, but rather with the actual role of chance in producing the final result.[74]

¶30 Another lottery decision in this period limited the possible scope of the earlier Beeson decision, which had found slot machine operations to be prohibited by the lottery statute.[75] In Territory v. Shinohara,[76] the court held that pinball machines were not lotteries. The decision was based

on the 1894 language which defined lottery as a scheme played "among persons".[77] Since pinball is a one-person game, the lottery provision could not reach its operation. Pinball players, however, still had to contend with the 1893 gaming statute.[78] In the same year as the Shinohara decision, the court held that winning free games on a pinball machine was a violation of the gaming act. Free games were considered "valuable", and pinball machines were again held to fall within the phrase "any other game".[79]

¶31 An important challenge to the gaming law was made in Territory v. Wong. The defendant was charged with being present in a place where monte was being played, in violation of the 1893 law.[80] The statute was challenged for vagueness, indefiniteness, and overbreadth, but the court held it constitutional by limiting the crime to situations where persons were intentionally present in a place where gambling was taking place, with knowledge that the game involved was an illegal activity. The court made it clear that the "presence" offense was applicable to social gamblers as well as professionals.[81]

¶32 One final case of note in this period concerned the 1909 statute which penalized those present in barred or barricaded places where gambling devices were "exposed to view".[82] In Territory v. Ah Fook Young, the court held that the gambling implements involved need not have been in use at the time of the police raid, but only had to be within the range of sight of the officer.[83]

¶33 In many prosecutions under the 1894 gambling laws, the complainant was the sole witness on behalf of the prosecution. A 1953 case, Territory v. Tacuban, ruled that the fact that such a witness participated in the gambling activity, and gave uncorroborated testimony, did not hinder the conviction of the defendant.[84] Another case in this period addressed the problem that under Hawaiian law there were no accessories to misdemeanors. The court held that defendants who did not participate in gambling, but were in fact accessories, were to be charged as principals.[85]

¶34 Hawaii finally gained statehood in 1959. Statehood brought with it phenomenal economic growth. Retail sales doubled from 1958 to 1965. Decreased transportation costs through package tours increased tourism substantially, and the sugar and pineapple industries continued to expand. The construction of housing, transportation facilities, and manufacturing establishments showed steady growth. Meanwhile, Hawaii's gambling prohibitions were cut back, first by judicial activism, and subsequently by the legislature itself.

¶35 As late as 1961, in State v. Prevo, the Supreme Court of Hawaii reaffirmed Territory v. Tsutsui[86] and Territory v. Wong.[87] Tsutsui had held that a game dependent on skill, rather than chance, was prohibited by the gaming laws, while Wong sustained the constitutionality of the so-called "presence at" offenses. Prevo made it clear that the traditional anti-gambling policy, formerly adhered to by the courts, was still vibrant. Once again, the "any other games" clause was

used to extend the prohibitory scope of the statute to outlaw new forms of gambling activity. The court observed:

> ...the words "any other game" have been held to include a horse race (dictum), Agnew v. McWayne, 4 Haw. 422; a lottery, The King v. Ah Lee and Ah Fu, 5 Haw. 545; Pak Kap Pio, a Chinese lottery, The King v. Yeong Ting, 6 Haw. 576; '7-11', commonly known as 'craps', Territory v. Apoliona, 20 Haw. 109; black jack or high card, Territory v. Tsutsui, 39 Haw. 287; by implication, paikau, Territory v. Wong and Hong, 40 Haw. 423; pinball machines, Territory v. Uyehara, 42 Haw. 184....
>
> There is no doubt that it was the intention of our legislature to broadly prohibit so as to discourage gambling in all its forms....The sweeping language of our statute clearly prohibits all forms of gambling games whenever they may be devised and by whatever names they may be called. It is not necessary that there should be new legislation to meet each new invention. The legislative intent was to make criminal the playing of any game so designed that money or property is risked on the contingency of winning some valuable reward.[88]

¶36 Seven years later, however, five newly appointed supreme court justices[89] expressly overruled Wong in State v. Abellano,[90] holding that an Honolulu ordinance, which penalized persons present at cockfights, was unconstitutionally vague:

> Primarily, the term presence has a spacio-physical frame of reference. Unless the activity at which presence is unlawful is in a narrowly confined place, determination of what constitutes presence at the activity can be resolved only on the basis of policy. Setting such policy is a legislative function. The legislative body has failed to make clear its policy determination.[91]

¶37 State v. Shigematsu[92] removed any doubts which may have lingered after the Abellano decision about the status of the so-called "presence at" offenses. The defendant in

Shigematsu was charged with being present in a room where gambling implements were exposed to view, and which was built to impede the entrance of police officers. The court declared this statute unconstitutional as well, but did not base its decision on the vagueness issue. Rather, Shigematsu focused on the overly broad scope of the statute, which penalized persons merely present at any place, under the required circumstances:

> Any home built with locks in the doors would come within the term "any such room, house or place...built or protected in a manner to make it difficult of access or ingress to police officers."...Thus, it would appear that any person within a room of his home where cards, dice or chips are in view would be violating the statute.[93]

¶38 The court did not conclude its opinion, however, upon finding that the statute was overbroad. In addition, it considered the statute's impact on Hawaiians' freedom of movement and association:

> As we have stated, there is no question that the State may in the exercise of its police power enact legislation to proscribe gambling and thereby suppress the evils connected therewith. However, recognizing that the statute places an unlimited and indiscriminately sweeping infringement upon the freedom of movement and association, we believe that the statute goes much further than necessary to achieve its purpose. We hold that the statute violates Art. I, Sec. 2 of the Hawaii State Constitution and, therefore, is void and unenforceable.[94]

D. Total Revision: The 1972 Code

¶39 In 1972, the legislature responded to the Abellano and Shigematsu decisions by repealing all existing gambling

laws, both criminal and civil, and replacing them with a chapter in Hawaii's new Penal Code.[95] In their current form, Hawaii's gambling laws have preserved many of the early legislative and judicial policy decisions. The most significant change in the new code is its treatment of social gambling. Decriminalization is effected by making an affirmative defense available to social gamblers, who are charged with certain gambling offenses.

¶40 Hawaii's criminal gambling law now revolves around four main offenses: promoting gambling,[96] gambling,[97] possession of gambling records,[98] and possession of gambling devices.[99]

(1) Promoting gambling

¶41 There are two degrees of promoting gambling. Promoting gambling in the first degree is a felony which affects those who handle large sums of money in connection with any gambling activity.[100] Players are not normally liable under this provision, but under some circumstances those gaining large winnings from gambling schemes would also be liable as first degree promotors.[101] Other winners, and anyone else who knowingly shares in any gambling proceeds, are guilty of second degree promotion, which is a misdemeanor.[102]

(2) Gambling

¶42 One who "knowingly advances or participates in any gambling activity" is guilty of gambling, a misdemeanor.[103]

The scope of the offense includes all persons who are involved in virtually any aspect of a game, gambling scheme, or contest of chance.[104] Those who establish such activities, acquire equipment for them, grant permission for the use of premises for gambling, or simply become players in an illegal game are liable under this section.[105]

(3) Possession of gambling records

¶43 There are two degrees of possession of gambling records, the first being a felony and the second a misdemeanor.[106] First degree possession focuses on persons who handle memoranda of large plays in connection with any gambling activity.[107] Players and other persons involved in a gambling operation may be liable for second degree possession of gambling records.[108] Proof of possession of such records is prima facie evidence that the possessor had knowledge of their content and character.[109]

(4) Possession of gambling devices

¶44 Possession of gambling devices is a misdemeanor.[110] A "gambling device" is defined as any paraphernalia used in a gambling activity, with the exception of lottery tickets.[111] One commits the offense by handling such a device or negotiating for its use with knowledge of its designed purpose. Anyone so involved with the device, from the point of view of the manufacture to its actual illegal use, may be convicted under this provision.[112] Again, proof of possession of a

device constitutes prima facie evidence of possession with knowledge of its content and character.[113]

(5) Social gambling

¶45 Social gambling is an affirmative defense to all the gambling, gambling record, and gambling device offenses.[114] Social gambling occurs only when six independent conditions are met: (1) players compete on equal terms, (2) no player receives anything other than his own personal winnings, (3) no other person receives anything of value, directly or indirectly from the activity, e.g., a proprietor receiving patronage, (4) the activity is not conducted in a business area or public place, (5) the players are adults, and (6) the activity is not bookmaking.[115] These conditions generally legalize private card games, private poolselling, and other social gambling. The defendant attempting to utilize this affirmative defense has the burden of proving the six necessary elements by a preponderance of the evidence.[116] The prosecutor need not show that the activity involved was not social gambling in order to gain a conviction.[117] In addition, persons who derive gambling income as elements of organized crime, along with their associates, are prohibited from using the social gambling defense to block the use of criminal sanctions against them.[118]

¶46 Some important definitions help clarify the scope of the new law. "Gambling activity" is defined as staking something of value upon a future event not within the player's

control, with the understanding that someone will receive something of value if a certain outcome occurs.[119] Specific forms of such illegal activity, however, are also defined. Accepting bets upon the outcome of future contingent events from the public constitutes "bookmaking".[120] A contenst where a material element of chance is operative is a "contest of chance".[121] Lotteries and mutuels are specifically defined as subspecies of "gambling activity".[122] Business promotional schemes, or gift enterprises, are also outlawed by the statute, because it defines "something of value" to include free games, entertainment, credit, or property.[123] The fact that skill is a factor in an activity does not negate the illegal nature of a gambling scheme.[124] Bona fide business transactions and insurance agreements, however, are not "gambling activities".[125]

¶47 Other miscellaneous gambling provisions in the code provide that the legality of a lottery outside the state is no defense to an in-state lottery prosecution.[126] In addition, one of the code sections provides for the forfeiture to the state of gambling devices and records, as well as money seized from a gambling operation.[127]

E. Organized Crime Statute

¶48 In addition to the gambling chapter in the 1972-73 criminal code, Hawaii has enacted one other significant law relating to gambling. In 1972, Hawaii passed a wide-reaching statute for the suppression of organized crime.[128] The intent of the legislature is illustrated by the following statement

of its findings:

> [T]he legislature finds that organized crime with its increasing affluence and power resulting from the investment of large sums of illegally procured wealth poses a significant threat to the safety and welfare of the State of Hawaii and that such illicit capital, seeking the protection of the corporation and other business laws of the State, could finance organized crime under the authority of law by creating legal entities fully clothed with respectability and capable of holding legal title to property.[129]

¶49 Essentially, the statute draws a connection between organized crime, racketeering, and certain types of criminal activity, e.g., illegal gambling.[130] Persons who derive income from illegal gambling are penalized under this statute. Acquiring an interest in, or control of, any business enterprise through illegal gambling activities is prohibited. The statute further prohibits persons from conducting illegal gambling activities through otherwise legal business entities.[131] Violators of these provisions are subject to maximum penalties of a $10,000 fine or ten years imprisonment, or both.[132]

¶50 Other provisions of the organized crime statute provide for the forfeiture of corporation charters,[133] the enjoining of business enterprises,[134] the forfeiture of property,[135] and the denial of the social gambling affirmative defense to elements of organized crime and their associates.[136]

F. Civil Law Developments

¶51 One important feature of Hawaii's new gambling law is its complete failure to deal with the civil law of gambling.

In 1972, the legislature repealed all existent statutory law in this area. It remains, therefore, an open question whether Hawaii has a body of civil law to which the courts may turn to handle private disputes, and if so, just what policies such law maintains. No such cases have been reported since 1972.

Conclusion

¶52 Hawaii has long had a strong and pervasive policy against gambling. This policy received its largest support from the Christian missionaries. Indeed, modest decriminalization by Queen Liliuokalani at the turn of the century was reversed as an abuse of power.

¶53 The judiciary's major influence has been to extend the scope of prohibitions to cover new forms of gambling. The court's sensitivity to constitutional rights in modern decisions has played an important role in prodding a legislative clarification and modernization of the law in this area. Modern legislation has exempted social gambling from criminal sanctions. But at the same time, all other forms of gambling have been strictly prohibited. Further, statutes particularly geared to combatting all the activities of organized crime, including gambling, have been enacted. New moves toward decriminalization, therefore, appear unlikely.

(Shepardized through February 1975;
Cases through Septe...ber 1972;
Statutes through 1974 Supp.)

Footnotes

1. Act of ------, -----, ch. 29, §§1-3, (1842) Hawaii Laws, in The Fundamental Law of Hawaii (Thurston, ed. 1904) 90-91.

2. Id.

3. Penal Code of the Hawaiian Islands, ch. 40, §1 et seq. (1850).

4. Id. §1.

5. Act of July 8, 1870, ch. 5, §1 (1870) Hawaii Laws 5.

6. Act of Aug. 11, 1884, ch. 22, §1, (1884) Hawaii Laws 25-26.

7. King v. Yeong Ting, 6 Hawaii 576 (1885).

8. Act of Oct. 15, 1886, ch. 41, §1 et seq. (1886) Hawaii Laws 88-90.

9. Id. §2.

10. Id. §3.

11. Id. §5.

12. Queen v. Kaka, 8 Hawaii 305 (1891), held that a numbers runner could be convicted for assisting in the maintenance of a lottery.

