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OFFICE OF THE ATTORNEY GENERAL OF TEXAS  
AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable Fred Erisman  
Criminal District Attorney  
Gregg County  
Longview, Texas

Dear Sir:

Attention: Mr. Mike Anglin

Opinion No. 9-2216.

Re: Whether or not the proposed  
movie contest is a lottery.

We have for reply your letter of April 10, 1940, requesting the opinion of this department as to whether or not the operation of a series of movie contests under the plan set out in your letter is a violation of the penal laws of this state against the operation and maintenance of lotteries. The plan described in your letter is as follows:

"It is proposed, as an advertising feature, to inaugurate a series of contests to be conducted by a local theater management, --but the management does not wish to contravene the law, and I am advised the contest is featured for the art or skill involved, under the following set-up:

1.

"A cash award (\$50.00 for instance) is provided by the management, to be given away on the night advertised to some patron in the audience (or divided pro-rata if more than one winner should qualify). If there be no winner, the award is carried over to the week following, augmented by some additional amount.

2.

"With each admission ticket, the patron is given a card, bearing numbers from 1 to 120, arranged in a circle - such as specimen enclosed, marked Exhibit 'A'.

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3.

"On the stage will be placed a large board on which will be imposed the same dial (on larger scale) as represented in Exhibit 'A' - but the marginal numbers will at first be covered by a disc extending just over the periphery of the dial. The disc is removable and is attached only to a center pin which permits it to revolve.

"On the disc there is an arrow head pointed to the outer rim.

5.

"At some pre-announced time, during show intermission, the board or stand with the large replica of dial shown in Exhibit 'A' is placed on the stage for full view of the audience. The line between No. 1 and No. 120 is directly downward and so remains.

6.

"The revolving disc, with arrowhead marker, is then placed over the dial, and by a procedure which may vary in detail, but free from calculation, the disc is made to revolve briefly. When it comes to rest the arrowhead will indicate a point on the dial, which is then identified by a colored sticker visible to the audience, tho the actual dial number is not visible. This spinning and marking is repeated until five different markers are shown.

"This procedure is a prelude to the contest, but not a part thereof.

7.

"The contest itself now begins. Full lights are put on in the auditorium and an allotted time is announced during which the audience may study the markers on the stage dial and by comparison with the replica, which each one has (Exhibit 'A') there remains the calculation of dial numbers to correspond with the markers on stage dial in which there is only to be gauged the degree of variation from the four cardinal numbers, viz: 1, 30, 60, 90.

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8.

"The contestant enters the five numbers selected in his calculations (a) on the dial marked part of his card, (b) on the stub bearing same serial number.

9.

"Contestant detaches and keeps the stub, but the marked card is taken up by the usher and all of these taken to the stage.

10.

"When all cards are in, the disc is removed and correct numbers on the dial as pointed by the five markers are announced.

11.

"The holder of any stub (subject to verification from its counterpart) bearing the same five numbers as shown by markers on the stage dial is entitled to the award then and there. More than one such holder shares proportionately.

"To enable you to trace the steps involved in this contest, enclosed find a sample of dial to be set up on the stage (Exhibit 'B') and a circular card to represent the disc (Exhibit 'C'). After the disc is placed over the dial and the marginal numbers covered, you can see how a conspicuous marker of spear-head shape can be pasted or attached to the board or background after the arrow on the disc is spun and has arrived at a stop. The board or back-ground will be large enough for markers visible throughout the theater.

"The author of this contest advances the idea that accurate determination of the five numbers making up the winning combination is simply an engineering problem; that skill alone is the controlling factor and that accuracy and proficiency are correlatives.

"While copyrighted under various names, including 'Bank Night Contest,' I am asked to dif-

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ferentiate in this case, because of the radical departure from other patterns, wherein chance predominates.

"In view of the holdings in *Boatwright v. State*, 38 SW (2d) 87 and *McRae v. State*, 81 SW 741, it would appear that such scheme, as above described, would not be a violation of the law."

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 (\$1000) 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 *City of Wink vs. Griffith Amusement Company*, 100 S. W. (2d) 695 (Tex. Sup. Court), the court said:

"The State Penal Code does not define a lottery, but our courts have interpreted it in accordance with public usage, to mean a scheme or plan which provides for a distribution of prizes by chance among those who have paid, or agreed to pay, a consideration for the right to participate therein. 28 Tex. Jur. p. 409, Sec. 2, and cases cited in the notes."

This department has on several occasions passed on the question of what constitutes a lottery, holding in:

(1) Opinion O-428, that a number system used by a theatre where each seat in the theatre is

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numbered and a ticket is selected or drawn from a number of tickets containing all the numbers on the seats and a money award or other thing of value is given to the person sitting in the seat that has a corresponding number with the number drawn is a "lottery" and the operation thereof is a violation of Article 654 of the Penal Code.

(2) Opinion O-967, that a scheme whereby, in substance, a theatre owner gives a prize to some patron of the theatre present after a drawing from which some patron's automobile license number may be selected, under the facts presented, constitutes a violation of the lottery laws of this state.

