New Jersey Supreme Court.

JOSEPH R. MOORE AND LEWIS HUHN, *Plaintiffs in Error,* ATS. THE STATE OF NEW JERSEY, *Defendant in Error.*	In Error to Monmouth Quarter Sessions. On Indictment

The plaintiffs in error were indicted at the October term nineteen hundred and five. The following is a copy of the indictment:

"In the Court of Oyer and Terminer of Monmouth County October term, in the year of our Lord one thousand nine hundred and five,

MONMOUTH COUNTY, TO WIT:

The Grand Inquest of the State of New Jersey and for the body of the County of Monmouth upon their respective oath and affirmation,

PRESENT, that LOUIS HUHN, JOSEPH R. MOORE, CHARLES HUHN, JOHN CLANCY and POPE McCARTHY, all late of the City of Long Branch, in the said County of Monmouth, on the first day of July in the year of our Lord one thousand nine hundred and five, and on divers other days and times, between that day and the day of taking this Inquisition, with force and arms, at the City of Long Branch aforesaid, in the County aforesaid, and within the jurisdiction of this Court, wilfully and unlawfully did keep and maintain a certain common, ill governed and disorderly house situate on the easterly side of Second Avenue, between Brighton Avenue and Matilda Terrace, in the City of Long Branch aforesaid, County of Monmouth aforesaid, and in the said house for their own lucre and gain, then and on the said other days and times, there unlawfully and willingly did with intent cause, procure, permit, aid, abet, and assist certain persons of evil name and fame, and of dishonest conversation, to resort, frequent and come together, and the purpose of engaging in gambling, gaming for playing for money and other valuable thing at and with cards, dice, E. O. Table and other tables, instruments, engines and devices, faro-bank and other bank of like kind, and the said certain persons, in the said house of them, the said

LOUIS HUHN, JOSEPH R. MOORE, CHARLES HUHN, JOHN CLANCY and POPE McCARTHY, at unlawful times, as well in the night as in the day, then and on the said other days and times, there to resort, be and remain, drinking, tippling, fighting, gambling, gaming and playing for money and other valuable thing at and with cards, dice, tables, instruments, engines and devices, faro-bank and other bank of like kind, and misbehaving themselves, unlawfully and wilfully did with intent permit, and yet does permit to the great damage and common nuisance of all citizens of the State of New Jersey, there inhabiting being, residing and passing, to the evil example to all others in like case offending, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same."

H. M. NEVIUS,
Prosecutor of the Pleas.

Filed October 26, 1905.
JOSEPH McDERMOTT,
Clerk.

The defendants were tried on the twenty-seventh day of November, in the year nineteen hundred and five before Judge John E. Foster in the Quarter Sessions of the County of Monmouth and a Jury.

The defendants were found guilty and sentenced. The defendants took a writ of error to this Court.

One of the errors assigned is because the indictment *alleged that it was returned* by the Grand Jury upon their respective oath and affirmation. The indictments are all printed with the words, "oath and affirmation" because sometimes some of the grand jurymen being conscientiously scrupulous of taking an oath, affirms. The indictment was found upon the oath of the Grand Jury, none of the grand jurors having affirmed. See copy of caption, page 3, case. The mere omission to erase the word affirmation does not make the indictment defective, and it should only be treated as surplus; there is no cause for reversal upon this ground.

Errors twelve, thirteen, fourteen, fifteen, seventeen and eighteen are all to the effect that the indictment was not properly returned into Court. The fact is that the indictment with others was taken into Court by the Grand Jury, the Judge of the Quarter Sessions presiding, the Justice of the Supreme Court and of the Oyer and Terminer not being present, the indictment with the other indictments was handed to the Judge of the Court of Quarter Sessions. See testimony of Edward Cashion, page 20 of the case and top of page 21.

An Act relating to Courts having criminal juries diction and regulating proceedings in criminal cases

(Revision of 1898), see Laws of 1898, page 868, section 6:

"If one of the Justices of the Supreme Court, shall not be present at the court house in any county of this state in which the judge of the inferior court of common pleas, sitting alone, can not, in the absence of the justice of the supreme court hold the court of oyer and terminer on any day when the grand jury, sitting in and for said county, desires to present any indictment or make any presentment, or to be discharged, then the court of quarter sessions in and of such county may receive such indictments or presentments as may be presented by said grand jury, and may also discharge the grand jury, the same as the court of oyer and terminer might do if said justice of the supreme court were personally present; and all indictments so received, which are not triable in the courts of quarter sessions, shall be delivered by said courts to the courts of oyer and terminer in their respective counties"

Objection is made to the form of the indictment. The indictment charges a disorderly house. A disorderly house is any house where illegal practises are habitually carried on. Gambling under our statute is illegal. Great stress has been laid upon the fact that one count of the indictment is under the 65th section of the Crimes Act, Laws of 1898, page 812. Counsel for the plaintiffs insisted upon the trial that that section only applied to pool selling upon races. A careful reading of it will show that after describing pool, it reads "or for gambling in any form, or aiding, abetting or assisting therein."

The indictment, at the time the prisoners were arraigned, was read to them and it was distinctly stated to them that the crime for which they had been indicted was for conducting a gambling place in which there was roulettte tables, crap tables and Klondike tables.

A reversal is asked for upon the 32nd error assigned because Juror number Five was challenged by the defendant, Moore, and excused against the objection of the other defendant, Huhn, also, because Juror McChesney was challenged by Huhn and excused against the objection of the defendant, Moore. This error is clearly frivolous. The defendants were tried together and they had a right to a certain number of challenges between them, and it is no ground of error because one of the defendants challenges and the other desires to have the juror sit.

Error 36, because there is no evidence designating the place charged in the indictment. A reading of

the evidence will show that the place was designated accurately.

As to errors 42, 43, 44, 45, 46, 47 and 48, relating to the charge of the Court, a reading of the charge of the Court, pages 79, &c., will satisfy this Court that there was no error in the charge.

Error 49, because the punishment imposed in this case is cruel and unusual, in violation of the Constitution of the United States and of the Constitution of the State of New Jersey. If this were true, it would be no ground for error. The punishment imposed by the Court in this case was made entirely in the discretion of the Court, after having heard the case, and in accordance with the statutes. The testimony of Clancey, Peterson, Hill, Nash, Dean, Oddley, Justice, Irons, Rue, Minugh and Hendrickson show clearly that this was a place where colored men, coachmen and men around town resorted nightly. Sometimes as many as thirty or forty, as appears by the testimony of Mr. Rue, the County detective, twenty-eight were present. The place was run in open violation of the law, and the evidence to that effect is overwhelming, none of which was contradicted or was any attempt made to contradict it, the case was so clear, so plain and so conclusive that no defense could be made.

Thomas Johnson, a witness sworn for the defendants, testified that he knew Joseph Moore, that he lived at West End and he knew his mother and that he had been engaged in the real estate business. See pages 76 and 77 of the evidence from line thirty on the first page to line ten on the second page. Also see his cross examination, line 18 to the bottom of page 77, which shows he had been engaged in the real estate business until within the last year, and that he, Johnson, is a speculator, the same as Clancy.

There is nothing in this testimony as to Moore's character or as to his truth and veracity or for anything else. Carl Huhn, a witness produced on the part of the defendants, testified for the other defendant, Moore. His testimony is found on page 78 of the case, and says he is a young man about twenty two years of age and that his son Louis, the other defendant, is about the same age, but that is all there is in his testimony as to either of the defendants, not a word as to the character for truth and veracity, for honesty or any other thing which would show them to be exemplary young men, and that is all the testimony there is in this case for the defendants as against the overwhelming testimony of twelve witnesses for the State.

I submit that the verdict of the Court of Quarter Sessions should be confirmed.

H. M. Nevius,
Prosecutor of the Pleas.

SUPPLEMENTARY BRIEF.

This case comes to this Court on a Writ of Error from the Supreme Court. The case was argued in the Supreme Court at the June Term and the judgment of the Court of Quarter Sessions was affirmed by the Supreme Court. The Assignment of Errors in this Court are precisely the same as those in the Supreme Court and I use the same brief that I used in that Court with an additional page.

The 11th Assignemtn of Error, because there was no severance of those tried under the indictment and those not tried. See page 6 of the case, line 20, which reads as follows: It is on this 27th day of November, 1905, on motion of Henry M. Nevius, prosecutor of the Pleas, ordered that a severance be granted as to Louis Hühn and Joseph R. Moore, therefore let the said indictment be continuted until the 27th day of November.

Assignemtn of Error No. 37 in the Supreme Court and No. 32 here, as to the paraphanlia being admitted in evidence. See testimony of Jacob B. Rue, page 70 of the case from line 30 to line 30 on page 71.

The Assignments of Error from No. 49 to and including No. 63 are assignments of error in the Supreme Court. This is nothing in these assignments of error except perhaps Nos. 60 and 62. As to No. 60, I call the attention of the Court to the case of The State vs Parker, 32 and 33 Vroom; the case of The State vs Wines, 36 Vroom, and also to the late opinion of the Chancellor given in this Court in the case of the State vs Twining and Cornell. The 62nd assignment of error, referring to section 66 of the Laws of 1898, An Act for the punishment of Crimes, simply makes it unlawful for a person to engaged in the sale of liquor without a license; section 60 of said Act, page 811, defines that the acts contained in the indictment are misdemeanors on the part of the person engaged therein section 65 of said Act, page 812, defines that any person or corporation that shall habitually or otherwise, keep a place to which persons may resort for engaged in such practices, or either of them, or for betting upon the event of any horserace, or other race or contest, or for gambling in any form or aiding, abetting or assisting therein, shall be guilty of a misdemeanor.

I insist that nothing has been shown or presented in this case which would warrant this Court in reversing the Court below, for there was no error in the Court of Quarter Sessions, no error in the Supreme Court, and that the judgment below should be affirmed.

H. M. Nevius,
Prosecutor for the State.

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H. M. Nevius,
Prosecutor for the State.

New Jersey Court of Errors and Appeal

THE STATE OF NEW JERSEY *Defendant in Error,* *vs.* JOSEPH R. MOORE AND LEWIS HUHN, *Plaintiffs in Error.*	IN ERROR TO SUPREME COURT ON ERROR TO MONMOUTH QUARTER SESSIONS ON INDICTMENT.

BRIEF ON BEHALF OF THE DEFENDANTS, JOSEPH R. MOORE AND LEWIS HUHN.

The defendants, Joseph R. Moore and Lewis Huhn, two young men, just over the age of twenty-one years, were convicted under an indictment which is set forth in the case and which the defendants claim is illegal, and were each sentenced by the Court to pay a fine of One Thousand Dollars and be confined in the State Prison at Trenton for the term of one year at hard labor, and from thence and until the costs of prosecution be paid. Joseph R. Moore lived with his mother, who is a widow, and was engaged in the real estate business with his partner Mr. Elva Green. I recite the fact of age and occupation so the Court will understand that these young men cannot be considered as the owners of the palatial mansions and gilded

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palaces of chance which surround the neighborhood in which these boys were born and raised, and they cannot be considered as belonging to the class of gamblers who have infested the seashore from New York and other large cities with apparent immunity, and, who, when they have been convicted in our Courts, the punishment has always been a fine.

In considering the errors and causes for reversal, I will proceed in the following order:

I. All objections to the form, proceedings and return of the indictment.

II. Objections to evidence.

III. Motions for direction and dismissal.

IV. Objections to the prosecution in summing up.

V. Objections to the charge of the Court.

VI. Objections to the penalty.

VII. Objections to the statutes.

I.

FIRST—The indictment should have been quashed under the first and second errors and causes for reversal because the indictment does not show that any members of the Grand Jury who affirmed were conscientiously scrupulous of taking an oath nor which members of the Grand Jury affirmed and what members of the Grand Jury found the indictment upon their oaths and the indictment simply alleges that "the grand inquest of the State of New Jersey upon their respective oath and affirmation do present Lewis Huhn, Joseph R. Moore, Charles Huhn, John Clancy and Pope McCarthy." In regard to said errors and causes for reversal, it may not only be assumed, but it is a positive presumption, that one or more of the grand jurors at the time of entering upon his duties as such, was permitted to make affirmation instead, and in place of, the customary oath. And there is no question as to the propriety of this procedure under proper or disjunctive, according to the evident meaning of the lawmakers.

conditions. It is assumed in the case of the State vs. Engemen, 25 Vr. 247, that if the objection now taken at the proper time it would be fatal. In this case the objection was made at the proper time.

Prior to 1727 and 1799 the date of the enactment of a statute making special provision in favor of those having conscientious scruples against the taking of an oath, an affirmation was unknown to the law and after such enactment was used only on occasions when it appeared that the affirmant elected that form of obligation himself.

In the indictment before the court there is no allegation as to the one or more jurors making affirmation that he or they had conscientious scruples against the taking of an oath.

In the almost ancient case of Lookup vs. The King, 6 Bro. Parl Ca. 138, the rule laid down with great positiveness as to the exactness required in all indictments. and in regard to a like contention as here made it therein appears "That it is stated" (in the indictment) "The grand jurors were duly sworn and affirmed" will not avail. No intendment can be made; the court must see that the proceedings are regular.

The above case is quoted and recognized as the law in the case of State vs. Harris 2 Hal. (7 N. J. Law, pages 361, etc.) where the learned justice in directing the quashing of the indictment, states that he regards the law on this point as well established.

Again in the case of the State vs. Jacob Fox 4th Hal. (9 N. J. Law, pages 244, etc.) where the contention was that the indictment should be quashed because it did not appear by the caption of the indictment nor by the indictment itself, that the individual grand jurors who affirmed, alleged themselves to have conscientious scruples of taking an oath, Chief Justice Ewing in rendering the unanimous opinion of the Supreme Court, said:

"We are all satisfied that the indictment must be quashed. As the law stood at the time of Sharp's

case, all the jurors were required to be sworn, except such as were of the people called Quakers, who, by statute, were entitled to take an affirmation; and the point decided in that case is that the grand jurors who take the affirmation must be shown on the indictment or caption to be within the exception. The same principal was decided in the State vs. Harris, and in the recent case of the State vs. Vanardsdale. The difference of phraseology between the statutes of 1728 and 1799 is that the former allows the affirmation to Quakers only, the latter extends it to all persons who allege themselves to be conscientiously scrupulous of taking an oath. The difference does not effect the principal ruled in these cases, all of which are direct authority."

SECOND—Errors and causes of reversal, ~~12~~, ~~13~~, ~~14~~, ~~15~~, ~~16~~, ~~17~~ and ~~18~~ will be considered together. They are directed to the fact that the indictment was found in the Court of Oyer and Terminer and was not properly returned to said Court, and was not properly sent to the Court of Quarter Sessions for trial and was wrongfully returned to the Monmouth County Quarter Sessions or was wrongfully returned to a Judge of the Court of Quarter Sessions in place of the Court of Quarter Sessions, and because no Justice of the Supreme Court was present when the indictments were returned, and because it does not appear that the indictment was returned to any court as appears by the testimony of the clerk and the record, pages 19 and 20 of printed case.

The clerk testified in reply to the question,

Q. I understand you to say this was returned to the Monmouth Quarter Sessions? It was not returned to the Monmouth Oyer and Terminer?

A. No, it was returned to the Judge of the Court of Quarter Sessions.

BY THE COURT—

Q. Does the record show that fact?

A. Yes, sir.
Q. Under what date?
A. October 26th, 1905.
Q. What page?
A. 340.
BY MR. STOKES—
Q. Of your minutes?
A. Yes, sir.
BY MR. FAY—
Q. Was Justice Hendrickson present when these indictments were returned?
A. No, sir.
Q. They were returned to Judge Foster, Court of Quarter Sessions of the County of Monmouth?
A. Yes, sir. Pages 5 and 6 of printed case.

There was no order sending the indictments from the Court of Oyer and Terminer to the Court of Quarter Sessions. Testimony, pages 19 and 20 of printed case.

Section 1, page 866, laws 1898, regulating proceedings in criminal cases provides for the filing of indictments in the Court of Quarter Sessions, but says, that where indictments for treason and murder are found, the Court of Quarter Sessions shall cause such indictments to be delivered to the Supreme Court or the Court of Oyer and Terminer.

Section 3 of the said act, page 867, Laws of 1898 says that "no session of the Court of Oyer and Terminer shall be held when the Justice of the Supreme Court is not present, except in counties of three hundred thousand inhabitants," to which class Monmouth County does not belong.

Section 6, page 868 of said act provides, that "the Court of Quarter Sessions may receive such indictments as may be presented by the Grand Jury; and all indictments so received which are not triable in the Court of Quarter Sessions, shall be delivered by said Court to the Court of Oyer and Terminer."

No indictment found by the Grand Jury in the Court of Oyer and Terminer is triable in the Court of Quarter Sessions without an order from the Court of Oyer and Terminer to deliver the indictments to the clerk of the Court of Quarter Sessions, and filing by him

Section 7, page 868 of said act, provides, that "the Court of Oyer and Terminer shall have cognizance of all crimes and offences whatsoever, which, by law, are or shall be of an indictable or presentable nature."

Section 8, page 869 of the said act, provides, that "when any indictment which the Court of Quarter Sessions of the County is competent to try and determine, shall be found in the Court of Oyer and Terminer in and for such County, it shall be lawful for such court at any time during their session, if they think proper, to order the said indictment to be delivered to the Clerk of the said Court of Quarter Sessions, who is hereby directed to file the same, and also to make entry thereof in the minutes at the then or subsequent session; and after such affiling, the said Court of Quarter Sessions shall have authority to issue process and proceed upon, and to hear and determine such indictment, in like manner as if the same had been originally found in the said Court of Quarter Sessions."

Section 9, page 869, of said act provides, "If any indictment or presentment found in the Court of Quarter Sessions, to the trial and determination whereof the said court is competent, be transmitted to the court of Oyer and Terminer, then such court may, if they think proper, remand such indictment or presentment to the said Court of Quarter Sessions, there to be proceeded upon in like manner as if the same had not been sent to the said Court of Oyer and Terminer."

The court will see that there is a full scheme provided for indictments found by the Grand Jury, either in the Court of Quarter Sessions or in the Court of Oyer and Terminer. No indictment is triable in the Court of Quarter Sessions unless found therein or ordered to be transferred to the Court of Quarter Sessions and filed therein, by an order of the Court of Oyer and Terminer; while the Court of Quarter Sessions has power, under Section 6, to receive indictments found in the Court of Oyer and Terminer, they are not triable in the Court of Quarter Sessions unless sent there by

order as provided in Section 8. If the Grand Jury intended that this indictment be tried in the Court of Quarter Sessions, they would have found the indictment in the Court of Quarter Sessions and not in the Court of Oyer and Terminer.

Section 9 provides what action may be taken when an indictment is found in the Court of Quarter Sessions. If the indictment in this case was found in the Court of Oyer and Terminer, it was not triable in the Court of Quarter Sessions unless sent there by an order of the Court of Oyer and Terminer. The Court of Quarter Sessions, therefore, had no jurisdiction to try the said indictment against the objections of the defendants. State vs. Holt, 29 Vr. 11, and 3 Harr, 209 cited therein is directly in point.

It has been held under a similar statute where the record simply stated "This day being the 4th day of said term of court the following indictments were filed in said court," to wit: this being all the record showed, it did not appear that the indictment under review was returned into open court by the Grand Jury, and was fatal.

Kelly vs. The People 39 Ill. 153.
Epps. vs. State 102 Ind. 539.
5 Am. Criminal Reports 519.

The question has been frequently raised and discussed.

Fitzpatrick vs. The People, 98 Ill. 272.
Hughs vs. The People, 116 Ill. 339.
Kelly vs. The People, 132 Ill. 369.
Morton vs. The People, 47 Ill. 468.

The following illustrations of a good record are set forth under a similar statute.

"Where the record recites that 'On this day comes the Grand Jury and presents to the court indictments of the following cases,' among which was one against the defendant. It sufficiently shows a return into open court."

Fitzpatrick vs. The People, 98 Ill. 272.

Where the record states that the Grand Jury appeared in open court and duly presented the indictment, a copy of which is set forth, from this it must be assumed that the indictment was presented according to law. The record affirmatively shows the return of the **PARTICULAR INDICTMENT** into open court by the Grand Jury.

See Yundt vs. The People, 65 Ill. 373.
1 Am. Criminal reports, 674.
Sullivan, vs. The People, 156 Ill. 95.
40 N. E. 288. 5 S. E. 407.
7 Am. Criminal reports 246.

It is respectively urged that there is no sufficient order made by the proper judge removing this **PARTICULAR INDICTMENT** to the sessions for trial.

THIRD—Error and cause for reversal ~~24~~ 10 The court should have ruled upon each objection to the indictment and the proceedure thereon separately. The defendant has the right of the court's judgment upon each distinct motion made.

FOURTH—Error and cause for reversal ~~27~~ 11 and ~~28~~ 12 it appears by the testimony, page 30, that John Clancy was indicted jointly with the defendants. There does not appear to be any separate severance for the defendants. The record shows, page 6, "on motion of Henry M. Nevius, Prosecutor of the Pleas, ordered that a severence be granted as to Lewis Huhn and Joseph R. Moore." It appears by the indictment, page 4 that Lewis Huhn, Joseph R Moore, Charles Huhn, John Clancy and Pope McCarthy were indicted as per record, which must be construed according to its language as a severance as to Lewis Huhn and Joseph R. Moore. With that record it was illegal to try them together. There should also have been a distinct severance as to John Clancy in order to qualify him to testify.

FIFTH—Error and cause for reversal ~~20~~ 13, the indictment does not allege who were principals and who were accessories, and who aided, abetted or assisted; while it is true that in misdemeanors all may be punished as principals, it is not true that those who aid, abett or assist, or are acessories, can be charged as principals. A principal should always be brought to trial before any one who aids, abetts, or assists. The defences of each class can be entirely different. There are numerous cases which hold that principals and accessories must be tried separately, Century Digest Volume 14, Section 1384. How is the court to decide whether they are to be tried separately as principals and accessories, if the indictment does not charge it as principal and accessory?

SIXTH—Error and cause for reversal ~~25~~ 14, because the location of the place, or house, is not sufficiently set out or described in the indictment nor is the location proved by the evidence with sufficient certainty, generally, the venue is sufficent, as laid within the jurisdiction of the court, "but the descripton of place as a material ingredient if the criminal character of an act depends upon the locality in which it is committed, the allegation of place becomes material, and does not then merely determine the venue, but furnishes an essential feature in the description of the offence and must be accurately laid, and matter of local description must be proved."

This is particularly necessary in a case of this kind so that the defendant cannot be twice tried for the same offence. In the description in the indictment, charging that the defendants, "the City of Long Branch aforesaid, in the County aforesaid and within the jurisdiction of this court, wilfully and unlawfully, did keep and maintain a certain common, ill-governed and disorderly house, situate on the easterly side of Second Avenue, between Brighton Avenue and Matilda Terrace, in the City of Long Branch, aforesaid, County of Monmouth, aforesaid."

Second Avenue, between Brighton Avenue and Matilda Terrace may be one block or twenty blocks and may have, on the easterly side, one hundred houses. The principals in this case may have had a dozen houses. It appears by the testimony of John Clancy, pages 34 to 35 and on page 32 that Charlie Huhn was the principal. Clancy said, "he used to do the business, and that he, Clancy, was in on the roulette work." Sypherd P. Peterson says, on page 47, in reply to the question: Q. "You say Charlie Huhn told you there wouldn't be any game open except the roulette that night you were there?" A. "Yes, sir." Q. "Did they open the roulette game for you?" A. "They did." Q. "But Charlie Huhn wouldn't allow any other game to be opened that night?" A. "Well, there was no one there to play it. If there were any others players came in—" Q. "He was there?" A. "Yes, sir." Q. "You were there?" A. "Yes, sir." Q. "Why did you say there was no one to play?" A. "Well, two is a very small crowd at the crap table, and they didn't care to open. They were counting up the cash at the time and didn't care to open, they said." Q. "Charlie Huhn said?" A. "Yes, sir."