13. Queen v. Alani, 8 Hawaii 533 (1892), sustained the conviction under the 1866 lottery statute of a lottery ticket seller.

14. Act of Oct. 15, 1886, ch. 41, §4, (1886) Hawaii Laws 89-90.

15. Civil Code of Hawaii, §75 (1859) 21-22, and Act of Aug. 7, 1882, ch. 44, §24, (1882) Hawaii Laws 98.

16. Civil Code of Hawaii, §80 (1859) 22.

17. Penal Code of the Hawaiian Kingdom, ch. 42, §§1-2 (1869).

18. Id. ch. 36, §1.

19. Id. §§9-10.

20. Id. ch. 39, §5.

21. Id. §6.

22. Id.

23. Id. §7.

24. Id.

25. Id.

26. Id. §8.

27. Agnew v. McWayne, 4 Hawaii 422 (1881).

28. Id. at 425-426. The court notes in this case that a wager was valid in 1881 at common law. But the status of the common law in Hawaii at that time can be seen in King v. Robertson, 6 Hawaii 718, 725 (1889), where Judge McCully states:

> [T]he common law is not in force in this Kingdom. This is not an English colony which has brought out the law of England to be in force here, except as modified by express statute. The law of this country is found in our enacted statutes, and in the precedents established by decisions of our Supreme Court, in which it is allowed (Section 823 of the Civil Code) "to cite and adopt the reasons and principles of the admiralty, maritime and common law of other countries, and also of the Roman or civil law, so far as the same may be founded in justice and not in conflict with the laws and customs of this Kingdom." This doctrine has been frequently expressed by the Supreme Court.

29. Act of Jan. 13, 1893, ch. 111, §1 et seq. (1892) Hawaii Laws 334-341.

30. Id. §§1, 3.

31. Id. §4.

32. Id. §5.

33. Id. §7.

34. Act of Jan. 25, 1893, ch. 6, §1, (1893-94) Laws of the Provisional Government of Hawaii 7.

35. Id.

36. Act of Mar. 7, 1893, ch. 21, §13, (1893-94) Laws of the Provisional Government of Hawaii 37.

37. Id. §5.

38. Id. §10.

39. Id. §§1-3, 7-10.

40. Id. §1.

41. Id. §3. This offense was also a misdemeanor.

42. Id. §10.

43. Id. §2.

44. Const. Rep. of Hawaii, Art. 98 (1894), in The Fundamental Law of Hawaii (Thurston ed. 1904) 238.

45. Act of April 30, 1900, ch. 339, §55, 31 Stat. 150 (Hawaii Organic Act).

46. Act of Mar. 7, 1893, ch. 21, §9, (1893-94) Laws of the Provisional Government of Hawaii 37.

47. Id. §7.

48. Id. §8.

49. Id. §4.

50. Act of Apr. 5, 1911, ch. 61, §1, (1911) Hawaii Laws 64.

51. Id. §2.

52. Act of May 10, 1935, ch. 190, §§1-3, (1935) Hawaii Laws 175-176.

53. Act of Apr. 22, 1896, ch. 16, §1, (1896) Hawaii Laws 31-32.

54. Act of July 7, 1898, ch. 6, §8, (1898) Hawaii Laws 145-146.

55. Act of Apr. 4, 1911, ch. 50, §1, (1911) Hawaii Laws 52.

56. Hawaii Rev. Laws §§445-51,52 (1968, 1974 Supp.).

57. Act of -----, -----, ch. 85, §1, (1905) Hawaii Laws.

58. Territory v. M.A. Gunst and Co., 18 Hawaii 196 (1907).

59. Act of Mar. 25, 1909, ch. 44, §1, (1909) Hawaii Laws 54-55.

60. 17 Hawaii 174, 7 A.C. 737 (1905).

61. Haw. Rev. Laws §62-34(5) (1968).

62. Territory v. Apoliona, 20 Hawaii 109 (1910).

63. Id. at 111.

64. Act of Jan. 25, 1893, ch. 6, §1 et seq. (1893-94) Laws of the Provisional Government of Hawaii 35.

65. 20 Hawaii 344 (1911).

66. 23 Hawaii 445 (1916). See Act of Jan. 25, 1893, ch. 6, §2, (1893-94) Laws of the Provisional Government of Hawaii 35, and text accompanying n. 43, supra.

67. 29 Hawaii 244 (1926).

68. 28 Hawaii 514 (1925).

69. 39 Hawaii 287 (1952).

70. Id. at 289.

71. Territory v. Sur, 39 Hawaii 332 (1952).

72. Id. at 337.

73. Id. at 339.

74. Territory v. Pierce, 43 Hawaii 246 (1959).

75. Territory v. Beeson, 23 Hawaii 445 (1916).

76. Territory v. Shinohara, 42 Hawaii 29 (1957).

77. Act of Mar. 7, 1893, ch. 21, §2, (1893-94) Laws of the Provisional Government of Hawaii, 46-47.

78. Id. §5.

79. Territory v. Uyehara, 42 Hawaii 184 (1957).

80. Act of Mar. 7, 1893, ch. 21, §5, (1893-94) Laws of the Provisional Government of Hawaii, 47.

81. Territory v. Wong, 40 Hawaii 257 (1953).

82. Act of Mar. 25, 1909, ch. 44, §1, (1909) Hawaii Laws 54-55.

83. Territory v. Ah Fok Young, 39 Hawaii 422 (1952).

84. Territory v. Tacuban, 40 Hawaii 208 (1953).

85. Territory v. Bollianday, 39 Hawaii 590 (1952).

86. 39 Hawaii 287 (1952).

87. 40 Hawaii 257 (1953).

88. State v. Prevo, 44 Hawaii 665, 671-672, 361 P.2d 1044, 1048-1049 (1961).

89. It is interesting to note that no justice who sat on the Wong or Tsutsui benches was on the court in 1968, when State v. Abellano, 50 Hawaii 384, 441 P.2d 333 (1968), was decided.

90. State v. Abellano, 50 Hawaii 384, 441 P.2d 333 (1968).

91. Id. at 386.

92. State v. Shigematsu, 52 Hawaii 604, 483 P.2d 997 (1971).

93. Id. at 607, 483 P.2d at 999.

94. Id. at 611-612, 483 P.2d at 1001.

95. Act of Apr. 7, 1972, ch. 9, §1, (1972) Hawaii Laws 32. This statute was replaced by Act of May 29, 1973, ch. 201, §1, (1973) Hawaii Laws 375-379, presently codified in Haw. Rev. Laws §§712-1220 to 1231 (1974 Supp.). There are some differences between the two versions, but they are designed toward the same ends.

96. Haw. Rev. Laws §§712-1221 and 1222 (1974 Supp.).

97. Id. §712-1223.

98. Id. §§712-1224 and 1225.

99. Id. §712-1226.

100. Id. §§712-1221(2).

101. Haw. Rev. Laws §712-1221 (1974 Supp.) reads as follows:

> (1) A person commits the offense of promoting gambling in the first degree if he knowingly advances or profits from gambling activity by:
> (a) engaging in bookmaking to the extent that he receives or accepts in any one

day more than five bets totaling more than $500; or

(b) receiving in connection with a lottery, or mutuel scheme or enterprise money or written records from a person other than a player whose chances or plays are represented by such money or records; or

(c) receiving, in connection with a lottery, mutuel, or other gambling scheme or enterprise, more than $1,000 in any one day of money played in the scheme or enterprise.

(2) Promoting gambling in the first degree is a class C felony.

Winners of more than $1,000 would be liable for first degree promotion under §712-1221(1)(c), while winners of $1,000 or under would not be so liable. But members of this latter group could still be convicted of first degree promotion under §712-1221(1)(b) if they made their gains as winners of a lottery, a mutuel scheme, or a mutuel enterprise.

102. Haw. Rev. Laws §712-1222 (1974 Supp.).

103. Id. §712-1223.

104. Id. §712-1220(1), 712-1220(4).

105. Id.

106. Id. §712-1224(2), and 1225(2).

107. Id. §712-1224(1). Casual players are not liable under this provision by definition, as they do not meet the dollar figure or number of plays requirement.

108. Haw. Rev. Laws §712-1225 (1974 Supp.).

109. Id. §712-1228(1).

110. Id. §712-1226(2).

111. Id. §712-1220(5).

112. Id. §712-1226(1).

113. Id. §712-1228(1).

114. Id. §712-1231(b)(1).

115. Id. §712-1231(a).

116. Id. §712-1231(b)(2).

117. Id. §712-1231(c).

118. Act of May 19, 1972, ch. 71,§2(-4), (1972) Hawaii Laws 282. This provision may invoke constitutional challenges along the lines of equal protection and freedom of association.

119. Haw. Rev. Laws §712-1220(4) (1974 Supp.).

120. Id. §712-1220(2).

121. Id. §712-1220(3).

122. Id. §712-1220(6), and 1220(7).

123. Id. §712-1220(11).

124. Id. §712-1220(3).

125. Id. §712-1220(4).

126. Id. §712-1229.

127. Id. §712-1230.

128. Act of May 19, 1972, ch. 71, §1 et seq. (1972) Hawaii Laws 280-287.

129. Id. §1.

130. Id. §2(-1).

131. Id. §2(-2).

132. Id. §2(-3).

133. Id. §2(-5).

134. Id. §2(-6).

135. Id. §2(-3).

136. Id. §2(-4).

PARAGRAPH INDEX: Hawaii

The Development of the Law of Gambling:

IDAHO

R.F.D.

Table of Contents

Summary

¶1 The development of the law of gambling in Idaho is both interesting and complex. The frontier period of Idaho Territory saw wide-open and wide-spread gambling. There soon developed a period of regulation and control, under state licensing and supervision. Next, legislative and constitutional prohibitions completely outlawed both gambling and the lotteries by the turn of the 19th Century. The modern period has seen still another policy shift, this time involving a program of partial decriminalization, and the regulation and licensing of certain gambling activities for the purpose of raising revenues. This policy continues today, but is limited in scope to parimutuel horse racing, due to action in the courts which voided, on constitutional grounds, certain other legislative attempts to license gambling activities.

I. The Territorial Experience

¶2 The name Idaho is a composite contraction of two Shoshonean Indian words, E-da-how and Eda-hoe, referring to the purple columbine of Colorado and meaning "the sun is coming up" and "it is time to arise." Idaho was originally part of the Oregon Country; when Oregon became a state in 1859, all of what is now Idaho was partitioned and included in Washington Territory. Within a few years still another partition took place, and on March 3, 1863, Idaho Territory was created, separate and distinct from what remained as Washington Territory.

¶3 The first recorded experiences of the white man in Idaho are associated with the expedition of Meriwether Lewis and William Clark (1803-1806).[1] On the heels of the explorers came the fur traders[2] and missionaries,[3] and the resulting fur posts and missions constituted the first white settlements in Idaho. The white population of Idaho Territory remained small until 1860 when E. D. Pierce's discovery of placer gold north of Weippe Prairie touched off the Idaho gold rush. The 1860 gold rush proved to be more of a bust than a boom and by the late 1860's the population of Idaho was again on the decline.[4]

¶4 One of the most memorable events in the early history of Idaho Territory was the war with Chief Joseph and his followers, the Nez Perce. The Nez Perce War of 1877 was brought about by the Indians' rebellion of a white land grab in defiance of a treaty. The War began with two battles in Idaho and ended months later when Chief Joseph was forced to surrender to

General Nelson A. Miles a short distance from the Canadian border. The Nez Perce had been the friend of the white man in Idaho from the beginning,[5] and the ruthless treatment they received, in return, is certainly one of the low points in American history.[6]

A. Gaming

¶5 In 1863 the organic act creating the Territory of Idaho was passed[7] and the first Territorial Legislative Assembly convened on December 7, 1863. One of the first acts of the assembly was to pass legislation adopting the common law of England as "the law of the land in this territory."[8] Since no gambling legislation had, as yet, been approved in the legislature, the effect of the act was to adopt the English common law of gaming in Idaho Territory.

¶6 At common law in England the general rule was that "all games, except perhaps cockfighting [were] lawful."[9] Moreover, wagering contracts were generally valid and enforceable, the only exception being those wagering contracts that were contra bonas mores.[10] The keeping of a common gaming house, however, was "a misdemeanor indictable at common law as a public nuisance, and punishable by imprisonment with or without hard labour."[11]

¶7 Gambling was indeed lawful in the early days of Idaho Territory, and it was a common diversion of the fortuneseekers and prospectors in gold rush Idaho. One westerner, however crudely, put it this way:

> Three things are requisite for mining-fuel, water, and pay dirt. Four things indicate prosperity in

> a mining town--Hebrews, gamblers, common women, and fleas. Hebrews, gamblers and common women are accurate thermometers of ready money and prosperity. When Jews and gamblers pull stakes for another town, it is a safe guess that prosperity is also going.[12]

Gambling took place openly and frequently in Idaho boom towns, and professional gamblers were accepted as "respectable" members of the community. Again, a commentator narrates:

> Gambling was done openly and under license in Boise. In the early seventies we classed gamblers as gentlemen or loafers. The cheap sports, the "tin-horn" gamblers, were driven out by vigilantes prior to 1868. Our regular faro or poker player was considered as respectable as a reputable merchant... Many of our licensed gamblers moved in polite society and were very popular. Eastern people find it difficult to reconcile gambling with respectability, but when custom permits a thing--when, in fact, gambling takes the rank of an industry--the social crime disappears.[13]

¶8 In 1870, the sixth session of the Legislative Assembly convened, and, on January 13, 1871, Idaho Territory had its first legislative enactment on the subject of gambling. The 1871 act[14] outlawed the bunco games of three card or French monte and the "thimble game" and licensed the games of "faro, monte, E-O, or roulette, shuffle-board, or any other banking game at cards, dice or other device."[15] Further, the keeping of unlicensed games was made unlawful, punishable by fine or imprisonment.[16]

¶9 The effect of the licensing requirement on the common law of Idaho was twofold--it made unlawful all unlicensed gambling games, but legalized the keeping of licensed gaming houses, a result not possible under the common law prohibition. In People v. Goldman,[17] the Supreme Court of Idaho Territory

found that the 1871 Act superceded the common law in relation to the offense of keeping a common gaming house and reversed the conviction of the defendant, who had been indicted for that offense.[18] Thus, regulation and not prohibition had become the official policy of Idaho Territory upon the subject of gambling during the 1870's.

