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SUPREME COURT OF VICTORIA

BRUDENELL v NESTLE CO (AUST) LTD

Menhennitt J

5, 8-9, 22 June 1970 — [1971] VicRp 27; [1971] VR 225; (1970) 22 LGRA 277

PUBLIC HEALTH – SELLING FOOD WHICH WAS ADULTERATED – FOOD (COFFEE IN A TIN) DID NOT COMPLY WITH THE STANDARD PRESCRIBED – FOOD CONTAINED MORE THAN THREE-TENTHS OF ONE PART PER CENT OF RESIDUE INSOLUBLE IN BOILING WATER – MAGISTRATE FOUND THAT THERE WAS A CASE TO ANSWER – WHETHER MAGISTRATE IN ERROR: *HEALTH ACT* 1958, SS238, 240(c), 273.

HELD: Orders nisi absolute. Information dismissed.
1. The argument for the informant, which the magistrate accepted, was that, because an authorized officer of a council was the informant in the proceedings, the provisions of s232(2) of the *Local Government Act* applied so as to make the regulation of the Governor in Council not impeachable in the Court of Petty Sessions. This decision of the magistrate was erroneous.

2. The portion of the regulation which was here attacked was invalid because it did not prescribe a standard for or define a food, drug or substance or prohibit the addition of a substance and it was not given validity by the general provisions of s390(1)(b) of the *Health Act*.

3. The portion of the regulation reading "It shall contain...not more than three-tenths of one part per centum of residue insoluble in boiling water" was *ultra vires* and invalid. That being so, there was no case to answer and for this reason the information should have been dismissed at the close of the informant's case.

4. The instant coffee the subject of the proceedings was not canned food. It was not contained in a sealed air-tight metal container. It was not necessary to fracture the metal to open the tins. On the contrary the lids could be lifted off the tins. It followed that the tins were not themselves hermetically sealed. It was nothing to the point that there was aluminium foil inside which was sealed and had to be cut to expose the coffee – the coffee was not "canned" within the meaning that word bore in the expression "canned food". The result was that the instant coffee the subject of the information was not specified within the meaning of s281(1A)(a) and the procedure laid down under s281(1A)(b) and s281(1B) could not be employed.

5. There was no evidence that the three tins selected from the shelf were the only tins on the shelf or that they were in proximity to each other and there was no evidence of any marks or labels or otherwise to suggest that they came from the same manufacturer's batch. In those circumstances, it seemed doubtful, to say the least, whether it would have been open to the Magistrate reasonably to conclude that the coffee in the three tins taken off the shelf was of the same composition. But whether this be so or not, the fourth tin came from a different unidentified place to which the employee had to go and, accordingly, it would not have been open to the Magistrate reasonably to find that all four tins came from the same manufacturer's batch or were of the same composition. The reality was that the inspector was relying upon the provisions of s281(1A) and s281(1B) and, these not being available, the obvious method of compliance with s281(1) would have been to divide the contents of one tin, which was not done.

6. Accordingly, it was not open to the Magistrate reasonably to conclude that s281(1) had been complied with and that the only conclusion reasonably open to the magistrate on the evidence was that the provisions as to dividing a food, drug or substance had not been complied with.

MENHENNITT J: On 11 November 1969 there came before the Court of Petty Sessions at Moonee Ponds constituted by a Stipendiary Magistrate an information by Douglas Arthur Brudenell (to whom I shall refer as "the informant") against the Nestle Company (Australia) Ltd (to which I shall refer as "the defendant") alleging that the defendant on 19 August 1969 did sell food to wit instant coffee which was adulterated contrary to the provisions of s238 of the *Health Act* 1958.

Section 240(c) of the *Health Act* provides, *inter alia*, that for the purposes of Pt XIV, which contains s238, food shall be deemed adulterated when it does not comply with the standard prescribed therefore under the *Health Act*. The *Food and Drug Standards Regulations*, as amended, which are made by the Governor in Council under the *Health Act*, include reg 43(8)(a) (as amended) in the following terms:

> – "Soluble Coffee or Instant Coffee.
> "(8)(a) Soluble coffee or instant coffee is a preparation consisting of dried soluble solids obtained from a water extract of coffee. It shall contain not less than three parts per centum of anhydrous caffeine (C8 H10 N4 O2) derived from the coffee and not more than three-tenths of one part per centum of residue insoluble in boiling water. It shall not contain any foreign substance."

The contention for the informant was that the sale was a deemed sale by the defendant by reason of s273 of the *Health Act* and that the food sold contravened s238 because it did not comply with reg 43(8)(a) in that it contained more than three-tenths of one part per cent of residue insoluble in boiling water.

On the hearing in the Court of Petty Sessions certain documents were tendered in evidence for the informant and two witnesses were called to give evidence – a health inspector who gave evidence of a sale and an analyst who gave evidence of an analysis and matters related thereto.

