S.C.
IN BANCO.
WELLINGTON.
1900.
May 25; June 1.
STOUT, C.J.

BROWN *v.* BOWDEN (POLICE).

"The Licensing Act, 1881," Section 146—Offence—Sale to Person "in a "State of Intoxication"—Justices—Appeal on Fact—Admission of Fresh Evidence—Two Informations heard together—Appeal by One Defendant—"The Justices of the Peace Act, 1882," Section 248, 250.

Section 146 of "The Licensing Act, 1881," makes it an offence for an innkeeper to permit drunkenness on his premises or to sell liquor to any person "already in a state of intoxication."

Held, That a person is in a state of intoxication within the meaning of this section if he has lost the normal control of his bodily and mental faculties. The words signify something less than absolute incapacity from drunkenness—a less degree of drunkenness, for example, than that contemplated by section 19 of "The Police Offences Act, 1884," which speaks of a person being found drunk.

Quære, Whether on a general appeal on fact and law, under section 248 of "The Justices of the Peace Act, 1882," from a determination of Justices or a Magistrate, fresh evidence, not given before the Justices or Magistrate, ought to be admitted.

Where two informations against different defendants for similar offences on the same day had by consent been heard together, and both defendants were convicted, and both gave notice of appeal, but one of them afterwards abandoned his appeal, the abandonment of the one appeal is no objection to the other proceeding.

THE appellant in this case was the licensee of the Commercial Hotel, Pahiatua, and the appeal was one on fact and law from a conviction of the appellant, by the Magistrate sitting at Pahiatua, on a charge of having sold liquor on the 12th of September, 1899, to one John Farrelly, the said John Farrelly being then already in a state of intoxication, contrary to section 146 of "The Licensing Act, 1881."

The evidence given was of sales of liquor to Farrelly in the Commercial Hotel between 2.30 p.m. and 3.30 p.m. on the day named, and the question was as to Farrelly's condition when in the Commercial Hotel between those hours. There was another charge against one Murray, licensee of the Post Office Hotel, Pahiatua, of selling liquor to Farrelly whilst in a state of in-

toxication after 3.30 p.m. on the same day. By consent the two informations, against Brown (the present appellant) and against Murray, were heard by the Magistrate together. The Magistrate convicted both the defendants, and both of them gave notice of appeal on fact and law. Murray, however, subsequently abandoned his appeal. The other facts of the case will be found fully stated in the judgment.

H. D. Bell, for the respondent :—

There is a preliminary objection to the appeal proceeding. The cases against Brown and Murray were by consent heard together by the Magistrate. The evidence in the one case was therefore available in the other. The evidence as to Farrelly's state on arriving at Murray's was available in Brown's case. The appeal could at best have been from the two decisions together. The one appeal having been abandoned, the cases cannot be reheard together. There is no direct authority, but where jurisdiction is given by consent there is no appeal: *Groves* v. *Janssens*(1). The Magistrate had Murray's own evidence as to the supply of liquor in his own house.

Findlay, for the appellant :—

The Court itself, without consent, could have taken the charges together, and if no objection was raised at the time it could not afterwards be objected to: *Paley on Convictions*(2), citing *Reg.* v. *Biggins*(3). The respondent cannot be embarrassed. Evidence as to Farrelly's condition in Murray's is undoubtedly relevant on the question of his condition in Brown's.

Cur. adv. vult. on the preliminary objection.

Evidence was then taken at length, and at its conclusion the question of law was argued.

H. D. Bell, for the respondent :—

The question is whether Farrelly was already in a state of intoxication when he was supplied with liquor, within the meaning of section 146 of "The Licensing Act, 1881." It

(1) 23 L.J. Ex. 91.
(2) 7th ed. 117.
(3) 5 L.T. 605.

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is not suggested that the etymological meaning of "intoxi-"cation" is to be taken, or it might be said that one glass would be enough in every case: a certain quantity of toxin—of poison—would have been introduced. The meaning of "intoxicated" is illustrated by the famous expression, "intoxi-"cated by the exuberance of his own verbosity"—meaning, excited and carried beyond himself. A man is in a state of intoxication if he is excited by liquor—drunk, but not necessarily drunk and incapable.

