manufacture, nor any spirits, without taking out another licence, so that he requires two licences. That, however, is an incident to all regulation of trade. The person subject to restrictions is at a disadvantage as compared with others who are not subject to those restrictions. That is incidental to freedom of trade and commerce within the Commonwealth, but it is not in any way an objection to the validity of a law regulating the manufacture.

For all these reasons we are of opinion that this licence fee is not a duty of excise within the meaning of sec. 90 of the Constitution, and that the Statute is not affected by the imposition of uniform duties of Customs throughout the Commonwealth, and that the respondent was guilty of the offence with which he was charged, and should have been convicted.

Appeal allowed. Order of the Supreme Court discharged. Case remitted to the Police Magistrate with a direction to convict. Respondent to pay the costs in the Supreme Court and of the appeal.

Solicitor, for the appellant, *The Crown Solicitor of New South Wales.*

Solicitor, for the respondent, *R. H. Matthews,* by *E. R. M. Newton.*

[HIGH COURT OF AUSTRALIA.]

MACDONALD . . . . . APPELLANT;

AND

BEARE . . . . . RESPONDENT.

Foll *R v Nicholas* (2000) 1 VR 356

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Games, Wagers and Betting Houses Act, No. 18 of 1902, *sec.* 4—*Special warrant—Form of—Address to police force at large—Motion to rescind special leave—Matter of public importance.*

A special warrant under sec. 4 of the *Games, Wagers and Betting Houses Act,* 1902, may be addressed to members of the police force of New South Wales generally, and need not mention any constable by name.

H. C. OF A. 1904.

MACDONALD v. BEARE.

The distinction between special and general warrants at common law considered.

Motion to rescind special leave to appeal dismissed on the ground that the question involved was of great public importance, and that on it depended the liability or non-liability of the appellant to a number of actions for trespass and false imprisonment.

Judgment of the Supreme Court, (1904) 4 S.R. (N.S.W.), 221, reversed.

APPEAL from a judgment of the Supreme Court of New South Wales in a special case stated under the *Justices Act*, 1902.

The respondent was charged before a stipendiary magistrate with being the owner or keeper of a common gaming house, which had been entered by the police under a special warrant (*a*) under sec. 4 (1) of the *Games, Wagers and Betting Houses Act*, 1902. The magistrate held that the warrant was bad because it was not addressed to any constable by name, and was not executed by a police constable to whom it was addressed, or by any assistant called by the constable to whom it was addressed.

(*a*) Sec. 4 (3) of the Act is as follows :—

Every special warrant shall be in the form contained in the second schedule hereto or to the like effect.

The form in the Schedule is as follows :—

to wit } To the constable.

WHEREAS it appears to me J.P., one of the justices or our Lord the King assigned to keep the peace in and for the State of New South Wales by the information on oath of A.B. of in the of [yeoman] that the house [*room, premises or place*] known as [*here insert a description of the house, room, premises or place by which it may be readily known and found*] is kept and used as a common gaming-house or place for gaming within the meaning of the *Games, Wagers and Betting Houses Act* 1901, this is therefore in the name of our Lord the King to require you with such assistants as you may find necessary to enter into the said house [*room, premises or place*] and if necessary to use force for making such entry whether by breaking open doors or otherwise and there diligently to search for all instruments of unlawful gaming [*or as the case may be*] which may be therein and to arrest search and bring before me or some other of the justices of our Lord the King assigned to keep the peace as well the keepers of the same as also the persons there haunting resorting and playing to be dealt with according to law and for so doing this shall be your warrant.

J.P. (L.S.)

Given under my hand and seal at Sydney this in the of the reign of .

The appellant then appealed, by way of special case, to the Supreme Court, and that Court dismissed the appeal, holding that the warrant was bad, and that the determination of the magistrate was correct; (1904) 4 S.R. (N.S.W.), 221.

The sections bearing on the point, and the proceedings, are fully set out in the judgment of *Griffith*, C.J.

Ferguson and *Walker*, for the respondent, moved to rescind or vary the special leave to appeal.

The motion was ordered to stand over for argument to the hearing of the appeal.

Blacket, for the appellant. The questions are (1) whether a warrant directed to the constables of the force generally is a valid warrant under the Act, and (2) whether a warrant is necessary at all. The latter point was not formally taken before the Supreme Court, but it is a question of law arising in the case within the meaning of sec. 106 of the *Justices Act*.

