[HIGH COURT OF AUSTRALIA.]

COOK . . . . . APPELLANT;
DEFENDANT,

AND

BUCKLE . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Local Government—By-law—Validity—Cinematograph exhibition—Licence—Discretion of local authority—Mandamus—Prohibition of use of place without licence—Order to quash conviction for using place without licence—Local Authorities Act 1902 (*Qd.*) (2 *Edw. VII. No.* 19), *secs.* 182, 183; *Sched.* 4, *subdivisions* 29, 60.

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BRISBANE, *Aug.* 2, 11.

Barton, Isaacs and Rich JJ.

By sec. 182 of the *Local Authorities Act* 1902 (Qd.) power is given to local authorities to make by-laws "with respect to" matters mentioned in the Fourth Schedule, subdivision 60 of which included the situation, form, and construction of buildings and other places which are or are intended to be used, kept, or let for (*inter alia*) theatres or cinematograph exhibitions, and the licensing and inspection of such premises.

Under that subdivision a shire council made a by-law which, so far as material, provided that no such building or place within the shire "shall be used, kept, or let for" (*inter alia*) a theatre or cinematograph exhibition, "unless the conditions with respect thereto prescribed by this by-law and any Statute in that behalf are complied with and it is licensed under this by-law." The by-law also provided for payment of fees for licences.

The appellant applied to the shire council for a licence for a certain place within the shire for the purpose of a cinematograph exhibition, and sent a licence fee with his application. The council refused to grant the licence, and thereupon the appellant used the place for such purpose without a licence. Being prosecuted under the by-law for so doing, he was convicted.

Held, that, even assuming that the by-law gave no discretion to the council to refuse the licence provided the prescribed structural conditions and provisions as to fees were complied with, the proper remedy would be by mandamus to compel the council to issue the licence; and that an applicant for such licence was not entitled to treat the requirement of a licence as a nullity

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and, on being convicted of a breach of the by-law in respect thereto, obtain an order to quash the conviction on the ground that the council had wrongly refused the licence to him.

Held, also, that the council, having authority under sec. 182 of the *Local Authorities Act* 1902 to make by-laws "with respect to" the matters above referred to, had a right to give themselves a discretionary power to grant or refuse the licence, and had validly done so by requiring a licence to be obtained from the council prior to the user of the place.

Held, further, that the power conferred by sec. 182 of the Act is not a mere power to regulate, but included power to act as the council had done, and, therefore, the by-law was not invalid as creating a power to prohibit which was beyond the powers conferred by the Act.

Decision of the Supreme Court of Queensland: *Buckle* v. *Cook*; *Ex parte Cook*, (1917) S.R. (Qd.), 144, affirmed.

APPEAL from the Supreme Court of Queensland.

On 5th December 1916 the appellant, Sidney Cook, picture show proprietor, applied, in writing, to the Council of the Shire of Toombul for a licence for an open air picture theatre at a certain place within the Shire, and enclosed £2 for the licence fee. On the following day the application was considered and was refused by the Council, and written notice of the refusal was sent to the appellant. On 9th December he opened the place as a picture theatre and used it for a cinematograph exhibition without a licence. On 8th January 1917 the respondent, William Green Buckle, clerk of the Council, on behalf of the Council laid a complaint against Cook for using the place above referred to for a cinematograph exhibition without such place being licensed under chapter 12 of the By-laws of the Council. One of the clauses in that chapter provided that "No building, room, garden, or other place within the Shire," with certain exceptions not material to this case, "shall be used, kept, or let for . . . a theatre, . . . cinematograph exhibition, . . . or for any other public performance or amusement, . . . unless the conditions with respect thereto prescribed by this by-law and any Statute in that behalf are complied with and it is licensed under this by-law." The complaint was heard by a Police Magistrate at Brisbane, and the appellant was convicted and fined. On 31st January the appellant obtained from the Supreme Court an order *nisi* calling upon Buckle and the Council to show cause before the Full Court why the conviction should not be quashed. The Full

Court, by majority (*Chubb* and *Shand* JJ., *Lukin* J. dissenting), discharged the order *nisi* with costs against the appellant: *Buckle* v. *Cook*; *Ex parte Cook* (1).

From this decision the appellant now, by special leave, appealed to the High Court.

Other material facts appear in the judgments hereunder.

