



1954

Gaming - Game of Chance - Free Games Awarded for High Score on Pinball Machine Held Property within Anti-Gambling Statutes

Richard V. Wicka

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Wicka, Richard V. (1954) "Gaming - Game of Chance - Free Games Awarded for High Score on Pinball Machine Held Property within Anti-Gambling Statutes," *North Dakota Law Review*: Vol. 30 : No. 1 , Article 8.

Available at: <https://commons.und.edu/ndlr/vol30/iss1/8>

This Case Comment is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.common@library.und.edu.

provoke the particular crime charged.¹³ There is dictum to the effect that even if the defendant is in the course of committing a crime of some kind, has already formed the design to engage in it, or is suspected with good reason, it is a good defense if the officer instigated the crime.¹⁴ The test turns upon the issue of inducement. "If the accused entertained the criminal intent before he was afforded the opportunity to violate the law, he is in no position to plead estoppel."¹⁵ Although there has been no recent opportunity for the courts of North Dakota to decide the issue of entrapment, they have in the past laid down a rule which is in accord with the general rule here stated.¹⁶ The instant case laid down no new or arbitrary rules concerning entrapment but was content to accept the law as determined in previous litigation before Federal courts. In the light of holdings in other recent cases, the decision of the court seems sound. An officer may use trickery or artifice to test a suspected person by offering him an opportunity to transgress, but may not put him under extraordinary temptation.¹⁷ Such artifice or trickery is not necessary to a good defense however,¹⁸ and the grant of a new trial because of an instruction to the jury naming such conditions as a prerequisite to acquittal is not contrary to existing law.

BAYARD LEWIS

GAMING—GAME OF CHANCE—FREE GAMES AWARDED FOR HIGH SCORE ON PINBALL MACHINE HELD PROPERTY WITHIN ANTI-GAMBLING STATUTES. — Plaintiff sought a declaratory judgment that a pinball machine installed in his restaurant was not a gambling device and an injunction prohibiting enforcement officials from arresting plaintiff, confiscating his machine, or interfering with its operation and use. The District Court entered judgment for the plaintiff. On appeal the Supreme Court of Nebraska held that a pinball machine which gave a free game or games upon the attainment of a certain minimum score, but in the operation of which the element of chance predominated over that of skill, was a game of chance played for money, and its use prohibited. *Baedaro v. Caldwell*, 56 N.W.2d 706 (Neb. 1953).

The constitutionality of statutes providing for the confiscation of gambling devices is almost uniformly upheld.¹ The problem of primary importance in

13. *United States v. Perkins*, 190 F.2d 49, 52 (7th Cir. 1951) (defendant not illegally entrapped where former inmate of House of Correction was given money by an officer for the purpose of buying drugs and he induced defendant, also a former member of same House who recognized him, to procure the drugs); *United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933) (where the defendant was regularly distributing obscene matter, the fact that postal inspectors induced him to ship such matter in interstate commerce for the purpose of prosecuting him, did not constitute an illegal entrapment); *United States v. Certain Quantities of Intoxicating Liquors*, 290 Fed. 824, 826 (D.N.H. 1923) "In the absence of special circumstances excusing it, a person who, at the suggestion or instigation of another, commits a crime not particularly affecting an individual in person or property, is just as guilty as though the design had originated with him, and this is true, though the suggestion came from an officer of the law."

14. See *United States v. Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933).

15. *State v. Marquardt*, 139 Conn. 1, 89 A.2d 219, 222 (1952).

16. *State v. Currie*, 13 N.D. 655, 102 N.W. 875 (1905).

17. *United States v. Wray*, 8 F.2d 429 (N.D. Ga. 1925); *Sutton v. State*, 59 Ga. App. 198, 200 S.E. 225 (1938); *State v. Boylan*, 158 Minn. 263, 197 N.W. 281 (1924).

18. *Demos v. United States*, 205 F.2d 596, 599 n. 3 (5th Cir. 1953).

