[HIGH COURT OF AUSTRALIA.]

PLACE . . . . . APPELLANT;
RESPONDENT,

AND

THOMPSON AND OTHERS . . . . RESPONDENTS.
APPLICANTS AND RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1949.

SYDNEY.
July 29;
Aug. 2, 12.

Dixon, McTiernan, Williams and Webb JJ.

Liquor—Publican's licence—Application for removal—Premises to be erected—Application conditionally granted—Licensing Court—Full Bench—Adjudication—Appeal to Quarter Sessions—Competency of appeal—Liquor Act 1912-1946 (*N.S.W.*) (*No.* 42 *of* 1912—*No.* 34 *of* 1946), *ss.* 39A, 170 (5).

An adjudication by the Full Bench of the Licensing Court, conditionally granting an application made under s. 39A of the *Liquor Act* 1912-1946 (N.S.W.) for the removal of a licence, is not subject to appeal to Quarter Sessions, and is an adjudication from which no appeal lies under s. 170 (1) of that Act other than appeal by way of prohibition or special case.

So *held* by *Dixon*, *McTiernan* and *Williams* JJ. (*Webb* J. dissenting).

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Thompson and Others*; *Re Place and Another*, (1949) 49 S.R. (N.S.W.) 256; 66 W.N. (N.S.W.) 117, reversed.

APPEAL from the Supreme Court of New South Wales.

Herbert Place, of City View Hotel, Abercrombie Street, Redfern, licensed publican and hotel-keeper, applied under s. 39A of the *Liquor Act* 1912-1946 (N.S.W.) to the Licensing Court for the Metropolitan Licensing District, Sydney, for an order conditionally granting the removal of the publican's licence for the City View Hotel, Redfern, to premises proposed to be erected on land situated at the corner of Sydney Road and Woodland Street, Balgowlah, within the Municipality of Manly.

The application was objected to by Richard Thompson and twenty-three other persons, and also by the Council of the Municipality of Manly, upon various grounds, but it was not objected to by the metropolitan licensing inspector.

All the formalities required by s. 24 and other provisions of the *Liquor Act* were proved, and that the removal of the licence would not affect detrimentally the interests of the public in the neighbourhood of the City View Hotel.

On the evidence adduced, the Licensing Court, which was constituted by three licensing magistrates, found that there did exist in the neighbourhood of the proposed site a requirement for meals, for accommodation, and for liquor supplied in quantities and in the manner authorized by a publican's licence; that such requirements were reasonable; that the proposed site was not in the immediate vicinity of a place of public worship, hospital or public school; that the quiet and good order of the neighbourhood would not be unduly disturbed and such disturbance, if any, would, doubtless, be controlled by the licensee and the police; that any traffic problems could be and doubtless would be satisfactorily dealt with by the traffic authorities; that by reason of (i) the absence of hotel facilities in the area, (ii) the size of the population, (iii) the number of workmen employed in the area, (iv) the number of visitors, and (v) the large volume of through traffic, there was a public likely to need accommodation whether in the way of liquor supplies, meals, or other accommodation, and that that public was of substantial magnitude; that the removal would be in the best interests of the public in the neighbourhood of Balgowlah; that the objectors had not proved to its satisfaction that the public interest would be served to a substantially greater extent by the removal to a site in some area or part of the licensing district other than the area or part in which the proposed site was situated; that the declaration of the proposed site as a "housing area" under the *Housing Act* 1912-1947 (N.S.W.) did not derogate from the powers of the Licensing Court to hear and determine the application for removal, although so long as that declaration continued the applicant would be precluded from erecting the hotel; and, that the granting of the application would not infringe the provisions of s. 342U of the *Local Government Act* 1919-1946 (N.S.W.) in respect of a town-planning scheme in course of preparation under that Act, although the applicant might be debarred thereby from erecting the hotel.

Thompson and other objectors appealed against that decision to Quarter Sessions but *Curlewis*, Ch. of Q.S., held that he did not

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have any jurisdiction to hear and determine the appeal and refused to make an order, whereupon, upon the application of the objectors, the Supreme Court of New South Wales (*Jordan* C.J., *Street* and *Maxwell* JJ.) by writ of mandamus, directed the Chairman of Quarter Sessions to hear and determine the appeal (*Ex parte Thompson*; *Re Place* (1)).

