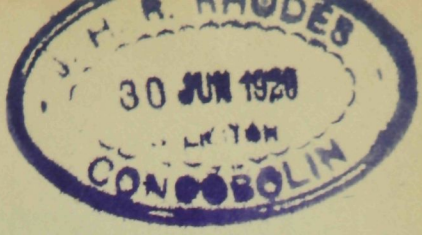

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1919-1920.

[HIGH COURT OF AUSTRALIA.]

FLANNAGAN . . . . . APPELLANT;

AND

MILNE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Oct* 1, 3.

Barton, Isaacs and Rich JJ.

Licensing—Lessor and lessee—Early closing—Adjustment of rent—Sufficiency of notice—Waiver—Licensing Acts Further Amendment Act (*No.* 2) 1915 (*S.A.*) (*No.* 1236), *secs.* 72, 73.

Sec. 72 of the *Licensing Acts Further Amendment Act* (*No.* 2) 1915 (S.A.) provides that "A lessee of any licensed premises may, within two months after the commencement of this Act, or within such further time, not exceeding six months after such commencement, as the President" of the Industrial Court "may allow, give to the owner of such premises notice in writing that, by reason of his pecuniary loss consequent on the operation of the *Licensing Act Further Amendment Act* 1915" (by which (*inter alia*) the time for closing hotels was fixed as 6 p.m. instead of 11 p.m.), "he desires that the amount of the rent payable under any lease, existing at the commencement of this Act, under which such lessee holds the said premises, or relating thereto, shall be adjusted as from the commencement of the said Act." Sec. 73 provides that "(1) If the said lessee (having given notice under sec. 72 of this Act) and the said owner do not, within one month after the giving of the said notice, agree as to the adjustment to be made, the said lessee may, within

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two months after the giving of the said notice, or within such further time as the President may allow, make application in writing to the President to adjust the amount of the rent payable as mentioned in the said sec. 72."

Held, that the notice required by sec. 72 need not follow the strict language of the section, and therefore that a notice in which the licensee said "under secs. 72, 73 and others of the *Licensing Acts Further Amendment Act* (*No.* 2) 1915 I hereby apply to have the rent of the" particular licensed premises "reduced," was a sufficient notice.

Held, also, on the facts, that even if the notice was insufficient the owner had waived any objection to it.

Toronto Corporation v. *Russell*, (1908) A.C., 493, applied.

Decision of the Supreme Court of South Australia reversed.

APPEAL from the Supreme Court of South Australia.

John Henry Flannagan, who was the licensee of the Imperial Hotel, Adelaide, which he held on a sub-lease, dated 12th November 1908, from George Milne (the lessee of Harry Esmond Rymill), Arthur Graham Rymill and Sydney Rymill, by notice dated 13th October 1916 applied to the President of the Industrial Court pursuant to the *Licensing Acts Further Amendment Act* (No. 2) 1915 to adjust the amount of the rent payable by him under his lease. That notice, by par. 3, alleged that the applicant had given notice in writing to Milne, on 23rd May 1916, "that by reason of my pecuniary loss consequent on the operation of the *Licensing Act Further Amendment Act* 1915 I desired that the amount of rent payable under" the lease "should be adjusted." On the application coming on for hearing on 28th November 1918 before a Stipendiary Magistrate exercising the powers, functions, duties and discretions of the President of the Industrial Court under Part IX. of the *Licensing Act* 1917, the Stipendiary Magistrate on the application of counsel for Milne called upon Flannagan to satisfy him that all notices required by the *Licensing Act* 1917 had been duly served by Flannagan, and fixed a subsequent day for the hearing and determination of the question whether such notices had been duly served. That matter coming on for hearing, the Stipendiary Magistrate on 28th March 1919 determined that all such notices had been duly served, except a notice to Milne, dated 19th October 1916, of the application by Flannagan to the President of the Industrial Court

to adjust the rent, and ordered that Flannagan should be allowed until 30th April 1919 to serve such notice upon Milne.

