Solicitor for the claimant, *H. H. Hoare.*

Solicitors for the respondent the Mount Bischoff Tin Mining Co. Ltd., *Derham, Robertson & Derham.*

Solicitor for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

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FEDERATED ENGINE-DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA *v.* ADELAIDE CHEMICAL AND FERTILIZER CO. LTD.

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE LICENSING COURT OF BRISBANE AND OTHERS.

Ex parte DANIELL.

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

H. C. OF A. 1920.

SYDNEY, *March* 22; *April* 22.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Constitutional Law—Legislative powers—Parliamentary election—Prohibition of vote under State law on day of Federal election—Ultra vires—Inconsistency between Federal and State laws—Validity of proceedings dependent on vote—Local option poll—Reduction of number of licences—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 9, 10, 51 (XXXVI.) *and* (XXXIX.), 109—*Commonwealth Electoral Act* 1902-1911 (*No.* 19 *of* 1902—*No.* 17 *of* 1911), *sec.* 182—*Commonwealth Electoral* (*War-time*) *Act* 1917 (*No.* 8 *of* 1917), *sec.* 14—*Election of Senators Act* 1903 (*Qd.*) (3 *Edw. VII. No.* 6), *sec.* 3—*Liquor Act* 1912 (*Qd.*) (3 *Geo. V. No.* 29), *secs.* 166, 167, 172—*Liquor Act Amendment Act* 1914 (*Qd.*) (5 *Geo. V. No.* 21), *sec.* 19 (3)—*Judiciary Act* 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *secs.* 38A, 40A.

Sec. 14 of the *Commonwealth Electoral* (*War-time*) *Act* 1917 provides that "On the day appointed as polling day for an election of the Senate or a general election of the House of Representatives, no referendum or vote of the electors of any State or part of a State shall be taken under the law of a State."

Held, by *Knox* C.J., *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ., that sec. 14 is a lawful exercise of the power conferred on the Parliament of the Commonwealth by secs. 10, 51 (XXXVI.) and (XXXIX.) of the Constitution.

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Held, also, by *Knox* C.J., *Isaacs*, *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. (*Higgins* J. doubting), that, where pursuant to the *Liquor Act of* 1912 (Qd.) as amended by the *Liquor Act Amendment Act of* 1914 (Qd.) a local option poll had been taken upon the day upon which, pursuant to a proclamation of the Governor in Council of Queensland made under the *Election of Senators Act of* 1903 (Qd.), a Senate election was held, the local option poll and the vote thereat were illegal and of no effect, and the illegal vote could not be the basis for anything which required as its basis the taking of a lawful vote; and therefore that a determination by a Licensing Court pursuant to that Act that a certain licence should cease to be in force was invalid.

ORDERS *nisi* for prohibition and certiorari removed from the Supreme Court of Queensland.

On 5th May 1917, pursuant to a proclamation of the Governor in Council of Queensland made under sec. 3 of the *Election of Senators Act of* 1903 (Qd.), an election was held for Senators of the Commonwealth Parliament for the State of Queensland. On the same day a local option poll was taken in the Local Option Area consisting of the Electoral District of Toowong, in Queensland, pursuant to the *Liquor Act of* 1912 (Qd.). At the poll a resolution was carried that the number of licences in the Local Option Area should be reduced by one-fourth of the existing number. On 7th September 1917 the Licensing Court for the Licensing District of Brisbane determined that among other licences that of the Regatta Hotel, of which Sarah Ann Daniell was the owner and James Patrick Gleeson the licensee, should cease to be in force, and on 8th September 1917 notice of that determination was published in the *Government Gazette*. The effect of this determination, if carried out, would have been that the licence for the Regatta Hotel would have ceased on 31st December 1919. On 24th November 1919 Sarah Ann Daniell moved the Supreme Court of Queensland for, and obtained, an order *nisi* for a writ of prohibition, directed to the Licensing Court for the Licensing District of Brisbane and the Returning Officer for the Local Option Area consisting of the Electoral District of Toowong and the electors of that Local Option Area, to restrain them from proceeding or further proceeding in respect of the local option vote taken on 5th May 1917, or the declarations and notices or the decisions or orders of the Licensing Court consequent thereon. The ground of the order *nisi* was that the local option vote was contrary to law and

invalid for the reason that it was held on a day appointed as polling day for an election for the Senate, and a general election for the House of Representatives, of the Commonwealth Parliament. The order *nisi* came before the Full Court on 3rd December 1919. On that day Sarah Ann Daniell further applied to the Supreme Court for, and obtained, an order *nisi* for a writ of certiorari directed to the same parties to remove into the Supreme Court the order or declaration of the Licensing Court of Brisbane of 7th September 1917, upon the same ground as that upon which the order *nisi* for prohibition was obtained. The Supreme Court, by the same order, ordered that the time limited for applying for a writ of certiorari in the matter should be extended for such period as was necessary in that behalf. The Supreme Court refrained from adjudicating upon either order *nisi* having regard to secs. 38A and 40A of the *Judiciary Act*, and they were removed to the High Court and now came on for hearing.

