THE LEGAL RESPONSE TO CARDSHARPS AND OTHER GAMBLING CHEATS

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1 Introduction

Cheating in gambling seems to be as old as gambling itself.1 Although there is overwhelming evidence that all Romans, from the emperors to the common people, participated enthusiastically in gambling, it was frowned upon and largely prohibited by law, except during the Saturnalia and specific sporting events.2 There is also evidence of cheating at play. In a tavern in Pompeii, a two-part wall painting shows two gamblers quarrelling about the one’s cheating, and the manager then asking them to leave.3 In graffiti in the same town, an honest player congratulates himself on winning without cheating.4 In the same vein Lanciano refers to Plautus, who spoke of several instruments

1 Jones Gambling Yesterday and Today: A Complete History (1973) 15, 167 cites early Indian literature, centuries before the Christian era, which refers to cheating by means of “clogged” dice, trick boxes and the thrower’s sleight-of-hand skill.


3 Kowalski on his webpage “Roman Board Games” accessible at http://ablemedia.com/ctcweb/showcase/boardgames8.html (10 Feb 2011) reproduces a drawing of the fresco from Gusman’s Pompeii, the City, Its Life and Art (1900) 219-220 together with a translation of the Latin. See also Lanciano “Gambling and cheating in Ancient Rome” July 1892 North American Review 98. In the first scene two gamblers are depicted gambling at a table. The Latin captions read as follows: The first gambler says “Exsi” (trl by Kowalski as “I am out”); the other replies: “Non tria duas est” (“But it’s not a three, it’s a two!”). In the second frame, the gamblers are standing near each other, fists clenched, ready to fight. The one says “Noxsii amii tria iigo fui” (“You hurt me friend, it’s a three”; also translated by Lanciano as “Not two, but three, I have the game”) and the other replies “Urtii. Piillatorii iigo tui” (“Cheaters like you should be hurt”). In the same frame the barkeeper says “Itis foras rixsatis” (“Get out if you want to fight”). Kowalski notes that although the Latin “seems archaic, it is charmingly slang-like and was probably all clichés to the Romans”.

4 Lanciano (n 3) 100.

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that had been developed to curb fraudulent gambling practices;\(^5\) as well as of Nero’s coin that was adjusted so that it always fell on the same side.\(^6\)

Certain writers on Roman-Dutch law refer to specific provisions on cheating in gambling, and several English and South African statutes deal with the issue as well. The aim of this article is to discuss the development of provisions relating to cheating in gambling.

Gambling as a pastime has always been frowned upon by society, mainly for religious reasons, but also because of the social and economic ills that go hand in hand with it. This was so even where gambling was not unlawful or prohibited.

There are broadly three possible approaches to the regulation of gambling, and each has a different impact on the ability of the justice system to enforce any claim arising from cheating. The first possible approach is to prohibit and criminalise gambling as a pastime, either wholly or in part. The second is not to regulate gambling at all, and thus neither prohibit nor specifically regulate it. The third possible approach is to specifically legalise and regulate gambling. The combination of these approaches differs from place to place and time to time, with certain forms of gambling often being regulated whilst others are prohibited.\(^7\) In instances of cheating at play, the regulatory system that has been chosen determines whether recourse to the courts is possible. If the first approach is chosen the courts cannot be approached, since any cheating claim would arise from an illegal act, and is thus unenforceable. In the second instance the courts may sometimes be approached, depending on the applicable legal principles and the \textit{boni mores} of society at the time. In the third instance there are generally specific provisions dealing with cheating in gambling and the courts may be approached to enforce claims based on such cheating.\(^8\)

This article confines itself to the subject of cheating during a gambling game.\(^9\) It firstly discusses cheating in gambling in general, then sets out the legal position in Roman-Dutch law and early and current South African law, as well as early and current English law.

\(^5\) \textit{Ibid} with reference to Plautus \textit{Persa} 61 and \textit{Truculentus} 760. Lanciano (n 3 at 100) argues that these precautions made cheating with dice almost impossible. This seems doubtful in the light of Jones’s (n 1 at 142) comment that lotteries, prior to their computerisation, had a long history of bribery and corruption.

\(^6\) Lanciano (n 3) 102. He also cites (at 104) Suetonius as stating that Caligula not only accepted the profits from games of chance but also obtained more by cheating his guests and friends. For the full text see Suetonius \textit{The Lives of the Caesars – Julius, Augustus, Tiberius, Gaius, Caligula}, Vol 1 (trl Rolfe) (Loeb Classical Library, no 31) (1914) \textit{Caligula} 41 at 471.

\(^7\) The current South African regulatory system is an example, casino gambling being legalised, licensed and regulated, whilst interactive gambling is prohibited (National Gambling Act 7 of 2004 ss 45 and 11 respectively).

\(^8\) See s 16(1) of the National Gambling Act (n 7) as an example.

