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ILLEGALITY; CONSIDERATION: Enforcement of Contract Arising From Lottery-like Transaction

An organization of gasoline retailers brings an action against a number of independent and semi-independent gasoline stations to enjoin the use of illegal means of competition—specifically business promotion by lottery. The court in denying the injunction bases its decision on the absence of one of the essential elements of a lottery, namely, consideration moving from the customers to the retailers.¹ Within a month a winner in one of the drawings brings an action for conversion of the prize by the stations. The defense is a lack of consideration given in return for the promise to conduct the drawing and award the prizes. The court finds for the plaintiff, which necessarily implies a finding of sufficient consideration.² Under similar circumstances, a later winner, perhaps heartened by the success of the prior action, brings an action in debt for a money prize. His counsel proves too much on the issue of consideration, and the judge dismisses the action on the basis that the consideration pleaded indicates that the entire transaction was a lottery.³ The cases seem anomalous, *i.e.*, insufficient “consideration” to precipitate the penal sanctions of the lottery statute⁴ coexisting with sufficient consideration to enforce a contract. The sufficiency or insufficiency in each instance does not arise from any peculiarity of the transaction involved, but is the result of statutory interpretation.

The practice of business promotion by questionable “give-away schemes” is not a modern innovation. The “bank night” and “retail merchant” cases of the 1930’s and late 1940’s brought the problems involved clearly into focus in almost all jurisdictions,⁵ and fairly recent cases in California,⁶ New Jersey,⁷ and the federal courts⁸ have re-examined and restated the issues.

¹ For such a case see *California Gasoline Retailers v. Regal Petroleum Corp.*, 50 Cal. 2d 844, 330 P.2d 778, *reversing*, 322 P.2d 945 (Cal. D.C.A. 1958). *Contra*, *Knox Indus. Corp. v. State ex rel Scanland*, 258 P.2d 910, (Okla. 1953); *Featherstone v. Independent Serv. Station Ass’n*, 10 S.W.2d 124, (Tex. Civ. App. 1928). *Compare*, *Peerles Prod. Inc. v. Federal Trade Comm’n*, 284 F.2d 825 (D.C. Cir. 1960).

² See *St. Peter v. Pioneer Theatre Corp.*, 227 Ia. 1391, 291 N.W. 164 (1940) (bank night case). *Cf.* *People v. Rosen*, 11 Cal. 2d 147, 78 P.2d 727, 116 A.L.R. 991 (1938); *Holmes v. Saunders*, 114 Cal. App. 2d 389, 250 P.2d 269 (1952). The paucity of cases in this area may be ascribed to the importance attached to “image maintenance” by retailers.

³ See *People v. Rosen*, *supra* note 2.

⁴ CAL. PEN. CODE § 319.

⁵ See *People v. Gonzales*, 62 Cal. App. 2d 274, 144 P.2d 605 (1944); *St. Peter v. Pioneer Theatre Corp.*, *supra* note 2; *Glover v. Malloska*, 238 Mich. 216, 213 N.W. 107 (1927); *People v. Miller*, 271 N.Y. 44, 2 N.E.2d 38 (1936); *Knox Indus. Corp. v. State ex rel Scanland*, *supra* note 1; *Featherstone v. Independent Service Station Ass’n*, *supra* note 1; *Cowie v. La Crosse Theaters Co.*, 232 Wis. 153, 286 N.W. 707 (1939).

⁶ *California Gasoline Retailers v. Regal Petroleum Corp.*, 50 Cal. 2d 844, 330 P.2d 778 (1958); *People v. Carpenter*, 141 Cal. App. 2d 884, 297 P.2d 498 (1956).

⁷ *Lucky Calendar Co. v. Cohen*, 19 N.J. 39, 117 A.2d 487 (1955).

⁸ *Federal Communications Comm’n v. American Broadcasting Co.*, 347 U.S. 284 (1954); *Caples Co. v. United States*, 243 F.2d 232 (D.C. Cir. 1957); *American Broadcasting Co. v. United States*, 110 F. Supp. 74 (S.D. N.Y. 1953).

