

SLOT MACHINES ARE GAMBLING DEVICES

Says Judge John W. Mason in an Elaborate and Exhaustive Opinion on the Subject in the Nature of Instructions to the Grand Jury.

Reviews at Length the Laws on Gaming in This State and Virginia and the Decisions of the Courts for a Century Along that Line--Corrects Impression About Supreme Court's Recent Decision.

Circuit Court convened here in regular term Tuesday morning with Judge John W. Mason presiding. Grand jurors were sworn as follows: M. C. Jarrett, foreman; James H. Bigley, H. H. Davis, W. S. Law, Reisin Davison, F. E. Robinson, L. J. Ayers, E. D. McCarty, Alfred Stout, Asbury Grubbhouse, Herschel Robinson, Jesse T. Wisco, A. D. Fitzhugh, Silas Ash, C. A. Lawson and Lihu Shadian.

The usual charge was given, except the part pertaining to slot machines, which was not included in the charge. The full text of Judge Mason's charge on that question is as follows: "Owing to a misconception of a recent decision of the Supreme Court of Appeals, I desire to call your attention, especially, to certain kinds of unlawful gaming."

It has been extensively reported that our Supreme Court has decided there is no law in this State prohibiting the use of what are commonly called slot machines, as a gambling device. The Court decided nothing of that kind. The decision referred to was made in the case of Morley v. Godfrey and Atkinson vs. Morley, decided at the November term, 1903.

The town of Bramwell in the County of Mercer, is a municipal corporation, chartered by the Circuit Court, under Chapter 47 of the code. Godfrey is the mayor of the town. The town Council passed an ordinance, which among other things, prohibited certain kinds of gaming, and named slot machines as among the games prohibited. Morley was a hotel keeper in Bramwell and had in his hotel a slot machine at which the public were permitted to play. He was arrested for violation of said ordinance upon a warrant issued by the mayor charging him with keeping and exhibiting a slot machine. Atkinson was also arrested charged with playing on a slot machine. They were taken before the mayor, and required to enter into recognizances to appear before the mayor on a future day to answer the said charges. The cases were taken to the Supreme Court upon petitions of the defendants praying that writs of prohibition be issued prohibiting the mayor from trying them for the alleged offenses. Upon the rules issued by the Supreme Court against the Mayor to show cause why writs of prohibition should not be issued, the Supreme Court said in

Syllabus 2:—"Unless the charter of a city, town or village confers upon it authority so to do, the council thereof has no right or power to pass an ordinance to regulate or prohibit gaming or gaming devices or prescribe and enforce penalties for a violation of such ordinance." And as the charter of Bramwell conferred no such authority on the council thereof it followed as a matter of law that the council has no authority to pass the ordinance under which the Mayor acted in issuing the warrants, and that the warrants were without authority of law and the arrests illegal. This is a new doctrine; our Supreme Court has said before this, in the case of Judy vs. Linsley, 50 W. Va., 628, that "the police power of a municipal corporation depends upon the will of the Legislature, and a city, town or village can only exercise such police power as is fairly included in the grant of powers by its charter." The same principle is announced in the case of Gas Company vs. Parkersburg, 30 W. Va., 439.

Morley and Atkinson were released from arrest by the Supreme Court, not because they had violated no statute, but because the Mayor was proceeding under a void ordinance. This ordinance was void not because it included slot machines among the games prohibited by it, but because the town council had no authority to pass an ordinance prohibiting gaming or gaming devices of any kind.

It will be observed that this decision refers to the powers of city and town councils, and the local wills of Mayors, councils, and the official ordinances. No

opinion is expressed as to the liabilities of the keepers or exhibitors of slot machines, when the prosecutions are had in a court having jurisdiction of the subject, acting under the laws of the State.

