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Article 9

Gambling Transactions

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GAMBLING TRANSACTIONS.

"'Wagers' implies that there are two or more contracting parties having mutual or reciprocal rights in respect to money or other things wagered, usually called the 'stakes' and that each of the parties shall jeopardize something, and having the chance to make something, or to recover the stakes or thing bet or wagered, upon determination of the contingent or uncertain event in his favor." [1]

At common law not all wagering contracts were illegal or void.[2] When not repugnant to sound morals and public policy, an action could be maintained thereon.[3] Prior to any statutes the courts began to look upon wagering contracts with displeasure, and limited the common law rule by declaring them invalid as to subject matter.[4] The next step was to regard such agreements to be invalid as opposed to public policy, and the general rule as to illegal contracts was applied with equal severity to both parties under the maxim: "*In pari delicto partior est Conditio defendentis.*" [5] The loser was debarred from recovery, not because of the defendant's merits, but for the reason that the plaintiff was deemed "unworthy to be heard in the particular case." [6] Money or property lost in a gaming transaction and voluntarily paid over by the loser could not be recovered by him from the winner.[7]

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[1] Jordon v. Kent, 44 How. Prac. 206 (N. Y. 1872).

[2] Harris v. White, 81 N. Y. 538 (1818); May v. Burras, 13 Abb. N. Cas. 384 (1882); Zeltner v. Irwin, 25 App. Div. 228, 49 N. Y. Supp. 337 (1st Dept. 1898); Thompson v. Hayes, 59 Misc. 425, 111 N. Y. Supp. 495 (1908).

[3] People v. Stedecker, 175 N. Y. 57, 67 N. E. 139 (1903); Bunn v. Ricker, 4 Johns. 426 (N. Y. 1809); Campbell v. Richardson, 10 Johns. 406 (N. Y. 1813); Eggers v. Klussmann, 16 Abb. N. Cas. 226 (1813); May v. Burras, *supra* note 2; 3 KENT'S COMM. 377-379.

[4] Nellis v. Clark, 4 Hill 424 (N. Y. 1842); Campbell v. Richardson, *supra* note 3.

[5] Randall v. Howard, 2 Black. 585, 587, 17 L. Ed. 269 (U. S. 1862); Griswold v. Waddington, 16 Johns. 438, 491 (N. Y. 1819); Swan v. Howard, 3 Edw. 287, 289 (N. Y. 1839); Kerrison v. Kerrison, 8 Abb. N. Cas. 444, 449 (1880); Marie v. Garrison, 13 Abb. N. Cas. 210, 330 (1883); De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co., 16 Dal. 529, 533 (N. Y. 1891); Barker v. Hoff, 7 Hun 284, 286 (N. Y. 1876); Collier v. Miller, 62 Hun 99, 109 (N. Y. 1891); Hirshbach v. Ketchum, 5 App. Div. 324, 326, 39 N. Y. Supp. 291 (1st Dept. 1896); Irwin v. Curie, 56 App. Div. 514, 516, 67 N. Y. Supp. 280 (2d Dept. 1900); Graham v. Wallace, 50 App. Div. 101, 103, 63 N. Y. Supp. 372 (4th Dept. 1900); Bennett v. American Art Union, 7 N. Y. Super. Ct. 614, 631 (1852); Standard v. Eytinge, 28 N. Y. Super. Ct. 90, 92 (1867).

[6] Meech v. Stoner, 19 N. Y. 26 (1859); Ruchman v. Pitcher, 20 N. Y. 9 (1859); Like v. Thompson, 9 Barb. 315 (N. Y. 1850); 3 WILLISTON, CONTRACTS, §§1667-1679 (as applied to partnerships, see Note 23, L. R. A. [N. S.] 477).

[7] Grant v. Hamilton, 10 Fed. Cas. No. 5,695, 3 McLean 100 (1842); *In re* Arnold, 133 Fed. 789 (1904); Davis v. Porter, 248 Fed. 397, 160 C. C. A. 407 (1918); Mount v. Waite, 7 Johns. 434 (N. Y. 1811); McCullum v. Gaurlay, 8 Johns. 147 (N. Y. 1811); Eggers v. Klussmann, *supra* note 3;

Statutes were then enacted which had for their purpose the discouragement of gambling by giving the loser a right to recover his loss by civil action.[8] It was early held that in an action under the statute where several persons contributed to the stakes, the plaintiff could recover only *"no more money than the defendant actually gained"* by his wager.[9] The sole purpose of the statutes and the intention of the legislature in giving this remedial right was to suppress gambling and to discourage not only a particular form of gaming but all forms, declaring "where chance enters into a bet as an element, there is a case of 'gambling' within the Constitution * * * forbidding [specific forms] or any other kind of gambling."[10] The statutes against gambling are now found as a part of our Penal Law,[11] which provide "that all wagers, bets, or stakes made to depend upon any race or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful."[12] Furthermore, "all contracts for or on account of any money or property, or thing in action wagered, bet, or staked as provided in the preceding section, shall be void."[13] Section 994 expressly provides a remedy for the recovery of property lost in wagering transactions. It declares:

> "Any person who shall pay, deliver or deposit any money, property or thing in action, upon the event of any wager or bet prohibited, may sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands shall be deposited any such wager, bet or stake, or any part thereof, whether the same shall have been paid over by such stakeholder or not, and whether any such wager be lost or not."

