

[HIGH COURT OF AUSTRALIA.]

SLATTER APPELLANT;
DEFENDANT,

AND

RAILWAY COMMISSIONERS FOR NEW }
SOUTH WALES } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. *Licence—Lease of licensed premises—Assignment of lease—Provisions of lease, including power of attorney—Effect of such provisions—When power of attorney exercisable—Renewal, transfer or removal of licence—Rights of Commissioners and assignee—"Beneficial interest" in licence—Liquor Act 1912-1929 (N.S.W.) (No. 42 of 1912—No. 49 of 1929), secs. 37 (2), 38, 39, 41*, 128, 130.*
1931.
SYDNEY,
Mar. 27;
April 20.

Gavan Duffy
C.J., Starke,
Dixon and
McTiernan JJ.

53 (N.S.W.) S.R. 105

Referred to:-
70 (N.S.W.) W.N. 75
Referred to:-
1053 (N.S.W.) S.R. 410
Referred to:-
70 (N.S.W.) W.N. 245

On 29th November 1929 A entered into an agreement with the Railway Commissioners for New South Wales for a quarterly tenancy of premises owned by them and licensed for the sale of Australian wines. At the time of the agreement A was in occupation of the premises in question as assignee of a prior lease, and the agreement for a quarterly tenancy was expressed to be subject (*mutatis mutandis*) to the terms and conditions contained in that lease. The Commissioners gave A three months' notice, expiring 10th December 1930, terminating his tenancy, but before the expiry of the notice A claimed that he was entitled to apply to the Licensing Court at the end of the tenancy to remove the licence to other premises. The Commissioners, however, sold the premises occupied by A and the licence to B, claiming to be entitled to dispose of the licence as they pleased at the end of the tenancy. The lease provided (*inter alia*) that the lessee and his assigns should not do or suffer any act

* The *Liquor Act* 1912-1929 (N.S.W.) by sec. 41 provides that "If any person at any one time holds a beneficial interest, whether in the name of himself or any one else, in more than one

licence for the sale of liquor under this Part, he shall be liable, for every day during which he holds such interest, to a penalty not exceeding five pounds."

whereby the licence might be forfeited, or become void or suppressed in any manner, or the removal withheld or refused, and should take all necessary steps from time to time to obtain the renewal of the licence. The lease also contained a power of attorney whereby the Commissioners, or their estate agent, were irrevocably appointed the attorneys of the lessee with power to transfer the licence to a nominee chosen by the Commissioners, to apply for the renewal and removal of the licence and, in the name of the lessee or his assigns, to sign all necessary documents in connection therewith. On appeal by A against an injunction granted by the Supreme Court,

Held, (1) that the provisions of the lease operated to preserve the licence in the interests of the Commissioners; (2) that the availability of the power of attorney given to the Commissioners was not confined to the duration of the tenancy; (3) that A's attempt to secure the removal of the licence to other premises tended to impair the efficacy of the irrevocable power and was, therefore, a violation of the conditions necessarily imported in the grant of such power, and (4) that the advantage obtained from the provisions of the lease did not amount to a "beneficial interest" in the licence within the meaning of sec. 41 of the *Liquor Act* 1912-1929 (N.S.W.).

Decision of the Supreme Court of New South Wales (*Long Innes J.*) affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court of New South Wales in its equitable jurisdiction by the Railway Commissioners for New South Wales against Stephen Henry Slatter in which the statement of claim, filed 11th September 1930, was substantially as follows:—

1. Prior to and on 17th August 1923 the plaintiffs were the owners of certain land and premises situated at and known as 385 Parramatta Road Leichhardt near Sydney in the State of New South Wales and were also the owners of an Australian wine licence granted under the *Liquor Acts* (N.S.W.) in respect of the said premises.

2. On 17th August 1923 the plaintiffs by an agreement in writing agreed to let the said land and premises to Leo Phillip Gehrig on a weekly tenancy as from 6th August 1923, on the terms contained in an annexure thereto that (*inter alia*) Gehrig should use the said premises only as a place for the sale and consumption of colonial wines, and at the termination of the said lease should do all necessary acts for transferring to the plaintiffs, their successors or assigns or their nominee the then existing licence and would sign any notice and make any application for the transfer or renewal of the said licence as the plaintiffs should require. Gehrig duly took possession under the said agreement, and held and used the said land and

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premises and the said licence under the terms of the said agreement until the execution of the memorandum of lease next herein mentioned.