"Whether or not a person exhibiting or using a slot machine may be punished under the laws of this State prohibiting gaming depends wholly upon the fact of whether or not a slot machine is a gaming device. The exhibition or use of slot machines is not specifically prohibited by name in any statute. If prohibited at all, it is because they come within the terms, intent and meaning of the statute as 'tables of like kind' with those specified in the statute. If the use of slot machines, as they are used, is in fact a game, and being a game, is of such character, as may properly and legally be said to be a game of like kind with the prohibited games named, within the true intent and meaning of the statute creating and defining the offense, then, the power and duty of the courts to punish the keeper or exhibitor of such machines, are precisely the same as though the name 'slot machines' was written in the statute. We must, therefore, look to the statute in relation to offenses of this character and give to the statute a correct interpretation.

Chapter 151 of the Code fully covers and includes all gaming and gaming devices, so far as the Legislature deemed it expedient to legislate upon the subject. Section one of this chapter provides that "A person who shall keep or exhibit a gaming table commonly called A. B. C. or E. O. table, or faro bank, or Reno table, or table of like kind under any denomination, whether the game or table be played with cards, dice or otherwise, or shall be a partner or concerned in interest in the keeping or exhibiting such table or bank, shall be confined in jail not less than two nor more than twelve months, and be fined not less than one hundred nor more than one thousand dollars. Any such able or faro bank, and all money staked or exhibited to all such persons to bet at such table may be seized by order of a court, or under the warrant of a Justice, etc."

"The other sections of this chapter provide penalties for various forms of gaming. There is no difficulty in executing this law and enforcing the penalties as to the games specified. The trouble is to determine what games properly come within the meaning of the 'tables of like kind' with those named. The statute expressly provides that these tables of 'like kind' may be of any denomination, and that 'the game or table may be played with cards, dice or otherwise.' That is to say, if there be a table used in connection with and as part of the game, it may be played with cards, dice or otherwise, or the game itself may be played with cards, dice or otherwise, and if so played as to make it of like kind with the games prohibited it is a violation of said section. What then is meant by tables of 'like kind,' as used in this section? Is it absolutely necessary that there shall be a real table, or are the games named intended to point out certain forms of gambling and include all games of that particular form and character? I am clearly of opinion that the Legislature intended to forbid certain kinds of gaming, among which are faro banks and keno tables, and all other games like them. It makes no difference in my judgment, whether these games are played with or without a table--on a table or under it; or rather it may be affirmed that anything on or by means of which such games are played is a table within the meaning of this statute. We must look to the game itself and not the name by which it is called, nor the instruments with which, nor thing in or on which it is played, to determine whether or not the game is unlawful. We must not lose sight of the spirit and intent of the law. There is an old Latin maxim which says: 'Qui haeret in litera haeret in cortice,' which somewhat literally translated means: 'He who

considers merely the letter of an instrument goes but skin deep into its meaning.' The law respects the effect and substance of the matter and not any nicety of form. When the intention is clear, too minute stress should not be laid on the strict and precise signification of words. The meaning of particular words in statutes is to be formed, not so much in a strict etymological propriety, nor even in popular use, as in the subject or occasion in which they are used, and the object that is intended to be attained. Brown's Leg. Maxims, side pages, 435, 436 and 437.

"Narrow and technical reasoning should never be resorted to by Courts to prevent a statute having the force and effect plainly intended by the Legislature, but on the contrary when courts know the reason which alone determine the will of the law makers, they ought to interpret and apply the words used, in a manner suitable and consonant to that reason, and as will be best calculated to effectuate the intent." Of course great caution should be exercised by the Courts in applying this rule to be certain that they know and have ascertained the true reason, which induced the awarding power to make the law. (See Cooley on Constitutional Limitations, Chapter 4.)

"Statutes providing for the punishment of offenses should be construed strictly, but they should be so construed as to give force and effect to the clear intent of the act. Courts should not so construe any statute as to furnish holes through which the guilty may escape, unless unavoidable.

