1968
*Mar. 25, 26
June 24

LEO ROSS, GEORGE BANKS AND FLOYD DYSON ..... APPELLANTS;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Common gaming house—Accused officers of unincorporated bridge and social club—Bridge players charged a fee for playing—Whether bridge a game of skill or of chance or of mixed chance and skill—Criminal Code, 1953-54 (Can.), c. 51, ss. 168(1)(f), 176(1).

The appellants, who were officers of an unincorporated bridge and social club, were convicted of unlawfully keeping a common gaming house, contrary to s. 176(1) of the *Criminal Code*. The game played was bridge; and fees were charged to the players. The Court of Appeal upheld the conviction and ruled that bridge was a game of mixed chance and skill. The appellants obtained leave to appeal to this Court where the question raised was as to whether there was any evidence upon which the Court of Appeal could find that the game of bridge was a game within the definition of "game" in s. 168(1)(*f*) of the *Criminal Code*.

Held (Spence J. dissenting): The appeal should be dismissed.

Per Cartwright C.J. and Judson, Ritchie and Pigeon JJ.: Bridge is a game containing an element of chance and an element of skill and is, therefore, a "game" within the meaning of s. 168(1)(*f*) of the Code. It was clear that Parliament intended to avoid the uncertainties involved in determining what is the dominant element and deliberately chose to include in the definition of "game" all mixed games as well as games of chance.

Per Spence J., *dissenting:* In the game of bridge the only chance involved is the chance in the dealing of the cards. The element of skill predominates in the playing of the game. On that basis, the game of bridge is not a game of chance or mixed chance and skill. The predominance of skill indicates that it should not be considered as being within the words of the statute "a game of mixed chance and skill".

*PRESENT: Cartwright C.J. and Judson, Ritchie, Spence and Pigeon JJ.

Droit criminel—Maison de jeu—Dirigeants d'un club de bridge non constitué en corporation accusés d'avoir tenu une maison de jeu—Les joueurs de bridge tenus de payer pour jouer—Le bridge est-il un jeu d'adresse ou de hasard ou un jeu où se mêlent le hasard et l'adresse—Code criminel, 1953-54 (Can.), c. 51, art. 168(1)(f), 176(1).

Les appelants, qui étaient des dirigeants d'un club de bridge non constitué en corporation, ont été déclarés coupables d'avoir tenu illégalement une maison de jeu, contrairement à l'art. 176(1) du *Code criminel*. Le jeu en question était le bridge; et les joueurs devaient payer pour le privilège de jouer. La Cour d'appel a maintenu la déclaration de culpabilité et a statué que le bridge est un jeu où se mêlent le hasard et l'adresse. Les appelants ont obtenu la permission d'appeler à cette Cour où la question soulevée a été de savoir s'il y avait une preuve en vertu de laquelle la Cour d'appel pouvait déclarer que le jeu de bridge est un jeu selon la définition du mot «jeu» de l'art. 168(1)(*f*) du *Code criminel*.

Arrêt: L'appel doit être rejeté, le Juge Spence étant dissident.

Le Juge en Chef Cartwright et les Juges Judson, Ritchie et Pigeon: Le bridge est un jeu qui comporte un élément de hasard et un élément d'adresse et il est, en conséquence, un «jeu» au sens de l'art. 168(1)(*f*) du Code. Il est clair que le Parlement voulait éviter les incertitudes qui se présentent lorsqu'il s'agit de déterminer quel est l'élément dominant et a délibérément choisi d'inclure dans la définition de «jeu» au même titre que les jeux de hasard tous ceux où se mêlent le hasard et l'adresse.

Le Juge Spence, *dissident:* Le seul élément de hasard dans le jeu de bridge se trouve dans la distribution des cartes. C'est l'élément d'adresse qui prédomine dans le jeu de bridge. Par conséquent, le jeu de bridge n'est pas un jeu de hasard ni un jeu où se mêlent le hasard et l'adresse. Le fait que l'adresse prédomine montre bien qu'il ne doit pas être considéré comme compris dans le sens des mots du statut «un jeu où se mêlent le hasard et l'adresse».

APPEL d'un jugement de la Cour d'appel de l'Ontario[1], confirmant la déclaration de culpabilité des trois appelants. Appel rejeté, le Juge Spence étant dissident.

APPEAL from the judgment of the Court of Appeal for Ontario[1], affirming the appellants' conviction. Appeal dismissed, Spence J. dissenting.

