and so deprive the public of the right to be heard. Sec. 25 does not give an independent and summary jurisdiction to the Court, but is a restriction on the Registrar. Application must be made to him in the first instance and the ordinary procedure on trade mark applications followed, and the Registrar may refer the matter to the Court ultimately under sec. 25. Otherwise the protection intended by the Act to be given to the public by means of publication and notice would be lost.

Leverrier K.C. In deference to your Honor's ruling we withdraw our application under sec. 28 for leave to amend.

Application withdrawn.

Solicitors, for applicant, *Mark Mitchell & Forsyth.*
Solicitors, for respondents, *Barnes & Laurence.*

[*Ex relatione* J. A. Ferguson, Esq., Barrister-at-Law.]

[HIGH COURT OF AUSTRALIA.]

HEDBERG . . . . . APPELLANT;
INFORMANT,

AND

WOODHALL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

Information—Offences—Charge of having in "possession or control"—One offence only—Information disclosing more than one offence—Right of election—Duty of magistrate—Fisheries Act 1889 (*Tas.*) (53 *Vict. No.* 11), *sec.* 36—*Magistrates Summary Procedure Act* 1855 (*Tas.*) (19 *Vict. No.* 8), *secs.* 1, 10.

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HEDBERG v. WOODHALL.

Practice — High Court — Appeal from Supreme Court of State — Security for costs — Notice to respondent of lodging security — Delay in giving — Rules of the High Court 1911, *Part II., Sec. III., r.* 12.

Sec. 36 of the *Fisheries Act* 1889 (Tas.) makes it an offence for a person to have in his "possession or control" fish under a certain size

Held, that on the construction of this section a charge of having in "possession or control" is not a charge of two separate offences.

Semble: When an information charges two offences it is the duty of the magistrate to tell the informant of his right of election to proceed on either charge.

Decision of the Supreme Court of Tasmania: *Hedberg* v. *Woodhall*, 8 Tas. L.R., 66, affirmed.

Where security for the costs of an appeal has been duly lodged within the time prescribed by the *Rules of the High Court* 1911, Part II., Sec. III., r. 12, the appeal will not be struck out merely because the appellant has not given the respondent notice of the lodging of the security until after such time had expired.

APPEAL from the Supreme Court of Tasmania.

The respondent was charged under sec. 36 of the *Fisheries Act* 1889 (Tas.) with unlawfully having in his "possession or control" flounders of a size less than that prescribed. After the evidence for the prosecution was given the respondent took the objection that the information was bad in that it disclosed two offences. The magistrate upheld the objection, and dismissed the information. The Full Court, on appeal by way of special case, dismissed the appeal: *Hedberg* v. *Woodhall* (1).

Special leave to appeal to the High Court against the decision of the Supreme Court was granted to the informant on 23rd September 1912, and notice of appeal was served on 11th October. The security for the costs of the appeal was lodged on 16th October, but notice of its having been lodged was not served upon the respondent until 31st January 1913.

A preliminary application was now made on behalf of the respondent to have the appeal struck out on the ground that it was not properly instituted.

Shields, for the respondent. Under the *Rules of the High Court* 1911, Part II., sec. III., r. 12, the appellant should have given the security and the notice thereof within three months

(1) 8 Tas. L.R., 66.

after the service of the notice of appeal. The giving of the security is not complete until the notice is given, and the rule provides that if the security is not given within the prescribed time, the appeal is to be deemed to be abandoned.

THE COURT dismissed the application, and proceeded to hear the appeal.

Dobbie, Solicitor-General for Tasmania, for the appellant. The information does not disclose two offences, but merely one. "Possession" includes "control": *Gleeson* v. *Ah Houn* and *Gleeson* v. *Ah Yen* (1). In *Johnson* v. *Needham* (2) the information, which was under the *Cruelty to Animals Act*, was for cruelly ill-treating, abusing and torturing.

