Ref to 57 W.N. Pt. 1. 98
Ref to at pp 200/2. (1975) 1 NSWLR 617.
Foll at p. 201. (1976) 2 NSWLR 431.

Appld 148 CLR 72.

[HIGH COURT OF AUSTRALIA.]

WILLIAMS AND OTHERS . . . . . APPELLANTS;
OBJECTORS,

AND

HOBDAY AND OTHERS . . . . . RESPONDENTS.
APPLICANT AND LICENSING MAGISTRATES,

H. C. OF A. 1954.

SYDNEY, *Mar.* 24; *Aug.* 28.

Dixon C.J., Kitto and Taylor JJ.

Liquor—Licensed premises—Licence—Removal—Objection—Public interest—Greater need in another area—Specific site—Availability—Necessity—Statutory prohibition—Liquor Act 1912-1946 (*N.S.W.*) *ss.* 39 (4C) (*c*), 39A—*Justices Act* 1902-1951 (*N.S.W.*), *s.* 115.

Section 39 (4C) (c) of the *Liquor Act* 1912-1946 (N.S.W.) provides:—"Without prejudice to the generality of any other provisions of this Act, a licensing court shall refuse to make an order of removal of a licence to a proposed new site if, having regard to the sufficiency or insufficiency of licensed premises in the various areas or parts of the licensing district it is satisfied that the public interest generally would be served to a substantially greater extent by the removal of the licence to a site in some area or part of the licensing district, other than the area or part in which the proposed new site is situated."

On an application under s. 39 of the *Liquor Act* 1912-1946 (N.S.W.) for the removal of a publican's licence from one site to another within the licensing district and against which objections have been lodged, it is sufficient under s. 39 (4C) (c) of the Act for the Licensing Court to be satisfied that, by the removal of the licence to some site or other in an area or part of the licensing district other than where the proposed new site is situated, the public interest generally would be served to a substantially greater extent.

Section 115 of the *Justices Act* 1902-1951 (N.S.W.), so far as material, provides:—"If upon the return day, . . . in the opinion of the court or judge after inquiry and consideration of the evidence adduced before the justice or justices, the conviction or order cannot be supported, the court or judge may direct that the writ applied for be issued, and may make such further order as may be just and necessary: . . ."

Held that if evidence is improperly rejected which is material to an issue upon which the correctness of an order depends and, if admitted, might have resulted in a different determination of that issue, an order must be set aside.

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Held further by *Dixon* C.J. and *Kitto* J., *Taylor* J. *dubitante*, that the remedy by way of statutory prohibition is available in a case where counsel informed the magistrates of the effect of certain evidence proposed to be but not actually tendered, and the magistrates rule against the relevance of the evidence.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Williams*; *Re Hobday* (1953) 54 S.R. (N.S.W.) 54; 71 W.N. 31, reversed.

APPEAL from the Supreme Court of New South Wales.

Herbert Williams, Reginald Charles Evinder, Jeannie Hillier and Kate Merry, all of Guildford, New South Wales, applied by motion to the Supreme Court for a statutory prohibition directed to the three stipendiary magistrates comprising the Licensing Court for the Metropolitan Licensing District arising out of the hearing by that court, as so constituted, of an application made by Mary Neta Hobday, a licensed publican and hotelkeeper, under s. 39 of the *Liquor Act* 1912-1946 (N.S.W.) for the removal of a publican's licence for premises known as the "University Hotel" situate at No. 281 Broadway, Glebe, to premises proposed to be erected on land situate near Guildford at the corner of Woodville Road and Guildford Road, the site of the said hotel and the site of the proposed premises both being situate within the Metropolitan Licensing District.

The applicants for the order for statutory prohibition had appeared before the Licensing Court to object to the grant of the application for the removal of the licence, *inter alia*, on the ground based on s. 39 (4c) (c) of the *Liquor Act* 1912-1946 that "the public interest generally would be served to a substantially greater extent by the removal of the license to a site in some area or part of the Licensing District other than the area or part in which the proposed new site at Guildford is situated."

