December 1955

Gaming—Slot Machines as Gaming Devices Under West Virginia Statute

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in the fourteenth amendment. That amendment states: "No state shall . . .", but this does not limit the federal courts' jurisdiction to violations by state legislatures. It does not limit the right guaranteed by the amendment. The United States Supreme Court in Virginia v. Rives, 100 U.S. 313 (1879), held that, whoever, by virtue of public position under a state government, deprives another of life, liberty or property without due process of law violates the constitutional inhibition and his act is that of the state. The Supreme Court in Chicago, Burlington, & Quincy R.R. v. Chicago, 166 U.S. 266 (1897), held that the fourteenth amendment applies to all agencies of the state. The fifth amendment uses the same language as the fourteenth amendment but the Court has consistently held that the right to vote has its foundation in the Constitution and its amendments and has never required facts showing "state action" to secure federal court jurisdiction. Wiley v. Sinkler, 179 U.S. 58 (1900), and Swafford v. Templeton, 185 U.S. 487 (1902).

Obviously, the principal case cannot be distinguished from Bell v. Hood on the ground that the fourteenth amendment requires a showing of "state action" as opposed to the fourth and fifth amendments which require only sufficient facts to show the existence of the violation.

The plaintiff in the principal case manifestly based his claim on the fourteenth amendment to gain jurisdiction in the federal court. The claim was not frivolous, as it stated a transgression of a right having its foundation in the Constitution and amendments. The plaintiff's pleading was designed to enable him to bring his case in a federal court, although it was an action usually brought in a state court. The plaintiff is the architect of his own pleading and has this choice. Bell v. Hood. Had the court followed this doctrine it appears that it should have taken jurisdiction of the principal case. The case is indicative of the tendency of the federal courts to limit their jurisdiction by distinguishing cases on the slightest provocation, thereby making it more difficult for the pleader to substantiate jurisdiction in the federal court in absence of diversity of citizenship.

J. W. P.

GAMING—SLOT MACHINES AS GAMING DEVICES UNDER WEST VIRGINIA STATUTE.—D was indicted under W. Va. Code c. 61, art. 10, § 1 (Michie 1955), for keeping and exhibiting a gaming device. The device in question, a slot machine of the general type known as
"one-armed bandits", was seized in a club, the property of a third party, with whom D had placed it on a profit-sharing basis. D had placed a sign on the machine which read "For Amusement Only." Winners were paid by an employee of the operator of the club. D was convicted and sought relief by writ of error. Held, *inter alia*, and with one dissent, that the State failed to prove beyond a reasonable doubt that the machine was a gaming device as defined by the statute. (Other parts of the decision are not within the scope of this comment.) Reversed, verdict set aside and D awarded a new trial. *State v. Calandros*, 86 S.E.2d 242 (W. Va. 1955).

The statute reads in part: "Any person who shall keep or exhibit a gaming table, commonly called A. B. C. or E. O. table, or faro bank, or keno table, or any other gaming table or device of like kind, under any denomination, or which has no name, whether the game, table, bank or device be played with cards, dice or otherwise, or shall be a partner, or concerned in interest, in keeping or exhibiting such table, bank or gaming device of any character, shall be guilty of a misdemeanor ..." W. Va. Code c. 61, art. 10, § 1 (Michie 1955). This statute bears a close resemblance to a Virginia statute of 1815, which was later incorporated in the Va. Revised Code (1819). *Commonwealth v. Wyatt*, 6 Rand. 694 (Va. 1828), construed the coverage of the "like kind" provision. No more is required, the court held, than 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." This test has been applied in numerous gaming device decisions since. *State v. Dawson*, 117 W. Va. 501, 186 S.E. 175 (1936); *State v. Henaghan*, 73 W. Va. 706, 81 S.E. 539 (1914); *Nuckolls v. Commonwealth*, 32 Gratt. 884 (Va. 1879); *Leath v. Commonwealth*, 32 Gratt. 873 (Va. 1879); *Huff v. Commonwealth*, 14 Gratt. 648 (Va. 1858).

