SOME ASPECTS OF SECTION 41(a) OF THE GAMING ACT 1908 AND THE SALES PROMOTION COMPETITION

INTRODUCTION

It is not entirely clear whether gaming was an offence at Common Law[1] but the introductory section to 10 & 11 Will, 3 c, 23 (c.17,Ruff), the prototype of all the Gaming and Lottery Acts, expresses in quite unequivocal terms the nature, and the moral and social implications, of the practices the gaming statutes were intended to eradicate. It reads;

> Whereas several evil-disposed persons, for divers years last past, have set up many mischievous and unlawful games called lotteries, not only in the Cities of London and Westminster, and in the suburbs thereof, and places adjoining, but in most of the eminent towns and places in England, and in the Dominion of Wales, and have thereby most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen, traders and merchants, and from other unwary persons, to the utter ruin and impoverishment of many families . . .

Blackstone too denounced gaming in quite unmistakable terms when he wrote in his 'Commentaries';[2]

> . . . but taken in any light, it (gaming) is an offence of the most alarming nature, tending by necessary consequence to promote public idleness, theft, and debauchery among those of a lower class; and among persons of superior rank, it hath frequently been attended with the sudden ruin and desolation of ancient and opulent families, and abandoned prostitution of every principle of honour and virtue and too often has ended in self murder.

Few could doubt that the sentiments behind these words are as applicable today as they were when they were written two hundred years ago. The necessity for legislative control over lotteries and wagering and gaming is not disputed in this paper. What is in issue here is whether the social and moral implications of sales promotion competitions[3] that play such an important part in the retail field of commercial operations today, are such, that the legality or otherwise of them should properly depend upon whether or not the conditions under which they are conducted comply with, or contravene, the provisions of s. 41 (a) of the Gaming Act 1908. In considering whether there is any justification for the embracing of these commercial operations within the net of the Gaming Act there is, apart from the

1. See 10 Halsbury's Statutes of England (2nd Ed.) p. 727, and Street, *The Law of Gaming* p. 3 for two contrary views.
2. (1765) Vol. iv p. 171.
3. Referred to by English writers as 'Prize Competitions'.

possibility of sociological studies, an avenue available in the form of an analysis of the gaming laws in operation with a view to ascertaining whether in fact the general concept of wagering and gaming laws provides a legitimate and workable method of control over advertising and sales promotion practices. It is this area, which is of particular interest to the lawyer and legislator, that will be examined here, and it is contended that, on an analysis of only a few aspects of the particular offence under s. 41 (a) of the Gaming Act 1908, the only conclusion possible is that attempts made to control sales promotion schemes by screening them through the loose riddle of the Gaming Act has led to the introduction of a number of subtle, and scarcely practical, legal distinctions.

No plea is made, of course, to protect the promoters of sham sales promotion schemes got up simply to keep outside the provisions of the Gaming Act and having as their predominant object the distribution of prizes by chance rather than the promotion of retail sales or some form of public entertainment. These are well known to the courts and, indeed, the Law Reports provide something of a running commentary of the continuous and unrelenting battle of wits between the sham sales promotion scheme promoters on the one hand, and their attempts to keep outside the gaming Acts, and the judges on the other, using each case before them as an opportunity to lay down a principle which will catch in anticipation the sham promoters' next creation. Promotion schemes of that type are outside the scope of this paper, not because they are a different genus of sales promotion competition, but simply because they are not sales promotion competitions at all. However, we cannot completely dispense with the sham sales promotion scheme at this stage because, as the following paragraphs will show, the sham sales promotion competition has played a very significant, and probably a far too important role, in the development of this area of the law.

At Common Law one of the ingredients necessary to constitute any scheme a lottery was some form of payment for a chance by the participants in the draw. Because there is rarely any direct form of payment by the participants in sales promotion competitions the first such schemes probably did not attract the attention of the police or the courts but, with the development of the 'tea' cases doctrine, sales promotion competitions become very much the concern of the police courts. The rationale of the doctrine is succinctly stated in Halsbury's Laws of England in the following terms;

> Thus a scheme whereby cash or other gifts are offered to purchasers of commodities may be a lottery, notwithstanding that the commodities are in fact worth the money paid for them. In such a case nothing is added to the price of the article for the chance; but the chance, by offering an inducement to others to purchase, so increases the sale of the article that it becomes possible to provide the prizes out of the profits. It is only in this indirect way that the purchasers contribute to the prizes; but this contribution is sufficient to make the scheme a lottery.[14]

4. 18 Halsbury's Laws of England (3rd Ed.) p. 239, footnote (m).

It is not intended here to question whether the 'tea' cases doctrine is or is not good law[5]. The only concern of this paper is whether in fact such a principle should be applied to genuine sales promotion competitions. In this regard it is interesting to note that the courts have never sought to distinguish between what is promoted as a legitimate commercial sales or advertising enterprise having as its objective nothing more heinous than a desire to stimulate business, and what is in fact nothing more than a lottery in the guise of a sales promotion competition. As a consequence of this, not infrequently, the rationes decidendi of cases have been stated too broadly and too generally in support of general propositions of law with the result that only too often a rule or principle is mistakenly believed to have much more authoritative support than is in fact the case. The 'tea' cases doctrine and the support it is sometimes believed to derive from the decision in *Taylor* v. *Smetten*[6] is a good example of this tendency.[7] It will be remembered that the doctrine applies where the chance to participate in the draw is not paid for directly because the goods sold are worth the money paid for them and each participant contributes only in the sense that his contribution or, if he does not contribute, the contributions of others who form the body of the general purchasing public, so increases the profits that a fund is thereby created out of which the prizes can be provided. In *Taylor v. Smetten* a vendor of tea advertised that he included with every packet of tea sold a coupon which entitled the holder to a prize the nature and value of which was only ascertainable after the purchase had been made and the package opened. At first glance these circumstances represent what one might call the classical factual situation in the sales promotion competition cases. However, contrary to the generally held view, Hawkins J. did not find that the coupons which provided the chance to participate had only been paid for indirectly. Indeed, he would probably be surprised to learn that his decision is often quoted as authority for the proposition stated in Halsbury because he expressly said that

> although it was admitted by the respondent that the tea was good and worth all the money, it is impossible to suppose that the aggregate prices charged and obtained for the tea did not include the aggregate prices of the tea and the prizes . . . [8]

Hawkins J. considered that he was dealing with a sham arrangement got up specifically to get over the provisions of the Gaming Acts and not merely as a sales promotion competition. This view is reinforced by the reference in the judgment to *Morris* v. *Blackman*[9] with the