"Our Legislature has not deemed it necessary to prohibit all forms of gaming. Many games may be played in private places provided the betting does not exceed \$20, and other games out of regard for the sentiments of some people, to whom such games are offensive, may not be played in public places. But no game of unequal chances can be played anywhere lawfully. The Legislature has, in effect, said that people may indulge in certain games for amusement, or even bet on them to a limited extent, but that no person shall cheat his companion in the game, by insisting on playing a game wherein the chances for winning are all on his side. History and tradition inform us that our Virginia ancestors were not wholly free from the vice of gambling, but they had a supreme contempt for the coward who would not 'play' without a guaranteed advantage, making it certain that he would win oftener than he would lose.

"Looking then to the history of our gaming laws, as well as the statute itself, let us see what is a proper construction of Section 1 of Chapter 151, of our Code: 'The games prohibited by this Chapter--and indeed all unlawful gaming--may be divided into two classes. To the first class belong the games wherein the chances are equal. To the second class belong the games wherein the chances are unequal, all other things being equal, the unequal chances being in favor of the keeper or exhibitor of the game. The games falling under the second class are enumerated in the statute as A. B. C. or E. O., and keno tables, and faro banks, and 'tables of like kind.' If the words 'slot machines' were inserted in the statute, and their use prohibited, very soon they would be supplanted by other machines bearing a different name, differing in form and construction--omitting the 'slot' but retaining all the objectionable features of the old machine. But according to certain strict constructionists such new devices would not be 'slot machines without the regulation 'slot' into which the player's money would disappear. The statutes could not be amended often enough to meet such cases unless the Legislature were in session continuously. I respectfully but most earnestly protest against all such rules of construction. It is absolutely impossible for the Legislature to name all games specifically. The names and devices are continually changing. Hence, in section one of this chapter, the Legislature named four games. They were selected as the representations of a case. They are the standards by which the criminal character of other games is to be determined. All other games when tested by these standards and found to be of like kind with them are prohibited by this section just as effectively as though they were named in the statute.

"In order then to ascertain what games not named in section one of this chapter were intended to be prohibited, we must determine in what respect the games not named must be like the games named to bring them within the terms and meaning of the statute of what must the likeness consist? The four games named are all games of unequal chances, and the unequal chances are in favor of the keeper or exhibitor of the games. The skill of the player

or his luck, cannot affect the general result of the game. From the very nature and character of these games, the keeper or exhibitor will win oftener than the player. This I understand to be the distinctive character of these four games, and that all other games possessing this distinctive feature are games of like kind with them, within the meaning of this statute. This is the construction which has always been given to this section by the Courts of Virginia and West Virginia. This law has been in force for many years in both states. We find it in the Code of 1819, Chapter 147, Section 17 and 18, except that keno tables were added by our Code of 1868. The first construction that we find of this section made by an appellate court is Wyatt's case, 6 Ran. 693. In that case the general court, in a very elaborate and able opinion, delivered by Judge Daniels, held that:

"The distinctive feature in the character of the games called A. B. C. and E. O., and Faro bank is that the chances of the game are unequal, all other things being equal, and those unequal chances are in favor of the exhibitor of the game or tables. If other games resemble those standard games in that distinctive feature they come within the terms of the 17th section of the gaming act, being gaming tables of the same or like kind, and are liable to the penalties denounced against those standard games, whatever may be the denomination of those other games, and whether played with cards, dice or in any other manner."

"Wyatt was indicted for keeping and exhibiting a gaming table called 'nap-hazard,' alias 'blind hazard,' alias 'smack-up,' alias 'sweat.' The game was played with cards; the deck being cut into parcels and the parcels placed on a table with the faces of the cards down; the betting done on the denomination of the bottom card of the parcel selected by the player. The game was so played that the dealer had unequal chances for winning, and this game so played, with cards alone, was held to be a game of like kind with a faro bank, within the meaning of the statute, for the plain reason that the distinctive features of the games were alike--both were games of unequal chances and the unequal chances in favor of the keeper of the game. This case was decided in 1828, and has been followed by all the Courts of Virginia and West Virginia so far as I am aware. I refer to Huff's case, 14 Grat. 648, and Nuckoll's case, 32 Grat. 884.

