PROTECTION OF AUTHOR’S COPYRIGHT

This copy has been supplied by the Library of the University of Otago on the understanding that the following conditions will be observed:

1. To comply with s56 of the Copyright Act 1994 [NZ], this thesis copy must only be used for the purposes of research or private study.

2. The author's permission must be obtained before any material in the thesis is reproduced, unless such reproduction falls within the fair dealing guidelines of the Copyright Act 1994. Due acknowledgement must be made to the author in any citation.

3. No further copies may be made without the permission of the Librarian of the University of Otago.
ASPECTS OF UNCERTAINTY IN PRIVATE
AND PUBLIC LAW

M. J. Grant

A thesis submitted in partial fulfillment of the requirements for the degree of Master of Laws at the University of Otago, Dunedin, New Zealand.

August 1972
PREFACE

Nothing contributes to the certainty of laws (whereof I am now treating), as to keep the authentic writings within moderate bounds, and to get rid of the enormous multitude of authors and doctors of laws. For by them the meaning of laws is distracted, the judge is perplexed, and the advocate himself, as he cannot peruse and master so many books, takes refuge in abridgements.

Francis Bacon (Spedding, (Ed.) The Works of Francis Bacon, Vol.5, p.104.)

This thesis, though written in contravention of Bacon's strictures, nonetheless dares to discuss the problem of uncertainty in laws, together with uncertainty in various types of legal instruments. The work was not intended as jurisprudential, although the topic is one which tends itself to such analysis, but rather as a study, through the cases, of a dilemma in which the courts frequently find themselves - the dilemma of whether to hold an unclear provision void for uncertainty, or alternatively to accord it what meaning they can, even though it be no more than a guess at the author's intention. My main interest was with the so-called "test" of certainty in public law instruments, where the origin, status and extent of application of the test are all obscure, but the study was extended to include the more common private law instruments in order to provide a basis for comparison.
The idea for the topic came from Associate-Professor D. E. Paterson of the Law Faculty at Otago University, and to him I owe a considerable debt of gratitude for his advice and encouragement. As my supervisor he has always been ready and willing to help with constructive criticism, and to indicate the more outrageous errors I have made. I must also acknowledge the help I received from Miss Judith Mayhew, who was kind enough to provide assistance with the chore of proofreading. Finally to Miss Penelope Roydhouse I owe a special debt for the fine job she has made of the laborious task of typing this work, both in its draft and final form.
# CONTENTS

<table>
<thead>
<tr>
<th>Chapter/Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preface</td>
<td>i</td>
</tr>
<tr>
<td>Case Index</td>
<td>iv</td>
</tr>
<tr>
<td>Index to Statutes and Regulations</td>
<td>xxxii</td>
</tr>
<tr>
<td><strong>PART ONE</strong></td>
<td></td>
</tr>
<tr>
<td>CHAPTER 1 Introduction</td>
<td>1</td>
</tr>
<tr>
<td>CHAPTER 2 Language</td>
<td>8</td>
</tr>
<tr>
<td><strong>PART TWO</strong></td>
<td></td>
</tr>
<tr>
<td><strong>UNCERTAINTY IN PRIVATE LAW</strong></td>
<td></td>
</tr>
<tr>
<td>CHAPTER 3 Contracts</td>
<td>38</td>
</tr>
<tr>
<td>CHAPTER 4 Wills</td>
<td>86</td>
</tr>
<tr>
<td>CHAPTER 5 Trusts</td>
<td>112</td>
</tr>
<tr>
<td>CHAPTER 6 Other Private Law Instruments</td>
<td>135</td>
</tr>
<tr>
<td><strong>PART THREE</strong></td>
<td></td>
</tr>
<tr>
<td><strong>UNCERTAINTY IN PUBLIC LAW</strong></td>
<td></td>
</tr>
<tr>
<td>CHAPTER 7 History of the Certainty Test</td>
<td>144</td>
</tr>
<tr>
<td>CHAPTER 8 The Status andExtent of the Requirement of Certainty</td>
<td>200</td>
</tr>
<tr>
<td>CHAPTER 9 The Operation of the Certainty Test</td>
<td>230</td>
</tr>
<tr>
<td><strong>PART FOUR</strong></td>
<td></td>
</tr>
<tr>
<td>CHAPTER 10 Conclusions</td>
<td>268</td>
</tr>
<tr>
<td>Case</td>
<td>Cited</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Abbot v. Matamata County (1970)</td>
<td>3</td>
</tr>
<tr>
<td>Adams v. Fleming (1619)</td>
<td>1 Brownl. &amp; Golds. 13, 123 E.R. 634</td>
</tr>
<tr>
<td>Adams and the Kensington Vestry, Re (1883)</td>
<td>27 Ch.D. 394 54 L.J.Ch. 87, 51 L.T. 382</td>
</tr>
<tr>
<td>All Cars Ltd v. McCann (1945)</td>
<td>19 A.L.J. 129</td>
</tr>
<tr>
<td>All Cars Pty. Ltd v. Tweedle [1937]</td>
<td>V.L.R. 35</td>
</tr>
<tr>
<td>Allgood v. Blake (1873)</td>
<td>L.R. 8 Exch. 160, 42 L.J. Ex. 101, 29 L.T. 331.</td>
</tr>
<tr>
<td>Allyns v. Sparks (1603)</td>
<td>1 Brownl. &amp; Golds. 6, 123 E.R. 629</td>
</tr>
<tr>
<td>Amalgamated Television Services Pty. Ltd v. Television Corporation Ltd [1970]</td>
<td>3</td>
</tr>
<tr>
<td>Anchorage Butchers Ltd v. Law (1939)</td>
<td>42</td>
</tr>
<tr>
<td>Andrews, Re.Mayor etc. of Dunedin v. Smyth (1910)</td>
<td>30</td>
</tr>
<tr>
<td>Arnold v. Hunt (1943)</td>
<td>67</td>
</tr>
<tr>
<td>Ashcroft v. Morrin (1842)</td>
<td>4 Man. &amp; G. 450, 134 E.R. 185</td>
</tr>
</tbody>
</table>
Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 K.B. 223,
193, 208, 237
Asten v. Asten [1894] 3 Ch. 260, 63 L.J.
Ch. 834, 71 L.T. 228
95
Astor's Settlements Trusts, Re. Astor v.
Scholfield [1952] Ch. 534, [1952] 1 T.L.R.
1003, [1952] 1 All E.R. 1067
126
Attorney-General v. Eenby [1925] Ch. 596, 94
L.J. Ch. 434, 133 L.T. 722
159, 163, 244
Attorney-General v. National Provincial Bank
[1924] A.C. 262, 93 L.J. Ch. 231, 131 L.T. 34
102, 126.
Attorney-General for Alberta v. Huggard Assets
Ltd [1953] A.C. 420, [1953] 2 W.L.R. 768,
[1953] 2 All E.R. 951
72
Attorney-General for Canada v. Hallett & Carey
168
Attorney-General for New Zealand v. Brown [1917]
A.C. 393, 86 L.J.P.C. 132, 116 L.T. 624,
33 T.L.R. 294
126
Auckland Meat Co. Ltd v. Minister of Works
[1963] N.Z.L.R. 120
141
Austin v. Jarvis (1615) 1 Browne & Golds.
11 123 E.R. 633
150
Australian Communist Party v. Commonwealth
(1951) 83 C.L.R. 1
224
Bacharach’s Will Trusts, Re. Minden v.
Bacharach [1959] Ch. 245, [1959] 2 W.L.R.
1, [1958] 3 All E.R. 715
90
Baden’s Deed Trusts, Re. [1971] A.C. 424,
37, 104, 121-124
Baird (Robert) Ltd v. City of Glasgow [1936]
A.C. 32, 105 L.J.P.C. 33, 154 L.T. 65
163, 185, 266
Balfour v. Balfour [1919] 2 K.B. 571
43
128, 132, 143
56
1050 [1961] 2 All E.R. 849
65
Bardswell v. Bardswell (1838) 9 Sim. 319,
59 E.R. 381,
117
Barker v. Carr (1957) 59 W.A.L.R. 7
181
Barnes v. City of Cobourg [1928] V.L.R. 334
Barracough v. Cooper [1908] 2 Ch. 121, n., 77 L.J. Ch. 555, n. 98 L.T. 852, n.
Bathurst v. Errington (1877) 2 App.Cas. 698, 46 L.J. Ch. 748, 37 L.T. 338
Baylis v. Attorney-General (1741) 2 Atk. 239, 26 E.R. 548
Beaumont v. Fell (1723) 2 P.Wms. 141, 24 E.R. 673
Bendixen v. Coleman (1943) 68 C.L.R. 401
Bishop v. Taylor (1968) 42 A.L.J.R. 227
Blackett v. Bates (1865) 1 Ch.App. 177, 35 L.J. Ch. 324, 136L.T. 656
Blackpool Board of Health v. Bennett (1859) 4 H.&N. 127, 157 E.R. 784
Blackwood, Re [1953] N.I. 32
Blue Haven Motel Ltd v. District of Burnaby (1965) 52 D.L.R. (2d) 464
Blundell v. Gladstone (1844) 14 Sim. 83, 60 E.R. 288
Boden, Re. Boden v. Boden [1907] 1 Ch. 132, 76 L.J. Ch.100, 95 L.T. 741
Bond, Re. Cole v. Hawes (1876) 4 Ch.D. 238
Bould v. Moore (1902) 4 G.L.R. 482
Brand Estates Ltd, Re [1936] 3 All E.R. 374
Brosseau v. Dore (1904) 35 S.C.R. 205
Brown v. McInnes (1896) 15 N.Z.L.R. 256
Brunswick Corporation v. Stewart (1941) 65 C.L.R. 88
Bunch and Town of Cobourg, Re (1963) 39 D.L.R.(2d) 513
Butchers, Re (1970) 11 D.L.R. (3d) 519
Butchers Co. v. Morey (1790) 1 H.B. 370, 126 E.R. 217
Callinan, Ex parte. Re Russell (1945) 45 S.R. (N.S.W.) 358
Cannan v. Fowler (1853) 14 E.B. 181, 139 E.R. 75
Cann's Pty. Ltd v. Commonwealth (1946) 71 C.L.R. 210
Magistrates' Court, Masterton E.R. 882, 883/70
Chandler & Co. Ltd v. Hawke's Bay County [1961]
N.Z.L.R. 746
Charter v. Charter (1874) L.R. 7 H.L. 364
Chartered Bank of India, Australia, and China v. British India Steam Navigation Co. Ltd
Churston Settled Estates, Re. [1954] Ch. 334,
City of London case (1609) 8 Co.Rep. 121b, 77 E.R. 658
Clayton v. Ramsden [1943] A.C. 320
Coates dec'd Re. Ramsden v. Coates [1955]
Ch. 495, [1954] 3 W.L.R. 959, [1955] 1 All E.R. 26
Cody v. Claxton (1945) 19 A.L.J. 206
Collman v. Mills [1897] 1 Q.B. 396
Connolly, Re. Connolly v. Connolly [1910]
  1 Ch. 219, 79 L.J. Ch. 148, 101 L.T. 783,
  26 T.L.R. 189

Cook v. North Vancouver (1911) 16 B.C.R. 129

Coope v. Ridout [1921] 1 Ch. 291

Cooper v. Hood (1858) 26 Beau. 293, 53 E.R. 911

Corless v. City of Richmond

Cory, dec'd, Re. Cory v. Morel [1955] 1 W.L.R.
  725, [1955] 2 All E.R. 630

  (1930) 43 C.L.R. 126


Coxen, Re. McAllum v. Coxen [1948] 1 Ch. 747,
  [1948] 2 All E.R. 492

Crabb and Town of Swan River, Re. (1913)
  9 D.L.R. 405

Craik v. Lamb (1844) 1 Coll. 489, 63 E.R. 512

Cranton v. Worthington (1908) 27 N.Z.L.R. 677,
  10 G.L.R. 358

Crisp from the Fens v. Rutland County Council
  (1950) 114 J.P. 105, 94 S.J. 177

Cullen, Re. [1921] N.Z.L.R. 209, sub nom. Cullen
  v. Cullen (1920) 22 G.L.R. 536

Cundy, Re. (1899) 8 N.Z.L.R. 53 1 G.L.R. 247

Cuthbert v. Cumming (1885) 10 Ex 809,
  156 E.R. 668

Dartmouth, City of v. S.S. Kresge Co. Ltd
  (1966) 58 D.L.R. (2d) 229

Davidson v. Mayor etc. of Auckland (1904) 24

Davies v. Davies (1887) 36 Ch.D. 359, 56 L.J. Ch.
  962, 58 I.T. 209

Dawson's Will Trusts, Re. National Provincial
  1 W.L.R. 391, [1957] 1 All E.R. 177

  659
Denne v. Light (1857) 8 D.M.&G. 774, 26 L.J. Ch.459, 44 E.R. 588

Denton v. Ryde Municipal Council (1953) 19 L.G.R.A. 321

Deprez, Re. Henriques v. Deprez [1917] 1 Ch.24, 86 L.J. Ch.91, 115 L.T. 662

De Rosaz, In the goods of (1877) 2 P.D. 66

Dilworth, Re. McMurray v. Dilworth (1902) 22 N.Z.L.R. 125


Duncan v. Lawless (1901) 3 G.L.R. 472


Dunning v. Maher (1912) 106 L.T. 846, 23 Cox.C.C. 1


Eades, Re. Eades v. Eades [1920] 2 Ch. 353

Eagleton v. East India Co. (1802) 3 B. & P. 55, 127 E.R. 32


---

x.

---

66

74

100

28, 31, 99

97

58

108

58, 93

59

98

223, 231, 241

243

227

163

200, 204, 243

126

155, 157, 158

29, 51, 58

50

91, 104

88

75
Elder, Re. Elder v. Hercus (1896) 14
N.Z.L.R. 565

Elderslie Steamship Co. Ltd v. Borthwick [1905]
A.C. 93, 74 L.J.K.B. 338, 92 L.T. 274,
21 T.L.R. 277

Ellenborough Park, Re. Davies, dec'd., Re.
3 W.L.A. 892, [1955] 3 All E.R. 667

Ellis v. Yarnly (1661) 1 Keble 124, 83
E.R. 852

Esso Petroleum Co. Ltd v. Harper's Garage
2 W.L.R. 871, [1967] 1 All E.R. 699


Fawcett Properties Ltd v. Buckingham County
[1960] 3 All E.R. 503 H.L.(E), [1959] Ch.543,
(C.A.)

Fenton v. Nevin (1893) 31 L.R.Ir. 478

Fickus, Re. Fanna v. Fickus [1900] 1 Ch.331,
69 L.J. Ch.162, 81 L.T. 749

Finbow v. Air Ministry [1963] 1 W.L.R. 697,
[1963] 2 All E.R. 647

First National Bank v. Methodist Home (1957)
181 Kan. 100, 309 F. 2d. 389

Flint v. Hughes (1843) 6 Beav. 342, 49 E.R.
858

Foley v. Classique Coaches Ltd [1934] 2 K.B. 1

Follett, dec'd., Re. Barclays Bank Ltd v.
22 (C.A.)

Foord, Re. Foord v. Condor [1922] Ch.519
G2 L.J. Ch.46, 1 28 L.T. 501

Ford v. Mayor etc. of Oamaru (1881) L.R.
1 S.C. 97


Foster v. Moore (1879) 4 L.R.Ir. 670 162, 170

Foster v. Wheeler (1888) 38 Ch.D. 130, 57 L.J. Ch. 871, 59 L.T. 15, 4 T.L.R. 399 81

Framework-Knitters' Co. v. Green (1696) 1 Ld Raym. 113, 91 E.R. 972 157, 158

Fraser Henleins Pty. Ltd v. Cody (1945) 70 C.L.R. 100 264


Gerard & Co. Pty. Ltd., Ex parte. Re Craig (1944) 44 S.R.(N.S.W.) 370 183, 186

Gerrish v. Rodman (1771) 3 Wils. 155, 95 E.R. 986 154


Giles v. Melsom (1873) L.R. 6 H.L. 24 92


Glynn v. Margetson & Co. [1893] A.C. 351


Gold v. Patman and Fotheringham Ltd [1958]
1 W.L.R. 697, [1958] 2 All E.R. 497


Grant v. Grant (1870) L.R. 5 C.P. 727, 39 L.J.P.C. 272, 22 L.T. 829

Grant v. Lynam (1828) 4 Russ. 292, 38 E.R. 815

Grater v. Montagu (1904) 23 N.Z.L.R. 904


Green, Re. Bath v. Cannon [1914] 1 Ch.134, 83 L.J.C.L. 248, 110 L.T. 58


Green v. Wood (1845) 7 Q.B. 178, 115 E.R. 455


Gully v. Cregoe (1857) 24 Beav. 185, 53 E.R. 327

Guthing v. Lynn (1831) 2 B. & Ad. 232, 109 E.R. 1130

[Page numbers for references are added here for context.]
<table>
<thead>
<tr>
<th>Case</th>
<th>Year(s)</th>
<th>Volume(s)</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Haddock v. District of North Cowichan</td>
<td>1966</td>
<td>59</td>
<td>392</td>
</tr>
<tr>
<td>Hains, Re. Hains v. Elder's Trustee and Executor Co. Ltd</td>
<td>1942</td>
<td>S.A.S.R. 172</td>
<td>129, 130</td>
</tr>
<tr>
<td>Hain's Settlement, Re.</td>
<td>1961</td>
<td>1 W.L.R. 440, 1 All E.R. 848</td>
<td>104, 120</td>
</tr>
<tr>
<td>Hall, Re. Andrews v. Wiffen</td>
<td>1931</td>
<td>N.Z.L.R. 382</td>
<td>98</td>
</tr>
<tr>
<td>Hall v. Nixon (1875)</td>
<td>1875</td>
<td>L.R. 10 Q.B. 152, 44 L.J.(M.C.) 51, 33 L.T. 92, 32 L.T. 87</td>
<td>156</td>
</tr>
<tr>
<td>Hall v. Weatherford (1927)</td>
<td>1927</td>
<td>32 370, 259 Pac. 282</td>
<td>49</td>
</tr>
<tr>
<td>Hamilton v. Ritchie</td>
<td>1894</td>
<td>A.C. 310</td>
<td>17</td>
</tr>
<tr>
<td>Harding v. Glynn (1739)</td>
<td>1739</td>
<td>1 Atk. 469, 26 E.R. 299</td>
<td>114</td>
</tr>
<tr>
<td>Harland v. Trigg (1782)</td>
<td>1782</td>
<td>1 Bro.C.C. 142, 28 E.R. 104</td>
<td>114</td>
</tr>
<tr>
<td>Harris v. Du Pasquier</td>
<td>1872</td>
<td>26 L.T. 689</td>
<td>126</td>
</tr>
<tr>
<td>Hart v. Hart (1881)</td>
<td>1881</td>
<td>18 Ch.D. 670, 50 L.J. Ch.697, 45 L.T. 13</td>
<td>74</td>
</tr>
<tr>
<td>Haws v. Haws (1747)</td>
<td>1747</td>
<td>3 Atk. 524, 26 E.R. 1102</td>
<td>91</td>
</tr>
<tr>
<td>Hazeldon v. McAra</td>
<td>1948</td>
<td>N.Z.L.R. 1087</td>
<td>172, 259</td>
</tr>
<tr>
<td>Healy v. Dunne</td>
<td>1898</td>
<td>1 W.A. 29</td>
<td>181, 247</td>
</tr>
</tbody>
</table>
Hetley, Re. Hetley v. Hetley [1902] 2 Ch. 866, 71 L.J. Ch. 769, 87 L.T. 265

Hicks v. Sallitt (1854) 3 De G.M. & G. 682, 43 E.R. 307

Higbie v. Wilkinson (1903) 23 N.Z.L.R. 74

Hill v. Hill [1897] 1 Q.B. 483


Hirsch v. Town of Winnipeg Beach (1961) 26 D.L.R.(2d) 659


Horowhenua County v. Nash (No. 2) [1968] N.Z.L.R. 632


Hughes, Re. Hughes v. Footner [1921] 2 Ch. 208, 91 L.J. Ch. 10, 127 L.T. 117

Hunt v. Hort (1791) 3 Bro.C.C. 311, 29 E.R. 554

Hunter v. McLean (1907) 27 N.Z.L.R. 231


Hussey v. Horne-Payne (1879) 4 App.Cas. 311, 48 L.J. Ch. 846, 41 L.T. 1

Hutton v. Warren (1836) 1 M. & W. 466, 5 L.J. Exch. 234, 150 E.R. 517


Ingham v. Hie Lee (1912) 15 C.L.R. 267

Inland Revenue Commissioners v. Ross and Coulter, Re Bladnoch Distillery Co. [1948] 1 All E.R. 616

<table>
<thead>
<tr>
<th>Case</th>
<th>Year</th>
<th>Volume</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>Innholder's case</td>
<td>1750</td>
<td>Wils. 281, 95</td>
<td>619</td>
</tr>
<tr>
<td>Ireland v. Wilson</td>
<td>1936</td>
<td>3 All E.R. 358</td>
<td></td>
</tr>
<tr>
<td>Jackson (F.E.) &amp; Co. Ltd v. Collector of Customs</td>
<td>1939</td>
<td>N.Z.L.R. 682, 229</td>
<td>622</td>
</tr>
<tr>
<td>Jacob, Re. Jacob v. Jacob</td>
<td>1897</td>
<td>16 N.Z.L.R. 52</td>
<td></td>
</tr>
<tr>
<td>Jacobs v. Batavia General Plantations Trust Ltd</td>
<td>1924</td>
<td>1 Ch. 287; affirmed [1924] 2 Ch. 329, 93 L.J. Ch. 520, 131 L.T. 617, 40 T.L.R. 616</td>
<td>56</td>
</tr>
<tr>
<td>James v. Allen</td>
<td>1817</td>
<td>3 Mer. 17, 36 E.R. 7</td>
<td>126</td>
</tr>
<tr>
<td>Jaques v. Lloyd D. George and Partners Ltd</td>
<td>1968</td>
<td>1 W.L.R. 625, 2 All E.R. 187</td>
<td>80</td>
</tr>
<tr>
<td>Jenkins v. Kent</td>
<td>1922</td>
<td>N.Z.L.R. 882</td>
<td></td>
</tr>
<tr>
<td>Johnson, Re. Public Trustee v. Calvert</td>
<td>1939</td>
<td>2 All E.R. 458</td>
<td></td>
</tr>
<tr>
<td>Johnson v. Hammond</td>
<td>1888</td>
<td>N.Z.L.R. 245</td>
<td></td>
</tr>
<tr>
<td>Johnstone v. Holdaway</td>
<td>1963</td>
<td>1 Q.B. 601, 2 W.L.R. 147, 1 All E.R. 432</td>
<td>135</td>
</tr>
<tr>
<td>Jones, dec'd., Re.</td>
<td>1971</td>
<td>N.Z.L.R. 796</td>
<td></td>
</tr>
<tr>
<td>Jones, Re Midland Bank Executor and Trustee Co. v. Jones</td>
<td>1953</td>
<td>Ch.125, 283, 1 All E.R. 357</td>
<td>130</td>
</tr>
<tr>
<td>Jones, Re. Public Trustee v. Jones</td>
<td>1945</td>
<td>Ch.105 115 L.J. Ch. 33, 173 L.T. 357</td>
<td>103</td>
</tr>
<tr>
<td>Jones v. Metropolitan Meat Industry Board</td>
<td>1925</td>
<td>37 C.L.R. 252</td>
<td></td>
</tr>
<tr>
<td>Jones v. Padavatton</td>
<td>1969</td>
<td>1 W.L.R. 328, 2 All E.R. 616</td>
<td>44, 46</td>
</tr>
<tr>
<td>Jones v. Price</td>
<td>1841</td>
<td>11 Sim. 557, 59 E.R. 988</td>
<td>91</td>
</tr>
<tr>
<td>Jones v. Walton</td>
<td>1966</td>
<td>W.A.R. 139</td>
<td></td>
</tr>
<tr>
<td>Jubber v. Jubber</td>
<td>1839</td>
<td>9 Sim. 503, 59 E.R. 452</td>
<td>109</td>
</tr>
</tbody>
</table>
Kay v. Crook (1857) 3 Sim. & G. 407, 65 E.R. 715 87
Kell v. Charmer (1856) 23 Beav. 195, 53 E.R. 76 23, 90
Kenny, Re. Read v. Isaacs [1921] N.Z.L.R. 537 115
Kerridge Odeon Corporation Ltd v. Auckland City [1966] N.Z.L.R. 266 194
King Gee Clothing Pty Ltd v. Commonwealth (1945) 71 C.L.R. 184 141, 152, 178, 184, 186-189, 197, 212-213, 230, 241, 268

Kirkbride's Trust, Re. (1886) L.R. 2 Eq. 400, 15 L.T. 51 92
Knight v. Knight (1840) 3 Beav. 148, 49 E.R. 58 113, 114
Koetsveld v. Patrick (1903) 29 V.L.R. 152 182, 203, 252
Krawitz Will Trusts, Re. [1959] 1 W.L.R. 1192, [1959] 3 All E.R. 793 130

Kursell v. Timber Operators and Contractors Ltd [1927] 1 K.B. 298 140
Lambe v. Eames (1870) L.R. 10 Eq. 267, (1871) 6 Ch.App. 597(C.A.) 114-115
Lawrence v. Turner (1623) 2 Rolle. 369, 81 E.R. 858
Le Marchant v. Le Marchant (1874) L.R. 18 Eq. 414
Life Insurance Co. of Australia Ltd v. Phillips (1925) 36 C.L.R. 60
Lindsay v. Union Steam Ship Co. of New Zealand Ltd [1960] N.Z.L.R. 486
Linson v. Walsh (1860) Argus Newspaper (Victoria) 23 March 1860, 3 Aust.Dig. 150
Lloyd's Trust Investments, (unreported) Megarry J. June 24, 1970
London, City of, case (1609) 8 Co. Rep. 121b., 77 E.R. 658
Lourie, dec'd., Re. [1968] N.Z.L.R. 541
Love & Stewart Ltd v. S. Instone Ltd (1917) 33 T.L.R. 475
Lutheran Church of Australia South
Australian District Inc. v. Farmers Co-operative Executors and Trustees Ltd (1970)
44 A.L.J.R. 176

Lushington, Re. Wynard v. Attorney-General

Luxor (Eastbourne) Ltd v. Cooper [1941]
A.C. 108, 110 L.J.K.B. 131, 164 L.T. 313,
57 T.L.R. 213, [1941] 1 All E.R. 83

Lysaght, dec'd, Re. [1966] Ch.191, [1965]
3 W.L.R. 391, [1965] 2 All E.R. 888

MacAndrew's Will Trusts, Re. Stephens v.
Barclays Bank Ltd [1964] Ch.704, [1963]
3 W.L.R. 822, [1963] 2 All E.R. 919

McAnnalley, Re. McAnnalley v. Public Trustee
[1935] N.Z.L.R. s.106

McCarthy v. Madden (1914) 33 N.Z.L.R. 1251,
17 G.L.R. 61

[1933] G.L.R. 821

McDevitt v. McArthur (1919) 15 Tas.L.R. 6

Macduff, Re. Macduff v. Macduff [1896] 2 Ch.451
74 L.T. 706

W.L.R. 179, [1969] 2 All E.R. 1039


McGill v. Garbutt (1886) N.Z.L.R. 5 S.C. 73

28 G.L.R. 372

McLachlan v. Taitt (1860) 2 De G.F. & J.
449, 45 E.R.695

McMillan, Ex parte. Re Craig (1944) 45
S.R.(N.S.W.) 229


Macphall v. Torrance (1909) 25 T.L.R. 810

McPhee v. Wolters (1901) 20 N.Z.L.R. 493

Maddison v. Alderson (1883) 8 App.Cas. 467,
52 L.J.K.B. 737, 49 L.T. 303

Mahupuku, Re Thompson v. Mahupuku [1932]
N.Z.L.R. 1397

102, 105, 125

110

69

128

90, 100, 108

98, 111

187, 193, 198,
213, 231

204, 263

154

125, 126

6, 25, 163, 165-169,
223, 242

101, 102, 103

171

256

92

183, 186

130, 132

87

171

87

108
Maihu v. Flower (1662) 1 Sid. 98, 82
E.R. 993

Malim v. Keighley (1795) 2 Ves. 529, 30
E.R. 760

Marilyn Investments Ltd v. Rural Municipality of Assiniboia (1965) 51 D.L.R. (2d) 711

Markham v. Junex (1606) 1 Brownl. & Golds. 92, 123 E.R. 686


Martin and Fort Garry; Re. (1957) 19 D.L.R. (2d) 578


Martin v. Clarke (1893) 62 L.J.(N.C.) 178, 9 T.L.R. 656


[1964] 2 Lloyd's Re. 283


Messenger's Estate, Re. Chaplin v. Ruane [1937] 1 All E.R. 355

Midgely Estates Ltd v. Hand [1952] 2 Q.B. 432,

Mifsud v. Commonwealth [1968] 2 N.S.W.R. 83

Miller v. City of Brighton [1928] V.L.R. 375

Miller and Giorgi v. Collinge (1909) 28
N.Z.L.R. 358


xx.

Mills v. Farmer (1815) 1 Mer. 55, 35 E.R. 597

Mitchell and Township of Saugeen, Re. (1919) 46 O.L.R. 279

Mitchel v. Reynolds (1711) 1 P.Wms. 181, 24 E.R. 347


Moggridge v. Thackwell (1803) 7 Ves.36, 30 E.R. 440

Monk v. Mawdsley (1827) 1 Sim. 286, 57 E.R. 584

Montreal, City of v. Morgan (1920) 54 D.L.R. 165

Morice v. Bishop of Durham (1805) 10 Ves. 522, 32 E.R. 947

Morris v. Ballard (1926) 16 F.2d 175

Mortimer, Re. Gray v. Gray [1905] 2 Ch.502, 74 L.J. Ch. 745, 93 L.T. 459

Mullooly v. Macdonald (1888) 7 N.Z.L.R. 1

Munt, Cottrell & Co. (Ltd) v. Doyle (1904) 24 N.Z.L.R. 417

Murray v. Parker (1854) 19 Beav. 305, 52 E.R. 367


Nash v. Finlay (1901) 85 L.T. 682, 18 T.L.R. 92, 20 Cox.C.C. 101


Nesbitt, dec'd, Re. Dr Barnardo's Homes v. United Newcastle-upon-Tyne Hospitals [1953] 1 W.L.R. 595, [1953] 1 All E.R. 936


Niller v. Green (1673) 3 Keble 153, 84 E.R. 648

Norris and Trussel, Wardens of the Society of Weavers in the Town of Newbury in the County of Berks v. J. Scapes (1616) 1 Brownl. & Golds. 48, 123 E.R. 657

Ofner, Re. Samuel v. Ofner [1909] 1 Ch.60, 78 L.J. Ch.50, 99 L.T. 813

Ogden, Re. Brydon v. Samuel [1933] Ch.678, 102 L.J. Ch.226, 149 L.T. 162, 49 T.L.R.341

O'Keefe v. City of Caulfield [1945] V.L.R. 227

Oriental Bank v. Wright (1880) 5 App.Cas. 842, 50 L.J.P.C. 1, 43 L.T. 177

O'Sullivan, Ex parte. Re Craig (1944) 44 S.R.(N.S.W.) 291


Oxford Mayor of v. Wildgoose (1689) 3 Lev. 293, 83 E.R. 696


Palmer v. Simmonds (1854) 2 Drew. 221, 61 E.R. 704


Parker v. Taswell (1858) 2 De G. & J. 559, 44 E.R. 1106

Parker v. Tootal (1865) 11 H.L.C. 143, 11 E.R. 1286

Parnall v. Parnall (1878) 9 Ch.D. 96

Pasmore v. Huggins (1855) 21 Beav. 103, 52 E.R. 798
Pearce v. Stevens (1904) 24 N.Z.L.R. 357
Pearce v. Watts (1875) L.R. 20 Eq. 492
Pearse v. City of South Perth [1968] W.A.R. 130
Peck v. Halsey (1726) 2 P.Wms. 387, 24 E.R. 780
Pierson v. Garnet (1786) 2 Bro.C.C. 38, 29 E.R. 20
Piper v. Chappell (1845) 14 M. & W. 624, 153 E.R. 625
Poulter's Co. v. Phillips (1840) 6 Bing N.C. 314, 133 E.R. 124
Powell v. Hopkins (1649) Styles 247, 82 E.R. 683
R v. Bratby, Re McLeod Bros (1889) 7 N.Z.L.R. 375
R v. Catherall (1731) 2 Str. 900, 93 E.R. 927
R v. Davis (1833) 5 B.&Ad. 551, 110 E.R. 893
R v. Fuller (1699) 1 Ld.Raym. 509, 91 E.R. 1240
R v. Garvey, ex parte Henry (1888) 6 N.Z.L.R. 628
R v. King (1826) 2 C.&P. 412, 172 E.R. 186
R v. Liggetts-Findlay Drug Stores Ltd (1919) 49 D.L.R. 491
R v. MacDonald, Re Christie (1889) 7 N.Z.L.R. 361
R v. Mayor of Durham (1757) 1 Ken. 512, 96 E.R. 1074
R v. Trelawny (1786) 1 T.R. 222, 99 E.R. 1062
Raffles v. Wichelhaus (1864) 2 H. & C. 906, 159 E.R. 375
Rayner, Re. Rayner v. Rayner [1904] 1 Ch. 176
Reigate v. Union Manufacturing Co. (Ramsbottom) Ltd [1918] 1 K.B. 592
Richardson v. Austin (1911) 12 C.L.R. 463
Richardson v. Watson (1833) 4 B.&Ad. 787, 110 E.R. 652
Richmond Gate Property Co. Ltd, Re. [1965] 1 W.L.R. 335, [1964] 3 All E.R. 936
[1963] 3 All E.R. 160, 161, 162, 214
Shamrock S.S. Co. v. Stoney & Co. (1899) 81 L.T. 413, 16 T.L.R. 6
Shaw v. City of Essendon [1926] V.L.R. 461
Sherratt v. Bentley (1834) 2 My. & K. 149, 39 L.R. 901
Shore v. Wilson, Lady Hewley's Charities (1842) 9 Cl. & Fin. 355; 8 E.R. 450
Simcoe, Re. Vowler-Simcoe v. Vowler [1913] 1 Ch. 552
Sinderberry, Ex parte. Re Reid (1944) 44 S.R.(N.S.W.) 263
Singleton v. Romlinson (1878) 3 App.Cas. 404, 38 L.T. 653
Smidmore v. Smidmore (1905) 3 C.L.R. 344
Smith, Re. [1948] Ch. 49
Smith v. Crabtree (1871) 6 Ch.D. 591
Smith v. Pybus (1804) 9 Ves. 566, 32 E.R. 722
Smith v. Wellington City (No.2) [1968] N.Z.L.R. 730 6, 221
Smith v. West Australian Trustee Executor & Agency Co. Ltd (1950) 81 C.L.R. 320 106
Soames, Re. Church Schools Co. v. Soames (1897) 13 T.L.R. 439 87
South Eastern Railway Co. v. Associated Portland Cement Manufacturers [1910] 1 Ch.12 79 L.J. Ch.150, 101 L.T. 865 135
Stamford and Warrington (Earl), Re. Payne v. Grey [1912] 1 Ch.343, 81 L.J. Ch.302, 105 L.T. 913, 28 T.L.R. 159 94
Staples & Co. Ltd v. Wellington City (1900) 18 N.Z.L.R. 857 171-172
Stationers' Co. v. Salisbury (1693) Comb.221, 90 E.R. 440 153, 154
Stead v. Mellor (1877) 5 Ch.D. 225, 46 L.J. Ch. 880, 36 L.T. 498 117
Stephan v. Baylor (1937) 37 S.R.(N.S.W.) 127 260
Stewart v. City of Essendon [1924] V.L.R. 219 182, 183, 188, 198
Stone v. Goddard (1616) 1 Brownsl. & Golds. 81, 123 E.R. 679 150


Surrey Zoning Bylaw 1954, No.1291; Re. British Columbia Electric Co. Ltd v. District of Surrey (1956) 1 D.L.R. (2d) 717 190, 260, 262

Sutton, Re. Stone v. Attorney-General (1885) 28 Ch.D. 464, 54 L.J. Ch.613 126


Taylor, Re. Cloak v. Hammond (1886) 34 Ch.D.255 27


Taylor v. Beverley (1844) 1 Coll. 108, 63 E.R. 342 92

Taylor v. Portington (1855) 7 De G.M.&G. 328, 44 E.R. 128 62

Taylors of Ipswich case (1614) Godb. 252, 78 E.R. 147 153


Thomas, Re. Smith v. Thomas (1915) 34 N.Z.L.R. 1110 97
Thompson and Pana, Re. (1894) 13 N.Z.L.R. 218
Thomson, Ex parte. Re Clarke (1945) 45 S.R.(N.S.W.) 193
Thorn v. Dickens [1906] W.N. 54
Tobacco-Pipe Makers' Co. v. Woodroffe (1825) 7 B.&C. 835, 108 E.R. 935
Topliss Bros. v. Cohr (1904) 24 N.Z.L.R. 540
Transport Department v. Manawatu Asphalts Ltd (1971) 13 M.C.D. 257
Treasure & Co. v. Bermondsey Borough Council (1904) 68 J.P. 206
Trustees Executors & Agency Co. Ltd v. Peters (1960) 102 C.L.R. 537
United Bill Posting Co. v. Somerset County Council (1926) 95 L.J.K.B. 899
Vancouver Incorporation Act 1921, Re. Re Bent [1940] 2 W.W.R. 697
Vardon v. Commonwealth (1943) 67 C.L.R. 434
Vince, Re. Ex parte Baxter [1892] 2 Q.B. 478
Voisey, Ex parte. In re Knight (1882) 21 Ch.D. 442
Von Hatzfeldt-Wildenburg v. Alexander [1912] 1 Ch.284, 81 L.J. Ch.184

Waikato (Cargo owners) v. New Zealand Shipping Co. [1898] 1 Q.B. 56, 68 L.J.Q.B. 1, 79 L.T. 326, 15 T.L.R. 33

Waldegrave v. Mayor etc. of Palmerston North (1909) 29 N.Z.L.R. 223


Walter v. Farmer (1620) Latch 216, 82 E.R. 353

Walton's Estate, Re. (1856) 8 De G.M. & G. 173, 44 E.R. 356

Waring & Gillow (Ltd) v. Thompson (1912) 29 T.L.R.

Way v. Latilla [1937] 3 All E.R. 759

Webb's case (1607) 1 Rolle. Abr. 609

Western v. Western [1916] N.Z.L.R. 195

White v. White (1908) 28 N.Z.L.R. 129

Whitlock v. Brew (1968) 118 C.L.R. 445


Widgeeshire Council v. Bonney (1907) 4 C.L.R. 977


Williams, Re. Williams v. Williams [1897] 2 Ch.12

Williams v. Melbourne Corporation (1933) 49 C.L.R. 142

Williams v. Weston-Super-Mare U.D.C. No.1 (1907) 96 L.T. 537


Williamson, J.C. Ltd v. Lukey & Mulholland (1931) 45 C.L.R. 282

Willis, Re. Shaw v. Willis [1921] 1 Ch.44, 90 L.J. Ch.94, 124 L.T. 290, 37 T.L.R. 43

Winn v. Bull (1879) 7 Ch.D. 29, 47 L.J. Ch.139

Winnipeg Beach (Town of) Re Bylaw 92 (1919) 50 D.L.R. 712

Wolff, Re. Thornthwaite & Goldby v. David (1958) 16 D.L.R.(2d) 527


Wood v. Searl (1618) Bridg. J. 139, 123 E.R. 1257

Woolworth, (F.W.) & Co. Ltd & City of Hamilton, Re. (1965) 46 D.L.R. (2d) 602

Wootton, dec'd, Re. [1968] 1 W.L.R. 681, [1968] 2 All E.R. 618

Wright v. Atkyna (1810) 17 Ves. 255, 34 E.R. 98

Wright v. Atkyns (1823) Turn. & R. 143, 37 E.R. 1051

Wright v. T.I.L. Services Pty. Ltd (1956) 56 S.R.(N.S.W.) 413


Yeap Cheah Neo v. Ong Cheng Neo (1875) L.R. 6 P.C. 381

Zietsch, Ex parte. Re Craig (1944) 44 S.R.(N.S.W.) 360

Zurowski, Re. [1928] 1 D.L.R. 357

51

191, 236

108

128, 131

148, 149, 151, 155

190

104

114

118

154, 177, 187

127

102

183, 186, 216, 232, 233, 243, 251

96
TABLE OF STATUTES AND REGULATIONS

Unless otherwise indicated, all references are to New Zealand legislation.

