DOBELL *ats.* POLICE.

[Appellate Jurisdiction (Young, C.J.) January 16, 1930.]

Liquor Ordinance 1911—s. 13—(1)[1]—*keeping premises open—bar-room door locked—customer admitted and supplied with liquor during prohibited hours—question whether offence committed if liquor ordered before closing time—force of English cases in Colonial Courts—attempt to read an affidavit as to words used by Magistrate in Court at first instance.*

A bottle of whisky was obtained from the Melbourne Hotel at 11.30 p.m. by a man who obtained admission by knocking at the entrance to the premises.

HELD.—If a publican admits a person or persons into his licensed premises during prohibited hours, that is a sufficient " keeping open " and if such person comes out with intoxicating liquor in his possessions, then in the absence of a satisfactory explanation from the licensee, the offence of keeping open for the sale of liquor is complete.

Cases referred to :—

(1) *Pletts v. Beattie* [1896] 1 Q.B. 519 ; 65 L.J.M.C. 86 ; 74 L.T. 148 ; 12 T.L.R. 227 ; 18 Cox, c.c. 264 ; 30 Dig. 79.

(2) *Jeffry v. Weaver* [1899] 2 Q.B. 449 ; 68 L.J.Q.B. 817 ; 81 L.T. 193 ; 15 T.L.R. 422 ; 19 Cox 386.

(3) *Brewer v. Shepherd* [1872] 37 J.P. 102 ; 30 Dig. 97.

(4) *Bristow v. Piper* [1915] 1 K.B. 271 ; 84 L.J.K.B. 607 ; 112 L.T. 426 ; 31 T.L.R. 80 ; 24 Cox, c.c. 553 ; 30 Dig. 96.

(5) *Saunders v. Thorney* [1898] 78 L.T. 627 ; 14 T.L.R. 346 ; 30 Dig. 95.

(6) *Noblett v. Hopkinson* [1905] 2 K.B. 214 ; 74 L.J.K.B. 544 ; 92 L.T. 462 ; 21 T.L.R. 448 ; 30 Dig. 96.

(7) *R. v. Vasey* [1905] 2 K.B. 748 ; 75 L.J.K.B. 19 ; 93 L.T. 671 ; 22 T.L.R. 1 ; 21 Cox, c.c. 49 ; 25 Dig. 48.

(8) *Police v. Roberts* [1904] 1 K.B. 369

APPEAL against conviction. The facts are fully set out in the judgment.

J. N. Leleu for the appellant.

The Attorney-General, *P. A. McElwaine, K.C.*, for the respondent.

YOUNG, C.J.—In this case the appellant one Ernest Dobell, the licensee of the Melbourne Hotel in Suva appeals against a conviction of the Chief Police Magistrate on an information laid by the respondent, the Distrct Inspector of Constabulary for that he the said Ernest Dobell did on the 6th November 1929 unlawfully keep his premises open for the sale of liquor to wit one bottle of whisky during prohibited hours contrary to s. 13 (1) of Ordinance No 6 of 1911 ; prohibited hours being those hours after 10 p.m. or before 10 a.m. on ordinary business or week days.

The facts of the case are as follows :—At about 11.30 p.m. on 6th November, 1929, two policemen on duty saw a motor car stop near the back door of the Melbourne Hotel. From the car there descended a

[1] *Rep. The section was substantially the same as s. 11-61 of the Liquor Ordinance, 1946.*

European, one Griffen, who walked up McArthur Street and knocked at the entrance to the premises (but not at the main door). The door in response to these knocks was opened by a European whom one police officer fails to identify but who, by the other is identified as the appellant. After a short conversation both the Europeans went inside the hotel and shut the door. The police officers then crossed over the road and placed themselves opposite the window of the bar from where they heard the noise of bottles being moved in the bar and shortly afterwards Griffen emerging from the hotel, was stopped, and found to have in his possession a bottle of whisky.

Appellant was questioned the same night by the respondent and declared that Griffen had not been in the hotel that night, nor was there in the liquor sales book any entry of a sale to him. But two days later appellant saw respondent, together with one Ashly when it was alleged he made a statement :—

> " Liquor had been supplied to Griffen but it had been ordered " and paid for at 5.30 p.m. Ashly actually handed the liquor to " Griffen."

Ashly supplemented this statement by adding that the bottle had been given to him earlier in the evening by the wife of the appellant.

For reasons which I shall give later it is important to bear this statement in mind.

At the police court hearing on the conclusion of the case for the prosecution, counsel for appellant submitted that there was no case to answer.

