[HIGH COURT OF AUSTRALIA.]

ADOLPH LOUIS FISH AND LEWIS PACKER . . . . . } APPELLANTS;
PLAINTIFFS,

AND

A. W. STANTON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1910.

SYDNEY.
Dec. 7, 8, 13.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

Promissory note—Security for money won by gaming—Consideration—Holder without notice and for value—9 Anne c. 14—Games and Wagers Act 1850 (*N.S.W.*) 14 *Vict.*, *No.* 9), *sec.* 17.

The Act 9 Anne c. 14 was wholly repealed by the Act 14 Vict. No. 9, sec. 17. A promissory note, therefore, though given as security for money won by gaming, is not void, but is enforceable against the maker by a holder in good faith for value without notice. So held by *Griffith* C.J., *Barton* J. and *O'Connor* J. (*Isaacs* J., dissenting).

Edwards v. *Hirschman*, 21 N.S.W.L.R., 116, overruled. The decision in *Woolf* v. *Towns*, 1 S.C.R. N.S., 242, on this point approved of.

Decision of the Supreme Court: *Fish* v. *Stanton*, 10 S.R. (N.S.W.), 622, reversed.

APPEAL by the plaintiffs from the decision of the Supreme Court of New South Wales.

The plaintiffs sued the defendant as endorsees of a promissory note for £300 made by the defendant. The defendant pleaded that the note was made by him in consideration of money won by gaming, and that there was no value or consideration for

H. C. OF A. 1910.

FISH v. STANTON.

the making or delivery of the note by him. The plaintiffs by their replication alleged that they took the note in good faith and for value, and without notice of any defect in the title of the holder. The defendant demurred to this replication upon the ground that by sec. 1 of 9 Anne c. 14 the note was void. Judgment upon the demurrer was entered for the defendant upon this ground by the Supreme Court, following *Edwards* v. *Hirschman* (1). The plaintiffs appealed. The relevant sections of the Acts in question are cited in the judgments hereunder.

Mitchell, for the appellants. The question is whether sec. 1 of 9 Anne c. 14 has been repealed. In *Woolf* v. *Towns* (2), it was decided that this Act had been wholly repealed, but this decision was overruled by *Edwards* v. *Hirschman* (1), and the Supreme Court in this case held they were bound to follow the later decision. It is submitted that the earlier decision is correct, and that no portion of the Act of Anne is now in force in this State. In England sec. 1 of the Act of Anne was repealed by 5 & 6 Will. IV. c. 41, which was never in force here. Then 8 & 9 Vict. c. 109 repealed so much of the Act of Anne as had not been previously repealed by 5 & 6 Will. IV. c. 41. The legislature, by sec. 17 of 14 Vict. No. 9, enacted that so much of the 8 & 9 Vict. c. 109 shall be in force in the Colony as enacts that so much of the Act of Anne as was not altered by the 5 & 6 Will. IV. c. 41, shall be repealed.

The intention of the legislature was to adopt the 5 & 6 Will. IV. c. 41 and the 8 & 9 Vict. c. 109 so as to assimilate the law of New South Wales to the law in force in England. The result is the whole of the Act of Anne is repealed. The legislature in sec. 17 of 14 Vict. No. 9 adopted *verbatim* the provisions of sec. 15 of 8 & 9 Vict. c. 109. It is an unreasonable construction of sec. 17 to assume that by the adoption of the section of an English Act, which had the effect of altogether repealing the Act of Anne, it was intended to preserve that portion of the Act of Anne which had previously been repealed in England. "So much as was not altered" means "so much as was not left as altered." The legislature, by adopting sec. 15 of the English Act,

(1) 21 N.S.W.L.R., 116.

(2) 1 S.C.R. N.S., 242.

adopted it with the meaning it bore in England, and with the results its enactment had on the English law. In *Edwards* v. *Hirschman* (1), the Court appear to have thought that this was probably the intention of the legislature, but that this intention was not sufficiently expressed. Upon the respondent's contention it is necessary to read in the words "in England" after the words "as was not altered." The Act 5 & 6 Will. IV. did not alter the New South Wales law. If the whole of the Act of Anne is repealed, except such part as was altered by 5 & 6 Will. IV., then as none of the Act of Anne was altered in New South Wales by the Act of William, the whole of it is repealed.

Knox K.C. and *Walker*, for the respondent. So far as the appellants' argument is based upon the Act 5 & 6 Will. IV. having been adopted as part of the New South Wales law by sec. 17 of 14 Vict. No. 9, it cannot be supported, because sec. 17 has since been repealed by the *Games, Wagers and Betting Houses Act* 1901, No. 18. The appellants ask the Court to give effect to an assumed intention of the legislature, which is not expressed in the enactment. Prior to the 14 Vict. No. 9 the whole of the Act of Anne was in force here. The only portion of that Act that has been repealed by sec. 17 of 14 Vict. No. 9 is so much as was not altered by 5 & 6 Will. IV., that is all the sections of the Act of Anne except sec. 1. Sec. 15 of 8 & 9 Vict. c. 109 had nothing to do with that part of the Act of Anne which it did not repeal. The English legislature by sec. 15 of 8 & 9 Vict. c. 109, cut a piece out of the English law and isolate it. Then they say the rest of the Act of Anne we sweep away. The legislature of this State then adopt *verbatim* sec. 15 of the English Act. But they have not said that they adopt the repeal of sec. 1 of the Act of Anne which had previously been effected in England by the Act of William.

Mitchell, in reply.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. In this case the Court is called upon to say December 13.

(1) 21 N.S.W.L.R., 116.

H. C. OF A. 1910.

FISH v. STANTON.

Griffith C.J.

which of two decisions of the Supreme Court of New South Wales as to the construction of sec. 17 of the Act 14 Vict. No. 9 should be followed. In *Woolf* v. *Towns* (1) the Supreme Court, constituted by *Martin* C.J., *Hargrave* and *Faucett* JJ., adopted one construction; and in *Edwards* v. *Hirschman* (2) the Court constituted by *Darley* C.J. and *Stephen* and *Owen* JJ., formally overruled that decision.