Bavin (with him *Grove*), for the prosecutor. The Commonwealth Parliament has exclusive power to legislate as to Federal elections (*Smith* v. *Oldham* (1)). The power, if not exclusive, exists under sec. 9 of the Constitution, and, having been exercised in sec. 14 of the *Commonwealth Electoral* (*War-time*) *Act* 1917, prevails over the provision of sec. 172 of the *Liquor Act of* 1912 (Qd.), which is inconsistent with sec. 14. If sec. 14 is not otherwise authorized, it is valid under the defence power in sec. 51 (VI.) of the Constitution (*Farey* v. *Burvett* (2)). If sec. 14 of the *Commonwealth Electoral* (*War-time*) *Act* is valid, then anything done in breach of it is invalid. The result is that the vote taken under sec. 172 of the *Liquor Act* was unlawfully taken, and all the consequences flowing from the taking of the vote are a nullity.

Ryan and *Macrossan*, for the defendants. The Supreme Court of Queensland had no power to grant an order *nisi* for prohibition in this matter. The application for the order *nisi* should have been removed to this Court under sec. 40A of the *Judiciary Act*. The Supreme Court had no power to extend the time for applying for

(1) 15 C.L.R., 355, at pp. 358, 361. (2) 11 C.L.R., 433.

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a writ of certiorari and the application should have been made to this Court. Sec. 14 of the *Commonwealth Electoral (War-time) Act* is invalid. The power given by sec. 9 of the Constitution to a State Parliament to fix the days on which Senate elections shall be held is exclusive. Sec. 14 is an attempt to cut down that power, for under that power the Parliament of Queensland might fix the day for holding an election as the day on which a local option poll was held. If it does not limit the power to fix the day for holding Senate elections, it limits the power to fix the day for holding local option polls, and so is an interference with a State instrumentality. Sec. 14 does not affect the validity of a local option poll taken on the day fixed for an election of Senators, for it is directory only and not mandatory (*Bellamy* v. *Saull* (1); *R.* v. *Barton* (2); *Stallwood* v. *Tredger* (3); *Catterall* v. *Sweetman* (4)). The taking of the poll on that day is an offence against the Commonwealth Act for which a penalty is fixed by sec. 182 of the *Commonwealth Electoral Act* 1902-1911, but the results which under the *Liquor Act* flow from the taking of a local option poll are not affected by the poll being taken on that day. The applicant not having taken any step since 7th September 1917, this Court should, in its discretion, refuse to grant her any relief. She is estopped from alleging the true facts. If proceedings had been taken earlier, a fresh poll could have been held under sec. 209. The proper remedy was by appeal under sec. 192.

Cur. adv. vult.

April 22.

The following judgments were read:—

KNOX C.J., ISAACS, GAVAN DUFFY, POWERS, RICH AND STARKE JJ. (read by ISAACS J.). On 24th November 1919 Sarah Ann Daniell moved the Supreme Court of Queensland (*coram Real* J.) for an order *nisi* for a writ of prohibition to restrain the Licensing Court for the Licensing District of Brisbane and others from proceeding or further proceeding in respect of the local option vote taken for the Local Option Area of Toowong on 5th May 1917, or the declarations and

(1) 32 L.J. Q.B., 366.
(2) 1 Qd.L.J. (Supp.), 16
(3) 2 Phillim., 287.
(4) 9 Jur., 951.

notices or decisions or orders of the said Licensing Court consequent thereon. The ground on which the order *nisi* was moved for was that the local option vote was contrary to law, and invalid, because it was held on a day appointed as polling day for an election of the Senate and a general election of the House of Representatives of the Federal Parliament. *Real* J. granted the order *nisi* on the ground stated, and it came before the Full Court on 3rd December 1919. On 3rd December 1919 the prosecutor further applied to the Supreme Court for a writ of certiorari to quash the determination of the Licensing Court on the same constitutional ground as that on which the prohibition was moved for; and this is before us in the same way as the prohibition. The Supreme Court refrained from adjudicating having regard to secs. 38A and 40A of the *Judiciary Act*, and the matter was listed for hearing before this Court.

