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# FEDERAL REGULATION AND STATE GAMBLING LAWS \*

WALTER H. MOSES \*\*

The statement that the detailed regulation of security exchanges and transactions conducted thereon which is embodied in the Securities Exchange Act of 1934<sup>1</sup> and the Securities Act of 1933<sup>2</sup> and the regulations promulgated by the Securities and Exchange Commission thereunder constitutes an encouragement to gambling<sup>3</sup> in securities, no doubt quite properly places a heavy burden of proof on the person making it. This article has as its purpose a demonstration of the truth of such statement.

The writer wishes to disclaim immediately any implication that such was one of the purposes of Congress in passing these laws. He is satisfied that it was not. He is confident that such effect, though in his judgment actual, was none the less unintended. At the outset he also wishes to dispel any doubt as to his own view. It is that the gambling laws never should have had application to transactions executed on organized markets, such as boards of trade, produce and security exchanges and that their application thereto is not in the public interest.<sup>4</sup>

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\* Acknowledgment is made to my associate, Morris Solomon, a member of the Illinois Bar, for his valuable assistance in research, upon the results of which this article is in part based. At the same time I should like to state that the entire responsibility for all of the views expressed is solely my own.

\*\* Author of STOCK BROKERAGE LAW FOR STOCK BROKERS AND THEIR EMPLOYEES (1937).

1. 48 STAT. 881 (1934), 15 U.S.C. § 78a (1940).

2. 48 STAT. 74 (1933), 15 U.S.C. § 77a (1940).

3. Since "gambling" and "gaming" are synonymous terms they will be used interchangeably herein.

4. In the writer's opinion the gambling laws should never have been interpreted by the courts as applicable to transactions in securities or commodities intended to be executed upon and actually executed upon established exchanges or boards of trade. The actual execution contracted for and made keeps the transaction from being a bet on the fluctuations of market prices, which is of the essence of gambling. Cases thus properly analyzing the transactions so hold. *Lamson Bros. and Co. v. Bane*, 206 F. 253 (C.C.A. 8th 1913); *Dickson v. Ullman Grain Co.*, 288 U.S. 188 (1933). Mississippi has embodied this essential distinction in her legislation. Miss. CODE § 1828 (1930) declares valid contracts of sale of commodities or securities intended for execution upon, and actually executed upon, boards of trade or exchanges, when made between members and their customers, while Miss. CODE § 1830 (1930) declares void contracts of sale of commodities or securities, which are to be settled on the basis of public market quotations or prices made on any board of trade or exchange, without any actual execution and carrying out or discharge of such contracts upon the floor of such board of trade or exchange. However, the interpretation of the state laws which controlled their construction consisted largely of emotional appeals which judges used to express their own prejudices to the organized markets and futures transactions, the nature of which they did not understand. Thus, in *Cothran v. Ellis*, 125 Ill. 496, 16 N.E. 646, 648 (1888), in denying recovery on a note given by a customer to his brokers for losses in transactions executed upon the Chicago Board of Trade, the court said:

"We are clearly of opinion that dealing in 'futures' or 'options,' as they are commonly called, to be settled according to the fluctuations of the market, is void by the common law; for, among other reasons, it is contrary to public policy. It is not only contrary to public policy, but it is a crime—a crime against the state, a crime against the general welfare and happiness of the people, a crime against religion and morality, and a crime against all legitimate trade and business. This species of gambling has become emphatically and preeminently the national sin. In its proportions

Gambling in its diverse and multitudinous forms constitutes "big business" in the United States. The satisfactions which the ordinary person derives from "winning" are in most instances peculiarly exhilarating. The acquisitive instinct, greed, cupidity and the assurance of superior shrewdness have each in its own way been vindicated. The ego of the winner expands noticeably.

If the authority of Blackstone be accepted, this attribute of the American character is derived in substantial part from our English and Teutonic inheritances.<sup>5</sup>

It comes as no surprise that a passion so strong would not be adequately satisfied by devices invented solely for playing games, such as dice, cards and the like. In consequence the desire for gain through gambling has resulted in the perversion of many institutions and facilities, invented to further entirely different economic and social objectives, to use for gambling. Modern American illustrations are found in the introduction of gambling on a large scale into the most popular American sports, not only at the professional level, but also at the collegiate and high school levels. A less recent example is betting on the fluctuations in prices of agricultural commodities. The latter has been a common phenomenon of American life for more than a century. It continued after the development of organized markets, such as boards of trade and produce exchanges.<sup>6</sup>

It should occasion no surprise, therefore, that with the development of the modern corporation as a result of the industrial revolution and the creation of stock exchanges offering facilities for extensive trading in corporate securities, many persons quickly saw and took advantage of the opportunities offered in this field for betting on fluctuations in market prices. The nationwide broadcasting of the constant fluctuations in the prices of securities being

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and extent it is immeasurable. In its pernicious and ruinous consequences it is simply appalling. Clothed with respectability, and entrenched behind wealth and power, it submits to no restraint and defies alike the laws of God and man. With despotic power it levies tribute upon all trades and professions. Its votaries and patrons are recruited from every class of society. Through its instrumentality the laws of supply and demand have been reversed, and the market is ruled by the amount of money its manipulators can bring to bear upon it. These considerations imperatively demand at the hands of the courts of the country a faithful and rigid enforcement of the laws which have been ordained for the suppression of this gigantic evil and blighting curse."