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5. The doctrine was expressed in very clear terms (and extended) in *Willis* v. *Young & Stembridge* [1907] 1 K.B. 448 and although no authorities were cited in the judgment the doctrine has enjoyed general acceptance both in New Zealand and England.
6. (1883) 11 Q.B.D. 207.
7. See for example *Steve Christenson* v. *Byers* [1967] N.Z.L.R. 416, 420.
8. (1883) 11 Q.B.D. 207, 211.
9. (1864) 2 H & C 912 (*R* v. *Harris* 10 Cox C.C. 352, was also referred to).

comment that it is "strongly confirmatory of the view we take . . . "[10] There a public entertainment was held at the conclusion of which the promoter said he would 'distribute amongst his audience a shower of gold and silver treasure on a scale utterly without parallel.' The distribution being effected by chance, Martin B. had no hesitation in accepting the learned Magistrate's finding that the whole proceeding was a contrivance got up to conceal the real nature of the transaction which was a game or lottery within the meaning of 43 Geo. 3,c.119 and the promoter was accordingly convicted of being a rogue and vagabond.

There is a clear distinction between the circumstances in the cases referred to and the sales promotion competition cases of recent years[11] and it is submitted that the courts have been in error in not distinguishing between what is a lottery dressed up as a sales promotion competition and what, on the other hand, is the latter presented in the form of a lottery. The legislature too has not been without fault in not making its intention more clear and specific. A reading of the Parliamentary Debates on the Gaming and Lotteries Bill 1881[12] reveals that some members considered the new Act only in terms of sham sales promotion competitions such as those in *Taylor v. Smetten* and *Morris v. Blackman* and did not foresee the extent of its possible application. For example, the Honourable Mr Thomas Dick considered that the Bill was long overdue and necessary to deal with a quite useless and injurious practice that had developed in the City of Dunedin whereby persons entering to view a diorama on the American War were issued with tickets which entitled the holders to participate in a draw for a prize at the conclusion of the performance.

> So far as his knowledge went it was not the diorama that the people went to see after a day or two, but just to speculate upon the possibility of drawing something by means of the tickets that were issued. There was a regular system of gambling in connection with it. In Dunedin the spirit of gambling rose to a great height in regard to it . . . this diorama business created quite a useless and injurious stir.[13]

Other Members were not as objective as Mr. Dick and were so concerned to stamp out gaming practices that they paid little attention to the breadth of the measures in the Bill. In this respect the comments of Sir William Fox are all revealing;

> He was glad to see that the Bill was stringent in its provisions. In such matters as these he was no friend of any half measures . . . He was . . . glad to see that this Bill dealt with the question of gambling in a thoroughly trenchant style,

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10. (1883) 11 Q.B.D. 207, 211.
11. e.g. *John Wagstaff Ltd.* v. *Police* [1965] N.Z.L.R. 973; *Whitbread & Co. Ltd.* v. *Bell* [1970] 2 All. E.R. 64 and even *Willis* v. *Young & Stembridge* [1907] 1 K.B. 448.
12. Section 41 (a) was taken directly from the Gaming and Lotteries Act 1881.
13. N.Z. Parl. Debates Vol. 38 (1881) 499-500.

> for any legislation that was not thorough would be so much milk and water . . .[14]

Activity-restricting and protectionist legislation needs to be drafted with very real precision so that no more than what is actually socially harmful is outlawed. The comments of Sir William Fox and the very wide terms in which s. 41 (a) is drafted reflect a legislative philosophy which may not be acceptable today. The measures in the Gaming and Lotteries Act 1881 completely failed to provide the Courts with any guidelines as to the legislative intent and it is not surprising, that even at that time it did not altogether escape the criticism that it "was too wholesale in its character (and) it was too complete; it was alike wholesale and retail; and went beyond what the public required at the present time."[15] This is even more true today.

SECTION 41(a) OF THE GAMING ACT 1908

Most prosecutions in respect of sales promotion competitions are brought under s. 41(a) of the Gaming Act 1908. It provides;

> Every person who — (a) establishes, commences, or is a partner in any lottery or in any scheme by which prizes, whether of money or of any other matter or thing are gained, drawn for, thrown, or competed for by lot, dice, or any other mode of chance . . .

is liable to a fine of $400.

The essential ingredients of the offences under this provision are;

(i) That the competition consitutes a *lottery* or a *scheme;* and

(ii) That *prizes* are *gained,* drawn for, thrown for, or competed for; by

(iii) Lot, dice, or any *other mode of chance;* and

(iv) Although the section does not expressly say so, there must be *some form of payment,* whether direct or indirect, for a chance to participate in the draw.

These factors will be considered in turn.

(i) *The Lottery — Scheme Dichotomy*

The disjunction between the terms 'lottery' and 'scheme' in the section would tend to indicate that the legislature had in mind two types of contrivance that would be caught by the Act. It is therefore reasonable to expect that since the enactment of the Gaming and Lotteries Act 1881 some rule would have emerged which would permit a reasonably neat classification of competitions into one category or the other. This has not occurred and, although some attempts to formulate such a rule have been made these have been far from satisfactory.[16]

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14. N.Z. Parl. Debates Vol. 38 (1881) 496.
15. N.Z. Parl. Debates Vol. 39 (1881) 302.
16. See comments of Mr. Wicks S.M. in *Police* v. *Porirua Meat Co. Ltd.* (1964) 11 M.C.D. 237, 239.

In *John Wagstaff Ltd.* v. *Police*[17] the appellant had been convicted under s. 41 (a) of 'establishing a lottery'. The facts were that the appellant, an electrical dealer in a suburb of Christchurch, distributed some four thousand numbered leaflets to dwellinghouses in the suburb. Each leaflet communicated to the recipient the fact that each day, commencing on a stated date, the dealer would display a number in his shop window and, if the recipient's 'lucky number' was displayed, on answering a simple quiz successfully, he became entitled to a hairdryer from the dealer's stock. The object being to advertise the dealer's wares, it was a condition of the scheme that a prize could only be claimed on the day that the recipients 'lucky number' was displayed in the shop window. A preliminary issue in the case was whether, on the facts, the information should more correctly have charged 'establishing a scheme' as opposed to establishing a lottery. Mr. Justice Wilson, without enlarging on his reasons, considered that 'establishing a scheme' was more appropriate to the evidence adduced[18] and he later went on to say;

