1914.

[FULL BENCH.]

Present: Wood Renton C.J., Pereira J., and De Sampayo A.J.

PERERA *v.* FERNANDO.

997—P.C. (Itg.) Colombo, 3,497.

Sanitary Board Ordinance, No. 18 of 1892—By-laws prohibiting sale of fish outside market without a license—Are the by-laws ultra vires ?

PEREIRA J. and DE SAMPAYO A.J. (*dissentiente* WOOD RENTON C.J.).—It is *ultra vires* of a Sanitary Board constituted under Ordinance No. 18 of 1892 to make a regulation under section 9 E of the Ordinance requiring vendors of fish at places other than a public market established by the Board to take out licenses for the sale of fish.

Section 11 (1) (*a*) of the Interpretation Ordinance, providing that all rules (made under an Ordinance) shall be published in the *Government Gazette* and shall have the force of law as fully as if they had been enacted in the Ordinance, has reference to rules that are not *ultra vires*. It was not intended to validate a rule that was *ultra vires*.

THE facts are set out in the judgment of the Chief Justice.

Bawa, K.C., with him *Samarawickreme and C. Z. H. Fernando*, for accused, appellant.—The rule 9 E (2) (*d*) does not give the Sanitary Board power to prohibit private markets. It only gives it power to control and supervise private markets. Under the present rule it is open to the Board to refuse licenses to hold private markets. That is clearly the intention of the Board. The rule is clearly *ultra vires*. Ordinance No. 21 of 1901 (Interpretation Ordinance) enacts (section 11 (*c*) that no rule shall be inconsistent with the provisions of the enactment. The Sanitary Boards Ordinance only gives power to " supervise and control, " and not to suppress.

A power given to regulate and govern implies the continued existence of the thing which is to be regulated. See *Maxwell 447, Municipal Corporation of the City of Toronto v. Virgo.* [1] Counsel also cited (*1905*) *A. C. 21*, (*1902*) *86 L. T. 449*, (*1908*) *98 L. T. 416.*

van Langenberg, K.C., for the respondent.—It is not open to us to question the validity of the by-law. The Interpretation Ordinance enacts (section 11 (1) (*e*)): " All rules shall be published in the *Gazette* and shall have the force of law as fully as if they had been acted in the Ordinance. " The words " as if they had been enacted in the Ordinance " had been expressly added by special amendment. These words will have no effect if the contention for the appellant were to be upheld.

[1] (*1896*) *A. C. 88, 93.*

Section 11 (1) (*d*) of the Interpretation Ordinance enacts: "In any rule the power to regulate, supervise, and control shall be deemed to include the power to issue licenses without fee." (De Sampayo A.J.—The power here is not provided in any rule.) "Rule" here means in any law or Ordinance, not to what is technically known as a "rule." The Board had therefore the power to prohibit markets without licenses. It is not correct to say that the rule in question aims at shutting up all private markets. The rule only imposes on market keepers the necessity of getting a license. The rule is valid, and was framed under section 9 E (2) (*d*) of the Sanitary Board Ordinance.

Once the rules go through the formality required by the Ordinance, their validity is beyond question. Counsel cited 383— P. C. Tangalla, 317;[1] 73—P. C. Balapitiya, 37,092;[2] 565—M. C. Colombo, 3,000.[3] See also *12 N. L. R. 249, 1 Leader 9, 1 A. C. R. 38, 14 N. L. R. 432, (1888) 57 L. P. C. 73, The Institute of Patent Agents v. Lockwood.*[4]

Bawa, K.C., in reply.

Cur. adv. vult.

December 8, 1914. WOOD RENTON C.J.—

This case raises a question of considerable public interest and importance. The appellant has for some time sold fish in a private market at Ja-ela. The market in question is situated on land belonging to the Roman Catholic Mission there, and is conducted under the supervision of the priest in charge of that mission. The Colombo Sanitary Board, purporting to act under the provisions of section 9 (E) (2) of the Small Towns Sanitary Ordinance, 1892 (No. 18 of 1892), has on January 14, 1913, with the approval of the Governor in Executive Council, made the following regulations:—

1 A. After any such public market has been established and opened, no person shall without a license granted by the Chairman of the Board publicly expose for sale any meat, poultry, fresh fish, fresh fruit, or vegetables in any place within the limits of the Board other than the public market.

