[HIGH COURT OF AUSTRALIA.]

ORR . . . . . APPELLANT;
PLAINTIFF,

AND

HOLMES AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 23, 26.

MELBOURNE, *Aug.* 30.

Latham C.J., Rich and Dixon JJ.

Appeal—New trial—Discovery of fresh evidence—Availability and character of evidence—Courts—Appeal—Appeal allowed—Order for new trial—Question of costs adjourned—Death of judge—Order as to costs by court differently constituted—Inquiries before trial—Diligence—Credibility—Influence on result.

The plaintiff brought an action in the Supreme Court of Queensland claiming a share in certain prize money won in a lottery the relevant ticket in which, according to his evidence, had been purchased jointly with the defendants on 12th August. The evidence given by the plaintiff contained many improbabilities. The defendants, in addition to a complete denial of all the plaintiff's material allegations, adduced evidence in order to show that the ticket could not have been issued before 13th August but the proof of this fact though raising a high probability was not conclusive or complete. The jury returned a verdict for the plaintiff. As a result of publicity given to the trial the defendants were subsequently supplied with further information which showed with practical certainty that the ticket could not have been issued on 12th August. The Full Court accordingly ordered a new trial. The plaintiff appealed:—

Held by *Latham* C.J. and *Dixon* J. (*Rich* J. dissenting) that the appeal should be allowed on the grounds (1) that the evidence would have been available at the trial had the defendants exercised reasonable diligence in the preparation of their case and (2) that the evidence went merely to the credibility of the plaintiff as to the precise date on which he said the ticket was purchased and was not such as to place such a different complexion upon the case that a reversal of the former result ought certainly to ensue.

Held, further, by *Dixon* J., that where on a Full Court ordering a new trial the question of costs was adjourned and a judge, who was a member of the

court, died, the matter of costs, being a distinct matter, might be dealt with by a court differently constituted.

Decision of the Supreme Court of Queensland (Full Court) reversed.

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APPEAL from the Supreme Court of Queensland.

In an action in the Supreme Court of Queensland Joseph Orr sued Isaac Cecil Holmes and Edith Allison Clark claiming a declaration that he was entitled to a one-third share in the first prize of £6,000 gained by ticket numbered 83737 in the Golden Casket Art Union drawn on 14th August 1946. The defendant Holmes was a lottery agent carrying on business in Brisbane and the defendant Clark was an employee assisting in the business. It was alleged in the material part of the statement of claim that " on or about the twefth day of August 1946 it was orally agreed by and between the plaintiff and the defendants that the plaintiff and defendants should jointly purchase for the benefit of the plaintiff and each of the defendants equally a ticket in the then current Golden Casket numbered 1056 in the said Golden Casket Art Union and that any prize won by the said ticket should be divided equally between the plaintiff and each of the defendants." It was further alleged that in pursuance of the agreement a ticket No. 83737 was purchased which drew the first prize of £6,000. By their defence, the defendants denied the agreement set up by the plaintiff.

The facts are fully set out in the judgments hereunder.

At the trial the jury found for the plaintiff and judgment was entered accordingly. The Full Court set aside this judgment and ordered a new trial. From this decision the plaintiff sought leave to appeal to the High Court, which granted leave, the respondents not objecting.

Bennett K.C. (with him *Wanstall*), for the appellant. A new trial should not have been ordered. With due diligence the fresh evidence would have been available at the trial and the evidence is such that it would not influence the result (*Green* v. *The King* (1)). There was no element of surprise in adducing evidence that the ticket was purchased on 12th August (*Rowe* v. *Australian United Steam Navigation Co. Ltd.* (2) ; *Wilson* v. *Wilson* (3)). There was an absence of diligence by the defendants in obtaining their evidence for the trial (*Boyfield* v. *Moncrieff* (4) ; *Isaacs* v. *Hobhouse* (5) ; *Nash* v. *Rochford Rural District Council* (6)). It was not competent for a

(1) (1939) 61 C.L.R. 167, at p. 174.
(2) (1909) 9 C.L.R. 1.
(3) (1938) Q.S.R. 1.
(4) (1939) S.A.S.R. 75.
(5) (1919) 1 K.B. 398.
(6) (1917) 1 K.B. 384.

