

1393.

GAMBLING—SLOT VENDING MACHINE NOT GAMBLING DEVICE PER SE—SPECIFIC CASE CONSTRUED.

SYLLABUS:

1. *A slot vending machine is not per se a gambling device since it may be used and operated for innocent purposes.*
2. *A slot vending machine, which upon deposit of a five cent coin, will release a package of mints together with checks, which checks are merely for the purpose of replaying the machine and having one's fortune told, and which checks have no cash or trade value, is not a gambling device within the provisions of Sections 13056 and 13066, General Code.*

COLUMBUS, OHIO, December 17, 1927.

HON. W. J. JONES, *Prosecuting Attorney, McArthur, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date which reads as follows:

“Would like to have your opinion, whether or not the following described (slot machine), mint vending machine and fortune telling device (so-called), could legally be operated in this state:

The same is a machine whereby a nickel is deposited in said machine, and said machine, by pulling a lever, gives out checks, which are merely for the purpose of replaying the machine and having your fortune told. The checks, which said machine gives out, cannot be used to purchase any article of merchandise. The machine also vends a package of mints with each nickel deposited.”

Your attention is directed to Sections 13056 and 13066, General Code, which provide:

Sec. 13056. “Whoever permits a game to be played for gain upon or by means of a device or machine in his house or in an out house, booth, arbor or erection of which he has the care or possession, shall be fined not less than fifty dollars nor more than two hundred dollars.”

Sec. 13066. “Whoever keeps or exhibits for gain or to win or gain money or other property, a gambling table, or faro or keno bank, or a gambling device or machine, or keeps or exhibits a billiard table for the purpose of gambling or allows it to be so used, shall be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days, and shall give security in the sum of five hundred dollars for his good behavior for one year.”

The questions presented are:

1. Is the machine which you described “a game to be played for gain upon or by means of a device or machine?”
2. Is the machine which you describe “a gambling device or machine” kept or exhibited “for gain or to win or gain money or other property?”

As stated in 12 Ruling Case Law at page 729:

"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."

As stated in 27 Corpus Juris, at page 988:

"The term (gambling device) has no settled and definite meaning; it is not defined by the common law and often the statutes fail to define it. It has been judicially defined as an invention used to determine the question as to who wins and who loses, that risk their money on a contest or chance of any kind; anything necessarily adapted to the use, and necessarily used in the carrying on, of any gambling game; an instrumentality for the playing of a game upon which money may be lost or won; anything which is used as a means of playing for money or other thing of value, so that the result depends more largely on chance than skill."

At page 989 of the same volume the following language appears:

"The various courts have formulated different rules for determining when a slot machine is a gambling device, but one which seems to have been accepted very generally is that, where one who plays a slot machine stands to win or lose money, trade, or checks, by hazard or chance, the machine is a gambling device. The machine is a gambling device where its operation is such that, although the player in any event will receive something, he stands a chance to win something in addition."

In the case of *State vs. Krauss*, 114 O. S. 342, (decided March 16, 1926), the Supreme Court of Ohio, in an opinion by the Court, used the following language:

"On this state of the record was there a case made of keeping a gaming device for gain in violation of Section 13066, General Code? \* \* \* This record fails to show that the checks received as a result of the consecutive play by the state's witnesses were redeemed or even offered for redemption in trade at the store of the defendant. Until something was received, or to be received in the future, as a result of the operating of the so-called gambling device we fail to see how there could be a violation of the statute. \* \* \* But until a record is presented which shows consecutive plays, or consecutive alternate play, or some other manner of play, as a result of which premiums, checks or coupons are received, which secure to the player or players something for nothing as a result of his play, we fail to see how there can be a violation of the statute. \* \* \* In the case at bar the intent of the defendant to keep the machine as a gambling device for gain is of the essence of the offense, which might be shown under certain conditions by redeeming the checks won by the player, thus bringing something of value to the player for nothing, which might appeal to the gambling instinct."

The quotations from the foregoing case are indicative of what would be required to sustain a conviction under Section 13066, supra.

The Supreme Court of Ohio affirmed the judgment of the lower courts in discharging the defendant, using the following language:

"In the light of the meager record presented in this case, we are unable to find that the state showed beyond the existence of a reasonable doubt the essential elements going to make up the offense charged."

The headnotes of the case of *State vs. Smith*, (Knox County) 6 O. L. R. 264, affirmed by the Supreme Court of Ohio without report, 71 O. S. 473, read as follows:

"Under an indictment charging that the defendant did keep and exhibit for gain a certain gaming device, commonly known as a nickel slot machine, and that the defendant did have in his possession a machine which he used and employed in gambling, and which he did exhibit to certain persons named and to others, it is necessary that the state satisfy the jury beyond a reasonable doubt that the defendant did, in the county and at or about the time named, exhibit such a machine for gain, or to gain or win money or other property, either for himself or for another who may have been the owner of the machine."

The first paragraph of the headnotes of the case of *Mills Operating Co. vs. Village of Toronto*, 20 O. N. P. (N. S.) 525 reads.

"1. A slot vending machine, which upon deposit of a nickel will release a package of chewing gum together with checks in number from two to twenty, good in trade in the store where the machine is installed, is a gambling device, notwithstanding some consideration is received for every nickel played."

The headnotes of the case of *City of Akron vs. Stojanovic*, 24 O. N. P. (N. S.) 479, read:

"Whenever the element of chance is embodied in a device or machine, making it possible for a player to receive something for nothing, it comes within the provisions of an ordinance prohibiting the exhibition of a gambling machine or device for gain; and the gambling feature is not eliminated by a provision whereby players receive some consideration for their money."

