[HIGH COURT OF AUSTRALIA.]

HEY . . . . . APPELLANT;
DEFENDANT,

AND

BROOKES . . . . . RESPONDENT.
INFORMANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1911.

MELBOURNE, *June* 6.

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

Licensing—Local option vote—Resolution for reduction carried—Subsequent resolution for continuance of "existing licences," effect of—Liquor (Amendment) Act 1905 (*N.S.W.*) (*No.* 40 *of* 1905) *secs.* 67, 69.

Sec. 67 of the *Liquor (Amendment) Act* 1905 (N.S.W.) provides that "(1) Except where resolution C of this section has previously been carried, and is in force in an electorate, the following resolutions shall be submitted to the vote of the electors:—

"(*a*) That the number of licences existing in the electorate continue (Resolution A.)

"(*b*) That the number of licences existing in the electorate be reduced (Resolution B.)

"(*c*) That no licences be granted in the electorate (Resolution C.) . . ."

Sec. 69 provides that:—"If any resolution is carried it shall . . . be given effect to within the electorate as follows, until altered by a subsequent vote:—

"(*a*) If resolution A is carried, the number of licences of the respective descriptions shall not exceed the number at the time of the taking of the vote."

Held, that where a resolution for continuance has been carried after a previous resolution for reduction, the number of licences which are to continue is

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exclusive of those licences already extinguished or in process of extinction pursuant to the previous resolution for reduction.

Special leave to appeal from the Supreme Court of New South Wales (*Ex parte Hey*, 11 S.R. (N.S.W.), 234, refused.

APPLICATION for special leave to appeal.

In 1907, under the provisions of sec. 67 of the *Liquor (Amendment) Act* 1905, a vote was carried in favour of the number of licences existing in the Leichardt electorate being reduced, and the Special Court constituted under sec. 70 of the Act determined that the number of the licences in the electorate should be reduced by one, and the licence of Joseph Hey should "cease to be in force at the expiration of three years from 6th February 1908." An official notification to that effect was received by Hey.

On 5th May 1910 Hey obtained from the Licensing Court a certificate that he was entitled to a renewal of his licence, and his licence was renewed for one year as from 1st July 1910.

On 15th October 1910 the general elections for Parliament were held, and another local option vote was taken in the Leichardt electorate and a vote was carried "that the number of licences existing in the electorate continue."

On the 9th March 1911 Hey was charged on information laid under sec. 45 of the *Liquor Act* 1898 for selling liquor at his hotel in the Leichardt electorate on 27th February 1911 without having a licence, and was convicted and fined.

He then obtained a rule *nisi* for a prohibition on the grounds:—(1) That the evidence disclosed no offence. (2) That, as Hey had a licence to sell up till 30th June 1911, he could not be convicted of the offence charged. (3) That Hey was the holder of an existing licence to sell. (4) That the order of the Special Court was rendered inoperative by the carrying of the vote for continuance in the Leichardt electorate at the general election of 1910.

The Full Court discharged the rule *nisi* holding that the vote for continuance applied to the licenses other than any which under the prior vote for reduction would cease to be in force at the expiration of the prescribed period. (*Ex parte Hey* (1)).

(1) 11 S.R. (N.S.W.), 234.

Application was now made on behalf of Hey for special leave to appeal to the High Court from that decision.

Loxton K.C. (with him *Clive Teece*), in support of the application. The effect of a vote for continuance after a previous vote for reduction which has not been fully carried into effect is to arrest the proceedings under the vote for reduction so that the number of licences which is to continue is the number then really in existence, including those licences directed by the Special Court to be terminated at a future day. The Special Board is a machine to work out the resolution of the electors and its determination only has operation if the resolution is not arrested by a subsequent vote of continuance. If this view is not correct, the electors cannot alter the effect of carrying a resolution for reduction. When the legislature wishes to refer to the number of licences as reduced by a previous vote, they use express words. See secs. 69 and 72 (*a*) of the *Liquor (Amendment) Act* 1908. He referred to *Smith* v. *McArthur* (1).

GRIFFITH C.J. We are told that the point involved in this application for special leave to appeal raises a question affecting nearly 200 licensed houses in New South Wales. Having regard to the period of the year and the time which, if leave were granted, must elapse before the appeal can be heard, it is evident that the granting of leave would have the effect of leaving in a state of uncertainty for a considerable period of time a matter of law as to which it is extremely desirable that there should be no uncertainty. That is the reason why we should be especially careful in considering whether special leave to appeal should be granted. We are told that in many of the cases an appeal will lie as of right. If so, what we say will not prevent the parties in those cases from taking advantage of their rights, but it may prevent some of them from going further.

