[HIGH COURT OF AUSTRALIA.]

MULLEN AND OTHERS . . . . . APPELLANTS;
APPLICANTS,

AND

HOOD AND OTHERS . . . . . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1935.

SYDNEY, *Oct.* 9, 10, 25.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Liquor—Licensed premises—Buildings—Demolition—Licence—Renewal—Removal—Appeal—Order confirmed subject to undertaking—Liquor Act 1912-1929 (*N.S.W.*) (*No.* 42 *of* 1912—*No.* 49 *of* 1929), *secs.* 39A, 131.

A Licensing Court made an order for the removal of a publican's licence from one place to another. An appeal by certain objectors to a Court of Quarter Sessions was dismissed upon the licensee giving an undertaking that the lease of the new premises would contain a covenant requiring the licensee to conduct the premises as a residential hotel, and that any breach of the covenant might be treated as a ground of objection to the renewal of the licence.

Applied 1977 1NSWLR 137

Held that the determination of the Court to confirm the removal order was not vitiated by the exaction of the undertaking.

Although under the *Liquor Act* 1912-1929 (N.S.W.) a new licence cannot be granted except in respect of an existing or prospective building, it is within the discretion of the Licensing Court to renew a licence notwithstanding the demolition of the buildings.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Mullen; Re Hood* (1935) 35 S.R. (N.S.W.) 289; 52 W.N. (N.S.W.) 84, affirmed.

H. C. OF A. 1935. MULLEN v. HOOD.

APPEAL from the Supreme Court of New South Wales.

Certain land, situate at a corner of Kent Street and Margaret Street, Sydney, upon which was erected a hotel building known as the "Sydney and Melbourne Hotel," and in respect of which a publican's licence under the *Liquor Act* 1912-1929 (N.S.W.) was held permitting the sale of liquor on the premises, was, by a notice in the *Government Gazette*, resumed on 8th January 1932 by the Resumed Properties Department. In March 1933 the department took possession of the premises and one Herbert Gillis Ruthven, its nominee, became holder of the licence. In the following month the building was wholly demolished; and on 14th June 1933 Ruthven obtained a renewal of the licence for the premises, on which no hotel building then stood, for the year 1st July 1933 to 30th June 1934. In May 1934 the licence was sold to William Hood, and on 23rd May 1934 it was transferred to him conditionally on his applying for its removal to other premises. On 25th June 1934 an application by Hood for a renewal of the licence for the year 1st July 1934 to 30th June 1935 was refused by the Licensing Court upon an objection by the licensing inspector that Hood did not have the necessary accommodation on the licensed premises. Upon an appeal by Hood under sec. 170 of the *Liquor Act* to a Court of Quarter Sessions, that Court, on 3rd August 1934, granted renewal upon his undertaking to apply for the removal of the licence to other premises. An application for this purpose having been made to it, the Licensing Court, on 3rd December 1934, made an order in favour of Hood conditionally granting the removal of the licence to premises situate in Liverpool Street, Sydney, which premises it was intended to reconstruct. Ulick Francis Mullen, hotel-keeper, of the "Crown Hotel," 160 Elizabeth Street, Sydney, Abraham Slutzkin, hotel-keeper, of the "Burdekin Hotel," 2 Oxford Street, Sydney, and Frederick James Bowen, chemist, Mosman, who, with others, had opposed the removal before the Licensing Court, appealed to the Court of Quarter Sessions against the conditional order granting removal. On 22nd February 1935 Judge *Edwards*, Chairman of Quarter Sessions, dismissed the appeal and confirmed the order of the Licensing Court, Hood having given an undertaking that in any lease of the premises to which the licence was to be removed a

