

CRIMINAL LAW: Distributors of wire service and distributors of printed racing news in gambling establishment, or hand-book operators are not guilty of any crime under the statutes of Missouri.

October 13, 1939

Mr. A. B. Lambert, President
Board of Police Commissioners
St. Louis, Missouri



Dear Sir:

We are in receipt of your request for an opinion dated October 6th, 1939, which reads in part as follows:

"We have in St. Louis and have had for some years past a so-called News Service identified with the operation of local hand-book makers.

"The primary function of this news service is to assemble the daily racing data from various racing tracks throughout the country and to transmit said data over telephone lines or wire service to the local hand-book operators. This data so transmitted is in the form of flash news, so to speak, giving the last minute entries, scratches, withdrawals, track conditions, more specifically quoting the odds as they vary or not until the race starts, followed by the results as to winners and place.

"This information, as provided by said news service, is essential to any hand-book operator conducting a betting service on a fairly large scale. The system resorted to by the news service in question is rather integrate in its telephone and wire service to about two hundred and twenty hand-book operators located throughout the city, including sub-operators and individuals who subscribe to their service. This service apparently is outgoing only, in that no bets or wagers are accepted by them in competition with their subscribers.

"The said news service rents space in a large building and uses this space as a base of operations. They have an elaborate system of telephones. They do not issue or circulate any racing news in published or printed form."

Mr. A. B. Lambert,

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Your first query reads as follows:

"No. 1. In view of the facts set forth above - Are the owners or operators of any such news service guilty of a violation of Section 4286 making it unlawful, among other things, for any person to occupy any building, room, shed, etc. with any telephone or telegraph instrument or device for the purpose of communicating information to any place for the purpose of there recording or registering bets on horse races?"

That part of Section 4286 R. S. Missouri, 1929, referred to in this query of your request is one of the disjunctives in the section, and reads as follows:

" * * * * * any person who occupies any room, shed, tenement, tent, booth, building or enclosure, or any part thereof, in this state with any telephone or telegraph instrument, or any apparatus or device of any kind whatsoever, for the purpose of communicating information to any place in this or any other state, for the purpose of there recording or registering bets or wagers or selling pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast, which is to be made or to take place within or without this state, * * * * * "

Section 4286, supra, was first enacted in the laws of 1907, page 232, and is almost exactly the same section as section 4285 R. S. Missouri, 1929, except it has added the word "enclosure" in the fourth line of this section, which is not in section 4285. The above disjunctive set out refers to bets registered by telephone or telegraph instruments and was included in section 4285, and section 4286, supra, by reason of an opinion handed down by the Supreme Court in the case of State v. Oldham, 200 Mo. 538. In this case at page 557, the court said:

" * * * According to the testimony of Mr. Halpin, the chief of detectives, no such book as this was kept by the defendant Oldham or his employees in his booth on this race track on the 19th of May, 1906. The blackboard used was in no sense such a book. Was the telephone used by the defendant, as already indicated in the statement, such an instrument as to bring it within the purview of the statute? Recurring again to the language of the act, it must be observed that the instrument which the occupant of the booth used, was 'for the purpose of recording or registering bets or wagers or selling pools.' Testimony shows that the only purpose which the telephone subserved was to report to the book-maker and register in Kansas the offer which the player would make, and to report back the book-maker's acceptance in Kansas of the amount he was willing to bet upon the race. There was no evidence showing or tending to show that the telephone was an instrument used for the purpose of recording bets or wagers or was adapted to such a purpose, and unless it was such an instrument then there was no proof that any such instrument was used by the defendant. The Attorney-General in his printed brief expresses the same view of the statute that we have just indicated. He says: 'Under the subdivision under which the fourth count was drawn, the crime consists, not in the actual recording of the bets, but the occupation of the booth with an instrument or device designed for the purpose of recording bets.' Without doing violence to the ordinary meaning of the words, a telephone wire with a transmitter and receiver cannot be said to be an instrument or device for the purpose of recording or registering bets. It may be said that the construction of the telephone line and the pre-arrangement for having the bets registered and recorded in Kansas City, Kansas, was a perfectly obvious trick and subterfuge to evade the law, and we agree with the counsel for the State that such was the obvious purpose, and that the disguise was too thin, but after all the question is not whether the defendant has successfully evaded the statute, but whether he has violated it."

In accordance with the above opinion it can readily be seen that the mention of telephone and telegraph instruments refer to the registration of the bet or wagers only, and does not apply to the furnishing of sport news.

Therefore, it is the opinion of this department that the owners or operators of such news service set out in your statement in the request is not guilty of a violation of section 4286 R. S. Missouri, 1929.

