[HIGH COURT OF AUSTRALIA.]

SPENCER INVESTMENTS PROPRIETARY LIMITED . . . . . } APPELLANT;
RESPONDENT,

AND

EVANS AND OTHERS . . . . . RESPONDENTS.
APPELLANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 11, 12; *June* 22.

Dixon C.J., McTiernan, Webb, Fullagar and Taylor JJ.

Liquor (Vict.)—Grocer's licence—Statutory limitation on number in licensing district—Reduction following vote at local option poll—Repeal of provision for poll—Change in area of licensing district—Licensing Act 1928 (*No.* 3717) (*Vict.*) *ss.* 2, 288.

Section 2 of the *Licensing Act* 1928 repealed the Acts mentioned in the first schedule to the Act " to the extent thereby expressed to be repealed " and provided that " such repeal " should not affect " any poll taken " under those Acts before the commencement of the *Licensing Act* 1928. The *Licensing Act* 1915 provided for the holding of local option polls in each licensing district, and for the consequent reduction in the number of licences by the Licensing Court if the resolution for reduction was carried. The local option provisions of the *Licensing Act* 1915 were repealed by the *Licensing Act* 1922. Section 288 of the *Licensing Act* 1928 provided that " subject to the express provisions of this Act, the number of . . . grocers' licences . . . in a district shall not at any time exceed the number of licences of the same description in the district " on 1st January 1917.

On an application for a grocer's licence in respect of certain premises it appeared that, although the premises were, at the present day, in the area constituting the licensing district of Malvern, in 1920 they had been in the area constituting the then licensing district of Malvern East. On 1st January 1917 and subsequently there had not been any grocer's licence in existence in respect of premises within the area comprising the then licensing district of Malvern East. At the former date there were four grocer's licences in existence in respect of premises in the then licensing district of Malvern. In 1920, a resolution for reduction in the number of grocer's licences was carried at local

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option polls held in both of the then licensing districts of Malvern and Malvern East. As a result of the poll in the then licensing district of Malvern, the Licensing Court ordered that the number of grocer's licences in that district be reduced from four to three, at which figure it had remained, notwithstanding changes in the boundaries of the district. No order was made by the Licensing Court in respect of the then licensing district of Malvern East.

Held that there was no restriction on the power of the Licensing Court to grant the licence.

Decision of the Supreme Court of Victoria (Full Court) reversed.

APPEAL from the Supreme Court of Victoria.

Spencer Investments Proprietary Limited, a company incorporated in Victoria, applied by notice, dated 28th September 1951, to the Licensing Court for the licensing district of Malvern, Victoria, for a certificate authorizing the issue of a grocer's licence and a spirit merchant's licence for premises to be erected at 1403 Malvern Road, Malvern. The application was opposed, among other ratepayers of the City of Malvern, by F. H. Evans, C. L. Stewart, J. H. Wailes, R. C. Lee and C. Norman. On 15th September 1952 the court approved the grant of a certificate for a grocer's licence to be issued conditionally upon the erection of a building in accordance with plans and specifications to be lodged within one year. Pursuant to application made on 29th September 1952 under s. 67 of the *Licensing Act* 1928 by the above-named objectors, the court stated a case dated 15th May 1953 for the opinion of the Supreme Court of Victoria. The material portions of the said case were as follows:—6. There were, on 1st January 1917, four spirit merchant's licences and four grocer's licences existing and operative in respect of premises situate within the boundaries of the licensing district of Malvern as at present constituted. At the time of this application there were three spirit merchant's licences and three grocer's licences existing and operative in respect of premises situate within the boundaries of such licensing district as at present constituted. 7. As a result of a vote in favour of resolution B at the local option poll held on 21st October 1920, one Holdsworth was, pursuant to s. 299 of the *Licensing Act* 1915, deprived of a spirit merchant's licence and a grocer's licence in respect of premises situate at 28 High Street Malvern, causing the number of spirit merchant's licences and grocer's licences existing and operative in respect of premises within the boundaries of the licensing district of Malvern, as at present constituted, to be reduced from four to three as aforesaid, and such licence ceased to exist on 31st December 1921. 8. On 1st January 1917 and at the date of the holding of

the said local option poll and at the date of the said cessation the subject premises (namely, 1403 Malvern Road) were in the area constituting the then licensing district of Malvern East and the premises at 28 High Street aforesaid were in the area constituting the then licensing district of Malvern. 9. On 1st January 1917 and subsequently until the date of the hearing of this application there have not been any spirit merchant's licences and grocer's licences in existence in respect of premises within the area comprising the licensing district of Malvern East. 10. At a local option poll taken on 21st October 1920 pursuant to Act No. 2683 resolution B (referred to in s. 296 of such Act) was carried in each of the said licensing districts of Malvern and Malvern East. 11. On the hearing of this application objection was taken by counsel for the appellant objectors that there was no " vacancy " for the granting of a grocer's licence in the licensing district of Malvern, as at present constituted. 12. This Court, on 15th September 1952, overruled the aforementioned objections and approved the grant of a certificate for a grocer's licence to be issued conditionally upon the erection of a building in accordance with a plan and specifications to be lodged within one year. The application for a spirit merchant's licence was adjourned to a date to be fixed not later than one year from 15th September 1952. This application was so adjourned because the Court did not desire to grant a spirit merchant's licence alone without also granting a grocer's licence. If the conditions, upon which the grant of the grocer's licence was approved by the Court, shall be fulfilled then (subject to the decision of the Supreme Court on this case stated) the Court intends to grant a spirit merchant's licence to the applicant upon the issue of the grocer's licence to the applicant. A spirit merchant's licence is not the subject matter of s. 288 of the *Licensing Act* 1928 and was not raised in argument, which was confined to objection to the grant of a grocer's licence. 13. The appellants, being persons feeling themselves aggrieved by the aforesaid determination of this Court as being erroneous in point of law, have requested this Court to state and sign a case setting forth the facts and grounds of such determination for the opinion of the Supreme Court. 14. This Court accordingly submits the following questions for the opinion and determination of the Supreme Court namely :— (i) Was this Court wrong in law in determining that the premises the subject of this application were in an area in which there was a " vacancy " for a grocer's licence and in respect of which the grant of such a licence might lawfully be made. (ii) Should this Court have held that neither of the licences the subject of this application

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could be granted, unless it appeared that the number of such licences existing and operative at the date of this application with respect to premises in the area of the licensing district of Malvern East, as constituted at the date of the local option poll of 1920, was less than the number of such licences which were existing and operative with respect to premises in such area at the date of such poll.

On 24th June 1953 *Barry* J. ordered that the case be referred to the Full Court of the Supreme Court of Victoria under s. 44 of the *Supreme Court Act* 1928.

In a judgment delivered on 30th September 1953 the Full Court of the Supreme Court of Victoria (*Lowe* A.C.J., *Barry* and *Dean* JJ.) held that the first question raised by the case should be answered in the affirmative and remitted the matter to the Licensing Court for re-hearing.

From this decision Spencer Investments Proprietary Limited appealed to the High Court.

J. X. O'Driscoll Q.C., and *J. P. Bourke*, for the appellant.

R. A. Smithers Q.C., and *P. A. Coldham*, for the respondents.

Cur. adv. vult.

June 22.

The following written judgments were delivered :—

DIXON C.J. I have had the advantage of reading the judgment prepared by *Fullagar* J. and I concur in it. I desire to add only the following observations.

