

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of  
Kelly v. Hart, from the Supreme Court  
of New South Wales; delivered the 2nd  
December, 1909.*

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Present at the Hearing :

LORD MACNAGHTEN.

LORD ATKINSON.

LORD COLLINS.

LORD SHAW.

SIR ARTHUR WILSON.

[*Delivered by Lord Collins.*]

The Appellant in this case is a sub-inspector of police in the Metropolitan Police District of the State of New South Wales. The Respondent was and is the lessee of the refreshment rooms at the new railway station at Sydney in that State. By Section 61 of the Police Offences Act, 1901, of New South Wales, it is enacted as follows :—

Whosoever trades or deals or keeps open any shop, store or other place for the purpose of trading or dealing on Sunday [with certain exceptions not material to the present question] shall be liable to a penalty not exceeding £3.

The information alleged that on Sunday, the 29th March, 1908, one Philip Hart did trade at the railway refreshment rooms, Sydney Railway Station, in the Metropolitan Police District, in the State of New South Wales, by selling cigarettes,

[54] P.C.J. 163.—L. & M.—100—6/11/09. Wt. 98.

The Defendant pleaded not guilty, and the Magistrate, after hearing the parties and the evidence adduced by them, dismissed the information, but at the instance of the Informant stated a Special Case, setting out the evidence for the opinion of the Supreme Court.

The main point made for the Defendant was that the Sunday trading clauses of the Police Offences Act, 1901, do not bind the Crown, that the Railway Commissioners were in the same position as the Crown, and that the Defendant, in doing what he had done, was acting in accordance with the terms of the lease from the Commissioners, and was therefore protected.

It appeared, however, from the lease, a copy of which formed part of the case, that it was given subject to certain conditions annexed thereto, one of which was as follows :—

12. The refreshment room shall be kept open at all times required by the Commissioners, and refreshments supplied on demand to all persons arriving or departing by train at any time during the day or night.

The lease, therefore, does not contemplate, or provide for, the supply of refreshments to persons other than actual or intending passengers. The Defendant, therefore, in admitting a *prima facie* breach of a general prohibition such as that of the Police Offences Act, 1901, must accept the onus of proving that he comes within an exception if he relies upon one to the general liability (see the cases collected in Roscoe's Digest, last edition, vol. I., at p. 95). Here he failed to give any evidence to prove that the person to whom he sold the cigarettes was an actual or intending passenger. The Judges who heard the case on Appeal to the Supreme Court differed in opinion. Simpson, J., was rather inclined to think that the statute which prevented trading on Sunday

bound the Crown, but thought it unnecessary to decide that question in the special circumstances. Assuming that the Commissioners were entitled to open refreshment rooms on Sunday as a necessary adjunct to their railway station, he questioned whether it could be considered a necessary adjunct to their railway station if it was used for the purpose of supplying the general public. He thought that Hart, as the servant of the Commissioners, was authorized by them to sell refreshments, not to the general public, but to persons arriving or departing by train. He was therefore of opinion that the Magistrate should have convicted, and that the case should be remitted to him with the expression of that opinion. Street and Sly, JJ., agreed in all points with the contention of the Defendant. Their Lordships agree with the view expressed by Simpson, J., and, like him, they refrain from giving any opinion on the question whether or not the Sunday trading clauses of the Police Offences Act, 1901, are binding upon the Crown.

Their Lordships will therefore humbly advise His Majesty that the Appeal be allowed, and that the case be remitted to the learned Stipendiary Magistrate to be dealt with in accordance with this opinion.

Each party will bear his own costs of this Appeal.

