[HIGH COURT OF AUSTRALIA.]

EDWARD JOHN MORLEY . . . . APPELLANT;

AND

RICHARDSON AND ANOTHER . . . RESPONDENTS.

ERIC HOPETOUN MORLEY . . . . APPELLANT;

AND

RICHARDSON AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

H. C. OF A. 1942.

SYDNEY, *April* 13, 30.

Rich, Starke, McTiernan and Williams JJ.

Gaming and Wagering—Commercial contract—Whether transaction by way of gaming or wagering—Speculative transactions—Purchases from and resales to broker—Payment of differences—Gaming and Betting Act 1912-1937 (*No.* 25 *of* 1912—*No.* 39 *of* 1937), *sec.* 16.

Prima facie a commercial or other agreement operates according to the legal effect of its terms: it must be taken to be what it appears to be. The terms, however, of such an agreement may sufficiently show that it is an agreement by way of gaming or wagering, or it may be proved, notwithstanding the form of the agreement, that the transaction was colourable and not a commercial or other contract but an agreement by way of gaming or wagering, for example, an agreement for the payment of differences only.

Contracts were made for the sale of grain elevator warrants for wheat at a price per bushel of wheat: delivery at option of seller of correctly endorsed warrants. No warrants or wheat was ever delivered. Contracts, however, were made between the purchasers and the vendor whereby grain elevator warrants for equivalent quantities of wheat were sold back to the vendor at prices which on the whole resulted in a loss to the purchasers. Adjustments of the differences in price were made at intervals. The estates of the purchasers were sequestrated in bankruptcy. The Judge in Bankruptcy found that the

transactions between the vendor and the purchasers were not by way of gaming and wagering for the payment of differences only, but commercial transactions, in the way of business, though of a speculative nature.

Held that the evidence supported the finding of the Judge in Bankruptcy.

See v. *Cohen*, (1923) 33 C.L.R. 174, distinguished.

Decision of the Federal Court of Bankruptcy (Judge *Lukin*) affirmed.

APPEALS from the Federal Court of Bankruptcy (District of New South Wales and the Australian Capital Territory).

Applications under sec. 124 of the *Bankruptcy Act* 1924-1933 were made by Edward John Morley and Eric Hopetoun Morley to the Federal Court of Bankruptcy that the sequestration orders made against them on 15th April 1940 be annulled on the grounds (*a*) that the judgment debts upon which the respective bankruptcy petitions were based were obtained in respect of contracts and/or agreements by way of gaming and wagering within the meaning of the *Gaming and Betting Act* 1912 (N.S.W.), and (*b*) that in the circumstances the sequestration orders ought not to have been made.

The petitioning creditor, Raymond Arthur Brown, opposed the applications.

The petitioning creditor was a commission agent and produce merchant who carried on business at Wellington in New South Wales. During the period October 1936 to March 1938 he sold to the bankrupt Edward John Morley grain elevator warrants for 455,000 bushels of wheat, and during the period December 1936 to March 1938 to the bankrupt Eric Hopetoun Morley warrants for 220,000 bushels of wheat. In every case there were written contracts, of which the following is a sample :—

" Contract. Wellington, 20th October, 1936.

R. A. Brown, Lee Street, Wellington, sells and E. J. Morley, ' Rose Hill,' Maryvale, buys the undermentioned N.S.W. Government Grain Elevator Warrants of Season 1936/1937 on the following terms and conditions :

Warrants : Equivalent to approx. Five thousand (5,000) bushels of F.A.Q. wheat of 1936-1937 season, weight, quality and conditions to be final as per Government Grain Elevator Warrants.

Delivery : The tendering by seller of correctly endorsed warrants at his option during December-January, 1936-1937 to constitute delivery.

Price : Five shillings and twopence half-penny (5s. $2\frac{1}{2}$d.) net per bushel, less freight as endorsed on Warrants and Country silo handling charge.

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Payment: Prompt net cash in exchange for Warrants.
This Contract shall be read to embody the regulations under the N.S.W. *Wheat Act*, 1927, and any amendment or addition thereto.
Confirmed: R. A. Brown,
Wheat buyer, Wellington,
(Sgd.) R. A. Brown."

The wheat was never delivered to the purchaser, nor were any elevator warrants tendered. Before the time for delivery expired the parcels of wheat or the warrants were sold back to the vendor Brown by the purchasers, by written contracts in form similar to the contract set out above. Differences were paid from time to time on settling accounts.