On the present argument a preliminary point was taken on behalf of the respondents, that the proceedings before us were a nullity because the Supreme Court had no power even to proceed so far as to make an order *nisi*, since the ground of application was one which raised a question of the constitutional limits *inter se* of the Commonwealth and a State. It is unnecessary to determine how far this objection is technically sound; for at the most it would mean that the Supreme Court proceeded one step further than the law permitted, and in that case the same law automatically removed this application itself for a prohibition and a certiorari to this Court, and, as the materials were before us, we could at once proceed to hear and determine it in the presence of both parties.

As to the matter itself, the material facts are that 5th May 1917 was a polling day fixed by law for a Senate election and on that day the polling for the Senate took place, and also that on the same day a vote of the electors in the Local Option Area of Toowong was taken by which a resolution was carried called resolution A of sec. 167 of the Queensland *Liquor Act of* 1912, namely, that "The number of licences in this Local Option Area shall be reduced by one-fourth of the existing number." Various subsequent proceedings under the State *Liquor Act* consequential on the carrying of the resolution took place, including a determination of the Licensing Court that certain licences should cease. The State Act provides

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that upon such a determination being made these licences shall cease. Among those licences is that for the Regatta Hotel, of which the prosecutor is the owner. The ultimate question we have to decide is whether resolution A, which in fact was carried on 5th May 1917, has any validity whatever in law, or can be regarded as the foundation of any proceedings, or whether it is to be regarded for all purposes as utterly null and void. If that resolution is in law null and void, all the subsequent proceedings, being dependent upon it, are necessarily of no effect, and either prohibition or certiorari (it is unnecessary in this case to say which) should be granted. The decision of that ultimate question rests upon several intermediate considerations, which we refer to in logical order. The local option vote, it must be assumed, was taken in strict accordance with the provisions of the State Act, and those provisions, if valid, fully authorize the vote. Sec. 166 of the Queensland Act of 1912 as amended by the Act of 1914 (5 Geo. V. No. 21, sec. 19 (3)) provided that the first local option vote "shall be at the Senate election in the year 1917, or if no Senate election is held in that year before the 30th day of September of that year, then on a day to be appointed by the Governor in Council by notification in the *Gazette*." And sec. 172 (as amended) provided that, "Save as is hereinbefore provided in the event of there being no Senate election before the 30th day of September in the year 1917, the local option vote in any local option area shall be taken on the day fixed for the poll therein at the Senate election held next after the receipt of the request for such vote."

Reading the State Act as a whole, it appears that, as a Senate election was held on 5th May 1917, the Act (1) authorized the local option vote to be taken on that day, (2) gave no authority to take it on any other day, (3) made all subsequent proceedings dependent on the result of the vote taken as authorized. It therefore appears clear to us that if any competent Legislature had revoked the authority or invalidated the taking of a local option vote on that day, the vote, though taken in fact, would be devoid of all legal effect, and could not in law form any support for the determination of the Licensing Court for the cessation of licences. The authority has not been revoked by the State Parliament, but the

Commonwealth Parliament in 1917, by sec. 14 of the *Commonwealth Electoral (War-time) Act* (No. 8), enacted as follows: "On the day appointed as polling day for an election of the Senate or a general election of the House of Representatives, no referendum or vote of the electors of any State or part of a State shall be taken under the law of a State." The first question as to that section concerns its construction. Does it prohibit persons under some penalty from assisting in a local option vote on that day, leaving the authority to vote untouched; or does it prohibit the thing itself, the actual taking of such a vote, notwithstanding the authority given by any law of a State? We think the words of sec. 14 are an express and unambiguous prohibition of the thing itself, the vote. Whether personal consequences in the shape of penalties or otherwise would follow from a contravention of its provisions is immaterial. The words themselves are so clear as to make useless any consideration of legislative purpose. But if that were necessary, it is manifest that the object was to protect certain Commonwealth elections from the possibly disturbing influences of other votes of the State electors on the same day. This naturally calls primarily for a prohibition of the disturbing factor, and any penalty for contravention is naturally only in aid of the primary object. Supposing the Commonwealth Parliament competent to enact such a prohibition, the result is not doubtful. There arises upon that construction a conflict, or inconsistency, between the State Act authorizing and commanding the vote on that day and the Commonwealth Act, assumedly competently made, forbidding the vote on that day. Then sec. 109 of the Constitution enacts that in such a case the State law, to the extent of the inconsistency, is invalid. In the presence of the conflicting Commonwealth law, the State enactment, *pro tanto*, disappears, and the vote, according to the only Australian law on the subject, has been illegally taken. The necessary result is that the illegal vote cannot be the basis for anything which requires as a condition the taking of a lawful vote.