\(^9\) Non-payment of a gambling debt or claims for the refund of losses are excluded from the discussion although it may be argued that they also involve cheating.
2  Cheating

In the moral code of the Western world the dishonourable is far more reprehensible than the dishonest, and cheating at cards is the most dishonourable of all offences. Especially to those involved, it carries a greater stigma than the seduction of a friend’s wife, the misappropriation of property held in trust, or even a show of cowardice when faced with
a fight over honour. The exposed cardsharp may expect a life sentence of ostracism, which is seldom reversed.\footnote{Morehead “The professional gambler” May 1950 Annals of the American Academy of Political and Social Science 85.}

What exactly constitutes cheating depends on the game being played. Although there is no uniform definition of cheating, the crux of it is that the cheater transgresses the rules of the game with the intention of gaining an unfair advantage over fellow gamblers or an interested third party.\footnote{See definitions in the various statutes infra. See, in general, Lewis Casino Surveillance. The Eye that Never Blinks (1996).} The unfair advantage may be that the element of chance (the method of selection or the criteria that determine the chance itself) is altered to influence the result of the game (or the amount or frequency of payment in a game).\footnote{This wording is loosely based on the definition of cheating in the Eastern Cape Gambling and Betting Act 5 of 1997 s 62(2); KwaZulu-Natal Gambling Act 8 of 2010 s 142; Limpopo Casino and Gaming Act 4 of 1996 s 81(2); Mpumalanga Gambling Act 5 of 1995 s 79(2); Northern Cape Gambling Act 3 of 2008 s 83(2); North West Gambling Act 2 of 2001 s 67(2); and Western Cape Gambling and Racing Act 4 of 1996 s 70(2).}

Various persons may cheat in a gambling game, depending on the type of cheat perpetrated. A gambler, a third party not part of the gambling game, the dealer or the operator may all possibly take part in the scam. Often persons may collude in order to cheat a third party.\footnote{For a discussion of various methods of cheating at cards, see Morehead (n 10) 88-90 and Eade & Eade Introduction to the Casino Entertainment Industry (1997) 49, 62.}

It seems that it is possible to cheat at all types of games. Sports betting scams are well known: the actions of Hansie Cronje\footnote{Cronje v United Cricket Board of SA 2001 (22) ILJ 2577 (T).} and certain Pakistani cricket players are only some examples.\footnote{The most infamous sporting scam, however, was in Cincinnati, where the members of the White Sox team (which until then had been the winning baseball team of the 1929 season), decided to defraud their owner by betting against themselves and then “throwing” the game by deliberately losing; all because he refused to give them an increase (Jones (n 1) 58-59). See also, for the facts concerning allegations of cheating in football in the United Kingdom, Grobbelaar v News Group Newspapers Ltd [2001] 2 All ER 437, [2001] EWCA Civ 33, CA.} In lotteries, an attempt may be made to change numbers on a ticket, or a retailer may take a punter’s ticket, stating that it displays a losing number, and then claim the winnings from the operator for himself. In roulette, there may be interference with the balance of the table, the stopping of the ball or placing of late bets.\footnote{A famous roulette cheater was William Jaggers who at the end of the 19th century won £75 000 in four days at a Monte Carlo casino. As a trained engineer he researched the (inaccurate) balance of the roulette wheels and increased his odds by betting accordingly. Other roulette scams include using magnets or adjusting the legs of the roulette table to manipulate the ball. There are also a variety of mechanical and electronic card-counting devices (Jones (n 1) 51).} Card swindles may include the substitution or the marking of cards,\footnote{See, in general, Lewis (n 11) 87; Eade & Eade (n 13) 62; Jones (n 1) 85-87; McDowell Techniques of Casino Surveillance (1998) 35, 49; S v Bywater (Johannesburg Regional Court unreported case number 5/1753/99 dated 2 Feb 2000 at 9).} or teams working together to pass
information to each other or to distract the dealer in order to place a late bet. Cheating with dice is usually through the loading of the dice or dice-sliding, and in horse-racing, cheating can take the form of doping or holding back a horse during a race or insider information trading.

Whatever the swindle, what concern us here are rare legal provisions relating to cheating in gambling. The next section tracks the relevant legal provisions in Roman-Dutch law as it developed into modern South African law, followed by the English law.

3 South Africa

31 Roman-Dutch law

The oldest available Roman-Dutch reference is from Disney who quotes Alciatus as saying that the prohibition of gambling and the possibility of reclaiming lost money, as discussed by Justinian, had been abrogated by custom and that in canon law any money won could be lawfully kept as long as there was no cheating or swearing during play. This was repeated by Clarus who noted that where the winner won at gambling fraudulently, he was under an obligation to return the winnings.

Gane refers to later jurists Zypaeus and Carpzovius who both indicated that gambling would be tolerated if it was free of fraud and fairly played, but left the issue at that. Cheating during gambling was seemingly not unknown during this time as may be seen in Michelangelo Merisi da Caravaggio’s famous painting Cardsharps as well as Jan Steen’s Argument over a Card Game.

18 Lewis (n 11) 70-71; Eade & Eade (n 13) 61-62. See also the allegations in Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino 2000 (4) SA 68 (W). Whether card counting constitutes cheating is controversial especially if no computer equipment is used (Rose “Current issues in gambling laws” 1986-1987 Whittier LR 257; Collins Gambling and the Public Policy (2003) 16; McDowell (n 17) 131).

19 Eade & Eade (n 13) 74-75; Jones (n 1) 167. “Dice sliding” increases the odds to 2:1 in favour of the cheater (Lewis (n 11) 56).