II

Your second query in your request reads as follows:

"No. 2. Upon the facts set forth above- Are the owners or operators of such a news service guilty of a violation of Section 4285, making it unlawful to telephone or telegraph a bet on a horse race to another state when so registered at the destination or local place of sending?"

Section 4285, supra, contains the same disjunctive, as hereinabove set out, as appearing in section 4286, supra. This section, 4285, originally was a new section appearing in the laws of 1905, page 131, and did not contain the above disjunctive phrase; but in the laws of 1907, page 232, the new section which is now 4286, supra, was enacted which includes the word "enclosure" after the word building, and the section, which is now section 4286, was re-enacted and amended in Laws of Missouri, 1907, to contain the above disjunctive. It is apparent that the word "enclosure" was included in the new section of the laws of Missouri, 1907, page 232, by the reason of the opinion of the Supreme Court in the case of State v. Oldham, supra, for the reason that under the facts in that case the telephones were in a fenced compartment, and not in a room, shed, tenement, tent, booth or building. Section 4285, supra, as it now appears was enacted in the laws of 1907, page 233, to include the above disjunctive, and amended the original laws of 1905, page 131, which did not include the above set out disjunctive. The disjunctive in section 4285, supra, reads as follows:

"* * * * or to register a bet on a horse race, either on a blackboard or any other substance, or to telephone a bet on a horse race to any other state to be registered there, or telegraph a bet for such purpose, or to use any other instrument or device to accomplish or register the bets, * * * "

This is the exact phrase as set out in section 4286, supra.

According to the facts stated in your request the operators of the news service are not registering the bets, but only furnishing the news obtained at the different race tracks. In view of the history of both sections, and the authority as set out in the opinion in the case of State v. Oldham, it is the opinion of this department, that it was the intention of the legislature in both sections to prevent the subterfuge of accepting money at a betting establishment and telephoning the bet out of the state to another establishment, where the bet would be registered, and, in that way avoid the section of the crime of registering bets. It was not the intention of the legislature that the use of a telephone furnishing the news of racing events to book-makers would be considered the registering of bets.

It is therefore the opinion of this department that the owners and operators of such new service are not guilty of registering a bet as set out under section 4285 R. S. Missouri, 1929.

III

Your third query in your request reads as follows:

"No. 3. Does the rendition of said service, as outlined above, coupled by the use of the same service by their subscribers, subject the operators of the news service to prosecution under the law of Missouri relating to conspiracy? And likewise the prosecution of any subscriber as a principal or accessory?"

In view of the fact that the wire news service is not registering bets and is not a party to the actual act of the bookmaking statute, they are not guilty, under the conspiracy section. Their only function is transferring the information and is not made under any agreement to

register or make bets with the general public. The conspiracy section 4243, R. S. Missouri, 1929, specifically says:

"If two or more persons shall agree, conspire, combine or confederate: First, to commit any offense; * * * * *

The telephone in itself is not per se gambling equipment. It was so held in State v. Joynt, 110 S. W. 2d 737, l.c. 740, which was a St. Louis case involving the (claw) prize machine, when the court said:

"In claiming that the true character of the device must be ascertained by a judicial hearing, counsel for respondent rest heavily on the case of Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420. There this court had under consideration the statutes then applicable to the board of police commissioners of the city of St. Louis providing for the seizure and destruction of gambling devices. An extension dining table had been seized and destroyed by the police on the charge that it was kept as a prohibited gaming table. We held that a summary mode of judicial proceedings should be provided in order to determine whether such property was used or held for purposes condemned by the statutes. That case is clearly distinguishable from the one now before us. There the property under the scrutiny of the court was in its very nature lawful and harmless. It was only by proof of its unlawful use that it became subject to destruction. The table in itself constituted no offense, but it was its employment in gaming which was unlawful, and proof of that fact, we held, required judicial determination."

Also, in the case of State v. Oldham, 200 Mo. 538, at page 558, the court said:

" * * * * *
There was no evidence showing or tending to show that the telephone was an instrument used for the purpose of recording bets or wagers or was adapted to such a purpose, and unless it was such an instrument then there was no proof that any such instrument was used by the defendant. * * * "

If the news service used the telephone to register bets, it would be a violation of both sections 4285 and 4286, R. S. Missouri, 1929. The telephone in itself is not a gambling device per se, as said before. It is true that in the case of State v. Joint, 110 S. W. 2d, 741, par. 14-15, the court said:

"This court has recognized the rule that a court of equity generally will not interfere with the authorities charged with the enforcement of the criminal law. Wellston Kennel Club v. Castlen, supra, 331 Mo. 798, 55 S. W. 2d 288; Kearney v. Laird, 164 Mo. App. 406, 144 S. W. 904. Furthermore, courts generally will not sustain actions in regard to property which has for its object the violation of the law as such property is 'outlawed.' Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 68. And certainly a court of equity will not listen to a man who asks the court to protect an unlawful device. * * * "

This ruling only applies to a device that can be of no use except gambling, but under the facts stated in your request the news service is only telephoning news and it has no control of the use of that news unless it also participates in the registration of the bets. The only mention of the use of telephone in both sections 4285 and 4286 refers to the registering of bets either in the state or out of the state. The two sections do not mention telephone and telegraphs in any other connection.

