Rhode Island Bar Journal

Volume 55.

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Will a Rhode Island common law court enforce a gambling contract? How much do you want to bet?

Samuel D. Zurier, Esq.

Samuel D. Zurier is partner at Tillinghast Licht LLP.

Courts of justice, while they uphold the great and universally recognized interests of society, ought nevertheless to be cautious about making their own notions of public policy the criterion of legality, lest, under the semblance of declaring the law, they in fact usurp the function of legislation.

Clark v. Allen, 11 R.I. 439, 444-45 (1877)

During the past two years, Rhode Island's citizens have witnessed a blizzard of activity by all three branches of State government on the subject of casino gambling, marked by:

(1) legislation passed by the General Assembly,

(2) a veto by the Governor,

(3) an override by the General Assembly,

(4) a judicial advisory opinion that the legislation was unconstitutional,

(5) revised legislation proposed the following year,

(6) a judicial advisory opinion that the revised bill was unconstitutional, and

(7) passage of a legislative resolution to place a measure on the November, 2006 ballot to amend the Rhode Island Constitution to permit casino gambling in West Warwick under certain conditions.

In its two advisory opinions, the Rhode Island Supreme Court has traced the history of gambling in this State and its regulation by the General Assembly, through which that branch's exclusive control of lotteries has been firmly established. (fn1)

While this evolution of the law of gambling in Rhode Island is now clear and well-known, I would like to argue here that a second evolution has been taking place that has not been recognized. This concerns the Legislature's now-total responsibility for gambling of any kind, not just lotteries. More specifically, I would argue that it is time for our Courts to end their quasi-legislative role of refusing, on "public policy" grounds, to enforce "gambling contracts" not prohibited by statute. My argument is based upon two parallel developments in the law of Rhode Island and nationwide. First, the scope of common law regulation of "wagering contracts" has steadily shrunk for more than a century in such areas as life insurance and options contracts, resulting in regular transactions today routinely invalidated in the past. Second, the legislature has virtually filled this field with statutes and regulations, thereby removing the need for public policy determinations by courts. We will consider each of these trends in turn, after first tracing the history of Rhode Island's common law ban on the enforcement of "wagering contracts."

I. Origins of Rhode Island's Common-Law Ban on "Wagering Contracts."

Interestingly enough, Rhode Island's very first reported case, Stoddard v. Martin, (fn2) announced this State's common-law ban on the enforcement of gambling contracts on the ground of public policy. In Stoddard, the parties placed a $50 bet on the outcome of the 1826 election by Rhode Island's General Assembly of the next United States Senator. The case was tried in the Supreme Court, the procedure in place before the establishment of the Superior Court in 1905. After the jury found for the plaintiff, the Court (per Justice Eddy) reversed, finding the contract void on public policy grounds. Justice Eddy acknowledged no statute prohibited the wager, and that "[i]t is admitted that by the common law, some wagers are legal, and may be enforced by a court of justice." (fn3) Nonetheless, the Court also reviewed other English cases of the time, and concluded that the trend was to enforce contracts of this kind "with regret. . . and were the question res integra, there is little doubt that all wagers would now be declared illegal." (fn4) Reviewing the potential pernicious consequences that could follow if there were a free betting market on election results, he ultimately concluded:

all bets on elections, whether by the people or the general assembly, and all bets on judicial decisions, are of immoral tendency, against sound policy, and ought not be sustained, especially in this state; where all our officers, judicial as well as others, are of annual appointment.

While Justice Eddy could cite authority in England and New York (fn6) supporting his conclusion, it was not as inevitable as it sounded. For one thing, the position of English statutory law and court-made common law was

far from clear. The principal English law in place at the time was the 1710 Statute of Anne, which permitted the judicial enforcement of all gambling debts in amounts of

In any event, Rhode Island's first reported case, Stoddard v. Martin, placed a marker down clearly on the side of a public policy judgment against the enforcement of gambling contracts.