The notice of 23rd May 1916 was as follows:—"George Milne, Esq., Grenfell Street, Adelaide.—Under sections 72, 73 and others of the *Licensing Acts Further Amendment Act* (No. 2) 1915 I hereby apply to have the rent of the Imperial Hotel reduced and I hereby appoint Messrs. Moody Winnall & Stace of Waymouth Street, Adelaide, hotel brokers, my agents to negotiate with you on my behalf in arranging such reduction of rent.—Yours faithfully, J. H. Flannagan."

From that decision Milne appealed to the Supreme Court upon the grounds: (1) that a certain notice served by Flannagan upon Milne on 23rd May 1916 was not the notice required by the *Licensing Acts Further Amendment Act* (No. 2) 1915 (sec. 250 of the *Licensing Act* 1917); (2) that no notice required by that section was given by Flannagan to Milne; and (3) that without having given to Milne the notice required by that section Flannagan had no right to maintain or prosecute his application to the President of the Industrial Court to adjust the rent.

The Full Court allowed the appeal, and ordered that the determination and order of the Stipendiary Magistrate should be rescinded, holding (*inter alia*) that the notice of 23rd May 1916 was not a sufficient notice under sec. 72 of the *Licensing Acts Further Amendment Act* (No. 2) 1915 and that there had been no waiver by Milne of notice under that section.

From that decision Flannagan now appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Cleland K.C. (with him *Kelly*), for the appellant. Although sec. 72 of the *Licensing Acts Further Amendment Act* (No. 2) 1915 requires a notice, it does not purport to set out more than the substance of the notice, and does not require any particular form of words to be used. The notice of 23rd May 1916 is a substantial compliance with sec. 72, and it was not necessary to state that it was by reason of his pecuniary loss consequent on the operation of the *Licensing Act Further Amendment Act* 1915 that he desired an adjustment of

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his rent. [Counsel referred to *Howard* v. *Bodington* (1).] If the notice was insufficient, the respondent waived his right to rely upon its insufficiency. The adjustment of the rent was purely a matter of private rights between the appellant and the respondent, and, notice being required for the benefit of the respondent, he might waive it. [Counsel was stopped.]

Piper K.C. (with him *Mellor*), for the respondent. The *Licensing Acts Further Amendment Act* (No. 2) 1915 came into operation on 26th March 1916, and 26th September was the latest date upon which a notice under sec. 72 could be given. Therefore, if no notice or no sufficient notice had been given within that time, the right given to the appellant would have lapsed, and nothing that the respondent did after that date would be a waiver of his right to object to the absence or insufficiency of the notice. Before 26th September 1916 the respondent did nothing which, as between him and the appellant, amounted to a waiver. This is not a case to which the principle of waiver applies. The Statute does not confer upon a lessee an independent and substantive right against his lessor, but it confers upon a lessee a right to take certain proceedings which may have a certain result. The giving of the notice is a condition precedent to the right to take the proceedings. The giving of the notice is not a mere matter of procedure. It cannot be said that notwithstanding the absence of the notice the respondent had agreed to the rent being adjusted. (See *Rendall* v. *Hill's Dry Docks and Engineering Co.* (2).)

[RICH J. referred to *Lowe* v. *M. Myers & Sons* (3); *Oliver* v. *Nautilus Steam Shipping Co. Ltd.* (4); *Graham* v. *Ingleby* (5); *Wilson* v. *McIntosh* (6).]

The notice which was given was not sufficient. The requirements of sec. 72 must be substantially complied with. The statement in the notice that the application is made under secs. 72, 73 and other sections of the Act does not import unambiguously that it was by reason of the applicant's loss consequent on the operation of the

(1) 2 P.D., 203, at p. 211.
(2) (1900) 2 Q.B., 245, at p. 249.
(3) (1906) 2 K.B., 265, at p. 269.
(4) (1903) 2 K.B., 639, at p. 646.
(5) 1 Ex., 651, at p. 657.
(6) (1894) A.C., 129.

earlier Act that an adjustment of the rent was desired. [Reference was also made to *In re South Australian Hotel* (1); *Keen* v. *Millwall Dock Co.* (2); *Stourbridge Urban District Council* v. *Butler and Grove* (3).]

Cur. adv. vult.

Oct. 3.

