[HIGH COURT OF AUSTRALIA.]

THE MAYOR, COUNCILLORS AND CITIZENS OF THE CITY OF FOOTSCRAY . . } APPELLANT;
RESPONDENT,

AND

MAIZE PRODUCTS PROPRIETARY LIMITED RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1943.

MELBOURNE, *May* 24; *June* 24.

Latham C.J., Rich and Starke JJ.

By-law—Validity—"Suppressing nuisances"—Prohibition of use of pulverized fuel in furnaces unless so constructed as to make escape of dust, grit or ash impossible—Local Government Act 1928 (*Vict.*) (*No.* 3720), *s.* 197 (1) (x).

A municipal by-law provided:—"No person shall, in" a defined area within the municipality, "use or permit to be used any pulverized fuel in any furnace unless such furnace is so designed and constructed or is fitted with such appliances or devices or has attached to it a chimney or flue of such design and construction as to make it impossible for any dust, grit or ash arising from the process of combustion in such furnace to escape or be discharged into the air either from such furnace or any appliance or device fitted thereto or from any chimney or flue attached thereto." From evidence adduced on the hearing of an application to have the by-law quashed it appeared that there was no known appliance which would entirely prevent the escape of dust, grit or ash from furnaces using pulverized fuel, though there were appliances which would so reduce the escape as to render it innocuous.

Held, by *Rich* and *Starke* JJ. (*Latham* C.J. dissenting), that the by-law was a valid exercise of the power conferred by s. 197 (1) (x) of the *Local Government Act* 1928 (Vict.) to make by-laws for "suppressing nuisances."

Decision of the Supreme Court of Victoria (*Macfarlan* J.): *Maize Products Pty. Ltd.* v. *City of Footscray*, (1942) V.L.R. 218, reversed.

APPEAL.

The municipality of the City of Footscray made a by-law, expressed to be made under s. 197 of the *Local Government Act* 1928 (Vict.)

H. C. OF A. 1943.

FOOTSCRAY CORPORATION v. MAIZE PRODUCTS PTY. LTD.

"for the purpose of suppressing nuisance hereinafter described" which provided:—"Whereas there exists throughout the area defined hereunder in the municipal district a nuisance of dust, grit, and ash arising from the escape and discharge of such materials into the air from furnaces and the chimneys and flues of furnaces in such area: And whereas it is considered by the Council of the said city to be necessary for the purpose of suppressing such nuisance to make this By-law: Now in the pursuance of the powers conferred by the *Local Government Act* 1928 and of all other powers (if any) in that behalf existing, the Mayor, Councillors, and Citizens of the City of Footscray do order as follows:—1. No person shall, in" a defined area within the municipality, "use or permit to be used any pulverized fuel in any furnace unless such furnace is so designed and constructed or is fitted with such appliances or devices or has attached to it a chimney or flue of such design and construction as to make it impossible for any dust, grit or ash arising from the process of combustion in such furnace to escape or be discharged into the air, either from such furnace or any appliance or device fitted thereto or from any chimney or flue attached thereto."

Maize Products Pty. Ltd., a ratepayer of the municipality, obtained from the Supreme Court of Victoria an order nisi calling upon the municipality to show cause why the by-law should not be quashed "for the illegality thereof on the grounds that such by-law exceeds the authority conferred on the municipality by the *Local Government Act* 1928 and that such by-law is an abuse of the by-law-making power of the said municipality and is unreasonable."

On the return of the order nisi before *Macfarlan* J. both parties adduced evidence (which is particularized in the judgments hereunder), the applicant to show that there was no known appliance which would entirely prevent the escape of solid particles from furnaces using pulverized fuel, and the respondent to show that a serious nuisance existed in the municipality through the discharge of such matter into the air and that appliances were available which would arrest 95 per cent or more (though not 100 per cent) of the solid matter.

