[HIGH COURT OF AUSTRALIA.]

LAWRY AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

WEST . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1947.

MELBOURNE, *March* 5.

SYDNEY, *April* 2.

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

Public Health—Sale of "adulterated" food—Taking of samples for analysis—Necessity that sample represent whole bulk—Supply of milk in bulk—Milk carried in cans for delivery—Samples not taken from all cans—"Sale" to health inspector—Health Act 1928-1935 (*Vict.*) (*No.* 3697—*No.* 4333), *ss.* 215, 216 (*c*), 247 (1), (4).

Section 247 of the *Health Act* 1928-1935 (Vict.) provided:—"(1) Any authorized officer—(*a*) (on payment or tender to any person preparing making manufacturing or dealing in any food drug or substance or to his agent or servant of the current market value thereof or of the rate prescribed) may at any place of preparation making manufacture sale or delivery or at any place in course of delivery or at any premises whatsoever demand and procure such samples as are required for the purposes of this Act. . . . (4) The procuring of any sample pursuant to this section and the payment or tender of the current market value thereof or of the rate prescribed (as the case may be) shall for all purposes of this Act be deemed to be a sale by such first-mentioned person or his agent or servant (as the case may be) to such officer of the food drug or substance contained in the sample."

The defendants carried on business as dairy farmers, supplying milk in bulk to distributors but not selling it by retail. Pursuant to a general contract for the daily delivery of not less than fifty gallons to a milk-distributing company, the defendants consigned eight 12½-gallon cans of milk to the company on a lorry owned by them and driven by one of them. An authorized officer under the *Health Act* stopped the lorry in a street and took one pint of milk from each of five of the eight cans, paying the driver the "current market value thereof." Each pint taken was found on analysis to be below the standard for fatty solids prescribed under the Act. The officer charged the defendants

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with a breach of s. 215 of the Act in that they sold milk which (by reason of s. 216 (*c*)) was " adulterated " inasmuch as it did not comply with the standard prescribed under the Act. He relied on the taking of each or all of the five pints as constituting a " sale " to him within s. 247 (4) and on the deficiency in each or all as establishing the offence charged. Evidence was given that the defendants' cows were first machine-milked and then " stripped " by hand ; the milk from the machines was carried into vats and then run into cans, and the stripped milk was also put in the cans ; the stripped milk would have a higher milk-fat content, and, unless it was equally distributed among the cans, some might be below and others above the prescribed standard. The magistrate before whom the charge was heard dismissed the information, being of opinion that, to obtain a sample for the purposes of s. 247, the eight cans should have been bulked and sampled.

Held that on the evidence before him the magistrate had rightly decided that s. 247 had not been complied with, and, accordingly, that a sample had not been procured in circumstances in which s. 247 (4) would operate.

Decision of the Supreme Court of Victoria (*Fullagar* J.): *West* v. *Lawry*, (1946) V.L.R. 304, reversed.

APPEAL from the Supreme Court of Victoria.

Herrick Victor Lawry, Henry Percy Lawry and Francis John Lawry carried on business in partnership as dairy farmers under the firm name of H. P. & F. Lawry Bros. They did not sell milk by retail but supplied it in bulk to distributors. On the information of John Somerville West, a health inspector, they were charged in a court of petty sessions at Bendigo with a breach of s. 215 of the *Health Act* 1928-1935 (Vict.) in that they sold milk which, within the meaning of the Act (by reason of s. 216 (*c*) thereof), was " adulterated" inasmuch as, being deficient in fatty solids, it did not comply with the standard prescribed under the Act. It appeared that the informant had stopped a lorry of the defendants in a street when it was carrying a number of cans of milk consigned by various suppliers, including eight $12\frac{1}{2}$-gallon cans consigned by the defendants to McEncroe Milk Products Pty. Ltd., a milk distributor, pursuant to a general contract for the daily delivery of not less than fifty gallons. In purported exercise of his authority under the Act to take samples of food for analysis the informant took one pint of milk from each of a number of the cans on the lorry, including five of the eight cans consigned by the defendants to the company, and paid the driver of the lorry (who was one of the defendants) the " current market value " of each pint taken. Each of the five pints taken from the defendants' cans was found on analysis to be below the standard as to fatty solids prescribed under the Act. As the case for the informant was presented, apparently the transaction in relation to each (or all)

of the five pints was treated as a " sale " to the inspector under s. 247 (4) of the Act and the deficiency in some one (unspecified) or all was treated as establishing the offence charged.

