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COURT OF ERRORS AND APPEALS.

WILLIAM B. SUTPHEN *vs.* THOMAS CROZER.	Writ of Error to the Supreme Court.

Returnable to Tuesday, March 22d, 1864.

J. D. BEDLE, *Att'y.*

STATE OF NEW JERSEY, SS:—*The State of New Jersey to our Justices of our Supreme Court of Judicature of the State of New Jersey, greeting:*

Because in the record and proceedings and also in the giving of judgment in a certain plaint which was in our said Court before us, by our writ, between William B. Sutphen, plaintiff, and Thomas Crozer, defendant, in a plea of trespass on the case, as it is said manifest error hath intervened to the great damage of the said William B. Sutphen, as by his complaint we are informed, we being willing that the error, if any there be, should in due manner be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given, then, without delay, you distinctly and openly send under your seal, the record and proceedings aforesaid, with all things touching the same, to us in our Court of Errors and Appeals in the last resort, on Tuesday, the twenty-second day of March, instant, in the present term of March, and this writ, that the record and proceedings aforesaid being inspected, we

may further cause to be done thereupon what of right and according to the laws and constitution of this State ought to be done.

Witness, Henry W. Green, Esquire, Chancellor, and Judge of our said Court of Errors and Appeals, the eighth day of March, one thousand eight hundred and sixty-four.

W. S. JOHNSON, *Clerk.*

J. D. BEDLE, *Att'y.*

The answer of the Justices within mentioned.

10 The record and proceedings within mentioned, with all things touching the same, we certify and send to the Court of Errors and Appeals, as within we are commanded.

M. BEASLEY, [L. S.]
Chief Justice.

NEW JERSEY SUPREME COURT.

THOMAS CROZER *ads.* WILLIAM B. SUTPHEN.	In Case. On Writ of Error to Monmouth Circuit. Affirmance. DENYSE H. SMOCK, *Att'y.*

Pleas before the Justices of the Supreme Court of the State
20 of New Jersey, of the Term of February, A. D. eighteen hundred and sixty-two.

Witness, E. W. Whelpley, Esquire, Chief Justice.

CHAS. P. SMITH, *Clerk.*

NEW JERSEY, ss.—Be it remembered, that heretofore, to
25 wit, on the first day of February, A. D. eighteen hundred and sixty-two, the State of New Jersey sent to the Judges of the Circuit Court of the County of Monmouth, its writ, in these words, to wit:

"New Jersey, to wit:—The State of New Jersey to Peter Vredenburgh, Esquire, Judge of our Circuit Court of the County of Monmouth, greeting: Because in the record and proceedings, and also in the giving the judgment in a plaint which was in our said Court before you, at Freehold, in and for the county of Monmouth, between Thomas Crozer and William B. Sutphen, in a plea of trespass on the case, upon promises, as is said, which said record and proceedings now remain before you, manifest error hath intervened, to the great damage of the said William B. Sutphen, as by his complaint 10 we are informed, we being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid, do command you, that if judgment be thereupon given, then, without delay, you distinctly and openly send under your seal the record and proceedings aforesaid, with all things touching the same, to our Supreme Court of Judicature, to be holden at Trenton on the fourth Tuesday of February next, together with this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon what of right and accord- 20 ing to the laws and customs of New Jersey ought to be done.

"Witness, Edward W. Whelpley, Esquire, Chief Justice of our said Supreme Court, at Trenton, this first day of February, A. D. eighteen hundred and sixty-two.

"Chas. P. Smith, *Clerk.*

"J. D. Bedle, *Att'y.*"

Which said writ the said Judges afterwards, pursuant to the command thereof, returned to our said Supreme Court, with a schedule annexed thereto; which said schedule is in the words and figures following, to wit: 30

MONMOUTH CIRCUIT, December Term, A. D 1861.

THOMAS CROZER *vs.* WILLIAM B. SUTPHEN.	In Case on Verdict.

Pleas before the Circuit Court holden at Freehold, in and for the County of Monmouth, of the fifth day of December, in the Term of December, A. D. eighteen hundred and sixty-one.

