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Note and Comment

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NOTE AND COMMENT

THE MICHIGAN RAILROAD TAX CASES.—Although the opinion of the court in these cases has not yet appeared in a form for general circulation, we have been enabled to examine it through the courtesy of Judge Wanty. The questions involved have been more or less prominently before the public and the profession for more than two years, and the following brief summary of the holding of the court will probably be of general interest.

Previous to the year 1900, the railroads of the state had been taxed upon their gross earnings. But in that year the State Constitution was amended so as to permit the legislature to provide for taxation upon the basis of the true cash value of the railroad property, and at the next session of the legislature, in 1901, an act was passed authorizing the State Board of Assessors to levy taxes upon this basis.

The original tax levy made by the State Board of Assessors upon the railroad property was $13.68+ per thousand dollars of its assessed valuation. This was determined as follows. The Board assessed the railroad property at its actual cash value. It then refused to accept the assessed valuation of the other property of the state as given by the local assessors, on the ground that it was far below the actual cash value thereof, but itself reassessed all such property at what it deemed the actual cash value. And on the basis of its own assessment of the railroad and other property it fixed the rate on the railroad property as above stated.

But upon the application of the Board of Education of the city of De-

troit, the Supreme Court granted a writ of mandamus requiring the State Board to accept the valuation given by the local assessors upon all property other than that of the railroads, and upon this basis to redetermine the rate. *Board of Education* v. *State Board of Assessors,* 133 Mich. 116. This was done, and a new rate was levied upon the railroad property of $16.55+ per thousand dollars of its assessed valuation. It was to stay the collection of this tax that the twenty-three Michigan railroads brought these suits in the Circuit Court of the United States for the western district of Michigan.

Except upon a question of jurisdiction, the court sustained the contention of the Auditor General upon every point involved. And these points were as follows:

1. The railroads claimed that they were deprived of due process of law, for the reason that due process requires the tax to be levied by a legislative body representing the community which includes the person or contains the property taxed; while the tax here levied upon the railroads is strictly a state tax and yet is arbitrarily determined by local officers.

But the court held that the tax was not determined by the local officers, but by the state legislature, which merely made the estimates of the local assessors the basis for computing the rate. This was merely a mode of measurement prescribed by the legislature, and did not violate the fourteenth amendment to the Federal Constitution by delegating the rate making power to the local legislatures and assessing officers.

2. The railroads urged a technical objection to the validity of the tax law on the ground that it violated the State Constitution in not distinctly stating the tax and the object to which it was to be applied. But the court overruled this objection on the authority of *Walcott* v. *The People,* 17 Mich. 68.

3. Again, the railroads claimed that they had not been accorded a hearing before the Board of Assessors. But this contention was held to be without merit for the reason that the functions of the Board were purely ministerial, and a hearing could be of no value before a body which had no discretion in the premises.

4. Great emphasis was laid upon the contention by the railroads that the statute provided a different method for the taxation of railroad property owned by railroad corporations, and railroad property owned by individuals and other corporations, such as logging railroads, electric interurban roads, etc. This, it was claimed, made ownership the basis of the tax, which denied to the railroad companies the equal protection of the laws.

Upon this question the court said: "It is not necessary that all railroad property be taxed under one method and at the same rate, but it is only necessary that all property belonging to railroads in the same class be taxed alike. If it is conceded that these logging roads owned by manufacturing corporations or individuals are railroads, they certainly are not railroads of the same class with the complainants. It seems as though it must be as competent for the legislature to place different classes of railroads in different classes, for the purpose of taxation, as it is to place railroads in a class by themselves and tax them and their property differently from other persons. Street railroads, which are chartered by the ordinances

of various cities, and electric suburban roads, organized under a general statute for that purpose, have different privileges and powers from those given to the roads organized under the general railroad statutes; and those roads built for service in the business in which individuals and manufacturing corporations are engaged have still further restricted powers and privileges, and we can see no reason why, in its discretion, the legislature may not, for purposes of taxation, place the railroads organized under the general railroad statutes in a class by themselves, leaving the other roads to be taxed under the general laws of the state, without violating the fundamental principles of taxation, or the fourteenth amendment to the Federal Constitution."

