

LOTTERIES:

"Joker" is not a lottery:

Machine called "Joker" having all outward appearances and method of operation similar to a slot machine, except "Joker" has no means by which money can be inserted or obtained therefrom, and all a successful player can win are free games; said machine is not a gaming device adapted, devised or designed for the purpose of playing any game of chance for money or property within the meaning of Section 563.370, RSMo Cum. Supp. 1953. Keeping device, or inducing others to play same is not a violation of the section.

FILED
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July 9, 1954

Honorable J. P. Morgan
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Morgan:

This department is in receipt of your recent request for an official opinion which reads, in part, as follows:

"I would appreciate an opinion of your office in answer to the questions herein set out based on the following facts. The Vinson Amusement Company of Chillicothe, Missouri, has for many years owned and operated many music and pin ball machines. They recently signed a contract to be distributors of a similar device which has all of the outward appearances of a slot machine, but has no place for coins to be inserted or discharged by the machine. The sole objective from my observation has been the construction of a machine that would be attractive from the standpoint of players and who could stand no chance at all other than the winning of free games, which with this device would be nothing other than pulling the handle one time for each game won. The name they have adopted in calling it the 'Joker' would be very appropriate.

* * * * *

"At Mr. Vinson's insistance I personally examined the machine and found that there was no opening for the insertion of coins or where money is commonly discharged from a slot machine. The control box along side of the same that is shown in the

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picture apparently is to be on the back bar of the counter and one desiring to play the 'Joker' would pay the attendant who would run up as many free games as were paid for. This score would be indicated on the three openings on the front of the machine and it would take one game each time the handle was pulled one time. In the event one had a winner as it was known on slot machines the machine would run up additional free games. I might say that the inside of the apparatus does not have any reels whatever and the variation in the result of each pull of the handle is dependent upon which light goes on behind each and every insignia on the face of the different bells and plums shown.

* * * * *

"The question is:

- "1. Is a machine that has all outward appearances of being an illegal slot machine, but which has no means by which money can be inserted or obtained from the same and only registers free plays as on a pin ball machine, to be considered a gambling device and prohibited by the present laws of the State?"

Gaming was not a criminal offense at common law, and the devices used for those purposes were not unlawful per se. The general rule in this regard has been stated in C.J.S., Volume 38, page 142, to be:

"Gaming in and of itself, when not so public as to constitute a nuisance, was not a crime at common law, and is not unlawful per se. However, under statutes in the several states, gaming generally or of certain kinds is now an offense."

It is not a criminal offense to keep or operate gaming devices unless it has been declared such by statute. In Missouri, Section 563.370, RSMo Cumulative Supplement, 1953, provides that any of the gaming devices therein mentioned, kept, or operated is a criminal offense. Said Section reads as follows:

"Every person who shall set up or keep any table or gaming device commonly called A B C,

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faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years, or by imprisonment in the county jail for a term not more than one year."

This section does not define "slot machine" or any of the other gaming devices therein referred to, but merely refers to each device by the name by which it is commonly called. The statute further recites that the keeping by any person of such devices "adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, * * * shall, on conviction, be adjudged guilty of a felony, * * *." Since we have no statutory definition of a slot machine or of the manner of playing upon same, we must turn to the statutes of other States for same.

We here call attention to Paragraphs 1 and 2, Section 964, Oklahoma Statutes of 1941, defining the words "slot machine", and which reads as follows:

"First, Any machine, instrument, mechanism or device that operates or may be operated or played mechanically, electrically, automatically or manually, and which can be played or operated by any person by inserting in any manner into said machine, instrument, mechanism or device, a coin, chip, token, check, credit, money, representative of value, or a thing of value, and by which play or operation such person will stand to win or lose, whether by skill or chance, or by both, a thing of value; and

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"Second: Any machine, instrument, mechanism or device that operates or may be played or operated mechanically, electrically, automatically, or manually, and which can be played or operated by any person by paying to or depositing with any person, or by depositing with or in any cache, receptacle, slot, or place a coin, chip, token, check, credit, money, representative of value, or a thing of value, and by which play or operation such person will stand to win or lose, whether by skill or chance, or by both, a thing of value."

