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EMBEZZLEMENT—CORPORATE LOANS IN WHICH DIRECTORS ARE PERSONALLY INTERESTED.—Loaning corporate funds by directors to themselves, their families, business associates, and other corporations in which they are interested is a persistent source of abuse in corporate management, of especial significance in "savings institutions," such as building and loan associations, savings banks, trust, banking, and insurance companies. The problem is one confronting the courts of every state and of the United States at the present time. In *People* v. *Stevens*, 358 Ill. 391, 193 N. E. 154 (1934), there was an opportunity to make an impressive mark of limitation with regard to such practices, and likewise with regard to that hardy perennial, the excuse of good intentions.

Three members of the Stevens family were prosecuted for embezzlement, the bill of particulars specifying four loans by The Illinois Life Insurance Company to The Stevens Hotel Company. The defendants were heavily interested in both corporations and controlled them completely, as majority stockholders, directors, and officers. The character of the loans is concisely indicated in the opinion as follows: "The evidence shows that in 1931, by reason of conditions produced by the economic depression, the hotel company found it necessary to borrow money to pay the interest on its outstanding bonds in order to prevent the bonds coming into default and to prevent foreclosure and sale of the property. Between June and December, 1931, James W. Stevens loaned to the hotel company $522,000 of his individual funds. During all the time from the opening of the hotel in 1927 until May, 1932, the hotel company met its current obligations, but it was necessary to borrow from time to time during 1931 to meet payment of its accrued bonds and interest. This money was loaned by The Illinois Life Insurance Company to the hotel company and constitutes the alleged crimes with which the plaintiff in error, his father and brother are charged."

The court "in nowise commend [ed] these loans," which were admittedly bad. But "it is a far cry from a mistake in investment made in good faith to a felonious fraudulent investment made for the purpose of converting the funds of the lender to the use of the accused. There is here no evidence of fraudulent intent." The bill of particulars covered four loans, three in 1931 and a fourth on

January 4, 1932. The conviction included only the last, which is, therefore, the heart of the case. The existence of fraudulent intent will be considered only with reference to this loan.

In concluding that there was no evidence of fraudulent intent, the court mentions four points: (1) that there was no secrecy; (2) that the defendants did not get the money, the hotel company did; (3) that the state did not show that the hotel company was insolvent; (4) that the defendants' conduct was consistent with an honest attempt to protect the insurance company. Since points 1 and 2 are dubious, they may be disposed of first. Secrecy is indeed evidence tending to show fraud, and absence of secrecy to negative fraud. But it tends only; it is not conclusive either way. Anyway, the defendants were not mere subordinates, but in complete control and, hence, under little necessity of hiding what they were doing, even if what is unknown can be said not to be secret. Point 2 seems equally indecisive. The fact that the hotel company received the funds loaned rather than the defendants personally does not disprove that the defendants gained an advantage entirely personal to themselves of continuing, by means of the loan, their personal control of the hotel company.

Point 3 is important. On December 31, just before the making of the $700,000 loan on January 4, 1932, the hotel company had assets, valued at 1925-1928 cost figures (which ought surely to be generous enough), showing a margin of $916,000 over its liabilities, after reducing those liabilities to $27,980,000 by deducting the entire $7,000,000 capital stock (only $4,000,000 of the common of which seem to have been held by the Stevens family, principally by the three defendants in this case. The opinion states that a transaction of May 15, 1931, involved selling by the insurance company to the hotel company $350,000 of the latter's first-lien bonds for the hotel company's note of $300,000 and $32,430.67 in cash. This transaction shows that the first-lien bonds had depreciated. In 1931 the hotel company had borrowed from the insurance company a total of $850,000 on unsecured notes to prevent its "bonds from coming into default and to prevent foreclosure and sale of property"; added to which the borrowings from James W. Stevens in the same year made a total of $1,372,000. On the 4th day of the ensuing year, $700,000 more of borrowed money was needed for the same purpose. At the time the loan of January 4, 1932, was made, the hotel company had out $22,000,000 of mortgage bonds of which $13,000,000 were a first lien, $3,000,000 a second lien, and $6,000,000 a third lien. At that time, the insurance company had $3,000,000 of the third-lien bonds. These facts did not, it is said, show, in the midst of a depression, an insolvent condition. However, it was gratuitous for the state to concede that utterly hopeless insolvency of the hotel company must be shown. The court itself seems uncertain that such a state of insolvency must be shown; for by iteration and re-iteration in the opinion the matter of insolvency is rested more on the concession rather than upon a holding of the court. Why concession of a point of law should govern does not appear.