5. The railroads further contended that they were discriminated against for the reason that while their property was assessed at its full cash value, the rest of the property in the state was undervalued by the local assessors, and they were therefore required to pay a greater proportion of the taxes than was justly due from them.

But the court said that a law could not be considered unconstitutional simply because as a fact the officers sworn to administer it did not do their duty. If their assertion were correct that there has been an undervaluation of the other property, the railroads could at most claim relief only from the misconduct of the officers and not from the statute, which works injustice only when violated.

6. The last contention of the railroads upon which they rested their resort to the jurisdiction of the Federal court, was that there was a discrimination against them in this, that while in the assessment of personal property generally, debits are required to be deducted from credits, the statute requires the credits of the railroads to be assessd at their full value without any deduction of indebtedness owed by them. But this claim was disposed of by the court on the same ground as the one last considered, and it was held that the legislature had an undoubted right to make any class of property bear a heavier share of the burden of taxation than another class, and could, if it saw fit, lawfully reduce credits by debits in one class and not in another.

7. Finally, as to the fact of the undervaluation of other property, the court held that it had jurisdiction to determine the question, notwithstanding there was nothing in the legislation complained of contravening the Constitution of the United States. But it held that relief on this ground could be obtained only when it was shown that the undervaluation had been so habitual, systematic and intentional as to amount to fraudulent undervaluation. Reviewing the evidence in the case the court held that there was nothing in the record to show any such fraudulent conduct on the part of the local assessing officers, and the railroads were therefore entitled to no relief.

IS A VOTE BY MACHINE A CONSTITUTIONAL BALLOT?—The voting machine is now authorized by statute in about fifteen of our states as a method of conducting elections, and its use seems to be constantly increasing in popularity. The constitutionality of this method was recently challenged in the case of *People ex rel. City of Detroit* v. *Board of Inspectors*

of Elections (1905),— Mich. —, 102 N. W. Rep. 1029.

In accordance with the statute (Mich. C. L. §§ 3750-58, amended by Act No. 234, Pub. Acts, 1903), the common council of Detroit directed that machines be used in certain election districts at the election in April, 1905. The inspectors of one of these districts refused to install the machines upon the ground that their use would be contrary to the provision of the State Constitution requiring that "All votes shall be given by ballot" except in certain specified cases. In holding that a writ of mandamus should issue to compel the installation of the machines, the Supreme Court makes use of the following language: "We regard the provision of the Constitution as a declaration of state policy assuring to the elector a secret as distinguished from an open or announced vote. * * * To say that the purpose of the framers of our constitution was not to secure a particular mode of voting secretly, but was to make manifest in the organic and continuing law a policy to be perpetuated is to give to the words of the instrument no forced or unnatural meaning." This quotation contains the kernel of the court's decision.

Whether or not voting by machine is voting by ballot depends, of course, primarily upon the meaning of the word "ballot." Taken as a term signifying any particular manner of registering a voter's will, the word is ambiguous, for historically there have been many varieties of ballot. But it is believed a study of the history of the term will show that in all times the idea of secrecy has been the one distinguishing feature of it. The earliest known use of the ballot was that by the Greek dikasts, or popular courts, which voted by means of balls of stone or wood, white signifying acquittal and black condemnation; marked shells, or ostrakoi, were used for banishing unpopular leaders. In Rome, tickets with candidates' names written upon them, boxes, inspectors, and check-lists were used as early as 139 B. C. In these early times common voting in the assemblies was by show of hands to secure public responsibility, while in cases of privilege, or in elections, it was by ballot. It is worthy of note, in passing, that we find almost the same distinction in the Michigan Constitution, and for the same reasons: votes in the legislature are to be given viva voce, while those in popular elections are to be given by ballot. A most curious method of voting, said to be by ballot, was that in use in Hungary about 1848. Each candidate for parliamentary honors had a large box painted some distinguishing color. As each voter entered the room alone, he was given a rod, from four to six feet in length, which he placed in the box belonging to the candidate of his choice, through a slit in the lid. Such length of the rod was required as an ingenious plan to prevent "repeating" by the use of similar rods concealed on the person of the voter. Thus, in this crude manner were secured the modern requisites of secrecy and accuracy. Without going farther into the minute history of the word, it is sufficient to say that it shows a continuous evolution if taken to signify a method of voting, but through all the successive stages the inherent principle of secrecy has been the one thing retained. So the conclusion seems fair that ballot voting is essentially secret as distinguished from open voting. And since the machine is intended to secure this result more effectively, it is to be regarded as one step, merely, in the evolution of the ballot.

