[HIGH COURT OF AUSTRALIA.]

ALEXANDER HOUSTON . . . . . APPELLANT; INFORMANT,

AND

WITTNER'S PROPRIETARY LIMITED . . RESPONDENT. DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 4, 25.

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

Evidence—Information—Sale of adulterated milk—Purchase from driver of milk-cart in street—Name and address of defendant on cart—Insufficient evidence of ownership of cart or of employment of driver—Health Act 1919 (*Vict.*) (*No.* 3041), *sec.* 206—*Food and Drug Standards Regulations* 1924 (*Vict.*), *reg.* 33 (1)—*Police Offences Act* 1915 (*Vict.*) (*No.* 2708), *sec.* 17 (4).

Upon the hearing of an information against the defendant for selling milk which did not comply with the required standard, the summons describing the defendant as "Wittner's Proprietary Limited of Belmore Road, Balwyn," the informant gave evidence that on the date in question he saw in the street a milk-cart with the name "Wittner's Pty. Ltd." and the address "Belmore Rd., Balwyn," thereon: that he spoke to the driver of the cart, and purchased some milk from him, and that such milk was adulterated. The defendant appeared to the summons but offered no evidence.

Held, by *Knox* C.J., *Higgins*, *Gavan Duffy* and *Starke* JJ. (*Isaacs* J. dissenting), that the evidence was insufficient to establish, even prima facie, that the milk-cart was the cart of the defendant or was used in its business, or that there was any relationship between the driver of the cart and the defendant; and that, therefore, the information should have been dismissed.

Decision of the Supreme Court of Victoria (*Lowe* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

Alexander Houston of Kew laid an information against Wittner's Pty. Ltd. alleging that on 1st March 1928 at Kew in the State of

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Victoria the defendant sold "an article of food, to wit milk, which was adulterated in that it did not comply with the standard prescribed therefor by reg. 33 (1) of the *Food and Drug Standards Regulations* 1924 under the *Health Acts*."

The information came on for hearing before the Court of Petty Sessions at Kew on 18th April 1928. The informant gave the following evidence in proof of the alleged sale by the defendant:— "On 1st March last in the early morning I saw a milk-cart in Huntington Street, Kew. The name 'Wittner's Proprietary Limited' was on the cart. I spoke to Bambury, who was the driver of the cart. I purchased a pint and a half of milk from the driver which was taken from the sealed can in the cart, and I divided it into three samples. I gave one sample to the driver, another to Mr. Fowler of the Public Health Department, and I produce the third sample. I produce certificate of analysis of the said milk made by Mr. Fowler. The certificate shows that the milk is 16·8 per cent deficient in fatty solids although the total solids exceed the required standard." An affidavit by the informant's solicitor stated that the informant said, in answer to the question "What was on the cart?" that the address "Belmore Road, Balwyn," was also on the cart in addition to the name Wittner's Pty. Ltd. Upon this evidence counsel for the defendant submitted that there was no evidence that the defendant company was the owner of the milk-cart and there was no evidence that the driver of the milk-cart was an agent or servant or in the employ of the defendant on the date in question; and, in answer to a question from the chairman of the Bench asking if he admitted that the driver of the cart was in the company's employ at the time the milk was sold, said that he would admit nothing. The magistrates convicted and fined the defendant £10, with £2 12s. 6d. costs.

An order nisi to review the conviction was granted by the Supreme Court on the grounds: (1) that there was no evidence before the Court of Petty Sessions that the defendant company sold adulterated milk on 1st March 1928; (2) that there was no evidence before the Court of Petty Sessions that the defendant was the owner or proprietor of the cart from which adulterated milk was sold on the said date; (3) that there was no evidence before the Court of

Petty Sessions that the driver of the cart was the servant or agent or in the employ of the defendant company on the said date; (4) that there was no evidence before the Court of Petty Sessions that the defendant was a duly incorporated company.

The order nisi came on for hearing before *Lowe* J. on 2nd May 1928 and was made absolute, the conviction was set aside and the information dismissed. In delivering judgment *Lowe* J. said:— "The case before me depends, not upon any of the cases which have been decided, which are indeed no more than illustrations of principles which are quite well known, but upon the proper inference to be drawn from the facts in evidence. I assume that the identity of the name appearing on the cart, coupled with the address, which was given in evidence, with the name appearing in the information and the address in the information, was sufficient to entitle magistrates to conclude that the defendant was the person whose name appeared on the cart stopped by the inspector, and that the fact that a person's name appears on a cart is prima facie evidence of his ownership of the cart. But, assuming that there was evidence of these facts on which the magistrates might act, there still remains the position that there must be a prima facie case proved by the informant that the man driving the cart and selling the milk was acting under such circumstances as to make the defendant responsible for his actions. On that point I have come to the conclusion that there was not a prima facie case made out by the prosecution. If the facts proved are consistent with an hypothesis other than that upon which the prosecution rests its case and consistent with the defendant's innocence, it seems to me that the prosecution has not established a prima facie case. It seems to me that, as was illustrated during argument, the facts are consistent with another hypothesis, or possibly more than one other hypothesis, than the defendant's guilt, and I think the prosecution did not establish the necessary prima facie case."

