RAY SULLIVAN (DEFENDANT).....APPELLANT;

AND

DONALD A. McGILLIS (PLAINTIFF).....RESPONDENT.

AND

THE ATTORNEY-GENERAL OF CANADA ..... } INTERVENANT.

1948

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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Gaming and wagering—Cheque given to cover losses in betting on horse-races—Whether amount recoverable—Whether horse racing within Gaming Act, R.S.O. 1937, c. 297.

Section 3 of the Gaming Act, R.S.O. 1937, c. 297, which reads as follows: "Any person who, at any time or sitting, by playing at cards, dice, tables, or other game, or by betting on the sides or hands of the players, loses to any person so playing or betting, in the whole, the sum or value of $40 or upwards, and pays or delivers the same or any part thereof, shall be at liberty, within three months thereafter, to sue for and recover the money or thing so lost and paid or delivered", applies to money lost in betting on horse racing, payment of which has been made by a cheque.

(1) [1933] S.C.R. 44.

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Kellock and Locke JJ.

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APPEAL from the judgment of the Court of Appeal for Ontario dismissing (1) the appeal of the defendant-appellant from the decision of the trial judge, Mackay J., in favour of the plaintiff-respondent.

J. R. Cartwright K.C. for the appellant.

R. M. W. Chitty K.C. and *W. J. A. Fair* for the respondent.

F. P. Varcoe K.C. and *W. R. Jackett* for the Attorney-General of Canada.

W. C. Bowman for the Attorney-General of Ontario.

The judgment of the Chief Justice and of Kerwin J. was delivered by

KERWIN J.:—This appeal should be dismissed on the ground that the respondent is entitled to succeed on his alternative claim under section 3 of *The Gaming Act,* chapter 297 of the Revised Statutes of Ontario, 1937:—

> 3. Any person who, at any time or sitting, by playing at cards, dice, tables, or other game, or by betting on the sides or hands of the players, loses to any person so playing or betting, in the whole, the sum or value of $40 or upwards, and pays or delivers the same or any part thereof, shall be at liberty, within three months thereafter, to sue for and recover the money or thing so lost and paid or delivered.

It is unnecessary and therefore inadvisable to express any opinion upon the constitutionality of those parts of sections 1 and 2 of the *Act* dealing with notes and bills although those sections must be referred to in considering the history of section 3.

The respondent sued the appellant for the principal sum of $5,479 and interest at five per centum per annum thereon from May 28, 1945. Judgment was given for the principal sum and interest from the issue of the writ, and that judgment was affirmed by the Court of Appeal for Ontario (1). May 28, 1945, was the date of a cheque drawn and signed by the respondent on a bank for the principal sum, on which date the appellant presented the cheque to the bank and received the money therefor. It was alleged by the respondent in his statement of claim that this cheque was so drawn, executed and delivered for

(1) [1947] O.R. 650.

an illegal consideration, in that the principal sum was the amount claimed by the appellant as owing to him by the respondent on account of gaming at horse racing during the week of May 21 to May 26, 1945, and the respondent pleaded sections 1 and 2 of the Act. In the alternative the respondent said that the sum was money lost by playing at a game, viz., horse racing, and the respondent pleaded section 3. Because of the question of onus raised by the appellant, it is important to notice that in answer to the alternative claim the appellant in his defence repeated certain allegations to the effect that the $5,479 was paid to him as agent for the respondent to be paid by the appellant to the person with whom the appellant claimed such wagers for the appellant had been placed, and denied that the said sum was at any time lost by playing at a game within the meaning of section 3. The only other defence to the claim under that section was that the money was not lost to the appellant and that the appellant was not playing or betting in such game.