(II ENCYCLOPEDIA AMERICANA, title "Ballot"; III ENCYCLOPEDIA BRITANNICA, p. 288; I WORDS AND PHRASES, 680; *State* v. *Shaw*, 9 S. C. 94.)

That such is the true test of ballot voting has been asserted by many courts in disposing of questions relating to suffrage. Thus, the court says in *Brisbin* v. *Cleary*, 26 Minn. 107, "This privilege of secrecy may properly be regarded as the distinguishing feature of ballot voting, as compared with open voting, as, for instance, voting viva voce. The object of the privilege is the independence of the voter." See also, *People* v. *Cicotte*, 16 Mich. 283; *Williams* v. *Stein*, 38 Ind. 90; *State* v. *Shaw*, supra; *Ex parte Arnold*, 128 Mo. 256.

The question as directly involving voting machines has only twice been discussed by courts of last resort (*In re Voting Machine*, 19 R. I. 729, 36 Atl. Rep. 716, 36 L. R. A. 547; *Opinion of the Justices*, 178 Mass. 605, 60 N. E. Rep. 129, 54 L. R. A. 430); and in both cases the constitutionality of their use was upheld by divided courts, but on account of differences in the constitutions of those states from that of Michigan the decisions are not precisely in point here. In Massachusetts the requirement is that officers "shall be chosen by written votes," while in Rhode Island a provision that voting for general officers shall be by ballot is qualified by the phrase "until otherwise provided by law."

The fact that obviously the framers of the constitution had in view in the use of the word "ballot" a paper ticket, and that all contemporary legislation was enacted with a similar idea, gives rise to much discussion in the briefs in the principal case—copies of which have been furnished the writer by the respective counsel—as to whether a proper construction will not limit the constitutional provision to the exact meaning that the framers thereof had in mind. This principle is often helpful, indeed it is sometimes controlling. But it is not to be indiscriminately applied. In the present case the correct principle applicable would seem to be that stated in the language of CHIEF JUSTICE PARKER in *Henshaw* v. *Foster*, 26 Mass. (9 Pick.) 312, 317: "We are to suppose that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to establishment of rules for the perpetual security of the rights of persons and property, had the wisdom to adapt their language to future as well as existing emergencies; so that words competent to the then existing state of the community and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce."

SIGNING "AT THE END" OF A WILL.—There is a manifest tendency in some courts to take almost every case which comes before them out of the operation of the general rule of law applicable thereto, and by a process of minute differentiation, to decide it according to the particular judge's notion of what is just and fair in the particular case. While something of this sort is necessary under the rapidly changing conditions of modern society and possible under the elastic scheme of the common law, yet it is a