The informant obtained special leave to appeal to the High Court on 24th May 1928, and in pursuance of such leave gave notice of appeal dated 12th June 1928 on the following grounds (*inter alia*): (1) That the learned Judge was wrong in holding that the appellant had not established a prima facie case against the respondent;

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(2) that the learned Judge should have held that it was sufficiently proved that the driver of the cart was the servant or agent or in the employment of the respondent and/or was acting in such a way as to make the respondent responsible for his actions; (3) that the learned Judge was wrong in law in holding, because the facts were consistent with another hypothesis than that the driver of the cart was the servant or agent or in the employment of the respondent, that the appellant had not established a prima facie case; (4) that in the absence of any explanation by the respondent as to how the driver of the cart came to be driving it the learned Judge should have held that the appellant had established a prima facie case and that the respondent was rightly convicted by the Court of Petty Sessions at Kew on the information.

Owen Dixon K.C. (with him *Pape*), for the appellant. The fact that the defendant's name appeared on the cart was prima facie evidence that the defendant was the owner (*Police Offences Act* 1915 (Vict.), sec. 17 (4); *Clutterbuck* v. *Curry* (1); *McKinnon* v. *Gange* (2)). Ownership under the circumstances proved is prima facie evidence that the person driving was a servant of the owner so as to make him responsible for the driver's acts (*Joyce* v. *Capel and Slaughter* (3); *Ward* v. *Roy W. Sandford Ltd.* (4); *Hibbs* v. *Ross* (5); *Beard* v. *London General Omnibus Co.* (6); *Timaru Borough* v. *Squire* (7); *Smith* v. *Bailey* (8); *Trenchard* v. *Ryan* (9)).

[STARKE J. referred to *Powell* v. *M'Glynn & Bradlaw* (10); *Everest* v. *Wood* (11).]

Robert Menzies (with him *King*), for the respondent. No presumption of ownership arises from the facts proved in this case. Proof of ownership is not prima facie proof of employment (*Ferguson* v. *Wagner* (12); *Goldman* v. *Barnfield* (13); *Trombley* v. *Stevens-Duryea Co.* (14))

(1) (1885) 11 V.L.R. 810.
(2) (1910) V.L.R. 32; 31 A.L.T. 112.
(3) (1838) 8 C. & P. 370.
(4) (1919) 19 S.R. (N.S.W.) 172.
(5) (1866) L.R. 1 Q.B. 534.
(6) (1900) 2 Q.B. 530.
(7) (1919) N.Z.L.R. 151.
(8) (1891) 2 Q.B. 403.
(9) (1910) 10 S.R. (N.S.W.) 618.
(10) (1902) 2 I.R. 154.
(11) (1824) 1 C. & P. 75.
(12) (1926) 27 S.R. (N.S.W.) 9.
(13) (1927) 27 S.R. (N.S.W.) 405.
(14) (1910) 206 Mass. 516.

Dixon K.C., in reply. The facts concerning the relationship between the owner and the person in charge of the cart are peculiarly within the knowledge of the owner, and strict proof is not required (*Blatch* v. *Archer* (1)).

[ISAACS J. referred to *Doe d. Bridger* v. *Whitehead* (2).]

The principles of *Joyce* v. *Capel and Slaughter* (3) and the other cases above referred to have been acted upon with regard to shops (*Shillinglaw* v. *Redmond* (4)).

Cur. adv. vult.

Oct. 25.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. We think this is not a case in which special leave to appeal ought to have been granted, but in deference to the opinions of our brothers *Isaacs* and *Higgins* we have consented to deal with the appeal on its merits.

The information charged that the respondent sold milk which was adulterated, in that it did not comply with the standard prescribed by the *Food and Drug Standards Regulations* 1924, contrary to the *Health Act* 1919 (Vict.), sec. 206. The magistrates sitting in the Court of Petty Sessions at Kew in the State of Victoria convicted the respondent; and, on an order to review, their decision was reversed in the Supreme Court of that State by *Lowe* J., from whose decision an appeal is now brought, by special leave, to this Court.

The case resolves itself into the question whether there was evidence upon which the magistrates could reasonably find as they did. The respondent, described in the information as of Belmore Road, Balwyn, appeared upon the information, and pleaded not guilty. The proof led was that an inspector of the City of Kew saw a milk-cart in Huntingdon Street, Kew, bearing the name and address "Wittner's Pty. Ltd., Belmore Road, Balwyn," that he purchased milk from the driver of the cart, and that the milk was adulterated. No evidence was led as to the business, if any, carried on by the respondent, or as to the ownership of the cart—except in so far as the mere name on the cart was evidence of ownership, or

(1) (1774) 1 Cowp. 63, at p. 65.
(2) (1838) 8 A. & E. 571.
(3) (1838) 8 C. & P. 370.
(4) (1908) V.L.R. 427; 30 A.L.T. 37.

