GAMING WINNINGS, DEBTS OF HONOUR, AND ACTS OF FRIENDSHIP

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1. Every year considerable sums of money are spent in Sweden on the state lottery, on football pools, and on totalizator betting in connection with trotting and horseracing. All three of these forms of gaming are subject to certain provisions of administrative law, embodied in the Lotteries Ordinance, 1939; they may be carried on only with the special permission of the King in Council. Permits for totalizator betting have been granted to about thirty-five racecourses, which operate under the control of the central confederations for trotting and horseracing. Bookmaking is not allowed in Sweden. During the last year of operation, there was a turnover of over 320 million Swedish kronor for the Swedish state lottery and over 250 million kronor for the state-owned company for football pools, AB Tipstjänst. The turnover on totalizator betting has risen very rapidly. It reached more than 60 million kronor in 1950, around 325 million kronor in 1960, and about 530 million kronor in 1965. It is not surprising that activities of such scope should give rise to disputes between organizers and bettors as well as among syndicates of bettors and between bettors and people who place bets on their behalf. However, statutory provisions for deciding such disputes are lacking.

In October 1962, an hotel porter of Mjölby called Knutsson entrusted 700 kronor to an acquaintance by the name of Wilzén, a clerk, who was to visit the trotting races at Solvalla, outside Stockholm, the same afternoon. According to written instructions given him by Knutsson, Wilzén was to place, on his behalf, 300 kronor on the horse Nouvel Amour in the fifth race and 400 kronor on Count Abbey in the ninth race. Both horses won their races, but Wilzén had not carried out his commission to place the bets.

Knutsson brought an action, claiming as damages the winnings he had thus had to forgo. He had already recovered the original stakes. In the case, which was carried to the Swedish Supreme Court (*Wilzén* v. *Knutsson,* 1964 N.J.A. 80), Knutsson's action

was entirely successful in the court of first instance and the Court of Appeal, while the Supreme Court found Wilzén, on the ground of negligence, liable for damages in respect of the ninth race, but not of the fifth. In regard to the ninth race, the Supreme Court approved the judgment of the court of first instance, which was to the effect that Wilzén had betted to such an extent both with Knutsson's money and with his own that he could not bet on the ninth race. The amount of the lost winnings and Knutsson's liability for damages amounted to not quite 2,500 kronor. In the matter of the fifth race, the Supreme Court decided differently. Wilzén had stated that he had watched the parade and trial starts of the horses before that race and had not been able to reach the pay desks before they closed as there had been long queues and general crowding in the betting hall. The Supreme Court held that, having regard to the stated character and significance of Wilzén's commission, he could not be considered to have acted negligently. Immediately before this the Supreme Court had pointed out that Wilzén had undertaken the commission without asking for any reward and as an act of friendship while visiting the trotting race to bet on his own account, and that—apart from the written instructions—Wilzén had not received any information from Knutsson about the way in which the commission should be carried out.

Thus the courts, without difference of opinion, decided the dispute according to the rules concerning commissions and agency, and considered the lost winnings to be an economic loss subject to compensation. The same outlook had been expressed earlier in a case of 1959 in which, however, the Supreme Court (on procedural grounds) did not grant leave for trial (*Bergman et al.* v. *Åsberg,* 1959 N.J.A. C 770). In this case, the principal's claim for recovery of the lost winnings, nearly 3,000 kronor, was not sustained, as negligence on the part of the agent had not been proved. It was a fact of some importance in that case too that the agent had first watched the parade and trial starts and then did not have enough time to attend to placing forty kronor on a certain horse.

No closer analysis will be attempted here of the question of how an agent's duties should be more precisely demarcated in respect of his right to abandon his commission and with regard to the care that he should show in carrying out a commission to spot winners for the benefit of another or to bet with the totalizator. Certain general, albeit somewhat archaic, stipulations are

given in Chapter 18 of the Code on Commerce embodied in the Swedish General Code of Laws, 1734.[1] In the case from 1964, however, the Supreme Court set up demands for care on the part of the agent which are somewhat less severe than these provisions, for the reason, *inter alia,* that the agent had undertaken the commission out of friendship. On the other hand, it is hardly clear to what degree the mere circumstance that the case concerned a commission in respect of gaming and not a mission of a more serious nature from a moral standpoint—for example, to pay rent due—should in itself be accorded importance. Nor is it possible to determine whether the same liability for damages could have been imposed upon Wilzén if he had not even received the stake money from Knutsson, but had been obliging enough not only to perform the commission but also to advance the stakes on Knutsson's behalf. This question is a natural one to pose, although the courts had no reason to express an opinion on it.

The somewhat relaxed standard by which the agent's negligence was judged is at any rate a brake on the liability for damages of the agent. A closely related and equally interesting question is how the courts would have decided if the lost winnings had reached a larger sum, for example, a couple of hundred thousand kronor for success in the "V 5" (correct results in five selected races) on the totalizator. The doctrine, known from the law of torts, of "adequate causation" (remoteness of damage)—which has its origin in Germany but has also attained a strong position in the Scandinavian countries[2]—can be used to justify any answer, whatever the pertinent question is considered to be: whether the damage was a foreseeable consequence of the negligence, or whether the winnings were typical or calculable in advance, or some other similar question. On the one hand, it could possibly be maintained that in the long run an average player must lose more than he wins, and that therefore *no* winnings should really be regarded as typical or calculable; this extreme standpoint was clearly rejected in the 1964 case. On the other hand, there may be some reason to state that every profit is a natural result of the game and that every lost winning was therefore really typical or "had lain in harm's way", when the agent did not place the bet.

[1] In regard to the liability for damages, compare secs. 1, 3, and 4, and the commentaries thereon in Hasselrot, *Några spörsmål ang. sysslomannaskap m. m.,* Malmö 1927, pp. 8 ff.; Ekeberg, Benckert & Nial, *Obligationsrättens speciella del* (mimeographed), 11th ed. 1961, pp. 302 ff.; and Tiberg, *Mellanmansrätt,* Stockholm 1965, pp. 24 ff.

[2] See A. Vinding Kruse, *Scandinavian Studies in Law* 1965, pp. 95 ff.

A middle solution would be to grant compensation only for such lost winnings as can be regarded as normal.[3] It remains, however, difficult to decide what is to be regarded as a normal profit.

