[HIGH COURT OF AUSTRALIA.]

THE CO-OPERATIVE BRICK CO. PROPRIETARY LTD. . . . . } APPELLANTS,

AND

THE MAYOR, &c., OF THE CITY OF HAWTHORN . . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909.

MELBOURNE, *August* 31, *Sept.* 1, 13.

Griffith C.J., Barton and O'Connor J.J.

Local Government—By-Law—Validity—Power to regulate or control—Power to prohibit—Local Government Act 1903 (*Vict.*) (*No.* 1893), *sec.* 197,

By sec. 197 (21) of the *Local Government Act* 1903 (Vict.) power is conferred upon municipalities to make by-laws for "regulating or controlling quarrying or blasting operations."

Held, that a by-law prohibiting within a particular part of a municipality the blasting of rock, &c., "in or within 100 yards from any public or private street, or within a distance of 200 yards from any occupied or unoccupied dwelling within the said part," was not within the power conferred, and was invalid.

Slattery v. *Naylor*, 13 App. Cas. 446, distinguished.

Municipal Corporation of the City of Toronto v. *Virgo*, (1896) A.C. 88, followed.

Decision of the Supreme Court of Victoria, *In re Mayor, &c., of the City of Hawthorn*; *Ex parte Co-operative Brick Co. Proprietary Ltd.*, (1909) V.L.R., 27; 30 A.L.T., 118, reversed.

APPEAL from the Supreme Court of Victoria.

The Co-operative Brick Co. Proprietary Ltd., pursuant to sec. 232 of the *Local Government Act* 1903, obtained a rule *nisi*

H. C. OF A. 1909.

CO-OPERATIVE BRICK CO. PROPRIETARY LTD. v. MAYOR &C. OF THE CITY OF HAWTHORN.

calling upon the Mayor, Councillors, and Citizens of the City of Hawthorn to show cause why a certain by-law should not be wholly or in part quashed for the illegality thereof, upon the following grounds:—(1) That the by-law was wholly or in part illegal and *ultra vires*, and made without legal authority; (2) that the by-law was not made *bonâ fide* in the exercise of the power conferred upon the City of Hawthorn by the *Local Government Act* 1903; (3) that the by-law was unreasonable.

The by-law was as follows:—

"A by-law of the City of Hawthorn, made under sec. 197 of the *Local Government Act* 1903, and numbered 57, for regulating blasting operations.

"1. In pursuance of the powers conferred by the *Local Government Act* 1903, the Mayor, Councillors, and Citizens of the City of Hawthorn order as follows:—

"'No person shall within the part of the City of Hawthorn hereinafter described blast any rock stone earth or timber in or within 100 yards from any public or private street or within a distance of 200 yards from any occupied or unoccupied dwelling within the said part. This by-law shall not apply to any person acting under the authority of any Act of Parliament. The penalty of £20 is hereby imposed upon any person guilty of wilful act or default contrary to this by-law.'

"2. This by-law shall apply to and have operation throughout the following part of the City of Hawthorn, that is to say, the whole of the area within the following boundaries." Then followed the boundaries, which included an area of about 900 acres of the municipality.

The Supreme Court having discharged the rule *nisi* (*In re Mayor, &c., of the City of Hawthorn; Ex parte Co-operative Brick Co. Proprietary Ltd.* (1), the company now appealed to the High Court.

For the purposes of this report, it is not necessary to set out any other facts than are stated in the judgments hereunder.

Mitchell K.C., and *Irvine* K.C. (with them *Starke*), for the appellants. This by-law is not a proper exercise of the power to

(1) (1909) V.L.R., 27; 30 A.L.T., 118.

regulate and control blasting operations. The by-law amounts practically to a prohibition of blasting within the particular area. The power given by sec. 197 (21) of the *Local Government Act* 1903, to regulate and control blasting operations, does not include a power to prohibit. Where the legislature intended to give a power to make by-laws prohibiting certain acts, they have done so in express words. Cf. sub-secs. 18, 20, 24 to 30 of sec. 197. The primary meaning of the words "regulating" and "controlling" does not include a prohibition, but they rather imply the continued existence of that which is to be regulated or controlled. *Municipal Corporation of the City of Toronto* v. *Virgo* (1); *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2). For the purpose of seeing whether a prohibition, or partial prohibition, is authorized by a power to regulate or control, the Court must look at all the surrounding circumstances and consider the subject matter. *Municipal Corporation of the City of Toronto* v. *Virgo* (3); *Slattery* v. *Naylor* (4). Once the by-law is determined to be within the power conferred, the Court cannot go into the surrounding circumstances to see whether the by-law is reasonable: *Widgee Shire Council* v. *Bonney* (5), but the Court may look at the surrounding circumstances to see whether the by-law is within the power. One of the facts to be considered here is that under sec. 5 (xvi.) of the *Police Offences Act* 1890 it is an offence to blast rock, &c., in or near a public street without the permission first obtained of the local authority and without attending to any directions in regard thereto given by the local authority. A power to regulate and control only includes a power to prohibit where the former power would be nugatory, unless it included the latter power: *Slattery* v. *Naylor* (6). If this is a lawful exercise of the power, a municipality might prevent mining within its area. This difficulty was got over by *Cussen* J., in the Court below, by saying that mining was carried on under Statute. But that is not so. A miner is by Statute given a title to the land and to the gold, but he gets his right to mine as an incident of ownership of land, and

(1) (1896) A.C., 88, at p. 93.
(2) (1896) A.C., 348, at p. 363.
(3) (1896) A.C., 88.
(4) 13 App. Cas., 446.
(5) 4 C.L.R., 977.
(6) 13 App. Cas., 446, at p. 450.

