[HIGH COURT OF AUSTRALIA.]

UNGER . . . . . APPELLANT;
DEFENDANT,

AND

MASON . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 10;

SYDNEY, *Nov.* 14.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Liquor — Licensing (Vict.) — Prohibition of sale of liquor without a licence — Exception in favour of "any . . . registered pharmaceutical chemist or druggist . . . selling any . . . liquors for medicinal purposes" — Pharmaceutical chemists—Registration—Persons not so registered not to carry on business as chemists and druggists, but this provision not to apply to wholesale dealers in drugs and chemicals—No provision for registration as "druggist" — Sale of medicated wine by wholesale druggist for medicinal purposes—Licensing Acts 1928-1946 (*Vict.*) (*No.* 3717—*No.* 5197), *ss.* 5 (1) (*c*), 161—*Medical Acts* 1928-1946 (*Vict.*) (*No.* 3730—*No.* 5151), *Part* III., *ss.* 87, 106, 107.

The *Licensing Act* 1928 (Vict.), s. 5 (1), provides: "Nothing in this Act shall apply . . . (*c*) to any apothecary registered pharmaceutical chemist or druggist or legally qualified medical practitioner administering or selling any spirituous or fermented liquors for medicinal purposes." The *Medical Act* 1928 (Vict.), Part III., provides for the registration of persons as pharmaceutical chemists. It provides that persons so registered may be described in any Act as registered pharmaceutical chemists (s. 87) and makes it unlawful for any person not so registered to carry on business as a chemist and druggist (s. 107), but it provides that nothing in Part III. shall extend to or interfere with the business of wholesale dealers in supplying drugs and chemicals in the ordinary course of wholesale dealing. There is no provision in that or any other Victorian Act for the registration of any person as a "druggist."

Held, by *Starke, Dixon, McTiernan* and *Williams* JJ. (*Latham* C.J. dissenting), that s. 5 (1) (*c*) of the *Licensing Act* did not except from the operation of that Act wholesale dealers in drugs, not being registered pharmaceutical chemists,

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who sold liquor for medicinal purposes. Accordingly, a wholesale dealer in drugs could not lawfully sell medicated wine by wholesale, even if the sale was for medicinal purposes, unless he had a licence under the *Licensing Act* authorizing him to sell wine.

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

APPEAL from the Supreme Court of Victoria.

Kurt Unger was charged on the information of Henry Mason in a Court of Petty Sessions at Melbourne with a contravention of s. 161 of the *Licensing Act* 1928 (Vict.) in that he sold liquor without a licence authorizing the sale.

It appeared that the defendant, who was a wholesale druggist, had sold to a licensed victualler fifteen dozen bottles of wine to which vitamin B1 had been added. Each bottle bore a label stating that it contained medicated wine which was to be used for medicinal purposes only. The defendant informed the purchaser that the wine was for medicinal purposes only. He only sold the wine to chemists and persons holding licences to sell liquor, and then only for medicinal purposes. He was not licensed under the *Licensing Act* to sell wine, and he was not registered as a pharmaceutical chemist under Part III. of the *Medical Act* 1928 (Vict.).

The magistrate who constituted the court decided that the wine, although medicated, was " liquor " within the meaning of the *Licensing Act*, but that the defendant was exempted from the requirements of that Act by s. 5 (1) (*c*) thereof because he was a druggist engaged in wholesale dealing and he had sold the wine for medicinal purposes. The information was, therefore, dismissed.

On an order to review obtained by the informant in the Supreme Court of Victoria, *Martin* J. held that in s. 5 (1) (*c*) the expression " registered pharmaceutical chemist or druggist " signified one class of persons, namely, persons registered as pharmaceutical chemists, and the defendant, therefore, got no protection from this provision. An order was made remitting the information to the Court of Petty Sessions and directing that the defendant be convicted.

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

Coppel K.C. (with him *D. M. Campbell*), for the appellant. The question is whether, in the expression " registered pharmaceutical chemist or druggist " in s. 5 (1) (*c*) of the *Licensing Act*, the word " registered " attaches to " druggist " as well as to " pharmaceutical chemist." In the natural meaning of the expression, it does not. It is important to notice that the familiar expression " chemist *and*

druggist " (which occurs frequently in the *Medical Act*) is not used ; the expression is " chemist *or* druggist." As a mere matter of grammar, the " or " is disjunctive, so that " registered pharmaceutical chemist " is apt to describe one category, while " druggist " (unqualified by " registered ") describes another category. That is the grammatical construction, and some valid reason would have to be found for departing from it. No justification for such a departure, it is submitted, is to be found either in the *Licensing Act* itself or elsewhere in Victorian law. If " registered " had been inserted before " apothecary," the grammatical construction would have been that it governed all that followed. *Martin* J. appears to have read the section as if it had been so expressed. At all events, he thought the appellant's construction would produce a strange result in that registration would be required in the case of every class mentioned in s. 5 (1) (*c*) except the druggist. This was a misconception so far as concerned apothecaries and medical practitioners. The only registration provided in Victoria for an apothecary is as a medical practitioner under the *Medical Act* 1928 : See the Fourth Schedule thereof. An apothecary, as such, cannot be registered or practise as a chemist at all. If he is registered as a medical practitioner, he may dispense drugs, but he cannot do so as a chemist. As to medical practitioners, all that s. 5 (1) (*c*) of the *Licensing Act* requires is that they are " legally qualified," which merely means qualified in law to be registered ; it does not mean " registered," but refers to the qualifications they must have *before* they can be registered. A medical practitioner would remain " legally qualified " even if he were struck off the register. Except that he is subjected to certain disabilities under s. 17 of the *Medical Act*, a legally qualified but unregistered medical practitioner is entitled to practise. The reference in s. 5 (1) (*c*) of the *Licensing Act* to a medical practitioner " administering " liquor as a medicine is, therefore, apt to describe both registered and unregistered practitioners. Thus, no inference unfavourable to the appellant can be drawn from the references to apothecaries and medical practitioners. The expression " registered druggist " would be devoid of meaning because there is not now, and never has been, in Victoria any provision for registration of persons as " druggists." Part III. of the *Medical Act* 1928 (See ss. 81, 87, 95) contains the only provisions for registration of persons carrying on the business which is described as that of " a chemist and druggist ". They are registered as " pharmaceutical chemists," and are described in Part III. as " registered pharmaceutical chemists." The phrase " carrying on business as a chemist and druggist " is defined in s. 100 in terms which suggest that it is confined to the

