quashed, and that the costs of the appeal to Quarter Sessions and of the proceedings in the Supreme Court and in this Court should be paid by the Crown.

H. C. OF A. 1919.

THE KING v. YOUNG.

ISAACS, GAVAN DUFFY, POWERS and RICH JJ. agreed.

Rule nisi discharged. Conviction quashed. Crown to pay costs in all Courts.

Solicitor for the Crown, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *C. O. Smithers*.

B. L.

[HIGH COURT OF AUSTRALIA.]

SLATTERY . . . . . APPELLANT;
INFORMANT,

AND

BISHOP AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1919.

MELBOURNE, *Oct.* 31; *Nov.* 5.

Knox C.J., Isaacs, Gavan Duffy and Rich JJ.

Factories and Shops—Grocer, meaning of—Sale of articles usually sold by grocer—Evidence—Factories and Shops Act 1915 (*Vict.*) (No. 2650), *sec.* 226.

Practice (*High Court*)—*Appeal from Supreme Court of State—Special leave—Rescission—Question of fact.*

Held, by *Knox* C.J., *Isaacs* and *Rich* JJ., that a shopkeeper who habitually in the course of his business sells goods of a description usually sold by a given class of traders is not for the purposes of the *Factories and Shops Act* 1915 (Vict.) excluded from that class by reason of the fact that his business includes the sale of other articles to an equal or greater extent.

Held, therefore, by *Knox* C.J., *Isaacs* and *Rich* JJ. (*Gavan Duffy* J. dissenting), that where, on a prosecution under sec. 226 of the *Factories and*

H. C. OF A. 1919.

SLATTERY v. BISHOP.

Shops Act 1915 for that the defendants carried on the business of a grocer in which business no employee receiving not less than a certain wage was engaged, and employed an improver in connection with that business not being entitled under a certain determination of the Grocers' Board to do so, the evidence established to the satisfaction of the Magistrates that the defendants, who kept a ham and beef shop, habitually in the course of their business sold articles that are usually sold by grocers, it was not reasonably open to the Magistrates to decide that the defendants were not grocers.

The High Court will grant special leave to appeal in a proper case on a question of fact where that question is one of ultimate fact based on admitted facts and the object of the appeal is to secure uniformity in the administration of justice.

Decision of the Supreme Court of Victoria (*Hood* J.) reversed.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Caulfield an information was heard whereby John Joseph Slattery, an Inspector of Factories and Shops, charged that George James Bishop and William Robert Bishop, trading as Bishop Brothers, on 22nd March 1919, being a date subsequent to the coming into operation of the determination of the Grocers' Board, carried on the process, trade or business of a grocer, in which process, trade or business no employee receiving not less than 65s. per week of 48 hours was engaged, and that they unlawfully employed in connection with such process, trade or business, one improver, William Borlase, they under the provisions of the determination of the Board not being entitled to employ in such process, trade or business, any improver. The prosecution was under sec. 226 of the *Factories and Shops Act* 1915 (Vict.). After hearing evidence the Magistrates dismissed the information, holding that the defendants did not carry on the business of a grocer. The informant obtained an order *nisi* to review that decision, which was discharged by *Hood* J., who held that the question whether the defendants carried on a grocery business was a question of fact for the Magistrates to decide upon the evidence, and that, as there was evidence to support their decision, the Supreme Court had no power to interfere with it.

From the decision of *Hood* J. the informant now, by special leave, appealed to the High Court.

The other material facts are stated in the judgments hereunder.

Shelton, for the appellant. A shopkeeper who sells articles which are habitually sold by a grocer is for the purposes of the *Factories and Shops Act* 1915 a grocer, whether he does or does not sell other articles and whether the sale of the first-mentioned articles forms a large or a small portion of his trade. The Act, in speaking of a particular kind of shop, means a shop in which a particular class of goods is sold. See secs. 77, 105 and 215, Fourth Schedule. [Counsel also referred to *Duncan* v. *Ellis* (1).]

Starke (with him *Dunlop*), for the respondents. The special leave to appeal should be rescinded. There is no matter of public interest involved. The decision under appeal lays down no principle of law. The only question is whether the respondents are grocers, and that is purely a question of fact (*Dorman Long & Co.* v. *Thomson* (2)). The question being one of fact, this Court should not interfere with the decision of the Magistrates. The fact that a shopkeeper sells one or more articles which is or are usually sold by a grocer does not make him necessarily a grocer.

Shelton, in reply.

Cur. adv. vult.

Nov. 5.