20 In Mckeown v British Horseracing Authority [2010] EWHC 508 (QB), a jockey was found guilty of “failing to ride (his horse) on merits”.

21 See the facts of Constantinides v Jockey Club of South Africa 1954 (3) SA 35 (C) and Jockey Club of South Africa v Forbes 1993 (1) SA 649 (A). For similar cheating scams in dog racing, see Jones (n 1) 93. For insider information trading, see Burger & Dodsworth “Horse whisperers” 3 Aug 2007 New Law J 1102.

22 Disney (n 2) 279 with reference to Alciatus Parergon iuris libri tres L 8 c 16 and Alciatus Operum tomus II in Pandectarum seu Digestorum iuris civilis septimae partis titulos aliquot commentaria continens (1582) col 401.

23 Disney (n 2) 279 with reference to Clarus Liber V. Sententiarum L 5 § Ludus v 7.

24 Gane “The Roman-Dutch law in relation to gambling and wagering” 1906 SALJ 24 with reference to Zypaeus Notitia juris Belgici 119.

25 Gane (n 24) 24 with reference to Carpzovius Practica nova imperialis Saxonica rerum criminalium in partes tres divisa. (Frankfurt, 1635) 3 134 26.

26 Completed in 1596 and currently housed at the Kimble Art Museum, Fort Worth.

27 Completed c 1670 and currently housed at the Gemäldegalerie, Berlin.
With regard to the criminal prosecution of a cheat, Damhouder, according to the 1656 Van Nispen-translation of the plagiarised work *De practijke of gebruyk zoo van civile als criminele zaken* (under the heading “CXIV Of false dice”), noted that someone who played with loaded dice and cheated another committed two crimes, namely fraud and theft. The offender had thus to be punished twice: once as a defrauder and once as a thief. Furthermore, sentencing was at the judge’s discretion unless the offender returned the fraudulent profit. Damhouder went on to say that a person who had lost because of loaded dice could reclaim the amount within a period of fifty years. In addition, where a

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28 *De practijke of gebruyk zoo van civile als criminele zaken* (Rotterdam, 1656) 550.

29 (n 28) 550-551. See also Disney (n 2) 277. It should be noted that Damhouder’s statement that any winnings could be claimed back within a period of fifty years has its roots in Roman law (C 3 43; Carnelley & Schrage (n 2) 260).
gambling house allowed false dice, the house itself might be confiscated by the crown in accordance with Justinian’s ruling on these matters.\(^{30}\)

As far as civil claims are concerned, it should be noted that although certain cities allowed it,\(^{31}\) gambling was generally forbidden in Holland. The general rule was that a gambling debt, even where not prohibited, was unenforceable in the courts.\(^{32}\) The reason for this rule was that no one could be heard in court who “alleges his own shameful conduct” and sought to gain from such conduct.\(^{33}\) Where the conduct of the two parties was equally reprehensible, the position of the possessor was stronger.\(^{34}\) For the same reason, namely that each party’s conduct was equally reprehensible, a gambling debt which had been paid was as a rule not recoverable since the position of the possessor was stronger.\(^{35}\) In Roman-Dutch law there was some difference of opinion on the enforceability of a gambling debt arising from a game in which there had been cheating.\(^{36}\)

However, the majority of writers noted that there was an exception\(^{37}\) to the unenforceability rule. Voorda,\(^{38}\) Groenewegen\(^{39}\) and Van Leeuwen\(^{40}\) all referred to the exception in their works.\(^{41}\) It was explained by Voorda as follows: where a man had “deceitfully cheated another out of his money with tricks and schemes, for then his conduct is far more shameful”,\(^{42}\) the innocent party had a claim to recover any money lost.\(^{43}\) And Voet stated the following under the heading “Winnings by fraud in no case recoverable”.\(^{44}\)

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30 Damhouder (n 2 at 281) 511. Disney (n 2) 281 argues that Damhouder wrongly extends this provision to all common gambling houses, whether there are false dice or not.

31 The cities where gambling was lawful were the city of Delft (since 1366) and Monnikendam (1395). See, in general, Aquilius “Immorality and illegality in contract” 1942 SALJ 113; Grotius in Maasdorp (trl) The Introduction to Dutch Jurisprudence of Hugo Grotius with notes by Simon Groenewegen van der Made and references to Van der Keessel’s Theses Selectae and Schorer’s “Notes”. Cape Town, 1878) 3 3 n 49 at 329 n 116; Grotius in Maasdorp (trl) The Introduction to Dutch Jurisprudence of Hugo Grotius Juta (1903) 3 3 n 49.

32 Van Leeuwen in Barber & Macfadyen (trls) Censura Forensis (Cape Town, 1896) 1 4 14 n 10; Voet in Gane (trl) Commentary on the Pandects ad D 11 5 n 6; Voorda in Hewett (trl) Dictata ad ius Hodiernum (2005) D 11 5 1 (495) with reference also to Huber Praelectiones juris civilis tomi tres, secundum Institutiones et Digesta Justiniani (Frankfurt & Leipzig, 1749) D 11 5 n 5.