"In Huff's case (14 Grat. 648) the indictment was over the sufficiency of the indictment--whether the allegations of the indictment were sufficient to bring the case within Section 1, Chapter 151, (now Chapter 151), and the court held that the indictment 'must show by overt acts that the gaming charged is of the like kind as those specified--that is, that the chances of the game are unequal, all other things being equal.' This case was decided in 1858.

"In Nuckoll's case (32 Grat. 884) the court says: 'In regard to what is a table of like kind with those specified in the statute, according to its true intent and meaning, there are two decisions of this court, which seem to settle the matter beyond all controversy.' The cases referred to are the Wyatt and Huff cases. The Nuckoll's case was decided in 1879, about 51 years after the Wyatt case was decided, and so after a half century had passed, during which time it had been the unquestioned law of the State it was again approved by the Supreme Court. It has been the recognized law of this state for three quarters of a century and does seem to me that it should be considered as settled.

"I may now venture to add a few words to these decisions. 'The word 'like' is not a precise term. We often say that a certain thing is like a certain other thing, and use the term correctly, when in fact the two things are quite unlike in many particulars. In such cases we have reference to some peculiar feature or distinctive character in which they are alike; and in this sense they may properly be said to be alike, no matter how widely they may differ in non-essentials. Many illustrations will occur to you.

"The distinctive feature of certain liquors is that they are intoxicating. All liquors containing sufficient alcohol are intoxicating, and are therefore in this particular the same, or of like kind, whether they are called whiskey, brandy, gin, rum, or any other name, and notwithstanding these liquors may differ widely in taste and in other respects--still they are drinks of like nature. And I concede that one game to be like another need not be played with the same things, in the same manner, with same kind of machinery, called by the same name, with or on the same kind of a table; it is sufficient if they are alike in their distinctive features and character.

"In Wyatt's case before-mentioned the cards might just as well have been placed on the floor, on a chair, on a table, or on the ground, as on a table. He was convicted, not because he played cards on a table, but because he kept and exhibited a game wherein the chances were unequal and the unequal chances were in his favor. The offense

consisted in the kind of game he was playing with the cards and not the place where the cards were deposited. The table was not part of the game.

"I may add that Wyatt's case was carefully and fully examined by a very able Court, composed of some of the most learned and distinguished judges of Virginia.

"It may well have been regarded by them, as possessing some elements of hardship. Wyatt evidently did not realize the magnitude of his offense. The verdict of the jury was: 'We, the jury, find the defendant guilty, but ignorantly so, he not knowing at the time that the law embraced this case, and do therefore recommend him to the mercy of the Court.'

"And then the penalty was unusually severe. He might under the law then in force, have been imprisoned in jail not less than one nor more than six months, at the discretion of the court, and he thereupon lost all his property as prescribed by law for convicts in the penitentiary," and in addition thereto "be punished with stripes at the discretion of the Court, to be inflicted at one time or at different times, during such confinement, as the Court may direct, provided the same do not exceed thirty-nine stripes at any one time," session Acts, of 1822, Chapter 32, Section 4. Wyatt might thus have been imprisoned six months and whipped any day of his imprisonment, provided only the stripes did not exceed "forty, less one," at any one time.

"Notwithstanding this harsh penalty, and I may add without unduly criticising our ancient law givers, the penalty was cruel and inhuman--and notwithstanding the further fact that Wyatt violated the law ignorantly, yet that Court, composed as it was at the time this case was heard of such men as Judges Brockenbough, Daniels, Parker, Uphur, and others acquired in this conviction, and gave to the statute a construction which made his conviction legal. The Courts and juries of that day seem to have asked themselves but one question: 'What is the law?' It is well that Courts and juries of this day follow their examples. We should always bear in mind that the Legislature makes the laws and that it is the duty of the courts simply to construe and enforce them.

"In considering offenses coming under Section one of Chapter 151, of the Code you will first inquire whether the thing complained of is a game, within the meaning of that section. If it is one of the four games named then your indictment should be for keeping the game named. If the thing done--the game played--is not one of the four games named, then you will inquire whether it is a game of like kind with any of the games specified, and in doing this you will observe the rules I have just stated."