The following judgments were read :—

BARTON J. Acts Nos. 1195 and 1236, both passed in 1915, came respectively into operation on days fixed by proclamation, the last-named Act coming into force, later than the first-named, on 26th March 1916. Sec. 72 of No. 1236 is as follows : " A lessee of any licensed premises may, *within two months* after the commencement of this Act, or within such further time, not exceeding six months after such commencement, as the President may allow, give to the owner of such premises notice in writing that, by reason of his pecuniary loss consequent on the operation of the *Licensing Act Further Amendment Act* 1915, he desires that the amount of the rent payable under any lease, existing at the commencement of the said Act, under which such lessee holds the said premises, or relating thereto, shall be adjusted as from the commencement of the said Act." Sec. 73 (1) of the same Act, so far as it is material to the present case, is as follows : " If the said lessee (having given notice under sec. 72 of this Act) and the said owner do not, within one month after the giving of the said notice, agree as to the adjustment to be made, the said lessee may, within two months after the giving of the said notice, or within such further time as the President may allow, make application in writing to the President to adjust the amount of the rent payable as mentioned in the said sec. 72."

The appellant, being the sub-lessee of the respondent, who himself held a lease from Harry Esmond Rymill and others of the licensed premises in question, gave the respondent on 23rd May 1916, that is within two months of the commencement of Act No. 1236, the following notice :—" George Milne, Esq., Grenfell Street, Adelaide.—Under secs. 72, 73 and others of the *Licensing Acts Further Amendment Act* (No. 2) 1915 I hereby apply to have the rent of the Imperial Hotel

(1) (1917) S.A.L.R., 262, at p. 270. (2) 8 Q.B.D., 482.
(3) (1909) 1 Ch., 87.

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reduced and I hereby appoint Messrs. Moody Winnall & Stace of Waymouth Street, Adelaide, hotel brokers, my agents to negotiate with you on my behalf in arranging such reduction of rent.—Yours faithfully, J. H. Flannagan." As between the appellant and the respondent, the latter was the "owner" of the licensed premises.

The questions argued were (1) whether the notice of 23rd May 1916 was a good and sufficient notice within the sections quoted, and (2) whether, if the notice was defective, the respondent had waived the defects.

The facts remaining to be stated relate to the question of waiver.

The respondent did not negotiate as requested, and there was no agreement. On 6th June 1916 the President of the Industrial Court by order allowed the respondent, as he might under sec. 73, three months in addition to the time fixed by that section to make application to the President for the adjustment of the rent. Notice of the President's order was given by the appellant's agents to the respondent in writing on 9th June 1916. On 13th October 1916 the appellant made application to the Industrial Court for the adjustment of the rent. In passing, it may be stated that objection was taken to par. 3 of that application as stating the notice of 23rd May 1916 incorrectly. On that it may be observed that if the notice is within sec. 72 the paragraph is correct. On 25th October 1916 the respondent made application to the President that if, as the result of any adjustment in respect of rent of the licensed premises, the appellant's rent to the respondent should be reduced, the President would, under sec. 76 of the Act No. 1236, reduce by so much as he should determine to be fair and equitable the respondent's rent to his superior lessors. In this application the respondent set out the appellant's notice of the 23rd of May. After correspondence beginning on 2nd November 1918 the respondent made application on the 22nd of that month to the Stipendiary Magistrate for an order against the appellant for (1) written particulars of the reduction of rent applied for, and (2) inspection of the account books, &c., relating to the carrying on of the business of the appellant's hotel, &c. At this stage, the respondent's solicitors on 27th November 1918 challenged, in a letter, the sufficiency of the notice of May 1916 and the jurisdiction of the Court to proceed in the matter. They also

purported to withdraw their notice of intention to apply for particulars. The application to the Stipendiary Magistrate was heard on 28th March 1919, when the Stipendiary Magistrate determined that he was satisfied that all notices required by the *Licensing Act* 1917 had been duly served by the appellant on the respondent except the notice of 19th October 1916, which notice might not have been received by the respondent until the 20th of that month, and he allowed the appellant further time within which to serve notice of the application. The notices required by the *Licensing Act* 1917 are those required by the Act No. 1236. The Stipendiary Magistrate (who was duly exercising the powers, &c., of the President of the Industrial Court) held the notice of 23rd May 1916 to be sufficient.