2. As already hinted, I shall leave open the question of how the agent's liability for failure to carry out an act of friendship of the type under discussion can be more completely delineated when one takes the starting points that the courts took in the two cases at issue. Instead, I propose to discuss the general private-law situation in regard to gaming and betting between private individuals. Later, however, I shall return to cases of commission to act for another's benefit at establishments licensed according to the lottery regulations in order to determine whether the rules concerning gaming and betting should not be accorded some importance in these situations. On the basis of that discussion, it will be asked whether the outcome of the 1964 case should not be regarded as unfortunate and whether Knutsson's claim against Wilzén should not have been rejected entirely. If the ensuing analysis of this special case can claim to possess some general interest, this is likely to be due to the method itself, according to which conclusions drawn, by analogy, from one set of provisions are applied to a case not covered by enactments, with emphasis placed on the purposes that rules of law can be considered to fulfil.

A simple argument, which at first seems attractive, can certainly be cited for the agent's liability for a lost gain, namely that agreements concerning totalizator gaming, as one of the specially sanctioned activities, involve the stipulation that winnings from the totalizator become collectible, in contrast to obligations based on gaming and betting between private persons. It would then seem that commissions to act should also be regarded as valid, and that a gain that was never realized owing to the agent's negligence should be considered as a recoverable loss of the person who gave the commission. It can be mentioned that as early as 1918 the German Reichsgericht possibly reasoned in this manner in a case wherein an agent was sued, exactly as with Wilzén, for damages when he had neglected to bet on the totalizator for the benefit of another.[4] In German law this solution comes naturally. Sec. 762 of B.G.B. provides that no obligation arises through gaming or betting, but, on the other hand, sec. 763 of B.G.B.

[3] Compare Ussing, *Obligationsretten, Alm. del,* 4th ed. Copenhagen 1961, p. 145, with references.

[4] 93 Entscheidungen des Reichsgerichts in Zivilsachen 348.

prescribes that agreements concerning lotteries are binding where the lottery has state approval. In the case referred to, the *Reichsgericht* declared that totalizator gaming, as being permitted according to special legislation, should be judged on the basis of the principles set out in sec. 763, and therefore the commission to bet was declared to be binding.[5] The Swedish courts did not render any account of how they viewed this matter in the two cases of 1959 and 1964. In any event, however, it would seem possible to demonstrate that the argument from the allowability of totalizator gaming—as with the allowability of lotteries and football pools—does not greatly illuminate the question whether lost winnings should be regarded as a loss capable of compensation.

Before we discuss the rules on gaming and betting in general, some emphasis should be put on a statement which has already been intimated, namely that situations similar to those arising from totalizator betting can occur in regard to other forms of gaming subject to the lotteries legislation. In two cases from 1940 and 1947 (*Ericksson* v. *Jädraås kooperativa handelsförening,* 1940 N.J.A. 442; and *Hofors Folkets-husförening* v. *Lundberg,* 1947 N.J.A. 13), liability was imposed upon the representative of AB Tipstjänst for damages to the clients of the pools service because football-pool coupons received had been lost. According to the rules of Tipstjänst, only such coupons as have been received by that corporation are taken into consideration, and the corporation is not responsible for any loss that its representatives may cause the client through faulty administration of coupons. In both of the cases mentioned, the problem was whether the counterfoil that the client retains as a receipt for his wager should be considered as sufficient evidence of how he had filled in the lost coupon. The coupon was alleged to have been completed in such a way that it would have returned winnings of around 1,700 kronor in the former case and 3,400 kronor in the latter. It had not been suggested in these cases that the lost winnings should not constitute a loss subject to recovery. Nor was there any question of judging by a relaxed standard the care given to the football-pool coupons by the representative. The courts concisely asserted that the representative was responsible for the coupon sections received but not sent to Tipstjänst. The formulation even indi-

[5] No complete examination of the claim for compensation by the principal was, however, undertaken, since the decision of the court only involved a reversal of the judgment of the lower courts, wherein the complaint had been rejected.

cates a responsibility entirely independent of negligence on the part of the representative. In all probability one should, however, accept the representative's freedom from liability, at least where he can exculpate himself. Such a result is in harmony with the principles of the general law of obligations.[6]

In connection with the two cases just mentioned, a Norwegian and a Danish case concerning the same question are of interest.

> In the case *Jørgen and Hjørdis Holen* v. *Hagelund,* 1955 N.Rt. 1132, liability for damages was imposed upon an agent for the Norwegian football pools corporation for lost winnings of approximately 3,400 Norwegian kroner. In the case, the question of whether there was a link of "adequate causation" between the injury and the agent's negligence was expressly dealt with. The first-voting judge in the Norwegian Supreme Court, with the concurrence of the other members of the Court, gave an affirmative answer, pointing out that the agent's actions were part of a business for which he received remuneration and which was based on the fact that private persons pay money for the possibility that the improbable will come true. At the same time, it was explained that there was no reason to go into the question of the degree to which lost winnings can, on the ground of their size, fall outside the loss subject to compensation.[7]
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> A Danish decision (*Kreutz* v. *Thowen,* 1964 U.f.R. 803) concerning lost winnings on football pools of around 6,000 Danish kroner produced a different result. The Danish Supreme Court found that it had certainly not been demonstrated that negligence on the part of the representative had *not* existed. The circumstance that the coupon had in some unknown manner been lost was considered insufficient by itself to lead to liability, having regard to the fact "that the defendant, for a modest compensation, had acted as a subordinate link between the pools clients and the football pools company, which had exempted itself from liability; the court also adduced the fact that the winnings can be very considerable". A minority of the court, however, wanted to impose liability upon the agent.[8]

Against the background of the viewpoints that will be applied in the following analysis regarding gaming and betting, the ques-

[6] See Ussing, *op. cit.,* pp. 112 f., and Rodhe, *Obligationsrätt,* Stockholm 1956, § 20 at and including note 28.

[7] See, in regard to this decision, Gaarder in *T.f.R.* 1956, pp. 173 f. and 469, as well as Kr. Andersen, *Erstatningsrett,* Oslo 1959, pp. 33 ff. and 85.

