[HIGH COURT OF AUSTRALIA.]

SKILL BALL PROPRIETARY LIMITED . APPELLANT;
DEFENDANT,

AND

THORBURN . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 26, 27.

SYDNEY, *Aug.* 13.

Starke, Dixon, Evatt and McTiernan JJ.

Gaming—Money received as consideration for undertaking to pay thereafter money on a sporting contingency—Use of premises—Game of mixed skill and chance—Entrance fee contributed by players—Money prize—Police Offences Act 1928 (*Vict.*) (*No.* 3749), *sec.* 97 (*b*).

The appellant used premises of which it was the occupier for the conduct of a game played in the following manner:—Each player had a card with four rows of four numbers. He was supplied with a number of balls, which he endeavoured to throw into numbered compartments in a box about three feet distant from him, his object being to throw the balls into such of the compartments as corresponded with a row of four numbers on his card. The player who first filled a row of four numbers on his card was the winner. Each player paid an entrance fee before commencing to play, and the winner received from the appellant a prize in money.

Held that, within the meaning of sec. 97 (*b*) of the *Police Offences Act* 1928 (Vict.), the appellant had used the premises for the purpose of money being received by the occupier thereof as or for the consideration for an undertaking to pay thereafter money on a sporting contingency.

Peers and Taylor v. *Caldwell*, (1916) 1 K.B. 371; (1917) W.N. 198, *R.* v. *Peers and Brown*, (1917) 86 L.J. K.B. 797; 116 L.T. 830; 12 Cr. App. R. 210, *R.* v. *Kirby, Parker and Patrick*, (1927) 20 Cr. App. R. 12, *Bennett* v. *Ewens*, (1928) 2 K.B. 510, and *Shuttleworth* v. *Leeds Greyhound Association*, (1933) 1 K.B. 400, applied.

Decision of the Supreme Court of Victoria (*Lowe* J.): *Thorburn* v. *Skill Ball Pty. Ltd.*, (1936) V.L.R. 108, affirmed.

APPEAL from the Supreme Court of Victoria.

George James Thorburn laid an information against Skill Ball Pty. Ltd. under sec. 97 (*b*) of the *Police Offences Act* 1928 (Vict.). The information alleged that the defendant, being the occupier on 18th December 1935 of a certain house or place at St. Kilda, did unlawfully use the same for the purpose of money being received on behalf of the defendant as the consideration for an undertaking to pay thereafter money on a sporting contingency, to wit, a game known as "skill ball." On the hearing of the information before the Court of Petty Sessions at St. Kilda it appeared that the method in which the game was played was as follows:—Inside an enclosure there were boxes containing numbered compartments, and outside the enclosure there were seats for players, one facing each box. Each player paid an entrance fee and was given ten cards. Each card was divided into sixteen numbered squares in rows of four. Before the game commenced the amount to be paid to the winner was announced. Each player was provided with four balls, which he endeavoured to throw from a distance of about three feet into such of the compartments in the box allotted to him as corresponded by number to a row (horizontal, vertical or diagonal) of four numbers on one of his cards. If no player filled a row of numbers with the first four balls, three more balls were provided for each player, and then two balls and then one ball, until a player filled a row of numbers. If more players than one filled a row at the same time the prize was divided between them. It was admitted by the informant's witnesses that there was more skill than chance in the game. Evidence was given by several persons on behalf of the defendant that they had played the game on a number of occasions and their main object was to obtain relaxation and amusement. The defendant was convicted and fined £20. An order nisi to review this decision was discharged by the Supreme Court of Victoria: *Thorburn* v. *Skill Ball Pty. Ltd.* (1).

From this decision the defendant, by special leave, appealed to the High Court.

