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Lotteries-"Bank Night"

RECENT CASE NOTES

LOTTERIES—"BANK NIGHT."—Both plaintiff and defendant operated theaters. Defendant evolved a scheme for the giving away of cash prizes to its patrons without extra charge to them and limited to those attending the theater. Each purchaser of an admission ticket to the theater was given a coupon ticket bearing duplicate numbers, one-half of each coupon ticket being dropped into a barrel by him. At an advertised time the barrel was taken upon the stage of the theater and tickets were drawn therefrom. The person holding the winning ticket was given a valuable money prize. Plaintiff did not conduct "Bank Night" in his theater. His business diminshed; defendant's business increased. Wherefore plaintiff brought a bill for an injunction to restrain the operation of this scheme on the ground that it was in violation of the lottery law. Held, injunction granted.[1]

Schemes for the distribution of property by chance have been parading the courts from a very early time. It is well settled that the three elements of a lottery are: a prize, a chance, and a consideration.[2] But every time a court has gone on record with a declaration as to what is sufficient to bring a case within the meaning of these elements, ingenuity has evolved a new scheme which is within the purview of the lottery statute but not quite within the latest decision. The current scheme bears the name "Bank Night." The operator of the "Bank Night" in the instant case concedes that two of the elements of a lottery are present, prize and chance. But it contends that consideration is lacking because the admission-price to the theater has not been increased on the night of the drawing.

There is an apparent diversity of legal opinion as to what constitutes consideration within the meaning of the lottery statutes. The dispute resolves itself into two questions. Do the words "pay" and "valuable consideration," as they are used in the statutes, mean that one must dig down in his pocket and actually hand over something of value for the chance to participate in the distribution of prizes? Or is a consideration made out by proof that some financial benefit results to the sponsor of the scheme through increase in business?

One line of authority is represented by those courts which hold that the question of consideration depends on something of value being passed from the participant to the sponsor.[3] In these cases the participants were not

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1 Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise Inc. (1936), — Mich. —, 267 N. W. 602.

2 Lohman v. State (1881), 81 Ind. 15; People v. Cardas (1933), — Cal. —, 28 Pac. (2d) 99; Brooklyn Daily Eagle v. Voorhies (1910), 181 Fed. 579 (Dist. of N. Y.); Central States Theater Corp. v. Patz (1935), 11 Fed. Supp. 566 (Dist. of N. Y.); Glover v. Malloska (1927), 238 Mich. 216, 213 N. W. 107; State v. Powell (1927), 170 Minn. 239, 212 N. W. 169; State v. Emerson (1927), — Mo. —, 1 S. W. (2d) 109; State v. Eames (1936), — N. H. —, 183 Atl. 590; Carl Co. v. Lennon (1914), 148 N. Y. S. 375; State v. Wersebe (1935), — Vt. —, 181 Atl. 299.

3 People v. Cardas (1933), — Cal. —, 28 Pac. (2d) 99; State v. Hundling (1936), — Iowa —, 264 N. W. 608; State v. Eames (1936), — N. H. —, 183 Atl. 590; State ex rel. v. Crescent Amusement Co. (1936), — Tenn. —, 95 S. W. (2d) 310. See also: R. J. Williams Furniture Co. v. McComb Chamber of

required to purchase admission tickets as a condition upon their eligibility either to register or to claim the prizes. The courts thought that inasmuch as any one could participate without buying an admission ticket, nothing was added if one did in fact purchase a ticket of admission.

The other line of authority is represented by those courts which hold that the accrual of a financial benefit to the sponsor as a result of the scheme constitutes sufficient consideration to bring the scheme within the policy of the lottery statutes.[4] The view of these courts is that valuable prizes will attract people to the theater who would not otherwise attend and that the purchaser of an admission ticket receives both a ticket to the screen show and a chance in the drawing. The scheme has been declared a lottery even though the purchase of an admission ticket is not made a prerequisite to registering or claiming the prize, the winning name being announced at the door of the theater and the winner being allowed to enter gratis for the purpose of claiming the prize.[5] As to this and in answer to the foregoing contra line of cases, it should be noted that the distribution of a few free chances should not make a scheme any less a lottery.[6]

There is an array of respectable authority in support of the second view on consideration. Suit clubs were held to be lotteries, irrespective of the fact that the members ultimately received full value for their money;[7] the sale of tickets to concerts, the purchasers of which were entitled to chances on prizes, constituted a lottery even though the entertainment gave the purchasers full value for their money;[8] likewise, schemes whereby merchants gave coupons with purchases of merchandise which entitled holders to participate in drawings for prizes, constituted lotteries even though the merchandise represented full value.[9]

In view of this ample precedent and of the desirable policy existing against anything which appeals to the cupidity of the public and the spirit of gambling, the courts should have no difficulty in declaring "Bank Night" to be a scheme in contravention to the lottery statutes. R. H. N.

Commerce (1927), — Miss. —, 112 So. 579; Commonwealth v. Wall (1936), — Mass. —, 3 N. E. (2d) 28.

