Bank Nights: Are They Lotteries?

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HISTORY.

The winning of property by chance—by lot—was undoubtedly known to the ancients. Throughout the Old Testament may be found such references to this method of distribution as: “They parted my garments amongst them: and upon my vesture they cast lots * * *.”¹ “Thou art grown old, and advanced in age, and there is a very large country left, which is not yet divided by lot * * *.”² The merit that attached itself to this method of distribution, obviously, is that it quieted contention and disposed of any charge of favoritism in the allocation of the property distributed.

But such parceling of awards by lot seldom was the result of the payment of, or the agreement to pay, a consideration. Just where this element of the lottery was first injected is problematical, but it seems clear that the earliest record of a lottery drawing, for a consideration, is to be found in the Low Countries (Ghent, Bruges, L'Ecluse) from 1443 to 1449.³ The town accounts of L'Ecluse indicate that lotteries were drawn in 1445 and in 1446: “the first with 4,304 tickets, the second with 4,271, all at 3s. 2d. gr.,” the complete prize-awards amounting to 1,737 florins (de Rhin) or £275 5s. gr. (Flanders).⁴ At least one of these lotteries was held with the object of raising 10,000 saluts d'or for walls and fortifications.⁵ Because hundreds of letters advertising this lottery were mailed to other countries, it is obvious that the English were aware of the existence of this game by the time Queen Elizabeth, in 1567, commanded that a lottery be held in England “towards the reparation of the havens and strength of the Realme, and towards such other publique good works.”⁶ We note that there were to be four hundred thousand lots “and no more”, and every lot—or

¹ OLD TESTAMENT, Psalm XXI, 19.
² OLD TESTAMENT, Josue XXIII, 1.
³ EWEN, LOTTERIES AND SWEEPSTAKES (1932) 25.
⁴ EWEN, op. cit. supra note 3, at 26.
⁵ EWEN, loc. cit. supra note 3.
⁶ EWEN, op. cit. supra note 3, at 36.
chance—was to cost only ten shillings. The prizes were to be partly in money, partly in “plate gilt and white” and partly in linens and tapestries. And so anxious, or greedy, was Good Queen Bess about the success of her enterprise, that she provided that anyone who wanted to visit any of the cities—London, Oxford, Southampton, Dublin, Waterford—for the purpose of investing in the game, could go to such cities and stay there seven days:

“without any molestation or arrest of them for any manner of offence, saving treason, murder, pyracie, or any other felonie, or for breach of her Majesties peace, during the time of their coming, abiding or retourne.”

However, despite this evidence of the Queen’s interest in the state lottery, or because of the suspicion on the part of the commoners that the choice prizes might be awarded to court favorites, only one-twelfth of the amount anticipated was collected, thus reducing the list of prizes from £100,000 to about £9,000. The royal lottery was a failure and no doubt the royal ministers received a warm reception from their forceful and, at times, avaricious ruler, when they announced to her the disappointing results of her attempts to raise funds by appealing to the cupidity of her “loving” subjects. However, lotteries still continued in England, either operating directly under the royal aegis or under a license granted by the crown to some favorite, or to some contractor who agreed to erect public works if granted the privilege of conducting a lottery to defray the expenses thereof.

In fact, this latter feature—a lottery for the benefit of the Commonwealth—is inextricably bound up with the history and the development of our own country, as may be evidenced from the following:

The settlement at Jamestown, Virginia, in 1607, was made at the expense of a small group of Englishmen who contributed funds to what they considered an undertaking,

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7 Ibid.
8 Ewen, op. cit. supra note 3, at 37.
9 Ewen, op. cit. supra note 3, at 62.
partly political and partly speculative. After five years of hardships, the promoters of the settlement, realizing that they could expect no immediate return on their investment, and not wishing to lose what they had already contributed, secured a new charter from the King in 1612, in which he permitted them to arrange for a public lottery, provided the managers thereof would be put under oath:

"to the intent and purpose, that none of our loving subjects, putting in their names, or otherwise adventuring in the said general lottery or lotteries, may be in any wise defrauded and deceived of their said monies, or evil or indirectly dealt withal in their said adventures."  

The lottery which, according to a hand-bill advertising it, was to contain "five thousand pound in prizes certayne, besides rewards of casualtie", was ultimately drawn in London, and at least two churches were prize-winners. One, the Church of St. Mary, in London, which had invested six pounds in the lottery, won "twoe spones price twentye shillinge", and the other church, which had taken fifty "lots", or chances, at twelve pence each, won ten shillings. Whether or not these "lots" or chances were taken by pious members of the two congregations, with the churches as beneficiaries, we do not know. But we do know that the churches were insignificant prize winners, compared to a London tailor. Thomas Sharpliss, who won the first prize of four thousand crowns, "in fayre plate, which was sent to his house in a very stately manner." The lottery yielded sixty thousand ducats and much of this was used to pay for supplies and for recruits for the Jamestown colony.

However, in a short time, the people in the towns of England, through which the lottery agents had passed, selling tickets or "lots", began to complain loudly "of the de-

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10 His interest naturally was to extend his realm by seeing to it that English colonies should be established in the New World.
11 Three Proclamations Concerning the Lottery for Virginia, printed for The John Carter Brown Library, Providence, R. I. (1907): An indication that some evils were to be found, even in those days, before "racketeers" became a word understood in all households.
moralization to business and industry caused by the popular excitement over the lottery", and, in March, 1620 (or 1621), the Commons requested the Privy Council to suspend lotteries. A proclamation to this effect was signed shortly thereafter by the King, who explained therein that, when he had previously granted permission for the Virginia lottery to be arranged and drawn, he had so acted with his "eye fired upon a religious and princely end and design." However, now that His Majesty discerned that the lotteries "do dayly decline to more and more inconvenience, to the hindrance of multitudes of Our Subjects", he decided, "for the generall good of Our Subjects", to suspend such lotteries in any part of England—or its dominions—until further notice from him.

