[HIGH COURT OF AUSTRALIA.]

SEE . . . . . APPELLANT;
PLAINTIFF,

AND

COHEN AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM A JUSTICE OF THE HIGH COURT.

H. C. OF A. 1922-1923.

MELBOURNE, *Oct.* 17, *Nov.* 20, 1922.

Starke J.

May 8, *Aug.* 28, 1923.

Knox C.J., Isaacs and Higgins JJ.

Contract—Validity—Sale of wheat certificates—Future dividends—Payment of differences—Contract of gaming or wagering—Police Offences Act 1915 (*Vict.*) (*No.* 2708), *sec.* 96—*Gaming and Betting Act* 1912 (*N.S.W.*) (*No.* 25 *of* 1912), *sec.* 16.

The plaintiff agreed in writing to sell to the defendants negotiable wheat certificates of the season 1915-1916 representing a certain number of bushels of wheat, at a certain price per bushel. It was stipulated in the agreement that delivery should take place "on the date of declaration of the final payment," and that all payments of dividends declared between the date of the contract and the final payment inclusive should be credited to the buyers and adjusted at the time of settlement, but that the seller should have the option of delivering the scrip or of making or claiming a cash adjustment, that is, that payment should be made by the seller to the buyers or vice versa of the difference between the price and the amount or amounts per bushel declared from time to time, inclusive of final dividend of the 1915-1916 pool. The certificates in question were issued by the Government of New South Wales under a scheme for marketing the wheat harvest of the season 1915-1916, and entitled the holders thereof to an account from the Government for the balance, over any advances then made, of the purchase price of wheat sold to the Government under the scheme.

Held, by *Knox* C.J., *Isaacs* and *Higgins* JJ. (reversing the decision of *Starke* J. on this point), that the contract was one of gaming or wagering, and that no action would lie upon it.

Per Isaacs J. : Speculation does not necessarily involve a contract by way of wager : to constitute a wagering contract a common intention to wager is essential.

Decision of *Starke* J. in favour of the defendants affirmed on another ground.

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APPEAL from *Starke* J.

An action was brought in the High Court by Samuel Grafton Norris See of Melbourne against Philip Cohen and Hugh Augustus Wolrige of Sydney, who formerly carried on business as P. Cohen & Co., to recover £318 0s. 6d. as being damages for breach of a contract by which the plaintiff agreed to sell and the defendants to buy certain wheat certificates.

The material facts are stated in the judgments hereunder.

The action was heard by *Starke* J.

Ham, for the plaintiff.

Lowe, for the defendants.

Cur. adv. vult.

Nov. 20, 1922.

STARKE J. delivered the following written judgment :—During the last week of March 1920 the parties to this action communicated with each other by telegram. Ultimately the plaintiff agreed to sell and the defendants to buy " two parcels of Wales A scrip each 50,000 bushels at ¾d. per bushel for final dividend." The agreement was subsequently reduced to writing. It was forwarded by the plaintiff to the defendants on 8th April 1920, and confirmed in writing by the defendants on 12th April 1920. The writing was as follows :—" I, Samuel G. See, 19 Queen Street, Melbourne, agree to sell and Messrs. P. Cohen & Co. of 115 Pitt Street, Sydney, agree to buy New South Wales negotiable wheat certificates season (1915-1916) representing about 100,000 (one hundred thousand) bushels at ¾d. per bushel. Delivery on the date of declaration of the final payment. All payments of dividends declared between the date of this contract and the final payment inclusive to be credited to the buyers and adjusted at the time of settlement, but sellers have the option of delivering the scrip, or of making or claiming a cash adjustment, i.e., payment to be made by sellers to buyers

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or vice versa of the difference between ¾d. per bushel and the amount or amounts per bushel declared from time to time, inclusive of final dividend of the New South Wales 1915-1916 Pool."