This may be considered with error and cause for reversal ~~36~~ 35, because there is no evidence designating the place charged in the indictment. On page 33, John Clancy was asked, Q. "This place you referred to, where was it located?" Answer, "At West End and Second," and when Sypherd P. Peterson was asked to locate the place he visited, stated that he visited the gambling rooms of the defendants on Second Avenue, and Bee Odley, on page 63 in answer to the leading question, "Have you ever been on the place on Second Avenue?" answered, "Once," and John Clancy, was asked the leading question, "During the month of July and August, what was going on in the building in the easterly side of Second Avenue?" And in connection with Charlie Huhn, he said he had been in a place on

the easterly side of Second Avenue between Brighton Avenue and Matilda Terrace, but his testimony related to doing business there with Charlie Huhn. All the other evidence is merely, were you in their place on Second Avenue or in a place on Second Avenue.

To illustrate the argument. The defendants might have had a place on Second Avenue which was not on the easterly side of Second Avenue between Matilda Terrace and Brighton Avenue, and they might have had a place on the easterly side of Second Avenue between Matilda Terrace and Brighton Avenue which was not the place intended to be designated in the indictment, therefore, the indictment lacks certainty in location. The testimony of Clancy says that the place referred to by him was located at West End and Second Avenue.

In the case of the State vs. Rogers, 29 Vr. 220, it was held that the place where the liquors alleged to have been sold illegally must be designated with certainty. Also State vs. Ham, 35 Vr. page 49. Following these cases to their logical conclusion, the indictment should be quashed and the conviction reversed.

SEVENTH—Error and cause for reversal ~~26~~ 13, states that time and facts are not alleged with certainty. If the indictment is construed to be an indictment for keeping a disorderly house, then time is correctly laid but if it is to be construed under the 65 Section, then the time must be alleged and proved. The general rule is, When the alleged offence may have continuance, the time may be laid with a continuando, that is, it may be laid to have been on a single day, certain and also on divers other days without charging one or more offense, but those other days must be alleged with the same legal exactness which is required in alleging a single day, unless the allegation of the other days can be wholly disregarded and rejected as surplusage. American and English Encyclopaedia of Pleading and Practice V. 10, page 517, Section 8.

The specific dates must be stated.

When then and there is used, when time is once mentioned in any part of the information or indictment it may be subsequently laid as the time of the commission of the offense by word of reference, as "then and there," with the same effect as if it were actually repeated, and likewise where the time is laid in one count, it may be laid in subsequent counts by such words of reference, but such a reference is not sufficent where more than one time is laid in the part of the pleading referred to by the words, because it would not appear to which time such words applied. Encyclopaedia of Pleading and Practice, Vol. 10, page 519, paragraph 9.

The facts should also be alleged with certainty. There is no certain allegation of fact. The language is all general. No distinct allegation of fact is set forth in the indictment. There is no precise allegation which the defendants can say with any certainty the charge he will be called upon to meet.

EIGHTH—Error and cause for reversal ~~22~~ 16 as follows, "Because the indictment ~~in~~cludes both with the common law conclusion of an indictment against the peace of this State, the government and dignity of the same," and also in the form of an indictment for a common law nuisance "to the great damage and common nuisance of all of the citizens of the State of New Jersey there inhabiting, being and passing to the evil example of all others in like case offending," and also contrary to the form of the statute in such case made and provided "thus confusing the defendant as to what charge he will be called upon to answer."

Ordinarily, if the conclusion did not set forth so specifically the conclusion of a common law offense, and the statutory offense, part might be rejected as surplusage, but in this case, where there is not only the conclusion of a common law offense and the conclusion of a statutory offense, but also the conclusion of an indictment for a disorderly house and common law nuisance and where the defendant is called upon

to decide whether he is to answer a common law offense or a statutory offense, it becomes very material to ascertain which shall be rejected as surplusage; which is a clear indication that the indictment is subject to the objection of being double, being a charge for the common law offense of keeping a disorderly house and also of a statutory offense which is not very clearly defined.

NINTH—Error and causes for reversal 5a 17, 18, 19, 20, 21 and 22, may be considered together. The indictment charges that, "Lewis Huhn, Joseph Moore, Charles Huhn, John Clancy and Pope McCarthy, etc., wilfully, and unlawfully **DID KEEP AND MAINTAIN**, a certain **COMMON, ILL-GOVERNED** and **DISORDERLY HOUSE**, situated on the easterly side of Second Avenue, between Brighton Avenue and Matilda Terrace." This language cannot be construed to any other offense than a common law nuisance or disorderly house.

The indictment concludes that among other things, using the form of the conclusion of an indictment for a disorderly house or a common nuisance, as follows: "to the great damage and common nuisance of all citizens of the State of New Jersey, there inhabiting, being, residing and passing, to the evil example of all others in like case offending."

This language prevents the application of Section 65

The indictment also alleges that, "Joseph Moore, Charles Huhn, John Clancy and Pope McCarthy, at unlawful times, as well in the day as in the night, then and on said other days and times, there to reside, be and remain, drinking, tippling, fighting, gambling, gaming and playing for money and other valuable thing, and misbehaving themselves unlawfully and wilfully, did with intent permit and yet does permit," and, "in said house for their own lucre and gain, then and on said other days there unlawfully and willingly did with intent cause, procure, permit, aid, abet and assist, certain persons of evil name and fame and of dis-

honest conversation to resort, frequent, and come together for the purpose, etc."

Are all the above quotations, which are the elements of a disorderly house to be rejected as surplusage for the purpose of reading into the indictment a charge to sustain an indictment under the 65th Section of the Crimes Act?

The 65th Section was designated to apply to race tracks and pool rooms, where they were betting on horse races, and the note on the side of Section 65 in the Laws of 1898, page 812, refers to the section as "Book making and Pool selling." It is not possible that the legislature ever intended that the offense of keeping a house, even though gaming were therein permitted, should receive infamous punishment provided by that statute. If that were so, every cigar store or barber shop in a country town, every house in which the owner permits a quiet game of poker would be liable to be indicted, and a penalty imposed of not less than One Thousand Dollars and one year's imprisonment in the State Prison as a minimum penalty. And the famous citation in Blackstone of Calligula, "who wrote his laws in very small characters and hung them up on very high pillars, the more effectually to ensnare the people," would be a model of justice as compared with the proceeding in this indictment.

And to read into this indictment the Criminal offense of Section 65 which reads as follows:

Book making and Pool selling.

"Any person or corporation that shall habitually or otherwise, buy or sell what is commonly known as a pool, or any interest or share in any such pool, or shall make or take what is commonly known as a book, upon the running, pacing or trotting, either within or without this State, of any horse, mare or gelding, or shall conduct the practices commonly known as bookmaking and pool selling, or either of them, or shall keep a place to which persons may resort for engaging in such practices, or either of them,

or for betting upon the event of any horse race, or other race or contest, either within or without this State, or for gambling in any form, or aiding, abetting or assisting therein, shall be guilty of a misdemeanor, and punished by a fine of not less than one thousand dollars, nor more than five thousand dollars, and by imprisonment in the State Prison for not less than one year nor more than five years; and any corporation of this state convicted of offending against this section, shall be dissolved thereby, and its corporate franchises shall thereby become forfeited and void, without any other proceedings to that end,''

would work an injustice which would violate every sense of justice.

The indictment should have stated the particular form of gambling and particular instrument or device, instead of using the general language of the 60th Section which reads as follows, ''All playing for money or other valuable thing, at cards, dice, or other game, with one or more die or dice, or with any other instrument, engine or device, in the nature of dice, having one or more figure or figures, number or numbers thereon, or at billiards, or A. B. C., or E. O. table, pool table, or other tables, or at tennis, bowls, or schuffleboard, or at faro bank, or other bank of the like kind, under any demonstration whatever; and all cock-fightings shall be misdemeanors,'' this language can not be used as statutory language for sustaining an indictment either as a common law disorderly house or nuisance, or under the 65th Section.

The first part of the 65th Section may define a criminal offence, but that part of the section which provides, ''or shall keep a place to which persons may resort for engaging, etc.,'' does not set forth a criminal offense.

The words ''may resort'' would apply to a person's private residence whether persons did resort there for

the purpose named or not. They would apply to a stock broker's office, they would also apply to a church fair, they would apply to all the churches of all denominations which were built by lottery, in the early part of the century, they would make the women who conduct church fairs or who hold progressive euchres in their homes for charitable purposes, liable to the penalty of at least a year in State Prison and a fine of One Thousand Dollars? The words are too indefinite upon which to frame an indictment. This part of the Statute can honestly be termed a legal pit-fall into which any unsuspecting person may stumble and suffer an infamous penalty. No short and easy high-way should be allowed by the courts to send a victim to State Prison. The ancient strictness of drawing indictments in the state has been relaxed and the courts of this state have gone to the extreme limit of sustaining indictments that would scarcely stand the test of a declaration on demurrer in a civil action. It is far better to maintain the ancient strictness than to prepare pit-falls for the unwary.

The legislature never intended that indictments should not be drawn with all the ancient strictness, and in Section 31, it permits the quashing of indictments for mis-writing, mis-spelling and false or improper English when taken advantage of at the proper time, and judgment may be reversed under proper circumstances, and only provides in Section 32 that it may be amended for a misnomer, and in Section 34 provides specifically that certain amendments may be made, and is confined to those mentioned in the section. In no place does it provide for the curing of the defects that are apparent in this indictment.

TENTH—Because it appears under error and causes for reversal ~~22~~, on page 29 of printed case, that Juror 5 was challenged by Moore and excused against the objection of defendant Huhn, and because Juror McChesney was challenged by defendant Huhn and excused against objection of defendant Moore. This

action practically gives the State two challenges as against the objecting defendants and deprived the defendant of a juror with whom he was satisfied. A defendant in a trial has the right to have any juror who is called in the case and he cannot be excused on the objection of a co-defendant, but can only be excused on objection by the prosecution or for some cause provided by statute. There is no statute or practice which permits a co-defendant to deprive another co-defendant of a juror with whom he is satisfied.

II.

WE WILL NEXT CONSIDER THE OBJECTIONS TO THE EVIDENCE.

Under this head we can consider the errors and cause for reversal No. ~~3~~, ~~4~~, ~~5~~, ~~30~~, ~~31~~, ~~33~~, ~~35~~ and ~~37~~. 23, 24, 25, 26, 27, 30, 31, 32

No. 29 ~~28~~ is the first appearing on page 30 of the printed case where the court refused to strike out the question "You plead guilty Mr. Clancy, in your part, in this, this morning."

The fact that Mr. Clancy plead guilty when jointly indicted with the defendants was not proper evidence to be submitted to the jury in determining the guilt or innocence of the defendants jointly indicted. This error was prejudicial to the defendants and the conviction should be reversed because of the admission of this evidence.

Second. Under error and cause for reversal ~~35~~ 30 on page 41 of the printed case where the defendant Clancy was cross-examined the court interferred with the cross-examination as set forth in the specification of error. Clancy testified page 19 as follows: Q. Who was conducting the crap table if you know, Mr. Clancy? A. I was in another room off the crap table. I wasn't in there; I was in on the wheel. I wasn't taking care of the other game. Q. Who did you see in charge of the crap table? A. I saw colored boys, and saw Lew and Joe and all of them at the table at the different

times; seen colored fellows in there with sticks in their hand. This answer is not **RESPONSIVE**, and simply says he saw them at the table.

On page 32, line 1, the following testimony is given. Q. But who was behind the table actually cutting the kitty? A. Well, I am telling you I seen Joe and Lew and two or three colored men.

THE COURT—Who were Lew and Joe?

Q. These two defendants?

A. Yes, sir.

(BY THE COURT.)

Q. Where were they?

A. Well, they used to be behind the crap table and roulette table.

BY MR. STOKES—

Q. How often have you seen them during July and August?

A. Only two or three times, because I never used to be in there much. I was in the other room.

The court will observe that in answer to the first question the answer was cut off by the question by the court before it was finished. Q. Who were Lew and Joe? That the witness was only there two or three times. This will conflict with his other testimony.

On page 33 the following question and answer was given.

Q. And what particular business did Lewis Huhn have there and what particular business did Joseph Moore have there if any? A. I don't know. They were behind the table once in a while. Q. Which tables, we want you to designate them? A. The crap tables and klondike tables, that was all. Q. You have seen them behind both classes of tables? A. There was no body there then, it was early in the night time. We used to go over to the house together to the place on Second Avenue.

This testimony is positive.

On page 33, line 25, Q. Mr. Clancy did you ever play at the klondike and crap games. A. Yes, sir, I played at all of them. Q. Who was behind the table when you played? A. Well, two nights I played Pope was behind the table when I played. Q. Pope McCarthy? A. Yes, sir. Q. Were these men there? A. No, I didn't see them. They went out some times.

Page 33, line 5:

Q. Who did you see running this klondike?

A. This man Pope and Charlie and the other colored fellow.

Q. What did you see these two defendants do while you were there, if anything, in regard to these tables?

A. Well, Joe had the klondike table and Lew had the crap table.

Q. Having the tables, what did they do with them?

A. Shake dice, and so on.

Page 39, line 10:

Q. How many times did you see either of these defendants at these tables when anybody was playing money?

A. They were not there all the time; these colored boys.

Q. How many times were they there?

A. Two or three times, I guess. I don't know how many times.

Q. How many people were playing when you saw these people there playing with money on the table?

A. Sometimes fifteen or twenty, sometimes less.

In view of the foregoing testimony the court did manifest injury to the defendants in not permitting the question to be answered without interruption. Q. You said a little while ago that you never saw Lewis Huhn or Joe Moore gambling—only saw some colored men, Pope McCarthy and some body else? The court will readily see on examining the above testimony that the witness told several different stories. The other question. Q. Now I want to know what statement is correct, the last or the first

Didn't you understand the question I have just put to you? You have testified in the beginning to the Prosecutor that you never saw Lew Huhn or Joe Moore behind the table. That there was never anybody there, that you saw colored men and several parties behind the tables, now you say you saw them there, which is correct? The court interrupted and said, page 42, "he hasn't said that he has seen them gambling, he hasn't testified to what he saw there. He didn't attempt to characterize it.

The defendants suffered manifest injury by the Court refusing to allow the witness to be examined as to his contradictory statements.

The record shows that the gambler, John Clancy, who pleaded guilty, has not been sentenced.

3rd. On error and cause for reversal ~~30~~ 27 the witness Peterson testified, page 41 and 42. Q. What place did you visit. A. Visited gambling rooms of the defendants on Second Avenue.

In the rest of his testimony he clearly shows that Charles Huhn was in charge of the place that he, Peterson, visited. The evidence can not be applied to the place charged in the indictment and the defendants have suffered manifest injury by its admission.

4th. On page 57, line 24, the court erred and it is cause for reversal and the defendants suffered manifest injury by the refusal of the court to permit the question to Walter Hill. Q. You do not expect to go to State's Prison?

This was a perfectly proper question in order to find out what promises had been made to the witness by the prosecution. 32

5th. Under the ~~37~~ error and cause for reversal the court erred in admitting the paraphernalia in evidence because there was no evidence connecting the paraphernalia with the place described in the indictment or connecting the paraphernalia with Joseph Moore or Louis Huhn.

The only evidence is that of Jacob Rue on page 71,

line 3, in which says he made a raid at Long Branch and that he found paraphernalia there, and who says on page 80 in reply to the question, Is that the same paraphernalia that was taken from the house on Second Avenue, Long Branch? A. Yes, sir, apparently. And Elwood Minugh, who does not identify the place. This evidence is not sufficient to justify admitting the paraphernalia in evidence against the objection of the defendants and exception thereto.

III.

MOTION FOR DIRECTION AND DISMISSAL.

Under this head may be considered errors and causes for reversal ~~8~~, ~~10~~, ~~24~~, ~~28~~, ~~29~~. 33, 34, 35, 36, 37, 37

For the reason set forth in the motion, pages 75 and 76, of the printed case, as follows:

"First. I move at this time to direct a verdict for the defendants in this case. There has been no proof that either Lewis Huhn or Joseph Moore were conducting this place. In fact, the proof of both the employer, Clancy, who was upon the witness stand, and the detective, is that Charles Huhn was the person who kept and conducted this place, that the detective said that Charlie Huhn was the man that told him whether they would or would not open the game; that Charlie Huhn was a partner with him at a table in one game, and that he transacted all business that he had with Charlie Huhn, but merely saw the defendants about the place on several occasions. His testimony was conflicting upon that point, even. It was not direct and positive as to what he saw them do—conflicting both on direct examination and cross-examination and under the examination of your Honor."

That the testimony of Clancy is so contradictory as to make it entirely worthless, but in no place does he directly say these defendants had any connection with the place, on the contrary he says, page 33, "He does not know what particular business Joseph Moore or

Lewis Huhn had there," and when asked if "he had seen them behind both classes of tables," said, "There was no one there then. It was early in the night time. We used to go over to the house together, to this place on Second Avenue." and Q. This place that you have referred to, where was it located? A. At West End and Second.

And the only reference in the testimony of Detective Peterson and the other witnesses, is to a place on Second Avenue.

Therefor all the testimony relating to the defendants, Lewis Huhn and Joseph Moore, does not relate to the place charged in the indictment and does not prove the charge in the indictment.

Second. The prosecutor did not sustain his opening, that he would prove that the defendants, were engaged in the gambling business and had no other occupation. There was no proof adduced before the jury. The prosecutor made it part of the case. While it may not have been a necessary part, it would have been material, and once having opened it to the jury it was a necessary part of his case to prove, and failure to prove it, is fatal. The court should hold the prosecutor strictly to proof of what he declares as part of his case. It would in a civil suit and should be more strict in a criminal case.

IV.

Under this head we will consider errors and causes for reversal ~~#39~~ and ~~#41~~.

In Number 40, on page 75, the Prosecutor made the statement to the jury that Charlie Huhn, the brother of Lewis Huhn, is made the scape-goat, to which exception is taken. This statement was not justified, in view of the fact that all the testimony relating to Charlie Huhn was given by the state's witness and showed conclusively that he had charge of, was the manager and the owner of, the business therein conducted. Such statement could only be made with a

view of predjudicing the jury, and being without warrant, the defendants suffered injury when the court did not correct it and for that reason there should be a reversal. The Prosecutor further said, "And he told you that they, (the defendants) got some of the proceeds thereof." This statement is objected to and exceptions found on page 78 of record. There is no evidence to warrant this statement to the jury as applying to either or both defendants. If it was allowed to stand without correction by the court, the defendants suffered manifest injury and there should be a reversal for that reason. Wherever statements are made by counsel in summing up, which are not warranted by the testimony, it is cause for reversal.

V.

Under the fifth head, exceptions to the charge of the court, errors and causes for reversal, ~~#2~~, ~~#3~~, ~~#4~~, ~~#5~~, ~~#6~~, 40, 41, 42, 43, 44, 47 and 48 will be considered. Under Numbers ~~#2~~, ~~#3~~ and ~~#4~~ might be considered together. The court, in its charge said, "It is not essential for you to find everything in it established just as it is alleged," and then proceeds to make a statement of what the essential charge in the indictment is and the essential fact to be determined, and says the essential charge and the essential fact to be considered is "whether these defendants, or either of them, kept a place where people resorted for the purpose of gambling in any form as specified in this indictment, namely, with dice, tables, etc." There is no such language in the indictment charging that either of the defendants kept a place where people resorted for gambling in any form. In the first part of the charge, page 79, line 15 and 16, the learned Judge said, "that it must be proved that the defendants or either of them **KEPT** a place." Later on page 79, line 30, he says, "you must weigh the evidence to learn, etc.," whether or not these defendants or either of them took any part in **CONDUCTING** this place, and later on, page 80, line 4, that "there is no

40, 41, 42

distinction between principal and accomplice, or as to any person who has aided or abetted in the **RUNNING** of the place, that this is an indictment for misdemeanor, and under our law any person who aided, assisted or helped in any way in committing the act complained of, are principals,'' and later, ''If you find the evidence to warrant you in reaching the conclusion that one or more of these defendants were **SIMPLY EMPLOYED** in this establishment, and that while so **EMPLOYED** they **ATTENDED** the tables at which gambling was being conducted, they would be guilty and would be guilty as principals in the violation of the law. The crime charged in this case being a misdemeanor.''

Section 65 provides, ''That any person, etc., who shall habitually or otherwise, etc., keep a place to which persons may resort, etc., or any person aiding, abetting or assisting therein, shall be guilty of a misdemeanor.'' The statute especially says ''persons aiding, abetting and assisting,'' and unless they are charged in the indictment as persons who aided, abetted and assisted, they cannot, under the statute be convicted as a person who keeps a place to which persons may resort for gambling in any form. They must be charged in the indictment as aiding, abetting or assisting.

The indictment does not warrant the language used by the court in charging. The indictment is for keeping a disorderly house in which the essential charge in the indictment is that, ''the defendants did wilfully and unlawfully keep and maintain, a certain common, ill-governed, and disorderly house, situated on the easterly side of Second Avenue, etc.'' The court said, ''Gambling, as defined by the **SECTIONS** of the Crimes Act, under which this indictment is framed, and as specified and alleged in the indictment, is gambling with dice, at tables of the kind specified in the indictment, or with any other instrument or instruments in the nature of dice or tables for money or other valuable things.'' This is too broad, and also

clearly indicates that the double pleading in the indictment is in the mind of the court. The court says, "Gambling, as defined by the **SECTIONS** of the Crimes Act under which this indictment is framed," thus clearly indicating in the Court's mind that the indictment was framed under more than one section of the Crimes Act, and clearly indicating that the court considered that the indictment was drawn under more than one section. There is no warrant for the above language used by the court on page 76.

The court again says that, "If you find that either of these defendants, or either of them, took any part in conducting that establishment where such gaming was going on, it will be your duty to find them guilty of the offence alleged in the indictment, namely, of conducting an establishment where gaming was being conducted in violation of the statute of this State." Under the indictment, this charge should not be sustained.

And on page 83, line 14, the court again says, "If you reach the conclusion that the defendants participated in the management of that place, and there conducted a gambling place, etc., then, of course, your duty would be to bring in a verdict of guilty against them." This is still another construction and is erroneous.

Secondly—Under Number ~~46~~ 44, the court erred and it is cause for reversal, "And it is immaterial, gentlemen, for the purpose of the consideration of the case, who was the owner and who was the lessee, absolutely immaterial who it was." In a case of this kind where a person is charged as the court construes the language of the indictment, it is important to know who the principal is, and whether he has been brought to trial. and the reason why he has not been brought to trial, and in what way the other defendants were connected with him; whether he employed them, and for the court to say to the jury that it was immaterial, was to mislead them. Any evidence upon this point would have been very material.

The charge of the court as set forth in the 46 specification of causes for reversal, relating to the significance as to whether the defendants took the stand was very prejudicial to the defendants.

VI.

The punishment in this case is cruel and unusual, unconstitutional, and unwarranted by the statute.

First. Under the 49th error and cause for reversal the defendants are entitled to a reversal because the punishment is a violation of Article 1, paragraph 15, which says "excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted."

The only case I can find in this State is the case of State vs. Gedecke, 14 Vr. 86, which was a case in which death might result by the act of the defendant. In that case the court held that both fine and imprisonment in this case was not within the constitutional inhibition; but said they would meet the question when a proper case arose.

We consider this a proper case.

Gaming was not an offense at Common Law, State v. Hall 3 Vr. 158; State v. Carrich 61 Atl. Rep. 35. It has been generally regulated by ordinance in the cities of this state and the usual penalties have been fines from about $10 to $100.

Under the old act in the Rev. of 1877, it was made an indictable offense and under the general clause Sec. 192, the extreme penalty for this, and all other common law offenses, therein named, was, "not exceeding two years in State Prison hard labor or otherwise, and a fine not exceeding five hundred dollars or both."

There was no specific punishment for the offense except as above.