The trial proceeded upon the basis of the pleadings and the only divergence in the evidence was on the point whether the appellant made any bets with the respondent or merely acted throughout as the latter's agent in placing bets with others. That issue was found against the appellant and confirmed by the Court of Appeal (1), and the appellant accepts that finding as the basis upon which this appeal must be determined. However, he contends that the respondent has not shown that he lost to the appellant $40 or more "at any time or sitting" within the meaning of section 3. The evidence disclosed that bets were placed each day on horse races during the week in question and that settlement was made by the cheque of May 28th. In view of the pleadings and the course of the trial, the appellant cannot now be heard to advance the present contention and, in any event, it is a fair inference from all the evidence that the respondent did lose to the appellant $40 or more at any sitting, i.e., on any one day during that week.

The trial judge held that section 2 of the *Act* applied but stated that, if he were wrong in that conclusion, he was also of opinion that section 3 likewise applied. In the Court of Appeal (1), after the first argument, reasons were

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delivered in which Mr. Justice Laidlaw, speaking for himself and Mr. Justice Aylesworth, while dealing at some length with the other questions argued, expressed, in one sentence, the view that the respondent had a substantive right under section 3 to sue for and recover the money lost by him and paid to the appellant. While agreeing with the reasons of Mr. Justice Laidlaw, the third member of the Court, Mr. Justice Hogg, stated:—

> This result, however, with respect to the question as to whether horse racing is embraced by the language of the Statute, was reached by me only after considerable deliberation because of the amendment made in 1912, by which the word "whatsoever" was omitted from s. 3 of the Statute, which is now known as "The Gaming Act".

It was only after the reasons for judgment had been delivered, following the first argument, and before the formal order was issued, that the appellant obtained leave to raise the constitutional question. That question was subsequently determined adversely to the appellant but, for the reasons already stated, I express no view upon the matter.

The first legislation in Ontario dealing with the matters under review is found in chapter 1, "The Statute Law Revision Act, 1902", of the Statutes of 1902. Section 2 provides in effect that the Imperial Statutes described in the Schedule to that Act are repealed so far as the same are in force and within the legislative authority of the province. In the Schedule appears "16 Car II, c. 7—An Act against Disorderly and Excessive Gaming." Section 8 of the 1902 Act provides that the statute passed in the ninth year of Queen Anne intitled "An Act for the better preventing of excessive and deceitful gaming" (1710) is amended so far as the same has been incorporated into the laws of the province by striking out the first section thereof and by substituting the following:—

> All notes, bills, bonds, judgments, mortgages, or other securities, or conveyances whatsoever given, granted, drawn, or entered into, or executed, by any person, where the whole, or any part of, the consideration of such conveyances or securities shall be for any money, or other valuable thing whatsoever, won by gaming, or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent or advanced for such gaming, or betting, as aforesaid, or lent, or advanced, at the time and place of such play, to any person so gaming, or betting, as

aforesaid, or that shall, during such play, so play, or bet, shall be deemed to have been made, drawn, accepted, given, or executed, for an illegal consideration.

Section 9 follows the Imperial Statute of 5-6 William IV (1835) chapter 41, section 2, by providing that money paid to the holder of such securities shall be deemed to be paid on account of the person to whom the same was originally given and to be a debt due and owing from the latter and recoverable by action.

Chapter 13 of the Ontario Statutes of 1902 provides for what is known as Volume 3 of the Revised Statutes of Ontario, 1897, in which volume appears chapter 329, "An Act for the better preventing of excessive and deceitful gambling". Section 1 of that Act is the same as that part of section 8 of chapter 1 of the 1902 Statutes copied above. Section 2 is, with irrelevant verbal changes, the same as section 9 of chapter 1 of the 1902 Statutes. Section 3 enacts in part:—

> Any person who shall, at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any person so playing, or betting, in the whole the sum or value of forty dollars, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same shall be at liberty, within three months then next, to sue for, and recover, the money or goods so lost, and paid, or delivered, or any part thereof, from the respective winner thereof, with costs of suit, by action, founded on this Act, to be prosecuted in any of His Majesty's courts of record, in which actions no privilege of Parliament shall be allowed, and in which actions it shall be sufficient for the plaintiff to allege that the defendant is indebted to the plaintiff, or received to the plaintiff's use, the monies so lost and paid, or converted the goods won of the plaintiff to the defendant's use, whereby the plaintiff's action accrued to him according to the form of this statute, without setting forth the special matter.

