[HIGH COURT OF AUSTRALIA.]

VAN RASSEL . . . . . APPELLANT;
DEFENDANT,

AND

KROON . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1952, SYDNEY, *Dec.* 9, 10.

1953, MELBOURNE, *March* 4.

Dixon C.J., Webb and Taylor JJ.

Gaming—Lottery—Ticket—Proceeds—Claim for share—Joint purchase—Onus of proof—Duties of person who acquires ticket.

A person in whose name a lottery ticket issues obtains the legal title to what is a chose in action, and in addition, if he is the applicant for the ticket he obtains the custody thereof and is in a position to exercise whatever rights the ticket confers and to deal with it as he chooses. If the application is or must be taken to be for the benefit of another or others or of himself and another or others he has, unless the ticket issues in the names of the person or persons beneficially entitled, the legal title, and thereby becomes a fiduciary agent or trustee. Included among the duties of such a trust or agency are the duties not to do anything to impair the rights of the persons for whom he holds the ticket and of distinguishing it from other tickets which he may obtain for himself or in which he may be interested. In such a case the burden is upon the person having the legal title of showing which is his property.

Where a joint contributor relies upon the terms of a particular arrangement in support of his title to a share or interest in a winning ticket which he asserts was bought on the joint account, the burden is upon him of establishing the terms in question.

Decision of the Supreme Court of New South Wales (*Richardson* J.) reversed.

APPEAL from the Supreme Court of New South Wales.

Jacques Kroon brought a suit in the equitable jurisdiction of the Supreme Court of New South Wales against Gerald Jacobus Antonius Van Rassel and Marcus Stanley Quinn, the director of the New South Wales State Lotteries, for, *inter alia*, a declaration that the defendant Van Rassel held ticket number 95518 in Special State

Lottery No. 99 and all rights attaching thereto and would hold all moneys paid to him in respect thereof as trustee for himself and the plaintiff in equal shares.

The defendant Quinn submitted to any order the Court might see fit to make.

After hearing the evidence *Richardson* J. declared that the said ticket number 95518 was held by the defendant Van Rassel in trust for himself and the plaintiff in equal shares and he ordered payment to Kroon of one half of the moneys payable in respect of the ticket.

From that decision the defendant appealed to the High Court.

Further facts appear in the judgment of *Dixon* C.J. and the judgment of *Taylor* J. hereunder.

N. A. Jenkyn Q.C. and *B. Seletto*, for the appellant.

N. D. McIntosh Q.C. and *T. R. Morling*, for the respondent.

Cur. adv. vult.

March 4, 1953.

The following written judgments were delivered :—

DIXON C.J. This is an appeal from a decree made by *Richardson* J. declaring that the defendant-appellant holds a lottery ticket which won a prize of £12,000 in the New South Wales State Lottery, and all rights attaching thereto as trustee for himself and the plaintiff-respondent in equal shares and ordering that the Director of New South Wales State Lotteries, who was joined as a defendant, pay to the plaintiff-respondent the sum of £6,000 being one half of the moneys to which the holder of the ticket is entitled. The ticket is identified by the decree as number 95518 in New South Wales Lottery No. 99. It was a "special" lottery, the cost of the tickets at the Lottery Office being 10s. The date of drawing was 26th March 1952. Some ten or twelve days earlier it had been arranged between the plaintiff and the defendant that they would join in purchasing a ticket in a special lottery, as distinguished from a ticket costing 5s. 6d. in an ordinary lottery, and the plaintiff had handed to the defendant sufficient money to cover his half share. The winning lottery ticket was purchased on 22nd March 1952 and the question in the case is whether as a result of the arrangement the defendant held it not for himself alone but for himself and the plaintiff as co-owners in equal shares.

The facts upon which the question depends may be briefly told. Both the plaintiff and the defendant are Dutchmen. Both speak

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English reasonably well but naturally they conversed with one another in Dutch. The defendant, whose name was Gerald Van Rassel, was employed in a wine cellar close to which was a kiosk selling lottery tickets. He was married and he and his wife lived in a room at Manly. They were trying to obtain a house. The plaintiff, whose name was Kroon, was chief cook on a Dutch ship called the "Niew Holland", which trades between Singapore, Sydney and Melbourne, and is periodically in the port of Sydney. Kroon met Van Rassel aboard the ship when she was in Sydney in October 1951. They became friendly and Mrs. Van Rassel met Kroon.

