

## POLICE v AH KIONG ET AL

High Court Apia  
25 February 1943  
Herd CJ

CRIMINAL OFFENCES (Gaming) - Game of mixed chance and skill distinguished from game of chance exclusively - Information charging defendants with playing Poker for money dismissed: Weathered v. Fitzgibbon [1925] N.Z.L.R. 331 followed.

PROSECUTION under s 141.(1.) of the Samoa Act, 1921.

Philipp for Police.  
Defendants in person.

HERD CJ. This is an information laid under section 141.(1.) of the Samoa Act, 1921 charging the defendants that they "did play for money in a game of chance, to wit, Poker."

The defendants admitted playing Poker for money and I intimated that I would consider the question whether the playing of Poker was playing "at a game of chance" within the meaning of the section.

There is no exactly similar section in the New Zealand Gaming Act, 1908 so that New Zealand cases and, indeed, all British cases must be used here not necessarily as binding decisions, but to ascertain the views of learned Judges generally on the subject of the distinction between games of chance, games of skill, and games of mixed chance and skill.

There was no evidence before the Court in this case that the game was played in any particular manner so as to show that the element of chance predominated over the element of skill or judgment.

The Samoa Act, 1921 also contains a section creating the offence of keeping a gaming-house (section 140) defining "gaming-house" as "a place of resort for gambling", and "gambling" as "playing for money . . . at any game of chance, or playing for excessive stakes or otherwise to the injury of public morals at any game of mixed chance and skill."

The defendants are not, of course, charged under this latter section, and I mention it merely to show that a distinction is drawn in another section within the Act between games of chance and games of mixed chance and skill, the latter not being there regarded as of any criminalizing effect unless played for excessive stakes or in some publicly immoral way.

In the New Zealand case of Weathered v. Fitzgibbon [1925] N.Z.L.R. 331, the English cases and the principles involved are discussed by Salmond J., who also refers to the leading New Zealand case of Scott v. Jackson [1911] N.Z.L.R. 1025, which decided that Pool and Billiards were not games of chance within section 10 of the Gaming Act, 1908. Reference in both these cases is made to the English case of Jenks v. Turpin 13 Q.B.D. 305.

I quote a portion of page 335 of the Judgment of Salmond J. in Weathered v. Fitzgibbon, supra, quoting Williams J. in Scott v. Jackson, supra:-

The Judgments of the learned Judges appear to me, however, to demonstrate that it is not every kind of gaming that will make a house where it is carried on indictable as a nuisance at common law, but only such gaming as in the opinion of the jury would render the house a nuisance by reason of the gaming carried on there being injurious to public morals. It is gaming to play a game even of pure skill for any stake, however small;

but the Judgments do not suggest that a house where such a game is played is indictable as a common gaming-house . . . . Playing whist for money is certainly gaming, yet it is perfectly clear from these Judgments that if the members of the Park Club had not played baccarat but had confined themselves to whist, and had kept within the points prescribed by the club rules, the learned Judges could not have considered the club to be a common gaming-house. The learned Judges evidently considered that to play whist, a game of mixed skill and chance, for such amounts as, considering the position of the parties, were not excessive, had not any tendency to injure public morals. Premises, therefore, where such a game was habitually played by members of a club would not be indictable as a common gaming-house, although if, instead of whist, a game of chance had been habitually played by the members for an excessive amount it would have been indictable. In an indictment at common law it would be for the jury to find whether in the particular circumstances a nuisance had been created.

And from page 337:-

The term "game of chance" is, however, ambiguous. It may be limited to games which are pure games of chance, or it may also include games, such as most games of cards, which are games of chance and skill combined. The question as to the true interpretation in this respect of s. 10 of the Gaming Act was considered and determined by this Court in Scott v. Jackson (1). There, if I understand the decision aright, it was held that the term "game of chance" as used in s. 10 of the Gaming Act is limited to games of pure chance, and does not include games of mixed chance and skill . . . . By a game of pure chance I understand to be meant a game in which there is either no element of skill whatever, or an element of skill so unsubstantial and unimportant that for all practical purposes the game is one of chance exclusively.

The remainder of the learned Judge's Judgment is interesting, but I have quoted sufficient to show the distinction drawn as to section 10 of the Gaming Act. I think it should be similarly drawn as to section 141 of the Samoa Act, 1921. In this case before this Court it does not appear that the game of Poker has been shown to be a game of chance in the light of the judicial interpretation given above, that is, "a game of pure chance".

Incidentally, Poker by a Canadian decision is considered a lawful game.

The information is, accordingly, dismissed.

Incidentally, it is to be noticed that under section 140 creating the offence of keeping a gaming-house "gambling" includes playing at games of mixed chance and skill (such as Poker) "for excessive stakes or otherwise to the injury of public morals".