

## No. 234

SLOT MACHINES—GAMBLING—NUISANCE—  
PINBALL GAME

**Held:** The pinball game is a gambling device within the meaning of the statute and the use of the machine constitutes a nuisance under the provisions of Section 11124, Revised Codes of Montana, 1935.

September 6, 1941.

Mr. John D. Stafford  
County Attorney  
Cascade County  
Great Falls, Montana

Dear Mr. Stafford:

You have submitted the following:

"In reply to your recent letter relative to the legality of operating pin-ball games for amusement, I describe the same more in detail as follows:

"These machines are in outward appearance substantially the same as the ordinary pin-ball machine, standing on four upright legs having a glass face, and slot for insertion of nickels. Player inserts a nickel into the slot and by pushing the lever he lifts the balls to be played in line with the plunger. The player is entitled to shoot five balls for one nickel. After the ball has been lifted in line with the plunger, player then pulls the plunger back for anyone of varying distances and shoots. The ball is shot towards the top or head of the machine and proceeds from thence by varying routes through a number of set bunkers to the bottom of the machine where it falls through a slot into its original position before lifted to the line of the plunger. As the ball proceeds from top to bottom it strikes upon the various bunkers and as each bunker is struck, whether once or more than once, a light flashed on the top of the machine indicating the score. The various bunkers have various values and as each bunker is struck there is a particular value added to the immediate prior score is flashed at once on the top of the machine. The rules are printed and pasted on the pane covering the machine and if the player hits certain scores above a given figure, he wins either a replay or replays.

"There is no question but that luck enters into the operation or playing of said machine. But when the player is lucky, he then may hoist the five balls into line with the plunger for a replay or replays. If the player wins a replay he is entitled to five additional shots. If he wins two replays, he is entitled to ten additional shots."

The question before us here is whether the use of the pin-ball machine constitutes a nuisance, under Section 11124, Revised Codes of Montana, 1935. If its use constitutes gambling as defined by our sections, then the building in which it is used is a nuisance. Whether or not it is a gambling device depends upon Section 11159, Revised Codes of Montana, 1935, as amended by Chapter 153, Laws of 1937. That section makes it a misdemeanor for any person to conduct, run or operate "any game of chance played with . . . any device whatsoever", or to run or conduct or keep any slot machine, or any similar machine or device, for "money, checks, credits or any representative of value." It provides, however, certain types of business may procure a license to operate tables for the use and pleasure of their customers where certain games may be played for "pastime and amusement" and for the maintenance of which a charge may be made, "to be paid by the users by the purchase of trade checks which must be redeemable in merchandise at the going retail price of such merchandise, which is the stock and trade of such business." It also provides

that on the payment of a license, places of business may exhibit for use and sale to customers "trade stimulators, such as pull boards and ticket boards, where each board so used returns to the owner or business not to exceed the going retail price of the consideration disposed of and sold and disposed of to the use of the same."

The question to be disposed of here is identical with that submitted in *State ex rel. Dussault v. Kilburn*, 111 Mont. 400, 109 Pac. (2d) 1108, save as to one exception. In the Kilburn case, the player received "trade checks" as the payoff and in the matter submitted here the player receives "free play" as the payoff.

The syllabus in the Kilburn case reads:

The game of "pin-ball" played by means of a machine equipped with a sloping plane or surface studded with small steel pins and containing holes into which a small ball catapulted by means of a spring must fall to enable the player to win and which pays off in trade checks is a gambling device, under the provisions of Section 11159, Revised Codes, as amended by Chapter 153, Laws of 1937. The fact that a person by long practice may acquire a certain amount of skill, in playing, not relieving the machine of its character as such a device, and that the trial court was justified by the evidence in holding that operation of the machine in defendant's business place constituted a nuisance.

It is well to review the Court's discourse in order clearly to acquaint you with the operation of the pin-ball machine and the holdings of the courts on the subject of the 'pin-ball' game as a gambling device.

