[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF POLICE . . APPELLANT;

AND

TANOS . . . . . RESPONDENT.

TANOS . . . . . APPELLANT;

AND

THE COMMISSIONER OF POLICE . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1957, *Dec.* 18, 19;

MELBOURNE, 1958, *Mar.* 11.

Dixon C.J., Webb and Taylor JJ.

Police Offences—Disorderly houses—Restaurant premises—Declaration of premises—Necessary factors—Ex parte order—Rescission granted—Appeal by police—"Allow"—"Allowance"—Owner or occupier of premises—Opportunity of being heard—Disorderly Houses Acts 1943 (N.S.W.), *ss.* 3 (1), 4 (1)—*Disorderly Houses Regulations, reg.* (1).

Section 3 (1) (b) of the *Disorderly Houses Act* 1943 (N.S.W.) provides:—"3. (1) Upon the affidavit of a Superintendent or Inspector of Police showing reasonable grounds of suspecting that all or any of the following conditions obtain with respect to any premises, that is to say—. . . (b) that liquor or a drug is unlawfully sold or supplied on or from the premises or has been so sold or supplied on or from the premises and is likely to be so sold again on or from the premises . . . any judge of the Supreme Court may declare such premises to be a disorderly house."

Regulation 1 of the *Disorderly Houses Regulations* provides:—"(1) An application to declare premises a disorderly house under section 3 (1) shall be made to the judge taking non-contentious matters in private chambers, upon an affidavit filed in the Prothonotary's Office setting out the grounds as required by the section. At the same time an order in or to the effect of Form No. 1 in the Schedule hereto shall be submitted for signature by the

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judge, and if granted a copy of the order shall be filed in the Prothonotary's Office forthwith. If the judge is of the opinion that reasonable grounds have been shown—(i) he may make the declaration immediately and ex parte if this seems to him necessary or desirable, or (ii) if he thinks that an opportunity should be given to the owner or occupier or both to oppose the making of the declaration he may direct them to be served with a copy of the affidavit and to be notified of the day on which the matter will be dealt with, such service and notification to be effected in such manner as may seem to him sufficient: when the matter comes on, the Superintendent or Inspector of Police or counsel or solicitor on his behalf and the owner and occupier or counsel or solicitor on their behalf may attend and be heard, and the matter shall be disposed of in public chambers."

Held that prima facie the course provided for in reg. 1, par. (ii) should be followed and only in exceptional or special cases should an immediate declaration be made.

Cooper v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180 [143 E.R. 414] and *Delta Properties Pty. Ltd.* v. *Brisbane City Council* (1955) 95 C.L.R. 11, referred to.

The matters required to be proved by an applicant for an order of recission under s. 4, considered.

Per Taylor J. and *semble per Dixon* C.J. and *Webb* J. a declaration improperly made *ex parte* under s. 3 may be rescinded or set aside on an application made independently of s. 4 (1).

Decision of the Supreme Court of New South Wales (*Walsh* J.) reversed; order of the Supreme Court of New South Wales (*Manning* J.) held to have lapsed.

APPEALS from the Supreme Court of New South Wales.

These were two appeals, by special leave, from orders made respectively by *Walsh* J. and *Manning* J. On 25th February 1957 *Walsh* J. made an *ex parte* order under s. 3 of the *Disorderly Houses Act* 1943 (N.S.W.) declaring certain premises in the occupation of Mrs. Alice Elsie Tanos to be a disorderly house. On 23rd July 1957 *Manning* J., on the application of Mrs. Tanos, made an order under s. 4 of the Act rescinding the *ex parte* order made by *Walsh* J. Application for special leave to appeal against the order of *Manning* J. was made on behalf of the Inspector of Police who had obtained the *ex parte* order. In granting special leave the Court imposed a condition that the respondent to that proposed appeal should have special leave to appeal from the original order of *Walsh* J. By consent the two appeals were heard together.

The relevant facts and statutory provisions are sufficiently set forth in the judgment of *Dixon* C.J. and *Webb* J. hereunder.

