Box 470/9430 #9

Christopher P. Hayden vs. James J. Little

St. Joseph District
February, 1865

943/12

943/12

① In Monroe county circuit court, the plaintiff says defendant owes $250 on a race horse. The defendant denies owing the money, accusing the plaintiff of fraudulently bribing the rider to lose the race. The jury found for the defendant. The plaintiff asks to set aside the verdict. Overruled. He gives his Bill of Exceptions to appeal.

② Statement & Brief - Appellant

③ Assignment of Errors

④ Opinion - affirms the lower court

RG 600

1 Pleas and proceedings had in the Circuit Court of Monroe County in the State of Missouri In the Cause wherein Christopher G Hayden is Plaintiff and James I Little is Defendant.

Be it remembered that on the 5 day of April 1861 the Plaintiff in the above mentioned suit filed his petition in the office of the Clerk of the Circuit Court in and for the County and State aforesaid, which said petition is in words and figures as follows to wit

"Christopher G Hayden Pltff
against
James I Little Deft

State of Missouri
County of Monroe
Civil Action
In the Circuit Court.

Petition

Plaintiff states that the defendant owes and is indebted to him in the sum of Two hundred and fifty dollars for money had and received by the defendant from one Elocious Buckman to and for the use of the Plaintiff on 12th day of May 1860. which said sum and the interest thereon from said date are now due plaintiff and for which he asks judgment against Defendant.

Carr & Pindall
for Pltff

10 on a horse race. It was made in the latter part of the winter or early part of the Spring of 1860. It was to be run on the 12th of May 1860. on the Prairie west of Indian Creek in the North East part of this County. The race was to be run by a horse owned by the Pfff & a horse owned by Elcius Buckman. Each bet $250, that his horse would beat the others horse in the race. they deposited the amount bet with the Deft as stake holder, the whole to be paid over to that one whose horse should beat the others horse in the race. It was run on the day appointed & at the place appointed. I was one of the judges of the race. the other judges were James Reighley. James O'Daniel &

Each party selected two judges. I was one of the judges selected by Elcius Buckman. There were two judges at the Starting point and two at the coming out point. Each party had a judge at each point & the Pfff's horse beat Buckmans horse. It was so decided by the judges at the time. there was no unfair riding or jockeying that I knew of. The morning before the race Buckman wanted me to go in with him in the bet. he said his horse would be certain to beat Hayden's.

11 "I told him that I did not want to have anything to do with the bet. as I was going to act as Judge. the defendant told me in a month or two after the race that he had let John S Buckman have a part of the money deposited with him on condition it was to be returned to him if the Pltff should recover it off him. In November following I heard the defendant say that he had all the money deposited with him. he at the same time took his pocket Book out of his pocket & held it up before the crowd and slapped his hand upon it & says that some persons had said that he did not have the money but there it was.

The Pltff here rested his case.

Elocius Buckman being duly sworn on the part of the deft testified as follows In answer to some question propounded by by the Pltffs attorney, he said 'I am not interested in this suit or in the event of it. It is not defended for my use or benefit My Father, John S Buckman, to whom the money belongs deposited the money ($250) with the deft. he demanded the money of the deft before the institution of this suit & he paid it back to John S Buckman before this suit was brought.

This was all the evidence
The plff then asked the Court to give the following instructions to the Jury:
"If the Jury believe from the evidence that Plff & one Elocius Buckman agreed to run a horse race on the 12th day of May 1860. by horses respectively owned by them & that they bet the sum of $250. each that his horse would beat the other's horse in said race & deposited said sum of $250. each with the deft as stake holder & the whole to be paid over by the deft to that one of said parties whose horse should beat the others horse in said race & that said race was run in pursuance of said agreement on the 12th day of May 1860. & the Plffs horse beat said Buckman's horse in said race & deft refused to pay over the $250 deposited with him by said Buckman after said race was determined they will find for the Plff the amount sued for & the interest thereon at 6 per cent per annum from the time of such refusal. unlesp they further believe from the evidence that said Buckman demanded of deft the amount so deposited by him with deft before said bet was determined:
2d. A horse race is not a gambling device within the meaning of the act to

13 restrain gaming" & betting on the result of a horse race is not prohibited by said act," which the court refused to give. To which refusal of the court to give said instructions the plaintiff at the time excepted.

The deft then asked the court to give the following instructions to the jury

"If the jury believe from the evidence in the case that the money mentioned in the petition was so much money placed in the of defendant by Buckman as a wager on a horse race to be run by said Buckman and Plaintiff and that the defendant paid said money back to said Buckman before the institution of this suit the jury should find for the defendant," Which the court gave to the giving of which the plaintiff at the time excepted.