But, in fairness to those charged with the management of the so-called Virginia Lotteries, let it be said that the latter furnished the means of sending to the struggling colony eight hundred recruits from over-seas who might, otherwise, never have joined the plantation.

To sum up, the lotteries in England were, from time to time, authorized by the Crown, and, as abuses crept in, they were suspended until finally prohibited by various acts of Parliament. However, due to the success of the Irish Sweepstakes (for the benefit of hospitals in the Irish Free State), agitation today is strong in England for the conduct of similar enterprises, and what is law there today, may be repealed tomorrow.

As for the beginning of lotteries in the early days of this country, it is likely that the English colonists who settled here engaged in them, but there is a surprising scarcity of literature on this subject. However, such devices were frequently resorted to in the early history of Philadelphia, to pave the streets, build wharves, etc., and, in 1748, a battery

12 Several lotteries, for the same cause, had been held in the eight years elapsing between 1612 and the date of their suspension.
13 This data, together with all other references to this lottery, was gathered from Three Proclamations Concerning the Lottery for Virginia, printed for The John Carter Brown Library, Providence, R. I. (1907).
15 This lottery was legalized in the Irish Free State by the Public Charitable Hospitals Act of the Parliament of the Irish Free State at Dublin.
of cannon, to be located on the banks of the Delaware, below the city, was secured by the same method.\textsuperscript{10}

In 1750, Yale College availed itself of this device to raise a building fund, and, in 1772, Harvard College obtained $18,400 to build Stoughton Hall. And it is interesting to note that the college, itself, drew the principal prize of $10,000.\textsuperscript{17}

Confirmation of the respectable status of the lottery in the early years of our country's development may even be found in our law reports, to wit:

"When the sources of public revenue were fewer than now, they were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes."\textsuperscript{18}

And again:

"In 1820, the city of Albany was authorized by a statute to dispose of its public lands, by a lottery not to exceed in amount $250,000."\textsuperscript{19}

But, in time, as our governing agencies began to use the power to tax more and more drastically, lotteries, with their evil appeal to those already impoverished, were eliminated, until today they are prohibited in practically all the states of our nation.\textsuperscript{20} But that does not mean that we have heard the last of them.

As was said in a recent English case:\textsuperscript{21}

"There will seemingly never be any finality on the question of what a lottery is. It has been said more than once in judgments by members of this Court that

\textsuperscript{10}These Colonial references are derived from \textit{Ewen, Lotteries and Sweepstakes} (1932) 31.
\textsuperscript{11}\textit{Ibid}.
\textsuperscript{13}\textit{N. Y. Almshouse v. American Art Union}, 7 N. Y. 228, 237 (1852).
\textsuperscript{14}\textit{38 C. J.} (1914) 293, n. 72c.
\textsuperscript{15}\textit{Coles v. Odhams Press, Ltd.}, 1 L. R. 416, 427, 428 (K. B. 1936).
so soon as a particular scheme is declared by a decision of the Court to be a lottery, the *skill and ingenuity* of a number of extremely able persons will be exercised in trying to discover some means of avoiding the effect of that decision.” (Italics ours.)

And that same “skill and ingenuity” above referred to, has, as its most recent and still current effort to evade the lottery laws, devised a scheme commonly known as “Bank Night”. Its cause and its origin are now to be considered.

**Bank Night.**

When, because of their reduced incomes, occasioned by the recent depression which shook the financial structure of our country to the point of collapse, our citizens found it necessary to retrench, they quite naturally began their retrenching process where it would hurt them least—in the field of luxuries. The first of these luxuries, or non-essentials, was entertainment received from the theatres, and since, by far, the greater part of our population finds its entertainment in the cinema theatres of the nation, the moving-picture industry was one of the first to feel the disastrous effect of John Citizen’s decision to curtail his hitherto generous expenditures by abstaining from attendance at the “movies” or “talkies”.

As great numbers of former patrons of the cinema made their visits to the box-office more and more infrequent, the leaders of that industry, because of the millions of dollars invested in it, became deeply worried. Without increased patronage, failure was just around the corner. What to do? Seek to entice the erstwhile movie patron back to his accustomed theatre, of course! But how?

Many schemes were tried, ranging from showing double-features, so called, for the price of one admission, all the way down to giving away glass-ware, or sets of dishes, piece by piece, on selected nights, to the ladies who patronized the theatre. But these simple schemes did not attract the theatre-goers in sufficient numbers. Other, and more effective, lures
had to be found if the "movie" industry was to be saved and, in 1931, a saviour came upon the scene in the person of a Colorado theatre manager. For it was he who devised the scheme we have already referred to as "Bank Night" which soon swept the country like the proverbial wild-fire.\textsuperscript{22}

"Bank Night", except for slight variations, is usually played as follows: In the lobby of the theatre, a book is displayed and any person, over the age of eighteen years, may register his name and address in the said book, whether he purchase a ticket of admission to the theatre or not. Opposite his signature is a serial number, already printed along the margin of the page, and the theatre’s manager causes a card to be made out, bearing the name and address of the registrant, together with the serial number opposite his name in the aforesaid book. These cards are then placed in a "permanent" container or receptacle.

