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James F. Thornburg
Member, South Bend Bar

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“BANK NIGHT” GOES TO COURT

By JAMES F. THORNBURG*

Although schemes of chance were probably a by-product of Adam and, in the opinion of some, *vice versa*, memory recalls that the modern lottery of a century since was discreetly and peculiarly an instrument of fraternity, church, and school.¹ The current era of the lottery does not enjoy such discreet limitations or salutary devotees. As a commercial stimulant, it presently affords a merchandising program for the metropolitan theatre, the neighborhood grocer, retail vendors of gasoline, wholesale bakers, and the warp and woof of business enterprise having immediate contact with the public. “Bank Night” and kindred formulae have been productive of economic benefit to their proponents, a commensurate loss to participants, and bloodless revolutions in the legal periodicals. Indiana has been an amiable host to the cause; it is hoped it will be tolerant of the effects.

Statutory and judicial disapproval of gaming enterprise has endeavored to remain apace of the ingenuity of those who sponsor the variegated schemes. A lottery is as easily recognized by its wake as it is difficult to define in the abstract.

* Of the South Bend Bar.

¹ *Whitney v. State* (1858), 10 Ind. 404. “In this state the sale of all lottery tickets is prohibited, as no lotteries are authorized by statute. Hence, tickets in numerous of the schemes gotten up to aid schools and churches, and gift exhibitions, being disguised lotteries, are illegal articles.”

The Legislature of the Indiana Territory, by an act of Sept. 17, 1807, chartered Vincennes University and authorized a lottery to raise funds for the institution. Despite the Constitutional proviso of 1851 forbidding the sanction of lotteries and legislation in accord therewith, the legality of the Vincennes University lottery was sustained in *Kellum v. State* (1879), 66 Ind. 588. In accord with the cases *Phalen v. Va.* (1850), 8 How. 163, 12 L. ed. 1030 and *Stone v. Miss.* (1880), 101 U. S. 814, 25 L. ed. 1079, the Supreme Court of Indiana expressly overruled the case of *Kellum v. State*, supra, in *State v. Woodward* (1883), 89 Ind. 110, 46 Am. Rep. 160.

Not unlike a childhood purgative piquantly blended with the juice of the orange, it is better known by its results than its ingredients. Notwithstanding the restrictions inherent to definition, the Courts uniformly have defined and delimited the judicial concept of a lottery to a species of gaming² which incorporates three concurrent elements, viz.:

1. A prize or thing of value proffered;
2. To one or more recipients among those participating, the recipients to be determined through chance or caprice;
3. A consideration having been exacted and/or received for the privilege of participation.³

Opinion is rife as to whether lotteries are illegal per se under common-law dogma. Mr. Williston⁴ and the American Law Institute⁵ reason that lotteries are mala in se as a species of gaming contract. Although no Indiana decision has been found which antedates our criminal statutes, the civil actions involving lottery schemes have furnished ample judicial expression in condemnation thereof as offending public policy.⁶ The Supreme Court of the United States has exhibited a contrary opinion with "They are not, in the legal acceptation

² "There may be gaming which is not by lot, but in every prohibited lottery there is an element of gambling." *Loiseau v. State*, 114 Ala. 34, 22 S. 138.

"Every lottery has the characteristics of a wager or bet, although every wager is not a lottery." *Wilkinson v. Gill*, 74 N. Y. 63, 30 Am. R. 264. For accumulated definitions see: *Yellow-Stone Kit v. State* (1890), 88 Ala. 196, 7 L. R. A. 599, 7 S. 338.

³ *Hudelson v. State* (1883), 94 Ind. 426; *Lynch v. Rosenthal* (1895), 144 Ind. 86, 42 N. E. 1103; *Utz v. Wolf* (1920), 72 Ind. App. 572, 126 N. E. 327; *R. J. Williams Furniture Co. v. McComb Chamber of Commerce* (1927), 147 Miss. 649, 112 S. 579; *Glover v. Malloska* (1927), 238 Mich. 216, 213 N. W. 107; *State v. Danz* (1926), — Wash. —, 250 Pac. 37; *State v. Mumford* (1881), 73 Mo. 647, 39 Am. R. 532; *State v. Wilson* (1938), — Vt. —, 196 A. 757; *Horner v. United States* (1893), 147 U. S. 449, 37 L. ed. 237.