In February 1952, the ship was again in Sydney. Kroon, however, owing to an ear infection, had to go into hospital for surgical treatment and the ship sailed leaving him ashore. On 25th February he went into hospital and on 13th March 1952 he underwent an operation. In the interval Van Rassel and his wife had visited him and a day or two after the operation they visited him again. According to the recollection of Van Rassel it was on Monday, 17th March. During the visit the difficulty the Van Rassels were experiencing over housing was referred to, not for the first time, and their desire to obtain a house. This led to the subject of the lottery as affording a chance of winning enough money for the purpose. Kroon proposed that he and Van Rassel should take a ticket in a big lottery, that is a special lottery, and Van Rassel assented. Kroon leaned over to a drawer from which he produced a £1 note and handed it to Van Rassel. The ticket would cost 10s. or 10s. 4d. if bought at an agency and Kroon's share was 5s. or 5s. 2d. Apparently they ignored the agency fee of 4d. For on its being found that the Van Rassels could only produce a 10s. note by way of change, Kroon asked them to use the other 5s. in buying a ticket for him in a smaller or ordinary lottery. Such a ticket would cost 5s. 6d. or 5s. 10d. at an agency but the pence were ignored between them. Van Rassel asked what they should call the syndicate ticket. According to Kroon he answered "Call it the 'Happy Landing' or 'Nieuw Holland' or something like that". According to Van Rassel and his wife, Kroon answered "Happy Landing" and nothing else. He did not add "Nieuw Holland". On Tuesday, 18th March, Van Rassel went to his place of employment carrying 19s. in his pocket. He went to the kiosk nearby and filled in application forms as follows:— First an application form for a ticket in an ordinary lottery number 2509 in the name of Mrs. G. Van Rassel, putting in the place for the "syndicate name" the initials "C.L.", his wife's names being

Christina Louisa. Second a ticket in the name of Kroon, placing in the blank for " syndicate name " the letters " N.H." Third a ticket (No. 52766) in the same lottery in the names " Kroon-Van Rassell ", placing in the blank for " syndicate name " the words " Happy Landing ". These tickets cost 17s. 6d., being bought through an agency. Van Rassel's explanation of these purchases or applications for tickets is that he went over to the kiosk intending to apply for a ticket in a special or " big " lottery for his wife, another ticket in a special lottery on the joint account of himself and Kroon and a third ticket in an ordinary or " small " lottery in the name of Kroon. But when he found he had only 19s. he saw that he could not do this. If he bought a special lottery ticket for the joint venture and only an ordinary ticket for his wife and an ordinary ticket for Kroon it would cost 22s. So he decided to buy a ticket in an ordinary lottery for the syndicate of himself and Kroon instead of in a special one. In placing the letters " N.H." on the ticket for Kroon he simply used initial letters which he and his wife had employed in a number of cases sometimes for the words " No Hope ", and sometimes for " No Home ". The cost of the full ticket for Kroon was 5s. 10d. and of his half share in the other ticket 2s. 11d. leaving 1s. 3d. of the amount of 10s. paid to him by Kroon in the hospital. But Van Rassel did not visit Kroon during the ensuing week and so did not pay him the 1s. 3d. or tell him that he had bought a ticket in an ordinary lottery on their joint account instead of in a special lottery. Lottery No. 2509 was drawn on 25th March and none of the three tickets received a prize. In the meantime, on 22nd March 1952, Van Rassel applied at the same kiosk for a ticket in special lottery No. 99. He put " G. Van Rassel " opposite the word " Mrs. " but did not strike out the " Mr." or " Miss " above and below it. He gave their Manly address and in the space opposite " syndicate name " he placed the letters " N.H." The ticket number was 95518 and when the lottery was drawn on 26th March 1952 this number won the prize of £12,000. It was announced in the press that G. Van Rassel had won this prize and the " syndicate name " " N.H." was stated. An evening newspaper gave an account of the circumstances in which he received the news and of the sentiments he was reported to have expressed. Kroon saw this in hospital and attempted to communicate with him by telephone, with the result that Van Rassel rang him up next morning and later, accompanied by his wife, visited Kroon. It is unnecessary to recount what passed then or afterwards. It is enough to say that Kroon showed an inclination to think that he might have a

