was a prohibited immigrant, and had entered the Commonwealth contrary to the Act. The time of his entry must, we think, be deemed to have been the time when he was absent from the muster, since his landing before that time fell within the exception in sec. 3. And, as the appellant was then the master of the ship, all the elements of the offence were established, and the conviction was right. We think that there is nothing in the objection that the *Immigration Restriction Act* is in conflict with the Imperial *Merchant Shipping Act.*

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The facts of this case are not distinguishable from those in *Preston* v. *Donohoe.* The same result must, therefore, follow.

Appeals dismissed.

Solicitors, for the appellants, *Bradley & Son.*

Solicitor, for the respondent, *The Crown Solicitor of the Commonwealth.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

CARROLL AND OTHERS . . . . APPELLANTS;
DEFENDANTS,

AND

SHILLINGLAW . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *June* 14, 15, 18, 25.

Medical Act 1890 (*Vict.*) (*No.* 1118), *secs.* 93, 97—*Friendly Societies Act* 1890 (*Vict.*) (*No.* 1094), *secs.* 5, 11, 13—*Unlawfully carrying on business as chemist and druggist—Friendly society—Rules—Effect of registration—Ultrâ vires—"Purchasing members"—Sale of medicines to public.*

Griffith C.J., Barton and O'Connor JJ.

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Sec. 12 .) ... *dly Societies Act* 1890 provides that :—"The registrar ... ed that any amendment of a rule is not contrary to the ... Act issue to the society an acknowledgment of registry of t... ...all be conclusive evidence that the same is duly registered."

Held, that such acknowledgment of registry is only conclusive that the things which might lawfully be done have been done, and has not the effect of declaring that a thing which could not be lawfully done has been lawfully done.

Held, therefore, that the Court could examine into the validity of a rule made by a friendly society, notwithstanding the acknowledgment of registry.

By sec. 5 of the *Friendly Societies Act* 1890, as amended by the *Friendly Societies Act* 1891, it is provided that :—"Societies may be registered under this Act to provide by voluntary subscriptions of or levies upon the members thereof with or without the aid of donations . . . (II.) For providing medical attendance for and dispensing medicines to the members their husbands wives widows children or kindred." The objects of the society were, according to its rules, "to raise a fund by voluntary subscriptions of the members to supply medicines and other articles required for relief in sickness or other ailment, medical advice, and attendance to members, their wives, children and kindred, as hereinafter provided." By one of the amended Rules of the society it was provided that :—"In addition to the membership provided for in the Rules and Regulations of this Institution, there shall also be a restricted form of membership which shall entitle the persons requiring the same to purchase medicines . . . at a scale of charges to be adopted by the Institution . . . Such members shall be known as 'Purchasing Members,' and shall acquire no interest whatever in the funds of the Institution, nor shall they acquire any of the rights and privileges of the other members, nor any other rights or privileges whatsoever save only the right of purchase from the Dispensary of the Institution at the prices as aforesaid. Any person may become a 'Purchasing Member' on payment of the sum of sixpence to the Dispenser . . . and may continue such membership by payment of an annual subscription of sixpence."

Held, that such last-mentioned Rule was *ultrâ vires*, that the sale of medicines to such "purchasing members" was not authorized by the Friendly Societies Acts, and, therefore, that sales of medicines to such "purchasing members" were a violation of sec. 97 of the *Medical Act* 1890, which provides (*inter alia*) that (sub-sec. I.) "any person not being a registered pharmaceutical chemist who carries on or attempts to carry on business as a chemist and druggist or homœopathic chemist or either," shall be liable to a certain penalty.

Decision of the Supreme Court, *Shillinglaw* v. *Carroll* (1906) V.L.R., 186; 27 A.L.T., 162, affirmed.

APPEAL from the Supreme Court of Victoria

An information by Harry William Shil[illegible]istrar of the Pharmacy Board of Victoria, charged tha[illegible]efendants T. Carroll, B. Hollingworth, W. S. Lyon, H. S. Higginson, J. M. Ross, C. Quelch, J. Walker, and J. T. Turner, members of the general committee of the Prahan United Friendly Societies' Dispensary and Medical Institute (hereinafter called "the Institute") between the 27th November and 5th December 1905, not being registered pharmaceutical chemists, did carry on business as a chemist and druggist contrary to the provisions of the *Medical Act* 1890.

The Institute was registered as a friendly society under the *Friendly Societies Act* 1890, and the Registrar of Friendly Societies, on 2nd April 1903, issued to the Institute an acknowledgment of registration of its amended Rules as required by sec. 13 of the *Friendly Societies Act* 1890. The rules which are material to this report were as follow:—

"2. The object of this Institution shall be to raise a fund by the voluntary subscriptions of the Members to supply medicines and other articles required for relief in sickness or other ailment, medical advice, and attendance to members, their wives, children, and kindred, as hereinafter provided.

"3. This Institution shall consist of an unlimited number of members, who shall have equal interest, and shall be subject to and governed by these Laws and the provisions of the Acts relating to friendly societies. All persons who are for the time being members of any Society for the time being connected with this Institution, and all persons for the time being entitled to medical benefits by the rule of any such Society, shall be members of this Institution.

"4. Members, whose names have been forwarded to the Secretary of this Institution by the Secretaries of the various Societies to which such members respectively belong, their wives, also unmarried sons and step-sons and unmarried daughters and step-daughters under the age of eighteen years, and widowed mothers of unmarried members, shall be entitled to the benefits of this Institution."

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"6. Members of any Society connected with this Institution, shall have the privilege of being on both the Dispensary and Medical Institute Lists or either of them.

