[HIGH COURT OF AUSTRALIA.]

INGHAM . . . . . APPELLANT;
INFORMANT,

AND

HIE LEE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1912.

MELBOURNE, *Oct.* 15, 16.

Griffith C.J., and Barton J.

Factory—Restriction of hours of labour—"Work," meaning of—Construction of Statute—Ambiguity—Factories and Shops Act 1905 (*Vict.*) (*No.* 1975), *secs.* 5, 42.

Where the language of an enactment is susceptible of two constructions, regard must be had to the general object and purpose of the Act, and, if the act done is not within the general purview of the Statute, regard may be had to the consequences of either construction. If one construction will do manifest injustice and the other avoid it, the latter construction should be adopted.

Sec. 42 of the *Factories and Shops Act* 1905 (Vict.) provides that "in any factory or work-room where any Chinese person is at any time employed . . . no person shall work for himself or for hire or reward, either directly or indirectly, or shall employ or authorize or permit any person whomsoever to work on any day before half-past seven o'clock in the morning or after five o'clock in the evening."

By sec. 5 of the *Factories and Shops Act* 1905 "any office building or place in which . . . one or more Chinese persons are or is employed directly or indirectly in working in any handicraft" is a "factory," and that term "handicraft" includes "any work whatsoever done in any laundry . . . and whether or not done in preparing or manufacturing articles for trade or sale."

Held, that the word "work" in sec. 42 means "work at factory work," and, therefore, that the section does not apply to a Chinese ironing his own shirt during the prohibited hours in a Chinese laundry.

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Decision of the Supreme Court of Victoria (*Madden* C.J.): *Ingham* v. *Hie Lee*, (1912) V.L.R., 329; 34 A.L.T., 41, affirmed.

APPEAL from the Supreme Court of Victoria.

An information was heard at the Court of Petty Sessions at Collingwood charging a Chinese named Hie Lee that, on 31st May 1912, being the occupier of a certain factory or work-room within the meaning of the *Factories and Shops Acts*, he did then and there permit a Chinese person to work on such day after five o'clock in the evening in such factory or work-room.

The evidence, so far as is material, showed that Hie Lee was a laundryman; that a Chinese named Ah Chook was a lodger and boarder at the premises in which Hie Lee carried on his business; and that on the occasion in question Ah Chook was ironing his own shirt in Hie Lee's laundry.

The justices having dismissed the information, an order *nisi* to review was obtained by the informant on the ground that the offence charged was proved and that on the evidence the justices should have convicted the defendant. On its return the order *nisi* was discharged by *Madden* C.J.: *Ingham* v. *Hie Lee* (1).

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

Lewers, for the appellant. Even if the word "work" in sec. 42 of the *Factories and Shops Act* 1905 is limited to work *ejusdem generis* as that done in the particular factory, the offence is proved. In *Prior* v. *Slaithwaite Spinning Co. Ltd.* (2), under the *Factory and Workshop Act* 1878, which by sec. 17 (2) provides that a child shall not during meal times be employed in a factory, and by sec. 94 that a child who works in a factory whether for wages or not, in oiling any part of the machinery, is to be deemed to be employed in the factory, it was held that an offence was committed where a child contrary to orders and for his own amusement oiled the machinery of a mill during his meal time.

McArthur K.C. and *Ah Ket*, for the respondent. The word "work" in sec. 42 must be limited to work which is the ordinary

(1) (1912) V.L.R., 329; 34 A.L.T., 41.

(2) (1898) 1 Q.B., 881.

business of the particular factory—work done in the pursuit of trade or business. The object of the Act is to restrict the hours of factory labour and to prevent unfair competition. What was done in this case is not within the purview of the Act at all. In *Prior* v. *Slaithwaite Spinning Co. Ltd.* (1), the legislation was for the protection of young children. The words "work for himself or for hire or reward" mean work either as a principal or as employé.

Lewers in reply.

GRIFFITH C.J. This was a prosecution of the respondent for a breach of the provisions of sec. 42 of Act No. 1975, which is one of the *Factories and Shops Acts*. It provides that "(1) In any factory or work-room where any Chinese person is at any time employed, ... no person shall work for himself or for hire or reward, either directly or indirectly, or shall employ or authorize or permit any person whomsoever to work on any day before half-past seven o'clock in the morning or after five o'clock in the evening." By sec. 5 of Act No. 1975 "any office building or place in which . . . . any one or more Chinese persons are or is employed directly or indirectly in working in any handicraft" is a "factory," and the term "handicraft" includes "any work whatsoever done in any laundry or dye-works and whether or not done in preparing or manufacturing articles for trade or sale."

