

Opinion No. 93**Lottery—Punch Board Licensing Law.**

Held: A game in which tickets are sold to customers who mark a fixed number of the symbols or numbers on the face of the tickets and then a drawing made whereby the holders of tickets who had numbers marked corresponding to the numbers drawn receive a cash award, constitutes a lottery under our laws, and is thereby prohibited.

— January 7, 1948

Mr. Melvin E. Magnuson
County Attorney
Lewis and Clark County
Helena, Montana

Dear Mr. Magnuson:

You have requested my opinion as to whether the following stated facts constitute a lottery.

A bar sells tickets to its customers, which tickets have upon their face two boxes, the first of which contains numbers from 1 through 40 in numerical succession and the second box contains numbers 41 through 80. The customer selects 10 numbers from the 80 numbers by marking the same with black ink. After the requisite number of tickets has been sold the man operating the game for

the house then draws a pre-determined number of balls from a wire drum or punches numbers from a punch board. If a customer has designated 4 or more numbers on his ticket of those which are either drawn from the wire drum or punched from the board, he then receives a cash award. The amount of the cash prize varies with the price of the ticket and the 3 per cent State Stamp-Tax is paid on every such ticket.

A lottery is defined in Section 11149, Revised Codes of Montana, 1935, which reads 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 is to be distributed or disposed by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known."

The above Section was considered in the case of *State v. Hahn*, 105 Mont. 270, 72 Pac. (2d) 459, wherein the Court said:

"It is important to understand what legal requisites are necessary to charge the offense of operating a lottery under our statutes. They are generally considered to be three: The offering of a prize; the awarding of the prize by chance; and the giving of consideration for an opportunity to win the prize."

It is apparent from the facts you have given me, that the rule of the *Hahn* case makes the scheme a lottery. The cash prize is offered and its award made by chance in that the numbers selected by the player on his ticket must correspond at least in part to those drawn or designated by the house. The giving of consideration for an opportunity to win the prize is found in the payment by the player for each ticket. The question of consideration was the perplexing problem in both of the bank night cases, *State v. Fox Missoula Corporation*, 110 Mont. 441, 101 Pac. (2d) 1065, and *State v. Theatre Corporation*, 114

Mont. 52, 132 Pac. (2d) 689, but does not constitute a problem here.

In *State v. Theatre Corporation*, supra, our Court considered Section 2 of Article XIX of the Montana Constitution, which reads as follows:

"The legislative assembly shall have no power to authorize lotteries, or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state."

The Court held that the first part of this Constitutional provision forbids legislative authorization of lotteries and quotes with approval from a Nevada case that "prohibitory provisions in a Constitution are usually self-executing to the extent that anything done in violation of them is void."

It is, therefore, my opinion that a game in which tickets are sold to customers who mark a fixed number of the symbols or numbers on the face of the tickets and then a drawing made whereby the holders of tickets who had numbers marked corresponding to the numbers drawn receive a cash award, constitutes a lottery under our laws, and is thereby prohibited.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General