The making of a fine not less than One Thousand Dollars and not more than Five Thousand Dollars (if this statute is to be applied to these defendants) is not only an excessive fine but is an outrageous abuse of legislative power and opposed to the

constitutional restriction, but when to that is added the penalty of imprisonment in State Prison for a period of not less than one year nor more than five years, the legislature seemed to lose sight of the fact that the people of the state had placed a limitation on their power against cruel and unusual punishments in the constitution. If it is not cruel, it is certainly unusual.

If it is not declared to be unusual, then the word unusual might as well be stricken from the constitution.

Robbery, rape, arson, burglary, larceny! Go through the whole criminal code if you will, and find in how many cases for serious crimes, a minimum penalty is fixed. It is reserved to keeping a house to which persons may resort for the purpose of gaming in any form (if that construction be adopted) to have the most infamous punishment.

Examine the history of Criminal Law in this State and see if it is not unusual to fix penalties of not less than One Thousand Dollars and not less than one year in State Prison, particularly when the offense is mala prohibita and not mala in se.

The penalty to Section 65 is clearly a violation of the constitution and should be so declared.

Second—There is no provision in law for the sentence as imposed by the court. The sentence is "It is ordered and adjudged that each of the defendants pay a fine of One Thousand Dollars and be confined in the State Prison at Trenton for the term of one year at hard labor and from thence and until the costs of prosecution be paid." This sentence is erroneous, first, because there is no provision in the 65 sec. of the Crimes Act for sending the defendants to State Prison at **HARD LABOR**. The section reads "shall be guilty of a misdemeanor and punished by a fine not less than One Thousand Dollars, nor more than Five Thousand Dollars and by imprisonment not less than one year nor more than five years."

There is no provision for **HARD LABOR** in this pen-

alty. In the penalties prescribed by Sections 217 and 218 of the crimes act laws of 1898, page 854, it provides, "Any person found guilty of any crime which by this or any other statute is declared to be a high misdemeanor and for which no penalty is fixed in the statute, shall be punished by a fine not exceeding Two Thousand Dollars, or by imprisonment with or without **HARD LABOR**, as the court may direct, for any term not exceeding seven years or both."

Section 218. "Any person found guilty of any crime which by this, or any other statute, is declared to be a misdemeanor, shall be punished by a fine not exceeding One Thousand Dollars or by imprisonment with or without **HARD LABOR** as the court may direct for any term not exceeding three years or both."

The above sections apply to nearly all the offenses in the Criminal Act.

The language of these two sections clearly show the legislative intent, if the legislature had intended to give the court power under Section 65 to impose the additional penalty of **HARD LABOR** it would have said so; therefore, the defendants should be discharged.

Second—The court had no authority by statute to impose that part of the sentence and "from thence until the costs of prosecution are paid," the section provides the full penalty and there is no statute which provides for adding the costs to the imprisonment. The statute only provides for the collection of costs by civil proceedings.

Third—The court should have passed sentence on each separately.

Fourth—They can not each be held for the full costs. Sec. 88, 89, 90, Criminal Proceedure Law 1898, p. 899. Sec. 90 provides for confining in a county jail or Penitentiary, but not in State Prison. Sec. 93, p. 900, provides when sentence is to State Prison for payment of costs by County Collector.

Therefore the sentence is invalid and illegal and the defendants should be discharged.

I do not think that any provision in the Criminal Proceedure Act, could add anything to the penalty imposed by statute defining the offence by adding costs or otherwise, the full penalty must be set out in the act in which the offence is defined.

VII.

OBJECTION TO THE STATUTES.

Under this head will be considered error and cause for reversal ~~8~~. affecting the statutes

1st. First Section 65, laws of 1898, page 812, is a section of "An Act for the punishment of Crimes," Revision of 1898, laws of 1898, page 791.

The offence charged in Section 65 is stated therein to be a misdemeanor, while the statute is for the punishment of crimes. There is a broad distinction between crimes and misdemeanors. The very distinction made so emphatically in this case by the court in its charge, page 80, printed case. Is in point: Bouvier, under the head of Crimes, quotes Blackstone: "The word crime generally denotes an offense of a deep and atrocious dye. When an act is of an inferior degree of guilt it is called a misdemeanor."

This is the distinction for the purpose of holding all as principals. If it is a crime then the charge of the judge is erroneous.

2nd. The act is unconstitutional because it embraces within its provisions more than one object.

Section 65 is unconstitutional because it embraces more than one offense and has more than one object. If this section was passed as an act to prevent "bookmaking and pool selling," as is clearly indicated by the side note, which seems to be part of the statute, that part "gambling in any form" would be clearly without the object.

The section clearly relates to gambling in any form by selling a pool or keeping a book upon the running, trotting, pacing of horses, mares or geldings, either within or without the state, or of keeping a house to which persons may resort for the purpose of engaging in the practice of betting upon the event of any horse race or any race or contest or of taking part in the practice of book-making or pool selling. It was never intended by the legislature that any other construction should be put upon this section. If it was so intended then it is unconstitutional, as embracing more than one object. The second object attempted to be read into this section is a very dangerous one, is a trap for the unwary as I have previously pointed out in this brief. p. 14

3rd. The Section 65 is also bad because it is ambiguous.

McConville vs. Jersey City, 10 Vr. p. 42.

Dwarris on Statute *652 quotes Lord Coke and says: "It is impossible to dissent from the doctrine of Lord Coke, that acts of Parliament ought to be plainly and clearly, and not cunningly and darkly penned, especially in penal matters."

The interpretation should lean strongly to avoid absurd consequences, injustice or even great inconvenience, if the legislative meaning is to be carried out.

If this section 65 contains more than one object, it is doubtful whether the legislature so intended it. The exercise of a doubtful power will not be attributed to the legislature; therefore construction will lean against it.

The section 65 can be construed as only relating to Pool selling, Book-making and Gambling on horse races, &c.

Conjunctive sentences, describing different branches of the same offence, will be construed as conjunctive

Bishop Statutory Crimes, Sec. 8, p. 73.
Dwarris Stat., 2 Ed. 682.
Smith Stat. & Constitutional law, 732.

V.

In addition on sub-division Five on the charge of the Court, the charge is as follows: "It is a matter for you to attach such significance as you think it deserves to the fact that these defendants have not seen fit to take the stand and deny the accusations against them. They are not obliged to take the stand. They have a right to remain off the stand and if they or their counsel see fit to keep them from the stand or from testifying. You have the right to say, however, whether or not the cause made up by this State was one that required denial under oath by them to satisfy you that a reasonable doubt exists of their guilt under the proof in the State's case. You may conclude that it was not necessary for them to take the stand and deny under oath that they were guilty of the charge. It is not obligatory on them to prove their innocence. The state must prove their guilt. But on the other hand, you may conclude that considering the testimony, in the case against them, it is very significant that they did not take the stand and tell you under oath that they were not guilty of this charge."

This is almost directly in conflict with the cases cited in Hughes on Instructions to The Jury, which is the best work published on the subject and in which the author has collected diligently all the authorities, the charge of the court above set out is clearly illegal and in conflict with these authorities.

Section 222, Clem v. State, 42 Ind. 420 Com. v. Hardiman, 9 Gray (Mass.) 136 Gordon v. People, 33 New York 501 Com. v. Pease 110 Mass. 412.

"The fact that the accused does not testify in his own behalf cannot be construed as a circumstance against him and the court may so advise the jury by proper instructions. And in some jurisdictions the court should instruct, if requested, that the fact that the defendant does not testify should not be considered or construed

against him; that no persumption of guilt be indulged against him because he has not testified in his own behalf. The refusal of an instruction properly embracing this principle is reversable error. But in the absence of a request for such an instruction, there can be no ground for complaint. The court is not bound to give an instruction on its own motion, that the failure of the defendant to testify in his own behalf should not be taken as a circumstance against him." Hughes Instruction to Juries, Section 229.

Under assignment 42 the court erred, as set out in the assignment, in stating "Gambling as defined by a section of the crimes act under which this indictment is framed and as specified and alleged in the indictment is gambling with dice, crap tables of the kind specified in the indictment, or any other instrument or instruments in the nature of dice or tables for money or other valuable thing." This practically instructs the jury that the indictment is found under the 60th section and not under the 65th section. The court ruled at the opening of the trial that the indictment was found under the 65th section. The Supreme Court in its opinion says that the indictment is "for keeping a disorderly house." When the court differs in its interpretation, in its ruling and in its charge, and the Supreme Court differs again in its decision, how can these defendants or counsel be expected to say what the indictment charges. It clearly charges more than one offence and would not even stand the test of civil pleading.

In assignment of Error and cause for reversal 63, the court led the jury to believe that, "It might suspend sentence if they brought in a verdict of guilty," to the manifest injury of the defendants.

Under assignment of Error and cause for reversal, the entire charge was prejudiced to the defendants. If it is impossible to portray the manner of the court in delivering a charge, to give the Court a review and adequent knowledge of the emphasis which was

placed on certain parts of the charge, the manner of the court in delivering the charge, but the reference in the charge, page 85, to the argument of counsel in characterizing it as a specious plea does manifest injury to the defendants. If there was anything wrong in the argument of counsel the court should have corrected the counsel.

The Supreme Court erred in not deciding all the questions which were presented to it for decision. That in a criminal case if the conviction has not reversed for some one of the assignments of error or specification of the defense, the defendant is entitled to a full and fair decision on every point, or assignment of error raised and every defence specified. The necessity for this is very apparent from the examination of the opinion rendered by the Supreme Court, which says, "This Writ of Error brings up a judgment of the Monmouth Quarter Sessions convicting the complainants in error upon an indictment for keeping a dsiorderly house."

The point that I have contended for most strenuously was that you cannot tell from reading the indictment whether it was an indictment for keeping a disorderly house or for some statutory offence either on the Sixtieth Section or Sixtieth-fifth Section of the Crimes Act. The Court held that it was under the Sixtieth-fifth Section and imposed the minimum penalty under that Section. The Court further in its charge referred to the indictment as having been drawn in the statutory language of the Sixtieth Section, showing clearly that the indictment was defective. The Supreme Court says the indictment is "for keeping a disorderly house."

These defendants were not convicted by due process of law and these defendants have been deprived of the rights, immunities and privileges guaranteed by Article Fourteen of the Constitution of the United States and by the provisions of the Constitution of the State of New Jersey. If this Court should hold that the indictment was properly triable in the Quarter Sessions

in spite of the case of the State vs. Holt, 29 Vr. pg. 11; 3 Harrison 209 and the State vs. Engerman, 25 Vr. 247, then the rule of Stare Decisis has received another rude shock in this State and due process of law will be a myth.

The decisions under the Fourteenth Amendment of the Constitution of the United States on due process of law are collected in the Constitution, Rules and Manuals of the United States Senate, addition of nineteen hundred and five, page 223 to page 227. The United States Court would review the decision of this Court in this case upon the question whether the defendants have been convicted by due process of law.

If this indictment can be sustained then it will be permissible to charge in a single indictment and in a single count any number of offences and after the defendant is brought to trial the State will be permitted to select under which charge it will proceed and the constitutional requirement that the defendant shall be informed of the nature and cause of the accusation will be a nullity.

If crimes and misdemeanors have separate and distinct rules as to the punishment of accomplices, aiders or abettors, then the "Act for the punishment of crimes" is not such title as will cover misdemeanors. The Court on page 80, lines 1-20, expressly charges that it makes no difference in this case whether they were principals, accomplices, aiders or abettors. The rule as laid down by the Courts of this State is that in misdemeanors all are principals, but it has never been laid down as a rule that in crimes all are principals. Therefore, either the charge of the Court was wrong or the title of the Act is unconstitutional. The point is raised and should be met without consideration of the consequences.

I respectfully submit that the indictment should be quashed or the conviction should be set aside and a new trial granted.

THOMAS P. FAY,
Attorney and of Counsel with Defendants.

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MacCrellish & Quigley, Printers, Trenton, N. J.

New Jersey Supreme Court.

THE STATE OF NEW JERSEY,
Defendant in Error,
vs.
LOUIS HUHN AND JOSEPH R. MOORE.
Plaintiffs in Error.

WRIT OF ERROR.

(*Returnable February 20th, 1906.*)

(*Filed February 20th, 1906.*)

NEW JERSEY, *ss.*—The State of New Jersey to John E. Foster, Judge of the Court of General Sessions of the county of Monmouth. Holden at Freehold, in and for the county of Monmouth, of the Term of October, nineteen hundred and five.

[L. S.]

Because in the record and process and also in the giving of judgment upon a certain indictment against Joseph Moore and Louis Huhn, late of the city of Long Branch, in the county of Monmouth, for a misdemeanor, for keeping a disorderly house, wherein drinking, tippling, fighting, gambling, gaming and playing for money and other valuable things at and with cards, dice, tables, instruments, engines and devices, faro bank and

other banks of like kind, and misbehaving themselves unlawfully and wilfully, and wilfully did with intent permit, and yet does permit, &c.

Pro ut the said indictment and the several counts therein whereof before you they have been indicted, and are thereof convicted by a certain jury of the county, taken between the State of New Jersey and the said Joseph Moore and Louis Huhn, as it is said manifest error hath intervened to the great damage of the said Joseph Moore and Louis Huhn, as from their complaint we have received information, we being willing in their behalf to correct the error in due manner in any there shall be, and that speedy justice be done to them, the said Joseph Moore and Louis Huhn, command you that if judgment be thereon given, then that you distinctly and openly send under your seal the record and proceedings aforesaid with all things touching the same to our Supreme Court of Judicature of the State of New Jersey, to be held at Trenton, on the twentieth day of February, A. D. 1906, and this writ, that the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error what of right and according to the laws and customs of New Jersey ought to be done.

Witness his Honor, William S. Gummere, Esq., our Chief Justice of our said Supreme Court of Judicature, at Trenton aforesaid, the twenty-seventh day of November, nineteen hundred and five.

WILLIAM RIKER, JR.,
Clerk.

THOMAS P. FAY,
Attorney.

The answer of John E. Foster, Judge of the Court of Common Pleas of the county of Monmouth, constituting the Court of General Quarter Sessions in and for the

county of Monmouth, the record and proceedings and all things touching and concerning the same hereof mentioned is within made to the Supreme Court of the State of New Jersey, within specified, at the day and place within named, I certify in the schedule annexed to this writ as I am within commanded.

JOHN E. FOSTER,
Judge
of the Monmouth Common Pleas Court, constituting the Court of General Quarter Sessions in and for the County of Monmouth.

COUNTY OF MONMOUTH, }
STATE OF NEW JERSEY, } *ss.*

Be it remembered that at a Court of Oyer and Terminer, held at Freehold, in and for the said county of Monmouth, on the first Tuesday of October, one thousand nine hundred and five, before Charles E. Hendrickson, Esq., one of the Associate Justices of the Supreme Court of Judicature of the State of New Jersey, and John E. Foster, Esq., Judge of the Inferior Court of Common Pleas and of the General Quarter Sessions in and for the said county of Monmouth, according to the form of the statute in such case made and provided by the oaths of

1. John H. Cook,
2. William O'Brien,
3. Daniel Shutts,
4. G. A. Steele,
5. Grandin V. Johnson,
6. Edward Cashion, Sr.,
7. Amos Brockelbanh,
8. Louis G. Hathaway,
9. Richard W. Herbert,
10. William C. Husle,
11. Patrick Devlin,
12. Elmer Willett,
13. John Reddington,
14. Holmes Patterson,
15. Rev. Thos. R. Taylor,
16. Walter Clayton,
17. Harry Bennett,
18. James Hayden,
19. Matthias Pease,
20. William Van Mater,
21. David E. Tantum,
22. George Height,
23. John Woolley,

Good and lawful men of said county of Monmouth, then and there duly summoned and then and there duly sworn and charged by the said Charles E. Hendrickson, Judge as aforesaid, presiding in said Court of Oyer and Terminer in and for the said county of Monmouth, to inquire in behalf of the State of New Jersey in and for said county of Monmouth.

It is presented in manner and form following, to wit:

Filed October 26th, 1905.

JOSEPH MCDERMOTT,
Clerk.

In the Court of Oyer and Terminer of Monmouth County, October Term, in the year of our Lord one thousand nine hundred and five.

MONMOUTH COUNTY, to wit:

The Grand Inquest of the State of New Jersey and for the body of the county of Monmouth upon their respective oath and affirmation, present that Louis Huhn, Joseph R. Moore, Charles Huhn, John Clancy and Pope McCarthy, all late of the city of Long Branch, in the said county of Monmouth, on the first day of July, in the year of our Lord one thousand nine hundred and five, and on divers other days and times, between that day and the day of taking this inquisition, with force and arms, at the city of Long Branch aforesaid, in the county aforesaid, and within the jurisdiction of this court, wilfully and unlawfully did keep and maintain a certain common, ill-governed and disorderly house, situate on the easterly side of Second avenue, between Brighton avenue and Matilda terrace, in the city of Long Branch aforesaid, county of Monmouth aforesaid, and in the said house, for their own lucre and gain, then and on the said other days and times, there unlawfully and willingly did with intent cause, procure, permit, aid, abet and assist certain persons of evil name and fame, and of dishonest conversation, to resort, frequent

and come together, for the purpose of engaging in gambling, gaming and playing for money and other valuable thing at and with cards, dice, E. O. table and other tables, instruments, engines and devices, faro bank and other bank of like kind, and the said certain persons, in the said house of them, the said Louis Huhn, Joseph R. Moore, Charles Huhn, John Clancy and Pope McCarthy, at unlawful times, as well in the night as in the day, then and on the said other days and times, there to resort, be and remain, drinking, tippling, fighting, gambling, gaming and playing for money and other valuable thing at and with cards, dice, tables, instruments, engines and devices, faro bank and other bank of like kind, and misbehaving themselves, unlawfully and wilfully did with intent permit, and yet does permit, to the great damage and common nuisance of all citizens of the State of New Jersey, there inhabiting, being, residing and passing, to the evil example of all others in like case offending, contrary to the form of the statute in such cases made and provided and against the peace of this State, the government and dignity of the same.

H. M. NEVIUS,
Prosecutor of the Pleas.

A true bill.

JOHN H. COOK, *Foreman.*

Filed October 26th, 1905.

JOSEPH MCDERMOTT, *Clerk.*

And afterwards, to wit: On the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and five, at a session of a court of the General Quarter Sessions aforesaid, being as yet of the term of October aforesaid, before the Honorable John E. Foster, Esq., judge of the Court of General Quarter Sessions, in and for the county of Monmouth, it is by the Court ordered that all the indictments triable by the Court of General Quarter Sessions be filed and retained in the Court of General Quarter Sessions for trial or

other disposition, whereupon on the second day of November, in the year of our Lord one thousand nine hundred and five, at a Court of General Quarter Sessions at Freehold aforesaid, in the county of Monmouth aforesaid, as yet of the term of October aforesaid, before John E. Foster, Esq., judge of the Court of Quarter Sessions aforesaid, here cometh the said Louis Huhn and Joseph R. Moore, who being brought to the bar here in their proper person by Obediah C. Bogardus, Esq., sheriff of the county of Monmouth aforesaid, to whom they are also here committed, and having heard the indictment read and further being committed of and concerning the premises in the said indictment above specified, and charged them how they will acquit themselves thereof, say they are not guilty thereof, and therefor and thereof for good and evil they put themselves upon the country, and Henry M. Nevius, Esq., prosecutor of the pleas of said county of Monmouth, who prosecutes for the State of New Jersey, doth the like. It is on this twenty-seventh day of November, in the year of our Lord one thousand nine hundred and five, on motion of Henry M. Nevius, prosecutor of the pleas, ordered that a severance be granted as to Lewis Huhn and Joseph R. Moore, therefor let the said indictment be continued until the twenty-seventh day of November, in the year of our Lord one thousand nine hundred and five, and a jury thereupon come here before the Judge aforesaid, at Freehold aforesaid, in the county of Monmouth aforesaid, on the twenty-seventh day of November, in the year of our Lord one thousand nine hundred and five, as yet of the term of October aforesaid, twelve good and lawful men, each of whom shall be a citizen of this State and resident within the county of Monmouth aforesaid, above the age of twenty-one years and under the age of sixty-five years, by whom the truth of the matter may be better known and who are not of kin to the said Louis Huhn and Joseph R. Moore, to recognize upon their oaths whether

the said Louis Huhn and Joseph R. Moore be guilty of the misdemeanor in the indictment aforesaid specified or not guilty, because as well the said Henry M. Nevius, prosecutor of the pleas for the said county of Monmouth aforesaid, who prosecutes for the State of New Jersey aforesaid, in that behalf, as the said Louis Huhn and Joseph R. Moore have put themselves upon the said jury and the same day is given to the parties aforesaid at the same place, at which time, that is to say, on the twenty-seventh day of November, in the year of our Lord one thousand nine hundred and five, being as yet of the term of October aforesaid, before the Judges aforesaid, here cometh as well the said Henry M. Nevius, prosecutor of the pleas aforesaid, who prosecutes as aforesaid, as the said Louis Huhn and Joseph R. Moore being brought to the bar here are in their proper persons by the sheriff of the county aforesaid, and the jurors of the said jury by the sheriff of the county aforesaid for this purpose are panelled and returned, that is to say:

1. Sidney Beers,
2. Jonathan White,
3. William Brower,
4. Garrett W. Buck,
5 Amos Hulse,
6. Charles A. Ely,
7. David M. Johnson,
8. John Daley,
9. James M. VanBrackle,
10. James Bedle,
11. William H. Cowart,
12. Richard B. Errickson,

being called, come, who, being chosen, tried and sworn to speak the truth of and concerning the premises, and thereupon the trial of the said issue commenced before the said Court and jury, and the evidence being closed and counsel heard, the said issue, after a charge from the said Court, was submitted to the said jury, and the said jury in charge of the officers of said court duly sworn for that purpose were taken to a private room to consider on their verdict, and afterwards, on the same day aforesaid, at Freehold aforesaid, the said jury returned into and before the said Court, in charge of said officers sworn as aforesaid to keep them in charge, and then and there, in the presence of the said Henry M.

Nevius, Prosecutor of the Pleas, and of the said Louis Huhn and Joseph R. Moore, do say, on being asked in due form, that they have agreed on their verdict, and by their foreman further say that they find the defendants both guilty as they stand charged in the indictment, whereupon it is ordered that the verdict and proceedings be recorded, and thereupon the said Louis Huhn and Joseph R. Moore, on the fourth day of December, in the year of our Lord one thousand nine hundred and five, being produced in and before the Court at Freehold aforesaid, it is ordered and adjudged by the Court that each of the defendants pay a fine of one thousand dollars and be confined in the State Prison at Trenton for the term of one year at hard labor, and from thence and until the costs of prosecution be paid.

Judgment signed this fourth day of December A. D. nineteen hundred and five.

JOHN E. FOSTER,
Presiding Judge of the Court of Common Pleas, constituting the Court of General Quarter Sessions in and for the county of Monmouth.

COUNTY OF MONMOUTH. }
STATE OF NEW JERSEY, } *ss.*

I, Joseph McDermott, Clerk of said county, do hereby certify that the foregoing "Transcript of Proceedings" is a true and correct copy thereof, as the same remains on file in my office.

In Witness Whereof, I have hereunto set my hand and seal this twentieth day of December,

[L. S.] A. D. nineteen hundred and five.

JOSEPH MCDERMOTT,
Clerk.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY,
Defendant in Error,
v.
LEWIS HUHN AND JOSEPH R. MOORE,
Plaintiffs in Error.

I, the undersigned, presiding Judge of the above-entitled court, hereby certify that the foregoing matter is the entire record of the proceedings had upon the trial of the cause wherein Louis Huhn and Joseph R. Moore were defendants, upon a certain indictment for a misdemeanor for keeping a disorderly house, where gaming was carried on, which said indictment was tried in the court aforesaid on the twenty-seventh day of November last past.

Dated this twentieth day of February, nineteen hundred and six.