course fraught with danger, and one which is responsible for much of the confusion and "conflict of authority" in our reports. It is reassuring to note the decisions of courts which realize this danger of frittering away the safeguards afforded by settled rules and long established statutes, and which therefore steadfastly adhere to those settled rules, in the face of strong temptation to depart from them in order to avoid harsh results in exceptional cases. A recent example of such a decision is found in the case of *Irwin* v. *Jacques* (1905), — Ohio—, 73 N. E. Rep. 683. This was an action contesting a will on the ground that it was not executed in accordance with § 5916 Ohio Rev. St., which provides that "Every last will * * * shall be in writing * * * and shall be signed at the end thereof by the party making the same." The original will consisted of a writing on the horizontal lines of six pages of legal cap paper. This was read over to the testator, who approved of all that was written, but refused to sign it until a clause designed to prevent a contest of the will, by heirs or legatees, should be added. Thereupon a clause was written in vertically on the left hand margin of the last page opposite the attestation clause, and was as follows: "My will is that any child or heir not taken with this my last will and testament shall be disinherited, cut out, and shall not have one doll of my estate." With this the testator expressed his satisfaction and then signed the will underneath the attestation clause and opposite, but not below, the lower part of the marginal addition. From a judgment of the lower court, finding that the paper produced was not a valid will, the case was taken on error to the Supreme Court. In affirming the judgment of the trial court, that court held that as clauses, like the marginal clause in this will, imposing a forfeiture of benefits under such will, upon those who shall contest it, are valid (see 3 MICH. LAW REV., 166, for recent American cases on this point), it follows that the clause in question is dispositive in character and hence material and cannot be rejected as surplusage, and that its location in the will is of essential importance in determining whether the will is signed at its end as required by the statute. There being no reference by word or character in the body of the will, by the aid of which the marginal clause could be read in connection with or as a part of any portion thereof, the court held that the will was not signed "at the end" in conformity with the plain requirement of the statute, and hence that it was not entitled to probate. This is in accordance with the clear weight of authority, in states having similar statues. *Glancy* v. *Glancy*, 17 Ohio St. 135; *In re O'Neil's Will*, 91 N. Y. 516; *Appeal of Wineland*, 118 Pa. St. 37, 12 Atl. Rep. 301; *In re Walker*, 110 Cal. 387, 42 Pac. Rep. 815. The construction thus put upon the statute is the only one which can make it effective for the purpose for which it was designed, namely, to prevent fraudulent or unauthorized additions to the will. The rule has been held in a few cases not to apply when the added clause is not dispositive, as for the appointment of executors. *Brady* v. *McCrossen*, 5 Redf. (N. Y.) 431; but this is denied in *Wineland's Appeal*, supra, and in *Sisters of Charity* v. *Kelly*, 67 N. Y. 409. In view of the purpose of the statute to prevent fraud as indicated above, it is doubtful if the decisions sustaining wills where added matter is referred to by asterisk or by such expressions as "See next page," in the body of the will, can be justified in

reason. See *Baker's Appeal,* 107 Pa. St. 381, 52 Am. Rep. 478; *Goods of Birt,* L. R. 2 P. & D. 214.

ANOTHER ATTEMPT TO EVADE THE LOTTERY LAWS.—Fourteen years ago an ingenious merchant tailor in Minneapolis devised a scheme for a "club" of patrons. Each person who joined the "club"—and it consisted of forty members—signed a written contract having forty numbered coupons, whereby he agreed to pay two dollars at the time of signing and one dollar each week for forty consecutive weeks in consideration for which he should each week have the privilege, upon the surrender of a coupon, of drawing for a forty-dollar suit of clothes. Each week the lucky member who drew the suit withdrew from the "club," and a new member was taken in. Each member was, however, guaranteed a forty-dollar suit at the end of his forty weeks, if he did not draw one sooner, and any member had the right to drop out at any time and receive credit for the full amount paid, such credit to be taken out in trade. The tailor was prosecuted under the lottery statutes and convicted. *State* v. *Moren,* 48 Minn. 555.

Undeterred by the fate of the Minneapolis tailor, or possibly ignorant of it, a tailor in Sault Ste. Marie, Michigan, wishing to increase his business, formed a similar "suit club." He was prosecuted under the Michigan statute against lotteries, was found guilty as a matter of law on the evidence, and the opinion of the Supreme Court affirming the judgment below has just appeared. *People* v. *McPhee* (1905), — Mich. —, 103 N. W. Rep. 174.

