

Opinion No. 35-933

March 12, 1935

BY: FRANK H. PATTON, Attorney General

TO: Mr. J. S. Vaught, Attorney at Law, Albuquerque, New Mexico.

{*51} You have requested this office to render an opinion upon a certain set of facts and which due to the importance of same throughout the state, we have concluded to disregard our general rule, which is to the effect that opinions will not be rendered to other than public departments and officials other than the State of New Mexico.

You desire to know whether the running and operation of a machine called "The Sportsman" constitutes gambling within the meaning and contemplation of the statutes of this State.

"The Sportsman" is a table 18 1/2 {*52} X 42 inches and rests on four legs. The playing board on the top of the table is protected by a glass cover. On the board we find pictures of various fowls and in the center of each fowl there is a round hole about one-half inch in diameter. At various intervals on the board there are pins driven into same, and the operator plays the game by means of a marble which he gets by pulling a lever after inserting a nickel or a metal slug, which is the charge for ten marbles. The marbles rest in an alley way at the right of the playing board and the operator through the use of a plunger hits the marble and causes it to go up the alley way on to the playing field. The marble then strikes these pins and either traverses the entire length of the playing board and falls into a receptacle at the lower end of the playing board, or else it drops into certain of the holes in the painted pictures of the fowls.

The speed of the marbles when struck by the plunger is dependent upon the manner of release of same by the operator and to the left of the plunger and is a gauge containing figures by which the operator may try to determine the force with which the marbles will travel and this gauge is presumed to accurately measure the degree of force to be used in releasing the marbles. When a certain number of marbles have been released and fall into certain holes on the playing board, the operator by pressing a lever recovers from the machine certain chips or tokens which may be redeemed in merchandise by the owner of the store.

It is contended that the above described machine is not a gambling device for the reason that it is not a game of chance, but that it is dependent, at least to a great degree, upon the skill of the operator or the player.

The writer of this letter has seen the machine demonstrated and is familiar with its operation and it is true, that to a degree, skill in releasing the plunger determines the result and the ultimate goal of the marble, but we are not convinced that the element of chance does not predominate. In 20 L.R.A. new series 239, we find the following:

"The generally prevailing opinion seems to be that the operation of slot machines will be considered as gambling or as given within the inhibitions of statutes against lotteries or gambling, where a return to the player is dependent upon an element of chance, and this even though he is assured of his moneys worth of some commodity and hence cannot lose."

It has not been my thought that this machine is within the classification of ordinary slot machines where a coin is placed in a slot, a lever is depressed, thereby starting machinery in the nature of rotating wheels and which finally come to rest, sometimes resulting in the release of a certain number of coins in another slot to the operator. That this form of machines constitute a gambling device there can be no doubt because the results to the player entirely depend upon hazard, luck and chance.

In 12 Ruling Case Laws, page 730, the statement is made that any slot machine will be deemed to be an unlawful gambling device where the one who plays the machine stands to win or lose money, trade checks or prizes by a chance and more broadly where there is an element of chance in its operation.

After having seen this machine in operation I cannot convince myself that there is no element of chance in its operation, and as above stated, while it may be true that an operator to a certain degree may perhaps regulate the speed of the marble and the control of its destination to a certain degree, nevertheless when such marble strikes the various springs and pins upon the playing board in certain ways and at certain angles, the element of luck thenceforth is bound to control and chance certainly predominates.

As a matter of fact the only point in the operation in which skill enters, is at the point of contact by the marble with the first spring at the head of the playing board and from that point on chance controls {53} as to the destination of the marble.

I realize that the question as to whether the operation of this machine constitutes a game of chance or a game of skill, is in reality a question of fact, and one which upon the trial of a criminal case, would be for a jury to decide.

However, it is my belief that a jury would be justified in determining in accordance with the foregoing statement and after having given this matter serious consideration, and after having read numerous opinions from various jurisdictions on so called gambling devices, I cannot persuade myself to hold that this machine is not in violation of the gambling laws of the State of New Mexico.

I herewith return to you copy of the Billboard of March 9, 1935, containing extract of opinion from one of the Texas courts and copy of opinion from the office of the Attorney General of the State of Texas. With these I am unable to agree.