REGULATION, PROHIBITION AND SUBDELEGATION

In *Wilton* v. *Mt Roskill Borough Council* [1964] N.Z.L.R.957, Hardie Boys J. had before him the question of the *vires* of a bylaw in these terms:

> No person shall establish or maintain any hospital, home, or boarding kennel for dogs or cats, or keep for a period of 14 days or more on any premises within the local authority's area 3 or more dogs or 3 or more cats of the age of 3 months or more unless such person shall be the holder of a licence for such purpose from the local authority.

This bylaw effects a prohibition coupled with a dispensing power, i.e. "a power to suspend the obligation of a law, or to excuse from obedience to its commands.": *Country Roads Board* v. *Neale Ads Pty Ltd.* (1930) 43 C.L.R.126, 134. Examples are licences, permits, or consents giving dispensation from a prohibitory regulation or bylaw.

The Council invoked the following provisions as authorising the bylaw:

1. Section 386(32) of the Municipal Corporations Act 1954 which gives the Council power to make bylaws:
   Regulating or licensing the keeping within the district of any animals, reptiles, birds, or bees, and prohibiting the keeping thereof if the existence or keeping thereof within the district is, or in the opinion of the Council is likely to become, a nuisance or injurious to health. Any such bylaw may apply in respect of animals, reptiles, birds, or bees within the district at the time of the making of the bylaw.
2. Section 64(1) of the Health Act 1956 which reads:
   Regulating, licensing, or prohibiting the keeping of any animals in the district or in any part thereof.

   The bylaw was held to be valid.

The question in issue was one which is of importance because of the existence of many statutes which authorize the making of bylaws, or regulations, for the purpose of regulating, controlling, governing, licensing, restraining, or prohibiting certain activities (or some combination of these purposes). There have been many decisions on the validity of particular exercises of such powers, and there will be more. The writer proposes, therefore, to survey in some detail earlier decisions in this field, and to examine the *Wilton* decision against that background.

Four propositions, as set out hereunder, are firmly established by the authorities:

Proposition 1. The power, or a combination of the powers, to merely regulate, control, govern or restrain an activity, (hereafter referred to as "regulate" etc.), with no express power to prohibit it, does not authorize a *total* prohibition of that activity, even though such prohibition is coupled with the grant of a dispensing power vested, for example, in the local authority or its officers: *Melbourne Corporation* v. *Barry* (1922) 31 C.L.R.174 (power to regulate traffic and processions; bylaw prohibiting street processions without the

consent of the Council *held* invalid); *Chandler & Co.* v. *Hawkes Bay County* [1961] N.Z.L.R.746. The basis of this rule was expressed by the Privy Council in *Toronto Municipal Council* v. *Virgo* [1896] A.C.88, 93 in these words:

> A power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.

Proposition 2. The power referred to in proposition 1 does, however, support the *partial* prohibition of the activity which is to be "regulated" etc.: *Slattery* v. *Naylor* (1888) 13 App.Cas.446 (P.C.); *Hazeldon* v. *McAra* [1948] N.Z.L.R.1087 (power to regulate the *use of reserves;* bylaw prohibiting public meetings or addresses thereon *held, intra vires.*); *Hookings* v. *Director of Civil Aviation* [1957] N.Z.L.R.929 in which case Turner J. said, at 934:

> While a power to regulate will not authorize a total prohibition of the thing which is to be regulated, nevertheless, it has been truly said that all regulation imports some degree of prohibition, and that, in regulating the whole, it may be necessary to prohibit a part only.

This is a very old doctrine, for in 1790 Lord Loughborough C.J., referring to trade regulations, said that "every regulation is more or less a restraint.": *Butchers' Co.* v. *Morey* (1790) 1 H.Bl.370, 374; 126 E.R.217, 220.

We turn now to that aspect of *ultra vires* which is expressed in the maxim, *delegatus non potest delegare.* A body which has delegated authority cannot further delegate such authority unless expressly authorized so to do, or such authority is implicit in the power granted to it. While this rule against subdelegation is of more general application, New Zealand decisions, for the most part, have dealt with the exercise of regulation or bylaw-making power by the Governor-General or local authorities (Parliament's delegates) respectively. In cases not beset by any regulation/prohibition question as outlined above, the application of the maxim in New Zealand has established the two following rules.

