LOCAL GOVERNMENT BY-LAWS AND ULTRA VIRES: A COMMENT.*

It is with considerable diffidence that I comment on the excellent paper given to you this afternoon by Mr. Justice Hale, I undertook to make this contribution only after being assured that the fact that I was a "new boy" here added to the desirability of having the views of one who has spent a number of years in Local Government. By-laws are, of course, a feature of the Local Government legal system, whether Australian or English; and I have served as a Town Clerk and Solicitor for nine years to two local authorities in England. I have therefore had experience in interpreting, administering and drafting by-laws.

Definition of by-law.

My first point is that I think we should be very clear in our minds as to what is a by-law, because lawyers as well as laymen sometimes seem to me to be somewhat confused as to this; and it is essential for a proper understanding of this subject to know what is a by-law. I will quote three apt definitions. The first is the one stated by Lord Russell in the well known case, in this context, of *Kruse v. Johnson,*[1] Lord Russell said:—[2]

> "A by-law of the class we are here considering I take to be an ordinance affecting the public or some portion of the public, imposed by some authority clothed with statutory powers ordering some thing to be done or not to be done and accompanied by some sanction or penalty for its non-observance."

Secondly, in the Victorian case of *Gunner v. Helding,*[3] it was said that a by-law is a regulation made by a municipality in a prescribed manner and within the powers conferred upon such municipality. And thirdly, in *Lumley on By-laws* it is stated that "A by-law is law made with due obligation by some authority less than the Sovereign and Parliament, in respect of a matter specially or impliedly referred to that authority and not provided for by the general law of the land."[4]

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

1 [1898] 2 Q.B. 91.

2 *Ibid.,* at 96.

3 (1902) 28 V.L.R. 303.

4 LUMLEY, BY-LAWS, 2.

When Parliament delegates to a Minister of the Crown the task of preparing and issuing instructions of a legislative force these are properly called rules or regulations, but they should never, as they sometimes are, be called "by-laws". By-laws are ordinances made by corporate bodies, usually public statutory authorities such as local authorities, who form the most common example, under the powers given to them by Parliament.

Inconsistency.

It is, of course, one of the fundamental considerations when making a by-law that it shall not be inconsistent with any other law or, as it is sometimes put, not repugnant to the general law.

There is no doubt that the reported cases both in Australia and in England support the speaker's contention that by-laws made under a repealed Act must be saved under the superseding Act if they are to survive and must in any case not be inconsistent with the latter Act. He raised a very interesting point, however, when he asks if there is any reason why an existing by-law made under another Act should prevent the making of a by-law under the Local Government Act which would be inconsistent with the former by-law. In this connection, it was held in the English case of *Thomas v. Sutters*[5] that a by-law validly made under one statute did not render a second by-law dealing with the same matter, but somewhat differently under another statute to be invalid on grounds of inconsistency or repugnancy. In this instance, it was possible to have both by-laws because there was no direct conflict, as there was, for example, in the enactments dealt with in the case of *Hotel Esplanade v. City of Perth.*[6]

In view of the High Court's decision in *Shanahan v. Scott*[7] I agree with the speaker that it is likely that a court will construe that part of subsection (1) of section 191 of the Local Government Act, 1960, which reads "A Council may so make by-laws etc. . . . which appear to the Council to be necessary or convenient for the purpose of effectually carrying out the provisions of this Act", as referring to the specific by-law making provisions, so that a by-law may be made under the "necessary or convenient" enactment *only* for the purpose of supplementing the specific authorisation in some strictly ancilliary manner. But in that case the Court took a restrictive view of a wide general power authorising the making of Government regulations;

5 [1900] 1 Ch. 10.
6 [1964] W.A.R. 51.
7 (1957) 96 C.L.R. 245.

consequently, a court is much more likely to adopt a similar view in regard to indirect subsidiary legislation such as by-laws made by a corporation.

Unreasonableness.

It would appear that there *may* be some divergence now between the views of Australian courts and English courts in regard to the test of reasonableness of a by-law, but this is doubtful, as I hope to show. The most important case in this connection in both countries was until fairly recently, the case of *Kruse v. Johnson.* Six out of seven Judges decided that a by-law prohibiting any person from playing music or singing within 50 yards of any dwelling house after being requested by a constable or an inmate of such a dwelling house to desist was a valid one, because it was reasonable. The whole question of reasonableness was considered and the point was strongly made that the courts would not lightly hold a by-law to be unreasonable.

I will quote part of what Lord Russell said in that case:—[8]

> "But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, if they involved such oppressive or gratuitous interference with the rights of those subjects to them as could find no justification in the minds of reasonable men, the court might well say Parliament never intended to give authority to make such rules, and that they are unreasonable and ultra vires. But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there."

