[HIGH COURT OF AUSTRALIA.]

PEMBERTON . . . . . APPELLANT;
INFORMANT,

AND

BANFIELD . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1912.

MELBOURNE, Oct. 7, 8, 10.

Griffith C.J., Barton and Isaacs JJ.

Factories and Shops—Carters and Carriers—Carting goods during prohibited hours—Empties carted back to stable—Carting goods "from outside a city"—Factories and Shops Act 1907 (*Vict.*) (*No.* 2137), *sec.* 40—*Factories and Shops Act* 1909 (*Vict.*) (*No.* 2184), *sec.* 12—*Factories and Shops Act* 1910 (*Vict.*) (*No.* 2305), *sec.* 38—*Practice—Breach of Statute charged—No serious wrong committed—Dismissal of charge—Special leave to appeal only granted on terms.*

Sec. 40 of the *Factories and Shops Act* 1907 (Vict.) as amended by sec. 38 of the *Factories and Shops Act* 1910 (Vict.) provides that "No person shall cart or deliver . . . any goods wares or merchandise or materials whatsoever before half-past seven o'clock in the morning or after half-past seven o'clock in the evening" on certain days.

Sec. 12 of the *Factories and Shops Act* 1909 (Vict.) provides that "Nothing in sec. 40 of the *Factories and Shops Act* 1907 shall be taken to prevent any person who has carted any . . . goods . . . from outside a city town or borough completing his journey in such city town or borough after the hours stated in this section to the extent only of taking the horse or other animal cart and goods into a yard but such goods shall not be unloaded until the next day."

A carter employed by a contracting carrier having delivered at a hotel in the City of Prahran barrels of beer which he had carted from a brewery, placed on his lorry certain empty barrels and crates to be returned to the brewery and proceeded to his employer's stables in the City of Richmond where he did not arrive until after half-past seven o'clock in the evening, his intention being to deliver the barrels and crates at the brewery the next

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day. He was prosecuted on an information charging him with having unlawfully carted goods after half-past seven o'clock in the evening in the City of Richmond.

Held, that the carter should have been convicted of the offence with which he was charged.

Where a man is said to have committed a technical breach of a Statute, but has done nothing seriously wrong, and it is sought to punish him for it, special leave to appeal from a dismissal of the charge against him is not granted without imposing terms.

Decision of the Supreme Court of Victoria: *Pemberton* v. *Banfield*, (1912) V.L.R., 213, reversed.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Richmond on 11th March 1912 an information was heard whereby Francis Joseph Pemberton, an inspector of factories and shops, charged that Edward Banfield, on Tuesday, 30th January 1912, unlawfully did cart goods after half-past seven o'clock in Church Street in the City of Richmond.

The facts are sufficiently stated in the judgments hereunder.

The justices having dismissed the information, the defendant obtained an order *nisi* to review on the grounds (*inter alia*) that the justices were wrong in holding that the defendant was not carting goods within the meaning of sec. 40 of the *Factories and Shops Act* 1907, as amended by sec. 38 of the *Factories and Shops Act* 1910, and that upon the evidence the justices should have convicted the defendant. The Full Court (*Madden* C.J. and *Hood* J., *àBeckett* J. dissenting) discharged the order *nisi*: *Pemberton* v. *Banfield* (1).

From this decision the informant now, by special leave, appealed to the High Court.

Sanderson, for the appellant. The respondent is within the clear words of sec. 40 of the *Factories and Shops Act* 1907, as amended by sec. 38 of the *Factories and Shops Act* 1910.

Mitchell K.C. (with him *Ian Macfarlan*), for the respondent. What the respondent did is within neither the mischief aimed at

(1) (1912) V.L.R., 213.

by, nor the words of, the section. The "carting" contemplated by the section is carting in connection with the delivery of goods to customers. The "delivering" was completed when the respondent left the barrels of beer in Prahran, and the return of his vehicle to the stable was permissible after half-past seven o'clock. The fact that he carried on his lorry empty barrels and crates involved no extra work after that hour, and was not part of the business of "carting" within the meaning of the section. The carting of the "empties" was begun outside the City of Richmond and in respect of an offence in that city the respondent is exempted by sec. 12 of the *Factories and Shops Act* 1909.

Sanderson, in reply.

Cur. adv. vult.

October 10.