10 HOLMES W. MURPHY, *Clerk.*

Monmouth, to wit:—Thomas Crozer puts in his place Dennis H. Smock, his Attorney against William B. Sutphen, in a plea of trespass on the case upon promises.

In the Circuit Court of the County of Monmouth, of the eleventh day of January, in the year of our Lord one thousand eight hundred and sixty-one:

Monmouth, to wit:—William B. Sutphen was summoned to answer unto Thomas Crozer in a plea of trespass on the case upon promises to his damage two hundred dollars, &c., and 20 thereupon the said Thomas Crozer, by his attorney, Dennis H. Smock, complains, for, that whereas the said William B. Sutphen heretofore, to wit, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty, at Freehold, in the County of Monmouth, and within the jurisdiction of this Court, was indebted to the said Thomas Crozer, the plaintiff in this suit, in the sum of two hundred dollars, for so much money had and received by the said William B. Sutphen, the defendant in this suit, to and for the use of the said plaintiff, and being so indebted, he, the said defend- 30 ant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Freehold aforesaid, in the county and within the jurisdiction aforesaid, undertook and then and there promised to pay the said plaintiff the said sum of money

when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty, at Freehold aforesaid, and within the jurisdiction aforesaid, was indebted to the said plaintiff in the further sum of two hundred dollars for so much money before that time had and received by the said defendant to and for the use of the said *defendant*, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, 10 on the day and year last aforesaid, at Freehold aforesaid, in the county and within the jurisdiction aforesaid, undertook and then and there promised the said plaintiff to pay him the said last mentioned sum of money when he should be thereunto afterwards requested.

And whereas, also, the said defendant, on the thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty, at Freehold aforesaid, and within the jurisdiction aforesaid, was indebted to the said plaintiff in the further sum of two hundred dollars, for so much money before 20 that time, and then due and payable from the said defendant to the said plaintiff for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said plaintiff, and by him, the said plaintiff, forborne to the said defendant for divers long spaces of time before then elapsed, at the special instance and request of the said defendant; and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Freehold aforesaid, in the county aforesaid, and within the jurisdiction aforesaid, 30 undertook and then and there faithfully promised the said plaintiff to pay him the said last mentioned sum of money when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant, on the day and year 35 last aforesaid, at the place and within the jurisdiction aforesaid, was indebted to the said plaintiff in the sum of two hundred dollars, for money then lent by the said plaintiff to the

defendant at his request, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the place and within the jurisdiction aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said last mentioned sum of money when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the said defendant, on the day and year last aforesaid, at the place aforesaid, and within the jurisdic-
10 tion aforesaid, was indebted to the said plaintiff in the sum of two hundred dollars, for money then paid by the said plaintiff for the use of the said defendant, at his request, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Freehold aforesaid, in the county and within the jurisdiction aforesaid, undertook and then and there faithfully promised the said plaintiff to pay him the said last mentioned sum of money when he, the said defendant, should be thereunto afterwards requested.

20 And whereas, also, the said defendant, on the day and year last aforesaid, at Freehold aforesaid, in the county and within the jurisdiction aforesaid, was indebted to the said plaintiff in the sum of two hundred dollars, for so much money found to be due from the said defendant to the said plaintiff on an account then and there stated between the said plaintiff and defendant, and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Freehold aforesaid, in the county and within the jurisdiction aforesaid, undertook and then and there faith-
30 fully promised the said plaintiff to pay him the said last mentioned sum of money when he, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant, not regarding his said several promises and undertakings, but contriving and fraud-
35 ulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to

do; but the said defendant, to pay him the same, hath hitherto wholly neglected and refused, and still doth refuse, to the damage of the said plaintiff two hundred dollars, and therefore he brings suit, &c.

And the said defendant, by J. D. Bedle, his attorney, comes and defends the wrong and injury when, &c., and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained, and of this he puts himself upon the country, &c.

And the said plaintiff, as to the plea of the said defendant, 10 by him above pleaded, and whereof he hath put himself upon the country, doth the like.

Therefore, let there come a jury thereof before the Court aforesaid, at Freehold aforesaid, on the first Tuesday of April, A. D. eighteen hundred and sixty-one, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c., the same day is given to the parties here, &c.