Point 4 is crucial. In addition to the financial condition of the hotel company, let us look at the condition of the insurance company when the loan of January 4, 1932, was made. According to BEST'S REPORTS its surplus was shrinking. In 1929, it was $3,329,-108; in 1930, $1,545,764; in 1931, $1,397,734. In 1931, the lapse ratio rose abruptly over 1930. The earning ratio on assets fell in 1929 under 1928; in 1930 still lower; and 1931 even still lower. The expense ratio rose in 1930 over 1929; fell in 1931 under 1930 but was still markedly higher than in 1927, 1928, or 1929. Profits on investments fell from a gain of $961,830 in 1928 to a loss of $357,-367 in 1929, to a loss of $1,681,-335 in 1930. In 1931 profits on investments showed a gain of $1,-318,660 *including a gain of $1,359,-955 being the difference between book and market values during the year.* (About the same figures as the borrowings in the same year.) The cash premium income fell from $4,364,390 in 1929 to $4,228,-082 in 1930, to $4,016,745 in 1931. From December 31, 1929 to December 31, 1931, the net life reserve liability rose by a million dollars. These facts show that demands for cash on the insurance company were increasing and that cash income and margins of safety in surplus were decreasing. Such a condition, especially in the midst of a depression, would seem to indicate an imperative need for the management of the insurance company to conserve liquid assets. The loan of January 4, 1932, involved in effect the sale by the insurance company of a prime liquid asset in the form of $608,463 of liberty bonds and turning the proceeds into the unmistakably frozen asset of the hotel company's unsecured note.

The intent with which the loan of January 4, 1932, was made must be judged by the probable consequences of making it and of not making it as these were in prospect at the time. It seems clear that if the loan were not made, a receivership would result and the defendants would lose their personal control of the hotel company, and not unlikely, if the hotel company went into receivership, their personal control of the insurance company would be jeopardized. Whether or not it could then be foreseen that the insurance company would be in a worse situation with regard to its prior investments in the hotel company under a receivership than it was under the defendants' management, it is impossible to say. Its principal claim was a secured claim. Nor can one say with any certainty that it could then have been foreseen whether the insurance company would be better or worse situated by turning its liberty bonds into the hotel company's note. At the utmost, the contention that the purpose of making the loan was to protect the insurance company does not rise above being problematic and conjectural. In such doubtful circumstances, the defendants did not, in a time of emergency, conserve a liquid asset of the insurance company but turned it into a frozen asset, with the only certain prospect before them when they did so that, if they did not make the loan, they would lose their personal control of the hotel company, and, if they did make the loan, that control would be continued at least for a time. The continuance of that control was vital for them per-

sonally but whether it was for the good of the insurance company is a matter for any opinion. It seems somewhat strained to assert that this personal advantage did not have as much to do with their determining to make the loan as the intent to protect the insurance company, if it did not have much more to do with inducing their decision. The question was: Did this personal advantage under the circumstances show a fraudulent intent? The Illinois Supreme Court said "No."

On intent to defraud, the federal courts have, luckily, spoken in clearer and more heartening tones. What tests have they announced for determination whether or not such intent exist?

