[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

MARTIN AND ANOTHER;

Ex parte WAWN.

H. C. of A. 1939.

SYDNEY, *Dec.* 19.

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

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

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

The applicant, as agent of a company carrying on business at Hobart, Tasmania, accepted in Sydney a sum of money for transmission to his Tasmanian principal and to be applied by that company in purchasing and forwarding to the informant a ticket in a lottery lawfully conducted in Tasmania. The applicant was convicted of an offence under the first-mentioned section.

Held, by *Starke*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Latham* C.J. and *Rich* J. dissenting), that the provisions of sec. 21 of the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.) do not contravene sec. 92 of the Constitution ; therefore the applicant was properly convicted. So *held*, by *Starke*, *Evatt* and *McTiernan* JJ., on the ground that the case was governed by *R.* v. *Connare* ; *Ex parte Wawn*, (1939) 61 C.L.R. 596 ; and, by *Dixon* J., on the ground that, although the transaction was of an inter-State character, sec. 92 of the Constitution 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.

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ORDER NISI for prohibition.

In an information laid by Harold James Martin against Victor Aubrey Wawn it was alleged that on 6th November 1939, at Sydney, New South Wales, Wawn accepted money in respect of the purchase of a ticket in a foreign lottery known as Tattersall's Consultation, Number 126, conducted in the State of Tasmania, contrary to the provisions of sec. 21 of the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.).

Upon the hearing of the information it was admitted (*a*) on behalf of the defendant, that Tattersall's lottery or consultation is conducted in the State of Tasmania and that it is a foreign lottery within the meaning of the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.); and (*b*) on behalf of the informant, that according to the law of Tasmania Tattersall's lottery is a legal lottery.

The defendant was a manufacturing chemist carrying on his business at Elizabeth Street, Sydney, New South Wales. On 6th November 1939, the informant went to the defendant's place of business and said to him: "Can you sell me a ticket in Tattersall's Lottery?" The defendant replied: "No, I cannot sell you one, but I will send to Tasmania and obtain one for you." The informant asked: "How long will it take?" The defendant said: "A couple of days." The informant replied: "That will do. How much will it cost?" The defendant said: "Five and sixpence, five shillings for the ticket and sixpence to defray postage and service." The informant filled in a form which the defendant gave to him and then handed it to the defendant together with the sum of five shillings and sixpence, for which sum the defendant, as agent of the Australian Investment Co., a firm registered in Hobart, Tasmania, and carrying on business there, gave to the informant a receipt. On 13th November 1939, the informant received by post from Hobart an envelope in which was enclosed a ticket in "Tattersall's Consultation, Number 126."

The defendant was convicted.

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

the magistrate's adjudication and order, on the grounds (*a*) that secs. 19, 20 and 21 of the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.), in so far as they purport to prohibit the acceptance of moneys in respect of inter-State purchases, are in conflict with sec. 92 of the Constitution of the Commonwealth; (*b*) that the said sections in so far as they purport as aforesaid constitute a restriction upon freedom of trade, commerce or intercourse among the States within the meaning of sec. 92 of the Constitution; and (*c*) that the said secs. 19, 20 and 21 constitute an attempt by legislation to protect from inter-State competition a State business enterprise in New South Wales known as the State lottery by preventing intending lottery subscribers from paying moneys in that State in respect of the purchase of tickets in lotteries lawfully conducted in other States.

Upon the order nisi coming on to be heard before the Full Court of the High Court the court was informed that neither the informant nor the magistrate intended to be represented at the hearing, whereupon the State of New South Wales asked for and obtained leave to intervene.

Louat (with him *Storey*), for the appellant. By reason of sec. 92 of the Constitution, sec. 21 of the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.) is not effective to forbid the acceptance in New South Wales of money for transmission to another State in respect of a foreign lottery. The facts in this case are substantially different from the facts in *R.* v. *Connare*; *Ex parte Wawn* (1). Here, there was not any sale of a ticket, but a mere acceptance by an agent of a company lawfully carrying on business in another State of money for transmission to his principal in that State. The acceptance of the money was an integral part of an inter-State transaction; it was a characteristic act of commercial intercourse. Such a transaction is protected by sec. 92 of the Constitution not only because it is a form of inter-State intercourse, but also because it comes within the meaning of the words "trade and commerce." The purpose for which the money was accepted and transmitted has no bearing upon the matter. Sec. 21 of the *Lotteries and Art Unions Act*,

(1) (1939) 61 C.L.R. 596.

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particularly the provision now attacked, is not an attempt to suppress an evil in New South Wales, which is all that the State of New South Wales is concerned with, it is an attempt to suppress a supposed inter-State evil arising from a business legally conducted in another State.

Weston K.C. (with him *Macfarlan*), for the State of New South Wales (intervening). This case is entirely covered by, and is indistinguishable from, *R.* v. *Connare*; *Ex parte Wawn* (1). That case was dealt with on the footing that a large proportion of the money there paid was transmitted to another State. The conduct of a lottery is not "trade and commerce." The State legislation does not discriminate against foreign lotteries as such; with the exception of the State lottery it uniformly suppresses all lotteries, whether intra-State or inter-State. In the circumstances the intervener should, if successful, be awarded costs: See *Judiciary Act* 1903-1937, sec. 26.

Louat, in reply. The fact that with the exception of the State lottery the State legislation uniformly affects all lotteries irrespective of whether they are conducted intra-State or inter-State is immaterial (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (2)).

