[HIGH COURT OF AUSTRALIA.]

RANDWICK-COOGEE LEGION EX-SERVICE CLUB LIMITED . . . . . Appellant;
Defendant,

AND

MALOUF . . . . . Respondent.
Claimant,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. of A. 1954.

Sydney, *April* 12, *Aug.* 19.

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

Landlord and Tenant—"*Prescribed premises*"—*Lease to incorporated club*— *Certificate of registration under Liquor Act* 1912-1946 (*N.S.W.*)—*Authority to sell and dispose of liquor*—"*Premises licensed for the sale of spirituous and fermented liquors*"—*Ejectment proceedings in the Supreme Court*—*Landlord and Tenant* (*Amendment*) *Act* 1948-1952 (*N.S.W.*) (*No.* 25 *of* 1948— *No.* 55 *of* 1952) *s.* 8—*Liquor Act* 1912-1946 (*N.S.W.*) (*No.* 42 *of* 1912—*No.* 34 *of* 1946) *Pt. X*—*Order in Council dated* 27*th November* 1950 (*Government Gazette* (*N.S.W.*) *No.* 186 *of* 8*th December* 1950).

The premises of a club the secretary of which holds a certificate under Pt. X of the *Liquor Act* 1912-1946 (N.S.W.) for the sale and disposal of liquor on such premises are not "premises licensed for the sale of spirituous or fermented liquors" within the meaning of Order in Council dated 27th November 1950, and are accordingly "prescribed premises" within the meaning of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1952.

Electric Light & Power Supply Corporation Ltd. v. *Macquarie Club Ltd.* (*Herron* J.) (1952) 69 W.N. (N.S.W.) 223 disapproved.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

Appeal from the Supreme Court of New South Wales.

Joseph Patrick Malouf (hereinafter called the claimant) was the owner of a certain two-storey building situate and known as Nos. 202-208 Arden Street and 268-274 Coogee Bay Road, Coogee. By agreement in writing dated 13th September 1948 the claimant let the upper storey of such premises to Albert Edward Ash and Frank William Stacey on a weekly tenancy determinable on one week's notice from either party. Randwick-Coogee Legion Ex-Service

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Club Ltd. (hereinafter called the defendant) was incorporated and registered in or about the month of April 1950 and immediately after its formation and registration became tenant of the premises on the terms and conditions of the agreement hereinbefore mentioned. On 17th June 1952 the clerk of the Licensing Court for the Metropolitan Licensing District issued to the secretary of the defendant a certificate of registration to sell and dispose of liquor on the defendant's premises pursuant to the provisions of Pt. X of the *Liquor Act* 1912-1946 (N.S.W.). The said certificate of registration was at all times material to these proceedings in force.

On 13th April 1953 the claimant served on the defendant a notice to quit effective at common law to determine the tenancy of the premises on 27th April 1953. The defendant did not vacate the premises as required by the notice and the claimant commenced proceedings in ejectment in the Supreme Court of New South Wales. The defendant by its particulars of defence alleged that the premises were " prescribed premises " within the meaning of the *Landlord and Tenant (Amendment) Act* 1948-1952 and that no notice to quit in compliance with such Act had been served by the claimant. It further disputed the jurisdiction of the Supreme Court to hear and determine the claim. The claimant took out a summons to strike out the particulars of defence so filed upon the ground that such particulars constituted no defence in law to the claim. The summons came on for hearing before *Maguire* J. who, by consent of the parties, referred it for hearing before the Full Court of the Supreme Court.

The Full Court (*Street* C.J., *Owen* and *Herron* JJ.) held that the point in issue between the parties was completely covered by the decision of *Herron* J. in *Electric Light & Power Supply Corporation Ltd.* v. *Macquarie Club Ltd.* (1) and accordingly ordered that the particulars of defence be struck out and that the claimant have leave to enter judgment for possession of the subject premises.

From that decision the defendant appealed to the High Court.

Relevant statutory provisions are sufficiently set forth in the judgments hereunder.