1. The application before the Licensing Court was for a certificate authorizing the issue of a grocer's licence for premises to be erected and the court approved the grant of a certificate conditionally upon the erection of a building in accordance with a plan. Prima facie to do this falls within the power conferred upon the Licensing Court by s. 65 (*a*) and s. 90 (2) (*b*) (ii) of the *Licensing Act* 1928 as amended by the *Licensing (Amendment) Act* 1949. The question is whether there is contained in the statutory provisions now in force a restriction upon that power based upon a particular resolution adopted at a local option poll that was held on 21st October 1920. It was a resolution for the reduction of licences and it was carried in a then existing licensing district the boundaries of which included the site of the proposed premises. The statutory provisions in pursuance of which the poll was held on 21st October 1920 were repealed in the year 1922. The restriction based upon the resolution must be found in the provisions of the now existing law, including, of course,

in that expression any provisions now in force the effect of which may be to continue the operation of earlier provisions. The existing law on the subject is undeniably contained in the *Licensing Act* 1928 as amended by subsequent Acts (all of which will be found enumerated in the margin of Act No. 5767 not yet in operation). But once the almost self-evident proposition that the restriction must be found in the statutory provisions at present in force is recognized and its consequences unreservedly accepted, it seems to me that all foothold is lost for the contention that there is such a restriction.

If s. 2 of the *Licensing Act* 1928, dealing as it does with the repeal of prior enactments and the saving of various things done thereunder, is put aside for separate treatment, I venture to think that no ground whatever appears upon the face of the Act of 1928 or of the amending Acts for imposing upon the power of the Licensing Court to grant licences a limitation based upon the adoption at some anterior date of a resolution to reduce licences. There are discernible in the Act of 1928 certain vestigial traces of earlier statute law relevant to local option or other liquor polls and, as they were laid hold of as lending support to the view that by reason of the resolution of 21st October 1920 to reduce licences the authority of the court to grant grocer's licences locally was numerically limited, it is necessary to mention at least some of them.

The express provision contained in s. 37 (*e*) as to the necessity of a three-fifths majority at a poll held concerning an " additional (victualler's) licence " certainly does not suggest an intention to impose such a limitation. Indeed it is the kind of express provision on a subject that is often relied upon as negativing an intention, if it otherwise might be inferred, to leave the subject to implication.

Any such limitation must be cumulative upon that imposed by s. 288. There is no doubt about the meaning of that section and no additional limitation can be extracted from it by any process of " construction " or " interpretation ". It must be discovered elsewhere, if it exists, and superimposed upon s. 288.

Section 289 (2) may or may not require in its administration a reference to the adoption at the poll of October 1920 of a resolution for reduction; that depends on the meaning of the Acts of 1915 and 1916, on the identity of licensing districts and perhaps on other considerations. But, however that may be, it does not tend to support any inference that the power to grant licences is subject to a limit derived from the adoption of such a resolution.

Section 290 excludes the possibility of its being supposed that the Licensing Court is prevented from reducing licences because at

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such a poll a resolution for continuance was adopted. Probably s. 290 was enacted *ex cautela*. At all events it would be unsafe to infer that the legislature positively believed that in its absence the state of the law would be such that the Licensing Court would be disabled from using its power under s. 289 to reduce licences by the fact that such a resolution for continuance had been passed in October 1920. Still less could it be inferred that the legislature believed that the fact that a resolution for reduction had been adopted in 1920 disabled the court from using its power under s. 65 (*a*) and s. 90 (2) (*b*) (ii) to grant licences. Further, even if such a legislative belief as to the condition of the law could be inferred, that in itself would be no ground for imputing an intention affirmatively to establish such a condition of the law.

In s. 293 (2) there is a provision that when the Licensing Court determines that any licence shall cease such licence shall at the expiration of the period for which it was granted or renewed cease and become absolutely void and shall not be renewed. This provision on its face applies to determinations made under s. 293 (1) and cannot apply of its own force to the determination in fact made by the Licensing Court on 15th August 1921 in pursuance of the resolution for reduction. That determination was that the number of licences at that time existing in the then licensing district of Malvern should be reduced and that the grocer's licence of Arthur Halsey Holdsworth in respect of the premises 28 High Street Malvern should cease and become void and should not be renewed. But even if it did so apply it would not mean that never in respect of other premises within the geographical limits which formerly bounded the district could a grocer's licence be granted to some other person, simply because that would increase or restore the number of such licences.

Putting aside s. 2, in my opinion there is simply not discoverable in the *Licensing Act* 1928 as amended any foundation for the supposed limitation upon the power of the court to grant licences in an area to which there applied a resolution for reduction adopted in October 1920.

2. Is there anything to be found in s. 2 which would cause a limitation to exist derived from the adoption of such a resolution? In my opinion s. 2 contains nothing which could possibly do so. Section 2 repealed certain Acts mentioned in a schedule so far as they had not been repealed. Comprised in the schedule were so much of the *Licensing Act* 1915 and of the *Licensing Act* 1916 as had not been already repealed and the whole of the *Licensing Act* 1922. Section 2 then proceeded to enact that the repeal should

not affect certain matters done under the Acts repealed before the commencement of the Act of 1928. Among other things the repeal should not affect any rule, regulation, order, application made or any poll taken under the repealed Acts. There may be some doubt whether the word " order " refers to an order of the Licensing Court and if it does whether a determination made under par. (*a*) of s. 299 (1) of the *Licensing Act* 1915 or a declaration under par. (*c*) thereof answers that description. But it seems clear enough that s. 2 is concerned only to prevent the repeal operating to undo such things as it mentions, in this case of an order or poll, and to rob them of their antecedent legal effect. It does not relate to legal consequences of what may be called a public general description, as distinguished from the accrual of private rights or liabilities from the order, the poll or the other matters it mentions. If such consequences were affixed to such order poll or other matters by prior legislation and if the provisions on which that general law depended were not reproduced in the Act of 1928, there is nothing in s. 2 which would operate to continue the law affixing those consequences to the order or poll or matters.

But in any case it was not under any provision repealed by s. 2 that the poll was taken, and the determination and declaration by the court were made. The poll was taken under the provisions of ss. 295, 296 and 297 of the *Licensing Act* 1915, effect was given to it by s. 298, and the order was made under s. 299 (1) of that Act. All these provisions were repealed by the *Licensing Act* 1922. The Act of 1922 contains no provision continuing any legal consequences theretofore flowing from the poll or order and, needless to say, what s. 6 (2) of the *Acts Interpretation Act* 1928 (Vict.) preserves from impairment are the previous operation of the repealed enactment and acquired rights, accrued liabilities etc. It is true that sub-s. (4) of s. 299, which corresponds with s. 293 (2) of the Act of 1928, was reproduced in s. 299 as sub-s. (3) by the Act of 1922 (s. 31). But in the setting which was then given to that subsection by the Act of 1922 its operation could not go beyond the validity and renewal of the particular licence, even if previously the sub-section could have received a more extensive meaning.

3. The *Licensing* (*Amendment*) *Act* 1953 (No. 5767) has not yet come into operation, no proclamation having been made under s. 1 (2). But when it does come into operation the effect of s. 7 of that Act will be to put at rest the question raised by this appeal. Clearly enough once that Act is proclaimed there can no longer be any question that the fact that a resolution for reduction was adopted

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in October 1920 affords no impediment to the exercise of the power of the Licensing Court to grant a licence.

I agree that the appeal should be allowed, that the order of the Supreme Court be discharged and that in lieu thereof it should be ordered that the determination of the Licensing Court be affirmed.

McTIERNAN J. This case arises out of an application for a grocer's licence and is concerned with the power of the Licensing Court to grant the licence.

A licensing court has power under s. 65 of the *Licensing Act* 1928 to grant or refuse all licences authorized to be issued under the Act. The power is subject to a restriction arising from the words " save as in this Act provided " which are in s. 65. Grocer's licences are within the scope of the section.

