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Criminal Law—Single Occurrence Satisfies Common Gambling and Bookmaking Requirements

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The majority of the Court may be setting a new trend in its novel approach to the mechanics of effecting a citizen's arrest. The language of the statute seems to be explicit: "an arrest is made by the actual restraint of the person of the defendant or by his submission to the custody of the officer,"⁵ and cases uphold as valid a citizen's arrest in which the citizen physically subdues the wrongdoer.⁶ However, a lower court case, *People v. Stewart*,⁷ presents the theory, similar to that advanced in the present case, of constructive arrest in which physical restraint by the citizen making the arrest is not necessary. In *People v. Stewart*, a policeman, called to investigate a family brawl, arrested the husband for assaulting his wife. Although the arrest was legal on other grounds, the court said in dictum that a valid citizen's arrest could have been effected by the wife for the assault committed upon her before the arrival of the policeman by her demanding the arrest of her husband when the policeman did arrive. It is difficult to see how either the wife in *People v. Stewart* or Mrs. Salzberg in the present case were physically capable of restraining her assailant to perfect a technical arrest. By creating a fictional citizen's arrest, the court is sanctioning an arrest made by a police officer upon the mere unsworn complaint of the injury party.

The Court (majority) seems to be stretching the law to reach a desirable result. Many victims have an understandable and often justifiable fear of retaliation if they swear out a warrant against their assailant. The result is that many grievances go unalleviated. Also there are many instances in which the assailant, immune from arrest because the police officer was not present when the misdemeanor was committed, departs, and since he is unknown to those present, a warrant may not be obtained. Although the decision more adequately meets present day law enforcement needs, there is a possibility that the Court is usurping a legislative function in changing the existing laws as to arrest for a misdemeanor.

P. A. L.

SINGLE OCCURRENCE SATISFIES COMMON GAMBLING AND BOOKMAKING REQUIREMENTS

Is one transaction or a single occasion sufficient to satisfy a requirement of "professionalism" under the New York bookmaking and common gambling statutes? The Court of Appeals in two recent decisions, *People ex rel. Guido v. Calkins*⁸ and *People v. Pavia*,⁹ regarded a single occasion sufficient to warrant convictions.

In the *Guido* case, relator was convicted in the Schenectady Police Court of aiding and abetting in the operation of a particular gambling establishment.

5. N.Y. Code Crim. Proc. § 171.

6. See *Bellinger v. State*, 206 Misc. 575, 134 N.Y.S.2d 104 (Ct. Cl. 1954); *People v. Ostrosky*, 95 Misc. 104, 160 N.Y. Supp. 493 (County Ct. 1916).

7. 183 Misc. 212, 47 N.Y.S.2d 349 (City Ct. 1944).

8. 9 N.Y.2d 77, 211 N.Y.S.2d 166 (1961).

9. 8 N.Y.2d 333, 207 N.Y.S.2d 659 (1960).

In a habeas corpus proceeding, he contended that the information charging him was defective because it had alleged a single occasion rather than a continuity of action necessary to distinguish *casual* from *common* gambling, the latter, a misdemeanor under Section 970 of the Penal Law.¹⁰ The Schenectady County Court dismissed the writ, and the Appellate Division reversed on the law alone.¹¹ The Court of Appeals held that an information charging defendant with *aiding and abetting in the operation* of a gambling establishment need not aver more than one occasion.

In the *Pavia* case, defendant was convicted of bookmaking under Section 986 of the Penal Law.¹² Defendant argued that a single transaction was only circumstantial evidence and of little relevance, since one occasion was just as consistent with a finding of guilt as of innocence. The Schenectady County Court reversed the conviction and dismissed the information,¹³ and the People appealed to the Court of Appeals. The Court held that all the facts and the inferences therefrom surrounding the one bookmaking transaction were sufficient to convict defendant under the statute.

"Professionalism" is what distinguishes a casual from a common gambler and what defines a bookmaker. Constitutional provision against gaming and gambling in New York has never been directed at casual betting or gaming.¹⁴ Thus, in applying Sections 970 and 986, one finds variations in meeting requirements of a violation on a professional basis.