[4] People v. Miller (1936), 271 N. Y. 44, 2 N. E. (2d) 38; Society Theater v. City of Seattle (1922), 118 Wash. 258, 203 Pac. 21; State v. Danz (1926), — Wash. —, 250 Pac. 37; Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc. (1936), — Mich. —, 267 N. W. 602; Central States Theatre Corp. v. Patz (1935), 11 Fed. Supp. 566: "It is very apparent that the increase in attendance is from those persons who are interested in the drawing and not in the picture, and that they have paid their entrance fee primarily in the hope of being successful on the wheel of fortune. It may be that this number is small in comparison to the whole, but, if it is a lottery to a few, or a lottery comparatively small in its consideration, it is a lottery nevertheless."

[5] Central States Theatre Corp. v. Patz (1935), 11 Fed. Supp. 566: "The very purpose of the registration book being within the foyer of the theater is to induce people to enter the theater. Also that part of the scheme which permits a person to participate in the result of the drawing, if any, by not being inside the theater, but on the outside, is a subterfuge, as the drawing is at 9 o'clock at night and the percentage of people who would stand outside and wait for the drawing at that time must be comparatively few."

[6] Glover v. Malloska (1927), 238 Mich. 216, 213 N. W. 107; Featherstone v. Independent Service Station Ass'n of Texas (1928), — Tex. —, 10 S. W. (2d) 124; Commonwealth v. Wall (1936), — Mass. —, 3 N. E. (2d) 28.

STOCK DIVIDENDS AS TAXABLE INCOME.—In 1924 and 1926 the petitioner purchased cumulative nonvoting preferred stock of Columbia Steel Corporation. The company's articles of incorporation provided that holders of preferred stock should receive an annual dividend of $7 a share or, at the company's option, one share of common stock for each share of preferred. The common stock had voting rights; and upon dissolution it was entitled to all the assets remaining after payment of the preferred, at par, and accrued dividends thereon. From 1925 to 1928 the company elected to pay the preferred shareholders dividends in common stock, although it had a surplus sufficient to pay them in cash. The company redeemed the preferred stock in 1930; and the commissioner, in computing petitioner's profit, apportioned the cost of the preferred stock between the preferred and the common stock received as dividends in proportion to their respective values, thereby decreasing the cost basis per share and increasing the gain. Held, dividends on cumulative nonvoting preferred shares paid in common voting shares were "income" and not "returns from capital"; and consequently, the cost of the preferred shares cannot be apportioned between the preferred and the common shares for determining the gain on the preferred shares.[1]

After the adoption of the Sixteenth Amendment and the passage of the Revenue Act of 1913, imposing income tax on dividends,[2] the question naturally arose as to whether or not stock dividends were taxable as income. In the leading case[3] on the question, the Supreme Court held that dividends on common stock in the form of common stock were not income within the meaning of the Sixteenth Amendment, hence not directly taxable as such. However, it should be noted that such dividends are not entirely exempt from income tax, since they are taxed upon sale to the extent that the proceeds represent a gain over the cost. Nor can the income tax be avoided by the

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[7] People v. Hecht (1931), — Cal. —, 3 Pac. (2d) 399; DeFlorin v. State (1905), 121 Ga. 593, 49 S. E. 699; People v. Wassmus (1921), 214 Mich. 42, 182 N. W. 66; People v. McPhee (1905), 139 Mich. 687, 103 N. W. 174; State v. Wolford (1921), — Minn. —, 185 N. W. 1017. See also: State v. Emerson (1927), — Mo. —, 1 S. W. (2d) 109; State v. Lipkin (1915), 169 N. C. 265, 84 S. E. 340.

[8] Thomas v. People (1871), 59 Ill. 160; Negley v. Delvin (1872), 12 Abb. Prac. (N. S.) 210 (N. Y.).

[9] Lohman v. State (1881), 81 Ind. 15; Hudelson v. State (1883), 94 Ind. 426; Utz v. Wolf (1920), 72 Ind. App. 572, 126 N. E. 327; Standridge v. Williford-Burns-Rice Co. (1918), 148 Ga. 283, 96 S. E. 498; Glover v. Malloska (1927), 238 Mich. 216, 213 N. W. 107; State v. Powell (1927), 170 Minn. 239, 212 N. W. 169; Retail Section Chamber of Commerce of Plattsmouth v. Kieck (1934), — Neb. —, 257 N. W. 493; Carl Co. v. Lennon (1914), 148 N. Y. S. 375; Market Plumbing & Heating Supp. Co. v. Spagenberger (1934), 112 N. J. Law 46, 169 Atl. 660; Rountree v. Ingle (1913), 94 S. C. 231, 77 S. E. 931; Featherstone v. Independent Service Station Ass'n of Texas (1928), — Tex. —, 10 S. W. (2d) 124. See also: Waite v. Press Publishing Ass'n (1907), 155 Fed. 58 (Dist. Mich.); United States v. Wallis (1893), 58 Fed. 942 (Dist. Idaho); State v. Mumford (1881), 73 Mo. 647; Blair v. Lowham (1929), — Utah —, 276 Pac. 292. See: 48 A. L. R. 1115; 57 A. L. R. 424.

[1] Koshland v. Helvering (1936), 56 Sup. Ct. 767, reversing 81 Fed. (2d) 641.

[2] 38 Stat. 166, 167. For the present act, see 26 U. S. C. A. 22 and 26 U. S. C. A. 115.

[3] Eisner v. Macomber (1920), 252 U. S. 189, 64 L. Ed. 521. See, also, Towne v. Eisner (1918), 245 U. S. 418, 62 L. Ed. 372.