PRUDENTIAL EXCHANGE COMPANY LTD. (PLAINTIFF) ..... APPELLANT;

AND

SHERMAN EDWARDS (DEFENDANT) RESPONDENT.

1938

* May 3, 4.
* Dec. 19.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Contracts—Gaming—Speculations on grain exchange—Right to recover on promissory notes given by speculator for amounts advanced to enable him to meet marginal requirements—Nature of the speculating transactions—Intentions, Knowledge, of parties—Legality or illegality of the transactions or advances—Cr. Code, ss. 231, 69—Evidence—Onus of proof—Authority of judgments in decided cases—Dicta.

Defendant, a farmer near Lang, Sask., speculated in grain futures on the Winnipeg Grain Exchange. His speculations were carried on through plaintiff, a company doing a general banking business and operating a grain elevator at Lang. Defendant gave verbal orders to plaintiff's manager to buy or sell for future delivery, which orders plaintiff transmitted to Winnipeg brokers who carried them out on the Exchange, and forwarded to plaintiff "confirmation memoranda," which stated (*inter alia*) that "all transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor." A by-law of the Exchange provided that "under all contracts of sale of grain for future delivery the actual receipt and delivery of the property and payment therefor is contemplated and may be enforced." Purchase and sale slips showing details of each transaction were also sent to plaintiff. Plaintiff received a share of the brokers' commission but had no other interest in the transactions. The trades were carried on margin. Plaintiff sent moneys for margins and charged them to defendant. In the beginning of 1930 defendant had not sufficient money to his credit with plaintiff to meet margin requirements and thereafter plaintiff advanced him money therefor, taking his promissory notes for the amounts, which notes were later discharged and replaced by other notes, on which plaintiff sued. The trial judge held that, upon the evidence, defendant was gaming in futures on the rise and fall in grain prices without any intention of actually dealing in the commodity itself, that plaintiff should be charged with knowledge of his real purpose, which was an illegal purpose, and aided

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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and abetted him therein by purposely providing the money for margining his account from time to time as required, that under the combined effect of ss. 231 and 69 of the *Criminal Code* the parties were principals in the commission of the offence and plaintiff could not recover. His judgment was affirmed by the Court of Appeal for Saskatchewan (with variation as to costs), [1938] 1 W.W.R. 22. Plaintiff appealed.

Held: Plaintiff was entitled to recover. The contracts entered into for defendant were binding, calling for delivery and payment, and were so intended and understood by the parties thereto; and hence were not gaming or wagering transactions within the law nor illegal within s. 231 of the *Cr. Code* (the construction and effect of s. 231 discussed), even though defendant may have intended, through the machinery of the Grain Exchange, to "close" his transactions by turning over the fulfilment of his obligations to others by buying or selling grain (by legally binding contracts) before his time for fulfilment. Plaintiff's advances were to enable defendant to carry out binding obligations undertaken on his behalf, and were not for an illegal purpose.

Ironmonger v. *Dyne*, 44 T.L.R. 497; *Forget* v. *Ostigny*, [1895] A.C. 318; *Thacker* v. *Hardy*, 4 Q.B.D. 685; *Franklin* v. *Dawson*, 29 T.L.R. 479; and *Woodward* v. *Wolfe*, 155 L.T.R. 619, cited.

Held, further, *per* The Chief Justice (Davis J. concurring): Even assuming that there was illegality in defendant's intention to "close" a transaction in manner aforesaid, and even assuming that the Winnipeg brokers (who financed the transactions, i.e., carried them on margin) were through knowledge thereof *particeps criminis* (which was not shown), yet the repayment of said brokers' loans (loans made to finance the transactions as aforesaid) was not in itself an illegal act within s. 69 or s. 231 of the *Cr. Code* (the illegal act, if any, consisted in the purchase or sale), and an advance for the purpose of such repayment (as the advances by plaintiff for the purpose of replenishing defendant's margin) may be recoverable and the debt thereby created may constitute good consideration for a promissory note. The burden of establishing illegality was on defendant. In order to charge plaintiff with aiding and abetting under s. 69, *Cr. Code*, it was for him to show that the advances in respect of which the notes were given were made in such circumstances as to constitute aiding and abetting a specific illegal purchase or sale, and this was not shown.

Per The Chief Justice (Davis J. concurring): *Beamish* v. *Richardson*, 49 Can. S.C.R. 595, and *Maloof* v. *Bickell*, 59 Can. S.C.R. 429, discussed and explained. *Beamish* v. *Richardson* was not a decision (nor, indeed, was *Maloof* v. *Bickell*) upon the construction and effect of s. 231, *Cr. Code*, though opinions thereon were expressed. Misconceptions by provincial courts with regard to the effect of *Beamish* v. *Richardson* pointed out. Opinions expressed in that case touching the construction or effect of s. 231 formed no part of the *ratio decidendi*, and, however valuable and weighty as opinions, they are not of binding authority (*Davidson* v. *McRobb*, [1918] A.C. 304, at 322; *Cornelius* v. *Phillips*, [1918] A.C. 199, at 211; *Leeds Industrial* v. *Slack*, [1924] A.C. 851, at 864; *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee*, [1913]

1 K.B. 612, at 623-4). Further, the evidence in the present case (discussed) does not bring the facts of this case within the opinions expressed in *Beamish* v. *Richardson* (as touching the application of s. 231) with regard to the facts there in question.

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APPEAL by the plaintiff from the judgment of the Court of Appeal for Saskatchewan (1) dismissing (except in the matter of costs) its appeal from the judgment of Taylor J. The action was brought to recover on certain promissory notes given by defendant to plaintiff and alternatively to recover for money lent by plaintiff to defendant. The defendant, a farmer near Lang, Saskatchewan, speculated in grain futures on the Winnipeg Grain Exchange. The plaintiff was a company doing a general banking business and operating a grain elevator at Lang, and did defendant's banking and financial business and handled most of his grain through its elevator. The defendant's grain speculations were carried on through the plaintiff, verbal orders by defendant to plaintiff's manager being transmitted by plaintiff to Winnipeg brokers who carried them out on the Winnipeg Grain Exchange. The notes sued on were given by the defendant in place of over-due notes (which were discharged) which (except as to the sum of $1,350 hereinafter mentioned) had been given by defendant to plaintiff for loans made to meet defendant's marginal requirements. The trial judge, Taylor J., held that, upon the evidence, defendant was gaming in futures on the rise and fall in grain prices without any intention of actually dealing in the commodity itself, and plaintiff should be charged with knowledge of his real purpose, which was an illegal purpose, and aided and abetted defendant therein by purposely providing the money for margining his account from time to time as it was required, that under the combined effect of ss. 231 and 69 of the *Criminal Code,* the parties were principals in the commission of the offence and plaintiff could not recover (except, under the alternative claim for money lent, the sum of $1,350, found to have been advanced independently of the grain trading, with interest). His judgment was affirmed by the Court of Appeal for Saskatchewan (with a variation as to costs) (1). The material facts of the case sufficiently appear in the

(1) [1938] 1 W.W.R. 22; [1938] 1 D.L.R. 218.

