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specific performance of the consequent contracts. Respondent Williams to pay costs of suit up to hearing. Further consideration reserved, with liberty to apply. Respondent Williams to pay the costs of the appeal.

Solicitors, for the appellant, *Ellis & Button.*

Solicitors, for the respondents, *J. V. Tillett*, Crown Solicitor; *B. A. McBride.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MUTUAL LOAN AGENCY LTD. . . . APPELLANTS;
DEFENDANTS,

AND

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES. . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *August*, 4, 5.

Griffith C.J. Barton and O'Connor JJ.

Applicability of English law in New South Wales—Prohibition of lotteries—10 & 11 *Wm. III. c.* 17, *secs.* 2,* 3—42 *Geo. III. c.* 119, *sec.* 2†—9 *Geo. IV. c.* 83, *sec.* 24.

*10 & 11 Wm. III. c. 17. Whereas several evil disposed persons, for divers years last past, have set up many mischievious and unlawful games, called lotteries . . . and have thereby most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen . . . to the utter ruin and impoverishment of many families . . . by colour of several patents or grants under the great seal of England for the said lotteries, or some of them . . . for remedy whereof be it enacted . . . that all such lotteries, and all other lotteries, are common and public nuisances, and that all grants, patents and licences for such lotteries, or any other lotteries, are void and against law.

2. And be it further enacted by the authority aforesaid that from and after the nine and twentieth day of December, (1699) no person or persons whatsoever shall publicly or privately exercise, keep open, shew or expose to be

Lottery—Mutual loan society—Ballot for loan without interest—Funds raised by subscription—Subscribers not members of society.

Construction of Statutes—Applicability of penal provisions to corporation— 7 & 8 *Geo. IV. c.* 28, *sec.* 14.‡

The provisions of the Imperial Acts 10 & 11 Wm. III. c. 17, secs. 2, 3, and 42 Geo. III. c. 119†, sec. 2, relating to the suppression of lotteries and little goes, and the punishment of offenders, are in force in New South Wales by virtue of the provisions of the 9 Geo. IV. c. 83, sec. 24.

Attorney-General v. *Edgley*, 9 N.S.W. L.R., 157, approved.

Those sections apply to lotteries kept by corporations as well as to those kept by individuals.

plaid at, drawn at, or thrown at, or shall draw, play or throw at any such lottery, or any other lottery, either by dice, lots, cards, balls, or any other numbers or figures, or any other way whatsoever; and that every person or persons that shall after the said nine and twentieth day of December, exercise, expose, open or shew to be plaid, thrown or drawn at, any such lottery, play or device, or other lottery, shall forfeit for every such offence the sum of £500, to be recovered by information, bill, plaint or action at law in any of His Majesty's Courts at Westminster, . . . and the said parties so offending shall likewise be prosecuted as common rogues, according to the Statutes in that case made and provided.

†42 Geo. III. c. 119. Whereas evil disposed persons do frequently resort to public houses and other places, to set up certain mischievious games or lotteries, called *Little Goes* . . . for remedy whereof, be it enacted . . . that all such games and lotteries, called *Little Goes*, shall, from and after the passing of this Act, be deemed, and are hereby declared common and public nuisances, and against law.

2. And be it further enacted, that from and upon the first day of July 1802, no person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, shew, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a *Little Goe*, or any other lottery whatsoever not authorized by Parliament, or shall knowingly suffer to be exercised, kept open, shewn, or exposed to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any such game or lottery, in his or her house, room, or place, upon pain of forfeiting, for every such offence, the sum of £500, to be recovered in the Court of Exchequer, at the suit of His Majesty's Attorney General, and to be to the use of His Majesty, his heirs and successors; and every person so offending shall be deemed to be a rogue and vagabond within the true intent and meaning of an Act passed in the seventeenth year of his late Majesty King George II., intituled An Act to amend and make more effective the laws relating to rogues, vagabonds, and other idle and disorderly persons, and to houses of correction, and shall be punishable as such rogue and vagabond accordingly.