During the hearing before the Licensing Court counsel for the four applicants-objectors asked that court to express its opinion on the interpretation of s. 39 (4c) (c) and stated that the court could assume that he would tender evidence (1) on the greater need for licensed premises in another locality; and (2) that this evidence could not point to an available site. The solicitor appearing for Mrs. Hobday submitted to the court that such evidence would be relevant but did not go far enough to support the objection taken by the four applicants-objectors. Counsel stated that no other evidence as to site was proposed to be called.

The chairman of the Licensing Court said "in his submission to us this morning" counsel for the applicants-objectors "has asked

us for an expression of opinion on the interpretation of s. 39 (4c) (c) of the *Liquor Act*. After hearing this submission and " the applicant's solicitor's " reply, it is our opinion that under that section we must be satisfied that the public interests generally would be served to a substantially greater degree by the removal of the licence not only to some area or part of a licensing district other than the area or part in which the proposed new site is situated but also to a site in such area or part of the licensing district, and further that such site is available on reasonable terms to the applicant for the purpose of erecting an hotel there. This is an expression of opinion on the interpretation of the section referred to. The decision as to whether the application should be granted or not will not be made until all evidence has been adduced."

At a later stage counsel stated that he proposed to call evidence to support the said application raised under s. 39 (4c) (c) and that that evidence would be directed to establishing the greater need in other areas of the same licensing district in terms of the section. He admitted that such evidence could not point to a particular site in those areas which was available to the applicant and available to her on reasonable terms, and said that his clients did not propose to call any further evidence in the case. Counsel said he did not propose to reargue the matter and asked the court to make its ruling thereon.

The chairman of the Licensing Court said " In this case we rule that we must be satisfied under the section, that the public interests generally would be served to a substantially greater extent by the removal of the licence not only to some area or part of the Licensing District other than the area or part in which the proposed new site is situated, but also to a site in such area or part of the Licensing District, and further that such site is available to the applicant on reasonable terms for the purpose of erecting a hotel thereon."

Counsel thereupon informed the court that " we are not calling any fresh evidence " and, at his request, was excused from further attendance.

In granting the application for the removal of the licence the Licensing Court, as regards the objection raised by the applicants-objectors, said that " as a consequence of the ruling given by us on the interpretation of s. 39 (4c) (c), no evidence was called that there was a site available to the applicant in another area or part of the Licensing District on reasonable terms for the purpose of building an hotel thereon. That objection, therefore, fails, and we find for the applicant on that objection."

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The Full Court of the Supreme Court (*Herron* and *Kinsella* JJ., *Owen* J. dissenting) discharged the rule nisi for prohibition: *Ex parte Williams*; *Re Hobday* (1).

From that decision the applicants-objectors appealed, by special leave, to the High Court.

The relevant statutory provisions are sufficiently set out in the judgment of *Dixon* C.J. hereunder.

Sir *Garfield Barwick* Q.C. (with him *J. A. Clapin*), for the appellants. Section 39 (4c) (c) of the *Liquor Act* 1912-1946 is not designed in any sense to further or advance the interests or convenience of the applicant licensee. The effect of the Court's want of satisfaction is not that the removal is to be allowed to some substituted site, because: the Act does not make any such provision. The only order that can be made—and must be made—is a refusal of the application. Whether the applicant obtains a particular site, or whether some other applicant comes forward, is immaterial. The policy of the section is that if the location of the licence in some area of the licensing district is more beneficial than its location in some other area or part by the refusal of any application for removal except to the most beneficial location the economic likelihood of an application for removal to that more beneficial location is increased. The licence is in the grant of the Crown, under the Act, and the legislature is entitled to disregard the convenience of the licensee when serving the public interest generally. The Act does not merely look to the present—a removal has an element of finality about it.

G. Wallace Q.C. (with him *J. Leaver*), for the respondent-applicant. This is not a case for statutory prohibition. It does not lie (*Ex parte Ross*; *Re Pym* (2)). Anything to do with a removal of a licence involves the concept that it is to a particular site or premises. A site *in* some area must be a site to which the licence could be removed. The intention of the legislature is indicated by the presence in the section of the expressions "of that site" and "of the premises". The onus should be upon the objectors of showing the availability of a specific site suitable for the purpose. If it were otherwise an objector would not have to show any site and would not be limited to any size of area—he would merely show something less than the whole. The word "site" is used three times in the section and should be given the same meaning on

(1) (1953) 54 S.R. (N.S.W.) 54; 71 W.N. 31.

