ST. 92 WN 946
T. 50. ALJR - 7.
APP. 16 ALR. 301.
C. 56. ALJR. 164.

C. 151 CLR 170.

[HIGH COURT OF AUSTRALIA.]

ARTHUR YATES AND COMPANY PROPRIETARY LIMITED . . . . . RESPONDENT, } APPELLANT;

AND

THE VEGETABLE SEEDS COMMITTEE AND OTHERS . . . . . APPLICANTS, } RESPONDENTS.

Practice—Pleading—Action in High Court against Commonwealth tribunal—Vegetable Seeds Committee—Statement of claim—Allegations—Application to strike out—Declarations of right—Bona fides of committee—Motives—Orders of committee—Legislative or administrative—Powers of committee—National Security (Vegetable Seeds) Regulations (S.R. 1943 No. 109—1944 No. 129), regs. 4, 10, 14A, 17, 23.

The *National Security (Vegetable Seeds) Regulations* established as a body corporate a Vegetable Seeds Committee consisting of four members including an official Chairman and an Executive Member. The objects of the Regulations were set out and were stated to be to ensure, for the purposes of the defence of the Commonwealth and the effectual prosecution of the war, that an adequate supply of vegetable seeds was available in Australia, that those seeds were true to type and of a satisfactory standard of purity and germination, and were effectively distributed, and it was provided that the Regulations should be administered and construed accordingly.

The Regulations required seed merchants to register with the Committee and prohibited the sale of seeds except as directed by the Committee and they empowered it by order to control and regulate the processing, treatment, distribution and disposal of vegetable seeds. Such an order might apply to a specified person or persons or might be general. The Committee was also empowered to buy, sell and otherwise deal in vegetable seeds.

Orders were made by the Committee in respect of the plaintiff, a seed merchant, which the plaintiff alleged were not made bona fide for the purposes for which the power was conferred but to conserve the financial interests of the Committee in respect of seeds bought or dealt in by the Committee, and the plaintiff sought a declaration that the orders were void.

H. C. OF A. 1945.

SYDNEY, *April* 23, 24; *May* 11.

Williams J.

SYDNEY, *Aug.* 10, 17, 22, 23; *Nov.* 21.

Latham C.J., Rich, Starke and Dixon JJ.

83 C.L.R. 44

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

Held, by *Latham* C.J., *Starke* and *Dixon* JJ. that the orders of the Committee were open to attack on the grounds alleged and that the plaintiffs as persons affected by the orders were entitled to maintain a suit for a declaration that the orders were unauthorized : by *Rich* J. that the question should not be decided on an application to strike out pleadings.

Decision of *Williams* J. reversed.

APPEAL from *Williams* J.

In an action brought by Arthur Yates & Co. Pty. Ltd. in the High Court against the Vegetable Seeds Committee as defendant for certain declarations in respect of the powers of that committee and of certain orders made by it, the statement of claim was substantially as follows :—

1. The plaintiff Arthur Yates & Co. Pty. Ltd. is a company duly incorporated and entitled to sue in and by its said corporate name and the defendant Vegetable Seeds Committee is a body corporate constituted under the *National Security* (*Vegetable Seeds*) *Regulations* and liable to be sued in and by its said corporate name.

2. The plaintiff is now and for a great number of years has been carrying on the business of seed merchants, seed growers and nurserymen within the State of New South Wales and importers and exporters of seed from and to other States and to many countries abroad. Seed for the purposes of its business has at all material times been obtained by the plaintiff :—(*a*) from crops grown by it upon its own land or upon lands leased by it ; (*b*) from crops grown by its subsidiary company Arthur Yates Seed Growers Pty. Ltd. ; (*c*) from crops grown by independent growers who from time to time contract with the plaintiff company to grow seed for delivery and sale to it ; (*d*) by direct purchase from Australian growers and Australian merchants ; and (*e*) by importation from abroad, including Great Britain, the Dominion of New Zealand, the United States of America and European countries.

3. The plaintiff is and at all material times has been a registered vegetable seed merchant, within the meaning of the regulations.

4. The plaintiff now has and at all material times has had in the Commonwealth of Australia large quantities of vegetable seed for sale, *inter alia*, of the kinds of vegetable seed covered by the orders hereinafter mentioned in pars. 5, 6, 7 and 8 hereof. All of the seed in this paragraph referred to is and at all material times has been true to type and of a satisfactory standard of purity and germination and the said seed is and at all such times has been otherwise unobjectionable as seed.

5. On or about 17th March 1944 the defendant committee caused to be served upon all registered vegetable seed merchants including

the plaintiff a document, which, so far as material, was in the words and figures following, namely :—

"*Economic Utilization of Seeds.*

Under Statutory Rules 1943 No. 109 of the National Security Act the Vegetable Seeds Committee hereby orders you until further notice not to sell, exchange, or otherwise dispose of or packet any vegetable seeds of the following types, which were or are harvested between the 1/7/43 and the 30/6/44 :—

Beet—Red (All varieties)
Beet—Silver ,,
Broccoli—Green Sprouting
Cabbage (All varieties)
Carrot ,,
Cucumber ,,
Lettuce ,,
Marrow ,,
Melon—Rock ,,
Melon—Water ,,
Onion—Early Flat White
Early Grano
White Bermuda
Early Flat White Bermuda
Yellow Bermuda
Danver's Yellow Globe
Ebenezer
Parsnip (All varieties)
Squash—Summer
Tomato (All varieties)
Swede Turnip ,,
Table Turnip ,,

' Packeting ' in relation to this Order means placing not more than one lb. of seed in separate containers.

This Order is not to apply to the sales of seeds by a producer (other than producer merchant) to a registered vegetable seeds merchant.

You are hereby further ordered by the Vegetable Seeds Committee to forward to the Executive Member of the Vegetable Seeds Committee the following information with respect of seeds grown in the Commonwealth of Australia and harvested during the year 1/7/43 to 30/6/44 and which are purchased by you or which are received by you as a result of production on your own properties :—

Name of the Producer.
Address of the Producer.
Kind of Seed.
Variety of Seed.
Quantity purchased.

For seed already received you are hereby directed to furnish this information within 7 days. For seed received in the future you are directed to furnish the information within 7 days of its being cleaned to a standard ready for retail sale.

(Sgd.) J. R. A. McMillan,
Executive Member Vegetable Seeds Committee."

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

6. On 18th October 1944 John Ruston Alfred McMillan, executive member of the defendant committee claiming to act under and by virtue of the said regulations signed and caused to be published in the Commonwealth *Government Gazette* of 20th October 1944 a document in the following terms, namely :—

" Vegetable Seeds Committee

Order to Cover Sale of Australian-Grown Seed ex the 1943-44 Crop.

Pursuant with the National Security (Vegetable Seeds) Regulations 14A of Statutory Rules No. 129 I, John Ruston Alfred McMillan, Executive Member of the Vegetable Seeds Committee, a body incorporate under the National Security Act 1939-1943, do hereby revoke the Order made on the 17th March 1944, referring to the Economic Utilization of Seed, and I do hereby order as follows :—

1. Except with the approval of the Vegetable Seeds Committee, a registered vegetable seed merchant shall not sell or pack for retail sale any vegetable seeds of the kinds and varieties specified in the Schedule hereunder, which were harvested during the period commencing on the first day of July 1943 and ending on the thirtieth day of June 1944.

2. The last preceding paragraph shall not apply to sales of vegetable seeds by a registered seed grower (not being a registered vegetable seed merchant) to a registered vegetable seed merchant.

SCHEDULE OF VEGETABLE SEEDS.

Red Beet—all varieties.

Parsnip—all varieties.

Turnip, swede—all varieties.

Turnip, table—all varieties.

3. ' Packeting ' in relation to this Order means placing not more than 1 lb. of seed in separate containers.

4. Consideration will be given to the release of certain varieties, but application for such consideration of release must be made in writing to the Executive Member, Vegetable Seeds Committee, and each application will be treated on its individual merits in relation to the overall stock position . . .

(Sgd.) J. R. A. McMillan, Executive Member."

7. On 4th November 1944 the defendant committee caused to be served upon all registered vegetable seed merchants including the plaintiff a document in the words and figures following :—" *National Security* (*Vegetable Seeds*) *Regulations*—Order under Regulation 14A.

In pursuance of reg. 14A of the *National Security* (*Vegetable Seeds*) *Regulations*, the vegetable seeds committee hereby makes the following order :—

i. Except with the approval of the Vegetable Seeds Committee, a registered vegetable seed merchant shall not sell by retail or otherwise, or pack for retail sale, any vegetable seeds of the kinds specified in the schedule to this Order which were harvested during the period commencing on 1st July 1943, and ending on 30th June 1944.

ii. The last preceding paragraph shall not apply to sales of vegetable seeds by a registered vegetable seed grower (not being registered vegetable seed merchant) to a registered vegetable seed merchant.

iii. For the purposes of par. 1 of this order, 'pack' means to place not more than one pound of seed in a container.

THE SCHEDULE.

Red Beet; Parsnip; Turnip, swede; Turnip, table.

On behalf of the Vegetable Seeds Committee.

(Sgd.) J. R. A. McMillan, Executive Member."

8. On 12th February 1945 the defendant committee caused to be served upon all registered vegetable seed merchants including the plaintiff a document in the words and figures following, namely:—

"Commonwealth of Australia,

National Security (*Vegetable Seeds*) *Regulations*.

Order under Regulation 14A.

In pursuance of reg. 14A of the *National Security* (*Vegetable Seeds*) *Regulations*, the vegetable seeds committee hereby makes the following Order:—

(i) Except with the approval of the Vegetable Seeds Committee, a registered vegetable seed merchant shall not sell by retail or otherwise, or pack for retail sale by himself or any other person, any vegetable seeds of the kinds specified in the schedule to this order which are, or have been, harvested during the period which commenced on 1st July 1944 and ends on 30th June 1945.

(ii) For the purpose of par. 1 of this order, 'pack' means to place not more than one pound of seed in a container.

THE SCHEDULE.

Bean—Broad; Beet—Red; Beet—Silver; Broccoli; Brussels Sprouts; Cabbage; Carrot; Cauliflower; Celery; Cucumber; Leek; Lettuce; Marrow; Melon—Rock; Melon—Water; Onion; Parsnip; Pea—Canning; Squash—Summer; Squash—Winter; Tomato; Turnip—Swede; Turnip—Table.

On behalf of the Vegetable Seeds Committee.

J. R. A. McMillan, Executive Member."

9. Each and every of the said Orders or purported Orders referred to in pars. 5, 6, 7 and 8 hereof remain unrevoked except in so far as the purported Order set out in par. 6 hereof may be effective to revoke the purported Order set out in par. 5 hereof.

H. C. OF A. 1945.

ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

10. Prior to 17th March 1944 the defendant committee had set up and established itself in the business of vegetable seed merchants and growers for profit to itself in competition with other seed merchants and growers, including the plaintiff, and was itself growing or causing to be grown on its own behalf and for profit to itself large quantities of seed of many kinds and varieties identical with or capable of being used in substitution for seed held in stock by vegetable seed merchants (other than the defendant committee) including the plaintiff or being produced by or for such other merchants including the plaintiff.

11. The defendant committee has now and at all material times before and since 17th March 1944 has had on hand large quantities of vegetable seed portion of which vegetable seed has been imported by the defendant committee from the United States of America and other sources beyond Australia.

12. The defendant committee both prior to and since 17th March 1944 has imported and it still does import large quantities of vegetable seed of various kinds far in excess of any reasonable requirement of the Australian market.

13. Of the stock of vegetable seed held by the defendant committee at all material times both before and since 17th March 1944 a large portion has deteriorated and has become or is in process of becoming useless as seed.

14. The defendant committee at all material times both before and since 17th March 1944 in order to further its own trading activities aforesaid and to prevent financial loss falling upon itself in the course of such trade has desired to compel the disposal by the vegetable seed merchants of large stocks of seed held by the defendant committee as aforesaid.

15. The plaintiff charges it to be and it is the fact that the determination by the defendant committee to make and serve upon the vegetable seed merchants, including the plaintiff, the documents set out in pars. 5, 7 and 8 hereof was made solely to protect and further the trading and financial interests of the defendant committee and to relieve it of competition from seed merchants other than the said committee including the plaintiff in relation to the kinds and varieties of seed covered by the said documents and generally in relation to the business of seed merchants carried on by the said committee.

16. The plaintiff charges it to be and the fact is that the defendant committee did not properly or at all authorize the said John Ruston Alfred McMillan to make or issue any order or direction in the terms of the document mentioned in par. 6 hereof nor to sign the document

nor to cause the document to be published in the Commonwealth *Government Gazette* as hereinbefore mentioned but the defendant committee claims that the said purported order is a valid order.

17. Alternatively to par. 16 hereof the plaintiff alleges it to be and the fact is that in so far as the defendant committee authorized or purported to authorize John Ruston Alfred McMillan to make issue or sign the document set out in par. 6 hereof or to have the same published in the Commonwealth *Government Gazette* the determination of the defendant committee so to authorize John Ruston Alfred McMillan was made solely to protect and further the aforesaid trading and financial interests of the defendant committee and to relieve it of competition from other seed merchants including the plaintiff in relation to the kinds and varieties of seeds covered by the said document and generally in relation to the business of seed merchants.

18. The plaintiff in its said business has at all times maintained a high standard and quality in goods sold by it and at all times has sold under its trade name seed of a germinating capacity and otherwise of a quality in excess of and far superior to any statutory requirements operating in the Commonwealth or in any of the States thereof and by such standard and quality of its seed has built up and maintained a favourable reputation and goodwill both throughout the Commonwealth of Australia and abroad.