Sometimes the transactions resulted in a small profit to the bankrupts, but over all of them they lost heavily, and at the beginning of January 1938 they each owed Brown a substantial sum. They each gave promissory notes for their respective debts, which were not met at maturity. Brown then sued for these sums and recovered judgments in respect of which he issued bankruptcy notices which were not complied with. The estates were sequestrated on Brown's petition.

On their public examinations the bankrupts gave evidence of conversations with Brown in which Brown suggested that they should deal in wheat. They informed him that they had no money to pay for thousands of bushels of wheat, to which he replied that they did not have to have money to deal in wheat, and that there was no wheat in it. They signed contracts for delivery of wheat and on or before the due date sold it back to Brown and all they did was to pay the differences between the buying and selling prices. Brown gave evidence denying these statements. He said that the bankrupts approached him with regard to buying wheat. When they wished to buy, he bought warrants from merchants in Sydney at the ruling prices and resold the warrants to the bankrupts at amounts equal to the prices he had paid plus broker's commission. When the bankrupts wanted to sell, he inquired the Sydney price and bought from them at a figure which enabled him to sell at a price equal to this figure plus such commission; although at times the variation in the Sydney market during the day caused him to make a smaller or higher profit than such commission, and sometimes a loss. He said he had warrants in the bank ready for delivery when warrants had been issued in respect of the wheat sold, that he informed the bankrupts of this, and that he expected them to take delivery unless they had resold in the meantime.

Judge *Lukin*, who heard the applications, accepted Brown's evidence as to the nature of the transactions Brown had had with the bankrupts, and as to the conversations which had taken place between Brown and the bankrupts, and, as to these matters, he did not believe or accept the evidence of the bankrupts. He found that so far as Brown was concerned the transactions were not gaming or wagering transactions, and dismissed the applications.

From these decisions each of the applicants appealed to the High Court, the respondents to the appeals being Arnold Victor Richardson, official receiver of the estate of each bankrupt, and Brown.

Further facts appear in the judgments hereunder.

Fuller K.C. (with him *Moverley*), for the appellants. Although on the face of the documents the transactions between the parties appear to be valid, a closer examination of what actually took place between them shows that the transactions were gaming transactions. Brown was not a broker; he was not paid, nor was he entitled to, any commission. That question had never been raised between them. The documents do not disclose a relationship of principal and agent between the parties. A consideration of Brown's accounts shows that the transactions resulted merely in a settlement of differences. There is no justification in the evidence for the judge's findings that the appellants concocted a false narrative of the purport of conversations which never took place, and that they acted in concert to deceive the Court. The principles applied by the court in considering the setting aside of bankruptcy matters are shown in *Ex parte Lennox*; *In re Lennox* (1); *In re Flatau*; *Ex parte Scotch Whisky Distillers Ltd.* (2); *In re Howell* (3); and *Re a Debtor*; *Ex parte Hogan* (4). Not only the documents themselves, but the nature of the transactions, the position of the parties, and other circumstances are matters which should be considered by the court for the purpose of determining whether the transactions were genuine commercial transactions or whether they were a mere gambling in differences (*Universal Stock Exchange Ltd.* v. *Strachan* (5); *In re Gieve* (6)). This case is covered by the decision in *See* v. *Cohen* (7). The decision in *Forget* v. *Ostigny* (8) turned upon the question whether the broker there concerned was entitled to an implied indemnity from his client, and therefore is distinguishable. See also *Halsbury's Laws of England*, 2nd ed., vol. 15, pp. 468, 469.

(1) (1885) 16 Q.B.D. 315.
(2) (1888) 22 Q.B.D. 83.
(3) (1915) 84 L.J. K.B. 1399.
(4) (1925) 25 S.R. (N.S.W.) 139; 42 W.N. 22.
(5) (1896) A.C. 166, at pp. 172, 173.
(6) (1899) 1 Q.B. 794, at p. 803.
(7) (1923) 33 C.L.R. 174.
(8) (1895) A.C. 318.

