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Criminal Law - Bank Night as a Lottery

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expenses, and this means not merely that the attorney is to advance the costs of litigation, but that he is not to be reimbursed in the event that no recovery is had. *Kelly* v. *Kelly,* 86 Wis. 170, 56 N.W. 637 (1893). The contract of the intervenors in the principal case would have been valid in Wisconsin.

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Criminal Law—Bank Night As a Lottery.—The State on information of Robert S. Cowie in an action against the LaCrosse Theatres Co. sought to abate as a nuisance the practice of "Bank Night." This was a scheme whereby a person would register his name at the theatre and on a certain advertised night a drawing would take place. The winning name drawn would receive a cash prize provided that the person appear on the stage within three minutes. The name was called both from the stage and from the lobby. If the person whose name was called were on the outside of the theatre, he could enter free of charge and claim his prize. Plaintiff claimed this was a lottery and contrary to the Wisconsin State Constitution, Art. IV, Sec. 24, and Sec. 348.01 of the Wisconsin statutes. The defense contended upon argument of a demurrer that there was no consideration so as to bring it within the lottery laws. The defendant's demurrer was overruled by the trial court.

Held, affirmed. The Supreme Court maintained that although chances may be had without payment, this does not remove such scheme from the lottery statute. The great number of those who pay for the ticket for the chance of participating in the drawing, thus making the scheme profitable to the theaters, furnish the consideration although others are given free chances. *State ex rel Cowie* v. *LaCrosse Theatres Co.* (Wis. 1939) 286 N.W. 707.

A lottery is loosely defined, but it is generally conceded to be a scheme involving a chance, a prize, and a consideration. *Brenard Mfg. Co.* v. *Jessup and Barrett Co.,* 186 Iowa 872, 173 N.W. 101 (1919); *Carl Co.* v. *Lennon,* 86 Misc. 255, 148 N.Y. Supp. 375 (1914). Courts deem it best not to attempt to define it because "no sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed, but not quite within the letter of the definition." *People* v. *McPhee,* 139 Mich. 687, 103 N.W. 174, 69 L.R.A. 505, 5 Ann. Cas. 835 (1905). As long as the above elements can be found, the name of the scheme is immaterial. *State* v. *Danz,* 140 Wash. 546, 250 Pac. 37, 48 A.L.R. 1109 (1926). Any scheme which tends toward arousing the public's spirit of gambling may be justly condemned as a lottery if these elements are involved. *Iris Amusement Corp,* v. *Kelly,* 366 Ill. 256, 8 N.E. (2d) 648 (1937).

The elements of chance and prize are generally conceded in such cases, but the element of consideration causes most of the trouble because of the different interpretations of the meaning of consideration. *Iris Amusement Corp.* v. *Kelly, supra; Central States Theatre* v. *Patz,* 11 F. Supp. 566 (1935); *State* v. *Hundling,* 220 Iowa 1369, 264 N.W. 608, 103 A.L.R. 861 (1936).

In construing the scheme of "Bank Night," as described in the principle case, as a lottery, the courts are in conflict. The majority of the decisions confirm the result of the *State ex rel Cowie* v. *LaCrosse Theatres Co., supra,* holding, after admitting the elements of chance and prize, that the consideration for the lottery is the increased gross receipts of the threater owner. *State ex rel Beck* v. *Fox Kansas Theatre Co.,* 144 Kan. 687, 62 P. (2d) 929, 109 A.L.R. 698 (1936); *State ex rel Hunter* v. *Fox Beatrice Theatre Corp.* (Neb. 1937) 275 N.W. 605.

It is also held that the people pay for the chance to draw and not to see the picture, and the fact that some are allowed free chances does not make it any less a lottery for those who do pay. *Central State Theatre* v. *Patz, supra.* The prizes attract many who would not otherwise come to the theater. In this manner, the theater reaps a direct financial benefit. This is the indirect consideration of those who have not paid. Therefore, "the free tickets are a mere subterfuge to escape the stigma of lottery." *Affiliated Enterprise* v. *Gantz* (C.C.A. 10th, 1936) 86 F. (2d) 597; *State* v. *McEwan* (Mo. 1938) 120 S.W. (2d) 1098; *City of Wink* v. *Griffith Amusement Co.* (Texas 1936) 100 S.W. (2d) 695. In other jurisdictions, consideration is based on the fact that the patrons paying to get into the theater have a better chance to get on the stage in time to win the prize. Therefore, the plan, as carried out, is to fill the inside of the theater and not the outside. Hence free participation is not a reality. *State* v. *Wilson* (Vermont 1938) 196 Atl. 757; *Dorman* v. *Publix Saenger Spark Theatres* (Florida 1938) 184 So. 886; *Iris Amusement Corp.* v. *Kelly, supra.*

Other courts condemn "Bank Night" as a gift enterprise. To those who pay to get in, it is clearly a lottery, but to those free participants it comes under the heading of a gift enterprise and outlawed as such. *Barker* v. *State* (Ga. 1937) 193 S.E. 605; *Jorman* v. *State,* 54 Ga. App. 738, 188 S.E. 925 (1936).

Construing the lottery law liberally, some jurisdictions have declared the scheme should be enjoined because it appealed to the cupidity of the public, and to their spirit of gambling and speculation, and as unfair and contrary to public policy, and so closely bordering on lottery that it should be condemned as such. *Iris Amusement Corp.* v. *Kelly, supra.*

Many jurisdictions in holding the minority view that "Bank Night" does not violate the lottery laws base their decision on the fact that free participation is a reality. *State* v. *Eames,* 87 N.H. 477, 183 Atl. 590 (1936); *People* v. *Cardas,* 137 Cal. App. Supp. 649, 28 P. (2d) 99 (1934); *People* v. *Shafer,* 160 Misc. 174, 289 N.Y. Supp. 649 (1936). The New Mexico court said that such gratuitous distribution would not constitute a lottery if its purpose is not to evade the law, if no consideration is paid, and if it does not cultivate the gambling spirit. Profit accruing to the theater is immaterial and not the same as having one actually pay the admission price as a consideration. *City of Boswell* v. *Jones* (N. Mex. 1937) 67 P. (2d) 286. A Federal court held that the buying of the ticket was not for a chance to draw, since the person could have gotten such a chance without paying. Therefore, there is no consideration. *Affiliated Enterprise Inc.* v. *Rock-Ola Mfg. Corp.* (Ill. E.D. 1937) 23 F. Supp. 3.

The authorities, though split in opinion, are clearly in favor of condemning "Bank Night" whether it be on the basis of a lottery or not. Even those courts who have not declared it illegal still realize its bad effects. This was expressed in the opinion of the Tennessee Court, when it stated: "There is good reason to support the often expressed view of our best informed citizens that the practice in question is detrimental to the show houses themselves; as well as hurtful to the public morals. No doubt many of the most faithful patrons of the pictures are anxious to see the fad pass and the houses devoted to their proper function of wholesome entertainment." *State ex rel Dist. Att'y. Gen.* v. *Crescent Amusement Co.* (Tenn. 1936) 95 S.W. (2d) 310.

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