Basilius v. ROP, 1 ROP Intrm. 230 (Tr. Div. 1985)

POLYCARP BASILIUS, dba KOROR AMUSEMENT,
Plaintiff,

v.

REPUBLIC OF PALAU, and MINISTER OF JUSTICE THOMAS O. REMENGESAU,
Defendants,

DANNY KINTOL, dba TOWN AND COUNTRY MUSIC AND AMUSEMENT,
Intervenors.

CIVIL ACTION NO. 83-85

Supreme Court, Trial Division
Republic of Palau

Opinion on petition for declaratory judgment
Decided: June 28, 1985

BEFORE: ROBERT W. GIBSON, Associate Justice.

BACKGROUND

Plaintiff brings his Petition to the Court seeking a Declaratory Judgment holding that the combined provisions of Section 705, PL 1-63, Laws of 1963, Palau District Code, and Section 102(e) and 502 of RPPL 1-63, Laws of 1984, read together do not make the use and operation of coin activated amusement devices which simulate the playing of Poker or Blackjack, "Gambling Devices," and thus illegal within the provisions of said Section 705.

Petitioner is the owner/operator of three such devices, and Intervenor of fourteen such devices, which have been seized and sequestered by Defendant National Government as "illegal gambling devices". Petitioner and Intervenor contend that having paid the license tax imposed by Section 502 of RPPL 1-63 to the National Government's Revenue and Tax Division that that same government, acting through the Enforcement Division, may not thereafter seize such machines as they have been effectively "legalized" by compliance with the provisions of said Section 502.

On June 11, 1985, this Court granted Plaintiff a ⊥ 231 Preliminary Injunction requiring that the machines be restored to Petitioner and the Defendants cease and desist from interference with their operation. The validity of that ruling was called into question by Defendants' Motion to Reconsider.

The Court, conceiving the matter to be of substantial precedential concern to both the National Government and a number of its citizens who, under their individual readings of RPPL 1-63 have undertaken to license from a revenue stand-point such and similar machines, the

Court, by Order dated June 12, 1985, under the authority of ROP R. Civ. Pro. Rule 65(a)(2) consolidated the hearing upon Defendants' Motion for Reconsideration with the Hearing upon Plaintiff's Petition for a Declaratory Judgment in order that a final and appealable Order might be entered as a guide to those who found themselves in circumstances similar to that of Plaintiff.

On June 12, 1985, Intervenors filed their Motion to Intervene and Complaint setting forth allegations substantially identical to those advanced in Plaintiff's Complaint. A hearing was had upon Intervenors' Motion, in limine, at 8:30 a.m., on June 13, 1985, and the Court granted said Motion to Intervene whereupon Intervenors participated in the Hearing upon Plaintiff's Petition for a Declaratory Judgment.

With this background the Court now undertakes to rule upon the Petition.

OPINION

We start with the basic premise that Section 705, aforesaid, is a penal statute. As such it must be strictly construed against defendant National Government. The proposition is so well ingrained in our legal system of laws that it may be said to be "Hornbook Law".

> This situation has led to the universal adoption of the rule that penal statutes are to be strictly construed. This is a fundamental principal which in our judgment will never be altered. Why? Because the law-making body owes the duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen may lose his life or liberty. Therefore, all the canons of interpretation apply to criminal statutes, and in addition there exists the canon (of strict construction) . . . [.] The burden lies on the lawmakers, and inasmuch as it is within ⊥232 their power, it is their duty to relieve the situation of all doubts. *Snitkin v. United States*, 265 F. 489 (CCA7th, 1920).

So mandated we turn our attention to Section 705, remarking that it is the sole evidentiary basis upon which Defendant must ground its claim of illegality.

Section 705 reads in part: "Except as herein specified, all forms of gambling shall be prohibited in the Palau District . . . . (b) Under no circumstances shall gambling or betting for money or other stakes be allowed in the following games: poker, blackjack, . . . or slot machines of any kind." We pause to note that in our opinion "slot machines" has its own peculiar connotation and does not include other types of coin operated machines within its genre. "Slots" provide one play for each coin thus making them pure games of chance, any element of skill whatsoever is not required. Only perseverance and a supply of coin. Game type machines on the other hand require, dependent upon the particular game, some element of skill whether it be in the form of manual dexterity or simply a recognition of what is a winning poker or blackjack hand, and of the laws of probability as to the draw, or a deciphering of the repetitive characteristics of the machine being played. "A four year old child might win at 'slots' as equally as an experienced gambler, not so however at Poker or Blackjack machines."

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Section 102(e) of RPPL 1-63 defines: "coin activated amusement device means any game or machine which may be activated by the insertion of a coin . . . (emphasis supplied). Section 502 refers to "coin-activated amusement device . . . that simulates the playing of any card game such as poker or blackjack."