¶10 The 1880's saw increasing sentiment in favor of statehood for the Idaho Territory, which culminated in 1889 with the Idaho constitutional convention and in 1890 Idaho became the 43rd state in the Union.[19] Improved transportation, in the form of railroads, made possible the development during this period of lead-silver mines on Wood River and in the Coeur d'Alene mountains, a fact which made Idaho one of the most prominent of the western silver states. The combination of improved transportation and developing economic opportunities resulted, quite naturally, in rapid growth for Idaho, and while the state was never destined to become heavily populated, it had already lost some of its character as an isolated frontier land.

B. Lotteries

¶11 The constitution of the new state, passed and ratified by the citizens of Idaho in 1889 and approved by the Congress of the United States in 1890, was the first clear sign of a shifting Idaho policy on the subject of gambling. Section 20 of Article 2 provided: "The legislature shall not authorize any lottery or gift enterprise under any pretense or for any purpose whatever."[20]

C. Anti-Gambling Legislation

¶12 In 1893 the Legislative Assembly reversed its earlier regulatory approach towards gambling and passed legislation which had the effect of a general prohibition of gambling in Idaho.[21] The 1893 act applied to every person who "deals, plays or carries on, opens or causes to be opened, or who conducts either as owner or employee" any gambling game[22] and, in addition to a moderate fine or term of imprisonment, provided for the seizure and forfeiture of "all implements or devices used for carrying on such games, as well as all moneys in the drawer of any such implements or devices."[23]

¶13 In 1897 the prohibition of the 1893 Act was extended to include "[e]very person who knowingly permits any of the games prohibited...to be played, conducted, or dealt in any house owned or rented by such person,"[24] and those winning at gambling "by any practice, cheat or device, or false pretense whatsoever."[25] The 1897 Act also contained a witness-immunity provision, which compelled any witness to testify in gambling prosecutions, regardless of the privilege against self-incrimination, provided that "no prosecution [would] afterwards be had against him for any offense concerning which he testified."[26] Finally, the legislation repealed all laws or parts of laws inconsistent with its provisions.[27]

II. The Modern Era

¶14 The population of Idaho nearly quadrupled in the 20-year

period between 1890, when it was admitted into the Union, and 1910--an increase from 88,548 to 325,594. The population was also becoming more agricultural, an influx due in no small part to the increasing number of Mormons homesteading in the southern part of the state, near what is now Bemhi County. The political influence of the Mormon homesteaders, today the dominant religious group in Idaho, goes a long way, perhaps, in giving insight into the shift in Idaho gambling policy from silence to regulation and, finally, to outright prohibition in a relatively short span of years.

A. Scope of Statutes

¶15 Upon passage of the 1897 Act, gambling law in Idaho entered a period of stability.[28] The gambling prohibitions of the late 1890's received their first test in the courts in 1902. The petitioner in In Re Rowland[29] had been convicted of playing "stud poker" for money, and his contention on appeal was that the Idaho gambling laws were "directed against the owners or operators of games," not against mere participants in the unlawful sport.[30] The court disagreed with petitioner, and observed:

> Under the statute in question here, one who deals a game of cards, plays a game of cards, or carries on a game of cards for money, checks, credit or other representatives of value, whether he is the owner of such game or not, is guilty of a misdemeanor. The object of the the statute is to prevent gambling. Under its terms, one who plays for money in a game of poker is guilty of a misdemeanor, and subject to punishment under the statute.[31]

¶16 The "seize and destroy" provision of the 1899 Act[32] passed

constitutional muster in Mullen & Co. v. Moseley,[33] where petitioners challenged the law on due process grounds. The court, in upholding the challenged provision, stressed the nature of the property seized, a wattling machine and two slot machines, as capable of being employed as "instruments of crime only."[34] Chief Justice Ailshie, speaking for the court, went on:

> Under the constitution, no man's property may be taken without due process of law, but when he invokes the protection of this constitutional provision, he must show that he is invoking it for the protection of something that is really property and falls within the meaning of that term. He is entitled to his day in court when his property rights are invaded, but this guaranty can scarcely be invoked where he seeds his day in court that he may dispute with the officers of the law the right of possession of instrumentalities, tools and machines contrived and designed as a ready means to be directed against society, and in violation of the laws of the land in the commission of crime.[35]

According to the court, the legislature had, in effect, declared gambling devices to be a nuisance, although the word "nuisance" had not itself been used in the statute.[36]

B. Civil Law

[17 Two years later the Supreme Court of Idaho had before it still another important gambling case, concerned this time with the civil consequences of gambling activities. In Camas Prairie State Bank v. Newman,[37] the issue was the validity of a bank check given to evidence a gambling debt. Justice Stewart, writing for the court, stated the rule as he found it in Idaho:

> If the check was given for the purpose of procuring money with which to gamble, and the plaintiff was a party to such transaction

> and cashed the check with the knowledge that it was to be used for such unlawful purpose the plaintiff cannot recover, as the courts will not lend their aid or assistance in violation of the laws of this state, or to aid or abet in the commission of crime.[38]

Thus, the rule in Idaho is that gambling obligations are unenforceable. No Idaho case to date, however, has considered the question of whether money or property lost at gambling may be recovered, subsequent to payment, by the loser.

C. Lotteries

¶18 In 1911, the Legislative Assembly passed a major piece of anti-lottery legislation, an enactment which is still in effect today. The term "lottery" was defined as follows:

> A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or interest in such property, upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.[39]

Thus, three elements are necessary to constitute a lottery in Idaho: (1) consideration paid for a "right"; (2) the "right" being an opportunity to receive a prize; and (3) lot or chance.[40]

¶19 The 1911 Act prohibited, as misdemeanors, the setting up or drawing of lotteries,[41] the selling or transferring of lottery tickets,[42] the advertising[43] and insuring[44] of lotteries, aiding or assisting the conduction of a lottery,[45] and allowing one's premises to be used in connection with a lottery.[46]

Property offered as prizes in lotteries was subject, upon the issuance of a warrant, to seizure and , "upon the conviction of any person or persons for violation of any of the provisions of [the] Act," to forfeiture.[47] Thus, although penalties were minimal, the 1911 Act amounted to a near total prohibition of all the aspects of a lottery. The purchase of a lottery ticket was not, however, made criminal by the statute, presumably, ticket buyers were seen as victims rather than as perpetrators of a crime.

D. Bookmaking and Pool Selling

¶20 The legislature continued its anti-gambling policy in 1913, with passage of an act designed

> to abolish and prohibit bookmaking and pool selling at race tracks within this State and to abolish and prohibit the conducting of pool rooms within this State for the purpose of selling pools and making books upon any and all races or contests of endurance of man or beast.[48]

The act, which prohibited bookmaking and poolselling,[49] also continued the legislative policy of treating gambling violations as only minor offenses, to be dealt with by the most minimal of penalties.[50]

¶21 The material demands of World War I brought a new prosperity to Idaho through the high prices paid for agricultural, mineral and forest products. The good times in the state were short-lived however, as the 1920's brought a depression to farmers everywhere and the Great Depression of the 1930's only increased the misery of the people.

E. Nuisance

¶22 In 1919, the Idaho legislature added two more weapons to its already impressive arsenal of anti-gambling laws. One act declared gambling places to be moral nuisances:

> Any building, place, or the ground itself, wherein or whereon gambling or any game of chance for money, checks, credit or other representatives of value is carried on or takes place, or gambling paraphernalia is kept...is declared a moral nuisance and shall be enjoined and abated...[51]

Idaho nuisance law was now applicable to gambling places, by statute, and gambling devices, by decree of the courts.[52]

¶23 The other 1919 gambling act was not a gambling act per se, but rather a boxing and wrestling act. The act sought to regulate the pugilistic sports, and its prohibition of betting and wagering at boxing, wrestling and sparring contests[53] was merely tangential to the primary purpose of the legislation.

F. Gambling Devices

¶24 Gambling law in Idaho remained at a virtual standstill for more than two decades following passage of the anti-boxing acts. In 1941, the Supreme Court of Idaho handed down a significant opinion on the subject of gambling devices. The court, in State v. McNichols,[54] found that "money deposited in gambling devices...[becomes] and integral part thereof."[55] Further, the court ruled that money found in slot machines was not property, but contraband subject to seizure along with the unlawful gambling devices, and that, although money could not lawfully be destroyed under the statute authorizing destruction

of gambling devices, it was forfeit to the use of the State.[56]

¶25 The court again dealt with the subject of gambling in 1945, when it held in Thamort v. Moline[57] that a "free game" pinball machine was a gambling device under the Idaho anti-gambling statutes.[58] The court's decision turned on one key question--"[I]s amusement, or the right to participate in [the free game]...a thing of value?"[59] The court in a lengthy opinion answered this question in the affirmative.[60] Of even more interest is the court's discussion of the public policy issues involved in the case:

> The chief vice in this is the fact, that [a pinball machine] is of small and trifling value and lures children and inexperienced persons into the habit of spending their money on these "chance amusements," which it is evidently the intent of the legislature to prohibit.[61]

¶26 It was at about this time that the legislature passed the Idaho Coin Operated Amusement Device Control Act of 1945.[62] This act, which was the harbinger of a liberalized legislative view of gambling, basically legalized[63] the use of slot machines[64] in certain fraternal and service-oriented clubs[65] upon payment by such club of a moderate license fee for each gambling device so authorized.[66] In authorizing the licensing of coin-operated gambling devices, the legislature was careful to declare that such devices constituted "gaming but not a lottery,"[67] a precaution taken, no doubt, by the sponsors of the bill to avoid running afoul of the constitutional prohibition banning lotteries.[68] The licenses were renewable from year to year upon payment of the license fee provided, that the club submit proof that "during the year immediately preceding it made

a charitable donation or charitable donations...in the aggregate amount equal to two and one-half times...the amount of the license fees paid."[69]

¶27 The 1945 act was short-lived. In 1947, it was repealed[70] and replaced[71] by the Legislative Assembly. The Local License Act of 1947,[72] attempted to continue the liberalized licensing and regulation policy of the 1945 act on a local option basis,[73] by shifting the responsibility for licensing or prohibiting coin-operated amusement devices[74] to the individual incorporated cities and villages of Idaho.[75] Violations of the act, including the operation and possession of unlicensed machines,[76] were made misdemeanors, punishable by a moderate fine and term of imprisonment.[77] Finally, the act provided that

> whenever any peace officer has probable cause to believe that a coin-operated amusement device is operated and possessed in violation of the Local License Act, then he is authorized and empowered, with or without warrant, to seize such device, and upon conviction of any person for such illegal operation and possession, such device shall be declared confiscated...[79]

¶28 Punchboards,[79] chance spindles[80] and chance prize games[81] were also made lawful in Idaho upon compliance with certain licensing and taxation requirements,[82] by a separate 1947 enactment. Again, the responsibility for licensing or prohibiting was made the responsibility of the individual localities,[83] and again, violations of the act were misdemeanors.[84]

¶29 In the years immediately following World War II, industry, which apart from the extractive mining and timber trades, had been virtually non-existant in Idaho, began to grow and expand

rapidly in the state. This trend has continued, and today industry ranks second to agriculture in the economy of Idaho, followed in order by lumbing and mining. Concomitant with the growth of industry was a shift in the distribution of the population of the state, from predominantly rural to increasingly urban. Today the urban-rural mix in Idaho is approximately even, with roughly half of its people classified as living in rural areas and the other half pigeon-holed as urban dwellers. These shifting demographic traits of the Idaho populace perhaps explain, at least in part, the greater willingness of the state's lawmaker's during the post-war period to experiment with the legalization and regulation of certain gambling activities. The revenue generated by licensing fees and taxation of regulated gambling operations was helpful in meeting the greater demands for public services of the increasingly urban localities.