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as to the circumstances in which the driver became possessed of the cart, or as to his relation, if any, with the respondent. A number of cases were cited to us which make it plain, in our opinion, that in proceedings like the present, the question whether a prima facie case has been established against a supposed principal depends upon the circumstances of each particular case, and a decision based on one state of facts is not of much assistance in arriving at a decision on any other state of facts unless it lays down some principle of law to guide the Court. In our opinion, the evidence in this case is insufficient to establish, even prima facie, that the milk-cart was the cart of the respondent or used in its business, or that there was any relationship between the driver of the cart and the respondent. The evidence is consistent with different conclusions and "if anyone is to suffer from deficiency in evidence . . . at the trial it must be the person on whom the burden of proof lay."

We were referred to the *Police Offences Act* 1915, sec. 17 (4), but we fail to understand how the provisions of that section give ground for any presumption against the defendant.

The appeal should be dismissed with costs.

ISAACS J. This case relates only to a pint and a half of adulterated milk, and yet from the standpoint of human life, and particularly infant life, it is far more important than many other cases that receive the sustained attention of this Court. In the circumstances my opinion is of no value with respect to the decision of this case. But the parties certainly, and I think also the profession, are entitled to know why I take the opposite view. And if incidentally Parliament may be assisted to consider and, if it thinks fit, by some effective provision to overcome the difficulties the responsible authorities administering the Act now have to face if the public are to be protected, what I have to say may possibly be of some service. I would add, however, that any such provision should, in my opinion, not be confined to milk, for otherwise the difficulties as to other articles of food might be intensified.

The appeal is brought to test whether, as the law stands, there can be any really effective enforcement of one of the most vital pieces of social legislation in the Victorian statute book. I refer

to sec. 206 of the *Health Act* 1919, which says: "Any person who sells any food drug article or substance which is adulterated or falsely described or is packed for sale contrary to this Part or any regulation thereunder shall be guilty of an offence against this Part." These few words mean a great deal to the community—but only if they can be reasonably enforced.

If the respondent's argument be right, there can be no effective enforcement of this section. It was contended that the prosecution could and should have called the driver as a witness against his employer. On my reading of the relevant authorities a step so unfair and prejudicial to employees, and at the same time so probably fatal to any proceeding however well founded in reality, is not necessary. The best answer to the contention is perhaps contained in the sworn statement made to obtain leave to appeal. It represents, on the whole, common knowledge and general experience. It not only answers the contention from a legal point of view, but it also shows how hopeless is any effective administration of the section if the respondent's view be accepted, and how essential it was to obtain an authoritative decision from this Court. The statement is this:—"Retail milk vendors display their names upon their carts which are driven by their servants, who also deliver their milk to customers' houses. It is not possible in such circumstances to obtain direct evidence of the employment of the driver by the person whose name appears upon the cart, unless the driver himself is called as a witness. There are grave objections to calling him for this purpose, because, in the first place, he is usually himself charged with the same offence, and, in the second place, his veracity cannot always be relied upon in relation to the various issues which may be raised, and, in the third place, if he gives candid evidence he is exposed to the consequences of his master's disapproval." Yet in the last analysis the respondent's contention is in effect "Either you must adopt that course or you must allow the evils to go unchecked." It is obvious that unless that is done, then, whatever else is proved, short of a confession, there must, at least in the majority of cases, remain as sufficient to defeat the prosecution what is termed in the judgment under appeal some

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"hypothesis consistent with innocence," for ingenious counsel to suggest.

The case, in my judgment, raises a distinct question of law, namely, whether in the proved and uncontroverted circumstances of this case, the tribunal of fact—that is, the justices in Petty Sessions—were lawfully entitled to draw the inferences they drew, as to (1) the ownership of the milk-cart and (2) the employment of the driver. *Lowe* J. *treated it as a matter of law, and rightly so.* His Honor held that *in law* the magistrates were not entitled to draw those inferences, because there was no prima facie case made out by the prosecution, inasmuch as the facts proved and uncontradicted were consistent with one or more hypotheses of innocence. With great deference, I cannot agree with that statement of law. His Honor's words were:—"There must be a prima facie case proved by the informant that the man driving the cart and selling the milk was acting under such circumstances as to make the defendant responsible for his actions. On that point I have come to the conclusion that there was not a prima facie case made out by the prosecution. If the facts proved are consistent with an hypothesis other than that upon which the prosecution rests its case, and *consistent* with the defendant's innocence, it seems to me that the prosecution has not established a prima facie case. It seems to me that, as was illustrated during argument, the facts are *consistent* with another hypothesis, or possibly more than one other hypothesis, than the defendant's guilt, and I think the prosecution did not establish the necessary prima facie case." However accurate that might be with reference to a crime such as murder, or arson, &c., it is not so, in my opinion, for reasons I shall give, in a case of this nature. Whether it is so or not is, of course, itself *a question of law, governing not merely this particular case, but every case of the same kind.*

A misapprehension on this subject must be avoided, which Judges of great eminence have more than once endeavoured to remove. That misapprehension would lead to the substitution of verdicts for judgments. Lord *Moulton*, for the Privy Council, in *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* said (1): "According to the

