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Corporations--Application of Proceeds to Personal Claim by Officer--Liability of Factor Guaranteeing Unauthorized Indorsement (Sam R. Levy Fabrics, Inc. v. Shapiro Bros. Factors Corp., 259 App. Div. 463 (1st Dep't 1940))

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CORPORATIONS—APPLICATION OF PROCEEDS TO PERSONAL CLAIM BY OFFICER—LIABILITY OF FACTOR GUARANTEEING UNAUTHORIZED INDORSEMENT.—The defendant corporation, as factor, collected $700 for the benefit of plaintiff. Instead of following its established practice of issuing a check, so stamped by it on the reverse side as to require the plaintiff to deposit same in plaintiff's bank account, defendant issued a check to plaintiff's order for the amount collected and, at the request of plaintiff's president, guaranteed plaintiff's corporate indorsement of the check by the plaintiff's president. He cashed the same and retained the proceeds thereof. At the time the transaction took place plaintiff was not actively engaged in business and had discharged all claims of creditors except a claim asserted by its president for back salary. Plaintiff's president had no authority to indorse checks without countersignature by another officer. Plaintiff sued defendant in conversion on the theory that it had aided its president in converting the proceeds of the check. Upon the trial, defendant sought to show that the president had used the proceeds of the check to pay a valid obligation of the plaintiff to him for back salary. The court excluded material testimony as to the validity of his claim and also as to whether there was a diversion of the plaintiff's funds to other than corporate purposes. *Held,* that the personal indorsement of plaintiff's president did not show an appropriation of the proceeds of the check to his own use, and that, upon the issue of whether there was a diversion of corporate funds to other than corporate purposes, it was error to exclude testimony offered to show the validity of his use of the money. *Sam R. Levy Fabrics, Inc.* v. *Shapiro Bros. Factors Corp.,* 259 App. Div. 463, 19 N. Y. S. (2d) 593 (1st Dept. 1940).

Any person taking checks made payable to a corporation which can act only through agents does so at his peril and must abide by the consequences, if the agent who indorses the same is without authority,[1] unless the corporation is negligent or is otherwise precluded by its conduct from setting up such lack of authority in the agent.[2] In accordance with this rule banks have been held liable in conversion where they have collected corporate checks and paid out the proceeds upon the officer's checks for his own personal use.[3] Stock brokers, who have accepted corporate checks in payment of an officer's individual speculations, have, likewise, been held liable.[4] Where liability has been imposed, the joint tort-feasor has either received the proceeds of the unlawful diversion or has aided the officer involved in

[1] Standard S. S. Co. v. Corn Exchange Bank, 220 N. Y. 478, 481, 116 N. E. 386 (1917).

[2] Phillips v. Mercantile Nat. Bank of N. Y., 140 N. Y. 556, 35 N. E. 986 (1894).

[3] Wagner Trading Co. v. Battery Park Nat. Bank, 228 N. Y. 37, 126 N. E. 347 (1920).

[4] Heig v. Caspary, 191 App. Div. 560, 181 N. Y. Supp. 633 (1st Dept. 1920), *aff'd,* 232 N. Y. 574, 134 N. E. 577 (1922).

misappropriating the same to his own use.[5] An unlawful exercise of dominion must be established to constitute conversion.[6] The indorsement of a corporate check and the collection of the proceeds by an officer would not amount to a conversion unless the proceeds were diverted to other than corporate uses.[7] The unauthorized indorsement would not be actionable unless loss ensued. The defendant in facilitating the collection of the proceeds of the check by the plaintiff's president acted at its peril. It cannot be charged with aiding in the conversion thereof unless the officer has converted the proceeds to his own use or used them for other than corporate purposes. If the officer, instead of paying himself, had paid creditors of the corporation holding valid claims, the corporation could not complain in the absence of proof that he did so to the prejudice of others who held claims superior to, or on a parity with, those so paid. Thus, the use made by the officer of the proceeds of the check bore materially upon the question whether the funds of the corporation had been used for other than corporate purposes. As it was conceded that plaintiff corporation had no outstanding creditors, other than possibly its president, his act in applying the proceeds of the check in satisfaction of his claim, if valid, would neither occasion a loss to the plaintiff nor constitute an unlawful diversion of its funds. The defendant created the opportunity for the officer to misappropriate the money, but, unless he actually did so, no conversion occurred.[8] The relations which existed between the corporation and its president were material on the issue of whether there was an unlawful diversion of its funds. Defendant was entitled to show that, even though the indorsement was unauthorized, the use of the money was proper or expressly sanctioned or impliedly authorized by a past course of conduct.[9] The trial court, relying upon the case of *Wagner Trading Company* v. *Battery Park National Bank*,[10] failed to observe that there was an actual misappropriation in that case and a possible diversion in the instant case

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[5] Ward v. City Trust Co., 192 N. Y. 61, 84 N. E. 585 (1908); Standard S. S. Co. v. Corn Exchange Bank, 220 N. Y. 478, 116 N. E. 386 (1917); Weissman v. Banque de Bruxelles, 254 N. Y. 488, 173 N. E. 835 (1930); Wen Kroy R. R. v. Public Nat. Bank & Trust Co., 260 N. Y. 84, 183 N. E. 731 (1932); Heig v. Caspary, 191 App. Div. 560, 181 N. Y. Supp. 633 (1st Dept. 1920).

