GIFT ENTERPRISES.

The phrase "gift enterprise" has been used to denote (a) a species of lottery; (b) a scheme for the gratuitous transfer of property by chance; and (c) a scheme for the transfer of property independently of chance. It is proposed to consider these concepts in the following pages.

(A.) *A gift enterprise as a species of lottery.*

The transfer of rights of independent value, together with the right to participate in a disposition of property by chance, in consideration of the payment of value, has been called a "gift enterprise." This, however, would seem to be a popular, not a legal, use of the expression. The technical term is "lottery," which comprehends the transfer of property by chance for value; in its more usual form there is simply the right to participate in a specified hazard; in what is here called a "gift enterprise" there is connected with this the transfer of rights of a value, independent of the right to share in the chance. This, of course, does not prevent the latter from being a lottery.

In *Bell* v. *State*, 5 Sneed 507 (1857), the purchase of books at their value with tickets for chances on certain property was held to be "that species of gaming called a lottery," while the indictment specified "gift enterprise" as the name of the scheme. So in *Eubanks* v. *State*, 3 Heisk. 488 (1872), where packages, each containing ten cents' worth of candy and an unknown article valued at from ten cents to five dollars, were sold at fifty cents each, the same words were used in the indictment and the scheme was declared to be gaming. Sometimes the device takes the form of a concert with a disposition of prizes dependent upon hazard. We, then, find the expression "gift concert." For illustrations of this scheme, *Thomas* v. *People*, 59 Ill. 160 (1871); *Ex parte Blanchard*, 9 Nev. 101 (1874); *Negley* v. *Devlin*, 12 Abb. Pr. N. S. 210 (1872), may be consulted. It is manifest that the "gift

concert" differs, legally, in no way from the "gift enterprise" and that both are merely species of lotteries.

In *Lansburgh* v. *District of Columbia*, 56 Alb. L. J. 488 (1897), a "trading-stamp" device was conceived to be a lottery. It is there said: "If the premiums should have any fair value, then the Stamp Company must inevitably rely upon the failure of the presentation of tickets for redemption by reason of its requirement that not less than 990 tickets, representing cash purchases of $99.90, shall be pasted in a book and produced at one time, to entitle the holder to his premium. In this event the company, if it actually contemplates making good its contracts, is relying upon a lottery; that is to say, the chances and advantages of its game for its expectations of profit or gain." But this view would seem to be erroneous. In *Goodman* v. *Cody*, 1 Wash. T. 329 (1871), chance has been well defined thus: "Anything happens by chance to one, which was neither understandingly brought about by his act nor pre-estimated by his understanding." In the case before the Court of Appeals of the District of Columbia no such element was present; there was simply the possibility of default.

(B.) *A gift enterprise as a scheme for the gratuitous transfer of property by chance.*

As has been said, to constitute a lottery, chance and consideration are essential. If authority on the necessity of the latter is desired, it may be found in *State* v. *Clark*, 33 N. H. 329 (1856); *United States* v. *Olney*, 1 Deady 461, Fed. Cas. No. 15 918 (1868); *Hull* v. *Ruggles*, 56 N. Y. 424 (1874); *Wilkinson* v. *Gill*, 74 N. Y. 63 (1878); *Yellowstone Kit* v. *State*, 88 Ala. 196, 7 L. R. A. 599, 7 So. 338 (1890); *Cross* v. *People*, 18 Colo. 321, 32 Pac. 821 (1893). Professor McClain, in the second volume of his treatise on criminal law (§ 1315), says: "In some cases the element of consideration has been left out of the definition, but where the point has been raised it has always been held to be an essential ingredient of the offence." And Somerville, J., says, in *Yellowstone Kit* v. *State* (*supra*): "It may be

safely asserted, as the result of the adjudged cases that the species of lottery, the carrying on of which is intended to be prohibited as criminal by the various laws of this country, embraces only schemes in which a valuable consideration of some kind is paid directly or indirectly for the chance to draw a prize."