G. Wallace Q.C. (with him *P. J. Kenny*), for the appellant. The question is whether a club holding a certificate of registration under the *Liquor Act* 1912-1946 (N.S.W.) falls within the phrase " premises licensed for the sale of spirituous or fermented liquors " in the Order in Council. If a broad interpretation is given to the Order, registered clubs might be covered, but the Order deals with a

(1) (1952) 69 W.N. (N.S.W.) 223.

technical subject and an analysis of the *Liquor Act* shows that registered clubs are treated in an entirely different manner from licensed premises. It is reasonable for the legislature to distinguish between hotel and wine and spirit licences on the one hand and club registrations on the other, for the former are responsible for goodwill of considerable value attaching to the premises in respect of which they are held. This is not the case with club premises. The Order should be interpreted bearing in mind the context and the object sought to be achieved. [He referred to *Bennett* v. *Murray* (1); *Income Tax Commissioners for City of London* v. *Gibbs* (2).] The object in this case is to permit landlords to protect goodwill as outlined earlier by enabling them to serve the speedy eviction of tenants who by their actions place such goodwill, and consequently the value of the premises themselves, in jeopardy. The Order employs a phrase used extensively—the *Liquor Act* and an examination of the statute shows what the legislature had in mind when using the phrase. [He referred to the *Liquor Act* Pt. 3A dealing with restaurant permits.] The Act distinguishes between premises in respect of which permits operate and licensed premises and the position of registered clubs is also distinguished. The Order should be interpreted bearing in mind these distinctions. Section 170 illustrates the distinction, for " licensed premises " are for the purpose of that section expressly made to include club premises. The express reference was necessary because of the distinction elsewhere made in the Act. Clubs are registered, not licensed. Compare the operative words of the publicans' licence, " do hereby issue . . . this license to sell and dispose of liquor " with the operative words of a certificate of club registration, " do hereby issue . . this certificate of registration to sell, &c." [He referred to ss. 168B and 168C.] The distinction also appears from an examination of s. 57A (1) and (2). Part X provides a separate code for clubs, and other sections of the Act outside that part are only applicable to clubs where expressly made so (see s. 133). Section 128 dealing with the disqualification of licensed premises does not apply to registered clubs, again underlining the distinction.

[FULLAGAR J. referred to s. 14.]

With the exception of brewers' and packet licences s. 14 sets out the only licences available under the Act. Nowhere in the Act are club premises referred to as licensed premises or club registration certificates as licences, though the term " licence " has for some purpose been expressly made to include club registrations See ss. 112A, 114. [He referred also to ss. 114, 116, 119, 160 and 166.]

(1) (1940) 64 C.L.R. 382, at p. 396. (2) (1942) A.C. 402, at p. 429.

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Although the language of the Order was taken from the Federal legislation dealing with the same subject matter, in the absence of any decisions on the language of the Federal enactment the Court should construe the language of the Order in the light of the existing State legislation. The Order was aimed at exempting " licensed premises " as known to the *Liquor Act*, and not registered clubs which are throughout differently described.

R. G. Henderson, for the respondent. The terms of the Order should be construed having regard to the ordinary meaning of the word " licence " which is a permission or authority to do that which would otherwise be unlawful. The *Liquor Act* regulates the sale of liquor and the leading section is s. 43 which prohibits the sale of liquor except in terms of the various types of authority under the Act. Despite the various descriptions given to them in the Act, these are merely licences permitting the sale or disposal of liquor. [He referred to ss. 15, 15A, 16, 18 and 78G.] In all cases except that of a restaurant permit these sections give authority " to sell and dispose of " liquor and that authority is in its general sense a licence. The word " licence " is used in a special sense in the *Liquor Act* not in its general sense. Restaurant permits and club registrations are licences in its general sense because they permit what would otherwise be illegal under s. 43. The Order uses the word " licensed " having regard to the general and not the particular sense of the word " licence." The wording of the Order was taken from the Federal legislation which related to the licensing systems of all States and this supports the view that the word is used in a general sense, not to the particular meaning given it in a particular State statute. The Order can be construed without reference to any particular statute. The policy of the legislature was to exclude all premises in respect of which there existed any authority, however designated, to sell liquor. The respondent relies upon the decision of *Herron* J. in *Electric Light and Power Supply Corporation Limited* v. *Macquarie Club Limited* (1). The phrase " licensed for the sale of spirituous or fermented liquors " appears in s. 8 (1A) of the *Landlord and Tenant (Amendment) Act* 1948-1952 (N.S.W.) and premises so described are excluded from the definition of " dwelling house " by that section.

G. Wallace Q.C., in reply. Unless the appellant is correct in its contention a residential club could not be a " dwelling house " by virtue of s. 8 (1A) of the *Landlord and Tenant (Amendment) Act*.

Cur. adv. vult.

