St. John's Law Review

Volume 14
Number 1 *Volume 14, November 1939, Number 1*

Article 17

Criminal Law--Disorderly Person--Section 899(5) Construed (People of State of New York v. Erickson, 171 Misc. 937 (1939))

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cation. The Act of 1891, however, required deposit "not later than the date of first publication." The Bill Committee of the 1909 Act thought this requirement too hard for the reason that "the delay of a single day" after publication in making the deposit "might destroy a copyright" and so the committee recommended an extension of time for deposit.[18] Thus the question: what did Congress have in mind when it continued in the 1909 revision of the copyright laws the requirement for the deposit of copies arises. A glance at the source of the expression and the judicial construction of it prior to the 1909 Act will give perspective [19] to the instant Act. Prior to the 1909 Act the United States Supreme Court construed provisions for deposit as essential requirements to the perfection of copyright, whether considered as conditions precedent or subsequent. The committee reporting the 1909 Act pointed out that "under existing law (the 1891 Act being then in force) the filing of title and deposit of copies on or before the date of first publication are 'conditions precedent' and any failure to comply with them works a forfeiture of the copyright. It is proposed under this bill to so change this as to have the copyright effective upon the publication with notice and the other formalities become 'conditions subsequent'." [20]

Petitioners asserted monopoly rights rest solely on the letter and intent of the statute.[21] The Act requires "prompt deposit." Admittedly, petitioner delayed fourteen months after publication before making deposit.

Did Congress intend that the requirement as to deposits must be literally complied with in order to perfect the copyright interest under the 1909 Act? The majority opinion, in effect, does not make such a compliance necessary but history, apparently, is on the side of the dissenters.[22]

A. J. S.

CRIMINAL LAW—DISORDERLY PERSON—SECTION 899(5) CONSTRUED.—The defendant was accused under Section 899(5) of the New York Code of Criminal Procedure which provides: "Persons

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[18] Instead of requiring deposit within a fixed number of days, or by the date of publication, the bill as reported, and the 1909 Act as passed, permitted a copyright to be perfected by a "prompt deposit" after publication. The committee did not recommend, nor did Congress provide, that Copyright could be perfected without deposit; the committee did recommend an extension of the time for deposit.

[19] Kepnor v. United States, 195 U. S. 100, 24 Sup. Ct. 797 (1904).

[20] H. R. REP. No. 2222, 60th Cong., 2d Sess. (1909).

[21] Banks v. Manchester, 128 U. S. 244, 24 Sup. Ct. 797 (1888); Caliga v. Inter Ocean Newspaper, 215 U. S. 182, 30 Sup. Ct. 38 (1909); Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 346, 28 Sup. Ct. 722 (1908); Globe Newspaper Co. v. Walker, 210 U. S. 356, 367, 28 Sup. Ct. 726 (1909).

[22] See dissenting opinion of Justice Black in instant case.

who have no visible profession or calling by which to maintain themselves, but who do so for the most part, by gaming" [1] are disorderly persons.[2] Defendant, interpreting the statute as meaning that only those whose actual physical support is dependent upon the revenue received from gaming are guilty, did not attempt to establish a "visible profession or calling" other than his gaming activities,[3] but proceeded to show that since he had ample financial resources,[4] exclusive of his gaming income whereby his support was assured, he did not, "for the most part", maintain himself by gaming. *Held,* defendant guilty.[5] The legislative intent "was the suppression of excessive gaming". *People of State of New York* v. *Erickson,* 171 Misc. 937, 13 N. Y. S. (2d) 997 (1939).

Clearly, the section is not, in itself, entirely free from ambiguity, and it must be admitted that defendant's interpretation does find support in the statute under the clause "by which to maintain themselves". Bearing in mind the meaning of the word "maintain", [6] defendant's proof that he was amply able to support himself and is not dependent for his support "for the most part" on his gaming income, would at first glance seem to constitute a good defense. Although penal statutes, as a fundamental rule, must be strictly construed,[7] the

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[1] Gaming is "a contract between two or more persons by which they agree to play by certain rules at cards, dice, or other contrivance. and that one shall be the loser and the other the winner." BOUVIER, LAW DICTIONARY (Stud. ed. 1928) 460.