<table>
<thead>
<tr>
<th>Act/Matter</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acts Interpretation Act, 1924 s.5(j)</td>
<td>174, 225</td>
</tr>
<tr>
<td>Air Services Licensing Act, 1951</td>
<td>210</td>
</tr>
<tr>
<td>Animal Remedies Act, 1967</td>
<td>211</td>
</tr>
<tr>
<td>Bankruptcy Act, 1885</td>
<td>139, 140</td>
</tr>
<tr>
<td>Broadcasting Authority Act, 1968</td>
<td>210</td>
</tr>
<tr>
<td>Bylaws Act, 1910</td>
<td>144, 173, 204-205, 245, 257-259, 260, 278</td>
</tr>
<tr>
<td>Charitable Trusts Act, 1957</td>
<td>125, 127, 128</td>
</tr>
<tr>
<td>Charitable Trusts Amendment Act, 1963</td>
<td>127</td>
</tr>
<tr>
<td>Charitable Trusts (Validation) Act, 1954 (U.K.)</td>
<td>127</td>
</tr>
<tr>
<td>Clerk of Works Act, 1944</td>
<td>210</td>
</tr>
<tr>
<td>Contracts Enforcement Act, 1956</td>
<td>41</td>
</tr>
<tr>
<td>Counties Act, 1956</td>
<td>257-259</td>
</tr>
<tr>
<td>Criminal Injuries Compensation Act, 1963</td>
<td>210</td>
</tr>
<tr>
<td>Customs Act, 1966</td>
<td>210</td>
</tr>
<tr>
<td>Dental Act, 1963</td>
<td>211</td>
</tr>
<tr>
<td>Finance Act, 1969 (U.K.) s.36</td>
<td>121-122</td>
</tr>
<tr>
<td>Forest &amp; Rural Fires Act, 1955</td>
<td>221</td>
</tr>
<tr>
<td>Housing Act, 1950 (U.K.)</td>
<td>214</td>
</tr>
<tr>
<td>Indecent Publications Act, 1963</td>
<td>211</td>
</tr>
<tr>
<td>Industrial Conciliation and Arbitration Act, 1964</td>
<td>210</td>
</tr>
<tr>
<td>Inferior Courts Procedure Act, 1909</td>
<td>139</td>
</tr>
<tr>
<td>Inland Revenue Department Amendment Act, 1960</td>
<td>211</td>
</tr>
<tr>
<td>Judicature Act, 1908</td>
<td>133</td>
</tr>
<tr>
<td>Land Settlement Promotion and Land Acquisition Act, 1952</td>
<td>211</td>
</tr>
<tr>
<td>Land Transfer Act, 1952</td>
<td>60, 136</td>
</tr>
<tr>
<td>Land Transfer Regulations, 1966</td>
<td>136</td>
</tr>
<tr>
<td>Land Valuation Proceedings Amendment Act, 1968</td>
<td>211</td>
</tr>
<tr>
<td>Law Reform (Testamentary Promises) Act, 1949</td>
<td>87</td>
</tr>
</tbody>
</table>
Law Reform (Testamentary Promises)
   Amendment Act, 1961  s.2  88
Magistrates' Courts Act, 1947  138
Milk Act, 1967  211
Motor Spirits Distribution Act, 1953  210
Municipal Corporations Act, 1900  172
   "   "   1908  172
   "   "   1920  172
   "   "   1933  172
   "   "   1954  172, 257-259
National Security Act, 1939-1945 (Aust.)  187
National Security (Prices) Regulations  183, 212
   1939-1945 (Aust.)
Police Act, 1958  210
Property Law Act, 1956  60, 140
Race Relations Act, 1971  210
Sale of Goods Act, 1908  41, 140
Sale of Liquor Act, 1952  211
Stabilisation of Remuneration Act, 1971  210
Summary Proceedings Act, 1957  139
Statutes Amendment Act, 1945  259-260
Town and Country Planning Act, 1953  211, 227
Trade Practices Act, 1958  210
Transport Act, 1962  210
Trustee Act, 1956  112
Trustee Amendment Act, 1935  126-127
Urban Renewal & Housing Improvement Act, 1945  172
Wills Act, 1837 (U.K.)  86, 101, 106, 255, 268
Wills Amendment Act, 1955  86
Wills Amendment Act, 1962  86
Wills Amendment Act, 1969  86
Workers' Compensation Act, 1956  210
PART ONE

INTRODUCTION
CHAPTER 1.

INTRODUCTION

Uncertainty of meaning of words is a problem of considerable concern to scientists, philosophers, and lawyers. Since the language of words is man's chief medium of thought and means of communication, its imprecise and ambiguous nature tends to cause unnecessary misunderstanding and confusion. Scientists and philosophers have devoted considerable thought and discussion, aided in recent years by laboratory research, to reaching a closer understanding of the nature and function of language in general, and particularly to the question of how words can be said to 'mean' something.

In law the meaning of words is of paramount importance, yet lawyers have approached problems of their interpretation in a generally haphazard, though admittedly pragmatic manner. Should uncertainty arise as to the meaning of a statute for example, resort may be had to any of a number of established rules or 'canons' or construction, each of which purports to guide the interpreter towards one or other of the choices that the language of the statute appears to leave open to him. It has been said that these rules

...consist of a number of guides which largely cancel each other out, of learned formulas giving a deceptive appearance of logic which only serves to conceal the choice of equal logical validity, and of inarticulate
ideological premises which depend on personal predilection and on changing trends of public and social policy.\footnote{1}

Of these interpretative rules and sub-rules much has been written elsewhere, and they will receive only passing reference in this work. The concern of this study is instead with those types of legal instruments where the courts have a way out of their dilemma. Where the words are so obscure that no certain meaning suggests itself, they need not embark upon a process of refined analysis in order to distil some drop of meaning to which effect may be given. They may instead hold the instrument to be invalid.

In private law, uncertainty may lead to invalidity principally in contracts, wills and trusts, although various other instruments may also fail on this ground. As may be expected the major problem is in determining the degree of uncertainty that is to be present before the instrument should fail. Different degrees of certainty are sometimes insisted upon for different types of provision. But because of the difficulty in defining and determining concepts such as 'meaning' and 'uncertainty', assessments of their degree are likely to be highly subjective. Because of this the courts have tended on

\footnote{1. Friedmann, Law and Social Change in Contemporary Britain, 243-244. (Quoted in S. A. de Smith, Judicial Review of Administrative Action 2nd ed. (1968) 87.)}
occasions to be guided and influenced in the final analysis by a number of subsidiary considerations. In private law, principles of approach to the problem of uncertainty have been laid down over a period of years, and tend to be applied with reasonable consistency, a consistency that is generally reflected in the actual decisions.

But in public law the situation is quite the reverse. Of all the reported cases where judges have been required to grapple with unclear and imprecise wording and to relate it to the validity of provisions, those arising from subordinate legislation must demonstrate the widest divergence of judicial approach and understanding. There can be few areas of law where judicial inconsistency of so great a magnitude exists.

As an example, reference may be made to the cases on bylaws. That a bylaw may be held void for uncertainty has not always been admitted, but even among those judges who accept the test, there exist differences as to what degree of uncertainty should induce invalidity. While some insist that its language should be readily intelligible to the average citizen, others maintain that the bylaw should be construed 'benevolently', or that principles of statutory construction should be applied, or again that it is sufficient merely that an experienced judge should be able to understand the intentions of the legislator. Again, there is confusion over the status of the test. There are those who see it as a facet of unreasonableness, while others designate
it an 'independent' test of validity, or alternatively an aspect of the *ultra vires* rule.

The standard public law texts afford little enlightenment. Professor S. A. de Smith, whose book *Judicial Review of Administrative Action* has rapidly become a leading work, states simply:

Bylaws may also be pronounced invalid for uncertainty or repugnancy. The test of uncertainty is uncertain, that of repugnancy elusive; but it is broadly correct to say that uncertainty exists where a bylaw fails to indicate adequately what it is prohibiting...

Uncertainty is a ground for invalidating conditions annexed to grants of planning permission and site licences.2

A footnote in which reference is made to a handful of cases, explains that 'how this test of uncertainty ought to be formulated is not altogether clear', but apart from an earlier footnote,3 which adds little to the passage quoted, there is nothing more.

H.W.R. Wade, in *Administrative Law* 4 makes no mention of the certainty test at all.

*Halsbury's Laws of England* contains two references to the test. The first is the simple statement:

A bylaw must be certain, that is, it must contain adequate information as to the duties of those who are to obey.5

A later passage elaborates on this,6 but unfortunately the analysis there contained is, with respect, superficial and misleading,

2. 2nd ed. (1968) 339.
3. Ibid., 279, footnote 72.
5. 3rd ed. ix, 44.
6. Ibid., xxiv, 517.
and fails moreover to take into account any of the many decisions since 1925.

One possible explanation for the inadequacy of the English texts\(^7\) may be that much of the development of the test has taken in place in Commonwealth Courts. Australia, in particular, has chosen to proceed along different lines from the other common law countries, yet Benjafiefield and Whitmore's Australian Administrative Law\(^8\) dismisses the problem in two paragraphs. Reliance is there placed upon the dissenting judgement of Kitto J. in Television Corporation Ltd v. The Commonwealth,\(^9\) and upon Lord Denning's judgement in Fawcett Properties Ltd v. Buckingham County Council.\(^10\) The unusual facts of the latter case are discussed more fully later in this work,\(^11\) and, it is submitted, are such as to call for a much narrower interpretation of Lord Denning's judgement than the learned authors indicate.


11. See at pp.213-17 infra.
But there has been a significant number of cases where subordinate legislation has been tested for certainty, and it is difficult to understand the failure of legal writers to devote more study to this area of law.\(^\text{12}\) The courts have always been reluctant to exercise wide powers of review over subordinate legislation of the Governor-General and Ministers of the Crown, and have declined in this country at least, to test it for reasonableness.\(^\text{13}\) It is surprising then that recent applications of the certainty test to such legislation\(^\text{14}\) should pass without comment.

The present study is to a large extent prompted by the significance, both present and potential, of the test of certainty as a basis for review of administrative action. In order to assist in the understanding of what is meant by the assertion that a word or phrase is 'uncertain', the first part of this work is devoted to a brief study of the nature of language, and to how uncertainty arises in its use.

12. It may be noted too, that decisions on uncertainty in public law are indexed in a different manner in practically every Report. Where they are listed in a category of their own, they are liable to be found under any one or more of the following headings: ambiguity, uncertainty, or vagueness. These in turn may be subheadings of any of the following: Administrative law, Bylaws, Crown practice, Local government, Municipal corporations, or Statutory instruments.


Part Two is concerned with the extent to which private law instruments may be tested for uncertainty. This Part is not intended as an exhaustive study of interpretative processes in the context of private law documents, but merely as an attempt to study the effect upon the validity of a provision of imprecise language in its terms. An effort is made to isolate particular factors involved in the determination of this question, in the hope that they may be of some assistance in the analysis of the operation of the test in public law.

That analysis is contained in Part Three of this work, and opens with a study of the history of the test in public law. Ensuing chapters are devoted to its status, extent, and operation. Finally, consideration is given to the extent to which principles derived from decisions on private law instruments can assist in the application of the test, and to its likely future status and operation.
CHAPTER 2.

LANGUAGE

1. The Nature of Legal Communication

It is a counsel of perfection to say that the draftsman of a legal instrument must first ascertain the wishes of his client with regard to all foreseeable contingencies, and then express them in his document in such a way as to ensure that its subsequent interpretation is an exact reversal of his procedures in its preparation. But it is also a gross oversimplification of the actual process. It would rarely be possible to provide in specific terms for all foreseeable contingencies, let alone those which are not foreseeable. Many must be overlooked, even deliberately. It is likely then that vague language will be used, leaving specific future interpretation and application of the instrument to a greater extent in the hands of the courts.

The language of words is the chief form of human communication, and also the most significant instrument of social control. But in its use in legal documents it is

1. An interesting example of considerations of delicacy preventing parties from raising important issues in their negotiations is provided by the case of First National Bank v. Methodist Home (1957) 181 Kan. 100 F.2d 389. An elderly woman entered a home for the aged, paying a lump sum to be returned to her 'if it should be found advisable to discontinue her stay' during a two month period. On her death within that period, it was held that the sum must be refunded. The decision is cited in E. Allan Farnsworth, "Meaning" in the Law of Contracts (1967), 76 Yale L.J. 939 at 956.
subject to a number of limitations. Psychologists have indicated that considerable amounts of information are communicable without language, particularly in the face to face conversational context. This may occur, for example, through sounds, be they vocal - such as laughing or crying - or non-vocal such as applause or stamping. Furthermore, in the context of the spoken word, the tone of voice employed by the speaker serves in itself to communicate. The point is that all these subsidiary communicative forms add meaning to the words they may happen to accompany. Ambiguities and uncertainties arising from the words used may readily be resolved through their place in the whole conversational context. One writer has put forward in illustration the phrase 'pretty little girls camp'. It is capable of a large number of quite different interpretations. That which it actually receives, however, is dependent upon contextual considerations. In the conversational context, the inflexion and stress employed by the speaker would indicate which meaning

2. The role of language in legal communication is specifically studied by Glanville Williams, 'Language and the Law' (1945), 61 L.Q.R. 387 and by Chafee, 'The Disorderly Conduct of Words' (1941), 41 Columbia L.R. 381. Stuart Chase also devotes part of his entertaining work The Tyranny of Words 5th ed. (1943) to legal use and abuse of words; see Chapter XVII, 'Round and Round with the Judges' at 212-226.

3. See e.g. B. F. Skinner, Verbal Behaviour (1957), Chap.1.

he intended. But when written, its meaning is dependent upon the surrounding text and the circumstances of its employment. In the interpretation of legal provisions, these are the major aids, since none of the subsidiary communicative forms are available.

Furthermore, word language is an imprecise means of communication. In order to achieve the precision necessary for their disciplines, scientists prefer to rely on special languages such as mathematics or chemical formulae whose denotations are precisely defined. The chemist for example, defines compounds in terms of the proportions of their basic elements, so that water becomes $\text{H}_2\text{O}$. In communicating with persons trained in the language he is then able to impart ideas and concepts with a minimum of ambiguity.

At the other end of the scale is the communication effected by various art forms, such as music and abstract painting, where the message is indirect and individual responses vary substantially as a result. Persons attempting to describe powerful experiences rely typically to a significant extent upon subsidiary forms of communication, such as gesture, to add meaning and colour to their words. Poetry, too, is an art form, and demonstrates a different use of language from that of the law courts. In poetic communication the literal sense of the words is generally of little significance, the poet instead relying upon imagery to convey subjective and imprecise impressions.
Given the ability of language to communicate in this way, and the inability of the legal draftsman to indicate through subsidiary means the sense in which he intended his words to be understood, ambiguity and imprecision appear as unavoidable, and indeed inherent in legal provisions. One further factor is the significance liable to be accorded each word and phrase in legal contexts. In the normal conversational situation, vagueness and ambiguity frequently will be ignored by a listener, possibly because of the unimportance to him of what is being said, but for various other reasons as well. Alternatively he may, through questioning, require the speaker to clarify his statements.

But neither course is open to a court of law interpreting an instrument. To ignore provisions is far from according effect to the intentions of their author, and is generally possible only where there is no indication whatsoever of what these intentions might have been. Nor can a court cross examine the draftsman of, or the parties to, an instrument, Even should they still be living, their intentions and beliefs at the time of interpretation are irrelevant. All that is seen as being of relevance to the interpretative process is the intention at the time of execution of the instrument, and that must be gleaned solely from narrow contextual considerations.
2. The Meaning of Meaning

One psychologist has written:

'Meaning' is a harlot among words; it is a temptress who can seduce the writer or speaker from the path of intellectual chastity.5

In recent years the study of meaning, or semantics, has received a considerable amount of attention from both psychologists and philosophers. Both branches seem now agreed that no fully satisfactory theory of semantics is possible until it can be expressed in physiological and eventually neural terms, and psycholinguists have been working for some time in that direction.6 In doing so they have rejected concepts of 'meaning' as unsatisfactory for accurate scientific study. In demonstrating the unsatisfactory nature of the word, philosophers and scientists have been able to pinpoint a number of matters that have on occasion confused philosophical thought and argument, and may therefore be of relevance to this study.

The classic work in this field is that of Ogden and Richards, The Meaning of Meaning first published in 1923. The authors conducted an exhaustive analysis of the word 'meaning'

5. C. Cherry, On Human Communication (1957), 112.
6. See particularly B. F. Skinner, (supra, n.3) and Sol Saporta (Ed) Psycholinguistics: A Book of Readings which contains a wide coverage of psycholinguistic thought and research. More technical but still intelligible to the layman is S. Rosenberg (Ed.) Directions in Psycholinguistics (1965), particularly Part V, 'Individual Differences in Verbal Behaviour'.
and were able to illustrate that it is commonly employed in sixteen different ways, with a further nine shades of usage within those different categories. With twenty-five common different understandings of the word it is little wonder that confusion may arise in the determination of what is 'meant' by, or the 'meaning' of a legal provision.

(a) The Relationship between a word and its meaning

One basic misconception that Ogden and Richards demonstrated was that of the simple dyadic concept of meaning. This postulates that there is some direct relationship between a word and some object in the real world - that the word is merely a sign for that object. This approach, is of course, simplistic and misleading, in that it overlooks the roles of both the user and the interpreter of the word. Ogden and Richards chose to stress this aspect by demonstrating that words are in themselves nothing but symbols, or kinds of signs, whose relationship to some thought, concept or object in the real world (for which they coined the word 'referent') is always indirect:

Our interpretation of any sign is our psychological reaction to it, as determined by our past experience in similar situations, and by our present experience.

8. Ibid., Chaps 1 & 2.
9. Ibid., 11.
The relationship between sign and object they illustrated with a triangle, where the three factors involved when any statement is made or understood are symbolized by the corners, and their relations represented by the sides.  

The significant fact is that the triangle has only two complete sides - between the symbol and the referent there is only an imputed, and not a direct relation.

One consequence of this rejection of the dyadic concept is the rejection too of any idea of 'word magic' - that words have some existence of their own.  

Glanville Williams, in

10. Ibid., 244. The diagram shown is that of Cherry (supra, n.5) which varies slightly from the original.

11. Cherry has expressed similar sentiments in a rather more colourful fashion: 'A "meaning" is not a label tied round the neck of a spoken word or phrase. It is more like the beauty of a complexion which "lies altogether in the eye of the beholder" (but changes with the light)'. (On Human Communication 115.) See further, Chafee (supra, n.2) 384-385.
an interesting study asserts that a significant reason why the crime of bigamy is regarded as seriously as it is, is because of this word magic, or as he terms it, 'word fetishism'. The severity of its punishment, he claims, stems to a considerable extent from the supposition that the marriage ceremony is a magic form of words that has to be protected from profanation. Whether or not one agrees with that conclusion, there can be little doubt that many lawyers have over the years fallen into the trap of assuming that every word has attached to it a constant and invariable, or 'literal', meaning.

It is their emphasis on the role of the interpreter, however, which gives special significance to Ogden and Richards' theory to lawyers. They assert that the most important sense in which words have meaning is this:

The meaning of A is that to which the mental process interpreting A is adapted.\textsuperscript{13}

Thus, even where the user of a word and its interpreter use 'meaning' in the same one of its twenty-five possible senses, yet what each 'means' by the word may still vary

\textsuperscript{12} (1945), 61 L.Q.R. 76-78. \\
\textsuperscript{13} Op. cit., 200. Cf. Wittgenstein's emphasis on the use of words: "For a large class of cases - though not for all - in which we employ the word "meaning" it can be defined thus: the meaning of a word is its use in the language. And the meaning of a name is sometimes explained by pointing to its bearer." \textit{Philosophical Investigations} (1953), 20.
according to his past experience of the word. This assertion may be illustrated by reference to what is known of the learning process, and in particular, to the way in which words are learned.

Behavioural psychologist B. F. Skinner\(^\text{14}\) sees this process in terms of his reinforcement theory. When the infant child begins to babble in a random way, the parents show pleasure when they hear sounds that are similar to words. Their pleasure serves as a reward or reinforcement to the child, who tends to repeat those sounds, responding with increasing adeptness to certain stimuli with certain words. Each child learns his vocabulary on the basis of different sets of stimuli presented to him, and is therefore likely to have a rather different understanding of some words from that of another child. Later experience will tend to temper and alter this understanding, but the same sense of one word may yet have different connotations to different persons.

Lawyers tend to use a plethora of technical words to convey meaning in the hope that through a process of successive judicial interpretations subjective assessments of the meaning will become less relevant, and they will have acquired some sort of standard meaning (if not a magic meaning) to those trained in the language. To a certain extent, of course,

\[^{14}\text{Verbal Behaviour} (1957). \text{See also W. Quine,} \text{Word and Object} (1960), 85.\]
this aids precision, but the system may break down, particularly when the language becomes too technical. Unlike the scientist, it is important for the lawyer to continue to employ a language that is reasonably intelligible to the ordinary citizen, since his is the conduct to which the language relates. One of the many problems that arises from a failure to observe that principle is the case where laymen use technical terms in their document. What meaning are they presumed to have intended, if any? 15

(b) Words that have more than one function

Another sense in which a word may have more than one meaning that has been underlined by semanticists is where the word has two functions, as is the case with evaluative words. 16 Take for example, the word 'murder'. In one sense, its descriptive sense, it means 'killing'. But there is an evaluative gloss - 'when it is wrong to do so'. Thus one does not talk of soldiers who kill as 'murderers', unless one wishes to evaluate their actions as wrong. Similarly, words like 'good' and 'ought' are almost wholly evaluative, and acquire descriptive meaning only through usage. An academic

15. The general rule is that unless it appears from the context of the whole will that the testator intended a different meaning to be accorded the words, legal and technical words should be read in their legal and technical sense, see: Van Grutten v. Foxwell, Foxwell v. Van Grutten [1897] A.C. 658, at 672, and at 684; Re Simcoe Vowler-Simcoe v. Vowler [1913] 1 Ch. 552, at 557; and also Hamilton v. Ritchie [1894] A.C. 310.

16. A clear and concise discussion of these may be found in J. Wilson, Language and the Pursuit of Truth (1967), 25-28.
lawyer and a criminal may each speak of a 'good' judge, yet mean different things. A 'good' judge to the criminal is probably one who is lenient, and to the academic, one whose grasp of legal principles he admires. There is a temptation, through a confusion of evaluative and descriptive meanings, to assert that the word 'good' has no 'ordinary' or 'plain' meaning, but that it is wholly dependent upon its context. What is in fact the case is that 'good' is performing a largely non-descriptive function, that of signifying the approval of the speaker, so that again, in a legal setting, it is from the user of the word that information as to its purpose must be sought. But in the game of legal interpretation there exists a number of rules that place severe limitations on the procedures available in the interpretative process. A court may not, for example, direct questions to the user of a word as to the meaning he intended it to bear. While the courts admittedly talk in terms of arriving at the intention of the draftsman, that intention must be gleaned normally solely from contextual considerations. The 'context' is not always limited to the verbal context surrounding a particular word or phrase, but may extend to the context of the instrument as a whole, the circumstances behind it, and the reasons for its existance.

17. Judge Jeffries, for example, was doubtless a 'good' judge to James I.
But uncertainty will remain if no guidance from that source is available. Should a testator bequeath a sum on trust to be distributed to 'any of my good friends whom I may have overlooked' for example, the minimal descriptive value of the word 'good' demands that contextual considerations become dominant. But the evaluative sense of a word is so subjective a matter that these limited contextual considerations will seldom provide more than a rough indication of its user's intention.

(c) **Dictionary definitions**

Another sense in which words may have meaning, and one frequently relied upon by the courts, is that of dictionary definitions, or lexicography. There are numerous examples of judges piecing together dictionary synonyms in order to interpret phrases, and this process is generally of assistance in adding to or illustrating meaning. But only a part of the picture of the words used is capable of being presented by dictionary definitions. The meaning of any word is not, as Ogden and Richards demonstrated, somehow directly attached to it, and no dictionary can hope to capture all its senses. This approach, if adopted inflexibly, ignores the intention of the author of an instrument beyond the extent to which he may have intended his words to bear meanings afforded by the dictionary employed by the interpreting judge.
(d) **Meaning in terms of the user's intention**

When lawyers talk of the meaning of a word or document they tend to use 'meaning' in a combination of the various senses outlined by Ogden and Richards, and to slide unconsciously from one sense to another. But the sense in which it is most commonly used by lawyers is the sense of intention - what meaning did the draftsman intend to convey by the language he has used.

Ogden and Richards specifically warned against the use of this sense of 'meaning', asserting that such a sense

...in which the meaning of a symbol is what the hearer believes the speaker to be referring to, is perhaps the richest of all in opportunities of misunderstanding.\(^\text{18}\)

But it is a warning that has gone unheeded so far as legal interpretation is concerned. Indeed its value in that particular context is open to considerable doubt. Semanticists, including Ogden and Richards, have tended to concern themselves generally with analyses of 'meaning' in the context of descriptive, rather than normative statements. Indeed, the study of the use of language to control human behaviour has as yet attracted little attention, possibly because of the complexity of the issues it raises.

In legal interpretation the primary question, despite the opportunities it provides for misunderstanding, must

always be that of the intention of the author of an instrument. The courts increasingly today see their task as one of ascertaining that intention and according legal effect to it. In a high proportion of cases, it is likely that the draftsman had formed no particular intention in respect of the facts that may have arisen, so that the search for it may be strictly speaking a fiction. The less guidance there may be available from his words, the more highly subjective is likely to be the assessment of his intended meaning. When it reaches the point of pure conjecture or guess work, the court may have no option but to hold a provision void for uncertainty. It is in drawing that line between subjective assessment and unreliable conjecture that the attitudes, opinions, and approaches of individual judges become apparent. It is perhaps significant that there have been comparatively few decisions on uncertainty, particularly in public law, where the judges have been unanimous on the question of whether or not a given provision should fail.

3. **Uncertainty of meaning**

Given the unsatisfactory nature of the word 'meaning' and the limited means of communication available to the legal draftsman, one might expect 'uncertainty of meaning' in legal provisions to be a most common occurrence. A substantial proportion of potential uncertainty is able to be resolved satisfactorily, however, through a consideration of the context of the words and surrounding circumstances. Furthermore, the
court or interpreter of the provision need not always engage in a detailed search for the 'meaning' of the provision as such, since the question of whether or not the fact situation before it falls within or outside the ambit of some legal provision may be able to be quite readily answered. In the case of statutory interpretation, the question is almost invariably one of the application of the provision to a given set of facts, so that although uncertainties of meaning may arise, the court's function is to resolve them with reference to those facts.

Since private law instruments and subordinate legislation may be held void for uncertainty, however, they are frequently attacked *in vacuo* on this ground, instead of being tested against some actual fact situation. For the purposes of that attack, any particular fact situation that may have arisen is generally regarded as irrelevant, and indeed hypothetical fact situations are often introduced to test the difficulties of the provision's application.

But whatever the manner in which the provision comes before a court, the most significant question, and the most difficult to answer, is that of the degree of uncertainty that will induce invalidity. It is a problem that receives closer consideration throughout this work. But for the purposes of later analysis, it is interesting to consider the manner in which uncertainty usually arises.
The vice of uncertainty in legal instruments appears to be attributable to any one or more of six main causes. These are outlined briefly below, and their operation and effect in different private and public law contexts is illustrated in later chapters.

(a) **Meaningless provisions**

Only very rarely does this extreme form of uncertainty arise, since some glimmering at least of the draftsman's intentions is normally present. In practice, the word appears to have acquired, if not an evaluative usage, then at least an emotional overtone, in the sense that it is frequently employed to describe a provision that is thought by the court to be not only uncertain, but also to reflect adversely upon the skill, intelligence, qualifications, and adeptness of the draftsman responsible for it.

'Meaninglessness' and 'unintelligibility' which are frequently employed interchangeably, are no more than extreme forms of uncertainty, and it may therefore be a matter of some doubt whether their treatment here as a separate cause of uncertainty is warranted. Because of possible differences in effect upon validity of a finding of meaninglessness, however,

19. A phrase quite meaningless to the layman, for example may be capable of technical explanation. See, e.g. Kell v. Charmer (1856), 23 Beav. 195, 53 L.R. 76, where a will provided, 'I bequeath to my son William the sum of 1,000. To my son Robert Charles the sum of 2,000.' Evidence was admitted to show that the testator was a jeweller and used those signs to mark prices in his trade, representing £100 and £200 respectively.
it was considered that the phenomenon required isolation and specific study.

Those differences arise in the context of the question of severance. The courts have frequently held that where an invalid portion of an instrument is capable of severance from the rest, then the valid part will continue to stand on its own. The test of severability has been said to be that it must be possible to remove the offending portion without disarranging the grammatical construction or substantially altering the application or effect of the valid portion.\(^{20}\)

If a provision can be said to be quite without meaning, or unintelligible, the process of severance is more easily achieved. A truly meaningless provision, after all, could probably only be said to have any bearing on the application or effect of the remainder of an instrument, where it is clearly intended as, indicated perhaps by some other provision, to govern an essential term.

The result is that whereas a provision said to be merely 'uncertain' and therefore void will frequently spell the failure of the entire instrument, a meaningless provision may not.\(^{21}\) It is a curious result, and one which has


\(21\). See e.g. Nicolene Ltd v. Simmonds [1953] 1 Q.B., where a contract subject to 'the usual conditions of acceptance' was held not to be invalid for uncertainty, for the phrase was meaningless and severable.
undoubtedly had some effect upon the designation by some judges of particular provisions as 'meaningless'.

(b) Ambiguities

Although the word 'ambiguous' is of considerable importance in the interpretation of documents, it has never received a satisfactory legal definition. Frequently it is used in its widest sense, that of 'capable of more than one meaning'. In this sense, all uncertainty may be said also to be ambiguity, and 'ambiguous' and 'uncertain' treated as synonymous.

Properly defined however, ambiguity is quite a different concept, and throughout this work will be used in the sense of 'capable of two or more distinctly different meanings'. This enables a distinction between ambiguity as such and 'vagueness', used herein in a complementary sense of 'capable of two or more shades of similar meaning'.

Different understandings of 'ambiguity' are demonstrated in the case of Fawcett Properties Ltd v. Buckingham County Council [1961] A.C. 636, where the House of Lords was considering the phrase, 'an industry mainly dependent upon agriculture'. Lords Cohen, Morton of Henryton and Denning, saw the question as one of ambiguity. Lord Keith of Avonholm denied that it was a question of ambiguity, while Lord Jenkins preferred the blanket term 'uncertainty' to ambiguity. See also, McEldowney v. Forde [1969] 2 All E.R. 1039, at 1046 (per Lord MacDermott C.J.) 1049 (per McVeigh L.J.) in the Northern Ireland Court of Appeal, and, in the House of Lords, where Lord Hodson (ibid., 1067) and Lord Diplock (ibid., 1074) talk of 'vagueness', while Lords Guest and Pearce (ibid., 1064) talk of 'ambiguity'. In both cases, under the definitions in the text, the phrases would be considered vague, rather than ambiguous. W. F. Young, in 'Equivocation in the Making of Agreements' (1964), 64 Colum. L.R. 619, at 626 discards 'ambiguity' because of the confusion surrounding its use,
conceded immediately that so sharp a distinction between the two has not always been drawn by the courts, and that it is sometimes difficult to draw in practice. But it has the advantage of enabling the independent analysis of the two expressions that their different practical effect requires.

Expressions which are ambiguous, then, have two or more quite different referents. Common legal examples are 'right', 'estate', 'property' and 'warranty'. Examples of vagueness, on the other hand, are such expressions as 'of the Jewish faith' and 'for all my old friends'. As Young expresses it, 'When vagueness is pointed out in a given expression, one ordinarily does not experience a sense of surprise that a pun is being made.'

One reason behind the confusion between ambiguities and vagueness in legal thinking is probably the fact that the

22. Cont.

preferring instead to talk in terms of 'equivocation', borrowed from Elphinstone, (Note in (1886) 2 L.Q.R. 110) but also widely used by English writers.

23. Glanville Williams, op. cit., 179, asserts that 'right' has some six meanings, 'property' at least seven, and 'warranty' two.


26. 'Equivocation in the Making of Agreements' (1964), 64 Colum. L.R. 619, at 627.
admissibility of extrinsic evidence is often said to depend upon the existence of latent ambiguity, - one which would not normally suggest itself to the reader of a document without his being aware of certain surrounding circumstances. For example, where a testator devised property to his 'nephew Joseph Grant', but had two nephews of that name, one by blood and another by marriage, evidence was admitted to show that the latter had lived in the testator's house, and helped manage his business, while the testator had for some years been estranged from the family of the former, and did not know of his name or existence. 27

This distinction between latent and patent ambiguities has been traced back to Lord Bacon, and his statement that:

\[
\text{ambiguitas patens is never holpen by averment,} \\
\text{and the reason is because the law will not mingle} \\
\text{matter of specialty, which is of higher account,} \\
\text{with matter of averment, which is of lower} \\
\text{account in law.}\ldots 28
\]

Phipson 29 notes that Bacon's rule had reference merely to pleading, but was later erroneously propounded as a rule of evidence by Bathurst in 1761, and so has descended to the present day.

27. Grant v. Grant (1870), L.R. 5 C.P. 727. It should be noted, however, that the decision has not always been accepted, see Re Taylor Cloak v. Hammond (1886), 34 Ch.D. 255, at 257 and Re Green Bath v. Cannon [1914] 1 Ch.134.
The desire to give effect to private law instruments rather than, as one Judge has put it, to 'repose on the easy pillow of saying that the whole is void for uncertainty', has meant that the distinction has become of less significance, leading to greater readiness on the part of the courts to resort to extrinsic evidence. This has been achieved through a realisation of its unnecessary technicality, and, because of the inherent ambiguity in all language, its illogicality. There has been, moreover, a tendency to employ 'ambiguity' loosely so as to include vagueness.

In using the 'distinctly different meaning' definition of ambiguity, then, it may be noted that extrinsic evidence of surrounding circumstances will always be admissible to resolve the ambiguity, but that its admissibility is not limited to that context. Where the ambiguity is such as to amount to a true equivocation, as for example where there are two equally qualified persons of the name used by a testator,

31. See e.g. Thayer, A Preliminary Treatise on Evidence (1898) 422-426.
32. A number of illustrations of this is provided by Farnsworth (supra, n.1) 961, and Phipson, 841-898.
33. One possible exception is where the language is so vague or imperfect that all that extrinsic evidence would achieve would be the making of a new instrument. See e.g. In the goods of De Rosaz (1877), 2 P.D. 66, at 69 per Sir J. Hannen.
direct evidence of intention may also be admitted. 34

A further point for the purposes of analysis is that ambiguities may be classified into those of term or of syntax. Typical of the former category is the proper name type of ambiguity as illustrated by the Joseph Grant case, and again in the celebrated case of Raffles v. Michelhaus, 35 where parties to a contract had agreed upon a sale of cotton to arrive "ex Peerless" from Bombay, but each had in mind at the time of contracting a different ship of that name. An example of ambiguity of syntax is provided by the case of Cuthbert v. Cumming 36 where a charter party obliged the charterer 'to load a full and complete cargo of sugar, molasses, and/or other lawful produce'. The expression 'and/or' left it open to the charterer to load in any one of a large number of ways.

Uncertainty may also arise where parts of an instrument are repugnant, and, to the extent that two or more conflicting interpretations may present themselves, this too is a form of ambiguity.

36. (1855), 10 Ex.809, 156 E.R. 668.
Thus in Brown v. McInnes, the New Zealand Supreme Court had before it a bylaw of five paragraphs. Its ambiguity arose from the fact that the fifth paragraph appeared to overrule the other four. But if it were construed in such a manner as to deprive it of that effect, it became impossible to determine exactly what effect it should be accorded. Because of its relationship to the other four paragraphs, it was not possible simply to ignore it, so that the whole bylaw failed for uncertainty.

(c) Inaccuracies

The uncertainty that arises from inaccuracy is sometimes seen as a form of ambiguity, but in fact the two are distinguishable. An example is where a testator left 'all for mother'. Evidence that he had no mother, but called his wife 'mother', was received, and the gift upheld. Had his mother actually been alive, an ambiguity would have existed, but as it was the question was solely one of inaccuracy. Uncertainty in this context can generally be resolved through the admission of extrinsic evidence.

(d) Omissions

Omissions too are sometimes regarded as matters of

39. Beaumont v. Fell (1723), 2 P.Wms. 141, 24 E.R. 673, demonstrates the extent to which extrinsic evidence may assist in this situation. There, a legacy to 'Catherine Earnley' was successfully claimed by one Gertrude Yardley, evidence having been received that there was no such person as the former, but that the latter had been a friend of the testator, who usually called her 'Getty', which may have been mistaken for 'Katy' or 'Catherine'. 
ambiguity, but this is not strictly true. The error probably arises from the similarity between the most obvious type of omission, an actual blank on the face of an instrument, and a patent ambiguity. Some testators, for example, have described their beneficiaries simply as 'Mr ________' and 'Lady ________'. In this type of situation, the expressions are not ambiguous, but fail to indicate any person at all. There is no ambiguity for extrinsic evidence to resolve.

In fact, instances of omission normally bear more similarity to vagueness, than to ambiguity. Since omissions are a failure to provide any guidance as to the author's intention, they are close to extreme vagueness, where but little guidance as to intention is available.

Uncertainty arising from omissions is of special significance in contract law, where the courts are frequently forced to imply terms in order to fill the gaps left by parties in their agreement. These gaps are not normally blanks on the fact of the instrument, but the result of failure to provide in specific terms for some important aspect of the contract. The anxiety of the courts to uphold contracts where the basic elements are clearly expressed has involved

40. Baylis v. Attorney General (1741), 2 Atk. 239, 26 E.R. 548; Hunt v. Hort (1791), 3 Bro.C.C. 311, 29 E.R. 554. But in In the goods of De Rosaz 2 P.D. 66 a legacy to 'Percival ________ of Brighton' was held not to be meaningless, and evidence was admitted to establish the identity of the beneficiary.
extensive use of the technique of implication of terms, leading on occasion to criticisms that contracts may tend to be 'constructed' rather than 'construed' by the courts. One further type of omission which is occasionally encountered is where an instrument purports to incorporate by reference the terms of some other document, which has since been lost or is otherwise unavailable. Its absence may be fatal to the validity of the later instrument.

(e) Delegation or reservation

Uncertainty is sometimes said to arise when a legal instrument purports to delegate a wide discretion to some person. For example, a bylaw may prohibit a particular activity, but reserve to some official the power to dispense with the prohibition in certain cases. Here uncertainty may arise from the inability to predict with any accuracy the way in which the official may exercise his discretion in any given situation.

Again, a will may provide a power of appointment without defining specifically the class of persons or objects to be benefitted. This is said to be a delegation of will making power. Similar problems arise with contracts where, for example, the amount of monetary consideration may be left in the sole discretion of one party.

Normally, however, cases of delegation or reservation resolve into either questions of power, as in the public law situation, or of vagueness.

(f) **Vagueness**

Of all forms of uncertainty, it is that which arises from vagueness which causes most difficulty. Extrinsic evidence is of considerably less assistance in ascertaining with regard to a vague expression the intention of the user, despite its ability to resolve most forms of ambiguity and inaccuracy. This is because vagueness is a quality, which, as has been shown, pervades all language; it may continue to exist after an ambiguity has been resolved, or after other forms of uncertainty have been eliminated.

The earlier discussion of Skinner's theory of learning illustrates to some extent how vagueness may arise - through persons learning the 'meaning' of words through different sets of stimuli. This problem is minimal with those words whose referents are well known objects in the real world. Typically, for example, little uncertainty arises as to the meaning of the word 'table' and most people would feel confident of their ability to determine whether or not any given object fell into this class. With concrete nouns and adjectives, borderline problems may still arise, but comparatively infrequently.

On the other hand however, there are those words of an
abstract nature, incapable of exact and precise definition. Words like 'hope', 'faith' and 'charity' suggest themselves as possible examples (although the last-mentioned has in some contexts acquired a technical legal meaning). Where the expression has an abstract referent, the likelihood of difficulty with borderline cases is considerably greater than where the referent is some real object. Evaluative words are similar, to the extent that they call for a value judgement on the part of the interpreter. It may be, however, that the interpreter has experience with the use of the word, and the ability to apply it. For example, the concept of 'reasonableness' is one with whose operation the courts are familiar in a number of contexts, and which as a result they show little reluctance in construing and applying when it appears in an instrument.