United States v. *Britton,* 107 U. S. 655 (1882), indicates personal advantage to the defendant; *United States* v. *Youtsey,* 91 Fed. 864 (C. C. Ky. 1898), that personal advantage need not be the sole purpose; *United States* v. *Breese,* 131 Fed. 915 (D. C. N. C. 1904), that an intent to defraud "is not inconsistent with a deep and abiding interest on the part of the accused in the prosperity of the bank and a sincere desire for its ultimate success and welfare"; and *Hargreaves* v. *United States,* 75 F. (2d) 68 (C. C. A. 9th, 1935), that "an officer who knowingly makes loans for his own private gain is guilty of misapplication." In *Olmstead* v. *United States,* 29 F. (2d) 239 (C. C. A. 9th, 1928), *cert. denied,* 279 U. S. 849 (1929), it is made clear that it is enough that a corporation in which the defendant is interested receive the loaned funds; and to the same effect are *Prettyman* v. *United States,* 180 Fed. 30 (C. C. A. 6th, 1910), and *United States* v. *Mulloney,* 8 F. Supp. 674 (D. C. Mass. 1934). The *Olmstead* case holds that hopeless insolvency of the corporation to which the loan is made need not be shown. In the *Mulloney* case the court said: "The evidence indicates the collateral is of substantial value; there is a possibility, though it seems to me a slight one, that the note will be paid. . . . These motives [those arising from the ownership of the corporation to which the loan was made by the defendant and an associate] led him to disregard the interest of his bank and to put upon it a risk far greater than was reasonable or defensible." In *Robinson* v. *United States,* 30 F. (2d) 25 (C. C. A. 6th, 1929), it was held that in the renewal of a loan, if security is taken inferior to that given up the transaction appears fraudulent. The *Olmstead* case also discusses disapprovingly change from liquid to frozen investments. Two recent cases must complete the picture. These are: *Morrissey* v. *United States,* 67 F. (2d) 267 (C. C. A. 9th 1933), *rehearing denied,* 70 F. (2d) 729 (C. C. A. 1934), *cert. denied,* 293 U. S. 566 (1934); and *House* v. *United States,* 78 F. (2d) 296 (C. C. A. 6th 1935), *cert. denied,* 296 U. S. 608 (1935). Both involve bank presidents of large affairs and both involve loans. In upholding the conviction in the *Morrissey* case, the court held that a reckless loan was evidence from which an intent to defraud could be found; further, the court pointed out that if the deals were successful the defendant stood to gain, if unsuccessful the bank stood to lose. In the *House* case, it was held that an intent to benefit a syndicate made the loans criminal misapplications instead of the always-contended-

for maladministration. In both cases, the aura of large affairs, so reminiscent of the *Stevens* case, was present; and the ever-ready defense of good intentions, *i.e.*, to sustain the bank's financial position, was urged strenuously.

The key to the somewhat surprising holding in the principal case is, perchance, revealed in the following words of the opinion: "It is but natural that the plaintiff in error and his co-defendants should desire to protect the Illinois Iife Insurance Company as well as the hotel company, since they were the principal owners of both." The court stated that the investment of the Stevens family in the insurance company was $18,000,000. This seems an error, since, before the surplus started falling, capital and surplus never equalled $8,000,000. The large figures in some way made an impression that the Stevens family owned the life insurance company and were doing what they desired with their own. Such was not the fact. They were dealing with other people's property. The "sacred" net life reserves alone amounted to over $29,000,000 out of admitted assets of around $40,000,000. The policyholders had made their investments in reliance upon the margin of safety afforded by the capital and surplus; without this inducement the Stevenses never could have had an insurance company. The assets belonged to the policyholders. This point was overlooked.

Under the rules announced in the federal cases, the making of a loan by the directors of a corporation which, as regards that corporation, is in nowise to be commended and which serves with certainty only the personal advantage of those directors by continuing their personal control of another financially involved corporation, would, doubtless, be placing a risk for personal gain on the first corporation "far greater than was reasonable or defensible." Hence, it would evidence an intent to defraud.

[For a discussion of the instant case, but confined to points of less general interest see (1935) 25 J. Crim. L., 941.]

ORVILL C. SNYDER.

Raymond Fellow, Northwestern University Law School, member of Ohio Bar.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION. — [California] Defendant, a police captain, appeared in response to a subpoena, but refused to be sworn as a witness in an investigation being conducted by a grand jury involving alleged corruption in the police department. Defendant contended that since he was a "potential defendant," he therefore had the constitutional right to refuse to be sworn as a witness before the grand jury. He was adjudged guilty of contempt by the trial court. On appeal, affirmed. *Held:* Defendant's status was that of a witness and he could not refuse to be sworn in, but could claim the privilege against self-incrimination *only* if the answer to a particular question would tend to incriminate him. *In Re Lemon,* 59 P. (2d) 213 (Cal. 1936).

