

HOLLAND v. McNALLY.

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Health—Food—Margarine—Not of prescribed colour—Sale to authorised officer pursuant to demand—Seller unwilling to sell—Act done under compulsion of law—Whether offence committed—Health Act 1928 (No. 3697), secs. 236, 247, 253—Health Act 1935 (No. 4333), secs. 13, 15—Health (Margarine) Act 1936 (No. 4439), sec. 2.

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August 1, 2;
September 6.

An inspector of the Commission of Public Health demanded from the defendant one pound of margarine, as a sample required for the purposes of the Health Act, and tendered the current market value of the sample. The defendant was unwilling to sell, but the inspector pointed out that under the Act he was empowered to require a sample. Thereupon the defendant sold him one pound of margarine. The margarine was not of the prescribed colour and the defendant was charged with selling margarine, which was not of the prescribed colour, in a lump of less than fourteen pounds in weight, contrary to section 236 of the Health Acts. The charge was dismissed.

Held, by MANN C.J. and LOWE J. (GAVAN DUFFY J., dissenting), that the act of the defendant being done under compulsion of law, the charge was rightly dismissed.

ORDER TO REVIEW.

K. Holland, an inspector of the Commission of Public Health and an officer duly appointed by the Commission, laid an information against Gordon Stanley McNally charging him that on the 17th December 1937 at St. Kilda he was guilty of an offence against Part XII. of the Health Acts in that, contrary to section 236 of the said Acts, he did sell to the informant margarine which was not of the prescribed colour in a lump of less than fourteen pounds in weight. The information came on for hearing before a Court of Petty Sessions at St. Kilda on the 3rd day of March 1938.

The informant gave evidence that on the 17th December 1937 he visited the defendant's factory at St. Kilda and there saw the defendant. He informed the defendant that he was a health inspector and showed him his authority from the Health Department. He also saw a box containing about thirteen pounds of margarine in one pound and half pound unsealed packages. In answer to the informant's questions, the defendant said the margarine was for sale in Victoria and had been manufactured within the last two days. The informant said he would purchase a package. The defendant said: "I won't sell you a package. I will give you a package. I only sell to syndicates and I have an agreement not to sell less than twelve pounds at a time". The informant said: "Under the Health Act I am empowered to take

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samples''. He showed the defendant section 247 of the Health Act and the defendant agreed to sell a pound after reading it. The informant paid him the retail price, 1s., for it and said that the purchase was for the purpose of analysis. He divided the package into three parts, produced three sample jars, showed the defendant that they were clean, placed one of the parts in each of the jars, sealed them, marked them "K20 Margarine 17.12.37 K. Holland'', gave the defendant one of the jars, retained one himself and sent the third to the Department's analyst. The informant produced the package retained by him and stated that it appeared to be the same in colour as when he obtained it. In cross-examination, the informant said that the defendant had said that he would not sell him a pound of margarine, but after the informant read section 247 (a) of the Act the informant said he would sell him a sample. There was evidence that the margarine was not of the prescribed colour.

The information was dismissed. The reasons for its dismissal are set out in detail in the judgment of Gavan Duffy J. The informant obtained an order *nisi* to review the decision of the Court of Petty Sessions on the following grounds:—1. On the evidence the magistrate should have found that there was a sale within the meaning of section 236 of the Health Act. 2. That the magistrate was wrong in holding that a sale to an authorised officer was not a sale within the meaning of the said section.

Herring K.C. (with him, *D. I. Menzies*), for the informant, to move the order absolute—On the evidence the magistrate should have found a sale within sec. 236 of the *Health Act* 1928, as substituted by Act No. 4333, sec. 13. The sale amounted to an offence. A person may be convicted under the Health Act in respect of a sale which is forced upon him. Section 236 (e) is general in its terms and cannot be cut down by sections 247 and 253, which must be read as subject to it. The magistrate incorrectly took the view that there could not be an offence if the sale was made to an inspector who forced the defendant to make it, but this is not so. It does not matter, on the facts of this case, that the inspector insisted on one pound only being sold to him. It is simply a sample of what the defendant had for sale and was selling, viz.—margarine made up in packages. There is no evidence that the defendant was forced into making a sale of a character different

from that which he ordinarily made. The magistrate wrongly interpreted section 236 (e) by excluding from its operation sales to authorised officers in all cases. "Sell" is defined in sec. 3 of the *Health Act* 1928 in wide terms. There was in this case a sale for analysis within that definition. This shows the Legislature had in mind, as a sale, a sale to an inspector, and this is also shown by sec. 15 of Act No. 4333.