The problems which arise from vague expressions in legal instruments are sometimes illustrated by legal philosophers in terms of a 'core' of settled meaning surrounding by a 'penumbra' of uncertainty. H.L.A. Hart cites the example of a rule which forbids the taking of a 'vehicle' into the public park. Plainly this forbids an automobile. But into the penumbral area falls the cases of bicycles, roller skates, and toy automobiles, to which

the words of the prohibition are neither clearly applicable nor clearly ruled out. This penumbral area is seen by Hart as an essential feature of the 'open texture' of rules of law. He asserts:

In fact, all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.44

So far as statutory legislation is concerned, this compromise must be reached by the legislature itself, but with subordinate legislation, the courts play a role in ensuring that the first social need described by Hart, that for certain rules, is given sufficient emphasis by subordinate legislative authorities. The need is not perhaps as pronounced in the case of provisions in private law instruments, since their control over human behaviour is nearly always markedly less significant. In both situations, however, the tendency is to hold a provision invalid for vagueness when its penumbral area assumes significant proportions in comparison with its settled core. Although it is impossible to analyse any given expression scientifically and determine the proportionate roles of core and penumbra, a brief look at the process of abstraction may serve to illustrate what is meant.

44. Ibid., 127.
Abstraction is that process which enables generalisations from specific matters proceeding up through what Chafee refers to as the 'hierarchy of words'. Given that those expressions which have a settled core of meaning with comparatively few penumbral problems are those with well known concrete referents, these form the basic words of the hierarchy. Thus, the least vague way of denoting a person is by proper name, even although the potential may exist for ambiguity. But legal control of the behaviour of individual specific persons is seldom possible, especially in public law, so that descriptions are generally in terms of classes. Thus, 'John Blank' on one level of abstraction may become 'carpenter', and on progressively to the higher levels of 'workman', 'men' and 'mankind'. In each case as the class gets larger the expression becomes increasingly less specific, and the task of finding a referent becomes more difficult. The more abstract the definition of a class, the more significant becomes the problem of the penumbral area.

Some judges have specifically recognised this distinction

46. An ambiguity is deliberately caused, for example, when a child is named after some other person. The denotation of persons by numbers would be a more exact (though considerably less desirable) method.
47. Cf. Chafee op.cit., 390. As Stuart Chase points out, 'meaning' itself is a high order abstraction: The Tyranny of Words 5th ed. (1943), 117.
between the uncertainty which may arise in borderline cases at basic levels in the hierarchy of words, and that which arises at high levels when the difficulty in finding a referent renders the concept itself uncertain. Uncertainty of the former type the courts must resolve, but the vagueness which arises from the use of words drawn from unnecessary heights in the hierarchy frequently results in invalidity.

4. Conclusion

A study of language is of some assistance in a work of this nature in demonstrating the way in which words operate, their inadequacies and deficiencies, and some of the common misunderstandings of their functions that have confused thought from time to time. The most common types of uncertainty have been isolated, but there remains the question of the degree to which any must be present in a given instrument to cause its invalidity. This is largely dependent upon the type and function of the provision under consideration and the role which the court sees itself as playing in each particular context.

The various factors that have influenced decisions on whether or not different provisions should be held void for uncertainty may now be considered in greater detail.

PART TWO

UNCERTAINTY IN PRIVATE LAW
1. **Introduction**

The purpose of including in this work a section on the operation of the certainty rule in private law is primarily to enable a comparison with the way in which it has been applied in public law. Of particular interest are such questions as the degree of uncertainty that is required to invalidate different types of provisions, the significance of various types of uncertainty, and the reasons that have been advanced by the courts for choosing to apply the test in different ways. Admittedly the types of provisions studied here vary substantially in their nature and function, but in most cases it is the same basic problem - that of the inherent vagueness and ambiguity of language - that causes difficulties.

A number of different factors operate to determine with regard to any legal provision whether a lesser degree of uncertainty than complete unintelligibility, should render it unenforceable. For example, holding a provision of a bylaw void for uncertainty is sometimes seen as a means of ensuring that local bodies exercise adequate care in their drafting.¹ In the case of contracts on the other hand, the desire to uphold agreements that have been entered into

---

¹. See further at p. 243 *infra.*
freely has meant that by and large a high degree of uncertainty need be present before an agreement will be upset.

Wherever a basic principle of this nature receives repeated acknowledgement by the courts, it seems inevitable that it should be symbolized by some form of Latin tag. This area of law forms no exception, and two Latin maxims call for study at this point.

The first, certum est quod certum reddi potest is generally interpreted as meaning 'that is certain which can be rendered certain'. The maxim is clearly applicable to the situation where an agreement leaves some matter undecided but provides the machinery for its ascertainment, usually at some later date. A lease, for example, may provide for a right of renewal at a rental to be fixed by a registered valuer. The new rental becomes certain when the valuer announces his award. The common application of the maxim extends beyond that limited situation, however, so that particularly in contract law, actual processes of judicial interpretation may be seen as rendering unclear provisions certain.

If the maxim has any real value, it is as an exhortation to the courts not to repose on the 'easy pillow

---

of uncertainty. Its widespread use as a principle of construction may prove dangerous, however, for in some cases the courts have declined for various reasons to take the necessary steps necessary to render unclear provisions certain.

The second maxim calling for comment is that which reads *verba ita sunt ut res magis valeat quam pereat.* This is generally understood as meaning that words are to be construed so that the object of the instrument may be carried out and not fail. So far as contracts are concerned, it is once more seen as an exhortation to the courts to uphold an instrument wherever some glimmering of contractual intent may be present. But the maxim, in the words of one Judge,

... does not mean that the Court is to make a contract for the parties, or to go outside the words they have used; except in so far as there are appropriate implications of law, as for instance the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail.

It is in the field of commercial contracts that this second maxim operates with particular vigour, and it is

significant that contracts relating to land on the other hand, have traditionally been construed by the courts in a more circumspect manner. One reason for this divergence in approach may be found in the following well known passage from Lord Wright's opinion in *Hillas & Co. Ltd v. Arcos Ltd*:

> Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba sunt intelligenda ut res magis valeat quam pereat*.

Land transactions, on the other hand, are often entered into more cautiously, even reverently, and for reasons that are largely historical, a greater number of formalities requires observance. The *Sale of Goods Act 1969* mirrors Lord Wright's approach by encouraging the implication of terms in commercial contracts, while on the other hand the *Contracts Enforcement Act 1956* requires that all essential terms of contracts relating to the sale of land be reduced to writing.

8. See e.g. ss.10(2), 11(1), 14, 15, 16, 17(2).
9. Section 2.
One result of the greater formality surrounding land transactions is that the courts are less reluctant to hold void for uncertainty a conveyancing contract whose essential terms are not clearly expressed. The fixing of a reasonable price, for example, is a task which the courts are content to perform in a sale of goods situation, but not for the sale of land. Moreover, voidness may be seen as a sanction in impressing upon parties to land transactions the importance of complying with formalities and expressing their agreement with sufficient certainty.

2. **Contract Formation**

The bilateral nature of the simple contract involves that uncertainty of language is significant in an area where it has little part to play in such unilateral instrument as wills and subordinate legislation. Whereas those instruments are created by unilateral action on the part of testator or legislator, a contract comes into existence only upon final

10. One example is the case of a lease which fails to specify its date of commencement. The courts have declined to imply a term that the tenancy should commence within a reasonable time: Harvey v. Pratt [1965] 1 W.L.R. 1025. See e.g. Hall v. Busst (1960) 104 C.L.R. 206, at 216 per Dixon C.J.; 222-223 per Fullager J.; and 233-235 Menzies J.; but see also at 226-228, per Kitto J. dissenting, and the strong dissenting judgment of Windyer J., especially at 236-245.

11. See e.g. Hall v. Busst (1960) 104 C.L.R. 206, at 216 per Dixon C.J.; 222-223 per Fullager J.; and 233-235 Menzies J.; but see also at 226-228, per Kitto J. dissenting, and the strong dissenting judgment of Windyer J., especially at 236-245.

12. So long as the property, parties and price are certain, the court may imply other terms, (see e.g. Willetts v. Ryan [1968] N.Z.L.R. 720, at 722 S.C.; 863, at 868 C.A.) but the courts seem less prepared to resort to the concept of 'reasonableness' where essential terms are unclear, than they are in commercial contracts: see e.g. Hall v. Busst at references in footnote 11 (supra).
agreement between two or more parties as to their intended rights and obligations. Reference has already been made to the fact that where the court is satisfied that a concluded contract was intended by the parties to exist, it will generally strive to uphold the agreement, construing vague language and implying terms to fill gaps. Quite a different attitude is apparent, however, when the language used by the parties suggests that no contract was intended. The fact that terms are unsettled may indicate that further negotiation was intended, or that the arrangement was intended to be merely one of honour or trust, and not enforceable in the courts. Uncertainty as to terms plays a purely evidentiary role in this context, but since a lesser degree of uncertainty than that required to invalidate an admittedly concluded contract is seen as significant, the opportunity is taken to look briefly at its operation.

(a) Intention to create legal relations

It seems now well settled that an intention to enter into legal relations is essential to the validity of any contract.\(^{13}\) Usually its existence is presumed but in the context of family arrangements the presumption operates the other way. A party

seeking legal enforcement of such an agreement must prove that a legal relationship was intended. The reasons for this approach were summarised briefly by Salmon L.J. recently in Jones v. Padavatton:

It derives from experience of life and human nature which shows that in such circumstances men and women usually do not intend to create legal rights and obligations, but intend to rely solely on family ties of mutual trust and affection.

In that case, the issues that arose from an alleged agreement between mother and daughter were first, whether the parties had intended it to be legally binding, and second, if so whether it was sufficiently certain to be enforceable. The two issues were treated independently by the Court, and Fenton Atkinson L.J. stated:

... I do not think that the lack of formality and precision in expressing the agreement is necessarily an indication that no contract was intended having regard to what the court knows of the parties and their relationship.

Indeed, the ambiguities and gaps that are liable to occur in even the most formal contract must serve as a warning against

16. [1969] 1 W.L.R. 336. But, with respect, the writer is unable to agree with the learned judge when he goes on to assert that the upset felt by the daughter when her mother initiated proceedings 'provide(s) a strong indication that she had never for a moment contemplated the possibility of her mother or herself going to court to enforce legal obligations....' (ibid., 337).
placing too much weight upon uncertainty of language as an indication of lack of intent to create legal relations.

It is respectfully submitted that the warning may have been overlooked in the recent case of Gould v. Gould. 17

The evidence of an alleged agreement between an estranged husband and wife in that case was outlined by Edmund Davies L.J. 18 in these terms:

According to the wife, the husband promised to pay her £15 a week 'as long as business was O.K.'.

The husband's evidence was substantially to the same effect, namely 'I suggested that I would give her £15 per week; and she said "for how long?"; and I said "As long as I can manage it"'.

'To my mind', continued the learned judge, 'those words import such uncertainty as to indicate strongly that legal relations were not contemplated.' Megaw L.J. 19 was of a similar view.

Lord Denning M.R., 20 on the other hand, dissented.

He would have upheld the agreement by implying a term that if the husband found he could not manage to keep up the payments, he could, on reasonable notice, determine the agreement.

His Lordship argued that the presumption against intent to

17. [1970] 1 Q.B. 275
18. Ibid., 281
19. Ibid., 282: 'the uncertainty of the words used must in my view be a matter of significance in considering the question whether or not there was an intention to enter into legal relations in a matter of this nature.'
20. Ibid., 280.
create legal relations should not operate where husband and wife were at arm's length and agreeing upon maintenance for a separation period. He declined to relate the uncertainty of language to that intention, arguing instead that a concluded contract existed, and that only if it were utterly impossible to attribute any meaning to its terms should it fail for uncertainty.

It is respectfully submitted that a more satisfactory solution might be found between these two extremes. While uncertainty of a lesser degree than that envisaged by Lord Denning might well be taken into account in determining the existence of an intention to create legal relations, it is submitted that such evidence can only be inconclusive, and should be accorded weight only where other factors are uncertain. The intention with which the court is concerned is not the actual or subjective intent of the parties, but that which is imputable to them from the evidence. It is submitted that the majority in Gould's case tended to over-emphasise the significance of vagueness in an oral agreement. Their attitude, however, serves as a reminder of the

21. This view, it is submitted, is borne out by the passage cited above from the judgement of Salmon L.J. in Padavatton's case: could it be said that an estranged couple intended to rely solely on family ties of mutual trust and affection?

reluctance of the courts to declare a party contractually bound where there is doubt that that may have been the intention of the parties at the time of their agreement.

(b) Incomplete negotiations or concluded contracts

A similar reluctance is apparent when the courts are asked to determine whether an alleged agreement is in fact a concluded contract or merely represents a step in incomplete negotiations. Where the language of the parties indicates that further negotiations were intended to settle the details of a term left uncertain, no contract will have been formed. In theory, a contract to negotiate if supported by consideration, might be supported by the courts, and damages, although possibly nominal, obtained for its breach. That is not the case, however, for in this situation it is the other terms of the agreement that the party asserting its validity is generally concerned to enforce. In this situation, however, the courts have repeatedly asserted that they will not enforce a mere 'agreement to agree'. Their attitude and reasons may be examined in the context of the more common types of cases that have arisen.

(i) 'to be agreed': the most obvious example is that of a term which the parties have expressly reserved 'to be agreed',

a situation which arises particularly in the context of fixing prices of goods,\textsuperscript{24} and of rent upon the renewal of a lease.\textsuperscript{25} In each situation, had the parties failed to make any provision at all, it is probable that the courts would imply a term that the purchaser pay a reasonable price, or the lessee a reasonable rent. Similarly, the parties may themselves provide that assessments of cost and suchlike should proceed on a reasonable basis.\textsuperscript{26} Because the test of reasonableness is said to be objective, the courts are able to determine the price to be paid through reference to recognised values and standards and uphold the agreement.

To imply a reasonable price when the parties have left it 'to be agreed', however, would be to make a contract for the parties.\textsuperscript{27} It may be noted here that American courts have in fact been prepared to take this step, by requiring first

\begin{itemize}
\item \textsuperscript{24} See e.g. May \& Butcher \textit{v. The King} [1934] 2 K.B. 17, where an agreement for the sale of tentage left price, dates of delivery and manner of payment 'to be agreed from time to time'. The House of Lords held that no contract had been created.
\item \textsuperscript{25} See e.g. \textit{King's Motors (Oxford) Ltd v. Lax} [1970] 1 W.L.R. 426 where rental was to be 'agreed upon between the parties ... prior to the expiration of the term hereby created'.
\item \textsuperscript{26} For example the following expressions have been held sufficiently certain: 'fair amount': Cannan v. Fowler (1853) 14 C.B. 181, 139 E.R. 75; 'fair market price': Charrington \& Co. Ltd v. Wooder [1914] A.C. 71; 'moderate terms': Ashcroft \textit{v. Morrin} (1842) 4 Man. \& G. 450, 134 E.R. 185.
\item \textsuperscript{27} See e.g. Lord Wright in \textit{Hillas v. Arcos Ltd} (1932) 147 L.T. 503, at 514. That decision is commented on extensively in 48 L.Q.R. 4, 141, 310. See also 49 L.Q.R. 316.
\end{itemize}
that parties to a 'to be agreed' clause negotiate. Then, if no agreement is forthcoming, the court may itself determine the price to be paid.28 Such a move has certain advantages, particularly in the case of agreements drawn up without professional advice where it is clear that the parties intended to bind one another, and have been frustrated in their attempts by their particular choice of words. Wedded as they are to the principle of construing, and not constructing contracts, however, it is most unlikely that English and Commonwealth courts will ever go so far without legislative sanction.29

'Reasonableness' is but one objective means of determining the contents of a term, however, and the courts have been happy to uphold expressions of similar effect, for example

28. See e.g. Hall v. Weatherford (1927) 32 Ariz. 370, 259 Pac. 282 where the rental upon a lease renewal was to be at 'a price to be agreed upon'. The Court held the clause to be valid, on the ground that if the parties could not agree what was reasonable the court would decide. See also Morris v. Ballard (1926), 16 F.2d 175.

The Uniform Commercial Code provides:
The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time of delivery if ... (b) the price is left to be agreed by the parties and they fail to agree. (2-305(1)).

It appears that the Code goes further than the authorities: see Schlesinger, Formation of Contracts (1968), i 443, 460.

where recourse may be had under the contract, or to other independent methods of assessment. So long as no further negotiation between the parties is required to render the terms of an agreement certain, the courts will seek to uphold it.

(ii) 'subject to contract': agreements expressed to be 'subject to contract' also illustrate the operation of these principles, although in a slightly different way. The expression may mean two things. If it is apparent that all that was intended was that the parties should reduce the terms upon which they had already agreed to writing in the form of a formal document, the expression will cause no difficulty, and may even be ignored. On the other hand, however, it may be that the expression was intended to act as a condition precedent to the enforcement of the terms of the contract, or that final settlement of its terms can only be achieved through further negotiation.

30. In Foley v. Classique Coaches Ltd [1934] 2 K.B. 1, the parties agreed on the sale of petrol 'at a price to be agreed by the parties in writing'. Differences under the agreement were to be settled by arbitration. The court implied a term that failing agreement, a reasonable price was to be determined under the arbitration provision, and was therefore able to uphold the contract.

31. The parties may provide some standard or mechanism by reference to which some term may be rendered certain: see May & Butcher v. The King [1934] 2 K.B. 17, at 21 per Viscount Dunedin.


33. The expression 'subject to contract' has on the facts been held sufficient to negative the idea of a concluded contract, in Eccles v. Bryant [1948] Ch. 93; as has 'Subject to title and contract': Coope v. Ridout [1921] 1 Ch. 291; 'subject to our approving a detailed contract
cases will the court uphold the purported agreement, although again, if in the latter situation it is clear that extra terms may be settled by independent means this process of rendering the contract certain will be adopted.\(^3\)\(^4\)

Similar considerations prevail in the case of 'subject to finance' clauses. Provided that the evidence is able to supply a reliable picture of what such a clause was intended to achieve, it will not be invalid.\(^3\)\(^5\)

(c) Conclusions

Where the court is not satisfied that the parties to an alleged agreement intended it to be legally enforceable, they are understandably reluctant to uphold it. The fact that terms are vague may indicate that legal enforcement was never intended. It may also indicate that the parties had not concluded their bargaining. In neither situation however,

---

33. Cont.

34. See also Hussey v. Horne-Payne (1879) 4 App. Cas. 311 where the parties had inserted a clause 'subject to the title being approved by our solicitor'. Earl Cairns L.C. would have upheld the clause since it meant no more than that the title should be investigated and approved of in the usual way (ibid., 322).

is uncertainty of terms compelling evidence of this fact in itself. As will be seen, mere vagueness will seldom render a contract unenforceable. There must also exist some indication that the uncertainty was intended to be clarified by the parties themselves, and not by the courts.

3. Interpretation of Concluded Contracts

Reference was made in Chapter 2 to the difficulties surrounding the use of the words 'meaning' and 'intention' in the interpretation of legal instruments. The bilateral nature of the simple contract raises further problems, for the user of the words is not a single person, such as a testator or settlor, but two or more parties, each of whom may at some later date assert that what he intended to convey by those words was a meaning quite different from that asserted by another party. With vague expressions, of course, a wide range of meanings may suggest themselves and the courts must, if it is possible, settle on that which it appears most likely that the parties contemplated in choosing those particular words. With ambiguous expressions, it is possible that where two parties held quite different ideas of what was meant at the time of contracting, that there was no consensus, and hence no contract. Again, it may be the case that although there was consensus at the time of contracting, one party later seeks to avoid his contractual obligations by asserting the contrary.
Ought a court called upon to 'interpret' the document choose either meaning asserted by the parties, and if so, which; or should it compromise between the two, choose another meaning altogether, or hold the contract void for uncertainty? Clearly the subjective intent of the parties is irrelevant, and the decision of which meaning to adopt must depend upon the facts of each case. But there are at least two factors which will play a part in determining which answer the court will choose. The first is the extent to which the court is prepared, or permitted, to go beyond the four corners of the contract as an aid to its interpretation. Secondly, there is the question of the extent to which the court is prepared to imply terms where the contract leaves them uncertain. Since both of these factors bear to a significant degree on the question of whether or not a contract is sufficiently certain to be enforced, they call for further consideration.

(e) Theories of interpretation

From time to time two different theories have been advanced to explain the process of contract interpretation. The first, or 'objective' theory asserts that a valid contract is created simply by agreement in expression, while the second, or 'subjective' theory, asserts that a contract is not created unless there is complete agreement, properly
expressed. Under the second theory the subjective intents of the parties is relevant - under the first it is not.

Neither theory succeeds in explaining the interpretative process adopted by the courts. Traditionally, however the courts have tended towards the objective view, and have insisted that the words used by the parties should act as the sole guide to their intentions. The obvious danger of this course if rigidly adhered to, is that it tends to assume that the meaning of a word is something that is fixed, and ascertainable in a vacuum. This idea of a direct link between word and meaning has (as was seen in Chapter 2) been rejected by semanticists and in its inflexible application provides a dangerous ground of contract interpretation. As Corbin points out, it is not words, but rather men who have 'meanings', which they try to communicate to other men through the use of words.

The courts then do not always insist upon a strictly literal interpretation, but permit themselves where the meaning of the words is unclear to have resort to extrinsic evidence of surrounding circumstances. What prevents them from going further and admitting evidence of the intention of the parties is probably a justifiable fear that the intention asserted in the witness box may be far different

37. Ibid., 475.
from that held at the time of contracting, if, indeed, any clear intention as to the operation of the words was held. Furthermore, there is a natural reluctance to upset a contract and allow a party to escape his obligations when the language used is capable of a reasonable construction in all the circumstances.

The policy of the courts is to support and maintain freedom of contract, and as Fridman points out, a necessary result is that where it is clear that a contract was intended the courts must assist rather than defeat the attempts of the parties to bind one another. A theory of interpretation that asserts that contracts are completed only where parties are in exact agreement would involve the failure of a significantly large proportion of contracts on the grounds of mistake. Accordingly, the courts have insisted that only uncertainty arising from

38. See e.g. Prenn v. Simmonds [1971] 1 W.L.R. 1381, at 1385 per Lord Wilberforce.
39. Lord Wilberforce has stated: 'The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get "agreement" and in the hope that disputes will not arise. The only course then can be to try to ascertain the "natural" meaning. Far more, and indeed, totally dangerous is it to admit evidence of one party's objective - even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in a world of give and take, men often have to be satisfied with less than they want. So, again, it would be a matter of speculation how far the common intention was that the particular objective should be realised.' (Prenn v. Simmonds [1971] 1 W.L.R. 1381, at 1385.)
unresolvable ambiguity should have this result.\footnote{41}{See e.g. F. E. Rose (London) Ltd v. William H. Pim Jnr & Co. Ltd [1953] 2 Q.B. 450, at 460-461.}

Nonetheless, evidence of surrounding circumstances is generally admissible where the meaning of words is unclear, to assist in their interpretation, and the parol evidence rule which prescribes the conditions of admissibility may be seen as determining the point between the objective and subjective theories at which the courts actually operate.

(b) The parol evidence rule

The rule itself simply prescribes that parol evidence cannot be admitted 'to add to, vary or contradict a deed or other written instrument'.\footnote{42}{Per Lawrence J. in Jacobs v. Batavia & General Plantations Trusts Ltd [1924] 1 Ch. 287, at 295.} The parties are deemed to have expressed their final agreement in writing, and if evidence were later admissible to alter that, contracts might never be regarded as final.

But it is the exceptions to this rule that are of significance. It is accepted that evidence may be admitted to supplement, or explain the meaning of words used, although if the court regards the words as having a fixed meaning, no further evidence will be of assistance.\footnote{43}{See Bank of New Zealand v. Simpson [1900] A.C. 182, at 189.} The extent to which extrinsic evidence is admissible then will frequently
depend upon the confidence of the court in a fixed meaning that suggests itself. There are signs that this confidence is waning, and that along with a realisation of the fluid nature of 'meaning' has come a more liberal attitude towards admitting extrinsic evidence.

One of the best known early passages supporting this view is that of Lord Blackburn in River Wear Commissioners v. Adamson, which states:

In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language it is impossible to know what that intention is without enquiring further and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.

The extent to which the court may have regard to extrinsic evidence where the literal meaning of the words is unclear and cannot be construed was described recently by Lord Upjohn in these terms:

It is then the duty of the court by the exercise of its judicial knowledge and experience in the relevant matter, innate common sense and desire to make sense of the settlor's or parties' expressed intentions, however obscure and ambiguous the language that may have been used,

to give a reasonable meaning to that language if it can do so without doing complete violence to it.\textsuperscript{45}

An illustration of this process at work is provided by the decision of Richmond J. in\textit{ Eastmond v. Bowis}\textsuperscript{46} where the purchaser of some land had signed an agreement that provided, 'I accept the conditions of this agreement subject to finance'. From evidence of the circumstances in which the agreement was signed, Richmond J. was able to find that by 'subject to finance' was meant 'subject to the sum of £6,000 being raised on mortgage of the vendor's property by the purchaser of Mr Matson on reasonable terms as to interest and repayment of capital'.

There are limits on what evidence may be admitted, however. Certain evidence may be quite unhelpful and dangerous. The House of Lords has recently affirmed that evidence of the prior negotiations of the parties is inadmissible as seeking to show their intention in a subsequent agreement,\textsuperscript{47} and declarations of intention subsequent to its execution will be similarly rejected.\textsuperscript{48}


One curious exception that exists is in the case of 'latent' ambiguities. Evidence may be admitted to demonstrate their existence, and direct evidence of intention used to resolve them. 49 A 'patent' ambiguity, on the other hand must be resolved from within the four corners of the document with assistance from evidence of surrounding circumstances. The rule has been subject to much criticism in both Britain 50 and America, 51 where there are signs now of its gradual modification. 52

(c) Implication of terms

Where some element of a contract has been omitted, or provided for in only a very vague way, the courts may uphold the contract by implying a term to indicate more clearly the intended operation of the contract. Sometimes, the implication is statutory. Section 10(2) Sale of Goods Act 1908 for example, prescribes that where no price is fixed by

51. Thayer, A Preliminary Treatise on Evidence (1898) 422-426, 471-474. Farnsworth, "Meaning" in the Law of Contracts' (1967) 76 Yale L.J. 939, at 961 points out that once it is realised that the referent of a word is heavily dependent upon its context, the distinction becomes blurred, and many supposedly latent ambiguities can be seen instead as patent. See too, Justin Sweet, 'Contract Making and Parol Evidence: Diagnosis and Treatment of a Sick Rule' (1968) 53 Cornell L.R. 1036.
52. See Farnsworth (supra, n.51) 961-965.
a sale of goods contract, the buyer must pay a price that
is reasonable.53

In the case of implication by the courts, however,
there is a very real danger that a contract may be made for
the parties, instead of effect being given to their original
intentions. It is understandable then that the courts adopt
a cautious approach. The test most commonly applied is that
terms will only be applied in order to remedy some obvious
oversight, where otherwise a clear contractual intent would
fail. Lord Justice Mackinnon in Shirlaw v. Southern Foundries
(1926) Ltd54 stated this in a well known passage:

Prima facie that which in any contract is left to
be implied and need not be expressed is something
so obvious that it goes without saying; so that,
if while the parties were making their bargain an
officious bystander were to suggest some express
provision for it in their agreement, they would
testily suppress him with a common, 'Oh, of course'.

So long as it is clear that a binding contract was intended
the process of implication of terms is likely to be of
considerable assistance in ensuring that it does not fail for
uncertainty. Extrinsic evidence may be looked at to
determine the way in which the parties intended the situation
to be governed, and particularly in commercial contracts,

53. Supra, n.8. The Property Law Act 1956, and Land Transfer
Act 1952 both operate to imply provisions into some
conveyancing contracts.
54. [1939] 2 K.B. 206, at 227. See, to the same effect,
Scrutton L.J. in Reigate v. Union Manufacturing Co.
(Ramsbottom) [1918] 1 K.B. 592, at 605; cf. Spring v.
National Amalgamated Stevedores & Dockers Society
evidence of custom and trade usage is of assistance. 55

Most frequently, however, the content of the implied term is determined by reasonableness. 56 The parties are deemed to be reasonable persons 57 and to have intended a reasonable solution.

Despite the cautious approach of the courts to both the admission of extrinsic evidence and implication of terms, each of these devices has been of considerable assistance in upholding contracts, notwithstanding the uncertainty of their wording. This may be demonstrated by looking at the approach of the courts to the six types of uncertainty outlined in Chapter 2, and the significance of each in contract law.

4. The Resolution of Different types of Uncertainty

As may be expected, the type of uncertainty that causes most difficulty in contract interpretation is that which arises from language that is vague. Vagueness may remain after other types of uncertainty have been resolved. All six types of uncertainty outlined earlier cause difficulty in contract law, however, and each calls for closer consideration.

57. Fridman claims this to be a 'fundamental postulate of contract law'; op.cit., 536.
(a) Meaningless provisions

It has occasionally been asserted that a provision of a contract will be held void for uncertainty only when it is utterly impossible to place a meaning on its words. In fact, however, the line between valid and void provisions seems to be drawn at a point before complete unintelligibility - at the point where a provision 'means' something in a very vague way, but causes extreme difficulty when it is sought to apply it. Perhaps a more accurate assessment of judicial approach is provided by Lord Pearson when he says that,

The courts are always loathe to hold a clause invalid for uncertainty if a reasonable meaning can be given to it.

An expression that is quite meaningless is in fact an extreme form of uncertainty, and is a comparatively rare phenomenon. Seldom is the ineptitude of the draftsman sufficient to defeat the determination of the courts to accord some meaning to his words. The case of Nicolene Ltd v. Simmonds

provides an illustration of one situation where this occurred. The seller of some goods wrote to the buyer 'I assume that we are in agreement that the usual conditions of acceptance apply'. The English Court of Appeal held the phrase meaningless, and that it could be ignored without disturbing the operation of the rest of the contract.

Provisions of that type are not commonly encountered, however. More frequently of significance are provisions that are repugnant or inconsistent with the rest of the contract, rendering it meaningless unless some provision can be ignored. In fact, the situation is one of ambiguity, and the choice between two vying interpretations of the contract is often difficult to make. In what situation may the court ignore words used by the parties in order to give effect to their contract. The test most commonly applied is that of Lord

---

63. Ibid., 549, per Singleton L.J.; 551, per Denning L.J.; 553, per Hodson L.J.
64. See also Re Vince, Ex parte Baxter [1892] 2 Q.B. 478. Denning L.J. in Nicoline Ltd v. Simmonds (at 551) thought that the clause 'subject to force majeure conditions' described by McNair J., in British Electrical and Associated Industries (Cardiff) Ltd v. Patley Pressings Ltd [1953] 1 W.L.R. 280, at 283 as 'so vague and uncertain as to be incapable of any precise meaning' could have been similarly severed, without affecting the validity of the document as a whole. It is submitted, however, that, to the extent that that clause envisaged some condition being imposed on the contract, to ignore it would be to alter the meaning of the whole contract. The clause was not as meaningless as 'usual conditions of acceptance'. Cf. Life Insurance Co. of Australia Ltd v. Phillips (1925) 36 C.L.R. 60.
Halsbury in *Glynn v. Margetson and Co.*: 66

Looking at the whole of the instrument and seeing what one must regard, for a reason which I will give in a moment, as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract.

The operation of this principle was demonstrated in the House of Lords in *Adamastos Shipping Co. Ltd v. Anglo-Saxon Petroleum Co. Ltd* 67 where a charter party had incorporated into it by a typed slip the following clause:

Paramount clause. This bill of lading shall have effect subject to the Carriage of Goods by Sea Act of the United States . . . 1936, which shall be deemed to be incorporated herein, and nothing shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under the said Act. If any term of the bill of lading be repugnant to the said Act to any extent such term shall be void to that extent, but no further.

The Act, however, provided by s. 5 that none of its provisions should be applicable to charter parties. Having accepted that 'bill of lading' was merely a slip for 'charter party', their Lordships proceeded to hold that s. 5 of the Act was meaningless so far as the contract was concerned and should be rejected. Viscount Simonds stated:

I cannot attribute to either party an intention to incorporate a provision which would nullify the whole incorporation. 68

68. Ibid., 154.
In both that case and Nicolene Ltd v. Simmonds it accords with the intention of the contract to ignore inconsistent provisions and it is clear that the courts will seek wherever possible to uphold contracts through adopting this approach. It is possible, although difficult, to envisage a contract that provided no indication of which of two conflicting provisions should prevail. Only in this situation, it is submitted, will the contract fail as meaningless.

(b) Ambiguities

It will be recalled that for the purposes of this study, cases of true ambiguity are distinguished from vagueness. Except in one respect, ambiguity will seldom invalidate contracts. A word or expression that is on its face capable of two or more meanings that are quite distinctly different, can usually be resolved through resort to canons of construction, or to evidence of surrounding circumstances. Evidence of usage or custom, for example, may point to one meaning as being more likely to have been in the contemplation of the parties. Again, applying an interpretative device of the

69. Supra, n.62.
last resort the court may choose to resolve the ambiguity in
the manner least favourable to the party that introduced the
ambiguous expression. 72

In these situations it is a matter of construction which
meaning should be attributed to the parties. The rare
situation where ambiguities really cause difficulty, however,
is where each of the parties clearly understood something quite
different when using an expression fundamental to the contract.
In such a case, there has been simply a failure to agree, and no
contract has been formed. Reference was made earlier to Raffles
v. Michelhaus 73 where the parties each had in mind a different
vessel when they spoke of goods to arrive 'ex Peerless from
Bombay'. Even in this situation the courts strive to uphold
contracts, recognising the danger in allowing persons seeking
to avoid liability to assert that they had been misled by
ambiguity. Where the evidence points to one meaning being
more likely to have suggested itself to a reasonable person
in the place of a party than that which he asserts to have under-
stood, he will be found by the former. 74 In the 'Peerless' case,

72. See e.g. Robjohns v. Hill (1900) 19 N.Z.L.R. 605, Jenkins
v. Kent [1922] N.Z.L.R. 882. The courts have also insisted
that parties be bound by the interpretation of an ambiguity
upon which they have acted in the past: see e.g. Topliss
Bros v. Cohr (supra), Cranton v. Worthington (1908) 27
169, at 176.

1381, at 1385.
the ambiguity was complete, and no evidence was brought to show that to a reasonable third party one or other of the meanings would have suggested itself. 75

It is comparatively rarely that no evidence of that nature will be available. Only in its absence, it is submitted, will a court hold invalid a contractual provision for ambiguity. 76

(c) Inaccuracies

It is probably true to say that inaccuracies present themselves far less frequently in contracts, than in wills and trusts. The presence of two parties renders it more likely that the terms of the contract will have been checked, and errors corrected before execution. Furthermore, so long as both parties are agreed that their document contains some inaccuracy, there is no difficulty in amending it.

Should the presence of inaccuracy be disputed however, it may be possible to obtain rectification by order of the court. The conditions under which this remedy is available have been stated in these terms:

75. Raffles v. Wichelhaus is discussed exhaustively by Young, in 'Equivocation in the Making of Agreements' (1964) 64 Colum.L.R. 619. He concluded that, given the pervasive quality of vagueness in language, disputes in contract law call for interpretation and construction unless there is no sensible basis for choosing between different understandings of the agreement.

76. The case of Frigaliment Importing Co. v. B.N.S. International Sales Corp., (1960) 190 F.Supp. 116 is discussed by Corbin, (Vol.3, 1971 Pocket Supplement) and provides an interesting illustration of the principles discussed in the text. A contract provided for the sale of 'U.S. Fresh Frozen Chicken, Grade A, Government Inspected'. The buyer found that the birds were not young chicken suitable for broiling or frying, but stewing chicken, or fowl. On the evidence, the Court chose the meaning advanced by the seller, holding that the
... it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly ... If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document, but nothing less will suffice ... There could be no certainty at all in business transactions if a party who entered into a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can that they agreed something different ... but not that they intended something different.77

Direct evidence of intention is nonetheless admissible in a suit for rectification,78 and as such forms an exception to the general rule of admissibility of parol evidence to vary the terms of a written agreement.

Uncertainty arising from inaccurate statements in contracts does not then induce invalidity. If the court is satisfied that inaccuracy exists, rectification will be allowed. Otherwise, the contract must stand as it is written. It may be that the inaccuracy was to the mind of one party only, in which case the matter must fall for consideration under the rules relating to mistake.

76. Cont.

plaintiff (buyer) had failed to show that the seller knew, or had reason to know that the plaintiff intended to buy broilers only.


78. Murray v. Parker (1854) 19 Beav. 305, at 308; 52 E.R. 367, at 368. It may be that parties will try for rectification in order to gain the introduction of evidence which would be excluded in a case of construction, see e.g. Prenn v. Simmonds [1971] 1 W.L.R. 1381.
(d) **Omissions**

It often happens that parties to a contract have omitted to make provision for some term that is essential to the carrying out of their contract. The general presumption is that they have provided for every essential term,\(^79\) so that the court will first attempt to enforce the agreement as it stands, construing it in such a way as to render it enforceable. Should this not be possible, however, it may be possible to imply terms. The rules relating to their implication have already been considered, and it is in this process of 'gap filling' that they play a most significant role.

It is necessary however that the parties themselves intended to conclude a contract, and had used language indicating that fact. That the courts will not imply terms where the parties have indicated that they wish to negotiate further was stressed by Richmond J. in *Willetts v. Ryan* \(^80\) where

\(^{79}\) Luxor (Eastbourne) Ltd v. Cooper [1941] A.C. 108, at 137 per Lord Wright.

\(^{80}\) [1968] N.Z.L.R. 720, at 722-723. Affirmed by the Court of Appeal, *ibid.*, 863 at 867. Note the comment of Richmond J. (724): 'The court is always reluctant to arrive at the conclusion that parties who have obviously intended to enter into a contractual relationship have failed to do so through leaving some part of their agreement outstanding for further negotiation.' Also, in the Court of Appeal, '... we have come to the conclusion, though not without some reluctance having regard to what appear to be the merits of the case, ... that in this case the parties have not concluded their contract' (*ibid.*, 867). The Court was therefore prepared to impute to the parties an intent which it did not believe to be their subjective intent, but which the language they had used dictated.
parties had agreed on the sale of some land and for the payment of the purchase price of '10% cash deposit on signing the agreement for sale and purchase and the balance by mutual arrangement.' Had the words 'mutual arrangement' not been present, the court could by implication have supplied all terms necessary for carrying out the contract. Those words, however, implied that the parties themselves desired to settle the method of payment, and that the court's powers of implication were thereby excluded.

(e) **Delegation and reservation**

The courts will not enforce what is a mere agreement to agree, so that as has been seen, a contract that purports to reserve some term to future determination by the parties will not exist as a contract, unless they reach agreement. Parties may, however, delegate the fixing of a term to some independent third party, and in this case the id certum maxim will operate. The term is ascertainable without further agreement.

Sometimes, however, one party may choose to delegate to another party the power to determine a term unilaterally. Examples of this are most frequently seen in cases where remuneration or commission is left in the discretion of an employer or client. If the discretion is unfettered, there

---


82. See e.g. Re Brand Estates Ltd [1936] 3 All E.R. 374.
is little that a court can do in ensuring its exercise favourably to a claimant. For the court itself to exercise the discretion and order payment of a certain sum would be to make a contract for the parties. However, the courts have been prepared where they are not satisfied that an unfettered discretion was intended, to imply a term to the effect that it will be exercised reasonably. In one case, a similar result was achieved by implying a contract to pay quantum meruit, but it is submitted that such an implication will be made only where there is no other express agreement for remuneration, and all payments have been left on a discretionary basis. The unlikelihood of it being the parties' intention that the plaintiff (claimant) should act gratuitously will, in that situation, allow of a quantum meruit payment.

An illustration of the extent to which the courts are prepared to go in upholding contracts despite the discretionary power vested in one party is provided by the recent cases:

83. See Way v. Latilla (supra), and Kofi Sunkersette Obu v. A. Strauss & Co. Ltd (supra) 250.
84. As in Powell v. Braun (supra), and Re Brand Estates (supra). But in Re Richmond Gate Property Co. Ltd [1965] 1 W.L.R. 335, where a managing director's remuneration was to be the same 'as the directors may determine', Plowman J. stated, 'he gets what they determine to pay him, and if they do not determine to pay anything, he does not get anything. That is his contract with the company, and those are the terms on which he accepts office.'
English Court of Appeal decision in Greater London Council v. Connolly where tenancies held from the Council were subject to the condition that rent was 'liable to be increased or decreased on notice being given'. It was argued that both the condition, and the amount of rent to be paid were uncertain. Lords Denning and Pearson were satisfied, however, that by implying a term that reasonable notice be given, the condition could be rendered certain, and that upon notice being given, the amount of rent payable also was rendered certain. It was not stated, however, whether a similar restriction of reasonableness might also be imposed upon the amount of increase that the Council might levy. There would seem no reason why such an implication might not be made if necessary.

(f) Vagueness

In one sense the use of wide and vague language may amount to delegation too, for the role played by the interpreter of the contract becomes of significance in 'rendering certain'

86. [1970] 2 Q.B. 100.
87. Ibid., 663, 665. Apparently, some quarter of a million tenants had received rent increases.
89. It is likely, for instance, that had Lord Justice MacKinnon's officious bystander suggested that the tenants and the Council place in their agreement a term to the effect that any increase be reasonable, he would have been met with a testy, 'Oh, of course'.
what the parties have left largely undefined. The situation is close to that of omissions too, for in neither situation may adequate guidance as to the parties' intention on specific terms be available.