5. See 4 BL. COMM. 170-173 (or Cooley's 3d ed. 1884, pp. 376-378). At this point Blackstone refers to gambling as "a passion to which valuable consideration is made a sacrifice, and which we seem to have inherited from our ancestors, the ancient Germans, whom Tacitus describes to have been bewitched with a sense of play to a most exorbitant degree." After quoting Tacitus he adds, "One would almost be tempted to think Tacitus was describing a modern Englishman." We are justified in saying, "One would almost be tempted to think Tacitus and Blackstone were describing a modern American."

6. The Chicago Board of Trade was organized by a group of merchants as a private association in April, 1848. Two years later it was incorporated by a special legislative act. See Chicago Tribune, March 21, 1948, pt. 1, p. 2, col. 3.

actively traded in on the exchanges through the use of ticker services made the opportunities for gambling in securities all the greater.

Our English forebears met the problem raised by this widespread interest on the part of the community in gaming by making it a misdemeanor punishable by fine. But they did not stop there. They supplemented these criminal penalties by making gambling transactions void and by invalidating all transfers of property, both real and personal, based upon gambling considerations. Furthermore, they appealed to the same greed and cupidity which contributed so largely to the desire to gamble by providing for an action by the loser against the winner to recover the moneys lost and by providing further, that, in the event the loser did not sue, any third person might sue the winner for treble the sum so lost. The plaintiff in such a proceeding was also given the right to obtain discovery in equity from the winner under oath. The statute abolished with respect to such a proceeding the ordinary objection against self-incrimination.<sup>7</sup>

The American colonies, faced with the same need to protect the community from widespread gambling and the consequent miseries and impoverishment resulting from it, met the problem in substantially the same way. The General Court of the Colony of Massachusetts Bay found it necessary to legislate on this subject as early as 1646. The history of the Massachusetts laws on this subject is set forth in *Cole v. Applebury*.<sup>8</sup>

Included among the laws of the Northwest Territory is "An Act for the prevention of vice and immorality" enacted in 1799 which in Sections 5 to 8,

7. BLACKSTONE, *op. cit. supra*, note 5, in part relates this history as follows:

"When men are thus intoxicated with so frantic a spirit, laws will be of little avail; because the same false sense of honor that prompts a man to sacrifice himself, will deter him from appealing to the magistrate. Yet it is proper that laws should be, and be known publicly, that gentlemen may consider what penalties they wilfully incur, and what a confidence they repose in sharpers; who, if successful in play, are certain to be paid with honour, or if unsuccessful, have it in their power to be still greater gainers by informing. For by statute 16 Car. II, c. 7, if any person by playing or betting shall lose more than 100 l. at one time, he shall not be compellable to pay the same, and the winner shall forfeit treble the value, one moiety to the king, the other to the informer. The statute 9 Ann. c. 14, enacts, that all bonds and other securities, given for money won at play, or money lent at the time to play withal, shall be utterly void; that all mortgages and incumbrances of lands, made upon the same consideration, shall be and enure to the use of the heir of the mortgagor; that if any person at any time or sitting lose 10 l. at play, he may sue the winner, and recover it back by action of debt at law; and in case the loser does not, any other person may sue the winner for treble the sum so lost; (17) and the plaintiff may by bill in equity examine the defendant himself upon oath; and that in any of these suits no privilege of parliament shall be allowed."

8. 136 Mass. 525, 527 (1884). In that case Judge Field traced the history of these Massachusetts statutes as follows:

"It was ordered by the General Court of the Colony of Massachusetts Bay, in 1646, that 'if any person shall, at any time, play or game for any money or money's worth, every such person shall forfeit treble the value of that so played or gamed for to the common treasury, half to the party informing thereof.' 2 Mass. Rec. \*157. 3 Mass. Rec. \*103. Anc. Chart. 118. And in 1670 it was also ordered that 'if any person that hath played or gamed, and shall give information thereof, he shall be

inclusive, dealt with the community problems raised by public gambling.<sup>9</sup> Section 8 provided for a suit against the winner by action of debt or case to be prosecuted in any court of record by a loser for recovery of the money or goods lost and paid or delivered in a gambling transaction. In 1807 the Governor and Justices of the Indiana Territory enacted "An Act for the prevention of vice and immorality" which in Sections 6 to 9, inclusive, embodied substantially the same provisions (including the provision for suit by the loser against the winner for moneys or other property lost in gambling) which in 1799 had been adopted as the law of the Northwest Territory.<sup>10</sup> These earlier statutes made no express reference to gambling in stocks or other securities of corporations.

The New York Stock Exchange is not only the largest and most important, but also the first stock exchange developed in the United States. Historians trace its origin to an agreement among twenty-four signers executed May 17, 1792, reading as follows:

We, the Subscribers, Brokers for the Purchase and Sale of Public Stock, do hereby solemnly promise and pledge ourselves to each other that we will not buy or sell, from this day, for any person whatsoever, any kind of public stock at a less rate than one-quarter per cent commission

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freed from the penalty of the law to pay treble damage, but shall have no further benefit of the law by his information,' etc. 4 Mass. Rec. \*652. Anc. Chart. 119.

"The Prov. St. of 1736-7 (10 Geo. II.) c. 17, 2 Prov. Laws (State ed.) 836, is, however, the first statute which contains provisions similar to those we are considering. This act was limited to the space of five years from the publication thereof (February 6, 1737), but it was substantially reenacted by the Prov. St. of 1742-3 (16 Geo. II.) c. 27, 3 Prov. Laws (State ed.) 45, and this act, although limited to seven years, was continued in force from time to time until November 1, 1787. Prov. St. 1749-50 (23 Geo. II.) c. 16, 3 Prov. Laws (State ed.) 488. Prov. St. 1759-60 (33 Geo. II.) c. 34, 4 Prov. Laws (State ed.) 325. St. 1770, c. 5, Mass. Temp. Laws, 422. St. 1773, c. 11, Mass. Temp. Laws, 498. St. 1778, c. 5. St. 1783, c. 7.

