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THE DOMINANT ELEMENT RULE

By

HOWARD NEWCOMB MORSE*

The Appellate Department of the Superior Court of Los Angeles County, California, in 1938 in People v. Settles declared that: "A game is not to be regarded as one of skill merely because that element enters into the result in some degree, or as one of chance solely because chance is a factor in producing the result. The test of the character of a game or scheme as one of chance or skill is which of these factors is dominant in determining the result. . . . If both of these factors are present, the question of the character of such game or scheme in this respect is ordinarily one of fact."1 A game in which the players participate in the selection of the numbers and in which the proficiency of the players in so selecting the numbers determines the winner is a game in which skill rather than chance constitutes the dominant element. The acid test is whether without skill it is absolutely impossible to win the game. It was brought out by expert testimony paraphrased by the Superior Court of New Jersey in 1952 in O'Brien v. Scott that: ". . . games of skill and chance are set off by two fundamental criteria. First, an expert or skilled player can win a substantial majority of games of skill from a novice or unskilled player; and second, in a game of skill which is won by the lowest score, an expert or skilled player will make, on the average, a substantially lower score than a novice or unskilled player. Neither of these results is true in a game of 'chance'."2

In the event of police interference it is better from the standpoint of the operator of the game to wait and submit to arrest rather than to seek a declaratory judgment, as in Thrillo, Inc. v. Scott,3 or an injunction, as in Cotroneo v. Townsend,4 for in the first case the State must carry the extraordinary criminal burden of proof by proving beyond a reasonable doubt that the game is predominantly one of chance while in the latter two cases the burden of proof is on the operator to prove by a preponderance of evidence that the game is primarily one of skill. Whether the operator or the State has the burden of proof can mean the difference to the operator of having to close his business or of being allowed to continue it as most closed-participation, multiple-participation, player-participation games include both skill and chance and pose relatively close questions. As the Supreme Court of New York stated in 1952 in the Cotroneo case: "The plaintiff has failed therefore to establish as a matter of law that this game is not a lottery and hence has failed to establish a clear legal right to injunctive relief."4 And as the court

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declared in the *Settles* case: "The defendants requested this further instruction No. 7: 'I instruct you that unless you are satisfied from the evidence beyond a reasonable doubt that the game conducted by defendants was a game of chance, then it is your duty to find the defendants not guilty.' This was a correct instruction. The court modified it and gave it as follows: 'I instruct you that if you are satisfied from the evidence, beyond a reasonable doubt, that the game conducted by defendants was a game of skill or science and not of chance, then it is your duty to find the defendants not guilty.' This instruction as modified implied that the burden was upon defendants of proving, beyond a reasonable doubt, that the game conducted by them was one of skill. This is not the law. The defendants would be entitled to an acquittal if the evidence raised in the minds of the jury a reasonable doubt on this point."

It is submitted that for the operator to exact a participation fee rather than an admission fee is indicative that the game is primarily one of skill. The Supreme Court of Florida observed in 1938 in *Creash v. State* that: "It is also banned as gambling if created as in this case by paying admissions to the game." It is also submitted that for the operator to have the attendant who sells the combination cards to the participants receive tips voluntarily given by the participants rather than a salary from the operator is indicative of the game being one in which skill predominates. In the *Creash* case the court in condemning the game as gambling pointed out that: "All entrance fees are paid into a common fund of the operator out of which is paid all operating expenses of the establishment, including salaries.” It is further submitted that for the operator to conduct a game anew each time there is a winner rather than at regular time intervals is indicative that the game is primarily one of skill. In the *Creash* case the court went on to say that: "... such games are run off at regular time intervals." And, finally, it is submitted that for the operator to pay as the prize per game the sum of money collected from the sale of the combination cards rather than having the amount of the prize predetermined, as in the *Creash* case, or paying as the prize per game the sum of money collected from the admission fees, as in *Hoffman v. State*. In the *Creash* case the court observed that: "All entrance fees go into this account, but the amount or value of the prize offered is always in the bank account before any entrance fees are paid and the prize is in no sense determined by the number of such fees paid.” The Court of Civil Appeals of Texas in 1949 in the *Hoffman* case pointed out that: "We may properly assume, therefore, that his outlay in money prizes... was entirely dependent upon intake at the box office, i.e., admissions of participants in the skill game, and bearing a relationship to these admission fees in some fixed ratio or percentage.”

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5 131 Fla. 111, 115, 117-120, 179 So. 149, 151-153 (1938).
6 219 S. W. 2d 539-543 (1949).