G. Civil Law

¶30 In Fowler v. Cheirrett,[85] the civil consequences of gambling transactions were again at issue. In that case, the defendant had stopped payment on a check for $300 given by him to the plaintiff in compromise of an alleged $1,200 claim arising as "the result of a pool game in which the defendant, due to lack of skill or poor judgment, lost [that] sum."[86] The Supreme Court, in affirming a judgment for defendant, found that

> [i]t is almost universally held that a compromise of a claim arising from a gambling transaction does not constitute any consideration for a new promise and

> the illegal character of the original transaction attaches to the attempted compromise.[87]

The court further ruled that the defense of illegal consideration for an alleged debt applies to an assignee who takes with notice of the tainted consideration.[88]

H. Constitution: Lotteries

¶31 In 1953 the constitutionality[89] of the Local License Act and the "punchboard" act came before the Supreme Court in State v. Village of Garden City.[90] The action in Garden City was brought by county citizens to enjoin the operation of slot machines, punchboards, chance spindles and chance prize games by appellants in Garden City. It was further alleged that

> ...[appellant] Garden City is a partner in such business of maintaining and carrying on such gambling places, in that Garden City has licensed the same under an agreement with the other [appellants] to share in the profits.[91]

The court ruled that slot machines were "mechanical lotteries" and that this characterization" applies equally to punchboards, chance spindles and chance prize games,"[92] since the three essential elements of a lottery, chance, consideration and prize, were present in each of the named gambling activities.[93] Thus, the acts purporting to legalize these activities under local licensing and regulation were "unconstitutional and void,"[94] and the activities complained of were enjoinable under the law of Idaho[95] as moral nuisances.[96]

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I. Horse Racing--Parimutuel Wagering

¶32 The liberalization of gambling law in Idaho culminated on March 5, 1963 when the Idaho Horse Racing Act[97] was approved, over the veto of the Governor, by a two-thirds majority of both houses of the Legislative Assembly. The act, which as subsequently amended[98] remains presently in effect in Idaho,[99] the act created a horse racing commission within the department of law enforcement[100] with the power to "license, regulate, and supervise all race meets held in this state... and to cause the various places where race meets are held to be visited and inspected at least once a year."[101] Parimutuel wagering was authorized at licensed horse races,[102] and the racing commission was designated "the sole judge of whether or not the race meet shall be licensed and the number of days the meet shall continue."[103] The legislature was not unaware of the possibility of misuse of the privileges granted by the act, and responded with two provisions--one declared that "[n]o person who has been convicted of any crime involving moral turpitude shall be issued a license,"[104] the other provided that "[i]t shall be unlawful to conduct pool selling, book making, or to circulate hand books, or to bet or wager on a race of any licensed race meet, other than by the parimutuel system."[105] Finally, the statute fixed the percentage take of the track and the tax revenues for the state and provided that, in addition to its fixed take, the "licensee may retain the ...breakage."[106]

¶33 In Oneida County Fair Bd. v. Smylie[107] the constitutionality of the Idaho Horse Racing Act was challenged under Article 3,

section 20 of the Idaho Constitution.[108] The question for the Supreme Court was whether the parimutuel "system of wagering on horse races is a lottery within the meaning of the constitutional prohibition."[109] The court, after reviewing an extensive list of foreign authorities, concluded that pari-mutuel wagering on horse races does not constitute a lottery.[110] The presumption of constitutionality accorded legislative acts,[111] and the court's finding that the parimutuel system "is not one solely based on chance, which constitutes an essential requisite of a lottery,"[112] together formed the ratio decidendis of the court. In denying a petition for rehearing, Justices McFadden and Smith further elucidated the court's reasoning:

> If skill plays any part in determining the distribution there is no lottery as prohibited by our Constitution. In any particular game where skill is in fact an element, the questions of whether skill predominates over chance in determination of the result, and whether any game in which skill may or may not predominate is to be prohibited, must be decided by the legislature under its inherent and delegated powers as the law making body.[113]

Thus, since some degree of skill, in the form of knowledge of the horse's breeding and training, the reputation of the jockey and other similar factors affecting the race,[114] is present in parimutuel wagering, no lottery existed and the law was upheld.

J. Constitution: Due Process

¶34 In Prendergast v. Dwyer[116] the Idaho Supreme Court once again heard arguments regarding the constitutionality

of the summary seizure and destruction, without notice or opportunity for hearing, of alleged gambling devices, a question first faced in 1907 in Mullen & Co. v. Mosely.[117] The court found that Mosely stood for the proposition that "the summary seizure and destruction of any alleged gambling device is sanctioned where the statute prohibits devices designed, intended and exclusively used for gambling."[118] Where such a device is expressly prohibited as a gambling device by the statute or where, although not expressly mentioned, there can be no question that it is prohibited as such "by reason of its well-known character and use as a gambling device, as for example, slot machines and roulette wheels," its summary seizure and destruction do not violate due process of law.[119] However, where doubt exists as to the character of the property as a gambling device, "then the destruction of the device without notice and opportunity for a hearing is... violative of due process of law.[120]

¶35 Gambling law in Idaho has changed little since passage of the Horse Racing Act. In the present code gambling,[121] bookmaking and poolselling,[122] owning a gaming house[123] and conducting and engaging in a lottery or the sale of lottery tickets[124] are prohibited as misdemeanors. Provision is still made for the seizure and destruction of gambling devices,[125] and for witness immunity,[126] and gaming houses remain characterized as moral nuisances.[127] Finally, article 3, section 20 of the state constitution continues to prevent the legislature from authorizing any activity which meets the three-pronged definition of a lottery or gift enterprise.

Conclusion

¶36 The development of gambling law in Idaho parallels that of a number of other states. In the frontier period, when miners and trappers were the sole white inhabitant of the territory, gambling was widespread and legal. As the area became more settled however, the influence of the Mormon-dominated homesteaders pushed the legislature for regulation and, finally, outright prohibition. As the industrial revolution slowly made its way into the economy of Idaho, the cultural changes which accompanied it made decriminalization and authorization of certain designated gambling activities politically, although not always constitutionally, feasible. Today, although the general rule is still total prohibition, the exception is licensed, parimutuel horse racing, and the revenue it generates helps pay for the increasing public service needs of this increasingly urban state.

(Shepardized through May, 1975)

Footnotes

1. See T. Donaldson, Idaho of Yesterday 24 (1941).

2. The next white men to arrive on Idaho soil were the fur traders, who for a quarter of a century pushed into the wilderness and established their fur posts, Kullyspell House (1809), Fort Henry (1810), Fort Hall (1834), and Fort Boise (1834).

   14 Encyclopedia Americana 660 (c)(1969).

3. During the following years, the missionaries established their stations. Henry Spalding founded the Presbyterian Lopwai Mission near Lewiston (1836); Pierre Jean De Smet built the Sacred Heart Mission, in the Coeur d'Alene region, north of the St. Joe River (1842); and later the Cataldo Mission was constructed (1848) by another Jesuit priest. In the south, the short-lived Mormon Lemhi Mission was established under the guidance of Brigham Young (1855).

4. T. Donaldson, supra note 1, at 20. The population of Idaho in 1869 was approximately 20,600. This total can be broken down as follows: 5,600 Indians, 4,274 Chinese, 68 Blacks 10,618 Whites. Id.

5. The Nez Perce encountered the Lewis and Clark expedition in Idaho in 1805 and proceeded to welcome "the white Americans, supplied them with food, and looked after the explorer's horses for several months while they continued by canoe to the Pacific shore."

   D. Brown, Bury My Heart at Wounded Knee 316 (1970).

6. The surrender speech of Chief Joseph eloquently indicates the treatment of the Nez Perce by the white man:

   > I am tired of fighting. Our chiefs are killed. Looking Glass is dead. Toohoolhoolyote is dead. The old men are all dead. It is the young men who say yes or no. He who led on the young men [Ollokot] is dead. It is cold and we have no blankets. The little children are freezing to death...Hear me, my Chiefs! I am tired; my heart is sick and sad. From where the sun now stands I will fight no more forever.

   Id. at 328-29 (footnote omitted).

7. Act of March 3, 1863, ch. 117, 12 Stat. 808.

8. [1863] Idaho Laws 527.

9. Halsbury's Laws of England, vol. 18, at 185 (3d. ed. 1957).

10. 6 Encyclopedia of the Laws of England 48 (1898). See Jones v. Randall [1774] Cowp. 37.

11. 6 Encyclopedia of the Laws of England 52 (1898). See People v. Goldman, 1 Idaho 714, 715 (1878), which recognizes this common law rule as having had effect in Idaho until superceded by statute in 1870.

12. T. Donaldson, supra note 1, at 41.

13. Id. at 41-42.

14. [1870] Idaho Laws 61-62.

15. Id. at §1.

16. Id. at §2. The fine was $100-$500 and the jail term was 90 days.

17. 1 Idaho 714 (1898). The court reasoned that the Act of 1871 had been intended to preempt the field of gambling legislation, therefore any prohibition against gambling must be found in that legislation. Since the legislation did not provide that gambling houses were public nuisances, no one could be convicted under an indictment so charging.

18. The court noted

> This statute having, as we hold, superceded the common law, there was no law in force, at the date mentioned in the indictment which constituted the acts, charged to have been committed by the defendants...

Id. at 716.

19. Act of July 3, 1890, ch. 656, 26 Stat. 215.

20. Idaho Const. act 3, §20.

21. [1893] Idaho Laws 163. The penalties were light--up to a $300 fine and up to six months in jail.

22. Id. at §1.

23. Id. at §2.

24. [1897] Idaho Laws 53, at §2.

25. Id. at §3. This section, as codified in the Idaho Code, was finally repealed in 1972. Ch. 381, §17 [Idaho Laws] 1109.

26. [1897] Idaho Laws 53, at §7.

27. Id. at §9.

28. In 1899 a gambling act, almost identical in terms to the 1897 act, was passed. [1899] Idaho Laws 389. In 1907 the Legislative Assembly approved legislation prohibiting the sending or directing of minors into "any saloon, gambling house, house of prostitution or other immoral place." [1907] Idaho Laws 250.

29. 8 Idaho 595, 70 P. 610 (1902).

30. Id. at 596, 70 P. at 611.

> Under this contention, the one who owned the cards with which that game was played would be guilty of a misdemeanor, but the petitioner, only having played in the game and bet thereon, is not guilty.

Id.

31. Id. at 596-97, 70 P. at 611.

32. The act provided:

> Whenever any judge or justice of the peace, shall have knowledge or shall receive satisfactory information, that there is any gambling table or gambling device,...it shall be his duty to forthwith issue his warrant, directed to the sheriff or constable, to seize and bring before him such gambling table or other device, and cause the same to be publicly destroyed, by burning or otherwise.

[1899] Idaho Laws 389, at §4. Thus, the statute is identical to section 4 of the 1897 act. See [1897] Idaho Laws 53, at §4.

33. 13 Idaho 457, 90 P. 986 (1907).

34. Id. at 468, 90 P. at 989.

35. Id.

36. Id. at 469, 90 P. at 990.

> Making their use a crime and rendering them incapable of any legitimate use,

reduces them to the condition and state of a public nuisance which they clearly are.

Id.

37. 15 Idaho 719, 99 P. 833 (1909).

38. Id. at 724, 99 P. at 835.

39. [1911] Idaho Laws 451, ch. 147, at §1.

40. See State v. Village of Garden City, 74 Idaho 513, 520, 265 P.2d. 328, 330-331, (1953) which holds that three elements are essential to constitute a lottery, "chance, consideration and prize."

41. Ch. 147 [1911] Idaho Laws 451, at §2.

42. Id. at §3.

43. Id. at §4.

44. Id. at §6.

45. Id. at §4.

46. Id. at §8.

47. Id. at §7.

48. Ch. 76 [1913] Idaho Laws 327, at §2.

49. Id. at §1. Prior to the passage of this act the village of Post Falls had passed a local ordinance which provided for the licensing of poolselling and bookmaking upon horse races conducted within the village. See State v. Bird, 29 Idaho 47, 156 P. 1140 (1916).

50. Violations were misdemeanors punishable by a fine of $300 and six months imprisonment. Ch. 76 [1913] Idaho Laws 327, at §1.

51. Ch. 97 [1919] Idaho Laws 361 (emphasis in original).

52. See note 36 and accompanying text supra.

53. Ch. 127, §12, [1919] Idaho Laws 415.

54. 63 Idaho 100, 117 P.2d 468 (1941).

55. Id. at 103, 117 P.2d at 469.

56. Id. at 104, 117 P.2d at 470.

57. 66 Idaho 110, 156 P.2d 187 (1945).

58. See note 32 and accompanying text supra. The Supreme Court had earlier held that a pinball machine with a payoff in coins was a gambling device under the Idaho statutes. People v. Headrick, 64 Idaho 132, 128 P.2d 757 (1942).

59. 66 Idaho at 112, 156 P.2d at 187.

60. Id. at 117, 156 P.2d at 190.

61. Id. But see State v. Fitzpatrick, 89 Idaho 568, 407 P.2d 309 (1965), which held that "free-ball" pinball machines are not gambling devices within meaning of gambling statutes.

62. Ch. 112 [1945] Idaho Laws 171.

63. [I]t shall be lawful for any Club... to own, conduct and operate, and the members of such Club to play, coin-operated amusement devices upon compliance by such Club with all the conditions...prescribed.

Id. at §3.

64. A "Coin-operated Amusement Device" is a machine or device into which may be inserted any piece of money or other object and from which as a result of such insertion and the application of physical or mechanical force may issue wholly upon any chance or uncertain or contingent event, any piece or pieces of money, or any check, memorandum, or other tangible evidence calling for money or property...which device is defined as and hereby declared to be gaming but not a lottery.