1 B. All licenses referred to in the preceding by-laws shall be in the form annexed, and shall be in force for the period mentioned therein and no longer, which period shall not be more than twelve months or less than one month. Such licenses shall be issued free of payment. Provided that it shall be lawful for the Chairman of the Sanitary Board at any time to cancel any such license or licenses.

Form of License to sell outside Market.

———— is licensed to sell ———— at ———— from ———— to ————.

————

Chairman, Sanitary Board.

[1] *S. C. Mins., June 20, 1913.*

[2] *S. C. Mins., March 6, 1913.*

[3] *S. C. Mins., June 17, 1914.*

[4] *(1894) A. C. 347.*

1914.

WOOD RENTON C.J.

Perera v. Fernando

These regulations were duly published in the *Ceylon Government Gazette* for January 17, 1913.

The appellant has now been prosecuted for having exposed fish for sale in a private market without a license, in contravention of rule 1 A of these regulations, and has been convicted and sentenced to pay a fine of Rs. 10. The first point raised by the appeal is the question whether rule 1 A can be brought within the provisions of the sub-section under which it purports to have been made. The same question came before me in 383—P. C. Tangalla, 317,[1] and I adhere to the view that I expressed in that case. I do not think that a rule which practically enables the Sanitary Board to refuse such a license as we are here concerned with altogether falls within clause (*d*) of section 9 E (2) of the Ordinance, enabling the Board to make regulations for "the supervision and control" of private markets. There is a considerable body of English authority (see *Municipal Corporation of the City of Toronto v. Virgo* [2] and *Parker v. Mayor of Bournemouth* [3]) showing that a statutory power conferred upon a Municipal Council to make by-laws for the regulating and governing of trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner; and under section 11 (1) (*d*) of the Interpretation Ordinance, 1901 (No. 21 of 1901), it is only where power to regulate as well as to supervise and control is conferred by any rule that power to issue and refuse licenses is held to be implied. In the present instance the power in question is conferred by the statute, and not by a rule made under it, and it deals with supervision and control alone.

It is unnecessary to consider whether the regulation that we are here concerned with could or could not be justified under clause (*t*) of section 9 E (2) of the Small Towns Sanitary Ordinance, 1892 (No. 18 of 1892). For, in my opinion, the regulation itself is one that, in view of the provisions of section 11 (1) (*e*) of the Interpretation Ordinance, 1901, the Courts have no power to canvass. I adhere on this point also to the view that I expressed in 383—P. C. Tangalla 317,[1] and in 73—P. C. Balapitiya, 37,092.[4] Few comprehensive enactments nowadays form a complete code in themselves as to all the details of the subject with which they deal. It is a constant practice with the Legislature to delegate the power of making rules and orders for the purpose of settling these details to a subordinate authority. The validity of the subordinate legislation depends on a due observance of the conditions imposed by the statute as to its enactment, its subject-matter, and its publication. If the statutory conditions are not complied with, the Court will treat rules made by the subordinate authority as invalid, unless the statute itself

