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Conflict of Laws -- Validity of Gambling Note

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between the right to obtain counsel in a criminal action and the right to have counsel appointed. The former was held to be absolute, the latter, except in capital cases, conditional.[15]

In the instant case, the Florida Supreme Court, relying upon the United States Supreme Court decisions in this field and the provisions of both federal and state constitutions, held that refusal of the trial court to grant a continuance denied the petitioner the right to obtain counsel and this was a denial of due process of law.

The instant case involved no new principle of law, and, considering prior decisions, the result might be said to have been expected. At the same time, viewing the five-year history of this case[16] two questions might be asked.

In light of the fact that the Florida Supreme Court said that "the instant case does not require any novel recognition of a constitutional claim,"[17] why did it take five years to reach this decision?

Secondly, the court criticized the trial judge for failing at the outset of the case to have a "straightforward recognition of the organic rights of one accused of a crime."[18] Admitting the criticism to be valid, could not the same criticism be leveled at this court for failing to recognize these same rights alleged in the first petition for habeas corpus which it denied without hearing three years previously?

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CONFLICT OF LAWS—VALIDITY OF GAMBLING NOTE

In an action based on a check issued in Nevada on a Florida bank, the drawer pleaded that the check had been given for money previously loaned for the purpose of gambling. The trial court in granting recovery to the original bearer ruled that the evidence supported a finding that the bearer had no knowledge of the purpose for which the drawer intended to utilize the money. *Held*, affirmed: the finding of the lower court was not against the manifest weight of the evidence. The appellate court, however, stated that: "A gambling obligation although valid in the state where

15. "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified . . . . [and] a necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." 348 U.S. 3, 9-10 (1954).

16. See discussion, note 1 *supra*.

17. Cash v. Culver, 122 So.2d 179, 187 (Fla. 1960).

18. *Ibid.*

created can not be enforced in Florida because it is contrary to public policy."[1] *Young v. Sands, Inc.*, 122 So.2d 618 (Fla. App. 1960).

While it is recognized that this statement is dictum, it is considered important as the first indication by a Florida appellate court of the treatment to be accorded gambling obligations validly made in another state.

In England, the Gaming Act of 1710[2] voided all bills and notes or other securities where any part of the consideration therefor was money won or loaned in a gambling transaction. The English cases involving gambling transactions in a foreign country in which gambling was legal have drawn a distinction between recovery on an instrument and recovery for money won or loaned. When a bill of exchange was drawn in France on an English bank as part of a gambling transaction, the court has held that the *making of the bill* was an English transaction to be governed by the laws of England, and it was thus void under the Gaming Act.[3] However, recovery was allowed on separate counts for money loaned for the purpose of gambling.[4]

No similar distinction has been utilized in this country.[5] Most of the jurisdictions denying recovery for gambling debts, valid by the *lex loci contractus*,[6] have rested their decisions on the repugnancy of gambling obligations to the public policy of the forum.[7] These cases have applied to gambling contracts the general maxim that the forum will not enforce a contract which violates its public policy even though the contract is valid where made.[8]

The cases allowing recovery for gambling obligations illegal in the forum, but valid where entered into, are approximately equal in number

