SECTION 92 AND THE DECISIONS IN HOSPITAL PROVIDENT FUND PTY LTD v. STATE OF VICTORIA[1] AND MANSELL v. BECK[2]

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In an article in *The University of Queensland Law Journal* in 1964 Mr J. M. Morris set about the task of devising—

> . . . a reasonably brief yet coherent scheme whereby a reader may gain some impression of the framework of the doctrine associated with s. 92 and the manner in which the more significant decisions are related to this framework.[3]

It is not intended in this article to comment on the overall degree of success achieved in that brave assault upon a mammoth task. It is proposed, however, to take up two suggestions made by Mr Morris and discuss them. These suggestions relate to the effect of the decisions in *Hospital Provident Fund Pty Ltd v. State of Victoria* and *Mansell v. Beck* upon the reasoning which was set out by Dixon J. in *O. Gilpin Ltd v. Commissioner for Road Transport and Tramways (N.S.W.)*[4] and which was afterwards adopted by the High Court. If the effect of the decisions is as Mr Morris asserts, considerable changes were effected in the doctrine associated with section 92. Both decisions, according to Mr Morris, reduce to its essential minimum the freedom guaranteed by section 92. This is, then, quite plainly not an unimportant matter.

In commenting upon the reasoning of Dixon J. in *O. Gilpin Ltd v. Commissioner for Road Transport* Mr Morris cautions the reader to treat with reserve two notions which he attributes to the learned judge.[5] The first notion is ' that an act of inter-State trade is protected not only insofar as it causes movement, but also insofar as it causes any result of a trading or commercial character '.[6] Mr Morris' caution with respect to this notion arises from the interpretation which he places upon the *Hospital Provident Fund* case.

The second notion is ' that a law imposing a burden by reference to an act of inter-State trade necessarily violates s. 92 '.[7] Mr Morris suggests that it is probable that this notion has not survived the decision in *Mansell v. Beck*.

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[1] (1952-1953) 87 C.L.R. 1.

[2] (1956) 95 C.L.R. 550.

[3] (1964) 4 *University of Queensland Law Journal* 369, 370.

[4] (1934-1935) 52 C.L.R. 189.

[5] (1964) 4 *University of Queensland Law Journal* 369, 400 n. 119.

[6] *Loc. cit.*

[7] *Loc. cit.*

First, it is questionable whether these ' notions ' are accurate expressions of the views of Dixon J. and therefore properly attributable to him. Secondly, there is the more important question of what changes, if any, the two decisions referred to wrought in section 92 doctrine as actually expressed by Dixon J. and his brother judges on the High Court. Do they in fact reduce the freedom guaranteed by section 92 to its essential minimum ?

What was the reasoning employed by Dixon J. in *O. Gilpin Ltd v. Commissioner for Road Transport* ? The essential facts of the case may be stated briefly. The High Court was asked to determine whether the protection of section 92 was to be afforded to a journey involving the carriage of goods from Melbourne to the Riverina district of New South Wales. The State legislature of New South Wales had imposed a levy of threepence a ton-mile upon a load of eight tons in respect of that part of the journey from Albury to places in the Riverina. The appellant company claimed that this was an invalid interference with interstate trade.

Dixon J. pointed out that a number of basic questions needed to be asked and answered. First, does the legislation operate so as to restrict or burden the acts for which immunity is claimed ? Secondly, are those acts part of interstate trade, commerce or intercourse ? Thirdly, is the nature of the restriction or burden imposed upon those acts such that section 92 will relieve against it ?[8]

It is this third question which most concerns us here as Mr Morris in formulating his first ' notion ' assumes a burden or restriction affecting an act of interstate trade, commerce or intercourse. However, for purposes of illustration the answer to the first question in the *O. Gilpin Ltd v. Commissioner for Road Transport* situation was that the legislation did impose a burden upon the journey from Albury to the Riverina, for which journey immunity was claimed. The burden was the financial exaction mentioned before. The answer to the second question was that although the journey from Albury to the Riverina took place within the confines of New South Wales it was only part of a longer journey from Melbourne in Victoria. Thus it was part of an interstate journey.

Dixon J. went on to explain more fully his third question. It is necessary because acts and transactions occurring in the course of interstate trade might possibly be burdened by legislation which had no particular relationship to trade, commerce or intercourse among the States. It is only where legislation is related to trade, commerce and intercourse among the States that section 92 has anything to say. Legislation has that necessary relationship when the burden or restriction is conditioned

[8] (1934-1935) 52 C.L.R. 189, 204.

on any one of those characteristics ' which are connoted by the description " trade, commerce and intercourse among the States " '.[9]

His Honour was at pains to point out that the characteristics of trade, and commerce, and intercourse are equally as important in that respect as in the interstate character of an activity;

> . . . 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.[10]

The test stated by Dixon J., then, consists of determining first whether acts or transactions are burdened by the legislation complained of. Secondly, whether those acts or transactions are part of interstate trade, commerce or intercourse. Thirdly, whether those acts are burdened in consequence of their possessing the character of trade, or commerce, or intercourse, or of their possessing an interstate character. If the answer to each of these questions is in the affirmative, then, according to his Honour's reasoning section 92 will protect the acts or transactions from the incidence of the offending law.