Graham (with him *Grove*), for the appellant It is not disputed that, apart from the *Local Authorities Act* 1902 and the by-laws, the appellant was lawfully entitled to carry on his business. Where, as here, all structural and pecuniary requirements have been complied with, the Council had, on the true interpretation of the by-law in question, no discretion to refuse the licence, but should have granted it to the appellant. Therefore he was entitled to take the course he adopted. If, however, the effect of the by-law is to prohibit or to give the Council power to prohibit altogether the use of such a place for the purpose for which it was desired to be used, the by-law was not authorized by the *Local Authorities Act* (see secs. 182, 183, and Fourth Schedule, subdivision 60). If the by-law is to be construed as conferring upon the Council such a power, it is unreasonable, because its effect is that, notwithstanding that all other requirements have been fulfilled, a man is unable to carry on his lawful business merely because he has not obtained a licence which has been wrongly refused to him. For these reasons the conviction was bad.

Macgregor and *McGill*, for the respondent, were not called upon.

During argument reference was made to the following authorities:—*Toronto Municipal Corporation* v. *Virgo* (2); *Co-operative Brick Co. Proprietary Ltd.* v. *Hawthorn Corporation* (3); *Rossi* v. *Edinburgh Corporation* (4); *Parker* v. *Bournemouth Corporation* (5); *R.* v. *Broad* (6); *Kerr* v. *Scott* (7); *Metropolitan Meat Industry Board* v. *Finlayson* (8); *R.* v. *Arndel* (9).

Cur. adv. vult.

(1) (1917) S.R. (Qd.), 144.
(2) (1896) A.C., 88.
(3) 9 C.L.R., 301, at p. 306.
(4) (1905) A.C., 21, at p. 25.
(5) 86 L.T., 449.
(6) (1915) A.C., 1110, at p. 1122.
(7) 9 Qd. L.J., 193.
(8) 22 C.L.R., 340.
(9) 3 C.L.R., 557, at p. 566.

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The following judgments were read :—

BARTON J. The *Local Authorities Act* 1902 consolidated and amended the laws relating to local authorities, of which the Toombul Shire Council is one. Sec. 182 of the Act runs thus: "Subject to the provisions of this Act, the local authority may from time to time make by-laws with respect to all or any of the matters mentioned in the Fourth Schedule to this Act." This power is therefore conferred in very wide language, covering the whole ground of the enumerated subjects save as provided in the section which follows. Sec. 183, clause 2, contains a minor restriction, and clauses 3, 4, 5, 6, 7 and 8 are permissive and do not restrict the operation of sec. 182. Clause 6 authorizes provision in a by-law for the issue or making of licences, &c., to or with respect to persons or property, and for the payment of reasonable fees in that connection. But the first clause of sec. 183 is in these words : "Save as by this Act is otherwise expressly provided, no by-law shall contain any matter contrary to this Act or any law in force in Queensland." This provision does not seem to me to cut down the generality of sec. 182 save so far as is expressly provided. Sec. 182 itself is "subject to the provisions of this Act." Clearly the words "any law in force" refer to statutory law, for to prohibit any change or modification of the common law would be practically to nullify the power to make by-laws at all.

The Fourth Schedule, enumerating the subject matters of legislation by by-law, includes in subdivision 60, "(*i*) The situation, form, and construction of buildings, rooms, gardens and other places, whether licensed for the sale of fermented or spirituous liquors or for the sale of wine, or not requiring to be so licensed, which are or are intended to be used, kept, or let for public meetings, theatres, dancing-halls, music-halls, athletic entertainment or boxing, or for circuses, or cinematograph exhibitions, or for exhibitions for hire or profit, or for bowling-alleys, or for other places of public amusement, whether a charge is made for admission or not. (*ii*) The licensing and inspection of such premises."

The power and the subject matter being as described, how was it used and applied ? The by-laws of this Council include chapter 12, with reference to places of public amusement. Chapter 12 is

one by-law (see par. 11), and contains eleven paragraphs. The material part of the first paragraph is as follows: "(*i*) No building, room, garden or other place within the Shire . . . shall be used, kept, or let for . . . a theatre . . . cinematograph exhibition . . . or any other public performance or amusement . . . unless the conditions with respect thereto prescribed by this by-law and any Statute in that behalf are complied with, *and* it is licensed under this by-law." The applicant is not only to fulfil conditions, but is to obtain his licence before he can use the premises for any purpose indicated. Clause (*ii*) prescribes the fees for such licences. I pass over the question whether the applicant deposited a sufficient fee. Such a point, if determined, might prevent a decision upon the matter which the parties have really come to argue, and I will therefore assume for the purposes of this case that the applicant deposited the correct fee.

