[HIGH COURT OF AUSTRALIA.]

WATSON . . . . . APPELLANT;
RESPONDENT,

AND

J. & A. G. JOHNSON LIMITED . . . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1936.

MELBOURNE, *Mar.* 9.

SYDNEY, *April* 29.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ

Appeal—High Court—Appeal as of right—Claim respecting property of the value of £300*—Receipts over expenditure on sales of liquor in a club exceeding* £300*—Not a claim to or respecting property of the value of* £300*—Excess not profit, but accretion to club funds—Judiciary Act* 1903-1933 (*No.* 6 *of* 1903—*No.* 65 *of* 1933), *sec.* 35 (1) (*a*) (2).

W., the manager of the L. Club, applied for a certificate of registration of the club pursuant to the provisions of the *Licensing Act* 1932 (S.A.). The Licensing Court granted the certificate, but the grant of the certificate was rescinded by the Supreme Court. The club was a members' club and its property and effects were vested in trustees for the members for the time being. The excess of receipts over expenditure on liquor in the club amounted to over £300 per annum. From the decision of the Supreme Court W. sought to appeal to the High Court.

Held that the decision did not involve directly or indirectly any claim, demand, or question, to or respecting any property or any civil right amounting to the value of £300 within the meaning of sec. 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1933; an appeal therefore did not lie to the High Court, and the case was not one in which special leave to appeal should be granted.

APPEAL from the Supreme Court of South Australia.

On 13th May 1935 the appellant, Benjamin Charles Watson, the manager of the Loxton Club in South Australia, gave notice to the

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Licensing Court of South Australia of his intention to apply to the Licensing Court for a certificate of registration of such club in respect of the premises situate at Edward Street, Loxton. The respondent, J. & A. G. Johnson Ltd. gave notice to the Licensing Court of its intention to object to the issue of a certificate of registration as a club to the Loxton Club. The Licensing Court granted this application. The objector, J. & A. G. Johnston Ltd., thereupon appealed to the Supreme Court of South Australia. The appeal was heard by *Reed* A.J. who allowed the appeal and rescinded the grant of the certificate for registration of the club. From this decision Watson now appealed to the High Court. On the appeal coming on for hearing in the High Court objection was taken by the respondent to the competence of the appeal on the grounds:— (1) That the order of *Reed* A.J. was not an order of the Supreme Court of a State within the meaning of sec. 73 (ii) of the Constitution; (2) that no claims, demand or question to or respecting any property or any civil right was involved directly or indirectly as required by sec. 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1933; (3) that if any such claim was involved it did not amount to or was not of the value of £300 as required by that section of the *Judiciary Act*.

Alderman (with him *Campbell*), for the appellant.

Villeneuve Smith K.C. (with him *Travers*), for the respondent, took the following preliminary objections to the appeal. First, the order of *Reed* A.J. is not an order of the Supreme Court of a State within the meaning of sec. 73 (ii) of the Constitution. Secondly, no claim, demand or question to or respecting any property or any civil right is involved directly or indirectly within the meaning of sec. 35 (1) (*a*) (2) of the *Judiciary Act*. Those words are applicable to claims to property, and this appeal is merely against a refusal to register a club under sec. 92 (1) of the *Licensing Act* 1932 of South Australia. The judgment of the Supreme Court of South Australia is in the position of a judgment which ought to have been made in the first instance, and the judgment, therefore, does not affect any property. The prerequisite of the existence of any right was the grant of a certificate. Finally, if any such claim was involved, it did not

amount to or was not of the value of £300 within the meaning of sec. 35 (*a*) (2) of the *Judiciary Act* 1903-1933. It is impossible to predicate that the licence is worth £300. All that the members lose is the right to consume on certain premises liquor bought on their joint account (*Russell* v. *The Queen* (1) ; *White* v. *Licensing Court* (2)).