Findlay, for the appellant:—

Under no possible definition can Farrelly be said to have been drunk or intoxicated when he was supplied at the appellant's house. "Intoxication" is more definite than "drunkenness." From the *American and English Encyclopædia of Law*(1) "intoxication" seems to have been adopted as the definite technical term to denote the condition of drunkenness which will excuse from a civil contract. The reasoning faculties must be seriously impaired. In the "Standard Dictionary of the English Language" the following meanings of "drunk" are given: "Under the influence "of intoxicating liquor to such an extent as to have lost the "normal control of one's faculties; evincing in general a "tendency to quarrelsomeness, violence, or bestiality." The passions must be visibly excited or the judgment impaired: *State* v. *Pierce*(2). Section 142 and the following sections are headed "Offences against Public Order." This was invoked by Stephen, J., in *Cundy* v. *Lecocq*(3). There must be such a condition as to be a menace to public order. The man must be violent or incapable. "Violent, quarrelsome, "or riotous conduct" is spoken of in section 146 itself, and the principle of *Noscitur a sociis* applies. "Drunkenness" in section 146 must have the same meaning as "drunkenness" in sections 19 and 20 of "The Police Offences Act, 1884." There must be either (*a*) such a state as would support a charge of being drunk under the Police Offences Act, or (*b*) such a degree that the man has lost the normal control

(1) Vol. xi. 773.
(2) 65 Iowa, 88; Am. & Eng. Enc. of Law, Vol. vi. 35.
(3) 13 Q.B.D. 207.

of his bodily and mental faculties, or (*c*) such a degree as to endanger the safety of the individual or the security of public peace or order. There is the best reason why the degree should be at least as high as this. A publican is bound to know when a man is drunk: *Cundy* v. *Lecocq*(1). This responsibility can possibly be discharged, with care, so long as intoxication is defined as some well-marked condition of insobriety; but otherwise it will be impossible for the business of a publican to be carried on. If there are two constructions, and one would operate oppressively, the Court will adopt that one which will avoid oppression: *Maxwell on Statutes*(2).

H. D. Bell, in reply:—

If a man is "half-drunk" when served, that is enough. The argument for the appellant reduces the matter to the absurdity that a publican must go on supplying liquor until a state warranting conviction under the Police Offences Act, or endangering peace or order, is reached. The very section opposes "a state of intoxication" to "drunkenness." The offence must be something short of "permitting drunkenness."

Cur. adv. vult.

STOUT, C.J.:—

This was an appeal on fact and law from the Magistrate sitting at Pahiatua by Thomas Brown, a licensed publican, who was convicted of selling intoxicating liquors to one John Farrelly whilst the said John Farrelly was in a state of intoxication.

In the Court below the information was heard along with an information charging another publican with selling liquors to the same person on the same day whilst in the same state. Both publicans were convicted, and both appealed. The other, however, abandoned his appeal, and his conviction stands. Mr. Bell, counsel for the informant, raised a preliminary point that, as both informations were heard together, there could not be an appeal by one, as the evidence in the appellate Court would be different from that in the Court below.

(1) 13 Q.B.D. 207. (2) 3rd ed. 277.

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I am of opinion that the abandonment by the other publican of his appeal cannot prevent the present appellant prosecuting his appeal. Though the cases were heard together, still it was the duty of the Magistrate, when he came to consider the evidence, to separate the cases, and see that there was evidence against each defendant of the crime charged. They are two distinct cases. Even if these charges had been in one information, as a joint offence, still it would have been equally his duty to so proceed. And I do not think, therefore, there is any validity in the preliminary point that has been raised.