It is said, however, that the Commonwealth statute merely forbids the holding of the election so as to make persons disobeying the enactment subject to a penalty but not make the vote invalid if in fact it is taken. At this point certain English cases of high

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authority become relevant. They establish the principle that where a thing is declared illegal, whatever may be the object of the prohibition the thing declared illegal is of no force or validity, and everything dependent on that thing, not being a purely collateral matter, shares the fate of the thing prohibited. In *Cope* v. *Rowlands* (1) *Parke* B. says :—" If the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract." In *Fergusson* v. *Norman* (2) *Tindal* C.J. draws a distinction as to collateral matters. In *Whiteman* v. *Sadler* (3) Lord *Dunedin*, after citing those two cases, applied their principles, holding that in the case then before the House the " contract itself was not prohibited." He adds : " Each statute must be judged of by itself." In *Cornelius* v. *Phillips* (4) the same test was applied: Was the contract prohibited ? The Act did not expressly prohibit the contract, but it provided that a moneylender shall carry on his business at a registered address, and at no other place, and a penalty was imposed for contravention. Lord *Finlay* L.C. (5) said : " It is admitted on all hands, and indeed could not be disputed, that a statutory prohibition avoids any transaction in contravention of the prohibition, as the transaction is unlawful, and any contract which forms part of it is void and can confer no rights." So per Lord *Haldane*, at p. 211. So per Lord *Dunedin*, at p. 212, who repeats the distinction as to matters collateral, and says (6) :—The section " seems to me to prohibit the contract, though it is expressed in words which apply directly to the contractor rather than to the contract. Indeed, if one looks at the mischief sought to be remedied, the case seems to me a stronger one than that of *Cope* v. *Rowlands* (7)." It may be added here, that the words of sec. 14 apply directly to the vote and not to the voters. Lord *Atkinson*, at p. 216, is to the same effect, and also refers to the distinction as to collateral matters. So per Lord *Parmoor*, at p. 219.

The respondents, however, strongly contended that such an

(1) 2 M. & W., 149, at p. 157.
(2) 5 Ping. N.C., 76, at p. 84.
(3) (1910) A.C., 514, at pp. 526 *et seq.*
(4) (1918) A.C., 199.
(5) (1918) A.C., at p. 205.
(6) (1918) A.C., at p. 213.
(7) 2 M. & W., 149.

enactment was beyond the competency of the Commonwealth Parliament. They so contended on two grounds. First they argued that the prohibition of State elections on the same day was not incidental to the acknowledged power to legislate as to Commonwealth elections. We are distinctly of opinion that the argument is unsound. The Commonwealth Parliament clearly has power to secure, so far as legislation can secure, the fullest opportunity it thinks desirable to the people of the Commonwealth to elect their Parliamentary representatives unconfused by any other public duties required of them as citizens of a particular State. It would be pedantic to say more on that subject. The second argument was founded on the Constitution itself. It was said that as sec. 9 enacts that "The Parliament of a State may make laws for determining the times and places of elections of Senators for the State," sec. 14 already quoted was a fetter on that power. By the *Election of Senators Act of* 1903 (No. 6) the Parliament of Queensland exercised its power under sec. 9 of the Constitution, and as to the day of polling enacted (sec. 3) that the Governor in Council may by proclamation published in the *Gazette* fix the dates for the polling. Sec. 14 of the Commonwealth Act in no way interferes with the Act of 1903 or any proclamation issued under it. The State of Queensland is left absolutely unfettered as to the day of polling for Senators. But the *Liquor Act*, not attempting to fix any time for the election of Senators proceeded to fix a time for a local option vote. That was the exercise of power not under sec. 9 of the Constitution but under the ordinary State Constitution. Now the Commonwealth Parliament, under the combined provisions of secs. 10, 51 (xxxvi.) and 51 (xxxix.), has power to regulate its own elections apart from the times and places of elections of Senators. Sec. 14 of the Commonwealth Act is such a regulation, and the second argument as to incompetency therefore fails.