"7. In addition to the membership provided for in the Rules and Regulations of this Institution, there shall also be a restricted form of membership which shall entitle the persons requiring the same to purchase medicines and other articles required for relief in sickness or other ailment at a scale of charges to be adopted by the Institution; which scale, however, shall be subject to amendment by the Institution as it may in its uncontrolled discretion from time to time deem necessary or expedient. Such members shall be known as 'Purchasing Members,' and shall acquire no interest whatever in the funds of the Institution, nor shall they acquire any of the rights and privileges of the other members, nor any other rights or privileges whatsoever save only the right of purchase from the Dispensary of the Institution at prices as aforesaid. Any person may become a 'Purchasing Member' on payment of the sum of sixpence to the Dispenser or his Assistant, who shall thereupon enter his or her name in an index book to be separately kept for that purpose, and may continue such membership by payment of an annual subscription of sixpence.

"8. The Institution shall be governed by a General Committee, consisting of Delegates from the Societies, for the time being, connected with this Institution . . . ."

"10. The Executive Committee shall consist of the President, Retiring President, Treasurer, Secretary, and five Delegates, five to form a quorum. It shall be the duty of this committee to supervise the affairs of this Institution . . . ."

"19. The General Committee shall appoint a Dispenser, who shall hold a certificate from the Pharmacy Board of Victoria . . . ."

"29. The General Committee shall at each Quarterly Meeting make a levy on each Society in connection with this Institution, according to the number of members as represented by their returns . . . ."

On the hearing of the information the evidence showed that two witnesses, who were not otherwise members of the Institute or of friendly societies connected with it, went on separate

occasions to the dispensary of the Institute; that each paid sixpence to one of the dispensers, who were all registered pharmaceutical chemists, received a "purchasing member's" ticket, and had a prescription made up for which he paid one shilling and sixpence; and that one of them went on a subsequent occasion and again had a prescription made up for which he paid one shilling and sixpence.

The defendants were members of the general committee of the Institute which comprised others as well, and were the whole of the members of the executive committee.

The Court of Petty Sessions having dismissed the information, an order *nisi* to review the decision was obtained, and was made absolute by *Hood* J.; *Shillinglaw* v. *Carroll* (1).

From this decision the defendants now appealed to the High Court.

Bryant, for the appellants. The society was entitled to make Rule 7. There is no limit in sec. 5 of the *Friendly Societies Act* 1890 to the kind of voluntary subscriptions, or to the manner in which the objects of the society may be carried out. It is perfectly lawful for funds to be raised by a payment of voluntary subscriptions of sixpence per annum. The amount cannot affect the question. Even if the Rule is *ultra vires*, having been registered, it remains effective unless got rid of in some manner provided by the Act. The acknowledgment of registration is under sec. 13 conclusive evidence that the Rule has been duly registered, that is, that it has been duly made: *Brosnan* v. *Trait* (2). Under secs. 11 and 13 the Registrar is a judicial officer, and the intention is that his decision as to the validity of a rule shall be final. The defendants are not the persons who were carrying on the business within the meaning of secs. 93 and 97 of the *Medical Act* 1890. It was either the trustees or the society itself which carried on the business. The persons carrying on the business must derive a pecuniary benefit from it: *Shillinglaw* v. *Honman* (3). In *Shillinglaw* v. *Hewer* (4), it was held that secs. 72 and 97 of the *Medical Act* 1890 must be read together, and that the

(1) (1906) V.L.R., 186; 27 A.L.T., 162.
(2) 29 V.L.R., 280; 25 A.L.T., 37.
(3) 24 A.L.T., 1.
(4) 15 A.L.T., 253.

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business must be carried on in an open shop in order that a person should incur liability under the Act. [He also referred to *Souter* v. *Davies* (1).]

Isaacs A.G., and *Mann*, for the respondent. The validity of Rule 7 may be disputed in these proceedings notwithstanding the acknowledgment of registration. Assuming that the rule is not warranted by the *Friendly Societies Act* 1890, its validity cannot be challenged in any other way, the Act only providing for appeal from the Registrar in case of refusal to register. The acknowledgment of registration given under sec. 13 of the *Friendly Societies Act* 1890 is not conclusive as to the validity of the rule: *Baroness Wenlock* v. *River Dee Co.* (2). This society is not a friendly society within the meaning of the Act. It is a chemists' shop which is established for supplying drugs to the members of certain friendly societies. Levies are made on those societies. In order to constitute a friendly society the levies must be on the individual members. As to the meaning of "voluntary contributions" in sec. 5 of the *Friendly Societies Act* 1890, see *Art Union of London* v. *Overseers of The Savoy* (3). Even if it is a friendly society, it sold medicines to the public or to its members, and it is not entitled to sell medicines at all. The appellants were the proper persons to be prosecuted. The society is not a corporation and cannot be prosecuted. A prosecution of trustees of a friendly society failed in *Shillinglaw* v. *Clark* (4). The person who actually dispensed the medicines was a servant of all the members, and some of them may be prosecuted: see *Justices Act* 1890, sec. 67. Each and every one of the members is doing the unlawful act and may be punished: *Friendly Societies Act* 1890, sec. 14 (v). Purchasing members under rule 7 have none of the indicia of members except the name. They have none of the obligations or the advantages of members. The *Friendly Societies Act* 1890, does not authorize friendly societies to do anything which is forbidden by the *Medical Act* 1890.

[They also referred to *Graff* v. *Evans* (5); *Montgomery* v. *Fox*

(1) 15 R., 261.
(2) 38 Ch. D., 534.
(3) (1894) 2 Q.B., 609.
(4) 15 V.L.R., 585.
(5) 8 Q.B.D., 373.

(1); *Templeman* v. *Trafford* (2); *Ericksen* v. *Last* (3); *Lewis* v. *Graham* (4); *Pharmaceutical Society* v. *Wheeldon* (5); *Cunnack* v. *Edwards* (6).]

Bryant in reply. Under sec. 5 of the *Friendly Societies Act* 1890, there may be members who have not all the privileges of members. [He referred to *Kruse* v. *Johnson* (7); *Davies* v. *Burnett* (8).]

Cur adv. vult.

June 25.

