17/77

SUPREME COURT OF VICTORIA

PRICE v PICA

Fullagar J

15, 16, 17, 22 February 1977 — [1977] VicRp 32; [1977] VR 272

LIQUOR CONTROL – LIQUOR STORED AT DEPOTS – WHETHER IN THE CIRCUMSTANCES THERE WAS A USER OF THE DEPOTS FOR THE PROVISION OF LIQUOR – MEANING OF "USER" – FAILURE OF DEFENDANT TO GIVE EVIDENCE – CHARGES FOUND PROVED – WHETHER MAGISTRATE IN ERROR: *LIQUOR CONTROL ACT* 1968, S110(1)(b).

A licensed grocer carried on business using premises at 417, 419, 421 and 423-5 Springvale Road. The licence was held in respect of a portion of 417 — the greater portion of 417 was used as a storage area. Liquor was also stored at 419, 421 and 423-5, and whilst deliveries were accepted at these premises, no sales took place there. As to No 417, liquor entered those premises by being sent down a chute from the unlicensed area into the licensed area. Charges were laid against the user of the premises alleging that the person did use a place not being part of licensed premises for the provision of liquor. All charges were found proved. Upon Order nisi to review—

HELD: Order discharged in respect of the first charge. Order absolute and convictions quashed in respect of the remaining three charges.

1. The first question – namely, whether the storage of liquor in the premises other than No. 417 in the circumstances disclosed by the evidence amounted to the provision of liquor within the meaning of s110(1)(b) was not satisfactorily answered merely by deciding that such storage fell within the actual words that have been repealed, although such an answer must be conclusive as to those premises. However this may be, that the concept of use "for the provision of liquor" in s110(1)(b), extended only to use for the purpose of the sale, supply or disposal of liquor by the licensee and only to acts and conduct done on the unlicensed premises and forming part of some transaction of sale, supply or disposal of liquor by the licensee.

2. In relation to Nos. 419, 421 and 423-5 there was no evidence that anything other than "mere storage" took place. The only connection between the storage there and the supply of liquor at 417 was some evidence that the liquor in storage was, in the ordinary course of business, destined at some time in the future to be carried to 417 and immediately sent down the chute into the licensed store at 417, and later to be removed thence for supply on some licensed or unlicensed portion of 417. This evidence did not justify a conviction. As there was no evidence to suggest that any part of any transaction of sale or supply or disposal of liquor by the defendant ever took place on any of these three premises, the information in respect of each of them should have been dismissed and the other nisi in respect of each of them made absolute.

3. In all the circumstances, there was sufficient evidence before the Magistrate to found the conclusion beyond reasonable doubt that, within the period laid, wine was stored and displayed in the unlicensed portion of No. 417 and was at the unlicensed portion selected and taken possession of by a customer as the initial step of a particular transaction of supply, by a self-service method, by which the defendant supplied (or provided) wine to the customer, although payment by the customer and the assent by the defendant to the final asportation of the wine occurred at the licensed portion of the premises.

4. This step of the customer on the unlicensed portion, combined with the purposive display there of which he took advantage, being the step of reducing the wine into possession and carrying it over towards the defendant's servant stationed at the licensed portion of the premises, formed an essential part of a transaction of supplying wine to the customer; the whole transaction was one of providing liquor and an essential part of that transaction, namely, display and ascertainment of the bottle by reducing it into possession, took place on the unlicensed portion of the premises.

5. "Provision" in s110(1)(b) of the *Liquor Control Act* includes sale, disposal and supply. There cannot be a supply without some form of delivery and the delivery of both wine and beer in the present case took place on the unlicensed portion of No.417.

6. The Magistrate was entitled to be satisfied beyond reasonable doubt that a case was made out

in respect of No. 417, and further of opinion that the absence of evidence from the defendant could rightly be used by him in removing any lingering feelings of doubt he might have had as to whether some part of the evidence for the prosecution should be accepted at face value.