‡7 & 8 Geo. IV. c. 28, sec. 14. That wherever this or any other Statute relating to any offence, whether punishable upon indictment or summary conviction, in describing or referring to the offence or the subject-matter on or with respect to which it shall be committed, or the offender or the party affected or intended to be affected by the offence, hath used or shall use words importing the singular number or the masculine gender only, yet the Statute shall be understood to include . . . bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and wherever any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every such case where such body shall be the party aggrieved.

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Principles stated by Lord *Blackburn* in *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.*, 5 App. Cas., 857, at p. 869, and by *Littledale* J. in *Cortis* v. *Kent Waterworks Co.*, 7 B. & C., 314, at p. 337, applied.

Per Griffith C.J. and *Barton* J.—The Acts are "Statutes relating to offences" within the meaning of 7 & 8 Geo. IV. c. 28, sec. 14, and therefore include corporations, there being nothing repugnant to that construction in the mere fact that one of the punishments prescribed for offenders is not applicable to a corporation.

Per O'Connor J.—*Quære* whether the provisions of 7 & 8 Edw. IV. c. 28, sec. 14, apply to these Acts. But upon the common law principles of construction, lotteries conducted by corporations being within the mischief aimed at, and the prohibitive words of the Acts being wide enough to include them, they should be deemed to be included and the provisions as to punishment should be applied to them as far as they are applicable.

A limited company, with power to raise a small capital, conducted drawings for what were called "ballot loans." The funds to be applied towards the loans were raised by subscription from the general public, and each subscriber obtained a "share warrant," which conferred no interest in the company, but entitled the holder to participate in the ballots. The ballots were drawn in the ordinary way, and the drawers of winning numbers won the right to loans of sums varying from £5 to £1,000, without interest for 50 years, subject to a deduction of 10 per cent. for expenses, and if no security was given for repayment of the loan, to a further deduction of 20 per cent. This latter sum was allowed to accumulate in the hands of the company, or invested to provide a fund for the repayment of the subscriptions during the 50 years to subscribers who presented their share warrants.

Held, that this was a distribution of prizes by lot or chance, and therefore a lottery within the definition formulated by *Hawkins* J. in *Taylor* v. *Smetten*, 11 Q.B.D., 207, at p. 210.

Decision of the Supreme Court, (*Attorney-General* v. *Mutual Loan Agency Limited*, (1909) 9 S.R. (N.S.W.), 148), affirmed.

APPEAL from a decision of the Supreme Court of New South Wales, on a motion for a new trial.

This was an information at common law by the Attorney-General for New South Wales to recover penalties from the appellants, under the Acts 42 Geo. III. c. 119, sec. 2, and 10 & 11 William III. c. 17, secs. 2, 3. There were six counts in the information, the first claiming a penalty of £500 for keeping an office at 17 Pitt Street, Sydney, "to exercise, keep open, show and expose to be played and drawn," a lottery not authorized by Parliament,

contrary to 42 Geo. III. c. 119, sec 2. The third and fourth counts were for penalties of £500 each for offences against the 10 & 11 William III. c. 17, sec. 2, in that the appellants did unlawfully and publicly "exercise, keep open, shew and expose to be played at and drawn by lots, balls, numbers and figures, a certain lottery" not authorized by Parliament, at the Sydney School of Arts and Protestant Hall respectively. At the trial before *Darley* C.J., the jury by direction found for the plaintiff Attorney-General on the first, third and fourth counts, and for the defendants on the second, fifth and sixth. The three counts last mentioned, therefore, are no longer material. The Full Court on the motion of the defendants, granted a rule *nisi* for a new trial on the grounds, mainly, that the Acts mentioned in the information were not in force in New South Wales, that the operations that were alleged to be lotteries were not lotteries within the meaning of those Acts, and that a corporation was not a person within the meaning of the Acts, or liable to a penalty under them.

The rule *nisi* was subsequently discharged with costs: *Attorney-General* v. *Mutual Loan Agency Ltd.* (1), and from that decision the present appeal was brought.

It appeared from the evidence that the office No. 17 Pitt Street was the place were the tickets for the alleged lotteries were sold by the company, and that the drawings took place at the other places mentioned in the information. The mode of operations in connection with the sale of tickets and drawing for prizes is sufficiently described in the judgments hereunder.