Proposition 3. Where rules or standards which are to guide the discretion vested in the subdelegate are not prescribed in the regulation (or bylaw[1], as the case may be) the instrument conferring the power (the regulation or bylaw) is *ultra vires,* and so, *a fortiori,* is any exercise of the purported power by the subdelegate: *Geraghty* v. *Porter* [1917] N.Z.L.R.554. (Governor in Council authorized to make regulations as to the mode in which registration plates were to be affixed to vehicles. His regulation provided that they were to be fixed in such manner as the *registering authority,* viz. local authorities, might require, but provided no standards by which that authority was to exercise its discretion. A registering authority passed a bylaw prescribing the manner in which registration plates were to be fixed in its area. *Held* 1. The regulation was *ultra vires,* since it purported to *transfer* the Governor's delegated power to legislate, i.e. his power to establish general rules. 2. The exercise of the transferred power, the bylaw, was *a fortiori* bad.)

So long as the power which is subdelegated can properly be described as a legislative power, a regulation conferring such power

1 With regard to bylaws, a good deal of what follows must be read subject to the statutory provisions referred to in note 4 (post).

is not saved by s.2(2) of the Statutes Amendment Act 1945:[2] *Hawke's Bay Raw Milk Producers' Co-op Co. Ltd* v. *New Zealand Milk Board* [1961] N.Z.L.R.218 (C.A.) (Governor-General's power to fix, by regulation, the price of milk, is a legislative power. Regulation delegating this power to a Minister, containing no basis or formula upon which he was to exercise such power, *held ultra vires.*)[3]

Proposition 4. Where, however, the delegate (the Govenor-General or the local body) defines the standards which are to guide the exercise of the subdelegate's discretion the further delegation is valid. In fact the legislative power, the power to prescribe general rules, *has* been exercised in the regulation; what is reposed in the subdelegate can properly be characterized as an "administrative discretion", to be exercised within the limits and in accordance with the criteria contained in the regulation: *Mackay* v. *Adams* [1926] N.Z.L.R.518, (regulation fixing speed limits and conferring on local authorities a discretion to extend the limits *by a prescribed margin and subject to prescribed conditions held* valid.) As Sim J., for the Full Court, said in *Godkin* v. *Newman* [1928] N.Z.L.R.593, 596:

> It is not necessary, we think, for the Governor-General himself to make the actual classification [of roads and streets]. He may entrust the duty to others; but if he does that *he must first determine the basis on which the classification is to be made.* (emphasis added.)

In *Hookings* v. *Director of Civil Aviation* [1957] N.Z.L.R.929, Turner J., while purporting to follow *Mackay* v. *Adams,* seems to have extended proposition 4. In *Hooking's* case the regulation *itself* contained no guidance for the recipient of the dispensing power, but His Honour was prepared to import criteria for its exercise (viz. "the safety of aircraft and of persons . . . carried therein") from the section *of the Act* which empowered the making of regulations.

We now turn to a more controversial field, one directly relevant to the *Wilton* decision. The issue for consideration is whether or not the principle in *Mackay* v. *Adams* (*ante,* proposition 4) applies to the validity of a dispensing power where there is a *prohibition* of an activity. If the power is merely to *"regulate"* etc. but the activity is totally prohibited, proposition 1 governs the question, and, as stated, the delegation of a dispensing power will not save the day.

The issue arises when either (A) the power to prohibit, *as exercised,* is implicit in a power to "regulate" etc. (see proposition 2 *ante*),

or (B) the empowering section itself *expressly* authorises prohibition (as in the *Wilton* case),

and in either case the prohibition is made subject to a dispensing power.

We will now examine the authorities before attempting a formulation of propositions to cover these two situations.

As to (A): I Strong support can be found for the proposition that standards must be prescribed before the power can be said to be validly exercised. To take the case of regulations[4] the argument

2 "No regulation shall be deemed to be invalid on the ground that it delegates to or confers on the Governor-General or on any Minister of the Crown or on any other person or body any discretionary authority."

3 Whatever else might be meant by the phrase "any discretionary authority" this case holds that it does not mean "any legislative power."

