Privy Council Appeal No. 89 *of* 1930.

Joseph Scales - - - - - - - - *Appellant*

v.

Henry Aiken Young and others - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24TH APRIL, 1931.

Present at the Hearing:

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD ATKIN.
LORD THANKERTON.
LORD MACMILLAN.

[*Delivered by* VISCOUNT DUNEDIN.]

The actual facts which give rise to this case are really few and simple. The appellant is the keeper of the Somerset Hotel, situate in the town of Ashburton. The respondents are the Licensing Committee of the district of Mid-Canterbury within which the town of Ashburton is situate. The appellant applied at the sitting of the Committee on the 7th June, 1929, for a publican's licence. The Committee refused on the ground that they had no jurisdiction to grant the licence desired. Upon that the appellant raised proceedings by way of certiorari and mandamus. The proceedings were removed into the Court of Appeal for determination. That Court unanimously held that the Committee had come to a right decision, but gave leave to appeal to His Majesty in Council.

To state the history as to the premises. Prior to 1903 Ashburton town was situate in the licensing district of Ashburton,

and the Somerset Hotel enjoyed a publican's licence. In 1903, owing to a vote under the existing law, Ashburton became a district wherein no licences were to be granted, described as a no-licence district in contradistinction to a district in which licences were to be granted, described as a licence district. At all the polls which from time to time, according to the legislation of the moment, were held in Ashburton the district remained no-licence and this was the state of affairs up till 1925. A word now as to the legislation. It has indeed been prolific. There were Acts dealing with licences in 1881, 1893, 1895, 1902 and 1904. Then in 1908 came a consolidating statute. But consolidation did not curb the avidity for legislation on the topic, and the Act of 1908 was amended and added to by statutes in 1910, 1914, 1917, 1918 and 1920. It is little wonder that one of the learned Judges in the Appeal Court characterised the total product as a " jungle of legislation."

Their Lordships do not think it necessary to examine in detail this mass of statutes. That has been done with infinite patience and accuracy in the judgments of the Appeal Court, and it would be useless repetition to say just what they have said. But there are certain landmarks in the history which must be signalised, because it is upon them that the whole question turns. It is not necessary for the purposes of decision to go further back than the Consolidating Act of 1908. For be it observed that when a Court is dealing with a Consolidating Act, though the Court may refer to the former Acts so consolidated for the purposes of clearing up an ambiguity of expression if such be found, more it cannot do. If anything which had a place in former Acts has been left out it must be taken that it has been left out on purpose. But the Act of 1908 embodied one of what may be called the landmarks in the legislation. That landmark had made its appearance in 1893 but it is as dealt with in 1908 that it must be considered. That landmark was as follows. Prior to 1893 the licensing districts were formed as licensing districts for that purpose. But in 1893 a great change was effected. The licensing districts were made co-terminous with the electoral districts. By the Act of 1908 this arrangement was continued and, further, the licensing polls were taken along with the electoral polls. By Section 11 of the Act it was provided that at such licensing polls three questions should be put to the electors: (*a*) whether the number of licences existing in the district is to continue; (*b*) whether the number of licences existing in the district is to be reduced; (*c*) whether no licences are to be granted in the district: and no licence was allowed to be granted or renewed until there had been a determination of the electors as between these three questions, and then only if that determination so permitted. Moreover, under the law in New Zealand electoral districts are reformed and refashioned according to the result of periodical census returns. It was obvious that the result might be a merging of part or all of an old licensing district with part or all another old licensing

district to form a new licensing district. This in the Act of 1908 was dealt with by Section 8, which is as follows :—

"8. Whenever by reason of changes in electoral districts the whole or any part of the area of a licensing district (hereinafter called an 'original district') becomes comprised within the boundaries of another licensing district (hereinafter called a 'new district'), the following provisions shall apply :—

(*a*) Until the Committee of the new district is duly constituted, the Committee of the original district shall continue to have jurisdiction throughout the whole of the original area thereof in like manner as if such district existed unchanged.

