

LOTTERIES: : The sales plan for defense stamps and bonds
is a lottery.

February 27, 1942

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Hon. Wilson D. Hill
Prosecuting Attorney
Ray County
Richmond, Missouri



Dear Sir:

We are in receipt of your request for an opinion,
which reads as follows:

"A group of men have devised a scheme they intend to promote in Ray County, which has as its goal the giving of defense bonds and stamps as awards.

"The plan is this: A club is formed in which new members are charged \$1.00 to belong; they are given an application blank which carries 10 blank lines and their name is placed on the first blank; for every two members they bring in (who pay the \$1.00 fee each) their name is put up one line, until when they reach the fourth or fifth space and are then paid a certain amount of defense stamps or bonds. This is similar to the chain letter idea.

"I am inclosing you herein a sample of the blank which they have printed and intend to use. My contention is that whenever plans are ceased and operations halted, someone who has paid to join will lose and therefore the scheme constitutes a lottery."

In your request you assume the scheme involved in the application plan attached, which is marked as "The V Sales Plan for Defense Stamps and Bonds" is similar to the chain letter. In checking over the application I find that it is the same as the chain letter idea. There is no question but that under the chain letter, and under the scheme or plan as set out in your request chance is involved, for the reason that one having paid the one dollar, may, if all following subscribers pay according to the plan, receive One Hundred, Twenty-eight (\$128.00) Dollars, and the applicant, if no one else subscribes to the plan, loses the original one dollar payment.

There is no question but that the consideration in the scheme, or plan, is one dollar, which the member pays on the original application.

Section 10, Article XIV, Constitution of Missouri reads as follows:

"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 ticket, 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. Missouri, 1939, reads 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."

This section was passed upon in the case of *State v. Emerson*, 1 S. W. (2d) 109, par. 2, where the court said:

"The people in framing the state Constitution (section 10, art. 14) declared their disapproval of the establishing of lotteries or schemes of chance in the nature of lotteries, by inhibiting the General Assembly from giving legislative recognition to such schemes. In the discussion and interpretation of this constitutional provision we have held that a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. *State ex rel. Hughes*, supra, loc. cit. 534 (253 S. W. 229). In *State v. Becker*, supra, loc. cit. 560 (154 S. W. 769), in line with our former rul-

ings and those of courts of last resort elsewhere, a more comprehensive definition is given to the word, and a lottery or a scheme in the nature of a lottery is held to include every punishable plan, scheme, or device whereby anything of value is disposed of by lot or chance.

"The crime having been properly charged, the proof of the existence of the elements necessary to establish it are held to be consideration, chance, and a prize. Were these elements shown to have been present in the instant case? Let the facts bear witness. The moving consideration in the making of the contract was the payment by the holder of weekly installments; the chance was that of an early selection of the holder's contract for a discount; and the prize was the furniture to be received. Further than this, the inequality between the different contract holders whereby one might secure \$55 worth of furniture for a few dollars while another would be required to pay that amount in full for the same quantity of furniture constituted a prize, within the meaning of the Constitution. The lack of knowledge of a holder as to when his contract would be discounted constituted a chance within the contemplation of the law."

Under the holding in the above case a lottery is described as a "scheme" or "Device" where anything of value is for the consideration allotted by chance. Under the

facts in your request there is no question but the consideration is one dollar and the chance is that subsequent applicants to the plan may not pay the original applicant who has paid his, or her, dollar.

In the case of State v. Globe-Democrat Pub. Co., 110 S. W. (2d) 705, 1. c. 713, pars. 1, 2, and 3, the court 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. State v. Schwemler, 154 Or. 533, 60 P. 2d 938; State ex rel. Home Planners Depository v. Hughes, 299 Mo. 529, 537, 253 S. W. 229, 231, 28 A. L. R. 1305, 1310; State v. Becker, 248 Mo. 555, 562, 154 S. W. 769, 771.

