

LOTTERY: An operation in a theater gives
DRIVE-IN THEATER: a prize to the driver of a motor vehicle, which
ATTENDANCE PRIZE: brings the most number of persons to the theater
on a specified night contains the elements of
prize, consideration and chance, and is therefore
a lottery.

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John M. Dalton



July 28, 1953

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John C. Johnsen

Honorable Raymond H. Vogel
Prosecuting Attorney
Cape Girardeau County
Farmers and Merchants Bank Building
Cape Girardeau, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your request:

"I would like an opinion with regard to the matter set out below.

"A drive-in theater gives an attendance prize to the driver of the motor vehicle which brings in the most persons to the theater. The persons in the vehicle pay admission to the theater and the prize is given sometime during the performance. Does this procedure violate any law?

"I was first approached about the legality of this matter on May 25, 1953. I advised the attorney who requested my opinion that it was not a violation of the lottery and gift enterprise statute. On June 5, 1953, your office directed a letter to the Honorable Robert A. Dempster, Prosecuting Attorney of Scott County, giving the opinion that the described procedure would be a lottery. I, therefore, asked the operator of a drive-in theater to desist from this procedure in view of your opinion and in the interest of uniformity.

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"I am unable to agree that the element of chance is present in the described procedure. It appears to me that the prize is an award to the person who brings the most persons to the theater and the award is not based on chance. Therefore, I would like to have a detailed and official opinion from your office with regard to this matter."

The question which we have to determine under the state of facts submitted by you is whether the procedure which you have outlined would be in violation of Section 563.430, RSMo 1949, which section reads as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

In the case of State ex inf. McKittrick, Atty. Gen., v. Gloye-Democrat Publishing Co., 110 S. W. (2d) 705, 1. c. 713, the Supreme Court of Missouri stated that:

"The elements of a lottery are: (1) Consideration; (2) Prize; (3) Chance."

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It is readily apparent that in the procedure which you outline the element of "prize" is present.

Let us now turn our attention to the matter of "consideration". In this regard we direct your attention to the 1938 decision of the Missouri Supreme Court in the case of State v. McEwan, 120 S. W. (2d) 1098, in which the Court stated, at l. c. 1100:

"* * * Courts have uniformly held that the scheme of 'bank night' is a lottery when the participants therein are limited to those purchasing tickets to the theater. * * *"

At l. c. 1102, the Court stated:

"In 38 C. J. 292, Sec. 7, it is said: 'Whatever may be the nature of the consideration required it may be given either directly or indirectly. The benefit to the person offering the prize does not need to be directly dependent upon the furnishing of a consideration.'"

In view of the above, we believe that the element of "consideration" is present in the procedure which you outlined to us.

The final question which we have to determine is whether the procedure which you outline contains the element of "chance" within the meaning of that word as a constituent element in a lottery.

For a thorough discussion of this matter we again direct attention to the Globe-Democrat case, supra. At l. c. 713, et seq., of that opinion, the court stated:

"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 -- was there. In England and Canada where the 'pure chance doctrine' prevails a game or

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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. 5, page 291; 17 R.C.L. § 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 thereinto in some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

And further, at 717, the Court stated:

"Further, we are convinced the question whether the element of chance was present must be viewed from the standpoint of the nearly 70,000 persons who entered the contest in response to the advertising thereof; and that it is not to be measured by any absolute or technical standards. As was said in Coles v. Odhams Press Ltd., supra, 'The competitor is the person to be considered'. In the instant case the public was informed that any one might win; that no special skill, training, or education was required; and that an opportunity was offered to gain some 'easy money.' It is true reference to the possibility of children's winning was omitted from the later advertising, but aside from that hope was held out to the general public. That being true, whether chance or skill was the determining factor in the contest must depend upon the capacity of the general public--not experts--to solve the problems presented."

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In the instant case a prize is given to the driver of the motor vehicle bringing the most persons to the theater on

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on a specified night. Specifically, the term "motor vehicle" could include anything from a motorcycle, capable of carrying, at the most, two persons in addition to the driver, up to and including a transport truck capable of carrying 50 or 60 people. Thus, we see that the use of the term "motor vehicle" is loose, vague, and indefinite, leaving to chance the particular manner in which a contestant may elect to enter this contest. In view of these facts and of the law stated above, it is the opinion of this department that the element of "chance" is here present, and that in as much as the other two necessary elements of "prize" and "consideration" are also present, the operation which you described is a lottery and is therefore illegal.

CONCLUSION

It is the opinion of this department that an operation whereby a drive-in theater gives a prize to the driver of the motor vehicle which brings the most number of persons to the theater on a specified night contains the elements of prize, consideration, and chance, and is therefore a lottery.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Hugh P. Williamson.

Very truly yours,

JOHN M. DALTON
Attorney General

HPW/mv