FULLAGAR J: This is the return of four orders nisi to review granted by Master Brett in August 1976. Each of the four relevant informations, and therefore each of the orders to review, relates to particular separate premises, one for 417 Springvale Road, Forest Hills, where the defendant carried on the business of a licensed grocer, one each for the next two parcels of land to the south (each contiguous to its northern neighbour), being Nos. 419 and 421 Springvale Road, and one for the next parcel of land to the south, which was the site of buildings occupied by a former motor service station and which was numbered 423-5 Springvale Road, but which was separated from No. 421 by a side street running west into Springvale Road. It is convenient to refer to the four separate cases by the street numbers of the premises to which they respectively relate.

The only licence under the *Liquor Control Act* held by the defendant related to 417. These premises were fitted out as a licensed grocer's shop and on the plan attached to the licence it was made clear that the liquor licence covered only two portions, being a first portion of the premises at the north-west corner fronting Springvale Road, where the supply of liquor was permitted, and a second portion at the south-east corner which was, according to the plan, licensed for use as a storage area for liquor. The remainder of the shop at 417 constituted the greater portion of the shop and all of this remainder constituted the "unlicensed" portion of the shop. What in fact took place in the various unlicensed areas of the shop at 417 must be left for analysis later in these reasons.

The information laid in respect of 417, which I shall call the 417 information, charged that the defendant Mrs Pica, who is sued as the person responsible for the acts of the licensee, an incorporated company, "...between 30 March 1976 and 13 April 1976 at Forest Hills...being a person responsible as licensee of a retail bottle liquor licence for premises...situate at 417 Springvale Road, did use a place not being part of licensed premises for the provision of liquor."

Each of the other three informations was identical with this, except that after "did use" the words were as follows, with the number of the premises inserted in the blank: "...premises situated at Springvale Road such premises not being part of the licensed premises for the provision of liquor." All four informations were heard together by consent, the defendant pleading not guilty to each charge.

In the case of each information the Stipendiary Magistrate found the charge proven and adjourned the proceedings for some six months on the defendant entering into a bond in the sum of $100 to be of good behaviour for that period. From these decisions these cases now come by way of order to review, the orders nisi having been obtained by the defendant.

In my opinion, the three orders nisi, in respect of user at Nos. 419, 421, and 423-5 respectively should each be made absolute and in each of those cases the convictions should be quashed. In my opinion, the order nisi in respect of No. 417 should be discharged. In fairness to the Magistrate, I must add that the arguments put before him were different from the pointed and detailed arguments put by other counsel before this Court.

From the evidence it appeared that during the critical period laid in the informations, the defendant (actually it was the company for whom the defendant was a "person responsible") conducted at 417 the business of a licensed grocer, selling in some parts of the non-licensed portion ordinary grocer's goods, but it seems that this latter part of the business was extremely small. From the licensed portion in the north-west corner the defendant sold liquor, including wines, spirits and beer. It seems that most if not all the liquor entered 417 by being put down a chute from the eastern boundary into the south-east licensed storage area. Thereafter it was sold in the premises of 417 to customers.

However, when the defendant took delivery from the suppliers of liquor, it did not always take delivery straight into the chute at 417. It maintained large stocks of liquor in storage at 419, at 421 and at the former garage premises at 423-5, and it apparently took delivery from brewers and wholesale distillers into these premises. It made no sales at these premises. At each of these

premises no activity whatever took place except receipt from the supplier, followed by storage, followed by ultimate removal by the licensee to the licensed store at 417 via the chute at 417. Mr Batt for the informant, in a careful and clear argument, submitted that the storage at Nos. 419, 421 and 423-5 (which I shall call "the storage depots") was in all the circumstances a user of the storage depots "for the provision of liquor" within the meaning of s110(1)(b) of the *Liquor Control Act* 1968 as amended by Act No. 8732 of 1975 (the *Liquor Control (Amendment) Act* 1975).

It is important to observe that, before the 1975 amendment, s110(1)(b) read as follows:—

> "(1) Any licensee who—...
> (b) uses any place or premises not being part of the licensed premises for the provision of liquor meals accommodation or any purposes connected therewith or ancillary thereto; ...
> shall be guilty of an offence against this Act."