Provision is then made for suit by any person in case the loser does not bring action. The only other section may be disregarded.

R.S.O. 1897, chapter 329, was repealed by *The Gaming Act*, chapter 56 of the Statutes of 1912, to which Mr. Justice Hogg (1) referred. Sections 2, 3 and 4 correspond to sections 1, 2 and 3 of the previous Act, with an alteration upon which the appellant relies. That alteration is that the words "or games whatsoever" in old section 1 after the words "bowls, or there game" disappear, and that the words "or games whatsoever" in old section 3, after the words

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"tables or other game", disappear. Deferring consideration of this argument for the moment, I turn to the contention that horse racing is not included in section 3 of the present *Act*, R.S.O. 1937, chapter 297. As Lord Justice Fletcher Moulton stated in *Hyams* v. *Stuart* (1), a long series of cases in England had settled that horse racing was within the statutes of Anne and William IV. It is objected that while that may be so in England because of references in the statute of Anne to the earlier statute of Charles II, which specifically mentioned horse racing, that consideration should not apply in Ontario. The argument fails because the statutes of Charles II and Anne were undoubtedly part of the law of Ontario by virtue of the first chapter, passed at the first sitting of the Upper Canada Legislature in 1792, and the subsequent statutes that have taken its place: *Bank of Toronto* v. *McDougall* (2). The statute of Charles II was repealed and the statute of Anne, with the modifications already made in England by the statute of William IV, was enacted as previously explained by section 8 of chapter 1 of the Ontario Statutes of 1902 and became chapter 329 of R.S.O. 1897. The same meaning should be ascribed to the Ontario legislation, and horse racing was therefore an "other game" within section 3 of R.S.O. 1897, chapter 329.

Turning now to the argument based upon the omission of the words "or games whatsoever" in sections 2 and 4 of chapter 56 of the 1912 statutes, it should be noticed that in section 1 of the original statute of Anne there were five "whatsoevers", relating to (1) securities or conveyances, (2) persons, (3) valuable thing, (4) games, and (5) "all intents and purposes." In section 1 of R.S.O. 1897, chapter 329, this number is reduced to three, and in the 1912 statute is omitted entirely. The dropping of the words "or games whatsoever" was merely for the purpose of shortening the enactment and as expressed in the recital to chapter 13 of the 1902 Ontario Statutes, to remove language that had become antiquated.

The decision of the House of Lords in *Sutters* v. *Briggs* (3), is an authority merely for the proposition that the word "holder", in section 2 of the English Gaming Act of

(1) (1908) 2 K.B. 698 at 715.
(2) (1878) U.C.C.P. 345 at 352.
(3) [1922] 1 A.C. 1.

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1835, includes the original payee and a banker who receives the note or bill for collection, but certain expressions in the speeches of Viscount Birkenhead and Lord Sumner might, on a casual reading, be taken as supporting or negativing the conclusion I have reached. A careful perusal of those speeches, however, has convinced me that it would be dangerous to look there for any guidance in determining the precise point before us as it really had no relevancy to the matters decided by their Lordships and in my opinion neither of them desired to state, or expressed, any view upon the subject. The mere fact that in the present case a cheque was given does not take the matter out of the operation of section 3 of *The Gaming Act,* R.S.O. 1937, chapter 297; *Smith* v. *Bond* (1).

The appeal should be dismissed with costs but there should be no costs to or against either Attorney General.

TASCHEREAU J.:—In his statement of claim, the plaintiff-respondent alleges that on the 28th of May, 1945, he signed a cheque payable to "cash", drawn on his bank, the Bank of Montreal, at Peterborough, for $5,479, which cheque was delivered to the defendant and cashed by him. He claims that this cheque represented the total amount which he had lost to the defendant by betting with him on horse races, and that, the consideration being illegal, he is therefore entitled to the reimbursement of that amount.

