Opinion No. 36.

Montana Charity League—Charity League—Gambling—Slot Machines—Licenses, Operation of Slot Machines.

Held: 1. The Montana Charity League under the facts presented by the Board of Equalization is not eligible to obtain a license under Chapter 142, Laws of 1945, and the Board of Equalization has no authority to issue it a license.
2. Only a bona fide religious, fraternal, charitable, or non-profit organization, which is the sole and complete owner of the slot machine or machines for which licenses are applied, and which is to receive the entire profit therefrom, and use, keep and maintain for use such machines upon its own premises, as incidental to its main purpose for its members only, is eligible to receive a license under the provisions of Chapter 142, Laws of 1945.
3. The Board of Equalization has authority, and it is its duty to require the facts which are necessary to determine if the applicant meets the requirements of the law, before granting a license under Chapter 142.

May 11, 1945.

Mr. Sam D. Goza, Chairman
State Board of Equalization
State Capitol
Helena, Montana

Dear Mr. Goza:

You request my opinion whether, under Chapter 142, Laws of 1945, licenses may be issued to the Montana Charity League.

You have advised me that one of the incorporators and directors of the Charity League, together with his attorney, appeared before the board and informed it the league contemplated making application for a license under Chapter 142. You were advised the intention of the league, should it obtain a license, was to operate as follows: The league will obtain a number of slot machines, of which it will be the sole owner; these machines will be placed in divers and sundry bars and taverns throughout the state; the "take" from the machines will be split with the proprietors of such bars and taverns where the machines are kept and operated; in order to qualify as a "charitable organization," a certain amount will be regularly distributed to such worthy causes as the Red Cross, Salvation Army, hospitals for crippled children, and the like.

Chapter 142, Laws of 1945, was enacted by the Twenty-ninth Legislative Assembly of 1945 and by its terms, becomes effective July 1, 1945. The act provides for the licensing of slot machines used, operated, kept and maintained for use by religious organizations, fraternal organizations and charitable or non-profit organizations, and requires the procuring of a license by such organizations before "using, operating, keeping and maintaining for use slot machines." The act further provides the State Board of Equalization shall prescribe the form of application to be used and issue licenses and collect the fees therefor.

Section 3 of the act provides:

> "**Religious organizations, ,fraternal organizations, charitable, or non-profit organizations, before** using, operating, keeping and maintaining for use, slot machines, must first procure the license and pay the license fee provided by this act, provided however, that such religious organizations, fraternal organizations, charitable or non-profit organizations are the **sole and complete owners** of said slot machines, and that **the entire profit, if any therefrom, shall go to said organizations."** (Emphasis mine.)

Section 5 of the act provides the fees to be charged for licenses, depending upon the population of the cities wherein the machines are to be located. But insofar as pertinent here, the section provides:

> "A license for the operation of any slot machine or slot machines within the State of Montana shall first be procured from the state board of equalization of the State of Montana (hereinafter called the "board"), by any of the organizations or persons enumerated in section three (3) of this act, desiring to use or operate same . . ."

It is clear from the above provisions of the act your board is authorized to issue licenses only to the organizations therein mentioned who meet the conditions set out in the act. There is, therefore, placed upon the board the duty of determining whether or not an applicant qualifies as such organization and meets the statutory requirements. This duty is further made clear by the provisions of Section 9 of the act, which provides:

> "The form of licenses to be issued under this act shall be prescribed by the state board of equalization. Said board shall also promulgate the forms to be used in applying for such licenses and may require the applicant for such license to state in his application such facts as the board may deem necessary to enable it to pass upon such application, including the name and address of the applicant and the premises where said slot machine or machines are to be kept and operated and such other information as the board may require. The making of any false statement in said application shall constitute a misdemeanor and be punishable as provided in section 10 of this act. Each machine licensed under this act shall at all times have attached to it an official stamp or marker prescribed by the state board of equalization, showing that the tax provided by this act has been paid."

From the information contained in the application, the board must determine if the applicant is such an organization as mentioned in the act and if the contemplated use and operation of the machine or machines for which licenses are applied are within the intent and meaning of the act. Hence, whether or not a license may be issued must depend upon the facts in each

case as appear from the statements in the application required by the board, and which it "deems necessary to enable it to pass upon such application." Therefore, four facts must appear from the application to authorize the board to grant a license:

1. The applicant is a religious, fraternal, charitable or non-profit organization.
2. The applicant is the sole and complete owner of the machine or machines.
3. The applicant is to receive the entire profit from said machine or machines.
4. The machines are to be possessed, operated and used in the manner intended by the legislature.

