[HIGH COURT OF [illegible]IA.]

WILLIAMS . . . . . APPELLANT;

AND

THE MAYOR, ALDERMEN, COUNCILLORS AND CITIZENS OF THE CITY OF MELBOURNE . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1933.

MELBOURNE, *Sept.* 27.

SYDNEY, *Nov.* 17.

Starke, Dixon, Evatt and McTiernan JJ.

Local Government—By-law—Validity—Street traffic—Regulation—Prohibition of driving cattle through specified streets at any time, and through other streets during specified times—Reasonableness—Local Government Act 1928 (*Vict.*), *sec.* 197 (1) (i), (ii), (xix), (xxiv), (2)*; *Thirteenth Schedule, Part I., par.* 44.*

The Council of the City of Melbourne passed a by-law in the following terms:—"No person shall drive or cause to be driven into or through any portion of the city any cattle intended for sale, slaughter or shipment or passing from one part of the country to another save and except as hereinafter is mentioned, that is to say:—(*a*) The streets set forth in the first schedule hereto may be used for such purposes at any time. (*b*) The streets set forth in the second schedule hereto may be used for such purposes only between the hours of twelve o'clock midnight and eight o'clock in the morning." The first schedule specified nine streets, and the second schedule forty-four streets. Most of the streets specified in the first schedule were in the vicinity of saleyards for sheep and cattle at Newmarket and the yards were owned and controlled by the city council. Evidence was adduced by the appellant to show that the by-law could in practice not be complied with.

* The *Local Government Act* 1928 (Vict.) provides:—By sec. 197 (1), that "by-laws may be made for any municipality . . . for the purposes following:—(i) The adoption of any of the provisions of the Thirteenth Schedule hereto: (ii) Carrying out any of the purposes provided for in the Thirteenth Schedule hereto . . . (xix) Regulating traffic and processions . . . (xxiv) Regulating the driving of cattle in or along any specified street in any municipal district." By sec. 197 (2), that sub-sec. 1 of that section shall apply to the City of Melbourne. By the Thirteenth Schedule, Part I., par. 44: "It shall be lawful for the council to make regulations . . . for appointing the hours during which it shall not be lawful to drive into or through the municipal district or any parts thereof by boundaries set forth in such regulation any cattle for sale slaughter or shipment or travelling from one part of Victoria or of any other State to any other part."

Held, that the by-law was within the powers conferred upon the municipality by sec. 197 (1) (xix) and (2) of the *Local Government Act* 1928.

The unreasonableness of a by-law made under statutory powers by a local-governing body is not a separate and distinct ground of invalidity: the Court is not entitled to form its own opinion as to the reasonableness of a by-law and if it thinks it unreasonable, though within the scope of the powers granted, to declare it invalid.

Decision of the Supreme Court of Victoria (Full Court): *Williams* v. *City of Melbourne*, (1933) V.L.R. 228, affirmed.

APPEAL from the Supreme Court of Victoria.

The appellant, Michael Sydney Williams, obtained a rule *nisi* calling upon the respondent, the Mayor, Aldermen, Councillors and Citizens of the City of Melbourne, to show cause why a by-law of the City of Melbourne made on 9th March 1931 and numbered 205 should not be quashed either wholly or in part on the grounds (*a*) that the by-law was *ultra vires* and illegal and beyond the powers conferred by the *Local Government Act* 1928; (*b*) that the by-law was unreasonable; and (*c*) that the by-law was against public policy.

The by-law in question was as follows:—"A by-law of the City of Melbourne made under Part VII., Division 1 of the *Local Government Act* 1928, and numbered 205 to regulate the driving of cattle in or along certain streets within the city.—In pursuance of the powers conferred by Act 19 George V. Number 3720 and of every other Act or power enabling it in that behalf the Council of the City of Melbourne makes the by-law and orders as follows:—1. This by-law shall be read and construed as one with by-law number 204 of the said city intituled 'A by-law of the City of Melbourne made under Part VII., Division 1 of the *Local Government Act* 1928 and numbered 204 to amend and consolidate the by-laws with reference to street traffic and for appointing in streets and roads standing places for motor cars.' 2. Clause 37 of said by-law number 204 shall be and the same is hereby repealed, and the following new clause shall be inserted and read in lieu thereof, that is to say:—'37. No person shall drive or cause to be driven into or through any portion of the city any cattle intended for sale, slaughter or shipment or passing from one part of the country to another save and except as hereinafter mentioned, that is to say:—(*a*) The streets

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set forth in the first schedule hereto may be used for such purposes at any time. (*b*) The streets set forth in the second schedule hereto may be used for such purposes only between the hours of twelve o'clock midnight and eight o'clock in the morning.' " The first schedule specified nine streets, and the second schedule forty-four streets.