Macfarlan J. held that the by-law was invalid and made the order absolute: *Maize Products Pty. Ltd.* v. *City of Footscray* (1). In his reasons for judgment his Honour said:—"Apart from authority . . . and but for one circumstance which I shall mention, I should be prepared, as at present advised, to hold that this by-law is valid. The case presented by the evidence for the Council to this Court, however, involves, first, an implied

(1) (1942) V.L.R. 218.

admission of one of the applicant's positions, that no design or appliance for the prevention or escape of dust, grit or ash can be 100 per cent effective; and, secondly, establishes that there is more than one design or appliance which will so reduce the escape of dust, grit or ash, and so modify its character as to render it innocuous, that is, will bring about the result that it is no longer a nuisance in any sense. It appears to me that this state of affairs does bring the by-law within the reasons given by *Isaacs* J. and by *Higgins* J. in *Melbourne Corporation* v. *Barry* (1) for holding that the by-law in that case . . . could not be justified under" a "power . . . to make by-laws for suppressing nuisances—per *Isaacs* J.: 'A procession may not be a nuisance; processions generally cannot be "suppressed as nuisances"'; and per *Higgins* J.: 'The appellant has also relied on . . . the power to make a by-law for the purpose of "suppressing nuisances." . . . It is sufficient to say that this by-law has the effect, if valid, of suppressing processions which are not nuisances.' Those reasons bind this Court—they were the reasons of the majority of the High Court" (2).

From this decision the respondent municipality appealed, by special leave, to the High Court.

Menzies K.C. (with him *Mulvany*), for the appellant. *Melbourne Corporation* v. *Barry* (3) does not govern this case; the passages in the judgments by which *Macfarlan* J. felt bound were *obiter dicta*. The evidence shows that a nuisance existed, and the by-law was a proper method of suppressing it. The evidence also shows that by the adoption of suitable apparatus the escape of grit &c. into the air could be almost entirely eliminated. The by-law is not bad because it is not possible entirely to prevent the escape of grit &c. In the circumstances it cannot be said that the by-law is not a reasonable and practical provision for suppressing the nuisance. [He referred to *Kruse* v. *Johnson* (4); *Brunswick Corporation* v. *Stewart* (5); *White* v. *Morley* (6).]

Eager K.C. (with him Dr. *Coppel*), for the respondent. The result of the by-law is to prohibit the use of pulverized fuel whether it creates a nuisance or not. As it is not possible to prevent some small quantity of grit &c. from escaping, any person using that fuel must commit a breach of the by-law, whether he is or is not committing a nuisance. The by-law, therefore, goes beyond the power for

(1) (1922) 31 C.L.R. 174, at pp. 193, 194, 209, 210.
(2) (1942) V.L.R., at p. 221.
(3) (1922) 31 C.L.R. 174.
(4) (1898) 2 Q.B. 91.
(5) (1941) 65 C.L.R. 88.
(6) (1899) 2 Q.B. 34.

H. C. OF A. 1943.

FOOTSCRAY CORPORATION v. MAIZE PRODUCTS PTY. LTD.

suppressing nuisances and is unreasonable and void. It is not possible to construe the by-law in any manner which will bring it within power. [Counsel referred to *Widgee Shire Council* v. *Bonney* (1); *Williams* v. *Melbourne Corporation* (2); *Gregory* v. *Commonwealth Railways Commissioner* (3); *Jones* v. *Metropolitan Meat Industry Board* (4); *Rossi* v. *Edinburgh Corporation* (5); *Seeligson* v. *City of Melbourne* (6).]

Cur. adv. vult.

June 24.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by special leave from an order of the Supreme Court of Victoria (*Macfarlan* J.) quashing a by-law made by the Council of the City of Footscray. The by-law was made under the *Local Government Act* 1928 (Vict.), s. 197, which empowers the Council to make by-laws for specified purposes, including " suppressing nuisances."

The by-law was in the following terms :—" Whereas there exists throughout the area defined hereunder in the municipal district a nuisance of dust, grit, and ash arising from the escape and discharge of such materials into the air from furnaces and the chimneys and flues of furnaces in such area : And whereas it is considered by the Council of the said city to be necessary for the purpose of suppressing such nuisance to make this By-law : Now in the pursuance of the powers conferred by the *Local Government Act* 1928 and of all other powers (if any) in that behalf existing, the Mayor, Councillors, and Citizens of the City of Footscray do order as follows :—1. No person shall, in the area defined hereunder, use or permit to be used any pulverized fuel in any furnace unless such furnace is so designed and constructed or is fitted with such appliances or devices or has attached to it a chimney or flue of such design and construction as to make it impossible for any dust, grit or ash arising from the process of combustion in such furnace to escape or be discharged into the air either from such furnace or any appliance or device fitted thereto or from any chimney or flue attached thereto." Par. 2 of the by-law specified the area within which the by-law was to apply. The area was half a mile long and a quarter of a mile wide. Within this area the respondent company, Maize Products Ltd., had a large plant (valued at about £420,000) employing 270 men, and manufacturing various maize products, including starch, corn-flour, dextrine and glucose.