Mr Morris' first notion appears to be a statement in reference to the views of Dixon J. on the third question. However, it is expressed in terms very different from those employed by his Honour. It is not clear to the writer just what meaning Mr Morris intended to convey. One assumption that is made throughout his article is that the qualities of an act may be assessed by the results which the act tends to cause. Thus if an act tends to bring about the movement of something from Melbourne to Sydney it has an interstate quality. Also if an act tends to bring about the sale of goods it has a commercial or trading quality. If an act brings about the movement of goods from Melbourne to Sydney for purposes of sale it has both an interstate and a commercial character. Presumably it is upon this assumption that Mr Morris rests in formulating his first notion in terms of the protection of acts of interstate trade insofar as they cause movement.

However, that test would be more appropriate to the task of determining whether particular acts are part of interstate transactions. That was the second question proposed by Dixon J. It goes to the nature of the particular act or transaction. The third question proposed by his Honour goes to the nature of the legislation concerned and its relationship to the act or transaction. If Mr Morris' first notion is, as it appears it must be, a reference to that question, it seems inappropriate to phrase it in terms only of the qualities of the act concerned rather than in terms

[9] *Ibid.* 206.
[10] *Ibid.* 205.

of the relationship between the imposition of the burden by the legislation and the qualities of the act.

The question to be asked is whether the law takes those particular qualities of the act as the basis for its operation. Assuming this to be what Mr Morris meant, he was saying that his Honour's notion was that acts of interstate trade would be protected not only from legislation which operates by reference to their quality of bringing about movement but also from legislation which operates by reference to their tendency to effect results of a commercial or trading nature. While not being in the precise words of Dixon J. that statement does not appear to do any great violence to his principles.

However, Mr Morris suggests that it may not be true that protection will be extended to cover the imposition of burdens by laws which operate not by reference to the tendency of any act to cause movement but by reference to its tendency to cause results of a commercial or trading nature. He suggests that it is only where the movement-causing tendency of the acts of interstate trade is concerned that section 92 does operate to protect those acts. It is the decision in *Hospital Provident Fund Pty Ltd v. State of Victoria*[11] which, in Mr Morris' opinion, shows that the operation of legislation upon an act of interstate trade, to use his own term, insofar as it tends to cause results of a trading or commercial nature, does not offend section 92. He regards the fact situation of that case as being one where a law burdened acts of interstate trade insofar as they caused results of a trading or commercial character. Nevertheless the law was upheld and was said not to infringe section 92. If that interpretation of the *Hospital Provident Fund* case is correct it is no longer true to say, in the terms of Dixon J., that a law which places a burden upon an act of interstate trade by reference to or in consequence of that act being of a commercial or trading character offends section 92.

It is necessary, then, to look carefully at the *Hospital Provident Fund* case to see exactly what was in issue and what was decided.

The Benefit Associations Act 1951 (Vic.) required that associations be registered before they would be permitted to carry on sickness, hospital, medical and funeral benefits businesses. Registration was refused the Hospital Provident Fund Proprietary Limited thus putting it out of business. The Fund claimed the protection of section 92 on the ground that in the course of its business it engaged in interstate trade and the Act prohibited such trade.

The interstate activities which the Fund referred to included the payment of benefit moneys across State lines and the receipt of contributions across those lines. The company maintained offices and office staff and employed servants and agents in Victoria, New South Wales and South Australia.

[11] (1952-1953) 87 C.L.R. 1.

The High Court held that the Benefit Associations Act did not infringe section 92 so far as the Fund's activities were concerned. The majority[12] took the view that the Fund was not engaged in interstate trade and, therefore, could not call upon section 92.

It was true that the Fund made payments of benefits and received contributions from across State borders. It was also true that these interstate transactions would come to an end if the Fund was put out of business as the result of failure to gain registration under the Act. The Act did operate by reference to the making of a particular kind of contract and the Court did seem to accept that the making of such a contract was a commercial activity.[13] Why, then, was it not also true that a burden was imposed upon acts of interstate trade and was conditioned upon a commercial characteristic and therefore contrary to section 92 ?

The decision rested upon the following reasoning. The essence of the business was the making of sickness insurance contracts. The making of the contracts did not itself involve any interstate activity.[14] The Act dealt with the core of the benefit business. What interstate transactions the Fund did engage in were mere accidental features of the business. The Act was not concerned with them and its effect upon them was also, therefore, accidental.

Mr Morris suggests that this decision cuts down the width of the principles expressed by Dixon J. in *O. Gilpin Ltd v. Commissioner for Road Transport*. However, the analysis of the case just undertaken shows that this is not so. The view which the Court took was that the Act did not operate by reference to any characteristic of the activities for which protection could be claimed let alone characteristics of a trading or commercial nature.