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. It is conceded that the first two of these were present in the 'Famous Names' contest, here involved, the sole question being whether the third element--chance--

was there. In England and Canada where the 'pure chance doctrine' prevails a game or contest is not a lottery even though the entrants pay a consideration for the chance to win a prize unless the result depends entirely upon chance. In the United States the rule was the same until about 1904; but it is now generally held that chance need be only the dominant factor. 38 C. J. section 5, p. 291; 17 R. C. L. section 10, p. 1223; Waite v. Press Publishing Ass'n, 155 F. 58, 85 C. C. A. 576, 11 L. R. A. (N. S.) 609, 12 Ann. Cas. 319. Hence a contest may be a lottery even though skill, judgment, or research enter therein to some degree, if chance in a larger degree determine the result. Whether the chance factor is dominant or subordinate is often a troublesome question."

Also, in the case of State v. McEwan, 120 S. W. (2d) 1098, 1. c. 1101, quoting from the case of Affiliated Enterprises v. Gantz, 86 F. 2d 597, said:

"We like the expressions of the United States Circuit Court of Appeals, Tenth Circuit, in the case of Affiliated Enterprises v. Gantz, 86 F. 2d 597, loc. cit. 599, involving an injunction proceeding to restrain an infringement of a copyright on 'bank night.' The scheme of 'bank night' there was the same as described in the information under consideration. The court said:

'The plan or system portrayed in the copyrighted sheets discloses more than once that an admission charge must not be exacted as a condition entitling one to participate in the drawing. Everyone, if he holds or does not hold or buys or does not buy a paid admission ticket to the show, is entitled to register at the entrance or in the lobby of the theatre, and he is thereupon designated by number opposite his name and must be permitted to have an equal chance with every other registrant in drawing the prize. This seems to be a subterfuge to escape the stigma of being a lottery. It is apparent that no one would give prizes if all participants in the drawings paid no admission fees. Show places are conducted for profit. The plan would be wholly worthless as a money making scheme, both to lessor and lessee. It is further apparent that when non-paying participants and those who pay admissions are each given the same chance at drawing the prize the lucky number may represent one who paid to get in only because of his interest in the drawing. Indeed, that is more than probable. Then how can it be maintained that the supposed evasion converted a lottery or gambling device into a mere altruistic opportunity and occasion to bestow a gift. If not within the literal definitions of those vices, plaintiff's plan and system is too closely akin to have the protection and assistance of a court of equity.'

The court in the case of State v. McEwan, supra, further said:

"We agree with the reasoning in the above cases that a sufficient consideration exists in the scheme to come within the terms of our statute, which makes it a felony to establish or aid in establishing any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery. We are supported in this conclusion by the following authorities: City of Wink v. Griffith Amusement Co., supra; State v. Danz, 140 Wash. 546, 250 P. 37, 48 A. L. R. 1109; Featherstone v. Independent Service Station Ass'n (Tex. Civ. App.) 10 S. W. 2d 124; Affiliated Enterprises, Inc. v. Gantz, supra; Maughs v. Porter, 157 Va. 415, 161 S. E. 242; Iris Amusement Corp. v. Kelly, supra; State ex rel. v. Fox Theatre Co., 144 Kan. 687, 62 P. 2d 929, 109 A. L. R. 698; Commonwealth v. Wall (Mass.), supra; Jorman v. State, 54 Ga. App. 738, 188 S. W. 925, loc. cit. 927. In the last case cited the Court of Appeals of Georgia had this to say: 'It cannot alter the fact that the operator may have given free chances to some without the purchase of tickets; even so, the lottery scheme as to a gift enterprise was present to all the rest, and this fact did not prevent it from being a lottery under the law of Georgia.' (Italics ours.)

"The court also quoted with approval the following from Equitable Loan & Security Co. et al v. Waring, 117 Ga. 599, 44 S. E. 320, loc. cit. 327,

62 L. R. A. 93, loc. cit. 100, 97
Am. St. Rep. 177: '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 re-
mains, it matters not how the special
facts may be shifted, the scheme is
still unlawful.'"

In Missouri a lottery is any scheme or device whereby anything of value is, for a consideration, allotted by chance. State vs. Emerson, 318 Mo. 633, 1 S. W. (2d) 109, 111; State ex rel. vs. Hughes, 299 Mo. 529, 253 S. W. 329, 28 A. L. R. 1305; State vs. Becker, 248 Mo. 55, 154 S. W. 769.