G. Arthur Martin, Q.C., for the appellants.

Clay M. Powell, for the respondent.

The judgment of Cartwright C.J. and Judson, Ritchie and Pigeon JJ. was delivered by

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[1] [1967] 2 O.R. 420, (1968), 2 C.R.N.S. 185, 1 C.C.C. 261.

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PIGEON J.:—The appellants have been convicted on the charge of keeping "a common gaming house". The agreed statement of facts shows that they were officers of an unincorporated bridge and social club. The game played was bridge and the players were charged for playing it the following fees:

> For one pivot, which is the equivalent of three rubbers, the charge of $1.00; for more than one pivot but less than two pivots, the charge of $1.25; for two complete pivots, a charge of $1.50; for more than two pivots but less than three pivots, a charge of $1.75; and for three pivots or more, a maximum charge of $2.00.

The question raised on the appeal is the following:

> Was there any evidence upon which the Court of Appeal for Ontario could find that the game of bridge was a "game" within the definition of "game" in section 168(1)(*f*) of the *Criminal Code*?

The following provisions of s. 168 of the *Criminal Code* should be considered:

> 168. (1) In this Part,
>
> * * *
>
> (*d*) "common gaming house" means a place that is
>
> (i) kept for gain to which persons resort for the purpose of playing games; or
>
> (ii) kept or used for the purpose of playing games
>
> (A) in which a bank is kept by one or more but not all of the players,
>
> (B) in which all or any portion of the bets on or proceeds from a game is paid, directly or indirectly, to the keeper of the place,
>
> (C) in which, directly or indirectly, a fee is charged by the players for the privilege of playing or participating in a game or using gaming equipment, or
>
> (D) in which the chances of winning are not equally favourable to all persons who play the game, including the person, if any, who conducts the game;
>
> * * *
>
> (*f*) "game" means a game of chance or mixed chance and skill;
>
> * * *
>
> (2) A place is not a common gaming house within the meaning of subparagraph (i) or clause (B) or (C) of subparagraph (ii) of paragraph (*d*) of subsection (1)
>
> (*a*) while it is occupied and used by an incorporated *bona fide* social club or branch thereof if
>
> (i) the whole or any portion of the bets on or proceeds from games played therein is not directly or indirectly paid to the keeper thereof, and
>
> (ii) no fee in excess of ten cents an hour or fifty cents a day is charged to persons for the right or privilege of participating in the games played therein; or . . .

A brief description of the game of bridge, more precisely contract bridge, was given in evidence. It is sufficient to say that it shows that the cards in the hands of each of the four players are determined by chance but that afterwards the outcome of the game depends in substantial measure upon the skill of the players in bidding and in playing their hands. In this the only element of chance is that which results from the deal and the fact that only the hand of the dummy is disclosed to the other players after the bidding. The opinion of an expert bridge player heard as the only witness was that, on the whole, the element of skill outweighs the element of chance. Appellants' contention is that this takes the game of bridge out of the category of games of mixed chance and skill.

In considering this submission, it is convenient to start by examining the language used in the enactment. Taken by themselves the words used in the definition of "game" are not ambiguous. They apply to any game of chance only or of mixed chance and skill. The word "mixed" implies no indication of the respective proportions of the two elements. Nothing shows that they must be equal or nearly so. Nothing indicates which is to be preponderant. The first rule to observe in construing any legislative enactment is that unless there is ambiguity, it is to be applied literally.

In the Encyclopedia Britannica, under the heading "gaming and wagering", one reads:

> In England and the United States a general distinction between lawful and unlawful gaming seems to be that where skill predominates, the gaming is lawful; where chance does, it is unlawful (27 *Corpus Juris* p. 969). A court must decide which is the predominant factor in the case of each game in question. Cases show that one cannot rely on the record, for it is full of reversals and contradictions.

It seems clear that the Parliament of Canada sought to avoid the uncertainties involved in trying to ascertain the predominant factor in mixed games by enacting that they would be treated in the same way as games of pure chance. The law in force prior to the enactment of the 1892 *Criminal Code* was the *Gaming Houses Act* originally enacted by 38 Vict., c. 41, reproduced in R.S.C. 1886, c. 158. As in the United Kingdom act, 17-18 Vict., c. 38, "unlawful game" was not defined. From the decision of the Queen's Bench Division in *Jenks v. Turpin*[2], it would appear that

[2] (1884), 15 Cox C.C. 486, 13 Q.B.D. 505.