> . . . in s. 41 (a) . . . the word 'lottery' denotes a business or undertaking in which the proprietor receives payment from a number of persons for the right to participate in the drawing of lots or other suitable thing, or the throwing of dice, or the turning of a wheel, to determine the distribution of prizes. (None of these methods were followed by the appellant and, accordingly, I think that Mr Roper was right in considering that the original charge of 'establishing a lottery' was inappropriate.) The alternative offence constituted by s. 41 (a) is, I think, much wider in its scope and includes not only schemes for the distribution of prizes by methods used in a lottery but also by 'any other mode of chance'.[19]

This formulation is consonant with a strict construction of the terms in ss. 41 (a) and 39 but as a practical rule for categorizing lotteries and schemes it does, with respect, fall rather short of the ideal. For example, on His Honour's analysis the word 'scheme' embraces a lottery so that 'lottery' in the section becomes mere surplusage to be used only as a matter of precision should the occasion arise. Secondly, it is extremely doubtful that one could accurately list all the methods of drawing which are applicable only to a lottery. Indeed, it is clear from His Honour's own list of methods of drawing a lottery that actual physical participation in the means used to determine the distribution is not a prerequisite. For example, although the drawing of lots or the throwing of dice might denote some form of physical participation by the recipients of a chance, clearly the turning of a wheel does not. It may be that His Honour had in mind a method of determination in which each participant turned a wheel, but such a notion is contrary to prevailing concepts of a lottery. The method of drawing in *Wagstaff*

17. [1965] N.Z.L.R. 973.
18. *Ibid.*, p. 975.
19. *Ibid.*, p. 976.

was just as applicable to a lottery as to a scheme, and it is submitted that the true distinction between a lottery and a scheme in s. 41 (a) is that in the former there must always be a draw of some description whereas in the latter a draw is not necessary. The term 'draw' is used here in a very loose sense and includes all manner of determination whether by lot, dice, or even the arbitrary selection of numbers by a person other than the participants as in *Wagstaff*. In a scheme, on the other hand, the method of determination need not amount to a draw. For example, in *Police* v. *Hays Wright Stephenson Ltd.*[20] a win was achieved when a lucky recipient obtained two matching portions of a 'cheque'. Many thousands of portions of 'cheques' were distributed and only two perfectly matching portions entitled the holder to a prize. In such a case there is no draw and thus no lottery but where there is a method of determination in the nature of a draw then the competition is more accurately described as a lottery. This does not, of course, get over the criticism already made that on Mr. Justice Wilson's interpretation of these terms the word 'lottery' becomes mere surplusage in the section, but, it does at least provide a practical means of drawing a distinction where, as in Haliuse, the prosecutor had elected to charge the defendant with establishing a lottery.

(ii) *The necessity for a prize*

The second ingredient of the offence under s. 41 (a) is that prizes must be gained, drawn for, thrown for, or competed for by the participants in the draw. No difficulty has been experienced in determining whether prizes have been drawn for, thrown for, or competed for, but the unusual circumstances in the case *Metropolitan Theatre Company Ltd.* v. *Police*[21] did require some explanation of the term 'gain' in s. 41 (a). There the appellant company made a gratuitous distribution of complimentary tickets to a performance at its picture house each night by announcing in the evening paper each day the names of the persons who had been selected as the management's guests for that night. The object of the scheme was apparently to encourage people to read the Theatre's advertisements in the paper. The distribution of the free seats was entirely gratuitous in the sense that no obligation was incurred by the recipients before or after the announcement of the names selected, and invariably the names were selected at random from the pages of the telephone directory. Mr. Justice Shorland considered that the scheme did not constitute a lottery because the complimentary seats were not drawn for, thrown for, or competed for by lot or dice etc., and nor were they gained because in his view " . . . the word 'gain' imports some notion of successful conscious striving on the part of the person who gains. If bounty comes unexpectedly to a recipient, who has been blissfully unaware of the fact that fate in the shape of some process of chance selection known only to the would-be benefactor has been engaged in selecting him,

20. An unreported judgment of Mr. Wicks S.M. delivered at Wellington on 24/11/70.
21. [1956] N.Z.L.R. 55.

. . . the word 'receives' and not the word 'gains' fairly conveys the passive role occupied by the recipient in the transaction."[22]

The question as to whether what has been distributed is a prize can generally be answered very simply. As Lord Parker C.J. said in the *Director of Public Prosecutions* v. *Bradfute*[23] "It is quite clear that a prize need not be a sum of money; it can of course be an article, a commodity, and, in my judgment can be anything which can be sold, or indeed anything which can be said to be of value . . . " However, where the competition or scheme is what has been called a 'two stage' competition the matter is considerably more complex and has given rise to the development of what is referred to as 'the doctrine of severance'.

The Doctrine of Severance: In *The Director of Public Prosecutions* v. *Bradfute*[24] purchasers of a cat food were invited to play 'The World's Biggest Bingo.' Included with each tin of cat food sold was a label printed upon which was a square containing sixteen differently numbered boxes, a rectangle containing eighteen differently numbered boxes, and a puzzle. If by deleting on the square any numbers that appeared on the rectangle a horizontal or vertical line of deleted numbers was thereby created in the square the competitor, upon completing the puzzle, became entitled to a prize varying in value depending upon an endorsement in the square. To complete satisfactorily the puzzle the competitor was required to state the number of triangles that appeared in 'the geometrical figure.' It was agreed that the distribution of labels with a 'winning line' was purely by chance as was the value of the prize stated in the square on any particular label. However, the Magistrate considered that the puzzle involved some skill and, in dismissing the information charging the promoters with an offence under s. 42 (1) (c) of the Betting Gaming and Lotteries Act 1963 (U.K.) he accepted the defendant's contention that the scheme was to be considered as a whole "so that success required the double qualification of the exercise of the requisite degree of skill and the possession of the requisite luck, and not as two competitions with separate prizes, one capable of being won only with luck and the other with skill."[25] In allowing an appeal by the Crown against the Magistrate's decision the Court of Queen's Bench accepted that a right to obtain a sum of money or anything else of value subject to a test, or subject to undertaking some service was a prize[26] and accordingly the right to complete the puzzle in *Bradfute's* case by acquiring the winning label constituted a prize in itself. Lord Parker C.J. went on to say;

> . . . I am influenced in coming to that conclusion by two considerations. One is that such skill as there is in solving

22. *Ibid.*, p. 58.
23. [1967] 1 All E.R. 112, 115B.
24. [1967] 1 All E.R. 112.
25. *Ibid.*, p. 114.
26. Following *Kerslake* v. *Knight* [1925] All E.R. Rep. 679; 94 L.J.K.B. 919.

