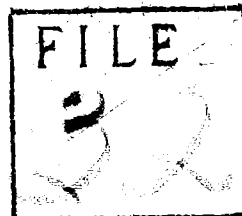


LOTTERIES: Tickets given with each sale of merchandise and weekly drawing had thereon, is lottery. The fact that tickets may be obtained upon request does not change rule.

October 21, 1941

Honorable A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri



Dear Sir:

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

"As Prosecuting Attorney of Moniteau County, Missouri, I have before me a problem on which I desire some help from your office. I would like to have a written opinion covering the following state of facts.

"Last week a man representing a sales promotion organization in Texas, came to Tipton, Missouri, and organized the merchants of that community to promoting a sales appreciation week. The following is the method used: it costs each merchant \$5.50 to belong to the association in Tipton. The merchants are given a treasure-chest coupon. Each merchant passes out to his customers a coupon with each purchase of merchandise in his store. A 25¢ to 99¢ purchase is given a 5% coupon; for every \$1.00 to 1.99 purchase, he is given a 10% coupon; for each \$2.00 to 2.00 purchase, he is given a 20% coupon; for a \$3.00 to \$3.99 purchase, he is given a 30% coupon; with each

\$4.00 to \$4.99 purchase, he is given a 40% coupon; for each \$5.00 to \$10.00 purchase, he is given a 50% coupon. The customer gets the coupon, turns it over and signs his name and address on the reverse side and places it in a box. Each merchant, belonging to the association, puts into a 'Treasure Chest' a dollar to three dollars each week, depending upon his rated gross annual sales of his business. On each Wednesday of the week, there is a drawing on the public street of Tipton. All the merchants put all of the coupons in one box, shake them up and draw a coupon therefrom until there is one winner. The highest prize that can be given each week at the drawing is 50% of the 'Treasure Chest.' The balance of the 'Treasure Chest' is carried over until the following week with the weekly contributions of the merchants added to it. By this manner, the 'Treasure Chest' is increased and if carried over a period of weeks, it will have several hundred dollars. On Wednesday, immediately before the drawing, the man in charge makes an announcement that if there is anyone in the crowd who does not have a coupon in his possession, if he will come forward he will be given a 5% coupon ticket. This is done because they have been told that the giving of the 5% coupon ticket to anyone in the crowd who does not have one will take the scheme out of control of the lottery laws in the State of Missouri.

"The first question is, is the sales promotion a violation of the lottery laws in the State of Missouri without the giving of the tickets gratis to members of the crowd who do not have a ticket.

"Second question: if they give a 5% 'Treasure Chest' coupon to any individual who asks for

one without requiring him to make a purchase, will that feature of the scheme avoid the lottery laws in the State of Missouri."

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 4704, R. S. Mo. 1939, 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."

A lottery has been defined by our courts as 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 elements of a lottery are (1) prize, (2) chance, and (3) consideration. *State ex inf. McKittrick, Attorney-General v. Globe-Democrat Publishing Co.*, 110 S. W. (2d) 705. From the facts presented in your request there is no doubt but that the first two of these are present in the scheme here involved, that is, prize and chance. The sole question presented is whether the third element, that is, consideration, is present.

In regard to your first question, we believe that all courts are in accord with the view that a scheme that features a chance drawing for pay patrons only, is a lottery even though the price or cost of the chance is completely merged and concealed in the regular price of the goods. As was pointed out in *Williams on Lotteries*, page 126:

"the courts look at the scheme as a whole and reason with respect to consideration that the price received from the customer is a consideration for both the thing sold and the chance in the drawing, or simply that a scheme which uses prize and chance to encourage sales contains all the elements of a lottery even though the sale price is not thereby increased."

In support of this statement there are cited the Missouri cases of *State v. Emerson*, 318 Mo. 633 and *State ex rel. v. Hughes*, 299 Mo. 529.

Schemes practically identical with that set out in your first question have been held lotteries in the following cases: *State v. Powell*, 170 Minn. 239, 212 N. W. 169; *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107, *Featherstone v. Independent Service Station Ass'n. (Tex.)*, 10 S. W. (2d) 124; *Chamber of Commerce v. Kieck*, 128 Neb. 18, 257 N. W. 493;

People v. Bloom, 227 N. Y. S. 225 and Market Plumbing and Heating Supply Co. v. Spangenberg, 112 N. J. L. 46, 169 A. 660.

The courts, however, have not been in accord in respect to their views about the facts presented in your second question. While there is no doubt, as pointed out above, that where only those persons participate who purchase merchandise from the persons conducting the scheme, that this constitutes a lottery, still, where a person is entitled to a ticket or chance free and upon request, the question of consideration then becomes more difficult.

This type of gift enterprise lottery appeared first in the United States in 1889 (Yellowstone Kit v. State, 88 Ala. 196). The scheme is usually conducted by advertising free participation which is in fact, in most cases, accompanied and restricted by conditions that are favorable to pay patrons and unfavorable to non-pay patrons, thereby inducing many persons to become pay patrons.

Williams in his recent work on Lotteries, says (page 119):

"The trick in such schemes is to assign numbers without charge to prospective patrons on the pretense that they represent free chances in a drawing by lot or chance and at the same time surround the participation with conditions and restrictions more favorable to cash patrons than to non-cash patrons thereby producing two classes of chances--the bare chances which may be had without the payment of money and the better chances which cannot be acquired without the payment of money."

The principal case upon this "flexible-participation" lottery is that of Willis v. Young, 1 K. B. 448, which was decided by the Court of King's Bench in 1907. In that case a newspaper made a general distribution of numbered medals to

the homes of the people throughout London. Each medal carried a serial number. A drawing was had each week and the winning numbers were published in a newspaper. Many places were maintained in London where persons could read the paper without having to buy a copy and winners were given several days in which to claim their prizes. The Chief Justice in the close of the opinion made the pointed inquiry as follows:

"Looking at the whole of the circumstance of the case is it not plain that the circulation of the paper increased by reason of the people getting these medals?"

The court held the scheme to be a lottery under the theory that the opportunity to participate in the drawings were paid for in the mass by the general body of the purchasers of the paper even though many individual participants did not purchase the paper.

This rule is followed in the Federal Courts of the United States (Central States Theatre Corp. v. Patz, 11 Fed. Supp. 566), the Post Office Department (George Washington Law Review, May, 1936, p. 482) and in the majority of the states (103 A. L. R. 870; 57 A. L. R. 424).

In State v. McEwan, 120 S. W. (2d) 1098, this rule was followed by our Supreme Court. The so-called "free number feature" of the scheme was called "the goat's skin upon the hands of Jacob." It is there in an attempt to fool the law." Judge Westnues pointed out that:

"The test is whether that group who did pay for admission were paying in part for the chance of a prize. * * * * *
It cannot alter the fact that the operator may have given free chances to some without the purchase of tickets; even so, the lottery scheme as to a gift enterprise was present to all the rest, and this fact did not prevent it from being a lottery."

Oct. 21, 1941

In view of what has been said above we believe it is the rule in Missouri that a scheme which is a lottery in all its essentials, does not lose its characteristics as such if some persons are given free tickets for the reason that the scheme is a lottery as to the great majority of those participating.

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Conclusion

It is, therefore, the opinion of this Department that a scheme whereby patrons of business establishments are given numbered chances with each purchase of merchandise, which chances every week are drawn from a receptacle, and the persons whose numbers are drawn receive a prize, is a lottery under the Constitution and statutes of Missouri, and the fact that certain persons are given free chances does not in any way alter the makeup of the scheme so as to make the same not a lottery.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

VANE C. THURLO
(Acting) Attorney-General

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