(2) (1953) 70 W.N. (N.S.W.) 174.

each occasion it is so used (*Re National Savings Bank Association* (1)). That word is not used loosely or inexactly, but is used in precise terms (*New Plymouth Borough Council* v. *Taranaki Electric Power Board* (2)). The objectors must satisfy the Licensing Court that the site advocated by them is practicable and available. The expression " removal of the licence " means " the licence before the court ". The site must be one to which the licence can in fact be removed. The onus is upon the objectors to satisfy the court that the public interest would be better served at another site. The site must be one in respect of which there can be a removal to it. The court must be " satisfied ", but it cannot be satisfied unless evidence is before it, and it must have a specific site under consideration.

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

Aug. 20.

The following written judgments were delivered :—

DIXON C.J. This is an appeal by leave from an order of the Supreme Court of New South Wales discharging an order *nisi* for statutory prohibition restraining further proceeding upon an order of the Licensing Court for the Metropolitan Licensing District. The order unsuccessfully impugned before the Supreme Court granted an application under s. 39A of the *Liquor Act* 1912-1946 (N.S.W.) for a conditional order for the removal of a publican's licence from one site to another in the Metropolitan Licensing District. The order *nisi* for prohibition was obtained by four objectors who relied upon s. 39 (4c) of the *Liquor Act*, a provision made applicable by s. 39A (2) as amended. The objection was disposed of by the Licensing Court by the construction placed by that court upon par. (c) of s. 39 (4c) and the purpose of the order *nisi* was to obtain from the Supreme Court a review of the decision by which the provision was thus construed unfavourably to the objectors. In the Supreme Court *Herron* J. and *Kinsella* J., while not adopting the view of the Licensing Court in its entirety, decided against the construction upon which the objectors depended. *Owen* J. dissented. By the present appeal the objectors seek to obtain the decision of this Court upon the construction of s. 39 (4c) (c). It will be necessary in a later part of this judgment to discuss the whole of s. 39 (4c), but it is convenient to set out par. (c) at once and describe the question of construction. Paragraph (c) is as

(1) (1866) 1 Ch. App. 547, at pp. 549, 550.

(2) (1933) A.C. 680, at p. 682.

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follows :—" Without prejudice to the generality of any other provisions of this Act, a Licensing Court shall refuse to make an order of removal of a licence to a proposed new site if, having regard to the sufficiency or insufficiency of licensed premises in the various areas or parts of the licensing district it is satisfied that the public interest generally would be served to a substantially greater extent by the removal of the licence to a site in some area or part of the licensing district, other than the area or part in which the proposed new site is situated." The question of construction which arises may be stated as follows : Do the last words of the section beginning with the words " by the removal " refer to an undetermined site so that the result would be the same had the conditional clause been expressed : " If the site to which the licence is to be removed was in some area or part of the licensing district other than the area or part in which the proposed new site is situated " ? Or, on the contrary, is the reference to some determinate or specific site so that it means : " If the licence were removed to some given site which site is in some area or part of the licensing district other than the area or part in which the proposed new site is situated " ?

The Licensing Court adopted the latter interpretation. After hearing other objections the court made an order for removal in accordance with the application before it. The appellants then obtained the order *nisi* for prohibition under s. 170 (1) of the *Liquor Act* 1912-1946. Section 170, so far as material, provides that any person aggrieved by an adjudication of a licensing court may appeal from such adjudication in the manner provided by Pt. V of the *Justices Act* 1902, as amended by subsequent Acts, and that the provisions of Pt. V shall apply *mutatis mutandis* to appeals under s. 170 from such adjudication. The provisions relating to statutory prohibition to justices are contained in the second division of Pt. V of the *Justices Act*. Section 115 provides that the Supreme Court if in its opinion " after inquiry and consideration of the evidence adduced before the Justice or Justices the conviction or order cannot be supported " may direct the prohibition applied for to be issued and make such further order as may be just and necessary.