Wilbur Ham K.C. (with him *Clyne*), for the appellant. Sec. 97 of the *Police Offences Act* 1928 (Vict.) comes from the English Betting

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Houses Act of 1853. It is directed against betting and not against the playing of a game. It was conceded by the police magistrate that there was an element of skill entering into the game. "Sporting contingency" is defined in sec. 86. Sec. 97 (*a*) deals with credit betting and sec. 97 (*b*) with cash betting. Sec. 98 reflects that the purpose of sec. 97 (*a*) and (*b*) is against betting. No prosecution except for betting was brought under the English section for sixty years. The Irish and Scottish cases are in the appellant's favour, and there is a division of opinion in the English cases. Until 1916 all the English authorities accepted the position that the section was confined to credit betting at a house and cash betting where the stake was received at a house, though the bet might be made elsewhere (*Haigh* v. *Town Council of Sheffield* (1); *R.* v. *Hobbs* (2); *Caminada* v. *Hulton* (3)). The last-mentioned case was distinguished in *R.* v. *Stoddart* (4). The present case comes within *Caminada* v. *Hulton* (5), and outside the distinction drawn in *R.* v. *Stoddart* (6). The Scottish cases say there is a broad distinction between betting and playing a game for a prize. Then came a decision of the Court of Appeal in *Lennox and Davis* v. *Stoddart* (7) and the decision in *Peers and Taylor* v. *Caldwell* (8). In the Scottish case of *Granata* v. *Mackintosh* (9) it was held that the keeper of the shop had not infringed the Betting Houses Act. In *Forte* v. *M'Alister* (10) the same question arose and the Court took the same view as the Scottish case. So in *R.* v. *Peers and Brown* (11). The nearest case to the present is *Bennett* v. *Ewens* (12). In *Powell* v. *Kempton Park Racecourse Co.* (13) the House of Lords took the same view as *Blackburn* J. took at the very beginning. In *Shuttleworth* v. *Leeds Greyhound Association* (14), *Powell's Case* (15) was misunderstood by the Divisional Court. In the present case all the evidence was that "skill ball" was a game in which some skill was involved

(1) (1874) L.R. 10 Q.B. 102, at p. 106.
(2) (1898) 2 Q.B. 647, at pp. 653, 657.
(3) (1891) 60 L.J. M.C. 116, at p. 121.
(4) (1901) 1 K.B. 177, at pp. 180, 181, 184.
(5) (1891) 60 L.J. M.C. 116.
(6) (1901) 1 K.B. 177.
(7) (1902) 2 K.B. 21, at pp. 36, 37.
(8) (1916) 1 K.B. 371, at p. 378; (1917) W.N. 198.
(9) (1916) S.C. (J.) 48, at p. 52.
(10) (1917) 2 I.R. 387, at pp. 395, 397, 401-405.
(11) (1917) 86 L.J. K.B. 797; 12 Cr. App. R. 210.
(12) (1928) 2 K.B. 510.
(13) (1899) A.C. 143, at pp. 191-193, 161, 186.
(14) (1933) 1 K.B. 400, at pp. 406, 411, 412.
(15) (1899) A.C. 143.

and that people played it for amusement. They did not play for the purpose of betting (*Strathern* v. *Albion Greyhounds (Glasgow) Ltd.* (1)). *Leng (Sir W. C.) & Co.* ("*Sheffield Telegraph*") v. *Sillitoe* (2) is under an entirely different Act.

O'Bryan (with him *T. W. Smith*), for the respondent. What is aimed at by the section is the keeping of a place for a particular business. If sec. 97 (*b*) dealt only with betting transactions, it would leave very little to be dealt with by sec. 97 (*a*). Unless there is some valid reason for reading down the words in sec. 97 (*b*), it must deal with matters other than betting transactions. Sec. 88 (2) (*b*) deals with lotteries. "Device" in sec. 88 (2) (*b*) is not to be given any dyslogistic connotation (*Deeley* v. *Kenny* (3)). "Property" in sec. 88 (2) (*b*) does not include money (*Morgan* v. *Knight* (4)). The English provisions differ from the Victorian. The words "with persons resorting thereto," which appeared after the word "betting" in sec. 1 of the English Betting Houses Act 1853, do not occur in the Victorian sec. 97 (*a*), and the last clause in sec. 98, put in by an Act of 1912, did not appear in England. Sec. 97 must be applied literally. The English section has been so applied since 1901. In *Caminada* v. *Hulton* (5), the first of the coupon cases, there was no proof that money was received in consideration of a chance. *Stoddart* v. *Sagar* (6) was another coupon case and *R.* v. *Hobbs* (7) related to a sweepstake. Up to the present there is no binding decision that the section is directed only to betting, though there are dicta to that effect. The question came up for direct decision in *R.* v. *Stoddart* (8), which decided that the words of the section must be applied literally and extended beyond betting. *R.* v. *Stoddart* (8) was accepted in England (*Stoddart* v. *Hawke* (9) ; *Mackenzie* v. *Hawke* (10)). About the same time *Lennox and Davis* v. *Stoddart* (11) was decided. The Victorian case of *O'Donnell* v. *Solomon* (12)