At which day, before the Court aforesaid, at Freehold aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the sheriff hath not sent the writ to him in that 20 behalf directed, nor hath he done anything thereupon, therefore he is commanded, as before he was commanded, that he cause a jury thereof to come before the Court aforesaid, at Freehold aforesaid, on the first Tuesday of September, A. D. eighteen hundred and sixty-one, by whom, &c., who neither, &c., to recognize, &c., because as well, &c., the same day is given to the parties here, &c.

At which day, before the Court aforesaid, at Freehold aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the sheriff hath not sent the writ to him in that be- 30 half directed, nor hath he done anything thereupon, therefore he is commanded, as before he was commanded, that he cause a jury thereof to come before the Court aforesaid, at Freehold aforesaid, on the first Tuesday of December, A. D. eighteen hundred and sixty-one, by whom, &c., and who neither, &c., 35 to recognize, &c., because as well, &c., the same day is given to the parties here, &c.

At which day, before the Court aforesaid, at Freehold

aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury whereof mention is within made being summoned, also come, who, to speak the truth of the matters within contained, being chosen, tried and sworn, say upon their oath that the said William B. Sutphen did undertake and promise in manner and form as the said Thomas Crozer hath within complained against him, and they assess the damages of the said Thomas Crozer by reason of the premises, over and above his costs and charges by him about
10 his suit in this behalf expended, to one hundred and six dollars.

Therefore it is considered that the said Thomas Crozer do recover against the said William B. Sutphen his said damages to one hundred and six dollars by the jurors aforesaid, in form aforesaid, assessed, and also forty-seven dollars and twenty-seven cents for his said costs and charges by the Court now here adjudged of increase to the said Thomas Crozer and with his assent; which said damages, costs and charges in the whole amount to one hundred and fifty-three dollars and
20 twenty-seven cents. And the said William B. Sutphen, in mercy, &c.

Judgment signed this fifth day of December, A. D. eighteen hundred and sixty-one.

P. Vredenburgh.

Afterwards, that is to say, on the fourth Tuesday of February, eighteen hundred and sixty-two, before the Supreme Court of the State of New Jersey, comes the said William B. Sutphen, by J. D. Bedle, his Attorney, and says, that in the record and proceedings aforesaid, and in giving the judgment
30 aforesaid, there is manifest error in this, to wit:

First—That the declaration aforesaid and the matters therein contained are not sufficient in law for the said Thomas Crozer to have or maintain his aforesaid action thereof against him the said William B. Sutphen.

35 *Second*—And also there is error in this, that the judgment aforesaid, by the record aforesaid, appears to have been given for the said Thomas Crozer against the said William B. Sut-

phen, whereas by the law of the land the said judgment ought to have been given for the said William B. Sutphen.

Third—And also there is error in this, that the said Thomas Crozer was not entitled in law to maintain his said action upon the evidence produced by him, and yet the judgment is in favor of the said Thomas Crozer.

Fourth—And also there is error in this, that the Court refused to allow the said William B. Sutphen to produce in evidence the facts contained in his offer, and yet the judgment is in favor of the said Thomas Crozer. 10

And the plaintiff in error prays that the judgment aforesaid, for the errors aforesaid, and other errors in the said record and proceedings being, may be reversed, annulled and altogether holden for nought, and that he may be restored to all things which he hath lost by reason of the said judgment, &c.

And the said Thomas Crozer, by his attorney aforesaid, also comes and says there is no error either in the record and proceedings aforesaid or in giving the judgment aforesaid, and therefore he prays that the judgment aforesaid, in form afore- 20 said given, may by the Court here be in all things affirmed.

But because our said Court are not yet advised what judgment to give of and upon the premises, a day is given to the parties aforesaid, to wit, until, &c., to hear judgment thereon.

And now, to wit, at the term of November, A. D. eighteen hundred and sixty-three, to which time this cause has been continued from term to term, before our said Supreme Court at Trenton, come the parties aforesaid, by their attorneys aforesaid, and hereupon all and singular the premises being seen and fully understood by our Court here, and mature de- 30 liberation being thereupon had, it appears to our said Court here that there is no error either in the proceedings aforesaid or in giving the judgment aforesaid.