It was sought by the defendant to exclude his case from the operation of the lottery statute on the ground that the members of the "club" took no risk of loss, but in all cases were guaranteed the full equivalent of the money paid. In other words, it was contended that a scheme whereby one might gain but could not lose was not a lottery under the statute. But the court said that the term "lottery" was generic, and should be construed broadly with a view to remedying the mischiefs intended to be prevented. "No sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed, but not quite within the letter of the definition given." And the language used in *Ballock* v. *Maryland,* 73 Md. 1, was approved, as follows: "Our statute does not justify a court in deciding a thing is not a lottery simply because there can be no loss, when there may be considerable contingent gain, or because it lacks some element of a lottery according to some particular dictionary definition, when it has all the other elements, with all the pernicious tendencies which the state is seeking to prevent."

The Michigan Supreme Court evidently has no intention of frittering away the moral benefits of the anti-lottery law by sustaining technical and unsubstantial objections to its operation.

SAVING EXCEPTION ON OVERRULING OF MOTION TO QUASH SUMMONS.—The diversity of views held by the courts relative to the right of a defendant to plead generally, without waiving the objection to the jurisdiction of the court over the person, after a motion to quash the writ for defects therein has been overruled, and exception to such ruling saved, is well illustrated in the majority and dissenting opinions in the recent case of

M. Fisher, Sons & Co. v. *Crowley* (1905), — W. Va. —, 50 S. E. Rep. 422. It was there held, that a defect in the summons commencing an action in a court of record is not waived by pleading to the merits after the overruling of a motion to quash, to which an exception has been taken and made a part of the record.

While this is, we believe, the better rule, it is by no means uniformly so held by the courts. In *Ry. Co.* v. *Wright*, 50 W. Va. 653, which the court attempts to distinguish in principle from the principal case, the rule is stated as follows: "When a defendant appears and objects to the jurisdiction and his objection is overruled, he must then elect either to stand upon his objection or go into the merits. Going into the merits waives his exceptions to the service of process. The latter rule is founded on justice and reason. For although the defendant may not be served with process, yet if he appears and contests the case and a fair trial is had why should he be permitted to invalidate the judgment thus obtained, because the process to bring him into court was not legally served upon him?" This view has been accorded the support of many of the courts, and the decisions sustained by a course of reasoning which is quite similar in all the opinions. A fair example is that of *Sealy* v. *Cal. Lumber Co.*, 19 Ore. 94, wherein the court said, "A defendant cannot answer the complaint and make a full defense on the merits without making a general appearance in spite of his special appearance, and when he does so he invokes the judgment of the court and submits himself and his rights to its jurisdiction and cannot longer be heard to say that it had no jurisdiction. He cannot fight his battle on the merits under a special appearance. The law will not allow him to occupy an ambiguous position to avail himself of its jurisdiction when the judgment is in his favor and to repudiate it when the result is adverse to him. He ought to do one thing or the other—either fight it out on the line of special appearance; or, if he appear and go to trial, accept its incidents and consequences." *Garrett* v. *Herring Furn. Co.* (1904), — S. C. —, 48 S. E. Rep. 254; *Franklin Life Ins. Co.* v. *Hickson*, 97 Ill. App. 387. But the objection to this argument lies in the fact that it would either make of every trial court a court of last resort, or require the defendant "to do what is impossible for other mortals—correctly forecast what will be the decision of the court of last resort upon the question."

As supporting the rule announced in the principal case, and contrary to that last expressed, we quote from the case of *Chandler* v. *Citizens National Bank*, 149 Ind. 601, as follows: "The settled rule in this jurisdiction and in others also, is that a party to an action who under a special appearance, in due season, unsuccessfully denies the jurisdiction of the court over his person, does not waive the question of jurisdiction of his person by thereafter answering over, and going to trial upon the merits of the cause of action. The authorities assert that the defendant under such circumstances, having at the very threshold resisted the jurisdiction of the court in a legitimate manner to the full extent of his power, is not required to desert his case, and leave his adversary to take judgment against him by default." Having unsuccessfully contested the jurisdiction, it is his privilege and duty to make the best defense of which he is capable. *Benedict* v. *Johnson*, 4 S. D. 387; *Am. Wire & Steel Bed Co.* v. *Goldman*, 83 N. Y. Supp. 330; *Mullen* v. *Canal Co.*, 114 N. C. 8. The defendant should