(1) (1907) 4 C.L.R. 977.
(2) (1933) 49 C.L.R. 142.
(3) (1941) 66 C.L.R. 50.
(4) (1925) 37 C.L.R. 252.
(5) (1905) A.C. 21.
(6) (1935) V.L.R. 365, at pp. 369, 370.

The company's plant includes five furnaces, which discharge into two lofty chimneys. The evidence showed that a very serious nuisance was caused by grit, dust and ash which was discharged from the chimneys. Persons living or carrying on business in the neighbourhood deposed that their premises were covered with a deposit of grit issuing from the company's chimneys, and that for this reason it was impossible to carry on ordinary domestic life or business operations without experiencing most serious discomfort. The fuel burnt in the furnaces was pulverized fuel, and the grit was produced by the burning of that fuel. No other plant in the area used pulverized fuel. There is no doubt that the Council has full power to make a by-law prohibiting the continuance of such a nuisance.

The evidence also showed, however, that no appliances or devices were known which would completely prevent the escape of grit when pulverized fuel was used. The evidence showed that 95 per cent of solid particles could be eliminated from the gases discharged from the smoke stacks, and one engineering expert deposed that it was possible, by the use of particular apparatus, to secure a 98 per cent elimination. Evidence adduced for the Council was to the effect that if the gases in the chimneys were passed through an extracting or arresting device before reaching the eliminating plant the proportion of grit &c. which would be discharged from the flues "would be reduced to a negligible fraction of the whole." In such a case there would be no nuisance arising from grit &c., but there would nevertheless be a breach of the by-law, because pulverized fuel would be burnt in a furnace which was not so constructed as to make it impossible for *any* grit &c. to escape.

Macfarlan J. applied what was said by *Isaacs* J. and *Higgins* J. in *Melbourne Corporation* v. *Barry* (1), where the court considered a by-law which prohibited processions in Melbourne without the consent of the Town Clerk. It was sought to support the by-law under the power to make by-laws for the purpose of suppressing nuisances. That argument was rejected for the reason stated by *Isaacs* J.: "A procession may not be a nuisance; processions generally cannot be 'suppressed as nuisances'" (2). *Higgins* J. said:—"The appellant has also relied on . . . the power to make a by-law for the purpose of 'suppressing nuisances' . . . It is sufficient to say that this by-law has the effect, if valid, of suppressing processions which are not nuisances" (3).

(1) (1922) 31 C.L.R. 174. (2) (1922) 31 C.L.R., at p. 194.
(3) (1922) 31 C.L.R., at p 209.

H. C. OF A. 1943.

FOOTSCRAY CORPORATION v. MAIZE PRODUCTS PTY. LTD.

Latham C.J.

In his reasons for judgment *Macfarlan* J. pointed out the precise effect of the by-law in the area specified. In the first place, it prohibits the use of pulverized fuel in any furnace unless the furnace is fitted with appliances or devices which do not exist and which cannot be made. Thus the by-law prohibits the use of pulverized fuel in any furnace at all. In the next place the by-law prohibits the use of pulverized fuel in any furnace, even if no grit &c. in fact escapes into the air from the furnace, unless the chimney or flue is of such design and construction as to make it impossible for any grit &c. to escape. Accordingly, the effect of the by-law is to prevent the use of pulverized fuel altogether whether or not such use causes any nuisance " in any sense " as the learned judge said. The by-law would be broken if such fuel were used in such a manner that no grit &c. escaped, unless it were shown that the chimney or flue used was such that it was impossible for any grit &c. ever to escape.

