[HIGH COURT OF AUSTRALIA.]

LUCAS . . . . . APPELLANT;
DEFENDANT,

AND

MOONEY . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909.

MELBOURNE, *Sept.* 16.

Griffith C.J., O'Connor and Higgins JJ.

Licensing—Special permit to sell liquor after hours—Premises "in the neighbourhood of" railway station—Permit necessary for "the public convenience"—Licensing Act 1890 (*Vict.*), (*No.* 1111), *sec.* 7.

Sec. 7 of the *Licensing Act* 1890 (Vict.) provides that in respect of licensed premises "in the neighbourhood of" (amongst other places) places at which coaches or trains arrive, or from which they depart, at an hour earlier than 6 a.m. or later than 11.30 p.m., the licensee may sell liquor earlier than 6 a.m. or later than 11.30 p.m. on obtaining a special permit so to do from the Licensing Court, provided that the Court shall satisfy itself by evidence that such permit "is necessary for the public convenience."

Held, that the question whether licensed premises are in the neighbourhood of a railway station within the meaning of that section is a question of fact, which may be answered in the affirmative if they are conveniently available for use by persons desiring to use the railway station.

Held, therefore, that the Licensing Court might properly find that licensed premises in Collins Street, Melbourne, distant about 350 yards from the Flinders Street Railway Station, were in the neighbourhood of that railway station within the meaning of the section.

Held also, that the fact that a considerable number of persons who use railway trains after 11.30 p.m. make it a practice to use certain licensed premises for the purpose of having supper there after 11.30 p.m. and desire to have liquor with their suppers is evidence from which the Licensing Court may properly find in respect of those premises that a special permit is necessary for the public convenience within the meaning of the section.

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Decision of the Supreme Court of Victoria: *Mooney* v. *Lucas*, (1909) V.L.R. 333; 31 A.L.T., 3, reversed.

APPEAL from the Supreme Court of Victoria.

A special case was stated by way of appeal to the Supreme Court in accordance with the provisions of the *Licensing Act* 1890 by the Licensing Court for the Licensing District of Latrobe within the City of Melbourne on the application of Samuel Mooney, Inspector of Police and Licensing Inspector for that Licensing District, who felt himself aggrieved by a determination of the Licensing Court granting a special permit under sec. 7 of the Act to Anthony J. J. Lucas, of the Vienna Café, Collins Street, Melbourne, licensed victualler.

The facts as set forth in the special case were to the following effect:—On 16th February 1909 Lucas, the holder of a victualler's licence for the Vienna Café, which is in the Latrobe Licensing District, applied to the Licensing Court for that District, consisting of his Honor Judge *Moule*, Chairman, and Messrs. P. J. Dwyer and C. Cresswell, Police Magistrates, under the provisions of sec. 7 of the *Licensing Act* 1890 for a special permit authorizing him to sell liquor from 11.30 p.m. until midnight.

The evidence in support of the application showed that, in addition to two bars, a basement capable of accommodating 100 persons and a banquet room at the top of the building holding 200 persons, there was accommodation on the ground floor for 230 persons and upstairs for about 150 persons; that a large number of theatre-goers visited the café after the theatre for supper, with which they wished to take liquor, every night, and more especially on Saturday nights, when the ground floor would be full; that people arrived at the café between 11 p.m. and 11.30 p.m., and that the majority of them were unable to finish their suppers, including their liquor, before 11.30 p.m. It was also shown that the café was about 350 yards distant from the Flinders Street Railway Station, to walk to which, when the streets were crowded, took 8 or 9 minutes, but less time when the streets were not crowded, that trains arrived at and departed from that station at a later hour than 11.30 p.m., and that these trains were used by the majority of the people who visited the

café, after they had had their suppers, for the purpose of reaching their homes. It was also shown that there were several hotels nearer to the Flinders Street Station than the Vienna Café, to none of which however had special permits been granted.

Upon the evidence the majority of the Court (Messrs. Dwyer and C. Cresswell, the Chairman dissenting) found as facts that the Vienna Café was in the neighbourhood of places at which railway trains arrive and from which they depart at a later hour than 11.30 p.m., and that the permit was necessary for the public convenience.

Two of the questions asked by the special case were as follow:—

1. Whether upon the evidence the Licensing Court could lawfully determine that the Vienna Café was, within the meaning of sec. 7 of the *Licensing Act* 1890, in the neighbourhood of places at which railway trains arrive, and from which they depart, at a later hour than 11.30 p.m.?

2. Whether upon the evidence the decision of the Licensing Court that the permit granted to the licensee of the Vienna Café was necessary for the public convenience within the meaning of the said sec. 7 was correct?

