[HIGH COURT OF AUSTRALIA.]

HALPIN . . . . . APPELLANT;
CLAIMANT,

AND

CLOWES . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1930.

MELBOURNE, *Sept.* 30; *Oct.* 16.

Isaacs C.J., Gavan Duffy, Rich, Starke and Dixon JJ.

*Health—Seizure of food—Officer having reasonable grounds of belief that there has been a contravention of Health Act—Not condition precedent to seizure that sample be proved by analysis to contain something the sale or use of which is prohibited—Disallowance of seizure—Discretion of justices—Health Act* 1919 (*Vict.*) (*No.* 3041), *secs.* 319, 320 (*e*), 324, 326 (1), (2), (3), 327 (2), 366 (3)—*Seizure* (*Claims Procedure*) *Regulations* 1925 (*Vict.*)—*Health Act* 1928 (*Vict.*) (*No.* 3697), *sec.* 360.

Sec. 320 of the *Health Act* 1919 (Vict.), which corresponds with sec. 360 of the *Health Act* 1928 (Vict.), provides that "in the execution of this Act any authorized officer . . . may . . . (*e*) seize detain or remove to some suitable place any animals or things with respect to which he has reasonable grounds to believe there has been a contravention of this Act."

*Held*, by the whole Court, that sec. 320 (*e*) of the *Health Act* 1919 confers an independent power of seizure which arises in the conditions which it describes and is not dependent upon the exercise of the powers conferred by sec. 324 of that Act. The power in sec. 320 (*e*) is given by the *Health Act* to seize food although no sample had been procured and proved by analysis to contain something, the sale or use of which, in such food or substance, is prohibited.

Extent of discretion conferred upon justices of the peace to disallow a seizure considered.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

The appellant, James Charles Halpin, laid two complaints against the respondent, William Howard Clowes, an officer of the Health

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Department, under sec. 327 of the *Health Act* 1919 (Vict.) with respect to certain goods seized by the respondent, who purported to have seized them under the provisions of that Act. The Court of Petty Sessions disallowed the seizures, and the respondent, William Henry Clowes, appealed to the Court of General Sessions, and, the matter coming on for hearing before that Court, the Chairman stated a case substantially in the following terms for the opinion of the Supreme Court pursuant to sec. 147 of the *Justices Act* 1928 (Vict.):—

1. On 30th August 1929 a complaint made under sec. 327 of the *Health Act* 1919 by the respondent, Halpin, against the appellant, Clowes, was heard at the Court of Petty Sessions at Richmond in which the respondent, Halpin, claimed as his property certain food, to wit, two "56lb. bulk" and one "48lb. prints" "Sunflower C.B.," alleging that the same had been seized on 5th July 1929 by the appellant, Clowes, and objecting to such seizure on the grounds that (a) the said seizure was unlawful; (b) the said food was not falsely described; (c) the said food was labelled as required by the *Health Act* and regulations; (d) the said food was not coloured in contravention of the *Health Act* and regulations; (e) the said food was not margarine sold without containing starch; (f) the notice was insufficient; (g) the officer seizing the said goods did not forthwith deliver a portion thereof marked and sealed or fastened in such manner as its nature could permit to James Charles Halpin, who appeared to be the manufacturer thereof by his name and address being attached to the package containing the same, such address being a place in Victoria; (h) no sample of the food, drug or substance for sale seized has been proved by analysis to contain anything the sale or use of which is prohibited.

2. On the same date, by a further complaint made under sec. 327 of the *Health Act* 1919 against the appellant, Clowes, the respondent, Halpin, also claimed as his property certain other food, to wit, four "56lb. cases" "Sunflower C.B.," which he alleged had also been seized on 5th July 1929 by the appellant, Clowes, and objecting to such seizure on grounds identical with those referred to in the first complaint.

3. The Court of Petty Sessions at Richmond made an order in each case that the seizure be wholly disallowed, and that the appellant, Clowes, pay to the respondent, Halpin, £2 2s., his costs of the complaint.

4. From each of such orders the appellant, Clowes, appealed to the Court of General Sessions of the Peace holden at Melbourne in each case on the grounds (a) that such order was bad in law and should not have been made; (b) that the Court of Petty Sessions was wrong in holding that no power to seize the "Sunflower C.B." was given by the *Health Act* 1919 except when a sample had previously been procured by an officer and proved by analysis to contain something the sale and use of which therein is prohibited.

5. The appeals came on for hearing before the Court of General Sessions of the Peace on 23rd October 1929 and were heard by such Court of which I was Chairman on 23rd and 24th October 1929.

6. By the consent of the parties both appeals were heard together. Counsel for the respondent first called evidence, and then counsel for the appellant.

