CONSTITUTIONAL LAW: INCONSISTENCY BETWEEN STATUTES AND BY-LAWS.

The case of *Powell v. May*[1] raises an interesting point in the relation between by-laws and statutes. The appellant acted as a bookmaker at a country race meeting held in a field, and had been convicted under a County Council by-law which prohibited bookmaking in a public place. A public place was defined as including " any open space to which the public have access for the time being," and hence included this field. The by-law was within the power granted by the *Municipal Corporations Act* 1882, but the appellant claimed it was repugnant to other statutes.

Two statutes were in point. S. 1 (1) of the *Street Betting Act* (1906) was for all intents and purposes the same as the by-law, but s. 1 (4) in defining a " public place " drew a distinction between enclosed and unenclosed places which are open to the public, and provided that in such enclosed places betting shall be unlawful only if a notice to that effect were conspicuously exhibited. The field, which was surrounded by a hedge, was an " enclosed place " within the meaning of the Act, and no such notice was exhibited. *The Lotteries Act* (1934) provided that betting was prohibited on a " track " (which was so defined as to include the field in question) unless certain strict conditions were observed. But such conditions had in fact been observed by the plaintiff.

Thus it was clear that the plaintiff's conduct was a breach of the by-law, but that it came within the exceptions in each of the statutes bearing on the point and so was not an offence against the statutes.

The appeal came before a Divisional Court (Lord Goddard C.J., Humphreys and Henn Collins JJ.). In delivering the judgment of the Court Lord Goddard C.J. said that it was clear that a by-law which was repugnant to the general law was bad; it " cannot permit that which a statute expressly forbids nor forbid that which a statute expressly permits, though it can of course forbid that which otherwise would be lawful at Common Law, otherwise no prohibitory by-law would be valid." Statutes may not only prohibit acts, but also authorize them; it is rare for this to be done expressly, but it may well be done by implication. Such was the position in this case. " If Parliament prohibits a certain thing from being done . . . and in the same Act says the prohibition is not to apply . . . if the very same thing is done in a certain way or under certain conditions, it seems almost pedantic to say that Parliament has not at least impliedly authorized the doing of that thing subject to the conditions laid down."

The by-law was therefore held to be repugnant to the statutes. The statement of the learned Chief Justice that a by-law must not be repugnant to the general law is one frequently made, though it leaves perhaps some doubt as to the meaning of the word " general." In Victoria the position is governed by s. 201 of the *Local Government Act* (1928) which provides that " No by-law. . . . shall contain matter contrary to any public law in force in Victoria." It is to be presumed that the phrases " public law " and " general law " are synonomous, and include statutes, the common law, and, unless there is a special provision to the contrary in

1. [1946] 1 K.B. 330; [1946] 1 All E.R. 444.

the empowering Act, executive regulations. But it is submitted that the judgment goes on to give a rather misleading impression when it says that a by-law cannot permit that which a *statute* expressly forbids (or forbid what it permits), though it can forbid that which *at common law* is otherwise lawful. A fuller statement would appear to be that a by-law cannot make legal what the public law (i.e. statute *or* common law) forbids ; but it can, in general, make illegal that which the common law *and* the statute book do not forbid. This second rule is of course subject to cases where the public law has conferred an express or implied right to carry out some action, in which case a by-law cannot take away such a right.

This however is a mere question of phraseology, and does not concern the *ratio decidendi* of the case. The decision can be approached from two aspects:

(i) The statute may be regarded as conferring a privilege or quasi-property right on persons who carried on the business of bookmaking within the restriction laid down by the Act. Such a right, being conferred by statute, could not be removed by a by-law.

(ii) The doctrine, well known in Australian constitutional law, of " covering the field "[2] may be applied. The statute may be said to have laid down an exhaustive code on the subject of bookmaking, and thus a law by an inferior body such as a County Council could not alter it.

But in fact the two grounds would appear to say the same thing from a different point of view. It depends on whether the case is considered with regard to its specific effects on the rights of the plaintiff (in which case the by-law will appear to infringe a privilege impliedly granted to him by statute) or with regard to the general question of the proper sphere of action of by-laws (when it will appear to be a case of a by-law purporting to interfere in a field which had been exhaustively regulated by statute.)

