

### **Criminal Law--Larceny--Ability of Wife to Complain of Larceny by Husband (People on Complaint of Rossiter v. Rossiter, 173 Misc. 268 (1940))**

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he takes the chance of any reasonable or legitimate inference being drawn by the jury which the evidence warrants.<sup>6</sup> At common law no game was in itself unlawful,<sup>7</sup> but any practice which tends to injure public morals is a common law offense.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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

<sup>6</sup> 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).

<sup>7</sup> 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).

<sup>8</sup> King v. Rogier, 1 B. & C. 272, 107 Eng. Rep. 102 (K. B. 1823).

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

<sup>10</sup> People v. Erickson, 171 Misc. 937, 13 N. Y. S. (2d) 997 (1939).

<sup>11</sup> (1939) 14 St. JOHN'S L. REV. 173.

<sup>12</sup> People v. Cramer, 139 Misc. 545, 247 N. Y. Supp. 821 (1930).

<sup>13</sup> Watts v. Malatesta, 262 N. Y. 80, 186 N. E. 210 (1933).

Law. The defendant moved to dismiss the charges on the ground that as the husband of the complaining witness, he cannot, as a matter of law, be guilty of the crime of larceny or embezzlement of her funds. *Held*, a husband may be guilty of larceny of his wife's property. *People on complaint of Rossiter v. Rossiter*, 173 Misc. 268, 17 N. Y. S. (2d) 30 (1940).

By marriage at common law husband and wife became one person,<sup>1</sup> and the husband was that person.<sup>2</sup> All personal property belonging to the wife while she was a *feme sole* vested absolutely in the husband at the moment of marriage,<sup>3</sup> and he had the right to possession of all that she had acquired during her coverture.<sup>4</sup> Marriage operated as a gift to the husband of all the personal property belonging to the wife at the time of the marriage.<sup>5</sup> The new capacity given to a woman by the Enabling Acts is to allow her to hold any property acquired by her as her own, free from interference by her husband in her use of it.<sup>6</sup> She may carry on a separate business, own and dispose of property, contract with her husband as if unmarried,<sup>7</sup> and sue or be sued in tort.<sup>8</sup> The married woman, in the capacity of a property owner, is treated as if she were a *feme sole*.<sup>9</sup> The result, in so far as property rights are concerned, is that the unity theretofore existing between husband and wife has been severed.<sup>10</sup> Under existing statutes the fiction of unity by virtue of marriage may not be invoked to deny the married woman a remedy against her husband for his personal torts.<sup>11</sup> A married woman may appear as a witness against her husband in criminal actions.<sup>12</sup> If she steals the property of her husband, she may be convicted of stealing the "property of another" as stated in the larceny statutes;<sup>13</sup> and, if a husband steal property belonging to his wife, he should be found guilty of larceny.<sup>14</sup> Although at common law neither husband nor wife could commit larceny from the other,<sup>15</sup> and although the common law theory of marital

<sup>1</sup> *Kelso v. Tabor*, 52 Barb. 125 (N. Y. 1867).

<sup>2</sup> *Johnson v. Johnson*, 201 Ala. 41, 77 So. 335 (1917).

<sup>3</sup> *Jaycox v. Caldwell*, 37 How. Pr. 240 (1868), *aff'd*, 51 N. Y. 395 (1873).

<sup>4</sup> *Stokes v. Macken*, 62 Barb. 145 (N. Y. 1861).

<sup>5</sup> *Blanchard v. Blood*, 2 Barb. 352 (N. Y. 1848).

<sup>6</sup> N. Y. DOM. REL. LAW § 50.

<sup>7</sup> *Id.* §§ 51, 56.

<sup>8</sup> *Id.* § 57.

<sup>9</sup> *Cashman v. Henry*, 75 N. Y. 103 (1878).

<sup>10</sup> *Beasley v. State*, 138 Ind. 552, 38 N. E. 35 (1894); *cf.* *Power v. Lester*, 17 How. Pr. 413 (1858), *aff'd*, 23 N. Y. 527 (1861).