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card games were considered "unlawful" if they were games of chance, or games of chance and skill combined which cannot be called games of mere skill.

When the first criminal code was enacted (55-56 Vict., c. 29), s. 196 read as follows:

> 196. A common gaming-house is—
>
> (*a*) a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance; or
>
> (*b*) a house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which—
>
> (i) a hand is kept by one or more of the players exclusively of the others; or
>
> (ii) in which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet.

Three years later, chapter 40 of 58-59 Vict. added to paragraph *a* "or at any mixed game of chance and skill", thus making the two paragraphs identical in that respect.

What is now subpara. B of para. (ii) of the definition of "common gaming house" was added in 1919 by 8-9 Geo. V, c. 16. Sections 4 and 5 of the same statute also replaced the words "any unlawful game" by "any game of chance or any mixed game of chance and skill" in s. 985 (702 of the 1892 *Criminal Code,* 169 of the present *Criminal Code*) and made a similar change in s. 986 (703 of the 1892 Code). Those two sections had their origin in ss. 4 and 8 of the *Gaming Houses Act* and it is apparent that the purpose of the amendment was to preclude any possibility of construction by reference to the law prior to the *Criminal Code.*

What is now in substance subpara. (C) of para. (ii) of the definition of "common gaming house" as well as subs. 2 of article 168 was added in 1938 (c. 44, s. 12). This came shortly after a decision of the Court of Appeal of British Columbia, *Rex v. Williamson*[3], in which it held that a certain club could no longer be considered as not operating for gain as this Court had on different facts decided, a few years before, in *Bampton v. The King*[4]. No changes of substance have been made since that time and in the

[3] (1937), 51 B.C.R. 456, 2 W.W.R. 545, 68 C.C.C. 380, 3 D.L.R. 553.
[4] [1932] S.C.R. 626, 58 C.C.C. 289, 4 D.L.R. 209.

present *Criminal Code*, the maximum fees for playing games in clubs remain those that were established by the 1938 statute.

To support their contention that in classifying games, one has to ascertain what is the dominant element, appellants contend that there is an element of chance in every game, even in those that are admittedly games of skill such as chess, tennis and golf. This argument overlooks the principle that statutes must be read in accordance with the usual and accepted meaning of the words used. It is undoubtedly true that there are chances involved in any human activity and that, statistically, results are never predictable with complete certainty. However, when the statute speaks of chance as opposed to skill, it is clear that it contemplates not the unpredictables that may occasionally defeat skill but the systematic resort to chance involved in many games such as the throw of dice, the deal of cards.

Among dictionary definitions, the following appear to be of some interest:

Funk & Wagnalls New Standard Dictionary:

> The expression *games of chance* is used to describe those contests the outcome of which is largely governed by chance, as in cards, dice and gambling games generally; and in opposition to *games of skill* the result of which depends largely upon the dexterity of the contestant.

Bouvier's Law Dictionary. Vo Gaming:

> There are some games which depend altogether upon skill, others which depend upon chance, and others which are of a mixed nature. Billiards is an example of the first; lottery, of the second; and backgammon, of the last.

Larousse XX^e siècle:

> *Jeu de hasard*. Jeu dans lequel le hasard seul décide de la perte ou du gain.
>
> *Jeux d'adresse*. Jeux où l'adresse a la principale part, comme le billard, la balle, etc.

Robert Dictionnaire de la langue française:

> Jeux mixtes, où le hasard peut être plus ou moins corrigé à l'aide du calcul ou de certaines combinaisons.

Having cited the above definition of "jeux mixtes" (mixed games) given by a French lexicographer, I must add that French courts having to apply criminal code provisions aimed at games of chance ("jeux de hasard") only, have held those provisions applicable to games in

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which chance is the predominating element, not to those in which skill predominates, and have placed bridge among the latter.

Dalloz Nouveau Répertoire. Vo Jeu.

N° 37. Depuis 1877, la jurisprudence attribue le caractère de jeu de hasard à tous les jeux dans lesquels la chance prédomine sur l'adresse et les combinaisons de l'intelligence. C'est ainsi qu'elle considère comme jeux de hasard: le loto, le poker, le baccara, les petits chevaux. Ne sont pas par contre considérés comme jeux de hasard ceux où l'adresse prédomine tels que le billard, les échecs, le bridge ou le piquet.