It will be noted therefore that what Gavan Duffy J. said in the Australian case of *Proud v. Box Hill*[9] was to some extent a repetition of what Lord Russell said. You will now understand why I emphasized that there *may* be some divergence. In fact, I doubt if there is any real divergence. Possibly, a false impression has been got about that the two judicial systems are beginning to take a differing attitude in regard to "Reasonableness of a by-law".

8 [1898] 2 Q.B. 91, at 99.
9 [1949] V.L.R. 208.

The case of *Kruse v. Johnson* was recently considered in four English cases; and the words which I quoted to you from the judgment of Lord Russell were affirmed by no less an authority than the House of Lords in the case of *Chertsey U.D.C. v. Mixnam's Properties Ltd.*[10] It can be said therefore that the test of wholly unreasonableness concerning by-laws has come to stay in the law of England.

You will have noted that *mere* unreasonableness is not a ground in England for invalidating a by-law, and it is true that there is a tendency for Australian courts to treat any question of unreasonableness as not affecting the validity of a by-law. But I cannot help feeling that this may be due in part to some confusion as to the distinction between regulations as direct subsidiary legislation and by-laws as indirect subordinate legislation. For example, the cases referred to by Mr. Justice Hale in support of the view that reasonableness was not necessary to the valid exercise of a by-law in Australia, were not in fact dealing with by-laws but with Government regulations; and for that reason should not, with the greatest of respect be relied upon when dealing with by-laws. The tests of repugnance to the general law, unreasonableness and uncertainty do not apply to Government made subsidiary legislation, certainly that is undoubtedly the case in England.[11] There are, of course, Australian cases where the distinction was clearly made, such as in *Barry v. Melbourne*[12] where, in the Supreme Court of Victoria, it was held that the test of reasonableness applied to by-laws but not to Government regulations.

Uncertainty.

With regard to the test of *uncertainty*, the speaker referred to an article by B. Sugarman, Q.C. (as he then was) in the Australian Law Journal[13] and that article deals exhaustively and well with the question of uncertainty as a test of the validity of a by-law and it has caused me to wonder what view an English court would now take of that doctrine. However, it is still regarded as good law in England, but there does not appear to be any recent, and in any event not more than a very few, cases on it.

A word of caution, however; I must point out that at least two of the cases referred to in the section on uncertainty, are cases dealing

10 [1964] 2 All E.R. 627.

11 36 HALSBURY, LAWS OF ENGLAND, (3rd ed.) 491.

12 [1922] V.L.R. 577.

13 *Uncertainty in Delegated Legislation,* (1945) 18 AUST. L.J. 330.

with direct subordinate legislation, and not with by-laws, which only confirms that there is a great deal of uncertainty about uncertainty!

Model by-laws.

Turning now to the Health Act and Model By-laws—I take the view that a Model By-law is no different to any other by-law after it has been adoptd by the local authority. Once it has been adopted it becomes a by-law made by the adopting authority and is subject to the same tests as any other by-law, except that, as pointed out by the speaker, section 343(4) of the Health Act would appear to deprive the courts of the opportunity of questioning a by-law on the grounds of it being ultra vires, subject, however, to his comments on that aspect of the matter.

General Opinion and Suggestions.

I favour the retention of the tests which have been mentioned for examining the validity of by-laws because, although by-laws made by local authorities are usually approved by the appropriate government before they are enforceable, nevertheless they are sometimes suggested and occasionally drafted by persons who have but an inadequate knowledge of their subject matter and of the likely consequences of their action. Let me illustrate what sometimes happens from an experience of mine.

One of my Councils had received a lot of complaints about nuisances caused by dogs, so the members decided that they would make by-laws requiring dogs to be on a leash when in the streets and to make their owners liable for the dogs causing nuisances on the footpaths. It seemed to me that the difficulties in enforcing such by-laws would outweigh their advantages so I offered discouraging advice. I enquired as to which streets the by-laws were to apply, pointing out that you could not reasonably pass a by-law the effect of which would be to stop dogs going out of doors anywhere in town except on a leash. I also pointed out that we would have to clutter the town with notices leading to and from various streets. However, even this did not deter the majority of the members so "I shot my last bolt" and asked if anyone knew of an easy way to teach dogs to read!

I think it is essential in Australia that the courts should have, at least, as an effective jurisdiction and control over the by-laws made by corporate bodies, as in the United Kingdom; if only for the reason that many more activities are regulated or governed by by-laws here than is the case in England. It therefore strikes me as somewhat

strange that there is here a tendency to relax the courts' jurisdiction in respect of by-laws.

I would suggest that all by-laws should have a limited life of, say, ten years. After that, if they are still required, they would have to be renewed. It would do no harm and would mean that all the many obsolete by-laws would cease to be effective after a certain date, without the necessity of a repeal. It would also cause local authorities to reconsider the need for or the desirability of continuing any particular by-law.

F. J. PEARSON.*

* *Solicitor of the Supreme Court (England).*