LOCAL GOVERNMENT BY-LAWS AND ULTRA VIRES.*

Scope of paper.

A glance at the Australian Digest will show the volume of case law on this subject in Australia, without reference to any other jurisdictions: and it is apparent that a paper of sufficient brevity to be acceptable to this Summer School can in truth do no more than scratch the surface. I have, therefore, not attempted to follow in depth any particular line of thought for the benefit of the small group of practitioners who are constantly concerned with the drafting and enforcing of by-laws and who are therefore familiar with the subject, and I have tried instead to write something which may be of use to the much larger group who from time to time are called on to defend clients who are charged with breaches of by-laws, but who have neither the background knowledge to see at once what to look for, nor much time to search for leading cases. It must be recognised that this paper is in no way comprehensive either as to subject matter or as to the treatment of the matters which are mentioned. At best I hope that it will serve to direct attention to the points which are more commonly worth considering, with some reference to cases which are likely to provide a useful point of departure.

Inconsistency with other law.

The by-law-making power under the Local Government Act 1960-1965 is contained in Part VIII which starts with section 190. As this Act came into operation as lately as the 1st July, 1961, there are in existence many by-laws which were made under the repealed statutes, and to such by-laws section 15(d) of the Interpretation Act 1918-1957 applies. The substance of that section is that, where an Act repeals and re-enacts the provisions of an earlier Act, a by-law which is in force under the earlier Act subsists as if it had been made under the latter Act. Clearly enough, in order thus to survive, the by-law must be within some power given by the later Act, and unless it was valid under the earlier Act it could scarcely answer the test of having been "in force", so that it could seem that such a by-law needs to pass the double test.[1]

Sections 192 to 253 set out specific matters about which by-laws may be made. However, by section 191(1) by-laws may be made

* A paper read at the 1966 Law Summer School held at the University of Western Australia.

1 *Cf.* Sayers v. Jacomb, (1872) 3 V.R.(L) 132.

prescribing things "which by this Act are contemplated, or are required or permitted to be prescribed, or which appear to the council to be necessary or convenient for the purpose of effectually carrying out the provisions of this Act, or for better effecting the operation, objects and purposes of this Act"; and by sub-section (2) the enumeration in the Act of specific matters in respect of which by-laws may be made is not to effect the generality of the power conferred by sub-section (1). I shall return to the latter sub-section, but meanwhile it is useful to look back at section 190.

Sub-sections (2) to (6) of section 190 prescribe the machinery provisions for the making of a by-law; then sub-section (7)(e) enacts that a by-law may be so made "only if [it] is not inconsistent with or repugnant to any of the provisions of this Act or any other law in force." All the subsequent empowering sections open with the words "a council may *so* make by-laws for . . .", that is to say they refer back to section 190 and *inter alia* to the limitation of power written into that section by sub-section (7)(e). It was on this ground that a by-law was held to be to an extent invalid in *Hotel Esplanade Pty. Ltd. v. City of Perth*[2]; I apologise for referring to one of my own judgments but there is no other reported decision on this particular sub-section.

It would seem that in truth this provision is merely declaratory of the common law.[3] *Powell v. May* and *Cullis v. Ahern* involved inconsistency with a statute; but is there any reason why an existing by-law or regulation made under some other Act should not be "a law in force" so as to prevent the making of an inconsistent by-law under the Local Government Act? The argument would presumably be that a valid by-law is in every sense a law.[4] It is worth noting that in *Robins v. Coster*[5] the contention was that an order made under the Control of Prices Act, 1947 was invalid as being inconsistent with a regulation made under the Weights & Measures Act, 1925. McCarthy J. held that there was no inconsistency and he did not refer to the present point, but he said nothing to suggest that if there had been inconsistency it would nevertheless not have availed the appellant.

Reverting for a moment to the general words found in section 191(1): although they are not identical with those used in the Vic-

2 [1964] W.A.R. 51.

3 See *e.g.*, Powell v. May, [1946] 1 K.B. 330; Cullis v. Ahern, (1914) 18 C.L.R. 540.

4 See *e.g.*, Henwood v. Municipal Tramways Trust, (1938) 60 C.L.R. 438, at 445 and 457.

5 [1959] N.Z.L.R. 690.

torian Marketing of Primary Products Act which was considered in *Shanahan v. Scott*[6] it may well be thought that their extent must be limited in the manner indicated by the High Court when it was said:[7]

> "The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends."

This statement was approved in *Utah Construction etc. Ltd. v. Pataky.*[8]

Motive.