From that decision Place, by special leave, appealed to the High Court.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

A. R. Taylor K.C. (with him *Leaver*), for the appellant. The two points which arise are (i) whether this was an application made to the Licensing Court, that is whether it was an application within the meaning of the *Liquor Act* 1912-1946, and (ii) whether the order which was made by the Licensing Court was an adjudication whereby that application was granted. What is referred to in s. 39A (1) of the Act as "an order for the removal of such license" which the court is required to make upon a certificate being given by the inspector that the premises have been substantially completed in accordance with the plan, is a purely ministerial proceeding. There is not any further application and there is not any adjudication *inter partes* at all. It is purely ministerial. As shown by sub-s. (2) of s. 39A, there is only one hearing, that is prior to the making of the first order, and it is upon that hearing that all the substantial matters are determined. In this case the applicant made an application for an order conditionally granting removal of a licence and in fact the Licensing Court granted that order. There was a substantial hearing. The competing arguments are: Is an application under s. 39A an application for removal, or is it a conditional application for removal? The expression "conditional application" is used as a technical term in various places in the Act in relation to the obtaining of new licences. That terminology is consistently retained in s. 170 (5) in relation to new licences but applications for removal, whether they be for removal to buildings already in a completed state or to buildings which are not completed, they are referred to as applications. None of them is called a conditional application. For all practical purposes an application under s. 39A is the same as an application under s. 39, the only difference being that in one case the building is either not erected, not completed or has required some additional alterations. The final order made under s. 39A (1) is automatic and is purely an

(1) (1949) 49 S.R. (N.S.W.) 256; 66 W.N. (N.S.W.) 117.

administrative order from which an appeal cannot lie. For such an order an application is not necessary under s. 39A, but an application is necessary for a final order under s. 27 (1). It is significant that a somewhat similar application is referred to in s. 27 as a " conditional application " whereas in s. 39A it is referred to simply as an " application." The two additions made by the Act of 1946 show that the draftsman deliberately chose between application and conditional application. It was the same Act by which s. 170 was amended and this right of appeal eliminated. It would have been inconsistent if the draftsman had referred to applications under s. 39A as conditional applications. Once it is conceded that proceedings under s. 39A are proceedings for removal then one must assume that the draftsman applied that choice in s. 170 (5). If an application under s. 39A is an application for removal then the subject application has been granted. The conditional granting of an application is the granting of that application. Whatever is made under s. 39A, it is an application as distinct from a conditional application and there is not any reason why s. 170 should preclude appeals in relation to new licences, whether the application be an application *simpliciter* or a conditional application. On the framework of the Act it was the obvious intention of the legislature to make the Licensing Court supreme in licensing matters. A court having power to grant an application *simpliciter* under s. 39A may lawfully do so subject to conditions. The application is granted notwithstanding the attaching thereto of conditions (*Ex parte Paton* (1)). The power of the court to grant subject to undertakings was dealt with in *Ex parte Mullen* ; *Re Hood* (2). Part V. of the *Liquor* (*Amendment*) *Act* 1946 provides that upon proclamation thereto by the Governor, Licensing Courts are to be reconstituted so as to consist of a district court judge and two magistrates. If an appeal lies to Quarter Sessions as suggested the anomalous position would arise of an appeal to a district court judge, as chairman of quarter sessions, against the decision of a tribunal constituted by a district court judge and two magistrates.

Fuller K.C. (with him *Clapin*), for the respondent objectors. The alleged anomalies will arise not only in respect of appeals relating to the conditional removal of licences under s. 39A, but also in respect of appeals against convictions for selling liquor without a licence, for renewals and for matters arising under s. 40A,

(1) (1929) 30 S.R. (N.S.W.) 67, at p. 71.

(2) (1935) 35 S.R. (N.S.W.) 289, at p. 303.