GRIFFITH C.J. This is an appeal from a judgment of *Hood* J. ordering a review of a decision of a Court of Petty Sessions dismissing an information whereby the appellants were charged with a breach of sec. 97 (1) of the *Medical Act* 1890, which provides that:—"Any person who commits in Victoria any of the following offences shall on conviction thereof be liable to a penalty not exceeding Ten pounds for each offence, and may also be committed to prison for any period not exceeding six months:—(1) Any person not being a registered pharmaceutical chemist who carries on or attempts to carry on business as a chemist and druggist or homœopathic chemist or either." By sec. 93 it is declared that:—"The word 'person' wherever the same occurs in this Division of this Part of this Act shall be deemed to include any corporation whether established by charter or otherwise and any company or society registered duly in pursuance of the provisions of any Act of Parliament." The appellants are the executive committee, and are also members of the committee of management, of a friendly society called the Prahran United Friendly Societies' Dispensary and Medical Institute, and the affairs of that institute are carried on under their direction. It does not appear when that Institute first received acknowledgment of registration under the Act, but as now constituted it obtained acknowledgment of registration under the Act on 2nd April 1903. The objects of the society as declared by Rule 2 of

(1) 21 N.S.W. L.R. (Eq.), 127.
(2) 8 Q.B.D., 397.
(3) 8 Q.B.D., 414.
(4) 20 Q.B.D., 780.
(5) 24 Q.B.D., 683.
(6) (1896) 2 Ch., 679.
(7) (1898) 2 Q.B., 91.
(8) (1902) 1 K.B., 666.

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its Rules are "to raise a fund by the voluntary subscriptions of the members to supply medicines and other articles required for relief in sickness or other ailment, medical advice, and attendance to members, their wives, children, and kindred, as hereinafter provided." Rule 3 provides that:—"This Institution shall consist of an unlimited number of members, who shall have equal interests, and shall be subject to and governed by these laws and the provisions of the Acts relating to Friendly Societies. All persons who are for the time being members of any Society for the time being connected with this Institution, and all persons for the time being entitled to medical benefits by the rules of any such Society, shall be members of this Institution." Rule 6 provides that:—"Members of any Society connected with this Institution, shall have the privilege of being on both the Dispensary and Medical Institute lists or either of them." So far as regards these members of the Institute, subscriptions are under the Rules made by the societies to which they belong at a fixed rate per member. If that were all that there is in the case, no difficulty would have arisen. But Rule 7 is as follows:—"In addition to the membership provided for in the Rules and Regulations of this Institution, there shall also be a restricted form of membership which shall entitle the persons requiring the same to purchase medicines and other articles required for relief in sickness or other ailment at a scale of charges to be adopted by the Institution; which scale, however, shall be subject to amendment by the Institution as it may in its uncontrolled discretion from time to time deem necessary or expedient. Such members shall be known as 'Purchasing Members,' and shall acquire no interest whatever in the funds of the Institution, nor shall they acquire any of the rights and privileges of the other members, nor any other rights or privileges whatsoever save only the right of purchase from the Dispensary of the Institution at the prices as aforesaid. Any person may become a 'Purchasing Member' on payment of the sum of sixpence to the Dispenser or his Assistant, who shall thereupon enter his name in an index book to be separately kept for that purpose, and may continue such membership by payment of the annual subscription of sixpence." It is said that rule was made by amendment, but whether that is so or not does not matter. There is only one

other Rule to which I need refer, and that is Rule 32, which provides that:—"Each Society shall supply every member on the Dispensary list good on their books with a prescription book, to be signed by the Secretary of the Society of which he is a member (with seal attached). The Medical Officer shall write all his prescriptions and repetitions of same therein."

It is contended for the respondent, who represents the Pharmacy Board of Victoria, that Rule 7 is invalid, that it is a mere evasion of the law, that these so called "purchasing members" are not members of the Institute at all, and that in substance the Institute is carrying on the business of a chemist and druggist, and is selling goods to anybody who applies for them. For the appellants it is contended that Rule 7 is not *ultra vires*, that it has been certified by the Registrar of Friendly Societies, that thereupon it is not competent for a Court of Petty Sessions or the Supreme Court to inquire into its validity, that these so called "purchasing members" must be taken to be members of the Institute, and that, as the Institute is merely supplying goods to those members, it is not carrying on the business of a chemist and druggist within the meaning of the *Medical Act* 1890.

I agree that, if the Institute is merely dealing in a manner authorized by the *Friendly Societies Act* 1890 with its members, it is not carrying on the business of a chemist and druggist within the meaning of the *Medical Act* 1890. The two Acts were assented to on the same day and must be read together. I think that if the society is lawfully established to do a particular thing under the *Friendly Societies Act* 1890, the Institute cannot be said to be carrying on business contrary to the *Medical Act* 1890.

It is necessary now to refer to some of the sections of the *Friendly Societies Act* 1890. Sec. 5, as amended by the *Friendly Societies Act* 1891, provides that:—"Societies may be registered under this Act to provide by voluntary subscriptions of or levies upon the members thereof with or without the aid of donations:— . . . (II.) For providing medical attendance for and dispensing medicines to members their husbands wives widows children or kindred." There is no other section of the Act which would cover the business the Institute is carrying on in the present case. By sec. 11 it is provided, amongst other things,

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that a Society must consist of at least ten members, that an application for registration, signed by ten members and accompanied by a copy of the rules and a list of the members, must be sent to the Registrar. That section further provides that an appeal lies from a refusal by the Registrar to register a society to the Supreme Court, and that "(x.) The acknowledgment of registry shall be conclusive evidence that the society therein mentioned is duly registered unless it be proved that the registry of the society has been suspended or cancelled." Sec. 12 then provides for the cancellation or suspension of registry in certain cases. Sec. 13 provides (*inter alia*) that:—"(I.) The rules of every society sent for registry shall contain provisions in respect of the several matters mentioned in the Second Schedule to this Act." One of the matters mentioned in that Schedule is:—"the terms of admission of members, the conditions under which any member may become entitled to any benefit assured thereby." Sec. 13 also contains a provision that:—"(v.) The Registrar shall on being satisfied that any amendment of a rule is not contrary to the provisions of this Act issue to the society an acknowledgment of registry of the same which shall be conclusive evidence that the same is duly registered."