19. The plaintiff has now and at all material times has had on hand for sale large quantities of vegetable seed produced by or on behalf of the plaintiff in Australia such vegetable seed being of high quality and germinating capacity and otherwise of a high standard and by reason of the documents mentioned in pars. 5, 6, 7 and 8 hereof the defendant committee claims to prevent and has prevented and attempted to prevent the plaintiff from selling and the plaintiff has been unable and still is unable to sell the said seed whereby the said seed has become and is becoming deteriorated in value and useless as seed and whereby the plaintiff has been compelled to purchase seed of a like kind from the defendant committee to supply its own market requirements.

20. By reason of the documents mentioned in pars. 5, 6, 7 and 8 hereof the plaintiff although having on hand available for sale seed conformable to its said established standard of quality and excellence has been and still is being compelled to sell under its trade name seed obtained by it from the defendant committee.

21. The seed so obtained by the plaintiff from the defendant committee is as to a large part thereof inferior in quality and below

H. C. OF A. 1945.

ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

the said standards of germinating capacity and quality heretofore maintained by the plaintiff in respect of its own seed as aforesaid.

22. From time to time and on numerous occasions since 17th March 1944 the defendant committee has stated to the plaintiff that it will release from the operation of the purported orders referred to in pars. 5, 6, 7 and 8 hereof the whole or portion of certain kinds and varieties of seeds being part of the plaintiff's own stock aforesaid covered by these Orders conditionally on the plaintiff purchasing from the defendant committee at prices appropriate to first-class seed in first-class condition and in quantities nominated by the defendant committee seed in a deteriorated or deteriorating condition held by the committee as hereinbefore set out.

23. For many years prior to and up to 1943 the plaintiff had imported from the Dominion of New Zealand large quantities of pea seed of which a large part had been expressly grown in that Dominion for delivery to the plaintiff and in order to supply the Australian market with such seed the plaintiff depended upon such importation.

24. In the year 1943 the defendant committee decided that it would not permit the importation of vegetable seed into Australia otherwise than by or through itself and thereupon forbade the plaintiff to import any vegetable seed including pea seed from the Dominion of New Zealand unless from time to time permitted by the defendant committee so to do.

25. Prior to the month of August 1943 the defendant committee gave its permission to the plaintiff to import certain specified pea seed from the Dominion of New Zealand and acting upon and in pursuance of such permission the plaintiff purchased from merchants in the Dominion of New Zealand large quantities of the said pea seed.

26. Subsequently to the purchase by the plaintiff of the said pea seed in New Zealand the defendant committee in carrying on its business as mentioned in par. 10 itself purchased in the Dominion of New Zealand similar pea seed to that there purchased by the plaintiff but at an average price greater than the price at which the plaintiff had purchased its seed as aforesaid.

27. After the defendant committee had purchased in the Dominion of New Zealand the pea seed as mentioned in the next preceding paragraph and before the plaintiff had imported the pea seed purchased by it in New Zealand as aforesaid the defendant committee purported to revoke the permission which it had given to the plaintiff to import the said seed and forbade the plaintiff to import the same unless the plaintiff would agree either—(*a*) to sell to the defendant committee the pea seed so purchased by the plaintiff at the price at

which the plaintiff had purchased the same and thereafter to re-purchase the said seed from the defendant committee at a higher price to be based upon the cost to the defendant committee of the seed purchased by it in New Zealand plus its overhead expenses and a margin of profit to itself; or (*b*) to pay to the defendant committee the difference between the price at which the plaintiff would land the seed purchased by it in the Dominion of New Zealand and a higher price being the price at which the defendant committee had determined to sell in Australia seed purchased by it in the Dominion of New Zealand as aforesaid.

28. The plaintiff was unwilling to perform either of the said conditions and in consequence was prevented by the defendant committee from importing the said seed.

29. In the month of January 1945 there was and there still is an insufficient quantity of pea seed available in Australia to seed merchants including the plaintiff to meet the requirements of the local trade.

30. The plaintiff is and at all material times has been desirous of importing into Australia from the Dominion of New Zealand new season crop of carrot seed known as the St. Valery variety for the purposes of its business aforesaid and at all such times has under offer from a New Zealand merchant a considerable quantity of the said variety for such importation but the defendant committee has at all such times prohibited the plaintiff from importing the said seed and still does so prohibit the plaintiff.

31. The defendant committee has purported to forbid the importation into Australia by the plaintiff or any other vegetable seed merchant or any other person of any vegetable seed and has claimed and still claims the exclusive right to import vegetable seed into Australia and in particular has refused and still refuses to permit the plaintiff to import any pea seed or carrot seed, including the St. Valery variety, from the Dominion of New Zealand in order to satisfy the requirements of the local market and the demands of the plaintiff's business or at all.

32. On 22nd September 1944 the plaintiff's secretary duly applied on its behalf to the defendant committee to renew its registration as a vegetable seed merchant. The plaintiff's application, omitting formal parts, was in the words and figures following :—" I hereby apply for re-registration as a Vegetable Seeds Merchant on the same conditions as my last application, in so far as such conditions are required by the *National Security Act* and Regulations."

Except for the words " in so far as such conditions are required by the *National Security Act* and Regulations " appearing in the said

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

application the form thereof is the form that the defendant committee has directed the plaintiff to adhere to but the words " in so far as such conditions are required by the *National Security Act* and Regulations " were added by the plaintiff.

33. On or about 1st November 1944 in response to the plaintiff's application for registration the defendant committee forwarded to the plaintiff a document in the words and figures following :—

" Commonwealth of Australia

National Security (*Vegetable Seeds*) *Regulations.*

Certificate of Registration of Vegetable Seed Merchant.

No. 36.

Pursuant to Regulation 17 of the *National Security* (*Vegetable Seeds*) *Regulations*, the Vegetable Seeds Committee hereby certifies that—

Arthur Yates & Co. Pty. Ltd.,

184-186 Sussex Street, Sydney, N.S.W.

is registered as a vegetable seed merchant in respect of the following vegetable seeds — (Here were specified thirty-one varieties of vegetable seeds).

" Pursuant to Regulation 18 (2) of the *National Security* (*Vegetable Seeds*) *Regulations*, the Committee hereby directs that a registered vegetable seed merchant shall not sell or otherwise dispose of for valuable consideration any vegetable seed imported into Australia unless such seed has been imported with the consent of the Vegetable Seeds Committee.

(Sgd.) J. R. A. McMillan (Seal),
Executive Member.

Dated—31st October 1944."

34. The determination of the defendant committee to prohibit and impede the importation of vegetable seed into Australia by vegetable seed merchants has been arrived at solely to protect and further the trading and financial interests of the defendant committee and to safeguard it in its trading activities as a vegetable seed merchant from competition with other vegetable seed merchants including the plaintiff and from competition with the superior seed available or which but for such prohibition and impeding by the defendant committee would be available to the plaintiff and other vegetable seed merchants.

35. The plaintiff has suffered and will continue to suffer great loss and damage by reason of the matters alleged in pars. 18 to 34 hereof both inclusive.

The plaintiff's claim was for the following relief :—

1. A declaration that the purported Orders dated respectively 17th March 1944, 18th October 1944, 4th November 1944 and 12th

February 1945 are and each of them is beyond the power conferred upon the Vegetable Seeds Committee by the *National Security* (*Vegetable Seeds*) *Regulations* and are and is void and of no effect.

2. A declaration that the said Orders are and each of them is void and of no effect as being made mala fide and capriciously in relation to any relevant power given to the committee by and under the said Regulations.

3. A declaration that the Order of 18th October 1944 is void and of no effect as being signed by a person, that is to say, John Ruston Alfred McMillan, having no authority thereunto.

4. A declaration that the Vegetable Seeds Committee has not now and never has had power to prohibit the sale of the aforesaid vegetable seed by the plaintiff.

5. A declaration that the plaintiff is now and at all times has been entitled to sell by retail or otherwise seed of the kinds and varieties referred to in the aforesaid Orders or any of them.

6. A declaration that the Committee has no power to control the importation of seed by the plaintiff.

7. A declaration that the purported prohibition of the importation of carrot seed and pea seed by the plaintiff from New Zealand was as to each of such seeds made mala fide and capriciously in relation to the powers of the Committee under the Regulations.

8. A declaration that the Committee has no power to prohibit the sale of imported seed.

9. A declaration that the prohibition of the sale of seed imported into Australia from abroad was made mala fide in relation to the powers of the Committee.

10. A declaration that the plaintiff is a registered vegetable seed merchant and is not precluded by virtue of such registration or otherwise from importing seeds from abroad.

11. Damages in respect of the matters set out in pars. 18 to 34 hereof both inclusive.

12. An order that the defendant do pay the plaintiff's costs of this action.

In its statement of defence the defendant: (*a*) admitted the facts and matters alleged in pars. 1, 3, 5, 6, 7, 8 and 33 of the statement of claim; and (*b*) denied each and every allegation contained in pars. 10, 12, 13, 14, 15, 17, 20, 21, 22, 24, 26, 27, 28, 29, 31, 34 and 35 of the statement of claim. The defendant admitted the facts and matters alleged in par. 2 of the statement of claim save and except that the defendant while admitting that seed for the purpose of the plaintiff's business had been obtained by the plaintiff from the sources mentioned in clauses (*a*) to (*e*) of par. 2, did not admit

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

that seed had been obtained by the plaintiff from the said sources or any of them at " all material times " or any " material time " within the meaning of that paragraph. The allegations contained in par. 4 of the statement of claim were not, either in whole or severally, admitted by the defendant. In answer to par. 9 the defendant craved leave to refer to each of the documents set out in pars. 6 and 7 for its effect as revoking wholly or in part either or both of the documents set forth in pars. 5 and 6 thereof and did not admit that such last-mentioned document remained unrevoked. In answer to par. 11 the defendant admitted that it had at the date of the statement of defence, 11th April 1945, and had had before and since 17th March 1944, quantities of vegetable seed and that it had imported vegetable seeds from the United States of America and other sources beyond Australia, but did not admit that it had on 11th April 1945, or at " all material times " or any " material time " within the meaning of par. 11 had on hand " large quantities " within the meaning of par. 11 of vegetable seed or of vegetable seed portion of which vegetable seed had been so imported. In answer to par. 16, and in further answer to par. 9, the defendant said that the terms of the said document embodied the effect of a decision of the defendant but admitted that it did not authorize the said John Ruston Alfred McMillan to make or issue any order or direction under the *National Security* (*Vegetable Seeds*) *Regulations* in terms of the said document. In further answer to par. 16 the defendant said that it did not claim and had not at any material time claimed that the said document was a valid order under those Regulations. In answer to par. 18 the defendant, while admitting that the plaintiff had established a favourable reputation and goodwill, did not admit that the plaintiff in its said business had at all times maintained a " high standard and quality " within the meaning of par. 18 in goods sold by it or that it at all times had sold under its trade name seed of a germinating capacity and otherwise of a quality in excess of and far superior to any statutory requirements operating in the Commonwealth or in any of the States thereof or that it by " such standard and quality " of its seed within the meaning of par. 18 had built up and maintained a favourable reputation and good will both throughout the Commonwealth of Australia and abroad. In answer to par. 19 the defendant did not admit that the plaintiff had at all or at any material time or times on hand for sale or at all large or any quantities of vegetable seed produced by or on behalf of the plaintiff in Australia or at all, whether or not of high quality or germinating capacity or otherwise of a high standard. In further

answer to par. 19 the defendant said that it claimed that the documents mentioned in pars. 7 and 8 were orders validly made by it pursuant to the powers conferred by reg. 14A of the *National Security (Vegetable Seeds) Regulations* made under the *National Security Act* 1939-1943. Except in so far (if at all) as what was stated by the defendant might amount to a claim to prevent or a preventing or an attempting to prevent within the meaning of par. 19 the defendant denied the allegations in par. 19 other than the allegations stated above to be not admitted. In answer to par. 23 the defendant, while admitting that prior to and up to 1943 the plaintiff had imported pea seed from the Dominion of New Zealand, did not admit that for many years prior to and up to 1943 or at all the plaintiff had imported from that Dominion or at all " large quantities of pea seed " within the meaning of par. 23 or large or any quantities of pea seed of which a large or any part had been expressly or at all grown in that Dominion for delivery to the plaintiff or that in order to supply the Australian market with such seed the plaintiff depended upon such importation. In answer to par. 25 the defendant did not admit that acting upon or in pursuance of " such permission " within the meaning of par. 25 or at all the plaintiff purchased from merchants in the Dominion of New Zealand large or any quantities of the " said pea seed " within the meaning of par. 25 or any pea seed. In further answer to par. 25 the defendant said that the plaintiff purported to ask of the defendant permission to arrange contracts in New Zealand for certain quantities of certain varieties of pea seed and the defendant informed the plaintiff that it saw no objection to the import of the said quantities and varieties from New Zealand and that except in so far as (if at all) the said facts might amount to a giving of " permission to the plaintiff to import specified pea seed from the Dominion of New Zealand " within the meaning of the statement of claim the defendant denied that prior to August 1943 it gave its permission to the plaintiff to import certain specified or any pea seed from that Dominion. In answer to par. 30 the defendant did not admit that the plaintiff was or at any material time or times had been desirous of importing into Australia either from the Dominion of New Zealand or at all new season or any crop of carrot seed known as the St. Valery variety or any variety for the purposes of its business or that the plaintiff at such time or times had had under offer a considerable quantity of the said or any variety for importation. The defendant denied each of the other allegations in par. 30. The defendant admitted the facts and matters alleged in par. 32 save and except that it denied that it had directed the plaintiff to adhere to the said form except for the words " in

H. C. OF A. 1945.

ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

so far as such conditions are required by the *National Security Act* and Regulations."

The defendant submitted that the statement of claim disclosed no cause of action and that the facts therein alleged did not entitle the plaintiff to damages as claimed or to any of the declarations of right therein claimed. The defendant further submitted that the said declarations of right were such as in the exercise of its discretion to make declarations of right the Court, in the circumstances, would not make.