H. A. Snelling Q.C. (Solicitor-General for New South Wales) (with him *R. P. Vine-Hall*), for the Commissioner of Police. The suspicion referred to in s. 3 is that of the deponent of the affidavit: see *Ex parte Gleeson*; *In re The Shanghai Club* (1). The principle was expressed by Baron *Parke* in *Bonaker* v. *Evans* (2). It may confer discretion on the judge. [He referred to *Ex parte Day*; *Re Courtney* (3); *Farrell* v. *Delaney* (4) and *In re Tattersall's Club* (5).] The absence of any provision for notice prior to declaration to either owner or occupier contrasting with the very specific and express provision for notice immediately thereafter, see s. 6 (1) (a), (b) indicates that the legislature contemplated an application *ex parte*. The declaration is discretionary: *Interpretation Act of* 1897, s. 23; *Ward* v. *Williams* (6), and the judge could, if he thought fit, order that the owner or occupier should be notified before he was prepared to make the declaration. Regulations made under the Acts show a correct understanding of the ambit of the discretion conferred upon a judge. An order was declared invalid in *Ex parte Day*; *Re Courtney* (7). Consideration of ss. 3, 4 and 6 shows that they are indications that the legislature was carefully considering the procedure and deliberately adopting an *ex parte* application in the first instance. *Owners of S.S. Kalibia* v. *Wilson* (8) and *Boyle* v. *Sacker* (9) seem to indicate that wherever the legislature has provided for an *ex parte* application the party who has thereby been precluded from being heard may apply to the judge for a discharge of the *ex parte* order on grounds not easy to define but which doubtless would include the ground that there was a lack of candour in placing the material before the court. [He referred to *H.M.S. Archer* (10).] The right to be heard is such a fundamental matter that it is unlikely that the legislature would have left it to regulations: see *Ex parte Gleeson* (11) and *Collins* v. *Nielsen* (12). Section 4 allows the owner or occupier who has received notice of the declaration in accordance with s. 6 to apply to the court and state that he was never at any time a party to any

(1) (1907) V.L.R. 463, at pp. 466, 467.
(2) (1850) 16 Q.B. 162, at p. 171 [117 E.R. 840, at p. 844].
(3) (1942) 42 S.R. (N.S.W.) 212, at p. 217; 59 W.N. 182, at p. 186.
(4) (1952) 52 S.R. (N.S.W.) 236, at pp. 239-241; 69 W.N. 260, at pp. 262-264.
(5) (1942) S.A.S.R. 211.
(6) (1955) 92 C.L.R. 496, at pp. 506-509.
(7) (1942) 42 S.R. (N.S.W.) 212; 59 W.N. 182.
(8) (1910) 11 C.L.R. 689, at p. 694.
(9) (1888) 39 Ch. D. 249, at pp. 251, 252.
(10) (1919) P. 1.
(11) (1907) V.L.R. 368, at pp. 369, 370, 373.
(12) (1941) 41 S.R. (N.S.W.) 42; 58 W.N. 58.

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of the conditions referred to in the section. The matter should be remitted to the judge to decide the issue which the section requires to be decided, together with the views of this Court as to the true meaning of the Act.

J. G. Starke (with him *W. P. Deane*), for Mrs. Tanos. This Court should set aside the original declaration on the ground that apart from the matter of the order having been made *ex parte* in the first instance there was no evidence before *Walsh* J. on the issue of likelihood. The affidavit was not a candid affidavit. None of the circumstances surrounding the commission of the offences were disclosed. There was not, and is not, any evidence before the Court covering the month, approximately, before the date of the making of the affidavit and the month, approximately, prior to the *ex parte* hearing. That evidence is required by the section. It requires not only evidence of the past commission of offences but evidence of the likelihood of the commission of further offences. The original *ex parte* order should be set aside because it should not have been made in the first instance on the materials in the affidavit. The rescission order was correctly made. [He referred to *Cooper* v. *Wandsworth Board of Works* (1); *Sydney Corporation* v. *Harris* (2); *Cameron* v. *Cole* (3) and *Cheetham* v. *City of Manchester* (4).]

[*H. A. Snelling* Q.C., by leave, referred to *Delta Properties Pty. Ltd.* v. *Brisbane City Council* (5) where those authorities are collected.]

The statute has severe consequences. An owner's and an occupier's reputation and business can be immediately destroyed under the operation of s. 6 (*Cooper* v. *Wandsworth Board of Works* (1)).

