1949
*Feb. 28
*April 12

JOHN HERBERT ROE.....APPELLANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF MANITOBA

Criminal Law—Lottery, Conducting of—Criminal Code, s. 236(1) (c)—Offences under first and second part clause (c) distinguished—Red River (Barrel) Derby.

Section 236 of the *Criminal Code,* is to the effect that every one who does any of the things described in the section is guilty of an indictable offence. Subsection (*c*) is divided into two parts. The first part applies to a person who conducts or manages any scheme for the purpose of determining who, or the holders of what tickets are, the winners of any property so proposed to be disposed of. The second part applies to every person who conducts or manages any scheme by which any person upon payment of any sum of money shall become entitled under such scheme to receive from the person conducting or managing such scheme a larger sum of money than the sum paid by reason of the fact that other persons have paid any sum under such scheme.

In construing subsection (*c*), it must be read with the preceding subsections and therefore the words "so * * * disposed of" in the first part refer to the scheme indicated in the preceding subsections, that is, "by some mode of chance". The second part of subsection (*c*) however, stands alone. It does not refer to chance, or to mixed skill and chance, and the receiving of money is not subordinate to any of these elements. The rule of *ejusdem generis* therefor does not apply to it.

Since in the charge, preferred under the first part of subsection (*c*), there was mixed skill and chance, there was no offence, and the appeal as to it should be allowed.

As to the charge preferred under the second part of the subsection, the admission of the appellant that winning estimators will receive a larger sum of money than that paid for their tickets because the non-winning estimators have contributed to the scheme, brings it within the prohibition of the Statute and the appeal as to it should therefore be dismissed.

APPEAL from a decision of the Court of Appeal for Manitoba (1) which allowed an appeal by the Crown against the dismissal by a magistrate of two charges laid against the appellant for conducting a lottery in violation of s. 236 (1) (*c*) of the *Criminal Code,* R.S.C. 1927, c. 36,

*PRESENT:—Kerwin, Taschereau, Rand, Estey and Locke JJ.

(1) [1948] 2. W.W.R. 1000.

as enacted by 1943-44, c. 23, s. 8. (Dysart and Richards JJ.A., dissenting in part, would have dismissed the appeal as to the first charge.)

W. B. Scarth for the appellant.

W. J. Johnston for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.—The appellant was acquitted by Magistrate D. G. Potter in the Provincial Police Court at Winnipeg, in Manitoba, of the two following charges under section 236 (*c*) of the *Criminal Code* of Canada.

First charge: That John Herbert Roe, between the first day of March, 1948, and the eighth day of March, 1948, at the City of Winnipeg, in the Province of Manitoba, unlawfully did manage a certain scheme, to wit The Canadian Tourist Club Red River (Barrel) Derby, for the purpose of determining which holders of what tickets are the winners of certain property, to wit money proposed to be disposed of by mode of chance, contrary to section 236 (*c*) of the *Criminal Code* of Canada.

Second charge: That John Herbert Roe, between the first day of March, 1948, and the eighth day of March, 1948, at the City of Winnipeg, in the Province of Manitoba, unlawfully did manage a scheme by which a person upon payment of a sum of money becomes entitled, under such scheme, to receive from the said John Herbert Roe, the person managing such scheme, a larger sum of money than the sum paid by reason of the fact that other persons have paid a sum of money under such scheme, contrary to section 236 (*c*) of the *Criminal Code* of Canada.

The learned magistrate reached the conclusion, that as the scheme managed and conducted by The Canadian Tourist Club, of which the appellant was the secretary, involved a certain degree of skill, there were no offences, and he dismissed both charges.

The Court of Appeal allowed both appeals and fined the appellant $25 on each, or in default of payment, 30 days imprisonment. On the first charge, however, Dysart and Richards JJ. would have dismissed the appeal. The appellant now appeals to this Court. (*Criminal Code* 1023 (2)).

The scheme which gave rise to the present proceedings is fully explained in the statement filed at the trial by the appellant himself.