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half interest in the winning ticket, Van Rassel explained what had actually taken place, produced the tickets in lottery No. 2509, which had been torn up after the lottery had been drawn but had been recovered and pasted together and gave an authority enabling a check to be made in the lottery office of the fact that he had made out an application form in lottery No. 2509 in the name of Van Rassel and Kroon and the syndicate name " Happy Landing ". Apparently Kroon's feeling that he had a claim ripened and on 31st March 1952 he commenced the suit. As part of his case he asserted that " N.H." on the winning ticket stood for " Nieuw Holland ". An importance was thus given to the question whether on being asked what name the syndicate should be called Kroon had answered " Happy Landing " only as the Van Rassels swore or " ' Happy Landing ', ' Nieuw Holland ' or something like that " as Kroon swore. *Richardson* J. found that he gave the latter answer, but his Honour so found for the reason that when Van Rassel gave evidence, after stating that Kroon was asked " What syndicate name are we going to give this ticket ", he continued " and the first thing he said to me was ' Happy Landing ' ". From this the learned judge inferred that there must have been a second thing, notwithstanding Van Rassel's denial. But the idiom means only that he answered thus at once or immediately and without any preceding expressions. The inference is untenable.

When one man agrees with another that he will obtain a lottery ticket for the latter or for the latter and himself jointly the identification of the lottery ticket he acquires in pursuance of the arrangement is likely to present difficulties. The person in whose name the lottery ticket issues obtains the legal title to what is a chose in action. If he is the applicant he obtains custody of the ticket and is in a position to exercise whatever rights the ticket confers and deal with it as he chooses. If the application is or must be taken to be for the benefit of another or others or of himself and another or others he has the legal title unless the ticket issues in the names of the person or persons beneficially entitled. Otherwise they have nothing but an equitable interest in the ticket and its proceeds if it wins a prize. In other words he becomes a fiduciary agent or trustee. It is not a trust or a fiduciary agency involving many duties or burdens. It is of the simplest kind and the fiduciary obligations flowing from it are few and for the most part negative, that is to say he must do nothing to impair the rights of the persons for whom he holds the ticket. But one of the duties of a person acquiring any piece of property, whether chose in action or corporeal thing, for the benefit of others as a fiduciary is to distinguish the

piece of property he so acquires from other similar things which he may obtain for himself or in which he may be interested. This duty has a particular application to the acquisition of a lottery ticket. For a lottery ticket is a chose in action possessing characteristics making the discharge of the duty specially important. When the ticket is applied for it is one of a series, very large in number, no one of which is distinguishable from the others except by the numerals they bear. Every one of them has the same value, a small uniform value. But when the lottery is drawn the value of some of the tickets will become very great indeed while most of the tickets will become valueless. The fiduciary is at perfect liberty before the drawing to acquire for himself beneficially any number of tickets in the same lottery as that in which he holds a ticket on behalf of others or of himself and others. It is evident that before the drawing the identity of the ticket which is held for others or for himself and others ought, if he fulfils his duty, to be ascertained so that it is clearly distinguished from those he holds for himself. If there is any confusion, the burden must be upon him of showing which is his property. It could not be otherwise where the duty rests upon him as a fiduciary not to confuse his own beneficial property with that which is subject to his fiduciary obligations and where at the same time his are the hands in which are placed the means of identifying the property.

A ready means of identifying the lottery ticket as that applied for in the interest of others is furnished by the space in the form of application for the name or title of a syndicate. If it is part of the arrangement between the contributors that a given syndicate name should be used then of course all that need be done by the person to apply for a ticket on their behalf is to use that name in the application. If a claim is made against him on the footing that some winning ticket he has purchased is that which he holds as a fiduciary he will discharge the burden of proof thrown upon him by proving that he used the syndicate name in his application for some other ticket. But in reference to the burden of proof, it is important to distinguish between the terms of the arrangement and the identification of the ticket acquired on behalf of the joint contributors. Where a joint contributor relies upon the terms of the arrangement in support of his title to a share or interest in the winning ticket which he asserts was bought on the joint account, the burden is upon him of establishing the terms in question. That is part of the contract or mandate and it is for the plaintiff to prove what the contract or mandate was in so far as it forms part of the title which he asserts. The duty of the fiduciary not

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to confuse the property he holds in that character with his own beneficial property gives rise to the consequence that the burden of identifying by proof what is his own property rests on him. If it were not so the task of the beneficiaries would be impossible. By what test are they to ascertain what is their property? Are they to set about proving with what intention the fiduciary acquired this or the other ticket? Is he to be at liberty to await the result of the lottery and to allow the identity of the trust property to depend on his own undisclosed or unrecorded intention?