The subject matter of the contract was certificates issued by the Government of the State of New South Wales under a scheme for marketing the wheat harvest of 1915-1916. The scheme was not gone into before me; but it is sufficient to say that the certificates entitled the holders to an account from the Government for the balance, over any advances then made, of the purchase price of wheat sold to the Government under the scheme. These certificates passed from hand to hand, and were freely bought and sold on the market. Both parties to the contract apparently anticipated further advances or dividends to the holders of the certificates, and these prospective dividends were in truth the subject of the contract. But the prospect of further dividends faded away. The Minister for Agriculture during November 1921 stated that the 1915-1916 pool had been largely overpaid, and in point of fact no further dividends were paid or declared in respect of that pool. And the parties have in this action mutually admitted as a fact "that on or about 24th January 1922, and not before, it was duly declared and announced by the proper authority that no further dividend would be declared with respect to the said wheat"—that is, the wheat represented by the certificates referred to in this case. The plaintiff on 8th February 1922 tendered to the defendants wheat certificates for 101,768 bushels 12 lb. in performance of his contract, but the defendants refused to accept delivery of the certificates or to pay the ¾d. per bushel mentioned in the contract note. The certificates became valueless so soon as it became known that the 1915-1916 wheat pool had been overpaid. The object of the action is to recover £318 0s. 6d., representing 101,768 bushels 12 lb. at ¾d. per bushel.

At the time of the tender the defendants did not object to certificates for 101,768 instead of 100,000 bushels being tendered, and they are, in my opinion, precluded by their pleadings, pursuant to an order in Chambers made by me on 12th October 1922, from now objecting to such a tender under the contract, if it be in other respects effective.

Originally the defendants pleaded that the plaintiff was not ready and willing to perform the contract on his part, but on 7th July

1922 the defendants notified the plaintiff that this defence had been abandoned. Later the defendants applied for leave to reinstate it, and were allowed to do so, but so that the defendants were limited to the allegation that the plaintiff's obligation was to deliver wheat certificates on the date of the declaration of final payment and that delivery was not given on that date.

The rights and obligations of the parties rest upon a proper construction of the written agreement between them. Did the defendants agree to pay for the wheat certificates in the events which have happened ? The case for the defendants was that their obligation to pay was conditioned upon a delivery of the certificates on the date of the declaration of the final payment and that no delivery was made or tendered upon that date. And, as a further defence, the defendants alleged that the agreement was a contract by way of gaming and wagering, and therefore unenforceable. The former argument appears to accept 24th January 1922 as the date of declaration of final payment within the meaning of the contract. But in my opinion it was not. As I construe the contract, the parties contracted on the basis that there would be one or more dividends to holders of wheat certificates after the date of the contract, and that payment and delivery or settlement under it would take place so soon as one of those dividends should be declared to be the final payment. The parties did not contemplate that no further dividend would in fact be paid or declared, and they did not provide for that contingency in their contract. The basis of the obligation to pay and deliver or settle under the contract, was, in my opinion, a payment subsequent to the date of the contract, declared by the proper authority to be the final payment. As this event never happened, no obligation arose on the part of the defendants to pay the purchase-money.

The argument that the agreement was a contract by way of gaming or wagering cannot be supported. An agreement to sell a dividend, not declared, is not a wagering contract (*Marten* v. *Gibbon* (1)). It was, no doubt, a speculative contract, but the question is, what were the intentions of the plaintiff and the defendants respectively at the time of the making of the contract ? Did the parties actually intend

(1) (1875) 33 L.T.(N.S.), 561.

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to sell and purchase the wheat certificates or the prospective dividends on these certificates? Did they intend to create a real obligation or to simulate an obligation? If the transaction was intended to be a real one, then it cannot be regarded as a gambling transaction and unenforceable. I see no reason to doubt the reality or the genuineness of the agreement before me (*Grizewood* v. *Blane* (1), *Shaw* v. *Caledonian Railway Co.* (2) and *Lowenfeld* v. *Howat* (3), cited in *Coldridge's Law of Gambling*, 2nd ed., pp. 14-19).

Judgment must be for the defendants with costs of action, less any costs exclusively attributable to the allegation that the contract was by way of gaming and wagering.

From that decision the plaintiff appealed to the Full Court.

