H. C. OF A. 1904.

McLAUGHLIN v. FOSBERY AND OTHERS.

of proceedings in the action, by omitting the description of the Full Court as sitting as the Full Court in Lunacy, and by directing that all the proceedings be amended by omitting the words "In Lunacy" in the title, with all necessary consequential amendments, and, instead of directing that the appeal be dismissed, ordering that all proceedings in the action be stayed, and by directing that respondents pay the costs of proceedings before the Chief Judge in Equity and Full Court, and omitting direction that plaintiff pay those costs. Order so varied affirmed. No costs of the appeal.

Solicitor, for appellant, *W. Morgan.*

Solicitor, for respondent, *The Crown Solicitor of New South Wales.*

[HIGH COURT OF AUSTRALIA.]

LOW . . . . . APPELLANT;

AND

BONARIUS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1904.

SYDNEY. *September* 8, 9.

Griffith, C.J., Barton and O'Connor, JJ.

Early Closing Act (N.S.W.), No. 38 of 1899, secs. 6, 7, 20, 21—Early Closing (Amendment) Act, No. 81 of 1900, sec. 5—Closing time for shops—Shop in which more than one business is carried on—Closed to the admission of the public for purposes of trade—Question of fact.

The *Early Closing Act* provides that a shop, in which the mixed business of a fancy goods seller and news agent is carried on, must be closed on Wednesdays at one o'clock p.m., the hour fixed for the closing of shops in which fancy goods only are sold.

The keeper of such a shop was charged with having committed a breach of the *Early Closing Act* by not closing and keeping closed his shop at and after the hour fixed by the Act. The evidence showed that he placed a table across the open door of his shop at the hour fixed for closing, thus barring the entrance, and that afterwards, but before the hour fixed for closing news agents' shops, he sold across the table some newspapers and other news agents' goods. The magistrate dismissed the information, on the ground that there was no proof that the defendant sold any goods which he was prohibited from selling after the hour stated.

Held, that if the shop was not closed to the admission of the public for purposes of trade at one o'clock p.m., the fact that no fancy goods were sold in it after that hour, was immaterial, and that therefore the magistrate was wrong in dismissing the information on the ground stated.

Held, also, that it was a question of fact for the magistrate, on the evidence, whether the shop, considered as a single shop in which the mixed business was carried on, was or was not so closed.

Order of *Cohen, J.*, 21 N.S.W. W.N., 117, varied.

Appeal from the decision of *Cohen*, J., on a special case stated under the *Justices Act*, 1902.

The appellant, Peter Low, a keeper of a shop in which he carried on the business of selling fancy goods as well as that of a newspaper seller and news agent, was charged by the respondent, C. A. Bonarius, an inspector under the *Early Closing Acts*, with having kept his shop open after the hour prescribed by the *Early Closing Act*, 1899. The section under which proceedings were taken was sec. 7, by which the keeper of any shop in any shopping district whose shop is not closed and kept closed for the remainder of the day at and after the closing time fixed under the Act for the closing of such a shop, is guilty of an offence against the Act. Secs. 6 and 20, and the Schedules to the Act of 1899, fix the hours of closing for the different classes of shops, the hour for closing fancy goods shops being 1 p.m. on Wednesdays. Sec. 5 of the Amendment Act of 1900 provides that news agents' and booksellers' shops may be kept open until eight o'clock on week nights. The information was dismissed by the magistrate on the ground that there was no proof that the appellant had sold goods which he was prohibited from selling after the hour stated in the information. The respondent appealed by way of special case stated for the opinion of the Supreme Court, under the *Justices Act*, 1902, and *Cohen*, J., before whom the matter came, allowed the appeal with

H. C. OF A. 1904. LOW v. BONARIUS.

costs, and remitted the case to the magistrate, with the following expression of his opinion: "That the said stipendiary magistrate's determination is erroneous in point of law, and that he was not right in dismissing the information in the said case mentioned," (21 N.S.W., W.N., 17).

The other material sections, with the facts and the proceedings, appear from the judgment of *Griffith*, C.J.

W. A. Walker and *Bignold* for the appellant. The appellant was charged with "not closing" and "keeping closed" his shop, after 1 p.m. The interpretation clause defines the word "close" as meaning "closed to the admission of the public for the purposes of trade." That does not mean that the news agency part of the shop must be closed, but only that the place must be closed in such a way as to keep out the public from the fancy goods business. In *Smith* v. *Morrison*, 17 N.S.W. W.N., 65, which the Judge followed, the evidence showed that the whole shop was open, and there was nothing to show that, as a fancy goods shop, it was closed to the admission of the public. It is a material question for the magistrate to consider whether the fancy goods were actually exposed or offered for sale.

[GRIFFITH, C.J.—You must contend that the appellant closed this shop in which he sold fancy goods and newspapers, and opened another which was a news agent's shop only.]

That is a question of fact in each case, whether at the moment the shop is one in which the business of selling fancy goods is carried on. In this case the placing of the table across the door really made a separate shop, in the same way as if there had been a partition, and in that shop nothing but newspapers and other articles sold by news agents were offered or exposed for sale.