On behalf of the defendants evidence was given that " we do the milking with milking machines. The milk is carried from cows to vats by pipes and cooled and then run into cans. . . . After being machine-milked the cows are stripped by hand and the stripped milk was placed in the cans. The stripped milk would have a much higher milk-fat content. . . . Some cans might get less of the stripped milk than others and this might account for some samples showing a lower test."

The police magistrate who constituted the court was of opinion that, to determine whether the article sold complied with the required standard, " the eight cans of milk should have been bulked and sampled. . . . The article in question was not properly examined. Five of eight cans only were examined, and, although the possibility of the unexamined three cans containing strippings is very remote, nevertheless, in view of the evidence there is one. Hence the necessity . . . to examine the whole of the article under such circumstances before a charge can be sustained." He accordingly dismissed the information.

In the Supreme Court of Victoria the informant obtained an order nisi to review the decision of the magistrate ; *Fullagar* J. made the order absolute and remitted the case to the court of petty sessions.

By special leave the defendants appealed from the decision of the Supreme Court to the High Court.

Phillips K.C. (with him *O'Driscoll*), for the appellants. The natural meaning of the word " sample " is that it corresponds in quality with some bulk. There is nothing in s. 247 to require that it be given some other meaning. The words in brackets in sub-s. (1) (*a*) suggest that the samples will correspond with a bulk of the substance being manufactured or dealt in. What is the bulk from which the sample is taken is a question of fact in each case. The tribunal of fact must be satisfied that the sample was of a particular bulk. The meaning of " sample " in s. 247 cannot have been changed by the insertion of sub-s. (4) ; that sub-section is expressly confined to samples procured " pursuant to this section." In this case the decision of the magistrate was well warranted by the evidence, and it should be restored. This case is one to which the principle in *Holland* v. *McNally* (1) would apply.

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Hudson K.C. (with him *Spicer*), for the respondent. The appellants' argument seeks to read into s. 247 (1) (*a*), after the word "samples," a limitation by relation to bulk which, the respondent submits, is not supported by the words in brackets and cannot have been intended by the legislature. Such a reading would make the section unworkable. For instance, if a sample is to be taken at the place of manufacture, it is difficult to see, on the appellants' argument, what bulk it is to represent unless it is the whole bulk of the substance being manufactured; obviously it would not be practicable to obtain a sample which could be proved to be representative of the whole bulk. The respondent does not contend that "sample" is not to be given its ordinary meaning in s. 247, but does contend that this does not mean that the sample is to be related to any specific bulk. All that is required is that the sample shall be taken in such circumstances that it can reasonably be inferred that it is fairly representative of some larger quantity of the substance dealt in. In the present case it is a reasonable inference that a sample taken from one can was fairly representative of the larger bulk contained in the eight cans. *Holland* v. *McNally* (1) was a very special case, the facts of which differ materially from those of the present case; it did not lay down any general rule which could be applied here.

Phillips K.C., in reply.

Cur. adv. vult.

April 2. The following written judgments were delivered:—

LATHAM C.J. The appellants are three brothers who carry on business in partnership as dairy farmers. On 20th November 1945 the appellant H. V. Lawry was driving a motor truck carrying a considerable number of cans of milk. Eight of the cans contained milk which the firm of Lawry Bros. was delivering under a contract to supply milk to McEncroe Milk Products Pty. Ltd. The respondent J. S. West, Health Inspector for the City of Bendigo, was authorized under the *Health Act* 1928 to take samples of food for analysis. The inspector took one pint from each of fifteen cans, including five of the eight cans belonging to Lawry Bros. None of the "samples" from the five cans complied with the standard prescribed for milk under the *Health Act* in respect of fatty solids or milk fat content. The respondents were then charged with selling food which was adulterated.

Evidence was given which was not contradicted that when the respondents' cows were milked with milking machines the cows were

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stripped by hand, that the stripped milk was placed in cans, and that the stripped milk would have a much higher milk fat content than the other milk. The magistrate was of opinion that the samples should have been taken from the whole eight cans, and not from five only of the eight cans, and he dismissed the information. The informant obtained an order to review and the Supreme Court (*Fullagar* J.) made the order absolute and remitted the case to the Court of Petty Sessions at Bendigo. *Fullagar* J. was of opinion that the provisions of the *Health Act* brought about the result that the procuring of each sample constituted a sale of the sample itself, irrespectively of the relation of that sample to any bulk quantity then being dealt in by the person from whom the sample was taken, and that the offence was therefore proved.