See also: *Burns' Ind. Stats.* 1933, Sec. 10-2301. Ordinarily the lottery may be distinguished from the common forms of wager in that the undertakings of the former are not aleatory.

⁴ Williston on Contracts (Rev. Ed.), Sec. 1665.

⁵ Restatement of the Law of Contracts, Sec. 520, Comment b.

⁶ *Swain v. Bussel et al.* (1858), 10 Ind. 438; *Riggs v. Adams* (1859), 12 Ind. 199; *Rothrock v. Perkinson* (1878), 61 Ind. 39; *Lynch v. Rosenthal* (1896), 144 Ind. 86, 42 N. E. 1103, 31 L. R. A. 835; *Utz v. Wolf* (1920), 72 Ind. App. 572, 126 N. E. 327.

of the term, mala in se, . . . but may properly be made mala prohibita."⁷ However, the Supreme Court has not extended advocates of the lottery the comfort of soft words:

"Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community: it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."⁸

The source of illegality, however, is a matter of academic import only, as the several commonwealths and the federal government have employed legislative mandate to outlaw the lottery.⁹

Indiana's initial Constitution of 1816 included no provision dealing with this proposition.¹⁰ Clause 8 of Article 15, the Constitution of 1851, reading as follows: "No lottery shall be authorized; nor shall the sale of lottery tickets be allowed" has been construed to be self-executing.¹¹ Such interpretation of this proviso automatically announces the public policy of the State. Statutory denial of the lottery in 1832¹² adumbrated the Constitutional denouncement. It is believed that since the latter date Indiana statutes have offered no

⁷ *Stone v. Miss.* (1880), 101 U. S. 814, 25 L. ed. 1079.

⁸ *Phalen v. Va.* (1850), 8 How. 163, 12 L. ed. 1030.

⁹ See: U. S. C. A. Title 15, Sec. 45. The Federal Trade Commission, through remedial cease and desist orders, have forbid the use of lottery merchandising programs in interstate commerce as an unfair trade practice. *Chicago Silk Co. v. Fed. Trade Comm.* (C. C. A. 1937), 90 F. (2d) 689; *Fed. Trade Comm. v. F. A. Martoccio Co.* (C. C. A. 1937), 87 Fed. (2d) 561, cert. den. 57 S. Ct. 794; *Hofeller v. Fed. Trade Comm.* (C. C. A. 1936), 82 F. (2d) 647, cert. den. 299 U. S. 557; *Fed. Trade Comm. v. R. F. Keppel & Bros., Inc.* (1934), 291 U. S. 304, 78 L. ed. 814. U. S. C. A. Title 18, Secs. 336 and 337 exclude lotteries and related matter from the mail. See also Title 39, Sec. 732. Sec. 387 of Title 18 bans the lottery from interstate commerce. See also Title 19, Sec. 1305. Title 47, Sec. 316 denies advertisement to lotteries by medium of radio.

¹⁰ *Kellum v. State* (1879), 66 Ind. 588.

¹¹ *State v. Woodward* (1883), 89 Ind. 110.

¹² For a detailed history of Indiana's legislation against the lottery see: *Kellum v. State* (1879), 66 Ind. 588.

respite to the custodian of the lottery.¹³ Our present statutes, invoked by the General Assembly in 1905, are as follows:

Burns, Indiana Statutes 1933.

