

LOTTERIES: A contest in which entrants pay a cash consideration, and in which that entrant receives a cash prize who catches the largest fish within a specific period of time, is a lottery.

May 10, 1951

5-10-51



Honorable Thomas G. Woolsey
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

Your request for an official opinion has been assigned to me to answer. You thus state your opinion request:

"The Lion's Club at Gravois Mills, Missouri in this county, is seeking a determination as to whether or not a fishing derby as outlined herein would be a legitimate enterprise or would be classified as a lottery and hence illegal.

"The Club proposes to offer monthly cash prizes for the largest fish caught of one or more game species by any person who has entered the contest, then at the end of the year, annual prizes are to be awarded for the largest caught during the year by those who entered the contest or derby.

"The contest would be opened to the public, but naturally the entries would come from local residents and people patronizing our resort area here on the Lake of the Ozarks. The surplus, if any, above the cash prizes, would be used by the Lion's Club to further their campaign of community betterment.

"They feel that the catching of game fish such as bass and jack salmon, requires an element of skill rather than luck or chance.

"To win a prize under this proposed contest or derby would require a legal effort by the contestants rather than a mere attendance or a drawing at some gathering."

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Subsequent to writing the above opinion request, you supplemented, at our request, the information contained therein by the following letter:

"This will acknowledge receipt of and thank you for your letter of February 28th seeking additional information for a determination of the question I submitted to you on February 23rd.

"Please accept my apologies for not being more explicit in the original request.

"The club proposes to charge a nominal cash entry fee to any person entering the contest. The amount charged will probably be \$1.00 or less."

In order to decide whether the procedure which you contemplate is or is not a lottery we must first determine the elements which must necessarily be present in order to constitute a lottery.

In the case of State v. Globe Democrat Publishing Company, 110 S.W. 2d 705, l.c. 713, the Court stated: "The elements of a lottery are: (1) Consideration; (2) Prize; (3) chance."

Subsequent appellate court decisions in Missouri have undeviatingly sustained the above declaration as to the constituent elements of a lottery. If all of these elements are present there is a lottery. If any one of them is absent there is no lottery.

In your second letter to this office you state that:

"The club proposes to charge a nominal cash entry fee to any person entering the contest. The amount charged will probably be \$1.00 or less."

Thus, very plainly the element of "consideration" is here present.

In your first letter to this office you state that: "The club proposes to offer monthly cash prizes * * *." Thus, it is clear that the second element of a "prize" is also present.

There remains therefore to be determined whether the third element of "chance" is also present.

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We will begin our consideration of this point by observing that in the great majority of lottery cases which have reached our appellate courts, the element of "chance" was clearly "pure or absolute chance," or was an arbitrary selection of the winner by the person or persons conducting the lottery. The latter method of arbitrary selection was that which was employed in the case of *State v. Emerson*, 318 Mo. 633. In *State v. McEwan*, 343 Mo. 213, the prize was given to the person whose name was drawn by lot from a list of names recorded in a theater's registration book.

As we said above, the great majority of lottery cases are similar to one or the other of the two cited above, where the winner is determined arbitrarily or by lot, which is to say, by "pure or absolute chance."

However, the instant case does not clearly fall within either of the two above mentioned categories. In it there is no arbitrary selection of the winner. And it seems probable that success in angling is not altogether at least a matter of "pure or absolute chance," but that, on the contrary, the element of skill is in some degree a factor in success.

For a thorough discussion of the part that the element of skill has in relation to the element of "chance" in determining whether this latter element is present as a constituent element of a lottery, we again direct attention to the case of *State v. Globe Democrat Publishing Company*, supra.

In that case the newspaper ran a series of cartoons, each one of which was designed as to suggest the name of a famous or notorious personage well known to the public. It was designated as a "Famous Names" contest. The winner of that contest would be that individual who, in the greatest number of instances, correctly deduced the name intended by the designer of the cartoon to be suggested by the cartoon. The appellant maintained that success in this contest would be to a dominant extent influenced by "skill, knowledge, experience, ingenuity, observation, and judgment of the contestants * * *."

Of this matter of skill and chance, the Missouri Supreme Court, in the above case, stated, l.c. 713:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. It is conceded that the first two of these were present in the 'Famous Names' contest, here involved, the sole question being whether the third element - chance -

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was there. In England and Canada where the 'pure chance doctrine' prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. 38 C.J. sec. 5, p. 291; 17 R.C.L. sec. 10, p. 1223; Waite v. Press Publishing Ass'n. 155 F. 58, 85 C.C.A. 576, 11 L.R.A. (N.S.) 609, 12 Ann. Cas. 319. Hence a contest may be a lottery, even though skill, judgment, or research enter therein to some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

The Court also stated at l.c. 717:

"It is impossible to harmonize all the cases. But we draw the conclusion from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. In other words, the rule that chance must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense. This was directly decided in Coles v. Odhams Press, Ltd., supra, when it was held the question was not to be determined on the basis of the mere proportions of skill and chance entering in the contest as a whole.

"The same thought is reflected in Eastman v. Armstrong-Byrd Music Co., supra, where it was stated that, if a contest 'rests upon a determination in whole or in part by chance,' it is a lottery; and in Commonwealth v. Theatre Advertising Co., 286 Mass. 405, 410, 190 N.E. 518, 520, which proceeds on the theory that the true inquiry is whether chance inheres in the contest, or whether it is merely incidental;

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and in *Horner v. United States*, 147 U.S. 449, 459, 13 S.Ct. 409, 413, 37 L.Ed. 237, where a scheme for selling bonds was held a lottery because 'the element of certainty goes hand in hand with the element of lot or chance, and the former does not destroy the existence or effect of the latter.' In the instant case it stands conceded that at the beginning of the 'Famous Names' contest the cartoons were comparatively simple and the list of suggested titles was short. This made the contest inviting to entrants. But toward the end the cartoons became more 'subtle' and as many as 180 titles had to be considered. It was a weeding out process, undoubtedly; and if chance inhered in the solution of these latter cartoons, though only a few of them, and eliminated a large number of contestants, then it must be said the result was influenced by chance."

It appears to us that the element of chance is less, and the element of skill is greater, in the "Famous Names" contest discussed above, than in a contest in which the winner will be determined by the size of a fish that he catches. But the Missouri Supreme Court held, in the case discussed above, that the element of chance was present in sufficient degree to constitute the general scheme a lottery; that the element of chance was the "dominant" element rather than skill. It, therefore, follows, assuming our first premise to be correct, that the element of chance is present in the instant case, that the instant case is therefore a lottery, since the elements of "consideration" and "prize", are also present, and that the proposed operation is therefore prohibited by law.

CONCLUSION

It is the opinion of this department that a contest in which entrants pay a cash consideration, and in which that entrant receives a cash prize who catches the largest fish within a specific period of time, is a lottery.

Respectfully submitted,

APPROVED:

HUGH P. WILLIAMSON
Assistant Attorney General


J. E. TAYLOR
Attorney General