The following judgments were delivered:—

LATHAM C.J. I propose to say very little indeed in relation to this appeal. In the case of *R.* v. *Connare*; *Ex parte Wawn* (1) I have expressed my opinion upon all matters which have been argued, and my reasons for judgment in that case may be regarded as expressing my view in the present case. Consistently with those views I think that the appeal should be allowed. I desire to say that in any event I would not be prepared to give costs to an intervener.

RICH J. I adhere to what I said in *Connare's Case* (3). I would not allow costs to the intervener.

STARKE J. *Connare's Case* (1) governs this case. No costs should be allowed to the intervener.

(1) (1939) 61 C.L.R. 596.
(2) (1934) 51 C.L.R. 108, at p. 128.
(3) (1939) 61 C.L.R., at pp. 612, 613.

DIXON J. In *R.* v. *Connare*; *Ex parte Wawn* (1) I limited the grounds of my decision to two considerations which arose upon the facts of the case and in combination appeared to me sufficient to support the conclusion. Those considerations were, first, that the actual transaction then in question was not of an inter-State character, and, second, that, apart from the State lottery and permitted charitable raffles, the legislation suppressed uniformly the sale in New South Wales of all lottery tickets. My decision does not, I think, necessarily govern the present case, where the facts have been carefully chosen because the transaction made the subject of the prosecution is of an inter-State character. The offence now charged is accepting money in respect of the purchase of a ticket in a foreign lottery. 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. Accordingly, in the present case, one of the two matters disappears which I thought combined in *R.* v. *Connare*; *Ex parte Wawn* (1) to support the conclusion that the defendant was properly convicted of offering for sale in Sydney a ticket in a foreign lottery. But I begin the consideration of the present case with the second proposition upon which I then relied, namely, that the *Lotteries and Art Unions Act* 1901-1929 (N.S.W.) suppresses uniformly throughout the State lotteries and lottery transactions whether domestic or foreign, subject to the exception in favour of the State lottery and of permitted raffles for charity. In saying this I do not overlook the difference in the amount of the maximum penalties named in the different sections. The discrepancy is not great, and when the content of the law is uniform I do not think that an insubstantial variation in the sanctions imposed for breaches of different parts of the law is enough to work a discrimination.

Treating the law, subject to the two specific exceptions, as a uniform or undiscriminating suppression of lotteries, I am of opinion, notwithstanding the inter-State character of the transaction, that sec. 21 of the *Lotteries and Art Unions Act* validly operates to forbid the transaction and make it penal. The reason for my opinion is

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that the application of the 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. There is no prohibition or restraint placed upon any act in connection with a lottery because either the act or the lottery is or involves commerce or trade or intercourse or movement into or out of New South Wales or communication between that State and another State. When sec. 92 of the Constitution says that trade, commerce and intercourse among the States shall be absolutely free it describes human activities in a specific aspect. It singles out attributes which acts or transactions may wear and makes the freedom which it confers depend upon those attributes. When a constitutional provision takes given attributes or characteristics as a description of a form of activity or transaction and under that description says it shall be free, I should understand it as meaning that the possession of those characteristics or attributes must not be burdened or restricted. To say that inter-State trade, commerce and intercourse shall be free, means, I think, that no restraint or burden shall be placed upon an act falling under that description because it is trade or commerce or intercourse or involves inter-State movement or communication. I believe that I am at liberty in the present case to give effect to this view because the conclusion to which it leads is not inconsistent with any previous decision of the court and, as I understand, no one sees any objection to my acting upon my own opinion. If, as I think, sec. 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 sec. 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.

For these reasons I think that the appeal should be dismissed.

We are not, I believe, in a position to give costs to the intervener, little as I wish to discourage intervention in such cases as this.

EVATT J. This case is governed in principle by the case of *R.* v. *Connare*; *Ex parte Wawn* (1). I need repeat only one sentence from the judgment I delivered in that case: "I am of opinion that the guarantee contained in sec. 92 has nothing whatever to say on the topic of 'inter-State' lotteries and cannot be invoked to prevent either the suppression or the restriction in the public interest of the practice of gambling or 'investing' in such lotteries" (2). This broad principle completely covers this case. The headnote to *R.* v. *Connare*; *Ex parte Wawn* (1) correctly expresses the decision.

With regard to costs, I regret that the court cannot order them to be paid by the appellant, because I am of opinion that the prosecution has been organized and the criminal law invoked by arrangement between the prosecutor and the appellant. (I say nothing whatever about their legal advisers.) In the present case, as in the case of Wawn decided in May last, the prosecution has again failed to endeavour to support the conviction he obtained at the police court. But for the intervention of the State of New South Wales, the result would have been that on both occasions the appellant would have been able to present an argument to this court without the disadvantage of having anyone to answer it. It is for these reasons I regret we cannot order costs in favour of the intervener and against the appellant.

The appeal should be dismissed.

MCTIERNAN J. I think the case is governed by the reasons I gave for my judgment in the case of *R.* v. *Connare*; *Ex parte Wawn* (1).

There should be no order for the payment of the intervener's costs, but I should add that the State of New South Wales acted properly in applying to intervene in this case.

Appeal dismissed. Order nisi discharged. No order as to intervener's costs.

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

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

J. B.

(1) (1939) 61 C.L.R. 596.

(2) (1939) 61 C.L.R., at p. 621.