"The Prov. St. of 1736-7, c. 17, was plainly taken from the English statute of 9 Anne, c. 14. By § 2 of that act, the loser of ten pounds or more 'shall be at liberty, within three months then next, to sue for and recover the money or goods so lost,' from the winner, by an action of debt; 'and in case the person or persons who shall lose such money or other thing as aforesaid, shall not within the time aforesaid, really and *bona fide*, and without covin or collusion, sue, and with effect prosecute for the money or other thing, so by him or them lost,' 'it shall and may be lawful to and for any person or persons, by any such action or suit as aforesaid, to sue for and recover the same, and treble the value thereof,' one moiety to the use of such person or persons, and the other to the use of the poor of the parish where the offence shall be committed. See St. 16 Car. II, c. 7, §§ 2, 3. The words above cited are exactly copied in § 2 of the Prov. St. of 1736-7, c. 17, and in § 2 of the Prov. St. of 1742-3, c. 27.

"All these acts provided, in § 4, for a discovery, under oath, of the money or other thing won, and that, upon the discovery and repayment, the person or persons who shall so discover and repay should be discharged from any other punishment, forfeiture, or penalty."

9. See Pease, *Laws of the Northwest Territory, 1788-1800*, 1925 ILL. STATE BAR ASS'N REP. 379 *et seq.*

10. Philbrick, *Laws of Indiana Territory, 1801-1809*, 1930 ILL. STATE BAR ASS'N REP. 367, 370, *et seq.*

on the special value, and that we will give preference to each other in our negotiations.<sup>11</sup>

Thereafter the stock market enjoyed a rapid growth. Within twenty-five years it had acquired its first enclosed place of business on Wall Street in New York City. Since 1903 it has occupied the Stock Exchange Building fronting on Broad, Wall and New Streets in New York City.<sup>12</sup> Following the lead of the New York Stock Exchange other exchanges of a more regional character were founded during the 19th Century and developed in other large cities in the United States which were centers in their respective regions for the flow of capital into industry. Such cities were Boston, Philadelphia, Chicago, New Orleans and Los Angeles. All of these institutions were founded and developed in private hands without direct governmental regulation of any kind.<sup>13</sup>

Contemporaneously with the growth of stock exchanges in the United States, the public was increasingly using the price fluctuations of securities traded in upon them for gambling purposes. Similar use of the price changes recorded in transactions conducted upon boards of trade and produce exchanges for gambling purposes had also become widespread. To meet these evils the laws of the various states were amended to deal with gambling in corporate securities and in grain and other agricultural commodities.

Thus, Illinois in 1874 added a new section to its Criminal Code, providing as follows:

*(Gambling In Grain, etc.)* Sec. 130. Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or

11. See MEEKER, *THE WORK OF THE STOCK EXCHANGE* 29 (1922); *TWENTIETH CENTURY FUND, THE SECURITY MARKETS* 222 *et seq.* (1935).

12. See MEEKER, *op. cit.*, *supra* note 11, Appendix Ch. 2, pp. 540-544, which gives both the successive homes of the New York Stock Exchange and the amazing growth of dealings in stocks and bonds between 1792 and 1920.

13. This was pointed out by Mr. Justice (then SEC Chairman) Douglas in a newspaper statement on November 23, 1937, dealing with the demand for reorganization of the stock exchanges in which he said:

"Operating as private membership associations, exchanges have always administered their affairs in much the same manner as private clubs. For a business so vested with the public interest, this traditional method has become archaic." See DOUGLAS, *DEMOCRACY AND FINANCE* 65 (1940).

Reflection of judicial hostility, based upon the entirely private nature of stock exchange management, is seen in *Dykers v. Allen*, 7 Hill (N.Y.) 497, 501 (1844), where the Chancellor said:

"But it was insisted upon the argument that the usage of stock jobbers in Wall St., to hypothecate or repledge stock taken by them upon a loan, formed a part of the contract in question, and an authority for the course pursued by the plaintiffs in error. It is a sufficient answer to this to say, that no such authority is reserved in the written contract; and to allow the usages of Wall St. to control the general law in relation to any matter, might result in the establishment of principles not always in accordance with sound morals. I prefer that legal principles should have an universal application, and that contracts should receive the same interpretation in the thronged and busy mart of our commercial metropolis that they do elsewhere."

This statement was quoted with approval in *Austin v. Hayden*, 171 Mich. 38, 137 N.W. 317, 326 (1912).

gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market or attempts to do so in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.<sup>14</sup>

In 1845 the State of Illinois had already enacted as a part of its Criminal Code a statutory provision similar to one in early English statutes, providing for an action at law against the winner by the loser in a gambling transaction to recover moneys lost in gambling. It further provided that in case the loser should not within six months sue, and with effect prosecute, his action, it should be lawful for any person to sue the winner for treble the value of the moneys or other valuable property lost in gambling, with costs of suit, one-half to the use of the county and the other to the person sued.<sup>15</sup>