Alderman, for the appellant. The Licensing Court is a Court of Record and an appeal lies to the Supreme Court (*Sweeney* v. *Fitzhardinge* (3)). That Court is a judicial body (*Sharp* v. *Wakefield* (4)) which shows that the discretion should be exercised as a judicial discretion (*Flannagan* v. *Milne* (5)). The club was trading for five months, and the judgment of the Supreme Court deprived it of that valuable right which was a right in property. It is accordingly a judgment of a Supreme Court of a State as to a " claim " within sec. 35 (1) (*a*) (2) of the *Judiciary Act* (*In re Addington, Newtown and Sydenham East Licensing Committees* (6)). The judgment involves a question respecting property of the value of £300 (*Ashton & Parsons Ltd.* v. *Gould* (7) ; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (8)). The Supreme Court has the same jurisdiction as any other appellate tribunal. The judgment of *Reed* A.J. is wrong because he has held that a condition precedent to the grant of the licence was not fulfilled. *Sweeney* v. *Fitzhardinge* (9) applies to the decision of the Licensing Court in this case.

LATHAM C.J. delivered the judgment of the Court on the preliminary objection as follows :—

In this matter a preliminary objection to the competency of this appeal has been raised. The Court is of opinion that that objection is well founded and will postpone giving reasons for that conclusion.

Alderman, for the appellant, then applied for special leave to appeal to the High Court.

Villeneuve Smith K.C., for the respondent, opposed the application.

(1) (1882) 7 App. Cas. 829, at p. 838.
(2) (1919) A.C. 927, at p. 932.
(3) (1906) 4 C.L.R. 716, at p. 723.
(4) (1891) A.C. 173.
(5) (1919) 27 C.L.R. 1.
(6) (1893) 12 N.Z.L.R. 70.
(7) (1909) 7 C.L.R. 598.
(8) (1896) A.C. 348, at p. 364.
(9) (1906) 4 C.L.R., at pp. 727, 736.

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LATHAM C.J. delivered the judgment of the Court on the application for special leave to appeal as follows :—

I have already stated that the Court reserves the statement of its reasons on the objection that there was no appeal as of right, but it is desirable that the Court should deal at once with the application for special leave. The application for special leave should be refused. The matter depends on the rules of a particular club and on the particular course followed by the organizers and the committee of the club. There is no question of general importance arising in the case. There was a right of appeal to the Full Court. No appeal has been taken to the Full Court of the Supreme Court if the order of his Honour Mr. Acting-Justice *Reed* was an order of the Supreme Court. The applicants are not precluded by this decision from resorting to that jurisdiction. The refusal of special leave to appeal should not be taken as indicating that the Court agrees with the learned Judge of the Supreme Court of South Australia in holding that at the time when an application for a certificate of registration is made it must be beyond dispute whether or not particular persons are members of the club. The application will be refused and the appeal struck out. The formal making of the order will be reserved until the Court gives its reasons for holding that the appeal as of right is incompetent.

Cur. adv. vult.

April 29.

The following written judgments were delivered :—

LATHAM C.J. Three objections were taken to the competency of this appeal :—

1. That the order of his Honor Mr. Acting Justice *Reed* was not an order of the Supreme Court of a State within the meaning of sec. 73 (ii) of the Constitution.

2. That no claim, demand, or question to or respecting any property or any civil right was involved directly or indirectly (see *Judiciary Act* 1903-1933, sec. 35 (1) (*a*) (2).

3. That if any such claim &c. was involved it did not amount to or was not of the value of Three hundred pounds (see *Judiciary Act* 1903-1933, sec. 35 (1) (*a*) (2)).

In my opinion, the third objection is sustained, and it is accordingly not necessary for me to express any opinion upon the other objections raised.