JOHN E. FOSTER,
Presiding Judge.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY
v.
JOSEPH R. MOORE AND LOUIS HUHN,
Defendants.
On Indictment for Misdemeanor.

ASSIGNMENTS OF ERROR.

(*Filed May 25th, 1906.*)

Afterwards, that is to say, on the twentieth day of February, in the year nineteen hundred and six, in the Supreme Court, come the said Joseph R. Moore and Louis Huhn, by Thomas P. Fay, their attorney, and say

that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and in the record, and also in the giving of the verdict, conviction and judgment aforesaid, there is manifest error, and further that on the trial below, and by the judgment of the Monmouth County Quarter Sessions Court, they suffered manifest error, wrong and injury. And they humbly assign error and also specify the causes in the record of the proceedings had upon said trial returned with the writ of error upon which they rely for reversal according to the statute in such case made and provided.

(1) That said indictment and the matter therein are not sufficient in law to convict the said Joseph R. Moore and Louis Huhn, or either of them, of the offense declared in said indictment, or of any other offense in law.

(2) That the Monmouth Quarter Sessions refused to quash said indictment when thereunto moved by counsel for the said Joseph R. Moore and Louis Huhn, whereas, for the reasons assigned to the said Court, by counsel appearing on the record of the said trial or some one of them said court should have quashed said indictment.

(3) That upon the trial illegal evidence offered by the State was admitted against objection and exception on the part of the said Joseph R. Moore and Louis Huhn and each of them, as more particularly appears in the several bills of exceptions sealed upon the admission of evidence.

(4) Upon said trial legal evidence offered on the part of the said Joseph R. Moore and Louis Huhn and each of them was excluded as more particularly appears in the several bills of exceptions sealed upon the exclusion of evidence.

(5) Illegal evidence admitted on said trial was allowed to stand against motion on behalf of the said Joseph R. Moore and Louis Huhn and each of them to strike out the same as more particularly appears in the

several bills of exceptions sealed upon refusal to strike out evidence.

(6) The said Court of Quarter Sessions refused to quash the indictment against the said defendants or either of them, although thereunto moved so to do by the said defendants and by each of them; the ground for quashing the indictment was that the indictment was drawn under the common law of keeping a disorderly house, or more technically, for a nuisance; the indictment also charges the offense defined in the sixtieth section of the Crimes Act. It is impossible to tell for which offense a conviction will be asked by reading the indictment. The indictment is bad for duplicity, for uncertainty, that no crime was charged thereby, and that the defendants were not notified of the crime they were charged with; the indictment did not show the names of the persons who came together for the purpose alleged in the indictment; that the indictment does not specify what particular form of gambling was permitted, who engaged in it, when it was permitted, does not specify the dates, but uses general language, naming all of the common law elements of a disorderly house, together with the statutory prohibitions of the sixtieth section.

(7) Because the Court before whom the indictment was tried held that the indictment was drawn under the sixty-fifth section, but the indictment does not specify which particular form of gambling took place in the house, and should set forth the particular gambling instrument or device which was used. The defendants were not notified of the crime of which they were charged. There is no evidence in the case proving the use of any of the instruments set forth in the indictment.

(8) That the Court before whom said indictment was tried refused to quash the indictment when it was alleged by the prosecutor that the indictment was drawn under the sixty-fifth section of the Crimes Act, while the stat-

ute, among other things, says, "or shall keep a place to which persons *may* resort for engaging in such practice or either of them for betting upon the event of any horse race, or other race, or contest either within or without this State, or for gambling in any form." This part of the section, besides being bad for alleging a number of different acts in the disjunctive, to constitute a criminal offense, is also bad because it sets out that "any person who should keep a place to which persons *may* resort." The words "may resort" would apply to any person's private residence, whether persons actually did resort there for the purpose named or not. They would apply to a stock broker's office. The indictment should then specify the exact form of the charges expected to be proved, and should name each specified device, machine, act or offense expected to be proved in a separate court.

(9) Said Court of Quarter Sessions refused at the close of the testimony on the part of the State, and also at the close of the whole case, to direct the jury to acquit the said Joseph R. Moore under said indictment, although moved to do so in his behalf, and although for the reasons assigned for such motion appearing in such record of the proceeding had upon said trial or some or one of said reasons a verdict of acquittal should have been directed as to the said Joseph R. Moore.

(10) Said Court of Quarter Sessions refused at the close of the testimony on the part of the State, and also at the close of the whole case, to direct the jury to acquit the said Louis Huhn under said indictment, although moved to do so in his behalf, and although for the reasons assigned for such motion appearing in such record of the proceedings had upon said trial or some or one of said reasons a verdict of acquittal should have been directed as to the said Louis Huhn.

(11) Because the indictment is fatally defective in that, without any qualification whatsoever, it alleges that it was returned by the grand jury upon their respective oath and affirmation.

(12) Because the indictment was not properly returned to the Court of Oyer and Terminer.

(13) Because there is no order sending the indictment from the Court of Oyer and Terminer to the Court of Quarter Sessions of the county of Monmouth for trial.

(14) Because the indictment was not properly returned to any court having jurisdiction.

(15) Because the indictment was wrongfully returned to the Monmouth Quarter Sessions.

(16) Because the indictment was not returned to a court of competent jurisdiction, but was returned to the Judge of the Court of Quarter Sessions.

(17) Because Justice Hendrickson, a Justice of the Supreme Court, holding the Court of Oyer and Terminer in and for the county of Monmouth, and a member of the Court of Quarter Sessions, was not present when the indictments were handed in, and because no other Justice of the Supreme Court was present.

(18) Because the indictments were returned to Judge Foster, Court of Quarter Sessions of the county of Monmouth, the record does not show the indictments were returned in open court.

(19) Because the indictment does not show that any members of the Grand Jury who affirmed were conscientiously scrupulous of taking an oath, and the indictment does not show what members of the Grand Jury affirmed and what members of the Grand Jury found the indictment upon their oath.

(20) Because the indictment does not allege who were principals and who were accessories or who were principals and who aided, abetted or assisted.

(21) Because there was no severence of those tried under the indictment and those not tried.

(22) Because the indictment includes both with the common law conclusion of an indictment "against the peace of this State, the government and dignity of the same," and also in the form of an indictment for a com-

mon law nuisance, "to the great damage and common nuisance of all of the citizens of the State of New Jersey, and inhabiting, being and passing to the evil example of all others in like case offending," and also contrary to the form of the statute in such case made and provided, thus confusing the defendant as to what charge he will be called upon to answer.

(23) Because where gambling is the sole offence proved in keeping a disorderly house the indictment cannot be sustained.

(24) Because the Court compelled the defendants to raise all of his objections at once to the whole indictment, and refused to decide them separately.

(25) Because the location of the place or house is not sufficiently set out or described in the indictment, nor is the location proved by the evidence with sufficient certainty.

(26) Because neither time, place or facts are alleged with certainty.

(27) Because there is no proof that the defendants were the keepers of a disorderly house.

(28) Because there is no evidence that the defendants aided, abetted and assisted in keeping a disorderly house.

(29) Because the defendant, John Clancy, was permitted to plead guilty and act as witness without a severance.

(30) Because the detective witness, Peterson, in his testimony, does not locate the place charged in the indictment as the place that he visited.

(31) Because the evidence of the witness John Clancy and the witness Peterson are contradictory.

(32) Because juror number five was challenged by Moore and excused against the objection of the other defendant, Huhn; because juror McChesney was challenged by Louis Huhn and excused against the objection of the defendant Joseph Moore, who was content with said juror.

(33) That the said Court when the indictment was tried refused to strike out the question, "You plead guilty, Mr. Clancy, in your part in this this morning?"

(34) Because the Court refused to direct a verdict when it appeared from the testimony of Clancy that he and Charlie Huhn were running the place, and that he was engaged in gambling in the place, and that it was during July and August, and the witness does not swear that Louis Huhn or Joseph Moore were there at any other time than the time when he and Charlie Huhn were running the place.

(35) Because the Court before whom the cause was tried erred while the witness was under cross-examination, and was asked, "*Q.* You said a little while ago you never saw Louis Huhn and Joseph Moore gambling, only saw some colored men, Pope McCarthy and somebody else?" and the Court said, "He has not testified to that; he testified directly to me." The Court also erred when he said, "He hasn't said that he has seen them gambling; he testified to what he saw, and he didn't attempt to characterize it."

(36) Because there is no evidence designating the place charged in the indictment. On page 22 John Clancy was asked, "*Q.* This place you referred to, where was it located? *A.* At West End and Second," and when Sypherd P. Peterson was asked to locate the place he visited, stated that he visited the gambling rooms of the defendants on Second avenue, and Bee Odley, on page 74, in answer to the leading question, "Have you ever been on the place on Second avenue?" answered, "Once." And John Clancy testified, in answer to the leading question, "During the month of July and August, what was going on in this building in the easterly side of Second avenue?" answered, "There was gambling, Klondike and roulette;" and in connection with Charlie Huhn he said he had been in a place on the easterly side of Second avenue between Brighton avenue and Matilda Terrace, but his testimony related to doing

business there with Charlie Huhn. This is all his testimony which designated any house.

(37) Because the Court erred in admitting the paraphernalia in evidence, because there was no evidence connecting the paraphernalia with the place described in the indictment or connecting the paraphernalia with Joseph Moore or Louis Huhn.

(38) Because the Court erred in refusing to direct a verdict on the grounds that the evidence did not sustain the indictment.

(39) Because the Court erred in refusing to direct a verdict on the grounds that the prosecution had not sustained what was said in the opening of the case, that he would prove that the defendants were engaged in the gambling business, and had no other occupation, when no such proof was adduced.

(40) Because the Prosecutor, in summing up, made a statement to the jury that Charlie Huhn was a brother of Louis Huhn, and was made the scapegoat, while there is no evidence relative to Charlie Huhn that was not given by the State's witness, and there was no warrant for such statement except to prejudice the jury.

(41) And also because the Prosecutor made the statement "and he told you that they, the defendants, got some of the proceeds thereof," while there is no evidence that either of the defendants got any of the proceeds.

(42) Because the Court erred in its charge to the jury by saying, "Under the form of the indictment, gentlemen, that is the words and language employed in it, notwithstanding anything that you have heard; it is not essential for you to find everything in it established just as it is alleged," to the prejudice of the defendants.

(43) The Court erred in its charge to the jury in instructing the jury as follows: "I might state at the outset, in order to clear up any doubt that may be in your minds from any reference to the Court's position on the law applicable to this case, in case you come to the con-

clusion that this was a place where people resorted to gamble in any form, as to any distinction you may make or attempt to make in your minds between principal and accomplice, or as to any person who is stated to have aided and abetted in the running of the place, that this is an indictment for a misdemeanor, and under our law any person who aided, assisted or helped in any way in committing the act complained of are principals. What I mean by that is this—and I do not want you to have any misunderstanding about it—if you find the evidence to warrant you in reaching the conclusion that one or both these defendants are simply employes in this establishment, and that while so employed they attended the table or tables at which some gambling game was being conducted, they would be guilty as principals in the violation of the law, the crime charged in this case being a misdemeanor. I do not want to leave any doubt or any question in your minds on that point," to the prejudice of the defendants.

(44) The Court erred in its charge to the jury in instructing the jury as follows: "Gambling, as defined by the sections of the Crimes Act under which this indictment is framed, and as specified and alleged in the indictment, is gambling with dice, at tables of the kind specified in the indictment, or with any other instrument or instruments in the nature of dice or tables, for money or other valuable thing," to the prejudice of the defendants.

(45) The Court erred in its charge to the jury in instructing the jury as follows: "If you find that at this place on Second avenue, between the dates I have mentioned, gambling was being carried on there for money or other valuable thing—that is, that some game with dice was being played for the purpose of gaining money or other valuable thing—then I tell you that that was the form of gambling alleged to have been conducted by these defendants in that place," to the prejudice of the defendants.

(46) The Court erred in its charge to the jury in instructing the jury as follows: "It is immaterial, gentlemen, for the purpose of your consideration of this case, who was the owner of the place, or who was the lessee—absolutely immaterial who it was. The question is, what did these defendants do, if anything. It is also a matter for you to attach such significance as you think it deserves to the fact that these defendants have not seen fit to take the stand and deny the accusation against them. They have a right to remain off the stand if they or their counsel see fit to keep them from the stand or from testifying. You have a right to say, however, whether or not the case made out by the State was one that required denial under oath by them to satisfy you that a reasonable doubt existed of their guilt under the proof in the State's case. You may conclude that it was not necessary for them to take the stand and deny under oath that they were guilty of this charge. It is not obligatory on them to prove their innocence, but on the other hand, you may conclude that, considering the testimony in the case against them, it is very significant that they did not take the stand and tell you under oath that they are not guilty of this charge," to the prejudice of the defendants.

(47) The Court erred in its charge to the jury in instructing the jury as follows: "The Court will put its own construction upon the statute in case it has to, when you bring in your verdict, no matter what the penalty may be, whether it be a suspension of sentence or imposition of that penalty," to the prejudice of the defendants.

(48) Because the Court erred in its charge to the jury because the entire charge was prejudicial to the defendants.

(49) Because the punishment inflicted is a cruel and unusual punishment in violation of the constitution of the United States and of the constitution of the State of New Jersey.

THOMAS P. FAY,
Atty. for Defendants.

MONMOUTH COUNTY QUARTER SESSIONS.

THE STATE OF NEW JERSEY
v.
JOSEPH R. MOORE AND LOUIS HUHN,
Defendants.

On Indictment for Misdemeanor.

TESTIMONY.

(*Filed February 21, 1906.*)

FREEHOLD, N. J., November 27th, 1905.

Before Hon. John E. Foster, Judge, and a jury.

Appearances—For the State, A. J. C. Stokes, Esq., Assistant Prosecutor; for defendant Moore, Thomas P. Fay, Esq.; for defendant Huhn, E. C. Forman, Esq.

Mr. Fay—I wish to withdraw the plea of not guilty for the purpose of making some motions.

The indictment in this case is found in the Oyer and Terminer of Monmouth county in the October term, 1905, against Louis Huhn, Joseph R. Moore, Charles Huhn, John Clancy and Pope McCarthy.

The Court—Are you representing all these defendants?

Mr. Fay—No, I am just going to state; I represent Mr. Joseph R. Moore, and Mr. Forman represents Mr. Louis Huhn. The indictment is found in the Oyer and Terminer, and there is no order signed by the Judge of the Court of Oyer and Terminer sending it down to the Court of Quarter Sessions of Monmouth county for trial. I would, therefore, object to trial on that ground. Will the Court rule on these objections as I make them?

The Court—No; go ahead, and I will rule on them all when you conclude them.

Mr. Fay—I would like to prove that by the clerk.

Edward Cashion, sworn.

Examined by Mr. Fay:

Q. Mr. Cashion, is there any order signed by the Judge of the Court of Oyer and Terminer sending these indictments down to the Court of Quarter Sessions for trial, signed by a judge?

A. No order signed by any judge.

By Mr. Stokes:

Q. Mr. Cashion, to what court was this indictment returned?

A. The Monmouth Quarter Sessions.

Q. It was returned to the Monmouth Quarter Sessions?

A. Yes, sir.

Q. On what day?

A. October 26th, 1905.

By Mr. Forman:

Q. I understand you to say this was returned to the Monmouth Quarter Sessions; it was not returned to the Monmouth Oyer and Terminer?

A. No; it was returned to the Judge of the Court of Quarter Sessions.

By the Court:

Q. Does the record show that fact?

A. Yes, sir.

Q. Under what date?

A. October 26th, 1905.

Q. What page?

A. 340.

By Mr. Stokes:

Q. Of your minutes?

A. Yes, sir; filed in the court on that day.

By Mr. Fay:

Q. Was Justice Hendrickson present when these indictments were returned?

A. No, sir.

Q. They were returned to Judge Foster, Court of Quarter Sessions of the county of Monmouth?

A. Yes, sir.

Mr. Fay—The indictment charges that the grand inquest of the State of New Jersey, in and for the body of the county of Monmouth, upon their respective oaths and affirmations, do present Louis Huhn, Joseph R. Moore, Charles Huhn, John Clancy and Pope McCarthy. There is nothing in the indictment which would show that any members of the grand jury who affirmed were conscientiously scrupulous of taking an oath; and the indictment does not show what members of the grand jury affirmed and what members found the indictment upon their oath. And this point is brought, as I have received some information that at least one of the names might have been in the indictment that was drawn before it was presented to the grand jury for signature by the foreman of the grand jury, that it was not actually passed upon and an indictment found by the grand jury. Of course, the ruling of Judge Gummere is that you cannot swear a grand juror to ascertain what took place within the jury room, but I know that perhaps an error might have been committed. My information upon this point is rather informal. That is the second objection to the indictment.

The third objection is that the indictment in this case is drawn presumably as a common law indictment for keeping a disorderly house. It charges that the defendants (naming them) "did keep and maintain a certain common, ill-governed and disorderly house, situate on the easterly side of Second avenue, between Brighton avenue and Matilda terrace, in the city of Long Branch aforesaid, in the county of Monmouth aforesaid; and

in the said house, for their own lucre and gain, then and on the said other days and times, there unlawfully and willingly did, with intent, cause, procure, permit, aid, abet and assist certain persons of evil name and fame and of dishonest conversation to resort, frequent and come together for the purpose of engaging in gambling, gaming and playing for money and other valuable thing, at and with cards, dice, E. O. table and other tables, instruments, engines and devices, faro bank and other bank of like kind; and the said certain persons in the said house of them, the said Louis Huhn, Joseph R. Moore, Charles Huhn, John Clancy and Pope McCarthy, at unlawful times, as well in the night as in the day, then and on the said other days and times to resort, be and remain, drinking, tippling, fighting, gambling, gaming and playing for money and other valuable thing, at and with cards, dice, tables, instruments, engines and devices, faro bank and other bank of like kind, and misbehaving themselves, unlawfully did with intent permit and yet does permit, to the great damage and common nuisance of all citizens of the State of New Jersey there inhabiting, being, residing and passing, to the evil example of all others in like case offending, contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same."

The particular vice in this indictment to which I desire to call the attention of the Court is that it charges a disorderly house in the words of the statute prohibiting playing for money and other valuable things with cards, dice, &c., as set forth in the indictment. Gambling of itself is not a criminal offence unless it is so made by statute. There is no such offence as keeping a disorderly house by having simply gaming therein. The indictment for disorderly houses was drawn under the common law, and if the mere fact of gaming at common law was not an offence without the statute, gambling in itself could not constitute a disorderly house.

The first statute passed in this State, I believe, was passed in 1797. It is in Patterson's Laws. Prior to that time it was not an offence to gamble in the State of New Jersey, and it was not a common law offence. The common law offence of keeping a disorderly house, the vice of it was that something was carried on there which was a crime per se, or a nuisance to the entire neighborhood and community at large. It was generally a crime in itself, and something against the moral law. It was not something which was merely prohibited by statute. Consequently, an indictment for keeping a disorderly house, where the mere charge is a single offence of gaming, cannot go under a common law indictment.

Now, there is some authority for that in this State. Gambling is not an offence unless it is provided for by statute. The Crimes Act of 1898, in the 60th section, provides for the offence of playing for money or other valuable thing at cards, dice, &c., as set forth in the indictment. But the indictment in this case is the common law offence of maintaining a common nuisance. There is no statutory offence defined by statute for keeping a disorderly house. There is nothing prohibitive in the statute of this State, in the criminal law, which defines what shall be a disorderly house. The Court, in finding out what the law is or instructing the jury, must go back to the common law offence of nuisance, of keeping a disorderly house, one of the crimes which comes under the head of nuisance, which is technically called under the late law keeping a disorderly house, and which must be by the common law. Now, if there is no law, there cannot be such an indictment. In the case of The State *v.* Hall, 3 Vroom, 158, Chief Justice Beasley wrote the opinion of the Court, and it was sustained in the case of The State *v.* Brown, and afterwards cited with approval, that gambling itself is not an offence at common law. So that if gambling itself is not an offence at common law, there cannot be such a thing as keeping a disorderly house at common law where gaming is set forth as the only offence.

Now, we will have to go back to the common law for an interpretation. The mere fact that the statute was passed since the adoption of the common law in this State, which was about the time of the Revolution, cannot go to show that an indictment for keeping a disorderly house at that time will contain elements which our legislature subsequently make a criminal offence. Consequently, the indictment must stand on the law at the time of the adoption of the Constitution of the State of New Jersey. The offence must go back to what it was at that time, and unless the legislature makes and defines particularly the statutory offence of keeping a disorderly house, you must take your interpretation at the time the common law was adopted in New Jersey.

So the indictment is clearly fatal and defective for that reason—that they cannot, on a charge of keeping a disorderly house in the usual statutory language, set forth the various things which are usually charged in keeping a disorderly house.

This indictment contains two separate counts setting forth criminal offences. It may be that the prosecutor intends to proceed under the indictment for keeping a disorderly house at common law. It may be that he intends to proceed under the 60th section of the Crimes Act, which provides (reads): That language is set forth in the indictment where it said that they caused "to come together for the purpose of engaging in gambling, gaming and playing for money and other valuable thing," in the language of the statute, "at and with cards, dice, E. O. table and other tables, instruments, engines and devices, faro bank and other bank of like kind." After that, he concludes, "and yet does permit, to the great damage and common nuisance of all citizens of the State of New Jersey there inhabiting, being, residing and passing, to the evil example of all others in like case offending;" then it proceeds, "contrary to the form of the statute in such case made and provided, and against the peace of this State, the government and dignity of the same."

Consequently the indictment upon its face charges two separate and distinct criminal offences; one, the common law offence of maintaining a nuisance or disorderly house, as it is commonly called; and the other is an offence against the 60th section of the Crimes Act, which is declared to be a misdemeanor. Or it might be that the attempt might be made to consider it under the 65th section of the Crimes Act, although I do not think it is possible for such a construction to be placed upon it, where the penalty would be a fine of not less than one thousand dollars nor more than five thousand dollars, and by imprisonment in the State Prison for not less than one year nor more than five years. In that case the act was passed for the purpose of prohibiting the sale of pools on race tracks, and the whole context of that section appears to apply to "any person who shall keep a place for selling pools upon the running, pacing or trotting, either within or without this State, of any horse, mare or gelding, or shall conduct the practices commonly known as bookmaking and pool selling, or either of them."

You can readily see what a serious matter it would be if any such construction as that was attempted to be placed upon this indictment, which is drawn in two forms—one, the common law offence of maintaining a disorderly house, and the other one under the 60th section. It might be further attempted to construe it that it was drawn under the 65th section. When a defendant is placed on trial he is entitled to know exactly, in exact language, what the State intends to prove. It is within their power to know exactly what their proof is. They have the opportunity of preparing their case or presenting it to the grand jury by their witnesses upon which they intend to found an indictment, and the defence has the right to the exact state of facts which the State intends to prove. They are not allowed to come in and make a broad assertion covering almost any and every ground, and then come in to court and prove one single

thing. In other words, the indictment, any more than a pleading in a case, cannot be double; it must be confined to a single distinct issue.

So that the indictment is bad for that reason. It is not drawn to charge the statutory offence; it is not only drawn for the common law indictment for a disorderly house, but concludes against the statute, and, as I have just read it, it also concludes against the peace of this State, the government and dignity of the same, to the common nuisance of all the inhabitants, in the usual form; that it does not specify any particular form of gambling which it is intended to prove. It goes through the entire range of the statute. The indictment should specify exactly whether it is dice, cards, E. O. table, or whatever the particular device was, without charging it in the general language of the statute.

The next objection, the charge is, presuming now that this indictment is drawn under the 60th section of the Crimes Act—

The Court—I can't see where the indictment was based on the 60th section. It seems to me it was drawn under the 65th section, for keeping a place where gambling is carried on in any form. I think that is what the prosecutor framed it under, is it not?

Mr. Stokes—Yes, sir; the 65th section.

Mr. Fay—The indictment is drawn in the language of the 60th section.

