[PRIVY COUNCIL.]

WHITE . . . . . APPELLANT;

AND

THE LICENSING COURT (SOUTH AUSTRALIA) RESPONDENT.

ON APPEAL FROM THE HIGH COURT.

PRIVY COUNCIL.* 1919. May 26.

Licensing—Local option—Adoption of resolution that number of licences be not increased or reduced—Application for renewal of licence—Objection on ground that premises not required for accommodation of public—Jurisdiction of Licensing Court to refuse renewal—Licensing Act 1908 (*S.A.*) (8 *Edw. VII. No.* 970), *secs.* 44, 47, 59, 183, 199, 200, 203.

Sec. 44 of the *Licensing Act* 1908 (S.A.) provides that a Licensing Bench "shall hear, inquire into, and determine" all applications for licences and for renewal of licences and also all objections which are made to any such applications. Sec. 47 provides that one of the objections that may be taken to an application for a grant or renewal of a publican's licence is "that the licensing of the premises is not required for the accommodation of the public." Sec. 59 provides that "(1) No licence shall be renewed nor shall any application be granted as a matter of course; and upon the hearing of any application for the grant, renewal, transfer, or removal of a licence, whether notice of objection has been delivered or not, and whether objection is taken at the hearing or not, the Bench shall hear, inquire into, and determine the application and all such objections (if any) on the merits, and shall grant or refuse the application upon any ground which, entirely in the exercise of its discretion, it deems sufficient; and against such grant or refusal there shall be no appeal." Secs. 177 to 182 provide for the taking of a local option poll of the electors in a Local Option District. Sec. 183 provides that "(1) The resolutions to be submitted at a local option poll are the following:—1. That the number of licences be reduced: 2. That the number of licences be not increased or reduced: 3. That the Licensing Bench may in their discretion increase the

* Present—Viscount Haldane, Lord Buckmaster, Viscount Cave, Lord Dunedin and Lord Shaw.

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number of licences." Sec. 200 provides that "If the second resolution is adopted at a local option poll in any Local Option District, no licence of any class shall thereafter, whilst such resolution continues in force, be granted in such district, except in respect of premises licensed at the time of such poll or premises to which a licence existing within such district at such time is removed."

Held, that the adoption of the second resolution only limits the number of licences that may be granted, and does not affect the discretion given to the Licensing Bench by sec. 59 to grant or refuse an application for a renewal of an existing licence.

Held, therefore, that where the second resolution has been adopted and an application is made for a renewal of a publican's licence the Licensing Court (which by the *Licensing Acts Further Amendment Act* (*No.* 2) 1915 was substituted for the Licensing Benches) may properly entertain an objection that the licensing of the premises is not required for the accommodation of the public.

Decision of the High Court: *Licensing Court* (*S.A.*) v. *White*, 24 C.L.R., 318, affirmed.

APPEAL from the High Court.

This was an appeal to the Privy Council by William Thomas White from the decision of the High Court: *Licensing Court* (*S.A.*) v. *White* (1).

The judgment of their Lordships, which was delivered by Viscount CAVE, was as follows:—

This is an appeal by special leave from a judgment of the High Court of Australia dated 27th February 1918, reversing a decision of the Supreme Court of South Australia and discharging a writ of prohibition issued by that Court. The writ in question prohibited the Licensing Court from hearing, inquiring into, and determining the objection of Thomas Henry Davey, the Chief Inspector of licensed premises at Adelaide, to the renewal of a publican's licence held by the appellant, William Thomas White, in respect of certain licensed premises at Adelaide known as the Adelaide Hotel; and the question involved in this appeal is whether, on the true construction of the *Licensing Act* 1908 of South Australia (No. 970) and in the events which have happened, the Licensing Court has jurisdiction to hear and determine that objection.

(1) 24 C.L.R., 318.

It will be convenient in the first place to refer to the material provisions of the *Licensing Act* 1908.

Under Part II. of the Act the Governor may by Order declare that any area in South Australia shall constitute a Licensing District, and may nominate a Licensing Bench for that district (sec. 5). By virtue of the *Licensing Acts Further Amendment Act* (*No.* 2) 1915 (No. 1236) the Licensing Benches have been abolished, and the powers formerly entrusted to those Benches have become vested in the Licensing Court.