The defendant, now appellant before this Court, pleaded that he never at any time made any bets with the plaintiff, but merely acted throughout as agent for the plaintiff from time to time in placing with other persons in the City of Toronto, wagers for the plaintiff on the result of horse races without any consideration from the plaintiff, and solely on the ground of friendship.

The trial judge found as a fact that the defendant was a principal making bets with the plaintiff. He also found that the plaintiff under the law was entitled to recover the amount claimed and gave judgment in his favour. The appellant before this Court does not quarrel with this finding of fact, which was confirmed by the Court of Appeal (2), and assumed for the purpose of his appeal, that the cheque referred to, was given by the plaintiff to the defendant in payment of bets made between themselves.

(1) (1843) 11 M. & W. 549. (2) [1947] O.R. 650.

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Before the Court of Appeal (1), after the case had been fully argued, a motion was made on behalf of the defendant to present further argument and, by order of the Court dated the 21st of April, 1947, leave was given to the defendant to amend his statement of defence and notice of appeal, so as to raise the following question:—

> 3A. The Defendant submits that the Gaming Act, being Chapter 297 of the Revised Statutes of Ontario, 1937, is *ultra vires* of the Legislature of the Province of Ontario and particularly that Sections 1 and 2 of the said Act are *ultra vires* being legislation in regard to bills of exchange and promissory notes a class of subjects assigned exclusively to the Parliament of Canada by the British North America Act and particularly Section 91 (18) thereof.

The amendments were made accordingly and the matter was further argued before the Court of Appeal (1). Notice of the hearing of this argument was duly served on the Attorney General for Canada and the Attorney General for Ontario, pursuant to section 32 of the *Judicature Act,* R.S.O. 1937, chap. 100. On the 18th of June, 1947, the Court of Appeal (1) gave further reasons for judgment, and held that sections 1 and 2 were *intra vires* of the Ontario Legislature, and the defendant's appeal was dismissed with costs.

The Act which is challenged is the *Gaming Act,* chap. 297 of the Revised Statutes of Ontario, 1937. Section 1 provides that every agreement, note, bill, bond, confession of judgment, cognovit actionem, warrant of attorney to confess judgment, mortgage, or other security, or conveyance, for which, or any part of it, is money or other valuable thing won by gaming, or playing at cards, dice, tables, tennis, bowls, *or other game,* shall be deemed to have been made, drawn, accepted, given, or executed for an *illegal consideration.*

Section 2 says that if any person makes, draws, gives, or executes, any note, bill, or mortgage, for any consideration which is hereinbefore declared to be *illegal,* and actually pays to any indorsee, holder, or assignee of such note, bill, or mortgage, the amount of the money thereby secured or any part thereof, such money shall be deemed to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given, and to be a

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debt due and owing from such last named person to the person who paid such money, and shall accordingly be recoverable by action.

The last relevant section is section 3 which is to the effect that any person who, at any time or sitting, by playing at cards, dice, tables, *or other game,* loses to any person so playing or betting, in the whole, the sum or value of $40 or upwards, and pays or delivers the same or any part thereof, shall be at liberty, within three months thereafter, to sue for and recover the money or thing so lost and paid or delivered.

The defendant-appellant before this Court submits that the court below wrongly held, that bets made on horse races came within the words "or any game" of sections 1 and 2 of the *Gaming Act.* He also submits that the court erred in holding that the plaintiff was entitled to recover the moneys in question by reason of the provisions of section 3 of the *Gaming Act,* because a bet on a horse race would not come within the words of that section, and that there was no evidence that any one bet of those that made up the total of the cheque, was in excess of $40. Finally, it is the contention of the appellant before this Court that sections 1 and 2 of the *Gaming Act* are *ultra vires* of the Province of Ontario, being legislation in regard to bills of exchange and promissory notes.