> the puzzle has nothing whatever to do with the value of the prize; it is, as it were, a mere condition which has to be fulfilled before the prize is paid; and secondly, because in this case in solving the puzzle the holder of the card is not competing with anybody. If he does not solve the puzzle, nobody else is going to get the prize; he is not competing with anybody else . . . [27]

The doctrine in its widest form is succinctly stated in this short extract from the judgment of the Lord Chief Justice. However, its precise limits have yet to be defined. It is significant that his Lordship expressly declined to enter into any speculation as to whether the complexity of the puzzle would make any difference as to whether what was obtained by chance was a prize[28] and he concluded, like Shorland J. in *Hamilton* v. *Auckland Bands*,[29] that on the particular facts the value of the prizes was fixed and unalterable. Glyn-Jones and Widgery JJ. were, on the other hand, considerably influenced in their judgments by the trivial nature of the puzzle in *Bradfute* and their judgments indicate that if the prize had been considerably more complex they would have been less confident in allowing the appeal. For example, although Widgery J. agreed with the formulation of the doctrine contained in the Lord Chief Justice's judgment, he then went on to say;

> I am impressed by counsel for the respondent's argument that one should not be too astute to separate what is in truth a compound scheme in order to isolate some part which depends on chance only with a view to saying that the whole scheme is a lottery. There are some schemes, however, and I am of the view that this is one, which, although they appear at first sight to be a single united scheme, are in fact readily separable, and, when separated, show that a lottery exists . . . I am quite satisfied that, when the lucky recipient of a card which had the appropriate numbers to draw a prize of £1,000 opened her label and observed that fact, she would be prepared at once to go around and tell her neighbours to rejoice, because she had won a prize, and she would do that because she would know perfectly well that, although the solution of the puzzle is not by any means a trivial matter, it is a puzzle which quite obviously she could get solved, and the possibility of her not getting a prize did not exist at all.[30]

The doctrine of severance is a valuable tool which enables the courts to catch those who would attempt to avoid the operation of the gaming Acts by adding a trivial test to what is, substantially, a game of chance. However, the doctrine may also be rather oppressive because it does not, in its present form, provide a method for distinguishing

27. [1967] 1 All E.R. 112, 115H.
28. *Ibid.*, 115C.
29. [1955] N.Z.L.R. 911.
30. [1967] 1 All E.R. 112, 116E.

between what is in truth a compound scheme involving a sufficient degree of skill and what, on the other hand, are two separate schemes, one involving skill and one chance. It is submitted that this difficulty could be overcome by using an additional test for determining what is a 'prize' in the two stage competitions to that used in the single stage schemes. The test for determining whether what has been won in a single stage competition is a prize is, as the Lord Chief Justice said in *Bradfute*, 'anything which can be sold, or indeed anything which can be said to be of value,[31] Broadly speaking this means that anything which is of some value in the community is a prize. Applying this test to the severance cases it means that no matter how difficult the puzzle which must be solved after the opportunity to solve it has been won by chance, the competition must be a lottery because the right to complete the puzzle could be sold by the holder to another if he did not himself feel competent to complete it. With respect, this test is too wide because what is obtained by chance may yet require the exercise of a high degree of skill before the promoter is obliged to pay out anything and the philosophy behind the Gaming Acts being, as Street concludes[32] to prevent the promoter from profiting wrongly and the contributor from incurring heavy losses, 'the gain of the former constituting the loss of the latter', the proper test should be whether or not what is obtained is a thing of value between the participant and the promoter. That is, is the nature of the puzzle such that any reasonable person would know 'that quite obviously he could get it solved.' If so, then the scheme is a lottery because what he has obtained by chance is a prize. If on the other hand a reasonable person would apprehend some doubts about his ability to complete the puzzle correctly then the competition must be looked at as a single compound unit and the element of skill necessary to solve the puzzle taken into account in the normal way to determine whether in fact the competition is a lottery. Only in this way can the promoter's liability to pay out in consideration of whatever it is the participant has at risk be decided as being determined on the basis of skill or chance. This is basic to the whole concept of Gaming and yet, the doctrine of severance fails to take account of it.

The doctrine has found ready acceptance in New Zealand[33] and indeed, it is probably true to say that it is not a new principle of gaming law in this country. In *Hamilton* v. *Auckland Bands*[34] Shorland J. came very close to formulating an identical principle with that of the Lord Chief Justice but, it is submitted, it is still not too late to modify the doctrine in the manner suggested and this must be done if the basic essentials of gaming are to be preserved.

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31. [1967] 1 All E.R. 112, 115.
32. Street, *The Law of Gaming*, 207.
33. *Police* v. *Hay's Wright Stephenson Ltd.* (unreported) Wellington 24/11/70 Wicks S.M.; *Police* v. *Nestles Company (N.Z.) Ltd.* (unreported) Auckland 17/7/70, Morgan S.M.
34. [1955] N.Z.L.R. 911.

(iii) *Distribution of the Prizes by Chance*

For a competition to contravene the provisions of s. 41 (a) the distribution of the prizes must be determined by chance. This is sensible enough and certainly consonant with current notions of gambling. But, just what constitutes chance as opposed to skill and what degree of skill is sufficient to displace chance, is an entirely different matter. However, before embarking on an analysis of skill and chance in the context of s. 41 (a) one preliminary matter needs first to be disposed of. Prior to the decision in *John Wagstaff Ltd.* v. *Police* there had been some uncertainty as to the meaning to be attributed to the words ' . . . or any other mode of chance' in s. 41 (a).[35] Counsel for the appellant in *Wagstaff* argued that these words were to be construed *ejusdem generis* with the words 'lot' and 'dice' in the section, but Wilson J. concluded that even if the *ejusdem generis* rule did have any application (which he doubted) " . . . it must be applied to a genus which includes all methods of decision which are logically unpredictable and unaffected by real skill or merit, and, which includes lot, dice, and other modes of chance."[36] The words 'or any other mode of chance' mean then exactly what they say, and the terms 'lot' and 'dice', like the term 'lottery', are merely surplusage.

What is skill — Chance? In *Scott* v. *Director of Public Prosecutions*[37] Lush J. said that a lottery involved the distribution of prizes:

> . . . by chance, and nothing but chance, that is, by doing that which is equivalent to drawing lots. If merit or skill plays any part in determining the distribution, there has been no lottery and there is no offence . . .

It is clear that in the light of subsequent decisions, this dictum is too wide and that what is necessary to displace chance is 'real skill', which, in the words of Humpherys J. in *Moore* v. *Elphic*;[38]

> must be more than a scintilla of skill, so that it can fairly be said that the distribution of the prize, the allocation of the prize, in the particular case, was due to two causes, not one cause with possibly a scintilla of some other cause added to it, but two separate causes, one being skill and the other being chance.