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Cassidy K.C. (with him *Paterson*), for the respondents. The contractual documents in evidence are on their face documents evidencing genuine transactions imposing the rights and obligations incidental to the contracts. The onus is upon the appellants to show that there was a secret understanding between themselves and Brown not shown by the documents. There is uncontradicted evidence that Brown himself purchased the wheat, purchased the warrants, and had them available, being under the obligation to deliver them if the purchaser handed him net cash against the documents. In *In re Gieve* (1) there was not any question of oral evidence. The matter should not be determined upon probabilities, but upon the evidence of what happened in the particular transactions (*Kitto v. Gilbert* (2)).

Fuller K.C., in reply. Upon it being established that Brown was not a broker, that there never was an intention to take or give delivery, and that it was a mere case of settling differences, or an agreement to settle on differences, then this case comes within the principle laid down in *See* v. *Cohen* (3).

Cur. adv. vult.

April 30. The following written judgments were delivered :—

RICH J. This appeal is brought by the bankrupts against an order of the Federal Court of Bankruptcy refusing to annul the sequestration orders made against them. The basis of their applications, which were consolidated and treated as one motion, was that the judgment debts upon which the bankruptcy petitions were founded were " obtained in respect of contracts and/or agreements by way of gaming and wagering within the meaning of the *Gaming and Betting Act* 1912, sec. 16." The applications were heard together, and the main evidence, apart from the documentary evidence, consisted of the public examinations of the bankrupts, their affidavits, upon which they were cross-examined, and the affidavit and cross-examination of the respondent Brown, the judgment creditor and petitioner. The learned trial judge who saw and heard the witnesses disbelieved the evidence of the bankrupts, who attempted to show that they were wagering with Brown on the rise and fall of the wheat market, and believed the evidence of Brown. The transactions between the parties were the subject of written contracts of which the following is a sample :—

(1) (1899) 1 Q.B. 794.
(2) (1926) 26 S.R. (N.S.W.) 441, at pp. 447, 448.
(3) (1923) 33 C.L.R. 174.

"Contract. Wellington, 20th October 1936.

R. A. Brown, Lee Street, Wellington sells and E. J. Morley, 'Rose Hall,' Maryvale, buys the undermentioned N.S.W. Government Grain Elevator Warrants of Season 1936/37 on the following terms and conditions:

Warrants: Equivalent to approx. Five thousand (5,000) bushels of F.A.Q. wheat of 1936-37 season, weight, quality and condition to be final as per Government Grain Elevator Warrants.

Delivery: The tendering by seller of correctly endorsed Warrants at his option during December-January, 1936-37 to constitute delivery.

Price: Five shillings and twopence half-penny (5s. 2½d.) net per bushel, less freight as endorsed on Warrants and Country handling charge.

Payment: Prompt net cash in exchange for Warrants.

This contract shall be read to embody the regulations under the N.S.W. *Wheat Act*, 1927, and any amendment or addition thereto.

Confirmed: R. A. Brown,
Wheat Buyer, Wellington.
(Sgd.) R. A. Brown."

Contracts in similar terms were entered into between E. J. Morley and Brown during the period October 1936 to 1st March 1938, and between E. H. Morley and Brown between 18th December 1936 to 18th March 1938.

The transactions, no doubt, were speculative transactions. But were the contracts in question "by way of" gaming or wagering, which "means contracts 'for' gaming and wagering, and relates only to contracts which are of themselves contracts by way of gaming and wagering" (*Ellesmere* v. *Wallace* (*Earl*) (1))? In *Thacker* v. *Hardy* (2) *Cotton* L.J. says: "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature —that is to say, if the event turns out one way A will lose, but if it turns out the other way he will win" (3). This definition was approved by Lord *Herschell* in *Forget* v. *Ostigny* (4). The English decisions on sec. 18 of the *Gaming Act* 1845, which is the prototype of the New-South-Wales sec. 16, are to be found in *Halsbury's Laws of England*, 2nd ed., vol. 15, pp. 492-494. In considering questions of this kind one must ascertain the real nature of the transaction as to whether the contracts are genuine

(1) (1929) 2 Ch. 1, at p. 33, and see p. 48, where the distinction is said to be subtle.
(2) (1878) 4 Q.B.D. 685.
(3) (1878) 4 Q.B.D., at p. 695.
(4) (1895) A.C., at p. 326.