H. C. OF A. 1909.

CO-OPERATIVE BRICK CO. PROPRIETARY LTD. v. MAYOR &C. OF THE CITY OF HAWTHORN.

he must carry on his mining operations subject to the existing law, which includes this by-law. The legislature did not in sec. 197 use the words "prohibit," "regulate," "control," "suppress," indiscriminately. Full meaning can be given to "control" as distinct from "regulate." It implies that the Council of the municipality may, by *their* officers, direct how a thing is to be done and supervise the doing of it. [They referred to *Rossi* v. *Edinburgh Corporation* (1); *Ex parte Edwards*; *In re Mayor, &c., of the City of Bendigo* (2).] The by-law is unreasonable, in that its operation is partial and unequal, that it is clearly made to affect the appellant company. On the evidence this by-law is not a *bonâ fide* exercise of the power of control vested in municipalities by sec. 197 (21), for the Council had in their minds only the question of law to prevent the appellants from carrying on their operations. The question to which they should have applied themselves was how far blasting operations generally required regulating in the particular portion of the municipality.

Duffy K.C. and *Cohen*, for the respondents. The only question here is whether the by-law is within the scope of the authority conferred by sec. 197 (21) of the *Local Government Act* 1903. If it is, then the by-law is good. The words "regulate and control" may confer a power to absolutely prohibit, but it is not necessary to go so far, because this is only a partial prohibition. The word "control" means to repress, exercise dominion over, or keep under dominion, and involves the idea of prohibition; *R.* v. *Croydon and Norwood Tramways Co.* (3). The by-law is aimed at preventing blasting being done in such a way as to cause damage, and damage would be just as likely to be done by blasting within a certain distance of houses or streets as by using charges which are too heavy. If the apparent object of the by-law is to carry out the management and to direct the process of blasting, it does not matter that incidentally proprietary rights are interfered with. If, in the course of regulating, the local authority thinks it prudent that there should be prohibition to a certain extent, they may make a good by-law to

(1) (1905) A.C., 21. (2) (1908) V.L.R., 609; 30 A.L.T., 63.
(3) 18 Q.B.D., 39, at p. 42.

that effect. This case falls within *Slattery* v. *Naylor* (1). If in fact the attempt is to regulate and to exercise the power for that purpose, then the fact that the Act sought to be regulated is prohibited as to a certain locality does not interfere with the validity of the by-law. The right to determine what is the proper means of regulating and controlling is in the municipality. [They also referred to *Municipal Corporation of the City of Toronto* v. *Virgo* (2); *Borough of Newcastle* v. *Selwyn* (3); *Calder* v. *Lewis* (4); *Ex parte Flack* (5); *Brooks* v. *Selwyn* (6); *Ex parte O'Neill* (7); *Cronin* v. *The People of the State of New York* (8); *Salt* v. *Scott Hall* (9); *Simmons* v. *Malling Rural District Council* (10).]

Irvine K.C. in reply.

Cur. adv. vult.

The following judgments were read :—

Sept. 13.

GRIFFITH C.J. This was an application under section 232 of the *Local Government Act* 1903 (No. 1893) to quash a by-law on the ground of illegality.

Section 197 of the Act authorizes the Council of a municipality to make by-laws for (amongst other purposes) "regulating or controlling quarrying or blasting operations" (pl. 21). The by-law impeached, which was (as authorized by sec. 203) limited in its application to an area of about 900 acres of the respondents' municipal district, was as follows :—

"No person shall within the part of the City of Hawthorn hereinafter described blast any rock stone earth or timber in or within 100 yards from any public or private street or within a distance of 200 yards from any occupied or unoccupied dwelling within the said part." The objections taken by the appellants to the by-law were (1) that it is wholly or in part illegal and *ultra vires*, and made without legal authority, (2) that it was not made *bonâ fide* in exercise of the powers conferred upon the respondents by the Act or at all, and (3) that it was unreasonable.

(1) 13 App. Cas., 446.
(2) (1896) A.C., 88.
(3) Tarl. (N.S.W.), 93.
(4) 7 Q.L.J., 158.
(5) 1 N.S.W. L.R. (L.), 27.
(6) 3 N.S.W. L.R. (L.), 256.
(7) 13 N.S.W. L.R. (L.), 280.
(8) 82 N.Y.R., 318.
(9) (1903) 2 K.B., 245.
(10) (1897) 2 Q.B., 433.

H. C. OF A. 1909.

CO-OPERATIVE BRICK CO. PROPRIETARY LTD. v. MAYOR &C. OF THE CITY OF HAWTHORN.

GRIFFITH C.J.