The decision might have been different, and the writer asserts that it should have been different, had the company ensured that its insurance contracts called for payment of benefits and contributions across State lines as part of their terms. This however is not clear from the judgment of Dixon J. and his Honour might well have disagreed. Nevertheless, it is submitted that the Fund could then have claimed protection for the making of interstate contracts. The Act, if it purported to affect interstate contracts at all would obviously burden them. Thus two of the questions proposed by Dixon J. would have been answered in the affirmative.

Now for the third question. Upon what was the restriction conditioned ? The answer is the making of contracts in respect of sickness

[12] Dixon C.J., McTiernan, Webb, Fullagar, Kitto and Taylor JJ.

[13] See discussion of insurance cases in the United States; 15-16 *per* Dixon C.J.; 39-41 *per* Fullagar J.; 46-48 *per* Taylor J. *cf.* McTiernan J. 20-25.

[14] Nor did the contracts by their terms require interstate activity in order that they might be fulfilled. *Supra* n. 13.

insurance. Since the Court accepted that the making of contracts was a commercial activity all aspects of his Honour's test would have been satisfied. The Act could have been said to operate upon an act of interstate trade in consequence of its commercial character. Surely section 92 would have had something to say about that ?

Provided that one accepts the High Court's description of the benefit association business and regards the making of contracts as its core and matters such as collection of contributions and payment of benefits as incidental features the *Hospital Provident Fund* case offers no difficulties.[15] If the foregoing analysis is accepted the case does not occupy a very significant position in section 92 doctrine. It is merely an example of the doctrine being applied not an instance of a radical alteration in it.

Now for the second notion as stated by Mr Morris. The notion that a law imposing a burden by reference to an act of interstate trade necessarily violates section 92. Again the writer has some difficulty in fathoming what Mr Morris means by phrasing the notion in this way. Some clue is perhaps afforded by Mr Morris' reference to the criticism by Dixon J. of the decision in *Ex parte Nelson [No. 1]*[16] in his judgment in *Tasmania v. Victoria.*[17] It appears that Mr Morris is influenced by the fact that in those particular cases the Court was faced with the most obvious type of offending law; a law conditioned upon or imposing a burden by reference to the very quality of interstate movement itself, rather than any words which Dixon J. used in *O. Gilpin Ltd v. Commissioner for Road Transport.* In both of those cases it was the very crossing of the border which attracted the prohibition.

The actual notion proposed by Dixon J. is somewhat more sophisticated than is suggested by Mr Morris. His Honour's first concern is with a burden being imposed upon something, that something being an act which is part of a transaction of interstate trade, commerce or intercourse. Having satisfied himself that an interstate act is burdened, his Honour then asks by reference to what characteristic, if any, of the act, is the burden imposed. If it is imposed in consequence of a characteristic which is of the essence of trade, or commerce, or intercourse, or in consequence of any essentially interstate quality of the act the burden is invalidly imposed. If the legislation falls in the last mentioned category its invalidity is simply more obvious.

It is, nevertheless, plain that in *Tasmania v. Victoria* Dixon J. did say that no matter what purpose lay behind such a law it must necessarily offend against section 92. In his Honour's opinion the fact that a law

[15] The problem might, however, then raise some of the points to be discussed in connection with *Mansell v. Beck* later in this article.

[16] (1928) 42 C.L.R. 209.

[17] (1934-1935) 52 C.L.R. 157.

was obviously designed to stop the spread of disease would not prevent its invalidation by section 92.

That is not to say that States cannot legislate to prevent the spread of disease. Undoubtedly they can do this but not simply by conditioning a prohibition upon the mere fact of entry into the State. There must be some closer connection between the law concerned and the prevention of the spreading of disease than the simple assertion of the legislature that the law is necessary to effect that end.

Dixon J. recognized that the States could pass inspection laws which could be used to facilitate detection of disease. However, his Honour was of the opinion that this could only be done by virtue of section 112 of the Constitution.[18] This writer does not share that view and suggests with respect that the States may have the power to pass inspection laws to enable detection of disease despite section 92 and apart from section 112. They could then take appropriate action upon the discovery of disease. So if it is disease in cattle which concerns a State legislature it may pass laws providing for the inspection of all cattle coming into the State. If then a noxious disease is discovered in a particular beast or beasts they may be refused entry into the State.

Interstate trade in these cattle would thereby be prevented but the prohibition against entry following upon the exercise of powers under the inspection laws, although necessarily operating at or about the border, would be imposed by reference to the presence of disease in the cattle, not by reference merely to their importation.

Acceptance of this would not damage the proposition that a direct prohibition of a particular example of interstate trade must necessarily offend section 92.

Does, however, *Mansell v. Beck*[19] involve a departure from that reasoning ? Is it possible consistently with section 92 to deliberately prohibit interstate trade ? The answer must be sought in the decision itself.

The legislation which came under attack in the case was the Lotteries and Art Unions Act, 1901-1944 (N.S.W.), especially sections 20 and 21. Section 20 provided:

> 20. Whosoever prints or publishes any advertisement, notice, or information relating to a foreign lottery in furtherance of the conduct

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[18] *Ibid.* 185-186. *Cf. James v. The Commonwealth* [1936] A.C. 578, 624-625. Section 112 reads as follows:

> 112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

[19] (1956) 95 C.L.R. 550.

