affixing the chattel to the freehold? It is suggested that such an argument cannot be sustained. It gives insufficient force to the facts that this was a single contract to supply and install, and that the plaintiff had no rights under it until it was fully carried out on his side. More generally, the contract was to add to, or improve, the freehold; the chattel nature of the cabinet was transitory, and it was only a reason of convenience which led to its being made in the company's workshop. Benjamin on *Sale* puts it thus: "In such contracts the intention is plainly not to make a sale of movables as such, but to improve the land or other chattel, as the case may be."[8] This principle applies to the present contract.[9] It is, therefore, submitted that even if the decision involves extension of the rule to facts not previously adjudicated upon, it is more than justified.

Turning to the second part of Dean J.'s judgment, we can say that it is clear law that if an express contract, even one which falls within the provisions of the Goods Act 1928, has ceased because of repudiation by one party and acceptance of that repudiation by the other, the latter may sue on a *quantum meruit* for payment for goods or services included in the express contract.[10] This case is a useful affirmation of that rule.[11]

J. H. BROOK

[8]8th edn. (1950) p. 167.

[9]It also has the advantage of simplicity. The other revolves around a distinction of fact; the line would clearly be most difficult to draw.

[10]*Lodder v. Slowey* [1904] A.C. 442; *De Bernardy v. Harding* (1853) 8 Exch. 822.

[11]Counsel for the defendant cited the early Victorian case of *Lyons v. Hughes* (1875) 1 V.L.R. (L.) 1, which, it would seem (though the report is short and does not make clear the exact form of action), is contrary to this principle at least in dicta, and is overruled to that extent.

CONSTITUTIONAL LAW—DELEGATED LEGISLATION EFFECT OF CLAUSE "AS IF ENACTED IN THIS ACT"

THE judgment of the Full Court in *Foster v. Aloni*[1] contains authoritative opinions on the often-discussed questions of the effect of "as if enacted in this Act" clauses and uncertainty on delegated legislation, and of the element of *mens rea* in statutory offences.

The defendant was charged before a Court of Petty Sessions with an offence against the Protection of Electrical Operations Regulations,[2] made under the State Electricity Commission Acts, which empowered the Governor in Council on the recommendation of the Commission to make regulations for or with respect to a number

[1][1951] V.L.R. 481. [2]Victoria, *Government Gazette*, 7 July 1949.

of subject-matters, and provided that such regulations when made "shall have the like force and effect as if they were enacted in this Act". The regulations provided that the Commission might, during a state of emergency, publish in a Melbourne daily newspaper an advertisement notifying that electricity was not to be used for, or except for, the purposes specified in that advertisement during periods stated therein. An advertisement was duly published notifying that on and after a certain date electricity was not to be used for, among other items, "booster elements for Hot Water Systems". To this item the advertisement listed certain exceptions.[3]

The defendant was charged with failing to ensure that no contravention of the provisions as to the use of electricity contained in the advertisement occurred at his premises. The magistrate found that the defendant was asleep at the time, and was not aware that the appliance was in operation. He therefore dismissed the information. On the return of an order *nisi* to review the decision Sholl J. referred the matter to the Full Court of the Supreme Court of Victoria.

In a joint judgment the Court (Lowe A-C.J., Barry and Sholl JJ.), upheld the validity of the regulations, relying on the words "such regulations. . . shall have the like force and effect as if they were enacted in this Act". The Court stated that these words did not enable any purported exercise of the power to make regulations to go unchallenged. On the other hand, the Court emphasized, the words would be "'mere verbiage" if they were only to have effect *after* the Court had determined that the regulation in question was within the head of power it purported to exercise. What was the effect of such words when contained in an Act conferring power to enact subordinate legislation on the validity of that legislation?

The Full Court postulated three limitations on subordinate legislation of this type. Firstly, it must have been in fact made by the proper authority after any necessary preliminaries had taken place. Secondly, if the regulation was inconsistent with sections of the Act other than those actually defining the power to make such

[3]The item, and the relevant exceptions, were: "Item 6. For the operation of an electric element used for heating of water which can be drawn off at more than one tap or like outlet which element is not so wired and fixed as to operate continuously . . ."