MISS HESS IS DEAD

At the Home of Her Father at Wyatt After Short Illness of Kidney Trouble--Funeral Tuesday Afternoon at That Place.

Miss Daisy D. Hess died at her home at Wyatt Monday morning at 7.30 o'clock of kidney trouble. She was sick only twelve days.

The deceased was a daughter of Mr. and Mrs. J. W. Hess, of Wyatt and sister of James N. Hess, of this city. Her age was 26 years. She was a popular young lady among many acquaintances, who are pained to learn of her early demise.

The funeral took place Tuesday afternoon and interment was made in the I. O. O. F. cemetery at Wyatt.

OFFICERS ELECTED

By S. George's Commandry, No. 186, of the Knights of St. John, for the Coming Year at Regular Meeting Sunday.

At a regular meeting of St. George's Commandry, No. 186, Knights of St. John, Sunday, Jan. 10, the following officers were elected for the ensuing year: President, W. T. Byrd; First Vice-President, A. M. Donahue; Second Vice-President, Charles E. Pike; Recording Secretary, P. J. Glaney; Assistant Recording Secretary, T. M. Donahue; Financial Secretary, E. S. Boggess; Assistant Financial Secretary, James T. Drury; Treasurer, James Price; First Lieutenant, P. H. Sammons; Second Lieutenant, Charles E. Pike.

WAR TENSION AFFECTS WHEAT

By Associated Press.

Chicago, Jan. 12.--War tension today caused an advance of one cent in the price of wheat here.

AUXILIARY IS INVITED

To Attend the Annual Meeting of Young Men's Christian Association in Presbyterian Church To-Night.

General Secretary James H. Norris, of the Young Men's Christian Association has sent out the following invitations to members of the Women's Auxiliary of that organization:

"You are cordially invited to attend the annual meeting of the members of the Young Men's Christian Association, which is to be held in the First Presbyterian Church, Tuesday evening, Jan. 12, at 8.00 o'clock.

"After the brief business session a talk on Camp experiences with the soldiers of the Spanish-American War, illustrated by over fifty stereoscopic pictures will be given by the general secretary.

"I wish also to call your special attention to the monthly meeting of the Women's Auxiliary, which is to be held in the Y. M. C. A. parlors, Wednesday, Jan. 13, at 3 P. M.

"I hope that there will be a large attendance at this meeting, because you will want to hear about 'Egyptia,' or 'The Wondrous Story of the Nile,' and other suggestions whereby the Auxiliary may make 'heaps' of money."

TAKE ENTIRE \$7,000,000 BOND ISSUE

By Associated Press.

Washington, D. C., Jan. 12.--The War department today accepted the proposal of Harvey Fiske & Sons of New York, representing Fiske and Robinson and the National city bank of New York for the entire seven million dollars bond issue of the Philippine government for the purchase of the Friars' lands at a premium of \$107,557.

BANKS ELECT DIRECTORS

The annual meeting of the Merchants, Traders and Empire National banks and the Peoples Banking and Trust company were held Tuesday. In every instance the old board of directors were re-elected and at the Tradecas Millard F. Snider and Charles S. Simley were a fide to the directorate. The Merchants, Empire and Peoples re-elected the officers and the Traders will do so at the meeting of the directors Thursday. The annual dividends were declared.

LEAP YEAR BALL ON

Unique Entertainment Will Be Given in Waldo Hotel Ball Room By Society Ladies of This City.

First unique entertainment of the present year, which is leap year, will be given the night of January 25. It will be a leap year masquerade domino ball at the Waldo hotel, given by the society ladies of the city. It will be in the ball room of the hotel and promises to be an event of unusual interest. It is likely a number of old bachelors and other male members of society will make their debut at this function and may be fortunate enough to hear some fervent love pleadings from those they little suspect of having yearnings in their direction.

SPECIAL TERM CALLED OFF

By Death of One of the Plaintiffs and Judge Goff Continues Big Oil Case Until It Can Be Revived.