A. H. Davis and *Fullagar*, for the appellant. The contract is in substance one for the sale of wheat scrip; and there is no absolute condition that delivery must be on the date of the declaration of final payment, for there is an option in the seller not to deliver, but to pay or claim differences. The provision as to delivery is subordinate and is contingent on there being a final payment. As there was no final payment the whole provision goes and there is left a contract to sell scrip, as to which delivery must be within a reasonable time (*Elliott* v. *Crutchley* (4); *Braithwaite* v. *Foreign Hardwood Co.* (5)). If the appellant was bound to deliver on the date of the declaration of final payment, the respondents waived that requisite by repudiating the contract. The words "the date of declaration of the final payment" are satisfied when a declaration was made that the last dividend paid before the contract was the final payment that would be made (see *Barr* v. *Gibson* (6)).

Pigott, for the respondents. The whole basis of the contract was that there would be one or more dividends after the contract, and, as that basis failed, there is no cause of action (*Scott* v. *Coulson* (7)). If there was no obligation to deliver the certificates and if the substance of the agreement was to pay differences, the contract is void

(1) (1851) 11 C.B., 526.
(2) (1890) 17 R. (Ct. of Sess.), 466.
(3) (1891) 19 R. (Ct. of Sess.), 128.
(4) (1906) A.C., 7.
(5) (1905) 2 K.B., 543.
(6) (1838) 3 M. & W., 390, at p. 400.
(7) (1903) 2 Ch., 249.

as being a gaming transaction (*Police Offences Act* 1915 (Vict.), sec. 96; *Gaming and Betting Act* 1912 (N.S.W.), sec. 16; *Coldridge's Law of Gambling*, 2nd ed., pp. 14 *et seqq.*).

[ISAACS J. referred to *In re Gieve* (1).]

A. H. Davis, in reply. The learned Judge below found that the transaction was a real and genuine sale of certificates. If that is so, it is not a gaming transaction.

Cur. adv. vult.

The following written judgments were delivered :—

Aug. 28, 1923.

KNOX C.J. This was an appeal from a judgment entered for the defendants in an action brought by the appellant to recover damages for breach of contract. The action was tried before my brother *Starke*, and the facts are fully stated in his reasons for judgment.

The grounds of defence were (a) that the appellant was not ready and willing to perform the contract because delivery was not made or tendered on the date of declaration of final payment, and (b) that the contract was a contract by way of gaming and wagering and therefore not enforceable.

In the view which I take of the latter ground it is unnecessary for me to express an opinion on the former. I take the law to be as stated by *Lindley* M.R. in *In re Gieve* (2) : "If the real effect of this contract is to stipulate for the payment of differences, it is plainly a gambling transaction." In the present case the effect of the contract is that, if the dividends thereafter declared including the final dividend amount to more than $\frac{3}{4}$d. per bushel, the appellant is to pay the difference to the respondents—but if such dividends amount in all to less than $\frac{3}{4}$d. the respondents are to pay the difference to the appellant. In the former event the respondents win and the appellant loses ; in the latter the appellant wins and the respondents lose. The appellant is under no obligation to deliver the certificates whatever the amount of the dividends may be, even though before the declaration of final payment the dividends paid after the contract amounted to more than $\frac{3}{4}$d. per bushel. On the other hand, the respondents never become liable to pay more than the amount by

(1) (1899) 1 Q.B., 794.

(2) (1899) 1 Q.B., at p. 798.

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which the dividends paid fall short of ¾d. per bushel, for the terms of the contract expressly provide that "all payments of dividends declared between the date of this contract and the final payment *inclusive*" shall "be credited to the buyers and adjusted at the time of settlement"—i.e., when the final payment has been declared. Nor are the so-called buyers entitled under any circumstances to demand as of right delivery of the certificates, even though the dividends received by the seller may have exceeded ¾d. per bushel.

It is, I think, impossible to regard a contract in these terms as a bona fide contract for the sale and delivery of the certificates, or even for the sale of future dividends. The certificates themselves were of no value except as evidence of the right of the holder to receive future payments made in respect of the wheat covered by them. In truth the so-called seller never sold the right to receive future dividends, but retained that right subject to an obligation to account to the other party for the amount by which the total dividends received should exceed ¾d. per bushel. Adopting the words of *Vaughan Williams* L.J. in *In re Gieve* (1), I think the proper inference to draw in this case is that neither of the parties ever contemplated delivery or acceptance of the certificates, but that both intended that the matter should be dealt with as a matter of difference only and not of delivery and acceptance. At the time of the contract it was uncertain what the future dividends would amount to; the appellant thought in the event they would not exceed ¾d. per bushel, the respondents took the opposite view. They agreed that, dependent on the determination of that event, one party should pay the other a sum of money; neither of the contracting parties having any other interest in that contract than the sum or stake he would so win or lose, there being no other real consideration for the making of such contract by either of the parties. Such a contract, according to *Hawkins* J. in *Carlill* v. *Carbolic Smoke Ball Co.* (2), is a wagering contract. For these reasons I am of opinion that judgment was rightly entered for the defendants.