Dr. Cullen K.C. and *D. G. Ferguson* (*Sanders* with them), for the appellants. The ballot for loans is not a lottery. If the prospectus is *bonâ fide* carried out there is a perfectly feasible scheme by which the whole amount subscribed is ultimately returned. The Court cannot assume *mala fides*. If there is anything depending upon the question of good faith, the case should go to the jury. The fact that the repayment is postponed for a long period does not alter the nature of the concern.

(1) (1909) 9 S.R. (N.S.W.), 148.

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[GRIFFITH C.J.—The period may be so long as to make the repayment illusory.]

This is no more a lottery than a drawing in a Starr Bowkett Society, which has been recognized by the Courts and legislature as legal. [They referred to 57 & 58 Vict. c. 47, sec. 12; and *Wallingford* v. *Mutual Society* (1).] The mere fact that the benefits of such a society are confined to the members cannot affect the question whether there is a lottery or not. The benefits in the present case are practically the same as those of the Starr Bowkett Society; in both there is a right to a loan without interest, and the mode of distribution is the same, *i.e.*, a ballot.

[BARTON J. referred to *Taylor* v. *Smetten* (2).]

The statement of *Hawkins* J. must be taken with some limitation or it would include what has been held to be legal. The real test is whether the subscribers part absolutely with their subscriptions in return for the chance of a prize, or retain an interest in the amount subscribed, whatever the result of the ballot.

Even if this is a lottery the appellants are not liable under the Acts relied upon. They are not in force in New South Wales. The provisions as to punishment are not applicable. There is no mode of enforcing the provision that the offender shall be a rogue and vagabond and dealt with as such, and the section is not divisible. [They referred to *Quan Yick* v. *Hinds* (3); *Mitchell* v. *Scales* (4); *Attorney-General for New South Wales* v. *Edgley* (5); 5 Geo. IV. c. 83, sec. 1.] Even if the Statutes are in force, what was proved in evidence was not the offence aimed at by sec. 2 of 42 Geo. III. c. 119. There was no keeping of a place for the purpose of a lottery. There was only one selling of tickets in one place. Under 42 Geo. III. c. 119, sec. 2 the lottery must be carried out in the place which is "kept." Keeping an office for the purpose of facilitating gaming in another place is not within the section. The offence is keeping the place for the purpose of exercising, and by exercising the lottery therein.

(1) 5 App. Cas., 685.
(2) 11 Q.B.D., 207, at p. 210.
(3) 2 C.L.R., 345.
(4) 5 C.L.R., 405.
(5) 9 N.S.W. L.R., 157.

The lottery, if there was one, was really exercised where the "dice lots cards or figures" were. There must be something habitual to constitute keeping a place. One selling of tickets is not sufficient. [They referred to *Martin* v. *Benjamin* (1); *Willis* v. *Young and Stembridge* (2); *Stoddard* v. *Hawke* (3); 42 Geo. III. c. 119, preamble and sec. 1.]

Neither sec. 2 of 42 Geo. III., c. 119 nor sec. 2 of 10 & 11 Wm. IV. c. 17 applies to corporations. A corporation cannot be deemed to be a rogue and vagabond, and therefore it must be assumed that the legislature was dealing only with persons capable of being so treated. Under the 2nd section a corporation could not be punished. The whole structure of the sections suggests that only the persons actually engaged in the lottery are aimed at, *i.e.*, natural persons. At the time when the Acts were passed corporations were not so easily formed as now under the Companies Acts. A special Act of incorporation was necessary, and it may well be that the legislature did not contemplate the possibility of a corporation being formed to carry on lotteries. A corporation could not itself do the things enumerated in the sections. Sec. 2 of 10 & 11 Wm. IV. c. 17 provides that offenders, in addition to the other penalties, "shall *likewise*" be dealt with as rogues and vagabonds, which implies that all the penalties are to be suffered by each offender and that there cannot be a separation of them in accordance with their applicability to the particular case. [They referred to *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* (4).]

[GRIFFITH C.J. referred to *Hawke* v. *E. Hulton & Co. Ltd.* (5).]

