gaming and lottery which constitute offences. Aspects which do not constitute any offence under the Ordinance came under the adjective (private.)

"Gaming" is defined in the Common Gaming Houses Ordinance 1953 in S.2.

("Gaming", with its grammatical variations and cognate expressions, means the playing of any game of chance or of mixed chance and skill for money or money's worth.)

A game of skill is one in which nothing nothing is left to chance and in which superior knowledge and attention or superior strength, agility and practice, gain the victory. The games of mere skill are exceedingly few for it excludes every game in which the element of chance enters. Chess perhaps and draughts and some few games ejusdem generis would be games of mere skill. No game of cards, no game in which dice were used, could, I submit, fall under such a category. Even billiards so long as points are scored for unintentional success, could hardly be called games of mere skill. But some people may regard billiards as a game of skill on the grounds that it does not cease to be such merely because sometimes points are scored unintentionally.

Games of skill are distinguished from games of change in that the latter are games dependent upon chance or luck and in which adroitness has no place at all. And games of chance or of mixed chance and skill are illegal under the Common Gaming Houses Ordinance.

The meaning of the word 'gaming' must be considered in relation to :-

(a) gaming in public

(b) gaming in a common gaming house.

There are some popular gambling games mostly in the card category which do not usually form subjects of criminal charges as they are invariably played under circumstances which do not constitute any offence under the Ordinance. The main reasons being that the number of persons who may participate in them at one time is limited, more often than not to four persons only. It is obvious therefore that if only four persons are able to participate in a particular game at any one time, then there is no opportunity for participation therein by the public, and unless the game is played in a public place, ordinarily no offence is committed.

Gaming in a common gaming house is restricted to games of chance as games of skill are outside the bounds of law. The expression common gaming house is of English origin. They are nuisances in the eyes of the law, not only because they are great temptations to idleness but because they are apt to draw together numbers of disorderly persons.

It is illegal to keep a common gaming house as laid out in S.2 of the Common Gaming Houses Ordinance.

A common gaming house is either a place to which the general public are able to resort for the purpose of gaming or a place to which, though barred to the public, is kept or used by the owners or occupiers primarily for the purpose of gaming.

A practical question may arise as to whether social clubs could ever be deemed to be a common gaming house if facilities for gaming are catered for.

In REX vs. FONG CHENG CHENG[I] it was held that a place does not become a common gaming house merely because gaming habitually occurs in it. A private residence is not a common gaming house because the owner makes a practice of inviting his friends to it to gamble, nor do the premises of an ordinary social club become a common gaming house merely because the club provides facilities for its members to gamble and some of them habitually use the premises for that purpose.

This reasoning is consistent with common sense. For if it were otherwise no social club whose primary object is social intercourse, or spot of any description ~~deseription~~.

No thesis developed.

I: (1930) SSLR 139.

would be within the law if it habitually permitted any of its members to gamble on its premises and provided facilities for that purpose. It is also logical because without the modification we will be left in a position where probably three quarters of the adult population of the Federation are unprosecuted criminals and in future then no man could play "old maid" with his family in his own house for a ten cents stake without committing a criminal offence.

However, notwithstanding that the avowed object of a club is to provide social amenities to its members if in fact the primary object of that Club is, or has become, gaming, and its premises are kept or used primarily for that purpose, then such a club is a common gaming house within the meaning of and subject to the provisions of the Ordinance.

It should be noted that there is a difference between the offence of gaming in a common gaming house in Singapore as compared to Malaysia.

'Gaming' is not defined in the Singapore Ordinance. It is defined in our country and is restricted to the playing of games of chance or if mixed chance and skill for money or moneys worth. Games of skill are outside the scope.

In Singapore the ordinary meaning of 'gaming' is used i.e. the playing of any game for money or moneys worth. Therefore it is immaterial whether the game is of skill or of chance or of mixed chance and skill. So long as it is played for money, it is an offence in our

country, unless the prosecution successfully invoke the presumption under S.19 of the Common Gaming Houses Ordinance 1953. They have to prove that the game played in the Common Gaming House was a game of chance or of mixed chance and skill.

