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THE HINES TRIAL—ADMISSIBILITY OF EVIDENCE OF PAST CRIMES.—[New York] The recent indictment under which James J. Hines of New York City was brought to trial contained one count of conspiring to commit certain felonies all violating the penal laws of the State of New York, and 12 counts charging the commission of the substantive felonies or crimes of contriving, proposing and drawing a lottery, or assisting in contriving, proposing and drawing a lottery. After the state had taken up four weeks in the presentation of its case against the defendant, and during the cross-examination of Lyon Boston, the first witness for the defense, District Attorney Thomas E. Dewey asked the question which became the basis for a motion for mistrial by defense counsel, Lloyd Paul Stryker. The motion was granted by Supreme Court Justice Ferdinand Pecora. (N. Y. Times, Sept. 11, 1938, p. 47, col. 3.)

To better understand the contentions *pro* and *con* concerning this ruling, it is necessary to go into the background of the witness and the questions that were asked of him on both direct and cross-examination. Boston was a former assistant district attorney under William Copeland Dodge, and in that capacity had conducted a previous investigation of the policy racket. Almost all of this investigation was made before the Grand Jury for March, 1935. (N. Y. Times, Sept. 11, 1938, p. 44, col. 5.) On direct examination Stryker asked the witness the general question "Just tell the entire story of that March grand jury. I think it has been referred to quite generally as the runaway grand jury." Boston replied that that was correct and Stryker continued, "Tell us your entire connection with that, your entire association with Mr. Wahl [another assistant district attorney assisting in the investigation], all that you recall about that. Would that give you an opportunity to tell me?" In answer Boston testified that on the instructions of Mr. Dodge he had investigated Hines' connection with the policy racket and also with the slot machine racket and that he had not found evidence sufficient to indict him. He further testified, in answer to a leading question by Stryker, that the laymen on the grand jury desired to indict Hines on no legal evidence at all, and that when he advised them such action

was impossible under the law, a controversy arose which eventually resulted in the grand jury's request for discharge. Stryker's reason for delving into this past investigation was to build up the defense of "persecution." By pointing out to the jury that Hines had once been investigated for the same crime and that no evidence had been found against him, he was drawing out the inference that the defendant was a victim of Dewey's ambition. On cross-examination Dewey attempted to bring out that there was other evidence before that grand jury concerning Hines' activities and that this other evidence might have been a substantial factor in the desire to indict him. In the course of his examination he asked the question, "Don't you remember any testimony about Hines and the poultry racket there by Morgan?" It was at this point that Stryker moved for a mistrial on the ground that Dewey had made an intentional prejudicial statement, not predicated on any evidence in the case, for the sole purpose of prejudicing the defendant on trial and as such it was reversible error on appeal. (N. Y. Times, Sept. 11, 1938, p. 47, col. 3.)

In support of his question Dewey contended first, that Stryker's general question to the witness opened the door for his inquiry into Hines' connection with the poultry racket; second, he had a right to ask the question to impeach the credibility of a witness; and third, that one question could not prejudice the defendant in the light of the 4600 pages of testimony that had been given. (N. Y. Times, Sept. 12, 1938.) Stryker, on the other hand, claimed that nothing in the direct examination opened the door for Dewey's question; that his broad question—and this in spite of the fact that the witness on direct had linked Hines with the slot machine racket—dealt entirely with the policy racket; and, although there is nothing in the report of the case to show this, that the court had warned Dewey to confine himself to the policy racket. (N. Y. Times, Sept. 12, 1938.)

It cannot be conceived that Dewey asked the question merely to show the bad character of Hines. There are too many other points upon which it might be considered relevant. He was completing a story which the defense on direct had left unfinished. He was impeaching the credibility of a witness. He was attempting to bring out that Dodge, then district attorney, was protecting Hines before the grand jury. This, he maintains, was a vital issue of the trial, and therefore a proper concern of the prosecution in his cross-examination of the witness who was in a position to know what occurred before the grand jury. It is apparent that Dewey was referring to the testimony relating to the controversy between the district attorney's office and the grand jury, which resulted in the grand jury's request for discharge. The defense claimed there was insufficient evidence to indict Hines and that the grand jury requested its discharge because the district attorney refused to indict on such evidence. Dewey claimed there was sufficient evidence to indict Hines, but that the grand jury was driven to its request by the district attorney's refusal to co-operate with them. While relevant for any of these purposes the question is inadmissible for any of them on the basis of the decision in *People* v. *Molineux*, 168 N. Y. 264, 61 N. E. 286

