

**Baseball—Baseball Pool—Gambling—Games of Chance  
—Lottery.**

Baseball pools conducted in the manner herein set out are prohibited by Section 11151, Revised Codes of Montana, 1921.

F. A. Ewald, Esq.,  
County Attorney,  
Great Falls, Montana.

My dear Mr. Ewald:

You have requested my opinion as to whether a person conducting a baseball pool is guilty of an offense under the statutes of this state.

You have described the method of conducting the pool as follows:

A person pays to the person conducting the pool the sum of 25c, in return for which he shakes 16 dice on each of which is a number. He throws out 8 of the dice and in that manner obtains 8 numbers, each of which represents one of the sixteen National and American league clubs.

The person holding the numbers selected in the manner above stated representing a combination of eight clubs, that together make the highest number of runs in the baseball games played that day, receives the money placed in the pool.

The size of the pool depends upon the number of persons who pay the 25c and take a chance.

A certain commission is also withheld from the pool by the person conducting the pool.

Lottery in Montana is defined by Section 11149, Revised Codes of 1921, as follows:

"A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known."

Section 11151, Revised Codes of 1921, provides as follows:

"Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person, any ticket, chance, share or interest or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in, or depending upon the event of any lottery is guilty of a misdemeanor."

In the state of Delaware in the case of *State v. Sedgwick*, 81 Atl. 472, it was held that a baseball pool such as outlined by you is illegal. The statute of Delaware involved in that case provided as follows:

"If any person \* \* \* sell or dispose of, \* \* \* any lottery policy, certificate, or anything by which such person or any other person promises or guarantees that any particular number, character, ticket, or certificate, shall in the event, or on the happening of any contingency in the nature of a lottery, entitle the purchaser or holder to receive money, property, or evidence of debt, \* \* \* every person so offending shall upon conviction, be subject to a certain penalty."

It was contended in that case that inasmuch as the "contingency" which determines the winning of a prize is the aggregate number of runs made by a certain number of baseball clubs, which are the result of skill and not of chance, the scheme was not "a contingency in the nature of a lottery." But the Court held that the scheme was prohibited by the statute, and, in so doing, said:

"The 'happening of a contingency in the nature of a lottery,' as contemplated by the statute and applied to the particular facts of this case, is not the number of the runs made by different baseball clubs, which uncertainty may or may not be a matter of chance within the meaning of the law, but the contingency here, into which enters the element of chance and which partakes of the nature of a lottery, is the double hazard of the selection of a combination of numbers which are designated by a drawing to be representative of certain clubs, the winnings upon which are determined by baseball scores. The prize is given not to him who may forecast the results of the games, either in victories or in runs, but to him who selects and pays for a combination of numbers, each representing a club not selected by but designated for him, the total runs of which approach nearest the highest total of runs made in a given time by a like number of clubs.

"There is but one highest total of runs made by six clubs regardless of the number of runs made and that highest number of runs is the factor that determines who wins on the combinations of numbers selected by the members of the pool. As a method of determining the winner of all who participated in the game, it has no advantage over nor is it essentially different from the ordinary method of having a little girl or a man of position draw the decisive or determining number from a hat. We are of opinion that the scheme disclosed by the evidence constitutes a lottery within the meaning of the law and therefore decline to grant the motion that the jury be instructed to acquit the prisoner."

The phrase "depending upon the event of any lottery" appearing in Section 11151 above quoted is not substantially different than the phrase "on the happening of any contingency in the nature of a lottery" contained in the Delaware statute.

The Delaware statute was under consideration in the later case of *State v. Gilbert*, 100 Atl. 410. In that case the scheme under consideration was one wherein a person for a small sum paid was given a certificate containing certain numbers. The person holding the certificate containing the number corresponding to the last three figures of the Philadelphia bank clearings as published should receive an article of merchandise worth \$25.00. The Court, in holding that the plan was prohibited by the statute, said:

"Lottery has been defined to be a scheme for the distribution of money or property by chance, and that the scheme is not limited to the sale of tickets nor to the terms or promises printed or written upon them. The meaning of a contingency in the nature of a lottery, within the contemplation of the statute, as applied to the facts of this case, is:

"'One' (article) 'will be given without extra charge to the holder of certificate bearing number corresponding to the last three figures of the Philadelphia bank clearings as published,' etc.

"The element of lottery in this scheme lies in the chance to get one of the list of articles named on the card without the full payment of twenty-five dollars by the holder of this certificate.

"What the Philadelphia bank clearings will be at the end of every week is the merest guess, and that any number on the certificate will correspond to the last three figures of such clearings is nothing less than chance. *State v. Sedgwick*, 2 *Boyce*, 453, 81 *Atl.* 472."

What was said by the Court in the case of *State v. Lipkin* (N. C.) 84 S. E. 340 is here pertinent. The Court in that case said:

"It does not 'matter that the person who buys a chance for a trivial sum, in the expectation of winning something of much larger value, can go on with his contributions, and after paying the full sum of \$17.50' (\$25 in this case) 'get the piece of furniture he may want' (a watch and chain in this case). 'This has been held not to divest it of its gambling quality. *State v. Perry* (154 N. C. 616, 70 S. E. 387) *supra*; *DeFlorin v. State*, 121 *Ga.* 593, 49 S. E. 699, 104 *Am. St. Rep.* 177; *State v. Moren*, 48 *Minn.* 555, 51 N. W. 618. In the case last cited, it is said that such a feature would probably operate as an additional incentive to purchase a chance in the lottery scheme, and does not take it out of the statute, as the vicious element still inheres in it. The sale of the ticket gave the purchaser a chance to obtain something more than he paid for, and the other fact became an extra inducement for the purchase, making the general scheme more attractive and alluring. The difference between it and a single wager on the cast of a die is only one of degree. They are both intended to attract the player to the game and have practically the effect of inducing others, by this easy and cheap method of acquiring property of value, to speculate on chances in the hope that their winnings may far exceed their investment in value. This is what the law aims to prevent in the interest of fair play and correct dealing. \* \* \* Call the business what you may, a 'gift sale,' 'advertising scheme,' or what not, but it is none the less a lottery, \* \* \* if the gambling element is there. \* \* \*"

It is, therefore, my opinion that to conduct baseball pools in the manner outlined by you is prohibited by Section 11151, Revised Codes of 1921. No opinion is expressed as to whether the scheme is also prohibited by other sections of our statutes.

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.