The cause was then submitted to the jury who found for the deft.

The Plff then filed the following motion to set aside said verdict and grant a new trial

"Christopher G Hayden Plaintiff
against
James I Little Defendant
In the Circuit court Monroe county. May Term 1864

Pltff moves the Court to set aside the verdict rendered in the above entitled cause & grant a new Trial for the following reasons. 1. Because the Jury rendered said verdict without evidence,

2 Because the Jury rendered said verdict against evidence

3. Because the Jury rendered said verdict against both law and evidence,

4. Because the Court refused proper & legal instructions to the Jury on the part of the Pltff.

5. Because the Court gave an improper & illegal instruction to the Jury at the request of the deft,

6. Because the jury found for the deft when they ought to have found for the Pltff.

James Carr Atty
for Plaintiff.

Which motion, the Court, after hearing & being fully advised of & concerning the same overruled, to the decision of the Court in overruling said motion the Pltff at the time excepted.

The pltff likewise filed the following motion in arrest of Judgment,

"Christopher G Hayden Plaintiff
against
James P Little Defendant

15 In the Circuit Court. Monroe County

May Term 1864.

Pltff moves the Court to arrest the judgment rendered in the above entitled cause for the following reasons.

1. Because the facts stated in defts answer do not constitute any defence to the cause of action alledged in pltffs Petition.

2. Because it is not averred in said ~~petition~~ answer that John S Buckman demanded of deft the money deposited by him in defts possession as stakeholder before the alledged bet or wager was determined.

3. Because the deft as stakeholder for the Pltff & Elcius Buckman cannot resist the payment of the money deposited with him by or for said Buckman, unless said Buckman demanded said money of deft before the bet or wager was determined.

[unless said Buckman had said bet or wager]

4. Because the deft as stakeholder cannot set up any bribery or other improper conduct on the part of the Pltff in running said race as a defence to the cause of action alledged in Pltffs Petition

James Carr

Atty for Plaintiff

Which motion, the Court, after hearing and being fully advised of and concerning the same overruled, To the decision of the Court in overruling said motion the plff at the time excepted,

Whereupon the plff tenders this his bill of exceptions & prayed the Court to allow, sign, seal & make the same a part of the record in this cause, which is done accordingly,

G. Porter. (Seal)

State of Missouri }
County of Monroe } SCT. I, Henry Davis Clerk of the Circuit Court in & for said County, certify that the above and foregoing is a true and correct Transcript of the Proceedings in the cause aforesaid, as full as the same appears of Record in my office

In testimony whereof I hereto sign my name and affix the seal of said Court

Done at office in Paris this 26 day of June 1864.

Henry Davis Clerk

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417

Christopher G Hayden Appl

vs Transcript

James I Little Res

Appeal from

Monroe County

Carr for Appl

Howell & Alexander for Res

Filed July 25/64

E H Williams

Clk

Christopher G. Hayden, Appellant
vs
James T. Little Respondent

In the Supreme Court, at St. Joseph Missouri, February Term, 1865.
Appeal from Nemaha circuit court.

And now comes the said appellant & says that in the record & proceedings of the court below, in the above entitled cause, there is manifest error, & for error said appellant assigns the following to wit:

1. That said court refused to give to the jury proper & legal instructions offered by appellant.
2. That the court gave to the jury improper & illegal instructions asked by the respondent.
3. That the jury found their verdict without evidence.
4. That the jury found their verdict against evidence.
5. That the jury found their verdict against the law.
6. That the jury found their verdict against both the law & the evidence.

2 Christopher G Hayden Plff makes oath and says that the foregoing petition and the matters as therein stated he believes to be true.

Christopher G Hayden

Subscribed and sworn to before me on this the 8th day of April 1861.

Henry Davis Clerk

Whereupon the Clerk of said court did on said 8th day of April 1861 issue and place in the hands of the Sheriff of Monroe County a summons which is in words and figures as follows to wit.

"State of Missouri }
County of Monroe } The State of Missouri To the

Summons

Sheriff of Monroe County, Greeting.

You are hereby commanded to summon James D Little, so that he be and appear before our circuit court on the first day of the next Term thereof. To be begun & held at the Court house in the Town of Paris in said County on the Second Monday in May next 1861. To answer the Plaintiffs petition filed herein, april 8th 1861 which is hereto annexed and a copy of the same accompanies this writ with the manner of its execution

Witness Henry Davis Clerk of our said court with the seal thereof annexed. Done at office in Paris this 8th day of April 1861.

(L.S.)

Henry Davis Clerk
By H M Pollard D.C.