It is contended, on the one hand, that the provision that an acknowledgment of registry is to be conclusive evidence that a rule is duly registered merely means that the acknowledgment is conclusive evidence that all the formalities as to the passing of the rule and for effecting registration of it according to the provisions of the Act, that it has been carried by a proper majority, and so forth, have been observed, and, on the other hand, that it is conclusive that all that the law requires in respect of a valid rule has been done. There is a great deal to be said for the latter argument in view of the words of sec. 13 (v.), by which the Registrar is required to be satisfied that any amendment of a rule is not contrary to the provisions of the Act. But I think the true view is that the acknowledgment of registration is only conclusive that the things which could lawfully be done have been done, and that it cannot have the effect of declaring that a thing which could not be lawfully done has been lawfully done. I think the rule can be examined

to see whether the matter said to be lawful, and as proof of which the certificate of the Registrar is relied upon, was a lawful act which under any circumstances could be done. For that purpose, I think the substance of the matter should be looked at and not the form. What is the real nature of the transaction complained of in this instance? The Institute kept a dispensary and sold drugs there to anybody who chose to enter and pay a fee of sixpence, whereupon he was entered as a purchasing member of the Institute. I will suppose for a moment that that was the sole object of the Institute. What would be said of a body of ten or more persons associated together and calling themselves a friendly society, whose object was the selling of drugs only to persons who paid sixpence a year and thereupon were called members of the society? In my opinion such a society as that would not be a society for "dispensing medicines to members their husbands wives widows children or kindred," but it would be a society for selling medicines to any member of the public who was willing to pay sixpence a year. They would be holding themselves out as vendors of medicines, their customers being inclusive of all who would pay sixpence a year. I am very much disposed to think that a society of that kind—apart from the *Medical Act* 1890—would, if it consisted of more than twenty members, be unlawful under the *Companies Act* 1890 as being an association of more than ten persons carrying on business for gain. But I am quite prepared to say that it would not be a society for "dispensing medicines to members their husbands wives widows children or kindred" within the meaning of the *Friendly Societies Act* 1890. If therefore such a society were formed, and by inadvertence were registered, and a certificate of registration were issued, in my opinion that acknowledgment of registration would confer upon that society no protection or right which a society authorized by the Act has. Such a society ought therefore to be considered as if it was not registered. If, then, a society constituted for lawful objects incorporates within its objects unlawful and unauthorized objects, I think the same consequences must follow. So far as these objects are unlawful and unauthorized, the society cannot claim any benefit from the *Friendly Societies Act* 1890. I am of opinion, therefore, that this Institute cannot

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claim any advantage or protection under that Act in respect of the transactions complained of here, and that it must be regarded as if it carried on the business without any lawful authority at all.

What then is the Institute doing? What is its business? It is selling drugs to anybody who chooses to pay for them. I assume that in one sense these "purchasing members" are members of the Institute, but I think a society formed of such members would not be a friendly society within the meaning of the Act, and that persons cannot join a friendly society for a limited purpose, that purpose being one for which a friendly society cannot be formed. I think, therefore, the case must be regarded apart from the *Friendly Societies Act* 1890, and that, so regarded, this Institute is within sec. 93 of the *Medical Act* 1890, and, being within it, is carrying on business as a chemist and druggist, not being a registered pharmaceutical chemist within the meaning of sec. 97 of that Act. I have already said that I do not think the mere dispensing of medicines to its own members properly so called, is carrying on business contrary to sec. 97.

I doubt very much, however, whether the appellants can be said to be carrying on this business, or whether they must be deemed to have authorized it to be carried on. So far as that is concerned, strictly the offence of the appellants is procuring or being accessories to an unlawful carrying on by the Institute of this business. But that is a purely technical question, and not the one on which we granted leave to appeal. On the substantial merits, I think that the Pharmacy Board is right, and that the appeal fails and should be dismissed.

BARTON J. The *Medical Act* 1890 (No. 118), sec. 97 (1) provides:—"Any person who commits in Victoria any of the following offences shall on conviction thereof be liable to a penalty not exceeding Ten pounds for each offence, and may also be committed to prison for any period not exceeding six months—(1) Any person not being a registered pharmaceutical chemist who carries on or attempts to carry on business as a chemist and druggist or homœopathic chemist or either." In *The Pharmaceutical Society* v. *London Supply Association* (1), a small body of persons had

(1) 5 App. Cas., 857.

obtained a registration under the *Companies Acts* 1862-1867. One only of these persons was a qualified, certified, and registered chemist. His share in the company was very small: he was the person who appeared in the shop and conducted the sales, and he received a salary for his labour in dispensing the drugs, which were sold for the profit of the company. It was held that, under these circumstances, the word "person" in the 1st and 15th sections of the Statute (31 & 32 Vict. c. 121) did not apply so as to make this incorporated company liable to the penalty. That being the state of the law, and sec. 97 having been a repetition of previous statutory law on the subject, that case appears to have led to the inclusion in the *Medical Act* 1890 of sec. 93, which is as follows:—"The word 'person' wherever the same occurs in this Division of this Part of this Act" (the same division in which sec. 97 is included) "shall be deemed to include any corporation whether established by charter or otherwise and any company or society registered duly in pursuance of the provisions of any Act of Parliament."

But this information is not laid against a corporation, a company or a society, but against eight persons who compose the executive committee, and are members of the general committee of a registered friendly society, called the Prahran United Friendly Societies' Dispensary and Medical Institute. The information of the respondent, Mr. Shillinglaw, the Registrar of the Pharmacy Board of Victoria, charged that the defendants, now appellants, did, between 27th November and 5th December 1905, at Prahran, not being registered pharmaceutical chemists, carry on business as a chemist and druggist, contrary to the provisions of the *Medical Act* 1890.

