[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE LICENSING COURT FOR THE LICENSING DISTRICT OF MARYBOROUGH AND OTHERS.

Ex parte WEBSTER AND COMPANY LIMITED.

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AGAINST

THE LICENSING COURT FOR THE LICENSING DISTRICT OF IPSWICH AND OTHERS.

Ex parte O'BRIEN and Ex parte VARLEY and Ex parte NASH.

ON REMOVAL FROM THE SUPREME COURT OF QUEENSLAND TO THE HIGH COURT.

H. C. of A. 1919.

SYDNEY, *Dec.* 22.

Knox C.J., Isaacs, Gavan Duffy and Rich JJ.

High Court—Removal of cause from Supreme Court of a State—Question of limits inter se of constitutional powers of Commonwealth and a State—Other questions in cause—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 75, 76, 77—*Judiciary Act* 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *secs.* 38A, 40A.

A question of the limits *inter se* of the constitutional powers of the Commonwealth and those of the State of Queensland arose in several causes before the Supreme Court of Queensland, and there were other questions in each cause the decision of which might have ended the litigation. Without determining any

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of the questions, the Supreme Court, being of opinion that the causes came within sec. 40A of the *Judiciary Act* 1903-1915, proceeded no further in the matters and the documents were transmitted to the Registry of the High Court.

Held, that the Supreme Court should have proceeded to determine the questions other than the constitutional question, and that the causes should be remitted to the Supreme Court for that purpose.

Miller v. *Haweis*, 5 C.L.R., 89, followed.

R. v. Young 27 C.L.R., 100 distinguished.

CAUSES removed from the Supreme Court of Queensland.

Orders *nisi* for prohibition and certiorari were obtained from the Supreme Court by Webster & Co. Ltd. directed to the Licensing Court for the Licensing District of Maryborough, the Returning Officer for the Local Option Area of Maryborough and the Electors thereof, in respect of a local option poll taken under the *Liquor Act of* 1912 (Qd.) and the orders of that Licensing Court thereon. Similar orders *nisi* were obtained by Margaret O'Brien, Richard Varley and Lavinia Nash with regard to the Licensing Court for the Licensing District of Ipswich. On the applications to make the orders absolute, the Supreme Court of Queensland, being of opinion that the several causes came within sec. 40A of the *Judiciary Act* 1903-1915, proceeded no further with the causes, and the documents relating to them were transmitted to the Registry of the High Court as on a removal of the causes to that Court.

The material facts and the grounds of the orders are stated in the judgment of KNOX C.J. hereunder.

Grove (with him *Power*), for the prosecutor Webster & Co. Ltd. The *Liquor Act of* 1912 (Qd.), sec. 172 (1), contravenes sec. 14 of the *Commonwealth Electoral* (*War-time*) *Act* 1917, and a constitutional question therefore arises.

[ISAACS J. There are other questions. How do we get jurisdiction in a question which might have been decided by a State Court, being one of purely State law?]

If that point only is taken we do not get full relief, for the magistrate has a discretion.

[KNOX C.J. Would the poll be invalid if the appellants could maintain any one of the grounds other than the constitutional ground?]

Yes.

[RICH J. The Queensland Court has jurisdiction to entertain ground 1 (*b*), which, if decided in your favour, would end the matter.

[ISAACS J. *Miller* v. *Haweis* (1) decides the matter of jurisdiction.

[KNOX C.J. There is an American case, *Cuyahoga River Power Co.* v. *Northern Realty Co.* (2), which supports *Miller* v. *Haweis* (1), and we think the best course to adopt would be to have the point first argued whether the matter comes within sec. 40A of the *Judiciary Act*, and that may involve the construction of sec. 40A and its constitutionality.

[ISAACS J. The difficulty affects the jurisdiction of this Court. The only power we have got in this case in original jurisdiction is under sec. 76 (I.) of the Constitution. It does not arise under any part of sec. 75. In sec. 76 there are four cases where Parliament may confer original jurisdiction. This is done by sec. 40A of the *Judiciary Act*. What do the terms of the section mean? Before 1907, in America, it was decided that the jurisdiction of the Supreme Court of the United States was limited to cases where it was *necessary* to invoke that jurisdiction, and in *Miller* v. *Haweis* (3) this Court dismissed the appeal on the ground that a Federal question was not necessarily involved. (He also referred to the judgment of *White* C.J. in *Cuyahoga River Power Co.* v. *Northern Realty Co.* (2).)]

Sec. 40A should be given its literal meaning: the cause goes over automatically when the question arises.

[KNOX C.J. When there is a constitutional point *inter alia*, the Supreme Court must consider the other points.]

There must be some reason for the difference in language between secs. 38A and 40A. [Counsel also referred to *In re Drew* (4).]

