OFFICIAL OPINION NO. 15

March 6, 1953.

Honorable Harold Handley,
Lieutenant-Governor of Indiana,
State House,
Indianapolis, Indiana.

Dear Lieutenant-Governor Handley:

I have examined House Enrolled Act No. 8 and am of the following opinion in regard to the provisions contained therein.

The Constitution of Indiana, Article 15, Sec. 8 provides as follows:

> "No lottery shall be authorized; nor shall the sale of lottery tickets be allowed."

Our present Constitution was adopted in 1851. At that time, as has been stated by the Supreme Court of Washington:

> "The operation of lotteries was wide-spread and flourishing in the United States. * * * They appear to have been an accepted phenomenon from early colonial times. They were used to raise funds to build churches, colleges, to construct roads, to assist in defraying the expenses of various governmental activities. Desirable objects and results were intermingled with most devious and reprehensible ones, the latter involving graft, corruption, chicanery, venal fraud, and outright crime. The lusty development of the lottery system may be illustrated by some statistics relative to the city of Philadelphia where in 1809, there were three offices for the sale of lottery tickets; in 1827 there were sixty such offices; in 1831, the number was 177; and in 1833, there were more than two hundred offices. In the year 1832, ticket sales in Philadelphia aggregated approximately fifty-three million dollars, involving around 420 lottery schemes being operated in various parts of the United States. In the 1870's the Louisiana State Lottery, the Cheyenne Lottery, the Laramie City Lottery, the Victoria, Canada Lottery, the Havana, Kentucky, Madrid, and the Royal New Brunswick lotteries ex-

erted baleful influence over thousands of victims, and throughout the body politic in this country."

State *ex rel.* Evans, Pros. Atty. v. Brotherhood of Friends (1952), — Wash. —, 247 P. (2d) 787, 794.

The intent of the framers of our Constitution was

"* * * to discountenance and, as far as possible, suppress gambling in all its forms, one of the most seductive phases of which is presented in the guise of lottery schemes and chance distributions of property."

Swain v. Bussell and Others (1858), 10 Ind. 438, 442, 443.

The constitutional provision that: "No lottery shall be authorized," has been held to be:

"* * * in restraint of the legislative authority *upon the subject involved,* and * * * intended to prohibit that body from authorizing such schemes to be consummated in the state, under the sanction of the public authorities, either for a public or private purpose." (Our italics)

Riggs v. Adams (1859), 12 Ind. 199, 201.

"The provision is not a mere check upon future legislation, but an absolute prohibition of lotteries. * * *"

The State v. Woodward (1883), 89 Ind. 110, 115, 46 Am. Rep. 160.

It will be noted that Section 2 (8) of House Bill 8 excludes *bona fide* religious, charitable, patriotic, or fraternal clubs from the operation of the Act.

Does this purport to authorize a lottery?

The Supreme Court of a sister state has held that it does. Article 2, Sec. 24 of the Constitution of the State of Washington provides that, "The legislature shall never authorize any lottery. * * *" Section 139 of the Penal Code of that State,

upon the subject of lotteries, contained an exceptive provision as follows:

> "Provided that nothing herein contained shall apply to any lottery for charitable purposes."

The Court said that:

> "The language of the Constitution is mandatory and the provision is self executing. The question naturally suggests itself, if lotteries for charitable purposes may be lawfully conducted and permitted, why may not lotteries for any other purpose? We think that the constitutional provision admits of no exception in favor of lotteries for charitable purposes, or for any other purpose."
>
> City of Seattle v. Chin Let (1898), 19 Wash. 38, 52 P. 324.

The Constitution of the State of Wisconsin contains a provision similar to that of the Indiana Constitution, to-wit:

> "The legislature shall never authorize any lottery. * * *" Article 4, Sec. 24, Constitution of Wisconsin.