The contention of the objectors (the now appellants) that the first of the two alternative constructions of s. 39 (4c) (c) should be adopted was presented and dealt with in a somewhat unusual if convenient manner. Among the objections upon which the appellants relied was the following : " That the public interest generally would be served to a substantially greater extent by the removal of the licence to a site in some area or part of the Licensing District

other than the area or part in which the proposed new site at Guildford is situated." Mr. *Cassidy*, who appeared for the appellants before the Licensing Court, informed that court that he proposed to call evidence in support of this objection and stated to the court the nature and extent of the evidence he proposed to call. He said: "That evidence will be directed to establishing the greater need in other areas of the same Licensing District in terms of the section. It is admitted that such evidence cannot point to a particular site in those areas which is available to the applicant and available to him on reasonable terms. The objectors for whom I appear do not propose to call any further evidence in the case." Apparently Mr. *Cassidy* had already argued the construction of the section in an earlier case. On this occasion he requested the court to make its ruling. The chairman of the Licensing Court said: "In this case we rule that we must be satisfied under the section, that the public interest generally would be served to a substantially greater extent by the removal of the licence not only to some area or part of the Licensing District other than the area or part in which the proposed new site is situated, but also to a site in such area or part of the Licensing District, and further that such site is available to the applicant on reasonable terms for the purpose of erecting a hotel thereon." The chairman had at the conclusion of the earlier argument concerning the construction of the section expressed himself as follows:—"In his submission made to us this morning Mr. *Cassidy* has asked us for an expression of opinion on the interpretation of s. 39 (4c) (c) of the *Liquor Act*. After hearing this submission and Mr. *Warren's* reply, it is our opinion that under that section we must be satisfied that the public interests generally would be served to a substantially greater degree by the removal of the licence not only to some area or part of a licensed district other than the area or part in which the proposed new site is situated but also to a site in such area or part of the licensed district, and further that such site is available on reasonable terms to the applicant for the purposes of erecting an hotel there. This is an expression of opinion on the interpretation of the section referred to. The decision as to whether the application should be granted or not will not be made until all evidence has been adduced." The judgment ultimately delivered by the Licensing Court in the present case made the following reference to this matter: "Mr. *Cassidy* Q.C., instructed by Mr. *Mitchell*, announced his appearance on behalf of the objectors, Williams and others, and asked the court to express its opinion on the interpretation of s. 39 (4c) (c) of the *Liquor Act*, and stated that

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the court could assume that he would tender evidence (1) on the greater need for licensed premises in another locality (2) that this evidence cannot point to an available site. Mr. *Warren* submitted that such evidence would be relevant, but did not go far enough, and Mr. *Cassidy* stated that no other evidence as to site was proposed to be called. At a later stage Mr. *Cassidy* re-stated his submissions and said that he proposed to call evidence to support objection No. 6, that such evidence would be directed to establishing the greater need in other areas in terms of the section, but admitted that he could not point to a particular site in those areas available to the applicant on reasonable terms; and he asked for a definite ruling from the court as to the meaning of the section. The court ruled that under the section it must be satisfied that the public interest generally would be served to a substantially greater extent by the removal of the licence, not only to some area or part of the licensing district, other than the area or part in which the proposed new site is situated, but also to a site in such area or part of the licensing district and, further, that such site is available to the applicant on reasonable terms for the purpose of erecting an hotel thereon. Mr. *Cassidy* then stated that the objectors did not propose to call any further evidence on objection 6 of the objections filed."