Id. at §2.

65. A "Club" is any Corporation or unincorporated association operated solely for fraternal, benevolent, education, ex-servicemen's, labor organizations, athletic or social purposes, and not for pecuniary gain or profit, and membership in which does not entitle any person to any interest in the assets of such corporation or association.

Id.

66. Id. at §5.

67. Id. at §2.

68. See note 20 and accompanying text supra.

69. Ch. 112 [1945] Idaho Laws 171, at §5.

70. Ch. 29 [1947] Idaho Laws 28.

71. Id. at §4; ch. 151 [1947] Idaho Laws 359.

72. Ch. 151 [1947] Idaho Laws 359.

73. From and after the passage and approval of this Act, it shall be lawful for any person to own and operate coin-operated amusement devices within the corporate limits of any incorporated city or village only, after having first procured a license as hereinafter provided.

Id. at §3.

74. A "Coin-operated Amusement Device" is a machine or device into which may be inserted any piece of money or other object and from which as a result of such insertion and the application of physical or mechanical force may issue wholly upon any chance or uncertain or contingent event, any piece or pieces of money, or any check, memorandum, or other tangible evidence calling for money or property, or which check, memorandum, or other other tangible evidence is, after issuance, actually redeemed in money or exchanged for money or property by any person whatsoever; which device is defined as and hereby declared to be gaming but not lottery.

Id. at §2.

75. Each local authority within its jurisdiction is hereby authorized and empowered to adopt all ordinances or resolutions licensing, regulating, controlling or prohibiting the operation of coin-operated amusement devices...

Id. at §9.

76. Id. at §9.

77. Id. at §6. The maximum penalty for violation of the act was a $1,000 fine and twelve months imprisonment. Id.

78. Id. at §8.

79. Ch. 239, §1, [1947] Idaho Laws 592 provides:

> A "punchboard," within the meaning of this Act, shall be a board containing a number of holes or receptacles of uniform size in which are placed slips of paper or other substance, in a capsule or otherwise, upon which is written or printed token numbers, figures, insignia, characters, symbols, letters or words, or combinations thereof, which may be punched or drawn from said hole or receptacle by any person upon payment of a consideration, and who shall obtain an award of merchandise or money only upon the chance of drawing the token number, figure, insignia, character, symbol, letter or word, or combination thereof, which has previously been designated to pay a prize.

80. The term "chance spindle," within the meaning of this Act, shall be any spindle, stick, pin, or other device, on which may be fastened by any method, slips of paper, envelopes, cards, or other devices, upon which is written or printed token numbers, figures, insignia, characters, symbols, letters or words, or combinations thereof, and which may be drawn by any person from said spindle, or holder, upon payment of a consideration, who may obtain an award of merchandise or money, only upon the chance of drawing the token number, figure, insignia, character, symbol, letter or work or combination thereof, which has previously been designated to pay a prize.

Id.

81. A "chance prize game," within the meaning of this Act, shall be any game in which the obtaining of a prize is based solely upon the chance of the player, upon payment of a consideration, to draw or otherwise secure a token number, figure, insignia, character, symbol, letter or work, or combination thereof, which is designated to pay a prize, in cash or merchandise.

Id.

82. Id. at §§2, 3, 4, and 7. The tax levied was 2% of the take where the prize is money and 1% if the prize is "merchandise not redeemable in money." Id. at §2.

83. Id. at §7.

84. Id. at §8. In 1947 one other gambling law was passed. The law, part of an enactment regulating the sale of alcoholic beverages by the drink, provided that it was unlawful "for any licensee to permit, conduct, play, carry on, open or cause to be opened any gaming in or upon the licensed premises." Ch. 274, §26 [1947] Idaho Laws 870.

85. 69 Idaho 224, 205 P.2d 502 (1949).

86. Id. at 225, 205 P.2d at 502.

87. Id. at 226, 205 P.2d at 503.

88. Id. at 227, 205 P.2d at 503.

89. See note 20 and accompanying text supra.

90. 74 Idaho 513, 265 P.2d 328 (1953). Earlier in the year the legislature had repealed the Local License Act, effective January 1, 1954. Ch. 62 [1953] Idaho Laws 82. The "punchboard" act, however, remained on the books. Id. at §2.

91. 74 Idaho at 519, 265 P.2d at 330.

92. Id. at 522-23, 265 P.2d at 332.

93. Id. at 520, 265 P.2d at 330-31. See notes 39-40 and accompanying text supra.

94. 74 Idaho at 523, 265 P.2d at 332.

95. See note 51 and accompanying text supra.

96. An unconstitutional act is not a law. Hence the statutes here attacked, being unconstitutional, the appellants cannot successfully contend that the nuisance complained of was carried on under authority of the State, or that such devices were operated under authority of the provisions of an ordinance of Garden City.

Id. at 524, 265 P.2d at 333.

97. Ch. 64 [1963] Idaho Laws 246.

98. See ch. 222 [1969] Idaho Laws 724; ch. 259 [1971] Idaho Laws 1037; ch. 27, §§192 [1974] Idaho Laws 977; ch. 96 [1974] Idaho Laws 1196.

99. The Idaho Horse Racing Act is codified at Chapter 25 of title 54 and all further references to the act will be made to it as codified therein.

100. Idaho Code §54.2503 (Cum. Supp. 1974).

101. Id. at §54-2507. The commission has the further power "to prepare and promulgate a complete set of rules and regulations to govern race meets and the parimutuel system." Id. at §54-2506.

102. Id. at §54-2512.

103. Id. at §54-2508.

104. Id.

105. Id. at §54-2512. Violations of the act were, however, only punishable as misdemeanors. Id. at §54-2509.

106. Id. at 2513. In 1973 attendance at Idaho race tracks was 224,382. Total revenue from horse racing to the state for that year was $156.747. See National Ass'n of State Racing Commissioners, Horse Racing in the United States-1973 at 2, 6 (1973).

107. 86 Idaho 341, 386 P.2d 374 (1963).

108. See note 20 and accompanying text supra.

109. 86 Idaho at 346, 386 P.2d at 376.

110. Id. at 368, 386 P.2d at 391.

111. Id. at 346, 386 P.2d at 376.

112. Id. at 368, 386 P.2d at 391 (emphasis added). See notes

113. 86 Idaho at 374, 386 P.2d at 395.

114. Id. at 347, 386 P.2d at 377. In 1972 the Idaho legislature amended the definition of lottery by providing that the "parimutuel system used in horse racing shall not constitute a lottery, so long as it is conducted in conformity with [law]." Ch. 381, §13 [1972] Idaho Laws 1102.

115. See also Braddock v. Family Finance Corp., 95 Idaho 256, 506 P.2d 824 (1973)(skill and judgment involved in sales referral scheme, hence not lottery).

116. 88 Idaho 278, 398 P.2d 637 (1965).

117. See notes 33-36 and accompanying text supra.

118. 88 Idaho at 285-86, 398 P.2d at 641.

119. Id. at 286, 398 P.2d at 641.

120. Id.

121. Idaho Code §18-3801 (Cum. Supp. 1974).

122. Id. at §18-3809 (Cum. Supp. 1974).

123. Id. at §18-3802 (Cum. Supp. 1974).

124. Id. at §§18-4901 to 18-4909 (Cum. Supp. 1974).

125. Id. at §18-38-4 (Cum. Supp. 1974).

126. Id. at §§18-3806 to 18-3807 (Cum. Supp. 1974).

127. Id. at §52-106 (1957).

PARAGRAPH INDEX: Idaho

The Development of the Law of Gambling:

ILLINOIS

Table of Contents

Summary

¶1 The development of the law of gambling in Illinois parallels that of a number of other states. Its formative years saw both gambling and attempts to suppress it. Constitutions and legislative efforts were made to outlaw most forms of gambling. Particular attention was paid to lotteries and speculation in the futures market. Substantial reforms were enacted recently. Today syndicated gambling is a special focus of the law. Authorized gambling is limited to parimutuel betting, charitable bingo and a state run lottery.

I. The Territorial Experience

¶2 The area we now call Illinois is not a physiographic unit, but a part of the great central plain of North America. The terrain consists of a fertile plain diversified somewhat by glacial maraines and stream valleys. At the Northeastern-most point, Illinois touches Lake Michigan. These features of its geography have given rise to Illinois' unique economic position; it has been and is a leader in both agriculture and commerce. Down state has farms; up state has been a manufacturing and trading center. The resulting tension between urban and rural interest has been reflected in Illinois life and law.

¶3 Two French missionaries, Pere Marquette and Louis Jolliet, were the first to cross Illinois. One hundred years

later, in 1763, the area was ceded to the British by the Treaty of Paris. Settlement was difficult, however, because of Indian uprisings--especially the Pontiac conspiracy.

¶4 George Rogers Clark captured the forts of Cahokia and Kaskaskia on behalf of Virginia during the Revolution. Ultimately, the region was ceded to the U.S. Government and was included as a part of the Northwest Territory. After 1800, the region was administered as a part of Indiana Territory until, in 1809, Illinois achieved territorial status in its own right.

¶5 Most of Illinois' early settlers came from the Southern States, especially Virginia, Kentucky and the Carolinas, and they settled mainly along the rivers of Southern Illinois. They tended to bring with them their own customs and laws. Illinois gambling law begins with a 1790 act to suppress gaming.[1] The preamble articulated the danger the activity represented:

> Whereas the population, happiness and prosperity of all countries, especially infant communities, necessarily depend upon the sobriety and industry of the people, and their attention to the moral and political duties of life . . . and whereas many pernicious games have been publicly practiced in this territory, tending to the corruption of morals and the increase of vice and idleness, and by which honest and unsuspecting citizens may be defrauded, and deserving families be reduced to beggary and want . . .

¶6 Gaming contracts were made void and gambling itself was restricted by providing for a $200 fine to be levied against anyone setting up or allowing to be set up "any species of gaming" where money might be bet. Tavern keepers were

prohibited from keeping billiard or other tables.[2] And a conviction entitled whoever prosecuted to one half the assessed penalty.

¶7 The 1790 law was repealed[3] and replaced by another in 1795. Adopted from the Virginia Code, this law left the previous act substantially intact, but additionally banded lotteries and raffles.[4]

¶8 Another act for the prevention of vice and immorality was passed in 1799.[5] Gaming was again proscribed,[6] as were gaming tables,[7] and gambling contracts were also declared void.[8] In addition, the act provided for the recovery of money from a winner if the loser instituted a court action within 30 days.

¶9 Taverns, too, were regulated during this period. Laws were passed in 1792,[9] and 1795,[10] providing a fine and/or revocation of license for permitting "unlawful games." In 1799, public billiard tables were given no more than two years to be closed down. To remain open the full two years, their owners had to pay a $30 license fee and post a $100 bond to insure their exclusive use for amusement and not gambling.[11]

¶10 The new territory of Illinois passed its first act to prevent unlawful "gaining" in 1810.[12] Similarly adopted from Virginia, the statute included prohibitions against several forms of gaming;[13] gaming tables,[14] lotteries and raffles were prohibited as well. Gaming contracts were made void, gaming in public places was forbidden[15] and provisions were inserted concerning professional gamblers, taverns, and fraud.[16]

¶11 There is some question as to how strictly this law was enforced[17] and it was repealed only two years after its creation.[18] Legislation continued with an act taxing billiard tables in 1814.[19]

II. The Formative Era: 1818-1900

¶12 Illinois was admitted as the 21st state in 1818. Its population then was only 12,282. Widespread settlement was hampered by Indian depredations until the Black Hawk War of 1832. Thereafter, settlers from the East began to arrive. The 1840's brought increasing industrial activity. Trade grew with the completion of the Illinois and Michigan Canal in 1848 and the incursion of railroads in the 1850's. Transportation facilities opened more farm land to the plow increasing land values by 50 percent in the ten year period between 1850 and 1860. In that same period, Illinois population passed the million mark, doubling itself in ten years. The Democrats held power in the state for most of the state's early history. In 1856, however, the first Republican governor took office due largely to the influx of people from the north rather than the south.

¶13 During the Civil War the state stood behind the Union despite a large southern-born population. The Democrats recaptured the state house in 1862, but from 1864 until the latter part of the century the state was dominated by the Republicans.

¶14 After the Civil War, Chicago grew rapidly until the 1871 fire. The panic of 1873 slowed economic development and farm-labor unrest grew--resulting in such disturbances as the Haymarket Riot of 1886 and the 1894 Pullman Strike. In 1892 the farm-labor coalition brought the Democrats back to power. Another panic hit the state in 1893, however, and the economy did not begin to recover until after 1898 under a new Republican administration.

¶15 The legislature made another attempt at prohibiting gambling after its illfated 1810 venture. An 1819 act[20] was essentially a copy of the 1799 Northwest Territory law, while taverns were once again regulated.[21] The law was replaced, however, in 1821[22] and amended in 1825.[23] The latter change added a prohibition against bringing into the state, selling, or buying "any . . . device or thing, invented or made, for the purpose of being used in games of hazard . . ." Penalties were increased for gaming and officers of the law were penalized for not enforcing the act.[24]

¶16 The basic statute with amendments was incorporated into the 1827 criminal code with minor changes.[25] And it was supplemented by another law passed in that same year.[26] The law dealt with gambling contracts, bonds, mortgages, etc. and further provided for recovery of losses.[27] A winner was subject to suit by the loser for six months. Thereafter, any person could sue--for triple the amount lost--keeping one half. In addition, a winner could discharge himself from further penalties by repaying the loser.

