

KANSAS

I. Definition of Gambling

Pursuant to Kan. Stat. Ann. § 21-4303 (2009) Gambling is making a bet; or entering or remaining in a gambling place with intent to make a bet, to participate in a lottery, or to play a gambling device. Kan. Stat. Ann. § 21-4303 (2009).

A "bet" is a bargain were the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement. Kan. Stat. Ann. § 21-4302(1) (Supp. 1987).

Commercial gambling is receiving, recording, or forwarding bets. State v. Head, 761 P.2d 332 (Kan. Ct. App. 1988).

A game (as defined by the Century Dictionary) is a contest for success or superiority in a trial of chance, skill, or endurance, or any two or all three of these combined. State v. Prather, 79 Kan 513, 100 P 57 (1909).

1. Dominant factor

A "Bet" is a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement. Kan. Stat. Ann. § 21-4302 (2009).

2. Material Element

A gambling device is a contrivance that for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance. Kan. Stat. Ann. § 21-4302(4) (2009).

3. Exemptions

Gambling does not involve the following:

- a. Bona fide business transactions which are valid under the law of contracts including, but not limited to, contracts for the purchase or sale at a future date of securities or other commodities, and agreements to compensation for loss caused by the happening of the chance including, but not limited to, contracts of indemnity or guaranty and life or health and accident insurance Kan. Stat. Ann. § 21-4302 (2009);
- b. Offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength, or endurance or to the bona fide owners of animals or

vehicles entered in such a contest Kan. Stat. Ann. § 21-4302 (2009);

- c. A lottery as defined in this section Kan. Stat. Ann. § 21-4302 (2009);
- d. Any bingo game by or for participants managed, operated or conducted in accordance with the laws of the state of Kansas by an organization licensed by the state of Kansas to manage, operate or conduct games of bingo. Kan. Stat. Ann. § 21-4302 (2009);
 - i. "Instant bingo" means a game:
 - 1. In which each player pays a charge;
 - 2. In which a prize or prizes are awarded to the winner or winners;
 - 3. In which each player receives one or more disposable pull-tab or break-open tickets which accord a player an opportunity to win something of value by opening or detaching the paper covering from the back of the ticket to reveal a set of numbers, letters, symbols or configurations, or any combination thereof;
 - 4. Which is conducted by a licensee under this act;
 - 5. The conduct of which must be in the presence of the players; and
 - 6. Which does not utilize any dice, normal playing cards, and instant ticket with a removable latex covering or slot machines.
 - ii. "Instant bingo" shall not include any game utilizing electronically generated or computer-generated tickets. Kan. Stat. Ann. § 21-4305 (2009).
 - iii. Winners of instant bingo shall be determined either
 - 1. By a combination of letters, numbers or symbols determined and posted prior to the sale of instant bingo tickets or

2. By matching a letter, number or symbol under a tab of an instant bingo ticket with the winning letter, number or symbol in a designated call game of bingo during the same session.
 - iv. "Instant bingo" shall not include any game utilizing electronically generated or computer-generated tickets. Kan. Stat. Ann. § 79-4701 (2009).
 - e. A lottery operated by the state pursuant to the Kansas lottery act. Kan. Stat. Ann. § 21-4302 (2009).
 - f. Any system of pari-mutuel wagering managed, operated and conducted in accordance with the Kansas pari-mutuel racing act. Kan. Stat. Ann. § 21-4302 (2009); or
 - g. Tribal gaming. Kan. Stat. Ann. § 21-4302 (2009).

Though the Kansas Criminal Code, enacted by the legislature, contained a broad prohibition against gambling, gambling operations, and gambling devices in Kan. Stat. Ann. §§ 21-4302 through 21-4308 (2009), gambling operated by the state pursuant to the Kansas Lottery Act, Kan. Stat. Ann. § 74-8701 et seq., was not included in the criminal prohibition against gambling. State ex rel. Stephan v. Finney, 254 Kan. 632, 867 P.2d 1034 (1994).

