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COLLIS v. SMITH.

BARTON J., O'CONNOR J., and ISAACS J. concurred.

*Special leave refused.*

Solicitor, for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor, for the respondent, *E. R. Abigail.*

C. A. W.

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[HIGH COURT OF AUSTRALIA.]

SOBYE . . . . . APPELLANT; INFORMANT,

AND

LEVY . . . . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 19th.

Griffith C.J., Barton, O'Connor and Isaacs JJ.

*Special leave to appeal—Question of fact or law—Gaming and wagering—Gaming and Betting Act* 1906 (*N.S.W.*) (*No.* 13 *of* 1906), *secs.* 3, 4—*Police Offences (Amendment) Act* 1908 (*N.S.W.*) (*No.* 12 *of* 1908), *sec.* 21—*Limerick competition—Lottery—Literary skill—Selection according to merit—Arbitrary conditions.*

The respondent was convicted under sec. 4 of the *Gaming and Betting Act* 1906, and the *Police Offences (Amendment) Act* 1908, sec. 21, of selling a ticket in a lottery, the alleged lottery being a Limerick competition. The respondent kept a tobacconist's shop, at which the appellant, upon payment of 1/-, obtained two cigars and a ticket entitling him to compete in the Limerick competition, by supplying the last line of the Limerick. The ticket stated that the competition was entered into by the holder thereof upon the distinct understanding and agreement that the decision of the committee appointed by the respondent should be final and conclusive, and that £500

would be distributed. Evidence was given that a judge was appointed ; that he examined all the lines sent in by the competitors ; that prizes were awarded in accordance with his decision ; and that in making his award he considered the appropriateness of the line, the metre, and the rhyme. The Supreme Court held by majority, (*Cohen* J. dissenting), that the competition was not a lottery.

Upon an application for special leave to appeal against this decision, *held*, by *Griffith* C.J., *Barton* and *O'Connor* JJ. (*Isaacs* J. dissenting), that whether the competition was a lottery was a question of fact, and that leave to appeal should not be granted.

*Held*, by *Isaacs* J., that the facts were undisputed, and the decision of the Supreme Court was erroneous in point of law, and that leave to appeal should be granted.

Special leave to appeal from the decision of the Supreme Court of New South Wales : *Ex parte Levy*, 9 S.R. (N.S.W.), 688 ; 26 W.N. (N.S.W.), 134, refused.

MOTION for special leave to appeal from a decision of the Supreme Court of New South Wales.

The respondent Levy was convicted upon an information under sec. 4 of the *Gaming and Betting Act* 1906, and sec. 21 of the *Police Offences (Amendment) Act* 1908, for that on 17th May 1909 he then being the occupier of a room in the Royal Arcade, Sydney, did knowingly allow the same to be used in contravention of the Act 1906 No. 13 as amended by the Act 1908 No. 12, in that the respondent did sell to one Nicholls a ticket for the disposal of money by lottery, to wit the Dudley Limerick.

Sec. 4 of the Act of 1906 No. 13 provides that "every owner and every occupier of any house, office, room, or other place who knowingly allows the same to be used in contravention of this Act shall be liable to a penalty."

By sec. 3 of the Act of 1906 No. 13 as amended by sec. 21 of 1908 No. 12 it is an offence against the Act 1906 No. 13 to use a house, office, room or other place as a common gaming house, or for playing or taking part in any unlawful game therein, or for giving or selling any ticket or chance, or share in a ticket or chance, for the disposal of money by lottery or chance, or for aiding or taking part in the disposal of money by lottery or chance.

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It appeared from the evidence that the respondent had a tobacconist's shop at the Royal Arcade. The words Dudley Limerick Cigar Co. were on the window, and also a notice that the Limerick could be written in a room at the back of the shop. Nicholls went into the shop and asked the respondent for a Limerick. The respondent handed him a box containing two cigars, and a ticket which he tore out of a book. Nicholls paid 1s. for the cigars and the ticket.

