

[FULL BENCH.]

Present : Ennis and De Sampayo JJ. and Loos A.J.

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113—P. C. Colombo, 27,041.

Food control—Defence of the Colony Regulations, 1919—Order fixing the price of flour—Ultra vires.

The order of the Food Controller, fixing the price at which flour, &c., should be sold, made under Regulation 1 of the Defence of the Colony Regulations, 1919, is not *ultra vires*.

THE facts appear from the judgment.

A. St. V. Jayawardene (with him *Tissevaeresinghe*), for the accused, appellant.—The regulation made by the Food Controller (*Gazette* of July 1, 1919) is *ultra vires*. The Regulation 1 of the Defence of the Colony Regulations made by the Governor (*Gazette* of May, 1919), from which the Food Controller purports to derive his power to make the regulation in question, is in its turn *ultra vires*. For the power to fix the maximum price for which articles of food may be sold by retail we have to look to clause 3 (10) of the Order in Council of October 26, 1896, and to that alone. Under that clause the Governor alone was empowered to make such a regulation, and that by a Proclamation. No such Proclamation has been made. It cannot be said that the Governor had delegated his power under clause 4 of the Order in Council of March 21, 1916, to the Food Controller. For he is not of the class of naval or military authorities, to whom alone under the clause the Governor can delegate any of his powers. The Food Controller has no legal status. His office has not been created by any Ordinance or Order in Council. In England it was thought necessary to pass an Act of Parliament to create the office of Food Controller. See 6 and 7 Geo. V., c. 68, s. 3. Similar legal sanction is necessary in Ceylon before the Food Controller can exercise any of his powers.

It was argued before the Police Magistrate that, apart from clause 3 (10), the Governor has no power under the Amending Order in Council of March 21, 1916, to make regulations, and by such regulations to make provisions with regard to matters coming within, *inter alia*, "Trading." It is said that the Defence of the Colony Regulations of May, 1919, made by the Governor are regulations under the Amending Order in Council of 1916, and that by those regulations he has made provision for the appointment of a Food

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Controller and in respect of his powers and duties, one of which was to fix maximum price of food, and that, therefore, the Defence of the Colony Regulations and the regulation of the Food Controller are *intra vires*. This will be a sound argument if the same Amending Order in Council did not specifically direct that the Principal Order in Council, including 3 (10), should be in force, and that the Amending Order should be construed and read as one with the Principal Order. Then, there are two apparently inconsistent Orders. The inconsistency is only apparent. They can be reconciled with each other if a reasonable construction can be placed on each of those Orders according to accepted canons of legal interpretation. The later powers given to the Governor are general, and will not necessarily affect or do away with the special power conferred on him by Order 3 (10). "When in the same or subsequent Statute a particular enactment is followed by a general enactment, and the latter taken in its most comprehensive sense would over-rule the former, the particular enactment is operative, and the general enactment is taken to affect only those other parts of the particular enactment to which it may properly apply." The general enactment affects all matters in respect of "Trading" other than fixing maximum price of any article of food. The other principle that penal enactments should be strictly construed and in favour of the accused applies. The later Order in Council enhances the punishment, and in cases of doubt effect should be given to the earlier enactment imposing a lesser punishment.

Garvin, S.-G. (with him *Akbar, C.C.*, for the Crown.—By Order in Council of October 26, 1896, the Governor was empowered to do certain acts in connection with the Defence of the Colony. These acts were to be done by him alone by Proclamation. In 1914, at the outbreak of the war to provide for emergencies, the Defence of the Realm Act (5 Geo. V., c. 8) was passed, by which His Majesty in Council was empowered to legislate by regulations. At this time, to bring the Colonial law on the subject into line with the English law, the Order in Council of March 21, 1916, was issued, by which the Governor was empowered to make regulations for the Defence of the Colony. This Order in Council was clearly designed to enlarge the Governor's powers, and it gave him the largest conceivable powers to legislate by regulations. See *The King v. Halliday*.¹ Power to legislate is given to the Governor, but it is not necessary for him to legislate until circumstances arise. The Governor has a two-fold power, *i.e.*, to do certain acts himself by Proclamation as well as to legislate by regulations. Both powers could exist together. They are not inconsistent. By virtue of the special enactment in the Amending Order any provision of law of the Colony which may be inconsistent with any regulation

¹(1917) 86 L. J. K. B. D., Part II., Page 1119.

made by the Governor shall be suspended and of no effect during the continuance of such regulation.