33 Van Leeuwen (n 32) 1 4 14 n 10.

34 Idem.

35 Voorda (n 32) 497.

36 Gane (n 24) 25.

37 There are various exceptions, but only the cheating exception is relevant for purposes of this article.

38 Voorda (n 32) ad Digesta 11 5 1 at 497. Simon Groenewegen van der Made Tractatus de legibus abrogatis et insitutis in Hollandia vicinisque regionibus (Amsterdam, 1669) ad D 11 5.

39 Voorda (n 32) 497 with reference to Groenewegen (n 38) ad D 11 5.

40 Van Leeuwen (n 32) 1 4 14; Van Leeuwen Het Rooms-Hollands-Regt (Leiden, 1678) 4 14 5 (361).

41 See also Gane (n 24) 28 with reference to Brunemann Commentariorum in quinquaginta libros Pandectarum (Frankfurt, 1692) 11 5.

42 Voorda (n 32) 497.

43 See also Voorda (n 32) 497 with reference to Huber (n 32) ad D 11 5 n 5.

44 Voet (n 32) ad D 11 5 7 with reference to Grotius (n 31) ad D 11 5 n 3.
Certainly if falsity has been committed at play, and victory is proven to have been won that way, it can hardly be that a claim for a refund should not be vouchsafed to any gamblers whatsoever, whether playing for money or for any other thing whatsoever. It is as though the disgrace of those joining in the play is not equal, and therefore the position of the winner in possession ought not to be better, since he suffers under the reproach both of a reproachful game and of falsity and fraud; while only the disgrace of the game appears on the side of the losing party.

Grotius\textsuperscript{45} adopted a more conservative approach than these jurists and argued that all wagers and gambling transactions were unenforceable.\textsuperscript{46} He did not suggest that there was an exception if there had been cheating.

In later Roman-Dutch law, Van der Linden seemed to prefer the view of the majority of writers and confirmed the exception to the general rule based on fraud:\textsuperscript{47}

Among offenders who are injurious to society are persons who cheat at play, whose conduct is often coupled with theft and fraud, and who are therefore punished even with corporal punishment or banishment where there are aggravating circumstances.

\textsuperscript{45} Grotius (n 31) 3 3 48-49.
\textsuperscript{46} Gane (n 24) 24-25.
\textsuperscript{47} See Juta (trl) \textit{Institutes of Holland or the Manual of Law, Practice, and the Mercantile Law} 2 6 7 (1904) at 228.
3.2 Pre-Union statutes

In pre-Union South Africa, three statutes referred to cheating in gambling and provided for a criminal sanction. In the Zuid-Afrikaansche Republiek, during the gold rush on the Witwatersrand, the legislature in 1892 amended Law 6 of 1889 to include a new section, article 7a. This section included a criminal penalty for fraudulent artifices:

Any person, who by fraud or illegal trick, pretext or artifice of whatsoever kind, with cards, tables or any other game, shall win any money or any article of value from any person or persons; or any person who shall, in any way whatsoever, conspire with others to induce another person or persons to commence play, in order by so doing to win their money or articles of value, by any sort of illegal game, shall be deemed to have committed the offence of obtaining money or goods under false pretences and shall be sentenced, for the first offence, to three months’ imprisonment with hard labour; for the second offence, to six months’ imprisonment with hard labour, and for a third offence, to two years’ imprisonment with hard labour, with this proviso, that the State Attorney or his lawful representative, shall, at all times, have the right to take the person who has lost at such play, or one or more accomplices as State evidence …. although they may have joined the play.

Section 7(a) of Law 6 of 1889 (of the old ZAR) has never been expressly repealed.48

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48 The Gambling Act 51 of 1965 repealed all the sections of Law 6 of 1889 with the exception of s 7(a). Although the 1965 Act was repealed by the National Gambling Act 33 of 1996 which in turn was repealed by the National Gambling Act 7 of 2004, neither of the last two statutes repealed Law 6 of 1889.
In the Cape, the Betting Houses, Gaming Houses and Brothels Suppression Act 36 of 1902 applied, based on the 1845 English legislation, and although gambling per se was not prohibited, the keeping or frequenting of a gambling house was unlawful. The following was laid down regarding cheating (s 10):

Whosoever by fraud, unlawful device or ill practice:

(a) in playing at or with cards, dice, tables or other games, or
(b) in bearing a part in stakes, wagers, adventures, or in betting on the sides or hands of those playing, or
(c) in wagering on the event of any game, sport, pastime or exercise;

wins from any person to himself or others any sum of money or valuable thing, shall be deemed to be guilty of theft of such money or valuable thing by means of false pretences, and shall be punished accordingly.

In the Free State, section 1 of Act 10 of 1908 contained the same provision as section 10 of the Cape statute, except that a cheat was regarded as being guilty of theft. Like the relevant provision of the ZAR-statute, neither section 10 of Act 36 of 1902 (Cape) nor section 1 of Act 10 of 1908 (Free State) has ever expressly been repealed.

For the sake of completeness, it should be noted that the Natal gambling statutes were silent on the issue of cheating in gambling. All these statutes created criminal offences, but were silent on whether the court could be approached civilly. It seems that the Roman-Dutch law approach still applied.