(3) Opinion O-1174, that it is a violation of the law for the merchants of a given town or community to give their customers tickets with each purchase of merchandise from them, which tickets are good for chances upon merchandise or money given away at drawings, held periodically in the said town or community.

(4) Opinion O-1200, that the "Aces Quiz Night" scheme or plan (under the facts stated to this office) is a "lottery" and in violation of Article 654 of the Penal Code of this state.

(5) Opinion O-1329, that a scheme whereby, in substance, a theatre buys the fingerprints of a citizen of the community by selection of one fingerprint from the files of the theatre, is a violation of the lottery laws of this state.

(6) Opinion O-1336, that a scheme whereby, in substance, a "suit club" gives credits in trade to winning contestants for completing a sentence, etc., constitutes a violation of the lottery laws of this state.

(7) Opinion D-1789, that a theatre program featuring the "Doctor I.C." radio broadcast over a network is not a violation of the lottery statutes of this state.

(8) Opinion O-1819, that a theatre operator conducting a scheme whereby questions submitted by the patrons of the theatre are drawn from a box, and the patrons whose questions are drawn

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and asked receive one dollar each, is guilty of operating a lottery in violation of Article 654 of the Penal Code.

(9) Opinion O-1858, that a scheme whereby, in substance, a theatre gives a prize to a person if he answers a question correctly, the name of such person being drawn from a container of signed entry blanks, is a violation of the lottery laws of this state.

(10) Opinion O-2063, that a scheme whereby, in substance, a theatre pays \$25 to a person who files his application card with the theatre and whose card number is thereafter called by members of the audience, is a violation of the lottery laws of this state.

In the case of Griffith Amusement Company vs. Morgan, 98 S. W. (2d) 844, it was held that the elements essential to constitute a lottery are (1) a prize in money or thing of value, (2) distribution by chance and (3) payment, either directly or indirectly, of a valuable consideration for the chance to win the prize. See also City of Wink vs. Griffith Amusement Company, supra; Featherstone vs. Independent Service Station Association, 10 S. W. (2d) 124; Peak vs. United States, 61 Fed. (2d) 973; Grant vs. The State, 112 S. W. 1068. In State vs. Randall, 41 Tex. 296, and Holman vs. The State, 47 S. W. 850, it was held that any scheme for the distribution of prizes by chance is a lottery. Accordingly, the "Bank Night" scheme (City of Wink vs. Griffith Amusement Company, supra), the "Buck Night" scheme (Robb and Rowley, et al. vs. The State, 127 S. W. (2d) 221), and the "Noah's Ark" scheme (Smith vs. The State, 127 S. W. (2d) 297) have all been held to be lotteries.

We believe that the essential elements of the lottery are presented by the facts set forth in your letter. The theatre provides a cash award or prize for those patrons fortunate enough to arrive at the correct numbers on the circular disc on the stage. Of course, the element of consideration, the direct or indirect furnishing of which is also necessary to constitute a lottery, is present. Each patron has directly paid a consideration by purchasing his ticket to the theatre, which also represents consideration for the right to participate in the prize. Cole vs. State (Tex. Ct. Crim. App.), 112 S. W. (2d) 725. It is the third element, chance, that raises a doubt in your mind as to whether or not this is a lottery, and in this connection you cite the case of Boatwright vs. State, 38 S. W. (2d) 87, and McRae vs. State, 81 S. W. 741, in support of the proposition that these are contests of skill

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rather than chance.

In the Boatwright case, the Court of Criminal Appeals held that a punch board, wherein were placed different checkers problems, the same to be completed by the participant after paying a fee for the privilege of participating, did not constitute a lottery, even though prizes were awarded those working out the best solution. However, the court emphasized the fact that the only element of chance there involved was the nature of the checker problem to be drawn. There any person might participate in the game, and every person who purchased a checker problem stood on an equal footing, based upon his knowledge or inaptitude in the science of checkers. The element of skill predominated.

Likewise, in the McRae case, whether or not a player won a knife depended entirely upon his skill in tossing a hoop onto the knife rack. The element of skill predominated.

It is stated in 38 Cor. Jur. at page 291:

"The rule generally followed in the United States is that the word 'lottery' includes those schemes wherein chance is the dominant factor in determining the result, although it may be affected to some degree by the exercise of skill or judgment, but the rule, known as the 'pure chance doctrine,' that a contest is not a lottery unless its issue depends entirely on chance, is supported by some authorities in this country and is of general appreciation in England and Canada."

See also 17 Ruling Case Law, p. 1225.

In State Ex rel. McKittrick, vs. Globe-Democrat Publishing Company (Sup. Ct. Mo.), 110 S. W. (2d) 705, 113 A. L. R. 1104, defendant newspaper conducted a "Famous Names" contest, wherein a list of titles was printed beneath a series of cartoons, contestants to select the one most appropriate to each of the cartoons. The court held that since more than one title would be equally appropriate, the dominant element of chance necessary to make the puzzle contest a lottery existed.

