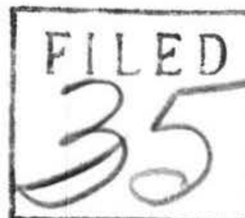
LOTTERIES: Card "Win the Bank" on which lines are drawn through numbers, and persons having highest total receiving a prize is a lottery under Sections 4314 and 4315 R. S. Mo. 1929.

April 25, 1940



Honorable Waller W. Graves
Prosecuting Attorney
Jackson County
Kansas City, Missouri

Dear Sir:

The writer is in receipt of your request for an opinion based on the following facts as contained in your letter:

> "I hereby respectfully request an opinion of the Attorney General's office in regard to the interpretation of Sections 4314 and 4315, R. S. Mo. 1929, and Article 14, Section 10, of the Constitution, in relation to the enclosed pamphlet.
>
> "This pamphlet or entry blank offers a prize to the person obtaining the highest total figures from a selection of the sixty numbers set out on said blank. According to the rules of this contest, as described in said entry blank, apparently two of the essential elements of a lottery are present, to-wit: a prize, and a consideration, inasmuch as the winner, in order to obtain one of these entry blanks, must have purchased a ticket, and

> likewise must be present at the time the prize is awarded. However, the third element of a lottery, that is, the element of chance, is not apparent, inasmuch as the judges have no discretion in the awarding of the prize, the decision resting on a mathematical calculation.
>
> "I would greatly appreciate your interpretation of the above mentioned sections of the Statutes and the Constitution, as applied to this particular plan or scheme, which is described on the enclosed form, and whether or not, in the opinion of the Attorney General's office, this plan is in violation of the law and in contravention of the sections hereinabove referred to."

From an examination of the blank designated as "Win the Bank," we believe that this contest is conducted by theaters and moving picture shows. The card, and its manner of operation, appears to be innocent within itself. We must assume at the outset that the author of "Win the Bank" was thoroughly familar with the operation of what was commonly called "Bank Night," which received the death knell in the decision of State v. McEwan, 120 S. W.(2d) 1098. Ever since that decision there have been numerous schemes submitted to this Department in an effort to evade one of the elements of a lottery, to-wit, chance, prize, and consideration. Some have been so astute in their operation as to be classified as successful evasion.

The official entry blank for "Win the Bank" does not state what the price will be. However, there is one significant paragraph under the "Official Rules and Regulations" which we are quoting as follows:

"In case of a tie, then the prize will be divided equally between the tying contestants who are present in the theatre at the time the award is to be made. Those persons with the highest correct total who are not present at the time the Prize is to be awarded, automatically forfeit all rights and interest in the prize. If the contestant with the highest total is not present and there are no ties or, if there are ties, and none of the contestants with the highest total are present, the prize will be added to the prize offered for the following week and awarded on the highest total for the particular Numbers Bank designated for the following week."

The above paragraph, in effect, is very similar to the method used in "bank night." You state in your letter that the element of chance is the controversial point in the scheme. The Supreme Court in the case of State v. Globe-Democrat Publishing Co., 110 S. W. (2d) 705, reviews all of the cases with reference to lottery in the United States and Canada, and we shall not burden this opinion with the quotations from the various cases, but those interested would do well to read the long and exhaustive opinion by Judge Ellison. We quote Judge Ellison's conclusion with reference to the various cases (l. c. 717):

"It is impossible to harmonize all the cases. But we draw the conclusion from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part

> of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. In other words, the rule that chance must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense. This was directly decided in Coles v. Odhams Press, Ltd., supra, when it was held the question was not to be determined on the basis of the mere proportions of skill and chance entering in the contest as a whole."

And again (l. c. 717 and 718):

> "But such is not the true general rule. As was said in People ex rel. Ellison v. Lavin, supra, if a contest were solely between experts, possibly elements affecting the result which no one could foresee might be held dependent upon judgment; but not so when the contest is unrestricted. What is a matter of chance for one man may not be for another. And as Mr. Justice Holmes said in Dillingham v. McLaughlin, 264 U. S. 370, 373, 44 S. Ct. 362, 363, 68 L. Ed. 742, 'what a man does not know and cannot find out is chance as to him, and is recognized as chance by the law.' Obviously, if some abstruse problem comparable to the Einstein theory were submitted to the general public in a prize contest on the representation that no special training or

> education would be required to solve it, the contention could not be made, after contestants had been induced to part with their entrance money, that the element of chance was absent because there were a few persons in the world who possessed the learning necessary to understand it."

We think the above quotation means, in effect, that the rule that chance must be a dominant factor in determining whether a contest is a lottery, is to be taken in a qualitative or causative sense rather than in a quantitative sense.