At common law a warrant addressed generally would be valid, and there is nothing in the Act to alter the common law in this respect. That can only be done by express words or necessary implication; *Wilberforce on Statute Law*, p. 19. The provision as to the special warrant in sec. 4, and the form in the schedule, do not in any way affect the common law incidents of procedure by special warrant. Such a warrant may be addressed generally, and executed by any person of the class to whom it is addressed, within his own precinct; 2 *Hawk., P.C.*, c. 13, p. 135, sec. 30; *Rex* v. *Weir*, 1 B. & C., 288, at p. 292. Sec. 4 must be read with the *Interpretation Act*, and therefore "constable" means constables generally. The warrant must be addressed to some person or persons. In this case it is addressed to the police force generally, and may be executed by any member of it. The form in the schedule does not justify the inference that a constable must be named in the warrant. If that were intended, there would be a space left and a direction to insert the name, as "to A.B." or "to C.D." The blank space is for the local address of the constable or constables. If a particular named person must execute the

H. C. OF A. 1904.

MACDONALD v. BEARE.

warrant, he might have to wait perhaps for weeks for an opportunity to do so.

[GRIFFITH, C.J.—The word "special" was probably taken from another Act. What was the meaning of "special warrant" under the older Acts? That may throw light on the question.]

All the local Acts are traceable to the English *Gaming Act*, 8 & 9 Vict. c. 109. The local Act was 14 Vict. No. 9.

[GRIFFITH, C.J.—There is a reference to "general" warrants in *Burns' Justice of the Peace.* He says that, *primâ facie*, a general warrant, to arrest any persons whom the officer entrusted with its execution thinks fit, is illegal at common law, and gives *Hale* as his authority. He mentions that the only exceptions are general warrants to take up idle and disorderly persons, and search warrants. Apparently a "general" warrant is one which does not specify the persons upon whom it is to be executed.]

[*Walker* referred to *Blake* v. *Beech*, 1 Ex. D., 320, at p. 325, where there is a reference to "general" warrants.]

A warrant which is general, in the sense that it does not state the offence or offences for which the defendant is to be arrested, is not bad on that ground; 2 *Hawk. P.C.*, p. 132, citing *Boucher's Case.*

The validity of the warrant was a matter which the magistrate need not have decided. He might have convicted the defendants of the offence charged without considering the validity of the warrant; *Sheehan* v. *Gallagher*, (1902) Q.S.R., 319; *Biggs* v. *Noonan*, 27 V.L.R., 583. This was a point arising in the case and might have been decided by the Supreme Court, although it was not specially taken; *Hamilton* v. *Walker*, (1892) 2 Q.B., 25; *Knight* v. *Halliwell*, L.R. 9 Q.B., 412; *McNab* v. *Fallon*, 15 (N.S.W.) W.N., 98; *Hayes* v. *Fuller*, 3 (N.S.W.) W.N., 21; *Eberhardt* v. *Cornish and another*, (1903) Q.S.R., 172; *Grant* v. *Pirani*, 18 N.Z.L.R., 209; *Campbell* v. *McDonald*, 22 N.Z.L.R., 65.

[GRIFFITH, C.J.—There is a great difference between points which might, if they had been taken, have been met by amendment or evidence, and points which would have been fatal.]

Ferguson and *Walker*, for the respondent. The appellant is not

entitled to take his second point now. It was not one of the points stated by the magistrate for the opinion of the Supreme Court. The proper course would have been for the appellant to ask the Supreme Court to refer the case back to the magistrate to have the point stated, as in *Hayes* v. *Fuller* (*supra*); in *Eberhardt* v. *Cornish and another* (*supra*), and *Hamilton* v. *Walker* (*supra*) the depositions were before the Court of Appeal, and the point appeared on the face of them. The Court was therefore able to say whether the magistrates decision on that point "was erroneous in point of law."

[GRIFFITH, C.J.—Suppose there was a conviction on a point which was irrelevant. Would the Court of Appeal be bound to send the case back, with the expression of opinion that the point was rightly decided, and uphold the conviction, although as a matter of law, on another ground, no offence had been committed ?]

In those circumstances the case would be sent back to be amended in such a way as to raise the point properly. In this case the evidence given would not have been sufficient to obtain a conviction but for the provision in sec. 10, and that section cannot be relied upon unless the warrant is in accordance with the requirements of the Act. The validity of the warrant is therefore a condition precedent to the conviction.

The words of the section and the schedule show that it was the intention of the legislature that the warrant should be addressed to some officer on whose intelligence the authority issuing the warrant could rely. The distinction in our law between what are understood to be general and special warrants appears from sec. 64 of the *Justices Act*, 1902. That provides for one form of warrant, to be addressed to some particular officer, and for another, which may be addressed to and executed by any one of a number of officers.