The Illinois Legislature in 1845 had included in its Criminal Code various additional provisions covering "gambling and gambling contracts." It made criminal and punishable by fine the playing for money or other valuable thing of any game with cards, dice, checks or billiards or with any other article, instrument or thing useful for the purpose of playing or betting upon or winning or losing money or other valuable property or the betting on any game others may be playing.<sup>16</sup> It made criminal and punishable by fine the keeping of a common gambling house. For the second offense the punishment provided was a fine and confinement in the county jail and the third offense was punishable by fine and imprisonment in the penitentiary.<sup>17</sup> It was made a crime punishable in the same manner for a tavern keeper to maintain on his premises implements useful for gaming and permitting persons to engage in gambling on his premises.<sup>18</sup> All promises, notes, bonds, covenants, contracts, agreements, judgments, mortgages or other securities executed for a gambling consideration were made void and of no effect.<sup>19</sup> Courts of equity were given jurisdiction to set aside and vacate all judgments, mortgages, assurances, bonds, notes and other acts, deeds, securities or conveyances given for a gambling consideration.<sup>20</sup> Protection was provided against the loss of his remedy by the person giving any such instrument by means of an assignment of the instrument by the winner before suit.<sup>21</sup> Discovery under oath in all actions brought to recover the money or other valuable thing won in gambling transactions was also provided.<sup>22</sup>

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14. See ILL. REV. STAT., c. 38, § 130 (Hurd, 1874).

15. ILL. REV. STAT., c. 38, § 132 (Hurd, 1874).

16. *Op. cit.* § 126.

17. *Op. cit.* § 127.

18. *Op. cit.* § 128.

19. *Op. cit.* § 131.

20. *Op. cit.* § 135.

21. *Op. cit.* § 136.

22. *Op. cit.* § 137.

In addition to Sec. 130, previously referred to, the Illinois Legislature in 1874 enacted a further provision subjecting to the payment of any judgment recovered against the winner, (either by the loser for the amount of the money or other valuable thing lost in gambling or by a third person for treble the value of the money or other valuable property lost in gambling) the premises where such gambling took place, provided such premises was rented or leased to be used or occupied as a common gambling house or as a place for persons to come together to gamble, or was knowingly permitted to be used for such purposes.<sup>23</sup>

Statutes similar in character were enacted generally by the various state legislatures during the second half of the 19th Century, aimed at outlawing, making criminal, and providing additional civil remedies as a deterrent for gambling in agricultural commodities and corporate securities, as well as in other ways.<sup>24</sup> Such statutes make criminal the maintenance of bucket shops and declare gambling contracts and entering into them void and criminal. A common provision makes the failure of the broker to render to the customer on demand a written statement of the contract, indicating the amount, price and time at which, and the party with whom, the broker contracted on the exchange, prima facie evidence of the illegality of the transaction. In New York the failure of a stock broker to render such a statement or its falsification is made a misdemeanor. In California a broker's failure to keep records of his dealings with customers establishes a prima facie case of the illegality of the transactions. Even the maintenance of an office where exchange quotations are displayed establishes a prima facie case of illegality under the statutory provisions of several states. In Alabama, Massachusetts, South Carolina, South Dakota and Tennessee, as well as in Illinois, the statute gives an action against the winner to recover losses incurred through gambling.<sup>25</sup>

Recognizing the importance of boards of trade and produce exchanges in the marketing of agricultural products and of stock exchanges in providing ready facilities for the investment of savings and risk capital in industry, for maintaining the liquidity of such investments, and for establishing a needed source of information regarding the market prices of corporate securities which is generally reliable, some states have enacted laws treating differently from the treatment of gambling transactions generally, orders given for execution on, and executed on, established boards of trade and exchanges. The Florida and Tennessee bucket shop statutes provide that they shall not be construed to forbid trading on a legitimate exchange, that no contract on

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23. *Op. cit.* § 133.

24. See Note, *Legislation Affecting Commodity and Stock Exchanges*, 45 HARV. L. REV. 912, 916 (1932). This excellent note classifies the statutes and contains a very able discussion of them.

25. *Op. cit.* footnotes 26-28 incl. pp. 917-918.

such an exchange shall be declared lacking in the essential elements of delivery because it was offset or settled, where the only effect of such settlement is the substitution of parties, and that the statutes are to be liberally construed to withdraw from the gaming and wagering laws all transactions on and in accordance with the rules of established exchanges.<sup>26</sup>

A Massachusetts statute provides that a party to a contract for the purchase or sale of securities cannot recover under the statute allowing the recovery of losses incurred on gambling contracts despite mutual intent not to deliver, if the other party, for the purpose of carrying out the contract, makes an actual purchase or sale of the securities, or a valid contract for their purchase or sale.<sup>27</sup> A contract on an exchange established for ten years and enforceable in the jurisdiction where made is valid within the meaning of this Massachusetts law.<sup>28</sup>

Ohio has a similar statutory provision applicable to both commodities and securities but qualified by the requirement that the broker actually deliver or receive the commodities or securities on the exchange.<sup>29</sup>

Arkansas,<sup>30</sup> Georgia,<sup>31</sup> Mississippi<sup>32</sup> and Oklahoma<sup>33</sup> all have statutes for which the Oklahoma statute was the model, which declare valid all contracts of sale for future delivery of cotton, grain, stocks or other commodities (1) made according to the rules of any board of trade, exchange or similar institution, (2) actually executed on the floor of such board of trade, exchange or similar institution, and performed or discharged according to its rules, and (3) when made with or through a regular member in good standing of any such institution.

