OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Karl Cayton
County Attorney
Dawson County
Lamesa, Texas

Dear Sir:

Opinion No. O-2286
Re: Whether or not advertising scheme of merchants and newspaper is a lottery.

This will acknowledge receipt of your letter of April 24, 1940, requesting the opinion of this department as to whether or not the advertising scheme or plan described in your letter constitutes a lottery such as is made unlawful by Article 654 of the Penal Code; and, if it does, whether or not it may be enjoined at the instance of the State. The plan is described in your letter as follows:

"A newspaper in our town is publishing a weekly paper and in conjunction with it are publishing another weekly paper on a different day, which paper is not sent through the mails. The second paper is distributed freely to the local citizens. This paper is numbered with different numbers on each copy of the paper. Several of the local merchants are offering prizes to the man or woman who brings the proper number into their store. The correct number for the different store prizes is determined by the following. The merchants will number different articles of merchandise and place the same on display and if the visitor comes in the store within the time limits of that particular day with a corresponding number on the newspaper, he will be given the prize. In addition the newspaper and the merchants are offering a cash prize for certain numbers. The consideration for the newspaper is the increase of advertising in the merchants who participate in the so-called

NO COMMUNICATION IS TO BE CONSTRUED AS A DEPARTMENTAL OPINION UNLESS APPROVED BY THE ATTORNEY GENERAL OR FIRST ASSISTANT

'Treasure Hunt.' For the merchants, it would be the increase in the number of visitors per day. Of course the visitor must find his particular number among the merchandise and call attention to the fact to the merchant."

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 principle, established or existing, in other states."

Pursuant to such command, the Legislature passed Article 654 of the Penal Code, which 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."

In Cole vs. State, (Ct. of Cr. App. 1937) 112 S. W. (2d) 725, the concurring opinion of Judge Hawkins states that,

"There is not now, nor ever has been, an attempt in this state to define by statute what constitutes a lottery. The term is defined by the statutes of only a few of the states. Corpus Juris, vol. 38, p. 288, note 10, lists only four, but says 'that such definitions seldom vary in substance from those established by the courts.' Having no definition in our statute, we must resort to the meaning given the term by popular usage as determined by the various courts. When that is done, it is clear that three things must concur to establish a thing as a lottery: (a) A prize or prizes; (2) the award or distribution of the prize or prizes by chance; (c) the payment either directly or indirectly by the participants

of a consideration for the right or privilege of participating. Texas Jur., vol. 28, p. 409, § 2, deduces from our own cases the rule stated, and it appears that in every case from our own court where a scheme has been denounced as a lottery that the three elements mentioned are shown by the facts to have been present. See Randle v. State, 42 Tex. 580; Grant v. State, 54 Tex. Cr. R. 403, 112 S. W. 1068, 21 L. R. A., N. S., 876, 130 Am. St. Rep. 897, 16 Ann. Cas. 844; Prendergast v. State, 41 Tex. Cr. R. 358, 57 S. W. 850; Holoman v. State, 2 Tex. App. 610, 28 Am. Rep. 439, and other Texas cases cited in Texas Jur., supra. The same rule demanding the presence of the three elements named will be found stated in 17 Ruling Case Law, p. 1222, and 38 Corpus Juris, p. 286, with innumerable supporting cases cited under the text in each of said volumes."

From your letter, we gather it is conceded that at least two of the elements essential for the existence of a lottery are present--a prize or prizes are offered by the newspaper in conjunction with the local merchants participating in the plan, and the distribution of the prizes is by chance to persons fortunate enough to receive a copy of the newspaper with "a lucky number" appearing thereon. The answer to your first question than depends upon whether or not the element of consideration is present. We hold that it is.

Our Texas Court of Criminal Appeals had before it a problem very similar to the instant one in the case of Smith vs. State (Ct. of Cr. App. 1939), 127 S. W. (2d) 297. In that case, defendant received a fee from retail merchants for the privilege of joining a "Noah's Ark" organization. The merchants in turn distributed cards of 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 defendant by the merchants operated as an indirect consideration for all contestants. Let us simulate the license fee paid by the merchants to the operator of this scheme to the increased advertising resulting to the newspaper from participating local merchants in your situation. Here is consideration moving indirectly from the recipient to the donor of the prize. But that is not all. The court in the Smith case found an additional element of consideration. It said:

"It is quite clear to us from the record

> that each business establishment which contributed a certain amount of money in order to join this 'Noah's Ark' and by whom the prize is paid, receives a card or cards and stamps symbolic of some animal. These cards are furnished to the merchant or business establishment, and by them distributed to customers or others who come to the establishment with wrappers, cartons, or containers of commodities which are sold by any member of the 'Noah's Ark.' It is obvious that the dealer, merchant or business establishment not contributing to the prize, did not receive any card or stamp for distribution. Consequently, parties desiring to secure a chance at the prize would necessarily have to go to such merchant or business establishment as had contributed to the general fund. As a result, the good will and patronage of the person favored with the cards is secured. This patronage, whatever it may be, is given in exchange for cards and stamps, which is an indirect benefit to the operator of the scheme, and enables him to continue his game of chance. It is a bait handed out to the gullible as an inducement to become customers of the dealers or merchants subscribing to the plan." (Underscoring ours.)

So also in the case at hand. Contestant, in order to determine whether or not his free paper contains one of the lucky numbers, is induced to visit and inspect the participating dealers' merchandise. An increased patronage is the expected concomitant of his visit. And this increased patronage together with the advertisement of his wares resulting to the merchant "is an indirect benefit to the operator of the scheme, and enables him to continue his game of chance."

We have held that the scheme set forth in your letter constitutes a lottery such as is condemned by Article 654 of the Penal Code of this state. We now pass to your second question of whether or not the equitable remedy of injunction is available to the State. This identical question was before the court in State vs. Robb & Rowley United (C. C. A. 1938), 118 S. W. (2d) 917, and Robb & Rowley United, Inc., et al. vs. State (C. C. A. 1939), 127 S. W. (2d) 221. In both of these

cases it was held that lotteries are a species of gaming and nuisance which the State is authorized to suppress by injunction under Article 4667, Revised Civil Statutes.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By

Walter R. Koch
Assistant

By James D. Smullen
James D. Smullen

JDS/oe

APPROVED MAY 3, 1940
Gerald C. Mann
ATTORNEY GENERAL OF TEXAS

APPROVED
OPINION
COMMITTEE
BY BWB
CHAIRMAN