The ticket was in the following form :—

"No. 275. May 1909.

Received the sum of one shilling for one packet of our choice Dudley Limerick cigars to be forwarded as per your instructions.

Dudley Limerick Cigar Co.,
Terry Chambers, 356 George St., Sydney.

This receipt is given, and the competition entered into by the holder thereof upon a distinct understanding and agreement that the decision of any committee appointed by the proprietor to award the prizes shall be final and conclusive. £500 to be distributed. The number of this coupon receipt corresponds with number of Limerick sent in. Prizes will be paid immediately after award of committee is made.

No 275. Limerick for May 1909.

Last week the subject was Mars,
One of the beautiful stars;
And what I did see
With me you'll agree,

Customers may forward order by post (postage added), and cigars will be sent securely packed. The last line may be written on plain paper or on Limerick forms supplied for the purpose."

Nicholls filled in the last line and handed it to the respondent. He asked the respondent what prize he would get if successful. The respondent said he did not know what the prize would be for May, but the previous prize was first prize £50, second £25 and third £12, and that there were 150 at 10s. each, and 60 at 5s. each. Nicholls also asked who decided the prizes. The

respondent said he did not know, but he thought the same gentlemen decided for April as the month before, but there might be a fresh lot for May. He thought one was a university man, and he thought another was named Walker. The respondent also said that the results were published in the *Sun* and *Truth* the first Sunday in every month.

For the defence evidence was given by Mr. P. J. Butler, a Bachelor of Arts of the Sydney University, who acted as judge of the May competition. He stated that he had done a good deal of literary and journalistic work, and was at present employed at the Lands Department. He received about 3,700 Limericks between 24th and 31st May. His duty was to pick out the best line. He had no interest in the Dudley business. He was told that 85 were wanted for prizes. He got them down to 85 and sent in his award. He picked out the best. The best lines were stated in order in the award. He spent about a fortnight on this work, and looked out and considered every coupon that was put before him. The line "Dudley, the peer of cigars," got the first prize. The second prize was "In ether they smoke cigars." He got five guineas for this work, and understood that his judgment was to be accepted as final. The printed copy of the winning list was the same as his award. He considered the appropriateness of the line, the metre, and the rhyme in his award.

The respondent was convicted and fined. The Supreme Court, consisting of *Simpson* A.C.J., *Cohen* and *Pring* JJ. by majority, *Cohen* J. dissenting, made absolute a rule *nisi* for a prohibition against the order of the magistrate, under sec. 112 of the *Justices Act* 1902 upon the grounds: (1) That the evidence did not show that the distribution was a lottery within the Act; (2) that as prizes were not allotted merely by chance the information should have been dismissed: see *Ex parte Levy* (1).

The informant Sobye now applied for special leave to appeal from the decision of the Supreme Court.

*Piddington*, for the applicant. The scheme disclosed by the evidence was a mere contrivance for the distribution of money

(1) 9 S.R. (N.S.W.), 688; 26 W.N. (N.S.W.), 134.

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by chance. If there was evidence upon which the magistrate could find that the suggestion of a literary competition was a mere sham, a prohibition should not have been granted against his decision.

[GRIFFITH C.J.—I think that principle has been rather run to death. If the Court is satisfied that the magistrate's decision was wrong it is its duty to say so. It is a real Court of Appeal. In some of the recent cases that principle has been carried to this extent, that, if it is a case in which the Court would not grant a new trial upon the ground that the verdict was against evidence, the Court cannot grant a prohibition. I do not think that is a correct statement of the principle.]

No information was given to competitors by the coupon as to how the money would be distributed. It was purely a matter of chance, so far as they knew, how many prizes would be awarded, or upon what basis the winning numbers would be selected.

[O'CONNOR J.—The informant has to prove that this is a lottery. How can it be said that it was decided merely by chance?

GRIFFITH C.J.—The question is what was the real nature of the transaction.]