4 Special considerations apply to bylaws: s.13 of the Bylaws Act 1910, and s.390(b) of the Municipal Corporations Act 1954, as to which see *post.*

is that the regulation *itself* must "regulate" the activity, in the sense of subjecting that activity to rules. If standards are not prescribed, it is the subdelegate, the repositee of the dispensing power, and not the regulation itself, which "regulates' 'the activity. In *F. E. Jackson & Co. Ltd.* v. *Collector of Customs* [1939] N.Z.L.R.682 Callan J. held the Import Control Regulations 1938 to be *ultra vires*. The Governor-General, by these regulations, prohibited all imports into New Zealand without the consent of the Minister of Customs, but formulated no principles to guide the exercise of the Minister's discretion. Neither empowering section relied on permitted absolute prohibition of all imports. With respect to the argument based on s.10 of the Reserve Bank Amendment Act 1936, Callan J. accepted the first of the following alternatives, which are set out at 732:

> Either Parliament meant that the Governor-General in Council should regulate these matters by the regulations which it empowered him to make, or it meant that the Governor-General in Council might entrust them, unregulated by him, to the discretionary control of any person or body whom he thought fit.

The second alternative, he held, involved unauthorized delegation of delegated legislative power. The section did not allow the Governor-General in Council, instead of regulating the field, to hand it over to be regulated by someone else:

> The attempted assumption or bestowal of power to deal with all cases in a certain field by a series of particular exercises of discretion is not a valid exercise of a power to make regulations concerning that field. (*ibidem* 735.)

To adopt an analogy from constitutional law,[5] Parliament has expressly prescribed the "manner and form" in which, and by which, the field is to be "regulated", (in the sense of subjected to rule), namely, in and by a statutory regulation. In cases such as *F. E. Jackson & Co. Ltd* v. *Collector of Customs*, and those referred to in proposition 3 (*ante*) the "rules", if there are to be any, are left for the subdelegate to prescribe, for example, by circulars or instructions,[6] or, as in *Geraghty* v. *Porter* (*ante*), by the passage of a bylaw. In such case the rules are prescribed by an agency and by a method other than that which Parliament has prescribed. If there are to be no "rules" then the subdelegate can only exercise his discretion in relation to each particular application as it arises, in which event there is no "regulation" of the field, but merely a series of independent administrative decisions. The position, it seems, is unaffected by the fact that the power of dispensation is vested in the person or body who is empowered to "regulate" etc.[7]

Hooking's case (*ante*) suggests that, where a dispensing power is conferred on a subdelegate, (the delegate's power being to "regulate"

5 Section 5 of the Colonial Laws Validity Act 1865 (U.K.); *Attorney-General for New South Wales* v. *Trethowan* [1932] A.C.526 (P.C.); *Harris* v. *Minister of the Interior* [1952] 2 S.A.428, [1952] 1 T.L.R.1245; and see *The Bribery Commissioner* v. *Ranasinghe* [1965] A.C.172 (P.C.).

6 As to which see *Blackpool Corporation* v. *Locker* [1948] 1 K.B.349, (C.A.); *Jackson Stansfield & Sons* v. *Butterworth* [1948] 2 All E.R.558 (C.A.).

7 As to regulations, see *F. E. Jackson's* case (*ante*) 735 (obiter); as to bylaws see *Staples & Co.* v. *Mayor of Wellington* (1900) 18 N.Z.L.R.857 (which, however, was decided at a time when neither of the provisions referred to in note 4 (*ante*) was in the statute book); and *Melbourne Corporation* v. *Barry* (1922) 31 C.L.R.174, 208 where Higgins J. speaks of a delegation from the bylaw making Council to the ordinary meeting of Council.

etc.), two processes are involved in determining the validity of the regulation:

(i) A finding that the prohibition is only partial, and thus regulatory in essence (proposition 2, *ante*).

(ii) An independent finding that the dispensing power is not bad for subdelegation, i.e. that because standards for its exercise are prescribed, the case falls within proposition 4.

Adopting the language of Sachs J. in *Commissioners of Customs and Excise* v. *Cure & Deeley Ltd.* [1962] 1 Q.B.340 to our (different) situation, this double process may be described as a "two-tier" approach to the question of the *vires* of the regulation.