A gratuitous transfer of property by chance is, therefore, not indictable as a lottery, but has been made so under the name of "gift enterprise." In Indiana, by § 2077, R. S. 1881, it is provided that whoever "sells a lottery ticket or share in any lottery scheme or gift enterprise . . . or transmits money to any lottery scheme or gift enterprise for the division of property to be determined by chance . . . shall be guilty of a misdemeanor." In *Lohman* v. *State*, 81 Ind. 15 (1881), Niblack, J., in commenting on this section, said: "In common parlance, a gift enterprise is understood to be substantially 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. And in § 3894 of the Revised Statutes of the United States, as amended by the Act of September 19, 1890, c. 908, it is provided that "No letter, postal-card or circular, concerning any lottery, so-called gift-concert or other similar enterprise offering prizes dependent upon lot or chance . . . shall be carried in the mail . . ." The clause beginning "so-called gift-concert" etc., is designated in the remainder of the section by the words "gift enterprise."

No question seems to have arisen on these statutes with respect to the necessity of consideration in a gift enterprise. The case of *Lohman* v. *State*, *supra*, throws little light on this point. It is conceived that the reasonable view is that a consideration is not necessary and cannot be present. No mention is made in the statutes or in the case of a consideration being requisite. If it were held to be necessary or permissible, the statutes would be tautological, as there would then be no difference between a gift enterprise and a lottery, both of which are specified in the statutes.

And it is within the police power of the state to prohibit

this form of device. That the inhibition of lotteries is competent for the legislature, because of their injurious effect on the moral, physical, social and financial welfare of the community, there can be no question. Their evil effect on the community is still present, where there is a gratuitous disposition of property by hazard. There is merely a difference of degree in the injury, and it has been so held in *Long* v. *State*, *infra*.

(C.) *A gift enterprise as a scheme for the transfer of property independently of chance.*

This is the latest sense in which the words "gift enterprise" are employed. This meaning differs from those previously mentioned in that the element of hazard is here absent. The element of consideration would seem to be here immaterial, except, perhaps, in Pennsylvania.

It is, doubtless, unnecessary to state that the right to pursue any lawful calling or business is protected by the constitutional provisions that (a) the privileges and immunities of citizens of the United States shall not be abridged by any law of any state; (b) no one shall be deprived of life, liberty or property without due process of law; and (c) the rights of life and liberty, of acquiring and possessing property and of pursuing happiness are inherent and inviolate. It is also needless to say that it is within the police power to prescribe reasonable regulations concerning any such calling when necessary for the public welfare. And it is this latter doctrine that we shall be called upon to consider under this head of "gift enterprises."

In Massachusetts, by St. 1884, c. 277, entitled "An Act to prevent the sale or exchange of property under the inducement that a gift or prize is to be part of the transaction," it is made a crime for any one to "sell, exchange or dispose of any property, or offer or attempt to do so, upon any representation, advertisement, notice or inducement that anything other than what is specifically stated to be the subject of the sale or exchange is, or is to be, delivered or received or in any way connected with or a part of the transaction."

In *Commonwealth* v. *Emerson*, 165 Mass. 196 (1896), this statute came before the court for consideration. The facts of the case were thus stated by Mr. Justice Holmes, who delivered the opinion of the court: ". . . The defendant, a retail dealer in tobacco, displayed in his shop window a large number of photographs of distinguished or notorious men and women, with an advertisement that each purchaser of a piece of a certain tobacco was entitled to one of these photographs. Upon each piece of tobacco was a label to the like effect, and the defendant told a witness that every purchaser was entitled to a photograph and to make his own selection. The witness testified that he bought a piece of tobacco and chose a photograph, and stated that every purchaser knew what he was buying before he made the trade."

On these facts the judge in the Superior Court refused to rule that the act was unconstitutional, and the defendant was found guilty. In setting this verdict aside, Mr. Justice Holmes said: "They [the words of the act] were not intended, and do not purport to forbid the sale of two things at once, even if one of them is the principal object of desire and the other an additional inducement which turns the scale . . . But the aim of this statute is to prevent bargains which appeal to the gambling instinct and induce people to buy what they do not want by the promise of a gift or prize, the precise nature of which is not known at the moment of making the purchase. There was nothing of that sort in the present case. All that was sold was 'specifically stated to be the subject of the sale,' and we think it very plain that if the offer of a single photograph with the tobacco would have been lawful, the offer of a choice out of a number is no less so, the buyer being free to make his choice before he takes the tobacco."