The peculiarity of the present case is that the defendant, standing as he does in the position of a fiduciary, does offer proof that he did identify a ticket as that which he acquired on the joint account and that he identified it in conformity with the terms of his mandate. For, if the identification of the ticket as that which he acquired on the joint account is considered independently of the description of the lottery, the proof of the identity of the ticket is incontestable. The arrangement specified "Happy Landing" as a syndicate name for use in such identification and he used it. That is beyond doubt, whether it be true or untrue that it was the only name which the arrangement specified and not one of two specified as alternative choices. Further, the two names of the subscribers themselves were given as the applicants. The difficulty with respect to the ticket is not its identification but the fact that it was for a lottery of a different description from that agreed upon. Doubtless that would mean that the plaintiff could repudiate any interest in that lottery ticket and insist on the purchase of a ticket in a lottery of the description which had been agreed. But why does it follow from this that the plaintiff can fix upon some other ticket which the defendant bought and claim an interest in it notwithstanding that the defendant bought it for himself beneficially, not only as a matter of intention, but of actual identification? It ought not to follow. Instinctively the plaintiff Kroon seems to recognize this; for he makes the case that the initials "N.H." amount to an overt identification of the winning ticket as one bought on the joint account of the defendant Van Rassel and himself. Presumably the defendant is to be supposed to have repented of his purchase of a ticket on the joint account in a lottery of the wrong description and, in order to put it right, to have bought one of the right description on the joint account and identified it as such. But to make that out it would be necessary for Kroon to establish that the method of identification agreed upon between them was not "Happy Landing" alone but a choice of "Happy Landing" or "Nieuw Holland". It would

be necessary also for him to succeed on the issue of fact that the letters " N.H." were used as the initials of " Nieuw Holland ", though on this issue the burden of proof would be upon the defendant once the plaintiff established that " Nieuw Holland " was an agreed alternative.

Now it seems almost certain that the plaintiff Kroon is wrong on both issues. For on the second of them the defendant Van Rassel made a very strong case. He certainly showed that he had used the initials " N.H." on previous occasions. His oral evidence that he had done so was confirmed by the *ex post facto* production from the lottery office of an application dated in the previous January upon which were inscribed those initial letters. It is true that the meaning of the letters is explained only by oral evidence, but other applications made by him containing analogous initials were unfortunately rejected as evidence. What would have been their effect if admitted, as I think they should have been, we cannot know. But a conclusion that " N.H." did not stand for " No Home " could not be reached without giving the defendant Van Rassel an opportunity of putting them in evidence and that would mean a rehearing in whole or in part.

On the issue whether " Nieuw Holland " was stated as an alternative choice, the learned judge's conclusion is vitiated by the reason he gave. The burden of proof is upon the plaintiff Kroon. He is contradicted by the defendant Van Rassel and his wife. The appearance in the newspaper of the letters " N.H." might quite well set his mind working on the possibility of their representing " Nieuw Holland " with the consequence that the title " Nieuw Holland " found a place in his account of the conversation in the hospital. It is difficult to believe that when the Van Rassels employed the letters " N.H." on prior occasions in applying for lottery tickets, as unquestionably they did, they were used as the initials of the words " Nieuw Holland " and that they subsequently invented the explanation that the letters meant " No Home " and " No Hope ". Except for the contradiction concerning the addition by Kroon of the words " Nieuw Holland " as an alternative syndicate name to " Happy Landing " the stories of the two opposing parties agree to an unusual degree. The burden of proof is upon the plaintiff and it would be wrong to treat him as having discharged it on the evidence as it stands.

It was suggested that Van Rassel should be treated as having received the 10s. as trust money. How this would advance the plaintiff Kroon's case, if it were so, is not clear. But common

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experience is enough to dissipate the idea that, when small sums of money are furnished by one person to another because the latter is to buy some inexpensive or trivial thing on the joint account or execute some small commission, either party treats it as anything but payment in advance. The money becomes the property of the recipient. He incurs a personal responsibility for fulfilling the commission and that is all that is relied upon.

