POTATO MARKETING ACT

Statutory Interpretation—Ultra Vires—Prohibition as distinct from Regulation

The case of *Atkins* v. *Golding*, a decision of Mayo J.[1] affirmed by the Full Court of the Supreme Court of South Australia,[2] had important practical repercussions which culminated in the amendment of the Potato Marketing Act 1948, in order to authorize the structure of potato marketing in the State which that decision held to be invalid.

The appellant was convicted of an offence under S21 (1) of the Potato Marketing Act, which prescribed penalties for any breach of the terms of that Act, or of orders made under its authority, the breach consisting of selling potatoes to a person other than the S.A. Potato Distribution Centre Ltd., contrary to Potato Marketing Order No. 1, Clause 2, which provides:

> "(a) No grower shall sell any potatoes grown by him except to the S.A. Potato Distribution Centre Ltd.,
>
> (b) Potatoes sold or for sale by the grower to the Centre shall be delivered at such times and places, and in such quantities, as shall from time to time be directed by the Centre, in accordance with instructions from time to time issued by the Board.

The appellant contended that Clause 2 was *ultra vires*, and alternatively that it was a prohibition and not a regulation of the sale of potatoes within the powers of the Board. This alternative submission is simply a further aspect of the first submission. In discussing these contentions, Mayo J. employed the customary technique for resolving problems of *ultra vires*, which involves analysis of the terms of the original grant, and an assessment of its scope by the process of statutory interpretation, followed by an examination of the exercise of the power, including its practical effects, to ascertain whether the particular exercise is authorized.

The Potato Marketing Act 1948 constituted the Potato Marketing Board as a body representative of both growers and merchants, with the capacity of selling personal property where it was no longer required by the Board,[3] and with powers of subordinate legislation enumerated by S. 20 (i) which provided that the Board could make orders:

1. 1963 S.A. Law Society Judgment Scheme, p. 276.
2. 1963 S.A. Law Society Judgment Scheme, p. 415.
3. S. 16 (b) and (c).

(a) Fixing the quantity of potatoes, or the proportion of his crop of potatoes, which a grower may sell or deliver at any place or time specified in the order;
(b) Otherwise regulating and controlling the sale and delivery of potatoes;
(c) Fixing maximum and minimum prices at which potatoes may be sold;
(d) Prescribing any matter necessary or convenient to be prescribed for ensuring compliance with, or enforcing an order made under this section.

In purported exercise of these powers, the Board issued the challenged measure. Since the Act contained no provision dealing directly with the identity of a purchaser as a subject of the Board's control, Clause 2 could only be valid if it were ascribable to the power conferred by S. 20 (1) (b). As Mayo J. pointed out, the position of this term in the clause inevitably suggests that its scope is qualified by the previous words and confined to similar matters. It is in fact treated as being *ejusdem generis* with S. 20 (1) (a), and interpreted as authorizing no more than the regulation and control of the contents of sales agreements, those essential incidentals of a transaction which His Honour discussed extensively at the beginning of his judgment. Since the identity of a purchaser cannot accurately be described as a "term or condition" of a contract,[4] it would appear that this is not a part of the subject-matter for regulation and control, a view reinforced by recourse to previous decisions on the meaning and extent of this phrase in authorizing delegated legislation.

The theoretical extent of the term has been defined in previous cases,[5] although actual decision on the validity of any particular measure as a regulation may be difficult, since the distinction which must be drawn between regulation and prohibition is a subtle one, essentially a matter of degree. All regulation involves some measure of prohibition; but where the effect of the prohibition is to preclude the subject-matter of regulation from coming into existence will it be invalid. The authoritative statement of the rule in this context is contained in the judgment of Dixon J. (as he then was) in *Swanhill Corporation* v. *Bradbury*.[6]

"Prima facie a power to make by-laws regulating a subject matter does not extend to prohibiting it altogether, or subject to a dis-

4. The decision in *R.* v. *L.C.C.* (1915) 2 K.B. 466 is not an authority contra, since the statute in question conferred a discretion as to identity of "fit persons".
5. See *Corporation Brick Co. Pty. Ltd.* v. *City of Hawthorn* (1909) 9 C.L.R. 301; *Municipal Corporation of the City of Toronto* v. *Virgo* (1896) A.C. 88; *A.-G. for Ontario* v. *A.-G. for the Dominion* (1896) A.C. 348; *Swanhill Corporation* v. *Bradbury* (1937) 56 C.L.R. 746.
6. Supra, p. 762.

cretionary licence or consent. By-laws made under such a power may prescribe time, place, manner and circumstance, and they may impose conditions, but under the prima facie meaning of the word they must stop short of preventing or suppressing the thing or conduct to be regulated."

Since this is a prima facie presumption derived from consideration of the meaning of the word, its operation may be displaced where the nature of the subject requires, e.g. where the activity is not one to be encouraged.[7] Its application to the present case, however, is clear. Dixon J. was discussing a situation in which the power to regulate an activity was exercised as if it authorised prohibition of the whole of the activity, subject to a discretion to allow its commencement: this exercise was invalid because the freedom to embark on the activity can not be circumscribed, although the actual conduct of the activity may be subjected to regulation necessarily involving some degree of prohibition. The essential distinction between an invalid prohibition and a prohibitory measure which is also regulatory lies in the point at which the prohibition is applied; where the power is properly exercised only certain aspects of the activity are prohibited and not the activity itself. In *Atkins* v. *Golding,* in purported exercise of a power to regulate the terms and conditions of a contract, the making of a contract with any person was prohibited subject to permission to sell to one company which, as His Honour demonstrated, had a discretion as to whether or not it would buy. A refusal to buy in any one instance would have constituted an effective prohibition, extending to the inception of the sequence of events which could properly be regulated, and for that reason the whole clause was held to be invalid.