An appeal to the Supreme Court was allowed by the judgment of the Full Court now appealed from.

The grounds of the appeals by the now respondent to the Supreme Court and by the now appellant to this Court are, respectively, that the notice is not that required by sec. 72 of the Act No. 1236 and the corresponding section, 250, of the *Licensing Act* 1917, and, on the other hand, that the notice is a good and sufficient one as required.

I am of opinion that the notice is sufficient for its purpose within the requirements of the section, and I also think that if there are any defects in it, which I do not concede, those defects have been waived by the respondent. On the first point the objections urged are two in number: first, that the notice does not state that the desire therein expressed for reduction is by reason of the appellant's pecuniary loss consequent on the operation of the Act No. 1195, and, secondly, that it asks not to have the rent "adjusted" but to have it "reduced." The second of these objections was not strenuously insisted on, and in this I think counsel were wise, because, looking at the context of sec. 72, it is plain that a notice under that section given by reason of the pecuniary loss entailed by the operation of Statute No. 1195 cannot well be for any other purpose than the obtaining of a reduction of rent, though that reduction may amount to an adjustment.

The Statute does not prescribe any precise form for the notice, and it is sufficient that it should contain substantially the requirements of the section. The notice is not a step in legal proceedings,

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though if it is ignored, or if it does not result in any agreement, proceedings for an adjustment may follow under sec. 73. The notice purports to be given under secs. 72, 73, and others of the Act No. 1236. It touches 73 only so far as proceedings may possibly follow in the event of its failure to lead to an agreement. The reference to other sections is mere surplusage. But it bears in its forefront a clear intimation of the invocation of sec. 72, and a person receiving that notice with that intimation is inevitably referred to the provisions of the section. *Verba relata inesse videntur.* A person can only give notice under this section by reason of the pecuniary loss mentioned. He declares in the notice that he gives it under the section. Is it not plain that he means that he is giving it because of the pecuniary loss ? If the notice had left out mention of the section, it would, of course, have been ineffective. But the reliance of the notice on the section makes it a matter of absolutely necessary inference that the pecuniary loss is the reason of the application. As a merely literal following of the section is conceded not to be necessary, can the conclusion be avoided that the terms of the notice are a compliance in substance ? I, at any rate, cannot resist that conclusion, and therefore I must hold that the notice is good.

In any case it seems clear that any defect that existed in the notice has been waived. It was only at a late stage that the respondent or those who represented him objected to it. He made the application of 25th October 1916. In that application he set out the notice now challenged, and could only have set it out as one of his reasons for the application then made. Without it there was no reason, and he made the application of 22nd November 1918, which he could scarcely have made without considering that he had received a sufficient notice. It is true he purported to withdraw that application on 27th November 1918, but he appeared by counsel in support of the application on 28th March 1919. But before that point was reached his previous actions amounted to a waiver.

It is not necessary to cite again the cases that were mentioned from the Bench in argument. The favour conceded to the appellant by Statute to apply for the adjustment of rent was conditioned, in favour of the respondent, upon the appellant's compliance with

the terms of the enactment in his notice. That is undeniable. But if the notice, coming to the knowledge of the respondent, was such as to satisfy him of its sufficiency to the extent that he took steps as between them evidencing such satisfaction, then he waived any mere defect in the notice, acting as if it were good. The cases proceed upon the maxim *Quilibet potest renuntiare juri pro se introducto*, which maxim, I think, applies here.

Accordingly I am of opinion that the appeal is well founded on all grounds, and should be allowed—the order of the Supreme Court to be discharged and the order of the Stipendiary Magistrate restored. The respondent to pay the costs here and below.

ISAACS AND RICH JJ. The first question is whether the notice of 23rd May 1916 was a compliance with the requirements of sec. 72 of Act No. 1236. That section enabled the lessee to give the owner "notice in writing that, by reason of his pecuniary loss consequent on the operation of the *Licensing Act Further Amendment Act* 1915, he desires that "the amount of the rent payable under any lease . . . shall be adjusted as from the commencement of the said Act." The fact that sec. 72 prescribed the time for giving that notice to be "within two months after the commencement of this Act" in the absence of extension, and limited the possible extension to a further four months, shows clearly that the "pecuniary loss" was mainly if not wholly potential. The notice might have been given on the day after the commencement of the Act. Therefore, what the Legislature meant was that the notice in writing should convey clearly to the lessor not merely the "desire" of the lessee to adjust—which means, as far as he is concerned, to reduce—his rent, but that the desired reduction has relation to the altered state of circumstances brought about by the Act No. 1195, called in sec. 72 "the Licensing Act Further Amendment Act 1915." The new legislation was, of course, a matter of notoriety, and it would be absurd to imagine that lessors of hotels were not well acquainted with it.