The facts of the case are that the respondent is a Chinese laundryman. His laundry is therefore a "factory." The facts as found by the magistrates were that during the prohibited hours one Ah Chook was doing manual labour—*i.e.*, ironing his own shirt—in the laundry. The question is whether that is sufficient to establish an offence against the Act. There is no doubt that the place is a factory, that Ah Chook was within the walls of the factory, and that he was ironing his own shirt there. He was not an employé of the respondent, but was a lodger with the respondent, and was allowed this privilege of ironing his shirt in the laundry. It is not disputed that the work that may not be

(1) (1898) 1 Q.B., 881.

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permitted is the same as that which may not be done. The respondent contends that the term "no person shall work" does not mean "no person shall do any manual labour," but means "no person shall work as a workman" or "work at factory work." In this view the words "work for himself or for hire or reward" would mean "do factory work either as a principal or proprietor or as an employé," the antithesis being between work done for his own exclusive profit and work done for wages. The appellant, on the other hand, contends that the antithesis is between work done for hire or reward and work not done for hire or reward, and that these two cases include every possible kind of manual labour. The words are susceptible of both constructions. In such a case regard must be had to the general object and purpose of the Statute, and, if the act done is one which is not within the purview of the Statute, then, as *Brett* L.J., said in *The R. L. Alston* (1), the enactment "is unfortunately expressed in such language that it leaves it quite as much open with regard to its form of expression to the one interpretation as to the other. What, then, is to be done? We must try and get at the meaning of what was intended by considering the consequences of either construction."

If it appears that one of those constructions will do injustice and the other avoid injustice, then it is the bounden duty of the Court, as Earl *Cairns* L.C. said in *Hill* v. *East and West India Dock Co.* (2), to adopt the second, and not to adopt the first, of those constructions. Moreover, an Act in restriction of the common law is not to be construed as restricting it further than the plain language of the Statute declares, just as in a taxing Statute the imposition of the tax must be made by plain words. The meaning sought by the appellant to be put upon the word "work" would include the case of a carpenter mending the leg of his saw bench, or a laundryman mending the leg of his ironing table, or brushing his own coat, or polishing his own boots, or mending his own clothes. Having regard to the whole purview of the Act, I think that this construction must be rejected, and that the word "work" must be construed as meaning "work at factory work." I do not think that for a man to wash his own

(1) 8 P.D., 5, at p. 9.

(2) 9 App. Cas., 448, at p. 456.

clothes is factory work at all, even within the definition of "handicraft," although the business of the factory is to wash clothes.

It is objected that this construction would render evasion of the Act easy. Very likely; but that is not a sufficient reason for extending the meaning of the words used as collected from the context and subject matter. On the other hand, it is very difficult for a defendant to establish such a defence as that set up in this case, and he will do the act at great risk of being unable to excuse himself. In this case he has succeeded in doing so. I think, therefore, that the appeal fails.

BARTON J. This case is by no means free from difficulty, and I must confess that my mind has fluctuated a good deal in the course of the argument. It depends upon the interpretation to be placed upon the words in sec. 42 of Act No. 1975 "no person shall work for himself or for hire or reward," that is to say no person in a factory, and "factory" is, so far as is material for present purposes, defined as "any office building or place in which . . . one or more Chinese persons are or is employed directly or indirectly in working in any handicraft," and "handicraft" includes "any work whatsoever done in a laundry." The interpretation section, sec. 5, also provides that "a person shall be deemed and taken to be employed whether he is or is not working on his own account or behalf or for hire or reward either directly or indirectly." It is clear that the phrase in question is open to more interpretations than one; and in construing a penal provision we are bound to remember that we ought not to adopt a construction adverse to an accused person unless he is brought clearly within the words of the Act. I do not think that the respondent was clearly brought within the words of the Act. I cannot, indeed, come to the conclusion that the construction contended for by the prosecution preponderates in reason over that contended for on behalf of the respondent.

There is a question of fact in the case. Evidence was given that the person said to have been working within the meaning of the section in the factory, was one Ah Chook, that he was a lodger of the respondent, and not his employé, and that the

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operation he was carrying on in the factory was ironing his own shirt. Whether he was a lodger or an employé, and whether he was ironing his own shirt or the shirt of a customer of the laundry, were mere questions of fact. The evidence on that subject was before the magistrates, and they found that Ah Chook was a lodger and was ironing his own shirt, and there are no materials upon which to dispute the correctness of that conclusion.