Even clause 10, if inconsistent, must yield to the regulations made under the Amending Order of 1916. But it is not inconsistent with the regulations in question.

The office of Food Controller need not be created by Statute. The Governor may by regulation confer powers on any officer by name without even creating the office of Food Controller.

A. St. V. Jayawardene, in reply.—In the English Act there is no provision similar to sub-clause (10) of Order in Council, October 26, 1896. The later Order in Council is to be read with the earlier one, and clause 3 (c) of the later one provides that any law inconsistent with the regulations made by the Governor shall be suspended and of no effect. This provision will not have the effect of suspending sub-clause (10) as sub-clause (10) comes later and gives specific powers to the Governor, which he cannot exceed. (*Ilber's Methods and Forms of Legislation*, p. 250, and *Craies on Statute Law*, p. 218.)

As special provisions controlled general provisions, any regulation inconsistent with sub-clause (10) is void. (*See Ilber's Methods and Forms of Legislation*, p. 250, and *Craies on Statute Law*, p. 218.)

Cur. adv. vult.

April 29, 1920. ENNIS J.—

This is one of seven appeals in which the same point of law has been referred to the decision of the Full Court.

The accused was charged with having sold on December 25, 1919, twenty bags of Australian flour above the controlled price, in contravention of the Food Controller's order published in the *Gazette* of July 1, 1919, made under Regulation 1 of the Defence of the Colony Regulations, 1919, published in the *Gazette* of May 9, 1919, an offence under Regulation 3 of those regulations.

The point for decision is whether the Food Controller's order fixing the price at which Australian flour should be sold is *ultra vires* ?

By clause 3 (1) of the Order in Council dated October 26, 1896, which came into operation in Ceylon by Proclamation of August 5, 1914, every person in the Colony was made subject to military law, and the Army Act was applied to them, subject to the other provisions of the Order. Clause 3 (10) contained a provision enabling the Governor by Proclamation to fix the maximum price for which an article of food might be sold by retail, and declaring that any person selling at a higher price than the price so fixed should be deemed guilty of an offence against the Order, and liable to a fine not exceeding £5, or to imprisonment not exceeding three months.

No Proclamation was made under clause 3 (10).

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By an Order in Council of March 21, 1916, which was proclaimed in the Colony on June 1, 1916, a new clause was substituted for clause 3 (1) of the Order in Council of 1896, enabling the Governor to make regulations for securing the public safety and defence of the Colony, and providing that a breach of such regulations should be punishable with fine not exceeding £100, or imprisonment, with or without hard labour, for a term not exceeding six months, or both; and further providing that "any provision of any law of the Colony which may be inconsistent with any regulation made by the Governor under this sub-clause shall be suspended and of no effect during the continuance of such regulation." The Order in Council of 1916 gave the Governor power to delegate to the naval or military authorities in the Colony any of his powers under the Principal Order.

On May 9, 1919, "The Defence of the Colony Regulations, 1919," were made, authorizing the Food Controller to make orders regulating, *inter alia*, the sale and purchase of any article (including orders providing the fixing of maximum and minimum prices). A notification (made on the same day) was published appointing Mr. Horsburgh to be Food Controller.

No regulation or law constituting the office of Food Controller has been cited to us, but it is conceded for the purpose of this appeal that Mr. Horsburgh is not either personally, or as Food Controller, a naval or military authority, to whom the Governor might, under the Order in Council of 1916, delegate his powers under the principal Ordinance.