There are no decisions in Ohio, nor have I been able to find any decision in other states, determinative of the question as based upon the facts in your inquiry. As indicative of what is necessary in order to constitute a slot machine a "gambling device" your attention is directed to the following recent cases:

- Nelson vs. State*, 256 P. 939 (Okla.). Decided June 18, 1927;
- City of Milwaukee vs. Johnson*, 213 N. W. 335 (Wis.). Decided April 5, 1927;
- Commonwealth vs. McClintock*, 154 N. E. 264 (Mass.). Decided November 29, 1926.
- Marvin vs. Sloan*, 250 P. 443 (Mont.). Decided October 15, 1926;
- State vs. Ellis*, 206 N. W., 105 (Iowa). Decided December 15, 1925.

In the case of *Commonwealth vs. McClintock*, supra, the facts, as stated by the court were as follows:

"The defendant operated a slot machine containing rolls of mints. When a five-cent coin was dropped in the slot at the top of the machine and the lever pulled, a package of mints would drop from the slot on the right, and discs corresponding to the number appearing on the face of the machine before the lever was pulled, would also drop from a slot at the foot of the machine. These discs or premium checks were good for additional packages of mints or 'for merchandise to the value of five cents for each disc.' Before pulling the lever the person dropping the five-cent piece in the slot would know what he was to receive. If 'No' appeared he would receive no premium check, but would receive a package of mints; if a number up to '20' appeared, he would receive a corresponding number of premium checks redeemable in merchandise."

On page 265, the court used the following language:

"The enumeration in the recess on the face of the machine informed the operator what he was to receive on each play, but with each operation of the machine there appeared in the recess a number showing the prize to be received on the following play. The chance was in the prospect of gaining the prize. This was the incentive which attracted the player. The chance of gain from the second operation was the inducement. It was an appeal to the gambling desire, a temptation to take the chance of gaining a substantial prize by continuing to operate the machine. The machine was a gambling device."

In the case of *Nelson vs. State*, supra, the third paragraph of the syllabus reads as follows:

"3. In order to render a slot machine a gambling device, it is not necessary that the money deposited may be lost; if there may be obtained more in value than the coin deposited, depending upon chance, it is a gambling device."

The facts in the above case were that defendant had in operation a certain slot machine containing mints in packages. Any person might place a nickel in a slot of this machine, work a lever, and he would receive for the coin played one package of mints, and would in some instances, in addition to the package of mints, receive trade checks, each of the value of five cents in merchandise. These checks could be played in the machine for other checks.

On page 940 of the *Nelson* case, supra, the court used the following language:

"The delivery of these checks not being uniform constitutes a chance or hazard under which the person playing the machine might receive value greatly in excess of the coin deposited. This makes the machine a gambling device. \* \* \* In order to gamble, it is not necessary that the player shall hazard what he plays. It is equally gambling if he may win by chance more than the value expended by him."

In *City of Milwaukee vs. Johnson*, supra, the following language appears on page 339.

"Without exception, so far as this court has been able to ascertain, every jurisdiction which has had occasion to pass upon the question has held that

slot machines which are operated in the same manner as the one here in question are gambling devices whose operation is contrary to law." (The court then cites numerous cases in support of its statement).

In the cases above referred to the judgments of the several courts were based upon the theory that the machines in question made an appeal to the gambling instinct, because the player had constantly before him the chance that the next play would assure him of the right on the next succeeding play to secure a number of "trade checks." It is the chance of receiving something of value for nothing which appeals to the cupidity of human nature and to the gambling instinct possessed by human beings. The slot machines in these several cases were so designed as to induce the player to deposit his coin for the purpose of ascertaining what, if any, trade checks he will receive in return, for the coins thereafter deposited. In other words, it is the element of chance involved in the second operation of the machine which attracts the player and makes the machine a gambling device.

Upon the facts that you present any person might place a nickel in the slot of such machine, pull a lever, and he would receive for the coin so played, one package of mints and a check or checks, which checks are merely for the purpose of replaying the machine and having one's fortune told. The checks have no cash value and cannot be used to purchase any article or merchandise. I seriously doubt, upon the facts stated by you, whether the "intent" could be shown so as to meet the statement of the Supreme Court of Ohio in the Krauss Case, *supra*, to the effect that "the intent of the defendant to keep the machine as a gambling device for gain is of the essence of the offense."

Upon such a state of facts I am of the opinion that the machine is simply operated as a merchandise vending device and the fortune telling inducement is merely an element of its salesmanship. No reasonable and prudent person would consider the fortune telling feature anything but a novelty used or played for innocent purposes.

In order to bring such a machine within the prohibitions of Section 13066, *supra*, it must be a "gambling device or machine" kept or exhibited "for gain or to win or gain money or other property" and to bring it within the prohibition of Section 13056, *supra*, it must be "a game to be played for gain upon or by means of a device or machine."

In view of the foregoing and answering your question specifically it is my opinion that:

1. A slot vending machine is not per se a gambling device since it may be used and operated for innocent purposes.
2. A slot vending machine, which upon deposit of a five cent coin, will release a package of mints together with checks which checks are merely for the purpose of replaying the machine and having one's fortune told and which checks have no cash or trade value is not a gambling device within the provisions of Sections 13056 and 13066, General Code.

Respectfully,

EDWARD C. TURNER,

*Attorney General.*

1394.

COUNTY COMMISSIONERS—MAY EMPLOY ARCHITECT FOR PRELIMINARY WORK—COMPENSATED FROM GENERAL FUND.

*SYLLABUS:*

1. *Under the provisions of Section 2343, General Code, the board of county commissioners of a county is authorized to employ an architect for the purpose of making*