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judgments now reported and are also dealt with at length in the judgment appealed from (1). By the judgment now reported the plaintiff's appeal to this Court was allowed with costs throughout.

G. W. Forbes K.C. for the appellant.

W. G. Ross K.C. for the respondent.

THE CHIEF JUSTICE.—There is no evidence that any of the transactions with which we are concerned were not real transactions giving rise to legal obligations on both sides. Indeed, the evidence is all the other way. The respondent (Edwards) himself so states and the one rule of the Winnipeg Grain Exchange which is before us, under which the transactions were carried out, is explicit that the actual receipt and delivery of the property is contemplated and may be enforced.

Of all the transactions of Edwards from 1912 or 1913 to 1931 there appears to have been only one which was carried through by the Winnipeg brokers (Reliance Grain Company) to the date of delivery, and in that case he was required to make payment and did make payment and receive delivery. To use the language of the Chief Justice of Canada in *Maloof* v. *Bickell* (2): "they were * * * *bona fide* transactions made for good consideration on the" Winnipeg Grain Exchange; and

there was no evidence of any express, implied or tacit understanding that the contracts so made were not enforceable or that any loss or gain in reference to the price of the commodities contracted for should be paid by a settlement of differences.

This is really not disputed as regards the contracts themselves as effected on the Grain Exchange by the Reliance Grain Co., but it applies equally to the transactions as between the appellants (the Prudential Company) and Edwards. Edwards, indeed, does not deny that he understood quite well that if he did not, as respects a purchase for example, sell before the date of delivery he would be obliged to accept delivery and pay the price agreed upon. There is not the slightest evidence of any sort of understanding that he could escape his obligation by a mere settlement of differences. In truth, neither the trial judge

(1) [1938] 1 W.W.R. 22; [1938] 1 D.L.R. 218.
(2) (1919) 59 Can. S.C.R. 429 at 430.

nor the Court of Appeal has found that any such understanding existed, and it is very clear to me that no such finding could be justified on the evidence.

The view of the Court of Appeal, as well as of the trial judge, is that the issue between the parties is determined by the fact that Edwards, whose evidence in this respect has been accepted by the learned trial judge, says he did not in any case intend to make or accept delivery, and, by the additional fact found by the trial judge that the Prudential Company were aware of this. These findings are based upon the evidence of Edwards and it is important to understand what he means by delivery. This he explains, and he makes it quite clear, that, by delivery, he means delivery of the commodity in kind at a terminal elevator and that, as to the acceptance of delivery, the cardinal feature is the actual payment of the full price. He says clearly enough that he intended neither of these things. This is, of course, not in the least degree inconsistent with his evidence that he intended that every transaction entered into on the Exchange by the Reliance Grain Company in Winnipeg should be, and was as he understood, a real transaction—a bargain involving legal and enforceable obligations to deliver or accept delivery and pay. His evidence really amounts to this: that his intention in the case of a purchase was to "close" the transaction by a sale. There is no evidence as to the practice on the Grain Exchange excepting that afforded by the one rule before us, viz., that

> Under all contracts of sale of grain for future delivery the actual receipt and delivery of the property and payment therefor is contemplated and may be enforced.

There is nothing to show, for example, that the Grain Exchange provides machinery for setting off the obligations on one contract against the obligations of another and thereby extinguishing them.

The evidence is equally consistent with a totally different procedure: a procedure by which, through some form of novation, the obligation of the customer is assumed by a third party whom the creditor is, by the rules of the Exchange, bound to accept as his debtor in lieu of the customer. Novation is obviously contemplated and provided for by the confirmation memorandum which is in these terms:

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We have made the following transactions for your account and risk, under the by-laws, rules, regulations and customs of the Winnipeg Grain Exchange and also those of the Winnipeg Grain and Produce Exchange Clearing Association.

All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor. On all marginal business we reserve the right to close transaction when margins are running out without further notice. We also reserve the privilege of substituting other responsible parties as principals with you in these transactions at any time until closed, in accordance with the rules of the Winnipeg Grain Exchange, where the transactions are made, and to clear all transactions through clearing associations from day to day in accordance with the usage prevailing at the time.

This trade has been, or may be, cleared through the said clearing association, and on being so cleared, we will be the only persons responsible for the carrying out of this trade or trades, and furthermore we will be the only persons against whom you will have any recourse for the fulfilment thereof.

There is no evidence of the nature of the proceedings in the clearing house; none that any one of the transactions was actually cleared through the clearing house.

It is plain that these transactions were neither gaming nor wagering transactions within the language of the law. Edwards in every instance incurred an enforceable legal obligation to carry out the sale or purchase, an obligation which he must perform by actual payment or delivery or satisfy or transfer by entering into another equally binding and enforceable obligation. Such transactions are not wagering or gaming transactions. *Ironmonger* v. *Dyne* (1).

The consideration for the promissory notes sued upon, as we shall see presently, was the discharge of overdue promissory notes given by Edwards to the Prudential Company partly in consideration of moneys advanced to Edwards and remitted to the Reliance Grain Company in order to replenish Edwards' margin account with them.

The Court of Appeal, as well as the trial judge, have held that, since Edwards did not in any of his purchases or sales intend to accept or make delivery, he was in each case guilty of an offence under s. 231 of the *Criminal Code*, and that the Prudential Company, being aware of his intentions, cannot recover in respect of the advances made. It will be necessary to consider whether the notes sued on, assuming Edwards to be right in his contention as to the construction and application of the statute, were given for an illegal consideration or for no consideration. Before

(1) (1928) 44 T.L.R. 497.

coming to this question, it is convenient first to discuss the effect of s. 231 of the *Criminal Code*.

The Court of Appeal and the trial judge, in deciding in favour of Edwards, conceived themselves to be following what is spoken of as a decision of this Court in *Beamish* v. *Richardson* (1) on the construction of that section. In truth, there was no decision in *Beamish* v. *Richardson* (1) touching the construction or effect of that section. Opinions were expressed, but, as I shall presently explain in detail, they form no part of the *ratio decidendi* and, however valuable and weighty as opinions, they are not in any way binding upon us and cannot relieve us from the duty of forming and giving effect to our own views.

In considering s. 231, it is essential to read that section in light of the title and preamble of the statute in which it was originally enacted (51 Vict., ch. 42):

> An Act respecting Gaming in Stocks and Merchandise.
>
> Whereas gaming and wagering on the rise and fall in value of stocks and merchandise are detrimental to commercial and public morality, and places affording facilities for such gaming and wagering, commonly called bucket shops, are being established; and it is expedient to prevent such gaming and wagering, to punish the persons engaged in them, and to prohibit and punish the opening and maintaining of places therefor, and the frequenting thereof: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

and also of sections 232 and 233 which reproduce sections of the same statute in a slightly modified form.