Even if alternative offences are disclosed in this information, the magistrate should have called upon the prosecutor to state which of them he was proceeding on, and should not have dismissed the information.

The *Magistrates Summary Procedure Act* 1855 (Tas.), sec. 1, provides that no objection is to be taken or allowed to any information or complaint for any alleged defect in substance or in form. At the most, the defect here (if any) is such a defect as is within that section.

Consequently, the Supreme Court should have remitted the case to the magistrate, with an expression of opinion that it should not have been dismissed.

Shields, for the respondent. The point as to the identity of the offences is now raised for the first time: it has been hitherto agreed that these words "possession or control" clearly suggested two offences. There is a marked legal distinction between "possession" and "control": *Stephen's Digest of Criminal Law*, 4th ed., p. 221; *Cotterill* v. *Lempriere* (3); *R.* v. *Wells and Another, Justices*; *Ex parte Clifford* (4). If there are two terms used which are not co-extensive, though one may necessarily include the other, there are two different offences: *Rodgers* v. *Richards* (5).

(1) 22 V.L.R., 156; 18A.L.T., 44.
(2) (1909) 1 K.B., 626.
(3) 24 Q.B.D., 634.
(4) 91 L.T., 98.
(5) (1892) 1 Q.B., 555.

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If there are alternative offences expressed in the information, the information is bad: *Marshall* v. *Lane* (1). The assumption is that there were two offences: *R.* v. *Rawson* (2).

The only point raised previously was whether the magistrate should not have called upon the informant to elect on which charge he would proceed. It is the duty of the informant to apply to be allowed to elect.

The case is not one of such importance as to warrant the granting of the leave to appeal, and it should be rescinded.

Dobbie, in reply. *Rodgers* v. *Richards* (3) concludes this case.

GRIFFITH C.J. The *Fisheries Act* makes it an offence for a man to have in his "possession or control" fish of a size less than that prescribed by regulation.

A complaint was made against the respondent for having in his "possession or control" certain flounders less in size than that prescribed. After the evidence for the prosecution had been given, objection was taken that the information disclosed two offences, one having the fish "in his possession" and the other having them "in his control." The magistrate thought that he was bound to give effect to the objection, and dismissed the information. An appeal to the Supreme Court by special case was dismissed, and we are now asked to say that the Supreme Court was wrong.

Although the point seems at first sight to be small and unimportant, a little consideration will show that it is not so.

Up to the end of the first half of last century innumerable objections could be taken in cases before magistrates. Then came the Acts called *Jervis's Acts*, which did away with many of them. One of those Acts, 11 & 12 Vict. c. 43, which was adopted in Tasmania by 19 Vict. No. 8, provides (sec. 1) that no objection shall be taken or allowed to any information for any alleged defect therein in substance or in form. That apparently means that if objections are taken which really do not go to the merits of the case the magistrate is not to stay his hand, but to

(1) 1 N. & St. (Tas.), 135. (2) (1909) 2 K B., 748.
(3) (1892) 1 Q B., 555.

proceed to dispose of the case on the merits. A later section (sec. 10) provides that a complaint must be for one matter only, and not for two or more. It was held by the Court of Queen's Bench in the case of *Rodgers* v. *Richards* (1), that the joining of two offences in one complaint, although contrary to the Act, is a defect in substance or form within the meaning of sec. 1, and does not justify the magistrate in refusing to give judgment in the case.

The objection to the information has been treated as one of duplicity, but I am not sure that the objection is not rather of uncertainty.

The charge was in form in the alternative, and not in the conjunctive, whereas in *Rodgers* v. *Richards* (1) the charge was in the conjunctive. But the objection, however it is described, is equally an objection of a defect in substance or form. I venture to say that I think that decision a most rational one.