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all of which matters are subject to a right of appeal. This was deliberately done by the legislature. The general right of appeal reserved by s. 170 (1) can only be taken away by express words which do not admit of any doubt. Sub-section (2) of s. 170 and s. 40A evidence the fact that it is not the object of the Act to take away the right of appeal in all strictly licensing matters. If such had been the intention of the legislature it could have been so expressed by apt words and there would not have been any need for s. 170 (5) (*a*). The right of appeal in respect of applications for orders conditionally granting removal was deliberately preserved by s. 170 (5) because, doubtless, the legislature realized that important changes, in local conditions and otherwise, might take place between the time of the making of the conditional order and the erecting of the premises, as for example " the reasonable requirements of the neighbourhood " (see s. 30 (2) and s. 29 (*e*)), thus avoiding the unnecessary or undesirable expenditure of large sums of money. Upon a proper interpretation of s. 39A, two applications are required to be made. The final order is not " automatic." It is just as necessary to make the second application under s. 39A as it is under s. 27. Upon the hearing of an application for a final order the court must give regard to relevant events which have happened and to new circumstances which have arisen since the making of the first order. That being so it is clear that the first order does not come within s. 170 (5) (*a*). If the order firstly made were an order for the removal of the licence there would not be any need for the action later provided for in that section. The application is a conditional application. It is not an application for an order for the removal of a licence ; that order is granted, if at all, only on the second application. It is for the legislature and not for the court to correct any anomalies which may arise in a statute. A right of appeal can be taken away only by express words.

A. R. Taylor K.C., in reply. The form prescribed in the regulations made under the Act refers to an application under s. 39A as an application for removal. There is only one written application under s. 39A and there is not any necessity for any appearance of or for the parties on the occasion of the making of the final order.

Cur. adv. vult.

Aug. 12. The following written judgments were delivered :—

DIXON J. This is an appeal from an order of the Supreme Court of New South Wales making absolute a rule nisi for a mandamus. The mandamus is directed to the Chairman of Quarter Sessions of

the Metropolitan District and it commands him to hear and determine an appeal from an order of the Licensing Court for the Metropolitan Licensing District. The appellant is a licensed publican and hotel-keeper who applied successfully to the Licensing Court for an order conditionally granting the removal of his licence. The application made by him to the Licensing Court was for an order conditionally granting the removal of the publican's licence for the premises known as the City View Hotel in Redfern to premises to be erected on land situated in Balgowlah. The respondents are residents of Balgowlah who objected to the application. The Licensing Court found that the removal of the licence to the proposed new site would be in the interests of the public in the neighbourhood of that site and would not affect detrimentally the interests of the public in the neighbourhood of the premises from which it was proposed to remove the licence and the court granted the application. Thereupon the objectors gave notice of appeal to Quarter Sessions from the order for the conditional removal of the publican's licence.

The learned Chairman of Quarter Sessions, his Honour Judge *Curlewis*, held that s. 170 (5) (*a*) of the *Liquor Act* 1912-1946, a provision inserted by Act No. 34 of 1946, s. 51 (*k*) (iii), deprived Quarter Sessions of jurisdiction to entertain appeals from, among other things, conditional orders of removal made by the Licensing Court. He accordingly declined jurisdiction over the appeal. In the Supreme Court this view of s. 170 (5) was considered to be erroneous. The Court, consisting of *Jordan* C.J., *Street* and *Maxwell* JJ., were of opinion that a grant of a conditional order for the removal of a publican's licence is not included among the orders or proceedings which s. 170 (5) (*a*) says are to be no longer subject to appeal to another court, except by way of prohibition or special case. As sub-s. (1) of s. 170 provides that any person aggrieved by an adjudication of a Licensing Court may appeal from such adjudication in the manner provided by Part V. of the *Justices Act* 1902, as amended, it followed from the view of the Supreme Court that an appeal from an order for conditional removal of such a licence lay to Quarter Sessions. Accordingly the Supreme Court granted the mandamus to the Chairman, directing him to exercise the jurisdiction.

Applications for the conditional removal of a licence are governed by s. 39A of the *Liquor Act* 1912-1946. Sub-section (1) of that section deals with the case of a holder of a publican's licence, or of certain other licences, who desires to remove his licence from his licensed premises to other premises upon which it is proposed to

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erect buildings or to add to or alter the buildings in order to make them suitable for licensing. It enables such a person to make an application to the Licensing Court before building the new premises or making the additions or alterations. The procedure it requires consists in the giving of a notice in a prescribed form and making an application to the Licensing Court for an order conditionally granting such removal. The applicant must furnish the court with the plan and information required to be furnished on an application for an original licence for premises to be erected or added to or altered. Applications of that kind are governed by s. 27 of the Act to which s. 39A refers. Section 39A proceeds: "And thereupon the court may make an order conditionally granting such application, and after recording the same in the book of proceedings of the court may furnish a copy of such record to the applicant." The section then goes on to provide that the order shall remain in force for twelve months or such further period as is allowed while the premises are completed. Finally, the section directs that on the completion of such premises the district inspector shall, after examining them, certify whether or not they have been completed substantially in accordance with the plans and that if the inspector certifies in the affirmative the Licensing Court shall, at its next sitting, make an order for the removal of such licence to the premises. It will be seen that s. 39A (1) requires two orders, one which it describes as an order conditionally granting such removal, and another which it describes as an order for the removal of such licence to the new premises.