In the case under appeal the Court very naturally followed the later decision, but, unless I misunderstand the language of the learned Chief Justice, inclined to favour the earlier.

The Act 9 Anne c. 14, sec. 1, which came into force in New South Wales, either upon settlement or by virtue of the Act of 9 Geo. IV., enacted, *inter alia*, that all notes, bills and mortgages given in consideration of a gaming debt should be "utterly void, frustrate, and of none effect, to all intents and purposes whatsoever." The Act 5 & 6 Will. IV. c. 41 (1835) enacted, by sec. 1, that so much of "the Act of Anne (and other Acts) as enacts that any note, bill or mortgage shall be absolutely void shall be repealed, but nevertheless every note, bill or mortgage which if this Act had not been passed would, by virtue of" the said Acts "have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration, and the said several Acts shall have the same force and effect which they would respectively have had if instead of enacting that every such note, bill, or mortgage should be absolutely void, such Acts had respectively provided that every such note, bill, or mortgage should be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration." The form of the enactment is unusual—first, a repeal of an existing enactment, then a substituted enactment, and, thirdly, a declaration that the repealed law should have the same effect as if it had been enacted in the new form: but it is quite clear that the law thence-forward in force was the Act of Will. IV. and not the Act of Anne. Nothing of that provision of the Act of Anne remained in force as an enactment, although some words of it were incorporated in the new law as the subject of a new predicate.

(1) 1 S.C.R. N.S., 242. (2) 21 N.S.W.L.R., 116.

The Act of 5 & 6 Will. IV. did not extend to New South Wales, in which the Act of 9 Anne remained in full force.

The Act 8 & 9 Vict. c. 109 (1845), entitled "An Act to amend the law concerning Games and Wagers," after reciting that the laws theretofore made in restraint of unlawful gaming had been found of no avail to prevent the mischief which might happen therefrom, and also applied to sundry games of skill from which the like mischief could not arise, dealt with the whole subject of the law of gaming which it put on a new basis. By sec. 15 a series of Acts, including so much of the Act of 9 Anne "as was not altered by" the Act of 6 & 7 Will. IV., were repealed.

The word "altered" is not strictly accurate, for the part referred to had been repealed, not altered; but there is no room for doubt as to the meaning of the reference, which was to the enactment that all notes, bills and mortgages given for a gaming consideration should be utterly void. The words are equivalent to "all that is left of the Act." The effect was therefore to repeal the whole of the Statute of Anne as a substantive law, leaving the law on the subject of notes, bills and mortgages given for gaming debts in the state in which it had been put by the Act of Will. IV.

In 1850 the New South Wales legislature passed the Act, 14 Vict. No. 9, which was, for the most part, in substance, a copy of such provisions of the Act 8 & 9 Vict. c. 109 as were applicable to New South Wales. The first sixteen sections were in the usual form of substantive enactments. Sec. 17, however, was in a different form. After reciting the passing of the Act 8 & 9 Vict. c. 109 and that it was desirable to adopt so much of the provisions of that Act as was thereinafter specially set forth, it was declared and enacted that "so much of the said recited Act of Parliament as is hereinafter specially set forth shall be and is hereby declared to be in force in the Colony of New South Wales and shall be applied so far as the same can be applied in the administration of justice therein." Sec. 15 of the Act 8 & 9 Vict. was then set forth *verbatim* with the introductory words :— "So much of the said recited Act as enacts that."

The key to the construction of the section is, in my opinion, to be found in the consideration that the legislature of New South

H. C. OF A. 1910.

FISH v. STANTON.

Griffith C.J.

Wales were applying their minds to the law of New South Wales and to the Statute of Anne as a part of that law.

Three possible constructions have been suggested:—

(1) That the Act of Anne, regarded as a law of New South Wales, should be repealed, except so far (if at all), as (still regarded as a law of New South Wales) it had been repealed or altered by the Act of Will. IV.

(2) That the law of New South Wales should be assimilated to the law of England as it stood after the Act of 8 & 9 Vict., including the alteration of the law made by the Act of Will. IV.; and

(3) That the Act of Anne, regarded as a law of New South Wales, should be repealed except as to that part of it which had been repealed in England in 1835, so that that part, and that part alone, should continue in force in New South Wales.

All the Judges of the Supreme Court before whom the matter has come appear to have thought that the second view expresses the real intention of the legislature, their difficulty being whether it was sufficiently expressed by the actual language used.

The literal meaning of sec. 17 is that sec. 15 of the Act 8 & 9 Vict. shall be part of the law of New South Wales. The effect, I think, is the same as if the English Parliament when passing it had declared that it should extend to New South Wales.

Having regard to the general purpose of the legislature of New South Wales in 1850, as appearing on the face of the Act of that year, the suggestion that they intended to leave unrepealed that part of the Act of Anne which had been repealed in England in 1835 seems, *primâ facie*, surprising; but the notion that, if that was their intention, they should have expressed it by declaring that the enactment of sec. 15 of the Act of 1845, which left nothing of the Act of Anne remaining in force in England, should be the law of New South Wales, seems to me, with all respect for those who have entertained a different view, to impute to them a perverseness of ingenuity which is almost fantastic. We know what were the intentions of the English Parliament in passing the Act of 1845. The suggestion that the legislature of New South Wales intended by the adoption of the *ipsissima verba* of that Act to enact a substantially different law needs, in my

opinion, for its support an overwhelming and unescapable necessity arising upon the literal construction of the language which they used. But, so far from any such necessity appearing, a strictly literal interpretation of the actual words negatives the suggested construction. For the words "so much as was not altered" by the Act of Will. are, as applied to the Statute of Anne as a law of New South Wales, if taken literally, inoperative. The words do not amount to a legislative declaration that any part was altered, and must be read "so much, if any."