1. *League for Preservation of Civil Rights and Internal Tranquility v. City of Cincinnati*, 64 Ohio App. 195, 28 N.E.2d 660 (1940); see *People v. One Pinball Machine*, 316 Ill. App. 161, 44 N.E.2d 950, 952 (1942).

cases of this type is that of determining what constitutes a gambling device within the terms of the various state statutes. The best manner of treating this problem is under two headings: the chance element and the award element.

Most states follow the rule that any machine, implement or contrivance for the playing of an unlawful game of chance or hazard is a gambling device.² A game of chance is a game which depends less on the skill and experience of the player than on accidental circumstances incidental to the manner in which it is played.³ The test which the courts most commonly apply to determine the character of a specific game is not whether it contains an element of chance or an element of skill, but which is the dominating factor that determines the outcome of the contest.⁴ Though evidence shows that a certain degree of skill can be attained through long practice,⁵ pinball machines as viewed from the standpoint of the persons that play them, contain an element of chance which far outweighs that of skill.⁶ This lack of control would seem to place it within the category of games of chance.

The second problem involved in the interpretation of the term "gambling device" is the legal effect of an award returned for playing.⁷ Though many state statutes contain wide, sweeping terms in their definition of a gambling device,⁸ others merely define them as any machine or device played for "money or property",⁹ or for "money or an interest in property" as is the case in North Dakota.¹⁰ Only a very few jurisdictions hold that all machines of a slot or pinball type are gambling devices per se,¹¹ because most states

2. However disguised the scheme or device, its essential element is that of affording a chance to get something for nothing. *Henry v. Kuney*, 280 Mich. 188, 372 N.W. 443 (1937) (The element of chance is the soul of a gambling device); *Snyder v. City of Alliance*, 41 Ohio App. 48, 179 N.E. 426 (1931); *State v. McTeer*, 129 Tenn. 535, 167 S.W. 121 (1914); *Milwaukee v. Burns*, 225 Wis. 296, 274 N.W. 273 (1937) "chance is the dominating element that determines the result of the game."

3. *Steely v. Commonwealth*, 291 Ky. 554, 164 S.W.2d 977 (1942); *Commonwealth v. Bowman*, 267 Ky. 602, 102 S.W.2d 382 (1936); *People v. Cohen*, 160 Misc. 10, 289 N.Y. Supp. 397 (1936); see *Engle v. State*, 53 Ariz. 458, 90 P.2d 988, 993 (1939).

4. *People v. Lavin*, 179 N.Y. 164, 71 N.E. 753 (1904); *Shapiro v. Moss*, 245 App. Div. 853, 281 N.Y. Supp. 72 (1935); *City of Milwaukee v. Burns*, 225 Wis. 296, 274 N.W. 274 (1937).

5. The ordinary pinball machine, such as was involved in this case, calls for some degree of skill; that is, the player may exert a sufficient degree of skill to influence the outcome to some extent. However, chance is undoubtedly the predominating factor. There are several varieties of pinball machines, some requiring more skill than others. *Commonwealth v. Bowman*, 267 Ky. 602, 102 S.W.2d 382 (1936); *State v. Coats*, 158 Or. 122, 74 P.2d 1102, 1106 (1938).

6. *State ex rel Dussault v. Kilburn*, 111 Mont. 400, 109 P.2d 1113, (1941).

7. Essentially, a game of chance contains three elements: consideration, which is obvious in the initial coin; chance, which is developed in the text above; and award, as treated here. See *Kraus v. City of Cleveland*, 135 Ohio St. 43, 19 N.E.2d 159, 160 (1939).

8. Okla. Stat. Tit. 21 §964 (1941) (Defines slot machines as any machine or device which is played with a "coin, chip, token, etc. representative of value or a thing of value".)

9. Kan. Gen. Stat. Ann §21-915 (1935).

10. In order to constitute a game of chance which is played for a consideration, the prize or award which the player may win must be property or an interest in property. N.D. Rev. Code §12-2301 (1943). While "amusement games" are defined by statute in such a manner as to include pinball machines. N.D. Rev. Code §53-0401 (1) (1943), the statute cited, which provides for licensing such machines, does not apply to "any machine which may constitute a lottery under the laws of this state." N.D. Rev. Code §53-0401 (1) (1943). A lottery as defined under §12-2401 of N.D. Rev. Code (1943) is "any scheme for the disposal or distribution of property by chance among persons who have paid . . . any valuable consideration for the chance of obtaining such property . . ."