In *Ex parte Gleeson* (6) with precisely the same provisions before him the judge was prepared to find, without reference to the provision as to notice, that there was a right to be heard. The judgment of *Mayo* J. in *In re Tattersall's Club* (7) is not in such positive terms as might be implied when one reads how the Chief Justice of New South Wales dealt with it in *Farrell* v. *Delaney* (8). Section 6 requires notice to be given to the owner and occupier, the effect being to fix a time under s. 9 as from which time the owner is penalised if he does not take all reasonable steps to remove the conditions

(1) (1863) 14 C.B. (N.S.) 180 [143 E.R. 414].
(2) (1912) 14 C.L.R. 1, at pp. 8, 10, 11.
(3) (1944) 68 C.L.R. 571, at pp. 589, 590.
(4) (1875) 10 C.P. 249.
(5) (1955) 95 C.L.R. 11, at p. 18.
(6) (1907) V.L.R., at pp. 369, 370.
(7) (1942) S.A.S.R. 211.
(8) (1952) 52 S.R. (N.S.W.) 236; 69 W.N. 260.

obtaining in relation to the premises. The owner could show that there were no reasonable grounds for the suspicion according to the materials disclosed in the affidavit: see *Ex parte Gleeson*; *In re The Shanghai Club* (1) and *James* v. *Pope* (2).

Cur. adv. vult.

Mar. 11, 1958.

The following written judgments were delivered :—

DIXON C.J. AND WEBB J. Upon the application of the Solicitor-General of New South Wales the Court granted special leave to appeal from an order made by *Manning* J. under s. 4 of the *Disorderly Houses Acts* 1943. The order rescinded an *ex parte* order which *Walsh* J. had made some five months earlier under s. 3 declaring the premises forming a certain restaurant to be a disorderly house. In granting special leave to appeal from the order of rescission on the application of the Solicitor-General the Court thought proper to make it a condition that the respondent to that proposed appeal should have special leave to appeal from the original order of *Walsh* J. There are consequently now before us two appeals, one that of an occupier of the premises from the *ex parte* order declaring them to be a disorderly house, and the other the appeal of the Commissioner of Police against the order rescinding the first order.

The premises are on the second floor of 267 Pitt Street, Sydney. According to the description contained in the order they are known as the Latin or alternatively the Cedar restaurant. The fee simple of the whole building was in an incorporated company but two persons were lessees of the premises forming the restaurant, which was occupied by them. They are Alice Elsie Tanos and her husband Frederick Jabour Tanos. It is Mrs. Alice Elsie Tanos who is the respondent to the appeal of the Commissioner of Police against the order of rescission and the appellant in the appeal against the order declaring the restaurant to be a disorderly house. Mr. Frederick Jabour Tanos who is her husband is not a party on the record of this Court.

The declaration that the restaurant was a disorderly house was made upon an affidavit of an Inspector of Police (Inspector Walden) sworn ten days before the making of the order. This affidavit after describing the building gave particulars of the physical character of the café, two rooms on the second floor, one thirty-five feet by thirty feet, fitted with chairs and tables for seventy people,

(1) (1907) V.L.R. 463.

(2) (1931) S.A.S.R. 441, at pp. 454, 455.

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the other a kitchen fourteen feet by twelve feet, equipped with stove, cooking utensils, cupboards and refrigerator. Some information was given about the ownership of the building and about the occupation of the restaurant by the two proprietors of the café and then the deponent swore to his suspicion and belief that there obtained in respect of the premises two conditions that are mentioned in s. 3 (1) (b) of the *Disorderly Houses Acts*. They are (a) that liquor has been unlawfully sold or supplied on the premises and (b) that liquor is likely to be unlawfully sold or supplied again on the said premises. The grounds of the suspicion follow. By brief statement they can be reduced to this. Three and a half years before two men, Koroschenko and Cubak by name, had been arrested, convicted and fined upon a charge of selling liquor without a licence in the premises. Six months later, that is three years before the making of the affidavit, Koroschenko was again arrested, this time with a man named Juhos, and they were convicted and fined on a similar charge. The next event narrated did not occur until over two years and nine months had elapsed. It was the conviction and fining of Mr. Tanos upon a charge of selling liquor without a licence. That was on 5th November 1956. On 18th January 1957, police again entered the restaurant. They arrested Mr. Tanos on a similar charge and on 11th February 1957 he was again convicted and fined. Inspector Walden swore his affidavit four days later. *Walsh* J. made his *ex parte* order on 25th February 1957.

