[HIGH COURT OF AUSTRALIA.]

SCHUBERT . . . . . APPLICANT;

AND

LEE . . . . . RESPONDENT.

MORRIS . . . . . APPLICANT;

AND

LEE . . . . . RESPONDENT.

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PERTH, *Sept.* 4, 6.

Latham C.J., Rich and Dixon JJ.

Road Traffic (*W.A.*)—*Obstruction of road or footpath*—"*Road*"—*Lane not dedicated to public as highway—Open to and used by public—Necessity to prove actual interference with other persons—Traffic Act* 1919-1941 (*W.A.*) (*No.* 60 *of* 1919—*No.* 16 *of* 1941), *s.* 4—*Interpretation Act* 1918-1938 (*W.A.*) (*No.* 30 *of* 1918—*No.* 28 *of* 1938), *s.* 39—*Traffic Regulations, reg.* 327.

The *Road Traffic Act* 1919-1941 (W.A.), s. 4, provides that, subject to the context, "'Road' means and includes any street, road, lane, thoroughfare, footpath or place open to or used by the public." The *Interpretation Act* 1918-1938 (W.A.), s. 39, makes the definition applicable to regulations made under the Act.

Regulation 327 of the *Traffic Regulations* provides: "No person shall either alone or with another behave, act or stand on any road or footpath so as to obstruct the free passage of traffic along, through or upon the same, nor loiter nor act in any way to the annoyance of other pedestrians."

Held, (1) that a lane falls within the definition of "road" in s. 4 of the *Traffic Act* if it is in fact "open to or used by the public," whether or not there is a public highway over it; (2) that the definition of "road" in the Act applies to reg. 327.

Held, also, that in order to establish that a highway has been obstructed within the meaning of reg. 327 it is not necessary to prove that any person has actually been impeded in his use of the street. If there is a lessening in a substantial degree of the commodiousness of the use of the highway for

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legitimate purposes by using it for purposes other than a highway it is unimportant that upon a particular occasion no member of the public was in fact impeded.

APPLICATIONS for special leave to appeal from the Supreme Court of Western Australia.

Albert Schubert and Thomas Morris applied for special leave to appeal from a judgment of the Supreme Court of Western Australia upholding convictions by a police magistrate of offences against reg. 327 made under the *Traffic Act* 1919-1941 (W.A.).

The charge against Schubert was that he stood with others in a lane off Fifth Avenue in such a manner as to obstruct the free passage of traffic along the same contrary to reg. 327. There was evidence that he was accepting bets with members of the public in a T-shaped passage which ran alongside and between separately occupied allotments of land. It was not established positively that the lane had ever been dedicated to the public as a highway. There was evidence that it was in fact regularly used by the public. It was shown that some twenty persons had collected in the lane, apparently for the purpose of betting with Schubert. He was convicted and sentenced to seven days' imprisonment.

Schubert appealed to the Supreme Court on the grounds, *inter alia*, that the magistrate was wrong in deciding that the lane was a road within the meaning of the definition in s. 4 of the *Traffic Act* 1919-1941, that there was no evidence that the land had been dedicated to the use of the public, and that there was no evidence that Schubert obstructed or caused any obstruction to the free passage of the pedestrian traffic.

The charge against Morris was that he did stand with others in North Beach Road in such a way as to obstruct the free passage of traffic along the same contrary to reg. 327. It was proved that he was making bets with individual persons between two motor cars which were parked close together at the side of North Beach Road. He had been there for a number of hours for the purpose of betting. Close by on the footpath was a seat intended for people who were waiting for the tram. He was convicted and sentenced to one month's imprisonment.

Morris appealed to the Supreme Court on the ground, *inter alia*, that there was no evidence that he obstructed or caused any obstruction to the free passage of pedestrian traffic.

The Supreme Court dismissed the appeals.

Schubert and Morris applied for special leave to appeal to the High Court.

Lappin (with him *Cahill*), for the applicants. The lane in question in Schubert's case was not a road within the meaning of s. 4 of the *Traffic Act*. The only persons entitled to use this particular part of the land were the persons who owned the blocks of land abutting on the lane and persons doing lawful business with the owners. The definition of "road" in s. 4 of the *Traffic Act* does not apply to reg. 327, because road and footpath are both mentioned in the regulation. In order to come within reg. 327 there must be obstruction in a substantial degree. [He referred to the *Transfer of Land Act* 1893-1944 (W.A.), s. 166; *Secourable* v. *Wain* (1); the *Interpretation Act* 1918-1938, s. 39; *Beal, Cardinal Rules of Legal Interpretation*, 3rd ed. (1924), pp. 340,341; *Windeyer, The Law of Wagers, Gaming and Lotteries in the Commonwealth of Australia*, (1929), pp. 152, 166, 168; *Halsbury's Laws of England*, 2nd ed., vol. 16, p. 354, par. 483; *R.* v. *Train* (2); *R.* v. *Bartholomew* (3); *Haywood* v. *Mumford* (4); *Adams* v. *Horan* (5).]

