the benefit of the defendant, yet in neither case it is stated or implied that the prior order is a condition of jurisdiction; and so accepting the standard laid down in *Lloyd's Case* (1), and being unable to distinguish in effect the material facts of the two cases, I agree that this appeal should be dismissed.

RICH J. I agree.

Appeal dismissed with costs.

Solicitor, for the appellant, *H. C. G. Moss.*
Solicitor, for the respondents, *E. A. Roberts.*

B. L.

(1) (1907) 2 K.B., 727.

[HIGH COURT OF AUSTRALIA.]

SPENCE . . . . . APPELLANT;
COMPLAINANT,

AND

RAVENSCROFT . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1914. SYDNEY, *Aug.* 13, 14, 17. Griffith C.J., Isaacs, Gavan Duffy and Rich JJ.

Sunday Trading—Transaction not involving human labour—Goods obtained from slot-machine—Police Offences Act 1901 (*N.S.W.*) (*No.* 5 *of* 1901), *sec.* 61.

Sec. 61 of the *Police Offences Act* 1901 provides that "Whosoever trades or deals, or keeps open any shop, store, or other place, for the purpose of trading or dealing on Sunday (the shops or houses of butchers, bakers, fishmongers, and greengrocers, until the hour of ten in the forenoon, and of

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bakers, between the hours of one and two in the afternoon, and of apothecaries at any hour, only excepted), shall be liable to a penalty not exceeding three pounds."

Held, by *Griffith* C.J. and *Gavan Duffy* and *Rich* JJ. (*Isaacs* J. dissenting), that no offence within that section is constituted unless something is done by the alleged offender which involves human labour or attention on Sunday.

Held, therefore, that where goods were obtained on a Sunday from a slot-machine belonging to the defendant by a person who placed money therein, an information against the defendant for trading on Sunday was properly dismissed.

Decision of the Supreme Court of New South Wales (*Ferguson* J.): *Spence* v. *Ravenscroft*, 30 W.N. (N.S.W.) 201, affirmed.

APPEAL from the Supreme Court of New South Wales.

At the Sydney Water Police Court an information was heard by a stipendiary magistrate by which James Spence, the complainant, charged that on Sunday, 19th October 1913, the defendant Lionel Bebington Ravenscroft did, on board the steamship *Balgowlah*, belonging to the Port Jackson and Manly Steamship Co. Ltd., in the harbour of Port Jackson in the Metropolitan Police District, trade by selling cigarettes. On the hearing there was put in evidence an agreement between the defendant and the shipping Company, by which the Company agreed to place a certain number of penny-in-the-slot machines belonging to the defendant upon each of seven of the Company's steamships, including two upon the *Balgowlah*, for a period of twelve months from 17th September 1913, with an option of renewal, and the defendant agreed to pay to the Company £60 per annum for the privilege. A constable of police gave evidence that on Sunday, 19th October 1913, he went on board the *Balgowlah* and saw there a penny-in-the-slot machine with directions printed thereon for obtaining cigarettes from it; that he placed threepence in the slot of the machine, pulled the slide, and received a packet of cigarettes from it; and that he saw several other passengers obtain cigarettes in a similar manner.

The magistrate held "that the machine, being an inanimate thing, could not be considered to be the defendant's agent, and that as no personal service was rendered by any person the defendant could not be convicted of the offence of trading as

charged." He then, on the complainant's application, stated a case for the opinion of the Supreme Court, the question being whether his decision was erroneous in point of law.

Ferguson J., before whom the appeal was heard, affirmed the magistrate's decision and dismissed the appeal: *Spence* v. *Ravenscroft* (1).

From that decision the complainant now, by special leave, appealed to the High Court.

Alec Thomson, for the appellant. The word "trade" in sec. 61 of the *Police Offences Act* 1901 imports the buying and selling of goods. The respondent, by leaving the machine in working order where the public had access to it, made a continuous offer to anyone who might accept it. There is no doubt that where a person obtained cigarettes from it on a Sunday a contract would be made on a Sunday, and therefore the respondent traded on a Sunday. The word "trade" is wide enough to include trading by an agent, and there is no difference between an animate and an inanimate agent in a case of this kind. This section was passed after the decision in *Ex parte Rogerson* (2), in which the words "trade or deal" in sec. 10 of 4 Will. IV. No. 7 were held to mean buy or sell goods, wares or merchandise. Sec. 61 of the *Police Offences Act* 1901 is substantially the same as that section, and, therefore, the same meaning should be given to those words in sec. 61. [He also referred to *Attorney-General* v. *Edison Telephone Co. of London* (3).]