In view of recent decisions, it is difficult to say how far, if at all, the objection of unreasonableness can be taken as to by-laws made under statutory authority, and, if it can be taken, what meaning is to be attributed to the word. In most of the cases, however, it will be found that the point sought to be raised under that head was open under the objection that the by-law was *ultra vires*.

I will deal with the other objections in order. The first point for determination is the meaning of the words of the Statute by which the power relied on is claimed to be conferred. The words in the present case are "regulating or controlling." Now in all cases of construction of language it is necessary to have regard to the subject matter, for the same words, either spoken or written, may have very different meanings as applied to different subject matter. In the present case the subject matter is "quarrying or blasting operations." Another principle to be remembered is that under British law every person is entitled to enjoy his personal liberty and to make free use of his property, except so far as he is controlled by some law. All Statute law and all derivative legislation by by-laws or regulations operate in diminution of this liberty, but the power of a subordinate legislative body to make such diminution only extends so far as the power is expressed or necessarily implied.

The appellants contend that the by-law in question does not regulate or control blasting, but prohibits it altogether within the prescribed limits. This is incontrovertible. If the by-law is valid, no foundations of a house fronting a street within the area affected can be excavated by blasting. They say further that the words "regulating or controlling" do not *primâ facie* include prohibiting, that if they could be held *primâ facie* to have such a meaning it is excluded by the context, and that, so far as regards the argument of necessary implication, complete regulation and control can be applied to such a subject matter without prohibition.

The respondents contend that the words *primâ facie* include prohibition. They say that all regulation involves a partial or conditional prohibition, and that the word "controlling" is a stronger word to the same effect. It is, no doubt, true that in

one sense regulation and control involve a conditional prohibition, but I do not think that the expression is logically accurate. It is more accurate to say that regulation is a conditional permission. Such a prohibition as can be said to be involved in it is not a prohibition of the thing in the abstract, but of some incident or attribute with respect to a thing assumed to be otherwise lawful.

In further support of this argument the respondents rely upon the case of *Slattery* v. *Naylor* (1). The by-law, the validity of which was under consideration in that case, was made under a power to make by-laws regulating the interment of the dead. As applied to such a subject matter it is obvious that the disposition of human bodies by burial could not be effectively regulated if every man were to be left free to bury them wherever he thought fit—under his floor or in his back yard. The notion of regulating therefore necessarily implied a power to prescribe the places in which interment might take place. And this was, in my opinion, the *ratio decidendi* of the decision of the Board, who pointed out (2) that any other construction would render the power itself nugatory. The overwhelming force of this argument was held to be not affected by the use of the word "prevent" and other like words in the context with regard to subject matter of a different nature.

In my opinion the words "regulating" and "controlling," as applied to an operation such as quarrying or blasting, do not, *primâ facie*, include prohibiting. Their primary meaning is to make provision for the manner of carrying on an operation, the lawfulness and the continuance of which are assumed. It was so held by the Judicial Committee in the case of *Municipal Corporation of the City of Toronto* v. *Virgo* (3), with regard to the words "regulating and governing" as applied to hawkers, and in the case of *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (4) with regard to the word "regulation" as applied to trade. On referring to the context of sec. 197, we find that in seven different cases the word "prohibiting" is used in conjunction with the word "regulating," and in two

(1) 13 App. Cas., 446.
(2) 13 App. Cas., 446, at p. 450.
(3) (1896) A.C., 88.
(4) (1896) A.C., 348, at p. 363.

H. C. OF A. 1909.

CO-OPERATIVE BRICK CO. PROPRIETARY LTD. v. MAYOR &C. OF THE CITY OF HAWTHORN.

Griffith C.J.

cases without it. In sec. 198 the words "regulating and restraining" are used. The inference is very strong, as the Judicial Committee thought in Virgo's case upon a similar context, that the words should bear their primary meaning.

Is there, then, anything in the subject matter to require an extended meaning? There is no doubt that, with regard to many matters besides the interment of the dead, a power to regulate necessarily implies a power to prescribe conditions of place, as, for instance, in the case of noxious trades or the possessing or keeping animals. But in such cases the prohibition of the use of one part of an area for doing a specified thing does not operate as a prohibition of the thing being done at all, for it may be done elsewhere. But it is obvious that a prohibition of quarrying or blasting within a specified place is an absolute prohibition, since from the nature of the case the operation of quarrying or blasting can only be carried on where the rock or stone is *in situ naturali*. This circumstance is of itself sufficient to differentiate the present case from *Slattery's Case* (1). The case seems to me to fall exactly within the principles laid down in *Virgo's Case* (2), but to be an *a fortiori* case. In that case a by-law, purporting to be made under a power to make by-laws for regulating and governing hawkers, prohibited them from carrying on their business in certain streets of the City of Toronto, and it was held to be bad as not being in substance a by-law for regulating and governing hawkers, but for preventing them from carrying on their business in a considerable part of the city. An argument appears to have been addressed to the Board, to the effect that regulations might incidentally involve the exclusion of hawkers from certain parts of the city, and the Board seems to have accepted the argument. As I understand, the test suggested as relevant to such a case is whether the substantial scope of the by-law was to regulate or to prohibit.