After very full argument I am unable to see any real doubt that the judgment of the Full Court was right. The question arises under what are commonly called the "local option" provisions of the *Liquor (Amendment) Act* 1905. That Act provides

(1) (1904) A.C., 389.

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for what is called a "local option" vote. The voting is in the parliamentary electorates. When the necessary provisions are complied with a vote is taken in an electorate, and the form of voting paper sets out three propositions to be voted upon :—

"1. I vote that the number of licences existing in the electorate continue.

"2. I vote that the number of licences existing in the electorate be reduced.

"3. I vote that no licences be granted in the electorate."

The elector is to put a cross against the proposition for which he votes. It is perfectly obvious that whatever the words "number of licences existing in the electorate" mean in the first proposition they also mean in the second proposition. If the result of the voting is that the number of licences is to continue, nothing in particular follows. If the result is that the number of licences is to be reduced, then the matter is referred to a Special Court, presided over by a District Court Judge, to determine to what extent, within limits prescribed by the Act, the number is to be reduced, and at what period the licences which are to be extinguished are to cease to have effect. That period may be not less than six months nor more than three years after the vote is taken, and is fixed under conditions carefully prescribed by the Act. If the result of the voting has been that the number of licences be reduced, another vote may be taken at the next general election, and if on the second occasion a resolution for reduction is again carried, then the Special Court has to determine to what extent the licences shall be reduced, and it is expressly provided by sec. 72 that the Court shall "determine the reduction to be made in the number of the existing licences of the respective descriptions, exclusive of those which, under a previous vote, will cease to be in force at the expiration of the prescribed period."

So that, when the Court in a case of that sort comes to perform its duty, it is to regard only the licences not already sentenced to extinction, and is not concerned with those upon which it has already adjudicated. The question, therefore, submitted to the electors when asked to say that the number of licences shall be reduced means the number of licences existing in the electorate

other than those already extinguished or in process of extinction pursuant to the previous vote for reduction.

In the present case a vote for reduction was given in 1907, and in February 1908 the Special Court gave its decision that the number of licences in the electorate in which the appellant carries on business should be reduced to the extent of one licence, and the appellant was the chosen victim. The order of the Court was that his licence should cease to have effect on 6th February 1911. After that another vote was taken in 1910, and upon that occasion the result of the voting was that the number of the existing licences should continue. I have already pointed out that the words "number of licences existing in the electorate" must have the same meaning in both the questions. If the result of the second vote had been that the number of licences should be reduced, that would have meant that the number of licences excluding that of the appellant should be reduced. and therefore the vote that the number of licences should continue must mean that the number of licences excluding the appellant's should continue. That is pointed out very clearly by the learned Chief Justice, and the argument appears to me to be conclusive.

But there is another argument, perhaps not put so plainly, arising from the effect of the order of the Special Court, the Act having provided that the order of the Special Court as to which licences are to cease to exist shall be final and conclusive. There is absolutely nothing in the Act to take away from the effect of the order. Mr. *Loxton* has been asked several times by my brother *O'Connor* to point out any provision of the Act which leads to a contrary conclusion. He could only say that the resolution for reduction remains in force unless and until altered by a subsequent resolution for continuing the number of licences, and that the object of this is to enable the electors to alter their minds when once they have passed a resolution for reduction of licences. The question of increasing the number of licences is dealt with by the Act, but any addition to the number is made, not by a vote of the electors, but by Order in Council after a recommendation of the Licensing Court following upon a petition by persons interested in the matter.

Both these arguments appear to me to be conclusive against

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the idea that a licence sentenced by the Special Court to be extinguished at a certain time can be revived again by a subsequent resolution in favour of continuing the number of licences. We are concerned here only with the interpretation of the Act, and not with the hardships it may bring about, and in these circumstances we should not be justified in granting special leave to appeal.

BARTON J. I agree.

O'CONNOR J. I am of the same opinion.

Special leave to appeal refused.

Solicitor, *C. A. Coghlan.*

B. L.

Cons *He Kaw Teh* v *R* 157 CLR 523

Dist *Poole* v *Wah Min Chan* (1947) 75 CLR 218

Appl *Police* v *Kennedy* (1998) 71 SASR 175

Cons *Kennedy* (1998) 100 ACrimR 377

[HIGH COURT OF AUSTRALIA.]

EDGAR HILL . . . . . APPELLANT;
DEFENDANT,

AND

JOHN THOMAS TAMPLIN DONOHOE . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF QUARTER SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1911.

SYDNEY, *August* 18.

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

Customs Act 1901-1910 (*No.* 6 *of* 1901, *No.* 36 *of* 1910), *sec.* 233B (c)—*Person in possession of prohibited imports—Evidence of importation—Validity of Commonwealth Statute.*

The defendant was found at night in a boat without a light, in Sydney harbour, coming from the s.s. *Taiyuan*, with opium, which was a prohibited