When s. 231 is read with sections 232 and 233 in light of the preamble and title of the parent statute, I think, on a true construction of it, it does not contemplate transactions such as those disclosed by the evidence before us; transactions, that is to say, in which there is a binding legal obligation on the one side to deliver and on the other side to pay, and in which these obligations are enforceable and intended to be enforceable in point of law.

I think this result is not affected by the fact that one of the parties intends to take advantage of the machinery of the stock exchange or commodity exchange on which the transactions are effected to sell, in the case of a purchase, for example, before the date of delivery, by a real sale legally binding and enforceable between himself and the purchaser. It is true that in such a case it can rightly be

(1) (1914) 49 Can. S.C.R. 595.

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said that the customer has no intention of making delivery personally or by his agent, but it does not necessarily follow that actual delivery is not contemplated or that the customer has no intention that actual delivery shall be made.

There is no evidence before us in this record to show that actual delivery was not made in any single transaction with which we are directly concerned; the evidence goes no farther than this: Edwards says he did not accept delivery except in one case which occurred prior to these transactions. He does not even negative delivery to the Reliance Grain Company in Winnipeg. I do not think a purchase of commodities for future delivery is brought within the section by reason of the fact that the purchaser intends to make a profit by the rise of the market price by selling before the arrival of the date of delivery and that, by arrangement between him and the seller, delivery is to be made to the sub-purchaser and payment made by him. Such a transaction may not improperly be described as speculating in many circumstances but nobody would think of describing it as wagering or gaming and it most assuredly is neither wagering or gaming within the meaning of the law. We should, I think, be wresting the statute from its purpose if we construed it as applying to such dealings.

Nor do I think the statute applies, to put the case in its simplest form, where the transaction contemplates delivery and payment and the enforceability of the obligations to deliver and pay, merely because one of the parties intends to make use of the machinery of an exchange in such a way as to discharge his obligation to deliver by the acquisition of a converse obligation to deliver to him and the setting off of these obligations one against the other; provided always that the converse obligation is equally real and equally enforceable in point of law.

It is, perhaps, proper to say that I see no reason to change the views I expressed in *Beamish* v. *Richardson* (1) and *Maloof* v. *Bickell* (2) (*supra*) touching the construction and effect of section 231, *Cr. C.*

Strictly, it is unnecessary to consider this last hypothesis in the case before us. The progress of the transactions through the machinery of the Grain Exchange is not traced.

(1) (1914) 49 Can. S.C.R. 595. (2) (1919) 59 Can. S.C.R. 429.

The machinery of the Exchange itself, as already observed, is not explained to us. We are left entirely in the dark with regard to it. The evidence again, as already observed, is entirely consistent with the hypothesis that in every case the obligation to pay or to deliver was performed by a substituted debtor. The evidence discloses no knowledge on the respondent's part of the actual procedure or proceedings on the Exchange. It is capable of the interpretation that to "close" a transaction merely meant he was relieved of his personal obligation to pay or to deliver as the case might be. The precise means by which that was effected, under the rules of the Exchange, whether by novation or otherwise, obviously did not concern him. His evidence is strictly limited to his own personal intentions. He knew quite well at the time of the transactions now in question, from his own experience, that if he gave an order for the purchase of future wheat and did not sell before the maturity of the contract he would be called upon to accept delivery and to pay the full price.

My conclusion, therefore, is that the respondent has failed to establish the illegality of these transactions and that on that ground his defence fails.

There is another ground upon which I am inclined to think the respondent fails. I think the proper conclusion from the evidence is that the consideration for the notes sued on was the discharge of the existing overdue notes, some of which were given in consideration of advances made by the appellants to the respondent and paid to the Winnipeg brokers in order to replenish Edwards' margin. The Winnipeg brokers, the Reliance Grain Company, were financing Edwards' transactions on the Winnipeg Grain Exchange. In other words, they were carrying these transactions on margin. Now, the evidence does not show, as counsel for the Prudential Company points out, that the advances in question were made to finance purchases or sales about to be made or thereafter to be made. They were made in part repayment of loans by the Reliance Grain Company in respect of transactions already entered into.

Assuming a purchase and a subsequent fall in the market price, a consequent shortage of margin and an advance for the purpose of replenishing the same by the Prudential

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Company to Edwards by way of remittance to the Reliance Grain Company; and assuming illegality in the sense found in the courts below, namely, illegality consisting in the intention of the respondent to close the transaction by a converse sale on the Exchange and not to carry it through by acceptance of delivery and payment; was there anything illegal in the payment to the Reliance Grain Company? There is no finding that they were *particeps criminis* and, on the evidence before us, I do not see how such a finding could be sustained.

But, apart from this, assuming knowledge ought to be imputed to the Reliance Grain Company and that they were *particeps criminis,* it does not follow that repayment of the loan by Edwards was an illegal act. The illegal act, if any, consisted in the purchase. The loan to enable the purchase to be made with knowledge of its illegality we may assume would have constituted the brokers aiders and abettors. It does not follow that repayment of the loan even on that assumption was an illegal act. The learned trial judge finds that there was an agreement on the part of the Prudential Company to make advances to replenish margins. The finding, if pertinent, must amount to this: that the Prudential Company had agreed for some valid consideration, in the case of a given purchase, for example, that they would make the advances necessary to maintain Edwards' margin with the Reliance Grain Company. That seems to me, with great respect, to be very improbable, and I can find no satisfactory evidence to support it. The Court of Appeal have not expressed their concurrence in this finding.

The onus is on Edwards in the strict sense to prove illegality; that is to say, the burden of establishing illegality is on him. If the evidence leaves the point in doubt he fails on that issue.

In order to charge the Prudential Company with aiding and abetting under s. 69, aiding and abetting a specific offence must be proved. It is necessary, therefore, to find the particular sale or sales, purchase or purchases, entered into by the respondent in violation of s. 231, in respect of which the offence of aiding and abetting is to be established. You cannot, under the *Criminal Code,* charge aiding and abetting in the abstract. You must prove the particular offence and then connect the alleged aider and

abettor with that offence. You must, that is to say, show that the advances in respect of which the discharged notes were given were made in such circumstances as to constitute aiding and abetting a specific illegal purchase or sale.

Assuming knowledge of illegality on the part of the Reliance Grain Company, and consequent illegality in the loan by them to enable the intended purchase to be made, I know no authority for the proposition that the repayment of such a loan in whole or in part would necessarily be illegal, or that an advance for the purpose of repaying such a loan would not be recoverable or that the debt thereby created would not constitute good consideration for a promissory note.