7. I find as a fact as follows :—(a) On 5th July 1929 the appellant, Clowes, who is an officer of the Health Department with another official called at the factory of the respondent in Richmond, and there seized two "56lb." bulk boxes of a product called "Sunflower C.B." and one "48lb." box of the same product made up into packages called "prints," and later on the same 5th July 1929 the appellant, Clowes, at the factory aforesaid seized a further four "56 1-lb." bulk boxes of "Sunflower C.B." (b) The appellant, Clowes, on each occasion gave the respondent, Halpin, written notice that he had seized these goods on grounds stated to be (i.) "false description"; (ii.) not labelled as required by the *Health Act* 1919 and regulations; (iii.) coloured in contravention of the *Health Act* and regulations; (iv.) margarine sold without containing starch. (c) The appellant, Clowes, on each occasion at or about the time of seizure delivered to the respondent, Halpin, a portion of the goods seized as required by sec. 326, sub-sec. 2, of the *Health Act* 1919; (d) The goods seized on the first occasion were those the subject matter of the complaint mentioned in par. 1 of this case, and the goods seized on the second occasion were those the subject

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matter of the complaint mentioned in par. 2. The goods seized on each occasion were food for sale within the meaning of sec. 324 of the *Health Act* 1919, but no sample thereof procured by any officer of the Health Department had been proved by analysis to contain anything the sale or use of which therein was prohibited. (e) The goods seized resembled butter in appearance. (f) Evidence was tendered on behalf of the appellant, Clowes, and objected to on behalf of the respondent, Halpin, relating to an analysis which had been made in March 1929. I upheld the objection but received the evidence subject to the objection in order that the question of admissibility might be referred by way of case stated to the Supreme Court and, if decided affirmatively, the facts established thereby be determined without the necessity of a further hearing. If such evidence be admissible I find as a fact (i.) that the goods seized had only been manufactured on the date of seizure and formed no part of the product manufactured by the respondent, Halpin, in March 1929; (ii.) that the product manufactured in March 1929 by the respondent, Halpin, under the name "Sunflower C.B." was identical in composition with the goods seized; (iii.) that a sample of the product manufactured by the respondent, Halpin, in March was in March procured by an officer of the Health Department and analysed; (iv.) that such analysis disclosed (*inter alia*) that the product contained a colouring matter called "Annato"; (v.) that the food seized on 5th July 1929 was labelled "Sunflower C.B."

8. The goods seized were, for the purpose of the proceedings only, conceded to be margarine within the meaning of the *Health Act* 1919 and were sold by respondent, Halpin, under the name "Sunflower C.B."

9. The Regulations made under the *Health Act* 1919 are to be taken as incorporated in this case.

10. The respondent Halpin's contention was that no food drug or substance for sale could be seized under the Act unless the conditions laid down in sec. 324 of the *Health Act* 1919 were complied with and that these conditions had not been complied with in that no sample of the food seized had been proved by analysis to contain

anything the sale or use of which therein is prohibited and that the seizure was therefore unlawful.

The appellant Clowes' contention was that the seizures were justifiable under the provisions of sec. 320 of the *Health Act* 1919 and that in the case of a seizure made under sub-sec. (*e*) of that section it was not necessary to show that a sample of the food had been proved by analysis to contain anything the sale or use of which therein is prohibited and alternatively that the seizure was justified under sec. 324 of the *Health Act* 1919 and that the analysis of the samples procured in March 1929 constituted a compliance with the requirements of sec. 324.

11. I agreed with the contention of the respondent, Halpin, and therefore dismissed the appeals and confirmed the orders of the Court of Petty Sessions at Richmond disallowing the seizure but at the request of the appellant, Clowes, in each appeal I state the facts specially for the determination of the Full Court thereon.

The question for the opinion of the Court is: Was I right in so dismissing the appeals?

The case came on for hearing before the Full Court (*Irvine* C.J., *Macfarlan* and *Lowe* JJ.), which answered the question asked by the case stated—No; and held that the appeal should have been allowed in the Court below, and determined the appeals by confirming the seizures.

