Not Foll *Cole* v *Whitfield* 165 CLR 360

Not Foll *Cole* v *Whitfield* 78 ALR 42

[HIGH COURT OF AUSTRALIA.]

MANSELL . . . . . APPELLANT;
DEFENDANT,

AND

BECK . . . . . RESPONDENT.
INFORMANT,

CONSOLIDATED PRESS LIMITED . . . APPELLANT;
DEFENDANT,

AND

LEWIS . . . . . RESPONDENT.
INFORMANT,

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MELBOURNE, *May* 22, 23, 24; *Oct.* 25.

Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

Constitutional Law (Cth.)—Freedom of inter-State trade commerce and intercourse—State statute—Foreign lotteries—Prohibition on publication of advertisements or display upon premises of notices relating to such lotteries—Acceptance of money in respect of purchase of ticket in foreign lottery prohibited—Gambling—Validity of prohibitions—Whether imposed by reference to essential attribute of inter-State trade etc.—Whether impediment to inter-State trade etc. of direct or indirect nature—Absence of discrimination as between foreign lotteries and lotteries conducted in State otherwise than by State—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Lotteries and Art Unions Act* 1901-1944 (*No.* 34 *of* 1901—*No.* 34 *of* 1944) (*N.S.W.*), *ss.* 3 (3), (4), 20, 21.

Section 3 (3) of the *Lotteries and Art Unions Act* 1901-1944 (N.S.W.) provides that whosoever prints or publishes any advertisement information or notice relating in any way to any sale or disposition of property by lottery or chance, made or to be made shall be guilty of an offence. Sub-section 4 provides that whosoever sells or offers for sale any ticket or share in any lottery or raffle or accepts any money in respect of the purchase of any such ticket or share shall be liable to a penalty. Sections 20 and 21 of the Act provide as follows:—20. Whosoever prints or publishes any advertisement, notice, or information relating to a foreign lottery in furtherance of the conduct of the lottery or announcing its result or displays upon any premises in his

occupation any card, poster, or notice relating to a foreign lottery in furtherance of the conduct of the lottery or announcing its result shall be liable to a penalty not exceeding two hundred pounds. 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 not exceeding twenty pounds.

Held, that s. 20 did not infringe s. 92 of the Constitution on the ground: *per Dixon* C.J., *Williams*, *Webb*, *Fullagar*, *Kitto* and *Taylor* JJ., that the acts prohibited were of an intra-State nature and the restriction was not imposed by reference to any essential element or attribute of inter-State trade, commerce or intercourse and was not discriminatory, having regard to s. 3 (3), as between foreign lotteries and lotteries conducted in New South Wales otherwise than by the State; *per McTiernan* J., that the acts prohibited were in the nature of gambling and could not in any event be within the protection of s. 92.

Held, further, by *Dixon* C.J., *McTiernan*, *Williams*, *Webb*, *Fullagar* and *Taylor* JJ., *Kitto* J. dissenting, that s. 21 did not infringe s. 92 of the Constitution on the grounds: *per Dixon* C.J., *Webb* and *Fullagar* JJ. that assuming that the transaction beginning with acceptance of the money and ending with delivery of the lottery ticket possessed an inter-State character the law was valid because it applied generally, having regard to s. 3 (4), to foreign lotteries and lotteries conducted in New South Wales other than by the State and did not select any element or attribute of inter-State trade, commerce or intercourse as the basis of its operation: *per McTiernan* J., that the acts prohibited were in the nature of gambling and for that reason were not within the protection of s. 92; *per Williams* J., that the section was concerned only with intra-State transactions and any impediment to inter-State trade, commerce or intercourse was merely indirect and consequential; *per Taylor* J., that activities involved in conducting lotteries were not trade or commerce and the section did not restrict rights of inter-State intercourse.

Per Kitto J. dissenting. Section 21 contravenes s. 92 of the Constitution in that it attaches a penal consequence to conduct by reason of its possessing the characteristic of participation in the movement of money inter-State, a characteristic essential to the conception of intercourse among the States.

R. v. *Connare*; *Ex parte Wawn* (1939) 61 C.L.R. 596 and *R.* v. *Martin*; *Ex parte Wawn* (1939) 62 C.L.R. 457, considered and affirmed.

ON REMOVAL under s. 40 of the *Judiciary Act* 1903-1955

Mansell v. *Beck*.

By information dated 17th March 1955, Mervyn Lindsay Beck, Detective Constable of Police, as informant, charged George Stanley Mansell that on 1st October 1954 at Sydney in the State of New South Wales the defendant did accept money in respect of the purchase of a ticket in a foreign lottery, to wit, the seventh five shilling lottery, Tasmanian Lotteries, conducted outside the State of New

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South Wales, that is to say, in the State of Tasmania, contrary to s. 21 of the *Lotteries and Art Unions Act* 1901-1944.

By a further information dated 1st December 1954 the informant charged the defendant that on 25th October 1954 at Sydney the defendant did display upon premises situated at 181 Hay Street, Sydney in his occupation a notice relating to a foreign lottery, to wit, Tasmanian Lotteries, announcing the result of the said lottery contrary to s. 20 of the *Lotteries and Art Unions Act* 1901-1944.

The informations were heard together before a stipendiary magistrate, the defendant pleading not guilty to each. He was convicted on each information, and in respect of each was fined the sum of £1 with court costs 12s. 0d. and professional costs £5 5s. 0d. in default fourteen days hard labour. On the defendant's application the stipendiary magistrate stated a case for the opinion of the Supreme Court of New South Wales substantially as follows :—

1. It was admitted or proved in evidence before me that: (1) The defendant has conducted the business of a newsagent and stationer at a shop at 181 Hay Street, Sydney for five and one half years and in that shop he has carried on a business of acting for intending purchasers of tickets in the New South Wales lottery. (2) It is the practice common to newsagencies of a similar character in New South Wales to carry on an agency of that type for the New South Wales State Lottery. (3) On 25th October 1954 the defendant was acting in respect to the Tasmanian Lotteries similarly to that in which he was acting in respect to the New South Wales State Lottery. (4) As a newsagent he is the agent for the sale in the ordinary way of newspapers which are printed and publsihed in Queensland, Victoria and Tasmania. The results of lotteries conducted in those States are published in such newspapers and the defendant had Brisbane and Melbourne newspapers in his shop on 1st or 25th October 1954 containing such results. (5) The seventh five shilling lottery of the Tasmanian Lotteries is a foreign lottery within the meaning of s. 19 of the Act. (6) The said lottery is legal or lawful in the place where it is conducted, namely, Tasmania. (7) Tasmanian Lotteries is a lawful organisation entitled by the law of Tasmania to conduct lotteries of which the seventh five shilling lottery referred to in both informations is one of such lotteries. (8) In May 1954 the defendant had correspondence with Tasmanian Lotteries at Box 725E, G.P.O. Hobart and he received a letter dated 1st June 1954 appointing him a clients' agent in respect of Tasmanian Lotteries and he received printed matter for distributing to intending purchasers of tickets. The defendant was so acting as a clients' agent at the time of the alleged offences. (9) On 1st October 1954

Constable Brodie entered the defendant's newsagency shop at 181 Hay Street, Sydney and paid the defendant six shillings and one penny for a five shilling lottery ticket in the seventh five shilling lottery, Tasmanian Lotteries. The defendant wrote the name, R. R. Brodie on a pad. (10) On 25th October 1954, the defendant handed Constable Brodie ticket No. 085138 in the said seventh lottery. (11) The defendant has conducted a lottery service at his shop from the time the Tasmanian Lotteries commenced. (12) That service is provided in the following manner: Applicants fill in a form of application for the tickets, hand the defendant the forms with the money required for the purchase together with a sum to cover the defendant's commission as their agent. The defendant writes the names of applicants on a printed remittance sheet, with any special requirements of the applicant such as for tickets of non-consecutive numbers, the syndicate name, name and private address of the person to be recognised as the rightful owner when it was drawn. The defendant retains a carbon copy of the sheet and forwards the original sheet and postal notes for five shillings for each ticket or for one pound for a ticket in the special lottery by registered air mail to G. A. Addison, Box 720E, G.P.O. Hobart. If requested by the applicant the application is sent immediately and direct to Addison singly or together with other applications but otherwise according to the circumstances of the transaction several applications are forwarded in the one envelope. If requested particularly by an inter-State client, the defendant will cause the ticket to be forwarded direct from Tasmania to the client by post instead of per medium of the defendant. (13) The defendant receives the tickets back from Tasmanian Lotteries about ten or fourteen days after the sheet is sent to G. A. Addison and he hands them to the clients when they call at his shop for them. The ticket was so received by the defendant. (14) G. A. Addison has a different postal address to that of Tasmanian Lotteries but Tasmanian Lotteries instructed the defendant to send order forms and remittances to Addison to facilitate the handling of clients agents consignments in the office of Tasmanian Lotteries. (15) The defendant retains one shilling and one penny being some remuneration for his services and disbursements. (16) Constable Brodie's name was entered on a sheet at the time of lodgment of his application. (17) On 25th October 1954, Constable Beck took possession of two notices which were attached to the wall of the defendant's shop announcing the result of lotteries drawn by Tasmanian Lotteries at Hobart on 30th June 1954 and 26th July 1954.

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2. The grounds upon which I convicted the defendant were: (1) I was of the opinion that the acceptance of the money aforesaid, by the defendant, was part of an inter-State transaction but the defendant was not engaged in trade, commerce or intercourse in so accepting such money. (2) There was no element of inter-State trade in the displaying of notices of results of the Tasmanian Lotteries in the defendant's shop. (3) The acceptance of the money by the defendant in the circumstances referred to herein and the displaying of the notices of results of the Tasmanian Lotteries were breaches of the *Lotteries and Art Unions Act* 1901-1944. (4) The said Act is a valid enactment of the Parliament of New South Wales. The provisions of s. 21 of the said Act do not affect freedom of trade, commerce or intercourse between the States. Sections 19, 20 and 21 of the Act do not contravene the provisions of s. 92 of the Constitution.

3. The question for the determination of the Court is whether my said determinations convicting the defendant were erroneous in point of law.

Consolidated Press Limited v. *Lewis.*

By information dated 1st December 1955, Colston Douglas Lewis, Sergeant of Police, charged Consolidated Press Ltd. that on 24th November 1955, at Sydney in the State of New South Wales the defendant, a company duly incorporated and having its registered office at 168-174 Castlereagh Street, Sydney, did publish an advertisement relating to a foreign lottery, to wit, Tasmanian Lotteries, in furtherance of the conduct of the said lottery, contrary to s. 20 of the *Lotteries and Art Unions Act* 1901-1944.

When the information came on for hearing before the stipendiary magistrate above-mentioned, the defendant entered a plea of not guilty thereto, but was convicted and fined the sum of £100 with costs of £10 10s. 0d. to be paid within twenty-one days. On the defendant's application the stipendiary magistrate stated a case for the opinion of the Supreme Court of New South Wales substantially as follows :—

(1)—1. It was admitted in evidence before me that the defendant is a company incorporated in the State of New South Wales having its registered office at 168-174 Castlereagh Street, Sydney. 2. The defendant carries on business in New South Wales and publishes daily in that State and elsewhere the Daily Telegraph newspaper. 4. The reference and the advertisement appearing on p. 37 of the Daily Telegraph newspaper dated 24th November 1955 to lotteries respectively called the Sportsmans Special £250,000 prize to be

allotted, £100 Tasmanian Lotteries, and the Prosperity Lottery £150,000 prize, £5 Tasmanian Lotteries are references to lotteries conducted outside the State of New South Wales and in the State of Tasmania. Such lotteries are foreign lotteries within the meaning of the *Lotteries and Art Unions Act* 1901-1944. 5. The advertisement appearing on p. 37 aforesaid was published by the defendant in furtherance of the conduct of the lotteries mentioned therein. 6. Such lotteries were lawfully conducted in the State of Tasmania and the organisation known as Tasmanian Lotteries is a lawful organisation according to the laws of the State of Tasmania. 7. The lottery of which the results were published in the advertisement was a lawful lottery according to the laws of the State of Tasmania. 8. The advertisement referred to in the information was printed and published pursuant to an agreement made between Tasmanian Lotteries and the defendant. 9. It was a term of that agreement that the defendant would by printing and publishing certain advertising material relating to lotteries conducted in Tasmania by Tasmanian Lotteries communicate information relating to such lotteries to members of the public in New South Wales. 10. It was a further term and condition of the agreement referred to that any advertisement printed and published by the defendant in furtherance of the conduct of any lottery conducted in Tasmania by Tasmanian Lotteries would consist only of material draft whereof and the copy for which was previously sent by Tasmanian Lotteries from its office in Hobart to the defendant at its office in Sydney for the purpose of being printed and published as aforesaid. 11. Pursuant to the last mentioned term and condition of the said agreement the advertisement referred to in the information consisted solely of material a draft of and the copy for which was previously sent as aforesaid. 12. Except as to terms and conditions of the aforesaid agreement relating solely to the remuneration payable to the defendant for the printing and publishing of the aforesaid advertisement the said agreement contained no terms other than those set out in the preceding admissions. 13. Among the purposes for which Tasmanian Lotteries arranged with the defendant for the printing and publishing of the advertisement referred to in the information were those of communicating to members of the public in New South Wales an invitation to subscribe for tickets in certain lotteries conducted in Tasmania and referred to in the said advertisement and of thereby increasing the volume of sales of tickets in the said lotteries to members of the public resident in New South Wales and the traffic in tickets in such lotteries between Tasmania and New

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South Wales. 14. The printing and publishing of the said advertisement effectuated the aforesaid purposes. Such advertisements as the one referred to in the information are calculated to and do in fact increase the volume of sales of tickets in the said lotteries to members of the public resident in New South Wales and the traffic in tickets in such lotteries between Tasmania and New South Wales and the transmission of money from New South Wales to Tasmania in payment for the said tickets. 15. Another of the purposes for which Tasmanian Lotteries arranged with the defendant for the printing and publishing by the defendant of the advertisement referred to in the information was that of communicating to members of the public in New South Wales including members of the public who had subscribed money for tickets in the above-mentioned lotteries the results of such lotteries.

(2) The grounds upon which I convicted the defendant were :— I was of the opinion that :—1. The publication by the defendant of the advertisement was a breach of s. 20 of the *Lotteries and Art Unions Act* 1901-1944. 2. The said Act is a valid enactment of the New South Wales Parliament. 3. The provisions of ss. 20 and 21 of the said Act do not affect freedom of trade and commerce or intercourse between the States and they do not contravene the provisions of s. 92 of the Commonwealth of Australia Constitution. 4. The defendant in publishing the said advertisement was not engaged in inter-State trade, commerce or intercourse within the meaning of s. 92 of the Commonwealth of Australia Constitution.

