[HIGH COURT OF AUSTRALIA.]

LAND DEVELOPMENT COMPANY LIMITED Appellant; Plaintiff,

AND

PROVAN . . . . . Respondent. Defendant,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. of A. 1930.

Sydney, *Aug.* 4, 14.

Gavan Duffy, Rich, Starke and Dixon JJ.

Sunday Observance—Sale of land—Contract made on a Sunday—By principal or agent—Enforceable—Sunday Observance Act 1677 (29 *Car. II. c.* 7), *sec.* 1.

Sec. 1 of the *Sunday Observance Act* 1677 provides that "noe tradesman, artificer workeman labourer or other person whatsoever shall doe or exercise any worldly labour, busines or worke of their ordinary callings upon the Lords day or any part thereof (workes of necessity and charity onely excepted)."

Held, that neither a company, nor its agent, selling land in subdivision, came within the provisions of the section.

Decision of the Supreme Court of New South Wales (Full Court) reversed.

Appeal from the Supreme Court of New South Wales.

The Land Development Co. Ltd. brought an action in the District Court against James Provan to recover an instalment of purchase-money, and interest, said to be due to it by the defendant in respect of the purchase of a block of land. The defence relied upon when the case came on for hearing was that the contract had been entered into by the defendant on the faith of an agreement made with or on behalf of the plaintiff Company that he would be provided with work that would enable him to pay for the land, and that no such work had been provided. The plaintiff Company acted in the

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matter through an estate agent named Jolly, who acted as its salesman, and in the course of his evidence the fact was disclosed that all the negotiations took place and the contract was signed on a Sunday, although it was dated as of the following day. Leave was then asked for to amend the defence by setting up the provisions of sec. 1 of the *Sunday Observance Act* 1677, but this was refused. The District Court Judge found a verdict for the plaintiff Company for the amount claimed.

The defendant appealed to the Full Court of the Supreme Court of New South Wales on the grounds, amongst others not material to this report, that he should have been allowed to set up the illegality of the transaction as an additional defence and that on the admitted facts the trial Judge should have held that the contract was voidable on the ground of illegality. In his statement of the case the District Court Judge stated that as to the claim that the contract, having been made on a Sunday, was illegal or void, nothing was put before him to show that the *Sunday Observance Act* applied to such a case, and he refused to allow an amended defence on that ground to be set up. As the contract and its setting were fully before the Court at the hearing, the Full Court was of opinion that, without any amendment of the pleadings, the trial Judge should have considered whether the transaction came within the provisions of the *Sunday Observance Act*, and should have pronounced on its legality. The Full Court held that it came within the Act, and allowed the appeal.

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

Further material facts appear in the judgment hereunder.

Maughan K.C. (with him *J. W. Shand*), for the appellant. Transactions relating to the sale of real estate do not come within the purview of the *Sunday Observance Act*. The Act is aimed at dealing with corporeal goods—goods, wares and merchandise—and has no connection with real estate. The Company has one estate, which it is selling to purchasers. The mere fact that the land was being sold in parcels does not make the Company a trader within the meaning of the Act. The Full Court was in error in holding that the Company carries on the business of buying and selling land, as there was no

evidence to show any buying of land by the Company. Neither the Company nor Jolly, the salesman, is a "tradesman" within the meaning of the Act. "Trade" and "tradesman" connote the bartering of chattels (see *The Oxford English Dictionary*, vol. x., Part I., pp. 223-225). The meaning of the term "tradesman" must be as at the time of the passing of the Act; which would be an even narrower interpretation than at the present time. The following occupations have been held not to be within the Act: that of a farmer (*R.* v. *Cleworth* (1)—*R.* v. *Silvester* (2)); that of a hairdresser (*Palmer* v. *Snow* (3)). The same principles apply whether it be a private individual or a company selling land. At the date of the Act a company owning land was practically unknown. *Ronald* v. *Lalor* (4) was rightly decided. Having regard to the conditions prevailing in 1677, Parliament could not have contemplated a position where a person or a company was buying or selling land: such a vocation was not in existence at that time.