The Fifth Amendment to the Federal Constitution provides that "no person shall be compelled in any criminal case to be a witness against himself." Although this applies only to the federal government, every state constitution, save

Iowa and New Jersey, contains a similar provision. The privilege against self-incrimination is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It "protects a mere witness as fully as it does one who is also a party defendant." *McCarthy* v. *Arndstein,* 266 U. S. 34, 40 (1924), *State* v. *Quarles,* 13 Ark. 307, 310 (1853). (The earlier cases were not uniform on this point. See Grant, *Self-Incrimination in the Modern American Law* (1931) 5 Temple L. Q. 368). Since the "object of the privilege was to insure that a person should not be compelled, when acting as a witness in any investigation to give testimony which might show that he himself had committed a crime" (*Counselman* v. *Hitchcock,* 142 U. S. 547, 562 (1892); *Boyd* v. *United States,* 116 U. S. 616, 638(1886)), it follows that "the protection extends to all manner of proceedings in which testimony is to be taken, whether litigious or not, and whether 'ex parte' or otherwise." 4 WIGMORE, EVIDENCE (2d ed. 1923) §2252. It therefore applies in investigations by a grand jury. *Counselman* v. *Hitchcock, supra; Hale* v. *Hinkel,* 201 U. S. 43 (1906); *Cullen* v. *Commonwealth,* 65 Va. 624 (1873).

The cases make a distinction between a defendant and a witness. By various state statutes the defendant is given a right to testify in his own behalf, or to remain silent; no presumption arises against him, and no comment upon his silence may be made by the prosecution. VA. CODE (Michie, 1936) §4778; *Price* v. *Commonwealth,* 77 Va. 393 (1883); CODE CR. PROC. N. Y. §393; *United States* v. *Kimball,* 117 Fed. 156 (C. C. S. D. N. Y. 1902). A statute providing that in a criminal case "defendant's failure to testify in his own behalf is hereby declared to be a proper subject of comment by the prosecuting attorney" was held unconstitutional as a violation of the self-incrimination provision. *State* v. *Wolfe,* 226 N. W. 116 (S. D. 1936) noted (1936) 27 J. Crim. Law 279. In *Boone v. People,* 148 Ill. 440, 36 N. E. 99 (1894), the court especially noted this distinction and quashed the indictment where, at the time of his examination before the grand jury, the prisoner was in jail charged with the very crime about which he was examined and for which he was indicted. The court held that the prisoner's rights were those of a party and not those of a witness. In *Mulloney* v. *United States,* 79 F. (2d) 566 (C. C. A. 1st, 1935), it was held that the mere calling of the defendant before the grand jury and requiring him to be sworn was not a violation of the constitutional privilege, where at the time no formal charge had been made against him, since under such circumstances he was merely called as a witness, not as a party.

However, as to witnesses, it is settled law that no right either constitutional or statutory is infringed by compelling their attendance and administering the oath. *United States* v. *Kimball, supra.* The reason for this is that the "constitutional privilege is personal to the witness, must be claimed by him, passed on by the court, and the claimant only becomes a witness by being duly sworn or affirmed as such." *State* v. *Comer,* 157 Ind. 611, 62 N. E. 452 (1902); *People* v. *Lauder,* 82 Mich. 109, 46 N. W. 956 (1890); *State* v. *Duncan,* 78 Vt. 364, 63 Atl.

225 (1906). The constitutional provision is therefore "an option of refusal and not a prohibition of inquiry." WIGMORE, *op. cit. supra* §2268.

The New York cases seem to indicate that a "prospective defendant" has the privilege of refusing to be sworn. Thus, if it appears at the time of the examination of the witness that a crime has been committed, and that he is in custody as the supposed criminal, he is not regarded as a mere witness, but as a party accused. *People* v. *Gillette,* 111 N. Y. S. 1333 (1908); *People* v. *Bermel,* 128 N. Y. S. 524 (1911). However, the language of these New York cases has not generally been adopted. *United States* v. *Price,* 163 Fed. 904 (C. C. S. D. N. Y. 1908); *State* v. *Cox,* 87 Ohio St. 313, 346, 101 N. E. 135 (1913); *Commonwealth* v. *Bolger,* 229 Pa. 597, 603, 79 Atl. 113 (1911); *United States* v. *Kimball, supra;* WIGMORE, *op. cit. supra* §2268.