What is 'something more than a scintilla of skill' is not immediately clear. Atkin J. in *Scott* v. *Director of Public Prosecutions*[39] considered that any kind of skill or dexterity which affected the result would be sufficient and Lord Parker C.J. in *Director of Public Prosecutions* v. *Bradfute*[40] suggested that 'any skill other than a mere colourable skill'

35. *Grant* v. *Collinson & Cunninghame* [1922] N.Z.L.R. 998, 1003; *Metropolitan Theatre Company* v. *Police* [1956] N.Z.L.R. 55, 58; *Police* v. *Porirua Meat Co.* (1964) 11 M.C.D. 237.
36. [1965] N.Z.L.R. 973, 976.
37. [1914] 2 K.B. 868, 874.
38. [1945] 2 All E.R. 155, 156H.
39. [1914] 2 K.B. 868.
40. [1967] 1 All E.R. 112, 114H.

prevented a competition from being a lottery. In *John Wagstaff Ltd.* v. *Police*[41] Wilson J. referred to skill or merit which had some effect upon the result. Whatever the individual merits of these tests, none of them, either individually or collectively, provides a satisfactory standard against which any objective assessment of the 'skill' content in a proposed competition could be made; having regard to the requirements firstly, that the question whether the distribution of prizes is by skill or chance must be assessed at the time a scheme is commenced and not on the subsequently ascertained actions of the participants,[42] and secondly, that the exercise of the requisite degree of skill must be by the competitors and not the promotor himself.[43] Also, apart from the amount of skill necessary to constitute 'real skill' there remains the question as to what type of activity constitutes skill. That is, need it be physical or mental activity, or can it be a combination of both. In *Scott* v. *Director of Public Prosecutions*[44] Atkin J. considered that:

> Any kind of skill or dexterity, whether bodily or mental in which persons can compete would prevent a scheme from being a lottery if the result depended partly upon such skill or dexterity.

In *Police* v. *Hay's Wright Stephenson Ltd.*[45] customers were invited to collect 'new win-a-cheque' cards everytime they called at the defendant's retail store. Inside each card was the portion of a cheque for one, two, five, ten, twenty, or one hundred dollars. To win the amount specified on a cheque the participants were required to collect the number of portions necessary to make up one complete cheque and to satisfactorily construct three four letter words from the letters in the words 'Hay's Wright Stephenson.' Although the information charging the Company with establishing a scheme in contravention of s. 41 (a) was dismissed on the grounds that there had been no payment by participants for their chance, the case does raise some interesting problems in relation to the question of the determination of chance or skill in a scheme or competition. The learned Magistrate held that the scheme was divisable into two parts under the *Bradfute* doctrine. The first involved the collection of the portions of cheques in order to make a complete cheque and, while his Worship did not give any consideration to the various modes of collection possible in the circumstances of that case, he did conclude that, although some industry, diligence and effort needed to be expended in order to obtain a whole cheque, there was insufficient to constitute real skill. However, it is submitted that an examination of the possible means of collection was vital to the determination of the skill/chance issue in that case. This is so because although, for example, many would be "chance winners"

41. [1965] N.Z.L.R. 973, 977.
42. *Steve Christenson & Co. Ltd.* v. *Byers* [1967] N.Z.L.R. 416, 419.
43. *Grant* v. *Collinson & Cunningham* [1922] N.Z.L.R. 998, 1001.
44. [1914] 2 K.B. 868, 880.
45. Unreported judgment of Wicks S.M. delivered at Wellington on 24/11/70.

in the sense that they would not consciously strive to obtain winning cheques, nevertheless, the holders of the more valuable portions might well be very desirous of obtaining the remaining portion or portions entitling them to claim a prize. They might consider it worthwhile to make repeated visits to the store and thus expend considerable time and trouble[46] in attempting to secure the matching portions. They might even advertise for the remaining portions and in this skill would be involved, because offers would have to be sufficiently attractive to encourage the holders of the other portions to go to the trouble of checking their portions and comparing them. Negotiations might be required to settle a profit sharing ratio. In each case the value of the prize, the number of portions needed to win it, and the chances of securing the remaining portion or portions would have to be carefully calculated. If, in a hypothetical situation a portion held was worth $5,000 a participant might well have to consider whether the expenditure of say $50 in advertising was a worthwhile investment. His Worship also found that the second part of the scheme, the puzzle, that is, making three four letter words out of the letters in the words *'Hay's Wright Stephenson'* did not involve any real skill. However, what if six, eight, twelve, or even twenty four letter words was the requirement, or what if five three letter words had to be made from the letters in the word 'Hay's?' Also, would it have made any difference if only University Professors, or, if only children under the age of seven years were eligible to participate? All of these considerations highlight the fact that in the circumstances of any particular case the question of chance or skill is going to be determined subjectively and somewhat arbitrarily by the tribunal holding the proceeding. The promoter who is desirous of keeping within the law but who fails to appreciate this fact will soon learn at no small cost and discomfort to himself how vague phrases like 'something more than a scintilla of skill' and 'any skill other than a mere colourable skill' really are.

'Skill' in the form of physical dexterity provides an added dark area. In *Police* v. *The Nestles Company (N.Z.) Ltd.*[47] cards placed in the lids of coffee jars contained forms printed in the form of an automatic telephone dial. To comply with the conditions of that competition, a participant was required to erase three of the ten spots from the telephone dial (the spots being $\frac{1}{4}$" apart) without in any way removing even the smallest portion of any other spot. Counsel for the defendant company, referring to Mr. Justice Atkin's dicta in *Scott* v. *Director of Public Prosecutions*,[48] argued that the removal of the substance covering the spots involved an element of skill sufficient to take the competition outside the Act. In dealing with this submission his Worship said;

In my opinion while the removal of the substance covering

46. As the participants were held to have done in *Wardell* v. *McGrath* (1900) 19 N.Z.L.R. 114.
47. An unreported judgment of Morgan S.M. delivered at Auckland on 17/7/70.
48. [1914] 2 K.B. 868.

> the spots requires a little care it does not involve dexterity. It is a simple mechanical physical process, involving no more than the co-ordination of the eye and the muscles of the hand, much in the same way as a young child with a coloured pencil takes care to keep within the borders of the objects outlined in the colouring book.