[RICH J. referred to *McKenzie* v. *Day* (4); *Palmer* v. *Snow* (5).]

Curtis (with him *Maxwell*), for the respondent. There is no difference in principle between this case and the supply of gas or electricity by means of a slot-machine which is used on a Sunday. What the respondent has done is, at most, to supply opportunities for trading on Sunday, and that is not an offence against sec. 61. The object of that section is to prevent labour on Sunday, and there must be a personal act on Sunday on the part of the

(1) 30 W.N. (N.S.W.), 201.
(2) 9 N.S.W.L.R., 30.
(3) 6 Q.B.D., 244.
(4) (1893) 1 Q.B., 289.
(5) (1900) 1 Q.B., 725.

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defendant. [He referred to *Sandiman* v. *Breach* (1); *Walker* v. *Solomon* (2); *Wilkinson's Australian Magistrate*, 7th ed., p. 1106.

Alec Thomson, in reply.

Cur. adv. vult.

August 17. The judgment of GRIFFITH C.J. and GAVAN DUFFY and RICH JJ. was read by

GRIFFITH C.J. *Primâ facie* a law creating an offence imports a personal act or omission on the part of a human actor. If the day on which the act is done, or omission is made, is material, it imports a personal act or omission on that day. A person may, of course, be responsible for the conduct of his agents. The subject matter of the law or context of the enactment may require a larger construction. In this case there is no such context. As to subject matter the history of the legislation as to Sunday observance shows that it is all directed to personal conduct on that day. The provision now in question is one dealing with that subject, and not with trade in general.

We think that the word "trades" is not used in sec. 61 in the wide sense of keeping a place of business open for trading, which is dealt with by the succeeding words of the section, but is limited to personal acts done on Sunday in the nature of trading.

For these reasons we agree with *Ferguson* J. that there is no offence under this section of the Act unless something is done which involves human labour or attention on Sunday.

We offer no opinion on *Rogerson's Case* (3), which was decided under a different Statute.

ISAACS J. read the following judgment:—The question for the consideration of the Court is whether a transaction which would undoubtedly be "trading or dealing" on a Monday is or is not "trading or dealing" if it happens on a Sunday. I think it is, because I cannot see that the day of the week affects the nature of the transaction. The answer to this apparently simple

(1) 7 B. & C., 96.

(2) 11 N.S.W.L.R., 88, at p. 104.

(3) 9 N.S.W.L.R., 30.

question is of interest, not merely to New South Wales, but to other States also, for Victoria, Queensland and Western Australia at least have passed similar legislation. The matter consequently demands careful examination.

So far as New South Wales is concerned, sec. 61 of the *Police Offences Statute* 1901 has a history. Both the history and the language of the section appear to me to support the appellant's view. The former affects this State alone; the latter applies also to other States, because of the close resemblance of the terms of their several enactments.

In 1833, the New South Wales legislature passed an Act (4 Wm. IV. No. 7, sec. 10) requiring that the "justices shall as far as in them lies cause the Lord's Day to be duly observed by *all persons* in the said town and port" of Sydney, and then went on to enact that they should "not permit or suffer any house shop or store or other place therein to be open on that day for the purpose of trade or dealing," with certain exceptions, and it concluded by saying that "any person who shall trade or deal or keep open any shop store or other place (except as aforesaid) for the purpose of trade or dealing on the Lord's Day" should be subject to a penalty.

In 1888 the Full Court of New South Wales were called on to interpret this Act in *Ex parte Rogerson* (1), a case of selling newspapers in the street. Now, although it is true that at that time slot-machines or other mechanical contrivances were not in use, and therefore no question of inanimate instrumentalities could present itself to the mind of the Court, the learned Judges had to lay down, and they did lay down, as the basis of their decision a fundamental principle.

Windeyer J., who dissented from the judgment of the Chief Justice (Sir *Frederick Darley*) and *Owen* J., did so on one ground only. He thought the key to the section was in the "prohibition against keeping shops, &c., open," and that trading or dealing was only guarded against as a secondary consideration. The majority of the Court, on the contrary, thought that "trading or dealing" was itself the matter aimed at as objectionable on Sunday, that the observance of the day as required by Parliament was the

(1) 9 N.S.W.L.R., 30.

