



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**GERALD G. MANN
ATTORNEY GENERAL**

Honorable Fred T. Porter
County Attorney
Kaufman County
Kaufman, Texas

Dear Sir:

Opinion No. 0-2063

RE: Whether or not "Box Office Insurance" constitutes a lottery.

We have carefully considered the question presented in your letter of March 7, 1940, wherein you request the opinion of this Department as to whether or not the "Box Office Insurance Plan" of a local theatre constitutes a lottery in violation of Article 654 of the Penal Code. Your letter reads in part as follows:

"I would like to have an opinion from your department on whether the following plan of stimulating attendance at theatres is a lottery under the authorities in this state. The plan is as follows:

"It is called 'Box Office Insurance' and a printed policy is issued to each and every person contacted by the management of the show whether a patron or not. This policy is worth the face value of \$25.00 under certain conditions. Once a week, on a certain night selected, the management calls for numbers to be given by persons in the audience. Four numbers are asked for, each being below 10, and these four numbers when arranged together form the number of the policy. Before the issuance of any policy the person receiving such signs an application card which is numbered and put in a file. If the person whose application card has the number called out by the audience is present in the theatre, he or she receives the cash value of the policy; but if the person is not in the theatre at the time of the calling out of the number and name, then the name of the one whose application card was so numbered shall be prominently posted in the lobby of the theatre for a period of one month, and any time during

the month the holder of that policy can call and the management will pay the amount of the policy to such holder. If at the end of the one month period, no one has called and presented such policy, then the amount of such policy is donated by the theatre management to the Parent-Teachers Association of the town or if there is no Parents Teachers Association then to some other like organization. There is attached hereto a copy of the Policy, application card and envelope for further information in regard to the plan."

Section 47 of Article III, of the Constitution of Texas, reads:

"The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this state, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principal, established or existing, in other states."

Article 654 of the Penal Code, reads as follows:

"If any person shall establish a lottery or dispose of any estate, real or personal, by lottery, he shall be fined not less than One Hundred (\$100) Dollars nor more than One Thousand (\$1,000) Dollars; or if any person shall sell, offer for sale or keep for sale any tickets or part tickets in any lottery, he shall be fined not less than Ten (\$10) Dollars nor more than Fifty (\$50) Dollars."

As stated to you in opinion No. 0-1819, dated January 27, 1940, the elements essential to constitute a lottery are (1) a prize; (2) chance; (3) a consideration. City of Wink vs. Griffith Amusement Company (Texas Supreme Court), 100 S. W. (2d) 695; Griffith Amusement Company vs. Morgan, 98 S. W. (2d) 844. It is clear that the first two elements are present -- a prize of \$25.00 is offered once a week; likewise, the chance element occurs when the prize is distributed to the fortunate "insured", if he is lucky enough to have his "policy" number called. Our problem concerns whether or not the necessary element of consideration is present.

In this connection you point out that the money offered may be received by two classes of prize-winners: first, those within the theatre who have an opportunity to witness and participate in the proceedings; and secondly, all other people who are not in attendance at the theatre who have made

application for a "Box Office Insurance" policy. In the event one of the latter class of person's policy number is called, his name will be posted in a prominent place in the lobby for a period of one month, during which time he may call, identify himself and receive the prize.

Insofar as the first class is concerned, that is, patrons actually present in the theatre, there can be no doubt that the scheme constitutes a lottery. We quote from the language of Chief Justice Cureton, City of Wink vs. Griffith Amusement Company, supra:

"... In the instant case, there were two different classes of possible prize winners, namely, the holders of free registration numbers, who chose to remain outside of the theater, where neither the show nor the paraphernalia of and actual operation of the drawing could be seen, and those who, at least on 'Bank Night', paid the consideration required at the door, entered the theater, and saw the show, including the paraphernalia to be used in the drawing, and the actual drawing itself while comfortably seated close at hand so that they might hear without fail the announcement of the winner and be present to claim the prize, each privilege a concomitant part of the entire scheme. It is idle to say, as to those who entered the theater and enjoyed the privileges named, that the admission charge was not both for the show and the pleasure and advantages stated above and the prize emolument of the drawing. This admission charge is inseparable from the privileges enumerated, which were materially different from the privileges of those who remained outside of the theater holding the so-called 'free' registration numbers. It is idle to say that the payment made for seeing the picture is not, in part at least, a charge for the drawing and the chance given. The things to be seen and done in the theatre and the privileges above enumerated which accompanied them, are all a part of one and the same show, meaning the entire proceedings inside the theater. The fact that part of the things to be enjoyed by those who paid at the door were classed as 'free' by the defendant in error does not change the legal effect of the transaction, or what was actually done by the defendant in error, namely, for the price of admission to grant the patron not only the opportunity to see and hear the pic-

ture, but to see and hear and enjoy the habiliments of the 'Bank Night', drawing, etc., detailed above. We are unable to see in what manner the giving of free registration numbers to those outside of the theater would change the legal effect of what was done inside the theater, for which a charge was made; . . ." (Underscoring ours)

But what of those persons who may participate "free" by merely making application for a policy and whose name (if they are fortunate) will be posed in a prominent position in the lobby? Does this device constitute an attempted evasion of the lottery laws, or is the scheme outside their purview? It has been said that had those who conducted the famous Louisiana Lottery in the early days made good their promise to give a free ticket to the president of each bank in the state, still the scheme would not have escaped the condemnation of the laws against lotteries.

