Gambling—Pari-Mutuals—Horse Racing — Co-ownership —State Fair.

Under the decision of the supreme court of Montana betting on horse races through the medium of the co-ownership plan is not gambling.

A. H. Bowman, Esq., September 8, 1927.
Commissioner of Agriculture,
Helena, Montana.

My dear Mr. Bowman:

You have requested my opinion whether it is lawful, under the decision of the supreme court in the case of Toomey vs. Penwell, 76 Mont. 166, to permit the use of pari-mutual machines or co-ownership gambling devices in connection with the holding of horse races at the state fair.

Under the plan involved in the above entitled action as appears from

the record in that case there was posted at the state fair grounds, at the place where the horse races were held, a notice, stating:

> "The Montana State Fair hereby offers various purses for horses competing in races to be held under the auspices of the Montana State Fair during the week of September 7 to 12, 1925. The amount of the various purses is to be found upon the daily program. Any owner or co-owner of a horse desiring to compete in any of said races must pay an entrance fee of not less than Two Dollars ($2.00). No person other than an owner or co-owner of a horse entered in a race is permitted to pay an entrance fee."

Those in charge of the races, upon the payment by a person representing himself as a co-owner of a horse entered in a certain race, of the sum of $2.00 issued to such person a receipt reading as follows:

> "This is to certify that the Montana State Fair has received from the holder of this receipt the sum of Two Dollars ($2.00); that the holder of this receipt represents himself to be one of the owners of the horse whose number appears on the back hereof and entered in a race to be run under the direction of the Montana State Fair; the said sum of $2.00 so paid is an entrance fee, paid by the bearer as one of the owners of said horse, to permit said horse to compete for a purse offered by the Montana State Fair for the horse winning said race. Said $2.00 is hereby paid unconditionally to the said Montana State Fair as such entrance fee and the same cannot be withdrawn."

From the record in that case it also appears that those in charge of the races offered as a purse a certain named sum of money and in addition thereto the amount of fees paid by different persons as entrance fees and at the conclusion of the race paid the said sum to the persons representing themselves to be owners or co-owners of the winning horse.

The supreme court of this state in the above cited case held that this plan of conducting horse races and distributing premiums or purses is not in violation of our anti-gambling statutes. The court in that case said:

> "It has been before the courts frequently, and the authorities are practically unanimous in holding that such a transaction does not come within the inhibition of an anti-gambling statute as comprehensive as our own. In 27 C. J. 1051, it is said: 'The mere fact that the contestants are required to pay an entrance fee does not make the contest a wager, where the entrance fee does not specifically make up the purse or premium contested for; and it held that there is no wager, but a valid transaction, where a purse consisting in part of entrance fees, and in part of an added sum, is offered.'
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> "The reason for the rule is apparent. When plaintiff paid the entrance fee, he received an adequate consideration for it—the privilege of having the horse 'Florence Fryer' participate

in the race. He parted with the title to the money and the $2.00 at once became the property of the Fair Association, and a part of its general funds, which it could use to pay premiums in whole or in part, to defray ordinary expenses, or for any other lawful purpose."

It should be noted, however, that the court also limited its decision to what it characterized as bona fide transactions. The court in this connection said:

"But these observations and the authorities cited have to do with bona fide transactions, and not with gambling so cleverly disguised as to appear to be what it is not. They are predicated upon the theory that the so-called entrance fee is an amount of money actually paid unconditionally and in good faith for the privilege of entering the contest and for no other purpose. If in fact the fee is not paid for such purpose, but is merely posted upon the outcome of the contest, no amount of dissembling can save the transaction from the condemnation of our anti-gambling statute.

"It is alleged in the complaint 'that on the twelfth day of September, 1925, the plaintiff, representing himself as a co-owner of a certain horse entered in said race, known as "Florence Fryer," paid the sum of $2.00 to the said defendants (Fair Association) as and for an entrance fee pursuant to the notice' given by the association and referred to above. In our opinion, this allegation is subject to only one construction, viz., that the fee of $2 was paid as a condition precedent to the right of the horse 'Florence Fryer' to participate in the race, and that this was the understanding of the parties is made plain. The receipt delivered to the plaintiff by the Fair Association recites that 'the said sum of $2 so paid is an entrance fee paid by the bearer as one of the owners of said horse to permit said horse to compete for a purse offered by the Montana State Fair for the horse winning said race.'

"Under the pleading as thus construed, the transaction described is not a gambling transaction within the meaning of our statute or within any recognized definition of that term. The complaint does not state a cause of action, and the demurrer was properly sustained."

Prior to the decision of the supreme court above referred to it was my opinion that the transaction as above set out and as appeared from the record in the above entitled cause showed on its face that it was not bona fide, but was a device conceived for the purpose of evading our anti-gambling statutes. Whatever my personal opinion may be at this time, I am bound by the decision of the court.

It is my opinion, in view of the decision of the supreme court, above referred to, that if the races are conducted and prizes or purses distributed in the manner as done in the above cited case, and are kept

within the limitations prescribed in the said decision, that the courts would uphold the transaction as not in violation of our anti-gambling statutes.

Very truly yours,

L. A. FOOT,
Attorney General.