(3) The question for the determination of the Court is whether my said determination convicting the defendant was erroneous in point of law.

On 18th April 1956 *Fullagar* J. ordered that each of the above-named causes pending in the Supreme Court of New South Wales be removed into the High Court.

B. P. Macfarlan Q.C. (with him *J. A. Clapin*), for the appellant Mansell. This Court has decided that s. 21 of the *Lotteries and Art Unions Act* 1901-1944 (N.S.W.) is valid : see *R.* v. *Connare*; *Ex parte Wawn* (1) and *R.* v. *Martin*; *Ex parte Wawn* (2). Because of the divergence between the reasoning of the justices who formed the majority in those cases and because of decisions given on s. 92 since the dates of those cases it is desired to submit that the Court should review the question of the validity of s. 21.

[DIXON C.J. The Court will not restrict the argument in any way.]

(1) (1939) 61 C.L.R. 596. (2) (1939) 62 C.L.R. 457.

The defendant was not an agent of Tasmanian Lotteries but a person whom Tasmanian Lotteries had stated that it would recognise as an agent, if appointed by a customer, to transmit the customer's money to Tasmania. The transaction is inter-State trade or commerce. The commerce is initiated by the customer handing to the agent money for transmission by him to Tasmania for the purchase of a lottery ticket and for the transmission of the ticket to New South Wales. Alternatively the transaction is inter-State intercourse. The ticket is an article of trade or commerce which may be bought or sold. [He referred to *Champion* v. *Ames* (1).]

[DIXON C.J. referred to *Ware & Leland* v. *Mobile County* (2).]

In *R.* v. *Connare*; *Ex parte Wawn* (3) *Latham* C.J. took the view that the buying and selling of lottery tickets can be the subject of trade and commerce. *Rich* J. took the view that the transaction was one of intercourse. The meaning of intercourse is discussed in *Bank of New South Wales* v. *The Commonwealth* (4). Intercourse between States may consist of a number of acts. To strike at one of those acts is to interfere with the intercourse. [He referred to *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick and Coy* (5); *Fergusson* v. *Stevenson* (6).] In the present case the inter-State intercourse commenced when the money was delivered to the agent in Sydney and terminated when the money or remission of credit was received in Hobart. In *R.* v. *Connare*; *Ex parte Wawn* (3) *Starke* J. placed his decision on the subject matter of the act in question being lotteries. *The Commonwealth* v. *Bank of New South Wales* (7) is authority for the proposition that an Act may infringe s. 92 no matter what its subject matter may be. *Dixon* J. held that the transaction was one of intra-State trade and commerce and that s. 21 of the Act did not offend against s. 92 of the Constitution because it was not discriminatory. In *The Commonwealth* v. *Bank of New South Wales* (7) the Privy Council laid down that the absence of discrimination is not decisive. *Evatt* J. based his judgment on the subject matter test: the judgment of *McTiernan* J. proceeded on the same basis.

[MCTIERNAN J. My judgment is founded on the view that the conduct of a lottery is not trade commerce or intercourse.]

In *R.* v. *Martin*; *Ex parte Wawn* (8) *Dixon* J. took the view that what was there involved was an act of inter-State trade or

(1) (1903) 188 U.S. 321, at pp. 353 et seq. [47 Law. Ed. 492, at pp. 500 et seq.].
(2) (1908) 209 U.S. 405, at pp. 411-413 [52 Law. Ed. 855, at pp. 858, 859.]
(3) (1939) 61 C.L.R. 596.
(4) (1948) 76 C.L.R. 1, at p. 381.
(5) (1952) 85 C.L.R. 467.
(6) (1951) 84 C.L.R. 421.
(7) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(8) (1939) 62 C.L.R. 457.

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commerce but that s. 21 of the Act did not offend against s. 92 because of the absence of discrimination. On the test of directness of operation laid down in *The Commonwealth* v. *Bank of New South Wales* (1) s. 21 of the Act does offend against s. 92. [He referred to *Grannall* v. *Marrickville Margarine Pty. Ltd.* (2).] Section 20 of the Act, in prohibiting display of a result notice, strikes at the last step of an act of inter-State trade and commerce or of intercourse and is invalid. [He referred to *Fergusson* v. *Stevenson* (3).] On this matter the appellant Mansell further adopts the argument to be put on behalf of Consolidated Press Limited.

A. D. G. Adam Q.C. (with him *T. E. F. Hughes*), for the appellant Consolidated Press Ltd. Section 20 of the *Lotteries and Art Unions Act* read with the definition of " foreign lottery " in s. 19 has involved in it the necessity for communication from the promoter of the lottery outside New South Wales of information to some person in New South Wales.

[DIXON C.J. referred to *Dew* v. *Director of Public Prosecutions* (4).]

There is a " publication " in New South Wales when a communication containing the information is first opened and read in New South Wales. [He referred to *Bata* v. *Bata* (5) ; *Tozier* v. *Hawkins* (6).] So read the section is invalid and not severable. [He referred to *Bank of New South Wales* v. *The Commonwealth* (7).] Publication of the advertisement in question was an act done in the course of commerce and intercourse among the States and s. 20 in so far as it purports to apply to that publication is invalid under s. 92. The conception of commerce and intercourse among the States is wide enough to cover the transmission from one State to another of information for publication to the public of that other State either through the medium of the press of that State or other means. [He referred to *Bank of New South Wales* v. *The Commonwealth* (8).] The freedom interfered with is that of both the transmitter of the information in Tasmania and the recipient of the information for publication in New South Wales. Even if the only freedom interfered with was that of the transmitter it is submitted that the recipient could invoke the protection of s. 92 on a prosecution of the nature in question here. Where a contract between residents of different States provides for the publication in one State by one of the parties

(1) (1950) A.C. 235, at pp. 308, 310 ; (1949) 79 C.L.R. 497, at pp. 637, 639.
(2) (1955) 93 C.L.R. 55, at pp. 78, 80, 81.
(3) (1951) 84 C.L.R. 421.
(4) (1920) 89 L.J.K.B. 1166.
(5) (1948) W.N. 366.
(6) (1885) 15 Q.B.D. 650.
(7) (1948) 76 C.L.R. 1, at pp. 369 et seq.
(8) (1948) 76 C.L.R., at p. 380.

of information to be supplied for that purpose by the other party, all essential steps in the entire transaction beginning with dispatch of the matter in one State and ending with publication in the other State, are within the concept of inter-State trade and commerce. [He referred to *W. & A. McArthur Ltd.* v. *State of Queensland* (1); *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick and Coy* (2); *Wragg* v. *State of New South Wales* (3); *Grannall* v. *C. Geo. Kellaway & Sons Pty. Ltd.* (4); *Hughes* v. *State of Tasmania* (5); *Blumenstock Bros. Ad. Agency* v. *Curtis Publishing Co.* (6).] The protection of s. 92 extends to all stages of such a transaction including the publication itself in the other State. Alternatively, even if the publication does not itself form part of inter-State commerce or intercourse, where the matter transmitted for publication is for the purpose of advertising inter-State commerce or intercourse, the protection of s. 92 will extend to such advertising as a thing concomitant with or inseverable from such commerce or intercourse. [He referred to *Wragg* v. *State of New South Wales* (7).] A law which operates by way of prohibiting or penalising an act, which, although not in general a part of inter-State commerce or inteorcurse, is, on the facts of a particular case, part of such commerce or intercourse, is invalid under s. 92 unless it is of a regulatory character. Section 20 of the *Lotteries and Art Unions Act* is of a prohibitory and not a regulatory character.

G. Wallace Q.C. (with him *D. Staff*), for the respondent in each appeal. The acts prohibited by ss. 20, 21 of the *Lotteries and Art Unions Act* are of a gambling nature and are not trade, commerce or intercourse. [He referred to *R.* v. *Connare*; *Ex parte Wawn* (8).] That case is correctly decided. In any event a mere contract is not trade or commerce or intercourse. [He referred to *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (9); *Ware & Leland* v. *Mobile County* (10).] The only elements of inter-State activity in the transactions is the movement of the application form from New South Wales to Tasmania and the return of the ticket. The Act does not prohibit these elements. In *Fergusson* v. *Stevenson* (11) and *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick and Coy* (12) an

(1) (1920) 28 C.L.R. 530, at p. 549.
(2) (1952) 85 C.L.R. 467, at pp. 483, 484.
(3) (1953) 88 C.L.R. 353, at pp. 385-387.
(4) (1955) 93 C.L.R. 36, at pp. 51, 53.
(5) (1955) 93 C.L.R. 113, at pp. 123, 124, 125, 126.
(6) (1920) 252 U.S. 436, at p. 442 [64 Law. Ed. 649, at p. 653].
(7) (1953) 88 C.L.R. 353, at pp. 398, 399.
(8) (1939) 61 C.L.R. 596.
(9) (1953) 87 C.L.R. 1, at pp. 14 et seq.
(10) (1908) 209 U.S. 405, at p. 411 [52 Law. Ed. 855, at p. 858].
(11) (1951) 84 C.L.R. 421.
(12) (1952) 85 C.L.R. 467.

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integral and essential step in inter-State trade was in question. [He referred to *R.* v. *Martin*; *Ex parte Wawn* (1); *Grannall* v. *Marrickville Margarine Pty. Ltd.* (2); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (3).] Section 20 of the *Lotteries and Art Unions Act* is valid. It deals with matters only ancillary to a transaction of trade and commerce. [He referred to *Grannall* v. *Marrickville Margarine Pty. Ltd.* (4); *Hughes* v. *State of Tasmania* (5); *Grannall* v. *C. Geo. Kellaway & Sons Pty. Ltd.* (6); *Carter* v. *Potato Marketing Board* (7); *Wilcox Mofflin Ltd.* v. *State of New South Wales* (8).]

B. P. Macfarlan Q.C., in reply.

T. E. F. Hughes, in reply.

Cur. adv. vult.

Oct. 25. The following written judgments were delivered :—

Mansell v. *Beck.*

DIXON C.J. AND WEBB J. A stipendiary magistrate convicted the defendant of two offences against the *Lotteries and Art Unions Act* 1901-1944 (N.S.W.). One offence was that on 1st October 1954 at Sydney the defendant did accept money in respect of the purchase of a ticket in a foreign lottery. The foreign lottery was specified in the conviction as the seventh five shilling lottery of " Tasmanian Lotteries " conducted in Tasmania. The provision relied upon by the informant as creating the offence is s. 21 of the Act. The other offence of which the defendant was convicted was for that on 25th October 1954 he did display upon premises in his occupation a notice relating to a foreign lottery, namely Tasmanian Lotteries, announcing the result of the lottery. Section 20 is the provision creating the latter offence. From these convictions the defendant appealed by way of case stated to the Supreme Court. The ground of the appeal is that the provisions in question can have no valid operation to penalise the conduct of the defendant on which the convictions are based because that would amount to an invasion of the freedom of trade, commerce and intercourse assured by s. 92 of the Constitution. On the application of the Attorney-General of

(1) (1939) 62 C.L.R. 457, at p. 462.
(2) (1955) 93 C.L.R. 55, at pp. 78, 79.
(3) (1955) 93 C.L.R. 127, at pp. 162, 205 et seq., 217.
(4) (1955) 93 C.L.R. 55, at pp. 79, 81, 82.
(5) (1955) 93 C.L.R. 113, at p. 124.
(6) (1955) 93 C.L.R. 36, at pp. 50-52.
(7) (1951) 84 C.L.R. 460, at pp. 485, 486.
(8) (1952) 85 C.L.R. 488, at p. 519.

New South Wales to this Court under s. 40 of the *Judiciary Act* 1903-1955 the appeals by case stated were removed here and are now before us for determination.

The facts are simple enough. The defendant is a newsagent and stationer whose shop is in Hay Street, Sydney. Apparently he is an agent for the sale of tickets in the State Lotteries of New South Wales conducted in pursuance of the *State Lotteries Act* 1930 of that State. In June 1954 he was appointed by Tasmanian Lotteries to be what is described as a clients' agent. Tasmanian Lotteries are conducted under a licence issued in pursuance of s. 85 of the *Racing and Gaming Act* 1952 (Tas.). The appointment was made by letter from Hobart and the defendant received by post some printed matter for distribution to intending purchasers of tickets in Tasmanian Lotteries and some instructions. The printed matter bears the heading " Operating under Government Licence and Drawn under Government Supervision: Tasmanian Lotteries ". Under this heading the lotteries are described and it is stated that prizes are offered in each of them and some information concerning the procedure for obtaining tickets is given. What is material for present purposes is expressed as follows: " This form has been handed on to you by your local agent through whom you may order tickets in the Tasmanian Lotteries, in any manner you desire, one or more at a time in either the 5/- or the £1 lotteries, or you may open an account with us by depositing with him say £5 for the issue of a ticket per week or per lottery to suit your individual requirements. Your agent, who makes a small charge for his services, is in the position to ensure the prompt return of your tickets and results, and effects a saving to you in the cost of remittances, and the postage necessary to forward same to us." The instructions are headed " Procedure for clients' agents ". Detailed directions are given for the use of what are called " consignment sheets " which are supplied to the clients' agents. They are forms in which the purchasers of tickets in each lottery are to be listed with the necessary information as to the number of tickets they respectively require and their indentification and postal addresses. For a five shilling ticket the " client " is to be charged 6s. 1d. of which sixpence forms the " clients' agent's " commission and sevenpence represents postage first of the ticket and then of the result. The agent retains the sixpence commission. He is to add up the other payments in the list and remit the amount by bank draft or money order to an address in Hobart, which is supplied.

On 1st October 1954 a purported " client " who in fact was a member of the police force entered the defendant's shop and asked

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the defendant to let him have a ticket in an inter-State lottery. The defendant suggested the Tasmanian Lottery and told the supposed " client " that the cost for " the small one " was 6s. 1d. for a five shilling ticket. The " client " paid the money and wrote his name on a pad. He asked when the ticket would be available and was told that it would be back in about ten days or a fortnight. On 25th October the policeman returned, gave his name and obtained the ticket.

On the wall were certain lists of prize winners in Tasmanian Lotteries that had already been drawn. It is the exhibition of these lists that forms the basis of the second conviction.