(1) (1952) 69 W.N. (N.S.W.) 223.

The following written judgments were delivered :—

DIXON C.J. The question for decision upon this appeal is whether the club house of a registered club falls within the description " premises licensed for the sale of spirituous or fermented liquors ". Premises so described are excluded from the operation of the *Landlord and Tenant (Amendment) Act* 1948-1952 (N.S.W.) by an Order in Council made pursuant to s. 8 of that Act on 27th November 1950. Section 8 empowers the Governor in Council to declare that any class of premises shall be excluded from the operation of the Act and when that is done the premises within the class are no longer " prescribed premises " within the provisions of the Act. The appellant, which is a club registered under Pt. X of the *Liquor Act* 1912-1946, claimed the benefit of the *Landlord and Tenant (Amendment) Act* 1948-1952 as a defence to an action of ejectment in respect of the club premises brought against it by the respondent as landlord. The Full Court of the Supreme Court of New South Wales held that the premises in respect of which a club is registered fall under the description " licensed premises " as employed in the Order in Council and accordingly are outside the operation of the *Landlord and Tenant (Amendment) Act* 1948-1952. Consequently the appellant's defence failed. In so deciding the court followed the decision of *Herron* J. in *Electric Light and Power Supply Corporation Ltd.* v. *Macquarie Club Ltd.* (1). That decision, as I understand it, proceeds upon the view that the expression " premises licensed for the sale of spirituous or fermented liquors " as used in the Order in Council is intended to include all premises in respect of which an authority has been granted under liquor or licensing legislation to some person or persons to sell spirituous or fermented liquor and that the form or description of the authority does not matter. " Premises are properly said to be licensed for the sale of spirituous or fermented liquors according to whether or not an official permit has been given according to law for a person to sell such liquor on those premises."—per *Herron* J. (2). Accordingly as s. 132A of the *Liquor Act* 1912-1946 provides that every certificate of registration of a club issued under Pt. X of the *Liquor Act* shall authorize the secretary therein named to sell and dispose of liquor but only on the club premises, the language of the Order in Council is satisfied. The premises were considered to be an integral part of the authority to sell liquor under the Act.

I am unable to give the same meaning to the words of the Order in Council. It is not, I think, enough for the purpose of determining

(1) (1952) 69 W.N. (N.S.W.) 223.

(2) (1952) 69 W.N. (N.S.W.), at pp. 225-226.

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the question to rely upon a legal analysis of the conceptions involved in licensing premises and of the similar consequences involved in the registration of clubs. The Order in Council is an instrument intended to take effect under the law of New South Wales and with reference to the liquor legislation of the State. Under that legislation a marked distinction exists between licences to sell spirituous and fermented liquors and the registration of clubs.

It would not, however, appear to me to matter if the words of the Order in Council were construed in reference to the liquor legislation of other States, a mode of construction which, it is suggested, their origin in an analogous Commonwealth instrument makes it right to adopt. For the same distinction exists in all six States.

It is true that the Order in Council does not use the expression "licensed premises" but that expression, in ordinary speech, is regarded as equivalent to the longer form employed by the Act and I do not think that it would be commonly understood as embracing the premises of a registered club. The distinction between registration of a club and the licensing of premises for the sale of spirituous or fermented liquors is not one merely of nomenclature or of common understanding. It is a legislative distinction of substance and moreover of purpose.

The licence is to sell to the public at large. It stamps the premises with the character of a particular business and usually adds enormously to their value. The liquor legislation recognizes the economic interest of a landlord in the existence of the licence in respect of the premises when his tenant is the licensee and provides means for the protection of that interest especially when the landlord is the owner of the freehold. See *Ex parte Berry*; *Re Kessell* (1) and *Griffin* v. *Clark* (2), and ss. 35 (2), 37 (2), 38, 39 (2) and (4), 128 (2), 130, 131. When the licence is imperilled by the commission of offences by the tenant, the forfeiture of the lease and his eviction by the landlord are what the *Liquor Act* 1912-1946 contemplates as the natural and proper remedies which the lease should reserve to the landlord (s. 130).