CHAPTER II

THE VARIOUS PRESUMPTIONS CONTAINED IN THE COMMON GAMING HOUSES ORDINANCE 1953:

SHORT STUDY

The Ordinance contains several sections which create presumptions and dispenses with the normal onus of proof placed on the prosecution (as required by the Evidence Ordinance 1950). These sections presume certain facts to exist and the onus of disproving them is thrown on the defence. The crown thus is given a powerful weapon to assist it in the suppression of crime.(1)

But it must be understood that these sections namely sections 4(2); 6(2); 7(3); 8(2); 9(2); 11(1) (2) & (3); 19 and 20(1) do not "make" offences. They exist to help the prosecution of persons who have been accused of an offence under the Ordinance. The offence is determined by the actual circumstances of the gaming i.e. whether the gaming was "public place" or "common gaming house" or in private. If the facts presumed do not actually exist then no offence is committed. For instance Section 16(1) empowers a police officer to enter a suspected place and

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(1) Objection has been expressed against this type of legislation although it has been held in SAMINATHAN VS. P.P. (1955) MJL 121 that these statutory presumptions are really nothing more than an extension of the provisions of S.106 of the Evidence Ordinance 1950 which provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

arrest persons found therein, provided that things or circumstances which are made by this Ordinance presumptive evidence of guilt are found in such place or on any person therein. This means that on presumptive evidence along a police officer is empowered to arrest. But this does not necessarily imply that an offence has already been or is being committed.

I. S.19

The most difficult and important sections dealing with presumptions are S.19 and S.20. The sections provide presumptions that:

(1) a place is a common gaming house

(2) that it is so kept or used by the occupier

(3) under S.20, with the permission of the owner.

For S. 19 the circumstances which raise the above presumptions are provided for in the section, and if any one or more of them occurs, the presumptions come into force. The effect of the section is that it places on any person whose premises are entered under the Ordinance and found to contain instruments of gaming the burden of proving that those premises are not a common gaming house within the meaning of the law. Certainly these sections sound very alarming and extraordinary, giving great leeway for the police and prosecution to round up almost anybody in whose house instruments or appliances for gaming

are found, and charge them with keeping a common gaming house. However they exist in the Gaming Ordinance and the courts have therefore to utilize them though in their instructions of S.20 and S.19 they have done all in their power to prevent them bearing too hardly upon the subject.

a) ORIGIN OF S.19 AND S.20

In order to understand these two sections the better, it is necessary to note their origin and their appearance in other gaming laws analogous to this Ordinance.

S.8 of the 8 and 9 Vic. C.109 (English) provides that where any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game are found in any place entered under the Act, it is evidence until the contrary be proved that such place is used as a common gaming house and that the persons found therein were playing, although no play was actually going on at the time of the entry.

However, the difficulty of getting such evidence of gaming was so great that this portion of the Act proved to be practically a "dead letter" because all the gaming houses were found to be provided with the means of secretly making away with the instruments of gaming on any

alarm being given. Therefore the 17 and 18 Vic. C.38 was passed, S.2 of which enacted that obstructing the entry of constables or fitting a house in order to obstruct the police should be evidence until the contrary be proved that the place so fitted or in which the obstruction took place was a common gaming house. These two sections are then the original sources from which S.19 and S.20 have ~~given~~ arisen.

In the Straits Settlement colonies, the initial sections to adopt the English counterparts were sections 58 and 60 of the Police Act XIII of 1856. Then was passed Ordinance XIII of 1870, Sections 14 and 15 dealing with the same presumptions. Next came Ordinance IX of 1870 S. 13 and S.14; Ordinance XIII of 1879, S.11 and S.12 and Ordinance V of 1888, S.14 and S.15. Finally it is all incorporated in the 1953 Ordinance under Sections 19 and 20. Some differences can be found in the wording of these various sections but it does not affect the crux of the matter hence authorities under any of these Ordinances should be applicable under the present Ordinance so far as the actual presumptions are concerned. It might not however, apply so far as the construction of some of the terms used in the sections.