Lamb (*Pickburn* with him), for the respondent, was only called upon on the question whether the Statutes applied to a corporation. As far back as the year 39 Eliz. the word "person" in Statutes has been held to include a corporation unless there is clear indication of an intention to the contrary. The mere fact that imprisonment may be awarded in the case of an offence against a Statute is not sufficient reason for excluding a corporation from its provisions. If it were so all provisions as to summary jurisdiction could have

(1) (1907) 1 K.B., 64.
(2) (1907) 1 K.B., 448.
(3) (1902) 1 K.B., 353.
(4) 5 Q.B.D., 310, at pp. 319, 320; S.C. on appeal, 5 App. Cas., 857.
(5) (1909) 2 K.B., 93.

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no application to corporations, because imprisonment is always provided as a penalty in default. Declaring a person to be a rogue and vagabond merely means that he may be summarily convicted and imprisoned. There is no reason to suppose that the legislature did not contemplate corporations as likely to conduct lotteries. In very early days corporations did so, as appears from the Act 10 & 11 Wm. III. c. 17 itself. [He referred to secs. 1, 4 and 5 of the Act; *Holmes' Everyday Book* (1619); *Brand's Book on Games and Gaming*, p. 89.] A municipal corporation was held to be a person within the meaning of an Act giving "persons" power to found hospitals: *Newcastle (Corporation of)* v. *Attorney-General* (1). A corporation was held liable as an "inhabitant" under the Poor Law: *Rex* v. *Gardner* (2). A corporation may be indicted by its corporate name for breach of a statutory duty: *Reg.* v. *Birmingham and Gloucester Railway Co.* (3). So far as the Act is applicable to corporations it should be applied to them. The mere existence of certain provisions which are not applicable is not a reason for holding that the Act as a whole does not apply to them. The rule stated in *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* (4), though founded on the *Interpretation Act*, was merely a declaration of the common law.

[O'CONNOR J.—The rule is that if a wider and a narrower meaning are both open, the Court should adopt that which is in accordance with the apparent object and intention of the legislature.]

If the only penalty provided were inapplicable to a corporation it might be argued that a corporation was not aimed at, but there is no authority for the exclusion of a corporation simply because one of the penalties is not applicable to it. In this case all are applicable except that of being dealt with as a rogue and vagabond. [He referred to *Reg.* v. *Great North of England Railway Co.* (5); *Reg.* v. *Tyler and International Commercial Co.* (6); *Hawke* v. *E. Hulton & Co. Ltd.* (7); *Pearks, Gunston & Tee Ltd.* v. *Ward*; *Hennen* v. *Southern Counties Dairies Co.* (8).] The

(1) 12 Cl. & F., 402, at p. 419.
(2) Cowp., 79.
(3) 3 Q.B., 223.
(4) 5 App. Cas., 857.
(5) 9 Q.B., 315.
(6) (1891) 2 Q.B., 588.
(7) (1909) 2 K.B., 93, at p. 98.
(8) (1902) 2 K.B., 1.

prohibition against lotteries is general. It was clearly intended to prohibit all unauthorized lotteries whether conducted by corporations or individuals. The evil is the same in each case. There is nothing in the context repugnant to their inclusion. In *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* (1) the Act *primâ facie* applied only to such persons as were capable of fulfilling certain personal qualifications which were altogether impossible to a corporation. Here the *primâ facie* presumption is the other way. The present case is covered by *Cortis* v. *Kent Waterworks Co.* (2). [He referred also to 7 & 8 Geo. IV. c. 28, sec. 14; 16 Vict. No. 1, sec. 6; *Ex parte Sperring* (3); *Reg.* v. *Justices of Antrim* (4).]

Dr. *Cullen* K.C., in reply. "Person" should be construed in the same sense throughout. "Every person so offending" is to be punishable as a rogue and vagabond. That is repugnant to the inclusion of corporations. The 7 & 8 Geo. IV. c. 28, sec. 14, applies only to offences punishable by indictment on summary proceedings. Here a new offence is created and a new penalty provided. No other punishment is open. The Acts should be construed without any presumption in favour of including corporations. They should not be held liable to a penal provision unless they are clearly within its meaning.

GRIFFITH C.J. The appellants are a joint stock company registered in New South Wales for the purpose of carrying out an enterprise which ordinary persons would characterize as a series of lotteries. The company has a number of shareholders, and they may, though they need not, raise a small capital. The enterprise is carried out in this way. Every month, on the third day of the month, they hold a drawing for what they call "genuine ballot loans," which are conducted on this principle. A sum of, say, £5,000 is to be distributed by way of loan. This sum is first raised by subscriptions of five shillings from any members of the general public who are willing to subscribe that amount. The public accordingly apply for "share warrants" or

5th August.