The judgment of KNOX C.J., ISAACS and RICH JJ., which was read by KNOX C.J., was as follows:—The appellant, an Inspector of Factories and Shops, laid an information under the *Justices Act* 1915 against the respondents charging them with an offence against sec. 226 of the *Factories and Shops Act* 1915, in that they "at Hawthorn Road in the City of Caulfield in the said Bailiwick and State on the 22nd day of March 1919 being a date subsequent to the coming into operation of the determination of the Grocers' Board hereinafter referred to carried on the process trade or business of a grocer in which process trade or business no employee receiving not less than 65s. per week of 48 hours was engaged and who further saith that the said defendants did then and there unlawfully employ in connection with such process trade or business one improver that is to say one William Borlase they the said defendants under the provisions of the determination of

(1) 21 C.L.R., 379, at pp. 382, 385.
(2) 21 C.L.R., 124; (1916) V.L.R., 13; 37 A.L.T., 129.

H. C. OF A. 1919.

SLATTERY v BISHOP.

Knox C.J. Isaacs J. Rich J.

the Grocers' Board not being entitled to employ in such process trade or business any improver."

It was proved that a board had been appointed under the *Factories and Shops Act* to determine the lowest prices or rates which might be paid to any person or classes of persons employed in the business of "a grocer including a seller of tea," and the determination of that board was put in evidence.

Having heard oral evidence, the Court of Petty Sessions dismissed the information on the ground that on the evidence the defendants were not brought within the description of "grocers including sellers of tea." It was admitted before the Magistrates and before us that if the defendants were included in this description the offence charged had been committed.

The facts proved in evidence with reference to the nature of the business carried on by defendants may be summarized as follows:— The shop of the defendants is a mixed shop where they sell ham and beef, dairy produce and a few groceries. There is a grocer's shop next door to defendants' shop, and the business carried on in each of these shops is not in all respects similar. The groceries sold by the defendants are limited to certain lines—pickles, sauces, tinned fish, jam, and packet tea. They also sell bacon, butter, cooked meat, cheese and honey. A part of the groceries sold is delivered to customers. A shop of this description is classed as a grocer's shop under the *Factories and Shops Act* for the purpose of closing hours unless the occupier obtains a suspension under sec. 105 to enable him to keep open after the normal closing hours for grocers for the sale of cooked meat and dairy produce and the defendants have a suspension certificate. The stock of groceries is a very small one, mainly pickles and sauces, the stock amounting in value to £6 or £7. Only about ten pounds of tea is sold each week. The groceries are locked away on the shelves after grocers' closing hours. The suspension certificate was applied for on the advice of the Inspector. The defendants' shop is an ordinary ham and beef shop, which is said to be a different class of business from that of a grocer. A grocer's business is said to consist in handling goods of a heavier and bulkier nature, such as the sale of potatoes, sugar, kerosene and flour. The business of a ham and beef shop is stated

to consist mostly of handling small goods over the counter. There are shops whose business consists wholly or mainly in the handling of tea. Practically every ham and beef shop in Victoria sells butter, eggs, packet tea, pickles, sauce, tinned fish and jam. Before the Department registered the defendants' shop as a ham shop the representations made by the occupiers were investigated and found correct.

The Magistrates having dismissed the information, an order *nisi* to review their decision was obtained, and subsequently *Hood* J., after hearing argument, discharged the order on the ground that it was a question of fact for the Magistrates whether the defendants were carrying on a grocery business, and that as they had decided that the business was not a grocery business he had no power to interfere with their decision. From this order the informant appealed by special leave to this Court.

We agree that the question whether the business carried on by the defendants was that of grocers is primarily a question of fact; but we do not think that it is such a mere question of fact as to prevent the informant from challenging the decision of the Magistrates in a superior Court if the conclusion at which they arrived was not reasonably open to them on the evidence. There was no question of credibility of witnesses involved, nor any question of deciding upon conflicting evidence of facts. The facts were uncontradicted, and the real question which arose for decision was whether the shopkeeper who habitually sells groceries (*i.e.*, goods commonly sold by grocers) in the course of his business, notwithstanding the fact that his business includes the sale of other articles not usually sold by grocers, carries on the business of a "grocer." In our opinion, where the evidence establishes to the satisfaction of the primary tribunal that a shopkeeper habitually in the course of his business sells a number of articles that are usually sold by grocers, it is not reasonably open to that tribunal to decide that he is not a grocer; and this conclusion is strengthened in the present case by the fact that the defendants applied for a certificate of suspension to enable them to keep their shop open after the closing hour for grocers, and by the further fact that the groceries stocked were locked up when the shop was kept open after grocers' closing hours.

H. C. OF A. 1919.

SLATTERY v. BISHOP.

Knox C.J. Isaacs J. Rich J.

For these reasons we are of opinion that the decision of the Magistrates was wrong, and that *Hood* J. was in error in discharging the order *nisi* to review that decision. We do not rest our decision on the ground that the defendants were "sellers of tea," because no contention to that effect was raised before the Magistrates.