3 3 1910-1994

Gane, in his explanatory notes on Voet, indicated that the principle of enforceability in instances of falsity and fraud had been approved (by implication in early case law) by the South African courts. In this regard he referred to R v Makogo, Yenka Reddy v Naidoo and Wilson v O’Halloran as approved by Aquilius. Unfortunately this
viewpoint was not shared by Nathan, who in his *Common Law of South Africa* in 1913 followed Grotius and stuck to a narrow interpretation of the law, stating categorically that gambling contracts were against legal policy and would not be enforced. Although he referred to Voet, he ignored Voet’s view on the issue of cheating at play.

The next important gambling statute was the 1965 Gambling Act which repealed most of the then existing provincial gambling statutes (subject to some exceptions mentioned above in 3.2). It did not, however, address the subject of cheating in gambling.

### 3.4 Post-Constitution

[Today], (g)ambling is an activity which involves the circulation of large sums of money. In any type of play, for instance in a casino or on a gambling machine, the amount of money which passes backwards and forwards between the player and the operator can be many times the initial stake gambled. With so much movement of money, gambling, if not properly controlled, can open the door to fraud, money laundering and other criminal activities and malpractice.

The South African Constitution introduced drastic changes to the regulation of gambling by legalising certain forms of it but made them subject to strict licensing, regulation and policing provisions.

The first post-Constitution National Gambling Act did not refer to cheating in gambling. It did, however, effect a change to the common-law principles of unenforceability. It provides that

> any gambling debt lawfully incurred by a person in the course of any gambling activity regulated by any law, and which is not in any respect in conflict with such a law, shall, notwithstanding provisions of common law or any other law, be enforceable in law.

The exception in respect of cheating has seemingly remained intact as there is nothing to indicate the contrary. The 1996 Act was repealed and replaced by the new National Gambling Act 7 of 2004.

The 2004 Act provides for the enforcement of gambling debts in certain circumstances, and ensures access to the courts in instances of cheating in limited circumstances. In this regard s 16(1) provides that:

> Despite any provision of the common law or any other law other than this Act—

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61 S 104(1)(b)(i) as read with schedule 4 part A of the Constitution of the Republic of South Africa, 1996, as read with the preamble of the National Gambling Act 33 of 1996 (now repealed). Note that the regulation of gambling, wagering and betting is separate from that of lotteries and sports pools.
62 33 of 1996 (now repealed).
63 *Idem* s 18.
(a) a debt incurred by a person ... in the course of a gambling activity that is licensed ... is enforceable in law;

(b) a debt incurred by a person ... in the course of a gambling activity that is lawful but not required to be licensed ... is enforceable in law only to the extent that it is enforceable in terms of the common law or another law;

(c) a debt incurred by a person in the course of any gambling activity that is unlawful ... is not enforceable in law;

(d) ...

(e) an informal bet is not enforceable in law.

Whether a claim arising from cheating can be enforced thus depends firstly on whether the gambling activity was licensed at the time. If it was, the courts will hear the claimant.\(^\text{64}\) If the cheating occurred in a gambling game that was lawful but did not require a licence, it will be enforceable only in so far as it was enforceable at common law. As discussed above, even though gambling contracts were generally unenforceable, it is submitted that the exception should still apply. Thus where the game was contaminated by cheating the claim should be enforceable. Where the gambling was unlawful and prohibited, or merely an informal bet, the courts will not entertain a claim. In this regard it appears that there is no exception in respect of cheating.

Besides dealing with the enforceability issue, the 2004 Act\(^\text{65}\) also creates certain uniform norms and standards to safeguard and protect members of the public who participate in licensed gambling activities.\(^\text{66}\) It protects the public largely through ensuring the integrity of the gambling games played at all licensed operations.\(^\text{67}\) The principle underlying player protection is that there must be clarity about the rules of the gambling game and how it should be played. All the provincial gambling statutes make provision for the criminalisation of cheating and cheating devices although it should be noted that these provisions relate only to licensed operators.\(^\text{68}\)

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\(^\text{64}\) In accordance with s 16(1)(a) as read with the provisions on cheating in the various provincial gambling statutes (see infra).

\(^\text{65}\) Act 7 of 2004.

\(^\text{66}\) See the Preamble. It should be noted that this Act regulates gambling, casinos and wagering, but not lotteries and sports pools.

\(^\text{67}\) The integrity of the licensed games is also ensured by ensuring the integrity of the licensed operators themselves. This aspect is excluded from this discussion. Where the games are unlicensed, players are less protected.

\(^\text{68}\) See Eastern Cape Gambling and Betting Act 5 of 1997 s 62; Free State Gambling and Liquor Act 6 of 2010 s 125; Gauteng Gambling Act 4 of 1995 s 74; KwaZulu-Natal Gambling Act 8 of 2010 s 142; Limpopo Casino and Gaming Act 4 of 1996 s 81; Mpumalanga Gambling Act 5 of 1995 s 79; Northern Cape Gambling Act 3 of 2008 s 83; North West Gambling Act 2 of 2001 s 67; and Western Cape Gambling and Racing Act 4 of 1996 s 70-70A.
The provincial provisions are not all exactly the same and some are more detailed than others.\(^69\) Section 67 of the North West Gambling Act 2 of 2001 serves as an example:

1. No person shall—
   
   (a) knowingly allow anyone to conduct or carry on cheating or to operate any cheating device or provide any person with information or with a device to cheat in any gambling game;

2. For the purposes of this section “cheating” also means—
   
   (a) the alteration of the selection of criteria which determine the result of a gambling game or the amount or frequency of payment in a gambling game,
   
   (b) the use of any scheme, arrangement, system or plan which the Responsible Member may from time to time by notice in the Provincial Gazette declare to be cheating, and
   
   (c) “cheat” shall have a corresponding meaning.