The appellant, Watson, applied to a Licensing Court on behalf of a club for a certificate of registration under Div. XII. of the *Licensing Act* 1932 of South Australia. If the application had been granted the club would have had the right or privilege of disposing of intoxicating liquor to members of the club and to visitors who were supplied in the presence and at the expense of a member. The application was granted by the Licensing Court, but the decision of that Court was reversed upon appeal to the Supreme Court. The question which now arises is whether there is an appeal as of right to this Court from the Supreme Court. An affidavit was filed showing that during a period of less than five months in 1935, when the club was selling liquor, what was called " the profit on the sale of liquor " amounted to more than £400. It was said, therefore, that the refusal of the application for a certificate deprived the club of a possible profit on the scale indicated, and that therefore the privilege or right to dispose of liquor was at least of the value of Three hundred pounds.

The club in question is what is known as a members' club and it accordingly has no juristic existence apart from its members. What is called a profit of the club really consists of moneys paid by members into a common fund and remaining unexpended in the fund. A club is, as *Griffith* C.J. said in *Bohemians Club* v. *Acting Federal Commissioner of Taxation* (1), " a voluntary association of persons who agree to maintain for their common personal benefit, and not for profit, an establishment the expenses of which are to be defrayed " by contributions made by these persons. He added " If anything is left unexpended it is not income or profits, but savings, which the members may claim to have returned to them." (See also *Halsbury, Laws of England*, 2nd ed. vol. 4, p. 482.) Thus the " profit " on the sale of liquor cannot be regarded as something which the members stand to gain if the club has a licence, or to lose if the club does not have a licence.

(1) (1918) 24 C.L.R. 334, at p. 337.

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Accordingly, I am of opinion that it cannot be said that the decision of the magistrate or of the Judge of the Supreme Court involved 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, even if it be conceded for the purpose of argument that a question of property or civil right was involved in the decision.

Upon the hearing of the appeal the Court intimated that it regarded the objection to the competency of the appeal as sound and that reasons would be given at a later date. An application was then made for special leave to appeal which was refused. The appeal should, therefore, be struck out.

STARKE J. The appellant, Benjamin Charles Watson, the manager of the Loxton Club, applied for a certificate of registration of the club, pursuant to the *Licensing Act* 1932, Part IV., Div. XII., of South Australia. It was granted by the Licensing Court. But on appeal to the Supreme Court of South Australia (Act, sec. 10), the grant of the certificate was rescinded, and an order was made that it be refused. Watson has appealed to this Court, but several objections were taken to the competency of the appeal. It appears that the Loxton Club is what is known as a members' club. Its rules provide that the property and effects of the club shall be vested in three trustees in trust for the members for the time being, and that all concerns of the club except such as are in the hands of the trustees shall be managed and controlled by its committee. The club is not a juristic entity : it is not even a partnership, it is simply a voluntary association of a number of persons for the purpose of affording its members and their friends facilities for social intercourse and recreation, and the usual privileges, advantages and accommodation of a club. The property acquired for or arising from the conduct of the club, though vested in trustees, belongs to the general body of members. The interest, however, of each member in the general assets of the club exists only during membership, and is not transmissible : it is a right of admission to and enjoyment of the club while it continues (*Wertheimer, Law Relating to Clubs*, 5th ed. (1935), pp. 1, 22). Registration under the *Licensing Act* enables a club to

keep liquor and supply it to its members. Supplying members with liquor is not a sale in the ordinary sense of that word, though they subscribe to the funds of the club for what is supplied to them; it is more like a release or transfer of the interests of other members in the liquor supplied.

In the present case, the facts show that liquors are supplied to members at amounts that will return more than their cost price. The excess goes to the funds of the club, and amounts to considerably over £300 per annum. It is therefore contended that the refusal of a certificate of registration of the club involves, directly or indirectly, a claim, demand, or question to or respecting property or some civil right to or of the value of £300 (*Judiciary Act* 1903-1933, sec. 35).