(1) (1933) S.C. (J.) 91.
(2) (1929) 1 K.B. 366.
(3) (1925) V.L.R. 253; 46 A.L.T. 182.
(4) (1927) V.L.R. 170; 48 A.L.T. 167.
(5) (1891) 60 L.J.M.C. 116.
(6) (1895) 2 Q.B. 474.
(7) (1898) 2 Q.B. 647.
(8) (1901) 1 K.B. 177.
(9) (1902) 1 K.B. 353.
(10) (1902) 2 K.B. 216.
(11) (1902) 2 K.B. 21.
(12) (1906) V.L.R. 425; 27 A.L.T. 237.

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was decided in 1906, after which the Legislature passed the *Lotteries, Betting and Gaming Act* 1906, which extended the first part of the section so as to cover all classes of bets and would include the second part if it were limited to bets. The dicta of *Halsbury* L.C. in *Powell* v. *Kempton Park Racecourse Co.* (1) apply to par. *a* only; in that case there was no dispute on the question of betting. There is no justification for limiting par. *b* to betting, and the decisions in England, New South Wales and Victoria so hold. In the present case there is a bet between the proprietor and the customer (*Diggle* v. *Higgs* (2); *Trimble* v. *Hill* (3); *Ellesmere* (*Earl*) v. *Wallace* (4)). Sec. 98 is limited to places where a business is carried on (*Powell* v. *Kempton Park Racecourse Co.* (5); *O'Donnell* v. *Solomon* (6); *Knox* v. *Bible* (7); *Bond* v. *Foran* (8)). It is a bet where a man pays out the same sum whoever wins. This is the same as in a totalisator (*Automatic Totalisators Ltd.* v. *Federal Commissioner of Taxation* (9)). This is consistent with *Attorney-General* v. *Luncheon and Sports Club* (10) and *Yeudall* v. *McQuilkie* (11)). [Counsel also referred to *Ex parte O'Connor* (12); *Phillips* v. *Lipp* (13); *Dowd* v. *Williams* (14); *Strathern* v. *Albion Greyhounds (Glasgow) Ltd.* (15); *R.* v. *Kirby, Parker and Patrick* (16).]

Wilbur Ham K.C., in reply. The keeper does not undertake to pay on a sporting contingency. He undertakes to pay out a certain sum to whatever person first achieves a certain result. These facts do not come within par. *b* (*Ellesmere* (*Earl*) v. *Wallace* (17)). The amendment of par. *a* had no effect on par. *b*.

Cur. adv. vult.

Aug. 13.

The following written judgments were delivered :—

STARKE J. The *Police Offences Act* 1928 of Victoria provides, in sec. 97 : " No house or place shall be opened kept or used for any of

(1) (1899) A.C. 143.
(2) (1877) 2 Ex. D. 422.
(3) (1879) 5 App. Cas. 342.
(4) (1929) 2 Ch. 1.
(5) (1899) A.C., at pp. 159, 160, 161.
(6) (1906) V.L.R. 425; 27 A.L.T. 237.
(7) (1907) V.L.R. 485; 29 A.L.T. 23.
(8) (1934) 52 C.L.R. 364, at pp. 376, 377, 380, 381.
(9) (1920) 27 C.L.R. 513.
(10) (1929) A.C. 400, at pp. 404, 407.
(11) (1928) S.C. (J.) 54.
(12) (1921) 21 S.R. (N.S.W.) 566; 38 W.N. (N.S.W.) 192.
(13) (1922) Q.S.R. 205.
(14) (1928) 45 W.N. (N.S.W.) 120.
(15) (1933) S.C. (J.) at p. 117.
(16) (1927) 20 Cr. App. R. 12.
(17) (1929) 2 Ch., at pp. 49, 52.

