OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN
ATTORNEY GENERAL

Honorable Clint Barham
County Attorney
Erath County
Stephenville, Texas

Dear Sir:

Opinion No. O-3958
Re: Whether or not a voting contest whereby votes are given with the purchase of drugs or other merchandise from a certain drug store, the number of votes varying with the amount of the purchase, and prizes being awarded to the contestant having the largest number of votes after the contest has continued for a certain stated length of time constitutes a lottery.

Your letter of November 19, 1941, is quoted as follows:

"A drug store in this county is giving away prizes for votes that are obtained by the purchase of merchandise in the store. Each penny's worth of merchandise purchased entitles one to a vote. Customers may come in and buy an article and either keep the votes for themselves or permit them to be credited to some other person. This contest is to run for about a month and was started yesterday. Two bicycles are the grand prize and there are other prizes of lesser value given for a lesser number of votes.

"It seems that the most recent case concerning lottery is the City of Wink vs. Griffin Amusement, 100 S. W. 2nd 695. In that case the court held that chances at a prize designated as 'free' and given with purchase is not in fact 'free' although article purchased is worth full price as respects whether transaction constitutes lottery, but payment for chance is embraced in part of purchase price. I am just wondering if the holding in that case would not be applicable to the holding of this case under consideration. In the state of facts submitted here in our case the

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the purchaser of the article does not get the benefit in some cases of the purchase since he gives his votes to some other person. I am unable to find this precise question answered in the cases or any of your opinions. We are very anxious to have an opinion on this as soon as possible in order that we may inform the drug store manager as to whether or not he is violating the law. If at all possible please let us have an opinion in the next two or three days. In my opinion this state of facts does constitute lottery even though the purchaser does receive the benefit in some cases."

Section 47 of Article 3 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."

In accordance with this provision of the Constitution of the State, 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 City of Wink v. Griffin Amusement Company, 100 S. W. (2d) 695, (Tex. Sup. Ct.) 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 the cases cited in the notes."

And in a later case Smith v. State, 127 S. W. (2d) 297, our Court of Criminal Appeals has the following to say:

"A fair definition of a lottery is found in the holding that it is necessary, in order to establish a lottery, that three things concur: (1) there must be a prize; (2) the ownership of such prize must be arrived at by chance, and (3) there must be some consideration moving from the recipient of such prize to the donor of such prize. All these three necessary constituents must be present before the establishment of a lottery is shown."

On numerous occasions this department has passed on lottery questions. The file numbers of some of these opinions are O-428, O-967, O-1174, O-1200, O-1329, O-1336, O-1789. Should you desire copies of any or all of these opinions this department will be glad to furnish same at your request.

Our courts have held that any scheme for the distribution of prizes by chance is a lottery in State v. Randall, 41 Tex. 296, and Holman v. State, 47 S. W. 850. In City of Wink v. Griffin Amusement Company, supra, the bank night scheme was held to be a lottery, in Robb and Rowley, et al v. The State, 127 S. W. (2d) 221, the "Buck Night" scheme was held to be a lottery and in Smith v. The State, supra, the Noah's Ark scheme was held to be a lottery.

We believe, however, that the plan described in your letter and the circulars and advertisements accompanying your letter is distinguishable from any and all of the schemes which the above cited opinions held to be lotteries within the prohibition of Article 654 of the Penal Code. The plan described by you wherein a drug store gives votes with the purchase of merchandise from such drug store, the number of votes depending upon the amount of the price of the purchase, the votes then being cast by the purchaser of the merchandise for and in favor of any contestant in whose behalf

