[HIGH COURT OF AUSTRALIA.]

WILCOX . . . . . APPELLANT;

AND

DONOHOE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *Sept.* 26, 27.

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

Beer Excise Act 1901 (*No.* 7 *of* 1901), *secs.* 4, 8—*Excise Tariff Schedule—Making beer without a licence—Liquor below dutiable standard when brewed—Subsequent increase in alcoholic strength—Not part of process of making.*

Appeals to High Court—Special leave—Supreme Court exercising federal jurisdiction—Less than appealable amount involved—Appeals from State Courts exercising original federal jurisdiction—Judiciary Act 1903 (*No.* 6 *of* 1903), *secs.* 35, 38, 39.

The appellant, not having a brewer's licence, brewed a liquor containing a lower percentage of proof spirit than the standard fixed for excisable beer by the *Excise Tariff*, 1902, and the liquor having been bottled and stored on the appellant's premises, the contents of some bottles were subsequently found, on analysis by the Customs authorities, to have increased in alcoholic strength to a point above the standard. The increase could only be accounted for as the result of a secondary fermentation in the bottles, which was no part of the process of brewing, and which every reasonable precaution had been taken to prevent.

Held, that the maker was not guilty of the offence of making beer without a licence, within the meaning of sec. 8 of the *Beer Excise Act* 1901.

The appellant was prosecuted by the Customs authorities in a Court of summary jurisdiction under sec. 134 (*c*) of the *Excise Act* 1901, and was convicted, and fined. He obtained a rule *nisi* for a statutory prohibition from the Supreme Court. The matter then came before a Judge in Chambers, exercising the powers of the Supreme Court under sec. 114 of the *Justices Act* 1902 (N.S.W.), who, without going into the merits, discharged the rule on the ground that he had no jurisdiction to entertain an application for a prohibition against a Court exercising federal jurisdiction.

Held, that the Judge had jurisdiction, inasmuch as the appellant was entitled under sec. 137 of the *Excise Act* 1901, to apply to the Supreme Court for a statutory prohibition, instead of appealing direct to the High Court under sec. 35 of the *Judiciary Act* 1903.

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The writ of prohibition referred to in sec. 38 of the *Judiciary Act* 1903, which confers on the High Court exclusive jurisdiction in "matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal Court" is the prerogative writ for the control by the Superior Courts of inferior Courts exceeding their jurisdiction, and does not include the statutory writ of prohibition in New South Wales, which is in reality a form of appeal.

Ex parte Stelling, 1904, 4 S.R. (N.S.W.), 201, over-ruled on this point.

Held, further, that, as the amount involved was less than the appealable amount, special leave to appeal to the High Court was necessary, but that under the circumstances it should be granted as a matter of course.

The words "Court or a Judge of a State" in sec. 39, sub-sec. 2 (*b*) of the *Judiciary Act* 1903 do not include a Judge sitting in Chambers, exercising the jurisdiction of the Supreme Court.

Decision of *Pring* J., 30th June, 1905, discharging rule *nisi* for a prohibition, reversed.

APPEAL from a decision of *Pring* J. sitting in Chambers.

In this case the appellant was prosecuted by the respondent, a Customs officer, for making beer without being licensed to do so, under the *Beer Excise Act* 1901, contrary to the provisions of sec. 8 of that Act. The proceedings were by information before a police magistrate, taken under sec. 134, sub-sec. (*c*) of the *Excise Act* 1901. The magistrate convicted the appellant, and imposed a fine of £5 and costs. The appellant then obtained from the Supreme Court a rule *nisi* for a prohibition, but on the matter coming before *Pring* J., sitting in Chambers, in the exercise of the powers of the Supreme Court, under sec. 114 of the *Justices Act* 1902, the rule was discharged. The learned Judge considered that he was bound by the decision of the Full Court in *Ex parte Stelling* (1), that the State Court had no jurisdiction to entertain an application for a prohibition to a Court exercising federal jurisdiction. He therefore declined to consider the appeal on the merits.

From this decision the present appeal was brought, without leave.

The facts are stated in the judgment of *Griffith* C.J.

Blacket, for the respondent, took the preliminary objection that the decision appealed from was one from which no appeal lay

(1) (1904) 4 S.R. (N.S.W.), 201.

without special leave, and that special leave had not been obtained. Less than £300 was involved. Sec. 35 of the *Judiciary Act* 1903 is exhaustive, and that does not give an appeal in such cases except by special leave. [He referred to *Parkin* v. *James* (1).] Sec. 39 must be read subject to sec. 35. The appellant might have appealed from the magistrate direct to the High Court, but having chosen to appeal to the Supreme Court, under sec. 137 of the *Excise Act* 1901, he can carry the matter no further without special leave. The magistrate was exercising original federal jurisdiction.