The argument for the appellant was that the Governor alone was empowered under the Order in Council of 1896 to fix the prices at which an article of food could be sold by retail, and that any delegation of his powers other than to a naval or military authority was *ultra vires*. It was further contended that any regulation made by the Governor under his powers to make regulations for the safety and defence of the Colony which were inconsistent with the special provisions of the Order in Council of 1896 would be *ultra vires*; and that the Defence of the Colony Regulations, 1919, in so far as they enhance the punishment for the offence of selling flour by retail over the controlled price and authorize the price to be fixed otherwise than by Proclamation, and by a person other than the Governor, were inconsistent with the provisions of clause 3, sub-clause (10), of the Order in Council of 1896, and therefore *ultra vires*.

A long argument was addressed to us on the question as to whether or not there is any inconsistency, which I do not think it necessary to go into, as the Order in Council of 1916 expressly provides that the provision of any law, if inconsistent with a regulation made for the safety and defence of the Colony, shall be suspended and of no effect during the continuance of the regulation, and the provision in clause 3, sub-clause (10), if consistent would be suspended.

The Order in Council of 1916, while leaving sub-clause (10) in the Principal Ordinance, added a new power to make regulations for the defence of the Colony, and provided that this new power could be exercised, notwithstanding any law to the contrary, by the express provision that any such law should be suspended and of no effect.

The power to make regulations for the safety and defence of the Colony is wide enough to cover the fixing of prices (on a sale by wholesale as well as retail). A similar power was so exercised in England, and no case has been cited to us where the scope of the power in this respect has been challenged, while the case of *The King v. Halliday*¹ was cited to show how wide the scope of the power is.

The fact that both powers are enacted in the same clause of the same Order in Council, with the provision that regulations made under the power to make regulations are to push all law to the contrary aside, does not, in my opinion, leave any room for the application, in favour of sub-clause (10), of the rule of law that a special provision is to control a general provision.

I would, therefore, hold that the order of the Food Controller of July 1, 1919, fixing the price at which Australian flour may be sold in Colombo is not *ultra vires*. The other points raised in the appeal are left for hearing and decision by a Judge sitting alone.

DE SAMPAYO J.—

This is one of several cases in which a point of law of vital importance has been referred to the Full Bench for decision. It has reference to the legal validity of the orders of the Food Controller in Ceylon fixing the prices of certain articles of food. In the present case the accused was charged with having sold twenty bags of American flour at a price higher than the price fixed by the Food Controller under Regulation 1 of the Defence of the Colony Regulations framed by the Governor and published in the *Government Gazette* of May 9, 1919. The contention on behalf of the accused is that Regulation 1 is *ultra vires*. I am bound to express the indebtedness of the Court to counsel on both sides, who argued this question with great ability and fullness. In order to make the matter clear, it is necessary to state in some detail the history of the regulation. On October 26, 1896, the Queen in Council made an Order applicable to Ceylon and certain other Colonies. Clause 3 of that Order contained several sub-clauses. By sub-clause (1) every person within the Colony was made subject to military law for the purposes of the Army Act, and provision was made for the trial of offences punishable under the Army Act. The Governor was empowered by sub-clauses to do certain acts in connection with the defence of the Colony. Of these acts, the one most

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¹ (1917) 86 L. J. K. B. D., Part II., p. 1119.

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relevant to the present question is that authorized by sub-clause (10), which is in these terms:—

“ The Governor may by Proclamation prescribe the maximum price for which articles of food may be sold by retail, and any person who after such Proclamation and until it shall have been revoked shall sell any article of food at a higher price than the price so prescribed shall be deemed guilty of an offence against this Order, and shall on conviction thereof be liable to a fine not exceeding £5, or an equivalent sum in the case of a Colony having a silver currency, or to imprisonment for a term not exceeding three months. ”

This Order in Council had no immediate emergency in view, and it was not proclaimed in Ceylon until August 5, 1914, when the war recently concluded broke out. In England the Defence of the Realm Act (5 George V., c. 8) was passed on November 27, 1914, by which the King in Council was empowered “ to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty’s Forces and other persons acting on his behalf. ” In order to bring the Colonial law on the same subject into line with the English “ Defence of the Realm Act, ” the old Order in Council of October, 1896, called “ The Principal Order, ” was amended by Order in Council of March 21, 1916, by which, in place of the old clause 3 (1), the following provision was substituted:—