II. Retreat Of Judicial Legislation: Life Insurance And Options Contracts

In the years following Stoddard v. Martin, Rhode Island's Supreme Court joined a national trend that cut back the scope of the common law "wagering contract" doctrine. Two examples of this trend are the law of life insurance and options contracts.

A. Life Insurance

It should not be a surprise that common law courts were concerned with the policy consequences of enforcing contracts involving a payout upon somebody's death. As Justice Eddy noted in Stoddard v. Martin, in a famous British case, Gilbert v. Sykes, the English common law courts refused to enforce a contract between two Englishmen concerning the death of Napoleon. (fn13) The English courts took this position based upon the view that the contract "gives to one person a pecuniary interest in the violent death of another, by whatever means procured." (fn14) Based on these policy considerations, nineteenth century common law courts developed the doctrine of "insurable interest," under which the only people authorized under the law to acquire an insurance policy of the life of particular person were those with an "insurable interest" in that particular person's life, including close family and certain creditors. Rhode Island recognized this doctrine in Mowry v. Home Insurance Co. (fn15)

It did not take long for Rhode Island's courts to narrow its view of life insurance policies as "wagering contracts." What if one person took out an insurance policy on his or her life, and then sold the policy to a complete stranger without an "insurable interest"? Would a common law court enforce an insurance contract following this transaction, which could be viewed as an "end run" around the common law "insurable interest" doctrine? Other courts in Massachusetts, Indiana and the United States Supreme Court (applying federal common law) refused to recognize assignments of life insurance polices for exactly this reason. (fn16)

The Rhode Island Supreme Court faced this issue in Clark v. Allen. (fn17) Instead of considering how a transferred life insurance policy amounted to the same as permitting a wager on another's life, the Court observed other well-established transactions that contained the same problematic "wagering" element, such as one person's purchase of another's annuity or life estate in real property. (fn18) Turning to the policy issue, the Court observed that the dangers of immoral wagers and peril to human life are mitigated when the original policy is purchased by the insured person. Based on these observations, the Rhode Island Supreme Court also recognized that there should be limits to judicial statements of legislative policy, stating:

Courts of justice, while they uphold the great and universally recognized interests of society, ought nevertheless to be cautious about making their own notions of public policy the criterion of legality, lest, under the semblance of declaring the law, they in fact usurp the function of legislation.

Clark, supra, 11 R.I. at 444-45.

In the years that followed, Rhode Island's Supreme Court reduced the scope of the "insurable interest" doctrine even further, holding that persons purchasing insurance policies could, at the outset, designate any beneficiary regardless of whether the beneficiary had an insurable interest, (fn19) and the fact that a third person paid the insurance premium did not affect the legally binding nature of the insurance policy. (fn20)

Rhode Island's Legislature has codified these and further expansions of permitted life insurance contracts, expanding the definition of what constitutes an "insurable interest" to include creditors and to allow charities to purchase life insurance policies on willing donors while continuing to ban a stranger's purchase of an insurance policy on the life of another. (fn21)

In recent years, the "wagering contract" doctrine has narrowed almost to the vanishing point. In response to the AIDS crisis, companies have developed "viatical settlements" under which terminally ill people can sell their life insurance policies for cash settlements, with the discount from the policy's face value determined by the purchaser's calculation of the seller's likely life expectancy. (fn22) For adults above the age of 70, some investors offer "stranger-owned life insurance" contracts under which the investor lends the insured premiums for the first two years of the policy, after which the insured (if he or she is still alive) can either pay off the loan plus interest (if the insured believes that the expected return on the policy will benefit his or her estate) or else transfer it to the investor (if the insured expects to live longer). (fn23) Today, with almost no qualification, (fn24) as long as the insured is the initial purchaser of a life insurance policy, then the policy can be freely transferred and sold as if it were a share of stock, thereby allowing unrelated third parties in effect to speculate on a stranger's life.

B. Options Contracts

Options contracts and futures contracts clearly involve speculation concerning changes in the price of commodities or assets in the future. As a result, 19th-century common law courts in Rhode Island and elsewhere viewed these transactions as unenforceable

"wagering contracts." With the growth of these markets in the 20th Century, however, this part of the common law doctrine ultimately gave way to federal statutes and regulations.