I think, however, that so much of the judgment as deals with the costs of the action should be varied. The order made was that the defendants recover from the plaintiff their costs of action less such

(1) (1899) 1 Q.B., at p. 803. (2) (1892) 2 Q.B., 484, at pp. 490-491.

costs as were exclusively attributable to the allegation that the contract was by way of gaming or wagering. In my opinion the plaintiff should pay to the defendants their costs of the action and of this appeal.

ISAACS J. I am of opinion that the appeal should be dismissed on the ground that the transaction was a contract by way of wagering within the meaning of the statutes both in New South Wales and Victoria, and therefore "null and void." The contract sued upon is in writing, and, therefore, its construction is a matter of law for the Court. It is, of course, essential to understand its subject matter and its position at the time the contract was entered into. From the materials appearing in evidence it may be gathered that the wheat certificates mentioned in the contract were certificates issued by the Government of New South Wales stating the quantity of wheat contributed to a general pool of wheat in that State established in the season 1915-1916 by the Government for sale by or through it abroad. After providing for expenses, the net proceeds were from time to time to be distributed in proportion to the quantity of wheat contributed, and so in that case each certificate would evidence the right of the holder to a calculable amount of money. How much had been received by way of dividend before the contract was made does not appear, but some dividends had been paid. If the written agreement had stopped at the end of the first paragraph, it would have appeared on its face to be an ordinary transaction of sale. Had it been then attacked as a wagering contract, the defendants would have been called upon to show by evidence that it was a mere colourable device for what was in reality a wagering transaction, as in *Grizewood* v. *Blane* (1) and *Hill* v. *Fox* (2). In that case "the character of the documents themselves coupled with the nature of the transactions entered into, the position of the parties who entered into them, and other circumstances" (per Lord *Herschell* in *Universal Stock Exchange Ltd.* v. *Strachan* (3)), would have to be looked at to see whether the contract was a "real transaction of commerce" or "a mere gambling for differences." The real intention of the parties would be ascertained in

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(1) (1851) 11 C.B., 526. (2) (1859) 4 H. & N., 359.
(3) (1896) A.C., 166, at p.172-173.

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that case by evidence *dehors* the written agreement. And such evidence would be admissible, not for the benefit of either party and not to vary or add to the terms of the record of the transaction, but to vindicate the law and to enable the Court to carry out the will of Parliament that no judicial aid should be given to a transaction of a wagering character.

It must, however, be made clear that speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential. A contract may be speculative and yet a perfectly good commercial contract. It would be disastrous to hold otherwise. One party to a good commercial transaction may never intend to deliver the goods he has sold and the other party may never expect him to deliver—still, if the contract itself creates the obligation to deliver, it is not, if otherwise valid, a wagering contract. The question always is: "Is the *contract* a wagering contract?" If, notwithstanding an apparently clear sale of goods, it is shown that there was a bargain or understanding between the parties, either express or implied, that the goods, though the buyer is bound to pay the price, are not to be, or need not be, delivered, but that, instead of delivery the seller is bound or at liberty to merely adjust differences, then there is established a common intention as part of the contract which shows it to be of a wagering character. (See *Bhagwandas Parasram* v. *Burjorji Ruttonji Bomanji* (1).) "If it rests with me to do or not to do a certain thing at a future time, according to the then state of my mind, I cannot be said to have contracted to do it" (per Lord *Herschell* L.C. in *Helby* v. *Matthews* (2)).