The registration of a club enables the club through its secretary to dispose of liquor to the members but not to the public generally. To obtain registration the rules of the club must provide that a visitor shall not be supplied with liquor on the club premises unless on invitation and in the company of a member (s. 135 (g)). The purpose of the registration of clubs is to secure control of and exercise supervision over the clubs in which liquor is supplied to

(1) (1936) 36 S.R. (N.S.W.) 485. (2) (1940) 40 S.R. (N.S.W.) 409.

members. The description of clubs that may be registered is limited and defined (s. 134). The rules of the club must fulfil certain requirements relating to its management, the identification of its members, the election of members and the admission of honorary members (s. 135). Much of this no doubt is pointed against a recourse to illusory clubs so as to escape the licensing provisions of the *Liquor Act*. Proprietary clubs are excluded (s. 134 (h) and s. 135 (2)). The responsibility for compliance is placed upon the secretary (s. 132A) but when the secretary changes the club is entitled to have the name of the new secretary endorsed on the certificate, whereupon the responsibility passes to him (s. 142). The landlord of the club has no economic or other interest in the club's registration in respect of the leased premises. Indeed the rent may not exceed ten per cent of the total sum which comprises the unimproved capital value of the land (excluding any added value attributable to the fact that the club is registered) and the value of the improvements on the land (s. 134 (h) (i) (2nd par.)). The club may remove to other premises if the licensing court gives its authority and the only objections open are that the premises are unsuitable or that the accommodation or the sanitary conveniences are insufficient or inappropriate to meet the purposes for which the club is formed (s. 145). There are provisions directed at the prevention of the abuse and misuse of the authority to supply liquor and at other irregular practices. The sanction may be refusal of the renewal of registration or cancellation (ss. 139, 140, 148). But this is the concern of the club and not the landlord under the Act. The differences in the treatment of clubs by the legislation and in that of victuallers and other licensees is so markedly different simply because both the purpose and effect are different. In point of history the registration of clubs came long after the licensing of victuallers &c. The idea came from Pt. III of the *Licensing Act* 1902 of the United Kingdom (provisions to be traced through the consolidation of 1910, 10 Edw. VII and Geo. V c. 24, into the *Licensing Act* 1953, 1 & 2 Eliz. II c. 46, ss. 143 et seq.).

It is not difficult to understand why a landlord of licensed premises should be set free of the obstructions arising from the *Landlord and Tenant (Amendment) Act* 1948-1952, to his recovering possession in case of breach of condition or other ground for terminating the tenancy. The licence giving value to his premises might be in imminent peril. But no such reasons apply to the premises of a registered club.

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In my opinion the premises of a registered club are neither within the natural meaning of the terms nor the probable purpose of the Order in Council.

I think that the appeal should be allowed with costs, the order of the Supreme Court of New South Wales of 16th November 1953 under appeal should be discharged and in lieu thereof it should be ordered that the summons dated 8th May 1953, should be dismissed with costs.

WEBB J. I would allow this appeal for the reasons given by the Chief Justice and *Kitto* J.

FULLAGAR J. This is an appeal from an order of the Supreme Court of New South Wales (Full Court) which ordered that the particulars of defence in an action of ejectment be struck out, and that the claimant have leave to enter judgment for possession of the premises claimed.

By an agreement in writing dated 13th September 1948 the claimant, John Patrick Malouf, let certain premises, being the first floor of a building at Coogee, to Albert Edward Ash and Frank William Stacey on a weekly tenancy determinable by one week's notice from either party. The defendant, which is, as its name implies, an incorporated club, was formed and registered in or about the month of April 1950, and immediately after its formation became tenant of the premises on the terms and conditions of the agreement of September 1948. On or about 13th April 1953 the claimant served on the defendant a notice to quit, which would at common law have been effective to determine the tenancy on 27th April 1953. The premises not being vacated in pursuance of this notice to quit, the claimant brought his action. The defence raised is that the premises are " prescribed premises " within the meaning of the *Landlord and Tenant (Amendment) Act* 1948-1952 (N.S.W.), that the provisions of that Act have not been complied with, and that the tenancy therefore has not been duly determined. It is common ground that, if the premises are " prescribed premises ", the defendant has a good defence. If, on the other hand, they are not " prescribed premises ", there is no defence to the action.

