1934 *Present: Garvin S.P.J. and Akbar J.*

TARRANT *et al.* *v.* MARIKAR.

340—D. C. Colombo, 43,262.

*Wagering contract—Contract for sale of rubber—Agreement to pay the difference between contract price and market price—Bond granted to secure payment of the amount of the difference—Contract unlawful under the Roman-Dutch law—Action on bond not maintainable—*Injusta causa*—Contract governed by Roman-Dutch law.*

Where the plaintiffs and the defendant had entered into certain contracts for the sale and purchase of rubber on the understanding that there was to be no delivery of the rubber and that the contract was to be performed by the payment of the difference between the contract price and the market price, and where a bond was granted by the defendant to the plaintiffs at their request to secure the repayment of the amount of the differences which remained unpaid by the defendant on the contracts,—

Held, that the agreement was in the nature of a wagering contract which was unlawful under the Roman-Dutch law, and that no action was maintainable on the bond.

Under the Roman-Dutch law a promise to pay a wager secured by the hypothecation of immovable property is unenforceable as it is not based on a *justa causa*.

The question whether a wagering contract, though in form a contract for the sale of goods or a claim in respect therefrom, is enforceable by action must be determined with reference to the law of Ceylon.

THIS was an action on a mortgage bond No. 2,100 dated March 28, 1930, to recover from the defendant a sum of Rs. 101,462.63 with interest alleged to be money borrowed and received from the plaintiffs. The defendant admitted the execution of the bond but pleaded that it was given for an illegal consideration and was void and was unenforceable. It was specially pleaded that the defendant and the plaintiff had entered into certain contracts for the purchase and sale of rubber under an arrangement by which there was to be no delivery or acceptance of rubber and by which the contract was to be performed by the payment of the differences between the contract price and the market price and that the bond in suit was granted to the plaintiff to secure the payment of money due from the defendant on the contracts.

The learned District Judge held that the real transaction between the parties was as alleged by the defendant, and that the contract amounted to a wagering contract which was illegal and unenforceable at law. He accordingly dismissed the plaintiff's action.

Soertsz, K.C. (with him *Garvin*), for plaintiff, appellant.—This is a contract for the sale of rubber. It is not a wagering contract as there is want of mutuality between the parties to regard it as such, although the defendant may have had such intention. (*15 Hals. 283, ss. 576-578; Thaker v. Hardy*[1]; *Carlill v. Carbolic Smoke Ball Co.*[2].)

[1] *(1878) 4 Q. B. D. 685.*

[2] *(1892) L. R. 2 Q. B. 484, at 491.*

[GARVIN J.—Though you had an intention of carrying out your contract, if you knew that the other party was speculating on the rise or fall of the market, are you not a party to a wagering contract ?]

No. There is no duty on plaintiff to refrain from entering into contract with a person who intends it to be a betting transaction. A wagering contract is a contract and here there is no *consensus ad idem.* Even if it is a wagering contract an action is maintainable in Ceylon.

[GARVIN J.—Is there any difference between English law and Roman-Dutch law ?]

At common law action is maintainable on wager if not contrary to public policy. The Gaming Act, 1845, declared that wager was unenforceable. The Statute declared what the public policy was. (Chitty on *Contracts 786.*)

In Roman-Dutch law the position is the same as in English law. Roman-Dutch Common law did not regard a wager as null and void. Action is maintainable on it (*1932 A.D. 76 ; 3 Maas, 26*). The District Judge relies on *2 Nathan 613, para 768,* but *Voet XI.* deals only with games of chance, *e.g.*, throwing dice and drinking bouts. Such gambling was prohibited by Statute in Roman-Dutch law. But when Grotius says "It is established by us" he refers to the by-laws of the State of Amsterdam. (Grotius' *Introduction, p. 303—5, Trans. Herbert, bk. III., ch. 3, s. 48.*)

[AKBAR J. referred to *Van Leeuwen 101.*—Is there any reason why the South African rule should not be followed in Ceylon ?]

The opinions of Roman-Dutch law text writers vary and are unsettled. South African law is generally against the enforcement of wagering contracts. There is the South African Act 36 of 1902 reproducing the Imperial Act which makes contract unenforceable. The matter is in doubt. In Transvaal and the Cape there are statutory prohibitions against enforceability. Here we have no Statute law. 1932 A.D. 76 is based on Act 36 of 1902.

[GARVIN J.—Which system of law do you say applies to this case ?]

Whichever law applies, the position is the same. Even if the contract is unenforceable at law, this is an action on the bond.

[GARVIN J.—If this is a wagering contract you must show a new consideration and a new contract, if you are to succeed.]

There is new consideration. We intended to sue defendant to recover the money due. Defendant asked for time to pay. Forbearance of plaintiff to sue at once. On bond, defendant got nine months' time to pay. We continued to supply defendant with rubber.

[GARVIN J.—Do you say that forbearing to sue on a contract which is unenforceable is consideration ?]

Yes. (*Jayawickrama v. Amarasuriya*[1].) Promise deliberately made to discharge moral duty is enforceable at law. *Causa* in Roman-Dutch law is wider than consideration. There is a difference between illegality and unenforceability. Question of enforceability has to be decided

[1] *20 N. L. R. 289 at 292.*

later by Court of law. When we gave defendant time to pay, we believed we had an honest claim. The view of a Court of law later that it was a wager makes no difference. Defendant himself believed our claim to be an honest one, and asked for time and obtained it. This was new consideration. (*Anson (17th ed.) 99-100; Collisher v. Bischoffsheim*[1]; *Cook v. Wright*[2]; *Miles v. New Zealand Alford Estate Coy.*[3].)

The promise stayed creditor's hand.

[AKBAR J.—Mere giving of time on unenforceable agreement is no consideration.]

There is evidence that plaintiff supplied defendant with rubber after getting the mortgage bond. Plaintiff incurred further liability. Defendant got credit from us and other dealers. If plaintiff sued defendant's credit would have suffered. It was a distinct advantage to defendant not to be sued.

Apart from consideration there is good *causa.* The bond was entered into *Serio ac deliberato animo* (*3 Maas, 35 et seq.*), and is a new contract.

H. V. Perera (with him *Gratiaen*), for defendant, respondent.—The contracts of purchase and sale by plaintiffs are only colourable transactions. This is an action on the bond. Plaintiff has to rely on consideration other than the consideration on the bond. Actual consideration is disguised. Money is due on differences. Plaintiff must show *fresh* consideration. In English law motive is different from consideration. There must be a new agreement for good consideration. (*Hyams v. Stuart King*[4].)

Every promise to pay a debt already existing is not a new promise. It must be new in reality. There is here no new contract according to English law. Mere refraining from going into Court is not consideration. New promise here replaces something that is worthless. Consideration must have some value, *i.e.*, forbearing to sue when you can sue.

The contract is unenforceable as being contrary to public policy. A new promise does not make the contract enforceable. Every debt might be enforced in that way. There is no *justa causa* for the bond. *Causa* may be vitiated by other reasons, *e.g.*, it may be against public policy. (Kotze's *Causa in Roman-Dutch Law, p. 31.*)

According to English law there is no fresh consideration. According to Roman-Dutch law no fresh *causa.* There is no novation. There must be an independent promise supported by fresh consideration without reference to the original transaction.

Roman-Dutch law regarded wagering contracts as unenforceable as being contrary to public policy. Obligation must not be merely a moral obligation. It must also not be contrary to public policy.

Grotius' expression "established by us" distinguishes Roman law from Roman-Dutch law, and not the common law of Holland from Statute law.