Order 1 (2) (b) does not supplement the defects of Clause 2 (a), and would not appear to be a valid regulation in its own right. Since it does not compel the Potato Distribution centre to buy all potatoes offered to it, the objections to Clause 2 (a), on the ground that the centre had a discretion as to whether or not it would buy, are still open. In effect the centre was in the position of a monopolist with wide discretionary powers; this practical result of the Board's measures was held to be beyond the contemplation of the Act.

His Honour raised the further objection that, since the Board's authority extended only to the seller and not to one in the position of the buyer, it had no power to issue instructions to the Centre, which had, therefore, an unfettered discretion. It is submitted that this point may be misconceived, since the whole of a transaction which has been initiated is subject to the regulation of its terms, and buyer and seller are equally required to conform with the conditions imposed; effective regulation might be achieved by communication of instruc-

7. Per Dixon J. in *Swanhill v. Bradbury,* supra.

tions to buyer as well as seller. It would appear further that S. 20 (1) (d) is a possible source of power to instruct a buyer. The practice of instructing the seller by orders transmitted through the Company as buyer, is, however, of doubtful propriety.

One further matter raised in argument relating to the validity of Clause 2 (b), but not considered necessary for decision, was the question of whether this order constituted an invalid subdelegation of legislative power, rather than a granting of administrative discretion, to the Distribution Centre. Mayo J. obviated consideration of this by pointing out that the Board itself had no statutory capacity to engage in the direct marketing of potatoes, and could not, therefore, invest any other body with such a power. In spite of the recent amending legislation empowering the Board directly to engage in the marketing of potatoes, this problem may arise in the future. In such an event, questions relating to the structure of the Board's nominee, and its dependence on the instructions of the Board would become relevant.

Submissions in the appeal before the Full Court were confined to the validity of Clause 2 (a), on which the majority agreed with the reasoning of Mayo J. Napier C.J. construed the act as contemplating a system of orderly marketing in which growers were free to sell to any person, although the details of these transactions might be subject to regulation. His Honour found the existence of provisions for the licensing of wholesale merchants[8] inconsistent with the monopoly established by the Board:

> "I can see nothing in the language of the section which authorizes an order prohibiting sale to anyone, but *a fortiori* to anyone but a monopolist who is under no compulsion to buy."

Hogarth J. concurred in this reasoning, adding the convincing observation that where the legislature intends to confer monopolistic and compulsive powers on a board, its intention to do so is clearly expressed, and significant safeguards are provided against the abuse of such a power, as in the Honey Marketing Act 1947, and the Barley Marketing Act 1949.

Travers J., however, was prepared to construe the Act in the widest terms, as authorizing any measure deemed suitable by the Board in the interests of the industry which it represented. His liberal interpretation of the scope of the legislation was largely founded on practical considerations, e.g. the fact that the Centre had never refused to buy, and under the circumstances such a refusal was never likely to occur. It is submitted that this does not affect the inherent potential for such a prohibition in the form of the Order which renders it invalid. His Honour also adopted the reasoning of the Special Magistrate to the effect that, since the business of growing potatoes for sale was not restricted, the prohibition was not invalid, if such a prohibition

8. *Atkins* v. *Golding*, Full Court decision, supra 418.

existed. This argument fails to recognize that the subject matter of the power is the regulation of sales of potatoes, not the growing of potatoes for sale. Ths broad dissenting judgment does, however, serve to throw into relief the severity of the majority views.

Although the practical consequences of the decision have been nullified by the amending legislation, the case remains a useful illustration of the possible divergence in the approaches of different judges to the construction of the same measure, and the narrow approach to questions of ultra vires which is currently favoured.

POLICE OFFENCES ACT

Loitering

The South Australian Supreme Court has in two recent decisions, *Wilson* v. *O'Sullivan*[1] and *Mills* v. *Brebner*,[2] further clarified the meaning of s. 18 of the Police Offences Act, 1953-1962. This section is mainly used by the police in controlling the activities of homosexuals prone to frequenting public places, "peeping-tom" offenders, suspected milk can thieves and other nocturnal nuisances. The section reads as follows:

> "Any person who lies or loiters in any public place and who, upon request by a member of the police force, does not give a satisfactory reason for so lying or loitering shall be guilty of an offence."[3]

Both *Wilson* v. *O'Sullivan* and *Mills* v. *Brebner*, although unconnected, arise from similar factual situations. The appellant in each case was spoken to by police while in the vicinity of a public lavatory in the East Parklands. Their reasons for being there failed to satisfy the police and each was arrested and charged with a violation of s. 18 of the Police Offences Act.

The appellant Wilson was convicted in a summary hearing before a Special Magistrate who found it unnecessary to make a finding as to whether the explanation given to the Court was satisfactory, as *that* explanation was not made to the constable. In the second case the appellant Mills was also convicted although the Special Magistrate added that the explanation given in Court was satisfactory. The Special Magistrate considered the offence to be made out by the appellant's failure to give to the constable at the time an explanation which the Court considered was satisfactory to him. On both appeals the convictions were quashed and the judgments handed down do much to remove ambiguities apparent within section 18.

1. [1962] S.A.S.R. 194.
2. [1962] S.A.S.R. 209.
3. Penalty: £25 or three months imprisonment.