Authority? why?

b) INSTRUMENTS OR APPLIANCES FOR GAMING: S.19

The above expression is not specifically defined in the Ordinance but S. 3 provides that the expression includes "all articles declared under sub-section (2) to be instruments or appliances for gaming and all articles which are used in or for the purpose of gaming or a lottery". By A.P. 29/66, the sub-section (2) referred has been changed to sub-section (3) with the word "Minister" used instead of "Chief Secretary".

Up to date no instruments or appliances for gaming has been gazetted by the Minister.(2) It leaves us to look at the other alternative given, for the word "includes" denotes that apart from gazetted instruments/ appliances there may be other means of gaming.

A question that arises is: Does the actual user of an article on a single occasion for the purpose of gaming make that article an instrument or appliance of gaming? Or is it restricted to articles which by their nature are used in for the purpose of gaming or a lottery? It is a difficult question which has never been actually decided in the Federation so far as can be ascertained.

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(2) In Singapore under S. 186 of the Common Gaming Houses Ordinance 1961 (No. 2 of 1961), the Minister for Home Affairs in the exercise of the powers conferred by sub-section (3) of S.2 of the Common Gaming Houses Ordinance declared the articles set out in a given schedule to be instruments or appliances for gaming. See appendix C.

The Bombay Act of 1887 (amended in 1890) contains an almost similar provision to our corresponding section. It reads

S. 2:"In this Act the expression 'instruments of gaming' includes any article used or intended to be used as a subject or means of gaming .....".

These words seem to import in themselves that it would be sufficient for the purposes of the act if an article were only used once as a subject or means of gaming. The leading case on the point is the QUEEN-EMPRESS vs KANJI BHIMJI.(3) This case decided that any article which is actually used as a means of gaming comes within the defination of instruments of gaming even though it may not have been specially devised or intended for that purpose.

However the contrary had been held in QUEEN-EMPRESS vs GOVIMD.(4) Parsons J. held that there was no indication in the amending act of 1890 of any intention to restrict the meaning of the word "used". If the legislature had so intended, they would have surely indicated it. He went further to say that whether or not an article is used as

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(3) I.L.R. 17 BOM. 184

(4) I.L.R. 16 BOM. 283

a subject or means of gaming or wagering, is a question of fact which has to be determined upon the evidence in each case.

Telang J. was even more emphatic in his view that some enlargement of the scope of the words was intended. He held that the word "means" is a word with a wider signification than was given to the word "instruments" of gaming and when the former word is added by express separate legislation to the defination of the latter, the inference is that some widening of the scope of the old law must hav e been intended.

This view however cannot be applied to the construction of our local Ordinance because of the absence of the word "means" (which according to Telang J. enlarges the scope). Instead we use the word "articles". Furthermore, unlike the Bombay Act 1887, we have no subsequent amending act to enhance this need for a wider construction of the word. It is humbly submitted that the view held in the former case of Queen-Empress vs. Kanji Bhimji[5] is the better one. The purpose of the Act is to supress gambling because of its inherent evils, not because certain games are

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(5) I.L.R. 17 BOM. 184.

deemed to be distasteful. Therefore as long as a person gambles, even once, using a totally new instrument, may be hitherto unknown, then this single user of the instruments should be deemed that which is forbidden by the Act. If the instrument/appliance to be illegal must be that normally used or is for the purpose of gaming then it would be cutting down the object of the act. So long as the accused were found playing any game of chance of of mixed chance and skill for money or moneys' worth, the fact that the instruments which they used is a novel one, not usually used by gamblers, should not be a deterrent factor. Apart from normal instruments like the mahjong tiles for instance, the courts should be given scope to hold that any instrument of gaming, even though used only once, so long as it is used to game, then it is an instrument or appliance of gaming falling under the act.