The *Health Act* 1928, s. 215, provides that any person who sells any food . . . which is adulterated . . . shall be guilty of an offence against Part XII. of the Act. Section 216 provides that for the purposes of Part XII. any food . . . shall be deemed adulterated . . . when (*c*) it does not comply with the standard prescribed therefor by or under the Act. As already stated, it was proved that the five pints of milk taken by the inspector from Lawry's cans did not comply with the standard prescribed by the Act.

Section 247 contains the following provisions :—

" (1) Any authorized officer—

(*a*) (on payment or tender to any person preparing making manufacturing or dealing in any food drug or substance or to his agent or servant of the current market value thereof or of the rate prescribed) may at any place of preparation making manufacture sale or delivery or at any place in course of delivery or at any premises whatsoever demand and procure such samples as are required for the purposes of this Act."

Section 253 provides that refusal to sell to an authorized officer for analysis or refusal to allow a sample to be taken for analysis shall be an offence. By the amending *Health Act* 1935, s. 15, the following sub-section was added to s. 247 :—

" (4) The procuring of any sample pursuant to this section and the payment or tender of the current market value thereof or of the rate prescribed (as the case may be) shall for all the purposes of this Act be deemed to be a sale by such first-mentioned person or his agent or servant (as the case may be) to such officer of the food drug or substance contained in the sample."

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The case was fought in the lower court and in the Supreme Court on the basis that the charge made related to five sales constituted by the taking of five pints from five of the respondents' cans.

Fullagar J. set aside the decision of the magistrate, declining to adopt the view that the word " sample " in s. 247 (1) meant a sample of the whole bulk or quantity which a defendant was preparing making manufacturing or dealing in. His Honour agreed that before the amendment in 1935 it would have been necessary that a sample taken should be representative of such a bulk, but his Honour was of opinion that after sub-s. (4) had been added to the Act it was not possible to continue to adopt this interpretation of the word " sample" in sub-s. (1) of s. 247. His Honour held that when sub-s. (4) provided that the procuring of a sample should be deemed to be a sale " of the food . . . contained in the sample " the result was that there was a sale of simply the quantity of milk &c. which the inspector was deemed to have bought. His Honour was of opinion that in the expression " person . . . dealing in any food " used in sub-s. (1) the words " any food " are used " in a merely generic sense without reference to any specific bulk or larger quantity."

Section 247 (4) provides that the procuring of a sample shall be deemed to be a sale only where the procuring of the sample is " pursuant to this section." Thus the procuring by an authorized officer of a quantity of food for analysis does not bring about what might be called a statutory sale of that quantity unless the food in question is procured pursuant to the section, i.e. in accordance with the provisions of the section. Therefore it must be obtained, not from a person who merely happens to have the food, but from a person who is, in the words of s. 247 (1) (*a*), a person " preparing making manufacturing or dealing in " that food. In this case the only relevant words are " dealing in." It may be observed that the words are not " dealing with."

That which is procured pursuant to the section is described in s. 247 (4) as a " sample " procured pursuant to the section. These words evidently refer back to s. 247 (1), where the right of the authorized officer is a right to " demand and procure such samples as are required for the purposes of this Act." The powers conferred by s. 247 (1) can be exercised only for the purpose of taking a *sample* of something, that is, for the purpose of taking a quantity which may fairly be considered to represent, in all but quantity, a larger bulk. It is not necessary to attempt to lay down any absolute rule stating the conditions which must be satisfied in order that a quantity of a commodity may be regarded as a sample. The conditions will vary in different circumstances. But, in order to comply with s. 247

(1) in the present case, it must be shown that the samples taken were in each of the five cases samples of the milk in which the defendant was then dealing. It is not, in my opinion, sufficient to say that the defendants were milk vendors and that the five pints were pints of milk which were in their possession where it is proved that they were dealing in the five cans only by selling them as part of a larger bulk quantity. The milk in which the defendants were dealing was the whole quantity of milk (eight cans) which they were engaged in delivering to McEncroe's. No one of the "samples" taken was a sample of that whole quantity. Therefore, as the procuring of the sample was not an act done in pursuance of the provisions of s. 247, the provisions of s. 247 (4) did not operate to bring about a sale as a result of the procuring of the samples by the inspector. In my opinion, therefore, the decision of the magistrate was right upon the ground that no sale was proved. Upon this view it is not necessary for me to consider arguments for the appellants based upon *Holland* v. *McNally* (1). The order of the Supreme Court should be discharged, and the decision of the magistrate dismissing the information should be restored.