(*b*) Until the first valid licensing poll in the new district comes into force therein the result of the licensing poll in force in the original district immediately prior to the change shall continue in force throughout the whole of the area thereof in like manner as if such district existed unchanged.

(*c*) If when the first licensing poll is to be taken in the new district the grant of licences is prohibited throughout any area thereof containing more than half the population of the district, the poll shall be taken under section thirty-eight hereof, as if no licences existed in the district :

Provided that if the result of such poll is that licences be not restored in the district, then, notwithstanding such result, every licence of any description existing at the time of the taking of the poll shall, subject to the provisions of this Act relating to forfeiture for breaches of the law, continue in force until the expiration of the current term of such licence, and shall then lapse.

(*d*) In any other case the first such poll shall be taken under sections eleven to twenty-eight hereof, as if the grant of licences were not prohibited in any part of the new district."

Section 38 provides that in any no-licence district as determined by the population there shall be a poll for restoration.

To make the point arising on these sections intelligible it is necessary to resort to the history of Ashburton district and Ashburton town. As already mentioned, Ashburton district had been continuously no-licence from 1903 up to 1925. The neighbouring district, whose frontier marched (to use a convenient Scotch term) with that part of Ashburton district where Ashburton town was situate was Ellesmere, and Ellesmere had been continuously a licence district. But in 1925, owing to electoral changes, the districts of Ashburton and Ellesmere both disappeared, and a new district called Mid-Canterbury sprang into existence, formed partly of Ellesmere, and partly of a part of Ashburton, in which part the town of Ashburton lay. The population of the Ellesmere portion was more than half of the whole, and consequently the poll would under the Act of 1908 have fallen to be taken in terms of sub-section (*d*) on the footing that the granting of licences was not prohibited within Mid-Canterbury. In other words, Mid-Canterbury began its existence as a licence district, and the existing licences in the Ellesmere part became geographically licences existing in Mid-Canterbury. If what happened in 1925 had happened in 1909 the question which would have been put to each elector at the

first poll after the creation of Mid-Canterbury would have been in terms of the second schedule of 1908 to determine whether he would say :—

" I vote that the number of licences existing in the district continue."

Or

" I vote that the number of licences existing in the district be reduced."

Or

" I vote that no licences be granted in the district."

And then Section 145 provides—

" Except as provided in the last preceding section there shall not be granted any increase in the number of licences in any district until after the taking of the then next census."

The preceding section deals with a sudden increase of population and prescribes application to the Governor-General of the Dominion. As to the next census, increase of licences is only possible if there is an increase of population of more than 25 per cent. since the previous census. Putting aside, therefore, these methods of increase depending on a great increase of population—which did not happen—it is quite clear it would have been impossible to grant a new licence for the Somerset Hotel, because that would increase the number of existing licences in Mid-Canterbury by one.

Now it is impossible to tell, or even to speculate, what would have been the views of the electors residing in that part of Mid-Canterbury which had formerly been Ashburton. They may have shared the views of the majority in Ashburton and wished their district to be no-licence. On the other hand, they may have all along wished their district to be a licence district, and been overborne by the outlying voters in the rural districts of Ashburton. On this latter assumption it is clear that their case was from their point of view a hard case. If the population of their portion had exceeded that of the Ellesmere portion, then the whole of Mid-Canterbury would have entered into life as a no-licence district, but at the very first poll there would have been a vote on restoration which might have been carried. But as it was their case was not dealt with in the statute. Their Lordships will not use the phrase *casus omissus*, because that means that the legislation has *per incuriam* allowed a lacuna in legislation to exist. But in view of the determined insistence of the prohibitionists the lacuna may have been left of set purpose. One of the learned Judges in the Court of Appeal considers he has found a justification. Others have characterised the omission as an injustice. Their Lordships do not propose to tender any opinion on the subject, which is one for the legislature and not for them, but they are bound to remark that against what the learned Judge urges in justification may well be set the remark that the whole legislation is supposed to rest on the will of the people as expressed by vote, and at least the population of the Ashburton portion of Mid-Canterbury would have to suffer their fate in silence.