the purchaser chooses to cast such vote and prizes being awarded at the end of a stated time to the contestant or contestants having the greatest number of votes, the principal prize being awarded to the contestant having the greatest number of votes, the second most important prize going to the contestant having the second largest number of votes, etc., we think clearly has two of the elements necessary to make it a lottery. First, the plan requires the payment of a consideration in order for the purchaser to participate in the contest by receiving votes in that he must make a purchase at this drug store in order to receive the votes, and the fact that the price of the merchandise is no greater than it would be if no votes were given with the purchase does not alter the fact that it is "consideration" as consideration is defined in the opinions. Second, the prize element is also contained in this plan, because prizes are awarded to contestants in accordance with the number of votes cast in their behalf. However, we do not believe that the third element "chance" is present in this plan so as to bring it within the definition of the opinion holding that selecting the recipient of the prize or prizes by chance is an essential element to constitute a lottery since the number of votes received by each contestant seems to depend largely or entirely upon his popularity, upon his skill and eloquence and persuasive ability in persuading others to cast their votes for him or his financial ability to buy merchandise entitling him to votes. Therefore, we are of the opinion that the "voting contest" described by you is lacking in one of the essential elements necessary to make it a lottery and is not such a lottery as is made punishable under Article 654 of our Penal Code.

We are unable to find in the reported decisions of our State any cases bearing directly upon or describing such "voting contests" as that described in your letter but upon searching the decisions of other jurisdictions, we have found several cases in which such "voting contests" were held not to be lotteries and no cases in which such contests were held to be lotteries. While these cases from other states would not be considered as controlling, we think they are persuasive and for your information we quote the applicable parts of such cases below, together with their citations:

> "A voting contest in a store with a piano and silverware as prizes to be awarded to the contestants having at the end of the contest the most

votes, which could be acquired only by purchasing merchandise at the store, or by procuring votes from other contestants, did not constitute a 'lottery', within Rev. Laws, c. 214, § 7. Whitman v. Fournier, 125 N. E. 303, 233 Mass. 154.

"The operator of a popularity contest under which merchants issued ballots to customers, entitling customers to vote for any person not engaged in sponsoring or promoting the contest, the winners of which were entitled to certain prizes, was not guilty of operating a 'lottery' prohibited by statute, since element of 'chance' was lacking. P. L. 8683. State v. Lindsay, Vt., 2 A. 2d 201.

"A scheme by which a merchant or association on selling merchandise at regular prices issues to purchasers ballots entitling them to express their choice a certain number of times, according to the price of articles bought, in favor of any person competing for prizes to be given to the persons receiving or holding the greatest number of votes, is not a 'lottery' prohibited by statute. P. L. 8683. State v. Lindsay, Vt., 2 A. 2d 201.

"A scheme by which a merchant, on selling merchandise at regular prices, issues to purchasers ballots entitling them to express their choice a certain number of times, according to the price of articles bought, in favor of any person competing for prizes to be given to the persons receiving or holding the greatest number of votes, is not a 'lottery', not involving an element of chance. National Sales Co. v. Mancint, 162 P. 1055, 1056, 83 Or. 34, L. R. A. 1917D, 485.

"The fact that there might have been fraud or sharp practice during popularity contest under which merchants issued ballots to customers entitling customers to vote for any person not engaged in sponsoring or promoting the contest, the winners of which were entitled to certain prizes, did not render the contest a 'lottery', since any such fraud or sharp practice, if shown, would not tend to indicate that blind fate was the deciding factor in the contest. P. L. 8683. State v. Lindsay, Vt., 2 A. 2d 201."

You are respectfully advised that in the opinion of this department the plan described by you does not constitute a lottery and is not prohibited or punishable under the provisions of our Penal Code.

This plan may be "a gift enterprise" such as that described by the provisions of the Constitution of Texas hereinabove set out. If it is the kind of "gift enterprise" described in said constitutional provision then it is against public policy being in contravention of the Constitution of the State of Texas. However, the Legislature has thus far not seen fit to effectuate this provision of our Constitution and has not prohibited or provided sanctions for the punishment of those operating gift enterprises if, in fact, the plan described by you is the kind of gift enterprise contemplated by the Constitution.

We trust that we have sufficiently and satisfactorily answered the inquiry contained in your letter.

APPROVED MAR 13, 1942

Geo. Sellers

FIRST ASSISTANT
ATTORNEY GENERAL

Very truly yours

ATTORNEY GENERAL OF TEXAS

By Robt. F. Cherry

Robert F. Cherry
Assistant

RFC:mp

APPROVED
OPINION
COMMITTEE
BY B.W.B.
CHAIRMAN