

LOTTERIES: Distribution of chances by filling stations
a lottery.

May 11, 1942

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Hon. Michael W. O'Hern
Prosecuting Attorney
Kansas City, Missouri

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Dear Sir:

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

"A group of independent filling station
operators have made a request from me
with reference to giving them an opinion
as to whether or not the proposed state-
ment which they have submitted to me in
writing would constitute a violation of
the law. I am giving this to you as
they have prepared it for me, setting
out what they intend to do, which is as
follows:

'A PLAN FOR A CASH AWARD
BUSINESS STIMULATOR FOR
FILLING STATIONS

(Prepared for submission to the
Attorney General of the State of
Missouri through Michael W. O'Hern,
Prosecuting Attorney of Jackson
County)

This plan, entitled "The Ghost
Walks," is an adaptation of a plan
for motion picture theatres which has
already been approved by attorneys
general, county prosecutors and the

U.S. Postoffice Department. The demand for stimulating methods by which small, independent filling station operators might be able to continue in business caused this adaptation to be made, with but a few changes in the original and approved plan for theatres. These few changes, however, require that investigation be made as to the legality of the plan.

"The Ghost Walks" is a competitive contest of skill and quick thinking, using scrambled words, hints and clues as to the correct words and awards for those most alert mentally.

The procedure of this adapted plan would be as follows: Contests will be conducted on a weekly basis, beginning and ending at midnight on Fridays. During each current week, cards bearing each a single word, together with printed contest rules, would be distributed to the customers of a filling station. Among these cards would be several that would provide the correct answer to the scrambled word to be posted on a bulletin board throughout Saturday of each week. For instance, on Saturday morning, the following scrambled word might appear, (with four easier scrambled words upon which lesser prizes are to be awarded):

K E E D T A R R U N

"He'll take you for a ride!!"

The clue indicated would appear below the word upon the card. During the week, several cards bearing the word UNDERTAKER would have been distributed. The first person to appear at the fill-

ing station, sometime during business hours on Saturday, and to present the card and identify the scrambled word would be awarded the prize. The four lesser prizes would be handled similarly.

The scrambled word would remain upon the bulletin board throughout Saturday and until closing time on Saturday night, or until midnight. Then, below it, would be posted the correct word and the name or names of prize winners.

The cards bearing words would be distributed through the preceding week and, due to the method of distribution, it would be impossible for attendants to arrange any illegitimate "fixing"---this because the attendants themselves will not see the scrambled word to be posted upon the board until late each Friday night, nor would they see the correct word until it is to be posted on Saturday night or Sunday morning.

"The Ghost Walks," as a feature for theatres, did not use the word cards and the contests were and are conducted with every person in the theatre entering the competition.

Under different conditions, such as prevail in filling stations or other businesses, the theatre plan is not feasible. Hence, the selection method is similar to that used by the quiz programs on the national radio networks, in which contestants are selected, by prearrangement or at random, from the studio audiences. Only these selected contestants may compete for the prizes.

By our plan, no consideration is necessary to qualify the public for participation. By simply calling at the participating station and requesting one of the word cards, any person may procure such a card and have a part in the contest. It is possible, however, that customers may be given extra cards with purchases. The distribution will be handled in such a manner that the person making no purchase whatever may earn the prizes by calling at the station on Saturday with the proper card and identifying the scrambled word. The only restriction shall be that cards will not be given to children under fourteen years of age. Of course, the motive is to stimulate business by attracting new business, but we believe that the fact that there is no compulsory consideration, added to the fact that a certain feat of mental skill is necessary, will make this feature legitimate and legal. It may be well to add that prizes will be War Bonds, except in cases where financial need seems to indicate that a better purpose would be served in awarding cash."

"I would appreciate very much if you would at your earliest convenience have some one advise whether this constitutes a violation of the law."

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 "any scheme or device whereby anything of value is, for consideration, allotted by chance." State v. Emerson, 318 Mo. 633, 1 S. W. (2d) 109; State ex rel. v. Hughes, 299 Mo. 529, 253 S. W. 29.

The elements of a lottery are: (1) consideration; (2) prize; (3) chance. State ex inf. McKittrick v. Globe Democrat Publishing Co., 110 S. W. (2d) 705.

The persons submitting the scheme for consideration admit that the chance and prize elements are present. Therefore, the only question to be decided is whether the element of consideration is present.

In Featherstone v. Independent Service Station Ass'n, 10 S. W. (2d) 124, a voluntary association of retail dealers sold numbered tickets to its members. These members in turn gave the tickets to their customers on the basis of one ticket for every dollar spent. At stated periods the association held drawings against the numbered tickets outstanding. The prize was an automobile. This plan was later modified so that dealers distributed tickets to non-customers as well as to customers.

Featherstone, a competitor, attacked the scheme as a lottery and unfair competition. Judgment for defendants on the ground that plaintiff could not maintain the action.

On appeal the Court of Civil Appeals of Texas at Dallas held that the scheme even as modified was a lottery and that plaintiff was entitled to equitable relief. The opinion was in part as follows:

"While dealers under the new plan distributed tickets to non-customers as well as to customers, it seems that the scheme was to distribute tickets in the main to customers, as the evidence discloses that only a few, negligible in number, were given to persons other than customers. That the giving of tickets, and the drawings and distribution of prizes, were inducements to patronage and unquestionably lured customers is shown from the very satisfactory business results that followed. Patronage thus induced was the consideration that passed from the ticket holder for the chance received, in that the price paid, whatever it was, the amount being immaterial, constituted the aggregate price for the merchandise or service and the ticket

that represented a chance to win the prize; in other words, for one undivided price both were purchased, the merchandise, or service, and ticket, the ticket being as much bought as though priced separately."

Glover et al. v. Malloska, 238 Michigan 216; 213 N. W. 107; 52 A. L. R. 77, is a leading case bearing on the question of business lotteries where chances in drawings by lot are distributed indiscriminately and without charge to customers and non-customers alike. Here certain retail oil stations distributed numbered tickets without charge to purchasers and to persons asking therefor. Once a month an automobile was disposed of by chance to the ticket holder of the same number. The retail stations acquired these tickets from Malloska from whom they purchased oil.

Glover et al., brought suit in equity, alleging unfair competition and charging that the scheme complained of was a lottery. In upholding the contentions of the complainants the Supreme Court of Michigan said:

"The scheme was clearly a lottery. People v. McPhee, 139 Mich. 678; 103 N. W. 174; 69 L. R. A. 505; 5 Ann. Cas. 835; People v. Wassmus, 214 Mich. 42; 182 N. W. 66. The often asserted essentials of a lottery, viz: consideration, prize and chance, were all present. Malloska sold the tickets to his customers for distribution by them in the course of trade to further his pecuniary interest, and this established consideration. The fact that Malloska gave some tickets away at fairs and exhibitions and the purchasers of tickets for use in the retail trade gave them away, without pay, to their customers, and sometimes to others, did not at all save the scheme from being a lottery."

The two cases quoted above are practically identical with the scheme submitted in your request. And, in view of the

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holdings in those cases and the reasons advanced therein, we believe that such a scheme is a lottery and prohibited by our Constitution and statutes.

CONCLUSION

It is, therefore, the opinion of this department that a scheme whereby chances are distributed by service stations to customers and also to non-customers who make request therefor, and a weekly prize is given upon the result of a drawing, is a lottery within the meaning of the Constitution and statutes of Missouri.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

APPROVED:

ROY MCKITTRICK
Attorney-General

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