II. Definition of bookmaking

Bookmaking and pool selling occur where bets on the results of horse races or other events are recorded and tickets sold showing the purchaser's proportion of the money won on such races or events. State ex rel. Dawson v. Anthony Fair Ass'n, 89 Kan. 238 (Kan. 1913). Ordinarily, bookmaking and pool selling by which bets on horse races are recorded and tickets sold showing the purchaser's proportion of the money won on such races constitute gambling, and the place where it is carried on is a nuisance. State ex rel. Dawson v. Anthony Fair Ass'n, 89 Kan. 238 (Kan. 1913).

Kansas' commercial gambling statute prohibits receiving, recording, or forwarding bets. To violate the statute, a person must take bets from others, keep records of bets others have made (presumably either with the record-keeper or with third persons), or take bets and pass them on to a third person. Those actions all involve helping others to make bets. The language of Kan. Stat. Ann. § 21-4304(b) is very similar to at least one definition of bookmaking, the making or taking and recording or registering of bets or wagers on races and kindred contests. That is consistent with the 1968 Judicial Council Comment to Kan. Stat. Ann. § 21-4304 that the commercial gambling statute is directed to the activities of professional gamblers as opposed to the casual social bettor. Those distinctions are adequate to inform persons of common

intelligence what actions constitute gambling and what actions constitute commercial gambling. State v. Head, 761 P.2d 332 (Kan. Ct. App. 1988).

III. Specific gaming Device definitions

2. Definition of gambling device

The term "gambling device" is defined in Kan. Stat. Ann. § 21-4302(4) (2009) as a machine which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, or any token, chip, paper, receipt or other document which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet.

The fact that the prize is not automatically paid by the device does not affect its character as a gambling device. Games Management, Inc. v. Owens, 233 Kan. 444, 447 (Kan. 1983).

Under Kansas statute gambling device includes:

- a. "Slot machines" or any other machine, mechanical device, or electronic device an essential part of which is a drum or reel with insignia, and which when operated may deliver, as the result of chance, any money or property, or
- b. By the operation of which a person may become entitled to receive, as the result of chance, any money or property; any other machine, or
- c. Electronic device which is equipped with or designed to accommodate the addition of a mechanism that enables accumulated credits to be removed, is equipped with or designed to accommodate a mechanism to record the number of credits removed or altered primarily for use in connection with gambling, and which when operated may deliver, as the result of chance, any money or property, or by the operation of which a person may become entitled to receive, as the result of chance, any money or property; or
- d. If any essential part intended to be used in connection with any machine, mechanical device, or electronic device, or any token, chip, paper, receipt or other document which evidences, purports to evidence or is designed to evidence participation in a lottery or the making of a bet.

- e. The fact that the prize is not automatically paid by the device does not affect its character as a gambling device. Kan. Stat. Ann. § 21-4302 (2009).

2. Requirements for machine to be a gambling device

Three requirements must be met before a machine can be considered a gambling device:

- a. There must be consideration;
- b. Something of value must be offered; and
- c. Whether the player wins must be determined by chance. *Games Management, Inc. v. Owens*, 233 Kan. 444, 447 (Kan. 1983).

IV. Bucket shop laws

In *State v. Garrett*, 78 Kan. 882, 98 Pac. 219 (Kan. 1949), defendant was prosecuted under section 2, chapter 77, Laws of 1899, which made it a misdemeanor for one to set up and keep a place commonly known as a "Bucket Shop" or "Board of Trade" (the statute, since amended, which made it a felony, is G. S. 1935, 50-122).

V. Prohibition of games of skills

8. Poker/card Games

Poker is a well-known American game. It is a game played with cards, and, usually with chips, for diversion or gain. There are several kinds of poker, such as 'straight poker,' 'draw poker,' 'stud' or 'stud-horse' poker, and senate poker, but a slight variation in name or mode of playing does not prevent a game from being 'poker' where it is decided on a showing of cards by the same high cards and combinations of cards as in common poker." *State v. Terry*, 141 Kan. 922, 925 (Kan. 1935).