In support of the application of Mrs. Tanos to rescind the declaration that the restaurant is a disorderly house, facts were made to appear by affidavit tending to show that under that lady's direction the place had assumed a new and highly respectable character.

She and her husband, having married two or three years before, bought the restaurant from Koroschenko for a very substantial amount and entered into possession on 1st November 1956. She says that her husband, a Lebanese of twenty-seven years of age, lacked experience and business sense. She being a little, but very little, older, an Australian-born woman of Lebanese extraction, had the advantage of having managed a residential for her father at King's Cross. His want of experience or possibly his want of business sense betrayed him on taking over the restaurant into selling liquor to patrons, who had been accustomed to it under the regime of Koroschenko, and he had been caught within a few hours. His wife set to work to change the clientèle and reform the restaurant. The old customers were insistent on wine with their food, a fact of which the Tanos couple say they were unaware when they bought

the business, but by means of Lebanese coffee, carefully brewed tea and a few soft drinks, coupled with the refurnishing of the room and the laying of some strips of carpet, the patronage of a much more desirable class of customer was obtained, a class which would not demand wine with their food. Unfortunately, before the change was complete Mr. Tanos, finding that customers to whom wine was refused left the restaurant, was led by his sense of the financial stringency that was so occasioned to commit the second offence. Thereupon Mrs. Tanos took control of the room thirty-five feet by thirty feet in which the customers eat and Mr. Tanos was relegated to that fourteen feet by twelve feet where he successfully performed the duties of chef de cuisine, duties to which he confined himself. No liquor was kept on the premises except a very meagre supply for some of the dishes he concocted. Under the exclusive management of his wife the conduct of the restaurant was raised rapidly to a level beyond the reach of any criticism from the licensing police. The word "Latin" in the name of the restaurant was replaced with the word "Cedar", reminiscent of the Cedars of Lebanon, and an inchoate attempt was made to rid the place of the sign "Latin" with whatever disrespect for the liquor laws the name may imply. Several of the regular patrons of the restaurant deposed to the unimpeachable manner in which it is now conducted and to the desirable character of its present clientèle. *Manning* J. was satisfied that notwithstanding what had gone before the restaurant is now well conducted and Mrs. Tanos is a person to be encouraged in carrying on the business rather than repressed. It was objected, however, for the Commissioner of Police that the *Disorderly Houses Acts* made it necessary in the case of such an application for rescission as that made by Mrs. Tanos that she should show that she had not at any time allowed the condition prescribed in s. 3 (1) to obtain on which the declaration that the premises were a disorderly house had been based. That would at least mean that Mrs. Tanos would have to show that there was not a time at which it would be true to say that she had allowed liquor to be sold or supplied on the premises and that under her allowance it was then likely to be so sold again. This view *Manning* J. regarded as inconsistent with what had been said in *Farrell* v. *Delaney* (1) by the Full Court consisting of *Street* C.J., *Owen* and *Dwyer* JJ. His Honour refused to give effect to the objection and rescinded the order of *Walsh* J. It was because the State authorities considered this ruling important in the administration of an Act

(1) (1952) 52 S.R. (N.S.W.) 236, at p. 242; 69 W.N. 260, at p. 264.

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the interpretation and application of which were in any event beset with difficulties that the Solicitor-General obtained, on terms, special leave to appeal to this Court. At the same time the Court considered that, if the meaning and operation of the statute were to be brought up for consideration here, it was right that the propriety of making the *ex parte* order in the first instance should be fully open for examination. For that reason special leave to appeal from that order was granted to Mrs. Tanos.