I think, if I may say so, that the Court of Appeal have overlooked the circumstance that these advances by the Prudential Company were for repaying loans by the Reliance Grain Company and, I may add, I think they must have overlooked the fact that there is no finding of complicity between the Reliance Grain Company and the client Edwards.

To sum up on this point. The respondent's case is that the notes, the discharge of which constituted the consideration for the notes sued on, were given for an illegal consideration; for a debt created by advances made by the Prudential Company to enable him to replenish his margin with the Reliance Grain Company. The onus is upon him to establish this case.

I am not satisfied that he has established the alleged illegality. He has not established the alleged illegality, first, because he has not shown that any of the advances were made in order to enable him to make an illegal sale or purchase; second, because the repayment of a broker's loan made in order to effect an illegal sale or purchase, even if known to be so by him, is not in itself an illegal act within section 69 or section 231 of the *Criminal Code;* and, third, there is not sufficient evidence of knowledge by the brokers of the illegality of Edwards' conduct, and, consequently, no foundation for the proposition that the loan by the brokers was an illegal act within these sections.

On these grounds I think the appeal should succeed.

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It seems to be desirable, however, to say a word with regard to two cases, *Beamish* v. *Richardson* (1) and *Maloof* v. *Bickell* (2), which have been the subject of discussion in the courts of Manitoba, Saskatchewan and Alberta.

I have already observed that *Beamish* v. *Richardson* (1) was not a decision, nor indeed, was *Maloof* v. *Bickell* (2), upon the construction or effect of s. 231 of the *Criminal Code*. The Court of Appeal for Saskatchewan came to the conclusion that what was said in the judgments of three members of the Court in the first mentioned case was binding on them and, as already observed, they speak of these opinions as a decision. These opinions have also been discussed in judgments in the Courts of Appeal for Manitoba and Alberta.

The practical question which a provincial court of appeal has to consider when confronted with deliberate and considered opinions in judgments delivered in this Court which do not form part of the *ratio decidendi* may, no doubt, be an embarrassing one. I am addressing myself to the effect of these opinions, not from the point of view of the provincial court, but strictly from the point of view of the judges of this Court.

First, as regards *Beamish* v. *Richardson* (1). There was a great deal of evidence before this Court in that case as to the nature of the proceedings on the Grain Exchange and in the Clearing House and there were marked differences of opinion as to the effect of that evidence.

Two members of the Court, Mr. Justice Idington and Mr. Justice Brodeur, expressed the view that the facts as disclosed in the evidence brought the case within s. 231. One member of the court expressed an opinion as to the construction of s. 231 which was a fully considered and definitive opinion as to the statute, but he did not rest his judgment on that ground because, as he said, it was unnecessary to do so in view of the fact that he was proceeding upon another ground, but also, as seems clear from his language, because he was not deciding that the facts had been established which, in his view of the statute, would make it applicable.

Plainly, it was no part of the *ratio* of the decision.

(1) (1914) 49 Can. S.C.R. 595. (2) (1919) 59 Can. S.C.R. 429.

The law on this point is well known and well understood but, in view of what was said in the Court of Appeal, I quote one or two passages in the numerous deliverances that might be cited on the subject. In *Davidson* v. *McRobb* (1), Lord Dunedin said:

My Lords, I apprehend that the dicta of noble Lords in this House, while always of great weight, are not of binding authority and to be accepted against one's own individual opinion, unless they can be shown to express a legal proposition which is a necessary step to the judgment which the House pronounces in the case.

In *Cornelius* v. *Phillips* (2), Lord Haldane said:

* * * dicta by judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless these dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding.

Again, in *Leeds Industrial Co-operative Society, Ltd.* v. *Slack* (3), Lord Dunedin said:

My Lords, if a decision is binding, there is an end of it. But if you have only to do with dicta, though such dicta may well serve to help you to form your own opinion, I cannot see that they ought to overrule it. It is a different question when a practice follows on dicta. A practice it might not be right to disturb, but then it is the practice and not the dicta that forms the binding authority. Further, the present case seems to be the last in which such a course ought to be followed, because Lindley L.J., sitting in the Court of Appeal with A. L. Smith and Davey L. JJ., distinctly stated in *Martin* v. *Price* (4) that the question was still an open one.

In my view I respectfully think that the Master of the Rolls and Warrington L.J. ought not to have confined themselves to the question of whether the dicta in *Dreyfus* (5) were carefully considered—their conclusion is one with which I cordially agree—but ought to have considered whether their own opinions or the dicta in *Dreyfus* (5) were right, and if they thought that their view was right, to have said so and let a higher Court, if it was so minded, go back to *Dreyfus* (5).

In *East London Railway Joint Committee* v. *Greenwich Union Assessment Committee* (6), Farwell L.J. said:

It is the decision of the House only that binds the Court; the opinions of individual Law Lords are valuable in assisting us to form our own judgments, but are of no binding authority; for example, if a decision of the Exchequer Chamber were criticized unfavourably in the House of Lords, it would remain binding on us unless it were expressly overruled. The House of Lords by its order can declare the law to be entirely different from anything that it has been supposed to be for years, but no opinion of individual peers, however eminent and however numerous, can have this effect.

(1) [1918] A.C. 304, at 322.
(2) [1918] A.C. 199, at 211.
(3) [1924] A.C. 851, at 864.
(4) [1894] 1 Ch. 276.
(5) (1889) 43 Ch. D. 316.
(6) [1913] 1 K.B. 612, at 623-624.

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In *Maloof* v. *Bickell,* Mr. Justice Kelly (1), who tried the case, held that the customer had no intention of making or accepting delivery of the commodity and the Toronto brokers who would forward their orders to their correspondents in Chicago for execution on the Chicago Board of Trade had knowledge of this fact. The pertinent passage in his judgment reads:

> I would have great difficulty in coming to the conclusion that either plaintiff or defendants in the present transaction contemplated or had any intention of making or receiving an actual delivery. The plaintiff, a man with no suggestion of experience in actual grain deliveries, and operating as he did operate in his numerous transactions preceding these, clearly had no such intention; and it would be very surprising if defendants expected ever to be called upon to make or accept actual delivery. In none of plaintiff's numerous purchases and sales with defendants did any actual delivery take place; nor were such even hinted at. The circumstances clearly lead to the conclusion that defendants knew plaintiff did not intend or expect actual delivery to be made or accepted.

On this finding he held, in deference to the opinions expressed in *Beamish* v. *Richardson* (2), that the transaction was illegal by force of s. 231. In the Court of Appeal (3), reasons for judgment were given by Mr. Justice Ferguson with whom two out of three of his colleagues concurred. He swept aside the findings of the trial judge, holding

> There is no evidence * * * that the plaintiff * * * had no intention or was not able or willing to perform the contracts.