the following purposes . . . (*b*) For the purpose of any money or valuable thing being received by or on behalf of the owner occupier or keeper thereof or any person as aforesaid—as or for the consideration for any undertaking to pay or give thereafter any money or valuable thing on any sporting contingency." "'Sporting contingency' includes any event or contingency of or relating to any horse race or other race fight game sport or exercise" (sec. 86). The appellant, Skill Ball Pty. Ltd., was charged that being the occupier of a certain house or place on the foreshore at St. Kilda it did unlawfully use the same for the purpose of money being received on its behalf as the consideration for an undertaking to pay thereafter money on a sporting contingency. It was not disputed that the appellant established and used certain premises on the foreshore at St. Kilda in which it conducted a game called skill ball. The game consists of throwing small rubber or other balls from a distance of some three feet into numbered compartments corresponding with the numbers on cards selected by the players. A small sum is charged for entrance as a player, and the winner or winners of the game receive a prize in money, greater than the entrance fee, but varying according to its amount, and announced by the management before each game commences. The winner or winners of the game are the person or persons who first get a number of balls into the compartments, in lines as numbered on the cards, either up, or down, or diagonally. The appellant was convicted of the offence charged, and that conviction was affirmed in the Supreme Court of Victoria. An appeal by special leave is brought to this Court.

The appeal turns upon the proper interpretation of the provisions of the *Police Offences Act* 1928 already mentioned, which are substantially a copy of the English Betting Houses Act of 1853 (16 & 17 Vict. c. 119, sec. 1). These or like provisions have been the subject of consideration and decision in England, Scotland, Ireland, New South Wales, Queensland, and New Zealand, resulting, however, in some divergence of judicial opinion. It is well, therefore, to adhere to the natural and ordinary sense of the words used in the sections of the *Police Offences Act* referred to, unless that would lead to some absurdity or some repugnance to or inconsistency with the rest of the Act.

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The appellant has opened, kept and used a house or place in which it conducts a game called skill ball. A charge was made by or on behalf of the appellant to persons desiring to take part in the game. Such persons, for that consideration, were allowed to take part in the game and to compete for the money prizes which the appellant, through its managers, offered, and undertook to pay upon a contingency named by it, namely, the winning of the game in accordance with the terms and conditions stated by it. It was an undertaking to pay on an event or contingency of or relating to the game, and therefore a sporting contingency according to the definition of those words in sec. 86 of the Act. It was also an undertaking to pay subsequently to the receipt by the appellant of the charge made by it, and therefore an undertaking to pay "thereafter" as required by the Act. This state of facts brings the case, I think, precisely within the words of the Act. A house or place was kept and used by the appellant for the purpose of money being received on its behalf as or for the consideration for its undertaking to pay thereafter money on a sporting contingency. The following authorities support this conclusion, but to discuss them at length would be as unprofitable as it is unnecessary:—England:—Coupons: *R.* v. *Stoddart* (1); *Lennox and Davis* v. *Stoddart* (2). Mechanical Contrivance: *Peers and Taylor* v. *Caldwell* (3); *R.* v. *Peers and Brown* (4); *R.* v. *Kirby, Parker and Patrick* (5); *Shuttleworth* v. *Leeds Greyhound Association* (6). Whist Drive: *Bennett* v. *Ewens* (7). Scotland:—Coupons: *Hart* v. *Hay, Nisbet & Co.* (8). Mechanical Contrivance: *Strathern* v. *Albion Greyhounds (Glasgow) Ltd.* (9). New South Wales:—Mechanical Contrivance: *Ex parte O'Connor* (10). Queensland:—Mechanical Contrivance: *Phillips* v. *Lipp* (11). New Zealand:—Mechanical Contrivance: *Dawson* v. *Sinclair* (12). But I must refer to the argument made for the appellant.

