REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

RICHMOND:
PUBLISHED BY ROBERT I. SMITH.
Samuel Shepherd & Co. Printers.
1833.

1805. *November.*

Dinwiddie Justices v. Chesterfield Justices.

ties; nor that the same was an ancient bridge, which had been built and kept in repair at the expense of both counties; nor even that it was upon any public road, leading from one county to another, or to the seat of government, &c. All which objections, as the defendants have never appeared, and by their answers directly or indirectly waived them, I conceive may now be made, and that the writ ought to be quashed; and, consequently, that the judgment of the district court, awarding a peremptory *mandamus*, should be reversed.

ROANE, Judge. As there was no rule to shew cause, the *mandamus* issued improvidently; and therefore I am of opinion, that the judgment should be reversed, and the writ quashed.

LYONS, President, concurred.

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MADISON *& al. v.* VAUGHAN.

A mistake in the drawing of a lottery, is fatal, and a redrawing must take place.

An act of assembly, passed the 9th day of January, 1804, authorized commissioners to raise a sum of money, by way of lottery, for the benefit of William and Mary college. By the scheme of the commissioners, which was advertized, each holder of a ticket was to receive the prize drawn against his ticket; but nothing, if the paper drawn against it was a blank: and the last drawn ticket was to be entitled to a prize of $ 10,000. The lottery was drawn; and, in the course of the drawing, a prize of $ 10,000, drawn against a certain ticket, was, by mistake, proclaimed to be $ 500, only. At the conclusion of the drawing, it was discovered, that the

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number of papers put into the number wheel, and marked with numbers corresponding with those on the tickets, was 7999 instead of 8000; and that one blank had been put by mistake into the prize wheel, more than ought to have been put in. The commissioners doubting whether they ought to pay the prizes which had been drawn, *Vaughan*, who owned one of the fortunate tickets, brought suit in the superior court of chancery, against the college, (of which *Madison* was president,) and the commissioners, to recover the sum drawn by the plaintiff. The chancellor decreed payment; and the defendants appealed to the court of appeals.

Randolph, for the appellants. If the missing ticket was not, in fact, put into the wheel, the chances were all changed, and the contract violated. The commissioners were the agents of all the parties; and the expectation of each person concerned was, that the drawing would be conducted according to the scheme; and, as that did not happen, all were deceived. If there had been fraud, the court would have interfered; and there is the same reason for it where there was a mistake. The holders of the tickets had a right to demand a strict adherence to the scheme; and, as if that had been pursued, the chances might have been different, a departure from it, without their consent, was an injury to the unsuccessful adventurers; which can only be compensated by a redrawing of the lottery.

Hay, contra. The court cannot assume that all the tickets were not put into the wheel; for all may have been there at first, and one afterwards lost by accident. The drawing of the prize gave a right to the money, which no mistake could defeat, as a mischance to one ought not to affect the rest of the holders. There was no fraud; and a mere mistake had no effect. *Schinotti* v. *Bumsted*, 6 T. Rep. 646. A contrary doctrine would be dangerous; for commissioners finding it convenient to retain the use of the money, might, to accomplish that object, purposely promote

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a redrawing of the lottery; which, if frequently repeated, would exhaust the fund. The evil of such a practice, is proved by the present case; for the drawing already had, cost $2000; and another would produce a total loss to the college. If a redrawing is decreed, all confidence in lotteries is gone; for men will not hereafter embark in such a sea of troubles. There was no contract between the commissioners on one side, and all the adventurers on the other, as the appellants' counsel contends. For it is a contract only between the commissioners on one side, and each adventurer, in his separate right, on the other. Therefore a loss to one ticket holder is nothing to the rest; who ought not to be prejudiced by an injury done to him; as there was no contract between them; but his redress, if he be entitled to any, is against the commissioners.

