[HIGH COURT OF AUSTRALIA.]

ROBERT ALEXANDER . . . . . APPELLANT;
DEFENDANT,

AND

DANIEL MENARY . . . . . RESPONDENT.
INFORMANT,

CHARLES BOYD ALEXANDER . . . APPELLANT;
DEFENDANT,

AND

DANIEL MENARY . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1921.

SYDNEY, *Aug.* 4, 15.

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

Diseased Animals—Consignment for sale—Burden of proof—Cattle Slaughtering and Diseased Animals and Meat Act 1902 (*N.S.W.*) (*No. 36 of* 1902), *secs.* 47, 50.

Sec. 47 (1) of the *Cattle Slaughtering and Diseased Animals and Meat Act* 1902 (N.S.W.) provides that "Whosoever sells or consigns or exposes for sale, or supplies for rations, any diseased animal, shall be liable to a penalty" &c. Sec. 50 provides that "(1) Any officer of or person authorized by the Board" of Health "may, at all reasonable times, inspect and examine any animal, carcass, or meat, sold, consigned, or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man. (2) The burden of proving that the same was not consigned or exposed or deposited for any such purpose, or was not intended for the food of man, shall be on the party charged."

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Held, that the provision in sec. 50 (2) that the burden of proof shall lie on the party charged does not apply to a charge made under sec. 47.

Decision of the Supreme Court of New South Wales (*Wade* J.): *Menary* v. *Alexander*, 38 N.S.W.W.N., 38, reversed.

APPEALS from the Supreme Court of New South Wales.

At the Court of Petty Sessions at Singleton, before a Police Magistrate, two informations were heard whereby David Menary charged that, in the one case, Robert Alexander and, in the other case, Charles Boyd Alexander did on 18th August 1920 unlawfully consign for sale certain diseased animals contrary to the provisions of sec. 47 of the *Cattle Slaughtering and Diseased Animals and Meat Act* 1902 (N.S.W.). The animals in respect of which the charges were made were ten head of cattle. Having dismissed both informations, the Magistrate on the application of the informant stated a case for the opinion of the Supreme Court in respect of each dismissal, setting out the evidence and stating that in each case he found that the cattle had not been consigned for sale but for inspection, and that therefore no point of law was involved. The cases stated were heard by *Wade* J., who held that the Magistrate's determination in each case was erroneous in point of law and ordered that the cases should be remitted to the Magistrate: *Menary* v. *Alexander* (1). It appeared from the transcripts that *Wade* J. in his judgment stated that under sec. 50 of the Act the onus lay upon the defendant to show that he did not consign for sale.

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

The material facts are stated in the judgment of the Court hereunder.

Brissenden K.C. (with him *Young*), for the appellants. There was evidence upon which the Magistrate might find that the cattle which were the subject of the charge were not consigned for sale but were consigned for inspection. The question was what was the intention of the appellants. That is a question of fact, and upon it the finding of the Magistrate is conclusive (*Boese* v. *Farleigh Estate*

(1) 38 N.S.W.W.N., 38.

Sugar Co. (1); *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (2); *Justices Act* 1902 (N.S.W.), secs. 101, 106; *Ellis* v. *Hill* (3)). Sec. 50 (2) of the *Cattle Slaughtering and Diseased Animals and Meat Act* 1902 (N.S.W.), which places upon the party charged the burden of proof that animals were not consigned for sale does not apply to a charge under sec. 47. Secs. 50 to 53 deal with a different class of offences altogether from that with which sec. 47 deals. (See *Diseased Animals and Meat Act* of 1892, secs. 3, 4, 5; *Public Health Act* 1875 (38 & 39 Vict. c. 55), secs. 116, 117; *White* v. *Redfern* (4).) [Counsel also referred to *Ex parte Green* (5).]

Street, for the respondent. There was no evidence upon which the Magistrate could find that the cattle were not consigned for sale. He treated "consigned for sale" and "consigned for inspection" as being mutually exclusive; but they are not. The only inspection which it is suggested the appellants meant to have is the inspection at the sale-yard which every animal must undergo before it is submitted to sale. The offence under sec. 47 (1) in relation to consigning is consigning *simpliciter*, and not consigning for sale. The fact that the information charged a consigning for sale is a matter which could be cured under sec. 65 of the *Justices Act* 1902. (See *Stiggants* v. *Joske* (6); *Hedberg* v. *Woodhall* (7).)

Brissenden K.C., in reply. Sec. 65 of the *Justices Act* applies only where objection can be taken by the defendant to the information.

Cur. adv. vult.

Aug. 15.

THE COURT delivered the following written judgment:—

Informations were laid against Charles Boyd Alexander and Robert Alexander under sec. 47 of the *Cattle Slaughtering and Diseased Animals and Meat Act* 1902, charging them with unlawfully consigning for sale certain diseased animals. Both informations were dismissed

(1) 26 C.L.R., 477, at p. 483.
(2) 16 C.L.R., 591.
(3) 29 N.S.W.W.N., 90.
(4) 5 Q.B.D., 15, at p. 18.
(5) 1 S.R. (N.S.W.) (L.), 384.
(6) 12 C.L.R., 549.
(7) 15 C.L.R., 531.