The transaction as recorded in writing may show sufficiently on its face the wagering character of the bargain. Where that is the case, there is no need to search for it in extrinsic evidence. Such a case was *In re Gieve* (3). There *Lindley* M.R. said (4):—"On the face of it, I think it is a gambling transaction. It runs thus: 'I beg to advise having sold to you twenty Canadas' at a certain price. If that were all, it would be an ordinary sold note: there would be

(1) (1917) L.R. 45 Ind. App., 29; 42 Bombay R., 373 (P.C.).
(2) (1895) A.C., 471, at p. 476.
(3) (1899) 1 Q.B., 794.
(4) (1899) 1 Q.B., at p. 799.

nothing on the face of it to show it did not mean what it said. It might, no doubt, be proved by parol evidence that the contract did not represent the real meaning of the parties; but here we have something else which, to my mind, is quite conclusive,—'plus $\frac{1}{8}$th if stock is taken up.' The expression 'if' taken up shows plainly that the parties do not intend that the stock shall be taken up: that the buyer need not take it up at all unless he chooses, but that if he does he is to pay the extra one-eighth. This is not, on the very face of it therefore, a bargain for sale and purchase at all, and this is where *Wright* J. has, in my opinion, failed to give effect to *the real intention of the parties as expressed by the terms of the bargain.*" *Richards* v. *Starck* (1) was also a case where the same conclusion was arrived at from the terms of the written bargain.

In other words, the intention of the parties to wager may be sufficiently evidenced by their contractual stipulations, expressed or implied, as appearing in the writing. Since the written agreement in the present case did not stop at the end of the first paragraph, but went on to express stipulations between the parties with reference to what had been just described as a sale of wheat certificates, we have to consider the effect of those additional stipulations. To my mind they show that the real transaction was not a sale of certificates but a contract to settle differences. There is no obligation whatever on the seller to deliver any certificates at any time, under any circumstances. It would be a peculiar kind of sale where the seller is entitled to be paid and yet is not bound over to transfer the property sold. There is certainly a primary provision: "Delivery on the date of declaration of the final payment." But that is only by way of prelude. The arrangement is that until that date arrives all interim dividends are to be received by the seller, retained by him and credited by him to the buyers. If they should exceed the amount payable by the buyers, they still remain in the seller's hands until the date of declaration of final payment. Then, when that date arrives, the seller may, if he chooses, collect the final dividend and, without delivering the scrip (for that would, in the assumption made, be already handed back to the Government), hand over the surplus of dividends received over the amount due by

(1) (1911) 1 K.B., 296.

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the buyers. How much that would exactly be I cannot say, because, there being no actual delivery necessary and no provision for appropriation of certificates or for prior declaration of identity of certificates, I cannot see how the word " about " could be satisfied except at the sole will of the seller within limits. But, if the interim dividends alone exceed the buyers' liability, the seller could, if he chose, hand over the excess and along with it certificates answering the description enabling the buyers to collect the final payment. The transfer of the paper would not mean more than authority to collect the final dividend as part of the profit of the transaction. But, if the seller chooses to collect the final dividend himself, he can, and then pay the surplus over. That is provided for by the option to the seller of " making " a cash adjustment. If, however, the dividends interim and final taken together amount to less than the sum agreed to be paid by the buyers, then the seller, having received the final dividend and, of course, delivered up to the Government the certificates, simply claims the deficiency. But it is obvious that all this can be done very simply without the intervention of any certificates at all.

Until after 24th January 1922, the agreed date, when the Minister announced there had already been an overpayment, no certificates were designated or tendered. On 27th January scrip representing 101,768 bushels 12 lb. was indicated. But that fact, being purely optional, cannot affect the real effect of the contract as regards its obligations. In *Forget* v. *Ostigny* (1) Lord *Herschell* L.C. said: " The question whether a contract is intended to be executed by delivery according to the obligations expressed upon the face of it is no doubt an important test for determining whether it is a real one or only a gambling arrangement under the guise of a commercial contract." Tested by that consideration, the bargain appears to be essentially a wager. I may add that I do not apply what *Cotton* L.J. said in *Thacker* v. *Hardy* (2) as the test, because, though approved by Lord *Herschell* L.C. in *Forget* v. *Ostigny* (3), I regard that statement, not so much as a definition and therefore the test, as a statement of an essential condition. (See per *Channell* J. in

(1) (1895) A.C., 318, at p. 323. (2) (1878) 4 Q.B.D., 685, at p. 695.
(3) (1895) A.C., at p. 326.

