

GAMBLING - "Bank Night"

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March 27, 1935



Honorable J. C. McDowell
State Senator
Jefferson City, Missouri

My dear Senator:

We have your request of March 20, 1935 for an opinion, which request is as follows:

"There was introduced into the House this Session House Bill No. 203, which endeavored to make it unlawful for a picture show or place of amusement to maintain any drawing in the nature of a lottery or gift enterprise in connection therewith, or any so-called 'bank' or 'cash night' at which any money or any other thing of value shall be distributed either by ticket or by registration or by any other method or identification. Some of my friends are interested in knowing whether what is known as 'Bank Night' in motion picture theaters is lawful under our Missouri Statutes. As I understand the plan, in brief, provides that the operator of a motion picture house shall decide upon the amount of money that is to be awarded, and arrange with a bank to guarantee the payment of the award to those to whom the award is made. It provides that a registry book shall be kept at or near the theater, but outside of the box office, where any adult person, without limitation or restriction whatsoever, and without any charge, without the purchase of a theater ticket, without a token of admission and entirely

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free, and without any qualification of any character, may enter his name in the registry book as a qualified participant. The theater ticket seller has no registration book or equipment, and the purchase of a ticket does not qualify the purchaser as a participant. No one is permitted or required to purchase a ticket in order to register. The holder of a ticket of admission who does not enter his name in the registry book is not a qualified participant. Only those persons who register are qualified. In other words there is no relation or dependency between the purchase of a ticket and the qualification of a participant. The plan provides that placards or banners both inside and outside the theater shall inform the public that registration for 'Bank Night' is absolutely free. It provides that the party registering must register his own name and only once, and that one registration will be good for all 'Bank Nights', and that the signature must indicate whether it is Mr., Mrs. or Miss, and that it must be a signature and not printed, and that theater employees or relatives are not allowed to participate. It provides that the money to be given away or awarded shall be deposited each week, in advance of the 'Bank Night', in the bank account in the Bank in which proper arrangement has been made. The numbers appearing on the register where the party signs serves only as an identification number. These numbers are to be placed in an open container, and one number is drawn out on 'Bank Night', and this one is given to a committee of three men who take the number and refer to the register book and then announce the name of the winner by announcing the name either Mr., Mrs. or Miss, and also the address. If the party is properly identified, then the money will be paid to him or her at a certain designated hour next morning. If the party whose name is called on 'Bank Night' does not appear (only one name is drawn on each 'Bank Night'), then the amount of the account is carried over to the next week, and this is added to the current week's account, etc. The drawing is made by a child, blind-folded, who takes from the container one number and this number is handed to

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the judges. At the same time, the party's name is called in the lobby of the theater and also in front of the theater. A reasonable time is given, and if the party whose name is called does not appear from the inside of the theater or from the crowd outside, then announcement is made that the bank account which has not been claimed will be added to the following week's account. The number called is returned to the container, whether it wins or not. The 'Bank Night' arrangement specifically provides also that the participant does not have to be in the theater at the time of the drawing or hold a ticket of admission in order to participate. If the holder of the number drawn happens to be outside the theater, he is permitted to enter without charge to claim the award.

"I am reliably informed that this plan is now in operation in a majority of the States of the United States and I have had called to my attention the opinion of the Attorney Generals of two of our adjoining States, to wit: Iowa and Kansas, holding that such a plan is lawful and not prohibited by the laws of those states, specifically that it is not a lottery. The following cases bearing on the question have been called to my attention: People v. Cardas, 28 Pac. (2) 99 (California); Cross v. People 18 Colo. 321, 32 Pac. 321; Yellowstone Kit v. Alabama, 88 Ala. 196, 7 L.R.A. 599; Holt v. Rural Weekly Co. (Minnesota) 217 N.W. 345.

"Will you, therefore, give me your opinion whether the operation of the 'Bank Night' plan in the manner outlined above, where the participants neither pay nor promise to pay or surrender anything of value for the right to participate, and the element of consideration is entirely lacking, is within the prohibition of the law relating to lotteries, or is a legitimate advertising plan."