It would seem that it is not permissible to inquire into the motives which led to the making of a by-law in order thereby to invalidate it: in this a by-law differs from an administrative act. The subject is discussed in some detail in *Arthur Yates & Co. Pty. Ltd. v. Vegetable Seeds Committee.*[9] The sole question is whether the by-law as it stands is within power. However, the statutory power is construed to extend only to the making of a by-law truly intended to subserve the statutory purpose, so that it will be held to be beyond power if, although in terms within power, its true purpose is a collateral or outside purpose:[10] Rich J. said:—[11]

> "If in pith and substance it is upon the subject (viz. of the statutory power) it is valid: if its ostensible connection with the subject is a pretence or pretext it cannot be supported as legislation on that subject."

It must, however, be remembered that if a by-law is in terms within power, and if it is truly intended to attain a permitted purpose,

6 (1957) 96 C.L.R. 245.

7 *Ibid.*, at 250.

8 (1965) 39 A.L.J.R. 240 (P.C.).

9 (1945) 72 C.L.R. 37.

10 *Ibid.*, at 83-84 *per* Dixon J., where he referred to the judgment of Dwyer J. in Bailey v. Conole, (1932) 34 W.A.L.R. 18, at 23-24.

11 *Ibid.*, at 72.

it does not become invalid merely because it will incidentally serve some other purpose.[12]

Unreasonableness.

What may be described as mere unreasonableness is not a ground for invalidating a by-law:[13] although if a by-law appears to be so totally unreasonable that it could not be justified in the minds of reasonable men it may be held to be beyond power as not being an honest attempt to exercise the given power at all.

The present Australian doctrine appears to be correctly stated by Gavan Duffy J. in *Proud v. Box Hill*[14] as follows:—

> "The history of the doctrine of unreasonableness in considering by-laws has been a history of growing disinclination on the part of the courts to interfere with by-laws, at any rate of local government bodies acting under statutory powers, on that ground. It is perfectly well established now that the fact that a by-law is apparently harsh, and that it may cause inconvenience to people, and that it is not of a type that would recommend itself to the judges trying the matter, is immaterial. The question of how the power should be exercised and how far it is necessary to exercise it, and what is reasonably required, is left by Parliament to the regulation-making authority. The only remnant of the old doctrine, once occasionally expressed somewhat widely appears to be this: that where you find that a by-law involves 'such oppressive or gratuitous interference with the rights of those who are subject to it as could find no justification in the minds of reasonable men', the Court may in such a case hold that, although on the face of it this might first appear to be within the words of the power, it is obviously not an exercise of the power at all: it is not a bona fide attempt to exercise the power given to the regulation-making authority."

Uncertainty.

Uncertainty as a separate ground of invalidity appears to have acquired respectability from the dissenting judgment of Mathew J.

12 Bailey v. Conole, (1932) 34 W.A.L.R. 18 at 23 *per* Dwyer J.; Jones v. Metropolitan Meat Industry Board, (1925) 37 C.L.R. 252, at 262-263 *per* Isaacs J., citing Narma v. Bombay Municipal Commissioner, (1918) L.R. 45 Ind. App. 125.

13 Williams v. Melbourne, (1938) 49 C.L.R. 142; Brunswick v. Stewart, (1941) 65 C.L.R. 88.

14 [1949] V.L.R. 208, at 210.

in *Kruse v. Johnson.*[15] He posed certainty and reasonableness as separate requisites for validity. As has been shown the latter has been rejected, but the former tended to survive and cause much confusion of thought.

In *Anchorage Butchers Ltd. v. Law*[16] the Full Court accepted the proposition that uncertainty was a ground for invalidating a by-law made by the City of Perth under the Health Act: that much at least seems certain, although the three members of the court were by no means unanimous on all points. Northmore C.J. found no uncertainty and said (by inference) of the two learned judges who were in due course to succeed him "only a Puckish will to find uncertainty can find it here". Dwyer J. found uncertainty and based his judgment on it: but he added as a possible alternative ground for invalidity that the by-law attempted an improper delegation of power. Wolff J. also purported to base his judgment on uncertainty but when his reasons are examined they may be thought to relate rather to improper delegation. Another odd thing about that case, although it does not appear from the report, is that the phrase which was held to be too uncertain had been lifted from a model by-law promulgated under the Health Act, and it had been generally assumed that under that Act when a model by-law is adopted as such it is conclusively presumed to be within power, from which it would seem to follow that one would be in or out according to whether one adopted or only borrowed from the model. I have referred at this length to that decision not because it throws particular light on the present subject but because, being a judgment of the Full Court of this State, it may well be cited on occasion. But it must be remembered in connection with the issue of improper delegation that section 190(7)(b) now permits a by-law to "delegate to or confer upon a specified person or body, or class of person or body, a discretionary authority", although the use in this phrase of the singular "a" and the disjunctive "or" may serve to raise arguments as to the extent of this power.