Quoting from page 404 of the opinion, our Court said, among other things:

"The Court was correct in holding that the device in question is condemned by Chapter 153. Machines of similar construction and operation have been held to be gambling devices. In *Howle v. City of Birmingham*, 229 Ala. 666, 159 So. 206, 209, the court in speaking of a machine not wholly dissimilar to that here said: 'The game is clearly a gambling contest with the owner and operator on the one side, and the members of the public on the other, who, while seeking a moment of diversion, are willing to hazard a nickel with the hope of winning three times that amount, and in which, as the facts alleged in the bill and the admitted facts show, the owner and operator hold the whip handle, and eventually win the stakes in the profits which the machine takes.'

"In *Ex parte Davis*, 66 Okl. Cr. 271, 91 Pac. (2d) 799, 809, a similar machine was held to be a slot machine because of the manner and result of its operation. The court in that case quoted with approval the following from the case of *Harvie v. Heise*, 150 S. C. 277, 148 S. E. 66, 69: 'In no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified and cunning mechanical inventions.' (*City of Moberly v. Deskin*, 169 Mo. App. 672, 155 S. W. 842.)

"The same conclusion was reached in the case of *In re Mapakakes*, 169 Misc. 766, 8 N. Y. Supp. (2d) 826. In the *City of Milwaukee v. Burns*, 225 Wis. 296, 274 N. W. 273, 275, such machines were condemned as gambling devices, the court saying: 'The machine makes an appeal to the gambling instinct because the player has constantly before him the chance that the next play will assure him of

the right on the next succeeding play to secure from two to twenty trade checks. Were it not for this appeal to the gambling instinct, these machines, which attempt to adhere to the letter of the law, while violating its spirit, would never have been placed upon the market.'

"In *State v. Coats*, 158 Or. 122, 74 Pac. 2d. 1102, 1105, the court in speaking of pin-ball machines said: 'To say that the operation of pin-ball machines or slot machines involves any substantial degree of judgment or skill severely strains the credulity of any reasonable-minded person. Such machines are constructed to win, and they do win. In a game involving skill or judgment, the player has a fair opportunity to win. Such opportunity is not afforded the player who 'bucks' a slot machine or a pin-mall machine. No judgment or skill which the player may exercise has any appreciable effect upon the result. \* \* \* It is perfectly obvious from the information that the only act which the player can, by possibility, perform to influence the result of this operation is to pull back the plunger a greater or lesser distance, and thereby, in its initial stages, regulate the speed of the ball. He can send the ball to the playing surface at greater or lesser speed, but he cannot guide or influence its course after it gets there. He cannot aim at anything, as in a game of billiards, or baseball or golf, but is absolutely limited by the mechanics of the device to propelling the ball along the so-called channel to the upper end of the table.'

"While the evidence shows that by long practice a certain amount of skill may be developed, yet we must view the operation and result of the machine as it is played by the mass of the patronizing public, with whom it is purely a game of chance. On this point the Supreme Court of Oregon in the *Coats* case, *supra*, had this to say: 'If it be conceded that an exceptional person might, after long practice, develop such proficiency in the business as to be able on occasion to influence the result of the play in any substantial or perceptible degree, yet it is apparent that, so far as the patronizing general public is concerned it involves nothing more than mere chance.' To the same general effect is *Commonwealth v. Bowman*, 267 Ky. 602, 102 S. W. (2d) 382.

"We are aware that this court in the case of *State v. Hahn*, 105 Mont. 270, 72 Pac. (2nd) 459, when treating of section 11149, prohibiting lotteries, declared that the test to be applied in determining the character of the game was whether the element of skill predominated over the element of chance. There are other authorities that make the same pronouncement when dealing with lotteries. While that test may be proper when applied to lotteries, it is not a proper test in determining whether Chapter 153 is violated. We believe the correct rule as applied to a case such as this was applied in the case of *Peers v. Caldwell*, 85 L. J. K. B. (n. s.) Eng., 754, where the court held that a machine through which a game of skill was played was nevertheless a gambling device when used for the purpose of betting. In other words, an innocent game involving the element of skill alone becomes a gambling device when players bet on the outcome. To illustrate: A game of poker may involve more skill than chance and is innocent when played for pastime and amusement, but constitutes gambling when played for money. In *Miller v. United States*, 6 App. D. C. 6, the court said: 'It has from an early time been held that a horse race is a game of chance, and so is a game of baseball, and so a foot race, where wagers have been made upon them.' (See, also, note in 60 A. L. R. 343; *Sparks v. State*, 48 Ga. App. 498, 173 S. E. 216, and *State v. Livingston*, 135 Me. 323, 196 Atl. 407.)