From the foregoing it can readily [be] noted that there is a differentiation to be made between Section 705 and 102(6) and 502, in particular with reference to the connotation of "games" and the limitation to "slot" machines in Section 705, but the mention only of machines in Sections 102(e) and 502.

Thus--under 705(b) gambling must be "betting for money or stakes" in a "game", in this case, poker or blackjack. No mention of playing poker or blackjack machines is made in this section, only "slot machines". It follows then that if coin activated amusement devices as defined in 102(e) are illegal per se it must be because they are "gambling devices" or "slot machines" and playing same is "gambling" under 705(b). But this is a presumption we are prohibited from making under ⊥233 accepted statutory interpretation rules.

> We know in a general way what was intended by Uman Ordinance 3-66, but we are limited to consideration of statutory words. A court may not speculate as to the probable legislative intent. The court must consider not what the legislative body intended to do but what it actually enacted. *Karuo v. Chochy*, 5 TTR 304 at 306.

Section 102(e) says that playing the machines is not gambling, rather it is activating, by the insertion of a coin, "a coin-amusement device", not a "slot machine." If the definition of "gambling" sought to be inferred by Defendants from this literal reading of Section 102(e) is to be accepted then it must be accomplished by implying some unwritten intention of the Legislature to make "coin activation of an amusement device which simulates the playing of poker and blackjack" a criminal "gambling" activity, a supposition which certainly cannot be derived from a reading of Section 102(e) and as we suggest a completely unwarranted inference,

> Penal statutes will not be construed to include anything beyond their letter and beyond the spirit of the words employed by the statute. 3 Sutherland, Statutory Construction, p. 54, § 5605 (emphasis added).

or because ipso facto eo nominee poker and blackjack machines are "gambling devices". But neither can this latter be so because the same authority, the OEK, has specifically differentiated between gambling games, slot machines, and "coin-activated amusement devices which simulate the playing of poker and blackjack" and declared that the latter type machines are not gambling devices or "slots" but rather machines for amusement even though they may simulate the gambling games of poker and blackjack. We pause to note that poker and blackjack, while generally games of chance as are bridge, whist, solitaire and cribbage, or for that matter all card games, (and certainly requiring no less skill for success although perhaps of a different nature) are thought of as gambling games simply because their manner of playing so readily lends itself to risking upon the turn of the next card -- a fact recognized by the framers of 705, "betting for

money or other stakes."

> It is a familiar rule that a thing may be within the letter of a statute and yet may not be within the statute because not within ⊥234 its spirit nor within the intention of its maker. *Holy Trinity Church v. U.S.*, 143 U.S. 457, 36 L.Ed. 226, 12 S.Ct. 511.

If, on the coin's flip side, we concede arguendo that 705(b) is neither an exception under the preamble to 705 and merely repetitious of the preamble itself, and therefore expresses the intent of the 1963 Palau District Legislature, we are then faced with a declaration that the 1984 OEK, the successor legislative body, intended to tax but not protect against seizure by the Executive Branch those devices which the Legislative Branch has sanctioned of continuing use. Devices which they classify as "amusement" rather than gambling. The concept of the Separation of Powers does not permit us to agree that that which the Legislative Branch has approved the Executive Branch may disapprove. Section 502, by making the license tax an annual obligation has indicated its intention that those machines to which the Stamp of Payment has been affixed, are not to be interfered with by either remaining Branch of Government. That, in its opinion, the machines in question are amusement devices and not "gambling devices." Adherence to Defendant's position demands that the Court find the statutes in conflict and the one superior to the other by ignoring the clear wording of 102(e) and 502 and espousing the lack of definitiveness found in Section 705. Defendant proposes that this be accomplished by the Court finding that the Legislature either intended to trick persons into senses of false security, take their five hundred dollars per machine, and let the thereafter consequences fall where they might, or, on the other hand, declaring that the Legislature "knew not what it was about" when it impliedly sanctioned the use of machines which Defendant says are historically, eo nominee "gambling devices". Neither conclusion is acceptable. We may not presume the Legislature has performed an absurd act by enacting a one time, one shot, revenue measure (ignoring "and thereafter on an annual basis") or that it dealt in the uselessness of passing intentionally conflicting legislation which the Executive Branch was at liberty to construe as it wished. *See e.g., Trust Territory v. Kaneshima*, 4 TTR 340 at 345.