It was contended that the game was a game of skill, and that the offences aimed at by the Act did not relate to games of skill, but to

(1) (1901) 1 K.B. 177.
(2) (1902) 2 K.B. 21.
(3) (1916) 1 K.B. 371; corrected, (1917) W.N. 198.
(4) (1917) 86 L.J. K.B. 797; 12 Cr. App. R. 210.
(5) (1927) 20 Cr. App. R. 12.
(6) (1933) 1 K.B. 400.
(7) (1928) 2 K.B. 510.
(8) (1900) 2 Fraser (J.) 39.
(9) (1933) S.C. (J.) 91.
(10) (1921) 21 S.R. (N.S.W.) 566; 38 W.N. (N.S.W.) 192.
(11) (1922) Q.S.R. 205.
(12) (1926) N.Z.L.R. 721.

"betting pure and simple," that is, transactions in which none of the parties has any interest other than the sum or stake he will win or lose, and reference was made to the following cases: *R.* v. *Hobbs* (1); *Granata* v. *Mackintosh* (2); *Forte* v. *M'Alister* (3); *Ellesmere* (*Earl*) v. *Wallace* (4). Skill ball, to my mind, is worthless as a game, and I agree with the police magistrate, who said that perhaps there was some element of skill in it, but that the element of chance outweighed any element of skill. But the question whether or not the game is one of skill is immaterial to the offence charged (*R.* v. *Peers and Brown* (5); *Ex parte O'Connor* (6)). The material question is whether the appellant did or did not do the things prohibited by the section. It is insisted, however, that a consideration of the Act and its history makes it clear that it is the keeping and using of houses for the purpose of betting that is prohibited. Despite the argument addressed to us, I am by no means satisfied that the use made by the appellant of its premises cannot be described as the carrying on of a betting business "pure and simple" (See the opinions of Lords *Hunter*, *Sands* and *Murray* in the case of *Strathern* v. *Albion Greyhounds* (*Glasgow*) *Ltd.* (7)). But the true answer to the argument is again a reference to the section itself, which prescribes that the receipt of money in the circumstances and on the conditions set forth establishes the offence and warrants conviction; and there is nothing in it which makes betting on the part of the person opening, keeping or using the premises, in any way necessary to the offence. The true test is one of fact, and it is whether or not the appellant's premises were kept for the purpose of its receiving money "as or for the consideration for an undertaking to pay or give thereafter any money . . . on any sporting contingency" (*R.* v. *Peers and Brown* (8)). The police magistrate has found as a fact in the present case that the premises were used for that purpose, and to my mind that is not only a right conclusion, but the only conclution possible upon the evidence adduced before him.

Lastly, I would add that it does not follow from the test propounded in *R.* v. *Peers and Brown* (8) that tennis, golf, and other social

(1) (1898) 2 Q.B. 647.
(2) (1916) S.C. (J.) 48.
(3) (1917) 2 I.R. 387.
(4) (1929) 2 Ch., at p. 49.
(5) (1917) 86 L.J. K.B. 797.
(6) (1921) 21 S.R. (N.S.W.) 566; 38 W.N. (N.S.W.) 192.
(7) (1933) S.C. (J.) 91.
(8) (1917) 86 L.J. K.B. 797.

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clubs, holding tournaments or competitions for prizes or trophies, will fall within the prohibition of the section. Much will depend upon the circumstances, but speaking generally, it is not true that such clubs open, keep or use premises for the purposes prohibited by the section. There is no doubt, however, in my judgment, that opening, keeping and using premises as a place for the playing of a game or games, charging the players entrance fees to compete in the game or games, and promising them money prizes on the contingency of winning, create an offence which is struck by the section and within the mischief which it seeks to suppress.

The appeal should be dismissed.

