Opinion No. 147

Lotteries—Coupons—Premiums.

Held: Coupons given with each $1.00 purchase, one of which, upon holding of a drawing, will entitle the holder to an automobile, do not constitute a lottery within Section 11149, Revised Codes of Montana, 1935, as determined by the Montana Supreme Court in State ex rel. Stafford v. Fox Great Fall Theatre Corp. 114 Mont. 52, nor do they fall within the licensing provisions of Section 2430, Revised Codes of Montana, 1935, where no valuable consideration passes to obtain such coupon, where such coupon entitled the holder to nothing more than a chance to win a prize, and where such coupon cannot be redeemed in goods, wares or merchandise as a premium.

November 19, 1948

Mr. Robert F. Swanberg
County Attorney
Missoula County
Missoula, Montana

Dear Mr. Swanberg:

You have requested my opinion on the following:

A group of merchants have initiated a plan whereby all purchases in the amount of $1.00, in their respective stores, entitle the purchaser to a numbered coupon. This coupon constitutes a chance to win an automobile. On a specified date, at a local theatre, a drawing will be held to determine the winner of the car. The holder of the coupon having the number corresponding to the number of the stub drawn, wins the car. To win, the holder of the winning coupon must be present in person at the drawing, or must have signed a "courtesy registration card" prior to the drawing.

Your questions are:

1. Does the above plan constitute a lottery within Section 11149, Revised Codes of Montana, 1935?

2. Does the above plan fall within the licensing provisions of Section 2430, Revised Codes of Montana, 1935?

Section 11149, 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 potrion 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.

In State ex rel, Stafford v. Fox Great Falls Theatre Corporation, (1942) 114 Mont. 52, (80-81), 132 P. (2d) 689, the Supreme Court of Montana interpreted the lottery law being Section 11149. In summary, the facts before the Court were that a bank night was being conducted by a Great Falls Theatre. Purchase of a theatre ticket was not necessary to participate in the drawing. Free tickets, for entry in the drawing, were available at various places in the town. The winning number was announced in the theatre, in the foyer and outside, to persons assembled or passing in front of the theatre. The Court held this practice did not constitute a lottery, no valuable consideration having passed to obtain a chance to win.

At page 80, the Court, speaking through Chief Justice Johnson said:

". . . But where the business is a legitimate one and the purpose is to advertise or develop that business, and the price of the commodity or service sold is not increased nor the commodity or service measurably cheapened, all of what the patron pays is obviously consideration for the commodity or service itself. Therefore, under those circumstances, no part of the money paid can be held consideration for the chance itself, the burden to prove which is on the plaintiff; and the scheme cannot be held a lottery. It would not even seem material whether some patrons might not have purchased tickets if the prize had not been offered; for they purchased an actual commodity or service at the regular price, without subterfuge, and received that article. The fact that with it they received gratuitously something extra, whether a chance to participate in the drawing, or an oatmeal dish, did not make part of the money paid a valuable consideration for the gratuitous thing received, regardless of the pocket or fund out of which the doner acquired the prize or the dish. Consequently if the extra thing was a chance to win a prize, the plan did not become a lottery.

If any doubt existed as to the extent of the rule in the Great Falls case, such doubt was clearly removed by the application of the rule in State ex rel. Smith v. Fox Missoula Theatre Corporation (1942) 114 Mont. 102, 132 P. (2d) 711. This case arose in Helena. It differed from the Great Falls case in that purchase of a theatre ticket was necessary to participate in the bank night drawing. The Montana Supreme Court ruled that the earlier Great Falls theatre case governed and that purchase of a theatre ticket did not constitute a valuable consideration for the chance to win a prize.

Applying the principle of these cases to the facts here stated, where the business is a legitimate one, and the purpose is to advertise or develop that business, and the price of the commodity or service sold is not increased nor the commodity or service measurably cheapened the customer pays for the commodity or service, and the chance to win a prize is a gratuity. There being no valuable consideration, there is no lottery, under the above holdings.

The second question involves Section 2430 which provides:

"Every person, firm, or corporation who shall use, and every person, firm or corporation who shall furnish to any other person, firm, or corporation to use, as a gift or bonus, or otherwise, in, with, or for the sale of any goods, wares, or merchandise, any premium or bonus, including stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm, or corporation, any premium, or bonus, including goods, wares, or merchandise, free of charge or for less than the retail market price thereof upon the production of any number of said

stamps, coupons, tickets, certificates, cards, or other similar device; and every person, firm or corporation placing premiums or bonuses of goods, wares, or merchandise, including such as crockery, chinaware, aluminumware, tinware, graniteware, or anything else that may be included or contained or delivered with packages of any kind of merchandise of any description, shall before so furnishing, selling, or using the same, obtain a separate license therefor from the county treasurer of each county wherein such furnishing or selling or using of such premiums or bonuses shall take place, for each and every store or place of business in that county from which such furnishing or selling of premiums or bonuses as herein enumerated, or in which such shall take place.

That Section 2430 is somewhat less than clear is forcibly expressed in State v. Lutey Bros. (1919) 55 Mont. 545, 552, 179 Pac. 457, where the Supreme Court said with reference to what is now Section 2430;

"The fundamental policy of the Act is to regulate the giving of premiums or bonuses. The language employed in Section 1 (now 2430), however, is so worded and contains so many meaningless words and phrases that it all but defies analysis.

Continuing its discusison of Section 2430, the Court said at page 553:

"An offense is not punishable unless it falls within the condemnation of some penal statute. If it is not plainly and specifically within the Act, it is not against law, and no conviction can be extended by implication, and the Act charged as an offense must be unmistakably within the letter as well as the spirit of the law. (State v. Tuffs, 54 Mont. 20, 26, 165 Pac. 1107). 'The rule is founded upon the principle that the power of punishment vests in the legislature, not in the courts'. (State v. Aetna Banking and Trust Co., 34 Mont. 379, 87 Pac. 268). Penal statutes are not to be extended by implication beyond the legitimate import of the words used in them, so as to embrace cases or acts not clearly described by such words. (26 A. and Eng. Ency, of Law, 657; State v. Aetna Banking & Trust Co., supra).'

In addition to the above, our Supreme Court has, in State ex rel, Krona v. Holmes, (1943) 114 Mont. 372, 376, 136 P. (2d) 220, restated the familiar principles of statutory construction:

" . . . in the construction of a statute the intention of the legislature is to be pursued, if possible. (Citing cases) And further that in the construction of a statute the intention of the legislature must control, and to ascertain that intention recourse must first be had to the language employed and to the apparent purpose to be subserved."

The language of the Act, Section 2430, indicates the intention of the legislature to prevent the use of coupons redeemable in merchandise upon presentation. The apparent purpose was to curb the then (1917) prevalent practice of merchants stocking large amounts of goods for use only as premiums. By fixing a high license fee, and providing a criminal penalty for use of coupons without a license, the legislature relieved the merchant of the burdensome necessity of carrying large inventories of premium goods, for with the advent of the license, there no longer existed competition forcing the use of coupons and premium goods.

In view of the apparent legislative intent to rid the merchandising field of the expensive task of stocking and handling premiums, and that such intent did not extend to the siutation where a coupon merely gives a chance to win a prize, it appears that Section 2430 does not apply to the facts above stated.

Therefore, by reason of the foregoing statutes and the decided cases, it is my opinion: (1) The plan involving the above facts does not constitute a lottery within the meaning of Section 11149, Revised Codes of Montana, 1935; (2) nor does said plan fall within the licensing provisions of Section 2430, Revised Codes of Montana, 1935.

Sincerely yours,
R. V. BOTTOMLY
Attorney General