So, in the present case, Mr. *Cohen* argued that it might be necessary for the effectual regulation and control of blasting, in the interests of owners of property, to prohibit any blasting within a short distance of existing buildings, and that the local authority, having thus authority to prescribe a minimum distance,

(1) 13 App. Cas., 446.

(2) (1896) A.C. 88.

might prescribe any distance they pleased. I doubt whether the power in question looks to the protection of private owners of property in the sense suggested, but, if it does, I think that the by-law on its face is not a by-law to effectuate such a purpose.

For these reasons, I have come to the conclusion that the by-law in question is *ultra vires*. It is not, therefore, necessary to express any opinion upon the other points raised, but I think it right to advert to an argument addressed to us on the second point. Upon the evidence there is strong ground for thinking that the real object of the respondents in making the by-law was to prevent the carrying on of the industry of brick-making within the specified area, and not to regulate blasting. But, as at present advised, I am unable to see any sure ground for holding that a Court of Justice can investigate the motives of a legislative body while acting *intra vires*. It was suggested that *Virgo's Case* (1) shows that extrinsic evidence is admissible to show the actual operation of a by-law for the purpose of establishing the objection that it is unreasonable. Again, I see a great difficulty. If extrinsic facts can be alleged they may be denied, and the truth might fall to be determined by a jury, with the result that the opinion of the jury as to the necessity for the exercise of powers in a particular respect would be substituted for that of the local authority. As at present advised, I think that the Court can only regard facts of which it can take judicial notice. But in the case of a by-law, which is a law of local territorial application and intended to be administered locally, I think that it can take notice of all facts, geographical or other, of which the local tribunal could take judicial notice. I do not think that the Board in *Virgo's Case* (1) meant to go beyond this. The appeal must be allowed.

BARTON J. The by-law in question is attacked on three grounds: (1) that it is *ultra vires*, not being covered by statutory authority; (2) that it is not a *bonâ fide* exercise of such authority; (3) that it is unreasonable.

If it is open to any one of these objections it is invalid.

By sec. 203 (2) of the *Local Government Act* 1903 (No.

(1) (1896) A.C., 88.

H. C. OF A. 1909.

CO-OPERATIVE BRICK CO. PROPRIETARY LTD. v. MAYOR &C. OF THE CITY OF HAWTHORN.

Barton J.

1893), any by-law made under that Act may be made to apply and to operate throughout the whole or any part or parts of the municipal area. This by-law has been made to apply to and operate within a block of about 900 acres of the Hawthorn area. Of course, under sec. 203, it could be made to cover the whole municipality, if valid.

Dealing first with the objection that the by-law exceeds the limits of the legislative authority, we must ascertain what it is that it purports to do. It distinctly forbids (by the words "No person shall," &c.) the carrying on within the defined 900 acres of the work of blasting rock, stone, earth, or timber in or within 100 yards from any public or private street, or within 200 yards from any occupied or unoccupied dwelling within that area. There is nothing to prohibit blasting outside it, even if within the stated distances from any of the streets or dwellings contained in the area. On the other hand, wherever there exists within it material which cannot be removed without blasting, that means of excavation cannot be employed in the execution, for instance, of an intention to build on or near a street, or near a dwelling, even though the safety of persons and property be insured by every precaution.

On the one side, it is contended that this is a prohibition covering the defined area, and that it is therefore not authorized by a power of "regulating or controlling" the operations of blasting and quarrying. On the other side, it is urged that such a by-law is not a "prohibition" in the sense of the 197th section of the *Local Government Act* 1903; that the word as there used means only an absolute prohibition, and does not include a qualified or partial one; and that the appellants place too narrow a meaning on the power to "regulate or control," which includes authority to prohibit *sub modo*, because the words used mean a power to regulate and to do something more, expressed by the word "control."

So we must see, first, whether this by-law amounts to a prohibition, and next, if it does, whether the power given authorizes such a prohibition. And in this connection it is necessary to inquire what would be the true extent of the power if it stood

alone, and then to arrive at its true extent in relation to the context, the whole of sec. 197.

That the by-law is a prohibition is abundantly clear. To justify that opinion I need only compare it with that in question in the case of the *Municipal Corporation of the City of Toronto* v. *Virgo* (1), where the portion of a by-law challenged ran thus:— "No person named and specified in sub-sec. 2 of this sec. (*i.e.*, no hawker) . . . shall . . . prosecute his calling or trade in any of the following streets and portions of streets in the City of Toronto." This was held by the Privy Council to be a prohibition. Counsel who maintained its validity called it a partial one, or a prohibition only in relation to the area defined, and argued that it did not quite amount to a prohibition, because hawkers might still carry on their business in certain streets of the city. That argument was not acceded to, and it is difficult to see how its acceptance could have been expected. Then does the power of regulating and controlling authorize this prohibition? The meaning of the words standing alone does not appear to go so far. It may be conceded that control means something more than regulation, though counsel were not very explicit in attempting to define its further extent. There may be, and probably is, some room between regulation and prohibition in which control may operate. That does not help us much. But clearly a power to prohibit authorizes the complete stoppage of a process or practice throughout any area to which the prohibition applies, while the regulation and the control of it are operations which seem to imply its existence and continuance. That is the view taken by the Judicial Committee in *Virgo's Case* (2), and in the case of the *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3), the Board, speaking by Lord *Watson*, said: "A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation." And his Lordship goes on to quote the judgment in *Virgo's Case* (1) in support of that proposition. Does then the context of sec. 197 give any more extensive meaning to the power in sub-sec. 21? On examina-

(1) (1896) A.C., 88.
(2) (1896) A.C., 88, at p. 93, per Lord *Davey*.
(3) (1896) A.C., 348, at p. 363.