(1) 5 App. Cas., 857.
(2) 7 B. & C., 314.
(3) 11 N.S.W. L.R., 407.
(4) (1906) 2 Ir. R., 298.

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certificates available to bearer for participation in the next distribution of "genuine ballot loans." If the £5,000 is raised by these subscriptions of five shillings each a ballot is held, and prizes are distributed ranging from £1,000 to £5. If a smaller sum is subscribed the prizes offered are correspondingly less. The distribution is carried out by a ballot upon the principle which is well known in connection with what are called "Consultation" sweeps, and the winner is entitled to what is called a "ballot loan" for the amount drawn, which may be anything from £1,000 to £5. The company deduct ten per cent. from the gross amount for what they call expenses of flotation, and the loan is for 50 years without interest, secured or unsecured at the option of the bearer. If the bearer elects to give no security, a further deduction of 20 per cent. is made from the amount of the loan, so that the man who draws the right number is entitled to a loan of £1,000, subject to a deduction of £100 for flotation charges, and a further deduction of £200 if he will not give security. That is, he receives £700 by way of what is called a loan for 50 years without security. In other words the winner at the ballot receives a cash payment of £700, and so on downward in proportion. There also is what I think a wholly illusory scheme for the repayment to the subscribers of the amount subscribed. It is to be repaid in this way. The 20 per cent. which the company deduct from the nominal amount of the loan may either be allowed to accumulate in their own hands or be invested for 50 years, and at the end of that period they guarantee to pay it back to the holders of certificates on presentation. Is this a lottery? I know of no definition of lottery which would not cover a transaction of that kind. It is simply a gamble for cash. The so-called holders of share warrants, do not become shareholders in reality, but are merely persons who take a chance of winning a cash prize. In my opinion that is a lottery. It is clearly within the definition of a lottery as formulated by Mr. Justice *Hawkins* in *Taylor* v. *Smetten* (1), any "distribution of prizes by lot or chance." If this is not a distribution of prizes by lot or chance, I confess that I do not know what it is. I do not think that any definition of lottery was ever given that would not include a transaction of this kind.

(1) 11 Q.B.D., 207, at p. 210.

These being the facts, the Attorney-General brought an action against the company for the recovery of penalties under two Statutes, 10 & 11 Wm. III. c. 17, and 42 Geo. III. c. 119. Sec. 1 of the former Act, after a preamble referring to the prevalence of lotteries and the evils resulting therefrom, provided that all lotteries should be common and public nuisances, and declared that all grants, patents, and licences for lotteries were void and against law. By sec. 2 it was enacted [His Honor read the section and continued:] There is no question as to the action having been properly brought by the Attorney-General, if the appellants have been guilty of exercising or keeping open a lottery. Sec. 2 of the Act 42 Geo. III. c. 119 provided [His Honor read that section and continued:] The first count of the information in the present case charges that the appellants kept open a place, namely an office, in Pitt Street, Sydney, to exercise and keep open a lottery. The place mentioned was the place where the company sold the tickets for the adventure. It was contended that that was not exercising a lottery. The term "exercising" is not familiar; in these days the word conducting would more probably be used to express the idea. I think that the word "exercising" means what we should now call conducting, or, as my brother *Barton* suggests, "running" a lottery. I think that selling the tickets in a lottery is an essential part of the process of "exercising" a lottery. I think, therefore, that the appellants did exercise a lottery within the meaning of the Act of Geo. III. at the place where they sold the tickets. The third and fourth counts of the information charged the company with exercising and keeping open a lottery at two places where the tickets were drawn on two different days. I have no doubt that at those places also the appellants came within the words of the section. Everything, therefore, that is necessary to entitle the Attorney-General to the verdict he has obtained is present, unless it can be shown that the appellants because they are a corporation are not within the words of these Acts, and that is the contention upon which the appellants mainly rely.