The Melbourne City Council owned and controlled sheep and cattle saleyards at Newmarket. These were situate close to the live stock siding of the Newmarket railway station, where on sale days trains carrying live stock arrived during the night and early morning. Most of the streets set out in the first schedule are in the vicinity of the saleyards.

In support of the contention that the by-law was unreasonable the appellant adduced evidence to the effect that it was impossible, especially during the winter months, to get sheep and cattle to the saleyards without using some of the streets set out in the second schedule during prohibited hours; and that it was impossible to get sheep and cattle away from the saleyards without infringing the by-law, and that it was continually being infringed with the knowledge of the officers of the city council.

The Full Court of the Supreme Court held that the by-law was within the powers conferred by sec. 197 (1) of the *Local Government Act* 1928 and was not unreasonable: *Williams* v. *City of Melbourne* (1).

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

Gorman K.C. and *Stretton*, for the appellant. The business of driving stock to and from the saleyards can be carried on only if everyone concerned agrees to ignore the by-law. The restriction of the use of the streets imposed by the by-law is so great that in effect it amounts to a prohibition of driving cattle in the City of Melbourne. Trains arrive at the Newmarket station in the vicinity of the saleyards at all hours and the stock has to be removed. The word " traffic " in sec. 197 (1) (xix) of the *Local Government Act* is not sufficient to support the by-law. There is a complete prohibition

(1) (1933) V.L.R. 228.

of droving stock in the vicinity of the saleyards during most of the day. This restriction is unreasonable (*Widgee Shire Council* v. *Bonney* (1)). This was not a nuisance at common law, and so the power to prohibit in sec. 197 (1) (x) does not come into operation. Prohibiting a particular type of traffic is not "regulating traffic" (*Cullis* v. *Ahern* (2)). The existence in par. 44 of Part I. of the Thirteenth Schedule of an express power of regulating the driving of cattle limits the power to regulate "traffic" under sec. 197 (1) (xix) (*In re Borough of Flemington and Kensington* (3)).

[STARKE J. referred to *Melbourne Corporation* v. *Barry* (4).]

The question of the regulation as distinguished from the prohibition of activities was considered in *Country Roads Board* v. *Neale Ads Pty. Ltd.* (5), and in *Municipal Corporation of City of Toronto* v. *Virgo* (6). The passing of live stock through the majority of the streets is totally prohibited. This amounts to a prohibition and not to a regulation. What purports to be regulation is accomplished in such a manner as to prohibit completely the use of the majority of the streets, and there is no power in the municipality to pass a by-law in these terms. The power to regulate merely gives power to regulate the conditions of the use, and the Court then has to determine whether what was done amounts to regulation or prohibition. The power to appoint hours presupposes that there will be some hours during each day when traffic will be permitted. The Court should not be influenced by the fact that as an act of grace some street, which is not a public highway, is permitted to be used by the municipality. The by-law is unreasonable and cannot reasonably be regarded as being within the scope or ambit of the power.

Robert Menzies, A.-G. for Vict. (with him *Pape*), for the respondent. The evidence adduced in this case showed that the use to which the streets were put constituted a nuisance at common law. The by-law is within the power conferred by sec. 197 (1) (xix) of the *Local Government Act*, which is not cut down by par. (xxiv) of sec. 197 (1) or par. 44 of Part I. of the Thirteenth Schedule. The

(1) (1907) 4 C.L.R. 977, at p. 983.
(2) (1914) 18 C.L.R. 540.
(3) (1901) 27 V.L.R. 7; 23 A.L.T. 3.
(4) (1922) 31 C.L.R., 174.
(5) (1930) 43 C.L.R. 126.
(6) (1896) A.C. 88.

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words " regulating traffic " in sec. 197 (1) (xix) are wide enough to support the by-law. There can be no distinction between, for instance, free horses and horses in harness. There is no case which indicates that these powers are to be restricted in the way suggested by the appellant. A power to regulate does not amount to a power to prohibit, but the subject matter may be of such a kind that regulation may include a power of partial prohibition (*Melbourne Corporation* v. *Barry* (1)). The prohibition of part of the subject matter may be a valid exercise of the power to regulate, and the regulation of traffic may take into account the convenience of persons not engaged in traffic. The by-law is good under par. 44 of Part I. of the Thirteenth Schedule : the only question arising under that paragraph is whether the streets are set forth by boundaries, and they are so set forth.

