St. Rep. 564, 61 L.R.A. 277, 63 N.E. 607 (1902); *Martin* v. *State*, 70 Ohio St. 219, 71 N.E. 640 (1904). Nor is there a statute in Ohio making gross negligence an unlawful act. Such a serious hiatus has enabled persons to avoid criminal punishment though their acts were highly dangerous to the public. Thus, in the case at bar, if the defendant were guilty of gross negligence in killing a person on a private road or driveway, or even on a public highway, he would not be liable unless the particular act he did was illegal by statute. The Ohio legislature is the only body that can remedy the aforestated hiatus, and there would seem to be good reason for it so doing.

In the principal cast the evidence definitely showed that the driveway was not only open to all the public but also maintained at public expense. Therefore, in the light of the preceding discussion, the driveway, in the case at bar, fits into the definition of a public road or highway. The fact that the General Assembly had not as yet granted a special permission, under Sec. 23 of the Ohio Gen. Code, for a road does not make the way any the less a public road for the purpose of the manslaughter statute. The defendance was found guilty by the jury, of drunken driving and driving without due regard for public safety, thus, violating the Ohio Gen. Code Secs. 12603-1 and 12628-1. Therefore, the Supreme Court, it seems, could reasonably have held the defendant amenable to the second-degree manslaughter statute.

WILLIAM T. CREME

WHAT ARE GAMES OF CHANCE AND LOTTERIES?

The plaintiff corporation claims to have conceived and is now operating short range shooting galleries in which the player pays ten cents and is allowed three shots with a regulation .22 calibre rifle and attempts to obliterate one of four small red figure "5"s printed in each corner of a small rectangular white card target. If a player succeeds in obliterating one of the figures, he is awarded the "Jack Pot," a fund consisting of five dollars put up by the operators and increased by ten cents every time all four of the figures have been shot at. It is alleged that the defendants are operating galleries similar in every way to the plaintiff's except for the target, which in the defendants' galleries are diamond shaped and marked with the letter "J"; and the name, "Jack Pot Galleries." The plaintiff seeks to enjoin the defendants from carrying on this line of business which is alleged to be in unfair trade competition with the plaintiff's galleries. The chief defense is a frank claim that the business of both parties violates the gaming laws and is therefore illegal and that a

court of equity should not interfere to protect it. The court dismissed the petition, holding that these operations were in violation of Sections 13056 and 13059 of the Ohio Gen. Code, and being in violation of the criminal law, it was not necessary to consider the claim as to "unfair competition," for a court of equity cannot extend its powers to protect such a business. *"5" Spot Short-Range Gun Clubs of America, Inc.* v. *Rinehart et al.*, 10 N.E. (2d) 450 (Court of Appeals of Ohio, Lucas County, 1937).

Section 13059 of the Ohio Gen. Code is broad in scope, saying, "Whoever plays a game for money or other thing of value, or makes a wager for money or other thing of value, shall be fined—" *etc.* Generally, gaming statutes may be divided into three classes. First, those which are very general and cover almost every supposed case; second, those which include every game at which money or property is won or lost; third, those which expressly forbid betting on games or contests, whether of chance or skill.

Although different in wording and in form, under all statutes covering this particular field of gambling, it becomes necessary to determine the question as to what is a game of chance which will bring the case within a given statute. The first requisite to hold a game illegal is that of chance. In one of the earliest leading cases on this point, it is said, "Universal acceptation of a 'game of chance' is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance." *State* v. *Gupton*, 30 N.C. 271 (1848); *Commonwealth* v. *Plissner*, 4 N.E. (2d) 241 (Mass.); *U. S.* v. *McKenna*, 149 Fed. 252 (1906). "The chief element of gambling is the chance or uncertainty of the hazard," *In re Cullivan*, 114 App. Div. 654, 99 N.Y. Supp. 1097 (1906). "The element of chance is the soul of the transaction," *Ferguson* v. *State*, 178 Ind. 568, 99 N.E. 806 (1912); *Green* v. *Hart*, 41 Fed. (2d) 855 (1930); *State* v. *Apodaca*, 32 N.Mex. 80, 251 Pac. 389 (1926); *Jenner* v. *State*, 173 Ga. 86 (1931).

The test, however, is not whether the game contains elements of chance or skill, but whether chance is the predominating element in the determination of the game. Where the game itself is entirely one of skill, but the element of chance is present in the determination of the amount of the prize which the player will win, the game is held to be within the prohibition of the gaming statutes. *Speed* v. *Keys* (Tex. Civ. App.) 110 S.W. (2d) 1245 (1937). Thus we see that the element of chance need not be present merely to defeat skill in the actual playing of the game, but if it is present in the determination of the value of the

prize won by the player, it is held to be of sufficient importance to make the game illegal. "It is the character of the game, and not the skill or want of skill of any given player which brings it into or excludes it from the prohibition of the statute." *Wortham* v. *State*, 59 Miss. 179 (1881). Accord, *People ex rel. Ellison* v. *Lavin*, 179 N.Y. 170, 71 N.E. 755; *Blackwell* v. *State*, 26 Ala. App. 398, 162 So. 312 (1935); *D'Orio* v. *Startup Candy Co.*, 71 Utah 410 (1928), annotated in 60 A.L.R. 338; *State* v. *Gaughan*, 55 W.Va. 692, 78 S.E. 210 (1904).