Reference has already been made to the situation where the width of the language used by the parties gives rise to an inference that their negotiations were incomplete. Close to that case is the situation where although the parties may have clearly believed themselves bound and even have acted on the agreement, yet they have used an expression so vague and indeterminate that the court is quite unable to enforce it. It might be said in this context also that clarification of the term is possible only by the parties themselves, and not by the court. 90

It is seldom, however, that the courts are defeated by mere vagueness. One line of cases frequently regarded as falling under this head appears on closer examination, to be more appropriately regarded as providing instances of ambiguity, although the borderline between the two categories is admittedly not always clear. These cases are where the parties have expressed their contract to be subject to some

90. See e.g. Bishop v. Taylor (1968) 42 A.L.J.R. 277, at 288 per McTiernan and Taylor J.J. The court was unable to find that any final agreement had been reached in a contract for '⅓ share of the crops', since the intended crops were never defined specifically.
common type of clause, but have failed to specify which of many
similar clauses with different effects was intended. Contracts
expressed to be 'subject to war clauses', 91 'subject to
strike and lockout clauses', 92 'subject to force majeure
conditions', 93 and 'on hire purchase terms' 94 have all been
held unenforceable because of the absence of any indication as
to which of a wide variety of clauses was intended. The
ambiguity was therefore unresolvable. If evidence is available
to suggest some specific clause, however, the ambiguity is
capable of resolution, and the contract enforceable.95

Those cases aside, however, instances of true vagueness
inducing invalidity are rare. Illustrations may be provided
by two nineteenth century decisions. In the first, a contract
for the sale of some land that reserved 'the necessary land for
making a railway' was held too vague to be enforced, for the

91. Bishop & Baxter Ltd v. Anglo-Eastern Trading and Industrial
93. British Electrical & Associated Industries (Cardiff) Ltd
19 L.G.R.A. 321, Allcars Pty. Ltd v. Tweedle [1937]
V.L.R. 35.
95. In Shamrock S.S. Co. v. Storey & Co. (1899) 81 L.T. 413,
'the usual colliery guarantee' was held valid, since such a
guarantee existed and was ascertainable. Similarly, a deed
of separation with 'the usual covenants' was upheld in
Hart v. Hart (1881) 18 Ch.D. 670, and an agreement to
lease that provided 'the lease shall contain such other
covenants and conditions as shall reasonably be required
by [the plaintiffs]' in Sweet & Maxwell Ltd v. Universal
News Services Ltd [1964] 2 Q.B. 699. See also Summergreene
Peters (1960), 102 C.L.R. 551.
Court neither knew what was 'the amount of land necessary for a railway, nor what line the railway is to take, nor anything about it ...'. Similarly, in Cooper v. Hood the Court was unable to enforce an agreement whereby the vendor agreed to leave 'a large portion of my money ... for some years' in the business that was the subject matter of the contract.

Uncertainty of that nature could not be regarded as rendering the contract unintelligible. In the unlikely event of its occurrence in a statute, the court would have had to construe it. There are signs that in recent years the tendency is to adopt a similar approach in contract interpretation, declining enforcement only where a provision is quite unintelligible. The High Court of Australia stated recently:

But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an

96. Pearce v. Watts (1875) L.R. 20 Eq. 492, at 494 per Sir George Jessel M.R.
97. (1858) 26 Beav. 293, 53 E.R. 911. See also Taylor v. Portington (1885) 7 De G.M. & G. 328, 109 E.R. 147 (agreement to take a house 'if put into thorough repair' and if the drawing room was 'handsomely redecorated according to the present style') and Guthing v. Lynn (1831) 2 B. & Ad. 232, 109 E.R. 1130 (promise to pay 'the buying of another horse if the purchased horse proved lucky.) Cf. Edwards v. Skyways Ltd [1964] 1 W.L.R. 349.
appropriate case, an arbitrator decides its proper construction: and the court or arbitrator will decide its application. The question become [sic] one of construction, of ascertaining the intention of the parties. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or intention, be resolved.98

It is submitted that, as a general rule, the courts will not hold a contract void for uncertainty arising from vagueness of language without first making every effort to construe that language. As a result, only an expression to which no meaning can be attributed without doing violence to the 'natural' meaning of the words used or their context, or entering upon pure conjecture will render a contract unenforceable.

5. Exceptions to the General Rule

It is clear that the courts are, as a general rule, extremely reluctant to hold a contract void for uncertainty whatever its cause. Since questions of interpretation and construction of legal instruments arise in almost every matter that comes before them, they frequently find difficulty in accepting that unskilled drafting could be capable of preventing them from according a meaning to any provision.

But there has been a small number of occasions where this reluctance has been possibly less apparent, and where the courts have been less willing to embark upon complex processes of interpretation to uphold an agreement.

(a) Specific types of provisions

The attitude of the courts of equity towards provisions of a harsh or unconscionable nature is well enough known. Particularly where the parties are of unequal bargaining strength, the courts have tended to construe such provisions narrowly, and to resolve ambiguities against the party seeking to enforce the provision. On occasion it would appear that this attitude has had some bearing upon the question of whether or not such a provision might be void for uncertainty.

(i) Exclusion clauses

On many occasions the courts have held that an exception to an obligation can only be established by clear and unambiguous words. But in particular this attitude has been apparent in the case of charter parties. It has been long established that the common law implies warranties into these documents, imposing upon the ship-owner the obligation of providing a seaworthy vessel. 100

courts have been reluctant to uphold provisions seeking to exclude that obligation, and have held that only plain words that are 'express, pertinent, and apposite',\(^{101}\) will have this effect.

Lord Macnaghten once stated:

In such a case as this an ambiguous document is no protection. It is a wholesome rule that a shipowner who wishes to escape liability which might attach to him for sending an unseaworthy vessel to sea must do so in plain words.\(^{102}\)

In the same case, Lord Lindley stated that by 'plain terms' be meant 'terms sufficiently plain to the shipper for him to understand it.'\(^{103}\)

But whether this means that failure to comply with such a requirement, which bears a marked similarity to a requirement sometimes said to exist in respect of bylaws, would render the provision void, is far from clear. The above passages would appear to suggest that it might. But in practice, the courts have preferred instead to adopt rigorous techniques of

---


\(^{103}\) Ibid., 97.
construction to narrow or preclude the application of particular clauses to the fact situations before them.\(^{104}\)

While the reluctance of the courts to enforce such clauses may yet lead to their accepting a lesser degree of uncertainty as an invalidating factor than is demanded in the case of other contractual provisions, it does not appear yet to have had that effect.

(ii) Restraints on trade In the days of the first Queen Elizabeth, all restraints of trade were thought to be contrary to public policy and therefore void.\(^{105}\) Over the years the scope of the doctrine has been modified considerably, but, as is demonstrated by the recent House of Lords decision in \textit{Esso Petroleum Co. Ltd v. Harper's Garage (Stourport) Ltd}\(^{106}\) it continues to have considerable force today.

In at least one case it is possible that the reluctance of the court to uphold a provision in partial restraint of trade led to its failing for uncertainty of a lesser degree than that normally permitted in contracts. In \textit{Davies v. Davies}\(^{107}\) a retiring partner had covenanted with the other

\(^{104}\) See e.g. \textit{Adamastos Shipping Co. Ltd v. Anglo-Saxon Petroleum Co. Ltd} [1959] A.C. 133, at 174-177 per Lord Reid.

\(^{105}\) See e.g. \textit{Mitchell v. Reynolds} (1711) 1 P.Wms. 181, at 188.


\(^{107}\) (1887) 36 Ch.D. 359.
members of his firm 'to retire from the partnership and, so far as the law allows, from the business'. The Court was unwilling to imply terms as to the extent of the restraint, or to construe it in such a manner as might render it valid. Instead, it preferred to hold the provision void for uncertainty.

(iii) Commission clauses A third situation where the attitude of the courts towards particular types of provision has tended to influence their determination of validity is in the case of commission clauses inserted typically in standard agreements of estate agents, whereby commission may become payable even without a sale having been effected. Again, the courts have insisted upon clear wording in this type of provision. In Jaques v. Lloyd D. George and Partners Ltd the English Court of Appeal had little hesitation in finding void for uncertainty such a provision, under which commission was to be payable upon the agent being 'instrumental in introducing a person willing to sign a document capable of becoming a contract'. The judgements of Lord Denning M.R. and Cairns J. demonstrate a marked reluctance to construe the provision in such a way as might render it more certain.

110. Ibid., 629-635.
111. Ibid., 634-635.
It appears that in holding the provision void for uncertainty their Lordships were influenced to a significant degree by the disagreeable nature of the provision, and the injustice that it might work if permitted to stand.

(b) The nature of the remedy sought

In Fry's work on Specific Performance there appears the following passage:

It is obvious that an amount of certainty must be required in proceedings for the specific performance of a contract greater than that demanded in an action for damages. For to sustain the latter proceedings the proposition required is the negative one, that the defendant has not performed the contract, - a conclusion which may be often arrived at without any exact consideration of the terms of the contract; whilst in proceedings for specific performance it must appear not only that the contract has not been performed, but what is the contract which is to be performed.

Stated in that form, the proposition has received little support. One judge has seen it as having the effect of requiring the Court to say to a defendant 'I do not know what you have contracted to do, but I can estimate the damages sustained by your not doing it, and you shall pay damages for not doing it.' The same judge, however, was prepared to accept the distinction to a limited extent, in the sense that while there might be no question as to the right to be...

112. 6th ed. (1921), by G. R. Northcote, 179. And see Foster v. Wheeler (1888) 38 Ch.D. 130, at 132 per Cotton L.J., 133 per Lindley L.J. Stonham, Vendor and Purchaser (1964) 64 also accepts this proposition, but without elaboration.
enjoyed under a particular contract, its mode of enjoyment might not be adequately defined to found a decree of specific performance. 114.

It is submitted that the true relevance of certainty to the question of remedy is in its bearing upon the exercise of the courts discretion. It is illogical to assert that the validity of a contractual provision is dependent upon the nature of the remedy sought for its enforcement. But it is not illogical to say that uncertainty of a degree insufficient to render the provision invalid may nonetheless involve that specific performance is an inappropriate remedy, and that the plaintiff ought to be left to his remedy in damages. This is because the courts retain a wide discretion in awarding the former remedy. Factors which have on occasion borne upon the exercise of that discretion include the possibility of difficulty in enforcement of the decree, 115 or the possibility of unnecessary hardship on a defendant. 116 If it is recalled that for breach of a decree the defendant may become liable for imprisonment, it may cause such unnecessary hardship that he

114. Idem.
be required to fulfill an obligation the terms of which are incapable of precise definition.

But it is to the remedy, and not the validity, of a contract, that uncertainty of this nature should relate.

(c) Executed and executory contracts

It has occasionally been suggested that a lesser degree of uncertainty may operate to invalidate a purely executory contract, than a partly executed contract. It is not easy to determine the extent to which this is true, however. In one instance, that of a provision to supply goods or services at a price 'to be agreed', it appears that the courts will give effect to what would be an unenforceable contract were it purely executory, if one party has performed his obligations. But the basis of such a decision would be the implication, from the conduct of the parties, of a contract that in default of agreement a reasonable sum would be paid. So that it is not an enforcement of the existing contract as such at all, but rather a requirement to pay quantum meruit.

But outside that situation it would be difficult to


118. See e.g. British Bank for Foreign Trade Ltd v. Novinex [1949] 1 K.B. 623, at 629-630 per Cohen L.J.

assess the relevance of partial performance of a contract to its validity. It may serve to clarify the obligations of the parties, or to remove difficulties of enforcement that might otherwise prevent the award of a decree of specific performance.\textsuperscript{120} The courts have stated, moreover, that they will strive to enforce partly executed contracts.\textsuperscript{121} But whether that process will involve an effort beyond that normally expended in the resolution of uncertainty is a matter solely of conjecture.

6. Conclusions

The desire of the courts to uphold freedom of contract has meant that no matter how clumsily or untidily parties may have worded their agreement, so long as it is clear that legal consequences were intended by the parties to flow from it, the courts will strive to accord it effect. In doing so, however, they must balance the risks of making a contract for the parties on the one hand, with the risk of allowing an obvious contractual intent to fail on the other. The balance is a delicate one, and in borderline cases other factors, some objective but largely subjective, tend to determine which way

\textsuperscript{120} See e.g. \textit{Parker v. Taswell} (1858) 2 De G. & J. 559, at 571, 44 E.R. 1106, at 1111; \textit{Oxford v. Provand} (1868) L.R. 2 P.C. 135, at 149-150.

\textsuperscript{121} See e.g. \textit{Thomas v. Harper} (1935) 36 S.R.(N.S.W.) 142, at 149.
the decision will go. 122

The exceptions occasionally advanced to the general rule are often confused and lacking in solid judicial support. Whether they amount to anything more than factors to be accorded weight in the occasional borderline case is unclear. But in their absence, at least, it is clear that only extreme instances of vagueness or ambiguity quite incapable of resolution will serve to invalidate a concluded contract.

122. The writer regrets his inability to accept the statement of one learned writer, that 'The cases in which the essentials of certainty have been considered are relatively easy to harmonise. The topic is one which, so to speak, has no loose ends.': F. Graham Glover, 'Essentials of Certainty' (1971) 121 Nw. L.J. 657.
WILLS

1. Will Formation

Reference was made in the previous chapter to the distinction that may be drawn between uncertainty that arises in the formation of a contract, and uncertainty in a concluded agreement. In the creation of wills, however, uncertainty plays a far less significant part. The making of a valid will requires compliance with various legal formalities. It must, for example, be in writing, and be executed in accordance with the statutory provisions relating to execution and attestation.¹ Compliance with these requirements will almost inevitably indicate that a will was intended, so that the courts are seldom required to determine from the language used in an alleged will whether or not there was a testamentary intention. Only when a will falls into a privileged class rendering such compliance unnecessary is it likely that testamentary intent may be in doubt,² but the writer has been unable to find any instances of uncertainty of language playing a role in this context.

There is one situation, however, where certainty is required, and that is where a testator has entered into an

¹. Wills Act 1837, s.9. But see Wills Amendment Act 1955 (as amended by Wills Amendment Acts of 1962 and 1969) as to wills of servicemen and sailors.
². See e.g. Re Knibbs, Flay v. Trueman [1962] 1 W.L.R. 852.
agreement in his lifetime to dispose of his property by will
in an agreed manner. Such an agreement is recognised as
binding upon his personal representatives, so long as there
is certainty that the testator intended an agreement and
not merely a statement of intention, and provided too that
there is certainty as to the subject matter of the agreement.

Certainty of obligation may be illustrated by reference
to Re Fickus where a statement in the following terms was
held to be unenforceable:

She will have a share of what I leave after the
death of her mother, who I wish to leave in
comfortable independence if I should leave
her a widow.

Similarly, where the subject matter is vague, as for
example a promise to recognise a son, 'in common with the
rest', no enforceable contract will exist.

The principles involved are those applied in contract
law generally, and require no further comment. Mention may
be made, however, of the Law Reform (Testamentary Promises)
Act, 1949 under which persons who have performed work under
a promise, express or implied, of testamentary provision,

3. See e.g. Maddison v. Alderson (1883) 8 App. Cas. 467;
and Synge v. Synge [1894] 1 Q.B. 466. See also, W.A. Lee,
"Contracts to make Wills" (1971) 87 L.Q.R. 358.
4. [1900] 1 Ch. 331. See also Kay v. Crook (1857) 3 Sim. & G.
See also Synge v. Synge [1894] 1 Q.B. 466; Re Soames
(1897) 13 T.L.R. 439; and Macphall v. Torrance (1909)
25 T.L.R. 810.
may bring a claim against the promisor's estate should he fail to honour the promise. 6

2. **Principles of Will Interpretation**

Leaving aside for the moment the question of trusts set up under wills, the areas in which uncertainty arises principally in wills are the ascertainment of the property intended to pass under a legacy, the ascertainment of the person to whom it is intended to pass and the machinery by which it is to pass. In ascertaining the objects and subjects of gifts under wills, the courts have tended to strive with particular vigour to find the testator's intention, and to resist holding provisions void for uncertainty.

One writer has observed that, 'In the construction of wills, the most unbounded indulgence has been shown to the ignorance, unskilfulness, and negligence of testators'. 7 As a result, resort is had constantly to extrinsic evidence in aid of interpretation, and a generally liberal approach is adopted to the interpolation of words where it is clear that a testator has not properly expressed his meaning. The two Latin maxims discussed in Chapter 3 are often cited in explanation or justification of these techniques.

---


The reasons why the courts should strive to uphold provisions are perhaps best illustrated by considering the result of invalidity. The most obvious feature is of course that the testator is unable to make a new instrument to correct the errors of the first, and to ensure that those persons he intended to benefit, will in fact benefit. Should the property be adequately described, but not the object, there will usually be an intestacy in respect of that property, which then passes to those eligible on intestacy. If, on the other hand, the object is certainly described but not the subject of the gift, the property will normally become part of the residuary estate. Only by coincidence will those intended to benefit receive their bounty.

A further reason for this 'most unbounded indulgence' is that in few areas of law is there to be found such a maze of complexity and technicality of expression as in the area of wills and trusts. It is an area which amateur draftsmen enter at their peril. Their lack of appreciation of the legal effect of half-understood expressions has for centuries caused anguish to judges anxious to accord a sensible meaning to confused and inconsistent instruments. There is an understandable reluctance not to allow a testator's lack of comprehension of legal technicality to frustrate a clear testamentary intenti.

Uncertainty may arise too from the fact that a will has no legal effect until the testator's death. This may not be
for some considerable time after its execution, and events that occur during that time, for example, the birth of children and the purchase and sale of property, may render interpretation extremely difficult, raising issues quite unforseeable at the date of execution.

The influence of these considerations and the operation of various principles of construction may now be observed briefly in the context of different types of uncertainty arising in wills.

3. The Effect of Different Types of Uncertainty

(a) Meaningless provisions

It has already been seen that in contract law a provision is liable to be declared 'meaningless' only when all attempts to accord it a meaning have failed, and that the expression is highly relative. Similarly, in the context of will interpretation there appear to be few occasions on which the confusion engendered by a draftsman's lack of skill has resulted in his provisions being accorded this label.

Provisions that may appear insensible at first glance, either through inconsistency and repugnancy, or through the use of local or private language or idiom, will generally be explicable

---


through extrinsic evidence. Mere difficulty in ascertainment of the subject or object of a gift will not render it void. To have that effect, one judge has stated, the difficulty must be so great as to be 'virtually incapable of resolution'. In doubtful cases the courts are aided by a number of principles of constructions and so-called 'presumptions'. Some of these are listed by Halsbury, who includes the presumption against intestacy; the presumption of legality and knowledge of the testator; and the presumption in favour of relatives or persons having a claim on the testator. Thus where there is no other indication of the testator's intention, the interpretation of an uncertain provision that more closely accords with one of these presumptions will be adopted.

It will be recalled that in contract law, an expression that is meaningless can generally be ignored, and the instrument permitted to stand without it. Similarly with wills, although the courts have paid lip service to a general rule that they should give effect to every word used by a testator, they have been quite ready to reject words when warranted by the immediate context or general scheme of the will, or where

11. Re Eden, Dec'd, Ellis v. Crampton [1957] 2 All E.R. 430, at 433 per Wynn-Ferry J.
it appears that the words are purely explanatory or mere surplusage.

(b) Ambiguities

Normally, the presence of ambiguity will not invalidate provisions of wills. Where a true ambiguity, or 'equivocation' arises, extrinsic evidence is admissible in order to indicate which of two equally qualified objects may have been intended to benefit, or which property fitting the testator's description was intended as the subject of his gift. Should doubt still remain, then the court may even receive direct evidence of the testator's intention.

In the absence of equivocation, however, the presence of ambiguity is still regarded as sufficient cause for the admission of extrinsic evidence, and its role in interpretation is explained typically in the following terms:

The object of the Court in every case is to ascertain the intention of the testator as declared by the words of the will, and for this purpose the Court is entitled to put itself in the position of the testator and consider all material facts and circumstances known to the testator with reference to


16. See e.g. Monk v. Mawdsley (1827) 1 Sim. 286, 57 E.R. 584; Taylor v. Beverley (1844) 1 Coll. 108, 63 E.R. 342; Craik v. Lamb (1844) 1 Coll. 489, 63 E.R. 512; Re Kirkbride's Trusts (1886) L.R. 2 Eq. 400; Giles v. Melsom (1873) L.R. 6 H.L. 24, at 33; Re Boden, Boden v. Boden [1907] 1 Ch. 132.

which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances. 18

'Evidence of surrounding circumstances' is generally interpreted broadly, and it may be used extensively. An example is provided by the New Zealand Supreme Court decision in Re Rooney, Dec'd, Public Trustee v. Rooney 19 where a testator had bequeathed to 'my two grandchildren' the sum of £20 each. He had fourteen grandchildren, all of whom were alive both at the date of his will and at his death. In order to explain what was meant by 'two grandchildren', Blair J. was prepared to look at evidence of the testator's children, who all believed that he intended to benefit two particular grandchildren, Moira and Joan, and that he had himself expressed such an intention to the Public Trustee's Office when giving tentative instructions for a new will. 20

Further evidence was available to the effect that these two children had stayed with the deceased on a number of occasions, and that in a former will he had provided legacies for them by name.

Even where extrinsic evidence is not conclusive as


20. This would appear to be direct evidence of intention, although Blair J. does not appear to have seen this as an equivocation, op. cit. 90.
against one or more possible constructions of an ambiguity, the courts strive against invalidity by the application of numerous 'last resort' canons of construction. Thus, where two or more meanings are possible, the courts will lean against that which is capricious,\(^{21}\) or would tend to bring about a harsh or whimsical result.\(^{22}\) They will similarly, applying the \textit{ut res magis} principle, lean against a construction that would render the provision invalid.\(^{23}\) It has even been suggested that where a will contains an absolute ambiguity through two inconsistent expressions, and there is no other way out, the court should simply prefer the first to the second, rather than hold the whole to be void.\(^{24}\)

The reasoning that has led to the development of these principles has been aptly expressed in the following manner:

The court is, furthermore, reluctant to hold a gift void for uncertainty, and adopts the benevolent rule that if there is ever so little reason in favour of one construction of an ambiguous gift more than another, the adoption of the construction so favoured is at least nearer the intention of the testator than that the whole disposition should be void and the persons entitled on an intestacy let in.\(^{25}\)

\begin{itemize}
\item \textbf{21.} Thellusson \textit{v.} Lord Rendlesham (1859) 7 H.L.C. 429, at 498, 11 E.R. 172, at 199.
\item \textbf{22.} Bathurst \textit{v.} Errington (1877) 2 App. Cas. 698, at 714; Barraclough \textit{v.} Cooper [1908] 2 Ch. 121n at 125n.
\item \textbf{23.} Re Sanford, Sanford \textit{v.} Sanford [1901] 1 Ch. 939; Re Mortimer, Gray \textit{v.} Gray [1905] 2 Ch. 502; Re Earl of Stamford & Warrington, Payne \textit{v.} Gray [1912] 1 Ch. 343.
\item \textbf{24.} See Re Gare, Filmer \textit{v.} Carter [1952] Ch. 80, at 83 per Harman J.
\end{itemize}
It is possible that so benevolent an interpretation may not be granted where it is clear that intestacy will not be the result of a gift failing, or if the failure of a gift should mean that an otherwise disentitled heir might inherit. Outside these situations however, a gift will fail for ambiguity only where it is quite impossible to suggest one interpretation in preference to another. Seldom, if ever, will this be the case.

(c) Inaccuracies

Inaccuracies occur frequently in wills, and cause a reasonable amount of difficulty. Not only are they likely to occur through errors in drafting, but they may also arise through wills becoming out of date. Thus a description by a testator of his property, or of a class of beneficiaries, may no longer be accurate at the time of his death. Because of the prevalence of inaccuracies, however, a number of principles have developed for their construction, and these may now be summarised briefly.

First it is clear that where a testator names a particular

26. See e.g. Blundell v. Gladstone (1844) 14 Sim. 83; 60 E.R. 288.
27. See e.g. Richardson v. Watson (1833) 4 B. & Ad. 787, 110 E.R. 652.
28. But see Asten v. Asten [1894] 3 Ch. 260, where individual gifts of four houses, each described simply as 'No. , Sudeley Place' failed, since the Court was quite unable to determine which house was intended to pass to which beneficiary.
property or beneficiary accurately, there will be a very heavy burden on he who seeks to demonstrate that something else was intended. The strictness of this rule may be illustrated by reference to the House of Lords decision in National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children. There, a Scotsman who had lived all his life in Scotland, left a gift to 'the National Society for the Prevention of Cruelty to Children'. All the interests of the testator were Scottish; the legacy was placed in the midst of a series of legacies to Scottish charities, and the Scottish National Society had recently been brought to the testator's attention. It was held nevertheless that the society that the testator had correctly named, whose headquarters were in London and whose operations did not extend to Scotland, was entitled to the gift. The 'moral feeling' of Lord Dunedin that the money was to go to a society that the testator did not intend, was insufficient to rebut the


32. Ibid., 214.
'strong presumption against any rival who is not the possessor of the name mentioned in the will.'

Where, however, the words used fail to fit any person or property with accuracy, the court may have regard to extrinsic evidence to ascertain what was intended. Frequently it is evidence to show that the testator had on other occasions used the words in question to designate some person or object to which the words do not properly refer.

One principle of construction that has received frequent attention in this context is the rule, falsa demonstratio non nocet cum de corpore constat, normally shortened to falsa demonstratio. The rule provides that where the description of a person or object is made up of two or more parts, and one part is true and the other false, then if the part that is true describes the person or object with sufficient certainty, the untrue part may be rejected and will not vitiate the gift.

The New Zealand case of Re Nathan, Nathan v. Hewitt provides

33. Ibid., 212, per Earl Loreburn L.C. See, for criticism of this decision, Z. Chafee, 'The Disorderly Conduct of Words' (1941) 41 Columbia L.R. 381, at 385: '...the law lords clung to the notion that the Scottish Society had only one name, which the testator must use to reach that society, just as Ali Baba couldn't open the door without saying "Open Sesame".'

34. See e.g. Re Ofner, Samuel v. Ofner [1909] 1 Ch. 60 (instructions for will admissible); Re Nesbitt, Dr Barnardo's Homes v. United Newcastle-upon-Tyne Hospitals [1953] 1 W.L.R. 595; Re Tetsall, Foyster v. Tetsall [1961] 1 W.L.R. 938, at 940.

35. See Williams on Wills 3rd ed. (1967) 421.

36. [1933] N.Z.L.R. s.141; and see also Bould v. Moore (1902) 4 G.L.R. 482; Re Dilworth, McKurray v. Dilworth (1902) 22 N.Z.L.R. 125; Re Thomas, Smith v. Thomas (1915) 34
an illustration of the operation of the maxim. There, the testator erroneously described in his will an insurance policy on the life of his grandchild that he had later replaced by a more beneficial one. The court was able to reject the false description and require the trustees to keep the later policy in force.

Inaccurate descriptions may arise through a change of circumstances between the date of the will and the testator's death. A person or object who once satisfied the description may no longer exist. For example, a testator left a gift to the Dunedin Volunteers but that group had since been transferred to the Territorial Force. It was held that the gift was good, since all that had occurred was a mere change in name. Had, however, the body come to participate in compulsory military training, the gift would have failed, for no longer could it be regarded as falling within the testator's description.

It is clear then, that mere inaccuracies in wills are not generally sufficient to defeat the attempts of the courts to arrive at the true intention of the testator, and that where the courts are satisfied that the intention was other

36. Cont.
than is revealed by the words used, they will strive to give effect to it.

(d) Omissions

It is convenient to regard omissions, like ambiguities, as falling into two categories, latent and patent. A patent omission is one that appears on the face of the will, where for example, the subject or object of a gift is left blank.39 Unless there is some other indication on the face of the will as to the testator's intention,40 the courts will decline to entertain extrinsic evidence for the purpose of identification.

The function of the courts in this situation is the interpolation of words into the testator's will, so that it is not surprising that their approach is cautious, and similar to that adopted when implying terms into contracts. This caution is particularly apparent when an omission is not altogether clear from the face of the will, but is 'latent'. The court must be able, it has been stated, to 'collect from the four corners of the document that something has been omitted and, further, collect with


40. For example, a legacy to 'Percival .............. of Brighton' has been held to provide sufficient basis for the admission of extrinsic evidence; In the goods of De Rosaz (1877) 2 P.D. 66. See also, Re Messenger's Estate [1937] 3 All E.R. 355, and Re Stevens dec'd., Pateman v. James [1952] 1 Ch. 323.
sufficient precision, the nature of the omission. Resort may be had to extrinsic evidence, although evidence that words were omitted by mistake in the drafting or engrossment of a will is generally inadmissible. In Re Lourie a testatrix had devised, 'the rest and residue of my personal property' but omitted any provision as to the disposal of her realty. It was submitted for the beneficiaries that the words 'real and' had been omitted from the will in error, a submission that Tompkins J. was prepared to uphold, finding it reasonably certain from a reading of the will that these words had been inadvertently omitted. Where the omission is wholly latent however, as was the alleged omission of the word 'Scottish' in the Society for Prevention of Cruelty case discussed above, only in


44. Ibid., 546, and see also Re Campbell, Campbell v. Potter [1924] N.Z.L.R. 1021, at 1023; where words were interpolated when a literal reading would otherwise have resulted in absurdity.

extraordinary circumstances will it be possible to convince a court that the testator's intention was other than appears from the plain words he has used.

(e) Delegation and reservation

Testators clearly cannot reserve any discretion to themselves under their wills but many attempt to leave to some other person the power to direct where their bounty should go. Most commonly this is done by providing a power of appointment, or a wide power of selection to trustees. The attitude of the courts to the latter type of provision is considered in the following chapter, but the power of appointment calls for further attention here.

The courts have often held that the power to make a will conferred by the Wills Act 1837 to "devise, bequeath, or dispose of" property by a duly executed will is a personal power. As such, it cannot be exercised by a will merely purporting to delegate to another person the distribution of the testator's estate, and the ascertainment of the objects of his bounty. There are possible exceptions. It has been said that where there is a general power which the donee may exercise for his own benefit, it may simply be regarded as equivalent to property. Again, for reasons considered later,

47. See e.g. Houston v. Burns [1918] A.C. 342, at 343; Re Hughes, Hughes v. Footner [1921] 2 Ch. 208, at 212.
a power of distribution amongst charities will never fail. 49

There is also the case where a testator indicates with sufficient certainty the class of beneficiaries from which the selection is to be made. Since the delegation here will not be total, it is more likely to be upheld. 50

Early rulings against powers appear always to have been on the grounds of uncertainty, rather than for delegation alone. 51 One writer has stated of the early decisions:

In most cases of this kind it is questionable whether there was any uncertainty in the wills, judging by the tests of certainty generally applied in the cases on powers. But the courts evidently felt that the testators should not be allowed to go this far, and since this was before objections had been conceived to delegation per se, the courts could lay hold of no better ground than uncertainty for ruling against the wills. 52


The true role of uncertainty in relation to delegation of will making power was considered in this country by Gresson J. in Re McEwan, McEwan v. Day. After a careful study of the authorities his Honour concluded that a power of appointment could be held valid upon either of two grounds; first, if the class of persons or objects to be benefitted were indicated with sufficient particularity, and second, if it were a general power and therefore equivalent to property.

But how certain need be the class of persons or objects to be benefitted? Harman J. in Re Gestetner Settlement indicated that different considerations might apply according to whether the power is a mere power, or whether it is coupled with or in the nature of, a trust. That decision together with the decision of the English Court of Appeal in I.R.C. v. Broadway Cottages Trust established that a power would be valid if it were possible from the terms of the instrument and the surrounding circumstances to predict with reasonable certainty whether any given individual was an object of the power or not. It would not be necessary, as it was in the case of trust powers, to be able to ascertain

56. [1953] Ch. 672, at 687.
57. [1955] Ch. 20.
the whole class of beneficiaries.

In the years that followed these decisions, the validity of a number of powers was determined in the courts according to this fine and difficult distinction between trust powers and mere powers,58 until its eventual rejection in 1970 by the House of Lords.59 For mere powers, however, the test of Gestetner was confirmed by the House of Lords in 1968,60 where it was emphasised that even if the terms of a power were so vague that its every exercise required an application to the court to ensure that it was within its terms, it would still be valid provided there was sufficient information available to the court to make a decision.61 These cases receive further consideration in the following chapter.

It would appear however, that even where the class of objects to be benefitted is sufficiently defined, a power may still fail for uncertainty. In Re Stapleton Deceased62


60. Ibid., 518-519, 520, 523, 526. And see J. W. Harris, 'Trust, Power and Duty' (1971) 87 L.Q.R. 31.

Bray C.J. in the South Australia Supreme Court was asked to pronounce on the validity of a clause in a holograph will that provided:

My trustees have discretionary power to transfer any mortgages, and property, and shares in Companies invested in my name to the Lutheran Mission 20 Marlborough Street St Peters, S.A. for building Homes for Aged Blind Pensioners after all expenses paid...

Bray C.J. saw a conflict between the conferment of 'discretionary power' and the fact that only one beneficiary was named, and concluded that the testatrix had conferred on her trustees the right to use the assets in more than one way, but had specified only one of the alternatives. The clause therefore, failed for uncertainty.

An appeal from that judgement to the High Court of Australia, in Lutheran Church of Australia v. Farmers' Co-operative Executors and Trustees Ltd failed, the four members of the Court being divided equally in their opinions. McTiernan and Menzies JJ. in a joint judgement were of the opinion that the clause simply left it to the trustees to decide whether or not to constitute a trust in favour of a named charity, and that as such it amounted to too great a delegation of will making power. But Barwick C.J., on the other hand, was firmly of the view that there was in fact no uncertainty at all - the identity of the repository of

63. Ibid., 125-126.
65. Ibid., 183.
the power, the property over which it extended and the object of the power were all quite clear. He was of opinion that a bare power to appoint amongst a class, no member of which derived a beneficial interest under the will in the property that was the subject matter of the power, would be a valid 'disposition' for the purposes of the Wills Act. Why then, he reasoned, should a discretionary power to appoint to a named person be in any worse case. 66 His Honour appears also to have regarded the charitable nature of the gift as of some consequence, at least in increasing the court's vigilance and also probably in narrowing the area of considerations that the trustee could properly entertain in deciding whether or not to exercise the power. 67 Windeyer J. too considered the power to be valid, stating that a power to apply property to a specified charity, or to select among charities generally, could never be invalid for uncertainty, 68 and that it was too late for a court now to declare a power of appointment invalid solely as an attempted delegation of testamentary power, amounting perhaps to an actual charitable trust. 69

The effect of the decision is unclear. McTiernan and Menzies JJ. appear to have regarded it as sufficient to

66. Ibid., 179-180.
67. Ibid., 181.
69. Ibid., 188.
invalidate the provision that it purported to delegate
testamentary powers, although also apparently finding
uncertainty arising from the fact that no alternative object
had been specified in the event of the trustees failing to
exercise the power. It is respectfully submitted, however,
that the view of Barwick C.J. that there was no uncertainty
in the power is preferable. It is clearly inducive of a
result far nearer to the intention of the testatrix.

In summary, it may be asserted that the role of certainty
in the context of validity of powers is this: in order for
a power that is neither charitable nor general to be valid
it must, according to Gulbenkian's case, define the class of
objects amongst which selection is to be made with sufficient
clarity for a court to be able to determine in any particular
case whether a given object will fall outside or within that
class. 71

(f) Vagueness

The majority of cases in which gifts have been held
bad for vagueness have involved high order abstractions that
necessarily require some person to make a choice to render

---

70. Ibid., 183.
71. Bray C.J.'s judgement in Stapleton might be considered as being based on this ground, to the extent that he suspected from the use of the words 'discretionary power', that the class intended to be described by the testatrix was wider than that actually defined, that there had therefore been an omission that he was unable to rectify, and that accordingly the provision failed for uncertainty.
the gift certain, but which fail to specify any such person. Thus, gifts to 'twenty of the poorest of the testator's kindred,'72 and to 'the senior members of the cafeteria staff'73 have both failed for uncertainty. Had each been worded in the form of a power with a specified repository of the power, then, provided the class was sufficiently certain, it need not have failed.74

But it is comparatively seldom that mere vagueness will deter the courts' ambition to accord effect to the testator's intention. Extrinsic evidence is admissible to add meaning to the testator's vague expression, since in this context words that have no 'plain meaning'75 are then regarded as 'ambiguous'.76 Where the testator employs the description of 'reasonableness' the courts may be prepared to uphold the gift even although no person is nominated by the testator to select what is 'reasonable', since such an assessment is, given a knowledge and experience of similar cases, an objective task which the courts themselves are able to

72. Webb's case (1607) 1 Rolle. Abr. 609.
74. See e.g. Re Ogden, Brydon v. Samuel [1933] Ch. 678 and Brosseau v. Dore (1904) 35 S.C.R. 205.
Descriptions of the subject matter of gifts that have proved too vague to be enforced by the courts include 'some of my best linen', 'a handsome gratuity', and 'a small portion of what is left'. In each case the subject matter was capable of substantially more precise definition by the testator, in the absence of which ascertainment by the Court could be no more than speculation. The extent of the gift may be ascertainable from the extent of the purpose it is designated to fulfill, however; thus a gift of enough money 'as shall be necessary to endow a bed' at a hospital has been held sufficiently certain.

4. **Exceptions to the General Rule**

It is clear that the determination of the courts to prevent wills failing for uncertainty is, if anything, even greater than in the case of contracts, although there is still a reluctance to make the testator's will for him. There are however, exceptions. Where the gift is of a charitable nature, for example, no matter how vague it may be the courts will

uphold it by application of the cy-pres doctrine. This doctrine is considered in more detail in the following chapter. An exception in the other direction arises in the case of conditions subsequent - conditions whose operation would result in forfeiture of the gift. Here, the courts have insisted upon a high degree of certainty because of the harsh effect such a condition might have. These conditions too are studied in the following chapter, since although they are frequently attached to gifts under wills, the task of ensuring compliance is normally placed in the hands of trustees.

5. Conclusions

The courts have, particularly in recent years, tended to take a very liberal attitude towards will interpretation, although they have from time to time introduced and relied on a number of technical, and often misleading, rules of construction in order to assist in arriving at the testator's intention. It is possible that future interpretative processes may reflect greater confidence in arriving at the testator's intention without resorting to technical rules in justification. Lord Denning M.R. stated recently:

In construing this will, we have to look at it as the testator did, sitting in his armchair, with all the circumstances known to him at the time. Then we have to ask ourselves, 'What did he intend?' We ought not to answer this question by reference to any technical rules of law. Those technical rules have only too

often led the courts astray in the construction of wills. Eschewing technical rules, we look to see simply what the testator intended.83

Only when it is quite impossible to gather what the testator intended, only when the gleaning of his intention becomes something less than an informed guess, will the courts hold a testator's directions void for uncertainty.

CHAPTER FIVE

TRUSTS

1. Introduction

The trust is a complex legal concept, which has been
defined in a number of different ways. One definition that
has received judicial acceptance and may be of assistance in
the present study is that of Sir Arthur Underhill:

A trust is an equitable obligation, binding a
person (who is called a trustee) to deal with
property over which he has control (which is
called the trust property) for the benefit of
persons (who are called beneficiaries, or
cestuis que trust) of whom he may himself be
one, and any one of whom may enforce the
obligation.

The obligations of trustees and of executors of wills
are similar in many ways. Both are subject generally to the
provisions of the Trustee Act 1956, and frequently executors
are also appointed trustees. But there are a number of
distinctions. Two of the most significant are first, that
the duties of an executor are generally to distribute
property, while those of a trustee are to hold it and apply
it as directed. Second, those persons entitled to receive
under a will, unlike trust beneficiaries, have no beneficial
interest in the property, but merely the right to compel the
due administration of the estate.

1. See e.g. Lewin on Trusts 16th ed. (1904) 3-4; Garrow and
Henderson's Law of Trusts and Trustees 3rd ed. (1966) 1,
7-9; Parker and Mellowes, The Modern Law of Trusts (1966)
2. By Cohen J. in Re Marshall's Will Trusts [1945] Ch. 217,
at 219; and by Romer L.J. in Green v. Russell [1959]
2 Q.B. 226, at 241.
In many ways, however, the effect of the two instruments is similar, and the jurisdiction exerted over both from an early time by the Courts of Equity has meant that the historical distinction between executor and trustee is now rather blurred. Interpretation of the two instruments by the courts follows similar patterns, so that in trusts, as in wills, uncertainty arising from ambiguities, omissions and inaccuracies is generally resolved through resort to extrinsic evidence and other interpretative techniques. No attempt will be made in this chapter to study specifically the resolution of those forms of uncertainty in trusts. Of greater significance is the attitude of the courts to what is frequently called the 'three certainties' that are sometimes asserted to be essential to the validity of a trust. Also of relevance are those provisions in trusts where the courts have insisted upon a higher degree of certainty than is usual in legal instruments, and the considerations which induce the courts to construe trusts benevolently on occasion with a view to upholding them despite the presence of a high degree of uncertainty.