In *State v Terry*, 141 Kan, 141, 922, 925 (Kan. (1935) the court adopted the Webster's dictionary definition of poker. Webster dictionary defines poker as:

Any of various card games in which players bet on the value of their hands to win a pool. When one player has bet, those following must equal his bet (see or call him), increase his bet (raise him), or drop out of the game for that hand (pass) . . . In stud poker, all cards but the first round are dealt face up and the betting usually begins after the second round." *State v. Terry*, 141 Kan. 922, 925 (Kan. 1935).

The game may be played for entertainment only, or for gain. Frequently it is a gambling game. Those who participate in it as a gambling game may be prosecuted for a misdemeanor. The

proprietor of a gambling house, operating the game as a gambling game, may be prosecuted for a felony, but the punishment is not as severe as for one who deals, plays or practices "the confidence game or swindle known as three-card monte." Five-card stud poker is not a "confidence game or swindle," but is a game of skill and chance. Of course it is possible for one to cheat at almost any card game, and in many business transactions, but the fact that such cheating may be done does not convert those games, or business transactions, into "the confidence game or swindle known as three-card monte," nor constitute them "any such game." Statutes exist for the prosecution of those guilty of fraud or deceit when loss results, but defendants were not prosecuted under those statutes. We are not asked to pass upon an information drawn under such statutes. *State v. Terry*, 141 Kan. 922, 925 (Kan. 1935).

Based on these judicial interpretations of Article 15, Section 3 of the Kansas Constitution, it is our opinion that requiring participants in a poker tournament to pay a cover charge to enter the establishment where the tournament is being conducted is sufficient consideration to meet that element of an illegal lottery, regardless whether non-participants are required to pay the same cover charge, whether the charge is used solely to fund the prizes for the tournament, or whether it is an on-going charge even when no tournaments are being played. *Atty Gen Op.*, Kan. AG LEXIS 4 (Kan. AG 2005).

9. **Games using dice**

While dice may be used for purposes other than gambling, they are adapted, and have always been largely used, for gaming or for determining by chance. The mere ownership and possession of a device practically adapted to gaming does not constitute an offense under the statute, but the setting up or keeping of such a gambling device is the element of criminality. In *State v. Oswald* the information charged the defendants with the throwing of dice, and this would seem to be fairly included in the matter of setting up or keeping to which the statute refers. *State v. Oswald*, 59 Kan. 508, 510-511 (Kan. 1898).

II. **Express Exemptions**

8. **Social Gaming**

Kan. Stat. Ann. § 21-4304, the commercial gambling statute, is directed to the activities of professional gamblers as opposed to the casual social bettor; to violate the statute, a person must take bets from others, keep records of bets others have made, or take bets and pass them on to a third person. Those actions all involve helping others to make bets. *State v. Head*, 761 P.2d 332 (Kan. Ct. App. 1988).

9. **Charity Gaming**

The Kansas legislature may regulate, license and tax the operation or conduct of games of bingo and instant bingo, as defined by law, by bona fide nonprofit religious, charitable, fraternal, educational and veterans' organizations. Kan. Const. Art. 15, § 3a.

10. **Commercial gaming**

Commercial gambling is defined as: operating or receiving all or part of the earnings of a gambling place; receiving, recording, or forwarding bets or offers to bet or, with intent to receive, record, or forward bets or offers to bet, possessing facilities to do so; for gain, becoming a custodian of anything of value bet or offered to be bet; conducting a lottery, or with intent to conduct a lottery possessing facilities to do so; or setting up for use or collecting the proceeds of any gambling device. Commercial gambling is a severity level 8, non-person felony. Kan. Stat. Ann. § 21-4304 (200).

- III. Gambling and commercial gambling are distinctive offenses because gambling, under Kan. Stat. Ann. § 21-4303, requires only one bet and is unconcerned with mere offers while commercial gambling, under Kan. Stat. Ann. § 21-4304, concerns more than one bet or offer to bet. *State v. Head*, 761 P.2d. 332 (Kan. Ct. App. 1988).
- IV. Distinctions between Kansas's gambling and commercial gambling statutes are adequate to defeat an unconstitutionally vague challenge. Gambling, under Kan. Stat. Ann. § 21-4303(2009), requires only one bet and is unconcerned with mere offers while commercial gambling, under Kan. Stat. Ann. § 21-4304(2009), concerns more than one bet or offer to bet. *State v. Head*, 761 P.2d 332 (Kan. Ct. App. 1988).

