PLAN OF SCREEN: A lottery in violation of Section 4314 R. S. Missouri 1929.

October 18, 1937

10-21

FILED

98

Honorable Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

We have your request of October 11, 1937, for an opinion relative to the game of "Screeno", which request in part is as follows:

> "The manager of the theater which uses this plan contends furnishing of cards without cost by distribution around the town on which this game is played and which may be played by those listening to the announcements in front of the theater without the purchase of a ticket operates to destroy the element of consideration which would make it a violation of the gambling law. At his request the Amusement Company owning the patent sent to me a brief which I enclose herewith. Personally, I am inclined to doubt the correctness of its conclusion. The statement of the operation of the plan on the first page is essentially correct as I understand the majority of the tickets actually used in the playing are those received by the purchasers at the ticket window immediately before the ticket is handed to them."

The principle underlying all lottery law is that a lottery is a scheme or device wherein anything of value, is for a consideration, alloted by chance.

A lottery contains three essential elements, namely, prize, chance and consideration. State vs. Emerson, 1 S.W. (2d) 109; State ex rel. vs. Hughes, 299 Mo. 529; 253 S. W. 229; State vs. Becker, 248 Mo. 555, 154 S. W. 769.

The following summary as to what is essential to constitute a lottery is taken from 45 Harvard Law Review, page 1200:

> "Variations in form are as immaterial as variations in substance. Of course, it is of no importance what the scheme is called; as the courts put it, it is the 'game' and not the 'name' which counts. Nor is any particular method of operation indespensable to the existence of a lottery. For example, a formal drawing by lot is not needed, although lotteries have often been associated with wheels of chance and drawings by lot, as the very terms indicate. That contestants write their own entrance tickets is unimportant. The situation is not affected materially even if tickets are dispensed with entirely. While the life of a contest, like any other form of advertising, is publicity, the lack of advertisement does not detract from its nature as a lottery. How the news that prizes are being awarded gets about is of no consequence, so long as it gets about somehow. In the last analysis, every aspect of the scheme is irrelevant, so long as people are induced to pay consideration for the possibility of receiving a prize distributed by chance."

The word "lottery" must be construed in its popular sense with the view of remedying the mischief intended to be prevented and to suppress all evasions for the continuance of the mischief. People vs. McPhee, 139 Mich. 687, 103 N.W. 174; 69 L. R.A. 505. State vs. Mumford, 73 Mo. 547, 650. State vs. Wersebe, 181 Atl. 299, 301.

The word is generic; no sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed but not quite within the letter of the definition given. People vs. McPhee, 139 Mich. 687; 103 N.W. 174; 69 L.R.A. 505. State vs. Clarke, 33 N.H. 329. This is made apparent from an examination of a large number of cases in which various methods of distributing money or goods by chance are examined and discussed.

The Court in Valhalla Hotel & Company vs. Carmona, 44 Phillipine 233, l. c. 242, said:

> "While ingenuity is continually at work to evolve some scheme which is within the mischief but not quite within the letter of the law--we propose to go beyond the shell to the substance and to condemn the same."

A Minnesota Court in construing its lottery statute in State vs. Moren, 48 Minn. 555, l. c. 560, said:

> "The statute is intended to reach all devices which are in the nature of lotteries, in whatever form presented, and the courts will tolerate no evasions for the continuance of the mischief."

Apparently it is conceded that a prize is given and that the winner is determined by chance under the game of "Screeno". This opinion therefore primarily turns upon the question of consideration. In this connection we quote Thomas on Non-Mailable Matter, Section 16, page 35, as follows:

> "The general rule relative to the consideration in schemes of this class, deducible from the adjudged cases and the elementary principles, may be formulated as follows: Where a promoter of a business enterprise, with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or inconvenience, even of a slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprise a lottery though the promoter does not require the payment of anything to him directly by those who hold chances to draw prizes."

The mere free distribution of tickets or coupons or chances entitling the holders to participate in the distribution of prizes by lot or chance does not relieve "Screeno" from its lottery features. The distribution of such tickets, as everyone knows, is for the purpose of inducing or stimulating pay patronage, and the pay patronage thus induced constitutes a consideration and the enterprise is a lottery. This is true whether all or only a part of the holders become pay patrons, and this situation is not changed by the fact that a few may obtain the prize without a direct payment of money therefor. This is the law in England, Willis vs. Young et al. 1 K.B. 448 (1907), and the rule in the federal courts, Central States Theatre Corp. vs. Patz, 11 Fed. Supp. 566, General Theatres vs. Metro-Goldwyn-Mayer Dist. Corp. 9 Fed. Supp. 546, and is also the rule of the post office department, George Washington Law Review, May 1936, p. 482. It is likewise the holding in several state courts, Glover vs. Malloska, 238 Mich. 216; State vs. Danz, 140 Wash. 546, 250 Pac. 37; Featherstone vs. Ind. Service Ass'n (Tex.) 10 S.W. (2) 124; City of Wink vs. Amusement Company (Tex.) 78 S.W. (2) 1065.

It is therefore the opinion of this office that the plan known as "Screeno" is a lottery in violation of Section 4314 R. S. Missouri 1929.

Respectfully submitted,

FRANKLIN E. REAGAN,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:MM