Because the objection was dealt with in this way a question arises whether the remedy by statutory prohibition is open to the objectors. They must sustain the burden of establishing that the order made by the Licensing Court cannot be supported within the meaning of s. 115 of the *Justices Act*. It is a provision that has been much considered in New South Wales from the time when it was first adopted by Act 14 Vict. No. 43 s. 12 : see *Peck* v. *Adelaide Steamship Co. Ltd.* (1) and the article by Professor *Harrison* (2). It seems to be established, however, that if a fundamental error in law amounting to a misdirection is made by the magistrates in such circumstances as to lead to their failure to determine what are in truth the relevant facts, then the order cannot be supported : see per *Stephen* J., *Ex parte Wetherburn* (3). An example will be found in the circumstances of *Ex parte Bogan* (4). There the justices were called upon to apply the law which deprived the holder of a packet licence of authority to sell liquor while the vessel licensed was plying between places within any harbour of the colony. But they contented themselves with observing that there was some undesirable obscurity about the use of the word

(1) (1914) 18 C.L.R. 167.
(2) (1936) 10 A.L.J. 300.
(3) (1936) 53 W.N. (N.S.W.) 103.
(4) (1887) 8 L.R. (N.S.W.) (L.) 409.

"harbour" in the Act and gave it as their opinion that it was intended by the legislature to restrict packet licences to sea-going vessels. The justices failed actually to determine whether the places between which the vessel was plying were geographically within a harbour. The Supreme Court did not agree that packet licences were confined to sea-going vessels and as the justices had not decided upon the facts, upheld the appeal and granted a statutory prohibition.

If evidence is improperly rejected by the magistrates an order cannot be supported provided that the evidence is material to an issue upon which the correctness of the order depends and if admitted might have resulted in a different determination of that issue: see *Ex parte Cassidy* (1), and per *Stephen* J.; *Ex parte Wetherburn* (2).

Applying these principles the first question must be whether the Licensing Court is to be taken to have rejected evidence which was tendered. Unsatisfactory as the course followed may be from a procedural point of view, if the Licensing Court and the parties were content to treat such a notional tender of the evidence as conventionally equivalent to an actual tender and if on that basis the evidence is to be taken to have been rejected, there appears to be no reason why for the purposes of s. 115 it should not be regarded as tantamount to a rejection of evidence regularly tendered. If the interpretation of s. 39 (4c) (c) adopted by the Licensing Court was erroneous and because of that erroneous interpretation the Licensing Court rejected evidence in support of an issue, which if proved would or might have governed the fate of the application, it is difficult to see why the order is not covered by the words of s. 115 as one that cannot be supported. It is of course true that in s. 115 these words are preceded by the words "if in the opinion of the Court or Judge after inquiry and consideration of the evidence adduced before the Justice or Justices". It is also true that in the reports some references to the introductory words may be found which may suggest that they restrict the test of what may be supported to a consideration of the evidence actually admissible and admitted. But neither in form or substance would such a restriction be justifiable. It may be remarked that some doubt must exist as to the grammatical meaning of these words. Are they equivalent to "after inquiry of the evidence and after consideration of the evidence" or do they mean "after inquiry and after consideration of the evidence," or to make it clearer by changing the order, "after consideration of the evidence and after

(1) (1871) 10 S.C.R. (L.) 180. (2) (1936) 53 W.N. (N.S.W.) 103.

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inquiry " ? If the latter is their meaning the inquiry must be into the whole character of the case. The expression " after inquiry of the evidence " is extremely clumsy and is hardly different from " after consideration of the evidence ". Further, in s. 12 of 14 Vict. No. 43 the words were " after inquiry into the matter and consideration of the evidence ". It rather looks as if the words " into the matter " were omitted as unnecessary on the footing that the phrase meant " after inquiry and after consideration of the evidence ". Whatever may be their grammatical intention, the Supreme Court has not in practice acted on the view that they mean that the question whether the order can be supported or not must be governed wholly by the evidence or admissible evidence which has been adduced and admitted. It must be governed by all other legal considerations which show whether or not the order is capable of being sustained upon the proceedings before the magistrate.

