

RICH J. I agree.

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1925-1926.

*Rule nisi discharged.*

THE KING  
v.  
DEPUTY  
FEDERAL  
COMMISSIONER OF  
TAXATION  
(S.A.) ;  
EX PARTE  
HOOPER.

Solicitor for the appellant, *J. G. Tenison Woods.*

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

B.L.

[HIGH COURT OF AUSTRALIA.]

KENCH . . . . . APPELLANT ;  
INFORMANT,

AND

BAILEY . . . . . RESPONDENT.  
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

*Pure Food—Offence—Dismissal of prosecution—Right of prosecutor to appeal—Pure Food Act 1908 (N.S.W.) (No. 31 of 1908), secs. 1\*, 10, 36, 39, 40\*—Public Health Act 1902 (N.S.W.) (No. 30 of 1902), secs. 107\*, 109—Justices Act 1902 (N.S.W.) (No. 27 of 1902), secs. 4, 101\*—Interpretation Act 1897 (N.S.W.) (No. 4 of 1897), sec. 12.*

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SYDNEY,  
Mar. 30 ;  
April 12.

When an information for an offence against the provisions of the *Pure Food Act 1908* (N.S.W.) is dismissed by a Stipendiary or Police Magistrate in the exercise of his summary jurisdiction, the prosecutor has the right of appeal

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

\* The *Justices Act 1902* (N.S.W.), sec. 101 (1), provides that "any party to the proceedings, if dissatisfied with the determination by any justice or justices in the exercise of their summary jurisdiction of any information or complaint as being erroneous in point of law, may . . . apply in writing to the said justice or justices to state and sign a case . . . setting forth the facts and grounds of such determination

for the opinion thereon of the Supreme Court." The *Public Health Act 1902* (N.S.W.), sec. 107, provides, by sub-sec. 1, that "penalties imposed by this Act . . . may be recovered before, and offences against this Act may be heard and determined by, a police or stipendiary magistrate or any two justices in petty sessions in a summary manner according to the provisions of the Act or Acts for the time being regulating

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by way of special case given by sec. 101 of the *Justices Act* 1902 (N.S.W.), there being nothing in sec. 107 of the *Public Health Act* 1902 (N.S.W.) which, assuming the prosecutor not to be a "person aggrieved," takes away that right.

Decision of the Supreme Court of New South Wales (Full Court): *Kench v. Bailey*, (1925) 26 S.R. (N.S.W.) 36, reversed.

APPEAL from the Supreme Court of New South Wales.

At the Police Court at Manly, before a Stipendiary Magistrate, an information was heard whereby Arthur Kench charged Francis Walter Bailey with an offence against the provisions of the *Pure Food Act* 1908 (N.S.W.), namely, selling adulterated milk. The information having been dismissed, the informant appealed to the Supreme Court by way of special case, pursuant to sec. 101 of the *Justices Act* 1902 (N.S.W.). The Full Court, by a majority (*Street* C.J. and *Ferguson J.*, *Campbell J.* dissenting), dismissed the appeal on the ground that the informant had no right to appeal: *Kench v. Bailey* (1).

From that decision the informant now, by special leave, appealed to the High Court.

*K. W. Street* (with him *W. J. V. Windeyer*), for the appellant. If the *Pure Food Act* 1908 stood alone, unaffected by the *Public Health Act* 1902 (N.S.W.), where a prosecution under the former Act was dismissed the prosecutor would have a right of appeal under sec. 101 of the *Justices Act* 1902. Assuming that the prosecutor in an unsuccessful prosecution is not a "person aggrieved," sub-sec. 2 of sec. 107 of the *Public Health Act* 1902 does not take away the right of appeal given by the *Justices Act* 1902. That sub-section is an enlarging provision, and not a limiting provision, and contains no negative words which would cut down that right; and sec. 109 of the *Public Health Act* 1902 shows that the right of

proceedings before justices"; and, by sub-sec. 2, that "any person aggrieved by any judgment, conviction, or order given or made under this section may appeal therefrom in the manner provided by the *Justices Act* 1902." The *Pure Food Act* 1908 (N.S.W.), by sec. 1, provides that this Act shall be construed

with the *Public Health Act* 1902; and, by sec. 40, provides that "penalties and forfeitures imposed by or under this Act . . . may be recovered and enforced in a summary way by a stipendiary or police magistrate or any two justices in petty sessions."



appeal given by the *Justices Act* 1902 was not intended to be taken away. If sec. 107 of the *Public Health Act* was intended to govern appeals in respect of prosecutions for offences under the *Pure Food Act*, then sec. 40 of the latter Act was unnecessary. [Counsel was stopped.]

