44 Phil. 278

[G. R. No. 19982. December 29, 1922]

"EL DEBATE," INC., PETITIONER, VS; JOSE TOPACIO, DIRECTOR OF POSTS, RESPONDENT.

D E C I S I O N

MALCOLM, J.:

On November 16, 1922, El Debate, a newspaper of the City of Manila, published a full page announcement which in translation reads as follows:

"P18,000.00

"HOW WIN THEM?

"READ THE FOLLOWING

"GRAND NUMBER CONTEST

"*El Debate* opens on this date two contests:

"The first contest is for the award of prizes for the nearest approximate guesses as to the total number of votes that will be cast for any of the winning candidates for Carnival Queen either in the provinces or in Manila. This contest will close at noon, December 23d.

"The second contest is for the award for the nearest approximate guesses as to the total number of votes that the Queen elect will receive for the Carnival queenship. This second contest will close at noon of the day in which the final canvass of the Carnival queen contest will take place.

"CONDITIONS TO PARTICIPATE IN THE CONTESTS

"Any subscriber to *El Debate* may participate in these two contests by paying in advance at least the amount of the subscription of a quarter under the following

conditions: The person who pays the price of a quarterly subscription shall be given a coupon for the first contest and another coupon for the second contest. He who pays for two quarters shall be given two coupons for the first contest and two for the second contest. He who pays for three quarters, that is to say, nine months, will receive three coupons for each of the said contests. And the one paying for a whole year will receive four coupons for each of the said contests. But payment is to be strictly in advance.

"EACH 'CALCULO' (ESTIMATE OR GUESS) MUST BE EXPLAINED

"Each *calculo* (estimate or guess) for any of the two contests must be accompanied by a brief statement or explanation containing the facts upon which it is based. This explanatory statement may be in English, or Spanish, or in any Philippine dialect. And in order that the participants may have some basis for making a correct estimate (*guess*), El Debate will publish every day information about the partial results that will be made from day to day at the Carnival offices, circulation of newspapers, etc. Estimates (guesses) without the corresponding explanatory note will not be considered.

"THE VERDICT

"The decision of the first as well as the second contest will be made immediately after the Carnival Headquarters has made public the result of the provincial elections and the final election, respectively. As soon as a certificate of the results in the provinces and of the final result is received in our office, we will proceed to select from the estimates (guesses), those that are the nearest in order to award the prize winners. The statements or explanations of the winning participants upon which their estimate (guess) was based will be published in *El Debate* for the satisfaction of the public. The checking of the winners will be made in the offices of *El Debate*, 2 De la Rama Bldg., Sta. Cruz, Manila.

"THE PRIZES

"There are 110 prizes of the total value of P6,000 for the first contest, and for the second contest there are 215 prizes, the total value of which is P12,000, that is, a

grand total of P18,000, based upon 20% of the value of 6,000 full subscriptions for one year, which is the present circulation of *El Debate*, and should this total value not be covered in the meantime, a proportional reduction of the number and of the amount of the prizes will be made.

"THE PRIZES FOR THE FIRST CONTEST

'First Prize……	P2,000.00
Second Prize……	1,000.00
Third Prize……	500.00
Two prizes of P200.00 each……	400.00
Five prizes of P100.00 each……	500.00
Ten prizes of P50.00 each……	500.00
Twenty prizes of P20.00 each……	400.00
Seventy prizes of P10.00 each……	700.00
110 prizes……	6,000.00

"THE PRIZES FOR THE SECOND CONTEST

'First Prize……	P4,000.00
Second Prize……	2,000.00
Third Prize……	1,000.00
Two prizes of P400.00 each……	800.00
Ten prizes of P100.00 each……	1,000.00

Twenty prizes of P50.00 each……	1,000.00
Forty prizes of P20.00 each……	800.00
140 prizes of P10.00 each……	1,400.00
215 prizes……	12,000.00

The Director of Posts, following the advice of the Attorney-General, refused to admit the issues of *El Debate*, containing the advertisement, to the mails, for the reason that it fell within the provisions of the Administrative Code concerning non-mailable matter. Not satisfied with the ruling of the Director of Posts, the publishers of *El Debate* have had recourse to these original proceedings in mandamus to settle the controversy between the newspaper and the Government.