Rooney and *Wright*, for the respondent. The evidence discloses that the business of the Company was that of selling land; the subject transaction was within the ordinary calling of the Company and, when negotiating the sale to the respondent, the agent Jolly was exercising his ordinary calling. The Legislature intended to prohibit the doing on a Sunday of all forms of work (*Fennell* v. *Ridler* (5)). The general words of the section point to "work" as being the element common to all (*Larsen* v. *Sylvester & Co.* (6); *Tillmanns & Co.* v. *S.S. Knutsford Ltd.* (7)). As to the application of the *ejusdem generis* rule, see *Anderson* v. *Anderson* (8) and *In re Ellwood* (9). The words "other person whatsoever" as appearing in sec. 1, construed in accordance with that rule, include a person or company selling land. If the section applied only to the persons specifically mentioned, the provisions of sec. 3 would not be necessary. The latter section exempts from the operation of the Act only those persons who are engaged in the dressing and selling of meat. A

(1) (1864) 4 B. & S. 927; 122 E.R. 707.
(2) (1864) 33 L.J. M.C. 79.
(3) (1900) 1 Q.B. 725.
(4) (1872) 3 A.J.R. 87.
(5) (1826) 5 B. & C. 406; 108 E.R. 151.
(6) (1908) A.C. 295.
(7) (1908) 2 K.B. 385; (1908) A.C. 406.
(8) (1895) 1 Q.B. 749.
(9) (1927) 1 Ch. 455.

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liberal interpretation should be given to the Act. It applies to persons who buy and sell (*Hawkey* v. *Stirling* (1)). The buying and selling should not be restricted to personalty. The agent is a workman within the meaning of the Act; which is sufficient to bring the transaction within its provisions.

Maughan K.C., in reply.

Cur. adv. vult.

Aug. 14. THE COURT delivered the following written judgment:—

The respondent, on a Sunday, entered into a contract with the appellant Company to purchase from it an allotment of land, and the question for decision is whether the contract cannot be enforced against him by reason of the provisions of sec. 1 of the "Act for the better Observation of the Lords Day commonly called Sunday" (29 Car. II. c. 7). The more material parts of this provision are as follows: —"For the better observation and keeping holy the Lords day commonly called Sunday bee it enacted . . . that all the lawes enacted and in force concerning the observation of the Lords day . . . be carefully putt in execution. And . . . that noe tradesman, artificer workeman labourer or other person whatsoever shall doe or exercise any worldly labour, busines or worke of their ordinary callings upon the Lords day or any part thereof (workes of necessity and charity onely excepted) and that every person being of the age of fourteene yeares or upwards offending in the premisses shall for every such offence forfeit the summe of five shillings."

The appellant is a company which sells land in subdivision. Whether it was formed for the purpose of acquiring and subdividing a single piece of land, or whether it carries on a business of land dealing, is not made quite clear by the evidence, but *Street* C.J., in whose judgment *Ferguson* and *James* JJ. concurred, was of opinion that there was enough to show that the Company carried on the business of buying and selling land.

The contract by which the appellant Company agreed to sell a block of land to the respondent was negotiated and made with him on behalf of the Company by an estate agent, and the negotiations

(1) (1918) 1 K.B. 63.

were confined to the Sunday upon which the contract was made. In these circumstances, the conclusion that the contract was unenforceable may be rested upon the ground that the Company exercised a calling within the statute or the ground that its agent did so, and that the contract in each case was made in the course of that calling. We think, however, that neither the "calling" of the Company nor that of the agent, comes within those provisions.

The words "tradesman, artificer workeman labourer or other person whatsoever" have received a construction which is settled by authority. We are not at liberty to give to the expression "other person whatsoever" the wide meaning which it might receive in a statute of to-day. It must be taken to refer only to persons who are *ejusdem generis* with tradesmen, with artificers, with workmen or with labourers: *Sandiman* v. *Breach* (1); *Peate* v. *Dicken* (2); *R.* v. *Cleworth* (*or Silvester*) (3); *Palmer* v. *Snow* (4). In these four cases drivers of stage coaches, attorneys-at-law, working farmers and barbers were held to be outside the statute. To be a tradesman within its meaning, a man must carry on the business of trafficking in goods; to be an artificer, he must make something; to be a workman or labourer, he must serve. A man is *ejusdem generis* with tradesmen if his business consists in buying goods, and disposing of them for gain, but not by ordinary sale, as the amusement proprietor did in *Hawkey* v. *Stirling* (5), or if it consists in dealing in goods on behalf of others as the broker did in *Smith* v. *Sparrow* (6), although the authority of this case has been doubted (*Ronald* v. *Lalor* (7)). The Supreme Court were of opinion that those dealing in land (as principals or agents) might be considered as *ejusdem generis* with traders in goods for the purpose of the statute. In this opinion we are unable to agree. A calling is not struck by the words "or other person whatsoever" unless it closely resembles the callings of tradesmen, &c., specifically mentioned, and