"Gaming" and "gambling" are treated as synonymous. Clement v. Belanger, 120 App. Div. 662, 105 N. Y. Supp. 537 (3d Dept. 1907).

[2] It is important to note that defendants found violating the above section are not guilty of a crime. People v. Fuerst, 13 Misc. 304, 34 N. Y. Supp. 1115 (1895) ("After careful examination of the books we fail to find that a 'disorderly person' as defined by § 899 of the CODE OF CRIM. PROC., is, in contemplation of law, guilty of the commission of either a misdemeanor or a felony"); People *ex rel.* Van Houton v. Sadler, 97 N. Y. 146 (1884) ("The main purpose of those provisions (CODE CRIM. PROC. § 899) is to arrest the disorderly practices named, by compelling a disorderly person to give security for his good behavior"); People v. Dimitry, 163 Misc. 279, 297 N. Y. Supp. 1002 (1937) (The offense of being a "disorderly person" is the one proceeded against before a magistrate without a jury, is *sui generis,* and is neither a misdemeanor nor a felony).

[3] Defendant not only admitted that he received many bets directly on various sporting events (horse racing, world series, fights, football, etc.) but that he operated extensively through agents. Instant case at 938.

[4] The unrefuted testimony of an accountant called on the behalf of the defendant showed that he was worth at least $317,000. Instant case at 940.

[5] Pursuant to N. Y. CODE CRIM. PROC. § 901(2), which provides the punishment for disorderly persons, the court required that defendant give security in the sum of $10,000 to the effect that defendant will be of good behavior for the space of one year. Instant case at 945.

[6] "Maintain" means to support; to supply with means of support; provide for; sustain; keep up." State v. Board of Trust of Vanderbilt University, 129 Tenn. 279, 164 S. W. 1151 (1914).

[7] Statute is criminal in nature and is to be strictly construed. People v. Neyer, 79 N. Y. Supp. 367 (1902); People *ex rel.* Commissions of Public Charities and Correction v. Cullen, 159 N. Y. 629, 47 N. E. 894 (1897); People

legislative intent, when clearly established, becomes a substantial part of the statute as though expressly inserted therein.[8] Therefore, a clear determination of the legislative intent becomes necessary.

At early common law no game in itself was unlawful,[9] and the winner might even maintain a special action to recover the stake won.[10] The tendency, however, was to render such gaming illegal as a public nuisance when they tended to breach the peace,[11] led to immorality,[12] or were conducted by means of cheating or fraud,[13] or were in any wise against public policy.[14] In England as early as 1664, a statute [15] was passed condemning excessive gaming. In substance it provided that "all lawful games and exercises should not be otherwise used than as innocent and moderate recreations, and not as constant trades or callings to gain a living or make unlawful advantage thereby", the express purpose of the statute being the suppression of excessive gaming because of the ill consequences. Even modern statutes condemn excessive gaming which will tend to affect the public at large.[16] However, ordinary betting, where the amount is reasonable,[17] has never been made a crime in New York.[18] Indeed, the Court of Appeals has held that "Casual betting or gaming by individuals, as distinguished from betting or gambling as a business or profession is not a crime".[19] The law does not prohibit individuals from acting as they desire in their affairs, unless by so doing they become objectionable to the best interests of society. Keeping these considerations in mind, can one whose entire business day is spent in gaming activities seek immunity from the law on the ground that he is wealthy? The law was not intended to exempt a wealthy gambler. The court in the instant case held, "The words 'by which to maintain themselves' as

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v. Schenkel, 140 Misc. 843, 252 N. Y. Supp. 415 (1931), *aff'd,* 258 N. Y. 224, 179 N. E. 474 (1932).

[8] The mischief designed to be remedied may be considered by the courts in the interpretation of a statute. Hawkins v. Hawkins, 193 N. Y. 409, 86 N. E. 468 (1908); see Note (1931) 70 A. L. R. 5.