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court differently constituted to order costs of the new trial (*Coleshill* v. *Manchester Corporation* (1) ; *Fulker* v. *Fulker* (2)).

Casey, for the respondent Holmes. The defendants used reasonable diligence in making inquiries at the lottery office in their endeavour to ascertain the date the ticket was issued to the shop. They were not obliged to inquire of other agents. All that is required is reasonable diligence (*Green* v. *The King* (3)). The fresh evidence was such that it would completely destroy the credibility of the plaintiff in the most important part of his case, the date on which he alleges the agreement was made and the ticket was purchased (*Chapman* v. *McDougall* (4)).

Mack, for the respondent Clark. The fresh evidence will be a determining factor in the result (*Green* v. *The King* (3) ; *Hip Foong Hong* v. *H. Neotia & Co.* (5) ; *R.* v. *Copestake* ; *Ex parte Wilkinson* (6) ; *Meredith* v. *Innes* (7) ; *Stiffler* v. *Stiffler* (8)). The case made by the plaintiff was that the date was 12th August and no other date and reasons were given as to the particular day being Monday 12th August. The plaintiff's pleading by the words " on or about " prevented the defendants realizing the true case to be presented (*Patterson* v. *MacDonald* (9)). The defendants were surprised at the trial and had no opportunity of making inquiries.

Bennett K.C. in reply. The fresh evidence cannot affect the result as the reasons given by the plaintiff for fixing Monday as the relevant day apply as well to Tuesday. The defendants are merely trying to corroborate their previous story (*Chapman* v. *McDougall* (10)). The fresh evidence was available before the trial and could have been obtained if proper inquiries were made (*Isaacs* v. *Hobhouse* (11)).

Cur. adv. vult.

Aug. 30. The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of Queensland directing a new trial in an action in which the plaintiff obtained a verdict and judgment for £2,000 against the defendants. The plaintiff Orr claimed that he

(1) (1928) 1 K.B. 776, at pp. 785, 786.
(2) (1936) 3 All E.R. 636, at p. 639.
(3) (1939) 61 C.L.R. 167.
(4) (1916) N.Z.L.R. 201.
(5) (1918) A.C. 888, at p. 891.
(6) (1927) 1 K.B. 468, at p. 477.
(7) (1930) 31 S.R. (N.S.W.) 104.
(8) (1944) Q.S.R. 81.
(9) (1894) 31 Sc. L.R. 517.
(10) (1916) N.Z.L.R. 201.
(11) (1919) 1 K.B. 398.

was a member of a "syndicate" of three, consisting of himself and the two defendants, which purchased a lottery ticket which won a prize of £6,000 in a Golden Casket Lottery. The defendants alleged that they only were the purchasers of the ticket. There was a complete conflict of evidence upon all material matters and the decision in the case turned entirely upon the credibility of the plaintiff and the defendants respectively. The plaintiff gave a circumstantial account of the occasion on which, according to him, the ticket was purchased for himself and the defendants. He fixed the date as 12th August 1946, and verisimilitude was added to his story by the corroborative detail that he remembered that the day was Exhibition Monday. It was indeed true that the 12th August was Exhibition Monday. The defendants adduced evidence with the object of showing that the ticket which won the prize could not have been issed by the Lottery Office before 13th August, but this evidence was not absolute and complete. The trial lasted only one day and as soon as the judgment in favour of the plaintiff was reported in the press lottery ticket agents gave information to the defendants as to the numbers of tickets issued to them on 12th and 13th August which showed with practical certainty that the ticket which was the subject matter of the dispute in the action could not have been issued on 12th August. The defendants were successful in their application to the Full Court for a new trial on the ground of discovery of fresh evidence.

The objections to granting such an application are obvious and the rule has been strictly applied that a new trial should not be granted on such a ground if by the exercise of reasonable diligence the "fresh" evidence could have been discovered in time to be used at the original trial. In the present case the collection of evidence was undertaken by the defendant Holmes, and not by the defendants' solicitors. He went to the Lottery Office, but that office had no record showing the dates when particular tickets were issued to agents so as to be available for sale. No inquiries were made by Holmes from any agencies. Lottery ticket agencies were an obvious source of possible information. In my opinion reasonable diligence was not shown by the defendants and on this ground this appeal should be allowed.