Act No. 8732 of 1975 repealed from the inset par.(b), all the words which follow the word "liquor". It is quite clear, and Mr Batt readily conceded, that one effect of the repeal was to remove from the list of offences the use of non-licensed premises only for purposes merely connected with or ancillary to the provision of liquor. When I asked him the kind of thing that ceased by the amendment to be an offence in relation to provision of liquor, he submitted the answer was, "Things like the book-keeping of the business, or telephoning to the brewery to order more beer."

For myself, I do not think that either of these two activities was ever included within the conduct prohibited by par.(b), although I do think that such things as advertising alcoholic liquor or advertising that the defendant's prices for liquor were lower than others or the holding of a wine-tasting, if, for example, there was some indication express or implied that the wares could advantageously be purchased at the defendant's premises, would fall within the repealed portion of par.(b). But, in my opinion, the purpose of book-keeping had nothing to do with the purpose of providing liquor except the incidental or accidental fact that the profit-making business, or tax-incurring business, with which the book-keeping was "connected", happened to be the selling to customers of liquor; the book-keeping to all intents and purposes would have to be done and would have been just the same in purpose if the business had been the growing of turnips or the selling of pharmaceutical products.

On the other hand, the wine-tasting would have been by no means the same and would have been connected with the provision of liquor and, as regards wine-tasting on an unlicensed portion of premises the subject of the licence, would also be clearly, in my opinion, ancillary to the provision of liquor. Likewise, I consider it clear that storage of liquor on an unlicensed portion of premises the subject of a licence would clearly be "connected with" the provision of liquor and, in my opinion, the connection would remain close enough to fall within the old prohibition if the storage was on premises close by whence the stored liquor was habitually taken to the "licensed storage portion" of the licensed premises themselves, en route eventually to a place of sale in the building to which the licence related.

The first of the critical questions in the present case, however – namely, whether the storage of liquor in the premises other than No. 417 in the circumstances disclosed by the evidence amounts to the provision of liquor within the meaning of s110(1)(b) after the repeal aforesaid — is perhaps not satisfactorily answered merely by deciding that such storage fell within the actual words that have been repealed, although I think that such an answer must here be conclusive as to those premises. However this may be, it is my clear opinion that the concept of use "for the provision of liquor" in s110(1)(b), both before and after the said repeal, extends and extended only to use for the purpose of the sale, supply or disposal of liquor by the licensee and only to acts and conduct done on the unlicensed premises and forming part of some transaction of sale, supply or disposal of liquor by the licensee.

It is not to be forgotten that, as Mr Batt for the informant rightly stressed, the notion of using premises for the provision of liquor connotes a purpose and connotes user of premises for a purpose, to wit, the purpose of providing liquor or, if it matters, the purpose of selling, disposing or supplying liquor. But this correct analysis does not, in my opinion, require the conclusion that what I might call "mere storage" on unlicensed premises, however close to or "handy" or contiguous to the precise site of habitual sale or supply, constitutes itself a user of the storage premises for the purpose of the provision of liquor within the meaning of s110(1)(b). By "mere

storage" I mean storage simpliciter or storage unaccompanied by any conduct of the licensee or his liquor customers or clients at the critical site which constituted a necessary incident of and, in that sense, a part of a transaction by which the said liquor was sold or supplied or (in a proven course of conduct) would in the ordinary course of business in the future be sold or supplied. By "mere storage", however, I do not exclude cases where the stored liquor will certainly be later supplied by the storer in other premises.

The distinction and test which I think is applicable to the words of s110(1)(b) as they now stand is analogous to the distinction and test which I believe was applied by Smith J, in *Downing v O'Donnell* [1959] VicRp 92; [1959] VR 696; [1959] ALR 1212 in relation to the statutory prohibition against a user of premises for the purpose of betting within the meaning of s97(1)(a) of the *Police Offences Act* 1957. His Honour there set aside the conviction below. His Honour distinguished the test under s97(1)(a) from that applicable under s97(1)(b) and he said on p698 of the report that:

> "... there was no evidence that any bet or any part of a transaction constituting a bet took place at the premises which the defendant was charged with using."

