

2. Any officer authorized to make arrests has authority to seize slot machines kept or possessed illegally as herein held, and to arrest the person or persons actually or apparently in possession or control thereof, or of the premises in which the same may be found, if such person or persons be present at the time of the seizure.

Aug. 7. 1947

Mr. John D. French
 County Attorney
 Lake County
 Polson, Montana

Dear Mr. French:

You have requested my opinion on the following questions:

1. Does Chapter 142 of the Laws of 1945 so amend Section 11160, Revised Codes of Montana, 1935, as to make mere possession of slot machines by an individual (not an incorporated club), legal, and hence require proof of maintaining for use, to convict?

2. Does said Chapter 142 so amend Section 11166, Revised Codes of Montana, 1935, so as to prevent the sheriff from seizing unlicensed slot machines in the possession of an individual or incorporated club?

Section 11159, Revised Codes of Montana, 1935, insofar as pertinent to the question here considered, provides:

"Every person who . . . keeps any slot machine, punch board or other similar machine or device or permits the same to be run or conducted for money, checks, credits or any representative of value . . . is guilty of a misdemeanor, . . ."
 (Emphasis mine.)

And, Section 11160, Revised Codes of Montana, 1935, prohibits the possession of gambling implements, and insofar as pertinent here, provides:

"Any person who has in his possession, or under his control, or who permits to be placed, maintained or kept in any room, space, enclosure

Opinion No. 53

Slot Machines—Gambling—Arrest—
 Seizure—Offices and Officers.

Held: 1. The mere keeping or possessing of a slot machine is illegal, except when kept or possessed under the authority of Chapter 153, Laws of 1937, or Chapter 142, Laws of 1945;

or building, owned, leased or occupied by him, or under his management or control any . . . slot machine, or any machine or apparatus of the kind mentioned in the preceding section of this act., is punishable by a fine . . ."

Section 11165, Revised Codes of Montana, 1935, provides:

"Maintaining gambling apparatus a nuisance. Any article, machine or apparatus maintained or kept in violation of any of the provisions of this act is a public nuisance, but the punishment for the maintaining or keeping of the same shall be as provided in this act."

Section 11166, Revised Codes of Montana, 1935, provides:

"Duty of public officer to seize gambling implements and apparatus. It shall be the duty of every officer authorized to make arrests, to seize every machine, apparatus, or instrument answering to the description contained in this act, or which may be used for the carrying on or conducting of any game or games mentioned in this act, and to arrest the person actually or apparently in possession or control thereof, or of the premises in which the same may be found, if any such person be present at the time of the seizure and to bring the machine, apparatus, or instrument and the prisoner, if there be one, before the committing magistrate." (Emphasis mine).

The above statutes have been in force in Montana for many years, and in clear terms prohibit gambling in all forms mentioned in said statutes. The language is likewise clear that the mere possession of slot machines is a violation of the statute. Section 11160, supra, states, ". . . Any person who in his possession, or under his control, or who permits to be placed, maintained or kept in any room, space, enclosure or building . . . any slot machine," is punishable by a fine and imprisonment. It may be noted the statute does not say the machine must be kept for the purpose of gambling. The mere possession is sufficient.

Section 11159, supra, was enacted as Section 600 of the Penal Code of

1895. The legislature here designated certain games as gambling games and certain devices, apparatus and paraphernalia as gambling apparatus and paraphernalia, and prohibited their possession and use. This section was amended by Chapter 115 of the 10th Legislative Session of 1907 and what are now Sections 11160 to and including 11179 were added and carried into the Codes of 1907 as Sections 8416 to and including 8436.

Section 11159, supra, specifically provides, "Every person who . . . keeps any slot machine . . . or permits the same to be run or conducted for money, checks, credits or any representative of value . . . is guilty of a misdemeanor."

