

1951, July 16, August 1. Supreme Court, Wellington. Fell J.

Statute — Construction — “Publish” — Whether includes “Distribute” — Effect of subsequent Amendment—Waterfront Strike Emergency Regulations 1951, Regulation 4 (d).

The respondent was charged with an offence under Regulation 4 (d) of the Waterfront Emergency Regulations 1951, the material words of which were:

“4. Every person commits an offence against these regulations who (d) prints or publishes any statement or other matter likely to encourage the continuance of a declared strike.”

The Magistrate held that though the respondent had distributed a pamphlet likely to encourage the continuance of a declared strike, this did not amount to “publishing” it under the regulation, and dismissed the information. A further regulation (1951/100) was then gazetted amending Regulation 4 (d) by inserting after the word “publishes” the words “or distributes or delivers to the public or to any person or persons or causes to be printed or published or distributed or delivered as aforesaid.” On appeal by the informant

HELD—(1) That the subsequent amendment could be looked to in order to see the proper construction to be put upon the word “publish”, which was ambiguous in the original regulation.

Attorney-General v. Clarkson (1900, 1 Q.B. 156); *Cape Brandy Syndicate v. Inland Revenue Commissioners* (1921, 2 K.B. 403); and *Ormond Investment Co. v. Botts* (1928, A.C. 143) followed..

(2) That the amendment showed an extension of the scope of the original regulation, and in the light of this the original regulation should be interpreted as limited to publication in the popular sense and not as covering distribution.

(3) That in any event, if the original regulation be looked at alone, it referred to printing or publishing; if distributing also was to be an offence the regulation should have expressly said so.

Cunningham for appellant.

Arndt for respondent.

FELL J.—This is an appeal by the informant on a Case Stated against the refusal of the learned Magistrate at Wellington to convict the respondent on an information that he did publish a statement to wit a pamphlet entitled “Workers!!!” likely to encourage the continuance of a declared strike contrary to the provisions of the Waterfront Strike Emergency Regulations 1951, Regulation 4 (d).

The facts as to the “publication” of the pamphlet found by the learned Magistrate were as follows:

“That on the 17th day of April, 1951, the respondent handed to a constable in plain clothes on a public street a pamphlet entitled “Workers!!!”. That subsequently the said constable in company with another constable followed the respondent (defendant) to in front of a factory where he was seen showing the pamphlet to several workmen from the factory and later when accosted by the two constables he admitted that he had distributed some pamphlets to persons in the City of Wellington. When arrested he was found to have in his possession some thirty-two copies of the pamphlet and he stated that he had originally had fifty copies of same.”

The learned Magistrate found that while it had been established that on the 17th April, 1951, there was a declared strike existing on the waterfront in

New Zealand, which strike came within the Waterfront Strike Emergency Regulations 1951, and while the pamphlet was one likely to encourage the continuance of the declared strike, the act of the respondent in distributing the pamphlets did not amount to publishing the same within the meaning of Regulation 4 (d) of the Waterfront Strike Emergency Regulations 1951, and he therefore dismissed the information.

The material words of the regulation are:

“4. Every person commits an offence against these regulations who—

(d) Prints or publishes any statement . . . or other matter . . . likely to encourage . . . the continuance of a declared strike.”

The regulations do not contain any definition of “prints or publishes”. Since the information was dismissed by the learned Magistrate a regulation (1951/100) dated 1st May, 1951, has been gazetted which amends Regulation 4 (d) by inserting after the word “publishes” the words

“or distributes or delivers to the public or to any person or persons or causes to be printed or published or distributed or delivered as aforesaid.”

The short question for determination by this Court is: Did the acts of the respondent in distributing the pamphlet amount to “publishing” it under the regulation before it was amended?

According to the Oxford Dictionary, to publish has a number of different shades of meaning, the primary one being “to make publicly or generally known, to declare openly, to tell or noise abroad”, and as a fourth (special) meaning the authors give:

“to issue or cause to be issued . . . to the public, said of an author, editor or of a professional publisher” and (b) “to make generally accessible or available, to place before or offer to the public.”

In various branches of the law the word “publish” has different meanings and uses, and publication is accomplished in a variety of ways according to the subject matter. A person, to be liable for libel, either civilly or criminally, must “publish” the libel, i.e., deliver or exhibit it to someone, and it matters not whether deliverer or exhibitor was the author of the libel or not. A book is published when it is surrendered by its author to public use. A testator “publishes” his will when he executes it before two attesting witnesses; an arbitrator publishes an award, and the word is used with different shades of meaning in the law relating to copyright and patents.

