

No. 233

LOTTERY—GAMBLING—DOPESTER'S CONTESTS

Held: The dopester's contest is a lottery and is considered to be in the same class as keno, screeno, bank night, serialgram and games of like kind and character.

September 6, 1941.

Mr. John D. Stafford
County Attorney
Cascade County
Great Falls, Montana

Attention: Mr. Cleveland Hall
Deputy County Attorney

Dear Mr. Stafford:

You have submitted a contest blank which the Home Oil and Refining Company of Great Falls proposes to use during the coming Fall and inquire whether the scheme proposed is a lottery. The following is the dopester's contest blank:

DOPESTER'S CONTEST BLANK

—Rules—

Mark an "X" in the square before each team you think will win. It's just like voting.

Twelve or 13 winners entitle you to 5 gallons of Silver Gas at the station where you secure this entry blank.

The weekly pot goes to the person or persons who name 14 winners. If more than one name all 14, the pot will be divided equally among them. If there are no winners, it will be carried over until the next week and \$50 will be added.

Each week's contest closes at 3 P. M. Thursday.

There is nothing to buy. Adults only. To secure a contest blank you must drive in. After making your selections, leave the blank at the station where you secured it.

All ties count as games lost.

In all questions regarding the contest, the decision of the judges will be final.

..... Great Falls vs.	..... Mississippi vs.
..... Anaconda	..... Louisiana State
..... Bozeman vs.	..... Colorado State vs.
..... Butte Central	..... Colorado Mines
..... Missoula vs.	..... Texas Tech vs.
..... Billings	..... Oklahoma A & M
..... Texas vs.	..... Pittsburgh vs.
..... Colorado	..... Ohio State
..... California vs.	..... Utah vs.
..... Michigan	..... Santa Clara
..... Brigham Young vs. Southern Methodist vs.
..... Nevada U. C. L. A.
..... Denver vs. Washington vs.
..... Iowa State Minnesota

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Section 11149 of the Revised Codes of Montana, 1935, provides:

"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."

Section 11151 of the Revised Codes of Montana, 1935, provides:

"Every person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person, any ticket, chance, share or interest or any paper, certificate or instrument, purporting or understood to be or to represent any ticket, chance, share or interest in, or depending upon the event of any lottery is guilty of a misdemeanor."

Our Supreme Court, as well as this office, has upon several occasions set out the three requisites of a lottery as:

The offer of a prize,
Its award by chance, and
The giving of a consideration for an opportunity to win the prize.

(See *State v. Fox Missoula etc. Corp. et al.*, 110 Mont. 441, 101 Pac. (2nd) 1065; *State v. Hahn*, 105 Mont. 270, 72 Pac. (2nd) 459; 38 C. J. 289, 17 R. C. L. 1222.)

Now let us proceed to analyze the dopester's contest blank to ascertain whether it contains the three necessary requisites of a lottery.

I.

Within paragraph two and three of the dopester's contest blank we find the following:

"Twelve or 13 winners entitle you to 5 gallons of Silver Gas at the station where you secured this entry blank.

"The weekly pot goes to the person or persons who name 14 winners. If more than one name all 14, the pot will be divided equally among them. If there are no winners, it will be carried over until the next week and \$50 will be added."

Couched within the language above we find the first of the three requisites of a lottery, i. e., the offer of a prize: five gallons of gasoline or possibly \$50—the so-called "pot."

II.

Paragraph one of the contest blank reads as follows:

"Mark an 'X' in the square before each team you think will win. It's just like voting."

To discern the second requisite of a lottery within the meaning of the phrase above quoted requires some research. However, the answer lies partly within the definition of the word "think."

Webster's New International Dictionary defines "think" as "to bring before one's mind clearly as by imagining, recalling, conjecturing, etc." "Conjecture" is defined as "an inference or conclusion so drawn or deduced; surmise; guess; as a mistaken conjecture, etc."

"'Think' means believe, consider, esteem."

Martin v. Iowa Railway Co., 13 N. W. 424, 425; 59 Iowa 511.

"When a witness prefaces his testimony with 'I think' he is to be taken to be testifying to what he remembers; 'think' meaning to 'believe.'"

Abbott v. Church, 123 N. E. 306, 308; 288 Ill. 91.

"Conclusion of an expert as 'I think' is equivalent to saying 'I believe,' and is an assertion of his professional opinion."

Jones v. Philadelphia and Reading Coal and Iron Co., 132 A. 122, 123; 285 Pa. 317.