3. On 8th January 1925 the plaintiffs by memorandum of lease under the *Real Property Act* 1900 (N.S.W.) leased to Gehrig as from 1st December 1924 the said land and premises for a period of five years from the date thereof, and Gehrig therein covenanted (*inter alia*) to use the said premises only as a place for the sale and consumption of colonial wines, and that he would not do any act whereby the said licence should be liable to be forfeited, and would apply for and use his best endeavours to obtain the necessary licences for keeping open the said premises as a place duly licensed for the sale and consumption of colonial wines as aforesaid. Gehrig thereafter held the said premises under the said memorandum of lease and duly complied with the conditions thereof up to 4th May 1925.

4. On 4th May 1925 Gehrig by memorandum of transfer under the *Real Property Act* 1900 with the consent of the plaintiffs transferred all his estate and interest under the said memorandum of lease to the defendant, and the defendant executed the said memorandum of transfer and entered into possession of the said premises and with the consent of the plaintiffs applied for and obtained a transfer to himself from Gehrig of the said Australian wine licence and continued to hold the said land and premises under the terms of the said memorandum of lease for the balance of the said term.

5. On 29th November 1929 by agreement in writing the plaintiffs agreed to let the said land and premises as from 1st December 1929 to the defendant on a quarterly tenancy subject to termination by three months' notice in writing given at any time by the plaintiffs, and it was a term of the said agreement that it should be subject (*mutatis mutandis*) to the terms and conditions contained in the memorandum of lease referred to in par. 3 hereof.

6. From and after 1st December 1929 the defendant continued to hold and he still holds the said land and premises under the said agreement dated 29th November 1929.

7. On 11th August 1930 the plaintiffs sold the said land and premises and their right title and interest in the said wine licence

to Thomas Henry Lindsay, and on 9th September 1930 gave notice to the defendant under the terms of the agreement referred to in par. 5 hereof that his tenancy under the said agreement would terminate on 10th December 1930.

8. The plaintiffs also on the said 9th September 1930 tendered to the defendant for execution by him the necessary documents for the transfer of the said wine licence to Lindsay, but the defendant refused and refuses to execute the said documents or any of them.

9. Shortly before the said sale to Lindsay the defendant took steps to have the said Australian wine licence removed from the said premises of the plaintiffs to other premises not owned by the plaintiffs, and the defendant denied and still denies that the plaintiffs are the owners of the said licence or have any interest therein and claims that he is the owner thereof and threatens and intends to have the same removed from the said premises of the plaintiffs and otherwise to deal with the said licence to the prejudice of the plaintiffs' rights.

The plaintiffs claimed (*inter alia*): (1) That it may be declared that the plaintiffs are the owners of the said Australian wine licence; (2) that it may be declared that the defendant is bound to do all things necessary for the transfer of the said licence as from the termination of the defendant's tenancy to such person as the plaintiffs shall direct; (3) that the defendant may be ordered to execute forthwith all such documents as are necessary or proper for the transfer of the said licence to the said Thomas Henry Lindsay or other the nominee of the plaintiffs; (4) that the defendant may be restrained from proceeding with any application for the transfer of the said Australian wine licence from the premises of the plaintiffs to other premises and from in any way dealing with the said licence to the prejudice of the plaintiffs' rights; (5) that the plaintiffs may have such further or other order or relief as to this Honourable Court shall seem fit.

On 26th September 1930 *Long Innes J.* was applied to by the plaintiffs on motion, notice of which had been given to the defendant, for (*inter alia*) the following orders: (1) That the defendant may be restrained by injunction from proceeding with any application for

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the transfer of the wine licence mentioned in the statement of claim from the premises of the plaintiffs to other premises not owned by the plaintiffs, and from in any way dealing with the said licence to the prejudice of the plaintiffs' rights; (2) that the defendant may be ordered to execute forthwith all such documents as are necessary or proper for the transfer of the wine licence to Thomas Henry Lindsay or other the nominee of the plaintiffs.