The Council, and not a court, has the right and the duty of determining whether it is necessary or desirable to deal with a particular nuisance. It is not for a court to say that it is inexpedient for the Council to exercise a power which the Council possesses. Discharge of grit &c. into the air plainly may be a nuisance, and it is for the Council " to say whether it shall be considered to be a nuisance in the particular locality for which they have power to make by-laws " (*White* v. *Morley* (1)). But it is quite a different thing for the Council to say that the use of a particular fuel shall be suppressed as a nuisance, whether or not any nuisance (by discharge of grit &c. or otherwise) results from such use. The Council can, under the relevant power, deal only with nuisances, and not with facts or circumstances which do not constitute nuisances. On the evidence there would be no difficulty in dealing with the existing nuisance, obvious and palpable as it is, by a by-law which prohibited the discharge of grit &c. in such quantities as to create a nuisance in the ordinary sense of that word. Legislation in such a form is quite common and has not been found to be ineffective : Cf. *Public Health Act* 1936 (Imp.), ss. 92 et seq., and see especially s. 94 (5) ; *Health Act* 1928 (Vict.), s. 32 ; *Police Offences Act* 1928 (Vict.), s. 5 (8), (12) ; *Mantle* v. *Jordan* (2). It would be no defence to a prosecution for a breach of such a by-law for the defendant to show that he could not carry on his business (if that were the fact) without committing the prohibited nuisance.

It was said in argument that even the discharge of five per cent only of solid matter from many chimneys would be a nuisance. Undoubtedly that might be the case. But the by-law now under

(1) (1899) 2 Q.B. 34, at p. 39.

(2) (1897) 1 Q.B. 248.

consideration does not deal, or attempt to deal, with such a state of affairs. It prohibits the use of pulverized fuel, whether such use amounts to a nuisance or not. If a number of persons each contributed a small amount of grit to the atmosphere, so that the total amount so spread abroad created a nuisance, they would each be guilty of committing the nuisance: See *Lambton* v. *Mellish* (1). There is no reason why the Council should not exercise its powers by making a by-law to deal with such a case. But the by-law now under consideration is not a by-law which deals with such a possible nuisance. It deals with the use of pulverized fuel, irrespective of any resulting nuisance.

The by-law prohibits the use of pulverized fuel, except in appliances which do not exist. Pulverized fuel may in fact be used without creating any nuisance. Accordingly the by-law cannot be justified under a power to make by-laws for suppressing nuisances. In my opinion it is unnecessary to consider whether the by-law is oppressive or capricious. It is simply beyond power. A power to make by-laws about horses cannot justify a by-law about dogs. No question of oppressiveness or caprice arises in such a case. So in this case a power to make by-laws suppressing nuisances cannot support a by-law which prevents the use of a particular fuel, irrespective of whether such use creates a nuisance or not.

I agree with the reasons for judgment of *Macfarlan* J., and would dismiss the appeal. As my brethren are of a different opinion, the appeal will be allowed, the appellant, in accordance with an undertaking given upon the granting of special leave, paying the respondent's costs of the appeal to this Court.

RICH J. The *Local Government Act* 1928 (Vict.) confers upon municipalities powers enabling them to make by-laws as seem to them suitable for the good rule and government of the districts under their jurisdiction. The powers are set out in ss. 197 and 198 and in the 13th schedule to the Act and are expressed in relation to purpose. The appellant Council relies on clause x of s. 197, "suppressing nuisances," to support the by-law under consideration. The preamble to this by-law states that it is made "for the purpose of suppressing nuisance hereinafter described existing throughout area defined hereunder." And the recitals which follow this preamble read as follows:—"Whereas there exists throughout the area defined hereunder in the municipal district a nuisance of dust, grit, and ash arising from the escape and discharge of such materials into the air from furnaces and the chimneys and flues of furnaces in such area:

(1) (1894) 3 Ch. 163.

H. C. OF A. 1943.

FOOTSCRAY CORPORATION v. MAIZE PRODUCTS PTY. LTD.

Rich J.

And whereas it is considered by the Council of the said city to be necessary for the purpose of suppressing such nuisance to make this By-law." The by-law is in these terms :—" No person shall, in the area defined hereunder, use or permit to be used any pulverized fuel in any furnace unless such furnace is so designed and constructed or is fitted with such appliances or devices or has attached to it a chimney or flue of such design and construction as to make it impossible for any dust, grit or ash arising from the process of combustion in such furnace to escape or be discharged into the air, either from such furnace or any appliance or device fitted thereto or from any chimney or flue attached thereto." Its operation is confined to a defined area. The learned trial judge referring to the evidence says : " The evidence shows first of all that a nuisance of a grave character had been caused by the deposit of dust, grit and ash, and that it existed from some time before the making of the by-law. The evidence also shows that the Council had ample grounds for believing that those deposits and that nuisance arose from the continued use of pulverized fuel within the area specified, and continued to exist in spite of the Council's own efforts and the efforts of the user of the pulverized fuel. In those circumstances the Council may well have believed that pulverized fuel could not be used without causing a nuisance, and, apart from the authorities, I should, if the evidence stood there, have thought that a by-law altogether prohibiting the use of pulverized fuel in this limited area was within the powers of the Council to make by-laws for the purpose of ' suppressing nuisances, and was not unreasonable.' "

