[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

CONNARE AND ANOTHER,

Ex parte WAWN.

H. C. OF A. 1939.

SYDNEY, *Mar.* 28, 29.

MELBOURNE, *May* 17.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Constitutional Law—Freedom of inter-State trade, commerce and intercourse—State lottery legislation—Sale within State of tickets in lottery lawfully conducted in another State—Prohibition—Object of legislation—Discrimination—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 92—*Lotteries and Art Unions Act* 1901-1929 (*N.S.W.*) (*No.* 34 *of* 1901—*No.* 9 *of* 1929), *sec.* 21.

By sec. 21 of the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.) it is provided: "Whoever sells or offers for sale or accepts any money in respect of the purchase of any ticket or share in a foreign lottery shall be liable to a penalty." A foreign lottery is defined by sec. 19 of that Act to mean any lottery conducted outside the State of New South Wales and whether legal in the place where it is conducted or not.

The applicant offered for sale in Sydney a ticket in a lottery lawfully conducted in Tasmania, and was convicted of an offence under the first-mentioned section.

Held, by *Starke*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Latham* C.J. and *Rich* J. dissenting), that the provisions of sec. 21 of the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.) do not contravene sec. 92 of the Constitution; therefore the applicant was properly convicted.

James v. *The Commonwealth*, (1936) A.C. 578; 55 C.L.R. 1, referred to.

ORDER NISI for prohibition.

John Connare laid an information against Victor Aubrey Wawn of Sydney, alleging that on 22nd November 1938 the defendant was guilty of an offence under sec. 21 of the *Lotteries and Art Unions Act*

1901-1929 (N.S.W.) in that he did at Sydney offer for sale a ticket in a foreign lottery known as Tattersall's Consultation, Number 104, conducted in the State of Tasmania.

Upon the hearing of the information admissions were made on behalf of (*a*) the defendant, that Tattersall's lottery is conducted outside New South Wales, and that it is a foreign lottery within the meaning of the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.); and (*b*) the informant, that according to the law of Tasmania Tattersall's lottery is a legal lottery and that prior to 1900 it was widely known as Tattersall's Consultation.

It was proved that during the course of a conversation had between the informant and the defendant on the subject of lotteries, the defendant said: "I can let you have a ticket at any time in Tatts. or the Golden Casket," to which the informant replied: "In that case there is no time like the present. I would like a couple of tickets in Tatts. if I could get them on the spot," whereupon the defendant handed to the informant two tickets in a lottery conducted by Tattersall's in Tasmania and received from the informant the sum of ten shillings, being five shillings in respect of each ticket. The defendant told the informant that he, the defendant, was definitely in the lottery business, and that he would get tickets for the informant at any time.

The defendant stated in evidence that Tattersall's lottery was in competition with the lottery conducted by the State of New South Wales in pursuance of the *State Lotteries Act* 1930 (N.S.W.), and that it was "run on similar lines" to the State lottery.

The stipendiary magistrate overruled contentions that the facts did not constitute the offence as set forth in sec. 21 of the *Lotteries and Art Unions Act* 1901-1929, and that secs. 19, 20 and 21 of that Act were *ultra vires* of the powers of the State Parliament in that they contravened the provisions of sec. 92 of the Constitution, and convicted the defendant.

Upon the application of the defendant *Rich* J. ordered the informant and the stipendiary magistrate to show cause before the Full Court of the High Court why a writ of prohibition should not be issued to restrain them and each of them from further proceeding on or in respect of the magistrate's adjudication and order, on the

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grounds (*a*) that secs. 19, 20 and 21 of the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.) are in conflict with sec. 92 of the Constitution of the Commonwealth, (*b*) that the said secs. 19, 20 and 21 constituted a restriction upon the freedom of trade, commerce and intercourse among the States within the meaning of sec. 92, and (*c*) that the said sections constituted an attempt by legislation to protect from inter-State competition a State business enterprise known as the State lottery.

The order nisi came on for hearing before the Full Court of the High Court.

Upon the matter being called on for hearing, the State of New South Wales applied to, and obtained from, the court leave to intervene, whereupon the court was informed that, in the circumstances, neither the informant nor the magistrate intended to be represented at the hearing.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

Louat (with him *Storey*), for the applicant. The transaction in this case comes within the meaning of the words "trade, commerce and intercourse" in sec. 92 of the Constitution. Lottery tickets, being property, are properly the subject of trade and commerce (*Champion* v. *Ames* (1); *Adair* v. *United States* (2); *Swift & Co.* v. *United States* (3); *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4); *Hawkey* v. *Stirling* (5); *Bank of India* v. *Wilson* (6); *R.* v. *Vizzard*; *Ex parte Hill* (7); *Lawton* v. *Hickman* (8)).

[EVATT J. referred to *Douglas* v. *Kentucky* (9).]

The doctrine of police power has never been accepted by this court in relation to Australia. Under the Constitution there is no room for a doctrine of police power, and there is no rule that the States preserved the right to protect the health and morals of their people (*R.* v. *Smithers*; *Ex parte Benson* (10)). The decision in

(1) (1903) 188 U.S. 321; 47 Law. Ed. 492.
(2) (1908) 208 U.S. 161, at pp. 176, 177; 52 Law. Ed. 436, at pp. 443, 444.
(3) (1905) 196 U.S. 375, at p. 398; 49 Law. Ed. 518, at p. 525.
(4) (1926) 38 C.L.R. 408, at p. 429.
(5) (1918) 1 K.B. 63, at p. 67.
(6) (1877) 3 Ex. D. 108, at p. 113.
(7) (1933) 50 C.L.R. 30, at p. 88.
(8) (1847) 9 Q.B. 563, at p. 588; 115 E.R. 1390, at p. 1400.
(9) (1897) 168 U.S. 488; 42 Law. Ed. 553.
(10) (1912) 16 C.L.R. 99.

James v. *The Commonwealth* (1) does not lend any colour to the view that there are implied or reserved powers such as *Ex parte Nelson* [*No.* 1] (2) would suggest. Regard must be had to the whole statute in order to ascertain its real object (*Tasmania* v. *Victoria* (3); *James* v. *Cowan* (4)). The combined effect of the decisions in *James* v. *Cowan* (4) and *James* v. *The Commonwealth* (1), is that a law is invalid if its "real object" is to interfere with "freedom at the frontier." Wherever a State law is found in fact to interfere with inter-State trade, it can only be valid if the "real object," so far as the law affects inter-State trade, is itself a function of that trade, having an improving, facilitating or rationalizing character. Thus, in *R.* v. *Vizzard*; *Ex parte Hill* (5), *Roughley* v. *New South Wales*; *Ex parte Beavis* (6), *Ex parte Nelson* [*No.* 1] (2) and *Hartley* v. *Walsh* (7) the real object was the regulation in the interests of, *inter alia*, inter-State trade, disorganized transport, dishonest agents, diseased stock and unhygienic fruits respectively. Contrasted with these cases are *Tasmania* v. *Victoria* (8), *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (9), *James* v. *Cowan* (4) and *James* v. *The Commonwealth* (1), in none of which could there be discovered any real object which was a function of inter-State trade as distinct from the object of interference with freedom. The true explanation of the remarks in *James* v. *Cowan* (10), commencing with the words "If the real object," and concluding with the words "incidentally inter-State trade was affected," is found in the fact that they were used in relation to the anomalous case of compulsory acquisition. The judgment in *James* v. *Cowan* (4) is not concerned with defining the scope of sec. 92; all it decided was that acquisition carried out with a "real object" of restricting inter-State trade is invalid. In *James* v. *The Commonwealth* (1) the Judicial Committee lends no countenance to the view that the references to "famine" &c. are part of an authoritative test of general application. The observation of the Judicial Committee (11)

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1928) 42 C.L.R. 209.
(3) (1935) 52 C.L.R. 157, at pp. 179 et seq.
(4) (1932) A.C. 542; 47 C.L.R. 386.
(5) (1933) 50 C.L.R. 30.
(6) (1928) 42 C.L.R. 162.
(7) (1937) 57 C.L.R. 372.
(8) (1935) 52 C.L.R. 157.
(9) (1926) 38 C.L.R. 408.
(10) (1932) A.C., at pp. 558, 559; 47 C.L.R., at pp. 396, 397.
(11) (1936) A.C., at pp. 624, 625; 55 C.L.R., at p. 53.

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on *Ex parte Nelson* [*No.* 1] (1), and the doubt expressed whether the maxim, *salus populi est suprema lex*, can have any relation to sec. 92 are inconsistent with any implication that the dicta in *James* v. *Cowan* (2) have a general application. The sale here struck at by sec. 21 of the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.) is part of an inter-State transaction (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (3); *R.* v. *Vizzard*; *Ex parte Hill* (4); *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (5); *James* v. *The Commonwealth* (6)). It is the first sale, and definitely, in this case, an essential part of the inter-State transaction. In the matter of the sale of lottery tickets the Act, particularly secs. 19, 20 and 21, discriminates between the New South Wales lottery on the one hand and lotteries established and conducted in other States on the other hand, and is, therefore, invalid (*Fox* v. *Robbins* (7); *Vizzard's Case* (8)). In the absence of evidence to the contrary the legality of those other lotteries must be presumed (*Norris* v. *Woods* (9)).