H. C. OF A. 1909.

CO-OPERATIVE BRICK CO. PROPRIETARY LTD. v. MAYOR &C. OF THE CITY OF HAWTHORN.

Barton J.

tion it is strong to confine the power to its primary meaning. Where the legislature intended to confer power to put a stop to a specified proceeding it did so by the use of the word "prohibiting." See sub-sections 18 and 25. Where it wished to give a choice between the due ordering of a thing and the putting a stop to it, it used the words "regulating or prohibiting," as in sub-secs. 20, 24 and 26, or inverted them, thus, "prohibiting or regulating" as in sub-secs. 27, 28, 29, and 30. Where again the legislature wished to authorize only the due ordering and safeguarding of operations or practices, it used the word "regulating" alone, either because of the plain necessity for their continuance, as in sub-secs. 5 (water supply by Council), 13 (sewerage and drainage), 14 (lighting), and 22 (traffic and processions); or because, being otherwise lawful, their conduct under proper precautions and conditions was consistent with the safety, peace, and comfort of individuals and the public. The cases of this class are sub-secs. 23 (the use of locomotives, steam rollers, and the like on roads), 31 (the use of merry-go-rounds, swing boats, and shooting galleries), and 32 (regulating the conduct of persons using cabmen's shelters or conveniences provided by the Council); and it seems to me that "quarrying or blasting operations," are particularly operations which the legislature would desire to allow under due ordination and subject to due precautions. An intention to render them unlawful, despite precautions, will not be lightly inferred, because they are in themselves lawful means of putting property to a lawful use. But they may easily become an injury or a nuisance to the public or to neighbouring owners (if we may take it that the legislature desired to add to the remedies of the latter class, which however it may perhaps not be open to infer in the present case). They are, therefore, proper subjects for such rules and precautions as may at least protect the public, while the attainment of this object does not constitute any necessity for absolute prohibition. That this was the view of the legislature is, I think, reasonably clear from the terms in which it has granted the several powers conferred by the numerous sub-sections of sec. 197; a comparison of which elucidates the care and propriety with which it has applied those

terms to their varying subject matters. The power to prohibit quarrying and blasting has not only not been granted in terms, but the context shows, by strong inference from the choice of its language by the legislature, that the power has been designedly withheld. Counsel for the respondents relied strongly on the case of *Slattery* v. *Naylor* (1). In *Virgo's Case* (2), eight years after the decision, it was similarly relied on, but in the judgment it is not mentioned. *Slattery's Case* (1) is, I think, distinguishable from *Virgo's* (2), and from the present case. If the two were in conflict I should follow *Virgo's Case* (2) as the later authority, and because I think its reasoning applies with even added force to this case. True, it was held in *Slattery's Case* (1) that under a a power to regulate the interment of the dead a municipal by-law was not *ultra vires* because it altogether prohibited further interments within limits inclusive of the cemetery in which the appellant and others had purchased land for the burial of their dead. Future interments were confined by the by-law to limits exclusive of this cemetery, which had been in use for a quarter of a century. The by-law was, beyond dispute, in form and substance a prohibition of absolute operation on this cemetery. Nevertheless it was held valid as within the power to regulate. The following passages will show the ground of the decision: "The interment of the dead is just one of those affairs in which it would be likely to occur that no regulation would meet the case except one which wholly prevented the desired or accustomed use of the property. It may well be that a plot of ground, having been originally far from habitations, and suitably used as the burying-place of a family or a religious society, has been reached by the growing town, and has so become unsuitable for the purpose. In such a case a power to regulate would be nugatory unless it involved a power to stop the burials altogether" (3). "Their Lordships cannot hold that a by-law is *ultra vires* because, in laying down a general regulation for the borough, ... it has the effect of closing a particular cemetery" (4). From these passages it is clear to my mind that the Judicial Committee considered that in this particular case the prohibition

(1) 13 App. Cas., 446.
(2) (1896) A.C., 88.
(3) 13 App. Cas., 446, at p. 450.
(4) 13 App. Cas., 446, at p. 451.

H. C. OF A. 1909.

CO-OPERATIVE BRICK CO. PROPRIETARY LTD. v. MAYOR &C. OF THE CITY OF HAWTHORN.

Barton J.

was incidental to the legislative use of the power to regulate, which power could not be used with full effect unless it authorized such incidental prohibitions; so that without such authority the main power itself would in some cases be nugatory. This is, I think, an example of the operation of the maxim "*Quando lex aliquid concedit*," &c., which this Court has in several constitutional cases found it necessary to apply.

