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Recovery of Gambling Losses

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LEGISLATIVE NOTES

RECOVERY OF GAMBLING LOSSES

*Florida Laws 1951, c. 26543**

To an unparalleled degree post-war America has seen the eye of public attention focused on the growth of organized crime.[1] In the forefront of this discouraging picture[2] stands the sinister ogre of illegal gambling,[3] with particularly sharp adverse criticism directed toward activities within the State of Florida.[4] Public reaction to disclosures of the pattern of illegal action has prodded lawmakers, both state and federal, to enact legislation designed to place new weapons[5] in the public arsenal with which to combat that group which operates in disregard of current morality and laws. The statute hereinafter discussed falls within this category.[6]

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*A brief summary of this statute appears in Legislative Highlights, 4 U. OF FLA. L. REV. 382, 393-394 (1951).

[1]See, *e.g.*, SEN. REP. No. 141, 82nd Cong., 1st Sess. (1951) (*Second Interim Report of the Special Committee to Investigate Organized Crime in Interstate Commerce,* a report of the investigatory group popularly known as the Kefauver Committee); KEFAUVER, CRIME IN AMERICA (1951).

[2]SEN. REP. No. 141, *supra* note 1, at 11-15; Peterson, *Gambling, Should It Be Legalized?,* 40 J. CRIM. L. 259 (1949); Notes, 39 CALIF. L. REV. 226 (1951); 42 J. CRIM. L. 205 (1951); 34 IOWA L. REV. 647 (1949).

[3]Not all gambling is illegal. *E.g.,* in Florida pari-mutuel betting at race tracks is permitted, FLA. STAT. c. 550 (1951), and at frontons, FLA. STAT. c. 551 (1951).

[4]*Hearings before Special Committee to Investigate Organized Crime in Interstate Commerce,* 81st Cong., 2d Sess., Parts 1, 1A and 16 (Fla.) (1950-1951). With regard to the committee see note 1 *supra.*

[5]Fla. Laws 1951, c. 26773 (suspension of beverage and hotel licenses of places that have been deprived of communication facilities under the laws prohibiting bookmaking or other gambling or by rules of Fla. R.R. & Pub. Util. Comm'n; see FLA. STAT. §§365.07, 64.11-64.15, 823.05 (1951)); c. 26847 (penalty for bookmaking); c. 26720 (duty of public utilities to provide all reasonable means to ascertain if their facilities are being used to violate gambling laws); c. 26939 (suspension or revocation of hotel licenses for knowingly allowing space to be used for gambling); c. 26722 (prohibiting transmission of racing information for gambling purposes and regulating other communication of racing information). Among new federal anti-gambling measures are: Pub. L. No. 183, 82d Cong., 1st Sess. §§471-472 (Oct. 20, 1951) (federal tax on gamblers); 15 U.S.C.A. §§1171-1177 (Supp. 1951) (prohibiting transportation of gambling devices).

[6]This statute appears in the latest statutory revision as FLA. STAT. §§849.26-

GAMBLING AND THE COMMON LAW

Gambling or gaming without such accompanying circumstances as would make it otherwise objectionable was not illegal at the common law, but the keeping or operation of a gaming house was an offense indictable as a public nuisance.[7] Today, however, most states by statute make gambling a criminal offense.[8]

The early courts did not look upon a contract as illegal or void merely because it was a wager,[9] but allowed the winner of a bet to recover from the loser for breach of the promise to pay.[10] Even at that time, however, it was recognized that some wagers were so detrimental to public welfare that recovery should be denied.[11] Eventually cases involving gambling contracts came to occupy a large space on the court dockets. Attention was thus focused on the fact that a large part of the time of courts was being employed in the enforcement of contracts that had no useful economic purpose and were counter to prevailing morals. Parliament therefore by statute declared all wagering contracts unenforceable.[12] In the United States courts have generally disregarded the early common law and held wagers illegal or

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849.33 (1951). This is, however, only prima facie evidence of the law, and the session law as enacted by the 1951 Legislature remains the official version of the statute until the 1953 Legislature adopts it in the form now appearing in FLA. STAT. (1951). For a thorough discussion of the Florida statutory revision system see Legis., 3 U. OF FLA. L. REV. 74, 77-80 (1950).