In the present case it seems on the whole proper to treat Mr. *Cassidy* as in the same situation as if he had actually called the witnesses, and tendered their evidence and as if the Licensing Court had rejected it on the grounds assigned by that court for treating it as insufficient. The affidavit in support of the application for prohibition says that the Licensing Court ruled that the evidence it was proposed to tender was inadmissible and it rejected the evidence. It is probably true, however, that the interpretation placed by the Licensing Court upon s. 39 (4c) would not justify the course of actually rejecting the proposed testimony. For the interpretation meant rather that the evidence when received would not go far enough and would prove inadequate to establish the objection under s. 39 (4c). Possibly that point was not perceived at the hearing though it is to be noticed that the submission attributed in the court's judgment to Mr. *Warren* is that the evidence would be relevant but did not go far enough. If, however, the course adopted was not notionally to reject the evidence but simply to rule that it was useless to tender it because the facts it was sought to prove were insufficient in law, Mr. *Cassidy* must be taken as complying with a ruling going to the basis of the ultimate decision and as proceeding on the conventional basis that he was to be in the same position as if he had adduced the evidence. In either view the magistrates may be taken to have directed themselves in accordance with their interpretation of the section and if that direction was wrong it seems necessarily to follow that the order could not be supported even although the evidence does not appear on the record which would make it right for them to pronounce

the contrary order. The result is that the decision of the appeal must turn upon the correctness of the Licensing Court's view or, in other words, upon the proper interpretation of s. 39 (4c) of the *Liquor Act*. It is therefore necessary to turn to a consideration of that provision.

As s. 39 of the *Liquor Act* stood before the amendments made by Act No. 34 of 1946 it prohibited the removal of a publican's, spirit merchant's, or Australian wine licence from one licensing district to another, but enabled the holder of any such licence to apply to the Licensing Court for an order for removal from the licensed premises to any other premises in the same licensing district. Licensing districts are established by proclamation and they may be subdivided, amalgamated or altered by proclamation: ss. 3 and 4. By amendments, which were at first to apply only to the Metropolitan Licensing District and the Newcastle Licensing District but were afterwards extended to the Parramatta Licensing District and the Ryde Licensing District, a further restriction was imposed upon the removal under s. 39 of such licences. It was made unlawful to remove them to premises beyond a mile radius from the licensed premises in respect of which the licence was held: s. 16 of Act No. 51 of 1923 and s. 3 of Act No. 49 of 1929. Section 39A, which was inserted by Act No. 42 of 1922, provided for the removal of a publican's licence to premises which it is proposed to erect or to premises which though already erected require additions or alterations to make them suitable. This power was limited to premises in the same licensing district. Again by an amendment applying at first only to the Metropolitan and the Newcastle Licensing Districts but extended later to those of Parramatta and Ryde, the power was further restricted to premises within a radius of one mile from the licensed premises: s. 16 (2) of Act No. 51 of 1923 and s. 3 of Act No. 49 of 1929. Another limitation was imposed on both s. 39 and s. 39A so far as concerns the four licensing districts aforesaid, namely that the licence should not be removed from one electoral district to another: s. 39B inserted by s. 16 (3) of Act No. 51 of 1923.

By Act No. 34 of 1946, s. 39 and s. 39A were both revised and sub-s. (4c), upon which this case depends, was introduced into s. 39. It is a provision which seems to arise from the fact that under the revision of s. 39 the removal of a licence was no longer restricted to the same licensing district or, in the case of the four licensing districts mentioned, to premises within a radius of one mile from the licensed premises. Instead it was first provided that no publican's licence or spirit merchant's licence or Australian wine

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licence held in respect of premises outside the Metropolitan or Newcastle Licensing Districts should be removed to premises within either of those districts: sub-s. (4A).

Then a general sub-section, not confined in its application to premises within the Metropolitan or Newcastle Districts, provided that the Licensing Court must be satisfied that the removal will be in the interests of the public in the neighbourhood of the proposed new site and will not affect detrimentally the interests of the public in the neighbourhood of the site of the existing premises: sub-s. (4B). Then comes sub-s. (4C), the interpretation of which is in question. It applies only to a publican's licence and premises in which a publican's licence is held and it applies only to a proposal to remove a licence from licensed premises situated within the Metropolitan or the Newcastle Licensing District to a site within the same district: pars. (a) and (b) of sub-s. (4C). And it does not apply if the proposed site is in the same neighbourhood as the existing site: par. (d). Section 39A was amended so as to include spirit merchant's and Australian wine licences and, like s. 39, so as to allow of the removal of a licence to premises in another licensing district. But by making applicable sub-ss. (4A), (4B) and (4C) of s. 39 the same limitations and conditions were imposed upon removals to premises to be erected as in the case of premises already erected, including those relating to the Newcastle and Metropolitan Licensing Districts. By proclamation the licensing districts of Ryde, Parramatta and also Liverpool were incorporated in the Metropolitan Licensing District. It is as part of these revised provisions and arrangements that par. (c) of sub-s. (4C) must be interpreted. What this means must be kept in view. It assumes that the proposed site is in the same licensing district, Metropolitan or Newcastle, that the removal to the site is in the interests of the public in the neighbourhood of that site and that the site is not in the same neighbourhood as the existing site of the licensed premises. In the application of par. (c) to s. 39 the assumption is that the premises are standing on the proposed site and in its application to s. 39A that they are to be erected on the proposed site (or are to be added to or altered).

