

## [HIGH COURT OF AUSTRALIA.]

ARTHUR BISHOP . . . . . APPELLANT;

AND

WILLIAM MACPHERSON MACFARLANE }  
AND ANOTHER . . . . . } RESPONDENTS.ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

H. C. OF A. *Metropolitan Traffic Act 1900 (N.S.W.), (No. 8 of 1900), secs. 21, 22\*—Regulation 1909. 50 of December 17th, 1900—Ultra Vires—Recovery of cab fare—Order for costs, compensation, and imprisonment—Civil or criminal proceeding.*

SYDNEY,  
Dec. 15.

Griffith C.J.,  
Barton and  
Isaacs JJ.

An information was laid against the appellant, under the *Metropolitan Traffic Act 1900*, charging him with not paying a cab fare upon demand. An order was made for payment of the fare and for costs and compensation, and in default a month's imprisonment.

*Held*, that if the magistrate had made an order under sec. 21 of the Act

\*Sections 21 and 22 of the *Metropolitan Traffic Act 1900*, No. 8, are as follows:—

"21. All penalties incurred under this Act, or any regulations or orders made thereunder, and all fares required by the regulations to be paid, and all other sums made payable by this Act or the regulations, may be recovered in a summary way before a Court of Petty Sessions, and all informations for offences against this Act or the regulations may be laid by any person and may be heard and determined in a summary way by such Court: Provided that any person aggrieved by any judgment, conviction, or order, given or made under this section, may appeal therefrom.

"22. In any conviction under this Act or the regulations, the Court of

Petty Sessions may order such payment as compensation for loss of time or expense incurred in consequence of the offence of which the defendant was convicted, as it thinks fit; and shall, in the manner prescribed, note the conviction on any licence under this Act held by the person so convicted, and may by order cancel or suspend his licence, and may order the delivery of the licence to some person to be named in the conviction."

Regulation 50 of December 17th 1900 is as follows: "If such prescribed or agreed fare or fare shown as aforesaid be not paid when demanded the Court may order the payment of such fare with such amount of costs and compensation for loss of time or otherwise as it considers just."



for payment of the fare, he had no power to order compensation. If, on the other hand, the order was regarded as a conviction under sec. 22 for breach of the regulations, the magistrate had no power to order payment of the fare.

*Held*, also, that, there being no evidence of demand of the fare, no order could be made against the appellant in either case.

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Regulation 50, so far as it provides for payment of compensation, is *ultra vires* the *Metropolitan Traffic Act*.

*Ex parte Peterson*, 9 S.R. (N.S.W.), 238; 26 W.N. (N.S.W.), 48, dissented from on this point.

Decision of the Supreme Court of New South Wales, 28th May 1909, reversed.

APPEAL from an order of the Supreme Court of New South Wales, refusing an application by the appellant for a *rule nisi* for a prohibition against an order made by a magistrate under the *Metropolitan Traffic Act* 1900.

The respondent Franklin, a cab driver, laid an information against the appellant, alleging that the appellant, being the hirer of a cab plying for hire, did not upon demand being made at the termination of such hiring pay the prescribed fare, to wit, the sum of 10s.

It appeared that about 11.30 a.m., on 23rd March, the appellant engaged Franklin to drive him in his cab to the Supreme Court, where the appellant left the cab. The appellant alleged that when he returned to the place where he had left the cab it could not be found. The respondent, Franklin, alleged that he had waited for the appellant several hours outside the court-house, and also made a search for him, but could not find him. In the afternoon of the same day the appellant returned to the Supreme Court and found Franklin there, and told him he had looked for him before lunch but could not find him, and asked him his fare. Franklin said, "I will leave that to you." The appellant did not pay Franklin, as he had no silver, and Franklin had no change, but the appellant told Franklin he would see him on the following morning, and took his address to post his fare to him. The appellant did not ask Franklin how much his fare was, and Franklin did not demand any particular amount. On the following day Franklin called at the appellant's office and demanded £1, which the appellant refused to pay. This information was



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then taken out by Franklin. At the hearing of the information Franklin stated that he had been at the Court of Petty Sessions on four days, that he lost two days in serving the summons, and he asked for 30 hours compensation for loss of time.

The magistrate ordered the appellant to pay 10s. cab fare, costs £6 2s., compensation £3 16s., and in default of payment to be imprisoned for one month with hard labour.

The appellant applied to the Supreme Court for a rule *nisi* for a prohibition to restrain further proceedings under this order. Counsel for the appellant, in moving for the rule, stated that the point involved had been decided by the Court in *Ex parte Peterson* (1), whereupon the Court, following the decision in that case, refused the rule.