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business of retailers: See also s. 101. It would seem, therefore, that when s. 107 imposes penalties on every person who, not being a registered pharmaceutical chemist, carries on business as a chemist and druggist, it is concerned only with retail business; if that is so, a context is afforded which will limit the further provisions of the section penalizing the unauthorized use of the descriptions "chemist," "druggist," "chemist and druggist." However that might be as a matter of the construction of s. 107 if it stood alone, the question is put beyond doubt by the provision of s. 106 to the effect that nothing in Part III. shall extend to or interfere with the business of wholesale dealers in drugs. This makes it clear that it would be lawful for the wholesaler to describe himself as a "druggist," and that he is the only person (apart from pharmaceutical chemists) to whom the description is appropriate. The original form of what is now s. 5 (1) (*c*) of the *Licensing Act* 1928 was more limited. One of the earliest Acts in which it appeared was the *Wines, Beer and Spirits Sale Statute* 1864 (No. 227): See s. 3 thereof. The description of the persons exempted was expressed in the words "any apothecary chemist or druggist." Shortly after that Act the *Medical Practitioners Statute* 1865 (No. 262) (see ss. 6, 9, Third Schedule) was passed. The *Pharmacy Act* 1876 (No. 558) was the first Act providing for the registration of chemists. Its provisions are reproduced in substance in Part III. of the *Medical Act* 1928. The *Licensing Act* 1876 (No. 566), s. 4, merely repeated s. 3 of No. 227, but it was succeeded by the *Licensing Act* 1885 (No. 857), s. 4, which was substantially the same as the present s. 5 (1) (*c*); it inserted "registered pharmaceutical" before "chemist" and also brought in medical practitioners. The *Pharmacy Act* 1876 is the obvious explanation of the amendment in relation to chemists, which merely adopted the statutory description of the registered persons; but it does not explain the retention of the words "or druggist." It is only on the basis of the appellant's argument that the retention of these words can be explained. If the judgment appealed from is right, wholesale druggists could not sell spirits at all unless licensed in some form under the *Licensing Act*.

P. D. Phillips K.C. (with him *J. G. Norris*), for the respondent. The construction of s. 5 (1) (*c*) of the *Licensing Act* for which the appellant contends is not open on the words of the paragraph, which are not apt to describe wholesale sales of liquor. The only kind of sale which is within s. 5 (1) (*c*) is a sale "for medicinal purposes". A wholesale sale is a sale for the purpose of resale; it cannot properly be called a sale for medicinal purposes. This view is supported by

other considerations to be gathered from the paragraph. It is important to bear in mind that " administering " as well as " selling " is referred to. In the case, at least, of an apothecary or a medical practitioner, it seems necessarily to be contemplated that there will be an immediate contact or relation with the person to whom the liquor is to be given as a medicine. " Administering " certainly has this sense, and " selling " must be given a kindred meaning. It is not suggested that liquor could not, for instance, be " administered " by a medical practitioner, within the meaning of the section, unless he handed it direct to a patient without its being touched by anyone else, or that a sale by a chemist would not be within the section unless the person who was to consume the liquor attended in person to receive the liquor from the chemist; if, for instance, some person were sent by the prospective consumer to the chemist's shop for the liquor, it would be sufficient. The words " for medicinal purposes " import at least some acquaintance with the individual case of the person supplied. If that is so, the magistrate's finding in the present case that the sale was " for medicinal purposes " cannot stand. It is based on an error of law. [He referred to *Shotts Iron Co. Ltd.* v. *Fordyce* (1); *Inland Revenue Commissioners* v. *Executors of Williams* (2); *Bean* v. *Doncaster Amalgamated Colliery* (3); *Great Western Railway* v. *Bater* (4).] Even on the widest construction which could reasonably be given to the words " for medicinal purposes," the finding was not warranted by the facts in evidence. The sale of wine to a licensed victualler who may dispose of it to such persons as he determines cannot be described as a sale for medicinal purposes. The vendor does not give the transaction the necessary attribute merely by saying that he is selling for medicinal purposes, and the labelling of the bottle in such a manner as to suggest that its contents should be regarded as medicinal takes the matter no further. Nothing more is shown by the evidence here. A construction of s. 5 (1) (*c*) which excludes wholesale druggists does not produce any unreasonable or absurd result. The *Licensing Act* applies only to alcohol in the form of a beverage (*Gleeson* v. *Hobson* (5)). If wholesale druggists desire to sell alcoholic beverages, it is not unreasonable that they should be obliged to obtain a licence under the *Licensing Act*; a wine and spirit merchant's licence would be the appropriate form of licence. In the expression " chemist or druggist " as it appeared before the *Licensing Act* 1885 " druggist " must at least have included " retail druggist." If the appellant's argument

(1) (1930) A.C. 503.
(2) (1943) 1 All E.R. 318.
(3) (1944) 2 All E.R. 279, at p. 283.
(4) (1922) 2 A.C. 1.
(5) (1907) V.L.R. 148, at p. 151.

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is correct, the meaning of the word was changed in 1885. The nature of the alteration then made in the form of the section is not such as to suggest that such a change of meaning was intended.

Coppel K.C., in reply.

Cur. adv. vult.