The South African law ought to be followed in Ceylon. It is not necessary to consider whether the contract was unenforceable or contrary to public policy as there is no fresh *causa.* New promise to perform unenforceable contract is no consideration.

[1] *(1869) 5 Q. B. 449.*
[2] *1 B. & S. 559.*
[3] *32 Ch. D. 266.*
[4] *(1908) 2 K. B. 696.*

[GARVIN J.—If the contract is not unlawful as being contrary to public policy, is it enforceable?]

There is no statutory prohibition as regards unenforceability. By the Roman-Dutch common law contracts were unenforceable as being immoral or when they were against public policy. In Ceylon, legislature has only prohibited certain types of gaming. Therefore under our common law, all contracts are enforceable unless there is a statutory prohibition or unless they are contrary to public policy. If this contract is against public policy, no new promise can support former obligation.

[AKBAR J. referred to *Lipton v. Buchaman* [1].]

The law as laid down by Grotius (*Trans. Maas. p. 328*) should be followed. Every contract must have legal and moral possibility, must have legal existence though it be legally unenforceable. There must be a proper or legitimate subject-matter. (Kotze's *Causa in Roman-Dutch Law at 30 and 51.*)

[AKBAR J.—Is this a wagering contract or not?]

There is no way of getting away from the betting transactions. Plaintiff never intended to take delivery of the rubber. Person may by long course of conduct manifest his intention. Intention may be declared by conduct. Plaintiff knew that defendant would not perform his part of the contract.

Defendant intended cross-sales. If plaintiff knew this, *i.e.*, refusal to take delivery plus a cross-sale, so that the rubber was always with plaintiff, and yet entered into contract with defendant, he was a party to a gamble.

There was a tacit understanding between the parties that contract was to be performed in a different way. Such tacit understanding may be presumed from past dealings between the parties.

Soertsz, K.C., in reply.—South African law ought not to be followed here; Roman-Dutch law is different in different places. Grotius and other writers treat gaming and wagering separately. (Van Leeuwen's *Cens. For. 1, 4, 14, 10-11*).

Wagers are valid in themselves unless made in reference to dishonourable subject or repugnant to morality. (Van der Keessel's *Select Thesis, s. 48, para. 514.*)

Counsel cited *Voet XI. 5. 5.*

Cur. adv. vult.

March 28, 1934. GARVIN S.P.J.—

This is an appeal from a decree of the District Court dismissing with costs the plaintiffs' action to recover from the defendant a sum of Rs. 109,112.59. The action as brought by the plaintiffs was in form an action upon a bond bearing No. 2,100, dated March 28, 1930, whereby the defendant bound himself to repay the sum of Rs. 101,462.63 alleged to be money borrowed and received by the defendant from the plaintiffs with interest thereon at 8 per cent. The repayment of this sum was further secured by the hypothecation of immovable property. The defendant admitted the execution of this bond but pleaded generally

[1] *10 N. L. R. 158.*

that it was given for an illegal consideration and was void and unenforceable. It was specially pleaded that the defendant and the plaintiffs had entered into certain contracts for the sale and purchase of rubber on the understanding that there was to be no delivery or acceptance of the rubber, and that the contract was to be performed by the payment of the difference between the contract price and the market price, and that this bond was granted to the plaintiffs at their request to secure the repayment of the amount of the differences which remained unpaid by the defendant on these contracts. Before the trial of the action Mr. N. Walsgrove, the second plaintiff, who was doing business in partnership with the first plaintiff under the name and style of Tarrant & Co., was examined *de bene esse*. The evidence given by Mr. Walsgrove showed conclusively that this bond was not given to secure the repayment of money " borrowed and received by the defendant " but for a different consideration which arose out of certain contracts for the sale of rubber in respect of which the plaintiffs were claiming from the defendant sums of money alleged to be due thereon which with interest amounted at the date of the bond to Rs. 101,462.63. It was proved not only by the evidence of Mr. Walsgrove but by the evidence given at a later stage by Mr. Mack that the amount inserted in the bond was the total of the various sums which the plaintiffs allege became payable to them up to that date on two contracts, the broker's notes relating to which have been produced and marked P 1 and P 28 respectively.

The contract evidenced by the broker's note P 1, which is dated November 20, 1929, is a contract for the sale by the plaintiffs to the defendant of 100 tons of rubber, FAQ sheet or crepe at 44 cents per pound, delivery to be made during January, 1930. Similarly, the contract referred to in the note P 28 dated April 24, 1929, is a contract for the sale of 600 tons of rubber, FAQ sheet or crepe at 62 cents per pound, delivery January to December 50 tons per month. There is no dispute as to the amount in the sense that it is not denied that if the plaintiffs' action be sustainable they would be entitled to judgment for this amount, but it is denied that the plaintiffs are entitled to maintain action for the recovery of this amount.

These contracts are in form bargains for the sale and purchase of rubber. The question for determination was whether they were in reality wagering transactions intended to end only in the payment of differences, under the appearance of contracts for the purchase and sale of rubber. At the trial various issues were proposed by counsel representing the parties and after discussion the Court framed the following issue:—" Was the mortgage bond sued on granted for a consideration which was illegal and if so is it void and unenforceable? " and the case proceeded to trial upon that single issue. The real questions at issue were fully appreciated by the parties and the whole of the evidence was directed to the question whether the contracts P 1 and P 28 were entered into by the parties for the payment by the plaintiffs to the defendant or by the defendant to the plaintiffs as the case may be of the difference between the market price and the contract price according as the market price was above or below the contract price at the time appointed for the delivery of the rubber and without further obligation. The learned District Judge has come to the

conclusion that the real transaction between the parties was as alleged by the defendant, that such a contract was a wagering contract, and that the claim of the plaintiffs was one which was unenforceable at law. He answered the first issue in the affirmative and accordingly dismissed the plaintiffs' action.

The principal points taken in appeal are these:—

1. That the evidence does not support the learned District Judge's finding that these were wagering transactions and not, as they purport to be, contracts for the sale of rubber.
2. Assuming that the District Judge was right in his view as to the real nature of these transactions and that they were wagering contracts as known to the law of England, such contracts were not obnoxious either to the Statute law or the Common law of Ceylon.
3. Even if a claim upon such a contract be unenforceable at law this action, which is an action on the bond, is sustainable under the English law as a claim upon a new contract for good consideration and alternatively under the law in force in Ceylon as a promise made for *justa causa*.

At the dates material to this claim the plaintiffs were doing business in partnership in Colombo. The second plaintiff, Mr. Walsgrove, was in sole charge of the rubber business which was extensive and consisted in the purchase, sale and shipment of rubber.

The defendant has been described as a well known rubber dealer. He was the owner of land planted with tea and rubber to the extent of 2,500 to 3,000 acres and the rubber output of these plantations was approximately 30-40 tons per month. He was not a shipper. He had been doing business with the plaintiffs for several years.