The appellant manages a club in Room 26, Marlborough Hotel, in the City of Winnipeg, in the Province of Manitoba, which is known as The Canadian Tourist Club

1949

ROE
v.
THE KING

Taschereau J.

Red River (Barrel) Derby. At the time the ice was to leave the Red River, approximately on the 10th of April, 1948, an oaken barrel of 45 gallon capacity, with 300 pounds of ballast, was to be placed in the Red River at the International Boundary at Emerson, then, carried by the river current to Norwood Bridge in the City of Winnipeg, and during its entire route it was to be convoyed by a party in a canoe or boat, to guard it against becoming beached on the shore or snagged or caught in bushes or other obstacles. The exact period of time taken by the barrel in its journey was to be recorded by the promotors of the scheme and their engineers. Tickets were then being sold at fifty cents each, and the purchaser of a ticket was entitled to make one estimate as to the time the barrel would take to make its journey. Attached to each ticket was a coupon which constituted Class "B" membership in The Canadian Tourist Club for 1948, and each coupon bore a serial number identical to the serial number on the ticket to which it was attached. This membership entitled the member to attend Club meetings and functions and take part therein, but did not entitle him to vote. The name and address of the purchaser were recorded on the stub of the ticket, and the purchase price, the sum of fifty cents, was forwarded by the particular vendor of that ticket to the scheme headquarters in Winnipeg, the copy and ticket being retained by the ticket purchaser. The purchaser was then at liberty to fill in on the ticket, his estimate of the time the barrel would take to make its journey, and was asked to forward such estimate to The Canadian Tourist Club, before 6 P.M. April 7, 1948.

Before the charges were laid against the appellant, quite a number of these tickets had already been sold, and it was understood that the sale of these tickets would cease prior to the day the barrel was to be released on its journey. After the barrel had completed its journey, and the exact travelling time ascertained, the ticket holder who had made the closest estimate of the time taken, was to be declared the winner, and awarded first prize, the next nearest second prize, and so on as set out on the back of the ticket. It was also admitted by Mr. Roe that the winners would receive from the scheme, a larger sum of

money than that paid for their tickets, by reason of the fact that other non-winning ticket holders contributed to the scheme.

Dealing with the first charge, there can be no doubt, I think, that there is an element of chance in determining the exact period of time that the barrel would take to cover the 105 miles, which is the approximate distance between the International Boundary at Emerson, and Norwood Bridge in the City of Winnipeg.

It is of course obvious that on its journey, the barrel may wander from bank to bank of the river, depending on the wind and the current, and it is therefore impossible to calculate in advance the exact distance which the barrel will cover, and a participant in that scheme has therefore to resort to guess work. But, there is also an element of skill. The evidence reveals that with the information as to the distance of the course, namely 105 miles, and the average speed of the current, namely 1·92 miles per hour, an experienced Red River navigator would be in a much better position to estimate the number of hours it would take to cover the course than one entirely unacquainted with the Red River. A person capable of computing figures and putting his experience into figures would have a great advantage over the ordinary individual. Mr. Walter M. Scott, a professional engineer, testified that a 45 gallon capacity barrel, containing 300 pounds of water would be two-thirds full, and that if he were asked to make an estimate of the time such a barrel would take to float down the Red River from the point already mentioned to Norwood Bridge, he would take into consideration the distance, the average velocity of the current, the wind effect and the effect of eddies or cross currents. It is also his opinion and I believe it to be sound, that a Red River navigator would have a much better chance of making a correct estimate than one unaccustomed to the River. I believe that a man who has a reasonable knowledge of mathematics to allow him to compute and put on paper his own considerations, might make a reasonable estimation of the time the barrel would take to cover the course. There is, therefore, in my opinion a mixed element of chance and skill involved in this scheme.

1949

ROE
v.
THE KING

Taschereau J.