Weston K.C. (with him *W. J. V. Windeyer*), for the State of New South Wales (intervening). The development of the legislation relating to lotteries is dealt with in *Windeyer* on *Wagers, Gaming and Lotteries in Australia* and *Paul's Police Offences*: See also *Attorney-General* v. *Mercantile Investments Ltd.* (10). The court is entitled to have regard to all relevant legislation existing in 1922, when secs. 19, 20 and 21 of the *Lotteries and Art Unions Act* 1901-1929 were enacted. Such a consideration will show that these provisions are part of a general law aimed at the suppression of lotteries, with a few rigid and safeguarded exceptions under the control of the State. The provisions of the *State Lotteries Act* 1930 (N.S.W.) and the *Charitable Collections Act* 1934 (N.S.W.) are not contrary to this view but support it: See also the *Gaming and Betting Act* 1912 (N.S.W.) and the *Police Offences Act* 1908 (N.S.W.). Sec. 21 is a section which is operative apart from executive action.

(1) (1928) 42 C.L.R. 209.
(2) (1932) A.C. 542; 47 C.L.R. 386.
(3) (1934) 51 C.L.R. 108.
(4) (1933) 50 C.L.R. 30.
(5) (1926) 38 C.L.R. 408.
(6) (1936) A.C. 578; 55 C.L.R. 1.
(7) (1909) 8 C.L.R. 115.
(8) (1933) 50 C.L.R., at pp. 93, 102.
(9) (1926) 26 S.R. (N.S.W.) 234; 43 W.N. (N.S.W.) 43.
(10) (1921) 22 S.R. (N.S.W.) 39; 39 W.N. (N.S.W.) 33.

No subsequent Act should be regarded unless the subsequent Act is of such a character as to alter that enactment. The position is that the character of that enactment has not been altered by subsequent legislation. The true object of the *Lotteries and Art Unions Act* is, in the main, the complete suppression of lotteries; thus the Act survives the test imposed as to its validity having regard to sec. 92 of the Constitution. The *discrimen* of whether a particular Act is good or bad is whether the Act is directed to interfering with or suppressing traffic in tickets in foreign lotteries because they are tickets in foreign lotteries or because they have crossed the border, or whether on the other hand it suppresses traffic in them merely because they are lottery tickets not within the excepted classes. The *Lotteries and Art Unions Act* is not an Act directed to restricting freedom as at the frontier in relation to lottery tickets. Any interference with or stoppage of any inter-State trade in lottery tickets is merely incidental. It is legislation which deals with the suppression of lotteries with indifference as to the country of origin; the use of the word "foreign" is merely an accident of draftsmanship arising out of the history of that type of legislation.

[EVATT J. referred to *Baldwin* v. *Seelig* (1).]

Where, as here, legislation is general in its application it does not infringe sec. 92; if the interference with inter-State trade is incidental it may be direct (*Hartley* v. *Walsh* (2)). The character of an Act should be ascertained from the whole of the Act. A lottery ticket cannot be the subject of trade and commerce within the meaning of sec. 92 (*Champion* v. *Ames* (3)).

Louat, in reply. Secs. 19, 20 and 21 of the *Lotteries and Art Unions Act* show that the Act is directed to inter-State lotteries. The presence of sec. 113 in the Constitution strengthens the implication that sec. 92 extends to the class of laws that might protect the public on moral or health grounds (*Fox* v. *Robbins* (4)), and that implication is further supported by sec. 112 (*Tasmania* v. *Victoria* (5)).

Cur. adv. vult.

(1) (1935) 294 U.S. 511, at p. 525; 79 Law. Ed. 1032, at p. 1039.
(2) (1937) 57 C.L.R. 372.
(3) (1903) 188 U.S., at p. 367; 47 Law. Ed., at p. 505.
(4) (1909) 8 C.L.R. 115.
(5) (1935) 52 C.L.R., at p. 185.

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The following written judgments were delivered :—

LATHAM C.J. The question which arises upon this appeal is whether sec. 92 of the Constitution is infringed by a New South Wales statute which prohibits the sale or offer for sale in New South Wales of tickets in lotteries which are lawful in other States of the Commonwealth.

Sec. 92 of the Constitution, so far as relevant, is in the following terms : " On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

The *Lotteries and Art Unions Act* 1901-1929 of New South Wales contains provisions in general terms prohibiting lotteries and games of chance but permitting charitable lotteries under conditions, and certain art unions. In 1922 the Act was amended by inserting new sections. One of these new sections, sec. 19, was as follows : " The expression foreign lottery in this Act means any lottery conducted or to be conducted outside the State of New South Wales and whether legal in the place where it is conducted or not, or whether it is described as a lottery, or as a sweep, consultation, or golden casket, or called by any other name or designation."

The evidence in the present case shows that a lottery known as Tattersall's Consultation is conducted in Tasmania, that a lottery named the Golden Casket is conducted in Queensland and that both of these lotteries are lawful in the States in which they are conducted. The Government of New South Wales conducts a State lottery under the *State Lotteries Act* 1930.

Sec. 21 of the Act is as follows : " Whosoever sells or offers for sale or accepts any money in respect of the purchase of any ticket or share in a foreign lottery shall be liable to a penalty not exceeding twenty pounds." The appellant was prosecuted for an offence under this section and was convicted. The evidence showed that he was an agent for the sale of tickets in Tattersall's consultation and that he offered tickets for sale and sold them. His only defence was that sec. 21 was invalid because it was an infringement of sec. 92 of the Constitution.

At the outset I call attention to the fact that the section does not penalize persons because they gamble or because they enter

into some particular kind of gambling contracts. Sec. 92 would have no operation in relation to such legislation. Gambling admittedly is not trade and commerce. Sec. 92 does not prevent a State Parliament from regulating or from prohibiting gambling if the State Parliament wishes to do so. The objection in this case is that the State law has selected for prohibition an element in gambling transactions which is trade and commerce, namely, the sale &c. of articles which are commonly bought and sold. It is argued that the State cannot, in order to discourage gambling, use the means of prohibiting inter-State trade and commerce in lottery tickets.

The New South Wales statute prohibits the sale of lottery tickets in lotteries conducted in other States. The prohibition does not depend upon any fraudulent character of such lotteries or upon anything unfair in the manner in which they are conducted. The Parliament of New South Wales has not assumed to say that Tattersall's Consultation in Tasmania and the Golden Casket in Queensland are fraudulent enterprises. The mere fact that a lottery is a foreign lottery makes the sale of tickets in it illegal. Thus the statutory provision is simply a prohibition of trading in tickets in foreign lotteries. The prohibition contained in the section is based simply upon the fact that the lottery tickets are tickets in foreign lotteries, that is, that they are conducted outside New South Wales in another State of the Commonwealth or in some other country. The sale of a ticket in any lottery (lawful or unlawful) conducted in New South Wales would not be a breach of this section and there can be sales of tickets in lawful lotteries conducted in New South Wales which would not infringe any section.

Prohibition of selling an article is an interference with trade in that article (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1); *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (2); *James* v. *The Commonwealth* (3)). Thus prima facie the prohibition of all sales of tickets in lotteries conducted in other States is an interference with trading in those tickets and, as the tickets come from other States, is an interference with inter-State trade.

(1) (1926) 38 C.L.R. 408.
(2) (1934) 51 C.L.R. 108.
(3) (1936) A.C., at pp. 623, 631; 55 C.L.R., pp. 52, 59.

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It is contended for the State of New South Wales (which has been granted leave to intervene in the appeal) that the section only prevents what should be regarded as an illegitimate form of trading and that sec. 92 does not prevent a State parliament from prohibiting the sale of foreign lottery tickets though it may permit or even encourage the sale of tickets in approved local lotteries. But sec. 92 might as well be repealed if any parliament can select any part of inter-State trade and condemn it as illegitimate simply because the parliament objects to any trade taking place in particular articles. It is necessary to inquire whether the Parliament of New South Wales has simply, as it were, disqualified certain inter-State trading of which it elects to disapprove, or whether the challenged provision can be shown to possess a character which removes it from the category of prohibited interference with inter-State trade and commerce.

In *James* v. *The Commonwealth* (1) their Lordships of the Privy Council have made an exposition of sec. 92 which it is the duty of this court to apply. *James* v. *The Commonwealth* (1) shows that some legislative regulation of inter-State trade is permissible. Thus, for example, it is said that sec. 92 does not prevent the prohibition by a parliament (either Federal or State) of "objectional trade practices in inter-State trade" or "illegitimate methods of trading" in such trade (2).

But a mere prohibition of all trade in particular articles is something different from the preventing of objectionable practices or illegitimate methods in trade. In *Fox* v. *Robbins* (3) *Griffith* C.J., referring to a State law requiring a higher licence fee to be paid for selling wine manufactured from fruit grown in another State than for selling other wine, said: "This provision would be quite illusory if a State could impose disabilities upon the sale of the products of other States which are not imposed upon the sale of home products" (4). Absolute prohibition of sale of the products of other States would be an *a-fortiori* case. The passage which I have cited from *Fox* v. *Robbins* (4) was cited with apparent approval

(1) (1936) A.C. 578; 55 C.L.R. 1.
(2) (1936) A.C., at p. 626; 55 C.L.R., at pp. 54, 55.
(3) (1909) 8 C.L.R. 115.
(4) (1909) 8 C.L.R., at pp. 119, 120.

by the Privy Council in *James* v. *The Commonwealth* (1). This principle is very relevant in the present case.

