

OPINION
44-68

January 11, 1944 (OPINION)

LOTTERIES

RE: Lotteries

I have your letter of January 4, in regard to "Bank Night" and have read the same carefully. Bank night, as it is usually conducted, consists of the drawing of numbers on a day certain, and the holder of the lucky number is awarded a prize. All persons, who purchase tickets to the theater at the regular price, not greater than is charged on other nights when bank night is not conducted, are eligible to sign their names in a register, which is usually kept in the lobby of the theater. Such register is also placed in the lobby of the theater or on the sidewalk in front of the theater, if the weather permits, and any person, whether he has purchased a ticket or not, is permitted to sign such register. Duplicate numbers are then given to every person who registers, one of them being given to the customer and the other being placed in a box from which the drawings are made. The winning number is then announced in the theater and also at the entrance of the theater for the benefit of any persons who might have signed such register, and who did not desire to purchase a ticket, but who wished to wait outside. Any person outside the theater who holds the winning number is entitled to enter the theater to claim the prize, without paying an admission charge.

Whether these facts constitute a violation of our lottery and gift enterprise laws, is a matter upon which neither the courts nor the members of this office are wholly in accord. The courts of the various states are almost equally divided, some holding that the operation of bank night is within the statutory provisions prohibiting lotteries and gift enterprises, while others hold that it is not contrary to such statutory prohibition, because there is no consideration passing from the person who participates for the privilege or the opportunity to win the prize.

The question narrows itself down to whether the facts, as stated above, constitute the offering of property by means of a lottery. Section 9666 of the 1913 Compiled Laws provides: "Every person who offers for sale, distribution, or disposition in any way, any real or personal property or things in action, or any interest therein, to be determined by lot or chance, that shall be dependent upon the drawing of any lottery within or out of this state, and every person who sells, furnishes or procures or causes to be sold, furnished or procured in any manner whatsoever, any chance or share or any interest whatever in any property offered for sale, distribution, or disposition in violation of this section, or any ticket or other evidence of any chance, share, or interest in such property, he is guilty of a misdemeanor."

A careful study of this section will show that in order for the plan of advertising involved in this manner to be a violation of that section, such plan must constitute a lottery, as defined by our statutes. Section 9660 of the 1913 Compiled Laws, defines a lottery in North Dakota. That section reads as follows: "A lottery is any scheme for the disposal or distribution of property by chance among the persons who have paid or promised or agreed to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share of or interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, a raffle, or a gift enterprise, or by whatever name the same may be known."

Thus we find that the essential elements of a lottery are three - to-wit: (1) a prize, (2) a determination of the winner of such prize by lot or chance; and (3) the payment or the promised payment of a valuable consideration for the chance of participating in the lottery.

The first two elements mentioned are clearly found in the plan designated as Bank Night. There is a prize and the winner of the prize is determined by chance. The only question, therefor, is, is there a consideration paid for the privilege of participating in the plan, and for the chance of winning the prizes offered.

The courts which have held bank night as illegal have based their decisions on the fact that the operation of bank night has increased the attendance at the theater on the night when bank night is being operated, and for that reason, a consideration, in increased admission fees, has in fact been paid by the collective groups attending the theater for the chance of participating in bank night, this notwithstanding the fact that some individuals may have been permitted to participate in the plan, who did not pay or promise to pay any consideration. See *Barker v. State*, 193 S.E. 605, *State ex rel Beck v. Fox Kansas Theater Co.*, 62 Pac. 2d, 929; *State ex rel Hunter v. Fox Theater Corporation*, 275 N. W. 605.

On the other hand, the courts of some states have held that lottery laws are penal in their nature and must be strictly construed. See *State v. Hundling*, 264 N.W. 608. Following this reasoning, a consideration must clearly be shown, if the plan is found to be in violation of the statute. The wording of our statute, section 9660 above, would indicate that the consideration must pass from the persons entitled to participate in the distribution of the property offered, and if a substantial number of those persons who are allowed to participate have paid no consideration, it is difficult for me to see how the fact that some persons have paid an admission to the theater, which is not greater than the admission ordinarily charged on other nights, can constitute such consideration as to make the plan a lottery. Some of the decisions which hold that such plan of bank night is not illegal, in that it has not all three of the elements necessary to constitute a lottery, and that no consideration is shown, are the *Hundling* case, cited above, where the Iowa Supreme Court holds that bank night is not a lottery, in that there is no consideration, where neither those who register nor the winner were required to purchase admission tickets; the mere fact that the owner of the theater derived some benefit by reason of increased attendance

was not held consideration as would make the plan illegal. In the case of *State v. Eames*, 183 Atl. 590, the New Hampshire court holds that the bank night scheme is not illegal, in that something of value for the opportunity to participate was not necessarily paid by those allowed to participate in the plan. *State v. Stern*, 275 N.W. 626, is a Minnesota case, where the Supreme Court of that state holds that bank night, as outlined above, does not constitute a lottery because of lack of consideration for the chance to participate in the distribution of such prize, although the court did point out that it would be lottery, if persons were not allowed to participate who had not purchased tickets.

The entire matter seems to rest upon the question of whether the consideration is to be determined from the standpoint of those participating in the chance to win the prize or from the standpoint of the owner of the tickets. Our statute clearly indicates that it must be from the standpoint of those participating in the distribution of the property.

The California Supreme Court in the case of *People v. Cardas*, 28 Pac. 2d 99, holds that consideration must pass from the persons who are eligible to win the prize. In that case, where a statute similar to that of North Dakota is being considered, the court said: "The question of consideration is not to be determined from the standpoint of the defendant, but from that of the holders of the prize tickets....Certainly those who received prize tickets, without buying an admission ticket, did not pay anything for the chance of getting the prize. They did not hazard anything of value...."

The California court in the above case holds that the giving away of a prize under circumstances which are identical to those in the bank night scheme did not constitute violation of the statute. They point out that the holder of the prize number would be eligible to win, whether he ever attended and paid for a single performance at the theater, and therefore, no consideration was present.

I have gone into this matter at great length, Mr. Hill, to show that the decisions are hopelessly in conflict. There is no way of determining what our Supreme Court would do if the matter were presented to them for their determination. The more logical reasoning would seem to indicate that the plan might not be considered to be a violation of the law, but from past experience, I have found it is not wise to hazard a guess as to what any court might do, where the question to be determined is as close as the one now under consideration. Of course, if the participation and the distribution of the prizes are limited to persons who buy tickets, and if no announcement is made outside of the theater to persons who are not in the theater, so that they can claim the prize, or, if persons holding complimentary tickets are not permitted to participate, then the plan is clearly illegal under any interpretation of our laws.

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