Bavin, for the prosecutors O'Brien, Varley and Nash. In *R.* v. *Young* (5) a question of the limits *inter se* of constitutional

(1) 5 C.L.R., 89.
(2) 244 U.S., 300.
(3) 5 C.L.R., at p. 93.
(4) (1919) V.L.R., 600; 41 A.L.T., 65.
(5) 27 C.L.R., 100.

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powers was raised but not decided. The decision went on the meaning of New South Wales Statutes. The effect of sec. 40A is that when the constitutional question arises the whole cause comes before this Court. It is constitutional for Parliament to say that, if the whole cause comes before this Court, this Court may not only determine the constitutional point, but may decide the whole cause.

Ryan A.-G. for Qd. and *Macrossan*, for the respective Licensing Courts, referred to *Taylor* v. *Attorney-General* (1). [Counsel were stopped.]

KNOX C.J. On 17th November 1919 the prosecutor Webster & Co. Ltd. obtained from *Real* J. an order *nisi* calling on the respondents to show cause before the Full Court of the Supreme Court of Queensland why a writ of prohibition should not issue restraining them from proceeding in respect of the local option vote taken for the Local Option Area of Maryborough on 5th May 1917, or the declarations and notices of the decisions or orders of the Licensing Court consequent thereon, on the following grounds, viz., (1) that the said local option vote was contrary to law and invalid for the following reasons : (*a*) it was held on a day appointed as polling day for an election for the Senate and a general election of the House of Representatives of the Federal Parliament ; (*b*) it was taken before a period of two years and six months had expired from the date of the last preceding local option vote : (2) that the said Licensing Court proceeded contrary to law to reduce the number of licences in the said local option area and in making such reduction employed an unlawful method. The prosecutor also obtained on the same grounds an order *nisi* for a writ of certiorari to remove into the Supreme Court the order of the Licensing Court made on 5th September whereby it was determined that the licence of the prosecutor should cease to be in force and to quash the said order.

When the application to make absolute these orders *nisi* came before the Supreme Court it was pointed out that ground 1 (*a*) set forth above raised a question of the limits *inter se* of the constitutional powers of the Commonwealth and of the State of Queensland,

(1) 23 C.L.R., 457.

and the Supreme Court, being of opinion that the matter came within sec. 40A (1) of the *Judiciary Act* 1903-1910, proceeded no further in the matter, although Mr. *Macrossan*, counsel for respondents, informs us that he requested the Court to consider and decide on the other grounds taken, the documents being thereupon transmitted to the Queensland Registry of the High Court. Subsequently an order was obtained for the transfer of the matter to the New South Wales Registry in order to expedite the hearing, and it comes on to be heard to-day in Sydney.

On the matter coming on before this Court, objection was taken that sec. 40A (1) of the *Judiciary Act* did not apply inasmuch as the constitutional question raised by ground 1 (*a*) did not *necessarily* arise for decision, it being conceded that a decision in favour of the prosecutor on ground 1 (*b*), which raised no constitutional question, would determine the whole matter, and so render it unnecessary to consider the constitutional question. In support of this contention, reference was made to *Miller* v. *Haweis* (1); *In re Drew* (2); *Cuyahoga River Power Co.* v. *Northern Realty Co.* (3).

The question for decision is as to the true meaning of the words "When . . . there arises any question" in sec. 40A (1) of the *Judiciary Act*. It is clear that a matter removed into the High Court by virtue of this section is a matter pending in the original, and not the appellate, jurisdiction of that Court. This being so, it is, in my opinion, necessary in construing this section to bear in mind the limits defined by the Constitution for the exercise of original jurisdiction by the High Court. The matters in respect of which original jurisdiction is or may be conferred on the High Court are limited to those set out in secs. 75 and 76 of the Constitution, and it is, in my opinion, clear from the language used in the relevant sections of the *Judiciary Act* that Parliament did not intend by that Act to attempt to confer on the High Court original jurisdiction in respect of any matter not covered by secs. 75 and 76 of the Constitution. Any attempt to confer on the High Court original jurisdiction in respect of any matter beyond these limits would, of course, be unconstitutional and therefore ineffective, and it is the

(1) 5 C.L.R., 89.

(2) (1919) V.L.R., 600; 41 A.L.T., 65.

(3) 244 U.S., 300.