The present case, however, does not resemble *Slattery's Case* (1) in that respect. It is common knowledge that quarrying and blasting can be and are daily carried on in densely populated areas without annoyance or danger to the public, if only precautions are taken to secure that result. This is the experience of even great cities. Thus the entire prohibition of these operations does not become an actual necessity as an incident to the effective exercise of the power of regulating or controlling them. It is otherwise in the regulation of interments, for the reasons so clearly pointed out by Lord *Hobhouse* in *Slattery's Case* (1), and therefore the decision in that case does not govern the present one, to which the reasoning of *Virgoe's Case* (2) is more apposite. Accordingly we should follow the latter, and the more readily because to prohibit the appropriate means of excavating rock and hard earth for removal does not, as does the exclusion from a street or several streets of an ambulatory trade like hawking, leave it possible to continue operations elsewhere. Rock, &c., must be blasted where it lies, or in the nature of things it cannot be blasted at all. Thus the subject matter of sub-sec. 21 renders the prohibition absolute as regards the very process involved.

As I think the by-law is bad on the first ground it is unnecessary to consider the others at length. I concur in what has been said of them by the Chief Justice of this Court and by the learned Judges of the Court below, and as to the question of reasonableness it is enough to say that this by-law, if within the power conferred, could not be condemned as one that "reasonable men could not make in good faith," and therefore it is within the reasoning of Lord *Hobhouse* in *Slattery* v. *Naylor* (3), and of the Chief Justice of this Court in *Widgee Shire*

(1) 13 App. Cas., 446. (2) (1896) A.C., 88.
(3) 13 App. Cas., 446, at p. 453.

Council v. *Bonney* (1). But on the first ground, and on that one only, I am of opinion that the appeal must be allowed and the by-law quashed.

O'CONNOR J. The Supreme Court in this case exercised the jurisdiction conferred on it by sec. 232 of the *Local Government Act* 1903. The validity of the by-law was attacked on three grounds, namely, (1) that the municipality in making it had exceeded their power, (2) that it was not made in the *bonâ fide* exercise of their power, (3) that the by-law was unreasonable. All three Judges in the Court below held that the two latter grounds of objection were not substantiated. I entirely concur in that view, and as to the second ground I do not wish to add anything to what they have said. Upon the question raised in the third ground as to the reasonableness of the by-law it is very important to bear in mind the distinction pointed out in many modern cases between by-laws made by bodies of limited powers incorporated by charter or otherwise and the by-laws of statutory bodies such as that created by the *Local Government Act* 1903. Having regard to the constitution of the municipal Councils, the publicity of their proceedings, the opportunities of Government revision of their by-laws before they can take effect, and the statutory force expressly given to them when made, it is clear that the legislature intended to constitute an important law-making body and to entrust it with very ample powers within the limits of its authority. So long as these limits are not exceeded it would seem that the legislature intended to leave it to the uncontrolled discretion of the local authority to determine in what circumstances, in what manner, and to what extent the powers conferred should be used. The judgment of the Chief Justice of this Court in the *Widgee Shire Council* v. *Bonney* (1) states very clearly the principles on which the validity or invalidity of such by-laws should be determined. Applying these principles it seems to me impossible to hold that any reason has been shown why the exercise of the municipality's discretion in respect of the particular by-law should be interfered with if in making it that body has kept within the authority

(1) 4 C.L.R., 977, at p. 983.

H. C. OF A. 1909.

CO-OPERATIVE BRICK CO. PROPRIETARY LTD. v. MAYOR &C. OF THE CITY OF HAWTHORN.

O'Connor J.

conferred by the Act. The real difficulty in the case is whether the municipality has kept within the authority conferred on it by the Act. That question is raised by the first ground of objection, and to that I shall at once address myself. The by-law is applicable only to a specified area covering nearly a thousand acres in which there appear to be comparatively few dwelling houses. Its general effect may be very shortly stated. The blasting of rock, stone, earth or timber is absolutely prohibited at any spot in that area which is within one hundred yards from any public or private street, or within two hundred yards from any occupied or unoccupied dwelling house. The blasting of stone, earth, or timber is one of the ordinary uses of land, and is in many localities essential in its preparation for dwellings. It is one of those uses which the common law allows a man to make of his land provided he does not injure his neighbour in person or property, or cause him or the public such discomfort or inconvenience as amounts to a private or public nuisance as the case may be. One other restriction on the use of the land for this purpose is imposed, and that is by the *Police Offences Act* 1890, sec. 5, sub-sec. xvi., which makes it an offence punishable by summary conviction to blast any rock, stone or timber in or near any public place, including a street, without permission of the local authorities, or to fail in attending to any directions in regard thereto given by the local authorities. Thus, before this by-law came into force, every occupier of land within the area was, as persons living in other parts of the municipality still are, at liberty, subject to the restrictions I have mentioned, to blast on any portion of his land which he might think fit to use in that way. The by-law being now challenged, it is incumbent on the municipality to show that the legislature has by express words or necessary implication conferred on them the power to abridge so materially the right of the landholder in the use of his property. Section 197 of the *Local Government Act* 1903 is the enactment relied upon. It empowers the municipality to make by-laws for certain purposes which are described in the various sub-sections. Amongst them is sub-sec. 21, which is as follows :—"Regulating or controlling quarrying or blasting operations." I may say at the outset that I do not attach much