[8] The decision, which has also been reported in 1965 Nordisk Domssamling 366, has been commented upon by Judge Trolle in *U.f.R.* 1965 B, pp. 145 ff.; see also the same author in *T.f.R.* 1965, pp. 249 ff.

tion could be posed as to whether it is appropriate at all to impose on representatives of football pools companies liability for winnings which a player missed owing to the representative's proved or presumed fault. The result in the Danish decision just mentioned was indeed that the agent went free, although the Court apparently left open the question whether liability for damages could come into consideration in case of proved and serious carelessness. The result, however, was not justified by an analogy with the rules on the invalidity of claims based on games and bets. It seems necessary to give the reason why such an analogy is not put forward in what follows, although a similar analogy constitutes a main element in the discussion of the two cases on totalizator betting. Upon closer examination, there are essential differences between the case where two private individuals dispute between themselves concerning the negligence of the one in taking part in the football pools or betting with the totalizator for the benefit of the other, and the situation which arises when the complaint is directed against an agent of the football pools company. The agents carry on their activity as a source of income and for a reward, a state of affairs which indeed was specially pointed out in the Norwegian judgment mentioned. It is true that the commission for each single item is trifling. But it should be noted that normally an agent handles a large number of football-pool coupons every week, that the total reward may therefore be substantial, and that the post of representative of a football pools company certainly has a general economic value to a tobacconist or the proprietor of a similar shop, although this value is difficult to assess. Furthermore, reliance on agents is perhaps necessary if football-pool activities are to function.[9] To a certain degree, therefore, the agents' responsibility appears to be necessary to the safety of the pools clients. At all events, these principles, when taken together, make the possibility of liability for the agents, who have been selected by the football pools company, appear natural. A limitation of liability may, however, seem to be called for, provided the lost winnings were especially large. As men-

[9] Under the rules of the Swedish Tipstjänst, there exists a possibility, designed for clients living in localities without agents, to send in coupons direct to the company. In opposition to the liability of the agents, therefore, it could be alleged that a player who relies on an agent can only blame himself. One might guess, however, that the football pools would function badly if the 11,000 agents could not be relied upon. A question that cannot be dealt with here is that of the suitability of the existing system and of the Tipstjänst's disclaimer of liability for errors of representatives.

tioned earlier, however, the question of the limitation of the scope of responsibility will not be discussed further here.[1]

The identity of the cases now discussed with the totalizator cases is, on the other hand, complete where a private person who has undertaken to send in a football-pool coupon on behalf of another neglects to fulfil his obligation. These cases are, however, probably very rare, since the Swedish Tipstjänst has about 11,000 agents. A client has, therefore, a good chance to handle his participation himself. Matters are different in regard to totalizator betting in Sweden, where the number of agents for so-called advance betting is rather limited, at least until now.

3. In regard to gaming and betting in general, the contents of the unwritten rules of Swedish law are well known. A claim based on gaming or betting cannot be collected through recourse to the courts by the winning party, but once it has been paid the sum cannot be demanded back by the losing party. The fact that winnings from gaming cannot be collected lies behind the common saying "gaming debts are debts of honour".[2] These principles are valid in many countries and not infrequently are wholly or partly laid down in statutes, as is the case in German, French, Danish and Norwegian as well as in English law.[3]

A mere statement of the content of the rules obviously gives no basis for an analogy applicable to cases of commission to play for another's account with organizations licensed under the Lotteries Ordinance. It must first be ascertained what rational purposes may be invoked in favour of such an extension of the above-mentioned principle. Questions of gaming and betting have not been discussed at all in modern Swedish law. In an elementary textbook of private law (well known to every Swedish lawyer),

[1] It may be mentioned that at least incorporated associations that are representatives for the Tipstjänst can obtain insurance against liability for damages due to negligence with football-pool coupons. Only a limited number of agents appear, however, to have an insurance of this type. A corresponding insurance exists for newspaper companies that handle advance betting on "V-5" gaming. Compare Bengtsson in *Nordisk försäkringstidskrift* 1966, p. 25.

[2] According to *Svenska Akademiens Ordbok* (the Swedish Academy's Dictionary), vol. 11 A, column 618, the primary meaning is a "debt that cannot lawfully be demanded, but for the payment of which the debtor's sense of honour constitutes the only security". The expression is said, however, to mean also a "debt that must be paid if the debtor wants to preserve his honour or his self-respect".

[3] See sec. 762 *B.G.B.*; art. 1965 *Code civil; Danske Lov* (Danish Code of Laws, 1683), Book 5, chap. 14, sec. 55; sec. 12 in the Norwegian Act (1902) of Transitional Provisions in respect to the Penal Code, as well as sec. 18 in the English Gaming Act, 1845.

one encounters only the opinion that an agreement with no other purpose than pure adventure should not provide the basis for obligations.[4] Apart from that, Swedish legal writing would seem to contain no guiding statements on the *ratio* of the rules. Certain assumptions can, nevertheless, be gathered from the circumstance that gaming and betting are usually discussed in close connection with legal transactions that are in conflict with the law or good morals, and are therefore invalid,[5] or are straightforwardly presented as examples of legal transactions in conflict with good morals.[6]

The attitude just mentioned undeniably puts the common expression "gaming debts are debts of honour" in a somewhat peculiar light. That no gaming winnings can be enforced through legal means does not, however, necessarily imply that the judicial system regards all forms of gaming for money as immoral. One could also take a completely opposite view of the matter; this would be in better agreement with the above-mentioned popular saying. One would then maintain that gaming winnings that depend upon pure chance should not be covered by rules of law, but by rules of morality. Statements to that effect did in fact appear in the legislative material concerning the section cited from the German *Bürgerliches Gesetzbuch*.[7] Such statements, however, provide no basis whatsoever for the prevailing rules.

One can, however, obtain a basis from the alternative idea that gaming and betting are immoral activities which should be handled in the same way as a real *pactum turpe*. It is usually pointed out that it is, on the whole, beneath the dignity of courts to concern themselves with legal proceedings of such a character.[8] This does in fact imply an argument for the technical legal solution that the courts neither adjudge debts that are based upon

[4] Malmström, *Civilrätt*, 1962, p. 87.

[5] See Almén & Eklund, *Lagen om avtal m. m.*, 8th ed. Stockholm 1963, p. 102.

[6] See Marks von Würtemberg & Sterzel, *Lagen om skuldebrev*, 3rd ed. Stockholm 1953, p. 24. Compare also Undén, *Svensk sakrätt*, vol. I, *Lös egendom*, 4th ed. Lund 1961, p. 178.

[7] See Staudinger's *Kommentar zum B.G.B.*, 11th ed., fasc. 26, Berlin 1959, p. 2419, with references. Compare also Larenz, *Lehrbuch des Schuldrechts*, vol. I, 7th ed. Munich & Berlin 1964, pp. 14 f., who first declares that the law looks disapprovingly on gaming debts, but thereafter explains the rule that a paid gaming debt cannot be demanded back by saying that the moral duty to pay serves as the legal basis.

[8] See Bramsjö, *Om avtals återgång*, Lund 1950, pp. 59 f.

legal transactions in conflict with good morals nor accept demands for return of sums if payment has already taken place.[9, 1]

However, a simple reference to the alleged immorality of gaming and betting can obscure more significant grounds for support of the rules.[2] A short survey will be made here of the possible viewpoints.