The Court—It is drawn in the language of this section, that he kept a place where persons assembled for the purpose of doing these particular things mentioned in the 60th section.

Mr. Fay—He says "for the purpose of engaging in gambling, gaming and playing for money and other valuable thing, at and with cards, dice, E. O. table and other tables, instruments and devices, faro bank and other banks of like kind"; then he proceeds with the language of the 65th section.

The Court—The 60th section applies to the person who plays at such games; the 65th section applies to

the person who keeps a place where persons resort for the purpose of playing such things.

Mr. Fay—That indictment is drawn in the common law form, in which he sets forth the vice of the things in the 60th section. But in view of what your Honor has just said, let us take the other view of it, that it is drawn under the 65th section. The defendant is entitled to know what particular form of gambling takes place there. If it was upon a faro table, the indictment should charge that he kept a place where faro bank was conducted. They must set forth the particular gambling instrument or device that was used for the purpose of gambling. If it was at cards, the indictment should charge that the gambling conducted at that place was with cards. If it was with dice it should charge that it was conducted with dice. So that the indictment is defective from the fact that it does not inform the defendant exactly what the prosecutor intends to prove. If it was the intention to draw the indictment under that section it should not have set forth that he "did cause, procure, permit, aid, abet and assist persons of evil fame and name and of dishonest conversation to resort, frequent and come together," and then use the other, "as well in the night as in the day, then and on the said other days and times to resort, be and remain, drinking, tippling, fighting, gambling, gaming and playing for money and other valuable thing, at and with cards, dice, &c."

Now, this is an elementary point, where they attempt to bring a man to the bar charged with a specific criminal offence, it should be specified in all its details, so that he would know exactly what he is called upon to meet. And the very fact that we are here to-day, after examining these indictments with care—and I have had some experience in examining indictments in the past—and the fact that we come here to-day, and I cannot tell and no one else can tell under the indictment what the charge against this defendant is, is suf-

ficient for your Honor to quash it. No lawyer, no court, much less any individual, can tell with any certainty what a man will be compelled to meet under this indictment as drawn here. And I, therefore, ask your Honor particularly now, with the declaration of the prosecutor that he intends to charge these men and try to convict them of an offence which not only means a fine of not less than $1,000, but also means imprisonment for not less than one year, and it means both, and there is no discretion left to the Court. This act was passed subsequently to the constitutional amendment which prohibits the Legislature from changing the punishment inflicted under this statute. I contend, too, that it is a cruel and unusual punishment under the constitution. It is something that is not demanded, and something that was passed under the heat of political excitement. But there it remains. And to say that a man allowed somebody to play a game of poker in his house, or a few men gather together occasionally for that purpose, and to say that the indictment drawn at this time—

The Court—I don't suppose you expect me to quash the indictment, Mr. Fay, because I may criticise the Legislature?

Mr. Fay—Not at all, but I am just using this as an argument that the very fact would cause any court to exercise its discretion in favor of a defendant under those circumstances. It would not be a criticism upon the Legislature, but it would be a fair construction to place upon it, in view of what the prosecutor has said.

Besides, the 65th section would require that the exact date should be charged at which the gambling was permitted, and this indictment charges that on the 1st day of April and at divers other times they permitted this gambling, tippling, fighting, &c., as charged in a disorderly-house indictment. We are entitled to have the exact date specified on which this gambling took place, if it is drawn under the 65th section of this act. I will, therefore, ask your Honor to quash this indictment and dismiss the defendants.

The Court—The motion is denied.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

JOHN E. FOSTER, *P. J.* [L. S.]

Mr. Forman—We make the same motion on the part of the defendant, Huhn.

The Court—The motion is denied.

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

JOHN E. FOSTER, *P. J.* [L. S.]

A plea of not guilty was thereupon re-entered on the part of both defendants.

The sheriff proceeded to draw the jury.

Juror No. 5 was challenged by Mr. Fay.

Mr. Forman—We object to No. 5 juror being challenged, as the defendant, Huhn, is content with No. 5.

(Objection overruled.)

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

JOHN E. FOSTER, *P. J.* [L. S.]

Another juror was challenged by Mr. Forman—Juror McChesney.

Mr. Fay—I object to the challenge, as the defendant, Moore, is content.

(Objection overruled.)

(Whereupon the defendant, by his counsel, prays a bill of exceptions, which is hereby allowed and sealed accordingly.)

JOHN E. FOSTER, *P. J.* [L. S.]

John Clancy, sworn for the State.

Direct examination, by Mr. Stokes:

Q. Mr. Clancy, where did you reside from the 1st of July on until October 26th?

A. Mrs. Smith's, at West End.

Q. What city?

A. Long Branch.

Q. Do you know these two defendants?

A. Yes, sir.

Q. You pleaded guilty, Mr. Clancy, to your part in this this morning?

A. Yes, sir.

Q. When did you first make the acquaintance of these two men?

Mr. Fay—I object and ask to have stricken out the question, "You plead guilty this morning?"

(Objection overruled.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

JOHN E. FOSTER, *P. J.* [L. S.]

A. Five years ago.

Q. And when did you meet them this summer, the past summer, and where?

A. When I first came down here; about the middle of June, I guess.

Q. Did you have any business relations with them, Mr. Clancy?

Mr. Forman—I object to that as going prior to the indictment.

(Objection overruled.)

Q. After the 1st of July, 1905.

The Court—That is your question, "Did you have any business relations with them after the 1st of July, 1905?"

Mr. Stokes—Yes, sir.

Mr. Forman—I don't object to that.

A. I was over in the place where there was a crap table.

Mr. Fay—I object to the answer. It is not responsive. He was simply asked the question whether he had any business relations with them or not.

The Court—I presume he is answering it. Wait till we get the answer and then you may move to strike it out.

A. This man's brother, Charlie Huhn, he was loafing around doing nothing, and he told me—

(Objected to.)

Q. Not what he told you. Did you go to this place situate on the easterly side of Second avenue, between Brighton avenue and Matilda terrace?

A. Yes, sir.

Q. When did you go there?

A. Went there nearly every night.

Q. During what time?

A. From about eight o'clock till two in the morning, I guess, or three.

Q. During what months?

A. July and August.

Q. Later than that?

A. No, sir.

Q. And during the months of July and August, what was going on in this building on the easterly side of Second avenue?

A. There was craps and Klondike and roulette.

Q. Who was conducting the crap table, if you know, Mr. Clancy?

A. I was in another room off the crap table. I wasn't in there; I was in on the wheel. I wasn't taking care of the other game.

Q. You were in during those two months?

A. Oh, yes; I would go in there.

Q. Who did you see in charge of the crap table?

A. I saw colored boys and saw Lou and Joe and all of them at the table different times; seen colored fellows in there with the stick in their hand.

Q. But who was behind the table actually cutting the kitty?

A. Well, I am telling you I seen Joe and Lou and two or three colored men.

The Court—Who were Lou and Joe?

Q. These two defendants?

A. Yes, sir.

By the Court:

Q. Where were they?

A. Well, they used to be behind the crap table and roulette table.

By Mr. Stokes:

Q. How often have you seen them during July and August?

A. Only two or three times, because I never used to be in there much. I was in the other room.

Q. Where the roulette wheel was?

A. Yes, sir.

Q. After you had been there did you work for anybody?

A. Charlie Huhn, he used to do the business. We was in this roulette work together, and in the morning when we would settle up, if there was anything coming, we used to take a little money and go home and go to bed. I never stopped around all the time.

Q. You have been in this room where the dice table was?

A. Yes, sir.

Q. And who was the proprietor of that place, Mr. Clancy?

Mr. Forman—I object.

A. I couldn't actually say who was the proprietor.

The Court—I will admit it.

Q. Who did you always see there in charge, what man?

A. The only once I was over there at night was Charlie and Joe running it.

Q. Was there a man named Pope there?

A. Yes, sir; Pope.

Q. He is a colored man?

A. Yes, sir; he is a colored man.

Q. And what particular business did Lewis Huhn have there and what particular business did Joseph Moore have there, if any?

A. I don't know. They were behind the table once in a while.

Q. Which tables? We want to designate them.

A. The crap table and Klondike table, that is all.

Q. You have seen them behind both classes of tables?

A. There was nobody there then. It was early in the night time. We used to go over to the house together, to this place on Second avenue.

Q. This place that you have referred to, where was it located?

A. At West End and Second.

Q. And in what part of the building?

A. Upstairs, one flight up.

Q. On the second floor?

A. Yes, sir.

Q. How did you get to this room on the second floor?

A. Well, went up a little step, and went through a big door and went up that stairs.

Q. Was this building located—

Mr. Fay—I object to that form.

Q. Mr. Clancy, did you ever play at the Klondike and crap games?

A. Yes, sir; I played at them all.

Q. And who was behind the table when you played?

A. Well, two nights I played. Pope was behind the table when I played.

Q. Pope McCarthy?

A. Yes, sir.

Q. Were these men there?

A. No, I didn't see them. They went out sometimes.

Q. Who was Pope employed for, do you know?

A. I couldn't tell you that.

Q. You don't know that?

A. No, sir.

Q. How many people have you seen there on these nights?

A. Oh, sometimes there was thirty or forty; sometimes less, sometimes more.

Q. And what time did the games start, and how long would they continue?

A. Well, about eight or nine o'clock at night till two or three in the morning.

Q. How frequently did that happen in the week?

A. Well, maybe two or three nights a week.

Q. Two or three nights a week?

A. Yes, sir.

Q. And what people have you seen there?

A. Oh, all kinds of people; white and colored people, and all kinds.

Q. What were their occupations, if you know?

A. I couldn't tell you.

Q. Couldn't tell that?

A. No, sir.

Q. How did you get paid for what you did there?

A. Charlie Huhn used to pay me. We used to split up the wheel.

Q. You had nothing to do with the other part?

A. No, sir.

Q. Simply the wheel?

A. Yes, sir.

Q. Did you see money on the tables, the Klondike and the crap table?

A. At times I saw it.

(Objected to.)

The Court—It is leading. You should not lead him. He knows what he saw there.

Q. What have you seen on the tables at different times?

A. When I would come in at nights I was in a room by myself, and the other two rooms, the tables, were shut off, and I was in one room and they was in the other room. I couldn't see in there all the time unless I got through and went in there.

Q. What have you seen on the tables?

A. Oh, I saw money there a couple times, two or three or four times.

Q. Anything else?

A. Dice blocks and one thing or another. I used to go home early. When I got through I used to go home and go to bed. I didn't stop around there all the time.

Cross-examination, by Mr. Fay:

Q. You were the party who conducted this place, were you?

A. No, sir.

Q. You were the manager of it? It was your place, wasn't it?

A. No, sir.

Q. You and Charlie Huhn?

A. Charlie Huhn. I used to conduct my business with Charlie.

Q. And you and Charlie were the managers, weren't you?

A. I wasn't no manager; no, sir.

Q. You participated, you say, in the profits?

A. I participated in the profits.

Q. You never participated with anybody but Charlie Huhn?

A. That is all.

Q. You never participated in any of the profits with either one of these defendants?

A. No, sir.

Q. How long were you engaged in running this business?

A. About three weeks.

Q. And the only party that you participated in the business with was Charlie Huhn?

A. That is all. Charlie and I was together.

Q. You have made an agreement in this case, have you not, to testify for the State?

A. No, sir.

Q. There has been no agreement made with the prosecutor?

A. No, sir.

Q. And informed of no agreement?

A. No, sir; I ain't spoke to nobody but Mr. Reilly, my counsel.

Q. You know there was an agreement made, don't you?

A. No, sir; I don't know anything about it.

Q. Why did you plead and then give testimony for the State?

A. Well, I pleaded because I know there was witness that can swear that I was there, and I think it is right that I should plead, that is all.

Q. You say you never saw any money on any table except your own?

A. I saw money, I say. I said I saw money on the tables and dice and everything on the other table; crap box and one thing or another.

By Mr. Stokes:

Q. I understood you to say that you and Charlie Huhn had charge of simply the roulette?

A. Yes, sir.

Q. Had nothing to do with the Klondike and crap table which these men had at all?

A. No, sir; that is all.

Cross-examination, by Mr. Forman:

Q. What is your business, Mr. Clancy?

A. Oh, I am a speculator.

Q. You live in New York?

A. Yes, sir.

Q. You are the same man, Mr. Clancy, who came here to try to convict Fred. Gerner of gambling, aren't you?

(Objected to. Objection sustained.)

Q. Mr. Clancy, how long have you been engaged down there at Long Branch in gambling in this place?

A. Oh, about three weeks.

Q. And the money you took in you divided up with Charles Huhn?

A. Yes, sir.

Q. All money?

A. Yes, sir; him and I used to whack up.

Q. Never gave this man Huhn a cent?

A. Me and Charlie had the place. Charlie made a proposition to me to get a wheel, and I had some money and I got it.

Q. And he divided up with you?

A. He split up, and he gave me a percentage every morning.

Q. Do you know how many rooms there were in the establishment?

A. I do not.

Q. Who paid the rent?

A. I couldn't tell you.

Q. Was there anything deducted from the profits of the tables to pay the rent?

A. I don't know; I wasn't there long enough.

Q. You say you were there three weeks?

A. Yes, sir.

Q. Well, you were in there every night in July and August?

A. Yes, sir.

Q. Then you were not engaged every night in looking after your own wheel?

A. No, sir.

Q. During the time that you were not looking after your own wheel were you not out and in the other rooms where the Klondike and crap were?

A. Yes, once in a while.

Q. You must have been if you were not running every night?

A. Yes, sir.

Q. Who did you see running this Klondike?

A. This man Pope and Charlie and the other colored fellow.

Q. What did you see these two defendants do while you were there, if anything, in regard to these two tables?

A. Well, Joe had the Klondike table and Lou had the crap table.

Q. Having the tables, what did they do with them?

A. Shake dice and so on.

Q. Just tell the jury what they did. Take up the Klondike table first; what is that game?

A. Used to put dice in a cup and shake it up, and if the customers threw more than you did they would take so much money.

Q. What were you playing for?

A. Money.

Q. What were the odds? What was the game?

A. A game on even money. If you win as much as the player and throw better dice, higher dice, if he did, the player would get the money; and if you didn't get the money the man behind the table would get it.

By the Court:

Q. When you speak of the man behind the table what do you call him?

A. Well, Joe is behind the Klondike and Lou behind the crap table.

Q. Did you ever see either of them behind these tables you speak of when anybody was playing there?

A. Oh, yes; they were bhind there.

Q. What were the people playing for?

A. For money.

Q. With what?

A. With money and dice.

Q. On this table?

A. Yes, sir.

Q. How often have you seen him at the crap table?

A. Two or three times. I didn't use to go in there much. I used to go home when I got through with my game.

Q. You were there two months?

A. Only three weeks of open game.

Q. How many times did you see either of these defendants at these tables when anybody was playing money?

A. They were not there all the time; these colored boys.

Q. How many times were they there?

A. Two or three times, I guess. I don't know how many times.

Q. How many people were playing when you saw these people there playing with money on the table?

A. Sometimes fifteen or twenty; sometimes less.

Q. Did you ever have any conversation with these defendants about their games?

A. I didn't have anything to do with them at all. No, sir; I didn't have anything to do with them.

Q. You got well acquainted with them during that summer?

A. Yes, sir.

Q. Was anything said about the games?

A. Not to me.

Q. I don't mean to you, but in your presence.

A. No, sir.

Q. Wasn't the business ever discussed, whether it was profitable or unprofitable?

A. I didn't have any conversation with the boys at all.

Q. I am not asking you that. I ask you whether you ever heard them say anything of that kind.

A. No, I didn't.

Q. When you went to this place was the Klondike table and the dice table there?

A. Everything except the roulette wheel.

Q. You provided that?

A. Yes, sir.

Q. Did Charles Huhn have any control over these two other tables?

A. I couldn't say that.

Q. As far as you know?

A. As far as I know, I couldn't say.

Q. Well, I ask you whether he did or not, as far as you have any knowledge of it?

A. I don't know.

Q. You don't know of any control that he had?

A. No, sir.

Q. Did he divide any of the profits of these two tables with you?

A. No, sir.

Q. You were limited entirely to the profits of the roulette table?

A. Yes, sir.

By Mr. Forman:

Q. You said a minute ago that you were a speculator. Now, as a matter of fact, isn't it so that you are a common gambler?

A. I don't know what you mean by a common gambler; I speculate; I try to make a living as best I can; at present I am not doing anything.

Q. You make a living out of gambling, don't you?

A. I make it out of selling anything and buying anything I can buy.

Q. That is not the question; you make it out of gambling, don't you?

A. I can't exactly say I make it out of gambling, because I ain't doing anything just now.

By Mr. Fay:

Q. You have been conducting a gambling house at Long Branch for a good many years, haven't you?

A. I haven't ben conducting any; haven't been down there for two or three years.

Q. You have been engaged in the gambling business a good many years, haven't you?

A. Only twice; two summers.

By the Court:

Q. What two summers, this summer and summer before?

A. Summer before last?

Q. Yes.

A. No; about three summers ago.

Q. Who did you work with then?

A. A man named Burbridge.

Q. Whereabouts?

A. Up in the block down at the West End.

By Mr. Fay:

Q. Did you work any other place this summer?

Objected to as not cross-examination.

Q. You said a little while ago that you never saw Lew Huhn or Joe Moore gambling, only saw some colored men, Pope McCarthy and somebody else?

The Court—He has not testified to that; he testified directly to me.

A. That was afterwards.

Mr. Fay—He never said he saw them gambling; he said he got there early, and there was nobody in the place.

Q. Now, I want to know which statement is correct, the last or the first. Didn't you understand the question I just put to you? You have testified in the beginning to the prosecutor that you never saw Lew Huhn or Joe Moore behind the table; that there was never anybody there; that you say colored men and several parties behind the table. Now you say you saw them there; which is correct?

Objected to.

The Court—He hasn't said that he has seen them gambling. He has testified to what he saw there. He didn't attempt to characterize it.

Q. You expect immunity, don't you, from the fact that you are testifying now—

A. I don't know anything about it.

Sypherd P. Peterson, sworn for the State.

Direct examination, by Mr. Stokes:

Q. You are a detective?

A. Yes, sir.

Q. And reside where?

A. 307 East 80th street, New York.

Q. And how long have you been a detective?

A. Twelve years.

Q. Were you employed by the county to do any work at Long Branch?

A. Yes, sir.

Q. Employed by whom?

A. By the prosecutor's office of this county.

Q. Did you visit any place in Long Branch?

A. I did.

Q. What place did you visit?

A. Visited the gambling rooms of the defendants in Second avenue.

Q. How many times did you visit them?

A. Three times.

Q. Now, just tell us on the first occasion what you saw when you went there, where the building was, how it was located and all.

Mr. Forman—I object; there is no time mentioned.

Q. When was it?

A. My first visit was on the 16th of August.

Q. When was your next?

A. On the Friday following, the 18th.

Q. When was your next?

A. The 19th, on the next Saturday.

Q. Saturday night?

A. Yes, sir.

Q. Were you there when the raid was made on the morning of the 20th?

A. Yes, sir.

Q. You were in the building?

A. Yes, sir.

Q. Now, just tell us what you found on your first visit.

A. On my first visit, accompanied by Mr. Van Pelt, who is also a detective, I went in the hotel opposite—there is a large hotel, a hotel opposite this place—and we sat there some time and noticed a number of white and colored men going into this place, and we went over. There was a pool table in the first room; we noticed a colored man attending.

Q. What floor is that?

A. On the ground floor. You go up four or five steps. We talked to the colored man a while and finally asked to go upstairs. He opened the door for us and we went up and found three rooms to our right. The first room contained that roulette wheel, the next room had a Klondike board in, and the furthest room had a crap table.

Q. What did you do there on the first visit?

A. The first visit we played the roulette wheel.

Q. And who was that played with, either of these defendants?

A. No, sir; that was—well, that is wrong there. In the first place the game was opened by Charlie—I believe one of the Huhns.

(Objected to.)

Q. What did you do after you got in the other room? The Klondike and dice room is what we care about particularly now.

A. There was no dice game that night. The crowd had gone out, and the only thing he said would be open would be the roulette wheel.

Q. That is the first night?
A. Yes, sir.
Q. Nothing open that night?
A. No, sir.
Q. What paraphernalia did you see there?

By the Court:
Q. Who said the roulette wheel would be open?
A. Charlie Huhn.

By Mr. Stokes:
Q. Who else did you see there that night of the 16th?
A. I saw Joe and the young man sitting next to him.
Q. Those two men?
A. Lou, I believe they called him.
Q. Now, nothing was done that night. Now, on the second night, on the 18th, what took place on Friday night?
A. On the 18th we played both the Klondike and the crap.
Q. Who had charge of the Klondike table in the middle room?
A. The man I have spoken of as Joe.
Q. Is this the man that was there? (Indicating defendant, Moore.)
A. Yes, sir.
Q. What did you do on that table?
A. We played the game of Klondike.
Q. How was it played? What for?
A. Played for money, played by dice. A number of dice put in a cup and they are thrown out, and if the dealer beats you he wins, and if you beat him you win.
Q. How did you figure out whether you won or not? You say he beats you and you beat him.
A. Well, if he throws a higher dice.
Q. Did you play any money on that?
A. We did, yes, sir.
Q. Who took the money?
A. Joe took the money.

Q. Where did he have the money?

A. Well, he had some in his pocket and some in a drawer, which is in the table.

Q. Were there many playing on Friday night?

A. Five or six at the Klondike table.

Q. Did you play the dice table that night also?

A. Yes, sir.

Q. Who did you find in charge of the dice table?

A. Lou was in charge of the dice table.

Q. This man here? (Indicating defendant, Huhn.)

A. The second young man, yes, sir.

Q. With a colored man on the outside of the stick?

A. Yes, sir.

The Court—Is that what you call a crap table?

Mr. Stokes—That is a crap table.

Q. Just explain the stick.

A. Well, the man throws the dice. You see it is a long table.

Q. Who threw them?

A. I would throw them, or whoever plays them, and they run alongside the length of the table. This man on the outside he took the count. He has a long stick with a hook on the end of it, and he would pull the dice back to the man.

Q. What did Louis do there that night?

A. He was what I would call the dealer, taking the money and paying the bets.

Q. Did you play on that?

A. Yes, sir; we played on that.

Q. Play for money?

A. Yes, sir.

Q. Were you successful or unsuccessful?

A. Well, we were very unsuccessful that night.

Q. On the night of the 19th, Saturday night, how many did you find there that night?

A. Well, there was possibly thirty or more.

Q. And who was in charge of the tables that night, the Klondike, the crap table and the dice table?

A. Joe was in charge of the Klondike table, and Lou and Pope was in charge of the crap table.

Q. In the same manner that you have stated the night before?

A. Yes, sir.

Q. Did you play on these tables that night?

A. We did, yes sir.

Q. What did you play for?

A. Played for money.

Q. How was your luck that night?

A. Well, it wasn't so bad that night, although we didn't carry out any great amount of money.

Q. Were you there when the raid was made?

A. I was, yes, sir.

Q. What was going on at the time the raid was made or right previous to that? Was the game on or not?

A. The game was on, yes, sir; we were playing—at least, I was playing at Joe's game, the Klondike.

Q. You were at the Klondike at that time?

A. Yes, sir.

Q. Had you been playing on the other table that night also?

A. Yes, sir; I played the crap table also.

Q. Were other people playing there?

A. Yes, sir.

Q. Anybody could play that wanted to?

A. Anybody could play. It was open for everyone.

Cross-examination, by Mr. Fay:

Q. What is your name?

A. Sypherd P. Peterson.

Q. Where do you live?

A. 307 East 80th street, New York.

Q. When were you employed to come down here?

A. The 4th of August.

Q. Who employed you?

A. The prosecutor's office of this county.

Q. Where did you get the money with which you played on these tables?

A. It was my own money.

Q. You have been reimbursed?

A. Yes, sir.

Q. You generally lose, don't you, when you play money which you are reimbursed by the State?

A. Well, the majority of games see that you do lose. I don't generally lose.

Q. I say you generally do lose, don't you, when you play money for which you are reimbursed?

A. No, sir.

Q. You put in a bill for what you lost?

A. I have answered the question, and I say I don't generally lose, but when I do I put in a bill.

Q. You generally win?

A. Yes, sir; and then lose occasionally.

Q. You say Charlie Huhn told you there wouldn't be any game open except the roulette that night you were there?

A. Yes, sir.

Q. What night was that?

A. That was Wednesday night.

Q. The 16th?

A. Yes, sir.

Q. Did they open up the roulette game for you?

A. They did.

Q. At your request?

A. Yes, sir.

Q. But Charlie Huhn wouldn't allow any other game to be opened that night?

A. Well, there was no one there to play it. If there were any other players came in—

Q. He was there?

A. Yes, sir.

Q. You were there?

A. Yes, sir.

Q. Why did you say there was no one to play?

A. Well, two is a very small crowd at the crap table, and they didn't care to open. They were counting up the cash at the time and didn't care to open, they said.