The *Lotteries and Art Unions Act* 1901-1944 as it now stands may not unfairly be described as an agglutinative measure; but, notwithstanding the reliance which, on the defendant's part, was placed for some purposes on the history of the development of the legislation, it seems clear enough that the question whether its intended operation is inconsistent in a material respect with s. 92 must be determined upon the provisions of the Act as it now exists. Section 3 of the Act contains a number of provisions tending to the prevention or suppression of lotteries which are all framed without express reference to the place where the lottery is conducted. No doubt the defendant would say that because of the presence in the Act of express provisions with reference to foreign lotteries, s. 3 should be interpreted as relating only to lotteries conducted in New South Wales. Sub-section (4) of s. 3 provides that whosoever sells or offers for sale any ticket or share in any 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 five pounds. Unless s. 3 (4) is confined to lotteries conducted in New South Wales there seems to be no reason, unless one is found in s. 92 of the Constitution, why the defendant should not have been charged and convicted under the provisions of that sub-section for accepting money in respect of the purchase of a ticket in a lottery. Section 21, under which the defendant was actually charged and convicted, follows the language of s. 3 (4) but relates to a foreign lottery. It is the third of three sections (ss. 19-21) which are placed under the heading " *Foreign Lotteries* ". By s. 19 the expression " foreign lottery " is defined to mean 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. It is evident that the words " golden casket " are included because that is the title of the lotteries conducted in

Queensland under the retrospective and prospective authority of s. 53 of the *Vagrants, Gaming, and Other Offences Act of* 1931 of that State. The word " consultation " possibly refers to the Tattersalls Sweep Consultations formerly carried on in Hobart (cf. *Blair* v. *Curran* (1)) and now carried on in Melbourne in pursuance of the *Tattersalls Consultations Act* 1953 (No. 5705) of Victoria.

Section 20 of the New South Wales Act deals with advertising in connexion with a foreign lottery. Section 21 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 defendant falls within the intended operation of this provision because he accepted from the policeman who came as a so-called " client " the amount of 6s. 1d. for the purchase of a ticket which in fact he delivered to the " client " some three weeks later.

This payment to the defendant is, of course, essential to the charge. But the defendant claims that it forms an inseparable part of a transaction of inter-State commerce. The transaction consists, it is said, of the transmission at the instance of the client of money to Tasmanian Lotteries in Hobart and of the consequent transmission of the ticket by Tasmanian Lotteries in Hobart to the defendant in Sydney for delivery to the client. It was for the purpose and as part of this transaction that the money was paid or entrusted to the defendant by the client.

It is argued that such a transaction of inter-State commerce must be protected by s. 92 from the interference which results from the prohibition by State law of the acceptance of the payment with which it must commence. It is no doubt, to say the least of it, permissible to view with scepticism the attempt to place the so-called " clients' agent " in any other situation than that of agent for Tasmanian Lotteries to receive the money from the " client ". But even if the defendant accepted the money as agent for the Tasmanian Lotteries it does not necessarily follow that its " acceptance " by the defendant cannot be considered to be part of an inter-State transaction. Having regard to his duty to transmit the money to obtain a ticket and to deliver it to the client it may be proper to treat the initial receipt of the money by the defendant on behalf of Tasmanian Lotteries as forming part of the inter-State transaction. For all these steps are involved in the terms upon which the defendant accepts the payment, even if no privity of contract exists between him and the " client ". But to concede that the transmission of money from one State

(1) (1939) 62 C.L.R. 464, at pp. 467, 470.

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to another and the consequent transmission of a "ticket" to the first State from the second forms inter-State trade within the meaning of s. 92 carries the defendant but a short distance. To concede that the two incidental steps, namely the acceptance of the money for the purpose and the delivery of the ticket as a result, may in the given case be inseparable from, though incidents of, the inter-State transaction, may carry him further, but not far enough. The first of these concessions simply illustrates the view that it was part of the purpose of s. 92 to remove from the possibility of legislative and governmental restriction activities conducted across State boundaries and to do so rather because of their inter-State character than of any special claim to immunity from interference that particular activities might have except for their inter-State character; the view, that is to say, that it was the intention to include all forms and variety of inter-State transaction whether by way of commercial dealing or of personal converse or passage. See *Bank of New South Wales* v. *The Commonwealth* (1). The second concession in its application to the facts is possibly of more doubtful validity but it does no more than assume the applicability to the circumstances of the principle that an inseparable or indispensable concomitant or consequence of an inter-State transaction forms part of the transaction and takes on itself an inter-State character. Cf. *Fergusson* v. *Stevenson* (2); *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick and Coy* (3), and contrast *Carter* v. *Potato Marketing Board* (4); *Wragg* v. *State of New South Wales* (5); and *Grannall* v. *Marrickville Margarine Pty. Ltd.* (6).

The fact that the "transaction" beginning with the acceptance of the money and ending with the delivery of the ticket may possess an inter-State character does not take the defendant far enough for a reason arising from the operation of s. 92 as it has now come to be applied. The reason is that it still remains to consider whether the provision impugned, notwithstanding that in this particular case its effect is to penalise the acceptance of money with which the transaction begins, is in truth a law impairing the freedom which is constitutionally assured by s. 92. To give a law that character it is not enough that there are or may be transactions of inter-State trade, commerce or intercourse that are adversely affected by the operation of the law. That may be a consequence of a law which is not concerned with any fact, matter or thing forming part of inter-State trade, commerce or intercourse but takes for its operation events

(1) (1948) 76 C.L.R. 1, at pp. 381, 382.
(2) (1951) 84 C.L.R. 421, at p. 435.
(3) (1952) 85 C.L.R. 467, at p. 480.
(4) (1951) 84 C.L.R. 460, at pp. 485, 486.
(5) (1953) 88 C.L.R. 353.
(6) (1955) 93 C.L.R. 55, at p. 79.

or circumstances or conduct which of their own nature do not fall within that conception and do not constitute or necessarily include any essential element or attribute of trade, commerce and intercourse among the States. A law which imposes restrictions or burdens upon some description of act matter or thing not of its own nature forming part of inter-State trade, commerce or intercourse and does so because of some characteristic which is independent of any element entering into that conception is very unlikely to be found to destroy impair or detract from the freedom secured by s. 92. It may conceivably do so if upon examination of the facts and scrutiny of its intended operation it appears that in spite of the prima-facie absence of any but an accidental interference with inter-State trade, commerce and intercourse the law is but a circuitous means of burdening, restricting or impeding operations of a kind which s. 92 protects. But no such vice can be imputed to the enactment under discussion and the qualification which the possibility demands may be ignored in considering the true relation of the prohibition contained in s. 21 of inter-State trade. The basis of the prohibition is the existence of a lottery. If the legislation had taken this basal conception and independently of the place where or whence the lottery was conducted had prohibited the selling of tickets and the acceptance of money for the purchase of tickets there would be little difficulty in regarding the case as one in which a law taking no aspect of trade, commerce or intercourse among the States and no attribute of that conception as the criterion of its operation, produced an incidental effect upon given transactions of inter-State trade, commerce or intercourse. Indeed on that hypothesis the case would fall within the simple but broad statement made by *Fullagar* J. in *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (1): "But one thing, I think, is well established. Legislation, which imposes restraints upon conduct without reference or regard to acts of inter-State commerce or intercourse, will not be held to be struck by s. 92 merely because it involves the accidental consequence that acts of inter-State commerce or intercourse, which have previously taken place, will or may cease" (2); further *Grannall* v. *Marrickville Margarine Pty. Ltd.* (3) and *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (4).

The essence of a lottery is the distribution of prizes among subscribers by lot or chance. If the statute were of the character supposed, that which it would seize on would simply be the incidents of

(1) (1953) 87 C.L.R. 1.
(2) (1953) 87 C.L.R., at p. 36.
(3) (1955) 93 C.L.R. 55, at pp. 78, 79, 81.
(4) (1953) 87 C.L.R. 1, at pp. 17, 18, 43, 44, 46.

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subscribing for tickets and collecting the stake. It is more than two centuries and a half since the legislature, because of mischievous effects they were considered to produce, declared lotteries to be common and public nuisances and all grants, patents or licences (*scil.* from the Crown) to be void: 10 *Will. III*, *c.* 23. This was on a basis to which all the factors are irrelevant that could conceivably be relied upon as forming part of or otherwise being characteristic of trade, commerce or intercourse such as the collection, payment and receipt of money and the communications between parties that may necessarily be involved, whether consisting in the issue of tickets or of notices or notifications. The collection and receipt of money considered by itself may be commerce; the communication of the record of a contract, as a ticket is, or of information may be commerce or intercourse. But these are accidental characteristics with which the suppression of lotteries as nuisances had no concern. In the same way, if a law which without regard to the locality of the lottery prohibits the sale, that is the issue for money, of a ticket in a lottery or the receipt of money on account of its purchase, it is evident that the law takes the aleatory nature of these simple " transactions " as the basis of its operation.

To seize upon the general and abstract truth that communications and payments of money from one State to another fall within the description trade, commerce or intercourse is to disregard the fact that in no such aspect are these things dealt with by such a provision. If the Federal Parliament were to enact that none of the means of communication or of paying money between States was to be employed for, or in furtherance of the conduct of, a lottery, then an attack upon the enactment upon the ground that it infringed s. 92 might be expected to fail. Indeed it may be supposed that the question would rather be whether in spite of *Champion* v. *Ames* (1), it should be regarded as a law with respect to trade and commerce within s. 51 (1). But to say that it was such a law would not mean that by consequence it necessarily worked an impairment of the freedom of trade, commerce and intercourse among the States. However no such question would arise on the kind of State law assumed. For it would operate, not by reference to inter-State commerce, but quite independently of the inter-State or commercial character of what was done. Such a law can perhaps be aptly illustrated by supposing that s. 3 (4) of the *Lotteries and Art Unions Act* ought, after all, to be construed as covering shares and tickets in lotteries wherever such lotteries might be conducted. On that footing it would be wrong to treat the provision as invalidated

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

(whether *in toto* or *pro tanto*) by the possibility that in particular cases it would prevent the transmission of a ticket to New South Wales from another State or of a sum of money to another State from New South Wales. These would be but consequences incidental to the operation of a general law dealing with another subject: "Clearly enough the fact that a particular transaction takes place in the course of inter-State trade or forms part of inter-State trade is not enough to exclude the persons engaging in it from the operation of the provisions of public and private law which otherwise would apply": *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (1).

But s. 3 (4), even when so interpreted, is free from an objection to which the form of s. 21 at first sight lays the latter section open. The objection is that s. 21 is so framed as to apply only to foreign lotteries, an expression necessarily referring to lotteries in other States as well as abroad. Accordingly one of the very conditions on which the application of s. 21 is expressly made to depend involves or includes, so it is said, a discrimination against lotteries in other States. In support of this objection reliance is placed upon the direct reference, in s. 19, to the golden casket, the name of the Queensland State lottery.

But does it really mean that the legislation takes, as a ground for penalising the issue of a ticket, the fact that it comes from another State or from abroad, or, as a ground for penalising the acceptance of a payment, the fact that the payment is made for such a ticket and therefore presumptively is made for transmission to that other State or to the place abroad? If it was intended to pick out, as the basis of the prohibition, the fact that it was a transaction over the boundary of New South Wales, it would give support for the view that it involved a direct restriction upon inter-State commerce or intercourse. But that conclusion could be justified only upon a consideration of the legislation as a whole. When the legislation is regarded as a whole, it is seen that the provisions directed against foreign lotteries are simply the counterpart of the provisions directed against lotteries in general, provisions presumed to operate only upon lotteries conducted in New South Wales. The provisions are complementary one to another. The history of the legislation against lotteries shows that from an early time foreign and domestic lotteries were dealt with by separate provisions. In the beginning this may be accounted for by what appears to have been the interpretation placed upon the reference in 10 *Will. III*, *c.* 23 to grants, patents and licences. It seems that the words were read as referring

(1) (1955) 93 C.L.R. 127, at p. 160.

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only to grants, patents and licences from the British Crown. According to a recital made by s. 4 of 9 *Geo. I, c.* 19 " in order to elude the many good laws made for suppressing unlawful lotteries several evil disposed persons have of late presumed to erect and carry on several lotteries upon pretence and colour of some grant or authority given by foreign princes or States ". The section, which then went on to prohibit foreign lotteries, was the first of many enactments.

The question whether legislation infringes upon s. 92 is in one sense a question of the exercise of constitutional power, the power which s. 92 leaves unrestricted. The true content of the State law must be ascertained to see whether the law that results from the whole impairs the freedom which s. 92 protects and so goes beyond the legislative power. If s. 3 (4) and s. 21 are read together they amount to a prohibition of the sale of tickets in lotteries or the acceptance of money in respect of the purchase of any such ticket covering lotteries conducted within and lotteries conducted outside the State. This is the content of the law. Viewed in this way the law does not select any element or attribute of inter-State trade, commerce or intercourse as the basis of its operation and is concerned only with penalising certain incidents of lotteries because of their aleatory nature. The fact that differing penalties are affixed for breach of the provisions cannot alter the character of the substantive provisions and that is the matter in question here, not the penalties.

It is nothing to the point to suggest that legislation of this kind proceeds upon a policy inconsistent with that of the *State Lotteries Act* 1930 or that the real interest of New South Wales is to protect the lottery conducted under that Act. The question simply is whether the freedom has been infringed of inter-State trade, commerce and intercourse. But in any case it should be noted that throughout the eighteenth century, when lotteries formerly were in favour, the policy of the British legislation ran upon similar lines. Lotteries not conducted under the authority of government were suppressed as pernicious. The legislation the validity of which is now in question is, in other words, of a traditional kind directed against lotteries as such independently altogether of trade, commerce and intercourse between States.

It follows from the reasons that have been given that the validity of s. 21 should be upheld. It might have sufficed in this case simply to say that no adequate reason appeared for refusing to act upon the authority of the decisions of this Court in *R.* v. *Connare*; *Ex parte Wawn* (1) and *R.* v. *Martin*; *Ex parte Wawn* (2). But

(1) (1939) 61 C.L.R. 596. (2) (1939) 62 C.L.R. 457.

having regard to the consideration which, since the date of those cases, s. 92 has received both in the Privy Council and in this Court, it seemed better to restate the reasons for the conclusion that s. 21 is valid.

Of the conviction for an offence against s. 20 little need be said. An attack upon that provision was made in the case argued together with the present, namely *Consolidated Press Ltd.* v. *Lewis*, and in the judgment given in that case the validity of the provision is upheld. There is nothing to add to the reasons contained in that judgment in support of the conclusion that s. 20 does not infringe s. 92 of the Constitution. It is enough to say that the offence with which the defendant was charged, namely displaying a notice announcing the result of the lottery, was proved by the evidence and that it was not denied that if s. 20 is valid the conviction was warranted.

For the foregoing reasons the appeals should be dismissed.