Rhode Island's first "stock option" case was Flagg v. Gilpin in 1890. (fn25) In that case, a client ordered his broker to make several stock purchases and sales through the Public Grain and Stock Exchange in New York. The client placed the orders "on margin," not paying fully in cash for these orders. Instead, the broker advanced the remaining funds, with both parties expecting (or hoping) that the package of orders would yield a surplus to pay the broker and make the buyer a profit after anticipated changes in market prices. When the market did not perform as hoped, the broker sold the client's holdings and sued for the difference. The buyer presented a legal defense that the whole transaction was a speculative "wagering contract" that could not be enforced in a court of law.

The Rhode Island Supreme Court held the contract was void and unenforceable. In reaching this conclusion, the Court acknowledged options contracts are not prohibited under any statute; however, common law courts had refused to enforce them on the public policy ground that such contracts

tend to unsettle the natural course of trade, and tempt the parties to them to work for a rise or fall in the prices of the commodities on which their wagers are laid, without regard to actual values, and by methods calculated to promote their own profit at the expense or ruin of others, without reciprocity of benefit. And besides these evils there are others, more immediate to the parties, culminating from time to time in loss of fortune and character, defalcations, crime, and domestic misery, evils which, though they do not always follow, yet follow so often that they have not been overlooked by the courts. (fn26)

For Rhode Island's common law courts, following the national trend at the time, the key question was whether the parties to a futures contract fully intended at the time for actual payment and delivery (making for an enforceable contract), or instead the "settling of differences" from each transaction by balancing off gains and losses from a series of transactions. In a 1902 decision, the Rhode Island Supreme Court described this distinction as follows:

If the agreement between the parties does not contemplate an actual purchase, but merely a payment by one party to the other or by the ostensible purchaser to his broker, if the stocks decrease in market value, and a payment by the broker to the customer if the price rises in the market, then no matter what form the transaction is in, verbally or in writing, it is merely a wager on the fluctuation of market values and not enforcible [sic] at law. (fn27)

Rhode Island's courts have not revisited the legality of options contracts, futures contracts and margin purchases since 1902; however, the issue has been resolved definitively in the common law since that time. In 1905, the United States Supreme Court (per Justice Holmes) announced a different perspective on futures markets: they served the useful purpose of allowing investors to "hedge" against market fluctuations, thereby promoting trade. In upholding an injunction protecting the confidentiality of pricing information on the Chicago Board of Trade, the Supreme Court described the role of futures markets as follows:

Of course, in a modern market, contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future, and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices, and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain. (fn28)

In the years that followed, the United States Congress enacted a series of laws that govern the securities industry and related financial markets. (fn29) While Rhode Island's Supreme Court has not since revisited the issue of whether contracts permitted under the federal laws and regulations can still be unenforceable "wagering contracts," other state courts have concluded that these statutes have pre-empted the field of common law policy decisions. (fn30) If there are to be restrictions on speculative "hedge funds" today, there is a consensus that the proper venue for those restrictions is the Congress or the Securities and Exchange Commission, not state common law courts. As a result, the consensus view today is that this part of the "wagering contracts" doctrine has become obsolete.

III. Constitutional and Statutory Regulation of Gambling

At the same time that common law courts in Rhode Island and the rest of the nation have diminished their regulation of "wagering contracts," the body of written law (in both the Constitution and statutes) concerning gambling has grown.