Paragraph (c) begins with the statement that what it provides is without prejudice to the generality of the other provisions of the Act and it may be supposed that the object was to prevent the neglect of other considerations governing applications for removal if a proposed site survived the test propounded by the paragraph. Next it is to be noted that the provision is imperative; the Licensing Court must refuse the order for removal if it is satisfied that the public interest generally would be served to a substantially greater

extent by the removal of the licence to a site in some (other) area or part of the licensing district. Unfortunately the words " removal . . . to a site in some (other) area or part of the licensing district " are quite equivocal. They are equally capable of meaning a specific or ascertained site or an unascertained or unspecified site. The equivocation does not lie in the word " site ", the meaning of which does not alternate. It arises from the form in which the phrase is expressed, employing as it does the indefinite article before the word " site ". Is it postulating a certain, particular and specified site ? Or is the word " site " to have its general descriptive meaning and an undetermined application ? If the former, the Licensing Court must find a specific site in another area or part of the licensing district and be able to say that if the licence were removed to that site the public interest would be served to a substantially greater extent. If the latter, it is enough for the court to be satisfied that if the site to which the licence was removed were in another area or part of the district the public interest would be served to a substantially greater extent and the court need not point to a specific hereditament. It is perhaps important to note that in this provision it is the interest of the public generally that matters, that is to say the public generally as distinguished from the public in the neighbourhood as mentioned in sub-s. (4B) and that is so whether it is the neighbourhood of the site to which, or the site from which, it is proposed to remove the licence. Further, the Licensing Court is directed in considering that public interest to have regard to the sufficiency of licensed premises in the various areas or parts of the licensing district. Probably it may safely be assumed that the Licensing Court, as a result of the experience gained in administering the Act in the metropolis, will be well aware of the distribution of licensed premises and of the changing needs of the various areas of the licensing district. Clearly enough the purpose of sub-s. (4C) is to see that removals of licences are not made where the general public interest would be better served by a removal to some other place and that must include consulting the changing needs of the various areas or parts of the Metropolitan or Newcastle Licensing District as the case may be.

The practical operation of this method of carrying out such a policy is affected by an alteration of the law made by Act No. 34 of 1946 which has not yet been mentioned. As a result of that Act, on 13th September 1953, a date seven years from the commencement of its relevant provisions, it became a lawful ground of objection to the renewal of a licence that the reasonable requirements of the neighbourhood do not justify its renewal : s. 45 (p) of Act

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No. 34 of 1946. Where there is reason to apprehend that such an objection may be taken to the renewal of a licence, those interested in the licence would naturally seek to remove it. But at that point par. (c) of sub-s. (4c) requires the Licensing Court to consider whether for the purpose of serving the public interest generally it is better that it should go to a site in some area or part of the district other than that where the site proposed is situated.

Equivocal as the language of par. (c) is, one or other of the two meanings of which it is susceptible must be placed upon it. The considerations which govern the choice must be found in the policy disclosed by the legislation, the general character of the provisions in their application to the subject matter and in such arguments of convenience as may arise therefrom.