[6] Employers' Fire Ins. Co. v. Cotten, 245 N. Y. 102, 105, 156 N. E. 629, 630 (1927) ("Conversion is an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights").

[7] Levy Fabrics, Inc. v. Shapiro Bros. Factors Corp., 259 App. Div. 464, 19 N. Y. S. (2d) 593 (1st Dept. 1940).

[8] Fidelity & Casualty Co. v. Farmers Nat. Bank, 249 App. Div. 348, 293 N. Y. Supp. 8 (3d Dept. 1937), *aff'd*, 275 N. Y. 194, 9 N. E. (2d) 833 (1937); Staten Island Lodge No. 841, B. P. O. Elks v. Staten Island Savings Bank, 223 App. Div. 859, 228 N. Y. Supp. 907 (2d Dept. 1928).

[9] Kepner Co. v. Hutton, 179 App. Div. 130, 166 N. Y. Supp. 407 (1st Dept. 1917), *aff'd*, 226 N. Y. 674, 123 N. E. 871 (1919); Reif, Trustee v. Equitable Life Assur. Soc. of the United States, 268 N. Y. 269, 197 N. E. 278 (1935).

[10] 228 N. Y. 37, 126 N. E. 347 (1920).

depending upon the validity of the president's use of the proceeds of the check.

J. J. T.

CRIMES—DISORDERLY PERSON—REQUISITES FOR CONVICTION.—The defendant had been found guilty under Section 899, subdivision 5, of the Code of Criminal Procedure[1] which provides: "Persons who have no visible profession or calling by which to maintain themselves but who do so for the most part by gaming[2] are disorderly persons."[3] Defendant appealed on the ground that the state had failed to present a *prima facie* case under a *strict construction*[4] of the statute. Defendant also contended that he did not have to explain facts and circumstances nor controvert inferences of guilt which have arisen. He admittedly failed to show any other "visible profession" besides gaming, in which field he operated extensive gaming establishments, but he had ample financial resources in the form of securities, from which he had a $12,000 annual income with which to support himself and, therefore, did not "for the most part" maintain himself by gaming. *Held,* defendant not guilty. The defendant does not have to refute state's evidence inferring guilt. The statute is to be given the construction that to hold defendant guilty he must almost exclusively maintain himself by gaming. *People of State of New York* v. *Erickson,* 283 N. Y. 210, 28 N. E. (2d) 381 (1940).

It has long been recognized that the failure by the defendant to contradict or explain incriminating state's evidence may be considered by the court in determining his guilt.[5] While it is the privilege of the defendant to refrain from testifying, if he fails to explain incriminating facts and circumstances lying peculiarly within his knowledge,

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[1] See (1939) 14 ST. JOHN'S L. REV. 173.

[2] Gaming and gambling are synonymous, People v. Cohen, 160 Misc. 10, 289 N. Y. Supp. 397 (1936).

Gaming is "an agreement between two or more persons to play together at a game of chance for a stake or wager which is to become the property of the winner and to which all contribute". People v. Todd, 51 Hun 446, 4 N. Y. Supp. 25 (1889).

[3] In People v. Meara, 79 Misc. 57, 140 N. Y. Supp. 575 (1913) and People v. Townsend, 214 Mich. 267, 103 N. W. 177 (1921), it was shown that disorderly persons are persons that are dangerous or hurtful to public peace and welfare by reason of their misconduct or vicious habits and are therefore amenable to police regulation.

Persons found to be disorderly persons under N. Y. CODE OF CRIM. PROC. § 899 must put up $10,000 as security to insure their good behavior. N. Y. CODE OF CRIM. PROC. § 901 (2).

[4] Italics ours.

[5] State v. Burzette, 208 Iowa 818, 222 N. W. 394 (1928); State v. Janes, 318 Mo. 525, 1 S. W. (2d) 137 (1927); State v. Blackmore, 327 Mo. 708, 38 S. W. (2d) 32 (1931); State v. Sinovich, 329 Mo. 909, 46 S. W. (2d) 877 (1931); People v. Connolly, 253 N. Y. 330, 171 N. E. 393 (1930).