The first charge is based on the first part of section 236(*c*) of the *Criminal Code,* but this section must be read with sections 236, 236(*a*) and 236(*b*) and 236(*bb*). Section 236 is to the effect that every one who does any of the things described in the six subsections of that section, is guilty of an indictable offence. Subsection 236(*a*) deals with the making of any scheme for disposing of any property * * * *"by any mode of chance"*. Subsections 236(*b*) and 236(*bb*) deal respectively with the selling and transmitting of tickets *for any such scheme.* Section 236(*c*) under which the accused was prosecuted is divided into two parts. The first part has been in the Code for many years and the second was added in 1935. The first part applies to a person who "conducts or manages any scheme * * * for the purpose of determining who, or the holders of what * * * tickets * * * are the winners of any property *so proposed to be * * * disposed of*".

It is clear to me that the words "so * * * disposed of" refer to the scheme indicated in the preceding subsections, that is, "by some mode of chance". If there is merely skill or a mixed element of skill and chance, there is no offence.

In *Rex* v. *Regina Agricultural and Industrial Exhibition* (1) Mr. Justice Martin said at page 135:

> Under sec. 236 (*a*) and under similar provisions contained in early statutes in Canada dealing with similar matters, and under the lottery Acts of England, it has been held that "a mode of chance" involves the absence of any skill; in other words, if it is found that skill enters into the estimates or guesses, there cannot be a conviction under the section.

At page 138, Mr. Justice Martin further says:

> Once it is admitted that a person of better judgment and better powers of observation might make a closer estimate, it is at once plain that skill plays a part, and the matter cannot be a "mode of chance".

The case of *Bailey* v. *The King* (2) has been cited, but for the following reasons given by Mr. Justice Dysart (3) I do not think that it applies:

> And in *Bailey* v. *The King*, 1938 S.C.R. 427, the Supreme Court of Canada, confirming a decision of the Appeal Court of Ontario, upheld a conviction of a drug store keeper for operating a "skill puzzle board". The board offered prizes for all correct answers to listed questions on obscure points of fact—which questions could have been answered with unfailing accuracy if the player would make adequate research. The Court, applying its "knowledge of the usual everyday

(1) [1932] 2 W.W.R. 131.
(2) [1938] S.C.R. 427.
(3) [1948] 2 W.W.R. 1000 at 1009.

custom of mankind", held that "the ordinary person entering the store would pay "ten cents" "for the chance of winning a prize, without critically examining the questions and returning later with a correct answer or answers" to one or more of them, and that therefore *the price was paid not for skill, but for chance, or at least for mixed chance and skill.* In that case, it is to be noted the issue was different from the issue in the present case. There the question was whether or not the accused was guilty under s. 986 (2) of having on his premises "a means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting"; here the issue under s. 236 (1) (*c*) is whether or not the accused was guilty of conducting a scheme, not of mixed chance and skill, but of chance solely. By upholding that conviction, the Supreme Court did not even pretend to say that the "skill puzzle board" was not a game involving some skill.

I agree with the above observations and I, therefore, come to the conclusion that as to the first charge, the appeal should be allowed.

The second charge is laid under the second part of subsection (*c*) which, as already stated, was introduced in the Code in 1935. It applies to every person who conducts or manages any scheme, by which any person, upon payment of any sum of money, shall become entitled under such scheme to receive from the person conducting or managing such scheme, a larger sum of money than the sum paid, by reason of the fact that other persons have paid any sum of money under such scheme. This part of section 236 (*c*) which stands alone, does not refer to chance, or to mixed chance and skill. The receiving of money is not subordinated to any of these elements. The larger sum of money is paid to the winner by reason of the fact that other persons have paid money under the scheme.

To my mind, the rule of *"ejusdem generis"* does not apply. The admission signed by the appellant that the winning estimators will receive a larger sum of money than that paid for their tickets, because other non-winning estimators have contributed to the scheme, brings the case within the prohibition of the Statute.

I would dismiss the appeal on the second charge.

Appeal allowed as to the first charge and conviction quashed. Appeal as to second charge dismissed.

Solicitors for the appellant: *Thompson & Scarth.*

Solicitor for the respondent: *J. O. McLenaghen.*