3 (1) (a) “ The Governor may make regulations for securing the public safety and the defence of the Colony, and as to the powers and duties for that purpose of the Governor and the officers of any of His Majesty’s Naval or Military Forces and other persons acting on their behalf, and in particular may by such regulations make provisions with regard to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

- (1) “ Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications, and means of communication.
- (2) “ Arrest, detention, exclusion, and deportation.
- (3) “ Control of the harbours, ports, and territorial waters of the Colony, and the movements of vessels.
- (4) “ Transportation by land, air, or water, and the control of the transport of persons and things.
- (5) “ Trading, exportation, importation, production, and manufacture.
- (6) “ Appropriation, control, forfeiture, and disposition of property, and the use thereof. ”

“ and may by such regulations authorize the trial by Courts Martial or Civil Courts, or in the case of minor offences by Courts of summary jurisdiction of persons committing offences against the regulations, and the infliction by such Civil Courts of the following punishments, that is to say:—

- (a) “ In the case of Courts of summary jurisdiction, imprisonment, with or without hard labour, for a term not exceeding six months, or a fine not exceeding £100, or both such imprisonment and fine.
- (b) “ In the case of other Courts, penal servitude for life or any less punishment, or in the case of offences where intention of assisting the enemy is proved, death, or any less punishment, ” &c.

Finally, clause 4 provided that the Governor may, if he thinks fit, delegate to the naval or military authorities in the Colony any of his powers under the Principal Order.

It is to be observed that the Defence of the Realm Act gives to the King, and the Order in Council to the Governor, unlimited powers to make regulations for securing the public safety and the defence of the realm or Colony. Under “ The Defence of the Realm Act, ” the King issued a regulation providing that the Food Controller (whose office was created by the New Ministries and Secretaries Act, 1916) may—

“ Make orders regulating or giving directions with respect to the production, manufacture, treatment, use, consumption, transport and storage, distribution, supply, sale or purchase of, or other dealing in, or measures to be taken in relation to any article (including orders providing for the fixing of maximum and minimum prices) where it appears to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country.”

That this regulation as regards the fixing of prices is justified by the power conferred on the King to make regulations for securing the public safety and the defence of the realm has never been questioned in the many cases in which persons have been prosecuted for breach of this regulation, and which have come up for consideration before the superior Courts in England. The only case, so far as can be ascertained, in which the validity of any regulation has been challenged is *King v. Halliday*.¹ That case was concerned with a regulation relating to internment of any person by order of a Secretary of State wherever it appeared to him expedient to make such order. It was there held, notwithstanding the fundamental principles of personal liberty secured by Magna Charta and the Habeas Corpus Acts, that the regulation was not *ultra vires*. It was pointed out

¹ (1917) 68 L. J. K. B. D., Part II., p. 1119.

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that Parliament, whose authority was paramount, could authorize the King to make such a regulation, and that the only question was one of construction. Similarly, in the case of a Crown Colony, the King in Council, by virtue of his power of prerogative legislation, could authorize the Governor to make such a regulation. Regulation 1 made by the Governor is in terms identical with the regulation issued by His Majesty under the Defence of the Realm Act, and must be held to be one within the scope of the Order in Council, that is to say, for securing the public safety and the defence of the Colony. It is true that at the date of the regulation the war had terminated and the Colony was free from external danger, but the consequences of war on national life and safety are by no means over even now. The Order in Council has not been withdrawn, and in view of the serious situation created by the scarcity of food, the suppression of profiteering must reasonably be taken to have been required for public security in Ceylon. Indeed, I think it is sufficient if the Governor thought it was so required. In my opinion, therefore, so far as clause 3 (1) (a) of the Amending Order is concerned, the regulation is good and valid. But, in view of sub-clause (10) of the Principal Order empowering the Governor himself by Proclamation to prescribe the maximum price for which any article of food might be sold by retail, it was contended that this special provision, prescribing as it did a particular procedure and penalty, prevented the Governor from making a regulation for fixing prices by any other person than himself or otherwise than by Proclamation, and that if he wished to delegate his powers in that respect, he must delegate it to the naval or military authorities, and not to the Food Controller. The reply of the Solicitor-General was that the acts authorized to be done by the Governor under sub-clause (10) and other sub-clauses of clause 3 of the Principal Order were administrative acts, whereas clause 3 (1) (a) of the Amending Order conferred on the Governor the power of legislation by way of regulations, and that the authority to do administrative acts and the authority to legislate were two different things, and were not inconsistent with each other. I think this is a sound argument. The making of Regulations by the Governor is an instance of the well-known form of legislation by devolution, and regulations when made will take effect as if they were contained in the Order in Council itself. It is noticeable that most of the classes of subjects in respect of which regulations were authorized to be made are also matters in respect of which the Governor was empowered to act directly. It was with some force asked, why were sub-clause (10) and other sub-clauses left untouched by the Amending Order, which was to be read as one with the Principal Order, if regulations were to cover the same ground? The answer was—and I think it was a good answer—that they were necessarily left in, because the Governor might not make regulations