Judge Nathan Goff intended to hold a special term of United States court here Tuesday morning at 10 o'clock, but just before the hour for going on the bench he received a telegram from Parkersburg informing him that one of the plaintiffs was dead in Philadelphia and on that account the case could not be heard, which was set for the special term. He accordingly did not go on the bench and the case was continued until it can be revived. It was an equity proceeding, styled, Harkness against Collins and Davis and involved the life of oil lands in Ritchie and Wood counties. The plaintiff that died was one of the Harkness family.

M'KINLEY

Accepts the Street Railway Franchise Granted by the Clarksburg City Council.

Acceptance Papers and Bond of Two Thousand Dollars Filed With City Clerk.

Salem Terminal Traction Company Will Go Ahead and Construct Street Railway, Franchise for Which They Will Pay City \$300 Yearly.

Homer B. McKinley, of Salem, promoter of the Salem Terminal Traction Company, has accepted the franchise granted him by the City Council of Clarksburg, to construct, operate and maintain a street railway. The acceptance was made in writing Tuesday morning and the papers filed with the city clerk.

On October 16, 1903, the city council granted the franchise to Homer B. McKinley after four or five attempts had been made to obtain it through that body. One of the conditions of the grant was as follows:

"The said Homer B. McKinley, his heirs and assigns, shall not be permitted to construct and operate said railway until he shall accept in writing the terms of the ordinance, which acceptance will be acknowledged for record."

Complying with this condition, Mr. McKinley submitted his acceptance in writing to the City Clerk Tuesday morning and the paper was filed for record in the city's archives.

Another condition of the grant was that "the said Homer B. McKinley, his heirs and assigns, shall execute before the mayor of the city of Clarksburg, a bond payable to the City of Clarksburg, in the penal sum of \$2,000 for the faithful performance of the duties and obligations imposed by this grant."

In accordance with this last stipulation, Mr. McKinley executed the said bond of \$2,000 before Mayor Crile Tuesday morning. The bondsmen named are J. Ed. Law, Walter F. Rau, and Homer B. McKinley.

The ninety days given Mr. McKinley within which to accept the franchise expires next Saturday. The franchise stipulates that the railway must be constructed and in operation within two years else the franchise becomes null and void.

The franchise grants Homer B. McKinley, which in other words mean the Salem Terminal Traction Company, the right to construct, operate and maintain a street railway in the city, over the following streets: Beginning at Barne's Crossing on Sycamore street, thence across Mulberry street to Locust street, thence over Locust street to Chestnut street, thence with Chestnut street across Pike and Main streets to Third street, on Mechanic street to Third street and over Third street to Main street. And also beginning at a point near Boyle's store at the junction and running in an easterly direction by the B. & O. depots to the overhead bridge and thence over and across said bridge.

A sum of three hundred dollars per year is to be paid to the City of Clarksburg by McKinley for the rights and privileges granted in the franchise.

WILL RESPECT TREATY RIGHTS

Russian Ambassador Officially Notifies Department of State At Washington That Russia Will Respect Chinese Treaty Right

By Associated Press.

Washington, D. C., January 12.--The State Department announces that the Russian Ambassador has conveyed to the Secretary of State the Assurance of his government that the Russian authorities would place no obstacle in the way of full enjoyment by all of the powers having treaties with China of all rights and privileges guaranteed by such treaties in Manchuria.

SYSTEMS

Of Street Car and Telephone Lines and Electric Light Plant to Be Built and Operated in Tennessee and Alabama.

A. M. T. Cunningham, of this city, is a member of a company that has obtained franchises for an electric light plant, street car line and telephone system in Pittsburg, Tenn., and Bridgeport, Ala. These two places are five miles apart and will be connected by the systems. It is proposed to run the street car line into Chattanooga, Tenn., which is 25 miles from Pittsburg. The system will be built a once and Mr. Cunningham will leave in a few days for those places to give the construction of the systems his personal attention. He has had success here in every thing he undertook and the Telegram predicts the same sort of experience in the new undertakings.