At the conclusion of the informant's case it was submitted for the defendant that for various reasons the information should be dismissed at that stage, but the magistrate rejected this submission and held that there was a case for the defendant to answer. The magistrate refused to adjourn the further hearing for the specific purpose of enabling the defendant to apply for an order to review, but, as the first day of the hearing had been substantially occupied, the hearing was adjourned for three weeks and during that time, namely, on 27 November 1969, the defendant applied for and obtained from a master an order nisi to review certain orders made by the magistrate including the decision that the defendant had a case to answer and that order to review has now come on for hearing before me.

On 25 May 1970 the informant issued a summons returnable before the judge sitting in the Miscellaneous Causes list upon the return-day of the order nisi to review, in which the informant applies for an order that the order nisi to review be set aside on four grounds, three of which are basically that there were no special circumstances warranting the grant of an order nisi to review the magistrate's decision that there was a case for the defendant to answer and one of which was in substance that there was no order made by the magistrate. The parties concurred in the course of arguing the return of the order nisi to review and informant's summons together before me.

I deal first with the informant's summons. I dismiss that summons for three sets of reasons.

The first set of reasons go to the procedure adopted on the summons. It seems to me that one consequence of the substitution of the new O54 of the *Supreme Court Rules* made by the *Supreme Court (Chambers) Rules* 1968 and the *Supreme Court (Chambers) Rules* 1968 No. 2 (to both of which I shall refer as "the Chambers Rules") is that, in the absence of special circumstances or special reasons, an application to set aside an order to review should be made either on summons to the master who made the order or by appeal against the grant of the order nisi to a judge in chambers pursuant to and in accordance with r16 of the Chambers Rules.

Among the provisions of the *Chambers Rules* are r14(d), whereby masters are authorized to hear and determine applications and may exercise any of the powers conferred on the Court or on a judge under s155(1) of the *Justices Act* 1958 (which authorizes the granting of orders to review orders of Courts of Petty Sessions) and r17 which provides that no matter which is authorized by or under O54 to be dealt with by a master shall be brought before a judge or the Court except on a reference from a master or on an appeal under the Order or by special leave of the Court or a judge. In *Lee v Loetsch* [1969] VicRp 116; [1969] VR 949, I held that these provisions were a valid exercise of the rule-making powers.

The power to set aside an order to review is, it appears to me, one that must be implicit in the powers contained in s155(1) of the *Justices Act* to grant an order to review. The decided

cases assume the power without discussing its source: see *Bevan v Moore* [1899] VicLawRp 151; (1898) 24 VLR 792; 5 ALR 100; *Hepworth v Gleeson* [1902] VicLawRp 59; (1901) 27 VLR 316; 7 ALR 218; *Gleeson Bros v Ellison and Evered* [1902] VicLawRp 60; (1901) 27 VLR 319; 8 ALR 28; *O'Sullivan v Humphries* [1906] VicLawRp 96; [1906] VLR 563; 12 ALR 382; *McCallum v Purvis* [1906] VicLawRp 99; [1906] VLR 578; 12 ALR 329; *City of Chelsea v Flint* [1934] VicLawRp 62; [1934] VLR 303; [1934] ALR 402; *Tulk v Pritchard* [1951] VicLawRp 14; [1951] VLR 99; [1951] ALR 337, and *Borowski v Quayle* [1966] VicRp 54; [1966] VR 382. The power being implicit in the power given by s155(1), it appears to me that by r14(d) of the *Chambers Rules* a master is given the same implied power to set aside an order to review as a judge previously had and that the effect of r17 of the *Chambers Rules* is that an application to set aside a master's order can come before the Court or a judge only in conformity with that rule. The reasoning of Lowe J in *City of Chelsea v Flint* [1934] VicLawRp 62; [1934] VLR 303, at pp304, 305; [1934] VicLawRp 62; [1934] ALR 402, points to the conclusion that, if the application is made to a master, it should be made to the master who granted the order nisi unless he requests another master to hear it or he is not available. In *Tulk v Pritchard*, *supra*, and *Borowski v Quayle*, *supra*, Sholl J and Gowans J heard the objections as though a summons nunc pro tunc had been taken out, but they did not expressly disagree with what Lowe J said in *City of Chelsea v Flint*. But in any event, when orders to review were granted by judges in chambers, the judge who granted the order nisi was often not readily available to hear a summons to set it aside because he was sitting in another jurisdiction, but, as masters are available all the time by appointment, the application to set aside should, I think, be made to the master who granted it unless he is not available or requests another master to hear it.