'Dexterity' is defined in the Shorter Oxford Dictionary (2nd Ed.) as 'Manual Skill, neat handedness, hence address in the use of the limbs and in bodily movements.' This definition seems extraordinarily similar to a process "involving no more than the co-ordination of the eye and the muscles of the hand" and, indeed, these are qualities possessed by the champions in many sports which are commonly regarded as requiring a great deal of skill and which require no enumeration here. It may be, of course, that there cannot be physical skill in the absence of a reasonably high degree of mental activity but such a requirement seems to reject physical activity altogether as an operative element in coming to an assessment of the degree of operative skill in a competition. But, in *Wardell* v. *McGrath*[49] the Full Court held that where the acquisition of coupons determined the distribution of prizes and that acquisition was directly controlled by the expenditure of time, money, and trouble, there was present a sufficient element of skill to take the competition outside the Act. It would seem then that unless there is present an accompanying element of mental skill or unless there has been an expenditure of time, money, and trouble, physical dexterity alone will not avail a defendant claiming that his prizes are not distributed by chance. Also, how much time, money and trouble must be expended is not entirely clear. For example, the amount of time expended in a local competition may not be sufficient to constitute skill in a competition run on a national basis. Finally, a competition which is relatively simple for a judge, professional man or even a fourth form schoolboy[50] whose days are spent working with words and numbers may require a considerably greater expenditure of time and effort by other members of society. In marginal cases does the existence of 'skill' depend on who are the expected competitors? In this area of the law it is easier to raise issues than provide answers.

The effect of Skill: To displace chance, the skill or merit required of the participants in any particular competition must contribute to the determination of the distribution of the prizes.[51] The fact that skill or dexterity must be exercised by the participants will not in itself prevent a competition from contravening s. 41 (a) if that skill or merit plays no part in determining the distribution of the prizes.[52] For example, in *Police* v. *Gorton*[53] the defendant conducted a cross-word competition

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49. (1900) 19 N.Z.L.R. 114.
50. See the dictum of Glynn-Jones J. in *Bradfute* [1967] 1 All E.R. 112, 116B.
51. Lush J. in *Scott* v. *Director of Public Prosecutions* [1914] 2 K.B. 868, 874.
52. And if the "skill" involved relates to forecasting the results of any racing event or contingency, the scheme will be caught by s. 62 of the Gaming Act 1908.
53. (1927) 22 M.C.R. 135.

in which five questions could be answered in more than one way and in respect of which there were 32 possible right solutions. One solution was arbitrarily determined by the defendant to be the right solution for the purposes of the competition and the learned Magistrate concluded that the distribution of the prizes was, therefore, effectively determined by chance. So also in *Coles* v. *Odhams Press Ltd.*[54] where Lord Chief Justice Hewart considered that such an element of skill as did exist in the cross-word puzzle competition having more than one solution (one of which having already, and arbitrarily been determined to be the right one):

> was directed, and directed only, to the lucky guessing of the details of a mysterious collection of unrelated words, selected beforehand by a person whose idiosyncracies are as completely concealed as his methods.

Referring to *Scott* v. *Director of Public Prosecutions*[55] he observed:

> . . . there is all the difference in the world between a case where persons engaged in a literary competition allow somebody else to pick out the best of their efforts and agree to abide by his decision and a case where persons undertake to make a series of shots at something already decided behind their backs not on the terms, that anybody shall exercise judgment in deciding which is the best and most skilful of the competitors' efforts, but on the terms that somebody shall perform the task of deciding which come nearest to a secretly fixed standard.[56]

In *Scott* each competitor was to select one of a number of given words and compose a short sentence which defined or illustrated the word selected. The literary results so achieved were then to be considerd by a judge who would irrebuttably determine which was the best entry. Unlike the cases of *Cole* and *Gorton* no one solution had arbitrarily been pre-determined to be the right one.

There is no disputing the logic in these decisions. However, it is submitted that they are not entirely satisfactory, and cannot be said to lay down general rules. If, for example, there is no limitation on the number of entries which any one participant may submit, the most skilful competitor would not only know all the various combinations of correct solutions, but also could and would take the time and trouble necessary to complete sufficient entries to cover them. A further objection is that *Cole* and *Gorton* were not simply cases of participants paying for a chance in a draw. On the contrary, each participant's chances of coming even near to winning a prize depended upon the exercise of a quite considerable degree of skill. Competitions of this nature are a far cry from the competitions which the opponents

54. [1936] 1 K.B. 416, 426.
55. [1914] 2 K.B. 868.
56. [1936] 1 K.B. 416, 424.

of gaming and lotteries were able to say 'caused a useless stir' and 'resulted in the utter ruin and impoverishment of many gentlemen and their families.' That formalism is the keynote is illustrated by two further decisions.

In *Wardell* v. *McGrath*[57] the Full Court held that where the prizes distributed went to the participants who collected the most coupons and this was directly related to the amount of time, money and trouble expended by each participant, that distribution was not determined by chance because whether a participant was to receive a prize and the nature of his prize was dependent upon the skill exercised in their collection. On the other hand, in *Hamilton* v. *Auckland Bands*[58] entrants to a band contest received a card which bore a number. Gifts bearing selected numbers were displayed in the windows of a number of shops in the City of Auckland and if the recipient of a card was able to locate an identically numbered gift in one of the shop windows he was entitled to that gift as a prize. In allowing an appeal against the dismissal of the information by the Magistrate, Shorland J. held that chance alone controlled the distribution of the cards which were the title to the prizes and the amount of industry, care and diligence a competitor expended in locating his prize did not affect the result because,

> . . . the moment a successful competitor received a prize-winning pamphlet the distribution of the particular prize relating to the particular pamphlet was fixed and unalterable. In some shop window . . . his prize . . . awaited him. True, he must still expend the necessary industry to locate his prize within the defined area; but neither judgment, skill, nor industry could lead him directly to his prize. Luck or pure chance would determine whether or not he located his prize with a minimum of trouble. If luck or chance dictated that he must expend much energy or diligence before finally locating his prize, that fact would not bear upon the distribution of his or any other prize. It was still only his prize that he could claim.[59]

If in the *Auckland Bands* case the recipients had received a portion of a cheque as in *Hay's Wright Stephenson* and had then to locate the remaining portion in a shop window would the decision have been any different? The value of the cheque would be fixed and unalterable and the holder of a portion of a cheque would not be competing with anyone and yet he would have had to expend the same amount of energy and diligence in locating the *title* to his prize as the recipients in the *Auckland Bands* case had to expend in locating their gifts. Mixing case fact situations in this way indicates that the law in this

57. (1900) 19 N.Z.L.R. 114.
58. [1955] N.Z.L.R. 911.
59. *Ibid.*, p. 914. As previously mentioned it is submitted that this decision is better understood in the light of the more recently developed doctrine of severance.

area is far from settled. However, when one considers the *Auckland Bands* case in terms of the distribution or non-distribution of the prizes clearly the expenditure of time and effort played a very significant part. In both *Wardell* and *Auckland Bands* expenditure of time and effort played a significant part. But, in *Auckland Bands* the holder of the pamphlet was not competing with others for a prize. The distinction between the factual situations is clear but it is questionable whether the legal consequences of the distinction reflect the social justification for the gaming legislation.

