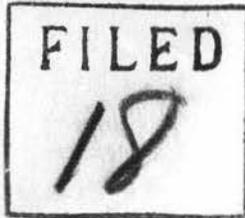


LOTTERY: Such an enterprise contains three elements: consideration, chance and prize, and, therefore, is a lottery.



November 22, 1950

11/28/50

Board of Police Commissioners  
Kansas City 6, Missouri

Attention: Mr. Jack K. Ellis, Secretary

Gentlemen:

This will acknowledge receipt of your request for an official opinion which reads:

"A questionable practice concerning coin operated machines in licensed liquor establishments has recently developed in Kansas City. Tavern patrons attaining a certain score on the machines become eligible for a prize or prizes awarded after a certain period as a result of a drawing held in the establishment.

"The Police Department, after receiving several complaints, requested opinions from the City Counselor's office and the Director of Liquor Control concerning the legality of such a practice. Enclosed is a copy of an opinion by Henry Arthur, an Assistant City Counselor, directed to Mr. Fred R. Johnson, Director of Liquor Control of Kansas City, Missouri, under date of November 9, 1950. The Board of Police Commissioners respectfully requests your advice on the opinion in order to ascertain if the practice conflicts in any way with the state law."

The law is well established in this state that it is illegal to operate a lottery. However, sometimes it becomes difficult to determine just what constitutes a lottery.

Section 39, Article III of the Constitution of Missouri, 1945, is a specific prohibition against the General Assembly passing any law legalizing a lottery. It reads in part:

Board of Police Commissioners

"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)"

The General Assembly, implementing the foregoing mandate of the people, enacted Section 4704, Mo. R.S.A., which reads:

"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 established in this state that the elements of a lottery are (1) consideration, (2) prize and (3) chance. In State ex inf. McKittrick v. Globe Democrat Publishing Company, 341 Mo. 862, 110 S.W. (2d) 705, 1.c. 713, the court said:

"The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. \* \* \* "

See also State v. Emerson, 318 Mo. 633, 1 S.W. (2d) 109, 1.c. 111, Point 3.

## Board of Police Commissioners

Therefore, in view of the foregoing decisions, it is necessary that all three elements hereinabove enumerated be present in any single enterprise for it to be declared a lottery. The absence of any one element will take it out of that classification.

We have read the enclosed copy of an opinion rendered by the City Counselor of Kansas City, Missouri, wherein after discussing the common lottery of purchasing a ticket with a number thereon and thereafter a drawing is held and the one holding the lucky number wins a prize and stating that is all the purchaser gets, the ticket and a chance, he states: "The procedure which you describe in your letter apparently differs from a common lottery for the reason that a purchaser placing his coin in an amusement machine at least buys the pleasure of playing the machine and secures relaxation or amusement by so doing." He then concludes: "The mere fact that the winner is determined by chance would not in our opinion make this enterprise a lottery."

If the only element involved in this enterprise were chance, we would agree with the conclusion reached by the City Counselor. However, as we read your request, there are two other elements included in said enterprise making a total of three elements, which is all the law requires under the foregoing decisions of the Supreme Court of this state to constitute a lottery, and, therefore, we regret to have to disagree with the opinion of the City Counselor. We must hold that such an enterprise does constitute a lottery.

An analogous enterprise to the one herein under consideration is where one attends the picture show on bank night. All he purchases is a ticket at the regular price to enjoy the feature picture and he sees the show. However, by so doing, he also is entitled to a chance to win a prize in addition to seeing said show. This is commonly referred to as bank night at the picture show. The courts have repeatedly held that the payment for said ticket to see the show constitutes a consideration and, along with chance and prize which cannot be denied in such an enterprise, makes it a lottery. In State v. McEwan, 343 Mo. 213, 120 S.W. (2d) 1098, 1.c. 1100, the court, in holding that bank night is a lottery, said:

" \* \* \* Courts have uniformly held that the scheme of 'bank night' is a lottery when the participants therein are limited to those purchasing tickets to the theater. Respondent concedes that to be the law. \* \* "

## Board of Police Commissioners

In the case of State v. Emerson, supra, the Supreme Court had before it a scheme or a 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 a winning number 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 in winning in the weekly drawing received a full value for the money paid in. In the instant case, the party purchases for a nickel a right to play a game for a high score and he also has the pleasure of playing and operating said machine. However, as in the case just cited, he is likewise entitled to a drawing and, if lucky, a prize.

Also see Featherstone v. Independent Service Station Association, (Texas Civil Appeals) 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. Sup. 225, (reversed on other grounds), 248 N.Y. 582, 162 N.E. 533.

In view of the foregoing constitutional and statutory prohibitions in this state against operating lotteries, namely, Section 39, Article III, Constitution of Missouri, 1945, and Section 4704, Mo. R.S.A., and the decisions quoted defining a lottery, it is apparent in this instance that the purchaser, in dropping a nickel in the machine, is not only the beneficiary of the pleasure of operating said machine, but likewise the beneficiary of the holder of a chance on a prize. This constitutes a consideration and the drawing to be held clearly constitutes a chance, and it is undisputed as to there being a prize for the lucky holder of the number drawn, so this enterprise definitely contains all three elements--consideration, chance, and last but not least, a prize.

## CONCLUSION

Therefore, it is the opinion of this department that such an enterprise contains all three elements of a lottery as heretofore defined by the courts of this state, namely,

Board of Police Commissioners

consideration, chance and prize, and anyone operating such an enterprise directly violates Section 39, Article III of the Constitution of Missouri, 1945, and Section 4704, Mo. R.S.A., and is subject to prosecution for a felony.

Respectfully submitted,

AUBREY R. HAMMETT, JR.  
Assistant Attorney General

APPROVED:

  
\_\_\_\_\_  
J. E. TAYLOR  
Attorney General

ARH:VLM