On a fixed night each week, and at a certain hour thereon, the container or receptacle is brought on the stage and a card drawn therefrom, and two or three minutes are allowed during which the registrant of the lucky card may step forward and claim the sum of money set aside by the management as a prize. The winning name is also called out in the lobby and, if the said registrant be outside the theatre, he is permitted to enter the theatre free of charge, claim his prize and then leave. However, if the registrant of the card chosen does not come forward in the allotted time, the prize is carried over to the drawing to be held the following week and added to the amount then to be distributed.

This advertising scheme, on the face of it, was designed to appeal to the gambling instinct, common to so many individuals, and was devised to circumvent the law in many states of our country regarding lotteries. The said law usually describes a lottery as a scheme or device whereby anything of value, for a consideration, is allotted by chance.\textsuperscript{23} By providing that non-purchasers, as well as purchasers of admission tickets, might register for the prize, the originator of the scheme thought to evade the lottery law, on the ground that

\textsuperscript{22} Time, Vol. 24, No. 5 (Feb. 3, 1936).
\textsuperscript{23} 38 C. J. (1914) 286-289, and citations thereunder.
no "consideration" would be furnished by the non-purchaser. But when the advertising device came into court, these hopes did not materialize in most jurisdictions.

It became the duty of the writer to debate this proposition before the appellate courts in New York after a judgment of conviction in the lower courts had been pronounced on several defendants who had operated the scheme in question, and who had been prosecuted for a violation of the lottery laws of New York. Because the ultimate decision therein attracted nation-wide attention, it is perhaps best to dwell at length upon the facts and the arguments presented upon the appeal to help elucidate the law upon lotteries generally.

In the case under discussion, People v. Miller et al.,\(^{24}\) the scheme, or device, was known as the "Kentucky Derby", but, in all its essentials, it was similar to "Bank Night", as heretofore described. Free opportunity for non-purchasers of admission tickets, as in "Bank Night", to participate in a drawing for a cash prize, was the salient feature of the plan which counsel for the appellants admitted was operated "in order to attract patrons to the additional amusement and entertainment afforded by the operation of the game" of "Kentucky Derby".

Under Section 1370 of the Penal Law of New York, a lottery is declared to be,

"* * * a scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance whether called a lottery, raffle or gift enterprise or by some other name." (Italics ours.)

And, under Section 1376 of the same law, any person who offers property for disposal, dependent upon the drawing of a lottery, is guilty of a misdemeanor.

Upon appeal from conviction, the defendants conceded that they had distributed a prize by chance, or lot, but contended that, since people could participate in the drawing by "free" registration, there was an absence of the "valuable

"A ‘valuable consideration’ means, and necessarily requires, under every form and kind of purchase, something of actual value, capable, in the estimation of the law, of pecuniary measurement." 26

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"A good consideration is such as is founded on natural duty and affection, or on a strong moral obligation. A valuable consideration is founded on money, or something convertible into money, or having a value in money, except marriage, which is a valuable consideration.” 27

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"It has been held that the rule as to consideration does not mean that a scheme will be held a lottery only where money is directly given for the right to compete, but that it is only necessary that the person entering the competition shall do something or give up some right, or that benefit may accrue to the person conducting the scheme.” 28 (Italics ours.)
comment upon them in the order of presentation as is deemed advisable.

The first of these “authorities” is State of Iowa v. Hundling, in which the court held that “Bank Night” was not a lottery because, of the three elements universally required to constitute a lottery—prize, drawing, and consideration flowing from the player to the donor of the prize—the last named was missing, since there were registrants who did not pay admission to the theatre who could participate in the drawing. It is to be noted that Iowa has no statute defining the term “lottery”, so the court declared it had to look

“to the generally accepted meaning of the term as defined by the authorities, and if there be conflict among the authorities, we must adopt the definition which includes as an element the evil which the statute was obviously intended to prevent.”

And, having looked at its own “authorities”, the learned Iowan tribunal found that the evil aimed at in the statute was any gambling scheme “in which chances are sold or disposed of for value and the sums thus paid are hazarded in the hope of winning a much larger sum”. In other words, the court believed that the old-fashioned schemes, such as the Louisiana Lottery, were prohibited, but not the modern, embellished “gift-enterprises” of Bank Nights.

People v. Cardas was also cited in behalf of Miller, Cranides and Kiley, the appellants, that case holding:

“Certainly those who received prize tickets without buying an admission ticket did not pay anything for the chance of getting the prize. They did not hazard anything of value.”

21 Id. at 609 (264 N. W.).
22 People v. Mail and Express Co., 231 N. Y. 586, 132 N. E. 898 (1921); Yellow-Stone Kit v. State, 88 Ala. 196, 7 So. 338 (1890); People v. Cardas, 137 Cal. 788, 28 P. (2d) 99 (1933).
23 See note 30, supra.
24 People v. Cardas, 137 Cal. 788, 28 P. (2d) 99 (1933).
Suppose this point were conceded, what about those who did pay admission? That question will be answered later.

Another case upon which the appellants relied, was *Yellow-Stone Kit v. State* where a "medicine-man" gave away numbered tickets to all those who attended his "medicine show" in which he performed certain feats and, between acts, sold his medicines of alleged curative power. No charge to attend these exhibitions was made until the final show was to be given. On that night, when a "Jubilee performance" was offered, there was an admission fee of ten cents charged. After that performance, anybody was allowed to enter the tent free of charge. Then the defendant threw upon the stage a large quantity of numbered slips, duplicates of the numbered tickets which had been previously distributed, gratuitously, to all and sundry who had attended the previous "medicine shows". Two children then came from the audience and picked up eight tickets from the stage. The eight holders of the corresponding duplicates were the prize-winners. "Even if some of them were not present on the night of the drawing, their prizes would be delivered to their homes." (Italics ours.) This generous fact had been advertised and the court found out such a delivery had, in at least one instance, been made.

