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THE KING v. REGISTRAR OF TITLES (VICT.)

EX PARTE THE COMMONWEALTH.

Solicitor, for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor, for the Registrar of Titles, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

PLUMB . . . . . APPELLANT;
COMPLAINANT,

AND

TRITTON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *July* 26; *Aug.* 2.

Isaacs, Gavan Duffy and Powers JJ.

Health—Adulterated food—Sale—Exposing for sale—Offence—Proof—Requirements of Statute—Samples—Analysis—Health Acts 1900-1911 (*Qd.*) (64 *Vict. No.* 9 —2 *Geo. V. No.* 26), *secs.* 91, 102, 103, 104, 111, 111D.

Sec. 91 of the Health Act (Consolidated), which provides that "No person shall sell any food or drug or article which is adulterated," &c., is a general section constituting an offence which is *primâ facie* provable in the ordinary way, and there is nothing in the Health Acts requiring such offence to be proved in any other way than by the ordinary methods and rules of evidence as known to the common law or enacted by way of general application in the Evidence Acts.

Sec. 103 empowers an officer under the Act to demand and take or obtain samples of any food or drug or article for the purposes of the Act from any person selling the same; under sec. 104 an officer so taking or obtaining such sample is to divide it into three parts, and offer one part to the person from whom he took or obtained the sample, and deliver another part to an analyst, and retain the third part; and sec. 111D enacts that on the hearing of a complaint, "the Court shall on the request of either party to any proceedings for an offence against this Part" (which includes sec. 91), "and may, if it thinks fit, without such request, order the Commissioner to procure that the

part of a sample retained by the officer when purchasing or obtaining the sample shall be submitted to another analyst for analysis; and the Commissioner shall comply with every such order accordingly."

To prove an offence under sec. 91 analysis is not an essential, or even a reasonable, mode of proof in every prosecution where a penalty is sought for selling adulterated food, &c., in contravention of the Health Act, but such offence may be proved by other satisfactory evidence.

Sec. 111D means that where the powers given in sec. 103 have been put in force, not only must sec. 104 be observed, but the object of that section may also be effectuated, if desired, by sec. 111D.

In a prosecution for selling (by exposing for sale) adulterated food in contravention of sec. 91 of the Health Act, evidence was given that the complainant, a duly authorized inspector, entered the defendant's premises, and, on examining some gin there exposed for sale, found it below the regulation standard of strength, and thereupon divided it into two parts—one of which he gave to the defendant, and the other he took away with him and sent to the State analyst, who gave evidence that the gin had been reduced, by the addition of water, below the prescribed standard. The defendant, relying upon secs. 104 and 111D, applied for the dismissal of the case. The Magistrate refused the defendant's application, and convicted and fined him.

Held, that the defendant had been rightly convicted.

Decision of the Supreme Court of Queensland: *Plumb* v. *Tritton*; *Ex parte Tritton*, (1914) S.R (Qd.), 239, reversed.

APPEAL from the Supreme Court of Queensland.

On a complaint by Mark Plumb, a duly authorized inspector under the *Health Acts* 1900-1911 (Qd.), the defendant, Joseph W. Tritton, was prosecuted for selling (by exposing for sale) adulterated food, to wit, gin. At the hearing, evidence was given for the complainant to the following effect:—Having entered the defendant's premises on the occasion in question, he examined some gin there exposed for sale, and found it below the authorized standard of proof; he took a sample in the defendant's presence, and divided it into two parts—one of which he gave to the defendant, and the other he retained and afterwards sent to the State analyst; the analyst's certificate and evidence showed that the gin had been adulterated by the addition of water which reduced the strength of the liquor below the regulation standard. The defendant's counsel asked for a dismissal of the complaint on the ground that the officer had not divided the sample taken for analysis into three parts as

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prescribed by sec. 104, and he called for the production of the third sample, contending that under sec. 111D the defendant was entitled to an independent analysis of this third sample, and that the dividing into three parts and the production of the retained third part, if required, were conditions precedent to a conviction. The Magistrate refused a dismissal. The defendant called no evidence, but stood upon his objections. The Magistrate convicted and fined him.

Subsequently the defendant obtained an order *nisi* to quash the conviction on the following grounds :—

(1) Upon the request of the defendant the Court did not order the Commissioner to procure that the part of the sample retained by the officer when purchasing or obtaining the sample should be submitted to another analyst for analysis.