It was argued that the order granting special leave to appeal should be rescinded on the ground that the only question involved was one of fact to be decided on the evidence in this particular case, and that the matter was, consequently, not one of general importance. We cannot agree with this contention. While it is no doubt true that the decision in this particular case, as in every case, depends on the facts proved in it, we think it is of general importance that the law should be declared to be that a shopkeeper who habitually in the course of his business sells goods of a description usually sold by a given class of traders is not to be excluded from that class in the administration of the *Factories and Shops Act* by reason of the fact that his business includes the sale of other articles to an equal or greater extent. The primary facts are not contested, and the ultimate fact—*i.e.*, that the defendants carried on the business of grocers—is an irresistible inference from the admitted facts. It is a recognized function of a superior Court to review the decision of an inferior Court on a question of ultimate fact so as to secure uniformity in the administration of Acts of Parliament. The principle is illustrated by the judgment of *Collins* L.J. in *Fenn* v. *Miller* (1). One of the objects of legislation of this class is to put all dealers in a given class of goods on an equal footing with regard to closing hours and conditions of employment; and the necessity for this is illustrated by the present case, where the next-door neighbour of the defendants is a grocer with whom the defendants are necessarily in competition in respect of some of the articles in which they deal. The decision of the Magistrates in this case, if followed, would render the Act practically a dead letter in the case of a great number of shops in which goods of many different classes are sold.

In our opinion the Magistrates ought to have convicted the defendants, and we think the proper order to make is that the

(1) (1900) 1 Q.B., 788, at p. 792.

appeal be allowed, and the defendants be convicted of the offence charged and pay a fine of one shilling.

Special leave to appeal having been obtained on the undertaking of the appellant to abide by the order of this Court as to costs, we think the proper order to make in the circumstances is that the appellant do pay to the respondents their costs of this appeal.

GAVAN DUFFY J. read the following judgment:—In my opinion the special leave granted in this case should be rescinded. The determination of the Grocers' Board on 27th May 1918 is applicable to persons employed "in the business of a grocer including a seller of tea." The information under which the respondents were charged alleged that they carried on the business of a grocer, but did not allege that they were sellers of tea. Before evidence was called on their behalf in the Court of Petty Sessions, counsel for the prosecution stated that he did not contend that they were "sellers of tea" but relied on the fact that they carried on the business of a grocer. Their evidence was then heard and the information was dismissed. The presiding Magistrate, in announcing the decision of the Court, said that there was no doubt that the defendants, who carried on the business of a ham and beef shop, sold certain articles which are sold by grocers but this did not bring them within the term of "grocer" and the determination of the Grocers' Board did not apply to their shop. An order *nisi* was obtained to review this decision, and that order was discharged by *Hood* J., who held that the evidence before the Magistrates justified them in deciding as a question of fact that the respondents' business was not the business of a grocer. Special leave to appeal from the decision of *Hood* J. was given by this Court, and before us it was argued that the respondents did carry on the business of a grocer or, in the alternative, were sellers of tea.

I agree with *Hood* J. in thinking that there was evidence to support the Magistrates' decision; but even if we assume that the Magistrates were wrong in their finding of fact, and that the evidence showed that the respondents' business was that of a grocer, their error was merely that they found against the evidence in that particular case, and no special circumstances were disclosed which would

H. C. OF A. 1919.

SLATTERY v. BISHOP.

Gavan Duffy J.

justify special leave to appeal. The Magistrates, in their simplicity, thought that the light of nature, without any legal subtlety, would enable them to tell a ham and beef shop from a grocery, and *Hood* J. thought they had succeeded in doing so without barking their shins against any legal principle. Now we are told that they and he were wrong, and that the question is really as nice as a scholastic *quodlibet*. Common sense might do very well to start the inquiry, but when the Magistrates found the ham and beef counterpoised by a certain quantity of tea and pickles they were bound to direct themselves that the shop (like Nick Bottom) was "translated." As the Magistrates failed to distinguish the quiddity of a grocer from that of a ham and beef man, *Hood* J. should have set them right, and as he failed to do so we should lay down a rule which would enable the initiated in future to recognize a grocer's shop. In my opinion Magistrates are as competent for this task as the most learned lawyer, and there is no need for us to encumber them with our assistance.

With respect to the contention that the respondents were sellers of tea it is enough to say that special leave should not be given for the purpose of enabling the informant to rely on a contention which was specifically abandoned before the Magistrates and which was not dealt with by them, or by *Hood* J. on the order to review.

Appeal allowed. Order appealed from discharged. Respondents convicted of the offence charged and fined one shilling. In accordance with his undertaking appellant to pay to respondents their costs of the appeal.

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

Solicitor for the respondents, *E. J. V. Nigan*.

B. L.