It was contended that these Acts were not introduced into New South Wales by the Act 9 Geo. IV. c. 83. It was, however, decided by the Supreme Court of New South Wales in 1888 in

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the case of *Attorney-General* v. *Edgley* (1) that an Act similar in all respects to these was in force in New South Wales. This Court had occasion to consider that case in *Quan Yick* v. *Hinds* (2), and *Mitchell* v. *Scales* (3); and no doubt was expressed by any of the members of the Court as to the correctness of that decision, nor can I now see any reason for doubting its correctness. In my opinion, these Acts making lotteries unlawful and imposing penalties upon a person conducting them were part of the law introduced into New South Wales in 1828.

But, it is said, these Acts do not apply to corporations. That contention is based upon this—that the Act 10 & 11 Wm. III. c. 17, after providing that a person guilty of the offence mentioned shall be liable to a fine of £500, and providing for its recovery, goes on to say, "and the said parties so offending shall likewise be prosecuted as common rogues, according to the Statutes in that case made and provided." Now, under Statutes in force at that time, common rogues, on being convicted, were liable to be imprisoned, and it was urged that, since a corporation cannot be imprisoned, the Act does not apply to corporations at all. In the Act 42 Geo. III. c. 119, the corresponding words were that "every person so offending shall be deemed a rogue and vagabond" within the meaning of two Statutes referred to, dealing with houses of correction and the suppression of lotteries, "and shall be punishable as such rogue and vagabond, accordingly." The two sections, therefore, stand upon the same footing. Sec. 3 of the Act of 42 Geo. III. goes on to provide that if the person so offending is not proceeded against by information for recovery of the penalty, he shall be nevertheless deemed a rogue and vagabond and punishable accordingly. That consequence, therefore, follows whether the offender is proceeded against for the £500 penalty or not. Before the passing of the Act 9 Geo. IV. c. 83, by which these Statutes became part of the law of Australia, another Act had been passed in England, 7 & 8 Geo. IV. c. 28, which by sec. 14 provided that in every penal Statute where a person was mentioned, a corporation should be deemed to be included unless there was something in the context repugnant to that construction, and that Act was

(1) 9 N.S.W. L.R., 157. (2) 2 C.L.R., 345.
(3) 5 C.L.R., 405.

retrospective. *Primâ facie*, therefore, these sections applied to corporations. The question, then, is reduced to this, is the context providing that persons who are obnoxious to this provision are to be treated as rogues and vagabonds repugnant to the notion that a corporation should be affected by the section? The general object of the Act was to put down lotteries for the reasons stated in the preamble. It is clear that the evil aimed at can be caused by corporations as well as by individuals. It was stated by Lord *Blackburn* in *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* (1) as good law—and I do not know of anyone having since doubted it:—"I am quite clear about this, that, whenever you can see that the object of the Act requires that the word 'person' shall have the more extended or the less extended sense, then, whichever sense it requires, you should apply the word in that sense, and construe the Act accordingly." The difficulty here only arises from the fact that you cannot put a corporation in prison. Now it is not necessary to discuss the matter merely upon principles of common sense, because we are fortified by the opinion expressed by a very learned Judge in 1827, *Littledale* J. in *Cortis* v. *Kent Waterworks Co.* (2). There the question was whether a company or corporation was within the meaning of the Statute under discussion. Under that Statute persons upon whom rates were made were entitled to appeal to Quarter Sessions on complying with certain conditions, which included entering into recognizances. It was argued, and assumed to be good law, that a corporation could not give a recognizance. As to the argument that, as some provisions of the Statute had no application to corporations, therefore the Statute as a whole was not applicable to them, *Littledale* J. said:—"But where an Act of Parliament directs a thing to be done which it is impossible for a corporation to do, but which other persons may do, and another act which a corporation as well as others can do, then the corporation will be excused from doing the thing which it cannot do, and will be compelled to do the act which it is capable of doing." The same principle may be expressed as applicable to the present case with a slight change of words: "Where an Act of Parliament prohibits a thing from being done

(1) 5 App. Cas., 857, at p. 869. (2) 7 B. & C., 314, at p. 337.

