Maryland Law Review

Volume 8 | Issue 4 Article 8

Recovery of Gambling Loss by Creditor of Loser - LaFontaine v. Wilson

RECOVERY OF GAMBLING LOSS BY CREDITOR OF LOSER

LaFontaine v. Wilson[1]

The plaintiff, Wilson, brought an action in the nature of Debt under the Maryland statute[2] to recover some $43,000, which he had gambled and lost to the defendants, LaFontaine, et al.[3] The money had been wrongfully taken by the plaintiff from his employers.[4] The plaintiff had no record or knowledge of the number of times he had visited or gambled at the defendant's establishment. Neither the exact amount of money taken from the employers nor the exact amount of money lost to the defendant was known; the testimony was conjectural. In effect the amount of the deficiency in the employers' accounts was surmised to be the amount embezzled and lost. The Court of Appeals affirmed the judgment at $30,000 for the plaintiff,[5] stating that the present Code provision was unencumbered by the requirements and restrictions of the English statute,[6] by virtue of the legislative method of adopting the Code of 1860. The Court upheld a recovery based on uncertain testimony as to the circumstances of the transactions and as to the exact amount of the loss; in fact the verdict was at variance with the alleged loss. The defendant had been held to be the winner as a result of his counsel's stipulation that the defendant declined to answer an interrogatory as to his ownership and operation of the place of the alleged gambling.[7] The defense, that the plaintiff did not have sufficient title to recover, because he was an embezzler, was overruled.

The Court stated that the employer might have sued the defendant directly in assumpsit for money had and received or in equity, provided the funds were traceable.[8]

[1] 45 A. 2d. 729, 162 A. L. R. 1218 (Md. 1946).

[2] Md. Code (1939) Art. 27, Sec. 298 provides that "Any person who may lose money at a gaming table may recover back the same as if it were a common debt, and shall be a competent witness to prove the sum he lost; but no person shall recover any money or other thing which he may have won by betting at any game or by betting in any manner whatsoever."

[3] Suit dismissed as to other defendants.

[4] Plaintiff here had been convicted in the District of Columbia prior to this suit.

[5] Prior to appeal the judgment had been assigned to the use of the employers.

[6] 9 Anne (1710) Ch. 14, Sec. II, 2 Alexander's British Statutes (2nd ed., 1912) 932.

[7] Conceded to be an admission under Rule 6, General Rules of Practice and Procedure of the Court of Appeals, Md. Code Supp. (1943) 1214.

[8] 45 A. 2d 729, 733, citing 2 A. L. R. 345, which notes Corner v. Pendleton, 8 Md. 337 (1855), where employer sued winner from embezzling employee and Court affirmed judgment for defendant because of insufficient evidence.

Even at common law, in most jurisdictions, a principal, employer, wife, or other owner of money or property could recover from a winner, where the money or property had been gambled without consent or authority.[9] The liability of a winner has been extended by statute in many states, but there is no uniformity in their provisions. It seems to be the settled law in Maryland that the loser may recover, regardless of how he obtained the money lost, and that an employer may recover directly from his embezzling employee's winner.

The principal case suggests a problem, not yet adjudicated in Maryland, namely, what remedies has a general creditor where money has been lost by his debtor in gambling transactions? There appears to be no logical reason why the general creditor should not be able to reach money lost in gambling. Our statute permits the loser to recover a gambling loss "as if it were a common debt."[10] A chose in action for the payment of money generally is assignable in Maryland and the assignee can sue in his own name, if the assignment is in writing.[11] Other jurisdictions have upheld the validity of an assignment of the right to recover a gambling loss under statutes similar to the Maryland statute.[12] On the basis of the local statute and de-

[9] 2 A. L. R. 345.

[10] *Supra*, n. 2.

[11] Gordon v. Downey, 1 Gill 41 (Md. 1843) held chose in action for payment of money was assignable, citing Md. Laws 1829, Ch. 51 (now Md. Code (1939) Art. 8, Sec. 1). The decision has been cited with approval in Dakin v. Pomeroy, 9 Gill 1, 6 (Md. 1850); N. Y. Life Ins. Co. v. Flack, 3 Md. 341, 354 (1852); Banks v. McClellan, 24 Md. 62, 80 (1866).