The requirement of certainty in three specific areas in trusts is generally regarded as flowing from the speech of Lord Langdale in *Knight v. Knight*. There must be certainty as to the intention to create a trust, certainty as to the

---

5. (1840) 3 Beav. 148, at 172; 49 E.R. 58, at 68.
subject matter of the trust, and certainty as to its objects. The first certainty, that of intention, is similar to that already discussed in contract law, but its unusual history qualifies it for further consideration here.

2. Formation of Trusts

Difficulty has occasionally arisen in determining whether or not a given provision was intended to create a trust. Although the courts insist upon no special formula for their creation, most trusts are set up by will or by formal deed in which the words 'on trust' or some similar phrase is used. In the absence of such wording, it may be uncertain whether or not a trust obligation was intended. For example, the language used may be merely precatory - in the nature of a recommendation or request that a person employ specific property in a particular way.

The early cases show that the courts tended to treat such expressions as imposing definite trust obligations, but by 1870 their attitude had clearly changed. In that year, Sir Richard Malins in Lambe v. Eames declined to imply such an obligation

7. The words 'on trust' in a disposition are not necessarily conclusive as to the existence of a trust, however: see e.g. Hunter v. Public Trustee [1924] N.Z.L.R. 882, Re Foord, Foord v. Condor [1922] 2 Ch. 519.
9. (1870) L.R. 10 Eq. 267.
where a testator had left property to his wife 'to be at her disposal in any way she may think best for the benefit of herself and family'. Instead, from the words of the will as a whole, he implied it was the intention of the testator to leave the property at the uncontrolled disposal of his wife. Affirming that decision, James L.J. in the Court of Appeal stated of the earlier cases:

... I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed.10

Since Lambe v. Eames the courts have been reluctant to imply the existence of a trust where the language used is precatory rather than mandatory, and it is clear that they will do so only where it is indicated from the whole instrument that a trust was intended.11 What the change of attitude in fact signified was that the courts were prepared now to look more closely at the intention of the author of the instrument as demonstrated by the words he had used, rather

10. (1871) 6 Ch. App. 597, at 599.
than as dictated by legal precedent. One possible exception to this principle is afforded by the decision of Wynn-Parry J. in *Re Steele's Will Trusts*\(^{12}\) where he held that where a particular form of wording had been held in the past to create a trust, its use today would have a similar effect, even though the previous decision was before 1870.

3. **Uncertainty of Subject Matter and Objects**

Uncertainty arising from vagueness or from excessive delegation to trustees is the chief source of difficulty in trusts. Now the very creation of a trust, of course, involves that the settlor is delegating to some other person or persons the right to deal with the legal interest in his property according to the guidelines he has set. What the courts have insisted on is that these guidelines be sufficiently definite to ensure that the trustees work largely in an administrative capacity. One of the essential features of a trust is the ability of the beneficiaries to enforce its terms through court action. The greater the discretion vested in the trustees as to the manner of distribution of the trust property, the more difficult becomes the task of enforcement. Again, the greater the vagueness in the definition of the trustee's duties, the more difficult it may be for him to determine whether or not some proposed action might be in breach of trust.

---

12. [1948] Ch. 603.
Insistence that the property or subject matter of a trust be adequately defined has long been a significant feature of the courts' attitude to the validity of trusts. In a number of cases the definition of the trust property has been so vague as to suggest strongly that no trust was intended. Examples include 'the remaining part of what is left', 13 and 'to give what shall remain at her death' 14 after an otherwise absolute gift. 15 Vagueness in directing the manner of investment of the trust property, as for example where a settlor directed that proceeds of sale be invested in 'stocks shares and convertible debentures in the"blue chip" category'16 need not invalidate the trust, however, although it may cause the direction itself to be void for uncertainty unless any necessary subjective determination is left specifically to the trustees. 17 In other cases, the trust property has been either undefined,18 or described in such indefinite terms that its ascertainment

15. See also Re Bond, Cole v. Hawes (1876) 4 Ch.D. 238: 'to do justice to those relations on my side such as she think worthy of remuneration but under no restriction to any stated property'; Stead v. Mellor (1877) 5 Ch.D. 225, 'shall distribute such residue as they think will be most agreeable to my wishes'; and see: Rodger v. Rodger (1893) 12 N.Z.L.R. 392, Re Jacob (1897) 16 N.Z.L.R. 52; Re Elder, Elder v. Hercus (1896) 14 N.Z.L.R. 565; Re Cate, [1923] N.Z.L.R. 419; Re Burton, Public Trustee v. Burton [1965] N.Z.L.R. 712.
17. Ibid., 539, per Cross J.
18. See e.g. Bardswell v. Bardswell (1838) 9 Sim. 319, 59 E.R. 381.
by objective means is not possible. 19

Greater difficulty, however, is caused by uncertainty in the objects of trusts. Frequently, testators and settlors are unclear in their own minds as to the objects they wish to benefit. Consequently, they employ vague descriptions of the class of beneficiaries entitled. There are a number of cases where an intention to benefit relatives or family is clear, but it is not clear how far the class was intended to extend. 20 Unless the uncertainty is capable of resolution the trust will fail.

Alternatively, the settlor may be quite clear as to the beneficiary he intends to benefit, but is reluctant to reveal his name. Consequently, he may elect to create a half secret trust. If the beneficiary's identity is not disclosed to the trustee in time, the trust will fail for uncertainty. 21

The third and most significant situation arises from the desire of settlors and testators to retain some degree of flexibility in choosing who shall benefit under a trust, in order to cope with changing circumstances. Most

20. See e.g. Wright v. Atkyns (1823) Turn C.R. 143; 37 E.R. 1051; Grant v. Lynam (1828) 4 Russ. 292, 38 E.R. 815; Re Cundy, (1899) 18 N.Z.L.R. 53 ('family'); and see also Sale v. Moore (1827) 1 Sim. 534, 57 E.R. 678 ('near relations'); and Re Bond, Cole v. Hawes (1876) 4 Ch.D. 238. ('those relations on my side').
frequently, this flexibility is sought by empowering the trustees to exercise a very wide discretion in choosing which members of a large class should benefit. The attitude of the courts with regard to delegation of testamentary power in this way has already received attention. Where, however, the trustees are given something more than a mere power to appoint - where they are under a duty to do so, - different considerations apply.

One form of delegation arises when trustees are directed to divide a fund or its income equally between members of a class. Now in this situation, it is said, the class must be clearly defined, so that every member of it is ascertainable. This is because equal division is otherwise impossible. The Court of Chancery, which acts in default of the trustees, must know with certainty the objects of the bounty so that it can execute the trust.

But where the settlor or testator does not direct equal division, but gives instead a power of selection among a class, should the court demand a similar degree of certainty? Harman J. in Re Gestetner Settlement, and the Court of Appeal in Inland Revenue Commissioners v. Broadway Cottages Trusts thought that it should, but that different

---

23. [1953] Ch. 672.
considerations ought to prevail where there was no more than a 'mere' or 'bare' power. In that situation, no duty exists to exercise the power, and the manner of its exercise cannot be controlled by the court - it is a mere power to distribute with a gift over in default. Thus, it might be distinguished from the situation where there is a trust to distribute among the class defined by the donor, with merely a power of selection within that class.²⁵

From those two decisions arose the principle that while for a mere power all that was required was that it be possible to say of any person whether or not he fell within the class, a greater degree of certainty would be necessary for a trust power, that is, that every member of the class should be ascertainable. But these principles involved that the validity of a number of trusts hinged upon a fine and often illusory distinction of whether the power of selection was a trust power or mere power. Not surprisingly, the distinction came in for a considerable amount of judicial criticism.²⁶ It was, however, affirmed in the House of Lords in 1968,²⁷ despite misgivings on the part of Lord Reid, who

stated:

But I trust that there may be an early opportunity for reconsideration of some of the narrow and technical distinctions which have grown up in this chapter of the law.28

Some judges, while of the opinion that the distinction ought to be abolished and that the standard of certainty required for mere powers should be extended to trust powers as well, believed that this could be achieved only by legislation.29 In its Fifth Annual Report, the Law Commission announced that it intended to enquire into trust powers and uncertainty.30

But legislative intervention proved unnecessary. In 1969, Britain's revenue law changed in such a way as to render discretionary trusts liable to estate duty, so that the amount of charge was determined by the actual income received by the object of the discretion.31 It now made no difference for taxation purposes whether the trustees had a mere power to apply the income, or whether it was a power coupled with a duty.

28. Ibid., 579.
30. Law Com. No. 36; (1970) H.C. 170; p.14 para 71. See now, Sixth Annual Report, Law Com. No. 47; p.15, para. 76, where it is suggested that recent litigation (discussed below) may mean that further action by the Commission is unnecessary.
31. Finance Act 1969, s. 36(2).
The extent to which this development influenced the law lords in *Re Baden's Wills Trusts* 32 is not clear. 33 But in that decision, delivered just fifteen months after its confirmation in *Gulbenkian*, the House of Lords rejected the distinction, and instead applied to trust powers the test previously applied only to bare powers — that all that was required was that it be possible to say with reasonable certainty whether or not any given person fell within the class of objects.

The significant opinion is that of Lord Wilberforce, with whom Lord Reid and Viscount Dilhorne simply concurred. His Lordship commenced by demonstrating the unsatisfactory nature of the distinction that had arisen, commenting that it did not seem satisfactory 'that the entire validity of a disposition should depend on such delicate shading' 34 He saw the difference between trusts and powers as one of degree rather than principle, not warranting the difference in their legal requirements for validity. His Lordship saw the basis of the distinction in the principle that for a trust to be valid it must be capable of execution by the court. Since

33. Dr Harvey Cohen, in 'Certainly Uncertain: The Discretionary Trust' (1971) Current Legal Problems 133, at 138 suggests that the new legislation may have been of substantial influence.
the court could only execute it by ordering equal
distribution, certainty as to the identity of the whole
class would be necessary. The maxim 'equality is equity',
however, had not been consistently applied by the courts,
and Lord Wilberforce saw it as an unsound basis for the
distinction.

But in the nature of a greater hurdle was the judgement
of Lord Upjohn in Re Gulbenkian's Settlements, seen
generally as an endorsement of the Broadway Cottages
decision. Lord Wilberforce's statement that, 'I doubt very
much whether anything his Lordship said was really directed
to the present problem.'35 must, with respect, be regarded
with some caution, since Lord Upjohn had devoted some
considerable attention to the distinction and the reasons
for it. One writer has commented,

The strongest grounds for the opinion of Lord
Wilberforce surely rests upon reason and common
sense rather than any attempt to justify it by
precedent.36

While rejecting the argument that there should be different
degrees of certainty for trusts and powers, Lord Wilberforce
was careful to express his agreement with Lord Upjohn in
distinguishing between linguistic and semantic uncertainty,
and mere difficulty in ascertainment. The former, unresolved,

35. Ibid., 455.
renders a gift void. The latter may be resolved by application to the courts for interpretation of a trust instrument.37

The decision in Baden's case, together with the criticism that had been levelled at Broadway Cottages in other decisions, demonstrates the reluctance of the courts to hold trusts invalid for a 'technicality'. For unless it were quite impossible to carry out a trust without that high degree of certainty, insistence upon it by the courts could be no more than a technicality. It is possible too, that the decision reflects an increased determination on the part of the courts to interpret trusts in a manner more closely in accordance with the intention of the settlor. It may, perhaps, be seen as an instance of a gradual yet discernible change of attitude by the courts this century, who appear to have turned increasingly against the invalidation of private law instruments for uncertainty, seeing even a strained interpretation as at least closer to their authors' intent than invalidity.

4. Charitable Trusts

Those private law instruments that clearly receive the most benevolent treatment at the hands of the courts are charitable trusts. It has been said that a trust for charity will never fail for uncertainty of object, provided there is

a clear intention to donate the property to charity. Thus, even although a simple provision placing property 'upon trust' without more will clearly fail as a trust, a provision 'upon trust for charity' will be upheld.

There are two ways of viewing this rule. The first is that the objection to uncertainty in other trusts - that the court is unable itself to execute them - is not present in the case of charity, since the Attorney-General representing the Crown as parens patriae can always intervene and propound a scheme for the regulation of the trust along charitable lines. Alternatively, it may be said that 'charity' itself is an object sufficiently certain, being defined by the preamble to the Statute of Elizabeth and applied by the courts for centuries.

The benevolence of the courts towards charities, however, has frequently been stated to be exercisable only where the trust is solely for charitable purposes. A gift in which charitable and non-charitable purposes are mixed has long been regarded as likely to fail for uncertainty. In

39. See e.g. Mills v. Farmer (1815) 1 Mer. 55, 35 E.R. 597; Moggridge v. Thackwell (1803) 7 Ves. 36, 30 E.R. 440; Re Willis, Shaw v. Willis [1921] 1 Ch. 44.
40. See Re Harpur's Will Trusts [1962] Ch. 78, at 94.
Morice v. Bishop of Durham,\textsuperscript{42} for example, a gift to the Bishop upon trust to dispose of to 'such objects of benevolence and liberality' as he should approve was held void for uncertainty. Because of the width of the language used, it was possible to dispose of all the property to non-charitable objects. Following that decision a number of gifts for wide purposes, not solely charitable, were held void for uncertainty.\textsuperscript{43}

It was clear however, that the invalidation of such gifts was far from the intention of testator and settlor, and that it was to the obvious detriment of charities.

The remedy in New Zealand was by legislation. The Trustee Amendment Act, 1935 provided:

2(1) No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed.

(2) Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust

\textsuperscript{42} (1805) 10 Ves. 522, 32 E.R. 947.

funds or any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed.44

In considering that section, now re-enacted in slightly different form as s.61B Charitable Trusts Act, 1957,45 the Court of Appeal in Re Ashton, Siddall v. Gordon46 was of the opinion that a broad interpretation should be accorded it. Thus where the charitable and non-charitable purposes under a gift were not distinct and separate but intermingled through the use of wide language, the section might still operate to save the trust.47

A further facet of the benevolence of the courts towards imperfect charitable trust provisions is demonstrated by the cy-pres doctrine. Under this doctrine, where the gift is uncertain, or initially impracticable or illegal, the court may order that the charitable intention be carried into effect cy-pres, by substituting for the objects


45. As inserted by s.4, Charitable Trusts Amendment Act 1963.


indicated by the donor another object as similar as possible.\textsuperscript{48} The doctrine now has a statutory basis in this country, where the Charitable Trusts Act, 1957\textsuperscript{49} provides that the trustees may prepare a scheme for dealing with the property and apply to the Supreme Court for its approval.

5. **Conditions on Gifts**

Charities form an exception to the general rules relating to certainty in trusts and wills, in that no matter how uncertain a charitable gift may be, it will never fail. An exception in the other direction is afforded by conditions subsequent. In the case of conditions precedent, the courts have applied the normal certainty rules, holding that so long as it is possible to determine with reasonable certainty whether or not any given object satisfies the condition, it should be enforced.\textsuperscript{50}

But in the case of conditions subsequent, a considerably higher degree of certainty is required. The most frequently advanced reason for this attitude is that a condition which might cause the forfeiture of a gift after its acceptance by


\textsuperscript{49} See particularly s.32; and generally Part III of the Act.

the donee, is liable to work harshly or unconscionably. 51
This in itself may be seen as grounds for construing such
conditions narrowly 52 but the courts have gone further, and
held uncertainty to be fatal to their validity.

The degree of certainty required in the case of conditions
subsequent was described by Lord Cransworth in 1859 in
these terms:

And I consider that, from the earliest times, one
of the cardinal rules on the subject has been this:
that where a vested estate is to be defeated by a
condition on a contingency that is to happen after­
wards, that condition must be such that the Court
can see from the beginning, precisely and distinctly,
upon the happening of what event it was that the
preceding vested estate was to determine. 53

It is clear that the attitude of the courts to
conditions subsequent has to a large extent been tempered
by the frequently distasteful clauses chosen by settlers
and testators. One of those commonly encountered is that
which purports to restrain on pain of forfeiture the marriage
of a donee outside a particular religious or ethnic group.
Lord Atkin has stated of such clauses:

For my own part, I view with disfavour the power
of testators to control from their graves the choice
in marriage of their beneficiaries, and should not
be dismayed if the power were to disappear, but at
least the control by forfeitures imposed by conditions

51. See e.g. Clayton v. Ramsden [1943] A.C. 320, at 325
per Lord Atkin, and at 333 per Lord Romer; and see
Re Hains [1942] S.A.S.R. 172, at 176 per Angas Parsons J.
52. See e.g. Lord Campbell L.C. in Clavering v. Ellison
53. Clavering v. Ellison (1859) 7 H.L.C. at 725, 11 E.R.
at 289.
subsequent must be subject to the rule as to certainty prescribed by this House in *Clavering v. Ellison*...\(^54\)

Expressions in marriage restraining conditions that have been held too vague to be valid include, 'of Jewish parentage and of the Jewish faith', \(^55\) 'profess the Jewish faith', \(^56\) 'a person of the Jewish race and religion', \(^57\) 'the protestant faith', \(^58\) and 'a pakeha'. \(^59\) Similarly, conditions which would work a forfeiture in the event of the donee having 'a social or other relationship with' a certain named person, or upon being 'deemed by my trustee to be unfit to undertake the management and control of my residuary estate' \(^60\) have been declared too uncertain.

Where the condition is less morally objectionable, however, there are signs that the certainty rule may operate with less severity. *Sifton v. Sifton* \(^62\) arose from a trust provision that contained a condition to the effect

\(^{54}\). *Clayton v. Ramsden* [1943] A.C. 320, at 325.
\(^{55}\). *Idem.*
\(^{60}\). *Re Jones, Midland Bank Executor & Trustee Co. v. Jones* [1953] Ch. 125.
that payments to a donee should continue 'only so long as
she shall continue to reside in Canada.' The opinion of
the Privy Council that the condition was void for uncertainty
has not always found favour in later cases. Similar clauses
were held in Re Coxen, McCallum v. Coxen\(^6\) and Re Gape,
Veney v. Gape\(^4\) to be sufficiently certain in all the
circumstances to be enforced.

Why there should be a different test of certainty in
the case of conditions precedent does not become clear
until the effect of invalidity of either type of condition
is understood. Where a gift is subject to a condition
precedent, the invalidity of the condition will cause the
whole gift to fail, as the court is unable to say what
persons will qualify for it.\(^5\) If, however, it is a
condition subsequent that is uncertain the court is unable
to say what events will result in forfeiture. Failure of
the condition will mean that the donee takes the gift
absolutely.\(^6\) The failure of the condition need not
involve the failure of the gift.

---

63. \([1948]\) 1 Ch. 747, at 750.
64. \([1952]\) 1 Ch. 418.
65. See e.g. Re Wolfe, Shapley v. Wolfe\([1953]\) 1 W.L.R.
1211; Re Allen, Faith v. Allen\([1953]\) Ch. 810.
66. See e.g. Sifton v. Sifton\([1938]\) A.C. 656, at 677
per Lord Romer; Re Abraham's Will Trusts\([1967]\)
3 W.L.R. 1198.
In assessing the validity of conditions, the courts have always been careful to separate that assessment from the fact situation before them. In *McMillan v. Tutt*[^67] for example, a condition sought to forfeit a gift to a woman if 'she should happen to marry a [pakeha] husband'. Gresson J. was unable to determine any precise meaning of 'pakeha' and held the condition void, notwithstanding that the wife had in fact married a full blooded European who clearly fell within the definition.

Although it is now truly settled that conditions subsequent should be worded as precisely and as certainly as possible, the rule has been to subjected to criticism. In the New Zealand Supreme Court Wilson J. stated recently that it demonstrated

> ...a willingness to defeat the clear intention of the testator not commonly found in modern decisions on the interpretation of wills.... With respect one can hope that in this class of case also the more modern and liberal rule will in time prevail and that where the intention of the testator (who is, after all, disposing of his own property) is sufficiently clear the Courts will give effect to it without demanding an unrealistic decree [sic] of precision and detail in the definition of the conditions under which the objects of his bounty may receive or retain the benefits thereof[^68].

It is respectfully submitted, however, that the rule requiring a high degree of certainty for conditions subsequent rests on a sound basis. The law recognises in other contexts


the embarrassment, financial and otherwise, that may be caused through forfeiture of property even where a donee has no strict legal right, having received it under a mistake of fact or law. 69 There is, with respect, a distinct difference in the position of a person required to satisfy particular conditions in order to qualify for a gift, from that of a person who may have enjoyed a gift for some period, but is liable to be deprived of it for non-compliance with specific conditions. Because of the possible draconian effect of such conditions, it does not seem particularly unfair to insist that they be worded with sufficient certainty. Conditions subsequent often seek to control the future behaviour of donees under threat of forfeiture, and thus might be said to bear a measure of resemblance to the bylaws of local authorities. 70 The courts have also insisted upon clarity of expression in that context.

6. Conclusions

It is undeniable that the likely effects of invalidity have played a significant role in the determination of whether or not any given trust provision is too uncertain to be enforceable. Thus, while the general rule is that a provision will be held void for uncertainty only where it is quite uncapable of bearing any meaning, that rule is

69. Judicature Act, 1908, s.94B.
subject to a notable exception in the case of conditions subsequent. In the case of charities the exception operates the other way, guaranteeing that no genuine charitable intention need fail for want of certainty.

Only in the context of trusts and gifts under wills does the effect of uncertainty vary so greatly according to the nature of the provision from which it stems.
CHAPTER 6

OTHER PRIVATE LAW INSTRUMENTS

1. Introduction

It is clear that the significance of contracts, wills and trusts in private law has dictated that a considerable amount of attention has been paid to the problem of uncertainty in those contexts. For a number of reasons uncertainty has infrequently operated as an invalidating factor in other private law instruments. This chapter looks briefly at some instances where uncertainty has been seen as having some effect over and above causing difficulties in interpretation.

2. Other Private Law Instruments

Any instrument that is quite without meaning cannot be said to exist as a legal instrument, but the courts have been prepared to accept on occasion a lesser degree of uncertainty than this as invalidating certain types of instruments. In particular, two classes of instruments that have been reviewed for certainty are conveyances\(^1\) and court documents,\(^2\) including judgements.\(^3\) It is seldom,


\(^3\) See e.g. R. v. Garvey, Ex parte Henry (1888) 6 N.Z.L.R. 628; Nicholson v. Kohai (1909) 28 N.Z.L.R. 552. It is assumed for the purposes of this study that judgements are, in fact, private law instruments. The classification may not always be strictly correct however.
however, that uncertainty beyond that merely causing difficulty of interpretation arises in these two situations, and for this two possible reasons may be advanced. The first is that such instruments are almost invariably prepared by professional draftsmen. This in itself is no guarantee against the use of vague or ambiguous expressions although it may serve to minimise their effect. But the other, and probably more significant reason is the safeguards which exist in each case.

In New Zealand, all dealings with legal interests in land fall under the Land Transfer Act, 1952, and are effected through the Land Registry Office. No document which, in the course of close scrutiny by the District Land Registrar, is found to be defective will proceed to registration. The Registrar may instead issue a requisition seeking, in the case of insufficient definition, further details to be entered in the instrument, thereby rendering its effect more certain. The existence of a duty on


5. Section 43, Land Transfer Act 1952, see also Land Transfer Regulations 1966, RR. 8, 12, 16, 19.
the Registrar to check documents in this way renders the presence of uncertainty considerably less likely in registered instruments. Of course not all conveyancing is concerned with legal interests in land. Mortgages and leases for example, need not be registered to be valid as contracts. But again time safeguard of professional preparation and checking by the advisers of all parties diminishes substantially the risks of invalidity through uncertainty. In the final analysis it is in fact doubtful that the rules applicable to certainty in any conveyancing documents vary from those pertaining to normal conveyancing contracts.

Similar safeguards are apparent too in the case of court instruments. Mention is made in the following chapter of the obsession of the seventeenth and eighteenth century courts with certainty in documents involved in the legal process. The New Zealand courts appear likewise to have operated strict rules for a time, and in particular to have accepted that judgements of the Native Land Court and other inferior courts might be held void for uncertainty, although in no reported case does a judgement appear in fact to have failed on this ground alone.

6. Infra p. 149.
8. See e.g. R. v. Garvey, Ex parte Henry (1888) 6 N.Z.L.R. 628.
9. In both Mullooly and Nicholson's cases the vital issue would appear to be whether the judgement was in fact the final judgement of the Court, In R. v. Garvey as discussed below, the question was one of whether the power to 'appoint' a prison had been well exercised.
It is highly unlikely, it is submitted, that any judgment could fail for uncertainty today. There are statutory provisions to protect the validity of documents despite purely formal defects, which is all that much of the uncertainty in the early cases could be said to amount to. But more importantly, the courts have reserved the power to amend judgements where they contain uncertain or ambiguous expressions, or otherwise fail to express the intention of the Court clearly. There are moreover, wide rights of appeal.

The form and content of convictions also caused considerable concern to eighteenth and nineteenth century courts. In order to be valid it was necessary that a conviction set out clearly the offence complained of and the penalty imposed. It was not sufficient, for example,

10. See e.g. Magistrates' Courts Act, 1947, s.64; Summary Proceedings Act 1957, s.204.
13. Re Swire, (1885) 30 Ch.D. 239; Re Salaman, (An Infant) [1923] N.Z.L.R. 50; Todd v. Percival [1923] N.Z.L.R. 1356; Gray v. Harris [1925] N.Z.L.R. 607. Where a judgement is quite ambiguous or obscure it is likely that justice would require that it be recalled; the circumstances in which this course is open were considered in Horowhenua County v. Nash (No.2) [1968] N.Z.L.R. 632, at 633 per Wild C.J.
simply to describe the offence, and then the penal provision
being invoked as, 'the statute in such case made and provided'.

But the technicality of this rule led to its abrogation in
this country under the Inferior Courts Procedure Act, 1909.

Where the courts have continued to insist upon certainty
in private legal instruments is where the making of the
instrument is pursuant to a statutory power, whose valid
exercise is dependent upon certainty in the instrument.
Authorisations to 'define' or to 'specify' or 'appoint', for
example, have each been held to indicate that certainty is
essential to the valid exercise of the power.

The Bankruptcy Act 1885 provides an illustration. By
s.171 the Bankruptcy Court was empowered to adjudge offending
bankrupts 'to be imprisoned in such prison as the Court may
appoint'. In R. v. Garvey, Ex parte Henry, a bankrupt had
been ordered to be imprisoned in purported exercise of this
power, in 'the prison in Wellington'. Apparently unknown to
the judge, there were at that time two prisons in Wellington.
The order was held to be not a valid exercise of the power.

One may sympathise with the lament of Williams J. commenting
on that decision in a later case, that,

16. By ss. 4, 5 and 6. See now Summary Proceedings Act 1957,
s.204.
17. (1888) 6 N.Z.L.R. 628, See also R. v. MacDonald, re
Christie (1889) 7 N.Z.L.R. 361, at 364, and 368.
... the sections in the Bankruptcy Act which authorise the Bankruptcy Court to exercise a summary jurisdiction have been so inarticulately framed that it is exceedingly difficult so to proceed, and so to prepare a warrant of commitment as to make it certain that the commitment will be effectual. 18

It is common today for a statute to provide that as a condition precedent to action being taken against persons under the statute, those persons should be served with a notice 'specifying' certain things. One example is afforded by s.92 Property Law Act, 1952, whereby mortgagees are empowered to exercise powers of sale only after the service upon the mortgagor of a notice specifying the default complained of and a date on which the power will become exercisable', and his failure to remedy one breach complained of. In Sharp v. Amen 19 the New Zealand Court of Appeal held that it was insufficient compliance with the requirement to 'specify' merely to provide a means whereby a date might be calculated. The id certum est quod certum reddi potest maxim was held inapplicable since the question was one of whether the statutory requirement had been fully satisfied. Similarly, the maxim has been held inapplicable in cases under the Sale of Goods Act 1908 (s.9) relating to the sale of 'specific' goods. 20

It is in fact less a question of whether the instrument concerned is sufficiently certain to enable those affected by it to be clear as to their duties, but of whether the condition precedent or statutory authorisation has been fulfilled. Examples of the same approach may be seen in public law situations where officials have been authorised to 'fix prices', 21 or to 'describe' 22 certain matters in notices.

Outside the situation where uncertainty in a private law instrument is in breach of some statutory requirement or authorisation, it is clear that only where its meaning is so gravely in doubt that interpretative techniques are incapable of resolving it satisfactorily will it be held to be invalid.

Brief mention may be made at this point of the attitude of the courts towards uncertainty in one situation that fails to fall neatly into any of the categories discussed this far. This is the question of ambiguous jury verdicts. The New South Wales Court of Appeal had occasion recently in Mifsud v. Commonwealth 23 to determine the validity of a jury verdict expressed to be for the defendant, yet which allowed the plaintiff his special damages. By a majority decision the

---

21. See e.g. King Gee Clothing Pty. Ltd v. Commonwealth (1945) 71 C.L.R. 184, at 195 per Dixon J; and see infra p.186


Court held that the general verdict being for the defendant, the rest might be dismissed as surplusage, even although the remainder of the verdict was clearly contradictory.

Ambiguity of this type will often be capable of resolution by questioning the jury to determine exactly what was intended.

3. Uncertainty in Private Law

Unless a legal instrument is so uncertain as to be quite unintelligible, the idea of holding it void for uncertainty takes on the aura of a technicality, particularly where it means that a decision is handed down that is effective in settling a dispute over the operation of the instrument, yet is independent of, and unrelated to the merits of the particular dispute. The technical nature of a decision based on uncertainty arises also from the fact that the intention of the author of the instrument must almost inevitably be defeated by its invalidation.

But as has been demonstrated, the nature of that intention is likely to be of considerable significance in a court's assessment of how far it should go in interpreting

24. Ibid., 86-87 per Herron C.J.; 89 per Asprey J.A.
25. See e.g. R. v. Crisp (1912) 7 Cr. App. Rep. 173 where the prisoner had been sentenced to six months imprisonment for attempted suicide, having, as his counsel solemnly informed the Court, 'jumped off the quay into Falmouth Harbour; shouting "A hundred to one", a remark that has never been explained.' The jury's verdict of 'guilty but of unconscious mind' was clarified through questioning.
and upholding, rather than upsetting an instrument. Should the intention be charitable, for example, the courts will generally be intent on upholding the instrument, however obscure its provisions. Where, on the other hand, it is felt that the intention is such as to operate harshly or unfairly, the courts may be reluctant to go any distance at all in searching for a meaning that might have this effect. Where invalidation of the instrument or one of its provisions would tend to induce a more just result, then obscurity or vagueness of language may more readily be accepted as the ground of invalidation.

The point seems to be that since an assessment of the degree of uncertainty present in any given provision is a process for which there are no clear guidelines, the courts feel justified in being influenced in that assessment by these external considerations.

The extent to which this approach may be justified in a time when legal interpretation is seen increasingly as the process of arriving at and carrying out the true intention of the author of a legal instrument, has not gone unquestioned. Whether or not the present day tendency in interpretation ought to extend to the public law situation, where authority to exercise delegated powers has traditionally been construed strictly by the courts, is a matter for consideration in the following chapters.

PART THREE

UNCERTAINTY IN PUBLIC LAW
HISTORY OF THE CERTAINTY TEST

1. Introduction

The rules that have evolved relating to certainty in the private law context provide for reasonably logical, or at least understandable, exceptions to the normal rules of interpretation demanding that some meaning be accorded words intended to have legal effect. The exceptions have reached their present form, for the most part, only after prolonged judicial consideration and development. Moreover, their application has been consistent. But in public law quite a different situation exists. While an actual "test" of certainty does exist, its development is clouded by numbers of confused and often conflicting decisions, and its status, extent, and effect are far from clear.

Its unusual and confused history may be such as to induce doubt as to the validity of the test, and for this reason alone it is appropriate to preface a study of its present day operation with an account of its development.

2. Early History

The early development of the certainty test was in the context of bylaws,¹ and it is only comparatively recently that it has been applied to other public law instruments.

¹ The spelling bylaw, is used in this work in preference to byelaw or by-law, as it is the form used in the 1957 Reprint of the Bylaws Act, 1910. The original form used in the Act was, by-law. Cf. Lumley, Essay on By-laws (1877) 2. The actual meaning of the word is probably 'townshiplaw' - see Pollock and Maitland, History of English Law (1895) Vol. 1; 615.
It is clear that legislation by bylaw began at an early stage of English legal history. Pollock and Maitland record\(^2\) that in London as early as 1189 there was issued the Fitz-Alwyne Assize, probably England's earliest building bylaw, which imposed stringent restrictions on building erection in parts of the City. A similar ordinance, issued in 1212, fixed the wages of tradesmen after a great fire.

These are probably isolated instances however, and it is clear that for the great majority of English towns, bylaw making power was not formally acquired before the fifteenth and sixteenth centuries.\(^3\) It had become the practice by this time for the Royal Charter of incorporation to expressly authorise the making of bylaws, and indeed the power to make bylaws became in the fifteenth century one of the five decisive criteria of a properly constituted borough.\(^4\)

Of considerable significance in the history of English local government were the ancient guilds, most of which possessed authority to make bylaws derived either expressly or impliedly from Royal Charter. Such bylaws might bind not only the members of a guild, but also those outsiders


\(^3\) See further Weinbaum, The Incorporation of Boroughs (1937) 22, 49. The Borough of Leeds, in fact, did not pass its first bylaw until 1662, and that bylaw dealt largely with the definition of its boundaries: see Wardell, The Municipal History of the Borough of Leeds (1846) cxxxix. It is not unlikely, however that ordinances of a less formal nature may have existed prior to the borough's formal incorporation.

\(^4\) Weinbaum, op.cit., 18.
who exercised the trade regulated by the guild. The powers of the guilds were wide, and while the process of incorporation of boroughs frequently involved little more than the conversion of the Leet Jury into a body corporate, some writers have noted the close resemblance borne by the early municipal corporations to the guilds, and have suggested that only gradually, from the sixteenth century onwards, did municipal corporations assume greater governmental powers than those exercised by the guilds.

Pollock and Maitland explain that seldom did the common law courts deal with bylaws of town corporations. Their enforcement was instead in municipal courts by those who made them, and only rarely would they be challenged in the common law courts. Only a bold and a rich citizen would bring in the King against the city. For this reason, there were few reported decisions touching on the validity of municipal bylaws even as late as the mid-eighteenth century. Most

8. In Webb, English Local Government: The Manor and the Borough, 362 it is suggested that the municipal corporation arose out of the guild, from which it gleaned many of its characteristic features.
present principles appear to have evolved either in the nine-
teenth century, or to be applications to municipal bylaws
of principles that had developed in the context of bylaws
of the guilds and other early corporations.

While it was established by at least the late fifteenth
century that the bylaws of guilds might be struck down for
unreasonableness, no suggestion of an additional requirement
of certainty would appear to have been made before the seven-
teenth century. In two cases early in that century, failure
to make clear provision with regard to penalty was suggested
as a ground upon which bylaws' validity might be questioned.

In 1616, the wardens of a weavers' guild brought an
action against one J. Scapes, for breach of one of their
bylaws. Three exceptions were advanced for the defendant,
but it is unclear which was accepted by the court. What is
significant is that one objection to the bylaw was that for
its breach, the constitution provided 'that the offender
should forfeit a sum, and it did not appear to whom this
forfeiture should go,' that is, that it was uncertain in its
terms as to an important detail.

Uncertainty relating to penalty was again advanced as

10. Norris & Trussel, Wardens of the Society of Weavers
in the Town of Newbury in the County of Berks v.
J. Scapes (1616) 1 Brownl. & Golds. 48, 123 E.R. 657.
an objection to a bylaw two years later in Wood v. Searl, where it was argued that a bylaw of the Commonalty of Cordwainers of the City of Exeter was void, in that

...no certain penalty is set down, but left to the discretion of any of the shoemakers of Exeter, and that is against the course of all laws; for when a law is made, it is necessary that the penalty thereof should be known, to the end that men might not offend.

Again, it is unclear from the report whether the court accepted this argument.

However, in 1755 a similar submission appears to have been accepted by Ryder C.J. in Leathley v. Webster, where a bylaw of a Company of Cutlers reserved to its Master and Wardens the power to determine what proportion of the fifteen shillings paid to the Clerk for each pair of indentures presented to him, should be deducted for the benefit of the company. Ryder C.J. explicitly held the bylaw void for uncertainty, adding however that it would also be void as repugnant to statute.

No other reported cases appear to deal with uncertainty of penalty until Piper v. Chappell in 1845, where the court

11. (1618) Bridg. J. 138, 123 E.R. 1257. The bylaw provided that no person not a brother of the society should sell 'any books, shoes, pantofloes, pumps, or startops, or any other wares belonging to the said art, under pain of forfeiting to the said master and wardens for the time being, for every offence such sum (not exceeding 40s) as shall be assessed by the master, wardens and assistants...'


had little difficulty in at least distinguishing, and in point of fact, overruling Wood v. Searl. The bylaw in Piper v. Chappell provided a penalty of £5 for its breach, but with a power of mitigation down to £2, and objections to it on the grounds of uncertainty were overruled.

Clearly uncertainty of the type demonstrated in those cases would not be regarded today as a serious defect, since flexibility in assessing penalty is generally accepted as more desirable than fixed and inflexible penalties. Why then should such a technical type of uncertainty have been seen as fatal to validity? One possible reason is the overriding concern that lawyers of at least the seventeenth century had with certainty, a concern that was manifest particularly in connection with court documents. With the transition from oral to written pleadings had come an insistence that all the facts relied on, together with all incidental facts and details be set out in full with painstaking clarity, and that the forms of action be strictly complied with. Thus, the reports of the times abound with cases similar to that of Allyn v. Sparks (1603) where, in an action for blocking the

16. (1603) 1 Brownl. & Golds. 6, 123 E.R. 629. See also Sawyer v. Crompton (1617) 1 Brownl. & Golds. 72, 123 E.R. 673 and illustrations in Potter, (op.cit., footnote 15). See too, cases on uncertainty of judgements: Powell v. Hopkins (1649) Style 247, 82 E.R. 683;
plaintiff's way, judgement was stopped, 'because it doth not appear in the [plaintiff's] declaration what village the common way led to'.

The inflexibility of such rules relating to certainty is well illustrated in their application to bylaws in what may well be the first reported instance of the bylaw of a town corporation being questioned for uncertainty, Mayor of Oxford v. Wildgoose (1689). The bylaw, as paraphrased by the reporter, provided:

That if any person should be elected to be Chamberlain and should refuse to undertake the said office he should forfeit £10 to the Mayor.

It was argued that the expression 'any person' was too wide and hence uncertain, since only those persons who were citizens and freemen were eligible for election. The argument was upheld. But by 1825, however, it was stated of Wildgoose's case that

[it] is not to be found in any contemporaneous reporter; it does not appear to have been much discussed or considered; and we think it cannot be supported. In that case as well as this, we think the question of eligibility is from the


17. (1689) 3 Lev. 293, 83 E.R. 696.
subject matter necessarily implied, and that
the word person must be considered as confined to
eligible persons.\textsuperscript{18}

The types of uncertainty discussed in \textit{Wood v. Searl}
and \textit{Leathley v. Webster} on the one hand, and in \textit{Wildgoose}
on the other, are the only two types of uncertainty the
writer has been able to discover applied to early bylaws.
All three decisions were later overruled. A further
significant fact is that in none of the eighteenth or early
nineteenth century Abridgements in which the validity of
bylaws was discussed, was certainty recognised as a test
of validity.\textsuperscript{19}

The writer is forced to conclude that up until the mid-
nineteenth century, cases wherein bylaws had been tested for
certainty were few, there had been no development of any
principles, the type of uncertainty involved was quite
different from that for which bylaws may be tested today,
and the only significant cases had been overruled. By
1850, it is submitted, certainty could not be, nor was it
in fact, recognised as a test of validity of bylaws.

2. Nineteenth Century Development

It is accepted today that a bylaw may fail for

\textsuperscript{18} Tobacco-Pipe Makers' Co. v. Woodroffe (1825) 7 B. & C.
835, at 853; 108 E.R. 935, at 942, per Lord Tenterden
C.J. Followed in \textit{The Poulters' Co. v. Phillips} (1840)
6 Bing N.C. 314, at 323; 133 E.R. 124, at 127.

\textsuperscript{19} See e.g. Blackstone, \textit{I Commentaries} 21st ed. (1723)
475; Viner \textit{IV General Abridgement of Law & Equity} 2nd.
ed. (1791), 303-308; \textit{II Comyn's Digest} 5th ed. (1822)
303-304; \textit{I Bacon's Abridgement} 7th ed. (1832) 802-812
and \textit{III Petersdorff's Abridgement} 2nd ed. (1862)
280-281.
uncertainty if it fails to contain adequate information as to the duties of those who are bound by it. Just how this principle developed is of some significance.