Sect. 10-2301. "Raffling.—Whoever sets up or proposes any money, goods, chattels or thing in action to be raffled for, or to be distributed by lot or chance to any person who shall have paid or contracted to pay any valuable consideration for the chance of obtaining such money, goods or things in action, shall, on conviction, be fined not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100).¹⁴

Sect. 10-2302. Lottery-Gift enterprise.—Whoever sells a lottery ticket or tickets, or a share or shares in any lottery scheme or gift enterprise, or acts as agent for any lottery scheme or gift enterprise, or aids or abets any person or persons to engage in the same, or transmits money by mail or express,¹⁵ or otherwise transmits the same, to any lottery scheme or gift enterprise for the division of property to be determined by chance, or makes or draws any lottery scheme or gift enterprise for a division of property not authorized by law, or who knowingly permits any building, tenement, wharf-boat or other watercraft owned, leased or controlled by him, to be used and occupied for any of the purposes above named, shall, on conviction, be fined not less than ten dollars (\$10.00) nor more than five hundred dollars (\$500).

Sect. 10-2303. Lottery-Advertising.—Whoever writes, prints, advertises or publishes in any way an account of any lottery, gift enterprise or scheme of chance of any kind or description, by whatever name, style or title the same may be denominated or known, stating when or where the same is to be drawn, what the prizes therein or any of them are, or the price of a ticket, or showing therein where any ticket may be obtained, or in any way giving publicity to such lottery, gift enterprise or scheme of chance, shall, on conviction, be fined not less than ten dollars (\$10.00) nor more than five hundred dollars (\$500)."

Although the Indiana decisions under these statutes fail to define with exactitude a lottery or gift enterprise, consideration is obviously present in each instance. No Indiana case has been found wherein consideration was not present. Both sections 10-2301 and 10-2302 contemplate that consideration be exacted as an element of the public offense. The

¹³ See note 12, *supra*.

¹⁴ It is to be noted that Sec. 10-2301 incorporates the three essentials of a lottery in defining the criminal offense.

¹⁵ Quære: Is the proviso rendering criminal the "transmission of money by mail" to a lottery scheme in violation of the dual form of government?

former prescribes payment or a contract to pay for the chance as an integrant. The latter section outlaws the *sale* of lottery tickets or shares in a gift enterprise. If the judiciary would be content to construe these statutes literally it might be argued that a monetary consideration or price must be exacted as an element of the crime.

However, Sec. 10-2301 expressly provides that the price exacted or contracted for may be "any valuable consideration". By the phrase, valuable consideration, the legislature presumptively intended any exaction which the law deems sufficient to support a simple contract. In *Swain v. Bussel et al.* (1858), 10 Ind. 438, the consideration for the participation privilege was the conveyance of real estate. The consideration requisite to a chance in the case of *Hudelson v. State* (1883), 94 Ind. 426 was the purchase of merchandise.¹⁶ Thus the favored construction enjoys at least a tacit judicial approval.

Secs. 10-2302 and 10-2303 employ the phrase, "gift enterprise." By the use of this phrase in addition to the word, lottery, it is of import to ascertain whether these sections of the statute levy criminal condemnation upon a gratuitous distribution of property by chance. It is submitted that a fair construction of the statute does not eliminate the necessity for consideration. Sec. 10-2302, by its terms, attacks the sale of "a share or shares in any lottery scheme or gift enterprise". Called upon to define a gift enterprise in the *Matter of Walter J. Gregory*,¹⁷ the Supreme Court of the United States, in an opinion delivered by Mr. Justice Hughes, approved a standard definition to the effect that

"a 'gift enterprise' is a scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have taken shares in the scheme."

¹⁶ This case arose under a former Indiana statute, identical with the present Sec. 10-2303. The opinion expressly states that "It makes no difference that the ticket was to be procured by the purchase of goods." Also see in accord: *Lohman v. State* (1881), 81 Ind. 15.

¹⁷ (1911), 219 U. S. 210, 55 L. ed. 184. In support of its statement the Court cites the Indiana decision of *Lohman v. State*, *infra* note 18.

This exact phraseology was accepted in the case of *Lohman v. State*,¹⁸ wherein the consideration for the participation chance was the purchase of twenty-five cents in merchandise. Opining upon facts presenting a similar consideration, the Court in *Hudelson v. State*¹⁹ announced:

"Whether the enterprise set out in the publication be called a scheme of chance, a gift enterprise, or a lottery, it is still a scheme of chance, and in that sense a lottery or gift enterprise."

