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*249 Dixon v Wells

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division

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Queen's Bench Division

Lord Coleridge , C.J. , Mathew , J.

1890 May 8

Adulteration—Jurisdiction—Complaint to Justice—Summons issued by another Justice— 11 & 12 Vict. c. 43 (Jervis's Act), s. 1 — 38 & 39 Vict. c. 63 (The Sale of Food and Drugs Act, 1875), s. 6 — 42 & 43 Vict. c. 30 (Amendment Act, 1879), s. 10 —Invalidity of Process—Appearance under Protest.

By 11 & 12 Vict. c. 43, s. 1 , in all cases where an information shall be laid before justices that any person has committed any offence within the jurisdiction of such justice or justices … and also in all cases where a complaint shall be made to any such justice or justices upon which he or they shall have authority by law to make any order for the payment of money or otherwise, then "it shall be lawful for such justice or justices to issue his or their summons directed to such person," requiring him to appear before a justice or justices to answer thereto.

By 38 & 39 Vict. c. 63 (The Sale of Food and Drugs Act, 1875), s. 6 , "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty …" By s. 20 every penalty imposed by this Act shall be recoverable in the manner prescribed by 11 & 12 Vict. c. 43 .

By 42 & 43 Vict. c. 30, s. 10 , "in all prosecutions under 38 & 39 Vict. c. 63 , and notwithstanding the provisions of s. 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase

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from such person for test purposes of the food or drug, for the sale of which in contravention to the terms of the principal Act the seller is liable *250 to prosecution, and particulars of the offence or offences against the said Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned."

A complaint having been made to two justices of a borough against the appellant for an offence under the above Acts, a summons was signed and issued by another justice, who had not heard the complaint, and was served on the appellant. The appellant thereupon appeared before the stipendiary magistrate of the borough, but objected that the summons was invalid and the magistrate had no jurisdiction to hear the case. The magistrate being of opinion that the defect, if any, in the summons was cured by the appearance of the appellant, heard the case and convicted him:—

Held, that the summons, having been signed and issued by a justice who had not heard the complaint, was invalid; that the defect was not cured by the appearance of the appellant, as he appeared under protest; that the provisions of 42 & 43 Vict. c. 30, s. 10 , were imperative, and not merely directory, and that as no summons had been duly served in accordance with them the magistrate had no jurisdiction, and the conviction was wrong.

CASE stated by the stipendiary magistrate for Kingston-upon-Hull, pursuant to 42 & 43 Vict. c. 49, s. 33 .

A complaint was preferred by the respondent, who was an inspector under the Sale of Food and Drugs Acts, against the appellant, a farmer, before the stipendiary police magistrate for the borough of Kingston-upon-Hull, for that the appellant did, on September 20, 1889, at the said borough, unlawfully sell or deliver to the prejudice of the purchaser a certain article of food—to wit, a quantity of new milk which was procured by the respondent at the place of delivery in the course of delivery to the purchaser and consigned in pursuance of a contract for sale to such purchaser, and which quantity of milk was not of the nature, substance, and quality of the article demanded by such purchaser, contrary to 38 & 39 Vict. c. 63, s. 6 , and 42 & 43 Vict. c. 30, s. 3 .

On the day fixed for the hearing of the complaint, [1] the appellant duly appeared before the stipendiary magistrate sitting as a Court of Summary Jurisdiction in answer to the summons, and was represented by his solicitor. The summons was, as a fact, signed by Edward Robson, Esq., one of the justices of the peace for the borough, and bore date October 14, 1889, and showed upon the face of it that complaint had been laid before the justice *251 personally on the date named. It was objected on behalf of the appellant that the summons was invalid, and that the Court in consequence had no jurisdiction to hear and determine the matter. It was admitted on behalf of the respondent that no complaint had been laid before the aforesaid justice on the day named, or on any day, but, on the contrary, it was admitted that the complaint had been laid before James Stuart, Esq., and T. W. Palmer, Esq., two justices of the peace for the borough, when sitting as a Court of

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Summary Jurisdiction at the borough on October 10, 1889, and that it was by them then granted but not signed. It was contended on behalf of the appellant that inasmuch as it was admitted that no complaint had been laid before the aforesaid Edward Robson, Esq., the summons was bad, and that the Court in consequence had no jurisdiction to hear and determine the complaint. It was admitted that the alleged irregularity or defect in the summons was unknown to the appellant prior to his appearance in court.