The whole case comes down to the simple position that Van Rassel has shown that what he bought on account of himself and Kroon was the ticket No. 52766 in lottery No. 2509, notwithstanding that this was not a lottery of the agreed description and that he bought ticket No. 95518 on his own account and identified it as his own.

The appeal ought therefore to be allowed with costs and the decree appealed from discharged. In lieu thereof the suit should be dismissed with costs.

WEBB J. I would allow this appeal for the reasons given by the Chief Justice and *Taylor* J.

TAYLOR J. This is an appeal from a decree of the Supreme Court of New South Wales in its equitable jurisdiction declaring that the appellant, who was the defendant in the suit, holds a winning ticket in New South Wales Special Lottery No. 99 as trustee for himself and the plaintiff, the respondent in this appeal, in equal shares.

It is admitted on the pleadings and by the testimony of the parties that about the middle of March 1952, the appellant and the respondent agreed to contribute equally for the purchase of a special lottery ticket. It is common ground that the respondent made his contribution in the manner hereinafter appearing and the evidence establishes that on 18th March, 1952, a lottery ticket was purchased by the appellant in the joint names of himself and the respondent and in the syndicate name "Happy Landing", though this ticket was not a "special" lottery ticket.

It appears from the evidence that the respondent and the appellant and his wife, who are all of Dutch nationality, became friends late in 1951. At that time the appellant had been a resident of Sydney for approximately a year and the respondent was an employee on the ship "Nieuw Holland" which trades between Sydney and Melbourne and eastern ports. In February 1952, the respondent remained in Sydney after his ship's departure in order to undergo hospital treatment and he was a hospital patient at the time of the agreement to which I have referred. There is no

dispute that whilst he was in hospital the appellant and his wife came to see him on a number of occasions and on the last of these occasions, after discussing the difficulties being experienced by the appellant and his wife in obtaining a residence of their own, the respondent suggested the purchase of a lottery ticket in a " big " lottery. The appellant assented to this and the respondent produced a £1 note to pay for his share. Neither the appellant nor his wife were able to give the respondent the appropriate change but after the appellant had handed to the respondent a 10s. note, which he had obtained from his wife, the respondent told the appellant to " keep the other change " for the purpose of buying a 5s. ticket for the respondent. So much is common ground between the parties. But there is a dispute concerning what was thereafter said or arranged about a " syndicate " name for the joint investment. The respondent says that he said: " Call it the ' Happy Landing ' or ' Nieuw Holland ' or something like that ", whilst the appellant and his wife denied that the name " Nieuw Holland " was ever suggested as a syndicate name. In view of subsequent events this conflict is of some importance in the case. On the following day, 18th March, 1952, the appellant came to town with 19s. in his pocket. He had left the hospital the previous day with approximately £1 2s. 0d. made up of the £1 note he had received from the respondent and some odd coins which he already had. On the way home he expended moneys for fares for himself and his wife and repaid to his wife the 10s. which she had provided in the hospital. The net result was to leave him with 9s. which, together with another 10s. obtained from his own moneys at home the following day, he took to town. Having arrived in town he made arrangements at a shop near his place of employment for the purchase of three lottery tickets. These arrangements consisted in providing one, Green, with the necessary information to fill in application forms and with the necessary money to purchase the required tickets. The appellant first of all arranged to purchase a ticket for his wife at a cost of 5s. 10d. This ticket was identified by the use of his wife's initials. No question arises in relation to this ticket, but after committing himself to its purchase the appellant did not have enough money to make arrangements for the purchase of both a special ticket and an ordinary ticket. However, he arranged to buy two further ordinary tickets—one in the respondent's name and the other in the joint names of the respondent and himself—at a total cost of 11s. 8d. The " syndicate " name selected by the applicant for the first of these tickets was " N.H." and for the second " Happy Landing " All three tickets were

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procured in the same lottery and none of them secured a prize when the lottery was drawn on 25th March, 1952. But prior to the drawing of this lottery the appellant, on 22nd March, 1952, purchased a special lottery ticket in his own name and in the "syndicate" name "N.H." This ticket was successful on the drawing of this lottery on 26th March, 1952, and entitled the owner thereof to the first prize of £12,000.

In the suit instituted by him the respondent claimed that this last-mentioned ticket had been purchased by the appellant pursuant to their arrangements to make a joint investment and consequently that the appellant was at all material times a trustee of the ticket and the resulting prize money.