He adds:

> It does not seem to me that there is evidence on which it can be found that the defendants * * * had any notice or knowledge that the principals to the contracts negotiated by them or through their instrumentality had not *bona fide* intentions to make or accept delivery of the commodities.

Mr. Justice Ferguson distinguished the facts in *Beamish* v. *Richardson* (4) from the facts in *Maloof* v. *Bickell.* The actual relation between the broker and the client in the earlier case, he declared, was that of vendor and purchaser and he added that the broker "in addition to his commission for acting as broker, benefited or lost according to the rise or fall of the market"; this he thought was one of the grounds on which the majority of this Court

(1) Reported shortly in 13 O.W.N. 4.
(2) (1914) 49 Can. S.C.R. 595.
(3) Reported shortly in 14 O.W.N. 289.
(4) (1914) 49 Can. S.C.R. 595.

had proceeded. With great respect, this was a misapprehension. No suggestion was made in the judgments of this Court that the brokers stood in the relation of vendors to their client or that they were concerned in the profit or loss from the rise or fall of the market. That, it is quite plain, is one main ground of distinction upon which he proceeds, but there are other grounds which he sums up in these two paragraphs:

The commission evidence establishes that the contracts entered into were real *bona fide* transactions made for good consideration on the Chicago Board of Trade through reputable brokers, and there is no evidence of any express, implied or tacit understanding that the contracts so made in Chicago were not enforceable or should not be enforceable or that any loss or gain in reference to the price of the commodities contracted for should be paid by a settlement of differences.

This is not a case of fictitious transactions such as were under consideration in *Pearson* v. *Carpenter* (1) but is a case of real transactions such as were found and considered in *Forget* v. *Ostigny* (2); *Buitenlandsche Bankvereeniging* v. *Hildesheim* (3); and the defendants were not vendors to their clients as was the case in *Beamish* v. *Richardson* (4). See also 27 Hals. pp. 258-260.

The last element of the sentence, I repeat, was penned in error. But, except as regards that, on appeal to this Court, two judges of this Court concurred in the reasoning of these paragraphs. On page 430, the Chief Justice says:

The other finding, reversing the trial judge, was that the transactions in question were not within the prohibitions of s. 231 of the Criminal Code; that they were on the contrary *bona fide* transactions made for good consideration on the Chicago Board of Trade; and that there was no evidence of any express, implied or tacit understanding that the contracts so made were not enforceable or that any loss or gain in reference to the price of the commodities contracted for should be paid by a settlement of differences. *Nelson* v. *Baird* (5). In other words, that the purchase and sale of the wheat in question at the times and in the manner in which it was bought and sold were *bona fide* transactions authorized by the plaintiff and were not illegal gambling transactions within the provisions of s. 231 of the Criminal Code. See *Forget* v. *Ostigny* (6).

At p. 442, Mr. Justice Mignault says:

The learned trial judge dismissed the appellant's action and the respondents' counter-claim for $156.62 on the ground that the transactions in question amounted to gambling transactions, prohibited as such by article 231 of the Criminal Code. The Appellate Division, on the contrary, decided that they were real purchases and sales under the authority of *Forget* v. *Ostigny* (6), and similar cases. In this I agree, but I think, for the reasons stated above, that the appellant's appeal here fails.

(1) (1904) 35 Can. S.C.R. 380.
(2) [1895] A.C. 318.
(3) (1903) 19 Times L.R. 641.
(4) (1914) 49 Can. S.C.R. 595.
(5) (1915) 25 Man. R. 244; 22 D.L.R. 132.
(6) [1895] A.C. 318.

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I should not like to be misunderstood as suggesting that in *Maloof* v. *Bickell* (1), either Mr. Justice Idington, Mr. Justice Anglin or Mr. Justice Brodeur had any intention of withdrawing their opinions expressed in *Beamish* v. *Richardson* (2). I am quite sure they had no such intention. On the other hand, the passages quoted from the judgments of the Chief Justice and Mr. Justice Mignault seem to indicate what they regard as the true badges of illegality under s. 231.

The Court of Appeal for Saskatchewan appears to have proceeded upon the view that the facts disclosed by the evidence in that case bring the case within the opinions of the majority of the judges in *Beamish* v. *Richardson* (2) as touching the application of s. 231. With great respect, I should, I think, refer to what appears to be a serious misconception by the Court of Appeal as to the effect of the evidence.

The judgment states that the confirmation shows the transactions had passed through the clearing house. I can find no such statement in the confirmation note; nor, as already observed, can I find any evidence in the record that any of the transactions in question passed or did not pass through the clearing house. With great respect, I am unable to agree that the evidence brings the facts of this case within the opinions mentioned. As to the facts, Mr. Justice Anglin says (3):

> I incline to think the evidence discloses that neither the plaintiffs nor the defendant at any time contemplated that delivery of the grain sold should be made or taken under the agreements purporting to be contracts for the sale of such grain which the defendant authorized and the plaintiffs made. The intent always was to meet the obligation to deliver by an off-set of a contract to purchase a like quantity of grain—to adjust the differences between the selling and the buying prices and by thus dealing in such differences to make gain or profit by an anticipated fall in the price of the merchandise.

The plaintiffs and the defendant in *Beamish* v. *Richardson* (2) were the brokers, who were the principals on the Exchange, and the customer. As to the Winnipeg brokers who executed the respondent's orders on the Exchange, there is no evidence, as we have already seen, of any such intent as that which Mr. Justice Anglin was inclined to ascribe to the brokers in the former case. As to the evi-

(1) (1919) 59 Can. S.C.R. 429. (2) (1914) 49 Can. S.C.R. 595.
(3) 49 Can. S.C.R. at 619.

dence of the customer, I have pointed out what that amounts to and, I repeat, it falls very far short of establishing the proposition that neither the customer nor the broker who executed his orders contemplated the delivery of the grain should be made or taken under the contracts. Still less does it establish an intent always to meet the obligation to deliver by an offset of a contract to purchase a like quantity. As already pointed out, the evidence of the respondent is entirely too vague to support a finding of fact that he had any definite idea as to the *modus operandi* by which his transactions would be closed and we are left equally in the dark as to the procedure by which they were in fact.

Turning to the Judgment of Mr. Justice Idington. It rests, as regards the application of the statute, upon the evidence as to the procedure on the Exchange and the evidence of the actual dealings between the parties. With him, one fact that he finds established is cardinal, viz., that in all the dealings by the brokers on behalf of the customer, not one pound of any commodity was ever delivered; a finding, curiously enough, which corresponds precisely with the finding of Mr. Justice Kelly in *Maloof* v. *Bickell* (1) and which the Court of Appeal for Ontario considered to be of no significance whatever.