The term " prescribed premises " is defined by s. 8 of the *Landlord and Tenant (Amendment) Act* (so far as material) as meaning " any premises other than . . . any premises, or the premises included in any class of premises, declared by the Governor in Council by Order published in the Government Gazette to be excluded from

the operation of this Act". By Order in Council published in the Gazette on 8th December 1950 the Governor in Council declared (*inter alia*) that "all premises licensed for the sale of spirituous or fermented liquors" should be excluded from the operation of the Act. The fact is that at the time when the notice to quit was given the defendant club was in possession of a certificate of registration under the *Liquor Act* 1912. This document, which was dated 17th June 1952, and was expressed to be effective until 30th June 1953, had been issued to one Hans Eisner, as secretary of the club. It followed the form prescribed under the *Liquor Act*, and the operative part reads as follows:—"I, the officer duly authorised in that behalf, do hereby issue to the said Hans Eisner, as secretary of the said club, this certificate of registration to sell and dispose of liquor on the said club premises, but not elsewhere, and subject to the provisions of the *Liquor Act* 1912, as amended by subsequent Acts." The expression "registration to sell and dispose of" is an inaccurate expression, but one supposes that it is to be read as meaning "registration authorising him to sell and dispose of". That is now the effect of a certificate of registration under s. 132A, which was introduced into the Act by the *Liquor (Amendment) Act* 1946.

The sole question in the case is whether the premises in question are "premises licensed for the sale of spirituous or fermented liquors" within the meaning of the Order in Council. Clearly the words include hotel premises, but do they include club premises? The Supreme Court, approving an earlier decision of *Herron* J. in *Electric Light & Power Supply Corporation Ltd.* v. *Macquarie Club Ltd.* (1), answered the question in the affirmative.

The answer to be given to the question appears to me to depend very largely on the approach to be made to it. There are two possible approaches. The one approach is made by simply looking at the material expression in the Order in Council, regarding it as containing nothing but familiar English words, and giving to those words what one conceives to be their full natural meaning. If this approach were adopted, one might well reach the conclusion that what is meant is simply "premises on which the sale of liquor is authorised by law". Then, when one finds that the club's certificate of registration in terms purports to authorize the sale of liquor on the club premises, one will say that the club premises are covered by the Order in Council. The other approach is made by regarding the words in question as, in effect, technical words, words which are used with direct reference to a known existing

(1) (1952) 69 W.N. (N.S.W.) 223.

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system of statutory control of sales of liquor, and which cannot be understood without an examination of that statutory system. The result of this second approach will depend, of course, on what one finds in the relevant legislation.

The second approach is, in my opinion, the correct approach. The words " premises licensed " do not really explain themselves. On their face they raise such questions as —licensed by whom ? —licensed under what legal authority ? It is common knowledge that the sale of intoxicating liquor is controlled in New South Wales, as in all the other Australian States and in England and elsewhere, by an elaborate system of statutory regulation. In four of the six States the relevant Act is entitled the " Licensing " Act. The word " licensed " is plainly intended to refer to this system, and it seems to me that what are " premises licensed for the sale of liquor " cannot be understood until we have referred to that system. The meaning of the words must depend on the statute or statutes, and must be sought in the statute or statutes. If any particular premises are not licensed premises within the meaning of the statute or statutes, they are not, in my opinion, licensed premises within the meaning of the Order in Council.

The relevant legislation is contained in the *Liquor Act* 1912-1946 (N.S.W.). That Act has been amended but not in any respect here material. The expression " licensed premises " is defined by s. 3 as meaning " premises in respect of which a licence granted under this Act, or any Act hereby repealed is in force ". Part II of the Act provides for the constitution of " licensing courts " to " hear and determine " applications for licences or for the renewal, removal, or transfer, of licences under Pt. III. Part III deals with " Publicans' & other Licences ". Section 14, which is in Pt. III, provides that " the following descriptions of licences for the sale of liquor may be granted under this part, namely :—publicans' licences, spirit merchants' licences, packet licences, Australian wine licences, and booth or stand licences ". All licences are granted in respect of particular premises. The rest of Pt. III deals with applications for, and the granting of, these various classes of licences, and with the effect of the grant of each particular class of licence. It contains many provisions with regard to the conduct of business on licensed premises and matters incidental thereto, and it creates a number of offences. Part V of the Act deals with brewers' licences, Pt. VIII with the entry of inspectors on licensed premises, and Pt. IX with the cancellation of licences.