Pring J. was exercising the jurisdiction of the Supreme Court under the *Justices Act* 1902, sec. 114. In that capacity he is not a "Court or Judge" within the meaning of sec. 39 sub-sec. 2 (*a*) of the *Judiciary Act* 1903.

Special leave being necessary, this was not a case in which it would have been granted if asked for. There was a mere question of fact to be decided.

[GRIFFITH C.J.—That would have been an excellent reason for refusing special leave to appeal if the learned Judge had really decided the matter. In reality he did not decide it on the merits, because he was of the opinion that he had no jurisdiction to entertain it. The appellant was entitled to appeal on the merits to the Judge, and, by special leave, to the High Court from him.]

It was only a question of fact that would have been decided if it had been heard. The appellant has made his election and should abide by the result.

Armstrong, (with him *Pitt*), for the appellant. This is an appeal from one Judge of the High Court to the Full Court: sec. 34 of the *Judiciary Act* 1900. Sec. 35 only applies to judgments from which there was an appeal to the Queen in Council. The decision appealed from does not come within that class. There would have been no appeal to the Privy Council except by special leave.

In any case sec. 39 sub-sec. 2 (*b*) applies, and there is an appeal to the High Court as of right. This was a decision of a tribunal from which an appeal lay to the Supreme Court, not only by

(1) 2 C.L.R., 315.

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virtue of the *Justices Act* 1902, but at common law: *Ex parte Baillie* (1); *Ex parte Pilley* (2).

[He referred also to sec. 20 of the *Judiciary Act* 1903.]

Sec. 137 of the *Excise Act* 1901 completely answers *Ex parte Stelling* (3).

If the Court is of the opinion that it is necessary, I ask now for special leave. The appellant has never had his appeal heard, and, so long as *Ex parte Stelling* stands, he is debarred from having it heard by the Supreme Court.

Blacket in reply.

GRIFFITH C.J. The point taken by Mr. Blacket is an important one, and has been mooted once or twice already. It will, therefore, be just as well for us to give a definite statement of our opinion on the point now. This is in form an appeal from a decision of *Pring* J., sitting in Chambers. The case of *Parkin* v. *James* (4) decided that an appeal lies from him, as a Judge of the Supreme Court exercising the jurisdiction of the Supreme Court, to this Court. But that right is controlled by the *Judiciary Act* 1903. The Judge's decision is a decision of the Supreme Court exercising federal jurisdiction. Sec. 35 (1) provides that:—"The appellate jurisdiction of the High Court with respect to judgments of the Supreme Court of a State, or of any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall extend to the following judgments whether given or pronounced in the exercise of federal jurisdiction or otherwise and to no others, namely:" Then paragraph (*a*) (1) prescribes the condition that the judgment must be one "given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of three hundred pounds: or" (2) "which involves directly or indirectly any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of three hundred pounds; or (3) affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy or insolvency." This case does not fall

(1) 5 S.C.R. (N.S.W.), 17.
(2) (1903) 3 S.R. (N.S.W.), 8.
(3) (1904) 4 S.R. (N.S.W.), 201.
(4) 2 C.L.R., 315.

within any of those categories. Then paragraph (*b*) provides for an appeal from:—"Any judgment, whether final or interlocutory, and whether in a civil or criminal matter, with respect to which the High Court thinks fit to give special leave to appeal"; and (*c*) "any judgment of the Supreme Court of a State given or pronounced in the exercise of federal jurisdiction in a matter pending in the High Court." The result is that an appeal does not lie as of right from the Supreme Court of a State exercising federal jurisdiction any more than when it is exercising its ordinary jurisdiction. In any matter in which less than £300 is involved special leave to appeal must be obtained from this Court. The question is whether that section is controlled by sec. 39 which confers federal jurisdiction on State Courts, and provides, *inter alia*, sec. 39 (2) (*b*) that "whenever an appeal lies from a decision of any Court or Judge of a State to the Supreme Court of the State, an appeal from the decision may be brought to the High Court." Now, in one sense, this applies to the present case, because *Pring* J. was a Judge of a State, and an appeal lies from his decision to the Supreme Court of the State. But it is clear that the "Court or Judge" referred to means some Court or Judge other than the Supreme Court, and does not apply to the case of a Judge exercising the powers of the Supreme Court or to the Supreme Court otherwise constituted. Therefore paragraph (*b*) does not apply here, and there is no appeal from the decision in question except by special leave. Under these circumstances we are asked for special leave. If the matter had been a trivial one, very likely we should have refused to grant it. But as a matter of fact His Honor declined jurisdiction. It is clear also that the appellant was entitled to have his appeal heard, and to have it heard by *Pring* J., unless there was some statutory restriction. But the Judge having refused to entertain the appeal, the appellant is entitled to some redress. He was strictly entitled to appeal direct to this Court, but he adopted the more expeditious process of appeal by special case under the *Justices Act* 1902. Under these circumstances leave to appeal should be almost a matter of course. Otherwise the appellant loses the appeal given to him by the Constitution. We might content ourselves with declaring that *Pring* J. had jurisdiction to hear the matter, and remitting it to him with that

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expression of our opinion. Certainly we are bound either to hear the appeal ourselves or to remit it to the learned Judge.

