possible that as a matter of interpretation this is to be restricted to acts which are unlawful either *per se* or by reason of the intent with which they are done. But even subject to this restriction what Ismail did clearly brought him within the scope of the section. By being in possession of the liquor, he was himself committing an offence in contravention of Regulation 69 and he was also doing on act which not only enabled but was necessary to enable the appellant to commit the offence in contravention of Regulation 70 with which he was charged.

At this stage, and in parenthesis, I would observe that to my mind this case is clearly to be distinguished from the local case of *Bechu v. the Police* (Fiji Criminal Appeal No. 1 of 1944). In that case the person who was alleged to be an accomplice had himself at no time committed any offence, and moreover, at the time that judgment was given (14th September, 1944), the Penal Code was not in force.

Having come to the conclusion that Ismail was an accomplice, it follows that a conviction could not be based on his evidence unless it was corroborated by other evidence implicating the defendant, or unless the Magistrate (who was, of course, sitting without a jury) directed himself as to the danger of convicting in the absence of corroboration. It is admitted that there was no corroboration, and from the learned Magistrate's announced decision at the close of the case for the prosecution that, in his opinion, Ismail was not an accomplice, it is impossible not to draw the inference that he failed to administer to himself the necessary warning.

The conviction, therefore, cannot stand and so it becomes unnecessary to consider the other grounds of appeal or in particular to express regret that the learned Magistrate has failed to throw the bright light of exposition on the darkness that at present surrounds the course of reasoning that enabled him to conclude at one and the same time (as he must have concluded) that the defendant Nel Compain's evidence was so truthful as to justify her own acquittal but so untruthful as to justify the conviction of the present appellant.

The appeal is allowed and the conviction quashed.

INDIAN TRADING COMPANY OF FIJI *ats.* POLICE.

[Appellate Jurisdiction (Thomson, J.) March 20, 1946.]

Defence (Liquor) Regulations 1943[1]*—application for wholesale liquor licence—notice of objection by police—District Commissioner's Court as a licensing Court—whether matter to be determined otherwise than on sworn evidence.*

The appellant Company applied in writing for a wholesale liquor licence and notice of objection was given by the police. The Acting Chief Magistrate held a Court to determine the matter and decided to refuse the application after hearing representations as to the facts by

[1] *Repealed. Vide Liquor Ordinance,* 1946, *Part* II.

counsel for the Company and by a police officer, unsupported by any evidence. (The only evidence called was formal evidence proving service of the notice of objection).

HELD.—Proceedings to determine whether a liquor licence should be granted under the Defence (Liquor)[1] Regulations 1943 are proceedings by a Court ; if the Court purports to determine a contested issue of fact without hearing evidence the proceedings are nullity.

[**EDITORIAL NOTE.**—The Defence (Liquor) Regulations 1943, Regulation 45 provided that the only appeal shall be on a point of law by case stated. The relevant Regulations were as follows :—

" 27. Every District Commissioner shall in the month of Novem-
" ber of every year, hold a Court for the purpose of hearing
" applications for licences under these Regulations or for their
" renewal, of which not less than one month's notice shall be given
" in the *Gazette*. The District Commissioner may make such order
" as to the costs of any such application as he may think fit and
" may adjourn the Court from time to time : Provided that the
" District Commissioner may hold a Court at any other time for
" the purpose of hearing interim applications on not less than one
" month's notice being given in the *Gazette*.

" 28. Every person wishing to obtain a wholesale licence shall
" give not less than one month's notice in writing to the District
" Commissioner and to the senior officer of the Fiji Police of the
" district in which the premises in respect of which application is
" being made are situated : Provided that it shall not be necessary
" to make application for the renewal of a wholesale licence unless
" objection has been lodged by such officer of Fiji Police, with the
" holder thereof, before the month of November in each year."