"We believe that it is not essential to gambling that one should have a chance to lose, but that the player has a chance and lure to get something for nothing." *Snyder* v. *Alliance*, 34 O.L. Rep. 543, 41 Ohio App. 48, 179 N.E. 426 (1931). In accord with this doctrine are cases in which it is held that any added amusement which may be procured by chance, in addition to a known consideration for the money expended by the player, is sufficient to bring the cases within the prohibition of the statutes. In these cases, the problem of what is a thing of value is integrated with the problem of the predomination of chance over skill. This problem is present in cases in which the device complained of is a machine in which the customer places a coin and receives a package of mints, gum, or some other confection, and in addition may receive disks or "slugs" with which to replay the machine. However, when operating the machine with these disks or "slugs," the player does not receive merchandise, but merely receives some mild form of amusement such as humorous sayings or horoscopes or pretended fortunes, presented by a system of revolving disks. Here we have the element of chance, but it is necessary to find the element of money or "other thing of value," to outlaw the device under gaming statutes. There appears a definite split of authority on this question, some courts holding that this added amusement, being determined by chance, and not distributed to each customer in the same quantity, is something of sufficient value as to brand these devices with the stamp of disapproval under gaming statutes. "The method of affording that amusement and the quantity thereof is determined by chance, and, while appeal thereby made to gamble may not be so strong as where the stakes are greater, nevertheless it does encourage such a spirit." *Gaither* v. *Cate*, 156 Md. 254, 144 Atl. 239 (1928). *Ferguson* v. *State*, 178 Ind. 568, 99 N.E. 806 (1912); *State ex rel. Manchester* v. *Marvin, et al*, 211 Iowa 462, 233 N.W. 486 (1930); *Milwaukee* v. *Johnson*, 192 Wis. 585, (1927); *Snyder* v. *Alliance, supra*: "A thing of value to be the subject of gaming, may be anything affording the necessity lure to indulge the gambling instinct. Any excitement which would impel the player to

stake money on a chance of winning, would produce consequences at which the enactment is aimed." *Painter* v. *State*, 163 Tenn. 627 (1927), annotated in 81 A.L.R. 173. Where the added amusement was a pretended horoscope or fortune, *Jenner* v. *State*, 173 Ga. 86 (1931); *Rankin* v. *Mills Novelty Co.*, 182 Ark. 561, 32 S.W. (2d) 161 (1930); *State* v. *Mint Vending Machine Co.*, 85 N.H. 22, 154 Atl. 224 (1931); *Commonwealth* v. *McClintock*, 257 Mass. 431, 154 N.E. 264 (1926).

In direct dissent to this view is substantial authority to the effect that amusement is not a thing of value to bring the game within the prohibition of the gaming statutes. Under a Connecticut statute almost identical in wording with the Ohio statute, saying "any person who shall play at any game—for any valuable thing, shall be fined * * *," the court in the case of *Mills Novelty Co.* v. *Farrell*, 64 Fed. (2d) 476, 3 Fed. Supp. 555 (1933), held that such humorous inscriptions are not things of value, and thus the element of chance is not involved with "a gain," and the game is not illegal. This was held to be a lawful advertising device and not gaming. The same machine manufactured by the same company was also held not to violate the gaming laws in *People* v. *Jennings*, 257 N. Y. 196, 177 N.E. 419 (1931); *Overby* v. *Oklahoma City*, 46 Okla. Crim. Rep. 42, 287 Pac. 796 (1930); *Green* v. *Hart*, 41 Fed. (2d) 855 (1930); *Jenner* v. *State*, *supra*; *In re Cullivan*, 114 App. Div. 654, 99 N. Y. Supp. 1097 (1906).

In the principal case, the court cites the case of *Stevens* v. *The Times-Star Co.*, 72 Ohio St. 112, 73 N.E. 1058 (1905), which involves a lottery. In that case it is held that the element of chance is not incompatible with the element of calculation or even certainty. It seems obvious that many devices may be held to be violations of the lottery laws as well as the gaming laws, and the reason for the differentiation may become lost in the numerous cases. In *State* v. *Schwemler*, 154 Or. 533, 60 Pac. (2d) 938 (1936), the court says: "The reason for the distinction between a lottery and ordinary forms of gaming is the demoralizing effect of a lottery upon people generally throughout the state. The lottery infests the whole community, reaches every class; while gambling is confined to a few persons and places". The authorities are in complete accord that the elements of prize, chance, and consideration are all necessary to bring a scheme within the prohibition of the lottery statutes. *Society Theatre* v. *Seattle*, 118 Wash. 258, 203 Pac. 21 (1922); *State* v. *Fox Kansas Theatre Co.*, 144 Kan. 687, 62 Pac. (2d) 929 (1936), annotated in 109 A.L.R. 709. In most cases in which a lottery is involved it is but a matter of a moment to discover the elements of