The memorandum of lease referred to in par. 3 of the statement of claim, by clause 18, provided "That the said lessors" (the Commissioners) "covenant with the said lessee" (Gehrig) "for quiet enjoyment and subject also to the following additional covenants, conditions and restrictions, namely:—(a) That the said lessee . . . or his assigns will use the said premises only as a place for the sale and consumption of colonial wines . . . and will not do or suffer any act whereby the licence necessary for using the . . . demised premises as a place for the sale and consumption of colonial wines may be or become liable to be forfeited or become void or suppressed or suspended in any manner howsoever or the renewal thereof withheld or refused and will at his own expense at all proper times and from time to time apply for and use his best endeavours to obtain the necessary licences or renewal of licences for opening or keeping open the . . . demised premises during the said term as a place duly licensed for the sale and consumption therein of colonial wines . . . And for the better preservation of the licence of the . . . demised premises the lessee doth hereby irrevocably appoint the lessors and the estate agent for the time being of the lessors jointly and severally the true and lawful attorney and attorneys of the lessee to transfer or cause to be transferred the licence or licences held in connection with the . . . demised premises to any person whom the lessors or their estate agent aforesaid may nominate and to apply for the renewal and removal of the said licence or licences or any new licence and to sign all notices transfers and documents for such purpose in the name of the lessee his executors . . . or assigns or other the person in whose name the said licence or licences shall then stand."

The material parts of the agreements which were respectively referred to in pars. 2, 4 and 5 of the statement of claim, and which were put in in evidence, are sufficiently stated in those paragraphs.

In an affidavit the defendant stated that although the lease of the premises in question was transferred to him by Gehrig with the consent of the Commissioners he had never applied to the latter for their consent to the transfer of the licence as he had never considered that they had any interest therein, and he claimed as his property the Australian wine licence issued to him in respect of the said premises. He stated also that the first time he received notice of the agreement referred to in par. 2 of the statement of claim was when that statement was served upon him, and, further, that when the licence was transferred from Gehrig to himself at the Licensing Court there was no appearance by or on behalf of the Commissioners. Other affidavits by former owners were filed on behalf of the defendant in support of the contention that the licence was not the property of the Commissioners. It was shown, however, that the subject land, with other lands, had been resumed under the *Public Works Act* 1912 (N.S.W.) for a proposed railway by the Minister for Public Works; that the compensation money paid to and accepted by the legal representative of the owner included an amount in respect of the licence, although the latter fact was disputed by such representative; and that the Commissioners became the owners of the licence when they entered into possession of the premises sometime after the resumption had taken place. The estate agent for railways stated in cross-examination that during the time the Commissioners were the owners of the licence in question they were also the owners of licences under the *Liquor Act* for five or six other places not including railway refreshment rooms; and it was admitted by counsel on behalf of the Commissioners that the latter were at all material times the owners of resumed properties having thereon premises in respect of which wine licences at all material times existed, and that at all material times they had interests in such premises and licences similar to the interests in the subject premises and licence conferred on them by the agreements referred to in pars. 2 and 3 of the statement of claim.

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By consent the motion for injunction was turned into a motion for a decree. *Long Innes J.* granted an injunction perpetually restraining the defendant from proceeding with any application for the transfer of the licence to other premises, and from in any way dealing with the licence to the prejudice of the Commissioners' rights. His Honor held (1) that the Commissioners were entitled as against the defendant, by virtue of his contract, at the termination of the tenancy existing under the agreement referred to in par. 5 of the statement of claim to transfer the licence or cause it to be transferred to whom they pleased, or to remove or to cause it to be removed to what premises they pleased; and (2) that the Commissioners were not beneficially interested in the licence within the meaning of that term as used in sec. 41 of the *Liquor Act* 1912-1929.

From this decision the defendant now appealed to the High Court.