See also People Ex rel. Ellison vs. Lavin, 171 N. Y. 164, 71 N. E. 753, 756, 66 I. R. A. 601, 1 Ann. Cases 165, where prizes were to be awarded to those making the closest estimate of the number of cigars on which the United States

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would collect a stamp tax during a specified month, and the contest was held to be a lottery. Similar rulings were made in *Stevens vs. Times-Star Company*, 72 Ohio State 112, 150, 73 N. E. 1058, 1061, 106 Am. St. Rep. 586, 593, and *Waite vs. Press Publishing Association*, 155 Fed. 58, 61, 11 L. R. A. (New Series) 609, 12 Ann. Cases 319, where guessing contests as to the popular vote in a presidential election were held lotteries. In both cases the court said:

"It is true that one acquainted with the results of the elections of the state in previous years and educated in politics would have some advantage over one ignorant in those respects, yet it must be apparent even to the casual observer that the result would depend upon so many uncertain and unascertainable causes that the estimate of the most learned would be after all nothing more than a random and undecisive judgment. In the sense above indicated there is an element of skill, possible certainty, involved, but it is clear that the controlling predominating element is mere chance."

In the *McKittrick* case, *supra*, the court said:

"But such is not the true general rule. As was said in *People Ex rel. Ellison vs Lavin*, *supra*, if a contest were solely between experts, possibly elements affecting the result which no one could foresee might be held dependent upon judgment; but not so when the contest is unrestricted. What is a matter of chance for one man may not be for another. And as Mr. Justice Holmes said in *Dillingham vs. McLaughlin*, 264 U. S. 370, 373, 44 Sup. Ct. 362, 363, 68 L. Ed. 742, 'What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law.' Obviously, if some abstruse problem comparable to the Einstein theory were submitted to the general public in a prize contest on the representation that no special training or education would be required to solve it, the contention could not be made, after contestants had been induced to part with their entrance money, that the element of chance was absent, because there were a few persons in the world who possessed the learning necessary to understand it."

It is stated in *People vs. Lavin*, 117 N. Y. 170, 71 N. E. 755, 66 L. R. A. 601:

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"The test of the character of the game is, not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game."

In *Hudelson vs. State* (1883), 94 Ind. 426, 48 Am. Rep. 171, the contest was to guess nearest to the number of beans contained in a glass globe; it was contended that the element of skill here predominated over the element of chance. The court held the contest to be a lottery and said:

"The contention of appellants' counsel is, that the enterprise, as set out in the publication, is not a lottery, nor in the nature of a lottery or gift enterprise. That to arrive at the correct number of beans in the glass globe is not a matter of chance, but a mathematical calculation. We cannot concur in this view. An expert mathematician might compute the dimensions of the glass globe with a reasonable degree of certainty. Necessarily, the result could be but approximately correct. To be mathematically correct the exact thickness of the glass would have to be known. This exactness could not be attained by an observation of the sealed globe. Here would necessarily be an element of guessing. And if the exact size of the globe were known, it would be utterly impossible by the application of mathematical rules, or by any other means, to calculate the number of beans contained in it. The size of the several beans, so far as they could be observed, would be a matter of pure guessing. And besides only those on the surface and next to the glass could be seen. Those in the center might be smaller or larger. In short, there could be no fixed or definite fact or quantity upon which to base a mathematical calculation or determination. The number of beans in the glass could be nothing else than a matter of guessing. An expert mathematician might more nearly fix the size of the globe than an entirely uneducated person. And so he, and persons of better judgment, might more nearly fix the number of beans in the globe than persons of less judgment. Yet the exact number would be a mere matter of guessing. That anyone should guess the correct number would be a matter of the merest chance, because there are no means

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of attaining to a certainty."

We believe that these cases are similar to the case at hand, and that the element of chance predominates over whatever elements of skill may exist. While one skilled in mathematics and engineering might more easily guess or calculate the numbers marked on the circular disc on the stage of the theatre by guessing the angles thereby formed, in the final analysis one making such a calculation--even one skilled in mathematics and engineering principles--would be performing no more than a guess. There are no certainties known to the man performing the calculation on which mathematical principles could be based, so as to arrive at the exact result. In other words, in order to be mathematically correct, the contestant would have to know the size of the circular disc on the stage of the theatre, the exact size of his entry card in his hand, and the exact ratio between the circle printed on his entry blank and the circular disc on the stage of the theatre. In addition, the exact angle made on the circular disc on the stage of the theatre would have to be measured and imposed upon the card, the entry blank, in his hand. No such exact calculations are available to an ordinary patron casually observing this paraphernalia from his seat in the theatre. Indeed, few patrons of the theatre will be so skilled in engineering and mathematical principles as to use any such method suggested in calculating the result. Nor do we believe that this was the intention of those conducting the contest. As in the bean contest, those participating must of necessity guess the numbers indicated by the markers, and the best guesses will win. We hold that this is the third element of chance necessary to constitute a lottery.

Consequently, you are respectfully advised and it is the opinion of this department that the movie contest plan, under the facts submitted in your letter, constitutes a lottery such as is condemned by Article 654 of the Penal Code of this state.

Very truly yours

ATTORNEY GENERAL OF TEXAS

By

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Walter R. Koch  
Assistant

By

*James D. Skullen*  
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APPROVED APR 29, 1940

*Gerald B. Mann*  
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JDS/oe

