

476

COMMENTS ON PROPOSED
NEW YORK PENAL LAW
ARTICLE 430 AND 435
CIVIL PROVISIONS

By Charles T. Matthews
Assistant District Attorney
Suffolk County, New York

I. General Comments

It was the stated purpose of the State Commission on Revision of the Penal Law and Criminal Code to submit to the legislature "a revised, simplified body of substantive laws relating to crimes and offenses." Chapter 346, Laws of 1961; Chapter 548, Laws of 1962.

In formulating the new Penal Law various provisions relating to civil remedies which appeared throughout the existing Penal Law relating to gambling, lotteries and prostitution were merely collected and grouped in Articles 430 and 435. No attempt was made to revise these provisions which are obviously more out of date than those provisions in the existing law of penal character.

The Commission states that it intends to undertake a study of these provisions in the future, "and, where necessary, to propose formulations that will adequately meet modern public needs." Edward Thompson Co., Proposed New York Penal Law, p. 399.

Some suggestions with regard to a new approach in this area of civil remedy are herewith submitted.

II. Suggestions.

At present in substantially all jurisdictions gambling contracts and transactions are illegal and void and cannot be enforced in the courts. 38 C.J.S. 78. Sections 991 and 992 of the existing Penal Law declare this to be the law in New York with respect to gaming. Sections 1385 and 1386 have the same effect with respect to lotteries. These provisions are set forth in the revised law without change in Sections 430.00, 430.05, 430.15 and 430.20.

It would seem preferable to have one new section declaring illegal and unenforceable any contract directly or indirectly involving gambling as defined in Section 230.00 with the exception of bingo lawfully conducted pursuant to Article 14-H of the General Municipal Law and pari-mutual betting on horse races lawfully conducted pursuant to the Pari-Mutual Revenue Law. Sections 7951-7975 of the Unconsolidated Laws.

In addition to declaring gambling contracts unenforceable, we have at present some provisions relating to a forfeiture of the sums won and lost in gambling and

the prizes offered in a lottery. Sections 995 and 1380 of the Penal Law. These sections were carried forward in the revised law as Sections 430.30 and 430.40.

It has long been recognized that forfeiture provisions can be useful to discourage the vice of gambling. We do not suggest that it should be the duty of the district attorney to sue for and recover in behalf of the people all property so forfeited. Penal Law, Section 1380; revised statute, Section 430.40. This is not the function of a prosecuting attorney.

We would suggest that the revised statute contain a provision declaring that anything of value offered for distribution in a lottery as defined in Section 230.00 or so distributed except in connection with bingo games lawfully conducted pursuant to Article 14-H of the General Municipal Law and anything of value as defined in Section 230.00, subdivision 6, wagered, won or lost in any gambling activity as defined in Section 230.00 except such sums lawfully wagered, won or lost pursuant to the Pari-Mutual Revenue Law shall be forfeited to the people of the State of New York for public assistance and care. Place the duty on the local public welfare official as defined in Section 2, subdivision 14, of the Social Welfare Law to demand, sue for and recover all such pro-

perty so forfeited and to cause the same to be sold if necessary. Further provide that if the local public welfare officer fails to recover or to institute suit to recover such property within 30 days after receiving written notice of the existence of such property within his jurisdiction, the person giving such notice may institute a taxpayer's action pursuant to Section 51 of the General Municipal Law to recover the said property for the people.

In addition to providing for a forfeiture of the property wagered in gambling and the property offered or distributed in a lottery, we further suggest that a new provision be added to provide for a forfeiture of the motor vehicles and other means of transportation used by those promoting gambling as defined in Article 230. It might be provided that these vehicles once forfeited become the property of the local police agency. This would be similar to the Federal provisions relating to the forfeiture of vehicles used to transport illegal distilled spirits and narcotic drugs. 26 USCA §5681; 49 USCA §782.

If it is the public policy of this state to declare unlawful and illegal these various lotteries and other gambling activities we might just as well provide this

substitute method of enforcement which might prove very effective in certain areas. For instance, the New York winner of a substantial sum in the Irish or New Hampshire sweepstakes would have to forfeit the prize to the local welfare officer. If the local welfare officer refuses to take action to recover the sum, any taxpayer may. Generally, the court in a taxpayer's action will allow suitable counsel fees from the amount recovered to make this a worthwhile activity for those who wish to be self-appointed law enforcers.

Similarly the welfare officer could seize the automobile being raffled off by a local church group in violation of law. He would also be entitled to gambling proceeds seized by the police on a raid and the police could keep the cars they seize from the policy runners.

These economic pressures may have greater weight in discouraging illegal gambling than the possibility of a fine or imprisonment.

By adopting this policy of forfeitures we would also have to abolish the right of a loser to recover the sum wagered. Revised Statute, Section 430.30. Once something of value has been risked upon the outcome of a contest of chance, that property is forfeited to the State and the former owner would no longer have a right to its return.

We further believe it desirable to retain the revised Section 435.00 relating to the right of a landlord to remove a tenant convicted of using certain premises for prostitution.

Dated: Riverhead, New York,
August 24, 1964.

CHARLES T. MATTHEWS
Assistant District Attorney.