[HIGH COURT OF AUSTRALIA.]

McCULLIN . . . . . APPELLANT;
RESPONDENT,

AND

CRAWFORD AND OTHERS . . . . RESPONDENTS.
APPLICANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1921.

MELBOURNE, *May* 17, 18, 23.

KNOX C.J., GAVAN DUFFY and RICH JJ.

Licensing—Adjustment of rent—Determination of Licences Reduction Board—Appeal to Court of Petty Sessions—Jurisdiction on appeal—Rehearing—Order less favourable to appellant—Licensing (Rents and Fees Adjustment) Act 1915 (*Vict.*) (*No.* 2776), *sec.* 4*—*Licensing Act* 1919 (*Vict.*) (*No.* 3028), *sec.* 13.*

Held, that sec. 13 of the *Licensing Act* 1919 confers on a Court of Petty Sessions power to rehear the whole case, to deal with it *de novo* as a Court of first instance, and to make any order which might have been made by the Licences Reduction Board.

Held, therefore, that on an appeal under that section where the respondent had given no notice of appeal the Court of Petty Sessions had jurisdiction to make an order less favourable to the appellant than the order against which the appeal was brought.

Decision of the Supreme Court of Victoria: *R.* v. *Berriman*; *Ex parte Crawford*, (1920) V.L.R., 609; 42 A.L.T., 107, reversed.

* Sec. 4 of the *Licensing* (*Rents and Fees Adjustment*) *Act* 1915 (Vict.) provides that "(1) In the case of any licensed premises of which the owner is not also the occupier . . . the occupier may . . . give to the owner . . . notice in writing that because of pecuniary loss sustained by him by reason of the restriction by the *Intoxicating Liquor* (*Temporary Restriction*) *Act* 1915 of the hours for the sale or disposal of liquor the occupier desires that the amount of the rent . . . payable under any lease . . . existing at the commencement of the said Act under which the occupier holds the said premises shall be adjusted as from the commencement of the said Act until the expiration thereof or until the said lease . . . ceases to operate (whichever first happens). (2) (*a*) If the said occupier and the said owner . . . do not agree as to such adjustment the said occupier . . . may make application in writing to the Licences Reduction "Board to adjust the amount of rent . . . . (3) The Board shall entertain inquire into and determine the matter of the application and in any such determination may make such adjustment (if any) of the amount of rent . . . as in the opinion of the Board having regard to

APPEAL from the Supreme Court of Victoria.

At all material times George Hunter Crawford, Robert Edington Crawford and Elizabeth Eleanor Byrne (hereinafter called "the owners") were the owners of the City Family Hotel at Bendigo, and Bryan McCullin was the occupier of the hotel under a lease from the owners for a term of twelve years commencing on 1st May 1913, at a yearly rental of £780.

On 15th February 1916 McCullin applied to the Licences Reduction Board for an adjustment of the rent in pursuance of the provisions of sec. 4 of the *Licensing (Rents and Fees Adjustment) Act* 1915, and on 16th March 1916 the Board ordered that the rent should be reduced as from 6th July 1915 by the sum of £4 weekly during the period provided for by that Act. After the passing of the *Licensing Act* 1916 McCullin applied for a further adjustment of the rent, and the Licences Reduction Board on 31st May 1917 ordered that the rent should be reduced as from 25th October 1916 by the sum of £3 5s. weekly during the period provided in the *Licensing (Rents and Fees Adjustment) Act* 1915 as amended by the *Licensing Act* 1916. The owners applied for a rehearing of the last mentioned application, and on 10th December 1917 the Licences Reduction Board made an order varying the order of 31st May 1916 by substituting for the sum of £3 5s. the sum of £2. On 23rd December 1919, pursuant to the *Licensing Act* 1919, the owners, by notices addressed to the Court of Petty Sessions consisting of a Police Magistrate sitting without Justices at Bendigo, to the Licences Reduction Board and to McCullin, appealed against the order of the Licences Reduction Board of 16th March 1916 and that of 31st May 1917 as amended by that of 10th December 1917.

all the circumstances is fair and equitable. . . . (6) (*a*) Every determination of the Board under this section shall be binding and conclusive upon the parties thereto." By sec. 13 of the *Licensing Act* 1919, sec. 4 was amended by adding at the end of subsec. (6) (*a*) the following words:— "unless such determination is appealed from as hereinafter provided. Any party to any such determination (whether made before or after the commencement of the *Licensing Act* 1919) who feels aggrieved thereby may . . . appeal from the determination to (i.) a Judge of County Courts; or (ii.) a Court of Petty Sessions consisting of a Police Magistrate sitting without Justices—and such Judge or Court (as the case may be) shall entertain inquire into and decide upon the appeal; and for that purpose may do all such matters and things relating thereto and in the same manner and to the same extent as he or it is empowered to do in the exercise of his or its ordinary jurisdiction and the decision of such Judge or Court shall be final and without appeal."