The *Disorderly Houses Acts* 1943 (consisting of No. 6 and No. 39 of that year) are based in conception upon the *Gaming and Betting Act* 1912-1942, ss. 20 to 32. These provisions go back to ss. 8 *et seq.* of the *Gaming and Betting Act* 1906 (No. 13) (N.S.W.). Similar provisions were enacted in Victoria in the *Lottery Gaming and Betting Act* 1906 (No. 2055) (Vict.) and there they were elucidated to some extent in *Ex parte Gleeson* (1) and *Ex parte Gleeson* ; *In re The Shanghai Club* (2). The original provisions, however, related to gaming while in the main the *Disorderly Houses Acts* 1943 relate to disregard of the liquor legislation and the use of premises by criminals. Thus while the mechanism may resemble it, the substance widely differs from the earlier enactment. After some definitions which need not detain us the *Disorderly Houses Act* goes directly to the authority of a judge to make a declaration that premises are a disorderly house. It is contained in s. 3, sub-s. (1) of which begins with the words "Upon the affidavit of a Superintendent or Inspector of Police showing reasonable grounds for suspecting that all or any of the following conditions obtain". Then follow four lettered paragraphs setting out certain respective conditions or states of affairs. At the conclusion of the four paragraphs the sub-section ends with the words conferring the power, viz. "any judge of the Supreme Court may declare such premises to be a disorderly house". It is scarcely necessary to say that the word "may" confers upon the judge an authority which may be exercised or not at discretion : see *Ward* v. *Williams* (3) where s. 23 of the *Interpretation Act of* 1897 (N.S.W.) is discussed. In the opening words of the sub-section it will be noticed that it is required that "reasonable grounds" must be shown, which no doubt means facts and circumstances forming objectively a reasonable basis for suspecting. The suspecting must, however, be done by the police, so one would suppose. In accordance with this view the Supreme Court has read the sub-section as if it said "for his suspecting": *In re The Shanghai Club* (4). This seems correct. You must therefore begin with a

(1) (1907) V.L.R. 368.
(2) (1907) V.L.R. 463.
(3) (1955) 92 C.L.R. 496, at pp. 505-507.
(4) (1907) V.L.R., at pp. 466-468.

superintendent or inspector actually suspecting and able to depose to reasonable grounds for doing so. But the thing he is to suspect may be any one or more of a number of states of affairs. Each of pars. (a), (b) and (c) covers a number of situations but they all make a distinction between on the one hand what " is " going on, and on the other hand, what has taken place and is likely to be repeated. Paragraph (a) prescribes as a condition that drunkenness or disorderly or indecent conduct or any entertainment of a demoralising character takes place on the premises, or has taken place and is likely to take place again. The present tense " takes place " seems to mean that the kind of thing described is currently going on. The alternative " has taken place and is likely " etc. appears to refer to a present likelihood of repetition of a past occurrence. Doubtless some context, background or surrounding circumstances must be shown making repetition likely. In par. (b) there occurs the condition on which the order with respect to the Cedar restaurant was based. The paragraph prescribes the condition that liquor or a drug is unlawfully sold or supplied on or from the premises or has been so sold or supplied and is likely to be so sold again on or from the premises. It should be noted that it was to the second division of the paragraph that Inspector Walden's affidavit was directed.

Paragraph (c) concerns itself with reputed criminals being found on or resorting to the premises or having done so and being likely to do so again. Paragraph (d) deserts the pattern of the previous paragraphs and in effect deals with the present and past character of the person having the control of or managing the premises including his acts and omissions with respect to other premises with which he was antecedently concerned. It is capable of covering not a few alternative situations, but it would serve no present purpose to discuss it further.

Sub-section (2) of s. 3 then provides that the declaration made under sub-s. (1) shall be in force until rescinded. The effect of the declaration while it is in force is somewhat drastic. Notice of the declaration must be published in the *Gazette* (s. 5) and twice in a newspaper circulating in the neighbourhood (s. 6 (1) (a)). It must also be served on the owner and the occupier of the premises, either personally or if that cannot promptly be done, by affixing it to the premises (s. 6 (1) (b)). The consequences of the declaration really fall under four heads. In the first place it throws on persons going to the premises the onus of proving that they went there for a lawful purpose : otherwise such a person is guilty of an offence punishable by imprisonment. In the second place the owner is

