

Opinion No. 36-1383

June 11, 1936

BY: FRANK H. PATTON, Attorney General

TO: Mr. C. C. Gregory, City Clerk, Las Vegas, New Mexico.

{*123} We have your letter of June 9th asking our opinion as to whether or not a marble machine is a gambling device. Your letter is not specific as to the exact type of marble machine in question nor does it set forth the way in which said machine or machines are being used. This would undoubtedly have considerable bearing upon the question which you ask.

So far as we know, no Court in this state has ever passed upon the legality of the so-called marble machines but we find a number of {*124} recent Supreme Court decisions from other states with regard to the question. You are referred to Sections 58-201, 58-202, 58-203 of the New Mexico Statutes Annotated, 1929 Compilation, as being the law involved in this cause. These sections of the law make it unlawful to run or operate certain specific games mentioned and "any other gaming device by whatsoever name known, for money or anything of value, in the State of New Mexico."

We refer you to two recent cases decided by the Court of Civil Appeals of the State of Texas, said cases being Adams vs. Antonio, 88 S.W. (2d) 503, and Roberts, et al vs. Gossett, et al, 88 S.W. (2d) 507. In both of these cases the marble machines involved were of the automatic pay-off type, the machine itself paying off type, the machine itself paying off various percentages when a marble fell in a particular hole. The Court of Civil Appeals of Texas held that the machines in question were illegal under the Texas law prohibiting gaming devices and further held that said machines were games of chance rather than games of skill for the reason, as the Court said:

"The element of chance, as the game is played, so predominates over the element of skill as to make the game essentially one of chance and not of skill."

The Texas cases above mentioned are the only ones which we find involving the automatic pay-off marble machines. There are several other cases, however, involving the legality of the non-automatic type where prizes are given by the operator to persons playing the machine and making a score above a certain specified amount. The cases thus referred to are Howle vs. City of Birmingham (Ala.), 159 South. 206; Steed vs. State (Ark.), 72 S.W. (2d) 542; Sparks vs. State (Ga.), 173 S.E. 216. Each of these last mentioned cases held the marble machines as operated to be a gaming device under their respective state statutes but in each of the cases either money or a prize was given to players making more than a certain score by the operator. The above cases would undoubtedly furnish authority to any Court in this state for holding the machines to be illegal under our state law but we can not say definitely what a holding of the New Mexico Court would be. We find no decided cases holding that a marble machine of the

usual type which does not pay off money automatically to be illegal where no prize or money is given to persons playing the same but where they merely play it for their own amusement and entertainment.

We believe that you should take up this matter, together with this letter, with your city attorney and later with your District Attorney and in view of the authorities herein cited allow these people to advise you as to whether the specific operations in question with which you are concerned should be prosecuted under the state gambling laws.

By J. R. MODRALL,

Asst. Atty. General