4. **Lottery**

Lotteries and the sale of lottery tickets are forever prohibited. Kan. Const. Art. 15, § 3.

- 14. Lottery, under Kan. Stat. Ann. § 21-4302 (2009), means the following:

An enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance. Kan. Stat. Ann. § 21-4302 (2009). *See also* State ex rel. Stephan v. Finney, 254 Kan. 632, 644 (Kan. 1994).

The term lottery is broadly defined in Kansas to encompass all forms of gambling that involve consideration, chance, and prize. The term lottery, as used in Kan. Const. art. 15, § 3, includes any game, scheme, gift, enterprise, or similar contrivance wherein persons agree to give valuable consideration for the chance to win a prize or prizes. *State ex rel. Stephan v. Finney*, 254 Kan. 632, 644 (Kan. 1994).

- 15. The three essential elements constituting a lottery include prize, chance and consideration. *Id.*

16. "Consideration" means anything that is a commercial or financial advantage to the promoter or a disadvantage to any participant. Kan. Stat. Ann. § 21-4302 (2009). Mere registration without purchase of goods or services; personal attendance at places or events, without payment of an admission price or fee; listening to or watching radio and television programs; answering the telephone or making a telephone call and acts of like nature are not consideration. *Id.*

The courts have viewed consideration under this constitutional prohibition as requiring that something of value must flow from those who participate. *State ex rel. Frizzell v. Highwood Service, Inc.*, 205 Kan. 821, 826 (1970). However, even if a good or service is acquired with the consideration given, in addition to a chance to win a prize, something of value has flowed sufficient to constitute consideration. *State ex rel. Kellogg v. Kansas Mercantile Ass'n*, 45 Kan. 351, 355 (1891).

- d. A lottery does not include a lottery operated by the state pursuant to the Kansas lottery act; or tribal gaming. Kan. Stat. Ann. § 21-4302 (2009).
- e. The Kansas Constitution provides that the legislature may provide for a state-owned and operated lottery, except that such state-owned lottery shall not be operated after June 30, 1990, unless authorized to be operated after such date by a concurrent resolution approved by a majority of all of the members elected (or appointed) and qualified of each house and adopted in the 1990 regular session of the legislature. The state shall whenever possible provide the public information on the odds of winning a prize or prizes in a lottery game. Kan. Const. Art. 15, § 3c.
- f. The term "lottery" includes pull-tab games and any game or combination of games involving consideration, chance and a prize. The constitutional amendment permitting a state owned and operated lottery is civil/regulatory in nature and therefore may not be enforced against Indians conducting lottery games on Indian reservations within Kansas. Cited herein: Kan. Stat. Ann. § 21-4302 (2009); L. 1986, ch. 414; Kan. Const., Art. 15, §§ 3b & 3c., Atty Gen Op No. 87-101, 1987 Kan. AG
- g. Though Kan. Stat. Ann. § 21-4302(2) (2009) defines a lottery, the enabling act for a lottery was the Kansas Lottery Act, Kan. Stat. Ann. § 74-8701 et seq., which set the initial scope of the state

lottery. State ex rel. Stephan v. Finney, 254 Kan. 632, 652, 867 P.2d 1034 (1994).

- h. While the ban against lotteries contained in the Kansas Constitution may be self-executing, it is not self-defining. That function is judicial in nature, devolving upon the courts. State v. Nelson, 210 Kan. 439, 444 (Kan. 1972).

Though the Kansas Criminal Code, enacted by the legislature, contained a broad prohibition against gambling, gambling operations, and gambling devices in Kan. Stat. Ann. §§ 21-4302 through 21-4308(2009), gambling operated by the state pursuant to the Kansas Lottery Act, Kan. Stat. Ann. § 74-8701(2009), was not included in the criminal prohibition against gambling. State ex rel. Stephan v. Finney, 867 P.2d 1034 (1994).