[McTIERNAN J. referred to *Melbourne Corporation* v. *Barry* (2).]

Country Roads Board v. *Neale Ads Pty. Ltd.* (3) shows that a power to regulate and govern implies the continued existence of that which is to be regulated or governed. There is no independent test of unreasonableness of the by-law as affecting its validity. The older cases such as *Gunner* v. *Helding* (4), suggesting that there was such an independent test, have been overruled (*Widgee Shire Council* v. *Bonney* (5)).

Stretton, in reply. If you prohibit portion of the traffic you have something left which is less than the traffic. Persons have a right to go over all streets in pursuit of their vocations and cannot be prevented from going over certain streets under a power to regulate traffic. It would appear that the rule regarding unreasonableness as a distinct ground of objection is now discounted.

[DIXON J. referred to *McCarthy* v. *Madden* (6) and *Blythe* v. *Wheeler* (7).]

Cur. adv. vult.

(1) (1922) 31 C.L.R., at p. 189.
(2) (1922) 31 C.L.R., at p. 207.
(3) (1930) 43 C.L.R., at p. 133.
(4) (1902) 28 V.L.R. 303, at p. 321 ; 24 A.L.T. 48, at p. 51.
(5) (1907) 4 C.L.R., at p. 982.
(6) (1914) 33 N.Z.L.R. 1251.
(7) (1925) N.Z.L.R. 560, at p. 562.

The following written judgments were delivered :—

STARKE J. The *Local Government Act* 1928, sec. 197, gives municipal authorities, including the City of Melbourne, power to make by-laws for various purposes. In reference to several of the purposes, the power is one of " prohibiting or regulating," and in reference to others is one of " regulating." Among the powers contained in sec. 197 (1) are the following : (ii) Carrying out any of the provisions of the Thirteenth Schedule ; (xix) regulating traffic and processions ; (xxiv) regulating the driving of cattle in or along any specified street in any municipal district ; (xxxiii) generally, for maintaining the good rule and government of the municipality. These powers, so conferred, are separate and independent, and not restrictive one of the other. But the power to make by-laws for the purposes of maintaining the good rule and government of the municipality " confers a power, not of extending the other powers, but of aiding them if need be or of making independent ordinances in matters *ejusdem generis* with the specific powers of the Act " (*Melbourne Corporation* v. *Barry* (1)). In connection with the power to make by-laws for the purpose of carrying out any of the provisions of the Thirteenth Schedule, reference was made to Part I. of that Schedule, " Streets and Footways," Division 9, " Obstructions &c. to Streets &c. by Cattle &c." and to par. 44 of that Part : " It shall be lawful for the council to make regulations from time to time for appointing the hours during which it shall not be lawful to drive into or through the municipal district or any parts thereof by boundaries set forth in such regulation any cattle intended for sale slaughter or shipment or travelling from one part of Victoria or of any other State to any other part."

There is power in sec. 197 (1) to make by-laws for the adoption of any of the provisions of the Thirteenth Schedule, but it is by no means clear what is the extent of the power conferred by the authority to make by-laws for carrying out any of the purposes provided for in the Thirteenth Schedule. Should these purposes be gathered from the specific provisions or clauses of that Schedule, or from the subject matters there dealt with, such for instance as streets and footways and obstructions, &c., to streets, &c., by cattle, &c. ? The

(1) (1922) 31 C.L.R., per *Isaacs* J., at p. 194.

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power is wider than a mere adoption of any of the provisions of that Schedule, and I doubt if it is confined, in the case of driving cattle in municipal districts, in the manner limited by par. 44 of the first Part of that Schedule. But it is unnecessary to delimit the power so conferred, in the view I take of the power granted to municipalities of regulating traffic and processions (sec. 197 (1) (xix)).

