

[HIGH COURT OF AUSTRALIA.]

LUNA PARK LIMITED . . . . . PLAINTIFF;

AND

THE COMMONWEALTH OF AUSTRALIA . DEFENDANT.

H. C. OF A. *Practice—High Court—Declaratory order—Hypothetical state of facts—Exercise of discretion—Entertainments tax—Rules of the High Court 1911, Part I., Order IV., r. 1.*

MELBOURNE,

Oct. 31.

Knox C.J.,  
Isaacs, Higgins,  
Rich and  
Starke JJ.

The plaintiff company brought an action in the High Court against the Commonwealth in which it alleged that it intended, in conducting its place of public entertainment, to charge sixpence for admission to the main enclosure where entertainment was provided, and a further sum of sixpence for admission to each of several other enclosures (within the main enclosure) where other entertainments were provided; and that the Commonwealth claimed that the plaintiff should pay or account for tax, pursuant to the *Entertainments Tax Assessment Act 1916* and the Regulations made thereunder, in respect of all payments amounting to or exceeding one shilling in the aggregate made by any one person for his admission to the main enclosure and the other enclosures, and intended and threatened to prosecute the plaintiff for offences against the Act and the Regulations if the plaintiff did not so pay or account. The plaintiff claimed declarations that certain of the regulations were invalid, and that the plaintiff was not liable to pay tax on any payments for admission to any entertainment save that it was liable to pay tax on any payment for admission to a separate entertainment which amounted to or exceeded one shilling. The parties concurred in stating a case for the opinion of the Full Court upon the questions whether the regulations referred to were invalid and whether the plaintiff was liable to pay entertainments tax on payments for admission to any entertainment other than that on any single payment for admission to an entertainment which amounted to or exceeded one shilling.

*Held*, by Knox C.J., Isaacs, Higgins, Rich and Starke JJ., that the questions should not be answered on the ground that, the facts upon which the claim to declarations was based being purely hypothetical, the Court should not make a declaratory order; and, by Higgins J., on the ground also that the action was not "properly brought" within the meaning of Order IV., r. 1, of Part I of the *Rules of the High Court*.



## CASE STATED.

H. C. OF A.

1923.

LUNA PARK

LTD.

v.

THE  
COMMON-  
WEALTH.

An action was brought in the High Court by Luna Park Ltd. against the Commonwealth in which the plaintiff by its writ of summons, dated 20th October 1923, claimed (1) a declaration that reg. 29 and/or reg. 30 of Statutory Rules No. 227 of 1917 as amended by Statutory Rules No. 299 of 1918 and Statutory Rules No. 218 of 1920 are or is invalid; (2) a declaration that the plaintiff is not liable to pay entertainments tax on any payment or payments for admission to any entertainment at Luna Park save that the plaintiff is liable to pay entertainments tax on any payment for admission to a separate entertainment which amounts to or exceeds one shilling.

Regs. 29 and 30 of the *Entertainments Tax Regulations* 1917 above referred to are as follows:—"29. When a person is admitted to any part of a place of entertainment and is subsequently admitted to another part or other parts of the place of entertainment, tax shall be payable on the total of the amounts paid for all the admissions as if the total amount had been paid for a single admission. 30. A person who has been admitted to any part of a place of entertainment shall not thereafter be admitted for payment to any other part of the place of entertainment unless and until either—(a) a stamped transfer ticket is issued to him; or (b) a stamped ticket for the full price of admission to such other part of the place of entertainment is issued to him—if the total of the amounts paid in respect of all the admissions is liable to entertainments tax. Penalty: Twenty pounds."

The parties concurred in stating the questions of law arising in the action in the following case for the opinion of the Full Court:—

1. The plaintiff is a company incorporated under the Companies Acts of the State of Victoria.
2. The plaintiff has for several years occupied and now occupies and proposes to continue to occupy a piece of land at St. Kilda in the State of Victoria known as Luna Park.
3. The plaintiff has in the past managed and carried on at Luna Park the business of providing public amusements and entertainments, and proposes and intends to reopen Luna Park on or about 2nd November 1923 for the purpose of managing and carrying on the said business.



