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Gambling: The Element of Chance

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of doctrines have been developed to mitigate the harshness of the mutual fault rule.[33] Most of these place the collision outside of the scope of the rule while others obviate the rule by allowing the court to overlook small amounts of negligence when there is a great disparity between the negligences of the two parties.[34] Such mitigating doctrines do not attack the real problem however, and it would be preferable to have this country adopt a proportional damage rule. Since establishing such a rule judiciary will be difficult, not because reversal by the Supreme Court will cause undue hardship but rather because of the reticence of the circuits to affirm a district court judgment that is contrary to the general rule. Attempts to jusify such a decision must be strained if they allege to follow the development of the original English rule. Pending legislation appears to be the best route to a just and equitable proportional damages rule.

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Gambling: The Element of Chance—In the case of *United States v. Bergland*,[1] the defendants were charged with a violation of title 18 U.S.C. §§ 1084 and 1952,[2] in that; one of the defendants would transmit by radio, from within the Oaklawn Park Race Track at Hot Springs, Arkansas, the results of a particular race to a co-defendant, stationed outside of the track; these results would then be

impossible to apply with any degree of accuracy, and that the older Judges in the Admiralty Division or the Admiralty Court held that no human being could say how much blame was to be attached to each of the vessels involved in a collision.'"

[33] *Supra* note 16, at 268.

[34] Note 20, TUL. L. REV. 585, 586 (1946).

[1] United States v. Bergland, 209 F. Supp. 547 (E.D. Wis. 1962).

[2] 18 U.S.C.A. §1084 (1962) Transmission of Wagering Information; Penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any working event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

§1952 Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the state in which they are committed or of the United States, or (2) extortion or bickery in violation of the law of the state in which committed or of the United States.

immediately transmitted by long distance telephone to a co-defendant in Milwaukee, Wisconsin; and this co-defendant would place a bet with Milwaukee bookmakers who were unaware that the race was over and that a winner had been declared. This act of placing a bet with bookmakers after a winner has officially been declared is commonly termed "past posting."[3] The gist of the indictment charges the defendants with having used a telephone in interstate commerce with intent to promote and carry on a gambling enterprise.

The court, upon defendants' motion to dismiss, found that the indictment failed to show that defendants' acts constituted an offense against the United States government. The defendants based the motion on failure of the indictment to show the defendants were engaged in gambling. As it was of the essence of the violations alleged in the indictment that the defendants be involved in gambling, the failure of the indictment to show this necessitated its dismissal. In finding that the indictment was insufficient, the court stated:

> . . . defendants' contentions are sound, and the indictment must be dismissed. However nefarious may be the alleged schemes, they did not involve the element of chance. . . . The defendants were certain to win, and the book makers were certain to lose.[4]

To constitute gambling under any federal statute prohibiting the same, it is necessary for the element of chance to exist in the transaction.[5] This element involves, simply, the necessity that the transaction must be determined by some forces outside the control of either party,[6] i.e. some uncertainty.[7] By knowing the results of the races bet on, the uncertainity of the transaction between the defendants and the bookmakers was eliminated, and with it, the crucial element of chance.

The court reviewed its decision on a motion for rehearing by the United States Government and affirmed its previous holding.[8] It was argued that although such offenses as defendants' were not gambling under the common law definition, Congress in enacting §§ 1084 and 1952 to title 18,[9] intended that such acts be included in its purview. Exerpts from the legislative history of the statute were presented to show that such acts as defendants' had allegedly committed, were intended to be included under the prohibition of these sections. In

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[3] *Supra* note 1, at 548.
[4] *Ibid.*
[5] *Supra* note 2, §§1084, 1952. See also 18 U.S.C. §§1301-1304, 15 U.S.C. §§1171-1177. There are very few Federal statutes that deal with gambling offenses, all of which require that the element of chance exist.
[6] People *ex rel.* Ellison v. Lavin, 71 N.E. 753, 179 N.Y. 164 (1904).
[7] BLACK, LAW DICTIONARY (4th Ed. 1951).
[8] United States v. Bergland, *supra* note 1, at 551.
[9] *Supra* note 2, §§1084, 1952.

affirming its earlier decision, the court stated that the statute contained no ambiguity and it was therefore unnecessary to refer to the legislative history of its enactment to determine its scope. It was further stated that statutes as highly criminal in nature as §§ 1084 and 1952 must be strictly construed, so that the language of the statutes must be confined to its common law interpretation.