As to r17 dealing with the manner in which matters may come before the Court or a judge, it appears to me that the "matter" there referred to means the whole of a matter and not part of it. There is, I think, much to be said for the view that an application to set aside an order to review is really an aspect of the original application for the order nisi, because the master is being asked to undo what he has done. If this be the true analysis, the application to set aside cannot be brought before the Court or a judge by special leave, because it is not a matter but only part of a matter. The power of the master to hear and determine the summons to set aside the order nisi does not, I think, derive from r14(b) because, although the application is by summons inter partes, it is not "under any Order or Rule" within the meaning of r14(b), which is referring, I think, to an Order or rule other than r14, and, accordingly, r14(b) does not make it a "matter" within the meaning of r17. If, however, the application to set aside can on some basis be regarded as a matter within the meaning of r17, I would in the present case refuse special leave because no good reason for granting it has been shown. Special leave should, I think, be granted only in special circumstances or for special reasons. In my opinion, it is now highly desirable that an application to set aside an order nisi to review should be made promptly after service of the order nisi upon a respondent and should ordinarily not be left to the return of the order nisi. If the application is soundly based and succeeds it disposes of the matter and if the application fails the return of the order nisi proceeds uncomplicated by the application to set aside: see per Hood J in *McCallum v Purvis* [1906] VicLawRp 99; [1906] VLR 578 at p581; 12 ALR 329. Further, the whole position has been significantly changed now that masters are empowered to grant orders to review. As I have stated, whereas the judge who granted the order nisi was often not readily available to hear the summons to set aside, masters are available all the time by appointment and hence, even if the Court or a judge can grant special leave to hear the application, ordinarily the application should be made to a master and special leave should, I think, be granted only in special circumstances or for special reasons and none have been shown in the present case. I also refuse special leave in the present case because, for the reasons I give subsequently, the application proceeds on an erroneous view as to the circumstances in which an order nisi will be set aside.

For the informant, I was asked to treat the summons to set aside as an appeal against the grant of the order nisi by the master, on the basis that the summons in substance complied with r16(3) despite the fact that that rule requires a notice without a fresh summons. However, if the summons to set aside be so regarded, it was not brought within five days after the grant of the order on 27 November 1969, the summons being in fact issued on 25 May 1970, almost six months later. Accordingly, the appeal could come before me only by extension of time allowed by me or a master. Ordinarily an extension of time until a reasonable time after the service of the order nisi would be justified (reasonable, that is, bearing in mind the fact that the rules give only five days for appealing), and in the present case I am prepared to assume in the informant's favour

that, because there was correspondence between the parties about the grounds of the order nisi until 12 March 1970, the time might well have been extended until a short time after that date. But no valid justification for the further delay of about two months thereafter has been given. Further, r16 provides for appeals to a judge in chambers and does not contemplate an appeal to the judge hearing the return of the order nisi. Accordingly, I refuse to extend until the date of the issue of the summons the time for appealing.

For the first set of reasons which I have given, which go to the procedure adopted by the informant in taking out the summons to set aside the order nisi to review, I dismiss that summons.

My next reasons for dismissing the informant's summons are because it proceeds, in my view, upon an erroneous concept as to the circumstances in which it is appropriate to set aside an order nisi to review. The circumstances in which it is appropriate to do that are, it seems to me, where it is established that what is sought to be reviewed does not come within the matters that are reviewable or that the conditions under which an order to review may be granted have not been complied with, as distinct from where all that is contended is that the master should, as a matter of discretion, have refused to grant the order nisi. A number of the cases to which I have earlier referred deal with s155(5) of the *Justices Act* (or its earlier equivalent), which provides in substance that, unless the amount in respect to which the person applying for the order to review was aggrieved exceeds $10, no order to review shall be granted unless the matter comes within certain specified exceptions, but a decision as to whether any of these conditions is satisfied involves not the exercise of a discretion but a determination as to whether the terms of the statute are satisfied. In the present case, on the other hand, the first three grounds of the summons to set aside really amount to a contention that the master should not, as a matter of discretion, have granted the order nisi.

In *Byrne v Baker* [1964] VicRp 57; [1964] VR 443, the Full Court said at p460 that it may be that there is a discretion to refuse to grant an order nisi where to grant it would be unjust or inconvenient and in *Mudge v O'Grady* [1965] VicRp 8; [1965] VR 65, Adam J decided that an order nisi to review a ruling that there was a case to answer should be refused unless there were special circumstances. However, these considerations go to the question whether the discretion to grant an order nisi should be exercised, not whether the case falls within the categories as to which an order nisi to review may be granted. If the discretion to grant an order nisi could be put in issue by a summons to set aside an order nisi, then it would be open in any case to seek to have the order nisi set aside on the basis that, for example, the grounds of the order nisi were not sufficiently arguable to have justified the granting of the order nisi. This would, it appears to me, create an intolerable situation and I doubt very much whether it is implied in s155(1) of the *Justices Act*. It is one thing to imply a power to set aside an order nisi because it is not within the matters which can be reviewed; it is another thing to imply a power to reconsider a discretion which is exercised ex parte. It is significant that in *City of Chelsea v Flint* [1934] VicLawRp 62; [1934] VLR 303 at p306; [1934] ALR 402, Lowe J said: "A party seeking to set aside an order nisi does so as a matter of right." This suggests that it is confined to a case where the respondent has a right to have it set aside as distinct from a case where he is asking for a discretion to be reconsidered. The fourth ground of the informant's summons is in substance that the magistrate's decision that there was a case to answer was not an order. However, the decisions in *Byrne v Baker*, *supra*, and *Mudge v O'Grady*, *supra*, establish that it was. For this second set of reasons I dismiss the informants's summons to set aside the order nisi.