These facts do not seem to be on "all fours" with those involved in "Bank Night" because, in this Alabama case, anybody could attend the entertainments each night (other than the final night) and receive "chances" free, whether or not they bought any of Kit’s medicines. In this thought, we are in the distinguished company of the Alabama Court of Appeals which declared, in a very recent decision:

"Now a word as to the holding of our Supreme Court in the *Yellow-Stone Kit* case. Beyond defining what constitutes a lottery we cannot see that it has any bearing upon the question raised by the present appeal. There the chances dealt out were really and in truth free chances." (Italics ours.)

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34 *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338 (1890).
The "appeal" in this Alabama case arose out of the prosecution of a theatre official who conducted a bank night in conjunction with "matinee registration". In other words, if one who had previously entered his name in the theatre's registry did not intend to, or could not, be present on the night of the drawing to claim the prize he might win, he could arrange to call for it later, provided he had attended the matinee that same day and signed and filed a matinee registration card. The court condemned the scheme, pointing out that the price of the matinee ticket "is nevertheless paid for the chance, plus the ticket or for the ticket, plus the chance".

A return to the New York "authorities" of Miller, Cranides and Kiley discloses that the appellants relied, primarily, upon two cases in that jurisdiction in an effort to secure a reversal of the judgment of conviction.

The first of these cases is Kohn v. Koehler, but how little justified the appellants were in leaning for support upon this prop is readily discovered in an excerpt from People v. Wolff which discussed the Kohn case at some length:

"In the case of Kohn v. Koehler the action was brought to recover the penalties provided for by section 22, 1 Revised Statutes, page 665 (marginal paging); and it is to be observed that the only lottery, game, or device of chance, by whatever name it might be called, which the Revised Statutes declared should be deemed unlawful and a common and public nuisance, was such as had not been authorized by law (section 26); and hence the court was construing the provisions of a statute (section 29) by which it was declared unlawful to deal in lottery tickets, only when such lottery was not expressly authorized by law. The lottery scheme contained in the Austrian bonds was expressly

96 N. Y. 362 (1884). In this case, Austrian bonds were sold to the general public with an opportunity to the purchasers to win a prize of money under certain conditions attending to the drawing of the bond numbers.

77 14 App. Div. 73, 43 N. Y. Supp. 421 (1st Dept. 1897).
authorized by law, and, therefore, under the Revised
Statutes was not illegal." 38

The court also declared that, if the Penal Code, instead of
the Revised Statutes, of New York had been involved, "it
may very well be held that such schemes come within the
prohibition of the Penal Code." 39

But the chief New York authority upon which the appel-
lants depended was People v. Mail and Express Co.40 There,
the defendant, a newspaper, distributed numbered coupons,
gratuitously, entitling the holders of the lucky numbers, later
to be drawn, to valuable gifts. It did not require holders of
these free coupons either to purchase or to subscribe to its
publication. On the contrary, it advertised places where one
could see the Evening Mail free of charge in order to ascertain
the lucky numbers that were drawn, entitling the holders of
the free coupons to a prize. The court held that, since the
holders of the coupons did not have to part with any con-
sideration to obtain them, nor pay to ascertain the lucky
numbers drawn, the acts complained of did not constitute a
lottery.

And the appellants argued that, "since the price of ad-
mission to the theatre was not raised and it was unnecessary
to purchase a ticket of admission to the theatre in order to
win a prize", the case under discussion was analogous to
People v. Mail and Express Co.41 Apparently the argument
was unavailing—but, since most of the jurisdictions in which
"Bank Night" has been held legal rely greatly upon the Mail
and Express Co. and the Yellow-Stone Kit cases for their
reasoning, we shall have more to say regarding the former
case later.

Counter-balanced against the cases offered by the appel-
lants, the People selected many authorities in New York and

38 Id. at 78, 79 (14 App. Div.)
39 Ibid. This conclusion of the court was made "in view of the fact that
the United States Supreme Court, in the leading case of Horner v. United
States, 147 U. S. 449, 13 Sup. Ct. 409 (1893), construing language similar to
that in the Penal Code, held that the purchase of such a bond was the purchase
of a chance in the lottery, or, in the language of the statute, an "enterprize
offering prizes dependent upon lot or chance".
41 Ibid.
other jurisdictions, to prove that the conviction of the appellant was justified under the law. We will consider the "foreign" cases first.

In Davenport v. The City of Ottawa,42 a "gift enterprise" was under consideration. There, a business house placed in its show windows a locked box, with glass front, containing twenty-five dollars in bills, and it advertised that all persons buying goods in its store, paying fifty cents or more therefor, would be given a key and that only one key would be given out which would unlock the box and so permit the lucky holder to take the money therein. It appeared also that the defendant sold goods at its usual prices without extra charge on account of said key. It was held, on appeal, that such transactions were in effect sales of merchandise and lottery tickets for an aggregate price, and that a conviction therefor was right.