at once, and in the meantime a sudden emergency might arise requiring the Governor to take prompt administrative action. As it happens, the regulation in question was not made by the Governor till three years after the Amending Order was proclaimed in Ceylon. Or the Governor might consider that regulations were not quite necessary in the circumstances of the Island, and that his own interventions in particular cases were adequate. The fact is that the exercise of his two-fold power in this respect is intended to be discretionary and not imperative, and alternative and not simultaneous. I may say, further, that, in my opinion, Regulation 1 does not constitute a delegation to the Food Controller of the Governor's authority under sub-clause (10) to prescribe the prices of articles. It is rather an exercise of his authority under clause 3 (1) (a) of the Amending Order to make regulations in his absolute discretion for securing the public safety and the defence of the Colony. For that clause empowered the Governor to make regulations as to the powers and duties not only of himself, but of "other persons acting on his behalf," and the Food Controller whom the Governor appointed is a person acting on the Governor's behalf. The difference in the penalties for acts of the same kind appeared also to present some difficulty. The penalty for the breach of any order of the Governor prescribing maximum prices was to be a fine of £5 or imprisonment for three months, whereas the penalty for the breach of the order made by the Food Controller on the same subject in pursuance of the regulation would be a fine of £100, or imprisonment for six months, or both such fine and imprisonment. This, however, was probably intended. The Principal Order was made in the peaceful days of 1896, but when the war began there arose circumstances of grave necessity for dealing with the same acts more severely.

If, however, any conflict is thought to exist between sub-clause (10) of the Principal Order and clause 3 (1) (a) of the Amending Order, the effect of clause 3 (1) (c) of the latter Order has to be taken into account. For it is thereby declared that—

"Any provision of any law of the Colony which may be inconsistent with any regulation made by the Governor under this sub-clause shall be suspended and of no effect during the continuance of such regulation."

When Regulation 1 in question was made, sub-clause (10) of the Principal Order was part of the law of the Colony, and by operation of the above provision became suspended and of no effect. It was however, contended that as "any law" could not include any provision of the order itself, and as the Amending Order was to be read as one with the Principal Order, sub-clause (10) of the Principal Order could not be said to be suspended by the making of the regulation under the Amending Order. I am unable to accept this

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contention. The Principal Order was in operation ever since it was proclaimed in August, 1914, and the fact that the Amending Order was to be read as one with it did not make sub-clause (10) any the less a law in operation at the time of the making of the regulation.

For these reasons I am of opinion that Regulation 1 of the Defence of the Colony Regulations, 1919, is not *ultra vires*, and that the order of the Food Controller for breach of which the accused has been prosecuted, is valid and operative.

Loos A.J.—

This case is one of several which are before this Court in which a point of law of considerable importance and some interest is raised, viz., the validity of a regulation which purports to have been made by the Governor under the powers conferred on him by clause 3 (1) (a) of the Order in Council dated March 21, 1916, which amends the Order in Council dated October 26, 1896, and is to be construed and read as one with the latter order in connection with the fixing of a maximum price at which articles of food may be sold.