Sir Roland Braddell however feels that the construction must be strict and in favour of the subject. He says that:

> "The Legislature in this colony had then no precise defination before them in 1888 and it may be possibly be that it was

considered safer not to define the expression at all but to interpret it as was done by a wide statement of what the expression was to include, and it may therefore never have been intended to make a single "user" sufficient for the purpose of the Ordinance." (6)

I humbly beg to differ in my opinion. The fact that there has been an obvious omission to define the phrase by the legislature could possibly mean that they are leaving the field open for a wide interpretation and 'wide' here I take it to mean to include a single user, unlike the interpretation of 'wide' given by Sir R. Braddell, restricting the phrase to exclude a single user.

It is curious to note that a place in the Ordinance shall be deemed to be 'used' for a purpose if it is used for that purpose even on one occassion only, as provided for in sub-section (2) also. Of course one can argue that there again if the Legislature intended to include a

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(6) Sir Roland Braddell, COMMON GAMING HOUSES - a Commentary on Ordinance No. 45, 2nd Edition at p.55

single user as an instrument of gaming under the Ordinance it would surely provide for it, as it provided for a 'place' used.

These are all possible arguments which in effect carry no legal precedence and the question can only be solved when it arises in court. Probably the best compromise is to adopt Parson's J's view in Queen Empress vs. Govind[7] that whether or not an article is used as a subject or means of gaming is a question of fact which has to be determined upon the evidence in each case. This was the basis upon which the case of Rex vs. Foo See Cheng [8] was decided. It was held that a pin table is not necessarily an instrument or appliance for gaming but if it has actually been used for gaming on any occasion then it at once falls within the defination and the presumption under S.19 of the Ordinance arises, and the court must infer until the contrary is proved that the place in which the pin table is found is a common gaming house and is so kept or used by the occupier thereof.

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(7) I.L.R. 16 BOM. 283

(8) [1938] MLJ 134; [1938] S.S.L.R. 431.

Some of the articles which has been held to be instruments of gaming includes lottery tickets [9], a pari-mutuel [10], a marked coin proved to have been used for the purpose of making a bet[11], and money[12] (although in the case of PYARELAL GOKUL PRASAD vs. EMP.[13] it was held that not all moneys are instruments of gaming. If a particular coin or a particular note has in fact been used as a means of gaming then that particular coin or particular currency note does fall within the defination).

c) "OCCUPIER"

There is a presumption under S.19 that a place is a common gaming house so kept by the occupier if upon entry into premises any instrument for gaming are found therein or if persons are seen or heard to escape therefrom on the approach or entry of a Magistrate or unlawfully prevented from entering.

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(9) R vs. Lee Hong Kang & Others (1862) 3 ky. 145

(10) Tallet vs. Thomas (1871) L.R. 6 QBD 514; see also Everett vs. Shand (1931) 2 K.B. 522

(11) P.X. DeSouza vs. Emp. [1932] BOM. 180

(12) Osman bin Trund vs. P.P. (1912) 1 FMSLR 84

(13) [1932] BOM. 94

This presumption is rebuttable unsuitable if some evidence to the contrary can be proved. In R vs. Khoo Seang Ju (14) where the only facts proved against the accused were that he was the occupier of the house and that persons escaped from it on the arrival of the police, which is statutory proof under S.19 that the house was so kept by the occupier as a common gaming house, Wood J held that it was not safe to convict where there was some evidence to the contrary.

Who is an occupier? Ordinarily the word means the tenant of the premises, although he may personally be absent from the premises. This is laid down in "Maxwell on Interpretation of statutes" 2nd Edition at page 81. It is to be noted that the word is not defined in this law, though it has been in other laws for the purposes of those laws. The defination was attempted by Wood J. in two cases although upon perusal the definations appear to conflict with each other. In R vs. Aw Eng Tho (15), he decided in 1884 that there must be proof of actual and not constructive occupation, and the man who really occupied the whole house we acquitted, while in the case of

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(14) (1888) 4 ky. 392

(15) 3 ky. at page 171.