The plaintiff joined issue and submitted that the statement of defence contained no answer in law to the statement of claim.

The defendant applied by way of summons for one or more of the following orders upon the respective grounds stated :—1. That proceedings in the action be stayed on the ground that the plaintiff had no reasonable or probable cause of action. 2. That the statement of claim be ordered to be struck out or to be amended on the grounds : (i) that it disclosed no cause of action ; (ii) that it disclosed no cause of action for the damages claimed ; (iii) that it disclosed no title to the declaration of right claimed ; and (iv) that the said declarations of right were not such as the court, in its discretion to make declarations of right, would make. 3. That pars. 10 to 15 inclusive, 17, 18, 22, 25 to 30 inclusive and 34 of the statement of claim be struck out on the grounds that the allegations therein contained were unnecessary and tended to prejudice, embarrass or delay the fair trial of the action. 4. That the plaintiff be ordered to deliver to the defendant a better statement of claim and also further and better particulars of matters stated in pars. 10, 12, 15, 19, 25, 26, 27, 28, 30, 31, 32 and 34 of the statement of claim.

The summons was heard before *Williams* J. in Chambers.

Sugerman K.C. (with him *Dignam*), for the applicant-defendant.

Kitto K.C. (with him *McKillop*), for the respondent-plaintiff.

May 11.

WILLIAMS J. delivered, so far as material, the following written judgment :—

The summons asks, as far as it has been pressed, that pars. 10, 11, 12, 13, 14, 15, 17, 18, 22, 25, 26, 27, 28, 29, 30 and 34 of the statement of claim may be struck out on the grounds that the allegations therein contained are unnecessary and tend to prejudice, embarrass or delay the fair trial of the action, or in the alternative that further and better particulars of certain matters stated in pars. 10, 12, 15, 19, 25, 26, 27, 28, 30, 31 and 34 may be given to the defendant.

The defendant committee is a body which is incorporated by reg. 10 of the *National Security* (*Vegetable Seeds*) *Regulations*. Regulation 4 provides that the objects of the Regulations are to ensure, for the purposes of the defence of the Commonwealth and the effectual prosecution of the war, that an adequate supply of vegetable seed is available in Australia, that those seeds are true to type and of a satisfactory standard of purity and germination and that those seeds are effectively distributed, and that the regulations shall be administered and construed accordingly. . . .

Regulations 14A, 17 and 18, so far as material, provide as follows :—

14A. (1) The Committee may, by order, control and regulate the processing, treatment, distribution and disposal of vegetable seeds. (2) An order under this regulation may—(*a*) be made to apply to any person specified in the order, to the person included in any class of persons or to persons generally ; (*b*) be made to apply either throughout Australia or to any part thereof ; (*c*) make different provisions with respect to different vegetable seeds.

17. (1) Upon application made by any person, the Committee may, in its absolute discretion, register that person as a vegetable seed merchant in respect of any vegetable seeds ; (3) The Committee may, at any time, for reasons which it thinks fit, cancel any such registration.

18. (1) A person shall not sell any vegetable seeds for valuable consideration unless he is a registered vegetable seed merchant in respect of those seeds ; (2) A registered vegetable seed merchant shall not sell any vegetable seeds for valuable consideration otherwise than in accordance with such directions, if any, as the Committee gives to him in writing.

Order XVII of the Rules of this Court, which relates to pleadings generally, provides, so far as material : (1) Every pleading shall contain a statement, as brief as the nature of the case allows, setting out the material facts on which the party pleading relies to support his claim or defence, as the case may be, but not the evidence by which they are to be proved. (5) If the party pleading relies on (*inter alia*) fraud and in all other cases in which particulars are necessary, particulars, with dates and items if necessary shall be stated in the pleading. (30) The Court or a Justice may order any pleading to be struck out on the ground that it discloses no reasonable cause of action. (31) The Court or a Justice may at any stage of the proceedings order to be struck out or amended any matter in any pleading which is unnecessary or which tends to prejudice, embarrass or delay the fair trial of the action.

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE. Williams J.

Order XVIII (1) of the same Rules provides that the Court or a Justice may in any case order either party to deliver to the other further and better particulars of any matter stated in any pleading.

Rules 30 and 31 of Order XVII are the same as Rule 4 of Order XXV and Rule 27 of Order XIX of the English Rules and under those rules it has been frequently stated that they should only be availed of in cases which are so plain and clear that they are worse than demurrable, or in other words are so beyond doubt that no legitimate amendment could save them from being demurrable (*Republic of Peru* v. *Peruvian Guano Co.* (1); *Mayor &c. of City of London* v. *Horner* (2); *Maas* v. *McIntosh* (3)). Matter should only be struck out as unnecessary where the statement of claim sets out immaterial matter in such a way that the defendant must plead to it and so raise irrelevant issues which may involve expense, trouble and delay and thereby prejudice the fair trial of the action.

The statement of claim in . . . the present action contains grave charges concerning the manner in which the defendant has exercised the extremely wide powers conferred upon it by the Regulations. It is the paragraphs containing these charges which the defendant is seeking to have struck out. . . .

The allegations . . . fall into two portions. Those in the first portion, which are contained in pars. 1 to 22, refer to four documents dated 17th March, 18th October, 4th November 1944 and 15th February 1945 whereby the defendant purported to place restrictions upon the sale of certain vegetable seeds by all registered vegetable seed merchants, the restrictions in the first three documents relating to seeds harvested between 1st July 1943 and 30th June 1944, and those in the fourth document relating to seeds harvested between 1st July 1944 and 30th June 1945.

The first declaration claims that these orders are beyond the powers conferred upon the defendant by the Regulations and are void, whilst the second declaration claims alternatively that they are void as being made in bad faith. Paragraphs 10, 11, 12, 13, 14, 15, 17, 18 and 22 contain the allegations upon which the charges of bad faith are based. The defendant by its statement of defence does not dispute the invalidity of the first two orders, so that it has become unnecessary for the plaintiff to prove that they were made in bad faith. It will be entitled to a declaration that they are void and to claim any consequential damages which it can establish.

The ground on which the defendant seeks to have the allegations of bad faith with respect to the third and fourth orders struck out is

(1) (1887) 36 Ch. Div. 489, at p. 496.
(2) (1914) 111 L.T. 512.
(3) (1928) 28 S.R. (N.S.W.) 441; 45 W.N. 107.

that they are of a legislative nature made under a power to legislate conferred upon the defendant by reg. 14A, and that the Court cannot inquire into the motives which actuate a legislative body, so that these allegations relate to a matter which is not justiciable.

It is clear, I think, that such motives are not the concern of the Court (*Co-operative Brick Co.* v. *Mayor &c. of City of Hawthorn* (1)). Two recent statements on this point are, one by the Supreme Court of the United States of America in *Bowles* v. *Willingham* (2) and the other by the Privy Council in *King-Emperor* v. *Benoari Lal Sarma* (3) (a case of delegated legislation).

Assuming, therefore, that the third and fourth orders are of a legislative character these allegations are irrelevant on the question of motive. It is, of course, open to the plaintiff to challenge the validity of these orders on the ground that reg. 14A is beyond the power conferred upon the Governor-General by the *National Security Act* and that the orders are beyond the powers conferred upon the defendant by reg. 14A ; and, since the Commonwealth Parliament cannot delegate wider powers than it possesses, that reg. 14A and the orders are beyond the ambit of the defence power. But in order to determine these grounds it would only be relevant for the Court to consider the language of the defence power and of the *National Security Act* and compare the provisions of reg. 14A and the orders.

The only facts that the Court could take into consideration would be any public general knowledge of which the Court would take judicial notice. Regulation 4 states what are the objects of the Regulations. This regulation is entitled to respect but is in no way conclusive in deciding whether legislation under reg. 14A is within power : See the cases cited in *Reid* v. *Sinderberry* (4). Its presence in the Regulations does not make evidence of motive admissible. The defence power is defined by the purpose for which it is granted (per *Dixon* J. in *Stenhouse* v. *Coleman* (5)) but it has never been the practice of this Court to take cognizance of any other facts. The legislation before the Privy Council in *Abitibi Power & Paper Co. Ltd.* v. *Montreal Trust Co.* (6) contained a recital of the objects for which it was passed. Lord *Atkin* delivering the judgment of the Privy Council, said : " This Board must have cogent grounds before it *arising from the nature of the impugned legislation* before it can impute to a provincial legislation some object other than what is to be seen on the face of the enactment itself " (7). (The italics are mine.)

(1) (1909) 9 C.L.R. 301, at p. 309.
(2) (1944) 321 U.S. 503, at p. 515.
(3) (1945) A.C. 14, at p. 28.
(4) (1944) 68 C.L.R. 504, at p. 523.
(5) (1944) 69 C.L.R. 457, at p. 471.
(6) (1943) A.C. 536.
(7) (1943) A.C., at p. 548.

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE. Williams J.

If the effect of the orders was not clear, evidence to show their operation might be admissible (*Attorney-General for Alberta* v. *Attorney-General for Canada* (1)), but that is a different question. Here the effect of the orders is quite clear.

The crucial question is, therefore, whether the orders are of a legislative nature. In order to determine this question the test laid down by the Supreme Court of the United States of America in *J. W. Hampton Jnr. & Co.* v. *United States* (2) has frequently been adopted :—" The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law."

Regulation 14A confers upon the defendant an absolute discretion to determine the extent to which and the manner in which the processing, treatment, distribution and disposal of vegetable seeds shall be controlled and regulated. Until an order is made no directions exist prescribing these matters or the persons to be affected. It is of the same nature as an order made under reg. 59 of the *National Security* (*General*) *Regulations*. Two of these orders came before this Court, the Bread Industry (N.S.W.) Order in *Stenhouse* v. *Coleman* (3) and the Fly and Insect Sprays Order in *Wertheim* v. *The Commonwealth* (4). In both these cases I considered that the orders were of a legislative nature and the other members of the Court presumably took the same view since in order to determine their validity they applied tests which were only relevant to legislation. The documents in question are, I think, clearly legislative, so that the paragraphs under discussion are unnecessary and should be struck out.

The summons also asks that pars. 25, 26, 27, 28, 29, 30 and 34 should be struck out. These paragraphs are contained in the second portion of the allegations in the statement of claim. They relate to the importation by the plaintiff into Australia of pea and carrot seeds from New Zealand between 1943 and January 1945. They allege that the defendant first gave permission to the plaintiff to import the pea seeds but subsequently withdrew its permission, and refused to give the plaintiff permission to import the carrot seeds.

When the plaintiff was re-registered as a vegetable seed merchant on 31st October 1944 the form contained directions that such a merchant should not sell or otherwise dispose of for valuable consideration any vegetable seed imported into Australia unless such seed had been imported with the consent of the defendant. The

(1) (1939) A.C. 117, at pp. 130, 131.
(2) (1928) 276 U.S. 394, at p. 407.
(3) (1944) 69 C.L.R. 457.
(4) (1945) 69 C.L.R. 601.

plaintiff claims that the defendant is not entitled to refuse permission to import seeds or to sell imported seeds, or alternatively that the refusal of permission was in bad faith.

The defendant seeks to have the paragraphs alleging bad faith struck out on the grounds that the plaintiff's proper and only remedy is a mandamus to compel the defendant to register the plaintiff without the restrictive conditions. But I cannot accept this contention. The plaintiff is entitled to sue for the declaration that the defendant is not entitled to refuse this permission or to impose this restrictive condition on the registration. If the defendant has this power under reg. 18 (2) but has exercised it mala fide it is an executive power so that the plaintiff is entitled to a declaration to this effect, and an injunction against the defendant enforcing such a condition, so that if the restriction is bad on either ground there is no binding restriction imposed within the reg. 18 (2). The application to strike out the paragraphs under discussion therefore fails.

There remains the question whether the defendant is entitled to further and better particulars of these paragraphs. They are not, in my opinion, as clear and precise as they should be and I think that it is difficult for the defendant to know the case which it has to meet when the action comes on for trial. I think that I should order the particulars asked for of pars. 25, 26, 27, 30, 31 and 32. I do not think it necessary to order further particulars of par. 28. During the hearing Mr. *Kitto* said that the determination referred to in par. 34 is the decision mentioned in par. 24 and Mr. *Sugerman* expressed himself as satisfied with this statement, so that I need not order further particulars of par. 34.

I give the plaintiff and defendant general leave to amend. I order the plaintiff to deliver the particulars to the defendant within 14 days and I give leave to the plaintiff to amend within 28 days. I also give leave to the defendant to amend within 14 days after the plaintiff's amendments have been delivered to it or if the plaintiff does not amend within 14 days after the plaintiff's solicitor has notified the defendant's solicitor to this effect or . . . after the delivery of the particulars, whichever is the later date. . . . The costs of the summons to be the defendant's costs in the action.

From that decision, so far as it related to the striking out of pars. 10 to 15 inclusive, 17, 18 and 22 of the statement of claim, the plaintiff appealed to the Full Court of the High Court.

During the argument the statement of claim was, by consent, amended by adding thereto as defendants the Commonwealth and the Attorney-General for the Commonwealth.