"The words 'suppose' and 'guess' are frequently used to express one's **opinion** though more apt to express conjecture." (Emphasis mine.)

Comcill v. Mayhew, 55 So. 314, 317; 172 Ala. 295.

Thus it can be seen the dopester is venturing his very best guess upon the outcome of the games played, thus leaving the award of the prize to chance, which constitutes the second prerequisite of a lottery. But let us go further on the element of chance.

In the State of Delaware, in the case of *State v. Sedgwick*, 81 Atl. 472, it was contended that inasmuch as the "contingency" which determines the winning of a prize is the aggregate number of runs made by certain number of baseball clubs, which are the result of skill and not of chance, the scheme was not a "contingency in the nature of a lottery." But the court held the scheme was prohibited by the statute, and, in so doing, said:

"The 'happening of a contingency in the nature of a lottery,' as contemplated by the statute and applied to the particular facts of this

case, is not the number of the runs made by different baseball clubs, which uncertainty may or may not be a matter of chance within the meaning of the law, but the contingency here, into which enters the element of chance and which partakes of the nature of a lottery, is the double hazard of the selection of a combination of numbers which are designated by a drawing to be representative of certain clubs, the winnings upon which are determined by baseball scores. The prize is given not to him who may forecast the results of the games, either in victories or in runs, but to him who selects and pays for a combination of numbers, each representing a club not selected by but designated for him, the total runs of which approach nearest the highest total of runs made in a given time by a like number of clubs.

"There is but one highest total of runs made by six clubs regardless of the number of runs made and that highest number of runs is the factor that determines who wins on a combination of numbers selected by the member of the pool. As a method of determining the winner of all who participated in the game, it has no advantage over nor is it essentially different from the ordinary method of having a little girl or a man of position draw the decisive or determining number from a hat. We are of the opinion that the scheme disclosed by the evidence constitutes a lottery within the meaning of the law and therefore decline to grant the motion that the jury be instructed to acquit the prisoner."

The phrase—"depending upon the event of any lottery"—appearing in Section 11151, quoted supra, is not substantially different from the phrase—"on the happening of any contingency in the nature of a lottery"—contained in the Delaware statute.

The Delaware statute was under consideration in the later case of *State v. Gilbert*, 100 Atl. 410. In that case the scheme under consideration was one wherein a person, for a small sum paid, was given a certificate containing certain numbers. The person holding the certificate containing the number corresponding to the last three figures of the Philadelphia bank clearings as published should receive an article of merchandise worth \$25.00. The court, in holding the plan was prohibited by the statute, said:

"Lottery has been defined to be a scheme for the distribution of money or property by chance, and that the scheme is not limited to the sale of tickets nor to the terms of promises printed or written upon them. The meaning of a contingency in the nature of a lottery, within the contemplation of the statute, as applied to the facts of this case, is:

'One (article) will be given without extra charge to the holder of certificate bearing number corresponding to the last three figures of the Philadelphia bank clearing as published,' etc.

"The element of lottery in this scheme lies in the chance to get one of the list of articles named on the card without the full payment of twenty-five dollars by the holder of this certificate.

"What the Philadelphia bank clearings will be at the end of every week is the merest guess, and that any number on the certificate will correspond to the last three figures or such clearings is nothing less than chance."

State v. Sedgwick, 2 Boyce, 453, 81 Atl. 472.

What was said by the Court in the case of *State v. Lipkin*, (N. C.) 84 S. E. 340, is pertinent here. The Court in that case said:

"Nor does not matter that the person who buys a chance for a trivial sum, in the expectation of winning something of much larger value, can go on with his contributions, and after paying the full sum of \$17.50' (\$25 in this case) get the place of furniture he may want.

(a watch and chain in this case). This has been held not to divest it of its gambling quality. *State v. Perry*, (154 N. C. 616, 70 S. E. 387) *supra*; *DeFlorin v. State*, 121 Ga. 593, 49 S. E. 699, 104 Am. St. Rep. 177; *State v. Moren*, 48 Minn. 555, 51 N. W. 618. In the case last cited, it is said that such a feature would probably operate as an additional incentive to purchase a chance in the lottery scheme, and does not take it out of the statute, as the vicious element still inheres in it. The sale of the ticket gave the purchaser a chance to obtain something more than he paid for, and the other fact became an extra inducement for the purchase, making the general scheme more attractive and alluring. The difference between it and a single wager on the cast of a die is only one of degree. They are both intended to attract the player to the game and have practically the effect of inducing others, by this easy and cheap method of acquiring property of value, to speculate on chances in the hope that their winnings may far exceed their investment in value. This is what the law aims to prevent in the interest of fair play and correct dealing Call the business what you may, a 'gift sale,' 'advertising scheme,' or what not, but it is none the less a lottery, . . . if the gambling element is there"

III.