Nevile, for the respondent. The definition of "road" in the *Traffic Act* is to be read according to the ordinary meaning of the words used. An English road means any street, &c., to which the public have access. It is not necessary that it should be dedicated. Private roads have been held to be included (*Harrison* v. *Hill* (6); *Bugge* v. *Taylor* (7)). A lane which exists in fact is also included (*R.* v. *Lloyd*; *Ex parte Leonard* (8)). [On the question of obstruction he referred to *Muller* v. *Kennedy*; *Ex parte Kennedy* (9); *Mullany* v. *Miller* (10); *O'Toole* v. *Bennett* (11); *Scanlan* v. *Convey* (12); *Haywood* v. *Mumford* (4).]

Lappin, in reply.

Cur. adv. vult.

Sept. 6.

The COURT delivered the following written judgment:—

These are applications for special leave to appeal in two cases in which the defendants were charged with offences against reg. 327, made under the *Traffic Act* 1919-1941 (W.A.). The regulation is as follows:—"No person shall either alone or with another behave, act or stand on any road or footpath so as to obstruct the free passage of

(1) (1941) 43 W.A.L.R. 102.
(2) (1862) 3 F. & F. 22, at pp. 25, 27 [176 E.R. 11, at pp. 12, 13].
(3) (1908) 1 K.B. 554.
(4) (1908) 7 C.L.R. 133.
(5) (1906) 26 N.Z.L.R. 169, at pp. 172-174.
(6) (1932) S.C. 13.
(7) (1940) 104 J.P. 467.
(8) (1875) 1 V.L.R. (L.) 79.
(9) (1921) Q.S.R. 126.
(10) (1901) 26 V.L.R. 655.
(11) (1917) V.L.R. 351.
(12) (1913) V.L.R. 354.

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traffic along, through or upon the same, nor loiter nor act in any way to the annoyance of other pedestrians."

In Schubert's case there was evidence that he was accepting bets with members of the public in a T-shaped passage which ran alongside and between separately occupied allotments of land. The *Traffic Act* 1919-1941, s. 4, provides—" 'Road' means and includes any street, road, lane, thoroughfare, footpath or place open to or used by the public . . ." The *Interpretation Act* 1918-1938, s. 39, makes the definition applicable to regulations made under the Act. It is not disputed that the passage, which was wide enough for wheeled vehicles, is a lane, but it is contended for the appellant that it is not a road or footpath within the meaning of those words as used in the regulation. No sufficient evidence was adduced on the part of the prosecution to establish positively that the lane had ever been dedicated to the public as a highway. It is contended for the applicant that the definition applies only to streets, roads, lanes, &c., which are open to or used by the public as of common right and not to such places although in fact open to or used by the public if they are not places which the public is entitled to have kept open or which it is entitled to use. It is argued that it would produce an unreasonable result to construe the words of the definition so as to make the *Traffic Act*, with its many provisions relating to the licensing of vehicles, the regulation of motor and other vehicles, width of tyres, &c., apply to roadways and passages upon land which the public used only by the licence of the owner.

The definition contained in the statute might very readily have been limited to " public " streets, roads, lanes, &c., but such a limitation has not been included in the definition. The words " open to or used by the public " are apt to describe a factual condition consisting in any real use of the place by the public as the public—as distinct from use by licence of a particular person or only casual or occasional use. It may be necessary to distinguish places open to members of the public as such from places left open by the owner but obviously intended only for the use of a particular description of person, for example, visitors to his shop or other premises. Prima facie the words of the section mean streets, &c., which actually are open to or used by the public, so that there is some need for protection of the public in the use of such streets, &c. This is a view which has been taken of not dissimilar provisions contained in the *Road Traffic Act* 1930 of the United Kingdom, where a definition of the term " road " includes the following words—" and any other road to which the public has access." It has been held by the Court of Session that a road falls within the definition if the public in fact has access to it,

even though it is privately owned, and the public has no right of access to the road. It was so held in the case of *Harrison* v. *Hill* (1), and that decision has been followed in England in relation to the same Act in the case of *Bugge* v. *Taylor* (2). In our opinion the words " open to or used by the public " should, as the Full Court has held, be construed in the same way, so that a lane falls within the definition if in fact it is " open to or used by the public," whether or not there is a public highway over it. There was evidence that the lane in question in this case was in fact regularly used by the public.

There is an alternative argument which, if correct, would exclude the lane in Schubert's case from the operation of the regulation. That argument is that in the regulation the context excludes the application of the definition of " road " because the regulation refers both to roads and footpaths. The definition of " road " in s. 4 includes both roads and footpaths and therefore it is said the word " road " in the regulation cannot be used in the sense of the definition. The result would then be that " road " and " footpath " in the regulation should be construed in their ordinary sense, independently of the definition. Then, the argument proceeds, the lane in question was not a road but a lane, and it was not a footpath because the evidence showed that it was used by wheeled traffic.