7. That the judgment was rendered in favor of the respondent when it should have been rendered in favor of the appellant.
8. That the court overruled the motion for a new trial made by the appellant.
9. That the court overruled the motion in arrest of judgment made by the appellant

Carr, Atty for
Appellant.

31.
C. G. Hayden
vs
James T. Little

Assignment
of Errors.—

Filed Feby 22/65
E. H. Wilkins
Clk

Christopher G. Hayden Appellant vs James J. Little, Respondent

In the Supreme Court, of Missouri, at St Joseph, Feb. Term, 1865, Appeal from Monroe Circuit Court.

Statement of the Case.

On the 8th day of April, 1861, the appellant commenced suit in the Monroe circuit court, to recover from the respondent the sum of $250, which he alleged the respondent had received from one Elocius Buckmaster on the 12th day of ~~April~~ May, 1860, to & for the use of the appellant. The respondent in his answer admitted that on the 12th day of May, 1860, at the county of Monroe, appellant & ~~said~~ Elocius Buckmaster

agreed to run a certain horse race; that is to say the appellant was to run a certain horse against a certain horse of the said Buckman on a wager or bet by said respective parties of $250. a side, which amount one John S. Buckman on behalf of said Elocius placed in the hands of the respondent, as stakeholder on said bet or horse race; & which sum he said he paid back to said John S. Buckman before the institution of this suit. He further alleged that the appellant had fraudulently bribed the Keeper of said Elocius Buckman's horse to so keep & ride said horse as to cause him to be beaten in said race.

On the trial the appellant proved by Stephen Keighley, one of the judges of the race chosen by Buckman, the race was run as agreed on; that Appellant's horse beat Buckman; that it was so decided by the judges at the time; that there was no unfair riding or jockeying in the race. This same witness further testified that the respondent told him a month or two after the race that he had let John S. Buckman, (the father of Elocin who had made the bet with the appellant,) have a part of the money deposited with him on condition it was to be returned to him (respondent) if the appellant should recover it off him. In November following the

respondent said that he had all the money deposited with him. He at the same time took his pocket book out of his pocket & held it up before the crowd & slapped his hand upon it, & said "That some persons had said that he did not have the money; but there it was."

The respondent simply proved by Elocius Buckman, that John S. Buckman, who had deposited the money ($250.) with the respondent, had demanded the money of the respondent before the institution of this suit, & he had paid it back to said John S. Buckman before this suit was brought.

The appellant, then, asked the court to give the following instructions to the jury:

1. If the jury believe from the evidence that pltff & one Elias Buckman agreed to run a horse race on the 12th day of May, 1860, by horses respectively owned by them, & that they bet the sum of $250. each that his horse would beat the others horse in said race, & deposited said sum of $250. each with the deft, as stakeholder, & the whole to be paid over by the deft to that one of said parties whose horse should beat the others horse in said race, & that said race was run in pursuance of said agreement, on the 12th day of May, 1860, & the pltff's horse beat said Buckman's horse in said race & deft refused to pay over the $250. deposited with him by said Buckman after said race was

determined, they will find for the plff the amount sued for & the interest thereon at 6 per cent per annum from the time of such refusal, unless they believe from the evidence that said Buckman demanded of deft the amount so deposited by him with deft before said bet was determined.

2. A horse race is not a gambling device within the meaning of the "act to restrain gaming", & betting on the result of a horse race is not prohibited by said act.

Which the court refused to give. To which refusal of the court to give said instructions the appellant at the time excepted.

The respondent then asked the court to give the following instruction to the jury:

If the jury believe from

the evidence in the case that the money mentioned in the petition was so much money placed in the of deft by Buckman as a wager on a horse race to be run by said Buckman & pltff, & that the defendant paid said money back to said Buckman before the institution of this suit, the jury should find for the deft.

Which the court gave. To the giving of which the appellant at the time excepted.

The case was then submitted to the jury who found for the respondent. The appellant then filed the following motion for a new & to set aside the verdict of the jury:

1. Because the jury rendered said verdict without evidence.

2. Because the jury rendered said verdict against evidence.
3. Because the jury rendered said verdict against both law & evidence.
4. Because the court refused proper & legal instructions to the jury on the part of the pltff.
5. Because the court gave an improper & illegal instruction to the jury at the request of the deft.
6. Because the jury found for the deft when they ought to have found for the pltff.

Which motion the court overruled. To the overruling of which the appellant at the time excepted.

The appellant likewise filed the following motion in arrest of judgment:
1. Because the facts stated in defts answer to do not constitute any defence to the cause of action.

alleged in plff's petition.