To the same effect was The State v. Mumford,43 which was cited. There, prizes were offered to subscribers to the Kansas City Times, each subscriber receiving a ticket entitling him to participate in a drawing of prizes, no extra charge above the ordinary subscription price being made. The court found this to be a lottery and that subscribers to the newspaper bought at the one time, and for one and the same consideration, the newspaper and the ticket in the lottery. In so finding, the court pointed out that similar schemes have been condemned by courts in other jurisdictions and referred to United States v. Olney and State v. Clarke.44

The constitutional prohibition against all lotteries,45 and the statutes enacted to enforce that prohibition, hereinbefore set forth, having been brought to the attention of the learned forum, cases heretofore adjudicated were then presented to show that, for many years past, New York has steadily frowned on "gift-enterprises".

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42 Davenport v. The City of Ottawa, 54 Kan. 711, 39 Pac. 708 (1895).
43 State v. Mumford, 73 Mo. 647 (1879).
44 United States v. Olney, 1 Abb. 275 (U. S. 1868); see also State v. Clarke, 33 N. H. 335 (1856); Thomas v. People of Illinois, 59 Ill. 160 (1871); Dunn v. People of Illinois, 40 Ill. 465 (1866); 2 WHARTON, CRIMINAL LAW (12th ed. 1932) § 1491.
It was argued that, under the authority of *People ex rel. Ellison v. Lavin*, the convictions of the appellants, *Miller et al.*, were justified. There, the purchasers of cigars were requested to retain the bands on same and, for every 100 bands on certain cigars, they would be entitled to four estimates regarding the number of cigars upon which the United States would collect taxes during a given month. To those estimating most approximately the correct figure, large prizes of cash or cigars would be awarded. Reversing the orders of the Special Term and of the Appellate Division of the First Department, the court found:

“That the persons among whom the distribution is to be made pay a valuable consideration for the chance when they purchase the cigars, the bands on which entitle them to compete for the prizes, is settled by authority.”

It declared further:

“We think the distribution in this case is controlled by chance within the meaning of the statute and that, therefore, it is illegal. The scheme certainly falls far within the requisites of a lottery as defined by the Supreme Court of the United States in the *Public Clearing House* case, under a statute very similar to our own.”

In *People v. Miller*, the purchase of the ticket of admission to the theatre may be substituted for the purchase of the cigars, and the bands attached thereto, in *Ellison v. Lavin*. And we should bear in mind also that, while the appellants in the *Miller* case conducted a drawing for the awarding of the prizes, no such drawings were held in the *Ellison v. Lavin* case, *supra*,—yet the Court of Appeals maintained that

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46 *People ex rel. Ellison v. Lavin*, 179 N. Y. 164, 71 N. E. 753 (1904).
47 Id. at 168.
49 *Supra* note 46, at 174 (179 N. Y.).
the laws regarding lotteries had been violated in the latter case.

In so doing, the court upheld the strict constitutional prohibition against all lotteries, no matter how harmless. In brief, it followed the reasoning in *N. Y. Almshouse v. American Art Union* wherein, in the following language, the court declared that no matter how innocent the purpose of the lottery might be, all lotteries are prohibited.

"Its mischiefs are certainly not so apparent, as if its prizes were to be paid in money, or as it would be, if framed for the purpose of enticing the necessitous and improvident into its hazards. But this case cannot be decided according to the views we may entertain of the probable good or evil consequent upon the execution of the scheme. The constitution took away from the legislature the power of determining whether this or any other lottery was of good or evil tendency, and certainly did not intend to confer that power on the judicial tribunals. If it were to be admitted, that the scheme is entirely harmless in its consequences, it would form no ground for making it, by judicial construction, an exception to the general and absolute constitutional prohibition. The constitution of 1846 contains a provision against lotteries, and the sale of lottery-tickets, substantially like that in the constitution of 1821. The judgment below must be affirmed."  

To the same effect is *Negley v. Devlin*, wherein a concert was to be given and the proceeds derived from the admission thereto were to be devoted to charitable enterprises. The face of the ticket sold for the concert indicated that the bearer was entitled to be admitted to the concert, "and to whatever gift may be awarded its number." This referred to the serial number on each ticket sold. Prizes to the amount

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51 *N. Y. Almshouse v. American Art Union*, 7 N. Y. 228 (1852).
52 Id. at 229.
of $260,000 were to be distributed after the concert to the holders of the winning numbers.

The court found that the scheme proposed constituted a lottery and condemned it.

"The object of the scheme, and the purpose to which it was designed, to bestow the proceeds, were such as to commend them to a most favorable consideration. But the worthiness and excellence of the charities, does not remove the vice from the enterprise, or make it lawful and proper."

In making this decision, the court was following the judgment rendered in *Rolfe v. Delman*, which case was "on all fours" with the *Negley* case, *supra*.

With the condemnation of New York so plainly evidenced by the decisions just quoted, the Court of Appeals, in 1936, unanimously affirmed the orders and judgments of the Appellate Division of the Second Department which, in turn, had affirmed the judgment of the Court of Special Sessions of New York City, convicting the defendants of maintaining a lottery. But the ruling of the distinguished forum left something to be desired. The court stated in part:

"Defendants offered evidence tending to show the possibility of participation in the chance by those who bought no ticket of admission to the theatre and in no way paid any valuable consideration for the opportunity to share in the chance, but the trial court rejected the credibility of such testimony. In view of this rejection our decision in *People v. Mail and Express Co.* has no application. The issue of law, therefore, is whether a payment which entitles one to a ticket of admission to the theatre plus a chance to win a prize constitutes payment of a valuable consideration for the chance." (Italics ours.)

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Assuming that the trial court did not reject, but had considered, the testimony offered by the appellants that non-purchasers of admission tickets could participate in the prize-drawing, would the appellate court's finding be different? Would *People v. Mail & Express Co.* have been authority for reversing the judgments of conviction?

