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SUPREME COURT OF VICTORIA

PALMER v RJ MERCER (HAMPTON) PTY LTD

Pape J

10-11, 15 March, 27 May 1966 — [1970] VicRp 4; [1970] VR 32; 19 LGRA 254

PUBLIC HEALTH – SALE OF PORK AND LAMB SAUSAGES SAID TO BE ADULTERATED – WARRANTY ALLEGEDLY GIVEN BY THE SUPPLIER TO THE DEFENDANT – WHETHER WARRANTY PROVIDED A DEFENCE – FINDING BY THE MAGISTRATE THAT THE WARRANTY WAS PROVED – DEFENDANT COMPANY DISCHARGED – WHETHER MAGISTRATE IN ERROR: *HEALTH ACT* 1958, SS238, 300, 301.

HELD: Order nisi absolute. Remitted to the Court to be dealt with in accordance with the judgment.
1. Where the warranty was in respect of goods not in existence at the time it was given, there must be clear evidence which established that the goods subsequently delivered were within the warranty.

2. The policy behind the legislation is clearly that where a trader purchases goods from a vendor in reliance upon a promise by that vendor that the goods comply with the requirements of the Act the purchaser, if he can show that he sold those goods in the same condition that they were in after he received them from the vendor, ought not be regarded as being at fault, but that liability should attach to the vendor. This indicates that before the purchaser can escape liability he must establish such a state of affairs as would inevitably lead to the conviction of the vendor. In a statute such as the *Health Act* which is concerned to protect the public from having adulterated food supplied to it, it is obviously unjust that the vendor to the public should escape liability on the ground that his vendor contracted with him for the purity of the goods, unless it is clear that the real culprit will be convicted in his place.

3. The warranty must be a contractual warranty and one forming part of the contract under which the goods were supplied.

4. The evidence led by the defendant did not show that the so-called warranty had been given as a result of any request by the defendant, nor did it show that there had been any purchase of smallgoods by the defendant from the RIV Co prior to the date on which these offences were alleged to have been committed.

5. There was no evidence of a general contract between the defendant and the RIV Co for the supply of smallgoods and even if there was evidence that these smallgoods the subject of the prosecution were supplied by the RIV Co to the defendant there was no evidence on which it could be found that the contract under which they were delivered contained a term that the written warranty was applicable.

6. Accordingly, there was no evidence on which the Magistrate could find that the defendant purchased the food in question with a written warranty.

PAPE J: On 13 October 1965 Lloyd George Palmer, a health inspector of the City of Sandringham, laid two informations against RJ Mercer (Hampton) Pty Ltd charging it with offences against s238 of the *Health Act* 1958.

One information charged the defendant with, on 14 September 1965, selling food, to wit "Mercer's Pork Mince" which was adulterated contrary to the provisions of s238 of the *Health Act* 1958. The other information charged the defendant with, on 14 September 1965, selling food, to wit pork and lamb sausages, which was adulterated contrary to the provisions of s238 of the *Health Act* 1958.

Within seven days after the service of these informations the defendant (pursuant to s301 of the *Health Act* 1958) sent to the informant a notice stating that it intended in each case to rely upon a written warranty dated 19 April 1965 received from RIV Equipment Hiring Pty Ltd (which

I will call the RIV Co hereafter) of 112 Patterson Road, Moorabbin, to which notice was annexed a copy of the warranty. Although there was no proof that a similar notice had been sent to the RIV Co, it appeared that such a notice had been sent, and counsel for the informant waived the necessity of proof thereof. The two informations (together with other informations not relevant to these proceedings) were heard at the Court of Petty Sessions at Sandringham on 10 November 1965 before a Stipendiary Magistrate and two honorary justices. The bench retired to consider its decision, after which the Stipendiary Magistrate returned to the bench alone and announced that he found the warranty was proved and he ordered that the defendant company be discharged from the prosecution in each case pursuant to s300(2) of the *Health Act* 1958.

It is this decision that is the subject of the orders nisi to review now before me.

No question arises in these proceedings as to sufficiency of the proof of the goods, the subject-matter of the two informations, were adulterated within the meaning of the Act. Adam J made the orders nisi on the following grounds in each case:

(1) That there was no evidence on which the Stipendiary Magistrate could find that the defendant purchased the food in question with a written warranty within the meaning of s300(2)(a) of the *Health Act* 1958.

