on the part of a defendant in a civil suit, or a pensioner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown." The High Court refused to adopt this formula[5] which had been used in a number of English cases,[6] preferring the more flexible principle stated above.

In *R. v. Owen*[7] the Court of Criminal Appeal had to consider a case in which the trial judge had allowed a witness to be recalled after the summing-up and after the jury had been enclosed. The Court referred to the language of Tindal C.J. in *R. v. Frost* as reported in 9 C & P. 129, 159, and declined to adopt the rule there laid down, stating that the question must be one for the discretion of the judge, which should be applied with caution.[8]

The Court, however, decided that, although the trial judge had a discretion to admit evidence for the prosecution after the case for the defence had been closed to rebut matters raised for the first time by the defence, "It is quite another thing to say that, after the whole case is concluded and it remains only for the jury to return their verdict, it is right to allow further evidence to be given to clear up some matter which is troubling the jury."[9]

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[5]In 9 C. & P. 129, 159, Tindal C.J. is reported as saying: "But in any matter arises *ex improviso* which the Crown could not foresee, supposing it to be entirely new matter which they may be able to answer by contradictory evidence, they may give evidence in reply."
[6]e.g., *R. v. Harris* [1927] 2 K.B. 587; *R. v. Day* [1940] 1 All E.R. 402.
[7][1952] 2 Q.B. 362.
[8][1952] 2 Q.B. 362, 368.
[9][1952] 2 Q.B. 362, 368.

CONSTITUTIONAL LAW – VALIDITY OF BY-LAW – INTERPRETATION OF LOCAL GOVERNMENT ACT 1928 SEC. 197 (I) xxxiii

Leslie v. City of Essendon [1952] A.L.R. 450, a decision of the Full Court of the Supreme Court of Victoria, is the latest illustration in Victoria of the attitude of the Courts to municipal by-laws.

The modern approach is usually dated from *Kruse v. Johnson* [1898] 2 Q.B. 91, in which Lord Russell C.J. said that by-laws "ought to be supported if possible",[1] and emphasized that courts must not interfere unnecessarily with the discretion which Parliament vests in local government bodies.

In *Kruse v. Johnson* the court was considering "unreasonableness" as a ground for declaring a by-law invalid, and it held that this ground would be sufficient only in exceptional circumstances, as

[1] [1898] 2 Q.B. 91, 99.

when a by-law showed partiality, oppressively and gratuitously interfered with the rights of the subject, disclosed bad faith, or the like. Unreasonableness is not regarded in Australia as being a separate ground of invalidity, but if a by-law is unreasonable in the manner described in *Kruse v. Johnson* it may be regarded as an improper exercise of the power conferred on the local authority and therefore invalid as *ultra vires*.[2] There is a similar treatment in Australian courts of uncertainty in by-laws.[3]

The validity of a Victorian by-law can be challenged on one of two grounds – that it is inconsistent with general law,[4] or that it is *ultra vires* the authority which made it. "A regulation or a by-law may be *ultra vires*," said Griffith C.J. in *Young v. Tockassie*,[5] "in the sense that it deals with a subject not within the scope of the power conferred upon the delegated legislative authority, or it may be *ultra vires* because, although dealing with such a subject, it exceeds the prescribed limits within which the authority may be exercised."

The by-law which was challenged as *ultra vires* in the present case read – "20. No person upon any street or footway shall after being required by ... (a certain class of person) ... to desist ... (b) sing or harangue."

The municipality contended that the by-law was covered by two of the placita in Sec. 197 (I) of the Local Government Act (1928), under the authority of which the by-law purported to be made.[6]

"Sec. 197 (I) ... by-laws may be made ... for the purposes following: ... (xxix) Prohibiting or minimizing noises in any public high way including the prohibition or the regulation of the use on vehicles of brakes which are calculated to cause noises;

... (xxxiii) Generally for maintaining the good rule and government of the municipality."

It was contended that even if the by-law was *ultra vires* placitum (xxix), it was certainly within the discretionary powers vested in the local authority by placitum (xxxiii), and counsel relied strongly on *Kruse v. Johnson* and the subsequent case of *Thomas v. Sutters*,[7] in both of which a by-law-making power in substantially the terms of placitum (xxxiii) was involved.[8]

[2] *Widgee Shire Council v. Bonney* (1907) 4 C.L.R. 977, *Williams v. Melbourne Corporation* (1933) 49 C.L.R. 142, *City of Footscray v. Maize Products Pty. Ltd.* (1942) 67 C.L.R. 301; see (1950) 4 *Res Judicatae*, 228.

[3] *King Gee Clothing Co. v. Commonwealth* (1945) 71 C.L.R. 184, *Cann's Pty. Ltd. v. Commonwealth* (1946) 71 C.L.R. 210.

[4] Local Government Act (1946) Sec. 201.

[5] (1905) 2 C.L.R. 470, 477.

[6] Now the Local Government Act (1946) Sec. 197 (I).

