GAMBLING: Prosecution for punch boards brought under Section 4290 R. S. Mo. 1929.

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Mr. Vincent S. Moody
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Mr. Moody:

We acknowledge your request for an opinion, as follows:

> "Would you be so kind as to render your opinion on the following question:
>
> Are punch boards covered by Section 4287, Revised Statutes Mo. 1929, or by any other Section, and if so, what type of punch board; that is, are punch boards that give 'something every time' prohibited by the laws of Missouri?
>
> An early opinion of this will be greatly appreciated by me."

In the case of State vs. Turlington 204 S. W. 821, 200 Mo. App. 192, the defendant was charged by information of the prosecuting attorney with violating Section 4753, R. S. 1909 (now Section 4290 R. S. Mo. 1929) by permitting a punch board, alleged to be a gambling device, to be used or operated in his store building.

Section 4290, supra, provides:

> "Every person who shall permit any

> gaming table, bank or device to be set up or used for the purpose of gaming in any house, building, shed, booth, shelter, lot or other premises to him belonging or by him occupied, or by which he hath at the time the possession or control, shall, on conviction, be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail or workhouse for not more than one year nor less than thirty days, or by fine not exceeding five hundred dollars or less than fifty dollars."

The point was made by the appellant in the above case that the manner in which he conducted the punch board was no offense under the law. The court said that the evidence showed:

> "The evidence shows that the punch board was a board in which there were a great many holes. In each of these holes was a small strip of paper containing a number. These holes were covered, but the cover was so designed as to indicate exactly the location of each hole. The prizes were knives and post cards. The knives ranged in value from 50 cents to $1.50, and the post cards were worth 3 cents each. A small wooden pin was used to punch the covering of the hole. Five cents a punch was charged, and the number on the slip of paper in the hole punched indicated whether a post card or a knife was the reward, and, if a knife, it indicated what knife. There were no blanks. The purchaser of a punch got a post card or a knife. When the board was first set up a 'punch' was sold for 5 cents; but, being advised that there might be less taint of a gamble or game of chance if the post card was

> sold in advance, this method was adopted. The post card was sold for 5 cents, and the purchaser was then entitled to a punch. If he got a knife, he was a post card ahead, as compared with original system. The defendant would buy back for three cents the post card if the purchaser desired to sell it. The defendant testified that the post card cost 3 cents, and that he bought back a number of them. So in any event the defendant was 2 cents ahead if the purchaser who got a post card did or did not sell it back. The slips of paper in the holes calling for post cards were far in excess of those calling for knives so that when the entire board was punched there was a margin of gain in favor of the defendant."

And in holding that such was a gambling device, said:

> "Clearly we think such board falls within the class of gambling devices. The incentive prompting any one to take a punch was the chance of getting something of more value than the cost of the chance. The amount of the winner's gain or loser's loss would make no difference, if the chance to win more than was invested was present. <u>It is this chance to get something of more value than the amount invested that characterizes the device as a gambling one.</u> Had the post card which was always drawn, except when a prize of more value was drawn, been in fact of the value of five cents, so that there would have been no chance for the customer or patron to lose, this would not purge the enterprise of its chance characteristics, because the chance to win more than invested yet remained. This is clearly the law as written in Moberly v. Deskin, 169 Mo. App. 672, 155 S. W. 842, from which

we quote:

> 'The chief element of gambling is the chance or uncertainty of the hazard. It is not essential that one of the party to the wager stands to lose. The chance taken by the player may be in winning at all on the throw, or in the amount to be won or lost, and the transaction should be denounced as gaming whenever the player hazards his money on the chance that he may receive in return money or property of greater value than that he hazards. If he is offered the uncertain chance of getting something for nothing, the offer is a wager, since the operator offers to bet that the player will lose and in accepting the chance the player bets that he will win. Such offer, therefore, is a direct appeal to the gambling instinct, which, it is said, possesses every man in some degree, and it is the temptation to gratify the instinct that all penal laws aimed at gambling are designed to suppress.'"

The court in passing on the sufficiency of the information under Section 4753, supra, said:

> "The sufficiency of the information is challenged. Omitting formal parts, the information is as follows:
>
> > 'That J. A. Turlington * * * did unlawfully permit a certain gambling device called a punch board, designed and used for the purpose of playing games of chance for money and property, to be used for the purpose of gambling in a certain building there situate, and under the control of him, the said J. A. Turlington,' etc. * * * * * * *

> "The information charges the offense in the language of the statute, and follows approved forms and precedents, and, we think, is sufficient. State v. Wade, supra; State v. Leaver et al., 171 Mo. App. 371, 157 S. W. 821; State v. Howell, 83 Mo. App. 198; Kelly's Crim. Law & Pr. (3d Ed.) Sec. 953."

From the foregoing, we are of the opinion that punch boards are covered by Section (4753 R. S. 1909) 4290 R. S. Mo. 1929.

You inquire whether punch boards are covered by Section 4287 R. S. Mo. 1929, as follows:

> "Every person who shall set up or keep any table or gaming device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years, or by imprisonment in the county jail for a term not less than six nor more than twelve months."

In the Turlington case, supra, it was contended by appellant that the information drawn under Section 4753, supra,

did not sufficiently advise the defendant of the offense in that it did not describe the gaming characteristics of the alleged gambling device, citing State vs. Wade, 267 Mo. 249, 183 S. W. 598 to support his contention. The information challenged in the Wade case was under Section 4750 R. S. Mo. 1909, now Section 4287 R. S. Mo. 1929, supra. The court said:

> "The information there challenged was under section 4750, where a number of specific gaming devices are named, followed by a general denouncement of any gaming device of whatever kind or pattern. The information there was for an offense falling within the general provisions of the statute, and was charged in language similar to that in the information in the case at bar. The information there was held insufficient because there was no allegation bringing it within the class of the enumerated devices. Following the well-known rule of ejusdem generis, it was held in the Wade case that an information charging an offense embraced within the general provisions of section 4750 must contain sufficient averments to show that the offense charged is within the class of offenses specifically named. Furthermore, it is pointed out in the Wade case that an information containing the averments there challenged would be sufficient under section 4753, known, with reference to gaming devices, as the misdemeanor section."

It being doubtful whether punch boards would fall within the class of offenses specifically named in Section 4287, supra, we are of the opinion that prosecution for permitting punch boards to be operated should be brought under Section 4290 R. S. Mo. 1929.

You ask what type of punch boards are prohibited, and if they include punch boards that give "something every time"?

In the Turlington case, supra, the court said:

> "It is this chance to get something of more value than the amount invested that characterizes the device as a gambling one."

The test is not whether a person gets "something every time", but whether there is a chance of getting something of more value than the amount invested. If the latter, we are of the opinion that the punch board is a gambling device and is prohibited under Section 4290 R. S. Mo. 1929, supra.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General
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