In recent years, our Supreme Court has discussed the history of one form of gambling, namely lotteries. In Almond v. Rhode Island Lottery Commission, (fn31) the Rhode Island Supreme Court noted that Rhode Island's

1843 Constitution imposed a ban on lotteries which remained in place until the 1973 amendment's change that permitted lotteries run by the State. (fn32) In addition, the General Assembly over the years has enacting a wide body of criminal statutes against various forms of gambling and bookmaking. (fn33)

Rhode Island's Supreme Court has relied on explicit statutory authority to strike down "wagering contracts." For example, in McGrath v. Kennedy, (fn34) the winner of a $500 bet on a billiards game sued to collect. The loser invoked an anti-gambling statute that declared void, among other things, "promises, given or made for money. . . won at any game, or by betting at any race or fight." (fn35) The plaintiff argued that a billiards contest was not a "race or fight," and that since he had not played in the pool contest, but merely bet on it, the statute did not prohibit his transaction. The Rhode Island Supreme Court adopted a broader interpretation, however, based upon the statute's history, in which earlier versions declared void both the winning player's effort to collect on a bet and an the enforcement of a bet by a non-player.

The Rhode Island Supreme Court's decision in McGrath was part of a national anti-gambling trend that developed during the late 19th century. In the years following the Civil War, all but one of the United States phased out state-run lotteries, leaving only Louisiana. (fn36) In 1890-95, the United States Congress passed laws, upheld by the Supreme Court, banning the distribution of lottery materials in interstate commerce. (fn37)

With the onset of the Great Depression, Rhode Island joined many other state governments in legalizing parimutuel betting at horse races (which had been outlawed in Rhode Island since 1777) (fn38) as a new revenue stream for state government. In April, 1934, the General Assembly approved formation of the Rhode Island Horse Racing Commission to license horse racing tracks with pari-mutuel betting, subject to a 31⁄2% state tax. (fn39) By August 1st of that year, Narragansett Park opened in Pawtucket and drew a crowd of close to 40,000, (fn40) and within a year was a major part of the local circuit, hosting the first victory of a horse named Seabiscuit.

In the years that have followed, Rhode Island has established regulatory programs (both in statutes and regulations) to govern the conduct of betting at horse races, (fn41) dog tracks, (fn42) jai alai (fn43) and off-track betting, (fn44) while prohibiting betting at boxing matches, (fn45) animal fights (fn46) and bets on horse races other than the state-regulated parimutuel wagering system. (fn47) Rhode Island's criminal law also bans bookmaking (or operating a gambling organization) for a wide array of subjects, including "the result of any trial or contest of skill, speed or power of endurance of man or beast, or upon the result of any political nomination, appointment, or election," (fn48) as well as the operation of lotteries other than those approved under law. (fn49) Rhode Island's statutes regulate certain "gambling contracts"; for example, leases become void if the location is used for gambling, (fn50) and notes, obligations and securities issued in connection with bets on a game, a race or a fight, (fn51) or in connection with lottery tickets, (fn52) are void. The 2004 Rhode Island Gaming Control and Revenue Act (which contained the provisions concerning casino gambling declared unconstitutional by the Rhode Island Supreme Court) defines state-regulated "gambling games" to include a broad array of activities, while excluding "games played with cards in private homes or residence in which no person makes money for operating the game." (fn53)

In light of this comprehensive regulation of the field by statute, what is the proper role for common law courts? California provides a useful example. By 1941, the Golden State had a comprehensive statutory program that, as is true in Rhode Island, specifically regulated virtually the entire field of gambling. There were, however, a few gaps that remained. For example, the criminal statutes of 1941 banned "stud poker" but not "draw poker"; therefore, the California courts vacated an injunction obtained to stop a draw poker game as a "public nuisance." (fn54) Observing that the legislature had pre-empted the field for common-law courts to set public policy concerning gambling, a California court stated:

It is also competent for the Legislature, within the constitutional limits of its powers, to declare any act criminal and make the repetition or continuance thereof a public nuisance. . . or to vest in courts of equity the power to abate them by injunction; but it is not the province of the courts to ordain such jurisdiction for themselves. (fn55)

With this abundance of statutes, California's Legislature has created a patchwork of regulation that allows certain types of gambling and not others; therefore, California's common law courts have decided not to assume an independent role in determining, based on its own notions of public policy, whether gambling outside of the confines of the legislative prohibitions is subject to a common law prohibition.