Due to a similarity in the "modus operandi"⁹ of such schemes and in the prohibitory statutes, most courts have concentrated on a single issue. Was there such a consideration given in exchange for the chance to win the prize as would bring the transaction within the penal statutes?¹⁰ Absent such consideration, the pall of illegality is removed and the operations continue with the blessing—as it were—of the courts. It is to be noted that the courts in most of these cases had before them only the question of illegality. A decision of the court that the scheme under appraisal does not constitute a lottery because of the absence of a sufficient consideration, in its most narrow construction, means simply that the consideration anticipated under the provisions of the lottery statute does not exist. That such a decision is not conclusive as to the presence or absence of consideration qua consideration shall be demonstrated presently.

The relationship of consideration to the enforceability of a simple contract would appear at first blush too obvious to warrant extensive citation. But it is not with the requirement of consideration that we are dealing, but rather with the nature of that which is required. As the general concept of consideration has been enshrined in the codes, a cursory examination would seem apropos.¹¹ The requirement of consideration as an element of every contract is established in the California Civil Code at section 1550, which provides in part that a ". . . sufficient cause or consideration" is essential to the existence of contract. The concomitants are elaborated in other sections of the codes;¹² for our purposes we need only note two such ancillary doctrines. The first is the common law doctrine of detriment to the promisee and benefit to the promisor, the California provision being alternative rather than conjunctive.¹³ The second doctrine is the "estoppel to deny," as a substitute for consideration which finds expression as a conclusive presumption.¹⁴ The consideration necessary as one of the elements of a lottery is found in the definitive section of the Penal Code which in part requires

⁹ The large number of cases involve some form of serially numbered tickets which are used in the drawing. Tickets are given at the time of purchase and upon request without the necessity of a purchase or without any request prior to any purchase. In obvious attempts to evade the statutes involved, some retailers distribute a certain number of tickets freely in neighborhoods contiguous to their establishments or make them readily available at designated locations. The holders of tickets need not be present at the drawings in order to win and generally attempts are made to eliminate anything which could be called consideration.

¹⁰ The California lottery statute, CAL. PEN. CODE § 319, provides: "A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any *valuable consideration* for the chance of obtaining such property . . . upon any agreement . . . that it is to be distributed or disposed of by lot or chance . . ." (Emphasis added.) Cf. 18 U.S.C. § 1301 (1951); 18 U.S.C. § 1304 (1948). See generally Note, 1 U.C.L.A. L. REV. 103 (1953).

¹¹ The code provisions are CAL. CIV. CODE §§ 1550, 1605; CAL. CODE CIV. PROC. § 1962; CAL. PEN. CODE § 319. See generally, Keyes, *Cause and Consideration in California—A Re-Appraisal*, 47 CALIF. L. REV. 74 (1959).

¹² CAL. CIV. CODE §§ 1605-15; CAL. CODE CIV. PROC. § 1963.

¹³ Haney v. Takakura, 2 Cal. App. 2d 1, 37 P.2d 170 (1934); CAL. CIV. CODE § 1605.

¹⁴ CAL. CODE CIV. PROC. § 1962 (3).

a valuable "consideration" paid or promised to be paid in return for the chance.¹⁵

Assuming for the moment that consideration is a constant rather than a variable and further that the consideration mentioned in the Civil Code is the same as that specified to be one of the elements of a lottery, the substance of the problem appears. Based upon the initial assumption—that of constancy of consideration—it would appear that no matter what the nature is of that called consideration in any particular transaction, it will be the equivalent of what is called consideration in every other transaction. It would therefore appear that a strict application of the rules of formal logic will result in a finding of a lottery in every instance and the situations posed initially would indeed be anomalous.¹⁶ In order to obviate such a result there must be an area of differentiation. Such differentiation may be quantitative or it may be based on some specific which has been read into the statutes by the courts. A short summation of authorities will indicate the general trend.