One difficulty in accepting the interpretation which requires the Licensing Court to fix on a specific or ascertained site, as that which is preferable in the public interest generally, is to know exactly what that involves. Is it enough for the Licensing Court to point to a piece of land and say that is the place for the hotel ? Or must the court be satisfied that the owner will sell it for the purpose at a reasonable price ? If the application is under s. 39 and not s. 39A must the court be satisfied of the suitability of the building on the supposedly eligible site ? On what basis does it estimate the reasonableness of the price ? Is it to consider the general market value of the land or the adequacy of the probable return from the exercise of the licence to cover interest on the outlay ? Do questions of restrictive covenants or residential area by-laws require consideration ? In other words, it may be well enough to say that there must be a specific site available, but it is another thing to find in the statutory provision any standards of availability.

This is a serious negative difficulty in the way of adopting the interpretation which requires the identification of a specific site. On the other side there are the positive considerations in favour of the indeterminate application of the reference to a site which arise from the policy disclosed by the legislation. They are set out with clearness and force in the dissenting judgment of *Owen* J. The policy evidently took the enlarged Metropolitan Licensing District as so to speak a reservoir of existing licences, into which no more were to come but from which licences might be removed. Within it removal from site to site was to be allowed but not required, except by the pressure after September 1953 which the possibility of objection to renewal might exert once the ground became open that the neighbourhood did not require a licensed house.

But removal is not to be allowed to the detriment of the neighbourhood whence, or the neighbourhood whither, the licence was taken or when " the public interest generally would be served substantially to a greater extent by the removal of the licence to a site in some area or part of the licensing district " other than that of the proposed site. In any such case the removal proposed was to be refused. But the licensee might apply for an order for removal to such other site as he might think fit to propose. The legislation leaves the origination of all proposals for removal to him.

This policy is not inconsistent with the hypothesis that the Licensing Court must for the purposes of par. (c) point to a specific site. But it does make such an hypothesis look somewhat improbable. It looks improbable because it is evidently not the office of the Licensing Court to force a specific site upon the licensee or owner, while it is the function of the Licensing Court to treat an application for removal as the occasion for inquiry into the public needs and to grant or refuse the application as they are fulfilled or not in the manner these provisions indicate. It is reasonable enough for the Licensing Court to assess the public needs of localities whether they be called neighbourhoods, areas or parts of the licensing district. But it is not so easy to suppose that, with or without the help of objectors, the Licensing Court was intended to find or ascertain a site and then to centre the question of public interest upon it.

On the whole it seems that the interpretation of par. (c) to be preferred is that which makes it enough for the Licensing Court to be satisfied that, by the removal of the licence to some site or other in an area or part of the licensing district other than that where the proposed new site is situated, the public interest generally would be served to a substantially greater extent.

For the foregoing reasons the rule *nisi* for statutory prohibition should be made absolute. The order should be appeal allowed with costs; set aside order of the Supreme Court, and in lieu thereof order that the rule be made absolute with costs and the Licensing Court be directed to reconsider the application for removal of the licence. Restrictive as may have been the interpretation of s. 115 there seems to be no reason why the words " make such further order as may be just and necessary " should not authorize such a direction in the circumstances of the present case : cf. *Ex parte Holland* (1) decided on s. 132.

KITTO J. I have had the advantage of reading the judgment of the Chief Justice. I am of the same opinion and have nothing to add.

(1) (1912) 12 S.R. (N.S.W.) 337; 29 W.N. 75.

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WILLIAMS v. HOBDAY.

TAYLOR J. I am in agreement with the Chief Justice as to the meaning of s. 39 (4c) (c) of the *Liquor Act* 1912-1946, but I have considerable doubt whether an application to the Supreme Court for a statutory writ of prohibition was, in the circumstances of the case, an appropriate or permissible method of challenging the order of the Licensing Court. In view, however, of the opinions of the other members of the Court I am not prepared to hold that the appeal should be dismissed on that ground and I, therefore, agree in the order proposed.

Appeal allowed with costs. Discharge order of the Supreme Court. In lieu thereof order that the rule nisi be made absolute with costs and that the Licensing Court be directed to reconsider the application of the respondent Mary Neta Hobday for removal of the publican's licence.

Solicitor for the appellants, *G. W. Mitchell.*
Solicitors for the respondent, *Smithers, Warren & Lyons.*

J. B.