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Lotteries - "Bank-Night" - Consideration for Chance

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Accordingly the recent sustention of the New York pooled fund unemployment insurance act goes no higher than the decision of the Court of Appeals of that state, and the situation is just as though the United States Supreme Court had never granted certiorari—in fact as though certiorari had never even been applied for. This fact was fully appreciated by the statutory three-judge federal court which unanimously held that the almost identical Alabama act violates both the state and the federal constitutions, and refused to pay any attention to the New York decision.[22] This Alabama case is now before the United States Supreme Court on appeal. Accordingly the score now stands on pooled fund laws: New York's law sustained by the Court of Appeals of that state by a five to two vote, Alabama's law declared unconstitutional unanimously by a three-judge federal court and appealed to the United States Supreme Court, the Massachusetts law declared constitutional by the Supreme Judicial Court of that state, and certiorari denied, no action whatever as yet by the Supreme Court of the United States. No reserve-type law has yet been even questioned in the courts; but in California a quasi-reserve type, i. e. "New Hampshire type," law has been sustained.

ROGER SHERMAN HOAR.

LOTTERIES—"BANK-NIGHT"—CONSIDERATION FOR CHANCE.—Advertising schemes such as "bank-night," "Hollywood," "country-store" and the like, have been challenged in both criminal and civil proceedings as lotteries. Generally a lottery is defined as a device for the distribution of prizes by chance.[1] More specifically it is a scheme for the disposal or distribution of property by chance among persons who have paid, or promised or agreed to pay, any valuable consideration for the chance of obtaining such property.[2] Three necessary elements will at once be distinguished, first, the giving away of property, second, chance, and third, consideration for the chance.[3]

Although the first two elements are usually found in the "bank-night" cases, the third element of consideration has caused the courts to follow diverging paths. It is certainly permissible for a theater to present its patrons with gifts in appreciation of attendance, and it would seem that it should make little difference that such a distribution of gifts is made to depend on chance. But once a consideration is paid for the chance, the whole scheme is a lottery. Neither the Wisconsin[4] nor federal statutes[5] define a lottery, although both have pro-

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prints, as to render it very difficult to trace the history of the situation. This present article employs corrected citations.

[22] Southern Coal & Coke Co. v. Carmichael, 17 F. Supp. 225 (D. Ala. 1936).

[1] BOUVIER, LAW DICTIONARY (8th ed. 1914).

[2] BLACK, LAW DICTIONARY, (3d ed. 1933).

[3] State v. Hundling, 220 Iowa 1369, 264 N.W. 608 (1936).

[4] WIS. CONST. art. IV, § 24; WIS. STAT. (1935) § 348.01 (setting up or promoting a lottery), § 348.02 (selling tickets for a lottery), § 348.03 (advertising tickets), §§ 348.04, 348.05 (fictitious lottery), § 348.06 (prizes forfeited to the state).

[5] 17 STAT. 294, 302 (1872), 18 U.S.C.A. §§ 336, 337 (1927); 28 STAT. 963 (1895), 18 U.S.C.A. 387 (1927).

visions thereon. Nevertheless by decision, the three elements above are recognized as necessary to constitute a lottery.[6]

In regard to consideration, if patrons of a theater pay the same price for a ticket on "bank-night" as on any other night, and the quality of the entertainment is not reduced for that particular evening, such as the showing of one feature picture instead of the usual two,[7] it is nevertheless the opinion of some courts that the benefit of increased attendance is a sufficient consideration for the chance of winning a prize to make the scheme a lottery.[8] The fact that prizes of more or less value are to be given will attract persons to the theater who would not otherwise attend. In this manner those obtaining prizes pay consideration for them, and the theaters reap a direct financial benefit. Even in cases where tickets are not purchased, as in those cases where by mere attendance at stores or auction sales[9] one is given a chance on a valuable prize, though he purchases nothing, the very fact of coming is held to be a sufficient consideration for the chance. However, in other than theater cases, this appears to be the minority rule. It is not contested that consideration for the chance of winning a prize might be either direct or indirect, but the majority holds that such attendance without being required to make a purchase is not even indirect consideration.[10] The expectation that those who come might purchase goods and thereby increase trade is a benefit too remote to constitute a consideration for the chance and make the scheme a lottery prohibited by law. But where something is paid out, such as money for a ticket, despite the fact that if no "bank-night" were conducted, the price of a ticket would most likely be the same, the scheme in the absence of saving circumstances, is held to be a lottery. The saving circumstances may be of various kinds. Winners might not be obliged to be in the theater when the prizes are drawn, but are usually given a very limited time to appear. Tickets might be distributed free of charge without paying admission, and the winner likewise need not be present but must make his appearance usually within five minutes after the drawing.