But for what has been decided as to the effect of the words " subject to the express provisions of the Act " with which s. 288 begins, I should have no doubt that the *Licensing Act* 1928 contains no provision by which the Licensing Court was prohibited from granting a grocer's licence to the appellant. From the introductory words of s. 288 it follows that an express provision is needed to render the maximum number of grocer's licences fixed by reference to 1st January 1917 inapplicable in the present case. It should be observed that the *Licensing Act* 1928 contains no express provisions permanently limiting the number of licences of any description to the number determined by a Licensing Court pursuant to a local option poll at which reduction of licences was favoured by the voters. It is argued that by reason of the saving which s. 2 of the *Licensing Act* 1928 makes in respect of " any poll taken ", such an express provision is necessarily part of the legislative intention expressed by the opening words of s. 2. This section repeals the Acts mentioned in the first schedule to the Act " to the extent thereby expressed to be repealed " and goes on to provide that " such repeal " should not affect " any poll taken " under those Acts before the commencement of the *Licensing Act* 1928. If this saving provision applies to a local option poll held under the *Licensing Act* 1915 it may have some preservative force as regards the local option poll mentioned in the case stated. If that poll is included in the saving clause it is not clear what continuing effect it is intended to have. A local option poll had no definitive legal effect as to the specific number of licences of any description. It would seem that in order to give efficacy to the saving of a local option poll the extension of the clause to the resolution for reduction carried at the poll and the order of the Licensing Court made pursuant to the

resolution, is required. However I do not inquire whether as regards any local option poll the saving clause should have these implications. In my opinion, s. 2 does not apply to a local option poll taken under the *Licensing Act* 1915 as amended by the *Licensing Act* 1916. The provisions of these Acts relating to local option polls were not standing when the *Licensing Act* 1928 was passed. This was a consolidating Act. Section 2 repealed only those provisions of the two Acts, mentioned above, which were in force at the time the *Licensing Act* 1928 was passed. The words of s. 2 and of the first schedule show that s. 2 was dealing only with the unrepealed provisions of the Acts which were consolidated. The *Licensing Act* 1922 which had put an end to the provisions relating to local option polls made no saving in respect of any such poll. The natural meaning of s. 2 is that it is concerned only with a poll under the legislation which s. 2 repeals. The provisions of the *Licensing Act* 1915 and the *Licensing Act* 1916 relating to local option polls were, as already stated, repealed in effect by the *Licensing Act* 1922 without any saving in respect of any poll taken under those Acts.

Section 50 of the *Licensing Act* 1915, which was amended by s. 40 of the *Licensing Act* 1922 provided for a " vote ", also called a " poll ". This vote or poll was not a prelude to reduction of licences. It was part of the process of granting a licence. These sections were some of the provisions which s. 2 of the *Licensing Act* 1928 repealed and they were re-enacted by ss. 36 et seq. The words " any poll taken " are not incapable of applying to a vote or poll other than a local option poll. There is scope for the application of the words to a vote or poll taken under the provisions of s. 50 of the *Licensing Act* 1916 as amended by s. 40 of the *Licensing Act* 1922. It is not necessary to go back to local option polls to find some poll to which the words " any poll taken " can apply. I think that the correct approach is to examine the provisions of the Acts which s. 2 was erasing for the purpose of consolidating the law. These Acts contained, as already mentioned, provisions authorizing at least one kind of poll to which s. 2 is capable of applying. I should not read the words " any poll taken " in the context of s. 2 as applying to a local option poll taken under legislative provisions that ceased to operate before s. 2 was passed and which are not, of course, consolidated by the Act itself.

The words of s. 290 of the *Licensing Act* refer to local option polls. Upon that reference a submission was made for the respondents to the effect that the Act manifests the intention that the number of licences determined by the Licensing Court in consequence

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of a local option poll should never be exceeded. In my opinion this submission goes beyond the intention of s. 290. An "express" provision is, by reason of the opening words of s. 288, necessary to give statutory force to a maximum number of licences less than the number fixed under the terms of the section. There is no express provision in the Act qualifying s. 288. It is not an excess of the limitation which s. 288 imposes upon the Licensing Court to grant the application for a grocer's licence, made by the appellant.

I would allow the appeal.

WEBB J. I would allow this appeal for the reasons given by *McTiernan* and *Taylor* JJ., and have little to add.

Assuming, as Mr. *Smithers* for the respondents submitted, that s. 290 of the *Licensing Act* 1928, upon which the respondents strongly relied, is a legislative recognition that local option votes taken before the 1928 Act continue to have effect, still it refers I think only to such votes as have been taken in districts in which there has been no change of boundaries since the resolution was carried, that is to say, in districts which have continued in existence. A change in boundaries really creates a new district. When a local option vote is taken and a resolution is carried it operates throughout the particular district as it then exists. It is taken for that district as a whole, nothing more or less. But a district cannot be distinguished from its boundaries in such cases : if they are changed, so is the district. The former district disappears and with it the effect of the local option vote, which was not taken for an area except so far as it constituted the whole of a district. It could not then survive the district for which it was taken and on which it was based. The legislature could have provided otherwise : it could have declared that, notwithstanding a change of boundaries of a licensing district, the carriage of a resolution should continue to have operation and that the area of its operation should be the new district, or that part of it which had constituted the district in which the resolution had been carried. But no such declaration has been made and none is implied. Complications would arise in any case where the former district was split up and its parts distributed among several districts, as *Taylor* J. indicates. Licensing districts are created *alio intuitu*, i.e. for electoral purposes, and then adopted as licensing districts, regardless of the effect on the carriage of resolutions at local option polls, which might have been considerable in some cases. If, as we were told, there was no such effect in this case, that was purely accidental and in any event

irrelevant to the real position, i.e. the dependence of the effect of the vote on the continued existence of the district for which it was taken.

But if this is a wrong view still s. 290 is not an " express " provision within the meaning of the introductory words of s. 288 for the preservation of the local option polls. Their Honours in the Full Court relied for this " express " provision not on s. 290 but on s. 2 of the 1928 Act which, in repealing certain earlier legislation, preserves " any poll taken " under that legislation. However I think there is much to be said for the submission of Mr. *O'Driscoll* for the appellant that s. 2 was intended merely to preserve a poll taken under the legislation so repealed where action in pursuance of the local option vote had not been completed when the 1928 Act commenced. But in any event I think it is confined, as *McTiernan* J. says, to polls taken under s. 50 of the 1916 Act as amended by s. 40 of the 1922 Act. Those polls have no particular relation to the boundaries of the district as distinct from a particular place or premises within it of which the identity is not affected by a change of boundaries. But if s. 2, read with s. 290, is broad enough to include local option polls, as literally it is standing alone, still for the reasons I have stated I think it must be confined to polls in districts of which the boundaries have not been altered, and which therefore have continued in existence, since the particular resolution was carried. That was not the case here.

FULLAGAR J. The appellant company applied to the Licensing Court under the *Licensing Acts* of Victoria for a grocer's licence in respect of certain premises situate in the Licensing District of Malvern. The application was opposed by the present respondents. The grounds of opposition included a submission that the Licensing Court had no power to grant the licence. The Licensing Court, after hearing evidence and argument, decided that it had power under the Acts to grant the licence, and that the licence should, subject to certain conditions with which the company is willing to comply, be granted. The present respondents appealed by way of case stated under ss. 67 et seq. of the *Licensing Act* 1928 to the Supreme Court of Victoria. The appeal having been referred to the Full Court, that court decided that the Licensing Court had no power to grant the licence. From that decision the company appeals by special leave to this Court.