Thus, it would appear that French courts interpret "jeux de hasard" much as British and American courts interpret "games of chance". However, granting that, in the application of legislative provisions aimed at games of chance ("jeux de hasard") the generally accepted view is that these include only games of pure chance or games in which chance is the dominating element, it does not follow that all other games must be considered as games of skill within the meaning of a code provision contemplating not only games of chance, but games of mixed chance and skill as well. To admit appellants' contention that mixed games in which skill is a dominant element are to be considered as games of skill really means to deprive of any effect the words "or mixed chance and skill".

In my opinion this would be contrary to Parliament's clearly expressed intention. It is clear that Parliament intended to avoid the uncertainties involved in determining what is the dominant element and deliberately chose to include in the definition of "game" all mixed games as well as games of chance.

Concerning Wurtele J.'s dictum in *The King v. Fortier*[5], it must be noted that it is not only *obiter* but entirely unsupported by any reference or analysis of the enactment.

I would dismiss the appeal.

SPENCE J. (*dissenting*):—This is an appeal from the decision of the Court of Appeal for Ontario[6] pronounced on July 4, 1967, wherein that Court dismissed an appeal from the conviction of the three accused by the police magistrate at Toronto on September 22, 1966.

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[5] (1903), 7 C.C.C. 417 at 423.

[6] [1967] 2 O.R. 420, (1968), 2 C.R.N.S. 185, 1 C.C.C. 261.

The three accused were convicted on the charge that:

> within six months ending on the 12th day of March, A.D. 1966, at the Municipality of Metropolitan Toronto, in the County of York, unlawfully did keep a common gaming house situate and known as 3101 Bathurst Street, Suite 201, contrary to the Criminal Code.

Although the Crown, at the commencement of the trial, adduced the evidence of detective John Frederick Leybourne, upon the continuation of the trial on a later date, an agreed statement of facts was submitted. That statement with the evidence of Mr. Eric Murray, who was called as the only defence witness, comprised the complete record considered by the learned magistrate. Mr. Murray was described by McLennan J.A., in the Court of Appeal, as follows: "His qualifications as an expert on the game of bridge are impressive." In view of the offices held by Mr. Murray, as taken from his own evidence, that description may be said to be, at any rate, not put too strongly. Upon such evidence, and after the submission of argument in writing, the learned magistrate convicted the three accused. That conviction was affirmed by the Court of Appeal, McLennan J.A. giving in writing the reasons of the Court.

The three accused applied for and obtained leave to appeal to this Court, and served a notice of appeal in which was set out the following ground of law:

> Was there any evidence upon which the Court of Appeal for Ontario could find that the game of bridge was a "game" within the definition of "game" in section 168(1)(*f*) of the *Criminal Code*?

McLennan J.A., in giving the reasons for judgment of the Court of Appeal, said:

> The narrow question is whether a card game called "Bridge" is a game of skill, in which event the convictions cannot stand, or whether it is a game of chance or of mixed chance and skill, and if so, the convictions must be affirmed.

Section 176(1) of the *Criminal Code* provides:

> 176. (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and is liable to imprisonment for two years.

Section 168(1) of the *Criminal Code* provides, in part:

> 168. (1) In this Part,
>
> * * *
>
> (*d*) "common gaming house" means a place that is
>
> (i) kept for gain to which persons resort for the purpose of playing games; or

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(ii) kept or used for the purpose of playing games

(A) in which a bank is kept by one or more but not all of the players,

(B) in which all or any portion of the bets on or proceeds from a game is paid, directly or indirectly, to the keeper of the place,

(C) in which, directly or indirectly, a fee is charged to or paid by the players for the privilege of playing or participating in a game or using gaming equipment, or

(D) in which the chances of winning are not equally favourable to all persons who play the game, including the person, if any, who conducts the game;

* * *

(*f*) "game" means a game of chance or mixed chance and skill;

It will be seen from a perusal of this section that the ground of law cited by the appellants for the determination of this Court is essentially the same question as that set out by McLennan J.A. and which I have quoted above.