The first step would appear to be the publication in 1850 of a work by James Grant, entitled Corporations. In it, there appears this passage:

[The byelaw] ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may readily be understood by those on whom it is to operate. Except in the two Universities and the College of Physicians a byelaw in Latin would be bad for that reason.20

No authority is cited for this assertion, and, it is submitted that on the cases as they stood, no authority was available. It seems that Grant had in mind a wider test than that illustrated by the Latin bylaw, which outside the institutions listed, might be unintelligible. This wider test is signified by the expressions 'unambiguous', and 'language as may readily be understood'. It was to this passage that Sir Owen Dixon21 once attributed the birth of the rule as it is known today, suggesting that it influenced Mathew J. in Kruse v. Johnson22 in a passage examined in more detail shortly, to list certainty as a requirement of validity of bylaws.

20. At p.86.
What is more likely, however, is that the rule came to the attention of Mathew J. only after the next phase of its development. This occurred in 1877 with the publication of W. G. Lumley's Essay on By-laws. In his introduction, Lumley acknowledged the assistance he had received from Grant's work,\(^{23}\) and it is probable that the following passage from Lumley's work owes much to Grant:

\[
A \text{ bylaw must be certain in its enactment, i.e. free from ambiguity, and must afford complete direction to those who are to obey it.}^{24}
\]

Unlike Grant, Lumley cites a number of authorities, but, it is respectfully submitted, not one of them supports the test in the form in which he states it. Each will now be considered.

(i) In In re Mayor of Durham,\(^{25}\) as Lumley admits, the objection of uncertainty was not raised, nor discussed. The bylaw there was challenged as being unauthorised, and unreasonable. Both objections failed.

(ii) The Stationers' Company\(^{26}\) v. Salisbury, and The Taylors of Ipswich\(^{27}\) case: In the Taylors' case, it was the Charter of the Company and not, as Lumley asserts, a bylaw which was held invalid, primarily as in restraint of trade. A


\(^{24}\) Ibid., 93. This passage is reproduced almost verbatim as a principle of Scottish Law in II Green's Encyclopaedia of Scottish Law 2nd ed. (1909) (by J. Chisholm) 398.

\(^{25}\) (1757) 1 Ken. 512, 96 E.R. 1074.

\(^{26}\) (1693) Comb. 221, 90 E.R. 440.

\(^{27}\) (1614) Godb. 252, 78, E.R. 147.
subsidiary ground, which was followed in the Stationers' case, was that the members of the Company in judging whether or not an apprentice had served his apprenticeship, would be 'judges in their own cause'. The use of that expression is in the context, clearly indicative of the *nemo judex* principle, rather than that the invalidity was induced through uncertainty as to how the discretion might operate. Lumley fails to explain the relevance of either case to the proposition he supports.

(iii) In *Gerrish v. Rodman*, a bylaw provided a penalty of 20s for the depasturing of sheep on a common contrary to that bylaw, and all former bylaws. There was no evidence to show what was the content of the former bylaws. Although Blackstone J. describes the bylaw as 'uncertain', it does not appear that the Court believed the bylaw to be bad for this reason. The case was stood down for further argument. The true reason for the opinions expressed by the judges would appear to be a reluctance to enforce unpublished legislation. The judges clearly did not accept uncertainty *per se* as an invalidating factor.

(iv) The Innholder's case *Blackpool Board of Health v.*

---

Bennett\textsuperscript{31} and Piper v. Chappell\textsuperscript{32} are, if anything, against Lumley's proposition. In the first case, the objection of a brother of the Company, four years in arrears, that no particular days were appointed by the relevant bylaw for his quarterly subscription payments, was rejected. A similar argument was rejected in the Blackpool case. Piper v. Chappell, another case on certainty of penalty, followed Woodruffe's case in rejecting Wood v. Searl.

(v) Eagleton v. The East India Company\textsuperscript{33} is, it is submitted, despite Lumley's efforts to demonstrate otherwise, concerned solely with unreasonableness. Counsel for the plaintiff did, however, contend that the expression 'giving satisfaction' where it appeared in the defendant's conditions of sale (regarded for argument's sake as a bylaw) was incapable of precise meaning. The submission was rejected, the expression interpreted narrowly, and the conditions upheld.

(vi) Wood v. Searl, as has been seen, must (to the extent that any proposition of law may be gleaned from it), be deemed to have been overruled at the time Lumley was writing.

(vii) Lumley refers also, on the matter of certainty of penalty, to Kyd on Corporations, where it is stated that:

\begin{itemize}
\item[(viii)] (1859) 4 H. & N. 127, 157 E.R. 784.
\item[(vii)] (1845) 14 M. & W. 624, 153 E.R. 625.
\item[(vii)] (1802) 3 B. & P. 55, 127 E.R. 32.
\end{itemize}
[the penalty] must not be left to the arbitrary assessment of the makers of the law according to the circumstances, even though the utmost extent of the sum be limited.\textsuperscript{34}

This passage, claims Lumley, was cited with approbation by Lush J. in \textit{Hall v. Nixon}\textsuperscript{35} But it is clear that it was to an earlier passage from the same page of \textit{Kyd} that Lush J. was extending approval, and it is only in the Law Times report of \textit{Hall v. Nixon} that the above passage is quoted. It appears in neither the Law Reports nor the Law Journal, and indeed it is tolerably clear that at the time Lumley was writing, it no longer represented the law.\textsuperscript{36}

None of the authorities relied on by Lumley supports the test that he states. In none of the cases that might still be regarded as good law in 1877 when Lumley was writing, had a bylaw been held void for uncertainty.

Yet Lumley's work had considerable influence. A bylaw was held void for uncertainty in this country in 1896 in reliance upon the principle stated by him.\textsuperscript{37} And in 1898 in \textit{Kruse v. Johnson}\textsuperscript{38} Mathew J. referred to another portion of Lumley's work at one stage of his dissenting judgement.

\begin{itemize}
\item \textsuperscript{34} Kyd, \textit{Corporations} Vol. 2; 156. In his introduction, Lumley says of this work, '...there is an able and well compiled chapter upon By-Laws but as the work was published at the end of the last century, it is not practically of much use at the present day.'
\item \textsuperscript{35} (1875) 33 L.T. 92; L.R. 10 Q.B. 152; 44 L.J. (M.C.) 51.
\item \textsuperscript{36} As a résultat of \textit{Piper v. Chappell} (1845) 14 M. & W. 623, 153 E.R. 625.
\item \textsuperscript{37} Brown v. McInnes (1896) 15 N.Z.L.R. 256.
\item \textsuperscript{38} [1898] 2 Q.B. 91, at 108.
\end{itemize}
That reference is significant, for immediately following it Mathew J. proceeded to state what has been described\(^{39}\) as locus classicus of the modern rule of uncertainty:

From the many decisions upon the subject it would seem clear that a by-law to be valid must, amongst other conditions, have two properties - it must be certain, that is, it must contain adequate information as to the duties of those who are to obey, and it must be reasonable: see City of London Case;\(^{40}\) Com. Dig, By-law B 1; Framework-Knitters' Co. v. Green;\(^{41}\) Eagleton v. East India Co.\(^{42}\)

Only five years earlier, Cave J. in the Divisional Court\(^{43}\) had said of an argument that the bylaw under consideration there was void for uncertainty, that

This objection is somewhat peculiar. The usual and general objection to a bylaw is that it is unreasonable but here we have it that the respondent objects because it is vague and uncertain. In my opinion this is a dangerous question to be left to Justices, who may decline to enforce a particular bylaw framed by a county council because in their view it appears to be vague, or vaguely expressed. I think that would lead to a great deal of bad law being laid down by Justices, and perhaps to a disinclination on their part to enforce bylaws at all, whenever in their opinion the language is vague.

It is surprising then that Mathew J. was able to state the proposition as assertively as he did. His

---


40. (1609) 8 Co. Rep. 121b; 77 E.R. 658.
42. (1802) 3 B. & P. 55, 127 E.R. 32.
authorities call for further consideration.

(i) The City of London Case: a bylaw here was closely examined for unreasonableness, but a careful examination of the report reveals no mention of uncertainty, nor do the terms of the bylaw appear in any way uncertain.

(ii) Comyn's Digest refers solely to unreasonableness. Similarly, as noted above, other writers and compilers of early abridgements, while stressing that bylaws must be reasonable, make no mention of certainty as a condition of validity.44

(iii) In Framework-Knitters Co. v. Green the bylaw in question provided a mode of fixing penalty similar to that in Wood v. Searl, yet, as counsel in the later case of Piper v. Chappell45 pointed out, no objection was taken to it on the grounds of uncertainty nor was the question considered. Again, the concern of the court was with reasonableness.

(iv) Eagleton v. East India Co.: It will be recalled that Lumley also cites this case, and its relevance has already been considered.

The authorities cited by Mathew J. all support the second of his conditions of validity - reasonableness, but do not support the existence of a test of certainty. The most likely source relied on by Mathew J. for that test,

44. See footnote 19 supra.
it is submitted, is Lumley's *Essay on By-Laws*.

It will be recalled that Mathew J. was dissenting in *Kruse v. Johnson* - in fact he was the sole dissenting judge of a specially constituted Divisional Court of seven judges. Further, his words on certainty are obiter. It is indeed surprising that they have received such widespread recognition, and that they should have been relied on as supporting the test of certainty throughout the Commonwealth.

3. The Twentieth Century

This century has seen the development of a range of different approaches to the certainty test in different common-law countries. The result is that the test varies in its status and application in Australia, England and New Zealand.

(a) Development in England

(i) The early cases

The application of the test in Britain has proved confused and inconsistent. One possible explanation is that the early cases of this century which have been later

---

46. The reason why the Court was specially constituted was that the original Divisional Court that had heard the case, comprising Lord Russell C.J. and Mathew J. had been unable to agree.

cited as precedents, are not altogether satisfactory.

Two cases almost invariably relied on by text writers and frequently too by counsel are Nash v. Finlay and Scott v. Pilliner.

In the former case, a bylaw that provided that 'no person shall wilfully annoy passengers in the streets' was held bad, because in the opinion of Lord Alverstone L.J., it was difficult to understand what it was intended to cover that was not already within the ambit of the other bylaws. Although Channell J. sought to stress that the Court's decision was based on a lack of certainty, it is clear that it was not in the sense of lacking adequate information that the bylaw was uncertain. The special facts of the case make it a rather special instance, and it has proved of little assistance in later decisions. The decision would appear to have since been limited to its facts.


52. See Ireland v. Wilson [1936] 3 All E.R. 358, at 359 per Lord Hewart L.C.J.
In Scott v. Pilliner, the bylaw under consideration provided:

No person shall frequent and use any street or other public place, either on behalf of himself or of any other person, for the purpose of selling or distributing any paper or written or printed matter devoted wholly or mainly to giving information as to the probable result of races, steeplechases or other competitions.

In the Divisional Court, Phillimore J. was in favour of upholding the bylaw. Kennedy J. on the other hand, was of opinion that it was too unreasonable to be upheld. Lord Alverstone C.J. also saw the language of the bylaw as being too wide, and stated that he thought it was desirable, 'for the good government of a locality that bylaws should be clear and definite and free from ambiguity'. He concluded,

Therefore, both on the ground of uncertainty, and mainly on the ground that it may strike at perfectly innocent sales of papers, I think this bylaw is bad and cannot be supported. 53

The decision was in fact principally on the ground that the width of the language used might have taken the bylaw outside power. The Court was not prepared to make appropriate implications limiting its application, 54 so it failed for unreasonableness.

Neither that case nor Nash v. Finlay are valuable precedents, as more than one judge has been quick to point

out, and it is probable that their continued use has served to weaken even further the test of uncertainty in England.

Another reason that might be suggested for the confusion in English law is that the test of uncertainty has on occasion been confused with the old maxim of statutory interpretation, that 'a man is not to be put in peril upon an ambiguity'. Some judges have preferred, in the case of ambiguity, and sometimes vagueness to adopt a construction whereby an accused person may still be acquitted yet the bylaw remain valid. An acquittal is of course possible only in the fact situation where it is unclear whether an accused person's behaviour was covered by the bylaw or not. For this reason the maxim is of little assistance where there has clearly been a breach of the bylaw, if it is valid, nor where the bylaw is being attacked directly.


57. See e.g. Treasure and Co. v. Bermondsey Borough Council (1904) 68 J.P. 206, at 207 per Kennedy J.: 'it ought to be made not merely inferentially possible, but absolutely clear as a matter of ordinary construction of language that they have done something which is forbidden...I do not think that you ought to convict a person on inference...'. Cf. Foster v. Moore (1879) 4 L.R. Ir. 670.
Yet it is possible that on occasion the assistance of the maxim may have overshadowed the quite separate test of certainty as a factor of validity.\textsuperscript{58}

In only one reported English decision this century does it appear that a bylaw has in fact been held void for uncertainty,\textsuperscript{59} although the test has been argued and mentioned in a number of cases.\textsuperscript{60}

(ii) Extension to other public law instruments

Conditions imposed upon grants of planning permission have caused difficulties in England, and on occasion their want of certainty has been questioned in the courts. It has been stressed that conditions should be worded in plain language so that any layman might understand what was


\textsuperscript{59} In Attorney-General v. Denby [1925] Ch. 596, but even here Astbury J. talks of it merely as being 'invalid in the present case' (612) and 'too uncertain for me to give effect to it in this case' and 'so uncertain that I am unable to place any construction upon it as applying to this case' (616) (Emphasis added). It is possible that the learned Judge saw the test as one of construction only. Cf. Townsend (Builders) Ltd v. Cinema News and Property Management Ltd [1959] 1 All E.R. 7, at 10; per Lord Evershed M.R.: '...a court will be all the slower to hold by-laws invalid in proceedings to which the local authority concerned are not parties [sic].'

\textsuperscript{60} See e.g. Leyton Urban District Council v. Chew [1907] 2 K.B. 283; Dunning v. Maher (1912) 106 L.T. 846, 23 Cox C.C.1; Robert Baird Ltd v. City of Glasgow [1936] A.C. 32; Ireland v. Wilson [1936] 3 All E.R. 358, at 359. Lord Hewart's words in United Bill Posting Co. v. Somerset County Council (1926) 95 L.J.K.B. 899 strike a reassuring note: 'Nothing is more clearly settled than that a bylaw must contain adequate information regarding the duties of those who have to obey it.'
required, but the degree of uncertainty needed to cause
invalidity is not clear. In Mixnam's Properties Ltd v.
Chertsey Urban District Council it was accepted in both the
Court of Appeal and House of Lords that a condition might
be considered analogous to a bylaw, and hence held void for
uncertainty. It would appear that a similar test might be
applied to the two types of instrument, and that a planning
condition ought to contain adequate information as to the
duties of those bound by it. However, it is necessary to
afford brief consideration to the decision of the House of
Lords in Fawcett Properties Ltd v. Buckingham County Council.
There it was held that the particular planning condition
under consideration should be held void for uncertainty only
if it could be given no sensible or ascertainable meaning.
The case is, it is submitted, distinguishable on its facts,
for the allegedly uncertain phrase had been borrowed vertabim

61. See e.g. Crisp from the Fens v. Rutland County Council
(1950) 114 J.P. 105, at 112 per Denning L.J.
63. See particularly per Diplock L.J., [1964] 1 Q.B. at
235, but also per Willmer L.J. at 227 and Dankwerts L.J.
at 234-235.
64. [1965] A.C. 735, at 747 per Lord Reid, and at 753 per
Viscount Radcliffe. It was considered in the House of
Lords that to decide the case solely on the grounds
of certainty would not benefit either party, since
the conditions could be rewritten in more definite
form and the substantive question come up again for
decision: see e.g. at 747, per Lord Reid.
from a statute. Those members of the House of Lords who doubted if it were too uncertain to be enforced, tended to equate the invalidation of the condition with the invalidation of the statute in which the same wording appeared, and hence were anxious to accord it what meaning they might. 66

A major significance of the case for this study is in its demonstration of a wide divergence of judicial opinion on the status and operation of the certainty test in England today, 67 and accordingly it will receive further consideration later in the text.

So far, attention has been paid solely to the operation of the certainty test at local government level. It is possible however, that the certainty test extends also to executive legislation. Seldom have statutory regulations ever been challenged in the British courts, and indeed Lord Guest recently stated, in McEldowney v. Forde 68 that


67. In the Court of Appeal in Mixnam's Properties Ltd v. Chertsey U.D.C. [1964] 1 Q.B. 214, at 238 Diplock L.J. was of the opinion that Fawcett's case had cast some doubt on the correctness of certainty as an independent test of validity.

68. [1971] A.C. 632, at 649 H.L. (N.I.); see too [1969] 2 All E.R. 1039 where the decision of the Court of Appeal of Northern Ireland is also reported. One must question Lord Guest's comment that since 1917 he had been unable to discover any case where a regulation made under statute had been challenged. Such a challenge who made and successfully in Chester v. Bateson [1920] 1 K.B. 829, and in Commissioners of Customs & Excise v. Cure & Deely Ltd [1962] 1 Q.B. 340; and see Hotel and Catering Industry Training Board v. Automobile Proprietary Ltd [1969] 1 W.L.R. 697.
'it must be plain that the task of a subject who endeavours to challenge the validity of such a regulation is a heavy one.' In that case, however, a regulation made by the Minister of Home Affairs for Northern Ireland was attacked, the main ground of challenge being that of uncertainty of language. The regulation prohibited membership of a number of listed organisations deemed to be unlawful, and added to that list, 'The organisations at the date of this regulation or at any time thereafter describing themselves as "Republican Clubs" or any like organisation howsoever described.'

The final phrase clearly describes a wide class without precision, and for this reason two members of the House of Lords would have held the regulation uncertain and void. But by what authority might a regulation be tested for certainty? There were at least three different views. Lord Pearce based much of his reasoning upon the maxim that a man must not be placed in peril upon an ambiguity in the criminal law. But, as was pointed out by Lord Denning in the Fawcett Properties case, this is a principle of interpretation, and not a yardstick of validity.

Lord Diplock, too, was of opinion that the regulation should fail for uncertainty, but on a different basis.

69. Lords Pearce (supra, at 653) and Diplock (supra, at 665).
70. Ibid., 653. The argument was put in these terms by counsel, at 640.
The Minister's authorisation was to make regulations, 'for making further provision for the preservation of the peace and the maintenance of order.' If the Minister's intention were to proscribe all clubs and associations in Northern Ireland, stated Lord Diplock, the regulation plainly fell outside the authorisation. But if his intention were to proscribe some narrower category of organisations the suppression of which would have the effect of preserving the peace and maintaining order, he had failed to disclose in the regulation what that category was. The meaning of the regulation was so vague that it could not be said to fall within the words of delegation. His Lordship appears to have considered this to be an issue distinct from the other ground of uncertainty which he believed existed, that the words used were too vague and uncertain in their meaning to be enforceable.

Lord Hodson, on the other hand, thought the objection of vagueness to be tied up with arbitrariness in the sense that the question became, was the regulation so vague and arbitrary as to be wholly unreasonable, and therefore not a valid or legitimate exercise of the Minister's power. 73 His Lordship did not believe that test to be satisfied. Lord Guest 74

73. Ibid., 643, at 646, Quaere whether the regulation would then be said to have been enacted in bad faith, or would gross unreasonableness per se be sufficient?
74. Ibid., 650.
appears to have had a similar understanding of the role of uncertainty, but again did not consider the class of 'like organisations' to be so wide as to render the Minister's exercise of power 'unreasonable arbitrary and capricious'.

Lord Pearson\(^{75}\) saw the uncertainty argument as the 'most formidable' against the validity of the regulation, but was prepared to construe the regulation in such a way as to render it within power.\(^{76}\)

All of their Lordships appear to accept that vagueness of language, although falling short of unintelligibility, might render a statutory regulation invalid. Clearly, a high degree of uncertainty would be required to have such an effect, and it is perhaps significant that no mention appears in the reports of McEldowney v. Forde to the bylaw cases.

It is submitted that it is unclear from that case whether a successful challenge of a regulation for uncertainty must depend upon proof of insurmountable difficulties in enforcement on the one hand, or, on the other, proof that the wording is too wide to fall within the authorisation. Because of the subjectivity of assessment of degrees of


\(^{76}\) It is significant that McVeigh L.J. in the N.I. Court of Appeal considers vagueness and ambiguity, but only in relation to the authorising statute and that part of the regulation stating the power being invoked and that it was expedient to involve it, using a test gleaned from A-G for Canada v. Hallett & Carey Ltd [1952] A.C. 427 ([1969] 2 All E.R. at 1050).
uncertainty of meaning, however, it is doubted if the
difference in effect of either test would be significant,
particularly where the authorisation is itself in very wide
terms.

To the extent then that statutory regulations in Britain
may be tested for uncertainty, that test appears distinct,
at least so far as it has developed, from the similar test
for bylaws, which may be viewed as imposing a condition of
certainty upon the valid exercise of bylaw making powers.
In Commonwealth countries, the status of the test with
regard to the two different instruments is also sometimes
seen as distinctly different.

Consideration may now be given to the development of
the certainty test in both New Zealand and two other Common-
wealth countries with similar principles of judicial review,
Australia and Canada.

(b) New Zealand

(i) The early cases

In this country the fact that bylaws might be set
aside for uncertainty was recognised some time before Kruse
v. Johnson was decided. As early as 1888 Prendergast C.J.
was able to test a bylaw on this ground, but found it not
too indefinite. 77 In two cases in 1896, however, bylaws
were held void on this ground. In the first, Brown v. McInnes, 78

78. (1896) 15 N.Z.L.R. 256, at 258.
Williams J. relied on Lumley for the proposition that a bylaw should be 'certain in its enactment, and afford complete direction to those who are to obey it.' The learned Judge purported to rely also on the Irish case of Foster v. Moore 79 but upon examination that decision shows that while the court there was prepared to insist that bylaws be worded clearly, it was not necessarily prepared to invalidate those that failed to meet its prescribed standards. For his action in invalidating the bylaw, Williams J. had no direct authority but Lumley.

In the second case, that of Riddiford v. Collier (No.2) 80 a statutory regulation provided:

Every cowshed shall be lighted, ventilated and cleansed to the satisfaction of the inspector.

Uncertainty was not argued, although the authorities that were argued dealt with bylaws, and not regulations. Their application to regulations was justified by reference to Lumley's wide definition of 'bylaws'. 81 Prendergast C.J. stated,

Persons desiring to comply with these regulations would not know what was required; and that, I think, is too vague. A regulation should be definite, so that persons wanting to comply with it may know what to do. 82

79. (1879) 4 L.R. Ir. 670, at 676.
81. That definition (Lumley p.2) is: 'A By Law is a law made with due legal obligation, by some authority less than the Sovereign and Parliament, in respect of a matter specially or impliedly referred to that authority, and not provided for by the law of the land.'
82. Supra, at 347.
No authority is cited in the judgement for invalidating the regulation on this ground, but the similarity of expression to that of Lumley points again to that work as its source.

However, legislation in this form whereby matters were reserved to the discretion of some official of the council, was becoming increasingly popular as local government extended its control, especially in areas such as hygiene and public health. Close control might otherwise require that bylaws contain a welter of detail. If the local authority had power to prohibit some activity, then there could probably be no objection to its authorising some relaxation of that prohibition at the discretion of its delegate. But without such authorisation, bylaws that left matters to official discretion were likely to be viewed by the courts as not bylaws at all.

Steps were finally taken towards settling the issue in 1900 following a decision by Sir Robert Stout in Staples & Co. Ltd v. Wellington City where a bylaw had authorised the Council itself to require certain public buildings to be protected against fire, and to be constructed in a different manner and of different materials from those otherwise required.


by an earlier bylaw. It was argued, relying again on Lumley,\(^85\) that the bylaw was bad for leaving everything to the discretion of the Council in each case. The submission was upheld.

(ii) Legislative intervention

As a direct result of that decision\(^86\) the legislature, at the request of the Municipal Association, inserted in the Municipal Corporations Act 1900 a new section, that provided:

405(1) A by-law may require any works or things to be executed or done of materials, within a time, or in a manner to be directed or approved in any particular use by the Council or any officer thereof, or other person:

(2) A by-law may leave any matter or thing to be determined, applied, dispensed with, prohibited, or regulated by the Council, from time to time by resolution, either generally or for any classes of cases, or in any particular case:\(^87\)

Now that Act settled, for municipal corporations, that bylaws of the Staples and Riddiford v. Collier types need no longer be invalid. In 1910 similar, though not

---

85. (1900) 18 N.Z.L.R. 857, at 858.
86. Fair J. in Hazeldon v. McAra [1948] N.Z.L.R. 1087, at 1104 points out that Staples was decided on August 13, 1900 and the Municipal Corporation Act passed on October 18, 1900. No debate on s.405 is to be found in Hansard. (Vols 114, 115 N.Z. Parl. Debates).
87. Re-enacted successively in Municipal Corporations Acts of 1908 (s.346), 1920 (s.357), 1933 (s.367) and 1954 (s.390). It is curious that a similar provision was not provided in the Counties Act until 1956 (s.405). The section quoted in the text has been judicially considered in Munt, Cottrell & Co. (Limited) v. Doyle (1904) 24 N.Z.L.R. 417; Bremner v. Ruddenklau [1919] N.Z.L.R. 444; and Trillo v. Christchurch City [1935] N.Z.L.R. 64. A similarly worded subsection but relating to statutory regulations is contained in the Urban Renewal and Housing Improvement Act, 1945; s.39(3).
identical, protection was extended to other bylaw making authorities, by the Bylaws Act. The Act authorises the reservation by bylaw of matters to 'the local authority, any officer or servant, or any other person', but with the proviso that the protection shall not apply where the discretion left is so great as to be unreasonable. 88

However the uncertainty deriving from reservation of power is but one type of uncertainty falling under Lumley's wide proposition. It may in fact be doubted if it ought now to be considered under the head of uncertainty at all. In New Zealand at least, the question must now be one solely of power. If such a mode of legislating can be said to be authorised by Parliament, the fact that the bylaw is thereby rendered uncertain will not serve to invalidate it. 89 The Bylaws Act, together with provisions in the Counties and Municipal Corporations Acts, today provides wide protection.

But the Bylaws Bill, when originally introduced to Parliament, was designed to provide even greater protection. Clause 13 provided simply, 'No bylaw shall be invalid on the ground of uncertainty.'


89. See further Chapter 9 infra. See also Sugerman, 'Uncertainty in Delegated Legislation' (1945) 18 A.L.J. 330, at 333.
The Attorney General of the day, Dr Findlay, in explaining the reasons for this proposal to the Legislative Council, stated:

...it would be wearisome if one gave illustrations of how often by-laws have been tested on what lawyers call the ground of uncertainty - uncertainty which to a layman would be no uncertainty at all - uncertainty because the courts are bound by obsolete rules of interpretation which once were of use, but which now are nonsense.90

All that was proposed, he explained, was to apply to by-laws the same canons of construction as are applied to statutes, and in particular that provision that is now s.5(j) Acts Interpretation Act 1924. He continued:

I could give you, from Lumley's book on by-laws, an illustration of how a by-law can be put out of court on what seems trivial grounds of uncertainty. Do we want by-laws upset on grounds like that? If I went on I could give you a hundred illustrations of how by-laws in the past have been upset because of the old rigid rule that unless the words were so clear that a man half-asleep could say what they meant there could be no conviction.91

Concern at the proposal was expressed by another speaker, Mr Sinclair, who asserted:

This seems to me to do a very great deal more than touch old and obsolete rules. It is a matter of substance, altering a principle that is in force now - a principle that I submit is a very wholesome one: that every by-law shall be clear and specific - that there shall be no doubt about its meaning...A by-law, if it is uncertain, may be capable of two constructions - it may be open to more. It is like a two pronged fork - it could impale its victim on either prong.92

90. (1910) 149 New Zealand Parliamentary Debates, 750.
91. Ibid., 757.
92. Ibid., 751-752.
It is probable that the custom of Parliamentary debate resulted in overstatements by each party. The Bill was then referred to the Statutes Revision Committee. When reported back to the House, the clause had been deleted. The test of certainty continued to be applied by the Courts.

(iii) Extension to other public law instruments

There appear to be few reported instances of the application of the certainty test to planning conditions in this country, and these are discussed elsewhere in this work. But its application to statutory regulations calls for further consideration at this point.

Reference was made earlier to the decision in Riddiford v. Collier (No.2), where a regulation of the Governor General was held bad on this ground, in reliance upon the wide definition of bylaws tendered by Lumley. That definition is certainly wider than would be accepted today, since it is no longer the custom to refer to regulations of the central government as 'bylaws'. Furthermore, all of the cases on certainty cited by Lumley relate solely to local, as opposed to national, legislation. It is accordingly doubtful how far Riddiford's case may be regarded as correct. Unfortunately, the law is confused.

One decision which, with respect, serves only to add to that confusion is R. v. Broad a decision of the Judicial Committee in 1915. There, a statutory regulation (though

93. The definition is set out in footnote 81, supra.
again called a bylaw) provided that level railway crossings should be crossed only at a walking pace, and that

...every person shall, before crossing the lines of rail, comply with the directions upon the notice board, 'stop: look out for the engine'.

The action arose from the death of the respondent's husband from being struck by a train, and his non-compliance with the terms of the bylaw was relevant to the issue of negligence. The opinion of the Judicial Committee is, with respect, unusual. Having concluded that the majority of the New Zealand public was in the habit of ignoring the notice boards and avoiding 'an idle and irritating ritual', when no engine was near, their Lordships concluded that, as a result, in the minds of the New Zealand public the bylaw did not bear the construction contended for it by the Railways Department. Their Lordships continued:

...that is proof that the bylaw fails by reason of its ambiguity to give adequate information as to the duties of those who are to obey it: Nash v. Finlay96

The reluctance of their Lordships to construe this ambiguity, if in fact one existed, may have perhaps been influenced by the circumstances of the case and the fact that the deceased had clearly been misled by that 'construction' held by the general public, and also by the conduct on this particular occasion, of the servants of the railway authority itself, to believe that no train was coming. It is submitted,

95. Ibid., 1121. Also described, at 1123, as a 'useless and cumbersome ceremony.'
96. Ibid., 1122. See discussion of Nash v. Finlay (supra).
however, that the decision might best be regarded as confined to these particular facts, and not as a precedent for the application of the certainty test to statutory regulations.\textsuperscript{97} It appears to have been seldom used as such in more recent cases.

In fact, when Hardie Boys J. came to consider whether a statutory regulation might be tested for certainty, in \textit{Strawbridge v. Simeon}\textsuperscript{98} he found a lack of authority, not, apparently, having been referred to either Broad's or Riddiford's case. His Honour referred to the English decision

\textsuperscript{97} Sugerman, in 'Uncertainty in Delegated Legislation' (1945) 18 A.L.J. 330, at 336-337, asserts that the effect of the decision appears to be that habitual popular interpretation of a bylaw makes it uncertain. He states in a footnote however, that 'The true explanation may well be that the decision deals with uncertainty not as affecting validity but as affecting the issue of contributory negligence where there has been disobedience of the by-law.' Although this may provide a convenient method of avoiding the decision, it is submitted that such an interpretation is precluded by the statement of their Lordships (at 1123) that the bylaw cannot be sustained. Acceptance of Sugerman's suggestion would seem to lead to the untenable proposition that a different (and lesser) degree of uncertainty should operate to invalidate a bylaw in civil proceedings, from that required in criminal proceedings, or in cases of direct challenge.

\textsuperscript{98} [1959] N.Z.L.R. 405. Noted by B.D. Inglis, 'Statutory Regulations, Ambiguity, Uncertainty, and Avoidance' (1959) 35 N.Z.L.J. 133. It is respectfully submitted that parts of this note may be misleading. Three of the nine cases cited (at 133) as examples of Australian courts holding statutory regulations void for uncertainty are in fact concerned with price orders made under authority of statutory regulations; Bendixen v. Coleman (1943) 68 C.L.R. 401, Vardon v. Commonwealth (1943) 67 C.L.R. 434, \textit{Ex parte Ryan, Re Bellemore} (1945) 46 S.R. (N.S.W.) 152. In two of the nine cases, the regulation concerned was not even held void: Bendixen v. Coleman (supra) and Wright v. T.I.L. Services Pty. Ltd (1956) 56 S.R. (N.S.W.) 415. Furthermore, the learned writer appears to have overlooked the significance of the judgement of Dixon J.
in Brierly v. Phillips\textsuperscript{99} where Lord Goddard L.C.J. had stated categorically that he was not prepared to support statutory orders couched in language open to all sorts of meanings, 'so that the unfortunate people cannot know whether they are acting legally or not, unless they get counsel's opinion, or at any rate a solicitor's advice', and also to a passage from Sir Carleton Allen's \textit{Law and Orders}\textsuperscript{100} which might be considered as implying that the certainty test extended to regulations. Neither source is satisfactory, however, for Lord Goddard fails to state whether a court has power to hold regulations void for uncertainty, as distinct from unenforceable in a particular case; and the passage from Sir Carleton Allen's book is itself ambiguous. Hardie Boys J. was unwilling, in the absence of further authority, to dispose of the appeal on the ground of uncertainty, but was able to hold instead on other grounds that the regulation in question was \textit{ultra vires} its authorising Act.\textsuperscript{101}

\textsuperscript{98.} Cont.

in King Gee Clothing Co. v. Commonwealth (1945) 71 C.L.R. 184 (discussed elsewhere in this work) which has had the effect of denying the operation, in Australia at least, of uncertainty as an independent test of validity.

\textsuperscript{99.} \[1947\] K.B. 541. Also referred to was \textit{R. v. Minister of Health; Ex parte Davis} [1929] 1 K.B. 619.

\textsuperscript{100.} 2nd Ed. (1956) 274.

\textsuperscript{101.} [1959] N.Z.L.R. 405, at 408.
The opportunity of clarifying the situation was not taken, it is respectfully submitted, in the recent decision of Wild C.J. in *Lee v. Marine Department*.\(^{102}\) His Honour was there considering a Fisheries Regulation\(^{103}\) that prohibited the taking by two persons associated together of shell fish in quantity exceeding 'one four-gallon lot measured in their shells'. The regulation afforded no further direction as to how that measurement might be made. The evidence for the defence raised at the very least a reasonable doubt as to whether different results might be obtained by different methods of measurement. That, suggested the learned Judge, left a position of doubt and uncertainty. He stated:

> It is axiomatic that before a citizen can be convicted of an offence the law must define the elements of the offence with sufficient precision so that people are not left in doubt as to whether or not they are committing an offence.\(^{104}\)

His Honour does not appear to have regarded the regulation as invalid however, but rather that its uncertainty meant that the prosecution's burden of proof had not been fulfilled.

---

103. R.106 Fisheries (General) Regulations 1950 (Reprinted 1966/20) as amended 1968/104. Now repealed, see S.R. 1971/71 R.4(e). A subsequent amendment to the Regulation (S.R. 1971/71) has clarified what is meant by '4-gallon lot': 106(k)(6)...the Court may infer that the accused committed the offence if the prosecution proves that the shell fish were poured into a 2-gallon, 4-gallon or 5-gallon container, as the circumstances require, and that the accused was or were in possession of shellfish in excess of the quantity necessary to fill the container.
104. At p.7 of the judgement.
To that extent, the effect of his judgement would appear to be similar to that of Lord Goddard's judgement in *Brierly v. Phillips*. An enquiry into the validity of a bylaw or regulation should be quite a separate matter from an enquiry into the conduct of a person charged under it, which was the enquiry conducted in both these cases.

The position of the certainty test in relation to statutory regulations in this country, then, is still unclear. There remains for consideration the question of what status the test might best be given in this context, and in determining that issue a study of the approach adopted by the Australian courts is both informative and helpful.

(c) *Australia*

Just as writers rather than judges must assume a large share of responsibility for the present status of the certainty test in England and New Zealand, so too an article by B. Sugerman K.C. appears to have paved the way for reconsideration of the test in Australia.

(i) **The early cases**

Early application of the certainty test in Australia was sporadic and inconclusive. As early as 1898 a bylaw was held void by the Western Australia Supreme Court for having 'no exact meaning which any reasonable person can

---

105. See *e.g.* *Masterton Co-operative Dairy Co. Ltd v. Wairarapa Milk Board* [1964] N.Z.L.R. 771, at 781 per McCarthy J.

understand, even after considerable study, but it was also void for repugnancy to the general law. Again the Full Court of that State in 1939 in Anchorage Butchers v. Law in a majority decision held invalid a bylaw requiring certain vehicles to be constructed of wood or 'approved' metal. Northmore C.J. dissented, by inference likening his brother judges to a Shakespearian caricature when he stated: 'only a Puckish will to find uncertainty can find it here'. Clearly, the issue of unlawful delegation was also present and it is likely that both Dwyer and Wolff JJ. were influenced by that consideration.

Neither case can be regarded as authority for the operation of a test of certainty as an independent test of validity of bylaws. Arguments based on uncertainty were put forward in a small number of cases up until the Second

107. Healy v. Dunne (1898) 1 W.A. 29, per Hensman J. See also Linson v. Walsh 23 March 1860 Argus Newspaper (Victoria) (3 Australian Digest, 2nd ed.) (1964) 150 where it appears that a mining bylaw was held void for uncertainty for failing to specify the width of a claim and how its boundaries were to be drawn.

108. (1939) 42 W.A.L.R. 40. Mr Justice Hale, in 'Local Government By-Laws and Ultra Vires' (1966) 7 Univ. of West. Aust. L. Rev. 336, at 340, points out that the phrase impugned had been lifted from a model bylaw promulgated under the Health Act, and had been presumed therefore to be within power.


110. Ibid., 43-44.

World War, but apparently accepted in only one line of cases, following Stewart v. City of Essendon. In that case, the local authority was authorised by bylaw to 'prescribe' certain areas within the City as residential areas. Weigall A.J. held that the failure of bylaw to specify any such areas with sufficient certainty involved that there had been no 'prescription', and that the bylaw was, therefore, outside power. Thus, he preferred to regard uncertainty as something less than an independent test of validity, relating it instead to a consideration of whether the power had been well exercised.

(ii) Wartime price control, and extension to statutory instruments

During the Second World War, Australians were faced with price control measures imposed by the Federal Government. The difficulties involved in fixing prices for wide varieties


and types of goods were so great that inevitably some
price orders became confused and jumbled, or left assess-
ments of prices to estimation and even conjecture. For the
sale of goods at prices in excess of those prescribed,
heavy penalties were provided under the Black Marketing
Acts.

The unsatisfactory nature of the National Security
(Prices) Regulations, and of the Price Orders made under
them, led to several challenges in the courts on the
grounds of uncertainty. Some challenges were successful, 115
others were not, 116 yet at no stage does it appear that
any particular consideration was given to the fact that a
rule formerly applied only to bylaws was now being extended
to statutory instruments. The first in the line of reported
cases, Vardon v. Commonwealth 117 proceeded on a similar
basis to that of Stewart v. City of Essendon discussed
above. The Price Commissioner had been authorised to

115. Price orders were successfully attacked in Vardon v.
The Commonwealth (1943) 67 C.L.R. 434; Ex parte Ryan,
Re Bellemore (1945) 46 S.R.(N.S.W.) 152; and statutory
regulations in Ex parte Zietsch, Re Craig (1944) 44
S.R.(N.S.W.) 360; Ex parte Gerard & Co. Pty. Ltd, Re
Craig (1944) 44 S.R.(N.S.W.) 370; Ex parte Thomson,
Re Clarke (1945) 45 S.R.(N.S.W.) 193. Regulations
were also successfully challenged in the unreported
case of Cody v. Claxton (1945) 19 A.L.J. 206 [High Court].

116. Price orders were unsuccessfully attacked in Bendixen v.
Coleman (1943) 68 C.L.R. 401; Ex parte O'Sullivan; Re
Craig (1944) 44 S.R.(N.S.W.) 291; Ex parte McMillan,
Re Craig (1944) 45 S.R.(N.S.W.) 229; and in All Cars Ltd
v. McCann (1945) 19 A.L.J. 129 Statutory regulations
were unsuccessfully attacked in Ex parte Callinan, Re
Russell (1945) 45 S.R.(N.S.W.) 358.

117. (1943) 67 C.L.R. 434.
'fix and declare the maximum price' at which goods might be held. The failure of his price order to set down with certainty that maximum price, meant that his power to fix prices had not been well exercised. No authority was relied on by the High Court in arriving at this conclusion. It will be seen that this is but a narrow application of the certainty test, but subsequent cases tended to treat certainty as an independent test of validity that operated regardless of the nature of the authorisation, and extended its operation beyond price orders\textsuperscript{118} to regulations.