(2) There was no evidence on which the Court could convict.

(3) The said Mark Plumb did not, as provided by sec. 104 of the *Health Acts* 1900-1911, divide the sample into three parts and mark and seal or fasten up each such part in such manner as its nature permitted, and offer one of such parts to the said Joseph W. Tritton, from whom he took or obtained the sample, nor did he subsequently deliver another of such parts to an analyst and retain the third of such parts.

The Full Court of Queensland held that the defendant had been wrongly convicted, and quashed the conviction : *Plumb* v. *Tritton*; *Ex parte Tritton* (1).

From this decision the complainant now, by special leave, appealed to the High Court.

T. J. Ryan, A.-G. for Queensland, and *Fahey*, for the appellant. Sec. 111D applies only where the health officer is acting under secs. 103 and 104. The appellant, being an officer authorized to do what he is allowed to do under sec. 102 and prove the adulteration in that way, it is not necessary for him to comply with sec. 111D. [Counsel referred to *Rouch* v. *Hall* (2) ; *Monro* v. *Central Creamery Co. Ltd.* (3) ; *Buckler* v. *Wilson* (4).]

(1) (1914) S.R. (Qd.), 239.
(2) 6 Q.B.D., 17.
(3) (1912) 1 K.B., 578.
(4) (1896) 1 Q.B., 83, at p. 90.

Stumm K.C. and *Wassell*, for the respondent. The procedure of sec. 104 is a condition precedent to a conviction. The appellant might have seized the adulterated food under the powers in sec. 102, and have taken proceedings for forfeiture (sub-secs. 5 and 6), but he had no power to prosecute for a penalty. Sec. 104 requires a division of the sample into three parts, and the production of the third portion of the sample is required by sec. 111D. [Counsel also referred to the following :—Secs. 91, 102, 103, 111A, 111B, 111C of the Health Acts ; *Gunner* v. *Payne* (1) ; *Smart & Son* v. *Watts* (2) ; *Barnes* v. *Chipp* (3).]

Cur. adv. vult.

The judgment of the COURT, which was read by ISAACS J., was as follows :—

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The respondent was proceeded against under the *Health Acts* 1900 to 1911 for a penalty for exposing for sale certain gin which was adulterated in contravention of law.

So far as the actual facts of contravention are concerned they are fully proved, and indeed, are not denied. The gin, which was called "schnapps" contained at least 28 per cent. of added water.

The defence rests upon one point only, namely, that the Legislature has required, as an indispensable element in the proof of the case, that secs. 103, 104 and 111D shall be complied with. The judgment of the Supreme Court proceeded upon the view that compliance with those sections is a necessary step in every case of prosecution for a penalty for selling adulterated food or prohibited food wherever analysis is relevant, whether it is necessary or not. This conclusion was reached on the grounds that the opposite conclusion had no words to support it, that the language of sec. 111D is *primâ facie* opposed to it, and that to give effect to it would render secs. 104 and 111D of no use, and might lead to an injustice to the subject.

That view was, during the argument before us, ultimately limited to this : that compliance with secs. 103 and 104, and, therefore, with sec. 111D, is required where analysis is necessary to establish the contravention charged. Apart from the difficulty of formulating

(1) (1908) V.L.R., 363 ; 29 A.L.T., 264.
(2) (1895) 1 Q.B., 219.
(3) 3 Ex. D., 176.

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a rule as to the cases where there is necessity for analysis, the admitted limitation really concedes the main principle relied on for the appellant, and finds no sufficient ground to rest on as an exception.

It is true, as pointed out by the Full Court, that the Statutes now under consideration do not follow any other single enactment, but are taken partly from English and partly from diverse State enactments, and, therefore, that the cases decided on those enactments afford very little assistance. So far as they are relevant they tend—as in *Buckler* v. *Wilson* (1)—to favour the appellant's contention.

The learned Judges add, with perfect accuracy, that the intention of the Legislature is to be ascertained from the language it has used.

The Act is one of a remedial nature for the preservation of the public health and the suppression of deception, particularly in cases where individuals are practically helpless to detect it. There is no reason for any special rigidity in construing the words of the Legislature. They should have their full and fair natural meaning, both on the side of the public, whose interests are to be conserved, and on the side of the individual, whose conduct is to be restrained.

The central provision relevant to the present case is sec. 91, which stands in these terms :—"No person shall sell any food or drug or article which is adulterated or falsely described, or which is packed or enclosed for sale or labelled in any manner contrary to this Act."