significance to the use of the word "operations." "Quarrying" and "blasting" in that context necessarily connote all work incidental to quarrying and blasting, and would include all the operations of quarrying and blasting whether the expression "operations" were used or not. On the face of the sub-section it contains no power to prohibit, and the question to be determined, therefore, is whether, having regard to the subject matter, the context, and the object which the legislature had in view in delegating this authority to the municipality, the power to "regulate" and "control" must be taken to include the power to "prohibit." Much light may be thrown on the sense in which the words "regulate" and "control" have been used by an examination of other sub-sections of the same section in which the word "prohibit" has been used in addition to the word "regulate." Under sub-section 20 by-laws may be made for the purpose of "regulating or prohibiting" the keeping of any animal or thing offensive, injurious to health, or dangerous. In sub-section 24 the expression is "regulating or prohibiting" the use of wire with spikes or jagged projections on fences adjoining streets. Sub-section 26 uses the words "regulating or prohibiting" the writing, painting, affixing, &c., of advertisements in streets; and in sub-section 27 the words are "prohibiting or regulating" cattle being allowed to graze on unenclosed land. In sub-section 28 power is given to make by-laws for the purpose of "prohibiting or regulating" the locking of vehicle wheels under certain circumstances; and in sub-sec. 29 for the purpose of "prohibiting or regulating" the use on the roads of the municipality of vehicles having spikes or projections on their wheels. The purpose for which sub-sec. 30 gives the power is "prohibiting or regulating" the drawing or trailing of any sledge or heavy timber upon any foot-way or carriage-way. The obvious inference to be drawn from the use of both expressions in these sub-sections is that in those instances, at all events, the legislature did not intend the power to regulate to include the power of prohibiting. They are almost all cases in which the effective guarding of public safety, public health, and public convenience necessarily involve prohibition under certain circumstances. And in order to meet such circumstances, Parliament has deemed it necessary in those

H. C. OF A. 1909.

CO-OPERATIVE BRICK CO. PROPRIETARY LTD. v. MAYOR &C. OF THE CITY OF HAWTHORN.

O'Connor J.

instances to confer on the local authority the power of "prohibition" expressly. In the *Municipal Corporation of the City of Toronto* v. *Virgo* (1), it was held by the Privy Council that a statutory authority to make by-laws for "regulating and governing hawkers" did not justify a by-law prohibiting hawkers altogether from plying their trade in a substantial and important portion of the City of Toronto. In arriving at that conclusion the Privy Council relied on the use of prohibitive words in other sections of the Act as throwing light on the meaning of the particular section which it then had under consideration. Lord *Davey*, in delivering the judgment, says (2): "An examination of other sections of the Act confirms their Lordships' view, for it shows that when the legislature intended to give power to prevent or prohibit it did so by express words." The same line of reasoning would appear to be applicable in the case of the sub-section now under consideration. It is difficult to extract from most decisions in that class of case any rule of general applicability. The extent of the power in each case must always depend on the language which the legislature has used in conferring it. But what general applicability there is in Lord *Davey*'s judgment is to be found in the following passage on the same page (2):—"But through all these cases the general principle may be traced, that a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner." The respondent municipality in this case place some reliance on the use in the sub-section of the word "controlling" conjointly with "regulating." They contended that the expression "control" carried with it a power of direct interference on the part of the municipality in the operations of quarrying and blasting, an authority to impose their own system of carrying out these operations on those who wish to quarry or blast within the municipality. Probably there is good ground for that construction. But it is clear to my mind that the expression "control" no more involves the power of prohibition than does the expression "regulate." Taken in their ordinary signification

(1) (1896) A.C., 88.

(2) (1896) A.C., 88, at p. 93.

neither expression carries with it the idea of prohibition. On the contrary, they both suggest the continued existence and operation of the thing to be regulated and controlled. *Prima facie*, therefore, the words do not confer the authority to absolutely prohibit. The respondents, however, rely on the interpretation which they put forward as being the only possible interpretation which will render the power effective. They argue that the object of the sub-section was to confer on the municipality the power of adequately protecting the public and adjoining landowners from the injury likely to be caused by unrestricted blasting on lands within the municipality, that in some circumstances that object can only be achieved by stopping blasting altogether within certain limits of space, and that the legislature must therefore be taken to have intended to include such prohibition in the words "regulate" and "control." It must of course be admitted that regulation and control necessarily import some restriction of individual liberty, and the nature of the subject matter may in special circumstances make effective regulation impossible unless the restriction is carried as far as prohibition. For instance, in *Calder* v. *Lewis* (1), it appears that authority was conferred on the Ipswich Traffic Board to make by-laws for "regulating traffic;" the by-law challenged prohibited the standing of any vehicle in any street for the purpose of exposing for sale any goods without the authority of the President of the Board. The Chief Justice in upholding the by-law pointed out that the regulation of traffic involves the prescribing of the conduct to be observed by persons using highways in vehicles, that the conduct prohibited was clearly likely to obstruct traffic, and therefore *prima facie* the by-law was good. In *Virgo's Case* (2), already quoted, Lord *Davey* refers to a similar phase in "regulating" hawking when he says:—"No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order." From which I gather that in his Lordship's opinion special circum-

(1) 7 Q.L.J., 158, at p. 159. (2) (1896) A.C., 88, at p. 93.