Section 288 of the *Licensing Act* 1928 (so far as material) provides : " Subject to the express provisions of this Act the number of victuallers' licences or grocers' licences or Australian wine licences in a district shall not at any time exceed the number of licences of the

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same description in the district on the first day of January one thousand nine hundred and seventeen." The " express provisions of the Act " to which s. 288 refers are s. 35, which provides for " roadside victualler's licences ", and ss. 36-39, which authorize in special circumstances and subject to special conditions, the grant of what are called " additional licences " (i.e. licences in excess of the number permitted by s. 288) in proclaimed areas. These provisions relate only to victualler's licences, and have no relevance to the present case. The number of grocer's licences existing in the licensing district of Malvern on 1st January 1917 was four. There are now three. The appellant company's contention, which was accepted by the Licensing Court but rejected by the Supreme Court, is that one more grocer's licence may, therefore, be granted. There is, the company says, no limit on the number of grocer's licences that may lawfully be granted in the licensing district of Malvern other than that imposed by s. 288.

It is impossible to find in the *Licensing Act* 1928, which is the relevant enactment, any suggestion of any answer to the company's contention. The respondents, however, put forward an argument based on certain repealed legislation and on certain events which took place while that legislation was in force. From 1906 to 1922 the Victorian licensing legislation contained provisions relating to what is commonly known as " local option ". These local option provisions, though enacted in 1906, did not come into operation until January 1917. Under those provisions, as amended, polls of electors for the Lower House of the Victorian Parliament were to be held from time to time in each licensing district. At any such poll electors might vote for any one of three " resolutions " described respectively as resolution A, resolution B, and resolution C. Resolution B was " That the number of licences existing in the district be reduced ". The only poll ever in fact held under these provisions was held in 1920. At this poll the electors in the then existing licensing districts of Malvern and Malvern East carried resolution B by the necessary statutory majority. This is the primary fact on which the respondents rely. They say (to put it, for the moment, in very general terms) that the effect of the then existing legislation on the result of this poll, and an order of the Licensing Court consequential thereon, was to reduce permanently the number of licences which could lawfully be granted in an area in which the company's premises are situate—in other words, to impose a local limitation operating in addition to, and independently of, the limitation imposed by s. 288. This contention necessitates an examination

of the history of the relevant legislation. It is not necessary, I think, to go back beyond 1906.

It is to be observed at the outset that the area affected by the carrying of a local option resolution was a licensing district. The licensing district was, so to speak, the constituency for the purposes of the poll. The boundaries of licensing districts have always been fixed by reference to electoral districts, though not always on the same basis, and the boundaries both of electoral districts and of licensing districts have changed radically since 1920. The judgment of the Supreme Court, however, proceeds on the assumption that resolution B was carried in and for the area constituting the now existing licensing district of Malvern, and it is convenient to proceed in the first place on the same assumption. This assumption being made, the facts are sufficiently stated by saying that, after the poll of 1920, the Licensing Court, acting under the *Licensing Acts*, ordered that a grocer's licence and a spirit merchant's licence held by one Holdsworth in the district should cease. The respondents maintain that no new grocer's licence could thereafter be lawfully granted in the district, although the effect of the order was to make the number of grocer's licences held in the district less by one than the number held on 1st January 1917.

The *Licensing Act* 1906 provided by s. 43 for the establishment of a Licences Reduction Board, which was charged with the duty " in every year until 31st December 1916 " of reducing the number of victualler's licences in Victoria. In effecting this reduction the board was to have regard to the convenience of the public, the requirements of different localities, and the conduct of business on particular licensed premises. After the expiration of this period, viz. on 1st January 1917, Div. VIII of the Act was to come into force. Division VIII was headed " Local Option ". It contained s. 118, which now appears with minor alterations as s. 288 of the *Licensing Act* 1928. The general scheme seems very clear. Over a period of ten years a general process of reduction in the number of licences in the various districts is to take place. At the end of that period the position is to be stabilized, and no new licence of any of the three specified classes is to be granted in any district in excess of the number then left standing. Division VIII of the Act of 1906 also contained the original provisions for local option polls, to which reference has already been made.

At the time of the poll of 1920 the relevant legislation was contained in the *Licensing Act* 1915 as amended by the *Licensing Act* 1916. The Act of 1915 was a consolidating Act, and it incorporated in Pt. XIII the provisions of Div. VIII of the Act of 1906, s. 118 of

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the Act appearing in Pt. XIII as s. 294. Part XIII provided (ss. 295, 296) for the submission to the electors of each *electoral* district of the three resolutions which have been mentioned, but the effect of s. 45 of the Act of 1916 was to substitute "*licensing* district" for "electoral district". What was called resolution A was "That the number of licences existing in the district continue". Resolution B was "That the number of licences existing in the district be reduced". Resolution C was "That no licences be granted in the district". The resolutions could not, of course, of their own inherent force, carry any legal consequences, and, if the Act had stopped there, the passing of any resolution by the prescribed majority could have served no other purpose than as a record of public opinion. But the Act did not stop there. It contained four provisions dealing with the results which were to follow the carrying of resolution B. The first was s. 295 (4), which provided that "The local option vote taken in any electoral district shall be given effect to by the Licensing Court having jurisdiction within such district". This is in such general terms that it does not carry the matter much further. Section 298 was more specific in providing for the consequences that were to follow on the carrying of each of the three resolutions. So far as material, it said:—"If any resolution is carried it shall be notified in the *Government Gazette*, and shall subject to the provisions of this Act be given effect to within the district as follows until altered by a subsequent vote:—. . . (b) If resolution B is carried the number of the licences of the respective descriptions at the time of the taking of the vote shall be reduced and in each case may be reduced to three-fourths of such number." The other two material provisions were contained in sub-ss. (1) and (3) of s. 299. That section (as amended by s. 46 of the Act of 1916) proceeded to deal further with the case where resolution B was carried, providing for the manner in which, and the extent to which, reduction of the number of licences in the district was to be effected, and for the considerations which were to be taken into account by the Licensing Court in deciding which licences were to remain and which were to go. Sub-section (1) provided that, where resolution B was carried, the Licensing Court having jurisdiction within the district should determine the reduction to be made and should "(c) make the reduction by declaring that certain specified licences of each description shall cease to be in force". Sub-section (3) provided: "When the Court determines that any licence shall cease, such licence shall at the expiration of the period for which it was granted or renewed cease and become absolutely void and shall not be renewed." The references in ss. 298

and 299 to licences " of the respective descriptions " seem to indicate that, in arriving at the appropriate reduction, licences of different classes (victualler's, grocer's, etc.) were to be treated as in separate categories, as they were by s. 294 (present s. 288). The order actually made by the Licensing Court, cancelling Holdsworth's grocer's licence, followed exactly the wording of s. 299 (3).

Of these four provisions it seems quite clear that neither s. 299 (4) nor s. 299 (1) (*c*) could operate to give permanent effect to the cancellation of any licence in the sense that no new licence of the same class could ever be granted in the district in excess of the number left. The Licensing Court would no doubt have refused to grant a new licence in the district except upon clear proof of changed circumstances. But, if those provisions had stood alone, there would, so far as I can see, have been nothing to prevent the Licensing Court, after it had effected a reduction, from granting at a later date a new licence or new licences in the district, so long, of course, as it did not exceed the maximum permitted by s. 294. Nor does either s. 298 (*b*) or s. 299 (1) (*c*) contain in terms any prohibition of any such grant. Mr. *Smithers*, however, argued with much force that the effect of one or other or both of these provisions was that, when once a licence or licences had " ceased " by virtue of s. 299 (1) (*c*), the number of licences of the same class which could lawfully be granted in the district was thenceforth limited to the number left. Because, he said, the demand for licences always, so to speak, exceeds the supply, the legislature was envisaging in each district a sort of " pool " of available licences, consisting, to begin with, of the number fixed by s. 294. When it was determined by the Licensing Court that a licence should " cease " as the result of a local option poll, what was meant was that that licence should be removed from the pool, which would thenceforth consist of one less than the number fixed for the district by s. 294. The legislature, Mr. *Smithers* said, took the view that the grant of a new licence in the district would be in substance a renewal—a restoration to the pool—and this was what it intended to prohibit and had prohibited.