I refer to some passages in *James* v. *The Commonwealth* (2), which further support the view that a mere prohibition of inter-State trade cannot be justified and that such a prohibition is to be regarded as different in kind from a regulation of trade which permits trade to proceed, though subject to conditions imposed by statute.

In *James* v. *The Commonwealth* (2) the importance of *James* v. *Cowan* (3) is said to be that the test of validity which was adopted in that case was whether the object of the Act was to prevent the sale of the commodities in question—whether the Act was directed "against selling to any of the States." Such a prevention of sale was said to be "restriction or prohibition of export from State to State, which necessarily involves an interference with the absolute freedom of trade among the States" (4). In the present case we have a prevention of the sale of Queensland and Tasmanian lottery tickets in New South Wales. It is, I think, plain that trading in such lottery tickets is prevented.

After reference to various statutes which are said to be valid because, though regulating trade, they do not interfere with the freedom of trade in passing across State borders (5), a line is drawn between legitimate regulation and illegitimate prohibition of inter-State trade or intercourse by adopting the criterion of "freedom as at the frontier" (6). This is explained to mean that (in the case of intercourse) there should be no "burden hindrance or restriction based merely on the fact that" (persons) "were not members of the same State" and (in the case of trade) that there should be no "special burden on the goods in the State to which they have come, simply because they have come from the other State" (7).

The application of the principles laid down in *James* v. *The Commonwealth* (2), as I understand them, leads to the conclusion that, as the New South Wales provision now under consideration is a prohibition of trading in lottery tickets simply because they come

(1) (1936) A.C., at p. 617; 55 C.L.R., at p. 46.
(2) (1936) A.C. 578; 55 C.L.R. 1.
(3) (1932) A.C. 542; 47 C.L.R. 386.
(4) (1936) A.C., at p. 623; 55 C.L.R., at p. 52.
(5) (1936) A.C., at pp. 625, 626, 628, 629; 55 C.L.R., at pp. 54, 55, 57.
(6) (1936) A.C., at p. 630; 55 C.L.R., at p. 58.
(7) (1936) A.C., at p. 631; 55 C.L.R., at p. 59.

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from places outside New South Wales including other States, it is obnoxious to sec. 92 of the Constitution unless there are some grounds for distinguishing lottery tickets from other things which are commonly bought and sold. The respondent accordingly contends that lottery tickets cannot be the subject of trade or commerce. The contention is that what is prohibited under the name of the sale of a lottery ticket really is the making of a wagering contract. The transaction between the conductor of the lottery and the first purchaser of a ticket from the conductor of the lottery or from his agent is, it is argued, really the making of a wagering contract of which the ticket is evidence. When an ordinary contract is put into writing and the writing is given by one party to the other, the former party cannot be said to sell the document to the latter party. What is called the sale of a lottery ticket is, it is said, really the same kind of transaction.

Before this argument is considered it should be noted that what sec. 21 of the *Lotteries and Art Union Act* penalizes is selling a foreign lottery ticket or offering it for sale. If it is impossible for any person to sell a lottery ticket then it is impossible to convict any person under the section. Thus it would appear that if the State were to succeed in the argument that a lottery ticket cannot be sold and thus prevent the legislation from being invalidated by sec. 92, the only result would be that no conviction could be obtained under the section because the same argument shows that no person could have been guilty of a breach of the section. This result can be avoided only by attaching some unusual meaning to the words "sell" or "sale" in the section, but that meaning has not been stated.

It must, however, be admitted that the question whether a lottery ticket can be bought or sold in such a way as to make the transaction of buying or selling a transaction in trade or commerce is one of difficulty. The question arose in the United States of America and it was decided in *Champion* v. *Ames* (1) (the *Lottery Case*). In that case it was decided that the carriage of lottery tickets from one State to another by an express company was inter-State commerce. It was further held that Congress could (under the commerce power)

(1) (1903) 188 U.S. 321; 47 Law. Ed. 492.

prohibit such carriage of lottery tickets. There is no provision in the Constitution of the United States corresponding to sec. 92. The case was first argued in February 1901, it was re-argued twice, and it was ultimately decided (in February 1903) by a majority of five justices to four justices. Such a record indicates the difficulty of the problem which confronted the court. It was held by the majority that "These" (lottery) "tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn" (1). The minority took a contrary view, holding that lottery tickets were simply evidence of the existence of contractual relations and "that they are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them" (2). I refer to *Champion* v. *Ames* (3) not as an authority which should in any degree govern the decision of this court, but for the purpose of indicating the dividing line between the two views, one only of which can be adopted by this court.

I agree that entering into a lottery is not in itself a transaction of sale and that a person who "buys" a ticket in a lottery from the conductor of a lottery or his agent makes a wagering contract with the lottery conductor. The section of the New South Wales Act applies not only to such a transaction, but also to the sale of the ticket by such a purchaser to another person. In the latter case there is an assignment of a chose in action. But I am of opinion that a lottery ticket can be bought and sold. The New South Wales legislature was evidently of the same opinion, as the terms of the Act show. The defendant was an agent for the sale of both Tattersall's Consultation tickets and Golden Casket tickets. The evidence is that he sold large numbers of lottery tickets—£130,000 worth in three Golden Casket consultations.

For many years English legislation has dealt with the sale of lottery tickets. There were State lotteries during various periods from 1569 to 1826. The sale of tickets in other lotteries was regulated or prohibited from time to time: See *Paul's Police Offences*, 2nd ed. (1934), pp. 375 et seq.; *Windeyer* on *Wagers, Gaming and Lotteries*

(1) (1903) 188 U.S., at p. 353; 47 Law. Ed., at p. 500.
(2) (1903) 188 U.S., at p. 368; 47 Law. Ed., at p. 506.
(3) (1903) 188 U.S. 321; 47 Law. Ed. 492.

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in Australia, Introduction; *Quan Yick* v. *Hinds* (1); *Encyclopædia Britannica*, 14th ed., vol. 10, p. 11—"Gaming and Wagering". In all States of the Commonwealth there is legislation dealing in express terms with the sale of lottery tickets. This statutory history makes it very difficult to contend that a lottery ticket cannot be the subject matter of a transaction of sale.

It is common to speak of the sale of government bonds, of shares in companies and of railway tickets. The result of such transactions is that the purchaser of the bond becomes a creditor of a government, the purchaser of the share becomes entitled to obtain registration as a member of the company in respect of a particular number of shares, and the intending passenger enters into a contract for carriage by the railway authority. In each case it might be said that the real transaction is not a transaction of sale and purchase. But in each case the transaction does involve in a real sense and in a legal sense an element which is a sale. The transactions involve the delivery of the bond, of the scrip, or of the railway ticket, with a transfer of the property therein to a purchaser unless, in the last case, some special provision prevents such a transfer of property. So in the case of the sale of a lottery ticket there is an element in the transaction which includes the sale of a lottery ticket to a buyer. The ticket is transferred to the buyer so that he becomes the owner of the ticket. This element in the transaction is not the whole of the transaction, but it is the part of the transaction which is dealt with by sec. 21 of the New South Wales Act. It is a trading element in the transaction and it is this which is prohibited by sec. 21: Cf. *Rummens* v. *Hare* (2), where the court distinguishes between the transfer of a document and a transfer of the rights evidenced by the document.

It is further argued on behalf of the State that sec. 21 is not legislation upon the subject of inter-State or foreign trade, but upon the subject of lotteries. It is said that *James* v. *The Commonwealth* (3) shows that it is necessary to look at the character and nature of legislation before considering whether or not it conflicts with sec. 92 of the Constitution, and that if legislation can be assigned to some

(1) (1905) 2 C.L.R. 345, at pp. 356, 357.

(2) (1876) 1 Ex. D. 169.

(3) (1936) A.C. 578; 55 C.L.R. 1.

other category than that of "trade and commerce legislation," then the fact that the legislation may interfere with trade and commerce to some extent does not necessarily make it invalid: See *James* v. *The Commonwealth* (1). For example, it is said that a man may be arrested for crime while about to cross a State frontier in the course of a trade operation and that such an arrest is no infringement of sec. 92 (2). Accordingly it is argued in this case that the Act is directed generally at the suppression of lotteries subject to exceptions, and that an Act which is really dealing with suppression of lotteries ought not to be regarded as dealing with trade and commerce, although it may have an effect upon trade and commerce. It is difficult, however, to assign lottery tickets to a class of articles which are criminal in nature or which, for some other reason, can be regarded as not articles of trade and commerce. Doubtless sec. 92 does not prevent the States from punishing the sale of obscene pictures or writings, or from preventing the sale of diseased meat, or other unwholesome food, or of impure or dangerous drugs. But can lottery tickets in Australia be placed in the same class as these articles?

It is true that very strong views are entertained by many people upon the subject of lotteries. Those views were admirably expressed in 1850 in the case of *Phalen* v. *Virginia* (3), a case which has frequently been cited in later decisions:—"Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple" (4). It would be pleasing to adopt these moral sentiments as the basis of a judgment in support of State legislation directed towards the suppression of lotteries. But it is not for this court to set itself up as a general *censor morum*. The legislatures of all the Australian States permit lotteries subject to conditions. The court should not profess to ignore the fact that

(1) (1936) A.C., at pp. 625, 630; 55 C.L.R., at pp. 54-58.
(2) (1936) A.C., at p. 630; 55 C.L.R., at p. 58.
(3) (1850) 49 U.S. 163; 12 Law. Ed. 1030.
(4) (1850) 49 U.S., at p. 168; 12 Law. Ed., at p. 1033.