Up to the year 1926 all his contracts were what are referred to as "spot" contracts. About 1926 he commenced to enter into forward contracts. The defendant refers to forward contracts as "speculations" —he did not intend to take delivery or make delivery of any rubber on such contracts the purpose of which was that he should pay or receive the difference between the contract price and the market price. He entered into such forward contracts with other firms as well. All these contracts were put through by brokers, either H. B. Philips or van Geyzel & Co., and during the period 1927 to 1930 he had in this way dealt with the plaintiffs to the extent of 3,000 or 4,000 tons of rubber. His dealings with the plaintiffs and other firms he says amounted to 500 to 1,000 tons per month. "All transactions" said the defendant "were on paper. Rubber was never brought or given out of stock. When I bought not a pound of rubber came in and when I sold not a pound of rubber went out. I am referring to forward contracts when I say that not a pound went in or came out". The learned District Judge has accepted the defendant's evidence when he says that no rubber actually passed on these forward contracts. This is a finding with which I can see no reason to disagree. On the contrary there is ample evidence apart from that of the defendant which points to the conclusion at which the Judge has arrived. Not a single pound of rubber passed on the contract P 1 which was for 100 tons; similarly, on the contract P 28 under which 50 tons a month were deliverable during the year 1930 no rubber passed in any of the first three months—the period with which we are concerned. There is besides the

evidence of Mr. Walsgrove: "There was not a single instance in which delivery was made to the defendant himself under these contracts". Later this statement was modified thus—"When I say not to himself I mean that cheques would be received from the broker in payment of his contract and the delivery order would be made out in favour of the broker. That is he would have entered into some arrangement with the broker who paid us and we delivered to the broker". If Mr. Walsgrove was here speaking with reference to forward contracts with the defendant, there is nothing to support his statement that he ever received a cheque for the contract price of rubber deliverable under any such contract or that actual delivery thereof was made to a broker as agent for the defendant. There should have been no difficulty in proving a few instances or even a single instance of the issue of a delivery order or of the receipt of a cheque for the value of the rubber.

Later in his cross-examination Mr. Walsgrove says: "If rubber is paid for, the money would pass and the delivery order would issue. In the case of differences there is a set off, my contract against his contract, and one or the other pays the difference. We have had several contracts of that kind with the defendant previously. There were large numbers of such contracts, in which we had set offs like that. I know that people enter into contracts for a larger amount of rubber than their estates could produce. *It would have been an exception to the rule if there was an actual delivery of rubber*".

Reading Mr. Walsgrove's evidence as a whole, I do not think the statements in the above extract were intended to be an express admission by him that a large number of these forward contracts were purely contracts for the payment of differences. What I think he intended to say and has said is that there were large numbers of forward contracts with the defendant which resulted in the payment of differences and that an actual delivery of rubber *would have been an exception to the rule.*

But there is no proof that there was even a single exception to the rule. According to the defendant the invariable rule in the case of forward contracts was for one or the other to pay the difference—not to deliver or take delivery of rubber. The evidence discloses a regular course of business in regard to these forward contracts. A letter is written by the seller formally tendering a quantity of rubber in terms of the contract. The purchaser does not take delivery. A contract is then passed by a broker which is in form a sale of an equivalent quantity of rubber by the original purchaser to the original seller at the market price. Then as Mr. Walsgrove has said there would be a "set off, my contract against his contract, and one or other pays the difference".

There are several other passages in the evidence to the same effect. But sufficient has been said to show that the learned District Judge was justified in his conclusion that on these forward contracts no rubber passed and that so far as the defendant was concerned it was his intention from the outset—an intention which he said he communicated to the brokers—that there was to be no delivery or acceptance of rubber on these contracts but merely the payment of differences.

The purchase of a commodity by a person for the sole purpose of realizing a profit by resale in the expectation that the market will rise is

a perfectly legitimate commercial transaction and the circumstance that the buyer intends to sell whether the market rises or falls is immaterial. In the case before us the intention of the buyer was never to take delivery from the seller but only to pay or receive the difference between the market price and the contract price. The fact that the purchaser entered into what is in form a contract of sale with such an intention does not of itself convert the contract into a wager. There must be mutuality before a Court can justifiably hold that this is a wagering contract in the guise of a contract for the sale of rubber.

There is no evidence here of a direct communication by the defendant of his intentions to the plaintiffs or any one of them. The defendant does say that he communicated his intentions that these should be understood to be merely contracts for the payment of differences to the broker. But the broker has not been called as a witness and there is therefore no evidence that he passed this on to the plaintiffs.

Notwithstanding that there is no evidence—and such evidence I should imagine would not often be available—that the plaintiffs were specifically informed of the defendant's intentions and assented thereto, there is a body of fact established by the evidence from which the District Judge infers that the contracts P 1 and P 28 were entered into by both parties with the common intention that neither party should have any other interest therein or obligation apart from the payment or receipt as the case may be of the difference between the market price and the contract price.

As we have seen there was a long course of dealings covering a period of two or three years between the parties before the contracts P 1 and P 28 were entered into. These purported to be forward sales or purchases of rubber to an amount of over 3,000 tons which was the aggregate of numerous forward contracts. So far as the defendant was concerned his position always was that there was to be no delivery or acceptance of any rubber.

During the whole of this period not a pound of rubber was in fact delivered. In every instance whether the market was in favour of the defendant or against him a cross-sale was put through and the difference paid. Not an ounce of rubber passed on these cross-sales, and there can be no doubt that, though expressed to be sales of rubber, they were purely fictitious and were merely a device for ascertaining at or about the time of each tender the amount of the difference between the contract price and the market price. These differences were regularly paid until in January, 1930, the defendant found himself unable to pay his losses.

There is no evidence as to the circumstances under which the earliest of these forward contracts were entered into but the history of the dealings on this and the numerous forward contracts over a period of two or three years is before us. The defendant never performed a single one of these forward contracts in the manner in which a contract of sale is ordinarily performed by a purchaser, viz., by taking delivery of the commodity purchased.

A striking feature of the dealings between the parties is that even when the market price was favourable to the defendant as purchaser no rubber passed but the plaintiffs paid the difference to the defendant.

Mr. Walsgrove's evidence on the point is as follows:—" Even if it was not to our advantage tc have the set off I would still have a set off. When the balance has been in favour of the defendant we have set off and paid the difference to him. That happened in 1929 very frequently. He would sell to me and I would owe him the difference and pay him ".

In the case of forward sales to the defendant when the market price was higher than the contract price is it to be supposed that the defendant refused to take delivery and preferred to make a loss? If he did anything so foolish the plaintiffs would be relieved from the obligation to deliver rubber to him at the contract price which was below the ruling market price. And yet we find the matter concluded by the usual cross-sale and the payment by the plaintiffs to the defendant of the difference—a profit to which as a defaulter he was not entitled. " Even if it was not to our advantage to have the set off I would still have a set off " said Mr. Walsgrove, but he has not said why he preferred to do that which was not advantageous to him. Counsel however suggested that as the plaintiffs were shippers they could always dispose of rubber and were therefore prepared to retain the rubber and pay the difference to the defendant. Had this explanation been offered by Mr. Walsgrove it would doubtless have been carefully tested and explored in cross-examination. What counsel's suggestion indicates is that the plaintiffs had other business obligations towards the performance of which the rubber referred to in their forward contracts with the defendant was regularly applied—they were even prepared to pay him the difference and retain the rubber.

The history of these dealings strongly indicates that a regular system of business had been established for the payment of differences which displaced the ordinary obligations of the seller to deliver and of the purchaser to take delivery—even supposing that at the commencement of these transactions three years previously these were genuine contracts for the sale and purchase of rubber.

It was in these circumstances that in April, 1929, the contract P 28 was concluded for the sale to the defendant of 600 tons deliveries to commence eight months later in January of the following year, and this was followed in November, 1929, by the contract P 1.