prize and chance, but much conflict is noted in the matter of decisions as to what constitutes the necessary consideration. This conflict of judicial interpretation is crystallized in the "Bank Night" cases which have recently reached courts of last resort. In discussing these cases it must be noted that there are two general types of "Bank Night" schemes. First, those in which registration and actual receipt of the award may be had without cost to the participants; Second, those in which it is necessary to pay admission to register, and/or admission at the times when the awards are made. Under both procedures, the registration numbers are placed in a receptacle from which a number and name are drawn at each of the periodical drawings in the theatre. The winner must claim the prize within an alloted time, usually from one to three minutes. If the prize is not claimed within that time, the amount of that award is added to the prize for the next drawing. The prize money is contributed by the operators of the scheme.

In the case of the payment of an admission fee as a condition of participation in the drawings, either as a condition precedent to registration or to be present at the drawing or both, the courts find no difficulty in finding the necessary consideration to determine that the scheme is a lottery, and violates the criminal law. This is done by a finding that the admission price is paid for the privilege of attending a movie program and also for the chance to win the award. *Davenport* v. *City of Ottawa*, 54 Kan. 711, 39 Pac. 708 (1895); *People* v. *Miller*, 271 N. Y. 44, 2 N.E. (2d) 38 (1936); *Horner* v. *United States*, 147 U.S. 449, 13 Sup. Ct. 409, 37 L. Ed. 237 (1893); where no admission price is necessary to win an award, the decisions are in sharp conflict. Some courts hold that under this plan there is no element of consideration present to bring the "Bank Night" scheme within the prohibition of the lottery provisions. The scheme is one merely to make gifts of money, and there is no criminal liability for such an enterprise. *State* v. *Eames*, 87 N.H. 477; 183 Atl. 590, 103 A.L.R. 866 (1936); *State* v. *Hundling*, 220 Iowa 1369, 264 N.W. 608 (1936); *Griffith Amusement Co.* v. *Morgan*, 98 S.W. (2d) 844 (1936); *People* v. *Shafer*, 273 N.Y. 475, 6 N.E. (2d) 410 (1936).

That the element of consideration need not be a pecuniary one flowing from the patron to the operator of the scheme, but that it nevertheless may be a lottery on the finding of other consideration, is the conflicting view held by many courts. Where the consideration was held to be the attraction of patrons to the theatre, who would otherwise not attend, the "Bank Night" scheme was held to be a lottery, and in violation of the lottery laws. *Simmons* v. *Randforce Amusement Co.*, 293

N.Y. Supp. 745, 162 Misc. (N.Y.) 491 (1937). Where those patrons who did pay to attend the theatre on the day of the drawing, as well as those who did not attend, had a chance to win the award, the admission price paid by some of the potential winners is held to be sufficient consideration to brand the plan as a lottery. *Jorman* v. *State*, 54 Ga. A. 738, 188 S.E. 925 (1936); *City of Wink* v. *Griffith Amusement Co.*, 100 S.W. (2d) 695 (1936); *Commonwealth* v. *Wall*, 3 N.E. (2d) 28 (1936); *Central States Theatre Corp.* v. *Colonial Theatrical Enterprises*, 276 Mich. 127, 267 N.W. 602 (1936).

Thus, to outlaw a device, scheme, or game under the gaming statutes, it is necessary to find the element of chance thwarting the element of skill involved, or the chance appearing in the amount of the prize the player way win. The game must be played for money or other valuable thing, which may include property, or merely amusement or entertainment, in addition to the goods which the patron professes to buy. To hold a scheme illegal as a lottery it is necessary to find the elements of chance, prize, and consideration. The consideration need not be a pecuniary one flowing from the patron directly to the operator of the lottery, but may be found to be any benefit to the operator, though it comes to him from some other source, and not directly from the patron.

ARTHUR W. MEIFERT

EVIDENCE

ADMISSIBILITY OF ILLEGALLY OBTAINED EVIDENCE — WIRE TAPPING

The defendants were charged with smuggling alcohol, possessing and concealing smuggled alcohol, and conspiracy to smuggle and conceal alcohol. Much of the evidence was secured by the wire tapping activities of Federal agents. The defendants were convicted and the result affirmed by the Circuit Court of Appeals. *U. S.* v. *Nardone*, 90 Fed. (2d) 630; certiorari granted, 58 S. Ct. 27, 82 L. Ed. Adv. Op. 11 (1937). Section 605 of the Federal Communications Act of 1934, 47 U.S.C.A. Sec. 605, 48 Stat. 1103 (June 19, 1934), provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purpose, effect, or meaning of such intercepted communication to any person." On the basis of this section the United States Supreme Court reversed the judgment of conviction, Justices Sutherland and McRey-