

## [HIGH COURT OF AUSTRALIA.]

HENDY . . . . . APPELLANT;  
 DEFENDANT,

AND

RIDER . . . . . RESPONDENT.  
 INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF  
 VICTORIA.

*Public Health—Offensive trades—Marine stores—Health Act 1915 (Vict.) (No. 2665), sec. 286.* H. C. OF A.  
 1919.

Sec. 286 of the *Health Act 1915* (Vict.) provides that "Any person (1) who establishes or carries on within any city town borough or shire without the consent in writing of the council thereof any of the trades businesses or occupations usually carried on in or connected with the undermentioned works or establishments (that is to say) . . . marine stores . . . or any trade business process or manufacture whatsoever causing effluvia offensive fumes vapours or gases . . . or any other noxious or offensive trade business or manufacture . . . shall be guilty of an offence," &c.

MELBOURNE,  
 March 7.

Isaacs,  
 Higgins and  
 Gavan Duffy JJ.

*Held*, that the business of dealing in bottles and old metals was a business usually carried on in or connected with marine stores within the meaning of the section, notwithstanding that it was carried on in such a manner as not to be offensive, and, therefore, that the carrying on of the business without the consent of the local council was an offence against the section.

Decision of the Supreme Court of Victoria (*Irvine C.J.*): *Rider v. Hendy*, (1918) V.L.R., 280; 39 A.L.T., 195, affirmed.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Prahran an information was heard whereby Henry Rider charged that A. A. Hendy "did carry



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on the business of a marine store without the consent in writing of the Council of the City of Prahran.” Evidence was given by the informant to the effect that the defendant was carrying on the business of a marine store at Duke Street, Windsor, but had not got the written consent of the Council of the City of Prahran ; that the informant had frequently visited the defendant’s premises and seen collectors bringing in bottles and old metals which the defendant purchased from them ; that the defendant had a licence as a dealer in special wares under the *Marine Stores and Old Metals Act* 1915, that the defendant’s premises were clean, and that there was nothing offensive there ; and that there was a notice posted on the defendant’s premises in the following words :—“ No rags, bones or fat bought. Please do not bring them in the yard. Only bottles and metals bought.”

The magistrates having dismissed the information, the informant obtained an order *nisi* to review their decision on the grounds that on the evidence before the Court of Petty Sessions the defendant should have been convicted, and that the evidence showed that the written consent of the Council of the City of Prahran was necessary before the business carried on by the defendant could be legally carried on. On the return of the order *nisi*, *Irvine C.J.* made it absolute, and remitted the case to the Court of Petty Sessions for rehearing with the expression of his opinion that the defendant’s premises were an establishment which would ordinarily be called a marine store and was therefore one which, whether offensive or not offensive, was intended to be covered by sec. 286 of the *Health Act* 1915 : *Rider v. Hendy* (1). During the course of his judgment the learned Chief Justice stated that, in his opinion, “ the expression ‘ marine stores ’ now means places or (using the expression in the Act) establishments to which are brought by the marine dealers or others old used-up materials of various kinds, which are collected or purchased from wherever they can be obtained, and are kept for sale, unconnected with any other definite trade or business.”

From the decision of *Irvine C.J.* the defendant now, by special leave, appealed to the High Court.

(1) (1918) V.L.R., 280 ; 39 A.L.T., 195.



*H. I. Cohen*, for the appellant. The meaning of places called "marine stores" in sec. 286 of the *Health Act* 1915 is not governed by the definition of things called "marine stores" in sec. 3 of the *Marine Stores and Old Metals Act* 1915. The latter Act had an entirely different object from that of the *Health Act*, namely, to regulate the dealing in articles which were often stolen. Sec. 286 is in Part X. of the Act, which is headed "Nuisances," and is in Division 2 of that Part, which is headed "Offensive Trades," and by sec. 10 of the *Acts Interpretation Act* 1915 the headings of Parts and Divisions are to be deemed to be parts of the Act. Sec. 286 must therefore be interpreted as referring only to businesses which are in fact offensive, as all the other businesses mentioned in the section are.

[*HIGGINS J.* In *Pope v. Franklin* (1) it was decided that it is not necessary to prove that all the occupations usually carried on at the establishment in question were carried on.]

Although the word "marine store" in its wide sense may include places where bottles and old metals are dealt in, that meaning should be cut down so as to limit it in accordance with the purpose of sec. 286 (*Ingham v. Hie Lee* (2); *Garnett v. Bradley* (3); *R. v. Tomlinson* (4)). That sec. 286 was aimed at noxious and offensive trades is shown also by sec. 287. The magistrates must be taken to have determined, as they were entitled to do, that the business of the appellant was not one usually carried on at marine stores, and the Supreme Court should not have interfered with their decision. [Counsel also referred to *Toronto Corporation v. Toronto Railway Co.* (5).]