A police expert on gambling has stated that the average gaming machine is adjusted to retain from twenty-five to seventy-five per cent of the receipts deposited therein. Drzaga, *Gambling and the Law—Slot Machines*, 43 J. Crim. L., C. & P.S. 114 (1952). The Maryland court examined several slot machines and found that by maximum adjustment the machines would pay out only seventy-six per cent of the deposited coins. *Hoke v. Lawson*, 175 Md. 246, 1 A.2d 77 (1938). These machines were held to be gambling devices. The operator of a vending machine retains a reasonable amount of the coins deposited to cover his expenses and return him a fair profit. Even the exhibitor of a machine vending mere
amusement, rather than tangible merchandise has his right to profit. But if the receipt of the amusement is coupled with the unequal chance of delivering an additional return, expressible in monetary terms, it would appear that such a machine constitutes a gaming device. Thus, whether such a machine retains seventy-five or twenty-five per cent, or even less, of the coins inserted, it would be a gaming device, regardless of an attached sign reading "For Amusement Only."

As the court felt here, such a sign may well be nothing more than a cover for the criminal scheme. But strong evidence pointed to the fact that the machine was a gaming device of "like kind".

The machine was so constructed that a person could play by inserting either a five cent piece or a twenty-five cent piece. This type of construction seems to rebut the "amusement only" angle entirely. How would a player receive more amusement from inserting the larger coin? The wheels would not spin any slower or faster, the pictures would not be any prettier. Only the pay-off would be proportionately larger. Admittedly, this machine would give the player a form of amusement, but it is the amusement aroused by the gambling instinct, thus not amusement pure and simple, "amusement only".

It would, then, seem clear that a machine of the instant nature constitutes a "gaming device of like kind" to those enumerated in the statute. Indeed, that "a one-armed bandit" slot machine is a "gaming device of like kind" had seemed settled long ago. State v. Gaughan, 55 W. Va. 692, 48 S.E. 210 (1904). It makes little difference whether the gaming return from such a machine is being paid through a pay-off tube attached to the machine, as in State v. Gaughan, supra, and in Hoke v. Lawson, supra, or whether an attendant at the place of exhibition pays the returns, as in State v. Henaghan, supra, and in the instant case. If these devices are alike amongst each other, and several of them have been held to be "of like kind" to the gaming devices listed in the statute, then they all must be gaming devices. The dissent would have upheld the above method of proof. But the majority announced that the State had taken too much for granted. It had failed to prove beyond a reasonable doubt that the instant machine did in fact distribute "unequal chances", the mere possibility of doing so not being enough. The fact that all previously considered "one-armed bandits" were set to distribute unequal chances is no proof of a like mechanical adjustment in the instant case. May this decision serve as a caveat to overconfident prosecutors to be painstakingly
meticulous in the future in proving all material elements of a criminal offense beyond a reasonable doubt. In cases of the instant nature this should not be difficult.

P. B. H.

INTERPLEADER—STATUTORY CONSTRUCTION—PARTY DEFENDANT.—
A recovered a judgment against B and garnisheed a bank in which B had an account. B filed an affidavit to interplead A and X, contending that the money placed in the bank by B belonged to X. The lower court made X a party defendant and found in his favor. On appeal, held, that a defendant in an action at law who has resisted the action and who has received an adverse judgment is not a "defendant in an action which he does not wish to defend" and thus can not maintain interpleader. Cargill, Inc. v. Eastern Grain Growers, 86 S.E.2d 569 (1955) (3-2 decision).

The majority opinion is based upon two grounds: (1) that B was not a defendant in an action which he did not wish to defend since he had ceased to be a defendant when the judgment was rendered against him and (2) that even though B were such a defendant he could not file a bill of interpleader because the bank was the proper party to file the bill and not B.

W. Va. Code c. 56, art. 10, § 1 (Michie 1955), reads in part as follows: "A defendant in an action for the recovery of money which he does not wish to defend, but which money is claimed by some third person . . . may file his affidavit stating the facts in relation thereto . . . and the court may thereupon make an order requiring such third person to appear and state the nature of his claim. . . ."

Statutory interpleader was provided to make the equitable remedy available to litigants in law courts in certain types of cases. Dikeschied v. Exchange Bank, 28 W. Va. 340 (1886). As a general rule, the statute is merely a substitute for the original bill in equity and is governed by the same doctrines and principles. Conway v. Kenney, 273 Mass. 19, 172 N.E. 888 (1930); McNevin v. Metropolitan Life Ins. Co., 160 Misc. 468, 290 N.Y.S. 44 (Sup. Ct. 1936). In Stone v. Reed, 152 Mass. 179, 25 N.E. 49 (1890), it was held that the party seeking interpleader must have possession of the subject matter and must allege this possession and a willingness to pay the fund into court if the interpleader is granted. In the principal case B was not in possession of the funds and could not have paid them into court. He had only a chose in action against the bank, a right to be paid the money on demand. Since the bank had been gar-