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Sholl, for the defendant, to show cause—The decision of the magistrate was correct. Sales to authorised officers constitute offences only in respect of breaches of the Act disclosable as the result of analysis. Alternatively, the creation of an offence must depend on the exercise of an option by the trader as to the personality of his purchaser and as to the quantity he purchases, and he must have the same option in the case of an inspector. Accordingly, section 236 (e) does not create an offence in cases where he is denied such option. [He referred to *Iles v. Orr (a)*.] Sec. 15 of Act No. 4333 does not deem a sale of a sample to be a sale, but the sale of the constituents of the sample. There was no sale within the meaning of the *Health Act* in respect of which the defendant was liable to be convicted. [He referred to the *Health Act* 1928, secs. 245-253, 264.]

Herring K.C. in reply.

Cur. adv. vult.

MANN C.J. read the following judgment: The defendant was charged in Petty Sessions with selling to the informant margarine which was not of the prescribed colour in a lump of less than fourteen pounds in weight, contrary to section 236 of the *Health Acts*. The evidence relevant upon this charge was that the informant, an inspector of the Commission of Public Health, demanded from the defendant one pound of margarine as a sample required by him for the purposes of the Act, at the same time tendering the current market value of the sample. The defendant did not wish to sell the pound of margarine to the informant. The reasons why he was unwilling to sell are quite immaterial. The informant, however, pointed out to him that if he refused to sell the quantity required by the informant for the

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purposes of analysis he, the defendant, would be guilty of a punishable offence under section 253. The defendant thereupon sold the quantity demanded. The margarine was not of the prescribed colour. The informant thereupon prosecuted the defendant for selling the margarine in a lump of less than fourteen pounds.

The police magistrate before whom the case came refused to convict on the ground that the act complained of was done under compulsion of law. In my opinion he was right. The point is not that the sale of margarine to the inspector was compulsory. All sales to inspectors are compulsory under the Act, but in the present case the attribute of the thing sold which is said to have given to the sale the quality of a penal act was an attribute for which the informant was himself responsible and to which the defendant assented under the compulsion of law. It matters little whether the result arrived at by the magistrate be attributed to inherent implications of the criminal law or to conditions to be implied in the statute arising from similar principles. Essentially the act complained of was not the act of the defendant or of any person for whose act the defendant was responsible.

As a matter of interpretation, it is to be noted that section 247 (4) provides that the procuring of any sample pursuant to the section shall *for all the purposes of this Act* be deemed to be a sale. The earlier sub-sections give power to the inspector to demand and procure such samples as are required for *the purposes of this Act*. It may be said that the informant in this case when he demanded a sample suitable for analysis and used it for the purpose of the present prosecution was using it otherwise than *for the purposes of the Act*, and that his procuring it with that end in view did not bring about a sale at all.

I think the order to review should be discharged for the reasons given by the magistrate.

LOWE J. read the following judgment: The informant in this case alleged that the defendant was guilty of an offence against Part XII. of the Health Acts in that, contrary to section 236 of the said Acts, he sold to the informant margarine which was not of the prescribed colour in a lump of less than fourteen pounds in weight. The sale alleged was made by the defendant to the informant on the latter's demand pursuant to section 247 of the Health Act which permits an authorised officer to demand and pro-

cure such samples as are required for the purposes of the Act, and declares that so procuring a sample is to be deemed, for all purposes of the Act, a sale of the food, drug or substance contained in the sample. Apart from this section it may be doubted whether the facts relied on would constitute a sale. The magistrate dismissed the information, and it is to review his decision that the present proceedings are brought. The grounds taken in the order *nisi* are:—[His Honour read the grounds.]

It is convenient in the first place to regard with some attention section 236 of the Act which creates among other offences that with which the defendant is charged. It reads as follows:—“Every person who—(a) otherwise than for the purpose of sale to any prescribed person or class of persons, manufactures any margarine which is not of the prescribed colour; or (b) sells, otherwise than to any prescribed person or class of persons, any margarine which is not of the prescribed colour; or (c) otherwise than for the purpose of sale to any prescribed person or class of persons, deals in margarine, which is not of the prescribed colour whether as manufacturer or importer or as consignor or consignee or as a commission agent or otherwise; or (d) has in his possession for sale margarine which is of the prescribed colour in lumps of less than two pounds in weight unless the same is made up in cube form; or (e) packs or sells margarine which is not of the prescribed colour otherwise than in lumps of not less than fourteen pounds in weight—shall be guilty of an offence against this Part.”