It has become necessary to refer to the case of *Ex parte Stelling* (1), upon which the decision of the learned Judge proceeded. The judgment in that case was founded upon sec. 38 (*e*) of the *Judiciary Act* 1903 which provides that the High Court shall have exclusive jurisdiction in "matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal Court." The learned Judge appeared to have considered that the word "prohibition" was there used in such a sense as to include a form of appeal in New South Wales which goes by that name. But I have no doubt that in the *Judiciary Act* 1903 the writ of prohibition referred to is the prerogative writ by which the Superior Courts control inferior Courts from going beyond their jurisdiction, and does not include the writ which is called by that name in New South Wales, but which is in reality only a form of appeal. I therefore think that sec. 38 does not apply. The jurisdiction of *Pring* J. to hear the appeal was settled in the case of *Ah Yick* v. *Lehmert* (2).

We think, therefore, that special leave to appeal is necessary, but that, under the circumstances, it is practically a matter of course to grant it. We therefore grant special leave.

Blacket submitted that, as special leave was necessary, security for costs should have been given by the appellant. The appellant should have taken this step before.

GRIFFITH C.J.—This might be regarded as an application for a *mandamus*. The security would only be nominal, if it were ordered.

Armstrong (with him, *Pitt*), for the appellant. Sec. 8 of the *Beer Excise Act* prohibits only the making beer without a licence. The appellant, although nominally convicted and punished for that offence, was only proved guilty of having beer in his possession without a licence. That is not an offence under the Act, though under the English Acts it is. [He referred to 43 & 44 Vict. c. 20, sec. 10, and 48 & 49 Vict. c. 51, sec. 4.] There was no evidence that the liquor when made contained as much as 2 per cent.

(1) (1904) 4 S.R. (N.S.W.), 201. (2) 2 C.L.R., 593.

of proof spirit. All the evidence points the other way. It was admitted that the percentage of alcohol in the liquor could not diminish while in the bottles, so long as the liquor remained sweet, but that it might easily increase. The keeping in bottles was no part of the process of making. It was merely for convenience in storage, and every precaution was taken to prevent further fermentation. Therefore, the liquor "made" by the appellant was not "beer" within the meaning of the *Beer Excise Act* and the *Excise Tariff Schedule*, and the conviction was bad.

Moreover the Government analyst spoke only of "proof spirit." This is a technical term, and there was no evidence that he used it in the sense in which it is used in the *Excise Tariff* 1902.

Blacket, for the respondent. The word "make" in sec. 8 includes every operation of the maker, so long as the liquor is in his possession, *e.g.*, maturing, bottling, and so on. It must be taken to mean more than "brew," otherwise that word would have been used. For instance in making wine every process necessary to produce a wine fit for market is part of the making.

[GRIFFITH C.J.—Was keeping in bottles part of the recognized process of making this ale?]

The beer was changed by the keeping. If that is not to be considered part of the process, a man might, without a licence, be able to produce highly alcoholic beer, by brewing it at a low grade, and taking care to leave some ferment in the bottles. It is immaterial at what stage of the process the increase in strength takes place. To leave in the bottles materials which will result in such an increase, is the same as actually adding alcohol. Nobody but the appellant was responsible for the making. He should have taken sufficient precautions to keep his product below the standard, or give up the manufacture, if he does not wish to pay duty. It is no excuse that he took some precautions. The result shows that he did not take enough.

[O'CONNOR J.—You must not put some special meaning on the word "make" without clear authority from the Act. In the absence of any such authority, surely you must read "make" in the ordinary sense.]

If on the appellant's own showing, there must of necessity be

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an increase in the strength after bottling, the process cannot be said to be complete before bottling. The intention of the appellant is immaterial. This is an unavoidable secondary fermentation. Moreover, there was no evidence that the strength would increase from less than 2 per cent. to the percentage found in some of the bottles. That raises a *primâ facie* case against the maker, and the onus was on him to rebut that presumption. The magistrate was therefore entitled on the evidence to find that, at the time when the liquor was put into the bottles, it was above the standard. The averments in the information are themselves evidence: *Excise Act*, No. 9 of 1901, sec. 144, which is incorporated with the *Beer Excise Act*, No 7 of 1901.