(1) (1827) 7 B. & C. 96, at p. 100; 108 E.R. 661, at p. 662.
(2) (1834) 1 C. M. & R. 422, at p. 428; 149 E.R. 1145, at pp. 1147, 1148.
(3) (1864) 4 B. & S. 927, at pp. 932-934; 122 E.R. 707, at p. 709.
(4) (1900) 1 Q.B., at pp. 727-728.
(5) (1918) 1 K.B. 63.
(6) (1827) 4 Bing. 84; at N.P., 2 C. & P. 544; 130 E.R. 700.
(7) (1872) 3 A.J.R. 12.

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unless the resemblance lies in the manner in which the calling is exercised. A lawyer sees a similarity in contracting for the sale of goods and contracting for the sale of land, and in the position of the intermediary, broker or agent, who procures such contracts. But these similarities are not of the kind upon which the application of the statute rests. Land and goods are essentially different, and the practice and conduct of the business of disposing of them must necessarily differ. The analogy required by the statute must be found in the manner in and purpose for which the calling is exercised. The business of broking in goods may perhaps be close enough to the business of trading in them to be *ejusdem generis* with it. But this assimilation arises from the fact that the business is to deal in the same thing, and in an analogous way. The exercise of the business of land-jobbing has no close resemblance to or connection with trading in goods. It cannot, we think, be considered *ejusdem generis* with it. Even less analogy is to be found in the business of a land-agent. It is not to the point to compare the business of a commercial broker with the business of a land-agent. To come within the statute the land-agent's vocation must be *ejusdem generis* with one of the four specified callings. The broker is not one of the four *genera* mentioned in the statute, and cannot be brought within its provisions unless under the words "other person."

In the Court of first instance, the respondent, who was the defendant in the action, sought an amendment, which was refused, by which he intended to raise another defence, and on the hearing of this appeal his counsel insisted that this amendment should have been made. The appellant, however, by its counsel gave an undertaking not to enforce the contract, and it became unnecessary to consider this matter.

The appeal should be allowed, and the appellant should, pursuant to the condition upon which it obtained special leave, pay the respondent's costs. The order of the Supreme Court should be discharged, and the appeal to it dismissed with costs, and the judgment of the District Court restored. The costs awarded to the appellant by the judgment of the District Court will not be set off against the respondent's costs of this appeal.

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Appeal allowed. Appellant, pursuant to the condition upon which special leave was granted, to pay the respondent's costs of the appeal. Order of the Supreme Court discharged, and in lieu thereof appeal to the Supreme Court dismissed with costs. Judgment of District Court restored; but for ever stayed in order to give effect to the appellant's undertaking not to enforce the contract dated 29th July 1929 between the appellant and the respondent. Costs of the appeal to the Full Court and costs awarded to the appellant by the judgment of the District Court not to be set off against the respondent's costs of this appeal.

Solicitors for the appellant, *John Edgley & Co.*

Solicitors for the respondent, *Harry Brown & Co.*

[HIGH COURT OF AUSTRALIA.]

AH YOU . . . . . APPELLANT;
DEFENDANT,

AND

GLEESON . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

H. C. OF A. 1930.

MELBOURNE, *Aug.* 18, 19, 25.

Rich, Starke and Dixon JJ.

Immigration—Powers of Commonwealth Parliament—Incidental power—Prohibited immigrant—Prosecution—Evidence—Burden of proof—Averment in information—Jurisdictional fact—Effect of legislation—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (XXVII.), (XXXIX.)—*Immigration Restriction Act* 1901-1908 (*No.* 17 *of* 1901—*No.* 25 *of* 1908), *sec.* 5—*Immigration Act* 1901-1925 (*No.* 17 *of* 1901—*No.* 7 *of* 1925), *sec.* 5.

The appellant, an alleged prohibited immigrant, entered the Commonwealth not later than the year 1906 and the dictation test, which he failed to pass, was