Michigan Law Review

Volume 32 | Issue 5

1934

CONTRACTS-WAGERS - NEW CONSIDERATION

CONTRACTS — WAGERS — NEW CONSIDERATION — Plaintiff and defendant were engaged in illegal stock transactions at the end of which plaintiff owed defendant $11,961. 05 and defendant owed plaintiff $7,600.00. In making out the check for his debt, plaintiff deducted for the $7,600.00 and wanted to give

only $4,361.05 because defendant's check for the former sum, although it had been mailed, had not yet cleared. On defendant's assurance that the check would clear and be paid, plaintiff added $7,600.00 to the check which he gave to the defendant. Defendant promptly cashed plaintiff's check and stopped payment on his own. In a suit for the $7,600, to which the defense of illegality was interposed, it was *held* that the plaintiff could recover. *Joel Stockard & Co. v. Reis*, 263 Mich. 155, 248 N. W. 580 (1933).

Even though a promise is related to and grows out of an illegal transaction, still if it is based on a new and independent consideration and the plaintiff can make out his case without relying on the unlawful transaction, the promise will be enforced.[1] The new consideration of the instant case was plaintiff's raising the check $7,600.00. By enforcing such promises the law is not fostering illegality because the illegal part of the transaction has been completed. In *Roberts v. Blair*[2] the defendant lost in a poker game and at the end of the game borrowed money from one of the participants, giving his note therefor, which was enforced. In *Stewart v. Hutchinson*,[3] *X* and *Y* were partners in gambling with funds previously borrowed from a bank, and *X* agreed to pay *Y's* portion of their joint debt in return for *Y's* note for that amount; the note was enforced. On the other hand, if the contract is so closely related to the illegal transaction as to be tainted by it, no recovery is allowed.[4] In *Cleveland, C. C. & St. L. Ry. v. Hirsch*[5] the railroad rented land at one-tenth its fair value to accomplish the purpose of a rebate to the lessee, who was giving the railroad all of his transportation business; the rental contract was declared invalid. On orthodox notions the plaintiff of the principal case gave a consideration and the transaction might be looked upon as a loan apart from the illegal portion, somewhat analogous to the situation in *Roberts v. Blair*.[6] But much is to be said in favor of not giving a recovery, because the contract is so closely connected to the illegal transaction as to be tainted by it. The check on which the action was founded was originally mailed for the purpose of paying a gambling debt and the subsequent transaction appears more plausible when viewed as primarily a part of a settlement of mutual gambling claims than as a fresh loan to the defendant.

N. F.

[1] Smith v. Barstow, 2 Doug. (Mich.) 155 (1845); Armstrong v. Toler, 11 Wheat. 258, 6 L. ed. 468 (1826); Missouri Fidelity & Casualty Co. v. Art Metal Constr'n Co., (C. C. A. 8th, 1917) 242 Fed. 630; 37 C. J. 1071, 1049 (1922); 3 WILLISTON, CONTRACTS, sec. 1753 (1931).

[2] 11 Colo. 64, 16 Pac. 637 (1887).

[3] 120 Mo. App. 32, 96 S. W. 253 (1906). See also Himmelman v. Pecaut, 133 Iowa 503, 110 N. W. 919 (1907); Whittemore v. Malcolmson, (C. C. S. D. N. Y. 1885) 155 Fed. 503.

[4] 3 WILLISTON, CONTRACTS, sec. 1753 (1931); Mills Novelty Co. v. Dupouy, (C. C. A. 7th, 1913) 203 Fed. 254; Johnson v. Berry, 20 S. D. 133, 104 N. W. 1114 (1905). *Cf.* Sheahan v. McClure, 199 Mich. 63, 165 N. W. 735 (1917); Willson v. Owen, 30 Mich. 474 (1874); Gilliam, Ex'r v. Brown, 43 Miss. 641 (1870).

[5] (C. C. A. 6th, 1913) 204 Fed. 849. *Cf.* Ballin v. Fourteenth St. Store, 123 App. Div. 582, 108 N. Y. S. 26 (1908).

[6] 11 Colo. 64, 16 Pac. 637 (1887).