

BAKER v. HOWARD SMITH & SONS.

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February 24. *Sydney Corporation Act* (43 Vic. No. 20), s. 198—*Meat, etc., unfit for food—*
 March 10. *Having in possession as carrier—Scienter.*

May 8.

The C.J.
 Owen J.
 and
 Walker J.

By the Sydney Corporation Act, s. 198, it is provided that "no person shall keep or have in his possession, or retain in any building, shop, or other place, any . . . fish unfit for human food." *Held*, that the defendants, who had certain tinned fish, which was unfit for human food, in their possession as carriers merely and pending delivery to the consignees, were liable to be convicted under the section, whether they knew of the condition of the fish or not.

SPECIAL CASE stated under the Justices Appeal Act.

The facts are fully stated in the judgments.

Pilcher, Q.C. (with him *Leverrier*), for the appellant. The question is whether the defendants are liable for having in their possession fish unfit for human food, whether they knew it to be unfit or not. The prohibition in s. 198 is in absolute terms, and it is evident from the wording of s. 197 that the omission of the word "knowingly" is not accidental. *Prima facie mens rea* is necessary, but in matters affecting public health an exception is frequently made, and where the words import an absolute prohibition the Court will construe them literally and not imply words of scienter: *Sherras v. De Rutzen* (1); *Attorney-General v. Lockwood* (2); *R. v. Woodrow* (3); *Betts v. Armstead* (4); *Pain v. Boughtwood* (5); *Dyke v. Gower* (6); *Blaker v. Tillstone* (7); *Piper v. Bank of N.S.W.* (8).

OWEN, J. Am I liable if I have a bad tin of sardines in my kitchen, which I do not know is bad?

Pilcher, Q.C. Yes. It may be argued that there is an exception in the case of a carrier, but some Acts expressly except carriers, whereas this Act does not.

(1) [1895] 1 Q.B. 918.

(2) 9 M. & W. 378.

(3) 15 M. & W. 404.

(4) 20 Q.B.D. 771.

(5) 24 Q.B.D. 353.

(6) [1892] 1 Q.B. 220.

(7) [1894] 1 Q.B. 345.

(8) 18 N.S.W. L.R. 224; 14 W.N. 1.

Bruce Smith, for the respondents. The question whether *mens rea* is necessary depends on the circumstances of each case, and the omission of words of scienter does not necessarily mean that the Legislature intended to dispense with its proof: see *R. v. Tolson* (1); *Hearne v. Garton* (2); *R. v. Sleep* (3). To hold that scienter is unnecessary in the present case would lead to such an absurd result as that suggested by Mr. Justice *Owen*. All the cases cited by my learned friend were cases where the thing was sold, or kept and intended for sale. The same considerations do not apply where goods are *in transitu*, or merely stored.

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Secondly, the section does not apply to the temporary possession of a carrier. Mere physical possession is not enough. The goods are, in law, in possession of the consignee, and merely in the temporary custody of the carrier. The wharf-owner who perhaps allows goods to be stored for an hour on his premises for the convenience of the consignee, and pending delivery, cannot be liable to prosecution. The words "have or keep" do not apply to a keeping of this temporary nature: *Biggs v. Mitchell* (4).

Pilcher, Q.C., in reply. The section says, "keep or have in his possession," which must be read, "keep in his possession, or have in his possession," the former being a different and larger term than the latter.

OWEN, J. The word "keep" really seems to be redundant, since it is included in "have."

Pilcher, Q.C. *Biggs v. Mitchell* merely decided that the prosecution was under the wrong section, since the Act in that case had another section which dealt with "having and conveying." See *Foster v. Diphwys Slate Co.* (5). My learned friend's contention comes to this, that the case of a carrier is a *casus omissus*. If that is so, the principal opportunity for safeguarding the public against rotten provisions will be lost, since they cannot

(1) 23 Q.B.D. 168.

(3) 30 L.J. M.C. 170.

(2) 28 L.J. M.C. 216.

(4) 2 B. & S. 523; 31 L.J. M.C. 163.

(5) 18 Q.B.D. at 432.