Nov. 14.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by special leave from an order of the Supreme Court of Victoria (*Martin* J.) setting aside the dismissal of an information by a Court of Petty Sessions. The appellant was charged with an offence against s. 161 of the *Licensing Act* 1928 (Vict.) in that he did sell liquor without a licence. It was proved that he sold fifteen dozen bottles of a medicated wine, known as Vitawine, to a licensed victualler. The defendant had no licence under the Act. He relied for his defence upon s. 5 (1) of the *Licensing Act*, which provides, *inter alia* : " Nothing in this Act shall apply . . . (*c*) to any apothecary registered pharmaceutical chemist or druggist or legally qualified medical practitioner administering or selling any spirituous or fermented liquors for medicinal purposes." Evidence was given, which was uncontradicted and was accepted by the magistrate, that the defendant was a manufacturing druggist carrying on a wholesale trade only, that Vitawine was a medicated wine which contained vitamin B1, that the dosage was prescribed on the bottle, and that the provisions of the *Health Act* and regulations under that Act in regard to the selling and labelling of the wine had been complied with. The magistrate held that the defendant was a druggist who sold the liquor in question for medicinal purposes, and that therefore the *Licensing Act* did not apply to him, and he dismissed the information. Upon the return of an order to review, it was held by the Supreme Court that in s. 5 of the *Licensing Act* the word " registered " in the phrase " registered pharmaceutical chemist or druggist " applied to both " chemist " and " druggist " and that, as the defendant was not a registered pharmaceutical chemist under the *Medical Act* 1928 and was not registered as a druggist under any statute, he was not entitled to claim any protection under this provision. *Martin* J. examined the course of legislation relating to this subject and arrived at the conclusion that there was no-one who, since the *Pharmacy Act* 1876, could properly be described as a druggist unless he was a registered pharmaceutical chemist.

The appellant did not contend before this Court that the wine was not liquor within the meaning of that word in s. 161. It was not

argued that the wine was not a drink or beverage so as to enable the appellant to rely upon *Gleeson* v. *Hobson* (1), where it was held that the word " liquor " in the *Licensing Act* meant liquor in the sense of beverages or drinks and did not include medicines and culinary and other chemical liquids containing alcohol, unless they were such as were commonly known and adapted for use as a drink or beverage for human consumption or reasonably capable of being used as a substitute for such a beverage or of being converted into such a beverage. The allegation of an informant that a liquid is " liquor " is prima-facie evidence that it is liquor—*Licensing Act* 1928, s. 243—an amendment made in 1906 immediately after the decision in *Gleeson* v. *Hobson* (1). If it were held that, because the wine was medicated and was intended for use as a medicine and not for use as a beverage, it was not liquor within the meaning of the Act, the result would be that the appellant should not have been convicted and that the appeal should be allowed. But no argument based on *Gleeson* v. *Hobson* (1) was submitted to the Court. The appeal must be dealt with upon the basis that the wine sold was " liquor " within the meaning of the *Licensing Act*.

The question therefore is, as the appellant puts it, whether he is a druggist within the meaning of that word in s. 5 (1) (*c*) of the *Licensing Act*. The respondent, on the other hand, contends that, in order to claim the protection of this provision, the appellant must be a registered druggist. The appellant replies that the word " registered " in s. 5 (1) (*c*) of the *Licensing Act* cannot be read as applicable to the word " druggist." There are provisions in the *Medical Act* 1928, Part III., for the registration of pharmaceutical chemists, but there are no provisions in that or any other Act for the registration of persons as druggists. The *Medical Act* 1928, s. 81, defines " pharmaceutical chemist " as meaning a person registered as a registered pharmaceutical chemist under the Act, or any corresponding previous enactment, whose name appears on the pharmaceutical register of Victoria. The Act contains provisions for a pharmaceutical register (ss. 87-94) and in s. 95 specifies qualifications the possession of which qualifies a person for registration as a pharmaceutical chemist. Section 100 defines, for the purposes of Div. 6 (ss. 100-109), the phrase " carrying on business as a chemist and druggist " as including " the retailing compounding or dispensing of drugs and medicines supplied on the order or prescription of a legally qualified medical practitioner." Section 101 requires personal supervision of the business by every pharmaceutical chemist " carrying on business as a chemist and druggist." Section 107 imposes penalties upon every

(1) (1907) V.L.R. 148.

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person who, not being a pharmaceutical chemist (that is, a registered pharmaceutical chemist—see s. 81), carries on or attempts to carry on business as a chemist and druggist or uses a title which implies or tends to the belief that he is a registered pharmaceutical chemist or is carrying on business as a chemist and druggist. These provisions prevent any person carrying on a retail business of supplying drugs or medicines on medicinal prescriptions unless he is registered as a pharmaceutical chemist under Part III. of the *Medical Act*.

Section 106 of that Act, however, contains an exception in favour of wholesale druggists. Section 106 provides that nothing in Part III. of the Act " shall extend to or interfere with the business or with any rights and privileges of any legally qualified medical practitioner or of any member of the Royal College of Veterinary Surgeons of Great Britain nor with the business of wholesale dealers in supplying drugs and chemicals in the ordinary course of wholesale dealing." Thus a wholesale dealer is not affected by the *Medical Act* in a business of supplying drugs and medicines in the ordinary course of wholesale dealing. The result is that he can carry on his business as a wholesale druggist without being registered as a pharmaceutical chemist under the Act.

Thus s. 5 of the *Licensing Act* 1928 correlates completely with the *Medical Act*. The exceptions in s. 5 (1) (*c*) include registered pharmaceutical chemists, that is, the ordinary dispensing chemists carrying on retail trade and, further, in my opinion, certain druggists, namely, the druggists who are entitled to carry on business as druggists and to describe themselves as druggists because they are in the wholesale trade and can therefore lawfully carry on their business without being registered under the *Medical Act* or under any other legislation.

The contrary view for which the respondent contends admittedly gives no effect whatever to the words " or druggist " in s. 5 of the *Licensing Act*. The view for which the appellant contends, on the other hand, gives a meaning to them which is fully intelligible, and which provides a reason for declining to regard the word " registered " as qualifying the word " druggist."

It was argued, however, that the history of the legislation showed that the word " registered " in s. 5 of the *Licensing Act* should be attached to the word " druggist " as well as to the words " pharmaceutical chemist." The exception in the *Licensing Act* was introduced in the *Wines, Beer and Spirits Sale Statute* 1864, s. 3. It applied then " to any apothecary chemist or druggist who may administer or sell any spirituous or fermented liquors for medicinal purposes." There was then no legal provision providing for the registration of

chemists or druggists. This provision was repeated in the *Licensing Act* 1876, s. 4.