II The by-law cases in New Zealand also follow this two-tier approach, but here a finding at the "second tier" is simplified by the statutory provisions referred to in note 4(*ante*). In *Hazeldon* v. *McAra* (*ante*, proposition 2) the Judges in the Full Court, after first deciding that the prohibition was merely partial, having regard to the field which the bylaw was authorized to "regulate", then examined the validity of a power to dispense from the prohibition, which the bylaw vested in the Town Clerk. It was held that the dispensing power was authorized by s.13(1) of the Bylaws Act 1910, which O'Leary C.J. analysed in these terms (1098).

> . . . . No by-law shall be invalid because the by-law (i) leaves any matter or thing (ii) to be determined, applied, dispensed with, ordered or prohibited (iii) by any officer of the local authority, [or, one must add, by the local authority itself, or by any other person].

This provision and the comparable provision in the Municipal Corporations Act 1954[8] is much wider than s.2(2) of the Statutes Amendment Act 1945 (note 2, *ante*). It is true that the discretion left to the subdelegate must not be so great as to be unreasonable[9] (s.13(2), and see *Hanna* v. *Auckland City Council* [1945] N.Z.L.R.622) but all the Judges in *Hazeldon* v. *McAra* agreed that that was not the case before them. Further s.13 must be construed in the same way that bylaws themselves should be construed, that is, benevolently: *Bremner* v. *Ruddenklau* [1919] N.Z.L.R.444 (F.C.), 461 (Chapman J.), 470 (Hosking J.) It appears that, apart from the question of the reasonableness of the discretion conferred, the absence of guide lines in the bylaw is not relevant. On the other hand, their absence might, in some cases, bear on the question of reasonableness.

Putting aside the bylaw cases we are now in a position to postulate, somewhat tentatively, a fifth proposition, compounded in effect, of propositions 2, 3 and 4.

Proposition 5. (*Semble*) Where the power vested in Parliament's delegate is merely to "regulate" etc., the imposition of a partial prohibition coupled with a dispensing power is valid if, and only if, standards by which the subdelegate is to exercise his discretion are prescribed, or (*quaere*) are ascertainable from an examination of the empowering section.

8 Section 390(b) which reads: A bylaw may leave any matter or thing to be determined, applied, dispensed with, prohibited, or regulated by the Council [only] from time to time by resolution, either generally or for any classes of cases, or in any particular case.

9 No such limitation is expressed in relation to the section quoted in note 8, but it is submitted that the Court could, in an appropriate case, fall back on its general power to declare any bylaw invalid on the ground of unreasonableness: s 17 Bylaws Act 1910.

The tentative nature of this proposition is due to the possibility that some of the decisions which support the sixth proposition (*post*), notably *Conroy* v. *Shire of Springvale & Noble Park*, and *possibly* the *Ideal Laundry* case, both of which are discussed under situation (B), might more properly be regarded as coming within situation (A).

(B): Turning now to the situation where Parliament's delegate is *expressly* empowered, not only to "regulate" etc., but also to prohibit; or indeed, to prohibit *simpliciter*.

I. There is some support for the view that what we have called the "manner and form" argument (note 5, *ante*) applies equally to this case. In *Melbourne Corporation* v. *Barry* (*ante*) Higgins J. (*obiter*) said, at 208:

> Even if it be assumed that s.197(22) [which authorized bylaws "regulating traffic and processions"] sanctions a by-law prohibiting a procession because of its nature or purpose, [*Quaere:* he *could* be referring to a situation (A) case] the prohibition must be by by-law, not by the council acting at an ordinary meeting, and by the chance majority at that meeting.[10]

It is clear that Callan J. in *F. E. Jackson's* case (*ante*), though also speaking *obiter*, supported the view that, even though there be express power to prohibit an activity, prohibition subject to a dispensing power without standards is bad for subdelegation. Callan J's *ratio decidendi*, insofar as the defendant relied on s.46(1) of the Customs Act 1913 as justifying the Regulations, was that a power to prohibit the importation of *any* goods could not support the prohibition of *all* goods. But even if it had, he was not prepared to accept the argument that the requirement that a licence to import in each particular case must be obtained from the Minister (a subdelegate) could be a "condition" to which the prohibition was subject.[11] He said (at 707):