Authorities are of little use in determining the validity of a particular by-law. The appropriate steps are to construe the statute under which the by-law is made and then interpret it to ascertain whether it is within the ambit of the statute. Municipalities and other representative bodies which are entrusted with power to make by-laws are familiar with the locality in which the by-laws are to operate and are acquainted with the needs of the residents of that locality and thus are, I venture to think, better fitted than judges to deal with their requirements. Such tests as " unreasonable," " capricious " and " arbitrary " appear to me to resolve into one test, namely, validity. In *R.* v. *Broad* (1), Lord *Sumner* said : " The rule is well established that if by-laws ' involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say—" Parliament never intended to give authority to make such rules " ' : Lord *Russell of Killowen* C.J. in *Kruse* v.

(1) (1915) A.C. 1110, at p. 1122.

Johnson (1)". The test of validity, assuming the by-law to have been duly approved, is whether it falls within the scope of authority given to the particular body: Cf. *Widgee Shire Council* v. *Bonney* (2). The learned primary judge would have held the by-law to be valid had he not said he was constrained by authority and by certain evidence which purported to show that no design or appliance for prevention or escape of dust, grit or ash can be 100 per cent effective and that there was more than one design or appliance which will so reduce such escape and so modify its character as to render it innocuous. This state of affairs, his Honour considered, brought the by-law within the reasons given in *Barry's Case* (3), by *Isaacs* J. (4), as he then was, and by *Higgins* J. (5). But, as *Isaacs* J. points out in *Country Roads Board* v. *Neale Ads Pty. Ltd.* (6), "*Barry's Case* was decided on a power of 'regulating' traffic, and not of 'prohibiting' it." Indeed, in *Barry's Case* (7) his Honour refers to clause x of s. 197 (1) and says: "That sub-section may be laid aside." Moreover in the present case "nuisance in fact already exists" (Cf. *Gunner* v. *Helding* (8)), so that the question suggested in *Barry's Case* (9)—the distinction between possibility and fact—does not arise. The evidence to which the learned primary judge refers of the existence of effective designs or appliances for nullifying the nuisance shows that it is in the power of the respondent to escape from the prohibition of the by-law. The by-law is not absolute in form. Pulverized fuel is not to be used in any furnace unless it is so designed and constructed &c. as to make it impossible for any dust, grit or ash to escape &c. This prohibition is not, in the circumstances, such as to invalidate a by-law expressing the purpose "suppressing nuisances."

For these reasons I think the appeal should be allowed.

STARKE J. Appeal from a judgment of the Supreme Court of Victoria quashing a by-law made by the municipality of the City of Footscray for the purpose of suppressing a nuisance arising from dust, grit and ashes being discharged into the air from furnaces and the chimneys and flues of furnaces in an area within the municipality specified in the by-law.

Macfarlan J., who gave the judgment, was of opinion that the by-law was authorized by law, but felt constrained by a decision of this Court in *Melbourne Corporation* v. *Barry* (3) to hold otherwise.

(1) (1898) 2 Q.B. 91, at pp. 99, 100.
(2) (1907) 4 C.L.R. 977, at p. 986.
(3) (1922) 31 C.L.R. 174.
(4) (1922) 31 C.L.R., at pp. 193, 194.
(5) (1922) 31 C.L.R., at pp. 209, 210.
(6) (1930) 43 C.L.R. 126, at p. 138.
(7) (1922) 31 C.L.R., at pp. 193, 194.
(8) (1902) 28 V.L.R. 303, at p. 319.
(9) (1922) 31 C.L.R., at p. 194.

H. C. OF A. 1943.

FOOTSCRAY CORPORATION v. MAIZE PRODUCTS PTY. LTD.

Starke J.