Section 170 (5) (*a*) and (*b*) are provisions which are concerned with appeals from certain adjudications of a Licensing Court. Licensing Courts are established by s. 5 (1), which provides that they shall consist of three licensing magistrates. Section 5 (10) provides that the licensing magistrates may delegate the jurisdiction and functions vested in them, with certain exceptions, either to one or more of their number or to a stipendiary or police magistrate. Broadly speaking, the jurisdiction and functions of the Licensing Court fall into two parts. One part is concerned with the licensing of premises, the removal of licences, the cancellation of licences, the certification and registration of clubs, the grant of permits, and generally matters controlled by the exercise of the power to grant or refuse licences. The other part consists in the jurisdiction to hear informations and complaints for summary offences against the *Liquor Act*. Part V. of Act No. 34 of 1946 contains provisions which have not yet been brought into force by proclamation. Section 55, which is contained in that part, alters

the constitution of Licensing Courts and provides for the appointment of three persons, one of whom shall hold the office of District Court Judge and two of whom shall each be stipendiary, police or licensing magistrates.

The purpose of par. (*a*) of sub-s. (5) of s. 170 is to enumerate certain descriptions of orders or proceedings and, with respect to those matters, to restrict the appeal which is granted to an aggrieved person by sub-s. (1) of s. 170 so that an appeal will only lie by way of prohibition or special case. The purpose of par. (*b*) of sub-s. (5) of s. 170 is to grant an appeal in the same matters to the full bench of the Licensing Court from a single member of the Licensing Court exercising a delegated jurisdiction. Section 170 (5) (*a*), which enumerates the orders or proceedings which are no longer to be subject to an appeal to Quarter Sessions, provides that no appeal other than an appeal by way of prohibition or special case shall lie or be taken under sub-s. (1) of the section against any adjudication of a Licensing Court whereby an application of the kind which it proceeds to mention is granted or refused. It is convenient to consider in numbered paragraphs the applications which it mentions. They are the following :—

(i) An application or a conditional application for a new licence. These are applications made respectively under ss. 24 and 27. It is unnecessary to say anything about ordinary applications for new licences made under s. 24. Section 27, however, provides for the case of a person desirous of obtaining a new publican's licence for premises proposed to be erected or premises already erected but requiring additions or alterations to make them suitable to be licensed under the Act. It will be seen that in a sense this section is *in pari materia* with s. 39A (1). But it is to be noticed that in describing the application which s. 27 authorizes its language varies somewhat from that employed in s. 39A (1). Section 27 (1) speaks of making a conditional application to the Court, while s. 39A (1) speaks of an application to the Court for an order conditionally granting removal.

(ii) An application for the removal of a licence. These are the words upon which the decision of the appeal hangs. They are words apt enough to describe an application under s. 39, which deals with an application for the removal of a licence to existing premises requiring no alteration to fit them for the purpose. The question is whether they also apply to an order conditionally granting removal under s. 39A (1). To this question I shall return.

(iii) An application for the removal of a certificate of registration of a club. Such applications are made pursuant to s. 145 (2).

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They are applications by a registered club which desires to remove from the premises occupied by it to other premises which are proposed to be erected or to other premises already erected but requiring additions or alterations to make them suitable to be registered. Section 145 (2) enables the club to apply in the first instance "for an order conditionally granting such removal." It will be seen that this phraseology is followed by s. 39A.

(iv) An application or a conditional application for a certificate of registration of a club. An application for a certificate of registration of a club may be made under s. 136 and it is unnecessary to say more about it. But s. 136A, which corresponds in the case of clubs with s. 27 in the case of publicans' licences, provides for the case of a club desirous of obtaining the grant of a certificate of registration for club premises proposed to be erected or for club premises partly erected but requiring additions or alterations to make them suitable to be registered. The language used by s. 136 (1) (*a*) to describe the application agrees with that used by s. 27. It is described as a conditional application, not as an application for a conditional order.