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or are merely camouflaged contracts by way of gaming or wagering. In his direction to the jury *Cave* J. said that " in order to be a gambling transaction such as the law points at, it must be a gambling transaction in the intention of both the parties to it " (*Universal Stock Exchange Ltd.* v. *Strachan* (1), approved by Lord *Halsbury* L.C. (2)). " But what are called time bargains are, in fact, the result of two distinct and perfectly legal bargains, namely, first, a bargain to buy or sell; and, secondly, a subsequent bargain that the first shall not be carried out; and it is only when the first bargain is entered into upon the understanding that it is not to be carried out, that a time bargain, in the sense of an unenforceable bargain, is entered into " (*Thacker* v. *Hardy* (3), per *Lindley* J.). If there be a stipulation in the contract between the parties that the balance at the foot of the account will be settled by the payment of differences it is immaterial that one party or the other, by the express terms of it, can ostensibly require delivery of the article sold (*Halsbury's Laws of England*, 2nd ed., vol. 15, p. 494). The respondent Brown in his evidence, which the learned trial judge has summarized, emphatically denies that there was any such stipulation: " When the Morleys entered into the contracts with him he intended that the terms of the contracts should be adhered to—he thought that they intended to buy wheat and take delivery of the warrants, possession of which would give them control of the wheat at the Government silo." The learned judge having accepted Brown's evidence was justified in his conclusion that the contracts stood as written contracts and that under the terms of them the buyers were entitled to require delivery and the seller to call for payment. The contracts, although they dealt with speculative transactions, imposed legal obligations and were capable of legal enforcement.

In support of his contention that the contracts in question were contracts of gaming or wagering counsel for the appellants cited *See* v. *Cohen* (4). The decision, however, in that case was based on different facts from those in the present case, and would require consideration in any case where similar facts occurred.

In my opinion the appeal should be dismissed.

STARKE J. Appeals from judgments of the Federal Court of Bankruptcy, District of the State of New South Wales, refusing applications for the annulment of orders of sequestration. The main ground of the applications was that the judgment debts upon which the petitions in bankruptcy were based were obtained in

(1) (1896) A.C., at p. 168.
(2) (1896) A.C., at p. 170.
(3) (1878) 4 Q.B.D., at p. 689.
(4) (1923) 33 C.L.R. 174.

respect of contracts or agreements by way of gaming and wagering within the meaning of the *Gaming and Betting Act* 1912 (N.S.W.), sec. 16.

The facts disclosed that the petitioning creditor R. A. Brown sold to the bankrupt E. J. Morley grain elevator warrants in the years 1936-1937 and 1938 for nearly half a million bushels of wheat; and to the bankrupt E. H. Morley warrants for nearly a quarter of a million bushels of wheat. The purchases were spread over a number of contracts which on their face were ordinary commercial transactions. To take an illustration, Brown sold to E. J. Morley New-South-Wales Government grain elevator warrants equivalent to approximately 5,000 bushels of f.a.q. wheat 1936-1937 season at 5s. $2\frac{1}{2}$d., and 5,000 bushels at 5s. $1\frac{3}{8}$d. net per bushel less freight as indorsed on warrants and country silo handling charge, prompt net cash in exchange for warrants; the tendering by seller of correctly indorsed warrants at his option during December/January 1936-1937 to constitute delivery. The wheat was never delivered to the purchaser, nor were any elevator warrants. But before the time of delivery expired the wheat or warrants were sold back to the vendor Brown by the purchaser Morley. To take an illustration, Morley sold to Brown New-South-Wales Government elevator warrants equivalent approximately to 10,000 bushels of wheat f.a.q. at 5s. $2\frac{1}{2}$d. net per bushel less freight as indorsed on warrants and country silo handling charge prompt net cash in exchange for warrants the tendering by seller of correctly indorsed warrants at his option during December/January 1936-1937 to constitute delivery. These transactions resulted in a small profit, but over all the transactions the bankrupts lost heavily and their estates were sequestrated.

The law of the case has long been settled. Prima facie a commercial or other agreement operates according to the legal effect of its terms: it must be taken to be what it appears to be. The terms, however, of such an agreement may sufficiently show that it is an agreement by way of gaming or wagering, or it may be proved, notwithstanding the form of the agreement, that the transaction was colourable and not a commercial or other contract but an agreement by way of gaming or wagering, for example, an agreement for the payment of differences only (*Forget* v. *Ostigny* (1); *Universal Stock Exchange Ltd.* v. *Strachan* (2); *Ironmonger & Co.* v. *Dyne* (3); *See* v. *Cohen* (4)). It was for the appellants to establish their allegation, and to establish it by plain, definite and clear evidence.