The letter that Flannagan wrote to Milne on 23rd May 1916, though inartistically framed, yet, particularly when coupled with the covering letter, certainly conveyed to the latter in the clearest

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possible terms that the desired reduction of rent was in pursuance of the recent legislation. Did that convey to Milne's mind that the expression of this desire was prompted by the potential pecuniary loss consequent on the earlier closing provisions of the new Act, or not? It was argued by Mr. *Piper* that Milne could not be supposed to carry in his mind the provisions of sec. 72. Perhaps not, but could he reasonably be supposed to be ignorant that, whether Flannagan correctly or incorrectly quoted the specific section, "the pecuniary loss" consequent on the operation of the Licensing Act of 1915 was the reason of the expressed desire of his tenant the licensee? Looking at the antecedent probability, at the absence of any attempt on Milne's part to deny that he understood the notice in the necessary sense, and looking also to the conduct of Milne even when acting under legal advice, it is not really open to doubt that he so understood it. If so, that is all that is necessary; for the section does not require any rigorous form. Substance is all that is necessary. All that is required is that the lessor shall understand it is the potential loss occasioned by the new Act that gives rise to the demand, and therefore that, unless a voluntary arrangement be arrived at, the President may be applied to, and that he, the lessor, may in turn take such steps as are necessary to protect himself in case his own liability needs adjustment. All this Milne thoroughly understood, and he acted accordingly, and so sec. 72 was, in substance, complied with. No possible disadvantage could in such circumstances arise, because sec. 77 enabled the President to adjust rents all along the line.

But a second question also arises—whether, even if the notice fell short of the technical requirements of sec. 72, Milne can be heard to object to the insufficiency. The principle is clear that a statutory provision introduced for the benefit of an individual can be waived by him if waiver is not forbidden by law. The material facts for the purpose are:—(1) On 23rd May 1916 Flannagan sent the notice to Milne, in a letter which further stated that the application was "pursuant to the provisions contained in the *Licensing Acts Further Amendment Act* (No. 2) 1915." (2) No action was taken or objection made by Milne up to June. (3) On 6th June 1916 the President

made an order giving three months' further time to apply to the President to adjust the rent. (4) On 9th June 1916 that order was notified to Milne. (5) 27th September 1916 was the last day for giving any notice under sec. 72, inasmuch as the Acts came into operation on 26th March 1916. And up to this date Milne stood by and made no objection. (6) On 13th October 1916 Flannagan made written application for adjustment. His application, by par. 3, alleged that on 23rd May 1916 he gave notice in writing "that by reason of my pecuniary loss consequent on the operation of the *Licensing Act Further Amendment Act* 1915 I desired" &c. That followed the language of sec. 72 and purported to be the effect of the notice actually given. (7) On 19th October 1916 Flannagan gave to Milne notice of that application. (8) No objection was made by Milne to the terms of that application. (9) On 25th October 1916 Milne, under sec. 76, made application to the President to adjust his over-lease with Rymill and set out Flannagan's original notice of 23rd May 1916. (10) Nothing was done until 1918, part of the interval of inaction being due, as stated at the Bar, to the pendency of the case of *In re South Australian Hotel* (1), decided in October 1917, on the meaning of "pecuniary loss" in sec. 72. (11) In 1918, on 2nd November, after and apparently in pursuance of that decision, Milne required Flannagan to give particulars of the reduced rent applied for in the notice of 23rd May 1916; and demanded inspection of Flannagan's books of accounts, threatening application to the Special Magistrate to compel particulars and inspection. This was pressed as late as 7th November. It is inconceivable that such demands should be made if Milne did not at least thoroughly understand the notice in the sense required by sec. 72. On 27th November 1918 comes a change of front by Milne. He now objects to the terms of par. 3 of the application already over two years old. And he withdraws his notice of application for particulars, asserting want of jurisdiction in the Court to hear the case. On 28th March 1919 the Special Magistrate, Mr. Nesbit, decided that the notice of 23rd May 1916 sufficiently answered the requirements of sec. 72, and on 26th August the Supreme Court reversed the decision and held further that the claim of waiver was not sustained.