1. Young v. Sands, Inc., 122 So.2d 618, 619 (Fla. App. 1960).
2. 9 Anne c. 14 (1710).
3. Robinson v. Bland, 1 W. Bl. 234, 96 Eng. Rep. 129, 141 (K.B. 1760) (another report of the same case is found in 2 Burr. 1077, 97 Eng. Rep. 717), criticized in Cohen, *On the Law of Securities Given Abroad for Gaming Debts*, 28 L.Q. REV. 127 (1912); *accord*, Moulis v. Owen, 1 K.B. 746 (1907), criticized in Cohen *supra* and Dicey, *Note*, 23 L.Q. REV. 249 (1907).
4. Robinson v. Bland, *supra* note 3; *accord*, Quarrier v. Colston, 1 Ph. 147, 41 Eng. Rep. 587 (Ch. 1842); Saxby v. Fulton, 2 K.B. 208 (1909); Societe Anonyme Des Grands Etablissments De Touquet Paris-Plage v. Baumgart, 96 L.J.K.B. 789 (1927).
5. However, one case followed part of the English viewpoint in holding New York law applicable to a check drawn in Florida on a New York bank in payment for a gambling debt. Thuna v. Wolf, 132 Misc. 56, 228 N.Y. Supp. 658 (Sup. Ct. 1928). This case favorably cites Moulis v. Owen, 1 K.B. 746 (1907).
6. "The law of the place where the contract was made." BLACK, LAW DICTIONARY 1056 (4th ed. 1951).
7. Savings Bank of Kansas v. National Bank of Commerce, 38 Fed. 800 (C.C.W.D. Mo. 1889); Ciampittiello v. Campitello, 134 Conn. 51, 54 A.2d 669 (1947); Thomas v. First Nat'l Bank, 213 Ill. 261, 72 N.E. 801 (1904); Maxey v. Railey & Bros. Banking Co., 57 S.W.2d 1091 (Mo. App. 1933); Nielsen v. Donnelly, 110 Misc. 266, 181 N.Y. Supp. 509 (N.Y.C. Munic. Ct. 1920); Gooch v. Faucette, 122 N.C. 270, 29 S.E. 362 (1898).
8. See cases cited note 7 *supra*; 11 AM. JUR. *Conflict of Laws* § 126, p. 415, n.6 (1937); 15 C.J.S. *Conflict of Laws* § 4, p. 860, n.29 (1939); STORY, CONFLICT OF LAWS § 244 (5th ed. 1857).

to those which have denied recovery,[9] although the rationales in the former are not as uniform as those of the latter. In *Tropicales, S.A. v. Drinkhouse*,[10] payment was obtained for a check drawn on a New York bank and given for a gambling debt in Cuba, where gambling was legal. The court was of the view that "the transaction took place in Cuba and the laws of Cuba and not of New York prevail."[11] Despite a New York law making lotteries illegal, a New York court enforced an agreement concerning lotteries made in Kentucky, where lotteries were lawful.[12] The court did not consider lotteries "plainly contrary to morality."[13]

In reference to a bet made on a horse race run in Maryland, a court in Delaware, where such racing and betting were illegal, stated:

> [T]his court cannot regard a horse race as illegal which is run in the State of Maryland, where racing is not prohibited. . . . Neither the race, nor the bet, is immoral in itself; nor is it prohibited by our act of assembly, which does not reach the case.[14]

In *Thomas v. Davis*[15] the plaintiff was allowed to recover his share of a bet made on a horse race run in Louisiana, the defendant having bet on the race pursuant to an agreement made in Mississippi; betting was unlawful in the forum, but not in Mississippi or Louisiana. The Kentucky court reasoned that the plaintiff had not bet with the defendant, but sought to recover money which the defendant had received for his use and benefit.[16]

Florida, according to the instant case, would join those forums which deny recovery on the basis of public policy when confronted with a gambling obligation valid by the *lex loci contractus*. A 1951 statute was the source of the public policy of this state against gambling obligations.[17] Professor

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9. This excludes consideration of cases concerning certain transactions in stocks and agricultural commodities which have been made illegal by statute in many states and are often classified as gambling. See 2 WHARTON, CONFLICT OF LAWS § 492a (3d ed. 1905).

10. 15 Misc. 2d 425, 183 N.Y.S.2d 679 (Sup. Ct. 1959).

11. *Id.* at 426, 183 N.Y.S.2d at 680; *accord*, Richter v. Empire Trust Co., 20 F. Supp. 289 (S.D.N.Y. 1937) (dictum); Harris v. White, 81 N.Y. 532 (1880) (dictum); Tropicales, S.A. v. Milora, 7 Misc. 2d 281, 156 N.Y.S.2d 942 (Sup. Ct. 1956) (dictum).

12. Kentucky v. Bassford, 6 Hill 526 (N.Y. Sup. Ct. 1844); *accord*, Thatcher v. Morris, 11 N.Y. 437 (1854) (dictum).

13. Kentucky v. Bassford, *supra* note 12 at 529.

14. Ross v. Green, 4 Del. (4 Harr.) 308, 309 (1845).

15. 46 Ky. (7 B. Mon.) 227 (1846).

16. Another somewhat unusual rationale is that of the Pennsylvania court in Scott v. Duffy, 14 Pa. 18 (1849), which allowed the plaintiff to recover money he lent the defendant in New Jersey, knowing that the money would be bet on the outcome of the Presidential election; such a wager was unlawful in Pennsylvania, but was not shown to be so in New Jersey. The court said that the money was not lent to carry any specific bet into execution, but on the assertion that it would be bet on the election and "honor and good faith seem to require that it should be repaid . . . ." *Id.* at 19.