The argument, while brilliant and informative to an unusually high degree, has covered a somewhat wider range than is essential. The issues will be more sharply defined and, correspondingly, our burden will be lightened, if all extraneous matter is thrown overboard.

The demurrer interposed by the Government serves to admit the facts pleaded in the complaint. The applicable law is, likewise, conceded, as is also the extent of power of the Director of Posts.

Section 1954 (*a*) of the Administrative Code includes, as absolutely non-mailable matter, "Written or printed matter in any form advertising, describing, or in any manner pertaining to, or conveying or purporting to convey any information concerning any lottery, gift enterprise or similar scheme depending in whole or in part upon lot or chance. * * *" As previously announced, the courts will not interfere with the decision of the Director of Posts as to what is, and what is not, mailable matter, unless clearly of opinion that it was wrong. (Sotto vs. Ruiz [1921], 41 Phil., 468; Reyes vs. Topacio, p. 207, *ante*.)

In the next place, the fact that an Attorney-General of the Philippines has held one way and another Attorney- General an opposite way (and to make the record complete, we would add that an Attorney-General in 1912 also rendered an opinion on the subject), with reference to carnival lotteries and newspaper guessing schemes; the fact that three Attorneys-General of the United States sustained the validity of guessing contests, only to be overruled by an Attorney-General subsequently in office; the fact that the older authorities in the United'

States refused to hold such contests illegal, while a contrary view is now entertained; and the fact that guessing contests are held not to be lotteries in England, Canada, and other foreign countries, is relatively unimportant. Passing by the historical phases, what we want to know is the actual state of the law, and if the doctrines announced in the authorities rest on a sound basis of reason.

In the next place, advancing one step further toward the issues, while countless definitions of lottery have been attempted, the authoritative one for this jurisdiction is that of the United States Supreme Court, in analogous cases having to do with the power of the United States Postmaster General, *viz*.: The term "lottery" extends to all schemes for the distribution of prizes by chance, such as policy playing, gift exhibitions, prize concerts, raffles at fairs, etc., and various forms of gambling. The three essential elements of a lottery are: First, consideration; second, prize; and third, chance. (Horner vs. United States [1892], 147 U. S., 449; Public Clearing House vs. Coyne [1903], 194 U. S., 497; U. S. vs. Filart and Singson [1915], 30 Phil., 80; U. S. vs. Olsen and Marker [1917], 36 Phil., 395; U. S. vs. Baguio [1919], 39 Phil., 962; Valhalla Hotel Construction Company vs. Carmona, p. 233, *ante*.)

Reverting then to the admitted facts, to the admitted law, and to the admitted judicial doctrines, the fundamental question is this: Was the decision of the Director of Posts, refusing the privileges of the mails to *El Debate*, clearly erroneous? And the subsidiary question is this: Is the guessing contest of *El Debate* a "lottery, gift enterprise, or similar scheme depending in whole or in part upon lot or chance" within the meaning of the law?

Counsel for the petitioner is the first to admit that the element of prize is present. We are, therefore, relieved from considering this point. But he maintains that the element of chance "has been reduced to a minimum and is practically nil, while the element of consideration is totally absent." Taking up, therefore, these two points in order, we finally arrive at our task.