The clause in question empowers the Governor to make regulations generally for securing the public safety and the defence of the Colony, and in particular with regard to certain specific matters set out in the clause, and by sub-clause (c) thereof provides that any provision of any law of the Colony which may be inconsistent with any regulation so made by the Governor shall be suspended and of no effect during the continuance of such regulation.

It is not disputed that the widest powers of making regulations have been conferred on the Governor by the Order in Council of March 21, 1916, for securing the public safety and the defence of the Colony, nor is it seriously disputed, I think, that those powers would have covered the making of the regulation in question; but it is contended, and that appears to be the main contention for the defence that so long as clause 3 (10) in the Order in Council of October 26, 1896, remains in force, it is only the Governor himself who can prescribe the maximum price for which any article of food may be sold by retail; that the only method in which it can be prescribed is by Proclamation; and that the only penalty for a breach is a fine not exceeding £5, or imprisonment for a term not exceeding three months.

The regulation made by the Governor delegates the fixing of the maximum price to the Food Controller, and by notification, and provides a penalty of a fine not exceeding Rs. 1,000 or imprisonment for a term not exceeding six months, or of both fine and imprisonment, and it is also argued that it cannot have been intended, and that it is unreasonable to suppose, that the Order in Council of March 21, 1916, intended to confer on the Governor power to make a regulation whereby the penalty for a breach of an order made by

the Food Controller appointed by the Governor is greatly in excess of that for a breach of a Proclamation made by the Governor himself.

So far as that contention is concerned, it is only necessary to refer to clause 3 (1) (c) in the Order of Council of March 21, 1916, already referred to, which suspends any provision of any law of the Colony which may be inconsistent with any regulation made under that Order in Council during the continuance of such regulation.

It is argued, however, that the provisions of clause 3 (1) (c) would only apply to a regulation which was not itself *ultra vires*, and that it is not competent to the Governor to make a regulation which overrides a direct provision in the Order of Council itself enacting that he shall prescribe the maximum price at which any article of food shall be sold by retail, the procedure to be adopted, and the penalty for a breach.

It appears to me that in interpreting the powers conferred by the Order in Council of March 21, 1916, it is necessary to take into consideration the conditions prevailing at the time of the making of the Order in Council, and the objects intended to be attained by making it.

In March, 1916, the great war had been in progress for considerably over a year, there was the greatest uncertainty as to what its duration would be, and the British Empire was undoubtedly considered to be in the gravest danger, and it was thought necessary to confer on His Majesty the King an unfettered freedom to take such action as was regarded to be requisite for the public safety and the defence of the realm immediately, without the delay consequent on legislation by Parliament; in fact, to confer on the King power to legislate in such manner as he thought proper.

Those same powers have been conferred by His Majesty on the Governor for the same purpose and reason, viz., for securing the public safety and the defence of the Colony; and the intention and object of the Order in Council of March 21, 1916, was to confer on the Governor similar power of legislating through the medium of regulations to be made under that Order, and such regulations must therefore be given effect to in the same way as legislative enactments.

That Order in Council empowers the Governor, for the purpose of securing the public safety and the defence of the Colony, to make regulations for the exercise of much greater powers than any already possessed by him, and those powers cannot be interpreted as having been in any way restricted by any existing provision of law. The greater powers must include the less, and the fact that clause 3 (10) of the Order in Council of October 26, 1896, would appear to confer certain powers on the Governor cannot, in view of the Order in Council of March 21, 1916, preclude the exercise by the Governor of the greater powers conferred on him by the later Order, and,

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therefore, in my opinion, clause 3 (10) of the former Order in Council cannot affect the validity of a regulation made under the later Order in Council.

If clause 3 (10) is not inconsistent with the regulation now in question, the regulation is innocuous, and if it is inconsistent, then it is to be regarded as suspended and of no effect during the continuance of the regulation in terms of clause 3 (1) (c) of the Order in Council of March 21, 1916.

For the above reasons I would hold that the regulation is not *ultra vires*.