The definitions contained in s. 4 of the Act are all declared in that section to be " subject to the context." There is, it must be conceded, some incongruity in the reference in the regulation to footpaths as well as to roads. But the incongruity is probably explained by the terms of s. 46 (1) (i), which provides that the Governor may by regulations regulate traffic and " the use of vehicles upon roads and the use of footpaths," and by other references in pars. (*a*) and (*b*) of s. 46 (1) (i) to footpaths as well as roads. We are of opinion that the context is not strong enough to displace the prima-facie application of the definition of " road." The redundancy of the reference to footpath is, we think, to be explained by a desire to make it clear that footways and paths for foot passengers were included, though not adjoining roads for wheeled traffic. We are therefore of opinion that the definition of " road " in s. 4 of the Act should be applied in s. 46 and consequentially (*Interpretation Act* 1918-1938, s. 39) in reg. 327.

In Morris' case the defendant was also engaged in betting, in this case in North Beach Road. He was standing between two motor cars which were drawn up at the side of the road and opposite a seat on the footpath which faced the buildings adjoining the road.

In Schubert's case it was shown that some twenty persons had collected in the lane, apparently for the purpose of betting with

(1) (1932) S.C. 13.
(2) (1940) 104 J.P. 467.

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Schubert, and in Morris' case it was shown that he had occupied the position mentioned on the roadway for about four hours on the day in question.

The contention for the applicants in each case was that there was no obstruction because there was no evidence of actual interference with other persons who required to use the lane or the street.

In order to establish that a highway has been obstructed within the meaning of a provision prohibiting obstruction it is not necessary to prove that any person has actually been impeded in his use of the street. If a man deposits a load of stones in a highway there is no doubt that he obstructs the highway, even though the members of the public are able to walk round the stones and even though it is not proved that any member of the public actually endeavoured to use the highway while the stones were there. This is the view of the law which was adopted in *Haywood* v. *Mumford* (1).

Where the alleged obstruction consists in the physical presence of the defendant upon the highway it becomes necessary to reconcile the prohibition of obstruction of a highway with the reasonable user of the highway by members of the public : See *Adams* v. *Horan* (2). Every user of a highway for the purpose for which a highway is intended may theoretically at least lessen its commodiousness for the use of other members of the public. But that arises from the nature of things. What is not permitted is the lessening in a substantial degree of the commodiousness of the use of the highway for legitimate purposes by using it for purposes other than a highway. It is only because the conduct of betting is not a use for which a highway is intended that the fact that the defendant was betting is relevant.

The extent of the unauthorized use of a highway or other place, its duration, the nature and the occasion of its use and the time must all be taken into consideration, and so too must the character of the place. But, if the conclusion is that a substantial detraction takes place from the commodious use of the place by the members of the public who may reasonably be expected to make use of it, it is unimportant that upon a particular occasion none is in fact impeded. The question which is involved, however, is always one of degree, and therefore of fact. In *Dunn* v. *Holt* (3), it was held that whether or not a person wilfully causes an obstruction in a thoroughfare is in each case a question of degree depending upon the particular facts. It is there pointed out in the reasons for judgment of the court that reasonable user of a highway is not obstruction, but that all the

(1) (1908) 7 C.L.R. 133.
(2) (1906) 26 N.Z.L.R. 169.
(3) (1904) 73 L.J. K.B. 341.

circumstances of time and place must be taken into account in determining whether the acts charged against the defendant do constitute such a reasonable user. In the present cases there was evidence that the lane in one case and the street in the other case were being used for the carrying on by the defendants of betting in such a way as to bring about varying degrees of congregation of persons. It was open to the magistrate upon the evidence in these cases to find that there was an obstruction, in the case of Schubert by the congregation of a substantial number of persons, and in the case of Morris by a series of persons dealing with Morris over a substantial period of time. In Morris' case he was not required to suppose that the placing of both motor cars in relation to the seat on the roadway was accidental and was a coincidence occurring as a result of the proper and reasonable user of the highway by the respective drivers who left them there. The presence of the defendant carrying on his trade in an area already so conveniently obstructed was said to add in no way to the obstruction. But the magistrate was entitled to take a realistic, not to say common-sense, view of the arrangement consisting of the cars, of the seat and of the defendant, betting in the supposed Alsatia so created. The offence, it should be carefully observed, is not betting in a lane or street, but obstructing the free passage of traffic therein. Carrying on a trade or vocation in a street is to make a use of it foreign to the purpose of a highway, and that is the relevance of the betting. An interference with the free passage of potential users of the street caused in such a manner amounts to an obstruction.

In our opinion the decision of the Full Court was right and the applications should be refused.

Schubert v. *Lee*. *Application dismissed with costs.*

Morris v. *Lee*. *Application dismissed with costs.*

Solicitors for the applicants, *Dwyer & Thomas*.

Solicitor for the respondent, *G. B. d'Arcy*, Crown Solicitor for Western Australia.