(1) (1895) A.C. 318.
(2) (1896) A.C. 166.
(3) (1928) 44 T.L.R. 497.
(4) (1923) 33 C.L.R. 174.

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The appellants themselves gave evidence of conversations with Brown that they had no money to pay for thousands of bushels of wheat, to which he replied: "You have not got to have any money to deal in wheat; there is no wheat in it. You sign for delivery of wheat contracts and on or before the due dates you sell it back to me and all you do is to pay the differences between the buying and selling price." Brown denied these statements and deposed that he made no agreement with the appellants other than that contained in the written contracts. His business, he said, was selling and buying wheat, and he sold it to the appellants and bought it back from them in the ordinary course of business and covered the contracts which he made with them by transactions with other persons which protected him and could be enforced against him.

The learned Judge in Bankruptcy accepted Brown's evidence and stated that he did not believe the appellants and was of opinion that they had prepared, developed and concocted a false narrative of the purport of numerous conversations which never took place, and had acted in concert to deceive the Court. Still the parties had a great many transactions whereby wheat was bought and sold, and the quantity bought by the appellants was substantially the same quantity as that bought back by Brown from them. No wheat or warrants were ever delivered, but adjustments of the differences in prices were made at intervals, sometimes in favour of the appellants, but mainly against them. The appellants were speculating in wheat, but not wagering or gaming in wheat unless the transactions with Brown were such that nothing was to happen except payment of differences.

Perhaps I should have had more difficulty in reaching the same conclusion as the learned judge, that the transactions between the appellants and Brown were not by way of gaming and wagering, but I cannot say that there is not reasonable evidence to support his conclusion or that it is against the evidence and the weight of evidence. The decision of this Court in *See* v. *Cohen* (1) was much relied upon for the appellants in argument, but it is based upon a written term in the contract that sellers were to have the option of delivering scrip or of making or claiming a cash adjustment, i.e., payment to be made by sellers to buyers, or vice versa, of the difference between $\frac{3}{4}$d. 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. But the decision has often puzzled me; the sale price was fixed and never altered, but an adjustment was to be made between that price and the amount of

(1) (1923) 33 C.L.R. 174.

the dividend declared from time to time. The contract gave the seller the option of collecting dividends instead of delivering scrip. Thus, if the dividend were ½d. per bushel the seller had to collect ¼d. from the buyer to make up the sale price, but if it were 1d. per bushel then the seller had collected ¼d. per bushel more than the sale price and had to account for it and adjust accordingly. The seller got the price agreed upon, neither more nor less, and the purchaser any dividend subsequently declared in accordance with the agreement. It was, I should have thought, an unobjectionable business transaction, and some day the decision may require further consideration. It does not govern these appeals for the reason already given.

These appeals should, as above indicated, be dismissed.

It is unnecessary, in this view, to consider whether the appeals should not be dismissed upon other grounds.

McTIERNAN J. In my opinion these appeals should be dismissed.

Each appellant gave evidence directly proving that he was invited by the respondent (Brown) to bet with him on the price of wheat. But Judge *Lukin* considered that no credit should be given to either appellant as a witness, and rejected his evidence. There are no grounds for setting aside this opinion, and the question whether the contracts were wagering contracts falls to be decided on facts about which there can be no dispute, and on the evidence of the respondent Brown, which Judge *Lukin* accepted as being truthful. The course of dealing between each appellant and the respondent (Brown) was that each appellant entered into a long series of contracts with the respondent (Brown) for the purchase of wheat warrants from him covering a very large quantity of wheat and into a series of counter contracts for the resale of the wheat warrants so purchased, and that differences were paid from time to time upon settling accounts, but nothing was ever received or delivered under any of the contracts.

From these facts standing alone the conclusion might be reached that, despite the form of the contracts, the parties did not intend, when entering into these contracts, to buy and sell wheat warrants or wheat; but that it was their common intention to wager or bet on the price of wheat by making contracts for the purchase and repurchase of wheat, and agreeing that the party against whom the differences stood should pay: Cf. *Grizewood* v. *Blane* (1). But Judge *Lukin* accepted the evidence of the respondent (Brown), which gives a detailed account of his part in the transaction. He said

(1) (1851) 11 C.B. 526 [138 E.R. 578].