If antecedent probability of intention were all that mattered there might be a good deal to be said for this argument. But it is extremely difficult to find in the words used the meaning which the argument attributes to them, and I should have thought that clear express words were required to impose so important a restriction on the powers given in general terms to the Licensing Court. So far as s. 299 (1) (*c*) is concerned, the mere fact that a licence is granted to a particular person in respect of particular premises could not of itself cut down the general discretionary power of the

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court under ss. 7 and 65. And the words " and shall not be renewed " cannot really be read as meaning " and no new licence of the same class shall be granted in the district ". The words " renew " and " renewal " have a clear meaning in many other provisions of the Act. Every licence remains in force up to the end of the year for which it is granted (s. 7), and at the end of that period it may be " renewed " (Pt. V, *passim*). The grant of a new licence is a different thing altogether from the renewal of a licence. Mr. *Smithers* is perhaps on stronger ground when he relies on s. 298 (*b*). It is perhaps not impossible to read the words " shall be reduced " as meaning " shall be permanently reduced ". But the most natural way of reading them is to regard them as simply imposing an immediate duty on the Licensing Court—a duty to be carried out in a manner subsequently prescribed in detail. I do not think that s. 298 (*b*) can carry the weight which Mr. *Smithers'* argument attributes to it. Whatever may have been desired or intended, it seems to me that the legislature simply did not provide by the Acts of 1915 and 1916 for the giving of any permanent effect to the " cessation " of a licence in a licensing district following on a carrying in that district of resolution B.

Actually, although I have thought it necessary to examine the position as it existed in 1920, I do not think that much importance now attaches to it. For, even if the *Licensing Act* 1915, as amended by the *Licensing Act* 1916, had the effect of prohibiting the granting of any new licence of the same class in a district in which it had been ordered that a licence should cease, it seems to me clear that subsequent legislation had the effect of removing any such prohibition.

The *Licensing Act* 1922 came into force on 21st December 1922. One effect of this Act was to abolish the local option system, which had subsisted under the Acts of 1915 and 1916, and to substitute for it a system of polls of electors which differed in two fundamental respects. In the first place, the poll was to be taken not for each licensing district but for the State of Victoria as a whole. This difference has been expressed by saying that the Act substituted a system of " State-wide option " for a system of " local option ". In the second place, provision was made for the submission to the electors of one " resolution " only at a time instead of three. As long as licences existed in Victoria, the resolution to be submitted, which was called " resolution I ", was "Abolition—That licences shall be abolished ". If at any poll resolution I was carried, another resolution was to be submitted at each subsequent poll until carried. This resolution, which was called " resolution II ", was " That licences shall be restored ". The Act of 1922 also contained, in

s. 31, a new and important provision giving to the Licensing Court power of its own motion in certain circumstances to reduce the number of licences of different classes in a licensing district. It will be necessary to refer further to this section later.

For present purposes the important thing is not so much the general character of what was sought to be attained, as the somewhat remarkable way in which the legislation designed to attain it was framed. One might have expected that the local option provisions of the Act of 1915, as amended by the Act of 1916, would be repealed with a special saving clause, and new provisions instituting the entirely different new scheme then enacted. But nothing of the kind was done. The Act of 1922 substituted certain new sections for certain sections of the old Act, as amended, and amended others so as to make them fit in with the new scheme. Thus it substituted new ss. 295, 296 and 298, and it amended ss. 297, 299 and 300. The " new " sections provided for the new State-wide single-resolution poll in place of the old local three-resolution poll, and for the general power to reduce the number of licences which has been mentioned above. The amended sections were amended in such a way as to make them appropriate to the new system. In this State of affairs it becomes necessary to see what happened to those provisions of the Act of 1915, as previously amended, which had provided for the consequences of a carrying of the old " resolution B " in any district. These, as has been pointed out, were four in number.

The first of those provisions was s. 295 (4), which provided that " the local option vote taken in any district shall be given effect to by the Licensing Court having jurisdiction within such district ". This provision simply disappeared, the new s. 295 containing no corresponding provision. This is, of course, not surprising; s. 295 (4) was, on the one hand, inappropriate to the new system, and, on the other hand, could never by itself have operated to attach any definite effect to a vote in favour of resolution B. The second of those provisions was contained in s. 298 (*b*), which provided that " If resolution B is carried, the number of the licences of the respective descriptions at the time of the taking of the vote shall be reduced and in each case may be reduced to three fourths of such number." This provision also disappeared, being obviously inappropriate to the new system. The third of those provisions was contained in s. 299 (1) (*c*), which provided that " Where resolution B is carried, the Licensing Court shall make the reduction by declaring that certain specified licences shall cease to be in force." This provision also disappeared for the same obvious reason. Whatever

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effect those three provisions may have had in the past, they could have no effect at all after 1922. There was no saving clause in the Act of 1922. An argument based on s. 6 (2) (*b*) of the *Acts Interpretation Act* I will mention later.

The last of the material provisions of the Acts of 1915 and 1916 was contained in s. 299 (3), which provided that "When the Court has determined that any licence shall cease, such licence shall, at the expiration of the period for which it was granted, cease and become absolutely void and shall not be renewed."

Now s. 299 (3) was not expressly repealed by the Act of 1922. It changed its context, however, in a very curious way. Before 1922 it appeared in a section, sub-ss. (1) and (2) of which provided for the extent to which, and the manner in which, the Licensing Court was to effect a reduction in the number of licences in a district which had carried resolution B. Whatever may have been its meaning, its function in that setting was clear enough: it was part of a series of provisions prescribing the consequences of the carrying of resolution B in any district. The section of the Act of 1922 which dealt with s. 299 was s. 31. This section, which has already been mentioned, gave to the Licensing Court a *general* power to reduce licences where "the number of licences of any description in any licensing district is greater than the number necessary for the convenience of the public or the requirements of a locality (but not otherwise)". It then repealed sub-s. (1) of s. 299, and amended sub-s. (2) of s. 299 so as to make it of general application to any reduction of licences by the Licensing Court. And it left sub-s. (3) of s. 299 standing. Read in its new setting, that subsection now applied to reductions which might in the future be effected under the new general power given to the Licensing Court, while ceasing to have any specific application to reductions effected in any district in consequence of the carrying therein of resolution B.

This position was made quite clear in the consolidation of 1928. The *Licensing Act* 1928 repealed so much of the *Licensing Act* 1915 and the *Licensing Act* 1916 as had not already been repealed, and it repealed the whole of the *Licensing Act* 1922. The repeal included, of course, s. 299 of the Act of 1915, as amended. The Act of 1928 then re-enacted the repealed provisions with some rearrangement. Section 31 (1) of the Act of 1922 appeared as ss. 289 and 290, and s. 299 (2) and (3) of the Act of 1915, as amended in 1916 and 1922, appeared as s. 293 (1) and (2). The remoteness of s. 293 (2) from any relation to any consequence of an order made to give effect to a carrying of resolution B is thus made more conspicuous than that of s. 299 (3) immediately after the passing of the Act of 1922. But

the rearrangement of 1928 did not go at all beyond the legitimate function of consolidation pure and simple. It represented precisely the effect of what had been done in 1922, though it brought it out, so to speak, more clearly.

The effect of all this is, in my opinion, the same as if the old s. 299 (3) had been repealed and then re-enacted in a different place in the Act and with a different meaning. The series of words contained in the old s. 299 (3) can still be found in the Act, but it is not really true to say that the old s. 299 (3) has remained in force. The words are found in a different context in the Act, and they refer to different things. In their new context they do not refer to any reduction in the number of licences effected in pursuance of the repealed provisions of the Act. If they operated before 1922 (as I think they did not) as a prohibition of the granting (subject, of course, to what is now s. 288) of a new licence in a district in which a licence had ceased, they could not so operate after 1922.