In discussing this constitutional provision, the Supreme Court of that State said:

> "* * * That is a strong declaration of the public policy of this state * * * the contention that Bingo when conducted for the purpose of raising funds for charitable or patriotic purposes is not gambling and that such a game, when so played, was never intended to be within the prohibition of the constitution or the statutes, needs little discussion because so obviously without merit."
>
> State *ex rel.* Trampe v. Multerer *et al.* (1940), 234 Wis. 50, 289 N. W. 600, 603.

Your attention is also invited to the case of State v. Brotherhood of Friends (1952), — Wash. —, 247 P. (2d) 787, 789, 798, in which it was held that an attempted exemption in regard to non profit clubs, which exemption was contained in a statute penalizing possession, use or operation of slot

machines as a felony, was in direct conflict with Article 2, Sec. 24 of the Constitution of Washington *(supra)* and the statute in that respect was held to be unconstitutional.

There is, therefore, substantial authority for holding that this Act, insofar as it excludes certain groups from the provisions thereof, violates the spirit if not the letter of the Constitution of Indiana, Article 15, Section 8.

There are, moreover, other constitutional provisions which must also be considered. Section 23 of Article 1 of the Constitution of Indiana provides:

> "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

Section 22 of Article 4 of the Constitution of Indiana provides:

> "The General Assembly shall not pass any special or local laws, in any of the following enumerated cases, that is to say: * * * (2) For the punishment of crimes and misdemeanors."

Under these constitutional provisions, it has been held that:

> "Unless there is a legal basis for classification, penalties imposed by criminal statutes must apply equally, without privileges or immunities on the one hand or additional burdens on the other."
>
> Dowd, Warden v. Stuckey (1943), 222 Ind. 100, 104, 51 N. E. (2d) 947.

The authorities are numerous in this state upon the subject of classification for legislative purposes.

> "A proper classification must embrace all who naturally belong to the class—all who possess a common disability, attribute or qualification *and there must be some natural and substantial difference germane to the subject and purposes of the legislation between those*

within the class included and those who it leaves untouched." (Our italics.)

Fountain Park Co. v. Hensler (1927), 199 Ind. 95, 155 N. E. 465;

Martin v. Loula (1935), 208 Ind. 346, 353, 194 N. E. 178.

Does House Enrolled Act No. 8 meet the standards and requirements set out in the cases cited above in regard to classification for legislative purposes?

Is there any natural and substantial difference, germane to the subject and purposes of this Act which exists between the classes included within its provisions and those classes which are excluded from the operation thereof? Do the classes within the purview of this Act include all who possess a common disability, attribute, or qualification?

First of all, there would appear to be no reason for exempting religious, charitable, patriotic, and fraternal clubs from the provisions of this Act, which reason does not apply with equal force to the exclusion of families where social gambling in the home is concerned, or any other group or organization conducting a gaming enterprise for social, non-profit, or public purposes. It has been held that:

"The gambling spirit feeds itself with as much relish upon a charity lottery as upon any other kind. If the average person be consumed with a desire to take a chance and get something for nothing, it matters not to him whether the promoter makes a profit or that profit goes to charity. Indeed, if it does go to charity, his participation wears a cloak of piety otherwise denied it. He thus may be persuaded to purchase tickets oftener and in larger volume because operated in the name of charity or religion. The point we seek to make is that widespread participation in a charity lottery is just as baneful in its effect upon the public as widespread participation in any other kind of lottery."

Harriman Institute of Social Research, Inc. v. Carrie Tingley Crippled Children's Hospital (1938), 43 N. M. 1, 84 P. (2d) 1088, 1091.

Consequently, the classification made in this Act cannot be justified upon the theory that gambling under the auspices of religious or charitable organizations will be better regulated than under other persons and organizations included within the scope of this Act, nor can this classification be upheld upon the theory that the public will not be exposed to the evils of gambling when the same is conducted by religious, patriotic, charitable or fraternal clubs.