None of the above provisions applies of its own force to clubs, which are the subject of special provision in Pt. X of the Act. In

fact the position of clubs under legislation from time to time in force in the Australian States has had a very special history. That history, in the case of Victoria, is traced in the recent case in this Court of *Bergin* v. *Stack* (1). The course of legislation in New South Wales was very similar. Three distinct stages can be traced. Clubs were, in the beginning, exempted altogether from the licensing legislation. Later they were exempted subject to certain conditions. Finally they were made the subject of special provisions applying exclusively and exhaustively to them. In the case of New South Wales those provisions are contained in Pt. X of the *Liquor Act*. Broadly speaking, they fall into three classes. In the first place, a system of registration of clubs is provided. In the second place, it is made an offence to sell or supply liquor to any person on the premises of an unregistered club. In the third place, certain provisions of Pt. III of the Act, relating to the days on which, and the hours within which, liquor may be sold or supplied on premises licensed under Pt. III, and to several similar matters, are expressly made applicable (*mutatis mutandis*) to registered clubs. The form of a certificate of registration, which has already been noticed, is provided not by the Act itself but by a regulation made under s. 153 (1) (f).

From all this it appears that the premises of a club registered under the *Liquor Act* are not "licensed premises" within the meaning of the Act. They are not subject to the general provisions of the Act relating to licences and licensed premises. Until 1946 indeed they do not appear to have been the subject of any express authority or permission to sell or supply liquor. The position was simply (as it still is in Victoria—see *Bergin* v. *Stack* (1)) that a registered club was, in effect, left to enjoy the benefit of the doctrine of *Graff* v. *Evans* (2), subject to certain specific restrictions. The *Liquor* (*Amendment*) *Act* 1946 introduced into Pt. X a new s. 132A, which provides that a certificate of registration shall authorize the secretary therein named to sell and dispose of liquor, but only on the club premises therein specified and subject to the provisions of Pt. X. This provision might be thought to go a long way and even to authorize sales to the public generally, but a club cannot be registered unless its rules provide that liquor shall be supplied only to members or to members' guests at the expense of members, and repeated breaches of club rules afford a ground for the cancellation of registration. The amendments of 1946 do not appear to have made any alteration material for present purposes. Club premises are still not "licensed premises" for the purposes of the Act,

(1) (1953) 88 C.L.R. 248. (2) (1882) 8 Q.B.D. 373.

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though some of the provisions applicable to licensed premises are expressly made applicable to registered clubs. It seems to me to follow that the premises of the appellant club in this case cannot be regarded as "premises licensed for the sale of spirituous or fermented liquors" within the meaning of the Order in Council of 27th November 1950.

I doubt if much light is thrown on the question by an attempt to arrive at a satisfactory practical reason for excluding "licensed premises" from the operation of the *Landlord and Tenant (Amendment) Act*. It may be, however, as was suggested by *Herron* J. in the *Macquarie Club Case* (1), that there is some force in the view that "as licences are extremely valuable, a landlord may wish to take action with considerable despatch against an undesirable tenant, and it was felt that such a landlord should not be hampered by the provisions of Pt. III" of the Act. This consideration, it should be noted, has no such force in the case of a registered club as it has in the case of (say) a licensed publican. A club registration is doubtless of value, but an ejected club may simply take its registration to new premises, whereas an ejected publican is likely to be simply replaced by another publican, the licence continuing to attach to the premises. A landlord has an interest in the registration of a club which is his tenant, but it is not the same direct kind of interest as the landlord of a licensed hotel has in the hotel licence. Registration does not attach to club premises in the sense in which a licence does attach to hotel premises.

There is one other observation to be made, which may not be without importance. The construction of the Order in Council which I would adopt removes from the protection of the *Landlord and Tenant (Amendment) Act* premises such as hotels and the shops of licensed grocers and licensed spirit merchants, but it does not remove registered clubs from that protection. This represents an entirely rational and understandable policy. Such premises as hotels and the shops of licensed grocers are premises on which a commercial activity is carried on, premises on or from which liquor is sold to the public or to the liquor trade itself. Club premises stand in an entirely different position. It may be conceded that the obtaining of liquor for members is the main excuse for the existence of some clubs. But it is not of the essence of a club (as it is, for example, of the essence of a hotel) that liquor should be available on its premises. Whether liquor is available or not, they are essentially private premises. Clubs do not, in any real sense, sell liquor to customers. The very reasons which led Parliament

(1) (1952) 69 W.N. (N.S.W.), at p. 224.

to make special provisions in the *Liquor Act* for clubs would equally account for an Order in Council which excluded such premises as hotels from the protection of the *Landlord and Tenant (Amendment) Act* while leaving club premises protected, like private premises generally, by the provisions of that Act. I may perhaps repeat what I said (with the concurrence, I think, of *Williams*, *Kitto* and *Taylor* JJ.) in *Bergin* v. *Stack* (1):—"Parliament may well have regarded, and almost certainly did regard, clubs as standing on a special footing of their own. They are societies, generally speaking, of a private and social nature, and, so far as the essential conception goes, their premises are more closely analogous to private homes than to public trading establishments" (2).