Gaming gives rise to winnings on the one hand and losses on the other. In regard first to winnings, it is characteristic of them that they are entirely or partly dependent upon chance; from a general standpoint it hardly appears to be a matter of great urgency to provide means for their collection. In regard to gaming between private individuals, both the gaming itself and the winnings would certainly seem to lack such a useful purpose as would justify their encouragement by society. Furthermore, the idea is well known that gaming and betting between private persons can easily give rise to criminal acts or to attempts to influence the course of events. It is, however, certainly doubtful to what extent this idea is generally convincing.[3] Especially in earlier times, serious evils were held to follow from the idea that winnings should be recoverable: the citizens, it was thought, could be induced to seek to increase their wealth by gaming and become disinclined to do serious work.[4]

At the same time, the lack of any useful purpose in gaming in itself makes it appear inappropriate to impose an economic burden on the losing party as a result of the influence of chance. With this as a point of departure, one may certainly wonder why, in addition, gaming winnings that have been paid cannot be demanded back. Only then, of course, would the loser be given

[9] As has been pointed out in legal writing, the related question of the invalidation of contracts that are in conflict with prohibitions in the law cannot be resolved in general terms. In regard to the validity of acquisitions in conflict with legal prohibitions, see Professor Nial in *T.f.R.* 1936, pp. 1 ff.

[1] In the cases mentioned below after note 3 on p. 25, the courts did not choose to stand on their dignity, however; the plaintiff's complaint was not dismissed but denied.

[2] During the preparatory work for sec. 762 *B.G.B.*, different opinions were expressed on the question of whether the rule should be based upon considerations of policy or on the view that gaming and betting concern moral but not legal questions. Compare above at note 7, p. 19.

[3] In case of fraud a gaming claim is, of course, invalid on that ground too, as well as, e.g., where the loser was a minor. With these and similar grounds for invalidity, demands for *repayment* of paid gaming debts can also, obviously, come into question.

[4] Compare Nordling, *Föreläsningar i svensk civilrätt, Allm. delen,* Uppsala 1913, p. 80; as well as—regarding the prohibition then existing against lotteries—Gistrén in *Naumanns tidskrift* 1866, p. 458.

complete protection. In this connection, an opinion of a Norwegian writer, Professor Arnholm, may be noted.[5] He emphasizes that it is above all gaming on credit that should be restrained. Provided that the game only concerns money that a participant has already laid on the table, gaming is not so dangerous. This would provide the basis for the rule that gaming debts cannot be recovered, but that a paid gaming debt cannot be demanded back either. I believe that there is some importance in the idea of the danger of gaming on credit. At the same time, the reservation must be made that even gaming with money that has been laid on the table can be dangerous enough. In regard, for example, to poker games, the rules are such that the parties are incited to lay repeated and increasingly large stakes. In this sense, the game has a quality of adventurousness beyond the fact that the result depends upon chance. In fact, this characteristic of the game was decisive when the organizing of poker games for the public was held to be a typical example of punishable "gambling", according to the Swedish Criminal Code.[6]

The rule that paid gaming debts cannot be demanded back is natural for yet another reason. Whether a person has squandered his money on gaming, liquor, or other things that he would perhaps have lived better without, the legal order cannot intervene to put things right. Already in the 18th century, the famous Swedish legal scholar Nehrman pointed out that gaming and betting are not forbidden, since it is permissible to *give* away one's property, and this idea provides a similar argument against the right of recovery.[7]

To summarize the viewpoints discussed so far, it seems justifiable to state that the accepted private-law rules on gaming should be explained, in the first place, as expressions of the idea that the collection of winnings that depend upon chance hardly appears to be an urgent task—especially as each winning corresponds to a loss striking a private party who should rather be protected against gaming temptations and against the risk of loss, particularly from gaming on credit. This reasoning is at the same time of such a character that it can lead to the idea that gaming is something

[5] Arnholm, *Privatrett*, vol. 1, Oslo 1964, pp. 82 f., and vol. 2, 1964, p. 355.

[6] Chap. 16, sec. 14. Regarding poker games, see *Modin* v. *The Chief Prosecutor of Sweden*, 1960 N.J.A. 339, and Beckman *et al.*, *Brottsbalken*, vol. 2, Stockholm 1965, pp. 210 f.

[7] Nehrman, *Inledning till den svenska jurisprudentiam civilem*, Lund 1729, p. 371.

immoral and that the law *therefore* should not assist in the collection of gaming debts. The adoption of this argument alone involves, however, an oversimplification of the situation. Certain of the viewpoints that will be cited in what follows regarding betting will imply policy considerations which may be cited in support of the invalidity of gaming claims.[8]

Betting has so far been left in the background in relation to gaming. The typical bet constitutes a wager between two persons on the correctness of an assertion. Such a bet may refer to something certain or an event that has already occurred. There are English decisions on bets concerning who won the Derby in the previous year or whether the earth is flat.[9] Thus, the uncertainty need not lie in the outcome of events being decided by chance but may merely be a matter of the setting of one assertion against another.

The rules on betting present an entirely different picture, from the viewpoint of legal history, from that presented by the rules on gaming, where the invalidity of gaming claims has a very strong tradition. Thus it was the rule in Roman law that in general gaming claims could not be collected, and the amount of a paid gaming debt could even be recovered. On the other hand, bets were considered in principle to be binding.[1] In England the same outlook was maintained according to the common law until the passing of the Gaming Act, 1845, mentioned earlier, which declares all agreements concerning gaming or betting to be invalid. In common law also, however, the courts often adduced special circumstances in the individual case as support for a declaration of invalidity, such as that the bet involved the commission by one party of a criminal or immoral act or was otherwise in conflict with "sound policy".[2] There has been some doubt in Scandinavian law, also, concerning the most appropriate treatment of bets. The provision in sec. 12 of the Norwegian Act of Transitional Provisions in Respect to the Penal Code, 1902,

[8] See, *infra*, after note 1, p. 24.

[9] See Treitel, *The Law of Contracts*, 2nd ed. London 1962, p. 363.

[1] See, in regard to this, Windscheid & Kipp, *Lehrbuch des Pandektenrechts* II, 9th ed. Frankfurt am Main 1906, §§ 419 and 420.