Upon a consideration of the facts the learned trial judge came to the conclusion that the respondent's version of the conversation on 17th March was correct. Accordingly, he found that the respondent had suggested the syndicate names "Happy Landing" or "Nieuw Holland" or "something like that". This was an important factor in the chain of reasoning which led to the making of the decree appealed from, for if the name "Nieuw Holland" was not mentioned as a possible syndicate name, there would be no link to found the respondent's claim to a share of the prize won by the special lottery ticket purchased in the "syndicate" name of "N.H." Accordingly, his Honour after considering the competing contentions, rejected the appellant's assertion that the letters "N.H." stood for "No Hope" or "No Home" and said: "I have also concluded that when he purchased the ticket on 22nd March he knew it was the first time he had applied for a special lottery ticket since accepting the obligation and he knew he had not, up to that time performed his obligation excepting only with respect to an ordinary ticket for the plaintiff which he called 'N.H.' I do not accept the defendant's evidence that the combination of letters on that ticket stood for 'No Hope'. *That name had never been mentioned by the parties*". The italics are mine and I have italicized this sentence to emphasize the reasoning which led to the learned judge's conclusion. The first step is the acceptance of the respondent's version of the original conversation. The acceptance of this version involves a finding that the parties contemplated the purchase of a joint lottery ticket, possibly, in the syndicate name "Nieuw Holland", and, admittedly, there was a purchase of a special lottery ticket in the syndicate name "N.H.", though this purchase was made in the name of the appellant alone. The letters "N.H." could indicate the suggested syndicate name "Nieuw Holland", but they could not, his Honour says,

indicate " No Hope " or " No Home " because the parties had never mentioned this name as a possiblity. This whole line of reasoning assumes that the ticket was purchased for the joint benefit of the appellant and the respondent and depends upon the validity of the first step, i.e., the acceptance of the respondent's version of the original conversation, for if the name " Nieuw Holland " was never suggested the remaining steps cannot be taken. The learned judge was at some pains to state his reason for taking the first step and it is his reason, as stated, that causes me difficulty in this matter. On this point his Honour said: " There is no dispute that an agreement was made to buy a ticket in a special lottery, nor is there any difference as to the terms of that agreement save in the matter of the name to be given to the ticket. The plaintiff says that the name was to be ' " Happy Landing ", " Nieuw Holland " or something like that '. Both the defendant and his wife, who was present at the conversation when the agreement was made, say that the words ' " Nieuw Holland " or something like that ' were not used and they both laid particular emphasis upon that piece of evidence but, notwithstanding, I prefer to believe the plaintiff. The defendant was asked to detail the conversation on the occasion when the agreement was made. It is significant that, according to the defendant, he said to the plaintiff: ' What syndicate name are we going to give this ticket ? ' and he continued his evidence by saying: ' The first thing he said to me " Happy Landing " '. True it is he said also that no other name was mentioned but I draw the inference that if the first thing the plaintiff said in this connection was ' Happy Landing ' there must have followed another suggestion as to a name, and so I accept the plaintiff's evidence that he put forward as an alternative to ' Happy Landing ' the name ' Nieuw Holland ' or something like that. The defendant and his wife agree that it was most likely that the name ' Nieuw Holland ' was mentioned on this occasion but the defendant added that it had nothing to do with a name for the syndicate ". It was, it seems to me, because, and only because, the appellant in evidence said: " The first thing he (the respondent) said to me ' Happy Landing ' " that his Honour preferred the respondent's version of the original conversation. I cannot agree that the choice of this form of expression bore the significance which his Honour attributed to it and, indeed, counsel for the respondent fairly conceded that at the most it could, by itself, form only slender ground for preferring the respondent's version. When it is borne in mind that the critical passage in the applicant's evidence is his version in imperfect

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English of a conversation which took place in Dutch, the passage relied upon is, by itself, quite insufficient to resolve the conflict between the parties. No doubt, the use of the word "first" might well be capable of indicating that the respondent had in mind another suggested syndicate name and no doubt would do so if used with particular emphasis. But there is nothing in his Honour's reasons to suggest that the word was so used, nor does it appear that during the hearing it was treated by counsel as having this particular significance. There is nothing in the cross-examination of the appellant to indicate that any of the respondent's representatives attributed any particular significance to the expression as it was used by the appellant. Indeed, a perusal of the relevant portion of the evidence gives the clear impression that the expression was used by the respondent to indicate that the name "Happy Landing" was immediately suggested and that no other name was mentioned. In the circumstances—and I am not unmindful of the principles upon which appellate courts should approach the findings on questions of fact of judges who have had the opportunity of observing the demeanour of witnesses—I cannot be content to dispose of the case in accordance with his Honour's findings on this point.