Sec. 111 enacts a penalty not exceeding £20, for a first offence; for a second offence a penalty of not less than £10 and not more than £50, and for any subsequent offence a penalty of not less than £30 and not more than £100. If the offence is wilful or culpably negligent, imprisonment with or without hard labour up to 12 months may be awarded.

By sec. 111A the goods are liable to forfeiture. There are some provisions, as in sec. 111C, which make legal evidence that which would not be evidence at common law, and, as in sec. 111F, which cast the burden of proof where it would not rest at common law; but there

(1) (1896) 1 Q.B., 83.

is nothing in the Acts which says that the facts constituting the offence, as that is declared in sec. 91, cannot be proved by the ordinary methods and rules of evidence as known to the common law, or enacted by way of general application in the Evidence Acts. The conclusion that there is such a restriction is one derived entirely from inference, which, on a construction of the enactment by ordinary principles of interpretation, is not found to be justified.

In the first place, it seems to us, with very deep respect, that the Supreme Court have overlooked the full meaning of the word "adulterated" as that word is used by the Legislature, and possibly this is the main cause of the interpretation adopted. Sec. 91 uses expressions in a short form, which have to bear expanded meanings by reason of the artificial interpretations attached to them by secs. 5 and 90. Thus "sell" includes many things not being a sale, and among others "exposing for sale." "Food" includes drink; and "adulterated" goes far beyond what is ordinarily meant by adulteration—among other things it connotes also dilution, deterioration, non-compliance with a standard, filthiness, decomposition, disease and unfitness for food. "Falsely described" includes a mis-statement of weight or measure on the outside of the package or on a label, and also the omission on imported goods of the trade or other description required by Commonwealth laws on imported articles.

From the nature of the provisions of sec. 91 as expanded, it is therefore abundantly evident that analysis cannot be an essential, or even a reasonable, mode of proof in every case of "adulteration," if we give to that word, as we must, its statutory signification. Analysis would be absolutely foreign to many cases of statutory "adulteration." It follows that it cannot be maintained that, giving full effect to that word, the provisions of secs. 104 and 111D are always necessary or relevant where a penalty is sought for selling "adulterated" food. From the standpoint of common-sense, upon which the ordinary rules of law are based, it is also manifest that, except where a specific standard is set, the exactness of analysis, however satisfactory in many instances, cannot be essential; the evidence of credible witnesses who saw the actual

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operation of dilution might conceivably, in a controverted case, be thought more decisive.

Learned counsel for the respondent did not attempt eventually to support so wide a proposition as that on which the judgment is founded, and the narrower view already adverted to has to be considered, namely, that wherever analysis is necessary it must be accompanied by the safeguards prescribed by sec. 104. His main reliance for this was the language of sec. 111D, and especially the word "obtaining," which he, no doubt rightly, said did not necessarily imply a purchase. His contention on this point was that the defendant had in all cases of prosecution for a penalty a right to the benefit of sec. 111D, and this involved of necessity the application of sec. 103, and the procedure of sec. 104.

It is true that the word "obtain" is not found at all in sec. 102 and is the very word used in sec. 103. The words "obtaining" and "obtained" are employed in sec. 104 as applicable to sec. 103 alone, and are strictly referable to that section. The scheme of sec. 103 is that there shall be what is in effect a compulsory sale. Payment is to be made or offered. If accepted, there is an actual sale; if not accepted, the offer still remains, but delivery cannot be refused.

The officer may, by sub-sec. 1, "demand and select and take or obtain samples" &c. So that, looking simply at the word "obtaining" in sec. 111D, it is *primâ facie* referable, more particularly when used in collocation with "purchasing," to sec. 103. This is strengthened by the words "part" and "retained," which have a distinct reference to sub-sec. 2 of sec. 104, and are not found in sec. 102. In the last mentioned section a totally different and independent scheme is enacted—so different as to be incapable of being worked in conjunction with sec. 103. The two are inconsistent.