The effect of Mr. Walsgrove's evidence is that when the contracts P 1 and P 28 were concluded there was no arrangement that they were to be performed by the payment of differences. It may be taken that there was no direct communication between the parties at the time the contracts were concluded. But these were only two—presumably the last two—of a large number of forward contracts made from time to time and dating back to the year 1926. Having regard to the history of these previous dealings and the course of business established in regard to forward contracts, is it to be supposed that when the plaintiffs entered into these contracts they intended them to be ordinary contracts for the sale of rubber to be performed as such by seller and buyer?

It has been urged that the plaintiffs always and all along regarded these as genuine sales and that this is evidenced by the tenders of rubber regularly made in terms of these contracts. The plaintiffs certainly did in every instance make a formal tender in writing and there is no reason to doubt that the plaintiffs were in control of the rubber described in

these tenders. But were they real tenders in the sense that the plaintiffs expected the defendants to take delivery and intended that they should? Where, as here, the defendant never took delivery of a single pound of rubber tendered at any time and we find the plaintiffs on every occasion arranging to retain the rubber even to the extent of paying the defendant the profit between the contract and the market price for the rubber which they tendered, a serious doubt does arise as to whether the plaintiffs ever expected or intended that the defendant should take delivery of this rubber which they evidently required themselves.

If the tender be not genuine why tender at all? Something has been said as to this being a requirement of the rules of the Chamber of Commerce. But a tender of some kind was necessary for the purpose of fixing the day on which the market price was to be taken and the difference ascertained, as these contracts gave the plaintiffs a period of time—in the case of P 1 a month and P 28 a month in respect of each month's deliveries—for the performance of the contract. On every occasion the difference was worked out with reference to the date of tender.

In my view these are the principal facts upon which a decision must be taken as to the true nature of these contracts. The learned District Judge has formed the opinion that these contracts were concluded on the understanding that there was to be no delivery or taking delivery of rubber but only that difference between the contract price and the market price should be paid by the winner to the loser. Can we say that he was wrong? It seems to me that the history of the dealings between the parties is not only consistent with such an understanding but points strongly to the conclusion at which the District Judge has arrived.

There is no need to refer specifically to certain subsidiary arguments based on some of the documents produced all of which were directed to show that the parties could not have regarded these transactions as real bargains for the sale and purchase of rubber, since for the reasons already given it seems to me that the learned District Judge arrived at a correct conclusion when he held that they were wagering contracts.

Our law relating to the sale of goods is to be found in Ordinance No. 11 of 1896 and in a *casus omissus* we are directed to apply the English law in determining any question which may arise in regard to the sale of goods. But the question whether a wagering contract, though in form a contract for the sale of goods, or a claim in respect thereof is enforceable by action must be determined with reference to the law of Ceylon.

The legislature of Ceylon has declared lotteries to be a common nuisance and against the law—*vide* Ordinance No. 8 of 1844; so also unlawful gaming has been penalized by Ordinance No. 17 of 1899. In recent times legislation has been passed prohibiting the receipt or negotiation of bets on horse races except taxable bets, *i.e.*, bets on a horse race run or proposed to be run upon a registered racecourse—Ordinance No. 9 of 1930. There is no legislation which prohibits betting or wagering generally. It would seem, therefore, that in Ceylon a wagering contract is not made illegal in the sense that is punishable by law. It is, therefore, necessary to inquire what the attitude of the common law is towards such contracts. Grotius in his treatise on the *Jurisprudence of Holland, book III., ch. III.*,

s. 48, says:—"Hereupon a doubt arises whether wagers, that is promises made upon a condition, when there is no evidence of an intention to give, and no other contract is involved in the transaction, are binding or not: this matter is held to be disputable as regards the Roman law, but with us it has been decided *in the common interest* that all such wagers are devoid of effect, unless there are reciprocal obligations and the parties have some interest in the event, which is the case in contracts of assurance. Otherwise, what has been given or paid may be demanded back". In a note Grotius adds: It is for the interest of the State that people should not waste their property in such useless and absurd wagers.

Van Leeuwen in his *Commentaries on the Roman-Dutch Law, book IV., ch. 11, s. 13* after stating that a promise to do something may be compelled to performance by imprisonment except promises, with respect to things in which "we either have not or cannot have any right or spring from immoral and dishonest causes or are contrary to public policy and general law", says, "In like manner, no action lies among us in cases of gambling and for whatever is stipulated or promised from such a cause; nor in the case of a wager, which depends on a bare accident, and is not mutually beneficial".

The same author when dealing in Book XIV. states in sections 4 and 5—"In like manner, whatever any one has given *for an unlawful or otherwise dishonest purpose,* that is if the improper purpose is on the side of the receiver alone, may be demanded back. Even where the transaction has been completed, just as if it had been tacitly stipulated that what the laws do not permit the receiver to retain, must be given back. But if the improper purpose be on both sides the payment made thereunder holds good.

"*For this reason* the winner in gaming, or gambling, cannot lawfully recover his promised winnings, and on the other hand, he, who has once paid, has no right to receive it back; so much so that he who lends another money with which to gamble or wager has no right to claim it back again".

Van Leeuwen refers to the Statutes of Leyden of the year 1583, which enacts that no action lies on gambling, *although bonds* have been given in consequence thereof, *founded on this same or any other cause,* and adds: "Of the same nature is wagering, which with us is subject to the same law, and concerning which there are likewise in different places special enactments; except where it is of such a kind that it promotes the benefit and interest of both parties, as in the case of insurance, bottomry and the like".

Schorer in his *Notes on Grotius' Treatise* dissents from the view that under the Civil law wagers were invalid and expresses the opinion that they were valid except where prohibited, but he states of Grotius' opinion "that it was so advised at Utrecht on the auhority of Grotius".

Groenewegen to whose work I have no access presumably held the same view as Grotius. Whereas Van Der Keessel (*Thes.* 514) says that though it cannot be proved from the general laws enumerated by Groenewegen that *all wagers* are prohibited in Holland, *it would appear*

that causes are very rarely decided upon such wagers. May it not be fairly presumed that such causes were " rarely decided " because the prevailing opinion was that of Grotius?

Van Leeuwen in his *Censura Forensis, 1.4.14,* expresses much the same opinion as Schorer but concludes as follows:—" But I should not dare to affirm this in opposition to Grotius ". We know from the passages cited earlier from his *Commentaries on the Roman-Dutch Law* that Van Leeuwen's views crystallized into a form identical with the opinion of Grotius which was accepted at Utrecht and Leyden.

Lastly there is the opinion of Voet. A perusal of his *Commentaries on the Pandects, Book XI., tit. 5,* leaves no doubt as to his opinion that wagers were prohibited under the Civil law. In XI., 5.7, he says: " Nor is the obligation for losses in gambling which have not yet been paid but only promised and in respect of which the winner has taken security from the loser strengthened by the fact that the wagerer has perhaps given sureties or pledges to his winning fellow gambler as security for the amount of the loss, since the whole of the principal obligation depending on the wager is condemned by Roman law and custom. Nor ought the pledge of the added parties to be binding nor should a successful right of action be granted against the sureties and such others, but leave should rather be given for the recovery of the pledge even if the loss has not been paid ".

In section 8 Voet states that the rules as to payments and promises as between those who gamble together are applicable to those who enter into contracts in respect of the victory of the players.

He then refers to the opinion of " Christineus and others "—Christineus being one of those relied on by Schorer—" that these agreements were not disapproved of just as though the purchase of a risk was considered to be thereupon contracted for and the price of the risk agreed upon " and says, " it is not possible for one who examines D 1-5 more closely not to approve rather of the contrary opinion for the reason that the price of the risk is there permitted to be agreed upon only provided it does not resemble a gamble; but there is no doubt that an agreement made in respect of a game of chance and its uncertain and fortuitous result resembles a gamble and moreover, the consideration (*causa*) for this agreement is clearly immoral (*inhonesta*) and does not permit the agreement to be effectual ".

