[HIGH COURT OF AUSTRALIA.]

HUGHES . . . . . APPELLANT;
COMPLAINANT,

AND

STEEL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 14, 15.

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

Public Health Act 1902 (*N.S.W.*) (*No.* 30 *of* 1902), *secs.* 81, 82—*Sale of adulterated liquor—Analysis of article sold—Certificate of analyst—Evidence of compliance with statutory directions.*

Sec. 82 of the *Public Health Act* 1902 provides that a certificate may be given by an analyst of the result of his analysis of any food or drug submitted to him for analysis in pursuance of the provisions of the Act; and that in any proceedings before any Court the production of a certificate purporting to be signed by the analyst shall be sufficient evidence of the identity of the food or drug analysed and of the result of the analysis without further proof of its authenticity.

Held, that on a prosecution for selling food which is not of the nature, substance, or quality demanded by the purchaser, where the certificate of an analyst is admitted in evidence under this section, it is not necessary for the prosecutor to prove that the analyst divided the food submitted to him by the purchaser into two parts as required by sec. 81.

Decision of *Sly* Acting-J.: *Hughes* v. *Steel*, 24 N.S.W. W.N., 146, reversed.

APPEAL from a decision of *Sly* Acting-J. on a special case stated under the *Justices Act* 1902.

The respondent, a hotel keeper, was proceeded against by the appellant under sec. 88 of the *Public Health Act* 1902, upon an

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information charging him with having, to the prejudice of the purchaser thereof, sold certain articles of food, namely, brandy and rum, which were not of the nature, substance, or quality of the foods demanded by the purchaser. It was proved that the appellant, an Inspector of Police and District Licensing Inspector, went to the hotel kept by the respondent, and there purchased some liquor. After the purchase the Inspector gave notice to the seller that he intended to submit the liquor purchased to the government analyst for analysis, and, as required by sec. 80 of the Act, offered to divide the liquor into three parts, to be separately sealed and labelled, and to leave one of the parts with the seller. This offer being refused, he labelled and sealed the bottles there and then, and afterwards handed them to the government analyst. This evidence having been given, a certificate purporting to be signed by the government analyst and to show the result of his analysis of the liquor in question was put in evidence without objection. The evidence for the prosecution being closed the point was taken for the defendant that, as there was no evidence that the analyst had divided the samples given to him in accordance with sec. 81 of the Act, the information should be dismissed. The magistrate upheld the objection and dismissed the information.

A special case was stated by the magistrate for the opinion of the Supreme Court whether his decision was erroneous in point of law. *Sly* Acting-J., before whom the case was argued, held that the magistrate was right: *Hughes* v. *Steel* (1), and from that decision the present appeal was brought by special leave.

The material sections of the *Public Health Act* 1902, are sufficiently set out in the judgments hereunder.

Watt, for the appellant. *Ex parte Kilby* (2), upon which the Judge relied, does not apply to the present case. That was a decision as to the requirements of sec. 80. It may well be that the purchaser is bound to comply with that section as a condition precedent to a prosecution. But sec. 81 merely imposes certain duties on the analyst, for a breach of which he may perhaps be liable as a public officer under the general law or under sec. 106

(1) 24 N.S.W. W.N., 146.

(2) (1901) 1 S.R. (N.S.W.), 228.

of the Act. Even if those requirements were conditions precedent, they would only affect the admissibility of the certificate, and objection should have been taken on that ground. But they are not an essential part of the case for the prosecution. The prosecutor proved that he had done all that the Act required him to do, and the certificate, being in the proper form, was admissible on its mere production, under sec. 82. That section is intended to obviate the necessity of calling the analyst, but, if the construction put upon it by the Supreme Court is correct, the analyst must be called in every case. There is no necessity to make use of the certificate at all: *Bennett* v. *Bell* (1). An analyst may be called to prove the result of his analysis. If that is not convenient, sec. 82 provides an alternative method of proving the same thing. It could not have been intended that proof of performance of the analyst's duty was a condition precedent either to the admissibility of the certificate or to obtaining a conviction. The part not analysed is retained to be produced if the defendant requires it. If he does not call for it he cannot complain. (See *Gettings* v. *Brian* (2)). The onus of proof would rest on the defendant, and in the absence of evidence to the contrary, *omnia præsumuntur rite et solenniter esse acta*: *Ex parte Kauter* (3); *Motteram* v. *Eastern Counties Railway Co.* (4); *Hill* v. *Hennigan* (5). The English decisions as to the requirements of an analyst's certificate are not applicable here, as the scheme of the English Act is altogether different. Under it there can be no prosecution unless an analyst's certificate is produced. [He referred to *Sale of Food and Drugs Act*, 38 & 39 Vict. c. 63, secs. 6, 9-15, 28, 29, and 62 & 63 Vict. c. 51, sec. 51; *Suckling* v. *Parker* (6).]