[12] (a) New York—

Meech v. Stoner, 19 N. Y. 26 (1859) held the right to recover gambling loss under local statute (Sec. 994, Penal Laws, Consolidated Laws of N. Y.) was assignable. The statute read: "any person who shall pay . . . upon the event of any wager or bet prohibited may sue for and recover . . ." Judge Comstock stated: "To take money from a person by gaming is, in a just sense, a wrong done to his estate. It subtracts from the means of paying his creditors. . . . Such a cause of action according to all the analogies of the law, is capable of transmission and assignment." This decision was followed in Zeltner v. Irwin, 21 Misc. Rep. 13, 46 N. Y. S. 852 (1897), which was reversed on other grounds in 25 App. Div. 228, 49 N. Y. S. 337 (1898).

Newhall v. Kerner, 132 Misc. Rep. 750, 230 N. Y. S. 319 (1928) held that the receiver of a trust company could recover funds lost in gambling by embezzling treasurer.

Marett v. Shannon, 164 Misc. Rep. 790, 300 N. Y. S. 1248 (1936) held that the receiver appointed in a Supplementary Proceeding could recover from the betting commissioner money lost by the judgment debtor.

Bamman v. Erickson, 288 N. Y. 133, 41 N. E. 2d 920 (1942) allowed assignee to recover $200,000. lost in gambling by assignor. Issue of case was whether a habitual bettor (assignor) was a professional gambler, so as to preclude a recovery.

(b) Tennessee—

Allen v. Dunham, 92 Tenn. 257, 21 S. W. 898 (1893) upheld the validity of an assignment by the embezzling-loser and his wife to his employer of

cisions and the authority of other states' decisions upholding assignments, there being found none which disallowed an assignment, the loser's statutory right to recover is probably alienable in Maryland. The old common law did not favor assignability in general because, among other reasons, it encouraged litigation and it was believed that the debtor had chosen a particular creditor and should not be required to answer to a stranger.[13] Since the policy of the law in Maryland favors recovery of gambling losses and frowns on gamblers in general, the common law argument against assignability should carry little weight.

The general rule as to a creditor's rights is that any asset of the debtor, which he may alienate, can be reached by the creditor.[14] The creditor can employ any of the usual means of realizing on an intangible asset of his debtor. Unless the debtor is subject to attachment on original process, under the rules governing its issuance,[15] the creditor should first obtain a judgment at law against his debtor. The winner's statutory indebtedness to the loser-debtor being an intangible is not subject to levy under a writ of *fieri facias* issued by the judgment creditor.[16] The simplest means of reaching this asset would be by an attachment "at the foot of the judgment", naming the winner in the gambling transaction as garnishee.[17] The judgment creditor should incorporate a *scire facias* clause in the writ of attachment laid in the hands of the garnishee, whereby the loser-debtor's right to recover from the winner-garnishee can be adjudicated in the condemnation suit. There are cases in other jurisdictions allowing an attaching creditor to recover from a stakeholder named as garnishee.[18]

---

their respective rights to recover gambling losses (here stock speculation agreement) under local statute ("any person who has paid any money . . . upon any game or wager . . ."). The case is especially strong in that it overruled the defendant's contention that such assignment was in effect compounding a felony (since local criminal statute provided that repayment of the thing would be a defense to embezzlement) or champerty and maintenance.

[13] 2 WILLISTON, CONTRACTS (Rev. ed. 1936) Sec. 405.

[14] GLENN, THE RIGHTS AND REMEDIES OF CREDITORS RESPECTING THEIR DEBTOR'S PROPERTY (1915) Sec. 25.

[15] Md. Code (1939) Art. 9; 2 POE, PLEADING AND PRACTICE IN COURTS OF COMMON LAW (5th ed., 1925) Sec. 502, *et seq.*

[16] Harding v. Stevenson, 6 H. & J. 264 (Md. 1824); Poe, *op. cit. supra* n. 15, Sec. 640.

[17] Poe, *op. cit. supra* n. 15, Sec. 689-90.