(1) (1914) L.R. 41 Ind. App. 110, at p. 119

well known principles of our law, a decision that there is no evidence to support a finding is a decision of law." In that case, therefore, their Lordships did not apply the rule as to concurrent findings of facts. So in *Walker* v. *Murrays* (1) Lord *Dunedin* L.P. said: "It will be considered a matter of law whether a finding in fact can be reasonably supported upon the evidence adduced." So per Lord *Kinnear* in *Nelson* v. *Allan Bros. & Co.* (2). And that stands to reason, because before a Court can say whether the evidence falls short of the required standard of law, that standard must be capable of expression. For a valuable and convincing exposition of this point, which affects the almost daily administration of justice, see the opinion of *Brett* J. to the House of Lords in *Bridge* v. *North London Railway Co.* (3). The reasoning of that learned Judge is entirely in accord with the decisions just quoted.

The question for us, then, is the standard or proposition of law up to which the evidence must fail to measure in order that the respondent may succeed. It depends not on what is the proper inference to be drawn from the evidence, for that is the function of the magistrates, and *Lowe* J. has rightly not attempted to supersede them. But conforming to the simple proposition, so to speak, formulated by *Brett* J. for the case before him, it depends on whether the evidence was sufficient to enable the magistrates as a jury, that is, as fair and reasonable men with a knowledge of the common events of business and of life generally, and guided by their experience as citizens, *in the absence of any contradiction or explanation by the defendant showing some exceptional circumstance*, to draw the inference that the defendant was the owner of the milk-cart, and that Bambury was its driver and in charge of the cart and the milk. I am unable to entertain the least doubt on the matter.

However, to proceed by legal steps, the first essential is to remember that the offence is one of those which "are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty" (per *Wright* J. in *Sherras* v. *De Rutzen* (4);

(1) (1911) S.C. 825, at p. 828.
(2) (1913) 6 B.W.C.C. 853, at p. 855.
(3) (1874) L.R. 7 H.L. 213, at pp. 232, 233.
(4) (1895) 1 Q.B. 918, at p. 922.

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see also *Brown* v. *Foot* (1), *Commissioners of Police* v. *Cartman* (2), *Coppen* v. *Moore* [*No.* 2] (3), *Parker* v. *Alder* (4), *Provincial Motor Cab Co.* v. *Dunning* (5) and *Andrews* v. *Luckin* (6)). The " considerations of public necessity " (see *Stroud's Mens Rea*, p. 214) which have been regarded by the English Courts in arriving at this result, are as strong in Australia as in England, and it is essential to follow that line of judicial decision if the Australian food and drug enactments framed on the same principles are to be given efficacy.

Ex necessitate no standard or scale can be formulated which can automatically measure all the facts of every case for the purpose of determining whether a prima facie case exists in the relevant sense. But Lord *Loreburn* L.C., in *Richard Evans & Co.* v. *Astley* (7), after premising the impossibility of a universal scale, says :—" The applicant must prove his case. This does not mean that he must demonstrate his case. If the *more probable* conclusion is that for which he contends, and there is anything pointing to it, then there is *evidence* for a Court to act upon. Any conclusion short of certainty may be miscalled conjecture or surmise, but *Courts, like individuals, habitually act upon a balance of probabilities.*" Lord *Robson* said (8) that " if they " (the circumstances) " give rise to conflicting inferences of *equal* degrees of probability, so that the choice between them is mere matter of conjecture, then " the party fails to prove his case.

I have so fully dealt with this subject in *Cofield* v. *Waterloo Case Co.* (9) that I say nothing on the subject beyond repeating what *Duff* J. said in one of the passages quoted, that notwithstanding the judgments on the question, " the error will doubtless survive." However, I feel bound to adhere to those judgments, and simply inquire, not whether the facts are " consistent " with some hypothesis of innocence, but whether, as they stand uncontroverted, there is " a balance of probability " that the milk-cart belonged to the company, and that the driver was in its employ.

(1) (1892) 61 L.J. M.C. 110, at p. 113.
(2) (1896) 1 Q.B. 655, at p. 658.
(3) (1898) 2 Q.B. 306, at p. 314.
(4) (1899) 1 Q.B. 20, at pp. 25, 26.
(5) (1909) 2 K.B. 599, at p. 603.
(6) (1917) 87 L.J. K.B. 507, at p. 509.
(7) (1911) A.C. 674, at p. 678.
(8) (1911) A.C., at p. 687.
(9) (1924) 34 C.L.R. 363, at pp. 374-377.