Wickham, on the same side. The court had jurisdiction as the bill claimed the performance of an agreement, and was calculated to settle conflicting rights. The act of assembly is to be construed according to the principles of the common law; and the commissioners having been empowered by it to regulate the scheme, and the drawing of the lottery, their act is conclusive. Consequently, as their contract was separate as to each adventurer, their proceedings cannot be reversed at the instance of one only; for his redress is against the commissioners, with whom he contracted; and the rest of the ticket holders have no concern in it, as there was no contract between him and them. A contrary doctrine would open innumerable doors to fraud; and therefore a redrawing was not once thought of in the case of *Schinotti* v. *Bumsted*, 6 T. Rep. 646. The presumption is, that all the tickets were put into the wheel, and that the missing one was accidentally omitted to be recorded after it was drawn out. That such an accident might occur, is proved by the fact of the $10,000 prize having been proclaimed as one of $500 only. This shews the contingencies to which such matters are liable. The pretermission of

the missing ticket was one of the hazards of the game; and the owner has no right to complain, as the fortunate tickets were exposed to the same risk; for the chance being equal, each must abide by his fate. All the tickets are accounted for; and there is no room to suppose that the lost one might have been a prize, especially as there is no imputation of fraud. The error, if any, was very small, and ought not to be regarded; for the loss to the owner of the ticket is $ 10 only, and *de minimis non curat lex. Hob.* 88. That there were no corresponding prizes to the two blanks makes no difference; for, being blanks, they produced no effect.

Randolph, in reply. There was an implied contract that the drawing should be fairly conducted according to the scheme; and if it was not, the ticket holders were deceived. That one ticket only was lost makes no difference, for the owner of that was an injured man; and the amount of his loss is not correctly stated by the opposite counsel, for it involved the chance of obtaining $ 10,000. The case of *Schinotti* v. *Bumsted*, 6 T. Rep. 646, does not apply; because the plaintiff there claimed the £1000 for the last drawn ticket; and, in point of fact, his was the last that was drawn. It makes no difference, whether the lost ticket was in the wheel or not: But, if it did, there is no proof that it was ever put in. Actual fraud would have been cause for relief; and mistake stands upon as strong ground. That the reversal of the decree may operate as a discouragement to lotteries, is of no consequence; for it is a pernicious practice, and had better be suppressed; but at any rate the legislature may provide a remedy in future, if it should be deemed important.

Cur. adv. vult.

ROANE, Judge. There is no ground for believing that the eight thousandth ticket was ever put into the numerical wheel; and therefore the question is, Whether the drawing, which took place, was valid? It is obvious, that the

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effect is diminished, or increased, according to the number of tickets; and, consequently, that the chances of the tickets actually drawn, were different, among themselves, from what they would have been, if the true number had been put into the wheel: so that, even as to them, the stipulations were not fulfilled; and the mistake ought to be corrected. But the argument is *a fortiori* as to the owner of the lost ticket; for the others had a chance, although not that stipulated in the scheme; which was in some degree compensated, as the omission diminished the number of competitors. Whereas the owner of the lost ticket had no chance at all; but was deprived of his right altogether. He is therefore an injured man; and the rest of the adventurers have no right to insist that he shall not have an opportunity of redress. It was said, by Mr. *Hay*, that the contract was only between the commissioners on one side, and each adventurer in his own right, upon the other; and therefore, that the loss to one ticket holder was nothing to the rest; but the injured person should seek redress from the commissioners. That, however, is not a true representation of the case; for the adventurers were joint partners in the lottery as far as respected the drawing of it, although the chances and the profits arising from them respectively, were several; they were therefore *pro hac vice*, socially interested, and must be understood as having jointly stipulated among themselves to assist each other in procuring a drawing according to the scheme, that each might have the profit, which fortune might allot him. The argument, therefore, that none but the party injured is concerned with his loss from misconduct in the drawing of the lottery, is not correct; for the nature of their engagement to each other is, that there shall be a drawing according to the scheme; and that they will jointly assist in effecting it. The rest, therefore, cannot separate themselves from one, and violate the stipulation, by ousting him of his rights themselves, or overlooking, or ratifying the ouster of others; for *In societatis contractibus fides exuberet.* But this is not the only view of the subject: a more