That would be enough to dispose of this case, and to justify us in saying that the magistrate should not have dismissed the information, but should have gone on and decided whether the defendant was guilty of having undersized fish in his possession, or of having them in his control, or was not guilty of either charge. I have assumed so far, as the magistrate seems to have assumed, that the information alleged two offences. A little consideration, however, will show that in substance there was only one charge, namely, having the fish in his control, with or without possession. For if the defendant had them in his possession, they were, necessarily, in his control. Possession is a larger term, and involves control; so that the charge of having in possession involves the charge of having in control. I am speaking, of course, of the *Fisheries Act*, and do not mean that the construction would be the same in a different context. If, therefore, the respondent had been convicted of having fish in his "possession or control," he would, in effect, have been convicted of having them in his control, with or without possession.

If different penalties were attached to possession and control, the result would be different, but under the Statute the penalty is the same in either case.

(1) (1892) 1 Q.B., 555.

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As, however, this point was apparently not taken before the magistrate or before the Supreme Court, I do not think that it would be proper to allow the appeal on this point only. If there were no more in the case, the leave to appeal should be rescinded.

I should add that, when an information charges two offences, it is the duty of the magistrate, if he thinks so, to tell the informant, and to inform him of his right of election, and ask him on which charge he desires to proceed. But in the case of an illiterate or ignorant complainant (and I suppose there are many such), if he does not know what to do, that would not, in my opinion, relieve the magistrate from his duty to hear the evidence and form his own conclusion as to whether either of the offences charged is proved.

For these reasons I think that the appeal should be allowed, that the question submitted should be answered by saying that the information was not rightly dismissed, and that the case should be remitted to the magistrate for decision upon the merits on the evidence, in accordance with this judgment.

BARTON, J. I concur and will not add anything to what has already been said by the learned Chief Justice.

ISAACS J. First of all, on the point that was taken in the Supreme Court I agree that the case of *Rodgers* v. *Richards* (1) is a good authority to show that on the assumption that two distinct offences were intended by the legislature, one in respect of possession and the other in respect of control, the wrong course was adopted by the magistrate. The words of the first section in the *Magistrates Summary Procedure Act* are, I think, perfectly plain, and the objection, as a vital objection, was untenable.

The magistrate appears to have held that the contention as to two distinct offences was well founded, and thereupon thought his only course was to dismiss the information. In my opinion that was an erroneous course to adopt, and, on the assumption of distinct offences, he should have asked the prosecutor to elect. If the prosecutor had then refused to elect, I am not prepared at the present moment to say what the magistrate should have done.

(1) (1892) 1 Q.B., 555.

But that difficulty does not arise, because, as I have already said, it was not his duty to dismiss the information.

As we have to decide this case, and as it is to go back to the magistrate with an intimation of the Court's opinion, I do not see how we can avoid giving our opinion as to whether the words "possession or control" do create two offences or only one offence. It is clear that the legislature had no intention of creating two offences. Sec. 35 creates an offence for buying, an offence for selling, an offence for causing to be bought, and an offence for causing to be sold, an offence for offering, also an offence for exposing for sale. Then come these words "have in his possession or control" any fish. The essence of that is the *having*, and the words "possession or control" seem to me to be quite subsidiary words, the legislature indicating that it is immaterial to them which it is, so long as the person is shown to "have" the fish.

If secs. 36, 37 and 38 are looked at, where these words "possession or control" are repeated, this view is made quite evident.

Sec. 38 towards the end contains these words, "the fact . . . of being in possession or control as aforesaid," which manifestly indicate the unity of the offence, and the immateriality in the mind of the legislature, for the creation of the offence, whether the accused has "possession" or "control."

For these reasons I think that the appeal should be allowed.

Appeal allowed. Order appealed from discharged except as to costs. Case remitted to magistrate with intimation of opinion that he should proceed to adjudicate upon the charge consistently with this judgment. Appellant to pay costs of appeal.

Solicitor, for appellant, *L. J. Hobkirk*, Crown Solicitor for Tasmania, Hobart.

Solicitor, for respondent, *T. Shields*, Launceston.

N. McG.