TAN YOK LAN[16] six years later, he held that the actual occupant was not the occupier but her husband, who paid the rent and lived somewhere else. This was followed by Law (Ag. C.J.) in Rex vs. Liong Thye Hye[17]. The accused was a married woman who occupied the premises in question but whose husband paid the rent. The husband only went home once a week and at the time of the occurence in the case, was living at a place where he was working. Law (Ag. C.J.) considered that the accused was not the occupier.

It should be borne in mind that S.19 is merely a presumptive section which does not carry any conviction. If certain conditions provided for are found then a certain presumption arises. This could be of great help in the use of the convicting sections of 4(1) (9) + (b) [18]. In a prosecution on a charge under this section the Charge should specify the capacity in which the accused is charged. The charge should allege either that the

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(16) (1890) 4 kysche 668.

(17) B. Common Gaming House 147.

(18) The presumption (provided by S.19 and S.20) that a place is a Common Gaming House is a general one and may be invoked against any accused whenever it is necessary for the purposes of the prosecution to prove that a place is a Common Gaming House. The presumption that a place is so kept or used by

accused is the owner or that he is the occupier or that he is a person having the use temporarily or otherwise of the place in question. Where a section as in this case, comprises more than one act which constitute an offence, the prosecution should make up their minds with which of those offences they propose to charge the accused. If they are not sure which of the offences will be established by the facts they can prove against the accused, they should charge him ~~in the~~ with offences in the alternative.

d) "PERMITTING"

The presumption under S.19 of keeping or using a place does not apply when the charge is of "permitting". The presumption under S.19 of the Ordinance cannot be invoked when the accused is charged with permitting another person to keep or use the place as a common gaming house.

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occupier can of course only be invoked against the "occupier" of the premises under S.4(a) and the 3rd presumption that the place is so kept or used with the permission of the owner can be involved only against the "owner" under S.4(b).

That presumption only applies when the accused is charged with keeping or using the premises as a common gaming house under S.4(1) (a) of the Ordinance.

S.4(2) provides that "any person who occupies or has the use temporarily of a place which is kept or used by another person as a common gaming house shall be presumed until the contrary is proved to have permitted such place to be so kept or used". If a presumption under S.19 is raised that the place is a common gaming house then a further presumption arises under the same section that the place is so kept or used by the occupier thereof. It will be seen that the prosecution cannot rely simultaneously upon S.19 and S.4(2) of the Federation Ordinance. The two presumptions deal with entirely separate and distant kinds of cases.

II. Section 20

The section creates the following 3 presumptions in certain circumstances in regard to a place (similar to the presumptions in S.19)

(1) that it is a common gaming house

(2) that it is so kept or used

(3) that the occupier so keeps or uses it.

And of the notice prescribed in SS (2) has been served on the owner of the premises a further presumption arises:-

(4) that the place is so kept with the permission of the owner

The circumstances which raise the above presumption are any one or more of the following provided the place has been entered under the provisions of the Ordinance:-

(a) where any passage or staircase or means of access to any part of the premises is unusually narrow or steep or otherwise difficult to pass

(b) where any part of the premises is provided with unusual or unusually numerous means for preventing or obstructing an entry

(c) where any part of the premises is provided with unusual contrivances for enabling persons therein to see or ascertain the approach or entry of persons or for giving the alarm or for facilitating escape from the premises.

