[HIGH COURT OF AUSTRALIA.]

AUTOMATIC TOTALISATORS LIMITED AND ANOTHER . . . . . } PLAINTIFFS;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } DEFENDANT.

H. C. OF A. 1920.

SYDNEY, *April* 26, 27.

Knox C.J., Isaacs, Gavan Duffy, Rich and Starke, JJ.

Income Tax—Income—Cash prize in lottery—Totalisator—Result not depending entirely on chance—Income Tax Assessment Act 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *sec.* 14 (*h*).

Sec. 14 of the *Income Tax Assessment Act* 1915-1918 provides that "The income of any person shall include . . . (*h*) a cash prize in a lottery," and a special rate of taxation in respect of such income is imposed by sec. 7 of the *Income Tax Act* 1919.

Held, by *Knox* C.J., *Gavan Duffy* and *Starke* JJ. and, with doubt, by *Isaacs* and *Rich* JJ., that dividends received in respect of investments in a totalisator are not prizes in a lottery.

Stoddart v. *Sagar*, (1895) 2 Q.B., 474; 18 Cox C.C., 165, approved and followed.

MOTION referred to the Full Court of the High Court.

A motion was made to *Starke* J. by Automatic Totalisators Ltd. and Colin Campbell Stephen, as Chairman of the Australian Jockey Club, for an interim injunction to restrain the Federal Commissioner of Taxation from enforcing the provisions of a notice served by him on 22nd April 1920 upon Automatic Totalisators Ltd., which is contained in par. 5 of the statement of claim hereinafter set out.

On the motion coming on for hearing before *Starke* J., his Honor ordered a statement of claim to be filed, and referred the matter to the Full Court.

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The statement of claim which was thereupon filed was as follows :—

1. Automatic Totalisators Ltd. (hereinafter called the plaintiff Company) is a company duly incorporated in the State of New South Wales and entitled to sue in that name, and carries on business in New South Wales as a totalisator manufacturer and operator, and is the registered proprietor of various patents for printing tickets and for registering numbers and otherwise for operating the totalisator.

2. The above-named plaintiff Colin Campbell Stephen is the present Chairman of the Committee of the Australian Jockey Club.

3. In pursuance of agreements made by the plaintiff Company with the Australian Jockey Club, Newcastle Jockey Club, Wallsend Jockey Club, Rosehill Race-course Co. Ltd., and Canterbury Park Race-course Co. Ltd., totalisators have been erected by the plaintiff Company on the race-courses of the said clubs and companies for such clubs and companies, and it is a term and condition of all the said agreements that the plaintiff Company shall be entitled to operate the totalisator on the said race-courses under the supervision of the owners of the said race-courses.

4. It is a further term of the said agreements that the plaintiff Company should have the right to deduct from the gross sum invested upon the totalisator sums varying from one and one-eighth per centum to one and three-quarters per centum of the said gross sums. The plaintiffs crave leave to refer to the said agreements when produced.

5. On 22nd April 1920 the defendant (considering it necessary in the protection of the revenue so to do) caused a notice to be served upon the plaintiff Company in the terms and figures following :—" Take notice that, pursuant to the powers in that behalf conferred upon him by sec. 52B of the *Income Tax Assessment Act* 1915-1918, the Federal Commissioner of Taxation hereby appoints you to be the agent for all persons who are at this date or who may hereafter become entitled to receive dividends declared by the totalisators installed at the Randwick, Canterbury, Rosehill, Newcastle and Wallsend race-courses, and hereby requires you to deduct from the amount of such dividends income tax to the amount

of 13 per centum of the gross amount of the dividends as provided in sec. 7 of the *Income Tax Act* 1919, and to pay the same to the Deputy Federal Commissioner of Taxation at his office, Warwick Building, Hamilton Street, Sydney, not later than 3 p.m. on the third business day after the close of each day's races, and to accompany such remittance with a complete and accurate return setting out the amounts appropriated for payment of dividends in respect of each race and the aggregate of such amounts."