appear specially, object to the jurisdiction and if the objection is adversely ruled upon, save an exception for appeal. That this is the proper practice is indicated by the following cases: *Perkins* v. *Hayward*, 132 Ind. 95; *Winfield Nat'l Bank* v. *McWilliams*, 9 Okla. 493; *Mullen* v. *Canal Co.*, supra; *Lilliard* v. *Brannin*, 91 Ky. 511. The case assumes a different aspect when the defendant, although objection is made specially to the jurisdiction of the court over his person, files a counter-claim or asks affirmative relief. He thereby becomes an actor in the suit and institutes a proceeding which has for its basis the existence of an action to which he must be a party. He thereby submits himself to the jurisdiction of the court and no disclaimer which he may make on the record, that he does not intend to do so, will be effectual to defeat the consequences of his act. 2 ENC. PLEADING AND PRACTICE, p. 626; *Chandler* v. *Citizens Nat'l Bank*, supra; *Montague* v. *Marunda*, — Neb. —, 99 N. W. Rep. 653; *Lower* v. *Wilson*, 9 S. D. 252; *Grant* v. *Birrell*, 72 N. Y. Supp. 366.

But the court went further and held, that it is not necessary for a defendant in appearing for the purpose of quashing the writ to cause the record to recite that his appearance is for that purpose only, but whether an appearance is general or special is to be determined by the record as it stands at the time the motion is made. In *State* v. *Thacker Coal & Coke Co.*, 49 W. Va. 140, the record recited that the defendant appeared by attorney and moved to quash the summons and the return of the sheriff thereon endorsed, which motion the court overruled, whereupon the defendant then and there excepted to the ruling of the court. The court held the appearance to be general and said, "An appearance for the purpose of taking advantage of defective execution or non-execution of process must be a special appearance for that purpose alone, and must be so stated at the time of making the appearance." Although attempting to "reconcile" the conflicting views as expressed in several previous opinions, the court apparently overlooked this case, which seems in point, and expresses, we think, the sounder view. It is true one may not make a general appearance special by denominating it such; but the tendency of the courts is to construe that a general appearance which is not designated, or is not clearly shown to be, a special appearance. It is certainly the more prudent course to specifically state in each special appearance pleading that "the defendant appears specially and for the purpose of this motion only;" and this practice is amply supported by authority. *Kinkade* v. *Myers*, 17 Ore. 470; *Collier* v. *Faek*, 66 Ala. 223; *Deshler* v. *Foster*, 1 Morris (Ia.), * 403.

WILLS EXECUTED WITHOUT ANIMUS TESTANDI.—The Supreme Court of Massachusetts has recently decided a case involving a fundamental question concerning the law of wills that is not often directly presented. The question is as to proof that a will drawn in due form by a scrivener, and executed by a sober man in sound health of body and mind and under no restraint, was not executed as a will, nor intended ever to have effect as such.

The will in question was offered for probate by Mary Fleming, the executrix and sole beneficiary therein named. In reversing a decree allowing probate of the will, the court said: "The finding that before Butter-

field and Goodrich 'parted' Butterfield told Goodrich that the instrument which had been signed by Butterfield as and for his last will and testament, and declared by him to be such in the presence of Goodrich, and attested and subscribed by Goodrich as witness, 'was a fake, made for a purpose,' is fatal to the proponent's case. This must be taken to mean that what had been done was a sham. This is not cured by the further finding that what Butterfield meant by this was 'that he did not intend to complete the instrument by having it attested and subscribed by at least two other witnesses, and that the purpose referred to by him was to induce said Fleming to allow him to sleep with her. This is not a finding that Butterfield intended to sign the instrument before Goodrich as and for his last will and testament, leaving the further execution to depend on future events. Much less is it a finding that Butterfield changed his mind after he had signed, and had had Goodrich attest and subscribe the instrument. The whole finding, taken together, amounts to a finding that Butterfield had not intended the transaction which had just taken place to be in fact what it imported to be." The court held that parol testimony to prove these facts was competent. *Fleming* v. *Morrison* (1904), — Mass. —, 72 N. E. Rep. 499.