[O'CONNOR, J.—Special warrants are referred to in *Blackstone*, vol. IV., p. 150, where the author cites 2 *Hawk. P.C.*, p. 135, s. 26.]

Sec. 64 of the *Justices Act* is taken from sec. 6 of 9 Geo. IV. c. 18, where the words were "specially addressed." That may be regarded as a special warrant. The same distinction is seen in 8 & 9 Vict. c. 109, from which our *Gaming Act* was taken. The

H. C. OF A. 1904.

MACDONALD v. BEARE.

extreme power of breaking into houses was to be exercised only under the greatest safeguards, and only entrusted to persons specially selected. Warrants addressed generally would fitly be termed general warrants. [They cited also on this point *Broom's Commentaries*, 2nd ed., pp. 522 *et seq.*; *Money* v. *Leach*, 19 H.S. Tr., 1001; 1 Wm. Bl., 555.]

[O'CONNOR, J., referred to *Wilkes* v. *Wood*, 19 St. Tr., 1,153.

GRIFFITH, C.J.—In that case Lord *Mansfield* says that a warrant must be to search a particular place, and not any place.]

[*Blacket* referred to 2 *Hawk. P.C.*, p. 130, sec. 10.]

[BARTON, J.—The distinction between the two kinds of warrants seems to be in regard to the place to be searched, and not the person to whom the warrant is addressed.]

In our Act the intention of the legislature seems to have been to throw on the justices the responsibility of deciding which officer was to execute the warrant. The use of the word "assistants" in the section and in the schedule points to the necessity for naming some person in the address.

Special leave to appeal should not have been granted. This is not a matter of great public importance. There would be no difficulty about addressing the warrant to some particular officer or officers.

Even if the appeal succeeds, the respondent should not be made to pay the costs; *Hannah* v. *Dalgarno*, *ante*, p. 1; *Forget* v. *Ostigny*, (1895) A.C., 318; *Montreal Gas Co.* v. *Cadieux*, (1898) A.C., 718. A test case by the Crown should not be tried at the expense of the first defendant in whose case the point arises.

Blacket, in reply. As to the motion to rescind, the matter is of great importance to the appellant, for, if the warrant is held to be invalid, he will be liable to a number of actions for trespass and false imprisonment. The respondent also has a strong interest in the proceedings, for he is liable to a fine of £100, in default six months imprisonment, if he is convicted. There are not as strong reasons against allowing appeals to the High Court, as there are in the case of appeals to the Privy Council. The expense and delay incidental to the former are small compared with those which attend the latter. It was intended that appeals to this

Court should be easier and more convenient than to the Privy Council. In *Hannah* v. *Dalgarno* the question of law was in doubt, as well as the question of the propriety of granting leave. The issue of this case will affect the practice throughout the States.

As to the main question, it seems from *Wilkes* v. *Wood*, 19 St. Tr., 1,153, cited in 2 *Hawk. P.C.*, 130, that a general warrant is one that is unlimited, either in regard to the subject matter, *i.e.*, the offence, or to the person against whom, or the place where, it is to be executed.

Cur. adv. vult.

September 2.

GRIFFITH, C.J. This is an appeal from the decision of the Supreme Court on a special case stated by justices under the *Justices Act* 1902, on an information presented against the respondent by the appellant, charging him with having committed an offence against the *Games, Wagers and Betting Houses Act*, 1901. The section under which the information was laid was sec. 4, which is as follows:—"Any justice upon complaint made on oath that there is reason to suspect any house, room, premises or place to be kept or used as a common gaming-house and that it is commonly reported and believed by the deponent so to be may by special warrant under his hand and seal authorize any constable to enter into such house, room, premises or place and arrest search and bring before any two justices all persons found therein and seize all tables instruments of gaming moneys and securities for money found therein," &c. The authority, it will be observed, is that any justice may by "special warrant . . . authorize any constable." The owner of the house, if convicted, is liable to a penalty not exceeding £100 (sec. 6). Sec. 10 provides that "whenever any house room premises or place suspected" is entered under a warrant under the provisions of the Act, the discovery of cards, dice and other implements of gaming in the place affords presumptive evidence that the place was used as a common gaming-house, and that the persons found there were engaged in play. For the purpose of sec. 10, therefore, it is important that there should be a valid warrant, because what would be sufficient presumptive evidence in the case of a house entered under