2. Because it is not averred in said answer that John S. Buckman demanded of deft the money deposited by him in deft's possession as stakeholder before the alleged bet or wager was determined.

3. Because the deft as stakeholder for the plff & Lucius Buckman cannot resist the payment of the money deposited with him by or for said Buckman, unless said Buckman demanded said money of deft before the bet or wager was determined

4. Because the deft, as stakeholder, cannot set up any bribery or other improper conduct on the part of the plff in running said race as a defence to the cause of action alleged in plff's petition.

On which said summons is the following endorsement to wit

"I certify that I executed the within Petition & summons by leaving a true copy of the same with the within named defendant James I Little. Done in Monroe County Mo. April 13th 1861.

Shffs return

J C McBride Shff M.C.
By B Hagan Dept Shff.

Shffs fee $1.00"

And afterwards to wit. on the 13th day of May 1862 In the Circuit Court of Monroe County the following proceedings were had in said cause to wit

"Christopher G Hayden Pltff
against
James I Little Deft
} Civil action

Deft files answer

At this day comes the defendant herein by his attorneys and files his answer to the plaintiffs petition in this cause." which said answer is in words and figures as follows to wit.

"Christopher G Hayden Pltff
against
James I Little Deft
} In the Circuit Court Monroe County

Answer

Defendant denies that he owes and is indebted to plaintiff in the sum of Two hundred and fifty dollars for money had and received by defendant from one Elocious Buckman

Which motion the court overruled. To the overruling of which the appellant at the time excepted, & brings this case to the Supreme Court by appeal.

On this record the following points arise:

I. The facts alleged in the respondent's answer constitute no defence to the cause of action stated in the appellant's petition

The answer admits the receiving of the money sued for; that it was deposited with the respondent by one John S. Buckman on behalf of said Elvins Buckman who had made a bet or wager with the appellant on the result of a horse race to be run on the 12th day of May, 1860. The respondent received the money as stakeholder. He says he paid it back to John S. Buckman before the

institution of this suit. When was this suit instituted? Not until the 8th day of April, 1861, eleven months after the race was run. He does not allege that he paid the money over to Elocius Buckman, the party to the bet or wager who deposited the $250. with him as stakeholder, before the race was run or determined — "previous to the expiration of the time agreed upon by the parties for the determination of the bet or wager." (9th § of the "act to restrain Gaming" Rev. Statutes p. 820. Wimer v Pritchartt 16 Mo. R. 252.) He has admitted that he received the money, as stakeholder, for the appellant & Elocius Buckman. This constitutes him a trustee. He receives the money under a certain agreement — on a certain

condition, viz: that he would pay it over to the winning party in the race. Does his answer show that he has performed the agreement on his part? And if not, does it show any legal excuse for his non-performance? His answer confesses the debt. Now does it show anything in avoidance? The answer is a plea of confession & avoidance. The answer simply says he paid paid sum back "to 'John S. Buckman on his demanding the same before the institution of this suit." How long after the determination of the bet or wager? Was it six months, nine months or only the day before the institution of this suit? The plea in avoidance does not show this. It is a general rule of plead-

ing that the pleading is to be taken & construed most strongly against the party whose pleading it is. Applying this rule to this answer, & it utterly fails to show any legal excuse for the respondent's failure to comply with his agreement to pay over this money to the appellant as the winning party in the race.

Let it be conceded, that a horse race is a "game or gambling device" within the purview of the act to restrain gaming, & that the respondent may shield himself, as stakeholder, by virtue of the provisions of said act from the payment of this money. The 10th § of said act makes the stakeholder liable to the party who placed the money or property

bet in his hands, both before & after the termination of such bet on certain conditions, viz:

"Provided that no stakeholder shall be liable afterwards, unless a demand has been made of such stakeholder of the money or property in his possession, <u>previous to the expiration of the time agreed upon by the parties for the determination of the bet or wager.</u>"

The evident intent of this section is to give a party, who has made a bet, the <u>right to rescind</u> the bet or wager, at any time prior to the determination of such bet or wager; & if he exercises such right at any time prior to the determination of such bet or wager & the stakeholder is notified of such

rescission, & a demand made of the stakeholder for the money or property bet & deposited with such stakeholder, he is bound to return such money or property to such party; & "the delivery of the money or property afterwards shall be no defence to any action brought by the losing party for the recovery thereof." Here is an express limitation upon a party's right to hold the stakeholder liable. He must notify the stakeholder that he has rescinded the bet or wager "previous to the expiration of the time agreed upon by the parties for the determination of the bet or wager"; & he must make a demand of the stakeholder of the money or property in his possession.