What may be termed "the pure chance doctrine" is no longer upheld by the weight of authority in the United States, the element of chance is present even though it may be accompanied by an element of calculation or even of certainty. Counsel, therefore, practically admits himself out of court when he concedes that any element of chance is present, for let it be remembered that our law includes the phrase "depending in whole or in part upon lot or chance." (Public Clearing House vs. Coyne, supra; People *ex rel* Ellison vs. Lavin [1904], 179 N. Y,, 164; 66 L. R. A., 601 [estimate of the number of cigars on which a tax is paid during a specified month]; 25 Ops. Atty.-Gen. U. S., 286 [estimate of the total

number of paid admissions to the World's Fair at St. Louis, Missouri, from its opening to its close, and estimate of the popular vote cast for the winning candidate for President of the United States' in 1904] ; Stevens vs. Cincinnati Times-Star Company [1905], 72 Ohio St., 112; 106 A. S. R., 586 [guessing the number of votes that will be cast for a public officer at an election]; Waite vs. Press Publishing Association [1907], 155 Fed., 58; 12 Ann. Cas., 319 [estimate of the total popular votes to be cast in the election for the office of President of the United States].)

It is difficult to select one of the cases cited to elucidate the point under consideration, because each and everyone of them contains well considered opinions. It was thus the decision of the United States Supreme Court in Public Clearing House vs. Coyne which marked the turning point toward a stricter application of the law. It was the decision of the Court of Appeals of the State of New York in People *ex rel*. Ellison vs. Lavin, which included the best dissertation on the philosophical subject of what constitutes chance. While it was the decision of the Federal Court in Waite vs. Press Publishing Association which had a splendid resume of the situation, followed by all the encyclopedias. We choose the latter because the more recent and because the briefest.

As indicated, in the case of Waite vs. Press Publishing Association, the question before the court was whether a guessing contest inaugurated by a publishing association prior to an election, offering certain rewards or prizes to those persons who, prior to such election, submitted to the association the nearest correct estimates of the total number of votes cast for the office of President of the United States, and at the same time paid a certain sum as the subscription to a named periodical, was a contest of chance and a lottery, in violation of the laws of the United States and the laws of the State of Michigan. We quote:

> "Several years ago it was a doubtful question whether a so-called guessing contest was valid or not. Three attorneys-general of the United States (Miller, Griggs, and Knox) had in formal opinions sustained the validity of similar contests, and following them, Judge Thomas, in the case of United States vs. Rosenblum (121 Fed. Rep., 180), had refused to hold such a contest illegal, and had sustained a demurrer to an information against the president of a corporation then engaged in carrying on one. These rulings were in accordance with the trend of authorities in this country and England, the cases being cited in the opinion of Judge Thomas (121 Fed. Rep., 182). The exception to be noted was the case of Hudelson vs. State (94 Ind., 426; 48 Am. Rep., 171), in which the

Supreme Court of Indiana held that a contest dependent upon the guessing of the nearest to the number of beans contained in a glass globe was a lottery or gift enterprise. The cases which sustained the validity of the various guessing contests all held that, since the correct number either did or would exist, more or less skill and judgment could be exercised in guessing it, and therefore the estimate of the nearest number to the correct one could not properly be considered a matter of mere chance. On the other hand, in the Hudelson case the court, for the first time, drew attention to the fact that, while the number of beans in the glass globe would be fixed and definite, the ascertainment of that number could be nothing other than a mere matter of guessing, for it was impossible under the circumstances to ascertain the information upon which a correct estimate could alone be made. Subsequent to the decision in the Hudelson case came that of the Supreme Court of the United States in Public Clearing House vs. Coyne (194 U. S., 497; 24 U. S. Sup. Ct. Rep., 789; 48 U. S. [L. ed.], 1092; and People vs. Lavin, 179 N. Y., 164; 1 Ann. Cas., 165; 71 N. E. Rep., 753; 66 L. R. A., 601). In the Coyne case the court sustained a fraud order issued by the post-office department, directing the rejection of the mail of 'The Public Clearing House' on the ground that it was a fraudulent scheme and constituted a lottery. It is unnecessary to describe the details of the scheme; the facts will be found in the opinion. The court, speaking by Mr. Justice Brown, disposes of the matter by saying:

" 'The scheme lacks the elements of a legitimate business enterprise, and we think there was no error in holding it to be a lottery within the meaning of the statute.'

"This case was followed by Preferred Mercantile Co. vs. Hibbard (142 Fed. Rep., 877), decided by Judge Lowell.