> . . . . the so-called "condition" is not, in my opinion, a condition at all, but is an attempt to hand over to someone else, to whom Parliament entrusted no powers under the section, a power which the Customs Act does not confer on anyone—namely, a power to select for prohibition or reduction not merely classes of goods, but particular importing transactions.[12]

II. This reference to prohibition subject to a condition leads us in to a strong line of authority which conflicts with Callan J's approach. Stated briefly, the authorities which we will now examine hold that if an express power of prohibition exists, the power may be exercised either absolutely, by imposing a blanket prohibition *simpliciter*, or conditionally, by the bestowal of a dispensing power *with or without standards*.

An early decision to this effect is *Williams* v. *Weston-super-Mare Urban District Council* (1907) 98 L.T.537 (affirmed, (1910) 103 L.T.9

10 But cp. the view of Isaacs J. who, with Higgins J., formed the majority in holding the bylaw invalid. He said, (at 200): "The real truth is that the Council's by-law is framed exactly as if the word 'prohibiting' were used in the sub-section instead of the word 'regulating'; and that is, of course, a fundamental error and cannot be justified." It appears that had there been express power to prohibit processions, Isaacs J. would have upheld the bylaw. Knox C.J. dissented, on rather special grounds, which have little to commend them.

11 Section 46(7) read: The powers conferred on the Governor-General by this section shall extend to authorize the prohibition of the importation of goods either generally or from any specified place or person, and either absolutely or so as to allow the importation thereof *subject to any conditions or restrictions*.

12 Distinguishing *Taratahi Dairy Co. Ltd.* v. *Attorney-General* [1917] N.Z.L.R.1.

(C.A.)), but the view receives its clearest statement in *Country Roads Board* v. *Neale Ads Pty Ltd* (1930) 43 C.L.R.126. Here the Board was empowered to make bylaws "regulating *or prohibiting* the erection and construction of hoardings" on or near a State highway. The bylaw in question forbade advertising hoardings near State highways unless the consent of the Board was given after it had considered whether certain specified objections existed. The High Court unanimously held the bylaw to be intra vires, overruling the decision of the Full Court of Victoria to the opposite effect in *Miller* v. *City of Brighton* [1928] V.L.R.375, where what we have called the "manner and form" approach was employed. The view of the High Court can be seen from the following two extracts. The first is from the joint judgment of Knox C.J., Starke and Dixon JJ. at 134-135:

> As the passage already quoted from the judgment in *Miller's Case* shows, the Full Court treated the dispensation as a discretionary power which could not be granted in the exercise of an authority to make by-laws for the purpose of prohibting and (presumably) regulating. It considered that such a power authorized no more than "prohibition together with conditions under which dispensation could be granted". But once it is realized that the power authorizes prohibition, complete or partial, conditional or unconditional, what reason is there for denying that the condition may be the consent, or licence, or approval of a person or a body? The answer that there is none was given by the Divisional Court and approved by the Court of Appeal in *Williams* v. *Weston-super-Mare Urban District Council;* and we respectfully agree. The supposition or suggestion that the conditions or circumstances should be defined in which the consent, licence, or approval must be given can rest only upon some justification other than the words in which the power is conferred.

And from the judgment of Isaacs J. (with whom Gavan Duffy J. agreed) at 139:

> In the present case there exists the statutory power to prohibit either entirely or partially. The prohibition adopted is not entire, but only extends to instances where the act is done without the written consent of the Board, the power of refusal being limited as mentioned.[13] As I pointed out during the argument, the two positions are essentially different. The power of regulation may, and almost necessarily does, involve some restriction or prohibition. The body entrusted with the power to regulate must in some sufficient way mark out whatever limits of prohibition are to exist. That is to say, legal rights otherwise existing are not to be cut down at the discretion of some individual or individuals, but must be dealt with by the law. And they are not properly dealt with in that case by first exercising the power of prohibition which is not conferred. But where the by-law itself prohibits, and in the absence of a written consent prohibits completely, the consent if refused simply leaves the by-law to operate without it, and if

13 Evatt J. in *Shire of Swan Hill* v. *Bradbury* (1937) 56 C.L.R.746, 768, 770-771, points out that *the bylaw* in *Neale Ads* did, in fact, lay down actual standards by which the discretion of the Board had to be governed, though these were expressed in general terms. While this *may* have influenced Isaacs J. in his decision (but cp. Gavan Duffy J. in *Conroy* v. *Shire of Springvale & Noble Park* [1959] V.R.737, 751 *dubitante*) it does not form part of the reasoning of the three Judges last quoted.

given satisfies the provision of the by-law by a *factum* which excludes the given case from its operation.