[9] Sherbon v. Colebach, 2 Vent. 175 (1726); Thomson v. Hayes, 59 Misc. 425, 111 N. Y. Supp. 495 (1908).

[10] State v. Vaughn, 81 Ark. 117, 98 S. W. 685 (1906); People v. Langan, 196 N. Y. 260, 89 N. E. 921 (1909).

[11] Mullen v. Mosely, 13 Idaho 457, 90 Pac. 986 (1907).

[12] See Note (1910) 33 AM. DEC. 134.

[13] *Ibid.*

[14] Zeltner v. Irwin, 25 App. Div. 228, 49 N. Y. Supp. 337 (1st Dept. 1898).

[15] 16 CAR. II, c. 7.

[16] N. Y. PENAL LAW §§ 970, 973, 986, 988, 990, 991; N. Y. CODE CRIM. PROC. § 899(5); N. Y. CONST. art. I, § 9.

[17] N. Y. PENAL LAW § 990 punishes by fine of five times the value of sum lost or won if sum exceeds $25.00.

[18] People v. McLaughlin, 128 App. Div. 599, 113 N. Y. Supp. (1st Dept. 1908); People v. Stedeker, 175 N. Y. 57, 67 N. E. 132 (1903); People v. Bright, 203 N. Y. 73, 96 N. E. 362 (1911).

[19] Watts v. Malatesta, 262 N. Y. 80, 186 N. E. 210 (1933); see People v. Bright, 203 N. Y. 73, 96 N. E. 362 (1911).

employed in the statute when considered in the light of its enactment [20] has nothing to do with financial return, but refers to constant uninterrupted and excessive gaming indulged in during the waking hours normally spent by those intent on maintaining themselves in some peaceable or legitimate vocation, no matter how humble it be." [21] This interpretation gives us a statute which can effectively suppress the activities of the undesirable individual whose day is spent in gaming activity. B. L.

EQUITY—INJUNCTION—RESTRAINING ACTION BY CITIZEN OF NEW YORK AGAINST ANOTHER CITIZEN OF NEW YORK IN A FOREIGN JURISDICTION.—Plaintiff, who owned and controlled certain motion picture theatres located in England, contracted to sell them through defendant, as agent. Both plaintiff and defendant were residents of New York. It was understood, according to defendant, that plaintiff would not deal with anyone else until all negotiations had proved fruitless. Defendant sued plaintiff in England, claiming he was damaged when plaintiff violated this agreement by his negotiations with another. Plaintiff now seeks to enjoin defendant from suing him in England, claiming that since the contract was made in New York, and since all their important witnesses are residents of New York, an action on that contract in England would prove inequitable, vexatious, and oppressive. The Supreme Court of New York granted plaintiff's motion for an injunction *pendente lite*. On appeal, *held,* reversed. In general, New York courts will not enjoin its citizens from prosecuting an action against each other in a foreign jurisdiction in the absence of proof that: (1) the suit in the foreign jurisdiction was instituted in bad faith or motivated by fraud, or (2) there was an attempt to evade the law or public policy of New York. Issuance of equitable relief by injunction in such a case lies within the sole discretion of the court. *Paramount Pictures, Inc.* v. *Ben Blumenthal,* 256 App. Div. 756, 11 N. Y. S. (2d) 768 (1st Dept. 1939), *aff'd,* 281 N. Y. 106, — N. E. — (1939).

Although it is well settled that a court of equity can enjoin one within its jurisdiction from suing in another state or country, the question is, when and under what circumstances it will do so. An early leading English decision [1] held that an injunction should not

[20] Instant case at 943. The court refers to the other subdivisions of N. Y. CODE CRIM. PROC. § 899 which in substance, "is aimed at a course of behavior disadvantageous to society, the violation of which makes one a disorderly person, the abandonment or threat to abandon wife or child; the keeping of bawdy houses or houses for the resort of prostitutes, gamesters or habitual criminals; performances by mountebanks; the keeping upon the public highway of an apparatus for gaming etc."

[21] Instant case at 943.

[1] Love v. Baker, 1 Ch. Cas. 67, 22 Eng. Rep. 698 (1665).