H. C. OF A. 1928.

GRAMOPHONE CO. LTD. v. LEO FEIST INCORPORATED.

KNOX C.J. The appeal will be dismissed with costs.

Appeal dismissed accordingly.

Solicitors for the appellant, *Arthur Robinson & Co.*

Solicitors for the respondent, *Westley & Dale.*

[HIGH COURT OF AUSTRALIA.]

DYER . . . . . APPELLANT;
DEFENDANT,

AND

LUCKETT . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1928.

SYDNEY, *Aug.* 9, 23.

KNOX C.J., ISAACS, HIGGINS, GAVAN DUFFY AND STARKE JJ.

Local Government—Proclamation—Residential district—Prohibition of use of buildings for purposes of trades—"Trades described in the proclamation"—General description—Insufficiency—Proclamation ultra vires—Local Government Act 1919 (*N.S.W.*) (*No.* 41 *of* 1919), *sec.* 309 (1).

By sec. 309 (1) of the *Local Government Act* 1919 (N.S.W.) "the Governor may . . . (*a*) declare by proclamation any defined portion of an area to be a residential district; . . . (c) prohibit the erection in such district of any building for use for the purposes of such trades . . . as may be described in the proclamation; and (*d*) prohibit the use of any building in the district for any such purposes."

Held, that the word "described" in sec. 309 (1) (*c*) requires that every trade intended to be included in the prohibition is to be expressly named in the proclamation, or otherwise specified; and, therefore, that, where a proclamation prohibited the use of any building in a residential district for the purposes of "any trade," the prohibition was invalid as the trades intended to be included were not "described" within the meaning of sec. 309 (1) (*c*).

Decision of the Supreme Court of New South Wales (*Campbell* J.): *Luckett* v. *Dyer*, (1927) 44 N.S.W.W.N. 110, reversed.

APPEAL from the Supreme Court of New South Wales.

The appellant, Walter Dyer, was proceeded against before a Stipendiary Magistrate in the Police Court at Hornsby upon an information by the respondent, Sydney Luckett, the health inspector of the Shire of Ku-ring-gai, which alleged that the Governor did by proclamation dated 30th June 1925 and published in the *Government Gazette* of 3rd July 1925 declare a certain area of the Shire to be a residential district and did thereby prohibit in such residential district the use of any building for the purposes of any trade, and that the defendant Dyer did between certain dates (specified) use a building situate in such residential district for the purposes of a trade, to wit the trade of a boot-repairer. The magistrate on 2nd June 1927 convicted and fined the defendant, and at the defendant's request stated a case for the opinion of the Supreme Court on the question whether the determination was erroneous in point of law—the ground of the defendant's contention that it was so erroneous being (so far as material) that the proclamation was beyond the powers conferred on the Governor by sec. 309 of the *Local Government Act* 1919 (N.S.W.).

The case stated was heard by *Campbell* J., who answered the question in the negative and dismissed the appeal: *Luckett* v. *Dyer* (1).

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

Griffin, for the appellant. In order to permit of a valid exercise of the powers conferred by sec. 309 of the *Local Government Act* 1919, all trades, industries, &c., sought to be prohibited must be particularized in the proclamation. Here there is a general prohibition, which does not meet the requirements of the section (*Stewart* v. *City of Essendon* (2)). The intention of the Legislature was to give power to preserve districts as residential areas. It is reasonable to exclude noxious trades, such as boiling-down works, but most unreasonable to exclude all trades and businesses indiscriminately so as to have the effect of prohibiting very ordinary and harmless occupations which do not cause a nuisance.

(1) (1927) 44 N.S.W.W.N. 110. (2) (1924) V.L.R. 219; 45 A.L.T. 167.

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DYER v. LUCKETT.

Hammond K.C. (with him *Miles*), for the respondent. The whole question is whether the prohibited trades, industries, &c., are described as required by the section. If the appellant's view were correct, it would often be impossible for a local governing body to take advantage of the section. If every trade, industry, &c., sought to be prohibited must be expressly described, it is possible that some trades, industries, &c., would be inadvertently omitted for want of proper description or want of knowledge. There are many ways in which a matter may be described, and so long as the persons concerned are sufficiently informed sec. 309 is complied with (*The Queen* v. *Justices of Penkridge* (1)). Suppose a council wishes to permit one business only, e.g., a dairy, and to exclude all others, it would be necessary for the council, if the appellant's contention is correct, to enumerate in the proclamation all trades, industries, &c., except that of a dairy, and it would not be sufficient to show specifically the permitted industry and to exclude all others in general terms. Unless a practical interpretation be given to the section it would be unworkable. In *Marsden* v. *Sutherland Shire Council* (2) *Scholes* D.C.J. held that a proclamation prohibiting the erection of " all shops used for trade " complied with the requirements of the section. Since that decision sec. 309 has been amended but the sub-section requiring that the prohibited trades, industries, &c., be described remained unaltered. This must be taken as an indication by the Legislature that *Scholes* D.C.J. had correctly interpreted the sub-section. The interests of the public, that is to say, of those persons who reside or propose to reside in the district, should be considered (*Attorney-General* (*ex relatione Lumley*) *and Lumley* v. *T. S. Gill & Son Pty. Ltd.* (3)).