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that what he did was to resell to the Morleys wheat that he had bought "from Sydney houses." It was sold at a price enabling him to make the equivalent of a commission. The respondent (Brown) denied that any agreement was made outside the written contract to repurchase the wheat sold to the Morleys. The respondent (Brown) was a buyer as well as a seller of wheat. The question of the tender or delivery of warrants never arose, because the Morleys always sold the wheat included in their purchase before the date for tender arrived. The respondent (Brown) was willing either to sell or to buy from them. He repurchased from the Morleys when the wheat market dropped. It is of course not unlikely that the Morleys would be anxious to resell in order to prevent their losses from growing when they saw a downward trend in the price, and the respondent was the available buyer. His profit was not the whole amount of the loss sustained by the Morleys. He said: "I would not get the amount of the loss sustained by the Morleys. I would have paid that to the Sydney merchants at the then market price, getting perhaps the commission." The amount of the commission that the respondent aimed at making was a farthing a bushel, but sometimes he made a halfpenny a bushel.

If the evidence of the respondent (Brown) be accepted—and I see no grounds upon which it can be rejected—it is impossible to reach the conclusion that the contracts are not what they purport to be, that is, genuine commercial transactions. The evidence clearly proves that both appellants were speculators. But that is not enough upon which to arrive at the conclusion that the respondent (Brown) was wagering with them (*Thacker* v. *Hardy* (1); *Forget* v. *Ostigny* (2)). It is necessary for a wagering contract that the intention to wager shall be common to both parties (*Carlill* v. *Carbolic Smoke Ball Co.* (3)). The contracts being real commercial transactions, it was legitimate for the parties to set off their respective liabilities under the contracts (*Thacker* v. *Hardy* (1)). *Cotton* L.J. said in *Thacker* v. *Hardy*: "the essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A will lose, but if it turns out the other way he will win" (4). This statement was adopted by Lord *Watson* in *Forget* v. *Ostigny* (5): See also *Carlill* v. *Carbolic Smoke Ball Co.* (3) and *Richards* v. *Starck* (6). It was not the essence of the transactions in the present case that one party was to win and the other

(1) (1878) 4 Q.B.D. 685.
(2) (1895) A.C. 318.
(3) (1892) 2 Q.B. 484.
(4) (1878) 4 Q.B.D., at p. 695.
(5) (1895) A.C., at p. 326.
(6) (1911) 1 K.B. 296.

to lose according as the price of wheat rose or fell. The evidence shows that the respondent (Brown), whose business it was to transact such business, entered into the transactions with the intent of realizing only the equivalent of a commission. The evidence does not show that he was wagering with either respondent for a stake equivalent to the difference between the contract price in the contracts under which the appellants bought and those under which they sold back to him.

It follows that the ground upon which the annulment of the sequestration order is sought fails.

WILLIAMS J. This appeal arises out of the dismissal by the learned Judge in Bankruptcy of applications made under sec. 124 of the *Bankruptcy Act* 1924-1933 by the bankrupts Edward John Morley and Eric Hopetoun Morley to have the sequestration orders made against them on 15th April 1940 annulled on the ground, *inter alia*, that the judgments upon which the bankruptcy petitions were based were obtained in respect of contracts by way of gaming and wagering within the meaning of the *Gaming and Betting Act* 1912 (N.S.W.), sec. 16. The petitioning creditor was in each case a produce merchant and commission agent named Raymond Arthur Brown who carried on business at Wellington. The bankrupts were farmers living in the district who speculated on the rise and fall in the price of wheat by means of purchases from and sales to Brown. E. J. Morley's transactions covered the period from October 1936 to 1st March 1938, whilst those of E. H. Morley commenced on 18th December 1936 and continued until 18th March 1938. The amount of wheat bought by E. J. Morley from Brown was 460,000 bushels and sold by him to Brown was 455,000 bushels, while E. H. Morley bought from Brown 220,000 bushels and sold to him 225,000 bushels. In every case there were written contracts by which Brown sold to the bankrupts and the bankrupts sold to Brown. The contracts, after specifying the New-South-Wales Government grain elevator warrants which were the subject of the sale, provided for a price net per bushel less freight as indorsed on warrants and country handling charges, for payment by prompt net cash in exchange for warrants, and for delivery by the seller tendering correctly indorsed warrants at his option during certain months.

