

Opinion No. 15-1447

March 1, 1915

BY: FRANK W. CLANCY, Attorney General

TO: Mr. C. W. McSherry, Silver City, N. M.

As to whether a gum vending slot machine is a gambling device.

OPINION

{*36} Your letter of the 24th ult. was received last Friday, together with the opinion of Cogan, Williams & Ragland as to the legality of the operation of what is known as the Mills O. K. Gum Vendor, but I have not found the question an entirely easy one to answer.

As I understand, the gum vendor is a slot machine, and it is contended that it is a mere selling machine without any gambling element and, therefore, is not subject to the prohibition contained in Chapter 64 of the Laws of 1907, which has, by our supreme court, been held to include gambling slot machines. It appears from what you write and from what is contained in the opinion which you enclose, that the player is advised in advance of exactly what he is to receive before he deposits his coin. If I understand the explanation correctly, upon the deposit of five cents, the player or purchaser receives a package of gum and trade checks varying in number from one to twenty, he being so advised by the appearance of a number in an opening in a card at the top of the machine upon which card is an inscription stating, "This is what you will get for five cents." The number of checks which he will receive is not always the same but varies perhaps with every successive play or purchase.

The argument in the opinion which you sent is an excellent one, but I am not certain that it quite covers what may be considered by the courts an essential element. If you will refer to page 45 of the first published volume of opinions of this office, you will see that in May, 1909, in a short opinion, I took substantially the same position as that which Cogan, Williams and Ragland take in about three {*37} typewritten pages, which is, that any such machine used for the simple purpose of selling merchandise is not a gambling device. On page 4 of their opinion they attempt to deal with the point that has troubled me in an attempt to reach the conclusion that this gum vendor is a mere selling machine. They use the following language:

"The only possible criticism that we can see that could possibly be made to it would be that there is a chance as to what the succeeding number would be, and the operator would deposit his coin, not for the purpose of obtaining the gum and checks shown in the opening, but with the intention of ascertaining what the second number would be."

The principal answer which they make to this possible criticism is that a court cannot look to see what may be in the mind of the party when he deposits his coin the first time, and cannot see that the buyer would or would not deposit his coin with the intention of ascertaining what the succeeding number would be, and they quote from Bishop on Criminal Law at Section 204, that to entitle the state to complain, some act must follow the unlawful thought, and they urge that an act and evil intent must combine to constitute in law a crime. This misses the thing which is now under consideration, and that is as to the legality of the machine and not as to the guilt of the player or purchaser as a gambler. Is the owner of the machine setting up and operating a gambling device?

Each single transaction with this machine as described, considered by itself and without any reference to any other matter, would clearly be nothing but a purchase of gum and checks, the exact amount of which is proclaimed to the purchaser before he makes his purchase. There is no element of uncertainty or chance in it. The only uncertainty in the operation of this machine is as to how the number of checks to be sold may vary, and that uncertainty is a part of the device of the maker or owner of the machine. May it not well be argued that the intent of the machine owner is to play upon the almost universal gambling sense in men's minds and thereby to induce them to make successive investments in the machine in the hope of increasing their winnings by the changes in the number of checks sold? Is it not a gratification of the gambling spirit which leads the purchaser or player to make a number of successive investments in the hope of getting more for his money?

I have no confidence in my ability to predict which view our courts would take, and I recommend that your client, if he contemplates the operation of such a machine, should set it up and get some proceeding started to prevent its operation and thus obtain a judicial decision.