17. FLA. STAT. § 849.26 (1951): "All promises, agreements, notes, bills, bonds or other contracts, mortgages or other securities, when the whole or part of the consideration if for money or other valuable thing won or lost, laid, staked, betted or wagered in any gambling transaction whatsoever, regardless of its name or nature, whether heretofore prohibited or not, or for the repayment of money lent or advanced at the time of a gambling transaction for the purpose of being laid, betted, staked or wagered, are void and of no effect; provided, that this act shall not apply to wagering on parimutuels or any gambling transaction expressly authorized by law." *Compare* the instant case citing FLA. STAT. § 849.26 (1959) *with* Ciampittiello v. Campitello, 134 Conn. 51,

Goodrich took a dim view of such an application of public policy when he stated:

> If a local statute prohibits recovery in local courts on certain kinds of claims, no matter where the operative facts upon which they are founded occurred, it will of course prevail, unless it violates some constitutional provision. In the absence of such a statute it should take a *very strong* case to preclude recovery upon a foreign contract on the ground of supposed conflict with local morals or policy. It is hard to think of many transactions which have the stamp of approval of the law of some civilized state upon them which reek so of immorality that to give a money judgment upon the claim will jeopardize the ethical standards of the forum. For one state of the Union to assume such an attitude with regard to a contract made in another seems an intolerable, provincial affectation of virtue.[18] (Emphasis added.)

On the other hand, an illustration in the *Restatement of Conflicts* would deny recovery for a gambling debt valid where made, if such debts were against the public policy of the forum.[19] This illustration would seem, perhaps, to be inconsistent with the particular section involved, which states that: "No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the *strong* public policy of the forum."[20] (Emphasis added.)

Recovery in the situation being considered would seem to depend on the answer to the question: How *strong* is the public policy of the forum against gambling and gambling obligations? It should be noted that Florida Statute section 849.26 voids obligations associated with some types of gambling, but does not apply to those arising from "wagering on parimutuels or any gambling transaction expressly authorized by law."[21] It is therefore suggested that gambling obligations are not so repugnant to the morality of the citizens of this state as to deny satisfaction to foreign suitors attempting to enforce gambling debts of Florida residents.

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54 A.2d 669 (1947) citing GEN. STAT. OF CONN. § 4738 (1930) (now CONN. GEN. STAT. REV. § 52-558 (1958)) *and* Thomas v. First Nat'l Bank, 213 Ill. 261, 72 N.E. 801 (1904) citing HURD'S REV. STAT. ch. 38, § 131 (1903) (now ILL. REV. STAT. ch. 38, § 329 (1959)) *and* Maxey v. Railey & Bros. Banking Co., 57 S.W.2d 1091 (Mo. App. 1933) citing Mo. REV. STAT. § 3007 (1929) (now Mo. REV. STAT. § 434.010 (1949)) *and* Nielsen v. Donnelly, 110 Misc. 266, 181 N.Y. Supp. 509 (N.Y.C. Munic. Ct. 1920) citing N.Y. PEN. LAW § 991 *and* Gooch v. Faucette, 122 N.C. 270, 29 S.E. 362 (1898) citing N.C. CODE §§ 2841, 2842 (now N.C. GEN. STAT. § 16-1 (1953)).

18. GOODRICH, CONFLICT OF LAWS 305 (3d ed. 1949). One of the examples of such "affectation of virtue," given in the footnote to this statement, is the decision in Maxey v. Railey & Bros. Banking Co., *supra* note 17, referred to in text accompanying note 7 *supra*. See generally Paulsen & Sovern, *"Public Policy" in the Conflict of Laws* 56 COLUM. L. REV. 969 (1956); Ehrenzweig, *The Lex Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 638, 671 (1960).

19. *"Illustrations*: 1. By the law of state X, gambling debts may be recovered; by the law of state Y, to allow recovery on such debts would be against public policy. A sues B in Y on a gambling debt incurred in X. Judgment for B." RESTATEMENT, CONFLICT OF LAWS § 612 (1934).

20. RESTATEMENT, CONFLICT OF LAWS § 612 (1934).

21. FLA. STAT. § 849.26 (1959).