The origin of this Ontario legislation which is challenged, may be found in the Imperial Statute 9 Anne, Chap. 14, 1711, and entitled "An Act for the better preventing of excessive and deceitful gaming." This Act stipulated that after the 1st of May, 1711, all notes, mortgages, etc. where the consideration was for money won by gaming, or the repayment of money lent at such gaming were *void.* Section 2 of the same Act was to the effect that the loser could sue for the repayment of the money within three months.

Later, in England, in 1835, (5 & 6 William IV, Chap. 41) another act was enacted entitled "An Act to amend the law relating to securities given for considerations arising out of gaming, usurious, and certain other illegal transactions". In this Act, it was stipulated that any notes, bills, or mortgages which up to then, were under the Statute of Anne absolutely *void,* should in the future be deemed and

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taken to have been made, drawn, accepted, or executed for an *illegal consideration.* Section 2 was also enacted, which reads as follows:—

> 11. AND be it further enacted, that in case any person shall, after the passing of this Act, make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the herein-before recited Acts of . . . the ninth and eleventh years of the reign of her said late Majesty Queen Anne, or by any one or more of such Acts, declared to be *void,* and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such *illegal consideration* as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's courts of record.

Several amendments to the original Statute were adopted by the legislature of Ontario, and we now find the *Gaming Act,* as it now stands in chapter 297 of the R.S.O. 1937. It practically embodies the Statute of Anne and the amending Imperial Statute of 1835.

Dealing first with the contention that the words "other game" found in the Statute do not include horse racing, it is sufficient to refer to the previous judgments on this point, to reach the conclusion that they do.

In *Goodburn* v. *Marley* (1), it was held that horse races was within the Act against the Statute of Anne, and this judgment was later confirmed in *Blaxton* v. *Pye* (2). In *Hyams* v. *Stuart King* (3), Fletcher Moulton L.J., said:—

> Horse racing is not expressly referred to either in the statute of Anne or in the Gaming Act, 1835; but by a series of decisions, culminating in the decision of this Court in *Woolf* v. *Hamilton* (4), it has been settled that horse racing is within these statutes, and that a cheque given for a bet upon a horse race is therefore to be deemed to have been given for an illegal consideration.

More recently in *Sutters* v. *Briggs* (5), Lord Sumner said at page 19:—

> They accepted that, as *Fletcher Moulton L.J.* observes in *Hyams* v. *Stuart King* (1908, 2 K.B. 696, 715), a long series of cases has settled that horse racing is within the statutes of Anne and William IV.

If any further authority is needed on this point, vide the following American cases: (*Tatman* v. *Strader* (6));

(1) (1742) 93 E.R. 1099.
(2) 2 Wils. Exch. 309.
(3) (1908) 2 K.B.D. 715.
(4) (1898) 2 Q.B. 337.
(5) (1922) 1 A.C. 1 at 19.
(6) (1859-60) 23 Ill. 493.

(*Ellis* v. *Beale,* (1)); (*Swaggard* v. *Hancock,* (2)); (*Daintree* v. *Hutchison* (3)); (*Swigart* v. *People of the State of Illinois* (4)); (*Boynton* v. *Curle* (5)).

As to the contention that there was no evidence that any one bet was in excess of $40, so as to bring the case within section 3 of the statute, I do not think that the appellant, who has never raised that point in the lower courts, may now be allowed to do so here. The case has never been fought on that basis, and I therefore assume that each bet was for over $40.

Turning now to the constitutional aspect that has been raised, I do not think it necessary to deal with sections 1 and 2 of the *Act,* because whether they are or not within the powers of the Legislature of Ontario, the respondent is entitled to succeed, even if he relies merely on section 3. Moreover, the case contemplated in section 2, deals with the rights of the loser when third parties are involved. But we are not confronted here with this eventuality. The legal relationship in the present case is between the winner and the loser of the bet, and in my opinion, section 3 is sufficient to justify the judgment given in favour of the respondent.

I have no doubt that this section is severable from the rest of the *Act,* and that the Legislature would have enacted it without the other provisions.