McTIERNAN J. In the first case there were two prosecutions. One was under that provision of s. 21 of the *Lotteries and Art Unions Act* which says that whosoever 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 second prosecution was under that provision of s. 20 which says that whosoever displays upon any premises in his occupation any notice relating to a foreign lottery in furtherance of the conduct of the lottery shall be liable to a penalty not exceeding two hundred pounds. The prosecution in the second case was under another provision of s. 20. It is the provision which imposes a similar penalty upon any person who publishes an advertisement relating to a foreign lottery in furtherance of the conduct of the lottery. The lottery to which each information referred was a lottery conducted or to be conducted in Tasmania and it was a foreign lottery within the meaning of each of these sections. " It is well settled " said *Knox* C.J., *Gavan Duffy* J. and *Starke* J., " that the word ' lottery ' imports a distribution by chance and nothing but chance that is by doing that which is equivalent to drawing lots ": *Automatic Totalisators Ltd.* v. *Federal Commissioner of Taxation* (1). This definition is applicable to those activities described in the Act as "foreign lotteries". In each of the present cases, the defendant claimed freedom under s. 92 to do the act charged by the information in the case. This plea cannot be

(1) (1920) 27 C.L.R. 513, at p. 518.

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sustained unless the matter charged belonged to trade, commerce and intercourse among the States. I adhere to the opinion which I stated in *Connare's Case* (1) and re-affirmed in *Martin's Case* (2), that an activity conducted across a State border, which is truly of the nature of gambling, is not trade, commerce and intercourse among the States on either side of the border. For that reason I decided that s. 21 of the *Lotteries and Art Unions Act* did not offend against s. 92 of the Constitution. The provision of s. 21 which is now in question makes it an offence to accept any money in respect of the purchase of any ticket or share in a foreign lottery. This prohibition puts a legal obstacle in the way of any person who wishes to outlay money on the chance of winning a prize in a foreign lottery because it would render any person who accepted the money from him in New South Wales liable to a penalty. But for the reason which I have stated the obstacle is a restriction upon freedom to gamble but not upon freedom to engage in commerce or intercourse across the borders of New South Wales.

Section 21 uses commercial terms to describe what it intends to prohibit. The matters prohibited, however, pertain to the conduct of a lottery or are incidents of it. The use of these terms cannot bring within the protection of s. 92 an activity which by its nature is not trade, commerce and intercourse among the States. Compare *Wilkinson* v. *Rahrer* (3). As I have said the conduct of a lottery is not trade, commerce or intercourse. The fact that a lottery is conducted by a State or made lawful by its law does not deprive the lottery of its gambling character and make s. 92 apply to it or the sale or purchase of tickets therein. It is important to observe the distinction that gambling is not trade, commerce or intercourse within the meaning of s. 92 otherwise the control of gambling in Australia would be attended with constitutional difficulties.

The provision under which the second charge in the first case was brought against the appellant makes " the furtherance of the conduct of the lottery " an essential ingredient of the offence. The provision under which the appellant was charged, in the second case, does likewise. Neither provision operates against trade, commerce or intercourse among the States. Each provision suppresses things incidental to gambling which is an activity of a different character from any given protection by s. 92.

In my opinion the appeals should be dismissed.

(1) (1939) 61 C.L.R. 596.
(2) (1939) 62 C.L.R. 457.
(3) (1891) 140 U.S. 545, at p. 558 [35 Law. Ed. 572, at p. 575].

WILLIAMS J. It was found to be convenient to have these two appeals argued together and it will be equally convenient to dispose of them in the one judgment. They both arise from convictions of the appellants for offences under the provisions of the *Lotteries and Art Unions Act* 1901-1944 (N.S.W.), ss. 19-21, relating to foreign lotteries. The first appellant, Mansell, conducts the business of a newsagent and stationer at 181 Hay Street, Sydney. He was convicted of two offences, one under s. 20 and the other under s. 21 of that Act. The second appellant, Consolidated Press Limited, publishes a daily newspaper, " The Daily Telegraph ", in New South Wales and elsewhere. It was convicted of an offence under s. 20 of that Act. The contention of both appellants is that the provisions of the sections under which they were respectively convicted are void because they offend against s. 92 of the Constitution. The text of that section has been set out so often in previous judgments of this Court and of the Privy Council that it would be otiose to set it out again. But it may assist to set out the texts of ss. 19, 20 and 21 of the *Lotteries and Art Unions Act*. They are as follows :— 19. 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. 20. Whosoever prints or publishes any advertisement, notice, or information relating to a foreign lottery in furtherance of the conduct of the lottery or announcing its result or displays upon any premises in his occupation any card, poster, or notice relating to a foreign lottery in furtherance of the conduct of the lottery or announcing its result shall be liable to a penalty not exceeding two hundred pounds. 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.

Part of the business of the first appellant is to receive applications from members of the public in New South Wales for tickets in a lottery lawfully conducted at Hobart in Tasmania under the laws of that State called Tasmanian Lotteries. It is also part of his business to act as agent for the sale of newspapers that are published in Queensland, Victoria and Tasmania. Lotteries may be lawfully conducted in Queensland and Victoria as well as Tasmania and the newspapers printed and published in these States contain advertisements relating to the conduct and result of the lotteries there conducted. The sale of these newspapers is not attacked. But

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this appellant also displays notices on the walls of his shop announcing the result of the lotteries drawn by Tasmanian Lotteries, and this is attacked. He was prosecuted and convicted (i) for accepting money in respect of the purchase of a ticket in a foreign lottery, to wit, the seventh five shilling lottery, Tasmanian Lotteries, conducted outside the State of New South Wales, that is to say, in the State of Tasmania, contrary to the Act in such case made and provided (or in other words contrary to the relevant provisions of s. 21 of the *Lotteries and Art Unions Act*); and (ii) for displaying upon his premises at 181 Hay Street, Sydney, in his occupation a notice relating to a foreign lottery, to wit, Tasmanian Lotteries, announcing the result of that lottery, contrary to the Act in such case made and provided (or in other words contrary to the relevant provisions of s. 20 of that Act). The second appellant publishes in "The Daily Telegraph" advertisements containing the results of the lotteries conducted by Tasmanian Lotteries. It was prosecuted and convicted for publishing an advertisement relating to a foreign lottery, to wit, Tasmanian Lotteries, in furtherance of the conduct of that lottery contrary to the Act in such case made and provided (or in other words contrary to the relevant provisions of s. 20 of that Act).

The relevant facts have already been stated in the joint judgment of the Chief Justice and *Webb* J. and need not be repeated. By a legal stratagem Tasmanian Lotteries have sought to make their representatives in New South Wales (including the first appellant) the agents not of themselves but of the purchaser of their lottery tickets. But the question whether these representatives are their agents or the agents of the purchasers does not appear to be very material. Accepting the position that they are the agents of the purchasers, the transaction which takes place includes the application for the ticket, the transmission of the application and the purchase money to Tasmania by the agent of the purchaser, the transmission of the ticket from Tasmania to that agent in New South Wales, the handing of the ticket to the purchaser by his agent in New South Wales, and the communication of the result of the drawing to the purchaser by his agent or otherwise. In the case of the second appellant, the transaction includes an agreement which provides that Tasmanian Lotteries will send to the appellant certain information relating to the conduct of its lotteries, including the results of the drawings, and that the appellant will print and publish the material sent to it in "The Daily Telegraph", the object being to communicate information relating to such lotteries to the members of the public in New South Wales. To the extent to which, in order

to effectuate these transactions, money or documents or other communications have to pass between New South Wales and Tasmania, the inter-State elements are clear enough. Section 92 provides that trade, commerce and intercourse among the States shall be absolutely free. It may be that there can be inter-State commerce in respect of lottery tickets. But it is unnecessary to express any final opinion on this point. For there can be at least inter-State intercourse. The first appellant could not be prevented by New South Wales law from applying for tickets in Tasmania in Tasmanian Lotteries or from forwarding the purchase money for them to Tasmania, and Tasmanian Lotteries could not be prevented from forwarding the tickets to that appellant in New South Wales on behalf of the applicants or from communicating to its ticket-holders in New South Wales through their agent or personally the result of the drawings. In a similar manner, Tasmanian Lotteries could not be prevented from communicating information to the second appellant relating to the lotteries, or the second appellant from receiving it.

The critical question is as to the number of links in the inter-State chain. Do they include what was done before and after these particular events or do they include only these particular events themselves? Section 21 of the *Lotteries and Art Unions Act* does not prevent any member of the public in New South Wales applying in Tasmania for a ticket in Tasmanian Lotteries or receiving in New South Wales a ticket forwarded to him by Tasmanian Lotteries. It is not sought to prevent such inter-State commerce and intercourse as may be necessary to achieve this purpose. In the same way, it is not sought to prevent the communication of information relating to the lotteries from Tasmania to any member of the public in New South Wales, including the second appellant. Sections 20 and 21 are on their face concerned and concerned only with intra-State transactions. They are part of an Act, the purpose of which is to suppress lotteries in New South Wales except to the extent the legislature of that State thinks fit to authorise them. Lotteries have been considered for generations evil things and have been for generations suppressed. The fact that many legislatures are now prepared to tolerate and even encourage them, provided they are conducted as a source of profit for the State or as a State monopoly, does not alter their inherent malevolence. It only emphasises their pecuniary attraction. A State must have power to enact that lotteries will not be conducted within its own borders, and if it has that power, it must also have power as incidental thereto to enact that activities in furtherance of foreign

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lotteries will not be conducted within such borders. Section 3 seeks to prevent persons conducting any lotteries in New South Wales. Sections 20 and 21 seek to prevent the activities of the kind just referred to. They refer specifically to certain activities in connexion with foreign lotteries and are a corollary to the provisions of sub-ss. 3 and 4 of s. 3 of the Act. The principle often relied on in judgments of this Court that s. 92 is violated only when legislation or an executive act operates to restrict trade, commerce and intercourse among the States directly, as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote, received its final approval in the judgment of the Privy Council in the *Bank Case* (1). That principle is exactly in point here. It is impossible to forge the conduct of the first appellant in accepting money in respect of the purchase of a ticket for an applicant in Tasmanian Lotteries into the initial link in the inter-State chain, or to forge the conduct of that appellant in exhibiting in his shop a notice relating to that lottery, or the conduct of the second appellant in printing and publishing information relating to such lottery in its newspaper into the ultimate link in such a chain. In the first instance, the conduct is prior to the commencement of such chain and, in the second instance, it is subsequent to its conclusion. Sections 20 and 21 of the *Lotteries and Art Unions Act* are confined to the prevention of activities which, if carried on, would be wholly carried on in New South Wales. They are activities which precede or succeed any activities which could be characterised as commerce or intercourse among the States. Their prevention does not directly hinder, burden or delay any such commerce or intercourse. The only impediment created by s. 21 to the first appellant applying for and obtaining tickets in the Tasmanian Lotteries is that it may not be worth his pecuniary while so to do if he is unable to sell them or offer them for sale or to accept any money in respect of the purchase of such tickets. In the same way, the only impediment created by s. 20 to the second appellant receiving information relating to the lotteries from Tasmanian Lotteries is that it might not be worth its pecuniary while to obtain it if it could not publish it in its newspaper. But these are not impediments to the freedom of inter-State commerce or intercourse. They are impediments which may have an indirect or consequential effect on that freedom, because they are calculated not to make it worthwhile for the parties to engage in such commerce or intercourse, but that is an economic consequence of the State

(1) (1950) A.C. 235, at p. 310; (1949) 79 C.L.R. 497, at p. 639.

law and such a consequence, as the Chief Justice pointed out in *Wragg* v. *State of New South Wales* (1), "is a different thing from interference by law or government action with the freedom which s. 92 confers" (2).

Mr. *Macfarlan* contended that that portion of s. 21 under which the first appellant was convicted, that is to say the provision which penalises the acceptance by any person of any money in respect of the purchase of any ticket or share in a foreign lottery, must offend against the freedom guaranteed by s. 92 because it strikes directly at the transmission of money from New South Wales to another State. He contended that, as a person must be left free to transmit his money from one State to another, this right must include the freedom to transmit the money himself or by an agent. The total sum of money the first appellant accepts from an intending participant in Tasmanian Lotteries is a sum sufficient to satisfy the purchase money for the ticket, the postage of the application to Tasmania, the postage of the ticket from Tasmania, and his commission. To the extent to which the total sum includes the last item, commission, the agent does not accept the money for transmission outside New South Wales. But he does accept the purchase money for transmission to Tasmania, and the money for the postage either way is no doubt part of the inter-State transmissions. But it is not the transmission of the money from New South Wales to Tasmania but the acceptance of the money in New South Wales for the purchase of the ticket which is penalised. The purchase of the ticket and, if the ticket won a prize, the payment of the prize money could be arranged so that it would not be necessary to transmit any money from New South Wales to Tasmania or from Tasmania to New South Wales. It is not the transmission of money from one State to another which is struck at by s. 21, but the acceptance of money by one person from another in New South Wales for a particular purpose. The operation of the provision is confined to preventing an activity in furtherance of a foreign lottery being carried on in New South Wales, which is already prevented in respect of a lottery sought to be conducted in New South Wales. Although ss. 20 and 21 specifically relate to foreign lotteries, they cannot be said to discriminate between lotteries conducted within the State and those conducted in other States, because the Act seeks to prevent all activities in connexion with lotteries conducted within the State, including those specifically described in ss. 20 and 21, and to prevent those activities in furtherance of foreign lotteries which are likely

(1) (1953) 88 C.L.R. 353.

(2) (1953) 88 C.L.R., at p. 387.

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to be attempted within the State. The presence or absence of discrimination between intra-State and inter-State trade, commerce and intercourse has never been decisive when the question arises whether an Act of a State offends against s. 92. But its absence may at least assist the conclusion that the direct operation of the Act is confined to transactions having their beginning and end wholly within the State and that any effect the Act may have on inter-State trade, commerce and intercourse is indirect and consequential only. At rock bottom, Mr. *Macfarlan's* contention really was that the payment of the money to the first appellant was an integral and inseverable link in the inter-State chain. The submissions made by Mr. *Adam* had the same rock bottom. The action of the second appellant in printing and publishing the information supplied to it by Tasmanian Lotteries in " The Daily Telegraph " was subsequent to and separate from the receipt of the information and this action took place wholly within New South Wales. It was contended that this transaction was an integral and inseverable link in the inter-State chain because, where a contract between residents of different States provides for the publication in one State by one of the parties of information to be supplied for that purpose by the other party from another State, all essential steps in the entire transaction which begins with the despatch of the information from one State and ends with its actual publication in the other State are within the conception of inter-State commerce and intercourse. But by parity of reasoning it seems to me necessarily to follow that the use the party in the second State may seek to make of the communication after it has reached him is subsequent to the cesser of the protection afforded by s. 92.