Cases of this kind are not analogous to cases in which deeds purporting to be real and required by law to be witnessed have been proved by parol to have been intended for some different purpose than appears by the writing; for deeds have to be delivered, wills do not; deeds operate from execution, wills from the death of the maker; the maker of the deed may confute the perjured story, but in the case of the will the perjuror knows that the only man having knowledge to expose him is safely out of the way. The distinction is recognized by the court in this case. The danger of permitting parol evidence thus to outweigh the sanction of a solemn act is obvious. It has a tendency to place all wills at the mercy of a parol story that the testator on this most serious occasion did not mean what he said and did. On the other hand, an inflexible rule admitting of no proof to the contrary might work great hardship in peculiar cases. It would seem that such proof should be held competent, for this reason.

In this case the court reviewed the principal cases similar to the one at bar, in one of which, *Lister* v. *Smith* (1863), 3 Sw. & Tr. 282, CHAPLIN'S CASES ON WILLS, 250, it was proved that the testator wished one of his family to give up a house she then occupied, and to induce her to do so, made pretence of revoking by codicil a bequest he had made for her daughter in his will. He explained his purpose to his attorney, who pointed out the folly of it to him, and refused to have anything to do with it; but the testator made the codicil and delivered it to his brother with instructions to use it for the purpose intended, in no event to part with, and that it was not to be allowed to operate. In deciding the case, Sir J. P. WILDE held the evidence competent; and being clear and cogent, it satisfied him to act on the finding of the jury. But he added: "I am far from saying that the court will in all cases repudiate the testamentary paper simply because a jury can be induced to find that it was not intended to operate." He said: "It is difficult to impress them with the enormous weight which attaches to the document itself as evidence of the animus with which it was made. This weight it becomes the court to appreciate,

and to guard with jealousy the sanction of a solemn act." In another case cited, *Nichols* v. *Nichols* (1814), 2 Phillim. 180, CHAPLIN'S CASES, 253, ABBOTT'S CASES, 270, the will was in these words: "I leave my property between my children; I hope they will be virtuous and independent—that they will worship God, and not black coats. July 30, 1803. Thomas Nichols. Witness, Thomas King." The witness swore that the will was made in the library of a friend after a private banquet, and that it was made to illustrate the ridiculous tautology employed by lawyers in drawing up legal papers, and was never intended as a will at all. On this proof probate was denied.

In re Goods of Hunt (1875), L. R. 3 Prob. & Div. 250, MECHEM'S CASES ON WILLS, 30, ABBOTT'S CASES, 264, is also cited, in which it was held, as it has been in several other cases, that a will cannot be admitted to probate when it appears that it was executed by mistake, when the testator intended to sign another paper. In this case sisters made mutual wills, and each signed the one prepared for the other.

THE LEGAL STATUS OF A PARTICIPANT IN A GUESSING CONTEST.—The determination of what are, and what are not lotteries, has of recent years been the subject of numerous judicial decisions. The status of a participant in such a scheme has not been so frequently decided. In the recent case of *Stevens* v. *The Cincinnati Times-Star, The Enquirer and the Tribune* (1905), — Ohio —, 73 N. E. Rep. 1058, both questions came up for consideration. The newspapers concerned offered prizes to persons who should come nearest to guessing the number of votes to be cast for state officers in Ohio and Indiana in the election in the fall of 1902. Each participant was required to pay fifty cents for the privilege of making a guess.