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Or again, suppose goods are consigned here to order, and the
order does not come forward, whom are you going to prosecute?

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Cur. adv. vult.

May 8. On May 8th,

THE CHIEF JUSTICE. This was a special case stated by one of the Stipendiary Magistrates at the request of the complainant, the Magistrate having refused to convict the defendants for an offence alleged to have been committed by them contrary to the provisions of s. 198 of the Sydney Corporation Act of 1879. That section provides that, "No person shall keep or have in his possession, or retain in any building, shop, or other place, any dead animal, carcase, meat, poultry, or fish unfit for human food, and every person offending against this enactment shall be liable, etc."

It appeared that the defendants are shipowners, and that a quantity of tinned fish admittedly unfit for human food was shipped on board one of their steamers in Melbourne consigned to certain persons in Sydney. On the arrival of the ship here the defendants allowed a full inspection of the goods by the complainant, who is the Inspector of Nuisances duly appointed under the provisions of the Sydney Corporation Act of 1879. The fish, on being landed from the vessel, was in consequence of the direction of the complainant not delivered to the consignees, and was placed under shelter on the wharf, and was not warehoused. The complainant thereupon filed an information against the defendants, which alleged that the defendants "Did have in their possession in a building off King-street certain fish, to wit, tinned fish, the same being unfit for human food." To this information the defendants pleaded "not guilty," but admitted that the allegations contained in the information were true. In other words, the defendants admitted that they had in their possession in a building tinned fish which was unfit for human food. The Magistrate held that the evidence did not support the information, and dismissed the complaint; hence this appeal.

It was argued on behalf of the defendants that although they admitted having physical possession of the goods, yet being merely common carriers, and it not being shewn that they had

any knowledge of the condition of the goods, possession under such circumstances was not such possession as was contemplated by the Act, and the case of *Biggs v. Mitchell* (1) was much relied upon in support of this position. During the hearing I was much impressed with the argument founded upon that case, but on full consideration I am of opinion that *Biggs v. Mitchell* is clearly distinguishable. In *Biggs v. Mitchell* the mischief against which the Act was aimed was the keeping or storing of large quantities of gunpowder in one place, and the Court thought that gunpowder which was, so to speak, *in transitu*, and merely held temporarily by a carrier for the purpose of distribution, was not a keeping within the meaning of the Act. Here, the very existence of food unfit for human food is provided for. Such food is to be destroyed, and any person keeping or having such food in his possession is guilty of an offence. The fact of its being *in transitu* is no palliation of the offence; the thing must not exist, whether *in transitu*, or in store.

Then as to the want of knowledge by the defendants, I think this is quite immaterial; this is one of those classes of cases where the doctrine of *mens rea* does not apply. Here, to apply the words of Parke, B., in *R. v. Woodrow* (2) to this case, "The Legislature have made a stringent provision for the purpose of protecting the revenue, and have used very plain words. If a man is in possession of an article as the defendant was in this case, and that article falls within the terms mentioned in the statute, there is no question but that the offence is proved."

It is said that this is a case of great hardship upon the defendants. Perhaps it is. However, the defendants most properly gave every facility to the Inspector of Nuisances, and seeing that this is, I understand, a test case, it is within the power of the Magistrate, should he in his discretion see fit, so to deal with it as to inflict a merely nominal fine. It should be borne in mind that the defendants have it in their power to refuse to carry this class of goods, unless indemnified by the consignors against the result of any prosecution, should it turn out that the goods consigned are not fit for human food.

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(1) 2 B. & S. 523.

(2) 15 M. & W. 417.

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The C.J.

The answer to this case is that the Magistrate's determination was erroneous in point of law, and that he ought to have convicted the defendants of the offence charged. The case is now remitted back for that purpose, and the appeal is granted with costs.