covenant would be included requiring the licensee to conduct the premises in all ways as a bona fide residential hotel, the actual form of the covenant to be submitted for the approval of Judge *Edwards* within fourteen days, such covenant to provide that, in the event of a complaint by the licensing inspector that the premises were not being so conducted, the complaint was to be treated as a breach of the covenant terminating the lease, and any breach of the undertaking was to entitle the licensing inspector to object to the renewal of the licence. On 6th March 1935 Judge *Edwards* approved a form of covenant. On 25th March 1935 demolition of the building on the land at Liverpool Street was commenced. On 11th April, by which date the work of demolition was virtually completed, a rule nisi, granted on 5th April upon an application by Mullen, Slutzkin and Bowen, was served on Hood, the three members of the Licensing Court, and the Chairman of the Court of Quarter Sessions, Judge *Edwards*, calling upon them to show cause why a writ of prohibition should not issue prohibiting them from further proceeding upon the order made by the Licensing Court on 3rd December 1934, and upon the order made on 22nd February 1935 by the Court of Quarter Sessions, whereby Hood's application for the removal of the licence was conditionally granted, or, in the alternative, why a writ of certiorari should not issue directed to the Licensing Court and the Court of Quarter Sessions to bring up to be quashed and to remove the proceedings in respect of the application from those Courts into the Supreme Court of New South Wales upon the ground that neither Court had jurisdiction to grant the application. The grounds upon which the rule nisi was based were that there was no jurisdiction in either Court to make the order for removal, because the existing licence was a nullity since there were no premises to which it could attach and there was therefore nothing to remove, and because a licence becomes irremovable when the premises for which it is granted cease to exist; and, as regards the Court of Quarter Sessions, that it had no jurisdiction to make an order for removal having attached thereto the condition as to the undertaking. The Full Court of the Supreme Court held that the orders of the Licensing Court and the Court of Quarter Sessions granting the conditional order for the removal of the licence were not made without jurisdiction and could

H. C. OF A. 1935. MULLEN v. HOOD.

not be challenged in the Supreme Court by prohibition or certiorari on the ground that the earlier orders had been improperly made and that there was therefore no subsisting licence, because the earlier orders had never been quashed and the question whether there was a subsisting licence was a matter for the determination of those Courts. The Full Court held, further, that the acceptance of the undertaking requiring a covenant was within the jurisdiction of the Court of Quarter Sessions: *Ex parte Mullen*; *Re Hood* (1).

From that decision the applicants now appealed to the High Court.

Although they were served with notice of the appeal, there was not any appearance by or on behalf of his Honor Judge *Edwards* or the three members of the Licensing Court, nominal respondents.

Watt K.C. (with him *Bathgate*), for the appellants. There was no subject matter upon which the Licensing Court could exercise jurisdiction. There cannot be licensed premises without a licensee, nor a licensee without licensed premises (*Anthoness* v. *Anderson* (2); *Jack* v. *Smail* (3)). The licence ceased to exist at the expiry date of the original grant. The act of the Court in renewing the licence was invalid; that invalidity continued thereafter. The Court can on this application deal with the question whether the renewal was a nullity (*Re Wright* (4)). The licence was in the form set forth in *Lamb and Cockshott's Liquor Law in New South Wales*, 2nd ed. (1925), p. 319. The material sections of the *Liquor Act* relating to the grant, renewal or removal of licences are secs. 14, 15, 27, 29, 35-40, and 131. Sec. 35 of the Act should be read in the light of the judgment in *Sharp* v. *Wakefield* (5), that a renewal of a licence is a new grant, during the period of the currency, of the licence, and that before the grant of that licence, whether originally or by way of renewal, there must be "premises" in existence (see sec. 25 of the Act). The departmental nominee was at no time in possession of the premises in respect of which he obtained a renewal of the licence (*Liquor Act*, sec. 131, proviso). Upon the demolition of those premises the licence became suspended until the end of the period

(1) (1935) 35 S.R. (N.S.W.) 289; 52 W.N. (N.S.W.) 84.
(2) (1888) 14 V.L.R. 127; 9 A.L.T. 175.
(3) (1905) 2 C.L.R. 684, at pp. 704 et seq.
(4) (1890) 16 V.L.R. 260.
(5) (1891) A.C. 173.

for which it was granted (*In re Evans* (1)); it then ceased to exist. When the Licensing Court dealt with the licence notwithstanding the non-existence of a building, it dealt with a non-legal concept; it extended its jurisdiction so as to deal with a fanciful case as against strict legislative provisions for a licensee and licensed premises. Secs. 37 and 38 are important as indicating the essential right of the public to have the convenience of licensed premises. Nowhere in the Act is there any provision for a licence in the absence of premises, that is, a building. The whole scheme of the Act is based upon the existence of licensed premises. The existence of premises is essential (*R.* v. *West Riding of Yorkshire Justices*; *Ex parte Shaw* (2)).