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

Barwick K.C. (with him *McKillop*), for the appellant. The orders now under consideration purporting to have been made under the *National Security* (*Vegetable Seeds*) *Regulations* are invalid. They are not legislative orders but are administrative orders and are not bona fide. The power under reg. 14A is clearly an executive power. The Regulations, particularly reg. 4, contain a sufficient indication of the policy or scheme which is to be broadly followed. Whether or not the power is legislative must depend upon the particular regulations or regulations viewed in substance. Regulation 14A must be fitted into the scheme. It is a scheme for stated purposes, to achieve stated objects, a scheme of registration and an administrative body to carry out what the legislature, or the executive in this case, has considered to be a policy sufficiently defined by the Regulations. The powers conferred by the Regulations must be exercised bona fide (*Municipal Council of Sydney* v. *Campbell* (1); *Sharp* v. *Wakefield* (2); *Stenhouse* v. *Coleman* (3)). The power is a power to regulate the method by which vegetable seeds are to be controlled. Executive and administrative powers as exercised and applied in the United States of America were considered in *J. W. Hampton Jnr. & Co.* v. *United States* (4); *Bowles* v. *Willingham* (5); *Yakus* v. *United States* (6) and *United States* v. *Rock Royal Co-operative Inc.* (7). In applying the American definition regard must be had to the way in which it is viewed in America, namely, that where the Act sufficiently indicates the policy and the limits within which the administrator is to prescribe the rules of conduct; although he prescribes them in a very real sense none the less what he does is executive. The Regulations define the purpose. All action in pursuance of the Regulations, including the making of orders under reg. 14A, must, in order to be valid, relate to that purpose. If action is related to some other purpose it is not authorized by the Regulations. Where there has been a sufficient indication of policy by the legislature, the acts are executive acts and they are controllable for, amongst other grounds, want of bona fides (*Victorian Chamber of Manufactures* v. *The Commonwealth* (*Women's Employment Regulations*) (8); *The Commonwealth* v. *Grunseit* (9); *Reid* v. *Sinderberry* (10); *Adelaide Company of Jehovah's Witnesses Inc.* v.

(1) (1925) A.C. 338.
(2) (1891) A.C. 173, at p. 179.
(3) (1944) 69 C.L.R., at p. 467.
(4) (1928) 276 U.S., at pp. 406, 407 [72 Law. Ed. 624, at p. 629].
(5) (1944) 321 U.S., at p. 515 [88 Law. Ed. 892, at p. 902].
(6) (1944) 321 U.S. 414, at pp. 425, 426 [88 Law. Ed. 834, at p. 849].
(7) (1939) 307 U.S. 533, at pp. 574-576 [83 Law. Ed. 1470].
(8) (1943) 67 C.L.R. 347, at pp. 377, 378, 398.
(9) (1943) 67 C.L.R. 58, at pp. 66, 67, 83, 93.
(10) (1944) 68 C.L.R., at pp. 514, 515.

The Commonwealth (1); *Stenhouse* v. *Coleman* (2); *Crowe* v. *The Commonwealth* (3)). Those cases show that the Court has always regarded orders made under the regulations as being rather of an executive than a legislative character. When considering whether the act of a subordinate rule maker, to whom a power has been given for a purpose, is valid, it is irrelevant to consider whether the act is in its nature legislative or executive. In the case of subordinate legislation, that is, orders made by such delegates as the vegetable seeds committee, the distinction between the legislative and the executive character of their function, where their power is conditioned by a purpose, is unimportant on the question of whether or not the validity of their orders can be attacked on the ground of want of bona fides. The principle in *Salomon* v. *Salomon* (4) that the intention of the legislature can only be legitimately ascertained from that which it has chosen to enact is not involved here. Nor has the principle in *Co-operative Brick Co. Pty. Ltd.* v. *Mayor &c. of the City of Hawthorn* (5) any bearing on the principle now being debated because it presupposes the very inquiry now raised as having been answered favourably to the legislation. The question of whether or not inquiry may be made into a piece of legislation, where the power to enact is conditioned by a purpose, is closely related to the question of whether evidence is admissible in order to establish what the real purpose was. It has never yet been held that where a power is conditioned by a purpose evidence cannot be received to determine what was the actual purpose of the legislation (*Stenhouse* v. *Coleman* (6); *W. R. Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation* (*N.S.W.*) (7); *Attorney-General for Alberta* v. *Attorney-General for Canada* (8)). The reference in *Abitibi Power & Paper Co. Ltd.* v. *Montreal Trust Co.* (9) to the real substance of the legislation is to the possibility of there being before the Privy Council other than what appeared on the face of the legislation. The possibility of the admissibility of evidence on the question of want of bona fides on the part of the legislature was referred to in *South Australia* v. *The Commonwealth* (10) and *Joseph* v. *Colonial Treasurer* (*N.S.W.*) (11). The English doctrine on this point, which differs somewhat from the doctrine which prevails in the United States of America, is shown in *South Australia* v. *The Commonwealth* (12) and the cases there

(1) (1943) 67 C.L.R. 116, at pp. 151, 152.
(2) (1944) 69 C.L.R., at pp. 467, 472.
(3) (1935) 54 C.L.R. 69, at pp. 84, 86, 89, 94.
(4) (1897) A.C. 22, at p. 38.
(5) (1909) 9 C.L.R., at p. 309.
(6) (1944) 69 C.L.R., at p. 469.
(7) (1940) A.C. 838, at p. 849; 63 C.L.R. 338, at p. 341; (1939) 61 C.L.R. 735, at pp. 793 et seq.
(8) (1939) A.C., at pp. 130, 131.
(9) (1943) A.C., at p. 548.
(10) (1942) 65 C.L.R. 373, at p. 410.
(11) (1918) 25 C.L.R. 32, at p. 43.
(12) (1942) 65 C.L.R., at p. 439.

H. C. OF A. 1945.

ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

cited. This is not a matter involving public policy as in *King-Emperor* v. *Benoari Lal Sarma* (1), therefore that decision is not applicable to the principle that where a power is limited to a purpose regard may be had to whether the purpose has been followed. The subject orders are administrative and should be declared invalid. They are only a colourable exercise of the power. The object of those orders was to save the respondent committee from financial loss.

Sugerman K.C. (with him *Dignam*), for the respondents. The real distinction which is relevant in relation to the problem before the Court is not, perhaps, a distinction between that which is legislative and that which is executive, as much as a distinction between the general rule of law enforceable by penal sanctions and some act of a government instrumentality which affects only an individual and is self-executive and operative directly against a person or his property. The respondents are not concerned with the prohibition against the importing and selling referred to in the second part of the statement of claim, but they are concerned with the orders set forth in pars. 5 to 8 inclusive of the statement of claim, and, in particular, with those set forth in pars. 7 and 8, because no serious dispute arises concerning the orders set forth in pars. 5 and 6. A power may be exercised even with intention of injuring another person. In law the intent is irrelevant. Everything which has been done by the respondent committee is within one or other of the very wide powers conferred upon it by reg. 23 of the *National Security* (*Vegetable Seeds*) *Regulations*. The policy of the committee was that of endeavouring to prevent loss to itself and loss to the Commonwealth in dealing with seeds. The question of whether the order or orders was or were arrived at mala fide is one of fact upon which different tribunals might come to different conclusions. Considerable confusion is caused by the use of terms " legislative " and " executive," but, where an order operates generally and is only operative by proceedings in the Court, the Court, in determining the validity of the order, must restrict itself to matters appearing on the face of the instrument itself and to matters of which the Court may take judicial notice. It has been said it is a question of fact whether the lawful purpose was being pursued, but the cases where the principle has been actually applied, where there has been more than a general reference to it, are all cases of resumption or acquisition of land and are all cases where the matter has been capable of determination by objective standards. Also, they are all cases

(1) (1945) A.C., at pp. 22, 23.

where the important matter was something quite objective, that is, the use to which the resuming authority was going to put the land. The more important cases of this type are *Galloway* v. *Mayor and Commonalty of London* (1), *Stockton and Darlington Railway Co.* v. *Brown* (2), *Marquess of Clanricarde* v. *Congested Districts Board for Ireland* (3), *Vatcher* v. *Paull* (4), *Narma* v. *Bombay Municipal Commissioner* (5), *Municipal Council of Sydney* v. *Campbell* (6), *Criterion Theatres Ltd* v. *Sydney Municipal Council* (7) and *Werribee Council* v. *Kerr* (8). All those cases are cases of a power given for a particular purpose, namely, the power to resume land. Another case of that type is *James* v. *Cowan* (9). There is a very important distinction in principle between that type of case and the case now before this Court, because in that type of case there merely arises an issue between two individuals which the court can determine as it would determine any other issue between two individuals, while in the type of case now before the Court in the absence of ordinary objective standards different results might be arrived at by different tribunals (*Kruse* v. *Johnson* (10)). The orders now under consideration are general rules of law laying down rules of conduct in a general sense and enforceable by penal sanctions which depend upon s. 10 of the *National Security Act*. On their face they are directed to a limited class of persons, that is, persons registered under the Regulations as vegetable seed merchants. The prohibitions contained in the orders are laid upon that class of persons, but the prohibitions and orders are capable of affecting anyone in the community. Under s. 5 of the Commonwealth *Crimes Act* 1914 any person who aids or abets is directly or indirectly concerned in the commission of an offence against the orders and is himself guilty of the like offence. If there are trading interests and orders are made for some ulterior purpose beyond the Regulations, they are bad but the question is : How far can a court of law inquire into that matter ? In testing par. 15 of the statement of claim, the assumption has to be made that on its face the order was perfectly good and directed to a purpose allowed by the Regulations. No court has ever upset a piece of delegated legislation on the ground of ulterior purpose or mala fides : See *Co-operative Brick Co. Pty. Ltd.* v. *Mayor &c. of the City of Hawthorn* (11). The subject orders are legislative acts. The orders themselves for the first time lay down the rule of conduct.

(1) (1866) L.R. 1 H.L. 34.
(2) (1860) 9 H.L.C. 246 [11 E.R. 724].
(3) (1914) 31 T.L.R. 120.
(4) (1915) A.C. 372.
(5) (1918) L.R. 45 Ind. App. 125.
(6) (1925) A.C. 338.
(7) (1925) 35 C.L.R. 555.
(8) (1928) 42 C.L.R. 1.
(9) (1932) A.C. 542 ; 47 C.L.R. 386 ; (1930) 43 C.L.R. 386.
(10) (1898) 2 Q.B. 91, at pp. 99, 100.
(11) (1909) 9 C.L.R. 301 ; (1909) V.L.R. 27, at p. 51.

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

There was not any relevant rule of conduct laid down in the Regulations which merely, for the present purpose, by reg. 14A, empower the committee to make orders, and the orders lay down a rule of conduct. The Vegetable Seeds Committee is a body of a mixed nature; it has both administrative and legislative functions. The principle of non-investigation of motives is not confined to Parliament but extends to all legislative bodies (*Co-operative Brick Co. Pty. Ltd.* v. *Mayor &c. of the City of Hawthorn* (1); *Shrimpton* v. *The Commonwealth* (2)). The general question of the admissibility of evidence in relation to purpose in the case of a legislative body was dealt with in *Stenhouse* v. *Coleman* (3), and a somewhat analogous question was dealt with in *Bendixen* v. *Coleman* (4). There is a want of particularity in the allegations made in the statement of claim. The pleader has not directed his attention to public general knowledge but to inferences which he suggested should be drawn from particular facts.

[DIXON J. referred to *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (5).]

The principle which is applicable in this case is shown in *South Australia* v. *The Commonwealth* (6).

Barwick K.C., in reply. The correct principle is that where a power is given to a public authority to be exercised for a purpose any purported exercise of the power is examinable to ascertain whether the power is being exercised for that purpose. The resumption cases are but an illustration of an application of that general principle and that there is not any warrant by authority nor any reason for any distinction between purported exercises of such power which are self-operating and acts under a power which are only enforceable by penalty. This case illustrates the absurdity of drawing such a distinction. There is no logical ground for this distinction because, as in this case, if there is disobedience to the order under the *National Security Act*, on indictment the appellant is liable to an unlimited term of imprisonment. A power given to a public body must be exercised bona fide (*Ferrando* v. *Pearce* (7)). Where the power is not conditioned by a purpose, one has to find dishonesty or collateral purposes which are dishonest, but where, as in this case, the power is conditioned by reference to a purpose one

(1) (1909) 9 C.L.R., at pp. 309, 314.
(2) (1945) 69 C.L.R. 613.
(3) (1944) 69 C.L.R., at pp. 469 et seq.
(4) (1943) 68 C.L.R. 401, at pp. 414, 415.
(5) (1939) 61 C.L.R., at pp. 795 et seq.
(6) (1942) 65 C.L.R., at p. 439; see also pp. 409, 410, 460.
(7) (1918) 25 C.L.R. 241, at pp. 258, 261, 262.

need merely find the collateral purpose. Regulation 4 has the effect of requiring that each and every act done in pursuance of the Regulations be done for the purpose of achieving the objectives. The statement of the principle in the resumption cases has always been a general statement (*Local Board of Health of Perth* v. *Maley* (1)). There is not any statement in *Co-operative Brick Co. Pty. Ltd.* v. *Mayor &c. of the City of Hawthorn* (2) of the exact extent to which the court may go, but, also, there is not any statement that a court may never inquire into the purpose.

Cur. adv. vult.

Nov. 21.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of *Williams* J. striking out certain paragraphs in a statement of claim in an action originally brought by Arthur Yates & Co. Pty. Ltd. against the Vegetable Seeds Committee as defendant. By amendment the Commonwealth of Australia and the Attorney-General for the Commonwealth have been added as defendants. The paragraphs of the statement of claim which have been struck out contain allegations that the defendant committee has exercised its powers solely in order to promote a business carried on by the committee in competition with the plaintiff, who is a vegetable seed merchant.

The plaintiff claims declarations that certain orders made by the committee prohibiting the plaintiff from selling seeds of specified descriptions are void as beyond the powers conferred upon the committee by the *National Security* (*Vegetable Seeds*) *Regulations* and as being made " mala fide and capriciously in relation to any relevant power given to the committee by and under the regulations." The plaintiff also claims damages.

The *National Security* (*Vegetable Seeds*) *Regulations*, Statutory Rules 1943 No. 109, as amended, provide in reg. 4 as follows :— " The objects of these Regulations are to ensure, for the purposes of the defence of the Commonwealth and the effectual prosecution of the war, that an adequate supply of vegetable seeds is available in Australia, that those seeds are true to type and of a satisfactory standard of purity and germination and that those seeds are effectively distributed, and these Regulations shall be administered and construed accordingly."

