

"When a witness claims his privilege, a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused. If the prosecution knows when it puts the question that he will claim the privilege, it is charged with notice of the probable effect of his refusal upon the jury's mind."<sup>41</sup>

Considering all the circumstances, the four questions put to Mr. Kahn by the prosecutor constituted the only evidence which connected Namet with persons actually taking bets. That an inference was naturally drawn by the jury as to what the answers would have been is obvious from the questions and from the manner in which the incident was staged. Therefore, the questions were extremely prejudicial and should have entitled Namet to a new trial.

Of the three positions taken by the courts in this country, the Texas rule presents the best reasoning. The Texas court will reverse when bad faith is found even though a curative instruction is given.

Viewed objectively, an instruction telling the jury to disregard the witness' refusal to answer does little more than to call their attention to it again. There is an odium in the public mind for the Fifth Amendment. This odium quite naturally reflects on the defendant when the witness refuses to testify. A curative instruction will not cleanse the result. To state that it will is naive. Texas, realizing this, has with pragmatic zeal fostered the most liberal rule in this area. If the appellate court finds the prejudicial error was sufficiently aggravated, an instruction will not suffice. *This should be the rule throughout the country.*

G. Dennis Adams

**CONFLICT OF LAWS — GAMBLING CONTRACT, VALID WHERE MADE, HELD UNENFORCEABLE BY FORUM PUBLIC POLICY. *Intercontinental Hotels Corporation v. Golden* (N.Y. 1963).**

Golden borrowed \$12,000 from a Puerto Rican hotel to gamble at the hotel's dice tables. Under Puerto Rican law such gambling is legal.<sup>1</sup> Having lost the money, he returned to New York where the hotel sought recovery. Held: A gambling contract, although valid where made, was unenforceable in New York because of a constitutional prohibition against gambling that represented a deep-rooted

<sup>41</sup> 262 F. 2d at 537.

<sup>1</sup> LAWS, PUERTO RICO, ANN., TIT. 15, ch. 5, § 71-84.

public policy. *Intercontinental Hotels Corporation v. Golden*, 18 App. Div. 2d 45, 238 N.Y.S. 2d 33 (App. Div. 1963).

A fundamental concept of international comity has led to the general conflict of laws rule that a contract valid where made is valid everywhere.<sup>2</sup> The rule is subject to a well-settled exception that a valid foreign contract will not be enforced if contrary to the forum's public policy.<sup>3</sup> The courts of the United States are divided on the question of whether gambling is against public policy.<sup>4</sup> Most states with statutes prohibiting gambling will interpret their statutes as expressive of a distinct public policy against gambling.<sup>5</sup> The basic principle on which gambling contracts are held unenforceable is that courts should not lend their aid to illegal transactions.<sup>6</sup>

*Gambling* or *gaming* are ordinarily synonymous terms that may be generally defined as the staking of money on a chance.<sup>7</sup> California has long denied recovery for money lost at gaming.<sup>8</sup> However, such a denial of recovery has been held not applicable to a wife's action to recover funds paid by a husband out of the community property.<sup>9</sup> Gambling is not a criminal offense in California unless so declared by statute,<sup>10</sup> but Civil Code section 1667 has been interpreted as expressive of a public policy against gambling.<sup>11</sup> Civil Code section 1667 prohibits those acts contrary to the policy of express law, and otherwise contrary to good morals. Penal Code section 330 determines the types of gambling which are punishable as misdemeanors.<sup>12</sup> The California Constitution provides for the express prohibition of lotteries and bucketing,<sup>13</sup> but sanctions horse racing and betting, subject to state regulation.<sup>14</sup>

California will enforce valid foreign contracts on the basis of comity in accordance with the general rule<sup>15</sup> if the foreign contract

<sup>2</sup> Annot., 173 A.L.R. 695 (1948); 11 CAL. JUR. 2D *Conflict of Laws* § 54 (1953). *Fenton v. Edwards*, 126 Cal. 43, 58 Pac. 320 (1899); *Mercantile Acceptance Co. v. Frank*, 203 Cal. 483, 265 Pac. 190 (1928).