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abstinence by all traders and dealers, buyers and sellers alike, from trading and dealing with the exceptions permitted, and that the offence of keeping open shops, &c., for the purpose of trading or dealing was inserted in order to effectuate the other and principal object, namely, cessation of "trading and dealing."

Sir *Frederick Darley* (1) said the legislature "used words large enough to stop all trading and dealing in Sydney on that day." And by "trading or dealing," said the learned Chief Justice, "I understand the *buying or selling of goods, wares, or merchandise.*" In other words, the view taken by his Honor was that the introduction of the reference to "shops &c." indicated that the trading or dealing struck at by the legislature was in commodities such as are commonly bought or sold in shops or stores, as, for instance, food, tobacco, newspapers, ironmongery, medicine, liquor, &c. Such a thing as turning on electricity or gas—suggested in argument by learned counsel for the respondent—is obviously outside the ordinary notion of trade or dealing in connection with shops and stores.

Sir *Frederick Darley* also pointed out that the Statute of Charles, which was aimed at personal labour, must have been deemed by the New South Wales Parliament to fall short of the desired means to ensure the due observance of Sunday with respect to the operations of trading and dealing, and this was one of the considerations on which he founded his judgment. The Court thereby *rejected the notion that personal labour was the dominant note of the section.*

Owen J. agreed with the Chief Justice, and said (2) "the Court should construe the words 'trade or deal' in the wide sense of traffic in commodities." In other words, the thing itself, the "traffic in commodities" as ordinarily understood, was struck at by the legislature, and not any special means of conducting it.

Even *Windeyer* J. takes this wide view of the words "trade or deal," because he says (3) "the object of this section being to stop trading in shops on Sunday," and he very properly appreciates (4) that "the Court is doubtless not to legislate but to interpret; but it never can be safely interpreting the meaning of

(1) 9 N.S.W.L.R., 30, at p. 34.
(2) 9 N.S.W.L.R., 30, at p. 43.
(3) 9 N.S.W.L.R., 30, at p. 37.
(4) 9 N.S.W.L.R., 30, at p. 41.

an Act of Parliament if it can only interpret by doing violence to the ordinary meaning of words."

His understanding of the majority decision is shown on p. 41, where he says "if the Court holds . . . . that trading or dealing only means the buying of goods, wares, and merchandise." The words "or selling" have by accident been omitted, as is apparent from the line preceding the passage quoted.

In a later case in the same volume, *Sydney Newspaper Co.* v. *Muir* (1), where *Rogerson's Case* (2) was cited, *Windeyer* J. says of the Statute then in force, it "forbids the *sale* of wares or merchandise in a shop on Sunday." The case had to do with the question of sale over the counter. But it is the "sale," and not merely the mode of sale.

Then in 1901, with this judicial declaration of the meaning of the section before it, Parliament passed sec. 61, now under consideration. In my opinion, following well known principles of interpretation, this re-enactment was an adoption of the *ratio decidendi* of the majority in *Ex parte Rogerson* (2), and an endorsement of the principles underlying the Act.

Now, as to the language of the section and its interpretation apart from any previous decision, *Ferguson* J. says (3), and I agree with him, "there can be no doubt that the transactions by which the cigarettes came into possession of the purchasers constituted trading by the respondent. From the time the goods were put into the machine they were being continually offered for sale, and when the offer was accepted by a purchaser paying the price in the manner stipulated by the vendor, there was a complete contract of sale." His Honor goes on to say that, "regarded in its contractual aspect, it was trading on Sunday, and trading by him" (the respondent). That is, it was within the ordinary meaning of the words.

This was questioned in the course of the argument, because, as it seems to me, if that point is reached it is the end of the matter, because the event mentioned in the Act is fully satisfied.

An authority for this position is *Saunders* v. *Thorney* (4), decided by Lord *Russell of Killowen* and *Channell* J. Liquor

(1) 9 N.S.W.L.R., 375, at p. 381.
(2) 9 N.S.W.L.R., 30.
(3) 30 W.N. (N.S.W.), 201.
(4) 78 L.T., 627.