The Full Court, by a majority (*Hodges* and *Hood* JJ., *à Beckett* J. dissenting), answered the first question in the negative, and by a majority (*à Beckett* and *Hodges* JJ., *Hood* J. dissenting) answered the second question in the affirmative, and they therefore held that the special permit should have been refused: *Mooney* v. *Lucas* (1).

From this decision Lucas now appealed to the High Court.

Duffy K.C. (with him *McArthur*), for the appellant. The Licensing Court was justified in finding that the Vienna Café is in the neighbourhood of Flinders Street Station. It is conveniently available for use by persons who happen to be at the railway station. That satisfies the requirement of being "in the neighbourhood of."

Mitchell K.C. (with him *Meagher*), for the respondent. The two questions of "public convenience" and "neighbourhood" run

(1) (1909) V.L.R., 333; 31 A.L.T., 3.

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into one another. "Public convenience" means the convenience of those using the railway station. But in this case "public convenience" has been treated as if it meant the convenience of those who want to have late suppers, and therefore stop in town for that purpose, and, having done so, want to travel by a train later than 11.30 p.m. The Judges at the Supreme Court were justified in taking judicial notice of the positions of the café and the railway station, and in saying that, under the existing conditions, the café is not in the neighbourhood of the railway station.

GRIFFITH C.J. In this case I, for my part, entirely concur with the judgment of *à Beckett* J. and the reasons given for it, and, if it were not that I am differing from the majority of the Supreme Court, I should not think it necessary to add anything. I will therefore say a few words upon the matter. Two questions arise under sec. 7 of the *Licensing Act* 1890, and they seem to me to be questions entirely distinct from one another. The ordinary hour for closing licensed premises is 11.30 p.m. Sec. 7 provides that:—"With respect to licensed victuallers' premises in the neighbourhood of wharves markets cattle or sheep yards or abattoirs or places at which coaches or railway trains arrive or from which they depart at an earlier hour in the morning than six o'clock or at a later hour than half-past eleven at night, the licensed victualler licensed in respect of such premises may sell and dispose of liquor in any quantity on such premises at an earlier hour than six o'clock in the morning or at a later hour than half-past eleven at night on obtaining a special permit so to do from the Licensing Court for the district under the seal of the said Court. Provided that the Licensing Court shall satisfy itself by evidence that such permit is necessary for the public convenience." There are therefore two conditions, one that the licensed premises shall be in the neighbourhood of—a railway station, in the present case—and the other that the Licensing Court shall satisfy itself by positive evidence that a permit is necessary for public convenience. If the condition of the premises being in the neighbourhood of a railway station is not satisfied, the fact that the permit is necessary for the public con-

venience is irrevelant, and if the permit is not necessary for the public convenience, the fact that the premises are in the neighbourhood of a railway station is equally irrelevant. The first question in the present case is whether premises which are distant about 350 yards from the Flinders Street Railway Station can be said to be in the neighbourhood of a railway station. I do not know how any Court can affirm that they can not. No limit is laid down by the Act. In many parts of the State houses separated by much greater distances from railway stations might be said to be in the neighbourhood of railway stations. In the case of a wharf, I know of a place where the nearest possible location of a house from the wharf is over a mile. The magistrates thought that the premises were in the neighbourhood of a railway station. In point of law could they say so? I say, of course they could. *à Beckett* J. thought that the meaning of "in the neighbourhood" was conveniently available for use by persons desiring to go to a railway station. I agree. Whether any particular house fulfils the condition is a question of fact for the Licensing Court.

On the other point, whether the permit was necessary for the public convenience, I accept the view taken by *à Beckett* and *Hodges* JJ. It appears from the evidence that there is a considerable class of persons—sometimes 100 in an evening, sometimes more and sometimes less—who desire to do a perfectly lawful thing, viz., to have supper in town at a place where they can get such a supper as they desire—and the appellant's premises are such a place—and they desire to be allowed to have that supper at an hour at which they will not be able to catch a train until after half-past eleven. If those persons are entitled to consideration as members of the public, it is for the justices to say whether for their convenience a permit should be granted. It is said that those persons are not sufficiently numerous to be considered. That also is a question of fact. If they were isolated persons—one at one time and one at another—the case might be different. But here it appears that there is a class of customers who desire to do a perfectly lawful thing which cannot be done at any other time, and, if they are to be allowed to do it, some facilities must be provided for them in the neighbourhood of a

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railway station. "Necessary" does not mean that persons cannot live without it. Is it a reasonable thing to allow the permit for the enjoyment of these social amenities? I cannot see any reason to doubt it. The majority of the Licensing Court came to that conclusion, and *à Beckett* and *Hodges* JJ. thought the same, and I agree with them. I think, therefore, that the appeal must be allowed.