Q. Charlie Huhn said?

A. Yes, sir.

Q. When was the second time you were there?

A. The next Friday.

Q. The following Friday?

A. Yes, sir.

Q. Who was with you?

A. Mr. Van Pelt.

Q. Where is Mr. Van Pelt?

A. I haven't the slightest idea where he is. I suppose he is somewhere in the city.

Q. You don't know where he is?

A. No, sir.

Q. He was with you, was he?

A. Yes, sir.

Q. You were the only two there?

A. There were others there.

Q. You were the only two the first night you went to play on the roulette table?

A. I believe when I went in there was one or two; two or three men came up.

Q. You have been paid for your services, have you?

A. I have.

Q. Did you make any memorandum?

A. Made out a report; yes, sir.

Q. Have you got it?

A. No, sir.

Q. How long were you in the place the first night you were there?

A. Oh, possibly forty-five minutes.

Q. And had you been in any other place that night at Long Branch?

A. We were across the street.

Q. Were you gambling there?

A. No, sir.

Q. You went around to a number of gambling houses, did you?

A. No, we didn't.

Q. Did you, the other nights that you were there?

A. Went around to some; tried to get in some; yes, sir.

Q. Weren't you instructed not to go in any other place of this kind?

A. No, sir; not at all.

Q. Weren't you instructed to keep away from certain places?

A. No, sir.

Q. Positive about that?

A. Positive, yes, sir.

Q. Were you instructed to go to any other place but this?

A. We were instructed to go to other places; we had very positive instructions on that.

Q. Did you go to any other place?

A. Yes, sir; went to a number of places.

Q. Did you see gambling paraphernalia there?

A. No, sir; we did not.

Q. Where did you go, to hotels?

A. Went to a number of places that were reputed to be gambling places, but were unable to get in.

Q. Didn't get in?

A. No, sir.

Further cross-examination, by Mr. Forman:

Q. Mr. Peterson, the first night you went there I understand you to say that you played at roulette?

A. That is what I said, yes, sir.

Q. And you lost considerable money?

A. We didn't lose considerable; we lost some.

Q. How much, about?

The Prosecutor—The man who had charge of the roulette is not on trial in this case.

The Court—I will admit it.

Q. About how much money did you lose?

A. We lost about $5.

Q. As a matter of fact. you never saw this man Huhn gambling in there, did you?

A. The man just behind you?

Q. Yes.

A. I did.

Q. On what occasion?

A. The two last visits.

Q. What did you see him do?

A. I saw him taking the money and attending to the crap table—paying the bets.

Q. How long have you been a detective?

A. Twelve years.

Q. What agency are you employed by?

A. I am not employed by any agency at the present time.

Q. Who were you last employed by?

A. The Fuller Detective Agency.

Q. How did you happen to leave them?

Objected to. Objection sustained.

Q. You say that at the time you made a memorandum of what you did there?

A. I said I made a report.

Q. That is, a report in writing?

A. A written report.

Q. Have you got that with you?

A. No, sir.

Q. How long since you have seen it?

A. Oh, it is considerable time.

Q. You haven't read it over to refresh your memory at all?

A. No, sir.

Q. Now, let me ask you, when did you come down to Long Branch, what day?

A. When do you refer to?

Q. Last August.

A. I went down there the 16th day of August.

Q. What day was that, do you know?

A. That was Wednesday.

Q. And you went to this place Wednesday night; is that right?

A. Yes, sir.

Q. Wednesday?

A. Yes, sir.

Q. What did you do the next day?

A. I was over in Asbury Park the next day.

Q. On pleasure or on business?

A. On business.

Q. Have you been paid for your services yet in this case?

A. Yes, sir; I have been paid.

Q. As I understand, when you went in this place you took the county's money and gambled with it and lost it, and they paid you back; is that right?

A. I took my own money and lost it.

Q. And then charged the county with it?

A. Yes, sir.

By Mr. Stokes:

Q. And you lost about $5?

A. Yes, sir.

Walter Hill, sworn for the State.

Direct examination, by Mr. Stokes:

Q. Mr. Hill, where do you live?

A. First avenue, Long Branch.

Q. You are a native of Long Branch?

A. Yes, sir.

Q. And you are not employed by anybody in this case?

A. No.

Q. You were at this place on the night of the raid; is that right?

A. Yes, sir.

Q. Do you know these defendants, Mr. Hill?

A. Yes, sir.

Q. How long have you known these two boys, Moore and Huhn?

A. Oh, I guess about—I don't know; a good while; seen them.

Q. How long have you known their place on Second avenue?

A. About two or three months, I guess.

Q. And how many times have you been there since July 1st, 1905, until October 26th, which is just before the raid?

A. Was raided in October?

Q. August, I mean; August 20th?

A. I don't know exactly.

Q. Well, how many?

A. Oh, several times.

Q. What did you go there for, Hill?

A. To speculate.

Q. Did you speculate?

A. Well, yes.

Q. And who did you speculate with?

A. Well, people congregated there for that purpose.

Q. And who did you see? What kind of tables did you see there? Do you see them in court?

A. Well, I seen a table like that. (Indicating crap table.)

Q. What kind of a table did you speculate on?

A. Crap table.

Q. Did you see any other tables there besides the crap table?

A. Well, I seen the other table there, but didn't see it working.

Q. That green table? Did you see the other table there with the word "Klondike" on it?

A. That is the table I am talking about.

Q. And who did you see when you were there on these numerous occasions? Who did you see behind the crap table?

A. Well, sometimes Pope was behind it; sometimes Lou and sometimes Charlie; very seldom Charlie, though.

Q. Very seldom Charlie? Who did you see, Louis?

A. Yes, sir.

Q. Now the Klondike table, who have you seen behind that?

A. Well, Charlie and Joe sometimes.

Q. Joe who?

A. That Joe there.

Q. Joe Moore?

A. Yes, sir.

Q. Now, on these speculations that you had, were these men behind the table, Huhn?

A. Sometimes.

Q. Huhn, was he behind the table when you speculated any time?

A. Yes, sir.

Q. How did you play the game that you speculated on, as you call it? What did you do? Just tell the jury what you did.

A. I either lost or won.

Q. Either lost or won, yes; and how did you do it? How did you lose or win?

A. Well, some stranger would make a bet, and you took his bet, and if you won he lost, and if you lost he won.

Q. Did the house sometimes take the bets?

A. No, sir.

Q. What did they get?

A. On the bets they would take off of it.

Q. How much would they take off of bets?

A. Five and ten cents.

Q. On every bet?

A. If you won?

Q. If you won?

A. Yes, it is in the bet.

Q. Well, somebody won every time?

A. Well, outside bets they didn't cut.

Q. Did they cut any bets when you were there?

Q. Sure, if you won.

Q. Who cut them?

A. Whoever was behind the box.

Q. Who have you seen cut them? Have you seen these defendants?

A. I seen one of them—Louis—and Charlie and Pope.

Q. You saw Louis and Charlie and Pope cut them?

A. Yes, sir.

Q. On more than one occasion?

A. Yes, sir; I wouldn't say exactly how many.

Q. You never played any Klondike, I understood you to say?

A. No; I didn't bother them games.

Q. Have you watched them at that game?

A. Well, I never took any notice.

Q. I say did you see them playing at those games when you were playing?

A. I passed through there.

Q. When you saw these people in front of the table, who did you see behind the table?

A. Charlie Huhn.

Q. Who else?

A. Sometimes Joe.

Q. Sometimes Moore?

A. Yes; sometimes Pope.

Q. They changed off, did they?

A. Yes, sir. Charlie is the only man that changed off.

Q. Charlie changed off with who?

A. Anybody.

Q. He was an extra man?

A. No; he was the head man.

Q. He was the head man?

A. Yes, sir.

Q. And who ran the roulette wheel?

A. I never saw the wheel till I saw Mr. Strong bring it up.

Q. You were not in that room?

A. No, sir; I don't play that game.

Q. On the night of the raid where were you?
A. Where was I?
A. Yes?
A. I was there.
Q. What were you playing on that night?
A. Why, the dice.
Q. On which table?
A. That white table.
Q. That is the dice table?
A. Yes, sir.

The Court—The crap table, you call it?
Mr. Stokes—The crap table.

Q. Who was behind the table at that time when the raid was made?
A. Lou one side and Pope the other.
Q. What part was Pope taking then?
A. He was the stick man.
Q. He was on the stick?
A. Yes, sir.
Q. Who was cutting at that time?
A. Lou.

By the Court:
Q. Won't you enlighten us what you mean by cutting the game? It may be all clear to you and the witness.

By Mr. Stokes:
Q. What do you mean?
A. Well, if you shoot a dollar to the bet, you get $1.95 down.

By the Court:
Q. When the house gets the five cents that you speak of, is that what you call the kitty?
A. Yes, sir.

By Mr. Stokes:
Q. That is to say, it is charged out of the throw?

A. Yes, sir.

Q. Out of every throw?

A. Yes, sir.

Q. Out of every throw, isn't it?

A. Well, if the man that shoots wins. If he loses the house gets nothing.

Q. If you have got the dice in your hands and throw a certain amount, do they take a nickel out of your throw?

Q. Does that vary with the amount that is bet?

A. Not as I know of.

Q. Does the house sometimes take bets?

A. No, sir.

Q. Not on that table?

A. No, sir.

Q. How about the Klondike?

A. I don't know anything about that.

Q. Supposing you had the dice in your hand and were throwing for a point and lost, who would take the money then?

A. The man that bet me.

Cross-examination, by Mr. Fay:

Q. Let me see whether you do understand or not. You say that if you have the dice in your hand and you throw and lose, who takes the money?

A. The man that craps, the same as I do.

Q. The man that craps on the table, it doesn't go to the house, does it?

A. No, the house don't take it.

Q. And the house doesn't get anything?

A. No, sir; not when I lose, the house gets nothing.

Q. You don't use any chips, do you, in that game?

A. No, sir.

Q. Just—

A. Cash. I guess your word goes sometimes, if you are known well enough.

Q. You say that you never saw Joseph Moore taking

charge of that table, you were never in that room, except to pass it; is that right?

A. I never saw him standing behind it, that is all. I never bothered.

Q. Never saw him doing anything?

A. No, sir.

Further cross-examination, by Mr. Forman:

Q. I understand you were in there at the time of this raid?

A. Yes, sir.

Q. You were caught there?

A. Yes, sir.

Q. Gambling? You had been gambling there that night? hadn't you?

A. Certainly.

Q. And you were caught right in there at the time? Did you have any talk with Mr. Stokes about this case?

A. No, sir; I refused to talk to anybody about the case.

Q. You hope by coming up here to-day and testifying against these two boys, to get clear?

A. No, sir; I don't, not a bit of it. I tell the plain truth. I expect to stand as much as the rest of the thirty-six.

Q. You don't expect to go to State Prison?

(Objected to. Objection sustained.)

Wesley Edwards, sworn for the State.

Direct examination, by Mr. Stokes:

Q. Where do you live?

A. I live on First avenue.

Q. How long have you lived in Long Branch?

A. I guess about ten or twelve or fifteen years, something like that.

Q. Do you know Louis Huhn and Joseph Moore?

A. Merely when I see them.

Q. Have you ever been to the place on Second avenue?

A. Oh, yes; lots of times.
Q. What did you go there for?
A. Oh, I played pool occasionally.
Q. And what else?
A. Nothing else as I know of.
Q. Nothing else as you know of?
A. No, sir.
Q. Have you ever been upstairs in that building?
A. Oh, yes.
Q. What did you see up there?
A. I didn't see any more than I see any time.
Q. Did you see this stuff that you see up here?
A. What is that you are speaking of?
Q. This paraphernalia.
A. No, sir; never seen anything like that.
Q. When were you up there?
A. Several times.
Q. You never saw any of these things?
A. Never went in there.
Q. What did you go up there for?
A. To meet a friend.
Q. Who was the friend?
A. Pope McCarthy.
Q. You never were in these rooms?
A. No, sir.
Q. At any time.
A. No, sir.
Q. You never played there?
A. No, sir.
Q. Were you there the night of the raid?
A. No, sir.
Q. You were not?
A. No, sir.

Silas Nash, sworn for the State.
Direct examination, by Mr. Stokes:
Q. Where do you live?
A. Long Branch?

Q. Do you know Moore and Huhn?

A. Yes, sir.

Q. Have you ever been to their place on Second avenue?

A. Twice.

Q. Were you there after July 1st, 1905?

A. Yes, sir.

Q. What did you see there on your visit there?

A. I dropped in there one evening and just got in there time enough to lose a $6 bet and walked out.

Q. Who did you lose that $6 bet with?

A. Some white fellow. Pope McCarthy seemed to have charge when I was there. He was cutting.

Q. Who was behind the table?

A. Pope McCarthy.

Q. Who else was there?

A. I have seen Lou standing around there with his hands in his pocket.

Q. What did Pope have in his hand?

A. He had the money box.

Q. Louis was there?

A. He was there, walking around like everybody else.

Q. Who had hold of the stick?

A. There wasn't anybody had hold of the stick that night.

Q. Who did you make your bet with?

A. Some white fellow. He said he come $6, and I said: "It is a bet." He hit me by eleven, and I paid it and went on out.

Q. That is the only time you were there after July 1st?

A. Yes, sir.

Q. Did you see the Klondike table that night?

A. I seen the table there.

Q. Any people around it?

A. Well, there was a few standing around it.

Q. Who did you see back of it?

A. I seen Mr. Moore standing up with his hands this way. (Indicating.)

Q. Back of the table?

A. He wasn't exactly back of that table; standing aside, like this.

Q. He was back of the table and the people around in front?

A. He was facing me. He wasn't around back of the table.

Q. How close were you to the table?

A. As near as that table over there.

Q. How could you see whether he had his hands in his pocket or not?

A. Just as I come in the door he was standing back of the table.

Q. Anybody else back of the table?

A. Nobody else back of the table; no, sir.

No cross-examination.

William Dean, sworn for the State.

Direct examination, by Mr. Stokes:

Q. Where do you live?

A. No. 6 First avenue.

Q. What is your business?

A. Laborer.

Q. And do you know Lewis Huhn and Joseph Moore?

A. Acquaintances.

Q. And have you ever been to the place on Second avenue?

A. Yes, sir.

Q. How many times were you there?

A. Two or three times.

Q. And what did you go there for?

A. Went there to gamble.

Q. Who did you find there when you went there on these different occasions?

A. Several fellows.

Q. Who did you find in charge?

A. In charge of what?

Q. In charge of the rooms upstairs?

A. The game that I play is the dice game; that is all I know anything about, is the dice game.

Q. Who was in charge of the dice game?

A. Pope McCarthy and this gentleman. (Indicating one of defendants.)

Q. Who else?

A. That is the only ones I saw behind the box at the time.

Q. Any of these nights you were there; any time you were there?

A. Pope McCarthy.

Q. You were the night of the raid; who was in there then?

A. I was just in there five minutes before the raid come off.

Q. Who did you see behind the table?

A. I didn't have a chance to get in the room.

Q. Weren't you in the dice room at the time the raid was made?

A. No, sir.

Q. You were not?

A. Just as I come up the steps the room that leads toward the left a couple steps—that room; I was in there.

Q. What was in that, the Klondike game?

A. A table; I don't know whether it was Klondike or not.

Q. What were you doing in that room?

A. A detective had a big gun in everybody's face.

Q. Who was that fellow?

A. That fellow there with the dark moustache by Jake Rue.

Q. Mr. Minugh?

A. I don't know what his name was, but he was there.

Q. How long had you been in there?

A. Hadn't been no time.

Q. Five minutes, you said awhile ago.

A. Five minutes before I had been in the house.

Q. What were you doing in the house?

A. Watching the game.

Q. And who did you see behind this table in the room?

A. Didn't see anybody but a whole lot of people standing up there and this man with a gun in his hands.

Q. You saw him coming upstairs?

A. No, sir; if I had, I would have tried to get out of the way; I didn't have time to go back; I didn't see him till he was there.

Q. On these other occasions you were there who did you see running the Klondike?

A. I don't know the Klondike table; I never played it, and don't know anything about it.

Q. Who did you see behind that?

A. I didn't see anybody but that man with a gun in his hand and a lot of people standing there.

Q. Not that night; the other nights when you were there.

A. I never seen anybody there.

Q. You say that?

A. Yes, sir; I do that.

Q. Did you see anybody around the table?

A. No, sir; I didn't.

Q. On the other occasions?

A. That is what I said.

Q. Nobody?

A. Nobody, I said.

Q. The table was vacant?

A. The table was; nobody around the table.

Q. Did you see Joseph Moore there?

A. No, sir.

Q. Louis Huhn?

A. No, sir.

Q. Did you ever see them there?

A. Saw them in the house, yes.

Q. What were they doing?

A. Standing by the table, the same as anybody else.
Q. Standing by the table?
A. Yes, sir.
No cross-examination.

Bee Oddley, sworn for the State.
Q. Where do you live?
A. Bath avenue.
Q. What is your business?
A. Coachman.
Q. You were at this place the night of August 20th, were you not?
A. Yes, sir; the night of the raid.
Q. How many times had you been there before that?
A. That was the first time I had been in the building this summer.
Q. The first time?
A. Yes, sir.
Q. What did you go there for?
A. Well, I tell you; I can't tell you what I went there for; I had been on the trolley car to Asbury Park, and stayed down there, and come up on the last trolley, and had several drinks around there in saloons, you know, and went over and got a cigar.
Q. Who did you go up there with?
A. Up where?
Q. This place on Second avenue?
A. Nobody.
Q. Went up alone?
A. Yes, sir.
Q. How came you to go up there?
A. When I got the cigar down in the pool-room and there was nobody playing pool there I just suddenly walked upstairs to see what was going on.
Q. Who said that to you?
A. Who said what to me?
Q. To go upstairs and see what was going on?
A. Nobody.

Q. How did you know anything was going on up there?

A. I heard the noise and I heard about it before.

Q. What did you see when you got up there?

A. When I got up there there was a big room and that big table there.

Q. That is the dice table?

A. Yes, sir.

Q. Did you go in that room?

A. Yes, sir; that is as far as I got.

Q. What were they doing in there?

A. As near as I could get to the table they must have been shooting dice, because I could hear them rolling it. I didn't get to the table.

Q. Who did you see back of the table?

A. The gentleman there with light hair and a colored fellow.

Q. Which man do you mean, right here? (Indicating defendant Moore.)

A. No, that gentleman over there next to Mr. Moore. I know Mr. Moore by sight.

(Mr. Huhn requested to stand up.)

Q. Is that the gentleman?

A. Yes, sir.

Q. He was behind the table, you say?

A. Yes, sir.

Q. Where were these other people that you refer to, the crowd?

A. Well, if you walk in the room everybody seems to stand all around the table, and this gentleman, Mr. Huhn, was on this side next to the wall and the other colored men was on the opposite side of the table.

Q. Did you notice a table in the other room?

A. No, sir; that is the only room I came to. That is all I saw.

Q. That is all you saw?

A. That is all I seen.

Q. How long did you stay there and hear these dice rolling?

A. I couldn't say. I couldn't get to the table at all, and I hadn't been there but a few minutes when I heard the shooting and seen the gentleman over there walk in, and I stood right still; didn't move.

Q. And you were held as a witness that night?

A. Yes, sir.

Cross-examination, by Mr. Fay:

Q. You were there when this raid took place, you say?

A. Yes, sir.

Q. What happened when that raid took place? Any shooting around there?

A. Yes, sir; I heard the shooting downstairs two or three times, and I looked out and there was a gentleman standing there, and he came in the room and had a great long gun in his hand, and he said everybody stand still, and I stood still and didn't move at all.

Q. Did they have a number of revolvers around there and shoot them off, in the hands of these gentlemen that came in?

A. That gentlemen there, he says "Hands up." I can't tell what he says, but I seen a great long gun in his hand, and he says "Stand still. You are under arrest." I seen everybody knocking around and stood still.

Q. There was considerable shooting going on there?

A. I think they shot two or three times downstairs, and I am pretty nervous, and I was afraid, and I stood still.

Q. Were you there when the cigars were distributed?

A. I don't know anything about the cigars.

Q. You were not there then?

A. No, sir; I don't know anything about the cigars distributed.

By Mr. Stokes:

Q. There was no shooting inside the building?

A. No; I don't think so.

Abel Justice, sworn for the State.

Direct examination, by Mr. Stokes:

Q. Where do you live?

A. Poole's avenue, Long Branch.

Q. Do you know Joseph Moore and Louis Huhn?

A. Slightly; yes, sir.

Q. Have you ever been to their place on Second avenue?

A. Once.

Q. How many?

A. One time.

Q. When was that one time?

A. That was the night of the raid.

Q. That is the night you were caught there?

A. That is the night I was there.

Q. What did you go there for that night?

A. I didn't go there for anything particular; only went there with a friend, as we were down from Long Branch together with a couple of ladies, to West End, and he wanted me to go in and get a cigar, and I went in and had a cigar, and he says, "Come on, let's go upstairs." I says, "I don't want to go upstairs. I want to catch the next trolley home." He says, "We will be down in time to catch the next trolley." So I went up and stood there a few minutes; I don't know, three-quarters of an hour, or something like that.

Q. What did you see going on while you were up there?

A. Well, I seen them standing around a table, a big long table. I stood in the door, and they seemed to be shooting dice and one thing or another.

Q. Who did you see? In the middle room where the Klondike table was, who did you see there?

A. I don't know. I never noticed them.

Q. Where were you? What room were you in?

A. I was in the room where the dice table was, stand-

ing at the side of the door. I wasn't in the room at all, standing at the side of the door, leaning up against the door.

Q. Who did you see in there?

A. Well, I couldn't tell you all I did see.

Q. Who did you see have charge of the table?

A. Well, I seen McCarthy on one side of the table; and whenever they would crowd away, then I could lean up the side of the door like this, and I could see Mr. Huhn on one side.

Q. Which Mr. Huhn?

A. That gentleman. (Indicating defendant.)

Q. This gentleman right here, the defendant?

A. Yes, sir.

Q. You didn't play any that night?

A. No, sir.

Q. Was anybody else playing? Could you see the dice roll?

A. Some few, yes, sir.

Q. Were there many at the table?

A. Well, yes, sir.

No cross-examination.

Frank Irons, sworn for the State.

Direct examination, by Mr. Stokes:

Q. Where do you live?

A. West Long Branch.

Q. Do you know Louis Huhn and Joseph Moore?

A. Yes, sir.

Q. How long have you known them?

A. Probably a couple years.

Q. Have you ever been to the place on Second avenue?

A. I was once, one time.

Q. When was that?

A. That was the night they made the raid.

Q. What did you go there for that night?

A. I went there in search of a hack driver, me and Mr. Hendrickson and a fellow by the name of Harry

Tilton, three of us together, and we was searching for a hack to take us home, and we saw a few hacks standing in front of this place, so we went in there.