It was contended that when Tasmanian Lotteries communicated information to a person in New South Wales, the communication of itself would cause the information to be published in New South Wales. Therefore, it was submitted, at least the provision in s. 20 of the *Lotteries and Art Unions Act* penalising the publication of an advertisement, notice or information relating to a foreign lottery in furtherance of the conduct of the lottery must be void because otherwise the information could not be communicated from a person in one State to a person in another without an offence being committed. Such a communication might be a publication by the sender for the purposes of the law of libel, but it would not, in my opinion, be a publication within the meaning of s. 20. The provisions of that section must be read in the light of s. 17 of the *Interpretation Act of* 1897 (N.S.W.) and the publication which is made an offence must be a publication by some person in New South Wales of

the information that is communicated to him to some member or members of the public in New South Wales (see *Dew* v. *Director of Public Prosecutions* (1); *Ranson* v. *Burgess* (2)). Such a meaning is borne out by the context of the section as a whole. It fits in with the provisions of the section making the display of cards, posters and notices upon premises an offence. The action of the first appellant in displaying notices relating to Tasmanian Lotteries on the walls of his shop and that of the second appellant in printing and publishing the information it received from Tasmanian Lotteries in "The Daily Telegraph" falls within this meaning.

In the course of the arguments several cases decided in this Court relating to s. 92, most of them cases decided since the *Bank Case* (3), were cited. Cases such as *Clements & Marshall Pty. Ltd.* v. *Field Peas Marketing Board (Tas.)* (4); on appeal (5); *Fergusson* v. *Stevenson* (6) and *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick and Coy* (7), were relied upon by the appellants in support of their contention that the activities for which they were penalised were themselves integral and inseverable parts of inter-State commerce and intercourse in lottery tickets. But the transactions discussed in these cases were very different from the present transactions. In the *Field Peas Case* (8), the plaintiffs in Tasmania had contracted to sell the field peas to buyers in other States. The inter-State trade and commerce there in question was the sale and delivery of the field peas by a vendor in Tasmania to such buyers. The Tasmanian Act impeached, by attempting to vest these field peas in the defendant Board, prevented the inter-State transaction taking place. It could not take place unless the field peas were available for sale and delivery. The Act therefore operated directly to prevent inter-State trade in the field peas taking place. *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick and Coy* (7) was, *mutatis mutandis*, depending as it did upon whether the potatoes around which the storm centred were, within the meaning of the New South Wales Act, in the course of trade or commerce between the States, of the same character. In *Fergusson* v. *Stevenson* (6) the inter-State trade was the trading in the skins and this could not effectively take place unless the purchasers could lawfully take possession in New South Wales for transit abroad of the skins which had been sold to them in Queensland. In each of these three cases the free passage of the commodities themselves from one State to another was prevented

(1) (1920) 124 L.T. 246.
(2) (1927) 137 L.T. 530.
(3) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(4) (1947) 76 C.L.R. 401.
(5) (1948) 76 C.L.R. 414.
(6) (1951) 84 C.L.R. 421.
(7) (1952) 85 C.L.R. 467.
(8) (1947) 76 C.L.R. 401; (1948) 76 C.L.R. 414.

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or impeded. In the present cases such inter-State movement as is required to enable lottery tickets and information necessarily incidental to their sale in one State to be purchased and acquired by residents of another State is not prevented or impeded by ss. 20 or 21 of the *Lotteries and Art Unions Act*. The present facts are more in line with the facts in such cases as *Graham* v. *Paterson* (1); *Wragg's Case* (2) and *Grannall* v. *Marrickville Margarine Pty. Ltd.* (3). The reasoning in these cases shows the necessity of strictly differentiating between activities which are characteristically part of inter-State trade, commerce and intercourse and activities in close juxtaposition thereto but not close enough to have the magic wand of s. 92 waved over them.

The constitutional validity of s. 21 of the *Lotteries and Art Unions Act* has already been upheld by this Court in *R.* v. *Connare*; *Ex parte Wawn* (4), and *R.* v. *Martin*; *Ex parte Wawn* (5). But we were invited to review these decisions in the light of the decision of the Privy Council in the *Bank Case* (6) and of the subsequent decisions of this Court relating to s. 92 since that case. It is sufficient to say that there is nothing in the reasoning in the judgments in the *Bank Case* (6) or in the subsequent decisions to indicate that these cases were not rightly decided. In my opinion, they were rightly decided. Some of the reasons given in the judgments may have been of an intransitive nature. But, omitting the protasis, the apodosis of *Dixon* J., as the present Chief Justice then was, in *Martin's Case* (5), seems to be completely in line with the subsequent decisions. He said: "If, as I think, s. 92 gives no protection to a transaction against a law the application of which is independent of any characteristic which enters into the description of trade, of commerce or of intercourse and of any element of inter-State movement or communication, then it appears to me to follow that s. 21 of the *Lotteries and Art Unions Act* has a valid operation. For the criterion of its application is the specific gambling nature of the transactions which it penalizes, and not anything which brings them under the description of trade, of commerce or of intercourse or makes them inter-State in their nature" (7).

In my opinion both appeals should be dismissed.

FULLAGAR J. The terms of ss. 19, 20 and 21 of the *Lotteries and Art Unions Act* 1901-1944 (N.S.W.), and the facts proved by the prosecution in the present case, have already been set out, and it is unnecessary for me to repeat them.

(1) (1950) 81 C.L.R. 1.
(2) (1953) 88 C.L.R. 353.
(3) (1955) 93 C.L.R. 55.
(4) (1939) 61 C.L.R. 596.
(5) (1939) 62 C.L.R. 457.
(6) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(7) (1939) 62 C.L.R., at p. 462.

In *R.* v. *Connare*; *Ex parte Wawn* (1), as in the present case, the charge was laid under s. 21. The Full Bench of this Court held (*Latham* C.J. and *Rich* J. dissenting) that the transaction in question was not protected by s. 92 of the Constitution. In that case, however, the defendant had simply "sold" and delivered in New South Wales, in exchange for a sum of money, a ticket in a lottery conducted in Tasmania. That transaction in itself (though this, of course, as *Dixon* J. pointed out, was not necessarily the end of the matter) was a purely intra-State transaction. It possessed itself no inter-State element—any more than would a sale in New South Wales of a share in a partnership whose business was carried on in Tasmania. Those interested appear accordingly to have decided to test further the question of the application of s. 92 to the *Lotteries and Art Unions Act*, and some six months later the case of *R.* v. *Martin*; *Ex parte Wawn* (2) came before the Full Bench of this Court. What was proved was that the defendant had received from the informant in New South Wales a sum of money which he agreed to send to Tasmania for the purpose of obtaining for the informant a ticket in a lottery conducted in Tasmania. Of this transaction *Dixon* J. said: "The money was accepted for transmission to another State, Tasmania, whence the lottery ticket was to be sent. To entrust money to an agent in New South Wales for transmission to another State for the purpose of obtaining an instrument or contract to be transmitted thence into New South Wales appears to me to be a transaction of an inter-State character" (3). It was nevertheless again held (*Latham* C.J. and *Rich* J. dissenting) that the transaction was not protected by s. 92.

The facts in the present case seem to me not to be distinguishable in any material respect from the facts in *R.* v. *Martin*; *Ex parte Wawn* (2). An attempt was made, by means of certain documents, to make the defendant appear to be the agent of the person or persons conducting the lottery in Tasmania. This was doubtless done in the hope of taking the defendant outside s. 21 by maintaining that he did not sell, or accept money for, a lottery ticket, but rather bought, or paid money for a lottery ticket. The magistrate who convicted him, however, must be taken to have found that he did, as the information charges, "accept money in respect of the purchase of a ticket", and not only is there evidence to support such a finding but I would think it the only proper finding on the evidence. For all material purposes, the defendant was, in my opinion, the agent of the person or persons conducting the lottery in Tasmania.

(1) (1939) 61 C.L.R. 596.
(2) (1939) 62 C.L.R. 457.
(3) (1939) 62 C.L.R., at p. 461.

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The case, therefore, is really covered by the decision in *R.* v. *Martin*; *Ex parte Wawn* (1). However, partly because the Justices who composed the majority were not unanimous in their reasons, but mainly because the whole subject of the effect of s. 92 has been to a considerable extent reopened since the decision of the Privy Council in *The Commonwealth* v. *Bank of New South Wales* (2), the argument proceeded on the footing that the case was not concluded by binding authority.

Approaching the matter on that basis, I am of opinion that *R.* v. *Connare*; *Ex parte Wawn* (3) and *R.* v. *Martin*; *Ex parte Wawn* (1) were rightly decided for the reasons given by *Dixon* J. in those cases, and that the defendant in the present case receives no protection from s. 92. The theory of s. 92 on which those reasons rest was first propounded by his Honour in *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (4). It was there illustrated by reference to the cases which had up to that time been decided under s. 92. It was referred to by his Honour in *McCarter* v. *Brodie* (5). What is essentially the same idea is reflected in a passage in the *Hughes & Vale Case* [*No.* 2] (6), in the joint judgment of *Dixon* C.J., *McTiernan* and *Webb* JJ., where their Honours say: "In most questions concerning the consistency with s. 92 of laws which in some way affect the conduct of any description of transaction or activity occurring in the course of inter-State trade commerce or intercourse there is nothing better calculated to open the way to a true solution than to distinguish between on the one hand the features of the transaction or activity in virtue of which it falls within the category of trade commerce and intercourse among the States and on the other hand those features which are not essential to the conception even if in some form or other they are found invariably to occur in such a transaction or activity" (7).

In *Gilpin's Case* (8), *Dixon* J. said: ". . . given an act or transaction which falls within the conception of trade, commerce, or intercourse among the States and a restriction or burden operating upon that act or transaction, it appears to me that it must be an infringement upon the absolute freedom guaranteed by s. 92 unless the restriction or burden is imposed in virtue of or in reference to none of the essential qualities which are connoted by the description 'trade, commerce, and intercourse among the States'" (9). The

(1) (1939) 62 C.L.R. 457.
(2) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(3) (1939) 61 C.L.R. 596.
(4) (1935) 52 C.L.R. 189, at pp. 204-212.
(5) (1950) 80 C.L.R. 432, at p. 467.
(6) (1955) 93 C.L.R. 127.
(7) (1955) 93 C.L.R., at p. 162.
(8) (1935) 52 C.L.R. 189.
(9) (1935) 52 C.L.R., at p. 206.

question in the present case is whether the *Lotteries and Art Unions Act*, and in particular s. 21 thereof, falls within the exception in the principle thus stated. And the correct answer, in my opinion, is that it does. In the last analysis the application of the State law " does not depend upon any characteristic of lotteries or lottery transactions in virtue of which they are trade or commerce or intercourse, nor upon any inter-State element in their nature. The only criterion of its operation is the aleatory description of the acts which it forbids " (*R.* v. *Martin*; *Ex parte Wawn* (1)).

I have now on several occasions expressed my respectful concurrence with the judgment of *Dixon* J. in *Gilpin's Case* (2) and it is perhaps unnecessary for me to say anything further. I wish, however, to refer very briefly to what have seemed to me to be the two real difficulties in the present case.

The first arises from the fact that s. 21 of the *Lotteries and Art Unions Act*, like s. 20, deals specifically with " foreign lotteries ", and the term " foreign lotteries " includes lotteries conducted in other States of Australia than New South Wales. It may well be suggested that, in so far as ss. 20 and 21 apply to lotteries conducted in other States than New South Wales, they involve a discrimination in favour of domestic transactions, and against inter-State transactions, of the forbidden character. In other words, do not ss. 20 and 21 take as the criterion of their application not merely the " aleatory " character of the thing to be suppressed, but also the inter-State character of transactions to which the prohibited acts are incidental ? If, indeed, ss. 20 and 21 stood alone, so that the Act penalised acts done in furtherance of a Tasmanian or Victorian lottery while leaving untouched acts done in furtherance of a New South Wales lottery, it would seem to me that s. 92 would invalidate those sections in so far as they applied in respect of Tasmanian or Victorian lotteries. Sections 20 and 21, however, do not stand alone, and one has some difficulty in understanding why they were inserted in the Act. For the Act contains in s. 3 what amounts to a general prohibition of lotteries in New South Wales. Sub-section (4) of that section contains a general prohibition which corresponds exactly with the particular prohibition in respect of " foreign " lotteries which is contained in s. 21. And sub-s. (3) of s. 3 contains a general prohibition which corresponds substantially with the particular prohibition contained in s. 20. So far as I can see, the defendant in the present case might just as well have been prosecuted under s. 3 (4). The general prohibitions contained in s. 3 seem to me to dispose of the argument that ss. 20 and 21 involve a

(1) (1939) 62 C.L.R., at p. 462. (2) (1935) 52 C.L.R. 189.

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discrimination against inter-State trade or commerce or intercourse. It is true that the maximum penalties are respectively greater under ss. 20 and 21 than under s. 3 (3) and s. 3 (4), and one can readily imagine cases where a difference in penalties might be very significant. But in the present case the intention to prohibit generally all activities in connexion with lotteries is quite clear, and the material consideration seems to be the substantive enactment and not the sanction.

The second difficulty involves looking beyond the statute immediately in question. It arises from the fact that, under the *State Lotteries Act* 1930 (N.S.W.), the Colonial Treasurer is authorised " to promote and conduct in the prescribed manner a State lottery " (s. 3). A " State lottery " has in fact for many years been conducted in New South Wales in pursuance of this Act. Although, therefore, we may say that the *Lotteries and Art Unions Act* 1901-1944 involves no discrimination, must we not say that the *State Lotteries Act* 1930, and what has been done in pursuance of it, show that the real purpose and effect of ss. 20 and 21 of the former Act is to protect the State lottery from inter-State competition ? I can see no reason why we should not, for the purpose in hand, look at the *State Lotteries Act* 1930, but I do not think that it can be rightly regarded as affecting the view which one would otherwise take of the *Lotteries and Art Unions Act* 1901-1944. It is important to note that the provisions of the *Lotteries and Art Unions Act* antedate the *State Lotteries Act* by many years. There was a general legislative prohibition of lotteries in New South Wales long before the Act of 1901, and ss. 19, 20 and 21 were added to the Act of 1901 in 1922, i.e. eight years before there was any provision for a State lottery. The Act of 1930 represented no more than a relaxation, in favour of the Crown, of a general prohibition which continued to exist. The giving to the Crown of this privilege—a traditional privilege of Government exercised from time to time in many countries—cannot, in my opinion, be regarded as having altered the character of the provisions of the *Lotteries and Art Unions Act*. The criterion of the law's operation was not, and is not, either the commercial character, or the inter-State character, of the acts prohibited or of transactions to which those acts are incidental.

The appeal should, in my opinion, be dismissed.

KITTO J. I agree that this appeal, so far as it relates to the conviction of the appellant under s. 20 of the *Lotteries and Art Unions Act* 1901-1944 (N.S.W.) is covered by the decision being given to-day in the case of *Consolidated Press Ltd.* v. *Lewis*.