Jordan K.C. (with him *D. Williams*), for the appellant. There is nothing in any agreement between the parties which takes away from the appellant his right under the *Liquor Act* to apply to the Licensing Court for a licence. A wine licence is a true licence which creates no proprietary rights whatever: it is a mere permission to a particular person to sell particular goods on particular premises (*Jack v. Smail* (1)). The question is whether the appellant has either expressly or impliedly contracted himself out of his right to apply to the Licensing Court to obtain in favour of himself a removal of the licence to some other premises. He has not so debarred himself, and, therefore, he is entitled to make such an application to that Court, having given due notice under sec. 39 of the *Liquor Act*. The power of attorney in clause 18 of the memorandum of lease referred to in par. 3 of the statement of claim is expressed to be for the better preservation of the licence, that is, to prevent the licence of the premises from ceasing to exist. The power of attorney enures to the benefit of both parties. The Commissioners already had power under the *Liquor Act* to apply to the Licensing Court, without the power of attorney. The power of attorney given by the licensee to the Commissioners is a power to apply in his name for a renewal of the licence to himself and, so

(1) (1905) 2 C.L.R. 684, at pp. 701 *et seqq.*

far as removal is concerned, for removal to other premises for himself. Such a power was given to meet cases of urgency. It could not, with propriety, be used in order to prevent the licensee from retaining, or obtaining a removal of, the licence for himself. The words "of the demised premises" are only descriptive of the licence referred to. If the provisions of the lease do give the Commissioners the right, as against the licensee, to have the licence transferred to their nominee at the expiration of the term, they would have a "beneficial interest" in the licence, and, as at the relevant times they had an interest in other licences, this would constitute an infringement of sec. 41 of the *Liquor Act*. "Beneficial interest" in that section cannot mean an interest in property. Those words refer to some interest arising out of contractual or fiduciary relations giving a person a right to control the licence. The Commissioners are bound by the *Liquor Act*.

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Maughan K.C. (with him *Bradley* and *Moors*), for the respondents. The terms of the annexure as set out in par. 2 of the statement of claim are unequivocal. The question is: What were the relative legal rights of the parties under clause 18 (a) of the memorandum of lease referred to in par. 3 of the statement of claim? That clause was inserted by the parties to protect the interests of the Commissioners. The appellant did not need any protection in respect of the matters set out in the clause, each of the covenants of which indicates that the lessors were protecting something which belonged to them. The fact that the lessors could terminate the lease for good cause shows that they had a very definite interest in the licence. The power of attorney to transfer the licence could only be exercised at the termination of the lease. The function of the power was to provide a successor to the appellant. It was a power which could be used *in invitum*, was irrevocable, and could be exercised in favour of any person nominated by the Commissioners. To exercise the power by transferring the licence to another person involves also the termination of the appellant's lease. Licences are granted to particular persons in respect of particular premises (*Jack v. Smail* (1)). The power of attorney contemplates an

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absolute transfer. If the appellant's contention were correct one would expect to find a provision stating when the licence was to be retransferred to him. The nominee of the Commissioners would not be a trustee for the appellant. The rights of the Commissioners in this matter do not constitute a beneficial interest within the meaning of sec. 41 of the *Liquor Act*. The reversionary right to determine the destination of the licence at the end of the lease is not a "beneficial interest" within the meaning of that section. The Commissioners do not carry on the business of purveyors of liquors. Rents, &c., received from property resumed for railway purposes are paid into consolidated revenue in accordance with the provisions of sec. 98 of the *Public Works Act* 1912. On this point the *Government Railways Act* 1912 (N.S.W.) does not apply to a matter of the description under review.

Jordan K.C., in reply. A licence, whether granted by the parties or by the Court, is not property (*Frank Warr & Co. v. London County Council* (1)). No dealing between the Commissioners and the ex-holder of the freehold can affect the appellant. The right to the licence can be cut down only by a contract to which the appellant is a party. The power of attorney must be read in relation to its expressed purpose, and the removal of the licence would not come within its operation. Secs. 37 and 38 of the *Liquor Act* give an owner a right in those circumstances to apply for a licence to be granted to his nominee, and the granting of such application by the Licensing Court is discretionary.

Cur. adv. vult.

April 20.