GRIFFITH C.J. The respondent in this case was charged with a breach of a provision that now stands as sec. 40 of the *Factories and Shops Act* 1907, which provides that "No person shall cart or deliver . . . any goods wares merchandise or materials whatsoever before half-past seven o'clock in the morning or after half-past seven o'clock in the evening" on certain days, one of which is Tuesday. The charge was that the respondent on a Tuesday unlawfully carted goods after half-past seven o'clock in the evening in the City of Richmond. The facts of the case were that the respondent, who is a carter in the employment of a contracting carrier, on the afternoon of the particular Tuesday took a load of goods from a brewery, which, I understand, is in Richmond, to a destination in Prahran. He there unloaded his lorry, the unloading being finished about a quarter to seven o'clock. Before returning to his employer's stables in Richmond for the night he put upon the lorry what are called "empties," that is, empty barrels and crates, and proceeded to the stables, which he did not reach until after half-past seven o'clock.

If he had not done what he did, the only result would have been that he would have had to drive his empty lorry from his destination in Prahran to the stables on that evening, and on the following day to drive his empty lorry back to Prahran, place the empty barrels and crates upon it and drive them to the

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brewery; thus wasting his time and the time of his employer and doing no good to anyone. Under those circumstances I am not surprised that the respondent thought that he was justified in acting as he did, and the justices appear to have taken the same view. They accordingly dismissed the case. A majority of the Judges of the Supreme Court thought that they were right in doing so, and this appeal is now brought.

It is contended that the section I have read was not intended to cover any such case. In the sense that it was not anticipated that it would ever be sought to enforce the provision in a case of this kind, I am disposed to agree. But the question is whether the act done falls within the express words of the section.

The Act says that no person shall cart any goods whatever after the particular hour. What the respondent was doing was carting goods from Prahran to the brewery. He proposed to divide that operation into two stages, one on Tuesday evening, when he took the goods from Prahran to the stables, and the other on the Wednesday morning, when he would take the goods from the stables to the brewery. But the fact that he was dividing the operation into two stages did not alter the character of the operation. He was engaged in carting goods from Prahran to the brewery. I do not see any escape from that conclusion. I have had some difficulty, indeed, in following the somewhat elaborate arguments of the majority of the Judges of the Supreme Court, and those put forward here by Mr. *Mitchell*, in support of the contrary proposition. I do not think that anything I can say would make the matter clearer.

It was suggested that this literal construction of the section would give rise to difficulties. For instance, a man might be sent out with goods in the afternoon in the anticipation that he would be able to complete his work before half-past seven o'clock, and it might turn out that from some unexpected cause he still had some goods on his cart undelivered at half-past seven o'clock. It is said that he must do something with them, and that it would be absurd to say that he would still be "carting" these goods within the meaning of the Act. I agree. I think that, if a man having started to do a lawful act finds himself in a position in which he cannot lawfully continue to do

it, he is excused if he only does what is necessary under the circumstances. In such a case he must put the goods in a safe place for the night, and in doing so he cannot reasonably be said to be engaged in "carting" them within the meaning of the prohibition. But that is not what the respondent was doing. He had not started to do work which he expected to finish by half-past seven o'clock, but had undertaken an operation which could not be finished within that time. So that I think he comes within the exact words of the section.

I thought at one time there was a loophole of escape for the respondent in sec. 12 of Act No. 2184, which provides that "Nothing in sec. 40 of the *Factories and Shops Act* 1907 shall be taken to prevent any person who has carted any . . . goods . . . from outside a city town or borough completing his journey in such city town or borough after the hours stated in this section to the extent only of taking the horse or other animal cart and goods into a yard, but such goods shall not be unloaded until the next day." It is a fact, as I understand the evidence, that the defendant carted these goods from outside the City of Richmond. On one construction of the section, therefore, he is within the exemption. On the other hand, Prahran, the place from which he carted the goods, is also a city; and, having regard to the fact that this Act is in force in all cities, I think that the section must be read "who has carted goods from a place which is outside a city town or borough." The respondent cannot bring himself within the section as so interpreted. I think, therefore, that the offence was proved. The defendant was technically guilty of a breach of the Act although he was doing what most people would think was a sensible and laudable act.

