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Criminal Law: Florida's Legal Lotteries

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may choose to rely on a similar instruction submitted by defendant. Should this distinction be decisive in determining whether the defendant is in jeopardy on a subsequent trial?

The obvious guilt of the accused, together with the unappealable error of the trial judge in directing a verdict on an immaterial variance, is perhaps the real basis of the instant holding. Since the defendant could have been validly convicted on the first trial, however, he was certainly in jeopardy at the subsequent trial. In view of the fact that constitutional rights are at stake, the use of estoppel to circumvent a jeopardy situation is dangerous precedent.

YOUNG J. SIMMONS

CRIMINAL LAW: FLORIDA'S LEGAL LOTTERIES

Opinion of the Attorney General 055-289 (Oct. 31, 1955)

A national soap company mailed to persons in Florida free entry blanks upon which the recipients wrote their names and addresses. The blanks were then returned to the soap company, which held a drawing and awarded prizes to those whose names were drawn. A Florida supermarket advertised that it would award duplicate prizes to the winners whose blanks had been stamped at the supermarket. Does either of these schemes violate Florida's lottery laws?[1] The Attorney General held that the manufacturer was not conducting a lottery but that the supermarket was.[2]

The opinion of the Attorney General listed three elements of a lottery: prize, chance, and consideration. There was no consideration moving to the soap manufacturer, the opinion said, but the financial benefits accruing to the operator of the supermarket in attracting a large group of participants to its store constituted consideration.

Decisions of the Florida Supreme Court indicate that neither of these schemes violates Florida's lottery laws. In addition to the three essential elements named by the Attorney General,[3] the Florida Supreme Court has named a fourth — widespread effect. This require-

[1]FLA. CONST. art. III, §23 (1885); FLA. STAT. §849.09 (1953).

[2]Op. Att'y Gen. Fla. 055-289 (Oct. 31, 1955).

[3]*E.g.*, Op. Att'y Gen. Fla. 055-251 (Sept. 29, 1955); REP. ATT'Y GEN. FLA. 660-75 (1954).

ment is unusual; apparently in no other state must a lottery be of widespread effect to violate the law,[4] and at least one state has expressly rejected such a requirement.[5]

The requirement of widespread effect was first set forth by the Florida Court in *Lee v. Miami*,[6] involving the constitutionality of the licensing of slot machines. It was argued that the licensing act[7] contravened the constitutional prohibition of lotteries. The Court held that slot machines are lotteries but not the type of lottery prohibited by the constitutional provision. The Court said[8] that the Constitution prohibited only a lottery that, in the words of the United States Supreme Court, "infests the whole community"[9] and that in this instance there was no showing that the community was infested. Mr. Justice Buford dissented[10] on the basis that the Court should take judicial notice that the whole state was infested.

The *Lee* case was expressly followed in other cases involving slot machines,[11] and the requirement of widespread effect was mentioned in cases involving the legality of "bank night" held by various theatres.[12] In upholding a conviction for selling tickets for "New York Bond," a lottery based on quotations of the New York Stock Exchange, the Court stated that it was common knowledge that all Hillsborough County was "infected" by the lottery.[13] The Court also upheld the conviction of a "Cuba" lottery operator in an opinion stating that the statute upon which the conviction was based did not define "lottery."[14] The opinion cited the *Lee* case but did not further define "lottery." In a later lottery case[15] the Court did not discuss widespread effect at all.

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[4]*E.g.*, Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579 (C.C.E.D.N.Y. 1910); Grimes v. State, 235 Ala. 192, 178 So. 73 (1937); State v. Dorau, 124 Conn. 160, 198 Atl. 573 (1938); Grant v. State, 54 Tex. Crim. 403, 112 S. W. 1068 (1908).

[5]State v. Coats, 158 Ore. 122, 129, 74 P.2d 1102, 1105 (1938) (dictum).

[6]121 Fla. 92, 163 So. 486 (1935).

[7]Fla. Laws 1935, c. 17257.

[8]121 Fla. 92, 103, 163 So. 486, 490 (1935).

[9]Phalen v. Virginia, 49 U.S. (8 How.) 163, 168 (1850).

[10]121 Fla. 92, 104, 163 So. 486, 491 (1935).

[11]Gibson v. Robinson, 127 Fla. 88, 172 So. 476 (1937); Hardison v. Coleman, 121 Fla. 892, 164 So. 520 (1935); Lee v. Beck, 121 Fla. 114, 163 So. 495 (1935).

[12]See Little River Theatre Corp. v. State *ex rel.* Hodge, 135 Fla. 854, 185 So. 855 (1939); Gulf Theatres Inc. v. State *ex rel.* Ferguson, 135 Fla. 850, 185 So. 862 (1939); Dorman v. Publix-Saenger-Sparks Theatres, Inc., 135 Fla. 284, 184 So. 886 (1938).

[13]Victor v. State, 141 Fla. 508, 193 So. 762 (1940).

[14]Jarrell v. State, 135 Fla. 736, 185 So. 873 (1939).

[15]Vestre v. State, 142 Fla. 366, 195 So. 151 (1940).

Florida's lottery statute has been amended since the *Lee* case was decided,[16] but it still does not contain a clear delineation of just what activity is prohibited. Since the Court has not overruled any of the above cases either expressly or by implication — and is not likely to do so in construing a criminal statute — it seems that the opinions of the Attorney General are in error in holding that chance, prize, and consideration are the only essential elements of an unlawful lottery. In view of the vagueness of the phrase "infests the whole community," a legislative enactment defining an unlawful lottery and expressly eliminating that unusual fourth element is desirable.

ROBERT P. GAINES

EMINENT DOMAIN: VIOLATION OF RESTRICTIVE COVENANTS WITHOUT COMPENSATION TO DOMINANT TENEMENT

Board of Public Instruction v. Bay Harbor Islands, 81 So.2d 637 (Fla. 1955)

Complainant incorporated town brought suit to enjoin a county board of public instruction from locating, erecting, or operating a public school building within town limits. The land that the board had contracted to purchase was subject to restrictions against the erection or maintenance of buildings other than residences, duplexes, apartments, and hotels. The circuit court granted a permanent injunction. On appeal, HELD, the restrictions do not vest in owners of lands in the subdivision a property right for which they must be compensated when a portion of the land is acquired for a public use inconsistent with the restrictions. Decree reversed.

The problem of whether restrictive covenants such as those in the instant case are to be treated as contract rights or as interests in land has been the subject of much controversy among courts and writers.[1] When lands are taken for a public use inconsistent with restrictive covenants the technical nature of the interest becomes all-important because of the constitutional questions involved. A few courts have

[16]Fla. Laws 1951, c. 26765.

[1]See Giddings, *Restrictions Upon the Use of Land,* 5 HARV. L. REV. 274 (1892); Pound, *The Progress of the Law,* 33 HARV. L. REV. 813 (1920); Stone, *The Equitable Rights and Liabilities of Strangers to a Contract,* 18 COLUM. L. REV. 291 (1918).