[7]BISHOP, CRIMINAL LAW §1135 (9th ed. 1923); 4 BL. COMM. **171-172; 15 HALSBURY, THE LAWS OF ENGLAND §§890-908 (2d ed. 1934); MILLER, HANDBOOK OF CRIMINAL LAW §132(d) (1934); 2 WHARTON, CRIMINAL LAW §§1735-1739, 1741-1742 (12th ed. 1932).

[8]*E.g.*, FLA. STAT. §§849, 871.03, 615.11, 616.09, 548, 104.25, 365.02 (1951). For a compilation of the gambling laws of nine states, including Florida, see 14 N.C.L. REV. 100 (1935).

[9]CLARK, HANDBOOK OF THE LAW OF CONTRACTS §155 (4th ed. 1931); 6 CORBIN, CONTRACTS §1483 (1950); 6 WILLISTON, CONTRACTS §1667 (rev. ed. 1938).

[10]Beadles v. Bless, 27 Ill. 320 (1862); Campbell v. Richardson, 10 Johns. 406 (N.Y. 1813); Hussey v. Crickitt, 3 Camp. 168, 170 Eng. Rep. 1343 (1811); Jones v. Randall, 1 Cowp. 954, 98 Eng. Rep. 954 (1774); March v. Pigot, 5 Burr. 2802, 98 Eng. Rep. 471 (1771).

[11]Atherfold v. Beard, 2 T.R. 610, 100 Eng. Rep. 328 (1788) (bet as to amount of revenues that would be collected); Da Costa v. Jones, 2 Cowp. 729, 98 Eng. Rep. 1331 (1778) (bet as to the sex of a third person).

[12]Gaming Act, 1845, 8 & 9 VICT., c. 109, §18.

unenforceable, even in the absence of statute,[13] as opposed to public policy.[14]

In England, following the passage of the statute, and in the United States, parties to a wagering contract were regarded as being *in pari delicto,* and the loser was not allowed to recover any payments made to the winner under the illegal bargain.[15] Only by statutory provision does the loser obtain a right to recover payments made to the winner.[16] Such statutes, termed recovery statutes, are by no means a new development in the United States[17] and have been adopted in thirty-one jurisdictions besides Florida.[18] An early English act, the Statute of

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[13]Florida had no statute specifically making wagering contracts void when Sec. 1 of the new recovery statute, declaring all such agreements of no effect, was enacted by the 1951 Legislature. No cases involving the legality of gambling bargains have come before the Florida Supreme Court, but it has denied relief on other types of illegal contracts, Brumby v. Clearwater, 108 Fla. 633, 149 So. 203 (1933); Finley Method Co. v. Standard Asphalt Co., 104 Fla. 126, 139 So. 795 (1932); Citizens' Bank & Trust Co. v. Mabry, 102 Fla. 1084, 136 So. 714 (1931); Escambia Land & Mfg. Co. v. Ferry Pass Inspectors & Shippers Ass'n, 59 Fla. 239, 52 So. 715 (1910); Stewart v. Stearns & Culver Lumber Co., 56 Fla. 570, 48 So. 19 (1908); *cf.* Boca Raton v. Raulerson, 108 Fla. 376, 146 So. 576 (1933); *see* Jones v. Pinellas County, 81 Fla. 613, 620, 88 So. 388, 390 (1921).

[14]*E.g.,* Love v. Harvey, 114 Mass. 80 (1873); Bernard v. Taylor, 23 Ore. 416, 31 Pac. 968 (1893); *see* Irwin v. Williar, 110 U.S. 499, 510 (1884); see 6 WILLISTON, CONTRACTS §1668 (rev. ed. 1938).