The facts are very plain, and outside a Court of law would, I imagine, in view of the eloquent silence of the defendant, be regarded as fairly conclusive against it. On 1st March, in the early morning, Mr. Houston, a city inspector of Kew, saw a milk-cart in a public street, Huntington Street, Kew. He saw on the milk-cart the name "Wittner's Proprietary Limited," and the address "Belmore Road, Balwyn." He spoke to the driver of the cart, a man named Bambury, who was thus apparently the servant of the company for the purpose of selling milk. The inspector purchased from Bambury a pint and a half of milk. The milk was taken from a sealed tin in the cart. The inspector divided the milk in the ordinary way for analysis, and gave, as the law requires, one portion to the driver. On analysis the milk was found to be adulterated. The adulteration is not contested. The company was summoned for selling adulterated milk. It was summoned as "Wittner's Proprietary Limited of Belmore Road, Balwyn." It appeared by its counsel at the Kew Court of Petty Sessions, answering to the summons as addressed. Its counsel said the company "formally pleaded not guilty." It declined to call any evidence, though Bambury was also in Court, having been summoned separately for breach of the Act. Its counsel contented himself with objecting that there was no evidence of (1) its ownership of the milk-cart or (2) its employment of the driver. To his credit, he did not deny the facts, but said "he would admit nothing." The five justices of the peace promptly convicted the defendant and fined it £10 with costs. *Lowe* J., on appeal, sustained the second objection only. The first he did not decide, though I gather from what he said that he was inclined against it. We have to deal with both objections, and, as they really depend on the same principles, they may be considered together.

The first point to notice is that the defendant is a limited company, "Wittner's Proprietary Limited," which means that it comes under sec. 130 of the *Companies Act* 1915 (Vict.), and is, in all probability, a trading company. Now, it is a matter of law (sec. 16 of that Act) that *there cannot be two limited companies with an identical name*, or with names so nearly resembling as to be calculated to deceive, except in a case here immaterial. Then as to the "milk-cart." Everyone of years of discretion in this community understands

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what is ordinarily meant by a "milk-cart"; and especially one that, as in the present case, contains milk in a sealed can in the cart, and from which, therefore, milk can only be drawn through a tap. Every schoolboy is familiar with a "milk-cart," and knows that such a cart is a commercial vehicle used for the purpose of distributing, and, if required, selling milk to consumers. We were invited by learned counsel for the appellant to turn to the *Police Offences Act* 1915. Sec. 17 is directed to the safety of persons and property in a public place. To this end it provides by sub-sec. 4, read with the opening words, that "Any person guilty of any of the following offences shall be liable to a penalty of not more than ten pounds:— . . . In or through any public place driving any cart waggon or dray without the name and residence of the owner thereof being painted in a legible and permanent manner on the right or off side in letters of at least one inch in length." The offence, no doubt, consists of the composite elements of driving in a public place and of the absence of the owner's name and address. But the essence of the provision is having the owner's name and address on the vehicle when it is driven in a public place where the safety of persons and property is endangered. Only the owner can do that lawfully, and therefore it is the owner's duty to see that it is done if he directs or authorizes his driver to drive the vehicle in a public street. The evidence, as is already stated, established that the name and address of this company were on the cart. It was objected that the evidence did not say they were on the right or off side. That is true. Neither did it say that the letters composing them were at least an inch in length, nor that they were painted in a permanent manner. But the main fact is they were there, and presumably to indicate the name of the owner. Presumably, if that were necessary, they otherwise complied with the Act. But it was further urged that all the enactment did was to penalize the driver; and said nothing about the owner, if he did not actually drive. If that be correct, the owner sitting passively beside the driver and exercising no control would go free, while his unfortunate employee would be punished for what is really the owner's fault. But this absurdity cannot be imputed either to Parliament or to the common law. There are, in the first place, two express statutory

provisions on the point. One is sec. 74 of the *Justices Act* 1915 (Vict.), and the other is sec. 13 of the *Police Offences Act* 1915, attached by sec. 15 to sec. 17. By the first, "Every person who aids abets counsels or procures the commission of any offence which is now or hereafter punishable on summary conviction shall be liable to be proceeded against and convicted for the same either together with the principal offender or before or after his conviction"; and he is liable to the same punishment. Unless it be considered that an employer who neglects to put his name on his milk-cart, and yet directs his employee to drive it out in a public street, does not "aid abet counsel or procure" the commission of the offence, it is no answer to say that sub-sec. 4 of sec. 17 of the *Police Offences Act* applies only to the driver personally. The second provision enacts (*inter alia*) that "In any case where . . . an offence is created and it appears to the Court before which the complaint or information against any person for the commission of any such offence is heard that the person committing the same has acted only *under the orders or by the sanction of any master or employer* of any such person and that such master or employer is in fact the offending party either solely or as well as such person so rendered liable, the Court of Petty Sessions may by summons or warrant order such master or employer to appear to answer the said complaint or information as if the same had originally been laid or made against such master or employer and may either discharge such person so first complained or informed against or may hear and determine the complaint or information as against both as to the Court seems fit." Now, I apprehend that where an employer directs or authorizes his employee to drive in a public street a cart without his name and address, as required by the sub-section, and the driver complies in the course of his employment, the employer, by the conjoint application of all the statutory provisions, is liable for the contravention. That is so decided in the case above cited of *Provincial Motor Cab Co.* v. *Dunning* (1). The driver having committed a breach of a traffic regulation by not having a proper lamp after sunset, the magistrate finding the owner was careless in not seeing to it that a proper lamp was

(1) (1909) 2 K.B. 599.