The California courts in discussing the consideration element of the lottery have specified that the two or more persons must have paid or promised to pay a consideration for the chance, without specifying what will amount to consideration for this purpose;¹⁷ further that a detriment to the promisee is not sufficient;¹⁸ that a consideration paid partly for the chance and partly for other purposes will be sufficient.¹⁹ Under similar fact situations, courts in other jurisdictions have based their decisions on the theory of multilateral contracts as supplying the consideration;²⁰ that consideration may be supplied by intermediate parties;²¹ that a detriment to the promisee is sufficient;²² that, conversely, a detriment to the promisee is insufficient;²³ that a benefit to the promisor is sufficient;²⁴ and that, on the other hand, such benefit is insufficient.²⁵ In many of these cases, although sufficiency of consideration is a conclusion of law, the cases have been decided on their facts.

The quantitative method has been championed by some courts in cases involving the "giving away" of the lottery tickets indiscriminately as well

¹⁵ CAL. PEN. CODE § 319.

¹⁶ The actual syllogism, of course, would either assume the existence of the operative facts or include such facts as part of the antecedent.

¹⁷ Gayer v. Whelan, 59 Cal. App. 2d 255, 138 P.2d 763 (1943).

¹⁸ California Gasoline Retailers v. Regal Petroleum Corp., 50 Cal. 2d 844, 330 P.2d 778 (1958).

¹⁹ Holmes v. Saunders, 114 Cal. App. 2d 389, 250 P.2d 269 (1952).

²⁰ Cowie v. La Crosse Theaters Co., 232 Wis. 153, 286 N.W. 707 (1939).

²¹ Glover v. Malloska, 238 Mich. 216, 213 N.W. 107 (1927). *Contra*, R. J. Williams Furniture Co. v. McComb Chamber of Commerce, 147 Miss. 649, 112 So. 579, 57 A.L.R. 421 (1927).

²² St. Peter v. Pioneer Theatre Corp., 227 Ia. 1391, 291 N.W. 164 (1940); Knox Indus. Corp. v. State *ex rel.* Scanland, 258 P.2d 910, (Okla. 1953); State *ex rel.* Regiz v. Blumer, 236 Wis. 129, 294 N.W. 491 (1940).

²³ See cases cited note 8 *supra*.

²⁴ Lucky Calendar Co. v. Cohen, 19 N.J. 39, 117 A.2d 487 (1955); Featherstone v. Independent Serv. Station Ass'n, 10 S.W.2d 124, (Tex. Civ. App. 1928).

²⁵ Federal Communications Comm'n v. American Broadcasting Co., 347 U.S. 284 (1954).

as in return for purchases. The question of consideration has been decided on the proportion of free tickets to the whole number of tickets involved, thereby making sufficiency of consideration a conclusion discoverable by mathematical formulation.²⁶ This has been rejected in California.²⁷ A Wisconsin court found a sufficient consideration partially on a detriment to the promisee and partially in the fact that the scheme must have been advantageous to the promisor or he would not have continued to operate it.²⁸ This might be called discovery of consideration from induction. It is submitted that the court should perforce limit its examination to relatively mediate matters, in that a pronouncement such as this assumes that which could only be ascertained by the most minute evaluation of the business involved.

A satisfactory statement of the elements necessary in California is found in *People v. Cadras*: "The question of consideration is not to be determined from the standpoint of the defendant, but from that of the holders of the prize tickets. The question is: Did the holders of the prize tickets pay a valuable consideration for the chance?"²⁹ Again in the *Cadras* case the court in discussing subparagraph three of the lottery statute, Penal Code section 319, qualifies the statutory requirement of disposition to a person who has paid a valuable consideration for the chance of winning the prize as being ". . . one who has *hazarded something of value* upon the chance."³⁰ (Emphasis added.) This seems to be the view taken in the later cases.³¹ To this extent *Cadras* is conclusive on the question of what amounts to consideration in a lottery; it must be something of value which is hazarded by the holders of the prize tickets in exchange for the chance, in effect, the familiar "quid pro quo."³²

The practical aspect of proving the contract and the consideration depends upon a showing by the plaintiff of something which will amount to consideration, but will not be within the "thing of value given in exchange" class. The stronger the plaintiff's case the closer he is to being thrown out of court. This is definitely a situation where the preponderance of the evidence will work contrary to the intention of the offering party. If the best the plaintiff can do is plead a valuable consideration given in exchange for the chance entirely or partially, the court will preclude him with a statement to the effect that: ". . . [A] contract against public policy or against the mandate of a statute may not be made the foundation of any action,

²⁶ Featherstone v. Independent Serv. Station Ass'n, *supra* note 24.