An example of this process is provided by the case of Ex parte Sinderberg, Re Reid\textsuperscript{119} which appears to be the first case in which the test of certainty was applied to statutory regulations in Australia. In the course of his judgement, Jordan C.J. stated,

There is an elementary but well established rule that, to be valid, a statutory regulation must be certain, in the sense that it must contain adequate information as to the duties of those who are to obey it: Nash v. Finlay;\textsuperscript{120} R. v. Broad;\textsuperscript{121} Country Roads Board v. Neale Ads.

\textsuperscript{118} In Arnold v. Hunt (1943) 67 C.L.R. 429 the High Court considered, (although not deciding the matter) that price orders might better be regarded as executive, rather than legislative instruments. See also King Gee Clothing Co. Pty. Ltd v. The Commonwealth (1945) 71 C.L.R. 184, at 195, per Dixon J.

\textsuperscript{119} (1944) 44 S.R.(N.S.W.) 263 (Concerned not with price control but with National Security (Man Power) Regulations).

\textsuperscript{120} (1901) 85 L.T. 682, at see supra p. 160

\textsuperscript{121} [1915] A.C. 1110, at 1112, and see supra p. 175
Of the authorities cited, only Broad's case was concerned with a statutory regulation, and the unsatisfactory nature of that decision has already been considered. The limited extent of the application of the certainty rule, (narrower than is suggested by Jordan C.J.) in Vardon's case to a price order, has also been discussed. All the other cases relied on relate solely to bylaws.

Precisely two calendar months later, Jordan C.J. reiterated this 'well settled' rule, relying again on Nash v. Finlay and the Sinderberry case itself.

The application of the certainty test in this fashion to statutory regulations and price orders continued until the publication in the Australian Law Journal of Sugarman's article, 'Uncertainty in Delegated Legislation', which contained an extremely thorough and exhaustive review of

122. (1930) 43 C.L.R. 126, at 132.
123. [1936] A.C. 32, at 44.
125. (1941) 65 C.L.R. 88, at 99.
126. (1943) 67 C.L.R. 434, at 449.
127. In Ex parte O'Sullivan; Re Craig (1944) 44 S.R. (N.S.W.) 291, at 296.
128. (1945) 18 Aust. L.J. 330. The article has since been described as 'the best starting point for a study of "uncertainty"' - see Mr Justice Hale, 'Local Government By-laws and Ultra Vires' (1966) 7 Univ. of West. Aust. 336, at 340, and see also comments of F. J. Pearson, ibid., 349.
the authorities on uncertainty. Sugerman K.C. (as he then was) had in fact acted as counsel, for the Commonwealth in a number of the cases in which price orders and regulations were tested for uncertainty.\textsuperscript{130} The effect of his article was, through an analysis of the authorities on the certainty test, to lay open the paucity of authority for the action being taken by the Australian courts with regard to statutory regulations. From his analysis he derived two possible conclusions, first that uncertainty did exist as an independent test of validity, but of such an indefinite nature as to allow the courts a wide discretion in disallowing delegated legislation otherwise within power, or alternatively, that it was not an independent test.\textsuperscript{131} He suggested that the second was the correct solution.

Some five months following the publication of that article, the High Court of Australia handed down its decision in \textit{King Gee Clothing Co. Pty. Ltd v. The Commonwealth}\textsuperscript{132} in which Dixon J. expressed similar concern that the

\begin{enumerate}
\item \textsuperscript{129} He was appointed to the New South Wales Bench on 10 September 1947, and became President of the N.S.W. Court of Appeal on 22 January 1970.
\item \textsuperscript{130} \textit{Ex parte O'Sullivan; Re Craig (1944) 44 S.R. (N.S.W.) 291; Ex parte Zietsch; Re Craig (1944) 44 S.R. (N.S.W.) 360; Ex parte Gerard & Co. Pty. Ltd; Re Craig (1944) 44 S.R. (N.S.W.) 370; Ex parte McMillan; Re Craig (1944) 45 S.R. (N.S.W.) 229.}
\item \textsuperscript{131} (1945) 18 A.L.J. at 337.
\item \textsuperscript{132} (1945) 71 C.L.R. 184.
\end{enumerate}
authorities might not support the operation of certainty as an independent test of validity. After a brief review of the history of the test he stated,

But I cannot see how this history warrants the courts in adopting as a general rule of law the proposition that subordinate or delegated legislation is invalid if uncertain. It appears to me impossible to qualify the power conferred on the Executive Government by ss.5 and 13A of the National Security Act 1939-1943 by adding the unexpressed condition that regulations made thereunder must be certain. I should have thought that, in this matter, they stood on the same ground as an Act of Parliament and were governed by the same rules of construction.133

Now it is a significant fact, central not only to Dixon J.'s judgement134 but also to Sugerman's article,135 that in Australia, the similar test of unreasonableness is not regarded as an independent test of validity of bylaws.136 It is there regarded simply as a question of power. In those circumstances it would be anomalous to regard uncertainty, with its far more dubious history, as an independent test of validity.137 Further, the infrequent


134. Ibid., 194, 195.


137. Particularly to Dixon J. who (at 194) saw the requirement that a bylaw be certain as an extension of the reasonableness test.
application of the test by the Australian and English courts to bylaws, together with its application to regulations and price orders unsanctified by authority, enabled a fresh start to be taken.

Dixon J. proceeded to state a test already applied in Stewart's and Vardon's case, relating uncertainty to the specific authorisation. In King Gee itself the authorisation was to 'fix' prices. Dixon J. stated:

It needs no imagination to see that in drafting an order for the fixing of prices for an important trade many difficulties must be encountered, and it would be impossible to avoid ambiguities and uncertainties which are bound to arise both from forms of expression and from the intricacies of the subject. But it is not to matters of that sort that I refer. They depend upon meaning of the instrument and they must be resolved by construction and interpretation as in the case of other documents. They do not go to power. But it is another matter when the basis of the price, however clearly described, involves some matter which is not an ascertainable fact or figure but a matter of estimate, assessment, discretionary allocation, or apportionment resulting in the attribution of an amount or figure as a matter of judgement. When that is done, no certain objective standard is prescribed; it is not a calculation and the result is not a price fixed or a fixed price. That, I think, means that the power has not been pursued and is not well exercised. 138

That statutory regulations and executive orders should be tested for certainty only when it is possible to imply into the grant of power that certainty was intended to be a condition of its valid exercise, has now been generally

138. 71 C.L.R. 184, at 197.
accepted by the Australian courts. But just as the test of uncertainty in bylaws became so readily applied to statutory instruments, so too has there been a tendency on the part of some writers to assume that the decisions involving statutory instruments require that a similar test should operate in respect of bylaws. In fact, the writer has been unable to discover any reported Australian cases since the King Gee decision in which bylaws have been tested for certainty, so that the issue would appear still to be open. It is likely, however, that should the issue arise for decision, the same test will be applied to both bylaws and regulations.

(d) Canada

The operation of the certainty test in Canada has been sporadic, and although numbers of bylaws have been held


140. See e.g. Mr Justice Hale in (1966) 7 Univ. of West. Aust. L.R. 336, 342; but see F. J. Pearson, ibid., 349-350.

141. The King Gee test was applied to a Town Planning Scheme in Pearse v. City of South Perth [1968] W.A.R. 130, at 132, and to conditions imposed upon a television broadcasting licence in Television Corporation Ltd v. Commonwealth (1963) 37 A.L.J.R. 107.
invalid on this ground, there does not appear to have developed any consistent body of law.

Once again, the authorities relied upon by the Canadian courts for testing bylaws for uncertainty, include the dictum of Mathew J. in *Kruse v. Johnson* and the other early twentieth century English decisions, either directly or through the pages of *Halsbury*. Sometimes, no authority at all is advanced, but it is clear that the test is accepted in Canada now as a test of validity. On a number of occasions bylaws have been held void for their failure to contain adequate information as to the duties of those who are bound, although again it has been stressed that where the


intention of the legislating body is reasonably clear, the court should strive to give effect to it. A somewhat stricter test appears to be applied in the case of bylaws purporting to interfere with private property rights however, where a high degree of certainty and clarity is insisted upon.

The writer has been unable to discover any instances of challenge to statutory regulations in Canada on the grounds of uncertainty.

4. Uncertainty and Unreasonableness

Bylaws are frequently tested in the courts for unreasonableness, and because of the similarity of the two tests,

145. Cont.

146. See e.g. R. v. Liggetts-Findlay Drug Stores Ltd (1919) 49 D.L.R. 491; Re By-law 92, Town of Winnipeg Beach (1919) 50 D.L.R. 71; City of Montreal v. Morgan (1920) 54 D.L.R. 165, at 173; Re Vancouver Incorporation Act, 1921, Re Bent [1940] 2 W.W.R. 697, at 702; Blue Haven Motel Ltd v. District of Burnaby (supra, n.142), at 466; and R. v. Bois (supra, n.142).

147. See e.g. Cook v. North Vancouver (supra, n.142); Re Mitchell and Township of Saugeen (supra n142); Blue Haven Motel Ltd v. District of Burnaby (supra n.142); Haddock v. District of North Cowichan (1966) 59 D.L.R. (2d) 392, Affirmed 5 D.L.R. (3rd) 147). It may be noted that most, if not all Canadian state legislatures have imposed limits upon the courts' jurisdiction in summarily quashing by-laws: see Todd, 'The Quashing and Attacking of Municipal By-Laws' (1960) 38 Can.Bar.Rev. 197, 200-202.

148. The test is not included or even mentioned in a survey of the grounds upon which regulations may be challenged, in Driedger, 'Subordinate Legislation' (1960) 38 Can.Bar. Rev. 1, 7-27. See also, for survey of non-judicial controls, H. McIntosh, 'Controls on Federal Subordinate Legislation' (1970-71) Sask.L.Rev. 63.
there has been a tendency to regard them as of similar origin, status and operation. Lest it should be mistakenly assumed that the history of the unreasonableness test is as tenuous as that of uncertainty, (and also for the purposes of further analysis in the following chapters) brief mention must be made of the manner in which it has developed, and its present status.

It will be recalled that bylaw making powers were vested in England in the ancient guilds and corporations. The first instance of a requirement that bylaws be reasonable appears to arise from a statute of Henry VI directed against 'masters, wardens, and fellowships of crafts or mysteries'. That Act, of 1436, subsequently expired, but the requirement of reasonableness was revived and confirmed by a further statute in 1503. Since that time down to the present day the courts have applied the test regularly and consistently, extending it, automatically it appears, to bylaws of municipal corporations.

Because of the differences in function that had developed by the nineteenth century between municipal and trading corporations however, a different standard of reasonableness

150. See for examples, II Comyn's Digest 5th ed. (1822) 303-304; I Bacon's Abridgement 7th ed. (1832) 802-812; 9 Halsbury's Laws of England 3rd ed. 43; 24 ibid., 517-518; and see also D. E. Paterson (infra, n.152) and An Introduction to Administrative Law in New Zealand (1967) 52-61.
came to be required of the bylaws of each. In *Kruse v. Johnson*¹⁵¹ Lord Russell of Killowen C.J. stated the test that has guided the courts in this century, when he considered that municipal bylaws ought to be supported if possible, and 'benevolently' interpreted. It appears now, that before a bylaw in England may be upset on this ground, the evidence of unreasonableness must be overwhelming.¹⁵²

The New Zealand courts, however, have not adhered as strictly to the 'benevolent' test, holding that where other controls over the reasonableness of bylaws (present in *Kruse v. Johnson* but only to a limited extent in this country) were absent, the courts might exercise greater powers of review.¹⁵³

But the important point is that reasonableness, in this country at least, is awarded the status of being a condition precedent to the validity of a bylaw. The court need not, as in Australia,¹⁵⁴ conduct a review of the local authority's authorisation in an effort to determine whether

¹⁵². See *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223, at 230 per Lord Greene M.R.
¹⁵³. See *Grater v. Montagu* (1904) 23 N.Z.L.R. 904 and *McCarthy v. Madden* (1914) 33 N.Z.L.R. 1251, at 1268-1269 per Denniston and Edwards J.J. But cf. Canadian view in *Re Crabbe and Town of Swan River* (1913) 9 D.L.R. 405, where Haggart J.A., after quoting with approval the words of Lord Russell in *Kruse v. Johnson* states, 'if these comments were pertinent in the old land, they apply with much stronger force in this new country where our municipal institutions are in the moulding and where legal and professional assistance is not always available.'
¹⁵⁴. See n.132 supra.
Parliament intended reasonableness to govern its valid exercise. It is a condition that the courts will infer wherever possible, from the grant of power.\textsuperscript{155}

The courts have seldom been prepared, however, to draw such an inference in the case of statutory regulations,\textsuperscript{156} and it is clear that in this country today they will decline to review the reasonableness of such instruments without specific authorisation.\textsuperscript{157}

It is apparent then, that if certainty and reasonableness were to be regarded as merely different aspects of the same test, or even as overlapping, it would be difficult to justify the application of the certainty test to statutory regulations, and further, to deny that its application to bylaws ought to be governed by the benevolent test. It is submitted that the two tests are quite separate, but that their similarities have sometimes caused confusion in thought.

One source of confusion has been the connection

---

\textsuperscript{155} See Gisborne City v. J. E. Openshaw Ltd [1971] N.Z.L.R. 538. As to whether reasonableness might be regarded as an independent test of validity, or as an aspect of the ultra vires rule, see D. E. Paterson, 'Aspects of Unreasonableness in New Zealand Administrative Law' (1968) 3 N.Z.Univ.L.Rev. 52, at 66-70.


occasionally seen between the two in the situation where a bylaw has used language capable of an interpretation giving it an effect wider than that envisaged by its authorising statute. It may be that the court will be prepared to uphold the bylaw by implying some necessary limitation.

This was done, for example, in the Tobacco-Pipe Makers Company case\textsuperscript{158} where a bylaw of the Company provided 'that if any person chosen to be warden should refuse to accept the office of warden, he should forfeit to the company £6 13s 4d'. An objection that the expression 'any person' was too wide and indefinite, and might include ineligible persons, was overruled. The condition of eligibility, said Lord Tenterton C.J., was necessarily implied from the subject matter. Where the language of a bylaw is wider than that of its authorisation the question becomes not one of uncertainty because of the width of the language, but of whether the bylaw can be said to fall within the power.

Confusion is greatest however, where unreasonableness is also alleged to exist in this context - unreasonableness through a bylaw in its terms extending to a wide class of persons, or over a wide area of operation. A recent example

of this situation is provided by Strawbridge v. Simeon\textsuperscript{159} where Hardie Boys J. was considering a regulation that provided, 'No person shall open toheroa in any place below high water mark'. His Honour stated:

Here, the only uncertainty is whether the regulation can embrace acts performed miles out at sea - a matter which goes rather to the reasonableness than the scope of the regulation. If I had to decide whether the regulation was ultra vires because it was uncertain, I would at least distinguish between uncertainty that was only a matter of unreasonableness, and uncertainty of a kind which left the subject in doubt whether or not a punishable offence had been committed...\textsuperscript{160}

With respect, it is submitted that such a distinction might well be illusory. It might be suggested that the question of whether the regulation can embrace the acts miles out at sea ought to be answered by first considering the scope of the authorising statute. Then, if the regulation in its terms is wider than the authorisation, it may be limited by implication.\textsuperscript{161} If not, the regulation must fail as ultra vires. The question of certainty does not arise unless the language of the regulation, even when its scope has been limited by implication, still leaves the subject in doubt as to

\textsuperscript{159} [1959] N.Z.L.R. 405.
\textsuperscript{160} Ibid., 408.
\textsuperscript{161} The learned judge appeared unwilling to imply that by 'in any place' was meant 'in any place in New Zealand' - that is on land or at sea within three miles from any part of the coast. (ibid., 407).
whether a punishable offence has been committed. The question of reasonableness, it is submitted, is quite a separate issue again. Assuming for argument's sake that a regulation might be tested on this ground, its application ought properly to be confined to a consideration of whether the wide class of persons, or wide area prescribed, is so great as to render the regulation oppressive or manifestly unjust.

Approached in this manner, the validity of subordinate legislation is tested by three quite different and independent methods, each of which involves quite separate considerations. Inevitably however, there must be some overlapping.

One such area of overlap, which again causes confusion and has led on occasion to the view that certainty is but an aspect of the reasonableness test, is where a bylaw is said to be unreasonable because of the unfairness of expecting persons to comply with its uncertain terms. This is a more difficult concept to counter, but two considerations would appear to point against it. First, the normal view

162. It is respectfully submitted that doubt as to the scope of operation of the regulation in Strawbridge was more than merely unreasonableness, for a person miles out at sea might still be in doubt as to his obligations under it.

163. See e.g. King Gee Clothing Co. Pty. Ltd v. Commonwealth (1945) 71 C.L.R. 184, at 194 per Dixon J.
of unreasonableness would appear to be that its presence and degree is to be observed from the operation of the bylaw and the extent of its interference with existing rights, rather than from internal considerations such as unclear wording. But secondly, and more importantly for the purposes of this study, the judiciary of this country has generally preferred to regard the tests as separate, applying each independently of the other.

The extent to which the test of certainty is historically dependent upon that of reasonableness is not clear, although as has been seen, most of the cases relied on by Lumley for his wide proposition relate solely to unreasonableness, as do all of those relied on by Mathew J. But both gentlemen regarded the two tests as separate.

If both history and present usage support the view that the two tests are separate and independent, they also indicate that the two are very closely linked. Whether this close link supports the view that each should operate in a similar manner and be subject to similar restrictions, is a matter.


5. Conclusions

All the evidence points to the fact that the acceptance by the courts this century of the test of certainty as a condition of validity of bylaws, and its further extension to statutory regulations, was almost wholly unjustified by previous authority. It points to the conclusion that the courts may have accepted too readily the statements of two text-writers for whose wide views no authority existed. And yet the requirement of certainty in bylaws is not without merit, and it may be that this factor itself has fostered the growth and development of the test. 166

166. Many judges, for example, have quite readily accepted the test as 'axiomatic' and 'well settled' without detailed consideration of the authorities; see e.g. Wild C.J. in Lee v. Marine Dept. 6 August, 1971 (unreported), and McCarthy J. in Masterton Co-operative Dairy Co. Ltd v. Wairarapa Milk Board [1964] N.Z.L.R. 771, at 783.
CHAPTER 8

THE STATUS AND EXTENT OF THE REQUIREMENT OF CERTAINTY

1. The Status of the Test

It is clear from the survey in the foregoing chapter that the historical basis of a test of certainty in public law is anything but sound. The courts of this country, however, have not hesitated in accepting the test, particularly in its application to bylaws of local authorities. But there appears to have been no occasion on which they have been required to pronounce upon the relation between the certainty test and the doctrine of ultra vires. Generally, however, there has been a tendency to regard certainty as a requirement of validity independent of vires. It is respectfully submitted that a preferable view is that which regards certainty as an aspect of vires, but that any distinction is semantic only, and has not been and is unlikely to be accorded any practical significance by the courts.

These arguments may now be considered in greater detail.

(a) That any distinction is semantic only

Probably the greatest cause of confusion in this respect arises from the nature of the ultra vires doctrine itself. The expression is ambiguous, and is frequently viewed in two distinctly different ways. There is first the narrow view, which sees the role of the courts in applying the doctrine as doing no more than ensuring that in exercising his discretion an official has not exceeded his authorisation as it stands. The court will ensure that the official has not stepped outside the four corners of his authorisation, except perhaps to the extent that his action may embrace activities regarded as reasonably incidental. There is no concern here with questions of the purposes or motives of the official, but simply with whether or not the power has been exercised within its statutory limits. Under this narrow view of ultra vires, matters such as reasonableness and certainty could be regarded as aspects of vires only in the event of an authorisation stipulating their presence as a condition precedent to the valid exercise of the power. Given that such tests are regularly operated by the courts independently of such express stipulation, it becomes necessary under a narrow view of ultra vires, to designate them 'independent' heads of validity.

But the courts have long held the narrow view of ultra vires to provide an inadequate mode of control over official
action. They have, in addition to ensuring that official action falls within the four corners of its authorisation, tended to impose as a matter of statutory interpretation various conditions upon the extent of the authorisation. In this way a power that may appear to be wide and unfettered may be confined, particularly in the manner of its exercise, within narrow limits. Official action that strays outside those limits is liable to be struck down as ultra vires - as outside power in the sense of contravening a condition imposed upon the valid exercise of that power by the courts.

To equate the breach of these conditions with ultra vires action is to accept the wide view of that doctrine.

The acceptance of this wide view appears now to be more general, and indeed it provides a number of advantages. It enables a more uniform approach to problems of judicial review by regarding ultra vires as the sole basis of review, and according other tests relating to procedures, motives and purposes, reasonableness and certainty, the status of component parts of the ultra vires doctrine itself.

---

In this writer's submission, however, the question of whether such tests are to be so regarded, or whether they are to be accorded independent status, is dependent wholly on whether one is adopting a wide or a narrow view of ultra vires.

(b) The practical significance of the distinction

Given that the courts of this country have yet to consider which view to take of the ultra vires doctrine in relation to certainty, it is necessary to consider the likelihood of the test being accorded differing effects under either designation. In this regard it is proposed to refer to three separate issues - to the past practice of the New Zealand courts, to certain possible distinctions that have been suggested in the parallel case of reasonableness and to the practice of other Commonwealth courts.

(i) Practice in New Zealand

As has been noted above, the practice of the New Zealand courts has generally been to list certainty as a test of validity independent of vires. In the early decisions, in fact, no mention of ultra vires is to be found, the usual practice being simply to determine whether or not the action was unreasonable or uncertain or repugnant. 3

---

The later cases continue to accept this formulation but with the addition of a test of ultra vires. On at least one occasion such judicial attitudes were clearly influenced by the formulation in Halsbury, which tends to view other tests of validity of bylaws as independent of vires. On a number of other occasions however, the courts have been content simply to accept counsel's formulation of the issues, which formulation in turn is generally similar to that to be found in Halsbury. Indeed, the two instances that the writer has found of a judge accepting certainty as a facet of vires, appear again to have derived largely from counsel's formulation of the issues, rather than through independent judicial consideration of the distinction.

On the other hand, it might be argued that the wording of s.8(2) of the Bylaws Act 1910 supports the view of certainty as an aspect of vires. That subsection provides:

Notwithstanding confirmation under this Act, a bylaw shall be invalid so far as its provisions are repugnant to the laws of New Zealand, or unreasonable, or ultra vires of the local authority by which it is made.

Given that bylaws may be tested for certainty, and that such a test is not expressly allowed by the section, it may be argued that the test must be deemed to be an aspect either of reasonableness or of ultra vires. The latter would seem the more probable. But the whole basis of such an argument is inconclusive. The subsection does not purport to be exclusive, and it is more than possible that the Legislature overlooked the certainty test when formulating it.

The lack of consistency on the part of the courts and of writers would seem to indicate that the question is of little significance, and that whether or not the test is an aspect of the ultra vires doctrine is unlikely to bear upon the effect of its application in any case.

8. The relationship between certainty and reasonableness has already been considered: infra.

9. It will be recalled that cl.13 of the Bylaws Bill had proposed the abolition of the certainty test but that it was deleted by the Statutes Revision Committee. Cf. s.17 of the Act, which refers to bylaws that are 'invalid because they are ultra vires of the local authority, or repugnant to the laws of New Zealand, or unreasonable, or for any other cause whatever...' (emphasis added).

(ii) Possible distinctions in the case of reasonableness

Similar inconsistencies have been noted by one writer in the parallel case of the test of reasonableness. He maintains, nevertheless, that the question of whether that test is independent or not is a matter of some significance:

If, for instance, a decision of an official performing a judicial function is unreasonable and is sought to be quashed by a writ of certiorari on that ground, the question of whether or not unreasonableness is to be regarded as an aspect of ultra vires would be very important because whilst there is no doubt that certiorari will issue on the ground of ultra vires there appears to be no precedent that it would issue on the ground of unreasonableness simpliciter. Again the question would be of great significance if there was a statutory provision excluding review by the courts except in the case of ultra vires in any particular case where official action was being challenged as unreasonable.

With the greatest respect, it is submitted that neither issue is in fact of practical significance, and that the points made are, in addition, of at least questionable validity.

The first relates to judicial officers and the issuance of the writ of certiorari. When speaking of the exercise of judicial functions the common tendency appears to be to talk in terms of 'jurisdiction' rather than 'vires', and of 'excess of jurisdiction' rather than 'ultra vires'.

It is admitted that the distinction has probably served more frequently to confuse than to enlighten, but its very existence is sufficient to call into question the writer's assertion that 'there is no doubt that certiorari will issue on the grounds of ultra vires', when it is clear that certiorari is available only in respect of judicial functions.

But a more significant point is that there is considerable doubt whether officials exercising judicial functions are obliged to comply with requirements of reasonableness or certainty. The majority in the House of Lords in Anisminic Ltd v. Foreign Compensation Commission, although not purporting to be exhaustive in the tests that were enumerated, did not appear to have regarded the absence of either as rendering a determination in 'excess of jurisdiction'.

On the other hand, Richmond J. in this country in Lange v. Town and Country Planning Appeal Board (No.2) appears to have taken the view that conditions imposed by the Board upon consents to specified departure applications

13. See criticism by Northey in this regard, Northey 428.
14. Bylaws may, of course, be quashed - but by Supreme Court order, not certiorari: see s.12, Bylaws Act, 1910.
15. [1969] 2 A.C. 147, at 171 per Lord Reid; 195 per Lord Pearce; 207 per Lord Wilberforce; 215 per Lord Pearson (concurring on this point with Lords Reid, Pearce and Wilberforce). See also Paterson, Introduction to New Zealand Administrative Law (1967) 58, where the learned writer states '...it seems always to have been assumed that the courts could not impose a restriction against unreasonableness upon officials performing judicial functions.'
under the Town and Country Planning Act 1953 might be reviewed for unreasonableness, though of so serious a degree as to render them "in excess of jurisdiction". Although this decision might be seen as lending support to the view that judicial officers are subject to at least the reasonableness test, it is submitted that this proposition must be approached with caution. In applying this test, Richmond J. relied upon three English decisions, including the House of Lords decision in Fawcett Properties Ltd v. Buckingham County Council, and in addition, on a passage in Halsbury's Laws of England. In none of those decisions was the function under review judicial, and the passage from Halsbury refers solely to administrative functions. In the result, although the learned Judge appears not to have considered the matter specifically, it would appear that his view must have been that in imposing conditions the Board was acting in either an administrative, or a legislative capacity. While there can be no doubt that the Board does generally perform judicial

17. Ibid., 902.
20. The writer assumes that the passage of Halsbury to which the learned Judge refers is that which states, 'If, however, an administrative body comes to a decision which no reasonable body could ever have come to, it will be deemed to have exceeded its jurisdiction, and the Court can interfere.' (ibid., 62). Certain other statements on the same page must now be read in the light of Anisminic Ltd v. Foreign Compensation Commission [1969] 2 A.C. 147.
functions, it is possible that this would not be the case where it operates under so wide a discretion as was provided by its authorisation here, that is, to impose 'such conditions as it thinks fit'. Unfortunately however, the situation is again confused by the more recent judgement of the same Judge as a member of the Court of Appeal in Turner v. Allison, where he does appear to accept the view that under the same particular authorisation the Board's function is judicial. His Honour was not in that case, however, concerned to enquire into the reasonableness of the conditions imposed.

While the question is admittedly of some considerable difficulty, it is submitted that the cases do not support the extension of the reasonableness test to judicial action, and that as a result nothing turns in this context on whether reasonableness is an aspect of vires or an independent test. What then of certainty?

There would appear to be no requirement that judicial action should be certain. Although, as was discussed in chapter six the Supreme Court has occasionally queried the certainty of orders of inferior courts, yet on no occasion does want of certainty appear to have induced invalidity nor has the writer been able to discover insistence by the

courts upon a requirement of certainty on the part of
tribunals or other judicial officers,\textsuperscript{23} except where the
specific authorisation clearly authorises only official
action that is certain.\textsuperscript{24}

It is submitted therefore, that certiorari will not
in any event be available in the case of certainty, so
that in this context the question of whether it is an
aspect of \textit{ultra vires} or an independent head of validity
becomes irrelevant.

The second possible matter of concern that was suggested
in the case of reasonableness, arises in the event of a
privative clause seeking to exclude review except in the
case of \textit{ultra vires}. In fact, the New Zealand legislature
at least appears as a matter of practice to insert privative
clauses only where the functions protected by the clause
are of a judicial nature, and the usual form is then to
exclude review except for 'lack of jurisdiction'.\textsuperscript{25} The

\textsuperscript{23} Although Richmond J. in Lange v. Town & Country Planning
Appeal Board (No.2) [1967] N.Z.L.R. 898, at 903, line
16, appears to assume that uncertainty might operate to
take a condition imposed upon a planning consent out-
side the protection of the 'Wednesbury umbrella'.

\textsuperscript{24} See e.g. R. v. Garvey, ex parte Henry (1888) 6
N.Z.L.R. 628.

\textsuperscript{25} See e.g. s.38 Air Services Licensing Act, 1951; s.16
Criminal Injuries Compensation Act, 1963; s.25 Motor
Spirits Distribution Act, 1953; s.62 Police Act, 1958;
s.19 Race Relations Act, 1971; s.11 Stabilisation of
Remuneration Act 1971; s.23 Trade Practices Act, 1958;
ss.147, 164 Transport Act, 1962; s.45(4) Workers'
Compensation Act 1956. Cf. s.41(4) Clerk of Works Act,
1944; s.142 Customs Act, 1966; s.47 Industrial
Conciliation and Arbitration Act, 1964; where an
exception is not expressly made in case of 'excess of
jurisdiction' (but see G. S. Orr, Report on Administrative
Justice in New Zealand (1964) 51-52). The modern
wide interpretation accorded that phrase by the House of Lords recently reflects the attitude of the judiciary to privative clauses. Once again, the problem is likely to arise only with regard to judicial functions, to which it is submitted, tests of reasonableness and certainty are inapplicable. The unlikelihood of a privative clause arising in the context of administrative functions is sufficiently remote, it is submitted, to render this distinction too, if not invalid, then at least of little or no practical significance. In the event, however, it is likely that the Courts will reflect and extend the views of the majority in the House of Lords and hold both tests to be aspects of ultra vires.

(iii) The practice in other Commonwealth courts

It might be argued that by regarding certainty in terms of vires, the extent and application of the test is accordingly limited, following certain remarks of Dixon J.

25. Cont.

tendency is to facilitate appeals from judicial officers to the courts: see e.g. s.26 Milk Act, 1967 (appeal to Magistrate's Court); ss.39(10) and (11) and s.40 Dental Act, 1963; s.19 Indecent Publications Act, 1963; s.28 Inland Revenue Department Amendment Act, 1960; (appeals to Supreme Court) and s.34 Animal Remedies Act, 1969; s.2 Land Valuation Proceedings Amendment Act, 1968; s.230 A, Sale of Liquor Act, 1952; s.5(4) Land Settlement Promotion and Land Acquisition Act, 1952; s.42A Town and Country Planning Act 1953 (appeals to Administrative Division, Supreme Court).

In the present case, the question whether the Order is ultra vires of the Price Commissioner depends upon the meaning and operation of reg. 23(1) and (1A) of the Prices Regulations, and, I think that, if the meaning of those provisions is ascertained, it will be found that there is no independent question of uncertainty or vagueness as a ground affecting the validity of the Order.

In that case the duty imposed, to 'fix and declare... maximum prices', was held not to have been satisfied by a Price Regulation that left to the discretion and choice of persons bound to comply with the Regulation essential criteria in the ascertainment of maximum prices. It is clear that Dixon J. was prepared to accept certainty as a test of validity only when the nature of the power clearly required certainty as an essential element of its exercise. That is, although he was prepared to accept certainty as an aspect of ultra vires, he preferred to take only the narrow view of that doctrine.

But in this country there would appear to be no reason why regarding certainty as an aspect of ultra vires should result in a similar limitation. The courts here have proved more ready than their Australian counterparts to infer from the terms of an authorisation that Parliament intended the valid exercise of the power conferred to be governed by

---

27. (1945) 71 C.L.R. 184, at 196.
considerations of certainty and reasonableness, particularly where the authorisation is not to make regulations or orders as was the case in King Gee, but to make bylaws. If certainty is to be regarded as an aspect of ultra vires then the New Zealand practice supports the view that this should be in the wide sense of that doctrine. Although the position with respect to bylaws in Australia is unclear there has been a tendency to adopt the narrow view of ultra vires in that context as well. But Dixon J. in a later case appears to take the view that the courts might be more ready to make the inference that a power to make bylaws requires certainty of expression as a condition of its valid exercise. The English attitude, too, is far from clear. There has been a tendency in recent years to view Lord Denning's speech in Fawcett Properties Ltd v. Buckingham County Council as an authoritative statement of the present status of the certainty test in that country. His Lordship stated there:


I can well understand that a by-law will be held void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning. But if the uncertainty stems only from the fact the words of the by-law are ambiguous, it is well settled that it must, if possible, be given such a meaning as to make it reasonable and valid, rather than unreasonable and invalid. Lord Wensleydale said so in *R. v. Saddlers' Co.*: "As in one sense of the word the by-law is good and in the other not, the rule is that it ought to be constructed so as to make it valid, not to defeat it."34

But with respect, Lord Denning's statement must be viewed in the light of a number of factors. The first is the fact that of all the decisions of English and Commonwealth courts on uncertainty as an invalidating factor in bylaws, only *Scott v. Pilliner* was relied upon by counsel a decision which Lord Denning had little difficulty in distinguishing. His Lordship appears then to have considered the question to be free from authority.

Secondly there is the fact that the instrument under consideration was a planning condition whose terms incorporated a clause taken directly from s.34 Housing Act, 1950. This factor was clearly regarded as being of significance by the majority in the House of Lords, who

35. [1904] 2 K.B. 855.
considered the provision to be sufficiently certain.37

Lord Denning stated:

My Lords, it is a bold suggestion to make that these words, taken as they are from a statute, are void for uncertainty. There are a few cases where a statute has been held void because it is meaningless but none because it was uncertain...But when a statute has some meaning, even though it is obscure, or several meanings, even though there is little to choose between them, the courts have to say what meanings the statute is to bear, rather than reject it as a nullity.38

The extent to which their Lordships were prepared to equate invalidity of the planning condition with the invalidity of the equivalent statutory section is sufficient, it is respectfully submitted, to restrict the decision, and in particular, Lord Denning's words, to the peculiar facts that were under consideration.

A third factor is the reliance that Lord Denning places, in the extract quoted earlier, upon the words of Lord Wensleydale in R. v. Saddlers' Co.39 With respect, some confusion appears to have arisen between the concept of ambiguity, on the one hand, with which Lord Wensleydale was concerned, and with vagueness on the other hand, which was the defect inherent in the planning condition in Fawcett

---

37. [1961] A.C. 636, at 662 (per Lord Cohen), 676 (per Lord Denning) and 692 (per Lord Jenkins). See also in the Court of Appeal: [1959] Ch. 543 at 568 (per Lord Evershed M.R.) and 574 (per Romer L.J.). Cf. Lord Morton of Henryton in the House of Lords, (supra, at 670) (dissenting), and Holroyd Pearce L.J. in the Court of Appeal (supra, at 577).
38. Ibid., 676.
Properties. It has long been recognised that where a true ambiguity exists, it may be resolved by reference to a number of external factors. Thus, if it occurs in a penal statute, it is to be resolved in favour of the accused; in a taxing statute, in favour of the tax-payer; and, in a bylaw, in such a manner as will render the bylaw valid rather than invalid. This is no more than the application of the maxim, ut res magis valeat quam pereat. But whether these canons of construction are applicable in the case of mere vagueness in a bylaw is another matter altogether. There appears no authority for the proposition that the courts must adopt such a course in that case. Lord Wensleydale clearly contemplated the instance of ambiguity solely when he stated, 'As in one sense of the word, the bylaw is good and in the other it is not...'. It was an ambiguity that arose from the use of 'insolvent', which was seen by the House of Lords as capable of meaning either 'not paying', or 'incapable of paying'.


42. See e.g. Poulters Co. v. Phillips (1840) 6 Bing. N.C. 314; 133 E.R. 124; and Widgeeshire Council v. Bonney (1907) 4 C.L.R. 977, at 983.

43. 10 H.L.C., 404, at 463; 11 E.R. 1083, at 1106. Cf. Lord Thankerton in I.R.C. v. Ross & Coulter (supra) at 625: '...if the provision is capable of two alternative meanings the courts will prefer that meaning more favourable to the subject.'
The only answer appears to be that in England as in this country, there is confusion over the status of the certainty test. There has been in recent years, however, a growing reluctance to recognise the test as 'independent', that is, as a condition to be automatically implied into all grants of bylaw making authority. This reluctance is accompanied by a similar desire to uphold bylaws wherever possible - to apply the Kruse v. Johnson 'benevolent' test.

(c) Conclusions

It is respectfully submitted that much of the confusion that has arisen is avoidable, and can be traced to misunderstandings of the nature and purpose of the ultra vires doctrine. It would appear that two separate but closely related factors are involved.

The first is the extent to which the courts will be prepared to infer from the terms of a power that Parliament intended certainty to be a condition of its valid exercise. The Australian courts have required, so far as statutory regulations at least are concerned, something positive in the power itself, for example a power to 'fix' or to 'specify' or to 'determine' or to 'describe' before making such an inference. The question then becomes not one

---

44. See e.g. per Lord Diplock in Mixnam's Properties Ltd v. Chertsey U.D.C. [1964] 1 Q.B. 214, at 237-238; and the Fawcett Properties case (supra) at 677-679 per Lord Denning. See e.g. Mixnam's Properties Ltd v. Chertsey U.D.C. [1964] 1 Q.B. 214, at 226-227 per Willmer L.J.; 237-238 per Diplock L.J.; and in the House of Lords, [1965] A.C. 735, at 760-761 per Lord Guest; 765 per Lord Upjohn. This aspect bears upon the extent or degree of uncertainty that is required to invalidate a provision, and is discussed more fully infra, at p. 236.
of certainty as such at all, but of whether the precise
terms of the power have been complied with. The English
and New Zealand courts, on the other hand, have been less
reluctant to make the inference that Parliament intended
certainty to govern the valid exercise of a given power.

The second factor is the extent or degree of uncertainty
that is required to invalidate any provision, a question
which is studied more closely in the following chapter. The
inter-relation between the two factors can be demonstrated
by reference to the Kruse v. Johnson test for unreasonableness:
that of such manifest arbitrariness, injustice or partiality
that a court would say: 'Parliament never intended to give
authority to make such rules; they are unreasonable and
ultra vires.'

The relationship would appear to resolve itself in
respect of certainty in this way - that Parliament cannot
be deemed to have intended that only bylaws absolutely free
from uncertainty should be valid, so that it becomes
necessary to draw the line between what should be permitted
and what should not. It is a matter for the court to draw
that line, and the point at which it is drawn is the point
which the court infers from the authorisation that Parliament
intended it to be drawn. Uncertainty that goes beyond that
point will render the instrument unauthorised or ultra vires.

46. [1898] 2 Q.B. 91; at 99-100 per Lord Russell C.J.
The attitude of the Australian courts would appear to derive from an emphasis upon the first of these two factors, while that of the English courts from their concern with the second factor. As will be seen, recent decisions have drawn the line at a significantly high point. As evidenced by the Court of Appeal decision in *Masterton Dairy Co-operative Co. Ltd v. Wairarapa Milk Board*, 47 however, the New Zealand courts have yet to adopt consistently either the Australian or English attitude.

But the difference in approach evident in the three countries should not, it is submitted, be explained by taking the view that in New Zealand the test is an 'independent' test of validity. More satisfactory from the point of view of consistency and logic, is the alternative explanation that the courts of this country are more prepared to limit by inference from an authorisation the area of movement conferred by it upon an official, - that is, that they are prepared, in the case of certainty at least, to take a wider view of the *ultra vires* doctrine than their English and Australian counterparts. Although the present situation is confused and lacks consistency in practice, the preferable view is that the test of certainty is an aspect of the *ultra vires* doctrine.

2. The Extent of Application of the Test

This question has already received some consideration in chapter six, where possible extensions of the test beyond bylaws were studied from an historical point of view. This section, therefore, will look at the question more from the point of view of vires. A second and closely related question - that of the degree of uncertainty required to be present in a provision to cause its invalidity - is considered in the following chapter.