Other regulations provide for the establishment of a Vegetable Seeds Committee consisting of the Director-General of Agriculture and three members appointed by the Minister, and reg. 10 provides that the Committee shall be a body corporate.

(1) (1904) 1 C.L.R. 702, at p. 712. (2) (1909) 9 C.L.R. 301.

H. C. OF A. 1945.

ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

Latham C.J.

Regulation 14A, introduced by Statutory Rules 1944 No. 129, provides as follows :—" (1) The Committee may, by order, control and regulate the processing, treatment, distribution and disposal of vegetable seeds. (2) An order under this regulation may—(*a*) be made to apply to any person or persons specified in the order, to the person included in any class of persons, or to persons generally; . . . (*c*) make different provisions with respect to different vegetable seeds." The validity of the orders of which the plaintiff complains depends upon this regulation.

Regulation 17 provides for the registration of persons as vegetable seed merchants. It is alleged that the plaintiff is registered under this provision. Regulation 23 provides, *inter alia* :—" On behalf of the Commonwealth and subject to any direction of the Minister, the Committee may—(*a*) purchase, sell, exchange, dispose of or otherwise deal in vegetable seeds ; (*b*) process, treat, clean and grade, or arrange for the processing, treatment, cleaning or grading of, any vegetable seeds ; (*c*) store, or arrange for the storage of, any vegetable seeds; (*d*) enter into agreements with any person on any matter relating to the production, acquisition, treatment, storage or disposal of vegetable seeds ; . . ."

The statement of claim sets forth in pars. 7 and 8 two orders made by the defendant committee which (it is pleaded) were served upon all registered vegetable seed merchants, including the plaintiff. The orders contained a direction that, except with the approval of the Committee, a registered vegetable seed merchant " shall not sell by retail or otherwise, or pack for retail sale by himself or any other person, any vegetable seeds of the kinds specified in the schedule to this order." The schedules specified red beet, parsnip and turnip seeds.

In par. 10 it is alleged that the defendant committee had set up and established itself in the business of vegetable seed merchants and growers for profit to itself in competition with other seed merchants and growers, including the plaintiff, and that it was growing or causing to be grown on its own behalf and for profit to itself large quantities of seed of many kinds and varieties identical with or capable of being used in substitution for seed held in stock by vegetable seed merchants (other than the defendant committee), including the plaintiff, or being produced by or for such other merchants, including the plaintiff.

Paragraph 11 states that the Committee has on hand large quantities of vegetable seed imported by itself. Paragraph 12 alleges that the Committee has imported and is importing large quantities of vegetable seeds in excess of any reasonable requirements of the

Australian market. Paragraph 13 alleges that a large portion of the seed held by the Committee has deteriorated. Paragraph 14 alleges that the defendant committee, in order to prevent financial loss to itself, has desired to compel vegetable seed merchants to dispose of large stocks of seed held by the Committee.

Paragraph 15 alleges that the orders already mentioned were made solely to protect and further the trading and financial interests of the Committee and to relieve it of competition from other seed merchants. I read this paragraph as making an allegation, not of bad faith, but of unauthorized, and in that sense illegitimate, purpose on the part of the Committee: Cf. *Jones* v. *Metropolitan Meat Industry Board* (1). The prosecution of the purpose alleged, namely the protection and furtherance of the trading and financial interests of the Committee, acting on behalf of the Commonwealth (see reg. 23), is not inconsistent with the personal honesty of the members of the Committee. An allegation of fraud is quite different from an allegation of a mistaken conception of right or duty or power. Allegations of fraud must be made clearly and without ambiguity. It is true that the plaintiff claims a declaration that the orders were made "mala fide and capriciously in relation to any relevant power given to the Committee by and under the said regulations." But there is nowhere in the statement of claim any allegation of dishonesty on the part of the committee.

Paragraph 17 refers to an order alleged by the plaintiff (and admitted in the defence) to have been made by an officer without the authority of the Committee. No cause of action against the Committee or any other defendant can be founded upon the allegation contained in the paragraph, and it was rightly struck out.

Paragraph 18 alleges that the plaintiff's seed is seed of very high quality, and that accordingly the plaintiff has a valuable good-will. Paragraph 22 states that the Committee has offered to release the plaintiff from the operation of the orders restricting the sale of seeds if the plaintiff would purchase from the defendant at high prices seed alleged to be in fact deteriorated.

Upon an application made under Order XVII Rules 30 and 31 of the Rules of the High Court (which are substantially identical with Rule 4 of Order XXV and Rule 27 of Order XIX of the English Rules of the Supreme Court) the learned judge struck out pars. 10 to 15, 17, 18 and 22 upon the ground that the orders made by the Committee were of a legislative nature made under a power to legislate conferred upon the defendant committee by reg. 14A and that the Court cannot inquire into the motives actuating a legislative body,

(1) (1925) 37 C.L.R. 252, at p. 262.

H. C. OF A. 1945.

ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

Latham C.J.

with the result that all the allegations mentioned related to a matter which was not justiciable.

The paragraphs which have been struck out of the plaintiff's statement of claim do not allege any actual or threatened wrong to the plaintiff by tort or breach of contract. Business competition does not need to be affirmatively authorized by some positive law in order to be lawful. Such competition is not a wrong which gives a rival trader a cause of action.

The enactment of a law cannot in itself give any cause of action to a person who is injured by the operation of the law. All members of the community are subject to the risk of a law being made, altered, or repealed to their detriment, and they have no remedy for any injury consequentially suffered unless the law provides for some form of compensation. This is obviously the case when a law is valid. If a pretended law is invalid, it is still the case that there is no remedy in respect of the mere making of the supposed law (*James* v. *The Commonwealth* (1)). If, however, acts are done under the supposed authority of an invalid law and those acts constitute a wrong or a breach of contract, then the invalid law does not provide any defence to the person acting in pursuance of it, and the ordinary rules of law with respect to tort or breach of contract are applicable (*James* v. *Cowan* (2) ; *Riverina Transport Pty. Ltd.* v. *Victoria* (3)).

The motives of a legislative body when it acts within its powers do not affect the validity of legislation (*Radio Corporation Pty. Ltd.* v. *The Commonwealth* (4) and cases there cited). An extreme instance of the application of this rule is to be found in *Fletcher* v. *Peck* (5), where it was alleged that legislation had been procured by bribing the members of the legislature. See also *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (6)—" The bona fides of the exercise of legislative power cannot be impugned in the Dominion's own Courts " ; *Stenhouse* v. *Coleman* (7), where *Dixon* J. refers to the practice of excluding from investigation (upon questions of the validity of legislation) " the actual extrinsic motives and intentions of legislative authorities." The Supreme Court of the United States of America takes the same view: See cases cited in *Hamilton* v. *Kentucky Distilleries Co.* (8).

There is authority that the bona fides of the Crown and of the Ministers of the Crown cannot be impugned in the courts—see per

(1) (1939) 62 C.L.R. 339.
(2) (1932) A.C. 542 ; 47 C.L.R. 386.
(3) (1937) 57 C.L.R. 327, at pp. 341, 342.
(4) (1938) 59 C.L.R. 170, at p. 185.
(5) (1810) 6 Cranch 87.
(6) (1933) 49 C.L.R. 220, at p. 240, per *Evatt* J.
(7) (1944) 69 C.L.R., at p. 471.
(8) (1919) 251 U.S. 146, at p. 161.

Isaacs, *Powers* and *Rich* JJ. in *Joseph* v. *Colonial Treasurer* (*N.S.W.*) (1) and per *Isaacs* J. in *James* v. *Cowan* (2) : " You cannot challenge the Minister's bona fides on the ground of dishonesty at all—that, in my opinion, can never be imputed to the King's Executive." But it may be noted that the Privy Council in *James* v. *Cowan* (3) said that, in view of the finding of the trial judge, " their Lordships do not think it would be right to adopt any view of the facts which would appear to suggest bad faith on the part of the Minister or his advisers." Apparently their Lordships did not regard the existence of bad faith on the part of Ministers as a fact which could not be proved or which would be irrelevant if it were proved. So also in *Theodore* v. *Duncan* (4), their Lordships of the Privy Council said, while referring to the fact that Ministers are responsible for the exercise of their functions to the Crown and to Parliament only, that " it cannot be assumed that the Queensland Ministry would have acted in any fashion inconsistent with such duty as they had been entrusted with by the representative of the Sovereign." This statement does not go so far as to say that it could not have been *proved* that Ministers have acted otherwise than in good faith. See also *The Crown* v. *McNeil* (5), where a case depending upon allegations of fraud against the Crown was dealt with without any suggestion that the Crown was incapable of fraud. It may, therefore, be that evidence of dishonesty in the case of an individual Minister may be admissible for the purpose even of invalidating a legislative act which he is authorized to perform ; but it is not necessary to decide this question in the present case.

The rule against inquiries into motives was applied to regulations made by the Governor-General (on the advice of a Minister) in *Victorian Stevedoring and General Contracting Co. Pty. Ltd.* v. *Dignan* (6). The same rule has been applied to by-laws (which are " laws " —see cases cited in *Henwood* v. *Municipal Tramways Trust* (*S.A.*) (7), and in *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 468) made by municipal councils (*Co-operative Brick Co. Pty. Ltd.* v. *Hawthorn Corporation* (8)).

But this rule applies only to laws. It applies to statutes, to some regulations and to some by-laws. But does it apply to all orders and directions given under powers conferred by statutes or regulations ?

(1) (1918) 25 C.L.R. 32, at p. 43.
(2) (1930) 43 C.L.R., at p. 411.
(3) (1932) 47 C.L.R., at p. 395 ; (1932) A.C., at p. 536.
(4) (1919) 26 C.L.R. 276, at p. 282 ; (1919) A.C. 696, at p. 706.
(5) (1922) 31 C.L.R. 76.
(6) (1931) 46 C.L.R. 73 ; see pp. 84, 85, 86, 87, 100, 103, 104, 129.
(7) (1938) 60 C.L.R. 438, at p. 445.
(8) (1909) 9 C.L.R. 301.

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE. Latham C.J.

The laws to which the rule stated has been applied are enacted laws in the ordinary sense of that term, that is, enforceable rules of conduct prescribed by a law-making authority such as Parliament, or by the Governor-General advised by Ministers responsible to Parliament, or by such representative bodies as municipal councils.

There are many kinds of orders and directions which are made in the course of the exercise of a power created by law or in the performance of a duty imposed by law. These may belong to the domain of administration and not to that of legislation. It is not the English view of law that whatever is officially done is law—a view adopted by some jurists on the continent of Europe—but, on the contrary, the principle of English law is that what is done officially must be done in accordance with law. I refer to an article (which my brother *Dixon* has shown to me) by Professor *Roscoe Pound* in the *American Bar Association Journal* 1944, p. 497, for valuable comment upon the idea of substituting for law the administrative absolutism of officials.

The distinction between legislative and administrative acts is one which it is easy to state in general terms, but which it is sometimes difficult to apply. The distinction between making a law and administering a law made by some other authority is quite clear in many cases. A Parliament passes a Lands Act, and a Lands Department administers the Act by putting it into operation. But where a law gives power to some person or body to give directions in order to put the law into operation, it is not always a simple matter to apply the distinction.

Persons using the highways must obey the directions of traffic constables, and they may be punished for failing to do so. But no one could say that the constable makes a law when he stops traffic or orders it forward. A military officer may give orders to soldiers under his command, an employer may give " lawful orders " to his employee, a court may give directions to parties in relation to proceedings before it. None of these orders or directions are laws, though disobedience to any of them produces legal consequences.

In *Crowe* v. *The Commonwealth* (1), this Court considered certain conditions attached to licences to export dried fruits which required licensees to act in accordance with the directions of a board (see report (2)) which were given from time to time. It was said by *Evatt* and *McTiernan* JJ. (3) that the purpose of the Act and regulations (which were held to be valid) was to give the board " full and complete executive control in a business sense over every detail of

(1) (1935) 54 C.L.R. 69.
(2) (1935) 54 C.L.R., at pp. 88, 89.
(3) (1935) 54 C.L.R., at p. 94.

the export trade in one particular commodity produced in Australia for export." The powers of the Vegetable Seeds Committee under the Regulations are not dissimilar in substance. They put the Board in " complete executive control " of the business of growing and selling vegetable seeds, and that control is exercised by means of directions given by the Committee. So also in *The Commonwealth* v. *Grunseit* (1), an order applying to refugee aliens of a particular description made by a Minister under National Security Regulations was held to be of an executive character—see the report (2).

In the present case, the orders of the Vegetable Seeds Committee are, in my opinion, administrative directions given in the exercise of a power claimed to be conferred or created by law. It has not hitherto been held that the rule excluding inquiry into the bona fides and motives of legislatures which applies to legislative acts is applicable to such orders. It may be that some such orders are of " a legislative character " within the meaning of s. 5 (4) of the *National Security Act*. But even if this should be the case, it does not necessarily follow that the orders themselves are actual laws to which the rule mentioned should be applied. There is, in my opinion, no authority which entitles the Court to adopt such a proposition, which would have far-reaching consequences in protecting against challenge the abuse of power by administrative bodies and officials who are not subject to those political sanctions which are relied upon to safeguard the citizen against abuse of power by Parliament, Ministers, or municipal councils.

The learned judge read the relevant paragraphs of the statement as containing " grave charges " against the committee—" charges of bad faith." Regarding the orders as legislation, he struck out these paragraphs on the ground that bad faith could not be attributed to a legislative body. But if the orders of the committee were acts of administration that proposition is irrelevant. I am therefore of opinion that the paragraphs of the statement of claim which are in question should not have been struck out for the reason stated by the learned judge.