However, the best starting point for a study of "uncertainty" is an article[17] by B. Sugerman, K.C. (as he then was) in the Australian Law Journal. The theme of the article is that in truth uncertainty should never have been regarded as a distinct head of invalidity. I quote merely the opening sentence, "The only thing that can be said

15 [1898] 2 Q.B. 91.
16 (1939) 42 W.A.L.R. 40.
17 *Uncertainty in Delegated Legislation,* (1945) 18 AUST. L. J. 330.

with certainty about the doctrine that delegated legislation, to be valid, must be certain, is that there is very little certainty in it." That article was published in April, 1945.

In October, 1945, *King Gee Clothing Co. Ltd. v. The Commonwealth*[18] was decided. After referring to the demand for "reasonableness" and its rejection by the High Court, Dixon J. said:—[19]

> "In more recent times, the necessity for reasonableness has given rise to a requirement that a by-law shall be certain. In his work on Corporations, published nearly a century ago, Mr. Grant wrote (at p. 86):— 'It (the bye-law) ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those on whom it is to operate. Except in the two Universities and the College of Physicians, a bye-law being in Latin would be bad for that reason'. As to the exception to his illustration *cessat ratio,* but in the meantime, though stated by Mr. Grant without authority, the rule has gained currency. It is perhaps to the foregoing passage that we may trace so much of the well known statement in the dissenting judgment of Mathew J. in *Kruse v. Johnson* as includes certainty among the conditions of validity of a by-law. It is interesting to notice that in America, too, certainty has come to be required of a municipal by-law ordinance.
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> But I cannot see how this history warrants the courts in adopting as a general rule of law the proposition that subordinate or delegated legislation is invalid if uncertain. It appears to me impossible to qualify the power conferred on the Executive Government by ss. 5 and 13A of the National Security Act 1939-1943 by adding the unexpressed condition that regulations made thereunder must be certain. I should have thought that, in this matter, they stood on the same ground as an Act of Parliament and were governed by the same rules of construction. I am unaware of any principle of law or of interpretation which places upon a power of subordinate legislation conferred upon the Governor-General by the Parliament a limitation or condition making either reasonableness or certainty indispensable to its valid exercise."

[18] (1945) 71 C.L.R. 184.
[19] *Ibid.*, at 194.

And in April, 1946, in *Cann's Pty. Ltd. v. The Commonwealth*[20] The same learned judge said:—[21]

> "As will appear from *King Gee Clothing Co. Pty. Ltd. v. The Commonwealth,* I do not take the view that doubts about the construction of an instrument made under reg. 23 can affect its validity. The interpretation of all written documents is liable to be attended with difficulty, and it is not my opinion that doubts and misgivings as to what the instrument intends, however heavily they may weigh upon a court of construction, authorise the conclusion that an order made under reg. 23 is ultra vires or otherwise void. If in some respects its meaning is unascertainable, then, no doubt, it fails to that extent to prescribe effectively rights or liabilities, but that is because no particular act or thing can be brought within the scope of what is expressed unintelligibly. But to resolve ambiguities and uncertainties about the meaning of any writing is a function of interpretation and, unless the power under which a legislative or administrative order is made is read requiring certainty of expression as a condition of its valid exercise, as the by-law-making powers of certain corporations have been understood to do, the meaning of the order must be ascertained according to the rules of construction and the principles of interpretation as with any other document."

In neither case did the other members of the Court say anything categorical on the point: but in *Television Corp. Ltd. v. The Commonwealth*[22] Kitto J. said:— "The point is not that the proposed conditions offend against a general principle that uncertainty in executive instruments spells legal invalidity, for there is no such general principle" and he cited the *King Gee* case and *Cann's* case. Again, the other members of the Court did not expressly mention the point: but maybe a State court would now feel free to jettison the doctrine of "uncertainty". In truth it must be very doubtful whether any case which has been decided on that doctrine could not have been better decided on some more certain and reliable ground.

Severability.

Sometimes it can be seen that a whole by-law is necessarily invalid, but frequently only one or more particular provisions can be

20 (1946) 71 C.L.R. 210.
21 *Ibid.,* at 227.
22 (1963) 109 C.L.R. 59, at 71.

shown to be beyond power, and the question then arises as to whether the bad provisions can be dropped out, leaving the residue good, or whether the bad part brings down the whole.