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.

Section 21 provided:

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.

Both of these sections came under a heading worded '*Foreign lotteries*' but it should also be noted that there was a general section dealing with lotteries without mention of intra or extra-State location. It provided:

3. (3) Whosoever prints or publishes any advertisement, information, or notice relating in any way to any sale or disposition, made or to be made, shall be liable to a penalty not exceeding fifty pounds.

(4) 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.

It should be noted that the penalties provided for under section 3 were considerably smaller than those under sections 20 and 21.

The defendant was convicted of offences under sections 20 and 21 of the Act. He exhibited lists of prize-winners in Tasmanian lotteries on the wall of his shop contrary to section 20. He also accepted money in respect of the purchase of a lottery ticket in a Tasmanian lottery contrary to section 21. He appealed against his conviction on the ground that the actions for which he was penalized formed part of trade, commerce and intercourse among the States.

With respect to the charge made under section 21, the defendant argued that the transaction prohibited and penalized was a transaction in the course of interstate trade and commerce. For, in accepting money in respect of the purchase of a ticket in a Tasmanian lottery, he was commencing a chain of activities which amounted to an interstate transaction. Dixon C.J. and Webb J. in a joint judgment, and Fullagar J. in a separate judgment, held that, even assuming that the transaction beginning with the acceptance of the money and ending with the delivery of the lottery ticket possessed an interstate character, the appellant was properly convicted. Taking into account section 3 (4) of the Act, it applied generally to foreign and domestic lotteries and did not select any element or attribute of interstate trade, commerce or intercourse as the basis of its operation. Williams J. held that the acceptance of money was purely an intra-State act, while McTiernan and Taylor JJ. did not regard the activities involved in conducting lotteries as trade or commerce. The lone dissentient, Kitto J., held that section 21 contravened section 92 since it attached a penal consequence to conduct by reference to its

possessing the character of participation in the movement of money interstate; a character essential to the conception of intercourse among the States.

Dixon C.J. and Webb J. said that it was not enough to show that an activity was part of interstate commerce and was being impeded by legislation. Such a result might follow from a law which was not concerned

> . . . with any fact, matter or thing forming part of inter-State trade, commerce or intercourse but takes for its operation events 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 or intercourse among the States.[20]

The time-honoured example of a law which causes a man to be imprisoned for theft or suchlike, thus effectively preventing him from engaging in interstate trade serves to illustrate this.

Their Honours went on to say:

> 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.[21]

That is unless, of course, it is but a circuitous device for doing what section 92 forbids.

Since the Act as a whole was concerned with lotteries, their Honours concluded that the basis of the prohibition was the existence of a lottery. The essence of a lottery, they said, ' is the distribution of prizes among subscribers by lot or chance ',[22] while the subscribing for tickets and collecting of prizes are merely incidents. Thus the penalties imposed on the acceptance of money in respect of the purchase of a Tasmanian lottery ticket were so imposed because of the ' aleatory ' nature of the transaction involved, not by reference to anything of the essence of interstate trade.[23]

Thus the High Court has held that even though an Act expressly prohibits part of an interstate transaction it may be valid provided that it complies with the condition stated in the previous sentence.

It should be noted that so far as section 20 was concerned McTiernan J. excepted gambling from the protection of section 92[24] while his brother judges held that the acts prohibited were of an intra-State nature.

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[20] (1956) 95 C.L.R. 550, 564-565.
[21] *Loc. cit.*
[22] *Loc. cit.*
[23] *Ibid.* 566.
[24] *Ibid.* 570.

Dixon C.J. and Webb J. were of the opinion that section 3, sub-sections (3) and (4) could have covered the fact situation in *Mansell v. Beck* without the aid of sections 20 and 21.[25] In which case, their Honours asserted, the validity of the Act would have been even more apparent. This view was taken apparently because the general nature of the application of the Act would have been plainer. Thus the effects upon interstate transactions such as the one in that case would have been ' consequences incidental to the operation of a general law dealing with another subject '.[26]

Dixon C. J. and Webb J. went even further in asserting that

> 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.[27]

They felt that a more likely question would be whether the Federal Parliament had power under section 51 (i.) to so legislate. However, even if such a law did come within section 51 (i.) they were convinced that it would not necessarily mean an impairment of the freedom guaranteed by section 92.[28]

The comment which this case elicited from Mr Morris has already been noted. It has also prompted comment from a number of other writers who have placed somewhat differing interpretations upon it. Mr P. H. Lane classified the case as providing an example of a law which operated by reference to an activity which was part of interstate trade and commerce but was valid because participation in a lottery was an inherently unlawful or *extra commercium* activity.[29] Professor Ross Anderson regarded the principle established by *Mansell v. Beck* as difficult to grasp but stated it as follows:

> . . . it is possible for a restriction or burden or liability to be imposed *on* something forming part of inter-State trade, commerce, or intercourse, but by reference to or in consequence of something which is not part of the concept or an essential attribute of it.[30]

Professor Anderson's interpretation of the decision will be examined first. The phraseology employed is interesting. If it were not for the words ' imposed *on* ' Professor Anderson might simply be stating the position with regard to any law which interfered with interstate trade only incidentally. However, the words ' imposed *on* ' in this context suggest the deliberate rather than the accidental or incidental imposition of a burden upon an interstate transaction.