It is difficult for this Department to pass conclusively on the question which you present for the reason that we are not familiar with the practical operation of "Win the Bank." But we remind you that the Globe-Democrat decision and the decision in the case of State v. McEwan, supra, show a decisive tendency on the part of the Supreme Court to view any scheme "with a scrutinous eye," for the public good, and that every scheme appears to be an effort "to fool the law." As an example of this we quote from Commissioner Westhues' decision in the McEwan case, supra, l. c. 1100:

> "Isaac was blind, and there is an old adage that justice is blind. But justice is only blind in so far as it does not make any distinction between litigants, be they of high or low degree, rich or poor, Jew or Gentile. Justice cannot distinguish one from the other. However, in detecting fraud and deception justice should have the vision to discover them in their true nature no matter

how well the design to deceive. The courts would be blind indeed if they could not see that the scheme described in the indictment is a deliberate plan to evade the lottery statute and at the same time attain the result which the statute has prohibited. The history of these cases conclusively shows that the entire scheme is a deliberate plan to evade the lottery statute. 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. Respondent concedes that to be the law. The plan, as described in the information, attempts to eliminate one of the elements of lottery, that of consideration. In the practical operation of the scheme the element has not been eliminated because it is not in fact free. The Supreme Court of Texas, in the case of City of Wink v. Griffith Amusement Co., 100 S. W. 2d 695, loc. cit. 699 (9 -11), correctly analyzed the situation. The court there pointed out that those remaining on the outside did not share equally with those who paid an admission. Those who paid admission witnessed the drawing and heard first hand the announcement of the winning number. Those upon the outside did not. The court concluded: 'This admission charge is inseparable from the privileges enumerated, which were materially different from the privileges of those who remained outside of the theater holding

the so-called "free" registration numbers. It is idle to say that the payment made for seeing the picture is not, in part at least, a charge for the drawing and the chance given. The things to be seen and done in the theater and the privileges above enumerated which accompanied them, are all a part of one and the same show, meaning the entire proceedings inside the theater. The fact that part of the things to be enjoyed by those who paid at the door were classed as "free" by the defendant in error does not change the legal effect of the transaction, or what was actually done by defendant in error, namely, for the price of admission to grant the patron not only the opportunity to see and hear the picture, but to see and hear and enjoy the habiliments of the "Bank Night," drawing, etc., detailed above. We are unable to see in what manner the giving of free registration numbers to those outside of the theater would change the legal effect of what was done inside the theater, for which a charge was made.'

"Upon this point see, also, the case of Iris Amusement Corp. v. Kelly, 366 Ill. 256, 8 N. E. 2d 648, loc. cit. 653 (3). In the plan described in the information any person desiring to participate therein must be in attendance at the theater, either inside or outside. One cannot sit by his fireside and take part therein. He must be present and swell the crowd

> at the theater. Such persons naturally get enthused and the gambling spirit, ever present in the human breast, is quickened. The very evil at which the law is aimed. The stake rises from week to week--$25, then $50, $100, perhaps to $150 or more. Soon the theater is filled with persons on bank night, each hoping that he may be the lucky person. The picture becomes of little importance. The participants in the lottery care little whether the picture is one portraying a masterpiece of Shakespeare or a light modern novel. The so-called free number feature of the scheme is only the goat's skin upon the hands of Jacob. It is there in an attempt to fool the law."

And again (l. c. 1102):

> "A number of the cases which have held the scheme legal are: Affiliated Enterprises v. Gruber (C.C.A.) 86 F. 2d 958; State v. Hundling, 220 Iowa 1369, 264 N. W. 608, 103 A. L. R. 861; Yellow-Stone Kit v. State, 88 Ala. 196, 7 So. 338, 7 L. R. A. 599, 16 Am. St. Rep. 38; State v. Crescent Amusement Co., 170 Tenn. 351, 95 S. W. 2d 310; State v. Eames, 87 N. H. 477, 183 A. 590. We cannot follow the reasoning as outlined in those authorities because we feel that in doing so we would be joining hands with those who designedly devise ways and means to evade our lottery laws and thereby defeat the very purpose of our Constitution and the law enacted in obedience thereto. Such a policy can only tend to force the legislators to constantly enact new laws to meet the ever increasing cunning devices to evade the existing laws."

In view of the late decisions by our Supreme Court we are of the opinion that "Win the Bank," both in its theoretical and practical effect, is a lottery under Sections 4314 and 4315, R. S. Mo. 1929, and Article XIV, Section 10 of the Missouri Constitution, and accordingly so hold.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

OWN:EG