The Printers and Newspapers Registration Act 1908, in section 6 creates as an offence selling or delivering apart from printing and publishing which is covered by section 4 and in section 22 a penalty is set out for everyone who wilfully sells, or delivers out or wilfully prints or publishes any unregistered newspaper, so that under that Act selling, delivering, printing and publishing may be different and distinct offences. Section 65 of the Statutes Amendment Act 1945, which substitutes a new section 19 in the Printers and Newspapers Registration Act, refers to printing, publishing and dispersing as though these were separate or different acts.

The Indecent Publications Act 1910, sec. 10, creates separate and distinct offences (a) for selling,

(b) printing, (f) publicly exhibiting, (g) delivering to any person, (h) delivering on occupied premises any indecent document; and sections 4 and 5 refer, amongst other things, to publishing newspapers with indecent matter as an offence.

On these differing uses of the word “publish”, which is to be adopted in interpreting the word as used in the original Waterfront Strike Emergency Regulations? Mr. Cunningham submitted that the intention of the regulation was to prevent both printing and distributing, that in the ordinary grammatical plain meaning what was done by the respondent was publishing, and that the best guide to take was the common law meaning given to publishing a criminal libel. On the other hand, Mr. Arndt submitted “publish” as used in the regulation did not cover “deliver” or “distribute”; that in ordinary parlance a newspaper boy when selling a daily newspaper in the street would not be guilty under the regulation of publishing the contents of the newspaper; that the regulation was highly penal and if the word was of doubtful significance the doubt should be resolved in favour of the subject; that there was no more reason to interpret the word in accordance with the meaning given to it by the law of libel than by the law relating to the printing, publishing and distributing of daily newspapers or indecent documents; and finally that the legislating body, in this case the Governor-General in Council, had adopted and accepted the learned Magistrate’s interpretation that “publish” in the regulation did not include “distribute” by amending the regulation to expressly make it do so. Mr. Cunningham replied to this latter argument that the original regulation should be interpreted as at the date of the information and that if the amendment could be looked at there was no more reason to say that its passing indicated agreement with the Magistrate’s interpretation than that it was passed “*ex abundanti cautela*”.

If respondent’s counsel is right in his last submission, that ends the appeal in his favour. In support of this proposition he relied on the following cases: *Attorney-General v. Clarkson* (1900, 1 Q.B. 156); *Cape Brandy Syndicate v. Inland Revenue Commissioners* (1921, 2 K.B. 403); and *Ormond Investment Co. v. Betts* (1928, A.C. 143). The two last of these cases are cited by the learned author of the 9th edition of *Maxwell on the Interpretation of Statutes* (at p. 314) as authority for the proposition that “subsequent legislation on the same subject may be looked into in order to see what is the proper construction to be put upon an earlier Act”, and at p. 316, “Where it is gathered from a later Act that the Legislature attached a certain meaning to certain words in an earlier cognate Act this would be taken as a legislative declaration of its meaning”. These two last cases arose under a series of complicated English Taxing Acts, and do not afford examples of a simple amendment as in the present appeal, but it seems to me that the following passage at p. 414, from the judgment of the Master of the Rolls Lord Sterndale in the *Cape Brandy Syndicate* case, lays down a general principle of construction:

“I think it is clearly established in *Attorney-General v. Clarkson* that subsequent legislation on the same sub-

ject may be looked to in order to see what is the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier."

This passage was approved in the House of Lords in the speech of Lord Buckmaster at p. 156 in the *Ormond Investment Co. case*. Lord Buckmaster's was a dissenting opinion in that case, but not on that point. Callan J. cites with approval the above quotation in support of the argument that a statute *in pari materia* with an earlier one may be looked at to clear up any ambiguity in the earlier one: see his judgment in the Court of Appeal in *Sluggish River Board v. Oroua Board* (1944, G.L.R. 177, at p. 183; 1944, N.Z.L.R. 445, at p. 457), where he refers with apparent approval (without deciding this question) to the view of Smith J. on this point.

If I look at the later amendment, in my opinion this shows not an abundance of caution but an extension of the scope of the original regulation, and in the light of this I should interpret the original regulation as limited to publication in the popular sense and not as covering distribution.

If I am wrong in interpreting the original regulation with the aid of the amendment and look at it alone, must I hold that the intention was to give to the word "publish" as used in the regulation the meaning "to distribute or deliver"?

Even though the regulation is penal, it is to be given such fair, large and liberal construction as will best ensure the attainment of its objects, but its objects must be gathered from reading the words used and so reading them I am not satisfied that the respondent, who only distributed the pamphlets, can be convicted of the offence charged. The regulation refers to printing or publishing; if distributing also was to be an offence, in my opinion the regulation should have expressly said so.

The appeal is dismissed with costs to the respondent £7 7s.

Solicitors: for appellant: W. H. Cunningham, Crown Solicitor, Wellington; for respondent, C. J. O'Regan & Arndt, Wellington.