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[25] *Ibid.* 567.
[26] *Loc. cit.*
[27] *Ibid.* 566.
[28] *Loc. cit.*
[29] (1959) 32 *Australian Law Journal* 335, 342 n. 72.
[30] (1959) 33 *Australian Law Journal* 276, 297.

Is it possible for a law to impose restrictions on interstate activity in a deliberate fashion and yet not attract section 92? The answer is yes. It is clear that a law may validly impose controls or restrictions upon interstate trade provided that it may properly be described as regulatory of that trade. That the regulation of interstate trade is compatible with the freedom guaranteed by section 92 has been recognized by both the Privy Council and the High Court.[31] In *Hughes and Vale Pty Ltd v. New South Wales* [*No.* 2] Dixon C.J., McTiernan and Webb JJ. stated their attitude clearly:

> . . . no real detraction from the freedom of inter-State trade can be suffered by submitting to directions for the orderly and proper conduct of commercial dealings or other transactions or activities, at all events if the directions are both relevant and reasonable and place inter-State transactions under no greater disadvantage than that borne by transactions confined to the State.[32]

By a regulatory law it is clear that their Honours meant a law prescribing the manner in which trade and commerce is to be conducted. Generally a law which simply prohibits an activity would not be regarded as regulatory. It would not comply with the definition laid down by the Court.

The Lotteries and Art Unions Act could hardly be described as regulating Mr Mansell's business as a lottery agent. Nor did the High Court approach it as such. If therefore, Professor Anderson's interpretation of the case as one in which a burden is imposed on interstate trade is correct, *Mansell v. Beck* must involve a new departure from section 92 doctrine.

Let us look at the approach which the High Court adopted to see whether Professor Anderson's interpretation of the decision is a reasonable one.

The majority of the members of the High Court were prepared to assume that the acceptance of money in respect of the purchase of the ticket in the Tasmanian lottery was part of an interstate transaction. The interstate transaction being the transmission of the money to Tasmania to obtain a ticket and the delivery of that ticket to his client. There can be no doubt that the Lotteries and Art Unions Act burdened that interstate transaction by prohibiting the initial step involved in it; the acceptance of money. There can be no greater doubt that the acceptance of money in respect of the purchase of a ticket is a commercial transaction. How, then, could the majority of the Court decide that section 92 was not infringed?

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[31] *Bank of New South Wales v. The Commonwealth* (1948) 76 C.L.R. 1, 389; [1950] A.C. 235, 310. *Hughes and Vale Pty Ltd v. New South Wales* [*No.* 2] (1955) 93 C.L.R. 127.

[32] (1955) 93 C.L.R. 127, 160.

Dixon C.J. and Webb J. said that a law did not automatically offend section 92 because it operated so as to adversely affect interstate trade. Their Honours said that a law which was not concerned with any fact, matter or thing forming part of interstate trade might have such an effect.

> 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.[33]

In their Honours' view, the legislation when looked at as a whole, simply prohibited the acceptance of money in respect of the purchase of tickets in lotteries conducted within or without the State. From this it was concluded that the law did not select any element or attribute of interstate trade or commerce as the basis of its operation.[34]

How can this conclusion be justified in the light of the undoubted operation of the Act upon the commercial transaction involving acceptance of money in respect of the purchase of tickets ? Their Honours reasoned as follows. The running of a lottery was not itself an act or transaction of trade, commerce and intercourse among the States. Their definition of the essence of a lottery has already been looked at.[35] The Lotteries and Art Unions Act was concerned with the suppression of lotteries. It was the aleatory nature of the transaction which attracted the legislative prohibition.[36] Dixon C.J. and Webb J. regarded the Act as operating not by reference to the interstate nature of the transaction, nor by reference to its commercial nature but by reference to the fact that it constituted participation in a gambling activity.

Professor Anderson recognized the difficulty involved with this form of reasoning when he said that the difficulty lay in ' identifying the characteristic of a transaction which the particular law selects as the basis of its operation '.[37] He took the case of *Fergusson v. Stevenson*[38] as an illustration.

In that case the Court considered the validity of legislation prohibiting the possession in New South Wales of the skins of kangaroos. The Act was the Fauna Protection Act, 1948 (N.S.W.) and was patently concerned with the conservation of native fauna. The particular skins in question in the case had been received from Queensland and were being held in Sydney for shipment overseas. The possession of the skins in Sydney

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[33] (1956) 95 C.L.R. 550, 565.
[34] *Ibid.* 568.
[35] *Supra* n. 22.
[36] (1956) 95 C.L.R. 550, 566.
[37] (1959) 33 *Australian Law Journal* 276, 298.
[38] (1951) 84 C.L.R. 421.

was held to be part of, or at least a consequence of an interstate transaction beginning in Queensland and as such was protected by section 92 from the operation of the Act.

