

Opinion No. 63-36

April 18, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: TO: Mr. Dan Sosa, Jr. District Attorney Third Judicial District Las Cruces, New Mexico

QUESTION

FACTS

The following proposed plan has been inquired about. Under the plan, involving a series of chain grocery stores and a horse race track, anyone coming into the grocery store could register for a chance to win a two-dollar win ticket at the race track. Drawings would be made approximately once a week and twenty two dollar pari-mutuel tickets would be given. The winners would get a voucher which would entitle them to a two dollar win ticket at the track. The voucher would designate a particular day, the race number and the horse number in the particular race. No purchase would be required of anyone who wished to register at the store.

QUESTION

Does this proposed plan violate either the New Mexico pari-mutuel laws or the lottery laws?

CONCLUSION

Yes.

OPINION

{*76} ANALYSIS

Under the view that we take of the proposed plan, it is not necessary for us to determine whether it violates our pari-mutuel laws, since it violates our lottery laws.

The three essential elements of a lottery are prize, chance and consideration. That prize and chance are present in the proposed plan can hardly be disputed. Thus the decisive inquiry is whether the element of consideration is present.

Under the plan here proposed, a person does not have to make a purchase at the grocery store in order to register for the drawing. This is what is denominated as a flexible participation lottery. While there is a divergence of opinion among the various states, New Mexico has adopted the position that the element of consideration is

present even if there is no admission charge or purchase required as a prerequisite to registration. **State v. Jones**, 44 N.M. 623, 107 P. 2d 324.

In the Jones case the Court quoted with approval the following from Williams, Flexible Participation Lotteries, § 215 (1938).

"The burden of the 'bank night' offensive is that its service to prospective patrons in registration, assignment of numbers, and the distribution of prizes by chance, is a free and gratuitous service and that its prizes are gifts and without consideration. This position is untenable. The object of this contention is to divorce the registration and offer of prizes by chance from the increase in gross receipts produced thereby. In short, it is an attempt to sever cause from effect, to separate advertising from its results, and to violate established principles underlying consideration, offers and acceptances and other features of the law of contracts."

Our Court also cited with approval the English case of **Willis v. Young**, 1 K. B. 448. That case involved a flexible participation plan by the Weekly Telegraph of London to increase the paper's circulation.

The Weekly Telegraph made a general distribution of numbered medals to the homes of the people in London. Each medal carried a serial number and the words, "Keep this, it may be worth 100 pounds. See the Weekly Telegraph today." A drawing was held weekly and the winning numbers were published in the Weekly Telegraph. Every precaution was taken to keep the sale of the papers separate from the distribution of medals and the winners were given several days in which to claim their prizes. Many places were maintained in London where persons could read the paper without having to buy a copy.

When the Weekly Telegraph was prosecuted for violating the lottery laws, the defense contended that the scheme was legitimate advertising and not a lottery; that the distribution of the medals and the award of prizes were gratuitous; that the risk of loss was absent from the plan; that the purchase of a copy of the paper was independent from the ownership of a medal.

The Court nonetheless found that the plan constituted a lottery, the Chief Justice asking this question:

"Looking at the whole of the {*77} circumstances of the case, is it not plain that the circulation of the paper increased by reason of people getting these medals?"

In view of our Supreme Court's pronouncements in **State v. Jones**, 44 N.M. 623, 107 P. 2d 324, we are compelled to conclude that the proposed plan violates our lottery law.

By: Oliver E. Payne

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