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guilty of an offence punishable by fine if after service of the declaration " any of the conditions referred to in sub-section one of section three of this Act obtain ", unless the owner proves that he has taken all reasonable steps to evict the occupier from the premises (s. 8). By s. 62 (5) (e) of the *Landlord and Tenant (Amendment) Act* 1948-1954, a ground is provided for giving notice to quit which covers the making of such a declaration against the tenant. Thirdly, the occupier is guilty of an offence punishable by imprisonment if after service of the notice any of the conditions referred to in s. 3 (1) obtain in relation to the premises, unless the occupier proves that he has taken reasonable steps to prevent it (s. 9). Fourthly, drastic powers devolve on the Police Force of entering and of forcibly obtaining access to the premises and of making seizures of liquor, glasses and the like. Obstructing a member of the Force in the exercise of such a power becomes an offence (ss. 10 and 11). There are provisions relating to the evidentiary effect of certain obstructions to the police, to the granting of search warrants and to the forfeiture of liquor etc. seized (ss. 12, 13 and 13A); but these may be passed by. What for present purposes is now important is a power in the Governor-in-Council to make regulations prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying the Act into effect (s. 15). In fact regulations were made in pursuance of this power on 20th August 1943 and published in the *Gazette* of that date.

It remains to describe the power to rescind a declaration made under s. 3. It is contained in s. 4, sub-s. (1) of which begins with the words " any such declaration may be rescinded by a judge of the Supreme Court subject to such terms as he thinks fit, on application made to him ". There follow two categories stating the person by whom the application may be made and the ground available to him. The contrast intended obviously is between the position of the owner or occupier as an applicant and the position of the Superintendent or Inspector of Police. If it is made by the owner or occupier of the premises it must be " on proof that he has not at any time allowed any of the conditions referred to in " s. 3 (1) " to obtain in relation to such premises " (s. 4 (1) (a)). If it is made by the police it is enough for them to prove that no reasonable grounds then exist for suspecting that any of the conditions obtain (s. 4 (1) (b)). The owner or occupier must serve on the police notice of his application.

The language of par. (a) of sub-s. (1) of s. 4 occasions no little difficulty. It will be noticed that in terms it requires the applicant

for rescission of the order, be he owner or occupier, to negative a very large proposition, namely, that at any time he has allowed any of the conditions to obtain to which sub-s. (1) of s. 3 refers.

On its very clear literal terms that means that one by one the very numerous possible examples of misbehaviour or breach of decorum which that sub-section enumerates must be shown at no time to have been allowed by the applicant. If, to take an illustration, the place has been declared to be a disorderly house because an inspector on reasonable grounds suspected that a demoralising entertainment was held there, the owner must, among other things, disprove the hypothesis that a person concerned in the management was once concerned in the control of other premises on which liquor or an unlawful drug was sold: see pars. (a) and (d) (iii) of s. 3 (1). The Solicitor-General was prepared to meet the unreasonableness of such a construction by conceding that, in spite of the words, the provision really meant that the owner or occupier must prove that it was not with his allowance that any of the conditions referred to in s. 3 (1) on which that declaration had been based had obtained. Another question which arises must be whether "at any time" means, on the one hand, "ever" or, on the other hand, "at any time since the making of the declaration". Again, it might be thought a more reasonable or at all events a milder requirement if the words did not go back beyond the declaration. But in spite of the stringent and onerous nature of the condition a literal interpretation imposes, the words of s. 4 (1) (a) are clear and explicit and really allow no escape from a construction of the condition they prescribe which makes it necessary that the applicant must offer some proof that never at any time did he allow any of the things to obtain, that is, occur or subsist which are covered by the enumeration in pars. (a), (b), (c) and (d) of sub-s. (1) of s. 3. Of course in proving negatives of this kind slight evidence will often be enough to set up a prima facie inference and it will always be open to those attempting to support the original order to narrow the issues and dispense with unnecessary formal proofs.

It will be important too to see precisely what are the conditions which are stated in s. 3 (1) (a), (b), (c) and (d) and which must be negatived accordingly in an application under s. 4 (1) (a) as something allowed by the applicant. For example, the second limb of pars. (a), (b) and (c) in each case speaks of something taking place and likely to take place again. To prove that such a thing was not "allowed" by the applicant, it will suffice to show that he did not "allow" the original act or omission or that he did not "allow" the prospect of repetition. Thus to show that he did not