It was argued that as the penalty was imposed as part of an animal preservation scheme, it was imposed independently of the interstate or commercial character of what was done. This argument was rejected. The Court confined itself to the application of the particular legislative provisions to the facts of the case in rejecting the argument based on the general character and purpose of the Act. The positive reason for saying that section 92 invalidated the law was that it operated so as to prohibit commercial dealings of an interstate nature.[39]

Possibly the State's argument could have been rejected on the simple ground that it was not for New South Wales to protect Queensland kangaroos. However, this was not done. It was enough that the Act would prevent interstate trade in the articles.

Why was a similar attitude not adopted in *Mansell v. Beck* ? Was it not by reference to the acceptance of money, a commercial activity, that Mr Mansell's interstate trade in lottery tickets was prevented ? The High Court decided otherwise. It was by reference to the fact that the acceptance of money was in respect of a lottery ticket that the burden was imposed. This reasoning involves going one step further than in the ordinary case of a law prohibiting interstate trade directly. The line of thought becomes similar to that employed in cases where legislation is found to be regulatory of interstate trade. Such laws directly affect interstate trade but do so by reference to characteristics of that trade which are not essential to the conception of trade, commerce and intercourse among the States. In a sense a double 'by reference to' test is involved. A law prohibiting vehicles from exceeding sixty miles per hour on journeys within New South Wales operates by reference to movement but not by reference to movement pure and simple. It also operates by reference to speed of movement. Speed is not an essential characteristic of interstate trade and commerce. The control involved in the law appears relevant and reasonable in its direction as to the manner in which movement, including interstate movement, is to be carried on. The Lotteries and Art Unions Act, however, does not prescribe a manner in which trade in lottery tickets is to be carried on. It straightforwardly prohibits such trade. Thus reasoning appropriate to a case of regulation has been used by the High Court in a case of prohibition.

It begins to look as though the High Court indulged in an exercise of characterization, deeming the Act to be essentially a law about lotteries, not about trade and commerce. But in previous cases the

[39] *Ibid.* 435.

Court, and especially Dixon J., has resisted any attempts to characterize laws in this fashion. In an earlier case, *Tasmania v. Victoria*, Dixon J. had, himself, spoken out strongly against the characterization of laws as being laws dealing with health, or disease, or suchlike, rather than interstate trade or commerce in section 92 questions. He had said ' sec. 92 is not concerned with a classification of subjects of legislative power '.[40] Furthermore, he had said that it was not necessary to ascertain why a law interfered with interstate trade, because ' the answer is that the terms of sec. 92 admit of no excuses or justifications for abrogating the freedom of trade in a commodity '.[41] In *Mansell v. Beck*, without saying so, his Honour appeared to have departed from his earlier view (which by that time had become, in general, the view of the whole Court) by looking at the purpose of the Act rather than its immediate effect.

But a warning must be sounded. It has already been submitted that Dixon J. had not said in *Tasmania v. Victoria* that a State government could not take action to prevent the introduction of disease into its territory. It was submitted that the States can make laws which burden importation provided that they do not do so simply by reference to the crossing of the border but by reference to the actual importation of disease itself.[42] Laws such as these would be prohibitory in effect, preventing particular interstate dealings. But it is submitted that they would nevertheless be consistent with section 92. Perhaps *Mansell v. Beck* is but an illustration of a law of that nature.

This is where Mr P. H. Lane's interpretation of the case becomes of interest. He justified the validity of the Lotteries and Art Unions Act on the ground that participation in a lottery was an inherently unlawful or *extra commercium* activity. Thus a different class of case is suggested in respect of which section 92 has less significance.

The laws attacked in *Tasmania v. Victoria* and its forerunner *Ex parte Nelson* [*No.* 1][43] were blanket prohibitions. It did not, in fact, matter whether the potatoes or the cattle were free from disease or actually diseased. The judges were not called upon to decide whether the States had power to prevent diseased commodities being brought over their borders. Nor did any of them indicate that the States did not have this power. They simply asserted that a prohibition had to bear close relationship to the actual prevention of the spread of disease. Straight-out blanket prohibitions did not do that.

But the prohibition contained in section 21 of the Lotteries and Art Unions Act was itself a blanket prohibition. Therefore, in order to uphold the law, it becomes necessary to show that lottery tickets in

[40] (1934-1935) 52 C.L.R. 157, 181.
[41] *Loc. cit.*
[42] *Supra* n. 18.
[43] (1928) 42 C.L.R. 209.

general cannot be classified as legitimate articles of commerce. A clue to the solution of the problem may be found in words used by Dixon J. in *Tasmania v. Victoria.* He said:

> When a State by legislation forbids importation from another State of an *ordinary commodity*, it is difficult to understand what are the further considerations which must be inquired into. . . .[44]

The significant words are 'ordinary commodity'. A diseased potato would not be regarded as an ordinary commodity, bought and sold in trade and commerce. Perhaps the answer is that a lottery ticket or the intangible chance to win a prize that it represents is likewise not an ordinary commodity.