In the case of State v. Chaney, 106 S. W. 2d 483, the court, in holding that the device not mentioned in the

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statute is a gambling device per se, such as a slot machine etc., the device must be alleged and proven that it is a device for gambling only. The court in this respect said:

"Omitting formal parts, the information charges that 'on or about the 1st day of February, A. D., 1936, at the County of Butler and in the State of Missouri, then and there being, the defendant, Vernie Chaney, did then and there unlawfully and feloniously set up and keep a certain gaming table and gambling device, to-wit: one crap table, commonly so called and upon which dice were thrown and used; which said gambling table and gambling device was adopted, devised and designed for the purpose of playing games of chance for money and property, and did then and there unlawfully and feloniously entice and permit divers persons, whose names are to the Prosecuting Attorney unknown, to bet and play at and upon and by means of said gaming tables and gambling device; against the peace and dignity of the State!

"In the recent case of State v. Herndon, 96 S. W. (2d) 376, we held the information fatally defective because a crap table is not one of the devices enumerated in the statute, pointing out that it would be necessary to show in what manner the table was or could be adapted to the playing of craps. The information in the case at bar is practically identical with that in the Herndon Case, supra; therefore, we hold the information herein fails to state an offense under section 4287, supra."

In other words, dice and cards which can be used for a lawful purpose and which are not used in gambling are not gambling devices per se, but must be used in a gaming transaction to be considered a gambling device.

In view of the above authorities, it is the opinion of this department that the rendition of the wire service as outlined in the statement in your request, which is simply furnishing news obtained from race tracks for other places, is not a crime under the conspiracy act as to the actual registers of said bets unless a conspiracy can

be shown, showing that they are connected with the actual registering of the bets or gain some part of the profits of the registering establishment, other than the regular price of the service.

IV

Your query number four in your request reads as follows:

"Is a telephone or a telegraph company leasing wires or service to the operators of said news service subject to prosecution for violation of any law in the State of Missouri? "

As said before, sections 4285 and 4286 R. S. Missouri, 1929, in reference to the use of telephones and telegraph only apply to the registering of bets by use of the telephone or telegraph. This point of furnishing telephone or telegraph use to bookmakers or wire service corporations, or partnerships, in reference to racing news, has not been before the Supreme Court of this state.

In the State of Kentucky there is a criminal statute known as the nuisance section which covers a multitude of crimes. This state has no such section, but in the case of Commonwealth of Kentucky v. Western Union, 57 L. R. A., page 611, l.c. 615, the court said:

"The indictments charge the appellee with the offense of unlawfully keeping and maintaining a common nuisance. It is averred in them that Ed. Alvey and others had a house in the city of Louisville, commonly called 'The Kingston,' in their occupation and under their control, and habitually sold pools upon horse races run at various cities and places in the United States, and did habitually suffer, permit, and procure divers idle and evil-disposed persons to habitually assemble in that house, who engaged in betting, winning, and losing money on horse races, to the common nuisance and common

annoyance of all good citizens of the neighborhood, and those passing and repassing, etc. As to the appellee it is averred that it is a corporation organized for the purpose of conducting the business of common carrier of intelligence by telegraph in the United States; that it, unlawfully designing to assist and aid and abet Alvey and others in the pool selling in the house mentioned, habitually received from divers race courses in the United States messages and intelligence concerning horse races, to wit, the names of horses entered in races, names of owners, trainers, riders, drivers, and distances of the races, terms, conditions, and state of betting at the races, condition of the weather and tracks of race courses, with the design to enable the persons assembled at the house of Alvey and others to bet upon races. It is further averred that the appellee transmitted and delivered to Alvey and others, at the Kingston, the information as to the result of races, with the view of enabling him and others to pay the bets made on races; that the information and intelligence transmitted and services rendered by the appellee was a necessary and essential service and means of carrying on and maintaining the existence of pool selling by Alvey and others, of which fact the appellee was aware."