(1901). That rule is substantially followed by the courts of New York and says, in effect, that on a criminal trial the state cannot prove any crime against the defendant not alleged in the indictment as aiding proof that he is guilty of the crime charged unless such other crime tends to prove motive, intent, absence of mistake or accident, identity of the person charged, or a common scheme or plan embracing the commission of two or more crimes so closely related that proof of one tends to establish the other. Seemingly Dewey was attempting to show that Hines, by virtue of his political position, had a scheme or plan to exact tribute from all the rackets of New York City. The question was not only relevant but admissible under this rule.

Stryker, in going into the investigation of Hines before that March grand jury was showing that the witness had made a fair, thorough, unfettered investigation and that Hines' hands were clean. An inference can be drawn from the questions on direct that Stryker was going even beyond this, that without the use of direct questions he was trying to prove Hines' good character by this witness. If such was the case, and Boston was actually a character witness for the defense, Dewey would have been justified in asking him concerning past criminal acts of the defendant. *People* v. *Jeffery,* 31 N. Y. 267 (1894); *People* v. *Callahan,* 130 N. Y. 1041 (1911).

In his opinion Justice Pecora refuses to consider Dewey's contentions and assumes that the question was prejudicial. Comparing the question to "one drop of poison" in the human blood stream he cites numerous cases to support him. These cases can be readily distinguished from the present one. The two cases upon which he places the most reliance are *People* v. *Robinson,* 273 N. Y. 438, 8 N. E. (2d) 25 (1937) and *People* v. *Posner,* 273 N. Y. 184, 7 N. E. (2d) 93 (1937). In the former the decision of the trial court was reversed *not* on the unanswered questions of the district attorney, *but on the prejudicial answer of the witness.* In the latter the district attorney insinuated by questions to which answers were received that the defendant had been guilty of improper conduct. By these questions, which did not allow the telling of a complete story, the district attorney built up a case against the defendant, and it was on the basis of the *series of questions* and *all the answers* that the trial court was reversed. In the other cases cited by the Justice like situations are found, either the question climaxed a series of insinuations by the district attorney, or the witness was allowed to answer. In the present case neither did the witness answer nor was there a series of insinuations on the part of Dewey. Where a single improper question has been asked and not answered the great weight of authority supports the proposition that it is not reversible error. *U. S.* v. *Frankel* (C. C. A. 2nd, 1933), 65 F. (2d) 285; *State* v. *Kwan,* 25 P. (2d) 104, 174 Wash. 528 (1933); *People* v. *Gray,* 218 P. 49, 63 Cal. App. 59 (1923). The New York court has laid down an even broader rule in *People* v. *Pacelli,* 251 N. Y. 66, 167 N. E. 173 (1929). In that case the defendant was on trial for keeping a disorderly house. A witness testified the defendant had admitted to him and to the district attorney that she had been previously

convicted on the same charge. The district attorney in summation twice referred to the admission. The trial judge instructed the jury to disregard the admission. The Court of Appeals held that an admonition to the jury by the trial judge to disregard the admission as no evidence in the case would cure the harm and it would not be held reversible error.

On the basis of the peculiarities of this situation it seems clear to us that Justice Pecora abused his discretion in granting a new trial. By refusing to rule on the motion at the time it was made and reserving his opinion until a later day he placed himself in a more difficult position than was necessary, for he gave the jury time to impress the question firmly on its mind. In spite of this it is extremely doubtful if this is "one drop of poison," at least a strong enough drop to do the damage claimed. Not only were there 4600 pages of testimony on the state's side of the case, but the defense itself had connected Hines with still another crime, the slot machine racket. In view of this the question seems completely harmless. If Hines was innocent he had nothing to fear from that one question, and he had a right to have that innocence declared by the jury. If they found him guilty he still had his right of appeal to correct the error, if error it was.

The trial had been in progress for four weeks. The Justice was ever alert to protect the defendant at all times. It is difficult, even impossible, for a prosecutor to conduct a trial for that long a time without error, and if he did make a slip there was this jury to consider. It had been impanelled under the laws of New York which make available for jury service persons of the highest type. N. Y. Stat. (Baldwin, 1938), Jud. Law, arts. 16, 17, 18, 18b. It, above all other juries, should have been expected to weigh the evidence for what it was worth. Noted far and wide as the "blue ribbon jury" it was composed of men from the upper walks of life whose intelligence was high, whose education was far above average; yet this aspect of the case did not seem to occur to Justice Pecora.