The courts on the whole have interpreted these statutory provisions in accordance with the evident intent of the legislatures to subject transactions executed on boards of trade and stock exchanges to different treatment than that applicable to gambling transactions generally.<sup>34</sup>

26. FLA. COMP. LAWS § 7899 (1927); FLA. STAT. ANN. § § 850.02, 851.01; TENN. CODE § 11.308 (1932).

27. MASS. GEN. LAWS, c. 137, § 4 (1921).

28. MASS. ACTS 1926, c. 353.

29. OHIO GEN. CODE § 5966 (Page, 1932).

30. Ark. Digest, c. 42, § 3343 (Pope, 1937).

31. GA. CODE, c. 20-602 *et seq.* (1933).

32. MISS. CODE, c. 32, § 1828 (1930).

33. OKLA. STAT. ANN., tit. 3, c. 562, *et seq.*

34. The following cases are intended to be illustrative and by no means exhaustive: *Arkansas*—Orvis Bros. & Co. v. Oliver, 197 Ark. 307, 123 S.W. 2d 1065 (1938), *Georgia*—Layton v. State, 165 Ga. 265, 140 S.E. 847 (1927), *Massachusetts*—Marshall v. Williston, 256 Mass. 147, 152 N.E. 227 (1926), Ryan v. Whitney, 257 Mass. 218, 153 N.E. 449 (1926), Bomeisler v. Jacobson & Sons Trust, 118 F. 2d 261 (C.C.A. 1st 1941), *Mississippi*—Alamaris v. Clark & Co., 166 Miss. 122, 145 So. 893 (1933), *Ohio*—McGill v. Miller, 63 Ohio App. 467, 27 N.E. 2d 186 (1939), Dayton Bread Co. v. Montana Flour Mills Co., 126 F. 2d 257 (C.C.A. 6th 1942), *Oklahoma*—Avery v. Goodrich, 103 Okla. 156, 229 Pac. 577 (1924), Taylor v. Starr, 109 Okla. 135, 234 Pac. 756 (1924), Hanes v. Coates, 193 Okla. 432, 145 Pac. 2d 394 (1944), *Tennessee*—Shepard & Gluck v. Thomas, 147 Tenn. 338, 246 S.W. 836 (1922), Palmer v. Love, 18 Tenn. App. 579, 80

The Illinois Legislature in 1913 amended Sec. 132 of the Criminal Code. As enacted in 1845 this section provided for a suit against the winner by the loser to recover the money or other valuable thing lost in gambling and that, if the loser had not within six months brought such a suit and prosecuted the same with effect, any third person might sue the winner for treble the value of the money or other valuable thing, with costs of suit, one-half to the use of the county and the other to the person suing.<sup>35</sup>

The amendment of 1913 consisted of adding to said section the following sentence:<sup>36</sup>

No person who accepts from another person for transmission, and transmits, either in his own name, or in the name of such other person, any order for any transaction to be made upon, or who executes any order given to him by another person on, any regular board of trade or commercial or stock exchange, shall, under any circumstances, be deemed a "winner" of any moneys lost by such other person in or through any such transactions.

The effect of this amendment was to insulate from the Criminal Code provisions relative to gambling orders for transactions to be made upon, and the execution of any orders upon, any regular board of trade or commercial or stock exchange. In other words, the deterrent to the use of the facilities of established boards of trade and exchanges for gambling purposes contained in the various provisions of the Illinois Criminal Code applicable to gambling was eliminated.

Shortly after the enactment of this amendment to Sec. 132 a suit was brought in Chicago by a customer against a member of the Chicago Board of Trade to recover moneys allegedly lost by the plaintiff in various transactions conducted by the defendants as brokers for the plaintiff in gambling on futures in grain. The defendants relied upon this amendment in 1913 to Sec. 132 of the Criminal Code as an effective bar of the action, since all the transactions sued upon were upon orders given by the plaintiff to the defendants for execution on, and by them executed upon, the Chicago Board of Trade. The plaintiff contended that this amendment was unconstitutional because it violated that provision of the 14th Amendment to the Federal Constitution which declares that:

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The plaintiff also relied upon similar provisions of the Illinois Constitution prohibiting special and discriminatory legislation. The Supreme Court of Il-

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S.W. 2d 100 (1934), *Easterly v. Myers*, 24 Tenn. App. 688, 148 S.W. 2d 640 (1940), *Texas—Merriam & Millard Co. v. Cole*, 198 S.W. 1054 (Tex. Civ. App. 1917), *McDaniel v. Tullis, Craig & Co.*, 11 S.W. 2d 203 (Tex. Civ. App. 1928), *Morgan v. Rose*, 62 S.W. 2d 1022 (Tex. Civ. App. 1933).

35. ILL. REV. STAT., c. 38, § 132 (Hurd, 1874).

36. ILL. REV. STAT., c. 38, § 132 (1913).

Illinois held in *Miller v. Sincere* that the amendment denied the equal protection of the laws and reversed the judgment below for the defendants.<sup>37</sup>

In arriving at its conclusion the Supreme Court of Illinois pointed out that the facts pleaded by the plaintiff entitled plaintiff to a judgment under its applicable decisions interpreting Sec. 132 prior to the 1913 amendment. Consequently, the amendment was invalid unless there were real differences, warranting different treatment in this respect, between transactions on established boards of trade and exchanges conducted for the purpose of gambling and gambling transactions conducted in other places and by different devices. It found no such real differences to exist. On the contrary, it held that the amendment in question constituted an attempt to grant a special privilege and immunity to those individuals who belonged to established boards of trade and exchanges and to discriminate against those who did not belong to them, but were engaged in the same business. The court in part said:

It is entirely true that the Legislature, in the enactment of criminal statutes, has a wide discretion in the determination of what shall be considered a crime and the classification of crimes. However, in any event, some reason must exist if any difference is made between individuals or different classes, and we are utterly unable to distinguish any difference in this case between those who are made immune and those who are not. Nor has any sufficient reason been urged by counsel for appellees in their able and exhaustive argument why a difference should be made in the case of one who is not a member of a board of trade and one who is, and the former subjected to liability for doing exactly the same thing that the other would not be held liable for. There is no reason why the Chicago Board of Trade, or stock exchange, or any other similar institution anywhere in the state, should be made a sanctuary for those who commit the crime of gambling on futures in grain or stocks. If it could lawfully be done, then it would be lawful to provide that persons could gamble at cards or with dice, or at other well-known gambling devices, in a board of trade or stock exchange building, but nowhere else. Conceding that there is ample reason for the enactment of the criminal statutes against gaming and betting of all kinds, then a bet or wager which is made upon any uncertain event, whether it be the future price of grain, or the result of a race, or the turn of a card, or the cast of a die, would be no different in principle than other kinds of gambling. The test is always: Is the wager or bet upon any uncertain event or contingency?