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The substantial ground of appeal was that the reduction in each case was excessive. At the hearing of the appeal *vivâ voce* evidence was given on behalf of the owners and McCullin respectively. On 24th May 1920 the Police Magistrate allowed the appeal in respect of each order, and he ordered that the rent payable under the lease should be reduced as from 6th July 1915 by the sum of £5 weekly during the period provided for in the *Licensing (Rents and Fees Adjustment) Act* 1915 and any Act amending the same, and he also ordered that the rent so reduced should be further reduced as from 25th October 1916 by the sum of £2 10s. weekly during the period provided for by the *Licensing Act* 1919. He also ordered the owners to pay £10 10s. for costs to McCullin.

The owners thereupon obtained from the Supreme Court an order *nisi* calling upon Daniel Berriman, Esq., the Police Magistrate who heard the appeal, and McCullin to show cause why a writ of prohibition or, alternatively, a writ of certiorari should not issue in respect of the orders of 24th May 1920. The order *nisi* came on for hearing before the Full Court, and the Court made it absolute and ordered that a writ of certiorari should issue: *R.* v. *Berriman*; *Ex parte Crawford* (1).

From that decision the owners now appealed to the High Court.

C. Gavan Duffy (with him *Reynolds*), for the appellant. On an appeal under sec. 13 of the *Licensing Act* 1919 the Police Magistrate is to hear the matter *de novo* and to give such a decision as in his opinion the Licences Reduction Board ought to have given in the first instance. A Court of Petty Sessions ordinarily has no appellate jurisdiction, and the power given by sec. 13 to do all such matters and things relating to the appeal and in the same manner and to the same extent as it is empowered to do in the exercise of its ordinary jurisdiction shows that the Court is to take evidence and decide upon the evidence what is the proper reduction of rent to allow. No provision is made for bringing before the Court of Petty Sessions the evidence and proceedings on the original hearing, and the only way of conducting the appeal is by taking fresh evidence. The Court of Petty Sessions cannot determine whether the tribunal from which

(1) (1920) V.L.R., 609; 42 A.L.T., 107.

the appeal is brought determined rightly or wrongly, because the material which was before that tribunal cannot be brought before the Court of Petty Sessions. The issue before that Court is the same as that before the Licences Reduction Board, namely, what is the proper amount of reduction to allow. There is no provision either for stating the grounds of appeal or for giving notice of cross-appeal, as would have been expected if the appeal had been intended to be confined to the question whether the original determination was right or wrong. [Counsel also referred to *R.* v. *Pilgrim* (1); *Quilter* v. *Mapleson* (2); *Daniel's Chancery Practice*, 4th ed., vol. II., p. 1369; *Rules of the Supreme Court* 1883 (Eng.), Order LVIII., r. 6; *Justices Act* 1915 (Vict.), sec. 137 (7).]

Lewers and *Owen Dixon*, for the respondents. No order less favourable to the appellant than the order appealed from can be made on an appeal under sec. 13 of the *Licensing Act* 1919. The only question on the appeal is whether the appellant was too unfavourably treated. By sec. 17 of the *Licensing Act* 1916 power was given to the Licences Reduction Board to rehear any matter, but by sec. 13 of the *Licensing Act* 1919 no power of rehearing is given to the Court of Petty Sessions. By sec. 4 (6) (*a*) of the *Licensing* (*Rents and Fees Adjustment*) *Act* 1915 the determination of the Licences Reduction Board is made binding and conclusive, and the words "unless such determination is appealed from," which are added by sec. 13 of the *Licensing Act* 1919, does not lessen the conclusiveness of the determination except so far as it is attacked by the appeal. The determination does not become void as soon as an appeal is brought. The word "appeal" is ordinarily limited to a means of correcting errors which are complained of in the decisions appealed from (*Attorney-General* v. *Sillem* (3); *Vernon* v. *Wright* (4); *Pollitt* v. *Forrest* (5)).

[RICH J. referred to *Parkes* v. *Dudley Justices* (6).]

That case does not suggest that an appeal is not limited to correcting errors of which the appellant complains. In none of the authorities has it been held that a respondent can get an advantage from

(1) L.R. 6 Q.B., 89.
(2) 9 Q.B.D., 672, at p. 676.
(3) 10 H.L.C., 704, at p. 724.
(4) 7 H.L.C., 35, at p. 43.
(5) 11 Q.B., 949.
(6) (1913) 1 Q.B., 1.