"Such, we think, is the purpose of the machine in question here as it is used and operated. We find nothing in Chapter 153 that excepts these machines from the operation of the first part of that chapter.

(Compare *State v. Aldahl*, 106 Mont. 390, 78 Pac. (2d) 935.) The court was correct in enjoining defendants from maintaining the nuisance. The vice of the game consists not alone in the amount of money risked in playing it, but also in the encouragement of the gambling instinct latent in many people."

But the ruling laid down in *State ex rel. Dussault v. Kilburn*, supra, is based on "trade checks" as the payoff while the question before us here has to do with "free plays" as the payoff. Therefore, we must continue our research of law which has to do with the pin-ball game when free plays constitute the payoff.

In the *City of Milwaukee v. Burns*, 225 Wis. 296, 274 N. W. 273, it was held:

That a pin-ball machine in which the player was required to insert a nickel for which he received ten balls for play involving the elements of chance and received, if he won, one or more chips which could be used to play the machine further, constituted a 'gambling device' within the ordinance, regardless of whether the chips were actually deemed in cash or for merchandise.

The Court in that case said:

"It is not necessary that we describe the mechanism of this pin-ball machine. It is constructed and operated to appeal to the gambling instinct as do many of the other machines now quite generally in use. The officer testified that he put six nickels into the machine before he won. It appears that there are various combinations on the machine. One must get a ball into the so-called 'skill' hole to win. If one can do this and also make certain other combinations, he wins free play tokens."

"Defendant testified:

"The average person inserts five or ten cents in the machine. They win the chips and play them back in. I don't cash a chip in the house \* \* \* I don't accept chips for merchandise."

"If this be true, if one wins, he gets only a certain number of free plays.

"An examination of the machine, which is in court as an exhibit, and the evidence as to its mechanism and operation leaves no doubt in the mind of the Court that it is a device 'into which money is or may be played or paid upon chance, or upon the result of the action of such \* \* \* device.'

"The player has constantly before him the chance that he may win tokens entitling him from three to twelve free-plays. Clearly, this device comes within the express prohibition of the ordinances. Chance is the denominating element that determines the result of the game. What is said in *Milwaukee v. Johnson*, supra, although it involves a different type of machine, is applicable to the machine in question, the court said:

"The machine makes an appeal to the gambling instinct because the player has constantly before him the chance that the next play will assure him of the right on the next succeeding play to secure from two to twenty trade checks. Were it not for this appeal to the gambling instinct, these machines which attempt to adhere to the letter of the law while violating its spirit, would never have been placed upon the market."

"This particular type of machine was involved in *Shapiro v. Moss*, 245 App. Div. 835, 281 N. Y. S. 72. There, the Court said:

"We are of the opinion that the element of chance in the operation of the machine now before us far out-weighs that of skill. The test of the character of the game is not whether it contains an element of

chance or an element of skill but which is the dominating element that determines the result of the game. *People ex rel. Ellison v. Lavin*, 179 N. Y. 164, 170, 171 N. E. 735, 755.'"

Whether the player is rewarded with chips entitling him to free plays only or by whatever method is immaterial. The result is that a win entitles him to a certain number of free plays.

In *Harvie v. Heise*, 150 S. C. 277, 148 S. E. 66, it was held a slot machine—which, when a coin was deposited therein and a lever operated, gave a package of mints, and at irregular intervals issued tokens in varying amounts—constituted a gambling device in violation of the South Carolina Criminal Code, 1922, Section 196, even if, as contended, such tokens had no monetary or trade value, but were offered merely as an inducement to sell mints, so that the player could operate the machine with such tokens for his own entertainment by causing reels or cylinders in the front of the machine to spin around and exhibit different combinations of pictures, humorous remarks, or the customer's 'fortune,' since the Court could not say the tokens had no value whatever—and was therefore no certain and uniform return in value of the coin deposited.