[15]*E.g.,* McGinley v. Cleary, 2 Alaska 269 (1904); Sofas v. McKee, 100 Conn. 541, 124 Atl. 380 (1924); Davis v. Leonard, 69 Ind. 213 (1879); Howson v. Hancock, 8 T.R. 575, 101 Eng. Rep. 1555 (1800); 2 KENT COMM. *468; 6 WILLISTON, CONTRACTS §1679 (rev. ed. 1938).

[16]6 CORBIN, CONTRACTS §1484 (1950).

[17]See Historical Notes to PA. STAT. ANN. tit. 12, §1672 (Supp. 1950), adopted April 22, 1794; TENN. CODE ANN. §7814 (Williams Supp. 1951), adopted 1799; VT. REV. STAT. §8566 (1947), adopted 1797; also *see* Pratt v. McIntosh, Wright 356, 357 (Ohio 1833) (attempted recovery under an act of 1824).

[18]ALA. CODE ANN. tit. 9, §§33, 44-46 (Supp. 1951); ARK. STAT. ANN. §§34-1601 *et seq.* (Supp. 1951); CONN. REV. GEN. STAT. §6786 (1949); D. C. CODE §§16-701 *et seq.* (1940); GA. CODE ANN. §20-505 (Supp. 1951); ILL. ANN. STAT. c. 38, §330 (Supp. 1951); IND. ANN. STAT. §§10-2321 *et seq.* (Burns 1942); KY. REV. STAT. §§372.020 *et seq.* (1948); ME. REV. STAT. c. 126, §§8, 9 (1944); MD. ANN. CODE GEN. LAWS art. 27, §298 (Cum. Supp. 1947); MASS. ANN. LAWS c. 137, §§1, 2 (Supp. 1950); MICH. STAT. ANN. §28.547 (Supp. 1951); MINN. STAT. §614.06 (1949); MISS. CODE ANN. §24 (1942); MO. REV. STAT. ANN. §§3392, 3393, 3400 (West 1950); MONT. REV. CODES ANN. §§94-2418, 94-2419 (Supp. 1951); NEB. REV. STAT. §28-944 (1948); N.H. REV. LAWS c. 447, §17 (1942); N.J. STAT. ANN. §§2:57-5 *et seq.* (Supp. 1951); N.M. STAT. ANN. §§25-1001 *et seq.* (Supp. 1951); N.Y. PENAL LAW §§994, 995; OHIO GEN. CODE ANN. §§5966-5971 (1951); ORE. COMP. LAWS ANN. §64-102 (Supp.

Anne,[19] which permitted recovery of gaming losses under certain conditions,[20] was in effect in Florida[21] by virtue of the Florida statute adopting portions of the English common law and statutes.[22] On May 7, 1951, it was probably repealed in part or in whole by the enactment of a new recovery statute.[23] The fact that few cases have

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1947); PA. STAT. ANN. tit. 12, §1672 (Supp. 1950); S.C. CODE §§6308-6310 (1942); S.D. CODE §24.0103 (1939); TENN. CODE ANN. §§7814-7816 (Williams Supp. 1951); VT. REV. STAT. §8566 (1947); VA. CODE §§11-15 (Supp. 1950); WASH. REV. CODE §4.24.070 (1951); W. VA. CODE ANN. §§5497, 5498 (Supp. 1947).

[19]9 ANNE. c. 14, §§2, 3, 4 (1710). This statute was in effect and recovery allowed in Atchison v. Gee, 7 S.C. 80, 4 McCord 211 (1827).