One point may be mentioned in conclusion. The *Landlord and Tenant (Amendment) Act* 1948-1952 (N.S.W.), like Acts of the other States *in pari materia*, followed closely the *National Security (Landlord and Tenant) Regulations* which were formerly in force throughout Australia under the *National Security Act* (Cth.). Those regulations contained a definition of the term "dwelling-house", which excluded from the scope of that term "premises licensed for the sale of spirituous or fermented liquors". (The corresponding definition in the New South Wales Act contains the same exclusion.) Against my view that, in order to interpret those words in the New South Wales Order in Council, we must look to the *Liquor Act* of New South Wales it may be urged that the regulations, which provided the precedent for the words used in that Order in Council, were framed for operation throughout the Commonwealth and could not properly be interpreted by reference to any New South Wales legislation. The answer to this suggestion seems to me to be that, when the Commonwealth Regulations were made, there were in force, in all the States of the Commonwealth, Acts closely similar to the *Liquor Act* of New South Wales. Each Act controlled the sale of liquor according to very much the same scheme, and each Act contained special provisions for clubs closely analogous to those made by the *Liquor Act* of New South Wales. The Acts are the *Licensing Act* 1928 (Vict.), *The Liquor Act* 1912 (Qld.), the *Licensing Act* 1932 (S.A.), the *Licensing Act* 1911 (W.A.), the *Licensing Act* 1937 (Tas.). All these Acts had been amended in various ways, but none in any material respect. It is not worth while to set out their provisions even in outline. They differ in many details. The South Australian Act in terms more nearly assimilates the position of club premises to "licensed" premises than any of the others. But all alike treat clubs and club

(1) (1953) 88 C.L.R. 248.

(2) (1953) 88 C.L.R., at p. 270.

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premises as standing outside the general licensing system. One would certainly suppose that the *National Security* (*Landlord and Tenant*) *Regulations* were framed with knowledge of, and in the light of, these existing State enactments.

This appeal should, in my opinion, be allowed.

KITTO J. This appeal depends upon the interpretation of some words used in an Order in Council made under s. 8 (1) of the *Landlord and Tenant* (*Amendment*) *Act* 1948-1949 (N.S.W.), whereby a class of premises therein described was declared to be excluded from the operation of the Act. The words to be interpreted describe the class of premises as " premises licensed for the sale of spirituous or fermented liquors ". The question to be decided is whether these words include premises which are the club premises on which the secretary named in the certificate of registration of a club issued under Pt. X of the *Liquor Act* 1912-1946 (N.S.W.), is authorized by s. 132A of that Act to sell and dispose of liquor. In my opinion the words used do not include such premises. I agree generally with the reasons for judgment delivered by my brother *Fullagar*, and there is little that I wish to add.

It is unnecessary to trace in detail the steps by which the legislature of New South Wales has dealt with clubs in relation to the sale and supply of liquor. Suffice it to say that a study of the *Licensing Act* of 1882 (45 Vic. No. 14), the *Liquor Act*, 1898, the *Liquor* (*Amendment*) *Act*, 1905, the *Liquor Act*, 1912, and the *Liquor* (*Amendment*) *Act*, 1946, reveals a history very similar to that which *Fullagar* J. described in relation to the Victorian legislation in *Bergin* v. *Stack* (1). It was Pt. III of the English Act of 1902 (the *Licensing Act*, 1902, 2 Edw. VII, c. 28), which first introduced into liquor legislation special provisions for the regulation of clubs by means of a system of registration. This seems clearly enough to have been the source from which Pt. V of the New South Wales Act of 1905 drew its inspiration, although it followed somewhat different lines. Its provisions as amended by the Act of 1946 are now found in Pt. X of the *Liquor Act* 1912-1946. In relation to these provisions some observations may be made which appear to me to afford cogent reasons for holding that the expression " premises licensed for the sale of spirituous or fermented liquors " is quite inapt to refer to the premises of a club in respect of which a certificate of registration is in force.

