

## Opinion No. 65-98

June 16, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

**TO:** Mr. Floyd B. Rigdon, Chairman, State Racing Commission, State Fair Grounds, P.O. Box 8576, Station C, Albuquerque, New Mexico

### QUESTION

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Is telephone wagering under the conditions hereinafter set forth legal in this state?

#### CONCLUSION

No.

### OPINION

#### {\*166} ANALYSIS

We understand that telephone wagering at horse race tracks operates generally in the following manner. Certain persons who are known to track management and whose credit is recognized are allowed to place wagers by way of telephone up to one hour prior to post time for the first race of the day. The persons permitted to place such wagers have on deposit with the track either money or a letter or credit or their own credit is recognized by the track. These telephone bets are accounted for in the pari-mutuel handle since they actually go through the parimutuel machines. These bets are reflected in the betting totals and odds that appear on the tote board. Telephone wagers, at least at Sunland Park, are made in duplicate. After the wagering ceases the mutuel department summarizes the betting by races and denominations. The original of the wagering record is used to place the bets through the mutuel machines. The duplicate copies are retained by the track. Prior to post time for the first race a copy of the summary {\*167} is made available to the Racing Commission auditor. Winning tickets on bets made by telephone are posted after the official results of each race by special cashiers. These amounts are posted to a separate ledger under the bettor's name and the winnings are available to the bettor at any time.

Clearly the controls are adequate to protect the Racing Commission, the tracks, the betting public, and the individual bettor. However, that is not the question before this office. For this reason, we point out initially that we do not concern ourselves with any so-called moral issues or policy matters that may or may not be involved. That is not our

function. Our sole consideration is whether the applicable state statutes prohibit this method of placing parimutuel wagers.

Section 60-6-6, N.M.S.A., 1953 Compilation provides in pertinent part as follows:

"A. Within the enclosure where any horse races are held and where the licensee has been licensed to use the pari-mutuel method or system of wagering on such races, the same shall be lawful **but only within the enclosure where such races are held.**

B. The sale to **patrons present on the grounds** of pari-mutuel system shall not be construed to be either betting, gambling, or pool selling, and is authorized under the conditions provided by law." (Emphasis added).

The key phrase in this legislative declaration is "patrons present on the grounds." It is a rule of statutory construction that, in the absence of anything in the context to the contrary, common or popular words are to be understood in the popular sense.

**Albuquerque Lumber Company v. Bureau of Revenue of New Mexico**, 42 N.M. 58, 72 P. 2d 334; **State v. Martinez**, 48 N.M. 232, 149 P. 2d 124.

Turning to **Webster's New Collegiate Dictionary**, we find the Word "present" defined as "Being before, in view, or at hand; being in a certain place and not elsewhere; -- opposed to absent." It is our conclusion that the phrase "patrons present on the grounds" requires that these patrons be physically present to place a pari-mutuel wager.

In the case of **People v. Robert**, 117 N.Y.S., 2d 415 (1952) a person at the Aqueduct Race Track accepted money from several of his friends for the purpose of betting it on horses running in races that day by purchasing pari-mutuel tickets for them. This occurred in the paddock which is within the fenced enclosure of the track but is in the portion of the track which could be entered without paying admission to the track. In order to reach the mutuel windows a person had to pay an admission price and pass into the track proper.

The Court noted that this type of transaction squarely presented for determination the question whether the putting in operation outside the confines of a race track of a wager on a horse race which will eventually be made through pari-mutuel machines is a violation of law.

The Court also recognized the importance of the issue, stating:

"The question raised is a fundamental one and goes far beyond what this defendant did. If I should hold in this case that defendant is not guilty on the conceded facts, I would be holding, as a matter of law, that you and I could open a store and put up a sign that we would accept wagers upon the horse racing to be run at pari-mutuel tracks in this State and that we would place wagers in the pari-mutuel machines for a consideration."

{\*168} The New York statute provided that race track licensees could:

"conduct pari-mutuel betting at a horse race meeting . . . within the race meeting grounds or enclosure at which such licensee shall conduct the pari-mutuel system of betting by its **patrons** on the results of the horse races at such meetings. Such place or places shall be provided with necessary equipment for issuing or vending pari-mutuel tickets, and adding machine equipment and a device capable of accurate and speedy determination of the amount of money in each pool and on each horse and the amount of award or dividend to **winning patrons** and displaying the same to its patrons." (Emphasis the Court's).

Unlike our statute, the above provision does not even say "patrons present on the grounds." Nonetheless the New York Court states as follows:

"From these provisions it seems clear that it was the intention of the Legislature that pari-mutuel betting be exempt from the . . . Penal law **only when done by patrons of the track physically present there at**, and that as a natural corollary the **forwarding of bets to the parimutuel machines from outside the track by those who are not patrons thereof does not come within the exemption.**" (Emphasis the Court's).

The Court's rationale, namely a "physical presence requirement" is equally applicable to a twoparty transaction such as we have in telephone wagering.

The New York court ruled the same way in **Stewart v. Department of State**, 174 Misc. 902, 22 N.Y.S. 2d 164. In the case of **People v. Mumford**, 12 N.Y.S. 2d 925, a patron of a track picked up bets from various persons in the parking lot at Jamaica Race Track, which was within the enclosure of the race track but not within the portion thereof that only those paying admission could enter. The court held that it was the intention of the legislature to exempt from the penal law "only such wagers on horse races which are instituted and made within that portion of the race track which may be reached upon paying the admission price."

The California Horse Racing Act originally provided that "Any person wagering upon the result of a horse race, except in the parimutuel or mutual method of wagering, when the same is conducted by a licensee and upon the grounds or enclosure of said licensee, shall be punishable as provided in the Penal Code." The legislature apparently recognized that this statute required the physical presence of the patron at the track because in 1935 the act was amended to provide that:

"A wager made inside an enclosure under the parimutuel system for a principal who is not within the enclosure shall be considered a wager made within the enclosure for the purpose of this act and any activity of the principal in connection with such wager shall not be considered a wager made outside the enclosure."

This amendment has been strictly construed in **Ex parte Goddard**, Cal., 74 P. 2d 818 and in **Ex parte Walker**, Cal., 80 P. 2d 990. In the latter case the court said:

"The meaning of the amendment is not at all clear. Its purpose seems to be to permit betters to place wagers without actually coming to the track to see the horse race. The better, called a 'principal' in the amendment, may apparently telephone or telegraph his bet, or otherwise forward directions with some one who attends the race, or to someone who is {\*169} inside the enclosure, who then makes the wager through the machine in a lawful manner."

The Court rather reluctantly, it appears to us, conceded "That if the agent is actually located within the enclosure and places the bet there, he **would seem** to be acting legally . . ." (Emphasis added).

We have had no such amendment to our statute. Our statute still restricts pari-mutuel wagering to "patrons present on the grounds."

Based on our research and the rules of statutory construction as we understand them, we must conclude that telephone wagering of the type here involved is not permitted by our racing statutes.

We are cognizant of the impact that eliminating such a long standing practice may have on tracks and their management. Therefore, persons who feel aggrieved by the opinion stated herein might wish to initiate a declaratory judgment action in order to obtain a decision from our courts on the matter. This office would cooperate in an effort to get an expeditious judicial determination of this question.