(v) An application for a permit under s. 57A of the Act. These are permits for the supply of liquor with meals in licensed or club premises. The provision has no bearing on the solution of the problem.

(vi) An application for a permit under Part IIIA. These are applications for permits to supply wines and malted liquor in restaurants. This provision too is not material.

Paragraph (*b*) of sub-s. (5) of s. 170 refers back to the foregoing enumeration and provides that where any such adjudication as is referred to in par. (*a*) is made by a Licensing Court which is constituted by a magistrate sitting alone, any person aggrieved may appeal to the Licensing Court constituted by the three licensing magistrates. The two paragraphs are therefore complementary. Where par. (*a*) takes away an appeal to Quarter Sessions par. (*b*) grants an appeal from a single magistrate to the full bench of the Licensing Court.

The question whether an order for conditional removal made under s. 39A (1) falls within the enumerated matters depends upon the words "any adjudication whereby an application for the removal of a licence is granted or refused." Are these words capable of including an order for conditional removal? The decision of the Supreme Court that they did not include such an order was based upon the view that two adjudications were necessary under s. 39A (1) and that the preliminary adjudication could not be described as one

whereby an application for the removal of a licence is granted. Their Honours appeared to concede that, in all probability, the omission of such an order from the category was due to inadvertence or a slip. But nevertheless their Honours considered that the words of the section were too definite and inflexible to admit of an interpretation which would cover such a case. The presence, in the context, of the expressions " conditional application for a new licence " and " conditional application for a certificate of registration " provided a contrast. For it seemed to show that when a conditional application, or for that matter a conditional order was intended, the legislature expressly described it as conditional.

The appellant, however, points out that the phraseology used in describing each of the adjudications to which I have referred appears to follow the language of the respective sections in which the various applications are authorized. The use of the words " conditional application for a new licence " and of the words " conditional application for a certificate of registration of a club " is due only to the draftsman's copying the exact words employed in s. 27 and in s. 136A respectively. It should not therefore be considered to indicate in any way that the reference to an application for the removal of a licence or certificate of registration is not intended to include applications for the conditional removal of a licence or of a certificate of registration. It is not as if s. 39A (1) and s. 136A had spoken of a conditional application. Each section speaks of an application for an order conditionally granting a removal. I think that the appellant is right in the submission that, on a close consideration of the phraseology of the sections describing these various applications, it is seen that no inference can be drawn from the use of the word " conditional " in reference to applications for new licences and registrations and from its absence in the references to removal of licences or of certificates of registration. I think that the point is reduced to the single question whether it can be correctly said that when an order conditionally granting removal has been made an application for the removal of a licence is granted. That appears to me to come back to the question whether the latter words cover the conditional grant of an application. There is nothing essential to the connotation of the word " grant " which excludes from its meaning a conditional grant. I do not see why a reference to an adjudication granting or refusing an application for removal should be incapable of covering an adjudication whereby an application is conditionally granted.

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The consequences of a construction of the words which excludes a conditional grant from par. (*a*) of sub-s. (5) are striking. If the application had been refused it is not denied, and I do not think it could be denied, that an appeal would not lie to Quarter Sessions and would lie under par. (*b*) from a single magistrate to the full bench of licensing magistrates. For it is self-evident that, if the application for conditional removal is refused, the application for removal is refused finally.

The result, therefore, of the interpretation adopted in the Supreme Court is that if such an application fails, there is no appeal to Quarter Sessions but there is an appeal from the single magistrate to the three magistrates; but if it succeeds there is no appeal by the objectors to the three magistrates, and there is an appeal to Quarter Sessions. In the next place, if upon a certificate of an inspector under s. 39A (1) that the condition contained in the conditional order for removal has been complied with the Licensing Court makes a final order for removal, it would appear that the final order falls within the meaning assigned by the construction adopted in the Supreme Court of the words "adjudication . . . whereby . . . an application for the removal of a license . . . is granted." Therefore an appeal would lie from a single magistrate to the three licensing magistrates and not to Quarter Sessions. But while that formally must be so on the interpretation adopted by the judgment under appeal, yet s. 39A (1) makes it the duty of the Licensing Court to act upon the inspector's certificate, and no question would be open upon the appeal except the formal correctness and validity of the certificate. If and when Part V. of Act No. 34 of 1946 is proclaimed and comes into operation a further anomaly will arise. You would then have the absurd position of a decision of a court composed of a Chairman of Quarter Sessions and two magistrates being subject to appeal to a Court of Quarter Sessions consisting only of a Chairman of Quarter Sessions.