"In the Lavin case (179 N. Y., 164; 1 Ann. Cas., 165; 71 N. E. Rep., 753; 66 L. R. A., 601), the scheme provided for the distribution of money among those purchasers of certain brands of cigars who should estimate most closely the number of cigars of all brands upon which the government would collect taxes during the month named. Discussing what constitutes chance, Judge Cullen, speaking for the court, says (page 168 of 179 N. Y., page 754 of 71 N. E. Rep.): "

'It is strictly and philosophically true in nature and reason that there is no such

thing as chance or accident; it being evident that these words do not signify anything really existing, anything that is truly an agent or cause of any event; but they signify merely men's ignorance of the real and immediate cause. But though nothing occurs in the world as a result of chance, the occurrence may be a matter of chance to the observer from his ignorance of antecedent causes or of the laws of their operation.'

"The court refers at some length to the Coyne Case (194 U. S., 497; 24 U. S. Sup. Ct. Rep., 789; 48 U. S. [L. ed.], 1092), and reaches the conclusion that the scheme before it falls far within the requisites of a lottery as defined in that case, under a statute very similar to the New York one. The two cases referred to, the Coyne case and the Lavin case, are cited by Attorney-General Moody in his opinion of Nov. 28, 1904 (25 Opinions of Attorneys-General, 286), as authority for the reversal of the opinions of his predecessors holding that 'guessing contests' were not within the prohibition of the federal statutes. The schemes presented to Attorney-General Moody for his decision were dependent, the one upon estimates of the total number of paid admissions to the World's Fair at St. Louis, and the other upon estimates of the total vote cast for President in 1904. The conclusions he reached were as follows:

" 'Conceding that the estimates in such a contest (the World's Fair contest) will be to some extent affected by intelligent calculation, the conclusion is, nevertheless, irresistible that it is largely a matter of chance which competitor will submit the nearest correct estimate. The estimates cannot be predicated upon natural and fixed laws, since the total number of admissions may be affected by many conditions over which the participants in this scheme have no control and cannot possibly foresee.' (Page 290.)

"And again:

" 'Neither of these contests is a "legitimate business enterprise." In each thousands invest small sums in the hope and expectation that luck will enable them to win large returns. A comparatively small percentage of the participants will realize their expectations, and thousands will get nothing. They are, in effect, lotteries, under the guise of "guessing contests," ' (Page 291.)

"The last case to which we care to call attention upon the general question is that

of Stevens vs. Cincinnati Times-Star Co. (72 Ohio St., 112; 73 N. E. Rep., 1058; 106 Am. St. Rep., 586). In this case the Supreme Court of Ohio passed upon a number of guessing contests carried on by newspapers in Ohio. They involved the total vote for a state officer at a coming state election. Respecting the nature of these contests, the court said (page 150 of 72 Ohio St., page 1061 of 7S N. E. Rep.) :

" 'It is true that one acquainted with the results of the elections of the state in previous years and educated in politics would have some advantages over one ignorant in those respects, yet it must be apparent even to a casual observer that the result would depend upon so many uncertain and unascertainable causes that the estimate of the most learned would be after all nothing more than a random and undecisive judgment. In the sense above indicated there is an element of skill, possibly certainty, involved, but it is clear that the controlling predominating element is mere chance. It was a chance as to what the total vote would be; it was equally a chance as to what the guesses of the other guessers would be.'

* * * * * * *

"We think, for the reasons given by the courts in the cases from which we have already quoted, the guessing contest before us came within the terms of the Michigan law and the mischief at which it was aimed. At the time the estimates on which this suit is based were submitted, the vote was yet to be cast; indeed, on June 6, 1904, when the Battrick estimate was sent in, one of the leading candidates for President had not yet been nominated. The number of persons who would be qualified to vote at the election, and the number who would cast votes which would be counted, were not only undetermined but impossible of ascertainment at the time the estimates were submitted. A thousand causes might, in one way or another, intervene to affect the total vote cast, so that at the best an estimate, if at all near the total vote cast, would be but a lucky guess. In so great a vote the necessary margin of chance would be so large that no element of skill or experience could operate to predict the result. While one skilled in national politics and conversant with existing conditions might make a closer estimate than one wholly ignorant, yet, after all, the successful persons in such a

> contest would be but makers of lucky guesses in which skill and judgment could play no effective part."

