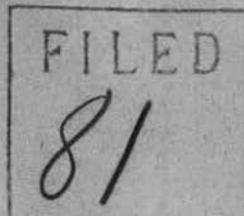


LOTTERIES: Theater scheme whereby contestant identifies local resident by clues is a lottery.

August 20, 1948



8-24
Mr. Sam E. Semple
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

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

"I would like to obtain an opinion as to whether or not the following described scheme is a lottery.

"One of the theaters here in Moberly has asked me about this as they would like to put it into effect. The plan is known as a 'Know Your Neighbor' contest. Inclosed is some literature on the subject. As I understand the plan, a biography is prepared of some prominent person and certain clues are also prepared. Then on one night each week a member of the audience is called to the stage and given the first clue. If he guesses the person he is given a cash prize. If he does not guess the person the thing is continued until the following week when the original clue plus an additional clue is given to some other person selected by lot from the audience. If that person does not guess it the thing is carried over and an additional sum is added each week until some person guesses the identity of the individual.

"They informed me that they will select the contestant each week by having a map on the stage of all of the seats in the theater and by calling someone to the stage and selecting some seat in the audience and thus choosing by that method the person who will have the chance to guess at the clue. The whole scheme works kind of like the radio

walking man contest, or the Dr. I. Q. contest. The theater manager informs me that on the nights the contest is held that every 10th person will be admitted to the theater free."

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

"The General Assembly shall not have power:

* * * *

"(9) 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;"

Section 4704, R. S. Mo. 1939, provides 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."

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 in your letter cannot be doubted

As to the element of consideration, the purchase of a ticket of admission to the theater is sufficient to constitute consideration. State v. McEwan, 343 Mo. 213, 120 S.W.(2d) 1098; 54 C.J.S. 854. The fact that every tenth person is admitted to the theater free does not in any way eliminate the element of consideration from the scheme. It has been well settled in this state since the case of State vs. McEwan, 343 Mo. 213, 120 S.W.(2d) 1098, which is the so-called "bank night" case, that a scheme is still a lottery even if certain free admission tickets are given. As the court, en banc, said through Commissioner Westhues: (l.c. 1101)

"So the scheme described in the information has, in actual practice, all the elements of a lottery, and is just as harmful as if it were limited to those purchasing tickets. See Commonwealth v. Wall (Mass.) 3 N.E. 2d 28, loc. cit. 30, where the court said:

"On the other hand, a game does not cease to be a lottery because some, or even many, of the players are admitted to play free, so long as others continue to pay for their chances. Glover v. Malloska, 238 Mich. 216, 219, 213 N.W. 107, 52 A.L.R. 77; State v. Eames (87 N.H. 477) 183 A. 590, 592. So here the test is not whether it was possible to win without paying for admission to the theatre. The test is whether that group who did pay for admission were paying in part for the chance of a prize. The jury could disregard all evidence introduced by the defendant favorable to him. They could take a realistic view of the situation. They were not obliged to believe that all the ingenious devices designed to legalize this particular game of chance were fully effective in practical operation * * *"

The question next presents itself as to whether the element of chance is present in the scheme described in your request. As stated, a person is chosen from the audience who in turn designates a seat on a map of the theater. The person sitting in the seat designated is then given the first clue as to the identity of a resident of the town. If the person is unable to identify the resident from the clue then the contest goes over to next week at which time another person is selected in the same manner and the original clue plus an additional clue as to the identity is given. This procedure is followed each week until the resident is identified.

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 applying the above rule to the scheme in question it will be seen that the person selected to identify the resident is selected by some person from the audience arbitrarily designating a seat in the theater. It is apparent that the right of the person to participate in the first instance is dependent entirely upon chance, that is, that his seat would be selected. Furthermore, after a person has been selected then he is only given one clue as to the identity of the resident under which circumstances it is obvious that the identification would be so difficult as to be entirely a matter of chance. As other clues are given in succeeding weeks the identity becomes more apparent. What was said in the Globe Democrat case, supra, is equally applicable to the present situation although in that case the process was reversed, that is, that the first questions were comparatively simple but towards the end of the contest the answers became so difficult as to render a correct answer one entirely reached by chance. The court said, l.c. 717:

"* * *In the instant case it stands conceded that at the beginning of the 'Famous Names' contest the cartoons were comparatively simple and the list of suggested titles was short. This made the contest inviting to entrants. But toward the end the cartoons became more 'subtle' and as many as 180 titles had to

be considered. It was a weeding out process, undoubtedly; and, if chance inhered in the solution of these latter cartoons, though only a few of them, and eliminated a large number of contestants, then it must be said the result was influenced by chance."

In view of the above, we believe it is apparent that the element of chance is present in the scheme described.

CONCLUSION

It is, therefore, the opinion of this department that a scheme whereby a person attending a theater is selected by lot from the audience and is given a clue which would identify a resident of the town and if the person is not identified then the next week another person is selected by lot and the original clue and an additional clue is given as to the identity of the resident, and such procedure is followed until the resident is identified and a prize is given to the person making the identification is a scheme in the nature of a lottery and violates the constitution and statutes of this state.

Respectfully submitted,

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APPROVED:

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