The conviction under s. 21 involves different considerations. It is a conviction on a charge of accepting money in respect of the purchase of a ticket in a foreign lottery. The money referred to, a sum of 6s. 1d., was accepted by the appellant in New South Wales. He accepted it from a man named Brodie as consideration for a promise which he then and there made to Brodie. As I interpret the stated case, the promise was, first, that the appellant would remit 5s. 3½d. of the money which he accepted to an organisation in Tasmania known as Tasmanian Lotteries, with an application for a five shilling ticket in a lottery which that organisation was in course of conducting in that State, the ticket to be issued in the name of Brodie and posted to the appellant in New South Wales, and, secondly, that he would deliver the ticket to Brodie when he received it from Tasmania. The remaining 9½d. consisted of 3½d. to cover the appellant's expenditure for postage and 6d. for his remuneration. To understand the promise in any more limited sense than I have stated would be, I think, to forsake the realities of the case.

The question which arises on these facts is whether the charge against the appellant under s. 21 should have been dismissed on the ground that the case is excluded from the application of that section by the guarantee of absolute freedom of trade, commerce and intercourse among the States which is given by s. 92 of the Constitution of the Commonwealth. Reading the case stated in the sense I have mentioned, I agree in thinking that the facts are indistinguishable in any material respect from those in *R.* v. *Martin*; *Ex parte Wawn* (1). No doubt has ever been cast, so far as I am aware, upon the correctness of the view there expressed by *Dixon* J. (2) that to entrust money to an agent in New South Wales for transmission to another State for the purpose of obtaining an instrument or contract to be transmitted thence into New South Wales is a transaction of an inter-State character. Nevertheless it was held in that case that s. 92 afforded no defence to the charge; and it follows that if that case and the earlier case of *R.* v. *Connare*; *Ex parte Wawn* (3) are to be followed, we must hold that the appellant's reliance upon s. 92 is misplaced. It seems to me, however, that we ought not to regard those cases as concluding the present, for in the diversity of views which the judgments exhibit concerning the principles governing the application of s. 92, and in the incompatibility of much of the reasoning employed with the doctrines established by *The Commonwealth* v. *Bank of New South Wales* (4) and

(1) (1939) 62 C.L.R. 457.
(2) (1939) 62 C.L.R., at p. 461.
(3) (1939) 61 C.L.R. 596.
(4) (1950) A.C. 235; (1949) 79 C.L.R. 497.

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later decisions, there seem to me to be compelling reasons for examining the subject afresh.

The material words of s. 21 are these: "Whosoever . . . 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 has been assumed throughout the case, and I take it to be correct, that "purchase" is used in the section, in accordance with general usage, as including any taking of a ticket in exchange for money: See the definition of "lottery" in the Oxford English Dictionary. By reason of a definition contained in s. 19, the lottery in question in this case was a foreign lottery within the meaning of s. 21. I am content to accept the view that, reading s. 3 (4) and s. 21 together, the problem before us should be considered as if by a single provision it were made an offence to accept any money in respect of the purchase of a ticket or share in a lottery wherever conducted.

On this basis, the question is whether the application of such a provision to the acceptance of the 6s. 1d. by the appellant from Brodie would mean a denial of, or detraction from, the freedom of either of those persons under s. 92 of the Constitution. It may well be correct to say that it would not affect the appellant's freedom, because in accepting Brodie's money he was not engaging in any inter-State intercourse of his own: he was only performing an act preliminary or preparatory to such intercourse and analogous to the manufacture the prohibition of which was held not to be protected by s. 92 in *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1). But s. 21 cannot apply to the appellant's acceptance of the money if to do so would be to detract from Brodie's freedom, in virtue of s. 92, to send money from New South Wales to Tasmania. That it would be to detract from that freedom in a very real sense I suppose no one would doubt. If a statute forbids a bank to accept my money for transmission, or forbids my friend to accept it for the purpose of carrying it in his pocket for me from any one place to another, it clearly places a legal obstacle to my sending the money inter-State. But it is said that if the statute forbids my bank or my friend to accept the money for transmission or conveyance, not generally, but in respect of the purchase of a lottery ticket, it leaves my freedom of inter-State intercourse unimpaired in any relevant sense. This, it is suggested, is a consequence of the undoubted proposition that s. 92 does not overrule a statutory provision unless that provision "operates to restrict (inter-State) trade, commerce or intercourse directly and immediately as distinct from creating some

(1) (1955) 93 C.L.R. 55.

indirect or consequential impediment which may fairly be regarded as remote " : *The Commonwealth* v. *Bank of New South Wales* (1). It is said that, while a statute which forbids the acceptance of money for transmission or conveyance inter-State, irrespective of purpose, operates " directly " to restrict inter-State trade, commerce or intercourse, a statute which forbids such an acceptance in respect of the purchase of a lottery ticket creates only an " indirect or consequential impediment ".

This is put as being the result of applying the criterion of directness of operation as stated in *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (2) ; *Grannall* v. *Marrickville Margarine Pty. Ltd.* (3) and *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (4). (See also *Commissioner for Motor Transport* v. *Antill Ranger & Co. Pty. Ltd.* (5).) In *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways* (*N.S.W.*) (6), *Dixon* J. expressed the principle, in a form which provides a convenient test for use in the present case, as an answer to the question which s. 92, as I have suggested before (7), poses on its face but leaves to be answered by inference from the nature of the instrument in which it appears and the characteristics of the classes of activities to which it refers. The passage is this : " ' Free ' must at least mean free of a restriction or burden placed upon an act because it is commerce, or trade, or intercourse, or because it involves movement into or out of the State. By this I mean that the application of the restriction or burden to the act cannot be made the consequence of that act's being of a commercial or trading character, or of its involving intercourse between two places, or of its involving movement of persons or things into or out of the State " (8).

If I thought it accurate to say that the application of s. 21 of the *Lotteries and Art Unions Act* to the facts of this case is the consequence of nothing but the connexion of the appellant's acceptance of Brodie's money with the purchase of a ticket in a lottery, I should agree that the direct operation of the section involves no detraction from the freedom which s. 92 establishes ; for that connexion is a characteristic apart altogether from the characteristics which make an acceptance trade, or commerce or intercourse or inter-State. But the words " in respect of the purchase of any ticket or share in a foreign lottery " do not contain the offence which s. 21 creates.

(1) (1950) A.C., at p. 310 ; (1949) 79 C.L.R., at p. 639.
(2) (1953) 87 C.L.R. 1, at p. 17.
(3) (1955) 93 C.L.R. 55, at p. 78.
(4) (1955) 93 C.L.R. 127, at pp. 162, 217.
(5) (1956) 94 C.L.R. 177.
(6) (1935) 52 C.L.R. 189.
(7) (1955) 93 C.L.R., at p. 216.
(8) (1935) 52 C.L.R., at p. 205.

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The offence is the *accepting* of money in respect of the purchase of a lottery ticket; and the elements in it are (a) a receiving of money which is offered upon terms having a sufficient connexion with the purchase of a lottery ticket, and (b) an assent to those terms by the recipient of the money at the time of the receipt—" a consenting mind ", to use the expression employed in the Oxford English Dictionary's definition of " accept ". Parties may make any agreement they like as to the purchase of a lottery ticket, and no offence is committed under the section unless and until one of them accepts money in respect of the purchase. Thus the criterion which the section prescribes for its application is not the gambling nature of an acceptance, but is the acceptance itself which has that nature. The application of s. 21 to the facts of the present case is the consequence, not of the appellant's assent to Brodie's terms, but of the movement of Brodie's money to the appellant upon those terms.

To participate in a movement of money from one person to another in circumstances such as these may not be to engage in trade or commerce, but assuredly it is to engage in intercourse between the place from which the money starts and the place to which the participants agree that it shall go; and if the movement between the participants is only a part of a larger movement the participation must be in intercourse between the place of departure and the destination provided by the larger movement. Here, the movement of Brodie's 5s. 3½d. to the appellant was nothing less than the first stage of the journey to Tasmania upon which Brodie embarked it when he handed it to the appellant. Yet it is the appellant's participation in that movement which is here relied upon as having constituted an offence.

If, therefore, s. 21 applies to the case, its direct operation is to infringe the freedom which s. 92 guarantees; for the result of applying it would be to attach a penal consequence to conduct by reason of its possessing the characteristic of a participation in a movement of money, that is to say because of a characteristic which is essential to the conception of intercourse among the States.

For this reason, I would allow the appeal.

TAYLOR J. The substantial question for our consideration upon this appeal is whether ss. 20 and 21 of the *Lotteries and Art Unions Act* 1901-1944 impair the freedom, accorded by s. 92 of the Commonwealth Constitution, to trade, commerce and intercourse among the States.

These sections are in the following terms:—" 20. Whosoever prints or publishes any advertisement, notice, or information

relating to a foreign lottery in furtherance of the conduct of the lottery or announcing its result or displays upon any premises in his occupation any card, poster, or notice relating to a foreign lottery in furtherance of the conduct of the lottery or announcing its result shall be liable to a penalty not exceeding two hundred pounds. 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 not exceeding twenty pounds."

By s. 19 the expression " foreign lottery " 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. Sections 19, 20 and 21 of the Act constitute a part of the Act relating to *Foreign Lotteries* and it should be noted in passing that an earlier provision of the Act, s. 3, prohibits the selling or disposing of any property whatsoever, real or personal, to or among any person or persons whomsoever by means of any game or of any other contrivance or device whereby any such property is sold or disposed of by lottery or chance. An earlier enactment also should be noticed. By s. 2 of the *Vagrancy (Amendment) Act* 1905 the disposal of money by lottery or chance was declared to be an unlawful game and, by s. 3 of that Act, any person who gives or sells any ticket or chance in any such disposal of money by lottery or chance is deemed to be guilty of an offence under sub-s. (2) of s. 4 of the *Vagrancy Act* 1902, and is deemed to be a rogue and vagabond within the meaning of that Act.

The defendant has been convicted of offences against both ss. 20 and 21 of the *Lotteries and Art Unions Act*. The charge under the latter section is that on 1st October 1954, at Sydney, he accepted " money in respect of the purchase of a ticket in a foreign lottery, to wit, the seventh five shilling lottery, Tasmanian Lotteries, conducted outside the State of New South Wales that is to say in the State of Tasmania " and, additionally, he was charged under the former section with having displayed " upon premises situate at 181 Hay Street, Sydney . . . a notice relating to a foreign lottery, to wit, Tasmanian Lotteries, announcing the result of the said lottery ". It will be convenient to refer to these charges respectively as the first and second charges.

Section 21 of the Act is in precisely the same form as it was in 1939 when the contentions which are raised in this case were rejected in *R.* v. *Connare*; *Ex parte Wawn* (1) and *R.* v. *Martin*; *Ex parte Wawn* (2) but, notwithstanding the decisions in those cases, the

(1) (1939) 61 C.L.R. 596. (2) (1939) 62 C.L.R. 457.

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defendant was, in view of intervening decisions of constitutional importance, permitted to reopen the question of the validity of that section.

Section 21, which deals with activities quite different in character from those referred to in s. 20, raises questions of some difficulty and, before proceeding to a consideration of the constitutional problems which arise it is desirable to inquire just what that section does. In terms, it imposes penalities upon any person who " sells " or " offers for sale " or " accepts any money in respect of the purchase of any ticket or share in a foreign lottery ". The first word, " sells ", may, perhaps, be thought inappropriate to describe the transaction whereby a participant in a lottery acquires what is virtually a numbered receipt for his subscription, but it is a word commonly used to describe such a transaction and its use presents no real problem. It refers, of course, to a " sale " in New South Wales and, consequently, it is inadequate to embrace a transaction between a resident of New South Wales and the promoters of a foreign lottery where the sale takes place outside that State. In this circumstance, no doubt, is to be found the reason for the inclusion of the words " accepts any money in respect of the purchase of any ticket or share in a foreign lottery " and the same circumstance may, in part, account for the presence of the words " offers for sale ". Each of these expressions, again, refers to activities in New South Wales but they are apt to extend the operation of the section so as to cover cases where sales outside New South Wales are arranged. The latter expression is clear enough but the former requires some examination. The word " *accepts* " and the expression " *in respect of* the *purchase* of any ticket or share in a foreign lottery " are of wide import and may be thought to cover the simple case where A hands money to B with the request that B should, on A's behalf, purchase a ticket in a foreign lottery. It may even be thought that a deposit of moneys at a post office or at a bank in order that such moneys may be remitted to another State in payment for a lottery ticket would be covered. The expressions however take some colour from the antecedent expressions used. A " sale " can take place only between a vendor and a purchaser. Likewise an " offer for sale " can be made only by a person having authority to make such an offer. These considerations are of some assistance when the question is asked " In what circumstances can a person be said to *accept* money *in respect of the purchase* of a lottery ticket ? " It is, of course, clear that there can be such an acceptance *after* a sale has taken place ; to receive payment of the *price* payable for a ticket already supplied

would be to accept money in respect of the purchase of the ticket. But where a sale has taken place and the purchaser merely puts his agent in funds for the purpose of paying for the ticket the receipt of those funds by the agent is not and cannot constitute an acceptance of money by the agent in respect of the purchase; he merely receives the money and his function is to pay it to some person who is authorised to accept it in respect of the purchase. But it is equally clear that there may be an acceptance of money in respect of the purchase of a lottery ticket *before* a sale has taken place. Money may be, and, I should imagine, generally is, received by the promoters of a lottery, or their agents, in anticipation of the issue of a ticket and moneys so received are accepted in respect of the purchase of the ticket. The same conclusion is justified where some person acting upon the instructions of the lottery promoters receives, both, applications for tickets and an amount representing the price of the tickets at one and the same time. But a transaction of the latter type is quite different from the case where A merely requests B to purchase a lottery ticket for him and hands him the appropriate amount of money to make the purchase. B does not in those circumstances accept money in respect of the purchase of the ticket; he may receive money for the purpose of making the purchase but this is an entirely different conception.