<sup>3</sup> RESTATEMENT, CONFLICT OF LAWS § 612 (1934).

<sup>4</sup> Annot., 173 A.L.R. at 696.

<sup>5</sup> 24 AM. JUR. *Gaming & Prize Contests* § 61 (1939).

<sup>6</sup> *Estate of Henshaw*, 68 Cal. App. 2d 627, 157 P. 2d 390 (1945).

<sup>7</sup> 23 CAL. JUR. 2D *Gaming & Prize Contests* § 1 (1955).

<sup>8</sup> *Bryant v. Mead*, 1 Cal. 441 (1851); *Carrier v. Brannan*, 3 Cal. 328 (1853); *Lavick v. Nitzberg*, 83 Cal. App. 2d 381, 188 P. 2d 758 (1948).

<sup>9</sup> *Novo v. Hotel Del Rio*, 141 Cal. App. 2d 304, 295 P. 2d 576 (1956).

<sup>10</sup> 23 CAL. JUR. 2D *Gaming & Prize Contests* § 2 (1955).

<sup>11</sup> *Nitzberg*, 188 P. 2d at 759.

<sup>12</sup> *Ibid.*

<sup>13</sup> CAL. CONST. ART. IV, § 26. *Bucketing* is the receipt of orders to purchase and sell stock without the intention of executing orders and without the execution of orders. *Black, Law Dictionary* (4th ed. 1951).

<sup>14</sup> CAL. CONST. ART. IV, § 25(a).

<sup>15</sup> *Blythe v. Ayres*, 96 Cal. 532, 31 Pac. 915 (1892); *Estate of Henning*, 128 Cal. 214, 60 Pac. 762 (1900); 11 CAL. JUR. 2D CONFLICT OF LAWS § 7 (1953).

is not contrary to public policy, to abstract justice, to pure morals, or injurious to public welfare.<sup>16</sup> The determination of how far the state will go in extending recognition to the foreign contract is a right of the judiciary in the absence of legislation.<sup>17</sup> The problem for the court then becomes one of enforcing the foreign contract for comity reasons, or refusing enforcement because of a strong forum public policy.

While California's highest court has not ruled on it, a similar issue was before the California District Court of Appeal in *Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc.*<sup>18</sup> In *Nevcal* a contract was made in California for the sale of a Nevada gambling casino. A provision in the contract required the buyer to obtain the necessary Nevada gambling license, with the buyer being entitled to the profits of the casino during the interim. The buyer sought an accounting for the profits when the license was granted. The trial court held that this was a gambling contract opposed to the public policy of California. On appeal the issue was stated as follows: ". . . is the public policy so definite and strong that it will not extend comity to a valid contract thus tainted with the California concept of iniquity, though performed in Nevada?"<sup>19</sup> In reversing the lower court, it was held that the contract called for the sale of land in another jurisdiction, where the place of performance determined the validity of the contract. The center of gravity or grouping of contacts theory would also have upheld the contract.<sup>20</sup> The court added as dictum, "In these modern days, Californians cannot afford to be too pious regarding gambling."<sup>21</sup>

Both the trial and appellate courts in the *Golden* case were in accord as to the forum's obligation to recognize and enforce valid foreign contracts, unless contrary to a strong public policy. In the New York Constitution gambling is expressly prohibited, with two exceptions.<sup>22</sup> The Appellate Division majority viewed the two exceptions as an affirmation by the people that all other gambling is contrary to the will of the public. The pari-mutuel betting exception was justified as a government revenue measure, while the legaliz-

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<sup>16</sup> *Thome v. Macken*, 58 Cal. App. 2d 76, 136 P. 2d 116 (1943); *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532, *affirming* 1 Cal. 2d 250, 34 P. 2d 716 (1934).

<sup>17</sup> *In the matter of Archy*, 9 Cal. 147 (1858).

<sup>18</sup> 194 Cal. App. 2d 177, 14 Cal. Rptr. 805 (1961).

<sup>19</sup> *Id.* 14 Cal. Rptr. at 806.