(iv) *Payment for a chance to Participate*

That the participants should have paid for their right to be considered in the draw or other determination is an essential ingredient of all gaming offences[60] and 'an absolutely free and gratuitous distribution of chances, none of which have been paid for'[61] is not a lottery. This requirement reflects the basic philosophy behind the Gaming Acts that the promoter should not profit wrongly as his contributors are impoverished. However, there have been some recent dissenters from this view[62] who have argued that the terms of s. 39 of the Gaming Act 1908 'expressly state that an offence can be committed when a game of chance is conducted *with or without consideration* on the part of the competitors.' A discussion of that section is outside the scope of this paper but the payment principle is of such importance that a short diversion is justified at this point. Section 39 provides, inter alia;

> "No person . . . shall sell or dispose of, or agree or promise, whether with or without consideration, to sell or dispose of, any real or personal property whatsoever . . . "

The dissenters' argument necessarily involves the proposition that the words 'whether with or without cosideration' qualify the words 'sell or dispose of.' That this construction is unsupportable is readily apparent when one reflects on the nature of a sale without consideration. Also, if the construction contended for had been intended 'it is more probable that the words 'whether with or without consideration' would have been inserted after the words 'any real or personal property whatsoever.' The only conclusion possible from this is that the words 'whether with or without consideration' are limited to qualifying the words 'agree or promise' and not the words 'sell or dispose of.' This was the construction adopted by Mann J. in *Morgan* v. *Knight*[63] when considering comparable provisions under a statute of the State of Victoria and, it is submitted, it is the correct one. The payment principle then remains intact.

Although it remains intact, the payment principle does not remain

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60. *Barnes* v. *Strathern* [1929] S.C. 41, 48; *Whitbread & Co. Ltd.* v. *Bell* [1970] 2 All E.R. 64, 67; Street, *Law of Gaming*, p. 214.
61. Darling J. in *Willis* v. *Young & Stembridge* [1907] 1 K.B. 448, 455.
62. (1971) Recent Law 72, (1971) N.Z.L.J. 76, 77.
63. [1927] V.L.R. 170.

undiminished. It has already been mentioned how, by the 'tea' cases doctrine the judges have minimised the effect of the payment principle 'by their adoption of a gloss that, if some persons paid for the chance to gain a prize or if that chance were acquired as the result of purchasing some article from the proprietor of the alleged "lottery" even though the claimant paid nothing extra for the chance, that was sufficient.'[64] However, the courts have not been content to stop there and a further lessening of the effect of the principle requiring payment by the participants has been made by the rule in *Willis* v. *Young and Stembridge*.[65]

In *Young and Stembridge* the proprietor of a weekly newspaper caused medals to be distributed gratuitously amongst members of the public, each medal bearing a distinctive number and the words "Keep this, it may be worth £100. See the Weekly Telegraph today." The winning numbers, which were arbitrarily selected by the newspaper proprietors, were published weekly in the newspaper. Evidence was adduced that as a consequence of running the scheme the newspaper's circulation was increased by 20% because many people purchased the paper, not to read it, but in order to ascertain the winning numbers. There was no direct payment for a chance to participate in the draw and the only payment made was the penny charged to buy the newspaper to check the results. Nevertheless, Darling J. had no hesitation in concluding that there was a sufficient payment to satisfy the requirements necessary to make the scheme a lottery because;

> . . . In the present instance all chances are paid for in mass by the general body of purchasers of the paper, although an individual purchaser may not pay for his chance. The person who distributes the chances is therefore paid if the sale of the newspapers be looked at as a whole, although some chances are given away.[66]

Now this is a rather startling extension of the 'tea' cases doctrine. It will be recalled that the doctrine applies where prizes are offered to the purchasers of commodities notwithstanding that nothing is added to the price of the article purchased and even though that article is in fact worth the money paid for it. Under the doctrine, payment is always necessary although the courts are not prepared to regard that payment as a direct payment for the chance to participate. This payment requirement has sometimes been misunderstood[67] but the operation of the rule is clearly illustrated by three recent decisions — in two of which the doctrine was held not to apply and a third in which it was. In *Police* v. *Hay's Wright Stephenson Ltd.*[68] the parts of 'cheques',

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64. Wilson J. in *John Wagstaff Ltd.* v. *Police* [1965] N.Z.L.R. 973, 978.
65. [1907] 1 K.B. 448.
66. *Ibid.*, p. 455.
67. [1971] N.Z.L.J. 76, 77. The writer of that article appears to have completely overlooked the distinction between the 'tea' cases doctrine and the rule in *Willis* v. *Young & Stembridge*.
68. Unreported judgment of Wicks S.M. at Wellington on 24/11/70.

which were the means of participation, were distributed to the public from counters in the defendant's retail store. Many customers made purchases and were then handed the 'cheques' and, indeed, many thought they had to make purchases to obtain the 'cheques' but, it was a finding of fact at the hearing that the 'cheques' were distributed gratuitously and it was not a condition or pre-requisite for obtaining them that any purchase should be made of the defendant's wares. In *Whitbread & Co. Ltd.* v. *Bell*[69] customers entering the defendant's public houses were handed sealed envelopes containing coupons which entitled the holders to participate in a competition. No payment was made for the envelopes and receipt of an envelope was in no way conditional upon the recipient buying a drink. In both *Hay's Wright Stephenson Ltd.* and *Whitbread & Co. Ltd.* the 'tea' cases doctrine was held not to apply because the participants had not made any payment or contribution either towards the prizes or the funds out of which they were provided. In *Police* v. *The Nestles Company (N.Z.) Ltd.*[70] possession of 'dial-a-prize' cards were a pre-requisite to participation in the competition. These were obtainable with every purchase of a jar of the defendant's coffee, the cards being inserted under the screw cap lid of every jar. Some cards were also obtainable 'without obligation to purchase' by writing to an advertised postal address. Mr. Morgan S.M. applying the 'tea' cases doctrine found that there had been a sufficient payment requirement to constitute the scheme a lottery because the cards were inserted in the lids of the coffee jars to induce the public to buy them and it could not therefore be said that none of the chances had been paid for.