Dixon J. did not define ordinary commodity but it seems safe to presume that by an extraordinary commodity he would not have meant an unusual article but something harmful or injurious in one way or another.

A more recent case, *Chapman v. Suttie*,[45] throws some light on this question. Section 17 of the Firearms Act 1958 (Vic.) provided that holders of gun dealers' licences should, every time they made a sale, require the purchaser to produce a firearm certificate entitling the purchaser to buy a firearm. Section 24 made it an offence to sell a firearm unless such a certificate was produced. Some Melbourne gun dealers were convicted of offences against both of these sections, in respect of sales of firearms to persons resident outside Victoria. They appealed to the High Court on the ground that sections 17 and 24 offended against section 92, insofar as they purported to relate to interstate sales of firearms.

Taylor, Menzies and Owen JJ., without giving any examples, expressed the view that there might be some commodities which could not be regarded as legitimate articles of commerce.[46] Transactions involving such articles would not receive the protection of section 92. Their Honours held, however, that ordinary firearms bought for legitimate usage were not in that category.

Dixon C.J., also referring to this question, said that the conflict between complete freedom of trade in dangerous things and measures of control in the interests of safety had not received much consideration in the courts.[47] His Honour did not go on to indicate where he stood on this question but the circumstances of his mentioning it indicate that he would probably have agreed that a class of dangerous goods existed.

Windeyer J. took a quite different attitude in asserting that the solution to the question posed in the case did not depend upon categorizing

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[44] (1934-1935) 52 C.L.R. 157, 180 (italics added).
[45] (1962-1963) 110 C.L.R. 321. (Noted in (1964) 1 *Federal Law Review* 140.)
[46] *Ibid.* 337 *per* Taylor and Owen JJ.; 341 *per* Menzies J.
[47] *Ibid.* 325.

firearms as articles of commerce or as dangerous commodities outside the protection of section 92.[48] His Honour conceded that the character of goods was relevant, but only as one of the factors to be considered when determining to what lengths a government might go in controlling dealings in them. That view, again, does not preclude the possibility that it might be necessary and permissible to totally forbid dealings in some goods. But that would be because this dangerous character outweighed all other considerations in the particular case.

A much earlier case in which considerations of this kind could be said to have been involved was *R. v. Smithers; Ex parte Benson.*[49] A New South Wales law made it an offence for a convicted person to enter New South Wales within three years of being convicted of a crime in another State.[50] Isaacs and Higgins JJ. declared the Act invalid as interfering with the freedom guaranteed by section 92. Griffith C.J. and Barton J. both seem to have suggested that it might in certain circumstances be permissible consistently with section 92 to prevent certain persons or classes of persons from entering a State. However, neither of their Honours thought that the reasons adduced to support the validity of the Act indicated such a necessity as to justify it even if the State's powers were untrammelled by section 92.[51]

Thus, in the case of diseased cattle, potatoes, persons or in the case of activities like gambling it appears that the character of the article, person or activity concerned may be at least one factor to be looked at in determining whether a prohibitory law is valid. The greater the danger that might follow from allowing the spread of the disease and the greater the likelihood of such a spread occurring, presumably the stricter the action that may be taken.

Even acknowledging that this may be so, it is difficult to justify the decision in *Mansell v. Beck* in the light of *Tasmania v. Victoria* and the views of Isaacs, Higgins and Powers JJ. in *Ex parte Nelson* [*No.* 1]. Although Dixon C.J. and Webb J. in their judgment, and Fullagar J. in his judgment, refer to the fact that lotteries have long been the subject of prohibition, their decisions do not appear to be based on this fact or on any argument arising from it.

Their Honours were content to treat the case as one falling straightforwardly within the limits of the seemingly neat 'by reference to'

[48] *Ibid.* 344.

[49] (1912) 16 C.L.R. 99.

[50] Influx of Criminals Prevention Act, 1903 (N.S.W.).

[51] (1912) 16 C.L.R. 99, 109 *per* Griffith C.J.; 111 *per* Barton J. Griffith C.J. and Barton J. held that the power of a State to exclude undesirable immigrants was limited to the making of laws for the promotion of public order, safety or morals. Their Honours held that Benson's offence in Victoria, that of having insufficient means of support, did not justify his exclusion from New South Wales as no threat to order, safety or morals was evident.

formula. Their words do not indicate any awareness that they were applying a double 'by reference to' test. Mr Lane's interpretation, while it is a possible rationalization of the decision, is not compatible with the actual terms of the judgments given.

It may be asked whether the Court could have made out an argument on the basis of something inherently unlawful or undesirable in lotteries or lottery tickets. Dixon C.J. and Webb J. briefly recounted the history of legislation against lotteries. Their Honours noted that for more than two centuries lotteries had been declared by legislation to be common and public nuisances. However, it was also pointed out that rather than being totally forbidden lotteries had been controlled. Patents had been granted to some persons to run lotteries and foreign lotteries had been legislated against so as to protect the monopolistic patents granted. This last point is important. The indiscriminate running of lotteries may have been regarded as undesirable and from time to time they may have been totally banned. Nevertheless, they were also in their controlled state a source of revenue and were used as such.