[1] *S. C. Mins., June 20, 1913.*
[2] *(1896) A. C. 88.*
[3] *(1902) 86 Law Times 449.*
[4] *S. C. Mins., March 6, 1913.*

forbids inquiry, or the conditions are merely directory. Whether any particular enactment creating rule-making powers has so prohibited inquiry is a question of construction. It cannot be contested that if the rules made under the Small Towns Sanitary Ordinance, 1892 (No. 18 of 1892), were required to be, and had been, laid on the table of the Legislative Council before they came into effective operation, no court of law could challenge their validity (see *La Brooy v. Marikkar* [1] and 565—M. C. Colombo, 3,000,[2] following *Institute of Patent Agents v. Lockwood* [3]), unless on the ground of repugnancy to an express provision of the principal enactment. It is suggested, however, that in spite of the strong and peremptory language of section 11 (1) (*d*) of the Interpretation Ordinance, 1901, this principle does not apply where a less august mode of publication is prescribed. In my opinion that contention derives no support from English case law. The House of Lords in the *Institute of Patent Agents v. Lockwood* [3] treated the provision that the rules in question should be laid on the table of both Houses of Parliament merely as evidence of the intention of the Legislature to make the authority of the subordinate rule-making body supreme, and not as a condition precedent to the supremacy of that authority. It is clear law that a direction in a statute that regulations, rules, or orders made by Executive or Administrative Departments of State shall have the same effect as if they were enacted in the statute creating the power may suffice to place their validity beyond the range of question in a court of law (see *Craies Statute Law 262* and *Barker v. Williams* [4]). The principles on which subordinate legislation rests clearly exclude any such test as it is sought to establish in the present case. It is obviously convenient that the procedure under many complicated enactments should be worked out, according to local requirements, by an experienced and responsible subordinate authority. Sometimes the subject-matter of the enactment may be of a character so important as to render it advisable that all rules made by the subordinate authority should be submitted to the tacit approval of the Legislature. In other cases a sufficient safeguard may be found in the nature of the subordinate authority itself, *e.g.*, as in the present instance, a Sanitary Board consisting of the Government Agent, the Provincial Engineer, the Provincial Surgeon, and certain other members nominated by the Governor, acting subject to the approval of the Governor in Executive Council. The Legislature acts on the assumption that bodies of this description may be trusted both to act with care, in the first instance, in framing regulations, and to be willing to cancel any regulation which experience shows to be unreasonable.

On the grounds that I have stated I would affirm the conviction and sentence and dismiss the appeal.

[1] *(1907) 2 A. C. R. 63.*

[2] *S. C. Mins., June 17, 1914.*

[3] *(1894) A. C. 347.*

[4] *(1898) 1 Q. B. 23, 25.*

1914.

PEREIRA J.—

PEREIRA J.

Perera v. Fernando

In this case the question is whether a Sanitary Board constituted under Ordinance No. 18 of 1892 has the power, under section 9 E of the Ordinance, to make a regulation requiring vendors of fish at places other than a public market established by the Board to take out licenses for the sale of fish. From certain correspondence filed of record in this particular case it is manifest that the object of the Board, whose powers are in question in the case, was to prevent altogether the sale of fish at any place other than its own public market. If the by-law passed by this Board is allowed operation, that object may, of course, be easily attained by means of the refusal altogether to issue any license at all. The power is claimed for the Board under sub-sections (*d*) and (*t*) of section 9 E (2) of the Ordinance. Sub-section (*d*) permits of rules being made " for the establishment and regulation of markets by the Board itself, and for the supervision and control of private markets." Sub-section (*t*) provides for the making of regulations " for every other purpose which may be necessary or expedient for the due conservancy of the town, the preservation of the public health therein," &c. I think it is clear that this latter sub-section has no application to the present case. It deals with purposes other than those expressly mentioned in sub-section (*d*), and as sub-section (*d*) makes express provision in respect of the supervision and control of private markets, I think that the Legislature must be presumed to have confined the power that it gave to Sanitary Boards to make rules in respect of the supervision and control of private markets to that given by sub-section (*d*). The power given by sub-section (*d*) is advisedly limited to the power of making rules for only the " supervision and control " of private markets, and not to their regulation. I say " advisedly," because in the same sub-section power is given to Boards to make rules for the regulation of their own markets. That being so, can it be said that it was the intention of the Legislature to vest in Boards the power to make rules requiring licenses to be taken for the sale of fish at places other than their own markets ? Section 11 (1) (*d*) of the Interpretation Ordinance, 1901, enacts : " In any rule power to regulate, supervise, and control shall be deemed to include power to issue and refuse licenses without fee," &c. Of course, the Ordinance refers to the language used in rules, but it may well be inferred from the section cited that it was the intention of the Legislature to require the power of regulation also to be included in the powers given to justify the exercise of a power to issue or refuse licenses. Whether that be so or not, it is clear that a power given to supervise and control, or even to regulate, a place does not include a power to discontinue its existence altogether. In the case of the *Municipal Corporation of the City of Toronto v. Virgo*,[1] their Lordships of the Privy Council