(2) That there was no evidence of a written warranty within the meaning of s300(2) of the *Health Act* 1958.

(3) That there was no evidence on which the Stipendiary Magistrate could find that the defendant sold the food in the same state as when it was purchased within the meaning of s300(2)(b) of the *Health Act* 1958.

(4) On the evidence the Stipendiary Magistrate should have convicted the defendant on the said informations.

Section 300 of the *Health Act* 1958 provides in subs(a) that

"Any person who purchases any food drug or substance for resale may demand from the vendor a warranty in writing that the food, drug or substance so purchased complies with such requirements of this Part [Pt XIV] as are applicable thereto".

Subs(1)(b) provides that

"Any such vendor who refuses to furnish such purchaser with such a warranty shall be guilty of an offence against this Part".

Subs(2) provides that

"If the defendant in any proceedings under this Part proves to the satisfaction of the court—
(a) that he purchased the food drug or substance in question with a written warranty as aforesaid; and
(b) that he sold the food drug or substance in the same state as when he purchased it—
he shall be discharged from the prosecution".

Subs(3) provides that

"Where the defendant has been discharged from a prosecution under the last preceding sub-section then notwithstanding anything in s295 of this Act [a section which places a limitation of 42 days from the time of purchase of the goods to the institution of legal proceedings] a prosecution may within 28 days after the discharge of the defendant be instituted against the person from whom the defendant purchased the food drug or substance in question (and for the purposes of that prosecution such person shall be deemed to have sold such food, drug or substance)".

Subs(4) provides that

"Where the defendant has been discharged from a prosecution under subs(2) of this section, the Court may direct that samples of the food drug or substance concerned be analyzed with a view to the results of such analysis being used in evidence...in any case proposed to be brought against the person who issued the warranty; and where any such order is made a certificate by the analyst of such analysis shall be submitted to the person proposed to be charged and shall subject to this Part be sufficient evidence of the facts stated therein in the proposed prosecution without any requirement to produce or analyze any further sample".

Section 301(1) provides that

> "A warranty shall not be available as a defence to any proceeding under this Part unless the defendant has within seven days after service of the summons sent to the informant a copy of such warranty with a written notice stating that he intends to rely on the warranty and specifying the name and address of the person from whom he received it and has also sent a like notice of his intention to such person".

Subs(2) provides that

> "The person by whom such a warranty is alleged to have been given shall be entitled to appear at the hearing and to give evidence; and the court may if it thinks fit adjourn the hearing to enable him to do so".

At the hearing the informant gave evidence that he purchased for analysis at the defendant's shop in Hampton from one Alan McDonald, the manager of the shop, one pound of "Mercer's Pork Mince" from a tray displayed in the window of the shop, which tray bore a label "Mercer's Pork Mince 1/6d." The goods so purchased were divided into three parts in accordance with s281, and were subsequently analyzed. The certificate of analysis was then tendered in evidence (pursuant to s304(f)). This document showed that the pork mince so purchased contained 65 per cent of total meat, 15.8 per cent of fat, and 2.8 grains of sulphur dioxide to the pound. Sulphur dioxide is, according to the regulations, a preservative, and I gather that it was contended that under s240 these facts established that the pork mince so purchased was adulterated within the meaning of s238. With regard to the pork and lamb sausages the informant gave similar evidence of purchase for analysis, division into three parts and analysis. In this case the analyst's certificate showed that the sausages did not comply with the standard fixed by the regulations for sausage meat in that the total meat content was below the minimum allowed (that is to say 64.1 per cent instead of 75 per cent.)

The defendant company elected to call evidence, and Alan Leslie McDonald, the then manager of the defendant shop at Hampton, and Robert James Mercer, the managing director of the defendant company, were called on its behalf. It will be necessary to examine their evidence with regard to this warranty with some care.

Before any evidence was called, counsel who was then appearing for the defendant asked counsel for the informant to produce a notice under s301(1) of the Act dated 22 October 1965, and a notice was duly produced. It does not appear from the affidavit in support of the order nisi that such notice was tendered in evidence, but I am prepared to assume that it was, for the notice was exhibited to the affidavit in support of the order nisi. This notice reads:

> "Take notice that pursuant to s301 of the *Health Act* 1958 the above-named defendants R J Mercer (Hampton) Pty Ltd and Alan McDonald intend at the hearing of these matters on the 10th day of November 1965 to rely on a warranty dated 19th April 1965 received by the said R J Mercer (Hampton) Pty Ltd and the said Alan McDonald from RIV Equipment Hiring Pty Ltd whose registered office is situate at 112 Patterson Road, Moorabbin, a copy of which is annexed hereto".