The next question is, what is the meaning of the words in section 146 of "The Licensing Act, 1881," under which this conviction has been obtained? The words of the section are, "If any innkeeper permits drunkenness, . . . or sells "any liquor to any person already in a state of intoxication, ". . . . he shall be liable," &c. What is meant by "already in a state of intoxication"? In my opinion the words mean that state in which, through intoxicating liquors, a person has lost the normal control of his bodily and mental faculties. In my opinion, in a state of intoxication both are more or less affected. It is, no doubt, a difficult matter to draw the line so as to determine when a man ceases to be sober, and becomes intoxicated. It ever is difficult to distinguish between states which come on gradually. To do so is akin to the difficulty of solving the old problem of the Sorites—when, as between two heaps of grain, one large and one small, does the large one cease to be large, and the small become large, if a grain from time to time is taken from the one and added to the other. The decision in such a case as this must rest on the evidence of impartial men of common-sense who are themselves sober. I do not think the words "drunk and in- "capable" are an exact equivalent of "in a state of intoxi- "cation." It seems to me that these words signify some degree less than absolute incapacity from drunkenness. It is, in fact, assumed that this "person already in a state of "intoxication" is capable of asking for more drink, and, apparently, capable of paying for it; for it cannot be assumed that a man who is thoroughly drunk could either

ask for a drink or pay for it. The state pointed out by the statute is therefore, in my opinion, a degree less than absolute drunkenness; and that is, I think, apparent from the use of the words in the section, and the fact that the word "drunkenness," though used in another part of the section, is differentiated from "in a state of intoxication." I agree, therefore, with Mr. Bell that the words have been inserted to show that a less degree of drunkenness is required than what is mentioned under, for example, "The Police Offences Act, 1884," section 19, which simply speaks of a person being found drunk. The case of *Cundy* v. *Lecocq*(1) shows that, though under the English Act, where the words are "to any drunken "person," yet that the Magistrate may find a person drunk though his inebriety is not observable by the publican or his servants.

In this appeal three witnesses have been examined who were not examined in the Court below. No objection was taken to this course, and the statute is silent as to whether such a practice can be permitted. It is clear from the statute that no new ground of appeal may be taken (see section 250): *Martin* v. *Campbell*(2); and it seems to me that no fresh evidence ought to be admitted. I understand, however, that a different practice has hitherto prevailed in this district, and it may be well for the Legislature to consider whether it is wise or just that persons convicted, or the prosecutor, should have the right on a rehearing to introduce fresh evidence. Such a practice places a Magistrate in an unfair position, for his decision on the evidence before him may have been right, and yet the appeal against his decision may be successful. And, what is more important, it seems to me to open the door to the manufacture of evidence. There can be, however, no suggestion of that in this case. The charge is that John Farrelly was in "a state of intoxication" between half-past 2 and half-past 3 in the afternoon of the 12th of September, 1899, whilst in the Commercial Hotel. The witnesses for the prosecution who speak to his state at the

(1) 53 L.J. M.C. 125; 13 Q.B.D. 207. (2) 13 N.Z. L.R. 42.

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time are himself, William Henry Fiske, and Henry William Fiske. It is clear he was drunk after half-past 3, and the question is, can the recollection of a drunken man be accepted as to his state at a certain hour, when he says he was drunk, if it is contradicted by sober witnesses? I do not think that would be satisfactory. The witness William Henry Fiske admits that from 2 to 3.30 he drank with the said John Farrelly at least twelve drinks of intoxicating liquor, and he had also several drinks of intoxicating liquor before 2. I do not think I can accept his testimony as to the state of another person, whilst on his own admission he was over-indulging in intoxicating liquors. It is known that drunken men and half-drunken men will assert that they are sober, and that their companions are drunk, when the positions are the opposite. Henry William Fiske does not seem to have drunk as much as his brother or as John Farrelly. He says that John Farrelly was about half-drunk when he saw him. Now, these were all the witnesses for the prosecution who speak to the state of John Farrelly between 2 and 3.30. I agree with Mr. Bell that the positive statement of a man who swears to drunkenness is of more value than the testimony of any ordinary observer who simply says that he did not think the person observed was drunk. The evidence for the defence is not, however, of that character. The following witnesses—Messrs. H. Warren, J. Perry, W. McArdle, Taylor, Mathews, and Dash—testify to the sobriety of John Farrelly whilst he was in the Commercial Hotel. It is to be observed that none of them are connected in any way with the hotel — none of them are servants or relations of the licensee, or bar-room habitués. Mr. Warren is a sheep-farmer, has been a member of two County Councils, and is a respectable man. His testimony, if believed, shows that John Farrelly was not in a state of intoxication up to 3.30. His statement is not that he was a mere casual observer of him, but that he went with Farrelly into a separate room, discussed a plan, and figures, and details with him, and he said Farrelly did so rationally and ably. If Mr. Warren's statement is true

