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LOTTERIES—GAMBLING—SOFT DRINK CAP GAMES ARE  
 LOTTERIES—§2915.10 R.C.—CRIMINAL LAW.

## SYLLABUS:

A contest promoted by a vendor of soft drinks in bottles whereby all bottles sold are closed with caps within which various letters of the alphabet are concealed, which letters when assembled in particular combinations entitle one to a prize supplied by such vendor, is a lottery, and the promotion of such scheme is a violation of Section 2915.10, Revised Code.

Columbus, Ohio, April 7, 1959

Hon. Thomas A. Beil, Prosecuting Attorney  
 Mahoning County, Youngstown, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Your opinion is respectfully requested as to whether the following constitutes a lottery.

“The Coca-Cola Company is extensively advertising in a local newspaper what it calls ‘Cross the T’, and pursuant thereof, they are distributing official entry blanks upon which appears ‘Play the New Game! Win big prizes!’ Among other matters, on this blank appears the following:—

“ ‘20 G. E. “Gramercy 17” Portable TV’s

or

G. E. STEREOPHONIC Portable HI-FI’s (Winner’s choice)

200 Eastman Kodak Starflash Camera Sets

“ ‘20 Prizes awarded in Youngstown territory (including Campbell, Lowellville, Poland, N. Jackson, Austintown, N. Lima, Canfield, Struthers and Boardman.)

“ ‘There is a Black or Gold Letter under each Coca-Cola bottle cap, imprinted with ‘BOTTLED BY THE COCA-COLA BOTTLING COMPANY OF YOUNGSTOWN, YOUNGSTOWN, OHIO,’ Remove the Cork and look for them. When you can spell the words that fit the “T” you can win a Camera, Record Player or TV.

“ ‘Black and Gold letters may not be mixed for a winning entry. Watch and listen for clues in our advertising.

“ ‘No purchase necessary

“ ‘CAPS ARE WHERE YOU FIND THEM’ ”

“The Pepsi-Cola Company have a similar game which it calls ‘Dot the I’. The entry blank reads as follows:—

“ ‘Play

“ ‘Dot the i’ ”

“ ‘A GAME OF SKILL

“ ‘HERE IS MY ANSWER

“ ‘WIN BIG PRIZES

“ ‘1959 Chevrolets

“ ‘KODAK STARFLASH CAMERA SETS

“ ‘ARVIN RADIOS

“ ‘RI-TONE 4-SPEED PHONOGRAPHS

“ ‘WALLACE 50-Pc. Stainless Steel Tableware

“ ‘All Prizes for YOUNGSTOWN AREA ONLY

“ ‘Inside each Pepsi-Cola cap you will find a Gold or Black letter. Simply remove the cork and you’ll see them. When you collect all of the Letters that fit the ‘i’ you can win the prizes listed above. Watch newspapers for clues.

“ ‘Bottle cap must bear the inscription ‘Pepsi-Cola Bottling Co., YOUNGSTOWN, OHIO.’

“ ‘FIND CAPS EVERY WHERE

“ ‘NO PURCHASE NECESSARY

“ ‘Collect ’em . . . Swap ’em . . . it’s fun.’

“You will find herewith enclosed copies of the entry blanks and their advertisements in the local newspapers.

“Complaints have been made that as a result of these advertisements, children and teen-agers, in the search of discarded caps, enter places where normally they would not go and where they should not go. It is for this reason that your opinion is requested as to whether or not the above transaction constitutes a lottery.”

In the official entry blank in the “Cross the T” contest, there is included the design of a “T” consisting of five block spaces in the horizontal

line and four block spaces in the vertical line, one such block being common to both.

In the official entry blank in the "Dot the i" contest, the dot consists of a single block space above a vertical line of eight blocks spaces.

As to the combination of letters needed in the former contest the contestant is advised in the entry blank to "watch and listen for clues in our advertising".

In the latter contest the contestant is advised to "watch newspapers for clues".

These schemes are thus virtually identical so far as the pertinent elements of each are concerned.