Before the election occurred, the plaintiff, one of the guessers, conceiving the contest to be illegal, brought suit to recover back his fifty cents and also alleged that he was one of a large number of persons similarly situated, each of whom had an interest in the fund accumulated from these fifty-cent payments, and that unless restrained the defendants would distribute the fund, leaving himself and his four hundred thousand fellow victims remediless, and asked that a receiver be appointed to take possession of the fund, ascertain the names of the parties lawfully entitled thereto and to distribute it among them. He invoked the statute, common to most codes that "when the question is one of common or general interest to many persons or when the parties are very numerous and it is impracticable to bring them all before the court one or more may sue for the benefit of all." The court held the scheme to be a lottery but that plaintiff could not bring suit for the other contestants and that the lower court, not having jurisdiction of his individual claim, properly dismissed the case.

In the recent case of *Ellison* v. *Lavin*, 179 N. Y. 164, a guessing contest as to the number of cigars subject to the internal revenue tax during a named month was held to be a lottery, while in *United States* v. *Rosenblum*, 121 Fed. Rep. 180, upon identical facts, the opposite conclusion was reached. It is said in *Quatsoe* v. *Eggleston*, 42 Ore. 315, "if the power of reason or the will is exercised it is not a lottery." In support of this view it has been held that giving prizes for naming the winner in a horse

race is not a lottery; *Shoddart* v. *Sager* [1895], 2 Q. B. 474; nor for making the nearest prediction as to number of births and deaths in London during a named week; *Hall* v. *Cox* [1899], 1 Q. B. 198, nor is giving prizes to the nearest guesser to the number of beans in a jar, *Reg.* v. *Dodds*, 4 Ont. 390—the contrary being held in *Hudleson* v. *State*, 94 Ind. 426. In the principal case the element of skill was regarded as immaterial. In this respect it is in harmony with the recent decision in *Public Clearing House* v. *Coyne*, 194 U. S. 497, where the court held a questionable scheme to be a lottery since it lacked the elements of legitimate business enterprise, the result being determined "from conditions over which the contestant had no control and with which he had no connection." This seems a reasonable doctrine as the manifest tendency of any "get rich quick scheme" should determine its character rather than its conformity to definitions.

The court conceded that the plaintiff had a right to recover back the fifty cents paid by him, each contestant having a several demand for that amount (*Jones* v. *Garcia Del Rio*, 1 T. & R. 297; *Barclay* v. *Pearson* [1893], 2 Ch. 154), but, in the absence of a showing to the contrary, presumed that the others did not want their money back and therefore should receive no aid from a court of equity; had they all been of the same class their consent would have been presumed. *Flint* v. *Spurr*, 17 B. Mon. (Ky.) 499. In *Jones* v. *Garcia Del Rio*, supra, Lord ELDON held that one person might thus file a bill on behalf of himself and others where the others have a choice between such relief and nothing. If, however, they desire to abide by their contract the rule would be inapplicable. In the principal case the contract being void, thus giving the parties no rights under it, the plaintiff claimed to be within the above rule.

It should also be noted that the statute giving the right to recover money back *after* the contract is executed seems to be designed for the benefit of the contestants. *Duval* v. *Wellman*, 124 N. Y. 156; *Jaques* v. *Golightly*, 2 Wm. Bl. 1073; *Equitable Loan & Surety Co.* v. *Waring*, 117 Ga. 599. It thus nullifies any consent to have it paid to the winner under the agreement. *Lewis* v. *Miner*, 3 Denio 103. Nor would it be presumed that it was intended as a gratuity. *Ruckman* v. *Pitcher*, 1 N. Y. 319.

Lotteries were not illegal at the common law but are merely mala prohibita. *Mississippi* v. *Stone*, 101 U. S. 814. In Ohio the statutory penalties are imposed only on the party conducting the lottery. Annot. Stat. 6929-31. The doctrine that the parties are in pari delicto consequently is inapplicable. *Mount* v. *White*, 7 Johns. (N. Y.) 434; CLARK CONTRACTS, §500. The practical difficulty of distributing the fund and the slight benefit that would accrue to the plaintiffs doubtless appealed to the court as it did in *Barclay* v. *Pearson* [1893], 2 Ch. 154, and in *Equitable Loan & Security Co.* v. *Waring*, 117 Ga. 599, 62 L. R. A. 93.