

LOTTERIES)
GAMBLING)

Game of Dartaway is lottery.

December 7, 1949

FILED

12/22/49

Honorable J. F. Allebach
Prosecuting Attorney
Gentry County
Albany, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion on the question of whether or not a game known as "dartaway" is a lottery. According to the enclosed memorandum the game is played as follows:

"1. Registration Books.

"Each book is called a volume. The volumes are designated by a letter of the alphabet, as 'Volume A'.

"Each volume has 26 pages, lettered from A to Z.

"Each page has 26 lines, lettered from A to Z.

"2. Board.

"Displayed on the front side of the board are a series of concentrically arranged circles divided by radial lines to provide lettered spaces.

"The spaces in the inner circle are lettered to correspond with the letters by which the volumes are designated.

"The spaces in the other circles are lettered to correspond with the letters designating the pages and lines in a volume.

"3. Darts.

RULES OF THE GAME

"The register or volume is placed at the theatre entrance available to the public.

Any person is privileged to sign his name on one of the lettered lines in the volume. When the person or individual does this, he is given a slip of paper on which is written the letter of the volume, letter of the page and letter of the line on which the person has signed his name.

"At the time set for the playing of the game, at which time the theatre is open to the public, persons in the audience and whose name appear in the register book are asked to volunteer to play the game.

"If more than one person volunteers--then a quiz is held on a historical, geographical, or current events subject until only one person among the original volunteers is left.

"The person thus volunteering or selected through the quiz program, is permitted to throw as many as three darts at the board in an attempt to hit the space in the inner circle which contains the letter of the volume in which the name appears.

"If the volunteer is successful in hitting the space containing his volume letter before the supply of darts furnished him is exhausted, he is then permitted to throw as many as three darts in an attempt to hit the space in the other circles containing the letter of the page whereon his name appears.

"If the volunteer is successful in hitting the space containing his page letter before the supply of darts furnished him is exhausted, he is then permitted to throw as many as three darts in an attempt to hit the space in the other circles containing the letter of the line whereon his name appears.

"If the volunteer is successful in hitting the space containing the letter of the line whereon his name appears then he is awarded the posted prize of \$15.00.

"If he is unsuccessful but hits a space in the other circles containing a letter then the individual whose name appears on the line containing the letter hit is invited to come forward and attempt to hit by means of two darts, two letters on the board which will spell an English two-letter word, like "to", "we", "so", etc. If successful in "spelling" a two letter word this individual is given the \$15.00 prize.

"If the volunteer fails to hit his volume letter with three darts furnished him, the game ends and the prize is carried over and added to the prize to be awarded at the next playing of the game. If the person whose name is called is not in the theatre, the prize is not awarded, but carried over to the next playing.

"If the party is not in the theatre, there will be no prize."

Section 4704, R. S. Missouri, 1939, provides 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. v. Globe-Democrat, 341 Mo. 862, the Supreme Court of this state in defining a lottery said at l.c. 875:

"The elements of a lottery are: (1) consideration; (2) prize; (3) chance. * * *"

It is obvious that there is a prize in this case. In the case of State v. McEwan, 120 S.W. (2d) 1098, the Supreme Court in discussing the question of consideration said at l.c. 1101:

"We like the expressions of the United States Circuit Court of Appeals, Tenth Circuit, in the case of Affiliated Enterprises v. Gantz, 86 F. 2d 597, loc. cit. 599, involving an injunction proceeding to restrain an infringement of a copyright on 'bank night.' The scheme of 'bank night' there was the same as described in the information under consideration. The court said: 'The plan or system portrayed in the copyrighted sheets discloses more than once that an admission charge must not be exacted as a condition entitling one to participate in the drawing. Everyone, if he holds or does not hold or buys or does not buy a paid admission ticket to the show, is entitled to register at the entrance or in the lobby of the theatre, and he is thereupon designated by number opposite his name and must be permitted to have an equal chance with every other registrant in drawing the prize. This seems to be a subterfuge to escape the stigma of being a lottery. It is apparent that no one would give prizes if all participants in the drawings paid no admission fees. Show places are conducted for profit. The plan would be wholly worthless as a money making scheme, both to lessor and lessee. It is further apparent that when non-paying participants and those who pay admissions are each given the same chance at drawing the prize the lucky number may represent one who paid to get in only because of his interest in the drawing. Indeed, that is more than probable. Then

how can it be maintained that the supposed evasion converted a lottery or gambling device into a mere altruistic opportunity and occasion to bestow a gift. If not within the literal definitions of those vices, plaintiff's plan and system is too closely akin to have the protection and assistance of a court of equity.'"

We believe it to be clear from this quoted provision that the Dartaway game has the element of consideration. The Supreme Court in the case of State ex inf. v. Globe-Democrat, cited supra, said at l. c. 881:

"This tedious review of the cases shows the ingenuity with which efforts have been made to circumvent lottery laws by devising contests for a consideration which purport to be and in some degree actually are contests of skill, although their obvious, intended and widely disseminated appeal is to chance--to the hope of winning by shrewd and lucky guessing disproportionately more than the contestant has put into the enterprise. These schemes have always been branded as mischievous. Indeed, an oft-quoted statement from Long v. State, 74 Md. 565, 570, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268, is that 'it is very difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan, short of a gratuitous distribution of property, which has not been held by the courts of this country to be in violation of the lottery or gaming laws in force in the various States of the Union.' Without going that far, it is safe to say that for the public good such schemes should be scanned by the courts with a scrutinous eye."

