

Opinion No. 55-6168

May 19, 1955

BY: RICHARD H. ROBINSON, Attorney General

TO: Richard F. Rowley, Esquire, District Attorney, Ninth Judicial District, Clovis, New Mexico

We have received your request for opinion regarding whether certain methods of selling merchandise are in violation of our lottery laws. I quote from your letter the factual situation which gives rise to your concern:

"The seller proposes to sell household appliances for an advertised period. At the end of the time, each person who has purchased an appliance during the advertised period will have an opportunity by drawing, or some other chance identification of having the appliance which he purchased given to him free. If it has already been paid for in cash, his money will be refunded. Another variation would be to hold a sale for an advertised period and at the end of the sale, determine the average daily sale and the day during the period in which the actual sales were closest to the average daily sale would be determined. Everyone who had purchased merchandise on the day that actual sales more nearly approach the average daily sale would be given credit for the merchandise which he had purchased."

Section 40-22-13, N.M.S.A., 1953, is the statute which prohibits lotteries and reads as follows:

"Lotteries-Setting up, drawing, managing or promoting -- Penalty. -- Whoever shall set up, draw, manage, or otherwise promote any lottery for money or any other thing of value, or dispose of, or promote the disposing of, any money or thing of value by way of lottery, or aid in committing any of said offenses, shall be fined from five hundred (\$ 500) to ten thousand dollars (\$ 10,000)."

Section 40-22-18, N.M.S.A., 1953, provides for certain exceptions from Section 40-22-13. We understand that the parties who propose to employ the methods outlined above do not come within the exceptions listed in the latter statute.

One of the leading cases on this subject in this State is *State v. Jones*, 44 N.M. 623, 107 P. 2d 324. The problem presented to the court there was whether or not "bank nights" held by theaters were lotteries within the purview of the above statute. The court held that these schemes were lotteries and in so holding the case of *City of Roswell v. Jones*, 41 N.M. 258, 67 P. 2d 286, was overruled. In the latter it had been held that "bank night" was not a lottery scheme.

Since *State v. Jones* was handed down, the particular scheme involved there has received legislative sanction and has been brought within the exceptions contained in

Section 40-22-18. However, State v. Jones in determining whether or not schemes other than theater "bank nights" are lotteries, retains full and persuasive force.

It must be admitted that the scheme which you ask about is not exactly the same as that one considered in State v. Jones. We do not, however, deem the differences in factual situations material and although these may exist, nevertheless, the tests enunciated in the Jones case are still proper measures for any scheme which may be devised.

The three elements for detecting a lottery are the presence of (1) chance, (2) prize and (3) consideration. Much is said in one of the concurring opinions in State v. Jones, one of the concurring opinions in Harriman Institute of Social Research, Inc. v. Carrie Tingley Crippled Children's Hospital, 43 N.M. 1, 84 P. 2d 1088, as well as the majority opinion in City of Roswell v. Jones, suggesting that factors outside those listed above should be given weight in determining whether or not a particular scheme is or is not a lottery. This line of reasoning is expressed in the concurring opinion of Justice Bickley, in State v. Jones, as follows:

". . . In other words, the terms of our statute invite liberal rather than strict construction, in view of the statute's historical background, as set forth in the specially concurring opinion in the Harriman case. As there suggested, it seems that the legislature did leave a 'no man's land' where the elements of prize, chance and consideration alone are not sufficient to stamp the scheme a lottery as 'such devices are commonly called or known' . . . I prefer to think that a 'no man's land' was left by the legislature where elements outside of prize, chance and consideration must have a bearing in determining whether the device is such as is 'commonly called or known as lottery'."

And in the City of Roswell case, at page 263 of the New Mexico report, the above view is also taken by Justice Zinn as follows:

"We prefer to reason the matter in our own way, going to the fundamental reason for banning lottery schemes. The mere finding of the three elements necessary to constitute a lottery, to wit, prize, chance, and consideration is not sufficient. These elements are often found in innocent games of amusement or in the distribution of gifts by legitimate and responsible merchandising firms, with no intent to encourage or participate in a gambling scheme."

We, however, adhere to the view expressed by Justice Sadler in State v. Jones. That view is best summarized by him in his opinion at page 629 of the official reports as follows:

"And we are not impressed that a given state of facts will answer the definition of a lottery in a suit of one nature and fall short of it when tested in a proceeding of a different kind. **It is a lottery when the three elements of prize, chance and consideration concur in the scheme. It is not a lottery where one or more of these elements is absent.**" (Emphasis supplied)

Thus, while perhaps under the view expressed in the concurring opinions cited above and the majority opinion in the City of Roswell case, which has now been overruled, the scheme here being one designed to stimulate legitimate business, might be considered other than a lottery. We, however, measure it by the view expressed by Justice Sadler in State v. Jones.

We, therefore, limit our inquiry to the following: Do the facts which you have presented indicate the presence of the three elements above?

(1) Chance: That this element appears cannot be questioned and deserves no further discussion.

(2) Prize: This element is also apparent in this scheme.

(3) Consideration: As concerns this particular element it might be argued that since a winner in this scheme eventually pays nothing, that no consideration is present in the transaction. We cite the test enunciated in State v. Jones for determining the presence or absence of this element. At page 629 of the official reports appears the following:

". . . We are quite satisfied that the showing of 'consideration' is adequate measured by the **usual tests applicable in the law of contracts . . .**" (Emphasis supplied)

Tested by this standard, consideration readily appears. The participant promises to pay if he does not win, or he pays subject to the payment being returned should chance make him the winner. Either of these, promise to pay or payment, is sufficient as consideration. That a subsequent event may relieve from the promise or payment cannot obliterate the fact that at the time the participant enters the scheme consideration is rendered.

It is thus the opinion of this office that the scheme described by you is such that comes within the definition of "lottery" and for this reason prohibited by law in this State.

I trust this answers your inquiry satisfactorily.

By Santiago E. Campos

Assistant Attorney General