Was Ah Chook then "working" in that factory "for himself or for hire or reward" within the meaning of sec. 42? The first question is—What is the meaning there of "work"? Does it mean any and every kind of work or does it mean work of that factory? One must consider the scope and purpose of the Act before determining that question. The object in view was to prevent people from working at their trades before or after hours, and sec. 42 is directed to the regulation of Chinese factories and work-rooms or those in which Chinese are employed. It restricts the hours of work by providing that work shall not be done before half-past seven o'clock in the morning or after five o'clock in the evening. The object, as I have said, is to prevent people from working out of hours, probably to prevent undue or unnecessary competition. It is not part of that purpose to prevent persons from doing casual work in their own time in places where they are not employed—work which is not done for any master or for profit or pay. It seems to me that the object of the section is to prevent people from working for profit to themselves or to their masters either before or after certain specified hours.

It may be that it was the intention of the legislature to make the attainment of its purpose more secure by providing that no person whosoever should outside hours do any kind of work—not merely the work of the factory, but anything which even by a strained construction would come within the widest meaning of the word "work." That is quite possible. But in order to carry out an intention of that kind, which on the face of it is not a very probable one, it would be necessary for the legislature to be precise in the language used to indicate that it intended to include not merely those engaged as proprietors of, or employés in, a

factory, but also any one who might be casually within a factory and be using it and the appliances there to do something like washing or ironing his own clothes. Such an intention is not clearly expressed, and I therefore think that the word "work" is employed as meaning "work of that factory."

If, as contended by the Crown, the section included in its prohibition persons, whoever they might be, doing any sort of work in another person's place of business outside that person's hours, then it would follow that under the words here used a workman of some other trade, called in to do some repairing work in a laundry, although he might be a member of the union of his trade, and although he might be entirely within the hours during which it was customary and proper for him to work—whether by an award of a Court of Arbitration or otherwise—would be within the prohibition. That would be a result which I think the legislature never intended. I come to the conclusion, therefore, that the word "work" in sec. 42 means "work of that factory." That is sufficient to dispose of the case. But I am inclined also to think that the words "for himself or for hire or reward" probably bear the meaning suggested by Mr. *Ah Ket*—that is, "for himself as principal or for hire or reward as employé." The words "hire or reward" are used elsewhere in legislation, for instance in the Commonwealth Arbitration Act, as a paraphrase for pay or wages, and reward may, of course, include payment in kind. But it is not now necessary to decide that point.

Now, it is said that the conclusion to which the appellant warned us not to come, is one that will multiply the dangers of evasion. I am not sure that it will. It may ensure that the inspectors shall use the greatest vigilance and the utmost discretion, but I do not think that that is a result which will be in any sense disastrous to the community. If an Act of this kind is to be interpreted in a sense adverse to the subject or citizen—if we may so designate Hie Lee—on the ground that if not so interpreted evasion will become easy, such an argument may be extended to various and indefinite degrees to justify invasions of the liberty of the subject. Therefore, this is an argument to which I do not attach much weight.

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Admitting the difficulty of the case, I come to the conclusion that the decision of the learned Chief Justice of this State is correct, and that the appeal should be dismissed.

Appeal dismissed with costs.

Rev *Taxes, Comr of v Melbourne Trust Ltd* (1914) 18 CLR 413

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

Solicitors, for the respondent, *Cohen & Herman.*

B. L.

[HIGH COURT OF AUSTRALIA.

THE MELBOURNE TRUST, LIMITED . . APPELLANTS;

AND

THE COMMISSIONER OF TAXES (VICTORIA) . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1912.

MELBOURNE, *Oct.* 3, 4, 7, 14.

Griffith C.J., Barton and Isaacs JJ.

Income tax—Company—Profits—Company formed to realize assets of companies in liquidation—Surplus proceeds of realization—Business of company—Income Tax Act 1903 (*Vict.*) (*No.* 1819), *sec.* 9.

Three assets companies were formed in England in December 1897 to carry out schemes of arrangement of the affairs of three Victorian banking companies then in course of liquidation in England and Victoria. In each case provisional agreements had been made with the sanction of the Courts in England and Victoria. The basis of each scheme was that the whole of the assets of the banking company should be handed over to a company to be formed for the purpose of carrying it into effect. The creditors of the respective banks were to accept in full satisfaction of their claims, shares