In 1876 the first *Pharmacy Act* was passed. This Act for the first time provided for the registration of pharmaceutical chemists. Section 11 of the Act established a pharmaceutical register, and provided that " all persons, so long as their names continue to be enrolled in such register, can be described in this or any other Act or regulations as registered pharmaceutical chemists." Wholesale druggists were excluded from the application of the Act by s. 23 which is, in its relevant provisions, in the same terms as s. 106 of the *Medical Act* 1928.

In 1885 the *Licensing Act* was amended, and the provision now contained in s. 5 (1) (*c*) of the *Licensing Act* 1928 was inserted. The changes made were that the words " registered pharmaceutical " were inserted before the words " chemist or druggist " and the words " or legally qualified medical practitioner " were inserted, so that the provision then assumed its present form: " Nothing in this Act shall apply to any apothecary registered pharmaceutical chemist or druggist or legally qualified medical practitioner who administers or sells any spirituous or fermented liquors for medicinal purposes." The history of the legislation shows that after registration had been made necessary to the carrying on of the business of a pharmaceutical chemist, and when pharmaceutical chemists were therefore distinguished from other chemists, the words " registered " and " pharmaceutical " were inserted before the word " chemist." The *Licensing Act* adopted the words the meaning of which have been fixed by s. 11 of the *Pharmacy Act*.

It is argued for the respondent that from this course of legislation a conclusion emerges that the exception contained in the *Licensing Act* (now s. 5) should be construed as applying only to persons who are " registered " under some statute. But a person can be an apothecary without being registered under any Act, and a person can be a legally qualified medical practitioner without being registered under any Act. To be an apothecary or to be a legally qualified medical practitioner is to possess a qualification which entitles an applicant to register under the *Medical Act*: See *Medical Act* 1928, ss. 13, 14, and Fourth Schedule. If such persons are not registered they are prohibited from suing for fees, from holding certain hospital appointments, and from using certain titles: *Medical Act*, s. 17. These are the only consequences of their not being registered. They still remain apothecaries or legally qualified medical practitioners, as the case may be. Thus it is only the pharmaceutical chemists who, among the persons mentioned in s. 5 (1) (*c*) of the *Licensing Act*, are

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required by law to be registered. It may be added that s. 5 (1) of the *Licensing Act* contains many other exceptions besides those mentioned in par. (*c*), e.g., persons selling perfumery, persons selling wine, cider or perry which they have produced, persons using beer brewed by them for the use of their own establishments. None of these persons need be registered under any statute. The only way of finding any meaning for the words " or druggist " in s. 5 (1) (*c*) is to regard them as applying to wholesale druggists, who can carry on business lawfully as druggists without being registered under any Act.

It was further argued for the respondent that the magistrate was wrong in law, upon the evidence which he accepted, in holding that the sale of the liquor in question was a sale for medicinal purposes. It was contended that no sale by wholesale could be a sale for medicinal purposes—that a sale by wholesale was a sale for resale. But the words " for medicinal purposes " are directed towards the ultimate use of the article sold. In my opinion this objection fails.

In my opinion, therefore, the appeal should be allowed, the order of the Supreme Court set aside and the order of the Court of Petty Sessions restored.

STARKE J. Appeal by special leave of this Court from a judgment of the Supreme Court of Victoria making absolute an order to review a decision of a Court of Petty Sessions dismissing an information charging that the appellant did sell liquor without a licence authorizing such sale contrary to s. 161 of the *Licensing Act* 1928 and remitting the information to the Court of Petty Sessions with a direction to convict the appellant.

The evidence was that the appellant was a wholesale druggist and that without any licence he sold to a licensed victualler fifteen dozen bottles of wine to which he had added to each bottle a small quantity of Vitamin B1 in the form of a powder.

It was not disputed that this sale was of liquor within the meaning of the Act (See s. 3 and *Gleeson* v. *Hobson* (1)). But the appellant claimed the benefit of the exemption contained in s. 5 (1) of the Act :—

" Nothing in this Act shall apply . . . (*c*) to any apothecary registered pharmaceutical chemist or druggist or legally qualified medical practitioner administering or selling any spirituous or fermented liquors for medicinal purposes."

The finding of the magistrate that the appellant sold this wine to the licensed victualler for medicinal purposes is unsupported by the

(1) (1907) V.L.R. 148.

evidence. It was obviously sold to the licensed victualler for use in his business as an hotel-keeper and not for medicinal purposes.

Let it be assumed, however, that the wine was sold to the licensed victualler for medicinal purposes. Still, in my opinion, the appellant is not within the exemption set forth in s. 5. The arrangement of the section is such that the exemption falls naturally into three classes, one of which is any registered pharmaceutical chemist or druggist. Any person, with the necessary qualifications, may be registered as a pharmaceutical chemist whether he describes himself as a chemist and druggist or simply as a chemist or a druggist. The history of the matter supports this construction of the section. Chemists and druggists deal with medicinal drugs and they have always been associated together. Indeed, the *Oxford English Dictionary*, under the word " chemist," states that the word " druggist " is the ordinary term in the United States and Scotland. And as far back as 1852 the Act regulating the qualifications of pharmaceutical chemists in Great Britain (15 & 16 Vict., c. 56) recites the formation of the Pharmaceutical Society of Great Britain consisting of chemists and druggists. Again, in Victoria, in the *Licensing Act* 1876 (No. 566, s. 4) we find a provision that nothing in that Act shall apply to any apothecary chemist or druggist who may administer or sell any spirituous or fermented liquors for medicinal purposes. No distinction between a chemist and a druggist is suggested.

But in Victoria in 1876 a *Pharmacy Act* was passed (No. 558) establishing a Board of Pharmacy and providing for the registration of pharmaceutical chemists, which term included druggists (See ss. 2 and 18). And there was a provision in s. 23 that nothing in the Act should extend to or interfere with the rights or privileges of any legally qualified medical practitioner nor with the business of wholesale dealers in supplying drugs and chemicals in the ordinary course of wholesale dealing. But the exemption allowed by the *Licensing Act* of 1876 (No. 566) was not altered until the *Licensing Act* 1885 (No. 857) was passed. And in that Act (s. 4) the exemption as it now appears in s. 5 of the *Licensing Act* 1928 was first enacted.