But, although I feel bound to differ from the opinion of the majority of the Judges of the Supreme Court, there is another matter to be considered. When special leave to appeal was granted, the Court—I think by inadvertence—did not impose the usual terms upon the appellant. Where a man is said to have committed a breach of a Statute, but has really done nothing seriously wrong, and it is sought to punish him for it, special leave to appeal from a dismissal of the charge against

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him is not granted without imposing terms. I presume the Crown will offer no objection to the Court following the usual practice. Otherwise another course is, of course, open, namely, to rescind the leave to appeal.

Barton J.

BARTON J. The respondent was charged with unlawfully carting goods after half-past seven o'clock in the evening of Tuesday 30th January, which is a breach of sec. 40 (1) (*a*) of Act No. 2137. The charge was dismissed by the magistrates. An order *nisi* to review that decision was discharged by the Full Court, *à Beckett* J. dissenting. An appeal is now brought to this Court.

There is no doubt that the respondent was carting empties—the evidence for the informant says hogsheads and crates. He had delivered full hogsheads and barrels and he took away the hogsheads and crates. He says he was taking them to the stables so that they might be redelivered to the brewery next morning. It is admitted that, at whatever time he took the empties on to his lorry, he was still carting them after half-past seven o'clock. If they were "goods, wares, merchandise, or materials," it seems to me we must hold that the offence was committed. If they were not goods, what were they? There is nothing in the Act to take the word "goods" out of its ordinary meaning. If the legislature did not mean to include goods as ordinarily understood, it could easily have said so. The matter seems quite plain unless there is a defence under sec. 12 of Act No. 2184. At first I was disposed to think that this provision protected the respondent, but on closer consideration I think sec. 12 must be taken to apply only where there is no city, town or borough the limits of which include the place at which the carting has begun.

I am of opinion, therefore, that the appeal should be allowed, but on just terms as to costs. As there is no evidence that the respondent increased his work by what he did, either as to quantity or time, the prosecution inflicts a hardship and is of a kind which we ought not to encourage.

ISAACS J. read the following judgment:—Two points of law

were dealt with in the Supreme Court. The first was whether the offence aimed at by sec 40 (1) is the composite act of carting plus delivery after the prohibited hours, or consists of either carting after hours, or delivery after hours. As to this, the majority of the Court, *à Beckett* and *Hood* JJ., thought the two were distinct, but *Madden* C.J. thought carting and delivery were inseparable elements of the one offence. In my opinion, the majority in this respect were right. The provisions of the section itself are in the disjunctive. What is prohibited is "carting *or* delivery." The contrary view would permit of carting without limitation of hours, if no delivery took place till next day; and of delivery without limitation of hours providing no carting was done. The learned Chief Justice of Victoria thought the legislature was not regarding the question from the standpoint of the carter or person delivering, but from the standpoint of the vendor of the goods, or owner of the shop or factory in which they were prepared. But an inspection of the various enactments shows that the object which Parliament had in view in this section was legislation in respect of the hours of labour of carters and carriers, and not for delivery of goods as such, or for the hours of labour of factory and shop employés who are protected elsewhere. In the Act of 1905 (No. 1975), Part XI. deals with closing of shops, and the sale or delivery of goods. But sub-division (6) consisting of sec. 144 is specially headed "Carters and Carriers;" these words referring to two well known and distinct classes of occupation, though often combined.

Sec. 144 enabled the Governor in Council to limit within the Metropolitan District the working hours of any person employed for wages as a carrier or carter in carrying or delivering, &c.; and it provided for a weekly half-holiday. Its limitation to "the ordinary course of business" was repealed in 1905 by sec. 27 of No. 2008; and its limitation to goods "from a factory or workroom or shop" was repealed in 1910 by sec. 17 of No. 2241.

In 1907, by Act No. 2137, sec. 7, among other things, extended sec. 75 of the earlier Act relating to Special Boards for the remuneration of persons employed "in any business of carting or driving or assisting in carting or driving either generally or in any specified process trade or business." In the same Act sec. 40

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(1) restricted the hours of carting or delivering certain specified goods, and nothing was said about the goods being delivered from or to a factory or shop. In 1911 Act 2305, by sec. 38, made the provision which is the present sec. 40 (1) under consideration.

But sec. 39 of the same Act is most significant as to the object of the legislation. It adds a fourth sub-section to sec. 40 to the effect that any person may, if allowed in writing by the Chief Inspector, be employed in carting or delivery out of hours provided he gets two shillings an hour for such carting or delivery.