As applied to the Statute law of England they meant the enactment of the Statute of Anne as to notes, bills and mortgages given for gaming debts which had already been repealed and did not need to be repealed over again. As applied to the Statute law of New South Wales they referred to the same enactment, which, however, had not been altered or repealed in the Colony.

It is suggested, however, that the words "so much as was not altered" are mere words of reference, and mean all the provisions of the Statute of Anne except the provision that certain notes, bills and mortgages should be utterly void, and that this excepted part is therefore not included in the repeal. If we treat the legislature of New South Wales as having had no regard to the actual law of that Colony which they were professing to remodel on new lines, the argument is plausible. But that is to throw away the key. If the legislature so intended it is strange that they did not say in plain words that what they meant to except from the repeal was the provision avoiding certain notes, bills, and mortgages.

The effect of sec. 15 of the English Act was that the whole law on the subject was comprised in that Act, and the Act of Will. IV. "altering" the Statute of Anne. When the legislature of New South Wales declared that that section should be part of the law of New South Wales, I think that they meant that the state of the law which resulted from its enactment in England should also be the state of the law in New South Wales—in other words that all that was left of the Act should be repealed, which was the meaning of the words as used in the English Act. But, if this was not their intention, and if the enactment is not to be construed, as a whole, as having the same meaning or effect in

H. C. OF A. 1910.

FISH v. STANTON.

Griffith C.J.

New South Wales as in England, the same differential rule must be applied to the words "so much as was not altered," &c. These words imply an inquiry "What is the part which was not altered," to which in England the answer would be "All except the enactment relating to notes, bills, and mortgages given for gaming debts," and in New South Wales "The whole Act."

If the matter is regarded from the point of view of an English enactment declared to extend to a Colony as far as applicable, the same result follows, for, as applied to the Colony, the words "so much as was not altered" are inoperative.

Martin C.J. thought that the words "so much as was not altered" were equivalent to "so much as is now in force (unaltered)." As applied to the English law, both forms of words unquestionably meant the same thing, or, as I have expressed it, all that is left. I confess my inability to see why they should not also mean the same thing as applied to the law of New South Wales, whether sec. 17 does or does not adopt by necessary implication the alteration made by the Act of Will. IV. Every Statute must be read as applying to the country for which it is enacted, and to the existing law of that country.

For these reasons I think that the third of the suggested constructions must be rejected, and that we must fall back upon the other two.

The question whether the effect of sec. 17 was to adopt the enactment of 1835 so far as it altered the enactment of Anne raises more difficulty. In my opinion the arguments for answering it in the affirmative are the more weighty, but it is now a matter of merely academic interest, since sec. 17 was itself repealed by the *Gaming Act* of 1901, and was not re-enacted. So far as it was a repealing section its repeal had not the effect of reviving the Statute which it repealed, and so far, if at all, as it adopted the law of Will. IV. it is itself repealed.

I am led, therefore, *quâcunque viâ*, to the conclusion that the Statute of 9 Anne is no longer in force in New South Wales, and that the case of *Woolf* v. *Towns* (1) was rightly decided in so far as it so held.

(1) 1 S.C.R. N.S., 242.

BARTON J. The plaintiffs (appellants) sued the defendant (respondent) on his promissory note for £300 payable to one Maidens at three months' date, and indorsed by Maidens to the plaintiffs. The defendant pleaded that the note was given to Maidens in consideration of money won by him from the defendant by gaming. The plea set forth the games of chance at which the money was lost by the defendant. The plaintiffs' second replication was that the note was complete and regular on its face, and indorsed to the plaintiffs before it was overdue, and without notice that it had previously been dishonored, and was taken in good faith and for value and without notice of the matters set forth in the plea.

The defendant demurred to the second replication, on the ground that the promissory note was altogether void by virtue of sec. 1 of the Act of Anne c. 14, which section, the defendant contends, is still in force in New South Wales unaltered. The plaintiffs took objection to the plea in their turn, on the ground that the Act of Anne has been repealed in New South Wales, either wholly or so far as it purports (that is by sec. 1) to make promissory notes waste paper when given in respect of gaming transactions. It is to be taken that the games described in the plea were games within the Statute of Anne.

The real question is whether the promissory note was from the time of its execution absolutely void. If it was not, then although it was admittedly given on account of gaming transactions, it is enforceable against the maker by an innocent holder for value without notice of these transactions, since at worst their effect would be to render the consideration an illegal one, and to prevent the sum secured from being recoverable as between maker and payee or in the hands of a holder with notice.

Sec. 1 of the Act of Anne c. 14, so far as it related to such matters as the present, provided that all notes, bills and mortgages "given . . . by any person . . . where the whole or any part of the consideration . . . shall be for any money . . . won by gaming, . . . shall be utterly void, frustrate, and of none effect." The *Gaming Act* 1835, 5 & 6 Will. IV. c. 41, recited this among other enactments, and that securities and instruments which they made void were sometimes indorsed to

H. C. OF A. 1910.

FISH v. STANTON.

Barton J.

purchasers for valuable consideration and without notice of the original consideration, and that their avoidance in the hands of such purchasers was often attended with great hardship and injustice; for the remedy of which it provided by sec. 1 that so much of the Acts recited as enacted that any note, bill or mortgage should be absolutely void should be repealed; "but nevertheless every note, bill, or mortgage which if this Act had not been passed would, by virtue" of any of the Acts recited "have been absolutely void," should be deemed and taken to have been given for an illegal consideration; and it goes on to say, "the said several Acts shall have the same force . . . which they would respectively have had if instead of enacting that any such note, bill, or mortgage should be absolutely void, such Acts had . . . provided that every such note, bill, or mortgage should be deemed and taken to have been . . . given . . . for an illegal consideration." Bonds, judgments, &c., rendered void by the recited Acts were left so by this section.

The *Gaming Act* of 1835, having been enacted later than 9 Geo. IV. c. 83, did not under that Act become part of the law of this State, and no part of it has been directly adopted. But as the effect of the first section has by reason of subsequent legislation become closely involved in the question now under discussion, I will consider its meaning before passing to other enactments.