To the writer's knowledge, this decision is the only one in the books rendered prior to the enactment of the extensive federal regulation of stock exchanges and boards of trade and produce exchanges beginning in 1933, which passed upon this question.

In 1933 the Illinois Legislature enacted a new Practice Act. At the 1935 legislative session Sec. 132 was amended to bring its provisions into conformity with the new Practice Act.<sup>38</sup> At the same time the Legislature re-enacted in identical language the amendment passed in 1913 which had been

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37. *Miller v. Sincere*, 273 Ill. 194, 112 N.E. 664 (1916).

38. ILL. REV. STAT., c. 38, § 132 (1947).

declared unconstitutional by the Illinois Supreme Court in 1916 in *Miller v. Sincere*.

The effect which the Illinois Supreme Court would give to the reenactment of this provision raised an interesting question. The writer expressed the view in 1937 that it would "in all probability" hold the 1935 amendment unconstitutional.<sup>39</sup> In 1940 an Illinois appellate court held that "The part of Sec. 132 declared unconstitutional by our Supreme Court in the *Sincere* case, was not again put into the section by the amendment of 1935."<sup>40</sup> Counsel for the broker argued without avail that public opinion had changed since *Miller v. Sincere* was decided in 1916 in the attitude taken towards boards of trade and stock exchanges and recognition of this fact was to be deemed to be implicit in the action of the Legislature in the reenactment in 1935 of the 1913 amendment to Sec. 132.<sup>41</sup>

The Illinois Supreme Court had no opportunity to consider this question until 1942. In the meantime there was presented to it for decision the constitutionality of the Illinois Horse Racing Act, enacted in 1927, which legalized pari-mutuel betting.<sup>42</sup>

The attack on the constitutionality of that statute was based upon *Miller v. Sincere* in substantial part. Counsel seeking to have the Horse Racing Act sustained argued that the decision in the *Sincere* case was not determinative, since the extensive regulation of horse racing and pari-mutuel betting provided by that enactment furnished adequate grounds for treating pari-mutuel betting differently from gambling generally. The Illinois Supreme Court was persuaded by this argument and sustained the Horse Racing Act, holding in *People v. Monroe* that it did not deny the equal protection of the laws.<sup>43</sup>

Also prior to 1942 the statutes providing extensive federal regulation of security and commodity transactions and exchanges begun in 1933 had been enacted and in effect for a number of years, the Commodity Exchange Act having been passed in 1936.<sup>44</sup>

When presented with the question in 1942 the Illinois Supreme Court held constitutional the 1935 amendment.<sup>45</sup> In that case the president of a bank had maintained an account of substantial size over a period of years beginning in 1936 with a Chicago brokerage house in which he engaged in dealings in

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39. MOSES, STOCK BROKERAGE LAW FOR STOCK BROKERS AND THEIR EMPLOYEES 82 (1937).

40. *Salzman v. Boeing*, 304 Ill App. 405, 26 N.E. 2d 696, 698 (1940).

41. *Op. cit.* For a criticism of this decision, see Bachrach, *The Constitutional Validity of the 1935 Amendment of Section 132 of the Illinois Criminal Code*, 6 JOHN MARSHALL L. Q. 149 (1940).

42. ILL. REV. STAT., c. 8, § 317 (a) *et seq.* (1941).

43. 349 Ill. 270, 182 N.E. 439 (1932).

44. 49 STAT. 1491 (1936), 7 U.S.C.A. § 1 (1939).

45. *Albers v. Lamson*, 380 Ill. 35, 42 N.E. 2d 627 (1942).

commodities on various boards of trade and in securities on various stock exchanges through his broker. His tradings were extensive. The net result of all his transactions was a very large loss which exhausted his margins and resulted in addition in a substantial indebtedness to the broker. Thereupon he committed suicide. Shortly thereafter it was learned that negotiable bonds in large amounts with which he had margined his brokerage account had been stolen by him from the bank of which he was president. An action was brought against the broker to recover the value of the bank's bonds, upon the theory that the transactions engaged in by its president through the broker were gambling transactions; that, consequently the broker was not a bona fide holder for value since the consideration given for the bonds was illegal.

The broker defended upon the ground, among others,<sup>46</sup> that the 1935 amendment was a bar to the action, since all of the transactions involved orders for execution on established boards of trade and stock exchanges and were executed thereon. The trial court ruled out this defense upon the basis of the decision in *Miller v. Sincere* and entered a decree for the plaintiff.