Now this answer totally fails to show that Elocius Buckman rescinded said bet or wager, & that he notified the respondent, as stakeholder, of such rescission, "previous to the expiration of the time agreed upon by the parties for the determination of the bet or wager," & demanded of him the $250. deposited by said Buckman with the respondent. And failing to show these material facts, he fails to show any legal excuse for the non-performance of his agreement when he accepted said money as stakeholder for the appellant & said Elocius Buckman. He must bring himself clearly within the provisions of this act, if he wishes to avail himself of it as a shield.

2. Another objection to the answer is, that he did not return the money deposited with him as stakeholder to Elocius Buckman, on whose behalf, he admits, it was deposited; but he returned it to one John S. Buckman. He does not even allege that he returned it to said John S. Buckman for, or to be delivered to, said Elocius Buckman, although he admits that said Elocius Buckman made the bet or wager with the appellant & said money was deposited on his behalf. If deposited on his behalf, then he was the owner & it should have been returned to him as such. He might as well say that he returned said money to Abraham Lincoln, as to say that he returned

ed it to John S. Buckman, not showing that John S. Buckman was authorized to receive it, either as agent, or on an order, or at the request of said Elverno Buckman.

3. The fact stated in the answer that appellant bribed the Keeper of said Elverno Buckman's horse, to so keep & ride said horse, as to cause him to be beaten in the race constitutes no defence to the appellant's cause of action. He does not allege that he was notified by Buckman not to pay the money over to the appellant for that reason, & that he cannot hold the respondent responsible for the money, if he

paid it over to the appellant. In the absence of any such notice, the respondent has no legal right to plead any such defence. He is not the proper party to do it. That is most emphatically res inter alios acta. He has no right to intervene & fight Buchman's battle, even if the allegation were true. The evidence shows that there is not a scintilla of truth in it, however. This statute is made for the benefit of the losing party, & not for the benefit of the stakeholder. The losing party may avail himself of its provisions or not. He may decline to avail himself of its provisions, & if he does so it is none of the stakeholder's business. It is like the privilege of infancy. It may be pleaded or not at the discretion

To and for the use of Plaintiff on the 12th day of May 1860. or at any other time or that he received said sum of money. or any other sum from the said Elocious Buckman to and for the use of Plaintiff or of which the plaintiff was the owner or in anywise interested. or that he received any money from the said Elocius Buckman as charged in the petition.

Defendant for further answer states that on or about the said 12th day of May 1860. at the County of Monroe. plaintiff and one Elocius Buckman agreed to run a certain horse race. that is to say the said plaintiff was to run a certain horse against a certain horse of the said Buckman on a wager or bet by said respective parties of Two hundred and fifty dollars a side, which amount of Two hundred and fifty dollars are John S Buckman on behalf of the said Elocius placed in the hands of defendant. as a stake holder on said bet or horse race. and which said sum the defendant paid back to the said John S Buckman. on his demanding the same before the institution of this suit and which is the pretended money mentioned in the Petition filed in this cause.

For further defense defendant says that Plaintiff fraudulently bribed the keeper and rider of said Elocious Buckmans horse.

of the infant when he arrives of age.* The only defence that the stakeholder can set up when sued for the deposit by the winning party is, that the losing party had rescinded the bet or wager" previous to the expiration of the time agreed upon by the parties for the determination of the bet or wager", & had so notified him & demanded the money or property deposited with him, & therefore that he is legally liable to the losing party for such money or property.

II. But if the court shall be of opinion, that the losing party shall have a right under the statute "to restrain gaming", to hold the stakeholder liable for the money deposited

* No: the person is allowed to plead it for him.

with such stakeholder after the termination of the bet, since the 10th § of said act has prescribed a limit to such liability. What is that limit? "Three months from the time the right of action accrued, & not afterwards." If the losing party, then, had seen proper, for any reason, not to abide the result of the race, he certainly must notify the stakeholder of such intention & demand the money which he had deposited with the stakeholder, so as to fix the stakeholder with a legal liability to him for the money deposited. If he fails or neglects to give this notice, & make this demand, & bring his action within ~~the~~ three months from the time the race

was run & determined, then he sleeps upon the right given to him by said act; & the consequence is that he loses it. The losing party, then, has no legal claim to the money deposited. This claim is barred. The legal & logical consequence, flowing from this bar, is that the stakeholder is no longer under any legal liability to the losing party to return the amount of the bet or wager deposited with him. Being thus absolved from all legal liability to the losing party, the question then recurs, whether he is liable to the winning party? It has been shown that he is not legally liable to the losing party. When he agreed to act as stakeholder it was upon the ex-

proposition that he would pay the money deposited with him to the winning party. He has no right to keep it. The statute to prevent gaming was not made for his benefit. It was made for the benefit of the losing party. The losing party has not seen proper to claim the benefit of the statute thus made for his benefit. He has no right, then, to keep money which properly belongs to another. It is contrary to his express agreement. The defense pleaded in the respondent's answer comes with a very bad grace from a party standing in a fiduciary capacity as he does in this case.