Under Part III. of the Act of 1908 no person may sell intoxicating liquors by retail without being licensed so to do under the Act (sec. 11). Licences are of different classes, such as publicans' licences, storekeepers' licences, wine licences, &c. (sec. 15). Every licence granted under the Act remains in force until the 25th day of March in the following year, but no longer (sec. 28). An application for renewal must be made to the Clerk of the Court (sec. 41), who is to give notice of the application to the police and to the inspector for the district (sec. 42); and notice of objection must also be served upon the applicant (sec. 46). The objections which may be taken to the renewal of a publican's licence are set out in detail in sec. 47 of the Act, and may be summarized as follows: (1) objections to the character of the applicant, *e.g.*, that he is of bad character or of drunken habits, or is interested in keeping a house of ill fame; (2) objections to the conduct of the house, *e.g.*, that it is of a disorderly character or is frequented by prostitutes, thieves, or persons of bad character, or that the management of the house has not been satisfactory; (3) objections to the structure of the premises, *e.g.*, that there is direct communication with unlicensed premises, that a direction of the Court as to additional accommodation has not been complied with, or that the accommodation is unsuitable or insufficient; (4) an objection that the licensing of the premises is not required for the accommodation of the public.

Provision is also made for the forfeiture of a licence on the conviction of the holder or on his default in other respects (secs. 69-74).

Sec. 59 of the Act is as follows :—" (1) No licence shall be renewed nor shall any application be granted as a matter of course; and upon the hearing of any application for the grant, renewal, transfer,

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or removal of a licence, whether notice of objection has been delivered or not, and whether objection is taken at the hearing or not, the Bench" (now the Licensing Court) "shall hear, inquire into, and determine the application and all such objections (if any) on the merits, and shall grant or refuse the application upon any ground which, entirely in the exercise of its discretion, it deems sufficient; and against such grant or refusal there shall be no appeal. (2) It shall not be necessary for the Bench" (now the Licensing Court) "to state the ground or reason for its decision to grant or refuse such application; or, if refused, to state upon what (if any) particular objection the application is refused. (3) No compensation shall be payable to any person by reason of the refusal of the Bench" (now the Licensing Court) "to grant any application."

Part V. of the Act provides for the limitation of the number of licences by what is called a local option poll. Under Division I. of this part of the Act each Electoral District for the House of Assembly is constituted a Local Option District, or may be divided by the Governor into several Local Option Districts (sec. 177). A quorum of electors in any Local Option District, *i.e.*, five hundred of such electors or one-tenth of the total number, may petition for a local option poll to be taken in the district (sec. 178); and thereupon a poll is taken of all the electors resident in the district, the resolutions submitted at the poll being as follows:—"(1) That the number of licences be reduced: (2) That the number of licences be not increased or reduced: (3) That the Licensing Bench" (now the Licensing Court) "may in their discretion increase the number of licences" (sec. 183).

If the first resolution is passed, it is taken to mean that the number of licences of each class current within the district shall be reduced by one-third, any fraction being disregarded (sec. 183). Each elector may record only one vote on his ballot-paper (sec. 184). If the votes recorded in favour of the first resolution do not constitute a majority of the valid votes recorded at the poll, the votes recorded in favour of that resolution are to be added to the votes recorded in favour of the second resolution; and if the sum of the votes thus found in favour of the second resolution does not

constitute a majority of the valid votes recorded at the poll, then the third resolution is to be adopted (sec. 185).

In Division II. of Part V. provision is made for the enforcing of the first resolution. If that resolution is adopted, a Special Bench is to be constituted for the purpose of determining which of the licences in each class shall not be renewed after the expiration of the year for which they were granted (secs. 191-198), and the Licensing Court is required at its next annual meeting to reduce the number of licences by not renewing any of the licences so selected by the Special Bench ; but it is expressly provided that the Licensing Court shall not, whilst the resolution continues in force, be bound to grant the full number of licences so reduced, and that its discretion shall in other respects continue as before the local option poll.