The applicant is right in saying that a number of the clauses in this by-law relate only to the use, management and conduct of the premises after the grant of a licence. Such are numbers 3, 4, 5, 6, 7, 8, 9; but it looks to me as if nearly all of the provisions of clause 10 relate to the conditions required at the time of license, save that it concludes with the following words: "all exit doors and inner doors of structures licensed at the confirmation of this by-law *and used* for any of the purposes before mentioned shall be altered so as to conform with this by-law within one month from the date this by-law is gazetted." These words give time for the alteration of exit doors and inner doors of structures licensed before the confirmation of the by-law, and used for any of the described purposes of amusement. But the employment of these words seems to confirm the construction that the other requirements of clause 10 are conditions precedent to obtaining a licence.

Clause 12 prescribes a penalty not exceeding £20 for any offence against any of the provisions "of this by-law" (chapter 12).

It is quite clear that this chapter is a by-law made with respect to the matters mentioned in the Fourth Schedule to the Act, subdivision 60, clauses (*i*) and (*ii*). The Council, rightly so thinking, have reprinted those two clauses at the head of their by-law.

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Now, the appellant built himself a picture theatre within Toombul Shire. His counsel says that he complied with all the conditions specified in the by-law, and this he may or may not have done. The depositions say nothing about it, for he did not give evidence before the Police Magistrate. Evidence of compliance with the conditions would not have been relevant on the charge preferred. He applied for a licence, which the Council refused after consideration, but without assigning any reason. The appellant then showed his pictures without a licence. He was charged with an offence against the provisions of the by-law and was fined. He went to the Supreme Court for a quashing order, and that Court, by majority, upheld the conviction.

The attack on the by-law is on two grounds: (1) (*a*) That it is *ultra vires*, as creating a power to prohibit, which is beyond the powers conferred by the Act, (*b*) that it is unreasonable, and (2) That on the true interpretation of the by-law the licence applied for should have been issued to the appellant.

It appears that the appellant began proceedings for a mandamus, but desisted after obtaining an order *nisi*—Mr. *Graham* says on account of technical points. If, as his counsel says, there was no discretionary power to refuse the licence an application for a mandamus was the more obviously proper means of challenging the by-law. The present at any rate is no proper method. I do not suppose that *Kerr* v. *Scott* (1) or any other case can reasonably be cited as an authority to the appellant to take the law into his own hands by showing his pictures without a licence, and thus aggressively setting the by-law at defiance. I am of opinion that he cannot now have the conviction quashed on the ground that he was entitled to treat this by-law as a mere nullity.

But as the parties desire a decision as to the validity of the by-law I wish to say that in my opinion it is entirely valid, and I might almost content myself with adopting the judgment of *Shand* J.

Having authority to make by-laws " with respect to " the matters I have quoted, the Council had a clear right to give themselves a discretionary power to grant or refuse the licence, and this is what they have done by superadding to the necessity for compliance with

(1) 9 Qd. L.J., 193.

certain conditions the requirement of obtaining a licence from the Council. It is no answer to say that there is an interference with common law rights, for, as I have pointed out, there is such an interference in practically every by-law. Nor is it an answer to say that the arrogating of a discretionary power is too large or is unreasonable. This is a statutory representative body having authority to legislate on this subject matter within limits which are extremely wide, which are expressed in the Statute, and which as expressed are not transgressed in the by-law. There is no complaint here that the discretion was exercised in any improper or unwarranted manner; the complaint is that discretion was exercised at all. As mandamus, if granted, might have commanded the exercise of the discretion, one can readily understand why the application for a mandamus was not proceeded with (see *R.* v. *Arndel* (1), per *Griffith* C.J.).

The argument that the by-law is *ultra vires* as creating a power to prohibit which is beyond the powers conferred by the Act is to my mind untenable. The power conferred by sec. 182 is not a mere power to regulate. It is wider, and includes power to act as this Council has done. To say that the by-law is unreasonable is in the circumstances beside the mark. There is here no absolute prohibition, as contended. There is power to grant a licence in some cases and to refuse it in others, the Shire being entrusted by superior legislation with power to enable itself to grant or refuse according to its sense of duty. As I have pointed out above, if it had been shown in a proper proceeding to have misused its discretion, or to have made its discretionary power a tool for indirect action, the case might have been different.

On all grounds I think that the majority were right in discharging the order *nisi* for a quashing order. It follows that this appeal must be dismissed with costs.

ISAACS J. This appeal has been argued on two grounds:—The first is that the by-law on its true interpretation gives no discretion to the Council to refuse the licence, provided that, as here, structural conditions and the provision as to fees are complied with, and therefore the Council, having wrongly refused the licence, are disqualified

(1) 3 C.L.R., 557, at p. 566.