It is believed that this definition is a good one and gives a clear description of a slot machine and the manner of operating or playing same. It is believed that said definition is in accord with Section 563.370, supra, as to the description of a slot machine and the manner in which this gaming device is operated. However, we wish to point out that, in our opinion, the slot machine referred to in the section quoted, is one which is capable of having money inserted into a slot for that purpose, and no other articles, such as those mentioned in the Oklahoma statute, being the representatives of money, are mentioned in the Missouri statute. The Oklahoma statute refers to the player winning something by chance or skill, or both, which is either money or a thing of value, whereas, Section 563.370, supra, makes no reference to skill. With these exceptions we feel that the definition of a slot machine is a proper one and is within the contemplation of the Missouri statute now under consideration.

Having noticed the characteristics of a slot machine given in the statutory definition, it remains for us to determine whether the machine described in the opinion request is a slot machine. If it is such a machine, then the keeping or operating of it would be a gambling device and in violation of the statute.

The machine called "Joker" has been described in the opinion request as having "all of the outward appearances of a slot machine, but has no place for coins to be inserted or discharged by the machine. The sole objective from my observation has been the construction of a machine that would be attractive from the standpoint of players and who could stand no chance at all other than the winning of free games, which with this device would be nothing other than pulling the handle one time for each game won." (Underscoring ours.)

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It is obvious that the "Joker" player can take no chance of winning a prize of money or property within the meaning of Section 563.370, supra, unless the winning of free games could be classified as property. The case of State vs. One "Jack and Jill" Pinball Machine, 224 S.W. (2d) 854, is one in point, among other matters, holding that the privilege of playing free games was not property within the meaning of the Gambling Statute.

The Court had before it for determination the sole question as to whether or not, in the operation of the machine in question, when a player is entitled to free games upon the attainment of a certain score this makes the machine a gambling device under our statutes and is subject to confiscation.

The machine had been seized under a search warrant issued under authority of Section 4173, R.S. Mo. 1939 (now Section 546.380, RSMo Cum. Supp. 1953). Its destruction had been ordered by the trial court, since the machine had been found to be a gaming device prohibited by Section 4176, R.S. Mo. 1939 (now Section 563.370, RSMo Cum. Supp. 1953). The Court said, l.c. 860:

"Many other cases have been read but nearly all of them construe a statute different in phraseology from ours.

"Gambling, as judicially defined, has three necessary elements, (1) consideration or risk, (2) chance and (3) reward or prize. But the legislature has required the third element, when referable to a gambling device, to be 'money or property'. Does the player get property for his nickel? We think not. It is argued that he gets amusement. The vacuous mind that may momentarily be brightened by finding entertainment and amusement in watching a metal ball meander aimlessly over the surface of an inclined table and finally score by dropping from sight into an aperture therein, would be equally entertained by watching a certain species of scarabaeoid beetle aimlessly roll his putrid ball across the ground and into a hole where eventually it becomes sustenance for itself and young. Would not the entertainment and amusement in each instance be the same though five cents is paid to pull the plunger in the one and in the latter, the propulsion is by the beetle and its accomplishments are

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not emblazoned upon an electrically lighted scoreboard. The privilege of watching either would certainly not be property, under Section 4675, and we shall not dignify either by holding it to be 'a "thing" of value.'

"If a free game is property or a thing of value, what kind of value has it? Certainly it has no educational or intellectual value. How could watching a rolling ball bounce from peg to pin and then disappear, enrich the mind or broaden one's intellect? After its propulsion by the plunger, gravity moves the balls but that law of physics was discovered by Sir Isaac Newton and became common knowledge more than two centuries ago. Such information is not acquired by inserting a nickel in a pinball machine. From the beetle, one might learn some new fact relating to entomology but nothing from 'Jack and Jill.' If there is educational value in either, it preponderates in favor of the beetle. A free play certainly has not the educational value of a picture show, which in addition to entertainment and amusement, brings before the eyes and ears of millions, scenes and descriptions of faraway places, fine acting, historical facts and scientific matters that could be, by them, viewed or heard in no other way. Few modern developments have more educational value than the cinema.