5. Horse Racing

The Kansas constitutional allows for the conduct of charitable bingo pari-mutuel wagering on horse and dog races. Kan. Const., Art. 15, § 3b

- a. "Pari-mutuel wagering" means a form of wagering on the outcome of horse and greyhound races in which those who wager purchase tickets of various denominations on one or more horses or greyhounds and all wagers for each race are pooled and the winning ticket holders are paid prizes from such pool in amounts proportional to the total receipts in the pool. Kan. Stat. Ann. § 74-8802 (2009).
- b. Despite the provisions of section 3 of article 15 of the constitution of the state of Kansas, the legislature may permit, regulate, license and tax, at a rate not less than 3 nor more than 6 of all money wagered, the operation or conduct, by bona fide nonprofit organizations, of horse and dog racing and pari-mutuel wagering thereon in any county in which:
 - i. A majority of the qualified electors of the county voting thereon approve this proposed amendment; or
 - ii. the qualified electors of the county approve a proposition, by a majority vote of those voting thereon at an election held within the county, to permit such racing and wagering within the boundaries of the county. Kan. Const. Art. 15, § 3b.

- c. No off-track betting shall be permitted in connection with horse and dog racing permitted pursuant to this section. Kan. Const. Art. 15, § 3b.

VII. **Specific Internet prohibition**

There is no express internet prohibition but an Attorney General Opinion does provide that clearly, placing, receiving or forwarding a bet, or conducting a lottery, over the telephone or the Internet is illegal, with few exceptions, just as if the bet were exchanged or lottery conducted in person. There is no requirement that the participants be in each other's presence. However, it may appear more difficult to determine where the crime occurs if the commercial establishment is outside the state of Kansas and the bet is placed or the lottery entered from a computer terminal within the state. Atty Gen Op 31, 3-5, 1996 Kan. AG LEXIS 31, 3-5 (Kan. AG 1996).

In our opinion, if a bet is placed or a lottery entered into via a computer located in the state of Kansas, then the crime is committed partly within this state and participants in the crime may be prosecuted in this state. Atty Gen Op 31, 3-5, 1996 Kan. AG LEXIS 31, 3-5 (Kan. AG 1996).

Placing, receiving or forwarding a bet and participating in or conducting a lottery on the Internet violates Kansas's criminal gambling statutes. If a bet is placed or a lottery is engaged in from a computer. 0 located in Kansas any person or entity participating in such crime may be prosecuted in this state. Cited herein: Kan. Stat. Ann. § 21-3104; 21-4302; 21-4303; 21-4304; 21-4305; 21-4308; 22-2612. Atty Gen Op 31, 1996 Kan. AG (Kan. AG 1996).

Placing, receiving or forwarding a bet and participating in or conducting a lottery on the Internet violates Kansas's criminal gambling statutes. If a bet is placed or a lottery is engaged in from a computer Atty. Gen. Op. No. 96-31, 1996 Kan. AG LEXIS 31.

VIII. **State of Anne/ recover of debts**

1. **Gambling debt**

Enforcement of a gambling debt is against public policy, and the courts of Kansas will not aid in the enforcement of such debts. *First State Bank v. Spencer*, 7 Kan. App. 2d 147 (Kan. Ct. App. 1981).

In an action to recover on a note, in *First State Bank v. Spencer*, 7 Kan. App. 2d 147 (Kan. Ct. App. 1981), the court held that when the plaintiff-bank's officers and directors knew the proceeds of the loan were to be used by the defendant to pay a gambling debt owed to the chairman of the board of the bank, such knowledge is imputable to the bank, and the note is unenforceable as against public policy.

Where both parties to a contract void as against public policy are equally at fault, the law will leave them where it finds them. If the contract be still executory, it will not enforce it, nor award

damages for its breach. If already executed, it will not restore the price paid nor the property delivered." *Carey v. Myers*, 92 Kan. 493, 509 (Kan. 1914).

2. **Gaming Contracts**

Gambling contracts are unenforceable. *Sinclair Prairie Oil Co. v. Worcester*, 167 Kan. 194, 210 (Kan. 1949).