We now come to the third requisite: The consideration for the opportunity to win the prize.

The natural supposition is the oil company would contend there was no consideration paid for participation in the dopester's contest, hence there could be no lottery.

Quoting from our Supreme Court in the Fox Theatre case, *supra*, our court said, speaking with reference to the element "consideration:"

"Where does the money come from for the prize? From the treasury of the theater? Where does the money come from for the treasury of the theater? From the customers who purchase tickets. Therefore the price paid for the ticket, in part, though disguised, later reappears as the gift. It enters the box office as Dr. Jekyll, and steps out as Mr. Hyde."

But the oil company may contend there is nothing to buy and no consideration paid, etc. However, to clarify this suggestion, we again quote from the Fox Theater case, *supra*:

"A further analysis of the question of consideration is found in Williams on Lotteries, *supra*, at page 132, which in several respects is pertinent to the problem before us:

"The Athens theatre has a show to exploit and seats to sell. It makes offers to the public upon certain terms and conditions which contemplates two classes of chances and the members of the public accept these terms and conditions without change. It is the theatre's game and the players have to accept the offers as they are made, if they accept at all.

"It is respectfully suggested that this scheme discloses six kinds of consideration connected with and included in the theatre's offer and the corresponding acceptance of the offer, namely:

"(a) The registrant's time, trouble and expense in going to and from the lobby of the theatre in order to register and receive his option number.

"(b) The registrant's subjection in the lobby to sales appeal of the theatre program by the flaming posters suggesting beautiful scenery, charming women, handsome men and thrilling music—a thing of value to the theatre.

"(c) The addition of registrant's name and address to the theatre's mailing list, a list which is of value and would cost considerable if made in some other manner.

“(d) The registrant’s time, trouble and expense in going to and from the theatre in order to participate in the drawing at nine o’clock on “bank night.”

“(e) The registrant’s service to the theatre in “broadcasting” notice of the scheme to his kin, comrades and acquaintances—a very valuable service since the use of the mails and radio is denied to “bank night.”

“(f) The admission fee, which, in most cases, is paid by the registrant in order to see the drawing as it actually occurs and to participate most comfortably and advantageously in the distribution, if, as, and when it takes place.

“In view of this analysis several things are obvious, namely:

“(a) That there are two prerequisites for participation in the distribution of prizes: (1) Registration of name and address in a book in the theatre lobby, and (2) attendance at the theatre, either in or out, at nine o’clock sharp on “bank night,” and that one of these prerequisites is absolutely worthless without the other.

“(b) That there is only one way for the registrant to see the drawing and get first hand information and thereby participate fully in what is done, and this way, this opportunity for visual participation, this chance de luxe, is sold to him in a 25 cent admission fee and all the hocus pocus that “bank night” promoters can muster cannot obscure that fact.

“(c) That while consideration is present in this scheme in all the kinds and aspects shown in the foregoing analysis, that part which is made up of the stimulated admission fees actually and undoubtedly received by the theatre, is, in itself, sufficient to constitute the consideration comprehended by the anti-lottery statutes in any state in the Union.

“(d) That another kind of consideration involved in the acceptance which is and of itself sufficient to supply the element of consideration in a lottery, is the presence of the registrants at the theatre, even on the outside, in response to the operator’s offer.

“(e) That the plan of drawing from all the registration numbers has the effect of playing the total registration against the attendance and thereby increasing the odds against the award and in favor of passing the prize for addition to the prize for the next Monday night. This, of course, increases the prize without increasing the admission and in so doing accelerates the gambling spirit. Here is where an increase in prize from \$35.00 to \$210.00 without any award at all. Thus there is no limit to the prize in the “bank night” scheme and consequently no height to which the gambling fever may not rise under it.”

Therefore, the third and last requisite of the lottery appeared in the matter of consideration hereinabove explained.

It is therefore my opinion the dopester’s contest is a lottery and is considered to be in the same class as keno, screeno, bank night, serialgram and games of like kind and character.

Sincerely yours,

JOHN W. BONNER
Attorney General