

no termination of his liability. The Gandy agreement contained a provision that the two younger daughters were to be educated and to be placed outside the custody of both parents, each having access. A divorce was granted the wife on the grounds of the husband's adultery and the wife was in such proceedings given custody of these two younger females—the husband pleaded that she had broken the separation deed because in such deed she covenanted that the custody of these children was not to be with her: the Court's powers were exercised in favour of the wife notwithstanding the covenant. The husband in other proceedings asked the Court to hold the wife to the maintenance provisions in such deed by refusing her extra maintenance beyond the contractual amount.

The Court held that the deed was not at an end and refused the wife's application for extra maintenance, the contractual amount still subsisted, with liberty to make further application when advised.

This clearly is not authority assisting the defendant husband Butler in avoiding his maintenance obligations: it supports the plaintiff's contentions that the separation agreement still subsists.

The plaintiff's rights to the benefit of maintenance in terms of the separation agreement have not in my opinion been in any way impaired by her having obtained a decree *nisi* in divorce upon the grounds of the husband's adultery, and the plaintiff is accordingly entitled to judgment for the amount claimed, with costs to be fixed by the Registrar.

#### POLICE V. TURNER.

1951, August 17 and 30. Before H. Jenner Wily, Esq., S.M., at Auckland.

*Criminal Law—Police Offences—Working on Sunday at "trade or calling" within view of public place—"Trade or calling" includes any occupation having a commercial basis—"Work of necessity" means work that is unavoidable, necessitous or indispensable—Police Offences Act 1927, sec. 18, subsecs. (1) and (3).*

Defendant was an artist who was charged under s. 18 (1) of the Police Offences Act 1927 that on a Sunday within view of a public place he did work at his trade or calling. The work done was the painting of a mural on a shop wall. Because the work could only be done during the closed hours of the shop the painting was done at the week-end. If not continued within 12 hours' "drying time" it would have to be done over again. The materials were in short supply and there would then have been insufficient materials to finish the work. The defendant therefore continued work on the Sunday. It was done as an expression of an artistic urge and the receipt of £30 for the work was only incidental or secondary. The defence pleaded that:

- (1) The occupation of an artist was a profession and therefore did not come within the meaning of "trade or calling".
- (2) This was a work of necessity and therefore exempt by subsec. (3).

HELD (convicting defendant)—(1) That the words "trade or calling" must be construed in their widest sense to include any occupation that has a commercial basis. Whether or not a profit is made is not material.

*Police v. Bayliss and Ors.* (1946, M.C.R. 35) applied.

(2) "Works of necessity" referred to in subsec. (3) implies work that is unavoidable, necessitous or indispensable, and this particular work could have been timed so that it would have been unnecessary to continue work into the Sunday.

*F. H. Haigh* for defendant.

Defendant is charged under sec. 18 (1) of the Police Offences Act 1927 that on Sunday, 24th June, 1951, within view of a public place, to wit, Ponsonby Road, he did work at his trade or calling. Defendant is an artist. It is admitted that on the day and date alleged, in full view of the public, he completed the painting of a mural depicting transport through the ages on the wall of a motor-cycle shop in Karangahape Road. He was in full view of the public through the plate glass window of the shop. Defendant submitted—

- (1) That the occupation of an artist is a profession and therefore does not come within the meaning of "trade or calling", and alternatively
- (2) That this was a work of necessity, and that in either case no offence had been committed under the section.

It is admitted by the defendant that his sole occupation is that of an artist, and that he earns his living from such occupation. He submits however that his primary objectives in any painting is an expression of his artistic urge and that the actual sale of the product is only incidental or secondary. He did receive £30 for this particular mural.

The word "calling" is defined in Webster's New International Dictionary as "one's usual occupation; vocation; business; trade". There does not appear to be any decision under this Act defining "trade" or "calling" but in *Police v. Bayliss and Ors.* (1946, M.C.R. 35) Marsack S.M. considered the meaning of "transacts business" and having dealt exhaustively with the interpretations given to the word "business" then states at p. 36 that the effect of sec. 18 is "to prohibit any public activities on a Sunday having a commercial basis in the broadest sense of the term, with the exception of the essential service specified in subs. (3)". I respectfully agree with this interpretation and I am satisfied that the words "trade" or "calling" must be construed in their widest sense to include any occupation that has a commercial basis and thus the word "calling" must include any occupation, vocation, business or profession that has a commercial basis and that is not otherwise included in the other words used in subs. (1). Whether or not a profit is made is not material: see *Bramwell v. Lacy* (1879, 70 Ch.D. 691).

Thus in this case the defendant's sole occupation is that of an artist and in pursuit of that occupation he carried out the completion of his work of art in full view of the public on a Sunday. Unless he can

show that this particular work was exempted under subs. (3) he must be convicted for this offence.

Counsel submits that this was a "work of necessity" and therefore exempted under subs. (3). His grounds for submitting that it was a work of necessity were that it was alleged that the work could only be done during the closed hours of the shop and that if not continued within 12 hours' "drying time" it would have to be done over again owing to the contents of the materials used and that these materials, imported from Holland, were in such short supply that the defendant would not have had sufficient to complete the work. The defendant commenced this work on Thursday and worked long hours on Saturday and Sunday to finish in the early hours of Monday morning. In my opinion "works of necessity" referred to in the subsection imply work that is unavoidable, necessitous or indispensable. The work done by the defendant cannot be classified under any of those classifications and he could have so timed his work that it would have been quite unnecessary to continue that work into the Sunday. He is not therefore exempted under this subsection and must be convicted of this offence.

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