Finally, it is not an irrelevant consideration that the question whether a licence should be removed from one premises to another and what kind of buildings ought to be erected is one which appears much more suitable for the consideration of the Licensing Court than of Quarter Sessions. On the surface of sub-s. (5) of s. 170 it is clear enough that the general intention of the legislature was to confine to the Licensing Court, subject to appeal by way of prohibition or special case, the adjudication upon the class of matters which relate to the administration of the licensing provisions of the *Liquor Act* as opposed to the provisions relating to offences.

These all appear to me to be powerful considerations pointing to the intention of the legislature to include orders for the conditional removal of publicans' licences to premises upon which buildings are to be erected or added to or altered. I think that the words "adjudication . . . whereby . . . an application for the removal of a licence . . . is granted or refused" are susceptible of a meaning covering a conditional grant or, if the phraseology is preferred, a grant of an application for conditional removal and, in my opinion, the considerations tending to show that it was the intention to cover such an application are strong and make it right to hold that the words have that operation.

For these reasons I am of opinion that the appeal should be allowed, that the order of the Supreme Court should be set aside and that the rule nisi for a mandamus should be discharged. The respondents should pay the costs of the appeal to this Court and the costs of the rule in the Supreme Court.

McTiernan J. I agree that this appeal should be allowed.

A correct test of whether any application comes within the description indicated by the words "an application for the removal of a licence" is, I think, the subject matter of the application. The subject matter of an application for an order conditionally granting the removal of a licence is the removal of the licence. It is an application for the removal of the licence in respect of which it is made.

This view is, in my opinion, confirmed by the language of s. 39A (1). This sub-section refers to the applicant to whom it gives the right to make such an application as the holder of a licence who "desires" to "remove" it. The application is the means provided to enable him to carry out his desire. If the application is successful the Licensing Court makes an order conditionally granting the removal. This is the first of the two steps in the proceedings which are begun by the application. But the subject matter from beginning to end is the removal of the licence. Section 39A (1) contains a special provision relating to the duration of an order conditionally granting the removal of a publican's licence. This provision begins with the words "in the case of the removal of a publican's licence." These words describe the general subject matter of the order and the proceedings.

In my opinion the words "an application for the removal of a licence" should not be construed in such a manner as to exclude from their general scope an "application for an order conditionally granting the removal of a licence," unless there is something in the

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Act which necessarily excludes the application. I am unable to find anything in the Act which does so.

It follows that by reason of s. 170 (5) an appeal does not lie to Quarter Sessions against an order conditionally granting the removal of a publican's licence and the rule nisi for mandamus should be discharged.

WILLIAMS J. Section 170 (5) (*a*) of the *Liquor Act* 1912 as amended by Act No. 34 of 1946 provides that there shall be no appeal, other than by way of prohibition or special case, against the adjudication of a Licensing Court whereby an application for the removal of a licence is granted or refused. Section 39A (1) of the Act provides that a holder of a publican's licence who desires to remove his licence from his licensed premises to other premises which are proposed to be erected, before building such new premises, may apply to the Licensing Court for an order conditionally granting such removal. Notice of such application must be given in such form as may be prescribed to the Licensing Court of his intended application and the same notice must be served on the owner, lessees, sub-lessees, and mortgagees if any of the premises from which the licence is to be removed as is required to be given upon an application by a licensee under s. 39 of the Act to remove this licence from his licensed premises to any other premises. Section 39A (2) of the Act provides that the provisions of sub-ss. 2, 2A, 3, 4, 4A and 4B, and sub-s. 4C of s. 39 of the Act shall apply to an application for the removal of a publican's licence under the section.

These provisions make applicable to such an application the same objections, so far as they are applicable, and the same rights of objectors to be heard on such objections as may be made to the grant of the licence, and require that the Licensing Court shall not make an order for removal unless satisfied that no valid objection to such removal is made by the owner of the freehold of the premises to which the licence is attached or by any lessee, sub-lessee or mortgagee of the premises. The applicant must furnish the court with a properly drawn plan showing the precise locality, the number and size of the rooms, and all other information necessary to enable the court to form a correct estimate of the utility of the proposed premises when completed.