The grounds of his submission were that—

(*a*) There was no evidence of sale of liquor.
(*b*) S. 13 (1) does not relate to " supplying " liquor.
(*c*) There was no evidence of keeping the premises open.

The learned Chief Police Magistrate having held that there was a case to answer, no evidence was called on behalf of the defendant and he was thereupon convicted and fined £10.

Appellant now appeals to this court on the grounds that his conviction is bad in law because—

(*a*) There is no evidence to support the offence of unlawfully keeping open licensed premises for the sale of liquor within the meaning of s. 13 (1) of Ordinance No. 6 of 1911.
(*b*) The learned Magistrate wrongly read the word " supply " into the second line of the said subsection.

There is further a subsidiary ground of appeal that the conviction is against the weight of the evidence and contrary to such evidence.

As regards this last point, one need only remark that learned counsel for the appellant, when in the police court, appears entirely to have overlooked s. 58 of Ordinance No. 6 of 1911[1] wherein it is enacted that delivery of liquor shall be prima facie evidence of sale so as to support a conviction unless satisfactory proof to the contrary is adduced.

Appellant not having produced any proof to the contrary, and the police evidence being uncontradicted, the learned Chief Police Magistrate was bound in law to hold that a sale had taken place at the time laid in the charge. Accordingly he ruled and in my view ruled rightly

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[1] *Rep. The Liquor Ordinance,* 1946, *s.* 91 *is identical in terms.*

that there was a case to answer, and the case to answer is that which is really the substantial point in this appeal—namely was what occurred a keeping open of the premises for the sale of liquor.

Had appellant been charged merely with the sale of liquor, the absence of any explanation from him as to the circumstances, would have provided abundant grounds for conviction and there could have been no possible basis for appeal.

What he was in fact charged with, was as, I have stated not merely the sale of liquor but keeping open his premises for the sale of liquor.

This court is asked to believe that the learned Magistrate wrongly read into the subsection the word supply. There is no evidence on the record to show that he did so but learned counsel has sought to read an affidavit, which I understand was served on the police magistrate, to the effect that he, the police magistrate, did in fact so read the subsection. I am told that the object of this affidavit is to prevent the police magstrate being taken by surprise. I cannot follow this reasoning, the police magistrate is no party to this appeal—he is given mere notice of the grounds of appeal and it is to me a novelty to find an alleged practice by which any words falling from a person acting in a judicial capacity, words used possibly merely *obiter* can be made the subject of an affidavit requiring an answer from such judge or magistrate or from the basis of an appeal.

There are proper means of securing the views and opinions of inferior judicial functionaries and I cannot permit this practice, if indeed it does exist, to continue.

In any event in this case the affidavit sought to be read must be wholly irrelevant because of the terms of s. 58 of the Ordinance, which section I again state seems in the lower court to have been overlooked. I can see no difference between "delivery" as the word is used in s. 58 and " supply " and if the learned chief police magistrate chose to adopt and use counsel's term " supply " when possibly " delivery " would have been the more correct term I fail to see how such use of the term can be urged as a ground of appeal.

I now have to deal with what I have termed the substantial ground of appeal namely was there a keeping open of the premises for a sale of liquor.

It will be convenient to recall the basic proposition in law that there was on this night a sale of liquor during prohibited hours and that in the police court, the police evidence being uncontradicted and appellant having failed (no doubt on good advice) to give evidence to dispel the basic proposition, the proceedings really amounted to this, I plead not guilty, I do not dispute the facts but I say that in law they constitute no offence. If you (the magistrate) say they do constitute an offence, I have no more to say but I reserve my right to have a definition from a superior court as to the true meaning of s. 13 (1).

Now to consider this subsection. It is clear that the opening lines enact three (learned counsel for appellant suggests four) separate and distinct offences, viz. keeping open for the sale of liquor, selling and permitting to be consumed on the premises, and to my view it is quite clear and I should under certain circumstances be prepared to hold that the offence of keeping open might be complete and a licensee properly convicted thereof even if no sale actually took place.

Various cases have been cited to me by learned counsel, all of which are a great help, but it must always be remembered that these cases are not binding upon me, especially where the learned judges have differed in their views. It may be as well that I should state the true rule as to the force of English cases in a Colonial Court. It is this : that where an English and a Colonial statute are in identical terms, the Colonial Court should, unless local circumstances do not permit, follow the construction given by the English Court of Appeal. But nevertheless great respect is due to and great help may be obtained from the judgments and dicta of His Majesty's Judges of the King's Bench Division and in particular when dealing with licensing matters I find myself in complete agreement with Wrights and Wills J. J. in *Pletts v. Beattie* [1896] 1 Q.B. 519 where Wright says " the Statute (Licensing Act) is not to be construed with excessive nicety as to what constitutes a sale " and Wills J. adds " The provisions of the licensing Act were not framed with a regard to the niceties which sometimes enter into consideration of a contract for goods sold and delivered ".