First, to regard the certificate of registration of a club as a licence called by another name is to overlook the fact that its function is entirely different from that of a licence. Its possession

(1) (1953) 88 C.L.R. 248.

does not afford an answer to a charge (under s. 43) of selling liquor without holding a licence. If the transaction to which such a charge relates consists in a supply to a member of a club, or to his guest, of liquor which the members own in common, neither licence nor registration need be proved, for the doctrine of *Graff* v. *Evans* (1) is that in such a case there is no sale but only a release to one member of the proprietary rights of his co-members. (Indeed it was precisely because this meant that clubs did not need licences that it was necessary to introduce a system of requiring clubs to be registered, as a means of establishing a degree of control over them in relation to their dealings with liquor.) On the other hand, in the case of a transaction consisting in a sale of liquor to a non-member of the club, the existence of a certificate of registration of the club was, until 1946, irrelevant, for the simple reason that the certificate was not a licence. And even though s. 132A now provides that the certificate shall authorize the secretary to sell and dispose of liquor on the club premises, the certificate still falls short of being equivalent to a licence, for very real restrictions upon selling liquor to non-members exist by reason of the provisions of the Act as to cancellation of certificates (s. 148) and as to objections to the annual renewal of certificates (s. 140). A certificate of registration, therefore, lacks the prime characteristic of a licence, in that it does not constitute the holder an authorized vendor of liquor to the general public. Its relevance is not to the prohibition of selling liquor without holding a licence, but to the more recently created special prohibition, now found in s. 149, of selling or supplying liquor on the premises of an unregistered club.

Secondly, a certificate of registration of a club is much less closely connected with particular premises than is, for example, a publican's licence. A comparison of ss. 37, 38, 39, 39A and 131 with s. 145 will suffice to make the point clear. There is no provision for the transfer of a club's registration upon the licensee being evicted from the premises, or upon the owner coming into possession, or becoming entitled to possession, to the exclusion of the licensee. With respect to removal to other premises, an application in the case of a club is not open to objection by the owner of the premises as such, nor are the permitted grounds of objection similar to those for which the Act provides in the case of a publican's licence, a spirit merchant's licence or an Australian wine licence. In particular, the interest of the public, either generally or in the locality, are not among the matters to be considered. The only grounds of objection allowed are (a) that the proposed premises are not suitable for a club, and (b) that the accommodation or sanitary conveniences

(1) (1882) 8 Q.B.D. 373.

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are insufficient to meet the purposes for which the members of the club are associated together. A discussion of the sections referred to (as they stood in 1936) will be found in the judgment of *Jordan* C.J. in *Ex parte Berry*; *Re Kessell* (1), which it is impossible to read without seeing how different is the part which the premises play in the case of a licence from that which they play in the case of a club registration. Because of these considerations, there is not nearly the same justification for a transfer of epithet from the person to the premises in the case of a club registration as there is in the case of a licence.

Finally, it is not unimportant to recall that, as *Jordan* C.J. pointed out in *Ex parte Berry*; *Re Kessell* (2), the enactment of ss. 37, 38 and 131 was "for the purposes primarily of enabling the licence to continue to be exercised in a place in which it may be to the public interest that it should continue to be exercised, and, incidentally, of enabling the owner to obtain the benefit of any rights which he may have in fact acquired by agreement or otherwise as against the licensee". The same purposes might well be considered to justify the exclusion of licensed premises (in the strict sense of the expression) from the provisions of the *Landlord and Tenant (Amendment) Act* by which the normal rights of owners to recover possession of their premises from tenants and ex-tenants are drastically curtailed. But these purposes have no possible relevance to the premises of registered clubs; and for that reason a construction of the Order in Council which treats the exclusion of licensed premises as not extending to the premises of registered clubs attributes to Parliament an intention to discriminate for which it is not difficult to account on grounds of understandable policy.

I agree that the appeal should be allowed.

TAYLOR J. I agree with the reasons and conclusion of the Chief Justice in this matter.

Appeal allowed with costs. Order of the Supreme Court of New South Wales of 16th November 1953 discharged. In lieu thereof order that the summons dated 8th May 1953, be dismissed with costs.

Solicitors for the appellant, *Kevin Ellis & Price.*
Solicitors for the respondent, *Matthew McFadden & Co.*

R. A. H.

(1) (1936) 36 S.R. (N.S.W.) 485.

(2) (1936) 36 S.R. (N.S.W.) 485, at p. 492.