¶17 The 1827 law was again codified in the Revised Laws of 1833[28]--and also in 1845[29]--under "Offenses Against Public Morality, Health and Police."

¶18 The courts first became involved in gambling by following provisions in the law voiding contracts.[30] An 1839 law prohibited recovery on any bet on elections arising under the law of Illinois.[31] Concerning voidability, Justice Treat observed in Morgan v. Pettit,[32] an 1844 decision:

> The prohibition, however, is confined to wagers on the result of elections to be holden in this State, and does not extend to those made concerning elections to be holden in other States.[33]

¶19 Anti-lottery provisions were included in both 1810 and 1819 law. However, the prohibition concerned private citizens and two authorizations came from the legislature in 1819 to raise money by lottery for public works projects.[34]

¶20 In 1847, as part of a nationwide movement against lotteries, lotteries, as a separate form of gambling, received special attention.[35] All laws authorizing lotteries or the sale of lottery tickets were repealed. Selling lottery tickets or keeping a place for such sales was made punishable by a fine of between $100 and $500.

¶21 A year later the new constitution declared that the legislature had no power to authorize lotteries for any purpose.[36] This was extended to include "gift enterprises" in the 1870 constitution,[37] the basic document of Illinois government, in force until 1970.

¶22 Lotteries were first given attention by the courts in 1866. In Dunn v. People,[38] Justice Lawrence construed the 1847 law:

> The term lottery has no technical meaning in the law distinct from its popular signification. . . . A lottery is "a scheme for the distribution of prizes by chance."[39]

They were judicially recognized as a social problem not long after. In 1871, Justice Thornton noted in Thomas v. People:[40]

> Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them. This influence may not be so direct, and the immediate consequences so disastrous as in some kinds of gambling, which rouse the violent passions and stake the gambler's whole fortune upon the throw of a die. The temptations, however, are thrown in the way of a larger number and a better class. The evil may spread more widely and infect more deeply.[41]

¶23 Three years after this opinion was written, lottery law penalties were substantially increased. The 1874 Revised Statutes provided for a fine of up to $2,000 for promoting a lottery, selling tickets, or permitting a drawing or the sale of tickets in one's house, building, etc. Advertising could bring a $100 fine. A second conviction brought in addition to a fine, imprisonment for up to one year. All prizes, money, etc. were forfeited to the State.[42] This law remained valid until the new criminal code of 1961 replaced it.

¶24 The courts and legislature concerned themselves, as far as possible, with activities which appealed to the public's gambling instinct. Thus, horse racing was held to be gaming by Chief Justice Caton in Tatman v. Strader,[43] an 1860 case:

> The law says, "any game or games", thereby expressly including athletic and other games of muscular strife, as well as games of hazard and skill, played with instruments.[44]

Thereafter, prize fighting was banned in 1869[45] and, in 1897, bicycle racing was regulated.[46]

¶25 In 1871, the Supreme Court, in Gregory v. Ring[47] reversed its decision in Morgan concerning bets on elections in other states.[48] Justice Thornton noted that progress in transportation and communication had outstripped the prior case and observed:

> We assume that the wager between the parties was against sound policy and the best interests of the whole country. . . . The law ought not to sanction gambling upon the result of popular elections. They should be free and pure.[49]

¶26 In 1872 the penalties for keeping a gaming house, tables, or apparatus were amended.[50] Two years later, in 1874, the courts defined a wager. Justice McAllister spoke in the case of Merchants Savings, Loan and Trust v. Goodrich:[51]

> A wager is a contract whereby two or more parties agree that a certain sum of money, or other thing, shall be paid or delivered to one of them on the happening of an uncertain event. 2 Bouv. Law Dict. 638.[52]

¶27 The Revised Statutes of 1874 were essentially a restatement of 1845 law. Penalties were provided for gaming,[53] keeping a gaming house,[54] and gaming in taverns.[55] Gambling contracts were made void[56]--but not insurance contracts[57]--and losses were recoverable.[58] New sections provided penalties for decoys[59] and made gambling premises liable for

lost money.[60] There were also provisions concerning lotteries (see ¶23) and betting on elections.[61]

¶28 Finally, Illinois recognized the need for legislation concerning speculation in stocks and commodities as the State grew into a major commercial and agricultural center.

¶29 Option contracts to buy at a future date were declared void. In addition, penalties were provided for speculation, spreading false rumors, or attempting to corner the market.[62] Initially, the courts interpreted this section to allow contracts made in good faith. Chief Justice Scott in the 1875 case of Pixley v. Boynton[63] noted:

> The intention of the parties gives character to the transaction and if either party contracted in good faith, he is entitled to the benefit of his contract, no matter what may have been the secret purpose or intention of the other party.[64]

However, this view was discarded in favor of a more stringent interpretation. An 1889 case, Schneider v. Turner,[65] held all option contracts unlawful. Justice Wilkin noted the purpose of the statute:

> It manifestly is to break down the pernicious practice of gambling on the market prices of grain and other commodities.[66]

¶30 Whatever the stated purpose of the statute, it appears not to have been effective. In 1890, Justice Baker observed in Soby v. Illinois:[67] ". . . the evil it was aimed at continued to increase with wonderful rapidity throughout the state."[68] Because of this,[69] an act was passed in 1887 suppressing bucket shops.[70] Penalties were provided for

keeping a place where gambling in stocks or commodities took place or for permitting such activity on one's property.[71]

¶31 It was in 1887, too, that the legislature gave attention to pool selling and bookmaking.[72] Keeping, permitting to be kept, or occupying any place with any device for registering bets or for selling pools could be punished by a $2,000 fine, one year imprisonment, or both.

¶32 Two more gambling laws were passed in 1895. One concerned the fraudulent entry of horses in contests of speed.[73] The other concerned gambling devices.[74] Every "clock, tape machine, slot machine" or other gambling device was made subject to seizure and destruction. Penalties were provided for anyone owning, operating, keeping, etc. such devices or for owning or possessing, etc. the premises where such gambling devices were located.[75]

III. The Modern Era: 1900-1975

¶33 By the twentieth century, Illinois was third in the nation in manufacturing and Chicago had grown into an important commercial and trading center. Reform legislation was prominent in the early part of the century, but by the 1920's, it was organized crime in the form of Al Capone that brought national attention to the State.

¶34 In 1932 the Democrats again gained the state house, which they held until 1944. After the second World War, the state enjoyed increasing prosperity along with the rest of the

nation. The Republicans dominated the 50's, but thereafter political races became close and neither party has been able to establish a lasting trend.

¶35 Today, Illinois has a population of over 11,000,000 and a per capita income of over $4300. Of the work force, manufacturing and trade account for over half of all employment. Agriculture accounts for 4 percent.

#36 With respect to gambling, a 1900 decision, Booth v. People,[76] helped to relax some of the restraints placed on commodity markets. Noting that the suppression of market gambling was within the police power of the state, Chief Justice Boggs went on to say:

> The prohibition need not embrace all contracts for options to buy or sell, but only all of such contracts as lie at the root of the evil which threatens the public safety and welfare.[77]

Thus, by dictum, option contracts which were nonspeculative were not illegal.

¶37 An 1894 case made it clear that the courts would not enforce any contract based on illegal gambling--even if it had been made in a state where it might be enforced. Justice Magruder delivered the opinion in Pope v. Hanke.[78]

> No State is bound to recognize or enforce contracts which are injurious to the welfare of its people or which are in violation of its own laws.[79]

¶38 It was in that same year that the court defined "winner" and "loser". Justice Scott in Zellers v. White[80] observed:

> . . . all those who have won more than they have lost during the sitting are "winners" and all those who have lost more than they have won during the sitting are persons "losing".[81]

The following year, 1905, policy playing--betting by means of policy numbers--was outlawed as a form of lottery.[82]

¶39 Pelouze v. Slaughter,[83] a 1909 decision, observed that a broker in a commodities transaction could be treated as a "winner" to be sued if it appeared that he understood that the parties to the deal intended it to be a settlement on differences only. The legislature realized that the recovery provisions of the gaming statute, so construed, would have a chilling effect on the burgeoning Board of Trade and other stock and commodity exchanges. As a result they amended the law in 1913 in order to exempt brokers on any regular board of trade, commercial exchange or stock exchange.[84] This amendment was declared unconstitutional, however, in Miller v. Sincere[85] --a 1916 decision which held that the exemption amounted to unfair discrimination in favor of the brokers.

¶40 In 1919 the legislature passed an act to protect counties in which there were U.S. navy or military bases from slot machines and gambling devices.[86] This, too, was struck down by the courts--but not until 1961.[87]

¶41 In 1927, Illinois legalized parimutuel betting on horses at a licensed track during a sanctioned meet, as part of a broad Horse Racing Act.[88] The law today states that the only horse racing to be allowed in Illinois is that licensed and authorized. All other racing, for stake, purse, or prize

is banned with the exception of racing at state, county, and agricultural fairs on which no money is bet. Applications are filed with the Racing Board specifying the dates of racing and hours, along with the location of the meets. All races must be held between the dates of April 15 and November 15 and no racing may take place on Sunday. Hours of operation must be between 12 noon and 12 midnight. Licensees must offer suitable purses and 85 percent of their employees must be state residents. Acts were passed in 1945[89] and 1969[90] governing harness racing and quarter-horse racing respectively and were set up along much the same lines.

¶42 The Horse Racing Act of 1927 had to withstand a constitutional challenge in the landmark case of People v. Monroe[91] decided in 1932. The court held that parimutuel betting was not a lottery in violation of the constitution. Nor would the fact that dog racing was not legalized make the act an unconstitutional violation of due process.[92] Chief Justice Heard first accepted the definitions of "lottery", "chance", and "parimutuel" as set out in Webster's New International Dictionary. He then went on to note:

> The winning horse is not determined by chance, alone, but the condition, speed and endurance of the horse aided by the skill and management of the rider or driver, enter into the result.[93]

Horse racing, said Heard, was, unlike dog racing, subject to human management. Obviously, the question centered on the degree of chance involved. Finally, it was noted that horse racing was not malum in se but rather malum prohibitum and

thus the state had the power to legalize the activity. Nevertheless, it must be noted that the operation of the horse racing act has not been free of corruption. Former Governor O.H. Kerner, for example, was convicted of taking unlawful payments in connection with setting racing dates.

¶43 The question of what constituted a lottery received closer attention with Iris Amusement Corp. v. Kelly[94]--a 1937 case. Justice Shaw outlined the essential ingredients: ". . . (1) a chance, (2) for a prize, (3) for a price."[95]

¶44 But the court was not as definite when it came to holding brokers subject to the recovery provisions of gambling law. Twenty-six years after the Miller decision, the court reversed itself; in 1942, in Albers v. Lamson,[96] it held that public policy required facilitating an open market and that brokers on a board of trade should not be penalized even though gambling might occur sometimes under their auspices.

¶45 After the Harness Racing Act of 1945, the legislature did not again give any serious attention to gambling until 1953, three years after the 1950 Attorney General National Conference on Organized Crime, which was called by Attorney General J. Howard McCrath at the urging of the U.S. Conference of Mayors, the American Municipal Association, the National Institute of Municipal Law Officers and the National Association of Attorneys General.

¶46 Law enforcement officials from all over the nation met in Washington on February 15, 1950 to consider the growing scope of organized crime, particularly interstate gambling.

The consensus seemed to be that things were getting out of hand. Illinois' Otto Kerner, however, dissented; he had "never received any evidence" of the "syndicate", and there was no "organized gambling" in his city, Chicago. One of the chief recommendations of the majority, who did not share Kerner's view, was the establishment of the Senate Select Committee on Organized Crime under the chairmanship of Senator Estes Kefauver of Tennessee.

¶47 It was only a short time later that the Senate Committee began its hearings. Over 800 witnesses, from nearly every state and all major metropolitan areas, were heard. Chicago, incidentally, was found to be the center of a national race-wire service. Chicago, too, was not found to be free of gambling. On the south side, it was found that policy wheels grossed in excess of $150,000,000 over the five-year period just before the hearings.

¶48 In partial response to the work of the Senate Committee, but largely not in sympathy with its recommendations, the State legislature in 1953 amended its gambling provisions. In that year, the law concerning gambling devices was amended so that pinball machines, played for amusement, would not be included. Further, the act declared that the right of replay was not a "valuable" thing.[97]

¶49 A year later, in 1954, work began upon a study which was to culminate in 1961 with a complete revision of the Illinois Criminal Code, one of the first of the new modern criminal codification efforts. The Code incorporated a

unified section on gambling, which is substantially the law today.[98] Basically, the offense of gambling is committed if one plays a game of chance or skill for money, makes a wager upon any game or election, or keeps, owns, manufactures,[99] etc. any gambling device. Option contracts where both parties intend settlement by differences in prices is gambling. Bookmaking, pool selling, lotteries and policy games are all included as gambling. And transmission of wagers and betting odds by telephone, radio, etc. except in conjunction with sports broadcasts is also made gambling.