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lotteries on a large scale are conducted in New South Wales, Queensland and Tasmania with the support of, and to an extent under the active management of, the government. Whatever my opinion as to the social and economic effect of lotteries may be, I find myself unable, in this state of Australian legislation, to justify as a judicial act the condemnation of all lotteries as a moral pestilence so as necessarily to remove the sale of lottery tickets from the category of legitimate trade and commerce and to place it in a separate legislative compartment.

It has been suggested that, while a State may be prepared to allow lotteries to be conducted within the State subject to the control of laws administered by the officials of the State, it may yet properly be concerned to protect its people from other lotteries over which the State has no control which may possibly be conducted in a fraudulent manner. Such an attitude is readily intelligible and it may constitute the best practicable and available means of dealing with a very difficult subject. But such considerations cannot exclude the application of a relevant constitutional prohibition. Further, the legislation in question does not base itself upon the presence of any fraud or improper practice in the management of a lottery. It is not for this court to presume that, while lotteries conducted in New South Wales are honestly conducted, lotteries in other States are or may be dishonestly conducted. The legislation cannot be supported as directed towards the prevention of fraudulent or undesirable practices in connection with the sale of lottery tickets. It does not regulate the sale of foreign lottery tickets. It simply prohibits such sale.

In the course of the argument various analogous cases were suggested. I take one for the purpose of illustration. Very strong opinions are held by many persons upon the subject of smoking tobacco. They regard it as a positive vice. Others regard it as an undesirable and very objectionable habit. If a parliament of a State took this view would it be open to that parliament, in the face of sec. 92, to prohibit the sale within its borders of all tobacco or of all tobacco brought from other States? In my opinion such legislation would be invalid and such legislation could not be distinguished in principle from the legislation under consideration in this case.

Sec. 92 prevents any parliament, whether Federal or State (*James* v. *The Commonwealth* (1)), from merely disqualifying an article from entry into inter-State trade, though, according to the same case, it permits at least some regulation of any inter-State trade. A parliament may prescribe some rules according to which such trade may be carried on, but it cannot merely prohibit it.

The kind of difficulty which arises in this case was actually foreseen in the case of intoxicating liquor. It was realized that sec. 92 would protect the sale in one State of such liquor brought from another State. Accordingly sec. 113 of the Constitution provided as follows: "All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State." There is no provision corresponding to sec. 113 dealing with or affecting the subject of lottery tickets.

Not without difficulty the Privy Council has, in *James* v. *The Commonwealth* (1), saved from the operation of sec. 92 pure food and health laws, traffic and transport regulation, and other legislation specifically mentioned in the judgment. But I have been unable to find in *James* v. *The Commonwealth* (1) any principle upon which reliance can be placed in upholding the provision which is challenged in this case—a provision which operates, in the case of lottery tickets brought from another State, merely to prohibit their sale.

For the reasons which I have stated I am of opinion that lottery tickets can be bought and sold and can therefore be the subject matter of trade and commerce. Sec. 21 of the New South Wales Act penalizes the sale of "foreign lottery tickets." Accordingly it interferes with the freedom of sale of lottery tickets coming from other States as freedom of sale is described and illustrated, rather than precisely defined, in *James* v. *The Commonwealth* (1).

In my opinion sec. 21 of the *Lotteries and Art Unions Act* (N.S.W.) is therefore invalid. I recognize that such a decision may be surprising and, indeed, alarming to many, but a doctrine of free trade is not consistent with a practice of prohibiting trade.

In my opinion the appeal should be allowed.

(1) (1936) A.C. 578; 55 C.L.R. 1.

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RICH J. In this case I granted a rule nisi for prohibition so that an appeal under sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1937 might be heard in this court in a matter alleged to concern the interpretation of the Constitution.

The appellant was prosecuted under the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.) for offering for sale in Sydney a ticket in a foreign lottery, known as Tattersall's Consultation, conducted in Tasmania. That consultation is carried on in that State under the authority of the *Gaming Act* 1935 (Tas.) and the Regulations dated 18th February 1938 and published in the Tasmanian *Government Gazette*, 22nd February 1938, p. 206 (amended 18th April 1939).

The facts which gave rise to the prosecution are that the appellant, who was engaged in the lottery ticket business and was the authorized agent of Tattersall's lottery, offered to let the informant have a ticket at any time in Tattersalls. The informant then said :—"In that case there is no time like the present. I would like a couple of tickets in Tatts. if I could get them on the spot." The appellant then gave him two tickets, for which he paid.

The effect of the *Lotteries and Art Unions Act* 1901-1929, under which the prosecution was launched, is to prohibit and penalize the sale of tickets and shares in lotteries conducted in or outside the State, raffles, art unions, &c. being excepted. The expression "foreign lottery" means any lottery conducted outside the State of New South Wales and whether legal in the place where it is conducted or not. The *State Lotteries Act* 1930 makes special provision for the promotion of a State lottery and for the immunity from the sanctions imposed by the *Lotteries and Art Unions Act* 1901-1929 of subscribers or contributors to a State lottery and of any person concerned in the promotion or conduct of a State lottery. The result of the offering for sale and the purchase of the ticket was that, according to the evidence, the informant, through the office of the appellant, was induced to and did enter into a transaction with the promoters of Tattersall's Consultation in Tasmania. What was done by the appellant and the informant was an important step in bringing about a relationship between the informant in New South Wales and the promoters of Tattersall's Consultation which had the following consequences :—The payment

of money to the promoters of Tattersall's in Tasmania through their agent in New South Wales; a right in the informant to an interest in a lottery lawful in the State where it was being conducted; a right should the appellant be successful to a sum of money—and such a sum of money could lawfully be recovered in an appropriate court, since in Tasmania the lottery carried on by the promoters of Tattersall's is lawful. The selling or offering for sale of a ticket is merely a step in a transaction which has the consequences mentioned. While it may be said that the taking part in a lottery such as Tattersall's may not amount to trade or commerce, it cannot be said that it does not amount to "intercourse" between the States. It may be suggested also with some force that the attempt of the legislature to prevent residents in New South Wales from taking part in lotteries in other States and which are lawful in such other States is not unconnected with the object of allowing an advantage for the State lottery of New South Wales at the expense of lotteries legally established in other States. The Act prevents the sale of tickets obtained from Tasmania. It does not prevent the importation of tickets, but only their sale after importation. The prohibition imposed by the Act is absolute. The Act does not merely control or regulate traffic in the tickets by, for example, prescribing sales by persons licensed by the State or their sale in certain places or at specified hours.

For these reasons I think that sec. 21 of the *Lotteries and Art Unions Act* 1901-1929 is obnoxious to sec. 92 of the Constitution and the appeal should be allowed.

STARKE J. Appeal by way of order nisi for prohibition pursuant to appellate rules of this court, sec. IV.

The appellant was convicted of an offence under the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.) for that he did offer for sale a ticket in a foreign lottery known as Tattersall's Consultation, conducted in the State of Tasmania. Tattersall's Consultations, it appears, are lotteries lawfully conducted in Tasmania under the law of that State: See *Gaming Act* 1935 (Tas.), Part II. Numbered tickets in these lotteries are issued and the holders of winning numbers, which are drawn by chance, become entitled to money prizes.

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The appellant is a manufacturing chemist carrying on his business in Sydney, New South Wales. The respondent, Connare, went to his place of business, and some conversation ensued on the subject of lotteries. Ultimately the appellant said to the respondent: "I can let you have a ticket at any time in Tatts." Connare replied: "In that case there is no time like the present. I would like a couple of tickets in Tatts. if I could get them on the spot." The appellant produced two tickets in one of Tattersall's Consultations or lotteries, and gave them to Connare on his payment of the sum of five shillings for each ticket. The appellant added that he could get tickets for Connare at any time.

The *Lotteries and Art Unions Act* 1901-1929 provides in sec. 21: "Whosoever sells or offers for sale or accepts any money in respect of the purchase of any ticket or share in a foreign lottery shall be liable to a penalty." A foreign lottery (sec. 19) means a lottery conducted outside the State of New South Wales.

It is now contended that this provision contravenes sec. 92 of the Constitution, which enacts that trade, commerce and intercourse among the States shall be absolutely free.

Lotteries are but a form of gambling, but it is claimed that the tickets had a money value and were the subject of trade and commerce and consequently that a sale in one State of tickets in a lottery lawfully established in another State constituted trade or commerce among the States: See *Lottery Case, Champion* v. *Ames* (1). And it is said that the New South Wales Act, sec. 21, interferes with trade and commerce among the States because it hinders or restricts the proprietors of Tattersall's from selling or placing their lottery tickets in New South Wales.