It is plain, I should have thought, that the words " registered pharmaceutical " were inserted before the words " chemist or druggist " in the *Licensing Acts* to accord with the description of " chemist " and " druggist " adopted for the purposes of the *Pharmacy Act* 1876 (No. 558) and the corresponding subsequent enactments and to confine the exemption to persons registered under those Acts. To drag in a provision in the *Pharmacy Act* of 1876 and the corresponding subsequent enactments, that nothing in those Acts shall extend to or interfere with the business of a wholesale dealer in supplying

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drugs and chemicals in the ordinary course of wholesale dealing, for the purpose of construing s. 5 of the *Licensing Act* 1928, is plainly wrong, and the ordinary grammatical construction of s. 5 (1) (*c*) of the *Licensing Act* 1928 should be adopted unless it is inconsistent with the statute itself or leads to some manifest absurdity or repugnance, in which case the language might be varied or modified so as to modify such inconvenience but no further.

The appeal should be dismissed.

DIXON J. This appeal depends upon the meaning and application of s. 5 (1) (*c*) of the *Licensing Act* 1928 (Vict.). What that paragraph provides is that nothing in the Act shall apply to any apothecary, registered pharmaceutical chemist or druggist or legally qualified medical practitioner administering or selling any spirituous or fermented liquors for medicinal purposes.

The appellant has been held guilty under s. 161 of the *Licensing Act* of selling liquor without a licence because he sold wholesale to a licensed victualler fifteen dozen bottles of medicated wine. It is described as medicated because, before bottling it, the appellant mixed with the wine a Vitamin B1 preparation, which he had made.

He is a manufacturing chemist selling by wholesale. He claims the benefit of s. 5 (1) (*c*) on the ground that he is a druggist within the meaning of that provision. He is not registered as a pharmaceutical chemist under Part III. of the *Medical Act* 1928, which contains an express provision that nothing in that Part shall interfere with the business of wholesale dealers in supplying drugs and chemicals in the ordinary course of wholesale dealing (s. 106). But he contends that druggists selling liquor for medicinal purposes are excepted from the operation of the *Licensing Act* by s. 5 (1) (*c*), whether they are or are not registered under Part III. of the *Medical Act*.

Notwithstanding the introduction into the wine of the Vitamin B1 preparation, the wine was found to be " liquor," as that expression in the *Licensing Act* has been construed and explained by *Cussen* J. in *Gleeson* v. *Hobson* (1). Section 3 of the *Licensing Act* defines " liquor " to mean any wine, spirits, ale, beer, porter, cider, perry, or other spirituous or fermented liquor of an intoxicating nature. *Cussen* J. considered that the word " liquor ", which forms a part of the definition itself, could not here bear its wide meaning of liquid, but must be limited to liquids which are used for human consumption. He was of opinion that the meaning of the word in the Act is still more restricted and refers to a liquid which is commonly known and is

(1) (1907) V.L.R. 148.

adapted for use as a drink or beverage for human consumption or which is reasonably capable of being used as a substitute for such a beverage or of being converted into such a beverage. His Honour said (1): "I think there is a wide distinction commonly recognized between a drink or beverage and a dose." He dealt with some particularity with the case of so-called proprietary medicines containing alcohol and said that it is not necessarily sufficient for a prosecutor to show that such a medicine contained even a large percentage of alcohol. Among other possible reasons why a medicine containing free alcohol should not be a liquor in this sense, his Honour mentioned the case of the alcohol being essential to the use of a medicine, or being essential for extraction, or as a preservative or vehicle, and the case of the alcohol being so contaminated with other ingredients as to lose its distinctive character so that it would not reasonably be used, or separated for use, as a beverage. But "if the liquid was really a beverage, or is reasonably likely to be used as such, though it contains drugs, &c., having medicinal properties, the finding should be that it is a liquor." (2)

The appellant accepts the finding that under the foregoing test his medicated wine was a liquor. But, at the same time, he contends that the fifteen dozen bottles were sold to his customer, the licensed victualler, "for medicinal purposes" within the meaning of s. 5 (1) (*c*) of the *Licensing Act*, and the magistrate has so found. The foundation for this conclusion is to be discovered in the fact that the label on the bottles stated that it was medicated wine and was to be used as a medicine only, and in the further fact that the appellant had informed the licensed victualler to whom the sale was made that the wine was for medicinal purposes only.

It may be supposed that it can rarely happen that a sale by wholesale of what is really liquor within the test laid down in *Gleeson* v. *Hobson* (3), an alcoholic beverage, is also a sale for medicinal purposes. The question in the case arises from these findings, which cannot but strike one in the case of a sale by wholesale as somewhat inharmonious.

It is important to hold steadily before the attention that s. 5 (1) (*c*) is primarily concerned with the sale or administration for medicinal purposes of the ordinary spirituous or fermented liquors commonly consumed as beverages or drinks. Though the provision covers liquors to which some medicament has been added, it is directed at the sale or administration to the sick by apothecaries, chemists, druggists and doctors of gin, brandy, wine and the like in the ordinary state of such liquors.

(1) (1907) V.L.R. at p. 151.
(2) (1907) V.L.R. at p. 153.
(3) (1907) V.L.R. 148.

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It is from this point of view that the provision should be construed. In my opinion the contention that s. 5 (1) (*c*) applies to a druggist who is not registered under Part III. of the *Medical Act* 1928 is wrong. It misconstrues the provision.