But this conclusion does not determine the matter before the Court. It is still necessary to answer the question whether, if the orders are regarded as administrative acts (and as not alleged to be dishonest) there can be a cause of action based upon proof that the orders were made solely for the purpose alleged—viz. that of promoting the trading and financial interests of the committee.

If a power is conferred in terms which require it to be used only for a particular purpose, then the use of that power for any other

(1) (1943) 67 C.L.R. 58.

(2) (1943) 67 C.L.R., at pp. 66, 83, 93.

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE. Latham C.J.

purpose cannot be justified. When a legislative power is defined by reference to purpose, legislation not directed to that purpose will be invalid (*Attorney-General for Alberta* v. *Attorney-General for Canada* (1), and see *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (2)). But the purpose of *legislation* is to be ascertained by considering the true nature and operation of the law and the facts with which it deals, and (as already stated) not by examining the motives of the legislative authority—*Stenhouse* v. *Coleman* (3) : Cf. per *Isaacs* J. in *James* v. *Cowan* (4). No such limitation applies in the case of administrative acts. It is true that if a power to perform an administrative act is conferred with no reference to purpose, no inquiry into purpose (in the sense of result or consequence desired and intended to be achieved) is relevant. But if such a power is given only for a particular purpose, the power can be validly exercised only for that purpose. The general principle is stated by Lord *Lindley* in *General Assembly of Free Church of Scotland* v. *Overtoun* (5)—" I take it to be clear that there is a condition implied in this as well as in other instruments which create powers, namely, that the powers shall be used bona fide for the purposes for which they are conferred." In *Reid* v. *Sinderberry* (6), *Rich* J., referring to powers to give directions vested in a person by National Security Regulations, the exercise of which powers by the Commonwealth was justifiable only if they were used for defence purposes, said :—". . . the powers conferred by the regulation are capable of being used for necessary purposes incidental to the defence of the Commonwealth. If at any time an attempt should be made to use them for what may be suggested to be some other and unjustifiable purpose the validity of the suggestion can be determined in proceedings to frustrate the attempt. In other words, the power may be ' exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power' (*Vatcher* v. *Paull* (7)). It is a question of fact whether the donee of the power, though professing to exercise his powers for the statutory purpose, is not in fact employing them in furtherance of such purpose but for some ulterior object (*Sydney Municipal Council* v. *Campbell* (8)) " (9).

So also, in the same case, *Starke* J. said : " If the power be abused and not used in good faith for the defence of Australia, for instance, if a person were directed to work or serve in some manner without

(1) (1939) A.C. 117.
(2) (1939) 61 C.L.R., at pp. 759, 760.
(3) (1944) 69 C.L.R., at p. 471.
(4) (1930) 43 C.L.R., at pp. 410-412, 421.
(5) (1904) A.C. 515, at p. 695.
(6) (1944) 68 C.L.R. 504.
(7) (1915) A.C., at p. 378.
(8) (1925) A.C., at p. 343.
(9) (1944) 68 C.L.R., at p. 514.

any relation whatever to the defence of Australia or the efficient prosecution of the war, it may well be that the direction would be bad and not binding upon the person so directed" (1), though (as the learned judge added) it was unnecessary in his opinion to decide this question in the case then under consideration. See, further, *Marquess of Clanricarde* v. *Congested Districts Board of Ireland* (2), and *Municipal Council of Sydney* v. *Campbell* (3), where the Privy Council considered all the circumstances associated with a decision of the council to resume land, including the discussions in the council, for the purpose of determining whether the power conferred had been exercised for the purpose for which it had been conferred. There are obvious difficulties in determining the purpose of a body consisting of several persons. These difficulties are stated by *Cussen* J. in *In re Mayor &c. of the City of Hawthorn*; *Ex parte Co-operative Brick Co. Pty. Ltd.* (4). But in the *Sydney Municipal Council Case* (5) the Privy Council did in fact base its judgment not upon the "purpose" disclosed by the actual administrative act of the council considered in relation to the facts in respect of which it operated, but upon the purpose which the evidence disclosed to be in the minds of the councillors who acted. This case was applied in this Court to an administrative act of a municipal council in *Werribee Council* v. *Kerr* (6).

Thus, in my opinion, it is open to a court to consider whether the orders made under the Regulations by the Vegetable Seeds Committee were made for the purposes of the Regulations as defined in reg. 4. It may be noted that this regulation, after stating those purposes, requires that the Regulations "shall be *administered* accordingly." The Regulations regard the committee as engaged in administration.

But though the mere giving of an invalid direction or the making of an invalid order is, in accordance with principles already stated, *brutum fulmen*, and does not in itself give rise to a cause of action unless something wrongful is done in pursuance of the direction or order, an action may be brought for a declaration of right under the principle established in *Dyson* v. *Attorney-General* (7).

Regulation 4, which has already been quoted, provided that the Regulations shall be administered for the purpose of securing an adequate supply of vegetable seeds in Australia which are true to type and of a satisfactory standard of purity and germination, and that those seeds are effectively distributed. Such a statement of the objects of legislation, whether by statute or by regulation,

(1) (1944) 68 C.L.R., at p. 516.
(2) (1914) 31 T.L.R. 120.
(3) (1925) A.C. 338.
(4) (1909) V.L.R., at p. 51.
(5) (1925) A.C. 338.
(6) (1928) 42 C.L.R. 1.
(7) (1911) 1 K.B. 410.

H. C. OF A. 1945.

ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

Latham C.J.

does not require, or in itself entitle, a court to uphold the validity of any provision: *South Australia* v. *The Commonwealth* (1). But such a provision is effective to limit the powers of the body which is charged with the responsibility of administering any regulations in which it appears. Thus it is the duty of the Vegetable Seeds Committee to administer the Regulations for the purposes stated and not in disregard of those purposes. If it is shown that the Committee is not so administering the Regulations, then it is open to a person whose interests are affected to claim a declaration that the action taken by the authority is unauthorized, even though there may be no case in tort or for breach of contract.

The orders of the Committee were made under reg. 14A. In my opinion the powers conferred upon the Committee by this regulation can be exercised only if the Committee exercises them for the purposes set forth in reg. 4. If the Committee has exercised them, as alleged in the statement of claim, " solely " for another purpose, the orders cannot, in my opinion, be supported under the Regulations. Upon this view the allegation that the powers were so exercised is relevant to a claim by the plaintiff that the orders are void.

Thus, although I agree with my brother *Williams* that no action can be based upon the ascription to a legislative body of improper motives, I am of opinion that the Vegetable Seeds Committee should be held to be an administrative and not a legislative body, and that the rule stated is therefore not applicable to orders made by the Committee. Upon this view the allegations made in the challenged paragraphs (with some exceptions) are relevant to a justiciable claim by the plaintiff for a declaration that the orders are void. The exceptions are par. 17 (to which I have already referred) and par. 18, alleging that the plaintiff's seeds are of high quality. It may be that evidence as to this fact, with proof of knowledge of the fact by the Committee, may be relevant to the ascertainment of the true purpose of the Committee in making the orders, but it is not the function of a pleading to set out evidence. Paragraphs 17 and 18 were, in my opinion, rightly struck out. I would therefore allow the appeal, except as to the paragraphs last-mentioned, leaving it to the defendants to apply for particulars, if desired, under the other paragraphs, which should be reinstated in the statement of claim.

A question was raised in argument as to the jurisdiction of the High Court to entertain the action as originally constituted against the Vegetable Seeds Committee as sole defendant. The Commonwealth and the Attorney-General of the Commonwealth have now been added as defendants, and the proceeding is therefore one in

(1) (1942) 65 C.L.R., at p. 432.

which the Commonwealth is a party, so that it comes within the jurisdiction of the High Court under the Constitution, s. 75 (iii). It is not necessary at this stage of the action to consider what the position in relation to jurisdiction would be if the claim, as against the Commonwealth, failed.

RICH J. We are here concerned with an appeal against an interlocutory order directing the striking out of some paragraphs in a statement of claim which asks for relief in respect of certain orders purported to have been made by the defendant committee by virtue of the *National Security* (*Vegetable Seeds*) *Regulations*. The material portions of the statement of claim and the relevant regulations have been set out in the reasons of the Chief Justice, and I do not, therefore, repeat them here.

The plaintiff company is a registered vegetable seed merchant, and the orders, the validity of which it seeks to challenge, were served upon it in common with all other such merchants and prohibited it, except with the approval of the Committee, from selling certain specified kinds of vegetable seeds.

The paragraphs ordered to be struck out are numbers 10 to 15 inclusive, 17, 18 and 22. Those numbered 10 to 15 allege that the defendant committee had imported vegetable seed which had gone bad, and had made the orders now objected to with a view to foisting the bad seed upon seed merchants in order to avoid loss to itself. Paragraph 17 consists of an allegation which seems to have little if any relevance to the matters in respect of which relief is sought. Paragraph 18 alleges that the plaintiff company's seed is of high quality, and that it has a valuable goodwill. Paragraph 22 alleges that the defendant committee has offered to lift the prohibition if the plaintiff company will buy its bad seed at a high price.

The material allegations of the statement of claim are not restricted to these paragraphs, relief being also claimed upon alternative bases.

His Honour did not order the striking out of the whole statement of claim under Order XVII, rule 30, but acted under rule 31 which authorizes orders for the striking out of matter which is unnecessary or scandalous or tends to embarrass or delay the fair trial of an action. He directed the striking out of the paragraphs in question because he regarded the orders attacked therein as being legislative in their nature, taking the view that if a body is authorized to make an order having a legislative operation its motives for making such an order cannot be examined by a court if the validity of the order is attacked.

The powers conferred upon a legislature which is not fully sovereign may be expressed to be limited by the subjects with respect to which,

H. C. OF A. 1945.

ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

Rich J.

or by the purposes for which, laws may be made by it (*Stenhouse* v. *Coleman* (1)).

When it is upon a particular subject that legislation by a parliament is authorized, the question whether a particular piece of legislation can be supported as made upon that subject depends upon its true nature and character (*Lethbridge Northern Irrigation District Trustees* v. *Independent Order of Foresters* (2)). If in pith and substance it is upon the subject it is valid ; if its ostensible connection with the subject is a pretence or pretext it cannot be supported as legislation on that subject (*Attorney-General for British Columbia* v. *Attorney-General for Canada* (3)). Its real nature is to be determined by a consideration of the provisions of the legislative act as a whole (*Gallagher* v *Lynn* (4)) ; and by considering what is the effect of what it has done by what it has enacted (*New South Wales* v. *The Commonwealth* (5)). In this type of case, the purpose for which the measure is enacted is not open to review by a court of law (*Attorney-General for Manitoba* v. *Attorney-General for Canada* (6)). " The judiciary concerns itself only with the existence and extent of the power, not with the occasion or purpose which may call for its exertion " (*Osborne* v. *The Commonwealth* (7)).

Where the legislative power of a parliament is expressed to be limited by the purpose for which it may be exercised, the purpose of a particular piece of legislation is to be ascertained by considering its terms and probable effect. In doing this, a court must take into account any public general knowledge of which it would take judicial notice, including legislative history as leading to the measure in question, and may in a proper case, require to be informed by evidence as to what the effect of the legislation will be. Where the legislative body is a parliament which has made the enactment after debate, the speeches of individuals would have little evidential value (*Attorney-General for Alberta* v. *Attorney-General for Canada* (8)).

Hence, where it is a parliament the validity of whose legislation is in question, there is little if any difference in the principles applicable whether the criterion of authority be subject or purpose ; nor, in the respects just mentioned, does it appear that there is any difference between a non-sovereign parliament and any other law-making body (*Jones* v. *Metropolitan Meat Industry Board* (9) ; cf. *Campbell* v. *Municipal Council of Sydney* (10) ; *Marquess of Clanricarde* v. *Congested Districts Board for Ireland* (11) ; *Werribee Council* v. *Kerr* (12)).

(1) (1944) 69 C.L.R., at p. 471.
(2) (1940) A.C. 513, at p. 529.
(3) (1937) A.C. 368, at pp. 375, 376.
(4) (1937) A.C. 863, at p. 870.
(5) (1915) 20 C.L.R. 54, at p. 98.
(6) (1929) A.C. 260, at p. 268.
(7) (1911) 12 C.L.R. 321, at p. 361.
(8) (1939) A.C., at pp. 130-132.
(9) (1925) 37 C.L.R., at pp. 262, 263.
(10) (1923) 24 S.R. (N.S.W.) 179 ; 40 W.N. 154 ; (1925) A.C. 338.
(11) (1914) 51 T.L.R. 120.
(12) (1928) 42 C.L.R. 1.

The bona fides of the Act of a parliament with limited powers will not be examined by a court, except in the sense that a court will consider whether its terms are such that the act is a real or only an ostensible exercise of the legislative power which it is purporting to exercise; nor in any other sense will the bona fides of delegated legislation by the King, or a representative of the King, acting on the advice of his responsible Ministers. But where authority is committed not to the Crown but to an individual Minister or to a body, I am not, as at present advised, prepared to commit myself to the view that, if the validity of a purported exercise of the authority is challenged on the ground that it was dishonest, a court is precluded from examining the charge of dishonesty if the act done in pursuance of the authority alleged to have been corruptly abused is legislative in its nature, that is, if it lays down a general rule as contrasted with providing for a particular case or cases, in other words, to the view that in this respect dishonesty is secure so long as it is systematic, and becomes unsafe only if sporadic. It is true that in *James* v. *Cowan* (1), *Isaacs* J. expressed the opinion that "You cannot challenge the Minister's bona fides on the ground of dishonesty at all," but I find difficulty in reconciling this dictum with the constitutional principle of ministerial responsibility, or in seeing how, in this respect, the position of a Minister of the Crown differs from that of any other servant of the Crown except in being one of high distinction and great responsibility.