Admissions were made on the part of the appellants before the hearing of the information against them:—

"1. That the Rules registered on 2nd April 1903 (Registered No. 1319) are the Rules of the Prahran United Friendly Societies' Dispensary and Medical Institute now in use.

"2. That the defendants are the executive committee, and are also members of the general committee of the said society, which said general committee is composed of the defendants and a number of other gentlemen.

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"3. That Harold Gordon MacDonald and Charles Edward Chadwick are dispensers in the employ of the said Society, and were appointed by and are under the control of the general committee."

The material evidence was that, on 28th November last, a person named Butchers, a clerk in the office of the Pharmacy Board of Victoria, called at the dispensary of this Institute. He was then acting under instructions from Mr. Shillinglaw. He handed to Chadwick a prescription, and said he wanted it made up. Chadwick said he would have to become a purchasing member. The medicine having been compounded Butchers paid sixpence for a purchasing member's ticket, and eighteenpence for the medicine. Chadwick handed him the medicine, the ticket, and also a docket. Butchers in giving evidence said:—"I then asked him, 'Does this ticket entitle me to get any medicine or other things during the year?' He replied 'Yes, for twelve months.'"

On 4th December Butchers again attended at the dispensary, and presented the same prescription to Chadwick to be made up. He waited about ten minutes, and while he was waiting, MacDonald came forward and recognized him. A few moments afterwards Chadwick handed Butchers a bottle of medicine, and Butchers paid Chadwick eighteenpence, and received another docket for that sum. MacDonald introduced Butchers to Chadwick as an officer of the Pharmacy Board. Chadwick said, "If Mr. Shillinglaw comes again I have instructions to enrol him as a purchasing member." The relevancy of that will appear in a moment. Shillinglaw was called. He had gone to the dispensary on 28th November, and seen Chadwick, and had said:—"I desire to become a purchasing member of the dispensary, and to have this prescription dispensed." After some conversation with some other person, Chadwick had said:—"We cannot make you a purchasing member, but we will dispense this prescription for you as an ordinary member of the public." But, subsequently, on 4th December, when Shillinglaw again went to the dispensary with the same prescription, MacDonald told him there was no difficulty as the committee had instructed him (MacDonald) to enrol Shillinglaw. Shillinglaw received a purchasing member's ticket in

the same way as Butchers had done, and paid for the ticket and for the medicine. The Rules were put in, and the justices practically decided that Rule 7 was an answer to the information, and dismissed it. Then the informant obtained an order to review, which was made absolute by *Hood* J. on 14th February.

The defendants obtained special leave to appeal to this Court, substantially on the following grounds:—

"1. That the Supreme Court of Victoria was wrong in holding and adjudging that Rule 7 of the Rules of the Prahran United Friendly Societies' Dispensary and Medical Institute, which were put in evidence at the hearing before the Court of Petty Sessions at Prahran, was *ultra vires*, and afforded no answer to the information.

"2. That Rule 7 having been duly registered by the Registrar of friendly societies, in pursuance of the Friendly Societies Acts, could not be challenged in the proceedings before the Court of Petty Sessions at Prahran, or before the Supreme Court, or alternatively in any other manner than that provided by the *Friendly Societies Act* 1890."

In *Baroness Wenlock* v. *River Dee Company* (1), the company named was empowered by Statute to borrow upon mortgage of its lands any sum not exceeding in the whole £25,000. The company borrowed more than that sum, and afterwards the Lands Improvement Company advanced it a still further sum, having statutory power to advance money to landowners for the improvement of their land. There was a clause in one of the Land Improvement Company's Acts making the execution by the Inclosure Commissioners of a charge on land, in pursuance of the Act, conclusive evidence of the validity of the charge. The Inclosure Commissioners did execute a charge on the lands of the River Dee Company for the repayment of the sum advanced to that company by the Lands Improvement Company. It was held by the Court of Appeal that the River Dee Company had no power to borrow beyond the express limit of £25,000; that the clause mentioned merely established that everything which could be done under the Act of which it was a part had been duly and

(1) 38 Ch. D., 534.

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regularly done; and that an order under the clause did not avail to validate a transaction which was *ultra vires*.

In *Brosnan* v. *Trait* (1), *Holroyd* J. held that the acknowledgment of registry of an amendment of a rule of a friendly society, issued under sec. 13 (5) of the *Friendly Societies Act* 1890, is conclusive evidence that such amendment has been duly made, as well as that it has been duly registered. The correctness of that decision cannot be questioned, but it does not go the length contended for on the part of the appellants. Reference to the case of *Baroness Wenlock* v. *River Dee Company* (2) already cited, will show the close parallel between the section just mentioned and the enactment dealt with in that case, where the order of the Inclosure Commissioners was held to establish no more than that the powers given by the Act, whatever they were, had been duly and regularly exercised; not that a rule or transaction, prohibited by express law, was brought *intra vires* by the order.

In support of his decision as to the effect of the acknowledgment of registry, *Holroyd* J. in his judgment referred to *Souter* v. *Davies* (3) for a passage in the judgment of *Wills* J.:—"Nothing can be clearer than the judgment of the Master of the Rolls in *Rosenberg* v. *Northumberland Building Society* (4) to show that that was all that was decided. He said, with regard to the question whether the new rules were duly passed, 'I have no doubt that the certificate of the Registrar is conclusive that all the necessary preliminary steps had been duly taken to make those rules binding on the society and the members. The decision in *Dewhurst* v. *Clarkson* (5) appears to me to establish that proposition. I should have come to the same conclusion without any authority.' There is no suggestion that, where there is no power to make new rules at all, the Registrar's certificate would be conclusive on such a point." The decision of *Holroyd* J. is entirely consistent with and warranted by the judgment of the Court of Appeal in the *Baroness Wenlock's Case*. On this point, *Hood* J. followed in the present case the decision of *Holroyd* J.