Division III. of Part V. is headed " Effect of other Resolutions," and consists of two sections. Sec. 200, which deals with the effect of the adoption of the second resolution, is as follows : " If the second resolution is adopted at a local option poll in any Local Option District, no licence of any class shall thereafter, whilst such resolution continues in force, be granted in such district, except in respect of premises licensed at the time of such poll or premises to which a licence existing within such district at such time is removed." Sec. 201 provides that, if the third resolution is adopted, new licences may be granted in the discretion of the Licensing Court, but not so as to exceed in number one-third of the existing number of licences. A resolution adopted at a local option poll is to continue in force until altered or rescinded by a resolution adopted at a subsequent local option poll (sec. 203).

The above appear to be all the sections of the Act which are material for the purposes of this case.

The Licensing District of Adelaide was duly constituted under the Act, and became a Local Option District. On 2nd April 1910 a local option poll of the electors of the Local Option District of Adelaide was taken pursuant to Part V. of the Act, and resulted in the adoption of the second resolution above referred to, namely, that the number of licences be not increased or reduced.

On 27th November 1916 the appellant, William Thomas White, who since 4th May 1914 had been the holder of a publican's licence

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for the Adelaide Hotel, duly made application for a renewal of that licence at the next annual meeting of the Licensing Court. On 5th February 1917 Thomas Henry Davey, Chief Inspector of licensed premises for the district, gave notice of objection to the renewal of this licence, on the ground that the licensing of the premises was not required for the accommodation of the public. On 7th March 1917 the application came on for hearing at the Licensing Court, and thereupon counsel for the applicant submitted that, in view of the decision on the local option poll "that the number of licences be not increased or reduced," the Court had no jurisdiction to entertain the objection of Thomas Henry Davey, or to refuse to renew the licence on the ground of redundancy. After argument this contention was rejected by the Licensing Court, who held that the whole effect of the second resolution is set out in sec. 200, and accordingly that the passing of that resolution, while it abrogates the power of the Court to grant new licences, has no effect on the absolute discretion to refuse an application for the renewal of an existing licence conferred upon the Court by sec. 59 of the Act. The Court accordingly held that they had jurisdiction to consider the objection, and, being of opinion that the objector had made out a case, called upon the applicant to show cause why his application should not be refused.

Upon this decision being given, the applicant applied to the Supreme Court of South Australia for a writ of prohibition, and upon this application an order *nisi* was made on 15th May 1917, and was made absolute on 14th August 1917. The decision of the Supreme Court, which represented the opinion of the majority of the Court (the Chief Justice and *Buchanan* J., His Honor Sir *J. H. Gordon* dissenting), was based upon the view that effect must be given to the express direction in the second resolution that the number of licences be not reduced, and that sec. 200 is inserted *ex abundanti cautelâ*, and in order to make it clear that a new licence is not to be granted in exchange for an existing licence. Against this decision an appeal was brought to the High Court of Australia, which on 27th February 1918 unanimously allowed the appeal, and discharged the writ of prohibition. Against this decision the present appeal is brought.

The real question for decision is whether the effect of the passing of the second resolution on the local option poll was to take away the absolute discretion given to the Licensing Court by sec. 59 of the Act of 1908 to refuse renewals of licences within the district. The appellant contends that the resolution had that effect, and relies upon the form of the resolution passed at the poll, namely, that the number of licences be not increased or reduced. But it is important to notice that Division I. of Part V. of the Act, while it provides for the passing of one or other of the three resolutions, contains no provisions which give to a resolution when passed any binding effect. In order to ascertain the legal effect of any of the resolutions, it is necessary to turn to Divisions II. and III. of Part V.; and, when this is done, it is found that the only effect thus given to the second resolution is that described in sec. 200, namely, that the grant of new licences in the district is thereby forbidden. It is argued that the resolution may have effect independently of sec. 200, and must be taken to mean what it says, namely, that the number of licences shall not be reduced; but the answer is that none of the resolutions set out in sec. 183 means exactly what it says, or can be understood without reference to the later sections of the Act. Resolution 1, which in form provides only for some reduction in the number of licences, and might be satisfied (so far as its terms go) by the refusal to renew a single licence, is explained by the later provisions of the Act as meaning that the number is to be reduced by one-third, and that this reduction is to be effected by the special means fully described in Division II. of this Part of the Act. Again, resolution 3, which in terms provides that the Court may in their discretion increase the number of licences and imposes no limit on such increase, is found on reference to sec. 201 to involve a limitation of the permitted increase to one-third of the existing number of licences. In view of these considerations it would be improper to rely entirely upon the form of any particular resolution as evidencing its effect, and regard must be had to the manner in which each resolution is worked out by the later sections of the Act.