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fixed on the cab, held the owner guilty of aiding and abetting. Lord *Alverstone* C.J. and *Jelf* and *Sutton* JJ. upheld the decision. In *Gould & Co.* v. *Houghton* (1) Lord *Reading* C.J., in a very distinct judgment, held that it could not be disputed that one who aided, abetted, counselled or procured the commission of an offence punishable summarily may be proceeded against as a *principal* under a section corresponding to sec. 74 of the *Justices Act* and also *at common law*, for, said the learned Chief Justice, " the statutes are in this respect declaratory of the common law."

We, then, on the questions of ownership and employment have this complete chain :—An ordinary commercial vehicle for the distribution and sale of milk—a peripatetic department of the owner's business—is found in the act of being employed in the ordinary business way in a public place for the sale of milk under the control and management of a driver, whose name and individuality indicate that he is not the owner, but the servant or agent of someone who is. The milk-cart bears a name and address to which the defendant on the return-day of the summons answers in Court. That name indicates, primarily at all events, that the owner is a trading company. By law that name belongs to the defendant exclusively. The owner, whoever it may be, was bound by law in order to escape punishment, and having regard to the place where it is found, to have the right name and residence on the cart, and the name exclusively belonging to the defendant company was found openly displayed on the cart in the course of the business operations, and so unless someone else had unlawfully placed that name on the cart, it must have been placed there by the defendant itself. The driver was clearly transacting the business, and as clearly received the divided sample of milk, on behalf of the owner of the business, ostensibly a limited company having the defendant's name and address. No explanation or denial is given by the defendant, even when the fullest opportunity is afforded and an imitation is given by the Bench. How can it be reasonably said there was not sufficient *evidence* to find the two stated facts against the defendant ? I do not stop to discuss the radically different case of a private vehicle with " John Smith " painted on it, and driven by William

(1) (1921) 1 K.B. 509, at p. 515.

Jones on no apparent business. But I propose to consider the legal effect of the chain of facts I have stated, with the view of ascertaining whether they fail to constitute, according to judicial precedent, a sufficient prima facie case for the prosecution, in the absence of any explanation by the defendant. The question as to ownership is this: As by law there is only one company in Victoria named "Wittner's Proprietary Limited" and as the defendant is that company—if, then, the milk-cart belongs to a company of that name (as it openly appears to do) is that, in conjunction with the circumstances and in the absence of all proved explanation, prima facie evidence in a case of this nature that the defendant company is the owner of the milk-cart? The question as to Bambury's employment is this: If the milk-cart belongs to the defendant company and is openly used and controlled by Bambury, apparently as the employee of somebody and as selling milk from the cart in the usual way of such business, is that, if unexplained, prima facie evidence that the person is in the defendant's employ? If the answers be in the negative, it must hamper the administration of the Act, because the case of an *individual* whose name may be more or less shared by others is still more difficult to prove. The proper answer depends on principles, and these are found in the decided cases. A number of cases were cited. I think it is correct to say that not one of them supports the respondent's position, and that every one of them supports, either in decision or in stated principle, that of the appellant. The earliest is *Joyce* v. *Capel and Slaughter* (1). In that case Lord *Denman* C.J. thought that where a barge, evidently commercial, had upon it the name "Capel," and the number 1055, it was sufficient to identify it with the two defendants, because "Capel" was the name of one of them and the number was a registration number belonging to the defendants' barges. Obviously it was quite consistent there that someone else had wrongfully put the number on the barge, and as to the name it was that of only one defendant, and, besides, it appeared that there was another firm of barge-owners named Capel & Co., whose registered number, however, was 1,110. But on the theory of possible hypotheses consistent with innocence, much more could have been

(1) (1838) 8 C. & P. 370.

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said for that case than for this, had Lord *Denman* considered that the proper test. *Hibbs* v. *Ross* (1) starts with the proof of ownership and deals directly with the question of employment of the agent. But its principles apply to both branches. *Blackburn* J. says: "Ships are *most commonly* in the employment of the owners; and consequently proof of ownership is evidence *tending* to prove that the persons proved to be owners of the ship are employers of those having the actual custody of the ship." He adds: "It is by no means conclusive"; and then adds four different hypotheses of cases where the ship hands are employed by someone else. Then he says: "But those are all *exceptional* cases, and the facts lie *so entirely in the knowledge of the defendant, and may so easily be proved by him*, that I think a jury would be fully warranted in acting on the *prima facie inference* that the persons having the actual custody of the ship are employed by the owners, *unless* some evidence to the contrary is given." That was a practical application of a maxim that Lord *Mansfield* enunciated nearly a hundred years before, and that the House of Lords in recent days has acted on. In *Blatch* v. *Archer* (2) Lord Mansfield said: "All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." This must, of course, not be confused, as in some early cases it was confused, with the onus of proof of the issue. It means only that the weight of the evidence, which affects the "balance" of probabilities, varies according to the opportunity of either giving more convincing testimony or of displacing it. Lord *Blackburn* afterwards, in *River Wear Commissioners* v. *Adamson* (3), from his place in the House of Lords confirmed the principle of *Hibbs* v. *Ross*. In the "ordinary course of things," he said, "those employed about a ship are the servants of the owners." In *Beard* v. *London General Omnibus Co.* (4) *Romer* L.J. said:—"If one sees in the streets of London an omnibus *admittedly belonging to the defendant company* driven in the ordinary way by a person who *appears to be a driver*, the presumption is that he is authorized by the company. That presumption may be removed." The immediately following