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was bought and paid for, and was to have been delivered on Saturday night. By mistake it was not delivered that night. Next morning the purchaser sent for it, and received it. The hotel-keeper was held guilty of "opening his premises for the sale" of the liquor, on the sole ground that there had been no appropriation of the liquor, and therefore no delivery before the Sunday, and as a material part of the contract was, according to the ordinary civil law, performed on Sunday the house was opened for the purpose of sale. The contractual result was the test of the offence. In the present case, not only the delivery but the whole transaction from beginning to end took place on the Sunday.

It was suggested in this case during the argument, and is adopted by the majority of the Court, as one reason for non-application of the section, that the only act attributable to the respondent himself was the filling of the machine prior to Sunday, and that whatever took place afterwards was not his act in law, because it was said it is a primary principle in criminal law that a crime must be committed personally. Now, if that is not accurate as to more serious crimes, it cannot be so as to an offence of this kind.

As I understand the law on this point, it is this. A principal in the first degree is the actual offender. If the culpable human agent of a person instigating him is alone the actual perpetrator, he, the agent, is the principal, and the person who instigated him is not, as the last *mens rea* preceding the crime was not that of the instigator: *R* v. *Manley* (1). But if the intermediary, that is, the actual perpetrator, be innocent—as, for instance, a child, or a lunatic, or an unsuspecting person doing what is, on the facts as he believes them to be, a lawful act, or an animal trained for the purpose (see *Kenny's Outlines of Criminal Law*, p. 85)—the instigator is himself the principal, and the unlawful act is his in point of law, as it is his morally: *R.* v. *Michael* (2); *R.* v. *Butcher* (3), and other cases. And the reason such an act is held to be the act of principals is stated in *R.* v. *Brisac* (4) to be this, that innocent intermediaries are "mere *instruments* in their hands for that purpose."

(1) 1 Cox, 104.
(2) 9 C. & P., 356, at p. 358.
(3) Bell C.C., 6, at p. 18.
(4) 4 East, 171, at p. 172.

It is therefore apparent that the circumstance which the stipendiary magistrate thought exonerated the respondent is the conclusive fact against him. Here the intermediary used is actually an inanimate "instrument"; and no possible doubt can exist in my opinion that the act of selling on Sunday was both legally and morally the act of the respondent.

But if the transaction, as proved, is trading or dealing as ordinarily understood, and as understood by the law itself in civil transactions, and if both in fact and law it is attributable to him personally, and if, further, it is trading and dealing in commodities such as are ordinarily bought and sold in shops—what other reason exists for exemption?

Well, the next reason given is that it is not shown he or his human agent did any personal act on Sunday. *Ferguson* J. says there was no human agent in connection with the trade. His Honor means, of course, the seller's agent. There was a human agent present in connection with the trade on the purchaser's side; and that disturbs the Sunday rest from trade. But looking at it from the seller's side first—unless we are to act the part of legislators and not merely judicial interpreters, we are not at liberty, in my opinion, to introduce any such qualification. If we simply ask ourselves, not what are the words the legislature intended to use but what is the fair meaning of the words they actually did use, there is no room for such a qualification. The section simply says in effect: "Do all your trading and dealing—such as is done in shops &c.—on six days in the week, and abstain from it on the seventh." Whatever would be trading or dealing on the other days cannot, as it seems to me, fail to be just what is forbidden on the Sunday. Without going outside the section there are no words to justify the qualification; and, if we go outside them at all, the original preamble to the earlier Act, especially as interpreted in *Ex parte Rogerson* (1), is point-blank against it.

But if not, let us for consistency sake see what becomes of the whole section. The principle invoked—namely, the requirement of the personal labour of the respondent himself or his agent—would, if consistently adhered to, destroy the whole section.

(1) 9 N.S.W.L.R., 30.

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And that in more ways than one. Suppose the owner of the shop employed an agent, a conscious, non-innocent agent. The agent, no doubt, would be liable. But as he is a consciously guilty offender, is the principal also guilty? Undoubtedly so, I should say in a case of this kind, because in law the act of the agent was done by his authority: *Commissioners of Police* v. *Cartman* (1). If that were not so the evasion would be easy. But if the authority so given was given, say, on Saturday—what act of personal Sunday labour has been performed by the principal? Clearly none. If he is liable it must necessarily be because his own personal labour is not essential. Thus it comes to the further refinement, not, as argued, that the man, himself the principal, is to have an opportunity for religious exercise, but because his conduct involves someone else's labour on that day, inasmuch as human labour of anyone on that day is inimical to Sunday observance. But if so, why is he not liable if it involves the personal labour of the purchaser or the purchaser's servants in coming to the machine, which may be one for selling not merely cigarettes but liquor, or indeed almost any ordinary portable article of merchandise, and in carrying it away. From the standpoint of the community the mischief is the same. That refinement also must then be discarded as a principle.