(1) 29 V.L.R., 280; 25 A.L.T., 37.
(2) 38 Ch. D., 534.
(3) 15 R., 261.
(4) 22 Q.B.D., 373.
(5) 3 E. & B., 194.

in *Brosnan* v. *Trait* (1), and there cannot be any doubt that he was right in doing so. I do not see that there is any judicial function of the Registrar of friendly societies, which goes beyond the limits thus assigned.

But the controversy at the bar centred on the first ground, that is to say, that *Hood* J. was wrong in holding that Rule 7 is *ultra vires*. Rule 7 is as follows:—[His Honor read the rule and continued.] From what I have said, it will be apparent that my opinion is that, if Rule 7 would be otherwise *ultra vires*, there is nothing in the *Friendly Societies Act* 1890 which would have this, to my mind, strange effect, that the certificate of the Registrar would make it a valid rule. Reference was made to a number of the rules, among them to Rule 2, for the purpose of ascertaining the object of raising funds:—"The object of this Institution shall be to raise a fund by the voluntary subscriptions of the members to supply medicines and other articles required for relief in sickness or other ailment; medical advice, and attendance to members, their wives, children, and kindred, as hereinafter provided." It has been contended that, taking that in connection with sec. 5 of the *Friendly Societies Act* 1890, the intention of the Act was, as held by *Hood* J., that the provision relating to the establishment, and giving of medical aid and dispensing of medicines, should be carried out from the funds to be established by voluntary subscriptions, and, under the amending Act, by levy; and that there was no intention that there should be any such thing as purchasing medicines under any circumstances. I do not think it necessary to give any opinion on that contention, because I think there is a broader ground on which the appeal should fail, although there is, I have no doubt, a great deal of strength in the contention, at any rate with regard to persons who are not otherwise members of the Institute, that it was intended that the expenditure in establishing and carrying on the Institute should be met out of the contributions of members. The *Friendly Societies Act* 1890, sec. 5 (2) (as amended by the Act of 1891, No. 1232) provides that:—"Societies may be registered under this Act to provide by voluntary subscriptions of or levies upon the members thereof with or without

(1) 29 V.L.R., 280; 25 A.L.T., 37.

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the aid of donations." Then follow five purposes, the second of which is this:—"For providing medical attendance for and dispensing medicines to the members their husbands wives widows children or kindred." It is contended that Rule 7 is valid under the powers given by that section. Sec. 13 of the Act provides that the Rules "shall contain provisions in respect of the several matters mentioned in the Second Schedule to this Act." Amongst the matters specified in the 2nd Schedule are—"The whole of the objects for which the Society is to be established, the purposes for which the funds thereof are to be applicable, the terms of admission of members, the condition under which any member may become entitled to any benefit assured thereby, and the fines and forfeitures to be imposed on any member." That of course leaves a very wide scope to a friendly society in making provisions on these subjects; but, in my opinion, it does not give any power to create membership merely by calling a class of persons members, or to constitute a class of persons as members, who, as appears by the method of their attempted incorporation into the society, have not any of the attributes of members.

Is, then, a person who has merely bought a purchaser's ticket in truth a member of this Institute? He acquires under it no right to medical attendance, no interest in the property or funds of the Institute, no right to vote or to become an officer or member of the governing body, and he lacks the power, the possession of which is, to my mind, the crucial test of membership of any association—namely, a right to exercise his influence, at the meetings and otherwise, so as to bear his part in the government and control of the society. What act of a member is it that he can perform? When he is not buying medicine he can do nothing whatever. The transaction is one of undisguised sale and purchase, such as the Act and the Rules do not appear to sanction in the case of members generally. The rule appears to me to be plainly a device for the purpose of enabling the Institute, through its dispensers, to sell to the public at large, in competition with ordinary chemists and druggists—for the sixpence is a sum fractional in relation to the value of the medicines which may be bought each year by the ticket-holder

for himself and all his friends and relations, a dozen of whom would gladly reimburse him at the rate of a half-penny each. The Acts contain no definition of the term "member," but I am not satisfied that to become a member of a friendly society within their meaning, it is not necessary to become a real participant in some, at least, of the work or burdens, and, reciprocally, in some of the benefits of the society. Honorary membership is an exception, perhaps, because there are a few words in the Principal Act tending to indicate that it is contemplated, but, whatever incidents may attach to honorary membership, the faint sanction given to it by the Statute cannot be held to warrant the creation of the so-called membership now in question by a mere rule. Did those who framed the Statute contemplate the creation of this anomalous relation under the name of membership? I find no expression in the Statute which justifies such an inference. Consequently, I am of opinion that Rule 7 seeks to give the name of membership to a class of persons who are expressly denied the attributes of membership, and that the Statute has not authorized the making of that rule.

Apart, then, from the Rule, which, I think, is a nullity, the transactions described in evidence are plainly cases of sale and purchase. They were manually conducted on one side by two registered pharmaceutical chemists at the society's dispensary The dispensers were employed under the Rules by the general committee, of which the appellants were members, and to which the Rules give the government of the Institute, and a dispenser may be suspended for misconduct, or removed for neglect of duty by the executive committee, who are the appellants themselves.

Seeing, then, that these sales of medicines compounded from prescriptions at the dispensary of which they take part in the management, are clearly a "carrying on" of the business of a chemist and druggist, and seeing that the appellants are not, nor is any of them asserted to be, registered as a pharmaceutical chemist, are the appellants liable under the 93rd section of the *Medical Act* 1890 for the offence charged against them? I think they are. Sec. 18 (1) of the *Friendly Societies Act* 1877 (No. 590) enacted that—"The trustees of any society or branch or any

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other officers authorized by the rules may bring or defend . . . any action suit or other legal proceeding in any Court . . . concerning any property right or claim of the society or branch . . . and shall sue and be sued implead and be impleaded in their proper names without other description than the title of their office." It was held by the Full Court of this State in *Shillinglaw* v. *Clark* (1) that this sub-section is limited to civil proceedings, and therefore that the trustees could not be prosecuted for the offence of carrying on the business of a chemist and druggist, not being registered, in breach of sec. 25 (1) of the *Pharmacy Act* 1876. Medicines had been dispensed to persons who did not belong to the Society by a registered chemist employed by the trustees as "managing dispenser." Sec. 5 of the Act No. 590 provided that—"Societies may be registered under this Act to provide by voluntary subscriptions of the members thereof with or without the aid of donations :— . . . (II.) For dispensing medicines to the members their husbands wives widows children or kindred."