The title of the Act of 1835 is "An Act to amend the Law relating to Securities given for Considerations arising out of gaming, usurious, and certain other illegal Transactions." How did it amend, that is to say, alter the law, which on this subject was all Statute law? Partly by way of repeal and substitution as in sec. 1; partly by making fresh provision in aid of the purposes of the prior Acts, as in sec. 2; partly by repeal simply, as in sec. 3. All these operations Parliament clearly deemed to be included in the process of amending the law of which the first section of the Statute of Anne was part, and it is not correct to say that certain parts of the latter Act were not repealed when it is found that the process of amending that and other enactments necessitated in the judgment of Parliament the inclusion of some repeals. Amendment is a term aptly used to include all the operations effected in altering the law, even where repeal is re-

sorted to as part of the process, but repeal does not therefore cease to be repeal. It is hard to conceive any other inclusive term than amendment to designate the process unless the word "alter" had been used in place of "amend," and that word would have expressed the thing intended with equal accuracy; Parliament afterwards employed it with the same meaning, as will be seen. The Act of 1835 therefore did alter, as to this class of securities, the law of England as prescribed by the Statute of Anne.

Then came "An Act to amend the law concerning Games and Wagers," 8 & 9 Vict. c. 109. This Act as a whole has not been adopted in New South Wales by using the term "adopted," though, as we shall see, its principal provisions have been enacted here. Passed in 1845, it provided a considerable body of law for the suppression of gaming houses, the licensing and supervision of billiards, the punishment of cheating at play, the annulling of gaming and wagering contracts and the prevention of their enforcement by action or suit. It appears to have been the intention to substitute these provisions for (*inter alia*) those of the Statute of Anne, but to leave the alterations of 1835 intact, for by sec. 15 it is prescribed that (*inter alia*) "so much of" the Statute of Anne "as was not altered" by the Act of 1835 should be repealed. Clearly the part which was altered was to stand as altered; repeals to be still repeals; substitutions to be still substitutions. There was no attempt to interfere with the effect of the Act of 1835. Indeed what was done amounted to a preservation and affirmance of its effect.

From what I have already said of the Act of 1835, it will be clear that I take the word "altered" in this section to be used in exactly the same sense as the word "amend," used in the title of that Act. I have no doubt that Parliament in England used that word to include every process by which this alteration of the gaming laws had been brought about, among those processes being that of partial repeal, and it gave sec. 15 the effect of preserving what had been done by the *Gaming Act* 1835.

Thus all of the Act of Anne except what was altered in 1835 went by the board. But the parts of the Act of Anne repealed in that year in the process of alteration were of course not repealed afresh. They continued to be dead.

H. C. OF A. 1910.

FISH v. STANTON.

Barton J.

That being the state of the law in England, let us pass to the Act of New South Wales, 14 Vict. No. 9, which has the same title as that of 8 & 9 Vict. c. 109, viz., "An Act to amend the Law concerning Games and Wagers." Before its passage, in 1850, the whole of the Act of Anne was in force in New South Wales, for the reason that the alterations (including repeals) made by the English Act of 1835 had not been adopted here, nor had the Act of 8 & 9 Vict. been adopted. But the provisions of the last-named Act were now to be almost wholly introduced. The 14 Vict. No. 9 enacts for New South Wales all the more important provisions of that Statute, some of them in identical words, others in identical substance, and indeed, save the provisions relating to billiards, it brings into force practically the whole of the English Act of 1845. In short, to follow the terms of the *Constitution Act* 1829, it applies the Act of 1845, "in the administration of justice . . . so far as the same can be applied," though it does not use the form of words to be found in the 24th section of the *Constitution Act*; and it makes only such modifications as were necessary to facilitate the application in New South Wales of the Act of 1845. In this process it had to deal with sec. 15 of the English Act, and it did so by its own sec. 17. To a draftsman in these days no doubt the form of sec. 17 is peculiar, and most of us will agree with *Owen* J. in calling it "confusing." But at any rate it says that the legislature adopts and directs to be applied so far as it can be applied in the administration of justice that part of the Act of 1845, which it sets forth, and which repeals all the provisions of the Act of Anne "not altered" by the English Act of 1835. The part which effects this repeal is the 15th section. Did the local legislature mean by the terms it has used to adopt and apply in New South Wales the mere repeal of parts "not altered" as effected by that section, so as to leave out the alterations made in 1835, or did it mean to adopt the section with the whole of the meaning it had in England? If it had the latter intention, it meant to finish by this section what it had almost completed up to that point: the assimilation of the law in New South Wales to that which then prevailed in England. I confess I see no ground for believing sec. 17 to be an exception to this purpose, unless the words necessitate such a construction.

No doubt in their literal sense they are capable of such a reading. But it is well to keep in mind, before coming to a conclusion, what the section adopted actually meant in England at the time of its adoption. If the reform made by the Act of 1835 was not intended to be transferred to the Statute book of the then Colony as preserved by the section adopted, it was intended by sec. 17 to enact the adopted section with a force and meaning totally different from that which it had in England. There the section operated so as to retain standing and effective the alterations made by the Act of 1835, and that indeed was clearly the intention with which it was enacted. But we are asked to say that it was here brought into the Statute book with the intention of excluding those alterations. I cannot think that the legislature harboured any such design, and I think their words lead to the contrary inference.

If the alterations made in 1835 were not to be embodied here, we must conclude that the local legislature, applying to the local conditions in all other respects the new body of law enacted in 1845, and wiping out the Statute of Anne to make room for it, made the singular exception of harking back to that otherwise discarded Statute for the one purpose of perpetuating the very hardship and injustice which its first section, re-formed for that avowed reason in England, had been found to produce in its application to bills, promissory notes and mortgages.

I agree with the opinion expressed by *Faucett* J. in *Woolf* v. *Towns* (1), when he said :—"It is clear to me that the legislature thought that the Act 5 & 6 Wm. IV. c. 41 was in force in this Colony, and intended to assimilate our law to the English law." Though the legislature was in error in that supposition, it sufficiently evinced its intention that the Act should be operative here as suitable to the then circumstances of New South Wales.

