

**Opinion No. 629****Lotteries, Defined—Consideration  
Necessary—“Bank Night.”**

**HELD:** To constitute a lottery there must be (1) distribution of prizes (2) by chance (3) among persons who have paid a valuable consideration therefor.

Where a theatre distributes money by chance on a plan called “Bank Night” to persons who are not required to pay for the chance, it is not a lottery as defined by Section 11149, R. C. M., 1921. (The opinion is limited to the facts stated therein.)

October 11, 1934.

You have asked my opinion in regard to the legality of what is known as the "bank night" put on by the Liberty theatre and you enclose a memo of the facts as follows:

"Every Wednesday night the sum of one hundred dollars is given away at the Liberty Theatre or Rainbow Theatre to the person whose name is drawn from a list of names which is made up of all persons who have registered in the registration book, provided that person comes forward within a reasonable time to claim the prize. In the event he does not so come forward, names continue to be drawn until the prize is claimed.

"In order to register so that his name may be eligible for Bank Night a person must write his name and address in the registration book. These books are kept in the lobby of both the Liberty and Rainbow Theatres but are open for any person, whether he has paid admission to the theatre or not, to register therein. Any person desiring to register may enter the theatre and do so without paying any admission therefor. Moreover, as the registration books now stand they contain the names of many persons who have registered without paying any admission.

"The books have been made available outside the theatre for those who desired to register therein. Requests may be and have been made at the box office during operating hours or to the manager, outside of hours, for the privilege of registering and it has been and will be extended to the person so requesting it.

"On Wednesday night the drawing is held on the stage of the Liberty Theatre at nine o'clock or very close to that time. The name of the winner is announced in the Liberty Theatre and in the Rainbow Theatre and it is likewise announced in front and outside of the Liberty Theatre and of the Rainbow Theatre.

"After the name has been announced that person is given a reasonable time to come forward and claim his prize. Announcements outside the Theatre are so made that anyone within a reasonable distance of the Theatre entrance may hear his name called and

if his name is called he is given a reasonable time to make that fact known and to enter the Theatre and to claim the money.

"Anyone whose name is called may enter the Theatre for the purpose of claiming the money without paying admission therefor. Anyone whose name is registered may, on or about nine o'clock on Wednesday night, come and stand in front of either the Liberty or Rainbow Theatres and have as much opportunity to have his name called and to receive the prize money as if he were within the Theatre.

"In making the drawing and in awarding the money there is no discrimination, in fact, there is no investigation made as to the payment of an admission fee either at the time of registering or at the time of claiming the prize money. Many prizes have been awarded to persons who were standing outside the Theatre at the time their name was called and they have been allowed to claim their prizes without regard to the fact that they had or had not a ticket of admission.

"No pressure is exerted to force or persuade people to buy admission tickets in order that they might thereby win the money."

For the purpose of this opinion we assume the facts as stated in the memo to be true. Should there be any material change therein it might require a change in my opinion.

Section 11149, R. C. M., 1921, defines lottery:

"A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share 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, raffle, or gift enterprise, or by whatever name the same may be known."

An analysis of this Section and similar statutory provisions and an examination of the authorities construing them discloses that there are three elements necessary to constitute a lottery: (1) distribution of prizes or

things of value, (2) by lot or chance, (3) among persons who have paid or agreed to pay a valuable consideration for the chance to obtain such prizes or things of value. (38 C. J. 286, sec. 1, and 289, sec. 2; 17 R. C. L. 1222; *People v. Cardas*, 28 Pac. (2d) 99; *People v. Hecht*, 119 Cal. App. Supp. 778, 3 Pac. (2d) 399; *Denver v. Fraueuff*, 39 Colo. 20, 36; 88 Pac. 389; 7 L. R. A. (n. s.) 1131; 12 Am. Cas. 521; *Lohman v. State*, 81 Ind. 15, 17.)

While the first two elements are present in the facts outlined, it is apparent that the third element, the consideration, is lacking. This plan is similar to the plan considered by the California Court in the case of *People v. Cardas*, supra, in which State a lottery is defined exactly as it is in Montana. The only difference in that case is that the prizes were free round-trip tickets to Santa Catalina Island. In holding that there was no consideration paid for the chance the Court said:

"Counsel for the people argue that patronage from the ticket holders as a whole constituted consideration for the distribution of the prizes, even though the individual holders of tickets had not parted with consideration for the individual ticket held by them. This argument apparently proceeds upon the theory that the element of consideration is established by showing that the defendant received something of value in return for the distribution of the prizes. The question of consideration is not to be determined from the standpoint of the defendant, but from that of the holders of prize tickets. The question is: Did the holders of prize tickets pay a valuable consideration for the chance? 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. It would then seem to follow that those who purchased admission tickets and received prize tickets, not at the box office, but from another employee, could not be said to have paid a consideration for the prize tickets since they could have received them free."

The facts are also similar to those considered by the Colorado Court in *Cross v. People*, 18 Colo. 321, 32 Pac.

821, 36 Am. St. Rep. 292, where the Court said:

"The gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and no consideration is derived directly or indirectly from the party receiving the chance, does not constitute the offense. In such case the party receiving the chance is not induced to hazard money with the hope of obtaining a larger value, or to part with his money at all; and the spirit of gambling is in no way cultivated or stimulated, which is the essential evil of lotteries, and which our statute is enacted to prevent. \* \* \* The fact that such cards or chances were given away to induce persons to visit their store with the expectation that they might purchase goods and thereby increase their trade, is a benefit too remote to constitute a consideration for the chances. Persons holding these cards, although not present, were, equally with those visiting their store, entitled to draw the prize. The element of gambling that is necessary to constitute this a lottery within the purview of the statute, to-wit, the paying of money, directly or indirectly, for the chance of drawing the piano, is lacking, and the transaction did not constitute a violation of the statute."

In view of the definition of lottery given by our statute and the lack of consideration paid by persons registering, it is my opinion that the bank night plan, as outlined above, is not a lottery and is not a violation of our statute. It is not the function of this office to legislate and to declare that illegal which the legislature has not condemned. There is no law which prohibits the gratuitous distribution of one's property by lottery or chance. (38 C. J. 291, sec. 6, note 49, citing *U. S. v. Olney*, 27 Fed. Case No. 15, 918, 1 Abb. 275, *Deady* 461; *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 S. 338; *Cross v. People*, 18 Colo. 321, supra; *Elder v. Chapman*, 176 Ill. 142, 52 N. E. 10; *Ginther v. Rochester Improvement Co.*, 46 Ind. A. 378, 92 N. E. 698; *Chancy Park Land Co. v. Hart*, 104 Iowa 592, 73 N. W. 1059; *Long v. State*, 74 Md. 565, 22 A. 4.)

I desire to point out, however, that unless the registration books are open and readily accessible to the public and

there is a general free distribution of the chances the plan might be held illegal by our Court as was done in *Featherstone v. Independent Service Station*, (Tex. Civil App.) 10 S. W. (2d) 124, and *State v. Danz*, 140 Wn. 546, 250 Pac. 37, 48 A. L. R. 1109.

There must be an actual and not merely a theoretical freedom of registration and distribution. If any coercion of any sort is exerted to influence persons to buy tickets in order to register or to collect the prize, then our opinion very likely would be different.

We call attention to this fact because we have been given to understand that altho at present free access may be in effect, in the past the purchase of a ticket was necessary from a practical standpoint.

Note: Section 11149, R. C. M. 1921, was amended by Chapter 36, Laws of 1935, to except giving of prizes by agricultural fairs and rodeo associations.