The stipendiary magistrate reserved the points raised on behalf of the appellant for future consideration, and proceeded to hear the evidence on the said complaint.

The facts adduced in evidence were practically undisputed. Having duly considered the points reserved, the magistrate was of opinion, even assuming there had been an irregularity or defect in the issuing of the summons, that the same was cured by the appellant's presence in court and by the absence of any proof or allegation that he had been misled, or of any request for adjournment, and therefore that he, the magistrate, had jurisdiction to hear and determine the complaint, and he convicted and fined the appellant.

The questions for the opinion of the Court were: (1) Whether there was an irregularity in the issue of the summons. (2) If there was, whether the same was cured by the appearance of the appellant in court on the day of hearing under the circumstances stated; and (3) Whether the magistrate had jurisdiction to hear and determine the matter.

C. Montague Lush , for the appellant. By 11 & 12 Vict. c. 43, s. 1 , in all cases where an information shall be laid before one or ***252** more justices of the peace that any person has committed, or is suspected to have committed, any offence or act within the jurisdiction of such justice or justices, &c., “and also in all cases where a complaint shall be made to any such justice or justices upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise, it shall be lawful for such justice or justices of the peace to issue his or their summons …” No information or complaint in writing was necessary. When a complaint is made to a justice, “such justice” must issue “his summons.” In this case the summons was not issued by the justices who heard the complaint, but by another justice, and was therefore irregular, and the magistrate who heard the case had no jurisdiction.

THE COURT called on

H. T. Kemp , for the respondent. The summons is mere process to bring the accused before the justices, and an irregularity is immaterial if he, in fact, appears. But the summons was not irregular. In practice the information or complaint is generally laid before the clerk to the justices, and a summons is signed by one of the justices. On the accused appearing to answer the charge, the magistrate had jurisdiction, even although there had been no information or summons: *Reg. v. Shaw* [2] ; *Reg. v. Fletcher* [3] ; *Reg. v. Hughes* . [4] The provisions of Jervis's Act for the purpose of bringing accused persons before justices are directory only, and do not affect the jurisdiction of justices to hear a charge made against a person who is before them of an offence within their

jurisdiction. “In such a case,” Hawkins, J., said, in *Reg. v. Hughes* (p. 629), “it is in my opinion altogether immaterial, so far as the jurisdiction of the justices to hear that charge is concerned, whether the accused was before them voluntarily or otherwise, or on legal or illegal process.” *Blake v. Beech* [5] , which may be cited for the respondent, turned on its special circumstances, as was explained in *Reg. v. Hughes* . [6] Irregularity in mere process which is not a condition precedent to jurisdiction does not invalidate the jurisdiction. It must be admitted that in the cases above cited the person accused did ***253*** not object to the jurisdiction, whereas in the present case the defendant protested against it. But he voluntarily appeared before the magistrate, and made no request for an adjournment. Protest makes no difference: *Gray v. Commissioners of Customs* [7] 42 & 43 Vict. c. 30 (the Sale of Food and Drugs Act (Amendment Act), 1879), s. 10 , provides that the summons under that Act shall be served within twenty-eight days in case of a perishable article, and the service on the appellant was within that time. But a summons was not necessary, as the appellant appeared, and the magistrate had jurisdiction over the charge. His jurisdiction did not depend on process, but on the time, place, and circumstances of the alleged offence.

C. Montague Lush , for the appellant. The principle of the decision in *Reg. v. Hughes* [8] is, that if a person, being before justices, however he may be brought there, chooses to give them jurisdiction on the chance of obtaining their decision in his favour, he cannot afterwards object that they had no jurisdiction. But the appellant did not waive the objection to the jurisdiction. The Sale of Food and Drugs Act (Amendment Act), 1879 , was more stringent against offenders than the principal Act of 1875, and therefore s. 10 was inserted for their protection, and enacts that the summons shall in a case of a perishable article be served within twenty-eight days. The argument for the respondent is, in effect, that an invalid summons is equivalent to no summons, and if the accused appears he may be convicted, perhaps a year after the alleged offence and when the subject-matter of the complaint has perished. But the Amendment Act was passed after the decision in *Reg. v. Hughes* [9] , and s. 10 is an additional provision to those of Jervis's Act, and renders a valid summons in conformity with the section essential to the jurisdiction of the magistrate. That decision cannot be reconciled with several other cases on the subject. In *Blake v. Beech* [10] , the Court quashed a conviction where there had been no information or summons under the statute creating the offence charged, and laid stress on the fact that the irregularity was not waived. Cleasby, B., at p. 335, ***254*** said: “In administering justice summarily, strict regularity must be observed.” In *Reg. v. Fletcher* [11] the materiality of a protest is recognised.