Traffic includes the passing to and fro of persons or of vehicles or animals along a street or road or route. But it is said that a power to regulate traffic cannot warrant a prohibition of traffic (*Municipal Corporation of City of Toronto* v. *Virgo* (1); *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2); *Melbourne Corporation* v. *Barry* (3)). And, while "every regulation implies restraint, prohibition in some degree," the limit is reached, as I understand the argument, if the by-law goes beyond rules of conduct for the behaviour of persons in traffic, that is, for their behaviour when passing to and fro along any street or road or route, with or without vehicles or animals. The argument was based upon a passage in the judgment of *Higgins* J. in *Barry's Case* (4): "Every regulation implies restraint, and prohibition of any act contrary to the regulation; but the point is that sec. 197 (22)"—now sec. 197 (1) (xix)—"does not sanction any by-law prohibiting a procession because of its nature or purpose." *Isaacs* J., in the same case, at p. 199, however, said:—"What the council has to 'define' or 'to enumerate' is not processions but conduct and necessary matters to be observed by processions so that such order and propriety and peace and freedom of traffic and other matters within the ambit of the council's jurisdiction may be observed and secured. For this purpose it has practically a free hand . . . I see no difficulty in the council stating the routes which it thinks are suitable or unsuitable for the processions or the days or hours." In this latter statement I entirely agree. A power to regulate traffic does not warrant an absolute prohibition of all traffic, but it does involve more than restrictions upon the conduct of persons in traffic, and extends in my opinion to the regulation of the times when, and the streets, roads or routes in which,

(1) (1896) A.C. 88.
(2) (1896) A.C. 348.
(3) (1922) 31 C.L.R. 174.
(4) (1922) 31 C.L.R., at p. 207.

traffic may proceed. *Slattery* v. *Naylor* (1) aids this conclusion, and *Melbourne Corporation* v. *Barry* (2) is not to the contrary: indeed, *Barry's Case*, in my opinion, depends upon the particular form of by-law adopted in that case; the point is put plainly enough by *Isaacs* J., at pp. 199, 200:—"For the regulation of traffic generally the council has not said that there shall be no traffic except such as it may consent to. That would be so obviously bad that no one would ever dream of so prescribing. But why should it not also be bad if adopted with respect to processions which are in the same sub-section, and are a species of traffic and, being especially named for regulation, are a species not to be 'prohibited' as a purpose? The real truth is that the council's by-law is framed exactly as if the word 'prohibiting' were used in the sub-section instead of the word 'regulating'; and that is, of course, a fundamental error and cannot be justified."

Under this power to make by-laws for the regulation of traffic and processions, the Corporation of the City of Melbourne has in the present instance made the following by-law: "No person shall drive or cause to be driven into or through any portion of the city any cattle intended for sale, slaughter or shipment or passing from one part of the country to another save and except as hereinafter is mentioned, that is to say:—(*a*) The streets set forth in the first schedule hereto may be used for such purposes at any time. (*b*) The streets set forth in the second schedule hereto may be used for such purposes only between the hours of twelve o'clock midnight and eight o'clock in the morning." The schedules set out the various streets by name. The Supreme Court of Victoria upheld the by-law, and from that decision an appeal is brought to this Court.

The by-law deals with the passage of cattle in and through the streets of the city. It prohibits the use of most streets, and permits the use of others. Such a by-law concerns the subject of traffic, and regulates it. Prima facie, therefore, it is within the ambit of the power conferred by the *Local Government Act*. It is said, however, that the by-law is unreasonable, and "cannot reasonably be regarded as being within the scope or ambit or purpose of the power." It is well settled that the Court is not entitled to form its own opinion

(1) (1888) 13 App. Cas. 446. (2) (1922) 31 C.L.R. 174.

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as to the reasonableness of a by-law and if it thinks it unreasonable, though within the scope of the powers granted, to declare it invalid (*Slattery* v. *Naylor* (1); *Widgee Shire Council* v. *Bonney* (2); and see *R.* v. *Broad* (3)). *Griffith* C.J. said in *Widgee Shire Council* v. *Bonney* (4):—"With regard to the objection that the by-law is unreasonable, I think that since the cases of *Slattery* v. *Naylor* (1) and *Kruse* v. *Johnson* (5) it is very difficult to make a successful attack on a by-law on this ground. . . . The existence of a power and the expediency of its exercise are quite different matters. The question of the existence of the power can always be determined by a Court of law. But, in my opinion, the expediency of the exercise of a power is not a matter for determination by a Court. . . . It is obvious that the question whether the circumstances of the locality warrant the exercise of a power is one of expediency and not of competency." *Slattery* v. *Naylor* (6), however, recognizes that "a merely fantastic and capricious by-law, such as reasonable men could not make in good faith" would be bad, for such a by-law could not in any proper sense be regarded as an exercise of the power conferred upon the authority making the by-law.

