

services of these entrepreneurs? Doubtless the court is not inconsiderate of unattractive ancillary aspects to the proposed laws, its attitude being at least the more definite as a consequence. Thus, for the people of Massachusetts to ease the housing shortage by encouraging new building and/or to aid the veteran—it being impossible to determine definitely which, if either, is the primary intent—in the exact manner proposed, leaves them as their first task the formation of a new article of amendment to the constitution as were their predecessors forced to do in a like situation nearly forty years ago.<sup>31</sup>

DIXON F. SPIVY

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CONSTITUTIONAL LAW—PARI-MUTUEL BETTING UNDER  
STATE ANTI-LOTTERY PROVISIONS

In the recent case of *Longstreth v. Cook*,<sup>1</sup> the Supreme Court of Arkansas, in a divided opinion, held that a statute legalizing pari-mutuel betting on horse races does not violate the following provision of the Arkansas Constitution: "No lottery shall be authorized by this state, nor shall the sale of lottery tickets be allowed."<sup>2</sup>

That the pari-mutuel system of betting on horse races constitutes gambling cannot be questioned. The issue involved in the *Longstreth* case, however, is whether it constitutes that form of gambling known as a lottery. The latter is defined as:

A scheme for the distribution of prizes by lot or chance; especially, a scheme by which one or more prizes are distributed by chance among persons who have paid or promised a consideration for a chance to win them, usually as determined by the numbers on tickets as drawn from a lottery wheel.<sup>3</sup>

A lottery consists of three essential elements: prize, consideration, and chance.<sup>4</sup> Unquestionably, the first two elements are present in wagering on horse races. It is the last of these requisites, chance, which controls the determination of the issue

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31. Following Opinion of the Justices, 211 Mass. 624, 98 N.E. 611 (1912) there proceeded certain amendments to the constitution to allow that which had been declared void. See note 3 *supra*.

1. 220 S.W.2d 433 (Ark. 1949).

2. ARK. CONST. Art. XIX, § 14.

3. WEBSTER'S NEW INT'L DICTIONARY 1461 (2d ed. 1945).

4. 34 C. J. LOTTERIES, § 3, p. 649; 54 C. J. LOTTERIES, § 2, p. 845.

before the court in the principal case. In order to constitute a lottery, it is essential not only that the element of chance is present, but also that it controls or dominates the awarding of the prize. When the element of chance is combined with skill or judgment in order to determine the winning prize, and skill or judgment is the dominating element, it is not a lottery; if chance controls, an opposite conclusion will be reached.<sup>5</sup>

In the view of the court in the principal case, this necessary degree of chance is lacking because the bettor possesses the opportunity to exercise his reason, judgment, sagacity or discretion, and the outcome of the race depends on many factors outside the realm of chance. The reasoning of the court in arriving at this conclusion is set out in the following extract:

Every event in life and fulfillment of every lawful contract entered into between parties is contingent to at least some slight extent upon chance. No one would contend, however, that a contract knowingly entered into between two parties is a gaming contract merely because its fulfillment was prevented as a result of unknown or unconsidered forces, or by the issue of certain conditions, or by the result of fortuity. The pari-mutuel system of betting does not come within the definition mentioned above. [The definition mentioned is that quoted from Webster, *supra*.] While the amount of money to be divided is indefinite as to dollars and cents, it is definite in that the amount of money to be divided is the total stakes on the winning horse, less a given percentage to the management. The persons among whom the money is to be divided are not uncertain, as they are "those who bet on the winning horse". The winning horse is not determined by chance, alone, but the condition, speed, and endurance of the horse, aided by the skill and management of the rider or driver, enter into the result.<sup>6</sup>

Assuming that wagering on horse races does not constitute a lottery *per se*, the question is simply whether the use of the pari-mutuel system of betting affects this conclusion. The pari-mutuel machine is defined as "A machine for registering and indicating the number and nature of bets made on horse races used in the pari-mutuel system of betting" and the definition of the system is "A form of betting on horses in

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5. *Ibid.*

6. Longstreth v. Cook, 220 S.W.2d 433, 437 (Ark. 1949).

7. WEBSTER'S NEW INT'L DICTIONARY 1717 (2d ed. 1945).

which those who bet on the winning horse share the total stakes, less a small per cent to the management."<sup>8</sup>

The court in the instant case, although without referring to the decision, follows the rule laid down in *Utah State Fair Ass'n v. Green*<sup>9</sup> and reasons that the use of the pari-mutuel machine, which in no way can affect the result of the race, but is merely a convenient mechanical device which greatly expedites the recording and tabulation of information regarding the number and nature of bets, will not make wagering on horse races a lottery if it is not otherwise so.