This statute "to restrain gaming" gives a <u>locus poenitentiae</u>

to either party to the bet or wager, provided he exercises such right in conformity with the provisions of said statute. The facts alleged in the respondent's answer totally fail to show the exercise of this right either before, or after the expiration of the time agreed upon by the parties for the determination of the bet or wager. He fails even to allege that he paid the money deposited with him for Elocius Buckman back to said Elocius Buckman the losing party, within three months after the determination of the bet or wager. This fact certainly ought to have been alleged; failing to allege it, he fails to show any legal excuse for his non-performance of the contract on his part.

The statute in this case modifies the rights of the parties; it makes them different from what they were at common law. It limits the loser's right to bring his action within three months from the time the right of action accrued; & if he fails to assert his right within this time he is forever barred. Now it is a general principle of law, where a party relies upon a special statute which creates an <u>absolute bar</u> in his favor, & he fails to show the necessary facts in his pleading to bring himself within the bar, that a demurrer will lie. (State to the use of Squire & Reed v Bird et al 22 Mo. R. 470 & authorities there cited.) If it can be reached

by demurrer, it can as well be reached by a motion in arrest of judgment. — The motion in arrest of judgment filed in this case reached the defence pleaded in the respondent's answer, & the overruling of it was error in the court below.

Horse racing & betting or wagering on a horse race were not illegal at common law. If the statute to restrain gaming shall be held to include betting or wagering on the result of a horse race, then the remedy provided by said statute is exclusive. The stakeholder cannot invoke any other remedy in his defense than what said statute expressly authorizes. His an-

sever totally failing to bring himself within the provisions of said statute, - within the remedy provided by said statute - fails for this reason to show any legal defence or excuse for the non-performance of the contract confessed by him in his answer. (Mason v Kennebec & Portland R.R. Co. 31 Maine R. 215 cited in 1 American Railway Cases p. 162. Stowell v Flag 11 Mass. R. 364; Stevens v Middlesex Canal 612 Mass. R. 446; Cushing v Baldwin 4 Wend. R. 667; Radcliff v Mayor &c. of Brooklyn 4 Comstock R. 195; 2 Van Santford's Pls. 18 & 35; 23 N.Y. Reports p. 552.)

III. Is a horse race a "game or gambling device" within the provision of the act to restrain Gaming? It is affirmed that it is not, any more than "bets & wagers on any election authorized by the Constitution & laws of this State" would be, were it not so expressly provided in the 6th § of said act. The words: "game or gambling device" used in the first § of said act do not convey the idea to the mind of a horse race. In the ordinary parlance of the country, whenever the word "game" is used, quite a different idea is conveyed to the mind than a horse race. What idea, then, is conveyed to the mind by the word "game"? Playing at cards; playing at billiards; playing chess; playing checkers;

playing backgammon; playing ten pins et id omne genus are at once conveyed to the mind by the word "game". But nothing like a horse race. What idea is conveyed to the mind by the words "gambling device"? A, B, C, faw bank, equality, E. O., roulette or some kind of gambling device, adapted, devised, & designed for the purpose of playing any game of chance for money or property. Now this cannot be affirmed of a horse or a horse race. Says Judge Napton in delivering the opinion of the court in the case of the State v Hayden (31 Mo. R. 35:) "It is a great perversion of language to call a horse race a gambling device".

The attention of the Legislature has been called to horse racing in several

5 To so keep and ride said horse as to cause him to be beaten in said race by bad keeping and unfair riding

Harrell & Alexander
Attys for Defendent.

Alocious Buckman agent for defendent makes oath and says the foregoing petition & the matters as therein stated he believes to be true

Alocious his + mark Buckman

Subscribed and sworn to before me this 29th day of April 1862.

