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Penal Law--Advertising Contests Constituting Lotteries (Minges v. City of Birmingham, 36 So.2d 93 (Ala. 1948))

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in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops." [12] Considering that neither the local agency in Idaho nor the regional office of the corporation in Denver knew of the exclusion that rendered plaintiff's 1945 crop uninsurable, it may well be that mere *publication* of these countless 'Regulations' [of Federal Administrative Agencies] is not enough to call forth the doctrine that ignorance of the law is no excuse.[13] To date, 100,000 of these regulations have been published in the Federal Register; ". . . they are often overlapping, and sometimes contradictory, and very often modify or repeal each other . . . ." [14] Though they have been placed in bound volumes, numbering forty-seven since December, 1946, they have not been codified so as to be as usable as the four volumes of the "United States Code" and its supplement. The spirit of the dissent, therefore, presents an equally strong and converse maxim or rule of law, namely, that, "A law not properly published to the people is no law." [15]

J. W. C.

PENAL LAW — ADVERTISING CONTESTS CONSTITUTING LOTTERIES.—The Pepsi-Cola Company of New York was engaged in an advertising campaign in the form of "Treasure Top" contests. Contestants were required to complete the sentence, "Pepsi-Cola hits the spot because . . . ." A bottle cap was to be submitted with each entry. Cash prizes were to be awarded on the basis of aptness, originality and interest. Complainants are engaged in the business of bottling, selling and distributing the soft drink known as Pepsi-Cola. Defendants contended that the contest was a lottery and as such against the public policy of the state as declared by the constitution and by statute.[1] From a decree denying a temporary injunction restraining defendants from interfering in any way with the carrying on of the contest, complainants appeal. *Held,* decree reversed and remanded, on the ground that the exercise of skill by contestants removed it from the nature of a lottery. *Minges v. City of Birmingham,* — Ala. —, 36 So. 2d 93 (S. Ct. Ala. 1948).

The three necessary elements of a lottery are the offering of a prize, the awarding thereof by chance, and the giving of a consideration for an opportunity to win the prize. All the essential elements must be present to constitute the scheme a lottery.[2] The elements

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[12] 332 U. S. 380, 387, 92 L. ed. 51, 55 (1947).
[13] Lavery, *"The Federal Register"—Official Publication for Administrative Regulations, etc.,* 7 F. R. D. 625, 633 (1948).
[14] *Id.* at 636.
[15] *Id.* at 634.
[1] ALA. CONST. § 65 (1901).
[2] Grimes v. State, 235 Ala. 192, 178 So. 73 (1937).

of prize and consideration being clearly present in the principal case, the issue revolves around the presence of the element of chance as that term is used in connection with lotteries.[3]

In England and Canada where the "pure chance doctrine" prevails, a contest is not a lottery even though the participants pay a consideration for the chance to win a prize, unless the result depends entirely upon chance.[4] In the United States the rule was the same until about 1904.[5] It is now generally held that chance need be only the dominant or controlling factor.[6] The mere fact that some skill is involved is insufficient to save a contest from condemnation as a lottery.[7] Thus various types of guessing contests are held to be lotteries in those jurisdictions which do not follow the "pure chance doctrine." [8] Although the correct answer either does or will exist and more or less skill and judgment could be exercised in approaching the solution, the chance element remains controlling. In competitions of this nature determining whether the chance factor is dominant or subordinate is often a troublesome question.

Defendants in the principal case contend that the rules communicated to the contestants do not establish sufficiently definite standards whereby one may intelligently exercise skill in preparing a statement, and that it is mere chance whether a contestant prepares a statement which will appeal to the taste or whim of the contest judge. In rejecting this contention the court stated that the preparation of such a statement or composition requires the exercise of judgment, skill, discretion and effort on the part of a contestant. It argued that some participants will exercise more skill, and put forth more effort than others. It stated further that the selections were to be made by the application of definitely known standards promulgated for that purpose. In *Brooklyn Daily Eagle v. Voorhies,* the awarding of a prize for the "best" essay upon the name of a certain breakfast food was held not to be a lottery.[9] The defendant postmaster therein contended that the rules of the contest did not specify

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[3] "Chance as one of the elements of a lottery has reference to the attempt to attain certain ends, not by skill or any known or fixed rules, but by the happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity." See Note, 34 Am. Jur. Lotteries § 6 (1941).