The dissenting opinion written by Chief Justice Smith in the *Longstreth* case considers a number of factors. (1) The pari-mutuel system is itself a misnomer, as it does not consist of mutual wagers and there is no privity of contract between the bettors. (2) The pari-mutuel system is similar to the lottery system in that the operators entertain no risk of loss. Operators merely accept the bets, deduct their percentage, and balance off the remainder among the winners. (3) The majority opinion indulges in a play on words when the court states, "The persons among whom the money is to be divided are not uncertain, as they are 'those who bet on the winning horse.'" The dissent maintains that the amount and winners are indefinite, and that only the method by which they are to be determined is definite. (4) Many of the bettors do not rely on their judgment and reasoning in arriving at their choice, and even among those who do, not one can be found who is able to win consistently.

Only two cases in point can be found, decided since the turn of the century, that seem to uphold the opinion of the two dissenting justices in the instant case; and, upon a closer perusal, their weight may be seriously questioned. One is *State v. Ak-Sar-Ben Exposition Co.*,<sup>10</sup> which can be clearly distinguished since the Constitution of Nebraska then in force made no distinction between gambling and lottery; the prohibition applied to both equally. Almost all states have constitutional provisions prohibiting lotteries, but not gambling, leaving the latter phase to special legislation or local enforcement. The Nebraska Constitution has since been revised to conform to those of other states. A second decision which in substance agreed with

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8. *Ibid.*

9. 68 Utah 251, 249 Pac. 1016 (1926).

10. 118 Neb. 851, 226 N.W. 705 (1929).

the dissent in the *Longstreth* case is *Opinion of the Justices*.<sup>11</sup> This is an advisory opinion given by the Alabama Supreme Court at the request of the legislature on the question of whether a proposed statute legalizing the bookmaking and pari-mutuel system of betting on horse races and dog races would be constitutional. In a four-to-three decision, the court advised the legislature that such a statute would violate the constitution's anti-lottery clause. The reasoning employed by the majority was that, although skill and judgment might go into the determination of the winner, the fact that the amount to be won is unknown makes it a lottery. The dissent in the advisory opinion, while giving a detailed resume of the Alabama and United States decisions generally, maintained that since skill and judgment did go into the determination of the winner, that is sufficient to take it out of the anti-lottery clause.

In conclusion, it is submitted that however sound may seem the argument of the dissent in the *Longstreth* case it is for the legislatures and not the courts to judge the relative merits and evils of such gambling legislation. A careful study of the decided cases indicates that the principal case is in accord with the weight of authority in the United States today.<sup>12</sup>

BURTON A. LIBRACH

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PERSONAL PROPERTY—FINDER V. LIFE TENANT, LIFE TENANT V. REMAINDERMAN—Plaintiffs, while swimming in a newly dug canal of the Chariton River in Missouri, discovered an ancient Indian canoe. One end was imbedded nine feet in the bank, the other rose six inches above the water. One Nina Haney held a life estate in the river bank, and Ella Evans held the remainder in fee. Biegel, one of the defendants, aided the plaintiffs in removing the canoe from the bank; when he refused to give up the find, the plaintiffs began this action of replevin. Prior to the bringing of the action, the plaintiffs had purchased all of the rights which the life tenant of the real estate had in the canoe. The remainderman intervened.

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11. 248 Ala. 516, 31 So.2d 753 (1947).

12. *People v. Monroe*, 349 Ill. 270, 182 N.E. 439 (1932); *Commonwealth v. Ky. Jockey Club*, 238 Ky. 739, 38 S.W.2d 987 (1931); *Roban v. Detroit Racing Ass'n*, 314 Mich. 326, 22 N.W.2d 433 (1946); *Utah State Fair Ass'n v. Green*, 68 Utah 251, 249 Pac. 1016 (1926).