

LOTTERIES: Trading stamp scheme with prize determined
by chance is lottery.

9/14
September 12, 1940



Mr. Michael W. O'Hern
First Assistant Prosecuting Attorney
Kansas City, Missouri

Dear Mr. O'Hern:

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

"Would you kindly let me know if
the following state of facts would
constitute a lottery as defined in
our Statutes:

"Booklets like the enclosed, bear-
ing the gold seal, are furnished
by the Kansas City Wholesale Grocery
Company in lots of 100, to grocery
stores for use by the stores in
setting the plan in operation. You
will note there is a blank space for
the grocery store to stamp its name,
and on the opposite side is a space
for the customer to write his name
and address.

"With each twenty-five cent purchase
at the particular store, the customer
is given a receipt. As these receipts
accumulate they are pasted on the card
by the customer in the space provided.
When completely filled with receipts,
the customer is instructed to return
the booklet to the store where the seal
is broken by the groceryman in the
presence of the customer. After the

seal is broken, it may reveal printed figures of STARS. If the figure of one star appears, the customer receives \$1 in cash, or the cash award may be as much as \$5, depending upon the number of stars beneath the seal. In one of the submitted booklets, five stars appear beneath the broken seal. In each lot of one hundred booklets only five of them will contain stars. We understand three booklets contain one star each, one booklet two stars, and one booklet five stars. Should the customer hold one of the five booklets entitling him to the cash award, we are informed the customer is required to sign one of the cards, photostat copies of which are attached.

"Should the person receive the \$5 in cash, you will note he signs the card agreeing 'to give five of his friends the Treasure Chest Grocery Dividend Booklet, and explain how they may secure free samples of products by trading at the store'. We understand the cash award is given to the lucky customer immediately upon the breaking of the seal and he is not required to distribute the requisite number of books to his friends before receiving the money.

"The sponsor of this plan admits the store does not attempt to compel the customer to distribute the booklets and that if it is done, it is entirely voluntary on the part of the customer, although the sponsor asserts the 'winners' are glad to distribute the booklets and perform the services designated. It is admitted that should the customer fail to keep his agreement, no action would be taken to compel him to perform his duties or services.

"The Kansas City Wholesale Grocery Company contends that the five out of the one hundred customers who receive \$1, \$2 or \$5 in cash, actually are receiving compensation for future services, which removes the cash award from the realm of a lottery prize, and makes it a payment for services. It is asserted that the store promoting the plan has the right to select employees or representatives by lot, and pay them for their services in advance.

"In addition to the possibility of the holder of the booklet receiving the cash money, each holder is entitled to a merchandise award, which is revealed after the seal is broken. We are told by the sponsor that the various merchandise awards are approximately of the same value, since the customer has the choice of requesting fifteen cents in cash in lieu of the merchandise. All customers holding booklets filled with 100 receipts, representing \$25 in merchandise purchases, will receive the merchandise award, or at their option, 15¢ in cash."

Section 10, Article 14 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 4314, R. S. Mo. 1929 (Mo. Stat. Ann. Sec. 4314, page 3002) 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."

It will be noted that both the Constitution and the statutes prohibit any scheme in the nature of a gift enterprise. Just what is a gift enterprise has never been defined by the courts of Missouri. However, the legal lexicographers define the term as "a scheme for the division and distribution of certain articles of property to be determined by chance among those who have taken shares in the scheme". Black's Law Dictionary; Bouvier's Law

Dictionary and Anderson's Law Dictionary.

As was said in *Lohman v. State*, 81 Ind. 17, the words "gift enterprise" had attained such notoriety that the courts would take judicial notice of what was meant when they appear in legislative enactments.

A definition as given in *Russell v. Equitable Loan, etc.*, 129 Ga. 154, 58 S.E. 881, is especially applicable to the instant case. The Court there said that "a gift enterprise is a scheme under which goods are sold for their market value, but by way of inducement each purchaser is given a chance to win a present or a prize".

The scheme present in your request is that a booklet is given to each customer which contains blank spaces in which trading stamps are to be pasted. The booklet also contains a seal, which, when the booklet has been filled with the stamps, is opened and the writing beneath the seal discloses whether the holder of the booklet is entitled to a nominal prize or gift or is entitled to receive \$1, \$2 or \$5 in cash.

In Missouri it has been held that a lottery includes 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) consideration; (2) prize; (3) chance. *State ex inf. McKittrick v. Globe Democrat Publishing Co.*, 110 S.W. (2d) 705.

The weight of authorities supports the view that trading stamp schemes are not gift enterprises inasmuch as the chance element does not enter into such schemes. Especially is this view strengthened where the term "gift enterprise" is used in connection with the word "lottery" or "lotteries". 39 A.L.R. 1036; *Humes v. Little Rock*, 138 Fed. 129; *Winston v. Beeson*, 135 N. C. 271, 47 S.E. 457; *State v. Sugart*, 138 Ala. 86, 35 So. 28.

However, it is apparent that the element of chance is present in the scheme submitted in your request. The distribution of prizes is dependent upon an arbitrary and unforeseen contingency, that is, only one participant out of a hundred will receive \$5.00; two will receive \$2.00 and three will receive \$1.00 each, such prizes to be determined

solely by what appears beneath the seal on the consumer's card.

The company sponsoring this scheme has attempted to take it out of the classification of a lottery or gift enterprise by providing that every person who wins must agree to give to a certain number of his friends one of the booklets and explain how they may secure free samples of the products by trading at the store.

In State v. McEwan, 120 S.W. (2d) 1098, 1. c. 1102, it is said:

"* * * 'As fast as statutes are passed or decisions made, some skillful change is devised in the plan of operations, in the hope of getting just beyond the statutory prohibition; but, so long as the inherent evil remains, it matters not how the special facts may be shifted, the scheme is still unlawful.'"

While the persons who win the prizes are required to do certain things, in consideration of the receipt of the prizes, however, as pointed out in your request, they are not required to do these things before receiving the money. Moreover, the thing to be done, that is, the distribution of the booklets to his friends, is merely a subterfuge to evade the lottery laws, because the work done is not compatible with the pay received.

Prize is defined in Fitzsimmons v. U. S., 156 Fed 477, as "anything of value offered as an inducement to participate in a scheme of chance".

In State ex rel. Home Planters Depository v. Hughes, 253 S.W. 229, 299 Mo. 529, our Supreme Court pointed out that:

"This inequality in value constitutes a prize within the prohibition of the

constitution if the element of chance determines the distribution of the rights to loans."

In view of the above we are convinced that the scheme advanced in your request is a gift enterprise and contrary to the constitution and the statutes of this state and should not be allowed to operate.

CONCLUSION.

It is, therefore, the opinion of this department that a trading stamp scheme, of which the amount of the prize is determined by the number of stars under the seal on the booklet, is a gift enterprise within the prohibition of the constitution and statutes of Missouri and is illegal.

Respectfully submitted,

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Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
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AO'K:CP