Sec. 40 enlarged the nature of the goods included in the prohibition. Sec. 41 amended the provision as to half-holiday, and sec. 42 requires a time book to be kept for carter's work.

From these provisions it is clear to me the point of view from which to regard the matter is that of the carter's or carrier's employment.

Once that is settled, the rest seems to follow naturally. The second point is as to whether empty hogsheads and barrels being returned to the brewery come within the description "goods wares merchandise or materials whatsoever." *Madden* C.J. and *Hood* J. were of opinion they did not, while *àBeckett* took the contrary view. In any aspect it seems to me difficult to exclude them from the definition, but regarding them as objects of carriage or delivery, that is, from the standpoint of the carter or carrier, it cannot, as I think, with great respect to the opinion from which I differ, be doubted they come within it. It is immaterial so far as overworking the carter or carrier is concerned whether the things he carries come from a factory or shop or a private dwelling house, or where they are going, or to whom they belong. The owner of the goods, say a building contractor, may cause them to be carted from one spot not a factory or shop to another miles away and there delivered to him. That would still be delivery as understood in the business of a carrier.

It is difficult to suppose the legislature was not guarding against that.

Mr. *Mitchell* invited the Court to say that the facts did not come within the language or the mischief of the enactment—because, he said, the carter had no extra work imposed on him by merely carting empties. In the first place, it is quite impossible

to say that; because it stands to reason some time is occupied in collecting and loading empties, even if not also in carrying them carefully. And the time so spent is so much time added to the hours of labour, and delays the cessation of work. It might in fact be the sole cause of overstepping the prohibited hours, and in any event increases the period of contravention. And the point is really immaterial, not because the legislature has rigidly and arbitrarily struck at a negligible and innocuous act, but because it is outside the matter they were considering, unless it be conceded that carting during longer hours is itself extra work. This, which is the real truth, answers the contention in point of fact, as it shows that when considering the length of time the employé is compelled to work it is not innocuous or negligible; apart from that concession, it is, as I have said, answered by the law. Parliament was dealing with hours of labour, not strenuousness of work, during those hours. The amount of work done during those hours is a matter which employer and employed settle for themselves, but the time occupied is a distinctly measurable incident, and that is the sole practicable as well as legal test in this connection. To introduce the consideration suggested into such a case would not only be legally incorrect, but would weaken, if it did not indeed counteract, the efficacy of legislation which Parliament has steadily adhered to, and, judging by its repeated amendments, has felt the necessity of strengthening from time to time to cope with what it evidently regards as a serious evil. Of course, the circumstances of a case as a whole may affect the amount of penalty inflicted. In the present instance the uncertainty of the law, as shown by the diversity of judicial opinion, is a circumstance that fairly lightens the penalty.

There remains a third point, namely, whether the fact that the respondent entered the city of Richmond from some place outside that city was entitled under sec. 12 of No. 2184 to cart though after hours until he arrived at a yard. That depends on the meaning to be given to the words "outside a city town or borough" in that section. The section is clumsily drawn, and if read literally would be meaningless, because it speaks of "the hours stated in this section." There are no hours stated in that

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section, and so "this section" must mean a different section previously mentioned, namely sec. 40. Again, "goods" where last mentioned, is evidently intended to mean not merely the "goods" specified earlier, but also all the other things enumerated along with it. Consequently, though some difficulty arises from the use of "such" before city where secondly mentioned, I think the section on the face of it is one which needs a stronger comparison with the rest of the Act than usual in order to ascertain its real meaning. It is not the inculpating section, and that is an important consideration, and when it is read with secs. 2, 7 and 40 of Act No. 2137, the true intention of Parliament seems tolerably plain. It is this: If the carting has commenced outside a city town or borough, that is, roughly speaking, if it has commenced from a place where the limitation of hours is not as a rule in force, the carting may be continued so far as to reach the shelter of a yard, in a city town or borough, but no unloading must take place till the next day. The provision is apparently primarily intended for country districts and not for two adjacent cities in the metropolitan area.

I agree the appeal should be allowed.

The appellant consenting to abide by any order as to costs that the Court might make: Appeal allowed. Order appealed from discharged except as to costs. Defendant fined one shilling. Appellant to pay the costs of the appeal.

Solicitor, for the appellant, *Guinness*, Crown Solicitor for Victoria.

Solicitors, for the respondent, *Pavey, Wilson & Cohen.*

B. L.