*Starke*, for the respondent. The fact that the information does not follow the language of sec. 286 is immaterial, as it might have been amended by the magistrates if any objection had been taken (see sec. 196 of the *Justices Act* 1915).

*ISAACS J.* We are of opinion that the appeal should be dismissed. The uncontroverted facts show that the appellant carried on the

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(1) 26 A.L.T., 170.  
(2) 15 C.L.R., 267.  
(3) 3 App. Cas., 944.

(4) (1895) 1 Q.B., 706, at p. 709.  
(5) (1907) A.C., 315, at p. 324.



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business of dealing in bottles and old metals and that he bought them from collectors of bottles and old metals. He held a licence under the *Marine Stores and Old Metals Act* 1915 as a dealer and to carry on the business of dealing in and buying and selling marine stores and old metals, and he thought it necessary to put up a notice that he did not buy rags, bones or fat, and requesting that those things should not be brought into his yard, and that he only bought bottles and metals. A witness deposed that the appellant carried on the business of a marine store. In itself that, of course, is not conclusive, but there was no objection to the evidence and it was not contradicted. The appellant himself did not give any evidence. The charge was dismissed by the magistrates, but on an order to review the Chief Justice of Victoria allowed the appeal, and remitted the case to the magistrates with the expression of his opinion that the establishment was one which would ordinarily be called a marine store. The learned Chief Justice, in the course of his judgment, stated his opinion as to what was the meaning of the expression a "marine store" within sec. 286 of the *Health Act* 1915. We do not think it necessary to say anything about that definition. We do not think that the definition was necessary for the case. The facts show that at all events the defendant carried on a business which under sec. 286 of the *Health Act* 1915 could not be carried on without the consent of the municipal council, because it was one which is usually carried on in or connected with establishments called marine stores. That business was carried on without that consent, the law was broken, and the order to review was rightly made absolute by the learned Chief Justice. This appeal should, therefore, be dismissed with costs.

HIGGINS J. I should like to add that the difficulty of this case vanishes when one reads carefully the opening words of sec. 286. There is no obligation to show that this was in all respects a marine store. It may have been, or it may not. Certainly the appellant did not do some things which are usually done at a marine store. It is quite enough to show that he carried on "any of the trades businesses or occupations usually carried on in or connected with . . . establishments" called "marine stores," and here he carried



on the business of dealing in bottles and old metals. I think that the case was, in substance, decided by *Hodges J.* in *Pope v. Franklin* (1). The very point was taken that it is not necessary to show that the defendant carried on all the occupations usually carried on in a boiling-down establishment.

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Appeal dismissed with costs.

Solicitor for the appellant, *D. C. Levy*.  
Solicitors for the respondent, *D. H. Herald & Son*.

B. L.

Cons  
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Minister for  
Education  
1994] 1 QdR  
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Rev  
McCawley v R  
(1920) 28  
CLR 106

Appl  
Min for Lands  
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133 LGERA  
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(1) 26 A.L.T., 170.

[HIGH COURT OF AUSTRALIA.]

McCAWLEY . . . . . APPELLANT ;

AND

THE KING AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF  
QUEENSLAND.

*Constitutional Law—Queensland—Judge of Supreme Court—Appointment—Tenure of office—Commission—Legislative power of Parliament—Judge of Court of Industrial Arbitration—Qualification—Barrister of five years’ standing—Industrial Arbitration Act 1916 (Qd.) (7 Geo. V. No. 16), sec. 6—Order in Council of 6th June 1859, clauses 2, 14, 15, 16, 22—New South Wales Constitution Act 1855 (18 & 19 Vict. c. 54), Sched. I, sec. 38—Constitution Act 1867 (Qd.) (31 Vict. No. 38), secs. 2, 15, 16, 17—Supreme Court Act 1867 (Qd.) (31 Vict. No. 23), secs. 9, 10—Supreme Court Acts Amendment Act 1903 (Qd.) (3 Edw. VII. No. 9), sec. 3—Colonial Laws Validity Act 1865 (28 & 29 Vict. c. 63), secs. 2, 3, 5—The Constitution (63 & 64 Vict. c. 12), sec. 103.*

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MELBOURNE,  
Sept. 10, 11,  
12, 27.  
Griffith C.J.,  
Barton, Isaacs,  
Higgins,  
Gavan Duffy,  
Powers and  
Rich JJ.

Sec. 6 of the *Industrial Arbitration Act* of 1916 (Qd.) by sub-sec. 1 establishes the Court of Industrial Arbitration; by sub-sec. 2 directs the Governor in Council, by commission, to appoint a Judge or Judges of that Court, one of