In the first place, sec. 103 is a self-executing grant of power to every "officer" *virtute officii*. He has to proceed by way of purchase, and by that way only. He has to divide the sample into three parts—one to keep, one to analyse, and one to offer to the owner. Sec. 102, on the other hand, comes into operation only when a special authority—general or particular—is conferred on an officer. No power of purchase can be given except in the case of spirits, and

if he "removes or seizes" any article he must forward or deliver a portion to the consignor or manufacturer, if his name and address in Queensland are on or attached to the article, and, if not, then, and then only, to the owner. In cases of liability to decomposition, that portion may be placed in cold storage, and notice given. The whole of the other portion may obviously, where analysis is required, be utilized for that purpose, and nothing is required to be retained by the officer. So different is the process that it is not reasonably conceivable that the Legislature should have intended to include it in the phrase "part of a sample retained by the officer when purchasing or obtaining the sample." But does it follow that because sec. 111D can only be applied where the powers of sec. 103, and the consequent procedure under sec. 104, have been pursued, that sec. 111D can always be insisted on; or does that section mean that where sec. 103 has been put in force, that not only must sec. 104 be observed, but that the object of the provision in that section as to retaining a part of the same may be effectuated, if desired, by means of sec. 111D? We think the latter view is the correct one. The language of the section is "the part of *a* sample . . . retained when purchasing or obtaining *the* sample." The article "a" is equivalent to "any," and the phrase means that where a sample has been purchased or obtained—that is, under sec. 103—then the part of *the* sample so purchased or obtained "may be dealt with as provided in that section." But it is all dependent upon and ancillary to sec. 103, which is the governing section, and, if that section has not been used, sec. 111D has no application. The contrary view makes sec. 111D the governing section, the others being rendered really dependent upon or ancillary to sec. 111D—a view we cannot accept even on the ordinary meaning of the words as they stand.

But, further, the fact is important that the Legislature has considered what, in case of analysis, when sec. 102 is put in force, is sufficient protection for the individual, and has enacted a specific method of protection where such analysis may be necessary or relevant. The circumstance is, according to recognized canons of interpretation, sufficient to exclude the inference that, because another method is attached as a condition to another scheme which

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it is not found necessary to employ, that other method is always to be insisted on in addition. It is obvious that the information obtained by the exercise of the powers under sec. 102 is not to be confined to forfeiture, because par. (*d*) of sub-sec. 6 relating to unwholesome utensils relates to forfeiture of any pipes for drawing beer, forbidden by sec. 99A, sub-sec. 2, and yet it would be impossible to contend that the information obtained under sec. 102 could not be disclosed on a prosecution under sec. 99A for a penalty under sec. 111. The forfeiture under sec. 102 is incurred where food is unfit for consumption by man, or where a drug is unfit for use, or an article is a prohibited article. The first two are instances of "adulteration" as defined by sec. 90, and the last may be. It is difficult to believe that where an officer is specifically authorized to inspect, and does inspect, for the very purpose of ascertaining whether those forms of adulteration exist, and of securing samples for analysis, and at the same time of following a prescribed course to protect the owner, although the fact is thereby legally ascertained and proved so that forfeiture follows, the law should decline to recognize the same fact, proved in the same way, for the purpose of a fine.

The whole case resolves itself then into these simple elements, which respect for the Court from which we are differing has led us to elaborate. Sec. 91 is a general section constituting an offence, *primâ facie* provable in the ordinary way. Sec. 102 is a specific potential power to acquire information and also to forfeit property, and when exercised its conditions must be strictly observed.

But though forfeiture might not for some reason result, the knowledge obtained by the officer is not obliterated, or declared useless for other purposes. It might be proved on an indictment, or in proceedings by a private individual.

Sec. 103 is another independent optional power to acquire information and evidence, and when exercised its conditions must also be strictly observed. But neither sec. 102 nor sec. 103 is inherently essential to the establishment of the offence under sec. 91. If, for instance, an actual sale takes place voluntarily to any person, he is free from both (see *Halsbury's Laws of England*, vol. xv., p. 12, notes (*t*) and (*a*)); he may submit his purchase to an analyst

(sec. 32) and he may prosecute (sec. 179): and if the owner cannot insist on the condition in the case of a private purchaser, it is not because he is not an officer, but because he has not put in force the special powers to which the condition is attached. On the same principle, an officer who has not put in force those powers is equally free from the attendant condition.

For these reasons, the ground upon which the decision appealed from rests cannot be maintained, and the appeal should be allowed.

Appeal allowed, without costs. Rule nisi to quash conviction discharged, with costs. Conviction and order of Police Magistrate restored.

Solicitors, for the appellant, *T. W. McCawley*, Crown Solicitor for Queensland.

Solicitors, for the respondents, *Morris, Fletcher & Jensen.*

R. G.