The problem is not that one Statute declares coin activated machines simulating poker and blackjack (irrespective of the means of pay-off) illegal while another Statute taxes such machines as a means of generating revenue. The fact with which we are here faced is that only one Statute mentions "coin activated machines which simulate the playing of poker and blackjack" and that Statute says that they are amusement devices and not illegal gambling devices. Judges should not philosophize on the nature of a just society nor engage in the ⊥235 process of making law to achieve that society. It is as though the Defendant is saying "Look, there is no law which specifically prohibits such machines or makes them illegal but I want you, the Court, to make up a new law or read into the only law we have, Section 705, something which makes such machines illegal. You need pay no attention to RPPL 1-63 since gambling is against good morals and public policy anyway." The answer of the Court must be "why did you not make this argument to the Legislature before coming to me?" The Court does not believe it has the authority to substitute its judgment for that of the OEK unless that power is found in the Constitution, and that power has yet to be pointed out to the Court.

Repugnancy among these two laws admittedly exists if we accept the interpretation demanded by Defendants. This means that the court in this Opinion must either strike down 102(e) and 502 unless it can reconcile those provisions with 705. This accommodation however violates a basic rule of statutory construction, that of reconciliation between seemingly conflicting statutes wherever possible. *See Ngirasmengesong v. Trust Territory*, 1 TTR 345 at 354. We comply with the mandate of Justice Furber simply by holding that since 705 makes no mention of "coin-activated amusement devices simulating poker and blackjack" and Section 102(e) and 502 nomers these amusement devices, that such machines are in fact as so classified amusement devices and not "gambling devices." They are therefore not illegal and not within the ambit of Section 705.

> The force which should be given to subsequent, as affecting prior legislation, depends largely upon the circumstances under which it takes place. If it follows immediately and after controversies upon the use of doubtful phraseology therein as to the true construction of the prior law it is entitled to great weight.--If it takes place after a considerable lapse of time and the intervention of other sessions of the legislature, a radical change of phraseology would indicate an intention to supply some provisions not embraced in the former statute. *People v. Davenport*, 91 N.Y. 574.

We have no argument with Section 705 prohibiting "gambling" per se. Neither do we disagree but there exist two schools of thought with reference to the effect of a revenue measure upon an anti-gambling statute. *See State v. Joyland Club*, 220 P.2d 988 (Mont.), and its contrary Nevada companion, *West Indies v. First National Bank of Nevada*, 214 P.2d 144. ⊥236 Given the absence of RPPL 1-63 and its Sections 102(e) and 502 this Court would find little difficulty in holding the machines to be illegal gambling devices. But the fact is we do have as part of the laws of the Republic of Palau RPPL 1-63 and this law is of equal dignity and force with 705 and must be read conjunctively with the latter. The court feels it has no option but to conclude that Defendants are estopped from seizing Plaintiff's and Intervenor's coin activated amusement devices under the guise of their being illegal gambling machines and whether the machines pay off in coins directly or in free games or skill points redeemable at the counter is "a distinction without a difference" and one which notably RPPL 1-63 refuses to make.

We have read with interest and great concern the Memorandum of Defendant. We cannot however find within his cited authorities (nor has our own research disclosed otherwise) any case on all fours with that presented here wherein the Legislative Body, charged with making the law under scrutiny, in contrast to enforcing it, has so specially segregated out the types of "coin activated amusement devices" which it proposes to tax. As the citation from License Tax Cases, 5 Wall 462, 18 L.Ed. 497, 118 A.L.R. 828, attached to Defendant's Memorandum, reads in part,

> They simply express the purpose of the government not to interfere by penal proceedings with the trade nominally licensed if the required taxes are paid. ---, and as 'implying nothing except that licensee shall be subject to no penalty under National Law if he pays it.'

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The cases collected at pages 832-834 of 18 A.L.R. attached to Defendant's Memorandum are distinguishable from the facts here under consideration in that in each cited case the license was subordinate to a prohibitory enactment of an overriding state or federal jurisdiction. In each instance that granted by one authority was prohibited by another separate authority. Here there is but one authority who has first defined and then licensed.

But whether the coin-activated devices we consider here are gambling devices are not, the National Government has effectively approved their use in Palau, good, bad or indifferent, and as the Nevada Court most aptly puts it:

> It is useless to continue this discussion. The law in question may be considered unreasonable and unwholesome, but the motive ⊥237 that prompted the Legislature in exempting from the operation of the anti-gambling law slot machines of the character here discussed is of no concern of ours. It is a matter for the people or their representatives. Ex Parte Pierotti, 184 P. 206.

IT IS THEREFORE THE ORDER OF THIS COURT: that the Injunction heretofore issued be made Permanent and that the importation, keeping, distributing, using, operating, and playing of coin-activated amusement devices simulating the playing of the games of poker and blackjack, irrespective of the manner in which said machines may reward the player, subject to the proper payment of taxes as provided by Section 502 RPPL 1-63 are declared to be acts sanctioned by the provisions of said RPPL 1-63 and thus not within the purview of Section 705 of the Palau District Code, PL 1-63 enacted 5-29-63, as being a form of prohibited gambling.