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an appeal. [Counsel also referred to *Harrup* v. *Templeton* (1); *Kellett* v. *Kellett* (2); *Ex parte Bishop*; *In re Fox, Walker & Co.* (3); *In re Cavander's Trusts* (4); *John Fowler & Co.* v. *Hunslet Assessment Committee* (5); *Keogh* v. *Dalgety & Co.* (6); *Ronald* v. *Harper* (7).]

C. Gavan Duffy, in reply. It is clear from the cases that the word "appeal" has no technical meaning, and that a rehearing in which the appellate tribunal is to hear the matter *de novo* is called an appeal. In the circumstances in which the word is used here, it requires a rehearing *de novo*. *Parkes* v. *Dudley Justices* (8) is plainly a case where on an appeal an order more unfavourable to the appellant was made.

Cur. adv. vult.

May 23. THE COURT delivered the following written judgment:—

The relevant facts in this case are as follows:—The respondents are and at all material times were the owners of the City Family Hotel, Bendigo; and the appellant McCullin is and was at all material times the occupier of this hotel under a lease from the owners for a term of twelve years commencing on 1st May 1913, at a yearly rent of £780. An order dated 16th March 1916 was made by the Licences Reduction Board under sec. 4 of Act No. 2776 (the *Licensing (Rents and Fees Adjustment) Act* 1915) reducing the rent by the sum of £4 weekly, and a subsequent order dated 31st May 1917 was made under Act No. 2855 (the *Licensing Act* 1916) whereby a further reduction in the rent was allowed to the extent of £3 5s. weekly. The latter order was, however, varied on 10th December 1917 by substituting for the sum of £3 5s. the sum of £2—the owners having obtained a rehearing of the application by the Board under the provisions of sec. 17 of Act No. 2855. Two years later, Act No. 3028 (the *Licensing Act* 1919) was passed, and pursuant to sec. 13 of that Act the owners appealed from the determination or order of the Board dated 16th March 1916 and also from that of 31st May

(1) 2 V.L.R. (L.), 185, at p. 187.
(2) L.R. 3 H.L., 160, at p. 165.
(3) 15 Ch. D., 400.
(4) 16 Ch. D., 270.
(5) (1917) 1 K.B., 720.
(6) 22 C.L.R., 402.
(7) 11 C.L.R., 63.
(8) (1913) 1 Q.B., 1.

1917 as varied by the subsequent order of 10th December 1917. There is no provision in the Act relating to the lodging or service of a notice of appeal, but notices were served in the case of each appeal, being addressed to "The Court of Petty Sessions consisting of a Police Magistrate sitting without Justices at Bendigo," to the Licences Reduction Board and to the occupier, Bryan McCullin. The grounds of appeal stated in the two notices were practically the same, and the substantial ground in each case was that the reduction ordered by the Board was excessive. The appeals duly came on for hearing before the Police Magistrate, sitting alone, and evidence was given *vivâ voce* on both sides, new witnesses being called in addition to those who had given evidence before the Board, and further evidence being elicited from the original witnesses. Neither at the hearing nor at any time previously, either by notice of appeal or otherwise, did the present appellant indicate any dissatisfaction with the orders appealed from or either of them. The Police Magistrate made an order in each case quashing the order of the Board, and substituting therefor an order providing for a reduction of rent to the extent of £5 weekly in the one case and £2 10s. weekly in the other. He also ordered the present respondents to pay 10 guineas costs to the present appellant. The result of these appeals was that in each case not only did the present respondents fail to establish that the reduction already ordered was excessive but a further reduction was allowed. The respondents on 8th July 1920 obtained in the Supreme Court a rule *nisi* for a writ of certiorari to bring up these orders of the Court of Petty Sessions to be quashed, and on 24th November 1920 the Full Court of the Supreme Court made the rule absolute. It is against this last-mentioned order that the present appeal is brought.