RICH J. It is necessary to state some of the salient facts before dealing with the construction of the relevant sections the subject of this appeal.

The appellants are dairy farmers who deal in food viz. milk within the meaning of ss. 215 and 247 (1) (*a*) of the *Health Act* 1928 (Vict.). The appellants' cows are milked with machines and the milk is carried from the cows to vats, cooled and then run into cans. After being machine milked the cows are stripped by hand and the stripped milk is also placed in cans. There is no doubt that the stripped milk has a much higher fat content and it may well be that some cans get none or less of it than others. This would account for some cans showing a lower test. On the day when the offence is alleged to have been committed the appellants were in the course of delivering eight cans of milk purchased from them by McEncroe Milk Products Pty. Ltd. In the truck conveying the eight cans there were seven other cans of milk not the subject of this charge. An inspector stopped the truck in a street in Bendigo and took "samples" from five of the eight cans already mentioned.

These "samples" did not comply with the standard prescribed by the Act in that they were adulterated within the meaning of ss. 215, 216 (*c*). Thereupon an information was laid under s. 215 of the *Health Act* 1928 (Vict.) charging the defendants, now the appel-

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lants, with the sale of food which was alleged not to comply with the standard prescribed.

Under s. 215 what is made an offence is the sale of any food, drug, article or substance. And the sale must be the sale of the food, &c. which is identifiable as the subject matter of the sale. This view is confirmed by s. 247 (1) whereby any authorized officer may demand and procure such samples as are required for the purposes of the Act. These are samples of the food, &c. referred to in s. 215. There is, I think, a clear inference from these provisions that " the samples " are " procured " for the purposes of the Act in order to ascertain whether such food complies with the prescribed standard.

It is suggested, however, that a difficulty is created by sub-s. (4) of s. 247 which was enacted in 1935. This sub-section provides that the samples procured by the authorized officer " shall be deemed " to be a sale to such officer of the food, &c. contained in the sample ; See *Leitch* v. *Emmott* (1) ; *International Hotel Ltd.* v. *McNally* (2).

Sub-section (4) is subsidiary to the provisions of the Act to which I have already referred—ss. 215, 216 (*c*) and 247 (1). And having regard to s. 215 under which the charge was laid the sale constituted by the statutory fiction in sub-s. (4) must be construed as a notional sale of the food, &c. the subject of the transaction. Any other construction of sub-s. (4) would, in my opinion, be inconsistent with the substantive provision s. 215.

The facts of the case already in statement more than indicate that " the samples procured " might very well fail to be a proper sample of the food, &c. sold. A curious result would, I think, follow if " the samples " were to be regarded as the food, &c. referred to in s. 215.

In my opinion, the appeal should be allowed.

DIXON J. This appeal comes by special leave from an order of *Fullagar* J. making absolute an order to review a decision of a magistrate who dismissed an information against the appellants. The information charged them with an offence against s. 215 of the *Health Act* 1928 (Vict.) in that they did sell a certain food, to wit milk, which said food was adulterated. In the Act, and possibly therefore in the information, " sell " has an extended meaning. It includes, among other extensions, sending, forwarding, delivering or receiving for or on sale : s. 3. To establish the charge the informant relied upon a taking of samples pursuant to s. 247 (1) of the *Health Act*. That sub-section empowers any authorized officer at any place of preparation, making, manufacture, sale or delivery or at any place in

(1) (1929) 2 K.B. 236, at p. 248. (2) (1940) 64 C.L.R. 24, at p. 28.

course of delivery or at any premises whatsoever to demand and procure such samples as are required for the purposes of the Act on payment or tender to any person preparing, making, manufacturing or dealing in any food, drug or substance or to his agent or servant of the current market value thereof or of the rate prescribed.