There is a further difficulty in the way of the appellant. If resolution 2 is to be taken as meaning what it says, then it prevents

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the justices from refusing a renewal, not only on the ground of redundancy, but also on any of the other grounds above described, such as the bad character of the applicant or the bad conduct or structure of the licensed premises; for a refusal to renew on any of these grounds would equally have the effect of reducing the number of licences. In that case the effect of passing the resolution is to give security of tenure to an unsuitable or even to a criminal licensee, and to premises in no way adapted for carrying on a publican's business. Counsel for the appellant, no doubt seeing the difficulty of maintaining that the Act must be construed so as to have this effect, contended that the passing of resolution 2 only prevents the refusal of a renewal on the ground of redundancy; but redundancy is classed in sec. 47 of the Act with the other grounds of objection, and no warrant is to be found for reading "reduced" in the resolution as meaning only "reduced on the ground of redundancy." It would be a strange result of the Act if the passing of resolution 2, for which, if resolution 1 is not passed, the supporters of that resolution are deemed to have voted, should be to destroy the discretion of the justices and give full security of tenure to the existing licence-holders.

It is said that, if the view of the High Court is correct, the words "or reduced" in resolution 2 have no meaning; but it appears to their Lordships that these words may fairly be held to refer to a compulsory reduction such as is described in resolution 1 and in the sections explaining that resolution. In other words, the electors, by passing resolution 2, decide that the number of licences is not to be compulsorily reduced by one-third, but is not to be increased.

Upon a consideration of all the provisions of the Act, their Lordships have arrived at the conclusion that this is the meaning and effect of the resolution, and accordingly that the decision of the High Court is right, and that this appeal should be dismissed with costs, and they will humbly so advise His Majesty.

Their Lordships cannot part with this appeal without adding that, while the effect of the second resolution may be ascertained by a careful consideration of the provisions of the Act, the form of the resolution renders it liable to be misunderstood by the electors, who are asked to vote upon it without having the Statute before

them; and if an amendment of the Statute should be in contemplation, it might be well to add to the form of ballot-paper short explanations as to the effect of each resolution such as are contained in the form of voting paper scheduled to the *Temperance (Scotland) Act* 1913.

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[HIGH COURT OF AUSTRALIA.]

MOORS . . . . . APPELLANT;
DEFENDANT,

AND

BURKE . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1919.

MELBOURNE, *June* 16, 19.

Isaacs, Gavan Duffy and Rich JJ.

Criminal Law—Possession of property suspected of being stolen—"Actual possession"—Physical control of goods—Exclusive right to obtain manual possession—Police Offences Act 1915 (*Vict.*) (*No.* 2708), *sec.* 40.

Sec. 40 of the *Police Offences Act* 1915 (Vict.) provides that "(1) Any person having in his actual possession or conveying in any manner any personal property whatsoever suspected of being stolen or unlawfully obtained may be arrested either with or without warrant and brought before a Court of Petty Sessions, or may be summoned to appear before a Court of Petty Sessions. (2) If such person does not in the opinion of the Court give a satisfactory account as to how he came by such property he shall be liable to be imprisoned for a term of not more than twelve months. (3) The said property if proved to be or to have been in the actual possession of such person whether in a building or otherwise, and whether or not the possession thereof had been parted with by him before being brought before the said Court, shall for the purposes of this section be deemed to be in his actual possession."

Held, that a person has not "actual possession" of property, within the meaning of the section, unless he has the complete present personal physical