conclusion, saying that any statute which required surrender of gold for anything less than just compensation[16] would be "clearly void and without effect." Just compensation, it said, is the true value of the grains of gold, which is $10,158.75, due to governmental reduction in the number of grains of gold to the dollar, and not a "fictitious, artificial value" set by the Treasury. But, if the lessor were paid in gold, he would be required to turn it over to the Treasury[17] for the value set by the Treasury[18] for gold circulating in non-compliance with its orders. The price that the lessor would obtain for 139,320 grains of gold, under present rates, would be not $10,158.75, but $6,000.[19] This would seem to be the "true" value of the gold and it furthermore corresponds to the alternative sum which the parties mentioned in the lease. If the lessor were allowed more, there would appear to be "unjust enrichment"[20] by reason of the governmental regulations.

S. H. W.

LOTTERIES—MOVIE "BANK NIGHTS"—OPINION OF ATTORNEY GENERAL—[Missouri].—Business men have long recognized that any sales promotion scheme which embodies chance as an element is almost certain of success. Chance as the main theme of promotion schemes has had an endless number of variations. The latest variation to be challenged is known as "Bank Night." Under this plan a theater operator advertises a prize to be awarded each week. A registration book is set up at or near the theater in which anyone, without charge, may write his name and address opposite a number. On the advertised night, at a specified hour, one number is drawn from a

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case came within the Joint Resolution and was hence dischargable "dollar for dollar." 83 F. (2d) 398 (C. C. A. 1, 1936). The Supreme Court has granted certiorari in this case. 4 U. S. Law Week 144 (1936).

16. This involves interpretation of Article V of the United States Constitution. The validity of the Treasury's price for gold circulating despite legislation demanding its surrender was not challenged in the instant case and has not as yet been ruled on. Just compensation for gold surrendered to the Treasury would appear to be currency having a purchasing power equivalent to that of the gold before its possession was ruled illegal. This would involve a consideration of the effect of devaluation upon the price structure. The difficulty of determining the exact amount of price increase caused by devaluation and then of determining just what loss would be borne by one who had turned in his gold because of Treasury orders is readily seen. See Perry v. U. S., 294 U. S. 330, 354-358. The argument also suggests itself that gold lawfully in use has a market value different from the official price of newly-mined gold and from the Treasury price of gold circulating in non-compliance with regulations.

17. See statutes and Executive Order cited in note 4, supra. Also, Orders of the Secretary of the Treasury of Dec. 28, 1933, Jan. 15, 1934, Jan. 17, 1934, relating to the delivery of gold.

18. Instructions sent by the Secretary of the Treasury on Jan. 17, 1934, concerning gold wrongfully withheld.

19. This figure is arrived at as follows: Divide 139,320 by 480, the number of grains in a troy ounce of gold, and multiply by $20.67, the price set by the Treasury for gold circulating in non-compliance with its orders under Order of Jan. 17, 1934.

20. See Perry v. U. S. 294 U. S. 330, 354-358.

receptacle containing the numbers opposite which names have been placed on the register. The number and name of the person winning is announced from the stage, in the lobby and at the entrance of the theater. That person is required to present himself within a time limit varying from two and one-half minutes to five minutes. If no one claims the prize, it is allowed to accumulate from week to week.

Missouri has not yet been called upon to decide the legality of "Bank Night," but the Attorney General of Missouri[1] has given his opinion that it is illegal. The promoters of the scheme admit that two of the elements of a lottery are present: a prize and a chance, but contend that the element of consideration is lacking. The Attorney General's opinion points out that the Missouri Constitution[2] denies the General Assembly power to authorize "lotteries" or "gift enterprises" and directs that it prohibit them as well as "any scheme in the nature of a lottery." R. S. Mo. 1929, sec. 4314 passed in pursuance of this constitutional mandate gives no definitions or limitations as to the essential elements of a lottery. These elements were enumerated in *State v. Emerson*[3] as being consideration, prize and chance. The opinion approves the dicta of the court in *Brooklyn Daily Eagle v. Voorhies*[4] which pointed out that consideration does not mean that pay shall be directly given for a right to compete, but that it is sufficient that the person entering the competition shall *do something* or give up some right. It further approves the holding of *Featherstone v. Independent Service Station*[5] that it was a lottery to give away tickets to customers and non-customers, the consideration consisting of increased trade for the service station operator. Likewise approved was *State v. Mumford*[6] which held that the price of a subscription to a newspaper (the regular price) entitled the subscriber to a ticket as well as a copy of the paper and that since many subscribers doubtless were induced to take the paper because they would get a ticket which might bring some valuable prize, the scheme was a lottery. The Opinion points out that although a person may not be required to purchase a ticket of admission under the "Bank Night" plan, yet to hear the number announced at the entrance of the theater he has to be present in that vicinity. This, the Attorney General contends, is sufficient consideration, it being