<sup>11</sup> Mr. Justice Pound, dissenting in *Allen v. Allen*, 246 N. Y. 571, 159 N. E. 656 (1927).

<sup>12</sup> CODE OF CRIM. PROC. § 392; see *People v. Dekker*, 143 App. Div. 590, 127 N. Y. Supp. 1059 (2d Dept. 1911).

<sup>13</sup> *State v. Koontz*, 124 Kan. 216, 257 Pac. 994 (1927).

<sup>14</sup> *Hunt v. State*, 72 Ark. 241, 79 S. W. 769 (1904); *Beasley v. State*, 138 Ind. 552, 38 N. E. 35 (1894).

<sup>15</sup> *Rex v. Willis*, 1 Mood. 375, 168 Eng. Rep. 1309 (1833); see *Queen v. Kenny*, 2 Q. B. Div. 307 (1877).

unity was adhered to even after the passage of the Enabling Acts,<sup>16</sup> the theory has suffered many inroads. For all legal purposes the husband and wife should no longer be considered as one person.<sup>17</sup>

S. L.

DOMESTIC RELATIONS — DIVORCE — ALIMONY PROVISIONS — AMENDMENT THEREOF.—Plaintiff appeals from a modification of a judgment of divorce which reduced the alimony provision of such judgment from \$21,000 per annum to \$14,000 per annum. While living apart plaintiff and defendant entered into a voluntary separation agreement on December 15, 1929. Several weeks later plaintiff obtained a divorce from defendant and the judgment, entered January 24, 1929, incorporated the stipulations of the separation agreement including the annual payment of \$21,000 by the defendant for the support of the plaintiff and two children. The evidence proved that the defendant's income was much greater in 1929 than in 1938, and in 1929 the anticipation of his future income was based on foundations apparently secure. The plaintiff contends that the provisions for the support of wife and issue incorporated in a decree of divorce pursuant to a valid separation agreement of the parties may not be changed or modified without the consent of both parties thereto.<sup>1</sup> *Held*, the statutory power<sup>2</sup> of the court to modify its decrees is not affected by the fact that the decree adopted an agreement of the parties, though it is true that the contractual obligation could not be so modified without the consent of both interested parties. *Goldman v. Goldman*, 282 N. Y. 296, 26 N. E. (2d) 265 (1940).

New York courts unequivocally follow the majority opinion<sup>3</sup> in the United States to the effect that they have power to modify a judgment of divorce, though such be an adoption of an agreement of the parties.<sup>4</sup> In the instant case the Court of Appeals has clarified any doubt which may have arisen through the decision laid down in the

<sup>16</sup> *People ex rel. Troare v. McClelland*, 146 Misc. 545, 263 N. Y. Supp. 403 (1933).

<sup>17</sup> *Mattison v. N. Y. Cent. R. R.*, 23 N. Y. 529 (1862).

<sup>1</sup> *Galusha v. Galusha*, 138 N. Y. 272, 33 N. E. 1062 (1893).

<sup>2</sup> N. Y. CIV. PRAC. ACT §§ 1155, 1170.

<sup>3</sup> *Herrick v. Herrick*, 319 Ill. 146, 149 N. E. 820 (1925); *Langrall v. Langrall*, 145 Md. 340, 125 Atl. 695 (1924); *Wilson v. Caswell*, 272 Mass. 297, 172 N. E. 251 (1930); *Fox v. Fox*, 263 N. Y. 68, 188 N. E. 160 (1933); *Levy v. Levy*, 149 App. Div. 561, 133 N. Y. Supp. 1084 (1st Dept. 1912); *Blake v. Blake*, 15 Wis. 339, 43 N. W. 144 (1889). *Contra*: *Connolly v. Connolly*, 16 Ohio App. 92 (1922); *Henderson v. Henderson*, 37 Ore. 141, 60 Pac. 597 (1900).

<sup>4</sup> *Kunker v. Kunker*, 230 App. Div. 641, 246 N. Y. Supp. 118 (3d Dept. 1930) (A modification of an alimony provision of a decree of divorce based on a voluntary separation agreement was granted on proof by petitioner that justice so required).