Attached to the notice was a copy of the alleged warranty, which was a roneoed pro forma with the name of the defendant company and the day of the month typed in, and the name of the month (April) written in handwriting. It reads:

> "To R J Mercer (Hampton) Pty Ltd, 108 Glenferrie Road, Malvern. RIV Equipment Hiring Pty Ltd of 112 Patterson Road, Moorabbin, hereby pursuant to s300 of the Health Act 1958 warrants that all smallgoods hereafter sold by it to you comply with all such requirements of Pt XIV of the said Act as are applicable thereto. Dated 19 April 1965. The Common Seal of RIV Equipment Hiring Pty Ltd was affixed hereto. [Seal]"

Opposite this attestation clause was the impression of a circular rubber stamp bearing around its circumference the words "RIV Equipment Hiring Proprietary Limited" and in the centre the words "The Common Seal of...".

The evidence of the defendant's then manager, Alan Leslie McDonald, so far as relevant to the matters in dispute in this order to review, was as follows. He was asked by his own counsel this

leading question (for he was also charged with certain offences): "Had these goods come in from RIV Equipment Hiring Pty Ltd on the afternoon before the particular day?", to which he replied: "Yes". He was then asked another leading question: "Were they in the same state and condition at the time Mr Palmer [the informant] came as when they were received from RIV Equipment Hiring Pty Ltd?", to which he again answered: "Yes". In cross-examination he was asked where RIV Equipment Hiring Pty Ltd's registered office was, to which he replied: "Glenferrie Road, Malvern". This answer is inconsistent with the defendant's notice which describes the registered office of RIV Equipment Hiring Pty Ltd as 112 Patterson Road, Moorabbin. He said that he knew that Mercer was a director of RIV Equipment Hiring Pty Ltd and that Mercer told him of the existence of that company when he was first employed by the defendant in July 1965. He was asked: "When did this pork mince come in from RIV?", to which he answered: "The day before." He was asked in cross-examination: "When?", to which he said: "At half past one in the afternoon of the day before the informant's visit." When asked whether he was there when it came in, he said: "I am not certain."

He admitted that he was not the only employee in this shop. He said that the pork and lamb sausages came in at the same time as the pork mince, and that he could not remember precisely whether he was there or not. He said that he did not know what state the sausages or the pork mince came in. In re-examination he said that there was no evidence to suggest that the sausages had been altered or tampered with, and that on the day the informant came in there was nothing to suggest that the pork mince or the sausages were not in the same condition as when they arrived or were first seen. He was asked: "You may have been at lunch when they arrived?", to which he said: "I am not certain." He said that he had no reason to suspect that the goods had in any way been interfered with. He was then asked: "What is the general term for sausages and mince meat and that type of thing?" His answer was: "Pork mince". He was then asked: "Is there a term smallgoods in the trade?", to which he replied: "Yes, that is the general term referred to." I do not understand these last two answers, but I am prepared to accept in the defendant's favour that the witness was saying that smallgoods is the general term in the trade for sausages and mince meat.

In an affidavit filed on 10 March 1966 (the day on which this hearing began) Mr McDonald swore that in addition to the evidence set out in the informant's affidavit he gave evidence that all smallgoods, including sausages and pork mince purchased by R J Mercer (Hampton) Pty Ltd, were purchased and to be purchased from RIV Equipment Hiring Pty Ltd.

The only other witness for the defendant was Robert James Mercer. He deposed that he was the managing director of R J Mercer (Hampton) Pty Ltd which was one of several shops or companies that he conducted. He was asked: "Did you obtain from any person a warranty in relation to smallgoods from RIV Equipment Hiring Pty Ltd?", to which he replied: "Yes—a warranty is given to any person or company that we supply smallgoods to". This question seems to have been directed to him in his capacity as managing director of the defendant, and his answer seems to have been given in his capacity as managing director of the RIV Co. He then said he was also a director of RIV Equipment Hiring Pty Ltd, and he identified the warranty he received as that then produced to him. It is in precisely the same form as that already described— but although the typewritten parts in both the copy attached to the notice and the document produced by the witness are carbon impressions, one such document is not a carbon impression of the other.

