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Contracts--Consideration--"Bank Nights"--Promissory Estoppel (Simmons v. Randforce Amusement Corp., 162 Misc. 491 (1937))

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nitely refuses to concern itself with *proximity* of cause. It says, "The question remains as to *the effect upon interstate commerce of the labor practices* involved; * * * the fact remains that the stoppage of those (respondents) operations by industrial strife would *have a most serious effect* upon interstate commerce. In view of respondents' far flung activities, it is idle to say the effect would be indirect or remote." [18]

B. B.

CONTRACTS — CONSIDERATION—"BANK NIGHTS"—PROMISSORY ESTOPPEL.—The defendant, in course of operating its theatre, held what is commonly termed a "Bank Night".[1] Patrons of the theatre, among whom was the plaintiff, were requested to enter their names and addresses next to numbers in a book provided by the defendant, who advertised publicly that the person whose number was drawn on a certain night would be awarded a money prize. Plaintiff alleges that he has done all the defendant had requested, that he was present when his number was drawn, and that the defendant has refused payment of the prize money. Defendant moves to dismiss the complaint for failure to state a cause of action on two grounds: (1) Lack of consideration for promise to pay prize money; (2) the contract, if the court finds consideration, is illegal and void as a lottery. *Held,* motion to dismiss complaint denied. The plaintiff furnished adequate consideration and according to a decision affirmed by the Court of Appeals certain "Bank Night" schemes are not lotteries,[2] and, therefore, are legal.[3] *Simmons* v. *Randforce Amusement Corp.,* 162 Misc. 491, 293 N. Y. Supp. 745 (1937).

Consideration need not be tangible property capable of delivery, nor need it have monetary value,[4] but it may consist in the promisee's performance of something he was not already legally bound to do.[5] The plaintiff furnished adequate consideration for the defendant's

[18] The Court seems to avoid the use of the word "direct" or "indirect"; it speaks of "the close and intimate effect," p. 625, "the close and intimate relation," p. 624.

[1] (1937) 37 COL. L. REV. 877.

[2] N. Y. PENAL LAW § 1370: "A lottery is 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 some other name".

[3] People v. Shafer, 160 Misc. 174, 289 N. Y. Supp. 694, *aff'd,* 273 N. Y. 475, 6 N. E. (2d) 410 (1936).

[4] ANSON, CONTRACTS (Turck ed. 1929) 63.

[5] 13 CORPUS JURIS 324; POLLOCK, CONTRACTS (4th ed. 1888) 166; 1 WILLISTON, CONTRACTS (1st ed. 1934) § 102a; Bigelow v. Bigelow, 95 Me. 17, 49 Atl. 49; Carlill v. Carbolic Smoke Ball Co., 1 Q. B. 256 (1893).

promise to award the prize money by signing his (the plaintiff's) name in the book provided by the defendant, and in attending the theatre the night of the drawing. He was legally bound to do neither.

In the case under discussion, the court expressed the opinion that the plaintiff's right to recover might rest on the doctrine of promissory estoppel.[6] The doctrine of promissory estoppel has been stated succinctly as that by which action by the promisee in justifiable reliance on the promise, will make the promise binding,[7] even though such action had not been requested by the promisor as the price or exchange for his promise. In the instant case not only was the action of the plaintiff, the promisee, in signing his name and attending the theatre, requested by the defendant, the promisor, but it would result in conceivable benefit to him in tending to increase his business. Consequently, the situation was not one in which the doctrine of promissory estoppel would apply in its strictest sense and as to that part of the decision was *dicta.* Moreover the application of the doctrine to the case in hand is rather startling in view of the previously expressed attitude of the courts of this state to limit or confine the application of the doctrine to charitable subscription cases.[8]

The objection to the contract on the ground that it was illegal as a lottery has been removed by a decision of the Court of Appeals holding that a "Bank Night" scheme is not a lottery under Sections 1370 and 1376 of the Penal Law.[9] No valuable consideration, within meaning of Section 1370, was given by the promisee for the chance.[10]

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[6] Wecht, J. "Looking at the question from a broader point of view, the same result can be arrived at on the theory of promissory estoppel * * *. The public has the right to trust implicitly these semi-public institutions (the theatres). It would be an unwarranted breach of faith on the part of a theatre to renege on its promise to award the advertised prize." These words may be significant for the future of "promissory estoppel" in New York courts.