Further, before a new trial is granted on the ground of discovery of fresh evidence it must be shown at least that the evidence to be admitted is "of such importance as very probably to influence the decision": *R.* v. *Copestake*; *Ex parte Wilkinson* (1). The story of the plaintiff involved many improbabilities. He did not make

(1) (1927) 1 K.B. 468, at p. 477.

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any claim upon the defendants until several days after the result of the lottery was known ; after it was known that the defendants had won a prize he simply congratulated them without inquiring whether the ticket in which he claimed to have an interest was the winning ticket. Even when, according to his own story, he became aware that the ticket in which he claimed an interest had won the lottery he did not make an immediate or direct claim, but was content to make cryptic suggestions to the defendants. But, in spite of what might appear to be almost insurmountable obstacles in the way of a conclusion that his evidence was worthy of credit, the jury in fact believed him as against the defendants. Proof that the plaintiff was wrong about the date when the alleged conversation took place would have added but little to the points of criticism of the plaintiff's story. In my opinion it cannot be said with any high degree of probability that the admission of the new evidence would result in a different verdict.

I am therefore of opinion that the appeal should be allowed, the order of the Full Court set aside and the judgment based upon the verdict of the jury restored.

RICH J. In matters such as this, which involve the admissibility of fresh evidence, each case must be decided according to its circumstances. The proposed fresh evidence relates to the date of the issue of a ticket in the Golden Casket Lottery.

In Queensland the existence of this lottery has given rise to customs and habits of conduct among the inhabitants of that State who interest themselves in the project, doubtless no small number. As observers, although detached, of these matters, the judges of the Supreme Court of the State have an opportunity denied to me of being familiar with considerations of no small importance in this case.

In these circumstances their Honours exercised their discretion and allowed a new trial holding that the defendants had used reasonable care and diligence in prosecuting inquiries at the office of the Golden Casket—the natural and authentic source of information—where all tickets are issued, to ascertain the date on which the ticket in question was issued. And their Honours were also satisfied that the new evidence was relevant and material and of such weight as, if believed, would probably have an important influence on the result : *R.* v. *Copestake* ; *Ex parte Wilkinson* (1).

But in this case it so happened that the press account of the trial extracted from a licensed shop the exact date of the issue of

(1) (1927) 1 K.B. 468, at p. 477.

the ticket, and as wisdom comes after the event it was contended that further inquiries should have been made at the licensed shops. These shops, however, are very numerous in number and carry on the lottery business not only in the city but also in the suburbs and the country. And it might be that the requisite evidence would only be obtainable in the country. Such an inquiry is, in my opinion, not reasonable or practicable. I, therefore, agree with their Honours that the defendants, in inquiring at the Office, had used such reasonable care and diligence as was requisite and possible in the circumstances and that the ingredients necessary for the admission of the fresh evidence were contained in the application.

For these reasons I would dismiss the appeal.

DIXON J. The plaintiff in the action appeals without leave from two orders, both of an interlocutory nature, made by the Supreme Court of Queensland. At the trial of the action the plaintiff recovered a verdict for £2,000. By the first order under appeal the Full Court set aside the verdict and directed a new trial and adjourned the question of costs. The second was a further order disposing of the costs and ordering that the plaintiff pay into court the amount of the verdict which before applying for a new trial the defendants had paid over to him and in default of paying it into court that he repay it to the defendants. This order disposed of the costs by awarding the costs of the appeal or application for a new trial to the defendants who are the respondents in this Court, and ordering that the costs of the former trial abide the result of the new trial or, if there were no new trial and the action were discontinued or dismissed for want of prosecution, then that the costs of the former trial be paid by the plaintiff. As the ground for the application for a new trial was the discovery by the defendants of fresh evidence, the order for costs departs widely from the practice generally observed where a party is deprived of a verdict which he has regularly obtained in order to afford to his adversary an opportunity of adducing newly discovered evidence. The order was attacked on an independent ground. The Full Court which made the order for a new trial included *E. A. Douglas* J., but the order for costs was made after the death of that very learned judge and therefore by a court differently constituted. It is objected that it was not competent to a court not composed of the same judges to deal with the costs. The objection is mistaken.