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from complaining of its absence. The second ground is that, if that be not the true interpretation, it is *ultra vires* as amounting to a prohibition or a power to prohibit. Notwithstanding the able argument of Mr. *Graham*, I am of opinion that neither ground can be sustained.

With regard to the first, assuming the interpretation to be correct, that on compliance with structural requirements and pecuniary requirements the Council had a duty to issue the licence, nevertheless the remedy for breach of that duty would be a mandamus. The Council might still believe, though mistakenly, that the conditions were not fulfilled, and so have refused the licence, and, as *Shand* J. observes, the appellant would not be justified "in taking the law into his own hands, and actively defying the by-law." Nor do I see how it can be said that a council in honestly and from a sense of public duty endeavouring to vindicate the law are to be regarded as personally disqualified, even if their prior refusal of a licence were open to correction by the law. They were certainly not a party to the act of open violation of the by-law complained of, as in *Kerr* v. *Scott* (1) the council were the originators of the nuisance. The first ground must fail.

As to the second, great reliance was placed on the two standard cases of *Toronto Municipal Corporation* v. *Virgo* (2) and *Rossi* v. *Edinburgh Corporation* (3).

The first was a case which turned on the effect of a power to pass by-laws for "licensing, regulating and governing" hawkers, &c. The council there passed a by-law by which it was provided that no person named and specified in sub-sec. 2 (*whether a licensee or not*) should trade in certain eight streets of Toronto, which in fact were the busiest and most important thoroughfares of the city. The Privy Council conceded the right of restricting the exercise of the trade, both as to time and to a certain extent as to place, where such restrictions were in the opinion of the public authority necessary to prevent a nuisance, or for the maintenance of order. But their Lordships said the continued existence of the trade was implied by the words "regulate and govern." It will be observed

(1) 9 Qd. L.J., 193.

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

(3) (1905) A.C., 21.

that for the purposes of the case the "licensing" power was immaterial because by the by-law even licensees were prohibited. And in answer to the contention that the by-law did not amount to prohibition, their Lordships said, not that forbidding trade in any streets would be prohibition, but that the effect of the by-law was "practically to deprive the residents of what is admittedly the most important part of the city of buying their goods of or of trading with the class of traders in question." Coupling the words of that judgment with the observations made by their Lordships during the argument (see *Finlayson's Case* (1)), I cannot regard that case as an authority that a power to legislate as to "licensing" does not include any power whatever to provide that licences may be refused or trading restricted unless certain conditions are complied with. When closely examined, I think *Virgo's Case* (2) is an instance where the rule was applied of such unreasonableness as to transgress the limits of power. The test in that respect is one which this Court has in more than case already applied, and is finally stated in *R.* v. *Broad* (3).

Rossi's Case (4) may for the present purpose be distinguished on the ground that it was a case where magistrates had power to grant a licence according to a law already made, whereas the present question is whether the power which the Council have to legislate as to the conditions on which licences shall be granted, includes the power to forbid the user of the premises unless licensed. The appellant's contention is that there is only power to enact a by-law requiring the owner to comply with conditions and to apply for a licence; that if in fact, however the Council may be advised and believe to the contrary, he has so complied and has applied, then whether the licence is granted or not he may lawfully proceed to use his premises for the purposes in question. Indeed, if the licence is refused, it is said that the subsequent conditions which would bind a licensee do not apply to him, and so his position is better than if the licence were issued to him. The question then is: Does the power to license connote the power to prohibit the user of the premises until

(1) 22 C.L.R., 340, at p. 348.
(2) (1896) A.C., 88.
(3) (1915) A.C., 1110, at p. 1122.
(4) (1905) A.C., 21.

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licensed, assuming the conditions required for a licence are in themselves *intra vires*? The answer to that question must ultimately depend upon the Act itself, and when that is examined it appears to me it gives no uncertain answer.

Sec. 182 gives power, subject to the Act, to make by-laws "with respect to" any of the matters in the Fourth Schedule. That is the most comprehensive form in which legislative power can be given in regard to a specified subject. "Licences" are one specific matter in that schedule, and 29 (*ii*) is in these terms "prescribing any conditions on which any licences . . . may be granted, transferred, suspended, or revoked by the local authority or the chairman." 29 (*iii*) relates to fees. It is quite clear, therefore, that some condition may be imposed beyond the merely structural and pecuniary requirements.

No condition is pointed to which is beyond the Council's power to enact. The first clause forbids the use of the place unless (1) "the conditions with respect thereto prescribed by this by-law and any Statute in that behalf are complied with," and (2) "it is licensed under this by-law."