The Lotteries Act 57 of 1997, which regulates lotteries and sports pools, in section 58(1)\(^{(b)-(c)}\) makes it an offence for:

any person who with the intent to defraud, falsely makes, alters, forges, utters, passes or counterfeits a National Lottery ticket or sports pool ticket; or influences or attempts to influence the winning of a prize through the use of coercion, fraud or deception, or through tampering with lottery or sports pool equipment, systems, software, data, tickets or materials.

Two post-Constitution cases of cheating have reached the South African courts indirectly:\(^70\) In \(S v Bywater\)^71 it was reported that the Caesars casino in Gauteng had lost about three million in nineteen days in a marked card scam in the game of black jack. This scam operated for almost three weeks right under the noses of the surveillance personnel, dealers and inspectors before they were able to pinpoint the cheating.\(^72\) In Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino 2000 (4) SA 68 (W), although the claim was for damages from the casino for wrongful detention and contumelia, the arrest took place because of the placing of late bets during a game of mini baccarat – which could amount to cheating as it “alters the elements of chance, method of selection or criteria which determine: (a) the result of the game; or (b) the amount or frequency of payment in a game”\(^73\).

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69 The Eastern Cape and Mpumalanga provisions are particularly detailed. The other seven provinces’ provisions relating to cheating are almost identical.
70 There is one earlier reported criminal matter arising from cheating, but in this matter the cheater was murdered (\(S v Xaba [1983] 2 All SA 343 (A)\)).
71 (n 17) at 9.
72 It is ironic that the printer who marked the high-value cards (by shading one colour) was sentenced to six years’ imprisonment whilst the group that hired him (and scammed the casinos) remains at large.
In practice cheating, especially in casinos, is dealt with in-house by the operators and the relevant provincial gambling board, not in the courts. The licensed operator investigates any possible cheating and decides on its consequences, specifically the payment of the bet and/or the removal of the gambler from the casino. The matter will be reported to the relevant provincial gambling board.\(^{74}\) In certain instances this is compulsory. Although theoretically a cheater may be criminally prosecuted in terms of legislation,\(^{75}\) the operators generally do not prosecute cheaters for policy reasons. After all, the operators trade on the integrity of their operations and games, and prosecution could create the impression that such integrity may be debatable.

4 United Kingdom

Early English statutes prohibited various forms of gambling by declaring them unlawful.\(^{76}\) In 1541 Henry VIII provided for a fine of forty shillings a day for anyone keeping for gain, or frequenting, a gambling place providing unlawful games.\(^{77}\) Ploscowe notes that despite these statutes, gambling was a popular English pastime\(^ {78} \) and argues that since it was impossible to prohibit gambling, a limitation was placed on possible gambling losses.\(^ {79} \)

At civil law, gambling contracts were unenforceable as from 1845, even though gambling \textit{per se} was not unlawful unless it took place in a gaming house.\(^ {80} \) This unenforceability rule was amended by section 335(1) of the (United Kingdom) Gambling Act 2005 which provides that “the fact that a contract relates to gambling shall not prevent its enforcement.”\(^ {81} \)

With regard to criminal sanctions, Street argued in 1937 that there were four types of punishable dishonest gaming, two of which are of particular importance here:

\begin{itemize}
  \item The gambler, if he is unhappy with the operator’s decision, may take the matter to the relevant gambling board for review in terms of the provincial legislation and administrative-law principles.
  \item See provincial statutory provisions in n 68.
  \item Ploscowe “The law of gambling” May 1950 \textit{Annals of the American Academy of Political and Social Science} 1.
  \item Unlawful Games Act, 1541 (33 Hen VIII c 9). See also Ploscowe (n 76) 2.
  \item Ploscowe (n 76) 2. Charles II limited gambling losses to £100 at any time or meeting (Gaming Act, 1664 (16 & 17 Cha II c 7)).
  \item Gaming Act, 1845 (8 & 9 Vict c 109).
  \item This is without prejudice to any rule of law preventing the enforcement of a contract on the grounds of unlawfulness (other than a rule relating specifically to gambling) (s 335(2)).
\end{itemize}
firstly, common-law cheating and secondly, statutory cheating at games. For each of these crimes there is some “black leg”-case law that is still applicable.

4.1 Common-law cheating

Not every successful liar is a common-law cheat.

Common law cheating was indictable if it was “of such a character as to affect the public and … common prudence will not afford protection against it; and [it was] in pursuance of a conspiracy”.

Marked cards and false dice fall within the category of common-law cheating. In 1684 a charge was laid against Arnope for cheating Squibb out of £80 by playing with false (marked) cards. In 1587 Bowden was indicted for playing with false (loaded) dice. In 1618 the same fate befell Leeser.