The English and Federal forms are alike in that they do not specifically mention consideration, but the element is implied. The Monetary form limits the consideration to the payment of money--legal tender. The Judicial form is so named because state courts, in the absence of statutory definitions have frequently used it. The Judicial and Statutory forms require a payment to be made; namely a direct benefit to the promisor. The Missouri form requires only "consideration" in any form recognized by law. It appears in the singular form and represents the total consideration from all contestants as a unit.

The Missouri form keeps alive the spirit of Article XIV, Section 10 of the Missouri Constitution, and Section 4704, R. S. Missouri, 1939, and gives to the word "lottery" its popular and non-technical meaning--a goal which all definition makers have sought. This definition is brief, clear, complete, comprehensive, and satisfactory in every respect. It assembles the elements of a lottery in bold relief, shows their relation to each other with no attempt to place any limited or confined meaning on one or more of the elements. It furnishes an accurate standard or hard stick for testing any lottery scheme.

There are two kinds of chance which are recognized in different jurisdictions as one of the elements of lottery. Some courts follow what is known as the "pure" chance doctrine, while other jurisdictions hold to that of "dominant" chance.

17 R. C. L. 1223 says:

"Chance as one of the elements of a lottery has reference to the attempt to attain certain ends not by skill or any known or fixed rules, but by the happening of a subsequent event incapable of ascertainment or accomplishment by means of human foresight or ingenuity, and it is essential * * * * in order to give to the scheme the character of a lottery. In the United States * * * * it is not necessary that this element of chance should be 'pure' chance but may be accompanied by an element of calculation or even of certainty."

Under the above ruling a lottery is described as something happening at a subsequent time, and, under the facts in your request some of the earlier applicants to this scheme, or plan, would not derive any benefit, unless the later applicants continued to buy, and give the dollars worth of defense stamps as set out under the plan.

The same proposition is presented in 38 Corpus Juris 291.

Commenting upon the element of chance, Thomas on Non-Mailable Matter, Section 67, page 79, said:

"* * * * But one can not read the opinions of the courts on this subject without being impressed with the proposition that chance, after all, consists in our ignorance of

the event upon which a wager is laid, rather than upon anything that inheres in that event itself. If a man does not know whether an event will turn out one way or the other and he stakes money on it, as to him the event will happen by chance, because it is brought about without his will or choice."

A New York Court in *People vs. Lavin*, 179 N. Y. 164, l. c. 169, 71 N. E. 753, in discussing the element of chance, said:

"Therefore, that may be a matter of chance to one man which is not a matter of chance to another, and with different men the chances of the occurrence of any event may differ greatly. It may be said that an event presents the element of chance so far as after the exercise of research, investigation, skill and judgment we are unable to foresee its occurrence or non-occurrence or the forms and conditions of its occurrence."

The Supreme Court of the United States in *Dillingham vs. McLaughlin*, 68 L. Ed. 742, l. c. 747, said:

"What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law."

The general rule is amply stated in *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."

Other cases to the same effect are: Union Gas and Oil Co. vs. Wiedeman Oil Co., 277 S. W. 323, 330; McNulty v. Kansas City, 198 S. W. 185; Mayfield vs. Eubank, 278 S. W. 243, 246; Mayers vs. Groves Bros. and Co., 22 S. W. (2d) 174, 177; Loveland vs. Bode, 214 Ill. App. 399; Maughs v. Porter, (Va.) 161 S. E. 242; 38 C. J. S. 7, p. 291; Tucker v. Dolan, 109 Mo. App. 442, 456; Underwood Typewriter Co. vs. Realty Co. 118 Mo. App. 197, 202.

CONCLUSION

In view of the above authorities, and under the description of the plan and scheme set out in the "The Sales Plan for Defense Stamps and Bonds", we are of the opinion that this scheme, or plan, both in its theoretical and practical effect is a lottery under Section 4704 R. S.

Hon. Wilson D. Hill

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Missouri, 1939, and Article 14, Section X of the Missouri
Constitution.

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APPROVED:

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