H. C. OF A. 1904.

MACDONALD v. BEARE.

a warrant might not be sufficient evidence in an ordinary case independently of the provisions in that section. On the hearing before the magistrate the objection was taken that the warrant was bad. Sec. 4 says that "Every special warrant shall be in the form contained in the second schedule hereto or to the like effect." In this instance the warrant was addressed "to the Superintendent of Police for the metropolitan district and a constable of the police force, and to all other constables in the said force." The objection was that, on that account, the warrant and conviction were bad. The objection was put in various ways. The magistrate was of the opinion that the warrant was bad (1) for uncertainty as to the address; (2) that it was not addressed to any police constable by name; (3) that it was executed by a person not being a police constable to whom it was addressed, nor (4) with any assistants called by the police officer to whom it was addressed, and (5) that it was not in the form of the special warrant under the Act. On the appeal to the Supreme Court, that Court decided that the magistrate's determination was right in point of law, and dismissed the appeal. It now comes before us on appeal from that decision. The various objections practically come to the same thing, that the address was too large. It is not disputed that at common law a warrant in the form of this one would be good, but it was contended that it was bad by reason of the provisions of the Statute. If it was bad, therefore, it must have been by reason of some alteration made in the common law by the Statute. The answer to the question whether any such alteration has been made is to be found by looking at the terms of the Statute.

The case before the Supreme Court is shortly reported. The learned Judges, after pointing out that there was no dispute as to the common law, said (I am reading from the judgment of the learned *Chief Justice*), "The question is whether this warrant is sufficient under the Act. As to the form given in the schedule it seems to me that the form of warrant really begins with the words 'whereas it appears to me' and that the heading 'to the constable' is no part of it, but merely indicates that the name of someone who is a constable is to be inserted." The *Chief Justice* then went on to say: "In my opinion the warrant should

be addressed to some constable by name, and the person so named should be some responsible officer upon whose intelligence and discretion the magistrate may rely." The other Judges of the Court concurred, and that is all that is reported. Now, with great respect to the learned Judges of the Supreme Court, if the common law has been altered, then some section, upon which those who make that contention rely, must be found in the Act. I have looked carefully through the Act to see if there is any section having that effect, and I cannot discover anything in the Act to support the view taken by the Supreme Court. Looking at the section itself, we see that authority is given to the justice to authorize "any constable," which suggests that it is left open to him to authorize any constable or constables to execute the warrant, on the general principle that in Statutes singular words include the plural. When it is remembered that at common law a warrant might be addressed to any number of persons and executed by any one of them, it seems impossible to suppose that the magistrate should be bound to address the warrant to any constable by name. It was suggested, though the point was not expressly referred to in the judgment of the Supreme Court, that some alteration of the common law was to be inferred from the use of the words "special warrant," and it was suggested that those words mean a warrant addressed to some constable by name. That certainly is a possible construction, but after the very full argument put before us, we can, I think, discover the real meaning of the words in this connection. It is a good instance of the assistance to be derived from the historical argument in construing a Statute. This section is intended to be a re-enactment of sec. 1 of 14 Vict. No. 9. That was itself an enactment in New South Wales of the English Act 8 & 9 Vict. c. 109. The words are practically the same. Sec. 3 of that Act uses the words "special warrant." We find also that, by the Act 42 Geo. III. c. 119, which also related to gaming, power was given to a justice, by sec. 4, "by special warrant . . . to authorize or empower any person or persons . . . to break open the doors or any part of such house or place where such offence shall have been committed," and to enter and seize all offenders. That was in 1802. So long ago as that the term "special warrant" was in

H. C. OF A. 1904.

MACDONALD v. BEARE.

use. In an earlier Act, 25 Geo. II. c. 36, passed in the year 1751, which was an Act for, amongst other things, the regulation of places of public entertainments, it was enacted that "it shall and may be lawful to and for any constable or other person being thereunto authorized by warrant under the hand and seal of one or more of His Majesty's justices of the peace . . . to enter such house or place and to seize every person . . . found therein," &c.