[1] *(1896) A. C. 88, 93.*

observed as follows: " There is a marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it; and, indeed, a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed." So, in the present case, inasmuch as a power to issue or refuse licenses involves practically a power to discontinue private markets altogether, I do not think that the power given in the Ordinance to " supervise and control " private markets can be said to include the power to issue or refuse licenses to trade therein.

Then, it has been argued that section 11 (1) (*e*) of the Interpretation Ordinance enacts: " All rules shall be published in the *Gazette*, and shall have the force of law as fully as if they had been enacted in the Ordinance," and that the rule in question in the present case has been published in the *Gazette*, and that therefore it has the force of law, even though it be *ultra vires*. I cannot for one moment accede to this contention. The authority relied on in support of the contention is the decision in the case of *The Institute of Patent Agents v. Lockwood*.[1] There it was held that the validity of a rule made under sub-sections (4) and (5) of section 101 of the Patents, Designs, and Trade Marks Act, 1883, which provided that any rules made by the Board of Trade in pursuance of that section should be laid before both Houses of Parliament and that if either House " Within the next forty days resolved that such rules or any of them ought to be annulled, the same should after the date of such resolution be of no effect," could not be questioned after it had gone through the ordeal mentioned. That case has been followed in several cases in Ceylon, which will be found cited in my judgment in *Seyappa Chetty v. Municipal Council of Kandy*,[2] but the *ratio decidendi* there was that the rule was to be deemed to have the direct sanction of the legislative body of the country. The same cannot be said of a rule that has merely been published in the *Gazette*.

The Solicitor-General further argued, that if the meaning of section 11 (1) (*e*) was not that the validity of rules after they have been published in the *Gazette* could not be questioned, the section would have no meaning at all. That, in my opinion, is not so. What the section provides is that the rules shall have the force of law as fully as if they had been enacted in the Ordinance. Now, in the first place, it is manifest that the rules here referred to are rules that are *intra vires*. The section in its initial lines speaks of *such* rules as are made under a " power conferred by an Ordinance on any authority to make rules." In the next place, there is a difference between the effect of an *intra vires* rule which is not to be regarded as forming part of the Ordinance under which it is made and the effect of one which is to be so regarded. Both no doubt

[1] *(1894) A. C. 347.*

[2] *(1913) 17 N. L. R. 195.*

1914.

PEREIRA J.

Perera v. Fernando

have the force of law, but in the latter case, in the event of inconsistency between the rule and any provision of the Ordinance, the latter does not necessarily prevail. The position is best set forth in the words of Lord Herschell in the case of *The Institute of Patent Agents v. Lockwood* [1] cited already. His Lordship said (p. 360) : "I own I find very great difficulty in giving to this provision, that they (rules) shall be of the 'same effect as if they were contained in the Act,' any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act. No doubt, there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other." It was said in the course of the argument of this appeal, that if a rule is found to be in conflict with the provision of the Ordinance under which it was passed it would, *ipso facto*, be *ultra vires*. It is not necessarily so. A rule may be in conflict with a provision of the Ordinance, but if it is justified by the powers given under the particular section under which it was passed it would be *intra vires*. The above quotation from Lord Herschell's judgment explains the difference in effect between a rule which is not to be deemed to be a part of the Ordinance under which it was passed and the effect of a rule that is not to be so, deemed, and the explanation, I think meets the Solicitor-General's query as to the reason for the enactment in section 11 (1) (*e*) of our Interpretation Ordinance.