An order had been pronounced upon the appeal or application for a new trial. The order which was drawn up included a specific provision adjourning or reserving the question of costs and so

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treating it as a distinct matter. The case is not one of the death of a judge before the hearing and determination of a proceeding are concluded by a court of which he is a necessary member. The order had disposed of the proceeding before the court and, as a matter of jurisdiction, the Supreme Court constituted as a Full Court in any manner might hear and determine the question of costs adjourned or reserved. No doubt as a matter of convenience the court would not be differently constituted to deal with costs that are adjourned or reserved, if it could be avoided. But that consideration does not affect jurisdiction.

I turn now to the more substantial question whether the order for a new trial ought to have been made. The action was to recover £2,000 as a third share in the prize money represented by a winning lottery ticket to which the plaintiff said he was entitled in equal shares with the two defendants. The plaintiff, whose name is Joseph Orr, is described as a retired engine-driver. The defendants say that he is a starting price bookmaker and, while he denies that title, his dealings with the defendants appear to have been not unconnected with betting. The defendant Holmes conducts a newsagency and lottery agency in the Valley, Brisbane. Mrs. Clark, who is the other defendant, is employed in his shop. The plaintiff was in the habit of visiting the shop on Mondays and on Fridays and he regularly bought lottery tickets or shares in lottery tickets. He says that he visited the shop on Monday, 12th August 1946, and bought some tickets. The lottery then on foot was Golden Casket Art Union No. 1056 and it closed at 11 a.m. on Wednesday 14th August. The prize of £6,000 was won by ticket No. 83737, which was held by the defendants. It was issued in Holmes' shop under the title, Rice Pudding syndicate care of Joe Blow. The defendants say that they are the sole members of the syndicate so described. The plaintiff claims that he is an equal member with them. In his evidence he gave a circumstantial account of the issue of the ticket. He said in effect that on Monday, 12th August, after buying three tickets, he was about to leave the shop when the defendant, Holmes, banteringly directed Mrs. Clark to write him out another ticket. She suggested that they should share in one and on his assenting and paying his quota she wrote it out choosing the title and name herself and giving some reason for the title, not a very satisfying reason. She called out the number " eight thirty-seven thirty-seven " and when he left the shop he wrote it down in a note book, together with the title of the syndicate and name, Joe Blow. All this the defendants denied. They explained the selection of Rice Pudding and Joe Blow as the

names on other grounds, also not very satisfying. They further said in their evidence that on Monday, 12th August, they had not received in the shop from the Lottery Office the particular book of tickets from which the winning ticket was taken. They swore that it had not been obtained until Tuesday, 13th August, but they had no written record to establish that fact. To support the statement, however, evidence was called from the Lottery Office of the practice according to which books are issued by the Office and the sequence in which they are issued. Again the date of the issue of the books was not recorded, but the sequence was such as to make the probability high that the defendants were right in saying the particular book in question did not reach Holmes' shop before Tuesday. The plaintiff's pleading had alleged the formation of the syndicate and issue of the ticket as taking place on or about 12th August. The date did not of course go to the cause of action and if the jury had thought the plaintiff's story was true in substance but that the date was 14th August, he would have been entitled to a verdict. But in his evidence he committed himself to Monday 12th, and the judge in his charge to the jury referred to the question of date as one which, if the proof had been certain, might have afforded a definite piece of evidence upon which the jury could rely as determining the issue one way or the other between the parties.

The plaintiff's case, however, was disfigured by more than one circumstance susceptible of use before the jury. For example he had not claimed to be interested in the prize when the defendant, Holmes, had first informed him that he and the defendant, Mrs. Clark, had won it. On his own admissions in cross-examination, Holmes had informed him on Thursday, 15th August, of their good fortune and the plaintiff had congratulated him. The plaintiff's explanation was that he did not then know that the "Joe Blow" ticket had won the prize. He said that on the following Wednesday he noticed the name and number in his note book and that was the first time he became aware of the fact. The name in which the winning ticket was issued had been published with the result of the lottery. According to his own evidence, the plaintiff visited the defendant's shop on Friday, 23rd August, and again on Monday, 26th August, but it was not until Wednesday, 28th August, that he made an open allegation to the defendants that he was entitled to share in the prize. Yet, notwithstanding the handicaps under which the plaintiff's case may have been thought to labour, the jury found a verdict for him, obviously accepting his story in preference to the defendants' denial.

