

July 30, 1946.

Mr. Frank J. Roe
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Roe:

I have your request for an opinion as follows:

"We would appreciate receiving your opinion in the matter especially as to whether under our law a fair association could operate for a six day period and a racing association for twenty-four additional days in a county of forty thousand population.

"Further, please advise whether in your opinion two separate and bona fide racing associations could operate in the same county for two thirty day periods, assuming of course, that the said county had a population of forty thousand people."

Prior to 1929, Section 11180, Revised Codes of Montana, 1921, provided as follows:

"It shall be unlawful to make or report or record or register any bet or wager upon the result of any contest of speed or skill or endurance of animal or beast, whether such contest is held within or without the state of Montana."

In the case of *Toomey v. Penwell, et al.*, reported in 76 Mont. 166, 245 Pac. 943, decided April 16, 1926, our Supreme Court held that when a fair association required the owners of a horse to pay an entrance fee and paid a purse plus an amount equal to the entrance fee to the owners or co-owners of the winning horse, the transaction did not constitute gambling as the fee so paid became the property of the association and a part of its general funds which it could use for the purpose of providing a purse to be paid the owners or co-owners of the winning horse.

The legislature in 1929 amended Section 11180, Revised Codes of Montana, 1921, by Chapter 103, Laws of 1929, and as amended that section was carried forward into the 1935 Codes. The amendment added an exception to the general words as follows:

"... except that it shall be lawful for any and all patrons, except minors, of a fair or racing association

Opinion No. 184.

Fair Associations—Racing Associations Gambling—Horse Racing.

Held: 1. It is lawful for all patrons, except minors, of a fair or racing association to contribute entrance fees toward a purse to be divided among such patrons in races to be given or conducted by a fair or racing association.

2. Such races may be given or conducted by such fair or racing association, and contributions to such purse made and such purse divided among such patrons, except minors, in counties of a population of forty thousand or more for a period of thirty days, except Sundays, in any one year, and in counties of lesser population for a period of not more than six days, except Sundays.

3. One fair association, or one race association may conduct such races for the periods specified, or the period may be divided between two or more racing associations, or two or more fair associations, or between such fair associations and such racing associations.

4. Specifically, a fair association may conduct races in the county for a part of the period, and a racing association for the balance of such period. The periods designated as above may not be exceeded.

to contribute entrance fees toward the purse in races to be given by any fair or racing association and it shall be lawful except on Sundays for any fair or racing association to divide the purses among such patrons for a period of not more than thirty days in any one year in all counties having a population of forty thousand people, or more, according to the United States census last preceding such fair or race meeting and also lawful in other counties for patrons, except minors, of a fair or racing association to contribute entrance fees toward the purse in races to be given by any fair or racing association and it shall be lawful except on Sundays for any fair or racing association to divide the purses among such patrons, for a period of not more than six days in any one year. The entrance fees may be recorded and such recording shall not be an unlawful wager."

In the construction of statutes, we must determine the intention of the legislature from the words used, and may take into consideration the history of the legislation and the evident purpose in view in enacting it. (*State v. Walker*, 64 Mont. 215, 210 Pac. 90; *McNair v. School District*, 87 Mont. 423, 288 Pac. 188; *State v. Sedgwick*, 46 Mont. 187, 127 Pac. 94; *State v. Hindson*, 40 Mont. 354, 106 Pac. 362; *Lerch v. Missoula Brick & Tile Co.*, 45 Mont. 314, 123 Pac. 25.)

It is significant to note in connection with the history of the amendment to Section 11180 that prior thereto our law did not by statute permit betting on horse races. It was only after the decision in the Toomey case, cited above, the legislature acted on the subject. In the Toomey case, the court, after stating horse racing as such never was prohibited under any law of this or any other state, clearly pointed out it was only when the gambling element entered into such sport the law was violated. The court, then, at some length explained the difference between a bet or wager and a purse, premium or prize, and held that, under the method used by the fair association, there was no bet or wager which constitutes gambling, but only a prize, premium or purse awarded the owners or co-owners of the winning horse, which transaction was not gambling.

It is, likewise, significant to note that in enacting the amendment the legislature placed certain safeguards therein so that there would be as little opportunity as possible to make of the permitted act a gambling game. It limited the number of days races could be conducted in certain counties. It further limited the permitted act by confining authority to conduct races to fair or racing associations.

It would seem clear, from the language of the amendment of Section 11180, the legislature intended to permit only fair or racing associations to conduct races under the conditions set out in the amendment, and only on the periods of time therein mentioned. In other words, races where a prize, premium or purse is offered may legally be conducted by a fair or racing association for a period of thirty days in any one year in counties having a population of forty thousand, and in counties of lesser population for a period of six days in any one year.

We now come to the question if the period of time specified in the statute may be divided between a fair association and a racing association. That is, may a fair association conduct races in a county of forty thousand population for a period of, say, six days, and a racing association conduct such races in the same county for twenty-four days, Sundays excepted; or, may one fair or racing association conduct such races for six days, and another and separate fair or racing association conduct such races for the balance of the thirty day period?

As pointed out, the statute limits authority to conduct such races to fair and racing associations, and the total period of time such races may be conducted in the several counties. I am of the opinion the important fact in this statute is that races be not conducted for more than the time specified, and only by racing or fair associations. It would therefore seem it would make no difference whether one fair or one racing association used all the time specified, or if the time were divided.

It is therefore my opinion, under our statute and the decision of our Supreme Court:

1. It is lawful for all patrons, except minors, of a fair or racing association to contribute entrance fees toward a purse to be divided among such patrons

in races to be given or conducted by a fair or racing association.

2. Such races may be given or conducted by such fair or racing associations, and contributions to such purse made and such purse divided among such patrons, except minors, in counties of a population of forty thousand or more for a period of thirty days, except Sundays, in any one year, and in counties of lesser population for a period of not more than six days, except Sundays.

3. One fair association, or one racing association may conduct such races for the periods specified, or the period may be divided between two or more racing associations, or two or more fair associations, or between such fair associations and such racing associations.

4. Specifically, a fair association may conduct races in the county for a part of the period, and a racing association for the balance of such period. The periods designated as above may not be exceeded.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General