It is true that Evatt J. in the *Swan Hill* case (note 13 *ante*) at 769-772 doubts the generality of the *Neale Ads* approach. In his view the presence in the by-law of an undefined discretionary power, according to which suppression will or will not follow, may tell against the validity of the by-law. He says, at 769:

> Suppression is usually far more onerous and restrictive of the general liberty of the subject than mere regulation, so that it may appear that the scope of a by-law-making power is exceeded, if, aimed at suppression alone, it suppresses by reference to the uncontrolled discretion of a body or person, instead of by means of a broad general rule operating with "majestic quality".

The whole tenor of his remarks accords with the views set out in paragraph (B) I *ante*. His statement reduces itself to this: That if supression does not follow from the actual operation of the bylaw (i.e. if the dispensing power is *in fact* exercised frequently) the bylaw in truth merely regulates; and this result is outside a power to prohibit *simpliciter*. One possible answer is that the validity of a regulation, or bylaw, must be judged of by what *may* on a fair construction be included in its language, and not by what the administration of it for the time being are inclined to do;[14] on its *possible* application, and not its *actual* application. Since it could possibly operate so as to produce absolute prohibition (i.e. if the dispensing power is, in practice, never exercised), it is within the power. The rule is "Might-Have-Been" not "Wait-and-See". Indeed, this very argument strongly influenced Callan J's reasoning in the *F.E. Jackson* case.

A less esoteric answer is that an express power to prohibit is very often coupled, disjunctively, with a power to "regulate" etc. However the bylaw or regulation operates in practice, it must result in either prohibition or regulation. In any event, the *ratio decidendi* of the other Judges in the High Court in the *Swan Hill* case was that the case came within my proposition 1 (*ante*).

The broader, and, it is submitted, correct view of *Neale Ads* was followed recently in South Australia[15] and was accepted as correct by North J. in *Ideal Laundry Ltd* v. *Petone Borough* [1957] N.Z.L.R.1038 (C.A.). In the latter case plaintiff claimed that a town planning scheme, operative under the Town and Country Planning Act 1953, was invalid, *inter alia*, as containing a large number of clauses enabling the Borough either to dispense at its discretion with the full requirements of the scheme (some of which involved prohibition, e.g. of buildings) or to impose conditions, and consequently these provisions were *ultra vires* because a dispensing power was not authorized by the Act. North J. held that the legislation conferred on local authorities required to prepare a scheme the power to prohibit certain activities (e.g. the erection or construction of certain buildings) the words of the legislature being "*make provision for* the matters referred to in the Schedule hereto" (e.g. Buildings . . .).

After discussing *Neale Ads* and other cases North J. dismissed

14 Per Isaacs J. in *Melbourne Corporation* v. *Barry* (*ante*) at 201; *Commissioners of Customs and Excise* v. *Cure & Deeley Ltd* [1962] 1 Q.B. 340, 356; *Watson* v. *Grey County Council* [1923] N.Z.L.R.386, 389.

15 *Schulz* v. *Paige* [1961] S.A.S.R.258, where no standards were laid down for the exercise of a dispensing power.

the contention that the reservation of a dispensing power amounted to a subdelegation to future Councils.[16] He said at 1056:

> The scheme stands, and all that is left to future councils is the power to grant relaxations in particular cases with or without conditions. The authorities cited show that once it is established that the authorizing statute permits the local authority "to prohibit" and not merely "to regulate", then a by-law made thereunder is not rendered void because the local body thought it right and just to make provision in the by-law in relief of strict compliance with its terms.