Henry Davis Clerk

And afterwards to wit on the 17th day of May 1862 the following proceedings were had in said cause. In the Circuit Court of Monroe County, To wit

"Christopher G Hayden Plaintiff
against
James I Little Defendant
} civil action

At this day come the parties herein by their attorneys, and on motion by agreement, this cause is by the Court ordered continued"

Continuance

And afterwards to wit on the 13th day of November 1862. In the Monroe Circuit Court the following proceedings were had in said cause To wit

in general respects, regulating when & where it may not be done. For instance horse racing on Sunday is prohibited; & in public roads & highways as will be seen by reference to §35 p. 631 & §§54, 55 p. 635 (Rev. Statutes.) The evident implication, then, is that by thus regulating when & where horse races may not be run is that at other times & places it is legal & proper to run them. And if so, then betting or wagering on the result of a horse race is not illegal, & a contract of this kind is not void; but may be enforced by the courts.

Applying the foregoing principles to the instructions asked by the appellant & refused by the court, & the instruction given by the court at the request of the respondent, & it will be perceived that the court below erred in refusing & giving said instructions.

For the foregoing reasons the judgment of the court below ought to be reversed.

Carr Atty for
Appellant.

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C. G. Hayden
vs
James S. Little

Statement of
the case & Brief
for Appellant.

Hayden
vs
Little

This was an action to recover the sum of $250, money won upon a horse race. The facts disclosed upon the trial are substantially as follows. Plaintiff and one Elocius Buckman agreed to run a horse race on the 12th of May 1860. Said plaintiff to run his horse against the horse of said Buckman upon a wager of $250 aside. Plaintiff deposited $250 with defendant as stakeholder and one John S Buckman deposited with defendant a like amount in behalf of Elocius Buckman. The race took place at the stipulated time, and was won by plaintiff's horse. Some time after the race but before the institution of this suit, John S Buckman demanded of defendant the money he had deposited with him, and defendant paid it over to him. This suit is to recover

the $250 deposited by Buckman with defendant as Stakeholder.

The plaintiff asked the Court to instruct the jury as follows.

1. "If the jury believe from the evidence that plaintiff and one Elocius Buckman agreed to run a horse race on the 12th day of May 1880 by horses respectively owned by them and that they bet the sum of $250 each that his horse would beat the others horse in said race, and deposited said sum of $250 each with the defendant as stakeholder, and the whole to be paid over by the defendant to that one of said parties whose horse should beat the other's horse in said race, and that said race was run in pursuance of said agreement on the 12th day of May 1880, and the plaintiffs horse beat said Buckman's horse in said race and defendant refused to pay over the $250, deposited with him by said Buckman after the race was ~~run~~ determined, they

will find for the plaintiff the amount sued for, and the interest thereon at 6 pr. ct per annum from the time of such refusal, unless they further believe from the evidence that said Buckman demanded of defendant the amount so deposited by him with defendant before said bet was determined."

2. "A horse race is not a gambling device within the meaning of the act to restrain gaming, and betting on the result of a horse race is not prohibited by said act."

Which instructions the court refused to give, and plaintiff duly excepted.

The court then at the instance of defendant gave the following instruction,

"If the jury believe from the evidence in the case that the money mentioned in the petition was so much money

placed in the hands of defendant by Buckman as a wager on a horse race to be run by said Buckman and plaintiff, and that the defendant paid said money back to said Buckman before the institution of this suit the jury should find for the defendant."

To the giving of which plaintiff objects and excepts. — A verdict being given for defendant, plaintiff filed his motion for a new trial which being overruled, he appeals to this court —

The only point presented by the record relates to the giving and refusing instructions —

The counsel for appellant has made a lengthy argument to show that the answer filed contains no valid defense because it is not stated that a demand of the money was made of the stakeholder previous to the expiration of the time agreed upon by the parties for the determination

of the bet or wager, and that Beckman, if he has any cause of action against the defendant as stakeholder has lost it by not instituting a suit within the time prescribed by the act to restrain gaming. We are at a loss to see the application of this argument for this is not a suit by Beckman against the stakeholder to recover the money by him deposited but it is a suit by the plaintiff to recover from the stakeholder money won upon a horse race and which the stakeholder returned to the losing party. In other words it is a suit to enforce a contract which has for its consideration a wager upon a horse race and the only question is whether the law will lend its aid to enforce such a contract. It is well settled that no action will lie upon a contract based upon an unlawful consideration, or which is repugnant to law, or against policy, or good

morals - 4 turpi contractu actio non oritur: Kent says "if the contract grows immediately out of, or is connected with an illegal or immoral act a court of justice will not enforce it."