In light of the history of Rhode Island's common law courts, as documented above, to defer to the legislature when considering the legality of "gambling contracts" in the areas of life insurance and futures contracts, I would argue that the time has come for our courts to declare an end to the common law public policy against gambling in areas not prohibited by a statute.

IV. Conclusion

Having laid all of my argument's cards on the table, it is time to return to Stoddard v. Martin, the first reported case in our State's legal history and thus, ipso facto, the first announcement of our courts' common law ban on

"gambling contracts" in a case involving a bet on an election. Is Stoddard still good law today?

We now can make the argument that Stoddard is not, or at least should not be, good law in Rhode Island today. Within the complex web of statutory prohibitions on gambling in Rhode Island today, there is a ban on organized gambling (or bookmaking) concerning political contests, (fn56) and there is a declaration that gambling contracts between two individuals involving some, but not all bets (games, races or fights) are void. (fn57) Missing from these prohibitions, however, is any restriction on bets between two individuals on the outcome of a political contest, exactly the transaction between Stoddard and Martin that triggered the court's pronouncement of the common law ban in Rhode Island's first reported case.

So let me end with a semi-serious (fn58) proposition. If a reader, or a client of a reader, has a dispute with a (current or former) friend concerning the collection of a bet on a political race, I would willing to represent him or her pro bono (or in that type of legally valid "gambling contract" known as a contingent fee agreement (fn59)) in a civil suit. If the defendant seeks to invoke Stoddard v. Martin as a defense, then our courts will have the opportunity to review the validity of a common law doctrine whose time has come and, in my opinion, gone. Rhode Island has nothing to lose, that is except for an antiquated common law doctrine that either already has or now should give way in the wake of a comprehensive statutory scheme.

Footnotes

1 See In re Advisory Opinion to the Governor, 856 A.2d 320 (R.I. 2004) and In re Advisory Opinion to the House of Representatives (Casino II), 885 A.2d 698 (R.I. 2005).

2 1 R.I. 1 (1828).

3 Stoddard, supra, 1 R.I. at 2.

4 Id.

5 Stoddard, supra, 1 R.I. at 6.

6 In Rust v. Gott, 9 Cow. 169 (N.Y. Supreme 1828), the New York Supreme Court (trial court) held that a bet on the outcome of the 1826 Governor's race was void and unenforceable. The bet was made shortly after the polls closed and before the vote was tabulated; nevertheless, the Court adopted the policy that a judicial decision concerning the outcome of an election could open the door to collusion between different departments of the government, impair public confidence and agitate the community. Cf. Bush v. Gore, 531 U.S. 98 (2000).

7 9 Anne, ch. 14, §1 (1710), cited in Rychlak, Ronald, "Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling," 34 B.C. L. Rev. 11, 19 (1992).

8 For the comparison to a laborer's wages, see Rychlak, n. 7, supra, p. 19, n. 49; for the comparison to today's dollars, see Lawrence H. Officer, "Comparing the Purchasing Power of Money in Great Britain from 1264 to 2002," Economic History Services, 2004, available on the Internet at http://www.eh.net/hmit/pppowerbp/.

9 In Johnson v. Fall, 6 Cal. 359 (1856), the California Supreme Court upheld the enforceability of a bet concerning when a railroad would be completed, holding that in the absence of a statutory prohibition, common law courts must enforce wagering contracts.

10 In Dunman v. Strother, 1 Tex. 89 (1846), the Texas Supreme Court upheld the enforceability of a wagering contract on a horse race.

11 In Morgan v. Pettit, 4 Ill. 529 (1842), the Illinois Supreme Court upheld the enforceability of a bet on the outcome of the Kentucky vote in the 1840 Presidential election (won by William Henry Harrison). Illinois at the time had a statute prohibiting betting on elections within Illinois, but there was no statutory ban concerning wagers on elections in other jurisdictions. Because no statute specifically prohibited the type of bet at issue, the Illinois Supreme Court held that it was enforceable. Illinois later reconsider this position 29 years later. See n. 12, infra.