There the word "special" was not used. The term "special warrant" therefore was a new term which came into use between 1751 and 1802, and on inquiry we find that very good reason had occurred for using it. Shortly after 1751 the question arose, in the case of the *North Briton Newspaper, Wilkes' case,* as to the validity of what were called "general warrants." In 1756 the celebrated resolutions of the House of Commons declaring general warrants to be illegal were passed. In the case of *Money* v. *Leach,* 19 H.S. Tr., 1001; 1 Wm. Bl., 555, a case of trespass and false imprisonment for acts done under a general warrant, the question arose whether such warrants were valid. The marginal note is "General warrants are illegal and void." That case was decided in 1765. During the argument it was pointed out by Sergeant *Dunning,* that Lord Chief Justice *Scroggs'* general warrants had been made a ground of parliamentary impeachment, and then the Court proceeded to consider the question whether general warrants were good. The warrant in that case was to search for the authors, printers and publishers of a certain seditious and treasonable libel, and to apprehend and seize them together with their papers, not for the apprehension of any particular person or to search any particular place. It was held to be bad on the ground that it was a general warrant. In *Wilkes* v. *Wood,* (1763) 19 H.S. Tr., 1153, the same point had arisen and had been decided in the same way. In *Burns' Justice of the Peace,* p. 1131, general warrants, to apprehend *all persons suspected,* and bring them before a justice, are compared to blank warrants, and there is a precedent in *Dalton,* which gives the form of a special warrant as distinguished from a general warrant. The subject is dealt with in 2 *Hawk. P.C.,* p. 130, sec. 10 (8th ed.), where the learned editor adopts the statement of the law in *Money* v. *Leach.*

There is therefore no doubt, regarding the matter historically,

as to what was the meaning of the term "special warrant," when it was first used in England; that it meant a warrant which did not purport to authorize the person to whom it was addressed to search for and arrest any person whom he thought fit, or to search any place that he thought fit, but was limited to some particular person or to some particular place. Sometimes the term "limited warrant" was used in the same sense in contradistinction to "general warrant." There is no doubt that, the attention of the people of England having been drawn by these well known cases to this distinction between general and special warrants, subsequent Acts of Parliament used the term "special warrant" in that sense, and there can be no doubt that that is the sense in which the term is used in this Act. It does not, therefore, suggest any intention on the part of the legislature to limit the authority for the execution of the warrant to any particular person or persons. Only one case was cited to us from the English Courts in which the Statute 8 & 9 Vict. c. 109 was discussed; *Blake* v. *Beech*, 1 Ex. D., 320. In that case the same point was not involved, but in the report it appears that the "special warrant" issued in that instance was addressed to "the constables of the Borough of Bolton in the County of Lancaster, and to all other police officers of the county aforesaid." It did not occur to anyone in that case to object that there was anything wrong with the warrant. It appears, therefore, to be the practice in England to address these warrants to the constables at large. We were informed by Mr. Blacket that that is also the practice in New South Wales. Under these circumstances I cannot find anything in the Act to alter the common law or to restrict the power of the magistrate to issue warrants empowering any member of the police force to carry them out, and I think, therefore, that the appeal must be allowed.

A motion was made by the respondent that the special leave to appeal should be rescinded on the ground that the case was not of sufficient importance to justify the Court in granting leave. It was pointed out at the time when the motion for special leave was made that the matter was of considerable importance, as the practice of issuing warrants in this form had been carried on for so many years. Moreover, if the warrant were held to be bad,

H. C. OF A. 1904.

MACDONALD v. BEARE.

the appellant, who acted upon it in accordance with the practice in England and other parts of Australia, had exposed himself to a number of actions for trespass and false imprisonment to which he would have had no defence. In my opinion there is no sufficient ground for rescinding the leave to appeal, and the motion therefore fails.

BARTON, J., and O'CONNOR, J., concurred.

Appeal allowed. Order of the Supreme Court discharged with costs. Case remitted to the magistrate for his determination with the expression of the opinion of the Court. Motion to rescind dismissed with costs.

Solicitor, for the appellant, *The Crown Solicitor for New South Wales.*

Solicitor, for the respondent, *J. W. Abigail.*

[HIGH COURT OF AUSTRALIA.]

THE NEW LAMBTON LAND & COAL CO. LTD. . . . . } APPELLANT;

AND

THE LONDON BANK OF AUSTRALIA LTD., EDWARD WILLIAM BANCROFT, AND JAMES LINDSAY BALLANTYNE } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1904.

SYDNEY, *Sept.* 2, 5, 6.

Company—Transfer of shares—Directors' power to refuse to register—Rectification of register—Companies Act (N.S.W.), No. 40 of 1899, sec. 232—Practice—Parties—Person or member aggrieved—Power of Court to impose conditions—Amendment.

Griffith, C.J., Barton and O'Connor, JJ.

The directors of a company, in exercising their power of refusal to register transfers of shares, must exercise it in good faith, and with due regard to the