[EVATT J. In *Toohey's Ltd.* v. *Valuer-General* (3) Lord *Dunedin* suggested that a licence could be granted only in connection with buildings. But that is a general observation only.]

In the circumstances the removal of the licence was a nullity (*Cowles* v. *Gale* (4)). The Licensing Court, an inferior Court, was without jurisdiction owing to the failure of subject matter (*Colonial Bank of Australasia* v. *Willan* (5)), it being known to the Court that the premises stipulated in the licence were non-existent (see *R.* v. *Shoreditch Assessment Committee*; *Ex parte Morgan* (6)). A superior Court has no limitations with respect to subject matter. It is nowhere stated in *R.* v. *Nat Bell Liquors Ltd.* (7) that the Court can state its own subject matter; put its own limits as far as it can as to subject matter. The principle which should be observed is stated in *Architects Registration Board of Victoria* v. *Hutchison* (8). The appellate power of the Court of Quarter Sessions is to review decisions and make orders, but it has no power to impose as a condition of the making of an order the giving of an undertaking in respect to an extraneous matter, as was done here (*Victorian Railways Commissioners* v. *McCartney and Nicholson* (9)). For that reason the licence purported to have been granted by the Court of Quarter Sessions is bad. Where an inferior Court has made a defective order, as here, the matter will, by writ of certiorari,

(1) (1902) 28 V.L.R. 413; 24 A.L.T. 81.
(2) (1898) 1 Q.B. 503, at pp. 508, 509.
(3) (1925) A.C. 439, at p. 444.
(4) (1871) L.R. 7 Ch. 12, at p. 16.
(5) (1874) L.R. 5 P.C. 417, at pp. 442 et seq.
(6) (1910) 2 K.B. 859, at p. 879 et seq.
(7) (1922) 2 A.C. 128.
(8) (1925) 35 C.L.R. 404, particularly at pp. 411 et seq.
(9) (1935) 52 C.L.R. 383.

H. C. OF A. 1935. MULLEN v. HOOD.

be removed into a superior Court, and the order quashed. As to whether prohibition will lie, see *R.* v. *Hibble*; *Ex parte Broken Hill Pty. Co.* (1).

Weston K.C. (with him *Clancy* and *Clegg*), for the respondent Hood. A clear distinction is shown in the *Liquor Act* between the initial grant of a licence on the one hand, and the renewal or removal of a licence on the other hand. In construing the Act regard should be had to the true nature of a licence. Under the Act a licence is a permission to do with impunity that which one could not do otherwise. A licensee is not under any statutory obligation to sell liquor in his building. Unless restrained by the express terms of his licence there is nothing to prevent him from selling liquor on any part of his land, or in any portion of his premises. In this connection the word "premises" refers to the whole of the land together with the buildings erected thereon. Whatever may be the position under sec. 25 as regards the initial grant of a licence, so far as the renewal of a licence is concerned there need not be an existing building. That there is a distinction for this purpose between an original grant of a licence and a renewal or removal thereof is shown by sec. 29. It cannot be said, either on the point of jurisdiction, or on the point of correctness of decision, that on an application for renewal the Licensing Court was bound to take into account the fact that there were no buildings in existence and to refuse the application on that ground. In the circumstances of this case the licence was not liable to be forfeited or cancelled within the meaning of sec. 35 (2); therefore the Court was, in its discretion, entitled to grant the application for a renewal. There is no statutory limitation upon the power of the Court to grant an application of this nature (secs. 39, 39A). The building and accommodation provided are not the principal matters for consideration (sec. 40). The expression "licensed premises" in sec. 131 is not limited to buildings; it refers also to vacant land. That expression is not used throughout the Act in a sense restricted to buildings (see secs. 44-47; 49-51, 53, 54, 57 and 58). The whole of the Act would be frustrated if those sections related only to buildings. Even where by deliberate