Many definitions of gambling may be found and their elements will depend on the nature of the so called "gamble" itself. Some use the word "game,"[10] while others refer to it as a contract[11] or agreement.[12] The one essential word or element found in every definition, is that of chance. If throughout the transaction, chance, i.e., uncertainty, is the dominant element as to which party wins or loses, there is gambling or a game of chance.[13]

The chance element takes on different appearances, depending on the nature of the gambling agreement or type of device used. Probably the most common of all the gambling transactions is the lottery. In a lottery the element of chance is present in the contrivance which, through its operation, determines a question or contingency without the action of man's choice or will.[14] The numerous methods and devices used are a somewhat dubious credit to man's ingenuity. In many of them, the participant does not risk any chance of loss, his only chance being that of winning more than he has ventured.[15] This occurs mostly in the slot or vending machine device. The prize, whether it be merely a chance to replay the machine,[16] or a chance to gain more than the amount paid for in vended merchandise,[17] makes these machines gambling devices, regardless of whether or not the player stands to lose the money he has ventured.[18]

Other types of gambling or gaming are those in which the existence of chance is satisfied by the outcome of some extraneous event or game. One of the most common is that which was involved in

[10] State v. O'Rourke, 115 Mt. 502, 146 P. 2d 168 (1944).
[11] 8 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 993 (1889).
[12] Baucum & Kimball v. Garrett Mercantile Co., 188 La. 728, 178 So. 256 (1937).
[13] People on complaint of Fleming v. Welti, 37 N.Y.S. 2d 552 (1942). It was held that the test is that of the *dominating element* in determining whether a game is a game of chance, and that such a game does not cease to be one of chance unless some other element exists to a greater degree than that of chance. [Emphasis added].
[14] Lynch v. Rosenthal, 144 Ind. 86, 42 N.E. 1103 (1896).
[15] Commonwealth v. Malco-Memphis Theatres, 293 Ky. 531, 169 S.W. 2d 596 (1943).
[16] Synder v. City of Alliance, 41 Ohio App. 48, 179 N.E. 426 (1931). Unequal opportunity to the patrons of a game to replay it based on tokens entitling the player to replay the game is gambling, if the controlling element of the game is chance.
[17] Lang v. Merwin, 99 Me. 486, 59 Atl. 1021 (1905). A cigar vending machine by which the patron always receives the merchandise paid for, but also may receive additional cigars *by chance,* without further payment is a gambling device, even though he risks no monetary loss at all. [Emphasis added].
[18] *Ibid.*

this case, the horse-race. It is not the game or race which is illegal, but the wager laid on the event's outcome.[19] By the nature of this type of gamble the participants, all other things being equal, have an equal chance to win or lose the amount wagered on the outcome. One must win and the other must lose and the contingency of the game, the result of which must be extraneous and uncontrolled by either party, is the element of chance which determines who will be the loser in the transaction.

Two systems are available for those who wish to bet on horse-races. "Pari-Mutuel" is the system used at the race track. Under this system the bets of the participants are recorded by means of a machine and all odds are determined by the number of bets placed. The actual odds on a particular horse are determined by the total amount bet by all participants on it and the other horses in a particular race.[20] A winning bettor receives a portion of the total stakes determined by the amount he has bet and the final odds quoted by the machine which registered the total number of bets.[21]

The other system available to the individual who wishes to bet on a race is through a bookmaker. In bookmaking, the odds are determined by the bookmaker himself. He solicits bets by quoting odds to the participants, which odds are carefully calculated by him, so as to bring in a profit.[22] The major difference, from the bettor's standpoint, is that the participant knows the odds and the amount he might win at the time of the bet, rather than at the completion of all betting and determination of the winning horse, as in the "pari-mutuel system." This factor is of significance here since the defendants were certain of the winner of the race; they were also certain as to the amount of money they would win. If this were not true, there might have been a convincing argument available that there was some element of chance in the acts of the defendants, in that they stood to win an uncertain amount of money,[23] even though they did not stand to lose anything. But, because their alleged gambling transaction was made with a bookmaker, the defendants also knew the amount they would win, leaving no uncertainty in the transaction that could satisfy the necessity that an element of chance need exist.

On rehearing,[24] the court refused to consider the legislative history of §§ 1084 and 1952 under which the defendants were indicted. So, whether or not Congress did intend to include acts such as those of the defendants was not determined. In some cases,[25] the courts have

