

LOTTERIES: Prize awarded by chance to holder of coupon given with purchase of merchandise.



October 23, 1947

Mr. Howard B. Lang, Jr.
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

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

"I would like an opinion upon the legality of the scheme known as 'Appreciation Day' which is described in the enclosed pamphlet."

The scheme known as "Appreciation Day" as described in the pamphlet which you enclosed is as follows:

The merchants of a community contribute each week to a fund known as the Community Treasure Chest. These merchants, with each purchase by a customer of twenty-five (.25¢) cents or more, give to the customer a percentage coupon, the percentage being based upon the size of the purchase. The customer's name and address is placed upon the back of the coupon which is placed in a box. Once a week a drawing is held and a coupon is selected from the box. If the person whose name is selected is present he is asked an allotted number of questions according to the amount of his percentage coupon. If the person correctly answers any or all of the questions then he receives a prize in proportion to the amount of his percentage coupon and the correct answers. If he fails to answer any of the questions the fund goes over until the next week. If the person is not present then no prize is awarded and the amount of the fund which would have been awarded is added to the prize for the next week.

Section 39, Article III of the Constitution of Missouri, 1945, provides, in part, as follows:

"The General Assembly shall not have power:

* * * * *

"(9) Authorization of Lotteries or

Gift Enterprises.- -To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; (Sec. 10, Art. XIV, Const. of 1875)"

Section 4704, R.S. Mo. 1939, provides as follows:

"Establishing lottery-penalty

"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 is well-settled in this state that the elements of a lottery are (1) consideration; (2) prize; (3) chance. *State v. Emerson*, 318 Mo. 633, 1 S.W.(2d) 109; *State ex inf. McKittrick v. Globe Democrat Pub. Co.*, 341 Mo. 862, 110 S.W. (2d) 705. The fact that there is a prize present in the scheme described above cannot be doubted.

As to the element of consideration, it is equally well-settled that a scheme whereby a merchant gives a ticket for a drawing with each purchase is a lottery because the element of consideration is present.

In the case of *State v. Emerson*, 318 Mo. 633, 1 S.W.(2d) 109, the Supreme Court had before it a scheme or device whereby a furniture company sold contracts for \$55.00 each to be paid on equal installments of \$1.00. Each week a drawing was held and the holder of the winning number paid received \$55.00 worth of

furniture without further payment. The persons who did not win any of the drawings still received \$55.00 worth of furniture in payment of a like amount. The court held that the payment of the weekly installments was consideration even though the person not winning in the weekly drawing received a full value for the money paid in.

In State v. McEwan, 343 Mo. 213, 120 S.W.(2d) 1098, the legality of "Bank Night" was before the Supreme Court. The court said: (l.c. 1102)

"In 38 C.J. 292, Sec. 7, it is said:
'Whatever may be the nature of the consideration required it may be given either directly or indirectly. The benefit to the person offering the prize does not need to be directly dependent upon the furnishing of a consideration.'

"Can it be denied that the requirement in the scheme, that all persons participating in 'bank night' must be in attendance, is not a revenue producer for the theater?"

Courts of other states have held that a ticket or chance given with each purchase of merchandise constitutes consideration within the meaning of the lottery law. Featherstone v. Independent Service Station Assoc. (Tex. Civ. App.) 10 S.W.(2d) 124; Retail Section of Chamber of Commerce v. Kieck, 128 Neb. 13, 257 N.W. 493; People v. Bloom, 227 N.Y.S. 225(reversed on other grounds) 248 N.Y. 582, 162 N.E. 533; Market Plumbing and Heating Supply Co. v. Spangenberg, 112 N.J.L. 46, 169 A. 660.

The question next presents itself as to whether the element of chance is present in the scheme "Appreciation Day".

Judge Ellison in State ex inf. McKittrick v. Globe Democrat Pub. Co., 341 Mo. 862, 110 S.W.(2d) 705, discusses extensively the question as to what constitutes chance in a lottery and this case is perhaps the leading case in the United States upon this question. He points out the rule in the United States and in Missouri which is that chance need be only the dominant factor and thereby adopting the "dominant chance" rule as opposed to the "pure chance doctrine" which prevails in England and Canada. This dominant chance rule is explained at l.c. 717 as follows:

"* * * *But we draw the conclusion

from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. In other words, the rule that chance must be the dominant factor is to be taken in a qualitative of causative sense rather than in a quantitative sense. * * * "

In the "Appreciation Day" scheme a person is selected by a drawing each week. This choice is determined entirely by chance and the fact that in order to win the prize certain questions must be answered does not in any way take away the inherent evil in the scheme. The answering of the questions is merely an ancillary or incidental element as compared to the selection of the name from the box which contains all of the coupon holders. It is our opinion that chance is a dominant factor in the scheme mentioned.

In view of what has been said above it will be seen that "Appreciation Day" contains all the essential elements of a lottery that is, consideration, prize and chance and, therefore, such scheme is illegal in Missouri.

CONCLUSION

It is, therefore, the opinion of this department that a scheme whereby the merchants of a community contribute to a fund from which a prize is paid each week to the holder of the coupon drawn from a box, which coupons are obtained with each purchase from the merchants contributing to the fund, is a lottery even though the person whose name is drawn must answer certain questions in order to obtain the prize.

Respectfully submitted,

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APPROVED:

J.E.TAYLOR
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