6. The defendant also (considering it necessary for the protection of the revenue so to do) intends to cause a similar notice to be served upon the said clubs or companies or their proper officer, including the Australian Jockey Club.

7. The method of operation of each totalisator erected on each of the said race-courses is as follows :—The public go to the selling windows and ask for a ticket on the horse that they have selected for that race. The issuing of the ticket mechanically makes a record on the face of the machine showing the public generally the number of investors on each of the horses starting in the race, and at the same time the grand total shows the total number of investors on that particular race at the time of the issue of such ticket, so that anybody can see, from the number of investors on a horse they wish to back and the total number showing, the amount of dividend that that horse would pay should it win. The tickets are of different values, usually five shillings, ten shillings, one pound and five pounds. The issue of the ticket automatically makes a record on the indicator showing to the public that that ticket has been issued.

8. The machine is closed at the starting time of the race ; the numbers of investors on each horse are added together ; eleven per cent. is deducted from the total money taken—seven per cent. tax for the State Government, three per cent. for the club for the cost of running the totalisator, and one per cent. for the sinking fund to defray the cost of building and installing. The remainder (eighty-nine per cent.) in the case of a three-dividend race is divided into three parts—sixty per cent. for the first horse, twenty per cent. for the second horse and twenty per cent. for the third horse; in the event of a two-dividend race the amount is divided into two parts—seventy-five per cent. for the first horse and twenty-five per cent.

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for the second horse; in a one-dividend race the whole amount goes to the first horse.

9. The amount of the dividend declared on each of the placed horses is displayed in a prominent place for the public to see.

10. Of the gross receipts eighty-nine per cent. less certain fractions is distributed by employees of the Company to the owners of tickets on winning horses. The eleven per cent. and these fractions over are handed to the Australian Jockey Club less the percentage paid the Company for working expenses under the said agreement.

11. The whole of the staff for the working of the totalisators is provided by the plaintiff Company, but the Australian Jockey Club provides a dividend calculator as a check upon the dividend calculator employed by the plaintiff Company. The Club also employs a totalisator steward, whose duty generally is to see that the operations of the totalisator and of the staff supplied by the plaintiff Company are properly carried out.

12. The above-mentioned seven per cent. is paid by the Australian Jockey Club to the taxation authorities of this State.

13. The plaintiffs contend that none of the dividends declared or to be declared by the totalisators so installed is a cash prize in a lottery within the meaning of the *Income Tax Assessment Act* 1915-1918 or of the *Income Tax Act* 1919.

14. The plaintiff Company further contends that, if the said dividends declared or to be so declared are cash prizes in a lottery within the meaning of the said Acts, neither the plaintiff Company nor its public officer is liable to pay income tax as claimed by the defendant.

15. The plaintiff Company further contends that neither it nor its public officer is a person liable to pay a cash prize in a lottery within the meaning of sec. 52B of the *Income Tax Assessment Act* 1915-1918.

The plaintiffs claim:—

(1) That it may be declared that none of the dividends declared or to be declared by the totalisators installed at the Randwick, Canterbury Park, Rosehill, Newcastle or Wallsend race-courses is a cash prize in a lottery within the meaning of the said Acts.

(2) That it may be declared that the notice served upon the

plaintiff Automatic Totalisators Ltd. by the defendant on 22nd April 1920 is invalid.

(3) An injunction to restrain the defendant, his servants and agents from enforcing the provisions of the said notice.

(4) The plaintiff Automatic Totalisators Ltd. also claims that, if any of the said dividends so declared or to be declared by the totalisators installed at any of the said race-courses is a cash prize in a lottery within the meaning of the said Acts, the said plaintiff is not nor is its public officer a person liable to pay a cash prize in a lottery within the meaning of sec. 52B of the *Income Tax Assessment Act* 1915-1918.

(5) An order for payment of the plaintiffs' costs by the defendant.