Counsel for the Crown before this Court took the position that whether or not the game of bridge was one of skill, on the one hand, or, on the other hand, a game of chance, or mixed chance and skill, was a question of fact and not a question of law, that that question of fact had been resolved by the magistrate and therefore there was no question of law to submit to this Court. Counsel cited authority for that proposition: *R. v. Thompson*[7], per Lewis J. at p. 94. I am of the opinion that such objection is not well based. What this Court must do is interpret the words in s. 168(1)(*f*) of the *Criminal Code* "means a game of chance or mixed chance and skill" and that interpretation is a question of law. As I have said, the magistrate came to his decision upon consideration of the agreed statement of facts and of the evidence of Mr. Murray. That agreed statement of facts must be set out in full. It is as follows:

STATEMENT OF FACTS

The North York Bridge and Social Club is located at 3101 Bathurst Street, Toronto, in Suite 201 of an office building and its name is listed as a tenant on the main directory in the lobby of the building. The facilities and amenities provided by the Club are as indicated in the photographs of the Club premises filed as exhibits. These facilities include: one long room with card tables; an area where a restaurant is set up with tables on which food may be served; a partitioned area used as an office; and a room used as a lounge with television and other amenities. The

[7] (1943), 29 Cr. App. R. 88, [1943] 2 All E.R. 130.

Club premises are open from twelve noon until midnight, and sometimes later, seven days per week. The premises, during the six months prior to March 11, 1966 were used primarily for the playing of card games.

During the period in question, the accused, George Banks, who is aged 42, married, with one child, and is a local Toronto business man was elected President of the Club. Mr. Banks is of previous good character and has carried on business in the city of Toronto as a purse and belt manufacturer for some twenty-five years. The accused, Leo Ross, who is aged 32, married, and of previous good character, was employed as a Bridge Instructor and was also elected an officer of the Club. Mr. Ross is a recognized bridge expert in the city of Toronto and has worked as a Bridge Instructor in several bridge clubs in the city. He was at various times in charge of the premises. The accused, Floyd Dyson, was employed as a Bridge Director sometime in the month of February 1966 and at a meeting of the Club members was elected a member of the executive.

A copy of the minutes of the said meeting have been filed as an exhibit. Mr. Dyson is of previous good character and has been a recognized bridge player in the city of Toronto for a number of years and has instructed in the game of bridge.

In accordance with various invoices and the ledger book of the Club filed as exhibits, all of the furniture and fixtures in and about the Club premises are owned by the North York Bridge and Social Club; and were paid for by the North York Bridge and Social Club. The Club maintains a bank account and all monies received are deposited to the credit of the Club and all disbursements are paid out of Club funds. The four officers of the Club are George Banks, Leo Ross, Floyd Dyson and Morris Taylor; and any two of the said officers have signing privileges on the Club account for the disbursal of funds.

Sometime during the month of December, 1964, the accused Banks contacted Sergeant of Detectives, John Wilson, respecting the proposed operation of a bridge and social club. Sergeant Wilson advised Banks as to the means of becoming incorporated.

On December 29, 1964, one Louis Silver, a Solicitor acting on behalf of Banks and other proposed incorporators also contacted Sergeant Wilson as to the proposed club. As a result, Mr. Silver, on January 4, 1965, sent a letter to the Ontario Provincial Secretary's Office as to the proposed incorporation. Further correspondence was exchanged between Silver and the Provincial Secretary's Office leading to an application for incorporation being submitted on January 14, 1965. Photostatic copies of this correspondence have been filed as exhibits. A copy of the final application for incorporation as submitted to the Provincial Secretary's department has also been filed as an exhibit.

In March of 1965, the Club began actual operations, On September 24, 1965, the Provincial Secretary's Office advised Mr. Silver that it would not approve the application for incorporation at that time. Meanwhile, on August 12, 1965, officers from the Morality Squad of the Metropolitan Toronto Police force attended at the Club premises. It was observed that there were approximately 40 men playing cards at the time. In some of the games, the officers observed that there was an exchange of money between players taking part in the games. It was learned that the Club charged an annual membership fee of $35.00, an amount arrived at by the auditors of the Club as being appropriate to cover the then expenses of running the Club and to be adjusted as required for this purpose.

There were seven additional attendances by various members of the Morality Squad from December 13, 1965 to and including March 11, 1966.

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All these attendances were pursuant to warrants to search filed as exhibits in this case. During all these attendances, card games were observed to be played. All the visits made by the police to the premises were made during the afternoon hours with the exception of one visit which was made during the evening hours. During the afternoon visits, the officers did not observe any bridge being played, however, at the time of the evening attendances upon the premises, two games of bridge were in fact in progress.

It would appear that the fees charged for playing bridge are as follows: for one pivot, which is the equivalent of three rubbers, the charge of $1.00; for more than one pivot but less than two pivots, the charge of $1.25; for two complete pivots, a charge of $1.50, for more than two pivots but less than three pivots, a charge of $1.75; and for three pivots or more, a maximum charge of $2.00. The length of a rubber would be approximately fifteen to twenty minutes, and consequently, an average pivot would be about one hour.