While the other members of the Court of Appeal, Finlay A.C.J. and Henry J. did not refer specifically to *Neale Ads* they agreed with North J. that the reservation of a dispensing power was within the power of the Council. It is submitted, with only slight reservations, that the *Neale Ads* reasoning forms part of the *ratio decidendi* of the Court's decision.

Professor C.C. Aikman, in his searching article, *Subdelegation of the Legislative Power* (1960) 3 V.U.W.L.R.69, 94-95, highlights the doubts which might still linger as to the opposing views reflected in paragraphs (B) I and (B) II (*ante*):

> It remains to be seen which line of authority—*Mackay* v. *Adams* or *Ideal Laundry*—will be followed by the New Zealand Courts, [presumably the Professor would not agree with my tentative submission as to the *ratio* of the latter case, otherwise there could not be any doubt]. There are strong grounds why the making of a prohibition accompanied by the grant of a dispensing power should be recognised for what it is—a subdelegation to the holder of the dispensing power. In that event, the grant of the latter power would be effective only if the delegate laid down the limits within which it was to be exercised . . . . But there is a difficulty: if the Legislature has authorized the making of a prohibition there will be many cases—particularly those involving any infringement of individual liberty—in which the Courts will be reluctant to find themselves in the position that they must find valid a straight-out prohibition, but not a prohibition accompanied by an ameliorating dispensing power. As one English judge has said: 'That is just the thing that prevents an otherwise too general prohibition from being unreasonable' [Channel J. in *Williams* v. *Weston-super-Mare U.D.C.*]. This is clearly what the Court of Appeal in the *Ideal Laundry* case had in mind.

We turn again to *Wilton* v. *Mt Roskill Borough Council*. Hardie Boys J. did not refer to the *Ideal Laundry* case, but his reasoning and decision are consistent therewith. His *ratio decidendi*, correctly set out in the headnote, is that

> if there is a power to prohibit, the power is properly exercised by prohibiting an act unless that act is authorised by a licence or consent. Both the prohibition and the licensing are within the law-making power of the Council. (959)

His Honour was able to distinguish the decision of the Full Court of the Supreme Court of Victoria in the interesting case of *Conroy* v. *Shire of Springvale & Noble Park* [1959] V.R.737 which

16 Section 13 of the Bylaws Act 1910 was not relevant, since the town planning scheme, by virtue of the statutory provisions, had the effect of a *Regulation* made under the Act. Rules relating solely to bylaws were therefore irrelevant.

had many apparent similarities to the case in hand. The wider of the two empowering sections prayed in aid in the Victorian case, contained in the Local Government Act, authorized bylaws for "regulating the keeping of animals or birds with power to limit the number of any such animals or birds kept on any property". A somewhat more limited power was contained in the Health Act.

The bylaw provided that, except with the written permission of the Council, no person should keep more than two dogs on urban property, or more than three dogs on rural property, and provided further that in respect of greyhounds, whippets or other racing dogs, the application for permission had to be accompanied by the approval in writing of the Dog Racing Control Board of Victoria. Herring C.J. appears to treat the bylaw as a total prohibition in respect of all who wanted to keep more than two or three dogs, and thus outside the power to "regulate and limit numbers". (see proposition 1)[17].

Gavan Duffy and Sholl JJ. (in separate judgments), correctly it is submitted, regarded the bylaw as merely a partial prohibition of the keeping *of animals,* regarded as a genus, and thus within that power. In the next stage of their reasoning they appear to extend the *Neale Ads, Ideal Laundry* approach to a case where the power to prohibit is not express, but merely implicit:

> Since the power of prohibition is to be construed as a power to prohibit *sub modo* I see no reason why a power to regulate with power to limit numbers should not be construed in the same manner . . . . I am, therefore, of opinion that the bylaw is not invalid because the prohibition is made subject to the written permission of the council. (per Gavan Duffy J. at 752.)

The fact that the empowering section included authority to *limit numbers* did play a part in the conclusion of these two Judges; and this factor does tend to remove the tentativeness from proposition 5(*ante*). If their reasoning applies to the mere power to "regulate" etc, and it is submitted that this is not so, the examination of the dispensing power in *Hooking's* case (*ante*) and *Hazeldon* v. *McAra* (*ante*) from the viewpoint of the operation of the maxim *delegatus non potest delegare* would have been sheer supererogation.