Section 1 of this Act declares that:

> "* * * the policy of the general assembly, recognizing the close relationship between professional gambling and other organized crime, to restrain all persons from seeking profit from gambling activities in this state; to restrain all persons from patronizing such activities when conducted for the profit of any person; to safeguard the public against the evils induced by common gamblers and common gambling houses; and at the same time to preserve the freedom of the press and to avoid restricting participation by individuals in sports and social pastimes which are not for profit, do not affect the public, and do not breach the peace. * * *"

Despite this announced intention of policy, in regard to not "restricting participation by individuals in * * * social pastimes which are not for profit, do not affect the public, and do not breach the peace," Section 3 (1) prohibits gambling in any form, whether for social, non-profit or public purposes by any persons other than the groups excepted from the provisions of this Act.

Gambling, by and under the auspices of the groups excepted from the provisions of this Act is usually for profit. Moreover, I know of no reason why gambling by or under the auspices of the excepted groups would tend to affect the public less or be less inclined to breach the peace than gambling by or under the auspices of educational and benevolent institutions and other non-profit organizations or by private individuals who gamble for social and non-profit purposes in their own homes.

In addition to this, I can find no reason for distinguishing between religious, charitable, patriotic and fraternal clubs on the one hand and other educational and benevolent institutions

and non-profit organizations and private individuals gambling for social purposes which reason is germane to the purpose of this Act in regard to restraining all persons from seeking profit from gambling activities in this state and from patronizing such activities when conducted for the profit of any persons.

A natural and substantial basis for the classification made in this Act is even less discernable when certain other provisions of the act are considered.

Section 6 (4) of the Act provides that whoever as owner, leasee, agent, employee, operator, occupant or otherwise knowingly maintains or aids or permits the maintaining of a gambling premise shall be subject to the penalties therein contained.

Section 5 (1) provides that whoever knowingly transmits or receives gambling information by telephone, telegram, radio, semaphore or other means, or knowingly installs or maintains equipment for the transmission or receiving of gambling information shall be subject to the penalties contained therein.

Section 4 (4) penalizes the owning, manufacturing, possessing, buying, selling, renting, leasing, storing, repairing or transporting of any gambling device or the solicitation of any interest therein, and Section 4 (5) covers the printing, making, possessing, storing, or transporting of any gambling record.

Religious, charitable, patriotic and fraternal groups are expressly excepted from all of the above provisions of this Act.

It can immediately be seen that these sections are quite comprehensive in their coverage of gambling and other activities usually associated therewith or necessary thereto. I can find no natural difference between the groups who are excepted from the provisions of this Act and those who are included within its provisions which would warrant any classification such as is above made.

The Supreme Court of Indiana has held that:

> "The distinctions must involve something more than mere characteristics which will serve to divide or identify the class."

Henry Heckler v. Herman L. Conter, Treas., *et al.* (1933), 206 Ind. 376, 187 N. E. 878.

"* * * if there are other general classes situate in all respects like the class benefited by the statute, with the same inherent needs and qualities which indicate the necessity or expediency of protection for the favored class, and legislation discriminates against, casts a burden upon, or withholds the same protection from, the other class or classes in like situation, it cannot stand."

McErlain v. Taylor (1934), 207 Ind. 240, 192 N. E. 260, 262.

In a word, the exclusion of certain favored groups from the provisions of this Act is based solely upon unreasonable and arbitrary favoritism. Such a legislative classification is not proper in view of the public policy pronounced by the legislature in this Act in accord with Article 15, Section 8 of our Constitution to discountenance and suppress gambling in all its forms as far as possible; and since there is no difference between the excepted clubs on the one hand and the groups included within the provisions of this Act, germane either to the general subject of gambling, or to the expressed intent of the legislature and the apparent purpose of this Act.

The foregoing conclusions are reached in light of the writer's assumption that House Enrolled Act No. 8 is intended to completely supersede the present gaming laws in this state.

If, however, this Act were to be construed as merely supplemental to the present gaming laws, then the constitutionality of the Act would still be in doubt since the clubs excepted from the provisions thereof would be subject to substantially lighter penalties, for the same offense or offenses, than persons and groups who are included in the Act.