In such case the court further laid down the rule that in determining whether or not a lottery existed depends upon whether or not chance or skill is the dominant fact. If chance is the dominant fact, a lottery exists.

The court said at l. c. 875:

"The elements of a lottery are: (1) consideration; (2) prize; (3) chance: * * * 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 Assn., 155 Fed. 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. * * *"

In the case of *Hernandez v. Graves*, 4 S.W. (2d) 113, the Supreme Court of Florida held that a machine operated by a coin, in which the contestant had twenty seconds to select a correct answer, and if successful, received a pay-off, violated the Statute of Florida prohibiting slot machines. The court said at l. c. 114:

"In this case the machine or device is a slot machine or device that is adapted for use in such a way that its operation as the result of the insertion of a coin involves an element of chance for the operator to win a stated cash prize if he correctly answers an unknown or unpredictable question in twenty seconds after it is disclosed by the machine, or to lose the coin inserted in the machine if the player does not, within twenty seconds after it is shown, correctly answer an unpredictable question posed by the machine and not known to or controlled by the player. Such operation of the machine affords an element of chance or unpredictable outcome of the operation of the machine involving the winning of a stated cash prize or the loss of the coin inserted in the machine. This

necessarily is a violation of the quoted statute. See *Weathers v. Williams*, 133 Fla. 367, 182 So. 764; *Eccles v. Stone*, 134 Fla. 113, 183 So. 628. The question is made known only after the coin has been inserted in the machine."

In the case of *Commonwealth v. Lake*, 57 N.E. (2d) 923, the Supreme Court of Massachusetts, Essex, described the game there in question as follows, at l. c. 924:

"The alleged lottery was carried on by means of machines known as 'rotary merchandisers' set up in a store called 'Sportland' in charge of the defendant. This machine is about four feet high and thirty inches square. The top cover and the upper portions of the four sides are of glass, so that the 'playing field' in the upper part of the inside is visible. In the center of the 'playing field' is a hole, about five and one half inches in diameter, around which is 'a green felt area.' Surrounding this is 'another area of green felt in the nature of a rim about six inches wide and flat.' When the machine is played this rim revolves around the center area 'in the manner of a turntable.' Upon the green felt areas are assorted prizes, such as cameras, watches, whistles, tape measures, and other objects. When a five cent piece is inserted in a slot the rim or 'turntable' slowly revolves with the objects upon it, but the operator can stop it at any point by pressing a button on the outside of the machine. When the rim is stopped in this way, a horizontal arm attached at its inner end to an axis at the rear of the machine automatically swings out across the 'playing field.' From the outer or free end of this arm is suspended a 'finger' the bottom of which, about one inch square, is the 'pusher.' As the arm swings, the 'pusher' travels in an arc at a height of about a quarter of an inch over the surface of the rim and the inner area up to and across the hole in the center.

The object of the game is 'to have the "pusher" on the horizontal arm push in front of it the desired prize' from the 'playing field' into the hole, whence the object is delivered to the player through a chute. The pusher always travels in the same arc."

The court said with respect to this game at l. c. 925:

" * * * Moreover, in determining which element predominates, where the game is not one of pure skill or of pure chance, some courts have held, we think rightly, that it is permissible in appropriate instances to look beyond the bare mechanics of the game itself and to consider whether as actually played by the people who actually play it chance or skill is the prevailing factor. State v. Globe-Democrat Publishing Co., 341 Mo. 862, 882, 110 S.W. 2d 705, 113 A.L.R. 1104; * * * So here, even if it might be possible by long practice to acquire a substantial degree of skill in stopping the revolving rim at a point or points where the swinging arm would work the desired objects toward the hole, the jury might well find that few, if any, of the persons who would play the machine at a place of public resort would be likely to possess any appreciable degree of skill; that to the great majority of players the game would be primarily a game of chance; and that the appeal of the game to the public would be a gambling appeal, with all the evil consequences of a lottery. Whether the game was predominantly one of chance or skill was a question for the jury."

In the case of People v. Settles, 78 Pac. (2d) 274, the Appellate Department, Superior Court, Los Angeles County, California, in discussing a dart game said at l. c. 277:

" * * * But here it appears that after covering a row of numbers on his card a player was required to throw a dart at a

circle upon a board (a four-inch circle for men, a six-inch circle for women), and in order to win must land his dart within the circle in three throws. This introduced a new element into the game. Considerable evidence was introduced upon the question whether the landing of the dart within the circle in three throws was a matter of chance or skill. Upon this evidence the jury might reasonably have found either way. If they found that the landing of the dart in the circle was entirely a matter of skill, or that it depended more on skill than chance, they might then have concluded further that the skill so exerted, rather than the chance which covered the row of numbers, was the dominant element of the game, and acquitted the defendants."

We believe, therefore, that the game of Dartaway, as described in your opinion request, constitutes a lottery, if the dominant element in such game is one of chance rather than of skill.

CONCLUSION.

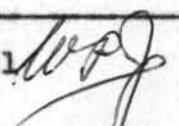
It is the opinion of this department that the game of Dartaway, as described in the opinion request, constitutes a lottery, if the dominant element, as such game is played, is chance instead of skill.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



CBB/feh