The appeal should be dismissed with costs. But there should be no costs to or against the Attorneys General.

The judgment of Kellock and Locke JJ. was delivered by

KELLOCK J.:—The first point made on behalf of the appellant with which it is necessary to deal is that section 3 of the *Gaming Act,* R.S.O., 1937, cap. 297, does not apply to money lost in betting on horse racing.

This section derives from section 2 of 9 Anne, cap. 14. So far as relevant that section read as follows:

> . . . any person or persons whatsoever who at any time or sitting, by playing at cards, dice, tables or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of the games aforesaid, lose to any one or more person or persons so playing or betting in the whole the sum or value of ten pounds, and shall pay or deliver the

(1) (1841) 18 Maine 337.
(2) (1887) 25 Mo. App. 596.
(3) (1842) 10 M. & W. 85.
(4) (1892) 50 Ill. App. 181.
(5) (1870) 4 Houck (Mo.) 351.

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same or any part thereof, the person or persons, so losing and paying or delivering the same, shall be at liberty within three months then next, to sue for and recover the money or goods so lost and paid or delivered or any part thereof, from the respective winner and winners thereof, with costs of suit, by action of debt founded on this Act . . .

It has been uniformly held in England under the Statute of Anne that although horse racing is not specifically mentioned in the statute, as was the case with earlier legislation, nevertheless it applied equally to money lost by betting on horse races, the words "other game or games" being held sufficient for that purpose; *Sutters* v. *Briggs* (1), per Lord Sumner at 19; *Woolf* v. *Hamilton* (2); *Blaxton* v. *Pye* (3); *Goodburn* v. *Marley* (4); *Applegarth* v. *Colley* (5). As stated by Lawrence, L.J., in *Ellesmere* v. *Wallace* (6):

> It is settled that . . . horse racing is a game within the meaning of the Gaming Acts;

and he cites *Applegarth* v. *Colley, supra.* The same construction has been put upon section 2 as upon section 1, notwithstanding that the enumeration of the games in section 2 is not the same as in section 1; *Thorpe* v. *Coleman* (7).

The Statute of Anne became part of the law of Ontario by the provisions of the *Constitution Act,* 1792, 32 Geo. II, cap. 1 (U.C.)

Prior to 1902 the amendments to the Gaming laws of 5 and 6 Wm. IV, cap. 41, sections 1 and 2, were not in force in Ontario; In *re Summerfeldt* v. *Worts* (8). In that year however, these sections were enacted by 2 Edward VII, cap. 1, sections 8 and 9. By section 8 section 1 of the Statute of Anne was amended to provide that the instruments mentioned in the section should be deemed to have been given for an illegal consideration instead of being rendered void as was the case under the original statute. Section 2 of 9 Anne was not affected by the amending Act. By section 9 the provisions of section 2 of the Act of William were enacted; now embodied in section 2 of the existing statute. By cap. 13 of 2 Edward VII, "An Act respecting the Imperial Statutes relating to property and civil rights incorporated into the Statute Law of Ontario",

(1) (1922) 1 A.C. 1.
(2) (1892) 2 Q.B. 337.
(3) 2 Wils. K.B. 309.
(4) 2 Str. 1159.
(5) 10 M. & W. 722.
(6) (1929) 2 Ch. 1 at 38.
(7) 1 C.B. 991.
(8) 12 O.R. 48.

the Statute of Anne, as thus amended, was revised and consolidated as part of the Revised Statutes of Ontario, 1897. By section 2 of cap. 13 provision was made for the repeal of the Imperial Acts to take effect from the day upon which the revision of 1897 should take effect, provision being made for the latter by section 4. By section 9 it was provided that the Revised Statutes should not be held to operate as new laws but should be construed and have effect as a consolidation and as declaratory of the law as contained in the repealed statutes for which the Revised Statutes were substituted. Section 10 provided that if upon any point the provisions of the Revised Statutes were not in effect the same as those of the repealed Acts then as to all matters subsequent the Revised Statutes should prevail.