On their face, therefore, the documents related to bona-fide commercial transactions, but the bankrupts now allege no genuine sales or resales of wheat were ever intended and the contracts were only a cloak to cover an agreement that there should be a settlement of the differences in favour of the bankrupts or of Brown according

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to whether the wheat market rose or fell between the dates of the contracts and the dates for delivery of the warrants.

It is plain that the bankrupts were speculating in wheat and that Brown was the instrument through whom they were doing so. But, as it takes two persons to make a bet, the critical question is whether Brown was wagering with them on the rise or fall of the market, and there was a mutual agreement "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" (*Carlill* v. *Carbolic Smoke Ball Co.* (1); *Ellesmere* v. *Wallace* (2); *Attorney-General* v. *Luncheon and Sports Club Ltd.* (3)).

As a result of the transactions both the bankrupts lost money, so that on 31st January 1938 E. J. Morley owed £1,100 and E. H. Morley £800 to Brown, and as neither of them could pay they each gave Brown promissory notes for their respective debts payable on 1st February 1939, which were subsequently renewed as agreed for twelve months, the renewed promissory notes falling due on 1st February 1940. The notes were not met at maturity, and Brown then sued the bankrupts for these sums and recovered judgments in respect of which he issued bankruptcy notices with which they failed to comply. Their estates were then sequestrated on the above date.

On 10th September 1940 E. J. Morley was publicly examined and stated that Brown mentioned wheat dealing to him, saying: "You don't have to have money to buy wheat scrip, all you do is to make out a contract and sign it for a month ahead, and if the market rises in the meantime you sell it out again and collect the profit; it is only buying and selling on the rise and fall of the wheat market; there is no wheat in it . . . You know what a good friend I am to you, I'll see that you don't get a loss." The public examination of E. H. Morley took place on 15th August 1940. He stated, referring to transactions with Brown and another broker Wilkins: "I agreed to buy a certain number of bushels at a certain price a month or two ahead for which I signed a contract. Either before or at the end of that time I would contract or agree to sell it back to whoever I bought it from at the ruling market price at that day," and that Brown said: "If the price went up we collected a profit and on account of being such good friends he would see that there was

(1) (1892) 2 Q.B., at pp. 490, 491. (2) (1929) 2 Ch., at pp. 48, 49.
(3) (1929) A.C. 400, at pp. 405, 406.

not any loss"; "Brown had advice from some of his friends in Sydney that the market was going to go up again and he always pretended that he was a good friend of mine"; "After December 1937, I bought very little, I had a lot of purchases on hand on this date which I had not disposed of. I transferred to a later month. I cannot remember the number. I did this on the advice of Brown." In reply to his own solicitor he said: "When Brown and Wilkins both told me in connection with the contracts 'there was no wheat in it' I gathered from that that warrants would never be tendered and that when the contract became due that if I had not already sold it it would be sold by them on the first of the month at the ruling market price at that day. That is, the wheat I agreed to purchase would be sold. My understanding was that if I did not sell the wheat above referred to, the agent would buy it back from me at the ruling rate."

A careful perusal of the evidence which they gave on these examinations seems to suggest, not that they were betting with Brown, but rather that they were speculating through his agency. If the agreement was that the parties stood to win or lose according as the market rose or fell, then if the Morleys made a profit Brown had to make a loss, whereas their suggestion was that Brown was advising them when to buy and sell so that they would benefit if his predictions proved to be correct. But they could hardly expect him to be trying to make a loss so that they might win. Moreover, if they were simply betting on differences with Brown, one would have expected a date to be fixed at which the rise or fall of the market would be calculated; but optional dates were fixed for delivery of the warrants, the resales took place at various dates prior to the due date for their delivery, and, on some occasions, when the due date arrived and the market had fallen no settlement took place, but the warrants were transferred to a later date.

Until the Supreme Court action of *Wilkins* v. *Wheeldon* was heard in Dubbo in April 1941, despite all the negotiations with respect to their indebtedness, neither bankrupt suggested that the transactions with Brown constituted wagering, but after the defendant in that action had succeeded in this defence, they alleged that their transactions with Brown were similar in all respects to Wheeldon's transactions with Wilkins, and launched the present applications. They filed affidavits containing evidence similar to but somewhat stronger in their favour than the testimony which they had given upon their public examinations. Brown opposed the applications and filed an affidavit denying their allegations. The applications, which were consolidated, were heard partly on the affidavits and partly on oral evidence given by the applicants and Brown.