(1) (1920) 28 C.L.R. 456.

default of the licensee the buildings have become dilapidated, the only person entitled to act is the licensing inspector, and the Court is not bound to cancel the licence (sec. 123). A licence is granted, not in respect of a building, but for the messuage which may include the building. The expression "licensed premises," in sec. 131 and elsewhere in the Act, means the whole of the land, whether vacant or otherwise, and includes any building or buildings which may be erected thereon (*Rolfe* v. *Willis* (1); *Ex parte McConnell* (2); *Graves* v. *Roth* (3); *Beddek* v. *Bowdler* (4); *R.* v. *Yaldwyn* (5)). Although made outside the period for which the licence was granted, an appeal from a decision made within that period wrongfully refusing an application for a renewal of the licence serves to keep the licence in existence until the matter is finally determined. The Act nowhere provides that a licence may be renewed or removed only if there are buildings on the subject land. On the contrary, there are express words in the Act which confer a jurisdiction upon the Court, in objections to renewals or removals, to ignore the fact that there are not any buildings on the land, e.g., the provisions applicable in the event of a resumption or a fire. In those events strict compliance in every detail with every statutory requirement is frequently impossible, and therefore unreasonable. The matter of the renewal or removal of a licence is entirely within the discretion of the Court, and there is no statutory limit. Owing to the difference between the statutory provisions before the Court there and here, *In re Evans* (6) is distinguishable. The position there was that in a special case stated by the Licensing Court it was shown, not that the Court acted without jurisdiction, but simply that it erred in its jurisdiction. The grounds in the rule nisi are limited to want of jurisdiction and do not suggest an error in law. The question of jurisdiction is based on sec. 9 (5). As regards *Colonial Bank of Australasia* v. *Willan* (7), the subject matter here was not a licence, but was an application for the removal of a licence. The Courts below were fully competent to deal with the matter, and even if

(1) (1916) 21 C.L.R. 152.
(2) (1906) 6 S.R. (N.S.W.) 88; 23 W.N. (N.S.W.) 9.
(3) (1904) 29 V.L.R. 841, at p. 847; 26 A.L.T. 58, at p. 59.
(4) (1907) 26 N.Z.L.R. 884.
(5) (1899) 9 Q.L.J. 242, at p. 245.
(6) (1902) 28 V.L.R. 413; 24 A.L.T. 81.
(7) (1874) L.R. 5 P.C. 417.

H. C. OF A. 1935. MULLEN v. HOOD.

their decisions are wrong there cannot be certiorari. The Court has to determine whether an applicant is qualified to be the holder of a licence, and deals with other questions relevant to the grant. It is erroneous to describe the existence of the licence as being in any way the subject of the jurisdiction. A Court set up for a special purpose, as here, is intended to be the judge of the whole matter. *Re Wright* (1) is a decision to the effect only that upon the special case stated for the opinion of the Court the justices erred in law. The decision in *R.* v. *West Riding of Yorkshire Justices*; *Ex parte Shaw* (2) was based upon statutory provisions which differ from those now under consideration; that case is, therefore, distinguishable. It is not necessary that a person who applies for a renewal of a licence shall be in possession of the premises (*R.* v. *Liverpool Justices*; *Ex parte Liverpool Corporation* (3)). The undertaking given by Hood only created obligations between him and his future landlord; it was not in any sense a bargain with the Court. The appellants are not in any way affected by the undertaking. On the material before the Court, the position is that the Court of Quarter Sessions dismissed the appeal on its merits, and then received an undertaking from Hood. In so doing the Court did not act without jurisdiction. The discretion of the Court in removal applications is unlimited. There is nothing to show that the result would not have been the same had Hood not given his undertaking. It is not essential that an applicant for a licence should have an appropriate interest in the land.