It is plain that the Legislature is concerned largely with three characteristics in the manufacture and marketing of margarine—viz.: its colour, its weight and its shape. The colour may be prescribed, and the weight and form are indicated in the section. But even these characteristics are not regulated in the case of a prescribed person or class of persons. Putting aside questions of onus of proof, an examination of the section discloses that the manufacture of margarine which is not of the prescribed colour does not alone establish an offence, for that is consistent with the manufacture being for the purpose of sale to a prescribed person or class of persons. Neither is an offence established by showing a sale of margarine which is not of the prescribed colour for *non constat*, that the sale is not to a prescribed person or class of persons. The position is the same where the question is that of dealing in margarine which is not of the prescribed colour.

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Hence neither manufacture nor selling nor dealing in margarine which is not of the prescribed colour is without more an offence. Bearing this position in mind let us now consider sub-section (e): "Every person who . . . packs or sells margarine which is not of the prescribed colour otherwise than in lumps of not less than fourteen pounds . . . shall be guilty of an offence". The element which is introduced in this sub-section and which makes unlawful what otherwise might be lawful is the sale in lumps of less than fourteen pounds in weight. It is important at this point to recall that the sale alleged is to an authorised officer under section 247 of the Act, and I may assume without discussion that section 247 was applicable. I have already drawn attention to the power of such an officer to demand and procure samples, but in fact the Act makes further provision in section 253 to ensure that the officer's demand shall be effective for it provides that if the person from whom the sample is sought by the officer refuses to sell he shall be guilty of an offence against the Act, and hence be subject to a penalty. Sale is not a unilateral act. If the buyer has a right to purchase, the seller is under an obligation to sell and this latter obligation is enforceable by penalty. It is the buyer who determines the quantity he requires for analysis and the Legislature commands the seller to supply that quantity. The evidence given in this case is clear that not only did the defendant not offer to sell the quantity bought, but that he was unwilling to sell it until the informant drew attention to his powers under the Health Act to require a sample. The seller then yielded to this constraint.

It, therefore, appears that the one element which is relied upon as colouring with illegality facts which otherwise are neutral is an element brought into existence by the command of the Legislature. I am quite unable to think that an act done in obedience to legislative command can in the absence of the clearest and most express language be at the same time an offence, and I think even the universal language of section 247 (4), "for all the purposes of this Act", should be read as subject to the exception of sales where the characteristic alleged to constitute the sale illegal is determined by an authorised officer acting in pursuance of the powers given by the Act. It is unnecessary here to enter upon the discussion to what extent the mental element known to lawyers as *mens rea* enters into the offences created by section 236 of the Health Act, but it is not inappropriate to recall the following words of Sir

James Stephen in *R. v. Tolson (b)* :—"Crimes are in the present day much more accurately defined by statute or otherwise than they formerly were . . . but it is the general—I might, I think, say the invariable—practice of the legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are ever introduced into any statute by which any particular crime is defined."

The conclusion I have indicated is arrived at as a matter of construction on a consideration of the relevant legislation, but it suggests an analogy to the operation of duress in the general criminal law as an element in the commission of acts which would otherwise be crimes, a matter mentioned in the passage just quoted from the judgment of Sir James Stephen. In some cases where the act done has been done under physical compulsion the act is held not to be a criminal act of the doer and compulsion of the Legislature would seem in point of reason at least as strong a ground of excuse.

My conclusion in this case has relation only to the offence charged. I have not considered and express no opinion whether the facts in evidence point to—much less whether they establish—an offence under any other sub-section of section 236.

I think the information was rightly dismissed and that this order *nisi* should be discharged.

GAVAN DUFFY J. read the following judgment: Sec. 236 of the *Health Act* 1928, as amended by Acts Nos. 4333 and 4439, provides that:—"Every person who—(b) sells, otherwise than to any prescribed person or class of persons, any margarine which is not of the prescribed colour . . . or (e) packs or sells margarine which is not of the prescribed colour otherwise than in lumps of not less than fourteen pounds in weight—shall be guilty of an offence". Section 247 (1) provides: "Any authorised 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 premises whatsoever demand and pro-

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(b) [1889] 23 Q.B.D. 168, at p. 187.

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cure such samples as are required for the purpose of this Act", and sub-section (4) thereof, added by Act No. 4333, provides: "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". Section 253 (1) makes it an offence to refuse to sell to an authorised officer tendering the appropriate price.

In the present case the defendant had at his factory a box containing thirteen pounds of margarine in one pound and half pound unsealed packages. An authorised officer asked him if the margarine was for sale in Victoria and the defendant said, "Yes". The officer then offered to purchase a packet. Defendant said he would give one, but he would not sell, as he only sold under an agreement with syndicates, in lots of not less than twelve pounds. The officer, however, insisted on his rights under section 247 and the defendant agreed to sell a pound package for which he was paid 1s. The margarine in such package proved to be not of the prescribed colour and an information was laid charging defendant with an offence under section 236 (e).