The motion before the Full Court was, by consent of the parties, treated as a motion for a decree.

Langer Owen K.C., *Lamb* K.C. and *Weigall*, for the plaintiffs. The word "lottery" connotes a distribution of prizes by chance, and nothing else (*Taylor* v. *Smetten* (1)). In the case of the totalisator, the winning of a prize is dependent, not on chance alone, but partly upon the judgment of an investor in choosing the horse upon which he invests his money. [Counsel also referred to *Scott* v. *Director of Public Prosecutions* (2) ; *Hall* v. *Cox* (3).]

[RICH J. referred to *Minty* v. *Sylvester* (4).

[KNOX C.J. referred to *Stoddart* v. *Sagar* (5).]

Weston, for the defendant.

Cur. adv. vult.

The following judgments were read :—

April 27.

KNOX C.J., GAVAN DUFFY AND STARKE JJ. (read by KNOX C.J.). The question raised in this matter is whether money paid to a successful investor in the totalisator is a cash prize in a lottery within the meaning of sec. 14 (*h*) of the *Income Tax Assessment Act* 1915-1918.

(1) 11 Q.B.D., 207, at p. 210.
(2) (1914) 2 K.B., 868.
(3) (1899) 1 Q.B., 198.
(4) 114 L.T., 164.
(5) (1895) 2 Q.B., 474 ; 18 Cox C.C., 165.

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The method of operation of the totalisator is described in the statement of claim as follows :—[His Honor here read pars. 7 to 10 of the statement of claim, and then continued :—] This statement is admitted by the defendant to be correct.

It is well settled that the word " lottery " imports a distribution by chance and nothing but chance, that is, by doing that which is equivalent to drawing lots (see *Hall* v. *Cox* (1) ; *Scott* v. *Director of Public Prosecutions* (2)). In the present case it is, in our opinion, impossible to affirm that the distribution of money to successful investors on the totalisator is determined purely by chance. A person investing on the totalisator selects the horse on which he wishes to invest his money, and, presumably, in doing so forms a judgment to the best of his ability, having regard to his knowledge and experience, and to such information as he may acquire, as to the probability of that horse winning the race. In such a transaction the investor exercises his own volition with respect to the horse which he desires to back, and eliminates all chances except those inseparable from the event of the race and the amount of the dividend. The transaction undoubtedly amounts to a bet, and substantially only differs from a bet made with a bookmaker in that in the one case the fund out of which the winner is to be paid is made up by mutual contributions of investors and the rate of odds is determined by the amounts invested on the respective horses, while in the other case the winners are paid the amount of their winnings out of the money of the bookmaker and the bookmaker determines the rate of odds. We think it is clear that a bookmaker cannot be said to carry on a lottery, and equally clear that a similar transaction carried out by means of the totalisator is not within the description of a " lottery." The decision in *Stoddart* v. *Sagar* (3) is precisely in point, and we see no reason to doubt that that case was correctly decided.

For these reasons we are of opinion that the plaintiffs are entitled to the injunction claimed in par. 3 of the prayer of the statement of claim, this motion being by consent of the parties treated as a motion for decree on admissions in the pleadings.

(1) (1899) 1 Q.B., 198.
(2) (1914) 2 K.B., 868.
(3) (1895) 2 Q.B., 474 ; 18 Cox C.C., at p. 171.

ISAACS J. I concur in the decision. The cases cited and referred to by Mr. *Langer Owen* were not questioned or distinguished by the defendant. I am not convinced by their reasoning. To a great extent I feel pressed by their conclusions. On the whole I feel bound to concur in the judgment of the Court.

RICH J. I concur in the result; but from the way the case was argued for the defendant I reserve my opinion as to the applicability of the cases cited.

Defendant undertaking not to enforce the provisions of the notice set out in the statement of claim, no order except that the defendant pay the costs of the action, including the costs of the application to Starke J.

Solicitors for the plaintiffs, *Macnamara & Smith.*

Solicitor for the defendant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.