In the light of all the circumstances it is apparent that Justice Pecora, should have ruled otherwise. A great deal of money and time had been spent on behalf of both the state and the defense. Had he ruled otherwise he would have been supported not only by the law, but by common sense, and justice would have been done not only the people of New York, but the defendant as well.

PETER WILSON.

ROBBERY—RETAKING MONEY LOST AT GAMBLING.—[California] Defendant David Rosen was convicted of robbery for having forcibly retaken $198 from one Whitcomb, keeper of the funds in a gambling house where defendant had lost the sum retaken. On appeal the California Supreme Court reversed the conviction. *People* v. *Rosen*, 78 P. (2d) 727 (Cal., 1938). Thus is poised the question of whether it is robbery for a person to forcibly retake from another money he has lost at gambling.

Although it is not clear whether Whitcomb was the proprietor of Miller's Tango Parlor, at least he was an agent in charge of winnings and therefore may, for the purposes of our inquiry, be con-

sidered as standing in the same position as the winner. Furthermore it is of no import that Whitcomb may not have actually owned the money, for one having a right of possession against a wrongdoer is, so far as the latter is concerned, the "owner." *Ex parte* Duel, 112 Cal. App. 24, 296 Pac. 91 (1931) citing *People* v. *Edwards,* 72 Cal. App. 102, 236 Pac. 944 (1925).

Robbery as defined in the California Penal Code, §211, comparable to the common law and to the statutes of other jurisdictions, is "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

In the instant case the only controversial issue is that of felonious intent or *animus furandi*—viz., intent to appropriate the money. *Johnson* v. *State,* 24 Okla. Cr. Rep. 326, 218 Pac. 179 (1923).

It is well settled that one cannot be guilty of robbery by taking from the possession of another his own specific property or property which he *bona fide* believes to be his own. This is true even though the taking is accomplished under circumstances which would amount to robbery if the property belonged to the person from whom taken. 54 C. J. 1028; 23 R. C. L. 1142; *Brown* v. *State,* 28 Ark. 126 (1873); *Crawford* v. *State,* 90 Ga. 701, 17 S. E. 628 (1893); *Triplett* v. *Com.,* 122 Ky. 35, 91 S. W. 281 (1906); *People* v. *Hughes,* 11 Utah 100, 39 Pac. 492 (1895); *State* v. *Steele,* 150 Wash. 466, 273 Pac. 742 (1929); *Butts* v. *Com.,* 145 Va. 800, 133 S. E. 764, 768 (1926). The reason for this rule is that in such cases there cannot exist the requirement of an intent to steal. *People* v. *Sheasbey, supra.*

Therefore the question resolves into the credibility of the defendant-witness, and it is a question for the jury whether a particular defendant had such a *bona fide* belief. *Johnson* v. *State,* 24 Okla. Cr. Rep. 326, 218 Pac. 179 (1923). Accordingly the decision reached in the instant case appears sound since no prejudicial instruction was given the jury upon that point.

Looking more broadly at the question, however, the main issue is whether or not title has passed to the winner of a gambling game when the monev has been handed over voluntarily by the loser. In their treatment of this point the various jurisdictions are not in accord. Some courts maintain that it is untrue that one may acquire a valid title to money by the simple, but unlawful, process of gambling. *Thompson* v. *Com.* 18 S. W. 1022 (Ky., 1892); *People* v. *Henry,* 202 Mich. 450, 168 N. W. 534 (1918); *State* v. *Price,* 38 Idaho 149, 219 Pac. 1049 (1923); *Sikes* v. *Com.,* 34 S. W. 902 (Ky., 1896). Texas, on the contrary, holds that voluntary delivery of possession of the money to the winner vests title in him so that the forcible taking thereof may be considered robbery. *Coker* v. *State,* 71 Tex. Crim. Rep. 504, 160 S. W. 366 (1913); *Carroll* v. *State,* 42 Tex. Crim. Rep. 30, 57 S. W. 99 (1900).