Much of the argument addressed to us in the present case really attacked the expediency of the by-law, and was thus irrelevant. But the argument that the by-law, though in form a regulation of the movement of cattle, was in truth an absolute prohibition of such movement, deserves some consideration. It was not denied that railway facilities exist for bringing cattle into and through the City of Melbourne. But it was said that some cattle must be driven on the roads for various business purposes, such as slaughtering and export, or for the purpose of crossing the city, and that the by-law, in operation, prohibited this traffic. I cannot agree. The by-law has appointed streets and roads along which this traffic may proceed, and the times when it may proceed. It appears to me that compliance with the by-law is simply a question of degree. Persons who reasonably restrict the number of cattle driven and who employ a sufficient number of drovers can comply with the by-law without

(1) (1888) 13 App. Cas. 446.
(2) (1907) 4 C.L.R. 977.
(3) (1915) A.C. 1110.
(4) (1907) 4 C.L.R., at pp. 982, 983.
(5) (1898) 2 Q.B. 91.
(6) (1888) 13 App. Cas., at p. 452.

much difficulty. But all this is really a matter for the consideration of the by-law making authority. It is not the by-law that is unreasonable, but those who assert the right to drive mobs of cattle or flocks of sheep through a large and modern city. Some restriction is absolutely necessary in the interest of the good order of the city and the safety of its citizens, and the council has not transcended reasonable restrictions, in the sense above indicated, nor made a "fantastic and capricious" by-law.

In my opinion the decision of the Supreme Court was right, and this appeal should be dismissed.

DIXON J. By-law no. 204 of the City of Melbourne, made in September 1930, is intituled a by-law to amend and consolidate the by-laws with reference to street traffic and for appointing in streets and roads standing places for motor cars. Its preamble recites that numerous by-laws have from time to time been made by the Council of the City of Melbourne dealing with and regulating the traffic of the city and that it is desirable to add to, amend and consolidate such by-laws. Sec. 197 (1) (xix) of the *Local Government Act* 1928 empowers the making of by-laws for any municipality for the purpose of regulating traffic and processions. The greater part of the by-law is referable to this power. But its thirty-seventh clause provided that cattle intended for sale, slaughter or shipment or passing from one part of the country to another should not be driven through any part of the city, except that formerly included within Flemington and Kensington, outside the hours between midnight and eight in the morning, and, unless the cattle were sheep or goats, they should not be driven through that part of the city outside the hours between ten o'clock at night and eight in the morning. "Cattle" is an expression which includes sheep, swine, and goats as well as horses and oxen. The thirty-seventh clause of the by-law was evidently based upon par. 44 of Part I. of the Thirteenth Schedule. In March 1931, the Council of the City of Melbourne made by-law no. 205, intituled a by-law to regulate the driving of cattle in or along certain streets within the city. Clause 1 required that it should be read and construed as one with by-law no. 204. Clause 2 repealed

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clause 37 of by-law no. 204 and substituted the following :—" 37. No person shall drive or cause to be driven into or through any portion of the city any cattle intended for sale, slaughter or shipment or passing from one part of the country to another save and except as hereinafter is mentioned, that is to say :—(*a*) The streets set forth in the first schedule hereto may be used for such purposes at any time. (*b*) The streets set forth in the second schedule hereto may be used for such purposes only between the hours of twelve o'clock midnight and eight o'clock in the morning. . . . First Schedule —Streets which may be used as stock routes at any hour." (Here nine streets were specified by name). " Second Schedule.—Streets which may be used as stock routes during the hours from twelve midnight to 8 a.m." (Here some forty-four streets were specified by name).

The question is whether this provision is valid. Like the previous clause 37, its terms are clearly derived from par. 44 of Part I. of the Thirteenth Schedule. But, in my opinion, the power given by par. 44 of Part I. of the Thirteenth Schedule under the operation of sec. 197 (1) (ii) of the *Local Government Act* 1928 is exceeded by the substituted clause 37. That clause does much more than appoint hours during which it shall not be lawful to drive cattle. And the parts of the municipal district through which driving cattle is forbidden are not set forth by boundaries. This portion of the Thirteenth Schedule has not been adopted under par. i of sec. 197 (1). Par. ii, nevertheless, empowers the council to make by-laws for the purpose of carrying out the purposes provided for in the Thirteenth Schedule. These general and somewhat vague expressions, in my opinion, ought not to be construed as enabling the council to exercise an unfettered power, where the Schedule, if adopted, would impose conditions. Accordingly, as the restrictions or conditions stated in par. 44 of Part I. of the Thirteenth Schedule have not been observed, some other power must be sought to justify the substituted clause 37. Par. xxiv of sec. 197 (1) gives power to make by-laws for the purpose of regulating the driving of cattle in or along any specified street in any municipality. This power, no doubt, would authorize the restriction of hours for the streets specified in the

second schedule, but it does not extend to authorizing the prohibition of driving in all streets other than those specified in the first and second schedules.