complete classification of the parties would be into the college, the commissioners, and the adventurers; and then their relative duties are obvious. For according to that arrangement, all must be understood as impliedly agreeing with each other to the scheme published by the commissioners; and the college and adventurers will stand in the relation of buyers and sellers; but the commissioners, like auctioneers, will occupy the station of agents of the other two for conducting the drawing as prescribed by the scheme. 3 *Burr.* 1921. Which necessarily makes the college and adventurers the real parties to the drawing; and consequently, mutually responsible that it should be justly conducted, according to the plan agreed on. Any departure from it, therefore, without the joint consent of all, vitiates the transaction. The obligation to adhere to the scheme is strengthened by the reflection, that the scheme was, in effect, part of the act of assembly from which it emanated, and from which the commissioners derived their authority: This made it indispensably necessary that the scheme should be fully complied with: For if it was part of the act, the commissioners could not lawfully depart from it. Consequently, as the scheme announced that 8000 tickets were to be drawn, if less than that number was drawn, the stipulations between the parties, and the law, were both violated; and therefore, the drawing wholly void. Nor is it material, whether the omission arose from negligence or mistake; for, either way, the effect was the same, as the drawing was not conducted according to the scheme. But it was said, that, if the commissioners were the agents of both parties, the college and adventurers were bound by their acts. That, however, does not meet my idea; because the agency was confined to authorized and lawful purposes only, without extending to any other. Therefore, as they were not authorized to agree to acts of negligence or mistake, neither the college, nor the adventurers, could be bound by any of that character. The case of *Schinotti* v. *Bumsted*, 6 T. Rep. 646, appears to be hardly reconcileable to the act of parliament: But be that

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as it may, it is the decision of a court of common law upon a statute that did not extend to this country; and therefore, is no authority here. I am, consequently, of opinion, that the drawing was void, and that a new one ought to take place.

FLEMING, Judge. The mistake vitiates the whole drawing: which ought, therefore to be set aside, and a new one directed. For it makes no difference that a single ticket only was missing, as the owner of that was an injured man, and the general risk, as to the rest of the holders, was necessarily changed. I am for reversing the decree, that a redrawing of the lottery, may take place.

LYONS, President, concurred; and the entry was as follows:

"This day came the parties, by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid, and the arguments of counsel, is of opinion, That in lotteries, every purchaser of a ticket is an equal adventurer, and, as such, has a right with every other adventurer, to an equal chance for a prize; and that, as a ticket numbered 3556 was not, by neglect or accident, put into the wheel before the lottery, in the proceedings of this cause mentioned, was drawn, that ticket had not an equal chance with the tickets of the other adventurers; or rather had no chance at all, to draw a prize. And that, although no fraud, collusion or evasion, was practised by the managers, or their agents, in their conduct or proceedings respecting the said lottery, yet as there was a mistake in the number of tickets put into and drawn out of both wheels of the said lottery, the mistake might have affected the chances of others, as well as that of the owner of the ticket No. 3556, and therefore ought, in equity, to be rectified; which can only be done by a redrawing of the said lottery according to the original scheme thereof; and that the appellee ought not to be benefitted by the mistake aforesaid, or to be paid the five hun-

dred dollars drawn under such error and mistake, as a prize to, and by his ticket. Therefore it is decreed and ordered that the decree aforesaid be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this court proceeding to make such decree as the said superior court of chancery ought to have pronounced, it is further decreed and ordered that the bill of the appellee be dismissed, and that the parties bear their own costs in the said superior court of chancery."

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COMMONWEALTH *v.* BROWN.

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The sheriff is not entitled to commissions, unless the sale is actually made.

This case is an appeal from the decision of the district court of Richmond, allowing a claim which was exhibited against the commonwealth by the appellee, to commissions claimed by the appellant, as sheriff of Southampton county, on an execution from the general court on behalf of the commonwealth against *Lazarus Cook*, security of *John Rogers*, formerly sheriff of Southampton county, which claim had been rejected by the auditor.

The facts were, that an execution issued from the general court against *Cook*, bearing date the 27th of January, 1803, which came into the hands of the appellee, who levied the same on twelve grown negroes, five young negroes and five horses, and appointed the 8th day of June, 1803, as the time of sale. The property appears to have been advertised at the court-house and other public places in the county. The appellee suffered the property to remain in *Lazarus Cook's* possession until the day of sale. The sheriff attended at *Lazarus Cook's* on the day of sale, but was prevented from selling by the said *Cook's* production of a