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

*Ashkanasy*, for the appellant. The respondent relies primarily upon sec. 320 (*e*) of the *Health Act* 1919 to justify the seizure complained of. If this contention be correct, any authorized officer may confiscate animals or goods unlimited in quantity or value without any requirement other than his mere suspicion that there has in respect thereto been a breach of the Act or regulations, no matter how trifling, e.g., as to the precise size of print on a label. This power, if it exists, would have to be very clearly expressed. Sec. 324 gives a power of seizure in respect of food, drugs and substances. If the respondent's contention is correct, sec. 324 is superfluous. Sec. 324 requires proof of adulteration by analysis as

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a condition precedent to the seizure. This requirement is introduced to protect the subject from the effects of an unwarranted seizure, and would be entirely abrogated by the construction contended for. The two sections are, however, quite reconcilable. Sec. 320 is expressed to be exercisable "in the execution of this Act," words which are absent from sec. 324. This indicates that the powers in sec. 320 are intended to be ancillary to those conferred in other parts of the Act. Thus, in expressing the power of seizure given in sec. 324 it may be necessary to seize a sample for the purpose of analysis and meanwhile (also under sec. 320) to "mark fasten or secure" the goods under suspicion pending analysis. This view is supported by other portions of sec. 320, e.g., the power in sub-sec. (*c*) to "stop and detain any person animal vehicle or other means of conveyance," which, since these words are otherwise entirely unqualified, can only be intended to apply to cases of stoppage or detention effected incidentally to the exercise of other powers contained elsewhere in the Act; or the provision in sec. 326 (3) exempting officers from liability for a seizure, since that section makes it a condition that such officer must have acted "under a reasonable belief . . . that there was with respect to any such food drug substance or animal any contravention of this Act." If the respondent is correct, this is identical with the only requirement under sec. 320 (*e*), namely, reasonable belief in contravention, and is nugatory. Having regard to the extensive nature of the power claimed, the Court should not merely accept the position that the Act is full of anomalies and repetition but should interpret it as a consistent whole, bearing in mind that the liberty and property of the subject are as much in need of protection as his health.

*C. Gavan Duffy*, for the respondent, was not called upon.

*Cur. adv. vult.*

Oct. 16. The following written judgments were delivered:—

ISAACS C.J., GAVAN DUFFY, RICH AND DIXON JJ. Sec. 320 of the *Health Act* 1919, which corresponds with sec. 360 of the *Health Act* 1928, provides that "in the execution of this Act any authorized

officer . . . may . . . (*e*) seize detain or remove to some suitable place any animals or things with respect to which he has reasonable grounds to believe there has been a contravention of this Act." The respondent, who is an authorized officer, seized at the appellant's factory some boxes of a product which the appellant called "Sunflower C.B." but which the respondent considered to be margarine. And the case stated says: "The goods seized were, for the purpose of the proceedings only, conceded to be margarine within the meaning of the *Health Act* 1919." Pursuant to sec. 326, sub-sec. 2, the respondent delivered a portion of the goods seized to the appellant and, pursuant to sub-sec. 1 of the same section, he gave notice to the appellant of the seizure in the form prescribed by the *Seizure* (*Claims Procedure*) *Regulations* 1925 made under the *Health Act* 1919. The grounds assigned in the notice were (i.) false description, (ii.) not labelled as required by the *Health Act* 1919 and regulations, (iii.) coloured in contravention of the *Health Act* and regulations, (iv.) margarine sold without containing starch.

The appellant made applications to justices, pursuant to sec. 327, complaining of the seizure, and they made orders disallowing the seizures upon the ground that no power to seize the product, which was a food or substance, was given by the *Health Act* 1919 except when a sample had previously been procured by an officer and proved by analysis to contain something, the sale or use of which in such food or substance is prohibited. From the orders disallowing the seizures the now respondent appealed, pursuant to sec. 364, to the Court of General Sessions, which confirmed the orders of the justices, but stated a case for the Supreme Court. The Supreme Court was of opinion that the seizures were authorized by sec. 320 (*e*), and that power was given by the *Health Act* 1919 to seize food although no sample had been procured and proved by analysis to contain something, the sale or use of which in such food or substance is prohibited. In this opinion we agree. We think sec. 320 (*e*) confers an independent power of seizure which arises in the conditions which it describes. The contention of the appellant was that the words "in the execution of this Act," with which the section begins, limit its application to cases in which the officer

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is in the course of exercising some other power specifically given by the Act. Upon this assumption, it was said that, as the only specific power of seizing food was that given by sec. 324, a seizure of food could not be made unless the condition prescribed by that section was observed, namely, that a sample was first procured and proved by analysis to contain something the sale or use of which in such food or substance is prohibited. We think this contention is founded upon a misunderstanding of the words "in the execution of this Act." These words are satisfied whenever, as here, one of the powers expressed to be given by the section is exercised in a bona fide attempt to obtain obedience to the provisions of the statute.