Kemp , for the respondent. The object of s. 10 seems to be merely that the alleged offender may be informed of the charge within twenty-eight days, so that he can have the perishable article examined in order to meet the charge. The section does not require the hearing to be within any prescribed time.

LORD COLERIDGE, C.J.

This case has been well argued, and is important. It is said that it has become a general practice for the magistrate's clerk to hear complaints without any written or other information, fill up a form

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of summons, obtain the signature of any magistrate, and so cause a man to be summoned, and perhaps exposed to a heavy penalty, although the magistrate signing the summons may not have ascertained whether there was a primâ facie case against the person summoned. If it be, indeed, the practice to sign a summons without hearing an information, and for one person to hear the information and another to sign the summons, a practice more loose or likely to lead to injustice, especially in matters relating to perishable articles which require to be dealt with quickly, I can hardly conceive. In the present case, if the magistrate who signed the summons had heard the information, he might have thought that no primâ facie case had been made out, and have declined to issue the summons. The practice seems to me to be in direct contravention of the provisions of Jervis's Act, s. 1 , which says that "in all cases" where a complaint shall be made to any justice, it shall be lawful for "such justice" to issue his summons. Clearly the Act did not mean that one justice was to hear the complaint and another to sign the summons. If I were at liberty to lay down the law for the first time, I should say that the provisions of Jervis's Act are to be obeyed, and, if disobeyed, the persons professing to act under them act without jurisdiction. But the law has been laid down otherwise, for I find that so long ago as the year 1865 Sir William Erle, in a case where a man had been brought before the magistrates under Jervis's Act without information or summons, ***255** said: "In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate"—that is, which the magistrate has a right to entertain—"the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued"—notwithstanding the enactment in Jervis's Act that it shall be issued—"unless the statute creating the offence imposes the necessity of taking some such step." That, as I understand it, means that Parliament might make the procedure imperative by enacting that "no proceedings shall be taken unless the provisions of Jervis's Act are followed," but that it had not done so. *Reg. v. Shaw* [12] does not stand alone. There is also *Reg. v. Hughes* [13] , decided, after having been twice argued in the Court of Criminal Appeal, by a full Court, over which I presided, and Kelly, C.B., was the only dissentient judge. In that case the defendant was indicted for perjury, alleged to have been committed before justices at the hearing of a charge against a person brought up on a warrant illegally issued without a written information on oath, and the contention was that the proceedings were invalid; but the Court held that they were valid. The case establishes the proposition, that when a person is before justices who have jurisdiction to try the case they need not inquire how he came there, but may try it. That decision is binding on me, and I have no wish to depart from it. But the present case, I am glad to think, is not within it, and is distinguishable upon the sound ground taken by the counsel for the appellant. The document called a summons in this case was, in my opinion, no summons at all. But the accused was before the magistrate. Two distinctions, however, separate this case from those cited. First, in all the cases to which our attention has been called there was no protest made by the person who appeared, and the Courts said, applying a well-known rule of law expounded centuries ago, that faults of procedure may generally be waived by the person affected by them. They are mere irregularities, and if one who may insist on them waives them, submits to the judge, and takes his trial, it is afterwards too late for him to question the jurisdiction which ***256** he might have questioned at the time. In this case there was a protest, because when the case was called on before the magistrate the appellant took the same objection that he has taken to-day. He objected that there was no summons and no information, that the whole proceeding was irregular, and that the Court