The type of game or gambling, and the frequency, custom, and habit of participation as a *player* determine a common gambler.¹⁵ A defendant charged as a *player* under Section 970 would necessarily escape prosecution if he were involved in no more than one participation; whereas, one charged as a gamekeeper becomes a common gambler within the statute upon a single partaking as distinguished from an unpunishable *casual player*.¹⁶ Likewise, any one occasion of running a gambling house is sufficient to bring a case within the statute.¹⁷ However, to determine whether a violation of Section 986 has been committed is a question of weighing the probative effect of circumstantial evidence in order to prove guilt beyond a reasonable doubt. The probative effect, of course, depends on the totality of facts shown concerning the collecting

10. N.Y. Penal Law § 970 provides that a person who is an owner or agent of a place for gambling, or who hires or allows a room to be used for such purpose, or who engages as dealer, gamekeeper, or player in any gambling game, or who sells or offers to sell lottery policies is a common gambler and guilty of a misdemeanor.

11. 10 A.D.2d 510, 200 N.Y.S.2d 907 (3d Dep't 1960).

12. N.Y. Penal Law § 986 provides that a person who engages in bookmaking or registers bets or makes book upon the result of a contest of skill or speed, or receives, registers, records, or forwards in any manner whatsoever any money bet or wagered or offered to bet or wager is guilty of a misdemeanor.

13. 20 Misc. 2d 846, 198 N.Y.S.2d 141 (County Ct. 1960).

14. N.Y. Const. art. I § 9. See *People v. Bright*, 203 N.Y. 73, 96 N.E. 362 (1911).

15. *People v. Bright*, supra note 14 at 78, 96 N.E. at 364.

16. *People on inf. Roberts v. Reille*, 50 N.Y.S.2d 196 (City Ct. 1944).

17. *Hitchins v. People*, 39 N.Y. 454 (1868) under a similar statute.

of bets even on one occasion. The conviction in the *Pavia* case, a "typical streetcorner observation case," is justified on the evidence: defendant accepted money for a previous bet and accepted more for nine additional bets which he agreed to place. Such facts constitute a continuity of practice on a professional basis, the degree forbidden by the statute.

Thus, the only time the distinction between casual and common gambler has any significance as far as continuity of action is concerned is when the defendant is charged as a *player*. Likewise, the test of bookmaking is not whether there was only an isolated transaction, but whether or not the facts constitute a professional gambling transaction.

It might be noted further that the Court in the *Guido* case took a most liberal view in determining the sufficiency of the information. Only the words that relator did "aid and abet in the operation of a gambling establishment" characterized the specific acts constituting the crime;¹⁸ however, the Court of Appeals held that such words, as a matter of law, should not be deemed insufficient, since the ultimate facts were set forth in the information. Granted, that, as a general proposition of law, an information does not have to be framed with the same exactness as a grand jury indictment,¹⁹ but the purpose of each remains identical: to inform the accused of what he is being called upon to defend and to prevent his being tried again for the same offense.²⁰ Surely, an information charging that relator did "aid and abet in the operation of a gambling establishment" does not apprise the defendant of the act the People intend to prove.²¹

It would seem that where a statute sets out, in detail and specificity, certain acts which would constitute a violation of the statute, as does Section 970, an information should, by the same token, state the act defendant is accused of with exactness. Moreover, Section 970 may be violated in any number of ways: by allowing or hiring a room to be used for gambling; by owning or superintending a place used for gambling; by engaging as a player, dealer, gamekeeper; or selling lottery policies or any writing in the nature of a bet. In these and other ways, relator may have committed acts or aided one committing them in violation of the statute, but none is set forth in the information. The nature of the offense, here, demands that the charge state the act constituting the crime without ambiguity.²²

E. J. S.

CONSPIRACY TO COMMIT MURDER, ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE, MUST BE PROVED TO A MORAL CERTAINTY

On the night of August 30, 1959, Salvatore Agron, Louis Hernandez, and

18. E.g., *People v. Goldstein*, 295 N.Y. 61, 65 N.E.2d 169 (1947).

19. See *People v. Knapp*, 152 Misc. 368, 274 N.Y. Supp. 85 (County Ct. 1934), aff'd, 242 App. Div. 811, 275 N.Y. Supp. 637 (1st Dep't 1934).

20. Cf. *People v. Zambounis*, 251 N.Y. 94, 96, 167 N.E. 183, 184 (1929).

21. Cf. *People v. Corbalis*, 178 N.Y. 516, 71 N.E. 106 (1904) (case concerning sufficiency of an indictment).

22. *Ibid.*