For the reasons given above I would set aside the conviction and acquit the accused.

DE SAMPAYO A.J.—

The by-law 1 A, prohibiting the sale of articles of food described therein in any place other than the public market without a license granted by the Chairman of the Sanitary Board, purports to have been made under and in pursuance of sub-section (2) of section 2 of the Ordinance No. 30 of 1909. That sub-section mentions various matters for which the Board is authorized to make regulations, but the *Gazette* notification does not specify the particular head under which the by-law in question is intended to be brought. We are, however, referred by counsel to sub-section (2) (*d*), which is concerned with regulations "for the establishment and regulation of the Board's own markets and levy of rents and fees therein, and for the supervision and control of private markets, bakeries, eating-houses, tea and coffee boutiques, butchers' stalls, fish stalls, cattle galas, dairies, laundries, washing places, common lodging houses, and

[1] *(1894) A. C. 137.*

latrines." The assumed power to issue licenses for these purposes implies the power of withholding them altogether and so suppressing the trade or business, but it is obvious that the authority to "supervise and control" imports the continued existence of what is to be so supervised and controlled. See *Municipal Corporation of the City of Toronto v. Virgo*,[1] which I shall refer to again in another connection The private market in which the accused sold fish is not objected to on sanitary grounds, and, as a matter of fact, it is proved to be much more suitable in that respect than the public market itself, and yet it appears that the intention of the Board is to suppress the sale of fish in any place, however unexceptionable it may be, other than the public market. In these circumstances, the by-law in question has no foundation of reason to support it, and the question is whether there is anything in the law compelling us to uphold it. In my opinion the by-law is not authorized by sub-section (2) (*d*) above referred to, and, indeed, the learned Solicitor-General did not seriously contest the point. We were then referred to the general provision in sub-section (2) (*t*), which authorizes the Board to make regulations "for every other purpose which may be necessary or expedient for the due conservancy of the town, the preservation of the public health therein, and the promotion of the comfort and convenience of the people thereof." I do not think that this by-law can be brought under that head, for it has no "other purpose" than that provided for under the preceding heads. The result is that the by-law is not justified by any power conferred by the Ordinance.

We have, however, still to consider the effect fo certain provisions of the Interpretation Ordinance, No. 21 of 1901. The first of these provisions is that contained in section 11 (1) (*d*), which enacts that "in any rule, power to regulate, supervise, and control shall be deemed to include power to issue and refuse licenses without fee for the purpose of such regulation, supervision, or control." As regards this, it is to be noted, in the first place, that in this case the power to regulate, supervise, and control is not provided in any "rule," but, if at all, in the Ordinance itself. The learned Solicitor-General said by way of answer that the word "rule" in the above passage was a mistake. But, considering that these are highly restrictive enactments affecting the liberty of the subject to carry on lawful trade, I am not prepared to explain away the above provision in that manner, and, whatever might have been intended to be meant by the word "rule," it cannot certainly be held to convey the sense of "Ordinance." In the next place, the Ordinance does not confer power "to regulate, supervise, and control," but only to "supervise and control," and there is manifestly a distinction between two such powers. Lastly, we are not concerned in this case with any question as to the supervision and control of private markets. The

38-

[1] *L. R. (1896) A. C. 88.*

1914.

DE SAMPAYO A.J.