In the result, the validity of the new clause 37 must, like the greater part of the by-law, rest upon the power to make by-laws for the purpose of regulating traffic and processions, which is conferred by par. xix of sec. 197 (1). In dealing with the question whether it is justified by that power, we should, I think, take into account the situation of the Newmarket saleyards and the other topographical considerations which determine the real operation of the by-law. So considered, the effect of the by-law is to establish a prima facie rule that no cattle shall pass through streets in the City of Melbourne, but, by way of exception to this rule, to allow cattle to be driven at any hours along a very few streets near or connecting with the area where the yards are situated and between midnight and 8 a.m. along a greater, but a very limited, number of streets which either do, or may be supposed to, lead to some place or in some direction, the character of which demands or suggests the need of a relaxation of the prima facie rule. The by-law does not operate to impede the movement of cattle into the municipal saleyards at Newmarket after their discharge from trucks in the adjacent railway yards or their movement from those saleyards after purchase to the City of Melbourne abattoirs for slaughter. But there is much carcase butchering done elsewhere in the metropolis, both for export and for domestic consumption. In Newport and Braybrook are freezing works, and in Richmond, South Melbourne and Preston are abattoirs. In the ordinary course, stock goes by road from the Newmarket saleyards to the suburban abattoirs. Of the stock arriving by rail at the live stock siding at Newmarket, about ten per cent is consigned, not for sale at the municipal saleyards, but for delivery to specific persons. These cattle must go by road. It appears also that stock comes by road to the freezing works from holding paddocks in, or in the vicinity of, Melbourne, and to do so must travel by road within the boundaries of the municipality. The restriction of hours and routes imposed by the present clause 37 of the by-law makes it very difficult, if not impossible, to move cattle in this way without infringing its provisions. It is true that

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the railway yards at the Newmarket live stock siding are open for the receipt and delivery of stock at all times throughout the week, except between the hours of 11 a.m. on Sunday and 7 a.m. next morning, and that stock may be taken from the saleyards from 6 p.m. onwards every night. But neither Railways Commissioners nor consignees can allow stock delivered from trucks to remain long in the yards. The Commissioners need the space, and the consignees are under the practical necessity of feeding, watering and caring for stock which have undergone transportation in railway trucks. Cattle and sheep trains appear to arrive for the most part between 8 p.m. and 7 a.m., except on Mondays, when they arrive from 11 a.m. onwards. If stock are held in paddocks in or in the neighbourhood of Melbourne, they are mustered and counted before delivery out of the paddocks, and this must be done in daylight. Sheep and lambs for slaughter are not driven more than a mile and a half an hour, and cannot be slaughtered while heated. A special stock route, which is not a public highway, but, in fact, may be used at any time, has been made by the municipality from the saleyards to an outlet by way of Lynch's bridge into Newport. Otherwise cattle and sheep must go by the public thoroughfares. It is said that compliance with the by-law has been found impossible and that in general no attempt is made to enforce it. On the part of the municipality, any general failure to enforce the by-law is denied, but it is stated that an endeavour is made to administer it "reasonably and sympathetically," to consider the facts of each case carefully before prosecuting, and to proceed against those only who disregard a warning or show no consideration for the comfort or rights of the public. It is admitted that the practice exists of driving sheep from the saleyards from 6 p.m.

The by-law was impugned as not made for the purpose of regulating traffic and as unreasonable. Although in some jurisdictions the unreasonableness of a by-law made under statutory powers by a local governing body is still considered a separate ground of invalidity (see *McCarthy* v. *Madden* (1)), in this Court it is not so treated (*Widgee Shire Council* v. *Bonney* (2); *President, &c., of the Shire of Tungamah*

(1) (1914) 33 N.Z.L.R. 1251.

(2) (1907) 4 C.L.R. 977.

v. *Merrett* (1); *Cook* v. *Buckle* (2); *Melbourne Corporation* v. *Barry* (3); *Jones* v. *Metropolitan Meat Industry Board* (4)).

