[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

OWENS AND FARRINGTON;

EX PARTE SEATON.

H. C. OF A. 1933.

SYDNEY, *April* 27.

Rich, Starke, Dixon and Evatt JJ.

Practice—High Court—Appeal from inferior Court of State exercising Federal jurisdiction—Writ of prohibition—Order nisi returnable before High Court granted by Judge of Supreme Court of State—Jurisdiction—Time for appeal—Extension—Special leave to appeal—Judiciary Act 1903-1927 (*No.* 6 *of* 1903—*No.* 9 *of* 1927), *sec.* 17—*High Court Procedure Act* 1903-1925 (*No.* 7 *of* 1903—*No.* 5 *of* 1925), *sec.* 37—*High Court Rules, Part II., Sec. IV., r.* 1.

On 17th February 1933 the applicant was convicted by a magistrate for breaches of an award made under the *Commonwealth Conciliation and Arbitration Act*. Upon affidavits filed in the High Court Registry the applicant obtained, on 9th March 1933, from a Judge of the Supreme Court of New South Wales, an order nisi for prohibition returnable before the Full Court of the High Court.

Held:—

(1) The Judge of the Supreme Court had no jurisdiction to grant an order nisi for prohibition returnable before the High Court. Under rule 1 of the *High Court Rules*, Part II., Sec. IV., such an order could be made only by a Justice of the High Court; there was no "matter pending in the High Court" within the meaning of sec. 17 of the *Judiciary Act* 1903-1927.

Symons v. *City of Perth*, (1922) 30 C.L.R. 433, followed.

(2) The High Court should not itself grant a rule nisi for prohibition in the matter. The Court had no power to extend the time for appealing, which had expired.

Delph Singh v. *Karbowsky*, (1914) 18 C.L.R. 197, followed.

(3) In the circumstances, special leave to appeal should not be granted.

ORDER NISI for prohibition.

Upon separate informations, laid under sec. 44 of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, by the secretary of the New South Wales branch of the Federated Liquor and Allied Trades Employees Union of Australia, Alfred Joseph Seaton, the licensee of Larkin's Hotel, 653 George Street, Sydney, was charged before a magistrate that "being an employer subject to and bound to comply with an award of the Commonwealth Court of Conciliation and Arbitration made . . . on 17th December 1928" in a matter in which the above-mentioned Union was the claimant, and the United Licensed Victuallers' Association of the Commonwealth of Australia was a respondent and "being the successor assignee or transmittee of the business of T. M. Grimsley formerly the licensee of . . . Larkin's Hotel . . . aforesaid, the said . . . Grimsley being a member of the said United Licensed Victuallers' Association of the Commonwealth of Australia" and "being the licensee of and carrying on the business of a publican at the said . . . hotel" he committed various breaches of the award in question. Records from the Metropolitan Licensing Court were produced in evidence and showed that transfers of the licence of Larkin's Hotel had been granted as follows:—On 21st May 1928, from Clara Frances Hutchinson to Leon Sharpe; on 16th June 1930, from Sharpe to John Ray Palmer; on 6th July 1931, from Palmer to Thomas Norman Grimsley; on 11th July 1932, from Grimsley to Robert Louis Glover; and on 12th September 1932, from Glover to Seaton. Evidence was given by the secretary of the Association that Seaton was not a member thereof; that Grimley was not a member of the Association in July 1931 but became a member in September 1932; that Sharpe was a member from 6th October 1927 until 1st September 1929; and that Palmer was not a member between 21st May 1928 and 12th September 1932. Receipts for membership fees paid by Sharpe were put in evidence. The magistrate allowed the informations to be amended by substituting for the name of Grimsley therein the name of Sharpe. Submissions that, though the licence had been handed down, Seaton was not thereby made a successor, assignee or transmittee within the meaning

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of sec. 29 (*ba*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1930, and that a successor was a person who had some contractual relationship with his predecessor, were overruled by the magistrate who, on 17th February 1933, held that, as the licence, which had been granted by the Government, had been transferred from Sharpe through successive persons to Seaton, and, as the business attached to the licence, the latter was bound by the award. Seaton was convicted and fined. Upon an application made by Seaton on 9th March, a Judge of the Supreme Court of New South Wales made an order nisi calling upon the informant and the magistrate to show cause before the Full Court of the High Court why a writ of prohibition should not issue, directed to them, restraining them from further proceeding upon the convictions, upon the grounds, *inter alia*, (1) that the magistrate's decision as to the interpretation of the award, and that Seaton was a successor, or assignee, or transmittee of the business in question within the meaning of sec. 29 (*ba*) of the *Commonwealth Conciliation and Arbitration Act* 1904-1930 was wrong in law; (2) that sec. 29 (*ba*) was *ultra vires* and did not apply; (3) that there was no evidence that Seaton was the successor, assignee or transmittee of the business of a party bound by the award; (4) that there was no evidence that Sharpe was bound by the award, or that he transferred or assigned the business after the making of the award; and (5) that there was no evidence that Seaton was bound by the award.

The matter now came on for hearing before the High Court.

O'Mara, for the informant, respondent. There is a preliminary objection that the matter has not been brought before this Court in the manner prescribed by the *High Court Rules*, Part II., sec. IV., r. 1, the method followed in this case being the method prescribed by sec. 112 of the *Justices Act* (N.S.W.), which is not applicable. The Judge of the Supreme Court had no jurisdiction to grant an order nisi for prohibition returnable before this Court (*Symons* v. *City of Perth* (1)). Nor is this a case where leave to appeal should be granted, because such appeal would not have been brought

(1) (1922) 30 C.L.R. 433.

within the time prescribed, and this Court has no power to extend such time (*Delph Singh* v. *Karbowsky* (1); see also *Muramats* v. *Commonwealth Electoral Officer* (*W.A.*) (2)).