The accused cannot be compelled to take the witness stand, *State* v. *Smith,* 57 Mont. 349, 188 Pac. 644 (1920), but if he elects to testify, he is held to have waived his constitutional privilege of remaining silent, and stands on the same footing as any other witness, not only as to the scope of his examination and admissibility of his testimony, but also as to the methods of examination and cross-examination. *State* v. *Allemand,* 153 La. 741, 96 So. 552 (1923); *People* v. *Morrison,* 195 N. Y. 116, 88 N. E. 21 (1909); *Williams* v. *Commonwealth,* 128 Va. 698, 104 S. E. 853 (1920); *Thaniel* v. *Commonwealth,* 132 Va. 795, 111 S. E. 259 (1922); *United States* v. *Hirsch,* 74 F. (2d) 215, *cert. denied,* 295 U. S. 739 (1934).

A witness may not arbitrarily refuse to answer. He must state the reasons for his non-disclosure. See Wartels and Pollitt, *A Critical Comment on the Privilege of Self-Incrimination* (1929) 18 Ky. L. J. 18. The danger must be real and appreciable, for the constitutional protection does not extend to remote possibilities out of the ordinary course of the law. *Heike* v. *United States,* 227 U. S. 131 (1913). If the question clearly calls for an incriminating answer, the witness need only plead the privilege, and not reveal his testimony to the court. A few jurisdictions hold that the witness also has the right to refuse where the question is doubtful. *People* v. *Spain,* 307 Ill. 283, 138 N. E. 614 (1923); *Overman* v. *State,* 194 Ind. 483, 143 N. E. 604 (1924); *Ex Parte Bommarito,* 270 Mich. 455, 259 N. W. 310 (1935). In *People* v. *Giablarenzi,* 268 N. Y. S. 488 (1924), the court went so far as to say that the witness is the sole judge as to whether an answer to a question propounded may tend to incriminate him. However, the majority view seems to be that the statement by the witness that his answer would incriminate him is not conclusive, but that the trial judge, and not the witness, is to determine whether the answer would in fact have a tendency to incriminate him. *Lockett* v. *State,* 145 Ark. 415, 224 S. W. 952 (1920); *In re Jennings,* 59 P. (2d) 702 (Ore. 1936); *Ex Parte Werner,* 46 R. I. 1, 124 Atl. 195 (1924); *Ex Parte Copeland,* 91 Tex. Cr. Rep. 549, 240 S. W. 314 (1922); *In Re Stewart,* 121 Wash. 429, 209 Pac. 849 (1922).

The instant case follows the majority rule, which is more sensible and more nearly the right which the constitutional provision was intended to secure. The rules which had their origin in the days of tyr-

rany and torture have been discarded in many instances, and those remaining should be given a broad interpretation in the light of existing conditions. The privileges of the individual citizen should be protected, but the rights of society should not be forgotten. The purpose of the self-incrimination provision in our laws is not to help the guilty escape, but to afford the innocent a protection which is deemed necessary. "The privilege is a shield and not an olive branch." *In Re Jennings, supra.* To permit a witness to refuse to be sworn because of his contention that he is a "potential defendant" would place an insurmountable obstacle in the path of justice.

MAX M. FLEISHER.

LOTTERIES—"BANK NIGHT."—[New Hampshire] The defendant upon information was charged with running a lottery wherein any person over the age of sixteen was allowed to register for a drawing, whether or not an admission ticket to defendant's theatre was purchased. The winner was required to be present within five minutes after the drawing of the number, and if he were outside the theatre he was allowed to enter without the purchase of an admission ticket in order to claim his prize. Upon transfer to the supreme court the information was quashed. *Held:* Indirect benefits to one who conducts the scheme cannot be regarded as payment within the meaning of the statute since to constitute a lottery the consideration must be something of value. *State* v. *Eames,* 183 Atl. 590 (N. H. 1936).