Later Voet refers to conditional stipulations which are valid both under the Roman law and the " laws of to-day " and remarks, " Yet reciprocal promises constituting an agreement in respect of the same chance, whether it is present or absent, are not therefore valid for the reason that they begin to take on the nature of a prohibited gamble ".

I would here acknowledge my indebtedness to Mr. Advocate Wickramanayake who during the argument prepared a translation of the titles of Voet relating to wagers and made it available to us.

It would seem therefore that Voet holds the same opinion as Grotius. He excepts certain unilateral conditional stipulations but brings all

reciprocal promises constituting an agreement in respect of the same chance, "whether it be present or absent", within the rule that wagers are invalid.

It may be presumed that some forms of wagering were tolerated and not prohibited or penalized. And there are indications, notably in *Schorer*, of a school of thought favourable to wagers so long as they were not immoral or dishonourable. But there is no clear authority for the proposition that in the provinces of the United Netherlands wagers were enforceable at law. Evidently Utrecht and Leyden, the two principal seats of learning, accepted the law as stated by Grotius, who is supported by Van Leeuwen, and Voet than whom "no greater authority could be produced". As in South Africa so also in Ceylon in case of a conflict of authority the opinions of Voet would usually be followed.

The weight of authority seems to be in favour of the opinions of Grotius that "in the common interest" wagers are devoid of effect, unless they are of such a kind that promotes the benefit of both partis as in the case of insurance.

Judicial decision in South Africa favours the opinion of Grotius that Courts should not enforce wagering contracts, *Dodd v. Hadley* [1], and *Estate Wege v. Strauss* [2].

I have searched in vain for any instance of an action to enforce a wager in the Courts of Ceylon. Looking back over the last 30 years I cannot recall an action to enforce a wager or even the suggestion that such an action might be maintainable under our law. There is however a recent case, *Swaminathan Chetty v. Gordon Douglas* [3], upon a kindred point. The plaintiffs there had lent money to the defendants who were carrying on a business as turf commission agents and who agreed to give him a share of the profits as part consideration for the loan. It was held that the plaintiff was not entitled under our law to recover a loan granted for the purpose of wagering. The decision was reached on the footing that the Roman-Dutch law applied and is based largely on Van Leeuwen.

There is therefore at least one decision of our Courts by a bench of two Judges which proceeds upon the view of the law approved by Grotius, Voet, and Van Leeuwen. I see no reason to doubt that our common law is and always was that wagering contracts were not enforceable at law as being contrary to public policy. Does the circumstance that this action is based upon a bond make any difference? An argument was addressed to us which obviously was based upon the decisions of the English Courts that a just promise based upon a good consideration is not a wagering contract within the contemplation of *8 & 9 Vic. c. 109, s. 18* and that an action may therefore be based thereon. What is this new consideration?

I hope I am doing no injustice to counsel when I say that it appeared to me that he had great difficulty in stating of what this new consideration consisted. It was said that it was the plaintiff's forbearance to sue;

[1] *4 Transvaal L. R. S. C. 439.* [2] *(1932) S. A. L. R. (App. Div. 76).*
[3] *(1931) 32 N. L. R. 293.*

that it was this forbearance to sue coupled with the concession of time to pay till the end of the year; that this concession must be viewed in the light of the defendant's confidence that the rubber market would recover and that he would in that time be able to recoup his losses and that another factor was that the plaintiffs would continue to do business during that period on the basis of the contract referred to in P 28 which was in terms thereof to run till the end of the year 1930.

Whether the evidence justifies the conclusion that this bond was given under any such circumstance is a matter which I shall consider later, but assuming that there is evidence of all this does it constitute good consideration for a fresh promise? Now the mere giving of time to pay that which is not enforceable is not consideration: "to give time for a payment that cannot be enforced is nothing at all"—Farvell L.J. in *Hyams v. Stuart King*[1]. The same observation applies to forbearance to sue for a wager for which no action is maintainable in a court of law; forbearance to sue and the giving of time are merely different terms for the same forbearance. Nor am I impressed with the argument that forbearance to sue in respect of a claim unenforceable at law though it is not of itself consideration becomes consideration if it is exercised in circumstances which afford the other party an opportunity to recoup his losses. Every such forbearance presumably is intended to give the other party time in which to find the money he is not in a position to pay at the moment. Lastly, if the contract P 28 is a wagering contract—the assumption with which this examination of the law commenced—the undertaking to continue to do business on the basis of that contract for the rest of the year is in effect an undertaking to continue to wager with the defendant which in the absence of definite auhority to the contrary cannot be regarded as good consideration for the payment of a wager which became payable and was unpaid.

It was finally urged that at the time the bond was given neither party regarded the claim as justly due and owing. But if the transactions were really wagering transactions, the claim, being for money won by the plaintiffs, was not enforceable at law. If forbearance to sue for a claim declared by law to be unenforceable is not good consideration for a promise to pay money, I cannot think that it becomes good consideration for a promise to pay, because the parties thought that the claim was enforceable.

But this bond was given purely to secure the payment of the claims on contracts P 1 and P 28 which have been found to be wagering contracts. Mr. Walsgrove says: "These accounts were not paid although we asked for payment several times. I saw the defendant personally. He promised to pay but failed to pay. I consulted my lawyers, Messrs. P. D. A. Mack & Sons, and I got this letter dated March 8, from Messrs. de Vos & Gratiaen who were defendant's lawyers. Then the proctors arranged matters between themselves and it was arranged that a bond should be given".

[1] *(1908) 2 K. B. 696 at p. 725.*

The letter referred to is in the following terms :—

"This gentleman (*i.e.*, the defendant) saw us to-day in connection with the amount due to you. We will write to you more fully on this subject".

Mr. Mack says he was consulted by Mr. Walsgrove of Messrs. Tarrant & Co. The claim was in respect of contracts of sale of rubber. The defendant had made default and he was asked to *safeguard* Tarrants' position. Tarrants wanted to sue the defendant who was anxious to gain time because he had great faith that the price of rubber would go up after some time. *Tarrants agreed to take security and give time.* This bond was accordingly drawn up for the amount of the bills and interest and was duly executed.

This is all the evidence adduced by the plaintiffs and all that it amounts to is that as the defendant wanted time to pay the claim the matter was settled on the basis that the plaintiffs should give him time and that he should give security by bond and hypothecation of property to pay the claim. The defendant's position is that as at that time he had not much cash and was slightly embarrassed for lack of money he gave this bond for the amounts he had to pay Tarrant & Co. on these contracts.

This is merely a case of a person who was not in a position to pay a claim giving security for the payment of that claim. If the claim was one which arose out of a wagering transaction, then what the bond was given to secure was the payment of that claim.

I gravely doubt whether assuming that the English law applied an action could be maintained in the circumstances of this case in any Court of law or equity to recover what is palpably money won upon a wager.

But it is the Roman-Dutch law which governs the case, and under that system wagering contracts are unlawful in the sense that they are contrary to public policy. Had such contracts been contrary to public policy under the common law of England it remains a question whether the Court would have permitted the recovery by action of what is in substance a wager even though presented as a claim upon a contract based upon good consideration. Since, however, it is the Roman-Dutch law which applies the question for us is whether there is *justa causa* for the promise to pay. What the defendant has promised to pay by the terms of this bond is now admitted to be the amount due on the contracts P 1 and P 28 or in other words the amounts won on these wagering contracts.

