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## Lotteries -- "Bank Nights"

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apparent error exists but failing to do so,<sup>14</sup> (c) Failure to plead that claimant was violating a statute when injured,<sup>15</sup> (d) Agreeing to restore a case to the docket after a nonsuit had been taken.<sup>16</sup>

HARRY LEE RIDDLE, JR.

### Lotteries—"Bank Nights."

The use of prize contests as a method of stimulating sales by business concerns is nothing new and is quite legitimate.<sup>1</sup> But when these schemes lose their status as contests and take on the elements of lotteries they become unlawful.

"Bank Night" as a scheme for advertising and increasing the attendance at theatres has been widely adopted in the United States during the past two years.<sup>2</sup> Under the various arrangements the question when a lottery exists has been brought to the forefront. By statute<sup>3</sup> North Carolina made lotteries illegal but this statute, like those of most states, fails to define a lottery. To constitute a lottery three elements must be present: (1) prize, (2) chance, and (3) consideration.<sup>4</sup> There is no question but what the first two elements are present in "Bank Night" schemes. The difficulty arises in determining if a consideration exists in such schemes.

Where the chances for the prize are limited to those purchasing tickets of admission to the theatre such schemes are unanimously held to be lotteries.<sup>5</sup> The price paid is considered to cover both the ticket of admission and the chance on the prize. Analogous situations are those where merchants give free chances only to purchasers of merchandise, and such are considered lotteries.<sup>6</sup>

<sup>14</sup> *McAleenan v. Massachusetts Bonding and Ins. Co.*, 219 N. Y. 563, 114 N. E. 114 (1916). But in the North Carolina case of *Wynnewood Lumber Co. v. The Travelers' Ins. Co.*, 173 N. C. 269, 91 S. E. 946 (1917) it was held that a failure to appeal where the insurer so agreed did not of itself constitute negligence in the absence of anything to show that the judgment was erroneous.

<sup>15</sup> *Anderson v. Southern Surety Co.*, 107 Kan. 375, 191 Pac. 583 (1920).

<sup>16</sup> *Aycock Hosiery Mills v. Maryland Casualty Co.*, 157 Tenn. 559, 11 S. W. (2d) 889 (1928).

<sup>1</sup> (1932) 45 HARV. L. REV. 1196.

<sup>2</sup> *Time Magazine*, February 3, 1936, p. 57; *Literary Digest*, March 6, 1937, p. 36.

<sup>3</sup> N. C. CODE ANN. (Michie, 1935) §4428. Statute 10 and 11, Wm. III, c. 17 declared lotteries illegal in England and this statute constituted part of the common law of the United States. Most states now have statutes declaring lotteries illegal.

<sup>4</sup> *Horner v. U. S.*, 147 U. S. 449, 13 Sup. Ct. 409, 37 L. ed. 237 (1893); *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338 (1890); *State v. Lipkin*, 169 N. C. 265, 84 S. E. 340 (1915); *Brevard Manufacturing Co. v. W. Benjamin and Sons*, 172 N. C. 53, 89 S. E. 797 (1916); *State v. Eames*, 87 N. H. 477, 183 Atl. 590 (1936).

<sup>5</sup> *Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise*, 276 Mich. 127, 267 N. W. 602 (1936); *People v. Miller*, 271 N. Y. 44, 2 N. E. (2d) 38 (1936); *Society Theater v. City of Seattle*, 118 Wash. 258, 203 Pac. 21 (1922).

<sup>6</sup> *U. S. v. Wallis*, 58 Fed. 942 (S. D. Idaho, 1893); *U. S. v. Jefferson*, 134 Fed. 299 (W. D. Ky., 1905); *Davenport v. City of Ottawa*, 54 Kan. 711, 39 Pac. 708

There are two lines of authority where the chances are given to anyone whether they purchase admission tickets or not. The first in order to find a lottery looks to see whether the patron is required to give something of value, some consideration directly or indirectly to the theatre owner for a chance to participate in the drawing.<sup>7</sup> Consideration is defined as being money or something of value and not the technical consideration that is sufficient to support a contract.<sup>8</sup> A mere benefit to the theatre owner is insufficient. If the distribution of the free chances is a reality then the majority of courts say no lottery exists.<sup>9</sup> Others view the plan as it actually works and if most of the participants buy admission tickets and only a few take advantage of the free chances then it is a lottery.<sup>10</sup>

The other line of authority, the minority, is to the effect that if there is a pecuniary benefit to the theatre owner this is sufficient consideration. Increase in attendance by attraction of customers to the promoter's business constitutes sufficient consideration.<sup>11</sup> The benefit received

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(1895); *State v. Powell*, 170 Minn. 239, 212 N. W. 169 (1927); Retail Section of Chamber of Commerce of Plattsburgh v. Kieck, 128 Neb. 13, 257 N. W. 493 (1934); *Blair v. Lowham*, 73 Utah 599, 276 Pac. 292 (1929). *Contra*: *Williams Furniture Co. v. McComb Chamber of Commerce*, 147 Miss. 649, 112 So. 579 (1927).

<sup>7</sup> *People v. Cardos*, 137 Cal. App. Supp. 788, 28 P. (2d) 99 (1933); *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608, 103 A. L. R. 866 (1936); *State v. Eames*, 87 N. H. 477, 183 Atl. 590 (1936); *Cross v. People*, 18 Col. 321, 32 Pac. 821 (1893) (analogous plan).