His Honour added:

> "The magistrate said that the book-keeping carried on" [scil. at the premises laid] "was an essential part of a starting-price bookmaking business because the defendant's business was run on a telephone starting-price system and he said that he found the charge proved. In my view the magistrate was in error. I think that he has applied authorities with regard to s97(1)(b) to this case and that the authorities in question are not applicable to s97(1)(a). I think that the cases show that a person cannot be convicted under s97(1)(a) unless bets are made at the place which is the subject of the charge or some part of the transaction constituting the bet takes place there." (Emphasis my own.)

See also *Earl v Kent* [1960] VicRp 10; [1960] VR 72.

It is, of course, unsafe to reason unquestioningly from reasoning applied to one ancient statute with its own notorious difficulties of construction to another statute altogether. One reason why I refer to *Downing v O'Donnell*, *supra*, is because it is difficult to express with precision what I regard as the clear test which is applicable to the present case, and because I am respectfully of opinion that the language of Smith J, in that case contains the best compendious statement of the test which I have been able to find. But I do not consider the analogy between the two statutes to be by any means unhelpful. I think that the analogy is real and significant. It is to be observed that s97(1)(a) of the *Police Offences Act* used the active voice, "For the purpose of the owner ... betting with any persons ..." whereas par. (b) was couched in the passive voice, "For the purpose of any money ... being received by ... the owner or ... ".

As a matter of expression, it is to be observed also that s110(1)(b) of the *Liquor Control Act* uses the active voice; it does not proscribe the use of unlicensed premises for the purpose of liquor being sold or supplied; if language like the latter had been used, it might well have caught the "mere storage" of liquor at 423-5 Springvale Road, on proof of a course of business in which all liquor stored there went through the chute or otherwise into 417 for sale, supply or disposal at 417. I do not, of course, decide that case. In a prohibition of the use of unlicensed premises for the purpose of liquor being sold or supplied, there is difficulty in supplying any limitation of locality or *situs* for the intended sale and every reason for supposing the legislature to have intended no such limit, because such limit could be used by the most unimaginative person to set the whole legislative provision at nought, that is to say, to virtually deprive the legislative provision of any effect, in fact, upon any "evil" at which it might be supposed the legislation was aimed.

In a provision which prohibits a specified person from using premises for betting or using premises for supplying liquor, there are good reasons for confining the acts constituting the proscribed user to acts which occur on the premises laid, and reasons for such confinement become virtually irresistible when there is super-added to the provision in question (e.g. by s97(1)(b) of the *Police Offences Act* 1957 and by the now repealed words of s110(1)(b) of the *Liquor Control Act* 1968) a further and separate provision from which any such limitation is inferentially or expressly excluded. Of course, it does not follow that the constitution of the bet (or of the provision or supply) must take place on the premises laid, but what must take place there are some acts forming a part of a transaction of a particular bet or forming part of a transaction of a particular "provision of liquor".

It is necessary to emphasize one or two aspects of the test to which I have referred. I have said that the expression of the test by Smith J was compendious. It is to be observed that he referred to two alternative requirements for making out a contravention of the section of the *Police Offences Act*. The second alternative, that some part of the transaction constituting the bet takes place on the laid premises, does not require that the act which completed the transaction should there take place; such a requirement would merely equate the second alternative with the first. Mr Hedigan argued strongly that, in order to contravene s110(1)(b), the sale (or supply or disposal) must have been completed on the laid premises; that is to say, it must have achieved legal constitution as a sale or a supply or a disposal on the laid premises. I reject this argument.

The supply of a bottle of wine to a customer or client of the supplier involves amongst other things an ascertainment of the bottle the subject of the transaction and a movement of that bottle from the possession or the custody of the supplier into the possession or custody of the client. Each of these two things is – to adapt the language of Smith J – "some part of the transaction constituting the supply". If the supply is for pecuniary consideration and therefore a sale, other elements are also involved in the sale such as the payment of money. In a case of supply, however, the ascertainment of the bottle is a part of the transaction of supply. If that takes place on the laid premises — here the unlicensed premises — it is no defence that the supply was not completed until further things took place in other and licensed premises. Under s97(1)(a) of the *Police Offences Act* the offence would be committed on the laid premises whether the engagement to pay was completed (save for illegality) by the defendant bookmaker communicating his acceptance from a telephone on the laid premises to the gambler on other premises, or not, notwithstanding a legal analysis to the effect that the contract became such (or the bet became such) at the place, namely, the gambler's house, where the acceptance was communicated to the offeror.