This language, it would appear, is clear and specifically prohibits the keeping of a slot machine. That it was not the intention of the legislature to require that the slot machine so prohibited be kept for the purpose of gambling is clear from the fact that the legislature specifically, in the same sentence, prohibited such a machine from being "run or conducted for money, checks, credits or any representative of value." In other words two crimes are here specified, viz., (1) keeping a slot machine, and (2) permitting a slot machine to be run or conducted for money, etc.

In 1937, the legislature by Chapter 153, Laws of 1937, amended Section 11159, Revised Codes of Montana, 1935. In amending the section, the legislature re-enacted it word for word, but added new language thereto permitting certain places of business to run or conduct certain of the specifically named gambling games "for the use and pleasure of their customers" to be played "for pastime and amusement." It further provided a license to be paid to the county for such privilege. Then in Section 3 of the amending act it was provided, "That any religious, fraternal or charitable organization, and all private homes are not included within the provisions of this act."

Section 3 of Chapter 153, Laws of 1937, was considered by our Supreme Court in the case of State ex rel. Bottomly v. Johnson, et al, 116 Mont. 483, 154 Pac. (2d) 262. In its opinion the

Court quoted the holding of the lower court as follows:

"The Court finds from the evidence that the fraternal organization involved here is not in good faith carrying out the purposes for which it was incorporated, that it has developed, not as a fraternal organization, but it has developed into a gambling club, it seems to me, and that illegal gambling is conducted as alleged in the complaint.

"I am basing this judgment, not upon non-members playing there, but the opinion of the Court is that the whole scheme of the Brotherhood in conducting their gambling at their club rooms is illegal, even when gambling among themselves." In affirming the lower court, the Supreme Court said:

"While thus the decision was not based upon mere 'non-members' playing, it was obviously based upon the entire scheme of operations, under which the admission of 'members' was a mere subterfuge and the gambling was thus not limited to nor for the amusement of bona fide members, but was operated as a business."

The case cited, *supra*, was one brought under the provisions of Chapter 29 of the Penal Code, Revised Codes of Montana, 1935, (Sections 11123 to 11133, inclusive) to abate a common nuisance based upon illegal gambling. The Supreme Court in affirming the lower court's judgment in abating the premises, in effect held that Section 3 of Chapter 153, Laws of 1937, did not repeal or in any way affect the gambling statutes, except as applied to bona fide fraternal organizations.

With the provisions of Section 11159, Revised Codes of Montana, 1935, as amended by Chapter 153, Laws of 1937, in mind, as well as the decision of the Supreme Court in the case of *State ex rel. Bottomly v. Johnson, et al*, the Legislative Assembly of 1945 enacted Chapter 142, Laws of 1945, commonly known as the "Slot Machine Act." By this Act, the legislature permitted the operation, keeping and maintaining of slot machines by "religious organizations,

fraternal organizations, charitable or non-profit organizations," (Section 2) upon payment of a license fee. And in this act the legislature specifically declared the operation, keeping and maintaining of slot machines were prohibited, except by the organizations mentioned and upon payment of a license fee. Section 1 of the act provides:

"No slot machine shall hereafter be used, operated, kept or maintained for use or operation within the State of Montana by any person or persons whomsoever save and except as in this act provided.
..."

It will be noted the language of this section is somewhat different than that of Sections 11159 and 11160, *supra*, in that it uses the qualifying words, "for use or operation" following the words "kept or maintained." This might indicate that, to be illegal, a slot machine must be "kept or maintained for use or operation." However, Chapter 142, Laws of 1945, was enacted to provide an exception to the general gambling laws, by permitting the use and operation of slot machines by certain organizations and upon payment of a license fee. It cannot be said the legislature intended in anywise to change the general law other than as specifically provided in the new act. This is made clear by Section 2 of Chapter 142, Laws of 1945, wherein the legislature provided:

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

In other words, Chapter 142, Laws of 1945, is merely an exception to the general gambling laws of the state. And, under the rule of statutory construction of criminal statutes, the exception must be strictly construed so as to prevent any extension of the legislative sanction. (117 A.L.R. 829; 24 Am. Jur. 403).