If the quoted statement bears meaning it is in the inference that the terms are synonymous. The opinion of *Utz v. Wolf*,²⁰ narrating upon like factual experience, concludes:

"We hold that the contract discloses a gift enterprise or lottery . . ."

Therefore, it appears that the two terms relate to schemes having common inwards, the phrase, "gift enterprise," being descriptive of that species of lottery wherein the participation chance is tendered with the purchase of other commodity or service.

The first element, that is, the prize or thing of value proffered to the public offers no avenue of evasion to the lottery custodian. Being the *sina qua non* of popular appeal, the prize is highly featured.

Skilled technicians of the lottery have sought to evade legal prohibition by introducing a degree of skill or judgment so that the participant may be averred to act as a rational being in the contest. The series of attempted evasions are as colorful as Christmas candies—and equally indigestible to the Courts. Only a few will be noted.

A glass globe is filled with beans and the public is invited to adjudge the numerical quantity of its content for a nominal stipend. Confronted by the assertion that this scheme challenged the mind to mathematical calculation, the Supreme

¹⁸ (1881), 81 Ind. 15.

¹⁹ (1883), 94 Ind. 426.

²⁰ (1920), 72 Ind. App. 572, 126 N. E. 327.

Court of Indiana in *Hudelson v. State*²¹ countered that speculation was predominant.

Pin ball games and machines employing toy cranes in a "catch as catch can" game are under the partial control of the customer and, in some instances, a fair degree of proficiency is obtained. Where both skill and chance are extant, the prevailing rule is "that if the element of chance rather than that of skill predominates, the game may be found to be a lottery."²² Upon like premise, a cartoon series entitled "Famous Names" was banned by the Supreme Court of Missouri.²³ The participants in that scheme endeavored to allocate from among several listed names the correct name suggested by the cartoon. Certain of the cartoons were equally applicable to more than one of the listed titles.

"Bank night" and allied schemes have sought to salvage the lottery through a plea of no consideration. Obviously elements one and two of the lottery are indigenous to all schemes of which "bank night" is representative. It is upon the element of consideration that a sharp cleavage of opinion arises among the cases.

"Bank night" as originally conceived required of the winning participant registration and appearance at the drawing in the theatre within a specified time limit. The usual and customary price of admission was exacted. It was urged that the participation privilege was in fact gratuitous since no additional admission price was required.

The case of *Utz v. Wolf*²⁵ held that where consideration is given for a thing of value and a "participation chance" is included the consideration is entire and thus the scheme suffers statutory disapproval as a "gift enterprise". This premise is not countered by the fact that the price paid for the com-

²¹ (1883), 94 Ind. 426.

²² *Commonwealth v. Plissner* (1936), Mass., 4 N. E. (2d) 241.

²³ *State v. Globe Democrat Publishing Co.* (1937), 110 S. W. (2d) 705.

²⁴ Our investigation has failed to reveal any decision from the appellate courts of Indiana upon the legality of "bank night" or a game of chance involving parallel facts.

²⁵ (1920), 72 Ind. App. 572, 126 N. E. 327.

modity or service remains static. Ostensibly a prize distributed by chance under such circumstances is a gift. However, the Courts indulge a realistic presumption that the costs of the participation scheme are actually paid by the participants as an entity. The costs are absorbed in the profit differential created by the participants. When this presumption is essayed, it is patent that the consideration paid is entire, that is to say, the consideration purchases the service or product plus the participation chance. Consideration being found the scheme is in violation of the statute.²⁶

Thwarted by the theory of entire consideration, proponents of "bank night" introduced an indifferent distribution of the participation chances among purchasers and non-purchasers. Free registration and appearance at the drawing within a prescribed time limit became the exclusive requisites to recovery by the winning participant. Certain of the decisions answered ingenuity with more of emotional piety than reason.²⁷ Their response, in substance, was that such schemes offend the spirit of right living and are inimical to public policy. Without questioning the justification of their moral resolution, the premise scarcely answers a plea of no consideration. The supposed logical conclusion of these decisions become illogical delusion in the case of *Grimes v. State*.²⁸ Yet, "upon occasion even Homer nods."