On March 11, 1966, various articles on the premises were seized pursuant to a warrant to search. Among those articles were decks of playing cards. During the last seven visits, either the accused Banks or the accused Ross was warned by the officers attending that in their opinion, the operation of the Club violated the Canadian Criminal Code. It seems, on the other hand, that Mr. Silver had previously advised Banks and other members of the Club including Ross, that in his opinion, the operation of the Club on the basis of instructions given to him were not in contravention of the provisions of the Canadian Criminal Code.

The ledger of the Club was seized on March 11, 1966 and filed as an exhibit. This ledger was prepared by a chartered accountant and is admittedly in good order. It has one sheet entitled "Card Fees" which sheet reveals the amounts that were collected for card fees during the time of the operation of the Club. The yearly dues supplemented by the above card fees constituted the only revenues to the Club. The restaurant facilities are provided to the operator of the restaurant and all profits derived from the operation of the restaurant are retained by the operator without any payment being made to the Club.

I shall attempt to summarize the evidence given by Mr. Murray. Having outlined his qualifications, he very tersely described the game of bridge in a few paragraphs as follows:

> Q. Now, will you explain to the Court how bridge is played and the basis on which it's played?
>
> A. Well, very briefly, bridge is a card game and it's played with the full deck of fifty-two cards. Thirteen cards are dealt to each four players who participate in partnerships, one partnership against the other.
>
> The cards are dealt thirteen face down to each player and thereafter the partnerships bid—the players bid in rotation, attempting to reach certain contracts.
>
> When a final contract has been determined, then a person who has named the suit first becomes the declarer. His partner spreads his hand face up on the table, which becomes the dummy, and the play commences and you can play through by tricks, each trick consisting of four cards, one card from each player's hand, including the dummy, to each trick. You bid and achieve game contracts or

> parts of contracts. With slam contracts you receive points bonuses so that your end result is correlated into points, and these points are kept on a tabulation.

Mr. Murray continued to testify that the literature as to the game of bridge was voluminous consisting of many hundreds of books and a very large number of magazines, monthly publications in Canada, North America and throughout Europe. He pointed out that bridge was now played on a basis of international competition, likening it to the Davis Cup in tennis. Mr. Murray then dealt with the elements of chance and skill in the playing of the game of bridge. He quite freely admitted that the dealing of the cards was altogether a matter of chance. He described the deal as "that is merely putting the weapons in the players' hands" and continued, "well, once the cards are dealt, the game is entirely skill, in my opinion". Mr. Murray contrasted the game of bridge with other card games such as poker and pointed out that in the latter there was, what he described, as the co-mingling throughout the game of skill and chance, and then testified, "this isn't true of bridge at all; once the cards are dealt it becomes a question of conveying information between a partnership within the limits of the rules of the game and then once the cards are dealt the dummy becomes a question of playing the hand the most skilful way you can". The latter part of this sentence is an accurate quotation from the evidence as certified but the word "dummy" must be an error. Mr. Murray was of the opinion that after the deal theoretically there is no opportunity for chance to enter into the playing of the game. He remarked that it was possible for an individual to play a hand that, in his opinion, might be played badly and yet he might succeed, but that had nothing to do with chance because a skilful player, even in a short game, is going to succeed. Then, in cross-examination, he added: "Certainly over any lengthy period of time it's virtually a certainty, if the period of time is long, you have control of the situation if you have skill".

Mr. Murray gave as his opinion that in any game there was some element of chance however small and he used as an example two games which could easily be considered those of pure skill: firstly, a chess game between masters, and, secondly, a finely played tennis match. In the first case, he pointed out that the chance slamming of a door

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nearby when a chess master was in deep concentration might disturb his thinking and cause him to make a poor move, and, in the second case, a chance pebble on an otherwise perfectly prepared court, might cause a ball to twist out of line. Those are both examples of what I might term accidental hazards. An example had occurred to me of tournament professional golf, where a bad lie on a fairway 285 yards away from the tee and quite imperceptible might cause difficulty to even the most skilful and cautious player.