The registration of a club under the *Licensing Act* enables the keeping and disposal of liquor on the club premises without contravening the provisions of the Act. But how is it established that the right (if any) so acquired amounts to or is of the value of £300 or more in the appellant or the members of the club whom he may be taken to represent? (Act, sec. 95). The club as a body cannot establish a right of any such amount or value, for it is not a juristic entity. There is no separate ownership in the individual members of the club which can be separated and taken out of the whole, and such interest as a member has exists only during membership. The right subsists only in the residuum, after all liabilities are discharged. Until the joint affairs are settled, the club dissolved, the liabilities discharged, and the mutual rights of the members adjusted, it is impossible to ascertain the value of the interests of the members in the common property or assets, whether considered individually or as a whole.

In my opinion, therefore, the appellant has not established the competency of his appeal under sec. 35 of the *Judiciary Act* 1903-1933.

DIXON J. The appellant instituted an appeal as of right from an order of the Supreme Court rescinding the registration of a members' club under Div. XII. of Part IV. of the *Licensing Act* 1932 (S.A.). The registration had been granted by the Licensing Court upon the application of the appellant as secretary of the club. He may be taken to represent "the club," that is, the members

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collectively. But he cannot maintain an appeal as of right unless the refusal of registration adversely affects " the club " he represents in a manner capable of estimation in money and to an amount of £300 at least. To make this out the appellant not unnaturally relies upon the pecuniary return which, with a confidence founded on experience, he expects from the supply of liquor to the members. If " the club " could be regarded as a separate juristic entity deriving from its members a revenue consisting in their individual payments for supplies of liquor, no doubt would exist that by refusing the entity registration the order appealed from would affect it to the extent of at least £300. But, in my opinion, in contemplation of law, the club cannot be so regarded. The rights or privileges conferred by registration belong to the members collectively. The club is a mere voluntary association. Its property is jointly owned by its members. When liquor is supplied to one of them for a money payment the transaction, as clubs have succeeded in establishing, is not a sale. Part of the common property is appropriated to the separate use of the member and he makes a corresponding contribution from his separate property to the common fund (*Graff* v. *Evans* (1); *Ranken* v. *Hunt* (2); *Humphrey* v. *Tudgay* (3); *Metford* v. *Edwards* (4)). Neither from subscriptions (*Bohemians Club* v. *Acting Federal Commissioner of Taxation* (5), nor from such contributions, does profit arise. The excess of receipts over expenditure is but the growth of the joint funds of all at the expense of the individual funds of each.

By insistence upon exact and steady adherence to all the consequences of their unincorporated character, clubs have obtained many advantages under the law relating to intoxicating liquors. There is nothing unfitting in applying the same theory in considering whether the privilege which registration confers is a right or matter which can be estimated in money. It is not a transferable right. It cannot be disposed of for money. Properly considered, it does no more than enable the members to supply themselves with liquor which they may purchase on the joint account and distribute among individual members who make appropriate subventions to the

(1) (1882) 8 Q.B.D. 373.
(2) (1894) 10 R. 249.
(3) (1915) 1 K.B. 119.
(4) (1915) 1 K.B. 172.
(5) (1918) 24 C.L.R. 334.

common fund. Important as this may be to them, its importance is not capable of expression in a money sum. Its tendency to increase the common fund gives no right to the members who constitute " the club " of ascertainable money value because the increase must be at their own individual expense and " the club " is not an entity separable from its members. This conclusion does not appear to me to be affected by the circumstance that the *Licensing Act* 1932 (S.A.) uses the word " sale " to describe the transaction by which liquor is supplied to a member, or that it speaks of a club as if it were a juristic entity. These are mere matters of terminology and do not alter the legal relations that are in fact established.

For these reasons I think an appeal does not lie as of right.

EVATT J. I agree with the judgment of the Chief Justice.

MCTIERNAN J. I agree with the judgment of the Chief Justice.

Appeal struck out with costs.

Solicitor for the appellant, *Gordon C. Campbell.*

Solicitors for the respondent, *Villeneuve Smith, Kelly, Hague & Travers.*

H. D. W.