It is, of course, not within the police power of the state to prohibit ordinary commercial contracts. But it would seem to be within that power to inhibit dispositions of property, with or without consideration, where the precise nature of the property is not known and stated at the time of the transaction. The disposition in connection with another transaction may not be dependent upon chance but only upon the whim or

caprice of the person disposing. It is conceived that, for the reason stated in the opinion, such a case would still be within the power of the legislature to prohibit.

The Act of Congress of February 17, 1873 (§§ 1176, 1177, R. S. D. C.), entitled "An Act prohibiting gift enterprises in the District of Columbia," refers to the Act of August 23, 1871, of the Legislative Assembly of the District of Columbia, where a "gift enterprise" is described thus: "Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement, with a promise, express or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal of any article or thing, for and in consideration of its purchase by any person of any other article or thing whether the object shall be for individual gain or for the benefit of any institution of whatever character, or for any purpose whatever, shall be regarded as [carrying on?] "a gift enterprise."

In *Lansburgh* v. *District of Columbia*, 56 Alb. L. J. 488 (1897) this act was considered in reference to the so-called "trading stamp" device. This scheme consisted of, in the language of the report, "an agreement between a number of merchants and a corporation, that the latter shall print the names of the former in its subscribers' dictionary and circulate a number of copies of the book in" the City of Washington, "and that the merchants shall purchase of the corporation a number of so-called trading stamps to be given to customers with their purchases, and by them preserved and pasted in the books aforesaid until a certain number had been secured, when they should be presented to the corporation in exchange for the customer's choice of certain articles kept in stock by the corporation."

Mr. Justice Shephard, who delivered the opinion of the Court of Appeals of the District, said: "The Washington Trading Stamp Company and its agents are not merchants engaged in business as that term is commonly understood. They are not dealers in ordinary merchandise, engaged in a

legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to trade. Their business is the exploitation of nothing more or less than a cunning device. With no stock in trade but that device and the necessary books and stamps and so-called premiums with which to operate it successfully, they have intervened in the legitimate business carried on in the District of Columbia between seller and buyer, not for the advantage of either but to prey upon both. They sell nothing to the person to whom they furnish the premiums. They pretend simply to act for his benefit and advantage by forcing their stamps upon a perhaps unwilling merchant, who pays them in cash at the rate of five dollars a thousand. The merchant who yields to their persuasion does so partly in the hope of obtaining the customers of others and partly through fear of losing his own if he declines. Again, a limited number only (an apparently necessary feature of the scheme) are included in the list for the distribution of stamps, and other merchants and dealers who cannot enter must run the risk of losing their trade or else devise some other scheme to counteract the adverse agency . . . There is not the shadow of rational foundation for the Stamp Company's claim that it confers a benefit upon buyers by procuring for them an actual discount. If its business were continued and its contracts faithfully performed, its inevitable result would be, as in all unnecessary interventions of third persons, or 'middle men' between producer and consumer, an increase of cost to the latter."

The view of the court with respect to the relation between this scheme and a lottery has been previously mentioned.

The learned judge admitted that the language of the statute might be sufficiently broad as to have an unconstitutional application, but that in its constitutional application the device before him was clearly included. He speaks thus of its operation:

"That it was not intended to apply to ordinary discounts for cash, or in proportion to amounts of purchases when made by the merchant himself to his customers, may be regarded as certain; and the exercise of such power would doubtless

be denied if expressly attempted. Nor can it with reason be said to apply to *bona fide* co-operative associations and the like. It is possible also that it might not be operative in a case where the sale of a lawful article is accompanied by a gift of something specific and certain, not attended with any element of chance, and where the gift is not the real object of the sale in an attempt to evade acts regulating or prohibiting a particular traffic . . ."

In New York, by section 335a of the Penal Code, it is enacted that. "No person shall sell, exchange or dispose of any article of goods, or offer or attempt to do so, upon any representation, advertisement, notice or inducement that anything other than what is specifically stated to be the subject of the sale or exchange is, or is to be, delivered or received or in any way connected with or a part of the transaction as a gift, prize, premium or reward to the purchaser."