The latter view is supported by the judicial theory of *in pari delicto* wherein both parties being equally guilty are looked upon in the same light and the winner becomes the owner when the money has been peacefully paid over. *Blain* v. *State,* 34 Tex. Crim. Rep. 448, 31 S. W. 368 (1895).

It has been suggested that one basis of distinction anent the issue of passage of title is the existence of statutory provisions giving the loser a civil right to recover the money lost. 35 A. L. R. 1461, 1462. In Texas where there is no such statute, the decisions hold, in cases with fact situations similar to that of the instant problem, that title passes to the winner and that robbery has been committed. *Coker* v. *State, supra; Carroll* v. *State, supra.* In Kentucky and Michigan, where there are recovery statutes, title has been held to remain in the loser, and consequently no robbery has been committed. *People* v. *Henry, supra; Thompson* v. *Commonwealth, supra.*

However, in Idaho and Georgia, where there are no recovery statutes the courts have held that no title has passed and that a conviction for robbery must fail. *State* v. *Price, supra; Grant* v. *State,* 115 Ga. 205, 41 S. E. 698 (1902).

The latter jurisdictions indicate that the existence of recovery statutes is immaterial to the resolution of the question, and there being a split in the authorities as to whether or not title has passed enabling a robbery conviction to be upheld, the only forecast for the future can be based on public policy. The verdict in the instant case seems proper for a number of reasons: 1—robbery is a serious felony for which a person should not be convicted and cannot be convicted without proof of a felonious intent; 2—it is arguable whether title to the winnings passes to the victor or not; 3—although ignorance of the law is no excuse, a *bona fide* belief that the defendant is entitled to the money prevents him from possessing *animus furandi;* 4—there can be a conviction on other grounds: assault with a deadly weapon, aggravated assault, etc., and the guilty party will not be able to escape unscathed.

JOHN H. O'NEIL.

ABORTION—NEED FOR LEGALIZED ABORTION.—[English] That abortion was known to exist as far back as the early Greeks is evidenced by its prohibition in the Oath of Hippocrates taken by healers. The religious and economic tendencies of that time favored an increasing population and were responsible for its prohibition. Many of the early writers were of the opinion, however, that abortion might be excusable or even commendable in a community faced with an increase in population without a proportional means of subsistence —the Malthusian theory. In England in medieval times the inroads of the Black Death, the Hundred Years War, and the War of the Roses made an increased birthrate necessary, thus furnishing the reason for the abortion law in the 14th century. Minty, *Medical Quackery* (1932) 142. At that time the church was very powerful and had a code of laws separate from the common law. If abortion had been regarded as a religious problem, it would have been prohibited in the church's code rather than left to the common law, thus it follows that abortion was not contrary to early religious principles.

Abortion is made a felony by statute in every state in the Union. A typical example is that of Illinois, Ill. State Bar Stat. (1937) c. 38, §3, which provides that any person who performs an abortion when it is not necessary to save the mother's life, shall be sentenced from 1-10 years. If the

mother dies, such person shall be prosecuted for murder.

The necessity of safeguarding the morals of unmarried people, ill-effect on the woman's health, danger to the safety of the state involved in unnatural limitation of growth of population, and religious pressure are the most common reasons advanced for passing abortion statutes. These statutes seem never to have been properly enforced. Alabama has had only 40 prosecutions and of that number only 5 convictions between 1892-1935; Cook County has had only 39 prosecutions and of that number only 9 convictions between 1925-'35. (1935) 35 Col. L. Rev. 87, 91, n. 18. On the other hand we find the practice to be prevalent. The number of abortions in Chicago alone is from 8,000-10,000 annually, while the total figure for the entire country is about 680,000 annually. Kopp, *Birth Control in Practice* (1934) 121-27. However, it is almost impossible to get accurate statistics on the subject because it is so easily concealed under existing conditions. "The frequency of arrests or trials for abortion afford no criterion of the actual frequency of the crime. Laws on abortion are so easily evaded that officers of justice find it useless to trouble themselves with prosecution . . . ." Storer, *Criminal Abortion* 136 (1868). The paucity of prosecutions are attributable to the reluctance of the legal profession to prosecute the medical profession, the difficulty of obtaining a prosecuting witness because of the unfavorable publicity accompanying prosecution, and the difficulty of detection because of the secrecy of the operation.