The witness said that the warranty was given on the date shown in the document, and that any smallgoods (which he said covered sausage meat and mince meat) supplied by RIV Equipment Hiring Pty Ltd to the defendant were covered by that warranty. In cross-examination he admitted that he was the governing director of both the defendant company and the RIV Co, and that the latter company manufactured mince meat and smallgoods. He said that the directors of each company were not necessarily the same. He did not recall whether the directors of RIV Equipment Hiring Pty Ltd held a directors' meeting on 19 April 1965—he said that he thought that those directors would have met in relation to this particular warranty, but that he could not recall that they had. When shown the actual warranty that he had produced as being the warranty given to the defendant company by the RIV Equipment Hiring Pty Ltd, he said he did not know if it was the actual document that the latter company gave to the defendant, and that if it was only a copy, the original would be with the defendant's solicitors. He said that there were several companies having the name RJ Mercer followed by the geographical situation of the

business, and that roneoed copies of the warranty were given to each company. He said that he did not write the word "April" in the document he produced, and that he did not type the name RJ Mercer (Hampton) Pty Ltd into the document or cause it to be typed in. He said that the articles of RIV Equipment Hiring Pty Ltd did not require the directors to sign under the seal when it was affixed to any document, and that he would not know for sure whether he affixed the seal to the warranty or who did affix the seal. He did not know what actual person in the defendant company received the warranty, and he expected that the warranty had been sent out by RIV Equipment Hiring Pty Ltd, but that he did not know by whom.

Then followed a re-examination, the meaning of which completely eludes me. It appeared that the witness said that the defendant's solicitors (who are also the solicitors for the RIV Co) prepared the warranty and that the duplicate roneoed form was given to the shops. Several shops had to be covered and carbons were typed up and sent to these shops. He was asked: "How did the carbons get from RIV to Mercer?" His answer was: "They did not get to Mercer (Hampton)." Then he was asked: "Where was the original filed?", and he said: "At the head office of RJ Mercer." He said that the registered office of RJ Mercer (Hampton) Pty Ltd was at 108 Glenferrie Road, Malvern, and that on behalf of that company somebody filed the original at the head office of the company in Glenferrie Road, Malvern. He said that in his capacity as managing director of the defendant company he knew of the existence of this warranty, and in that capacity he believed that the warranty attached to any goods when his company bought them from RIV.

Mr McNab (for the informant) advanced a number of arguments as to the proper construction of s300. He first argued that s300 had no application in respect of future sales, and that there must be a separate written warranty with each sale. I think this argument is unsound. It gains some support from the decision of Lord Coleridge CJ in *Harris v May* (1883) 12 QBD 97, but that is an unsatisfactory decision. His Lordship's reasons for judgment have been interpreted in various ways in the many English cases which have been decided after it, and in some of those cases it has not been followed. In *Watts v Stevens* [1906] 2 KB 323, Darling J said, at p327:

> "Whatever may have been the case, it cannot now be maintained that a warranty can only apply to things in existence at the time the warranty was given".

See, also, per Ridley J at p330.

Australian decisions are to the same effect: *Moyle v Lannigan* [1909] St R Qd 195; *Mitton v Jeffries* [1923] SASR 133, where Murray CJ examines all of the English cases.

But where the warranty is in respect of goods not in existence at the time it is given, there must, in my opinion, be clear evidence which establishes that the goods subsequently delivered are within the warranty. Most of the English cases are cases where there was clearly a contract to supply future goods. But that is not the case here, for there is no evidence of any contract between the defendant and the RIV Co, for the supply of future goods, and the warranty, if it is to apply at all, must be shown to have been incorporated in the contract for the purchase and sale of the goods, the subject-matter of these informations.

It was then argued by Mr McNab that the reference in s300(2)(a) to "A written warranty as aforesaid" requires proof of such a warranty as is referred to in s300(1), and that it must be shown that the defendant demanded the warranty from the RIV Equipment Hiring Pty Ltd. It was said correctly that there was here no evidence that this warranty was demanded by the defendant from the RIV Co, but that the evidence showed that it had been sent to the defendant by that company without any such demand. But I think that the written warranty "as aforesaid" referred to in the section is merely a written warranty that the food purchased was purchased for resale and that it complies with the Act, and that it is not necessary to prove that it was demanded of the vendor by the purchaser. The words "as aforesaid" refer to the nature and extent of the warranty and do not extend to the circumstances under which it was given.

