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*Joseph E. Brennan's Game of Chance Defined
17 M.R.S.A. § 330 -1*

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To: Sgt. Arthur Wood, Maine State Police
From: Joseph E. Brennan, Attorney General
Re: Definition of Games of Chance

This opinion responds to your request for advice on the applicability of 17 M.R.S.A. § 330(1) to a game entitled "New Penny Falls."

FACTS: The game under consideration consists of a machine approximately four feet in height with a playing surface of a few square feet. The playing surface is enclosed with glass and contains a wooden bar on the right which is in constant motion from right to left. In the center of this surface are several dollars worth of quarters. The object of the game is to insert a quarter into a lever on the side of the machine directing the projection of the quarter in such a way that it falls directly in front of the moving bar. Once this is done, the bar moves the quarter to the left which in turn moves the mass of quarters in the same direction. If the movement is sufficient the quarters on the far left of the playing surface fall into the slot provided and are instantly returned to the player.

QUESTION: You asked whether the game popularly described as "New Penny Falls" is a Game of Chance as defined by 17 M.R.S.A. § 330(1).

ANSWER: The game of "New Penny Falls" or any other game operating on the same principles is a Game of Chance as the outcome of such a game depends in a material degree upon an element of chance.

REASONING: Whether the operation thus described constitutes a game of chance depends on whether it comes within the purview of 17 M.R.S.A. § 330(1). That section states that a

"Game of Chance" shall mean a game, contest, scheme, or device in which a person stakes or risks something of value for an opportunity to win something of value and in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestant or participant may also be a factor therein ...

Initially it is observed that "New Penny Falls" is a game or device in which the player risks something of value (i.e. a quarter) for an opportunity to win something of value (i.e. several quarters). See 17 M.R.S.A. § 330(8). The issue for consideration is the degree to which the factor of chance and skill influence or determine the game's outcome.

A.

Prior to the enactment of this section the test for determining whether a particular game should be characterized as one of chance or one of skill was not whether it contained elements of both but rather which element was the "dominating factor in determining the results of the game". In re Allen, 337 A.2d 280 (Cal. 1962)¹ In 1975, however, the Legislature revised the definition of a "Game of Chance" and in so doing designed a new standard by which games were to be reviewed for the purpose of classification.

Under this new standard or test the dominance of risk over skill was no longer determinative. While the presence of risk was still essential for a game to be considered one of chance, it had only to exist to a material degree. Since the Legislature failed to define the term "material" we must ascribe to it its common meaning. Union Mutual Life Insurance Co. v. Emerson, 345 A.2d 504, 507 (Me. 1975); Doughty v. Maine Central Trans. Co., 39 A.2d 758 (Me. 1944). In so doing, the term "material" is to be understood as synonymous with the words "substantial" or "significant" for it is this type of construction that men of "common intelligence would readily ascribe" thereto. State v. Shaw, 343 A.2d 210, 213 (Me. 1975); State v. Davenport, 326 A.2d 1 (Me. 1974).

B.

As previously noted, the game of "New Penny Falls" is commenced by partially inserting a quarter into a lever located on the outer surface of the machine and aiming it in the optimum direction. The player then releases the quarter which slides through the lever and onto the playing surface. During this process it is the judgment of where to aim the lever, the accuracy of the aim, the determination of when to release the coin, and the speed at which it is released which, taken in combination, constitute what is termed skill or dexterity. See People v. Shapiro, 77 N.Y.S. 726, 729 (1948). While it is clear that such skill is helpful in attaining the end sought, this fact alone is not sufficient to remove the game from those which may be statutorily characterized as "Games of Chance". In addition it must be shown that no element of chance exists or that if it does exist it is not material, that is, the element of chance is not a substantial or significant factor in determining the outcome of the game.


¹The predecessor to 17 M.R.S.A. §330(1) stated that a

"Game of Chance" shall mean a game, scheme, or device in which a player or participant risks something of value for a chance to win something of value and in which an element of chance or luck, rather than skill is the dominating element which determines the outcome of the game or the result of the risk ...

C.

To some extent, the player of "New Penny Falls" is able to control his risk of winning. Nonetheless, an element of risk is present which may be directly attributed to the nature of the game itself. The effect which one force has when brought in contact with another is what this game is all about and therein lies the element of risk. Not even the most experienced player can consistently control the effects of this force once his quarter enters the playing surface. If the quarter lands in the optimum position that is, horizontally, the impact of the moving bar may force the quarter up onto other quarters; it may move the mass of quarters either forward or to the sides; or it may reposition the played quarter but have no effect on the movement of the others. Even if the mass of quarters is pushed forward on the first attempt, such movement is rarely if ever enough to force the return of those quarters on the far left of the playing surface. One must play several times before the movement of quarters is sufficient to constitute a win and even then the player more often than not receives fewer quarters than those which he has already expended. In sum, the game is designed on a scientific principle that makes it difficult to win and more difficult to win more than that which is played.

To say that the risk that inheres in this game is material is to state the obvious.² It follows that the game of "New Penny Falls" or any other like game operating on the same principles comes within the purview of 17 M.R.S.A. §330(1) and as such must be denominated as a "Game of Chance".


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²Even were the more demanding test of the predecessor section to be applied, this particular game would be characterized as one of chance; the element of risk not being subordinate to the proficiency of the player in determining its outcome.