No stay of execution was obtained by the defendants, who paid the amount of the verdict, £2,000.

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But later the proprietors of other lottery agencies came forward and informed the defendants that they had received from the Lottery Office on Tuesday, 13th August, books of tickets bearing numbers earlier than No. 83737 and that this they were able to verify from records. Evidence from the Lottery Office would show that, if it were so, the defendant Holmes could not have obtained the book from which the winning ticket came earlier than the morning of Tuesday, 13th August.

The application for a new trial was based upon the discovery of this further evidence.

For the plaintiff some attempt was made to contest the certainty of the conclusion to be drawn from the issue by the Lottery Office on Tuesday morning of books of tickets bearing earlier numbers than that of the winning ticket. Doubt was thrown upon it on the ground that, consistently with the practice obtaining in the office by which books are allocated to different agencies and afterwards picked up by the agents, it was possible that an agent might actually obtain his books on the afternoon of one day and another agent his books on the morning of the following day. The consequence would be that, although the allocations might be in numerical sequence, the actual issue of the books would not be according to the order of the numbers borne by the tickets. But I am prepared to accept the assumption that the evidence which the defendants are now in a position to produce would show that the book whence ticket number 83737 was issued could not have been in the hands of the defendants before Tuesday, 13th August. Even so, I think that to order a new trial on the ground of the discovery of fresh evidence involves an erroneous application of principle.

If a trial has been regularly conducted and the party against whom the verdict has passed cannot complain that evidence has been wrongly received or rejected or that there has been a misdirection or that he has not been fully heard or has been taken by surprise or that the result is not warranted by the evidence, the successful party is not to be deprived of the verdict he has obtained except to fulfil an imperative demand of justice. The discovery of fresh evidence makes no such demand upon justice unless it is almost certain that, if the evidence had been available and had been adduced, an opposite result would have been reached and unless no reasonable diligence upon the part of the defeated party would have enabled him to procure the evidence. In *Scott* v. *Scott* (1) the Judge Ordinary (Lord *Penzance*) observes upon the enormous evil that new trials are in themselves, though justice

(1) (1863) 3 Sw. & Tr. 319, at pp. 322, 326 [164 E.R. 1298, at pp. 1299, 1300].

sometimes demands them: "No element in the administration of justice is so destructive of its efficiency as uncertainty; and no grievance more sorely felt by suitors than that which snatches success away at the moment of its accomplishment, and sets all abroad and in doubt again after one complete hearing and decision. Nothing shakes so much that confidence in the law which it is the first duty of all tribunals to uphold." Afterwards his Lordship speaks of the practice at common law with reference to new trials because of the discovery of fresh evidence. "It has never been the habit in Westminister Hall to grant new trials on the simple ground that the party could make the same case stronger by corroborating testimony (even though newly discovered) if another trial were allowed. And if it were otherwise, there are few cases that would not be tried a second time." The rule stated in *Chitty's Practice* was that if new evidence discovered after the trial is such as to satisfy the court that if the party had had it at the trial he must have had a verdict, the court will grant a new trial on the payment of costs in order to do justice between the parties. Variations of phraseology occur in later cases but however it is expressed the sense of the rule remains that the new evidence must have so high a probative value with reference to an issue essential to the cause of action or defence as the case may be that it cannot reasonably be supposed that had the evidence been adduced the issue would not have been found for the party seeking the new trial. In *Brown* v. *Dean* (1), Lord *Loreburn* L.C. says: "When a litigant has obtained a judgment in a court of justice . . . he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed, would be conclusive." Lord *Shaw* (2) says that he cannot go the whole length of the proposition that it must be conclusive. "It is possible to figure cases in which it might be so gravely material and so clearly relevant as to entitle the court to say that that material and relevant fact should have been before the jury in giving its decision." In *Hip Foong Hong* v. *Neotia & Co.* (3), Lord *Buckmaster*, speaking for the Judicial Committee, says: "In all applications for a new trial the fundamental ground must be that there has been a miscarriage of justice. If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties; the applicant must go

(1) (1910) A.C. 373, at p. 374.
(2) (1910) A.C., at p. 376.
(3) (1918) A.C. 888, at p. 894.