In the third place I dismiss the summons because, in my opinion, it was reasonably open to the master to decide that to refuse to grant the order nisi would be unjust or inconvenient and that there were special circumstances justifying the granting of the order nisi. For one thing, the matters raised by the order to review were all matters on which all the relevant material was before the Court of Petty Sessions at the conclusion of the informant's case, all being matters of law, and all except two not turning on oral evidence, and the evidence on those two being given by the witnesses called for the informant and being evidence as to which there has been no suggestion that a conflict of evidence would emerge later in the case. In those circumstances and having regard to the importance of the issues raised, it seems to me that it was open to the master to conclude that it was desirable that the issues should be decided at the conclusion of the informant's case, because if the contentions for the defendant are correct, that would dispose of the information and, if not, both parties would know precisely where they stood on these basic issues before any

issues on which there might be conflicts of evidence were proceeded with. Accordingly, in my opinion, it was reasonably open to the master to conclude that it would be unjust or inconvenient to refuse to grant the order nisi and to find that there were special circumstances which justified the granting of the order to review the orders made at the conclusion of the case for the informant.

I turn to the order to review and deal in turn with the grounds thereof. For the defendant it was submitted in Petty Sessions that reg43(8)(a) of the *Food and Drug Standards Regulations* 1966 (as amended) was invalid but the magistrate decided that the validity of the regulation could not be impeached in a Court of Petty Sessions and the first ground of the order nisi is that he was wrong in so deciding. The basis of his decision was that s232(2) of the *Local Government Act* 1958, applied by reason of the provisions of s379(2)of the *Health Act* 1958, the relevant portions of which provide that for the purpose of the carrying into effect by any council (other than the cities of Melbourne and Geelong) of the provisions of the *Health Act*, the *Local Government Act* 1958 shall (if not inconsistent with the Health Act) be read and construed as part of the provisions of the *Health Act*. Section 232(2) of the *Local Government Act* provides: "No by-law regulation or joint regulation shall be impeachable in any Court of Petty Sessions or before justices."

The argument for the informant, which the magistrate accepted, was that, because an authorized officer of a council was the informant in the proceedings, the provisions of s232(2) of the *Local Government Act* applied so as to make the regulation of the Governor in Council not impeachable in the Court of Petty Sessions. In my opinion, this decision of the magistrate was erroneous.

In the first place "regulation" as used in s232(2) of the *Local Government Act* means, I think, a regulation made by a municipality and not a regulation made by the Governor in Council. Municipalities are authorized to make regulations and joint regulations by s200 of the *Local Government Act* 1958 which attracts regulation-making powers in some 17 separate clauses of the Fifteenth Schedule. Section 232(2) refers, I think, to all by-laws, regulations or joint regulations made by a municipality in the manner and form prescribed and to the extent defined in Divisions 2 to 5 and 7 of Pt VII of the *Local Government Act*, even though the power to make the by-laws, regulations or joint regulations comes from some part of the Local Government Act other than Pt VII or some other Act (such as s93, s326 and s394 of the *Health Act*). But the regulations referred to in s232(2) are in my opinion, confined to regulations made by municipalities. This follows, I think, from the heading and subject-matter of Pt VII of the *Local Government Act* (in which s232(2) is found). That heading and those provisions all refer expressly or by clear implication only to by-laws, regulations and joint regulations made by municipalities. The procedure in s232(2) for a ratepayer to test the validity of a by-law is confined to a regulation or joint regulation made "as aforesaid", that is, in accordance with the procedure laid down in Pt VII, and clearly does not include regulations made by the Governor in Council and it would be a surprising thing to find an express procedure for testing the validity of a municipality's by-laws and regulations, whilst making them unimpeachable in Petty Sessions, and, at the same time, no express procedure for testing the validity of regulations of the Governor in Council whilst making them also unimpeachable in Petty Sessions. Further, all the provisions in the *Local Government Act* empowering the Governor in Council to make regulations are to be found in parts of the Act other than Pt VII (see for example s334 (as amended), s462(1), s488, s664, s696, s755, s833C, s898, and s925) and this reinforces the conclusion that "regulation" in s232(2) is confined to regulations of a municipality.