The ordinary grammatical meaning of the language employed by s. 5 (1) (*c*) should be adopted unless some reason to the contrary appears. To my mind no such reason does appear, but, on the contrary, the prima-facie meaning is supported by what may be supposed to be the general policy of the legislature and by the history of the legislation. The prima-facie grammatical meaning is determined by the absence of the word " or " between " apothecary " and " registered pharmaceutical chemist or druggist " and the presence of the " or " between that phrase and " legally qualified medical practitioner." It is the last " or " which expresses the alternative cases to which the exemption applies and makes it clear that they fall into three categories, viz. (1) apothecary ; (2) registered pharmaceutical chemist or druggist ; (3) legally qualified medical practitioner. The second category is itself expressed in the alternative, a subordinate alternative, " pharmaceutical chemist or druggist." It is a subordinate alternative because both members share the common requirement expressed by the governing word " registered." As to policy, it seems only reasonable to suppose that such an exemption, made for the purpose of enabling those ordinarily administering to or supplying the sick to provide them with ordinary alcoholic beverages for them to use medicinally, should not go beyond chemists, druggists and physicians who are registered or qualified. The word " apothecary " is a survival but the apothecary was authorized by law to prescribe for the sick and treat them with the drugs and medicaments he compounded or supplied. He fell into place, and perhaps as a result of the eighth and ninth heads of the Fourth Schedule of the *Medical Act* may still conceivably fall into place, in the section as a person who may lawfully treat the sick.

The history of the provision and of those now contained in the *Medical Act* is discussed in the judgment of *Martin* J. and was fully examined during the arguments before this Court. I can see nothing in the development of the statute law on the subject to weaken the conclusion that only registered druggists, registered so that they may lawfully deal with the public, are entitled to the benefit of the exemption.

When the exemption originated no registration was necessary, and the *Wines, Beer and Spirits Sale Statute* 1864 (No. 227), s. 3, simply provided that nothing in the Act should apply to any apothecary, chemist or druggist who may administer or sell any spirituous

or fermented liquors for medicinal purposes. Presumably, if a physician administered spirituous liquors for medicinal purposes, he was *pro hac vice* within the same category. Registration of chemists and druggists became necessary by the *Pharmacy Act* 1876 (No. 558), but in the consolidation of the licensing laws passed in the same session (No. 566) no notice of this fact was taken in the exemption, which was repeated in the same words. But when the *Licensing Act* 1885 (No. 857) repealed the former Acts and replaced them with a consolidation and amendment of the law, the material part of the section analogous to the present s. 5 (1) was cast in the form of s. 5 (1) (*c*).

The only inference I can draw is that the draftsman considered it necessary or desirable to add an express exemption in favour of legally qualified medical practitioners, and at the same time to notice the necessity that chemists or druggists should be registered, and expressly to limit the exemption to those who were so registered.

I should mention more particularly three of the points made for the appellant against the reading of the provision which commends itself to me. (1) It was said that the position of the wholesale druggist (who was not required to register as a pharmaceutical chemist in order to carry on his business) needed protection under the *Licensing Act*. The word " druggist " was apt to cover him. Remembering that the primary purpose of s. 5 (1) (*c*) is to deal with ordinary spirituous or fermented liquors when they are supplied for the use of the sick, and that the *Licensing Act* does not cover true medicines containing alcohol, it appears to me to be a mistake to suppose that the position of the wholesale druggist was such as to induce the legislature to exempt him. The wholesale druggist or manufacturing chemist is not the proper source of supply for ordinary alcoholic beverages, he does not directly supply the sick or administer to them, and, if he prepares for wholesale distribution an alcoholic beverage capable of non-medicinal and of medicinal use, as distinguished from a medicine containing alcohol (which would not be a liquor), there is little reason why he should enjoy the exemption and, if it extended so far, there is much danger of its abuse.

(2) In connection with the first point, and also independently of it, the expression " pharmaceutical chemist *or* druggist " was relied upon. The expression " chemist *and* druggist " is found frequently. But the " or," so it was said, showed that different descriptions of callings were intended. The difference between the chemist and the druggist had ceased to be significant long before 1864. Yet in s. 3 of the Act No. 227 of that date the expression " apothecary chemist or druggist " was used. In bringing this language up to date in 1885

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the " or " was allowed to stand. Under the *Pharmacy Act* 1876 druggists had to register and there was no reason to remove the word " druggist " and no reason to change " or " to " and."

(3) Again, it is said that, if the word " registered " is attached to the word " druggist " as well as to the words " pharmaceutical chemist," the word " druggist " adds nothing to the meaning of the paragraph. No doubt in 1928 that was true. For, by that date, it is unlikely that anybody calling himself a druggist before 1876 still carried on his business. But it was not necessarily so in 1885 and then it was natural enough to keep the word, adding " pharmaceutical " to " chemist " and placing " registered " before both " pharmaceutical chemist " and " druggist ".

The provision, as the word " administering " and the reference to legally qualified medical practitioners show, was always concerned with the direct supply of spirits or wines for medicinal purposes to the sick or ailing consumer, and whether or not there was any aspect in which possible transactions of wholesalers were covered, it is hardly credible that the purpose of retaining " or druggists " was to exclude from the operation of the licensing laws wholesale druggists selling spirituous or fermented liquors for medicinal purposes. I agree in the conclusion of *Martin* J.

In my opinion the appeal should be dismissed with costs.

McTIERNAN J. I am of opinion that the appeal should be dismissed.

The question to be decided depends upon the proper construction of s. 5 (1) (*c*) of the *Licensing Act* 1928. It is necessary in the first place to decide what is the proper grammatical construction of the provision. Does the word " registered " qualify the word " druggist " ? I think that according to the correct grammatical construction of the provision the word " registered " does qualify the term " pharmaceutical chemist " and the term " druggist." This construction should prevail unless there is a good reason why it should not do so. Is there a good reason for confining the word " registered " to " pharmaceutical chemist " ?

Section 5 (1) (*c*) introduces an exception to s. 161 in the Act. This contains a prohibition against the sale of liquor by any person without a licence. The exception is made in favour of the persons described in s. 5 (1) (*c*) when they are administering or selling liquor for medicinal purposes. The liquor to which the provision applies includes whisky, brandy, gin and so forth, which s. 161 provides must not be sold without a licence. There is nothing in the terms of s. 5 (1) (*c*) which suggest any good reason why " registered "

should not be read as applying both to " pharmaceutical chemist " and " druggist." On the contrary, the context and subject matter afford the strongest possible reasons for presuming that the legislature confined the privilege given by s. 5 (1) (*c*) to persons who were registered under the law or had some similar mark of fitness and competency.