¶50 Exceptions to the statute include insurance contracts, prizes awarded in contests, and parimutuel betting, bingo, and lotteries as authorized.

¶51 Making a wager or playing a game of chance or skill for money are Class A misdemeanors.[100] All other activity outlined above is punished as a Class A misdemeanor except upon a second offense when it becomes a Class 4 felony.[101]

¶52 Syndicated gambling is dealt with more strictly. "Recognizing the close relationship between professional gambling and other organized crime" the legislature has made operating a policy game or bookmaking Class 3 felonies.[102]

¶53 The law goes on to define "gambling device",[103] "lottery",[104] and "policy game"[105] and proscribes keeping a gambling place by making it a Class A misdemeanor and a public nuisance.[106]

¶54 Registration of federal gambling stamps is dealt with,[107] and there is a section devoted to the seizure of

gambling devices and funds.[108] Every device incapable of lawful use is subject to seizure and destruction.

¶55 Gambling contracts are void[109] and losses of $50 or more are recoverable within six months time. Thereafter, anyone may sue and recover triple the amount lost.[110]

¶56 Finally, prosecutions may be instituted by information.[111] There are further sections concerning bribes,[112] gambling on boxing matches,[113] and gambling as a public nuisance.[114] And municipalities are given powers to suppress gambling and gambling houses.[115]

¶57 Illinois has recognized since territorial times that the impulse of its citizens to gamble can be turned to the state's advantage for revenue purposes. Thus, some forms of gambling, particularly in recent years, have been held not contrary to public policy. Thus, with regard to parimutuel betting it was said:

> A primary legislative purpose in the regulation of horse racing is generation of income for the State.[116]

For many years this was the only legal form of gambling in the state. In the last few years, however, demands for revenue have pushed Illinois toward accepting other forms of gambling.

¶58 In Illinois, state revenues are derived chiefly from an income tax, a sales tax, a motor fuel tax, motor vehicle and liquor taxes, and a cigarette tax. The property tax is the principal source of local revenue.

¶59 The Illinois constitution of 1970 now conveniently excludes any mention of lotteries. With the prohibition

removed, the legislature enacted in 1973 a law to allow a state-run lottery.[117] The Lottery Act's stated purpose is to provide revenue and to curb illegal gambling.[118] The act creates a Division of State Lottery[119] administered by a State Lottery Superintendant who is appointed for a two-year term by the governor with the advice and consent of the senate.[120] The superintendant submits recommendations on such rules and regulations as price of tickets, size and number of prizes, frequency of drawings, ticket sales, etc. to the Lottery Control Board which takes the necessary action with regard to implementation or rejection.[121] Net revenues to the General Revenue Fund cannot be less than 40 percent.[122] Counterfeiting tickets is made a Class 4 felony[123] and sales of tickets to anyone under 18 is prohibited.[124] Violation of any rule or regulation promulgated or of the act itself is a Class B misdemeanor.[125]

¶60 Private lotteries are still illegal under the Criminal Code but an exception has been made under the Bingo License and Tax Act.[126] Any bona fide religious, charitable, labor, fraternal, educational or veterans organization which operates without profit is eligible to be licensed for one year upon payment of a $50 fee and approval of an application specifying the day of the week, location, etc. of the bingo occasion.[127]

¶61 Restrictions are placed on the size of prizes,[128] the number of games per day[129] and days per week[130] bingo may be played, the price of bingo cards,[131] etc. No one under 18 may play and 10 percent of the gross proceeds are payable to the

Department of Revenue.[132] Strict records must be kept by the organization and a license may be revoked for noncompliance with any provision of the act.[133] Violation of the act is a misdemeanor punishable by a fine of not over $500, a jail term of not more than one year, or both.[134]

Conclusion

¶62 Illinois, unlike some of its midwestern neighbors, became industrial and urban early in its history, to such an extent that the law of gambling in Illinois has become somewhat more permissive than in other states. Differences between the attitudes of the inhabitants of urban and rural areas, as well as the revenue requirements of operating a state including the major metropolis of Chicago, are possible reasons for the relatively permissive nature of Illinois' gambling law.

(Shepardized through March 1975)

Footnotes

1. N.W. Terr. Laws, 1790, ch.13, at 30 (Ill. Bar Ass'n. Reprint ed., 1925).

2. A $100 fine and loss of license constituted the penalty for violation. Id. at 31.

3. N.W. Terr. Laws, 1795, at 256 (Reprint ed.).

4. N.W. Terr. Laws, 1795, at 276 (Reprint ed.). See at 277, §6.

5. N.W. Terr. Laws, 1799, at 377 (Reprint ed.).

6. Cock fighting, bullet playing, cards, dice, bowls, and shovel board were specifically mentioned. A $3 fine was levied for violation. Id. at 379, §5. Gaming on Sunday could bring a 50¢ to $2 fine; and running horses on public highways brought a $5 fine. Id. at 377, §1.

7. Billiard and E.O. tables were specifically mentioned. A $50 fine and forfeiture of the table were the penalties provided. However, billiard tables could be licensed and were taxed $30. Id. at 380, §6.

8. Especially those concerning cock fighting and horse racing. Id. at 381, §7.

9. N.W. Terr. Laws, 1792, at 65 (Reprint ed.). Revocation of license was provided for.

10. N.W. Terr. Laws, 1795, at 193, §2 (Reprint ed.). Violators were fined $5 for the first offense, suppression followed the second. Taverns were also a part of 1795 gambling law. Tavern keepers were prohibited from permitting "cards, dice, billiards or any instrument of gaming" upon pain of loss of license and a fine of from $50 to $200 unless the keeper cooperated with the authorities by providing information concerning those gaming. Id. at 277, §§2,3.

11. N.W. Terr. Laws, 1799, at 380, §6 (Reprint ed.).

12. Terr. Laws, 1810 at 18. For laws in force from 1800-1809 see Laws of Indiana Territory.

13. Cards, dice, tables, tennis, bowles, horse racing and cock fighting were specifically prohibited. Id. §1.

14. Especially ABC, E.O. and faro bank tables. Id. §§10,13.

15. [W]hich must be often attended with quarrels, disputes and controversies, the impoverishment of many people and their families, and the ruin of health, and corruption of manners of youth, who upon such occasion frequently fall in company with lew'd, idle and dissolute persons, who have no way of maintaining themselves but by gaming.

Id. §5.

16. Corporal punishment and a fine of 5 times the amount won was provided for fraud. Id. §8.

17. The first mention of any prosecution under the statute reveals the governor remitting the fines. Terr. Records, 1809-1818, at 18, Exec. Register, Feb. 3, 1811.

18. Terr. Laws 1812, at 52.

19. Terr. Laws 1814, at 51. The tax was $40. It jumped to $150 in two years. Terr. Laws 1815-1816, at 43.

20. Act of March 5, 1819, §§7-9, (1819) Ill. Laws 126.

21. Act of Feb. 27, 1819, §§1,2, (1819) Ill. Laws 77. Allowing unlawful games brought suppression of license. Unlicensed taverns were fined $1/day.

22. Act of Jan. 31, 1821, §§5-8, (1821) Ill. Laws 48. Under an Act for the Prevention of Vice and Immorality, and repealing 1819 law. Gaming at cards, dice, billiards, shovel board, bowls, etc. was fined $39. Id. §5. Gaming tables, specifically billiard and E.O., brought a $1,000 fine and forfeiture of the table. Id. §6.

23. Act of Jan. 10, 1825, (1825) Ill. Laws 61.

24. Id. §5, at 63. Packs of playing cards, dice, and billiard balls were specifically mentioned. Violators were fined $25, one half of which went to the informer. Id. §§1, 3. Tavern keepers and grocery owners who allowed gaming were fined $100 (one half to informer) and forfeited their license and were incapable of getting another for one year. Id. §4.

25. Ill. Rev. Code of 1827, Crim. Code, §§122-26, 149-50. Keeping a disorderly house by encouraging gaming or keeping a gaming house, table, or room for profit brought a $100 fine or six months imprisonment. But see Harbough v. People, 40 Ill. 294, 295 (1866), where it was held that a billiard saloon where persons assembled for

amusement was not a common gaming house. Chief Justice Walker concluded:

> The act was intended to suppress and prevent the vice of gambling and not the suppression of playing games alone for amusement.

Persons gaming - cards, dice, checks, billiards - were fined from $25 to $100. A $100 fine and forfeiture of license for one year were penalties assessed against tavern keepers who allowed gaming. And dice, packs of playing cards, or billiard tables brought into the state unlawfully could bring a fine of from $25 to $50.

26. Id., 235-36, §§1-5.

27. All gambling contracts were made void. Recovery depended upon $10 or more being lost at one sitting. Id. at 235, §2.

28. Ill. Rev. Laws of 1833, Crim. Code, §§124-128 at 198 et seq.

29. Ill. Rev. Stat. of 1845, ch.30, §§127-131 at 174.

30. Lurton v. Gilliam, 2 Ill. 577,579 (1839):

> . . . money loaned to be used in gaming could heretofore have been recovered back at common law, but it is now prohibited by the statute against gaming.

Vennum v. Carr, 130 Ill. App. 309,312 (1906):

> . . . a judgment rendered upon any promise or other contract where the whole or any part of the consideration thereof is for money won at gaming is absolutely void, and of no effect, whether confessed or not.

In Abrams v. Camp, 4 Ill. 290 (1841), the court in equity refused to relieve plaintiff from a prior judgment at law enforcing a gambling contract where plaintiff, the defendant in the first action, did not assert a perfectly valid statutory defense that all gambling contracts were void. Mallett v. Butcher, 41 Ill. 382,383-4 (1866) overruled Abrams. Justice Breese in speaking on the void nature of gaming contracts said:

> This statute was evidently designed to strike at the root of a vice, the indulgence of which more effectually demoralizes its victims than any other which can be named. A persistence in it, so changes the nature of the infatuated,

> that they no longer feel the common instincts of humanity, but become brutalized. All our legislation has been an earnest desire to put a stop to the vice, and it was thought the statute before us would go far to effect that object. . . . But it has not so proved. The defect is in our natures and in our training, and unless both be reformed by proper discipline and education, legislation cannot avail much to destroy the propensity.

31. Act of Feb. 15, 1839, (1838-39) Ill. Laws 109. Violators could be fined $1,000.

32. 4 Ill. 529.

33. Id. at 530-31. Justice Treat continued:

> . . . the bet in question, if on the result of an election in this State whether made before or after the election would be illegal, as against good policy. If made before the election, the parties to it would have a direct pecuniary interest in the result, which might control their votes, and induce them to use improper means for the purpose of controlling the election. If made after the election, the same interest might induce an attempt to influence and control the determination of the authority whose duty it is to canvass the votes and declare who is elected.

34. A $10,000 lottery was authorized for the purpose of improving navigation on the Big Wabash River--Act of March 25, (1819) Ill. Laws 257. A $50,000 lottery was authorized for the purpose of draining the Mississippi Bottom for reasons of health--Act of March 27, 1819, [1819] Ill. Laws 310.

35. Act of Feb. 26, 1847, [1847] Ill. Laws 56.

36. No such provision was included in the 1818 constitution. Ill. Const., art.3 §35 (1848) stated:

> The General Assembly shall have no power to authorize lotteries for any purpose . . . and shall pass laws to prohibit the sale of lottery tickets in this state.

37. Ill. Const., art.4 §27 (1870) stated:

> The General Assembly shall have no power to authorize lotteries or gift enterprises, for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this State.

38. 40 Ill. 465.

39. Id. at 467, accepting the dictionary definition.

40. 59 Ill. 160.

41. Id. at 164-165.

42. Ill. Rev. Stat. of 1874, ch.38, §180 et seq. at 378.

43. 23 Ill. 493. See Mosher v. Griffin, 51 Ill. 184 (1869) and Garrison v. McGregor, 51 Ill. 473 (1869).

44. Tatman v. Strader, 23 Ill. 493,496 (1860).

45. Act of March 31, 1869, (1869) Ill. Laws 307.

46. Act of June 10, 1897, (1897) Ill. Laws 202.

47. 58 Ill. 169.

48. This was foreshadowed by Gordon v. Casey, 23 Ill. 70 (1859), when the law was held applicable to Presidential elections even though such elections were not confined to Illinois.

49. Gregory v. Ring, 58 Ill. 169,170-71 (1871).

50. Act of Feb. 29, 1872, (1872) Ill. Laws 75. The minimum fine for the first offense was $100. For the second, it was $500 and a six month minimum jail term. For the third, it was $500 and 2 to 5 years in the state penitentiary.

51. 75 Ill. 554.

52. Id. at 560. McAllister also observed:

> All wagers are not void at common law. It is only those that are contrary to public policy; as on the question of war and peace, on the event of an election, etc.

53. Rev. Stat. of 1874, ch.38, §126, at 371. Offenders were fined anywhere from $10 to $100.

54. Id. Gaming boats were included. For penalties see note 50.

55. Id. §128, at 371. The license was forfeited and the offender was fined as in note 50. Five years later, in 1879, gaming in taverns by minors was prohibited. Such activity made the tavern a disorderly house and brought a fine of not more than $50, or 30 days in jail. A

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subsequent offense could bring a $100 fine or 60 days. Act of May 20, 1879, (1879) Ill. Laws 94-95.