The common-law offence could also be committed by fraudulent betting. In the complainant was persuaded to bet on a “rigged” foot race and although the cheating was private, the court found it to be public in its consequences. However, in a group of infamous cheats and gamblers sought prosecution of another similar group for common-law cheating when that group had cheated them out of £900. The

Street The Law of Gaming (1937) 234. The other two categories are obtaining money by false pretences and larceny. In 1757, the offence of obtaining money “by false pretences with the intent to cheat” was created (Obtaining Money by False Pretences, etc Act, 1757 (30 Geo 2 c 24); see Street at 246; Young v The King 100 ER 475 1378-1865 (1789)). Most of the relevant case law related to betting on foot- or swimming races, where a person was entered in a race under a false name in order to conceal his ability, the purpose being to entice a third party to lay a bet (see Street at 236-237) with reference to R v Dickinson Times Newspaper 26 Jul 1879; R v Larner (1880), 14 Cox C C 497; and R v Button (1900) 2 QB 597. All the cases, however, concerned instances of attempt only (see Street at 237)). In the case of larceny by a trick, Street argued that the distinction between obtaining money by false pretences and larceny by a trick is one of intention, although the cases in point are difficult to reconcile (see Street at 240). The available cases relate mainly to betting on which of three thimbles covered a hidden pea (see Street at 241 with reference to R v Reed (1849) 13 JP 573 and R v Robson (1820) Russ & Ry 413); or “welshing” (where a bookmaker fails to pay a bet). See McConnell “Freedom of speech” 11 Jun 1993 New Law J 866. A full discussion of this topic falls outside the scope of this article.

A gambling cheat was referred to as a “black leg” (Barnett v Allen 157 ER 516 1220-1865 (29 May 1858); Wright v Johnston 175 ER 656 1688-1867 (16 Mar 1858)).

Street (n 82) 234. He quotes Holt CJ in R v James (1703) 1 Salk 379: “We are not to indict one man for making a fool of another … .”

Street (n 82) 234. He notes that in these common law-cheating cases the court was not bound to impose any particular punishment and could sentence someone to imprisonment with hard labour. In addition, no warrant was required for an arrest.

Ibid.


Harris v Bowden 78 ER 348 1378-1865; Street (n 82) 235.

Martin Leeser’s Case 4, 79 ER 424 1378-1865; Street (n 82) 235.

Street (n 82) 235.

The Queen v Orbell 87 ER 804 1378-1865 (1703); Street (n 82) 235.
court declined to give them such extraordinary assistance to "enable them to attack their brethren in iniquity".\(^{92}\)

4.2 Statutory cheating

With regard to Street’s category of statutory cheating at games, the first relevant statute was the 1664 Gaming Act of Charles II, which penalised cheating in any game whatsoever, or in betting on such a game, with forfeiture of treble the amount won and treble costs for the loser or an informant, as long as the suit was brought within six months.\(^{93}\)

The 1710 Gaming Act of Anne focused on the prevention of *inter alia* deceitful gaming. It provided that “if any person who was fraudulent in playing at, or betting upon, games, should win any money or valuable thing, he would forfeit five times the sum so won, be deemed infamous, and be whipped as a perjurer”.\(^{94}\)

The next important provision was section 17 of the Gaming Act of 1845 of Victoria that repealed these sections and replaced them with the following:\(^{95}\)

> Every person who shall, by any fraud or unlawful device or ill practice, in playing at or with cards, dice, tables, or other games, or in bearing a part in the stakes, wagers or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any person to himself, or any other(s), any sum of money or valuable thing, shall be deemed to be guilty of obtaining such money or valuable thing from such other person by a false pretence, with the intent to cheat or defraud such person of the same, and, being convicted thereof, shall be punished accordingly.\(^{96}\)

For a successful prosecution there had to be proof that money\(^{97}\) had been won by “fraud or unlawful device or ill practice”\(^{98}\) and that the cheating had occurred during a gambling game.\(^{99}\) The cheating must have happened in the playing of some “game, sport, pastime

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\(^{92}\) *Rex v Peach et al* 97 ER 442 1378-1865 (15 Apr 1758); Street (n 82) 235-236.

\(^{93}\) Gaming Act, 1664 (16 & 17 Cha II c 7). See also Street (n 82) 237.

\(^{94}\) Gaming Act, 1710 (9 Anne c 19). This Act was repealed by the Gaming Act, 1845 (8 & 9 Vict c 109). See also Ploscowe (n 76) 2.

\(^{95}\) Street (n 82) 237 with reference to the Gaming Act, 1845 (8 & 9 Vict c 109 s 17).

\(^{96}\) Gaming Act, 1845 (8 & 9 Vict c 109) (n 79). See, in general, Street (n 82) 238 and Richardson (ed) *Archbold: Criminal Pleading, Evidence and Practice* (2000) 22-71. In 2005, Kwong Lee, Martin Fitz and Shuhal Miah were found guilty of cheating at roulette under this section (“Trapped by a sting that won too much” *TimesOnline* (London) accessed at http://www.timesonline.co.uk/tol/incomingFeeds/article1293306.exe (4 Aug 2007)).

\(^{97}\) Money (not merely the title of winner) must be won and retained (*R v Harris* (1963) 47 Cr App R 125; Richardson (n 96) 22-73).

\(^{98}\) See *R v Darley* (1826) 1 Stark NP 359; *R v Moore* 10 Cr App R 54, CCA; Richardson (n 96) 22-71.