The following written judgments were delivered :—

GAVAN DUFFY C.J., STARKE AND DIXON JJ. On 29th November 1929 the appellant entered into an agreement with the respondents for a quarterly tenancy of premises licensed for the sale of Australian wines. The appellant was then in occupation of the premises as assignee of a prior lease, and the agreement with the respondents for a quarterly tenancy was expressed to be subject *mutatis mutandis*

to the terms and conditions contained in the memorandum of that lease. The respondents gave to the appellant three months' notice expiring on 10th December 1930 terminating the tenancy. Before the expiration of the notice, the appellant claimed to be entitled to apply to the Licensing Court at the end of his tenancy to remove his licence to other premises. The respondents, on the other hand, entered into a contract with a stranger to sell to him the fee simple of the land together with the licence, claiming to be entitled to dispose of the licence at the end of the tenancy. The respondents at once brought a suit in equity and, before the tenancy expired, a decree was made in the suit declaring that the respondents were entitled as against the appellant, by virtue of his contract, at the termination of the tenancy existing under the agreement to transfer or cause to be transferred the Australian wine licence to whom they please or to remove the said licence or cause it to be removed to what premises they please, and ordering that the appellant be perpetually restrained from proceeding with any application for the removal of the licence to other premises, and from dealing with the licence in any way to the prejudice of the respondents' rights. In our opinion this decree was right. The provisions incorporated in the agreement of tenancy imposed upon the appellant an obligation to yield up the demised premises to the respondents at the expiration of the notice terminating the tenancy, until the end of the tenancy to use the premises only as a place for the sale and consumption of Australian wines, and not to do or suffer any act whereby the licence necessary for using the premises as a place for the sale of colonial wines might be, or become liable to become, forfeited, or become void, suppressed or suspended in any manner howsoever, or the removal withheld or refused. The provisions also required the appellant at all proper times and from time to time to apply for and use his best endeavours to obtain the necessary licences or renewal of licences for opening and keeping open the demised premises during the term of the tenancy as a place duly licensed for the sale and consumption therein of colonial wines; and they gave the respondents a power of forfeiture in case the appellant was convicted of any offence which might render the licence liable to be forfeited, or become void, or suppressed in any manner

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howsoever, or in case the licence should be cancelled, or the renewal refused, or in case of the breach or non-performance by the appellant of his agreement. These stipulations appear to us to be intended to preserve the licence in the interests of the landlord, so that at the end of the term the premises would enjoy the advantage of being licensed for the sale of Australian wines. After the proviso for forfeiture the provisions incorporated in the agreement of tenancy proceed: "And for the better preservation of the licence of the said demised premises the lessee doth hereby irrevocably appoint the lessors and the estate agent for the time being of the lessors jointly and severally the true and lawful attorney and attorneys of the lessee to transfer or cause to be transferred the licence or licences held in connection with the said demised premises to any person whom the lessors or their estate agent aforesaid may nominate and to apply for the renewal and removal of the said licence or licences or any new licence and to sign all notices transfers and documents for such purpose in the name of the lessee his executors administrators or assigns or other the person in whose name the said licence or licences may then stand."

We can see no reason whatever for confining the operation of this clause to the duration of the tenancy. It appears to us naturally to extend beyond the term so as to enable the respondents to apply in the name of the appellant as licensee for the transfer of the licence to a new occupier of the premises. It is an irrevocable authority for the advantage of the persons authorized. Any act on the part of the appellant which would destroy the authority or impair its operation must be a breach of the conditions necessarily implied in granting an irrevocable authority exercisable exclusively for the benefit of the persons authorized. An attempt to secure the removal of the licence to other premises pursuant to the provisions of sec. 39 of the *Liquor Act* 1912-1929 appears to us to be designed to impair if not destroy the authority irrevocably appointing the respondents attorney for the purpose of transferring or removing the licence, and accordingly to be a violation of the conditions necessarily imported in the grant of the authority. We think the evident purpose of the provisions incorporated in the tenancy agreement was to preserve the licence for the benefit of the premises, and at

the end of the term to enable the landlords to ensure that it was available to the person who next occupied the premises under them. The advantage obtained by a landlord from such provisions does not, in our opinion, amount to a beneficial interest in the licence within the meaning of sec. 41 of the *Liquor Acts*. The tenant remains entitled to exercise the licence for his own benefit so long as he is entitled to occupy the premises. But the licence is exercisable by its terms only in the premises which the tenant holds of the landlord and when he ceases to occupy the premises he can no longer exercise the licence. The contractual rights given to the landlord to ensure that the licence is not destroyed or removed to other premises, but is kept on foot and transferred to a person chosen by the landlord, do no more than safeguard the interests of the owner which secs. 37 (2), 38, 39 (4), 128 (2) and (3) and 130 of the *Liquor Acts* recognize.