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allow the condition to obtain expressed by the words of s. 3 (1) (b) " that liquor . . . has been sold or supplied on or from the premises and is likely to be so sold again on or from the premises ", it would suffice to show that nothing the applicant " allowed " could give rise to the inference that the sale was likely to be repeated. It would not be necessary also to prove that he did not " allow " the past act of selling alleged, though of course if that were disproved the whole condition would be negatived. There can be no doubt of the correctness of what in *Farrell* v. *Delaney* (1) *Street* C.J., speaking for himself, *Owen* and *Dwyer* JJ. said of the word " allow ". His Honour said : " The word ' allow ' involves the concept of knowingly permitting or suffering this " (i.e. the defined) " state of affairs to exist, and an owner could not be said to allow something to happen when he did not know in fact that it was happening or had happened or was likely to happen " (2). But it is difficult to adopt the view expressed in the passage which precedes this statement. That passage appears to interpret s. 4 (1) (a) as meaning that it is enough for the applicant to show either one of two things, viz. (1) that he did not allow the condition relied upon in support of the order declaring the place to be a disorderly house to obtain presently, that is at the time of that order, or (2) that although he had in the past allowed that condition to obtain there was no likelihood at the time of that order (or, it may be at the time of the application) of that condition existing in the future. In the first place the words of s. 4 (1) (a) seem clearly to require that some proof negativing all the conditions under s. 3 (1) (a), (b), (c) and (d) should be given ; and in the second place, it must be shown under each of pars. (a), (b) and (c) that the act or event expressed in the present tense in the first limb, e.g. " that liquor or a drug is unlawfully supplied " has not been with the allowance of the applicant and similarly with the act or event in the second limb, e.g. that it has been so sold or supplied on or from the premises and is likely to be so sold again on or from the premises. In the latter case the thing that he must not have allowed is composite ; it is composed of the sale or supply which has taken place and circumstances constituting the likelihood of its recurring.

The actual evidence produced on behalf of Mrs. Tanos in support of her application for rescission hardly raised an inference sufficient to negative many of the conditions contained in s. 3 (1) (a), (b), (c) and (d), but it is plain enough that as to most of them there was no suggestion that they were relevant, and if the point had been made they could readily have been negatived. It all came back

(1) (1952) 52 S.R. (N.S.W.) 236 ; 69 W.N. 260.

(2) (1952) 52 S.R. (N.S.W.), at p. 242 ; 69 W.N., at p. 264.

to the supply of liquor. But one may doubt whether the applicant did negative the proposition that she did not allow liquor to be sold unlawfully at or about the time of the order declaring the place a disorderly house or the proposition that although liquor had been sold, she did not allow it in circumstances implying a likelihood of repetition. In any case at that time at all events her husband was a joint occupier and no such disproof could be made as to him.

To meet the difficulty it is argued on behalf of Mrs. Tanos that the affidavit of Inspector Walden was made three to four days after the conviction of Mr. Tanos and the infliction of a highly deterrent fine and then ten days elapsed before the judge's order was made. How on that, it is said, could one reasonably suspect as on the day of the order, that liquor is unlawfully sold on the premises ? The question emphasises the present tense " is " and the sense of present continuity or practice it conveys. Again, how could it be inferred that there was a likelihood of repetition ? Short as the interval is, so it is said, it was long enough for amendment and too long to give reasonable grounds for suspecting that there would be no immediate amendment. Once Mrs. Tanos's story of her intervention, her relegation of her husband to the kitchen and her determination to redeem the restaurant and its reputation is accepted, perhaps plausible ground for the argument is provided. But otherwise, it is not easy to see why according to common experience the grounds did not remain sufficient to support the suspicion as at the time of the order.

But so far it has been assumed that the order declaring the Cedar restaurant to be a disorderly house was regularly made. To any one unfamiliar with the practice that has grown up in the administration of the *Disorderly Houses Acts* 1943 the fact that it was made *ex parte* cannot but appear anomalous and must cause some question. For it is a deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard. In *Cooper* v. *Wandsworth Board of Works* (1) *Byles* J. said that a long course of authority established " that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature " (2). The older authorities ever recur to the lines from Seneca's Medea which apparently were introduced into the subject by *Boswel's Case* (3): *Quicunque aliquid statuerit, parte inaudita altera, Aequum licet*

(1) (1863) 14 C.B. (N.S.) 180 [143 E.R. 414].
(2) (1863) 14 C.B. (N.S.), at p. 194 [143 E.R., at p. 420].
(3) (1583) 6 Co. Rep. 48b, at p. 52a [77 E.R. 326, at p. 331].