In the present case it is said, first of all, that the defendant was merely the agent of the purchaser for the purpose of acquiring a lottery ticket on his behalf. The case stated by the magistrate states, in effect, that the defendant "carried on the business of acting for intending purchasers of lottery tickets" but, whatever this may mean, it is clear enough from the documents in the case that the defendant, upon the instructions of the lottery promoters, was accustomed to accept applications for lottery tickets from intending subscribers, to receive the appropriate amounts from them and to transmit the applications to and account for the purchase money to the promoters. In his evidence the defendant said that, by letter of 1st June 1954 received by him from the promoters, he was "appointed a Clients' Agent" in respect of Tasmanian Lotteries and, in performing the activities previously mentioned he observed the detailed instructions prescribed for "Clients' Agents" by the promoters. The detailed instructions were contained in a compendious form which constituted an exhibit to the case stated. I do not, myself, understand how the promoters could appoint an agent to act on behalf of prospective purchasers of tickets and I do not understand it to be seriously argued that this

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occurred. What in fact happened was that the promoters authorised the defendant to hold himself out as a person to whom applications might be made for tickets in the lottery, to whom moneys might be paid for transmission to them and to whom, in due course, tickets would be forwarded for distribution among the respective purchasers. If this was so the defendant was not a mere agent of the purchaser; indeed I doubt if he was the agent of the purchaser in any real sense at all. Moreover it is, I think, impossible to say, on any view, that the defendant was employed by the purchaser to procure a ticket on his behalf from Tasmania, or indeed, to transmit the money paid by him to that State. The evidence shows that the intending purchaser merely entered the defendant's shop and said that he wished to purchase a ticket in an inter-State lottery. When asked if the Tasmanian lottery would do he said "Yes" and in reply to an appropriate inquiry he said he would like a ticket in the "small lottery". Thereupon he gave his name, paid the appropriate amount and left the defendant's premises. Both parties apparently understood that the ticket would be available in a few days but it is impossible to conclude that the customer employed the defendant as his agent to procure the ticket from Tasmania. He entered the shop to purchase a lottery ticket and it was immaterial to him whether the defendant then held tickets in stock or whether, in the course of *his* business, the defendant would obtain a ticket or tickets from the promoters in Tasmania or elsewhere. It was equally immaterial to the customer whether the defendant transmitted to the lottery promoters in Tasmania the amount received by him in respect of the purchase of the ticket or accounted to them for that sum either in or beyond New South Wales in any other way.

These observations lead not only to the conclusion that the defendant did accept money in respect of the purchase of a ticket in a foreign lottery but they permit a direct attack which is made on s. 21 to be disposed of briefly. This attack was based upon the assertion that where one person deposits with another money to be transmitted on his behalf to another State and the money thereafter is so transmitted the inter-State transaction commences at the moment of such deposit. In effect, it is said, that is just what occurred in the present case. For the purposes of this case the wide proposition may be generally conceded but upon the true meaning of the expression, "accept money in respect of the purchase of a ticket in a foreign lottery", s. 21 does not apply to any such inter-State transaction. As already appears money received by the agent of a person for the purpose of paying it to some other person in

respect of the purchase of a lottery ticket is not *accepted* by the agent in respect of such purchase. From this it follows that the relevant provisions of s. 21 do not impede the right of any person in this State, either by himself or his agent, to resort to any method of inter-State communication for the purpose of purchasing a ticket in a foreign lottery.

There still remains to be considered, however, the question whether, upon the facts of the case, the defendant is entitled otherwise to maintain that s. 21 operates to prohibit or impede activities which may be said to constitute trade, commerce or intercourse among the States. In considering the contentions advanced on this branch of the case it is essential to observe, initially, that the particular transaction, which constitutes the ingredients of the first charge, is a transaction which took place wholly at the defendant's premises in Sydney. True, it was the step which initiated a series of events which led to the defendant obtaining from Tasmania, in return for the money paid to him, a ticket in the lottery in question. But the actual transaction, the subject of the charge, was the delivery by the prospective subscriber or purchaser of a sum of money to the defendant and its acceptance by him. The offence, if there was one, was complete at that stage and at that point no transaction within the purview of s. 92 had occurred. And this, it may be said, was so whether the defendant became, as is claimed, the agent of the prospective purchaser to apply the moneys received by him in the purchase of a lottery ticket or whether he became the agent of the lottery promoters to account to them for such moneys and, ultimately, to supply the purchaser with a ticket. But the defendant asserts—and attaches importance to the assertion—that the money was paid to him pursuant to an arrangement that he should obtain a lottery ticket for the defendant from Tasmania. For the purposes of s. 92 it is said that the present case is no different from the case where a contract has been made for the sale of a commodity and the vendor's obligation can be performed only by a supply and delivery of the commodity from another State. Therefore, it is contended, the prohibition erected by s. 21 against the payment of moneys pursuant to such an arrangement is a direct interference with trade and commerce among the States (cf. *Wragg* v. *State of New South Wales* (1)).

For the purposes of this aspect of the case I am prepared to assume the validity of the assertion made by the defendant but the observation must be made at once that the direct application to the facts

(1) (1953) 88 C.L.R. 353, at p. 396.

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of the present case of observations made in *Wragg's Case* (1) is dependent, at least, upon the correctness of two assumptions which the defendant's contentions make. The first is that the act of subscribing for a lottery ticket constitutes an activity properly characterised as trade or commerce, and the second, that the defendant was the agent of the lottery promoters with authority to make agreements for the sale in New South Wales of lottery tickets to be procured from another State, or that the dealing between the defendant and the prospective purchaser resulted in an agreement of that character between the latter and the promoters. Whether or not either branch of the second assumption correctly states the position is, however, of little consequence, for the terms of s. 21 are appropriate to prohibit the acceptance, *in any circumstances*, of money in respect of the purchase of a ticket in a foreign lottery and no provision is made which would enable the section to be read down so as to give the relevant words a residual, as distinct from total, operation. But since, in my view, the matters involved in the first assumption are vital to the defendant's argument and that assumption is wrongly made it is unnecessary to say more on this point. I have not, I should add, overlooked the fact that, on this aspect of the case also, the defendant relies upon the presence in s. 92 of the word " intercourse " but for reasons which will appear it is desirable first of all to indicate why the transaction, the subject of the first charge, was not part of trade and commerce in the sense in which that expression is used in s. 92.

In cases where the protection afforded by s. 92 is invoked it becomes necessary to inquire whether the activity immediately prohibited or impeded, itself, forms part of those transactions which constitute trade commerce and intercourse among the States. The mere fact that such an inquiry produces a negative answer does not necessarily mean that the attack on the impugned legislation will fail, for the prohibition or impediment may, nevertheless, constitute a direct burden upon or impediment to such trade commerce and intercourse. The freedom which is accorded to inter-State trade and commerce " means a freedom from restrictions and burdens operating against transference from one State to another at whatever point the burden or restriction is imposed. It may be before or after the actual movement from one State to another at whatever point the burden or restriction is imposed. It may be before or after the actual movement from one State to another. It may be in the State in which the trade originates or in that where it

(1) (1953) 88 C.L.R. 353.

terminates. It may be a prior restraint or a subsequent burden " (per *Dixon* J., as he then was, in *Field Peas Marketing Board (Tas.)* v. *Clements & Marshall Pty. Ltd.* (1)). Of course, once it is found that impugned legislation prohibits or impedes activities or transactions which are, themselves, part of inter-State trade and commerce the problem is comparatively simple. Yet it has not, in many cases, been a simple matter to say whether particular transactions were of that critical character and, in those cases, the answer, in the end, has depended upon practical considerations arising from the nature of the transactions themselves. For instance in the comparatively simple case where A, in the one State, contracts with B, in another State, to purchase goods to be sent to A from B, in the latter State, the parties to the contract may be said to be engaged in inter-State trade. The reason why this is so is because the contract can be performed only by a despatch of the goods from one State to another. In other cases, a problem arises in relation to acts and transactions which, though not, themselves, part of such trade and commerce, are closely associated with it. That is to say, associated acts and transactions which are performed or carried out antecedently to or after the transaction which, itself, constitutes inter-State trade or commerce. In such cases difficulties frequently arise in determining whether a burden imposed on such antecedent or subsequent activities or transactions constitutes a *direct* impairment of the freedom accorded by s. 92 to the inter-State trade and commerce itself. Again, in these cases, practical considerations will play a substantial part in solving the problem. No doubt problems of the nature indicated may arise in relation to " intercourse " but the complexities of modern trade and commerce operate to provide, for questions of this character, a field which, in the nature of things, is much more fruitful and much more suited to the exercise of forensic ingenuity. For this reason it is of importance to determine the true character of the activities in which the defendant was engaged.

In approaching the question whether participation in the conduct of a lottery may properly be characterised as trade or commerce I have no desire to derogate from the views expressed by *Dixon* J. (as he then was) in *Bank of New South Wales* v. *The Commonwealth* (2) and approved by the Judicial Committee (*The Commonwealth* v. *Bank of New South Wales* (3)) concerning the width of the expression as used in s. 92. The observations referred to are, of

(1) (1948) 76 C.L.R. 414, at p. 423.
(2) (1948) 76 C.L.R. 1, at pp. 380-382.
(3) (1950) A.C. 235, at p. 303; (1949) 79 C.L.R. 497, at pp. 632, 633.

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course, necessarily of a general character; indeed their content indicates the impossibility of stating in other than a general way the extent of the field covered by the expression. But since "the essential attributes which belong to the conception (of trade and commerce) should determine the field of human activities to which it applies" it is clear that the mere act of legislating cannot operate to divest of its true character that which is or ought properly to be regarded as falling within that field. No simple legislative expedient purporting to transmute trade and commerce into something else will remove it from the ambit of s. 92. But whilst asserting the width of the field in which s. 92 may operate it is necessary to observe that not every transaction which employs the forms of trade and commerce will, as trade and commerce, invoke its protection. The sale of stolen goods, when the transaction is juristically analysed, is no different from the sale of any other goods but can it be doubted that the Parliament of any State may prohibit the sale of stolen goods without infringing s. 92 of the Constitution? The only feature which distinguishes such a transaction from trade and commerce as generally understood is to be found in the subject of the transaction; there is no difference in the means adopted for carrying it out. Yet it may be said that in essence such a transaction constitutes no part of trade and commerce as that expression is generally understood. Numerous examples of other transactions may be given, such as the sale of a forged passport, or, the sale of counterfeit money, which provoke the same comment and, although legislation prohibiting such transactions may, possibly, be thought to be legally justifiable pursuant to what has, on occasions, been referred to as a "police power", I prefer to think that the subjects of such transactions are not, on any view, the subjects of trade and commerce as that expression is used in s. 92 and that the protection afforded by that section has nothing to do with such transactions even though they may require, for their consummation, the employment of instruments, whereby inter-State trade and commerce is commonly carried on.

It may be said, however, that the purchase of a lottery ticket does not fall into the same category as activities of the character referred to and the suggestion is advanced that the legislative prohibitions which have been erected against the conduct of lotteries in general does not withdraw the disposal of lottery tickets from the field of trade and commerce. I doubt very much if the purchase of a lottery ticket ever was regarded as trade and commerce but whether or not it was, at some remote period so regarded, it is clear that it has not been so regarded for some centuries. The "distribution of prizes

by lot or chance " (*Taylor* v. *Smetten* (1)) constitutes a lottery and is a conception which appears to be as old as history itself. (See *Street—Law of Gaming* (1937), p. 204.) Both in ancient and modern times lotteries have been employed, both privately and publicly, in many countries, as an unfailing method of obtaining money. The first recorded instance in England of a lottery authorised for a public purpose was that conducted in 1589 for the repair of harbours. It was authorised by proclamation in that year and the terms of the proclamation (see *Holdsworth—A History of English Law*, 2nd ed. (1937), vol. IV, pp. 306, 307) indicate that lotteries were already well known as gambling devices. This lottery was followed by many others for public purposes including that for the establishment and maintenance of the London water supply in 1627. From 1697 till 1710 no State lotteries were conducted but in the latter year they were renewed and from then until 1824 it is said that " the Government annually raised by lotteries large sums, averaging yearly . . . £346,765 ". The break between 1697 and 1710 resulted from the provisions of the Statute 10 & 11 Will. III c. 17 which, in 1698, operated to suppress both public and private lotteries. This statute recited that " several evil disposed persons had set up many mischievous and unlawful games called lotteries by colour of grants or patents under the Great Seal " and had thereby " most unjustly and fraudulently got to themselves great sums of money from the children and servants of several gentlemen, traders and merchants, and from other unwary persons to the utter ruin and impoverishments of many families and to the reproach of English laws and government ". Thereupon the Act declared lotteries to be common and public nuisances and made it an offence to open or keep a lottery and provided for the prosecution of offenders as common rogues. Provision was also made for the punishment of persons " playing in " lotteries. Subsequent statutes are referred to in Mr. *Windeyer's* book on *Wagers, Gaming and Lotteries in Australia* (1928) and reference to this work will show that the general prohibition erected in England in 1698 has never been relaxed. One of the last of these statutes—42 Geo. III c. 119 (1802)—recited that " certain evil disposed persons had frequently resorted to public houses and other places to set up certain mischievous games or lotteries called ' little-goes ' and to induce servants, children and unwary persons to play at such games ". All such games were declared to be common and public nuisances and illegal and any person keeping any office or place for the purpose of carrying on

(1) (1883) 11 Q.B.D. 207.

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any such game or lottery was to be guilty of an offence and punishable by a substantial fine and also as a rogue and a vagabond. Assisting in the conduct of a lottery was, also, an offence against the Act. Further provision was made by a later statute—4 Geo. IV c. 60 (1823)—and the substantial provisions of this statute together with those of the Act of 1802 became part of the law in force in New South Wales by virtue of 9 Geo. IV c. 83 s. 24 (*Mutual Loan Agency Ltd.* v. *Attorney-General for New South Wales* (1) and *Attorney-General* v. *Mercantile Investments Ltd.* (2)). The *Vagrancy (Amendment) Act* 1905 (N.S.W.), to which reference has already been made, declared the disposal of money by lottery or chance to be an unlawful game and provided that any person who should sell any ticket or chance should be guilty of an offence under sub-s. (2) of s. 4 of the *Vagrancy Act* 1902 and should be deemed to be a rogue and a vagabond within the meaning of that Act. These later provisions have continued in force in New South Wales with the result that any offender is, upon a first offence, deemed to be a rogue and a vagabond and, upon any subsequent offence, an incorrigible rogue. (See *Vagrancy Act* 1902, s. 3.)

The foregoing observations give some indication of the attitude of the law for over two and a half centuries towards the carrying on of lotteries. But they show also that, in this country, lotteries were, from the moment of its first settlement, common and public nuisances and that, in general, it was impossible to conduct them except in violation of the law. Indeed it was impracticable for any person to conduct a lottery without achieving the status of a rogue and a vagabond. This is still so in this State except in very special circumstances and, in most cases, with the approval of the Minister (*Lotteries and Art Unions Act* 1901-1944, ss. 4 and 5). Whether or not it is still so in the other States I do not stop to inquire for each State has framed its own laws with respect to lotteries and it is sufficient for the present purpose to observe that, in general, the carrying on of lotteries in the States other than New South Wales has continued to be unlawful. In these circumstances it is difficult to see how and when it can be said that the activities involved in the conduct of a lottery assumed, in this country, the character of trade and commerce. Apart from the fact that tickets might have been bought and sold—though illegally and pursuant to contracts which created neither rights nor obligations—the carrying on of a lottery in no way resembled any known form of trade or commerce. To speak of the *sale* of a lottery ticket as though it

(1) (1909) 9 C.L.R. 72.