What was said in Opinion No. 67 of the Report and Official Opinions of the

Attorney General, Volume 20, wherein Chapter 153, Laws of 1937, was considered, might well be repeated here:

"That gambling and betting are evils always condemned by the public policy of Montana is apparent by an examination of the statutes and laws of the state. Thus, Section 600, Penal Code of Montana, 1895, prohibited certain acts therein defined as gambling. Section 600, with amendments made from time to time, now appears as Chapter 153, Laws of 1937, the act under consideration. The chapter is not materially different in condemning the forms of gambling prohibited by Section 600, as originally enacted, but makes an exception of fraternal organizations. We, therefore, have a statute prohibiting general gambling, but permitting it under certain circumstances."

In my opinion, therefore, Chapter 142, Laws of 1945, does not amend either Sections 11159, as amended, 11160 or 11166, Revised Codes of Montana, 1935, nor any other statute dealing with gambling, except insofar as Chapter 142 provides for an exception granted to the organizations therein specifically mentioned.

We must, therefore, consider the question as to whether or not the mere possessing or keeping of a slot machine (other than as excepted by Chapter 153, Laws of 1937, or Chapter 142, Laws of 1945), is illegal.

We have been unable to find any Montana decision directly on this point. However, in 27 C. J. 1009, it is said:

"Statutes punishing the setting up, keeping, or exhibiting of gambling tables or devices, generally require in express terms that they shall be set up, kept, or exhibited for the purpose of gambling, or for the purpose of playing for money or property, and in such a case such purpose is an essential element of the offense. (Furlow v. State, 123 Ark. 471, 185 S.W. 788; Peo v. Carroll, 80 Cal. 153, 22 Pac. 129.)

"In the absence of such an express provision it has been implied; but the contrary has also

been held. (Bodel v. Peo, 173 Ill. 19, 28; 50 N.E. 322)."

In the Bodel v. Peo case, *supra*, the statute upon which a conviction was had provided that, "Whoever, in any room, saloon, inn, . . . operates, keeps, owns, rents, or uses any . . . slot machine, or any other machine upon which money is staked or hazarded, or into which money is paid or played . . . shall, upon conviction . . . be fined . . ." The indictment charged that the defendant "did keep a certain slot machine, the same then and there being a device upon the result of the action of which money or other valuable thing is staked." It was contended the mere keeping of such a gambling machine is not an offense under the statute; that to constitute the offense the machine must be actually used, or at least actually kept for gambling purposes. In disposing of this contention adversely, the Supreme Court of Illinois said:

"While a plausible argument is made that in view of the phrasology of the statute, and especially of the title, the purpose of the act is not to prohibit the mere keeping or using of such a device, but only the keeping or owning of the same to be used for gambling purposes, still it cannot be doubted that the legislature has the power to prohibit the mere keeping in possession of such gambling devices as well as to prohibit their use, as it has done in respect to obscene and indecent pictures, drawings, etc. . . . And we are of the opinion that it was the purpose of the legislature in enacting this statute, not only to suppress the use of these gambling devices, or the keeping of them for gambling purposes, but also to prohibit the ownership or the keeping of them, whether for gambling purposes or not; otherwise why make it a criminal offense to own or keep them, without qualification as to the purpose of such ownership or keeping and why provide for their seizure and destruction."

The language used in Section 11159 and 11160, *supra*, does not include the purpose for which kept, as did the language in the Illinois statute, and yet the Illinois case holds the mere keeping of such a machine, whether

for gambling purposes or not, was a crime under the statute.

The term "slot machine" as used in this opinion refers to such a machine as is defined by the statutes.

It is, therefore, my opinion:

1. The mere keeping or possessing of a slot machine is illegal, except when kept or possessed under the authority of Chapter 153, Laws of 1937, or Chapter 142, Laws of 1945;

2. Any officer authorized to make arrests has authority to seize slot machines kept or possessed illegally as herein held, and to arrest the person or persons actually or apparently in possession or control thereof, or of the premises in which the same may be found, if such person or persons be present at the time of the seizure.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General