But there are observations in *Roughley* v. *New South Wales*; *Ex parte Beavis* (2) which suggest that no element of inter-State trade exists in the present case. *Knox* C.J. quoted there with approval the following passage from *Hopkins* v. *United States* (3): —"Granting that the cattle themselves, because coming from another State, are articles of inter-State commerce, yet it does not therefore

(1) (1903) 188 U.S. 321; 47 Law. Ed. 492.
(2) (1928) 42 C.L.R. 162.
(3) (1898) 171 U.S. 578, at p. 591; 43 Law. Ed. 290, at p. 295.

follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of inter-State trade. The commission agent in selling the cattle for their owner simply aids him in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in inter-State commerce, nor is his agreement with others engaged in the same business as to the terms upon which they would provide those facilities, rendered void as a contract in restraint of that commerce": See per *Knox* C.J. (1); per *Higgins* J. (2); per *Gavan Duffy* J. (3). The farm-produce agents did not, in the opinion of *Knox* C.J., in *Roughley's Case* (4), act as servants of the producers, and the business which each of them carried on was his own business of commission agent and not the business of the grower by whom the produce was consigned.

So in the present case it may be said that the appellant was not the agent of Tattersall's for the sale of lottery tickets and that the sale of lottery tickets was wholly his local or domestic business. But I venture to observe in the present case that the operations of the New South Wales Act may be said to restrict or hinder the proprietors of Tattersall's Consultations from selling their lottery tickets in New South Wales (*O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (5)).

But it is unnecessary in the present case to decide whether the sale in this case was an intra-State or an inter-State transaction because, on the authorities as they stand, the New South Wales Act does not contravene the provisions of sec. 92.

The freedom of trade, commerce and intercourse among the States, enacted by sec. 92 of the Constitution, means freedom at the frontier or in respect of goods passing into or out of the State (*James* v. *The Commonwealth* (6)). But as I understand the authorities the question whether that freedom has been restricted or burdened

(1) (1928) 42 C.L.R., at pp. 180, 181.
(2) (1928) 42 C.L.R., at pp. 195, 196.
(3) (1928) 42 C.L.R., at p. 204.
(4) (1928) 42 C.L.R., at p. 178.
(5) (1935) 52 C.L.R. 189, at p. 209.
(6) (1936) A.C., at p. 630; 55 C.L.R., at p. 58.

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depends upon the true character and effect of the Act. All the facts and circumstances such as the nature of the Act, its operation, the character of the business involved and its actual effect on the flow of commerce must be examined.

The main purpose of the *Lotteries and Art Unions Act* 1901-1929 is to prevent or suppress lotteries, and particularly, in secs. 19, 20 and 21, foreign lotteries. It is aimed at preventing illegitimate methods of trading, if sales of lottery tickets be regarded as trading: See *James* v. *The Commonwealth* (1). It is said, however, that the legislation of New South Wales allows State lotteries (1930 No. 51) and discriminates against lotteries established in other States. There is no question that State lotteries are allowed in New South Wales under strict supervision and that the sale of tickets in foreign lotteries is prohibited. Foreign lotteries, over which New South Wales has no control, are regarded as inimical to the welfare of citizens of New South Wales, and an illegitimate method of obtaining their money. It may be that the legislation has also the effect of protecting the State lotteries from competition. But the true character of the *Lotteries and Art Unions Act* of New South Wales, secs. 19, 20 and 21, is to suppress gambling in foreign lottery tickets, and examined from the historical point of view, from the character of the Act, its function and its effect upon the flow of commerce, the Act does not, according to the criterion already mentioned, restrict or hinder the freedom of any trade across the frontier of the States.

The appeal should be dismissed and the order nisi discharged.

DIXON J. Sec. 21 of the *Lotteries and Art Unions Act* 1901-1929 of New South Wales enacts that whosoever sells or offers for sale or accepts any money in respect of the purchase of any ticket or share in a foreign lottery, that is, a lottery conducted outside the State, shall be liable to a penalty not exceeding £20. Sec. 3 (4) of the same Act provides that whosoever sells or offers for sale any ticket or share in a lottery or raffle or accepts any money in respect of the purchase of any such ticket or share shall be liable to a penalty not exceeding £5. Apart from a difference in the penalties, these

(1) (1936) A.C., at p. 626; 55 C.L.R., at p. 55.

provisions combine to form a uniform suppression of the sale of lottery tickets whether the lottery is conducted inside or outside the State. Exceptions are made in favour of permitted raffles for charitable purposes or the like (secs. 4-6). The *State Lotteries Act* 1930 then makes lawful a State lottery promoted and conducted by the Colonial Treasurer of New South Wales.

In this state of the law of New South Wales the appellant was prosecuted for offering for sale in Sydney a ticket in a foreign lottery known as Tattersall's Consultation conducted in Tasmania.

The evidence showed that the appellant, who said that he was in the lottery business, proposed to the respondent, the informant in the prosecution, that he should buy tickets in a lottery outside New South Wales and said that at any time he could give him a ticket in Tattersall's or the Queensland Golden Casket. There and then the informant bought and paid for two tickets in a Tattersall's Consultation. It is this transaction which is relied on as constituting the offence charged.

The appellant was convicted before the magistrate and now appeals to this court under sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1937 on the footing that a question has arisen under the Constitution or involving its interpretation. That question is whether the appellant was entitled under sec. 92 of the Constitution to immunity from the operation of the provisions of the New South Wales statute.

In the present state of authority, it is wise, I think, at all events for me, to decide any case under sec. 92 on the narrowest grounds which the facts provide.

There are two reasons which, in conjunction, appear to me sufficient to establish that the appellant obtains under sec. 92 no protection from the sanctions of State law for the transaction with the informant.

In the first place, the transaction was not in itself a transaction of inter-State trade, commerce, or intercourse. It was a " sale " in New South Wales of a ticket then in New South Wales. No doubt, juristically analysed, it was not a sale but the making of an agreement consisting of an offer in writing by the appellant on behalf of his Tasmanian principals in consideration of a payment in cash then and there made to him. But the fact that one principal to the

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contract is in another State does not give the agreement the character of inter-State commerce. It remains an intra-State transaction.

It follows that the transaction itself could not fall under the direct protection of sec. 92. But a law which forbids or burdens an intra-State transaction may operate to hinder or prevent some anterior dealing of an inter-State character and therefore be bad. Thus, an attempt to place a burden upon the first sale of goods after their introduction into a State well might be obnoxious to sec. 92 because of its tendency to prevent or discourage the importation of such goods from another State. It therefore does not follow from the mere fact that the sale by the appellant to the respondent of the ticket in Tattersalls was an intra-State transaction that it is effectually penalized by sec. 21 of the *Lotteries and Art Unions Act* 1901-1929. For the contention would still remain that no State legislation could place a burden on the introduction into New South Wales of lottery tickets from other States, things which the appellant seeks to bring into the same category as commodities that are the subjects of trade and commerce.

The second matter or reason to which I referred appears to me to answer this contention. It is that, apart from the State lottery and permitted charitable raffles, the New South Wales legislation suppresses uniformly the sale of all lottery tickets in New South Wales. In form of expression, the legislation forbids under a separate heading the sale of foreign tickets. But the content and not the form of the law must be considered to discover whether it detracts from the freedom guaranteed by sec. 92. The New South Wales law does not by its content discriminate against foreign lottery tickets. It does not forbid them because they come over the border but because they are lottery tickets and because all lotteries except the State lottery are uniformly suppressed and the sale of tickets in all other lotteries is made an offence.

In my opinion, therefore, sec. 21 is not entirely void but is capable at least of operating upon an intra-State sale of a lottery ticket, such as the sale made by the appellant.

For these reasons I think the appeal should be dismissed with costs.

EVATT J. The present appellant was convicted for having at Sydney in the State of New South Wales offered for sale a ticket in a "foreign" lottery known as Tattersall's Consultation conducted in the State of Tasmania. The offence is created by sec. 21 of the *Lotteries and Art Unions Act* 1901-1929, which is designed to suppress the business of inducing residents in New South Wales to "invest" money in all foreign lotteries, i.e., lotteries operated outside the State. The section provides: "Whosoever sells or offers for sale or accepts any money in respect of the purchase of any ticket or share in a foreign lottery shall be liable to a penalty not exceeding twenty pounds."

It is contended that as sec. 21 applies, *inter alia*, to lotteries conducted in Tasmania and the other States of the Commonwealth, the sale in New South Wales of tickets and shares in such lotteries cannot lawfully be penalized by that State, being protected by sec. 92 of the Constitution, which guarantees the freedom of inter-State marketing.

As a result of the decisions of this court in *R.* v. *Vizzard*; *Ex parte Hill* (1), *Gilpin's Case* (2) and *James* v. *The Commonwealth* (3), and the final pronouncement of the Privy Council in *James* v. *The Commonwealth* (4), any decision that the legislative power exerted by a State is inconsistent with sec. 92 necessarily involves an analogous restriction of the legislative power of the Commonwealth in relation to inter-State trade and commerce. For instance, a decision in the present case that the State of New South Wales is incompetent to prevent its citizens from buying tickets in those lotteries conducted outside the State which happen to be conducted in Australia involves a ruling that the Commonwealth Parliament cannot legislate so as to prohibit inter-State dealings or communications in relation to the purchase of lottery shares. In substance, therefore, the appellant asks us to declare that sec. 92 has created an overriding constitutional right to traffic or invest in lotteries so long as the trafficker or investor can succeed in placing some State boundary or other between himself and the conductor of the lottery. In my opinion such a proposition cannot be supported in principle

(1) (1933) 50 C.L.R. 30.
(2) (1935) 52 C.L.R. 189.
(3) (1935) 52 C.L.R. 570.
(4) (1936) A.C. 578; 55 C.L.R. 1.