12 Morgan v. Pettit, n. 6, supra. Seventeen years later, in Smith v. Smith, 21 Ill. 244 (1859), the Court upheld the enforceability of a bet, made after the election but before the votes were tabulated, on the outcome of the 1856 New York presidential election. In 1871, however, the Illinois Supreme Court overruled these cases with its holding in Gregory v. King, 58 Ill. 169 (1871), in which it held that all bets on the presidential election would be void as matter of public policy even if not prohibited by statute, citing the national importance of Presidential election results.

13 See Stoddard v. Martin, 1 R.I. 1, 3 (1829) (discussing Gilbert v. Sykes, 16 East. 156).

14 Stoddard v. Martin, n. 10, supra quoting Bailey, J. It should be noted that the "moral hazard" of life insurance policies is not limited to one person's interest in the death of another. One can imagine situations where a person with a policy on his or her own life would conclude that s/he is "better off dead than alive." One can view a dramatic depiction of exactly this situation in a memorable scene from the Frank Capra movie It's A Wonderful Life, in which George Bailey utters exactly these words as he stands poised to leap off a bridge in Bedford Falls.

15 9 R.I. 346 (1869).

16 See Clark v. Allen, 11 R.I. 439 (1877) (citing Franklin Life Ins. Co. v. Hazzard, 41 Ind. 116, Stevens, Adm'r v.

Warren, 101 Mass. 564, Cammack v. Lewis, 15 Wall. 643. See also Warnock v. Davis, 104 U.S. 775 (1881) (federal common law decision invalidating $5,000 insurance policy taken out by one Henry Crosser and immediately transferred to the Scioto Trust Association, with the latter paying all of the premiums and retaining 90% of the death benefit).

17 11 R.I. 439 (1877)

18 Clark v. Allen, supra, 11 R.I. at 444.

19 Minuto v. Metropolitan Life Ins. Co., 58 R.I. 71 (1937).

20 Monast v. Manhattan Life Ins. Co., 32 RI 557 (1911).

21 R.I. Gen. Laws §27-4-27.

22 See, e.g., "Death Benefits Become Living Benefits," New York Times, October 16, 1993; "Pre-Death Cash: A Business Grows," New York Times, November 14, 1994.

23 See "Letting an Investor Bet on When You'll Die," Wall Street Journal, May 26, 2005, p. D1. Regulators are looking at this practice, and some are seeking to halt it.

24 There still may be a limited category of "bad faith" life insurance policies that are void as "wagering contracts." See Kreitner, Roy, "Speculations of Contract, or How Contract Law Stopped Worrying and Learned to Love Risk," 100 Colum L. Rev. 1096, 1121-27 (2000). See also n. 18, supra.

25 Flagg v. Gilpin, 17 R.I. 10. 19 A. 1084 (1890).

26 Flagg v. Gilpin, supra, 17 R.I. at 13.

27 Winward v. Lincoln, 23 R.I. 476, 494 (1902).

28 Board of Trade of City of Chicago v. Christie Grain & Stock Co., 198 US 236, 247-48 (1905) (quoted in Kreitner, supra, 100 Colum. L. Rev. at 1112).

29 See Commodity Exchange Act, 7 U.S.C. §1 et seq.; Securities and Exchange Act of 1934, 15 U.S.C. §78a et seq.; Securities Act of 1933, 15 U.S.C. §77a et seq.

30 See, e.g., Albers v. Lamson, 380 Ill. 35, 42 N.E. 2d 627, 630 (1942) (quoted in Kreitner, p. 1113).

31 756 A. 2d 186 (R.I. 2000).

32 From 1744 to 1843, the General Assembly authorized and supervised a number of lotteries for the purpose of funding public improvements. Almond, supra.

33 See, e.g., R.I. Gen. Laws §11-19-14 (felony penalties for bookmaking); §11-19-15 (horse racing, except at state-licensed facilities); §11-19-18 (maintaining gambling places or gambling devices, including billiard tables!).

34 15 R.I. 209, 2 A. 438 (1866).