"31 (1) Every application for a publican's licence or for the
" renewal removal or transfer thereof shall (except as hereinafter
" provided), he heard by the District Commissioner for the district
" wherein the premises are situated to which the application relates
" and every application for a packet licence or for a renewal thereof
" shall be heard by the District Commissioner of the district in
" which the agent or owner of the vessel in respect of which the
" application is made resides, and every applicant shall, subject to
" the provisions relating to applications for renewals, attend person-
" ally before such District Commissioner unless prevented by sick-
" ness or infirmity or other reasonable cause to be proved to the
" satisfaction of the District Commissioner. The District Com-
" missioner may summon and examine on oath such winesses as he
" may think necessary, and as nearly as may be in the manner
" directed by any Ordinance now or hereafter to be in force, relating
" to the duties of District Commissioners in the exercise of their
" summary jurisdiction.

" (2) In the case of an application for a wholesale licence the
" District Commissioner, on being satisfied on a report from the
" senior officer of the Fiji Police of the district in which the premises
" are situated that the premises comply with the provisions of these
" Regulations, and that there is no objection to the issue of the
" licence, shall grant his certificate for the issue of it."

" 44. On the hearing of any application (except for a renewal), " the applicant by himself, his counsel or attorney shall open his " case, then the objectors (if any) who have given the prescribed " notice shall be heard by themselves, their counsel or attorney, " and the applicant may reply. On applications for renewals the " objector shall commence and the applicant shall reply only."]

Cases referred to :—

(1) *R. v. Tolhurst, ex p. Farrell* [1905] 2 K.B. 478 ; 74 L.J.K.B. 652 ; 93 L.T. 76 ; 69 J.P. 308 ; 21 T.L.R. 533 ; 30 Dig. 15.

(2) *Dartmouth Brewery Co. v. Quarter Sessions for County of London* [1906] I K.B. 695.

(3) *re J. A. Clark* [1938] 3 Fiji L.R.

(4) *Pickering ats. Police* [1935] 3 Fiji L.R.

(5) *R. v. Newcastle-on-Tyne Licensing J.J.* [1887] 3 T.L.R. 351 ; 30 Dig. 45 ; 51 J.P. 244.

(6) *Boulter v. Kent J.J.* [1897] A.C. 556.

APPEAL by case stated against Magistrates order refusing application for wholesale liquor licence.

P. Rice, for the appellant : The onus of proof lies on the objector (*re J. A. Clark ; R. v. Tolhurst ; Dartmouth Brewery Co.*). The Magistrate took the opinion of the police without hearing evidence. The objector did not discharge the onus of proof and accordingly the licence should be granted as a matter of course.

E. M. Prichard, for the respondent : Appeal is limited to appeal by case stated. Weight of evidence cannot now be in issue ; appellate Court has to consider only whether any evidence at all (*Pickering ats. Police* ; *Paley* 9th Edition pp. 746, 765). There was no evidence to show that needs of community served by present licences —but the Magistrate knew the district. In *R. v. Tolhurst* evidence as to a particular house was required—something justices would not be expected to know about. Justices knowledge is not excluded (Stone's Justices Manual, 1943, p. 1070). The only matter requiring proof was the number of licences already in force. Counsel for appellant supplied that in the form of an admission—he admitted it in course of his address to the Magistrate. In any event an order cannot be made on this appeal to the effect that licence must be issued (*re Clarke* is distinguishable). In this case Regulation 44 settles the question of onus of proof and if proceedings were a nullity matter must be heard again on evidence.

P. Rice, for appellant, in reply : The applicant has only to show that the formalities have been complied with. The appellant did this but the objector did not sustain his objection. (*Newcastle-on-Tyne Licensing* J.J.).