The lottery is one of the oldest known gambling devices and at common law was illegal only when it became a nuisance. 2 WHARTON, CRIMINAL LAW (12th ed. 1932) §1777. However, because of statutes regulating lotteries they have now become illegal *per se.* For a good discussion of lotteries and a compilation of statutes see C. Pickett, *Contests and the Lottery Laws* (1932) 45 Harv. L. Rev. 1196. See also *Cross* v. *People,* 18 Colo. 321, 32 Pac. 821 (1897).

Under the present state of authorities it is generally agreed that three elements are necessary to constitute a lottery: prize, chance, and consideration. It is upon the last element that most of the "bank night" cases turn, since the first two elements are generally admitted to be present. See Note (1936) 25 Calif. L. Rev. 112. The majority of courts, as in the instant case, require that the consideration be something of value. *State* v. *Hundling,* 264 N. W. 608 (Iowa, 1936) noted (1936) 10 So. Calif. L. Rev. 92; *People* v. *Cardas,* 28 P. (2d) 99 (Cal. 1936). Other courts have gone further in holding such schemes illegal, saying that increased patronage amounted to consideration (*Sproat-Temple Theatre Corp* v. *Colonial Enterprize Co.,* 267 N. W. 602 (Mich. 1936) noted (1936) 23 Va. L. Rev. 218; (1937) 21 Minn. L. Rev. 215); or that a part of the admission price was consideration (*People* v. *Miller,* 271 N. Y. 44, 2 N. E. (2d) 38 (1936) noted (1936) 14 N. Y. U. L. Q. Rev. 98; *Commonwealth* v. *Wall,* 3 N. E. (2d) 28 (Mass. 1936); *Society Theatre* v. *Seattle,* 118 Wash. 258, 203 Pac. 21 (1922); *Central States Theatre Corp.* v. *Patz,* 11 F. Supp. 566 (S. D. Iowa 1935); *cf. Yellowstone Kit* v. *Alabama,* 88 Ala. 196, 7 So. 388, 7 A. L. R. 599 (1889); or that mere attendance at

a drawing was sufficient consideration. *Maughs* v. *Porter,* 157 Va. 415, 161 S. E. 242 (1931) criticized in (1932) 80 U. of Pa. L. Rev. 744, and (1932) 18 Va. L. Rev. 465.

Where the participation is said to be free because of the giving away of a few free tickets the court has nevertheless held the scheme objectionable. *State* v. *Danz,* 140 Wash. 546, 250 Pac. 37 (1926); *Glover* v. *Malloska,* 238 Mich. 216, 213 N. W. 107, 52 A. L. R. 77 (1927); *Featherstone* v. *Independent Service Station Assoc.,* 10 S. W. (2d) 124 (Tex. Civ. App. 1928). This realistic attitude is preferable if the policy of the lottery law is to be given full effect. See *Thomas* v. *People,* 59 Ill. 160 (1871), where the court held illegal a scheme whereby the drawing for cash prizes was based on the number on an admission ticket to a music festival. The court there said it did not matter that the musical concerts might in fact be intrinsically worth the amount paid for the ticket, if further benefits were determinable by chance to be awarded to the holder of a ticket. This view has been adopted in many cases. Pickett, *supra,* at 1207.

The wide range of opinion and diversity of result on ostensibly the same fact situations is explainable in part on the various statutes involved. In the principal case the scheme would clearly have been within the statutory prohibition (N. H. PUB. LAWS (1926) c. 384, §1) if it had been shown that the participants had "to pay for such property, or for any share or chance therein." The court seemed to require that the participant *pay* something of a tangible nature in a *direct* manner, and not get the opportunity to win by reason of some other act, such as purchase of an admission ticket. The same was true in *State* v. *Crescent Amusement Co.,* 95 S. W. (2d) 210 (Tenn. 1936) noted (1936) 85 U. of Pa. L. Rev. 310, where the prohibiting statute (TENN. CODE ANN. (1934) §11275, required "money or valuable thing" to be wagered by the participant before the scheme became illegal. See *State* v. *Hundling, supra* holding "bank night" legal under IOWA CODE (1935) §13218. *Cf. Central States Theatre Corp.* v. *Patz, supra,* where a federal court in Iowa refused an injunction against interference with "bank night" on the ground that it was considered illegal.