Watt K.C. in reply. For all purposes relevant to this matter there is no distinction between a renewal and an original grant of a licence. A renewal is merely a grant that has been the subject of decision. A renewal of a licence is not a mere continuance of the original grant, but is a grant for a new term (*Sharp* v. *Wakefield* (4)). There then being no building in existence, the licence became void as at 1st July 1933. So far as Hood was concerned the position was even worse in May 1934; he then had neither land, premises, nor

(1) (1890) 16 V.L.R. 260.
(2) (1898) 1 Q.B. 503.
(3) (1934) 2 K.B. 277.
(4) (1891) A.C., at pp. 178, 183, 185.

possession. In those circumstances he was not entitled to a removal of the licence.

[DIXON J. referred to *Slatter* v. *Railway Commissioners (N.S.W.)* (1).]

Sec. 38 shows that the essential quality of a licence is possession of the licensed premises. Upon the special facts in *In re Evans* (2), a transfer was possible because there there would be a building in existence by the time the Court's order operated. The Court has not an unqualified power with regard to determining what it will exercise its jurisdiction on. There is no subject matter that this Court can deal with so as to effect a removal. The necessity of subject matter is made clear in all cases in which certiorari or prohibition is dealt with.

[STARKE J. referred to *Mackrell* v. *Brentford Justices* (3).]

The Court should uphold the appeal and order prohibition, or, in the alternative, certiorari.

Weston K.C., by leave. The word "renewal" does not occur in the English Act; therefore *Sharp* v. *Wakefield* (4) does not apply.

Cur. adv. vult.

Oct. 25.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. The Licensing Court for the Metropolitan District made an order for the removal of a publican's licence from one place to another. The removal was objected to and the objectors appealed to the Court of Quarter Sessions from the order. That Court dismissed the appeal but, before doing so, obtained an undertaking from the licensee. The undertaking was that in any lease of the licensed premises a covenant should be included by the lessee with the lessor that the premises would be conducted as a residential hotel and that any breach of the covenant might be treated by the inspector as a ground of objection to the renewal of the licence. The objectors complain in the present proceedings that the order for removal was made without power or authority because the licence which it purported to remove

(1) (1931) 45 C.L.R. 68.
(2) (1902) 28 V.L.R. 413; 24 A.L.T. 81.
(3) (1900) 2 Q.B. 387.
(4) (1891) A.C. 173.

H. C. OF A. 1935.

MULLEN v. HOOD.

Rich J. Dixon J. Evatt J. McTiernan J.

did not exist in point of law. They further complain that the order of the Court of Quarter Sessions dismissing their appeal was bad because the Court ought not to have allowed the giving of the undertaking to enter into its determination. This ground of attack upon the order of the Court of Quarter Sessions may be dealt with at once. As *Jordan* C.J. pointed out, the case is to be distinguished from one in which a Licensing Court or other authority possessing a discretion refuses to exercise it or to exercise it in a particular way unless the party invoking it fulfils some condition which it is not entitled to impose upon him. The applicant for the removal order is not complaining of a refusal to grant the order unless he gave the undertaking. If he did so, the question would simply be whether a refusal based upon such a reason was within the scope and ambit of the discretion conferred upon the Court. The objectors were entitled, no doubt, to a consideration by the Court of Quarter Sessions of the grounds of their objection unaffected by any legally irrelevant or extraneous reason tending to weaken the effect which their objections otherwise should produce. But it is impossible to treat the willingness of the licensee to give such an undertaking as an extraneous consideration inadmissible in point of law and therefore vitiating the determination of the Court to confirm the removal order.