It appears that the appellants were supplying milk under a general contract for the daily delivery of fifty gallons of milk to a distributor known as McEncroe Milk Products Pty. Ltd. They were not retailers and supplied milk in bulk only. On the day mentioned in the information as the date of the offence, an inspector stopped a lorry of the appellants carrying a large number of cans of milk consigned by various suppliers, including eight $12\frac{1}{2}$-gallon cans consigned by the appellants to the McEncroe Milk Products Pty. Ltd. The inspector purported to take samples from some fifteen of the cans. From the eight cans consigned to McEncroe Milk Products Pty. Ltd. he took five samples, that is to say, one sample from each of five cans. Under the contract of sale the appellants were required to supply milk containing not less than 4 per cent of fatty solids. As I understand it, under the regulations under the *Health Act* the minimum required is 3.5 per cent of fatty solids. The result of the analysis of the five samples taken showed that in one can the fatty solids were 2.89 per cent, in another 3.03 per cent, in a third 3.02 per cent, in a fourth 3.15 per cent and in the fifth 2.98 per cent. There was but one information and it might have been possible to support it on the ground that a sale within the meaning of the Act to McEncroe Milk Products Pty. Ltd. had been shown inasmuch as under the definition the carrying of the milk for the purpose of delivery would be enough. This would mean, however, that the whole eight cans must be considered as the subject of the notional sale.

According to the appellants' case, the samples from the five cans would not establish that the milk from the whole eight cans, when poured together, fell below the required standard. The reason for this is that the cows had been machine-milked and stripped by hand and the strippings, which would contain the highest percentage of fatty solids, might conceivably have been put in the three cans from which no sample was taken. The method of actual delivery was to pour the contents of all the cans into a vat, so that the bulk obtained from the eight cans might, it is said, have proved to contain not less than 3.5 per cent of fatty solids.

I feel somewhat sceptical about this contention which seems to me to pay more respect to logical possibilities than to actual probability. But the magistrate accepted the view that, to show whether the article complied with the required standard, eight cans of milk

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should have been bulked and sampled, and that the article in question was not properly examined. It is true that he said that the possibility of the unexamined three cans containing strippings was very remote. Nevertheless, he took the view that there was such a possibility and, accordingly, that it was necessary to examine the whole of the article. Moreover, *Fullagar* J. (*West* v. *Laury* (1)) did not question the fact. He said: "The whole, or an undue proportion, of the strippings might have gone into the three cans from which no samples were taken. If, therefore, samples had been taken from all the eight cans and those samples had been bulked, it might very well have been that no deficiency in the cream content of the whole would have been shown."

Notwithstanding my own scepticism, I think that I ought to give effect to the views of the magistrate and of his Honour upon this question of fact. This means that the samples were inadequate as a test of the fatty solids of the total quantity of milk contained in all eight cans in course of delivery to McEncroe Milk Products Pty. Ltd. It would, therefore, seem that the charge ought to fail if it related to the sale of the eight cans under the general contract, that is the statutory or notional sale established by their being in course of transit for delivery thereunder. But, before the magistrate, the informant did not treat the charge as relating to this "sale." He relied on sub-s. (4) of s. 247, a provision introduced by the *Health Act* 1935, No. 4333. That provision is as follows:—"The procuring of any sample pursuant to this section and the payment or tender of the current market value thereof or of the rate prescribed (as the case may be) shall for all the purposes of this Act be deemed to be a sale by such first-mentioned person or his agent or servant (as the case may be) to such officer of the food drug or substance contained in the sample." The informant took the actual procuring of the samples as amounting to sales. He did not condescend to say which of the five samples was the subject of the prosecution and no one seemed to concern himself with this question. *Fullagar* J. took the view that the use of sub-s. (4) was decisive. His reasons are stated at length and I shall not traverse them. It is sufficient to say that they concentrate on sub-s. (4), and treat the samples taken by the inspector as the food sold and as itself amounting to the bulk which is the subject of the sale.

In my opinion, there is an antecedent question to be answered before such a course is justified. That question is whether the sample was taken in accordance with the requirements of s. 247 (1). It is an antecedent question because the operation of sub-s. (4) is

(1) (1946) V.L.R. 304, at p. 307.

dependent, among other conditions, upon the procuring of any sample pursuant to the section. The words "pursuant to this section" introduce an indispensable condition which throws the prosecution back on s. 247 (1) and makes it necessary to consider whether the sample was taken, not merely in purported pursuance of sub-s. (1), but in actual pursuance of sub-s. (1).