The only exception to criminal responsibility for abortion under the statutes is necessity in fact for the preservation of the mother's life—therapeutic abortion. As to what constitutes necessity is a jury question to be determined in the particular case. *Commonwealth* v. *Hoyt,* 279 Mass. 400, 181 N. E. 473 (1932); *Commonwealth* v. *Polian,* 288 Mass. 494, 193 N. E. 68 (1934) Some state courts give a strict construction of the statutory exception restricting it to the preservation of life only. *State* v. *Rudman,* 126 Me. 177, 136 Atl. 817 (1927); *Rodermund* v. *State,* 167 Wis. 577, 168 N. W. 390 (1918); *State* v. *Powers,* 155 Wash. 63, 283 Pac. 439 (1929). A few States are more liberal allowing a physician to perform an abortion when peril to life is not necessarily imminent, but where health would be impaired. *State* v. *Dunkelbarger,* 206 Iowa 98, 221 N. W. 592 (1928). This is a minority view, however, in this country, most American courts not giving doctors discretionary power to operate under the statute. *State* v. *Tippie,* 89 Oh. St. 35, 105 N. E. 75, 77 (1913). The motive of the doctor is immaterial and only a few states recognize good faith as a defense. "Motive is more or less immaterial in abortion. The gist of the crime is in the intent to procure a miscarriage. If the act is done with this intent without a lawful justification, the crime is complete regardless of motive." 1 C. J. Sec. 312. Also *State* v. *Rudman, supra; Hatchard* v. *State,* 79 Wis. 357, 48 N. W. 380 (1891).

The situation has been almost identical in England where, as in America, abortion is made a felony unless performed to save the mother's life. Recently, however, a prominent English obstetrician performed an abortion on a 15 year old girl to preserve her mental and

physical health, and was prosecuted under the English Preservation of Life Statute. The girl had been criminally attacked and pregnancy resulted. The physical injuries would not have caused difficulty in delivery, but the circumstances were such that a mental breakdown seemed likely if pregnancy was not terminated. See (1938) Journal of the American Medical Association, Vol III, No. 8, 731. The defendant contended that the statute should be liberally construed allowing doctors wide latitude to terminate pregnancy when mental and physical health were impaired, and there should be no dividing line between danger to life and danger to health. Justice MacNaughten in summing up said, "If pregnancy is likely to make a woman a physical wreck" a doctor who operated in that belief did so "for the purpose of preserving the mother's life." He further stated that the defendant had performed "an act of charity without fee." The defendant was acquitted. N. Y. Times, July 20, 1938, page 4, col. 2.

This is clearly an advance over American decisions. The interpretation of the American statutes is unsatisfactory for several reasons. First, the abortion statutes have resulted in abortions being performed by quacks, midwives and incompetent doctors, because reputable physicians are afraid of prosecution and blackmail if they perform an abortion. Secondly, even if the doctor or midwife is skilled they must operate with a secrecy which prevents the subsequent attention necessary for the safest performance of the operation. One of the greatest dangers in procuring an abortion is the possibility of infection arising from its unsanitary performance. Most of the deaths arising from this operation are due to infection. Kopp, *supra,* estimates about 680,000 abortions are performed annually in the United States and about 8,000 deaths from termination of prégnancy or about one death for every 75 abortions performed; whereas in Russia where abortion is legalized and under government supervision there is only 1 death per every 20,000 abortions performed. Thirdly, it has not raised the moral standard of unmarried people but rather has been avoided by the use of contraceptives. Further, most abortions are performed upon married women who submit to the operation because more children would injure their future health and because they are financially unable to support any more children. (1935) 35 Col. L. Rev. 87, 93, n. 39. Finally abortion statutes have not resulted in an increased birth-rate because they have not decreased the actual number of abortions.

Giving a more liberal interpretation to our existing statutes as in the English case is not an effective solution, since the shadow of criminality would still be cast over doctors terminating pregnancy and would discourage them from performing the operation in justifiable cases. Seemingly the solution lies in the hands of the legislature. A law should be passed and strictly enforced making it a criminal offense for anyone but a licensed physician to perform an abortion. While the number of prosecutions under the statutes at present, are few making it a seemingly unimportant law, its effects are in reality far-reaching in that it is indirectly responsible for the high death rate in abortion operations.