But there is no such description known to the law as " registered druggist." The description " registered pharmaceutical chemist " is known to the law. For this reason it is said that if the grammatical construction of s. 5 (1) (*c*) prevails, the result would be that the legislature has used the words " registered druggist " which have no meaning. But the calling of a druggist, as distinct from a registered pharmaceutical chemist, is not recognized by the law.

The *Medical Act* prohibits a person who is not a registered pharmaceutical chemist from carrying on business as a druggist or calling himself a druggist. Hence the argument for departing from the grammatical construction of s. 5 (1) (*c*) is not advanced by reading " druggist " without the word " registered," but as a general word. The *Medical Act* exempts from the general provisions of the Act " the business of wholesale dealers in supplying drugs and chemicals in the ordinary course of business." This exception is relied upon as justification for adding the qualification " wholesale " to " druggist " in s. 5 (1) (*c*) instead of reading the word with " registered " as the grammatical construction of the provision requires. If the legislature passed s. 5 (1) (*c*) with its eyes on the *Medical Act*, it is difficult to suppose that it intended to give the privilege in s. 5 (1) (*c*) to a person who could not lawfully call himself a druggist or carry on the business of a druggist. But it is sought to add the qualification " wholesale " because the *Medical Act* exempts from its provisions " the business of wholesale dealers in supplying drugs and chemicals in the ordinary course of wholesale dealing." The words of this exemption do not give much support to the supposition that the legislature there contemplated the wholesale druggist as a vendor of beverages such as whisky and so forth, which are liquors within the meaning of the *Licensing Act*. The word " wholesale " cannot be added to " druggist " if " registered " is not read with it, except by necessary implication. It would not, in my opinion, be a legal interpretation of s. 5 (1) (*c*) to detach " registered " from " druggist " and to imply the word " wholesale " before " druggist." I see nothing in the *Licensing Act* or the *Medical Act* to justify the assumption that wholesale druggists not recognized by the law by way of registration or otherwise were intended to share with apothecaries,

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registered pharmaceutical chemists or legally qualified medical practitioners the exemption given by s. 5 (1) (*c*) when administering or selling liquor for medicinal purposes, and in my opinion it is not a proper method of construction to drop the word "registered" from "druggist" and to add by implication the word "wholesale" for the reason that there is no person literally described as a registered druggist.

Martin J., after an exhaustive examination of the statutes said: "I am of opinion that when the *Licensing Acts*, from 1864 onwards, were enacted the Legislature used the words 'chemist or druggist' as signifying one class of persons and did not intend to draw any distinction between them nor subsequent to 1876, to give immunity to one who was not registered under any act and was committing an offence by describing himself as a druggist." I agree with this statement.

It is unnecessary to deal with the question whether the magistrate was right in drawing from the facts which he found the conclusion that the liquor the subject of the case was sold for medicinal purposes. The evidence may prove that it was manufactured for medicinal purposes, but I think it is another question whether it was sold for medicinal purposes.

WILLIAMS J. This is an appeal by special leave from an order made by *Martin* J., sitting as the Supreme Court of Victoria, which set aside an order of the Court of Petty Sessions dismissing an information charging the appellant with an offence under s. 161 of the *Licensing Act* 1928 (Vict.) of selling liquor without a licence authorizing such sale. The sale in question was the sale by the appellant to a publican of fifteen dozen bottles of a liquid called "Vitawine," consisting of red wine with the addition of Vitamin B1, so that each ounce of the liquid contained 300 international units of this vitamin. The labels on the bottles, which described the liquid as a medicated vitamin wine tonic, stated that the wine was to be used as a medicine only, and that the dose was a small wineglassful three times daily. The magistrate was satisfied that the liquid was liquor within the meaning of the *Licensing Act*, but he was also satisfied that the appellant was a druggist carrying on the business of a wholesale druggist who had sold the liquor to the publican for medicinal purposes. He dismissed the information on the ground that on these findings the *Licensing Act* did not apply because the liquor was sold by a druggist within the meaning of the exception contained in s. 5 (1) (*c*) of that Act.

On appeal, *Martin* J. held that the sale did not come within the section. He said that prior to the *Pharmacy Act* 1876 the words "chemist" and "druggist" were synonymous and either was apt to describe a person who practised pharmacy, but that after that Act there was no person recognized by the law as an unregistered druggist because no one could lawfully describe himself as a chemist or druggist unless he was a registered pharmaceutical chemist. He was accordingly of opinion that the words "registered pharmaceutical chemist or druggist" in s. 5 (1) (*c*) were confined to registered pharmaceutical chemists, and that "druggist" did not include an unregistered wholesale druggist. He therefore remitted the case to the Court of Petty Sessions with a direction to convict the appellant.

Section 5 (1) (*c*) of the *Licensing Act* 1928 provides that nothing in this Act shall apply to any apothecary, registered pharmaceutical chemist or druggist or legally qualified medical practitioner administering or selling any spirituous or fermented liquors for medicinal purposes. The origin of this exception was s. 3 of the *Wines, Beer and Spirits Sale Statute* 1864 which provided that "nothing in this Act shall apply to any apothecary chemist or druggist who may administer or sell any spirituous or fermented liquors for medicinal purposes." That Act was repealed and replaced by the *Licensing Act* 1876 which by s. 4 re-enacted the exception in the same words. The latter Act was repealed and replaced by the *Licensing Act* 1885. In s. 4 of the Act of 1885 the exception was altered by the addition of the words "registered pharmaceutical" before "chemist", and the addition after "druggist" of the words "or legally qualified medical practitioner," so that it assumed the same form as that in which it now appears in s. 5 (1) (*c*) of the *Licensing Act* 1928.