Mr McNab then argued that the warranty referred to in the section must form part of a contract between the defendant and the RIV Co under which these goods were supplied, and that there was no evidence of such a contract.

I think that the first part of this argument is undoubtedly correct. Section 300(1)(a) and s300(2)(a) clearly contemplate a purchase of goods for resale with a warranty, and some of the English authorities lay down that the warranty must be given at the time of the sale or, if given later, must be given pursuant to a provision in the contract that such a warranty is to be given: see *Jeynes v Hindle* [1921] 2 KB 581, per Lord Coleridge, at pp587, 588. All this means, I think, is that the warranty must be part of the contract so as to exclude a warranty given after the contract is entered into (for which there would be no consideration) unless it was stipulated for in the contract. It does not, however, exclude a written undertaking given before any contract was entered into, provided the contract includes by express or implied reference the undertaking antecedently given: see *Rider v Crofts* [1914] VicLawRp 2; [1914] VLR 4, per Hodges J at p7; 19 ALR 559. The section does not require the contract itself to be in writing, but only the warranty, and thus if the warranty is in writing and is shown to have been given by the supplier, but the other terms of the contract (including the term which incorporates the warranty) are parol, the section is satisfied.

The policy behind the legislation is clearly that where a trader purchases goods from a vendor in reliance upon a promise by that vendor that the goods comply with the requirements of the Act the purchaser, if he can show that he sold those goods in the same condition that they were in after he received them from the vendor, ought not be regarded as being at fault, but that liability should attach to the vendor. This seems to me to indicate that before the purchaser can escape liability he must establish such a state of affairs as would inevitably lead to the conviction of the vendor. In a statute such as the *Health Act* which is concerned to protect the public from having adulterated food supplied to it, it is obviously unjust that the vendor to the public should escape liability on the ground that his vendor contracted with him for the purity of the goods, unless it is clear that the real culprit will be convicted in his place.

In spite of Mr Fagan's argument to the contrary, I think it is plain that the warranty referred to in s300 must form part of a contract between the defendant and the RIV Co for the supply of the pork mince and sausages the subject-matter of these informations. Mr Fagan referred me to a great number of English cases which have been decided on similar sections in the English legislation and I have read them all. They are extremely difficult to reconcile one with the other, so much so that when they were cited to the Full Court in *O'Connor v McKimmie* [1909] VicLawRp 28; [1909] VLR 166, Madden CJ at p172; 15 ALR 118, at p119, dismissed them by saying: "A number of English cases were cited which were so much in conflict and so difficult to understand side by side that we do not quote them here or attempt to say how they can hang together."

But I think that it is correct to say that all of these cases, either expressly or by implication do regard it as essential for the warranty to be a contractual warranty, one forming part of the contract under which the goods were supplied, and this is the view which I think is correct: see *Laidlaw v Wilson* [1894] 1 QB 74, per Charles J at p77; *Iorns v Van Tromp* (1895) 72 LT 499, per Wright J at p500; *Watts v Stevens*, to which I have already referred, per Darling J at p328; *Evans v Weatheritt* [1907] 2 KB 80, per Lord Alverstone CJ at p85; *Jeynes v Hindle* [1921] 2 KB 581, per Lord Coleridge, at pp587, 588; *Follett v Luke* [1947] KB 289, per Lord Goddard CJ, at p296; [1947] 1 All ER 35; *Moyle v Lannigan* [1909] St R Qd 195, per Cooper CJ at p199; *Rider v Crofts* [1914] VicLawRp 2; [1914] VLR 4, per Hodges J at p7; 19 ALR 559; *O'Connor v McKimmie* [1909] VicLawRp 28; [1909] VLR 166, per Madden CJ at p173; 15 ALR 118.

It remains then to examine the second leg of Mr McNab's argument, namely, that there was no evidence on which the magistrate could find that there was a contract containing such a warranty between the defendant and the RIV Co for the sale and purchase of the goods the subject-matter of these proceedings.

The section places the burden of proving this defence on the defendant. What had to be proved was:

> (1) that the defendant purchased for resale the pork mince and sausages from RIV Equipment Hiring Pty Ltd under a contract, one of the written terms of which was that this latter company warranted that such goods complied with the regulations of the *Health Act*, and
>
> (2) that it sold such pork mince and sausages to the informant in the same state as when it purchased them.