²⁷ California Gasoline Retailers v. Regal Petroleum Corp., 50 Cal. 2d 844, 330 P.2d 778 (1958); *People v. Babdaty*, 139 Cal. App. Supp. 791, 30 P.2d 634 (1934); *People v. Cadras*, 137 Cal. App. Supp. 788, 28 P.2d 99 (1933).

²⁸ State *ex rel* Regez v. Blumer, 236 Wis. 129, 294 N.W. 491 (1940).

²⁹ *People v. Cadras*, 137 Cal. App. Supp. 798, 790, 791, 28 P.2d 99, 100.

³⁰ *Ibid.*

³¹ See California Gasoline Retailers v. Regal Petroleum Corp., *supra* note 27; *People v. Carpenter*, 141 Cal. App. 2d 884, 297 P.2d 498 (1956); *Holmes v. Saunders*, 114 Cal. App. 2d 389, 250 P.2d 269 (1952); 17 CAL. OPS. ATT'Y GEN. 63 (1951); 9 CAL. OPS. ATT'Y GEN. 150 (1947).

³² *Ibid.*

either in law or in equity."³³ The prohibition against basing a suit on an illegal contract runs through this entire area and is controlling.³⁴

It will be a rare case where the plaintiff has the benefit of a precedent decision on the legality of the very scheme he is attempting to enforce.³⁵ The court will consider the question of legality first, and not until a decision is made on this point will further matters be considered. Again the nature of the consideration that the plaintiff has pleaded may well be determinative of the court's ruling on the lottery question, which ruling, if adverse to the plaintiff, will determine the entire action.³⁶

Under the provisions of Civil Code section 1605 the sufficient showing of benefit to the promisor or a detriment to the promisee will suffice to demonstrate an enforceable contract, absent such factors as to make the contract illegal. A very good statement of the benefit doctrine is found in the recent case of *Follansbee v. Benzenberg*,³⁷ where the court stated that benefit includes anticipated or prospective profit, which may be as effectual as an immediate or direct compensation, such as an opportunity to create good will that might otherwise not have been accorded, and the fact a like benefit might have been obtained in some other manner does not affect the benefit received from the hope of future business.

The adoption³⁸ of the Restatement rule,³⁹ that consideration must be something bargained for and given in return, may create an evidentiary problem, but the main premise remains—that a benefit or detriment is sufficient consideration to create an enforceable contract if it is proven. To the extent that a recent case⁴⁰ defining "good consideration" as used in the Civil Code⁴¹ as equivalent to "valuable consideration" is decisive of the terms used, the efficacy of the benefit and detriment doctrine as specified therein might be seriously limited upon a re-examination of some of the so-called lottery cases.⁴²

³³ *Stockton Morris Plan Co. v. California Tractor and Equip. Corp.*, 112 Cal. App. 2d 684, 689, 247 P.2d 90, 92 (1952); quoting from *Hooper v. Baranti*, 81 Cal. App. 2d 570, 574, 184 P.2d 688, 691 (1947).

³⁴ *Lee On v. Long*, 37 Cal. 2d 499, 324 P.2d 9 (1951); *Kyne v. Kyne*, 16 Cal. 2d 436, 106 P.2d 620 (1940); *Reynolds v. Roll*, 122 Cal. App. 2d 826, 266 P.2d 222 (1954), *cert. denied*, 348 U.S. 832 (1954); *Stockton Morris Plan Co. v. California Tractor and Equip. Corp.*, *supra* note 33; *Shenson v. Fresno Meat Packing Co.*, 96 Cal. App. 2d 725, 216 P.2d 156 (1950).

³⁵ For such a case see *Holmes v. Williams*, 127 Cal. App. 2d 377, 273 P.2d 931 (1954).

³⁶ *Holmes v. Saunders*, 114 Cal. App. 2d 389, 250 P.2d 269 (1952); *Holm v. Bramwell*, 20 Cal. App. 2d 332, 67 P.2d 144 (1937).

