

LOTTERIES:

Gift auction at which merchandise certificates
are bid not a gift enterprise or lottery.

November 15, 1939

Mr. Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri



Dear Sir:

This department is in receipt of your request
for an official opinion which reads as follows:

"Twenty merchants in Butler are buying fake paper money that varies in denominations. With each purchase by a customer, an amount in this fake money equal to the amount of the purchase is given to the customer. In other words, a 10¢ purchase by a customer entitles him to 10¢ worth of the fake money. Every two weeks these merchants will have what they call a fake money auction. At this auction, each merchant will give two gifts from his store. An auctioneer will be employed and he will auction off all of these gifts to the highest bidder who will, of course, bid with the fake money that he has received from his purchases at the stores.

"I, personally, am a little doubtful about this scheme but I do not believe that it will constitute a lottery, mainly because there is no direct element of chance present in the scheme. The inducement to purchase at the stores carrying this fake money is, of course, present,

but the auctioning off of the articles to the highest bidder who must use the fake money in payment does not seem to me to constitute a valid element of chance. If a party has not secured enough of the money by the time the first auction is held, and is thus unable to purchase anything at the auction, he can, of course, retain what money he has, add to it, and bid at the next auction. Whether or not a customer receives one of the gifts does not depend upon any lucky ticket or chance but merely upon the amount of money he may have and that will depend upon the amount of purchases he makes at these stores."

Section 10, Article XIV of the Constitution of Missouri provides:

"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."

Section 4314, R. S. Missouri 1929 (Mo. St. Ann. Section 4314, page 3002) provides:

"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."

It will be noted that both the Constitution and statute prohibit any scheme in the nature of a lottery; and it has been held that within their meaning and intent a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. *State v. Emerson*, 318 Mo. 633, 1. S. W. (2d) 109.

The word has no technical meaning in our law. Lotteries are judicially denounced as especially vicious because by their very nature they are public and infect the whole community. They prey upon the credulity of the unwary and widely arouse and appeal to the gambling instinct. *State ex rel. Home Planners v. Hughes*, 299 Mo. 529, 253 S. W. 229; *State v. Becker*, 248 Mo. 555, 154 S. W. 769.

The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. *State ex Inf. McKittrick, Attorney General v. Globe-Democrat Pub. Co.*, 110 S. W. (2d) 705. Your request concedes that the first two of these are present in the scheme here involved, the sole question being whether the third element--chance, is present.

A "gift enterprise" is a scheme under which goods are sold for their market value but by way of inducement each purchaser is given a chance to win a present or prize. *Russell v. Equitable Loan, etc.*, 129 Ga. 154, 58 S. E. 881,

Thomas, Nonmailable Matter, page 85. However, as noted in 38 C. J. 297, "It is obvious that where a gift enterprise lacks the essential element of chance * * * * it is not a lottery. * * * * "

We find no cases in Missouri in which this exact scheme, or one similar thereto, has been before the courts for determination as to whether or not it is lottery. Foreign jurisdictions are almost uniform in holding that a scheme by which the award depends upon votes is not a lottery because the absence of the element of chance.

In Strand Hardware Co. et al. v. Moose et al., 224 N. W. 158, the scheme, as related by the court, was as follows:

"* * * The purchaser of merchandise received votes proportionate to the amount of his purchase or bought coupon books and might cast them for any person who had entered as a contestant. Payments on overdue accounts entitled the one paying to votes on a specified basis. * * * * * * * * * * "

The person receiving the highest number of votes was declared the winner. The court said, l. c. 159:

"Vote contests or popularity contests similar to the one before us usually have not been held lotteries within like statutes. The reason assigned is the absence of the element of chance."

In State v. Lindsay, 2 Atl. 201, which was decided by the Supreme Court of Vermont in November, 1938, the scheme in question was as follows, l. c. 202:

"The campaign consisted of giving tickets or ballots to the several merchants and business men engaged therein, which they in turn gave to customers with a number of votes, so-called, written thereon, this

number varying in proportion to the amount purchased at the usual retail price, ten votes being given for each one cent's worth of merchandise so purchased. The customer in turn wrote his name, or the name of any person not engaged in sponsoring or promoting the campaign, on the ballot and deposited the same in a box kept at each store for that purpose, the person whose name appeared on the ballot becoming thereby entitled to the indicated number of votes.

"At intervals the ballots were collected from the several boxes by the respondent or his agents and taken to the contest headquarters where they were counted, the totals for each contestant as disclosed by such count being later posted at the stores participating in the contest. At the close of the contest the person who had received the greatest number of votes was to receive the first prize which was a Plymouth automobile. Those having the second, third and fourth largest number of votes respectively were also to receive prizes."

The court said:

"A scheme by which a merchant or association, on selling merchandise at regular prices, issues to purchasers ballots entitling them to express their choice a certain number of times, according to the price of articles bought, in favor of any person competing for prizes to be given to the persons receiving or holding the greatest number of votes, is not a 'lottery.'"

Other jurisdictions which have held schemes similar to the ones described above and very much like

the one in question not to be within the inhibition of the lottery statute, are: Quatsoc v. Eggleston, 42 Cr. 315, 71 P. 66; Commonwealth v. Jenkins, 159 Ky. 80, 166 S. W. 794, Brenard Mfg. Co. v. Jessup and Barrett Co., 186 Iowa 872, 173 N. W. 101; Dion v. St. John Baptiste Soc., 82 Me. 319, 19 A. 825; Whitman v. Fournier, 233 Mass. 154, 125 N. E. 303; Conqueror Trust Co. v. Simmon, 62 Okla. 252, 162 P. 1098; Millsaps v. Urban, 116 Ark. 90, 171 S. W. 1198.

CONCLUSION.

In view of the above authorities it is, therefore, the opinion of this department that a scheme whereby a customer of a merchant is given a ten cent certificate with every ten cent purchase which certificate can be used to bid upon merchandise at an auction every two weeks is not a lottery or gift enterprise within the meaning of Article XIV, Section 10 of the Constitution and Section 4314, R. S. Missouri 1929, because the element of chance is not present.

Respectfully submitted

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APPROVED:

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