this conviction cannot stand. William Henry Fiske states that he saw Mr. Warren with John Farrelly. Mr. Warren's statement as to the sobriety of John Farrelly is corroborated by Mr. John Charles Taylor, a plumber in Pahiatua, and apparently a respectable and sober man, who says that Farrelly paid him an account between 2 and 3, and that he was "perfectly sober." George Mathews's evidence is to the same effect, though in some details it is not in accordance with other witnesses. Mr. Perry, the Chairman of the County Council, saw Farrelly between 3 and 3.30, had a drink with him, and he says he was sober. Mr. McArdle's testimony as to the state about 3 is similar. Mr. R. Smith, another County Councillor, says that when he went to the Post Office Hotel, and after 3.30, Farrelly was sober. Then, Henry Dash's evidence is valuable, not so much as to Farrelly's state—though he says Farrelly was sober at 3.30—as that it contradicts one of Mr. W. H. Fiske's statements—namely, that he (Dash) helped to place Farrelly in Mr. Fiske's trap on his leaving the Commercial Hotel. How is Mr. Fiske's evidence to be reconciled with this flat contradiction save on the assumption that he was himself so affected by drink on the date in question that his recollection is not reliable?

The case really comes to this: There are two witnesses who positively say that John Farrelly was in a state of intoxication. They are Mr. H. W. Fiske and Mr. W. H. Fiske; but both were admittedly affected by drink at the time or immediately afterwards. As against their testimony, there is the testimony of Messrs. Warren, Smith, Perry, McArdle, Taylor, and others. I cannot assume these admittedly respectable witnesses have committed perjury, and, if they have not, Farrelly was not in a state of intoxication whilst drinking in the Commercial Hotel. Under such circumstances I do not see how the conviction can stand. I may add that the three witnesses who were examined for the first time before this Court all testify to Farrelly's sobriety. They were Messrs. McArdle, Taylor, and Dash.

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The appeal must be allowed, and the conviction quashed. No costs will be allowed.

Appeal allowed.

Solicitors for the appellant: *Findlay, Dalziell, & Co.* (Wellington).

Solicitor for the respondent: *Crown Solicitor* (Wellington).

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SOLICITOR-GENERAL, *ex relatione* BAYLIS, *v.* MAYOR, ETC., OF MELROSE.

Municipal Corporation — Streets — Levels — Necessity for Plan — Injunction — Costs — "The Municipal Corporations Act, 1886," Section 242.

Semble, That "The Municipal Corporations Act, 1886," assumes that a plan showing the levels of all streets, in compliance with section 242 of that Act, will be prepared within a reasonable time after the constitution of a borough; but, if that plan cannot be prepared at once, the borough should, before it begins the formation or alteration of a street, have some defined plan or scheme as to what the works are to be and what the level is to be. An injunction against the removal of gravel from a street by the Corporation of the borough refused, the evidence not showing any intention to create, or likelihood of, a nuisance, but without costs, as the Corporation had proceeded without any defined plan or scheme.

THIS was a proceeding brought by the Solicitor-General on the relation of George Henry Baylis to obtain an injunction restraining the Corporation of the Borough of Melrose from continuing to take gravel from a certain public highway within the borough known as the "Esplanade."

An interim injunction had been obtained *ex parte* on the 10th of July, 1900, restraining the defendants, until the further order of the Court, from removing gravel from the highway in question save in pursuance of some plan for the improvement or construction of the said highway, the relator, by his counsel, giving the usual undertaking as to damages, and undertaking to accept twenty-four hours' notice to rescind the order. On the 30th of July, 1900, the defendants gave notice to move on the 1st of August to rescind this