Two separate questions arise for consideration on this aspect of the case — the first is whether there was any evidence on which the magistrate could find as he did, and the second is whether even if there were some such evidence, it was such that acting reasonably the magistrate ought to have acted upon it. The first is a question of law and is covered by grounds 1, 2 and 3 of the order nisi — the second is a question substantially of fact or of mixed law and fact and is covered by ground 4 of the order nisi. In connexion with ground 4 it is well to remember that these are proceedings by way of order to review and that this Court is not permitted to substitute its own decision for that of the magistrate, but is only concerned to see whether there is evidence on which the issue could reasonably be found in favour of the defendant.

In *Taylor v Armour and Co Pty Ltd* [1962] VicRp 48; [1962] VR 346, the Full Court consisting of Gavan Duffy, Sholl and Adam JJ, said, at p351:

> "It is not for this Court to make up its own mind upon the evidence, though giving weight if necessary to the fact that the tribunal below has seen the witnesses. This Court has merely to see whether there was evidence upon which the magistrate might, as a reasonable man, have come to the conclusion to which he did come."

The first ground of the order nisi was that there was no evidence on which it could be found that the defendant purchased the food in question with a written warranty within the meaning of s300(2)(a) of the *Health Act*. In my view, this ground is made out. Assuming for the moment that this so-called warranty of 19 April 1965 can be said to bind the RIV Co (which as I shall afterwards show is very doubtful) I think that this matter is governed by the decision of the Full Court in *O'Connor v McKimmie*, to which I have already referred. There the warranty relied upon took this form: "A renewal guarantee re milk, January 10th, 1908. I do hereby guarantee to supply you with milk under the same conditions as the executrix and executors of the late R Bodycoat were doing and guarantee the milk to be pure and all that is required by the Pure Food and Health Acts." The Full Court (Madden CJ, Hodges and Hood JJ) said ([1909] VLR) at p172:

> "It was said that that was not a written warranty such as is contemplated by s71. A number of English cases were cited to us which are so much in conflict and so difficult to understand side by side with one another that we do not quote them here or attempt to see how they hang together. It appears to us that this document was no more than an offer by Bodycoat. There was no evidence of any acceptance in writing by the defendant and of course a contract of warranty of this kind must like all other contracts present the essential quality of mutuality. This would appear to have been no more than an offer by Bodycoat which does not appear ever to have been accepted in writing. It is quite consistent that it was never accepted whether in writing or otherwise and if Bodycoat was sued by McKimmie he might say 'I made that offer but you never accepted it, or accepted it with another condition altogether which makes all the difference' and nothing but an offer presents itself to the justices. We think that is a complete answer. Where a warranty is presented as a defence there must be a contract, including the warranty in writing binding both parties".

The learned Chief Justice does appear to use language which suggests that the acceptance of the offer must be in writing, but having regard to the last sentence quoted from the judgment, I do not regard the case as so deciding, for what the Chief Justice is saying is that the warranty must be in writing and that there must be evidence of a contract which incorporates as one of its terms the written warranty. It was argued by Mr Fagan that this part of the judgment was *obiter*, for the Court had already decided that s71 of the *Health Act* 1890 did not apply to prosecutions under the *Pure Foods Act* 1905, which was the Act under which the prosecution was brought. But even if that be so, I doubt whether sitting as a single judge I ought to disregard an opinion expressed by the Full Court in such positive terms. In any event, I think that the view so expressed is correct, and is supported by the authorities to which I have referred decided both before and after the case came before the Full Court. The evidence led by the defendant did not show that the so-called warranty had been given as a result of any request by the defendant, nor did it show that there had been any purchase of smallgoods by the defendant from the RIV Co prior to the date on which these offences were alleged to have been committed. The statement in McDonald's answering affidavit that "all smallgoods, including sausages and mince purchased by RJ Mercer (Hampton) Pty Ltd were purchased and to be purchased from RIV Equipment Hiring Pty Ltd" does not, in my view, affect this conclusion for it is so vague and general in point of time that I think no reliance can be placed upon it. *Non constat* that the transaction under review was the first purchase of smallgoods. The document must, therefore, be regarded as one sent by the manufacturer to a retailer with whom there had been no previous transactions. It is plain that

the document standing alone is not a contract. It is, I think, not even an offer to sell smallgoods, capable of being turned into a contract by the placing of an order, for I think it plain that if the defendant had merely ordered goods of the RIV Co, and that company had not accepted the order, it would not have been possible for the defendant to sue it for failure to deliver. At most the document was an offer to treat. Doubtless its terms could have been incorporated into a contract to sell smallgoods if the defendant had given the RIV Co an order for smallgoods and in that order had stipulated for the applicability of the warranty contained in the pre-existing document, and the RIV Co had accepted the order on those terms.