A respectable quantum of authority has exploited the indirect benefit theory of consideration to hold "bank night"

²⁶ U. S. v. Wallis (1893), 58 F. 942; State v. Mumford (1881), 73 Mo. 647, 39 Am. R. 532; Hudelson et al. v. State (1883), 94 Ind. 426; Lynch v. Rosenthal (1895), 144 Ind. 86, 42 N. E. 1103; Lohman v. State (1881), 81 Ind. 15; People v. Miller (1936), 2 N. E. (2d) 38, 271 N. Y. 44; Commonwealth v. Wall (1936), Mass., 3 N. E. (2d) 28; Iris Amusement Corp. v. Kelly (1937), 366 Ill. 258, 8 N. E. (2d) 648; Featherstone v. Independent Service Station Assn. (Texas), 10 S. W. (2d) 124; State v. Danz (1926), Wash., 250 Pac. 37; Blair v. Lowham (1929), 73 Utah 599, 276 P. 292; Chamber of Commerce v. Kieck (1934), 128 Neb. 13, 257 N. W. 493. *Contra*: R. J. Williams Furniture Co. v. McComb Chamber of Commerce (1927), 147 Miss. 649, 112 So. 579.

²⁷ Glover v. Malloska (1927), 238 Mich. 216, 213 N. W. 107; Shancell v. Lewis Amusement Co. (La.), 171 So. 426; Grimes v. State (1937), Ala. App., 178 So. 69; City of Wink v. Griffith Amusement Co. (Tex.), 100 S. W. (2d) 695.

²⁸ (1937), Ala. App., 178 So. 69.

a lottery.²⁹ Rationalized upon the premise that attendance is increased and incidental economic benefits are derived, this class of decisions, when carried to fruition, condemns every form of chance enterprise—though the only accrued benefits are those of advertisement and good will.

Other among the decisions denounce the indirect benefit theory in that it raises incidental benefits to the status of consideration whereas, under the better reasoned cases, incidental benefits will not support a simple contract. Furthermore the incidental benefits are not bargained for and given in exchange of the promise of the lottery custodian. These cases, however, are productive of a like result in holding that the scheme is a lottery if any of the participants tender consideration.³⁰

"A game does not cease to be a lottery because some, or even many of the players are admitted to play free, so long as others continue to pay for their chances."³¹

With strict adherence to the preferred legal detriment theory of consideration, the Supreme Court of Vermont in the recent adjudication, *State v. Wilson*,³² declared "bank night" to be illegal. Tacitly construing the contract as unilateral (that is, a promise for an act), the Court depicts consideration in the very acts of registration and appearance within the prescribed time limit. Thereby the promisee-participant foregoes the exercise of his legal privileges to refrain from registering and from appearing at the theatre

²⁹ *State v. Fox Kansas Theater Co.* (Kan.), 62 P. (2d) 929; *Sprout-Temple Theatre Corp. v. Colonial Theatrical Enterprises*, 276 Mich. 127, 287 N. W. 602; *United-Detroit Theatres Corp. v. Colonial Theatrical Enterprises, Inc.* (1937), 280 Mich. 425, 273 N. W. 756; *Society Theatre v. Seattle* (Wash.), 203 Pac. 21; *Maughs v. Porter* (1927), 157 Va. 415, 161 S. E. 242; *State v. Fox-Beatrice Theatre Corp.* (1937), Neb., 275 N. W. 605; *Barker v. State* (1937), Ga., 193 S. E. 605.

³⁰ *Commonwealth v. Wall* (1936), Mass., 3 N. E. (2d) 28; *Iris Amusement Corp. v. Kelly* (1937), Ill., 8 N. E. (2d) 648; *Jorman v. State* (Ga.), 188 S. E. 925.

³¹ *Featherstone v. Independent Service Station Assn.* (Texas), 10 S. W. (2d) 124.