(2) (1922) 22 S.R. (N.S.W.) 39; 39 W.N. 33.

were the sale of a commodity is to fail to recognise that the transaction is essentially and exclusively one of gambling in which the *purchaser* stakes his subscription on his chances of winning a prize. This is gaming purely and simply and, to say this is, immediately, to reject the contention that it constitutes trade or commerce. The carrying on of a lottery, as far as it is possible to see, always was regarded as gaming and when the first prohibition was erected lotteries were proscribed as unlawful games. How, in those circumstances, those who conducted lotteries could be thought to be engaged in trade or commerce I find difficult enough to understand. But I am quite unable to understand how lotteries and the activities involved in conducting them can ever be said to have constituted, in this country, a branch of trade or commerce when the only recognition afforded to them has been as common and public nuisances and, to those who have conducted them, as rogues and vagabonds. In my view the defendant fails in his attempt to establish that he was engaged in any relevant activity of trade or commerce though, no doubt, he resorted to instruments of inter-State trade and commerce in communicating with and transmitting funds to the promoters of the lottery in Tasmania.

I perhaps should add that, in support of the contrary view, we were referred by counsel for the defendant to the case of *Champion* v. *Ames* (1). This was a case which, as was pointed out by *Latham* C.J. in *R.* v. *Connare*; *Ex parte Wawn* (2), was argued on three occasions and ultimately decided by the Supreme Court of the United States upon a majority of five justices to four. The minority considered that lottery tickets were not articles of commerce and, although it is contended that the majority concluded otherwise, I doubt if it can be regarded as deciding more than that lottery tickets *when in the course of being carried from one State to another by the agents of a company engaged for hire in the business of transporting goods across State borders* are articles of inter-State commerce. Though some of the expressions used by the majority may be thought to have a wider application their carefully worded concluding observations have a limiting effect. But whether or not the decision should be so limited there is nothing in the observations of the majority which induces me to modify the view which I have already expressed.

What has already been said leads to the conclusion that the only basis upon which the defendant can call in aid the provisions of s. 92 is that s. 21 operated to impair his freedom of intercourse

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

(2) (1939) 61 C.L.R. 596, at p. 607.

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" among the States ". " 'Intercourse' ", said *Dixon* J. (as he then was) speaking of that section (*Bank of New South Wales* v. *The Commonwealth* (1)), " was doubtless added because of the view, now no longer open in the United States, that commerce might not extend to intercourse that was not concerned with business profit or pecuniary gain and because of the degree to which the right of the citizen to access to every constituent part of the union had been rested on implication " (2). But once the view is rejected that the defendant was engaged in any relevant activity of trade or commerce what room is there for suggesting that either s. 20 or s. 21 of the *Lotteries and Art Unions Act* restricted his right to engage in communication across State borders ? The notion that the acceptance of the money the subject of the charge was part of an inter-State activity or transaction, or interwoven with such a transaction, is, to my mind, wholly dependent upon the contention that the defendant was, *qua* the acceptance of the money in question and the procuring of a lottery ticket, engaged in trade and commerce. Once that contention is rejected the practical considerations which, otherwise, might induce the view that the acceptance of the money was but part of a wider transaction, or interwoven with it, disappear. The fact that there may have been a promise or understanding—outside the field of trade and commerce and which did not create enforceable rights and obligations—that the money would be remitted to Tasmania and a lottery ticket obtained from that State is, in my view, quite inadequate to make the receipt of the money by the defendant part of the defendant's inter-State intercourse or to enable it to be said that the prohibition of the former constituted an impediment to the latter. The plain fact is that ss. 20 and 21 have nothing to say on the subject of intercourse among the States and they leave the defendant's constitutional right completely untouched. It is true that if he is prevented from accepting money in respect of the purchase of tickets in lotteries conducted in other States he may not have occasion to exercise his right as frequently as he, otherwise, might, but it cannot be said that such a circumstance impairs his freedom of intercourse among the States. Nor for the reasons given earlier can it be said that s. 21 impaired the right of the purchaser in that respect. Section 21 is, if possible, less vulnerable and I can see no reason of substance why it should be thought to impair the constitutional rights, either, of the defendant or of the lottery promoters.

For the reasons given the appeal should be dismissed.

(1) (1948) 76 C.L.R. 1.

(2) (1948) 76 C.L.R., at p. 381.

Consolidated Press Ltd. v. *Lewis.*

DIXON C.J., WEBB, KITTO AND TAYLOR JJ. In this case, which was argued with *Mansell* v. *Beck*, the defendant was convicted under s. 20 of the *Lotteries and Art Unions Act* 1901-1944 (N.S.W.). An appeal by the defendant from the conviction to the Supreme Court by way of case stated was removed into this Court under s. 40 of the *Judiciary Act* 1903-1955 on the application of the Attorney-General of New South Wales. The charge of which the defendant was convicted was that on 24th November 1955 in Sydney the defendant company published an advertisement relating to a foreign lottery to wit Tasmanian Lotteries in furtherance of the conduct of such lottery. The defendant is the publisher of the Daily Telegraph newspaper and the offence consisted in the inclusion of an advertisement in its issue of the date named. The advertisement was in respect of two lotteries the titles and nature of which it stated, and it invited both applications for tickets and remittances, which, as the advertisement said, could be posted to Tasmanian Lotteries, Hobart, from any post office. It appears from certain admissions made by the informant that the advertisement was published pursuant to an agreement between the defendant and Tasmanian Lotteries. Under the terms of the agreement the newspaper was to publish information concerning such lotteries which was to consist of material of which a draft and the copy should be sent by Tasmanian Lotteries from Hobart to the newspaper office in Sydney.

Section 20 provides that whosoever prints or publishes any advertisement, notice, or information relating to a foreign lottery in furtherance of the conduct of the lottery or announcing its result or displays upon any premises in his occupation any card, poster, or notice relating to a foreign lottery in furtherance of the conduct of the lottery or announcing its result shall be liable to a penalty not exceeding two hundred pounds. A definition of the expression "foreign lottery" is contained in s. 19. It 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.

A provision corresponding with but less extensive than s. 20 is made by s. 3 (3). Section 3 relates to the sale or disposition of property, a term doubtless including money, by lottery or chance. Because of the express provisions concerning foreign lotteries, it has been assumed that the operation of s. 3 in all its sub-sections is confined to lotteries conducted in New South Wales. Sub-section

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(3) provides that whosoever prints or publishes any advertisement, information, or notice relating in any way to any such sale or disposition, made or to be made, shall be liable to a penalty not exceeding fifty pounds. In answer to the charge the defendant sets up s. 92 of the Constitution and maintains that s. 20 is void as an interference with the freedom of inter-State trade, commerce and intercourse and in any case the publication of the advertisement was the last step, and an inseverable step, in a transaction of inter-State commerce arising in Hobart.

One might suppose that the publication in Sydney of a newspaper containing an advertisement of a given description was an intra-State transaction which it would be competent to the legislature to forbid, unless by reason of the nature of the advertisement coupled with some very special facts it was possible to say that the prohibition of publication reflected some prejudice back upon inter-State commerce or intercourse which would amount to a real interference with its freedom.

There are in effect three arguments advanced for the defendant by which it is sought to meet this prima-facie position.

Of these it is convenient to deal first with one which depends upon the view that s. 20 will be entirely invalid if any part of its intended operation involves an infringement upon s. 92. It is sought to show that so much of s. 20 as prohibits the publishing of any notice or information relating to a foreign lottery includes "publishings" which of necessity form part of inter-State communication. Thus it is said that if Tasmanian Lotteries were to send such a notice by post from Hobart to a prospective subscriber in Sydney the communication forming inter-State intercourse would not be complete until the recipient opened the missive; yet that would amount to "publication" in Sydney by the sender. This contention is based on an interpretation of s. 20 which gives to the word "publishes" the meaning and application which belongs to it in the law of libel. It might be enough to say that the provision does not appear to employ the word in that wide sense. But if the word were meant to extend so far, it would not follow that the provision failed. General words are not construed as exhibiting an intention to collide with s. 92 simply because they are capable of including imaginary cases protected by that constitutional provision. If such an imaginary case arises as a real one, the words may be understood as not attempting to invade the unconstitutional field in which the case has been discovered.

Of the three arguments advanced, a second, like that just considered, depended on the character of the provision made by s. 20.

On its face the provision singles out foreign lotteries and prohibits the printing and publishing in New South Wales of information notices and advertisements relating to them. Thus the assumption on which the provision is based is that persons elsewhere will seek to communicate to persons in the State information of a particular description. It is evident that the lotteries outside the State which are most in mind are those conducted in other States. They are lawful under the law of the State where they exist. The advertisements, notices and information forbidden are those " in furtherance of the lottery " outside New South Wales, e.g. in another State. These features, it is suggested, show that s. 20 is a law which does more than affect inter-State trade, commerce and intercourse consequentially ; the restriction upon advertisements etc. is imposed by reference to matters necessarily, or at all events generally, involving inter-State commerce or intercourse.

But what are the elements of inter-State trade, commerce and intercourse which arise out of the conduct of a lottery in another State and the publication in New South Wales of advertisements, notifications and information ? Nothing but communication and the transmission of funds. It is doubtless necessary for the purposes of the business that those conducting the lottery should use these examples or instruments of trade commerce and intercourse between the two States ; and s. 92 says that they shall be free to communicate across State boundaries. If s. 20 had anything to say against the use by the persons concerned of communications or of the facilities for the transmission of funds it is by no means clear that its validity would be saved by the fact that the business to which the communications and the transmission of funds are incidental is that of conducting a lottery. But s. 20 has nothing to say against inter-State communications, and it has nothing to say at all about any subject concerned with the transmission of funds. It takes two things, the lottery and the publication of advertisements, notifications and information. These it makes the basis of its operation. Neither of these things constitutes or forms part of inter-State commerce or intercourse. It may be true enough that without the use of inter-State and other communication the lottery could not be carried on or the advertisements authorised. But s. 92 does not say that all activities which must resort to inter-State commerce and intercourse in order to be effective are on that ground preserved from interference to the end that they may do so. That is to invert the meaning and purpose of the constitutional protection which s. 92 gives. The freedom it gives is to resort to inter-State trade, commerce and intercourse if for the purpose of any lawful activity there is occasion to do so.

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It is unnecessary to repeat in this judgment what has been said in the reasons that have been given in *Mansell* v. *Beck*. In those reasons the grounds are given for saying that a provision which does not otherwise infringe upon s. 92 does not do so because it is directed against the conduct of a lottery. There too will be found a discussion of the relation of s. 3 (4) to s. 21. Those two sections complement one another more completely than do s. 3 (3) and s. 20, but a comparison of the two latter provisions will show that it has not been the object of the legislation to discriminate between foreign lotteries and lotteries conducted in New South Wales otherwise than by the State.

The third contention for the defendant depends in part upon the complexion which the facts of the case are said to bear and in part upon a conception of the extent of the protection given by s. 92.

Beginning with the thesis that communication from one State to another is protected by s. 92 and that the protection covers the communication of an advertisement from one State to another for publication in the second State so that the public may have information about a lottery in the first State, the argument proceeds to much more disputable ground. First it is said that the actual publication of the advertisement, that is to say the dissemination of the information it gives, is part of the communication amounting to inter-State intercourse, or if you like commerce, and is protected accordingly. The same result is claimed on the ground, which is somewhat different, that the advertisement is the end or purpose of the inter-State communication and is inseparable therefrom; it therefore is part of the inter-State transaction that is protected. Further, it is contended that even if the advertisement in itself be not a part of the inter-State transaction it is on the facts an incident, a contractual incident, in the inter-State operations of Tasmanian Lotteries and that s. 20 goes far beyond regulating the operation or business and cannot validly apply. The argument in these various forms is met by the considerations that have already been stated. However true it may be that you could not have the advertisement without an inter-State communication, that gives the advertisement no title to share in the protection which an inter-State communication may obtain as part of trade, commerce and intercourse among the States. It is simply not correct to say that an advertisement in Sydney based upon information obtained from Tasmania is part of an inter-State communication forming part of and enjoying the freedom of trade commerce and intercourse among the States. Nor does the conduct of the lottery from Tasmania

and the offer of tickets in New South Wales in themselves constitute an inter-State transaction the incidents of which are protected by s. 92.

It follows that s. 20 validly operates to forbid the publication of the advertisement.

The appeal should be dismissed.

McTIERNAN AND WILLIAMS JJ. [Their Honours' judgments in this case have been printed with their judgments in *Mansell* v. *Beck*.]

FULLAGAR J. In this case the charge against the defendant was laid under s. 20 of the *Lotteries and Art Unions Act* 1901-1944 (N.S.W.). The substance of the offence charged is the publication in New South Wales of an advertisement relating to a lottery conducted in Tasmania. The defendant invokes s. 92 of the Constitution. The act which constitutes the offence is an act which in itself involves no element of inter-State trade or commerce or intercourse, but it does not necessarily follow from that mere fact that s. 92 does not protect the defendant. I would think it clear that a prohibition of advertising might in some cases be properly held to infringe s. 92. Advertisement is at the present day a normal and more or less necessary means of finding purchasers for goods. A manufacturer in Tasmania of an ordinary article of commerce, who wished to sell that article to persons in New South Wales, could not I should think, be lawfully precluded by a statute of New South Wales from advertising that article in New South Wales. Such a law would restrict and hamper the Tasmanian manufacturer in the carrying on of trade between two States. In the present case, however, the enactment in question is not concerned with commerce as such, but is ancillary to a general prohibition of a particular kind of gaming. It follows, for the reasons which I have given in *Mansell* v. *Beck*, that the defence based on s. 92 fails. The appeal should be dismissed.

Mansell v. *Beck*.

Appeals to the Supreme Court of New South Wales (removed into this Court) dismissed. In so far as the costs of the defendant appellant have been increased by reason of the transfer of the cause to Melbourne for hearing and of the cause being heard in Melbourne, the costs are to be paid to the defendant appellant by the informant

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respondent. The costs of the appeals otherwise are to be paid by the defendant appellant to the informant respondent. Costs to be set off.

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Appeal to the Supreme Court of New South Wales (removed into this Court) dismissed. In so far as the costs of the defendant appellant have been increased by reason of the transfer of the cause to Melbourne for hearing and of the cause being heard in Melbourne, the costs are to be paid to the defendant appellant by the informant respondent. The costs of the appeal otherwise are to be paid by the defendant appellant to the informant respondent. Costs to be set off.

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Solicitors for the appellant Consolidated Press Ltd., *Allen, Allen & Hemsley*, Sydney, by *Malleson Stewart & Co.*

Solicitors for the respondent in each appeal, *F. P. McRae*, Crown Solicitor for the State of New South Wales by *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

R. D. B.