But there was here no evidence from which a conclusion could be drawn that there was any such contract. There was no evidence of any order for the goods the subject-matter of these prosecutions and no evidence of the terms of such an order and no evidence of any acceptance by the RIV Co of any such order. The magistrate sought to distinguish *O'Connor v McKimmie* by finding a specific contract for the supply of these goods incorporating the warranty. He found that there was evidence that the warranty of 19 April 1965 was part of a general contract to supply smallgoods by the RIV Equipment Hiring Pty Ltd to the defendant; that there was evidence that the warranty was accepted by the defendant company because after the date of such warranty, smallgoods (including those the subject of the prosecution) were purchased by the defendant from the RIV Co and, in his view, that was a sufficient acceptance of the warranty. But I think that these findings were not justified on the evidence. There was no evidence of a general contract between the defendant and the RIV Co for the supply of smallgoods and even if there was evidence that these smallgoods the subject of the prosecution were supplied by the RIV Co to the defendant there was no evidence on which it could be found that the contract under which they were delivered contained a term that the written warranty was applicable.

Doubtless the magistrate was induced to take this view by the very casual manner in which the evidence for the defendant was presented, leaving that which ought to have been proved to be presumed. It ought clearly to be understood that the defence provided by s300(2) is one which defendants ought to be made to prove strictly (even though the standard of proof is proof on a balance of probabilities) and that mere surmise and inexact proofs, indefinite testimony and indirect inference will not do. It may well be that the necessary proof was available and could have been led, but, in my view, it was not adduced. There might have been some force in the magistrate's reasoning if the document of 19 April 1965 had been an offer to sell goods (as was probably the case in *O'Connor v McKimmie*) for the mere placing of an order thereafter might well have amounted to an acceptance of an offer which contained a written warranty. But since this document was, in my view, at most an offer to treat, or something in the nature of an advertisement soliciting business, this conclusion cannot be drawn, and any contract created by the giving of an order for smallgoods accepted by the RIV Co can only be said to incorporate the warranty if there is evidence that the offer which was made by the defendant included a term that the warranty was to apply. Even if this document had been an offer to sell the reasoning in *O'Connor v McKimmie* involves proof of an acceptance for, I think, it is probably true that the warranty in that case did amount to an offer, as the words "I hereby guarantee to supply you with milk" are capable of meaning "I hereby offer to supply you with milk".

For these reasons I think ground 1 is sustained. But before leaving this part of the case I desire to refer to one other matter which has given me some concern, and that is whether it had been shown that the document of 19 April 1965 was one which bound the RIV Co, for it is implicit in the magistrate's approach to this problem that there was an offer by the RIV Co containing such a warranty. It purports to bear the common seal of this company but it does not appear on the document that the seal was affixed in the presence of any of the officers of the company whose signature is normally regarded as necessary to authenticate the sealing. It is plain that it was not necessary for this document to be sealed by the company and it is also plain that if it were sealed it is not a deed: see *Norton on Deeds*, 2nd ed., p2. Article 96 of Table A of the Fourth Schedule to the *Companies Act* 1961 requires that the seal shall be only used by the authority of the directors and that every instrument to which the seal is affixed shall be signed by a director and shall be countersigned by the secretary or by a second director or by some person appointed by the directors for that purpose.

Section 30 of the *Companies Act* 1961 provides that articles may adopt all or any of the regulations in Table A and that if articles are not registered or if articles are registered then in

so far as the articles do not exclude or modify the regulations contained in Table A those articles shall be the articles of the company. Mercer swore that the articles of RIV Equipment Hiring Pty Ltd did not require directors to sign under the seal, and, therefore, unless those articles expressly excluded art. 96 or Table A in its entirety, art. 96 did apply and this so-called warranty would not bind the company. Mercer's evidence as to when and how this seal was affixed to this document was most unsatisfactory and I do not think that any judicial officer, acting reasonably, should have accepted it as proof that the company was bound thereby, or that the directors of the RIV Co had authorized the giving of the warranty: see *Re Efron's Tie and Knitting Mills Pty Ltd* [1932] VicLawRp 3; [1932] VLR 8 per Cussen ACJ at pp23, 24; [1931] ALR 347; *D'Arcy v Tamar, Kit Hill and Callington Railway Co* (1866) LR 2 Exch 158, and *Re Haycraft Gold Reduction Co* [1900] 2 Ch 230.