The court then hears the application and either grants or refuses the application. If it grants the application it makes the order applied for, that is an order conditionally granting such removal. The order remains in force until the completion of such premises provided such completion is effected within the prescribed time.

On completion of the premises the district inspector must examine them and certify whether or not they have been completed substantially in accordance with the plan. If he certifies in the affirmative the Licensing Court must at its next sitting make an order for the removal of the licence to the new premises. Section 39A (1) only refers expressly to one application, namely the application for an order conditionally granting the removal, and it is on the hearing of this application that the whole merits of the case are considered by the Licensing Court, and the applicant and other persons interested are entitled to be present and to give evidence and to be heard. Section 39A (2) refers to the application for this order as an application for the removal of a publican's licence. It is this order which the Licensing Court must not grant unless it is satisfied that no valid objection to the removal has been made by the owner, lessee, sub-lessee or mortgagee of the premises from which the licence is to be removed. If an order is made the applicant must comply with the statutory condition, that is to say, he must complete the building of the new premises in accordance with the plan furnished to the court within the prescribed time. He is then entitled as of course to an order for the removal of the licence to the new premises. Section 39A (1) does not state that the applicant must make a second application to the Licensing Court for this purpose but he would no doubt in practice appear in court, refer the court to the inspector's certificate in the affirmative, and apply for the order.

The Full Supreme Court of New South Wales was of opinion that the making of an order conditionally granting the removal was not the granting of an application for the removal of a licence within the meaning of s. 170 (5) (*a*) and that the application was only granted when the Licensing Court made the second order. *Jordan* C.J. said that when an application is made under s. 39A (1) the Licensing Court may refuse a conditional order or may grant a conditional order. In the first case the refusal operates as an adjudication refusing the application altogether. In the second case the adjudication does not grant the application, it provides only that the application shall be granted in the future if certain conditions are complied with. But the appeal that is taken away by s. 170 (5) (*a*) is an appeal from an adjudication of a Licensing Court whereby an application for the removal of a licence is granted or refused. The question to be adjudicated upon is whether the application for the removal of the licence should be granted or refused. In my opinion this adjudication takes place when the Licensing Court hears the application for an order conditionally granting such removal. It is this application which the court may

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grant or refuse. If the court accedes to the application and makes the order conditionally granting such removal, it grants the application. If the court refuses to accede to the application, then it refuses the application. The second order is not an order which the Licensing Court has a discretion to grant or refuse. It is an order which must be granted on compliance with the statutory condition. The duty of the Licensing Court before making the order is merely to satisfy itself that the inspector has certified in the affirmative. This duty is purely ministerial and could not be reasonably described as an adjudication whereby an application for the removal of a licence is granted or refused. In my opinion the provisions of s. 39A (1) and (2) supply a context sufficient to indicate that the adjudication in question is the adjudication upon the application for the conditional order.

For these reasons I would allow the appeal.

WEBB J. I think the appeal should be dismissed. I share the view of the Supreme Court as to the meaning and effect of s. 39A and s. 170 (5) (*a*). There is a powerful reason for holding that an appeal of the kind in question does not lie if s. 39A and s. 170 (5) (*a*) are ambiguous, namely, the absurdity that otherwise arises under the 1946 Act, not yet proclaimed, of allowing an appeal from a chairman of quarter sessions and two magistrates to a chairman of quarter sessions alone. But if there is no ambiguity in those sections nothing in the 1946 Act creates one. The absurdity otherwise arising under the 1946 Act does not render obscure or ambiguous the plain language of ss. 39A and 170 (5) (*a*), so as to supply a justification for a construction of those sections that avoids the absurdity. I think there is no ambiguity in s. 39A or s. 170 (5) (*a*). Section 39A describes the second order as the order for removal and it is made only after the inspector certifies to the completion of the premises substantially in accordance with the plan. This in my opinion prevents the first order—the conditional order—from being held to be, under s. 170 (5) (*a*), an adjudication whereby the application for the removal of the licence is granted so that no appeal lies except by way of prohibition or special case.

Appeal allowed. Order of the Supreme Court set aside and in lieu thereof discharge the rule nisi for a mandamus with costs.

Solicitors for the appellant, *Smithers, Warren & Lyons.*
Solicitors for the respondent objectors, *Walter Linton & Bennett.*

J. B.