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which it is possible for a corporation to do and which other persons may do, and imposes a penalty which it is impossible for a corporation to bear but which other persons may bear, and another penalty which a corporation as well as others may bear, then the corporation is liable to the penalty which it can bear and is not liable to the penalty which it cannot bear." That seems to me to be sound sense and in accordance with the principle laid down by *Littledale* J. In the present case the law imposes three penalties, indictment for nuisance, a penalty of £500, and punishment as a rogue and vagabond. Two of these can be borne by a corporation; the third cannot. The law *primâ facie* includes corporations. And, in my opinion, when the Statute 7 & 8 Geo. IV. c. 28 says that every person offending shall be liable to be treated as a rogue and vagabond, it means only that every person capable of being so treated shall be so treated. I think, for the reasons I have stated, that the operation of the 7 & 8 Geo. IV. c. 28 is not excluded by the mere fact that a corporation cannot be imprisoned.

I am of opinion, therefore, that the Supreme Court was right and that the appeal should be dismissed.

BARTON J. I am of the same opinion. I am quite clear that this is a lottery. I think that the words of *Sir James Martin* C.J. in *Reg.* v. *Ah Tow* (1) exactly fit this case. "But what is the contrivance proved in this case? A person pays a smaller sum on the chance of getting a larger sum. There is no exercise of forethought, the thing is decided by mere chance. If he chooses" (in this case, draws) "the winning number he wins a prize. What can that be but a lottery? There is the chance of winning a prize. In fact, these persons conduct a business which affords facilities for persons who come there of obtaining prizes by chance." Then there is the case of *Taylor* v. *Smetten* (2) in which Mr. Justice *Hawkins* gave the definition of a lottery to which reference has already made, which was adopted by Mr. Justice *Stirling* in *Barclay* v. *Pearson* (3), a case relating to one of the newspaper missing word competitions. So here the funds

(1) 7 N.S.W. L.R., 347, at p. 352. (2) 11 Q.B.D., 207.
(3) (1893) 2 Ch., 154.

were themselves contributed by the whole of the participants; and for what purpose? That they make take their chance of getting what was called a loan, but was really, for all essential purposes, a gift of the exact sum subscribed, minus 30 per cent., and that out of a fund contributed by the purchasers of what are called, or nicknamed, share warrants, but are really tickets of distribution. This is very far removed from the case of *Wallingford* v. *Mutual Society* (1) where the persons concerned had associated themselves for the laudable purpose of enabling the members to build houses, on the principle of a *Starr Bowkett Society*. There, for want of a better method of deciding who shall have the benefit for which they are associated, it is determined by chance or ballot, the issue being not who shall have a prize, but who shall have the privilege of this loan the obtaining of which is the general object of all the members. That is a totally different case from the present. Indeed I am surprised at the attempt made to assimilate the two.

On the other point I agree with his Honor. It is quite clear that under the English Statutes the word "person" is used to comprehend every person, whether individual or corporation, to whom the provisions can apply. Where the word is used for the purpose of comprehending persons who shall be deemed to be rogues and vagabonds it applies obviously only to those who are capable of coming under the description of persons who can be so treated, and must be restricted to that extent. Notwithstanding the fact that at the time when these Statutes were passed the incorporation of companies had not proceeded to the extent to which it has now been carried, and notwithstanding the fact that the means of obtaining incorporation at the present day are very different from those that then existed, it is impossible to argue that it was intended by the legislature that, where there was a corporation dealing in this way with the public, and bringing about the consequences which the legislature deemed injurious, even if the corporation itself should not be capable of being treated in the same way as other offenders, it was not to be subject to the section so far as its provisions were capable of applying to it. I am quite sure that that was not the meaning of the

(1) 5 App. Cas., 685.

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legislature, and I am also satisfied that the section can be reasonably interpreted in such a way as to avoid such a consequence. I, therefore, entirely agree with what his Honor has said upon the subject.