35 Pub. State. R.I. c. 246, §16 (quoted at McGrath, supra, 15 R.I. at 211), now codified at R.I. Gen. Laws §11-19-17.

36 See Rychlak, n. 7, supra, 34 B.C. L.Rev. at 41-42.

37 See Champion v. Ames, 188 U.S. 321 (1903) (upholding the ban on lottery tickets from interstate commerce) (cited in Rychlak, supra, 34 B.C. L. Rev. at 43, n. 211).

38 R.I. General Assembly in session at South Kingstown, September 22, 1777 (quoted in Chafee, Zechariah, Jr., State House versus Pent House (1937), p. 82).

39 P.L. 1934 c. 2086.

40 "For Love or Money," broadcast on WJAR-TV news, available from www.turnto10.com.

41 R.I. Gen. Laws §41-3-9.

42 R.I. Gen. Laws §41-3.1-6.

43 R.I. Gen. Laws §41-7-5.

44 R.I. Gen. Laws §41-10-1.

45 R.I. Gen. Laws §41-5-18.

46 R.I. Gen. Laws §4-1-9.

47 R.I. Gen. Laws §11-19-15.

48 R.I. Gen. Laws §11-19-14.

49 R.I. Gen. Laws §11-19-1.1.

50 R.I. Gen. Laws §11-19-23.

51 R.I. Gen. Laws §11-19-17.

52 R.I. Gen. Laws §11-19-3.

53 R.I. Gen. Laws §41-9.1-3(17).

54 Montery Club v. Superior Court, 48 Cal. App. 2d 131 (2nd Dist., 1st Div. 1941).

55 People v. Lim, 18 Cal. 2d 872, 880 (1941) (quoting State v. Ehrlick, 65 W. Va. 700, 64 S.E. 935 (1909)).

56 See R.I. Gen. Laws §11-19-14.

57 See R.I. Gen. Laws §11-19-17. While a zealous prosecutor or a deadbeat bettor might try to extend this statute's reach to include political "races" as well horse races and dog races, that effort likely would fail, as R.I. Gen. Laws §11-19-14's ban on bookmaking defines

separate categories for "any trial or contest of skill, speed or power of endurance of man or beast" on the one hand, and "the result of any political nomination, appointment, or election" on the other.

58 There are additional arguments that can be made against requiring courts to assume jurisdiction to resolve wagers. For example, our courts have limited resources, and litigants with more compelling disputes might find justice delayed if the courts are clogged with disputes concerning a bet on the outcome of an election. Concerns of this kind could support further legislation either to ban this type of litigation if the legislature so finds or, alternatively, to have different filing fees for "gambling contract" cases to support the expansion of the courts to handle these disputes without compromising others' access to justice. With that said, some courts, in my opinion, at least, have gone too far in refusing to assume jurisdiction over cases that have a limited "wagering" element. For example, in the 1960's, the Milwaukee, Wisconsin area had a referendum on whether to fluoridate the water. A citizen's group challenged the local Junior Chamber of Commerce to prove that fluoridation would not cause certain types of disease, offering a reward of $1000 upon presentation of such proof. When the Junior Chamber of Commerce presented its proof, the citizen's group refused to pay, resulting in a lawsuit. The Wisconsin Supreme Court, in Cudahy Junior Chamber of Commerce v. Quirk, 41 Wisc. 2d 698, 165 N.W. 2d 116 (1969), vacated the judgment and directed the dismissal of the action on jurisdictional grounds, holding "the [litigants'] cases, affirmative and negative, were submitted to the jury at the polls. They were not for a jury in a courtroom to affirm or reverse." Cudahy, supra, 41 Wisc. 2d at 705.

59 At first, courts disallowed contingent fee agreements on the ground that they violated common law prohibitions against champerty and maintenance. By the middle of the 19th century, however, courts recognized that contingent fee agreements were necessary to permit "creditors of small means" to obtain vindication in the courts. See, e.g., Ball v. Halsell, 161 U.S. 72, 80-81, 16 S.Ct. 554 (1896) (collecting cases).