Perera v. Fernando

by-law aims at all individuals who expose certain articles for sale in any place whatever other than the public market. The decision of the Privy Council in *Municipal Corporation of the City of Toronto v. Virgo* (*supra*) is of great value in this connection. There the statute had given power to pass by-laws "for licensing, regulating, and governing hawkers," &c., and the local body passed a by-law prohibiting all persons of that description from prosecuting their calling in certain specified streets. The Privy Council held that the by-law was invalid, and in the course of his judgment Lord Davey referred to an argument that the by-law did not amount to prohibition, because hawkers might still carry on their business in other streets of the city, and observed as follows: "Their Lordships cannot accede to this argument. The question is one of substance, and should be regarded from the point of view as well of the public as of the hawkers. The effect of the by-law is practically to deprive the residents ..... of buying their goods or of trading with the class of traders in question." This remark applies with equal force to the present by-law, which has the effect of confining the fish trade, if it continues to exist at all, to the public market. The conclusion arrived at was that the power to license, regulate, and govern, without express words of prohibition, did not authorize the making it unlawful to carry on a lawful trade in a lawful manner, *Parker v. The Mayor of Bournemouth* [1] is another case of great importance. There the Corporation had statutory power to regulate the selling of any article on their beach and foreshore, and acting thereunder they made a by-law prohibiting such sale except in pursuance of an agreement with the Corporation. The Court of King's Bench held this by-law to be bad on the ground that it gave the Corporation power to make any agreement they chose without reference to its reasonableness, and to refuse to give a license to any particular person. This, again, aptly describes the circumstances of the present case. I would add, although it is not necessary to decide it in this case, that, in my opinion, the Sanitary Board, though it may supervise and control the private market in question, cannot suppress it. I think the by-law cannot be upheld under section 11 (1) (*d*) of the Interpretation Ordinance.

The other provision to be examined is that contained in section 11 (1) (*e*), which enacts that "all rules shall be published in the *Gazette*, and shall have the force of law as fully as if they had been enacted in the Ordinance," and it is upon this provision that the argument on behalf of the prosecution is chiefly based. This method of giving legislative sanction to rules framed by local authorities is well known. In some of our Ordinances, such as Ordinance No. 6 of 1910, and Ordinance No. 8 of 1912, the rules are required to be laid on the table of the Legislative Council before they are given the force of law, and in others, such as the present

[1] (*1902*) *86 Law Times 449.*

Ordinance and Local Boards Ordinance, 1898, all that is required is confirmation by the Governor in Council and publication in the *Gazette*. In all such cases, when the condition precedent, whatever it may be, is fulfilled, the by-law acquires the force of law. It is not the province of the Court to canvass the policy of what has been called skeleton legislation and of delegating of legislative authority to inferior bodies. All that the Court can do is to insist on the strictest fulfilment of the condition precedent. Now, in this case the by-law was published in the *Gazette*, but I think that that does not conclude the matter. The provision as to rules acquiring the force of law when published in the *Gazette* is preceded by the words "where any Ordinance confers power on any authority to make rules." This, I think, must be taken to mean power to make rules with regard to a specified subject-matter, for it cannot be supposed that the Interpretation Ordinance is intended to give legal force to rules relating to one thing where the power conferred is to make rules regarding quite a different thing. I think the intention is to save rules only where the local authority exceeds its powers with reference to a given subject-matter, but not where it acts without any power at all, and I have given reasons for holding that the Ordinance confers no power on the Sanitary Board to make rules with reference to the subject-matter with which we are now concerned. Further, section 11 (1) (*e*) of the Interpretation Ordinance makes no allusion to the sanction of the Governor in Council, but only to the publication in the *Gazette*, and since the enabling Ordinance requires the sanction of the Governor in Council for rules framed by the Board in addition to their publication in the *Gazette*, it cannot be supposed that the mere publication in the *Gazette* gives to the by-law in question the force of law. This must, therefore, be taken to be a case which is excluded by the qualifying words in the section, "unless the contrary intention appears." I may remark incidentally that the *Gazette* publication itself does not seem to be quite in order. It notifies that the Sanitary Board had made the by-law in pursuance of sub-section (2) of section 2 of the amending Ordinance, No. 30 of 1909, whereas the by-law should have been made in pursuance of sub-section (2) of section 9 E of the principal Ordinance, No. 18 of 1892. For the reasons I have above given the Interpretation Ordinance does not, in my opinion, render the by-law valid.

I would set aside the conviction and acquit the accused.

Set aside.