McLennan J.A., in giving the reasons for the Court of Appeal, expressed the view that the element of chance caused originally by the deal continued to affect the play of the game thereafter. In short, that there was the same co-mingling of chance and skill as Mr. Murray had pointed out would occur in a poker game. The learned justice in appeal said:

> The play of the hand follows the bidding. The play consists of each of the players, in some order or other, which has not been described in the evidence, placing a card on the table with one from the exposed hand and such cards constitute a "trick". As each player has 13 cards to start with there must be 13 tricks, won or lost, following each deal. One must assume, because it was not otherwise stated, that the play of 13 tricks following a deal is an individual game or part of a game. It seems a reasonable inference from the reference in Mr. Murray's evidence to "bidding" and "contract" that the partnership making the highest bid undertakes or contracts to win a certain number of the 13 tricks. The winning of a trick must be based upon some values determined either by certain differences between the cards or some rule of the game giving values to groups of cards. It is obvious that such values, and they may be the same or different values from the bidding values, must determine whether a trick is won or lost, and since what particular cards and the playing values thereof each player has is determined by the chance of the deal, the play of the cards or the way in which they can be played are substantially affected by chance. The defensive play, no doubt, refers to the play of the cards by the partnership opposing the partnership making the highest bid and defensive play would also be substantially affected by chance for the same reasons as the play.

With respect, these conclusions do not seem to be in accordance with the evidence given by Mr. Murray. Once the cards were, by chance, dealt thirteen to each player, then it was the task of each of those players by the exercise of his skill to inform his partner with a very considerable degree of accuracy what thirteen cards, which had been so dealt to him by chance, he held in his hand. It is also the part of each pair of players, by the process of bidding, to deceive their two opponents as to the values of the cards

which they held in their hands. When the bidding was completed, it was the part of each of the players to so play the thirteen cards in his hand as to arrive, in the case of those successful in the bidding, at the contract which they had declared and in the case of those who were unsuccessful in the bidding to defeat that contract.

I am of the opinion that once the cards had been dealt then in the progress of the play all element of chance disappears and any chance thereafter can only result from the deal. In these circumstances, therefore, I believe it must be taken as established that in the game of bridge the only chance involved is the chance in the dealing of the cards and that certainly the element of skill predominates in the playing of the game. It is the submission of counsel for the appellants that on that basis the game of bridge is not "a game of chance or mixed chance and skill".

I am of the view that there is some aid in interpretation in the submission made to us by counsel for the appellants that in a very complete research of prosecution as to gaming in Canada and the United Kingdom he had not found a single case where the playing of a game of bridge had been the subject of prosecution. There is a series of cases dealing with other games where remarks have been made, perhaps obiter, by the courts indicating that in the view of those courts the game of bridge was a game of skill or even of pure skill. So, in *Woolf v. Freeman*[8], Macnaghten J. remarked at p. 181:

> It is certainly lawful to play bridge. In playing games of cards some skill is required. Bridge is a game of skill, but whether poker is a game of skill is more questionable.

In *D'Orio v. Leigh & Cuthbertson Ltd.*[9], Ellis, Co. Ct. J., said at p. 156:

> After the problem to be played is determined by the method above stated, it appears that skill, if it is not entirely necessary to win the game, predominates and the element of chance if, not negligible, is a no greater factor than it is in any game of skill such as bridge.

In *re Betty Loeb Allen*[10], Gibson C.J. said, at p. 281:

> The rules of the game of bridge, which have been established on an international basis, are set forth in encyclopedias and other texts, and we are satisfied from the rules and from the many publications on the subject that the game is predominantly one of skill.

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[8] [1937] 1 All E.R. 178.
[9] (1929), 41 B.C.R. 153, 2 W.W.R. 171.
[10] (1962), 377 Pac. 2nd. 280.

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In *Regina v. Thompson*[11], Lewis J. said:

> Bearing in mind that all games of cards are made unlawful by statute and that the Gaming Act, 1845, did not repeal specifically that part of the statute of 33 Hen. 8 which dealt with "carding", we are of opinion that the proper question for a jury, when dealing with a game of cards, is: Is this a game of skill, i.e., a game in which the element of chance is so slight as to render the game one which can properly be said to be a game of mere skill?

(The underlining is my own.)

In my view, we are not assisted by a general statement as to games of cards, such as made by Chancellor Boyd in *The King v. Laird*[12]:

> Euchre is a well known game at cards, imported from the States and it is a game of chance.

Nor that made by Harvey C.J., dissenting, in the Supreme Court of Alberta, in *Rex v. Hing Hoy*[13]:

> The ordinary game of cards in which there is a chance in the deal of the cards as to the value of the hands dealt to each player is a game in which chance and skill are combined, and that is no doubt what is meant by the expression "mixed game of chance and skill".