Under this act an indictment was found against a dealer in coffee, who had in his window this advertisement: "Try our eight o'clock breakfast coffee; checks given away with this coffee." A witness testified that he purchased the requisite number of pounds of coffee (2), and that he received a present as a part of the transaction; that he would not have purchased the coffee but for the present, and that these presents were lying in full view of purchasers, who could make his choice provided he purchased as much as two pounds of coffee. It will be seen at once that this case—*People* v. *Gillson*, 109 N. Y. 389 (1888)—was very similar to the Massachusetts one. The facts are closely analogous and the statutes are almost identical. In this case, however, a broader conclusion was reached. The Court of Appeals, in an opinion by Peckham, J., declared the act unconstitutional as an illegal deprivation of liberty, in that it is an unreasonable interference with a man's business or calling. The following is quoted from the opinion:

"A person engaged as a retailer of coffee might very well think that he could greatly enlarge the amount of his trade by doing precisely what was done by the defendant in this case; and while his profits on the same amount of coffee sold

would be smaller than if he gave no present, yet by the growth of his trade his income at the end of the year would be more than by the old method. This statute, if valid, steps in to prevent his adopting such a course to procure trading, and from it to secure an income and livelihood for himself and family. It says nothing as to any lottery, and does not confine its prohibition to the giving away or distribution of any other article of property by virtue of any scheme founded upon chance . . .

"I lay no stress whatever upon the argument that this kind of transaction naturally induces people to purchase more than they want of any article of food in order to get the other article with it which comes to them in the shape of a gift; and thus the poorer people are led to extravagance or outlay. It may be remarked that in purchasing articles of food—even if one purchases more than is thus absolutely necessary—the food need not be, and in all probability is not wasted. But aside from that, the argument is directed to that class of sumptuary legislation which, while good enough in some phases, is, when carried to minute details, simply unauthorized and illegal . . . It seems to me that to uphold the act in question upon the assumption that it tends to prevent people from buying more food than they may want, and hence tends to prevent wastefulness or lack of proper thought among the poorer classes, is a radically vicious and erroneous assumption, and is to take a long step backwards and to favor that class of paternal legislation which, when carried to this extent, interferes with the proper liberty of the citizen and violates the constitutional provision referred to. Equally unfounded and for practically the same reasons is the assumption that the law is valid as a law regulating trade and for the prevention of fraud and deception. It has no tendency to prevent either, and its regulation of trade is a mere arbitrary, unreasonable and illegal interference with the liberty of the citizen in his pursuit of his livelihood by engaging in a perfectly valid business conducted in a perfectly proper manner. That a man engaged in trade will not, for any length of time, continue to sell an article below what it costs him to procure it, is a safe assumption,

while it is equally safe to say that he may do so for a time long enough to enable him to introduce his article to the notice of the public and to create a demand for it which he will make a profit by supplying; or he may make a profit by supplying one article, which will amount to enough to enable him to give away some other article with it, and permit him to receive the average rate of profit in the business which he is engaged in. To prevent this by legislative action, does not reasonably or fairly tend to prevent fraud or deception in sales of articles of food."

In Maryland, in the case of *Long* v. *State*, 74 Md. 565 (1891), the Act of Assembly of 1886, c. 480, which directs that "no person or body corporate shall be permitted, either directly or indirectly, by agent or otherwise, to barter, sell, trade or to offer for barter, sale or trade by any publication, or in any way, any wares, goods or merchandise of any description, in package or bulk, holding out as an inducement for any such barter, sale or trade, or the offer of the same, any scheme or devise by way of gift enterprises of any kind or character whatsoever," was determined to be constitutional only so far as it relates to transactions dependent upon chance. Fowler, J., says in the course of his opinion, "Such a regulation of trade is in our opinion not only unwise but unlawful, and unlawful because it is necessary neither for the health, safety nor welfare of the people, and in its operation would be oppressive and burdensome."

