REPUGNANCY AND 'REGULATION'

DOMINION BREWERIES LTD. v. BAIGENT, [1954] N.Z.L.R. 274.

Here is an ultra vires case with a difference. A considerable number of such cases have been concerned with the interpretation of a statutory power "to regulate", where a purported exercise of such a power had resulted in the prohibition of the whole or a substantial portion of the activities the subject-matter of the power. The general principle to be deduced from these cases is that such a power does not authorize the prohibition of any more than such a portion of the subject-matter as is judged reasonable in the circumstances. In the instant case, however, the power given was that of

> Specifying . . . matters which must not be mentioned in any medical advertisement. [Medical Advertisements Act 1942, s. 14 (c). Emphasis added.]

Is the exercise of such a power likewise conditioned by the requirement that there be some medical advertisements remaining at the conclusion of the process of specification? This interesting question is suggested by the instant case, but it was not directly in issue. Counsel for the appellant did, however, argue for an even more stringent limitation on the exercise of the power, namely, that at the conclusion of the process there should be some medical advertisements remaining out of a particular class of advertisements.

In the Medical Advertisements Regulations 1943 (Serial No. 1943/63) there are a number of provisions in which the power cited above was apparently exercised. These purported (inter alia) to prohibit advertisements claiming anything to be a "universal panacea" (Reg. 12 (c)), or "a cure for cancer" (Reg. 12 (a) and Schedule, Part I). Another, Reg. 23 (added in 1950 by the Medical Advertisements Regulations Amendment No. 2 (Serial No. 1950/96)) was couched in the following terms:

> No medical advertisement relating to any alcoholic beverage . . . shall contain any word, statement, claim, design, or device which directly or by implication indicates or suggests that the beverage contains any nutritive or medicinal properties.

The appellant Brewery Company was convicted by a Magistrate of having offended against this regulation by inserting in a newspaper an advertisement depicting a certain gentleman, of cheerful countenance who, it was claimed, had "found new life, and new hope" by his having partaken, at regular intervals, of specified quantities of the company's beer. The appellant, on appeal to the Supreme Court, contended (inter alia) that the regulation was ultra vires.

Prima facie, it would seem that the purported prohibition was within the authority of the enabling section. Section 14 (c) of the Medical Advertisements Act 1942 (quoted above), interpreted in vacuo would seem to indicate that, even if the matters prohibited were essential to some species (or "class", the term used in the instant case at p. 280, line 24) of the genus "medical advertisement", and not merely incidental to it, the "specifying" power would not be vitiated by the fact that the prohibition of those matters would inevitably result in prohibition of the whole species or class.

We must not overlook the possibility, however, that another section of the Act may have expressly or impliedly authorized the insertion in medical advertisements of certain of the matters the proscription of which is apparently justified by s. 14 (c), or that the Act read as a whole may be taken as an implied authorization. It would then be open to a person attacking the regulation to show that, while not ultra vires the enabling section, the regulation was repugnant either to another section of the Act or to the spirit and intendment of the Act read as a whole and was accordingly ultra vires the Act. This approach demands some classification of the terms "ultra vires" and "repugnancy". As each section of an Act is deemed to be a substantive enactment (Acts Interpretation Act 1924, s. 5 (b)), it is submitted that it is logically possible for a regulation to be ultra vires a section. If it is intra vires in this sense yet repugnant to another section (or sections) of the same Act, it can be said to be ultra vires that Act.

Counsel for the appellant appears (p. 280, lines 23-4) to have based his arguments on the assumption that the effect of Reg. 23 was to prohibit a certain species or class of medical advertisements; that is to say, those relating to liquor. This would seem to follow naturally from the generality of the regulation, and may be taken as an unexpressed major premise of the judgment of Turner J. Counsel's task, therefore, was to show that Reg. 23 was ultra vires in that the Legislature had not authorized the prohibition of a class or classes of medical advertisements. To this end he appears to have adopted two lines of argument, both suggested in the above discussion: i.e. an argument based on the Act read as a whole, and a second based on the provisions of Reg. 23 itself. Unfortunately, the arguments of counsel have not been published, and it is not possible, on the basis of the judgment alone, to state with any assurance how counsel for the appellant developed his case.

I. Argument from The Long Title and Balance of the Act.

This would seem to resolve itself into two alternative propositions. The first, that "the very general language of s. 14 (1)" should be construed restrictively by reference to the long title and the balance of the Act; the second, that the regulation was repugnant to the Act as a whole.

The first proposition was that, in the words of the judgment at p. 280:

> The intent and purposes of the Act, if s. 14 is excepted, may . . . be deduced from its long title— "an Act to make Provision for the Regulation of Medical Advertisements". The purpose of the Act, he therefore contended, is to provide for the regulation of medical advertisements, and, in this connection, regulation will not be construed to include prohibition.

This contention is not one that Reg. 23 is ultra vires or repugnant to the Act as a whole; it is being used to justify a restrictive interpretation of s. 14 (c) and so

to aid the second main argument—that Reg. 23 is ultra vires the powers given by that section. The proposition therefore calls for consideration under that heading.