In *Westerhaus v. Cincinnati*, 165 Ohio St., 327, the Ohio Supreme Court held, in the fifth, eighth and ninth paragraphs of the syllabus:

"\* \* \* 5. In general, the elements of gambling are payment of a prize for a chance to gain a prize.

"8. In order to have a lottery, the determination as to who gets a prize or how much of a prize he gets must be dependent at least predominately upon the element of chance.

"9. The term 'gambling' includes a lottery but is broader and may encompass more than the term 'lottery.' \* \* \*

In each of the contests here involved it is plain that the element of prize is not only present but is prominently so. That the element of chance is present is likewise plain and it remains only to inquire, as to this element, whether the winner is determined "predominately" by chance.

The contestant cannot know what letters represent the winning combination without resort to the promoter's advertising, from which he may obtain "clues". This word is defined by Webster as follows:

"An indication which guides one in solving anything of a doubtful or intricate nature."

Since the solution of this phase of the contest by large numbers of contestants would appear to be vital to the success of the whole promotional scheme, which is obviously to increase the sale of the promoter's product, we may assume, for the sake of argument, that we are not concerned with a matter of highly "doubtful or intricate nature", and that only a small

degree of skill is necessary to solve this phase of the contest ; and specifically, we may assume, without deciding the point, that this phase of the contest is not governed "predominantly" by chance.

We come then to the acquisition of all of the letters needed to establish the required combination. Since the promoter wholly controls the assignment of letters to the bottle caps currently in use the contestant can have no means of knowing in advance what letter will be found in any particular cap he acquires, whether by purchase or otherwise, he has no opportunity whatever to exercise any skill whatever in acquiring such letters. Such acquisition of the winning letters is, therefore, "predominantly" governed by chance. It thus remains only to consider whether there is a consideration paid to the promoter concerned.

In 35 Ohio Jurisprudence 2d 64, we find this statement :

"\* \* \* the strict consideration that is required in contracts is not the kind required as an element of a lottery, and what may appear on its face to be a gratuitous distribution of property or money has frequently been declared to be merely a device to evade the law. The element of advertisement and increased patronage is consideration sufficient to constitute a lottery, and where lottery tickets are given with meals, the consideration is adequate. \* \* \*"

In *State, v. Bader*, 24 N. P. (N.S.) 186, the headnote reads :

"A scheme, whereby an automobile worth approximately \$1,300 is given away, by means of a drawing of tickets, which are given to purchasers of meals at a restaurant, as well as to a few others who come in without purchasing meals, said tickets being in two parts, each part bearing the same serial number, one part of said ticket being dropped by the recipient into a barrel placed at the front of the restaurant for that purpose, and the other part retained by the holder thereof, which scheme and drawing were advertised by the owners of the restaurant both by a display of the automobile placed in their show window and was also advertised in the daily press, and a card inviting persons to come in and get tickets, which scheme and drawing are admitted to be an inducement for people to patronize the restaurant, is a lottery, and in violation of the provisions of Section 13063 of the General Code of Ohio."

In the opinion in this case, Judge Eyrich quoted from *Brooklyn Daily Eagle v. Voorhies*, 181, p. 579, as follows :

"\* \* \* The question of consideration does not mean that pay shall be directly given for the right to compete. It is only neces-

sary that the person entering the competition shall do something or give up some right or acquisition, a sending in of labels is sufficient to comply with that requirement. Nor does the benefit to the person offering the prize need to be directly dependent upon the furnishing of a consideration. Advertising and the sales resulting thereby, based upon a desire to get something for nothing, are amply sufficient as a motive.’”

Of this decision it was said by Geiger, J., in *Troy Amusement Co. v. Attenweiler*, 64 Ohio App., 105, said at page 115, 116:

“\* \* \* State v. Bader, 24 N.P. (N.S.), 186, holds that a scheme whereby an automobile is given away by means of a drawing of tickets, which were given to purchasers of meals at a restaurant, as well as to a few others who came in without purchasing meals, which scheme and drawings are admitted to be inducement for people to patronize the restaurant, is a lottery, and in violation of the provisions of the Code. While this case is by an inferior court, there is much in it of value and the facts are suggestive of those involved in the case at bar. \* \* \*”

The headnote in the *Troy Amusement* case is as follows:

“A plan, commonly known as ‘bank night,’ whereby every adult member of the public is invited to register his or her name in a book in the lobby of a theater free of charge, and, upon registering, is given a number which he is to hold so as to be eligible to participate in a drawing for a sum of money given each week to the person who holds the number drawn from a wheel if he is present at the time of the drawing or presents himself at the theater within a specified number of minutes after the drawing, is a scheme of chance within the provisions of Section 13063 *et seq.*, General Code, prohibiting the sale, promotion, distribution or advertisement of a ticket or device representing an interest in a scheme of chance.”