O'CONNOR J. I am of the same opinion. The Licensing Court before giving this permit were bound by law to find two facts, first, that the applicant's premises were in the neighbourhood of a railway station, and secondly, that the permit was necessary for the public convenience. "Neighbourhood" is, no doubt, a word of very general application, and in the sense in which it is used in the Act, entirely relative. What is neighbourhood in one set of circumstances would not be in another set of circumstances. I agree with Mr. *Mitchell* that, in determining what is in the neighbourhood within the meaning of the section, some light may be gathered from the other requirement—public convenience. It seems to me that no house can very well be said to be in the neighbourhood of a railway station unless it is in such a position that it can reasonably be said to administer to the convenience of the public using the railway station. This, I gather, is the test which *à'Beckett* J. applied in his exposition of what neighbourhood means, and in the application of that test I entirely concur. Judged by that principle I think it difficult to say with any reason that these premises are not in the neighbourhood of the Flinders Street Railway Station when it is shown that persons using the railway station frequent this café as a convenience.

The next question is whether it is for the public convenience that this particular place should have a permit to sell liquor after half-past eleven o'clock. A number of irrelevant considerations appear to have been introduced in argument in the discussion of the question what is public convenience. If persons choose for whatever reason to stay in town late at night, whether it be with the wish to have supper in town and to go home by a late train, or whether they prefer to spend their time having supper rather than wait at the railway station until the train starts, that is a

matter into which it seems to me this Court has no right to inquire. The members of the public have the right to determine for themselves what is for their convenience. If there is a sufficient number of the public to form a substantial body, and that substantial body needs a convenience of that kind, then it appears to me the Licensing Court is entitled to consider whether for the accommodation of that convenience it is necessary to keep open this particular place after ordinary closing hours. The evidence is to my mind completely satisfactory that there are a considerable number of persons using the Flinders Street Station who make it a practice to frequent this café for the purpose of having supper there after half-past eleven o'clock at night. That being so, it seems to me that their convenience is in the sense contemplated in the Act the public convenience. The Act does not require that the convenience of the whole of the public should be studied, and it seems to me that the convenience of a sufficient number of the public is involved in keeping open this place to the hour for which the permit is granted. That being so, the finding of the majority of the Licensing Court seems to me to have been entirely justified by the evidence. I agree with my brother the Chief Justice in concurring entirely with the judgment of *à Beckett* J., and I do not think it necessary to add anything further.

HIGGINS J. I am of the same opinion. The word "neighbourhood" is vague, and that has led to the chief difficulty. But I think it was meant to be vague. I think the main inquiry of the magistrates was meant to be applied to their discretionary power for the public convenience. But even if we are to take the very modest meaning of "neighbourhood" suggested by *à Beckett* J., the magistrates have found as a fact that the house is within the neighbourhood of a railway station, and there is evidence to support their finding, and I do not think we ought to disturb it.

As for "public convenience," I am strongly inclined to agree with Mr. *Mitchell* that the proviso about the permit being necessary for the public convenience means the public convenience for the purpose of frequenters of "wharves markets cattle or sheep

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yards or abattoirs or places at which coaches or railway trains arrive or from which they depart at an earlier hour in the morning than six o'clock or at a later hour than half-past eleven at night." But accepting that view—assuming that it is right—for it is not necessary to decide that question—still this permit has been found to be for the convenience of that portion of the public—of a considerable number of persons acting independently—who go to theatres and who like to have supper before going to their trains. I can see no difficulty in treating that body of persons, limited though it is, as being portion of the public, and saying that it is for the public convenience that they should be served.

As to the word "necessary," I cannot concur with the argument that we must treat that word as meaning logically or absolutely necessary. I think, if we want to have an exposition of how the word "necessary" can be used in a freer sense and still a true sense, we have only to think of the case of *M'Culloch* v. *Maryland* (1), where Chief Justice *Marshall* speaks of means which are appropriate—which are plainly adapted—to a certain end as being necessary within the meaning of the American Constitution.

As to the imposition of a condition as to not serving liquor without meals, I desire to express no opinion.

Appeal allowed. Order appealed from discharged. Appeal to the Supreme Court dismissed. Respondent to pay the costs of this appeal.

Solicitor for the appellant, *Raynes W. S. Dickson.*

Solicitor for the respondent, *Guinness,* Crown Solicitor for Victoria.

B. L.

(1) 4 Wheat., 316.