Legalized abortion would eliminate this evil. One of the leading arguments against legalized abortion is that it would greatly decrease the birth rate. True, there would be an increase in the number of abortions among poorer classes of people but this would seem to be more of a good than an evil. The total number of abortions for all classes would not increase to such an extent as to seriously decrease the present birth rate because physicians would only act in justifiable cases. Further, normal married people do not want to avoid childbirth unless they absolutely have to.

The advantages of legalized abortion would be manifold. It would enable the dissemination of accurate statistical information. Moreover, protection of the social, physical, and mental future of innocent girls who have been criminally attacked would be afforded. Likewise it would make for better future generations by providing a means of eliminating the birth of children to physical and mental defectives. Minty, *supra,* 151 writes, "Many mentally defective children are born of mentally defective parents. It is almost certain that mentally defective women will breed mentally defective children. Those who allow such children to be born are guilty of a grave moral crime, for such a child is condemned to inescapable misery and degradation . . . ." Finally, it would eliminate the extortionate prices now charged by quacks and midwives who are able to charge high prices because of the risk they take rather than for the skill that is required to perform it properly. Reputable doctors would perform the operation at a nominal charge and under sanitary conditions when in their discretion as a physician it is physically, socially, and economically desirable.

JACK FROST.

LOTTERY—WHAT IS A LOTTERY—AS UNFAIR TRADE.—[Illinois] To promote advertising a distributor of gas and oil products gave qualifying cards not only to purchasers of his products but also to any auto owner or driver requesting them. At the end of each month the holder of such a card was entitled to participate in a cash drawing of $200. A competing gas and oil merchant just across the street sought to enjoin the defendant, claiming the plan was a lottery. *Held:* temporary injunction affirmed on appeal. *Jones* v. *Smith Oil & Refining Co.,* 15 N. E. (2nd) 42 (1938). The court found the three elements of a lottery—prize, chance, and consideration—constituted a plan violating the law and unfair to plaintiff's business.

In England as early as 1541 an act prohibited lotteries because the young men spent their time gambling instead of practicing archery. Later in 1698 another act forbade lotteries because they were inimical to good trade, welfare, and peace. 173 L. T. 237 (1932). Then in 1823 the English Parliament prohibited all lotteries except those authorized by Parliament. Lotteries Act, 4 Geo. 4, c. 60 (1823). This includes horse racing subscriptions. *Allport* v. *Nutt,* 14 L. J. 272 (1845). Finally in 1934 the Betting and Lotteries Act prohibited all lotteries except small ones incidental to entertainments and private lotteries; the Act further permitted lottery tickets to be sent through the mails. See 78 L. J. 433 (1934). This relaxation in the attitude

toward lotteries may be an effect of the Irish Hospitals Sweepstakes, a charity enterprise, which finds a huge market for its tickets in England. Journal of Comp. Legis. and International Law, Vol. 14, p. 286 (3rd series, 1932).

Though England has relaxed its lottery law somewhat, many of the states in this country still have laws forbidding lotteries. See 2 Wharton, Criminal Law, §§1777, 1778 (12th ed., 1932) and cases cited. In further tightening the state restrictions, Congress has closed the mails and interstate commerce against lottery tickets. The Lottery Case, 188 U. S. 321 (1903). The disfavor in the United States against lotteries is founded in the protection of those who would dissipate their money by gambling against odds not fully appreciated. See 45 Harv. L. Rev. 1205 (1931). Further evils of lotteries include enhancement of a desire to get something not earned, the encouragement of the gambling instinct, and the destruction of individual initiative essential to individual livelihood and citizenship. *State ex rel. Hunter* v. *Fox Beatrice Theatre Corp.*, 133 Neb. 392, 275 N. W. 605 (1937).

The usual concept of a lottery attaches to a scheme for the distribution of prizes by chance among persons purchasing tickets. 2 Wharton, *op. cit.*, p. 2075, §1778. Not having an exact legal definition the word lottery may be construed in this commonly accepted meaning. *U. S.* v. *Olney*, Fed. Cas. No. 15, 1918 (1868). Difficulty of interpretation hinges not so much on prize and chance as on the element of consideration. The idea that the consideration is the price paid by the purchaser for the chance to get a prize is fundamental. *Cf.* Williston on Contracts §100 (1926). Variations of this idea make for difficulty in the lottery question.