To determine whether a by-law is an exercise of a power, it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject. The true nature and purpose of the power must be determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is intended to apply. Notwithstanding that *ex facie* there seemed a sufficient connection between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power. (Compare *Widgee Shire Council* v. *Bonney* (5)).

In the present case, the subject matter of the power is traffic—the movement of men and things through the streets. But the nature and purpose of the power does not extend to the exercise of absolute control over the subject. The purpose of the power is regulation, and this Court has insisted upon the limited nature of a power to regulate traffic (*Melbourne Corporation* v. *Barry* (6)). As I understand it, that decision, when applied to traffic as well as to processions, construes the power as enabling the council to prohibit passage through the streets only in so far as the council may reasonably consider necessary or conducive to the safe, orderly, commodious and proper use of them by the heterogeneous components of "traffic" who are making an otherwise lawful use of them considered as highways. The decision applied the doctrine "that a power to regulate implies the continued existence of the thing to be regulated, and that a power to regulate a subject does not authorize the donee of the power to prohibit the subject matter" (7). But this doctrine does not altogether exclude the prohibition of particular acts or

(1) (1912) 15 C.L.R. 407.
(2) (1917) 23 C.L.R. 311, at p. 319.
(3) (1922) 31 C.L.R., at pp. 189-192 and 211.
(4) (1925) 37 C.L.R. 252, at pp. 260-262.
(5) (1907) 4 C.L.R., at pp. 982, 986.
(6) (1922) 31 C.L.R. 174.
(7) (1922) 31 C.L.R., at p. 211 (*per Higgins* J.).

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things which may be contained within the subject matter. The nature, operation, and apparent purpose of the restraints imposed must be considered and, if they fairly answer the description of a regulation of the subject matter, the power will sustain them.

In the present case, the general scope of by-law no. 204 is clearly a regulation of traffic. The provisions at first contained in clause 37, although based on par. 44 of Part I. of the Thirteenth Schedule, appeared to fall within that purpose and to look to the safe and comfortable conduct of street traffic. Whatever may be the reason actuating the change, the substitution of the much more drastic provisions of the present clause 37 appears, on its face, to be no more than a stringent amendment directed to the same purpose. The passage of cattle through the streets is, I think, undeniably part of traffic. Par. xxiv of sec. 197 (1) cannot be regarded as implying any limitation on the former amplitude of par. xix. The ultimate question in the present case appears to me to be whether, when applied to the conditions of Melbourne, the by-law involves such an actual suppression of the use of the streets for the purposes of the necessary transit of an important and ordinary commodity as to go beyond any restraint which could be reasonably adopted for the purpose of preserving the safety, convenience and proper facility of traffic in general. Upon a full consideration of the matter, I feel unable to say that the by-law does have such an operation. I think that it cannot be denied the description of a by-law for the purpose of regulating traffic.

For these reasons I think the appeal should be dismissed.

EVATT J. The by-law passed by the Corporation of Melbourne prevents cattle from being driven in the streets of the city except during the hours between twelve midnight and 8 a.m. During these hours the cattle may be driven, but only through certain specified streets. These streets are few in number compared with the total number of city streets, but it is clear that, by using them during the permitted period, it is possible for cattle to be driven into or out of the city from or to the main directions of approach or departure.

It is said that it is not possible to obey the by-law and that it is often disobeyed. But I think that this evidence amounts to no

more than an assertion that it is very inconvenient so to restrict the size of the mobs or to increase the number of men employed in driving them, as to ensure compliance with the by-law. This is only another way of saying that it is not economical or profitable to comply strictly with the terms of the by-law.

The main question is whether such a by-law can correctly be described as one for " regulating traffic " within the meaning of sec. 197 (1) (xix) of the Victorian *Local Government Act* 1928.

The case for the appellant is that the power to make by-laws for regulating traffic assumes that all traffic must be free at all times to come and go, and that the by-law in question contains a prohibition in respect of all streets of the city for sixteen hours out of the twenty-four, and in respect of most streets for the whole period of twenty-four hours. Then it is argued that a mere power to regulate does not cover a regulation which contains so drastic a prohibition.