[7] [1900] 1 Ch. 10.

[8] Municipal Corporations Act (1882), Local Government Act (1888).

O'Bryan J. delivered the first judgment. The by-law was clearly not supportable under placitum (xxix), being not limited to public highways nor to "noises" in the sense in which that word is used in the placitum ("a loud or harsh sound or a din or a disturbance"[9] certainly more than mere sound). As to justification under placitum (xxxiii), giving that placitum its full and natural meaning, he did not deny the authority of *Kruse v. Johnson*, *Thomas v. Sutters*, and the cases which followed them, but he emphasized firstly that those cases did not deny the power of the court to consider the validity of by-laws, and secondly that in those cases a very different by-law-making power was in question – a general power to make by-laws for the "good rule and government" of the municipality, not preceded, as in the present case, by a number of limited and specific powers. Because of this difference in context, placitum (xxxiii) "must in my opinion be given a much more limited meaning than that given to similar words in a statute like the Municipal Corporations Act (1882) s. 23."[10] He cited *Melbourne Corporation v. Barry*[11] in support of this view. What was the limitation to be placed upon placitum (xxxiii)? Counsel for the municipality had contended that the placitum could not contradict but could supplement or complement any of the preceding powers. But His Honour preferred the dictum of Isaacs J. in *Barry's* case,[12] approved by Starke J. in *Williams v. Melbourne Corporation*,[13] and accepted as the basis of the decision in *Seeligson v. City of Melbourne*[14]—"It confers a power, not of extending the other powers, but of aiding them if need be or of making independent ordinances in matters *eiusdem generis* with the specific powers of the Act."

Respondent had also relied on *Williamson v. City of Melbourne*,[15] but this again was a "good rule and government" clause in a context similar to that of the English section, and dissimilar to that of placitum (xxxiii).

On this interpretation of placitum (xxxiii), His Honour held that the by-law could not be supported, as it could not be said to "aid" the specific power in placitum (xxix), nor was it for a purpose *eiusdem generis* with the purpose of that placitum. It should therefore be quashed.

[9] [1952] A.L.R. 450, 452. [10] *Ibid.* 453.

[11] (1922) 31 C.L.R. 174; for earlier and rather inconclusive comments on what is now placitum (xxxiii), see In *re The Municipal Council of Kyneton* (1861) 1 W. & W. (L.), 11; *Shire of Tungamah v. Merret* (1912) 15 C.L.R. 407, 415.

[12] (1922) 31 C.L.R. 174, 194.

[13] (1933) 49 C.L.R. 142, 147.

[14] [1935] V.L.R. 365.

[15] [1932] V.L.R. 44.

Coppel A.-J. gave judgment to the same effect.

Sholl J. agreed with this interpretation of placitum (xxxiii), but thought that in the present case it did support a by-law extending beyond public highways to other places used by the public for purposes of passage, and that it did support a by-law prohibiting "harangue", which he considered must involve "noise", and he therefore allowed the appeal only to the extent of declaring the prohibition of singing invalid.

R. L. SHARWOOD

TRUSTS—UNAUTHORIZED INVESTMENTS—TRUSTEE ACT S.57

THE case of *Riddle v. Riddle*[1] raises two issues, the scope of S.57 of the Trustee Act 1928, and more general question of the propriety of investing trust funds in company shares in a time of inflation. It seems to be the first time that S.57 has come before the High Court, and is particularly interesting because the decision was reached by a bare majority (Dixon, Williams and Webb JJ., Fullagar and Kitto JJ. dissenting), and because in a different case decided four months before (but not before the High Court because it had not been reported[2]) the Full Court of the Victorian Supreme Court had unanimously reached an opposite conclusion: *Boyd v. Cowell*[3] (O'Bryan and Sholl JJ. and Coppel A.J.).

The High Court case concerned a will which left on trusts an estate comprising mainly company shares, but gave no directions for conversion or investment. The trustees applied to the N.S.W. Supreme Court, under S.81 of the N.S.W. Trustee Act[4] (which

[1][1952] A.L.R. 167

[2]Decided in November 1951 (just after the High Court case was argued), but not reported until June 1952, and therefore not mentioned in any judgment. An interesting example of what must, under our present system, happen if the more quickly appearing reports do not report a case.

[3][1952] V.L.R. 288

[4]S.81 is materially as follows: "(1) *Where in the management or administration* of any property vested in trustees, . . . any purchase investment acquisition expenditure or transaction is in the opinion of the court *expedient*, but the same cannot be effected by reason of the absence *of any power* for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the court . . . *may* by order confer upon the trustees, *either generally or in any particular instance*, the necessary power for the purpose, on such terms and subject to such provisions and conditions . . . as the court may think fit. . . .

"(2) The provisions of sub-section one of this section shall be deemed to empower the court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustees . . . is expedient, to authorize the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorization of the Court or the consent of the beneficiaries would be a breach of trust. . . ."