



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 87- 38

The Honorable Vincent K. Snowbarger
Representative, 26th District
Capitol Building, 446-N
Topeka, Kansas 66612

Re: Constitution of the State of Kansas --
Miscellaneous -- State Owned and Operated
Lotteries

Synopsis: The constitutional provision permitting a state owned and operated lottery would allow the state to advance and market any game or combination of games as long as there is consideration, chance and a prize involved in each game. Cited Herein: Kan. Const., Art. 5, §3C; L. 1986, ch. 414.

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Dear Representative Snowbarger:

As Representative for the Twenty-Sixth district, you ask our opinion as to the definition of the word "lottery." Specifically, you question whether the game "lotto" is allowed by the Kansas constitutional provision, Art. 15, §3C.

The constitutional provision as voted on and passed by the Kansas electorate did not define or restrict the term "lottery," nor did it define or restrict itself to any specific games. The definitional responsibility of defining "lottery" is therefore passed to the courts of

this state. State v. Nelson, 210 Kan. 439, 445 (1972). In Nelson, the Court stated that "[t]he definition should achieve a consistency so that it shall not be taken to mean one thing at one time and another thing at another time." Id. at 445.

In Higgins v. Cardinal Manufacturing Co., 188 Kan. 11 (1961), the Court stated that a constitution is not to be narrowly or technically construed but its language "should be held to mean what the words imply to the common understanding of men." This position was adopted in the later case of State, ex rel., v. Highwood Services, Inc., 205 Kan. 821 (1970), when the court used resources available around the time the Kansas Constitution was adopted in 1859 to define "lottery." The Court wrote in Highwood at 825 and 826 that "in ascertaining the meaning of constitutional provisions courts should consider what appears to have been the intendment and understanding of the people at their adoption. (See, also, State v. Sessions, 84 Kan. 856, 115 Pac. 641)." Thus, in defining the term "lottery" the Court has adopted common usage definitions.

In Highwood, the Court's research included the following:

"In Abbott's Law Dictionary, published in 1879, we have found this definition of a lottery:

"'A scheme for the distribution of prizes by chance, among buyers of the chances.

"'Such schemes were formerly very common, were authorized by law, and were even set on foot, in many instances, by the authorities, for raising revenue for public or benevolent purposes. In view of the ill effects of the element of gambling involved, they are now very generally made unlawful.'

"Foremost among the citations appended to the text, the author has placed the following:

"'A lottery is a distribution of prizes by chance or lot, where a valuable consideration is given for the chance of drawing a prize. United States v. Olney, 1 Abb. U.S. 275.,' (1868).

"Webster's Third New International Dictionary, unabridged, (1964) conveys much the same idea as it defines lottery:

'a scheme for the distribution of prizes by lot or chance; esp.: a scheme by which prizes are distributed to the winners among those persons who have paid for a chance to win them, usu. as determined by the numbers on tickets as drawn at random (as from a lottery wheel).'

"To similar effect, see Oxford Illustrated Dictionary (1962) and The Random House Dictionary of the English Language, the Unabridged Edition (1967)."

The court has refined the various definitions into three required elements in order to be recognized as a lottery in Kansas. "The court has held that the essential elements of a lottery are three: (1) consideration, (2) prize, and (3) chance. (State, ex rel. v. Bissing, 178 Kan. 111, 283 P.2d 418)." Highwood, 205 Kan. at 823. Using this three element definition the court has adhered to the constitutional provision banning lotteries and struck down such efforts prior to Kan. Const. Art. 15, sec 3c. "The State, ex rel v. Mercantile Association, 45 Kan. 351, 25 Pac. 984, [distribution of prizes by chance]; In re Smith, Petitioner, 54 Kan. 702, 39 Pac. 70, [sale of lottery tickets]; The State, ex rel v. Fair Association, 89 Kan. 238, 131 Pac. 626, [bets on horse races]; State, ex rel., v. Fox Kansas Theatre Co., 144 Kan. 687, 62 P.2d 929, [theater bank night]; City of Wichita v. Stevens, 167 Kan. 408, 207 P.2d 386, [punch boards]; State v. Brown, 173 Kan. 166, 244 P.2d 1190, [punch boards]; State, ex rel. v. Bissing, 178 Kan. 111, [parimutuel betting on dog races]." Nelson, 210 Kan. at 444.

In considering the lottery provision, numerous individuals and state agencies advanced definitions for the term lottery. Included in the minutes were reports that "new forms of lottery games are constantly being invented," Minutes of the House Federal and State Affairs Committee, January 16, 1986, testimony of Ross Mills, Legislative Research Department, Attachment A., and "there are currently several types of lottery products being played . . . weekly game or draw lottery . . . instant lottery ticket . . . online system . . . numbers game . . . pick four." Minutes of the House Federal and State Affairs

Committee, January 16, 1986, testimony of Secretary of Revenue Harley Duncan, Attachment B.

It was further presented that some states have restricted their lottery to specific games. Minutes of the House Federal and State Affairs Committee, January 21, 1986, testimony of Patrick J. Hurley, Attachment C. The Kansas Legislature did not preclude any specific game or games with the language used in 1986 Senate Concurrent Resolution 1609, L. 1986, ch. 414.

In Attorney General Opinion No. 87-16, this office indicated that:

"[t]he intent and understanding of both the legislature and the people seems to have been to have a government controlled lottery as a revenue raising measure. Minutes of the House Federal and State Affairs Committee, January 21, 1986, testimony of Secretary of Revenue Harley Duncan, Attachment A.

"It appears that the intent of the voters in approving the lottery was to allow closely regulated gambling and to raise money for the state. A multi-state lottery would not be repugnant to the intent of the constitutional provisions."

In our judgment, the game "lotto" would fall within the scope of the Kansas constitutional "lottery" amendment since it is an unrestricted provision. The lottery could include both an active game and a passive game. An active game has been recognized as a lottery game in which the player takes action to determine the outcome by choosing a number or set of numbers to bet on, attempting to match the numbers later drawn. A passive game is a lottery game in which the player takes no active part in determining the outcome; the ticket sold is either a winner or a loser, and no choices of numbers are made. Minutes of the House Federal and State Affairs Committee, January 16, 1986, testimony of Secretary of Revenue Harley Duncan. Attachment B. Again, to be recognized as a lottery the three (3) essential elements must be present in either an active or passive game.

The Kansas Supreme Court in Highwood, supra, came to the conclusion that:

"In short, we entertain the opinion that not only in 1859, when the constitution was adopted, and in 1895, when K.S.A. 21-1506 was enacted, but in recent years as well, the common understanding of a lottery entertained by men in general has been that a consideration of value must flow from those who participate. We gravely doubt that had the ordinary man in the streets in 1859 been able to envision the advent of television he would have characterized as a lottery the give-away program known as Dialing for Dollars." 205 Kan. at 826.

In keeping with the court pronouncement that the definition must remain constant and should withstand the test of time, any game, no matter the extent of player participation or the title assigned to the game, be it "lotto" or "casino gambling," as long as it is state owned and operated and involves the essential elements discussed above, it would be classified as a lottery.

It is therefore our opinion that a state-owned and operated lottery could include any game or combination of games as long as there is consideration, chance and prize involved in each game. Such a game would not be repugnant to the intent of the constitutional provision.

Very truly yours,



Robert T. Stephen
Attorney General



Brenda L. Braden
Deputy Attorney General

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