Dixon and Evatt JJ. The appellant was convicted under sec. 97 (*b*) of the *Police Offences Act* 1928 of using premises for the purpose of money being received as the consideration for an undertaking to pay thereafter money on a sporting contingency, namely, a game known as "skill ball." The question for decision is whether the game is within the purview of the section. Each player stands opposite a rectangular box containing numbered compartments. He is given a number of balls to throw into the compartments. Every player is supplied with a card or cards bearing numbers arranged in adjacent squares in a particular order. The object of the player is to throw the balls into compartments bearing the numbers which stand on one of his cards in a row, whether vertical, horizontal or diagonal. The appellant's premises are fitted up so that many players may compete at once. Each intending player pays his entry money and receives a card or cards in respect of the box into which he is to throw. When a sufficient number of players has paid for cards and they have taken their places, one of the appellant's servants announces what sum of money will be paid to the winner. Every player begins with four balls and if, when these are thrown, it is found that no one has put his balls in holes bearing numbers lying consecutively on any of his cards more balls are served out. Doubtless enough skill in pitching the balls may be acquired to enable a player greatly to increase the probability of his balls entering the compartments he desires. But, in most cases, it is a matter of luck whether the balls tumble into one compartment

rather than another. The appellant's profit presumably consists in the excess of the total entry money over the amount of the prize awarded for the game.

Thus the appellant keeps a place for the purpose of obtaining money from intending players in a competitive game of some skill and more chance, and organizes the game, furnishes the means of playing it, and for every game offers a prize which provides the inducement to enter for the game, although its amount is not named until the entries for each game are closed and the game is about to begin.

Upon these facts the magistrate convicted and the Supreme Court upheld his decision. The question is whether they disclose an offence against par. *b* of sec. 97, under which the information is framed. That section is based on sec. 1 of the English Act for the Suppression of Betting Houses 1853 (16 & 17 Vict. c. 119), the preamble to which stated its purpose. The preamble recited: "A kind of gaming has of late sprung up tending to the injury and demoralization of improvident persons by the opening of places called betting houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies."

The *Police Offences Act* 1928, in an attempt to simplify the form of the provisions, takes part of the English section into a definition of an expression "sporting contingency." The expression includes "any event or contingency of or relating to any horse race or other race fight game sport or exercise" (sec. 86).

Par. *a* of sec. 97 deals with the purpose of betting *stricto sensu*. Par. *b* provides that no house or place shall be opened, kept or used "for the purpose of any money or valuable thing being received by or on behalf of the owner occupier or keeper thereof or any person as aforesaid—as or for the consideration for any undertaking to pay or give thereafter any money or valuable thing on any sporting contingency; or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such contingency."

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A house or place opened, kept or used for a purpose forbidden by either paragraph is declared a common gaming house.

Sec. 101 provides that these provisions shall not "extend to any person receiving or holding any money or valuable thing by way of stakes or deposit to be paid to the winner of any race or lawful sport game or exercise, or to the owner of any horse engaged in any race."

If, alike unenlightened and unrestricted by judicial decision, we were called upon to interpret sec. 97 (*b*), we believe we should understand it to apply only to an event which was, so to speak, extrinsic to the transaction and to an undertaking which in one event would not require the person giving it to pay the money or give the valuable thing and, in another event or other events would require him to do so. By an event extrinsic to the transaction, we mean the result of a race, fight, game or exercise other than one in which as part of the agreement the person paying the consideration obtains a right to compete and which he must win in order to become entitled to receive thereafter the money or valuable thing. In other words, we should not have thought that the paragraph covered a case where persons conducting a race, fight, game or exercise undertake to competitors paying entrance money that the winner will receive a prize. Further, we should not have thought that the provision applied when the undertaking imposed on the person giving it an absolute obligation to pay in all events the sum of money or valuable thing to one or other of a plurality of definite persons, so that the event of the race, fight, game or exercise could give him no advantage and would operate only to identify the individual, the winner, who was to receive the money or thing.