In my opinion this argument should not be accepted. In the first place I think it is clear that in the expression " traffic " there is comprehended the passage of cattle through the streets. It is not possible to restrict the term to any particular being or vehicle which uses the streets for the purpose of passing through a municipality. The common law right of passage over a highway was frequently described as a right for all persons " to go and return on foot and with horses, cattle and carriages, at all times of the year at their free will and pleasure." As passage with cattle was involved in the exercise of the right of using the highway it would seem that, when the Legislature intervened to confer a power to regulate traffic along highways, it intended to authorize a regulation of the right to pass as much with cattle as with carriages or on foot.

In the second place, I consider that there is no force in the argument that the by-law is void because it contains a prohibition in respect of most streets at all times and all streets at some times. The truth of the proposition that " the power to regulate does not include the power to prohibit " must depend upon the nature of the power which is being exercised. It is clear that prohibition of some character must be authorized by a power to regulate " traffic." For as " traffic " includes the passage through the city of persons and vehicles, any regulation of the subject matter would exclude the

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absolute right of each person and vehicle to pass without restriction at any time and along any street selected. The result of such a right would be to cause indescribable confusion. Indeed it would altogether prevent traffic from taking place. The power to regulate a subject matter like "traffic," which itself implies movement, necessarily includes the power to stop particular movement so that general movement may proceed. Unless, for instance, the red light is used against north-south traffic, traffic cannot move east-west. While the red light shines, north-south traffic is prohibited. This illustration shows that the power to make by-laws for the regulation of traffic in a city or a municipality must include a power to impose certain prohibitions. The by-law here attacked certainly includes prohibitions, but this does not place it outside the power conferred. The cattle driver is not altogether prevented from traversing the city with his cattle. All that is done is to regulate the time and manner of his coming and going.

The question whether the by-law is unreasonable was mentioned by Mr. *Gorman* during argument. It seems to me that the question of unreasonableness does not arise in this case except by way of criticism of the expediency of the exercise of the power. No doubt the appearance of unfairness and unreasonableness in the exercise of such a power as this compels a closer scrutiny of its validity. But how unreasonableness can be a separate ground for challenging this particular by-law, I fail to see.

Two other points may be mentioned. Firstly, the power for "regulating traffic" is not, in my opinion, limited in its natural meaning and operation by the presence of other regulation-making powers in the Act. Secondly, no reliance was placed by the appellant upon sec. 92 of the Commonwealth Constitution, although it is quite possible that cattle will be driven through the city in the course of inter-State trade. Mr. *Gorman's* abstention in respect of the latter point is the more worthy of praise because his client has certainly lost nothing by it.

The appeal should be dismissed.

McTIERNAN J. I agree that the appeal should be dismissed.

The word "traffic" in sec. 197 (1) (xix) of the *Local Government Act* 1928 of Victoria includes, in my opinion, cattle driven in or through the streets. Clause 37 of the by-law which the appellant assails relates to subject matter within the power contained in the

above-mentioned section. The main question which arises is whether clause 37 is, adopting the words of the section, a by-law which is made for the municipality for the purpose of regulating traffic. The appellant's submission is that the by-law is in effect made for a different purpose because it prohibits the form of traffic to which the by-law is addressed in certain streets at any time. Clause 37 does not, in my opinion, offend against the doctrine invoked in support of the submission. The doctrine is that the power to regulate does not include the power to prohibit (see *Melbourne Corporation* v. *Barry* (1)). The prohibition contained in clause 37 against driving beasts through certain streets in the municipality and through other streets except in specified hours, serves the order and convenience of traffic as a whole. Clause 37 is therefore a regulation of traffic in the city. This clause of the by-law was also attacked on the ground that it is unreasonable. I agree with my brother *Dixon* that this ground of attack does not raise a question which is separate from the question whether the clause is within the power conferred by sec. 197 (1) (xix) of the Act. The material question raised by the submission that the by-law is unreasonable is whether, notwithstanding that on its face it relates to traffic, the operation of the by-law is such that it can have no reasonable relation to the purpose for which the power to make by-laws was granted, namely, the order and convenience of the traffic of the city. The effect of the by-law is to restrict the traffic with which it deals to certain streets. But it does not appear that the streets and hours allowed by the by-law to this traffic, though somewhat severely restricted, are so inadequate as virtually to close the entire city against this form of traffic altogether. In restricting the driving of beasts through the city in the manner mentioned in the by-law it regulates the traffic of the city as a whole. But it does not prohibit this kind of traffic within the boundaries of the city.

Appeal dismissed.

Solicitors for the appellant, *McInerney, McInerney & Williams.*

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

H. D. W.

(1) (1922) 31 C.L.R. 174.