Blacket, for the respondent. Secs. 80 and 81 are alternative sections. If the procedure under sec. 80 is carried out, sec. 81 does not apply. It only applies where the vendor does not accept the offer of the purchaser to divide the article. There is no reason why the two sections should be treated upon a different footing as regards their legal effect. If, where sec. 80 applies, it is

(1) 23 N.S.W. W.N., 1.
(2) 21 N.S.W. W.N., 52.
(3) (1904) 4 S.R. (N.S.W.), 209.
(4) 29 L.J.M.C., 57.
(5) I.R. 11 C.L., 522.
(6) (1906) 1 K.B., 527.

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a condition precedent to a conviction that its requirements should be complied with, then where sec. 81 applies it should be regarded as equally imperative, and the certificate provided for by the section should not be deemed valid unless the conditions have been fulfilled. It is established by a long line of cases that the provisions of sec. 80 must be strictly carried out. [He referred to *Barnes* v. *Chipp* (1); *Smart & Son* v. *Watts* (2); *Lowery* v. *Hallard* (3); *Suckling* v. *Parker* (4).] Sec. 82 only makes the certificate evidence of the identity of the article analysed and the result of the analysis. But it is not proof of a division by the analyst or of the retaining of one part for production. This is a provision for the benefit of the defendant and should be strictly enforced. The part retained should be ready for production, just as under sec. 80 one of the three parts must be kept by the purchaser. The object is to enable the defendant to check the *primâ facie* evidence of the certificate by having an analysis of the part retained. The suggested distinction between the English Act and this Act does not exist, for there may be a prosecution without any certificate at all: *Buckler* v. *Wilson* (5). Moreover in England the defendant has an advantage that he has not here. He may require that the analyst be called as a witness: [See 38 & 39 Vict. c. 63, sec. 21.] The facts to be proved under sec. 81 are facts solely in the knowledge of the prosecution and can only be proved by a witness on that side. The defendant should not be compelled to call a witness from the side of the prosecution in order to prove that the Act has not been complied with. The onus is on the prosecution to prove the fulfilment of all statutory conditions. If the legislature had intended to make the certificate evidence of the fulfilment of all those conditions it would have clearly said so. It would be a great extension of the maxim *omnia præsumuntur rite esse acta* to make it apply to conditions of this kind. No such presumption is made as to the requirements of sec. 80. Why should there be any presumption as to sec. 81? The directions in the two sections are much alike. The illustrations given in *Broom's Legal Maxims* are different in

(1) 3 Ex. D., 176.
(2) (1895) 1 Q.B., 219.
(3) (1906) 1 K.B., 398.
(4) (1906) 1 K.B., 527.
(5) (1896) 1 Q.B., 83, at p. 90.

kind from this case. *Hill* v. *Hennigan* (1) stretches the maxim too far. No presumption should be made as to acts which are collateral to the certificate and are not embodied in it or essential to it.

[ISAACS J. referred to *Waddington* v. *Roberts* (2).]

Even if this appeal is allowed costs should not be given against the respondent. The case, though of importance to the Crown as involving a principle, is not of great importance otherwise, as only a small amount is involved.

May 15th.

GRIFFITH C.J. We have had the opportunity of considering this case since the argument yesterday, and there is no reason why we should reserve our judgment.

The question arises under sec. 81 of the *Public Health Act* 1902. Sec. 80 provides that the purchaser or officer obtaining any food or drug with the intention of submitting it to analysis shall notify the seller of his intention to have it so submitted for analysis and offer to divide it into three parts, which, if the offer is accepted, are to be separately labelled or marked. Sec. 81 provides that, if that offer is not accepted by the seller or person dealing in the food or drug or his agent or servant, the analyst receiving the article from the purchaser for analysis shall divide it into two parts, and seal or fasten up one of them and retain it for production in the event of further proceedings being taken in the matter. Sec. 82 provides that the analyst who analyses any food or drug submitted to him in pursuance of the Act may give a certificate of the result of the analysis in a prescribed form, "and in any proceedings before any Court or justices the production of a certificate, purporting to be signed by the analyst, shall be sufficient evidence of the identity of the food or drug analysed, and of the result of the analysis without proof of the signature of the person appearing to have signed the same." The point taken is that in this case, in which the seller did not require the article to be divided into three parts, there was no evidence that the analyst divided the drug submitted to him into two parts and sealed one of them up and retained it for production as prescribed by sec. 81. The objection is well founded in fact. There was no such evidence.

(1) I.R. 11 C.L., 522. (2) L.R. 3 Q.B., 579.