This view of the provision receives support from the Scotch cases of *Granata* v. *Mackintosh* (1), *Strathern* v. *Scottish Greyhound Racing Co.* (2), *Gibson* v. *Laird* (3), and from the Irish case of *Forte* v. *M'Alister* (4). But in one or both of its branches it is opposed to the views adopted by the King's Bench Division in a long list of cases: see particularly *Peers and Taylor* v. *Caldwell* (5); *R.* v. *Peers and*

(1) (1916) S.C. (J.) 48.
(2) (1930) S.C. (J.) 24.
(3) (1933) S.C. (J.) 6.
(4) (1917) 2 I.R. 387.
(5) (1916) 1 K.B. 371.

Brown (1); *R.* v. *Kirby, Parker and Patrick* (2); *Bennett* v. *Ewens* (3) (a whist drive); *Shuttleworth* v. *Leeds Greyhound Association* (4). These and other cases decided consistently with them may be taken to settle the law in England. The decisions were not open to appeal and it appears to us to be very unlikely that the course of authority in England will undergo a change, or, at any rate, a change great enough to affect the matter. A like interpretation or application has now been given in Scotland to the provisions: *Strathern* v. *Albion Greyhounds (Glasgow) Ltd.* (5), where two of the earlier Scotch decisions we have mentioned were overruled. The same view, in effect, has been adopted in New South Wales: *Ex parte O'Connor* (6); *Dowd* v. *Williams* (7), in Queensland: *Phillips* v. *Lipp* (8), and in New Zealand: *Dawson* v. *Sinclair* (9).

In this state of authority we do not think we should give effect to our individual views as to the construction which ought to have been placed upon the provisions. Like so many other enactments of the British Legislature, they have been transcribed with more or less fidelity in many jurisdictions within the Empire. To reject an interpretation so firmly established in England would involve a departure from the practice hitherto prevailing in our courts. We are aware that, unless one or other of the two limitations we have attempted to state is placed upon the interpretation of the provision, or its meaning undergoes some kindred restriction, it makes illegal the "use" of "places" for many lawful games played for stakes or prizes by competitors paying for their entry. This consideration did not deter the King's Bench Division from applying the enactment to a whist drive, and at best it is an argument from probability as to the legislative intention. Sec. 101 appears to provide a way of escape available in many such cases. If all the money paid in in respect of the undertaking to give the prize is devoted to the purpose of providing it, the exemption conferred by that section will apply. Any additional sums obtained from the competitors

(1) (1917) 116 L.T. 830; 86 L.J. K.B. 797.
(2) (1927) 20 Cr. App. R. at p. 14.
(3) (1928) 2 K.B. 510.
(4) (1933) 1 K.B. 400.
(5) (1933) S.C. (J.) 91; more fully reported, (1933) Sc.L.T. 552.
(6) (1921) 21 S.R. (N.S.W.) 566; 38 W.N. (N.S.W.) 192.
(7) (1928) 45 W.N. (N.S.W.) 120.
(8) (1922) Q.S.R. 205.
(9) (1926) N.Z.L.R. at p. 728.

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must be paid for some separate consideration and not for the undertaking to give the prize or stake.

The argument for the appellant was not based upon the exact interpretation which, apart from authority, we should probably have adopted. But some such interpretation was included in the wider ground the argument took. It was not claimed that the view now obtaining in the English King's Bench Division was compatible with the appellant's success, but the consistency of that view with earlier dicta and one actual decision was denied, and the reasoning of the later cases was impugned.

Our answer to such considerations is that an examination of the cases and of their treatment by text writers shows that an interpretation has been established in England inconsistent with that which we regard as necessary to the appellant's success and that we ought not to place upon the same provisions a meaning which we may be sure will be denied by English courts.

We think the appeal should be dismissed.

McTIERNAN J. I agree that the appeal should be dismissed.

A decision that, notwithstanding the facts proved, the appellant did not commit the offence charged, would be opposed to the weight of authoritative decisions, including a long line of decisions in the King's Bench Division, by which the construction of the language used in sec. 97 (*b*) has been settled. It is unnecessary for me to repeat the citation of these cases.

Appeal dismissed with costs.

Solicitors for the appellant, *Gillott, Moir & Ahern.*

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria.

H. D. W.