The court further said:

"* * * Common carriers are not the censors of public or private morals. They cannot regulate the public and private conduct of those who ask service at their hands. It was certainly no wrong per se for the appellee to transmit over its line the information which it is charged to have transmitted. The simple fact that persons who received the information, and as a result of it, were guilty of unlawful acts, does not make the appellee a violator of the penal or criminal law. If in doing so it violated the penal or criminal law, it would be likewise guilty in

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transmitting information to the newspapers of the country as to prospective prize fights and horse races, because the information thus published induced persons to engage in betting on their results. * * * "

In view of the fact that the statutes of this state do not contain any section which holds that the distribution of race news by telephone is a crime, and in view of the fact that the state of Kentucky has held under their nuisance section that a distributor of race news is not guilty of any transactions in a separate place where bets are registered, it is the opinion of this department that a telephone or telegraph company leasing wires or service to the operators of said news service are not subject to prosecution for violation of any law in the state of Missouri.

V

The fifth query in your request reads as follows:

"If the rendition of any such service, as outlined in Item No. 4, is unlawful, are the officers, managers, directors, stockholders, and employees thereof subject to arrest and prosecution?"

In view of our holding upon your query number four, it is not necessary for this department to render any opinion under your query number five.

VI

Your query number six in your request reads as follows:

"Is the rendition of any service, as outlined herein, a violation of any law of Missouri relating to lotteries?"

After a diligent search this department is unable to find any law in which the service set out in the statement in your request is a violation of any law of Missouri, relating to lotteries.

VII

Further, as a part of your statement you say as follows:

"In addition to the News Service in question there are various publications in St. Louis, local and national, that print, publish and sell by circulation detailed information relative to horse races, supplying the fundamental data, such as the names of horses, jockies, positions, selling prices, weight, etc. This data, published in advance, forms the basis, in conjunction with the Follow up telephone or wire service, of the said news service."

Your query number seven, in this respect, reads as follows:

"Are such publications printing and circulating said racing news, by mail or otherwise, liable to arrest and prosecution in violation of any law or statute of this state?"

After careful and diligent research we are unable to find any statutory law declaring the publishing of racing news as a crime.

Article 2, section 14, of the Constitution of the State of Missouri, provides as follows:

"That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions

for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

The principal case in this state concerning free speech and publication is *Ex parte Harrison*, 212 Mo. 88, l.c. 93, in which the court said:

"The General Assembly under the legislative power granted it by the people subject to the limitations of the State and Federal Constitutions unquestionably has the power to enact penal statutes and prescribe civil remedies, 'for all abuses of that liberty' of speech, or publication. If a publication is neither blasphemous, obscene, seditious or defamatory, then under the Constitution of this State, no court has the right to restrain it, nor the Legislature power to punish it. * * *"

It is obvious that none of the news service publications printing racing news only contain any article that would be considered blasphemous, obscene, seditious or defamatory.

In view of the above authorities, it is the opinion of this department, that any publication in St. Louis, either printed locally, or nationally, that prints, publishes and sells by circulation detailed information relative to horse races and which supplies fundamental data, such as the news of horse races, jockey, positions, selling prices, weights etc., do not violate any law or statute of this state.

You further ask if there are any other laws or statutes not specifically covered in this request, which can be resorted to as to basis for the arrest and prosecution and elimination of hand-book operators. We find no other laws applicable to hand-book operators, except the regular gambling law. In the pamphlet attached to your request, which is called "The Hand-Book Situation in St. Louis as of September, 1939", you state, or assume, that there are two hundred, fifteen hand-book operators and individuals who professionally, or from sporting point of view are identified with horse racing and tracks. All

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that can be said by this office, if these men are known, and we assume, from the exact number of two hundred, fifteen, that they are known, that after the evidence is obtained against them, they should be prosecuted under sections 4285 or 4286, R. S. Missouri, 1929.

It appears by Sections 4285 and 4286, supra, that the Legislature had in mind the prosecution of persons engaged in bookmaking, that is, the person who actually registers the bets, accepts the money, records the same, or pays out after the race or athletic event. It may be that the News Service is a carefully guarded, astute method of evading the law, as is said by the court in the Oldham case, quoted supra:

"It may be said that the construction of the telephone line and the pre-arrangement for having the bets registered and recorded in Kansas City, Kansas, was a perfectly obvious trick and subterfuge to evade the law, and we agree with the counsel for the State that such was the obvious purpose, and that the disguise was too thin, but after all the question is not whether the defendant has successfully evaded the statute, but whether he has violated it."

The functions of this Department are in many respects very similar to that of the Supreme Court, that is, to interpret the laws as enacted by the Legislature. In construing statutes we cannot broaden their terms beyond the plain words as contained therein.

If the News Service referred to in your letter is contrary to good morals and evades the statutes as they are now written, the remedy lies at the doorstep of the Legislature and it alone can correct the evil.

APPROVED:

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Respectfully submitted,

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