The police magistrate dismissed the information saying:—"The inspector has authority to compel a sale of a certain commodity. Where the sale of a commodity in one quantity would create an offence and the sale of that commodity . . . in another quantity would not create an offence the inspector has no right to demand a sale in a quantity that would create an offence and compel that sale. I do not think under these circumstances that the defendant would be committing an offence if under duress by the inspector he sold him (as he did in this case) a quantity of margarine which would bring him within the purview of this section and render him liable to a penalty. . . . This is a position which I do not think that the Legislature contemplated when the original Act was passed. It has arisen by reason of the peculiar verbiage of section 236 (e) which requires two elements in committing one offence, one colour and the other weight".

Giving the words of the Act their ordinary plain meaning the defendant has committed the offence with which he is charged. At the same time it appears an extraordinary result that a manu-

facturer of margarine, who has done nothing wrong, should be faced with the dilemma of contravening either section 253 (1) or section 236 (e), for though the defendant in this case may have intended to dispose of his thirteen pounds of margarine contrary to the Act, he would equally have been under an obligation to sell a pound to the inspector, if asked, and thereby commit an offence against section 236 (e), if he had not.

It will be observed that section 247 (4) if it is to be given any effect at all may in a number of cases deprive the defendant of a defence that would otherwise be open to him under section 259, that is to say that a person who has on some premises an article which he had no intention at all of selling may be compelled to sell it and thereby commit an offence; but, of the offences of "selling" dealt with in the Act, those created by sections 207, 208, 209, 211, 212, 213, 215, 217, 218, 221, 222, 223, 225, 228, 229, 231, 232 and 240 may well have been thought to be of a nature to make such a result not unreasonable, and, as to section 236 (b), that in my opinion would not be contravened by a sale to an authorised officer, because he is a person prescribed by the Act.

But section 236 (e), as the police magistrate observed, has peculiar features in that the possession of margarine not of the prescribed colour, even if for sale, does not of itself suggest an intention to disobey the Act. A defendant charged under this section may, therefore, find himself in a peculiarly hard position, and this may well have happened by inadvertence, but if we refuse to give effect to the plain words of the statute we must proceed on some understandable principle. That principle cannot I think be that the sale was made under the pressure of section 247, for the very essence of that section and section 253 is to make the defendant sell whether he wants to or not. It cannot either I think be based on any supposed unwillingness in the Legislature to penalize one who has not intended or prepared to do anything that would be a breach of the Act; for a man might, as I have said, be forced to sell something which he had on premises remote from his shop or factory, in a laboratory for example, and which he never intended to sell, and thereby to commit one or other of several offences.

The real protection of a person who might be forced to commit an offence is perhaps that departmental officers are to be expected

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to act reasonably, and section 236 (e) may be peculiar only in so far as it seems to place a more unreasonable power in their hands. A person may possibly find some additional protection in a right to refuse to sell to an officer if the sample is not required for the purposes of the Act, though where, as here, there is at least strong suspicion that a breach of the Act had been committed or was intended, an inspector could properly demand a sample.

On the whole I can find no sufficient reason for refusing to give the words of the Act what I conceive to be their plain meaning, and, therefore, I conclude, though with some reluctance, that the magistrate was wrong and that the order *nisi* should be made absolute.

Order nisi discharged.

Solicitor for the informant: *F. G. Menzies*, Crown Solicitor.

Solicitor for the defendant: *Joan Rosanove*.

P. E. J.

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August 3, 5;
Sept. 6.

THE VICTORIAN RAILWAYS COMMISSIONERS v. WRIGHT.

Workers' Compensation—Agreement—Review of weekly payments—Form of application to review—Date from which review may be ordered—Workers' Compensation Act 1928 (No. 3806).

Upon an application under the *Workers' Compensation Act 1928* for a review and termination of a weekly payment payable by way of compensation, under an agreement recorded under the Act, during the total or partial incapacity of a worker for work or until the same should be ended, diminished, increased or redeemed in accordance with the Act, where the relief sought in the particulars is that the weekly payment then being paid to the worker should be terminated or the liability therefor redeemed by a lump sum, and no claim is made for any retrospective declaration as to the extent of the worker's incapacity, it is not competent for the arbitrator to make an award commencing from a date antecedent to the application to review and covering a period during which payments have been made.

APPEAL.

An arbitration by a Judge of County Courts under the *Workers' Compensation Act 1928* was, on the 25th January 1938,