Q. How long had you been in there before the raid?

A. About ten minutes.

Q. And you say that hacks were standing in front of this place when you went in?

A. Wagons were standing there.

Q. Horses tied?

A. Yes, sir.

Q. Who went in with you?

A. Frank Hendrickson.

Q. And who else?

A. Henry Tilton.

Q. Were they in there at the time of the raid?

A. Yes, sir.

Q. Were they held too?

A. Yes, sir.

Q. Now, what did you see there that night, Mr. Irons?

A. Saw them shooting crap.

Q. In which room was that?

A. That was in the far room.

Q. Who was in charge of that table?

A. Louis Huhn.

Q. Was there money on the table?

A. Some money on the table.

Q. What were they crap with?

A. Dice.

Q. That is the only time you ever were there?

A. That is the only time.

Q. Did you see anybody in the other room?

A. I saw some people in there.

Q. Did you see either of these defendants in there?

A. No, sir.

Q. Didn't notice them?

A. No, sir.

Q. You were not in that room?

A. I didn't have time to see much up there.
Q. Did you play at all?
A. No, sir.

Jacob B. Rue, sworn for the State.
Direct examination, by Mr. Stokes:
Q. You are one of the county detectives?
A. Yes, sir.
Q. And you were present at the raid on the night of August 20th at Long Branch?
A. Yes, sir.
Q. Just tell what you saw that night as you went there.
A. Well, we went in through the side door downstairs and went up a flight of stairs into the crap table room first, and wheeled right through there and went into the Klondike and found a number of men in there.
Q. What did you see as you went into the crap table room?
A. Well, there was dice on the crap table. They were shooting dice, I think, from the appearance of everything.
Q. And who did you see back of the table, the crap table?
A. I think Mr. Huhn was there.
Q. This defendant here?
A. Yes, sir.
Q. Anybody else?
A. There was a colored man with curly hair. That is Bob McCarthy, I think.
Q. After you went from that room into the next room to your left, you say, who did you see there, the Klondike table?
A. I think Mr. Moore was in that room.
Q. Mr. Moore?
A. Yes, sir.
Q. What did you do, Mr. Rue?
A. Well, we made a grab for the change and the dice that lay there.

By the Court:

Q. Where? In which room now?

A. In the Klondike. In both rooms, in fact.

By Mr. Stokes:

Q. Did anybody else make a grab for them also?

A. I think so. Everybody thought it was their duty to get all that paraphernalia possible. They all understood that.

Q. Was Mr. Moore searched there that night?

A. Yes, sir.

Q. Any money taken off him?

A. Yes, sir.

Q. Do you remember how much?

A. $251.50.

Q. How many people did you find in there when you went there? Was anybody there in the rooms?

A. Somewhere in the neighborhood of twenty-eight, I think it was.

Q. Somewhere about that?

A. Yes, sir.

Q. Where were the people, in relation to the two tables you have spoken of?

A. I think they were equally divided.

Q. How do you mean equally divided?

A. Perhaps about the same number in the crap room as the other.

Q. Were they near the tables, or away?

A. Right close to the tables.

A. Yes.

Q. What paraphernalia did you find there that night?

A. Klondike table—which is called a Klondike table, crap table and roulette wheel.

Q. What was done with those things?

A. The paraphernalia?

Q. Yes.

A. It was carted to Red Bank and kept in my barn under lock until it was delivered to Constable Minugh and taken to Colt's Neck to Mr. Strong.

Q. Do you see this paraphernalia here to-day?

A. Yes, sir.

Q. Is that the same paraphernalia that was taken from the house on Second avenue, Long Branch?

A. Yes, sir; apparently.

Q. Was anything else taken from there; anything else except the three tables?

A. Well, the legs and braces that went under the tables.

Q. Anything else?

A. Chips.

Q. Anything else?

A. Dice.

Q. This bag that I have here?

A. That looks like the same bag.

Q. That was also turned over at the same time by you to Mr. Minugh?

A. Yes, sir.

Cross-examination by Mr. Fay:

Q. Mr. Rue, you searched a number of people there that night, didn't you?

A. Searched for weapons; yes, sir.

Q. Searched for money, also, didn't you?

A. I think one man, by Mr. Stokes' order.

Q. You saw Abel Justice, the colored man that was on the witness stand?

A. Yes, sir.

Q. Did you search him?

A. With the rest of them, for weapons, I presume.

Q. Did you take any money from him?

A. No, sir.

Q. Positive about that?

A. Positive.

Q. Did you search Bee Oddley, the man that was on the stand?

A. Well, we searched everyone, presumably, as they were in that room, as they were lined up.

Q. Did you take any money from him?

A. No, sir.

Q. You did the searching?

A. Yes, part of it. I think Mr. Minugh helped. I am not positive about that; I think so. Probably Mr. Strong; I don't know. I think Mr. Strong searched some of them. There were very few of us in the raid that night. We were a little afraid of guns and razors.

Q. You shot your gun off several times?

A. No, sir; not at all.

Q. Did you go down stairs and make a raid on the cigar stand, too?

A. No, sir.

Q. Were you there when it was made?

A. No, sir.

Q. Were you there when the cigars were distributed?

A. No, sir.

Re-direct examination, by Mr. Stokes:

Q. Was any money taken from the table that night?

A. $16.45 I have, sir.

Q. From which table?

A. The Klondike table.

Further cross-examination, by Mr. Forman:

Q. Were you there when a search was made of one of these men and a bottle of brandy was found on him?

A. No, sir.

Q. Didn't that occur?

A. I am not positive. I wasn't there. I didn't see any man searched and brandy taken from him.

Q. You didn't see this defendant doing anything? (Indicating Huhn.)

A. I didn't see anybody doing anything but standing around. Of course, everything was confusion the minute I was in the door.

Elwood Minugh, sworn for the State.

Direct examination, by Mr. Stokes:

Q. You are an officer?

A. Yes, sir.

Q. You were present with the party that went to Long Branch on the night of August 20th, were you?

A. I was.

Q. Just tell us what you saw when you got into the building where you found the paraphernalia, if you found any, and all about it.

A. I followed Mr. Rue upstairs and went to the door of the crap room, from the outside porch, I suppose, they called it. I rushed right to the first door, and I seen them rushing out of that room on to the back porch, and I had my gun in my hand and told them to stand back, they were under arrest, and not come out.

Q. Did you go in the room?

A. I did after I shoved them back.

Q. And who did you see in there when you got in behind the table, if anybody?

A. Well, they were on top of it and under and everywhere.

Q. What paraphernalia did you find that night?

A. This paraphernalia which is here.

Q. Did you find these two defendants there?

A. Yes, sir.

Q. Were they arrested that night?

A. They were.

Q. Is this the same paraphernalia that you turned over to Mr. Strong that you took from Mr. Rue's barn?

A. Yes, sir.

Q. And is that the same stuff?

A. Yes, sir.

Q. You identify it as such?

A. Yes, sir.

Frank Henderson, sworn for the State.

Direct examination, by Mr. Stokes:

Q. Were you at the place on Second avenue on the 20th of August?

A. I don't remember the date.

Q. Were you there the night of the raid?

A. Yes, sir.

Q. How long had you been there?

A. I judge five or ten minutes.

Q. Who did you go in with?

A. Two gentlemen and I went up to get a carriage.

Q. Which room did you go in after you got up there?

A. The crap game.

Q. Did you see anybody in that room?

A. It seemed to be full.

Q. Did you see either of these defendants there that night?

A. I did not; no, sir.

Q. Didn't notice them?

A. No, sir; I never seen either one of them.

Q. You didn't see them there at any time?

A. Well, after the raid, yes, sir.

Q. Well, they were there at that time?

A. Sure.

Q. They were there at the raid, were they not?

A. You asked me if I saw them there at that time.

Q. Did you see them there that night?

A. Yes, sir.

Q. You didn't notice them particularly before that?

A. No, sir.

Q. You hadn't been there but a few minutes?

A. Five or ten minutes, I judge.

Q. What did you see going on while you were there?

A. A crap game.

Q. Who was playing the game?

A. Well, different ones; I didn't know who they was.

Q. Who was on the stick?

A. That I couldn't say.

Q. Couldn't say that?

A. They were lined so thick around the table I couldn't get through.

Q. You couldn't see who was back of the table or had charge of the stick?

No cross-examination.

Mr. Stokes—I offer the paraphernalia and rest.

Mr. Fay—If the Court please, I move at this time to direct a verdict for the defendants in this case. There has been no proof that either Louis Huhn or Joseph Moore were conducting this place. In fact, the proof of both the employer, Clancy, who was upon the witness stand, and the detective, is that Charles Huhn was the person who kept and conducted this place; that the detective said that Charles Huhn was the man that told him whether they would or would not open the game; that Charles Huhn was a partner with him at a table in one game, and that he transacted all business that he had with Charles Huhn, but merely saw the defendants about the place on several occasions. His testimony was conflicting upon that point, even. It was not direct and positive as to what he saw them do—conflicting both on direct examination and cross-examination and under the examination of your Honor.

The verdict should also be directed on the ground that the evidence does not sustain the indictment in this case. There is no evidence that the defendants conducted or kept or maintained the keeping of a disorderly house. The evidence is that they were merely seen about the place on several occasions. I will therefore ask your Honor to direct a verdict.

(Motion denied.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

JOHN E. FOSTER, *P. J.* [L. S.]

Mr. Fay—I submit it is improper to admit this roulette wheel and paraphernalia here, because there is no

evidence connecting the defendants with it, and, on the contrary, the evidence is that it was connected with Mr. Clancy.

The Court—I will agree with you on the roulette wheel. There is no roulette wheel belongs in this case, but the rest of the paraphernalia.

Mr. Fay—Are the chips in connection with it?

The Court—I don't know what they are in connection with.

Mr. Stokes—Of course the chips go with the roulette wheel. The dice and the other stuff go with this.

The Court—Whatever relates to Mr. Clancy does not affect the other defendants and should not be admitted.

Mr. Fay—The prosecutor in opening this case said that he would prove that the defendants were engaged in the gambling business and had no other occupation. There has been no such proof adduced before the jury, and as he made it a part of his case, I will therefore move to direct a verdict on the ground that the prosecutor has not sustained his opening.

(Motion denied.)

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

JOHN E. FOSTER, *P. J.* [L. S.]

Recess to 1:30 P. M.

Trial of the cause resumed at 1:30 P. M.

DEFENDANTS' TESTIMONY.

Thomas Johnson, sworn for defendants.

Direct examination, by Mr. Fay:

Q. Mr. Johnson, you know Joseph Moore?

A. Yes, sir.

Q. How long have you known him?

A. A number of years.

Q. Where does he live?

A. West End.

Q. Do you know with whom he lives there?
A. His mother.
Q. Do you know his mother?
A. I do.
Q. Do you know his father?
A. His father has been dead some years.
Q. And do you know that he is engaged in the real estate business at West End?

(Objected to. Objection sustained.)

Mr. Fay—On what ground?

The Court—Too leading.

Q. Do you know what business he is engaged in at West End?
A. I know he was engaged in the real estate business.
Q. Do you know who his partner was?
A. Mr. Green—Elva Green.

Cross-examination, by Mr. Stokes:
Q. What time were you referring to, Mr. Johnson?
A. Last spring and part of the summer.
Q. From what time till what time?
A. Until recently, within the last year.
Q. What months of last year was he engaged with Mr. Green?
A. Well, during the spring and early part of the summer.
Q. Since July 1st?
A. I couldn't say that.
Q. You couldn't say that?
A. Couldn't say that.
Q. Do you know anything that he has done since July 1st except at this place on Second avenue, in Long Branch?
A. I couldn't say that he done anything there.
Q. You don't know anything about him then?
A. Nothing at all.
Q. What is your business?
A. Well, speculator.

Q. You are a speculator, the same as Mr. Clancy?
A. Yes, sir.

Carl Huhn, sworn for defendants.
Direct examination, by Mr. Fay:
Q. Mr. Huhn, do you know Joseph Moore?
A. I do, sir.
Q. How old is he?
A. Joseph Moore, I think, is a young man about twenty-two years of age.
Q. You have lived in the neighborhood of him all the time he has lived there?
A. I was building my house in the time of the blizzard and he was a little boy.
Q. How old is your son Lou?
A. About the same age.
Q. How old?
A. Twenty-two.
Both sides rest.

During the course of the argument for the State by Mr. Stokes, he made the statement to the jury that Charlie Huhn is the brother of Lewis Huhn, and is made the scapegoat.

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

JOHN E. FOSTER, *P. J.* [L. S.]

Mr. Stokes also made the statement, "And he told you that they (defendants) got some of the proceeds thereof."

(Whereupon the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

JOHN E. FOSTER, *P. J.* [L. S.]

CHARGE OF THE COURT.

Gentlemen of the Judy—These defendants and certain others were indicted at the present term of court for a misdemeanor. On the application of the prosecutor a severance, as it is called, of the indictment has been granted, so that we are now trying in this indictment, two defendants, Louis Huhn and Joseph H. Moore, and no one else that may be named in the indictment. Under the form of the indictment, gentlemen—that is, the words and language employed in it—notwithstanding anything that you have heard, it is not essential for you to find everything in it established just as it is alleged. The essential charge in this indictment relied on by the State and the essential fact for you to determine in the consideration of the case will be whether these defendants or either of them kept a place where people resorted for the purpose of gambling in any form, as specified in this indictment, namely, with dice and tables, etc.

These defendants, I may say at the outset, gentlemen, are presumed to be innocent of this charge until the State has established their guilt to your satisfaction beyond a reasonable doubt. If you have such reasonable doubt in your mind arising from the evidence in the case it is your duty and you must resolve that doubt in their favor and acquit them. When you come to consider the evidence to determine whether you have such doubt or not, and determine whether your verdict will be guilty or not guilty, you must take all the evidence in the case and weigh it carefully in order to learn whether or not this was a gambling place or place where people gathered to gamble in any form, and whether or not these defendants or either of them took any part in conducting the place.

I might state at the outset, in order to clear up any doubt that may be in your minds from any reference to the Court's position on the law applicable to this case,

in case you come to the conclusion that this was a place where people resorted to gamble in any form, as to any distinction you may make or attempt to make in your minds between principal and accomplice, or as to any person who is stated to have aided and abetted in the running of the place, that this is an indictment for a misdemeanor, and under our law any persons who aided, assisted or helped in any way in committing the act complained of are principals. What I mean by that is this, and I do not want you to have any misunderstanding about it: If you find the evidence to warrant you in reaching the conclusion that one or both these defendants were simply employees in this establishment, and that while so employed they attended the table or tables at which some gambling game was being conducted, they would be guilty, and would be guilty as principals in the violation of the law, the crime charged in this case being a misdemeanor. I do not want to leave any doubt or any question in your minds on that point.

The first thing, then, gentlemen, for you to determine in the consideration of the case, is this: Did these defendants take any part in managing or did they conduct a place on Second avenue, Long Branch, between the 1st day of July, 1905, and the 26th day of October, 1905, at which persons gathered for the purpose of gambling in any form? Gambling, I might define generally, as it is commonly understood, is the engaging in any practice or game with cards, dice, etc., for gain, or engaging in such games on a chance of gaining money or something of value. Gambling, as defined by the sections of the Crimes Act under which this indictment is framed, and as specified and alleged in the indictment, is gambling with dice, at tables of the kind specified in the indictment, or with any other instrument or instruments in the nature of dice or tables, for money or other valuable thing. If you find that at this place on Second avenue, between the dates I have mentioned, gambling

was being carried on there for money or other valuable thing—that is, that some game with dice was being played for the purpose of gaining money or other valuable thing—then I tell you that that was the form of gambling alleged to have been conducted by these defendants in that place. If you find the proof to establish that this place was so conducted as a gambling resort, or a place where people did resort for the purpose of gaming in the form alleged in the indictment, and if you find that the defendants or either of them took any part in conducting that establishment where such gambling was going on, then it will be your duty to find them guilty of the offense alleged in the indictment, namely, conducting an establishment where gambling was being conducted in violation of the statutes of this State.

To support the prosecution a number of witnesses have been called, among others one Clancy, who, as you have heard, has been indicted with them and has pleaded guilty to that indictment. He tells you that he was engaged with one Charles Huhn in running a roulette wheel in this place on Second avenue, in Long Branch, during the time between the dates in question, or at least for about three weeks between those dates; and he says that he and Huhn divided up the proceeds from the roulette table; that is, he and Charles Huhn—not this defendant. He says he had nothing to do with any other part of the house. It appears from the proof in this case that this establishment which these defendants are alleged to have conducted consisted of three rooms, one containing a roulette wheel, which Clancy says he and Charles Huhn managed. The other rooms contained a Klondike table, which table was played with dice; and the other contained a crap table or dice table, as it has been referred to. There is proof in the case from Clancy that on two or three occasions he has seen the defendants behind these tables; that he has seen money, dice, blocks, etc., upon the tables.

It is also testified by Peterson, the detective from the Fuller Agency at that time, but who is not now engaged with that agency, that on the 18th and 19th of August last he saw Joseph Moore, the defendant, attending the Klondike table, at which he, Peterson, played and lost money; that on the same occasion, August 18th, he saw Huhn in charge of the crap of dice table, at which the witness Peterson also played and lost money. He tells you that on the 19th of August he again found Moore in charge of the Klondike table, and Louis had charge of the crap table again—that is, Louis Huhn. He says there were about thirty people present on the night of August 19th and the morning of the 20th, the occasion when the house was raided by a force under the prosecutor, and he says that he was playing Klondike at the table over which Moore presided when the raid was made.

Walter Hill, another witness who has been called by the State, tells you that he was at the defendant's place on the night of the raid; he had been in the place several times, and he saw crap and Klondike tables there and people playing on them; he saw Pope McCarthy, Charles Huhn and Louis Huhn at different times in charge of the crap table, and also saw Charles Huhn and Joseph Moore at times in charge of the Klondike table. He finally summarized his testimony by saying that Louis kept the game of crap and Joe presided at the Klondike —Joe being Joseph Moore; and he says that at the time of the raid Louis Huhn was at one end or side of the table, the people on the other side, and that Pope McCarthy was at the other end of the crap table. He says he never saw Moore doing anything except standing behind the Klondike table.

Silas Nash said he was there in the place several times since July 1st; that he saw Louis Huhn standing and walking around the place with his hands in his pockets, and that he lost $6 on the dice table. He said he saw Moore standing facing the people near the Klondike

table, and that no one else was back of the table but Moore. William Dean testifies that he went to the place two or three times and gambled; he was there on the night of the raid. At the time the raid was made Mr. Rue testifies that among other things that they took possession of, with the paraphernalia, they collected $16.45 in money from the Klondike table, and that he took possession of it, and that they then seized the paraphernalia which has been offered here in evidence, which you will have the liberty to inspect when you go to your room.

If you believe that testimony, gentlemen, if you find that there is no reasonable doubt, after giving the weight and credence to it that you think it entitled to, and if as a result of the consideration you give it, you reach the conclusion that these defendants participated in the management of that place and there conducted a gambling house; if, as I say, having no reasonable doubt on the evidence of that fact, then of course your duty would be to bring in a verdict of guilty against them.

It is immaterial, gentlemen, for the purpose of your consideration of this case, who was the owner of the place or who was the lessee—absolutely immaterial who it was. The question is, what did these defendants do, if anything. It is also a matter for you to attach such significance as you think it deserves, to the fact that these defendants have not seen fit to take the stand and deny the accusation against them. They are not obliged to take the stand; they have a right to remain off the stand if they or their counsel see fit to keep them from the stand, or from testifying. You have a right to say, however, whether or not the case made out by the State was one that required denial under oath by them to satisfy you that a reasonable doubt existed of their guilt under the proof in the State's case. You may conclude that it was not necessary for them to take the stand and deny under oath that they were guilty of this charge. It is not obligatory on them to prove their innocence;

the State must prove their guilt. But, on the other hand, you may conclude that, considering the testimony in the case against them, it is very significant that they did not take the stand and tell you under oath that they were not guilty of this charge.

Great stress has been laid, gentlemen, in this case, on the penalty to be attached and to be imposed on these defendants in case you find a verdict of guilty against them. With that penalty you have nothing to do. That is the Court's duty, just as much as it is your duty to say what the verdict should be. The Court must take that responsibility, let the penalty be what it will. The Court will put its own construction upon that statute in case it has to, when you bring in your verdict, no matter what the penalty may be, whether it is a suspension of sentence or imposition of that penalty. You are here to do your duty, and you should do it regardless of what the Court is going to do in case you find the defendants guilty or not. You have not taken an oath to convict or acquit these defendants according to the penalty which the Court is going to impose; you have taken an oath, a sacred oath, to convict or acquit these defendants according to the evidence—nothing else. There is some sentiment that you might have heard from counsel on both sides in regard to the suppression of gambling in this county, and while we are all desirous, gentlemen, of suppressing gambling in this county, none of us are desirous of suppressing it at the expense of innocent men, and we are not going to convict innocent men in this court to suppress gambling. Nor, on the other hand, are we going to be fooled, no matter how specious the plea may be, and allow men guilty of violating the gambling laws of this State to go free and not suffer the consequences of their act by the claim that the penalty may be too severe or that the Legislature had no business to pass such a law. That is not our business. The Legislature in its wisdom has seen fit to pass that law. It is a law upon the statute books. It is your duty

and mine to enforce it if the evidence warrants it. We have no right to shirk that duty, gentlemen. Furthermore, if you are going to have respect attached to the Court, and the administration of the law here by the jury, then you must act according to the evidence and nothing else. There is nothing else in this case but the guilt or innocence of these defendants, absolutely nothing else, and you have no right to allow anything else to come into the case to influence your verdict. No matter what you think of gambling, no matter whether you approve of it or disapprove of it, it is entirely immaterial in this case. The question is, will you observe your oath and act according to the evidence in this case. Whether you please or displease anyone is entirely immaterial.

Therefore, gentlemen, in conclusion, I simply say to you again, if you have any reasonable doubt, a doubt for which you can give a good and sufficient reason under the evidence in this case, then resolve it in favor of these defendants. If you do find the evidence to raise a reasonable doubt in your mind in favor of either of them, you should resolve that doubt in favor of that one and acquit him. If, however, after a fair and conscientious consideration of all the evidence in the case, you find no such reasonable doubt to exist, then do your duty to the State and convict them.

(The defendants pray a general exception to the whole charge, which exception is hereby allowed and sealed accordingly.)

JOHN E. FOSTER, *P. J.* [L. S.]

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY,
Defendant in Error,
vs.
JOSEPH MOORE AND LOUIS HUHN,
Plaintiffs in Error.
} In Error.

WRIT OF ERROR.

(*Returnable December 8, 1906.*)

(*Filed November 23, 1906.*)

NEW JERSEY, *ss.*—The State of New Jersey to the Chief Justice and other Justices of our [L. S.] Supreme Court of Judicature, Greeting:

For as much as in the record and proceedings and also in the giving of judgment upon a certain indictment against Joseph Moore and Louis Huhn, late of the city of Long Branch, in the county of Monmouth, for a misdemeanor, for that on the first day of July, in the year of our Lord, one thousand nine hundred and five, and on divers other days and times between that day and the day of taking this inquisition, with force and arms, at the city of Long Branch aforesaid, in the county aforesaid and within the jurisdiction of this court, wilfully and unlawfully did keep and maintain a certain common, ill-governed and disorderly house, situate on the easterly side of Second avenue, between Brighton avenue and Matilda Terrace, in the city of Long Branch aforesaid, county of Monmouth aforesaid, and in the said house for their lucre and gain, then and on the said other days and times, there unlawfully and willingly did with intent cause, procure, permit, aid, abet and assist certain persons

of evil name and fame, and dishonest conversation to resort, frequent and come together, for the purpose of engaging in gambling, gaming and playing for money and other valuable things at and with cards, dice, E. O. table and other tables, instruments, engines and devices, faro-bank and other bank of like kind, and the said certain persons, in the said house of them, the said Louis Huhn, Joseph R. Moore, Charles Huhn, John Clancy and Pope McCarthy, at unlawful times, as well in the night as in the day, then and on said other days and times, there to resort, be and remain, drinking, tippling, fighting, gambling, gaming and playing for money and other valuable thing at and with cards, dice, tables, instruments, engines and devices, faro-bank and other bank of like kind, and misbehaving themselves, unlawfully and wilfully did with intent permit, and yet does permit, to the great damage and common nuisance of all citizens of the State of New Jersey, there inhabiting being, residing and passing, to the evil example of all others in like case offending, contrary to the form of the statute in such case made and provided and against the peace of this State, the government and dignity of the same.