11. *Alexander v. Hunnicutt*, 196 S.C. 364, 13 S.E.2d 630 (1942) (gambling devices even though played solely for amusement); *Prickett v. State*, 88 Okla. Cr. 213, 200 P.2d 457 (1948).

say that their illegality hinges upon the nature of their actual use.¹² However, under any type of statute forbidding gambling devices it is generally held that a machine is illegal if it pays off in tokens exchangeable for merchandise or usable for free plays.¹³

The major controversy arises when the only "pay-off" by the machine is the opportunity to play automatically registered free games obtained by achieving a certain minimum score. The majority of jurisdictions state that free games represent amusement and are things of value or property and therefore fall within the statutory prohibitions¹⁴ or that they fall within this category because they offer the necessary lure to indulge in a gambling instinct.¹⁵ Nevertheless, in a large minority of the jurisdictions the word "property" in statutes similar to that involved in the case treated here is construed to mean something more tangible such as goods, chattels, effects, or choses in action, and is said not to include the trivial free amusement provided by free plays on a pinball machine.¹⁶

North Dakota has a unique manner of dealing with gambling devices in that she prohibits them as lotteries.¹⁷ The only case tried under this section to date, states that a pinball machine for which the player pays a valuable consideration and receives an opportunity, chiefly dependent upon chance, to win a prize or award which is property, is a lottery as prohibited by law.¹⁸ In holding in this manner, the court declared that the exclusive right to operate an amusement device was a form of property. In short, pinball machines are illegal under North Dakota law if they award free games. However, the statute has not been vigorously enforced in this state.

RICHARD V. WICKA

INSURANCE—RISKS AND CAUSES OF LOSS—IS THE CUMULATIVE EFFECT OF RADIUM BURNS AN ACCIDENTAL INJURY?—Plaintiff entered into a contract to supply a manufacturing concern with a patented process, materials and equipment for producing a radioactive ointment. An employee of the manufacturer sued plaintiff in tort for radium burns suffered over a period of several months while the employee was operating an emanator used in the production of the ointment. It was alleged that plaintiff was negligent in

12. *State v. Wiley*, 232 Iowa 443, 3 N.W.2d 620 (1942); *State v. Six Slot Machines*, 166 Kan. 361, 201 P.2d. 1039 (1949); *State v. Hightower*, 156 S.W.2d 327 (Tex. Civ. App. 1941).

13. E.g. *Giomi v. Chase*, 47 N.M. 22, 132 P.2d 715, 718 (1942); *Commonwealth v. Bowman*, 267 Ky. 602, 102 S.W.2d 382 (1936).

14. *State v. Wiley*, 232 Iowa 443, 3 N.W.2d 620 (1942); *Commonwealth v. Rivers*, 323 Mass. 379, 82 N.E.2d 216 (1948); *Giomi v. Chase*, 47 N.M. 22, 132 P.2d 715 (1942).

15. *Painter v. State*, 163 Tenn. 627, 45 S.W.2d 46 (1932).

16. *Washington Coin Mach. Ass'n. v. Callahan*, 142 F.2d 97 (D.C. Cir. 1944); *State v. Waste*, 156 Kan. 143, 131 P.2d 708 (1942); *In re Wigton*, 151 Pa. Super. 337, 30 A.2d 352 (1943).

17. It was provided in §9660, N.D. Comp. Laws (1913), that "the playing of an amusement device, commonly called a pinball machine, which is played for a consideration and which offers to the player an opportunity, dependent chiefly upon chance, to win the right to extended free use of the device for periods of varying duration, is a lottery." When this section was carried over into the 1943 code, the language quoted above was not included in the revised section. However, the Notes of the Revision Committee state that the change in language was not intended to affect the meaning of the statute. N.D. Rev. Code §12-2401 (1943); N.D. Code Revision Notes §12-2401 (1943).

18. *Middlemas v. Strutz*, 71 N.D. 186, 299 N.W. 589 (1941).