

LOTTERIES:
THEATRE:

A plan whereby persons in attendance at a movie having a chance to be selected to answer some question which may be propounded to them, and, if they answer the question correctly, they are awarded a prize and, if incorrectly, they are given passes to the theatre, is a lottery.

February 4, 1943

Mr. Kelso Journey
Prosecuting Attorney
Henry County
Clinton, Missouri



Dear Sir:

This is in reply to your letter of January 25th, 1943, wherein you request an opinion from this department on the following statement of facts:

"Upon Tuesday the patrons desiring to enter the theatre paid a regular admission price at the ticket window. The regular picture was run as advertised. As part of the program within the theatre the manager went upon the stage and announced to the audience that he would ask questions to the audience; that an employee would pass down the aisles and among the audience and would act as a selector; that the members of the audience who desire to participate would signify their intentions by raising their hands, and that the selector would select or choose one of such persons. The selector then would select such a person and announce the fact to the manager. The manager then announced that the question he intended to read to that person was worth two quarters (50¢), or some monetary amount, if answered correctly. Then he proceeded to read a question relating to some subject generally known. A typical question was, 'Who wrote the song hit, "I'm Dreaming of a White Christmas"?' If the person so selected answered

the question correctly, the selector gave that person the sum of money first mentioned. Should the person selected fail to answer within a reasonable time or if that person answered the question incorrectly, then the manager would call to the entire audience for the answer. In that event the selector gave the person so selected one and sometimes two passes to the theatre, which entitled that person to enter the theatre for amusement a later date free of charge.

"Each week a sum of \$10.00 from the funds of the enterprise is allotted for prizes for answering such questions. If some questions are unanswered, the money allotted for those questions is held over for the following week and the prizes increase accordingly.

"Do the above facts constitute a lottery under the laws of this state in your opinion?"

Section 10 of Article XIV of the Constitution of Missouri, which relates to lotteries, reads as follows:

"The General Assembly shall have no power to authorize lotteries or gift enterprizes for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprize 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, which is an enabling act to the above Constitutional provision, 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."

The leading and most recent case on lotteries in this state is *State ex inf. McKittrick v. Globe-Democrat Pub. Co.*, 110 S. W. (2d) 705. In this case the court, at l. c. 713, in speaking of the subject of lottery said:

"It will be noted both the Constitution and statute prohibit any scheme in the nature of a lottery; and it has been several times 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, 639, 1 S. W. 2d 109, 111. The word has no technical meaning in our law. Lotteries are judicially denounced as especially vicious, in comparison with other forms of gambling, because by their very nature they are public and pestilentially infect the whole community. They prey upon the credulity of the unwary and widely arouse and appeal to the gambling instinct. * * * * *

And, on the elements of lottery, at l. c. 713, the court further said:

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

From the statement of facts which you submit we find that there is no question but what two of these elements exist, namely, consideration and prize. The consideration for the admission to the movie, and the prize to the person who is selected to answer the question if the person answers the question correctly and, if he does not answer the question correctly, he still gets a prize, which is passes to the movie. This leaves a question of whether or not there is an element of chance involved.

Under the facts which you submit an employee passes down the aisles and among the audience and selects a person who will be interrogated. All persons in the audience who desire to be interrogated are asked to raise their hands and from those who raise their hands the employee selects the one who will be interrogated and announces the fact to the manager. Then the manager announces the question and states what it will be worth if the question is answered correctly. By these facts we think there can be no doubt but that the

person who is attending the movie has the chance of being selected as the one who will be interrogated. If he is not in the theatre, then, of course, he could not be selected. From your statement we understand that the persons entering the theatre paid a regular admission price, so we assume that there were no free tickets and for that reason, every person taking part in this plan had paid a consideration therefore.

We have researched considerably on this question, which is annotated in 113 ALR 1121; 103 ALR 867; 48 ALR 1106 and 57 ALR 424. The question of whether or not the element of chance exists in any particular plan will depend upon the facts. We quote from the cases in these annotations which we think are closest to the facts which you have submitted.

In 48 ALR, l. c. 1117 is stated the following:

"In State v. Shorts (1868) 32 N. J. L. 398, 90 Am. Dec. 668, a lottery was held to be shown where defendant, exhibiting a panorama, had previously circulated handbills to the effect that 800 presents of various values would be distributed among the audience, and in pursuance thereof gave each person upon entering a numbered ticket, and after the close of the exhibition persons holding numbers called out at random were given premiums according to defendant's selection, if he thought they would be good advertisers of his exhibition. The court said, in delivering the opinion: 'Taking a practical view of the thing, its real nature cannot be misunderstood. It is clearly a "lottery," if tested by any of the ordinary definitions of that term. A lottery, says Johnson, is a "game of chance; a distribution of prizes by chance." This ingredient of chance is, obviously, the evil principle against which all prohibitory laws are aimed. It is by this

means that cupidity is solicited, for, if fortune be propitious, in consideration of the trivial price of a ticket, a return of value is to be expected. This temptation was, undoubtedly, offered to the public by these defendants.' The court in conclusion says: 'My conclusion is that this was a game of chance, and consequently a lottery, and none the less so because of those reservations of control over it, by the adroit use of which the getters-up of the game were sure, in all substantial respects, to be the winners. It is an affair conspicuously within the mischief at which the statute is leveled; the particular traits of it, above noticed, appear like devices to evade the law. But the law regards not mere semblance, but substance of things, and consequently these devices, however ingenious, cannot be successful.'

"In *Negley v. Devlin* (1872) 12 Abb. Pr. N. S. (N. Y.) 210, where tickets were sold to a grand concert for the benefit of charity, each ticket entitling the bearer to admission to the concert, and to whatever gift might be awarded to its number, the scheme was held to be a lottery."

A Missouri case is annotated in 57 ALR 424, as follows:

"The statute against aiding the establishment of a lottery as a business or avocation was held in *State v. Emerson* (1927) Mo. ___, 1 S. W. (2d) 109, to have been violated by the president of a corporation engaged in the future business, where the method of business was to sell contracts for \$55 each, to be paid on weekly instalments of \$1, the company reserving the right to discount one or more contracts

each week by charging off deferred payments and delivering to the contract holder \$55 worth of furniture without further payment. The court held in effect that the discounting of the contract each week at the pleasure of the company was a determination by 'chance' within the meaning of the statute, and rejected the contention that the element of 'chance' was not present because there was absent from the determination of the winners the casting of lots, and drawing of cards from a box or wheel, or other method usually employed in such transactions."

We think these authorities support our conclusion.

CONCLUSION

From the foregoing it is the opinion of this department that a plan whereby persons in attendance at a movie theatre are given a chance to be selected as the one to answer questions which may be propounded by the manager, and where, if they answer the question correctly, they are awarded a prize, or, if incorrectly, they are given passes to the theatre, is a lottery and in violation of the Constitution and laws of this state.

Respectfully submitted,

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APPROVED:

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