THOMSON, J.—This is an appeal by way of case stated from a decision of the Acting Chief Magistrate at Ba purporting to sit as a Court under the Defence (Liquor) Regulations, 1943, which is described in the case as a " licensing Court ", whereby he refused the application of the appellant Company for a wholesale liquor licence. The proceedings in question were commenced in October, 1945, and concluded in December of the same year, that is to say at a time when the law relating to the lower Courts of the Territory as it existed when the

Defence (Liquor) Regulations, 1943, were enacted had been replaced by the Criminal Procedure Code but when the Regulations themselves had not yet been replaced by the Liquor Ordinance, 1946.

I would observe *in limine*, though the point was not taken by the appellant, that I have grave doubts as to whether the Court which dealt with the application was properly constituted in that, on the face of the proceedings, the learned Acting Chief Magistrate purported to officiate as such and not as a District Commissioner, with which dignity I assume he was in fact clothed at the material time. As, however, I propose to deal with this appeal on other grounds, and as the point is, as a result of the legislative changes I have mentioned, no longer of practical importance, I do not propose to decide it in these proceedings.

Proceeding to the actual case, to my mind it is clear that the whole question is whether or not the Licensing Court (an expression of which I propose to make use for the sake of convenience) adhered sufficiently closely to the procedure which it should have followed or whether it departed so far from that procedure as to lay its decision open to successful attack as a matter of law. To ascertain the procedure that should have been followed is a task of no small difficulty, but before addressing attention to that task it becomes necessary to set out briefly what actually occurred.

On 25th October, 1945, the applicant (the present appellant) made written application for a wholesale liquor licence. On that, and if no other event occurred, he would in due course, by virtue of Regulation 31 (2) of the Defence (Liquor) Regulations, 1943, have been entitled to receive his licence on the District Commissioner being satisfied on a report from the senior police officer of the District that the premises complied with the provisions of the Regulations and that there were no objections to the issue of the licence. From what counsel on both sides have said, I think the question of the suitability of the premises can safely be disregarded here, but within the statutory period the Police gave notice of objection to the issue of the licence on various grounds including the ground that there were already wholesale licences in existence in the district and that the reasonable requirements of the neighbourhood did not justify the granting of yet another licence.

In due course the learned Acting Chief Magistrate proceeded to hold a Licensing Court to dispose of the matter and in effect what that Court had to decide where issues of fact, viz., what was the number of existing licences in the neighbourhood and whether or not the reasonable requirements of the neighbourhood, once they were ascertained, did or did not justify the issue of yet another licence. To decide these issues what happened was this. Counsel for the applicant made a statement apparently from his place at the Bar but did not adduce any evidence in support of what he said, a Police Officer who appeared for the Police made a statement in support of the objections but did not give or adduce any evidence, and counsel for the applicant then addressed the Court in reply. The learned Magistrate then announced that he had come to the conclusions that there were already two wholesale licences in Lautoka and that, in his opinion, the reasonable requirements of the neighbourhood did not justify the granting of yet another licence. He accordingly dismissed the application.

To my mind, these proceedings were so radically faulty as to render them a complete nullity. By Regulation 27 of the Regulations it is provided that every District Commissioner shall hold a Court for the purpose of hearing applications for licences, and by Regulation 2 a "Court" is said to mean a District Commissioner's Court. Whether or not that Court is the same Court which a District Commissioner was empowered to hold by virtue of the District Commissioners Ordinance, 1876, and the Summary Jurisdiction Procedure Ordinance, 1876, is a matter of grave doubt, in the absence, as far as I have been able to advise myself, of any statutory authority to that effect. But it is clear from the wording of the Regulations that the Disrict Commissioner is to act as a Court and not merely as an administrative functionary, and that his position in relation to the disposing of applications for licences is in no respect the same as the position of the Justices under the English Licensing Acts in the same connection (see *Boulter v. The Justices of Kent* [1897] A.C. p. 556). And in the absence of any statutory provision to the contrary there is one way and one way only that any Court acting within the framework of English law can decide disputed issues of fact, and that is by hearing the sworn evidence of witnesses to the relevant facts. That, to my mind, is a proposition so elementary and fundamental as to call for no show of authority. It is true that the rigour of the law may be modified. Presumptions may arise, statutory exceptions may occur, parties may make admissions, affidavits may be filed. But in the absence of any of the recognised exceptions one of the pillars of justice is the witness on his oath, and to come to a decision of fact that does not rest on such support is so wrong that, as I have said, the proceedings in which it occurs must be regarded as a nullity.