[18] See 89 Am. Dec. 602 (1866) noting Reynolds v. McKinney, 4 Kan. 94, which held that where betting is illegal, the stakeholder is a naked bailee who has received money without consideration. Here the betting debtor was acting as agent for a third person, yet the court held for the agent's attaching creditor.

There are other possible means of attempting to seize this asset. The judgment creditor might use supplementary proceedings,[19] to reach the assets in the winner's hands. He might perhaps use a creditor's bill but this may be a doubtful remedy in view of the Court's language in *Harper v. Clayton.*[20]

A trustee in bankruptcy can recover either as representative of the creditors or on the more secure ground as transferee of the bankrupt's title by operation of law.[21] There are cases allowing such a recovery.[22]

Thus it seems that either a general creditor or one representing creditors of a gambling loser can recover from the winner. This is sound from the standpoint of creditor's rights in that a creditor should be able to reach anything a debtor can claim or alienate; and it is sound from the standpoint of public policy, for, since gambling is generally recognized as wrong and undesirable,[23] anything which will render it less secure and less profitable will further tend to deter the practice. A sense of honor or a fear of

---

[19] Md. Code (1939) Art. 75, Sec. 150; Poe, *op. cit. supra* n. 15, Sec. 707 A-C. By this method, a creditor may petition the court issuing a judgment (upon showing either that the debtor is concealing or disposing of assets in order to evade the judgment, or that ninety days has elasped since the entry of the final judgment or decree and the same remains unsatisfied) to order the judgment debtor to appear for an examination under oath, and provision is also made for examination of third persons who may have assets or credits belonging to the debtor. The court is authorized to use legal and equitable process to subject any assets thus uncovered to the judgment after notice and hearing to affected persons. The procedure probably had not been used generally prior to the inclusion of the ninety-day provision, because the court had strictly construed the requirement of showing a fraudulent concealment. There appears to be only one Maryland case of the Court of Appeals construing the statute, but the provisions are practically identical with the New York statute, hence the New York decisions should be helpful precedents.

[20] 84 Md. 346, 35 A. 1083 (1896) where there was a strong statement that a Creditor's Bill cannot be used to reach a chose in action which is not subject to execution by a writ of fi. fa. at law. Cited with approval in Harford Bank v. Banking & Tr. Co., 165 Md. 454, 169 A. 315 (1933).

[21] Bankruptcy Act, Sec. 70(a) (4) (5) (6); 11 U. S. C. A. (1937) Sec. 110(a) (4-6).

[22] Brownlow v. Davis, 69 Ga. App. 111, 25 S. E. (2d) 150 (1943) held that firm trustee in bankruptcy could recover from the winner of fund lost by one of the partners, stating that the trustee held the firm's title under 11 U. S. C. sec. 110. Brandon v. Pate, 2 H. Bl. 308, 126 Eng. Rep. 566 (1794) held that assignee in bankruptcy could recover from the bankrupt's winner in a gambling transaction. Cited with approval in Meech v. Stoner, *op. cit. supra* n. 12a.

[23] 6 ENCYLOPEDIA OF RELIGION AND ETHICS (1928 ed.) p. 163; KORAN (translated by E. H. Palmer), Ch. 2 (Of the Heifer) 215 and Ch. 5 (Of the Table) 95; FAIRCHILD, FURNISS, BUCK, ELEMENTARY ECONOMICS (3d ed. 1936) p. 159; SMITH, WEALTH OF NATIONS, Ch. 10, part 1 (chance of gain is overvalued) p. 108; VEBLEN, THE THEORY OF THE LEISURE CLASS, Ch. 11. *Cf.* 6 CATHOLIC ENCYCLOPEDIA (1937 ed.) p. 375; 4 UNIVERSAL JEWISH ENCYCLOPEDIA (1903 ed.) p. 563; Md. Code (1939) Art. 27, Sec. 291-5, Art. 78 B.

violent retaliation by the winner usually prevents a loser from enforcing his statutory right. The creditor of the loser feels no such restraint and, having only an affirmative selfish interest, is more likely to press a recovery. It is true that in most instances the creditor will not attempt to recover from the winner unless his debtor-loser is insolvent, yet every recovery serves the public policy against gambling, and also allows the particular creditor to have his claim satisfied.