Exemptions.—The relevant restriction of Item 6 above will not apply to the use of electricity: (a) for heating between the hours of 10.00 p.m. and 7.00 a.m. water of a hot water system, by a consumer who has made a written application to the Commission for a supply of electricity to that hot water system during limited hours and has been informed in writing by the Commission that it approves the application but cannot supply a time switch to effect the automatic switching on and off of the element."

regulations then it was subordinate to them. And thirdly, the purported exercise of power would not be saved by an "as if enacted" clause if it were "patently or absurdly irrelevant" to the head or heads of power purported to be exercised. The Court said: "If regulations genuinely purport to be an exercise of one or more of the heads of power granted by the Act, upon a matter or matters connected with the purposes which the Commission as a statutory authority is created to achieve, in that case at least (subject as aforesaid) the Court is not called upon to examine whether in any respect the purported exercise of power is too broad, or whether cases may not be figured, falling within the regulations, which go beyond the necessity of the occasion."[4] Sholl J. thought that the regulations must purport without patent irrelevance or absurdity to exercise one or more of the heads of power. The Court held that the regulations in question were valid.

The Full Court considered its view to be in accordance with dicta of a majority of the House of Lords in *Institute of Patent Agents v. Lockwood.*[5] Whether this is so may be doubted, as the dicta referred to seem to indicate that an "as if enacted" clause prevents the Court from questioning the validity of subordinate legislation. Be that as it may, the Full Court's view is in accordance with the more recent decision of the House of Lords in *Minister of Health v. R., ex parte Yaffe,*[6] and with the opinions of many textwriters. The judgment provides a much needed judicial opinion on the meaning of such a clause, which is frequently encountered in Acts giving to the Executive power to make regulations.

With regard to the advertisement, the defendant challenged its validity on the grounds of uncertainty. The Court agreed that the relevant part of the advertisement was completely uncertain as to what was prohibited and what allowed. As to the effect of uncertainty the Court refused to decide whether its effect was to vitiate the purported exercise of power or only to leave it without subject-matter to operate upon, the latter view being that expressed by Dixon J. in *King Gee Clothing Co. Pty. Ltd. v. The Commonwealth*[8] and *Cann's Pty. Ltd. v. The Commonwealth.*[9] In either case, however, the defendant succeeded. The advertisement, it was held, conveyed no intelligible message to the electricity-using public.

The effect of uncertainty on subordinate legislation has been the subject of much discussion.[10] This much is certain, that one of the

[4][1951] V.L.R. 481, 484. [5][1894] A.C. 347. [6][1931] A.C. 494.
[7]E.g. C. K. Allen, *Law and Orders* (1945) 295 ff.; Schwartz, *Law and the Executive in Britain* (1949) 176 ff.
[8](1945) 71 C.L.R. 184, 195–6. [9](1946) 71 C.L.R. 210, 227–8.
[10]See Sugerman (1945) 18 A.L.J. 330.

two views mentioned by the Full Court is the correct one. Probably the result in most cases, as in the instant case, will be the same whichever be the view adopted, and the Full Court seems to hint at this.

On the question of guilty intent the Court was of opinion that the regulation[11] did not in terms "import any mental element necessary to constitute the offence". It imposed a positive duty, performance of which could be excused only by the defendant satisfying the Court that he had done everything possible to ensure performance of the duty. This he had not done, nor had he given any evidence of a *bonâ fide* and reasonable belief in the only facts which could exculpate him. Here the Court seems to approve the opinion of Dixon J. in *Proudman v. Dayman.*[12] The Court declared that the regulation did not admit of a construction which would require the informant to prove guilty intent.

On this matter of *mens rea* and statutory offences the Court laid down no definite rule, and merely referred to *McCrae v. Downey,*[13] in which O'Bryan J. in a very useful judgment reviews many of the cases, and to *Proudman v. Dayman.*[14] In the latter case Dixon J., in the course of his judgment, said that "as a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence".[15] Although the present case lays down no definite rule, it is an example of the modern trend of opinion that *mens rea,* in the sense of a specific state of mind, is not ordinarily a necessary element in a statutory offence.

R. HATCH

[11]Section 4 provided: "Every person shall ensure that no contravention of any of the provisions as to the use of electricity contained in any advertisement . . . occurs at these premises . . . and in the event of any contravention of any of the said provisions occurring such person shall (unless he satisfies the Court that the contravention occurred in spite of his having done everything possible to prevent its occurrence) be guilty of an offence. . . . "

[12](1941) 67 C.L.R. 536. [13][1947] V.L.R. 194. [14]*supra.* [15]*supra,* 540.

CONTRACT—COMMUNICATION OF OFFER ANOTHER TICKET CASE

MOST of the contracts of everyday life are of a skeleton type into which the law must imply terms to cover matters to which the parties themselves do not advert. In the so-called "ticket" cases one party hands to the other, at the time of the transaction, a document purporting to limit the liability of the former by modifying or excluding