

CRIMINAL LAW: When one-ball pinball machine is a gambling device
GAMBLING: under Section 4678, R. S. Mo. 1939.

September 15, 1949

9/14/49

Honorable Ronald J. Fuller
Prosecuting Attorney
Phelps County
Rolla, Missouri



Dear Sir:

Your letter at hand requesting an opinion of this department which in part reads:

"I would appreciate very much an opinion from the Attorney General's department in regard to the following question:

"Is a one-ball pin ball machine, commonly known as the "Horse Race Game", a gambling device within Section 4678, Revised Statutes of Missouri, 1939?"

In our telephone conversation after your request had been received, the description and operation of the particular device or game was understood to be substantially as follows:

The machine in appearance resembles the usual type of pinball machine commonly seen in various places of business, in that it stands on four legs with its playing board in an inclined horizontal position and under glass. At the end of the playing board opposite from the player is an up-right panel on which the play is indicated. On the device in question, the player inserts a five-cent piece in the slot, which is then pushed into the machine; lights flash on the up-right panel, and when they finally stop flashing, a number of a particular horse which has a corresponding number on the playing board remains lit, together with odds being shown as win, place or show, and possibly one other. The player then shoots one steel ball with the use of a plunger under spring tension, thus projecting it upon playing board where it bounces in various directions as a result of striking up-right obstacles or bumpers, and finally drops into a hole or goes clear through without falling into a hole to come to rest in a trough at the rear end of the machine or the end from which the player operates it.

Should the ball drop into a numbered hole on the playing board corresponding to the horse number lit on the up-right

panel, he would win according to the odds shown depending on whether the numbered hole into which the ball fell was in the win, place or show column. If the ball goes on through or does not fall in a numbered hole corresponding to the horse number illuminated on the up-right panel, the player does not win. Another feature of this particular machine is that the player, after inserting the first coin and determining the number of the horse and the odds, may, before shooting the ball, insert another coin or several more up to five and each time increase the odds on the designated numbered horse. If, when he then shoots the ball, it falls in the numbered hole corresponding to the horse number appearing on the up-right panel, he would benefit by the increased odds which he established by inserting the additional coins or nickels.

The specific question presented in your opinion request asks if such a machine is a gambling device within the meaning of Section 4678, R. S. Mo. 1939, which section provides as follows:

"Every person who shall permit any gaming table, bank or device to be set up or used for the purpose of gaming in any house, building, shed, booth, shelter, lot or other premises to him belonging or by him occupied, or of which he hath at the time the possession or control, shall on conviction, be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail or workhouse for not more than one year nor less than thirty days, or by fine not exceeding five hundred dollars or less than fifty dollars."

Looking to the characteristics of the machine in question and the means of operating it, it is apparent that the player's winning is dependent almost entirely on the element of chance.

With the insertion of the coin in the machine, the selection of the winning horse or number and its odds is purely a matter of chance so far as the player is concerned. Furthermore, when the player projects the ball upon the playing board by means of a plunger, the path or course of the ball and where it eventually stops is completely out of the player's control, and its falling into the winning hole is again a matter of chance. At most, any control that the player exercises over the ball is so inconsequential that the courts have not considered it sufficient to make such machines games of skill rather than games of chance.

A comprehensive discussion of the characteristics of pinball machines, a type of which we are now considering, and their operation appears in 135 A.L.R. 104, Part III in Note 4. Cases from many jurisdictions are cited and representative of their decisions is the case of State vs. Coats, 158 Ore. 122, 74 Pac. (2d) 1102, where it is said, Pac. (2d) 1.c. 1105-1106:

"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 ball machine. No judgment or skill which the player may exercise has any appreciable effect upon the result. It is, to all intents and purposes, a matter of chance."

* * * * *

"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.

"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. * * "

There are two characteristics of the machine in question which make it considerably different from the usual type of pinball machine. One is that before starting the play by shooting the ball, the player may insert several coins in order to increase the odds in his favor should he win. The other, that there is only one ball to be shot. When it is shot, and finally comes to rest on the playing board, the game is ended and obviously with only one ball to be shot, the game is of extremely short duration.

You do not state in your opinion request what the player of the machine in question realizes or receives should he win the game. However, considering the manner in which the machine is operated or played and the duration of the play, it is incredible that one would play it for amusement only or even on the anticipation of receiving free games. Why would a player hazard one coin or several coins in playing the machine with the view of only winning free games, each game being consummated with the shooting of one ball?

