

Opinion No. 60-05

January 15, 1960

BY: OPINION of HILTON A. DICKSON, JR., Attorney General

TO: Mr. Patrick F. Hanagan District Attorney Fifth Judicial District Roswell, New Mexico

QUESTION

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Under the facts set out below, is the scheme a lottery within the meaning of Section 40-22-13, N.M.S.A., 1953 Comp?

A punch card is given to each customer purchasing merchandise in a store or chain of stores, said punch card indicates that it is worth at least a dollar and perhaps worth \$ 1,000.00. Each time the customer purchases items from the store, the dollar amount of the purchase is punched out on the card. This is continued until the customer purchases merchandise in the amount of \$ 100.00 or some similar amount. At that time, the large seal on the card is removed under which is found one of three figures -- \$ 1.00, \$ 100.00 or \$ 1,000.00, or in the alternative some simple question which any person can answer which would entitle him to a prize -- the latter method being an obvious attempt to make the scheme a "game of skill". The customer pays nothing for the card. It is merely given to him when he purchases at the store.

CONCLUSION

Yes.

OPINION

{*338} ANALYSIS

Assuming the facts set out above are substantially true, it is our opinion that such would constitute a lottery within the meaning of the above-cited statute, and, therefore, be unlawful.

We arrive at this conclusion on the basis of past opinions rendered by this office and by virtue of the case of **State v. Jones**, 44 N.M. 623, 107 P. 2d 234, and the other cases in this jurisdiction defining a lottery.

It is elementary law that a lottery has been deemed to contain three elements, i.e., chance, prize and consideration. See **Jones** case, supra.

This office held in Opinion of the Attorney General No. 5979, dated June 23, 1954, that a scheme, whereby persons attending baseball games in Carlsbad were, by virtue of purchasing a ticket of {*339} admittance, eligible to participate in a drawing for prizes, was a lottery within the meaning of the statute. That opinion held that notwithstanding the fact that the participant paid nothing extra for the chance to win, the three elements of a lottery were present. Opinion of the Attorney General 6347, dated January 9, 1956, held that a scheme whereby persons renting a room in a motel were given a chance to enter a drawing at the end of the day whereby he might win the prize of having his room free. This office held that all three elements of a lottery were present. On the element of consideration, that opinion said that the consideration was the fact that a person pays for his room subject to it being returned or that he promises to pay if he does not win. Under the standard of contract consideration, either would be sufficient.

The **Jones** case, supra, indicates that consideration in the scheme known as bank night is the fact that persons are enticed into purchasing theatre tickets or attending the theatre on a chance that they will win a prize. This is certainly a legal benefit to the person conducting the scheme.

The reason for the prohibition of lottery is well stated in the **Jones** case, supra, wherein the court said at page 627:

"The deceit in schemes of this nature lies in the pretense of allowing free participation but at the same time surrounding the opportunity with conditions calculated upon a knowledge of human characteristics to entice those attracted by the offer to purchase tickets of admission to the theatre. **Looking behind the pretense and disregarding legalism, nothing is given away. All prizes, disarmingly called gratuities, are supported by mass contributions.**" (Emphasis supplied).

And further at page 628:

"Drawing aside the veil of outward appearance, it is readily enough seen that bank night is a scheme conceived in deception, having the guise of legitimate effort. It is based on profit at the expense of the gullible chance taker and no doubt the profits have been tremendous. It pretends to offer a gratuity whereas in fact what is offered is a prize paid out of the funds produced in part at least by the scheme itself. . . ."

We think it is clear that the first two elements of chance and prize are present in this case. It is our opinion on the basis of the above authorities that the third and final element of consideration was certainly present in this case. We are unable to distinguish this scheme from those in the above cited opinions and from the bank night scheme in the **Jones** case. It might be pointed out parenthetically that after the **Jones** case the lottery laws were amended to specifically exempt bank night schemes from the proscribed acts. Such exemption does not in any way change the statute in regard to the present scheme.

Therefore, considering the scheme in the light of cited authority, it is our opinion that it is unlawful as being a lottery within the meaning of Section 40-22-13, supra.

By: Boston E. Witt

Assistant Attorney General