No. 13454

Supreme Court of Illinois

Rogers.

---

vs.

Parmelee.

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Supreme Court.—Third Grand Division.

ANSON ROGERS, *Appellee*,

ads

FRANKLIN PARMELEE, *Appellant.*

} ERROR TO SUPERIOR COURT OF CHICAGO.

This was an action of Assumpsit for money had and received, brought by Rogers against Parmelee, as stakeholder of a bet on a horserace, to take place in Cook County, Illinois.

The declaration contains a special count averring a specific demand of the money before suit brought, also the common counts.

The only defence set up by Parmelee was a bet upon a horserace and that he held the money as stakeholder, etc.

The cause was tried by a jury who rendered a verdict in favor of Rogers for $1200.

A motion for a new trial made by the defendant in the Court below, was over-ruled, and the case bronght to this Court by writ of error.

POINTS FOR THE APPELLEE.

FIRST.

Horse racing is gaming in this State, and all contracts relating thereto, and all bets or wages thereon are illegal and void.

Revised Statutes 1858, page 294, sections 1 and 2.
Also page 396, sec. 130.

Both the first and second sections of the English Statutes of Anne, are similar to our Statutes above cited; and horse racing is gaming within the Statute of Anne.

Chitty on Contracts, 7th edition, pages 712 and 716.
Alcinbrook vs Hall, 2 Wills 309.
Goodburn vs Marly, Strange, 1159.
Brogden vs Marriott, 2 Scott 712.
Whaley vs Pegot, 2 B. and P. 51.
3 Bing. N. C. Rep. 88 S. C.
6 Taunton's Rep. 499.

The Statute of Anne is in force in South Carolina, and horse racing is there held to be gaming, and illegal under that Statute.

Hasket vs Wootan, 1 Nott & McC. 180.
See also 1 Car. Law, Rep 90 and
2 Murphy, pages 172, 458.

From the above authorities it is clear that the contract or wager set up in the special plea was illegal and void.

The first replication set up a disaffirmance of that contract and a demand of the money before any forfeiture had accrued, or the arrival of the time for the intended event to take place, and alleged the illegal and void character of the contract, &c., relied upon as a defence.

The rejoinder denied the matters set up in the first replication, and thus put in issue all that was in any sense material in the case.

The balance of the special plea, alleging performance of the illegal and void contract, and the issue taken thereon by the second replication, was wholly immaterial, and of no consequence, whether proved or not.

The appellant knew before suit was brought, that Rogers had repudiated this illegal and void contract, and demanded his money of the stakeholder.

This last issue was therefore both false and frivolous, nor could the recovery of Rogers be defeated by proving that the stakeholder, or any other person had done an illegal act, after the void contract which led to it had been repudiated by Rogers.

The finding of this issue for the defendant could not, therefore, affect the question of costs, because the statutory discretion of the Court in awarding costs should only be exercised on material issues. Besides, the statute only applies to issues joined on the declaration and not on a plea.

The admission in the pleadings that Parmelee paid over the money to Morgan, does not aid the defence, because he paid it in his own wrong after demand made by Rogers.

SECOND.

The action lies against the stakeholder and was properly brought.

Allen vs Eple, 7 Cow. 496.

It is not necessary that the declaration should conclude "contrary to the form of the statute," nor even refer to it. The statute is a public one, and the appellant is chargeable with knowledge of its existence.

O'Maley vs Reese, 6 Barbour,
Sup. Court Rep. 685.

If such conclusion is at all necessary, the want of it is cured after verdict, by the statute of jeofails.

12 Illinois Reps 37.
6 Conn Reps 176
Revised Statutes 1858, page 250, section 6.
1 Chitty's Pleadings 673.
13 Illinois Reps 88.
3 Scam Reps 118.

But this is not an action to recover back money won at play, hence the cases requiring the declaration to conclude, *contra formam statuli* have no application.

THIRD.

The proof in this case shows that Rogers demanded the $1200 of Parmelee, before suit brought; and before the time specified for trotting the race, and before any forfeiture had accrued.

This was a repudiation of the bet before the race was had or determined.

Parmelee, therefore, held in his hands $1200 of Rogers' money without any legal consideration, which Rogers was entitled to recover, after demand, in an action for money had and received without reference to the statute.

See testimony of witness Eycleshimer, and the stipulation as to demand.

See, also, 6 Barbour, above cited, 658.
Morgan vs Groff, 5 Denio, 364.
Allen vs Ehle, 7 Cow, 496.
13 East's Rep. page 20.
3 Gilman Reps 504

FOURTH.

The instructions given to the jury were in no way erroneous, but were fully sustained by the proof and the authorities. And those refused being contrary to law and the evidence were properly rejected

FIFTH.

In addition to the special plea there was a plea of the general issue.

The verdict upon all the material issues, was in accordance with the law and facts upon the merits of the case.

The motion for a new trial was therefore properly over-ruled.

1 Scam Reps 65 — 3 Scam Reps 117.
2 Gilman Rep. 604.
& cases there cited.

G. W. CUMMING,

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Supreme Court

Anson Rogers
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ads
Franklin County
appellant

Brief & Points
for appellee.

S. W. Manning
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Filed Apl. 25. 1861.
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