Now sub-s. (1) itself relates to the taking of a sample from any person preparing, making, manufacturing or dealing in any food, drug or substance or his agent or servant. Further, the taking of the sample is to be at one of a number of points or stages, the relevant point or stage being in course of delivery. In my opinion, once the conclusions are adopted, first, that the dealing was in the whole eight cans as one consignment to be actually delivered by pouring into a bulk vat, and secondly, that sampling five of the eight cans was insufficient to produce a reasonably certain result, then the further conclusion is inevitable that a fair sample was not taken. I understand the word "sample," whether as a matter of law or as a matter of popular speech, to mean a part of a fluid or substance taken from some larger quantity because it is a fair representation of the whole. The whole in this case must, I think, for the purposes of sub-s. (1) be taken to be the eight cans. I think it must be taken to be the eight cans because they together contain the milk dealt with and in course of transit and delivery. It is their combined contents that were to be delivered and were sold. It may be true that, once you are within sub-s. (4) and it is to be finally applied, you may take the sample as the bulk. But, because of the words "pursuant to this section," you cannot get into sub-s. (4) in such a case as this except by compliance with sub-s. (1), and, for the purposes of that subsection, the sample must be regarded as inadequate, if you accept, as I have done, the findings of the magistrate adopted as they were by *Fullagar* J. On this ground I find myself unable to agree in the conclusion reached by that learned Judge.

I think the appeal should be allowed, the order of the Supreme Court set aside and in lieu thereof the order nisi should be discharged with costs. The respondent should pay the costs of the appeal.

McTiernan J. I agree that the appeal should be allowed.

As the case now stands the determination of the question whether the appellants should be adjudged guilty of selling adulterated milk depends upon the meaning of the word "sample" in s. 247 (4) of the *Health Act*.

The word "sample" is not defined by the *Health Act*. Section 3, the definition section, only says that "sample" includes part of a

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sample. It is necessary to construe the word in the context of s. 247. The words " any sample " in sub-s. (4) of this section refer to a sample which the officer mentioned in sub-s. (1) is authorized by that sub-section to demand and procure. Subject to the conditions mentioned in sub-s. (1), he is authorized to demand and procure " such samples as are required for the purposes of this Act."

The conditions are :—Payment or tender of the value of the sample is to be made by the officer ; his authority is limited to demanding and procuring the samples from a specified description of persons ; the sub-section specifies the places at which the samples may be demanded and procured by the officer. These places are the place of preparation, making, manufacture, sale or delivery or at any place in course of delivery or at any premises whatsoever.

It is clear that the samples which the officer is authorized to obtain are samples of a food, drug or substance. But it is not expressly said what mass of food, drug or substance any sample is to represent. It is implicit, I think, that the authority is given to an officer to take samples in order to test the quality of the food, drug or substance which the person, from whom the samples are authorized to be demanded and procured, has prepared, made, manufactured or in which he is dealing. If the quality of such food, drug or substance may be inferred from any quantity taken by the officer in pursuance of his powers under s. 247 (1), such quantity is, I think, a sample within the meaning of the section and the procuring of it is, by force of sub-s. (4), a sale of the food, drug or substance contained in the sample.

This construction of the provisions raises a question of fact in every case whether the quantity procured by the inspector is a fair specimen of the food, drug or substance in respect of which the person from whom it is procured does any of the things mentioned in sub-s. (1).

The words, " in any food, drug or substance ", do not indicate a specific mass of food, drug or substance of which the samples are to be representative. These words are part of the description of the persons from whom samples are authorized to be demanded and procured. Further, the words, " at any place in course of delivery ", merely indicate a place and occasion at and when samples are authorized to be taken. These words do not make any reference to the mass which it is necessary that the samples should represent.

It is a condition of sub-s. (4) of s. 247 that a sample should be procured in pursuance of the section. If this condition is not fulfilled the procuring of the sample is not a sale under sub-s. (4). In this case it was admitted in argument that the five samples in respect

of which the prosecution was brought were obtained in pursuance of the section. The case comes down to the question of fact whether the sample which the informant took from any of the five cans was a fair specimen of the milk dealt in by the appellants.

I think that upon the evidence a court could not but entertain the doubt whether a sample of the contents of any one of the five cans from which the officer drew the samples would fairly represent the quality of the milk which the appellants prepared for sale or dealt in. I think that the proper inference from the evidence is that the milk which the appellants prepared for sale or dealt in was milk of the quality of the bulk of the eight cans on the truck, that is, the five cans from which the officer took samples and the three other cans from which no sample was taken.