H. C. OF A. 1909.

CO-OPERATIVE BRICK CO. PROPRIETARY LTD. v. MAYOR &C. OF THE CITY OF HAWTHORN.

O'Connor J.

stances might have to be met by special restrictions, and that a local authority in regulating such a trade in a city might have authority to extend its restrictions even as far as prohibition at certain times and in certain places if the prevention of nuisance or the maintenance of order made such a course in its opinion necessary. It is to be noted that those cases are illustrations taken from the regulation of street businesses capable of being carried on by the same person on parts of streets other than those to which the restriction applies. In such a case the trader is still allowed to pursue his calling generally, the prohibition extends only to particular localities. But prohibition as to locality is infinitely harder to justify in a case like the present where the operation prohibited can in the nature of things be carried on only in one spot, and where therefore prohibition against carrying it on in that spot amounts to a denial of the right to carry it on at all. It was in respect to that phase of the question that the respondents relied strongly on the authority of *Slattery* v. *Naylor* (1). There the owner of a burial place in an existing cemetery claimed to exercise his right to bury in that particular place, notwithstanding that it was within the area within which interments were forbidden by the by-law. The power conferred was, to regulate interments of the dead, and the by-law forbade interment within a certain distance of streets or buildings of a specified kind, the distance fixed being such that the by-law amounted to a total prohibition of any interment in that cemetery. The Privy Council upheld the validity of the by-law. The real ground of the decision is to be found in the following passage from the judgment of Lord *Hobhouse* (2). "The interment of the dead is just one of those affairs in which it would be likely to occur that no regulation would meet the case except one which wholly prevented the desired or accustomed use of the property. It may well be that a plot of ground, having been originally far from habitations, and suitably used as a burying-place of a family or a religious society, has been reached by the growing town, and has so become unsuitable for the purpose. In such a case a power to regulate would be nugatory unless it involved a power to stop

(1) 13 App. Cas., 446. (2) 13 App. Cas., 446, at p. 450.

the burials altogether." The case, therefore, is no authority for the proposition that the power to regulate must be read as including the power to prohibit in all cases in which the local authority deems prohibition to be the most effective form of regulation. At most it amounts to no more than an illustration of the principle that the Court will always endeavour to so construe the words conferring the power as to give effect to the object of the legislature. There is nothing in the subject matter of the sub-section under consideration in this case which makes it necessary to construe the expressions "regulate" or "control" as including prohibition in order to effectuate the object which the enactment aimed at accomplishing. If blasting is so carried on as to be a nuisance it may be suppressed by by-laws under sub-sec. 10. If it is being carried on near a street or public place the operations may be directly controlled and, if necessary, forbidden by the municipality under the sections of the *Police Offences Act* to which I have already referred. As to the property of adjoining owners, if the Act was ever intended to take individual interests under its protection, upon which I express no opinion, quite sufficient authority for reasonably safeguarding private property will be found in the words of the sub-section taken in their ordinary meaning. There is, therefore, nothing in the subject matter of the sub-section which makes it necessary to extend the signification of the words "control" and "regulate" beyond their ordinary meaning. Nor is there anything to prevent the inference which follows so irresistibly from the express use of the word "prohibit" in the other sub-section, namely, that where the legislature intended to empower the municipality to prohibit as well as regulate, it conferred that power in express language. For these reasons I am of opinion that the sub-section did not confer upon the municipality the power of entirely prohibiting blasting which they purported to exercise in the by-law under consideration. It follows that in my opinion the by-law was invalid and the Supreme Court should have so held, and the appeal must be allowed.

Appeal allowed. Order appealed from discharged. Rule absolute to quash the

H. C. OF A. 1909.

CO-OPERATIVE BRICK CO. PROPRIETARY LTD. v. MAYOR &C. OF THE CITY OF HAWTHORN.

by-law with costs. Respondents to pay costs of the appeal.

Solicitors, for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitors, for the respondents, *Derham & Derham.*

B. L.

Cons/Appl *Mackinnon* v *Attorney-General (NSW)* (1909) 9 CLR 503

[HIGH COURT OF AUSTRALIA.]

THE MINISTER FOR LANDS (NEW SOUTH WALES) AND PERRY . } APPELLANTS;

AND

THE BANK OF NEW SOUTH WALES . RESPONDENTS.

THE MINISTER FOR LANDS (NEW SOUTH WALES) AND LAKE . } APPELLANTS;

AND

THE BANK OF NEW SOUTH WALES . RESPONDENTS.

THE MINISTER FOR LANDS (NEW SOUTH WALES), NORMAN AND OTHERS . . . . . } APPELLANTS;

AND

H. C. OF A. 1909.

SCOTT AND OTHERS . . . . RESPONDENTS.

SYDNEY, *Aug.* 13, 16, 25.

CONSOLIDATED APPEALS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Griffith C.J. Barton, O'Connor and Isaacs JJ.

Improvement Leases Cancellation Act 1906 (*N.S.W.*) (*No.* 42 *of* 1906), *sec.* 3—*Reserves Declaratory Act* 1895 (*N.S.W.*) (58 *Vict. No.* 16), *sec.* 6—*Cancellation*