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duty of this Court in construing sec. 40A to place upon its words, if possible, a meaning which will not offend against the limitations imposed by the Constitution on the power of Parliament to confer original jurisdiction on the High Court. It may be noted, in passing, that Parliament is empowered by sec. 77 of the Constitution to exclude the jurisdiction of the State Courts in respect of matters mentioned in secs. 75 and 76, and this power has been exercised to some extent by sec. 38A of the *Judiciary Act*. This affords an additional reason for confining the operation of sec. 40A (1) strictly to the matters specified in secs. 75 and 76 of the Constitution. In my opinion, the true construction of sec. 40A (1) is that it only comes into operation when it becomes necessary for the purpose of determining rights of parties to decide a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States. I agree with the course taken by the Supreme Court of Victoria in *In re Drew* (1), applying the decision in *Miller* v. *Haweis* (2). The jurisdiction of the State Courts to decide questions brought before them is excluded by the *Judiciary Act* only so far as is necessary to prevent those Courts from deciding questions in respect of which original jurisdiction has been conferred on the High Court to the exclusion of the State Courts by the combined effects of the Constitution and the *Judiciary Act*. I think it is clear that the object of sec. 40A of the *Judiciary Act* was to remove into the High Court those matters in which the jurisdiction of the High Court was by sec. 38A of that Act declared to be exclusive, and that Parliament had no intention, as it had no power, to confer on the High Court original jurisdiction in matters not included in those mentioned in secs. 75 and 76 of the Constitution, and in respect of which the jurisdiction of the State Courts is unaffected by consideration of the Federal character of the point requiring decision. For these reasons I am of opinion that the removal of a cause to the High Court under sec. 40A (1) of the *Judiciary Act* is limited to those cases in which a decision on a constitutional question of the nature therein described is necessary in order to decide the rights of parties, and that the case now under consideration is not within the provisions of that section.

(1) (1919) V.L.R., 600; 41 A.L.T., 65. (2) 5 C.L.R., 89.

This decision governs also the cases in which Margaret O'Brien, Richard Varley and Lavinia Nash respectively were prosecutors, and the Licensing Court for the District of Ipswich and others, respondents—there being in each of those cases a ground independent of the constitutional question on which the case might be finally decided.

The order, in each of the four cases, will be that the cause be remitted to the Supreme Court of Queensland for determination of all questions raised other than that as to the validity of the provisions of sec. 14 of the *Commonwealth Electoral (War-time) Act* 1917 (No. 8 of 1917).

I should add that Mr. *Bavin* contended that the order made by this Court in *R.* v. *Young* (1) was inconsistent with the view expressed above as to the scope and meaning of sec. 40A (1). I think this contention is well founded, but the point now raised was not raised in that case, and so escaped the observation of the Court. So far as the decision in *R.* v. *Young* is in conflict with the decision in the present case it cannot be regarded as an authority.

By consent, the costs of all parties in each of the four cases will be costs in the cause.

ISAACS J. So far as the Constitution is concerned, this case is covered by the decision in *Miller* v. *Haweis* (2). That case adopted the reasoning in several American cases there cited. The relevant words of the American Constitution and in some American decisions were copied into the Australian Constitution, and the same reason exists here for the interpretation of sec. 76 (I.) as exists in the United States. In the later case I mentioned, *Cuyahoga River Power Co.* v. *Northern Realty Co.* (3), the same doctrine is firmly maintained, and I quote the following passage, at p. 304, taken from a prior case: "If the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and *the ground independent of a Federal question is sufficient in itself to sustain it*, this Court will not take jurisdiction." I italicize the governing words. It is an

(1) 27 C.L.R., 100.

(2) 5 C.L.R., 89.

(3) 244 U.S., 300.

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à fortiori case where no judgment at all has yet been given by the State Court. It follows that, whatever is the meaning of sec. 40A of the *Judiciary Act*, this Court has at this moment no original jurisdiction to entertain this case.

As to the interpretation of sec. 40A, reading it as a whole and in conjunction with the other sections with which it is associated, I construe its language as going no further than the Constitution itself. Its language is certainly capable of that construction, and therefore, in conformity with a well established principle, that construction should be adopted.

I agree in the order proposed by the Chief Justice.

GAVAN DUFFY J. At present I am disposed to think that sec. 40A is satisfied where a question as to the limits *inter se* of the constitutional powers of Commonwealth and State is in fact in issue between the parties, but I do not propose to dissent from the opinion of the other members of the Court. The construction put by them on the section has the advantage of making it a valid exercise of the legislative power of the Commonwealth, which it might not be if construed otherwise.

RICH J. I agree with the construction placed upon the section by the Chief Justice and *Isaacs* J., and I consider that the causes were prematurely removed to this Court. I agree with the order about to be pronounced.

Causes remitted to the Supreme Court for determination of the questions other than (1) (*a*). *Costs of all parties in each case to be costs in the cause.*

Solicitors for the prosecutor Webster & Co. Ltd., *Atthow & McGregor*, Brisbane, by *J. E. V. Nott.*

Solicitors for the prosecutors O'Brien, Varley and Nash, *P. L. Cardew & Simpson*, Ipswich, Queensland.

Solicitor for respondents in each case, *W. F. Webb*, Crown Solicitor for Queensland.

N. McT.