[GRIFFITH C.J.—It is a question whether the Commonwealth legislature has power to make such a provision The English Parliament has no doubt power to do so, but no English Act says that the person charged is to be deemed to be guilty of the offence, though they say that the introductory averments are to be taken to be proved. However the question does not arise in this case.]

There was evidence given by the analyst from which the magistrate might have found the charge proved.

[GRIFFITH C.J.—It is the duty of the Court, on an appeal of this kind, to go into the whole case, and not only to see whether there was a fragment of evidence to support the finding.]

Blacket referred to *Ex parte Ward*, and *Ex parte Bolton*, *Addison's Digest of Criminal and Magistrates Cases*, pp. 275, 276; *Wilkinson Australian Magistrate*, 7th ed., p. 703; *Ex parte Tully* (1). There was more than a mere fragment here, there was abundance of evidence to support the finding. [He referred to various portions of the evidence, and to *Howarth* v *Minns* (2).]

Counsel for the appellant were not heard in reply.

GRIFFITH C.J. This is in form an appeal from a decision of His Honor Mr. Justice *Pring*, but it is in substance an appeal from a police magistrate, because His Honor, following the decision in *Ex parte Stelling* (3), held that he had no jurisdiction to entertain the matter, and discharged the rule *nisi* for a pro-

(1) 21 N.S.W. L.R., 408.
(2) 56 L.T., 316.
(3) (1904) 4 S.R., N.S.W., 201.

hibition. The matter therefore comes before us as an appeal for the first time. The appellant was prosecuted for the offence of making beer without a licence. It appeared at the hearing before the magistrate that he was the brewer of a drink called "Dandelion Ale." Now, "beer" by sec. 5 of the *Beer Excise Act* 1901, under which Act he was prosecuted, means "any liquor upon which under the name of beer any excise duty imposed by the Parliament is payable." Under the schedule to the *Excise Tariff* 1902 beer on which excise duty is payable is stated to be "Ale, Porter, and other Beer, containing not less than 2 per cent. of proof spirit." In order therefore to convict the appellant it was necessary to show that he had made beer containing not less than 2 per cent. of proof spirit. The evidence offered for that purpose was this: Some five or six months after the beer in question was brewed, an inspector went to the appellant's premises, and took away some bottles containing a portion of the beer. On analysis, the beer in some of the bottles was found to contain more than 2 per cent of proof spirit. But the analyst called for the prosecution stated that, when beer which had been bottled five or six months was analysed, the amount of alcohol shown to exist in it at the time of analysis was no evidence of the strength of the liquor at the time when it was brewed. So that, on the prosecutor's own case, there was no evidence to show the alcoholic contents of the liquor when it was brewed. For the defence evidence was given that samples were taken at random from the same brew, and an analysis of their contents showed the presence of less than 2 per cent. of proof spirit; and it was proved both by witnesses for the prosecution and for the defence that it was impossible for the amount of alcohol present in the liquor when brewed to diminish whilst in the bottles. The inference was plain that the beer was stronger in alcohol at the date of analysis, than it was when it was bottled, and that it could not at the time when the bottling took place have contained more than 2 per cent.

Under these circumstances the prosecutor failed to prove his case, for there was no evidence that the appellant had made beer containing more than 2 per cent. of alcohol, unless the term "making beer" can be extended to such a degree as to justify

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holding the brewer responsible for any chemical changes that may have taken place in the liquor after the process of brewing was finished. The evidence was that, unless the brew is perfectly clear, that is to say, unless the bottles are absolutely freed from spores of fermentation, all sugar excluded, and the process of sterilization thoroughly successful, there is a prospect that a secondary fermentation may be set up in the bottles and the amount of alcohol will slightly increase. If the legislature had intended to make a man responsible for any changes that may take place in the liquor after the brewing was complete, it would have been easy for them to have said so, as was done in England by the Act 48 & 49 Vict. c. 51, sec. 4, wherein it was laid down that the term "beer" in the *Inland Revenue Act* 1880, which forbade unlicensed brewing, should extend to "any liquor which is made or sold as a description of beer or as a substitute for beer, and which on analysis of a sample thereof *at any time* shall be found to contain more than two per centum of proof spirit." There is no similar provision in the *Beer Excise Act* 1901 or *Excise Tariff Act* 1902 here, nor is there anything to suggest that the word "make" was intended to import any such condition. On the facts, therefore, it appears to me that the prosecutor failed to prove that the appellant was guilty of any offence under the Statute, and that the appeal should be allowed.

BARTON J. and O'CONNOR J. concurred.

Appeal allowed with costs. Rule appealed from discharged. Rule Nisi made absolute to quash the conviction.

Blacket, for the respondent, having been successful on the preliminary objection, asked for the costs of that.

GRIFFITH C.J. Under the circumstances there will be no order as to those costs.

Solicitor, for the appellant, *F. Y. Wilson.*

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

C. A. W.