The Pennsylvania statute of June 3, 1885, P. L. 55, is entitled "An Act for the suppression of lottery gifts by storekeepers and others to secure patronage." The preamble recites that " . . . The laws against gambling and lotteries are evaded by the giving of tickets entitling the holders thereof to money or articles of value as inducements to purchasers to the injury of legitimate business." The enacting clause provides: "That any merchant, manufacturer, importer, retailer or dealer doing business within this Commonwealth, who shall offer, give or sell, or authorize or permit any agent, salesman or employe to offer, give or sell any purchaser or customer any ticket or tickets, check or checks, or other token or

memoranda entitling such purchaser or customer to demand or receive money or any article of value, shall be deemed guilty of a misdemeanor . . . "

This statute has been held unconstitutional by a county court on the ground that it violates Section 3 of Article III. of the Pennsylvania Constitution, which requires the subject of a bill to be "clearly expressed in its title." In *Commonwealth* v. *Moorhead*, 7 Pa. C. C. 513 (1890), Mr. Judge Endlich considered that the "phrase 'lottery gifts' must be understood as conveying the idea of gifts in some way connected with chance or hazard, and that it cannot be understood as embracing anything which is free from all hazard or chance," and hence as the "title of the Act gives notice only of the former," while the body of the act covers only the latter class of subject, the Constitution is violated. The same view of the act is taken by Henry S. Borneman, Esq., in an article in 1 Pennsylvania Law Series, 223.

As has been seen above, a consideration is requisite in a lottery. The legal conception of a gift excludes the idea of a consideration. We have, therefore, a statute combining in its title two legal ideas essentially antagonistic. It is conceived that one of these words can be retained and the other rejected. The constitutional provision mentioned requires only that the title shall "fairly give notice of the subject of the act, so as reasonably to lead into an inquiry into its body:" *Allegheny County Home's Appeal*, 77 Pa. 77 (1814); *State Line, etc., R. R. Co.'s Appeal*, Ib. 429 (1875). A statute containing two inconsistent ideas in its title would seem to satisfy this requirement. No inconvenience can result from the adoption of such a view. The remaining provision of the section quoted from the Constitution, that a bill shall contain only one subject, prevents this. There must be one subject of the statute, and the double title fairly gives notice that the contents are one of two things; if neither, then the act is void.

Inasmuch as the retention of "gifts" and the rejection of "lottery" will render the present act constitutional (at least partially), it is conceived that this should be done. And it

may be said that, there being no obscurity in the enacting clause, the preamble is of no importance.

It will be noticed that the body of the statute does not require the gifts to be to induce patronage; but as the title, which is in Pennsylvania part of the act, contains this, the act may be so construed. This is admitted in the opinion of the court in the case cited. But the body of the act does not make the crime dependent on chance. This would seem, on the authorities previously mentioned, to make the statute unconstitutional in general when the transaction is independent of chance and perhaps of caprice connected with another transaction. And in view of the grounds upon which the title has been suggested to be valid, and of the use of the single word "gift," it is submitted that the statute can be operative only where a consideration is absent from the transaction. The act would, therefore, seem to be applicable only to gratuitous dispositions of property by chance, or perhaps by caprice connected with another transaction.

Another view of this statute might be that inasmuch as its body is within the legislative power to enact only to the extent to which the title (adopting the interpretation of "lottery gifts" suggested by Mr. Judge Endich) expresses it, the title is a valid one. There seems to be no authority on this point, but it is conceived that, from the nature of the constitutional provision previously cited, the validity of the title of an act is independent of the validity of its contents; and though such contents be substantially beyond the legislative province, no question concerning them can arise unless the title clearly expresses them.

The result of the cases on this head would, therefore, seem to be:

(a.) In general, it is not within the police power of the state to prohibit the disposition of property, with or without consideration, independently of chance, or perhaps of caprice connected with another transaction.

(b.) But a trading-stamp scheme or any other device tending injuriously to affect the community is within the legislative province to forbid, and such a scheme is included within the statutes against "gift enterprises."

The conclusions of this article may be stated thus:

(a.) A "gift enterprise" is popularly used to signify a species of lottery.

(b.) It is used to designate a scheme for the gratuitous disposition of property by chance; and such statutes are constitutional.

(c.) It is used to describe a scheme for the transfer of property, with or without consideration, independently of chance; and in general such statutes are unconstitutional; when, however, the scheme is such as to be injurious to the public welfare, notwithstanding its independence of hazard, the act is constitutional.

Thomas James Meagher.

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