Cur. adv. vult.

Aug. 23. The following written judgments were delivered :—

KNOX C.J., ISAACS AND GAVAN DUFFY JJ. The appellant was convicted on an information alleging that the Governor by proclamation dated 30th June 1925 did declare a certain area of the Shire of Ku-ring-gai to be a residential district and did thereby prohibit in

(1) (1892) 61 L.J. M.C. 132.
(2) (1923) 6 L.G.R. (N.S.W.) 96.
(3) (1927) V.L.R. 22, at p. 32; 48 A.L.T. 112, at p. 116.

such residential area the use of any building for the purposes of any trade and that the appellant used a building in such district for the purposes of a trade, to wit the trade of a boot repairer. At the request of the appellant the magistrate stated a case for the opinion of the Supreme Court on the question whether his determination was erroneous in law. The ground relied on by the appellant in support of his contention was that the proclamation of 30th June 1925 was beyond the powers conferred on the Governor by sec. 309 of the *Local Government Act* 1919. On the case stated *Campbell* J. held that the determination of the magistrate was not erroneous in law; and this appeal is brought by special leave from that decision.

Sec. 309 (1) of the *Local Government Act* 1919, so far as relevant, is in the words following: " The Governor may on the application of the council (*a*) declare by proclamation any defined portion of an area to be a residential district; . . . (*c*) prohibit the erection in such district of any building for use for the purposes of such trades, industries, manufactures, shops, and places of public amusement as may be described in the proclamation; and (*d*) prohibit the use of any building in the district for any such purposes." By the proclamation, so far as now relevant, the Governor declared the area in question to be a residential district and prohibited in such district " the erection of any building for use for the purposes of any trade, industry, manufacture, shop, or place of public amusement whatsoever, except recreation ground club-houses, and buildings appurtenant thereto," and further prohibited the use of any building for any such purposes. The question for decision is whether in this proclamation the trades for the purposes of which the use of any building in the district is prohibited are " described " within the meaning of sec. 309 of the Act. In our opinion this question should be answered in the negative. We think the provision of the Act that the trades, &c., shall be " described " in the proclamation requires that every trade intended to be included in the prohibition shall be individually dealt with. It must be mentioned by name in the proclamation, or otherwise indicated therein by the use of words by which it can be recognized or identified.

A prohibition of the use of a building for the purposes of " any " trade does not, in our opinion, " describe " the trades for the

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purposes of which the use of the building is prohibited. According to the *Oxford Dictionary* the ordinary current sense of the word "describe" is "to set forth in words, written or spoken, by reference to qualities, recognizable features, or characteristic marks; to give a detailed or graphic account of." Applying this definition we think the expression "any trade" cannot be treated as describing a particular trade.

In our opinion the appeal should be allowed, the order of *Campbell* J. discharged, and the question submitted by the case answered in the affirmative and the conviction quashed. The respondent must pay the costs of the proceedings in all the Courts.

HIGGINS J. In my opinion, this proclamation was invalid, and the appellant was not rightly convicted.

The power conferred, by sec. 309 of the *Local Government Act* 1919, on the Governor in Council by proclamation to prohibit the use of any building in the district for any such purposes—that is to say, "for the purposes of such trades," &c., "as may be *described in the proclamation*" is not exercised by a proclamation prohibiting the use of any building for the purposes of any trade whatever with specified exceptions. Under the Act, the public are entitled to know, by direct description, what specific kinds of trades are forbidden; and the trades forbidden are not "described" by describing other trades which are excepted from the prohibition, or "permitted." "Permitted" is the fit word used in the schedules A and B to the proclamation.

This distinction between prohibiting specified trades and permitting specified trades is by no means merely verbal; especially in a community which recognizes the natural liberty of every man to do as he pleases so far as he is not prohibited by law: *Libertas est naturalis facultas ejus quod cuique facere libet nisi quod jure prohibetur.* It by no means follows that because Parliament is willing to entrust to the Governor in Council—the Ministry of the day—the power to prohibit trades which he describes, it is willing to entrust to the Ministry the power to prohibit all trades, or all trades with an exception. The latter power would enable the Ministry to prohibit trades to which it had never directed its attention. Suppose a new kind of trade came into existence in the

district after this proclamation, and were carried on, however innocently, however noiselessly, however remotely from the public —suppose the trade of making radio-receivers or making microscopes —such a trade would be forbidden by this proclamation under the general words, although the Ministry has not addressed its mind to the suitability of such a trade to the residential district. The meaning of sec. 309 is that the Ministry must frankly state the trades which it prohibits, describing them, and take the responsibility for its choice. It is not for me to say that a power to prohibit all trades, or all trades with an exception, should be given: it is enough to say that it has not been given; and powers have to be strictly construed and strictly followed. There is no valid execution of a power if the conditions prescribed by the donee of the power are not satisfied by a literal and precise performance even if they seem to be unessential and unimportant except as being required by the donor of the power (see cases cited in *New South Wales* v. *Commonwealth* (1)).