In these circumstances, whether the committee's orders now in question should be regarded as legislative or administrative in their nature, I am of opinion that the character of the questions which have been raised is such that it is undesirable to dispose of them upon an interlocutory application to strike paragraphs out of a pleading.

For the reasons which I have stated, I am of opinion that the order appealed from should be set aside, and the paragraphs directed to be struck out allowed to stand. The utility of par. 17 is open to question, but it would not justify a special order. As regards par. 18, this appears to be directed to reinforcing the plaintiff company's *locus standi* by showing that it has a substantial interest in the subject-matter of the action. Perhaps this is leaping before coming to the stile, but although it may be unnecessary I cannot see that it does any harm.

STARKE J. Declarations are claimed in this action that certain orders of the Vegetable Seeds Committee directing that registered seed merchants shall not, except with the approval of the Com-

(1) (1930) 43 C.L.R., at p. 411.

H. C. OF A. 1945.

ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

Starke J.

mittee sell by retail or otherwise or pack for retail sale any vegetable seeds of the kind specified in the schedule to the orders during the periods therein specified are beyond the power conferred upon the Committee by the *National Security* (*Vegetable Seeds*) *Regulations* and that the orders were made mala fide and capriciously in relation to any power given to the Committee by and under the Regulations and are void and of no effect.

The statement of claim charges that the orders were made by the Committee solely to protect and further the trading and financial interests of the Committee and to relieve it of competition from seed merchants including the plaintiff in relation to the kinds and varieties of seeds covered by the order and generally in relation to the business of seed merchants carried on by the Committee. All the paragraphs of the statement of claim connected with this charge were struck out in Chambers and an appeal is brought to this Court from that order. They were struck out on the ground that the orders were of a legislative nature made under reg. 14A of the *Vegetable Seeds Regulations* and that the Court could not inquire into the motives which actuate a legislative body.

It is true that a sovereign body such as the Imperial Parliament is omnipotent in the sense that it can make what laws it pleases. Any laws that it chooses to pass are within power and the motives, the reasons and the bona fides of such a body cannot be examined in any court of law (See *Lee* v. *Bude and Torrington Junction Railway Co.* (1)). And there are legislative bodies that are not sovereign legislatures in this sense such as the Commonwealth of Australia, the Dominions and the Colonies. But their powers are " not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits " of the powers conferred upon them " as the Imperial Parliament in the plenitude of its power possessed and could bestow " (*Hodge* v. *The Queen* (2)). And whatever laws these legislative bodies choose to pass within the limits of their authority are valid and the motives, reasons and bona fides of such bodies can no more be examined in courts of law than can those of the Imperial Parliament itself (*Phillips* v. *Eyre* (3)). The only question open in such cases for judicial consideration is whether the legislative enactment is within or without power. It may be that orders in council made pursuant to statutory authority fall within this category (*Theodore* v. *Duncan* (4); *Rex* v. *Halliday* (5); *Hudson's Bay Co.* v. *Maclay* (6)). Other bodies also exercise

(1) (1871) L.R. 6 C.P. 576, at p. 582.
(2) (1883) 9 App. Cas. 117, at p. 132.
(3) (1870) L.R. 6 Q.B. 1, at p. 22.
(4) (1919) A.C., at p. 706; (1917) 23 C.L.R. 510, at p. 544.
(5) (1917) A.C. 260, at p. 307.
(6) (1920) 36 T.L.R. 469, at p. 475.

functions of a legislative nature delegated to them by legislative bodies. In a sense they are subordinate legislative bodies, but in truth, they are what Lord *Maugham* described in *Rowell* v. *Pratt* (1) as domestic executive bodies which the legislature has thought fit in the public interest to entrust with important statutory powers. Such, for instance, are governmental and local authorities with powers to make by-laws and regulations on various subjects or to prescribe rules of conduct for the purpose of carrying out statutory powers. And mingled with these functions are frequently powers that are not of a legislative or judicial nature at all but mere powers to carry out the particular law or regulation and which may be described as administrative or executive functions. In this class of case it is settled law, I think, that it is the duty of competent courts of law to examine the powers of such bodies and to determine whether they have acted within those powers and exercised them and the discretions confided to them bona fide and in good faith. If a regulation commits to a domestic or executive administrative body the decision of what is necessary or expedient and that authority makes a decision it is not competent for the courts to investigate the grounds or the reasonableness of the decision "in the absence of an allegation of bad faith." All that the courts can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and that those powers are exercised in good faith. Apart from that the courts have no power at all to inquire into the reasonableness, the policy, the sense or any other aspect of the case (*Carltona Ltd.* v. *Commissioners of Works* (2); *Point of Ayr Collieries Ltd.* v. *Lloyd George* (3); *Liversidge* v. *Sir John Anderson* (4); *Sharp* v. *Wakefield* (5); *R.* v. *Board of Education* (6); *Board of Education* v. *Rice* (7); *R.* v. *Broad* (8); *R.* v. *Halliday* (9); *Chester* v. *Bateson* (10); *Hudson's Bay Co.* v. *Maclay* (11); *Widgee Shire Council* v. *Bonney* (12)). This requirement of good faith resolves itself, I think, into an inquiry whether the act of the authority is within or without power. If a regulation or order is not made bona fide, if it is arbitrary or capricious and not in good faith, the court holds that the power to make the regulation or order is non-existent (*Kruse* v. *Johnson* (13); *R.* v. *Broad* (8); *Adelaide Company of Jehovah's Witnesses Inc.* v. *The Commonwealth* (14);

(1) (1938) A.C. 101, at p. 113.
(2) (1943) 2 All E.R. 560, at p. 564.
(3) (1943) 2 All. E.R. 546.
(4) (1942) A.C. 206, at pp. 226, 248, 259.
(5) (1891) A.C. 173.
(6) (1910) 2 K.B. 165, at pp. 179, 180.
(7) (1911) A.C. 179, at p. 182.
(8) (1915) A.C. 1110.
(9) (1917) A.C., at p. 307.
(10) (1920) 36 T.L.R. 225.
(11) (1920) 36 T.L.R., at p. 475.
(12) (1907) 4 C.L.R. 977.
(13) (1898) 2 Q.B. 91.
(14) (1943) 67 C.L.R., at pp. 151, 152.

H. C. OF A. 1945.

ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

Starke J.

Footscray Corporation v. *Maize Products Pty. Ltd.* (1)). This want of bona fides or capriciousness may appear on the face of the regulation or order itself, but there are cases which suggest that extrinsic evidence may be admitted to establish the fact (See *Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (2) ; *James* v. *Cowan* (3)). It would be idle to discuss the relevancy of evidence to the charge made in this case until the nature of that evidence is known, but so far as extrinsic evidence is admissible it is plain, I think, that acts or statements of individual members of the domestic body cannot be proved ; only relevant acts or statements of the authority itself or of its authorized representatives would be admissible (Cf. *James* v. *Cowan* (4) ; *W. R. Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation* (*N.S.W.*) (5) ; *In re Mayor &c. of the City of Hawthorn* ; *Ex parte Co-operative Brick Co. Pty. Ltd.* (6)).

The *National Security* (*Vegetable Seeds*) *Regulations* set up a committee which it incorporates. The objects of the Regulations are to ensure for the purposes of the defence of the Commonwealth and the effectual prosecution of the war an adequate supply of vegetable seeds in Australia, that those seeds are true to type, and of a satisfactory standard of purity and germination and are effectively distributed (reg. 4). On behalf of the Commonwealth and subject to any direction of the Minister the Committee may purchase, sell, exchange, dispose of or otherwise deal in vegetable seeds and do many other things (reg. 23). And by an amending regulation (1944 No. 129 reg. 14A) the Committee may, by order, control and regulate the processing, treatment, distribution and disposal of vegetable seeds. An order under this regulation may, *inter alia*, be made to apply to any person or persons specified in the order, to the person included in any class of persons, or to persons generally, and to contain such incidental and supplementary provisions as are necessary or expedient for the purposes of the order. In pursuance of this regulation the orders challenged in this action were made. To take that of 12th February 1945 as an illustration the Committee ordered that, except with the approval of the Committee, a registered vegetable seed merchant should not sell by retail or otherwise or pack for retail sale by himself or any other person any vegetable seeds of the kind specified in the schedule to the order harvested during the period which commenced on 1st July 1944 and ended on 30th June 1945. This Committee is not a legislative body but a domestic, executive or

(1) (1943) 67 C.L.R. 301, at pp. 308, 309.
(2) (1939) 61 C.L.R. 735 ; (1940) A.C., at p. 849.
(3) (1932) A.C., at pp. 556-558.
(4) (1932) A.C. 542.
(5) (1940) A.C., at p. 849.
(6) (1909) V.L.R., at p. 51.

administrative body entrusted with statutory powers. And, in my opinion, these powers are not even of a legislative nature but are administrative or executive powers for carrying out the Regulations. But whether the powers conferred upon the Committee by reg. 14A be of a legislative or of an administrative nature the committee must nevertheless exercise them bona fide and honestly for the purposes for which they were given. And here it is alleged that the powers were not so exercised but were exercised to further the Committee's own trading and financial interests and to relieve it of competition from seed merchants. But the judgment below denies the plaintiff the opportunity of establishing this allegation, which for present purposes must be accepted as true. That judgment cannot, in the face of the authorities, be sustained. The error resides in the assertion that the Committee is a legislative body, that the orders made by it are of a legislative nature and in any case that the bona fides and honesty of the committee in making the orders challenged cannot be examined in any court of law.

During the argument a suggestion was made that the appellant had no sufficient interest to maintain the action, but the Attorney-General of the Commonwealth has now been joined as a party and the matter can be discussed if need be in other proceedings or at the trial of the action (see *Attorney-General (N.S.W.)* v. *Brewery Employees Union of New South Wales* (1); *Tasmania* v. *Victoria* (2)). The relevancy of the allegations in the pleadings relating to the bona fides and honesty of the Committee was the subject matter of this appeal and not the competency of the appellant to maintain the action. Further, non-observance of the pleading rules, e.g. par. 22 of the statement of claim, was not raised in this appeal and therefore I say no more about the matter.

The appeal should be allowed.

DIXON J. The question which we are called upon to decide is both important and difficult, but it comes before us in an unfortunate form. It concerns the grounds upon which an order of general application made by an administrative body, established for the control during the war of a commodity, may be invalidated. The order contains a general prohibition against selling the commodity except with the approval of the body, and it is assumed that on the face of the order there is no apparent excess of that body's powers of control. Is it a ground for invalidating the order that the only purpose for which it was in fact made was one outside the scope and object of the power, namely for the purpose of protecting and furthering the

(1) (1908) 6 C.L.R. 469. (2) (1935) 52 C.L.R. 157.

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE. Dixon J.

trading and financial interests of the administrative body and preventing competition with it by merchants ?

The form in which this question has been brought forward for judicial determination is by an application to strike out certain paragraphs of a statement of claim in a suit by one of the merchants affected. As the suit is now constituted, the Commonwealth, the Attorney-General of the Commonwealth and the body itself are all joined as defendants. *Williams* J., before whom the application came in Chambers, struck out the paragraphs, because he considered that the order had been made in the exercise of a legislative function and that it could not be invalidated on the ground assigned. From his order the plaintiff has appealed. In the circumstances we must proceed upon the assumption that the material facts alleged in the plaintiff's pleading are true and confine ourselves to a consideration of their legal relevance or significance.

The body in question is the Vegetable Seeds Committee. It is a body corporate set up by the *National Security* (*Vegetable Seeds*) *Regulations* and it consists of the Director-General of Agriculture, who is an officer of the Department of Commerce, and of three other members. A statement of the objects of the regulations is set out in an earlier clause. The objects are to ensure, for the purposes of the defence of the Commonwealth and the effective prosecution of the war, that an adequate supply of vegetable seeds is available in Australia, that those seeds are true to type and of a satisfactory standard of purity and germination and that those seeds are effectually distributed. The recital of these purposes concludes with the customary direction that the regulations shall be administered and construed accordingly. They provide for the registration of growers of seeds and of seed merchants and prohibit others from selling or disposing of vegetable seeds except in certain conditions.

The Committee is empowered to buy and sell vegetable seeds, to process, treat, clean and grade them, to store them and to make agreements in relation to the production, acquisition, treatment, storage and disposal of vegetable seeds.

From the financial provisions of the Regulations it appears that the Committee, though receiving funds from parliamentary appropriation or from loans, was to carry on a trading account and maintain its own bank account. According to the pleading the Committee had in fact set up in the business of seed merchants and growers and was in competition with other seed merchants and growers, including the plaintiff. Besides growing seed, or causing it to be grown, the Committee imported large quantities, and, according to the allegations, the importations exceed the reasonable requirements of the Australian

market. Much of the stock held has deteriorated, it is said, and is, or is becoming, useless as seed. The plaintiff says that it has good seed of its own, but is compelled to sell under its own trade name the Committee's seed, and that the Committee has offered to release vegetable seed of the plaintiff from the operation of the orders complained of, upon condition that the plaintiff buys at the price of good seed the Committee's deteriorated seed. Of the orders complained of two are now in contest and they were made respectively on 4th November 1944, in reference to the 1943-1944 crop, and on 12th February 1945, in reference to the 1944-1945 crop, and relate to certain specified kinds of vegetable seeds.

The orders were made as under an amendment of the regulations which came into operation on 25th August 1944. The amendment consisted of an additional regulation as follows :—" 14A. (1) The Committee may, by order, control and regulate the processing, treatment, distribution and disposal of vegetable seeds. (2) An order under this regulation may—(*a*) be made to apply to any person or persons specified in the order, to the person included in any class of persons, or to persons generally; (*b*) be made to apply either throughout Australia or to any part thereof; (*c*) make different provisions with respect to different vegetable seeds; (*d*) exempt any person, or the persons included in any class of persons, from the operation of all or any of the provisions of the order; (*e*) contain such incidental and supplementary provisions as are necessary or expedient for the purposes of this order."