Cap. 329 contained the revision of the Statute of Anne as amended by 2 Edward VII, cap. 1, sections 8 and 9. Section 3 perpetuates the provisions of section 2 of the Statute of Anne. Verbal changes were made in this section, such as omitting the words "or persons whatsoever" after the words "any person" at the beginning of section 2 of the Statute of Anne and there were similar changes. The phrase "or other game or games whatsoever" remained in the section.

In 1912 by cap. 56 the Act was again revised, section 3 of the earlier statute becoming section 4. Among the changes made the words "or other game or games whatsoever" in the Act of 1902 became "or other game". The phrase "the sides or hands of such as do play at any of the games aforesaid" was also shortened to "the sides or hands of the players". I see no reason however, for thinking that the legislature intended to make the statute inapplicable to the subject matters of the preceding Act and I think the Act of 1912, which is reproduced in the Revised Statutes of 1937, is to be given the same construction so far as betting on horse racing is concerned as the original Statute of Anne.

It is however, further contended that by reason of the tax imposed on betting at horse races by the *Race Tracks Tax Act* of 1939, cap. 39, section 3, the *Gaming Act* should not be construed as including horse racing. Assuming the subject matter of the Act of 1939 is the same as that of the

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Gaming Act, section 3 of the *Gaming Act* remains on the statute books and, in my opinion, it is not to be considered as thus indirectly amended without more express language than that contained in the Statute of 1939. There is no contradiction in taxing the winner in respect of his gains even although he may, though not necessarily must, be called upon to repay.

The next point which arises is as to whether or not section 3 of the present statute applies where the plaintiff has given a cheque to the winner in payment of the bets lost or whether the section is, as appellant contends, limited to cash payments. That the section has always been limited to the recovery of payments directly made by the loser to the winner is clear, I think, from the authorities. It is sufficient to refer in this connection to *Sutters* v. *Briggs, ubi cit.* It is however, also established that a payment made by cheque is within the section where the cheque has been collected directly by the winner; *Smith* v. *Bond* (1). Under section 1 of the Statute of Anne all bills were void and payment thereof could not be recovered in any case not within section 2. Section 2 of the Statute of William was enacted to permit recovery where payment had been made by bill of exchange which had found its way into the hands of third parties; *Sutters* v. *Briggs, ubi cit.* The present case appears to come clearly within the provisions of section 3 as the appellant received payment directly from the bank upon which the cheque here in question was drawn payable to "cash".

While argument was addressed to us on the basis that sections 1 and 2 of the statute, or at least those portions of the sections which relate to bills of exchange, are *ultra vires* on the ground that they constitute legislation within the exclusive jurisdiction of the Parliament of Canada, no similar argument was addressed to us, nor I take it from the judgments below, to the Court of Appeal (2) with respect to section 3. The matter need not therefore be considered.

It is next argued that it was not proved on behalf of the respondent that the amount sued for was made up exclusively of amounts lost "at any time or sitting" of "the sum or value of $40 or upwards."

(1) 11 M. & W. 549.

(2) [1947] O.R. 650.

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The Statement of Claim includes in the alternative a claim within section 3 to which the Statement of Defence raised two defences, namely, (1) that the section does not include money lost by betting on horse races; and (2) that the respondent was, in any event, an agent and not a principal. The present objection was not raised before the trial judge and the course of the trial in my opinion brings the case within the principle of the decision in *The Century Indemnity Co.* v. *Rogers* (1). I would dismiss the appeal with costs, save that there shall be no costs to either of the Attorneys-General.

Appeal dismissed with costs; no costs to or against either Attorney-General.

Solicitors for the Appellant: *Smith, Rae, Greer and Cartwright.*

Solicitor for the respondent: *W. J. A. Fair.*

Solicitors for the Attorney-General of Canada: *F. P. Varcoe and W. R. Jackett.*

Solicitor for the Attorney-General of Ontario: *C. R. Magone.*

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(1) [1932] S.C.R. 529.