

Opinion No. 48.

**Slot Machines—Gambling—Cigarettes,
Slot Machines.**

Held: A cigarette vending device of the construction of a slot machine which entails the element of chance either in obtaining the cigarettes or anything of value in addition thereto, or from its mechanical construction and operation appeals to the player's propensity to gamble, is a slot machine and hence a gambling device as contemplated by Section 11159, Revised Codes of Montana, 1935, as amended, and therefore prohibited, except as provided by said section as amended.

June 25, 1945.

Mr. Melvin N. Hoiness
County Attorney
Yellowstone County
Billings, Montana

Dear Mr. Hoiness:

You have requested my opinion whether a so-called cigarette vending machine under the following facts is a slot machine as is prohibited under the gambling laws of this state. The facts describing the use of the machine in question are stated by you as follows:

These machines operate in the same manner as the usual slot machines except that they pay off in cigarettes. The complaints originated because of the fact the machines were so regulated that it was difficult to obtain a package of cigarettes, and in many cases a player would spend as much as \$2.00 and not get a package of cigarettes.

Not every slot machine, of course, is a gambling device which is prohibited by gambling statutes. Ruling Case Law, Vol. 12, at pages 729 and 730, states:

"There are so many kinds of slot machines, differing so much in construction and operation and used for such varied purposes, that it is difficult to lay down any general rule fixing their status with reference to the question of gaming or gambling. A slot machine, it has been said, is

not per se a gambling device, since it may be used or played upon for innocent purposes, and the courts cannot therefore take judicial notice that every slot machine is a gambling device, as the use to which it is put must determine its character. In general, however, any slot machine, regardless of its description and although it is a mere automaton which keeps and runs itself, will be deemed to be an unlawful gambling device, where the one who plays the machine stands to win or lose money, trade checks, or prizes, by a chance or more broadly, where there is an element of chance in its operation. And where the player is dependent on an element of chance the generally prevailing opinion seems to be that a slot machine is a gambling device even though the player is assured of his money's worth of some commodity and hence cannot lose."

Generally statutes prohibiting the maintenance, use and operation of slot machines, do not define the term "slot machine." Our statute, Section 11159, Revised Codes of Montana, 1935, insofar as it relates to slot machines, provides:

"Every person who . . . runs or conducts or causes to be run or conducted, or keeps any slot machine . . . or other similar machine or device, or permits the same to be run or conducted for money, checks, credits or any representative of value, or for any property or thing whatsoever . . . is guilty of a misdemeanor . . ."

This section was amended, of course, by Chapter 153, Laws of 1937, to permit slot machines to be kept, run and conducted by religious, fraternal or charitable organizations, or in private homes.

Our Supreme Court, so far as I am able to find, has had only one occasion to pass upon the question as to when a slot machine is a gambling device within the provisions of Section 11159, supra. In the case of *Marvin v. Sloan*, County Attorney, et al, 77 Mont. 174, 250 Pac. 443, the machine in question was an automatic vending device used for the sale of packages of a certain kind of mint. Each package was of the retail value of five cents. In its general outlines the machine resembled somewhat an ordinary cash register. At

the top of the machine was a place for the insertion of a coin the size of a nickel; at the right side was a lever and in front was a container with a glass front for packages of mints, with a small drawer at the bottom from which the packages could be removed. In front was this inscription: "for 5c you receive a package of mints and— trade checks." In the place indicated by the blank space was a glass covered opening in which appeared either the word "no" or a numeral which might be any even number from two to twenty. The machine was operated by inserting a nickel and pulling the lever which caused a package of mints to fall into the drawer from which it might be removed. If, when the nickel was inserted, the word "no" appeared at the window the purchaser received nothing but the mint; if a numeral appeared at the window there fell into the drawer, in addition to the mint, an equivalent number of trade checks, each check being good for purchase over the counter of a five cent package of mints or other merchandise of the value of five cents. The purchaser always received a package of mint whenever he placed a nickel in the machine and operated it; he might or might not receive trade checks in addition thereto. Before operating the machine, the purchaser knew before placing his nickel therein what he would receive.