Learned counsel for appellant has particularly urged upon me the case of *Commissioner of Police v. Roberts* [1904] 1 K.B. 369 but in that case the facts show that no person entered the licensed premises during the prohibited hours. All that that case is an authority for is that " keeping open " predicates some persons entering the premises from outside or alternatively the supply from inside of liquor to persons outside.

Jeffry v. Weaver [1899] 2 Q.B. 449 is on the same lines and a long list of cases go merely to show what must be the ingredients of but not what actually constitutes keeping open and indeed what constitutes keeping open must depend upon the facts of any particular case.

In the case of *Brewer v. Shepherd* [1872] 36 J.P. 373 referred to in *Bristow v. Piper* [1915] 1 K.B. 275 it was held that a licence holder could be convicted of keeping open for sale during prohibited hours upon evidence that a man during such hours went to the house and came out with a bottle of intoxicating liquor.

This court however is invited by the persuasive argument of counsel for the appellant to say that the evidence of the respondent in the police court can be taken to give an innocent dress to the facts upon which appellant was convicted.

I am invited to say that it is possible to assume that the sale took place during open hours and that the delivery during closed hours created no offence.

I may hereafter have to decide that point but now I can only say that as at present advised I decline to hold any such view, but I may perhaps however add that in general I incline to the view that a person is keeping his licensed premises open within the meaning of s. 13 whenever he opens them for the carrying out of any material part of the sale.

Saunders v. Thorney [1898] 78 L.T., p. 627, lays down that if the sale takes place and is completed during open hours, there may be no offence for giving delivery during closing hours. It is to be observed that the learned judges only go as far as to say that there may be no offence but in any event this case is of doubtful authority and, as suggested by the learned editor of *Chitty's Statutes*, it is in my view overruled by *Noblett v. Hopkinson* [1905] 2 K.B. 214.

The decision in *Noblett v. Hopkinson* turns upon the hour at which a material part of the contract had to be performed. The facts of that case are indeed very similar to the case I now have to decide but the defendant not having chosen to give evidence I have no data as to the actual terms of the sale and therefore the case is not very helpful to me.

As this case stands I am bound to hold that a sale of a bottle of whisky took place during prohibited hours and the question is were the licensed premises being kept open for such sale. It is idle to speculate as to how many times a door must be opened to constitute keeping open. I am satisfied that if a publican admits a person or persons into his licensed premises during prohibited hours, that is a sufficient keeping open since it shows that he is ready at hand to come down, unbolt the door admit and to deliver to such persons intoxicating liquor.

In this case Griffen manifestly got in from outside, admitted by appellant. If I am to hold that obtaining entrance by knocking on the door is not keeping open, it is clear that the statute will be constantly and easily evaded.

It is clear legal principle that the manifest intention of a statute must not be defeated by too liberal an adhesion to its precise language (*R. v. Vasey* [1905] 2 K.B. 748 per Lord Alverstone, C.J., p. 751) which case by the way was a case on a quasi penal statute.

The object of s. 13 (1) is to enact that licensed premises shall not be open during certain hours. This does not mean merely that the doors of the premises shall be shut, barred or locked. The manifest intention of the legislature is that no liquor shall be supplied during those hours to a casual purchaser and accordingly when there is proof that such a purchaser has obtained entrance to the licensed premises and issues therefrom with intoxicating liquor in his possession I hold that in the absence of satisfactory explanation from the licensee, the offence of keeping open is complete. Appellant was rightly convicted by the learned police magistrate and this appeal fails and is dismissed.

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re THE PUBLIC TRUSTEE OF NEW SOUTH WALES, *ex parte* REGISTRAR OF TITLES.

[Civil Jurisdiction (Maxwell Anderson, C.J.) July 15, 1930.]

Resealing of grant of Probate to a company—will valid in Switzerland —succession to land governed by lex loci rei sitæ—will invalid under Wills Acts—intestacy as to real estate in Fiji—whether company carrying on business in Fiji by acting as executor.

James Brand Simmons died in Switzerland. Probate of a will made in Sydney, New South Wales, was granted by the Supreme Court of New South Wales, to the Public Trustee of New South Wales. The estate included a parcel of land in Fiji and the title of the Public Trustee thereto was duly registered. Subsequently a later will, made in Switzerland, was discovered. The Supreme Court of New South Wales revoked the grant of Probate to the Public Trustee and granted letters