H. C. OF A.  
1923.

LUNA PARK  
LTD.  
v.  
THE  
COMMON-  
WEALTH.

4. Luna Park is enclosed by a fence and within the main enclosure are other enclosures and areas within each of which other enclosures and areas other amusements or entertainments are provided.

5. The plaintiff has in the past conducted and proposes and intends to conduct its said business at Luna Park upon the following system : (a) A payment of sixpence per adult for admission to the main enclosure where entertainment or amusement is provided without further payment ; (b) a payment of a further sum of sixpence per adult for admission to each of the other enclosures and areas (within the main enclosure) within each of which other entertainments or amusements are provided ; (c) smaller payments in each case for children.

6. The plaintiff contends that under the system mentioned in par. 5 hereof no entertainments tax will be payable by the plaintiff, and that regs. 29 and 30 of Statutory Rules No. 227 of 1917 as amended by Statutory Rules No. 299 of 1918 and Statutory Rules No. 218 of 1920 are invalid.

7. The defendant, the Commonwealth of Australia, contends that under the system mentioned in par. 5 hereof the plaintiff will be liable to pay entertainments tax on all payments amounting in the aggregate to or exceeding one shilling made by or on behalf of any one person for his admission to the said main enclosure and the said other enclosures and areas.

8. The defendant, the Commonwealth of Australia, claims that the plaintiff should pay or account for entertainments tax upon the basis set out in par. 7 hereof, and intends and threatens to prosecute the plaintiff for offences against the *Entertainments Tax Assessment Act* 1916 and the Regulations thereunder if the plaintiff does not do so.

The questions for the opinion of the High Court are :

- (1) Whether reg. 29 and/or reg. 30 of Statutory Rules No. 227 of 1917 as amended by Statutory Rules No. 299 of 1918 and Statutory Rules No. 218 of 1920 are or is invalid ;
- (2) Whether the plaintiff is liable to pay entertainments tax on payment or payments for admission to any entertainment at Luna Park other than entertainments tax on any



single payment for admission to an entertainment which amounts to or exceeds one shilling.

H. C. OF A.  
1923.

LUNA PARK  
LTD.  
v.  
THE  
COMMON-  
WEALTH.

*Latham K.C.* and *Owen Dixon K.C.* (with them *Spicer*), for the plaintiff. An action for a declaration lies in this case under Order IV., r. 1, of the *Rules of the High Court*. The Court found no difficulty in making a declaratory order in *W. & A. McArthur Ltd. v. Queensland* (1) and *Commonwealth v. Queensland* (2). In the latter case proceedings were entertained as to the validity of a Queensland statute and there was no statement of facts beyond a mere apprehension that the statute would be enforced.

[STARKE J. In that case there was a trespass by the State upon the legislative power of the Commonwealth.

[ISAACS J. In *W. & A. McArthur v. Queensland* (1) there was an allegation that the plaintiff's trade would be destroyed if the statute in question were valid.]

The action is "properly brought" within the meaning of Order IV., r. 1. It is not necessary that there should be a cause of action (*Dyson v. Attorney-General* (3); *Guaranty Trust Co. of New York v. Hannay & Co.* (4)). In *Dyson v. Attorney-General* no more facts were stated to have occurred than in this case.

[KNOX C.J. In that case every fact had occurred upon which the liability of the plaintiff to pay was based; here no such fact has occurred.

[RICH J. referred to *In re Clay*; *Clay v. Booth* (5).]

The fact that a decision against the plaintiff might cause him to alter his mode of conducting Luna Park is not a ground for the Court refusing to make an order (*Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* (6)). The Court has jurisdiction to make a declaratory order, and in the exercise of its discretion it should do so in this case. In exercising its discretion it will have regard to the importance of the matter, to the number of persons affected by it—for, if the tax is payable, every person who is admitted without the tax having been paid is liable to a penalty (sec. 15 (1) of

(1) (1920) 28 C.L.R., 530.