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*J. W. Shand*, for the respondent. By virtue of sec. 1 of the *Pure Food Act* 1908 and sec. 12 of the *Interpretation Act* 1897 (N.S.W.) the *Pure Food Act* 1908 is to be read as if it were a part of the *Public Health Act* 1902 (see *Bedingfeld v. Keogh* (1) ; *Sweeney v. Fitzhardinge* (2) ). That being so, sec. 107 of the *Public Health Act* by sub-sec. 1 provides the procedure for recovering penalties imposed by the *Pure Food Act* and by sub-sec. 2 establishes the class of persons to whom alone a right of appeal is given. Sec. 40 of the *Pure Food Act* was inserted in order to provide for the recovery of forfeitures, and the word " penalties " should be disregarded as being surplusage. Even if sec. 40 applies to informations, sec. 107 of the *Public Health Act* must still be looked at to find who is entitled to appeal. There is nothing in the *Pure Food Act* which can be regarded as a repeal of sec. 107 of the *Public Health Act*. The provisions of sec. 109 of the *Public Health Act* apply only to rights and remedies which then existed and to offences and penalties which had already been created.

*Cur. adv. vult.*

The following written judgments were delivered :—

April 12.

KNOX C.J. AND GAVAN DUFFY J. The only question raised by this appeal is whether, when an information for an offence against the provisions of the *Pure Food Act* 1908 is dismissed by a magistrate in the exercise of his summary jurisdiction, the prosecutor has the right of appeal by way of special case given by sec. 101 of the *Justices Act* 1902. In the Supreme Court it was decided by the majority of the Full Court (*Street C.J.* and *Ferguson J.*, *Campbell J.* dissenting) that no such right existed. The decision was founded on the view that the case was governed by sec. 107 (2) of the *Public Health Act* 1902, which gives a right of appeal only to " a person

(1) (1912 13 C.L.R. 601, at p. 606.

(2) (1906) 4 C.L.R. 716.



H. C. OF A. aggrieved," it being admitted in argument in the Supreme Court  
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KENCH The question turns on the provisions of the Acts above referred to.

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provisions of sec. 10 of the *Pure Food Act*. Sec. 36 of that Act  
prescribes penalties for offences against its provisions; and sec. 39  
provides, in case of conviction, for the forfeiture by order of the  
magistrate of the article to which the conviction relates. Sec. 40  
is in the words following: "Penalties and forfeitures imposed by  
or under this Act or the regulations may be recovered and enforced  
in a summary way by a stipendiary or police magistrate or any two  
justices in petty sessions." Sec. 4 (1) of the *Justices Act* 1902 is  
in the words following: "Where by any Act, past or future,  
or by any rule, regulation, or by-law made under or by virtue of  
any such Act, any person is made liable to imprisonment or other  
punishment, or to any fine, penalty, or forfeiture, or to pay any  
sum of money or costs, for any offence, act, or omission, upon the  
conviction or order of a justice or justices, it shall be deemed to  
be provided that the matter shall be heard and determined by a  
justice or by two or more justices, as the Act dealing with the  
matter may prescribe, in a summary manner, according to the  
provisions of the Act or Acts for the time being regulating proceedings  
before justices, although no such provision be expressly made in the  
Act dealing with the matter; and the matter shall be so heard  
and determined accordingly."

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If these were the only provisions to be considered, it would be  
clear—indeed, it is not denied—that sec. 101 of the *Justices Act*  
1902, which gives to any party to the proceedings, if dissatisfied  
with the determination of justices as being erroneous in point of  
law, the right to appeal by way of case stated to the Supreme Court,  
would apply. But it is said that the joint effect of sec. 1 of the  
*Pure Food Act*, sec. 12 of the *Interpretation Act* 1897 and sec. 107 (2)  
of the *Public Health Act* is to deprive the prosecution of such right  
of appeal. The argument may be stated thus:—The title of the  
*Pure Food Act* shows that it is an Act to amend the *Public Health*  
*Act* 1902, and sec. 1 provides that it shall be construed with that  
Act, which is referred to as the Principal Act. Sec. 12 of the



*Interpretation Act* 1897 provides that every Act amending another Act shall be construed with the amended Act and as part of it unless the contrary intention appears in the amending Act. Sec. 107 (1) of the *Public Health Act* 1902 makes substantially the same provision for the recovery of penalties, as distinct from forfeitures, as sec. 40 of the *Pure Food Act*, and sub-sec. 2 of sec. 107 gives a right of appeal to any person aggrieved. It is said that the effect of these provisions is to make the provisions of sec. 107 of the *Public Health Act* applicable to prosecutions for offences against the provisions of the *Pure Food Act*, and thus to limit the right of appeal in the case of such prosecutions to "persons aggrieved" to the exclusion of an unsuccessful prosecutor.

