Gambling Law, 1907, Construed.

Principal, agent or employee who carries on, etc., for money etc., is liable.

Playing for treats, etc., when it is expressly or impliedly understood that the loser must pay is gambling; if no such express or implied understanding it would be merely amusement and not gambling.

Certain enumerated games are prohibited absolutely, even for amusement, in certain places of business.

Social clubs exclusively for members and not for profit are not such places of business.

Helena, Montana, April 23, 1907.

O. M. Harvey, Esq.,
County Attorney,
Livingston, Montana,

Dear Sir:—

Your letter of the 8th inst., has been received and contents carefully noted, in which you present for decision by this office certain questions arising with respect to the operation and effect of the new anti-gambling statute. Your questions relate to the one subject and for our purpose are better united and stated as one. You ask a construction of section one of the new law, and inquire whether playing, or permitting the playing, of the games prohibited, in any saloon, beer hall, bar room, cigar store, or other place of business, or any place where drinks are sold or served, is, in itself, a violation of the law, without reference to what the game may be played for, and, in the event such is the interpretation, who are punishable? In order to fully answer the question presented, it is necessary to fully analyze and apply the language used in Section I. of the Act (Chapter 115, Laws of 1907), and for this purpose we will separate the provisions of said section into two parts for the purpose of better understanding and determining the legislative intent.

I. The first part of said section I. reads as follows:

> "Any person who carries on, opens or causes to be opened, or who conducts or causes to be conducted, or operates or runs, as principal, agent or employee, any game of monte, dondo, fan tan, tan, studhorse poker, craps, seven and a half, twenty-one, faro, roulette, draw-poker, or the game commonly called round-the-table poker, or solo, or any banking or percentage game, or any game commonly known as a sure thing game, or

> any game of chance played with cards, dice or any device whatever, or who runs or conducts, or keeps any slot machine, or other similar machine, or permits the same to be run or conducted, for money, checks, credits, or any representative of value, or for any property or thing whatever * * * is punishable by a fine of not less than one hundred nor more than one thousand dollars, and may be imprisoned for not less than three months nor more than one year or by both such fine and imprisonment."

This part of the section provides for the punishment of any principal, agent or employee who carries on, opens, etc., any of the games covered by the section, when played for money, checks, credits or any representative of value, or for any property or thing whatever.

It will be noticed that it includes not only the games mentioned, but also any game of chance played with cards, dice, or any device whatever, when played for money, checks, etc.

Similar laws have been uniformly held to include all such games when played for treats, such as cigars, liquor, fruit, etc., that is, whenever it is understood that the looser must buy the cigars, drinks, etc., for the other players. It makes no difference whether such understanding is expressed or implied. So long as the expressed or implied purpose of the game is to obligate the looser to buy the treats, whereby the winner gets something of value for nothing, it is gambling within the meaning of the said law, and it has been held that an implied understanding may be shown by proof of an established custom requiring the loser to buy the drinks or cigars for the winners.

Such is the construction placed upon similar gambling laws by the supreme court of the following states:

> "Arkansas, Iowa, Kentucky, Massachussetts,, Michigan, New Hampshire, New Jersey, New York, Ohio, Tennessee, and Texas,"

and we find no decisions giving a different construction.

See CYC, Vol. 20, p. 889 and cases cited.

Of course, where there is no express or implied understanding to the effect that the loser must buy the cigars or drinks for the winners, then the players are merely playing for sociability, amusement or pastime, and it would not be gambling. And, as there is no law against voluntary treating, there is nothing to prohibit or prevent any one of the players from buying the cigars or drinks during or after the game, so long as he does not do it under some express or implied rule of the game requiring him so to do.

In an opinion given by this office to the county attorney of Cascade County on April 26, 1906, we said:

> "Whether the game is played with reference to the treat in such a manner as to violate the law, must be determined from the particular facts of each case."

2. This brings us to the consideration of the second part of said section with respect to the meaning and application thereof, and a more

difficult problem is presented. The latter portion of said section reads:

> "Any person owning or in charge of any saloon beer hall, bar room, cigar store, or other place of business, or any place where drinks are served or sold, who permits any of the games mentioned in this section to be played in or about such saloon, beer hall, bar room, cigar store, or other place of business, or permits any slot machine, or other similar machine to be kept therin, is punishable by a fine of not less than one hundred nor more than one thousand dollars, and may be imprisoned for not less than three months or more than one year or by both such fine and imprisonment."

By the language used in the latter portion of said section 1, the owner or any person in charge of "any saloon, beer hall, bar room, cigar store or any other place of business," is liable to prosecution under the law if it is proven that he has permitted or permits "any of the games mentiond in this section to be played in or about" such premises. But now arises the question, what are the games prohibited to be played in such places?