[2] See Treitel, *op. cit.*, p. 368, with reference *inter alia* to the case *Gilbert* v. *Sykes* (1812), 16 East 150, which concerned a bet in regard to whether Napoleon would die during peace time. The court declared that the bet was invalid because it "might lead to his assassination (which would be 'against sound policy' in time of peace) or to his preservation (which would be 'against sound policy' in time of war)". (Cited from Treitel.)

provides that no obligation arises from either games or bets, but the corresponding provision in the Danish Code of Laws, 1683 (book 5, chap. 14, sec. 55), is directed only against claims based on "gambling". It has long been considered doubtful whether claims founded on bets should be considered valid in Danish law, at least in certain cases. In one of the Court of Appeal judgments from 1944 cited by the Danish writer Ussing, however, a bet concerning the date when the Second World War would end was declared to be invalid, as the bet must depend upon pure guesswork.[3] The reasoning suggests the possibility of a limitation of invalidity to certain wagers, but it is also possible that, in the future, Danish courts will follow Ussing's recommendation to declare all bets invalid.[4]

Concerning Swedish law, finally, varied opinions have been expressed in such older works as now belong to legal history. In his most famous work, from 1729, Nehrman declared that all wagers were prohibited and invalid. As a *ratio,* he cited the many disadvantages that commonly follow upon wagers and the great amount of fraud that can occur in connection with them. "And since all bets are prohibited, I hold it unnecessary to explain their nature or to treat them further."[5] Sixty-five years later, on the other hand, Tengwall maintained that bets that were entered into through voluntary agreements between adults could in no way be considered as prohibited or invalid.[6] In the middle of the 19th century, Schrevelius argued for a middle standpoint. He found that bets were permissible but that the claim could be collected only if the wager had been deposited with a third person for safety, in which case a sort of lien was stated to exist.[7] Another half century later, Nordling takes it for granted that bets are not binding according to Swedish law.[8]

The conception last mentioned can certainly now be said to be the prevailing one,[9] although the Swedish case law is extremely meagre. A relatively old decision of a Court of Appeal (*Jonsson*

[3] *Laursen* v. *Poulsen*, 1944 U.f.R. 936.

[4] See, in regard to betting in Danish law, Ussing, *Aftaler,* 2nd ed. Copenhagen 1945, pp. 215 f., with references.

[5] Nehrman, *op. cit.*, p. 372.

[6] Tengwall, *Twistemåls Lagfarenheten,* Lund 1794, p. 227.

[7] Schrevelius, *Lärobok i Sveriges allmänna nu gällande civilrätt,* vol. 2, 2nd ed. Lund 1857, pp. 648 ff.

[8] Nordling, *op. cit.*, p. 80.

[9] Compare Almén, *Om köp och byte av lös egendom,* 4th ed. Stockholm 1960, *addendum* to § 1, at note 36.

v. *Persson,* 1921 Sv.J.T. rf. 3), however, constitutes fairly good authority. The case involved a foreman engaged in floating timber, who (believing that the task was impossible) had offered 100 kronor to any worker who could pull up some poles fastened in the bottom of the river with his bare hands. This promise was considered, with reference to the circumstances, to constitute a wager and declared not to be binding. The decision is of interest, among other things, because by adopting the attitude of the courts toward this special case (which appears at least doubtful), one must certainly declare invalid not only agreements in which chance plays a decisive role, but all agreements that can be said to constitute bets in the broader sense.

Although the development leading up to present solutions has been variable, both betting and gaming debts are thus not binding in any of the countries that have been touched upon here.[1] Probably, this is appropriate if rational policy considerations are applied. It is likely that the rules now considered have few obvious practical functions, at least in Sweden. This state of things is presumably connected with the fact that the interest of people in games and wagers for money is currently channelled into totalizator betting, football pools, and lotteries. However, a rule making bets invalid can offer protection against the same dangers as attend games of chance, namely that a losing party can be burdened to the advantage of the winner without this fulfilling any useful purpose—a possibility that may strike hard. Placing gaming and betting on the same level has, in addition, the great technical advantage that a troublesome delimitation of the boundary between the two concepts is avoided. At the same time, it is difficult to discover a single disadvantage to a rule making claims based on gaming or wagers invalid. The idea, permeating the law of contracts, that the parties should be able to rely on each other's promises is, of course, merely a case of begging the question. In addition, the principle of Swedish law, according to which an oral promise of a gift is as a general rule invalid, can give a certain support for the conclusion that gaming and wagers are not binding. Games of chance and wagers also, of course, ultimately result in a unilateral performance on the part of the loser.

4. What has so far been said about the basic policy underlying

[1] In French, German, English and Norwegian law, this is expressly provided in the statutory provisions listed above in note 3, p. 18.

the rules on gaming and betting should reasonably be noted in judging certain related agreements and answering other questions arising out of gaming and betting. In this category one finds, among others, cases where the losing party has signed a promissory note, accepted a bill of exchange or drawn a cheque, or issued a document containing an express promise to pay the gaming debt. He may also have pledged some item as security. The question can arise to what degree the gaming claim can be made the basis for setting off. The loser may have received an advance from a third party in order to be able to bet or in order to pay a loss. The third party could, either before or after the game, have given a guaranty or an independent promise of payment regarding the other's gambling debt. In all these cases, more penetrating considerations of the underlying policy should give a better and more solidly justified basis for a judgment than the mere reference to the allegedly immoral character of a gaming claim. Not infrequently the delimitation of the area of invalidity should come to depend upon fairly subtle considerations. The problems are to a large degree virgin territory in Swedish legal theory, and they cannot be discussed within the scope of this article.[2] The circumstance that there are few decisions indicates, in addition, that in Swedish law questions of this type are primarily of theoretical rather than practical interest. In English law, the situation is apparently somewhat different.[3]

> Questions in regard to advances in connection with games of chance were examined by the Supreme Court of Sweden in three cases from 1920 and 1921 (*Larsson* v. *Ohlsson,* 1920 N.J.A. 280, *Persson* v. *Ohlsson,* 1920 N.J.A. 282, and *Persson* v. *Åberg,* 1921 N.J.A. 151). All the cases arose out of the social life at the inn at Skurup, in the clubroom of which certain persons were in the habit of playing "vingt-et-un" for high stakes. In the 1920 cases the decision of the Court of Appeal, which was affirmed by the Supreme Court, declared that a bill of exchange based on an advance of in one case 3,000 and in another 10,000 kronor could not be validated, "as the bill originated in and for adventurous gambling which the

[2] In connection with security, see, however, Undén, *op. cit.,* p. 178 with references, and Ekeberg, Benckert & Nial, *op. cit.,* p. 236. Compare Ussing, *op. cit.,* p. 211, note 7. In regard to the validity of so-called fixed-term transactions, see Almén, *op. cit.,* addendum to § 1 at note 37 ff. (with references).

[3] Regarding German and English law, see, e.g., Staudinger, *op. cit.,* sec. 762, nos. 11–15, 28–33 and 39, respectively, Treitel, *op. cit.,* pp. 377 ff., or Cheshire & Fifoot, *The Law of Contract,* 4th ed. London 1956, pp. 266 ff., or Chenery, *The Law and Practice of Bookmaking, Betting, Gaming & Lotteries,* 2nd ed. London 1963, pp. 10 ff. Compare also the Gaming Act, 1892.

parties carried on with each other". In the 1921 case, a bill of exchange based on an advance was rejected, in spite of the fact that the bill had a somewhat looser connection with the game. The creditor here had lent the debtor 2,000 kronor, whereupon he had immediately left the gaming group. The judgment of the Court of Appeal, which was affirmed, declared that the claim on the bill could not be collected since it had its origin in the debtor's taking part in adventurous gambling.