"A free game has no physical value such as a game of golf, which by its pleasurable exercise, coupled with fresh air and sunshine develops the muscles, invigorates the body and creates a feeling of physical well being, thereby improving health and prolonging life. No such benefits appear here. To be allowed to do a useless thing free does not make that privilege property or a 'a "thing" of value' because one has previously paid for doing another such useless thing. There is a vast difference between cost and value. Permission to use a useless device is not property of 'a "thing" of value,' though the device used cost money to construct.

"Does the player receive anything of financial or economic value? Rather isn't this so-called

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recreation and amusement the antithesis of value? If one's time is worth anything, it is a loss instead of gain, a waste instead of reward. Hope of reward or gain, above the amount risked, is the lodestone of gambling. The fact that one has paid five cents for it does not conclusively fix that, or any other sum, as its value or any value at all.

"It may be argued that opportunity to play brings customers to the place of business where such devices are located. Assuming that it does, that 'pay off' does not go to the one who risks his nickel and takes the chance. If the only benefit that arises from the keeping of the device goes to the keeper by reason of other potential business transactions of the player, it could hardly be said that the third element of gambling was present. Rather, the first element of gambling is augmented.

"The legislature may decide that such a device should be suppressed because it is useless, causes a waste of valuable time and tends to encourage and develop the gambling instinct in the young, an argument that has been advanced, dicta, in many decisions. But until legislation to that effect is enacted, we must construe the statutes as we find them.

"The judgment should be reversed and the machine, so seized, returned to claimant. It is so ordered."

It is generally conceded that, before a device, or the operation of same, can be classified as a gambling device or game within the contemplation of the criminal statutes prohibiting the keeping or operation of said devices or games, three essential elements must co-exist at the time of the keeping of said game or device, namely, one, consideration; two, chance, and three, prize.

Ordinarily, the consideration is the amount of money or other property paid for the privilege of playing, and the player by so doing plays the game, taking a chance to win a prize of money or property, which is usually of much greater value than the consideration paid.

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From the facts given in the opinion request, a player pays a certain amount of money consideration in advance for the privilege of operating the device known as "Joker". The operation of same is accomplished when the player pulls the handle located upon the side of the machine. When this action is completed one game has been played. At such time the player takes a chance on winning free games, which games, as was pointed out by the Court in the "Jack and Jill" Pinball Machine case, were neither money nor property, hence, such games could not, and do not, constitute a prize, and prize is one of the essential elements to make the transaction a game of chance.

It further appears that the "Joker" was constructed for the purpose of affording innocent amusement to players and also as a stimulant to the business of the proprietor in whose place of business the machine is located. It is obvious that the "Joker" is not a slot machine or a gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property within the meaning of Section 563.370, supra. While it might be physically possible for players to gamble upon the machine, and by their actions make it a game of chance, yet this is not the purpose for which the machine was constructed nor intended to be operated, consequently, said machine is not a gambling device per se.

The statement of facts does not disclose that the machine referred to in the opinion request has ever been used for gambling purposes. In the event such facts should be shown, then, of course, in that particular instance the machine could, and should be classified as a gambling device, and the keeping or operation of same would be in violation of the statute.

In view of the foregoing and in answer to your inquiry, it is our thought that the machine described in your letter and called "Joker" is not a gambling device, and that the keeping and operation of same is not prohibited by Section 563.370, supra.

CONCLUSION

It is the opinion of this department that a machine referred to as "Joker" and having all the outward appearances of a device

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commonly called a slot machine, but having no means by which money can be inserted into it, and no money or property of any kind obtained therefrom, and free games are all that a player can win when operating it, is not a gaming device adapted, devised or designed for the purpose of playing any game of chance for money or property, within the meaning of Section 563.370, RSMo Cum. Supp. 1953. The keeping, or inducing others to play or operate said machine is not a violation of said statute.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Paul N. Chitwood.

Yours very truly,

JOHN M. DALTON
Attorney General

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