It may be noted that the actual game involved in this case was that of fan-tan which is surely a game of chance alone.

Counsel for the appellant stressed in his argument to this Court a statement made by Wurtele J. in the Court of King's Bench, Appeal Side, in the Province of Quebec, in *The King v. Fortier*[14]:

> A game of chance is one in which hazard entirely predominates; and a mixed game of chance and skill is one in which the element of hazard prevails notwithstanding the skill and adroitness of the gamesters and the combinations brought to bear by their understanding and ability.

It is the submission of counsel that the interpretation of the words in s. 168(1) of the *Criminal Code* "or mixed chance and skill" should therefore be that in order to fall within such classification the game must be one in which chance prevails over skill or predominates and that, therefore, a game of bridge in which any element of chance ends with the deal and where that element of chance is overcome and very much subordinated by the exhibition of skill thereafter should not be classed as such a mixed game.

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11 (1943), 29 Cr. App. R. 88 at 100, [1943] 2 All E.R. 130.
12 (1903), 7 C.C.C. 318 at 319.
13 (1917), 28 C.C.C. 229 at 232, 11 Alta. L.R. 518, 36 D.L.R. 765.
14 (1903), 7 C.C.C. 417 at 423.

Although in the *Fortier* case the game of bridge was not being considered at all, certainly the element of predominance of one factor or the other was considered by the learned justice in appeal to be a telling and important element. On the basis that there must be some chance in every game, as Mr. Murray testified, I am of the opinion that the statements made in the *Woolf* case, in the *D'Orio* case, and in the *Betty Loeb Allen* case support the contention that the predominance of skill in the game of bridge should indicate that it is not properly considered a game of mixed chance and skill. Indeed in the *Betty Loeb Allen* case a conviction for permitting an illegal game to be played was quashed by the Supreme Court of California for that exact reason. I have come to this conclusion much assisted by the test stated by Lewis J., giving judgment for the Court of Criminal Appeals in *R. v. Thompson, supra,* when he put the question "Is this a game of skill, i.e., a game in which the element of chance is so slight as to render the game one which can properly be said to be a game of mere skill?"

The question arises, of course, that if a game is a game of chance, when although skill is present chance predominates, then what is the necessity of the words in the statute "a game of mixed chance and skill". The explanation may well be found in the judgment of Salmond J. in *Weathered v. Fitzgibbon*[15]:

> The term "game of chance" is, however, ambiguous. It may be limited to games which are pure games of chance, or it may also include games, such as most games of cards, which are games of chance and skill combined. The question as to the true interpretation in this respect of s. 10 of the Gaming Act was considered and determined by this Court in *Scott v. Jackson,* [1911] N.Z.L.R. 1025. There, if I understand the decision aright, it was held that the term "game of chance" as used in s. 10 of the Gaming Act is limited to games of pure chance, and does not include games of mixed chance and skill. This decision is chiefly based on the provisions *in pari materia* of s. 163 of the Crimes Act, 1908, defining the indictable offence of keeping a common gaming-house, in which a distinction is drawn by the Legislature between games of chance and games of mixed chance and skill. It was held accordingly that the term "game of chance" as used in the corresponding provisions of the Gaming Act was similarly used by the Legislature as distinguished from games in which chance was combined with skill. By a game of pure chance I understand to be meant a game in which there is either no element of skill whatever, or an element of skill so unsubstantial and unimportant that for all practical purposes the game is one of chance exclusively. All such games are unlawful games within the meaning of s. 10 of the Gaming Act. But this section has no

[15] [1925] N.Z.L.R. 331 at 337.

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application to games of mixed skill and chance—that is to say, to games in which there exists a substantially operative element of skill—for example, most games of cards.

The legislator, therefore, desiring to include in the prohibition not only games of pure chance but games where, although a degree of skill was present, the predominating element was chance, used the words as they appear in the present statute. I am none the less of the opinion that in the game of bridge, where the element of skill far outweighs any element of chance and where in fact the element of chance is a mere coincidental preliminary, it should not be considered as being within the words of the statute "a game of mixed chance and skill".

For these reasons, I would allow the appeal and quash the conviction.

Appeal dismissed, SPENCE J. *dissenting.*

Solicitor for the appellants: G. A. Martin, Toronto.

Solicitor for the respondent: The Attorney General for Ontario, Toronto.