

FINES AND PENALTIES: Procedure for instituting suit to recover fine where a part of the proceeds go to a private informer.

March 26, 1940

3/30

Honorable Andrew Howard  
Prosecuting Attorney  
Christian County  
Ozark, Missouri



Dear Sir:

We are in receipt of your request for an opinion, dated March 20, 1940, which reads as follows:

"A party here wants an action instituted under Section 14279, 1929, Revised Statutes of Missouri, which reads as follows:

'Every licensed keeper of any table mentioned in section 14272 who shall suffer any person under the age of twenty-one years to play on such table kept by him without the permission of the father, master or guardian of such minor first granted, shall forfeit and pay a fine of fifty dollars for every such offense, one-half of which shall be for the informer, to be recovered by a civil action.'

Should the procedure under this section be as in a criminal action by way of a complaint, warrant, arrest of defendant, and commitment to jail on failure to give bond? Or should the procedure be as in a civil action by way of a petition and summons?

The term fine would seem to contemplate a criminal action, but the statute winds up with the clause 'to be recovered by a civil action' in contrast to the preceding section (14278) which also refers back to

section 14272, but winds up with the clause 'to be recovered by indictment or information.'

No citations of decided cases interpreting this statute appear under same.

I would appreciate a legal opinion from your office as to the proper procedure to take under the above quoted statute."

Section 14279, R. S. Mo. 1929, cited in your request, but which we again cite for the purpose of this opinion, is as follows:

"Every licensed keeper of any table mentioned in section 14272 who shall suffer any person under the age of twenty-one years to play on such table kept by him without the permission of the father, master or guardian of such minor first granted, shall forfeit and pay a fine of fifty dollars for every such offense, one-half of which shall be for the informer, to be recovered by a civil action."

This statute provides that one-half of the fine recovered for a breach of the provisions of said section shall be paid to the informer. There being no provision for the disposition of the remainder of the fine, it is governed by Section 8, Article XI of the State Constitution of Missouri, which is as follows:

"All moneys, stocks, bonds, lands and other property belonging to a county school fund, also the net proceeds from the sale of estrays, also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the State, and all moneys which shall be paid by persons as an equivalent for exemption from military

duty, shall belong to and be securely invested and sacredly preserved in the several counties as a county public school fund; the income of which fund shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this State."

You state that the use of the word "fine" indicates a criminal action. We find the following discussion of the word in 25 C. J., page 1150, Section 5:

"Since the word 'fine' in its strict technical sense is to be regarded as a punishment for a criminal offense a criminal prosecution is the usual mode of recovery. But the mode in which fines and penalties are to be recovered is a matter of legislative discretion; and the method pursued for the recovery of a fine depends upon the particular statutes rather than upon any rule of general application. Many of the statutes provide for the recovery of fines by civil action or by indictment.\* \* \*"

The proceeding in which a part of the penalty recovered goes to the informer and a part to the state is known as a qui tam action, and is discussed at length in State ex rel. Rodes v. Warner, 197 Mo., page 650. In that case there was a discussion of the constitutionality of a statute giving a part of the fine to the informer in the case of a conviction under the Game and Fish Laws, and we find the following in the opinion of the court, l. c. 664:

"(a) Where penal statutes are merely leveled at a violation of private rights, and a private person or class of persons is nominated herein as entitled to sue for and recover penalties arising from the violation of such statutes for their own use, then such penal laws are not of

the character of penal laws referred to in section 8, article 11, of the Constitution, and the penalties provided in such laws are not devoted by the Constitution itself to the public school fund.

(b) And where penalties such as are referred to in the foregoing hypothesis may be recovered by a qui tam action -- a civil action -- a part may go to the informer and the other part may be devoted to the purposes prescribed by statute law. \* \* \*

The exact method of procedure appears to be set out in In re. Green, 40 Mo. App. 491, l. c. 493:

"We think the suit in which said bill of costs accrued should have been brought in the name of the state at the relation of the prosecuting attorney of Ray county, on the information of George McMullen, informer, against said railway, instead of the manner in which it seems to have been brought. If it had been instituted, as undoubtedly it should have been, then no question as to the non-liability of the county for the payment of the costs therein could have arisen under the statute, which, in express terms, provides that, where a suit is brought in the name of the state on the relation or in behalf or for the use of a private person, the person for whose use the action is brought shall be held liable for the payment thereof."

In this case, however, we wish to point out that Section 4467, R. S. No. 1929, provides another manner in which this fine may be recovered, and is as follows:

"Whenever a fine, penalty or forfeiture is or may be inflicted by any statute

of this state for any offense, the same may be recovered by indictment or information, notwithstanding another or different remedy for the recovery of the same may be specified in the law imposing the fine, penalty or forfeiture: Provided, that in all cases the fine, penalty or forfeiture shall go to the state, county, corporation, person or persons to whom the law imposing the same declares it shall accrue."

A case in which the fine was recovered in this manner is found in 51 Mo. App., page 129, styled State of Missouri v. Barney Mackin. In this case the fine was recovered by indictment of a grand jury. We quote the following from the opinion of the court, l. c. 132:

" \* \* \* The section of the statute which forms the basis of this prosecution reads thus: 'Every licensed keeper of any table \* \* \* who shall suffer any person under the age of twenty-one years to play on such table kept by him, without the permission of the father, master or guardian of such minor first granted, shall forfeit and pay a fine of \$50 for every such offense, one-half of which shall be for the state, the other half for the informer, to be recovered by civil action.' Revised Statutes, 1889, sec. 715.

Now the contention is that this permits only a civil action by the party offended or by the state, and that no prosecution by indictment is allowed. But in this connection let us refer to section 3971, Revised Statutes, 1889, under the heading of 'crimes and punishment.' That statute reads: 'Whenever a fine, penalty or forfeiture is or may be inflicted by any statute of this state for any offense, the same may be recovered by indictment or information, notwithstanding another or

March 26, 1940

different remedy for the recovery of the same may be specified in the law imposing the fine, penalty or forfeiture: provided, that in all cases the fine \* \* \* shall go to the state \* \* \* or person to whom the law imposing the same declares it shall accrue.' It is also clear that the matter charged on defendant by this indictment constitutes an 'offense' under the foregoing section."

It is therefore the conclusion of this department that suit for recovery of the penalty above set out may be brought in the name of the state at the relation of the prosecuting attorney on the information of the person claiming the benefit of Section 14279, or may be recovered by information or indictment under Section 4467, as outlined above.

Respectfully submitted,

ROBERT L. HYDER  
Assistant Attorney General

APPROVED:

COVELL R. HEWITT  
(Acting) Attorney General

RLH:VC