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or by reference to authority. For it is obvious that the appellant's argument also involves the assertion of the constitutional right of a citizen, so long as he can rely upon, or if necessary artificially create, some inter-State connection in his business, to sell indecent and obscene publications, diseased cattle, impure foods, unbranded poisons, unstamped silver, ungraded fruit and so forth (*Hartley* v. *Walsh* (1)). I wish that such a proposition could be characterized in the language which first Sir *Samuel Griffith* and later Sir *Frank Gavan Duffy* would have employed. Ratiocination is good, but common sense is necessary. At times, as Mr. Justice *Holmes* pointed out, " the decision will depend on a judgment or intuition more subtle than any articulate major premise " (*Lochner* v. *New York* (2)).

In the interpretation of sec. 92 it is permissible to accept some postulates or axioms demanded alike by the dictates of common sense and by some knowledge of what was being attempted by the founders of the Australian Commonwealth. I think that the method of approach adopted in the Privy Council's decision in *James* v. *The Commonwealth* (3) would suggest the immediate rejection of the constitutional right claimed by the present applicant.

For the purposes of the present appeal it is best to assume in the appellant's favour (*a*) that he is conducting his business of selling tickets by the method most likely to attract the operation of sec. 92, and also (*b*) that the transaction by which an operator of lotteries in one State sells shares or tickets therein to purchasers in another State possesses a sufficient inter-State character to enable the Commonwealth Parliament to regulate such transactions by virtue of its legislative power under sec. 51 (i) (controlled, of course, by sec. 92). The second assumption was disputed in the powerful reasoning of the minority of the Supreme Court of the United States in the *Lottery Case* (*Champion* v. *Ames* (4)). But the opinion since accepted in the United States is that there may be a sufficient inter-State element in lottery transactions to attract the legislative power over inter-State commerce which in the United States is

(1) (1937) 57 C.L.R., at pp. 394, 395.
(2) (1905) 198 U.S. 45, at p. 76; 49 Law. Ed. 937.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1903) 188 U.S. 321; 47 Law. Ed. 492.

vested in Congress alone, but which in Australia is vested in the Commonwealth and State legislatures concurrently.

Making these assumptions and concessions I am of opinion that the guarantee contained in sec. 92 has nothing whatever to say on the topic of " inter-State " lotteries and cannot be invoked to prevent either the suppression or the restriction in the public interest of the practice of gambling or " investing " in such lotteries.

I use the word " investment " advisedly, because here the New South Wales legislature might easily have framed its legislation so as to forbid the employment of money in a gambling syndicate, and so evidenced that its object is to discourage or suppress gaming. The fact that the legislature has chosen for penalty the seller of lottery tickets and the point of sale indicates only this, that the general legislative scheme is thought to be best forwarded by such method of enforcement.

The *Lotteries and Art Unions Act* is aimed not only at prohibiting " investment " by citizens of New South Wales in lotteries conducted outside the State whether in Australia or elsewhere; it also restricts the conduct of lotteries within New South Wales. Certain exceptions have been introduced, but very strict conditions are imposed upon those who are specially permitted to conduct lotteries within the State. Long after the year 1922, when the sections dealing with foreign lotteries were inserted, the State of New South Wales itself commenced to conduct a lottery, the profits from which go to swell the general revenues of the State. The prohibition of the sale of tickets in foreign lotteries is undoubtedly intended to suppress investment by New South Wales citizens in lotteries conducted outside that State under conditions which are beyond the control of its legislature and where " investors " might even be deprived of a fair chance of winning. The fact that in Queensland and Tasmania lotteries are conducted which are above suspicion is quite accidental and irrelevant. The New South Wales legislation has its analogue in that of almost every State of the Commonwealth.

Are the legislatures of the States precluded by sec. 92 of the Constitution from giving full effect to a policy of suppressing and controlling lotteries ? It is not for this court to lay down that such a legislative policy cannot be fully enforced once we perceive the

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ground and reason of the legislation. A sufficient reason or ground for the policy of lottery suppression was expressed in *Douglas* v. *Kentucky* (1), where the Supreme Court of the United States said :—

> "This court had occasion many years ago to say that the common forms of gambling were comparatively innocuous when placed in contrast with the widespread pestilence of lotteries ; that the former were confined to a few persons and places, while the latter infested the whole community, entered every dwelling, reached every class, preyed upon the hard earnings of the poor, and plundered the ignorant and simple. Is a State forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results ? Can the legislature of a State contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lotteries ? " (2).

For New South Wales, counsel pointed out that sec. 21 of the Act, under which the conviction was had, does not prohibit the very act of bringing lottery tickets into the State or sending money out of it. In form, therefore, the legislation is distinguishable from that considered by this court in *Ex parte Nelson* [*No.* 1] (3), where a proclamation issued under the New South Wales *Stock Act* 1901 had forbidden not the sale in New South Wales of cattle introduced from an infected area situated in Queensland, but the actual introduction into New South Wales of such cattle unless the cattle had been dipped so as to prevent the spread of tick or Texas fever. However, if the *Stock Act* 1901 had been framed so as to prohibit the sale or offering for sale in New South Wales of cattle which had been introduced from an infected area outside the State without compliance with the dipping requirement, the effect upon the trade in cattle between the two States would not have been substantially different. Where a State directly prohibits the importation of diseased cattle, the business of an individual trader or importer may be interfered with no more than in the case where the State's regulation is applied after the act of importation.

In my opinion, the decision in *Ex parte Nelson* [*No.* 1] (3), if considered solely in relation to the actual regulation imposed by the relevant New South Wales proclamation, was right. In substance the court considered that the requirement of dipping suspected cattle

(1) (1897) 168 U.S. 488 ; 42 Law. Ed. 553.

(2) (1897) 168 U.S., at p. 496 ; 42 Law. Ed., at p. 555.

(3) (1928) 42 C.L.R. 209.

as a precaution against the spread of Texas fever or tick was a genuine and relevant health requirement, and so far from being an impediment to inter-State trade was rather an aid to its safe and proper conduct.

There is nothing in *Tasmania* v. *Victoria* (1) which runs counter to the decision in *Ex parte Nelson* [*No.* 1] (2) as thus explained. The former decision was based upon the finding that although Victoria purported to restrict the importation of Tasmanian potatoes by reference to health regulations contained in its *Vegetation and Vine Diseases Act* 1928, it was established or admitted that the supposed health regulation was neither a genuine nor a relevant provision in relation to imported potatoes. The majority judgment (3) carefully distinguished *Ex parte Nelson* [*No.* 1] (2) and was based on the view that the absence of any nexus between potatoes from Tasmania and the spread of a particular plant disease in Victoria left the offending regulation standing as an almost undisguised prohibition of trade in potatoes.

Here it should be stressed that the judgment of *Isaacs* J. in *Ex parte Nelson* [*No.* 1] (2) was based upon the principle that, as the New South Wales proclamation required the dipping of certain cattle arriving from Queensland, it was obviously a *regulation* of inter-State trade, but *McArthur's Case* (4) excluded from State legislative control inter-State trade in all its aspects. In his judgment *Isaacs* J. emphasizes this point over and over again. Sec. 92, he says, "*withdraws from the States what would otherwise have been a concurrent power*" (5). Having regard to sec. 51 (i), conferring upon the Commonwealth Parliament the power to regulate inter-State trade and commerce, sec. 92, in his opinion, had the effect of "*making the Commonwealth power exclusive*" (6). It followed in *Isaacs* J.'s view that every attempt by a State to legislate in relation to inter-State commerce was null and void (7). Had the court been compelled to accept the principle that the State's power exists concurrently with that of the Commonwealth it is

(1) (1935) 52 C.L.R. 157.
(2) (1928) 42 C.L.R. 209.
(3) (1935) 52 C.L.R., at p. 169.
(4) (1920) 28 C.L.R. 530.
(5) (1928) 42 C.L.R., at p. 224.
(6) (1928) 42 C.L.R., at p. 234.
(7) (1928) 42 C.L.R., at pp. 236, 237.

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certain that the conclusion in *Ex parte Nelson* [*No.* 1] (1) would have been acquiesced in by all members of this court.

An analogous opinion to that adopted by *Isaacs* J. in *Nelson's Case* (1) was expressed by *Dixon* J. in his dissenting judgment in *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (2), where he gives an illustration which seems to me to give point to the fundamental difference between the reasoning of *Isaacs* J. in *Nelson's Case* (1) and that of the Privy Council in *James* v. *The Commonwealth* (3). *Dixon* J. said :—

> "A deserting husband might be arrested under a law of a State notwithstanding that his destination lay over the border. But if the State law made his liability to arrest depend not on the fact of desertion but upon his attempting to leave the State, I should think that sec. 92 would invalidate it. In the first case, his inter-State journey might be interrupted but only as a consequence produced by a law which had no reference to any aspect of trade, commerce and intercourse among the States. In the other case, the State boundary is adopted by the law as the limit of the deserting husband's movement; the inter-State character of his flight is made the reason for his detention" (4).