[19] Swigart v. People, 50 Ill. App. 181, *aff'd*, 154 Ill. 284, 40 N.E. 432 (1892).
[20] Pompono Horse Club v. State, 90 Fla. 415, 111 So. 801 (1927).
[21] City of Portland v. Dunthey, 185 Ore. 365, 203 P. 2d 640 (1949).
[22] 24 AM. JUR., *Gaming & Prize Contests*, §24 (1939).
[23] United States v. Bergland, *supra* note 1, at 549.
[24] *Id.* at 553.
[25] United West Coast Theatres Corp. v. Southside Theatres, 86 F. Supp. 109

looked to the legislative history of a statute when failure to do so would have resulted in a construction quite at variance with the intent of Congress even though the words of the statute were plain and unambiguous. This is, of course, dependent on whether it appears that Congress has used words in a different context than that attributed them in common usage.[26] Where criminal statutes have been involved, there has been a great degree of reluctance on the part of our courts to employ legislative history, with most courts holding for a narrow construction in criminal definitions.[27] An even greater degree of reluctance exists where the language employed gives a statute a plain meaning on its face, as was expressed in *United States v. Williams*,[28] where the court said:

> Criminal statutes should be given the meaning their language most obviously invites and their scope should not be extended to conduct not clearly within their terms.

Seemingly, the only situation involving a criminal statute where courts have looked to the legislative intent or history have arisen where the statutory wording has created a loophole or where the obvious intent of Congress would be circumvented when the words are given a strict technical construction.[29] To date, there has been no case decided involving these recent enactments where the court was squarely faced with the problem of deciding whether an alleged offense fell under their prohibitions. So, it might be argued that the technical construction given §§ 1084 and 1952, requiring that the element of chance be present, creates such a legal loophole for the defendants. Though no chance actually existed, defendants' act, to the bookmaker as well as to any onlooker, was that of placing a bet.

The question then is: Will the other federal courts follow this decision in dealing with alleged offenses under these statutes and will such strict construction as was applied here,[30] so limit the effect of these statutes as to nullify the intent of Congress to combat interstate gambling and other forms of organized crime? If such a nullify-

(S.D. Cal. 1949); Matson Nav. Co. v. War Damage Corp., 74 F. Supp. 705 (N.D. Cal. 1947); Northwestern Mut. Fire Ass'n v. C.I.R., 181 F.2d 133 (9th Cir. 1950); Federal Savings & Loan Ins. Corp. v. Grank Forks Building & Loan Ass'n., 85 F. Supp. 248 (D.N.Dak. 1949).

[26] United West Coast Theatres Corp. v. Southside Theatres, *supra* note 25, at 112.

[27] United States v. Eller, 114 F. Supp. 284 (M.D.N.Ca. 1953); United States v. Davis, 71 F. Supp. 749 (D.D.C. 1947); Kordel v. United States, 335 U.S. 345 (1948).

[28] 341 U.S. 70 (1951).

[29] United States v. Omar Inc., 91 F. Supp. 121 (D. Neb. 1950); Ryan v. United States, 278 F.2d 836 (9th Cir. 1960); United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1959); United States v. Barnard, 255 F.2d 583 (10th Cir. 1958); United States v. Taylor, 178 F. Supp. 352 (E.D. Wis. 1959).

[30] United States v. Bergland, *supra* note 1, at 552. "This court must look to the ordinary well-defined and unambiguous *common law* meaning of the term gambling." [Emphasis added].

ing effect will result from a continued strict construction of these statutes, the courts will have to look to the legislative history of their enactment, or Congress will have to specifically re-define the criminal elements of the acts intended to be prohibited.

JOHN L. REITER

Criminal Law: Insanity as a Defense and The Problem of Definition—The case of *State v. Esser*[1] involved an indictment for first degree murder. The defendant had pleaded not guilty, and not guilty by reason of insanity. The insanity instructions submitted to the jury by the trial judge were based on draft four of the Model Penal Code of the American Law Institute.[2] The jury found Gregory Esser not guilty because of insanity. Esser was committed to Central State Hospital pursuant to § 957.11 of the Wisconsin Statutes.[3] The State appealed the decision. Included in the grounds for appeal was the argument that the definition of insanity used by the trial court should not be adhered to upon its merits. The State's contention was that Wisconsin has always followed the M'Naghten definition[4] in criminal cases, and this long tradition should not now be changed. This case is typical of the many cases that have been arising before the high courts of several states in an attempt to reach a unanimously accepted and workable definition of what constitutes legal insanity.

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[1] 16 Wis. 2d 567, 115 N.W. 2d 567 (1962).

[2] MODEL PENAL CODE, Proposed Final Draft No. 1 (1961), p. 4, §4:01:
"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.
"(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

[3] WIS. STAT. §957.11(3) (1961): "If found not guilty because insane or not guilty because feeble-minded, the defendant shall be committed to the central state hospital or to an institution designated by the state department of public welfare, there to be detained until discharged in accordance with law."

[4] ". . . And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction: and that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: . . . If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong:" M'Naughten's Case, 10 Clark and Finnelly's Reports 200, 210-211 (1843).