And whereas, said indictment, proceedings and judgment were removed by writ of error into our Supreme Court before the justices thereof, and the judgment of the Court of Quarter Sessions of the county of Monmouth was in all things affirmed, as is said manifest error hath intervened to the great damage of Joseph Moore and Louis Huhn, as from their complaint we have information, we being willing in their behalf to correct the error in due manner, if any there shall be, and that speedy justice be done to them, the said Joseph Moore and Louis Huhn, command you that if judgment be thereon given, then that you send to our judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the 8th day of December next, distinctly and openly under your seal, the record and

proceedings and judgment aforesaid, with all things touching and concerning the same, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to the laws and custom of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the twentieth day of November, nineteen hundred and six.

S. D. DICKINSON,
Clerk.

THOMAS P. FAY,
Attorney for Defendants,
Plaintiffs in Error.

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WILLIAM S. GUMMERE, *C. J.* [L. S.]

NEW JERSEY SUPREME COURT.
November Term, 1906.

THE STATE OF NEW JERSEY,
Defendant in Error,
vs.
JOSEPH MOORE AND LOUIS HUHN,
Plainitffs in Error.
} In Error.

AFFIRMANCE AND REMITTITUR.

The Court having heard the argument of counsel, and inspected the judgment and proceedings removed by the

writ in this cause, and duly considered the causes assigned for error,

It is ordered that said judgment be in all things affirmed, with costs; and that the record be remitted to the Hudson County Court of Quarter Sessions, to be proceeded in according to law.

Entered November 14, 1906.

On motion of

HENRY M. NEVIUS, *Attorney.*

I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule made by said Court in the above-stated cause and entered in the minutes thereof.

In testimony whereof I have set my hand and the seal of said Court, at Trenton, this [L. S.] twenty-second day of November, A. D. nineteen hundred and six.

WM. RIKER, JR., *Clerk.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN
THE STATE OF NEW JERSEY,
Defendant in Error,
vs.
JOSEPH MOORE AND LOUIS HUHN,
Plaintiffs in Error.
} In Error.

ALLEGATION OF DIMINUTION.

(Filed December 8, 1906.)

Afterwards, that is to say, on the eighth day of November, nineteen hundred and six, before the Judges of the said Court of Errors and Appeals, in the last

resort in all causes, at Trenton, comes the said Joseph Moore and Louis Huhn, by Thomas P. Fay, his attorney, and alleges that the writ of error and return in the Supreme Court, the supplemental return of John E. Foster, Esquire, Judge of the said Court of Quarter Sessions, the specifications of causes relied on for reversal and the additional specification of causes relied on for reversal, and other papers in the Supreme Court in relation to the judgment and record aforesaid, are not certified and returned with the writ of error depending in this Court, and the said Joseph Moore and Louis Huhn prays that a writ of the State of New Jersey be directed to the Judges of the said Supreme Court to certify to the said Court of Errors and Appeals the truth of the same, and it is granted to him.

THOMAS P. FAY,
Attorney for and of Counsel with Plaintiff in Error.

WRIT OF CRTIORARI.

(*Filed December 8, 1906.*)

NEW JERSEY, *ss.*—The State of New Jersey to the Chief Justice and other Justices of our [L. S.] Supreme Court of Judicature, Greeting: Whereas, a certain writ of error was by us issued, directed to you, the Justices aforesaid, returnable in the Courts of Errors and Appeals on the eighth day of December, nineteen hundred and six, directing you to certify and send to said court the record of a certain judgment given on a certain writ of error before you depending wherein Joseph Moore and Louis Huhn were plaintiffs in error and the State of New Jersey was defendant in error, to remove an indictment and judgment of conviction in the Court of Quarter Sessions of

Monmouth county; and whereas, it appears that the writ of error and return in the Supreme Court, the supplemental return of John E. Foster, Esquire, Judge of the said Court of Quarter Sessions, the specifications of causes relied on for reversal, and the additional specifications of causes relied on for reversal, and other papers in relation to the judgment and record aforesaid, are not certified and returned with the writ of error depending in this court; now, therefore, we do command you that you send, under your seal, to our Judges of our Court of Errors and Appeals, in the last resort in all causes, at Trenton, on the twentieth day of December, instant, the said writ of error and return in the Supreme Court, the said supplemental return of John E. Foster, Esquire, Judge of the said Court of Quarter Sessions, the specifications of causes relied on for reversal, and the additional specifications of causes relied on for reversal, and the said other papers in relation to the judgment and the record aforesaid, with all things touching the same, together with this writ.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the eighth day of December, in the year of our Lord one thousand nine hundred and six.

S. D. DICKINSON,
Clerk.

THOMAS P. FAY,
Attorney.

I do herewith send to the Court of Errors and Appeals of the State of New Jersey the proceedings as within I am commanded under the seal of the Supreme Court and my hand.

[L. S.]

WM. RIKER, JR.,
Clerk.

Dated December 8th, 1906.

NEW JERSEY SUPREME COURT.

THE STATE
vs.
LOUIS HUHN AND JOSEPH R. MOORE.

(*Filed November 12, 1906.*)

Submitted July 5, 1906.
Decided November 12, 1906.
In error to the Monmouth Sessions.
Before Gummere, Chief Justice, and Justices Garrison and Swayze.
For the plaintiff in error, Thomas P. Fay.
For the State, Henry M. Nevius.

PER CURIAM:

This writ of error brings up a judgment of the Monmouth Quarter Sessions convicting the plaintiffs in error upon an indictment for keeping a disorderly house. Forty-nine assignments of error are filed and relied upon for reversal. We have examined all these assignments and find no error prejudicial to the defendants for which under the statute law of this State the judgment could be lawfully reversed; neither do we find any ground of error that raises any novel question, unless it be the assignment that the title "An act for the punishment of crimes" is an unconstitutional title under which to legislate with respect to misdemeanors, and the 49th assignment, that "The punishment inflicted is a cruel and unusual punishment in violation of the Constitution of the United States and of the Constitution of the State of New Jersey." The punishment referred to was a fine of one thousand dollars and one year's imprisonment. We are unable to accept these views upon either of these constitutional questions.

The judgment of the Quarter Sessions is affirmed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE STATE OF NEW JERSEY
vs.
JOSEPH R. MOORE AND LEWIS HUHN,
Defendants.
} On Indictment for Misdemeanor.

ASSIGNMENT OF ERROR AND SPECIFICATIONS OF CAUSES FOR REVERSAL.

(Filed January 10, 1907.)

Afterwards, that is to say, on the tenth day of December, in the year nineteen hundred and six, in the Court of Errors and Appeals of last resort, comes the said Joseph R. Moore and Lewis Huhn, by Thomas P. Fay, their attorney, and say that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exceptions, and in the record, and also in the giving of a verdict, conviction and judgment aforesaid, there is manifest error; and further, that on trial below, and by the judgment of the Supreme Court, they suffer manifest error, wrong and injury. And they humbly assign error, and also specify the causes in the record of the proceedings had upon said trial returned with the writ of error, upon which they rely for reversal according to the statute in such case made and provided, and also in accordance with the rules of common law, the rules and practice of this Court and the rules and practice of the State of New Jersey.

(1.) Because the idictment is fatally defective in that, without any qualification whatsoever, it alleges that it was returned by the grand jury upon their respective oath and affirmation.

(2.) Because the indictment does not show that any members of the grand jury who affirmed were con-

scientiously scrupulous of taking an oath, and the indictment does not show what members of the grand jury affirmed and what members of the grand jury found the indictment upon their oath.

(3.) Because the indictment was not properly returned to the Court of Oyer and Terminer.

(4.) Because there is no order sending the indictment from the Court of Oyer and Terminer to the Court of Quarter Sessions of the county of Monmouth for trial.

(5.) Because the indictment was not properly returned to any court having jurisdiction.

(6.) Because the indictment was wrongfully returned to the Monmouth Quarter Sessions.

(7.) Because the indictment was not returned to a court of competent jurisdiction, but was returned to the Judge of the Court of Quarter Sessions.

(8.) Because Justice Hendrickson, a Justice of the Supreme Court, holding the Court of Oyer and Terminer, in and for the county of Monmouth, and a member of the Court of Quarter Sessions, was not present when the indictments were handed in, and because no other Justice of the Supreme Court was present.

(9.) Because the indictments were returned to Judge Foster, Court of Quarter Sessions of the county of Monmouth. The record does not show the indictments were returned in open court.

(10.) Because the Court compelled the defendants to raise all of his objections at once to the whole indictment, and refused to decide them separately.

(11.) Because there was no severance of those tried under the indictment and those not tried.

(12.) Because the defendant, John Clancy, was permitted to plead guilty and act as witness without a severance.

(13.) Because the indictment does not allege who were principals and who were accessories, or who were principals, and who aided, abetted or assisted.

(14.) Because the location of the place or house is

not sufficiently set out or described in the indictment, nor is the location proved by the evidence with sufficient certainty.

(15.) Because neither time, place or facts are alleged with certainty.

(16.) Because the indictment includes both with the common law conclusion of an indictment "against the peace of this State, the government and dignity of the same," and also in the form of an indictment for a common law nuisance, "to the great damage and common nuisance of all of the citizens of the State of New Jersey, and inhabiting, being and passing to the evil example of all others in like case offending," and also contrary to the form of the statute in such case made and provided, thus confusing the defendant as to what charge he will be called upon to answer.

(17.) That said indictment and the matter therein are not sufficient in law to convict the said Joseph R. Moore and Louis Huhn, or either of them, of the offense in law, declared in said indictment, or of any other offense in law.

(18.) That the Monmouth Quarter Sessions refused to quash said indictment when thereunto moved by counsel for the said Joseph R. Moore and Louis Huhn, whereas, for the reasons assigned to the said Court, by counsel appearing on the record of the said trial, or some one of them, said Court should have quashed said indictment.

(19.) The said Court of Quarter Sessions refused to quash the indictment against the said defendants, or either of them, although moved so to do by the said defendants and by each of them; the ground for quashing the indictment was that the indictment was drawn under the common law of keeping a disorderly house, or, more technically, for a nuisance; the indictment also charges the offense defined in the sixtieth section of the Crimes Act. It is impossible to tell for which offense a conviction will be asked by reading the indictment. The in-

dictment is bad for duplicity, for uncertainty, that no crime was charged thereby, and that the defendants were not notified of the crime they were charged with; the indictment did not show the names of the persons who came together for the purpose alleged in the indictment; that the indictment does not specify what particular form of gambling was permitted, who engaged in it, when it was permitted; does not specify the dates, but usues general language, naming all of the common law elements of a disorderly house, together with the statutory prohibitions of the sixtieth section.

(20.) Because the Court before whom the indictment was tried held that the indictment was drawn under the sixty-fifth section, but the indictment does not specify which particular form of gambling took place in the house, and should set forth the particular gambling instrument or device which was used. The defendants were not notified of the crime of which they were charged. There is no evidence in the case proving the use of any of the instruments set forth in the indictment.

(21.) That the Court before whom said indictment was tried refused to quash the indictment when it was alleged by the prosecutor that the indictment was drawn under the sixty-fifth section of the Crimes Act, while the statute, among other things, says, "or shall keep a place to which persons may resort for engaging in such practice, or either of them, for betting upon the event of any horse race, or other race, or contest either within or without this State, or gambling in any form." This part of the section, besides being bad for alleging a number of different acts in the disjunction, to constitute a criminal offense, is also bad because it sets out that "any person who should keep a place to which persons may resort." The words "may resort" would apply to any person's private residence, whether persons actually did resort there for the purpose named or not. They would apply to a stockbroker's office. The in-

dictment should then specify the exact form of the charges expected to be proved, and should name each specified device, machine, act or offense expected to be proved in a separate court.

(22.) Because juror number five was challenged by Moore and excused against the objection of the other defendant, Huhn; because Juror McChesney was challenged by Louis Huhn and excused against the objection of the defendant, Joseph Moore, who was content with said juror.

(23.) Because where gambling is the sole offence proved in keeping a disorderly house the indictment cannot be sustained.

(24.) That upon the trial illegal evidence offered by the State was admitted against objection and exception on the part of the said Joseph R. Moore and Louis Huhn and each of them, as more particularly appears in the several bills of exceptions sealed upon the admission of evidence.

(25.) Upon said trial legal evidence offered on the part of the said Joseph R. Moore and Louis Huhn and each of them was excluded, as more particularly appears in the several bills of exceptions sealed upon the exclusion of evidence.

(26.) Illegal evidence admitted on said trial was allowed to stand against motion on behalf of the said Joseph R. Moore and Louis Huhn and each of them to strike out the same, as more particularly appears in the several bills of exceptions sealed upon refusal to strike out evidence.

(27.) Because the detective witness, Peterson, in his testimony, does not locate the place charged in the indictment as the place that he visited.

(28.) Because the evidence of the witness John Clancy and the witness Peterson are contradictory.

(29.) That the said Court, when the indictment was tried, refused to strike out the question, "You plead guilty, Mr. Clancy, in your part in this this morning?"

(30.) Because the Court before whom the cause was tried erred while the witness was under cross-examination, and was asked: "*Q.* You said a little while ago you never saw Louis Huhn and Joseph Moore gambling; only saw some colored men, Pope McCarthy and somebody else?" And the Court said: "He has not testified to that; he testified directly to me." The Court also erred when he said: "He hasn't said that he has seen them gambling; he testified to what he saw, and he didn't attempt to characterize it."

(31.) Because there is no evidence designating the place charged in the indictment. On page 22 John Clancy was asked: "*Q.* This place you referred to, where was it located? *A.* At West End and Second," and when Sypherd P. Peterson was asked to locate the place he visited, stated that he visited the gambling rooms of the defendants on Second avenue, and Bee Odley, on page 74, in answer to the leading question, "Have you ever been in the place on Second avenue?" answered "once." And John Clancy testified, in answer to the leading question, "During the months of July and August, what was going on in this building in the easterly side of Second avenue?" answered "There was gambling, Klondike and roulette," and in connection with Charlie Huhn, he said he had been in a place on the easterly side of Second avenue, between Brighton avenue and Matilda Terrace, but his testimony related to doing business there with Charlie Huhn. This is all his testimony which designated any house.

(32.) Because the Court erred in admitting the paraphernalia in evidence, because there was no evidence connecting the paraphernalia with the place described in the indictment or connecting the paraphernalia with Joseph Moore or Louis Huhn.

(33.) Said Court of Quarter Sessions refused, at the close of the testimony on the part of the State, and also at the close of the whole case, to direct the jury to acquit the said Joseph R. Moore under said indictment, al-

though moved to do so in his behalf, and although for the reasons assigned for such motion appearing in such record of the proceeding had upon said trial, or some or one of said reasons a verdict of acquittal should have been directed as to the said Joseph R. Moore.

(34.) Said Court of Quarter Sessions refused, at the close of the testimony on the part of the State, and also at the close of the whole case, to direct the jury to acquit the said Louis Huhn under said indictment, although moved to do so in his behalf, and although for the reasons assigned for such motion appearing in such record of the proceedings had upon said trial, or some or one of said reasons a verdict of acquittal should have been directed as to the said Louis Huhn.

(35.) Because the Court refused to direct a verdict when it appeared from the testimony of Clancy that he and Charlie Huhn were running the place, and that he was engaged in gambling in the place, and that it was during July and August, and the witness does not swear that Louis Huhn or Joseph Moore were there at any other time than the time when he and Charlie Huhn were running the place.

(36.) Because the Court erred in refusing to direct a verdict on the grounds that the evidence did not sustain the indictment.

(37.) Because the Court erred in refusing to direct a verdict on the grounds that the prosecution had not sustained what was said in the opening of the case, that he would prove that the defendants were engaged in the gambling business, and had no other occupation, when so much proof was adduced.

(38.) Because the prosecutor, in summing up, made a statement to the jury that Charlie Huhn was a brother of Louis Huhn, and was made the scape-goat, while there is no evidence relative to Charlie Huhm that was not given by the State's witness, and there was no warrant for such statement, except to prejudice the jury.

(39.) And also because the prosecutor made the statement "and he told you that they, the defendants, got some of the proceeds thereof," while there is no evidence that either of the defendants got any of the proceeds.

(40.) Because the Court erred in its charge to the jury by saying, "Under the form of the indictment, gentlemen, that is the words and language employed in it, notwithstanding anything you have heard; it is not essential for you to find everything in it established just as it is alleged," to the prejudice of the defendants.

(41.) The Court erred in its charge to the jury in instructing the jury as follows: "I might state at the outset, in order to clear up any doubt that may be in your minds from any reference to the Court's position on the law applicable to this case, in case you come to the conclusion that this was a place where people resorted to gamble in any form, as to any distinction you may make, or attempt to make, in your minds between principal and accomplice, or as to any person who is stated to have aided or abetted in the running of the place, that this is an indictment for a misdemeanor, and under our law any person who aided, assisted or helped in any way in committing the act complained of are principals. What I mean by that is this—and I do not want you to have any misunderstanding about it—if you find the evidence to warrant you in reaching the conclusion that one or both these defendants are simply employes in this establishment, and that while so employed they attended the table or tables at which some gambling game was being conducted, they would be guilty as principals in the violation of the law, the crime charged in this case being a misdemeanor. I do not want to leave any doubt or question in your minds on that point," to the prejudice of the defendants.

(42.) The Court erred in its charge to the jury in instructing the jury as follows: "Gambling, as defined by the sections of the Crimes Act under which this indictment is framed, and as specified and alleged in the

indictment, is gambling with dice, at tables of the kind specified in the indictment, or with any other instrument or instruments in the nature of dice or tables, for money, or other valuable thing," to the prejudice of the defendants.

(43.) The Court erred in its charge to the jury in instructing the jury as follows: "If you find that at this place on Second avenue, between the dates I have mentioned, gambling was being carried on there for money or other valuable thing, that is, that some with dice was being played for the purpose of gaining money, or other valuable thing, then I tell you that was the form of gambling alleged to have been conducted by these defendants in that place," to the prejudice of the defendants.

(44.) The Court erred in its charge to the jury in instructing the jury as follows: "It is immaterial, gentlemen, for the purpose of your consideration of this case, who was the owner of the place, or who was the lessee —absolutely immaterial who it was. The question is, "What did these defendants do, if anything?" It is also a matter for you to attach such significance as you think it deserves to the fact that these defendants have not seen fit to take the stand and deny the accusation against them. They have a right to remain off the stand, if they or their counsel see fit to keep them from the stand or from testifying. You have a right to say, however, whether or not the case made out by the State was one that required denial under oath by them to satisfy you that a reasonable doubt existed of their guilt, under the proof in the State's case. You may conclude that it was not necessary for them to take the stand and deny under oath that they were guilty of this charge. It is not obligatory on them to prove their innocence, but, on the other hand, you may conclude that, considering the testimony in the case against them, it is very significant that they did not take the stand and tell you under oath that they are not guilty of this charge," to the prejudice of the defendants.

(45.) The Court erred in its charge to the jury in instructing the jury as follows: "The Court will put its own construction upon the statute, in case it has to, when you bring in your verdict, no matter what the penalty may be, whether it be a suspension of sentence or imposition of that penalty," to the prejudice of the defendants.

(46.) Because the Court erred in its charge to the jury because the entire charge was prejudicial to the defendants.

(47.) Because there is no proof that the defendants were the keepers of a disorderly house.

(48.) Because there is no evidence that the defendants aided, abetted and assisted in keeping a disorderly house.

(49.) Because the punishment inflicted is a cruel and unusual punishment, in violation of the constitution of the United States and of the constitution of the State of New Jersey.

(50.) That the Supreme Court erred in holding that there was no error in the refusal of the Monmouth Quarter Sessions to quash said indictment as against the defendants, or either of them, for the reasons presented to said Court, or any of them.

(51.) That the Supreme Court erred in holding that there was no error in the refusal of the Monmouth Quarter Sessions to direct the jury to acquit the defendants, or either of them, at the close of the State's case for the reasons presented to said Court, or any of them.

(52.) That the Supreme Court erred in holding that there was no error in the refusal of the Monmouth Quarter Sessions to direct the jury to acquit the defendants, or either of them, at the close of the whole case for the reasons presented to said Court, or any of them.

(53.) That the Supreme Court erred in holding that there was no error committed by the Monmouth Quarter Sessions on the trial of said indictment in the admission of evidence against the defendants, or either of them, in the particulars hereinbefore set forth.

(54.) That the Supreme Court erred in holding that there was no error committeed by the Monmouth Quarter Sessions in the instructions to the jury as to the defendants, or either of them, in the particulars hereinbefore set forth.

(55.) That the Supreme Court erred in holding that the matters set out in the indictment constituted a crime as to the defendants, or either of them, under the law of the land.

(56.) Tha the Supreme Court erred in holding that the evidence in the case proved or constituted a crime as to the defendants, or either of them, under the law of the land.

(57.) That the Supreme Court erred in holding that there was no error prejudicial to the defendants, or either of them, committed by the Monmouth Quarter Sessions in the trial of said indictment.

(58.) That the Supreme Court erred in sustaining the judgment of the Monmouth Quarter Sessions, instead of reversing it for the reasons hereinbefore given.

(59.) That the Supreme Court erred in not reversing the judgment of the Monmouth Quarter Sessions for the reasons hereinbefore given.

(60.) That the Monmouth Quarter Sessions, in charging the jury in the trial of this cause as follows: "It is a matter for you to attach such significance as you think it deserves to the fact that these defendants have not seen fit to take the stand and deny the accusations against them. They are not obliged to take the stand. They have a right to remain off the stand, and if they or their counsel see fit to keep them from the stand or from testifying. You have the right to say, however, whether or not the case made up by the State was one that required denial under oath by them to satisfy you that a reasonable doubt exists of their guilt under the proof in the State's case. You may conclude that it was not necessary for them to take the stand and deny under oath that they were guilty of the charge. It

is not obligatory on them to prove their innocence. The State must prove their guilt. But, on the other hand, you may conclude that, considering the testimony in the case against them, it is very significant that they did not take the stand and tell you under oath that they were not guilty of this charge," violated aritcle 14th of the constitution of the United States, and the Supreme Court violated said article 14th in holding that there was no error committed by the Monmouth Quarter Sessions on the trial of said indictment, and so charging the jury, and these defendants insist that for the above defect and the defect in the indictments and in the presentation of the indictment and in the lack of the jurisdiction in the Court, that thereby they have been deprived of their liberty without due process of law; that thereby they have been denied equal protection of the laws and violates the said article 14th of the constitution of the United States.

(61.) That the Supreme Court erred in not deciding all the questions which were presented to it for decision; that, in a criminal case, if a conviction is not reversed for some one of the assignments of error or specifications of defences, that the defendant is entitled to a full and fair decision on every point or assignment of error raised and every defence specified; and the Supreme Court erred in not rendering such a decision on each point, assignment of error and specification of defence, and denied to the defendants their rights under the constitution of the United States and of the State of New Jersey.

(62.) The Supreme Court erred in holding that section sixty-six of the Laws of 1898 of "An act for the punishment of crimes," page 791, was within the title of said act and was constitutional.

(63.) That the Court erred in sustaining the charge of the Court of Monmouth Quarter Sessions; the Court said: "The Court will put its own construction upon the statute in the case, if it has to, when you bring in your

verdict, no matter what the penalty may be, whether it is a suspension of sentence or an imposition of that penalty," because the charge of the Court is prejudicial to the defendant.

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Atty. for Defendants.