(2) (1920) 29 C.L.R., 1.

(3) (1911) 1 K.B., 410; (1912) 1 Ch.,

(4) (1915) 2 K.B., 536, at p. 557.

(5) (1919) 1 Ch., 66.

(6) (1921) 2 A.C., 438, at p. 449.



H. C. OF A. 1923.  
 LUNA PARK LTD.  
 v.  
 THE COMMON-WEALTH.

the *Entertainments Tax Assessment Act* 1916),—and to the fact that that Act provides no method of appeal (see *Smeeton v. Attorney-General* (1)). Reg. 29 of the *Entertainments Tax Regulations* 1917 is clearly in derogation of the common law rights which the plaintiff claims to exercise. This case is on all fours with *Automatic Totalisators Ltd. v. Federal Commissioner of Taxation* (2). [Counsel also referred to *Barwick v. South-Eastern and Chatham Railway Cos.* (3).]

*Sir Edward Mitchell* K.C. and *C. Gavan Duffy*, for the defendant, did not offer any argument upon this question.

KNOX C.J. In this case I do not think it is necessary to consider whether the Court has jurisdiction to make a declaration, for, even if it had, I do not think the case is one in which the application for a declaration should be entertained. The state of facts on which the claim is based is purely hypothetical—"If the company elects to carry on its business in a certain way, will it be liable to pay a certain tax?" It has always been the rule that the Court does not answer questions based on a hypothetical state of facts. If authority were needed for that, it will be found in the case of *Glasgow Navigation Co. v. Iron Ore Co.* (4), where Lord Loreburn L.C. stated that it was not the function of a Court of law to advise parties as to what would be their rights under a hypothetical state of facts. If this declaration were made, it would have no binding effect in the true sense at all. It would be no more than an abstract opinion in the nature of advice that, if the company did certain things, it would or would not become liable to pay a certain tax. None of the cases we have been referred to, I think, goes as far as that, and in my opinion the questions should not be answered.

ISAACS J. I agree.

HIGGINS J. In concurring with the judgment of the Court I wish to add a few words; because in the previous cases on which Mr.

(1) (1920) 1 Ch., 85.  
 (2) (1920) 27 C.L.R., 513.

(3) (1921) 1 K.B., 187.  
 (4) (1910) A.C., 293, at p. 294.

*Latham* and Mr. *Dixon* rely I had the misfortune to differ from the majority of the Court. In the *McArthur Case* (1) and in the case of *Commonwealth v. Queensland* (2) my personal opinion was, as stated in the reports, that the action did not lie. But I am bound by the decision of the majority, and I loyally accept it. However, I am glad to find that in this case a limit is being put upon this class of actions. There certainly is a difference here from the former cases, and it is regarded by my colleagues as indicating a sufficient limit. Some effect, too, must be given to the additional words inserted in our Order IV., r. 1—words which are not in the corresponding English rule—"the Court may make binding declarations of right in an action properly brought." In my opinion this action is not properly brought. It is all the more important for the Court to watch jealously the limits of its powers when it finds that the Commissioner does not take the point. We might soon be led into a ridiculous position.

I agree that the questions should not be answered.

RICH J. I agree.

STARKE J. I agree. I would only add that the case of *Automatic Totalisators Ltd. v. Federal Commissioner of Taxation* (3), to which Mr. *Dixon* referred, is the nearest to this case, and I am by no means sure that that case does not require further consideration.

*Questions not answered.*

Solicitors for the plaintiff, *Arthur Robinson & Co.*

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

B. L.

(1) (1920) 28 C.L.R., 530.

(2) (1920) 29 C.L.R., 1.

(3) (1920) 27 C.L.R., 513.

H. C. OF A.  
1923.

LUNA PARK  
LTD.  
v.  
THE  
COMMON-  
WEALTH.  
Higgins J.