It appears reasonable, also, that an advance that has been granted in close connection with a game in progress, and with a view to making participation possible, should not be regarded as binding if one holds fast to the legal policy aim of providing protection against gaming losses. This should, in any case, be the rule if the advance (as in the 1920 cases) has been granted by a winning player, and possibly also in certain cases where the advance (as in the 1921 case) has been granted by a third party. The latter situation is, however, more complicated, since the advance need not have been occasioned, in any case, by the creditor's own interest in winnings.

In a somewhat earlier case (*Gyllner* v. *Engman,* 1912 N.J.A. 45), there arose a question concerning a card game in which A had lost 350 kronor to B. C was present, but took no part in the game. So that B could be paid his claim from the gaming, C drew a bill of exchange for the sum, and A accepted it. The winner B took possession of the bill and turned it over later the same day to C in exchange for cash. Consequently, B had succeeded in collecting the amount of his winnings. In his turn C assigned the bill to another party, but was forced to redeem it, as it had been protested for non-payment. In the case, C brought an action on the bill against A. In the Supreme Court no fewer than four separate points of view were expressed. C's claim was admitted on the primary grounds that the demand on the bill could not be considered equivalent to the gaming claim of B, but that the matter involved a claim that C held against A by reason of the facts that C had drawn the bill at A's request and that C was later compelled to redeem the bill.

Obviously, the critical question in this case concerns the issue of whether the act of making out the bill to C and C's payment to B in reality involves anything other than a collection of the gaming claim of B with the assistance of C. However, the majority in the Supreme Court appears to have regarded the matter as implying that C had granted A an advance after the game so that A would be able to pay his gaming debt to B, which already existed at that time. It seems to be particularly significant that the court pointed out that the transaction had occurred at A's request. The existence of several different opinions within the Supreme Court illustrates that this is a question of holding a balance between debts that are

considered to be independent of the game and debts that aim at assisting the winner to obtain payment; and certainly, these latter debts should be invalidated, perhaps even if the debtor borrowed the money some time after the game.

5. (a) The object of the preceding section was to illuminate the fact that the invalidity of agreements concerning games and bets can "spread" to different transactions connected with the game, such as advances and making out bills of exchange. The question now is to what degree the virus can spread to situations regarding commissions, when a private individual has undertaken to place bets on another's behalf. Provided there was a question of participation in an arrangement that is forbidden according to the lottery legislation, e.g., bookmaking at horse races, or that directly constitutes gambling in the sense of the Criminal Code, it appears to be clear that *if* anyone neglected to participate on another's behalf according to a commission in such betting or gaming, and *if* the participation would have produced winnings, the grantor of the commission should not be able to demand damages therefor from the agent. It should not be possible in general to make such punishable lotteries or gambling the basis of obligations to participate or of demands against the organizer of lotteries to obtain winnings. Nor should the principal be able to demand lost winnings from the agent, in a case where the gaming arrangement did not constitute a punishable lottery or gambling, but where a claim for winnings was not, in any case, collectible even among the players on the basis of the general rules on gaming and betting.[4] On the other hand, it is another matter that *if* the agent has in reality used the money of the grantor of the commission and made a profit, he should in all the indicated cases also be liable for rendering an account of the winnings; it is, at least, difficult to see any argument against this.[5]

Finally, what should obtain in this regard if the commission

[4] Compare an English case, *Cohen* v. *Kittell* (1889) 22 Q.B.D. 680.

[5] Regarding German and English law, see Staudinger, *op. cit.*, sec. 762, no. 36, and Treitel, *op. cit.*, pp. 374 f. The situation appears to be the same as if two people had participated together in an unlawful lottery. Compare the cases *Haraldsson* v. *Svensson*, 1886 N.J.A. 143, and *J. E. Karlsson* v. *N. J. Karlsson*, 1895 N.J.A. note A 366, which concerned the question of joint participation in a foreign lottery. In both cases the question of proof appears to have been decisive. In the 1886 case, however, the judge reporting the case to the court held that agreements concerning joint participation in the Hamburg lottery were invalid according to the reasons for the prohibition against lotteries; obviously he also considered that the participants were not liable to account themselves for the winnings due.

concerned gambling for another's benefit in connection with football pools, betting, or lotteries for which special permission has been granted according to the lotteries legislation? In both of the cases on totalizator betting discussed in the introduction of the present paper, the courts certainly appear to have considered without hesitation that the failure to bet could occasion liability for damages on the part of the agent. Nevertheless, I now propose to discuss the relations between this attitude and the policy considerations applicable to gaming and betting in general.

In order to avoid misunderstanding, it should, first of all, be indicated that *if* the agent carried out the commission and received a profit, there is no argument against putting him under an obligation to render an account of the winnings. As has just been stated, the same principle can certainly be accepted even when the game itself could not provide a basis for obligations. That the same should be true concerning accounting for winnings due from approved lotteries is certainly obvious. The situation is, in addition, the same here as when two or more individuals decide to take part jointly in football pools, buy a lottery ticket jointly, or gamble jointly in some other manner, and a dispute arises over the winnings due. Where an agreement exists, the winnings should obviously be divided.[6] Nor are there any objections to assigning liability to the agent, if, through failure to carry out the commission, he has involved the principal in expenses for, e.g., the agent's travel costs and subsistence in connection with the gaming. To that extent, it appears to be obvious that a commission to place bets with an organization that is licensed under the lottery legislation should be considered binding. The discussion concerns only the agent's liability for damages in connection with lost winnings, when he neglected his commission to take part in wagering, football pools or a lottery.

It may be that this concerns procedures permitted under the lotteries legislation. This means that it must be possible to direct claims for winnings to the organizer, and that—as was mentioned earlier in connection with football pools—the liability for damages for a representative selected by the organizer appears to be natural and acceptable, provided that a participant lost winnings owing to the negligence of the representative. The circumstance that these activities are carried on with permission under the

[6] See *Backman* v. *Forsman*, 1938 N.J.A. 199 (concerning a gift of a lottery ticket), and *Andersson* v. *Karlsson*, 1939 N.J.A. 434 (concerning joint participation in football pools).

lotteries regulations hardly means, however, that a participant's attempt to make an economic profit through participation in totalizator betting, football pools, or lotteries should be regarded as an interest that is so much more important for the individual than that which he attaches to gaming and betting in general. In both cases, of course, the profit depends entirely or partly on chance. This view of the winner's situation is fundamental to the following reasoning, but at the same time is only a point of departure.