If the court so intended to intimate, with all due deference to that learned tribunal, we think such a ruling would be erroneous. This, we say, as a result of a close examination of that case, the results of which study are now to be set forth.\(^7\)

As the facts of *People v. Mail and Express Co.* disclose, the newspaper caused wide distribution of numbered cards, *gratis*, announcing that the holders of such of these cards, whose numbers might correspond to numbers later to be drawn by the newspaper, would win certain cash prizes. One did not need to buy a copy of the newspaper to read the winning numbers, as the paper could be seen, without charge, at certain places designated by, and enumerated in, the paper. On these facts, the owners of the paper were charged with violating the lottery law. They demurred on the ground that the said facts, set forth in the information, did not constitute a crime, and the demurrer was sustained by the trial and the appellate courts, even though the trial court considered Section 21 of the Penal Law which stated:

"The rule that a penal statute is to be strictly construed does not apply to this chapter or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law." (Italics ours.)

Now, what did the "terms" of Section 1370 of the Penal Law import? The statute read:

"'A lottery' is a scheme for the distribution of property by chance, among persons who have paid or

\(^7\) An analysis of this case is important because the ruling therein has been followed in other jurisdictions as well as in New York.
agreed to pay a valuable consideration for the chance, whether called a lottery, raffle or gift enterprise or by some other name." (Italics ours.)

It is plainly evident that the Legislature was condemning all such schemes, no matter by what names they might be designated. "Some other name" precluded any exclusive definition; it was all-embracing—provided all the elements of a lottery were present. But the learned justices agreed that the element of "consideration" was lacking in the Mail and Express Co. case. They reached that conclusion in spite of the fact that the prosecution presented "the cogent reasoning of Lord Alverstone, C. J., and Darling, J., in the King's Bench Division, in a recent case," as to the facts substantially like those now before us." This is the "cogent reasoning" referred to:

"The money for the prizes, however, comes out of the receipts of the respondents, and these in their turn come, to a considerable extent, from the people who buy the paper, although no doubt the advertisements may bring in a considerable sum. The persons who receive the medals therefore contribute collectively (though each individual may not contribute) sums of money which constitute the fund from which the profits of the newspaper, and also the money for the prize winners in this competition, come. I adopt the definitions of 'lottery' which have been cited to us in the present case, and, looking at the real substance of the scheme, I think that it falls within the narrowest and most limited definition of a lottery, though it is not necessary for the purpose of our decision to go so far as that. If the scheme had been to deliver a medal with each copy of the paper to the person buying that copy, there could have been no question that it would have been a lottery; in the present case the mischief

65 Same today.
66 Willis v. Young, 1 L. R. 448 (K. B. 1907).
67 Numbered medals, instead of tickets, had been freely distributed; otherwise the facts are the same as in the Pacific Mail and Express case.
is really the same, and an inducement is held out to the same class of people to buy copies of the paper, and I am glad to say that I know of no statute, and of no judicial decision, which compels me to hold that this scheme is not a lottery." 61

It is submitted that this is sound reasoning, and, if followed, would have saved the court from falling into error. And error obtained also in the formation of the trial court's opinion as will be seen by the following.

One of the judges, discussing *Willis v. Young*, supra, quoted Justice Darling in this fashion:

"I do not intend to hold that a free and absolutely gratuitous distribution of chances, some of which obtain prizes, would be a lottery." 62

whereas the learned justice really said:

"I do not intend to hold that a free and absolutely gratuitous distribution of chances, *none of which have been paid for*, would be a lottery." (Italics ours.) 63

Obviously not. But to bring "Bank Night" under the protection of Justice Darling's opinion, it would be necessary, if we may resort to hyperbole, for the theatre owners to throw the doors to their entertainment wide open, to all and sundry, free of charge. Who can visualize this act of philanthropy?

After long contemplation of the *Pacific Mail and Express Co.* case, it is submitted that the reasoning evidenced by the opinion therein is erroneous; that the conclusion could be correct is unlikely. The theory that prevailed in this case was followed in a "Bank Night" case that was decided in New York, subsequent to the decision of *People v. Miller, et al.*, and the conclusion was reached that the lottery scheme under discussion was not a lottery. In that

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63 See note 60, *supra*.
particular case,64 *People v. Shafer*, one of the rules of the game was that the winner of the prize must be in the theatre, or in the lobby, or in the street, so that within *five* minutes he could claim the prize, and the trial court held that this requirement furnished the "consideration" requisite to a lottery. Reversing this finding of the City Court of Rochester (*Criminal Branch*), the County Court of Monroe said:

"I fail to see how the requirement of the presence of the participant in the theatre or lobby constitutes a payment of a valuable consideration or an agreement to pay it." 65

That this ruling of the County Court aforesaid (apparently approved by the Court of Appeals) is not being fully accepted, in at least one judicial department of New York, is indicated by the decision in *Simmons v. Randforce Amusement Corporation*,66 where a prize-winner, having duly presented himself for the prize of $250, was denied the prize. He brought suit to recover, and we read that:

"The defendant now moves to dismiss the complaint for failure to state a cause of action, attacking it on two grounds: *First*, that the complaint sets forth no consideration for the promise of the defendant to pay the prize money; and *second*, that if a consideration can be spelled out, the contract is illegal and void, as the payment of any consideration would reduce the entire scheme to a lottery * * *." 67

The motion to dismiss was denied, the court accepting that part of the decision in the *Shafer* case which held "Bank Nights" legal, but rejecting the part which declared that no consideration could be found passing from the winner to the theatre owner, under circumstances similar to those prevailing in the *Simmons* case.