The *Local Government Act* 1928, s. 197 (1) (x), empowers municipalities to make by-laws suppressing nuisances. A valuable exposition of this power was given by *Irvine* C.J. in *Jenner* v. *Shire of Mildura* (1), which cannot, I think, be better nor more accurately stated. But it is not necessary for me in this case to discuss the difference that arose between the learned Chief Justice and his brethren upon the validity of clause 3 of the by-law there in question. The rule is well established that if by-laws " involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, 'Parliament never intended to give authority to make such rules.' . . . A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or . . . because it is not accompanied by a qualification or an exception which some judges may think ought to be there " (*Kruse* v. *Johnson* (2); *Jenner* v. *Shire of Mildura* (3); *Widgee Shire Council* v. *Bonney* (4)). " Where a thing is of such a character as that it can be a nuisance, it is to rest with the local authority to say whether it shall be considered to be a nuisance in the particular locality for which they have power to make by-laws. The court can say whether it is reasonably possible for the prohibited act or thing to be a nuisance; but they cannot say whether it should or should not be forbidden in the particular locality " (*White* v. *Morley* (5), *Channell* J.). It has been said in various cases that the authority given by the *Local Government Act* to municipalities to suppress nuisances means the suppressing of nuisances which are nuisances at common law. But the proposition is not illuminating, for it is " impossible, having regard to the wide range of subject matter embraced under the term nuisance, to frame any general definition " (*Garrett* on *Nuisances*, 2nd ed. (1897), p. 4). The characteristics of a nuisance have often been described, but the category of acts or omissions constituting nuisances at common law is not closed: See *Archbold, Criminal Pleading, Evidence & Practice*, 25th ed. (1918), p. 1246; *Pearce & Meston* on *Nuisances*, (1926), pp. 4, 27. Such cases as *Higgins* v. *Egleson* (6), *Ex parte Stafford*; *Re Shire of Boroondara* (7), *Gunner* v. *Helding* (8), *In re Borough of Flemington and Kensington*; *Ex parte Fairbairn* (9), appear to me to be illustrations of by-laws that were too wide and in the judgment of the courts oppressive and gratuitous interferences

(1) (1926) V.L.R. 514.
(2) (1898) 2 Q.B. 91, at pp. 99, 100.
(3) (1926) V.L.R., at p. 522.
(4) (1907) 4 C.L.R. 977.
(5) (1899) 2 Q.B. 34, at p. 39.
(6) (1877) 3 V.L.R. (L.) 196.
(7) (1894) 20 V.L.R. 23.
(8) (1902) 28 V.L.R. 303.
(9) (1901) 27 V.L.R. 7.

with the rights of the subject and so beyond power. But if they purport to lay down a rule that the use of night-soil as a manure for agricultural purposes or carrying it through municipalities can never be a nuisance at common law, then it is a rule that is contrary to both law and fact. If the use or the carriage of night-soil or other manures or offensive material causes or is likely to cause annoyance to the public or is likely to be injurious to the public, then it is a nuisance according to the common law (See *Pearce & Meston* on *Nuisances*, (1926), pp. 36, 37), and subject to the power to make by-laws to suppress nuisances.

The by-law which was quashed in the Supreme Court remains for consideration. It recites that there exists throughout the area in the municipality of Footscray defined in the by-law a nuisance arising from the escape and discharge of dust, grit and ash into the air from furnaces and the chimneys and flues of furnaces in such area and that it was considered necessary by the municipality for the purpose of suppressing such nuisance to make the by-law.

It is clear enough that acts of the character mentioned are capable of being and do constitute a nuisance. They cause or are likely to cause annoyance to the public and are or are likely to be injurious to the public. Indeed, the affidavits filed on the part of the municipality, if material, indicate that an intolerable nuisance exists in the municipality, mainly, I gather, owing to the operations of the respondent. So the only question is whether the means adopted by the municipality for suppressing the nuisance is too wide, or, in other words, is an oppressive and gratuitous interference with the rights of the subject.

The by-law provides that no person shall, in the area defined, use or permit to be used any pulverized fuel in any furnace unless such furnace is so designed and constructed or is fitted with such appliances or devices or has attached to it a chimney or flue of such design and construction as to make it impossible for any dust, grit or ash arising from the process of combustion in such furnace to escape or be discharged into the air either from such furnace or any appliance or device fitted thereto or from any chimney or flue attached thereto.