The lower court held this machine not to be a gambling device. The Supreme Court, in reversing the lower court, said at page 179, Montana reports:

"The precise question has been before a number of appellate courts, always, so far as we are apprised, with the same result. In *State v. McTeer*, 129 Tenn. 535, 167 S. W. 121, the court said: 'The question raised is whether the slot machine described is a gambling device. We are of the opinion it is. It is insisted by the defendant that this is not a sound conclusion, because the indicator always shows what the player is to get before he deposits his nickel; hence it is said there is no element of uncertainty, and no opportunity of obtaining disproportionate gains, or sustaining loss, by the hazard of anything of value. It is true there is no hazard of loss, if we assume, as we think we should, that each package

of gum is the fair commercial equivalent of five cents; but there is the prospect of obtaining very greatly disproportionate gains . . ."

The court quoted with approval the following excerpts from the case of *Ferguson v. State*, 178 Ind. 568, Ann. Cas. 1915C, 172, 42 L. R. A. (ns) 720, 99 N. E. 806:

"The machine appealed to the player's propensity to gamble, and that is the vice at which section 2474 is directed. The inventor of the machine has endeavored 'to adhere to the letter of the law while violating its spirit' and, as always must be the result, has failed."

In concluding its opinion in the *Marvin v. Sloan* case, *supra*, the court held:

"Undoubtedly the machine in question is a gambling device within the contemplation of section 11159, *supra*."

In addition to the facts stated in your request, you have furnished me with a clipping showing a picture of the machine in question, which is designated as a "Ciga-Rola." This clipping contains the following wording: "Ciga-Rola offers choice of six brands of cigarettes. There are six columns in the machine, each holding 20 packages of cigarettes. Columns can be refilled by attendant at any time, without access to cash box. All Ciga-Rola models may be equipped with reel combinations of various percentages, permitting cigarettes, vended through the amusement side of the machine, to return either 27c, 34c, or 37c per package. In ordering, please mention the return you want per package."

From the picture, it would appear that this machine is the common make of a slot vending machine, whereby you place coins in a slot and operate a lever or bar and a package of cigarettes of the market value, represented by the coins so placed, is dropped into a drawer from which it may be removed by the purchaser. However, from your statement that "the complaints originated because of the fact that the machines were so regulated that it was difficult to obtain a package of cigarettes, and in many cases a player would spend as much as \$2.00 and not get a package," I assume there may be some element

of chance in the operation of this machine.

From the printed matter accompanying the clipping, it appears the machine may be regulated so that a return to the dealer is in excess of the retail value of the cigarettes. However, a conclusion that the machine here in question, under the facts as given, is a gambling device would necessarily have to be based more or less on assumption. The mere fact the package of cigarettes vended in this machine returns a value in excess of the regular market value would not in itself constitute the machine a gambling device. For instance, the common cigarette vending machine operated by inserting a coin in a slot and pulling a lever which releases a package of cigarettes of the market value represented by the coins inserted is not a gambling device. Not every slot machine is necessarily a gambling device within the contemplation of Section 11159, Revised Codes of Montana, 1935. (12 R. C. L. 729). However, under the opinion of our Supreme Court in the case cited above, and the authorities therein mentioned, it may safely be said any machine or device which entails an element of chance, or as was said by the Supreme Court of Indiana in the Ferguson case, supra, "appealed to the player's propensity to gamble" is a gambling device as contemplated by our statute.

It is therefore my opinion that a cigarette vending device of the construction of a slot machine which entails the element of chance either in obtaining the cigarettes or anything of value in addition thereto, or from its mechanical construction and operations appeals to the player's propensity to gamble, is a slot machine and hence a gambling device as contemplated by Section 11159, Revised Codes of Montana, 1935, as amended, and therefore prohibited, except as provided by said section as amended.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General