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All that was proved was the purchase of the article, that the purchaser offered to divide it into three parts, that the seller did not accept the offer, and that the article was then sent to the analyst, and the analyst's certificate was produced. Reliance was placed by the defendant upon some English decisions, and one of the Supreme Court of New South Wales, as to the effect of the directions in sec. 80. No case was cited before us as to the effect of the provisions of sec. 81. It is to be remarked that the scheme of the English Act is very different from that of the New South Wales Act. Under the English Act there can be no prosecution at all by the purchaser until he has received a certificate from the analyst. That is not the scheme of the New South Wales Act. The certificate of the analyst in New South Wales is merely a mode of proving the committing of the offence. If reliance is placed upon the certificate, then the statutory directions, whatever they are, must be proved to have been complied with. No assistance, therefore, can be derived from these decisions. Moreover the provision in the English Act corresponding to sec. 83 is different. There is first a direction that the goods may be sent by registered letter to the analyst. Then there is a direction that the analyst, not only shall divide the article into two parts, but shall deliver one of the parts which was not analysed to the purchaser or officer either when he receives the sample or at the time when he supplies the certificate. So that if an article of food or drug is sent to an analyst for analysis the prosecutor will have in his possession, not later than the date of receiving the certificate, the half not analysed by the analyst. Sec. 81 of the New South Wales Act, on the other hand, provides merely that the analyst shall "retain such part for production in the event of proceedings being afterwards taken in the matter." "For production" must mean either to be produced if required by the defendant or by the prosecutor or to be produced in all cases. Now, the scheme of the Act is clearly that the analyst need not be called as a witness. That is the main purpose of sec. 82; and in a country like New South Wales the reason for such a provision is obvious. There is not likely to be an analyst in every town, at any rate not a competent one, though there may be prosecutions for offences against the Act

wherever there are sellers of food or drugs. It seems to me, therefore, clearly to have been intended that the calling of the analyst should not be necessary. If the contention put forward by the respondent were correct it would be necessary to call the analyst in every case, so that the advantage intended to be given by the section would be gone. This provision, it seems to me, was inserted for the benefit of the defendant, but the defendant is entitled to take advantage of it only to the extent to which it was intended that he should be benefited, that is to say, if he desires to have this part produced he may ask for it. If he does not get it, or if any difficulty is placed by the magistrate in the way of his getting it, which I should think highly unlikely to occur, then a somewhat difficult question may arise, as to which I do not at present express any definite opinion. In my opinion it is not necessary for the purpose of obtaining a conviction under this Act to do any more than prove the purchase of the article, with the prescribed notification and offer, delivery to the analyst, and the result of the analysis. If the analyst fails to comply with the directions in sec. 81, that is a matter which may possibly afford a defence if it is established by the defendant, but it is not necessary for the prosecution to prove affirmatively that the analyst has complied with them. As for the suggestion that the maxim *omnia præsumuntur rite esse acta* applies, I would remark that that is a maxim to be applied with very great caution. The doctrine is applied by the Statute to the extent of making the certificate sufficient proof of the identity of the goods mentioned in it with the goods received by the analyst from the purchaser, but I should hesitate to extend it further. It was, as I have said, the obvious purpose of the enactment to render it unnecessary to call the analyst as a witness.

For these reasons I think that the learned Judge was in error in thinking that proceedings under this section were subject to the rules laid down in the English cases and in New South Wales with respect to the provisions of sec. 80.

O'CONNOR J. I am of the same opinion. The charge before the magistrate was laid under sec. 88, sub-sec. 2 of the *Public Health Act* 1902. It is necessary, in order to substantiate that

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offence, to prove that the article in question was not of the nature, substance, and quality demanded by the purchaser. In proof of that allegation the certificate of an analyst was put in evidence. Sec. 82 enables the analyst's certificate as to the result of the analysis to be put in evidence without calling the analyst, and there is nothing in that section which makes it necessary to prove that there has been a division of the sample into two parts as provided in sec. 81. In order to establish his contention, therefore, it was necessary for Mr. *Blacket* to satisfy the Court that from reading these sections of the Act together there can be deduced an expression of the intention of the legislature that the division of the samples under sec. 81 must be proved before the certificate can be allowed to be effective in evidence. Now, I am unable to find in these sections anything from which that deduction as to the intention of the legislature can be drawn. There is a very great difference between the position and duties of the analyst under the New South Wales Act and that of the analyst under the English Act. Under the English Act of 1875 (sec. 21) the party accused has the opportunity of having the analyst called as a matter of right by giving notice of his desire to have him called. After such notice, the analyst will then have to be called as a witness, bringing with him the portions of the articles which are directed to be sealed up and retained for production. With regard to the analyst and his duties under the New South Wales Act there is no such provision. The analyst there is a public officer. "Analyst" is by sec. 76 defined to be the government analyst, and to include any person appointed an analyst by the Board for the purposes of the Act. Power is given by the Act to appoint an analyst, in sec. 81 the analyst is treated as a public officer, and it becomes his duty to divide the sample received for analysis into two parts only in the event of the seller not accepting the offer of the purchaser or officer to divide the drug or food into parts as required by the Act. The analyst is not present when the offer is made, and therefore he must get information in some form from the purchaser as to whether the seller has or has not accepted the offer. This seems to me to clearly indicate that the communication of this information is to be regarded as