It is clear that the games specifically named in the forepart of the Section are by this latter portion of the section prohibited from being permitted to be played at all in the places mentioned, even though played simply for sociability, pastime or amusement. And the games mentioned, and so prohibited from being played, in such places, are "monte", "dondo", "fan tan", "tan", "studhorse poker", "craps", "seven and a half", "twenty-one", "faro", "roulette", "draw poker", "round-the-table poker", "solo", while slot machines and similar machines are specifically prohibited by the latter part of the section, and by Section 2, made contraband; and by Section 8, it is made the duty of the Sheriff and other police officers to make seizure of them whether they are being played for money or not. And as to whether cigar slot machines are embraced in the act, see

> State vs. Woodman, 26 Mont. 348; also Opinions Atty. Gen., 1905-'06, p. 324.

The first portion of said Section 1. is directed solely and entirely to any person, agent or employee who carries on, open or conducts, or causes to be conducted any of the prohibited games, for money or value, while the latter portion of said section subjects to prosecution the proprietor or person in charge of any saloon or other place of character mentioned in the statute, who permits the games named to be run in his place of business at all.

We find that other states have similar statutes prohibiting certain games to be played at all in certain places. (See: Sec. 3620 of the Revised Code of Alabama of 1867; and Art. 379, Title II Wilson's Texas Criminal Statutes). We make mention of these statutes particularly because of the fact that we find decisions upholding them and construing the language thereof, but from our examination into the question we have found that several other states also have similar statutory provisions.

The Supreme Court of Alabama in the case of Phillips vs. State 51 Alabama, 21, said:

"The General Assembly of this State has not yet seen fit to denounce card playing as a public offense, unless it is engaged in in certain places. It requires the act of playing cards in some of the places named to constitute guilt. Unless both these elements enter into the charge alleged, the accused should not be convicted. The offense created by the statute is 'card playing at public places'. * * * The object of the statute was not only to suppress the evil practice of gambling, but to disconnect it from tippling-shops, and houses where ardent spirits are retailed; and whether the gaming takes place in the room where the retailing is carried on, the one in which the parties keep their books, or in which they or their clerks sleep, if connected with the same establishment, and constituting an appendage thereto, the party playing is equally guilty. Also.

Graham vs. State, 105 Ala. 130

Chambers vs. State (Tex.) 27 S. W. 127.

In the administration of this law the question will likely at once arise, and be presented to your department, as to whether or not social clubs constitute "a place of business" so as to come within the prohibition of this Act; and therefore we here briefly set forth for your advice and information our opinion with respect to the subject, supported by reference to some of the decisions of the courts.

In the case of Barden, County Treasurer, vs. The Montana Club, 10 Mont. 330, it was held by our Supreme Court that a social club incorporated for Literary, educational and social purposes, and for mutual improvement and benefit, maintaining a library, and keeping a stock of liquors for the exclusive use of the members and their guests, was not a retail liquor dealer's establishment, and therefore not required to secure a license.

The Supreme Court of Texas in the case of Koenig vs. State, 26 S. W. 835, construing the following statute says:

"If any person shall play at any game with cards, at any house for retailing spirituous liquors, store house, tavern, inn, or any other public house, or any street, highway, or other public place, or any out house where people resort, he shall be fined not less than ten nor more than twenty-five dollars."

The facts in the case were as follows

A person was arrested in that State charged with playing a social game of cards in a club room know as the "Turner Hall". This club was an association organized for the purpose of mental, moral and physical improvement of the stockholders, their families and friends, to promote generally the difusion of the knowledge of the literary arts and sciences, and to encourage social and friendly intercourse. Outsiders could only be introduced by members as their guests, and their names must be entered on the guests' book, and the member introducing a guest was responsible for his good conduct. The employees in charge of the bar were positively forbidden to rceive any money from others than members. A supply of spirituous and malt liquors for the exclusive use of the

members was kept and sold only to members by the drink. by the stewart at five and ten cents per drink, which was either paid in money, or charged to the member and collected at the end of the month. The money thus paid by the members was paid by the stewart into the general fund of the association, and chiefly used in replenishing the stock of liquors, it not being the intention to run the bar for profit or to conduct the same as a business or calling, but simply for the convenience of members.

The court, upon the above statement of facts, held that such transactions "were not sales of liquors in the way of trade, and that neither the association, its members, nor its stewart, were engaged in the occupation of selling liquors." It further held that the statute quoted above "shows that the places and houses named and thus intended to be embraced, are all 'public places'. Was the club room of the association either? None but members and their guests could enter there or share its privileges. So long as the rule was enforced it was not public, and the evidence shows that the rule was strictly observed." See also

Winters vs. State, 26 S. W. (Tex.) 839.
Grant vs. State, 27 S. W. (Tex.) 127.

We therefore venture the opinion that as to games of cards played for sociability or amusement in a social club, which may be likened to one's home, that there can be no objection to them under the law, as such a club cannot properly be designated "a place of business". But argument may be advanced that because of the use of the language "in places where drinks are sold or served", that a club being a place where drinks are served, that it would come within the prohibition contained in the statute.

It will be noticed, however, that this phrase is omitted from the prohibiting clause of the section, which reads as follows:

> "Who permits any of the games mentioned in this section to be played in or about such saloon, beer hall, bar room, cigar store, or other place of business."

Yours very truly,
ALBERT J, GALEN,
Attorney General.