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statuerit, haud aequus fuerit; cf. *Bonaker* v. *Evans* (1); *In re Hammersmith Rent-Charge* (2). The general principle has been restated in this Court with a citation of authority in *Delta Properties Pty. Ltd.* v. *Brisbane City Council* (3). It is hardly necessary to add that its application to proceedings in the established courts is a matter of course. But the rule is subject to a sufficient indication of an intention of the legislature to the contrary. Such an intention is not to be assumed nor is it to be spelled out from indirect references, uncertain inferences or equivocal considerations. The intention must satisfactorily appear from express words of plain intendment. In the present statute no such evidence of a contrary intention is discoverable. But it is in a broad sense a procedural matter and while the general principle must prevail it is apparent that exceptional cases may be imagined in which because of some special hazard or cause of urgency an immediate declaration is demanded. A power to regulate procedure might be treated as authorising regulations allowing an *ex parte* order in such cases. Under the power conferred by s. 15 upon the Governor-in-Council to make regulations this very course seems to have been adopted. Regulation 1 provides that if the judge is of the opinion that reasonable grounds have been shown (i) he may make the declaration immediately and *ex parte* if this seems to him necessary or desirable, or (ii) if he thinks that an opportunity should be given to the owner or occupier or both to oppose the making of the declaration he may direct them to be served with a copy of the affidavit and to be notified of the day on which the matter will be dealt with, such service and notification to be effected in such manner as may seem to him sufficient: when the matter comes on, the Superintendent or Inspector of Police or counsel or solicitor on his behalf and the owner and occupier or counsel or solicitor on their behalf may attend and be heard, and the matter shall be disposed of in public chambers. This regulation may perhaps be read as leaving the choice of courses at large to the judge. But it ought not so to be interpreted. It should be understood as meaning that prima facie the course provided for in par. (ii) should be followed and only in exceptional or special cases should an immediate declaration be made. The analogy is that of an interim injunction, but the caution should be greater because the declaration, unless it is framed as provisional or conditional, concludes the right subject to rescission.

It may be added that probably a declaration improperly made *ex parte* may be rescinded or set aside on an application made independently of s. 4 (1).

(1) (1850) 16 Q.B. 162, at p. 171 [117 E.R. 840, at p. 844].

(2) (1849) 4 Ex. 87, at p. 97 [154 E.R. 1136, at p. 1140.]

(3) (1955) 95 C.L.R. 11, at p. 18.

In the present case there can be no doubt that no exigency was shown or existed warranting an *ex parte* declaration. It seems unlikely that the effect of the general principle or of the modification effected by the rule was ever considered. The proper course therefore is to set aside the original declaration.

The appeal from the order of *Walsh* J. by special leave should be allowed. That makes any order on the appeal from the order of *Manning* J. otiose.

In accordance with the undertaking given on the application by the commissioner for special leave the costs in this Court should be paid by him.

TAYLOR J. I agree with the reasons and conclusion of the Chief Justice and *Webb* J. and merely wish to add a few words in further discouragement of the notion that s. 4 (1) of the *Disorderly Houses Acts* provides the sole means whereby an order under s. 3, made *ex parte* as a matter of necessity or desirability may be set aside or otherwise abrogated. It would, indeed, be anomalous if it were not permissible for a judge to discharge such an order upon proof that at the time when it was made no grounds existed to justify it.

Section 4 (1) does not purport to deal with such a set of circumstances; on the contrary it purports to deal with the rescission of orders made upon an appropriate ground and notwithstanding the existence of the material facts at the relevant time. In my view an application for the discharge of an order made *ex parte* in the exercise of a judicial discretion may, in general, be based upon any material relevant to the proper exercise of the discretionary power pursuant to which the order was made in the first instance. There is, it remains to be added, nothing in the relevant statute to deny to a judge the power to discharge an *ex parte* order upon consideration of any such material.

Allow appeal of Alice Elsie Tanos (being No. 87 of 1957) from the order of Walsh *J. Order of* Walsh *J. discharged. Order of* Manning *J. lapsing accordingly dismiss appeal of the Commissioner of Police (being appeal No. 74 of 1957). Costs of the proceedings in the High Court to be paid by the Commissioner of Police.*

Solicitor for the Commissioner of Police (N.S.W.), *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for Mrs. Tanos, *Eric N. Rowley, Rogers & Co.*

J. B.