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Lotteries--Consideration Necessary to Constitute--Bank Night and Similar Theatre Give-Away Programs

J. T. C. Jr.
West Virginia University College of Law

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LOTTERIES—CONSIDERATION NECESSARY TO CONSTITUTE—BANK NIGHT AND SIMILAR THEATRE GIVE-AWAY PROGRAMS.—Defendant Theatre Corporation, on established dates and in connection with the entertainment provided for its patrons, conducted a give-away program by which the awarding of prizes was confined to those who registered their names in a book provided by the defendant, although not all of them had purchased tickets. The prize winners were determined by chance. The trial court instructed the jury that if any of those registered purchased a ticket of admission in order to register and thereby become eligible for a prize, the defendant should be found guilty of conducting a lottery as charged. The jury found defendant guilty. *Held*, on appeal, that the purchase of a ticket to the entertainment also furnishes consideration for the opportunity to participate in the determination, by chance, of the winners of the prizes offered, and even though some persons are permitted to register without purchasing a ticket, the general plan constitutes a lottery under the provision of W. VA. REV. CODE c. 61, art. 10, §11 (Michie, 1949). Judgment affirmed. *State v. Greater Huntington Theatre Corp.*, 55 S. E.2d 681 (W. Va. 1949).

All jurisdictions have statutes which are similar to the above West Virginia Code provisions prohibiting lotteries. Few of these statutes define a lottery, but the courts have uniformly held that the elements necessary to constitute a lottery are consideration, prize and chance. *State v. Hudson*, 128 W. Va. 655, 37 S. E.2d 553 (1946). In all cases of theatre-sponsored give-away programs, whether labeled "bank night", "cash night", "Ten-O-Win", or otherwise, the elements of prize and chance are unquestionably present. The difficulty arises in determining whether there is consideration. If participation is open only to those paying for the right to participate, consideration is nearly always found to be present, and the device is accordingly held to be a lottery. *People v. Gonzales*, 62 Cal. App. 2d 274, 144 P.2d 605 (1944); *Commonwealth v. Malco-Memphis Theatres, Inc.*, 293 Ky. 531, 169 S. W.2d 596 (1943). But the problem arises under what the courts refer to as the "flexible-participation" plan, by which some are permitted to participate without purchasing a ticket of admission, as in the *Huntington Theatre* case, or where participation is open to all without the necessity of purchasing a ticket of admission but with the stipulation that the winner must be in the immediate vicinity of the

theatre so that if his name is drawn and announced, he can appear within a very few minutes to claim the prize.

The supreme court in the *Huntington Theatre* case decides the point for the first time in West Virginia, and in finding consideration present, West Virginia is in accord with both the majority and the trend of the decisions in the other jurisdictions. See Notes 103 A. L. R. 866 (1936), 109 A. L. R. 709 (1937), 113 A. L. R. 1121 (1938); 6 WILLISTON, CONTRACTS §1665 n. 6, especially at page 4704 (Rev. ed. Williston & Thompson, 1938). The courts finding consideration present do so on one or more of the following grounds: (1) *Contract consideration*. This requires only such consideration as is necessary to support a contract, and may consist of benefit to the promisor or detriment to the promisee. Here, sufficient consideration is found in such acts of the promisee as signing the register and being present within or near the theatre to claim the prize should he be the winner. *Fursh v. A. & G. Amusement Co.*, 128 N. J. L. 311, 25 A.2d 892 (1942); *Affiliated Enterprises, Inc. v. Waller*, 40 Del. 28, 5 A.2d 257 (1939); *State v. Wilson*, 109 Vt. 349, 196 Atl. 757 (1938). (2) *Increased revenues*. Here, the increase in revenues which results from the unusually large attendance on the nights that give-away programs are conducted is itself held to be the consideration, notwithstanding that the prize may go to one who had paid nothing. *Little River Theatre Corp. v. State ex rel. Hodge*, 135 Fla. 854, 185 So. 855 (1939); *Grimes v. State*, 235 Ala. 192, 178 So. 73 (1938); *United-Detroit Theatres Corp v. Colonial Theatrical Enterprises, Inc.*, 280 Mich. 425, 273 N. W. 756 (1937). (3) *Valuable consideration by payment in part for the chance to participate*. Here, those purchasing tickets of admission are held to have paid partly to see the entertainment and partly to participate in the drawing, unless this question is left to the jury, notwithstanding that the purchase of a ticket is not a condition precedent to participation. *State v. McEwan*, 343 Mo. 213, 120 S. W.2d 1098 (1938); *Iris Amusement Corp. v. Kelley*, 366 Ill. 256, 8 N. E.2d 648 (1938); *Commonwealth v. Wall*, 295 Mass. 70 3 N. E.2d 28 (1936). The court in the *Huntington Theatre* case seems to place West Virginia within this category. See point 4 of the syllabus and the court's opinion at 55 S. E.2d 681, 688.

Each of the cases above cited deals with some form of a theatre-sponsored give-away program, usually bank night. It should be noted that the leading case holding contract consideration sufficient to constitute a lottery is *Maughs v. Porter*, 157 Va. 415, 161 S. E. 242

(1927), where a drawing for an automobile was conducted without charge among those attending an auction. The Virginia court held that one's attendance at the sale was legal detriment which supplied the element of consideration necessary to constitute a lottery. The court in the *Huntington Theatre* case did not refer to this Virginia case in rendering its decision.

On the other hand, a minority of courts hold that a valuable consideration is necessary to constitute a lottery, and that such is not shown by a mere technical consideration or by increased revenues arising from larger attendance or by the purchase of a ticket of admission where that is not a condition precedent to participation. *State v. Eames*, 87 N. H. 477, 183 Atl. 590 (1936); *State v. Hundling*, 220 Iowa 1369, 264 N. W. 608 (1936); *People v. Shafer*, 160 Misc. 174, 289 N. Y. S. 649, *aff'd*, 273 N. Y. 475, 6 N. E.2d 410 (1936); *People v. Cardas*, 137 Cal. App. 788, 28 P.2d 99 (1933).

It must be pointed out that in the *Huntington Theatre* case, the court was apparently dealing with a scheme whereby all but a few were required to purchase a ticket of admission in order to participate in the give-away program. It does not necessarily follow that the court will find the element of consideration present where participation is open to all without the necessity of purchasing a ticket, even though such a requirement as presence in the vicinity of the theatre in order to claim the prize promptly serves to induce nearly all those desiring to participate to purchase tickets so as to be seated in the theatre at the time the awards are made. However, the court cited with approval and appeared to base its decision upon the reasoning of many of the cases herein cited under the majority view. It would seem to be a fair inference that the court in the future will not tolerate any similar scheme which is cloaked with a flimsy veil of "free participation" and designed to evade the lottery statute.

J. T. C., Jr.

WORKMEN'S COMPENSATION—THIRD PARTY TORTFEASOR—COMPENSATION PAYMENT AS BAR TO ACTION.—*A* fractured his arm in a coal mine. *A* and his employer, *B*, were subject to the Workmen's Compensation Act. Dr. *X* of *Y* hospital treated *A*, and the state compensation commissioner paid for the medical and surgical care. Compensation paid to *A* for his total injury was upon a fifteen per-