I can now turn to the evidence in the present case. In relation to Nos. 419, 421 and 423-5 there is no evidence that anything other than "mere storage" took place. The only connection between the storage there and the supply of liquor at 417 was (at best from the prosecutor's point of view) some evidence that the liquor in storage was, in the ordinary course of business, destined at some time in the future to be carried to 417 and immediately sent down the chute into the licensed store at 417, and later to be removed thence for supply on some licensed or unlicensed portion of 417. In my opinion, this evidence, assuming for the moment that it is possible to view it as reaching so far factually in favour of the prosecution, does not justify a conviction under s110(1)(b) of the *Liquor Control Act* 1968 as amended by the *Liquor Control (Amendment) Act* 1975. As there is not the slightest evidence to suggest that any part of any transaction of sale or supply or disposal of liquor by the defendant ever took place on any of these three premises, the information in respect of each of them should have been dismissed and the other nisi in respect of each of them must be made absolute.

As to the premises at No. 417, Mr Hedigan forcefully argued that, even if the legal test of "provision" were to be such as I have above adopted, still there was not sufficient evidence to satisfy any reasonable tribunal beyond reasonable doubt that the offence had been committed. I allowed Mr Hedigan to amend ground 6 of the order nisi to review to make it clear that this point was being taken, but I wish to observe that I do not think that the prosecution had any ground to complain at Mr Hedigan taking this ground on the hearing, because I think that ground 6 as earlier expressed was sufficient in the circumstances to warrant his taking this point. If I were to reject, as I do, Mr Hedigan's submission that the completion of, and thus the constitution of, the sale or supply must occur on the laid premises, he argued alternatively that still the evidence here was insufficient to justify a conviction. It is therefore necessary to refer to the evidence in some detail in respect of the premises at No. 417.

Chief Inspector Price gave evidence relating to his visit to 417 on 31 March, 1976, as follows:

> "Whilst there I observed two customers take bottled wine from cartons stacked in unlicensed areas and attend the counter in the licensed area for service, one at least being served by a shop assistant... Vicki Newman."

Then he spoke to the defendant and said, after indicating to her the unlicensed areas of No. 417:

> "I have observed customers take liquor from these areas, take it to the counter and be served by that saleswoman [indicating Vicki Newman]. Would you call her over?"

He then says she did so and he continues:

> "I reiterated my observations to Miss Newman of sales I observed, and had her confirm it."

In cross-examination, in answer to a question whether he agreed that "possession of liquor takes place in the licensed sales area", he said:

> "As I see it sales take place in two ways. Orders are taken and payment is made for beer in the licensed area, and they have possession of it from the trolleys stacked in the unlicensed area--wines and spirits are done by self-serve, the customer taking that liquor to the counter (scil. in the licensed portion of the premises) where they pay for it."

In evidence there were photographs taken by the Chief Inspector or his men on 6 May 1976, which is later than the dates laid in the informations which are "between 30 March 1976, and 13 April 1976". Photographs 8 and 9 show how the liquor was stacked on 6 May 1976 in the unlicensed portions of No. 417. Chief Inspector Price in his evidence indicated that on 31 March 1976 there were certain differences in the scene from that shown in the photographs and he stated differences. Of the premises at 417 on 31 March 1976 he said:

> "The licensed area was extremely busy with customers and the grocery section virtually empty; there was no attendant on the cash register for the grocery section...down one side...outside the licensed area was a considerable quantity of bottled liquor...similar to that shown in the photograph marked 8. Stacked in front of the Gondola shown in the centre of the photograph marked 9 was another large quantity of liquor but considerably more than is shown in the photograph. This is also outside the licensed area." (It is clear from the evidence that there was a person attending to receive cash in the licensed section). It was immediately after this passage that the Chief Inspector referred to his observations as aforesaid: "...two customers take bottled wine from cartons stacked in unlicensed areas...".