It has been held by this Court that horse racing is gaming within the meaning of our statute to "restrain gaming," and that a note given to secure a forfeiture for failing to run is void - Shropshire vs Glascock & Gasenen 4 Mo. 534 and Boynton vs Curle, ib 599 - There is no conflict between these cases and the case of the State vs Hayden 31 Mo. 35 for in the latter case it was merely held that a horse race was not a gambling device within the meaning of the 17th sec of the 8th article of the act concerning crimes and punishments - The act to restrain gaming (R C 1855 p 818) authorises any person who shall lose money

or property, at any game or gambling device, to recover the same by civil action, and it further provides that all bonds bills notes &c, when the consideration is money or property won at any game, or gambling device, shall be void - And in the 8th sec it is declared that bets and wagers on any election authorised by the Constitution and laws of this state are gaming within the meaning of the act but before the enactment of this 8th sec it was held by this court that though a wager on the result of an election authorised by law was not within the meaning of the statute concerning gaming then in force (R S 1835 p 290) yet it was void, being contrary to public policy and sound morality - Hickerson vs Benson & Workman 8 Mo 8 -

The policy of the law is to discourage bets and wagers as being contra bonos mores, and one of the methods adopted for that purpose is to refuse its aid to

"Christopher G Hayden Plaintiff
against } civil action
James J Little Defendant

continue At this day come the parties herein by their attorneys and on motion by agreement this cause is by the court ordered continued"

And afterwards to wit on the 18th day of May 1863. In the circuit court of Monroe county the following proceedings were had in said cause to wit

"Christopher G Hayden Plaintiff
against } civil action
James J Little Defendant

At this day come the parties herein by their attorneys, and on the application of the defendant this cause is by the court ordered continued on account of the absence of material witnesses for defendant"

continue

And afterwards to wit on the 10th day of November 1863. In the circuit court of Monroe county the following proceedings were had in said cause to wit

"Christopher G Hayden Plaintiff
against } civil action
James J Little Defendant } At this day

continue

enforce contracts predicated upon such a consideration. This was the view, no doubt, of the law taken by the court below and hence its ruling with reference to the instructions given and refused. Judge McAyden concurring the judgment is affirmed.

M. T. W. Bay

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Hayden

v

Little

Opinion

Bay

Aff-

7 come the parties herein by their attorneys, and on motion of defendant this cause is by the Court, ordered continued at his costs. It is therefore ordered and adjudged by the Court, that the plaintiff have and recover of the defendant his costs by him expended at this term of the Court, and that he have therefor his writ of execution"

And afterwards to wit on the 10th day of May 1844. In the Circuit Court of Monroe County the following proceedings were had in said cause to wit

"Christopher G Hayden Plaintiff
against
James I Little Defendant } Civil Action

Trial At this day come the parties herein, and say they are ready for Trial, whereupon come a Jury to wit, William Gammaway, William A Sparks, Walter Shropshire John Powell, John Barker, Jacob Ford, William T Adams, William Bowman, John Davis, George H Palmer, William A Scott & William M Foster, twelve good and lawful men of Monroe County, who being duly sworn to try the issue joined between the plaintiff and defendant and after hearing the evidence adduced in said cause; on their oaths return the

following verdict to wit "We the jury find for the defendant

Jno Bowman Foreman"

It is therefore ordered and adjudged by the court that the defendant have and recover of the plaintiff his costs by him in this behalf expended and that he have therefor his writ of execution"

And afterwards to wit on the 13th day of May 1864. the following proceedings in said cause were had in the circuit court of Monroe county to wit

"Christopher G Hayden Plaintiff
against
James J Little Defendants

Pltff files motion for new trial

At this day come the parties in this cause by their attorneys and the plaintiff files his motion to set aside the verdict of the jury and for a new trial in this cause which said motion coming on to be heard is by the court overruled. to which said ruling of the court the plaintiff excepted at the time.

And afterwards to wit on said 13th day of May 1864 in the circuit court of Monroe county the following proceedings were had in said cause to wit

9 Christopher G Hayden Plaintiff
against James I Little Defendant

At this day come the parties herein by their attorneys. and the plaintiff files his motion in arrest of judgment. which said motion coming on to be heard is by the court overruled, - To which said ruling of the court the Plaintiff excepts at the time. And thereupon the plaintiff files his affidavit for an appeal to the Supreme court. and also files his bill of exceptions. which is by the court allowed signed. sealed. and ordered to be made a part of the record in this cause. and grants an appeal.

Pltff files motion in arrest of judgment

which said Bill of exceptions is in words and figures as follows to wit.

"Christopher G Hayden Plaintiff
against
James I Little Defendant
} In the Circuit court Monroe County May Term 1864.

Be it remembered that on this 10 day of May 1864. this cause came on for trial on the plaintiffs petition the defts answer and the testimony of witnesses.

Bill of exceptions

Stephen Rightley being duly sworn on the part of the Pltff testified as follows "I am acquainted with the Pltff & Deft. I know that the Pltff & Elecius Buckman made a bet