The *Pharmacy Act* 1876 constituted the Pharmacy Board of Victoria, and provided for the Pharmaceutical Register of Victoria and the registration of pharmaceutical chemists. Section 2 provided that chemists and druggists within the meaning of the Act should consist of all persons who at any time before the passing of the Act had carried on in Victoria the business of a chemist and druggist in the keeping of open shop for the compounding of prescriptions of duly qualified medical practitioners, and also of such persons as might be duly registered under the Act. Section 18 (1) provided that any person who had attained the age of twenty-one years and had carried on such a business for not less than two months before the commencement of the Act should be qualified for registration. Section 11 provided that the Board should from time to time cause the names of all persons certified by the Board as duly qualified for registration as registered pharmaceutical chemists to be registered

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in a register to be called the Pharmaceutical Register of Victoria, and that all such persons so long as their names continued to be enrolled in such register might be described in this or any other Act or any regulations as "registered pharmaceutical chemists." Section 23 provided that nothing in the Act should extend to or interfere with the business of wholesale dealers in supplying drugs and chemicals in the ordinary course of wholesale dealing. Section 25, as amended by the *Pharmacy Act* 1885, provided that (i) any person not being a registered pharmaceutical chemist who carried on or attempted to carry on business as a chemist and druggist or homoeopathic chemist or either, or (ii) any person not being a registered pharmaceutical chemist who took, used or exhibited the name or title of or who pretended to be a registered pharmaceutical chemist, chemist and druggist, chemist, druggist, pharmacist, pharmaceutist, pharmaceutical chemist, homoeopathic chemist, dispensing chemist or dispensing druggist, or other words of similar import, or used or exhibited any title or term or sign or symbol which might be construed to mean that he was qualified to perform the duties of a pharmaceutical chemist, should on conviction thereof be liable to a penalty not exceeding £10 for each offence and might also be committed to prison for any period not exceeding six months

The legislation now in force in Victoria relating to the registration of pharmaceutical chemists is the *Medical Act* 1928, Part III., which was assented to on the same date as the *Licensing Act* 1928. This Part continues to provide for the constitution of the Pharmacy Board of Victoria, the Pharmaceutical Register and the registration of pharmaceutical chemists. Section 87, like s. 11 of the Act of 1876, provides that all persons, so long as their names continue to be enrolled in such register, may be described in any Act or any regulations as registered pharmaceutical chemists. Section 106, like s. 23 of the Act of 1876, provides that nothing contained in Part III. shall extend to or interfere with the business of wholesale dealers in supplying drugs and chemicals in the ordinary course of wholesale dealing. Section 107 of the Act of 1926 is substantially similar to s. 25 of the Act of 1876.

It is therefore clear that since 1876 it has been unlawful for any person carrying on a retail business in Victoria to describe himself as a chemist or a druggist unless he is a registered pharmaceutical chemist. Further it would appear that the words "registered pharmaceutical" were added before the word "chemist" in the *Licensing Act* 1885 because the *Pharmacy Act* 1876 had provided that persons enrolled on the pharmaceutical register of Victoria might be described in any Act of Victoria as registered pharmaceutical chemists.

But such persons are not confined to this description and might lawfully describe themselves as chemists, or chemists and druggists, or druggists.

An apothecary was a person who professed to diagnose internal disease by its symptoms and applied himself to cure that disease by administering medicines of his own compounding. But it was also an important part of his work to compound medicines prescribed by physicians. A chemist, on the other hand, or chemist and druggist, or druggist as a chemist was called in Scotland and the United States, was a person who prepared and sold medicines prescribed by physicians but did not diagnose the disease or administer the medicine (*The Apothecaries' Company* v. *Warburton* (1) ; *Allison* v. *Haydon* (2) ; *The Apothecaries' Company* v. *Greenough* (3) ; *Society of Apothecaries* v. *Lotinga* (4)). The word " administer " in the exception contained in s. 3 of the *Wines, Beer and Spirits Sale Statute* 1864 was therefore apt to describe the administration by an apothecary to his own patient of liquor as a medicine or part of a medicine which he had himself prescribed, and the word " sell " to describe a sale by an apothecary or chemist of liquor as a medicine or part of a medicine prescribed for a patient by a physician.

It seems to me that the ordinary grammatical meaning of the words " chemist or druggist " in the whole collection of the words contained in the exception is that the persons intended to be excluded from the operation of the Act of 1864 were persons keeping open shop for the compounding of prescriptions by physicians whether they called themselves chemists or chemists and druggists or druggists. After the *Pharmacy Act* 1876 had required that such persons should be registered, the exception was altered by the addition of the words " registered pharmaceutical " before " chemist," but this would not have the effect of enlarging the meaning of the word " druggist." The addition of the words " or legally qualified medical practitioner " tends rather to confirm the view that the excepted class is confined to persons directly administering or selling the spirituous or fermented liquors to the persons who require them for medicinal purposes. Further, I think that as a matter of grammar the exception in its present form contains three classes—apothecaries, registered pharmaceutical chemists or druggists, and legally qualified medical practitioners—and that the word " registered " governs both chemists and druggists. The word " chemist " may now have ousted the word " druggist " in popular favour as a description of the busi-

(1) (1819) 3 B. & Ald. 40 [106 E.R. 578].
(2) (1828) 4 Bing. 619 [130 E.R. 907].
(3) (1841) 1 Q.B. 799 [113 E.R. 1337].
(4) (1843) 2 M. & Rob. 495 [174 E.R. 360].

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ness of a chemist and druggist. But the prohibition contained in s. 25 of the *Pharmacy Act* 1876 against unregistered persons using the word "druggist" would seem to show that such businesses were then being carried on in Victoria under that title; and this prohibition has been re-enacted in s. 107 of the *Medical Act* 1928.

The *Pharmacy Act* 1876 and the succeeding Acts except from their operation the business of wholesale dealers in drugs and chemicals. As a result wholesale dealers need not and indeed cannot be registered. But there is nothing in this exception to indicate that it was intended that they should be entitled to sell liquors by wholesale without a licence. If the liquid in question is really a medicine and not a beverage, although it may contain a large percentage of alcohol, it is not liquor within the meaning of the *Licensing Act* and can therefore be sold without a licence. (*Gleeson* v. *Hobson* (1)).

For these reasons I am of opinion that *Martin* J. was right and that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Luke Murphy & Co.*

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

E. F. H.

(1) (1907) V.L.R. 148.