On appeal counsel for the broker contended that the 1935 amendment was constitutional upon the basis of the decision of the Illinois Supreme Court in the *Monroe* case rendered in 1932, upholding the Horse Racing Act, and that the decision in 1916 in *Miller v. Sincere* was not applicable. *Miller v. Sincere* was sought to be distinguished upon the ground that the federal legislation providing for extensive regulation of security and commodity exchanges and transactions created a basis for treating transactions for execution upon, and executed upon, commodity markets and security exchanges differently under the state gambling statute from gambling conducted elsewhere and through other means. The Illinois Supreme Court first rendered an unreported opinion holding that the unconstitutionality of the 1935 amendment was no longer debatable in view of its decision in *Miller v. Sincere* dealing with an identical statutory provision. Upon rehearing it reached exactly the opposite conclusion and held the 1935 amendment constitutional.

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46. One such ground, which the court did not pass upon, was that federal regulation constituted an occupation of the field by Congress in a manner to supersede the state gambling laws as applied to transactions executed upon contract markets and national security exchanges. For an able statement of this contention see Bachrach, *The Cloverleaf Case and Suspension of State Gambling Statutes as Applied to Commodity Futures Transactions*, 7 JOHN MARSHALL L.Q. 457 (1942). On this question, see *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) and *Rice v. Chicago Board of Trade*, 331 U.S. 247 (1947); *Hill v. Florida*, 325 U.S. 538 (1945); *Bethlehem Steel Co. v. N.Y. State Labor Relations Board*, 330 U.S. 767 (1947). In *Dickson v. Uhlmann Grain Co.*, 288 U.S. 188 (1933), the Court held that the Grain Futures Act of 1922 did not supersede the Missouri Bucket Shop Law, which invalidated fictitious transactions in commodity futures. In *Crosby v. Weil*, 382 Ill. 538, 48 N.E. 2d 386 (1943) the court held that the Securities Act of 1933 and the Securities Exchange Act of 1934 did not supersede the civil remedy provided to a buyer of securities sold in violation of the Illinois Blue Sky Law, even though the mails were used to consummate the local sale.

Its decision was based upon the principle enunciated in the *Monroe* case and it found that the legislative and administrative regulation of commodity markets and security exchanges provided by the detailed federal legislation beginning with the Securities Act of 1933 placed, from the standpoint of the state gambling laws, transactions for execution and executed upon established boards of trade and exchanges in a different class from other gambling transactions. In reaching this conclusion the Court said:<sup>47</sup>

After this decision the Congress of the United States found it appropriate to further define national public policy in that field of interstate commerce wherein the Federal government is supreme. In 1934 a comprehensive act was passed known as "Securities Exchange Act of 1934." U.S.C.A. Tit. 15, Sec. 78a et seq. This act followed the Securities Act of 1933. U.S.C.A. Tit. 15, Sec. 77a et seq. There was also enacted by Congress the Commodity Exchange Act. U.S.C.A. Tit. 7, Sec. 1 et seq. There have also been other acts of Congress which might be pertinent, but none of the details of any of them is essential to this decision. They are mentioned only for the one purpose of pointing out that the Congress has exercised its constitutional power to regulate interstate commerce, in which field it has unquestioned supreme control. That the Securities and Exchange Commissions, the boards of trade and other similar instrumentalities are engaged in interstate commerce is not a debatable question.

So far as this opinion is concerned these citations are only for the purpose of pointing out that a valid constitutional agency, i.e., the Congress of the United States, has provided such a system of regulation and control over dealings in stocks, bonds, grain, etc., as to regulate the conduct of those agencies in the public welfare within all of the requirements laid down by this court, wherein we held it legal to bet on horse races within proper supervision. *People v. Monroe*, supra. The situation as to boards of trade and

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47. *Albers v. Lamson*, 42 N.E. 2d 627, 630 (1942). The opinion continues:

"Our decision in *Miller v. Sincere*, supra, thwarted an obvious legislative intent to permit dealings in futures. This court at that time evidently realized what is commonly known, i.e., that these contracts are frequently used as gambling transactions and that at that time gambling in general was regarded as contrary to the public policy of this State. The Horse Racing act has made it clear that that public policy is no longer in existence and this court has sustained the Legislature's prerogative in so declaring. The titles to the various acts of Congress make it clear that our public policy now recognizes the desirability and necessity of maintaining open markets, even if they sometimes be used for gambling, in order to stabilize values in commodities and securities. As briefly mentioned in the *Monroe* case, every human transaction is a gamble, which all must take whether they wish to or not. From the time he plants his seed until he sells his crop, every farmer is gambling. From the time he makes a contract of sale until he delivers the flour, every miller is gambling. The public policy has been declared to be that these contracts for future delivery are necessary to the commerce of the people of the United States in their domestic interstate economy, and since no one can tell with what intent they are entered into, it is impossible to pick and choose among them.

From a survey of a period of years we think it clear that the legislature of this State has always intended to validate contracts such as those here in question; that the valid acts of Congress have provided such regulatory and supervisory means of control as to bring these stock exchanges and boards of trade within the rules laid down in *People v. Monroe*, supra, concerning bets on horse races. It is our conclusion that during the quarter of a century since the decision of *Miller v. Sincere*, supra, the State and national public policy has so changed as to make the decision in that case no longer applicable or binding in a record such as the one now before us."

stock exchanges has been materially changed since the decision of the court in the Miller case, *supra*, and it can no longer be said, as was said in the Monroe case, referring to the Miller case, that they are "purely private entities not differing in any way as to their rights of contract from any other private entity and whose acts were not, by the act there in question, subject to the inspection or control of any state agency." On the contrary, these exchanges have been subjected to the most minute control of their every act and that control is imposed by the highest legislative authority. By this opinion we are not deciding or even conceding that the Congress has any power to determine what the criminal law of Illinois shall be, but we are deciding and conceding that the Congress in its control of interstate commerce is supreme and that we have neither power nor right to decide whether or not it may or should either authorize or prohibit the making of contracts for future deliveries, either of securities or any commodity. It is enough to say here that Congress has assumed control of these exchanges, and that nothing has been shown by this record to invalidate any contract now under consideration.