It may be, for all I know, that evidence of the same character as that on which Mr. Justice Idington proceeds, evidence, for example, showing in detail the course of procedure in the clearing house and the proceedings actually followed in the transactions under consideration, could have been adduced in this case, but the onus, as I have said, was on the respondent and, as regards this procedure, we are left in ignorance and it may be that since *Beamish* v. *Richardson* (2) the procedure has undergone radical changes.

I have had an opportunity of reading the judgments of my brothers Davis and Hudson and I agree with their reasons.

The appeal should be allowed with costs throughout and judgment should be entered for the appellant for the principal of the notes sued upon with interest at the proper rate or rates; with liberty to the respondent, if so advised,

(1) See *supra*, p. 148. (2) (1914) 49 Can. S.C.R. 595.

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to have a reference to the Local Registrar of the Court of King's Bench for the Judicial District of Regina to ascertain and settle the exact figures if the parties cannot agree; costs of the reference to be costs in the cause.

CROCKET, J.—I concur in the judgments of both my Lord the Chief Justice and my brothers Davis and Hudson, that in the circumstances disclosed by the evidence in this case the appeal should be allowed with costs throughout and judgment entered for the appellant for the principal of the notes sued upon with interest at the proper rate or rates, and with liberty to the respondent to have a reference to the Local Registrar of the Court of King's Bench for the Judicial District of Regina, to ascertain and settle the exact figures, if the parties cannot agree, on the terms stated in the judgment of the learned Chief Justice.

DAVIS, J.—This is an action on several promissory notes, for different amounts, all payable on demand. The defence is that the notes were given in settlement of an account for moneys loaned for illegal purposes, i.e., gambling in grain futures contrary to sec. 231 of the *Criminal Code*. As the learned trial judge said,

> The defendant had his gamble and now seeks to unload his loss on the private banking concern now in liquidation which he alleges knowingly loaned him the money for margining his trades in futures.

The conclusion of the trial judge was that the respondent (defendant) was merely gambling in futures on the rise and fall in the prices of grain without any intention of actually dealing in the commodity itself and that the evidence was sufficient to charge the appellant (plaintiff) with knowledge of the respondent's real purpose and on the facts of the case the learned trial judge found that the appellant aided and abetted the respondent in his illegal purpose by purposely providing the money for margining his account from time to time as it was required, and that the combined effect of sec. 231 and sec. 69 of the *Criminal Code* made the parties principals in the commission of the offence. The trial judge's further conclusion was that Steidl, the appellant's former manager, knew full well that the respondent never had the remotest intention of doing anything but gamble on the market.

> It was known that when he (i.e., the respondent) sold for future delivery twenty thousand bushels of this now, ten thousand bushels of

another future, etc., etc., in the trades so privately and roughly recorded by Steidl, that he had no grain nor expectation of having grain to make delivery, and that when he bought for future delivery he would have no more use for the commodity he agreed to take in the future than he would have for a carload of plugged nickels. Steidl knew he was gaming on the market and not dealing in the commodities in which he was gaming and was an active aid and abettor therein.

The total amount sued for was $9,623.90 with interest. The trial judge found that, independently of the grain trading, the appellant had properly advanced to the respondent three sums, aggregating $1,350. For this sum with interest the appellant was given judgment against the respondent but otherwise the action was dismissed. Both parties appealed to the Court of Appeal for Saskatchewan, which Court affirmed the trial judgment with some variations as to the disposition of costs (1). The plaintiff appeals.

It is with the greatest respect that I find myself unable to accept the judgment of the careful and experienced trial judge, Mr. Justice Taylor, confirmed as it has been by the Court of Appeal for Saskatchewan. The learned trial judge found that it was quite clear upon the respondent's evidence "that the trades were actually executed from time to time on the Exchange." The respondent's evidence indeed made it plain that in every case, whether he bought or sold, he "wanted a real sale to be made or a real purchase to be made on the Winnipeg Grain Exchange for future delivery."

The respondent dealt and intended to deal in grain futures on the Winnipeg Grain Exchange and the appellant acted as his broker, carrying his accounts on margin and dealing through a Winnipeg broker who had a seat on the Exchange. While the records of the transactions as between the appellant and respondent were loosely kept, there cannot be the slightest doubt that had the price of grain gone up when the respondent thought it was going up, or had it gone down when the respondent thought it was going down, and resulted in a money profit on trading, the respondent would very gladly have taken the profit. But it is plain that his marginal trading was on the whole unsuccessful and that he suffered substantial loss. Now he says, when confronted with a demand for payment of his promissory notes covering an adverse balance, that it

(1) [1938] 1 W.W.R. 22; [1938] 1 D.L.R. 218.

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was mere gambling of a criminal nature that he was engaged in and that the appellant was a party with him in this unlawful course of conduct and he contends that he is not bound to pay. But he knew that his transactions were being carried out in the regular course on the Winnipeg Grain Exchange and he intended that they should be. In one sense it is true, in most marginal trading on a stock market, that the customer does not expect to be called upon to make physical delivery of share certificates representing the shares that he has sold or to take physical delivery and make payment in full for the shares which he has bought. When a marginal trader sells either short or long he probably seldom visualizes the obligation to take or to give delivery—he is so hopeful of a rising or a falling market in the particular stock or commodity in which he is trading that he expects within a short time to be able to close his account and take out a money profit. But the legal obligation is always there and he knows perfectly well that it is there. If a customer who deals on a recognized stock exchange could, every time he loses heavily by the stock going the opposite way from that which he expected, turn round and say that he never intended to have any real transactions in the stock or commodities but was merely gambling in breach of the *Criminal Code*, it would be quite impossible to carry on the business of a well regulated public stock exchange which renders its own peculiar public service. Here, the respondent admits that he wanted real sales to be made and real purchases to be made for him on the Winnipeg Grain Exchange for future delivery. I cannot see that he can escape from the payment of his losses.

If I may say so, with great respect, I am in entire agreement with the conclusion as well as with the reasons for the judgment of the Chief Justice.

The judgment of Kerwin and Hudson JJ. was delivered by

HUDSON, J.—This action was brought on promissory notes made by defendant in favour of the plaintiffs, and in the alternative for moneys lent by the plaintiffs to the defendant. The only defence which requires consideration here is that the notes were given or the money lent in respect of transactions in the nature of gaming or wager-

ing and contrary to law, and particularly contrary to section 231 of the *Criminal Code*. The courts below upheld the contention of the defendant, except in respect to a sum of $1,350 and interest, part of the plaintiff's claim.

The defendant, a substantial farmer growing large crops of grain in the neighbourhood of Lang, Saskatchewan, also over a period of many years speculated in grain futures on the Winnipeg Grain Exchange.

