

**LOTTERIES:** A newspaper subscription contest, containing the elements of consideration, chance, and prize, is a lottery.

June 29, 1951

Mr. Jeremiah Nixon  
Assistant Prosecuting Attorney  
Jefferson County  
Hillsboro, Missouri



Dear Mr. Nixon:

We have given careful consideration to your recent request for an official opinion, which request is as follows:

"I am sending herewith portions of the Jefferson Republic's issue of June 14th, 1951. Please advise as to whether this promotion scheme is a Lottery. I believe the material that I send herewith sufficiently sets out the facts upon which this question is based."

This is a comprehensive plan to build up the subscription list of the said newspaper. It inaugurates a contest which is to run for six and one-half weeks. Two automobiles and various cash prizes are to be given to the winning contestants. Winners of prizes will be determined by the number of votes turned in, said votes being represented by ballots issued on subscriptions and free coupons clipped from the newspaper. Subscribers may cast their votes for any person who has entered the contest. A contestant, in addition to his chance to win a prize, will receive regular commissions on all subscriptions taken by him.

The Constitution of Missouri, in Section 39(9) of Article III, provides that the legislature shall not have power: "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." And the General Assembly has enacted laws, embodied in Sections 563.430 and 563.440, RSMo 1949, in an effort to carry out this mandate.

These statutory provisions, however, do not give a clear-cut definition of the crime, leaving it to the courts to supply the meaning of the term. The Supreme Court of Missouri, in the case of State v. Emerson, 318 Mo. 633, l.c. 639, said:

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"The people in framing the State Constitution (Sec. 10, Art. XIV) 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. v. Hughes, supra, l.c. 534.] In State v. Becker, supra, l.c. 560, in line with our former rulings 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."

In the very next paragraph of this opinion the court said: "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." These three elements are essential, and the rule is definitely the law in Missouri.

Consideration implies the payment of something of value for the privilege of sharing in the lottery. But the courts have consistently held that such payment need not be a definite purchase of a lottery ticket. It may be merely a transaction connected in some way with the lottery scheme. The use of "free tickets" has been held to imply a sufficient consideration when such tickets are given to induce customers to participate in the scheme. The courts are inclined to suppress any subterfuge or attempt to escape the stigma of being a lottery. We are supported in this conclusion by the following authorities: State v. McEwan, 343 Mo. 213; State ex inf. McKittrick v. Globe-Democrat, 341 Mo. 862; State v. Emerson, 318 Mo. 633; State v. Becker, 248 Mo. 555; State ex rel. Home Planners Depository v. Hughes, 299 Mo. 529.

The promotion plan inaugurated by the Jefferson Republic is based upon payments made for subscriptions, and this without question is sufficient consideration to bring the scheme within the purport of the lottery laws of this state.

The element of chance, as defined by the courts, is a factor that may not appear on the surface of the contest. It may be hidden under the camouflage of skill or services performed. The presence of any degree of chance may be held to reduce the scheme to the penalties of the lottery laws. In the case of State ex inf. McKittrick v. Globe-Democrat, 341 Mo. 862, l.c. 881, the Supreme Court said:

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"It is impossible to harmonize all the cases. 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 or causative sense rather than in a quantitative sense. This was directly decided in *Coles v. Odhams Press, Ltd.*, supra, when it was held the question was not to be determined on the basis of the mere proportions of skill and chance entering in the contest as a whole."

In the State of Oregon a certain company proposed to sell "thrift tickets" and pay cash prizes to such persons as should be selected by the vote of the ticket holders. The Supreme Court of Oregon, in the case of *National Thrift Association v. Crews*, 116 Ore. 352, held this scheme to be a lottery. In the course of that opinion, the court said, l.c. 355, 356:

"\* \* \* Is the element of chance involved? Let us examine the contract. Assume that 25,000 persons each paid one dollar in order to provide funds for a full monthly distribution. Under the terms of this contract \$15,000 would be paid out in prizes, the balance of \$10,000 going to the company. When the money is distributed, 2,500 purchasers get their money back, 1,582 receive something in excess of what they paid, and 20,918 do not receive anything. This scheme reminds us of 'Get-Rich-Quick Wallingford.' It certainly does not have the appearance of a legitimate business enterprise. If, instead of voting these tickets, they were marked with numbers and drawn from a box to determine who would receive the money, would it be contended that the law against lotteries was not violated? The mere fact that the