In my opinion the evidence was not capable of satisfying a court beyond a reasonable doubt that any of the samples, the procuring of which was relied upon as a sale under sub-s. (4) of s. 247, was a sample according to the fair meaning of the word in the section.

It follows that the magistrate was right in declining to convict the appellants.

WILLIAMS J. The facts have been fully stated in the judgment of *Fullagar* J. in the court below and I shall not repeat them. These facts establish that the sale of milk by the appellants to McEncroe Milk Products Pty. Ltd. was a single sale of the whole of the milk contained in the eight cans, and not separate sales of the milk contained in each can. The inspector took samples of milk from five out of eight cans. The appellants were prosecuted under s. 215 of the *Health Act* 1928 (Vict.) for selling milk which was adulterated in the sense that it did not comply with the standard prescribed by the Act. It is not contested that the samples taken from the five cans did not comply with this standard. But there is evidence that the appellants' cows were first milked by machines and then stripped by hand, and that the stripped milk would contain a much higher milk fat content. It is therefore contended that it was necessary to take a portion of the milk from each of the eight cans in order to obtain a proper sample of the milk as a whole. The inspector acted under the provisions of s. 247 of the *Health Act*. This section provides, so far as material, that any authorized officer, on payment or tender to any person preparing, making, manufacturing, or dealing in any food of the current market value or at the rate prescribed, may at any place of preparation, making, manufacturing, sale or delivery or at any place in course of delivery or at any premises whatsoever demand and procure such samples as are required for the

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purposes of the Act. The Act does not define the word "sample," so that it must be given its ordinary popular meaning. I agree with the learned judge that the procuring of samples under s. 247 before it was amended would not constitute a sale for the purposes of s. 215. But s. 15 of the *Health Act* 1935 added a new sub-s. (4) to s. 247 in the following terms:—"The procuring of any sample pursuant to this section and the payment or tender of the current market value thereof or of the rate prescribed (as the case may be) shall for all the purposes of this Act be deemed to be a sale by such first-mentioned person or his agent or servant (as the case may be) to such officer of the food contained in the sample." I also agree with the learned judge that the conception behind s. 247 in its original form was that a sample, in order to be a sample within the meaning of the section, must fairly represent the quality, or in other words must be a fair specimen, of the bulk or larger quantity of which it is alleged to be typical. The food dealt in, and in course of delivery in the present case, was the milk contained not in the five, but in the eight cans. It was a sample of that entire bulk which the inspector was authorized to demand and procure for the purposes of the Act. But if the sample so procured was found to be adulterated and it was desired to launch a prosecution under s. 215, it was necessary to convert the procuration into a notional sale or the sample to the inspector. For this purpose the section was amended by the addition of sub-s. (4). The notional sale is a sale of the food contained in the sample. But it is only a sample procured pursuant to the section which is deemed to be sold. I cannot agree with the learned judge that the words "any food" in the expression "person dealing in any food" which is found in sub-s. (1) of s. 247 and the words "the food" at the end of sub-s. (4) are used in a merely generic sense as referring to milk or butter or bread, as the case may be, in which the person is dealing and which the inspector buys. I am of opinion that the food referred to in the former expression is the specific quantity of food which is being prepared, made, manufactured, or dealt in, and that the words "sale of the food contained in the sample" in sub-s. (4) refer to a portion of the food previously forming part of the whole which is fairly representative of the larger quantity. In the present case a sample within the meaning of s. 247 would have been a portion of the milk which fairly represented the larger quantity contained in the whole eight cans. To comply with the section, therefore, portions taken from each of the eight cans should have been bulked before analysis or, if they were separately analysed, the results should have been averaged: *Lamont* v. *Rodger* (1); *Wildridge* v. *Ashton* (2).

(1) (1911) S.C. (J.) 24.

(2) (1924) 1 K.B. 92.

For these reasons I would allow the appeal.

Appeal allowed with costs. Order of Supreme Court set aside. In lieu thereof order nisi discharged with costs and order of magistrate restored.

Solicitors for the appellants, *Macoboy, Taylor & Taylor*, Bendigo, by *Scheele & Scheele.*

Solicitors for the respondent, *Tatchell, Dunlop, Smalley & Balmer*, Bendigo, by *Shaw & Turner.*

E. F. H.