The further contention on the part of the appellant that the presence of sec. 324 in the statute required the conclusion that sec. 320 (*e*) did not extend to the seizure of "foods, drugs or substances" either at all, or at least without compliance with the conditions prescribed by sec. 324, cannot be supported. The powers given by sec. 320 (*e*) are not dependent upon the exercise of the powers conferred by sec. 324. We do not mean to suggest that the provisions of sec. 324 have any reference to the facts of this case. It follows that the ground upon which the seizure was disallowed by the justices and by the Court of General Sessions is erroneous. But that does not necessarily end the matter. For sec. 327 empowers the justices to disallow a seizure notwithstanding that it was authorized when made. It contemplates an inquiry not merely into the question whether the authorized officer had power to seize, but also into the question whether there has in fact been a contravention of the Act and whether on the facts the property seized ought to be dealt with in the manner provided by sub-sec. 2 of sec. 327. In this case, however, upon the facts found by the special case and the admissions made by the appellant for the purposes of the proceedings, there can be no doubt that the Supreme Court was right in confirming the seizure. We do not accede to the argument of the appellant that the express exoneration conferred in sec. 326 (3) indicates the accuracy of his main argument, and we think it unnecessary to enter into detailed reasons for this

opinion. But we consider it desirable to direct attention to the absence of the word "thing" from sec. 326 (3), an omission that recurs in the Act now in force—No. 3697, sec. 366 (3).

For these reasons the appeals should be dismissed with costs.

STARKE J. The construction put upon sec. 320 of the *Health Act* 1919 by the Supreme Court of Victoria is plainly right. "In the execution of this Act" means, as the learned Judges of that Court said, for the purpose of carrying out the Act and ensuring its due observance. The same words occur in sec. 319, and are there clearly used in that sense. The authorities conferred by sec. 319 and sec. 320 are not conditioned upon, or merely ancillary to, the exercise of other powers given elsewhere in the Act. One passage, however, in the judgment of the learned Judges, may lead to some misapprehension:—"Upon the concession made on behalf of the respondent" (Halpin) "for the purposes of these proceedings only, that 'Sunflower C.B.' is margarine within the meaning of the *Health Act* 1919, it is clear that there was a contravention of the Act in regard to this substance. We answer the question stated for us by saying that the appeal should have been allowed in the Court below, and determine the appeals by confirming the seizures." Now, sec. 327 provides that any person claiming any animals or things seized under the Act may complain to a justice, and the complaint shall be heard and determined by any two justices who (after hearing the evidence) *may* confirm or disallow the seizure, wholly or in part, and make an order accordingly. The words of the section grant a power, but, in my opinion, do not—as the passage cited might be thought to suggest—impose an obligatory duty to confirm a seizure whenever the Act has been contravened: they give a discretion—a judicial discretion—to exercise the power according to the circumstances of the case. Thus, a label may be false or incorrect (cf. sec. 207 (*g*)), and yet, if it were altered or withdrawn, a contravention of the Act might, in such circumstances, be avoided. The justices might, in my opinion, on the alteration or withdrawal, or on proper undertakings given, disallow the seizure. The discretion is not, however, arbitrary, and the justices should

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not disallow a seizure merely because the complainant is poor, or for other like reason.

The appeals should be dismissed.

*Appeals dismissed with costs.*

Solicitor for the appellant, *Joan Rosanove.*

Solicitor for the respondent, *Frank G. Menzies*, Crown Solicitor for Victoria.

H. D. W.

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[HIGH COURT OF AUSTRALIA.]

POWELL . . . . . APPELLANT;

AND

LENTHALL . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1930.

ADELAIDE, *Sept.* 23.

SYDNEY, *Dec.* 3.

Rich, Starke and Dixon JJ.

*Lottery and Gaming—"Reasonable suspicion" in mind of Special Magistrate—Prima facie evidence—Failure by Magistrate to hold that there was a "reasonable suspicion"—Whether subject to appeal—Lottery and Gaming Acts* 1917-1928 (*S.A.*) (*No.* 1285—*No.* 1877), *secs.* 39, 78—*Lottery and Gaming Act Amendment Act* 1921 (*S.A.*) (*No.* 1494), *sec.* 14—*Justices Act* 1921 (*S.A.*) (*No.* 1479), *secs.* 4, 163, 176, 177.

Sec. 14 of the *Lottery and Gaming Act Amendment Act* 1921 (S.A.) provides that if, on the hearing of any information against any person for unlawful gaming, the evidence for the prosecution is such as to raise in the mind of the Special Magistrate hearing such information a reasonable suspicion that such person is guilty of the offence charged, such evidence shall be deemed prima facie evidence of his guilt. Sec. 78 of the *Lottery and Gaming Act* 1917 (S.A.), with which the amending Act is incorporated, provides that all proceedings under the Act shall be disposed of summarily and there shall be an appeal in respect of such proceedings. This appeal is provided for by Part VI. of the *Justices Act* 1921 (S.A.), and sec. 177 of that Act (which is contained in