In our opinion the appeal should be dismissed with costs.

McTIERNAN J. I agree that the appeal should be dismissed. Although an Australian wine licence, granted under the *Liquor Act* 1912-1929, is not property in the strict sense and assignable as property, the licensee may bind himself by a contractual or fiduciary obligation with respect to the exercise of his rights under that Act to apply for the renewal or transfer or removal of such licence, and such an obligation will in a proper case be enforced (*Jack v. Smail* (1)). It was argued on behalf of the appellant that clause 18 of the memorandum of lease of 8th January 1925, which was incorporated in the agreement under which the appellant leased the premises from the respondent, bound the appellant only during the period of the tenancy, and the power of attorney contained in the clause had no effect when the tenancy terminated, and the licensee then became free to apply under the provisions of the *Liquor Act* 1912-1929 to remove the licence to other premises. In my opinion, that is not the meaning and effect of the clause.

Reliance was placed by counsel for the appellant on the words introducing the power of attorney, as exhibiting an intention to confine the operation of the provision of the agreement creating

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the power of attorney to the duration of the tenancy. The words are: "And for the better preservation of the licence of the said demised premises." Those introductory words appear to me to convey the meaning that the clause is being continued in order to provide additional safeguards for the preservation of the licence and its maintenance on the respondents' premises. In the dissection of clause 18 the fact should not be overlooked that it is part of an agreement under which the appellant held the licence as the tenant of the owner of the premises. In the case of a lease of licensed premises it is necessary that the tenant, who is to carry on business on such premises, should be the person authorized by the licence to sell liquor. The owner of the premises, therefore, may deem it necessary to obtain covenants from the tenant for the protection of the licence (see *Encyclopædia of Forms and Precedents*, vol. VII., p. 368). "The licence may be described as having two attributes each being absolutely distinct from the other. First, it is a personal licence . . . and secondly, it is a licence to carry on business in these premises" (*Jack v. Smail* (1)). "In my opinion, the object of the whole clause was to protect the licence in respect of both its attributes. The power of attorney was expressed to be added "for the better preservation of the licence" which had been described in the clause as the licence "necessary for using the said premises as a place for the sale and consumption of colonial wines." The *Liquor Act* 1912-1929 provides that the holder of a licence may apply to remove the licence to other premises; it also provides that the owner should be served with notice of the application, and that the application should be refused if the Court is satisfied that the owner has a valid objection (see sec. 39). Notwithstanding the owner's right to object, it is conceivable that, if the tenant were unfettered by any contractual or fiduciary obligations and free to make such an application, and able to show strong grounds for the removal, the continuance of the premises as licensed premises might be placed in jeopardy. The purpose of the agreement, in aid of which the power of attorney was inserted, negatives the intention that the tenant should, as the licensee, be free as against the owner of the premises to make such an application during the tenancy or after its termination. In

my opinion, clause 18 bound the tenant as long as he was holding the licence, because he was or had been the tenant of the premises under the agreement, and was capable, therefore, of endangering the licence, by refusing to make or by making the applications respectively mentioned in the power of attorney. Moreover, if upon its proper construction the power of attorney were available only during the tenancy, it would not be effective to protect the licence in the event of the tenant's incapacity, absence, contumacy or other cause personal to him, preventing him, as the licensee, from applying to transfer the licence to another tenant, after the termination of his tenancy. Clause 18 guards the respondents against such a contingency. Upon this construction of the power of attorney it had not, in my opinion, the effect of giving the respondents a beneficial interest in the licence, within the meaning of sec. 41 of the *Liquor Act* 1912-1929. It protects the interest of the respondents only as the owners of the licensed premises.

Appeal dismissed with costs.

Solicitors for the appellant, *Murphy & Moloney.*

Solicitor for the respondents, *Fred. W. Bretnall.*

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