The more basal objection that the licence, which the order purported to remove, had no legal existence, is grounded on the fact that more than a year and nine months before the making of the removal order all buildings on the licensed premises in respect of which the licence subsisted had been demolished. The land had been resumed and the licence transferred to a nominee of the resumption authority, which had then caused the land to be cleared of buildings. The next succeeding date for the renewal of the licence fell very shortly after the demolition of the building was completed; a renewal was granted. During the ensuing year the licence was transferred to the present licensee, who purchased it from the resumption authority, doubtless with the intention of obtaining its removal to other premises. The transfer to him was granted conditionally upon his applying for its removal. This he did not do before the next renewal date, which occurred not long after the transfer. The renewal was objected to and the Licensing Court

refused it, but on appeal to the Court of Quarter Sessions the refusal was set aside and the renewal granted conditionally upon the licensee's undertaking to apply for removal. He did so, and it is the removal order made on that application which is now in question. As the remedies sought are prohibition and certiorari, the objectors must establish that the removal order is bad. To do so they rely upon the supposed invalidity of the renewed licence. The primary ground upon which the judgment of the Full Court, delivered by *Jordan* C.J., proceeded was that the existence and validity of the licence the subject of a removal application is a matter to be decided in the application by the Licensing Court and not a condition precedent to the exercise of its jurisdiction to make a removal order. But his Honor also expressed an opinion against the contention that the renewed licence was invalid and void. Upon the hearing of this appeal, the *Liquor Act* 1912-1929 was examined for the purpose of establishing that the valid renewal of the licence was essential to the validity of the removal order and that its renewal was invalid. So far from establishing this proposition, the examination has led us to the conclusion that it was within the discretion of the Licensing Court to renew the licence nowithstanding the demolition of the buildings. It was open to the Licensing Court to refuse to renew the licence on the ground that the buildings had ceased to exist and that there was no intention of exercising the licensee's trade upon the premises. Perhaps the Court of Quarter Sessions ought not upon the merits to have set aside the Licensing Court's decision refusing renewal. But, on the other hand, it was within the discretion of the Licensing Court to renew the licence for the purpose of continuing its existence to enable its removal. A new licence could not be granted except in respect of an existing or prospective building (secs. 25, 26 and 27). But, if, during the currency of the licence, the building is destroyed, the licence does not *ipso facto* become void (cf. sec. 40). The licence is a valuable piece of intangible property which continues to exist in respect of the site. The nature and kind of building which from time to time is placed upon the site is subject more or less to the control of the Licensing Court. The fact that no building exists upon the land is a matter which the Licensing Court may consider by way of objection to the renewal

H. C. OF A. 1935.

MULLEN v. HOOD.

Rich J. Dixon J. Evatt J. McTiernan J.

of the licence (sec. 29). But it cannot be fatal to the power of the Court to renew. Nor can it deprive the Court of authority to remove. Whether the two powers of renewal and removal should together be so exercised as to enable the new owner of licensed premises, who has acquired them in order to put them to a new use, to continue the licence in existence for a lengthy period in the name of a nominee or purchaser who delays removal, is a question for the Licensing Court. It is a question of the proper exercise of its power; it does not go to the existence of its power. In this view of the matter, the question whether the existence of a valid licence is for the Licensing Court to decide or is a condition precedent to its jurisdiction to make a removal order attaching, does not arise. But it must not be assumed that, in abstaining from dealing with it, it is intended to imply any doubt of the correctness of the decision of the Supreme Court.

The appeal should be dismissed with costs.

STARKE J. This is an appeal from the Supreme Court of New South Wales discharging an order nisi for a writ of prohibition to restrain further proceeding upon an order made on 3rd December 1934 by the Licensing Court, and upon an order made on 22nd February 1935 by the Chairman of the Court of Quarter Sessions, whereby the application of Hood, one of the present respondents, for the removal of the publican's licence held in respect of the "Sydney and Melbourne Hotel" situate at the corner of Kent and Margaret streets, Sydney, to premises to be reconstructed, altered and/or added to and situate on and known as numbers 165 and 167 Liverpool Street, Sydney, was conditionally granted; or, in the alternative, for a writ of certiorari removing the proceedings in connection with the orders already mentioned into the Supreme Court for the purpose of quashing the orders.