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65 *Id.* at 176.
67 *Id.* at 492.
A month later, another indication of the disinclination of the courts to agree with the ruling of the Court of Appeals in the Shafer case was made evident, and again it fell to the writer to debate the legality, or illegality, of "Bank Night", before the justices of the Appellate Division of the Second Department.

In this case, two defendants were convicted in the lower court of unlawfully maintaining and operating a lottery (Bank Night) in Brooklyn and appeals were taken therefrom. The judgments of conviction were unanimously affirmed, without opinion, even though two witnesses had testified at the trial of the defendants: one, that he had registered to participate in the drawing without buying any admission ticket; and the other, that he had won a prize at defendant's theatre of $312.50, while standing outside of it—a month after these appellants had been arrested—as a result of having registered, "free", some months prior thereto. And, although the Shafer case was fully discussed upon the argument for reversal, the learned court unanimously affirmed the judgments of conviction—and the appellants' attorneys, although representing large theatrical interests, made no move to have the affirmance reviewed by the Court of Appeals.

Is it possible definitely to state what the New York law is in regard to that type of Bank Night where those who pay admission to a theatre and those who do not may equally participate in the distribution of prizes? It would seem that the Court of Appeals has declared such a transaction not to be a lottery. However, the later cases in courts of lower jurisdiction are disinclined to a complete acceptance of the decision in People v. Shafer. This may be due to the fact that the Court of Appeals wrote no opinion in the Shafer case and there is consequently no way of determining whether the acquittal was really affirmed on the reasoning of the court below. Such is the rather unsatisfactory status of Bank Night in New York today.

As for its status elsewhere, it is found, from a very good

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survey of the situation, that since the writer argued the case of People v. Miller, et al., "Bank Night" has received consideration in many other jurisdictions, with the result that Tennessee, California, New Hampshire, New Mexico and Iowa regard it as a lawful enterprise, while Kansas, Michigan, Massachusetts, Illinois, Louisiana, Texas, Georgia, Washington and Alabama (distinguishing the Yellowstone Kit case) condemn it as illegal.

Most of the latter states base their disapproval on the belief that, where there was an admission fee charged to some participants and not to others, the plan was to deduct a certain percentage of the admission charged, and "use this fractional fee to pay or offset the loss which might be occasioned by the prize", the increased number of patrons paying admission to the theatre on the night of the drawing furnishing, en masse, the required consideration.

CONSTITUTIONALITY OF LOTTERY STATUTES.

Upon appeal, in the case of People v. Miller, et al., herefore discussed, the appellants raised the point that any attempt to prevent them from distributing merchandise free of charge would be "unconstitutional and void for uncertainty as setting up no ascertainable standard for guidance". It was answered that it was too late to raise the question of constitutionality, for the first time, upon appeal and we do not believe that the appellate tribunal considered that question in its findings against the appellants. However, it seems certain that, if such consideration had been given, the judgment affirming their conviction would have been unchanged. This is maintained in view of what follows.

Some years ago, the country was swept by what was designated as the trading-stamp scheme. Briefly, it was a device to stimulate purchases of goods in local stores dealing

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in any and all kinds of commodities—groceries, meats, vegetables, hats, clothes, shoes, etc. When the customer made a purchase, the store-keeper would give him a small premium stamp for each ten cents he spent. After securing a thousand or more of such stamps, the customer could present them to the storekeeper and receive some commodity “free”, or he could take them to a central premium parlor (maintained by the company which printed and sold the stamps to the storekeepers) and select a premium or prize, in return for surrendering the stamps he had accumulated.

In time, this trading-stamp scheme to promote business came under the scrutiny of the courts in many states and, with few exceptions, it was held that any statutes or ordinances designed to interfere with a merchant giving away trading stamps or gifts to his customers, were unconstitutional in that they violated those provisions of the federal and state constitutions which guarantee to every one the security of his liberty and his property.73

Eventually, the Supreme Court of the United States was called upon to pass judgment on the status of such prohibiting acts or ordinances in Matter of Gregory.74 In this case, the statute involved made it a crime for a person to engage in gift enterprises conducted “in any manner, as defined in said act or otherwise”, in the District of Columbia, and it was urged that the prohibition contained in that statute violated the Fifth Amendment of the Constitution of the United States by depriving the petitioner (who dealt in trading stamps) of liberty and property without due process of law. But the nation’s highest Court brushed aside the contention that “gift enterprises” did not include the trading-stamp scheme, by saying that:

“It cannot be said that the words ‘gift-enterprise business’ are so uncertain as to make the prohibition

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73 Ex parte Hutchinson, 147 Fed. 950 (C. C. D. Ore. 1905); People v. Gillson, 109 N. Y. 389, 17 N. E. 343 (1888); People v. Zimmerman, 102 App. Div. 103, 92 N. Y. Supp. 497 (4th Dept. 1905); Ex parte Drevel, 147 Cal. 763, 88 Pac. 389 (1907); Denver v. Freauuff, 39 Colo. 20, 82 Pac. 429 (1905); Hewin v. Atlanta, 121 Ga. 723, 49 S. E. 765 (1905); State v. Dalton, 22 R. I. 771, 46 Atl. 234 (1900); State v. Dodge, 76 Vt. 197, 56 Atl. 983 (1904).

nugatory, or that they necessarily include conduct which lies outside the range of legislative interference in the exercise of the police power. While these words are general, they may be regarded as embracing a class of transactions which the legislature is competent to condemn. Thus, a 'gift enterprise' has been defined to be '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.'