The point of departure can, however—as, also, with gaming and betting in general—be combined with a consideration of the loss that could strike an agent who neglected to place a bet, in the event of lost winnings. Responsibility for damages here depends on chance to an even higher degree than with invalid gaming and betting in general. It is not only that the question of whether there would have been any winnings at all depends on chance. This is the case with all gaming. Nor can the extent of the possible liability for damages be calculated in advance. The winnings depend, of course, on what odds come to apply to the race or on how many persons guessed all the football results correctly. In addition, whether lost winnings can be proved at all depends upon the form of gaming. In regard to failure to bet on a certain horse with the totalizator, it can certainly be easily demonstrated whether the horse would have returned winnings. In regard to failure to buy a ticket in the state lottery for another person's account, on the other hand, it cannot normally be confirmed whether the purchase of a ticket would have produced winnings, although exceptions are conceivable. From all of these viewpoints, a negligent agent who is assigned liability for damages for lost winnings, is in a worse position than a person who plays, e.g., poker on credit. Such a person at least knows the whole time how large are the amounts or promises that he wagers in the game. In comparison with the protection that the law gives against even unimportant losses in innocent forms of gaming, the agent's possible liability for damages appears as almost horrifyingly severe.

Undoubtedly, however, the situation is distinct in certain respects from that which arises from agreements on gaming and betting between private individuals. The agent's liability is based, of course, on his undertaking to carry out a commission and a subsequent failure to complete the undertaking. One may, however, ask whether this difference is not of a formal nature, in so

far as it concerns the agent's liability for damages for lost winnings. It may, among other things, be worth noting that in certain situations not even a formal boundary can be maintained between an agreement on a commission and a direct game or wager between the principal and agent. Assume that the agreement between Knutsson and Wilzén had been that Wilzén would either bet with the totalizator for Knutsson's benefit or would have the right to "pocket", i.e., omit to place the bet, with the undertaking or guaranty to pay the same winnings that the totalizator would have given. In such a case, it would have been a question of express gaming or betting between Knutsson and Wilzén. The same arguments that can be presented against the validity of gaming claims would have existed here to an extreme degree, and Wilzén would obviously not have been obligated to deliver up the same winnings that the totalizator would have given. Paradoxically enough, a guaranty in this case, in opposition to what is normally the rule, would have been an argument against liability for damages for lost winnings, since the boundary between commission agreements and direct gaming or betting between the parties would then have been blurred.

To a lesser degree the reasoning just mentioned is also valid for the perfectly conceivable case where the agent has undertaken to act on behalf of the principal, but has omitted to carry out the commission, being convinced that the horse picked would not produce any winnings. Therefore, not even the possibility that the agent's failure to act was intentional appears to be a necessarily effective argument for liability; on this, however, more will be said in what follows. And even if the agent's failure was due to carelessness, the difference is insignificant in relation to express gaming or betting between the parties. The agent's liability for the lost winnings constitutes, of course—as always with damages intended to cover the profits made on a contract—the direct extension of an agreement with the principal, and the injury is due, as indicated, to factors that make claims on the basis of gaming or betting invalid. Since the agent cannot be bound by an express undertaking to pay lost winnings, it seems inconsistent to assign to him the same obligations in the form of a liability for damages under the law of contracts. This is precisely where lies the nub of the argumentation against the agent's liability for damages in respect of winnings.

Nor can this line of argument be upset by reference to the principal's possible expectation or reliance that the commission

would be carried out, and that he would receive any winnings due. It is only reasonable that the principal should, in his expectation, take into consideration that—as long as the commission has not been carried out—he cannot be as certain that he will obtain a profit as he can be when the stakes have been paid in to the totalizator, football pools company, or lottery. His expectation should, accordingly, be directed only towards the agent. But it cannot be decisive, either, in regard to whether the agent will be held liable for damages for lost winnings. It would obviously involve circular reasoning to consider the agent liable for the winnings because the principal had taken this for granted. The problem is, of course, what responsibility for the lost winnings the law finds it appropriate to impose upon the agent. The principal's expectation must be adapted to the legal rule and cannot be decisive for it.

What has been said up to now leads to the proposition that failure to carry out a commission to act for another in a licensed lottery should not, in principle, give rise to liability for lost winnings, if one starts out from the accepted rules on gaming and betting and their real underlying purposes. The taking up of a definitive position must, however, depend upon further deliberation.

(b) Thus, it must be discussed whether a liability for damages in respect of lost winnings is not necessary for preventive reasons in order to protect the principal against dishonest behaviour on the part of the agent. Certain viewpoints are involved that are of particular interest for totalizator betting. In the 1959 and 1964 cases not even the principals argued that liability for lost winnings could not in principle be assigned. What was submitted was only different views on the question of whether the agent had demonstrated such negligence as would justify an action for damages. A couple of arguments proffered should be noted, however, in a discussion of the question whether liability should come into consideration at all.

Thus, in the 1959 case, the principal pointed out the existence of "pocketing", signifying that the agent keeps the stakes in his pocket and omits to bet, in the hope that the selected horse will not return any winnings; such procedures are, in addition, also conceivable in regard to commissions to spot winners or to play in lotteries. A liability for damages should have a preventive effect against this. The correctness of this reasoning must be conceded, up to a certain point. However, this possibility alone

does not give any convincing support for responsibility for damages.

In some situations the principal can protect himself against loss by demanding that the agent produce the receipt for the stake. It may, however, be admitted that a deceitful agent who has omitted to bet with a totalizator after the race might not find it difficult to pick up a receipt thrown away by some other person. Nevertheless, a rule on responsibility that is aimed only at protecting the principal's interest in winnings against the risk of dishonest "pocketing" is rather harsh on the agent, even if he *has* pocketed. For the basic analogy with gaming and betting still remains; on the basis of his attempt to profit by the principal's stakes, the agent would be forced in principle to make good lost winnings that are perhaps many times greater. Even disregarding this, a rule of responsibility based upon the purpose mentioned might easily strike too lightly as well as too hard. It could strike *too lightly* with reference to the problem of proof in the matter of responsibility, especially where a reduced standard of care is set up, as was the case in the Supreme Court decision from 1964. Even though restrained to some extent, pocketing is nevertheless conceivable because of the difficulty of proving negligence as a basis for damages. And in spite of the reduced standard of care, the rule on responsibility would strike *too hard* against negligent agents who did not intend to pocket for their own profit, provided that one begins with the idea that the analogy with gaming and betting should normally justify freedom from responsibility for the lost winnings.

