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Contracts--Non-Enforceability of Lottery Contracts--Effect of Consideration Apart From chance of Winning

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RECENT CASE COMMENTS

CONTRACTS — NON-ENFORCEABILITY OF LOTTERY CONTRACTS — EFFECT OF CONSIDERATION APART FROM CHANCE OF WINNING. — Defendant advertised a lot sale, announcing that he would give to every white person over the age of sixteen years who attended the sale, whether a bidder or not, a chance to win a new Ford automobile. Plaintiff's name was drawn as winner of the car. When defendant refused to carry out his promise, plaintiff brought this action for the value of the car. *Held*, plaintiff could not recover. *Maughs v. Porter*.¹

The result of the case is, of course, no surprise to members of the bar. However, there seems to be prevalent among laymen an idea that a lottery, raffle, or similar game of chance can be hooked up with a sale of merchandise or some other business transaction and be thereby legalized. The case well illustrates that the law recognizes no foundation for such a belief.

The court, in *Maughs v. Porter*, was satisfied as to the sufficiency of the consideration but denied recovery because the contract was founded on a lottery which violated both the Constitution² and the Code³ of Virginia. The statute made participating in a lottery a misdemeanor, punishable by confinement in the county jail for not more than one year and a fine not exceeding five hundred dollars. Mr. Chief Justice Prentiss agreed with Lord Mansfield⁴ that, while the defense of illegality sounded very ill in the mouth of the defendant, public policy would forbid the enforcement of contracts made in direct violation of the laws of the commonwealth.

The case was properly distinguished from *Cardwell v. Kelly*.⁵ In that case the suit was not between the original parties to the illegal transaction. To have allowed the illegality to be set up there would have encouraged lottery contracts and thus have defeated the purpose of the statute. Generally, the illegal nature of the enterprise can be taken advantage of only in suit between the immediate parties to the illegal contract.⁶

Aside from a few criminal prosecutions,⁷ Virginia does not

¹ 161 S. E. 242 (Va. 1931).

² Va. Const., § 60.

³ VA. CODE ANN. (Michie, 1930) § 4693.

⁴ *Holman v. Johnson*, 1 Cowper 341, 343 (1775).

⁵ 95 Va. 570, 28 S. E. 953 (1898).

⁶ *Matta v. Katsaulas*, 192 Wis. 212, 212 N. W. 261 (1927).

⁷ *Commonwealth v. Gaylord*, 5 Rand. 652 (Va. 1826); *Commonwealth v. Chubb*, 5 Rand. 715 (Va. 1827); *Temple v. Commonwealth*, 75 Va. 892 (1881);

seem to have any other cases dealing with lotteries; but the rule that lottery contracts are unenforceable is well supported by modern authority.⁸ The only difficulty is to determine just when a given situation amounts to a lottery. The usual test is that there must be consideration, chance and prize.⁹ Chance is the thing that stands out most conspicuously. A contest wherein the success of the participants depends more on the exercise of skill and judgment than on chance does not violate the lottery statutes.¹⁰ But if the element of luck or chance is the dominant factor in electing the winner, the undertaking will usually fall within the statutory prohibition.¹¹ The fact that the tickets are given away with a sale of merchandise and the scheme is called something else does not save it from being a lottery.¹²

West Virginia has a constitutional provision against the authorization of lotteries¹³ and a statute¹⁴ almost identical with that of Virginia. No West Virginia case seems to have dealt with the question that arose in *Maughs v. Porter*; but since the doctrine of that case appears to be sound and to be rather well settled law in most jurisdictions, it is hardly probable that any other rule will be adopted when, if ever, the question does come up in West Virginia.

—GEORGE W. MCQUAIN.

EASEMENTS — DISTINCTION BETWEEN EASEMENT AND LEASE — EASEMENTS LESS THAN FEE. — Defendant conveyed a lot to plaintiffs in fee; on the same day by another writing it "leased" to plaintiffs a right of way for a pipe line across adjacent land of defendant to a railroad side track, and granted in addition the right of unloading gasoline and oil tank cars from that side track. Plaintiffs agreed to pay 1/2c a gallon for all gas and oil put

Lawrence v. Commonwealth, 86 Va. 573, 10 S. E. 840 (1890); Young v. Commonwealth, 101 Va. 853, 45 S. E. 327 (1903).

⁸ Featherstone v. Ind. Service Station Ass'n. of Texas, 10 S. W. (2d) 124 (Tex. 1928); Blair v. Lowham, 73 Utah 599, 276 Pac. 292 (1929); Whitley v. McConnell, 133 Ga. 738, 66 S. E. 933 (1910).

⁹ Glover v. Malloska, 238 Mich. 216, 213 N. W. 107 (1927).

¹⁰ Hoff v. Daily Graphic, 230 N. Y. Supp. 360, 132 Misc. Rep. 592 (1928); Boatwright v. State, 38 S. W. (2d) 87 (Tex. 1931).

¹¹ Brewer v. Woodham, 15 Ala. App. 678, 74 So. 763 (1917); People v. Hecht, 3 Pac. (2d) 399 (Cal. App. 1931).

¹² Standridge v. Williford-Burns-Rice Co., 148 Ga. 283, 96 S. E. 498 (1918); State v. Danz, 140 Wash. 546, 250 Pac. 37 (1926).

¹³ W. Va. Const., art. 6, § 36.

¹⁴ W. VA. REV. CODE (1931) c. 61, art. 10, § 11.