As the law of New South Wales stood from 1850 up to 1902, then, I think that a promissory note given in consideration of gaming losses was to be taken to have been given for an illegal consideration, and that, in the hands of an indorsee for value without notice of the consideration, it could be enforced against the maker.

(1) 1 S.C.R. N.S., 242, at p. 246.

H. C. OF A. 1910.

FISH v. STANTON.

Barton J.

In 1902 however the (consolidating) *Games, Wagers and Betting Houses Act* 1901 was passed in New South Wales. It repealed the whole of the Act 14 Vict. No. 9 with slight exceptions which are not material here. It re-enacted practically all that it had repealed except sec. 17. Though section 17 is no longer law, the repeal had not the effect of reviving anything which that section repealed. The Statute of Anne being already gone, the amendments made in 1835 and preserved or introduced by sec. 17 of 14 Vict. No. 9 are now also gone.

It follows that there is now nothing in the Statute law which makes the promissory note sued on void, or which requires it to be treated as given for an illegal consideration.

In my opinion the conclusion of the Supreme Court in *Woolf* v. *Towns* (1) was right and that in *Edwards* v. *Hirschman* (2), overruling it, was erroneous.

I think the plea is bad, and judgment on the demurrer should be for the plaintiff, whose appeal ought to be allowed.

O'CONNOR J. The Statute 9 Anne c. 14 enacted amongst other things that promissory notes given for gaming debts should be "utterly void, frustrate, and of none effect, to all intents and purposes whatsoever." The Statute became law in New South Wales by virtue of the 24th section of the New South Wales *Constitution Act*, and continued in force unamended up to the year 1850. In that year the New South Wales legislature passed the 14 Vict. No. 9, which dealt comprehensively with the subject of gaming and wagering. Many of its provisions were adopted from the English Act 8 & 9 Vict. c. 109 which had been passed in England five years before; some of the sections, such as sec. 8, which renders gaming contracts void, were taken bodily from the English Act. Looked at as a whole, it obviously aims at assimilating the New South Wales law to the then existing English law. At that time the Statute of Anne in effect had ceased to operate in England. The New South Wales Act does not repeal the Statute of Anne in direct terms, but purports to deal with it and with some other English Acts in sec. 17. The determination of this appeal depends upon the effect of that

(1) 1 S.C.R. (N.S.W.), 242. (2) 21 N.S.W. L.R., 116.

section, and it is the cumbersome form and involved language in which the legislature has expressed its intention that has created the difficulty we are now called upon to solve. The section begins by reciting that the 8 & 9 Vict. c. 109 had been passed, and that it was desirable to adopt so much of its provisions as are thereinafter specially set forth. It then declares and enacts that those provisions shall be in force in New South Wales, "and shall be applied so far as the same can be applied in the administration of justice therein." It goes on then to set forth specially the provisions to be applied. They are substantially a *verbatim* copy of sec. 15 of the English Act. In so far as the adoption affects the Statute of Anne it may be stated as follows:—"So much of the 8 & 9 Vict. is adopted as repeals that portion of the Statute of Anne which was not altered by the Act of 5 & 6 Will. IV." The legislature clearly intended to repeal some portion of the Statute of Anne, and for that purpose it treats it as divided into two portions, first, that which was, secondly, that which was not, altered by the Act 5 & 6 Will. IV. There can be no doubt about the effect of the English Acts mentioned on the Statute of Anne in England. The Acts 5 & 6 Will. IV., and 8 & 9 Vict. between them got rid of it altogether. But having come into force after the New South Wales *Constitution Act*, neither of them could affect the Statute of Anne in New South Wales, except in so far as their provisions may have been adopted and applied by New South Wales legislation. In order to give proper effect to the portion of 8 & 9 Vict., adopted and set forth in sec. 17 of the New South Wales Act, we must have regard to the existing law which the New South Wales legislature was then intending to amend. It must be assumed that the New South Wales legislature knew that the Act of Anne was in full force in New South Wales, and that in England the various amending Acts, the substance of which they were then re-enacting, had had the effect of repealing it altogether. Under these circumstances it is difficult to impute to the legislature the intention of adopting the section of the 8 & 9 Vict. which completed the repeal of the Statute of Anne in England, in order that they might keep alive the Statute of Anne in New South Wales. To avoid a consequence so obviously contrary to their real intention

H. C. OF A. 1910.

FISH v. STANTON.

O'Connor J.

the words of the 8 & 9 Vict., adopted in sec. 17, must in my opinion be applied literally to the Statute of Anne in New South Wales, in so far as they can be applied. The English Act 5 & 6 Will. IV. did not, and could not, alter the Statute of Anne in New South Wales, and in New South Wales therefore the portion of the Statute of Anne "not altered by an Act passed in the sixth year of the reign of his late Majesty," to quote the language of the English section, was in effect the whole Statute. That being so, the whole Statute of Anne was in New South Wales open to the repealing operation of the adopted provisions.

In my opinion, therefore, sec. 17 of the New South Wales Act must be construed as repealing the Statute of Anne in New South Wales. It is, I think, not easy to read into that section the adoption of the Statute of Anne as modified by the later English Statutes, which Sir James *Martin* held, in *Woolf* v. *Towns* (1), had been effected. But I think his view is a truer view of the general intent of the New South Wales Act than that of the Supreme Court in *Edwards* v. *Hirschman* (2). The decision in that case imputes to the legislature, in my opinion, an intention which its words in sec. 19, taken in connection with the state of the law with which it was then dealing, cannot reasonably support.

For these reasons I am of opinion that the appeal must be allowed, and judgment on demurrer entered for the plaintiffs.