The restriction imposed by the by-law is not general, but relates to a defined area and to the use of pulverized fuel in furnaces. Pulverized fuel is fuel reduced to fine particles which when introduced into furnaces ignite whilst floating in the furnace gases. The incombustible matter is carried off by the furnace gases through some outlet and discharged into the air. The substance and effect of the by-law is to prohibit this discharge. It prohibits the use of pulverized fuel within the defined area unless the appliances used prevent or

H. C. OF A. 1943.

FOOTSCRAY CORPORATION v. MAIZE PRODUCTS PTY. LTD.

Starke J.

render impossible this escape. It was suggested rather than contended that the by-law is beyond power because there is no known method of preventing or rendering impossible the escape of more than 95 per cent of the incombustible material or the grit, ashes and dust. But that is an argument well known and oft rejected. "At common law, if I am sued for a nuisance, and the nuisance is proved, it is no defence . . . to say, and to prove, that I have taken all reasonable care to prevent it," or that it is impossible to carry on business operations without causing the nuisance (*Rapier* v. *London Tramways Co.* (1)). If the law were otherwise, it would lead to business operations interfering with public and private rights. It is for those carrying on business so to conduct their operations that a nuisance is not created.

Next it was contended that the discharge into the air by the respondent of only five per cent of the incombustible matter from its furnaces would not cause any nuisance and that the by-law involves prohibition of an act in the case of the respondent and other persons that would not be a nuisance. But the by-law-making authority may well conclude that the dust, grit and ash nuisance cannot be suppressed unless the discharge of the material into the air is prohibited or rendered impossible. The respondent's argument would apparently reach the absurdity that there would be no nuisance if each user of pulverized fuel in the area discharged only five per cent of his incombustible material into the air although the aggregate discharge of all users might create an intolerable nuisance.

The by-law-making authority is of necessity best qualified to prescribe what is needful and proper to suppress the nuisance arising from the escape and discharge into the air of dust, grit and ash from pulverized fuel. Indeed, I notice that an engineer deposes that an electrostatic plant installed at a cement works is guaranteed to give and in fact gives a 95 per cent extraction of the incombustible material discharged into the air under full load and when the load is reduced by one-third the percentage extracted rises to 98.4 per cent. And he also deposes that he was of opinion that, if the gases were passed through some other form of arresting and extracting device such as a Cindervane fan or a settling chamber and then through an electrostatic precipitation plant, the percentage of material extracted would be increased substantially above that attained by an electrostatic plant operating alone.

The by-law is not in any relevant sense unreasonable, nor greatly, or at all, in excess of what is necessary for the suppression of the nuisance. It is a good and valid by-law.

(1) (1893) 2 Ch. 588, at pp. 599, 600.

Melbourne Corporation v. *Barry* (1) does not, I think, conflict with this result. There a by-law of the City of Melbourne provided that no procession of persons or of vehicles or motor cars or of any combination of them should except for military or funeral purposes parade or pass through any street unless with the previous consent of the Council and by the route specified in such consent and unless twenty-four hours' notice with particulars of such consent and route was given to the police. It was decided that authority to regulate traffic and processions did not warrant this by-law. But an argument suggested, I should think almost in despair, that the power to make by-laws for the suppression of nuisances warranted the by-law. The argument was rejected. *Isaacs* J. observed: "A procession may not be a nuisance; processions generally cannot be 'suppressed as nuisances'" (2). And *Higgins* J.: "It is sufficient to say that this by-law has the effect, if valid, of suppressing processions which are not nuisances" (3). Processions may be nuisances and, if of that character, might be suppressed. But the by-law in *Barry's Case* (1) prohibited all processions without consent and destroyed the common law right of walking in procession. The by-law was too wide, which means that it was, in the opinion of the majority of the court, an oppressive and a gratuitous interference with the rights of the subject, and so beyond power.

In my opinion, therefore, this appeal should be allowed and effect given to the real opinion of the learned judge from whom this appeal is brought.

Appeal allowed. Appellant to pay respondent's costs of appeal. Order of Supreme Court discharged and order substituted that respondent company pay appellant's costs in the Supreme Court.

Solicitors for the appellant, *A. C. Secomb & Tibb.*
Solicitors for the respondent, *Hedderwick, Fookes & Alston.*

E. F. H.

(1) (1922) 31 C.L.R. 174. (2) (1922) 31 C.L.R., at p. 194.
(3) (1922) 31 C.L.R., at pp. 209, 210.