Kelynack for the respondent. The shop was not closed within the meaning of the Act. The evidence shows that the fancy goods could be seen by persons making purchases at the table. The magistrate found as a matter of fact that the shop was open, but not for the purpose of selling prohibited goods. The purpose is immaterial. The whole shop must be closed at the hour fixed for the closing of fancy goods shops. The offence is complete if

the shop is open; *Bonarius* v. *Bellemy*, 16 N.S.W. W.N., 200; *Smith* v. *Morrison*, 17 N.S.W. W.N., 65. These cases were before the amending Act of 1900, but are not affected by it. In the present case the placing of the table across the door did not amount to a closing of the shop. If the shopkeeper wishes to take advantage of the provisions by which he is allowed to continue the news agent's business after the hour fixed for the closing of fancy goods shops, he must comply with the Act, and erect the necessary partition, so as to effectually shut off the fancy goods department. The question here was a mixed one of law and fact; *Hoddinott* v. *Newton, Chambers & Co. Ltd.*, (1901) A.C., 49, at pp. 56, 68.

[GRIFFITH, C.J.—Apparently the admitted facts might or might not amount to a closing. You ask the Court to say that as a matter of law they cannot do so.

[BARTON, J., referred to *McCabe* v. *Jopling and Palmer's Travelling Cradle Ltd.*, (1904) 1 K.B., 222.]

In *Taylor* v. *Goodwin*, 4 Q.B.D., 228, the Court treated the question whether a bicycle was a carriage, within the meaning of an Act dealing with furious driving in streets, as in part, at least, a question of law. The present case is somewhat analogous. The Court is asked to construe the word "closed" in the Statute, and say whether the placing of a barrier across the doorway amounts to a closing.

[GRIFFITH, C.J.—The difficulty arises from the learned Judge having found, as a matter of law, that the shop was not "closed," whereas we are disposed to think that, under the circumstances, it may or may not have been "closed." His finding, practically, amounts to a direction to the magistrate to convict.]

That is subject to the defendant calling evidence to contradict that already given. The magistrate should not have dismissed the case without calling upon the defendant. If the case goes back to him he will be bound to rehear it, but he will not be compelled to convict the defendant unless the evidence for the prosecution is unanswered; *In re Grover*, 3 W.N., 52. If it is held that the evidence in this case discloses no offence, the Act will be rendered useless, and impossible to enforce.

H. C. OF A. 1904.

LOW v. BONARIUS.

Walker, in reply, referred to *Turnbull* v. *Cocking*, 21 A.L.T., 55.

Cur. adv. vult.

September 9th.

GRIFFITH, C.J. This was an appeal from a decision of *Cohen*, J., on an appeal by way of special case stated by a stipendiary magistrate under the *Justices Act*. The prosecution was under the *Early Closing Act* 1899, and the charge was that the defendant " was the shopkeeper of a certain shop within the metropolitan shopping district, being a shop mentioned in Part III. of Schedule I. to the said Act in which a trade was carried on . . not being a trade usually carried on in a news agent's shop, which was unlawfully not closed, and kept closed, for the remainder of the day at and after the closing time deemed to be chosen for such day in respect of such shop, by or under Part I. of the said Act, that is to say, one o'clock after the hour of noon," &c. The defendant was a seller of fancy goods, and carried on in the same shop the business of a seller of newspapers and news agent. The time appointed by law for the closing of fancy goods shops was one o'clock in the afternoon on Wednesdays, the time for closing news agents' shops being much later. Sec. 20 of the *Early Closing Act*, 1899, provides that:—" Every shop mentioned in Schedule I." (which includes news agents' shops), " in which is carried on any class of trade not usually carried on in shops mentioned in the schedule, shall be closed at the closing time fixed by or under this Act for shops not mentioned in the schedule." The result of this provision is that this class of shop in which this mixed business is carried on, viz., that of a seller of fancy goods together with that of a newspaper seller and news agent, had to be closed at one o'clock in the afternoon. That had been decided by *Cohen*, J., in a previous case of *Smith* v. *Morrison*, 17 N.S.W. W.N., 65. Any other construction of sec. 20 would, practically, give no effect whatever to secs. 20 and 21 of the Act. In the present case the appellant, at 1 p.m., the time for closing mixed shops such as this, closed one of the two half doors of the shop opening on the street, and put a table inside the shop across the opening thus left, and there is evidence that, during the afternoon, he sold some newspapers to customers across the table. Those facts being in evidence before the magistrate, he