In Champion v. Ames the right of legislative bodies to prohibit lotteries was also upheld, as will be seen from the following:

Champion, with others, was accused of violating the "Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service", in that he and his associates conspired to send lottery tickets, via express, from one state to another. The constitutionality of that statute was attacked, the defendants claiming that the act of expressing the said tickets from state to state did not constitute commerce, and further that no valid act of Congress could be made to prohibit, under penalties, such traffic, under that clause of the national Constitution giving Congress the right "to regulate commerce with foreign nations and among the several states". Answering these two questions, in their order, the United States Supreme Court found that interstate "commerce" means more than the carrying from one state to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money. In justification of this finding, the Court wrote:

"The cases cited, however, sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce

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77 28 Stat. 963 (1895).
clause. They show that commerce among the states embraces navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted, Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed.”

More specifically the Court found that the sending of the tickets, by express, from one state to another constituted “traffic” and therefore “commerce”.

Addressing itself to the second point, that the statute gave Congress only the right to regulate, as distinguished from “prohibiting”, the Court inquired:

“If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the states, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?”

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79 Id. at 354.
80 Substitute “State Legislatures” for “Congress”, and the analogy is clear.
And, in answer to its own question, the Court declared:

"'The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge.' Re Rahrer, 140 U. S. 545, 563, sub nom. Wilkerson v. Rahrer, 35 L. ed. 572, 577, 11 Sup. Ct. 865, 869. If the carrying of lottery tickets from one state to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one state to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute, and has become offensive to the entire people of the nation. It is a kind of traffic which no one can be entitled to pursue as of right." 82

Although the Chief Justice, and three of his distinguished colleagues, voted to dissent, the opinion which prevailed held that the Congressional Act of 1895, heretofore mentioned, was valid and that Congress was within its powers when it passed this Act.

And in New York, the right of the Legislature to pass statutes condemning all lotteries, be they gift enterprises or not, is clearly implied in N. Y. Almshouse v. American Art Union.83

In this case, the constitution of the American Art Union (formerly the Apollo Association), a corporate body, provided that works of art purchased by it with money paid by its subscribers, should be distributed by lot among those subscribers once a year. Each subscriber, we may add, in addi-

82 Id. at 358.
83 7 N. Y. 228 (1852).
tion to receiving a chance to win one of those pictures, also received an engraving of an American painting, as well as the issues of the "Bulletin of the American Art Union." The sanction of the Legislature to distribute the works of art by lot was given by an act of that body passed on January 29, 1844. A few years later, on the eve of such distribution by lot, the Overseers of the Poor began a proceeding against the American Art Union to recover the penalty provided by law, where property is distributed by lot. The Union contended that the legislative sanction above mentioned made its distribution of pictures lawful, and that it had thereby repealed the statute against lotteries and raffles, as far as the Union was concerned. However, the Court of Appeals of New York held that the act of the Legislature aforesaid could not exempt the Union from the rigor of the eleventh section of the seventh article of the State Constitution of 1821, which provided that:

"No lottery shall hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law." (Italics ours.)

The tribunal of last resort in this state was not receptive to the argument made by the Union that the constitutional prohibition just recited condemned only public lotteries, for cash prizes, conducted as a means of raising state funds but, instead, declared that lotteries had never been created in New York for the purpose of general revenue, so the prohibition could not apply to them. As private lotteries had been consistently frowned upon since 1721 (when New York was a province), the prohibition must have been directed at all lotteries, the court concluded, and affirmed the judgment in favor of the plaintiffs, Overseers of the Poor, one judge dissenting.

In view of this sweeping ruling of the Court of Appeals,

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84 R. S. pt. 1, c. 20, tit. 8, 33, modified now in § 1384, Penal Law.
85 Embodied, and broadened, in Article I, § 9, of the present Constitution of New York State.
we believe that any question of the constitutionality of the statutes, in New York, passed by direction of Article I, Section 9 of the state's constitution, and under which Miller et al. had been prosecuted, would have been answered adversely to them had this issue been determined.

CONCLUSIONS.

1. It is submitted that the conditions demanding attendance at the theatre to register, whether with, or without charge, attendance at the theatre, either in or outside of it on the night of the drawing, and the condition that the winner must claim his prize within a few moments time, or else forfeit it, furnish sufficient consideration for the promise, and hence a lottery is created—the other elements of a drawing for a prize by lot being present, of course. One of the great legal minds of our age, Mr. Justice Cardozo, as Chief Justice of the Court of Appeals of New York, showed his sympathy with such reasoning in the opinion written by him in Allegheny College v. National Chautauqua Bank Co., where he quotes approvingly from Section 112 of the eminent Professor Williston's treatise on contracts as follows:

"It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration."  

2. The legal prohibition of lotteries is, and should be, directed at the substance of the scheme, regardless of its

246 N. Y. 369, 159 N. E. 173 (1927).

"The happening of the condition", in Bank Night, is the attendance of the prize-winner, either in the theatre or outside of it, at the time of the drawing. Obviously, the presence of a crowd outside the theatre attracts attention to it, and advertises it. Those inside the theatre furnish "consideration" by purchasing tickets of admission thereto.
form, and all attempts to evade the spirit of the lottery laws should be met with the reasoning set forth in *N. Y. Almshouse v. American Art Union* 88 condemning all such attempts:

"The prohibition was not aimed at the objects for which lotteries had been authorized, but at that particular mode of accomplishing such objects."

**George F. Palmer.**

Brooklyn, N. Y.

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88 7 N. Y. 228 (1852).