(1) (1917) S.A.L.R., 262.

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It is convenient at once to refer to the case of *Toronto Corporation* v. *Russell* (1), which at once states and illustrates the principle of waiver of a statutory condition. There the appellants sold the respondent's land without giving him notice as required by Statute. The Privy Council, speaking by Lord *Atkinson*, said (2) :— " These being things entirely for his own benefit, he can undoubtedly waive the notice : *Great Eastern Co.* v. *Goldsmid* (3). The question is, Has he waived it ? In other words, is there evidence from which it may fairly be inferred that he consented to dispense with the notice ? *Bowen* L.J. in *Selwyn* v. *Garfit* (4) says :—' What is waiver ? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice. If it could be shown that the mortgagor had power to waive the notice, and that he knew that the notice had not been served, but said nothing before the sale and nothing after it, although this would not be conclusive, there would be a case which required to be answered.' " Now, in applying the principle that inaction though not waiver is evidence of waiver, their Lordships proceed to inquire what the respondent knew was taking place, how far he failed to complain, and how far he failed to explain his inaction ; and then they conclude thus : " Their Lordships think that, in the absence of all explanation by the plaintiff other than that given in his evidence on discovery, the legitimate inference to be drawn is that he consented to dispense with this notice—that is, he waived it."

Pursuing the same method in this case, it is the just and reasonable conclusion—from the silence and inaction of Milne, not only until the time permitted by the Act for giving a better notice had passed, which is a very important consideration in itself, but also long afterwards (until, indeed, more than two years afterwards no complaint was made) in circumstances which challenged opposition and in which opposition on other grounds was shown, and in view of the positive action of Milne under the provisions of the Act, and the entire absence of any explanation or statement by him that he did not understand the notice as conveying the necessary reason—that he was content to accept it as a sufficient notice, and consented to

(1) (1908) A.C., 493.
(2) (1908) A.C., at p. 500.
(3) 9 App. Cas., 927, at p. 936.
(4) 38 Ch. D., 273, at p. 284.

dispense with a better one, in other words that he waived any objection to its literal terms.

On both grounds the appeal should succeed.

Appeal allowed. Order appealed from discharged and order of Stipendiary Magistrate restored. Respondent to pay costs here and below.

Solicitors for the appellant, *Barwell, Kelly & Hague.*

Solicitors for the respondent, *Bakewell, Stow & Piper.*

Appl *(v Dolan* (1992) 58 ASR 501 | Dist *Hicks v R* (1920) 28 CLR 36 | Cons *M v R* (1994) 126 ALR 325 | Appl *M v R* (1994) 69 ALJR 83 | Cons *Gipp v R* (1998) 72 ALJR 1012 | Cons *R v Gallagher* [1998] 2 VR 671

B. L.

[HIGH COURT OF AUSTRALIA.]

HARGAN . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Criminal Law—Evidence—Sexual offence on young girl—Absence of corroboration—Effect of omission to warn jury—Misleading direction—Miscarriage of justice—Quashing conviction—New trial—Criminal Appeal Act 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *secs.* 6, 8—*Crimes Act* 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 71—*Crimes (Girls' Protection) Act* 1910 (*N.S.W.*) (*No.* 2 *of* 1910), *sec.* 2.

Sec. 6 of the *Criminal Appeal Act* 1912 (N.S.W.) provides (*inter alia*) that on an appeal against a conviction the Court of Criminal Appeal shall allow the appeal if it is of opinion that on any ground whatsoever there was a miscarriage of justice, and that, subject to the Act, if it allows the appeal, it shall quash the conviction. Sec. 8 empowers the Court to order a new trial if it considers that the miscarriage can be more adequately remedied by an order for a new trial than by any other order which the Court may make.