So far their Lordships have viewed what would have happened if Mid-Canterbury had come into existence in 1909. But it did

not come into existence until 1925, and by that time the Act of 1908 was not intact, but had been amended. In particular it had been amended by the Act of 1910, and here comes the second great landmark in the legislation. By that Act the form of questions to be put at the licensing poll was altered. The new form of questions was fixed separately for no-licence districts and for licence districts. In the case of licence districts, the choice was between " I vote for continuance " and " I vote for no-licence." This it will be observed dealt, not as did the questions under the 1908 Act, with the number of actual licences, but with the continuance of licences in general, and then Section 5 provided that if the proposal for no licences was not carried, or in other words if the vote for continuance gained the day, the number of licences should continue as they were, until at a subsequent poll the vote for no licences prevailed. That is to say, if continuance was carried, the licences became stereotyped as to number. Section 8 of the Act of 1908, which has been quoted, and which dealt with the situation arising when owing to electoral changes a new licensing district sprang into existence, was repealed ; but it was substantially re-enacted by Section 12, and it again exhibited the old lacuna. If the majority of the population in the new district belonged to an old no-licence district the new district entered life as a no-licence district and there was to be a poll as to restoration in terms of Sections 8 to 11 which replaced with greater detail the repealed Section 38 of 1908 ; but if on the other hand the new district was a licence district then the only poll was that just set forth ; and the licences *de facto* existing were stereotyped without provision for any licence being allotted to the included portion which had previously formed part of a no-licence district. And by Section 30, to which their Lordships will revert in detail, provision was made for the case where one of the stereotyped licences lapsed. There was also added another brace of questions to be settled at the poll, viz., whether there should or should not be national prohibition. This, if carried, would sweep away licences altogether.

Then eventually—for " finally " is a word whose use legislation such as this does not permit—came the Act of 1918. That provided for a special poll where the two alternatives were National Continuance and National Prohibition with Compensation : and then, if National Continuance was carried at the special poll and the next poll thereafter—which happened—it provided in future that there should be three alternatives : (1) National Continuance, (2) State Purchase and Control, (3) National Prohibition ; and then Section 73 (1) repealed Sections 3 to 5 of the Act of 1910 and prescribed that no questions as to local no-licence should be submitted to any poll. But by Section 77 it provided that in any no-licence district there should be submitted the question as to restoration, and this should be submitted as prescribed by Sections 8 to 11 of the Act of 1910.

Now the effect of these various enactments seems clear. In terms of Section 12 of the Act of 1910, which was the existing

ruling Act as to what was to happen when owing to electoral change the new district of Mid-Canterbury came into being, that district was a licence district. Consequently in terms of Section 73 (1) of the Act of 1918 no question as to local no-licence could be submitted to the first poll in Mid-Canterbury. But the existing licences in Mid-Canterbury being the *de facto* licences which had existed in Ellesmere continued, and could only be wiped out if the first poll had determined in favour of National Prohibition—which it did not.

Now the first argument put forward by the learned Counsel for the appellant was one that was not submitted to, and consequently not dealt with by, the Court of Appeal. Counsel contended that the effect of Section 12 of the Act of 1910 as applied to the facts, to wit, that the population of the Ellesmere portion (*quondam* licence) exceeded the population of the Ashburton part (*quondam* no-licence)—was, to use his words, to effect "*ipso facto* restoration." His object in saying that was to contend that restoration being effected, Section 11 applied and allowed licences to be granted as upon restoration they could be granted; *i.e.*, to the extent of not less than one licence for each thousand electors, and that the appellant would have his chance of getting one of the new licences.