The trustees, then, of this Society could not be prosecuted for what has taken place. The case of *Shillinglaw* v. *The Equitable Co-operative Society Ltd.* (2) decided in 1886, clearly rested on *Pharmaceutical Society* v. *London and Provincial Supply Association* (3), and does not assist us to come to a conclusion on the present question.

In *Pharmaceutical Society* v. *Wheeldon* (4), the defendant was the assistant of a duly qualified and registered chemist, but was not himself a "registered pharmaceutical chemist or chemist and druggist" within the meaning of the *Pharmacy Act* 1868 (31 & 32 Vict. c. 121.) Sec. 15 of that Act renders liable to a penalty of £5 any person who shall sell poisons, not being a "registered pharmaceutical chemist or chemist and druggist." The defendant, being in sole charge of his employer's shop, sold to a customer a packet of a preparation containing poison (strychnine). He was held liable to the penalty, notwithstanding that the sale was on behalf of his master, and that the master was duly registered. That is rather the converse of the present case, and does not lead

(1) 15 V.L.R., 585.
(2) 12 V.L.R., 898 ; 8 A.L.T., 115.
(3) 5 App. Cas., 857.
(4) 24 Q.B.D., 683.

to a conclusion against the present appellants. But *Templeman* v. *Trafford* (1) was a case in which the respondent had been prosecuted for selling poison, the packet containing which had not upon its label the particulars required by the 17th section of the *Pharmacy Act* 1868. Under that section the person on whose behalf any sale is made by an apprentice or servant was to be deemed to be the seller. The particulars required by the section to be stated on the label were the name of the article, the word "poison," and the name and address of the seller. The label on the packet, for the sale of which the respondent was prosecuted, had upon it not the name or the address of the respondent, but the following name and address—"W. Paterson, chemist and druggist, 3 Cowley Road, Oxford." Paterson was a registered chemist, who employed the respondent to sell goods for him on commission, and the respondent sold them at a shop, the actual sale being on this occasion made to the appellant by a woman behind the counter. The information was dismissed by the justices, but on a case stated the Court of Queen's Bench reversed their decision, and remitted the case to them, holding that the "seller," within the meaning of the section, was the person who actually conducted the sale, although not necessarily the person by whose hand the sale was made, and that the respondent had conducted the sale, inasmuch as he kept the shop, and carried on the business where the poison was sold.

In giving judgment, *Grove* J., said (2):—"Then who is the seller? No doubt difficult questions may arise on any construction of the word, but I am of opinion that in any case within sec. 17 the 'seller' is the person who actually conducts the business of sale, although not necessarily the person by whose hand the sale is made. . . . The object of the Act is the protection of the public, and the protection contemplated by Parliament is that the person who controls the sale of poisons shall be a duly qualified person, so that the public may have a remedy against him, and that he shall be responsible for the state of the poisons, preparations, and labels, and for the shop, and have it conducted in his name."

Lopes J., added:—"It seems clear that the word 'seller' as used

(1) 8 Q.B.D., 397.

(2) 8 Q.B.D., 397, at p. 401.

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in that section means the person keeping or controlling the shop or place or carrying on the business where the poison is sold. This construction is consistent with the general policy of the Act, which is to protect the public against the sale of poisons by unqualified persons."

Now, what is the position of these appellants in relation to dispensing? It is fully defined by Rule 19—"The general committee" (of whom these appellants are members) "shall appoint a dispenser . . . He shall compound and dispense all medicines . . . The dispenser or his assistant shall reside at the dispensary, and be ready at all times to compound all prescriptions, with the exception of such hours as may be arranged by the general committee." Then, further:—"His appointment shall continue as long as he performs his duties to the satisfaction of the general committee, or as long as they may require his services; he shall be subject to removal for neglect or non-fulfilment of any of his duties, by receiving one month's notice to that effect in writing from the executive committee, but the executive committee have power to suspend him at any time for misconduct." The defendants are members of the general committee which governs the society. That committee appointed the dispensers. The members of it who are proceeded against compose the executive committee, which has the power to suspend the dispensers from duty, or, for the causes mentioned in Rule 19, dismiss them. I am much inclined to think that it is they who conduct the shop and carry on the business. I am not sure that the facts do not bring the appellants within the cases, but as my learned brothers think that, technically, they are not liable, I do not dissent, the question being technical only, and the real controversy having been on the substantial questions 1 and 2 raised in the notice of appeal. On these questions, I am of the same opinion as the learned Chief Justice. In the result, I am of the opinion that *Hood* J. came to the right conclusion, and that the appeal ought to be dismissed.

O'CONNOR J. In the form in which this appeal comes before us, it is not necessary to decide whether the business of the Institute, assuming it to be carried on contrary to the provisions of

sec. 97 of the *Medical Act* 1890, is carried on by the appellants, who are members of the general committee of the Institute, or by the Institute itself. If it were necessary to decide that matter, I am of opinion that Mr. Bryant was right in his contention. Sec. 93 of the *Medical Act* 1890 evidently contemplates that a friendly society may be made liable for infringement of the Act. The business is carried on by the Institute through its general committee in the same way that the business of a company is carried on through its directors. If a company does something which amounts to a criminal offence, its directors become personally liable under sec. 67 of the *Justices Act* 1890. In this case it is quite clear that the general committee have the control of this business, and, under those circumstances, an information directly in the form of sec. 67 of the *Justices Act* 1890 would be unanswerable, assuming this business is contrary to sec. 97 of the *Medical Act* 1890. It was, however, pointed out by the learned Chief Justice that a question of that sort is not for our consideration on this appeal. The question for us is, substantially, whether this business was carried on contrary to sec. 97 of the *Medical Act* 1890.