The scheme is a new device for gambling, which is attempted to be concealed under a purely fictitious literary guise. If the lines had been drawn out of a hat it would be a compliance with the conditions. It does not purport to be a decision upon any ground of merit. This case is governed by *Blyth* v. *Hulton & Co. Ltd.* (1).

[GRIFFITH C.J.—The Court held that, upon the facts of that case, it was impossible that the decision should be by merit. Here the evidence shows that the respondent took skilled advice and acted upon it. The fact that the person selected as judge may have been incompetent does not affect the question.]

The magistrate must be taken to have found that the scheme was a fraud, and the Court held that he could not come to that conclusion. Upon the whole of the facts there was evidence of a distribution of prizes by lot or chance. On the decision of the Court below, it would be impossible to suppress lotteries if they

(1) 24 T.L.R., 719.

masquerade in the form of Limerick competitions. [Reference was also made to *Barclay* v. *Pearson* (1).]

GRIFFITH C.J. I do not think this is a case in which special leave should be granted. In his judgment the Acting Chief Justice says (2): "In the case of the *Attorney-General* v. *The Mutual Loan Agency* (3), this Court decided that to constitute a lottery there must be a distribution of prizes by mere chance or lot, and not as the result of the exercise of judgment or skill on the part of the competitors. That decision has been recently affirmed by the High Court. I do not understand the respondent to contest that definition, but to contend that for various reasons the result of this competition did in reality depend on chance and nothing else."

If that statement was intended to lay down the principle that the mere fact of there being in any particular case the exercise of judgment or skill conclusively determined whether or not it amounted to a lottery, I do not so interpret the decision referred to. A competition may be a lottery although some element of skill is involved.

But whether or not there was a lottery in the present case seems to me to be purely a question of fact. It is possible that this was a lottery, or, on the other hand, that it was not. It depends on the particular facts of each case whether the transaction was an honest or a fraudulent one. The Court does not grant special leave to appeal on a mere question of fact. I therefore am of opinion that this application should be refused.

BARTON J. and O'CONNOR J. concurred.

ISAACS J. I take a different view. I regard this decision of the Court as one which practically defeats the object of the Act. I take the view adopted by *Cohen* J., in whose judgment I concur. It has been practically held by the majority of the Court that, if a competitor has anything to do in connection with a competition, it does not become a matter of chance, and therefore is not a

(1) (1893) 2 Ch., 154.

(2) 9 S.R. (N.S.W.), 688, at p. 690.

(3) 9 S.R. (N.S.W.), 148.

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Isaacs J

lottery. I think that is absolutely contrary to *Blyth* v. *Hulton & Co. Ltd.* (1) and *Barclay* v. *Pearson* (2), and I think it is also contrary to the later case of *Willis* v. *Young and Stembridge* (3).

The facts of this case are undisputed. The magistrate found that it was a lottery. The competition was simply this, that a person paid 1s. for a packet of cigars and got a receipt in these terms: "This receipt is given, and the competition entered into by the holder thereof upon a distinct understanding and agreement that the decision of any committee appointed by the proprietor to award the prizes shall be final and conclusive. £500 to be distributed. The number of this coupon receipt corresponds with number of Limerick sent in. Prizes will be paid immediately after award of committee is made." There is nothing in the coupon to indicate that excellence is to be the standard. The committee, if they choose, may select any competitor's paper because of its absurdity. The selection is purely an arbitrary one. There is nothing to say that there will be a breach of the conditions if they do not take excellence as the standard. The mere fact that a particular judge has chosen to take the excellence of the lines as the standard of merit he will adopt does not seem to me to conclude the matter. The question is what is the bargain entered into.

I think this is an appeal, not from a question of fact, but from a conclusion of law, namely, that as a matter of law, because a line has to be written by a competitor, this is not a lottery. I think that is a wrong decision, and that leave to appeal should be granted.

*Application refused.*

Solicitor, *Crown Solicitor for New South Wales.*

C. E. W.

(1) 24 T.L.R., 719.

(2) (1893) 2 Ch., 154.

(3) (1907) 1 K.B., 448.