The general test for answering that question is to inquire whether, when the bad part is removed, what is left is a substantially different law: whether one can feel confident that if the makers of the law had known that the invalid part was beyond power they would nevertheless have enacted the remainder.[23]

Regulate—Prohibit.

If the power given by the Act is to regulate an activity then a by-law made under that power cannot prohibit the activity.

Regulation will often, of necessity, involve some limited degree of prohibition, but it involves allowing the activity to continue. A by-law which purports to prohibit, except subject to a licence which may be granted or refused in discretion, is in truth a prohibition, and cannot be supported under a power to regulate.[24]

But if there is power to prohibit absolutely, then it is permissible to prohibit the activity and at the same time to reserve an unfettered discretion to license the activity. A prohibition *sub modo* cannot be said to be beyond a power to prohibit absolutely: and in such a case it is not necessary to set out in the by-law the conditions on which a licence will be granted.[25]

Constitution.

When considering the validity of a local government by-law one's mind does not readily advert to the Commonwealth Constitution, but its possible relevance should not be ignored. Many activities can be controlled by means of licenses: and by section 222(2)(a)(iii), of the Local Government Act 1960, fees may be charged for licenses. When the activity involves the production or sale of goods, *e.g.* brick-making (section 198), hawkers (section 217), petrol pumps (section 232), or quarrying (section 235) it would be easy enough to frame a scale of fees which would answer the description of a duty of excise within section 90 of the Constitution.[26]

23 Olsen v. Camberwell, [1926] V.L.R. 58; Owners of S.S. Kalibia v. Wilson (1910) 11 C.L.R. 689, in particular at 713 *per* Isaacs J. Compare Wall v. Commissioner of Railways, (1905) 7 W.A.L.R. 206, with Dunkerley v. Nunawading, [1957] V.R. 630.

24 Swan Hill v. Bradbury, (1937) 56 C.L.R. 746; Shanahan v. Scott, (1957) 96 C.L.R. 245, at 253.

25 Country Roads Board v. Neale Ads Ltd., (1930) 43 C.L.R. 126.

26 Matthews v. Chicory Marketing Board, (1938) 60 C.L.R. 263; Anderson's

One might even find that the user of an unlicensed handcart (section 216) could escape under section 92 of the Constitution.[27]

Health Act—Model By-Laws.

Earlier I mentioned the making of model by-laws under section 343 of the Health Act, 1911-1965. So far as is relevant for present purposes the section reads:—

> "(1) The Governor may cause to be prepared model by-laws for all or any of the purposes for which by-laws may be made by a local authority under . . . this Act . . ."
> (2) A local authority may . . . adopt the whole of any portion of such by-laws . . ."
> (3) Such resolution shall be published . . . and thereupon shall operate to extend such by-laws . . . so adopted to the district . . ."
> (4) Whenever a local authority adopts . . . such by-laws, the by-laws so adopted shall in all courts be deemed to be within the powers conferred on the local authority to make by-laws under this Act."

At first sight sub-section (4) seems clear enough: but before anybody decides what its true ambit is he should read the dissenting judgment of Wanstall J. in *R. v. Brisbane*.[28] By way of example, if a model by-law is promulgated and adopted and if it is then seen that its effect would be to abrogate some express statutory provision, must a court nevertheless treat it as within power?

The answer to such a question necessarily depends on what the section means, but, without looking to possible results, it may be thought that section 343 itself contains an ambiguity. It will be seen that sub-sections (2), (3) and (4) each refers to "such by-laws". In each case the reference must be to model by-laws prepared under sub-section (1). But by sub-section (1) model by-laws can be made only "for all or any of the purposes for which by-laws may be made by a local authority . . . under this Act." It follows that in order to come within the section at all a model by-law must be for a "purpose" for which a local authority can make a by-law under the Health Act.

Pty. Ltd. v. Victoria, (1964) 111 C.L.R. 353, at 364 *per* Barwick C.J. and 377-378 *per* Menzies J.

27 Bell Bros. Ltd. v. Rathbone, (1963) 109 C.L.R. 225; but *cf.* Deacon v. Mitchell, (1965) 39 A.L.J.R. 79.

28 [1961] Qd. R. 241.

Now a by-law may be invalid for either of two reasons. It may purport to deal with an unauthorised subject matter or it may purport to deal with an unauthorised subject matter in an unauthorised way. In this context, what does "purpose" mean?

It is suggested that perhaps the effect of this section is not quite as self-evident as it is sometimes assumed to be.

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