The business consisted of two parts. The substantial part apparently was the dispensing of medicine to the ordinary members of the Institute. In addition to that there was the business of selling to "purchasing members" who became entitled to that right under Rule 7. Such being the business carried on, the question is whether it was contrary to sec. 97 of the *Medical Act* 1890. That section makes no exception in favour of a friendly society, and if the appellants, as members of the general committee of this friendly society, are to escape from liability for carrying on that business, it can only be by bringing the Institute within sec. 5 of the *Friendly Societies Act* 1890. Now, that Act authorizes the dispensing of medicines to "members their husbands wives widows children or kindred," and it does not authorize the carrying on of the business of selling, in the ordinary sense of the word, medicines to persons whether they are members or not. In regard to the dispensing of medicines to the ordinary members of the Institute it is quite clear that that is not a sale. It comes within

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the principle laid down in *Graff* v. *Evans* (1), which has been followed in several other cases. That principle is that, where a club or society consists of a number of members owning in common the property of the club or society, a transaction by which portion of the property is delivered to individual members, whether on payment of money or not, does not amount to a sale. It is apparent, according to the rules of the Institute, that no charge is made for medicines supplied by it to ordinary members except under special circumstances, but it seems to me immaterial whether any charge is made to those members or not, because the transaction does not amount to a sale and cannot be described as carrying on business. But the case of "purchasing members" under Rule 7 is altogether different. What is the position of a "purchasing member" under that Rule? It is expressly provided that he has no interest whatever in the funds of the Institute, that he shall not acquire any of the rights or privileges of other members, nor any other rights or privileges whatsoever save only the right to purchase from the dispensary of the Institute at a scale of charges to be fixed by the Institute, and which the Institute has power to alter at any time as it thinks fit. Under those circumstances it appears to me clear, assuming even that for certain purposes these "purchasing members" are members of the Institute, that a sale to them—a transfer of portion of the property of the Institute to them upon payment of a price—stands in an altogether different position from that of a transfer to an ordinary member of the Institute who contributes to the funds of the Institute in the ordinary way. Therefore, so far as the handing over of medicines to "purchasing members" under Rule 7 is concerned, I am of opinion that each transfer is a sale in the ordinary sense of the word, and is therefore a carrying on of business contrary to sec. 97 of the *Medical Act* 1890.

Whether or not Rule 7 is within or without the provisions of sec. 5 of the *Friendly Societies Act* 1890 is only another way of putting the same question, and I am clearly of opinion that that section does not authorize membership such as that which is provided for by Rule 7. If the purposes of Rule 7 were stated as a purpose under sec. 5 of the *Friendly Societies Act* 1890, they

(1) 8 Q.B.D., 373, at p. 378.

would be stated in this way:—"And for the purpose of selling to any member of the public who chooses to register his name and pay sixpence such drugs as he may think fit to purchase from the Institute." If that was set out plainly it is quite clear that it is an object that does not come within sec 5 of the *Friendly Societies Act* 1890, and is altogether contrary to the whole scope and purposes of that Act.

One can well understand that a well-managed business of the kind under consideration in this case would be likely to attract a very large custom. The stock in trade is, of course, purchased out of the funds of the Institute, and I presume the profits arising out of the sale of drugs to "purchasing members" are added to the funds of the Institute. The question at once arises whether it was ever in the contemplation or scope of the *Friendly Societies Act* 1890 to allow a friendly society to carry on a business in which the funds of the society are invested, and in which those funds to the extent of the investment must necessarily be exposed to the ordinary risks arising from the fluctuations of trade. The provisions of the Act show that any object of membership directed to that end cannot be within its scope and purpose. The basis of these friendly societies is the providing of benefits for members out of the contribution by members, and the extent of the benefits must depend upon the amount of the contributions taken in connection with a number of contingencies in regard to health and duration of life which combine to make up what is called the actuarial basis of these societies. So much is that so, that by sec. 11 (v.) a society cannot be registered "unless the tables of contributions certified by some actuary approved by the Governor in Council who has exercised the profession of actuary for at least five years be sent to the Registrar with the application for registry." All through the Act there are provisions for inquiry into the accounts of friendly societies, and there are provisions by which the government may collect statistics as to health and other matters to enable the business of these societies to be carried on on a safe basis. Any certain actuarial basis would be impossible if a friendly society were allowed to invest its contributions in a business of selling medicines to the public. I have no doubt that the Institute honestly believed, as *Hood* J. found,

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that it was within the law in carrying on business in this way. It is no doubt very convenient to carry on this business, and it may be profitable. But I am quite clear that it is a business which it cannot lawfully carry on, and that this membership under Rule 7 is merely a device for enabling the Institute to carry on the business of selling medicines to the public just as in any ordinary chemist's shop.

There was another answer sought to be set up by Mr. Bryant, viz., that the acknowledgment of registration is conclusive. I agree with the observations of my learned brothers as to that contention. The acknowledgment of registration is conclusive only that all the provisions of the Act necessary for registration have been complied with, and that everything has been done which is necessary to be done for the purpose of giving the society legal existence under the Act. As put in a few words by *Cotton* L.J. in *Baroness Wenlock* v. *River Dee Co.* (1), in reference to a similar enactment:—"In my opinion it establishes that everything which could be done under the Act has been duly and regularly done . . . It is conclusive evidence to show that the proceedings have been duly taken so far as they could be under the Act." For these reasons I am of opinion that the decision of *Hood* J. was right, and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for appellants, *Gaunson & Lonie*, Melbourne.
Solicitors, for respondent, *Barrow & Pearcey*, Melbourne.

B. L.

(1) 38 Ch. D., 534, at p. 540.