The most important question is, not under what precise doctrine of Constitutional law this decision is to be fitted, but how far it is likely to be extended in the future. It seems that in Australia its extension will not be very wide. The Australian Courts do not willingly accept the argument that the purpose of a statute has been to exclude from operation a by-law which merely extends the scope of the statute, provided the by-law is within the scope of its own empowering statute. Rather, the presumption is the other way, that the statute intended to lay down a minimum standard of conduct, and that local bodies should have the power to make further regulations required by local conditions. In *Hallion v. Eade*[3] Macfarlan J. applied to a by-law a principle enunciated by Starke J. in *Victoria v. Commonwealth*[4] with regard to conflict between State and Federal legislation, that unless the lesser law was " entirely destructive " of the provisions of the greater the courts would read them together, rather than treat them as repugnant.[5] The decision in *Powell v. May* was on a very special set of facts. The restrictions contained in

2. See *Cowburn's Case,* (1926) 37 C.L.R. 466 ; 32 A.L.R. 214, and cf. *Stock Motor Ploughs v. Forsyth,* (1932) 48 C.L.R. 128.
3. [1938] V.L.R. 179.
4. (1937) 58 C.L.R. 516, at 627-8.
5. See also *Jenner v. Mildura,* [1926] V.L.R. 514, and *Matthews v. Prahran,* [1925] V.L.R. 469.

the Act were extremely detailed and severe, and suggested that Parliament had considered in detail all the cases in which bookmaking was felt to be undesirable. Therefore it was possible to infer an intent by Parliament that a person who complied with all the restrictions obtained a right to act as a bookmaker ; and it followed, of course, that such a right could not be removed by a by-law.

The whole question of "inconsistency" or "repugnancy" has been much more fully analysed in this country, because of its frequent occurrence in cases concerning the relation between State and Federal law under s. 109 of the Constitution. It may be doubted, with respect, whether an Australian Court would have regarded the legislation in *Powell v. May* as doing more than restricting a common law liberty, without prejudice to the power of the Council to restrict it further.

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CONSTITUTIONAL LAW: STATUTORY CORPORATIONS AND THE SHIELD OF THE CROWN.

The ever-recurring question whether a statutory body created for the purpose of discharging functions and duties of a public commercial nature is entitled to Crown immunities and prerogatives was raised in *Grain Elevators Board of Victoria v. Shire of Dunmunkle.*[1] The appellant board was a body corporate constituted under the *Victorian Grain Elevators Act*, 1934. The Shire claimed that the Board was liable to the payment of rates under the *Local Government Act.* The Board claimed that it was exempt from rating under s. 249 (1) of that Act, which exempts "land, the property of His Majesty which is occupied or used for public purposes." The Supreme Court held for the municipality and on appeal the High Court confirmed this decision, Rich J. dissenting.

In the High Court, only Latham C.J. and Williams J. based their decision on general principles governing the relation between statutory corporations and the Crown. Their observations may be summarized as follows. In determining whether a statutory body is under the shield of the Crown, each case must be resolved by a consideration of the purpose and effect of the particular statute by which the statutory body is established. In order to be entitled to the immunities of the Crown, the authority set up under statute must show that the functions which it discharges are governmental in character. An incorporated body may be a government department and hence entitled to Crown immunities[2] if the financial control of the body is in the hands of the Crown : if revenues of the body are paid into consolidated revenue and expenses appropriated thereout, there is a probability of its being "under the shield."[3] Where persons or corporations are subject to ministerial control in the performance of

1. [1946] A.L.R. 273.
2. *Repatriation Commission v. Kirkland*, (1923) 32 C.L.R. 1 ; [1923] A.L.R. 297.
3. *Metropolitan Meat Industry Board v. Sheedy*, [1927] A.C. 899 ; *Fox v. Newfoundland*, [1898] A.C. 667 ; for a recent example see *In re Mathrick*, 12 A.B.C. 212.