[7] Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173 (1927).

[8] Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173 (1927); Comfort v. McCorkle, 149 Misc. 826, 268 N. Y. Supp. 192 (1933); Quincey Co. v. City Service, 156 Misc. 83, 282 N. Y. Supp. 294 (1935).

[9] N. Y. PENAL LAW § 1376: "A person who offers for sale or distribution, in any way, real or personal property, or any interest therein to be determined by lot or chance, dependent upon the drawing of a lottery within or without the state, or who sells, furnishes or procures, or causes to be sold, furnished or procured, in any manner, a chance, or share, or any interest in property offered for sale or distribution, in violation of this article, or a ticket or other evidence of such chance, share or interest is guilty of a misdemeanor".

[10] People v. Shafer, 160 Misc. 174, 289 N. Y. Supp. 649, *aff'd,* 273 N. Y. 475, 6 N. E. (2d) 410 (1936). Kohlmetz, J.: "* * * I fail to see how the requirement of the participant being in the theatre or lobby constitutes payment of a valuable consideration or agreement to pay it. In my opinion either the payment of a valuable consideration or an agreement to pay for a chance must precede the drawing * * * there was a distinct understanding with the people who signed the book that they would not be required to pay anything for the chance, and that they assumed no obligation whatever. They are not even required to purchase a ticket of admission, and the winner could go into the

The court distinguishes its decision by which it finds a valuable consideration in the instant case for the defendant's promise, in this fashion: "True it is that some *dicta* will be found in the opinion that the so-called 'Bank Night' promises were void because of lack of consideration. However, the rule promulgated in a criminal prosecution is unlike that in a civil suit. * * * the above cases construed a criminal statute. Criminal statutes must be strictly construed. The rights of a prize winner were in no wise discussed or involved, and any reference to the invalidity of the contract by reason of inadequate consideration must be assumed to be *obiter dictum.*" [11]

L. J.

CONTRACT — DECEIT — REPRESENTATIONS—OPINIONS.—This is an action for deceit brought against the defendant corporation for the alleged fraudulent statements made by its sales agent, one Freeman. The alleged fraud arose in the following manner: The plaintiff, a noted violinist, purchased the violin in question from Freeman with a certificate stating that the violin was the work of a great "Master, Antonius Stradivarius in Cremona 1717 as shown by the label it bears", and that the "top" (also described as "belly" or "table") was of "Spruce of Stradivarius' choicest selection and unique among his violins as we have seen by reason of its unusual strength". It is further to be noted that in its numerous previous sales the instrument had always been regarded as a genuine Stradivarius. The plaintiff, after using the violin satisfactorily for more than ten years, and after stating, "It is one of the finest Stradivarius violins in existence and totally unsurpassed" discovered that the "left half of the top" was not the original work of Stradivarius, but that it was the substituted work of, probably, a French artisan, who had made repairs upon the instrument in 1840 and 1850. Therefore the plaintiff brought this action for the difference between what he had paid for the violin and its actual value. *Held,* judgment for plaintiff in lower court reversed and complaint dismissed. No action lies for deceit where scienter, a necessary element of the tort, is lacking or where the statements made by the agent were mere opinions or beliefs rather than representations. *Banner* v. *Lyon and Healy,* 249 App. Div. 569, 293 N. Y. Supp. 236 (1st Dept. 1937).

Deceit actions will lie when one party to an agreement know-

theatre to obtain his prize without any expense to him." People v. Mail & Express Co., 179 N. Y. Supp. 640 (1919), *aff'd,* 231 N. Y. 586, 132 N. E. 898 (1921).

[11] Wecht, J., in Simmons v. Randforce Amusement Corp., 162 Misc. 491, 293 N. Y. Supp. 745 (1937).