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had no jurisdiction to try him because he was not properly brought there. Of course, it is assumed that if he had made no protest the cases cited would have been applicable; but his protest makes a marked distinction. I do not, however, feel able to decide in his favour on that point alone, for, although the fact of his protest ought to be a complete answer to the assumed jurisdiction, I cannot disguise from myself the fact that from the language of many of the judges in *Reg. v. Hughes* [14] —although, perhaps, not necessary for the decision of the case—and the judgments of Erle, C.J., and Blackburn, J., in *Reg. v. Shaw* [15] , they seem to assume that if the two conditions precedent of the presence of the accused and jurisdiction over the offence were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference; but I find no such qualification in *Reg. v. Hughes* [16] , although something like that is said in one of the cases. It is an important question well worth consideration in the Court of Appeal. There is, however, a part of the able argument for the respondent which has not satisfied me, that is, as to s. 10 of the later Act (42 & 43 Vict. c. 30), which enacts that, "In all prosecutions under the principal Act, and notwithstanding the provisions of s. 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug, for the sale of which in contravention to the terms of the principal Act the seller is rendered liable to prosecution, and particulars of the offence or offences against the Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the ***257** person summoned. The section appears to me to enact as a condition precedent to the trial of offences under the Acts that all charges shall be made within a reasonable time—in the case of perishable articles not exceeding twenty-eight days from the sale; and that the summons shall be served within twenty-eight days, and that the hearing shall be not less than seven days from the day of service, thus carefully securing to the person accused the opportunity of defending himself, and that he shall have at least seven days to prepare himself for his defence. I think that the provision as to *time* in that enactment cannot be disregarded; it is of the essence of the jurisdiction to try the offence. Except by extendi ng *Reg. v. Hughes* [17] to this section, it is impossible to ny that it has been violated. It is possible to say that it can be treated like the other section as mere procedure, and that as the defendant was present the magistrate had jurisdiction to try the charge. But it seems to me that in this case the legislature has made it a condition precedent to the magistrate's jurisdiction that the proceedings should be brought within the operation of s. 10, and that in all prosecutions under the Act certain things shall be done and certain things shall not be done. The section is not only directory, but strongly imperative. In the present case there was, in my opinion, no summons. I think that, according to s. 10, which applies to this case, it was essential to the jurisdiction that it should be exercised in twenty-eight days, and that it was not so exercised, and the appellant is entitled to our judgment.

MATHEW, J.

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I am of the same opinion. I entirely agree that there was, in this case, no summons. A summons is a citation proceeding upon an information or complaint laid before the magistrate who issues the summons, and conveying to the person cited the fact that the magistrate is satisfied that there is a primâ facie case against him. The document in question purported to be a summons by the magistrate who heard the information and complaint. That was not so. The document might as well have been signed by a magistrate of another borough. It was worthless as a citation, and when the defendant appeared the ***258** objection was taken, and the stipendiary magistrate acquiesced in that view; but he said, in effect, on the authority of the cases cited to him: "The defendant is now before me. There is an information and complaint now against him, and I will proceed to hear it. If he is prepared to meet the charge, it will be idle to impose on the prosecutor the necessity of issuing another summons." The defendant was entitled to say in answer:

> "You cannot hear an information given to you now, for a limit to your authority is prescribed by 42 & 43 Vict. c. 30, s. 10 , and if a fresh summons is granted there will be an answer to it, that s. 10 prohibits the issuing of it after the expiration of twenty-eight days from the sale of the article in question."

Representation

Solicitors for appellant: Bell, Brodrick, & Gray .
Solicitors for respondent: Cunliffes & Davenport .

Judgment for appellant. (J. R.)

Footnotes

1 23rd October, 1889.
2 *34 L. J. (M.C.) 169* .
3 Law Rep. 1 C. C. R. 320.
4 *4 Q. B. D. 614* .
5 *1 Ex. D. 320* .
6 *4 Q. B. D. 614* .
7 *48 J. P. 343* .
8 *4 Q. B. D. 614* .
9 *4 Q. B. D. 614* .

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10 *1 Ex. D. 320* .
11 Law Rep. 1 C. C. R. 320.
12 *34 L. J. (M.C.) 169* .
13 *4 Q. B. D. 614* .
14 *4 Q. B. D. 614* .
15 *34 L. J. (M.C.) 169* .
16 *4 Q. B. D. 614* .
17 *4 Q. B. D. 614* .

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