To that extent, then, this appeal must succeed. The question, however, arises as to what should be done in the premises. For the apellant it was contended, with great force and ability, that once he had made his application in proper form and the District Commissioner was satisfied that the premises complied with the provisions of the Regulations and that there was no objection he thereupon became entitled to his licence, and that since no evidence was in fact adduced in favour of any objection this Court should order the Licensing Court (as I have no doubt it has jurisdiction to do) to grant the licence. As it stands I am not altogether prepared to dissent from this proposition but I am bound to observe that it does not truly reflect the state of affairs in this case. Whatever may be the position regarding the premises, there was certainly no report before the Court that there were no objections, and indeed there could be no such report, for in fact there were objections of which notice had been given in proper form.

That being so, there was an issue to be tried between the applicant and the objectors (who in this case were the Police), and the mode of procedure was that laid down by Regulation 44 the material parts of which read as follows :—

> "44. On the hearing of any application (except for a renewal) "the applicant . . . shall open his case, then the objections "(if any) . . . shall be heard, and the applicant may reply. "On applications for renewals the objector shall commence and "the applicant shall reply only."

Now it may well be that the terms of this Regulation are notable rather for their economy than for their clarity and at first sight there would appear to be room for doubt as to its meaning. But the doubt is removed when it is considered that it draws a clear distinction between applications for new licences and applications for renewals, a distinction that is a logical corollary of the provision contained in Regulation 28 that no application is necessary for the renewal of a wholesale licence. That position is clear. The applicant for a renewal has in the past succeeded in obtaining a licence and the burden of showing that he should no longer enjoy it is placed wholly on the shoulders of the Police should they see fit to intervene. But where a new licence is applied for the position is not so clear, particularly where there are objections, and to my mind the question turns on the nature of the " case " which by Regulation 44 the applicant is required to open. The " case " cannot only be that in the absence of any further proceedings he is entitled to the licence, for that would involve setting up the existence of a report to satisfy the Court there were in fact no objections and *ex hypothesi* such a report in such proceedings cannot exist. It must be something more. Neither can the " case " be that as against the whole world and in the face of any objection he should have his licence, for such a construction would be unreasonable and is completely devoid of any statutory support. To my mind, it follows from the wording of the Regulation that the " case " must consist of satisfying the Court that the necessary formal steps have been taken and in addition (for, as I have said, it is *ex hypothesi* impossible to say that all the necessary conditions have been fulfilled) of grounds for saying that prima facie the objections should not be accepted. To that extent, at any rate, the applicant for a new licence is put on his proof in a way that an applicant for a renewal is not. And it is hardly necessary to add that there is, of course, no danger of the applicant being taken by surprise or being put in difficulties by finding after he has opened his case that the grounds of objection are stronger than he had envisaged. For not only has he had notice of what the objections are going to be, but at the actual proceedings he is entitled to reply after the objector has been heard.

It follows then that the answer to the question contained in the case is that the Acting Chief Magistrate did not come to a correct determination or decision in point of law and that the proper order to be made (which I now make) is one remitting the case to the Licensing Court for rehearing and determination. In the circumstances of the case, there will be no order as to costs.

I would add that, in view of the doubt which must continue to exist as to the constitution of the Licensing Court which originally heard the matter, and in view of the legislative changes which have been mentioned, the parties might well consider abandoning these proceedings and commencing *de novo* in whatever Court now has jurisdiction. That observation is, of course, in no way binding on the parties and they will no doubt advise themselves regarding it.