Leaving out of account for the moment what I regard as cogent evidence as to the sale of beer, I am of the opinion that the above constituted clear *prima facie* evidence before the Stipendiary Magistrate that, in the period laid in the information, one customer selected wine from the display stacks in the unlicensed area, took it to the counter in the licensed area and in the latter place paid the price to Miss Newman and thence took the wine off the premises.

Mr Hedigan argued strenuously that the evidence was quite consistent with the customer asking Miss Newman whether the selected wine was any good and being told by her that she had a better bottle of wine under the counter, consistent with his putting aside his selection and buying on the licensed premises the allegedly better wine. In my opinion this is not so. The Chief Inspector was cross-examined as to the course of conduct as to possession, which must have related to his observing of the course of conduct, and he responded by giving the evidence above recorded concerning wines and spirits being "done by self-serve", the customers taking the liquor from the unlicensed over to the licensed area, "where they pay for it". Counsel for the defendant below (who is not any one of the counsel appearing before me) asked the question and was bound by the answer, although he could have tested but did not test the witness's means of knowledge.

Not only was this evidence not tested in the cross-examination, but no evidence whatsoever was given on behalf of the defendant. In these circumstances the Stipendiary Magistrate was entitled to conclude, if he thought it was the proper conclusion, that the only reasonable inference from these circumstances was that if the defendant had adduced evidence (e.g. through Mr Pica or Mrs Pica or a servant), that evidence would not have assisted the defendant's case. He was not, of course, entitled to speculate what the evidence might have been if Mr or Mrs Pica had given evidence, but he was entitled to find that their evidence would not have assisted the defendant. (See *O'Donnell v Reichard* [1975] VicRp 89; [1975] VR 916, at pp929 and 935, per Newton and Norris JJ)

He was entitled thus to take into account the silence of these knowledgeable persons as a factor strengthening the conclusions at which he might otherwise with hesitation have arrived. He was entitled to consider that the unexplained silence of Mr and Mrs Pica and of their cashier

made the drawing of inferences, otherwise justifiable, less unsafe than it would have been. (See *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671.) Of course a party's failure to give evidence can never convert insufficient into *prima facie* evidence because, *ex hypothesi*, the stage has not been reached where an explanation is called for. But in the present case I am of the opinion that the Magistrate was entitled to be satisfied beyond reasonable doubt that a case was made out in respect of No. 417, and further of opinion that the absence of evidence from the defendant could rightly be used by him in removing any lingering feelings of doubt he might have as to whether some part of the evidence for the prosecution should be accepted at face value.

In my opinion the *prima facie* evidence in the present case called for explanation and, as Alderson, B, remarked in *Boyle v Wiseman* [1855] EngR 110; 156 ER 598; (1855) 10 Ex 647, at p651,

> "A party not denying a fact which is within his power to deny gives a colour to the evidence against him." This was put more colourfully by Rich J, in *Insurance Commissioner v Joyce* [1948] HCA 17; (1948) 77 CLR 39, at p49; (1948) 2 ALR 356; (1948) 22 ALJR 278, as follows: "...when circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold."

In all the circumstances, I am of opinion that there was sufficient evidence before the Stipendiary Magistrate to found the conclusion beyond reasonable doubt that, within the period laid, wine was stored and displayed in the unlicensed portion of No. 417 and was at the unlicensed portion selected and taken possession of by a customer as the initial step of a particular transaction of supply, by a self-service method, by which the defendant supplied (or provided) wine to the customer, although payment by the customer and the assent by the defendant to the final asportation of the wine occurred at the licensed portion of the premises.

In my opinion, this step of the customer on the unlicensed portion, combined with the purposive display there of which he took advantage, being the step of reducing the wine into possession and carrying it over towards the defendant's servant stationed at the licensed portion of the premises, formed an essential part of a transaction of supplying wine to the customer; the whole transaction was one of providing liquor and an essential part of that transaction, namely, display and ascertainment of the bottle by reducing it into possession, took place on the unlicensed portion of the premises.

Further, if it matters, I think there was sufficient evidence before the Stipendiary Magistrate to found the conclusion that the defendant caused the wine to be displayed on the unlicensed portion of the premises at 417 with the very purpose and intention that customers would avail themselves of the presented opportunity of performing as above on the unlicensed portion an essential step of supply of the liquor by the self-service method.