When then s379(2) of the *Health Act* provides that the *Local Government Act* shall be read and construed as part of the provisions of the *Health Act*, it is incorporating in the *Health Act* the provisions of the *Local Government Act* with the meaning they bear and not changing their meaning: compare *Pedersen v Young* [1964] HCA 28; (1964) 110 CLR 162 at p165; [1964] ALR 798; 38 ALJR 58. Accordingly, even if s379(2) of the *Health Act* attracted the provisions of s232(2) of the *Local Government Act*, it would not apply to regulations made by the Governor in Council, pursuant to either the *Local Government Act* or the sections of the *Health Act* (some 38 in number) which empower the Governor in Council to make regulations.

In the second place, the words in s379(2) of the *Health Act* –"For the purpose of carrying into effect by any council of the provisions of this Act" – do not, in my view, make s232(2) of the *Local Government Act* applicable to the proceedings in the Court of Petty Sessions by reason of the fact that the informant was an authorized officer of a council (a fact which I am prepared to assume

although there was no direct evidence of it). The words in s379(2) which I have quoted refer in the context, it seems to me, to carrying into effect in the sense of making by-laws and like matters but not enforcement. The expression "carrying into effect" is used in this sense in numerous sections of the *Health Act* which empower the Governor in Council to make regulations (see s5(3), s13(s2)(b), s39(d), s47(h), s92(n), s105(i), s117(e), s140(1)(42), s141(g), s13(s157(f), 162, s186(e), s200(1)(k), s212(1)(h), s219(1)(h), s226(1)(h), s269(f), s327(1)(s), s376(f), s377(3) (which is in the same Part as s379(2)), s390(2)(g) and s451(6)(d)). Further, when it was intended to cover enforcement, as in s16(1), the word "enforcing" is used in conjunction with the words "carrying out". Section 379(2) has the effect, I think, of making provisions as to the manner and form of making by-laws in Pt VII of the *Local Government Act* applicable to by-laws made by a municipality pursuant to the powers granted by the *Health Act* and, when so made, s232(2) of the Local Government Act would apply to such by-laws by force of its own words and not by force of s379(2) of the *Health Act*. Further, s232(2) of the *Local Government Act* is not, I think, a provision for the purpose of carrying into effect anything done by a municipality. It is a provision which governs a Court of Petty Sessions in the carrying out of its functions and at the same time imposes a prohibition on litigants who might otherwise seek to challenge the validity of municipal by-laws and regulations.

The reasons I have stated appear to me to be reinforced by other considerations. It is the *prima facie* duty of every court to be satisfied that any provision which it is called upon to enforce is a valid operative law and it requires, I think, the clearest language to take away this duty. No such provision is, in my view, to be discovered in s379(2) of the *Health Act*. Further, the argument for the informant would produce the very surprising result that, in a prosecution pursuant to s435(1) of the *Health Act* by an authorized officer of the Health Department or an authorized member of the police force, the validity of a regulation of the Governor in Council could be impeached but in a prosecution by an authorized officer of a council it could not. It is no answer to this to say that under the Health Act municipalities are given substantial functions of administration and enforcement of the Act. The fact remains that authorized officers of the department and authorized members of the police force (and indeed members of the public) may prosecute for breaches of the Health Act.

For all of the reasons I have given, I conclude that it was the duty of the magistrate to consider and decide upon the validity of the regulation made by the Governor in Council.

I turn to the second ground of the order to review which was that the magistrate ought to have considered reg43(8) of the *Food and Drug Standards Regulations* 1966, as amended, and held it invalid. The portion of that regulation which was attacked as beyond the regulation-making power of the Governor in Council was: "It [that is soluble coffee or instant coffee] shall contain... not more than three-tenths of one part per centum of residue insoluble in boiling water."

For the informant, reliance was placed on the regulation-making powers in s289(1)(a), (b) and s289(2)(d), and s390(1)(b) of the *Health Act*. Those sections empower the Governor in Council to make regulations prescribing standards for the composition or strength or purity or quality of any food or drug or substance or for the nature or proportion of any substance which may be mixed with or used in the preparation or preservation thereof or prohibiting the addition of any substance to any food (s289(1)(a)) and defining, or with respect to defining, foods, drugs and substances for the purposes of the regulations (s289(1)(l) and s289(2)(d). Section 390(1)(b) is a general overall regulation-making power in common form.

For the defendant, it was submitted that the portion of the regulation attacked did not prescribe a standard within s289(1)(a) and did not define foods, drugs or substances within the meaning of s289(1)(l) or s289(2)(d) and, by inference, that it is not a prohibition because the prohibited residue was not defined, and reliance was placed on the decisions of the High Court in *King Gee Clothing Co Pty Ltd v Commonwealth* [1945] HCA 23; (1945) 71 CLR 184; [1945] ALR 397, and *Cann's Pty Ltd v Commonwealth* [1946] HCA 5; (1946) 71 CLR 210. It was acknowledged for the defendant that uncertainty is not a separate ground of invalidity of a regulation but that the question comes back to *ultra vires*: see per Dixon J in *King Gee Clothing Co Pty Ltd v Commonwealth*, at CLR pp194-6.

