Opinion No. 284.

Insurance—Theaters—Bank Night Insurance—Lotteries.

HELD: 1. Compliance with the Montana Insurance Law by the theater is necessary where the theater provides insurance against loss in the event a patron's name is drawn and the patron fails to attend a theater legally operating a bank night.

2. If the bank night is so operated as to be a lottery as defined by statute then such insurance is in violation of Section 8062, R. C. M. 1921, prohibiting the insurance of a lottery.

May 13, 1936.

Hon. John J. Holmes
State Auditor
The Capitol

You have submitted the question whether insurance against loss in case a patron fails to attend a theater operating a bank night, in the event the patron's name is drawn, is legal. You call attention to Sections 8061 and 8062, R. C. M. 1921.

We agree with your conclusion that if such insurance is legal, compliance with the Montana Insurance Law by the theater is necessary. We also agree with your conclusion that such insurance is in violation of Section 8062, R. C. M. 1921, provided that such bank night is a lottery as defined by our statute. No facts are stated from which we can determine whether the bank night in question is or is not a lottery.

We call attention to our opinion in Volume 15, Opinions of the Attorney General, page 432, in which we held that a bank night is not a lottery where prizes are distributed to persons who were not required to pay for the chance. This opinion was based upon a line of cases following Yellowstone Kit v. State, 88 Ala. 196, 7 So. 338. In addition to the cases cited therein, the recent cases of State v. Hundling (Ia., 1935) 264 N. W. 608, and State v. Eames (N. H. 1936), 185 Atl. 590, should be added. There are also a line of contrary cases from English and American jurisdictions, See: Willis v. Young, et al., 1 K. B. 448 (Eng.) (1907); Glover et al. v. Malloska, 238 Mich. 216, 213 N. W. 107; State v. Danz, 250 Pac. 37, 140 Wash. 546, 48 A. L. R. 1109; Featherstone v. Service Assn. (Tex.) 10 S. W. (2d) 124; Maughs v. Porter, 157 Va. 415 (1931); Central States Theatre Corp. v. Patz, 11 Fed. Supp. 566 (1935).

The first line of cases take the view that the word "consideration" is used in the narrow, technical and contractual meaning, while the other line consider the word in its general meaning and the scheme as a whole finding the consideration in the increased patronage of the theatre. They are inclined to look at the practical results. It is conceded that the question is a close one and what position our Supreme Court will take, if a case is presented to it, is problematical. Considerable care will have to be exercised in order to obtain a sound record in the event a test case is made.