As to the first requisite, it may be said the applicant need not necessarily be a corporation, so long as it qualifies as a religious, fraternal, charitable or non-profit organization.

In the instant case, your board was presented with a certificate of the Secretary of State, dated May 1, 1942, certifying that the "Montana Charity League" had filed its Articles of Incorporation in accordance with the provisions of Chapter 42 of the Civil Code of Montana, 1935, and that such "association is a body corporate and politic and is authorized to do business in the State of Montana for a term of forty years." This association or organization is, therefore, a corporation incorporated under what is commonly known as the non-profit corporation statutes of the state. From the certificate of incorporation, it appears the Montana Charity League is a non-profit organization, and comes within the class of organization mentioned in the act. In my opinion the certificate of the Secretary of State is sufficient to establish this fact as one of the requisites to obtain a license under the act insofar as your board is concerned. (See the case of State ex rel. Bottomly v. District Court, et al., 115 Mont. 400, 143 Pac. (2d) 559.)

From the facts given you, as stated above, the league will be the sole and complete owner of the machines, thus meeting the second requisite.

As to the third requisite, you have been informed that the "take" (or profit) will be split with the proprietors of the premises where the slot machines are kept and operated, and that "in order to qualify as a charitable organization, a certain amount will be regularly distributed to such worthy causes as the Red Cross, Salvation Army, hospitals for crippled children, and the like."

It is very clear from the facts given you the entire profit, if any, from the machine or machines is not to go to the organization. The act, Section 3, specifically provides that "the entire profit, if any therefrom, (the machines) shall go to said organizations." This provision is clear and means just what it says. The entire profit must go to the organization, not to any member, agent or employee of the organization, or to anyone else, but the organization.

It would, therefore, appear that under the facts given your board the Montana Charity League, although organized as a charitable or non-profit organization, fails to qualify under the provisions of the act as an organization to which your board may issue a license, for the reason that said organization is not to receive the entire profit and the machines are to be located at places other than the applicant's place of business as provided by the act.

I deem it advisable here to apprise your board of the construction of Chapter 142 for your future guidance in passing upon applications which may hereafter be presented to you.

Our state has, since its territorial days, prohibited all forms of gambling. In the first session of the territorial legislature a bill was enacted prohibiting gambling. This statute specifically mentioned the games then commonly known. (See Laws of First Territorial Legislative Session, 1864, page 354.) Since that time the statute has been amended several times, but the amendments consisted merely of including new forms of games or changing penalties. (See Laws of 1897, page 80; Senate Bill 74, Seventh Session, 1901; Chapter 115, Laws of Tenth Session; Chapter 86, Laws of 1917.) The latter chapter was re-enacted without change and placed in the Codes of 1921 as Section 11159, and re-enacted as the same numbered section in the Codes of 1935. No exception to the prohibited games was made until the Legislative Assembly of 1937, when Section 11159 was amended by Chapter 153, Laws of 1937, known as the "Hickey Law." This act excluded

from the general provisions of Section 11159 the prohibited games, if played, conducted or operated by religious, fraternal or charitable organizations.

A review of the gambling statutes clearly indicates the policy of the state toward commercial gambling. As was aptly said by the District Court of Appeals of California, from which state many of our gambling statutes have been adopted, in the case of Ex Parte Goddard, 74 Pac. (2d) 818, 823, and People v. Haughey, 120 Pac. (2d) 123:

> "The policy of the state toward commercial gambling is clear and unequivocal. A mere superficial reference to the Penal Code reveals that commercial gambling in all of its phases has been uniformly condemned for many years."

Hence, in the light of this history in construing a recent enactment of the legislature purporting to change or depart from this long established policy, it is necessary we do so under well founded rules universally adopted by the court and especially those rules promulgated and consistenly folowed by our own courts. Chapter 142 is such an enactment.

In the construction of statutes, the intent of the legislature is to be ascertained and given effect whenever possible. (State v. Stewart, 53 Mont. 18, 161 Pac. 309; State v. Callow, 78 Mont. 308, 254 Pac. 187; State v. Board of Commissioners of Cascade County, 89 Mont. 37, 269 Pac. 1.)