But this does not mean that the necessary consequence is that the appeal must be allowed; it is for this Court as best it can to make its own findings on the facts before it. In proceeding to do so I should first say that I do not attach the critical importance which his Honour did to the precise terms of the original conversation. It is true that it is of some importance, but the appellant had on at least one prior occasion purchased for himself a special lottery ticket in the syndicate name "N.H." The evidence—which for reasons I will presently give was rightly admitted—establishes that this occurred some two months before the agreement for a joint investment was made. Moreover, when the joint ticket was purchased on 18th March, 1952, in the names of the appellant and the respondent the syndicate name selected was not "N.H." or "something like that", but "Happy Landing". There can be no doubt that, although it was not a special lottery ticket, this ticket was purchased by the appellant for himself and the respondent, and it is to my mind improbable that if the appellant subsequently intended, when purchasing the special lottery ticket on 22nd March, 1952, to do so for himself and the respondent jointly he would not have made the purchase again in their joint names and in the same syndicate name. In the circumstances, it is not of significance that the appellant did not,

as he might have done, acquaint the respondent of the number of the lottery ticket purchased in their joint names, though this fact was relied upon to suggest that the appellant decided after 18th March to discharge his full obligation to the respondent by purchasing a special lottery ticket for them both. If the appellant had so decided there was an equally sound reason for informing the respondent of what he had done, but it seems abundantly clear that the fact that no information was given to the respondent between 18th and 25th March arose from indolence or thoughtlessness on the part of the appellant for no information was given to the respondent concerning the ticket purchased on 18th March as his sole property.

Upon a consideration of the matter as a whole I am of opinion that the evidence does not establish that the special lottery ticket purchased on 22nd March was purchased by the appellant with the intention that it should be the joint property of himself and the respondent. On the contrary the evidence suggests very strongly to me that it was purchased by the appellant for himself. I do not think that this conclusion depends in any substantial degree upon whether or not the appellant suggested more than one syndicate name during the course of the original conversation, for it is clear that the lottery ticket which was actually purchased in their joint names on 18th March was intended to be their joint property and there is nothing in the evidence to indicate, with any degree of probability, that the special lottery ticket purchased on 22nd March was intended to be their joint property.

Counsel for the respondent contended, however, that irrespective of the respondent's intention when he purchased the latter ticket, that ticket, as a matter of law, became the joint property of the appellant and the respondent. He argued that the appellant had been entrusted by the respondent with moneys which were trust moneys, that he had mixed those moneys with moneys of his own and that the first special lottery ticket thereafter purchased by the respondent became the joint property of them both. I do not think that this argument is sound. I am of opinion that no trust, in the true sense, attached to the moneys which the respondent handed to the appellant; it was never the intention of the parties that they should be treated as trust moneys, though no doubt intended that the appellant should become a trustee of any ticket purchased by him pursuant to their arrangement and of any resultant prize money.

The point remaining to be dealt with is whether documentary evidence was rightly admitted concerning the purchase by the

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respondent of a special lottery ticket on 22nd January, 1952, in the syndicate name "N.H." and also whether oral evidence that he had purchased other special lottery tickets in this syndicate name should have been admitted. I have no doubt that the whole of this evidence was rightly admitted. The respondent sought to show that the use of the name "N.H." was attributable exclusively to the conversation which the respondent alleged took place at the hospital between himself and the appellant. This being so, I can see no reason why evidence should not have been admitted to establish that this syndicate name, even if then suggested, had been thought of by the appellant, and used by him on earlier occasions.

For the reasons which I have given I am of opinion that the appeal should be upheld, the decree of the Supreme Court discharged and the suit dismissed.

Appeal allowed with costs. Decree of Richardson J. discharged. In lieu thereof suit dismissed with costs.

Solicitors for the appellant, *J. E. A. Florance & Florance.*
Solicitors for the respondent, *F. J. Church & Co.*

J. B.