This argument really turns on what may be called a play on the word "restoration." In one sense the part of Ashburton which came into Mid-Canterbury did *ipso facto* undergo restoration. That is to say, an inhabitant of the town of Ashburton might say with satisfaction or regret according to his own views, "Before this I was in a dry district, now I am in a wet one." But that is not the sort of restoration which allows a new grant of licences under Section 11. Section 11 only speaks after there has been a determination under Section 8, *i.e.*, a determination at a poll when the question has been put whether licences should be restored, and such a poll has never taken place in Mid-Canterbury, and never could take place because Mid-Canterbury is not and never has been a no-licence district and consequently Section 77 of the Act of 1918 cannot bring in sections 8 to 11 of 1910.

Now the second argument, which was the chief argument before the Court of Appeal, and was repeated here, depended on the phraseology of Section 30 of 1910 as amended by 1920. That section is still in force. The amendments in 1920 were rather verbal than substantial, but in its amended form the article reads thus:—

> "(1) Save as provided by this Act in respect of the restoration of licences or by Section 144 of the principal Act with respect to the increase of licences, no new publican's licence, accommodation licence, New Zealand wine licence or wholesale licence shall be granted in any licensing district except when a licence of the description applied for has been forfeited or has not been renewed or has otherwise ceased to exist. In the case of a publican's licence, accommodation licence or New Zealand wine licence no such licence shall be granted in respect of premises situate beyond the limits fixed by ss. (4) of S. 127 of the principal Act.

"(2) In every such case one new licence of the same description as the licence which has been forfeited or has not been renewed or has otherwise ceased to exist may at the first annual meeting after the forfeiture non-renewal or cesser of the former licence or at the annual meeting at which a renewal of the former licence might have been granted if duly applied for be granted by the Licensing Committee having jurisdiction for the time being in the place where the premises were situated to which the former licence related."

The argument is this. The licence for the Somerset Hotel ceased to exist in 1903. The section therefore applies and allows one more licence in addition to the existing old Ellesmere licences, and to get this licence the appellant along with others may have his chance.

Now it will be remembered, as already pointed out, that a complete change in the form of the questions put at the licensing poll was introduced in 1910. Prior to that the electors' answer dealt expressly with the number of licences. But when the question took the form of a continuance of licensing in general, obviously something had to be done as to the settlement of number. In 1910 that was done, first of all by Section 5 which stereotyped the number of licences at the number at which they were in a licensing district previous to the poll. It was also done, pleonastically it may be, as to the prohibition part, by Section 30. But in 1918, Section 5 of 1910 was repealed, so that now the only section is Section 30 as amended and quoted above. The sole question therefore is—for the prohibition words are absolute—whether "otherwise ceased to exist" can apply to a ceasing to exist owing to a no-licence vote. Their Lordships are unable to think that they can do so. Their collocation with forfeiture and non-renewal point to something of the same character, *i.e.*, something which had affected the licence in what may be termed its individual existence, not to a general determination affecting many other licences, it might be, besides the one in question. Also the additional words were necessary, for death and bankruptcy are both things that bring a particular licence to an end, and they are not embraced in the words "forfeiture" and "non-renewal." Moreover the references as to when the application should be made seem to indicate that the ceasing to exist is an event happening within the period between the sitting of two licensing committees, not something which happened 25 years ago, in the case of which the meeting of the licensing committee in November, 1929, was only the first meeting after the event, because Mid-Canterbury was a non-existent district till just before that date.

This disposes of the case. In respect of the importance attached to it as indicated by the allowance of an appeal to this Board by the Court below their Lordships have dealt fully with the matter in their own way. But although they must not be taken as agreeing with each and every one of the reasons contained in the separate judgments, some of which are open to criticism, they have not in fact added anything to what has been so well said by the Court of Appeal. Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

In the Privy Council.

JOSEPH SCALES

v.

HENRY AIKEN YOUNG AND OTHERS.

DELIVERED BY VISCOUNT DUNEDIN.

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