The circumstances under which this bond was given have been referred to earlier—it is merely a case of a person who was unable to pay being pressed or persuaded to give security for the payment of his debt—the debt in this instance being the amount of his losses on wagering contracts.

This is in effect a second promise to pay a wager secured by hypothecation of property and as such is unenforceable—*vide Voet XI., 5, 7.* The promise relates to a matter in regard to which no lawful contract can be made—wagers being unlawful as being contrary to public policy—and no *justa causa* exists for the promise.

The appeal fails on all grounds and is accordingly dismissed with costs.

AKBAR J.—

This was an action on a mortgage bond for the recovery of Rs. 109,112.59 and the appeal is from an order of the District Judge dismissing plaintiff's action with costs on the ground that the bond was void and unenforceable because it was for a consideration which was illegal or in other words that the agreement was in the nature of a wagering contract. It appears that there were two forward contracts for the sale of rubber, F.A.Q. sheet or crepe, by the plaintiffs to the defendant, P 1 dated November 20, 1929, by which 100 tons of rubber were sold at the fixed rate of 44 cents per pound delivery to be given in January, 1930, and P 28 dated April 28, 1929, for the sale of 600 tons, F.A.Q. sheet or crepe, at 62 cents per pound delivery from January to December, 1930, at 50 tons per month.

According to the evidence of Mr. Walsgrove who was examined *de bene esse* for the plaintiffs, defendant made default in accepting delivery of the rubber under these two contracts, and the defendant entered into the mortgage bond A sued upon to secure the payment of the sums due on the two contracts till March 11, 1930, and it is on this bond that the plaintiffs sue.

There are three questions which arise in this case, one on a question of fact, and the other two on questions of law. The question of fact is whether the contracts P 1 and P 28 were wagering contracts to the knowledge of both parties (see the summing up of Cave J. reported in *Universal Stock Exchange, Ltd. v. Strachan*[1]). The questions of law are, firstly whether assuming that P 1 and P 28 were wagering contracts to the knowledge of both parties are such wagering contracts void and unenforceable under our law and secondly, even so, was there fresh consideration for the mortgage bond now sued upon to make it valid and enforceable. Let me deal with these three questions in the order stated by me. On the question of fact the learned trial Judge held that the contracts were wagering contracts to the knowledge of both parties and there is ample evidence to support his finding. As it was pressed in appeal that the District Judge was wrong in his finding it is necessary that I should state my reasons for thinking that this finding of fact was correct.

It will be noticed that the bond A gives a fictitious reason for its execution. The words are: "I, the above-bounden obligor, am indebted to the said obligees in the sum of Rs. 101,462.63 for money borrowed and received by me from them, which said sum of money it has been agreed should be secured by these presents, &c.". Admittedly no money was borrowed by the defendant and the real cause of action alleged by Mr. Walsgrove is that the sums of money were due on P 1 and P 28 in respect of sales of rubber.

The defendant himself stated in his evidence that before these contracts were entered into he had previous forward contracts with the plaintiffs for about two to three years from 1926 to 1927 and that he entered into these

[1] *(1896) A. C. 166.*

forward contracts with a view to speculation. He used to buy and sell about 500-1,000 tons of rubber for a month and all the transactions on forward contracts were mere paper contracts as there was no delivery of rubber either by defendant or to him and on the due date payment was made on the differences, because immediately after the sale by one to the other there was a cross-sale from the latter to the former to obviate any necessity for the delivery of any rubber sold or bought. He also stated that his brokers, Philips and Vangeyzel, put through a large number of forward contracts on his behalf between him and the plaintiffs, and for a period of about two years (1927-30) they bought and sold about three thousand to four thousand tons of rubber on his behalf.

Defendant stated that although he owned rubber estates he was not a shipper of rubber and that it was only in the case of spot sales rubber was deliverd and money paid. The defendant practically challenged the plaintiffs to produce a single letter or a delivery order signed by him to show that on forward contracts he had ever accepted delivery of rubber or made delivery.

Mr. Walsgrove's evidence on these points goes a long way to corroborate the defendant. Let me quote a few passages :—" We did not actually deliver the rubber to the defendant in respect of these contracts, we merely made the tender in reference to the contracts. The tenders were not accepted when they were made. Before the tender and after it there were other transactions with the defendant which were set off. They were deliberately intended to set off the amounts due under the contracts. Defendant did not take delivery of anything under these contracts. In each of the cases there was a set off and the amount due was the difference on the contracts between the parties. That was so in respect of the subsequent contracts. We have only particulars of the January portion of the old contract. I can speak to the earlier contracts as well. I am not sure whether the old contract is only for January delivery. If the January delivery is for 100 tons then that is correct. Always on the day of the tender there were cross-sales. The cross-sales were not immediately after the tender but within a day or two. The first tender under P 1 was on January 3, 1930, P 2. On January 6, 1930, there was a cross-purchase. The writing in pencil in P 21 at the corner is a clerk's writing 'set off against H. P. B's contract, &c.' dated January 10, 1930. I cannot say whether the cross-purchase was at our instance or defendant's instance. It is the customary thing to set a contract off by another contract at the market rate. If the buyer wishes to sell it back and the seller wishes to buy, then the contract for purchase is passed. The difference would be between the contract price and the market price on the day on which payment is due.

" I do not know of any instance where the rubber was taken by the defendant himself and put into his store. There have been contracts for purchase by the defendants and sales to us by the defendant in many instances. I distinguish between rubber being paid for and rubber being set off. If rubber is paid for, the money would pass and the delivery order would issue. In the case of differences there is a set off, my contract

against his contract, and one or the other pays the difference. We have had several contracts of that kind with the defendant previously. There were large numbers of such contracts in which we had sets off like that. I know that people enter into contracts for a larger amount of rubber than their estates could produce. It would have been an exception to the rule if there was an actual delivery of rubber. We did not usually expect a contract for resale to be entered into. In cases where he sold to me on forward contracts, the same custom did not prevail, I would invariably take the rubber as I was a shipper.

" We had to keep to the rules otherwise we could not go on trading. We contemplated that there was (not) a possibility of his not taking delivery of the rubber by his asking us to enter into a contract of sale from him. That was not contemplated at the time the contract was entered into but that would be decided at the time of tender as to whether there would or would not be a delivery and whether there would be a set off. Even if it was not to our advantage to have the set off I would still have a set off. When the balance has been in favour of the defendant we have set off and paid the difference to him. That happened in 1929 very frequently. He would sell to me and I would owe him the difference and pay him. If he was selling to me on a forward contract and at the time of tender it is disadvantageous to me to have set off I would accept the rubber. In the case where he buys from/sells to me and the contract was advantageous to him he would resell to me and take the difference. When it is to our advantage not to take up the contract, price having fallen, it is because I did not want the rubber. Where we buy from/sell to him and we could not get the rubber, we resell to him at a disadvantage.

