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the kind. This section of the Act is of a penal character. It presses hardly upon persons who may have rights of long standing, and was enacted simply for the purpose of protecting the Government revenue. It must, therefore, be construed strictly. But just as the law vests "the proprietor" of an estate with power to measure the lands of such estate, and our Courts have repeatedly held that no sharer only can be treated as a proprietor to enforce this right, so here we think we must hold that one of two joint auction-purchasers, who, without the consent of his co-sharer, brings a suit to avoid undertenures within the estate purchased by them, cannot be recognised as an "auction-purchaser of an entire estate" within the meaning of s. 37 of the Act.

On all these grounds, therefore, we reverse the judgment of the Court below, and dismiss the suit of the plaintiff with costs in all Courts.

Appeal allowed.

CRIMINAL REFERENCE.

Before Mr. Justice Pontifex and Mr. Justice Field.

THE EMPRESS v. NUDDIAR CHAND SHAW, ACCUSED.*

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March 9.

Excise—Sale by wholesale—Sale by Servant—Beng. Act VII of 1878, ss. 15, 59, and 60.

A sale of more than twelve quart bottles, or two gallons of spirituous or fermented liquors of *the same kind*, made at one transaction, is a sale by wholesale.

Quere.—Whether a sale of twelve quart bottles of one kind of liquor, and three quart bottles of another kind, at the same time, comes within the prohibition in the explanation clause of s. 15.

The licensed retail vendor himself is the only person liable to conviction under s. 60.

THIS was a reference made to the High Court under s. 296 of the Criminal Procedure Code.

* Criminal Reference, No. 33 of 1881, from the order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 28th February 1881.

One Nuddiar Chand Shaw, a servant of a licensed retail vendor of imported liquors, sold to an informer, twelve quart bottles of beer and three quart bottles of brandy (the sale of the two sorts of liquor being completed in one transaction). On these facts being proved, the Joint Magistrate of Howrah convicted Nuddiar Chand of an offence under s. 60 of Beng. Act VII of 1878 for having sold excisable imported liquor by wholesale, and sentenced him to pay a fine of one hundred rupees.

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On the case coming up before the Sessions Court, the Judge was of opinion that the facts proved, did not amount to an offence under s. 60 of the Act, for that the sale of two distinct quantities of different liquors, although in total exceeding two gallons, did not amount to a wholesale sale within the meaning of the Act. He further added, that the transaction was one which was prohibited by s. 15 of the Act and by the conditions of the license held by the convicted person's employer, and as such, would be punishable, under s. 59 of the Act, with a fine of Rs. 50; but the offence could not be brought under s. 60. He further was of opinion that the conviction was bad, inasmuch as it had been had upon *the servant of the vendor*, whereas the last clause of s. 59 made the vendor alone responsible. He therefore referred the case for the opinion of the High Court.

No one appeared at the hearing.

The opinion of the Court (PONTIFEX and FIELD, JJ.) was given by

PONTIFEX, J.—The accused has been convicted under s. 60 of "The Bengal Excise Act," VII (B. C.) of 1878. This section enacts that "every licensed retail vendor who sells by wholesale . . . shall be liable for every such offence to a fine not exceeding two hundred rupees."

The Sessions Judge is of opinion that the conviction is bad: (1) because the sale of twelve bottles of beer and three bottles of brandy at the same time, is not a sale by wholesale; and (2) because the person convicted is not a retail vendor, but the servant of such a vendor.

We think that the Sessions Judge is right in his view of the law as to the second point.

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As to the first point, there is more room for doubt. Under s. 15 of "The Bengal Excise Act," the sale of a larger quantity of spirituous or fermented liquors than twelve quart bottles would be a sale by wholesale. If, therefore, more than twelve bottles of beer or of brandy, *i. e.*, of the same kind of liquor, had been sold at one transaction, this would be a sale by wholesale. In this case two kinds of liquor were sold, and the quantity of neither kind exceeded twelve bottles. The case of such a sale is provided for by a clause of the 15th section, which is in fact an explanation, *viz.*, "Under this section a sale of an assortment of spirituous or fermented liquors in greater quantity than is specified above, by a licensed retail vendor, is prohibited." If this provision stood alone without any other provision following or qualifying it, the sale in the present case would probably be within the prohibition. The section then goes on to enact:—"The Board may, by rule, define what shall be held to be an assortment for the purposes of this section." So far as we have been able to discover, there is no evidence that the Board have made a definition of "an assortment" from which would be excluded such a sale as that in this case—a sale, that is, of twelve bottles of beer and three bottles of brandy. This being so, the sale in question probably comes within the prohibition in the explanation clause above referred to, but for the decision of this case it is not necessary to determine this point, as we think that, upon the second ground, the convictions must be reversed.

We are clear that the licensed retail vendor himself is the only person liable to the penalty provided by s. 60, and that the servant of such vendor is not liable to conviction under this section.

We set aside the conviction of Nuddiar Chand Shaw had under s. 60 of "The Bengal Excise Act," acquit him, and direct that the fine, if realized, be refunded.

Conviction set aside.