OWEN, J. This was a special case submitted to the Court by Mr. *Delohery*, S.M. It appears that the defendant company are engaged in the intercolonial shipping trade, and as such carriers brought in one of their ships from Melbourne some cases containing preserved fish, for consignees in New South Wales. These cases were landed at their wharf in Sydney, and placed under a shed there, awaiting removal by the consignees. The fish appear to have been in tins, and the tins packed in wooden cases, and the defendant company did not know, and had no means of knowing, whether or not the fish was unfit for human food. It appears that information as to the fish was telegraphed from Melbourne to the authorities in Sydney, who thereupon seized the fish, and indicted the defendants under s. 198 of the Act 43 Vic. No. 3.

The defendants' counsel relied mainly on the case of *Biggs v. Mitchell* (1). In that case the appellant Biggs had been convicted under s. 11 of the statute 12 Geo. III. c. 61, for having and keeping at one time more than 50lb. weight of gunpowder. Biggs was a carrier, and had deposited the gunpowder in a building in the course of transit. The Court allowed the appeal. But the statute in that case clearly dealt with two classes of persons—dealers and others having gunpowder to keep, and carriers having gunpowder to convey. In s. 11 the words are "have and keep," and in s. 18 the words "have and convey," and the Court held that the meaning of the word "have" in each section must be controlled by the word conjoined to it—in s. 11 by the word "keep," and in s. 18 by the word "convey"—and that, therefore, a carrier having goods in course of transit did not come within s. 11. *Compton*, J., says: "Inasmuch as the words in s. 11 are 'have or keep,' and the words in s. 18 are 'have or convey,' I am led to think that the word 'have' in each section is to be read

(1) 31 L.J. M.C. 163.

in reference to the second word in the same section. One is having with reference to keeping, and the other having with reference to carrying."

It is impossible to draw such distinctions in reference to s. 198 of this Act. Moreover, the words are not "have and keep," but the disjunctive is used, "keep *or* have in his possession, *or* retain in any building, etc." Again, reading ss. 197 and 198 together the Act seems to contemplate only two classes of persons—those who sell or expose for sale meat, etc., unfit for human food; and those who have or keep in their possession, or retain in any building, etc., any such food.

I can see nothing in the Act exempting carriers who have food of this description in their possession, even though retained in a building for a temporary purpose only, and in course of transit. The object of the Legislature, in my opinion, was, in view of public health, not merely to prevent the sale of meat, etc., unfit for human food, but to prevent such meat remaining in the possession of any person for any purpose, or for any time. As was pointed out in argument, if carriers were exempt from the provisions of this Act, they could distribute articles unfit for human food throughout the colony to the serious detriment of the public health.

As the having in his possession food unfit for human consumption is a statutory offence, it does not matter, in my opinion, that the defendant company was not aware of the contents of these packages. In s. 197 the statute expressly provides that knowledge is necessary where adulterated food or milk is sold, but no such expression occurs in reference to meat, etc., unfit for human food either in ss. 197 or 198. A similar distinction was much relied on in the case of *Piper v. Bank of New South Wales* (1).

In *R. v. Woodrow* (2) a dealer in tobacco was held liable for having adulterated tobacco in his possession, although he bought it as genuine, and had no reason to suspect it was adulterated. The statute 5 and 6 Vic. c. 93, s. 3, enacts "that every manufacturer of, dealer in, or retailer of tobacco, who shall receive or take into or have in his possession" any adulterated tobacco, shall

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(1) [1897] A.C. 383; 18 N.S.W. L.R. 224; (2) 15 M. & W. 404.

14 W.N. 1.

1899. forfeit 200*l*. *Pollock*, C.B., says: "It appears to me that in this case, it being within the personal knowledge of the party that he was in possession of the tobacco . . . it is not necessary that he should know it was adulterated. . . . If this were a case of provisions, or of any matter that affected public health, it would not be at all unreasonable to require persons dealing in them to be aware of their character and quality, and to be responsible for their goodness, whether they know it or not." See *Betts v. Armstead* (1); *Paine v. Boughtwood* (2); *Piper v. Bank of New South Wales*.

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For these reasons I think the case must be remitted to the Magistrate, and the appeal allowed with costs.

WALKER, J., concurred.

Attorney for the appellant: *Dawson*.

Attorneys for the respondents: *Sly & Russell*.

(1) 20 Q.B.D. 771.

(2) 24 Q.B.D. 353.