1. Opinion, Attorney General of Missouri, "Gambling: 'Bank Night'" (March 27, 1936).

2. Missouri Constitution, Art. XIV, sec. 10 (1875). Petit v. Bouju, 1 Mo. 64 (1821), in the absence of a statute prohibiting lotteries, lottery transactions and contracts connected with the operation of lotteries are valid and may be enforced. Prior to the Constitution of 1865 there was nothing in the law of Missouri prohibiting the legislature from establishing lotteries, which it did for the purpose of fostering the building of railroads, of aiding charites and of provding funds for buildings: Morrow v. State, 12 Mo. 297 (1848).

3. 1 S. W. (2d) 109, 318 Mo. 633 (1927); State ex rel. Home Planners' Depository v. Hughes, 299 Mo. 529, 253 S. W. 229 (1923), under Art. XIV, sec. 10 of the Missouri Constitution the term "lottery" includes every device whereby anything of value is allotted by chance for a consideration.

4. 181 Fed. 579 (C. C. 1910).

5. 10 S. W. (2d) 124 (Texas Civ. App., 1928).

6. 73 Mo. 265 (1881).

"immaterial as to how much consideration he pays, whether it be 1c or $100 or whether he travels across the street or one hundred miles in order to be present at the drawing. . . ."[7]

The courts which have passed on the legality of "Bank Nights"[8] are divided as to whether the element of chance is present. Of seven recent decisions involving "Bank Night," New Hampshire,[9] Iowa[10] and Tennessee[11] have held it legal. California[12] held legal a scheme which matches it in all details save the character of the prize. Michigan,[13] Massachusetts,[14] New York[15] and the Federal District Court[16] for Iowa have held it to be a lottery. Also a sister-scheme called "Country Store Night" has been adjudged a lottery in Washington.[17]

Those courts which have held the device legal have done so largely on the ground that no consideration passed,[18] aided by the particular wording of the state lottery statutes.[19] Such consideration as signing the registration book, appearance at the theater within five minutes to receive the prize, benefit to the operator from advertising and increased patronage were rejected.

The courts which look upon "Bank Night" as a lottery are influenced by a pratical view of its working and an adoption of the theory of consideration taken in the case of *Maughs v. Porter*.[20] The Virginia court in that case held that the plaintiff by the act of attending an auction of real estate lots at which an attendance prize was offered gave sufficient consideration to uphold a contract between her and the promoter. The Michigan,[21] Washington[22] and Federal[23] courts used the test of whether the scheme would