\(^{99}\) Richardson (n 96) 22-71; *R v Lawler* 14 JP 561; *R v Governor of Brixton Prison, ex parte Sjoland and Metzler* [1912] 3 KB 568, 570. Street (n 82) 238 refers to *R v Gardner* (1851) 17 LT 7 in which Gardner was convicted for “‘packing cards”. The facts in *R v Bailey* (1850) 4 Cox 390 were that a cheat pretended to be drunk with the object of deceiving (and winning £70) at a game of skittles. Because it is a game of skill, the Act was found not to apply and Bailey was not convicted. See also Street (n 82) 238-239.
or exercise”

although the character of the game was immaterial. Later, fraud in wagering would also be found to meet the criteria of the section. In the recent case of R v Governor of Brixton Prison, ex parte Stallman the German government requested the extradition of Stallman as he had cheated one Von Dippe by playing rouge et noir with false cards and had obtained a bill for 80,000 marks in contravention of the Gaming Act of 1845. Mere trickery, such as a “three-card trick” was however excluded from the application of the Act. In the most recent case of R v Webb a member of a group of cheats was successfully prosecuted for cheating the casino at roulette and convicted of conspiracy to defraud.

The 1845 Act was repealed in 2005. Section 42 of the 2005 Gambling Act makes it an offence for any person to cheat at gambling, including casino gambling and lotteries:

“(1) A person commits an offence if he (a) cheats at gambling, or (b) does anything for the purpose of enabling or assisting another person to cheat at gambling.” No reported case has been found on this section.

In practice instances of cheating are generally dealt with by the Gambling Commission, not by the courts. In terms of the 2005 Gambling Act the Commission has the power to investigate bets that are “substantially unfair” and may apply a number of available sanctions that include the power to void any unfair bets, including ones in which cheating occurred. Because gambling debts are no longer unenforceable, it is possible to bring a civil claim arising from a cheating game.

100 Richardson (n 96) 22-71.
101 Street (n 82) 239.
102 R v Leon [1945] KB 136; R v Clucas [1959] 1 WLR 244; R v Clucas and O’Rourke (1959) 43 Cr App R 98; Richardson (n 96) 22-73.
103 [1912] 3 KB 424; Street (n 82) 238.
104 For a three-card-trick, see also R v Hillard (1913) 9 Cr App R 171 174; R v Bailey (1850) 4 Cox, CC 390; R v Governor of Brixton Prison, ex parte Sjoland and Metzler (n 99). [For a contrary view, see the Scottish case of Stuart v Macpherson 1918 JC 96 decided in terms of the Prevention of Gaming (Scotland) Act, 1869.] In R v Connor & Brown (1881) 45 LT 512 the accused was convicted for cheating at “tossing of coins” and R v Hudson (1860) Bell CC 263 for a “conjuring trick”. See in general Richardson (n 96) 22-71 and Street (n 82) 239.
105 [1995] 16 Cr App R(S) 486.
106 He was sentenced to two years’ imprisonment.
107 S 42(6) of the Gambling Act, 2005: “Section 17 of the Gaming Act 1845 (c. 109) (winning by cheating) shall cease to have effect.”
108 It is immaterial whether a person who cheats improves his chances of winning anything, or actually wins anything (s 42(2)). The offence may consist of actual or attempted deception or interference in connection with the process by which gambling is conducted, or a real or virtual game, race or other event or process to which gambling relates (s 42(3)). A person guilty of an offence under this section is liable on conviction to imprisonment for a term not exceeding two years, to a fine or to both, or on summary conviction, to imprisonment for a term not exceeding fifty-one weeks, or to a fine not exceeding the statutory maximum or to both (s 42(4)).
109 Ss 336-338; Littler (n 60) 112-113.
110 See discussion supra on s 334 of the United Kingdom Gambling Act, 2005.
Statutory provisions on cheating in gambling have a long history in both South African and English law. Cheating in gambling creates two possible consequences: civil enforcement in the courts, and/or criminal prosecution. Civil enforcement of a gambling debt in South Africa is currently defined in the National Gambling Act of 2004 that distinguishes various types of gambling contracts. The common law still applies to lawful but unregulated gambling contracts although there is uncertainty about the enforcement of a game in which cheating occurred. This is an unfortunate state of affairs. Criminal prosecution is possible in terms of the provincial statutes but unlikely in view of the operators’ policy. In the United Kingdom, all gambling contracts, including those in which cheating occurred, have been enforceable since 2005. No distinction is drawn between licensed, on the one hand, and lawful (but unlicensed) gambling contracts on the other, making the enforceability of a gambling contract in which cheating occurred more likely than in South Africa. At criminal law the prosecution of a cheat is also possible, but as in South Africa, unlikely in view of the role of the regulatory body.
Abstract

This article discusses the Roman-Dutch laws pertaining to gambling with specific reference to the provisions dealing with cheating during play. Both the criminal aspects and the legal rules relating to the unenforceability of gambling debts in the Roman-Dutch period, and the possible exception thereto in instances of cheating, are discussed and compared with pre-Union South African legislation as well as pre- and post-Constitutional statutes. A comparison is drawn with the legislation in England/the United Kingdom during the corresponding period. The document is illustrated with mainly European paintings depicting cardsharps and persons cheating at gambling.