Conceding that the views of the American decisions are sound,—and upon this point they are so full and clear that little remains to be said; conceding that the estimates in the contest of El Debate will, to some extent, and possibly to a great extent, be effected by intelligent calculation, as has been ingeniously argued by counsel for the petitioner, the conclusion is nevertheless irresistible that the scheme depends in part upon chance. The estimates cannot be predicated upon natural and fixed laws, since the total number of votes that will be cast for the winning candidates for carnival queen may be affected by many conditions, over which the participants in this scheme have no control and cannot possibly foresee. We think it is perfectly clear that the dominating and controlling factor in the awarding of the prizes is chance.

In respect to the last element of consideration, the law does not condemn the gratuitous distribution of property by chance, if no consideration is derived directly or indirectly from the party receiving the chance, but does condemn as criminal, schemes in which a valuable consideration of some kind is paid directly or indirectly for the chance to draw a prize. But what may appear on its face to be a gratuitous distribution of property by chance, has often been held to be merely a device to evade the law.

Predicated on these legal assumptions, it is argued here with much force that there is no consideration, for the reason that a subscriber to *El Debate* receives the full value of his money by receiving the paper every day for the number of months that he subscribes. The position is tenable, as respects those persons who would subscribe to the paper regardless of the inducement to win a prize, for as to them there is no consideration. The position is fallacious, as to other persons who subscribe merely to win a prize (and it is to such persons that the scheme is directed), for as to them it means the payment of a sum of money for the consideration of participating in a lottery. Moreover, the subscribers do not all receive the same amount, for there are a few of them who will receive more than the others, and more, too, than the value paid for their subscriptions, through the chance of a drawing. (17 R. C. L., 1222; U. S. vs. Wallis [1893], 58 Fed., 942; State vs. Mumford [1881], 73 Mo., 647.)

The general rule, therefore, is that guessing competitions or contests are lotteries within the statutes prohibiting lotteries. Indeed, it is very difficult, if not impossible, for the most ingenious and subtle mind to devise any scheme or plan short of a gratuitous distribution of

property, which will not be held to be in violation of the Gambling Law, and repugnant to the Postal Law. It is for the courts to look beyond the fair exterior, to the substance, in order to unmask the real element and the pernicious tendencies which the law is seeking to prevent.

The purpose of *El Debate* in devising its advertising scheme was to augment its circulation and thus to increase the number of newspaper readers in the Philippines—which is commendable. But the advertisement carries along with it a lottery scheme—which is not commendable.

The evils to society arising from the encouragement of the gambling spirit have been recognized here and elsewhere. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infest the whole community; they enter every dwelling; they reach every class; they prey upon the hard-earned wages of the poor; they plunder the ignorant and simple. Punitive and condemnatory laws must, therefore, be interpreted and enforced by the courts in a way calculated to secure the object sought. (U. S. vs. Salaveria [1918], 39 Phil., 102; Phalen vs. Commonwealth of Virginia [1850], 8 How., 161; Stone vs. Mississippi [1880], 101 U. S., 814.)

Open the door of chance but a little, for one scheme, however ingeniously and meritoriously conceived, to pass through, and soon the whole country will be flooded with lotteries.

Meeting, therefore, the issues in the case, we rule that the Director of Posts acted advisedly in refusing the use of the mails for the issue of El Debate which contained the announcement of its guessing contest, and that said contest is a lottery, or gift enterprise depending in part upon lot or chance, within the meaning of the Postal Law. The demurrer interposed by the Attorney-General is sustained, and unless the petitioner shall, within five days, so amend the complaint as to state a cause of action, the case shall be dismissed, with costs. So ordered.

Araullo, C. J., Avanceña, Villamor, Ostrand, Johns, and *Romualdez, JJ.,* concur.

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