(1) (1866) L.R. 1 Q.B., at p. 543.
(2) (1774) 1 Cowp., at p. 65.
(3) (1877) 2 App. Cas. 743, at p. 768.
(4) (1900) 2 Q.B., at p. 534.

words of the learned Lord Justice show that the principle stated and not the actual decision is material here. In *General Accident, Fire and Life Assurance Corporation* v. *Robertson* (1) very slight evidence, almost conjectural, was considered to make a sufficient prima facie case, having regard to the fact of the company's exceptional opportunities of proving the contrary. Lord *Loreburn* L.C. said (2): "It is a matter peculiarly and solely within their knowledge, and the burthen is on them to prove this if they can." His Lordship says also that he comes to his opinion "*not merely* because the defenders have failed to prove the contrary, but *also* because upon a balance of probabilities I infer that was the fact for the reason stated." Three other learned Lords agreed, and Lord *Shaw of Dunfermline*, obviously on the same grounds, also independently places the onus of satisfying the Court on the company (3). Sir *James Stephen*, in art. 96 in his *Digest of the Law of Evidence*, expresses the rule thus: "In considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively." Lord *Mansfield's* maxim thus stands clothed with the most eminent and the most authoritative recognition, and the two cases of *Hibbs* v. *Ross* (4) and *Beard* v. *London General Omnibus Co.* (5) correctly state the principle to be applied.

As to *Ward* v. *Roy W. Sandford Ltd.* (6), it is only necessary to say it was a case in which the Supreme Court held the evidence sufficient on the principles I have stated. In *Ferguson* v. *Wagner* (7) the evidence was held insufficient, but merely because nothing more was proved against the defendant than that he owned the motor-car which injured the plaintiff. It was proved that not the defendant, but another person not shown to be or appearing to be the defendant's servant, drove the car, which was a private car. The nature of the case is so essentially different that the actual result is irrelevant. But a principle of great relevance and importance is stated by *Street* C.J. (8). The learned Chief Justice says: "I quite agree

(1) (1909) A.C. 404.
(2) (1909) A.C., at p. 413.
(3) (1909) A.C., at p. 416.
(4) (1866) L.R. 1 Q.B. 534.
(5) (1900) 2 Q.B. 530.
(6) (1919) 19 S.R. (N.S.W.) 172.
(7) (1926) 27 S.R. (N.S.W.) 9.
(8) (1926) 27 S.R. (N.S.W.), at p. 10.

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that if a person is found in charge of a car which is intended to be used by the owner for commercial purposes, and which at the time is being used in the ordinary way for business purposes, that would be sufficient prima facie evidence that he was the servant or agent of the owner." The learned Chief Justice adds: "But that is not this case." The general statement of *Street* C.J., if correct—and it follows *Blackburn* J.—is decisive of the second point in this case; and in effect its principle governs the first. In *Goldman* v. *Barnfield* (1) the majority held that there was not a prima facie case, the case being of precisely the same type as the one last mentioned. *Street* C.J. (2) said that *mere* ownership alone does not prove agency or service, which is quite true. Some further fact must be shown. He also said, in accordance with the English cases mentioned, that where facts are peculiarly within the knowledge of a defendant, comparatively slight evidence is enough to throw upon him the burden of rebuttal or explanation; but, of course, some facts must appear from which even upon that basis the inference may be drawn. In Victoria the same view has been taken (see *Clutterbuck* v. *Curry* (3)). The Supreme Court of New Zealand goes at least as far as, and probably further than the cases cited in support of the appellant (see *Timaru Borough* v. *Squire* (4)). There was an Irish case to which we were referred (*Powell* v. *M'Glynn & Bradlaw* (5)). So far as the point determined is concerned, it does not assist either side. The facts were simply that M'Glynn, in the absence of Bradlaw, carelessly drove a private car which belonged to Bradlaw, and which Bradlaw had handed over to M'Glynn earlier in the day for some purpose undisclosed. The Court of Appeal held there was no prima facie case, and, in doing so, were, I apprehend, entirely within the principles I have stated. *FitzGibbon* L.J., who gave the leading judgment, said (6):—"No doubt, ownership of the thing which does the mischief often supplies prima facie evidence sufficient to make the owner responsible for the damage. If we refer, for example, to the barge and omnibus cases, the person in charge was manifestly acting as the *servant of someone, and presumably*

(1) (1927) 27 S.R. (N.S.W.) 405.
(2) (1927) 27 S.R. (N.S.W.), at p. 407.
(3) (1885) 11 V.L.R., at p. 816, per *Williams* J.; at p. 817, per *Holroyd* J.
(4) (1919) N.Z.L.R. 151.
(5) (1902) 2 I.R. 154.
(6) (1902) 2 I.R., at p. 188.

of the owner." I may again say those were commercial vehicles, and the person in actual charge was obviously servant of some one. The same learned Lord Justice (1), with great appositeness to the judgment now appealed from, refers to " the rule that where there are two *hypotheses*, one involving and the other not involving the liability of a defendant, each *equally* consistent with the evidence, the plaintiff cannot get a verdict, and the defendant is entitled to a nonsuit." It is noticeable also that *Holmes* L.J. (2) would possibly, though doubtfully, have thought that ownership even in that case would have been sufficient to launch the case, but for the other circumstances proved, which led to the opposite conclusion.