a communication between one officer of the department and another, and under some circumstances it may become the duty of the magistrate to see that the part not analysed is produced. No doubt it was the intention of the legislature that this division should be carried out for the protection of the person charged, but it is merely a departmental matter, the failure to carry out which may be a contravention of the Act, possibly subjecting the analyst to punishment under sec. 107. However that may be, I have no doubt that the proof of that having been carried out is not a condition precedent to the putting in evidence of the certificate. If it were not for the cases cited as to the effect of sec. 80 and as to the corresponding sections of the English Act, I do not see how there could be any question that the meaning of the Act is what I have stated. But the argument has been raised by reason of the supposed analogy between the provision of sec. 80 and those of secs. 81 and 82. I do not see any such analogy. The position of the prosecutor, with whom sec. 80 deals, is altogether different from the position of the public officer, the analyst whose duty is set out in secs. 81 and 82.

I wish to rest my judgment entirely upon the Act itself. I think that the maxim *omnia præsumuntur rite esse acta* must be applied with a great degree of care. If it was the duty of the analyst to make this division, I am not at all certain that we should assume that it had been made from the mere fact of the certificate being produced. In my opinion, the matter should be decided entirely apart from any consideration of that kind. I rest my judgment, therefore, on the ground that it is not a condition precedent to the production and efficacy of the certificate that the division of the sample specified in sec. 81 should be proved to have been made.

ISAACS J. I am of the same opinion. The question here is, what is the intention of the legislature? As to whether the requirements of sec. 81 should be affirmatively proved before there can be a conviction, there is nothing in the Act which says that the omission to carry out those requirements shall invalidate the certificate. The intention of the legislature must be gathered from the Act itself and from a comparison of its various parts.

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Isaacs J.

Now Mr. *Blacket*, in a very able argument, has endeavoured to place sec. 81 upon the same footing as sec. 80. But there is one great difference between the two, as it seems to me. Sec. 80 provides that the purchaser shall do certain things. There is no provision in the Act as to any special mode of proving these things. The law therefore necessarily implies that he must be called to prove that these things have been done. Sec. 81 requires the analyst to do certain things, but sec. 82 definitely provides that he need not be called. When I say definitely provides, the section does not say that in so many words, but it provides that his certificate shall be evidence of the analysis, &c., which amounts to the same thing. It would be inconsistent with sec. 81 that any of the matters there directed to be done should go unproved, but it is not inconsistent with sec. 81 that the matters there mentioned should not be proved affirmatively. It would be inconsistent, on the other hand, with sec. 82 for affirmative proof to be required in respect of the matters prescribed in sec. 81. It would make sec. 81 qualify sec. 82. The learned Chief Justice has pointed out the inconvenience of such a requirement, and the reasons why the legislature of the State has provided that documentary evidence should be sufficient. There is nothing to prevent the defendant from proving, if he can, that the provisions of sec. 81 were not complied with. But that was not done in this case.

I rest my judgment upon the Act itself. I gather the intention of the legislature from reading secs. 81 and 82 together, and unless one is prepared to nullify the provisions of sec. 82, I do not see how you can give effect to the argument of the respondent here, that affirmative evidence must be given of the matters in sec. 81.

With regard to the maxim *omnia præsumuntur rite esse acta*, I do not think any English case goes the full length required for the appellant's argument here. There is an Irish case, *Hill* v. *Hennigan* (1), as to which I shall only say this, that I agree with Mr. *Blacket* that the decision goes to an extraordinary length, and I desire to reserve my opinion whether it can be justified or not.

(1) I.R. 11 C.L., 522.

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Per Curiam. It is not the practice of the Court to grant costs of the appeal in such a case. It may be of great importance to the appellant to have the matter decided, but it is not of such importance to the other side.

Appeal allowed. Order appealed from discharged. Case remitted to the magistrate for determination. Respondent to pay the costs in the Supreme Court.

Solicitor, for the appellant, *The Crown Solicitor of New South Wales.*

Solicitor, for the respondent, *J. W. Abigail.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

SWAN AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

RAWSTHORNE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 24; *May* 12, 18.

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

Vendor and purchaser—Assignment of leasehold—Agreement by purchaser to allow vendor to retain portion under sub-lease—Agreement by vendor to erect improvements—Delay on part of vendor—Right of vendor to specific performance—Compensation—Action by purchaser against vendor for trespass—Injunction.

The holder of a Crown lease agreed in writing to assign the leasehold and stock thereon subject to a condition that he should be entitled to retain a portion of the area on lease from the purchaser, who was to give him a