However, what could be called the reversal of the reasoning on pocketing is also interesting. This viewpoint, which also appeared in the parties' pleadings in the 1959 case, involves the idea that responsibility for damages for winnings is necessary if the agent has omitted to act, because otherwise he would be able to gamble with the principal's money and retain possible winnings with the assertion that he did not have any opportunity to bet. Such a procedure is difficult to expose, since winnings at racecourses are paid out immediately after the races upon presentation of the receipt for the stakes. However, the interest in guarding against this risk can hardly be accorded decisive importance in regard to the primary question whether liability for lost winnings should come into question at all. As with forbidden pocketing, a rule based upon this aim would strike too hard, since the aim of guarding against a special form of bad practice would strike

negligent agents in general. At the same time, the rule would strike too lightly to a yet higher degree than in the case of pocketing, since it lacks preventive effect against an agent's designs in first betting in accordance with the commission and subsequently —if winnings occur—maintaining that he never betted, in the hope that neither the winnings nor any negligence providing a basis for responsibility could be revealed.

In addition, the possibility of criminal responsibility—if the matter can be proved—involves a certain check on both the above-mentioned forms of abuse on the part of the agent. Thus, depending upon the circumstances, responsibility for fraud or misappropriation should come into question, where the agent has put the stakes or winnings into his own pocket. In addition, it may be remarked that the opportunity for an agent to put the winnings into his own pocket and then report that he was unable to bet appears to be limited to totalizator betting. In any case, the situation is different with football pools, as the winnings are sent to the winners by post. In sum, therefore, it appears that the concept of the possibilities for manipulation by dishonest agents should hardly be accorded such great significance in a general discussion of the question whether it should be possible at all to assign liability for lost winnings to negligent agents.

(c) If the foregoing reasoning is accepted, the final result of an analogy with the rational purposes supposed to underlie the rules on gaming and betting would be that a private person and agent would not need to risk delivering up lost winnings, if he completely neglected to act according to his commission in a form of gaming arranged in accordance with the lotteries legislation.[7] Provided that these rules are considered to be justified between private individuals, it should not matter, as regards the agent's freedom from responsibility, whether the principal promised a share in possible winnings. The possibility of a comparison with the rules on gaming and betting appears to be the same in any case. In addition, the scope for compensation to the agent is limited in Swedish law, for under the lotteries legislation it is punishable to assist another person, as a regular occupation or in return for compensation, in taking part in a licensed lottery with-

[7] On the other hand, it should be possible for the agent to become liable for damages, in a case where an omission on his part which occurs later on—e.g., carelessly losing the receipt for the stakes—should cause the principal to lose winnings. In the light of what is stated here in the text, the contention may perhaps appear doubtful. For further analysis, see my argumentation in *Festskrift till Håkan Nial,* Stockholm 1966, pp. 24 ff.

out the permission of the organizer.[8] This rule emphasizes, in addition, the necessity, in regard to damages, of distinguishing between representatives of the organizer and private representatives of the participants.

If one examines the conceivable effects of the applicable legal rules on a more general scale, one can presume that the 1964 case, if the judgment becomes widely known, may cause people to be more careful in undertaking a commission to lay bets for another's benefit, and also to be more careful to carry out the commission properly. This does not mean that a certain possibility of dishonest behaviour on the part of the agent might not remain, or that disputes might not arise concerning, e.g., the excusability of the fact that an agent has filled in a football-pool coupon incorrectly, that he has paid in an incorrectly calculated sum for a "V-5" coupon, which thereby became invalid, or that he neglected to pick up before closing time at the tobacconist's shop (where state lottery tickets are usually sold) the principal's reserved lottery ticket, which later proves to be a winner. Judging by the 1964 Supreme Court decision, responsibility for damages can be assigned in these cases, if the negligence was sufficiently clear. If, on the other hand, it should have been decided that an agent's failure to act did not in principle bring liability for compensation for lost winnings, the consequence would certainly have been that those who desire to take part in football pools or bet with the totalizator would either have refrained from the gaming, provided they could not handle their participation personally, or have requested service only from persons upon whom they could safely rely. At the same time, it must be admitted—at least in regard to totalizator betting—that a greater scope would exist for dishonest behaviour on the part of those agents who were called upon to act.

The result of the discussion is rather to reinforce doubts about the appropriateness of the outcome of the 1964 case and to increase the support for the position that failure to act for another's benefit should not in general lead to an obligation to compensate the principal for his lost winnings, even if the agent intentionally neglected to bet. It may be that liability for compensation constitutes a barrier against an agent's fraudulent attempt to appropriate the principal's winnings to his own use. As has been mentioned earlier, the preventive effect is, nevertheless, limited, especially if the standard of care is relaxed, as in the 1964 Su-

[8] See secs. 7 and 10.

preme Court decision. And there is the question whether it is reasonable that preventive considerations valid in reference to special cases, above all totalizator betting, should provide a civil-law responsibility in principle over the entire area, even if this is otherwise considered to be inappropriate. If liability for compensation for winnings were not imposed in such cases, the principal would always bear the risk of lost winnings himself, but this hardly arouses any apprehensions when he has chosen to bet with the assistance of a private individual. In addition, a rule of this import has great technical advantages. It is simple and does not involve difficulties in deciding what behaviour on the part of the agent signifies sufficient negligence for liability,[9] or what limitation of liability is called for in the case of large winnings.

6. Anyone who comes to the conclusions that have been presented here must pose the question why the analogy with gaming and betting does not appear to have been even considered in the two cases that were carried to the Supreme Court. If one seeks to explain the discrepancy between the actual judgments and the analogy with the rules on gaming and betting, there are ultimately only two possibilities.[1] Either the courts did not even consider the question whether such an analogy could be tenable, or else it was thought that the analogy had some weakness that required that it be rejected.

Having regard to the huge and rising turnover involved in the forms of gaming referred to in this paper, the problem should be of some general interest, and it should also possess a certain interest with regard to future decisions. For if the proposed analogy is considered to be reasonably justified, it can be said that the situation in Swedish law is perhaps still not entirely certain after only one isolated decision by one division of the Supreme Court, where this way of looking at matters was not touched upon at all. The hope may nevertheless be expressed that in the future the courts will utilize available opportunities to clarify how they view the connection between gaming winnings, debts of honour, and acts of friendship.

[9] In view of the judgment of the Supreme Court in the case 1964 N.J.A. 80, the question can be posed as to whether a relaxed standard of culpability will be valid even for the manager's liability for compensation for expenses that the principal was charged with and that became futile as a result of the agent's failure to bet. This, however, hardly appears justified. But neither can it be appropriate to work with different standards of care regarding different injuries.

[1] In *Festskrift till Håkan Nial,* pp. 28 f., I have touched upon the question of whether procedural questions could have played a role.