[STARKE J. referred to *Bell* v. *Stewart* (3).]

This Court is bound by sec. 37 of the *High Court Procedure Act* 1903-1925. This is not a case for the granting of special leave to appeal unless the Court is prepared to overrule its previous decisions on the matter.

Webb, for the applicant. Prior to the granting of the order nisi, affidavits relating to the matter had been filed in the Registry of this Court and had become part of the record, sufficient to make it a "matter pending in the High Court" within the meaning of sec. 17 of the *Judiciary Act* 1903-1927. If the order nisi was wrongly made, then special leave to appeal from the decision of the magistrate should be granted. There is no evidence that the applicant was a successor in title to the person bound by the award. The evidence does not show that Sharpe was a member of the Licensed Victuallers' Association; therefore it has not been proved that he was bound by the award. The decision in *George Hudson Ltd.* v. *Australian Timber Workers' Union* (4), so far as it has the effect of deciding that the provisions of sec. 29 (*ba*) of the *Commonwealth Conciliation and Arbitration Act* are not *ultra vires*, should be reconsidered.

[EVATT J. referred to *Carter* v. *E. W. Roach and J. B. Milton Pty. Ltd.* (5).]

This Court should now grant an order nisi for prohibition, or, alternatively, special leave to appeal. The application for the order nisi granted by the Supreme Court Judge was made under sec. 112 of the *Justices Act* 1902 (N.S.W.) and was made within the time allowed. If that application is not in order, the Court should, in the circumstances, extend the time so as to permit the making of another application. The question arises as to whether a successor in the licence is a successor in the business; a licensee is not necessarily the owner of the business. There is no definite legal nexus

(1) (1914) 18 C.L.R. 197.
(2) (1923) 32 C.L.R. 500.
(3) (1920) 28 C.L.R. 419.
(4) (1923) 32 C.L.R. 413.
(5) (1921) 29 C.L.R. 515.

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or privity between the applicant and a predecessor who was bound by the award (*Bransgrove* v. *Ward and Syred* (1)). The applicant was not the immediate successor of a person bound by the award.

[*O'Mara* informed the Court that in the event of the dismissal of the application the applicant would not be held to an undertaking given by him to plead guilty in respect of other charges of breaches of the award preferred against him, and gave an undertaking that such dismissal would not be regarded as an estoppel upon the hearing of such further charges.]

THE COURT delivered the following judgment:—

In this matter several points of procedure have been raised. The applicant adopted the course of obtaining an order nisi made by a Judge of the Supreme Court instead of a Justice of the High Court. But this procedure was declared to be wrong in the case of *Symons* v. *City of Perth* (2). Mr. *Webb* endeavoured to support the order nisi under sec. 17 of the *Judiciary Act*. At the time when the order was obtained there was no matter pending in the High Court, and therefore a Judge of the Supreme Court had no jurisdiction under that section to make the order. The same contention was advanced by Mr. *Flannery* in the case mentioned, and the point was necessarily involved in that decision. It was next suggested by Mr. *Webb* that the time for appealing should be extended. But, when the time for appealing has expired, it has been decided by this Court that the Court has no power to extend the time in the case of appeal (*Delph Singh* v. *Karbowsky* (3)). In the absence of a Full Bench that decision should not be disturbed. Mr. *Webb* then suggested that this Court should grant a rule nisi, but no application was made within time to a Justice of this Court. Finally an application was made that special leave should be granted. But the facts appearing in the case do not very clearly raise the point of law which Mr. *Webb* wishes to argue, and, further than that, in view of the undertaking given by Mr. *O'Mara* that his client, the organization, will not hold the present applicant to his undertaking to plead guilty

(1) (1931) 30 A.R. (N.S.W.) 272. (2) (1922) 30 C.L.R. 433.
(3) (1914) 18 C.L.R. 197.

to other charges and will not contend that he is estopped in any other proceedings, this does not appear to be a case in which special leave should be granted.

Special leave is therefore refused and the appeal struck out with costs.

Appeal struck out with costs.

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Solicitor for the applicant, *R. C. Kirby.*

Solicitors for the respondent, *Marsland & Co.*

J. B.

[HIGH COURT OF AUSTRALIA.]

ADELAIDE DEVELOPMENT COMPANY PROPRIETARY LIMITED . . . PLAINTIFF, } APPELLANT;

AND

POHLNER . . . . . DEFENDANT, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1933.

MELBOURNE, *March* 16, 17.

SYDNEY, *April* 21.

Sale of Land—Contract—Illegality—Subdivision—Plan—Approval by town planner—Deposit of plan—Condition precedent to sale of land—Failure to deposit—Illegality of sale—Plan deemed to have been deposited on receipt of letter of approval from town planner—Different plan approved from that subsequently deposited—Non-compliance with statutory requirements—Town Planning and Development Act 1920 (*S.A.*) (*No.* 1452), *secs.* 32, 35—*Town Planning Act* 1929 (*S.A.*) (*No.* 1945), *sec.* 22.

The appellant brought an action against the respondent for damages for breach of a contract for the purchase of certain lots of land on a plan of subdivision in South Australia. The defendant pleaded illegality, relying on the appellant's failure to comply with the requirements of sec. 23 (*c*) of the *Town*

Rich, Starke, Dixon, Evatt and McTiernan JJ.