Richards v. *Starck* (1).) I think the matter is to be judged of by its substance, and I rest chiefly on the absence of any obligation regarding delivery, and on the affirmative provisions for settlement, which are, in my opinion, quite opposed to any notion of a commercial transaction.

HIGGINS J. Assuming that this contract involved an obligation on the part of the plaintiff to deliver wheat certificates to the defendants, and on the part of the defendants to pay three-farthings per bushel on such delivery, then, in my opinion, the judgment in favour of the defendants at the trial was given on a proper ground—though not taken in the defence—that the whole basis of the contract had failed. The contract was based on the assumption that there would be some future declaration or declarations of dividend—at the least a final declaration. The delivery of certificates was to be "on the date of declaration of the final payment"; and there was no such declaration. The payment and the delivery are to be treated as concurrent conditions, in the absence of any expression to the contrary (*Benjamin on Sale*, 3rd ed., pp. 581, 667). The date for delivery and for payment has not come, and now can never come. The last dividend was declared on 30th September 1919; the contract was made afterwards, on 24th March 1920; and on 22nd January 1922 the announcement came that no further dividend would be declared. Another way of putting the position is that the plaintiff has not satisfied a condition precedent to his right to recover the three farthings per bushel. But the whole basis of the obligation to pay has gone (*Taylor* v. *Caldwell* (2)).

But, in my opinion, there is under the contract no such obligation. The contract gives to the plaintiff a mere "option" to deliver the certificates for this wheat; he may, if he chooses, have a mere cash adjustment with the defendants, paying or receiving any difference between three farthings per bushel and the future dividend or dividends. If the dividends should amount to one penny per bushel, the seller was to pay one farthing per bushel to the defendants; if the dividends should amount to one halfpenny only, the buyers were to pay to the seller one farthing per bushel. All the dividends after

(1) (1911) 1 K.B., at p. 302. (2) (1863) 3 B. & S., 826.

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the contract would be received by the seller as the holder of the certificates, but he was to put the amount to the credit of the defendants, and to hand the surplus over three farthings to the defendants, retaining the rest (I infer) for himself. As for the buyers, the contract purports, in its first clause, to state a definite price to be paid by the buyers—three farthings per bushel; but the full intention is set out in detail in the second clause, which shows that the buyers are merely to pay the difference between the future dividend or dividends (there must be at least one), and the three farthings—that is, if the dividend or dividends are less than three farthings. There is no reason why the seller could not make a similar contract with one or a dozen other "buyers"; for he is not under any obligation to deliver the certificates; and everything tends to the conclusion that this is not a real sale of the wheat certificates at all, but a mere sale of "differences." I accept the definition given by *Hawkins* J. in *Carlill* v. *Carbolic Smoke Ball Co.* (1):—"A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract."

Here, the plaintiff must lose any dividends which he receives over three farthings; but he may win the difference between one halfpenny and three farthings. The defendants may win the difference between three farthings and one penny; but they may lose the difference between one halfpenny and three farthings. I cannot distinguish the transaction, in essence, from a bet between two spectators at an auction as to the price which a piano will fetch.

(1) (1892) 2 Q.B., at pp. 490-491; aff. (1893) 1 Q.B., 256.

I concur, therefore, with my learned colleagues in the view that such a contract as this is a contract " by way of gaming or wagering," and therefore null and void (*Grizewood* v. *Blane* (1); *Universal Stock Exchange Ltd.* v. *Strachan* (2); *In re Gieve* (3)).

This action is brought in the High Court because it is between residents of different States, New South Wales and Victoria; but inasmuch as the provisions of the English *Gaming Act* (8 & 9 Vict. c. 109, sec. 18) have been adopted in both these States, we are not concerned to determine which State law is applicable (*Gaming and Betting Act* 1912 (N.S.W.), sec. 16; *Police Offences Act* 1915 (Vict.), sec. 96.

I concur in the order proposed by the Chief Justice.

Appeal dismissed. Plaintiff to pay costs of action and of appeal.

Solicitor for the appellant, *J. W. McComas.*

Solicitors for the respondents, *Read & Read*, Sydney, by *Henderson & Ball.*

B. L.

(1) (1851) 11 C.B., 526.
(2) (1896) A.C., 166.
(3) (1899) 1 Q.B., 794.