To one technically uninformed as to solubility of instant coffee in boiling water, it might have been thought that the percentage of a given amount of coffee which was insoluble in boiling

water would be the same whatever the proportions of coffee and water. However, the analyst called for the informant gave in cross-examination evidence of scientific facts as to which there was no suggestion before me that there was any doubt or difference of opinion. This evidence in substance was that, of a given amount of instant coffee, the residue which is insoluble in boiling water depends on the proportions of the coffee and the boiling water used and that, with greater quantities of boiling water, the percentage of a given amount of coffee which will be insoluble residue will be smaller than with smaller quantities of boiling water. He agreed that, to make an accurate analysis of the degree of insolubility, it must be known how much of the coffee must be added to how much of the boiling water. He also agreed that, with repeated applications of boiling water to instant coffee, the result would never remain the same and some of it would always be dissolved.

In my opinion, it is permissible and appropriate to have regard to undisputed scientific facts of this kind in considering the validity of a regulation: see *Foster v Aloni* [1951] VicLawRp 69; [1951] VLR 481, at p485; [1952] ALR 18. The regulation includes the expression "residue insoluble in boiling water" and the proceedings reveal that, to know the meaning of that expression in relation to instant coffee, it is necessary to know uncontroversial scientific facts either by evidence or in some other way. Further, the decisions and reasons for judgment of the High Court in cases such as *Griffin v Constantine* [1954] HCA 80; (1954) 91 CLR 136; [1955] ALR 28; *Sloan v Pollard* [1947] HCA 51; (1947) 75 CLR 445 at pp468 and 469; [1948] 1 ALR 1; *Jenkins v Commonwealth* [1947] HCA 41; (1947) 74 CLR 400; [1947] ALR 558, and *Breen v Sneddon* [1961] HCA 67; (1961) 106 CLR 406, at pp411, 412; [1962] ALR 340; 35 ALJR 314, establish that, in deciding the constitutional validity of statutes and regulations, evidence of facts which are not controversial is admissible for certain purposes and in certain circumstances. It seems to me in principle that the same basic considerations apply to determining whether a regulation falls within the powers conferred by a statute as apply to determining whether a law falls within the powers granted by what is after all a statute, namely, the Commonwealth of Australia *Constitution Act*. Among other purposes, such facts may looked at, I think, in order to understand the meaning of technical words used in a regulation and what is involved in technical processes referred to in a regulation. This conclusion follows also I think from the decision in *Attorney-General v Brown* [1920] 1 KB 773, particularly at pp799, 800.

In my opinion, the portion of the regulation which is here attacked is invalid because it does not prescribe a standard for or define a food, drug or substance or prohibit the addition of a substance and it is not given validity by the general provisions of s390(1)(b) of the *Health Act*. The reason for this is that the regulation does not prescribe or define the proportions in which instant coffee and boiling water are to be used for the purpose of ascertaining the insoluble residue. The uncontroversial scientific evidence establishes that the insoluble residue varies according to these proportions but the proportions are not prescribed or defined. It is erroneous to say that the regulation prescribes a standard and leaves unprescribed the method of ascertaining whether the standard has been complied with. Proportions are essential to the laying down of a standard and without them no standard is laid down. If the regulation were construed to mean that instant coffee would fail to comply with the test only if the smallest quantity of coffee would leave the named excess of residue insoluble in the largest amount of boiling water, it was acknowledged for the informant, and the evidence established, that no instant coffee would ever fail to comply and the regulation would have no operative effect. But if this is not the true meaning of the regulation (and, in the light of the scientific evidence, I think it is not), then no standard is prescribed or defined. There is no justification for reading in some word of vague general import and, even if it were read in, it would still not prescribe or define a standard. The regulation does not read and cannot be read to mean the proportions (if any) stated on the label on the container of the coffee, even if those proportions in fact referred to boiling water. The analyst took proportions stated in a formula issued by a Commonwealth departmental committee but the regulations make no reference to any such standard. Accordingly, I conclude that the regulation fails to prescribe a standard or define a food, drug or substance. This conclusion is pointed to by the reasons for judgment of the High Court in *King Gee Clothing Co Pty Ltd v Commonwealth* [1945] HCA 23; (1945) 71 CLR 184; [1945] ALR 397, and *Cann's Pty Ltd v Commonwealth* [1946] HCA 5; (1946) 71 CLR 210; 27 P 68. In not defining proportions the regulation also leaves it impossible to ascertain to what extent the addition of any substance is prohibited. Nothing in s390(1)(b) cures these deficiencies or gives any validity to the portion of the regulation attacked, which I conclude is outside power. It is unnecessary to decide whether the invalid portion is severable, because it was only in respect of

the portion of the regulation that is attacked that it was sought to establish that the instant coffee failed to comply with the regulation. The validity of the regulation was attacked on other grounds related to the length of time the coffee had to be in boiling water and whether it had to be shown to leave the named excess of residue insoluble after one dissolution in boiling water or whether it had to leave that excess of residue insoluble after an indefinite number of dissolutions. I am disposed to think that on its proper construction the regulation requires only one dissolution in boiling water for a sufficient length of time to ensure that all that is soluble dissolves. However, for the other reasons I have given, I find that the portion of the regulation reading "It shall contain... not more than three-tenths of one part per centum of residue insoluble in boiling water" is *ultra vires* and invalid. This being so, there was no case to answer and for this reason the information should have been dismissed at the close of the informant's case.

