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Criminal Law--Gaming Statute

R. G. K.

West Virginia University College of Law

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STUDENT NOTES AND RECENT CASES

CRIMINAL LAW—GAMING STATUTE.—Chapter 151 of the West Virginia Code is entitled "Offenses Against Public Policy." Section 4 of that chapter reads as follows:

"If any person bet or play at any such table or bank as is mentioned in the first section, or if at any hotel or tavern, or other public place, or place of public resort, he play at any game except bowls, chess, backgammon, draughts, or a licensed game, or bet on the sides of those who play, he shall be fined not less than five nor more than one hundred dollars, and shall, if required by the court, give security for his good behavior for one year, or in default thereof, may be imprisoned not more than three months. (Code Va. 1860, c. 198.)"

It is believed that the foregoing section has been generally accepted as prohibiting the playing of cards in public places, whether or not the game included betting or gambling. But was that the intent of our legislature in enacting the statute, or rather, was it the intent of the Virginia Legislature, for we took it from the Virginia Code of 1860?

Under the Virginia Code (c. 198) it was held that playing at cards at a tavern is an unlawful game, whether or not there is betting.¹ It would seem that this decision, not having been overruled before June 20, 1863, would bind us.

A game has been defined as any sport or amusement, public or private.² Under the statutes of all or nearly all of the states, having for their object the prohibition of all or of various kinds of gaming, the terms "gaming" and "gambling" are defined as the same and treated as synonymous.³ "Game" is defined as a contest for success or superiority in a trial of chance, skill, or endurance, or any two or three of these combined, and is very comprehensive, and embraces every contrivance or institution which

¹ *Commonwealth v. Terry*, 2 Va. Cas. 77 (1817).

² *McCall v. State*, 18 Ariz. 408, 161 Pac. 893, 895 (1916), 28 C. J. 986.

³ *In re Opinion of Justices*, 73 N. H. 625, 63 Atl. 505 (1906), 12 R. C. L. 707.

has for its object to furnish sport, recreation, or amusement.⁴ As a general rule there must be a bet or a wager of money or something of value upon the result of a game or event, in order to constitute gaming.⁵ In *State v. Gaughan*⁶ our court would appear to indicate that the statute in question applies only to gambling, inasmuch as it says the games prohibited in chapter 151 may be divided into two classes, viz., where the chances are equal and where the chances are unequal, the unequal chances being in favor of the keeper of the game. Apparently the authorities are not uniform as to the meaning of "gaming."

The West Virginia decisions say that a place to be public must be a place to which people are privileged to resort without invitation.⁷ The following have been held to be public places: A house of public resort, whether licensed or not;⁸ a field along a river, between a river bank and a highway which has been discontinued;⁹ a licensed eating house.¹⁰ It would appear that section 4 and other sections in chapter 151 make it unlawful to play any kind of a game of cards at or in any public place.

In *State v. Brast* and in *State v. Maynard*¹¹ our court said that this section was intended to prevent gaming from becoming an annoyance or a nuisance to the public, and not especially to prevent gambling as a vice *per se*.

In general, at common law, all games are lawful.¹²

There may have been a time in the history of our state when gaming or the playing of cards in public places threatened to become a public nuisance. If so, then the offense might well be termed an offense against public policy. But it is doubted if that is true today; that the public has any very decided policy against a game of cards at a public place. It is an every-day occurrence to find women at some tea room, hotel, club, or some similar place, engaged in a game of bridge. And it is not uncommon to find men occupied with a game of cards while on a passenger train. The question then arises whether or not such acts are unlawful. If these acts are offenses against public policy, then the public appears to take but little interest in them. If they really are offenses against the public, then they should be prohibited and

⁴ 2 WORDS AND PHRASES 698.

⁵ *Lascallet v. Commonwealth*, 89 Va. 878, 17 S. E. 546 (1893).

⁶ 55 W. Va. 692, 697, 48 S. E. 210 (1904).

⁷ *State v. Brast*, 31 W. Va. 380, 7 S. E. 11 (1888); *State v. Maynard*, 66 W. Va. 522, 66 S. E. 688 (1909).

⁸ *Wortham v. Commonwealth*, 5 Rand. 669 (Va. 1827).

⁹ *Commonwealth v. Wilson*, 9 Leigh 648 (Va. 1839).

¹⁰ *Neal v. Commonwealth*, 22 Gratt. 917 (Va. 1872).

¹¹ Note 7, *supra*.

¹² 1 BOUVIER, LAW DICTIONARY, 626.

the statute enforced. If they are not such offenses, and if the statute prohibits them, then it should be stricken from our code.

There would appear to be no case in which our Supreme Court has directly decided whether or not section 4 of chapter 151 prohibits card-playing in public places, in the absence of gambling. But the writer is informed that some of our Circuit Courts have held this to be unlawful. If this be true, it is submitted that the statute should be repealed, inasmuch as it is disregarded and is not in keeping with the *mores* of the times.

—R. G. K.

TRUSTS—EFFECT OF STATUTE OF FRAUDS—Plaintiff filed a bill in equity to set up a parol trust in her favor and to have a deed set aside as a cloud upon her title. Plaintiff alleged that in 1909, she by deed reciting a consideration of one dollar cash in hand paid, and other valuable considerations, conveyed certain lands to the defendant, her daughter. It is further alleged that notwithstanding the consideration therein stated there was no consideration paid and that the conveyance was made with the distinct understanding and agreement that the grantee would hold the property in trust for plaintiff, the grantor, and would reconvey the same to her whenever so requested; that the plaintiff was in possession at the date of the deed and is still in possession, the defendant claiming no interest in the property until recently when plaintiff requested a reconveyance which defendant refused. Defendant's demurrer to the bill was sustained. Upon appeal, the order sustaining the demurrer was affirmed. *Held*, it is well settled by numerous decisions in this state, that the grantor of land cannot set up by way of a parol trust an interest in the land conveyed. To permit this would be to go in the face of the statute of frauds and the rule against the admission of parol evidence to contradict, vary or add to written contracts. The authorities make it impossible to so create an equitable title in land.—*Hawkinberry v. Metz*, 114 S. E. 240 (W. Va. 1922).

The review will attempt only to consider the status of the law in this state on the question to what extent, if any, the statute of frauds affects the creation of a trust by parol. In England before the enactment of the statute of frauds, under the common law no particular form of creation or declaration of a trust was required. It could be created by deed, or will, or writing not un-