[20]The statute provides that one losing £10 at gaming may bring action within three months of the loss to recover the money or goods so lost and may obtain treble the value of the loss, the loser retaining half and half going to the poor of the parish. The language of the act is not clear as to whether the £10 is the minimum or maximum amount of loss that may be recovered. See 6 WILLISTON, CONTRACTS §1679, n.3 (rev. ed. 1938) (interpreting the statute as allowing recovery of £10 or more). For a case in which defendant contended that recovery under the Statute of Anne should be limited to £10, see La Fontaine v. Wilson, 185 Md. 673, 45 A.2d 729 (1946). The court held that later Maryland recovery statutes had either modified or repealed the Statute of Anne, making such a limitation unnecessary. Another interesting question is the value in dollars that courts would establish as equivalent to £10 in 1710. The District of Columbia adopted the Statute of Anne and incorporated the amount of $26.67 in place of the £10; D. C. CODE §16-704. For an explanation of how this figure was arrived at see the Compiler's Note to §16-704.

[21]3 FLA. STAT. 32 (1941); *see* Valdez v. State *ex rel.* Farrior, 142 Fla. 123, 130, 194 So. 388, 392 (1940). Other relevant British statutes in effect in Florida, 3 FLA. STAT. 31 and 33 (1941), are 16 CAR. II, c. 7 (1664), which provides for the recovery of gaming losses when fraud exists and 18 GEO. II, c. 34 (1745), which provides for equitable decrees to enforce relief obtained by recovery suits under the Statute of Anne. On these and other British statutes see 4 BL. COMM. *172-173. The latest compilation of British statutes in effect in Florida appears in Part I, 3 FLA. STAT. (1941). For the history of this compilation see Day, *Extent to Which the English Common Law and Statutes Are in Effect*, 3 U. OF FLA. L. REV. 303, 308-309 (1950). For an earlier list of the statutes see FLA. STAT. ANN. §2.01 (Supp. 1951).

[22]FLA. STAT. §2.01 (1951). For a discussion of the English common law and statutes in effect in Florida see Day, *supra* note 21. Our statute adopts the English common law and statutes as of July 4, 1776; hence the repeal of the Statute of Anne by the Gaming Act, 1845, 8 & 9 VICT. c. 109, §15, does not prevent it from being in effect in Florida.

[23]The legislature can expressly or impliedly, as is the probable case here, repeal any English statute in effect, La Fontaine v. Wilson, 185 Md. 673, 45 A.2d 729 (1946) (Statute of Anne held repealed or at least modified by subsequent legislative enactments); see Day, *supra* note 21, at 308.

arisen in Florida in which losers sought recovery under the Statute of Anne may indicate the extent, or lack of extent, to which losers will utilize the new law.[24]

PROVISIONS

Section 1[25] of the new statute is a general clause rendering void all gambling agreements or promises, whether heretofore declared illegal or not,[26] unless the law specifically authorizes the gambling transaction.[27]

The crux of the statute is Section 2,[28] which provides for the recovery of any money paid to the winner of a gambling transaction. Suit must be brought within ninety days of the loss and payment. In addition, provision is made for the awarding to the State of Florida for its use and benefit of a sum equal to the amount of the loss recovered.

If the loser or his guardian or curator fails to bring the suit within the ninety-day period, Section 3[29] provides for an additional ninety days in which suit may be maintained by (a) the loser's wife or husband; or (b) by any relative of the loser or his spouse if the loser has a spouse or minor children; or (c) by the parents of a loser who is an unmarried minor. Suits under (a) and (b) shall be for the benefit of the loser's spouse and minor children, with an equal amount for the use of the State of Florida. The parents of the loser shall be the beneficiaries of suits under (c), with again an equal amount going to the state.

A comprehensive enumeration of persons liable to suits under the act is contained in Section 4.[30] Section 5[31] allows the plaintiff the

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[24]The absence of litigation may perhaps be explained if it is assumed that the recovery under the Statute of Anne is limited to losses not exceeding £10; see note 20 *supra*. For an attempted recovery for $3,000, however, see [Jacksonville] Florida Times-Union, June 3, 1952, p. 29, col. 6, discussing a suit brought in the Circuit Court in and for Pinellas County. Since the debt arose prior to the passage of the new recovery law, the plaintiff had to rely on the Statute of Anne.

[25]FLA. STAT. §849.26 (1951).