The result of the examination of the cases, apart from the judgment under appeal, is that in England, Ireland, New South Wales, Victoria and New Zealand the law has been hitherto uniformly laid down in terms which lead to the conclusion that the judgment appealed from is erroneous, and that the magistrates' decision should be upheld. I adhere to that view, and accordingly am of opinion that this appeal should be allowed.

HIGGINS J. The defendant company having been convicted in Petty Sessions of the offence of selling adulterated milk, an order nisi was made absolute in the Supreme Court of Victoria (*Lowe* J.) setting aside the order of conviction ; and the appeal is made by special leave from that order of the Supreme Court.

There is no doubt as to the offence having been committed ; but the serious nature of the offence must not tempt a Court to relax its vigilance as to the question did the defendant company commit the offence—did *it* sell the adulterated milk ? The order for review of the conviction was made absolute on the third ground stated in the order nisi—" that there was no evidence before the said Court of Petty Sessions that the driver of the cart was the servant or agent or in the employ of the defendant company on the said date " (1st March 1928). For my part, if it had been proved that the defendant company was the owner of the cart, I should not have been prepared to say that there was no prima facie evidence that the driver, Bambery, was the servant or in the employment of the defendant

(1) (1902) 2 I.R., at p. 190. (2) (1902) 2 I.R., at p. 195.

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company; and as the company did not call any evidence to meet the prima facie evidence, the conviction ought probably to stand. The authority of *Blackburn* and *Lush* JJ., in the case of *Hibbs* v. *Ross* (1), to say nothing of the other cases cited, is strongly in favour of the view that ownership of the cart is prima facie evidence that the person in charge of the cart is the employee of the owner. As *Blackburn* J. said (2)—(it was a case of accident to the plaintiff through negligence of a shipkeeper)—" The facts lie so entirely in the knowledge of the defendant, and may so easily be proved by him " (in this present case the driver was in Court during the trial), " that I think a jury would be fully warranted in acting on the prima facie inference that the persons having the actual custody of the ship are employed by the owners, unless some evidence to the contrary is given." In that case, the defendant was registered owner of the ship. But in this case I cannot find any proof that the defendant company was the owner of the cart; and the lack of such proof is actually one of the grounds (No. 2) on which the order nisi was granted. The mere fact that the defendant's name " Wittner's Proprietary Limited " was on the cart is not evidence against the defendant that the defendant was the owner. It did not even appear that the defendant was a company that sold milk. Here is the evidence on the subject :—" On 1st March last in the early morning I saw a milk-cart in Huntingdon Street, Kew. The name ' Wittner's Proprietary Limited ' was on the cart. I spoke to Bambury, who was the driver of the cart. I purchased a pint and a half of milk from the driver which was taken from the sealed can in the cart, and I divided it into three samples," for the analysis. Stress has been laid in argument on sec. 17 (4) of the *Police Offences Act* 1915, which makes it an offence to drive in or through any public place any cart, waggon or dray without the name and residence of the owner thereof being printed in a legible and permanent manner on the right or off side in letters of at least one inch in length. There was no evidence to show on which side the name (and the address) appeared, or as to the size of the letters; and there was no evidence adduced that the defendant caused its name to be painted on the cart. Of course, the probability is that no one would put the name

(1) (1866) L.R. 1 Q.B. 534.

(2) (1866) L.R. 1 Q.B., at p. 543.

of the defendant on the cart without the defendant's sanction or except to indicate the owner; but we are not justified in treating the defendant as guilty of a criminal offence because of such a probability. This is a case of lack of adequate proof. I notice that no depositions were taken in writing at the trial, and the only evidence of what the city inspector said is that given by Bambury, the driver. One may surmise that the driver's account of what the inspector said is incomplete; but the solicitor for the inspector made an answering affidavit and did not in any way correct Bambury's version of the evidence.

I fully concur with my brother *Isaacs* as to the far-reaching importance of this case, and as to the lamentable result if such legislation as this should not be enforceable; and it may not be amiss to remark that the practical difficulty which faces prosecutors under the *Health Act* could be met by a legislative amendment prescribing that a name on a cart shall be prima facie evidence of ownership, and that the person driving shall be deemed to drive as servant of the owner unless the contrary be proved.

In my opinion, the appeal from the Supreme Court should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Rylah & Anderson.*

Solicitors for the respondent, *Phillips, Fox & Masel.*

H. D. W.