O'CONNOR J. I agree for the reasons given by my learned brothers, and which I need not amplify, that the business carried on by the appellant company was in reality a lottery. I also agree that the two Acts upon which the information has been founded are clearly in force in New South Wales. The arguments to the contrary seem to me quite untenable. The only part of the decision of the Supreme Court about which any question can really be raised, in my opinion, is that which holds that in the two Statutes in question the word "person" should be interpreted as including a corporation. Mr. *Lamb*, for the Attorney-General, relied upon sec. 14 of 7 & 8 Geo. IV. c. 28, as throwing light upon the matter. There is no doubt that that Act necessarily became part of the law of this country, whether by force of the common law or by the provisions of the Act 9 Geo. IV. c. 83, when the two criminal Acts now in question were made part of our laws. But I am not satisfied that sec. 14 does apply to the particular portions of these Acts which are in controversy in this appeal. If we were dealing with offences punishable upon indictment or upon summary conviction it is perfectly clear that it would be applicable. But as it is, I am not quite clear that this section relating to corporations can be used in the construction of the Statutes under consideration. But that is of no moment to the decision at which I have arrived, because I think that the ordinary rules of interpretation necessarily lead to the same conclusion. It has been held, as was pointed out by Mr. *Lamb*, as far back as the time of Lord *Coke*, that the word "person" may include a corporation, that the word has the wider and more extended meaning which will include it, and the narrower meaning which will not include it. Which of these meanings is to be adopted in the particular case must depend entirely upon the scope and purpose of the Act, and the subject matter to which it is applied. It is quite clear that the "exercising" of a lottery, to use the words of the Act, or the keeping of

a place for a lottery, and the playing of a lottery are just as much against the interests of the public where the "exercising" or "keeping" or "playing" are by a corporation as where they are by an individual, and, therefore, these things when done by a corporation must be taken to be within the mischief aimed at by the Act. But it is said that the Act cannot be applied because its provisions themselves show a contrary intention. In support of that argument there is only one aspect of the Act that can be relied upon, and that is this. In the case of the offence created by both these Acts there are two remedies provided by the Act itself, in addition to the remedy by indictment for nuisance. I leave the remedy by indictment for nuisance out of the question for the moment, because it is not referred to in the section with which we are now dealing. I take it to be a principle of common law beyond controversy, that, where a statutory offence is created by Statute for the first time, the remedy provided by the Statute is the only one that can be followed. I assume, therefore, that the only punishment that can be visited on persons committing a breach of sec. 2 of each of these Acts is the recovery of a penalty in a Court of justice and the prosecution of the offender as a rogue and vagabond. It may be taken that in the case of a corporation the latter remedy could not be applied, and if that were the only punishment the prohibition so far as a corporation is concerned would be a mere *brutum fulmen* and it might be fairly argued that the Act could not be interpreted as applying to a corporation. But that is not so. There are two punishments provided, one applicable to a corporation, *i.e.*, punishment by penalty recoverable in the Civil Courts, and another which is not applicable, *i.e.*, punishment by summary conviction as a rogue and vagabond. It is contended that, because both remedies cannot be applied against a corporation, a corporation cannot be included in the section at all. Such a contention seems to me to be directly in the teeth of all the decisions, particularly that of *Littledale* J. in *Cortis* v. *Kent Waterworks Co.* (1) the words of which have been already quoted by my learned brother the Chief Justice. I think that the proper rule to be observed in interpreting a Statute in which these questions arise is that where a corporation clearly

(1) 7 B. & C., 314, at p. 337.

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comes within the mischief aimed at by the Statute, and there is a punishment which is appropriate and another which is inappropriate to a corporation, the Statute will apply to a corporation by reason of the provision for the punishment which is appropriate. A question was raised under the Act 10 & 11 Wm. III. c. 17 which is perhaps a little more difficult. Under sec. 2 of that Act there is apparently a direction to the Government that the party so offending shall *likewise* be prosecuted as a common rogue according to the Statute providing therefor. That is, there is a direction to the Crown, or the officer having the care of prosecutions for such offences, that not only shall the punishment by suit for penalties be inflicted on the offender, but that there shall be also a prosecution to summary conviction as a common rogue according to the Statutes made and provided. But the principle stated by *Littledale* J. is equally applicable there. The Statute can be carried out fully in regard to individuals or natural persons but only portion of it can be carried out with regard to corporations. That is no reason why the provision which can be carried out against corporations should not be applied to them.

For these reasons I am of opinion that the Supreme Court were right in deciding that both these Acts applied to a corporation. I therefore agree that the appeal must be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellants, *W. A. Gilder.*

Solicitor, for the respondent, *J. V. Tillett,* Crown Solicitor for New South Wales.

C. A. W.