[26]See note 13 *supra*.

[27]See note 2 *supra*.

[28]FLA. STAT. §849.27 (1951).

[29]FLA. STAT. §849.28 (1951).

[30]FLA. STAT. §849.29 (1951).

[31]FLA. STAT. §849.30 (1951).

use of writs of attachment[32] and garnishment[33] for recovery of money other than that awarded for the use of the state. The writ of replevin[34] is available to obtain things of value sought under those provisions of the act that permit recovery in specie.

If one other than the loser bring suit, Section 6[35] provides that the loser shall not be excused from testifying or producing evidence on grounds of self-incrimination. It is made clear, however, that no such testimony or evidence shall be received against him in a later criminal investigation or prosecution; nor shall he be prosecuted for any transaction or matter concerning which he is required to testify or produce evidence. Likewise, the same immunity results in a suit brought by the loser or another when the loser voluntarily appears and testifies or produces evidence. The bringing of suit by the loser or any relevant statement or admission in pleadings may not be received against him in a later criminal proceeding.

No mention is made as to any immunity awarded the defendant in such situations. Section 4 of the Statute of Anne,[36] however, provides that upon payment of the amount sued for the defendant is discharged from further punishment or penalty because of the illegal act for which recovery is sought. Since the Legislature in the new statute did not speak on this matter and relying on the maxim that statutes in derogation of the common law must be construed strictly, it is reasonable to suggest that at least this part of the Statute of Anne is still in force in Florida.

Section 7[37] imposes a duty on the state attorney to protect the interests of the state in any suit and to call the attention of the court to a failure by the plaintiff to prosecute the suit effectively, after which the court shall direct the state attorney to proceed with the action. The proceedings may not be dismissed unless there is a sworn statement by the state attorney or plaintiff that is satisfactory to the court. In addition, under Section 8[38] the state attorney must diligently seek collection of sums due the state and transmit these to the state treasurer.

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[32]FLA. STAT. c. 76 (1951).
[33]FLA. STAT. c. 77 (1951).
[34]FLA. STAT. c. 78 (1951).
[35]FLA. STAT. §849.31 (1951).
[36]9 ANNE, c. 14 (1710).
[37]FLA. STAT. §849.32 (1951).
[38]FLA. STAT. §849.33 (1951).

PROBLEMS RAISED BY THE STATUTE

Obviously the intent of the recovery statute is to allow the small loser to recover from the professional gambler and thereby retard the operation of widespread commercialized gambling. Such suits would also reveal gambling activities and thus enable government officials to apply criminal sanctions against those whose illegal actions would otherwise remain hidden. Yet it should be noted that the terms of the statute, which are so general as to allow any loser to sue,[39] can give the professional bettor a cause of action against the few who should be so fortunate as to win from him. In many cases this would be doubly advantageous because of the immunity from criminal prosecution given the plaintiff in such suits.

The courts of at least one state, New York, have met this situation by holding that, although the recovery statute[40] on its face allows suits by any person, this cause of action is not available to professional or noncasual gamblers.[41] The Florida Legislature would do well to enact such a provision into the statute rather than rely on the possible adoption by our Supreme Court of the New York position.

Another potential trouble spot in the recovery act is the provision allowing suit for not only the amount of the loss but also for an equal amount payable to the state.[42] The technique of enforcing laws through payment to the informer of a portion of the amount recovered is not new.[43] Furthermore, the federal anti-trust laws permit recovery of treble damages in a civil suit and a subsequent criminal suit for the same act.[44] No question of double jeopardy arises in such cases, although treble damages are in the nature of a fine. These

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[39]Fla. Laws 1951, c. 26543, §2, now FLA. STAT. §849.27 (1951).

[40]N.Y. PENAL LAW §994.