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7. Supra, note 6.
8. State v. Eames, 183 Atl. 590 (N. H., 1936), patented by Affiliated Enterprises, Inc.
9. State v. Eames, 183 Atl. 590 (N. H., 1936).
10. State v. Hundling, 264 N. W. 608 (Iowa, 1936).
11. State ex rel. v. Crescent Amusement Co., 95 S. W. (2d) 310 (Tenn. 1936).
12. People v. Cardas, 137 Cal. App. (Supp.) 788, 28 P. (2d) 99 (1936).
13. Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, Inc., 267 N. W. 602 (Mich., 1936).
14. Commonwealth v. Wall, 3 N. E. (2d) 28 (Mass., 1936).
15. People v. Miller, 271 N. Y. 44, 2 N. E. (2d) 38 (1936).
16. Central States Theatre Corp. v. Patz, 11 F. Supp. 566 (D. C. S. D. Iowa, 1935).
17. State v. Danz, 250 Pac. 37 (Wash., 1926).
18. State v. Eames, 183 Atl. 590 (N. H. 1936), the state's theory (not upheld), was that any consideration sufficient to support a contract at common law is sufficient to make illegal a scheme fulfilling the other requirements of a lottery.
19. Public Laws, N. H., 1926, c. 384, sec. 1; Tennessee Code (1932), sec. 9324, sec. 9325; Penal Code, California, 1931, sec. 319.
20. 161 S. E. 242 (Va. 1931); 1 Williston, *Contracts* (1924 Ed.) 232, Sec. 112, says in effect that a short walk may constitute consideration.
21. Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprises, Inc., 267 N. W. 602 (Mich. 1936).
22. State v. Danz, 250 Pac. 37 (Wash. 1926). See: Society Theatre v. Seattle, 118 Wash. 258, 203 Pac. 21 (1922); Willis v. Young & Stembridge, 1 K. B. 448 (1907).
23. Central States Theatre Corp. v. Patz, 11 F. Supp. 566 (Iowa 1935).

attract patrons who would not otherwise have come. They concluded on this basis that a ticket of admission was in fact part payment for a chance and hence consideration was present.

This view of consideration has been criticized[24] on the ground that it does not follow that a consideration sufficient to support a contract is necessarily the kind of consideration contemplated by the statutes prohibiting lotteries. In popular conception a lottery presupposes a pecuniary or valuable consideration for the chance to participate in the contest.[25] Did the framers of the Missouri Constitution have anything more technical in mind when they passed the lottery provision? Apparently they did for "gift enterprises"[26] are included in the prohibition and such schemes do not need consideration to make them illegal.

E. C.

REMOVAL OF CAUSES—FRAUDULENT JOINDER — PLEADING — [Federal]. — The plaintiff brought a tort action in a state court to recover damages for personal injuries sustained as the result of the sale to him of a defectively constructed automobile. Suit was brought against the resident dealer and non-resident manufacturer jointly. The latter sought to remove the case to the federal court on the ground of diversity of citizenship and separable controversy. *Held;* where a plaintiff states a case of joint tort liability there is no separable controversy, even though plaintiff might have sued resident and non-resident defendants separately, unless claim of joint liability is obviously frivolous and unsound or facts so clearly false as to disclose a fraudulent device to prevent removal to federal court.[1]

While a few federal cases have held otherwise,[2] it seems to be well settled that a separable controversy does not exist where the plaintiff states a case of joint tort liability.[3] In such cases, the federal court, on petition to remove, will not try the essential merits of the case to determine whether the joinder is proper.[4] The plaintiff has a right to elect his own method of attack, and if his joinder is improper he will fail in the state court.[5] But the non-resident defendant can have the case removed on the ground of a separable controversy by showing that the joinder was fraudulently made

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24. Comment, 80 U. of Pa. L. Rev. 744 (1932); Comment, 18 Va. L. Rev. 465, (1932).

25. Webster's International Dictionary.

26. Missouri Constitution, Art. XIV, sec. 10 (1875), R. S. Mo. 1929, sec. 4314.

1. Siler v. Morgan Motor Co. et al., 15 F. Supp. 468 (D. C. E. D. Ky., 1936).

2. Warax v. Cincinnati etc. Ry. Co., 72 Fed. 637 (C. C., D. Ky., 1896).

3. Louisville & Nashville Ry. Co. v. Wangelin, 132 U. S. 599, 10 S. Ct. 203, 33 L. ed. 473 (1889); Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 92, 18 S. Ct. 264, 42 L. ed. 673 (1897); Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206, 26 S. Ct. 161, 50 L. ed. 441 (1905).

4. Doughtery v. Yazoo Ry. Co., 122 Fed. 205 (C. C. A. 5, 1903).

5. See Shane v. Butte Electric Ry. Co., 150 Fed. 801, 808 (C. C., D. Mont., 1906).