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by the Magistrate before whom the same were heard. The complainant was dissatisfied with the determination as being erroneous in point of law, and applied to the Magistrate in writing under the *Justices Act* 1902, sec. 101, to state and sign a case setting forth the facts and grounds of such determination for the opinion thereon of the Supreme Court. The Magistrate did so state and sign a case. The depositions were attached to the case, and the Magistrate stated that he found that the animals were consigned not for sale but for inspection. Therefore, the Magistrate added, no point of law was involved. The case came before *Wade* J. in the Supreme Court, who held that a question of law did arise in the case stated by the Magistrate, and, further, that the conclusion he arrived at was erroneous. Consequently the matter was remitted to the Magistrate with the opinion of the Court thereon. Special leave was given by this Court to the defendants to appeal against the judgment of *Wade* J., and this appeal now comes before us for determination.

The learned Judge was of opinion that the provisions of sec. 50 (2) of the Act first mentioned put the onus upon the defendants of proving that the animals were not consigned for sale. This proposition, which is at the root of the judgment, is not, we think, in accordance with the law. The sub-section is as follows: "The burden of proving that the same was not consigned or exposed or deposited for any such purpose, or was not intended for the food of man, shall be on the party charged." It occurs as a sub-clause in a section dealing with the examination of animals and meat sold, consigned or exposed for sale, and the seizure thereof if diseased, unsound or unfit for the food of man, in order that it may be dealt with by the Court. Condemnation follows if it appears to the Court that the carcase or meat is unsound, &c., and the person to whom the same belongs, &c., is liable to a penalty (see sec. 52). The situation of sec. 50 (2) suggests that it relates to the authorities given by the section in which it is found, and to proceedings following upon the exercise of those authorities. The cases provided by sec. 50 (2) are the cases mentioned in sec. 50 (1), and are wider than those covered by sec. 47. The words "party charged" are completely satisfied by reference to the proceeding contemplated by

sec. 52 (2). The view that sec. 50 (2) relates to the authorities given by sec. 50 and to proceedings following upon the exercise of those authorities is also in accordance with the history of the section (see 38 & 39 Vict. c. 55, sec. 116; 55 Vict. No. 17 (N.S.W.), sec. 5). We are satisfied, upon its true construction, that the provisions of sec. 50 (2) cannot be relied upon as altering the burden of proof under sec. 47.

Mr. *Street* in his able argument sought to uphold the decision upon a different basis. He admitted that the jurisdiction of the learned Judge under the *Justices Act* on appeal by way of case stated was to determine questions of law stated by the Magistrate and not review findings of fact. But he said that there was no evidence to support the finding of the Magistrate, and that was a question of law which arose upon the facts stated by the Magistrate. We agree that it is a question of law whether there was any evidence to support the finding. This drives us to a consideration of the evidence, which disclosed a most undesirable state of affairs. Our duty however lies within a narrow compass; it is not to determine whether we should have come to the same conclusion as the Magistrate but whether there was any evidence sufficient to justify the conclusion at which he in fact did arrive. We think there was. The prosecutor took upon himself to prove that the animals were consigned for sale. They were mustered on Carrington Station, which belonged to the defendants, and 56 head were driven to a railway station at Whittingham. At the station the drover, acting under the authority of the defendants, apparently examined the animals and marked 21 for inspection, and he prepared travelling statements and delivery notes to accompany the cattle on the railway, showing 35 as sound and 21 for inspection. Some of the animals were put on trucks, but Health Officers intervened, untrucked the animals that had been trucked, and examined the whole mob. The result was that 11 showed visible signs of disease: some tubercular disease indicated by lumps in the throat and coughing, and all were emaciated in condition. These animals were condemned and destroyed. Apparently they formed part of the number of animals marked for inspection, and it is in respect of them that the present charges were laid.

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The defendants, Charles Boyd Alexander and his drover, in answer to this case gave evidence that the animals had been running on prickly-pear country and, owing to the intrusion of thorns, frequently developed lumps in the throat. Animals with lumps were, therefore, to be regarded as suspects and marked for inspection, and, in pursuance of that practice, the 21 head were so marked. On this state of facts the Magistrate found that the defendants did not intend to and did not consign the diseased animals for sale but for inspection. We have considered the comments of *Wade* J. upon the evidence, but we cannot say as a matter of law that there was no evidence upon which the Magistrate could found his decision. It was open for him to say that the defendants recognized that lumps on cattle might be caused by disease or by a local irritation due to prickly-pear thorns, and that they desired to separate out the diseased animals so that they might not be sent for sale. The intent of the defendants was all-important, and it was for the Magistrate to say as a fact what was their real intention.

The appeal must be allowed in each case and the decisions of the Magistrate restored.

Appeals allowed. Orders of Supreme Court dated 23rd December 1920 set aside. Orders of Magistrate dated 29th October 1920 dismissing informations restored. Declare that no question of law arises on the special cases. Respondent to pay appellants their costs in the Supreme Court.

Solicitors for the appellants, *A. B. Shaw & Grainger*, Singleton, by *A. B. Shaw & McDonald*.

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

B. L.