<sup>8</sup> *Commonwealth v. Wall*, 3 N. E. (2d) 28 (Mass. 1936); *People v. Mail and Express Co.*, 179 N. Y. Supp. 640, *aff'd* 231 N. Y. 586, 132 N. E. 898 (1921) (analogous plan).

<sup>9</sup> *People v. Cardos*, 137 Cal. App. Supp. 788, 28 P. (2d) 99 (1933) (no lottery because holders of tickets did not pay any consideration. The winner of one of the prizes was a patron who had not purchased an admission ticket.); *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608, 103 A. L. R. 866 (1936); *State v. Eames*, 87 N. H. 477, 183 Atl. 590, 592 (1936) (Court said: "As we understand the actual situation of this case, however, free participation is a reality. If this is so, then regardless of the motive which induced the defendant to give such free participation, the scheme is not within the ban of the statute."); *People v. Schafer*, 289 N. Y. Supp. 649, 150 Misc. 174 (1936).

<sup>10</sup> *General Theatres v. Metro-Goldwyn Distributing Corp.*, 9 Fed. Supp. 546 (D. C. Colo. 1935) (In one month 354,000 chances were given to patrons who purchased tickets of admission to the theatre and 180,000 were given to non-purchasers and scheme was held to be a lottery.); *Commonwealth v. Wall*, 3 N. E. (2d) 28 (Mass. 1936); *Glover v. Malloska*, 238 Mich. 216, 213 N. W. 107 (1927) (where gas and oil station gave away a few chances on a prize free but most of them were given only to customers); *Featherstone v. Independent Service Station Ass'n of Texas*, 10 S. W. (2d) 124 (Tex. 1928) (Oil station gave away chances on auto and actually only very few chances were given to persons not making purchases; held to constitute lottery.); *State v. Danz*, 140 Wash. 546, 250 Pac. 37 (1926) (The evidence showed that by a card conspicuously placed at the entrance to the theatre the appellants offered free tickets to the drawing without the necessity of purchasing an admission ticket to the theatre; however, the evidence also showed without dispute that no one ever asked for or received the one without buying the other; held a lottery.).

<sup>11</sup> *Central States Theatre Corp. v. Patz*, 11 Fed. Supp. 566 (S. D. Iowa, 1935); *Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise*, 276 Mich. 127,

from advertising is enough.<sup>12</sup> The profits made on "Bank Night" greatly exceed those of any other night.<sup>13</sup> Therefore can it be said that no consideration is paid for the chances? The promoter is receiving increased profits as a direct result thereof. Inferior pictures are often shown on "Bank Night"<sup>14</sup> and the price of admission could be held to cover both admission and the chance.

It has long ago been determined that lotteries are an evil which the law should prevent. In substance "Bank Nights", whatever their form, are a variety of the same abuse. People are induced to part with their money for the chance of winning a larger sum. The promoters of "Bank Nights" expect them to. Otherwise there would be no object in the schemes. The problem has not been presented to the North Carolina Supreme Court, but when and if it is, it is to be hoped that the Court will look to the substance and not the form of these transactions.

JAMES A. WELLONS, JR.

#### Officers—Law Enforcement—Bonds.

A statute proposed but not enacted in the recent session of the North Carolina legislature would have required all peace officers of every city and town in the state to be bonded.<sup>1</sup> However, a bill was passed requiring the bonding for faithful performance of their duties of all members of the Highway Patrol and every other peace officer employed by the state.<sup>1a</sup> This legislation, and that attempted, was an effort to make more adequate the remedies available to innocent persons who are injured by police officers in the performance of their duties. This is desirable since the duties of police officers place them in a position where they are more likely to injure innocent parties than are other members of the general public, and all too often the officer is execution proof.

267 N. W. 602 (1936); *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242 (1931), criticized in (1932) 18 VA. L. REV. 465, (1932) 80 U. OF PA. L. REV. 744 (chances given to anyone attending an auction sale. Attendance of persons at sale constituted consideration); *Society Theatre v. City of Seattle*, 118 Wash. 258, 203 Pac. 21 (1922); *Willis v. Young*, 1 K. B. 448 (1907) (increase in circulation of newspaper held consideration).

<sup>12</sup> See *Brooklyn Daily Eagle v. Voorhies*, 181 Fed. 579, 581 (E. D. N. Y. 1910).

<sup>13</sup> *Central States Theatre Corp. v. Patz*, 11 Fed. Supp. 566 (S. D. Iowa, 1935).

<sup>14</sup> *Ibid.*

<sup>1</sup> S. B. No. 389, Session 1937.

Sheriffs are required to give bond for faithful performance of their duties. N. C. CODE ANN. (Michie, 1935) §3930. For a discussion of the extent of liability on sheriff's official bond see (1934) 12 N. C. L. REV. 394. Every injured party may sue in the name of the state the officer and his surety for any injury inflicted by virtue of or under color of office. N. C. CODE ANN. (Michie, 1935) §354; *Warren v. Boyd*, 120 N. C. 56, 26 S. E. 700 (1897).

<sup>1a</sup> P. L. N. C. 1937, Ch. 339. Cf. p. 342, *supra*.