Then the Act by sub-sec. 5 of sec. 183 expressly provides that "a by-law may leave any matter or thing to be determined, applied, dispensed with, prohibited, or regulated by the local authority from time to time by resolution, either generally or for any classes of cases, or in any particular case." It would be difficult to imagine a fuller authority to reserve the power to deal with circumstances as they arise, even to the extent of dealing separately with each case as it arises. And when that sub-section is read in conjunction with sub-sec. 6 dealing (*inter alia*) with licences, it appears to have been framed with special intention to meet some of the decisions on the common law as to uncertainty of by-laws, such as *Staples & Co.* v. *Wellington Corporation* (1), in 1900, and the power of dispensing with their provisions in particular cases, as *Yabbicom* v. *King* (2).

In the present instance, it does not appear that the general power of legislation under sub-sec. 5 has been exercised, but the sub-section itself is a very strong answer to the objection that there can be no power to refuse a licence, except for

(1) 18 N.Z.L.R., 857. (2) (1899) 1 Q.B., 444.

non-compliance with specified conditions. It may be that the only condition precedent to the issue of a licence required by the by-law as it stands has been complied with, and that, as there is no general power of refusal by resolution reserved, the refusal was improper, and that a mandamus would succeed. I say nothing as to that one way or the other. The construction of the by-law in that aspect is not before us, and the facts as they would be relevant to such an application are not before us, even if the mandamus part of the application had not been abandoned in the Supreme Court.

All we are concerned with is that in view of the distinct prohibition against user until licence issued (which we must take to mean licence lawfully required), the appellant maintains that for that reason alone the by-law must be invalid. "Licensing" premises means, according to the natural signification of the word "license," authorizing their use, and a by-law that is made "with respect to licensing" therefore includes a provision for authorizing the use of premises by licence. The principle that some prohibition is lawful where there is a power to license was admitted by the Court in *Elwood* v. *Bullock* (1) as in *Toronto Municipal Corporation* v. *Virgo* (2), though the by-law in each case was set aside as being unreasonably wide.

What is there in the context of the *Local Authorities Act* to destroy the primary meaning of the word "license"? Besides the considerations already mentioned, reference may be made to No. 20 of the Fourth Schedule, licensing of ferrymen, and No. 52, licensing of sanitary carts. Can it be imagined that the use of sanitary carts unlicensed cannot be prohibited under a penalty? Is it possible that the Legislature meant that though a licence might be required, yet the use of a cart spreading disease and death was nevertheless lawful, notwithstanding a refusal of a licence, if only the owner could persuade the justices that it complied with requirements, though the Council and its officers thought differently? I think clearly not. And if that is so as to one licence, it is so as to another.

There are, of course, as I have said, limits to the power of imposing conditions, and perhaps to the exercise of the general power of

(1) 6 Q.B., 383, at p. 401. (2) (1896) A.C., 88.

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determination contemplated in sub-sec. 5 of sec. 183, but in the present case we are not called upon to determine them.

In my opinion, it is not the law that all prohibition of user is unlawful in respect of unlicensed premises, and therefore the second point also fails, and the appeal should be dismissed.

RICH J. I agree that the majority of the Supreme Court were right in discharging the order *nisi*, and that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Atthow & McGregor.*

Solicitors for the respondent, *Chambers, McNab & McNab.*

[HIGH COURT OF AUSTRALIA.]

Appl *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 153 ALR 490

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THE MINISTER FOR LANDS (NEW SOUTH WALES) . . . . . APPELLANT;

AND

JEREMIAS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 23, 24: *Sept.* 3.

Barton, Isaacs and Rich JJ.

Crown Lands—Conditional purchase—Mortgage—Condition of residence—Performance by mortgagee—"Holder"—Crown Lands Consolidation Act 1913 *(N.S.W.)* (*No.* 7 *of* 1913), *secs.* 5, 47, 181, 272.*

* Sec. 47 (1) of the *Crown Lands Consolidation Act* 1913 (N.S.W.) provides that "The holder of a conditional purchase or conditional lease shall hold the same subject to a condition of residence for a term which . . . shall expire ten years after the date of the application therefor, and residence shall commence within three months after the confirmation of the application: Provided always that—(*a*) where the conditional purchase or conditional lease has been transferred *bonâ fide* by way of mortgage, the condition of residence may be performed by the owner subject to such mortgage—and (*b*) where the beneficial owner of a conditional purchase or conditional lease dies or becomes of unsound mind, the performance of the condition of residence shall be waived until the conditional purchase or lease has been