ISAACS J. In my opinion the judgment of the Supreme Court of New South Wales was correct and should be upheld. Until 1850 the New South Wales legislature was content that the law of the Colony relating to gaming should rest upon the operation of the Act of 9 Anne c. 14, and whatever other English Statutes "applied in the administration of justice in the Courts . . . so far as the same could be applied," by virtue of the self-executing provisions of the Act 9 Geo. IV. c. 83, sec. 24.

Besides the Act of Anne, there were two other Acts, viz., 16 Car. II. c. 7 and 18 Geo. II. c. 34, passed before 1828, which might or might not be wholly or partially inapplicable to New South Wales.

(1) 1 S.C.R. (N.S.W.), 242.

(2) 21 N.S.W. L.R., 116.

The Act 5 & 6 Will. IV. c. 41, being subsequent to that year, never was part of the law of the Colony, and what is material to remember, the legislature could never have imagined it was, and so the Act of Anne and the other two Acts, whatever force they otherwise had, remained as the legislature well knew entirely unaffected by the Act of William.

In 1850, however, the local legislature passed the Act 14 Vict. No. 9 intituled "An Act to amend the law concerning Games and Wagers," and by sec. 17 adopted a specific portion of sec. 15 of the Imperial Act 8 & 9 Vict. c. 109. The main question is as to the effect of that adoption.

Naturally the first thing is to ascertain the nature and effect of what was adopted. The Act 8 & 9 Vict. c. 109 was passed five years before the New South Wales Statute, and among other things, enacted two things. First, by section 15 it repealed the Act of Charles, and "so much of" the Act of Anne "as was not *altered*" by the Act of William.

Next, by sec. 18 it enacted an entirely new provision, making all contracts or agreements whether by parole or in writing by way of gaming or wagering null and void. This latter enactment not only embraces wider classes of transactions than those comprised in previous Acts, but also regards such contracts as merely void.

It will be seen presently that this provision has considerable importance.

With regard to the first mentioned enactment of the Act of Victoria, a good deal turns on what is the meaning of the words "as much of" the Act of Anne "as was not altered" by the Act of William. It is of course not a general question of how much of the "law of England" on the subject of gaming was altered. There is no doubt the effect of the latter Act upon the law of England was that the securities, that is the notes, bills and mortgages themselves, were no longer avoided, but were regarded as being given for illegal consideration. Thenceforth such a bill, though void as between the immediate parties, could be recovered upon by a transferee who took it while current, for value and without notice. But though the law as a whole was so changed, is it correct or incorrect to say that, the Act of Anne with refer-

H. C. OF A. 1910.

FISH v. STANTON.

Isaacs J.

ence to the validity of gaming notes, bills and mortgages, still remained part of the law though in an altered form?

I am of opinion that it is correct. The Act of Anne as originally passed dealt by sec. 1 with securities and instruments given in payment of or as securities for gaming debts. The remaining eight sections related to other matters connected with gaming. The Act of William, besides one consequential enactment, dealt only with sec. 1 of that Act, and with earlier Acts, referring to securities and instruments. Its enactments range themselves under three heads:—

1. As to the validity of notes, bills or mortgages.

2. By sec. 2 a consequential provision allowing recovery back, from a person to whom such an instrument was originally given, any money which the party by whom it was given was forced to pay to an indorsee, holder or assignee.

3. Repeal of the enuring provisions of sec. 1 of Anne's Act.

The rest of the Act of Anne was unaltered. That is to say, besides its following 8 sections, all the provisions of sec. 1 making bonds, judgments and "other securities or conveyances" utterly void remained untouched. Now with regard to the first of the altering provisions, namely, as to the validity of notes, bills or mortgages, the Statute says that so much of the Act of Anne as enacts that these instruments should be "absolutely void" shall be repealed. So far, that eliminates the words "utterly void, frustrate and of none effect to all intents and purposes whatsoever," and leaves the rest of that part of sec. 1 of the Act of Anne standing, but with a gap and without a sanction.

Then the Act of William declares, that nevertheless every such note, &c., shall be *deemed* to be executed for an illegal consideration, "*and the said several Acts shall have the same force and effect*" as they would respectively have had if instead of enacting as to notes, bills and mortgages "absolutely void" they had provided "illegal consideration." This fills in the gap, but the appellants give no effect to these words, and contend that the said several Acts shall have *no* force or effect. Of course, the Imperial legislature might have framed its will in any way it pleased, and so far as effect is concerned, the mode is immaterial. It might have repealed the provisions of Anne, and simply made

a new clear substantive enactment without reference to the former Act, treating it as forever dead and gone. But in its plenary choice of methods it selected the retention of the Act of Anne as part of the code, merely altering one of its sections, and treating the Act of William as an Act amending the earlier one, so that if sec. 1 of Anne's Act were written out after the Act of William it would appear without the words "utterly frustrate," &c., but with the substituted words "deemed and taken to have been given, &c., for an illegal consideration," and the enuring part would have disappeared. Phrasing it somewhat differently, a Court thenceforth construing the Act of Anne as to notes, bills and mortgages would construe sec. 1 in conformity with the directions given in the Act of William. And in construing the subsequent language of the same legislature in 1845, we have to recollect that this was the method recognized as employed.

Finally, by sec. 4 of the Act of William it is provided that "this Act may be *altered* or *repealed* by any other Act during this present session of Parliament," a distinction therefore found *ex facie*, between the two words.

On the construction of the legislation itself, and without the aid of any English judicial interpretation, it seems plain to me that Parliament in repealing one set of words, and substituting another, and declaring the former Act to be in "force," intended the Courts to consider it in force.

But we have in addition very strong judicial concurrence in that view, in cases which I have found since the argument. In *Moulis* v. *Owen* (1) an action by the payee against the drawer of a cheque given in Algiers for what I may call a gaming consideration was held not maintainable. Lord *Collins* (then Master of the Rolls) said (2):—"If the Statute of Anne was an answer to a claim on the bill in the time of Lord *Mansfield*, it is certainly equally so now, since all that part of the Statute has been repealed which might have been relied upon as limiting its operation exclusively to transactions taking place in England. Sec. 15 of 8 & 9 Vict. c. 109 repeals the Act of 16 Car. 2, c. 7, to which the Statute of Anne was said to refer. It also repeals so much of 9 Anne, c. 14, as was not altered by 5 & 6 Will. 4, c. 41."