In the recent case of *Watts* v. *Malatesta*,[14] the Court of Appeals in an interpretation of Section 994 sustained a recovery by the plaintiff in an action to recover money lost to the defendant in betting on horse races. The defendant counterclaimed for a much

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Weyburn v. White, 22 Barb. 82 (N. Y. 1856); Meech v. Stoner, *supra* note 6; Betts v. Hillman, 15 Abb. Pr. 184 (N. Y. 1862); Longworthy v. Broomley, 29 How. Pr. 92 (N. Y. 1864); Arrieta v. Morrissey, 1 Abb. Pr. (N. S.) 439 (1866); Wilkenfeld v. Attic Club, 74 Misc. 543, 134 N. Y. Supp. 507 (1911).

[8] Ruchman v. Pitcher, 1 N. Y. 392 (1848); Story v. Brennan, 15 N. Y. 524, 69 Am. Dec. 629 (1857); Duval v. Willman, 124 N. Y. 156, 26 N. E. 343 (1891); Luetchford v. Lord, 132 N. Y. 465, 30 N. E. 859 (1892); Irwin v. Curie, 171 N. Y. 409, 64 N. E. 168, 58 L. R. A. 830 (1902); Stewart v. Grattin, 217 App. Div. 336, 216 N. Y. Supp. 127 (3rd Dept. 1926).

[9] Zielly v. Warren, 17 Johns. 192 (N. Y. 1819).

[10] N. Y. CONST., art. 1, §9; Thompson v. Hayes, *supra* note 2.

[11] N. Y. PENAL LAW, art. 88, §§970-997.

[12] N. Y. PENAL LAW §991.

[13] *Id.* §992.

[14] 262 N. Y. 80, 186 N. E. 210 (1933).

larger amount than he lost to the plaintiff. The Court held that he was not entitled to offset his losses as against the plaintiff's, allowing the plaintiff to keep all that he had won and at the same time permitting him to recover his losses arising out of the same transactions *over a period of two years.* The ground on which this judgment was based is that the professional gambler and his customer are not in *"pari delicto."* The Court not only distinguishes between a *"professional gambler"* and his client, a *"casual gambler,"* hitherto unknown to the law, but also gives the casual gambler a right to retain all moneys won in the same transaction and at the same time affords him the remedy to recover any loss he had sustained. This result, Judge Crane in his dissenting opinion points out, was never the intention of the Legislature. "Instead of discouraging gambling and bookmaking, which is the purpose of the law, such a result would do the very reverse by encouraging people to wager on horse races with a bookmaker whose money they could legally take, and then recover all that they may have lost in the same afternoon. The very purpose of Section 994 is thus nullified." [15] The view expressed by Justice Crane in his opinion is admirable on grounds other than sporting. It is to be admired for its logic and reason as well as the fact that he tries to give to the statute the effect that the Legislature expressly intended. He regards both parties as gamblers and it therefore follows that they are in *"pari delicto."*

A gambler is one who follows or practices games of chance or skill with the expectation of winning money or other property,[16] especially one who makes gambling his business.[17] It is a fair inference that the plaintiff herein entered into the transactions with the view of profiting thereby. The fact that he was at the same time also engaged in a legitimate business should not detract from his act. The plaintiff, having played the horses continuously over a period of two years, wagering hundreds of thousands of dollars, is more than a casual gambler. The time element reinforced by the large amount of money wagered should have been taken into consideration by the Court in determining the status of the parties. That both parties are gamblers is the more convincing view. The Penal Law refers to common gamblers and provides "Any person who * * * engages * * * as dealer, gamekeeper, or *player* in any gambling game where money or property is dependent upon the result, is a common gambler, guilty of a misdemeanor and punishable by imprisonment." [18] The plaintiff certainly comes within this category. The fact that the defendant is a bookmaker should not detract from the acts of the plaintiff in playing the horses. The law declares both acts crimes.[19] In the trial of a

[15] *Id.* at 85, 186 N. E. at 212.
[16] Thompson v. Hayes, *supra* note 2.
[17] Clement v. Belanger, 120 App. Div. 662, 105 N. Y. Supp. 537, 538 (3rd Dept. 1907).
[18] N. Y. PENAL LAW §970.
[19] *Id.* §§970 and 986.

civil action the question of criminality is immaterial; the biggest rogue may have the most righteous case.[20] The parties being in *"pari delicto,"* the plaintiff should not be allowed to profit by his wrong.[21] In New York it has been held that betting upon a horse race is not an indictable offense, if the bet is made at a race course or other place named in the statute.[22]