Therefore, it is considered that the judgment aforesaid, in form aforesaid given, be in all things affirmed, and that the 35 same do stand in full force and effect, anything above for error assigned to the contrary notwithstanding; and that the said Thomas Crozer do recover against the said William B.

Sutphen as well the damages and costs in said judgment mentioned as also the sum of forty-five dollars and fifty-eight cents for his double costs and charges by him sustained and expended in this behalf, by the Court now here adjudged to the said Thomas Crozer and with his assent, and that he have execution thereof according, &c.

Judgment signed the twenty-seventh day of November, A. D. eighteen hundred and sixty-three (1863.)

By the Statute.

10 M. Beasley, *Chief Justice.*

In Monmouth Circuit Court.

THOMAS CROZER *vs.* WILLIAM B. SUTPHEN.	In Case.

Be it remembered, that on the day of December, A. D. 1861, before the Honorable Peter Vredenburgh, Judge of the Circuit Court held at Freehold, in and for the County of Monmouth, and a jury duly empannelled and sworn, the above cause came on to be heard and tried 20 upon the issues *pro ut* the same, whereupon the plaintiff, to maintain and prove the issues on his part, gave in evidence that the plaintiff, in November, 1860, bet $100 with Peter Voorhees against $60, that a horse called Thomas H. Benton would win in a trot with another horse, called Bay Vermont, three heats in five, that was to be trotted on the 30th day of November, 1860, at a certain time and place at Freehold, in Monmouth County, New Jersey. The $100 was put into the hands of defendant by plaintiff, and the $60 was also put into defendant's hands by the said Peter Voorhees—the whole of 30 the money to be paid by defendant to the winner. The trot commenced at the time and place, and two heats were trotted

Each horse got a heat. It then came on dark. The judges went and consulted, and announced that it was dark and they could not see to judge and would not act any longer. Benton was then taken off the track; Vermont remained. Plaintiff saw defendant about one hour afterwards and demanded the $100 put up by him, which defendant refused to pay.

The plaintiff then rested his case, and the defendant offered to prove before the Court and Jury that the horses came upon the ground at the time appointed to trot, and that they trotted two heats, when two of the judges announced that they would not serve any longer, and that the third judge remained; that upon making that announcement the Benton horse was withdrawn from the track and the Vermont horse remained and then trotted the number of heats required by the bet, so as to take the three out of the five heats, in the presence of the remaining judge, who announced after such heats were trotted that Vermont won the first heat, Benton the second, and Vermont the third and fourth heats and the money, and signed a certificate at that time accordingly; that at the time the Benton horse was withdrawn the controller of Vermont, who made the bet on him, objected, and insisted upon trotting out the race, and that if Benton was withdrawn he should trot it out and insist upon the money; that also, according to the custom of trotting in the section where such race was trotted, the judges have no power to defeat a trot by declining to serve, and that if such judges, or any of them, decline to serve, the parties can choose other judges, or in case they cannot agree that that will not prevent one party from trotting the race if he wishes and claiming the money.

The defendant also offered to prove that there was no agreement between plaintiff and defendant that any particular judges should decide this race; that there was no agreement made and nothing said about judges; that the bet was only as to which horse would win in that race.

The defendant also offered to show that at the time the bet in question was made there was no agreement between the persons who made the original bet as to who should be judges.

The defendant also offered to show that it is the custom in

the section aforesaid that such judges, or any number of them, cannot postpone a race indefinitely, and that this trot was to be made according to the ordinary rules of racing.

The defendant also offered to show that it was not the agreement of the persons who made the bet in question that the judges, whoever they were, should have power to decide whether the race should be trotted or not, and that it was not agreed that they should have power to do as they did and as herein stated.

10 The defendant also offered to show that the money, $100, claimed by plaintiff, was paid over by the defendant to Peter Voorhees after such race was trotted as aforesaid, and before a demand was made by the plaintiff for the same, and upon the ground that the defendant believed the said Peter Voorhees was the winner of the money, and accordingly paid it in good faith.