Their Honours dismissed the argument to the effect that as New South Wales itself ran lotteries it was by means of the Lotteries and Art Unions Act seeking to protect them. Dixon C.J. and Webb J. said :

> 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.[52]

Perhaps that could truly have been said if lotteries were banned and nothing further said. However, legislation which prohibits some lotteries but permits and protects others can hardly be said to operate independently of the commercial character of lottery operations. New South Wales was seeking to ensure that its citizens, if they participated in lotteries at all, participated in those run by the government of that State. It does not help to say that such legislation is traditional. The granting of monopolies in all sorts of commercial fields was also traditional in England but there was never a section 92 to contend with there. Lotteries are, in fact, conducted in a number of the States of the Commonwealth. An argument which is based on some general notion of the illegality of lotteries does not, therefore, hold much water. It should be noted that in *Fergusson v. Stevenson* the High Court noted this very point in connection with the varying attitude of the States towards the protection or extinction of kangaroos.[53] What remains when laws such as the Lotteries and Art Unions Act are upheld is a number of protected State lotteries. The primary purpose of section 92 was to prevent protectionism.

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[52] (1956) 95 C.L.R. 550, 568.

[53] (1951) 84 C.L.R. 421, 434.

Dixon C.J. and Webb J. also dismissed the argument that the fact that the legislation discriminated against foreign lotteries was of significance. They did so because they reasoned that it did not alter the character of the substantive provisions. It is submitted that section 21, which penalized the acceptance of money in respect of the purchase of a ticket in a foreign lottery, was no less substantive than any other provision. Therefore the attaching of a higher penalty to participation in an interstate lottery would be of significance.

The cursory way in which these two last arguments were dismissed is, perhaps, the least satisfactory aspect of the case.

An *obiter dictum*, which has already been referred to, contained in the joint judgment of Dixon C.J. and Webb J., lends support to both Mr Morris and Professor Anderson in the view which they take of the limiting effect of *Mansell v. Beck* upon the application of section 92.
Their Honours said:

> 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 the 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.[54]

Their Honours felt that a more likely question would be whether the Federal Parliament had power under section 51 (i.) to so legislate. Furthermore, it was thought that even if such a law did come within section 51 (i.) it would not necessarily mean an impairment of the freedom guaranteed by section 92. The ordinary means of carrying on trade, commerce and intercourse among the States would continue to exist—a basal assumption of section 92 in the view of Dixon C.J.—but the scope of their use would be restricted. Their Honours were thus saying that the Commonwealth can prohibit their use in connection with activities that are not themselves protected by section 92.

This contention is open to the same objections that have been raised against the Lotteries and Art Unions Act, 1901-1944 (N.S.W.). The using of the means of communication between States is surely an act of interstate intercourse if not of commerce. Such a law would be forbidding interstate transactions because they were connected with lotteries. It is submitted that the finding that lotteries were essentially intra-State operations would not be enough to justify the law. It would have to be shown that lotteries or lottery tickets were illegal or undesirable in some way.

One further point merits a little discussion. There appears to be some confusion in the joint judgment of Dixon C.J. and Webb J. over the application of that part of the ' by reference to ' test which requires the

[54] (1956) 95 C.L.R. 550, 566.

drawing of a distinction between essentials and incidentals of interstate trade.

Their Honours used the words 'essential' and 'incidental' in their analysis of the lottery business. They classified the actions penalized by section 21 as mere incidents of the lottery business. But their arguments concerning the distinction between essence and incident of interstate trade, and the decision they came to, suggest that they treated the penalized acts as if they were only incidents of trade, commerce and intercourse among the States. It may or may not be sensible to class these actions as merely incidental to the running of a lottery but they are of the essence of interstate trade and commerce. They are commercial transactions forming part of interstate dealings. Whatever the general ambit of the Lotteries and Art Unions Act was, section 21 dealt squarely and specifically with those transactions.

The significance of *Mansell v. Beck* is, in the writer's opinion, still unclear. Further explanation of the decision by the High Court is needed before a clear statement of its impact upon section 92 doctrine can be made. At least two quite divergent interpretations appear possible. First, that an Act dealing in a general way with some activity or thing not falling within the definition of trade, commerce and intercourse among the States will not be invalidated by section 92 by reason of the circumstance that some sections of it directly prohibit interstate dealings in connection with that activity or thing.

Secondly, that interstate dealings may validly be prohibited if they involve activities or articles which are illegal according to the general law or which the Court may consider undesirable or harmful.

If the first interpretation is adopted the decision represents a quite radical departure from settled section 92 principles. A characterization approach to laws said to infringe section 92 would seem to be in order.

The second interpretation does not involve so drastic a change. It will, however, mean that the Court will in some instances be called upon to make political decisions as to the desirability or otherwise of some activities or the harmful nature of certain articles.