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further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result." The language of *Collins* L.J. in *Young* v. *Kershaw* (1) is " practically conclusive—that is, evidence of such a class as to render it probable almost beyond doubt that the verdict would be different." That of *Williams* J. in *Kennedy* v. *Jones* (2) is that " it ought to be clearly established that the effect of the suggested evidence would be not only to render it possible that a different conclusion might be arrived at, but that it would be the duty of the jury to come to a different conclusion." The test proposed by *Scrutton* L.J. in *Guest* v. *Ibbotson* (3) is that the evidence is so material that its absence will cause or has caused a miscarriage of justice. In *R.* v. *Copestake*; *Ex parte Wilkinson* (4) his Lordship said that the Court of Appeal had clearly decided that the evidence must be of such weight, as if believed, would probably have an important influence on the result but had not gone so far as the full extent of Lord *Loreburn's* statement. This language was adopted by the Supreme Court of New South Wales in *Meredith* v. *Innes* (5). In *Preston* v. *Green* (6), *Jordan* C.J. no doubt has this in mind when, in framing the questions to be considered in determining whether a new trial should be directed, he expresses the two that are material to the strength of the evidence thus—(1) Is the new evidence prima facie likely to be believed ? (2) If believed, would it be likely to be a determining or at least a very important factor in the result of the trial ? In Queensland a like test has been framed: *Boyd* v. *Boyd* (7); *Stiffler* v. *Stiffler* (8).

No doubt some of the foregoing expressions are susceptible of a weaker application than others of them. But the evident purpose of all of them is to ensure that new trials will not be granted because of fresh evidence unless it places such a different complexion upon the case that a reversal of the former result ought certainly to ensue. The fact which the new evidence tends to prove, if it does not itself form part of the issue, must be well nigh decisive of the state of facts upon which the issue depends. The evidence must be so persuasive of the existence of the fact it tends to prove that a finding to the contrary, if it had been given, would, upon the materials before the court, appear to have been improbable if not unreasonable. Now the evidence which is forthcoming from the other lottery agents, combined with that from the Lottery Office, may be regarded

(1) (1899) 81 L.T. 531, at p. 532.
(2) (1887) 6 N.Z.L.R. 81, at p. 85.
(3) (1922) 126 L.T. 738, at p. 740.
(4) (1927) 1 K.B., at p. 477.
(5) (1930) 31 S.R. (N.S.W.) 104, at p. 108.
(6) (1944) 61 W.N. (N.S.W.) 204.
(7) (1940) Q.S.R. 331.
(8) (1944) Q.S.R. 81.

as sufficiently persuasive of the fact it tends to prove, namely that the book from which the winning ticket came did not reach the hands of the defendants before Tuesday, 13th August. But assuming that fact to have been proved at the former trial, its only importance was with reference to the credibility of the plaintiff's story. The judge would have been bound to direct the jury that if they believed the substance of his testimony but considered that he was wrong in saying that it was Monday and not Tuesday when the ticket was issued, he was entitled to recover. It is true that he gave reasons for fixing Monday, 12th August. But there could be no mistake about the story he told of the arrangement by which he and the defendants formed the syndicate. His narrative of the conversation, the adoption of the name, the writing out of the ticket and his payment of 1s. 10d. as his share is either a concoction or it represents a real transaction that took place after the book of tickets came into the defendant's shop. His personal credit and the probability of his tale were exposed to vigorous attack on grounds much stronger than anything that could arise from the fixing of a date or time that could not be right. Yet his evidence commended itself to the jury in preference to that of the defendants whom they disbelieved.

It is needless to recount the criticisms to which the plaintiff's case was open. But if, when they were marshalled and presented to the jury, it had been added that it was proved that he was wrong in his date, would it really have sounded so cogent a consideration? No doubt it might well have turned the scale. But we are not concerned with what might have influenced the jury, or what might have happened. We must find much more solid ground than that for depriving a successful litigant of his verdict.

In considering whether the plaintiff had concocted his story, the naming of a date that could not be right, though material, is anything but decisive. The jury had before them the oath of the defendants that the tickets were not in their hands on Monday, 12th August, and evidence from the office confirmatory of that testimony to the extent that it was highly improbable that the book could have been in their hands by that time. The very fact that so much could be said against the plaintiff's case on so many grounds weakens the contention that the fresh evidence ought in reason to prove decisive. After all it can only turn to a certainty what was a high probability as to the date of the issue of the book. A jury impressed by the plaintiff's evidence might well think a mistake in the day of small account, however positive the plaintiff might have been in fixing it and whatever reasons the plaintiff might have given.