The defendant also offered to show that the race was to be trotted on the 30th day of November, 1860, without reference to weather or other circumstances, and to be postponed in no 20 event except as the parties who made the trot might agree; and that the bet made by plaintiff with Peter Voorhees, in question, was made with reference to the agreement between the parties to the original bet for the trot.

The defendant also offered to prove that the race was made under the agreement that the horses must trot at all events on that day, and in case of failure of one to trot that the person who entered the other horse should be the winner, and that the plaintiff knew of such agreement at the time of making the bet in question.

30 The defendant also offered to prove that according to the cnstom of racing the Vermont horse, under the facts as above stated, was the winner of the race.

Which several offers of the said defendant the Court overruled, and directed the jury to find a verdict for the plaintiff. 35 To which the counsel of the defendant excepted, and prayed a bill of exceptions, which is accordingly signed and sealed.

P. VREDENBURGH, [L. S.]

NEW JERSEY SUPREME COURT, Feb'y Term, 1863.

WILLIAM B. SUTPHEN *vs.* THOMAS CROZER.	In Error To Monmouth Circuit Court. Opinion.

BROWN, J.—This action was brought by Crozer against Sutphen to recover moneys deposited with him as stakeholder by Crozer, on a bet made between him and one Voorhees. The bet was made upon the result of a trot between horses called Benton and Vermont, the horse taking three heats in five to be the winner. 10

It appeared by the evidence of the plaintiff below, that the race commenced at the time and place appointed, each horse took one heat, when it became dark, and the judges refused to act. Benton was taken from the ground. About an hour after Crozer saw Sutphen and demanded his deposit. The plaintiff having rested, the defendant offered to prove that but two of the judges refused to act, that the third judge remained and Vermont trotted two other heats after Benton was withdrawn, and was declared winner by the judge who remained; that according to the custom in Monmouth the owner 20 of Benton had no right to withdraw him, and that Vermont was the winner of the race; that the money was paid to Voorhees as the winner before demand made and in good faith. This offer was over-ruled and a bill of exceptions signed.

In the case of French *v.* Francis the Court was divided upon the question whether this action would lie against a stakeholder since the act of 1846 making him indictable for a misdemeanor to the same extent as the parties who made the bet. Two of the Judges held that the stakeholder and the plaintiff being *pari delicto*, the law should not aid either, 30 but leave the possessor as it found him. I cannot agree to this,—the maxim does not apply. The stakeholder and the gamesters may be made equally guilty by statute, but they are not in the *same fault*. The offences are collateral, but

not identical. The opinion delivered by the then Chief Justice (Green) is entirely satisfactory to my mind. The stakeholder and the bettors are not in *pari delicto*, notwithstanding the act of 1846 making the stakeholder liable to indictment for misdemeanor, the stakeholder remains not guilty of betting, and the bettors not guilty of stakeholding. The bettors commit no crime by depositing stakes, but merely pay or deposit money upon an illegal contract. If that contract has not been executed, the parties, or any of them, may rescind
10 it and place themselves, or have the aid of the law, if necessary, in being placed *statu quo ante contractum*. This doctrine is well settled.

But the question here is, has the contract been executed? The stakeholder agreed to pay the money to the winner. He did pay it to Voorhees as the winner, but it is said he was not the winner, and further, that the bet was not decided, the race not run. This position is well taken unless the Court will ascertain what are the rules which govern sportsmen in such cases and decide according to such rules. It is clear
20 that this ought not to be done. The whole thing being illegal and immoral, we cannot inquire whether Benton lost the money by refusing, under the circumstances, to trot, nor whether Vermont won it by going over the track without a competitor.

But it is said that the stakeholder was the judge of the race for the parties who staked their money with him, and his decision binding on them. This may be so by the rules of sportsmen, but there is no such legal rule, and we cannot make one for such a case.

30 The evidence does not show that the contract was executed by payment to the *winner*, and therefore it cannot be considered as executed at all.

Judgment should be affirmed.

OGDEN, J., concurs.

I, Charles P. Smith, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true transcript of the record of judgment and proceedings in the case above stated, as fully as the same remain of record and affiled in my office.

In testimony whereof, I have hereto set my hand and affixed the seal of said Court, at Trenton, this tenth day of November, A. D. 1864.

CHAS. P. SMITH, *Clerk.*