The plaintiffs carried on a general banking business and also operated a grain elevator at Lang. They did the defendant's banking and financial business, handled most of his grain through their elevator, and in addition to this the defendant's grain speculations were carried on through them. The method of procedure was that the defendant gave a verbal order to the plaintiff's manager to buy or sell a specified quantity of wheat for future delivery. These orders were then transmitted by the plaintiffs to the Reliance Grain Company to be carried out on the Winnipeg Grain Exchange. When the orders had been executed, the Reliance Grain Company forwarded to the plaintiff what was called a confirmation memorandum. Several of these were put in evidence and were in the following language:

EXHIBIT "D. 15"

Confirmation Memorandum

Grain Exchange,

Winnipeg, Jany. 15, 1931.

From

Reliance Grain Company Limited

Messrs. Prudential Exch. Coy. Ltd., Lang, Sask.

We have made the following transactions for your account and risk, under the by-laws, rules, regulations and customs of the Winnipeg Grain Exchange and also those of the Winnipeg Grain and Produce Exchange Clearing Association.

All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor. On all marginal business we reserve the right to close transaction when margins are running out without further notice. We also reserve the privilege of substituting other responsible parties as principals with you in these transactions at any time until closed, in accordance with the rules of the Winnipeg Grain Exchange, where the transactions are made, and to clear all transactions through clearing associations from day to day in accordance with the usage prevailing at the time.

This trade has been, or may be, cleared through the said clearing association, and on being so cleared, we will be the only persons respon-

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sible for the carrying out of this trade or trades, and furthermore we will be the only persons against whom you will have any recourse for the fulfilment thereof.

BOUGHT

Quantity	Market	Delivery	Article	Price	
M 5	July	Wht.	.57⅞	Your Reference Edwards	
1		July		.58½	Mrs. Knouse

Evidence was admitted of a by-law of the Grain Exchange in the following terms:

Under all contracts of sale of grain for future delivery the actual receipt and delivery of the property and payment therefor is contemplated and may be enforced.

Purchase and sale slips showing details of each transaction were also sent to and received by the plaintiff. The learned trial judge has held that the trades in question were actually executed from time to time on the exchange.

The plaintiffs were compensated by one half of the brokers' commission but had no other interest in the transactions.

The trades were carried on margin; the money for the margins was usually advanced by the plaintiff for the defendant and charged to the defendant in his current account with the bank. He got monthly statements of these payments. Sometimes the moneys were advanced in Winnipeg through shipments of actual grain made by the defendant. These operations continued over a period of 15 or 16 years, so far as appears, to the profit of the defendant. Subsequently, however, the defendant was less wise or less fortunate, as the case may be, and in the beginning of 1930 he had not sufficient money to his credit with the plaintiff to meet margin requirements and the advances which gave rise to the present litigation were thereafter made by the plaintiffs at the defendant's request. These advances seem all to have been in respect of contracts for sale or purchase previously entered into and presumably were made to maintain outstanding contracts, that is, the defendant's right to deliver or to receive the quantity of grain on the terms specified.

Notes were given by the defendant at the time to the plaintiffs and these notes were subsequently marked paid and given to the defendant and new notes taken in their place.

The defendant swore repeatedly and positively that he never intended to take or make delivery in any of these transactions and that the plaintiffs' manager knew this from the very beginning. Notwithstanding that his statements were denied by the plaintiffs' manager, the learned judges chose to accept the defendant's story.

Just what the defendant meant by taking or making delivery may be inferred from some of his answers. He was asked:

Q. I am not talking about cash. You wanted a real sale to be made or a real purchase to be made on the Winnipeg Grain Exchange for future delivery? A. Yes.

That he knew that these contracts involved an obligation to take or make actual delivery at the time fixed by the contract is shown by an experience which he had in 1928, when he took delivery of some 25,000 bushels of grain which he had bought on margin. He explains this transaction in the following terms:

I thought—the premium was so high on cash grain that I did not think it could be delivered on contracts so I left it go and when the time came I couldn't get out and they unloaded on me.

Q. They gave you the grain you had previously bought? A. Yes.

At another place he states:

Q. Now, when you were buying grain for future delivery you were hoping it would rise in prices? A. I was gambling in the rise in price.

Q. You were expecting it would rise in price? A. Anybody that gambles that way will expect it to rise.

Q. When you had bought grain for a future delivery did you intend to sell an equal quantity of grain when the price was high enough to suit you? A. Well, I did not wait. I had to sell out when it came time, whether it was up or down.

Q. You would expect your broker to go into the market and sell? A. I would instruct Mr. Steidl to sell.

Q. An equivalent quantity of grain? A. Yes.

Q. And the same thing would apply where it went short? A. I would expect him to buy it back.

Q. You would expect him to buy an equivalent quantity of grain? A. Yes.

It would then appear that what the defendant had in mind when he said he did not intend to make delivery was that although he recognized that the contracts were binding contracts, he intended to turn over the fulfilment of the obligation to somebody else by buying or selling a similar quantity of grain on the best terms he could before the date for fulfilment. He also recognized that if he failed to do this he would then be called upon to make or take actual delivery himself. It appears that the

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defendant had himself adequate resources to take care of any call for delivery.

The question, then, is whether or not the conduct of the parties here was a violation of the provisions of section 231 of the *Criminal Code*. Before discussing this section, it might be wise to consider the law prior to its enactment and as the law still is in England. The case of *Thacker* v. *Hardy* (1) is most frequently cited. The headnote fairly summarizes the opinions of four very eminent judges. It is as follows:

> The plaintiff, a broker, was employed by the defendant to speculate for him upon the Stock Exchange: to the knowledge of the plaintiff the defendant did not intend to accept the stock bought for him, or to deliver the stock sold for him, but expected that the plaintiff would so arrange matters that nothing but differences should be payable by him; the plaintiff knew that unless he could arrange matters for the defendant as the latter expected, the defendant would be unable to meet the engagements which the plaintiff might enter into for him. The plaintiff accordingly entered into contracts on behalf of the defendant, upon which the plaintiff became personally liable; and he sued the defendant for indemnity against the liability incurred by him and for commission as broker:—
>
> *Held,* that the plaintiff was entitled to recover; for the employment of the plaintiff by the defendant was not against public policy, and was not illegal at common law, and, further, was not in the nature of a gaming and wagering contract against the provisions of 8 & 9 Vict., c. 109, s. 18.

There are several quite recent decisions in England to the same effect: see *Franklin* v. *Dawson* (2); *Woodward* v. *Wolfe* (3).

In Halsbury (2nd Ed.), vol. 15, at p. 493, it is stated:

> If one who is desirous of "speculating" employs a broker on the Stock Exchange to buy or sell for him, their relation is that of principal and agent. The broker charges a commission for his services, and a rise or fall in the price of the stocks purchased or sold does not affect him. If such be the case, there is nothing at stake between the parties, and there is no wager. As long, therefore, as the relation of the parties is really only that of broker and client, the contract between them cannot itself be a wager, even although the broker may know that the client does not expect to be called upon to settle the transaction except by the payment of differences.

