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Article 16

Crimes--Disorderly Person--Requisites for Conviction (People of State of New York v. Erickson, 283 N.Y. 210 (1940))

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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).

he takes the chance of any reasonable or legitimate inference being drawn by the jury which the evidence warrants.[6] At common law no game was in itself unlawful,[7] but any practice which tends to injure public morals is a common law offense.[8] Many general practices or courses of behavior indulged in by certain persons are prejudicial to the public welfare and are likely to corrupt public morals.[9] With this in mind and in view of the other subdivisions under Section 899 of the Code of Criminal Procedure, it seems that the legislative intent was to suppress excessive gaming.[10] The interpretation of the statute by the Court of Appeals seems to indicate that mere possession of outside wealth would exempt the defendant from the statutory penalty. Thus, it might happen that the successful gambler would be condoned, and the unsuccessful one condemned.[11] It has been held that the "visible means" of support, so dwelled on by the Court of Appeals as a means of freeing the defendant, must be lawfully acquired and be the result of honest toil.[12] Here the defendant's "business and profession" is acknowledgedly gaming. It was the opinion of the trial judge, in the instant case, that the words "by which to maintain themselves" as employed in the statute seem to have nothing to do with financial return but to the pursuit of business. Emphasis is to be placed on gaming as a vocation, not as an avocation.[13]

A. M.

CRIMINAL LAW—LARCENY—ABILITY OF WIFE TO COMPLAIN OF LARCENY BY HUSBAND.—The complaining witness, defendant's wife, gave to the defendant a check payable to her order to be deposited for collection and the proceeds thereof to be paid over to her. Subsequently, the complaining witness demanded her money. The defendant told her that he had spent the money for his own purposes, and gave the complaining witness a note, which was renewed three times. None of the notes or any part thereof has been paid. The defendant was charged with violation of Section 1290 of the Penal

[6] Graves v. United States, 150 U. S. 118, 14 Sup. Ct. 40 (1893); Donegan v. United States, 296 Fed. 843 (C. C. A. 5th, 1924); Blanda v. People, 67 Colo. 541, 189 Pac. 249 (1920); People *ex rel.* Woronoff v. Mallon, 222 N. Y. 456, 119 N. E. 102 (1918); People v. Trombino, 262 N. Y. 689, 188 N. E. 127 (1933); People v. Smith, 114 App. Div. 513, 100 N. Y. Supp. 259 (1st Dept. 1906).

[7] Thomson v. Hayes, 59 Misc. 425, 111 N. Y. Supp. 495 (1908); Sherbon v. Colebach, 2 Vent. 175, 86 Eng. Rep. 377 (K. B. 1726).

[8] King v. Rogier, 1 B. & C. 272, 107 Eng. Rep. 102 (K. B. 1823).

[9] *Ex parte* McCue, 7 Cal. App. 765, 96 Pac. 110 (1908); Morgan v. Nolte, 37 Ohio St. 23 (1881).

[10] People v. Erickson, 171 Misc. 937, 13 N. Y. S. (2d) 997 (1939).

[11] (1939) 14 ST. JOHN'S L. REV. 173.

[12] People v. Cramer, 139 Misc. 545, 247 N. Y. Supp. 821 (1930).

[13] Watts v. Malatesta, 262 N. Y. 80, 186 N. E. 210 (1933).