The rule in *Young and Stembridge* did not apply in either *Hay's Wright Stephenson* or *Whitbread & Co. Ltd.* because, although the schemes were undoubtedly promoted with a view to increasing profits by increasing sales, there was no direct evidence available to prove any such increases. If evidence of that nature had been adduced and accepted by the Court then in both cases a conviction *may* have been entered. It is submitted 'may have been entered' because it is not clear how much support the *Young and Stembridge* doctrine will receive and, indeed, the writer entertains grave doubts both as to the reasoning in the case and in fact whether Darling J.'s purported extension of the 'tea' cases doctrine is justified. Dealing with the latter point first, there may have been some justification when the doctrine was originally developed for holding that payment for goods which carried with them a right to participate in a chance draw was socially harmful because of the probability that some people could be led into gambling by buying goods, not for the purpose of acquiring the goods, but for the purpose of acquiring the right to participate in a draw, but, this reasoning cannot apply to the rule in *Young and Stembridge* where the chances were distributed gratuitously and no matter how many papers a recipient of a medal might buy he could not, by that means,

69. [1970] 2 All E.R. 64.
70. Unreported judgment of Morgan S.M. at Auckland on 17/7/70.

reduce the odds against his winning a prize. The chances too of any recipient being impoverished in *Young and Stembridge* were very slim indeed, the papers costing no more than a penny and no one being denied the opportunity to acquire one from his friends at no cost at all. Also, if, as has been said[71] the decision in *Young and Stembridge* turned on the fact that a subsequent increase in profits was proved then it is respectfully submitted that the decision completely overlooks the requirement that whether or not the conditions under which a competition is conducted contravene the Gaming Act must be "judged at the moment of establishment and not on any events which subsequently take place . . . "[72] It may of course be possible to overcome this objection by the adoption of a principle from taxation cases[73] so that the competition under examination is to be looked at as an 'arrangement' in the sense that not only the initial plan or establishment of the scheme but also all the transactions by which it is to be carried into effect must be taken into account. This would then catch all such schemes because without exception they are conducted with a view to increasing profits and with that factor established the rule in *Young and Stembridge* would operate against them automatically. However, the adoption of a combination of the rules in *Willis* and the taxation cases would only be justified if the sales and advertising promotion competition was a thing morally and socially bad *per se*, and it is submitted that the experience of the past fifty years lends no support to that contention.

It is also submitted that *Willis v. Young & Stembridge* is not good law and that the decision should not be followed in New Zealand. There are, of course, a number of Magistrate Court decisions[74] in which the rule has been applied here and it is also evident that Mr. Justice Turner did not specifically disapprove of Darling J.'s reasoning when he referred to *Young & Stembridge* in *Steve Christenson & Co. Ltd.* v. *Byers.*[75] However, there has yet to be an authoritative pronouncement on the rule by the New Zealand Court of Appeal so that the opportunity expressly to decline to adopt it still remains. Even the House of Lords appears reluctant to pronounce on Darling J.'s formulation and so far, the only expression of opinion has been that of Lord Parker C.J. who said it was " . . . a case which depends entirely . . . on its very special facts . . . "[76]

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71. Per Lord Parker C.J. in *Whitbread & Co. Ltd.* v. *Bell* [1970] 2 All E.R. 64, 67, 68.
72. *Steve Christenson & Co. Ltd.* v. *Byers* [1967] N.Z.L.R. 416, 419.
73. e.g. *Newton* v. *The Commissioner of Taxation of the Commonwealth of Australia* [1958] A.C. 450.
74. Mr. Wicks S.M. in *Police v. Porirua Meat Co. Ltd.* 11 M.C.D. 237, 241, summarises earlier cases.
75. [1967] N.Z.L.R. 416, 420.
76. In *Whitbread's* case at p. 67. See also Lord Hodson in *McCollom* v. *Wrightson* [1968] 1 All E.R. 514, 517.

CONCLUSION

Further attempts to control sales and advertising promotion competitions by submitting them to close scrutiny within the context of the Gaming Act 1908 can lead only to the increased distortion of our concepts of wagering and gaming as morally and socially damaging practices. If these competitions are harmful because they constitute 'unfair trading', legislature should say so, and after investigation bring in the appropriate legislation to deal with the problem. However, in today's relatively sophisicated society it is becoming increasingly difficult to see the relevance of the gaming laws to what are, in fact, legitimate commercial operations having as their objective nothing more heinous than a desire to stimulate business. The attempts made, both in New Zealand and England, to bring such commercial practices within the ambit of the Gaming Acts has resulted in such a confusion of rules and exceptions to rules that it is not surprising that one detects a hint of exasperation in the concluding words of His Worship Mr Wicks S.M. in delivering his judgment in the *Police* v. *The Porirua Meat Company*[77] when he said:

> I am unable to decide what subtle distinctions were in the minds of the Legislature when in 1881 it enacted the forerunners of ss. 39, 40, and 41 of the present Act and it seems to be an anachronism that the legality or illegality of what today appears to be a perfectly honest advertising scheme should be tested by interpretations of legislation which may have been necessary in 1541 and 1698 to stamp out the evils referred to in the Statutes of Henry VIII and William III which I have already quoted. In view of the tangled draftmanship of ss. 39, 40, and 41 of our present Gaming Act it seems to me that the Legislature should be approached with a view to having these sections redrafted and re-enacted in the light of modern conditions.

With these sentiments the writer is in complete agreement. The genuine commercial operator is entitled to pursue his activities under conditions which do not result in the question as to his innocence or guilt of an offence against the criminal law resting in such fine balance.[78] The time has come not only to re-draft and re-enact the Gaming Act 1908 but also to provide expressly that legitimate commercial sales promotion and advertising schemes are not within the intended objects of the legislation.

R. A. MOODIE.

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77. 11 M.C.D. 237, 244.
7.8 In delivering judgment in *Police* v. *Hay's Wright Stephenson Ltd.* an unreported judgment delivered at Wellington on 24/11/70, His Worship Mr. Wicks S.M. was forced to conclude that his decision in the *Porirua Meat Company* case was wrong in law.

"If a man can make himself a real master of his art, we may say that he has learned his trade, whatever his trade may be. Let him know how to advertise, and the rest will follow."

Anthony Trollope

Just as a retail store must advertise to increase or retain business, the lawyer must window-dress (to a certain extent) to remind the client of his seriousness of purpose. Dress can imply all manner of attitudes and states of mind. How often in literature is a character's clothing mentioned to discuss personality or status? At Vance Vivian we have capitalised on a society in which "clothing oft proclaims the man" and within that society we feel there is no profession where outward appearance means more than in law. For that reason Vance Vivian are particularly well prepared to suit the lawyer, both starting and culminating a career.

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