56. Id. §131, at 372. Gambling contracts upon cards or dice or by betting upon any "race, fight, pastime, sport, lot, chance, casualty, election or unknown, or contingent event whatever" were void.

57. Id. §134 at 373.

58. Id. §132 at 372. But $10 or more must have been lost. After six months anyone could bring suit for triple the amount, receiving one half. Later by decision a loser could bring suit even if he was a knowing victim. Auxer v. Llewellyn, 142 Ill. App. 265,271 (1908):

> The statute of this state, in the interest of public policy . . . permits the victim of such a conspiracy, although a conspirator, to recover his money.

However, a bank was not a "winner" to be sued if it paid a check drawn on losses. Gibb v. Doming, 154 Ill. App. 74 (1910).

59. Id. §129 at 372. Decoys were those who invited or prevailed upon someone to visit a place where gambling went on.

60. Id. §133 at 372-73.

61. Ill. Rev. Stat. of 1874, ch.46, §85 at 463-64. Offenders could be fined $1,000 or imprisoned for one year.

62. Ill. Rev. Stat. of 1874, ch.38, §130 at 372. Offenders could be fined from $10 to $1,000, imprisoned for one year, or both.

63. 79 Ill. 351. See also Colderwood v. McCrea, 11 Ill. App. 543 (1882) and Semler Milling v. Fyffe, 127 Ill. App. 514 (1906).

64. Pixley v. Boynton, 79 Ill. 351,354 (1875).

65. 130 Ill. 28, 22 N.E. 497.

66. Id. at 41, 22 N.E. at 499.

67. 134 Ill. 66, 25 N.E. 109.

68. Id. at 72, 25 N.E. at 111.

69. Id.

> To remedy the mischief the legislature, satisfied of the futility of attempting to suppress gambling in grain and other commodities by merely striking at the gambling contracts themselves . . . has sought by the statute of 1887 to suppress all bucket shops . . . wherein gambling in grain or other commodities is conducted or permitted.

70. Act of June 6, 1887, (1887) Ill. Laws 96.

71. The first offense brought a fine of from $200 to $500. The second brought a possible six months' imprisonment together with the fine. If the violator were a corporation, its charter was subject to forfeiture. Id. §1.

72. Act of May 31, 1887, (1887) Ill. Laws 95. This did not apply to incorporated fair or race track associations.

73. Act of May 31, 1895, (1895) Ill. Laws 156. Offenders could get one to three years in the state prison, a fine of from $100 to $1,000 or a minimum jail sentence of six months.

74. Act of June 21, 1895, (1895) Ill. Laws 156.

75. Id. §1. The first offense brought a minimum $100 fine, the second a minimum of $500 and a six months' minimum jail term. The third offense brought the fine and from two to four years in the state prison. The act was held not to be a violation of constitutional protections of property in Bobel v. People, 173 Ill. 19, 50 N.E. 322 (1898). The statute was construed in Almy Mfg. Co. v. City of Chicago, 202 Ill. App. 240,244 (1916):

> The purpose of the machine, its quality and character, the possibilities of its operation and the manner in which it is susceptible of use are controlling factors in determining whether it is a gambling device in fact or not.

76. 186 Ill. 43, 57 N.E. 798.

77. Booth v. People, 186 Ill. 43,53, 57 N.E. 798,800-01 (1900).

78. 155 Ill. 617, 40 N.E. 839.

79. Id. at 628, 40 N.E. at 842. See Thomas v. First National Bank of Belleville, 213 Ill. 261, 72 N.E. 801 (1904).

80. 208 Ill. 518, 70 N.E. 669.

81. Id. at 527, 70 N.E. at 672. Justice Scott observed:

> The purpose of the legislature in the enactment of this statute was to lessen, and, if possible, to prevent, gambling. The evils resulting therefrom are among the most pernicious that afflict modern society. The practice destroys in its devotees all desire to engage in legitimate employment or business. The loser becomes intent on recovering his losses at the gaming table and is frequently driven to embezzlement and theft. The winner acquires a contempt for the small gains of honest pursuits. He spends the profits of unlawful hours in idleness and debauchery, among dissolute companions. Thrift is destroyed. Wholesome pleasures soon pall upon the taste. The ties of home and domestic life are disregarded, and eventually annihilated, by the craze for gaming and by the feverish excitement with which it fires its followers. Being itself unlawful, it creates and encourages contempt for all law, weakens every legal restraint and every honest impulse. Financial ruin and more degradation alike inevitably overtake every man who cannot resist its allurements, no matter with what degree of skill he engages in the nefarious business.

Id. at 526, 70 N.E. at 672.

82. Act of April 29, 1905, [1905] Ill. Laws 192.

83. 241 Ill. 215, 89 N.E. 259. Justice Cartwright noted:

> To make a transaction in stocks a gambling transaction it must appear that neither party intended the stocks to be delivered or intended an actual purchase and sale but that both had the intention of settling on the differences, only.

Id. at 227-28, 89 N.E. at 263.

84. Act of June 11, 1913, §132, [1913] Ill. Laws 256.

85. 273 Ill. 194, 112 N.E. 664.

86. Act of July 11, 1919, [1919] Ill. Laws 689.

87. Hershey Mfg. Co. v. Adamowski, 22 Ill. 2d 36, 174 N.E. 2d 200 (1961).

88. Act of June 13, 1927, [1927] Ill. Laws 28. [Now substantially incorporated within Horse Racing Act, Ill. Ann. Stat. ch.8, 637 et seq. (Smith-Hurd 1966)].

89. Act of July 17, 1945, [1945] Ill. Laws 56. [Now substantially incorporated within Horse Racing Act. See note 87.]

90. Quarter Horse Racing Act, Ill. Ann. Stat. ch.8, §401 (Smith-Hurd Supp. 1975-76).

91. 349 Ill. 270, 182 N.E. 439.

92. Hawthorne Kennel Club v. Swanson, 257 Ill. App. 499 (1930), transferred 339 Ill. 220, 171 N.E. 140 (1930).

93. People v. Monroe, 349 Ill. 270,275, 182 N.E. 439,442 (1932). See also Weiss v. Schachter, 275 Ill. App. 26 (1934).

94. 366 Ill. 256, 8 N.E. 2d 648.

95. Id. at 261-262, 8 N.E. 2d at 651. The opinion continues:

> The ingenuity of the "Bank Night" scheme forcibly illustrates the dangers pointed out by the Michigan court which grow out of attempting exact definition of generic and well understood words. There are many words in the law such as "fraud," "confidence game," and others, which are their own best definition and which are better left with some elasticity lest the ingenuity of nefarious minds devise means for evading the letter of the law while transgressing its spirit. In this scheme there is present every element of the evils attendant upon mass gambling. A small stake concealed within the price of admission gives its chance for a large prize, which may become large enough to arouse intense cupidity; there is the excitement of drawing a lucky number with its attendant exultation for one fortunate individual; there is depression and disappointment for a thousand losers, many of whom must think enviously of what they could do with so much money had they won it, and there is the constant temptation to continue to play in the hope of winning. We have thus

> created cupidity, envy, jealousy and temptation--the very things sought to be avoided by that enlightened public policy of most of the world which has outlawed lotteries. The nature of the appeal made is a controlling factor, and if the controlling inducement is the lure of an uncertain prize, the business is a lottery.

(at 267, 8 N.E. at 653). Even a raffle for charity can constitute an illegal lottery. Green v. Waller, 17 Ill. 2d 392, 161 N.E. 2d 858 (1959).

96. 380 Ill. 35, 42 N.E. 2d 627.

97. Act of July 7, 1953, [1953] Ill. Laws 929.

98. Ill. Ann. Stat., ch.38, §§28-1 to 28-8 (Smith-Hurd 1970), as amended, (Supp. 1975-76). Some opposition to the new gambling statute was voiced by the stock and commodity exchanges due to the prohibitions of gambling in futures. The drafting committee declined to make changes, however.

99. However, manufacture for sale outside the state is legal if not prohibited by federal law. Id. §28-1(6)(4). The Criminal Code had been expanded in 1961 to prohibit manufacture of gambling devices. Chicago was still the "slot machine capitol of the world" id. Committee Comments--1961, at 627 (1970 ed.). The courts, however, held that gambling devices manufactured exclusively for foreign and interstate commerce had a potential for lawful use, and thus were outside the prohibition. Hershey Mfg. Co. v. Adamowski, 22 Ill. 2d 36, 174 N.E. 2d 200 (1961). The 1963 act was an affirmation of that decision.

100. A Class A misdemeanor is an offense for which one may be fined not more than $1,000 or imprisoned for not more than one year. A Class B misdemeanor may bring a fine of not over $500 nor more than six months. Formerly making a wager or playing a game brought a possible $5,000 fine, one year imprisonment, or both.

101. A Class 4 felony can bring a fine up to $10,000 or from one to three years in the state prison. Formerly, violation could bring a fine of up to $5,000 or either one year in jail or from one to five years in the state prison, or both fine and imprisonment. A second offense brought the fine together with a minimum six months in jail or the prison sentence. A third offense brought the prison sentence and the fine.

102. Id. §28-1.1(a),(f). A Class 3 felony can bring a fine up to $10,000 or from one to ten years in the state prison. Formerly, violation brought one to five years.

> The policy behind this provision is to place heavy sanctions on the conduct of gambling as a business enterprise. Because of the possibility of a penitentiary sentence, the practice of paying fines as a part of "overhead" by professional gamblers and organized mobsters will no longer be possible.

Id., Committee Comments--1961, at 627 (1970 ed.).

103. A "gambling device" is any clock, tape machine, slot machine or other machines or device for the reception of money or other thing of value on chance or skill or upon the action of which money or other thing of value is staked, hazarded, but, won or lost, or any mechanism, furniture, fixture, equipment or other device designed primarily for use in a gambling place. Id. §28-2(a). This definition applies to such things as crap tables, dice, chips, poker tables, croupier sticks, punch boards, and poker tips and tickets. See People v. McDonald, 26 Ill. 2d 325, 186 N.E. 2d 303 (1962).

104. A "Lottery" is any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win such prizes, whether such scheme or procedure is called a lottery, raffle, gift, sale or some other name. Id. §28-2(b).

105. A "policy game" is any scheme or procedure whereby a person promises or guarantees by any instrument, bill, certificate, writing, token or other device that any particular number, character, ticket or certificate shall in the event of any contingency in the nature of a lottery entitle the purchaser or holder to receive money, property or evidence of debt. Id. §28-2(c).

106. Id. §28-3. Further, all state-issued food and liquor licenses become void and cannot be reissued for 60 days. A second offense is a class 4 felony. Formerly, a violator would be fined as much as $500, imprisoned for not over one year, or both. A second offense brought a fine of not over $1,000,or one to three years in the state prison, or both.

107. Id. §28-4.

108. Id. §28-5.

109. Id. §28-7.

110. Id. §28-8. But brokers are not "winners".

111. Id. §28-9.

112. Id. §§29-1 to 29-3 and 29A-1 to 29A-3.

113. Ill. Ann. Stat., ch.10 4/5, §§121-123 (Smith-Hurd Supp. 1975-76).

114. Ill. Ann. Stat. ch.38, §§37-1, 37-4 (Smith-Hurd 1970), as amended, (Supp. 1975-76). The courts originally did not allow the use of an injunction. Equity would not intervene in an area already regulated by criminal law. People v. Condon, 102 Ill. App. 449 (1902). However, the courts later recognized that a remedy at law might not adequately exist and held that there was room for an injunction. City of Sterling v. Speroni, 336 Ill. App. 590, 84 N.E. 2d 667 (1949). In 1965, §§37-1 to 37-4 amended ch.38 to allow for liens on gambling nuisances. See Illinois National Bank v. Chegin, 35 Ill. 2d 375, 220 N.E. 2d 226 (1966).

115. Ill. Ann. Stat., ch.24, §11-5-1 (Smith-Hurd 1970).

116. People ex rel. Scott v. Illinois Racing Board, 54 Ill. 2d 569,576, 301 N.E. 2d 285,288 (1973).

117. Lottery Act, Ill. Ann. Stat., ch.120, §1151 et seq. (Smith-Hurd Supp. 1975-76).

118. Id. §1152. Predictions are for an additional $60 million in state revenues; this would account for 7 1/2 percent of the state budget of 8 billion. Christian Science Monitor (hereinafter, Monitor), July 30, 1974, at 6.

119. Id. §1154.

120. Id. §1155.

121. Id. §1157.1, 1157.2 Some 10,000 grocery drug and department stores, newsstands, charitable organizations and lodges have been licensed to sell the 50¢ tickets. Monitor, July 30, 1974 at 6.

122. Id. §1157.2. Sales agents keep 10 percent, 45 percent goes for prizes and the rest to the state. Monitor, July 30, 1974 at 6.

123. Id. §1164.2.

124. Id. §1165.

125. Id. §1166.

126. Bingo License and Tax Act, Ill. Ann. Stat. ch.120, §1101 et seq. (Smith-Hurd Supp. 1975-76).

127. Id. §1101.

128. Id. §1102. Prizes may not exceed $2,250 in one day, or $500 for one game.

129. Id. Twenty-five games may be played per day.

130. Id. Bingo may be played one day per week.

131. Id. The maximum price of a card is $1.

132. Id. §1103.

133. Id. §1104.

134. Id. §1105.

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END