It may be added that the very fact that the words in question are now found in a series of provisions giving a general power of "reduction" seems to reinforce the view that they did not originally bear the meaning which the argument for the respondents attributes to them. For it seems unlikely that the legislature would intend that, if the Licensing Court, for the reasons stated in the present s. 293, reduced the number of licences in a district, it should be forever precluded from granting a new licence of the same kind in a district notwithstanding that the reasons justifying reduction had ceased to exist. When the legislature did intend a reduction to be permanent and irrevocable, it made its intention very clear. The Act of 1906 provided for a process of reduction to be continued over a period of ten years, and then provided that no more licences should be granted in a district in excess of the number remaining at the end of that period.

The position is not affected in any way either by s. 6 (2) (*b*) of the *Acts Interpretation Act* 1928 or by the saving clause in s. 2 of the *Licensing Act* 1928. The former provides that the repeal of an enactment shall not "affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed." Nobody suggests that any repeal in 1922 or 1928 affected in any way the previous operation of any repealed provision or anything done under it. All that is suggested is that none of the possibly relevant provisions of the Act of 1915, as amended by the Act of 1916, could, *after* their repeal, operate for the *future* as a continuing prohibition of the granting of a new licence. To the argument based on the provision in s. 2 of the

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Licensing Act 1928 that the repeal of pre-existing enactments "shall not affect . . . any poll taken" there seems to be a very clear answer. No local option poll ever had of its own force any legal effect whatever by way of reducing the actual or permissible number of licences in a district. It is a mistake, by the way, to say that the reference to "any poll" in s. 2 is meaningless unless the reference be to the local option poll of 1920. Section 50 of the *Licensing Act* 1916, as amended by s. 40 of the *Licensing Act* 1922, contained provisions for polls in connection with "additional" victualler's licences. These are reproduced in ss. 36-38 of the Act of 1928. At least one poll had in fact been held under these provisions before the commencement of the Act of 1928 : see Victorian Government *Gazettes* of 21st December 1927 (p. 3999) and 7th March 1928 (p. 815).

So far I have proceeded on the assumption, which was made by the Supreme Court and for the most part in the argument before this Court, that the only relevant "licensing district" for all the purposes of the case is the existing licensing district of Malvern. The question of statutory construction involved was important and was fully argued, and it seemed desirable to express an opinion on it. The assumption, however, is entirely unwarranted, and the whole matter should be considered in the light of the actual facts.

The "licensing districts", into which Victoria has at all material times been divided for the purposes of the *Licensing Acts*, were, at the time of the poll of 1920, constituted on a different basis from that which now exists. In 1920 Victoria was divided, for the electoral purposes of the Lower House, into a number of "electoral districts", each of which was subdivided into "divisions" (*Constitution Act Amendment Act* 1915, ss. 131 and 132 and seventeenth schedule). Each electoral *division* constituted a separate licensing district (*Licensing Act* 1915, s. 6). At this time the licensing districts of Malvern and Malvern East were "divisions" of different electoral districts, the division of Malvern being in the electoral district of Toorak, and the division of Malvern East being in the electoral district of Boroondara (*Consolidated Statutes* of 1915, vol. I, pp. 788, 791). The effect of s. 6 of the *Licensing Act* 1922 was that, as from 21st December 1922, each electoral district constituted a single licensing district. The licensing district of Malvern and the licensing district of Malvern East thus ceased to exist, the former becoming merely part of the licensing district of Toorak and the latter merely part of the licensing district of Boroondara. This, however, is not all. Since 1922 there have been two electoral redistributions in Victoria. The first was effected under and in pursuance of the *Electoral Districts Act* 1926 (Act No. 3451), and

the second under the *Electoral Districts Act* 1944 (Act No. 5028). Each of these two redistributions involved a change both of boundaries and of names. The provision, however, that each *electoral* district should constitute a single *licensing* district has remained unaltered since 1922, and the boundaries and names of licensing districts have changed accordingly with the boundaries and names of electoral districts. In 1920, when the local option poll was taken, there was no electoral district of Malvern. *Now* there *is* an electoral district of Malvern, and therefore a licensing district of Malvern, but its boundaries are different from, and wider than, those of the licensing district of Malvern as it existed in 1920. There was not in 1920, and there is not now, any electoral district of Malvern East, and the licensing district of Malvern East, which existed in 1920, has ceased to exist as such. In what follows it will be convenient to refer to the licensing districts as they were constituted at the time of the poll of 1920 as the " old " districts.

The net result of what has been recounted above is that the existing licensing district of Malvern consists of the whole of the area of the old licensing district of Malvern together with a part (about one-third) of the old licensing district of Malvern East. In 1920 there were four grocer's licences in the old district of Malvern. There were no grocer's licences in the old district of Malvern East. Resolution B (reduction) was carried at the poll of 1920 both in the old district of Malvern and in the old district of Malvern East. But the consequences of the vote differed in the two old districts.

In the old district of Malvern the Licensing Court, acting under ss. 298 and 299 of the Act, ordered that one of the four grocer's licences existing in the old district of Malvern should cease : this was the licence held by Holdsworth in respect of premises at 28 High Street, Malvern. The Licensing Court could not, however, cancel any grocer's licences in the old district of Malvern East, because none existed in the old district of Malvern East. Whether any licence of any other class existed in the old district of Malvern East, or whether the electors of that old district were voting in their enthusiasm for a minus number of licences within their borders, does not appear. We are concerned only with grocer's licences.

Now the premises for which the appellant company now seeks a grocer's licence are situate in that part of the existing licensing district of Malvern which was in the old licensing district of Malvern East. In that area no order that any grocer's licence should cease was ever made. The mere carrying of resolution B in the old district of Malvern East could have, as has been pointed out, no legal effect. And no order was ever made by the Licensing Court

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which could affect the area comprised in the old licensing district of Malvern East. On the other hand, the order made by the Licensing Court with respect to premises in the old licensing district of Malvern could have no operation except within the old licensing district of Malvern. In other words, the maximum effect that can be given to s. 298 (*b*) or s. 299 (3) is that no new licence shall be granted within the area comprised in 1920 in the old licensing district of Malvern.

It seems to me, therefore, that, even if s. 298 (*b*) or s. 299 (3) be construed as Mr. *Smithers* invited us to construe them, they never prohibited the granting of the licence for which the appellant company applied. That licence is sought for premises in an area for which no order reducing the number of grocer's licences was ever made.

The appeal should be allowed, and the order of the Supreme Court discharged. In lieu thereof it should be ordered that the determination of the Licensing Court be affirmed.

TAYLOR J. This is an appeal from a decision of the Full Court of the Supreme Court of Victoria upon a case stated pursuant to s. 67 of the *Licensing Act* 1928. The relevant question for the determination of the Full Court was whether the Licensing Court was wrong in law in determining that certain premises, the subject of an application for a grocer's licence under the Act, were situated in an area in which there was a " vacancy " for such a licence and in respect of which a grant of such a licence might lawfully be made. Whether or not this was so depends upon the ascertainment of the maximum number of grocer's licences which, consistently with the provisions of the Act, might have been in force in the licensing district at the time the application was made.