I turn to the third ground of the order nisi which goes to the question of samples. The inspector gave evidence that he purchased four one-pound tins of instant coffee from a self service grocery store and gave one tin to the vendor, sent one to the defendant, kept one and had one analysed. The prime case for the informant was that this constituted compliance with the provisions of s281(1A), s281(1B) and s281(2) of the *Health Act* as inserted or amended in 1962 by Act No. 6883. Those subsections provide in effect that, where a food, drug or substance has been specified by proclamation of the Governor in Council pursuant to s281(1A)(a) and is sold in the form of separate or severable objects, it shall not be necessary to divide such food, drug or substance into parts and it shall be sufficient compliance with s281 if the purchaser purchases a number of such objects and divides the number so purchased into the requisite number of parts and deals with each part in the manner prescribed by the provisions of s281. It is an essential step in reliance on those provisions to establish that the food, drug or substance in question has been specified by proclamation of the Governor in Council.

There was put in evidence a proclamation of the Governor in Council dated 17 August 1965 which specified a number of foods, drugs and substances including "CANNED FOOD (other than canned meat and canned meat products and canned fish products)". The third ground of the order nisi was in substance that the magistrate was wrong in deciding (as he did) that that proclamation specifying canned food was in fact the specification of instant coffee as a food, drug or substance for the purposes of s281(1A) of the *Health Act*.

Before me, reliance was placed for the informant on the provisions of s389(1) and s389(2)(e) of the *Health Act* that proclamations made under the Act shall have the like force and effect as if enacted in the Act and on the effect of such a provision, as decided in *Foster v Aloni* [1951] VicLawRp 69; [1951] VLR 481 at pp483-5; [1952] ALR 18, and the cases there cited. The proclamation was also supported as being within the power to specify given by s281(1A)(a). For the defendant, it was submitted that a proclamation to be valid must specify each food, drug or substance individually, which it was said the proclamation relied on did not do, and further, that the proclamation in issue specified not foods, drugs or substance but containers therefor.

In order to consider all or any of these contentions it is necessary in the first place to decide what the proclamation means. For the informant, it was submitted that canned food means any food in a can and that a can means any metal container.

In my opinion, canned food has come to have a special meaning and is now a term of art. It means, I think, food which has been enclosed in a sealed air-tight metal container and sealed in such a way that it is necessary to fracture the metal container by some means, such as by an instrument or device, in order to extract the contents. The article in the *Encyclopaedia Britannica* on "Commercial Canning" (1958 ed., vol. 4, pp748 to 750) reveals that in the nineteenth century the process of enclosing food in a sealed air-tight metal container was developed as a valuable commercial method of food preservation. Heating and other forms of treatment are commonly used in the process but are not, I think, essential to produce canned food. But for food to be canned food, it must, it seems to me, be enclosed in a sealed airtight metal container in the sense that the metal container itself is sealed and airtight. Dictionary meanings establish that this is now the well-recognized meaning of canned food. In the 1956 edition of the *Shorter Oxford English Dictionary* the relevant definition of "can" is "A vessel of tinned iron, in which fruit, fish etc., are sealed up air-tight for preservation (chiefly in US) 1874", and in the 1969 edition of the *Concise Oxford Dictionary* the words "chiefly in US" are not included and the relevant meaning is "(put

in a) tin-plate box for hermetic sealing (meat, fish, fruit, etc.,) whence canner, cannery, canning factory" and "hermetic seal" is defined as "air-tight closure by fusion etc., whence hermetically - adverb". In my opinion, this indicates the widely and commonly accepted meaning of canned food in Australia. It is of course not permissible to allow the language of regulations made under an Act to govern the meaning of a proclamation made under the same Act, but as to the commonly accepted meaning of the expression "canned food", it is significant that the meaning I have given it accords with the meaning used in relation to canned meat products, canned fish products, and canned vegetables in reg27, reg29(1), and reg31(3) of the *Food and Drug Standards Regulations*, in that they are described as being "hermetically sealed" or "packed in air-tight containers".