It is interesting to note that a petition was signed by owners of house property in Singapore in 1876 asking for exemption from liability which befalls them should their houses, rented out to tenants, be found to be a common gaming house by the Gaming Houses Ordinance 1870. In their report(19) (found at the National Ardkives) they complained that the Ordinance has been so framed and construed as to make innocent owners of houses responsible in fine and imprisonment for the use without their knowledge or consent of their houses for gaming purposes. At page lxxiii the petition reads:

> "..... indeed the 16th and 17th clause of the Act appear to be clearly intended to secure an owner having full notice of the use to which the tenants are putting his house, but unfortunately the 15th section is so framed as practically to over-ride the protecting provision of the 16th and 17th sections. This section provides that "whenever any passage, staircase or means of access, in a place lawfully entered as

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(19) Proceedings of the Legislative Council of Straits Settlements from 1876, Monday 27th March 1876, page lxxiii.

> aforesaid, to any part thereof is unusually narrow or steep, or otherwise difficult to pass, or any part of the premises is provided with unusual or unusually numerous means for preventing or obstructing an entry, with unusual contrivances for enabling persons therein to see or ascertain the approach or entry of persons, or for giving the alarm, or for facilitating escape from the premises, it shall be presumed, until the contrary be shown that the place is a gaming house, that the same is so kept or used by the occupier thereof, and that it is so kept with the permission of the owner thereof".

The petitioners requested for the repeal of the last 13 words of section 15 above (equivalent to our present S.20). Among the reasons given were that under this section, Magistrates have held that the presence of a ladder at the wall, which is common in Chinese houses, which could be made to give access to the roof, or the addition of a swinging bar to the usual trap door entrance, are sufficient to raise a presumption

under this section, that the house is a gambling house and is so used with the owners' permission, although these and similar fittings can readily be added by the occupier without the landlords' knowledge or suspicion, for a house once let, the landlord has no power whatever during the tenant's occpation to enter it without the tenant's leave.

In response to this appeal the Attorney General at the time, Mr. R. Braddell, replied that[20] at page ccxx

> "..... the petitioners have made out a fair ground for relief and at any rate they ought to be placed by the law in a position better suited to enable them to deal with the responsibility thrown on them as house owners. If such relief is given, I think the responsibility of them may properly be allowed to rest, for experience has proved that nothing but the strongest measures will suffice to compete with the astuteness of parties, who find it so much to their interest to break the law as to gaming".

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(2) Legislative Council Proceedings, Monday 11th September, 1876.

In order to give relief, he proposed (and it was accepted and hence the law amended to the position as if now)[21] to enact that the police, in every case when it comes to their knowledge that a house is fitted for gaming are to give notice thereof to the owners and occupiers and such notices to be served on the persons inscribed as owners in the Municipal Books, and if no names are there given, then the notices are to be fixed to the premises and a penalty is provided against every sub-tenant, who knowing of such notice, does not inform his landlord "With this provision as to notice, I propose to make the presumption at the end of S.15[22] applicable only in cases where notice has been served", he wrote.

It may be said that obliging the police to give such notices will interfere with their prospects of capture in certain cases but at the same time, as the object is to prevent gaming,

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(21) See S.20(2) and S.20(3) 1953 Ordinance.

(22) See S.20(1) 1953 Ordinance.

not merely to capture gamblers, it is hoped that the advantage gained through the landlords, if they omit to take proper steps to check their tenants will counterbalance the injury in preventing captures. With the amended law, the owners are put in a position to do right, then, if they do not do so, they will be themselves to blame, and less hesitation would be felt in putting the law in force against them. We may thus find the law to work as an actual pressure on the occupiers, who will soon find difficulty in the way of getting houses in which to carry on with their work.

Courts have held[23] that in the case of principal tenants of a house who let out rooms which becomes common gaming house can be convicted of having permitted the use of the room as a common gaming house, if he is shown to have known of the user and not taken steps to prevent it by determining the tenancy or otherwise. Sometimes knowledge of such user can be inferred from circumstances like the keys being in control of the principal tenant and infact if they were living closely together.

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(23) e.g. Tang Meon Sam vs. P.P. (1948) MLJ. 49