The matter may perhaps be more vividly brought home to the mind by recollecting that traders and dealers are purchasers as well as sellers, and some are purchasers in their own shops and stores. Suppose, then, such a trader or dealer provides a machine or other receptacle for regularly receiving goods—as bread, fish, meat, clothing and so on—with perhaps an account for them, payment being made by him subsequently. Can it really be said that, notwithstanding he is personally absent and needs no human agent present, he is not flagrantly offending against the Act, both its words and its spirit, by inducing labour on the part of the seller and his servants, and breaking down effectually the very wholesome law for public rest? He is "trading and dealing." And, if so, the supposed essential of human labour on his part disappears.

But further still, what becomes of the second part of the

(1) (1896) 1 Q.B., 655.

enactment, as to keeping open the shop, &c.? It is incontestably clear that if the section is hitting only at acts involving actual Sunday labour on the part of the seller or his servants, that principle must apply to every act mentioned in both parts of the section with equal force. If the principle is fundamental, it must permeate the whole enactment. Thus, according to that, a man does not "keep open" a shop or place within the meaning of the Act, notwithstanding the ordinary meaning of the words, unless he actually exerts Sunday labour in connection with keeping it open. If, therefore, a man at half-past eleven on Saturday night securely fastens up all his goods except in the case of automatic machines or other receptacles in which goods are placed for sale next day, he may leave his shop or other place wide open all Sunday, and yet not be guilty of keeping it open within the meaning of the section. And even if he could be said with any show of consistency to keep the place open, it would not be for the purpose of "trading or dealing" within the meaning of the Act, for if selling automatically is not trading or dealing within that meaning, then the keeping open the shop for automatic selling is not for the purpose of "trading or dealing," and that is the only purpose for which the section makes it an offence to keep the shop open at all. Otherwise a man would be liable if he opened the shop simply to walk through to church.

We must at least give Parliament the credit of attaching the same meaning to "trades and deals" in the first line of the section as it does to "trading and dealing" in the second.

Now, if there can with impunity be one automatic machine in the smoking saloon of the *Balgowlah* there can be fifty, and if in a fixed place in the smoking saloon of the *Balgowlah*, then on land, in a shop or house or other place which would be not more a "place" within the meaning of the Act than the "place" in the present case. The automatic machines may work most energetically and profitably selling cigarettes and receiving money all day Sunday for their proprietor, and yet he is not "trading or dealing" in cigarettes.

If the last cigarette inserted on Saturday night were sold at 10 o'clock on Sunday by the machine, it would not be trading; but if he were then to replenish the machine at 10.30 and go

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away and a cigarette were sold automatically at 6 in the evening in his absence, it would be trading.

On the whole I see all sorts of inconsistencies in introducing judicially a test the legislature has not thought fit to insert, and I see also a great danger of breaking down a law that by common Australian sentiment has been enacted for general rest on Sunday. And it seems to me that with equal propriety the same idea could be applied to all Sunday liquor laws. I adhere to the plain and simple words of the text giving them their ordinary meaning, the meaning attached to them over thirty ago by Sir *Frederick Darley*, *Windeyer* J. and *Owen* J., and since ratified, as I think, by Parliament.

In my opinion the appeal should be allowed.

Appeal dismissed with costs.

Solicitor, for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for the respondent, *Mark Mitchell & Forsyth.*

B. L.

Dist *Xebec Pty Ltd (in liq) v Enthe Pty Ltd* 18 ATR 893

Cons *Lean v Comrs of the Rural & Industries Bank Ltd* (1991) 5 ACSR 455

[HIGH COURT OF AUSTRALIA.]

LOXTON . . . . . APPELLANT;
DEFENDANT,

AND

MOIR . . . . . RESPONDENT.
PLAINTIFF,

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SYDNEY, *May* 18, 19, 20; *Aug.* 6.

Griffith C.J., Isaacs, Gavan Duffy and Rich JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Trustee—Appointment of new trustee—Vesting of property in new trustee—Legal choses in action—Right of action on guarantee—Trustee Act 1898 (*N.S.W.*) (*No.* 4 *of* 1898), *sec.* 6.