On the basis that "canned food" means what I have stated, I turn to the question whether the proclamation specifies any food, drug or substance within the meaning of s281(1A)(a). Section 17 of the *Acts Interpretation Act* 1958 produces the result, I think, that the singular includes the plural and the word "any" does not in the context amount to an express provision to the contrary. Accordingly, it is permissible to specify any foods, drugs or substances. Once it is conceived that the expression "canned food" refers to food that has been treated in a special way to ensure preservation, namely, by hermetic sealing, then it seems to me that the expression is a specification not of a container but of a class of food treated in a certain way. On this basis it seems to me that the proclamation, in naming canned food, does specify foods or substances, namely, those which have been canned in the manner I have referred to. The decisions in *Croft v Rose* [1956] VicLawRp 100; [1956] VLR 684; [1957] ALR 148, *Squire v Bayer and Co* [1901] 2 KB 299, and *McMorran v A E Marrison (Contractors) Ltd* [1944] 2 All ER 448, point to this conclusion, as do the definitions of "specify" in the judgments in *United Repairing Co Ltd v Glover* [1945] NZLR 160, at pp164 and 170. Accordingly, the submission that the proclamation was beyond power, in so far as it specifies "canned food", fails.

The conclusion follows that whether or not the proclamation of "canned food" was the specification of instant coffee as a food, drug or substance for the purposes of s281(1A) of the *Health Act* depends upon whether or not in any particular case the instant coffee concerned is or is not contained in a sealed air-tight metal container.

It is, accordingly, necessary to turn to the instant coffee in question to determine whether or not it was canned food. One tin of instant coffee purchased by the inspector was put in evidence before the magistrate as an exhibit but it was not exhibited to the affidavit in support of the order nisi. Counsel for the informant complained that it was not before me but, after I pointed out to him that the informant was called upon to show cause and that, subject to any proper objection, the informant could do so by exhibiting the tin to an affidavit made at any time even during the hearing before me, nothing further was heard of that complaint and the tin was not in fact produced before me. In these circumstances, I must decide the matter on the other evidence before the magistrate, which in any event is clear. That evidence was in effect that the instant coffee the subject of the information was in tins, that the inspector "lifted off" the lids of each of the tins and that if he had wanted to expose the contents of the tin it would have been necessary to cut the aluminium foil inside the can.

In my opinion, the instant coffee the subject of the proceedings was not canned food. It was not contained in a sealed air-tight metal container. It was not necessary to fracture the metal to open the tins. On the contrary the lids could be lifted off the tins. It follows that the tins were not themselves hermetically sealed. It is nothing to the point that there was aluminium foil inside which was sealed and had to be cut to expose the coffee – the coffee was not "canned" within the meaning that word bears in the expression "canned food". The result is that the instant coffee the subject of the information was not specified within the meaning of s281(1A)(a) and the procedure laid down under s281(1A)(b) and s281(1B) could not be employed.

The fourth ground of the order nisi was that the procedure of division prescribed by s281(1)(a) was not complied with. For the informant, reliance was placed on passages in the judgments of the Full Court in *Stephens v G J Coles and Co Ltd* [1962] VicRp 5; [1962] VR 47 at pp49, 50 and 54; (1961) 21 LGRA 306 in support of a submission that it was open to the magistrate to find that the four tins purchased were of uniform composition and that to divide the purchase of four tins into the four separate tins was a division of the food or substance in compliance with s281(1)(b).

The evidence was that the inspector went into the self-service grocery and went to some shelves at the back part of the shop and took from the shelf three one-pound tins of instant coffee. He then asked a person who was apparently an employee for another tin and another person, apparently in charge, then instructed the employee to go and get another pound tin of coffee which he apparently did. After some discussion the person apparently in charge selected one of the four tins, one was retained and produced in court, one was analysed, and one was sent to the defendant.

There is no evidence that the three tins selected from the shelf were the only tins on the shelf or that they were in proximity to each other and there is no evidence of any marks or labels or otherwise to suggest that they came from the same manufacturer's batch. In these circumstances, it seems to me doubtful, to say the least, whether it would have been open to the magistrate reasonably to conclude that the coffee in the three tins taken off the shelf was of the same composition. But whether this be so or not, the fourth tin came from a different unidentified place to which the employee had to go and, accordingly, it would not, in my view, be open to the magistrate reasonably to find that all four tins came from the same manufacturer's batch or were of the same composition. The reality is that the inspector was relying upon the provisions of s281(1A) and s281(1B) and, these not being available, the obvious method of compliance with s281(1) would have been to divide the contents of one tin, which was not done. Accordingly, I find that it was not open to the magistrate reasonably to conclude that s281(1) had been complied with and that the only conclusion reasonably open to the magistrate on the evidence was that the provisions as to dividing a food, drug or substance had not been complied with. Accordingly, the order nisi succeeds on this ground also.

The result is that the order nisi is made absolute, and it is ordered that the order of the magistrate that the defendant had a case to answer be set aside, that the information be dismissed and that the informant pay the defendant's taxed costs of the order to review not exceeding $120. The informant is granted a certificate under s13 of the *Appeal Costs Fund Act* 1964.

Solicitors for informant: Grant and Co.
Solicitors for defendant: Blake and Riggall.