The appellant obtained special leave to appeal from this order upon the grounds: (1) that the magistrate had no jurisdiction to award costs or compensation, or to order imprisonment; (2) that regulation 50 is *ultra vires* the *Metropolitan Traffic Act* 1900; (3) that the information disclosed no offence.

*Holman*, for the appellant. If the information was for an offence under sec. 21, the magistrate could not order payment of the fare. If it was a proceeding to recover a civil debt, there was no power to award compensation. Presumably the magistrate purported to act under regulation 50. In either case evidence that the legal fare was demanded is a condition precedent to the right to recover. Regulation 50 is *ultra vires*, because it assumes that sec. 22 is as wide as sec. 21, and *Ex parte Peterson* (1), in so far as it decided that that regulation is valid, was wrongly decided.

*Blacket*, for the respondent magistrate. The magistrate had jurisdiction to determine whether an offence had been committed. Sec. 22 provides that in any conviction under the Act or the regulations, the Court may order compensation for loss of time or expense incurred in consequence of the offence. That section includes a conviction for an offence against the regulations. Assuming there was evidence of a demand, there was a breach of

(1) 9 S.R. (N.S.W.), 238.



regulation 48, which says "that the hirer of a cab shall pay the prescribed fare upon demand," and regulation 75 says "that any person offending against the regulations shall be liable to a penalty not exceeding £10." Under sec. 22 and regulations 48 and 75 the magistrate had jurisdiction to award compensation apart altogether from regulation 50. The cabman can recover for time lost by reason of the fare not being paid when demanded. If the magistrate had power to award compensation under sec. 22 it will be assumed that he did so.

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There was no appearance for the respondent Franklin.

*Holman*, in reply.

GRIFFITH C.J. This is a curious case arising under the *Metropolitan Traffic Act* 1900. That Act makes provision for the regulation of traffic, including payment of cab fares, which is the subject of these proceedings, and provides by sec. 21: [His Honor read the section.] Sec. 22 provides: [His Honor read the section and proceeded]:—

Two modes of procedure, therefore, are provided for by the Act: One, a prosecution for breach of the Act or regulations, followed by conviction; the other, a proceeding for the purpose of obtaining an order for the payment of money. Each proceeding is taken before a Court of Petty Sessions, and the mode of procedure is the same, though the proceedings are quite different. The one is for an order for the payment of money, that is for the enforcement of a civil right, and that right extends to the recovery of fares required to be paid, and all other sums made payable by the Act or regulations. The section in question does not in general authorize the Governor in Council to make money payable under the regulations which is not payable under the Act. In sec. 7 power is given to regulate traffic, and a variety of other things. By sub-sec. (f) the regulations may "prescribe and regulate the seizure and custody of unattended vehicles and horses in public streets, and provide for the recovery of expenses of the custody and keep of the same, the disposal of such vehicles and horses after failure within the time prescribed to claim the same, or to pay such expenses."



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By sec. 8 (j) the Governor is empowered to make regulations providing for the payment of compensation for trouble incurred in connection with the custody and return of property left in public vehicles. Those are two instances in which the Governor in Council is empowered by regulation to make money payable.

By sec. 18 the driver, or licensee of a public vehicle, is made liable for damages wilfully or negligently caused by the driver. Those are cases to which sec. 21 applies.

The facts here are that the appellant engaged a cab, and after he had done with it did not pay the fare, saying that he had no change. No specified sum was then demanded by the respondent Franklin as his fare. The appellant appears to have thought that 5s. was the proper fare. The cabman said that he would leave it to the appellant. The following day, according to the appellant, the cabman demanded £1, which the appellant refused to pay. Thereupon an information was laid against the appellant, as for an offence, that he "being the hirer of a cab plying for hire did not upon demand being made at the termination of the hiring pay the prescribed fare, to wit, the sum of 10s." As an information for an offence, that must be for a breach of reg. 48, which provides that the hirer of a cab shall upon demand pay the prescribed fare. The order made upon that information must have been an order for payment of a penalty for committing that offence. Under the Act the Governor in Council can impose a penalty not exceeding £10 for breach of the regulations, and under the regulations he did provide for a penalty of £10. If the conviction in the present case had been made in that form it is possible that the consequences provided for by sec. 22 would have followed. Having been convicted of an offence, the defendant might have been ordered to pay compensation for loss of time incurred in consequence of the offence. But that is not what happened. What the magistrate actually did was to make an order in the form prescribed by sec. 21, purporting to be for payment of the fare to the complainant, together with a sum of £3 16s. compensation, and £6 2s. costs. The order the magistrate made was not a conviction, but an order under sec. 21, and he undoubtedly assumed to act upon the words in that section authorizing an order to be made for payment of



all sums made payable by the regulations, regulation 50 being the one relied upon. That regulation provides that if the prescribed fare be not paid when demanded, the Court may order the payment of the fare with such amount of costs and compensation for loss of time or otherwise as it considers just. So far as that regulation provides that the Court may order the payment of the fare, it adds nothing to the law. That was already provided for by sec. 21. So far as it says the Court may order compensation for loss of time, it is clearly not authorized by the power to make regulations. The Act only authorized the making payable of such sums as are specified in the Act. So far as reg. 50 provides for payment of compensation for loss of time, it is *ultra vires* and invalid, and this portion of the regulation must be regarded as mere surplusage. Therefore, reg. 50 adds nothing to the law.