On the subject of consideration in this case, Judge Geiger said at page 121:

“\* \* \* The plaintiff publishes an account of the scheme, stating when the prize may be drawn, the prize to be secured and gives publicity to such a game of chance and exhibits the paraphernalia used for gain. It would be idle to discuss the question whether the plaintiff, in promoting the scheme, does so ‘for gain.’ It is not engaged in a public philanthropy. If it were, it would not seek the protection of the court in order to be permitted to distribute, as a bounty, large sums of money. We are driven to the conclusion that even though the patron goes to the theater

for the sole purpose of seeing the picture and does not pay a portion of the admission fee for the purpose of participating in the prize drawing, yet there is a violation of the statute in the other features which we have pointed out.

*“The element of advertisement and increased patronage is sufficient consideration flowing to the operator to bring the transaction within the condemnation of promoting and advertising a scheme of chance. \* \* \**

(Emphasis added)

The Troy Amusement case was a proceeding in equity to enjoin the defendant official from interfering with the operation of this “bank night” scheme by criminal process. This relief the Court of Appeals denied on the ground that equity would not interfere since the scheme was actually in violation of the lottery statute, Section 13063, General Code. This decision was affirmed in *Troy Amusement Co. v. Attenweiler*, 137 Ohio St., 460.

Section 13063, General Code, is now codified as Section 2915.10, Revised Code, as follows:

“No person, for his own profit, shall vend, sell, barter, or dispose of a ticket, order, or device for or representing a number of shares or an interest in a lottery or scheme of chance, by whatever name, styled, or title denominated or known, located in or to be drawn, paid, or carried on within or without this state.

“Whoever violates this section shall be fined not more than five hundred dollars or imprisoned not more than ninety days, or both.”

The limiting words, “for his own profit”, in this section would have no application here for in this case, as in the *Troy Amusement* case, the promoter “is not engaged in public philanthropy”, and the stimulation of its business is the obvious gain which is sought and undoubtedly realized.

It remains only to consider the device by which the promoters here apparently seek to avoid the force of the statutes which denounce lotteries and the *sale or disposition* of a ticket order or *device for or representing an interest in a lottery*. See Section 2915.10, Revised Code.

In the one case the entry blank, and the advertising, states that “caps are where you find them”, evidently suggesting that a purchase is not necessary to compete.

In the other case it is advertised that "find caps everywhere" and "no purchase necessary".

The inefficiency of these claims are evident when it is considered that a cap, i.e. a "device representing an interest in a lottery" is sold to the original purchaser; and that a part of the consideration for the beverage, however small, must be deemed a consideration for the sale of the cap, just as a part of the price of a meal in the Rader case was attributed to the sale of the chance. As to such original purchaser there was, therefore, the sale of a lottery device whether he chose to play the game or not. As to all such purchasers who do play the game this scheme is so plainly a lottery that the matter cannot be seriously debated. Is this violation of the law to be avoided by the possible circumstance that some original purchasers discard their "lottery devices" so that some street urchin may collect them and win a prize? Certainly not, for the latter in such case merely succeeds to the position of eligibility to compete which *was paid for* by the former. This device of avoidance is too clearly ineffective to be given serious consideration.

Accordingly, it is my opinion that a contest promoted by a vendor of soft drinks in bottles whereby all bottles sold are closed with caps within which various letters of the alphabet are concealed, which letters when assembled in particular combinations entitled one to a prize supplied by such vendor, is a lottery, and the promotion of such scheme is a violation of Section 2915.10, Revised Code.

Respectfully,

MARK McELROY

Attorney General