Since there is no natural difference between these clubs which is germane to the subject, this latter situation would seem to fall squarely within the rule that:

"Unless there is a legal basis for classification, penalties imposed by criminal statutes must apply equally,

> without privileges or immunities on the one hand or additional burdens on the other. These principles are fundamental."
>
> Dowd, Warden v. Stuckey, *supra.*

and therefore, is in violation of Section 23, Article 1, and Section 22 of Article 4 of the Constitution of Indiana.

It then becomes necessary to determine whether or not this partial invalidity will cause the whole Act to fall or whether the invalid portion is sufficiently distinct from the rest of the Act so that the residue of the Act is effective without the invalid portions.

In this connection it is pertinent to note that in the case of State v. Brotherhood of Friends, *supra,* at page 799 of the opinion, the Court held the entire Act, including the exemption as to clubs and its felony penal provisions, to be unconstitutional.

In Indiana, the subject of separability has frequently been before the Supreme Court. The case of Ettinger v. Studevant (1941), 219 Ind. 406, 38 N. E. (2d) 1000 appears to me to be the most recent declaration in this matter which is applicable to the facts substantially similar to those under consideration here. In that case a statute concerning cities and towns contained an exemption of cities of the first class. It was determined that the exemption was invalid. The Supreme Court, after a particularly extensive review of authorities of this state and some other jurisdictions, concluded, p. 423:

> "We have quoted sufficiently to illustrate the application of the principles above stated. The act before us expresses clearly the intent that it shall not apply to cities of the first class. If we strike out the exception, the law is made to apply to such cities against the express declaration of the legislature. We cannot say that without the exception the bill would have become law for there is no formula by which we can determine that fact. The separability clause is not enough. It cannot be interpreted to mean that if the presence of a clause or phrase in the act invalidates the legislative intent, the Court may change that intent. Even if this were its effect we would have no right under the doc-

trine of separation of powers to accept such responsibility for that is within the legislative domain.

> "Where the Legislature attempts to do several things one of which is invalid it may be discarded if the remainder of the act is workable and in no way dependent upon the invalid portion. But if that portion is an integral part of the act and its excision changes the manifest intent of the act by broadening its scope to include subject-matter or territory which was not included therein as enacted, such excision is judicial legislation not statutory construction."

Thus it follows as a necessary result from my conclusion that the exemption contained in this Act is bad, that the whole act is invalid and inoperative. In addition to the objections which I have discussed in this opinion there are a number of other reasons which might be sufficient to hold all or a portion of House Enrolled Act No. 8 to be in violation of the Indiana Constitution. Some of these are as follows:

Section 4 (3) of this Act provides that, "Forfeit monies and other proceeds realized from the enforcement of this subsection shall be paid equally into the general funds of the state and the general funds of the political subdivision or other public agency, if any, whose officers made the seizure, except as otherwise provided by law."

This section is probably unconstitutional to the extent that it authorizes, or purports to authorize the payment of forfeitures to anything but the common school fund of the State since the Constitution, Article 8, Section 2 provides that:

> "The common school fund shall consist of the Congressional Township fund, and the lands belonging thereto * * *. From the fines assessed for breaches of the penal laws of the State; *and from all forfeitures which may accrue.*" (Our italics.)

Section 2 (7) provides in part as follows:

> "In the application of this definition, any place where a gambling device is found shall be presumed to be intended to be used for professional gambling."

The Supreme Court of Indiana in the case of Powers v. State (1932), 204 Ind. 472, 184 N. E. 549, 86 A. L. R. 166 said:

> "An enactment which would make a fact prima facie evidence of a crime which has no relation to a criminal act, and no tendency to establish a criminal act, would be unconstitutional. But we must go farther and hold that before a proven fact can constitute a prima facie evidence of criminal intent, it must be sufficient of itself to sustain a conviction without support of statutory enactment."