<sup>20</sup> *Auten v. Auten*, 308 N.Y. 155, 124 N.E. 2d 99 (1954); HARPER, *Policy Bases of the Conflict of Laws: Reflections on Rereading Professor Lorenzen's Essays*, 56 YALE L. J. 1155 (1947).

<sup>21</sup> *Nevcal v. Cal-Neva*, 14 Cal. Rptr. at 807.

<sup>22</sup> NEW YORK CONST. ART. 1, § 9(1) (1894), 1939 Amend. legalizes pari-mutuel betting; 1957 Amend. legalizes bingo.

ing of bingo was deemed an aid to charitable institutions. The case law was divided on the subject.<sup>23</sup> The dissent expressed the view that gambling *per se*, not being illegal or immoral at common law, is not so heinous as to be against public policy. The constitutional provisions were said to be guidelines of conduct for New York citizens in New York.<sup>24</sup>

Public policy as a reason for refusing to enforce valid foreign contracts has been criticized by legal writers.<sup>25</sup> On the other hand two landmark conflict of laws cases have upheld a restrictive *strong* public policy.<sup>26</sup> California and New York are similar in the following respects: (1) the highest court of each state has not spoken, (2) both states will enforce valid foreign contracts, (3) both states reserve the right to refuse to enforce valid foreign contracts where a breach of *strong* forum public policy is involved.

California, in the absence of constitutional prohibition, is said to be committed to the doctrine that public policy concerning gambling is a matter for the legislature rather than the courts.<sup>27</sup> This view appears unsound. A court in determining a state's public policy must examine the constitution, statutes, and case law.<sup>28</sup> Since 1851<sup>29</sup> the California courts have consistently denied enforcement to gambling contracts as being *contra bonos mores*.<sup>30</sup>

In New York *all* gambling, except as otherwise provided, is constitutionally prohibited. Because of this direct prohibition it appears the decision in *Intercontinental Hotels* is analytically correct. However, implicit in the result is the proposition that the court of today must have the right to determine public policy by a flexible standard that varies with changing conditions.

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<sup>23</sup> *Bernstein v. Fuerth*, 132 Misc. 343, 229 N.Y.Supp. 791 (1928); *Tropicales, S.A. v. Milora*, 7 Misc. 2d 281, 156 N.Y.S. 2d 942 (Sup. Ct. 1956); *Tropicales, S.A. v. Drinkhouse*, 15 Misc. 2d 425, 183 N.Y.S. 2d 679 (Sup. Ct. 1959); *Contra, Nielsen v. Donnelly*, 110 Misc. 266, 181 N.Y.Supp. 509 (1920).

<sup>24</sup> 238 N.Y.S. 2d at 37.

<sup>25</sup> GOODRICH, *CONFLICT OF LAWS* 305 (3rd ed. 1949); PAULSEN & SOVERN, "Public Policy" in *the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

<sup>26</sup> *Loucks v. Standard Oil*, 224 N.Y. 99, 120 N.E. 198 (1918). *Ciampittello v. Campitello*, 134 Conn. 51, 54 A. 2d 669 (1947). The Connecticut legislature having repeatedly refused to legalize gambling, the plaintiff's claim to one-half of certain proceeds won at a horse race in Rhode Island (where betting was legal) was refused enforcement. The Connecticut court acknowledged that only a strong and deep-rooted public policy might be used to deny enforcement of a valid foreign contract.

<sup>27</sup> *People v. Lim*, 18 Cal. 2d 872, 118 P. 2d 472 (1941).

<sup>28</sup> GOODRICH, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26 (1938).

<sup>29</sup> *Bryant v. Mead*, 1 Cal. 441.

<sup>30</sup> *Union Collection Co. v. Buckman*, 150 Cal. 159, 88 Pac. 708 (1907); *Hamilton v. Abadjian*, 30 Cal. 2d 49, 179 P. 2d 804 (1947); *Poorman v. Mills & Co.*, 39 Cal. 345 (1870); *Hankins v. Ottinger*, 115 Cal. 454, 47 Pac. 254 (1896).