It is however said in Gore Browne's *Handbook of Joint Stock Companies*, 41st ed., that "the mere affixing of the seal of a corporation is sufficient without witnesses, and unless the Articles provide that the directors shall attest it is not necessary, although it is customary for them to do so". Counsel for the informant did ask a question of Mercer which indicated that the articles of this company had been searched, but they were not produced. It may be that if there had been evidence that the seal on this document was the seal of the RIV Co it could be said on the evidence that there was some justification for holding that the document bound the company, at any rate prima facie. But there was no direct evidence that this was the company's seal, although a number of questions were put to Mercer and answered by him on the assumption that it was. But we are not concerned with assumption, but with proof. This document did not prove itself, and upon the whole I think that there was no evidence that this document bound the company because there was no evidence that the seal was that of the company. Further, I am very doubtful whether there was any evidence that it was affixed in such a manner as would bind the company. The seal, I think, cannot be regarded simply as a rubber stamp bearing the company's name and so amount to a signature by the company: see *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702; [1956] 1 All ER 341, where Denning, LJ (as the Master of the Rolls then was), said:

> "It has not yet been held that a company can sign by its printed name affixed with a rubber stamp."

But even if there was some evidence that the document was a document binding the RIV Co it seems to me that the magistrate acting reasonably should not have been satisfied to act upon it.

Ground 2 of the order nisi that there was no evidence of a written warranty is covered by what I have already said, and is I think sustained.

Ground 3 was that there was no evidence on which the Stipendiary Magistrate could find that the defendant sold the food in the same state as when purchased. The wording of this section is far from satisfactory, for it is not clear at which point of time the comparison is to be made. On one view, the goods are purchased when the contract for their purchase is entered into, at any rate if they are specific goods. On another view, the purchase is completed when the goods are appropriated by the vendor to the contract. If either of these views be accepted, a purchaser would find it very difficult to establish a defence under this section for he could not know the condition of the goods before they were delivered to him. But it is not necessary for me to decide the precise meaning of this section and for the purposes of these proceedings I am content to look at the matter from the most favourable view for the defendant and to assume without so deciding that the words "when purchased" mean when delivered by the RIV Co to the defendant. This matter depends on the evidence of the witness McDonald. He first of all said in answer to a leading question that these goods had come in from RIV Equipment Hiring Pty Ltd on the previous afternoon, and that they were then in the same state and condition when the informant purchased them as when received. Of course, the mere fact that the evidence is given in response to a grossly leading question does not mean that such evidence is to be treated as if it had never been given but it is a very good reason for attaching little weight to it. The weight of this evidence was seriously affected as the result of the cross-examination. Indeed, I think it was totally destroyed. In cross-examination he said that these goods came in at 1.30, that he was not certain that he was there when they came in, that there were other employees in the shop and that he did not know precisely whether he was there when the goods came in or not. He did not know what state the pork mince and the sausages were in when they came in. In re-examination

he said there was no evidence to suggest that either the pork mince or the sausages had been altered or tampered with, and nothing to suggest that they were not in the same condition as when they arrived. This again invited the magistrate to make assumptions not based on proof.

In my view, the answers the witness gave in cross-examination destroyed what little probative effect his answers given in evidence in chief had and since he explicitly said that he did not know what state these goods were in when they arrived there was, in my opinion, no evidence on which the magistrate could find that at the time of the sale to the informant they were in the same condition as when purchased. I would go even further and I would say that there was no evidence on which it could be found that the goods were supplied by the RIV Co to the defendant. I therefore think that this ground has been made out.

As to ground 4, that on the evidence the defendant should have been convicted, I am of opinion that even if I am wrong in saying that there was no evidence of the matters covered in grounds 1, 2 and 3, nevertheless that evidence was so vague and unsatisfactory, so inexact and so based upon assumption, that no magistrate acting reasonably should, on a balance of probabilities have acted upon it. This ground is, therefore, also made out. The result is that the order nisi will be made absolute on all grounds with costs. The informations will be remitted to the Court of Petty Sessions at Sandringham to be dealt with in accordance with this judgment.

Solicitors for the informant: Maddock Lonie and Chisholm.
Solicitors for the defendant: Herbert Geer and Rundle.