[4] Regina v. Jamieson, 7 Ont. Rep. 149; Regina v. Dodd, 4 Ont. Rep. 390 (guessing the number of beans in a glass jar held not to be a lottery).

[5] United States v. Rosenblum, 121 Fed. 180 (S. D. N. Y. 1903) (following the pure chance doctrine).

[6] Waite v. Press Pub. Ass'n, 155 Fed. 58 (C. C. A. 6th 1907); Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092 (1904); People *ex rel.* Ellison v. Lavin, 179 N. Y. 164, 71 N. E. 753 (1904).

[7] Commonwealth v. Plessner, 295 Mass. 457, 4 N. E. 2d 241 (1936); State ex Inf. McKittrick Atty. Gen. v. Globe-Democrat Pub. Co., 341 Mo. 862, 110 S. W. 2d 705 (1937).

[8] People *ex rel.* Ellison v. Lavin, 179 N. Y. 164, 71 N. E. 753 (1904).

[9] Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579 (E. D. N. Y. 1910).

in what respect the essays should be "best" and therefore left it open to the whim of the judge or chance. The court ruled that sufficient appeared in the record to show that the contest was to be judged on the basis of literary merit for advertising purposes.[10] In further support of its ruling the court in the principal case cites *Hoff v. Daily Graphic, Inc.*, a New York case concerning a game involving movie titles, wherein it was said, "The allegations in the complaint clearly indicate the exercise of judgment and taste in the selection of titles, both by the contestant and by the judges, and while taste is to a certain extent individual, and perhaps at times fanciful, nevertheless the exercise of it is far removed from blind guesswork or chance." [11]

In those jurisdictions which have a lottery statute similar to the one in New York [12] which does not provide that the distribution must be by pure chance or by chance exclusively, but by chance, the determination of the character of a contest as a lottery or not is generally held to depend on which is the dominating element. Competitions in which skill or judgment is the predominant factor in determining the winners will not be considered lotteries. The solution of the problem of which is the dominant element, skill or chance, in borderline cases will vary with the jurisdiction.

K. R.

TORTS — ASSAULT AND BATTERY — NEGLIGENCE — PRACTICAL JOKE—STATUTE OF LIMITATION.—Plaintiff instituted an action for personal injuries resulting from "horse play" during a game of pitch with the defendant and other friends. As the defendant stooped to retrieve his money, he jokingly jerked the plaintiff's leg. Plaintiff's chair was fitted with gliders, and since the linoleum was highly waxed, the plaintiff fell over backwards, thereby injuring his back and suffering partial disability. Plaintiff filed his petition one and one-half years after the cause of action accrued. Nebraska statutes provided for a one-year assault and battery statute of limitation,[1] and for a four-year general tort statute of limitation.[2] Defendant claimed the

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[10] *Contra:* People v. Rehm, 13 Cal. App. (Supp.) 2d 755, 57 P. 2d 238 (1936). Contest consisting of selecting titles for cartoons held to be a lottery. "There is no standard by which one title can be said to be either 'best' or 'more appropriate' than all others." State ex Inf. McKittrick Atty. Gen. v. Globe-Democrat Pub. Co., 341 Mo. 862, 110 S. W. 2d 705 (1937).

[11] Hoff v. Daily Graphic, Inc., 132 Misc. 597, 230 N. Y. Supp. 360 (Sup. Ct. 1928). *Contra:* State ex Inf. McKittrick Atty. Gen. v. Globe-Democrat Pub. Co., 341 Mo. 862, 110 S. W. 2d 715 (1937). The court therein states that the *Hoff* case seems to be ruled on the English "pure chance" theory.

[12] N. Y. PENAL CODE §§ 1370-1386.

[1] Neb. Rev. Stat. § 25-208 (1943).

[2] Neb. Rev. Stat. § 25-207 (1943).