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We find that Section 4314, R. S. Mo. 1929 makes it a criminal offense to establish a "lottery" or "gift enterprise" in this State. It appears that this section was passed in pursuance of the constitutional mandate contained in Article XIV, Section 10 of the Missouri Constitution, which provides as follows:

"The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

The three essential elements to bring any activity within the provision of the lottery law are set out in *State v. Emmerson*, 1 S. W. (2d) 109 to be, (1) consideration, (2) prize, (3) chance. This makes the Missouri lottery law conform to court holdings in other states. In *Naugh v. Porter*, 157 Va. 451, 161 S.E. 242, the court held that a scheme whereby an auctioneer gave tickets for a prize drawing on an automobile in order to attract a crowd to his auction was a lottery. From your letter, it appears that the money to be given away constitutes the prize; that the method of giving it away by selecting a winner by lot or drawing constitutes the "chance" element essential to every lottery.

The third element, "consideration", is therefore the last one to be considered in this opinion. It is not necessary that people should pay directly or purchase a ticket in order to furnish the element of consideration. In *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579, the court said:

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"The question of consideration does not mean that pay shall be directly given for the right to compete. It is only necessary that the person entering the competition shall do something or give up some right. The acquisition and sending in of labels is sufficient to comply with that requirement. Nor does the benefit to the person offering the prize need to be directly dependent upon the furnishing of a consideration. Advertising and the sales resulting thereby, based upon a desire to get something for nothing, are amply sufficient as a motive."

In your request, it is stated that the "Bank Night" arrangement does not require the participant to be in the theater at the time of the drawing or to hold a ticket of admission; that if the holder of the winning number happens to be outside of the theater, he is permitted to enter without charge to claim the award. In Featherstone v. Independent Service Station, 10 S. W. (2d) 124 (Texas Civil Appeals), filling stations, for the purpose of increasing trade and drawing business from competitors, gave away tickets to customers and non-customers, and the scheme was held to be a lottery. In State of Washington v. Danz, 250 Pac. 37, the Supreme Court of Washington held that it was immaterial that free tickets to a drawing were offered persons not purchasing theater tickets.

In People v. Cardas (1933), 28 Pac. (2d), 99, the California lottery law defined lottery as,

"any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, * "

- Penal Code, Section 319.

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Virtually the same definition of a lottery is found in Section 2464 Rem. Comp. Stat. of Colorado, involved in the case of State v. Danz, (1926) 250 Pac. 37. In People v. Cardas, supra, the California Superior Court, Los Angeles County, held that a motion picture theatre operator's scheme to give away steamship excursion tickets as prizes to holders of lucky tickets distributed in the vicinity of, and announced in or at the entrance to the theatre, was not a lottery. The Supreme Court of Colorado, (1893) in Cross v. People, supra, in construing the same definition of a lottery, held that the gratuitous distribution of business cards to all persons calling or writing for same entitling the holders to a chance on a piano was not a lottery, since no valuable consideration was paid. Yellowstone Kit v. Alabama, 7 L. R. A., 599 is a similar case wherein consideration is limited to a direct payment of consideration. In that case, the court held there was no consideration involved in the matter.

An examination of the Missouri statute involved will reveal that it is much broader than the penal codes, California, Colorado, Alabama, in that the Missouri statute makes it a criminal offense to establish a lottery or gift enterprise unfettered by any definitions or limitations as to the essential elements of a lottery.

Generally, the term "consideration" is defined as being a benefit to the party promising, or a loss to the person to whom the promise is made. 12 C. J. 525.

The general rule is stated in 33 C. J., p. 297, Section 17 as to the importance of consideration, in the following language:

"It is obvious that where a gift enterprise lacks the essential element of chance or of consideration, it is not a lottery, *"

A reference to the Missouri statute, 4314, will reveal that it includes gift enterprises as well as lot-

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teries, and it would therefore appear that no consideration was necessary for a gift enterprise. However, from your letter it is apparent that the holder of a prize-winning number must go to the theatre, at the proper time, and wait outside for the time of the drawing so as to be available in the event he holds the lucky number. If the ticket holder travelled 100 miles in order to be present in front of the theatre for the drawing, no one would question but what his long journey was sufficient consideration for the prize offered by the theatre. Under such conditions, the necessity of his going to the theatre is sufficient consideration. It is immaterial as to how much consideration he pays, whether it be 1¢ or \$100.00, or whether he travels across the street or 100 miles in order to be present at the drawing; in the final analysis, he is giving consideration for the chance to win a prize.

The giving away of tickets with each newspaper subscription which qualifies the holder to receive a prize, and the awarding of the prize by lot has been held in this State to constitute a lottery. State v. Munford, 73 Mo. 647.

In view of the above and foregoing, it is therefore the opinion of this office that the scheme for "Bank Night" as outlined in your letter constitutes a lottery in violation of the criminal laws of this State.

Yours very truly,

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APPROVED:

ROY McKITTRICK
Attorney General

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