[41]Watts v. Malatesta, 262 N.Y. 80, 186 N.E. 210 (1933), *affirming* 237 App. Div. 558, 261 N.Y. Supp. 51 (1st Dep't 1932); Dupper v. Rogan, 254 App. Div. 747, 4 N.Y.S.2d 128 (2d Dep't 1938); Galtrof v. Levy, 174 Misc. 1004, 22 N.Y.S.2d 374 (N.Y. City Ct. 1940); *see* Klein v. Morris Plan Ind. Bank, 132 F.2d 809, 810 (2d Cir. 1942).

[42]Fla. Laws 1951, c. 26543, §§2, 3.

[43]The Statute of Anne allowed suit by any person, if suit was not filed by the loser within three months, for three times the amount of the loss, half going to the plaintiff and half to the poor of the parish in which the offense was committed, 9 ANNE c. 14, §2 (1710).

[44]38 STAT. 731 (1914), 15 U.S.C. §15 (1946); 26 STAT. 209 (1890), 15 U.S.C. §2 (1946).

situations are not precisely analogous to the Florida statute, however, in that the state is not a party to civil suits for damages under the anti-trust laws. It is possible to argue that the payment to the state, which is a party to any proceeding under the Florida gambling recovery laws,[45] is the counterpart of a criminal fine under the guise of recovery in a civil proceeding. If the statute is interpreted to permit a subsequent criminal proceeding against the defendant in the civil case,[46] it may be argued that the defendant is being placed in double jeopardy, contrary to the provisions of the Florida Constitution.[47] This contention seems ill-destined, however, in view of the prevailing holding that a civil proceeding does not constitute jeopardy.[48]

The particular provision allowing suit in behalf of the state is unique with Florida and New Jersey,[49] but provisions do exist in other states whereby under certain conditions actions may be brought under recovery laws for the use of the educational fund of the county,[50] the overseers of the town poor,[51] the county in which the offense was committed,[52] and for the benefit of the public schools.[53]

The last session of the Legislature repealed[54] statutes forbidding dealings in margins and futures.[55] Since this act was passed after the new recovery statute, it is probable that even the very broad Section 1 of the recovery law does not render such transactions illegal in Florida. A slight though dubious possibility exists that these dealings might be held illegal under the common law.[56] Apparently, therefore, no recovery may now be had in Florida on losses incurred in margin and futures transactions.

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[45]See note 6 *supra*.

[46]FLA. STAT. c. 849 (1951).

[47]FLA. CONST. Decl. of Rights §12.

[48]See Note, 2 U. OF FLA. L. REV. 250, 251 (1949).

[49]N.J. STAT. ANN. §2:57-6 (Supp. 1951) provides that if the loser fails to sue, then anyone may sue for the loss and upon recovery share the amount with the state.

[50]GA. CODE ANN. §20-505 (Supp. 1951).

[51]N.Y. PENAL LAW §995.

[52]S.C. CODE §6309 (1942).

[53]S.D. CODE §24.0103 (1939).

[54]Fla. Laws 1951, c. 26774.

[55]FLA. STAT. c. 850 (1949).

[56]See CLARK, HANDBOOK OF THE LAW OF CONTRACTS §155 (4th ed. 1931).

CONCLUSION

It is doubtful that our recovery statute will ever be extensively utilized or that through it there will occur any perceptible reduction in organized gambling. Several factors suggest the likelihood of the law falling into relative disuse. Individuals, particularly small, occasional, or casual bettors, are naturally reluctant to admit publicly their participation in illegal activities. Although the statute grants immunity to persons seeking recovery under it, public stigma and embarrassment will in all probability arise from a suit. In many situations intimidation or fear caused by the professional criminals who operate many gambling enterprises will forestall the filing of an action seeking return of wagering losses.

Perhaps the greatest value of this new statute will lie in its indirect influence upon gamblers, who, fearing its use against them by losers, will curtail, at least to an extent, their illicit activities. It remains for the future to determine how successful the statute will be in this regard. If it be successful at all it will be but another step forward in a long and continuing battle against an able, treacherous, and indefatigable foe, the end of which is not yet in sight.

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