Conroy's case clearly supports the findings in *Wilton's* case that the bylaw was within the power; especially as both empowering sections relied on in the New Zealand case gave *express* power to prohibit. It was only because Gavan Duffy J. held that that part of the bylaw which required the consent of the Dog Racing Control Board was invalid,[18] and incapable of severance, that he formed, with Herring C.J. a majority for holding the bylaw to be *ultra vires.* Sholl J., dissenting in the result, also held this requirement to be invalid, but held it to be severable from the rest of the bylaw.

We are now in a position to formulate our final proposition.

Proposition 6. Where the power vested in Parliament's delegate is, or includes, an *express* power of prohibition, the power is properly exercised by prohibiting subject to a dispensing power, whether or

17 He also flirts with the "manner and form" argument.

18 This result would probably follow in New Zealand. The test of "reasonableness" under s.13(2) of the Bylaws Act depends on the greatness of the discretion and this is judged by the nature of the bylaw, the character of the delegation, and the status [in *Conroy's* case, the lack of status] of the delegate: *Bremner* v. *Ruddenklau* [1919] N.Z.L.R.444, 461 per Chapman J.

not standards by which the recipient of the discretion is to be guided are prescribed.[19]

If it be argued against the bylaw in *Wilton's* case that the principle governing the prohibition or licensing is not stated; that no guidance is given either to the householders or to the borough officials so that the field is left to the uncontrolled and possibly arbitrary discretion of the officials in question,[20] the answer, no doubt most unsatisfactory for the residents of Mt. Roskill, is this: On what is submitted to be a clear preponderance of authority, Parliament, in the empowering sections, has authorized this course. As Sholl J. points out in *Conroy's* case (at 758):

> But if the effect of regulation of the keeping of dogs by the imposition of limits is to prohibit some businesses [e.g. boarding kennels] absolutely, or conditionally, subject to the council's possible permit to continue, what of it? Parliament allows responsible local government to do such things in the interests of the local community as a whole. For the Act expressly says so.

If, however, a Supreme Court Judge is free, in the light of the *Ideal Laundry* decision, to adopt what we have called the "manner and form" approach, the *Wilton* decision might still find support in two possible considerations, not adverted to by Hardie Boys J.

1. That the grant of an unlimited dispensing power is authorized by both s.13 of the Bylaws Act 1910 and s.390(b) of the Municipal Corporations Act 1954: *Hazeldon* v. *McAra* (*ante*).[21]
2. *If* it is permissible to look behind a bylaw to the sections relied on as authorizing its making, in order to ascertain the conditions and standards under which the dispensing power is to be exercised, and *Hooking's* case (*ante*) suggests that it is, then the empowering sections relied on in *Wilton's* case might well provide such standards. The Municipal Corporations Act provision authorizing prohibition refers specifically to nuisance and health considerations (actual, or apprehended by the Council); the latter criterion is implicit in the context of s.64(1)(m) of the Health Act 1956.

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19 It is apprehended that one aspect of *Conroy's* case derogates from the generality of this proposition. If the person or body in whom the dispensing power is vested *could not* have been in Parliament's contemplation, then invalidity follows—in the case of Statutory Regulations (the Governor General having express power to prohibit by his Regulation) as a matter of *vires;* in the case of by-laws, by the operation of the principle referred to in note 18. It is submitted that the grant, in a Regulation, of an "ameliorating" dispensing power to a Minister of the Crown, or a Senior Departmental Officer, to name two possibilities, would usually be within Parliament's contemplation; but not so a grant to Tom, Dick or Harry.

20 See note on *Wilton's* case in "Case and Comment" [1964] N.Z.L.J.391 (J.F.N.)

21 The writer fails to grasp the point, *in the context of Wilton's case*, of the statement of another commentator (previous note, *idem*) that, while these sections contemplate the possibility of discretionary powers being exercised by the local authority or its officers under a bylaw, there must first be shown to be a valid bylaw conferring these powers. This is true, but in our context it would appear to be relevant only if, putting aside the dispensing power, the bylaw is otherwise invalid, e.g. as being a total prohibition when the power is merely to "regulate" etc, as in *Chandler & Co.* v. *Hawke's Bay County* (*ante*). Proposition 1.