held that "there was no proof that the defendant had his shop open for the purpose of selling anything that he was prohibited from selling after one o'clock that day," and dismissed the information. But that was not the question at all. If the shop is one in which the mixed business described is carried on, and it is kept open, it does not matter for what purposes it is kept open. The prohibition in the Act is against keeping open a shop in which any business other than those included in Schedule I. is carried on. The prosecutor appealed by way of special case stated under the *Justices Act*, and the appeal was heard by *Cohen*, J. He held, following his previous decision, that the magistrate was wrong, and I agree that he was clearly wrong. The facts which the magistrate found were not a ground for dismissing the information. He decided the case on a ground which was really quite irrelevant. It was proper, therefore, that the case should go back to him for reconsideration. But the learned Judge went on to say: "I am of opinion that, as a matter of law, the shop was open for purposes of trade"; and he held that the defendant should have been convicted of the offence with which he was charged. Now that question the magistrate had not determined at all. He found only that the shop was not "open for the purpose of selling anything that" the defendant "was prohibited from selling after one o'clock that day." That, as already pointed out, was not the question he had to determine. The question was whether the shop, being a mixed shop, was or was not open. But, if the case goes back to the magistrate with the expression of opinion given by the learned Judge, the magistrate will be obliged to convict the defendant. It should go back to him simply with the intimation that he has determined it on an irrelevant point.

The question whether a shop is "closed to the admission of the public for purposes of trade," is a question of fact in each case. If it was not so closed, the defendant was guilty; if it was, he was not guilty, and should have been discharged. The "admission of the public" does not mean merely allowing them to come in through the door, because, by the definition in the Act, the word "shop" includes a stall at which goods are sold, and that would be open if the public were allowed access to it for the purpose of trade. But the facts in this case seem to me ambiguous. It does

H. C. OF A. 1904.

LOW v. BONARIUS.

not follow because a shop is one in which two kinds of business are usually carried on, that a single business cannot lawfully be carried on in the same premises at another time. To give an illustration, if at one o'clock the doors of the shop were closed, and a table placed upon the pavement in front, and newspapers put on it and sold there, that might very reasonably be held to be the opening of a new shop on the footpath, and that might be so, whether the seller stood in or out of the shelter of the doorway. The question, in truth, in a case like this, is whether the shop, considered as a mixed shop, in which the business of selling fancy goods was carried on, was in substance open to the admission, that is, the access, of the public for the purposes of trade; or whether, on the other hand, considered as such a shop, it was in substance closed to access, so as to be, for the time being, a mere newspaper shop or stall. That was a question of fact which the magistrate ought to have determined, and the case must therefore go back to him for its determination, with the expression of our opinion. What conclusion he ought to come to under the circumstances, it would not be desirable for us to say. The order, as it now stands, amounts practically to a direction to convict. The learned Judge should have said only that the magistrate was wrong in point of law, and that the only point of fact which he had determined was irrelevant. The order, therefore, should be amended so as to read that the magistrate was wrong in dismissing the case on the ground stated by him. With that variation the order made by the Judge should stand.

BARTON, J. and O'CONNOR, J. concurred.

Order of the Supreme Court varied by omitting the words "and that he was not right," and adding after the word "mentioned," the words "on the ground stated by him." The direction that appellant pay the costs to be omitted.

Order so varied affirmed.

No costs of the appeal.

Solicitor, for the appellant, *N. W. Montagu.*

Solicitor, for the respondent, *The Crown Solicitor of New South Wales.*

H. C. OF A. 1904.

LOW v. BONARIUS.

Appl Kirmani v Captain Cook Cruises Pty Ltd & Ors 159 CLR 461

Appl Western Australia v Hamersley Iron Pty Ltd (No2) (1969) 120 CLR 74

Ovrr Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129

Discd West v Deputy Commissioner of Taxation (NSW) (1937) 56 CLR 657

Disap Webb v Outtrim (1906) 4 CLR 356

Foll Baxter v Comrs of Taxation (NSW) (1907) 4 CLR 1087

[HIGH COURT OF AUSTRALIA.]

ALFRED DEAKIN . . . . . APPELLANT;

AND

THOMAS PROUT WEBB (COMMISSIONER OF TAXES) . . . . . RESPONDENT.

SIR WILLIAM LYNE . . . . . APPELLANT;

AND

THOMAS PROUT WEBB (COMMISSIONER OF TAXES) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1904.

MELBOURNE, *Aug.* 16, 17, 18, 19, 22. *Oct.* 28. *Nov.* 3.

Griffith, C.J., Barton and O'Connor, JJ.

Legislative power of State—Limits inter se of Constitutional powers of Commonwealth and State—Control of Commonwealth Agency—Income Tax — Taxation of Income of Commonwealth Officer—Income taxed after receipt—Appeal to Privy Council—Application for Certificate—"Special reasons"—The Constitution, secs. 52 (*ii.*), 74, 106-109—*Income Tax Act* 1895 (*Victoria*) (*No.* 1374), *secs.* 2, 7, 9, 14; *Income Tax Act* 1901 (*Victoria*) (*No.* 1758).

The principle enunciated in *D'Emden* v. *Pedder* (*ante* p. 91, at p. 111), that "when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative," re-affirmed.

An Income Tax Act of a State, in so far as it attempts to tax the salaries of officers of the Commonwealth, is within the above principle.

Such an Act of a State is not taken out of the above principle by reason of the fact that the income tax is assessed on salary received during a preceding year.