Turning to the second proposition, counsel for the appellant made a valiant attempt to import the concept of repugnancy as used in Kerridge v. Girling-Butcher, [1933] N.Z.L.R. 646; [1933] G.L.R. 491. In that case, special provision had been made in the enabling statute, the Board of Trade Act 1919, s. 28 (2), to the following effect:

> No Board of Trade regulation shall be deemed invalid because it deals with a matter already dealt with by this or any other Act, but in such a case the regulation shall be read subject to such Act, and shall be valid and operative so far as not repugnant thereto.

Sir Michael Myers C.J. held that regulations under the Board of Trade Act, although authorized by that Act, were repugnant to the provisions of s. 32 of the Cinematograph Films Act 1928 and therefore ultra vires. That portion of the judgment of Turner J. which deals with Kerridge's case is difficult to understand and it is submitted, with respect, that the learned Judge was confused as to which statute was parent to the regulations under attack (p. 281, lines 23-6).

It is suggested that counsel may have been endeavouring to apply Kerridge's case to the facts of the instant case by showing that, just as the regulations in the former case were repugnant to a provision in another statute, the regulation in the present case was similarly repugnant to other sections (which, as has been indicated, can be regarded as separate "enactments") in the same, or parent statute. (It is to be noted, of course, that there is no provision in the Medical Advertisements Act 1942 dealing with repugnancy as does s. 28 (2) of the Board of Trade Act).

This would appear to explain why counsel is said to have "strongly relied" upon a passage cited from the judgment of Sir Miacheal Myers C.J. in which "repugnancy" is used in the sense of "repugnancy to another statute".

There is, it is submitted, no doubt about the correctness of the application, in principle, of Kerridge's case. The submission was, however, rejected in this instance inasmuch as Turner J. held, after an examination of the provisions of the Act, that there was no repugnancy as between the regulation and the balance of the Act. He said at 282:

> The Act . . . purports to whittle down the freedom (to advertise as they would) which they had before it was passed, and Reg. 23 operates similarly; . . .

This appears to dispose of the "balance of the Act" argument.

II. Was Regulation 23 ultra vires Section 14 (c)?

Counsel for the appellant sought to apply the series of cases which have considered the extent to which a power to regulate carries with it a power to prohibit some or all of the matters to be regulated. Particular reliance was placed on Municipal Corporation of the City of Toronto v. Virgo, [1896] A.C. 88 in which Lord Davey said (at 93):

> But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed.

It has already been shown that the appellant contended that s. 14 (c) should, by reference to the preamble and the balance of the Act, be construed as a power to regulate. Turner J. would have nothing of this. After deciding (at 281) that

> the section . . . gives a specific power to do much more [than to regulate]- to "specify other matters which must not be mentioned in any medical advertisement"

he refused to limit this specific power by reference to the long title.

Having rejected this first step in the appellant's argument, the learned Judge had little difficulty in deciding that s. 14 (c) authorized regulations specifying in wide terms "other matters which must not be mentioned in any medical advertisement" and that, accordingly, the

regulations might prohibit certain classes of medical advertisements. It followed that Reg. 23 was beyond attack even though, in effect, it prohibited a medical advertisement advertising the appellant's beer.

Some of the difficulties in the Dominion Breweries case flow from the curious form taken by Reg. 23 in relation to the definition of "medical advertisement" contained in s. 2 of the Act and to the power given by s. 14 (c). The relevant portion of s. 2 defines "medical advertisement" as an advertisement

> Relating to any article, [or] substance . . . advertised for . . . alleviating . . . any ailment . . . of the human body (per Turner J. at 277).

Under s. 14 (c) regulations may specify "other matters" which must not be mentioned in any medical advertisement". Then Reg. 23 (S. No. 1950/96), instead of taking the straightforward course of specifying that alcoholic beverages may not be mentioned in any medical advertisement, goes full circle and provides that "No medical advertisement relating to an alcoholic beverage . . . shall [indicate or suggest] that the beverage contains any nutritive or medicinal properties." This means that a very roundabout way has been adopted of saying that no advertisement may claim that an alcoholic beverage is capable of "alleviating . . . any ailment . . . of the human body".

The conclusion reached by Turner J. appears to be beyond question. It would, it is submitted, still have been the same had the appellant's argument, that the Act should be looked at as a whole and the authority given by s. 14 (c) regarded as a power to regulate, been accepted. The Virgo line of cases (in particular Slattery v. Naylor (1888), 13 A.C. 446) establish that the power to regulate is consistent with partial prohibition of the thing to be regulated. In the present case the power to regulate would be one to regulate medical advertisements and the total prohibition of a particular class of medical advertisements, i.e. those relating to alcoholic beverages, would appear to be justified.

One can imagine other circumstances in which the learned Judge's conclusion that s. 14 (c) is something more than a power to regulate could be significant: The power to regulate cannot authorize total prohibition and the question could arise as to the stage at which the prohibited classes of medical advertisements had become so numerous as to amount to a total or near-total prohibition. If, however, advantage could be taken of Turner J.'s conclusion that s. 14 (c) confers the broader power, regulations could validly specify so many matters that are not to be mentioned in medical advertisements that in effect medical advertisements would be completely prohibited.