" In the case of the 600-ton contract it was not our wish to have these sales : we wished to have our accounts settled, and the only way we had out of it was by having these cross-sales. There is no other way of settling the accounts if the man does not take the rubber. It is because the defendant continually promised payment of these accounts that we did not at once sue him. This system of cross transfers went on for many years but he did not owe us money, not until these contracts. In 1928, and so on, perhaps we paid him on some and he paid us on some contracts. We did not sue him in January because he promised to pay us the difference, which is our damages. The question of set off came into play after the default. After the default of each instalment I should say. In the case of each tender the question of set off would occur between the date of tender and the date of set off. Contracts would probably pass between us between the purchase and the set off. "

Mr. Walsgrove's evidence shows that there were forward contracts previous to P 1 and P 28 in which no delivery was ever made to the defendant and that there was a set off by the system of cross-sales and payments were made to or by the defendant on the differences—the difference being between the contract price and the market price on the day on which payment was due. This happened even when the market price happened to be above the contract price, which happened frequently, according to Mr. Walsgrove, in 1929. This shows the real nature of these

contracts. If the defendant never accepted delivery then there was a breach of the contract on his part and the plaintiffs need not have paid anything to the defendant and could have kept the rubber themselves. And yet the plaintiffs in such cases actually bought back their own rubber from the defendant on this system of cross-sales even when the market price rose above the contract price and paid the difference between it and the contract price to the defendant. When P 1 and P 28 commenced the price was falling and when the defendant refused to accept delivery of any of the tenders, there was a breach of the contract on non-acceptance of any one of the tenders and yet when the defendant's brokers sold these lots back to the plaintiff they bought these lots at the market price and sent in their accounts for the differences.

This is not all. These sales of rubber were regulated according to the Chamber of Commerce rules, according to Mr. Walsgrove, and under these rules a tender was necessary in all forward contracts (see rule 12), and the form of the tender is given in the rules (see form 3). All the tender were made by the plaintiffs in this form. On P 1, tenders were made by P 2, P 4, P 6, and P 8 on January 3, 1930, and the payment was to be prompt (see P 3, P 5, P 7, and P 9), *i.e.*, under rule 12 and rule 7 (*d*) three days were given for payment. According to P 3, P 5, P 7, and P 9 payment was due on January 7, 1930, and yet before payment was due, on January 6, 1930, by P 21 and P 22 the plaintiffs by cross-sales bought back the 60 tons sold to defendant by plaintiffs at the market rates prevailing on what day it is not quite clear, but it must be January 6, 1930, and the account sent in is for the difference (see P 20) of January 10, 1930.

The tenders on P 1 were 9 in number (P 2, P 4, P 6, P 8, P 10, P 12, P 14, P 16, and P 18) and were for 100 tons plus 47 lb. and the cross-sales were on P 21, P 22, P 23, and P 24 and amount to 110 tons. It may be noted that on P 21 and P 22 the delivery was to be made immediately and on P 23 and P 24 delivery was to be in January, 1930. The course of business pursued on these contracts corroborates the opinion of the trial Judge that these words relating to delivery were meaningless because no delivery was ever contemplated.

On P 28 the January tender was made by P 29 for 50 tons plus 90 lb. and the cross-sale was made on January 9 by P 37 for 50 tons, the 90 lb. excess being ignored and the date being two days after prompt date. In P 37 there is the fictitious entry that delivery was to be "Ex Stores Spot" and "Payment against tender (set off)". Thirty tons of the February tender was made by P 31 of February 6, 1930, the prompt date being February 10. The cross-sale was made by P 39 on February 10 not for the 30 tons but for the full 50 tons and the balance 20 tons still due from the plaintiffs on the February contract was set off against this excess on the cross-sale on February 14 by P 33 after a cancellation of some earlier set off and the plaintiffs claimed for the difference by P 34 (or P 41). In P 39 the delivery of the 50 tons was to be in February ex stores but the words "set off" appear in brackets and the payment was against tender.

I think I have said enough to show that these cross-sales were undisguisedly and admittedly fictitious. They were entered into with the concurrence of the plaintiffs when there had been a definite breach of the contract by the defendant. When one finds this occurring in every instance for a period of three years and even when the market price rose above the contract price, necessitating the payment of money by plaintiffs to defendant, the reasonable inference that one can draw from this course of business is that the understanding was to pay on the differences with no delivery of rubber (see section 15 of Ordinance No. 14 of 1895).

Mr. Walsgrove spoke of a custom provided for in the rules by which the buyer could invoice back to the seller at the market rate when there is a breach. But there is no such rule when the buyer is the defaulter. Rule 15 is the only rule, and that only applies when the seller defaults.

The plaintiffs have taken great pains in this case to show that every tender they made was with regard to specific lots which they had bought at public auctions and were easily traceable. The first comment that one can make is that such tenders were necessary under the Chamber of Commerce rules under which all these sales were conducted (see Ordinance No. 10 of 1895) and the fact that plaintiffs were shippers of rubber on a big scale [they had no less than 2,500,000 lb. of rubber at the Suduwella Stores, which was admitted by counsel for the appellants as being the plaintiffs' store, in February (see evidence of Mr. W. C. Wishart)] enabled them to make fictitious tenders to keep within the Chamber of Commerce rules.

The plaintiffs knew that the defendant was not a shipper and that he had a small store. They also knew that the defendant was dealing very largely in rubber, buying and selling them on forward contracts and apparently on a large scale for a Ceylonese capitalist and that he was never taking any delivery of rubber sold to him. By their readily agreeing to the cross-sales, sometimes even before the prompt date, the plaintiffs must have known that the defendant was speculating on differences and they did everything in their power to smooth the way for the defendant in his speculations. This opinion of mine is confirmed by certain other facts disclosed in the evidence.

By P 35 of March 4, 1930, the plaintiffs tendered the 50 tons of rubber for March and the reply P 49 of March 5 is significant. The reply is to the effect that defendant is sorry he "is compelled to delay your cheque for the difference this time. I am making arrangements to get money to pay you and I hope to be able to do so in a short time. I shall settle your claim with the least delay, believe me. I quite appreciate your patience in my matter and thank you very much for same". There is no mention of his inability to accept the delivery; his regret is for his inability to pay the difference this time. As defendant had failed to make any payment on the differences on P 1 and P 28 the words "this time" can only mean "in contrast to our previous dealings". What is the reaction of the plaintiffs to his letter? There is no protest from the

plaintiffs of the breach of the contract to accept delivery but the whole matter is entrusted by plaintiffs to their proctor, Mr. Mack. Mr. Mack said: "At that time Tarrant's position was that the defendant owed them a considerable amount of money. He had defaulted on the amount agreed on . . . . I was asked to make an endeavour to safeguard Tarrant's position. I corresponded with Mr. de Vos, defendant's proctor . . . ."

On March 6 defendant's proctors wrote P 44 direct to plaintiffs and the proctors met and discussed. On March 10, 1930, followed the inevitable cross-sale of the 50 tons (see P 42) with the fictitious entry, "Delivery ex Store Spot (set off) Part contract 1821. Payment—Difference"; and the account P 27 was made up for Rs. 101,462.63 including interest on the differences; and the mortgage bond A entered into with the incorrect recital that the sum was due "for money borrowed and received" by the defendant from the plaintiffs. The bond P 2 dated July 15, 1930, for the subsequent operations on P 1 and P 28 states definitely that the further sums were due on P 28 and might become due on P 28. The method of calculating these further apprehended damages was still the system of differences (unless of course the defendant accepted delivery) for the defendant bound himself to resell to plaintiffs on the 5th day of each month at the current market price on that day, and, if he failed to resell, the ruling price of rubber on that day certified by a recognized broker was to be conclusive on the question of damages.

Mr. Walsgrove said in his evidence that at the time of the contract P 1 and P 28 they entered into contracts in England to purchase rubber to cover themselves against the contracts P 1 and P 28. If the rubber tendered to defendant was meant by the plaintiffs for delivery to defendant, the fact that they rebought it by cross-sales from defendant perhaps points to other transactions where this surplus will come in useful, especially as some of the cross-sales took place even before the prompt day of the tenders on a market where prices were varying. The inference is that the transactions with defendant were entirely transactions on differences and that the rubber was wanted by plaintiffs for other contracts on which they had to supply.