One further contention must be noticed. It was that the prosecutor, by her conduct, was estopped from invoking the Court's power of prohibition or certiorari. It is sufficient to say that the undisputed facts deposed to establish that when the Police Magistrate sat as the Licensing Court both in July and in August 1917,

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the point as to invalidity now relied on was expressly taken. That being overruled, the respondents proceeded at their own peril. No acquiescence in fact on the part of the prosecutors being shown, it is unnecessary to consider what its effect, if established, would have been.

There having been no argument raised why prohibition is not in the circumstances of the present case an appropriate remedy, assuming the Licensing Court made its determinations without jurisdiction—that remedy as the simplest and the more effective is awarded.

Order that writ of prohibition issue absolute in the first instance in the terms sought by the application.

HIGGINS J. I am of opinion that sec. 14 of the *Commonwealth Electoral (War-time) Act* is within the power of the Commonwealth Parliament.

In effect it forbids the holding of a poll of electors for any State purpose on any day that a Federal election is held for the Senate or the House of Representatives. For some reason which does not appear, but which seemed sufficient to the Commonwealth Parliament, the section provides for the isolation of the day of the Commonwealth elections from all State polling. That Parliament can, without doubt, make such laws as it thinks fit with respect to its own elections; and just as it can, under the defence power, isolate specified ground from the intrusion of the public, so it can, under other powers, isolate the days of election from all other elections. In this case the Queensland *Liquor Act of* 1912 provides that the local option vote shall be taken on the day fixed for the poll of the Senate election held next after the receipt of the request for such vote (sec. 172), and at the polling-places appointed for the Senate elections (sec. 189 (*a*)). This provision in sec. 172 became inconsistent with sec. 14 of the *Commonwealth Electoral (War-time) Act* of 1917 and the latter "prevails" over the Queensland Act "to the extent of the inconsistency" (sec. 109 of the Constitution).

Sec. 14, therefore, is binding, and ought to have been obeyed. The people of Queensland were forbidden to take the local option poll on the day in question—5th May 1917. The Commonwealth

Act had been passed on 19th March 1917. What is the effect on the poll of the disobedience—probably inadvertent—to sec. 14 of the *Commonwealth Electoral (War-time) Act*? It is clear that an offence was committed by those who took the election; and under sec. 182 of the *Commonwealth Electoral Act* 1902-1911 (with which this War-time Act is to be read (sec. 3)), those guilty of the offence are liable to a penalty not exceeding £50. But does sec. 14, in addition, make the poll void and inoperative? It is on this point that I feel much doubt, which my learned colleagues do not share.

We are dealing with a territory which is subject to two different Parliaments, each competent to make laws within its own ambit of powers. The Queensland Act, sec. 172, as to the day of polling is not either repealed or amended. The words of sec. 172 stand; and if sec. 14 of the Federal Act were repealed to-morrow, the direction in the Queensland Act to take the poll on the day of the Senate election would be binding, as part of the Queensland law, without re-enactment. The authority to take the poll on that day continues, so far as the State law is concerned; sec. 172 still lives, subject to the pressure of the Federal Act—like Jack-in-the-box under his lid. The question is, how far does that pressure extend. The State law says that a poll taken on that day shall have certain consequences—in this case, that the licences shall be reduced, that the Licensing Court shall exercise its functions and select the licences to be cancelled. The Federal law does not say that the poll shall not have these consequences. It merely says that no poll shall be taken on that day, and imposes a penalty on those who disobey. Under sec. 109 of the Constitution, the State law is invalid only "to the extent of the inconsistency"; and there is no inconsistency—no direct inconsistency at all events. It would seem, therefore, that the State law remains in its full efficacy, except that those who held the election on the Senate election day are liable to certain penalties. I fancy that some confusion arises from treating sec. 14 of the Federal Act as being incorporated in the State Act. It is not. For the purpose of sec. 109 of the Constitution the two Acts are to be regarded as Acts otherwise valid but in collision; and the State law yields only to the extent of the collision.