It is both a common law and statutory rule of construction of statutes that the intention of the legislature must be discovered and, if possible, pursued. (State v. Dunn, 57 Mont. 563, 190 Pac. 107; see also Section 10520, Revised Codes of Montana, 1935.)

The spirit and reason of a statute should prevail over its letter, and words may be rejected and others substituted. (Baraby v. U. S., 1 F. Supp. 443; Cruse v. Fischl, 55 Mont. 258, 175 Pac. 878; State v. State Highway Commission, 82 Mont. 382, 267 Pac. 499.)

The policy of the law is persuasive in determining the meaning of statutory provisions. (State v. Sedgwick, 46 Mont. 187, 127 Pac. 94.)

In construing statutes courts may consider actual proceedings of the legislature in enactment of laws, as disclosed by legislative records and the history of the legislation. (Normile v. Cooney, 100 Mont. 391, 47 Pac. (2d) 637; Guilott v. Highway Commission, 102 Mont. 149, 56 Pac. (2d) 1072.)

In arriving at legislative intention it is proper to consider not only acts passed at the same session, but also acts passed at prior and subsequent sessions.

The Supreme Court of North Carolina in the case of State v. Humphries, 210 N. C. 406, 186 S. E. 473, had occasion to construe a recent enactment of the General Assembly of that state defining a slot machine. The laws of North Carolina prohibited the possession, use and operation of slot machines and defined the term slot machine. By an act of the 1935 General Assembly this law was amended so as to make the provisions of the existing law comprehensive enough to include the possession of any kind of coin operated machine where by reason of any element of chance the outcome of its operation was unpredictable in advance. Because the new definition was a departure from the long standing and accepted meaning of the term, the court called to its aid certain well recognized rules of construction.

These particular rules seem applicable here and for that reason I quote them:

> "The object of all interpretation is to determine the intent of the law making body. Intent is the spirit which gives life to a legislative enactment. The heart of a statute is the intention of the law making body. Branch Banking & Trust Co. v. Hood, 26 N. C. 268, 173 S. E. 601; State v. Earnhardt, 170 N. C. 725, 86 S. E. 960. In the language of Chancellor Kent: 'In the exposition of a statute the intention of the law-maker will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context, from the mischief felt and the remedy in view, and the intention is to be taken or presumed according to what is consonant with reason and good discretion.' 1 Kent. Com. 461."
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> "The ascertainment of the legislative intent is the cardinal rule, or rather the end and object, of all construction; and where the real design of the legislature in ordaining a sta-

tute, although it be not precisely expressed, is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such construction as will carry that design into effect, even though, in so doing, the exact letter of the law be sacrificed, or though the construction be, indeed, contrary to the letter. And this rule holds good even in the construction of criminal statutes." Citing Endlich Int. Stat. p. 400.

With these rules of construction in mind, we proceed with a construction of Chapter 142, Laws of 1945.

As noted above, our gambling statutes from territorial days were never repealed or amended so as to permit gambling of any kind or by any class or group until the amendment of Section 11159, Revised Codes of Montana, 1935, by Chapter 153, Laws of 1937, the "Hickey Law."

Chapter 153, supra, permitted gambling to be carried on and gambling devices and paraphernalia to be kept, possessed and operated by fraternal, religious and charitable organizations. It was, however, the generally accepted concept by both the public and the law enforcement officers that such gambling was permitted only when carried on on the premiises of the organization and under its supervision and direction and only as incidental to its main purpose. It was never the idea that by this exception the legislature departed from its long standing policy against commercial gambling.

At the first opportunity, our Supreme Court, in the case of State ex rel. Bottomly, Attorney General, v. District Court, 115 Mont. 400, 153 Pac. (2d) 559, 560, expressed its opinion in the construction of Chapter 153, in the following words:

"A bona fide corporation organized such as the Brotherhood, under Chapter 42 of the Civil Code, (Sections 6453 to 6461, Revised Codes, as amended) may legally permit gambling among its members but not permit any person or persons other than its members to participate in such gambling."

I have above noted the long established policy of our legislature to prohibit commercial gambling. That the legislature intended that this policy still stand is evidenced by its action in enacting Chapter 142, Laws of 1945. At this same session there were introduced two bills dealing with gambling. House Bill No. 183, designed to legalize all forms of gambling on a commercial basis and under license and regulation was defeated. House Bill No. 13, designed to legalize and permit the use and operation of slot machines on a commercial basis and under license and regulation, was likewise defeated. Chapter 142, supra, was introduced as a substitute for House Bill No. 13. Are not these facts convincing, in the light of the foregoing rules of construction, that the legislature, by the enactment of Chapter 142, did not intend to permit the use and operation of slot machines on a commercial basis?