The finding of any mechanisms, in and of themselves innocent and lawful and in no sense whatever especially adapted to the commission of the crime of professional gambling on any premises would raise the presumption that said premises were intended to be used for professional gambling. It goes without saying that this would be a violation of fundamental rights guaranteed by the 14th Amendment to the Constitution of the United States.

Section 4 (3) provides that after seizure by a peace officer, the property is forfeited to the State for sale by public auction. *Bona fide* liens against property so forfeited shall on good cause shown by the lienor be transferred from the property to the proceeds of the sale of the property. Unless the words "*bona fide* liens" and "Lienors" can be construed to include conditional sales vendors, chattel mortgagees and innocent parties holding by tenants in common, tenants by the entirety and joint tenants this might be construed by the courts to be a taking of property without due process in violation of both the Indiana and the Federal Constitutions. United States v. 372 Pipes of Spirits (1879), 5 Sawyer 421, Fed. Cas. No. 16, 505; United States v. Two Barrels of Whiskey (1899), 96 F. 479, 37 C. C. A. 518.

Section 8 of this Act provides in part as follows:

> "After complying with the order (to testify) and if, but for this section he would have been privileged to withhold the answer given or the evidence produced by him, such person shall not be prosecuted or subjected to penalty or forfeiture *under this* act." (Our italics.)

As specifically shown, any testimony given by virtue of Section 8 will grant immunity for prosecution, prevent such person from being subjected to penalty or forfeiture under this Act *only*.

Article 1, Sec. 4 of the Indiana Constitution provides:

> "No person in any criminal prosecution shall be compelled to testify against himself."

It is uniformly held in the State of Indiana that:

> "This privilege, being granted by the Constitution, it cannot be abridged by any Act of the legislature. It follows that any statute which undertakes to compel a witness to testify to any matter which might tend to show that he has committed a crime must grant to such person immunity which will fully guarantee to him his Constitutional rights. That is, such a statute must protect him to the same extent as does this provision of the Constitution, and prevent his testimony being used against him *in any criminal prosecution.* The statute must fully shield the witness or he cannot be compelled to testify." (Our italics.)
>
> Overman v. State (1923), 194 Ind. 483, 143 N. E. 604.

Section 2 (6) provides that gambling information includes information as to wagers, betting odds, or changes in betting odds.

Section 5 (1) provides whoever knowingly transmits or receives gambling information by various means shall be fined or imprisoned.

In the case of Parkes v. Bartlett (1926), 236 Mich. 460, 210 N. W. 492, 47 A. L. R. 1128, the Court said:

> "* * * the legislature has said that all publications of betting odds after the event are harmful because they encourage gambling. * * * In other words, the mere fact of publication, without regard to time or circumstances or connection with any event, is made a violation of the statute. * * * Its power to prohibit

such publication rests upon a duty to protect the public against the injurious results that may follow. Therefore, when it prohibits publications that have no harmful public tendency it exceeds its constitutional authority. It is our judgment that its *wholesale* prohibitions of publication concerning bets and wages *unrelated in time* to any race, game or contest is an unreasonable exercise of police power and is, therefore, beyond the constitutional authority of the legislature."

As noted, Sec. 2 (6) does not differentiate as to information published prior or subsequent to happening of said event. Therefore, I believe there is some doubt as to the validity of the above two mentioned sections.

In view of the foregoing observations, I am of the opinion that House Enrolled Act No. 8 is unconstitutional.

OFFICIAL OPINION NO. 16

April 1, 1953.

Mr. Harry E. Wells,
Commissioner of Insurance,
Department of Insurance,
State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of February 18, 1953 requesting an official opinion has been received which is as follows:

"A question has arisen as to the interpretation of the provisions of Chapter 195, Acts 1897, having to do with the accumulation and maintenance of the reserve or emergency fund by a company organized on the assessment plan as provided by that Act. (Burns' Indiana Statutes Annotated, Sections 39-421 to 39-446.) Section 7 of the Act (Section 39-427, Burns' Indiana Statutes Annotated) reads in part as follows:

" '39-427 (8990). Reserve or emergency fund. —Every life insurance corporation, association