In the case of *Forget* v. *Ostigny* (4), the same principles were applied by the Privy Council in an appeal from Quebec. It is said there by the Lord Chancellor at p. 322 of the report:

> The appellant was employed by the respondent as his mandatory or agent to make certain contracts of purchase and sale on his behalf.

(1) (1878) 4 Q.B.D. 685.
(2) (1913) 29 T.L.R. 479.
(3) (1936) 155 L.T.R. 619.
(4) [1895] A.C. 318.

The contracts made, which were unquestionably within the authority given by the respondent, were certainly not gaming contracts as between the parties to them. They were real transactions: the shares purchased and sold were in every case delivered, and the price of them paid or received, as the case might be. All this is not in dispute. The appellant having entered into these contracts as agent for the respondent, the latter was *primâ facie* bound to indemnify the former against any liability incurred in respect of them. He was, on the other hand, exclusively entitled to the benefit of them. If the shares purchased increased in value the result was a gain to the respondent and did not involve any loss to the appellant. If, on the other hand, the shares decreased in value, while the respondent sustained a loss no gain resulted to the appellant. In neither contingency, therefore, did the respondent's gain involve a loss to the appellant. His remuneration was in any event a fixed commission of ¼ per cent. It would be, of course, an abuse of language to apply the term "bet" to such a transaction. Their Lordships cannot think that it is any more legitimate to speak of it as a gaming contract between the appellant and the respondent.

I think that from these decisions it is clear that the transactions involved in the present case were not gaming or wagering transactions within the law and were valid and enforceable unless prohibited by section 231 of the *Criminal Code.*

The present section 231 originated in an Act passed by the Parliament of Canada in 1888, being 51 Vict., chap. 42, entitled "An Act respecting Gaming in Stocks and Merchandise." This Act was introduced by the following preamble:

Whereas gaming and wagering on the rise and fall in value of stocks and merchandise are detrimental to commercial and public morality, and places affording facilities for such gaming and wagering, commonly called bucket shops, are being established; and it is expedient to prevent such gaming and wagering, to punish the persons engaged in them, and to prohibit and punish the opening and maintaining of places therefor, and the frequenting thereof.

Then followed provisions which are in substance the same as those subsequently incorporated in section 231 of the *Criminal Code.* This section reads as follows:

Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise,

(*a*) without the *bona fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same, as the case may be, makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any shares of stock, goods, wares or merchandise; or

(*b*) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase

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of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bona fide* intention to make or receive such delivery.

2. It is not an offence under this section if the broker of the purchaser receives delivery, on his behalf, of the articles sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money or any part thereof.

Transactions on the Winnipeg Grain Exchange have been the subject of much litigation in the Prairie Provinces and have given rise to the expression of very divergent views in the courts. Most of the judges who held such transactions in some respect similar to the present to be of a kind prohibited by section 231, have based their decisions on views expressed by some of the judges of this Court in the case of *Beamish* v. *Richardson* (1). Notwithstanding those views, I think it is still open to us to determine this case according to our own views as to the interpretation and application of the section.

The transactions under consideration in the case of *Forget* v. *Ostigny* (2) already referred to, took place before the Act of 1888 came into force, but it had been enacted before the Privy Council came to give its decision and this reference was made to it by the Lord Chancellor:

> Much stress was laid on the fact that the respondent never asked for delivery of any of the shares purchased, and that the appellant never tendered such delivery. The question whether a contract is intended to be executed by delivery according to the obligations expressed upon the face of it is no doubt an important test for determining whether it is a real one or only a gambling arrangement under the guise of a commercial contract.
>
> In the Act passed by the Dominion Parliament in 1888 (51 Vict., c. 42) with a view of putting down what were then known as "bucket shops," it is provided (sect. 1) that: "Every one who * * * with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, * * * or of any goods, wares or merchandise makes * * * any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise, in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery; and every one who acts, aids or abets in the making or signing of any such contract or agreement is guilty of a misdemeanour."
>
> A proviso was, however, added in the following terms: "but the foregoing provisions shall not apply to cases where the broker of the purchaser receives delivery, on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase-money or any part thereof."
>
> Their Lordships think this proviso was enacted by way of precaution only, inasmuch as they cannot doubt that, where a real contract of pur-

(1) (1914) 49 Can. S.C.R. 595. (2) [1895] A.C. 318.

chase has been made and carried out by a broker on behalf of a principal, delivery to the broker is delivery to the principal just as much as if it had been actually made to himself.

In the present case, the respondent might at any time on tendering the balance due in respect of any of the shares purchased have required the appellant to deliver them to him. As has been pointed out, he received the dividends upon them, and any increase in their value enured exclusively for his benefit, whilst if there were a diminution of value the loss was exclusively his.

It seems to me that delivery to or by a vendee of the defendant would be as effective as delivery to or by an agent.

The purpose of the statute was to prohibit bucket shops and to render void gaming or wagering transactions. There can be no suggestion that there was any bucket shop transaction involved here, once it is admitted that real contracts were entered into. Nor do I think there was any gaming or wagering as those words are construed in law. There was, it is true, speculation, which is quite a different thing. The contracts entered into for the defendant were real; they were not fictitious. They called for delivery and all the parties thereto understood them to be enforceable. I think the word "delivery" in a criminal statute should be construed broadly enough to include anything which would be considered as delivery under the *Sales of Goods Act*. The contracts entered into were similar to the contracts on which practically the whole of the grain business of Canada is carried out and similar to contracts which have been in use on stock and commodity exchanges since long before the enactment of the legislation under consideration.

Now, if the contracts were valid and enforceable contracts entered into by the Reliance Grain Company on behalf of the defendant and the defendant fully understood the nature of the obligation which was being entered into on his behalf, I do not think that he should be relieved of the responsibility for moneys advanced by the plaintiffs to enable him to carry out binding obligations which had been undertaken on his behalf, even if he himself never intended to fulfill these obligations by delivery of the grain but intended to relieve himself of such obligations by so arranging things that the delivery might be made by others.

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For these reasons I think that the appeal should succeed and the judgment of the courts below be set aside and judgment entered for the plaintiffs for the amount of the notes sued upon with interest at the proper rate or rates. I have not entered into any discussion of the views expressed by former members of the Court in the case of *Beamish* v. *Richardson* (1), in view of the reference thereto made by My Lord the Chief Justice.

Taking this view, I do not think it necessary to discuss the other grounds of appeal put forward on behalf of the plaintiffs.

I concur in the suggestion that the respondent, if so advised, shall have liberty to have a reference to the Local Registrar of the Court of King's Bench of the judicial district of Regina, to ascertain the correct figures if the parties cannot agree.

Appeal allowed with costs.

Solicitors for the appellant: *Cross, Jonah, Hugg & Forbes.*
Solicitor for the respondent: *W. G. Ross.*