Where lottery tickets are bought outright for a chance to win a prize, the consideration is plain in that money has been paid for the ticket alone. Where chances are bought with purchases, even though at no increased cost, of entertainment or merchandise, there is a lottery on the ground that the price furnishes the consideration for both. *State* v. *Powell*, 170 Minn. 239, 212 N. W. 169 (1927). But see *R. J. Williams Furniture Co. v. McComb Chamber of Commerce*, 147 Miss. 649, 112 So. 579 (1927). Where chances are offered to purchasers and non-purchasers alike, the courts are hopelessly divided. Some may find consideration, as in the theater cases, in increased attendance and the fact that free ticket distribution was negligible. *State* v. *Danz*, 140 Wash. 349, 250 Pac. 37 (1926). In a case similar to the instant case the court penetrated through the free distribution plan and held that the price paid constituted the aggregate price for the merchandise and the chance. *Featherstone* v. *Independent Service Station Ass'n*, 10 S. W. (2nd) 124 (Tex., Civ. App., 1928). Other courts say there is no lottery where a contestant may obtain a chance without paying for entertainment or merchandise. *Cross* v. *People*, 18 Colo. 321, 32 Pac. 821 (1893); *People* v. *Mail Express Co.*, 179 N. Y. S. 640 (1919); *State* v. *Hundling*, 220 Iowa 1369, 264 N. W. 608 (1936). But see *Maughs* v. *Porter*, 157 Va. 415, 161 S. E. 242 (1931) where consideration for a lottery was found in mere attendance at an auction sale. This interpretation of consideration has been criticized.

80 U. Pa. L. Rev. 744 (1932); 18 Va. L. Rev 465 (1932). However, though pecuniary consideration may not be found for a lottery to convict in a criminal prosecution, there may be enough consideration to support a suit by the winner for collection of the prize. *Corio* v. *Laurelton Amusement Co.*, N. Y. L. J., p. 764, col. 2 (Feb. 13, 1937, Sup. Ct. App. term). That is, the contract was not affected by the lottery laws because the ticket holder had not paid monetary consideration. Such an approach lends support to a belief that courts might construe a different consideration in a civil suit than in a lottery prosecution. See 37 Col. L. Rev. 877 (1937).

In some instances courts may also look to see whether the plan in question is an evasion of the statute or an avoidance of the statute, the latter being permitted. *State* v. *Eames*, 87 N. H. 477, 183 Atl. 590 (1936). Thus there was an evasion where the plan was changed from one giving tickets only to customers to one giving tickets both to customers and non-customers. *Featherstone* v. *Independent Service Ass'n, supra.* In the instant case which relies heavily on the *Featherstone* case, there was no such evasion.

The court relied also on a bank night case, *Iris Amusement Co.* v. *Kelly*, 366 Ill. 256, 8 N. E. (2nd) 648 (1937) which found consideration for an increased chance to win in the price of admission. In applying this case to the instant situation the court apparently overlooked the distinguishing fact that non-purchasers had an equal chance with purchasers in the gas and oil scheme because all were privileged to attend the drawing.

In interpreting consideration for the non-purchasers the court said that the money paid in by those who purchased gas and oil and received tickets furnished the consideration for non-purchasers. If the participation of non-purchasers was negligible, such a test of consideration might be valid. But as the amount of non-purchaser participation increases (and the court does not say here that non-purchaser participation was negligible) the proposed test of consideration seems inadequate. Indeed by this test if 5% of participants were purchasers and 95% were not, then the court would be placed in an anomalous position by declaring consideration from purchasers furnished consideration for the lottery when in reality the monetary consideration was negligible. Failing to stress the fact of participation, the court lays down a formula which might well work an injustice in a case where free participation is a reality.

The original aversion to lotteries, based on the protection of those who might lose their money in an effort to get something for nothing, thus has been expanded to protect by injunction a merchant's advertising scheme in which no one loses any money—except the protected merchant whose business decreased. Declaring a lottery did not protect anyone from dissipating his money. Insofar as lottery laws may be designed for other purposes the court might well have examined the fact of non-purchaser participation to supplement its theory of consideration, particularly if such participation was negligible. The court in effect disregarded the non-purchasers in its effort to declare a lottery, that is, it did not

look into the extent of their activity in the plan. Much more intellectually satisfactory would it have been if the court had openly declared that monetary consideration was not required for a lottery or that the plan was illegal because it made the disposal of property dependent upon a chance by lot. See Smith-Hurd, Ill., Stat. c. 38, §406 (1937).

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