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In our opinion this argument cannot be sustained. Assuming, not unfavourably to the respondent, that the effect of sec. 12 of the *Interpretation Act* is that the *Pure Food Act* is to be construed as if its provisions were inserted in the *Public Health Act*, the question under discussion may be treated as if the *Pure Food Act* were inserted by amendment in the *Public Health Act* as Part IX. of that Act in place of secs. 76 to 93 which were repealed by sec. 3 of the *Pure Food Act*, the necessary verbal amendments being made. Sec. 40 would then read as follows: "Penalties and forfeitures imposed by or under this Part of this Act or the regulations made in pursuance thereof may be recovered" &c. If the legislation were in this form, it would, we think, be impossible to maintain that the general provisions of sec. 107 relating to the recovery of penalties imposed by the Act should be construed as overriding or superseding the special provisions made by the earlier section for the recovery of penalties imposed by or under Part IX. of the Act. On ordinary principles of construction the cases covered by the special provision would be treated as excepted from the operation of the general provision, applying the maxim *Generalia specialibus non derogant*. Adapting a phrase from *Maxwell on the Interpretation of Statutes*, 3rd ed., at p. 244, the general provision is read as silently excluding from its operation the cases which have been provided for by the special one. And we think the result is not affected by the fact that the *Pure Food Act* is in form a separate Act. In no other way can the provisions of the two sections be read as consistent



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with one another, having regard to the inclusion in sec. 40 of the word "penalties." Indeed, Mr. *Shand* for the respondent properly admitted that the construction for which he contended involved reading sec. 40 as if the word "penalties" were omitted from it. We can find nothing in the legislation to justify the Court in construing the plain words of sec. 40 in this manner.

For these reasons we are of opinion that the appeal to the Supreme Court was competent; and, as that Court has not dealt with the appeal on its merits, we think the proper order is that the case should be remitted to the Supreme Court to do what is right in accordance with this opinion.

ISAACS J. I agree that this appeal should be allowed. It is not necessary to consider whether the appellant was a "person aggrieved." I think that upon the authorities it is by no means a closed question. But, assuming he was not a "person aggrieved" within the meaning of sub-sec. 2 of sec. 107 of the *Public Health Act* 1902, I am of opinion he has a right of appeal under sec. 101 of the *Justices Act* 1902.

I entirely agree with all that was said in the majority judgment of the Supreme Court as to the manner of construing Acts of Parliament. But, applying to the enactments we have to consider those well established methods, I arrive at the conclusion I have stated. Sec. 101 of the *Justices Act* 1902 is an enactment of general and standing application to all decisions of justices, unless in a later Act there is found some inconsistent provision. In the present case it is urged that the *Pure Food Act* 1908, by reason of its identification, through sec. 12 of the *Interpretation Act* 1897, with the *Public Health Act* 1902, provides one specific appeal in sec. 107 (2) of the last mentioned Act. That specific appeal, it is said, is exclusive and excludes any one but a "person aggrieved" from appealing at all.

No doubt appeal is the creature of statute, and, if there were no other provision for appeal, sub-sec. 2 of sec. 107 would be exclusive. But there is other provision by sec. 101 of the *Justices Act*. There are no negative or repugnant words in sec. 107 of the *Public Health Act* which cut away or are inconsistent with appeals given expressly

to persons who are not "persons aggrieved." If Parliament intended to repeal, for the purposes of the *Public Health Act*, so distinct and general a remedial provision as that contained in sec. 101 of the *Justices Act*, passed only two days before, I am forced to think it would have done so expressly. It had again the subject before it in 1908, and again was silent. The improbability of tacit repeal is heightened by the circumstance that it would have removed one of the most important means of ensuring the due observance of legislation for the preservation of the public health. Those considerations in themselves suffice, in my opinion, to show that sec. 101 of the *Justices Act* applies to this case. But there is still the fact that sec. 109 of the *Public Health Act* expressly reserves all rights and remedies given by other Acts. Those rights and remedies are primarily—though not necessarily exclusively—rights and remedies for enforcing the law against wrongdoers. Applying the doctrine of literal construction to sec. 109, the section saves, if nothing else does, the right or the remedy, whichever it may be thought to be, of appealing under sec. 101 against a decision of justices.

The appeal should, therefore, be allowed and the case remitted to the Supreme Court for determination of the appeal from the Stipendiary Magistrate.

*Appeal allowed. Order appealed from discharged with costs. Case remitted to Supreme Court to do what is right in accordance with this judgment. Appellant to pay costs of appeal pursuant to his undertaking.*

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

Solicitors for the respondent, *J. E. A. Florance & Crocker*.

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