On behalf of the appellant it is not urged that the particular building which is not to be used has to be specified; and I leave that matter open. The only points finally urged are that the proclamation is unreasonable and *ultra vires* because the trades to be prohibited are not described. I am glad to observe that *Campbell* J. in his judgment recognizes the objection of unreasonableness to be in truth an objection that the thing done is not within the ambit of the power (see *Widgee Shire Council* v. *Bonney* (2)).

I cannot find that any of the cases cited throw much direct light on the problem in this case; although, indirectly, the cases which show that a power to regulate does not involve a power to absolutely prohibit—such as *Municipal Corporation of the City of Toronto* v. *Virgo* (3)—seem to me to involve the principle which I have stated. But it may be noticed that, where prohibition of the use of a building *without permission* is intended by the Legislature, it is expressly given (sec. 316). Sec. 648 obviously does not cover this case.

I think that the appeal must be allowed and the conviction set aside.

(1) (1926) 38 C.L.R. 74, at p. 128. (2) (1907) 4 C.L.R. 977, at p. 989.
(3) (1896) A.C. 88.

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Starke J.

STARKE J. Under the *Local Government Act* 1919 of New South Wales the Governor in Council may, on the application of the municipal council, proclaim any defined portion of a municipal area to be a residential district, and may prohibit the use of any building in such district for the purposes of such trades, industries, manufactures, shops and places of public amusement as may be described in the proclamation (see sec. 309). In pursuance of these powers, the Governor in Council proclaimed the residue of Ku-ring-gai Shire (after provision for certain specified districts) as a residential district, and prohibited the use of any building in such residential district for the purposes of any trade, manufacture, shop or place of public amusement—except recreation ground club-houses and buildings appurtenant thereto.

The only question for determination is whether the all-embracing prohibition of *any* trade &c. (with the minor exceptions mentioned) falls within the power to prohibit the use of any building for the purposes of such trades &c. as may be described in the proclamation. Much as I am impressed by the reasoning of *Campbell* J. and the convenience of the method adopted in the proclamation, yet, in my opinion, the proper exercise of the power requires some specification or description in the proclamation of the trades prohibited thereby, and it is not enough to proclaim generally, as was done in this case, that all trades &c.—with a few minor exceptions—are prohibited. The provisions of sec. 309, sub-sec. 2, as amended by the Act of 1927, appear to me to support this view.

In my opinion, it would be wise for this Court to confine itself to the part of the proclamation attacked in this proceeding, and to refrain from attempting any very precise interpretation of the words " as may be described in the proclamation " found in sec. 309 of the *Local Government Act*.

The appeal should be allowed.

Appeal allowed. Order of Campbell J. discharged. Question submitted by the case answered in the affirmative and conviction quashed. Respondent to pay costs of all proceedings in all Courts.

Solicitor for the appellant, *N. L. R. Griffin.*

Solicitors for the respondent, *Dowling, Tayler, Macdonald & Walker.*

J. B.

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[HIGH COURT OF AUSTRALIA.]

KELLY AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

THE COUNCIL OF THE MUNICIPALITY OF WILLOUGHBY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1928.

SYDNEY, *Aug.* 9, 10, 23.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Local Government—Rates—Ratable land becoming not ratable—Refund of portion of rates paid—Time of operation of statute—Local Government Act 1919 (*N.S.W.*) (*No.* 41 *of* 1919), *secs.* 132 (1) (*h*), 139 (7), (9)—*Local Government* (*Amendment*) *Act* 1927 (*N.S.W.*) (*No.* 33 *of* 1927), *sec.* 7 (*h*).

By sec. 139 of the *Local Government Act* 1919 (N.S.W.), as amended by sec. 7 (*h*) of the *Local Government* (*Amendment*) *Act* 1927, it is provided that "(9) where land which was ratable becomes not ratable, part of the rate payable thereon proportionate to the period of the year during which the land is not ratable shall be refunded by the council."

Certain land which had been ratable and rated in 1927 prior to the passing of the amending Act, which came into force on 21st March 1927, became not ratable by virtue of par. (*h*) of sec. 7 of that Act.

Held, that the appellant ratepayers, who had paid the rate for the year 1927, were entitled to a refund of a proportionate part of the rate for that year as from 21st March 1927.

Decision of the Supreme Court of New South Wales (Full Court): *Kelly* v. *Council of Municipality of Willoughby*, (1928) 28 S.R. (N.S.W.) 213, reversed.