It has generally been held that the measure of the winner's liability to the loser, under the statute permitting money or property lost in gaming to be recovered, is the net amount of his winnings from such a loser at the particular time or setting.[23] It is to be noted that the plaintiff herein is not suing to recover any particular bet lost at any specific time, but upon a series of bets ranging over a period of two years, during which time he had won a much larger amount from the defendant. In reality he is the winner and not the loser. The question of set-off in this particular case is therefore a very important one. The exact question has been under consideration by courts of other states. The courts of Kentucky, in construing a statute very similar to our own in body, spirit and design, held that the losses of the defendant may be offset as against his liability to the plaintiff.[24] That case is exactly in point to the question in issue, dealing with wagers on horse races. This is in accord with the rule of other jurisdictions.[25] The court of Massachusetts held a contrary construction in its interpretation of a statute enacted against buying and selling on margin without intention to perform by receipt or delivery of property, giving the plaintiff the right to recover from a broker money paid under the contract and denying the defendant the right to offset the moneys he paid the plaintiff.[26] Thus we are losing view of the fact that, at common law, bets on horse races have been especially favored. Such bets have been enforced at periods when actions upon no other bets were tolerated.

By following the construction adopted by the Massachusetts court we are defeating the aim of our own Legislature. It never intended to limit the right to institute an action to the bettor, as distinguished from the bookmaker. If it intended to do so, the wording of the statute could have been so termed. Section 994 of the Penal Law was intended for the benefit of *any person.* Undoubtedly, this term is "broad enough to comprehend every human

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[20] Gough v. St. John, 16 N. Y. 646 (1857); Taylor v. Heft, 150 App. Div. 509, 135 N. Y. Supp. 450 (1st Dept. 1912).

[21] Riggs v. Palmer, 115 N. Y. 506, 22 N. E. 188 (1889); Murray v. Interurban St. Ry. Co., 118 App. Div. 35, 102 N. Y. Supp. 1026 (1st Dept. 1907).

[22] People v. Fallon, 152 N. Y. 1, 46 N. E. 302, 37 L. R. A. 419 (1897).

[23] Zielly v. Warren, *supra* note 9; Hogle v. Connell, 134 Mass. 150 (1883); Elias v. Gill, 92 Ky. 569, 18 S. W. 454 (1892); Johnson v. McGregor, 157 Ill. 350, 41 N. E. 558 (1895); Zallers v. White, 208 Ill. 518, 70 N. E. 669 (1904).

[24] Elias v. Gill, *supra* note 23.

[25] Dunn v. Bell, 85 Tenn. 581, 4 S. W. 41 (1887); Fallett v. Saviers, 8 Ohio S. & C. P. 669 (1897).

[26] Lyons v. Coe, 177 Mass. 382, 59 N. E. 59 (1901).

being." [27] Chief Justice Marshall concluded "that general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." [28] The decision in the case under consideration constitutes legislation by the judiciary. "It is the function of the Court to construe the statute and not to defeat it as construed." [29] "It is the duty of all courts of justice," said Lord Chief Justice Wilmot, "to keep their eye steadily upon the interest of the public, even in the administration of commitative justice; and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give it no countenance or assistance in *foro civili.*" [30] As the decision now stands, the purpose of the statute is lost. Is it to be assumed that any man may now make a livelihood illegally? Can he take his chance in winning and if successful retain his gains, and in losing bring an action and recover the money he has lost? This undoubtedly will stimulate gambling to the *n*th degree, for under the law of the recent decision the bookmaker is unable even to offset his losses.

It should not have been necessary to plead the illegality of this contract which plainly appears on its face. If the plaintiff's action is to be sustained, the defendant should have been allowed to offset his losses against the plaintiff's. A disposition even more harmonious with the intention of the Legislature would have been for the Court to have, of its own motion, stepped in and denied the right to any relief thereunder without reference to the state of the pleadings, since it is apparent that the wager is antagonistic to the interests of the public.[31]

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WORKMEN'S COMPENSATION ACT—INCIDENTAL OCCUPATION.

The Workmen's Compensation Law,[1] in its far-reaching paternalism, has opened a field of statutory law in which liberal construc-

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[27] United States v. Palmer, 3 Wheat. 610 (U. S. 1820) (Chief Justice Marshall in construing an act of Congress of April 30, 1790, §8 [1 Stat. 113] relating to robbery on the high seas).

[28] *Ibid.*

[29] United States v. Palmer, *supra* note 27; Sorrell v. United States, 287 U. S. 435, 449, 450, 53 Sup. Ct. 210, 215 (1932).

[30] Law v. Peers, Wilmot's Notes, 364, 378; approved in Veasey v. Allen, 173 N. Y. 359, 368, 66 N. E. 103 (1903).

[31] Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539 (1880); Raferts v. Criss, 266 Fed. 296 (C. C. A. 2d, 1920); Drake v. Lawer, 93 App. Div. 86, 88, 86 N. Y. Supp. 986, *aff'd*, 182 N. Y. 533, 75 N. E. 1135 (4th Dept. 1905); Drake v. Siebald, 81 Hun 178, 183 (N. Y. 1884).

[1] Laws of 1913, c. 816; Amended and Re-enacted, Laws of 1914, c. 41; Consolidated Laws, c. 67.