It is, of course, common ground that one limit is that prescribed by s. 288 which provides that : " Subject to the express provisions of this Act the number of . . . grocers' licences . . . in a district shall not at any time exceed the number of licences of the same description in the district on the first day of January one thousand nine hundred and seventeen." If this is the only relevant restriction upon the powers of the licensing court the case presents no difficulty, for on 1st January 1917 there were in existence in the area which now constitutes the Malvern licensing district and in which the subject premises are situate, four grocer's licences and at the time of the application three only were currently in force. But prior to the enactment of the *Licensing Act* 1928 a reduction to three of such licences in the district was made in the following

circumstances. In the course of argument we were told that in October 1920 the area which now constitutes the Malvern licensing district comprised two separate licensing districts, that of Malvern and that of Malvern East. In that month there was held in each of those licensing districts a local option poll pursuant to the provisions of the *Licensing Act* 1915 as amended. In each of these then existing licensing districts resolution B, within the meaning of s. 296 of that Act, was carried and, accordingly it became the duty of the Licensing Court to give effect to those polls by reducing the number of licences of the respective descriptions in each district at the time of the taking of the vote. Thereupon the Licensing Court determined that the number of existing licences in the licensing district of Malvern, as it was then constituted, should be reduced, and notice was given to one Holdsworth, the holder of a spirit merchant's licence and a grocer's licence, of a declaration by the Licensing Court that each of his said licences should cease to be in force at the expiration of the then current period for which they had been renewed. The premises in respect of which these licences were held were situated in the former licensing district of Malvern. Indeed all four grocer's licences previously referred to were then held in respect of premises in that district and no such licences existed in respect of premises in the licensing district of Malvern East. There appears to have been no further change in the number of grocer's licences held in the area comprised in those licensing districts, and which now constitutes the present licensing district, before the passing of the Act of 1928. Accordingly, immediately prior to the coming into operation of the last-mentioned Act, there were only three grocer's licences in existence in the area which now constitutes the licensing district of Malvern. This had been the position since Holdsworth's licence ceased to be in force in the circumstances above related.

With these facts in mind it becomes possible to state the basic contentions of the parties to this appeal. The appellant maintains that the only relevant restriction upon the power of the Licensing Court to grant his application is that expressed in s. 288 of the *Licensing Act* 1928, that is, the number of such licences " in the district on 1st January 1917 ". Accordingly it is claimed that there is a vacancy for one grocer's licence in the area constituting the present licensing district. The respondent, on the other hand, contends that the reduction effected in this area pursuant to the local option poll operated to reduce the aggregate number of *available* grocer's licences to three and, accordingly, that there is now no existing vacancy in the district for such a licence. Any

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reduction effected pursuant to a local option poll under the legislation existing in 1920 was, it was said, clearly intended to be a permanent reduction and, as such, operated to impose a restriction, additional to that prescribed by s. 288, upon the powers of the Licensing Court to grant applications for such licences.

The broad contention advanced by the respondents was based, in the main, upon a comprehensive examination of earlier *Licensing Acts*, though some reliance was also placed upon the provisions of s. 2 of the 1928 Act as to the preservation of the effect of " any poll taken " under earlier legislation and upon the provisions of s. 6 (2) (*b*) of the *Acts Interpretation Act* 1928 as to the effect of a repealing statute upon the previous operation of any enactment repealed or anything duly done or suffered under any enactment so repealed. After a review of the licensing legislation from 1885 onwards the Full Court accepted the contentions of the present respondent. The members of that Court observed that, notwithstanding the provisions of s. 294 of the 1915 Act—the predecessor of s. 288 of the 1928 Act—a vacancy could not during the currency of that Act, be said to have occurred where pursuant to a local option poll a licence or licences had ceased to exist with the result that the number of existing licences in a licensing district was reduced below the number existing on 1st January 1917. In those circumstances, it was thought, the licensing court had no power under that Act, whilst it was in operation, to grant licences which, though within the limit prescribed by s. 294, would, in effect, destroy the result of the local option poll. If this was the effect of the earlier legislation then no other conclusion could be reached concerning the operation and effect of the 1928 legislation during the period of its operation and, apparently, the Full Court thought that this was so. It appeared plain, they said, that s. 288 of the 1928 Act " is performing the same function as s. 294 performed between 1915 and 1922, namely, to provide an upper limit beyond which the number of licences in a district cannot go (except in the case of ' additional licences '), but not to provide the only limit upon the granting of licences. It cannot be relied upon, for example, to create a ' vacancy ' where the Court has, upon the grounds mentioned in s. 289 reduced the number of licences in a district ; such a view would be as untenable under the 1928 Act as it appears to us to be under the 1922 Act. Nor could it be relied upon to avoid the consequences of a vote for abolition of licences ". These observations did not, however, dispose of the vital point in the case which was whether the result of the local option polls under earlier legislation resulted in the continued imposition after the commencement of the *Licensing Act*

1928 of a limit, in addition to that prescribed by s. 288 of that Act, upon the number of licences which might thereafter lawfully be in force in any licensing district as then constituted. Accordingly the Full Court proceeded: "There remains the question whether it (s. 288) avoids the effect of the local option poll taken in 1920. We have already given reasons for thinking that prior to 1928 it did not have that effect. Section 288 is expressed to be 'subject to the express provisions of this Act'. One of such express provisions is s. 2 which in repealing prior legislation, preserves 'any poll taken'. Incidentally, it is identical with s. 2 of the 1915 Act. Now the only poll to which this could refer was that taken in 1920. The stipulation in s. 2 that the repeal of previous legislation shall not affect 'any poll taken' could not have been intended merely to preserve from challenge the mere taking of the poll. When that stipulation is taken in conjunction with the *Acts Interpretation Act* 1928, s. 6 (2) (*b*), we think that its purpose is to preserve not only the poll but the consequence that flowed from that poll, and s. 2 therefore preserves the effect of that poll. That poll is thus another limitation upon the power of the Court to grant licences, and is no more affected by s. 288 than reductions effected by the Court under s. 289 or than abolition effected under s. 299 if resolution I (abolition) is carried. Section 288 does not authorize the granting of licences up to the 1917 number; it prevents the granting of licences in excess of that number, while leaving that number subject to reduction by the act of the Court whether pursuant to a poll or not. A reduction effected pursuant to a poll is, in our opinion, still effective, notwithstanding s. 288."

There is, however, I think considerable difficulty in giving to the provisions of s. 2 of the Act of 1928, either considered alone or in conjunction with s. 6 (2) (*b*) of the *Acts Interpretation Act*, the effect which the latter passage attributes to them. Section 2, in the first instance provides, in terms, that the Acts mentioned in the first schedule to the Act, to the extent thereby expressed to be repealed, are thereby repealed. Thereupon it is further provided that such *repeal* shall not affect, *inter alia*, any poll taken under the said Acts or any of them before the commencement of the 1928 Act. Included in the first schedule are references to the *Licensing Act* 1915 and the *Licensing Act* 1922, the extent of the repeal in respect of the former being expressed to be "So much as is not already repealed" and in respect of the latter "the whole". From these references it is clear that some part or parts of the 1915 Act must have been repealed on some previous occasion or occasions and that the repeal effected by the 1928 Act was of the residue of the

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provisions of that Act. Indeed—and this seems to be of vital significance—the local option provisions of the 1915 Act had been repealed by the 1922 Act and it is of some importance briefly to indicate the extent to which the former Act was affected by the latter. Under s. 6 of the 1915 Act each licensing district of Victoria consisted of *one division* of an electoral district as described in the *Constitution Act Amendment Act* 1915 or any Act amending or repealing the same or constituting new electoral districts or divisions thereof. Provision was made for taking a local option vote in each such district at the places and on the day fixed for the poll therein at each general election for the Legislative Assembly (s. 295). Thereafter ss. 296, 297, 298 and 299 prescribed the form of resolutions to be submitted at such polls, the manner in which such polls should be conducted and their result ascertained and for the manner in which the carrying of any resolution should, in each district, be given effect. It was under these provisions of the *Licensing Act* 1915, as they stood in this form or, rather, as amended in some comparatively minor particulars, that the poll of 1920, previously referred to, was conducted. But in 1922 s. 6 was amended so that thereafter each licensing district consisted, not of one division of an electoral district, but of an electoral district itself. Further, ss. 295, 296, 298 and sub-s. (1) of s. 299 of the 1915 Act were repealed whilst s. 297 was substantially amended. For ss. 295, 296 and 298 other sections, correspondingly numbered, were substituted. Broadly, the effect of these new provisions was to provide for a vote of electors for the Legislative Assembly to be taken once in every eighth year on a day to be fixed by proclamation of the Governor in Council, not being a day within three months before or after the day for a general election and the first of such votes was to be taken in the year 1930. At the first of such votes and at any subsequent vote when licences should exist resolution I—" that licences shall be abolished "—was to be submitted to the electors, whilst, if at any vote resolution I should be carried, resolution II was to be submitted to the electors at each subsequent vote until carried. Resolution II was " that licences shall be restored ". Thereafter s. 298 made provision for the carrying into effect of the general result of each poll. Additionally to these provisions the licensing court was given power to reduce licences if it should find that the number of licences of any description in any licensing district should be greater than the number necessary for the convenience of the public or the requirements of a locality.