In my opinion this regulation, which, of course, forms part of the *Vegetable Seeds Regulations*, is governed by the purpose clause setting out the objects of those regulations. It must, therefore, be construed as a power to control and regulate the processing, treatment, distribution and disposal of vegetable seeds with the object of ensuring, for the purposes of the defence of the Commonwealth and the effectual prosecution of the war, that an adequate supply of vegetable seeds is available in Australia, that those seeds are true to type and of a satisfactory standard of purity and germination and that those seeds are effectually distributed.

The complaint is that the orders were made with a different object, with an object inconsistent with the declared purpose of the power.

The power itself belongs to an administrative body or authority. It would, I think, be classified nowadays as an administrative power. If adherence to the old dichotomy of non-judicial governmental power into executive and legislative were obligatory, and also significant in the decision of the case, it would be probably necessary to dissect the power and allot some of its content to one head and some to the other.

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE. Dixon J.

For the authority it gives of control and regulation by means of orders is exercisable either by the promulgation of a general rule to be observed by all or by the issue of specific directions with reference to a particular transaction. For the purpose of such a provision as s. 5 (4) of the *National Security Act* 1939-1943, the orders here in question may be considered to be of a legislative and not of an executive character, though strangely enough it nowhere appears whether they were so dealt with under that sub-section. But to say that, for the purpose of a requirement that they be laid before the Houses of Parliament, the orders are of a legislative character will shed no light upon the question whether the purpose animating them or their corporate author is a ground of invalidity. Indeed I do not think that in English law such a question will be found ever to be solved by ascertaining whether, upon a correct juristic analysis, the power should or should not be described as legislative. It will depend rather upon the nature of the authority in whom the power is reposed and upon the measure and extent of the power, its subject matter and its limitations and the conditions in or upon which it is exercisable. In American jurisprudence the rule excluding inquiry into the good faith of a legislative act is considered applicable not only to the legislatures of the Union and of the States, but to subordinate legislative bodies also. The distinction is between functions. Whatever the body, an act legislative in its character cannot be attacked collaterally because of its ulterior purpose even if fraud or corruption be alleged. In *United States* v. *Constantine* (1), *Cardozo* J. states it as " a wise and ancient doctrine that a court will not inquire into the motives of a legislative body, or assume them to be wrongful." See the cases collected in *Arizona* v. *California* (2). " The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge, and in good faith ": *United States* v. *Des Moines Navigation & Railway Co.* (3) per *Brewer* J., who cites an often quoted passage from *Cooley's Constitutional Limitations*, 5th ed. (1883), p. 222 ; 8th ed. (1927), pp. 379-382. " And the same presumption that legislative action has been devised and adopted on adequate information and under the influence of correct motives, will be applied to the discretionary action of municipal bodies, and of the State legislature, and will preclude, in the one case as in the other, all collateral attack " : *Cooley's Constitutional Limitations*, 5th ed. (1883), at pp. 305-6 ; 8th ed. (1927), at pp. 451-455. If, however, the municipal act or determination impugned is not

(1) (1935) 296 U.S. 287, at p. 299 [80 Law Ed. 233, at p. 240].
(2) (1931) 283 U.S. 423, at pp. 455, 456 [75 Law. Ed., at p. 1166].
(3) (1892) 142 U.S. 510, at p. 544 [35 Law. Ed. 1099, at p. 1109].

legislative, it may be invalidated by proof of a corrupt or improper purpose. The distinction is examined in *Weston* v. *Syracuse* (1). There the common council of Syracuse had adopted a resolution amounting to a waiver of performance of a requirement of a contract. Proof was offered that the resolution was obtained by corrupt means and was held admissible notwithstanding a contention that the courts were without power to inquire into such a matter. " The reason assigned," for the contention, " is that the act of the common council in passing this resolution was legislative in character and hence the motives that induced the members to vote for its passage whether honest or corrupt are not the subject of judicial investigation." It was decided that the resolution constituted part of the administrative duties of the council and was not an exercise of " sovereignty," that is of authority to legislate.

But in English law the position is not quite the same. Our distinctions are concerned rather with the status, composition and purposes of the body, with the difference between bad faith and *ultra vires* objects and with the precise provisions of the legislation under which the power arises and with the grounds for judicial review they afford. Indeed the last matter may be expressed not inappropriately in language used recently in America by *Frankfurter* J. in relation to a kindred topic : " Whether judicial review is available at all, and, if so, who may invoke it, under what circumstances, in what manner and to what end are questions that depend for their answer upon the particular enactment under which judicial review is claimed," that is, of course, always subject to the constitution. " Apart from the text and texture of a particular law in relation to which judicial review is sought, ' judicial review ' is a mischievous abstraction. There is no such thing as a common law of judicial review in the federal courts " (*Stark* v. *Wickard* (2)). Under our law in the case of a supreme legislature there could, of course, be no question. Even with a private Act of Parliament, the grounds upon which it proceeded were never considered examinable. So a suggestion that the promoters had obtained it by fraud could not be entertained (*Stead* v. *Carey* (3) ; *Waterford, Wexford, Wicklow and Dublin Railway Co.* v. *Logan* (4)). And if a false or erroneous recital is contained in a statute it must be ascribed to misinformation, " forasmuch as the legislature always have justice and truth before their eyes " (*Earl of Leicester* v. *Heydon* (5)). " If an Act of Parliament has been obtained improperly, it is

(1) (1899) 158 N.Y. 274, at pp. 286-291.
(2) (1944) 321 U.S. 288, at p. 312 [88 Law. Ed. 733, at p. 749].
(3) (1845) 1 C.B. 496, at pp. 515, 522 [135 E.R. 634, at pp. 642, 644].
(4) (1850) 14 Q.B. 672, at pp. 675, 680 [117 E.R. 259, at pp. 260-262].
(5) (1570) 1 Plowden 384, at p. 398 [75 E.R. 582, at p. 603].

H. C. OF A. 1945. ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE. Dixon J.

for the legislature to correct it by repealing it; but, so long as it exists as law, the courts are bound to obey it" (*Lee* v. *Bude and Torrington Junction Railway Co.* (1)). Then, too, legislative and executive acts formally done in the name of the Crown stand in a special position: see *Duncan* v. *Theodore* (2). But with respect to the acts or determinations of subordinate authorities other questions arise. To begin with their powers are limited and the form of the limitation upon a power of subordinate legislation may itself involve purpose. If there is an exercise of such powers for a different purpose, it is outside the Act which confers them (*Narma* v. *Bombay Municipal Commissioner* (3)). "There are forms of legislative authority, such as in *Clanricarde's Case* (4) and in *Municipal Council of Sydney* v. *Campbell* (5) where a given 'purpose' is made an express condition of exercising the power. If that 'purpose' is not pursued, the power is not exercisable, and therefore the facts are examinable in order to ascertain what purpose was in view," per *Isaacs* J. in *Jones* v. *Metropolitan Meat Industry Board* (6): Cp. *Werribee Council* v. *Kerr* (7) (which, however, like *Clanricarde's Case* (8) and *Campbell's Case* (5) did not involve a by-law). But where purpose is not made expressly, or by necessary intendment, a condition of the exercise of the power, then it is necessary to consider the composition of the body, and, if it is a deliberative assembly, to distinguish between the motives actuating individual members and the purpose disclosed by the character and operation of the measure in relation to the actual facts and circumstances. In *In re the Mayor &c. of the City of Hawthorn*; *Ex parte Co-operative Brick Co. Ltd.* (9), speaking of a by-law of an elective municipal council, *Cussen* J. said: "So far as the question of bad faith is concerned, if it is meant by this that individual councillors were actuated by improper motives in giving their votes, I find no evidence of the fact, and even if there was, I find great difficulty in seeing how such a contention could be given effect to. Each councillor may be actuated by many reasons, each having some different reasons from the others, and it seems to me almost, if not quite, impossible to penetrate into their minds. It must at least be necessary to show that the improper motive was the sole or dominant one, and that but for it a majority would have voted against adopting the by-law. The ratepayers and councillors honestly voting for the

(1) (1871) L.R. 6 C.P. 576, at p. 582, per *Willes* J.
(2) (1917) 23 C.L.R. 510, at p. 544; (1919) 26 C.L.R., at p. 282; (1919) A.C., at p. 706.
(3) (1918) 45 Ind. App., at p. 129.
(4) (1914) 79 J.P. 481; 31 T.L.R. 120.
(5) (1925) A.C. 338.
(6) (1925) 37 C.L.R., at p. 262.
(7) (1928) 42 C.L.R. 1.
(8) (1914) 31 T.L.R. 120; 79 J.P. 481.
(9) (1909) V.L.R., at pp. 51, 52.

by-law would be placed in a false position if the by-law could, perhaps after a long time, be upset on such a ground. These considerations make one think that the furthest the Court can go is to look at the object and effect of the by-law, to be gathered from its language, and possibly by applying it in a general way to the existing state of legislation, and to the conditions of things existing in the locality." On this point the judgments in the Supreme Court were approved in this Court (1).

The extent of the materials which may be considered in such a case even where it is a legislature may be seen from *Attorney-General for Alberta* v. *Attorney-General for Canada* (2). But bad faith may take the form of falsely avowing a legitimate purpose to cover the actual pursuit of an object outside the scope of the power (see per *Isaacs* J. in *Jones* v. *Metropolitan Meat Industry Board* (3) and *Werribee Council* v. *Kerr* (4)).

In the Canadian courts bad faith in this sense has been regarded as an admissible ground of invalidity in the case of by-laws of local governing bodies. The effect of the decisions appears to be that the powers of the council must be exercised bona fide, and the action of its members must not be founded upon fraud, oppression, or improper motives and a by-law may be quashed if the council in passing it was not using its power in good faith in the interest of the public, but simply to subserve the interests of private persons (per *Maston* J. in *Re Howard and City of Toronto* (5)). See further *Hurst* v. *Mersea* (6) and, in the Supreme Court of Canada, see *Jones* v. *Township of Tuckersmith* (7) and *Upper Canada College* v. *City of Toronto* (8).

In *United Buildings Corporation Ltd.* v. *City of Vancouver* (9), reliance was placed on the Canadian doctrine in an attack upon a by-law of Vancouver and (10) Lord *Sumner* for the Privy Council appears to accept it as a ground of invalidity, though denying its application to the facts of that case. During the argument, counsel cited from the speech of Lord *Davey* in *Scott* v. *Glasgow Corporation* (11) a passage in which he also appears to accept the doctrine. It is to the effect that it is a perfectly sound and important principle " that the power of making by-laws entrusted to a municipal or other public authority is so given for the purpose of better enabling them

(1) (1909) 9 C.L.R., at pp. 309, 314, 315.
(2) (1939) A.C., at pp. 130, 131.
(3) (1925) 37 C.L.R., at pp. 264, 265.
(4) (1928) 42 C.L.R., at pp. 8-10.
(5) (1928) 1 D.L.R. 952, at p. 964.
(6) (1931) 3 D.L.R. 355, at p. 357.
(7) (1917) 47 D.L.R. 684, at p. 696.
(8) (1917) 38 D.L.R. 523.
(9) (1915) A.C. 345.
(10) (1915) A.C., at p. 350.
(11) (1899) A.C. 470, at p. 492.

H. C. OF A. 1945.

ARTHUR YATES & CO. PTY. LTD. v. THE VEGETABLE SEEDS COMMITTEE.

Dixon J.

to perform their general duties, and ought not to be used for any collateral or outside purpose." See, too, *Bailey* v. *Conole* (1).

The present case falls, I think, well within the principles upon which a purported exercise of power is invalidated because of an inadmissible purpose. It is well to notice the special features which it possesses. Without suggesting that they are all essential to the conclusion, it is at least desirable to state some of them with a view of confining our decision to the actual circumstances of the case. We are concerned solely with an allegation of fact and not with any question of the materials upon which it is to be established. The gist of the allegation is that the determination by the Vegetable Seeds Committee to make and serve on vegetable seed merchants the orders impugned was made solely for the protection and furtherance of the Committee's financial and trading interest and to exclude competition. It is a purpose ascribed to a corporate body consisting of four persons. It is not a deliberative assembly. The complaint that the orders are the product of an improper or inadmissible purpose does not depend upon an imputation of motives bearing on their private and personal interests actuating individual members to give their concurrence in the orders. It relates to the effect upon the affairs of the body itself, the effect which it was sought to achieve by means of the orders. The power to make the orders forms part of the total authority given to an administrative organization of a subordinate character. The organization was set up for a defined purpose, one to which its policy and administration must be directed. The object ascribed to it in making the orders is outside the purpose for which it was set up and is at variance with it. That purpose forms a condition to which the exercise of the power must conform. In these circumstances I think the allegations, if made out, would invalidate the orders.

It is to be observed that the present proceeding is not a collateral attack upon the validity of the orders. It is a direct attempt to impeach them by a proceeding against the body by which they were promulgated as well as the Commonwealth and the Attorney-General of the Commonwealth whose responsibility it would be to enforce the orders. The application to strike out the paragraph of the pleading does not raise any question concerning the competence of the suit or the propriety of making the declaration of right claimed.

In my opinion the appeal should be allowed and the order striking out pars. 10, 11, 12, 13, 14, 15, 17, 18 and 22 of the statement of claim should be set aside. I should add, however, that I have some

(1) (1931) 34 W.A.L.R. 18, particularly at pp. 23, 24, per *Dwyer* J.

doubt about par. 22 on the ground that it seems to plead evidence and, at that, evidence of dubious admissibility.

Appeal allowed. Order discharged in so far as it directs that paragraphs of the statement of claim be struck out. Defendants to pay costs of appeal. Costs of summons to be costs in the action.

Solicitors for the appellant, *Parish, Patience & McIntyre.*

Solicitor for the respondents, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.