³⁷ 122 Cal. App. 2d 466, 471, 265 P.2d 183, 186 (1954).

³⁸ *Forgeron Inc. v. Hansen*, 149 Cal. App. 2d 352, 308 P.2d 406 (1957).

³⁹ "(1) Consideration for a promise is . . . [something] bargained for and given in exchange for the promise." RESTATEMENT, CONTRACTS § 75 (1932).

⁴⁰ *Horton v. Kyburz*, 53 Cal. 2d 59, 346 P.2d 399 (1959).

⁴¹ CAL. CIV. CODE § 1605.

⁴² On the strength of this case previous decisions holding benefit and detriment not sufficient consideration for purposes of the lottery statute could be overruled.

The estoppel to deny which is specified in the Code of Civil Procedure⁴³ has been closely related to Restatement of Contracts section 90.⁴⁴ A somewhat recent case has specified that without reliance or substantial detriment the doctrine will not be allowed.⁴⁵ In *Wade v. Markwell* the court held that estoppel is either a substitute for consideration or a species of consideration.⁴⁶ Application of the doctrine in order to evade the stringencies of the lottery statute seems not to be overly fraught with difficulties. The "consideration" or substitute therefor resulting from the application of the doctrine may always be considered as something entirely different from that anticipated by the lottery statute.⁴⁷

It would appear that the courts could so extend the meaning of "consideration" under the lottery statute as to make many presently legal operations lotteries. Such extension is not probable at this time, but so long as the possibility exists it must be part of the equation. The likely antipathy to extension of the scope of the lottery statute may be demonstrated by the analogy of the application of the doctrine of unjust enrichment to patently illegal contracts. In the recent case of *Wilson v. Stearns*⁴⁸ the pronouncements of Peters, J., concerning the application of the rule against enforcement of illegal contracts was quoted with approval.⁴⁹

Where by applying the rule the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.

This rule as expressed in *Norwood v. Judd*⁵⁰ and reiterated in the *Wilson* case as well as more recent cases,⁵¹ is a direct reversal of a previous case which had specifically denied "unjust enrichment" as a basis for enforceability of an illegal contract.⁵² Attempts might be made to extend the doctrine of *Norwood v. Judd* into situations where the court finds a lottery but also finds that the plaintiff's equities are substantial.

⁴³ CAL. CODE CIV. PROC. § 1962 (3).

⁴⁴ See *Henry v. Weinman*, 157 Cal. App. 2d 360, 321 P.2d 117 (1958); *Klien v. Farmer*, 85 Cal. App. 2d 545, 194 P.2d 106 (1948).

⁴⁵ *Henry v. Weinman*, *supra* note 44.

⁴⁶ 118 Cal. App. 2d 410, 417, 258 P.2d 497, 502 (1953); *accord*, *Porter v. Commissioner*, 60 F.2d 673, 675 (2d Cir. 1932).

⁴⁷ See generally *Annots.*, 48 A.L.R.2d 1069 (1956); 124 A.L.R. 1248 (1940); *Comment*, 5 STAN. L. REV. 783 (1953); *Note* 10 HASTINGS L.J. 435 (1959).

⁴⁸ 123 Cal. App. 2d 472, 267 P.2d 59 (1959).

⁴⁹ *Id.* at 482, 267 P.2d at 66, quoting from *Norwood v. Judd*, 93 Cal. App. 2d 276, 283, 209 P.2d 24, 31 (1949).

⁵⁰ *Id.*

⁵¹ *Matchett v. Gould*, 131 Cal. App. 2d 821, 824, 281 P.2d 524, 528 (1955); *Cain v. Burns*, 131 Cal. App. 2d 439, 444, 280 P.2d 888, 891 (1955).

⁵² "The rule as to nonenforceability of illegal contracts is not based upon any consideration for the party against whom the relief is sought, and who may be benefited by the refusal of the court to grant the same, but upon consideration of sound public policy." *Del Rey Realty Co. v. Foul*, 44 Cal. App. 2d 399, 403, 112 P.2d 649, 651 (1941).