Under the common law and the statutes of Kansas a contract of sale or purchase of grain or other commodities for future delivery is void where it appears that it was not intended that the goods should be delivered. The real test whether the ostensible contract is or is not a gambling contract is a question of fact, and if the evidence is conflicting it is for the jury, under proper instructions from the court, to determine. The burden of proof in actions on these contracts is upon the party alleging that the transaction is illegal, and a gambling contract. *Orthwein-Matchette Inv. Co. v. McFarlin*, 93 Kan. 526, 528-529 (Kan. 1914).

"The plaintiff may recover only if the evidence shows the plaintiff was not in any way connected with or aided in the unlawful gambling contract. In 53 A.L.R.2d at 367, we find the general rule stating that loans extended to enable the borrower to pay antecedent gambling debts generally are recoverable by the lender, in the absence of specific statutory regulation to the contrary." *First State Bank v. Spencer*, 7 Kan. App. 2d 147, 150 (Kan. Ct. App. 1981).

IX. **Penalties for unlawful gambling/Gambling Crimes**

An offense is committed partly within this state if either an act which is a constituent and material element of the offense, or the proximate result of such act, occurs within the state...." See *State v. Grissom*, 251 Kan. 851, 886, 887 (1992); See also Kan. Stat. Ann. §. 22-2619 (2009).

1. **Gambling device**

A gambling device is a contrivance, which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance. Kan. Stat. Ann. 21-4302(4) (2009).

2. **Gambling is a class B non-person misdemeanor.** Kan. Stat. Ann. § 21-4303 (2009).
3. **Commercial gambling is a severity level 8, non-person felony.** Kan. Stat. Ann. § 21-4304 (2009).
4. **Illegal bingo operation is a class A non-person misdemeanor.** Kan. Stat. Ann. § 21-4303(a) (2009).

5. **Permitting premises to be used for commercial gambling is a class B non-person misdemeanor. Kan. Stat. Ann. § 21-4305 (2009)**

Permitting premises to be used for commercial gambling is a crime. When someone is permitting premises to be used for commercial gambling is intentionally by granting the use or allowing the continued use of a place as a gambling place; or permitting another to set up a gambling device for use in a place under the offender's control. Kan. Stat. Ann. § 21-4305 (2009).

6. **Installing communications facilities for gamblers is a severity level 8, non-person felony. Kan. Stat. Ann. § 21-4308 (2009).**

Installing communication facilities for gamblers is installing communication facilities in a place which the person who installs the facilities knows is a gambling place; installing communication facilities knowing that they will be used principally for the purpose of transmitting information to be used in making or settling bets; or knowing that communication facilities are being used principally for the purpose of transmitting information to be used in making or settling bets, allowing their continued use. When any public utility providing telephone communications service is notified in writing by a state or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used principally for the purpose of transmitting or receiving gambling information, it shall discontinue or refuse the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any such public utility for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a court of competent jurisdiction, that such facility should not be discontinued or removed, or should be restored. Kan. Stat. Ann. § 21-4308 (2009).

7. **Possession of a gambling device is a class B non-person misdemeanor. Kan. Stat. Ann. § 21-4307 (2009).**

Possession of a gambling device is knowingly possessing or having custody or control, as owner, lessee, agent, employee, bailee, or otherwise, of any gambling device. Kan. Stat. Ann. § 21-4307 (2009).

8. **Dealing in gambling devices is a severity level 8, non-person felony. Kan. Stat. Ann. § 21-4306 (2009).**

Dealing in gambling devices is manufacturing, transferring or possessing with intent to transfer any gambling device or sub-assembly or essential part thereof. The proof of possession of any device designed exclusively for gambling purposes, which device is not set up for use or which is not in a gambling place, creates a presumption of possession with intent to transfer. Kan. Stat. Ann. § 21-4306 (2009).

9. **Illegal bingo operation**

Illegal bingo operations include the management, operation or conduct of games of bingo in violation of the laws of the state of Kansas pertaining to the regulation, licensing and taxing of games of bingo or rules and regulations adopted pursuant thereto. Kan. Stat. Ann. § 21-4303a (2009).