Quoting from the above cited case, we find the following explanation by the Court:

"In addition to what has been said, even if it should be conceded that it is the sincere purpose of the owner, that the checks be played only for the amusement of the operator, we cannot say that they have no value whatever; for it must be that the amusement or entertainment furnished the player is worth something to him if it constitutes the inducement for him to operate the machine. It is idle to argue that he would spend his money and time in operating the machine for the purpose of obtaining something that is of no value to him—unless we impute to him the lack of that common sense which he is presumed to have. Further, especially in view of the high cost of amusement or entertainment and the immense sums paid for it by the people of all classes, it is reasonable to suppose that the owners of the machines, if they expect the amusement or entertainment furnished to operate as an inducement to play, must consider it of some value to the operator. In addition, it is apparent that some cost or expense is necessarily incurred in the manufacture and distribution of these checks or tokens, and the simple assertion that they are of 'no value' does not establish that fact. Even the contention that the checks are not the property of the player, but loaned him for the purpose of playing the machine only, does not help the cause of the petitioner. He finds himself in the same predicament, namely, that he is lending to the operator something of no value to him, which comes into his possession temporarily as an inducement to play for something that he does not want.

"Viewing the question from all possible angles, we are satisfied that the checks or tokens have some monetary or trade value, and, in view of the fact that they are released by the machine at irregular intervals and in uncertain numbers, the element of chance is always present, and there is no certain and uniform return in value for the coin deposited in the machine. In these respects, the operation or possession of the machine clearly violates the statute in question."

Speaking of slot machines, the Court in *Moberly v. Deskin*, 169 Mo. App. 672, 155 S. W. 842, said:

"In no field of reprehensible endeavor has the ingenuity of man been more exerted than in the invention of devices to comply with the letter but to do violence to the spirit and thwart the beneficent objects and purposes of the laws designed to suppress the vice of gambling. Be it said to the credit of the expounders of the law that

such fruits of inventive genius have been allowed by the courts to accomplish no greater result than that of demonstrating the inaccuracy and insufficiency of some of the old definitions of gambling that were made before the advent of the era of greatly expanded, diversified and cunning mechanical inventions."

While our Code is silent as to the definition of a slot machine, we think it can be safely said an unlawful slot machine is a machine, apparatus or device that is adopted for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or be operated by reason of any element of chance over which the operator cannot have any control. Nor can it be said that the operator has any control over the outcome of the operation of such machine or device each and every time the same is operated; or, the operation of such machine or device is unpredictable in advance. The operator may receive or become entitled to receive any piece of money, credit, allowance or thing of value, which may be exchanged for any money, credit or thing of value or allowance, or which may be given in trade, or, the user may secure additional chances or rights to use the machine, apparatus or device. The outcome of each operation is not dependent, in whole or in part, upon skill or practice of the operator.

In a very late case, *People v. Cerniglia* reported in 11 N. Y. S. (2nd) 5, the Court held that:

- (1) A statute making it unlawful to possess slot machines which, as a result of any element of chance or other outcome unpredictable to him, may entitle a user thereof to an additional chance to play, is so plain and specific that its meaning may not be changed by any general principles of interpretation or construction.
- (2) A statute making it unlawful to possess slot machines which as a result of any element of chance or other outcome unpredictable to him may entitle a user thereof to an additional chance to play is explicit and should be enforced.
- (3) A slot machine giving a player a free opportunity to play because he attains a certain score is a "gambling device" within the statute making it unlawful to possess slot machines which as a result of any element of chance or other outcome unpredictable to him may entitle a user thereof to an additional chance to play.

From the foregoing, it is my opinion the pin-ball game operated as outlined in your query above is a gambling device within the meaning of the statute and the use of the machine constitutes a nuisance under the provisions of Section 11124, Revised Codes of Montana, 1935.

Sincerely yours,

JOHN W. BONNER  
Attorney General