In my opinion it is clear that notwithstanding sec. 92 the legislation of a State can authorize the arrest of a wife deserter not merely where he has broken the State law by deserting his wife, but also where, leaving his wife still deserted and unprovided for, he is attempting to leave the jurisdiction. In such a case the State boundary is selected as creating a liability to arrest not because it marks the beginning of the territorial area of another State or of the high seas, or because the State is impeding inter-State trade, but because the State boundary also marks out the limit of the State's territorial jurisdiction. To take an analogous illustration, it may be noted that one of the essential requirements of the modern procedure for arrest on mesne process is that the defendant is about to remove himself from the territorial jurisdiction of the State: Cf. *Arrest on Mesne Process Act* 1902 (N.S.W.), sec. 5 (*c*).

Since the decision of the Privy Council in *James* v. *The Commonwealth* (3) the foundation of the reasoning upon which the dissenting judgments in *Nelson's Case* (1) were based has been destroyed. Sec. 51 (i) does not give the Commonwealth an exclusive power to

(1) (1928) 42 C.L.R. 209.
(2) (1935) 52 C.L.R., at pp. 202 et seq.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1935) 52 C.L.R., at pp. 205, 206.

regulate inter-State trade. Dealing with certain passages from *R.* v. *Vizzard*; *Ex parte Hill* (1), the Privy Council said: "If this reasoning, which in *Vizzard's Case* (1) was primarily applied to the States, is, as it seems to be, correct, then in principle it applies *mutatis mutandis* to the Commonwealth's powers under sec. 51 (i) and shows that sec. 51 (i) has a wider range than that covered by sec. 92" (2).

Having regard to the analysis of the prior decisions of this court which was made by the Privy Council in *James* v. *The Commonwealth* (3), it should be taken that in *Tasmania* v. *Victoria* (4) this court was of opinion that there had been an interference with trade freedom as at the frontier, whereas in *Nelson's Case* (5) the dipping restriction was in the circumstances rightly held not to be an interference with such freedom, which alone is guaranteed by sec. 92. "In every case," said Lord *Wright*, "it must be a question of fact whether there is an interference with this freedom of passage" (6). The facts in *Tasmania* v. *Victoria* (4) differed considerably from those in *Nelson's Case* (5).

Further, the correctness of *Nelson's Case* (5) was not denied by the Privy Council in *James* v. *The Commonwealth* (3). It was only said:—"It is certainly difficult to read into the express words of sec. 92 an implied limitation based on public policy . . . But the question whether in proper cases the maxim, *salus populi est suprema lex*, could be taken to override sec. 92 is one of great complexity" (7).

Undoubtedly the fact that by a particular legislative provision the State is genuinely endeavouring to restrict the spread of disease (although at the same time it is directly regulating certain aspects of inter-State commerce) may in the circumstances tend to show that freedom of the frontier is not being impaired. In such cases, however, the reason is, not that provisions directed towards the prevention of disease are an *exception* carved out of sec. 92, but that sec. 92, properly construed and properly applied, does not prohibit the

(1) (1935) 50 C.L.R. 30.
(2) (1936) A.C., at p. 622; 55 C.L.R., at p. 51.
(3) (1936) A.C. 578; 55 C.L.R. 1.
(4) (1935) 52 C.L.R. 157.
(5) (1928) 42 C.L.R. 209.
(6) (1936) A.C., at p. 631; 55 C.L.R., at p. 59.
(7) (1936) A.C., at pp. 624, 625; 55 C.L.R., at p. 53.

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States from exercising a particular precautionary power creating no real barrier against inter-State trade. This distinction was adverted to by Lord *Atkin* in *James* v. *Cowan* (1), where the State legislative power sought to be exercised was the power of acquisition. There an executive power created by statute was made expressly subject to sec. 92.

"If," said Lord *Atkin*, "the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the legislature itself had imposed the commercial restrictions. The Constitution is not to be mocked by substituting executive for legislative interference with freedom" (2).

The above statement was the Privy Council's short and conclusive answer to the argument that in no case whatever can a State Act, which acquires property within its borders, constitute an infringement of sec. 92. The answer is that the State's power of acquisition *may* be utilized in order to place restrictions upon inter-State commerce just as it *may* be utilized to prevent the spread of disease or the onset of famine. In each case the effect of the legislation on the inter-State flow of certain commodities may be noticeable or considerable. In the one case sec. 92 is infringed, in the other there may be no infringement. And it is not material whether the legislature acts directly or through the executive.

"It may be conceded," said Lord *Atkin*, "that, even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected" (3). In the case of State legislation *in its ordinary form*, analogous distinctions may be valuable; for "it is impossible to accept the theory that, in applying sec. 92, one need not look past the mere operation of the State law upon the inter-State trader, traveller or carrier and that one should disregard the nature and character of the State law which is impugned" (4).

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.
(3) (1932) A.C., at pp. 558, 559.
(4) (1933) 50 C.L.R., at p. 80.

It does not necessarily follow from the fact that the State legislature or executive is dealing to some extent with the subject of disease, that sec. 92 is not being infringed. But the pursuit of such an object by a State is a circumstance of the utmost importance in determining the question—really one of fact—whether the trade freedom of the frontier has been interfered with. In some cases, such as *Nelson's Case* (1), it is clear that the "frontier" crossing is selected by the State as the *discrimen* of liability, not because it is the trade frontier, but because the health precaution must, if it is to be of any value, operate at the very first moment of time when the suspected goods come effectively within the State's territorial jurisdiction and can be dealt with so as to prevent the spread of disease. If in such cases the operation of the State law were postponed until the arrival of the goods at the market place, not only might disease be spread, but the owner of the goods might have to be exposed to the risk of complete forfeiture. In all cases the crucial question is: has there been interference with the trading or commercial freedom of the frontier?

Although the Constitution of the United States contains no express provision like sec. 92, the decisions of the Supreme Court are often of value. Broadly speaking that court has deduced from the existence of a power in Congress to regulate inter-State commerce, the entire exclusion of the State legislatures from that field of law making, except in cases where the exercise of State legislative power may inferentially be permitted either by the action or the inaction of Congress. Notwithstanding the inferior position of State legislatures there as contrasted with their position here, the Supreme Court has frequently affirmed the power of State legislatures to prevent the spread of disease into their borders by regulations operating at the moment of entry. One can hardly deny to the States of Australia an authority at least as extensive, for here the States are bound by sec. 92 only to the same degree as is the central legislature. In the United States, also, it has been held, conformably with the Privy Council's ruling in *James* v. *The Commonwealth* (2), that questions of fact and degree are necessarily involved in determining very analogous constitutional issues. As Mr. Justice *Cardozo* said:—

(1) (1928) 42 C.L.R. 209.

(2) (1936) A.C. 578; 55 C.L.R. 1.

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"The line of division between direct and indirect restraints of commerce involves in its marking a reference to considerations of degree . . . Subject to the paramount power of the Congress, a State may regulate the importation of unhealthy swine or cattle (*Asbell* v. *Kansas* (1); *Mintz* v. *Baldwin* (2)); or decayed or noxious foods (*Crossman* v. *Lurman* (3); *Savage* v. *Jones* (4); *Price* v. *Illinois* (5)). Things such as these are not proper subjects of commerce, and there is no unreasonable interference when they are inspected and excluded. So a State may protect its inhabitants against the fraudulent substitution, by deceptive colouring or otherwise, of one article for another. . . . None of these statutes—inspection laws, game laws, laws intended to curb fraud or exterminate disease—approaches in drastic quality the statute here in controversy which would neutralize the economic consequences of free trade among the States" (*Baldwin* v. *Seelig* (6)).

For the reasons I have given I am of opinion that even if the New South Wales legislation here impeached had assumed the form of prohibiting the introduction into the State of lottery tickets or the sending out of the State of money for the purchase of lottery tickets, sec. 92 would have had nothing to say in denial of such an exercise of the State's power.

In *James* v. *The Commonwealth* (7) Lord *Wright* said: "The true criterion seems to be that what is meant is freedom at the frontier or, to use the words of sec. 112, in respect of 'goods passing into or out of the State'". As already pointed out, I am not concerned to dispute that inter-State transactions in respect of lottery tickets may be regarded as within the legislative power of the Commonwealth under sec. 51 (i). It does not follow that lottery tickets can be regarded as goods or commodities which are entitled to the protection of sec. 92. If they are goods or commodities they belong to a very special category, so special that in the interests of its citizens the State may legitimately exile them from the realm of trade, commerce or business. The indiscriminate sale of such tickets may be regarded as causing business disturbance and loss which, on general grounds of policy, the State is entitled to prevent or at least minimize.

How such legislation, merely because it discourages unrestrained investment in lotteries conducted in other States of the Common-

(1) (1908) 209 U.S. 251, at p. 256; 52 Law. Ed. 778, at p. 781.
(2) (1933) 289 U.S. 346; 77 Law. Ed. 1245.
(3) (1904) 192 U.S. 189; 48 Law. Ed. 401.
(4) (1912) 225 U.S. 501; 56 Law. Ed. 1182.
(5) (1915) 238 U.S. 446; 59 Law. Ed. 1400.
(6) (1935) 294 U.S., at pp. 525, 526; 79 Law. Ed., at pp. 1039, 1040.
(7) (1936) A.C., at p. 630; 55 C.L.R., at p. 58.

wealth, can possibly be regarded as inconsistent with sec. 92 I fail to understand. In order to assist the Royal Commission on the Constitution of the Commonwealth which reported in the year 1929, a committee of counsel of the Bar of Victoria made a useful reference to the High Court's interpretation of sec. 92. This was before the upsetting of *McArthur's Case* ruling (1) that the States had no legislative power at all in relation to inter-State trade. *Inter alia* it was said :—

> "It seems incredible that the immunity given by sec. 92 should operate to prevent the States from including in general prohibitions relating to transactions of trade and commerce, transactions which form part of inter-State trade. The suppression of lotteries, for instance, in a State, upon a logical application of the view that freedom means freedom from all legal restriction, could not extend to a lottery conducted by inter-State communications" (*Report of the Royal Commission on the Constitution*, (1929), p. 263).