As if to make this intention clear, it is significant to note by Section 2 of Chapter 142, the legislature provided:

"The provisions of the so-called 'Hickey Law,' Section 11159, Revised Codes of Montana, 1935, as amended by Chapter 153, Session Laws of Montana, 1937, prohibiting the running, keeping or operating of slot machines, are hereby declared to be in full force and effect."

It may be noted at the time of the passage of Chapter 142, Laws of 1945, Chapter 153, Laws of 1937, had been in effect for some eight years. Three legislative sessions had convened without amending the law and only one year prior to the 1945 session, the case of State ex rel. Bottomly v. District Court, supra, had been decided by our Supreme Court.

The Supreme Court of this state said in the case of Bottomly v. Ford, et al., 157 Pac. (2d) 108, 112:

"The fact that the legislature has not seen fit by amendment to express disapproval of a contemporaneous or judicial interpretation of a particular statute, has been referred to as bolstering such construction of the statute, or as persuasive evidence of the adoption of the judicial construction. In this respect, it has been declared that where a judicial construction has been placed upon the language of a statute for a long period of time, so that there has been abundant opportunity for lawmaking power to give further expression to its will, the failure to do so amounts to legislative

approval and ratification of the construction placed upon the statute by the courts, and that such construction should generally be adhered to, leaving it to the legislature to amend the law should a change be deemed necessary. **These rules are particularly applicable where an amendment is presented to the legislature and fails of enactment, or where the statute is amended in other particulars."** Citing 50 Am. Jur. Statutes, Sec. 326, pp. 318, 319, 59 C. J. 1037, notes 44-48. (Emphasis mine.)

The rule is that if two statutes cover the same matter in whole or in part and are not absolutely irreconcilable, it is the duty of the court to give effect to both. (State v.. Humphries, 210 N. C. 406, 186 S. E. 473, 478; State v. Mills, 81 Mont. 86, 261 Pac. 885; Short v. Karnop, 84 Mont. 276, 275 Pac. 278; Putnam v. Putman, 86 Mont. 135, 282 Pac. 855.) And the later act does not repeal the earlier. (State v. Humphries, supra; State v. Broadway, 157 N. C. 598, 72 S. E. 987; Casterens v. Stanly County, 209 N. C. 75, 183 S. E. 3.)

It cannot be said the provisions of these two acts are "absolutely irreconcilable." On the other hand, it is clear the legislature by the provisions of Section 2 of Chapter 142, quoted above, intended both acts be in force and effect.

In the instant case the legislature not only refused to change the existing statutes relative to slot machines, by defeating House Bill No. 13, but by the provisions of Section 2 of Chapter 142, supra, specifically continued in force the provisions of the Hickey Law. It may be said, under the expression of our Supreme Court in the case of Bottomly v. Ford, et al., supra, above quoted, the legislature gave "legislative approval and ratification" to the construction of this statute.

In the light of the history of gambling legislation in this state, and the consistent refusal of the legislature to lay down the bars and give its approval to licensing widespread gambling, it cannot be reasonably said the legislature by Chapter 142 opened the gates and permitted widespread gambling, even though confined to slot machines.

The only reasonable construction of this statute in view of all the facts and history of such legislation, is that the legislature recognizing the existence of Chapter 153, Laws of 1937, and the construction placed upon it by our Supreme Court, intended by Chapter 142 to license those slot machines made legal under the former act, and that the use and operation of such machines shall be as provided under Chapter 153, and as construed by the Supreme Court.

It is therefore my opinion:

1. The Montana Charity League under the facts presented to your board is not eligible to obtain a license under Chapter 142, Laws of 1945, and the State Board of Equalization has no authority to issue it a license.

2. Only a bona fide religious, fraternal, charitable or nonprofit organization, which is the sole and complete owner of the slot machine or machines for which licenses are applied, and which is to receive the entire profit therefrom, and use, keep and maintain for use such machines upon its own premises, as incidental to its main purpose for its members only, is eligible to receive a license under the provisions of Chapter 142, Laws of 1945.

3. Your board has authority and it is its duty to require the facts which you deem necessary to determine if the applicant meets the requirements of the law, before granting a license under Chapter 142, Laws of 1945.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General