Recently the Chicago Better Business Bureau warned the local theatre operators that they must discontinue "bank night" or legal action would be taken against them, pointing out that such a scheme had been termed illegal by a Municipal Court judge in a suit to collect winnings. See Chicago Daily Tribune, Nov. 28, 1936, at 1. The Attorney General also gave his opinion that it is illegal. Chicago Daily Tribune, Dec. 1, 1936, at 17. The Chief of Police has issued orders to stop the practice throughout the city (Chicago Daily Tribune, Dec. 24, 1936, at 1), and several arrests have already been made. Further developments have resulted in the issuing of an injunction preventing the interference by the police with a drawing which requires only the registering in a book in the lobby and not the purchase of an admission ticket. See Chicago Sunday Tribune, Dec. 27, 1936, at 1. Other theatre officials have indicated an intention to follow this plan. There is, however, some doubt as to whether

such a plan is legal under the Illinois statute.

The Illinois Constitution, art. 4, §27, prohibits lotteries and the statute provides that "Whoever . . . disposes of, or offers or attempts to dispose of any . . . property [or anything whatever] . . . with . . . [such] disposal . . . dependent upon or connected with any chance by . . . numbers . . . whereby such chance . . . is made an additional inducement to the disposal or sale of said property . . . shall, for each offense, be fined not exceeding $2,000." ILL. STATE BAR STATS. (1935) c. 38, §40. It is interesting to note that by statute all lottery prizes are forfeited to the state. *Id.* §406.

From this statutory provision it appears that consideration is not necessary since all that is needed is a disposal dependent on chance, though the Illinois court might take the view, as in *State* v. *Eames, State* v. *Hundling,* and *People* v. *Cardas, supra,* and require that consideration be something of value. However, in a very recent case, *State ex. rel. Beck* v. *Rox Kansas Theatre Co.,* 62 P. (2d) 929 (1936), the Supreme Court of Kansas, in a *quo warranto* proceeding to oust defendant theatre from operating "bank night" in the state, held the scheme illegal even though no registered person was required to buy a ticket in order to be entitled to the money. The court said that ". . . the indirect benefit derived by the defendant . . . in the way of increased gross receipts from paid admissions . . . is sufficient consideration coming directly or indirectly from those entitled to chances generally . . . ." The Kansas statute (KAN. REV. STAT. ANN. (1923) §21-1051) is practically identical with the Illinois provision. In any event, if a winner in Illinois were one who had registered when an admission ticket was necessary to be eligible in the drawing there would still be a violation of the statute despite the present type of plan. Cf. *Thomas* v. *People, supra.*

WM. T. MORGAN, JR.

EVIDENCE—ADMISSIBILITY OF DYING DECLARATIONS.—[Georgia] Defendant was convicted as an accomplice on a charge of murder. The trial court, without first deciding whether certain statements were dying declarations, left the determination of the primal question of admissibility entirely to the jury. On appeal, affirmed. *Held:* The preliminary evidence was sufficient to admit proof of statements of the deceased as dying declarations. *Daniel* v. *State,* 187 S. E. 36 (Ga. 1936).

A dying declaration to be admissible in evidence must be made under realization of death; it must be an utterance of a sane mind; and it must concern facts relating to the killing and the surrounding circumstances forming a part of the *res gestae.* Most courts hold that the judge must first make this determination before admitting it as evidence. *Soles* v. *State,* 97 Fla. 61, 119 So. 791 (1929); *Handley* v. *State,* 170 So. 748, 755 (Fla. 1936); *People* v. *Selknes,* 309 Ill. 113, 140 N. E. 852 (1923); *Strong* v. *Commonwealth,* 216 Ky. 98, 287 S. W. 235 (1926); *Lipscomb* v. *State,* 75 Miss. 559, 23 So. 210 (1897); *State* v. *Simon,* 50 Mo. 370 (1872); *State* v. *Yarrow,* 104 N. J. L. 512, 141 Atl. 85 (1928); *People* v. *Smith,* 104 N. Y. 491, 10 N. E. 873 (1887); *Morehead* v. *State,* 12 Okla. Cr. Rep. 62, 151 Pac. 1183 (1915); *Commonwealth* v. *Birriolo,* 197 Pa. 371, 47