If, notwithstanding *McArthur's Case* (1), it was "incredible" that the States could not suppress or regulate lotteries conducted by inter-State communications, the adjective to be selected to-day when the States have been restored to their constitutional status by *James* v. *The Commonwealth* (2) and are as much at liberty to regulate inter-State communications as the Commonwealth itself, should be even stronger. But "incredible" is strong enough. In relation to sec. 92 it evidences one of the postulates or axioms which, I suggest, are demanded alike by common sense and by a sound knowledge of what was aimed at by the founders of the Australian Commonwealth.

The appeal should be dismissed with costs.

McTiernan J. The conviction against which this appeal is brought depends on secs. 19 and 21 of the *Lotteries and Art Unions Act* 1901-1929, an act of the State of New South Wales. The ground of the appeal is that these sections infringe sec. 92 of the Commonwealth Constitution, which provides that trade, commerce and intercourse among the States shall be absolutely free. The Act in which the sections appear is expressed in its long title to be an Act to consolidate the Acts relating to the prevention of lotteries and the legalizing of art unions and similar associations. Sec. 21

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

(2) (1936) A.C. 578; 55 C.L.R. 1.

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of the Act prohibits, under a penalty not exceeding £20, three things, namely, offering to sell a ticket or share in a foreign lottery, selling such ticket or share, and accepting money in respect of the purchase of such ticket or share. The appellant was convicted of the offence of offering to sell a ticket in a lottery in Tasmania, which is a foreign lottery within the definition of that expression in sec. 19. The section says that a foreign lottery means a lottery conducted or to be conducted outside New South Wales.

A lottery is defined in *Johnson's Dictionary* as "a game of chance; a sortilege; distribution of prizes by chance; a play in which lots are drawn for prizes." In *Webster's Dictionary* (1832) it is said to be "a scheme for the distribution of prizes by chance, or the distribution itself." These definitions were approved in *Barclay* v. *Pearson* (1): See also *Taylor* v. *Smetten* (2). There are very varied methods of deciding the chance upon which the distribution may depend. Instances of the devices which might be employed for the purpose are to be found in the following summary of the English Lotteries Acts: "The Act of 1699 refers to lotteries by drawing, playing or throwing by dice lots, cards, balls, or any other numbers or figures, or in any other way whatsoever. That of 1721, to lots, tickets, numbers, or figures, that of 1738, to lots, tickets, numbers or figures, cards or dice, and games, methods or devices depending on or to be determined by any lot or drawing, whether it be out of a box or wheel, or by cards or dice, or by any machine, engine, or device of any kind whatsoever. The Acts of 1738, 1740, and 1745 treat as lotteries the games ace of hearts, faro, basset and hazard, passage and roulette or roly-poly, and all games (except backgammon and tables), invented or to be invented, which are to be played with dice, or with any instrument, engine, or device in the nature of dice having one or more figures or numbers thereon; and the Act of 1812 deals with little-goes, or any lottery not authorized by statute, played, drawn, or thrown for by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever" (*Encyclopædia of the Laws of England*, 2nd ed. (1907), vol. 8, p. 440).

(1) (1893) 2 Ch. 154, at p. 164.

(2) (1883) 11 Q.B.D. 207, at p. 210.

It is quite a novel suggestion that the disposition of prizes by any of these means is an operation within the sphere of trade and commerce. To stake money on the chance upon which prizes are to be distributed by any such devices is plainly gaming or gambling. Hence the *Lotteries Acts* are regarded as Acts relating to gaming. They are collected in *Chitty's Statutes*, vol. 11, p. 1310, under the title "Gaming," and are discussed in text-books on that subject. Examples are: *Stutfield* on the *Law relating to Betting, Time-bargains and Gaming*; *Coldridge and Hawksford* on the *Law of Gambling*.

The present *Lotteries and Art Unions Act* applies to any scheme which is within the ordinary definition of the word "lottery." Its scope is expressed to be wide enough to suppress dispositions of property which are determined by reference to the result of a horse race and competitions determined by chance, although they may involve a certain degree of skill on the part of the competitors. The Act prohibits all lotteries except such as it legalizes. These are raffles and art unions which are permitted if held for any of the objects and under the conditions laid down in the Act. The wide sweep of the prohibition explains the provision that the Act is not to affect either the provisions of the *Gaming and Betting Acts* which legalize betting under certain conditions or of the Acts regulating the use of the totalisator on race courses. Since the passing of the *Lotteries and Art Unions Act* 1901-1929 the Parliament of New South Wales gave to the government power to conduct lotteries.

Some trades are more adventurous or speculative than others, but trade or commerce as a branch of human activity belongs to an order entirely different from gaming or gambling. Whether a particular activity falls within the one or the other order is a matter of social opinion rather than jurisprudence. In *Boswell's Life of Johnson* the following conversation is recorded:—"Boswell: So then, sir, you do not think ill of a man who wins perhaps forty thousand pounds in a winter? Johnson: Sir, I do not call a gamester a dishonest man; but I call him an unsocial man, an unprofitable man. Gaming is a mode of transferring property without producing any intermediate good. Trade gives employment to numbers and so provides immediate good." It is gambling to buy a ticket or share in a lottery. Such a transaction does not belong to the commercial business of the

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country. The purchaser stakes money in a scheme for distributing prizes by chance. He is a gamester.

The Act does not attach the label of crime to the foible of buying a lottery ticket. The plan of the Act is to eliminate all lotteries except those which are legalized and to place obstacles in the way of persons gambling by obtaining tickets or shares in lotteries. The provisions of sec. 21 regarding tickets or shares in foreign lotteries have been mentioned, and it should be observed that the Act contains similar provisions regarding tickets or shares in (presumably) local lotteries. It is gambling to purchase a ticket in a lottery whether it is conducted outside or inside the State. The legislation has not sought to prohibit all lotteries. It has, in effect, aimed at preventing gambling by lottery from reaching proportions which it would consider mischievous. It would be singularly ineffective to achieve this object if it had not attacked the distribution within the State of tickets and shares in lotteries conducted outside the State. Sec. 21, therefore, is an integral part of the legislation. The section is, in substance, a law for the regulation of gaming. There is no ground for the assumption that the things which the section forbids to be done with tickets or shares in foreign lotteries are forbidden simply because the lotteries are foreign: it is patent that those things are forbidden as gambling operations or transactions incidental to gambling.

None of the things forbidden by sec. 21 belongs, in my opinion, to the trade or commerce of the country. No wider statement of what is comprised within the words trade and commerce among the States has been given than that in the case of *W. & A. McArthur Ltd.* v. *Queensland* (1). Indeed, the definition has been criticized as being too wide. The generalization which was made in that case of the elements of trade and commerce is: "All the commercial arrangements of which transportation is the direct and necessary result"(2). It is not a commercial arrangement to sell a lottery ticket; for it is merely the acceptance of money or the promise of money for a chance. In this case the purchase of a lottery ticket merely founds a hope that something will happen in Tasmania to benefit the purchaser.

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

(2) (1920) 28 C.L.R., at p. 547.

Sec. 92, however, has a wider field than trade and commerce. It guarantees freedom of intercourse among the States against infringement by a State or even by the Commonwealth (*James* v. *The Commonwealth* (1)). Sec. 21 does not, in my opinion, in any way impair freedom of intercourse among the States. As has been explained, the section is a law against gaming. What it does, in effect, is to prevent a person in New South Wales from selling to others, in return for their cash, tickets in a lottery, or, in other words, distributing for money consideration things which are part of the paraphernalia necessary or incidental to the game. Sec. 92 intends that Australia should be a unity in trade and commerce; it also intends its unity in social intercourse. But it is not true that the social unity of the Commonwealth is impaired if, for example, a citizen of Tasmania, who goes to New South Wales for the purpose of selling tickets in a Tasmanian lottery, is prevented by the laws of New South Wales from selling the tickets. The State of New South Wales could not prevent him from entering the State, but the limitation or regulation of his gambling activities in the State is no infringement of the freedom of intercourse guaranteed by sec. 92. *A fortiori*, it is not an infringement of the freedom of intercourse between the States for the State of New South Wales to prohibit one of its own citizens from selling tickets in a Tasmanian lottery, whether the tickets are sent from Tasmania or printed in New South Wales.

In my opinion, the legislative provisions on which the conviction appealed against is based are not invalid as an infringement of sec. 92 of the Constitution. The appeal, therefore, should be dismissed.

Appeal dismissed. Order nisi discharged with costs.

Solicitors for the applicant, *T. T. Henery & Co.*.

Solicitor for the State of New South Wales (intervening), *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.

(1) (1936) A.C. 578; 55 C.L.R. 1.