No vote was ever taken under these provisions because before the year fixed for the taking of the first vote the provisions were

repealed by the *Licensing Act* 1928. Nevertheless, the provisions of the 1915 Act under which the 1920 poll had been taken were displaced by the *Licensing Act* 1922. This being so, it may at once be said that the 1928 Act did not effect any repeal of the local option poll provisions of the 1915 Act and accordingly s. 2, the purpose of which is, notwithstanding the repeal effected thereby, to preserve the effect of any poll taken under the statutory provisions repealed by that Act, have no materiality in the present case. Nor, in these circumstances may the provisions of s. 6 (2) (*b*) of the *Acts Interpretation Act* be invoked to assist the respondents' case.

These observations are sufficient to dispose of the support given to the respondents' contention by the reasons of the Supreme Court and, indeed, in my opinion, to dispose of the substantial aspects of those contentions. Nevertheless, it is desirable to refer expressly to the broader ground upon which the submissions which were addressed to us were based.

Once it becomes clear that neither the provisions of s. 2 of the *Licensing Act* 1928 nor of s. 6 (2) (*b*) of the *Acts Interpretation Act* can be called in aid by the respondents the grounds upon which it may be contended that s. 288 of the former Act does not make exclusive provision for the maximum number of licences which may exist in any district are considerably weakened, if not entirely destroyed. But, nevertheless, the respondents claim, upon an examination of the history of the licensing legislation of the State of Victoria, that, in enacting the 1928 Act, the legislature intended that any reduction in the number of licences available in any district following upon an earlier local option poll should, apart from the effects of any subsequent poll or vote, be permanent. That is to say that any reduction effected after the taking of a poll should be regarded as diminishing the number of licences available in any district not only during the currency of the Act under which the poll was taken but also at any subsequent time. The plain answer to this contention is that in enacting the *Licensing Act* 1928 the legislature, by s. 288, made express provision for this very matter. To accept the argument of the respondents on this point would mean that the authority to grant grocer's licences conferred by the 1928 Act would be restricted to the number of such licences existing or available at the time of the commencement of that Act. On the respondents' argument this number would in no circumstances be more than the number ascertainable by reference to s. 288. But it could be, and in the present case was, less than that number. I fail to see, however, how by any process of implication it is possible

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to restrict the authority of the Licensing Court to grant grocer's licences to any greater extent than that which is made the subject of an express declaration in s. 288. It must be assumed that, in enacting s. 288, the legislature was directing its attention to this very matter and, that being so, it is impossible to make any implication the result of which would be inconsistent with that express declaration.

But even if this principle were inapplicable to the present case there are reasons for thinking that the provisions of s. 288 of the 1928 Act were deliberately framed and enacted as the exclusive measure of the authority of the Licensing Court to grant grocer's licences thereunder. In passing I say nothing as to whether or not in the case of victualler's licences the limit prescribed by this section may perhaps be exceeded where additional licences had, prior to 1928, been granted pursuant to the provisions of s. 50 of the 1916 Act as amended by s. 40 of the 1922 Act, for both of these provisions were repealed by the 1928 Act and s. 2 of the latter Act may well have an effective operation in those cases. So far as local option polls under the 1915 Act are concerned, however, those polls were conducted in respect of defined licensing districts which in 1922 completely changed their composition so that if effect now is to be given to such polls it becomes necessary to determine the effect of more than one poll in relation to each licensing district as at present constituted. In the present case it appears that separate polls for the former licensing districts of Malvern and Malvern East were conducted and now, if effect is to be given to them, it must be given throughout the single licensing district of Malvern as at present constituted. Now it is clear that the local option polls in each of the former licensing districts might have resulted differently. In one of them resolution A might have been carried and in the other resolution B or C might have been carried. Or, indeed, in one or both of those districts none of the prescribed resolutions might have been carried (see *Ex parte Major* (1)). If the poll in these districts had produced different results it would, of course, be impossible to formulate any basis upon which the results of the polls could be aggregated and regarded as the result of the poll in the present licensing district. The point is made clear if it be assumed that in one of the former districts resolution A had been carried and in the other resolution C had been carried. The effect in each district would have been entirely different and it would be quite impossible to aggregate the two results for the purpose of ascertaining and

(1) (1908) 8 S.R. (N.S.W.) 68; 25 W.N. 24.

preserving in the present licensing district the effect of those polls. It is true that one aggregate result of the conflicting polls would have been to fix the number of licences available in the area comprising the new licensing district of Malvern some time before the commencement of the 1928 Act. But to regard this as the effect of the polls in the new licensing district would produce a completely artificial result for it would result in empowering the Licensing Court to grant licences in, or to permit transfers thereof to, that part of the new licensing district which formerly comprised a licensing district in which the electors had voted for resolution C. Conversely any such grant or transfer would result in an unintended reduction in an area where the poll for a former district had resulted in resolution A being carried. It does not seem to me that the happy coincidence that the result of the local option poll in each of the former licensing districts of Malvern and Malvern East was the same and that the present licensing district is known by the same name as one of the former districts assists in the solution of the matter. The plain fact is that no poll was ever taken for the licensing district of Malvern as it is at present constituted and it is impossible in any real sense to preserve with respect to that district the effect of two separate polls taken in two other districts notwithstanding the fact that those other districts may comprise the present licensing district.

If these obvious difficulties presented themselves to the legislature in 1928 it may well be thought that s. 288 was deliberately enacted to provide exclusively for the maximum number of grocer's licences which might be in force in each licensing district leaving it to the licensing court to exercise its powers under s. 289 in appropriate circumstances. Ample provision is made by that section for the reduction of the number of licences in any district where the existing number is found by the Licensing Court to be greater than the number necessary for the convenience of the public or the requirements of a locality. These considerations serve to strengthen my view that not only is it not possible to imply any additional limitation as was contended, but that there is every reason to believe that the terms of s. 288 were not blindly adopted from earlier legislation but were the result of full consideration of the matter with which it is concerned. In those circumstances I am of the opinion that the appeal should be allowed.

Since writing the above the Court has been provided with a map which indicates the past and present boundaries of licensing districts in and around Melbourne. From this it appears that the present

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licensing district of Malvern consists of the old district of Malvern and part only of Malvern East. It is unnecessary, perhaps, to say that this circumstance can operate only to increase the respondents' difficulties in the matter.

Appeal allowed.

Order of the Supreme Court of Victoria discharged. In lieu thereof order that the determination of the Licensing Court be affirmed and that the matter be remitted to the Licensing Court to enable that court to exercise its discretion to extend the period mentioned in par. 12 *of the case stated, namely the period of one year from* 15*th September* 1952 *fixed for the fulfilment of the condition upon which the issue of a grocer's licence was approved.*

Respondents to pay the costs of the appeal to this Court and of the case stated for the opinion of the Supreme Court.

Solicitor for the appellant, *J. W. McClusky.*
Solicitors for the respondents, *A. G. Hall & Wilcox.*

R. D. B.