In light of the particular characteristics of the machine and the manner in which it is played, we believe it is more logical to presume that a player may expect or anticipate a return of more material things of value, such as money or other tangible property should the element of chance be in his favor and permit him to win.

If the return that a successful player receives is in fact free games, we do not endeavor at this time to express an opinion on the gambling characteristics of the machine in view of the fact that a case is now pending in one of our appellate courts involving this question. However, if the expected return to the winning player is money or other tangible property, we believe the machine would clearly fall within the ambit of Section 4678, supra, as a device used for the purpose of gaming.

In view of the characteristics of the machine and its method of operation, we believe that it should be looked upon with great suspicion for its patent potentiality seems to be one for gambling rather than amusement.

Now let us look to some of the decisions of the appellate courts of this state regarding what constitutes a gambling device. In the case of State ex rel. Igoe vs. Joynt, 110 S.W. (2d) 737, 341 Mo. 788, an injunction was sought against the St. Louis Board of Police Commissioners and the Police

Department to restrain them from seizing certain devices in the plaintiff's store called "rotary merchandisers." The plaintiff alleged they were amusement devices and not gambling devices. The machine was a cabinet-like device on the top of which was a rotary disk displaying articles of merchandise. When the disk was properly operated by the player, it could be stopped so that a particular item of merchandise might be released through a chute. In ruling that the machine was a gambling device, the court, at l.c. 740, said:

" * * * The chief element of gambling is the chance of winning or losing. * * * *
It is clearly apparent that the dominating element of this device is that of chance, and therefore it is a gambling device. * * * "

In State vs. Turlington, 204 S.W. 821, 200 Mo. App. 192, the defendant was charged under Section 4753, R. S. Mo. 1909 (Section 4678, R. S. Mo. 1939) with permitting punch boards as a gambling device to be used in his place of business. The prizes were post cards and knives and the punches were five cents. Later, to remove the taint of a gamble to the game, the three-cent post card was first sold for five cents which then entitled the purchaser to a punch on the board, and if the right number was punched, he got a knife. Under this arrangement the defendant contended that the punch board was not a gambling device under the statute. In ruling to the contrary, the court, at S.W. l.c. 823, said:

"Clearly we think such board falls within the class of gambling devices. The incentive prompting any one to take a punch was the chance of getting something of more value than the cost of the chance. The amount of the winner's gain or loser's loss would make no difference, if the chance to win more than was invested was present. It is this chance to get something of more value than the amount invested that characterizes the device as a gambling one. Had the post card which was always drawn, except when a prize of more value was drawn, been in fact of the value of five cents, so that there would have been no chance for the customer or patron to lose, this would not purge the enterprise of its chance characteristics, because the chance to win more than invested yet remained. This is clearly the law as written in Moberly v. Deskin, 169 Mo. App. 672, 155 S.W. 842, from which we quote:

"The chief element of gambling is the chance or uncertainty of the hazard. It is not essential that one of the party to the wager stands to lose. The chance taken by the player may be in winning at all on the throw, or in the amount to be won or lost, and the transaction should be denounced as gaming whenever the player hazards his money on the chance that he may receive in return money or property of greater value than that he hazards. If he is offered the uncertain chance of getting something for nothing, the offer is a wager, since the operator offers to bet that the player will lose and in accepting the chance the player bets that he will win. Such offer, therefore, is a direct appeal to the gambling instinct, which, it is said, possesses every man in some degree, and it is the temptation to gratify the instinct that all penal laws aimed at gambling are designed to suppress."

Certainly a person maintaining on premises under his control a type of pinball machine as the one in question and permitting its use for gambling purposes would be subject to prosecution under Section 4678, supra. If in playing the Horse Race Game the player, by hazarding a coin, is afforded a chance to get something of more value than the amount invested, then such is gambling and the game is a device characterized as a gambling one. So it was held in the Turlington case and such would be the case even though the thing of value received was not paid directly from the machine, but rather by some person on the premises where the machine was operated. State vs. Pollnow, 14 S.W. (2d) 574, (Sup.).

CONCLUSION

In the premises, it is the opinion of the department that a one-ball pinball machine, commonly known as the Horse Race Game, is a device or game, the operation of which with successful or winning results is dependent upon chance. If in playing

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the game the player has the chance to receive something of more value than the amount invested to play it, the game is one characterized as a gambling device used for gaming under Section 4678, R. S. Mo. 1939.

Respectfully submitted,

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APPROVED:

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RFT:VLM