Now, even in the case of a country under a single Legislature,

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Higgins J.

such as Great Britain, it does not follow that because some provision of an Act has been disobeyed, the whole series of proceedings of which the disobedient step forms a fraction becomes invalid (see cases collected under "imperative or directory," *Maxwell on Statutes*, 3rd ed., pp. 518-540). Especially in the case where penalties are provided against offenders against the provision, the Courts are loth to treat a misfeasance on the part of officials as fatal to the proceedings—are loth to treat the fulfilment by the officials of all the provisions of an Act as a rigid condition precedent to the validity of the proceedings. The question is often a very difficult question of construction of the Act, in which the intention of Parliament on the subject is to be found, in the absence of express words, by the weighing of consideration of convenience and justice. "Where the prescriptions of a statute relate to the performance of a public duty; and to affect with invalidity acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, without promoting the essential aims of the Legislature; they seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed. . . . The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them" (*Maxwell on Statutes*, 3rd ed., pp. 528-529). Even where the Act 43 Eliz. c. 2 required that overseers of the poor should be appointed in Easter week, the Courts held that they may lawfully be appointed at any other time of the year (*R.* v. *Sparrow* (1)). The acts of aldermen who had been in office for several years without re-election were held valid until their successors were appointed (*Foot* v. *Prowse* (2)). In the case of justices of the peace who have acted without taking the prescribed oath, even the strongest negative words, negativing authority and capacity to act until the oath be taken, have been held to be merely prohibitory upon the justice—making it unlawful for him to act as justice, but not so as to make his acts invalid. "An exposition of these statutes, pregnant with so much inconvenience, ought not to be made, if they will admit of any other reasonable construction" (*Margate Pier Co.* v. *Hannam* (3)).

(1) 2 Stra., 1123. (2) 1 Stra., 625.
(3) 3 B. & Ald., 266, at p. 270.

But the position is much stronger here, where there is a prohibition coming, not from the Act itself, but *ab extra*—from the Act of a Parliament which must be treated as paramount. The State Act operates not *through* the Federal Act or Constitution, but by virtue of the State Constitution; and it is valid in all respects except so far as the Federal Act and Constitution obstruct it. If the Federal Act, in place of merely forbidding the poll and prescribing penalties for the taking of the poll, had said that no reduction of licences should result from an affirmative poll, it would seem that there could be no reduction; but it has not said so. The considerations which I have stated appear to prevent the application of the principle stated in *Cornelius* v. *Phillips* (1) (and in other similar cases), the principle that "a statutory prohibition avoids any transaction in contravention of the prohibition, as the transaction is unlawful, and any contract which forms part of it is void and can confer no rights." For this principle is necessarily law in a unitary State, such as Great Britain is: the law which prohibits a certain step cannot logically enforce a contract involving the step prohibited, or treat proceedings as valid which are forbidden by that law. The position is quite different where there is a collision between a law (otherwise valid) of the State and a law of the Commonwealth. Suppose that a city were to contract for the lighting of its streets for five years, and during that period a Federal Act, passed under the defence power, forbids any person to enter a certain street without a licence. The contractor, without a licence, enters the street and lights the lamps. He is liable to the Federal penalties; but I rather think that he would be able to recover the full amount payable under his contract.

There is good ground for fearing that, if we take the view of the prosecutor on this point, not only are all local option polls taken on 5th May 1917 invalid, the investigations and determinations of the Licensing Court futile, the expectations of the better class of publicans as well as of the people of the district frustrated, and the whole licensing system thrown into confusion; but also that the whole of Part VIII. of the Queensland Act is invalid. I doubt very strongly that the Federal Parliament intended any such results. There are

(1) (1918) A.C., at p. 205.

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no express words to such an effect; and I can find no necessary implication. But as the considerations which influence my mind have not been fully discussed, and as the withholding of my definitive opinion will not cause any inconvenience, I prefer to say merely that I doubt as to the decision which is now being given by the Court.

Rule absolute for prohibition.

Solicitors for the prosecutor, *F. C. Petrie & Son*, for *Atthow & McGregor*, Brisbane.

Solicitor for the defendants, *J. V. Tillett*, Crown Solicitor for New South Wales, for *W. F. Webb*, Crown Solicitor for Queensland.

B. L.

Appl *R v Gardner* [1988] 2 QdR 682

Cons *R v Do* (1990) 54 SASR 543

Foll *Kelleher v R* (1974) 131 CLR 534

[HIGH COURT OF AUSTRALIA.]

HICKS . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1920.

SYDNEY, *April* 19, 20, 27.

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

Criminal Law—Evidence—Corroboration—Sexual offence on young girl—Direction to jury—Reasonable doubt, direction as to—Miscarriage of justice—Practice—Appeal to High Court—Criminal matter—Point taken for first time in High Court—Jurisdiction—Criminal Appeal Act 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *sec.* 6.

On the hearing of a charge of carnally knowing a child under the age of ten years there was evidence, apart from that of the child, that at some time during a period of half an hour at night the child had been carnally known, that the accused during that period had led the child to a churchyard, and that he gave a false account of his own movements during that period.