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winners are determined by the number of votes received does not, in this particular scheme, eliminate the element of chance and make it less evil in its tendencies. It is a cleverly designed scheme to evade the law against lotteries and must not be countenanced.\*\*\*"

In North Carolina a promotion scheme, similar to the one inaugurated by the Jefferson Republic, was held to be a lottery or a gift enterprise by the Supreme Court of the state in the case of Manufacturing Co. v. Benjamin, 172 N.C. 53. In the course of that opinion, the court said, l.c. 54, 55:

"The defendants were to furnish plaintiffs with the names of one hundred and fifty women, who were to be known thereafter as contestants for the prizes offered and later described. The plaintiffs were to notify contestants of their appointment, and the first sixty accepting were to be rewarded with the gift of a 'Queen Esther Spoon.' Each of the one hundred and fifty were to be given a white coupon free to the value of \$10 ordinary coupons. Each of the one hundred and fifty in return was expected to drum up trade among their friends and acquaintances to purchase from defendants, and such purchaser either for cash or payment on account would be given certain tickets, which varied with amount of cash paid. These tickets were delivered to favored contestant or deposited to her credit by purchaser. There were also red tickets for special sales which had an extra value. There were coupon books each of value of \$5 which could be bought for cash, and amount paid for said books was placed to credit of purchaser, to be traded then or later at his convenience, but the coupons in said book could be voted at any contest by the woman contestant to whom same was delivered. Also there was a card of value of \$2.50 to be punched on margin, which, in addition, was worth \$1 to holder for the purchase of any article enumerated on back of same by paying the difference between such value and list price, which ran from 3 cents to \$1.55. A book of instructions was also sent by plaintiffs, which contained the rules of contest.

"This 'Trade Extension Campaign' was to extend over a period of six months. On Wednesday of each week a piece of silver was given the contestant having the

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largest number of coupons deposited, and such tickets could be voted in no further weekly contest, and as to them were worthless. Once a month a watch was delivered to the contestant having the largest number of coupons deposited, and all tickets so deposited were worthless at any subsequent monthly drawing. At the end of six months the contestant having the largest number of coupons deposited for the entire campaign received the grand prize of the Grafanola; then the campaign was closed, and all coupons were worthless in the hands of all except the fortunate winners at the weekly, monthly, and final contests. This is a concise statement of the scheme as disclosed by the evidence.

"The defendants made the notes and executed the contract and received the various articles to be offered as prizes described in contract.

"Awaiting the coming of plaintiff's representative, who was to open the campaign, the prizes were displayed in defendants' show windows, when they were advised by the county solicitor if they went forward with this plan they would be indicted for conducting a lottery. Defendants at once advised plaintiff of the situation, and offered to return prizes and cancel contract, which offer they have kept good to date, but plaintiff refused to accept offer, and demanded that contract be carried out.

"His Honor held upon all the evidence that the scheme came within the purview of section 3726 of the Revisal as a gift enterprise, that the consideration for the notes was illegal, and that plaintiff cannot recover.

"It is immaterial whether this scheme to enlarge defendants' business is a lottery or a gift enterprise, as both are prohibited by the law. We concur with the judge that the scheme falls under the denunciation of the statute, and, therefore, the consideration for the notes is illegal, and plaintiff cannot recover.

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"Schemes of this character are so numerous that it would tax the ingenuity of man to define with accuracy and to draw the line clearly between those which are devised to evade the laws made for the protection of an unwary public and those which are bona fide and harmless methods of advertising a legitimate business."

The contest promoted by the Jefferson Republic may appear at first thought to be free from any possibility of chance. But out of the scheme may evolve a most vicious gambling contest, inasmuch as the contestants could purchase large blocks of subscriptions for the sole purpose of increasing their chances of winning a prize. A situation such as this could easily develop in the final stages of the contest. The element of chance is very definitely embodied in the plan.

The prize element is certainly included in the promotion scheme of the newspaper, since two automobiles and various cash prizes are offered to the winners. No further proof is necessary.

#### CONCLUSION

It is the opinion of this office that the promotion scheme of the Jefferson Republic, containing the essential elements as defined by the courts, is a lottery.

Respectfully submitted,

B. A. TAYLOR  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

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