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His Honour accepted Brown's evidence, disbelieved that of the bankrupts, and said: "In my opinion they have prepared and developed and concocted a false narrative of the purport of numerous conversations which never took place, and I believe that they had acted in concert to deceive the Court. In my opinion both the Morleys went to Brown with the object of speculating in wheat and of taking advantage of the fact that Brown's business as a merchant and broker was suited to the kind of speculation they desired to carry on."

The effect of Brown's evidence was that he was prepared to buy and sell wheat warrants for persons who wished to indulge in such speculations. When the Morleys wished to buy, he bought warrants from merchants in Sydney at the ruling prices and resold these warrants to the Morleys at amounts equal to these prices plus broker's commission. When they wanted to sell, he inquired the Sydney price and bought from them at a figure which enabled him to sell there at a price equal to this figure plus such commission; although at times the variation in the Sydney market during the day caused him to make a smaller or higher profit than such commission and sometimes a loss. He denied that there was any agreement with either of the Morleys that he would not deliver the warrants or expect them to take delivery if there was no resale, and that the only settlement would be for differences. He said he had warrants in the bank ready for delivery when warrants had been issued in respect of the wheat sold, that he informed them of this, and expected them to take delivery unless they had resold in the meantime. He denied that there was any secret stipulation that the warrants need not be taken up and that the only bargain was for the payment of differences. His evidence as to his dealings with the Sydney merchants and the lodging of warrants with the bank was not contradicted, and he was not seriously cross-examined on either of these points. Apparently his books were available to the appellants, so that if his evidence was untrue it should have been easy to have contradicted him.

The contracts were absolute on their face, the Morleys' evidence tended to show the dealings were genuine, although they never intended to take delivery of the warrants but to resell on or before the due date; and there was ample evidence to justify his Honour as the judge of fact in coming to the conclusion that the transactions were real bargains for the purchase and repurchase of wheat after, as appears from his judgment, he had properly directed himself by asking himself the question put to the jury in *Universal Stock Exchange Ltd.* v. *Strachan* (1). As *Scrutton* L.J. said in *Ironmonger*

(1) (1896) A.C. 166.

& Co. v. *Dyne* (1): "If it were a contract in which differences in prices were to be paid it was not a gaming contract unless it could be shown that there was an agreement between the parties that the purchaser had no right to claim delivery of the goods and the seller had no right to claim acceptance." The appellants relied upon the decision of this Court in *See* v. *Cohen* (2), but the facts in that case were quite different from the present transactions. It is not an authority for the proposition that if it is intended to carry out transactions by the payment of differences, although they relate to genuine sales and resales of goods, it is nevertheless a gaming contract. If it was it would be in conflict with *Ironmonger & Co.* v. *Dyne* (3). The contract in *See* v. *Cohen* (2), which related to the sale of any future dividends on wheat certificates for ¾d. per bushel, provided for settlement to take place on the date of the declaration of the final dividend and that if the dividends, including the final one, exceeded ¾d., the seller would have to pay the buyer the difference, while if the dividends were less than ¾d., the buyer would have to pay the seller the difference. But the buyer alone was speculating, as the seller did not stand to gain or lose anything according to the amount of the future dividends; but was only to receive a fixed-price for the sale of the right to receive them.

The correctness of the decision may therefore be doubted. It certainly does not establish any new principle, and so cannot assist the appellants upon different contracts and facts. Brown's position was really analogous to that of the sharebrokers in *Thacker* v. *Hardy* (4), *H. W. Franklin and Co.* v. *Dawson* (5), and *Weddle, Beck & Co.* v. *Hackett* (6).

The appeals should be dismissed.

Appeals dismissed with costs. If and so far as the costs of the respondents are not paid by appellants they are to be paid equally out of the bankrupt estates of the appellants as between solicitor and client.

Solicitor for the appellants, *D. Mander Jones*, Wellington, by *Barry, Norris & Wildes.*

Solicitors for the respondents, *Quirk & Davidson*, Wellington, by *Walter Dickson & Co.*

J. B.

(1) (1928) 44 T.L.R., at p. 499.
(2) (1923) 33 C.L.R. 174.
(3) (1928) 44 T.L.R. 497.
(4) (1878) 4 Q.B.D. 685.
(5) (1913) 29 T.L.R. 479.
(6) (1929) 1 K.B. 321.