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[6] State v. Williams (N.H. 1936), 182 Atl. 202; State v. Matthews (W.Va. 1936), 184 S.E. 665.

[7] Central State Theater Corp. v. Patz, 11 F. Supp. 566 (S.D. Iowa 1935). An outstanding picture was shown on bank night, lasting approximately two hours; but on other nights of the week, two feature pictures were shown and the entertainment lasted two and one-half hours.

[8] Society Theater v. Seattle, 118 Wash. 258, 203 Pac. 21 (1922). The chances were distributed only after the patrons were in the theater. The prizes were furnished by merchants who were advertised as the donors.

[9] The English doctrine holds such a scheme to be a lottery because, looking at the plan as a whole, the increase in sales is a consideration, though a winner did not necessarily have to make a purchase. Willis v. Young and Stembridge [1907] 1 K.B. 448. This is the minority rule in the United States. Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931). Here the defendant was unwilling to give a prize after it was raffled and pleaded lack of consideration for the chance. Consideration was found, but this made the scheme a lottery and defendant prevailed despite his defense.

[10] The courts recognize indirect as well as direct consideration, but often differ radically in the interpretation of indirect consideration. Yellowstone Kit v. State of Alabama, 88 Ala. 196, 7 So. 338, 7 L.R.A. 599 (1890); *cf.* Cross v. People, 18 Colo. 321, 32 Pac. 821 (1893).

In the leading case of *State* v. *Danz*,[11] decided in 1926 before "bank-night" came into existence, the bone of contention being the legality of a scheme known as "Country-store," the Washington court decided by a four to five decision that even though free chances were given without the necessity of buying an admission ticket, there was consideration for the chance and therefore a lottery. The majority of the court felt that, since the free chances were little used, they were mrely a device to escape the lottery law.

The same principle has been followed by the Michigan court,[12] where, although no tickets were given free, the court held the scheme a lottery on the ground that the gratuitous distribution of money or property was merely a device to evade the law. This case, however, does not afford a precedent for "bank-night" cases because under the Michigan statutes,[13] any disposition of property, real or personal, by way of lottery or gift enterprise, is prohibited. The court holds the plan a lottery, but that it was influenced by the wider scope of the statute cannot be doubted.

But, to refer once more to the five to four Washington decision, there are later cases which seem to follow the minority opinion. If the holder of a chance ticket need not pay consideration for it by way of admission or otherwise, and if he need not be present in the theater at the time of the drawing, although only a nominal time is given him to make his appearance after the drawing, and if he need not pay an admission to enter and claim the prize should he be declared the winner, courts are hesitant to say that, nevertheless, the benefit of increased attendance is a consideration for the chance.[14] Courts which follow this line of authority distinguish seemingly contradictory decisions on one of two grounds. Either, in non-theater cases, chances were furnished only to customers, or those who purchased goods. Or, in theater cases and others, while the distribution of chances purported to be both to customers, and to those who were not customers the distribution to the latter class was in fact negligible.[15] But where free participation is a reality, indirect benefit to the operator of the scheme, standing alone, is not enough to create a consideration.

The decision in this Washington case seems to have been followed in only one other case, a Colorado case.[16] But even here the ruling of the court can be explained on the ground that the distribution of free chances was negligible in comparison to those accompanying admission tickets. Besides, this was not a case of a criminal nature.

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[11] 140 Wash. 546, 250 Pac. 37 (1926).

[12] Sproat-Temple Theater Corp. v. Colonial Theatrical Enterprise (Mich. 1936), 267 N.W. 602.

[13] MICH. COMP. LAWS (1934, Supp.) §§ 16611-16612.

[14] Indirect benefit, when free participation is a reality, is not enough. State v. Eames (N.H. 1936), 183 Atl. 590. Here the participants had to be registered in a book, but registrants were not required to purchase admission tickets. The winner had to make his appearance five minutes after the drawing. The same situation prevailed in People v. Cardas (Cal. App. 1933), 28 P. (2d) 99 (1933).

[15] People v. Cardas, *supra*, note 14, 28 P. (2d) at 101.

[16] General Theaters v. Metro-Goldwyn-Mayer D. Corp., 9 F. Supp. 546 (Colo. 1935). Many of the tickets were given away in drug stores, but had to be deposited at the theater, although no admission was charged to do this. The winner was not required to be present.

It was a proceeding in equity by the theater to compel producers to continue to distribute films to the plaintiff. The defendants had threatened to refuse, not because the plaintiff was conducting a lottery, but because under the "N.R.A." code, the plaintiff by his scheme was violating a code practice. Although it did not expressly term the device a lottery, the court said that it was in its essence a gamble, appealing to the cupidity of the public and opposed to public policy and good business ethics.

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