All the cross-sales were effected by brokers on bought and sold notes and the defendant stated in his evidence that the brokers knew that defendant never expected to accept delivery or to make it and that these were the instructions given by him. If so, it is a question whether the brokers' knowledge was not that of the plaintiffs on these cross-sales. It is not necessary to consider this question, because in my opinion the learned District Judge appears to have been right in coming to the conclusion that these were wagering contracts to the knowledge of both parties when the position of the parties, their course of business before these contracts and during them, the documents, the conduct of parties and other relevant circumstances are considered and weighed. This is in accordance with the judgment of the House of Lords in *Universal Stock Exchange, Ltd. v. Strachan*[1].

[1] *(1896) A. C. 166.*

The fact that the plaintiffs were in a position to supply the rubber on the tenders is no answer to the question whether these were wagering contracts. It is an element which must be considered along with the other circumstances in the case and the District Judge has taken this factor into account (see also the Indian cases, *Partabchand v. Jeychand*[1], and *Mollah v. Mollah*[2]) and I cannot say that he was wrong.

As regards the two questions of law which arise in this case, the first is the question as to the law applicable to the case. There are no Ordinances prohibiting ordinary wagering in Ceylon, and the law that would govern wagering contracts would therefore be the Roman-Dutch law. It was held in the local case of *Swaminathan Chetty v. Douglas*[3] that in the case of a gaming or wagering contract the law applicable in Ceylon was the Roman-Dutch law and that under that law moneys paid on such contracts were not recoverable.

There can be no doubt that if the real transactions covered by P 1 and P 28 were agreements to pay on differences without delivery of the rubber such agreements would be wagering contracts (see *Universal Stock Exchange, Ltd. v. Strachan* (*supra*) and *2 Nathan* (*1904 ed.*), *p. 554*). What is the Roman-Dutch law in force in Ceylon with regard to wagering contracts? The Roman-Dutch law on the subject is discussed in two South African cases, *Dodd v. Handley*[4] and *Estate Wege v. Strauss*[5]. Innes C.J., in the former case quoted from Grotius (3.3.48) as follows:— "It has been decided with us for the general good that such wagers are invalid, unless there is an obligation on both sides, and unless the contracting parties have an interest in the consideration, as in the case with an insurance". Schorer disagrees with him (note 312) but he adds as follows: "But by the Civil law Grotius says they are null and void on grounds of public policy, and it has been so advised at Utrecht on the authority of Grotius". In a note to 3.3.48 Grotius adds that it is for the interest of the State that people should not waste their property in such useless and absurd wagers. In 3.30.13 he states that "although every one is by natural law master of his own property and actions, municipal law does not allow people to use the same to their own injury without any benefit to the general public, as was stated above with reference to the case of wagers". Van Leeuwen agrees with Grotius (*2 Kotze, 1923 ed., pp. 29 and 117*).

Voet discusses the question in XI. 5-7, 8, 9. In section 8 Voet speaks of wagering contracts and says that agreements made in respect of a game of chance and its uncertain and fortuitous result resemble a gamble and the *causa* is *inhonesta* and does not permit the agreement to be effectual. He then goes on to say that agreements in respect of any future matter the result of which is doubtful and uncertain, and does not depend on human industry and skill but on chance, were put on the same footing as games of chance. For instance, when the turpitude of the contracting parties is equal, the state of the person in possession is better than his who brings the action whether the profit on the agreement offered

[1] *30 Bombay 83.*
[2] *29 Calcutta 459.*
[3] *32 N. L. R. 293.*
[4] *4 Transvaal L. R. 439.*
[5] *(1932) South African L. R. A. p. 76.*

to the winner has been paid or promised. Reciprocal promises constituting an agreement in respect of the same chance, whether it is present or absent, are not therefore valid—according to Voet—for the reason that they begin to take on the nature of the prohibited gamble.

In section 9 Voet speaks of stakes in a wager and he ends by saying that the *causa* for such an agreement is *inhonesta* as it appears to be in the case of a game of chance, as stated before.

I have given this long extract from Voet to show that in his opinion a wager was on the same footing as a game of chance and that therefore the *causa* was *inhonesta,* and that the law did not allow such contracts. If we keep in mind what Grotius said, namely, that such contracts were made invalid for the public good it becomes clear that such contracts were not merely unenforceable but forbidden by the Roman-Dutch law, unlike the English betting contracts (see *Universal Stock Exchange, Ltd. v. Strachan* (*supra*)).

In the two South African cases the opinion of Grotius and Van Leeuwen was followed in preference to that of Schorer and there can be no doubt that the same preference ought to be shown to them in Ceylon too. But unlike the law in South Africa, which appears to have been settled by a long series of cases (in the words of Innes C.J. : " The general current of legal decision in South Africa "), where it was held that wagering contracts would not be enforced—the Roman-Dutch law in Ceylon would appear to go further and appears to be that such contracts are forbidden by law or are immoral.

But, even if the common law be as stated in the South African cases, wagering contracts as disclosed on the transactions on P 1 and P 28 are unenforceable in our Courts. Then there remains the question whether the mortgage bond A was valid because there was a new contract. In this connection we should keep in mind that the plaintiffs' instructions to their proctor, Mr. Mack, was merely to safeguard the position of the plaintiffs. The bond A, a mortgage bond under the Roman-Dutch law, was a collateral security to secure the principal debt. The English decisions seem to me to be clear that mere time given to pay an unenforceable debt was not a good consideration.

In the words of the President (*Hyams v. Stuart King* [1]) " the mere giving of time to pay that which cannot be enforced does not amount to consideration ", and in those of Farvell L.J. " to give time for a payment that can at no time be enforced is nothing at all ".

There is no evidence at all in this case of a threat to post up or ruin the defendant if he did not give the bond, which the Court held in the above case to be a sufficient consideration to validate a new agreement.

There are several English decisions on this point, *Hyams v. Coombes* [2]; *Hodgkins v. Simpson* [3]; *Cohen & Co. v. Ulph & Co.* [4]; *Burrell v. Leven* [5]; *Chapman v. Franklin* [6]. If the Roman-Dutch law is applied the position is worse. Liabilities due on wagering contracts were not regarded as debts of honour under the Roman-Dutch law, nor were they regarded as valid under our common law as they were under the English common law.

[1] *(1908) 2 K. B. 696.*
[2] *28 T. L. R. 413.*
[3] *25 T. L. R. 53.*
[4] *25 T. L. R. 710.*
[5] *42 T. L. R. 407.*
[6] *21 T. L. R. 515.*

Kotze in his *Treatise on Causa* (*p. 31,* and also see *2 Kotze's Van Leeuwen, 1923 ed., p. 604-616*) discusses the whole question and he is of the opinion that there must be a reasonable or legitimate cause for the agreement, *i.e.,* it must not be *contra legem aut bonos mores.*

As I have already pointed out Grotius, Voet, and Van Leeuwen say that such contracts are null and void as they are not for the public good, and as the *causa* is *inhonesta.* Voet as a matter of fact uses the words " non licet " and even " turpis ". (See in this connection Van der Keessel's *Thesis 484 and 2 Kotze, 614*).

In my opinion the judgment of the District Judge was correct and the appeal should be dismissed with costs.

Appeal dismissed.