The countless schemes of man to capitalize upon the natural cupidity of his fellowman are legion; yet our Texas courts have in all cases pierced the veil of subterfuge and refused to countenance artifice. This is the position we believe our courts will take should a case like the present come before them. We believe that a consideration does move to the donor of the prize in the present instant sufficient to condemn the plan even though participation is allowed by non-patrons who have a month to claim their prize. As in the first paragraph of your letter, the purpose of the plan is to stimulate attendance, and, we suppose in addition serves as an advertising scheme. Is this not at least an indirect consideration moving to the owner of the theatre? We believe so.

As stated by Judge Graves in *Cole v. State*, 112 S. W. (2d) 725, on motion for rehearing:

". . . A consideration may consist of a benefit moving to the donor of the prize regardless from whom the benefit may come. See *Corpus Juris*, vol. 13, p. 311. Appellant testified that he thought since establishing a bank night that it is possible on Tuesday night it (the attendance) had increased some, and that the advertisement for his theater, he thought, was benefited by bank night, and, in the light of our knowledge of human nature, we feel sure that, unless such benefits had accrued, he would not have continued such bank nights." (Underscoring ours)

Likewise, as stated by Chief Justice Gallagher in *Robb and Rowley United, Inc., et al v. State* (C. C. A. 1939), 127 S. W. (2d) 221;

"Appellants apparently concede that 'Buck' nights as operated by them involved the distribution of cash awards by chance, but they contend that no consideration was received by them for such distribution. Substantially the same contention was made in the case of *State v. Robb & Rowley United, Inc., Tex. Civ. App., 118 S. W. (2d) 917*, and the court, in its opinion in that case, held that while no direct charge was made for registration, nevertheless the increased patronage expected by reason of the operation of such scheme, though only an indirect benefit, was a sufficient consideration to warrant its being classified as a lottery. See also: *Cole v. State, 133 Tex. Cr. R. 548, 112 S. W. 2d 725*, pars. 2 and 3; *City of Wink v. Griffith, 100 S. W. (2d) 695, 699*, par. 12, and authorities there cited; *State v. McEwan, Mo. Sup., 120 S. W. (2d) 1098.*"

In *Featherstone v. Independent Service Station Association, (C.C.A. 1928) 10 S. W. (2d) 124*, defendants distributed tickets to patrons of their service station good for a chance on an automobile to be given away. Defendants likewise gave away some ticket free to those who had not purchased merchandise, and the court said:

"This testimony fails to show any material change in the scheme as originally operated, but reveals a change simply in the plan of its operation. While dealers, under the new plan, distributed tickets to noncustomers as well as to customers, it seems that the scheme was to distribute tickets, in the main to customers, as the evidence discloses that only a few, negligible in number, were given to persons other than customers. That the giving of tickets, and the drawings and distribution of prizes, were inducements to patronage and unquestionably lured customers, is shown from the very satisfactory business results that followed. Patronage thus induced was the consideration that passed from the ticket holder for the chance received,"

In *Smith v. State, (Ct. Cr. App. 1939) 127 S. W. (2d) 297*, defendant received a license fee from retail merchants for the privilege of joining a "Noah's Ark" organization.

The merchants in turn distributed cards and stamps to the public, upon the completion of which cards a person was entitled to participate in a chance to receive a substantial prize. The court held that payment of these license fees to defendants by the merchants operated as an indirect consideration for all persons who came to such merchants' place of business and requested a stamp or card for the purpose of entering into this contest. The court held this scheme to constitute a lottery and said:

"We think it clearly appears herein that appellant received a fee from the 145 merchants and dealers who paid him a license fee and joined his 'Noah's Ark' organization, and that the payment of such fee operated as a consideration for the entering into the drawing contest of all persons who came to such dealers' place of business and requested a card or a stamp for the purpose of entering this contest. That this license fee was the payment of a consideration moving indirectly from the contestant and directly to the supervisor or owner of this scheme. Moving indirectly, it may be for the benefit of the contestant through his merchant or dealer who also received a benefit therefore presumably at least, in the advertising that he was obtaining as well as playing upon the natural cupidity of mankind to obtain something for nothing, and this moving it completes the trinity of a prize arrived at by chance, and based upon a consideration, not only given by the contestant but received by the donor." (Underscoring ours)

In view of the authorities cited and for the reasons stated, you are respectfully advised that it is the opinion of this Department that the "Box Office Insurance" plan under the facts stated constitutes a lottery in violation of Article 654 of the Penal Code of this State.

Very truly yours

ATTORNEY GENERAL OF TEXAS

JDS:LM:wc

APPROVED MAR 18, 1940
s/Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

By s/Walter R. Koch
Assistant

Approved Opinion Committee
By s/BWB Chairman

By s/James D. Smullen
James D. Smullen