Then, what under these circumstances ought to be done? Can an order which is for payment of money, and not a conviction, be supported on the ground that it might be turned into a conviction? If that view is set up, we are confronted by this difficulty, that there is no evidence of any offence having been committed, because the fare was never demanded. That is the only foundation for the making of an order as for an offence under sec. 22, and the magistrate did not purport to act under that section. It follows that the order for the payment of compensation was wrong. The magistrate might have made an order for the payment of the 10s. cab fare, and added an order for costs, but he could not have made the order for payment of compensation. It is obvious that the magistrate based his decision upon the supposed validity of reg. 50, and I think it must be taken that the order for costs was founded on that view, and, as that foundation was wrong, the order as to costs must go.

The order must be that the order of the magistrate should be amended by striking out all except the order for the payment of the 10s. cab fare. As to the 10s. no question is raised. The Court when granting special leave to appeal made it a condition that it should be immediately paid.

I should add that I do not think that the case of *Ex parte Peterson* (3) governs this case. The circumstances there were

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(1) 9 S.R. (N.S.W.), 238; 26 W.N. (N.S.W.), 48.



H. C. OF A. 1909. different. I do not dissent from that decision, except so far as it relates to the validity of reg. 50.

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BARTON J. I am of the same opinion, and have nothing to add.

ISAACS J. I agree with the judgment. I think that the magistrate was misled to some extent by reliance on reg. 50.

That regulation cannot be supported so far as it prescribes that compensation may be awarded where there is a mere demand for the recovery of payment of a fare. The legislature, by sec. 21 of the *Metropolitan Traffic Act*, has provided that fares required by the regulation to be paid may be recovered in a summary way before a Court of Petty Sessions, and that section says nothing whatever about any addition by way of compensation. When compensation is provided for the legislature has taken that matter into its own hands, and said specifically where there is to be compensation. Therefore not only is there no express affirmative power given to the Governor in Council to make a regulation with reference to such a matter as this, but there is the fact that the legislature has specifically provided for compensation in cases where it has desired that it should be awarded.

Sections 22 and 23 are correlative sections limited, in the one case, to a conviction, and in the other to an information or complaint for the recovery of fares. The provisions of the 23rd section relate to civil matters, but only where the proceedings are dismissed or withdrawn. They do not relate to proceedings for the recovery of fares in cases where the complainant is successful. What the magistrate did here was to find in favor of the informant, and to order the payment of the fare to him. That is not treating the matter as a conviction under sec. 22 of the Act, and therefore there was no power to award compensation. If, on the other hand, it were treated as a conviction, in which case compensation could be given, it was wrong, because the magistrate had no power to order payment of the fare. *Quáacunque viâ* the order is wrong.

The judgment being wrong entailed very serious consequences, because the magistrate went on to order that for non-payment of



the fare, and for non-payment of costs and compensation there should be imprisonment with hard labor for one month. That cannot be justified. The non-payment of the fare of 10s. is not to be visited in law with imprisonment for more than 7 days, and we cannot assume that the magistrate, if he had taken the right view of the law, would have given costs to an amount which would have rendered the appellant liable to imprisonment for a month. Evidence of the demand of the fare is necessary whether it is a case of an offence or whether the proceedings are taken for the recovery of the fare, because it is a statutory obligation. Sec. 21 says :—" All fares required by the regulations to be paid." Reg. 48 requires payment upon demand, and I think that demand is a condition precedent to the recovery of the fare. Therefore if the regulation is relied upon the statutory obligation must first be observed, and I accordingly think that the absence of any demand of the right fare would be a good defence, but in the circumstances of this case, as pointed out by the learned Chief Justice, the leave to appeal was granted on the condition that the fare should be paid. That portion of the order should therefore be allowed to stand.

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*Appeal allowed, order of the magistrate varied by omitting all except the order for payment of 10s. cab fare.*

Solicitor, for appellant, *E. J. Peterson.*

Solicitor, for respondent magistrate, *Crown Solicitor.*

C. E. W.