A publican's licence had been granted in respect of certain premises described in the licence as the "Sydney and Melbourne Hotel." In 1932 the land on which the hotel stood was resumed by a resumption authority, and its nominee became the holder of the licence. By April of 1933 the buildings on the premises were wholly demolished. But in June of 1933 the nominee of the resumption

authority obtained a renewal of the publican's licence for the year 1st July 1933 to 30th June 1934. In May of 1934 the licence was transferred to Hood. Hood applied for a renewal of the licence for the year 1st July 1934 to 30th June 1935, which was granted by Quarter Sessions upon his undertaking to apply for the removal of the licence to other premises. On 3rd December 1934 the Licensing Court made an order conditionally granting the removal to premises in Liverpool Street, Sydney, which it was proposed to reconstruct. On 22nd February 1935 the Court of Quarter Sessions confirmed this order upon Hood giving an undertaking that in any lease of the premises to which the licence was to be removed a covenant would be included requiring the licensee to conduct the premises in all ways as a residential hotel, such covenant to provide that, in the event of complaint by the licensing inspector that the premises were not being so conducted, the complaint should be treated as a breach of the covenant terminating the lease, and that any breach of the covenant should entitle the inspector to object to a renewal of the licence. By March 1935 the demolition of the buildings in Liverpool Street had commenced, and on 5th April 1935 the order nisi above mentioned was granted.

Two objections were taken to the jurisdiction to make the removal orders of 3rd December 1934 and 22nd February 1935. One, that there was no licence upon which the orders could operate. It was submitted that the foundation of the jurisdiction of the Licensing Court to grant a publican's licence, or to transfer, renew or remove it, was the existence of a building upon the premises licensed. It was not contended that the original grant of the publican's licence was bad, for at that time buildings existed upon the premises. But it was insisted that so soon as the buildings upon the premises were demolished, the jurisdiction of the Licensing Court ended, and that its orders in this case transferring, renewing, or removing the licence were therefore " nullities and fictions." There is no doubt that the *Liquor Act* contemplates a house upon the premises, with certain accommodation, both before it grants a publican's licence, and during the continuance of the licence (*Liquor Act* 1912-1929, secs. 25, 29 (*d*), 39A, 40A, 42, 70 (3), (4), (5)). But I have not been satisfied that the existence of a building upon premises is the foundation of

H. C. OF A. 1935. MULLEN v. HOOD. Starke J.

the Licensing Court's jurisdiction. Its jurisdiction is to hear applications as well for licences as for transfers, renewals or removals, and all objections which may be made to them, and to determine whether the licence, transfer, renewal or removal should be granted. It is clearly within the jurisdiction of the Court, for instance, to determine whether the standard of accommodation required by sec. 25 exists. So too, I should think that the Licensing Court must determine the existence or non-existence of proper premises for a licence, and that, in exercise of its jurisdiction (see sec. 27). But however this may be, there are provisions in the *Liquor Act* which indicate that the jurisdiction of the Licensing Court to transfer, renew or remove a publican's licence is not founded upon the existence of a building upon the licensed premises. Thus, by sec. 35, a licensee is entitled to renewal of his licence—subject to objections allowed by sec. 29—unless the licence has expired, or been forfeited or cancelled, or become void. Then again, sec. 40 provides that if premises are rendered unfit for carrying on business by fire, tempest, or other calamity, a temporary licence to carry on in neighbouring premises may be authorized. In my opinion, therefore, the first objection fails.

The other objection is that there was no jurisdiction to require from the licensee the undertaking set forth in the order of 22nd February 1935. If the removal order had been refused except upon a condition or term that the licensing authority had no power to impose, then no doubt mandamus would go to compel the authority to grant the order, or to hear and determine the application for a removal order according to law. But in the present case, the removal order was granted subject to a term which the licensee voluntarily accepted. The order is not rendered null and void nor is it made without jurisdiction, because of the undertaking, whether the latter could or could not be enforced.

The result is that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Smithers, Warren & Lyons.*

Solicitors for the respondent Hood, *S. G. Rowe & Co.*

J. B.