The principle adopted as the basis for decision by the Illinois Supreme Court in this case would be equally applicable in sustaining the statutes in other states differentiating transactions for execution upon and executed upon contract markets and national security exchanges from other gambling transactions and alleviating various provisions of their gambling laws so far as applicable to board of trade and exchange transactions.

In *Miller v. Sincere* the Illinois Supreme Court rested its decision in part on *Connolly v. Union Sewer Pipe Co.*,<sup>48</sup> in which case the United States Supreme Court held unconstitutional as denying "equal protection of the laws" in violation of the 14th Amendment to the Federal Constitution the 9th Section of the Illinois Statute enacted in 1893 which prohibited trusts, combinations and pools and which section provided that the Act should not apply to agricultural products or livestock while in the hands of the producer or raiser.

Of more than passing interest in this connection was the Supreme Court's overruling of the *Connolly* case in *Tigner v. Texas*.<sup>49</sup>

48. 184 U.S. 540 (1902).

49. 310 U.S. 141 (1940). After pointing out the recognition, both by Congress and various State Legislatures since 1902, when the *Connolly* case was decided, of the fundamental difference between agriculture and industry in the formulation of public policy the Supreme Court said: (pp. 146-147)

"At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers. The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. *Connolly's* Case has been worn away by the erosion of time, and we are of opinion that it is no longer controlling."

It is hoped that the writer has demonstrated the truth of the statement that the detailed regulation of security exchanges and transactions conducted thereon which is embodied in the federal regulatory measures, the anniversary of which it is the purpose of this symposium to commemorate, constitutes an encouragement to gambling in securities. The encouragement is found in furnishing a basis for the upholding of the constitutionality of legislation which excludes from the general application of the gambling laws of the various states transactions conducted upon such security exchanges. The deterrent presumed to result from the gambling laws no longer exists. It may be replied that this encouragement is illusory since federal regulation furnishes an adequate substitute for the state gambling laws. That may well be possible, whether true today or not. It may also be replied that the application of state gambling laws in their established form to transactions upon national security exchanges is not in the public interest, since speculation performs a valuable role in the proper functioning of security markets in a capitalistic economy,<sup>50</sup> and the differences between legitimate speculation and gambling involve factors which are not given adequate recognition in the decisions of courts and

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50. For discussion and defense of speculation, see TWENTIETH CENTURY FUND, *THE SECURITY MARKETS 3 et seq.* (1935); *GARSDALE, COTTON GOES TO MARKET 337 et seq.* (1935); *BAER AND WOODRUFF, COMMODITY EXCHANGES 122 et seq.* (1936). For recognition of the function and inevitability of speculation, see *Board of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 247 (1905), where Mr. Justice Holmes said for a divided Court:

"As has appeared, the plaintiff's chamber of commerce is, in the first place, a great market, where, through its eighteen hundred members, is transacted a large part of the grain and provision business of the world. Of course, in a modern market contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want. It is true that the success of the strong induces imitation by the weak, and that incompetent persons bring themselves to ruin by undertaking to speculate in their turn. But legislatures and courts generally have recognized that the natural evolutions of a complex society are to be touched only with a very cautious hand, and that such coarse attempts at a remedy for the waste incident to every social function as a simple prohibition and laws to stop its being are harmful and vain."

For recognition of a change in attitude on the parts of courts and legislatures toward security and commodity markets, see *Nairn v. J. A. Acosta & Co.*, 103 F. 2d 656, 659 (C.C.A. 7th 1939) where the Court said:

"We perceive no practical distinction between the activity in the securities market and the activity in the commodities market. The Chicago Board of Trade came into existence in 1859. For a long period of time futures contracts were frowned upon by the courts as being gambling contracts. An Illinois legislative committee in 1883 was unable to see much difference between transactions on the Chicago Board of Trade and those in basket shops. In time, this attitude toward organized trading in commodity futures changed, and, today, the activity around the futures and securities exchanges is essentially similar and so looked upon by the courts and the legislative bodies. This attitude was forthcoming as soon as the people began to see that the trading in futures in any commodity is an adjunct to, and part of, the marketing of that commodity."

juries in cases arising under such gambling laws. This is a view in which the writer heartily concurs after years of experience in the trial of such cases.<sup>51</sup>

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51. One serious difficulty is that the legislatures have laid down, and the courts have applied, rules as to gambling in security transactions which developed in dealing with commodity futures transactions. They ignore the fundamental difference involved in the fact that delivery always follows under exchange rules within a day when securities are sold and futures contracts remain open without delivery until a counter transaction takes place, closing the open commitment, or until delivery is actually made on the date fixed by the contract for delivery in a future month. *Cf.* *Riordan v. McCabe*, 341 Ill. 506, 173 N.E. 660 (1930), a grain futures case, with *Pelouze v. Slaughter*, 241 Ill. 215, 89 N.E. 259 (1909), a security case. See *C.I.R. v. Covington*, 120 F. 2d 768 (C.C.A. 5th 1941). The same lack of analysis and clear thinking is evidenced by Reg. 111, § 29.117-6, promulgated by the Internal Revenue Bureau, relative to determining the holding period in income taxation of capital gains and losses resulting from short sales of securities, 482 C.C.H., p. 3742. See *Provost v. U.S.*, 269 U.S. 443 (1926). Note, *Federal Taxation of Short Sales of Securities*, 56 HARV. L. REV. 274 (1942).