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A further difficulty lies in the defendants' path. It is not enough that the evidence be of compelling force. The applicant for the new trial must show that no reasonable diligence upon his part would have enabled him to adduce it upon the former trial. This, in my opinion, the defendants have entirely failed to establish. The evidence they propose to rely upon comes from the three most conspicuous lottery agencies in Brisbane. It depends for its value upon the fact that they are able to say upon what day they received the books issued to them and that books of earlier numbers were received by them on Tuesday, 13th August. The inference from this fact depends upon the practice of the Lottery Office in issuing books to the agencies and this might readily have been proved. No inquiry whatever was made of the agencies in question or of any other agencies to discover whether they could show when they received their books and what was the sequence of numbers in relation to the book that contained the winning ticket. The reasoning which made such evidence of importance, if it were available, should have been plain to the defendants who were in the business and also to their solicitors. The only steps which were taken before the trial to obtain evidence upon the question when the book was issued to the defendants consisted in an inquiry or inquiries by the defendant Holmes himself at the Lottery Office in order to ascertain what evidence was available from that source. During the course of the trial, which did not extend over one day, a further attempt to strengthen the proofs actually called from the Lottery Office was made. So far as appears in preparing for the trial the pursuit of evidence upon the point in question was left wholly to Holmes. No steps were taken by his solicitors. It does not appear whether advice on evidence was obtained from counsel or what, if any, consideration was given by the defendants' legal advisers to the ways and means available to show that the date named by the plaintiff was impossible.

For the defendants it is said that they were unaware of the importance of the date because the plaintiff's pleading did not allege that the arrangement was made on 12th August 1946 but on or about that date. The fact that he fixed the date definitely when he gave evidence is relied upon as an element of surprise. The only element of surprise in the case, is that such an argument should be used. Pleaders almost invariably employ the form " on or about " when referring to a date, unless for some reason it is legally essential that the fact alleged must have occurred on the exact day.

It was apparent that the plaintiff had given instructions to his solicitors which named that day and there was an *a-priori* probability

that he would fix it in his evidence. But in addition, the defendants' own case was that the plaintiff came into the shop habitually on Mondays and Fridays. No interrogatories were administered to ascertain whether the plaintiff would tie himself to the Monday, and this could readily have been done if the defendants had any doubt about the matter. To my mind the failure to call the evidence which the defendants say is newly discovered is plainly due to an inadequate preparation of the defendants' case.

I regard the application for a new trial as an attempt to secure a further opportunity of making exactly the same case on behalf of the defendants strengthened by evidence, which though of course relevant to the issue, bears in reason only upon the credit to be attached to the plaintiff's story, and consists of proofs which were available and might with ordinary diligence have been used by the defendants at the trial. It is a case which falls exactly within the description of Lord *Penzance* in *Scott* v. *Scott* (1) that is, an application for a new trial "on the simple ground that the party could make the same case stronger by corroborating testimony (even though newly discovered)."

Further the failure to discover the evidence must be laid at the defendants' door.

Finally no case can be found, I believe, in which an order has been made that the party who obtained a verdict, set aside only because the unsuccessful party has discovered fresh evidence, should pay the costs of the former trial and the costs of the application for a new trial. Such an exercise of discretion ought not, in my opinion, to be allowed to stand.

At the hearing of the appeal before us, I think that there was some misunderstanding about the grant of leave to appeal. But in any event I think that leave to appeal should be given to the plaintiff and that the appeal from both orders should be allowed.

Leave to appeal granted and appeal allowed with costs. Orders of Full Court of 26th August 1947 *and 18th March* 1948 *set aside. Verdict and judgment thereon of Macrossan C.J. restored. Respondents to pay appellant's costs of appeal in Supreme Court.*

Solicitors for the appellant: *R. G. Smith & Smith.*
Solicitors for the respondent Holmes: *Leonard Power & Power.*
Solicitor for the respondent Clark: *J. Gregg.*

B. J. J.

(1) (1863) 3 Sw. & Tr. 319, at p. 326 [164 E.R. 1298, at p. 1300].