³² (1938), 196 A. 757.

within the time allotment. The reasoning of the opinion is in conformity with the general law of contracts³³ and it is submitted that the opinion will frequently be approved by astute theorists.

Those cases which sustain the legality of "bank night" as cautiously set up with an indifferent distribution of chances do so upon the basis that consideration is not exacted.³⁴ Even these decisions display a prompt caution toward any scheme in which consideration is exacted under a deceptive screen.³⁵

A quantitative analysis reveals that eight states have held bank night legal under the particular facts presented, namely, New York, Tennessee, California, New Hampshire, Iowa, Minnesota, Mississippi, and New Mexico. The Courts of thirteen states have outlawed such schemes on one or another theory. They are Kansas, Michigan, Massachusetts, Illinois, Louisiana, Texas, Georgia, Alabama, Vermont, Nebraska, Washington, Virginia, and Utah. England has furnished two pointed decisions against a kindred scheme to increase newspaper circulation.³⁶ At least four federal decisions³⁷ have indicated their antipathy while there is dictum

³³ Williston on Contracts, Vol. 1 (Rev. Ed.), Sec. 102; Restat. of Contracts, Sec. 75; *Cates v. Seagraves* (1914), 56 Ind. App. 486, 105 N. E. 594.

³⁴ *State v. Stern* (1937), Minn., 275 N. W. 626. (Three justices dissenting); *People v. Shafer* (1936), N. Y., 6 N. E. (2d) 410; *Simmons v. Randforce Amusement Corp.*, (N. Y. Mun. Ct.), 283 N. Y. S. 745; *State v. Crescent Amusement Co.* (Tenn.), 95 S. W. (2d) 310; *State v. Eames*, 87 N. H. 477, 183 N. E. 590; *People v. Cardas* (1933), 137 Cal. App. 768, 28 P. (2d) 99; *State v. Hundling* (1936), (Iowa), 264 N. W. 608. The Federal Dist. Ct. for the Southern District of Iowa reached a contrary result in *Central States Theatre Corp. v. Patz*, 11 F. Supp. 566; *Yellow-Stone Kit v. State* (1890), 88 Ala. 196, 7 So. 338; *Affiliated Enterprises v. Gruber* (C. C. A. 1st Cir.), (1936), 86 F. (2d) 958; *City of Roswell v. Jones* (N. M.), 67 P. (2d) 286.

³⁵ *State v. Eames*, 87 N. H. 477, 183 A. 590.

³⁶ *Kerslake v. Knight* (1925), 41 Times L. R. 555; *Willis v. Young* (1906), 96 L. T. N. S. 155. For complete discussion see: Hensley, "The legality of Theatre Bank Nights," 1 *Am. Lawyer* (Sept., 1937) 5 ff.

³⁷ *U. S. v. Wallis* (1893), 58 F. 942; *Central States Theatre Corp. v. Patz* (1935; D. C.), 11 F. Supp. 566; *Gen. Theatres v. Metro-Goldwyn-Mayer Distributing Co.* (1935; D. C.), 9 F. Supp. 546; *Affiliated Enterprises v. Gantz* (1936), 86 F. (2d) 597.

in one case to the contrary.³⁸ Of interest is the fact that, according to our investigation, eight decisions have been rendered since January 1, 1937, seven having outlawed "bank night".

From its strictly legal aspect the problem obviously is visited by divergent judicial opinion. It is futile, of course, to predict whether "bank night" schemes will continue to enjoy a comfortable retreat in Indiana. However, where gaming schemes fall within the spirit of a prohibitory statute there is a strong judicial inclination to press these schemes within the ambit of its letter.

For those who have endured (as the price of domestic tranquillity) two comics, a news reel, and double features including the "Birth of A Nation" (which, like infant industry, never grows up—just old)—all in anticipation of the "bank night" drawing—know well enough that the lottery laws should expand to protect the human personality from ennui.

³⁸ *Affiliated Enterprises v. Gruber* (1936), 86 F. (2d) 958.