Atl. 355 (1900); *Edmunson* v. *State,* 106 Tex. Cr. Rep. 34, 291 S. W. 231 (1927); *Klehn* v. *Territory,* 1 Wash. 584, 21 Pac. 31 (1889); *State* v. *Meek,* 107 W. Va. 324, 148 S. E. 208 (1929). See also Notes (1935) 14 N. C. L. Rev. 380; (1935) 17 Miss. L. J. 516. Following the admissibility by the judge, the jury will then proceed to give to the evidence the probative value which they think appropriate.

A conflicting rule is prevalent, however, in California, Georgia, Iowa, Massachusetts and Oregon. In those states, while the question of the dying declaration is primarily one for the judge, nevertheless, after the evidence has been admitted, it is not only the right but the duty of the jury to find whether a proper foundation has been laid. *People* v. *Thompson,* 145 Cal. 717, 79 Pac. 435 (1925); *People* v. *Hoffman,* 195 Cal. 205, 232 Pac. 974 (1925); *Campbell* v. *State,* 11 Ga. 353, 374 (1852); *Jackson* v. *State,* 56 Ga. 235 (1876); *Mitchell* v. *State,* 71 Ga. 128 (1883); *Bush* v. *State,* 109 Ga. 120, 34 S. E. 298 (1899); *Robinson* v. *State,* 130 Ga. 361, 60 S. E. 1005 (1907); *State* v. *Phillips,* 118 Iowa 660, 92 N. W. 876 (1902); *State* v. *Nowells,* 109 N. W. 1016 (Iowa 1906); *Commonwealth* v. *Brewer,* 164 Mass. 577, 582, 42 N. E. 92 (1895); *Commonwealth* v. *Polian,* 288 Mass. 494, 193 N. E. 68 (1934); *State* v. *Doris,* 51 Ore. 136, 94 Pac. 44 (1908). It has been suggested that this rule in Georgia is based upon a construction of the Georgia Code (1933) §81-1104, which provides that it is error for any judge to express or intimate his opinion to the jury as to what has or has not been proved, or as to the guilt of the accused. See Notes (1902) 56 L. R. A. 434; (1908) 16 L. R. A. (N. S.) 660; (1914) 52 L. R. A. (N. S.) 152. Under this minority rule both the functions of deciding admissibility and probative value of the evidence are turned over to the jury. In the instant case, the dissenting judge points out that the court went beyond its previous rule in submitting the primal question of admissibility entirely to the jury without foundation for the dying declaration, but, strangely enough, makes no reference to the well established majority rule.

To allow the jury to determine both the question of admissibility and probative value usurps the function of the judge. Since the purpose of exclusionary rules of evidence is to prevent confusion and passion of the jurors, effect is given to this purpose by keeping objectionable evidence entirely away from the jury rather than admitting it conditionally. Moreover, it would be difficult for an appellate court, when confronted with questions of admissibility, to determine how far the decision had been controlled by preliminary determinations and how far by ultimate ones. See McGuire and Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence* (1927) 40 Harv. L. Rev. 392; 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2550. There are further objections: ". . . It takes great faith to expect jurors to distinguish between bare assertion, arguments and objection of counsel on the one hand and to rely on the evidence as a basis for their verdict. To require them at the outset to separate questions of admissibility from ultimate questions, to apply to the former the testimony touching their foundations and to reach rulings thereon prior to a consideration of the merits is

to demand the practically impossible . . . ." Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact* (1929) 43 Harv. L. Rev. 165, 168.

The unwarranted abandonment of the orthodox rule was probably the result of an obscure notion in the mind of the trial judge as to the function of his office and from his attitude of extreme solicitude for the jury, caused by a vague acquiescence in a supposed popularity of that institution. Though the Georgia court has interpreted its statute to mean the allowance of foundations of admissibility to go to the jury, it is obviously a deviation from common sense and practicability.

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