The substantial question to be determined is whether upon an appeal under sec. 13 of Act No. 3028 (the *Licensing Act* 1919) the Court of Petty Sessions has power, when no notice of appeal has been given by a respondent, to make an order less favourable to an appellant than the order against which the appeal was brought. The answer to be given to this question depends on the true construction of sec. 13 of the *Licensing Act* 1919. That section is in the following words :—"At the end of paragraph (*a*) of sub-section

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6 of section four of the *Licensing (Rents and Fees Adjustment) Act* 1915 there shall be inserted the following words:—'unless such determination is appealed from as hereinafter provided. Any party to any such determination (whether made before or after the commencement of the *Licensing Act* 1919) who feels aggrieved thereby may—if the determination were made before the commencement of that Act, within fourteen days after such commencement; or if the determination is made after the commencement of that Act, within fourteen days after the making of the determination—appeal from the determination to (i.) a Judge of County Courts; or (ii.) a Court of Petty Sessions consisting of a Police Magistrate sitting without justices—and such Judge or Court (as the case may be) shall entertain inquire into and decide upon the appeal; and for that purpose may do all such matters and things relating thereto and in the same manner and to the same extent as he or it is empowered to do in the exercise of his or its ordinary jurisdiction and the decision of such Judge or Court shall be final and without appeal.'"

For the appellant it was contended that this section confers on the Court of Petty Sessions power to rehear the whole case, to deal with it *de novo* as a Court of first instance, and to make any order which might have been made by the Licences Reduction Board. For the respondents it was argued that the function of the Court of Petty Sessions is limited to determining the complaint of the appellant, and that it has no power to make an order less favourable to an appellant than that against which his appeal is brought. The argument for the respondents was rested mainly, if not entirely, on the use of the word "appeal" in the section under consideration; and authorities were cited in which it was decided that the function of a tribunal which has power to entertain "*appeals*" is limited to determining whether the complaint of the appellant is well founded. But, in our opinion, the word "appeal" is a word of flexible meaning, and is not invariably used in the strict or limited sense attributed to it in those authorities. Decisions given on the meaning of the word in other Acts are of little or no assistance in arriving at a conclusion as to the meaning to be attributed to it in this Act, once it is established that the word is fairly capable of more than one

meaning. The meaning of the word in sec. 13 is to be determined upon a consideration of the words of that section and of the other provisions of the Acts dealing with the adjustment of the rents of licensed premises.

Looking first at the provisions of sec. 13, the word "appeal" is the only word which tends to indicate that it was intended to limit the function of the Court of Petty Sessions in the manner suggested by the respondents, and, as already pointed out, the use of this word cannot of itself be regarded as conclusive. On the other hand the section provides that the Court of Petty Sessions, in dealing with appeals under it, is to have power for the purposes of the appeal to do everything which it might do in the exercise of its ordinary jurisdiction, *i.e.*, as a Court of first instance; for apart from this section the Court of Petty Sessions is not a Court of appeal. It is also to be noticed that no provision is made for any formal notice of appeal to be given or for any statement of the grounds of appeal. Consequently there is no obligation on the appellant to inform either the appellate tribunal or the other parties to the determination of the Board what portion of the determination it is of which he complains or on what grounds he complains of it. The importance of this is seen by reference to sec. 4 of the Act No. 2776, which is amended by the section now under consideration. Sec. 4 provides in effect that the Licences Reduction Board may by one determination finally and conclusively adjust the rights of all persons interested in the licensed premises (see sub-secs. 5 and 6). Suppose three persons to be interested—A as owner, B as lessee and C as sub-lessee. The Board in adjusting their rights would presumably adjust the rent payable by B to A conformably to the adjustment made of the rent payable by C to B. If B feels aggrieved by the adjustment he may appeal. There is nothing in the Act which requires him to inform either the tribunal of appeal or the other parties to the determination whether his complaint is that the rent payable by C has been reduced by too much, or that payable to A has been reduced by too little. In such a case it might well be impossible for the Court of Petty Sessions to decide whether B's complaint was well founded and to give effect to its decision, unless it had the power to increase the reduction made by the Board in the rent

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payable by C to B or to diminish that in the rent payable by B to A. But, if the respondents' contention be well founded, the appellant in such a case could, by limiting his appeal to the question whether the reduction made in C's rent was excessive, prevent the Court of Petty Sessions from revising the reduction made in the rent payable by B to A, although the evidence adduced before that Court might clearly show the propriety of altering both of the reductions made by the Board, and although the propriety of making one alteration might depend on the power to make the other.

On the whole we are of opinion that the Court of Petty Sessions had jurisdiction to make the orders of 24th May 1920, and that the order *nisi* for a writ of certiorari should have been discharged.

The appeal is allowed, and the order of the Supreme Court set aside. The respondents are to pay to the appellant his costs in the Supreme Court and in this Court.

Appeal allowed. Order appealed from set aside. Respondents to pay costs of appellant in Supreme Court and High Court.

Solicitors for the appellant, *Brayshay & Luke Murphy.*

Solicitors for the respondents, *Shaw & Turner*, for *Tatchell, Dunlop, Smalley & Balmer*, Bendigo.

B. L.