(1) (1907) 1 K.B., 746.

(2) (1907) 1 K.B., 746, at 752.

H. C. OF A. 1910.

FISH v. STANTON.

Isaacs J.

But there is another material circumstance. On page 751 Lord *Collins* quotes approvingly from the judgment of *Rolfe* B., in *Applegarth* v. *Colley* (1), practically to the same effect. The additional importance of the earlier case is that it was decided in 1842, that is eight years before the New South Wales Statute. Baron *Rolfe's* words were :—"We assume, therefore, with the defendant, that the Statute of Anne, in connection with the 5 & 6 Will. IV., c. 41, must be taken to avoid all contracts for the payment of money won at play. But then the question arises, is the contract which the plaintiff here is seeking to enforce a contract for the payment of money lost at play, within the true intent and meaning of the Statute of Anne ? We think it is not. One great object of the Statutes of Charles II. and Anne (both of which must be construed together) was to prevent gaming on credit, and to confine parties who were playing for money to such sums as they should pay down at the time of the play." And again :—"If then the plaintiff is not within the Statute of Charles II. or the first section of the Statute of Anne, is he prevented from recovering, &c."

These judicial expressions therefore show that not only is the expression accurate that the Act of Anne was still in force, but it was so held to be by authoritative decision when the New South Wales legislature proceeded to adopt the provisions of the English Act of Victoria. In these circumstances, the Act 14 Vict. No. 9 was passed, and by sec. 8 made precisely similar provisions to those of sec. 19 of the English Act of Victoria. That is to say, it enacted that all wagering contracts should be null and void, and so on. But it is most material to observe that in adopting these provisions, it did so by direct positive enactment, independently, and as if the words were entirely its own, and without reference to the terms of the English Statute.

When however in sec. 17 it proceeded to adopt sec. 15 of 8 & 9 Vict. c. 109 it pursued a very different course. It recited the fact that that Act had been passed, so as to identify it, though some of its provisions had already been copied ; further recited the desirability of *adopting* certain of *its provisions* ; and then declared and enacted, not a direct repeal of the Act of Anne, but

(1) 10 M. & W., 723, at p. 732.

that so much of the Act of Victoria "as is hereinafter specially set forth" (1) shall be and is hereby declared to be *in force* in the Colony of New South Wales, and (2) "shall be *applied* so far as the same can be applied in the administration of justice therein that is to say." I stop there for a moment to discuss the meaning of those two expressions "in force," and "applied." They are quite distinct. The first, declaring the provisions of the English Act to be in force, makes them law here; the second, enacting how they shall be applied, does not add to or detract from their validity or their comprehensiveness, but is a direction to the Courts to apply them as far as they can be applied. According to *Whicker* v. *Hume* (1), that means as far as they can be reasonably applied. *Jex* v. *McKinney* (2), approved of that interpretation. The words in question are *verbatim* those in the Act of 9 Geo. IV. c. 83, and their meaning in one Act is obviously their meaning in the other. Putting it shortly, the legislature first declared the provisions to be law, and then added a direction that, in view of the fact that they were not New South Wales but English provisions, they were not to be regarded as intended to be applied at all costs and in spite of any existing circumstances whatever in the Colony, but only so far as those circumstances reasonably permitted of such application. Of course that would be an absurd provision if the subsequently indicated words were to be regarded as original independent legislation.

Then having declared the effect to be given to the selected portion of the English Act, and having instructed the Courts how to apply it, sec. 17 proceeds to identify that portion, which it does by extracting it bodily from the Imperial Statute.

The enactment of sec. 17 is therefore not a *corresponding* enactment like sec. 8, but it is the *identical* enactment with all its true signification, nothing more and nothing less, just as if the Imperial Parliament had declared that sec. 15 of the English Act should apply to Great Britain and New South Wales alike or as if it had been prior in date to 9 Geo. IV. c. 83, and become applicable under sec. 24 which is perhaps the true analogy. In that case no interpretation could be given to it in one country wider than that in the other. Its application, on the other hand,

(1) 1 DeG. M. & G., 506, at p. 511. (2) 14 App. Cas., 77.

H. C. OF A. 1910.

FISH v. STANTON.

Isaacs J.

might be more limited because of differing circumstances. But that is immaterial to its import. It is only to be applied so far as is not repugnant to circumstances.

It was urged by Mr. *Mitchell* in a very good argument that the legislature must have meant to assimilate the colonial law to the English law, necessarily going so far as to argue that by inference the whole of the Act of William was incorporated and is still in force. But I cannot see how that is tenable. It is contrary to all judicial decisions in New South Wales, a point adverted to by the learned Chief Justice of New South Wales in the present case. No express words can be found to support it. The specific reference to the Act of William is for another purpose, and silence as to incorporation is thus doubly significant. No one would contend that the self-same words in the English Act introduce the Act of William into English law, and it is hard to maintain the position that they mean anything different here. Besides there is another defect, and a fatal one, in this branch of his argument. It treats sec. 17 of the Act of 1850 as having, *qua* the Act of William, a purely affirmative force, that is, enacting as independent provisions for New South Wales all that the Act of William is argued to do as an independent enactment, including its second section. But if that is correct, it must be also remembered that sec. 17 is itself repealed by the Act of 1902 No. 18, First Schedule, and whatever affirmative introductory force it had has disappeared, because the repeal of an Act establishing a statutory law, unlike a law declaring a repeal, does not on its own repeal leave the law unaltered. So far then as the argument depends on the Act of William being now part of the law of New South Wales I hold it unmaintainable. If the appellants are right they must be right notwithstanding the fact that the New South Wales law is different from that of England in the way pointed out by *Cullen* C.J. in the judgment under appeal, and notwithstanding also the fact that the maker of a note or bill for illegal consideration is unprotected here by sec. 2 of the Act of William, which I take to be a just and necessary part of its scheme.