Likewise, I think there was sufficient evidence before the Stipendiary Magistrate to justify the conclusion, beyond reasonable doubt, that in the material period a customer paid the price of a carton of beer bottles to the defendant's servant stationed in the licensed portion and then collected his carton of beer from the trolleys which were left on the unlicensed portion for the purpose of such collection.

In my opinion the dictum of Romer J, about supply by a butcher in *Norris v Syndi Manufacturing Co Ltd* [1952] 1 All ER 935, at p941 (E,F) does not assist in the present case; his Lordship contemplated the case where the leaving of the meat a mile from the customer's house was the end of the transaction, the case where the customer did not ask for the meat to be delivered at the place chosen and did not even know it was there.

Mr Hedigan relied on authorities to the effect that the display of goods is not an offer, but they do not, in my opinion, conclude the present case, where the customer made an offer by presenting a bottle to the defendant's servant at the counter on the licensed portion, but where it was an essential step in the ascertainment of the goods which he offered to purchase that he selected them in the unlicensed portion. As to the beer, the customer offered at the counter in the licensed premises to buy any beer (within the description sought), but an essential step in the transaction of sale was the ascertainment of the actual goods sold by the customer selecting them from the trolleys in the unlicensed portion of 417.

In my opinion the case of *Hales v Buckley* (1911) 104 LTR 34 does not assist the defendant with regard to the premises at 417 — the question in the present case is whether what occurred on the unlicensed portion was an essential step in a transaction of disposing of liquor, and in my opinion it was, in the case of both the beer and the wine.

Mr Hedigan for the defendant relied upon the decision of Martin J in *Mason v Corner Hotels Pty Ltd* [1956] VicLawRp 53; [1956] VLR 327; [1956] ALR 837. In substance the charge there was that the defendant disposed of liquor otherwise than at the place authorized by the licence. It was apparently the view of Martin J, that, for the purposes of s177 of the *Licensing Act* 1928, a disposal took place upon a bargain and sale and before the goods were sold and delivered. I must confess, with the greatest respect, to entertaining some doubts as to the correctness of the actual decision but, however this may be, two observations should be made of it: namely, (1) it is distinguishable on the ground that the statute there in question required a disposal to take place, to be completed, as it were, on unlicensed premises, whereas the statute in the present case requires only the use of unlicensed premises for the purpose of a disposal and (2) the goods were there held to be disposed of upon ascertainment and, if that test were to be applied here, the beer was ascertained on the unlicensed portion of 417 and so was the wine.

I accept the proposition, at one time maintained by Mr Hedigan, but later perhaps resiled from, that "provision" in s110(1)(b) of the *Liquor Control Act* includes sale, disposal and supply. In my opinion, there cannot be a supply without some form of delivery and the delivery of both wine and beer in the present case took place on the unlicensed portion of No.417.

In relation to Mr Batt's reliance, in relation to the premises outside number 417, upon *Stoddart v Hawke* [1902] 1 KB 353, I should point out that there the offence was, like the conduct prohibited by s97(1)(b) of the *Police Offences Act*, couched in the passive voice.

In my opinion, the repeal by the legislature of the words from s110(1)(b) by Act No.8732 of 1975 strongly fortifies the view which I have taken as to the "mere storage" at Nos. 419, 421 and 423-5.

With reference to the orders for costs hereinafter contained, I am of opinion that a fair allocation of the time spent on the hearing before me is one-half as to the information relating to No. 417 Springvale Road and one-half as to the other three informations.

The orders of the Court will be in accordance with the following minutes:

(1) Order to review No. 7351: Order nisi discharged;

(2) Order to review No. 7350: Order nisi made absolute and order that the conviction be set aside and order that an acquittal be entered and order that the costs of the defendant including all costs reserved be taxed and when so taxed be paid by the informant, the aggregate of all such costs, however, not to exceed $200;

(3) Order to review No. 7352: Order in the same terms as for No. 7350;

(4) Order to review No. 7353: Order in the same terms as for No. 7350.

Orders accordingly.

Solicitor for the informant: John Downey, Crown Solicitor.
Solicitors for the defendant: Mackenzie and King.