Then alternatively he contended that, as the Act of Anne was at the time of the passing of the Act of 1850 unaltered in New South Wales by the Act of William and any other Acts, the

words in sec. 17 "not altered" must mean "not altered in New South Wales"; as if the whole phrasing were an ordinary section penned as an original enactment. But apart from the violence done to the primary construction of the section, it would offend against other considerations of a most striking character. In the first place it would assume the New South Wales legislature to describe the part of the Act of Anne to be operated on as the part not altered by the Act of William, that is, an Act of which the date alone was sufficient to inform the legislature it was an Act impossible to alter any Act in force in New South Wales; and besides being an impossible standard, it would be a most complicated, cumbersome and doubtful method of reaching a result, obtainable in two lines, by simply repealing the Acts referred to.

Naturally Mr. *Mitchell* relied on *Woolf* v. *Towns* (1), a decision in 1878, by which it was held that the Act of Anne was entirely repealed. *Sir James Martin* C.J. treated sec. 17 of the New South Wales Act as a section "substantially the same" as the English section, instead of being *pro tanto* identical. He says the Imperial legislature intended to get rid of the Act of Anne altogether and erase it from the Statute book. That, with great deference, is not accurate, as I have already shown. The Imperial legislature intended to erase the unaltered part, but to retain the part that was altered. His Honor confessed it was a nice question, but what determined his mind was this:—"We ought to carry out what must have been the intention of the legislature"; and he adds "I read the words 'so much as is not repealed' as equivalent to the words 'so much as is now in force.'" Again with much respect, the learned Judge fell into error. The words are not "so much as is not *repealed*" but "so much as is not *altered*." "Repealed" is widely different from "altered." The former relates to what has been eliminated; the latter to what is left though in an altered state. If *Sir James Martin* had kept to the actual words "so much as is not altered," he could never have said it was equal to "so much as is now in force," because both the "altered" and the "unaltered" portions were equally in force.

Hargrave J. had great doubt and gave no reason. *Faucett* J.

(1) 1 S.C.R. N.S., 242, at p. 246.

H. C. OF A. 1911.

FISH v. STANTON.

Isaacs J.

confessed to great difficulty, and was simply not prepared to dissent. He however yielded, thinking that the legislature intended to assimilate the colonial law to the English law, and therefore thinking, mistakenly, that the whole of the Act of William was in force. That is the very opposite to the line of reasoning taken by the learned Chief Justice who assumes the legislature only intended to repeal the Act of Anne: *Woolf* v. *Towns* (1) is not therefore from any point of view a satisfactory case. In 1900 *Edwards* v. *Hirschman* (2), after full consideration of the law, overruled *Woolf* v. *Towns* (1), on grounds substantially those I have stated, and the quotation made by *Darley* C.J. from *Salomon* v. *Salomon* (3), is very relevant. The later case gains additional interest from the fact that the learned Chief Justice was the counsel who successfully contended the opposite way in the earlier case, but who on maturer consideration felt convinced the decision was wrong.

The Supreme Court in the present case did not formally re-open the question, but some observations were made indicating difficulties in the way of adopting the plaintiff's view, and whatever tendency is discernible is opposed to that view.

When reduced to its simplest form, the foundation of the appellants' case is the conjecture that the legislature must have intended more than it actually said.

In addition to the quotation made by *Darley* C.J. there are four brief references which are to the point. The first is *Barton* v. *Muir* (4), where *Sir John Stuart* speaking for the Judicial Committee said:—"It is dangerous in the construction of a Statute to proceed upon conjecture." The second is *Rothschild & Sons* v. *Commissioners of Inland Revenue* (5), where *Mathew* J. said: "Our limited function is not to say what the legislature meant, but to ascertain what the legislature has said that it meant," the next is *Durga* v. *Jawakir* (6), where Lord *Macnaghten* for the Privy Council said:—"It is always dangerous to paraphrase an enactment, and not the less so if the enactment is perhaps not altogether happily expressed," and the last is a passage in the

(1) 1 S.C.R. N.S., 242.
(2) 21 N.S.W.L.R., 116.
(3) (1897) A.C., 22, at p. 38.
(4) L.R. 6 P.C., 134, at p. 144.
(5) (1894) 2 Q.B., 142, at p. 145.
(6) 18 Calc., 23.

case cited by Mr. *Mitchell*, the *Mayor of Portsmouth* v. *Smith* (1), in which Lord *Blackburn* stated:—"Where a single section in an Act of Parliament is introduced into another Act, I think it must be read in the sense which it bore in the original Act from which it is taken."

I regret that my consideration of this matter leads me to a conclusion different from that reached by my learned brothers.

Appeal allowed.

Solicitors, for the appellants, *Sydney M. Quinlan* and *Lee*.

Solicitor, for the respondent, *R. J. O'Halloran*, Tamworth, by *R. H. Levien*.

C. E. W.

[HIGH COURT OF AUSTRALIA.]

WILLIAM HENRY BOXALL . . . APPELLANT;

AND

THE HON. RICHARD MEARES SLY, CHARLES EDWARD WEBB, EDWARD JOHNSTON SIEVERS, THE HON. SAMUEL WILKINSON MOORE (SECRETARY FOR LANDS) AND THE HON. CHARLES GREGORY WADE (ATTORNEY-GENERAL FOR NEW SOUTH WALES) . . . . . RESPONDENTS;

AND

IVIE JAMES SLOAN . . . . . APPELLANT;

AND

SAME . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Crown Lands—Closer Settlement (Amendment) Act 1907 (*N.S.W.*) (*No.* 12), *secs.* 4, 5*

Purchase and resumption of land.

4. (1) Where an advisory board reports that any land is suitable to be

*Secs. 4 and 5 of the *Closer Settlement (Amendment) Act* 1907 (No. 12) are as follows:—

(1) 10 App. Cas., 364, at p. 371.