The most frequent application of the test in England, Canada and New Zealand has been to bylaws of local authorities. The history of the test as studied in chapter six would appear to indicate that it was in the field of bylaws that the test originated, and one would expect that any application of the test beyond that field must be a deliberate extension of it. In fact, however, on those early occasions when statutory regulations were subjected to the test, no concern would appear to have been given to this fact. 48

In only one New Zealand case does there appear to have been any specific consideration of whether or not the test does extend to direct delegated legislation, as opposed to bylaws, but there Hardie Boys J. preferred to leave the

question open. In the leading cases in which the grounds upon which the courts may review direct delegated legislation have been considered by the courts, certainty appears never to have been discussed. The approach typically adopted is outlined in the following passage from *Smith v. Wellington City (No. 2)*, where North P. (sitting as a Judge of the Supreme Court) in determining the validity of a regulation made under s.60, Forest and Rural Fires Act, 1955, stated:

It will be observed that the Governor-General is called upon to exercise a discretion, he is required to form an opinion whether a particular regulation is 'necessary' or 'expedient'. In this class of case the Court will not usually inquire into the reasonableness of the regulation but will content itself by considering whether the regulation is within the ambit of the Act. The leading case in New Zealand is *Carroll v. Attorney General for New Zealand*. In that case Myers C.J. in discussing a submission made by the Solicitor-General, said: (I agree at once that where the Governor-General is given power to make such regulations as he thinks necessary and any particular regulation he makes is within the ambit of the Act, this Court would have no power to interfere, or even to inquire into the reasonableness of the regulation. But it is the duty of this Court, when the validity of a regulation is challenged, to consider the Act and to say whether the regulation is within its ambit; and if upon the true construction of the statute the Court comes to the conclusion that the Act does not authorise the regulation, then it must hold the regulation to be ultra vires and void.

The practice of the Law Draftsman in the country has

been, since 1960 at least, to refrain from vesting so wide a power in the Governor-General, and from thereby making him the judge of what regulations might be necessary or expedient. Bearing this in mind, the Parliamentary Committee on Delegated Legislation in its Report of 1962 was of opinion that no need existed for more detailed political scrutiny of delegated legislation. 52 So long as power was restored to the courts to review the necessity or expediency of any regulation, further political control would be superfluous.

But it is by no means certain that the courts have, as a result, shown a readiness to go beyond narrow applications of the ultra vires rule. Although North P., in the passage quoted above, may appear to support an extension of the ambit of the court's surveillance where there is no highly subjective power vested in the Attorney-General, a more recent decision of the Chief Justice, in Martin v. Attorney-General 53 would appear to deny that this is so. Similarly, a majority of the members of the House of Lords, in McEldowney v. Forde 54 rejected the submission that a more extensive application of the ultra vires doctrine might be operated by the courts where the regulation-making authorisation is not largely subjective.

54. [1971] A.C. 632, at 644 per Lord Hodson; 650 per Lord Guest and 651 per Lord Pearce. But cf. the powerful dissenting judgement of Lord Diplock on this point, at 660-662.
Given this reluctance of the courts to extend their powers of review beyond a mere 'four corners' approach it is unlikely, it is submitted, that certainty will be firmly accepted as a touchstone of validity of regulations.

The attitude of the Australian courts to this question has already been considered. In rejecting certainty as an 'independent' test of validity, the Australian courts have nonetheless remained prepared to review regulations for certainty when the requirement of certainty goes to power. 55 This view, it is submitted, is one which would also be adopted by the courts of this country should the occasion arise. 56

But the question of certainty may also be relevant to the validity of regulations under a narrow view of ultra vires in the situation demonstrated by McEldowney v. Forde. 57 In that case, although admittedly it is not altogether clear, it appears that a majority at least of the House of


56. Such an approach has already been adopted by the New Zealand courts in respect of other types of instruments, including statutory notices; see e.g. Sharp v. Amen [1965] N.Z.L.R. 760, at 766; Dowling v. South Canterbury Electric Power Board [1966] N.Z.L.R. 676, at 678; and in respect of judicial orders, see e.g. R. v. Garvey; Ex parte Henry (1888) 6 N.Z.L.R. 628.

Lords would accept that vagueness of such a nature as to cause a statutory regulation to operate in a wholly arbitrary manner could render it unauthorised. But it is clear that such a regulation would require to be sufficiently arbitrary as to render it outside the ambit of the authorising Act, hence the concept is but a limited extension, if it is an extension at all, of the narrow view of ultra vires. It should be noted too, that it was a regulation of a Minister with which the House of Lords was concerned in that case, so that questions of the possibility of bad faith, such as might be raised by a wholly arbitrary regulation could be considered. The Australian High Court, which the New Zealand courts might be expected to follow on this point, has held that no such questions may be permitted to arise in the case of the exercise of powers by the Governor-General.

There is, it is submitted, little authority upon which the courts of this country could extend the certainty test to

58. See ibid., 643, per Lord Hodson; 650 per Lord Guest; 653, per Lord Pearce. Lord Diplock may not be far from this position when he asserts, 'A regulation whose meaning is so vague that it cannot be ascertained with reasonable certainty, cannot fall within the words of delegation' (ibid., 665); but His Lordship also appears to regard the test as directly applicable, when he states, that the regulations 'are too vague and uncertain in their meaning to be enforceable.' (idem.)

59. Ibid., 653-654, per Lord Pearce.

statutory regulations, beyond the extent to which considerations of certainty come into a narrow view of ultra vires. At the same time, it must be conceded that lack of authority appears seldom to have hindered various extensions and interpretations of the test in the past. The true position is far from clear, and it is hoped that the Supreme Court will take the opportunity to provide a definite answer when next the question arises for consideration.

It is significant that one Australian judge has taken the view that a requirement of certainty exists with regard to proclamations, as distinct from regulations, of the Governor-General. In Walpole v. Bywool Pty. Ltd, O'Bryan J.

61. The conclusion reached in the text appears to be supported by a recent Magistrate's Court decision that has just come to hand. In Transport Department v. Manawatu Ashphalts Ltd (1971) 13 M.C.D. 237, Mr J.R.P. Horn S.M. was asked to rule upon the validity of a traffic regulation prohibiting the emission from a motor vehicle of an excessive amount of smoke. After reviewing a number of authorities on the topic, the learned Magistrate concluded, 'that any doctrine of invalidity for uncertainty has no application to statutory regulations in New Zealand' (ibid., 240). His Worship also makes the interesting point that, since the Acts Interpretation Act, 1924; s.4 includes in its definition of 'Act', all rules and regulations made under a statute it may well conflict with the 'fair, large, and liberal construction' provisions of s.5(j) of that Act to hold a regulation void for uncertainty.


stated:

The validity and interpretation of proclamations, being subordinate legislation, are to be considered in the same way as the validity and interpretation of bylaws (see Hitchener v. Ham [1961] V.R. 97, at pp. 103-104).

But with respect, it is doubtful that the proposition can stand. It does not appear in fact to be supported by Hitchener v. Ham. It may, however, be possible to support a modified proposition that, where a proclamation has a statutory basis and may therefore be capable of review under a narrow application of the ultra vires rule, then certainty may be relevant to that issue in the sense already considered. It is possible indeed in the Australian context that O'Bryan J. intended to assert no more than this. But as it stands, his proposition could by no means be said to be accurately descriptive of the principles of validity of proclamations in this country.

The courts have indicated clearly, however, that they are prepared to apply the test to other public law instruments directly analogous to bylaws. There was little difficulty, for example, in the Fawcett Properties 65 and Mixnam's Properties 66 cases, in holding that conditions imposed by local authorities upon planning consents should

66. [1965] A.C. 735. And cf. Lamason v. McLean [1952] N.Z.L.R. 288. An interesting decision which at first sight indicates an extension of the certainty test, is Foster v. Aloni [1951] V.L.R. 481 where the Victorian Full Court declared void or ineffective for uncertainty an advertisement in the daily Press restricting the use of electricity. It is submitted, however, that it was void
be subject to the bylaw tests of reasonableness and certainty, although the degree to which either must be present in order to induce invalidity is still confused. Generally speaking, however, the tests appear to be regarded as aspects of the ultra vires doctrine, and the courts require the presence of uncertainty or unreasonableness to a substantial degree before they are prepared to hold conditions unauthorised. 67

The extent to which other forms of official action may be reviewed for certainty must depend upon the extent to which the courts will be prepared to apply the ultra vires doctrine to that form of official action. The question appears to be, how readily will the courts infer that a requirement of certainty should govern the valid exercise of a given power? It is clear that the courts will not hold a provision of a statute void for uncertainty, 68 for example, although there are isolated instances of nineteenth century decisions where statutes quite devoid of meaning have been

66. Cont.
as a notice required under statute, rather than as an advertisement per se.

67. The test in this country is governed by Lange v. Town and Country Planning Appeal Board (No.2) [1967] N.Z.L.R. 898. The Appeal Board itself has on occasion considered the validity from the point of view of vires, notwithstanding its power to review conditions on the merits (s.42(1A) Town & Country Planning Act, 1953); see e.g. Abbot v. Matamata County (1970) 3 N.Z.T.C.P.A. 281.

The likelihood of such an occurrence today is extremely remote. At the other end of the scale, one would expect a greater willingness on the part of the courts to infer from powers conferred on local authorities to impose conditions and to issue statutory notices that the language used in their exercise should be readily comprehensible. But at present there are few consistent guidelines in this area of law.

CHAPTER 9

THE OPERATION OF THE CERTAINTY TEST

1. Introduction

It is a matter of some significance that among those judges who accept that subordinate legislation may be tested for certainty there is a considerable divergence in approach to the problem of the degree of uncertainty that will induce invalidity in any given provision. Four distinctly different tests that have been advanced from time to time are discussed in this chapter, and their application to uncertainty arising from various causes considered. In addition, a number of other factors that have from time to time been accorded weight by different judges are examined. But it would be a mistake to assume that there is any consistency in their use.

There is however, general acceptance of the fact that it is beyond the capabilities of any legislative body to formulate rules devoid of uncertainty, and that it would be unrealistic for the courts to insist upon too high a standard in subordinate legislation. In a Canadian case decided earlier this century this concern was expressed in this way:

It may be a counsel of perfection that in drafting bylaws the use of words susceptible of more than one interpretation should be avoided; but it is too much to exact of municipal councils that such a degree of certainty should always be attained. It would be going quite too far to say that
merely because a term used in a bylaw may be susceptible of more than one interpretation the bylaw is necessarily bad for uncertainty.  

Because uncertainty is itself a highly relative concept and may be caused by a number of different factors, a decision as to where the line should be drawn in any case is likely to be highly subjective. While it is clearly impossible to provide a precise answer, it is possible to indicate a number of factors that the courts have taken into account on occasion when faced with this problem.

2. **The Test of Certainty**

Most important of these factors is the particular test which the judge sees as applicable. At least four tests have been applied from time to time, but on no occasion have the courts of this country been required to consider whether the divergence in approach revealed by past practice might bear in a material manner upon the application of the test. On some occasions, indeed, the adoption of different tests by different judges has clearly had little bearing on their conclusions, but on other occasions differing approaches have brought about vastly different results. For the purpose

1. *City of Montreal v. Morgan* (1920) 54 D.L.R. 165, at 173 per Anglin J.
of ease of reference it has been necessary to accord a
title to each of the four tests about to be studied. Each,
it is trusted, is reasonably self-explanatory.

(a) The 'Layman' test:

It may be recalled that in early formulations of the
test, the requirement was that the language of a provision
should be capable of being understood by those bound by
it. Grant, for example, thought that it should be 'in
such language as may readily be understood by those on
whom it is to operate', 4 while Lumley similarly believed
it necessary that the provision 'afford complete direction
to those who are to obey'. 5 A number of the earlier New
Zealand cases follow this approach, 6 and it has also found
limited acceptance in other jurisdictions. 7 The requirement

3. Cont.
S.S. Kresge Co. Ltd (1966) 58 D.L.R. (2d) 229, at
234 per Ilsley C.J., 263 per Fielding J.

4. An Essay on By-laws (1877) 93.
5. See e.g. Brown v. McInnes (1896) 15 N.Z.L.R. 256;
Riddiford v. Collier (No.2) (1896) 15 N.Z.L.R. 344;
Boyd v. Onehunga Borough [1916] N.Z.L.R. 713, at 727-
R. v. Broad [1915] A.C. 1110, at 1122; Masterton Co-
Department Supreme Court Hamilton 6 August 1970 (unreported).

7. See e.g. Ex parte Ryan; Re Bellemore (1945) 46 S.R.(N.S.W.)
152, at 157; Ex parte Callinan; Re Russell (1945) 45 S.R.
(N.S.W.) 358, at 362; City of Dartmouth v. S.S. Kresge
District of North Cowichan (1966) 59 D.L.R. (2d) 392,
(Sup.Ct); 5 D.L.R. (3d) 147 (C.A.); Crisp From the Fens v.
Rutland County Council (1950) 114 J.P. 105, at 112.
under this test is that provisions be understandable to a layman, unversed in the skills of construction or interpretation of legal instruments.

(b) The 'Judiciary' test:

In expressing the view that certainty was a test of validity of bylaws Mathew J. in Kruse v. Johnson\(^8\) stated simply that a bylaw 'must contain adequate information as to the duties of those who are to obey', without requiring that the information be in a readily understandable form. Some judges have since taken the view that it is sufficient that a bylaw be in a form intelligible to themselves.\(^9\) Thus, they have on occasion insisted that they first attempt to construe an uncertain bylaw and only when that process fails to remove reasonable doubts as to its meaning, should it be held invalid.\(^10\) Whether or not this test is different from the 'layman' test seems never to have been considered. Its application has, however, led on occasion to some unusual results. In Bendixen v. Coleman\(^11\) the Australian High Court adopted the 'judiciary' approach in determining whether or not a price order should fail for uncertainty. The majority

---

10. See e.g. Ex parte Zietsch; Re Craig (1944) S.R.(N.S.W.) 360, at 365-366; Foster v. Aloni [1951] V.R. 481.
11. (1943) 68 C.L.R. 401.
was prepared to accept that the concept of 'cost' was sufficiently certain in its context in the order. 12 But, as another judge later pointed out, they disagreed as to its 'certain' meaning:

...it must be kept in mind that according to the most recent exposition of the subject, 'certain' or 'clear' must be regarded as somewhat relative terms, since in Bendixen v. Coleman five learned judges took three different views as to the meaning of the expression 'cost' as used in a statutory order, and yet what the majority thought to be the meaning was held to have been sufficiently clear to enable three trades people to know what it meant, so that they were liable to be convicted of a criminal offence for having failed to comply with the order. 13

Although it is likely that consistent application of the 'judiciary' test would lead to fewer bylaws being found uncertain than under the 'layman' test, simply through the reluctance of some judges to be defeated by the unskilfulness of a draftsman, the subjectivity of the test leads to wide variation in its application. The question of at what point it becomes preferable to hold a provision void, than to 'construe' it, is one that is incapable of an objective answer. One suggestion that has received some support, is to distinguish between uncertainty of application, on the one hand, and uncertainty as to the concept enshrined in a


13. Per Jordan C.J. in Ex parte O'Sullivan; Re Craig (1944) 44 S.R.(N.S.W.) 291, at 296. See also his observations in Ex parte Zietsch; Re Craig (1944) 44 S.R.(N.S.W.) 360, at 366.
provision on the other. The test then becomes one of whether sufficient criteria are given to enable a tribunal of fact to determine whether the provision will apply in any particular case. 14

While such a formulation has the advantage of emphasising that mere difficulties in application should not invalidate a provision, it is respectfully submitted that it provides no more scientific nor predictable a guide than had existed previously.

(c) The 'Statute' test:

On some occasions the 'judiciary' test has been taken a little further, resulting in the assertion that all legislative provisions, be they enshrined in statutes or bylaws, should be construed and applied in the same manner, except that although unintelligibility might render a statute unenforceable, a bylaw may instead be held invalid. 15


other words, it is suggested that only a provision of subordinate legislation that is quite without meaning can validly be attacked for uncertainty. With one exception, however, this assertion would appear to have been made in isolation and without reference to the other cases where uncertainty has operated as a head of validity. It appears, moreover, despite the apparent conclusion that such an approach must negate any test of certainty, that some judges regard the certainty test as still operative, with predictable resultant confusion.16

The exception is Lord Denning, in the Fawcett Properties case, who does have regard to authority, but there can be little doubt that in his rigid formulation of the certainty test the learned Judge was greatly influenced by the fact that the provision in that case had been taken verbatim from a statute.17

To apply to bylaws and other subordinate legislation the rules relating to validity of statutes is to deny the existence of any 'test' of certainty. This, it is submitted, cannot validly be done without consideration of the opposing authorities. Those authorities support the application of

16. See e.g. Springbank Municipal District v. Render (supra) and Parry v. Osborn (supra).
17. This, and other aspects of Lord Denning's speech in that case have received more detailed consideration supra, at p.213.
a test based either upon the 'layman' or the 'judiciary' approach. In applying those tests the courts have occasionally had regard to another factor, which is of sufficient significance to warrant its consideration as a test in itself.

(d) The 'Benevolent' test;

Lord Russell of Killowen C.J. stated in Kruse v. Johnson a test that has become widely accepted with relation to alleged unreasonableness in the bylaws of public representative bodies:

...I think the consideration of such bylaws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction.

Lord Russell's words were not expressly limited to unreasonableness, and although it was not from his but from the dissenting judgement of Mathew J. that the modern test of certainty derived, yet courts in Canada, England, See e.g. Re Bylaw 92, Town of Winnipeg Beach (1919) 50 D.L.R. 712; City of Montreal v. Morgan (1920) 54 D.L.R. 165, at 173; Hirsch v. Town of Winnipeg Beach (1961) 26 D.L.R. (2d) 659, at 664; City of Dartmouth v. S.S. Kresge Co. Ltd (1966) 58 D.L.R. (2d) 229, at 234; Haddock v. District of North Cowichan (1966) 59 D.L.R. 392.

Australia,\textsuperscript{21} and this country\textsuperscript{22} appear to have had little hesitation in extending the benevolent test to certainty as well. Applying this test the approach is typically to attempt to attach a clear meaning to a provision through processes of construction and interpretation, bearing in mind that the bylaw should be upheld so far as possible. Thus the approach adopted frequently bears a close resemblance to that adopted under the 'judiciary' test.

Now, the benevolent test has operated for some time with regard to reasonableness in bylaws, and in Britain at least, it has been said that it would require something 'overwhelming' in the way of unreasonableness before a bylaw could be held invalid on this ground.\textsuperscript{23} In New Zealand, however, the courts have retained greater powers of review, particularly where no other safeguards exist over the bylaw making authority,\textsuperscript{24} and it is true to say that generally the benevolent test has not received such rigorous application in this country.

\begin{itemize}
\item \textsuperscript{21} See e.g. Brunswick Corporation v. Stewart (1941) 65 C.L.R. 88, at 98-99; Anchorage Butchers v. Law (1939) 42 W.A.L.R. 40, at 48.
\item \textsuperscript{22} See e.g. Williamson v. Christchurch City [1955] N.Z.L.R. 988, at 992; Masterton Co-operative Dairy Co. Ltd v. Wairarapa Milk Board [1964] N.Z.L.R. 771, at 777 per North P., 784 per McCarthy J.
\item \textsuperscript{23} See Associate Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 K.B. 223 at 230 per Lord Greene M.R.
\item \textsuperscript{24} See e.g. Grater v. Montagu (1904) 23 N.Z.L.R. 904, and McCarthy v. Madden (1914) 33 N.Z.L.R. 1251, at 1268-1269 per Denniston and Edwards J.J.
\end{itemize}
The position with regard to certainty is similar. The benevolent test has seldom been applied in this country in the situation where lack of certainty is an alleged defect in a bylaw, and moreover, in those cases where it has been used, its introduction has not been seen as a deliberate extension of it.25

The possibility of its more frequent use, together with its widespread acceptance in the context of uncertainty overseas, however, requires that some consideration be given in this work to its likely effect. It might appear at first sight incongruous and contradictory that there should be a rule requiring the courts to uphold bylaws wherever possible, yet at the same time accept that the validity of those bylaws is governed by the ultra vires rule. Does the benevolent test amount to an abrogation of the ultra vires rule?

In a number of instances it clearly has not. The benevolent test has been cited by judges simply as authority for their course of action in placing upon a provision a construction that serves to render it valid.26 But the manner in which the test has come to be applied in some other jurisdictions, particularly in England, suggests that

25. See cases cited in footnote 22 supra.
it has had considerable influence upon the impact of the *ultra vires* rule. It would appear to have made the courts significantly more reluctant to infer from the terms of a grant of power that it was intended by Parliament to place close limits on the manner of its exercise. Clearly, it was in these terms that Lord Russell of Killowen C.J. was thinking when he considered in *Kruse v. Johnson*\(^27\) how the test of reasonableness ought to be conceived of:

If for instance, [bylaws] were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.'

But recent English decisions relating both to reasonableness and certainty have gone further than this, and appear now to be heading towards the situation where only a very narrow view of *ultra vires* will be taken by the courts in respect of the validity of all subordinate legislation.

Thus Diplock L.J. (as he then was) has stated that:

The various special grounds upon which subordinate legislation has sometimes been said to be *void* - for example because it is unreasonable; because it is uncertain; because it is repugnant to the general law or to some other statute - can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers contained by statute...if the courts can declare subordinate legislation to be invalid for

---

27. [1898] 2 Q.B. 91, at 99-100.
'uncertainty' as distinct from unenforceable, as in the case of a clause in a statute to which it is impossible to ascribe a meaning, this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislation authority to make changes in the existing law which are uncertain.28

There is, it is submitted, nothing new in this approach. But what is significant is the readiness of the courts to infer from grants of powers that various conditions were intended to govern their exercise. The Australian courts, as has been seen, have adopted the position of requiring some specific indication in the authorisation itself, at least so far as statutory regulations are concerned, and it would appear that the English courts may be moving towards this position with regard to all subordinate legislation.29

But New Zealand courts, by and large, appear to be still ready to imply into the grant of any bylaw making power the conditions that it be exercised reasonably and with certainty. The benevolent test at present operates probably more as a principle of construction of assistance in borderline cases, than as a substantive rule of law casting a severe limitation on powers of judicial review.30

3. **Other Factors Taken Into Account**

Because the courts have yet to adopt and apply consistently any one test of certainty, there has been a notable tendency to take into account any number of a wide range of different factors in determining whether or not a particular provision should fail for uncertainty. Because of the unpredictability of which of these factors will weigh most heavily with a particular judge, it is possible to regard them as no more than indecisive guidelines. They do, however, require brief consideration.

One factor which has weighed heavily with a number of judges from time to time has been the presence and proximity of sanctions laid down for breach of the legislative provision. The fact that heavy penalties are provided for is seen as an indication that Parliament could have intended only clear and certain legislation to bring them into effect.31

Or, to put it another way, the more severe the likely penalties, the more important it is to ensure that only clear language is used.32 On occasion this consideration has brought about

---


32. See e.g. Masterton Co-operative Dairy Co. Ltd v. Wairarapa Milk Board [1964] N.Z.L.R. 771, at 781 per Turner J.
comparisons with conditions subsequent in trusts and wills, whose breach would work a forfeiture. It will be recalled that the courts have insisted upon a high standard of certainty in that situation. But the comparison has not always been favourably received. 33 Similarly, the presence of sanctions has on occasion brought into consideration the maxim of interpretation that 'a man is not to be put in peril upon an ambiguity', 34 but only occasionally has this maxim been seen of significance in this context. 35 It is of more relevance to the construction of an instrument, than to questions surrounding its validity. 36

Another factor which has received consideration on occasion has been the extent to which a provision interferes with private rights. The Canadian courts in particular have insisted upon clear language as a condition precedent to the validity of a bylaw that purports to interfere substantially with private rights, and particularly rights of property. 37

---

33. See e.g. Fawcett Properties case (supra) at 662, per Lord Cohen, 677-678 per Lord Denning, 692-692 per Lord Jenkins.
35. See e.g. Fawcett Properties case (supra) at 668 per Lord Morton of Henryton; McEldowney v. Forde [1971] A.C. 632, at 653 per Lord Pearce.
36. See the comments of Lord Denning in the Fawcett Properties case (supra) at 677.
Other factors occasionally considered include the extent of other controls available over the legislative body, or over officials exercising powers under the subordinate legislation. The courts have also had regard to whether the subject matter of the provision was such as would enable its rewording in more specific terms, or whether, on the other hand, vagueness and uncertainty were inevitable and must be deemed to have been authorised by Parliament. If clearer wording would be possible, however, the courts have occasionally seen invalidating a bylaw as a means of imposing a sanction upon a local authority in order to ensure that laxity in drafting should not be encouraged.

Again, in determining whether or not a given provision is uncertain, the courts have placed weight on earlier decisions where similar wording has been found to be either certain or uncertain, although they have generally

38. See e.g. Kruse v. Johnson [1898] 2 Q.B. 91, at 109 per Mathew J.
39. See e.g. Duncan v. Lawless (1901) 3 G.L.R. 472, at 473.
41. See e.g. Kruse v. Johnson [1898] 2 Q.B. 91, at 112 per Mathew J.; Treasure and Co. v. Bermondsey Borough Council (1904) 68 J.P. 206, at 207 per Lord Alverstone C.J.
42. See e.g. Ex parte O'Sullivan; Re Craig (1944) 44 S.R. (N.S.W.) 219, at 296; Ex parte Zietsch; Re Craig (1944) 44 S.R.(N.S.W.) 360, at 366; Ex parte Callinan; Re Russell (1945) 45 S.R.(N.S.W.) 358.
43. See e.g. Bendixen v. Coleman (1943) 68 C.L.R. 401, at 416, 421.
recognised that meanings may vary considerably from context to context. Also, in some cases, the courts have considered whether ascertainment of a provision's meaning has caused any difficulty to citizens in the past. It appears too that where the alleged uncertainty arises not in a substantive prohibition itself, but in a section of a provision which seeks to relax otherwise strict standards, the courts will be less reluctant to find that the uncertainty should induce invalidity. It is possible also that there will be reluctance to find a bylaw void for uncertainty where the local authority concerned is not a party to the proceedings before the court.

One final factor which has occasionally been seen as relevant to the issue of certainty calls for further comment, however. This is the question of the facts or merits of the case before the court. It has occasionally been suggested that the fact that the party complaining of the uncertainty has not himself been misled by it is of relevance to the issue

---

44. See e.g. R. v. Broad [1915] A.C. 1110; Fawcett Properties Ltd v. Buckingham County Council [1959] Ch. 543, at 568 per Lord Evershed M.R. And cf. Attorney-General v. Denby [1925] Ch. 596, at 614, where an experienced architect's evidence of difficulty in applying a bylaw was accepted by the Court.


46. See Townsend (Builders) Ltd v. Cinema News and Property Management Ltd [1959] 1 All E.R. 7, at 10 per Lord Evershed M.R.
of validity. This is a suggestion that must be viewed with considerable misgiving. In a number of proceedings it will be necessary to determine the validity of bylaws with no disputed fact situation. Under section 12 of the Bylaws Act 1910, for example, provision is made for the quashing of invalid bylaws on the motion of any person, thus providing a means of direct attack.

It has been the long standing practice of the courts to determine the validity of legislative instruments independently of any fact situation that may have arisen under them. The view is that the validity of a legislative instrument should not be dependent upon the facts of a particular case. This attitude is reflected in the judgement of McCarthy J. in Masterton Co-operative Dairy Co. Ltd v. Wairarapa Milk Board, where the learned Judge stated:

I do not intend to set out the facts of the case at any length at all, for the question of validity of the clause must be determined independently of those facts.

There can be no authority for the proposition that the validity of such a provision is dependent upon whether the party alleging the uncertainty was himself misled by it.

---


If there were, it would involve that validity would vary from case to case. As with private law instruments, it can be only the application, and not the validity of subordinate legislation which is in any way dependent upon the facts of a case arising under it.

4. The Effect of Different Types of Uncertainty

It will be recalled that in Part One of this work the concept of uncertainty was divided into a number of component parts for the purpose of analysis. Uncertainty was found to arise in the case of meaningless provisions, ambiguity, inaccuracies, omissions, from delegation or reservation, and from vagueness. In Part Two, the manner in which the courts coped with these types of uncertainty in some private law instruments was considered.

It is proposed now to examine the incidence of each type of uncertainty in public law instruments, and to compare the approach of the courts in resolving the uncertainty or considering the validity of the instrument, with the approaches already examined in the private law sphere.

(a) Meaningless provisions

As with private law, "meaninglessness" at public law is an essentially relative matter. Given that there exist a number of checks on subordinate legislation, particularly in the case of legislation of a representative body, one might expect that seldom would a court of law feel bound to pronounce a provision meaningless or unintelligible. On those
occasions on which this has happened, it has generally been in relation to legislation that is contradictory or confused. Thus, in an early Australian case, Hensman J. of the Western Australian Supreme Court stated of a bylaw:

Also it is bad because it is meaningless in this sense, that it has no exact meaning, which any reasonable person can understand, even after considerable study.

Less kind were the words, nearly fifty years later, of Jordan C.J. who when speaking of a Price Control Order stated:

Clause 7 falls ludicrously short of enabling those to whom it is addressed to know the nature and extent of the legal duty which it imposes upon them, and in my opinion it is therefore invalid. I find it difficult to believe how any responsible person could have promulgated such an impractical, unintelligible jumble as a price-fixing measure.

With contracts and wills the courts have occasionally taken the opportunity of labelling a provision 'meaningless' so as to enable it to be severed from the remainder of the instrument. This step has seldom proved necessary in public law however, since merely holding a provision invalid - as uncertain in a less emotional sense than is indicated by meaninglessness - need not render the remainder of a piece of legislation invalid. It is probably true to say that clauses of price orders, bylaws, regulations and planning

50. Healy v. Dunne (supra).
51. In Ex parte Ryan; Re Bellemore (1945) 46 S.R. (N.S.W.) 152, at 157.
conditions are more readily severable one from the other, than maybe the case with, for example, contracts, where clauses may, since they are dealing primarily with the one transaction, be closely interrelated and interdependent.

The New Zealand case of Brown v. McInnes\(^{52}\) however, affords an illustration of a clause of a bylaw not being severable. Four of the bylaw's paragraphs were rendered, by the fifth paragraph, subject to the provisions of that paragraph. Williams J. found that if that paragraph were given a literal meaning it would render the whole bylaw absurd and unreasonable, but that if it were not, then it was unintelligible. It could not be severed however, since the effect of the other four paragraphs depended upon the construction placed on the fifth.

(b) Ambiguities

It may be recalled that in this work the expression 'ambiguous' is employed in its more narrow sense - that of 'having two or more distinctly different meanings.' It has been seen that where ambiguities occur in contracts, trusts and wills, the courts go to considerable lengths to resolve them, taking into account not only contextual considerations, but also extrinsic evidence, and possibly even direct evidence of intention.\(^{53}\) Only where no evidence of this

---

52. (1896) 15 N.Z.L.R. 256.
53. See discussion at pp. 65, 92.
nature is available is it likely that an ambiguous provision will fail. In wills especially, use may be made of a number of 'last resort' canons of construction, so that even when there is only the slightest reason for preferring one construction to another, the choice of that construction is likely to be seen as being at least closer to the testator's wishes than invalidity.

But the effects of invalidity at public law are somewhat different. Unlike a testator, a local authority whose bylaw is held to be ambiguous and void is able to proceed to reword it, and to promulgate new legislation. Unlike a party to a contract, it is able to do this unilaterally. While this process may be of some inconvenience to the local authority, it is unlikely to interfere seriously with rights of third parties.

So that it is with these considerations in mind that the courts approach ambiguities in public law instruments, and it appears that the result in any case is likely to depend to a significant extent on the weight placed on those factors by the judge.

In resolving ambiguities, the court is more limited in the public law situation in the evidence it may receive. Clearly, where the ambiguity is latent, evidence may be received to establish its existence. In the absence of

such evidence, a court may be most reluctant to find that any ambiguity exists. But the extent to which a court may legitimately go beyond purely contextual considerations in resolving ambiguities is unclear. It has been suggested for example, that evidence of trade usage may be relied on in resolving ambiguities. But the difficulties inherent in such a course have been indicated in the Australian High Court:

If evidence of trade meaning were held to remove uncertainty in the cases in which such evidence was given, then presumably the conclusion in each of those cases would be that the order is valid. If, however, in other cases no such evidence was given, then, upon the basis that such evidence was necessary to remove uncertainty, in those cases the order would be held to be invalid. But the same order cannot be held by the same court to be certain and valid in one case, and also to be uncertain and invalid in another case. These considerations suggest that evidence of trade meaning is not relevant to the certainty, but that it may perhaps be relevant to the application of the order.

The point is that the validity of a provision in a public law instrument, unlike a provision of a private law instrument, is liable to be tested on a number of occasions in the same or in different courts, simply because of its likely widespread application. In these circumstances, it would be unwise for a court to rely too heavily on evidence available in a particular case as to the alleged uncertainty.

55. See e.g. Ex parte Ryan; Re Bowrey (1957) 57 S.R. (N.S.W.) 438.
56. Bendixen v. Coleman (1943) 68 C.L.R. 401, at 415 per Latham L.J.
Instead, for the sake of consistency it is preferable that the resolution of ambiguity be on the basis of largely internal considerations.

Thus the courts have tended to resolve ambiguities by reference to their context, and also through reference to particular canons of construction. If one construction would tend to render a bylaw outside power or otherwise invalid, the other will be adopted, and the ambiguity thereby resolved.  

Similarly, if the provision is of a penal nature, the construction which favours the accused person will be more readily adopted.

The courts of this country, however, have shown a marked reluctance to go very far in resolving ambiguous expressions, and have been more willing than in the case of private law instruments to hold bylaws void. This attitude has been summed up by one judge in the following terms:

The present is a case in which there are strong reasons in favour of two interpretations as to the extent to which the bylaw is to operate. In the case of a statute, deed, or a will, the ambiguity would have to be resolved if possible, but in the case of a bylaw, according to the principles stated, an ambiguity in the part sought to be enforced is fatal to its validity.

---


58. See e.g. Richardson v. Austin (1911) 12 C.L.R. 463, at 474; Ingham v. His Lee (1912) 15 C.L.R. 267, at 271; Ex parte Zietsch; Re Craig (1944) 44 S.R.(N.S.W.) 360.

But the extent to which the courts in future will feel bound to apply the id certum reddi potest maxim and strive to resolve ambiguous bylaws and other public law instruments is dependent largely upon the test for certainty that they elect to adopt. Only under a layman's test for certainty, it is submitted, would the above passage be regarded as accurate today.

(c) Inaccuracies

The degree of formality that surrounds the passage and promulgation of subordinate legislation usually involves that close scrutiny is applied, so that inaccuracies have little chance of passing unnoticed. The occasional case has centred around ungrammatical and infelicitous wording in bylaws that may or may not have been the result of inaccuracy, but by and large the courts have not been bothered by this defect.

On one occasion, however, the Magistrates' Court in this country has had cause to comment upon an error in numbering bylaws in the official printed copy, and upon the

59. Cont.
the 'owner or occupier' of land, but failed to specify which of these was liable. Similar examples are afforded by Brown v. McInnes (1896) 15 N.Z.L.R. 256; Hunter v. McLean (1907) 27 N.Z.L.R. 231; Waldegrave v. Mayor etc. of Palmerston North (1909) 29 N.Z.L.R. 223; and R. v. Broad [1915] A.C. 1110.

60. See e.g. Koetsvald v. Patrick (1903) 29 V.L.R. 152; Waldegrave v. Mayor etc. of Palmerston North (supra).
miscitation of an authorising statute. The learned Magistrate stated:

I could perhaps agree with counsel for the Borough, that the first appearance of number 3205 is in misprint and should read 3203. These By-laws however, have the authority of a Statute and should be correct, and in my view the fact that there are two By-laws numbered 3205 in the sealed copy produced to the Court make [sic] both By-laws invalid for uncertainty.

With respect, however, on this occasion the ut res magis maxim might well have applied since the inaccuracy went not to the substance of the bylaw, but only to its form.

(d) Omissions

Again, the checks to which subordinate legislation is normally subjected tend to ensure that no patent physical omissions will occur. In private law, it has been seen that the courts may be prepared to imply terms when an instrument allegedly omits some essential factor. It is not uncommon, for example, for the courts to imply the necessary terms as to settlement in land transactions, so long as the agreement of the parties provides the essentials of the contract. But it has been said that the court must be able to 'collect from the four corners of the document that something has been omitted and, further, collect with sufficient precision the nature of the omission.'

61. Carterton Borough Council v. Harman, Magistrates' Court, Masterton, C.R. 882, 883/70. (Unreported), at p.5 of decision of Rennie S.M.
62. See discussion at pp. 59-61 supra.
63. Re Whitrick, Sutcliffe v. Sutcliffe [1957] 1 W.L.R. at 887 per Jenkins L.J.
The courts have demonstrated a reluctance to imply terms into subordinate legislation in order to render it more certain, particularly when approaching the matter under the 'layman' test, which demands that the provision physically contain adequate information as to the obligations it imposes, in a manner that can be understood without refined analysis. But generally, the problems raised through possible omissions are considered in terms of their effect - normally vagueness - rather than their cause. The manner in which vagueness is approached by the courts will receive consideration shortly.

(e) Delegation and reservation

It is by no means unusual for public law instruments to purport to reserve to the legislative body, or to delegate to some other person or body, various functions and powers under the instrument. Indeed, the sheer inability of the draftsman to foresee all possible fact situations and make provision for them frequently demands that flexibility be provided by such a form of legislating. But objections have been voiced on numerous occasions that the certain element of such legislation diminishes as the discretionary powers become more significant. In this situation, it may

be alleged that the instrument becomes uncertain, in that it fails to contain adequate information as to the duties of those bound by it.

It may be recalled that similar objections of uncertainty arise in this context with relation to private law instruments. The issues that arise in contract law are different, however, for there the question becomes one of whether there is a concluded agreement between the parties. Provided that test is met, there would appear no objection to delegating to one party or to a third party the fixing of non-agreed terms. Should parties wish to contract in this way, it is not the function of the court to prevent them, for that would be unnecessary interference with freedom of contract. 65

But different considerations prevail where persons making legal instruments do so under statutory authorisation, and desire that the rights conferred by statute be enforced by the courts. Thus, the courts have held that the power conferred by the Wills Act 1837 to devise, bequeath, or dispose of property, is a personal power that cannot be wholly delegated. 66 Unless persons or objects to be benefitted under a will are indicated with sufficient certainty, it is likely that the gift will fail. The

65. See discussion at pp. 70-72 supra.
66. See e.g. Houston v. Burns [1918] A.C. 342, at 343; Re Hughes, Hughes v. Footner [1921] 2 Ch. 208, at 212.
question of certainty then goes to establishing the extent of the delegation, but does not appear to be in itself the test of validity.

At public law, on the other hand, each test is of independent significance. The courts have long acted to prevent extensive delegations of power, (and in particular legislative power), applying the maxim delegatus non potest delegare quite independently of questions of certainty. In New Zealand, probably to a greater extent than in other jurisdictions, the courts have been slow to infer from the terms in which a power is conferred that persons other than those designated might validly exercise it. Where, however, the power is not delegated wholly, but only partially, the courts are more ready to uphold the delegation, particularly when considerations upon which the subdelegate must base his actions are clearly laid down.

It can be seen then that the issue is closely related to the issue of certainty, since the more closely the subdelegate's area of movement is defined, the more adequately


68. See e.g. Secretary for Law v. Tenalom [1965-1966] P. & N.G.R. 414, at 427, where Ollerenshaw J. claims to have found no general authoritative recognition or adoption of the delegatus non potest maxim outside New Zealand.

will there be provided information for the citizen on the extent of the legislation. Thus, in an early New Zealand case, a regulation was held uncertain in its requirement that dairy farmers should keep their milking sheds lighted, ventilated and cleaned to the satisfaction of the local Inspector of Milk and Dairies, since no indication was provided of what standards would satisfy the Inspector. The issue of delegation was apparently not discussed.

The legislation that was introduced early this century, and whose history has already been discussed, was effective in placing considerable restrictions upon the extent to which the courts could review subordinate legislation of this type.

Section 390(b) of the Municipal Corporations Act 1954 now authorises wide reservations of power by bylaw to the Council itself, while Section 390(a) authorises the reservation of somewhat narrower powers to 'the Council, or any officer thereof, or other person'. Moreover section 13 Bylaws Act 1910 authorises wide powers of reservation of power in bylaws to the Council, its officer or servant or any other person, but adds a proviso excluding protection where the discretion left is so great as to be unreasonable.

71. See pp.172-173 supra.
72. And see s.405 Counties Act 1956.
The two sections have received occasional consideration by the courts. In *Munt Cottrell & Co. v. Doyle*\(^73\) it was argued that a bylaw was bad for vagueness and uncertainty in its reservation of power. In delivering the judgement of the Supreme Court,\(^74\) Cooper J. considered that without the protection of the new section the bylaw would have been defective. He stated:

> These powers are very wide, and may, if not fairly administered, result in hardship to particular persons. They give to Municipal Councils a power of enacting by resolution matters affecting the public which previously could only have been regulated by bylaws duly made with the publicity and safeguards required under the former Act; but the Legislature has thought it desirable to clothe Municipal Councils with this additional authority, and it is our duty to construe the statute according to its true intent and meaning.\(^75\)

The effect of the two sections on the common law rules relating to delegation has been considered elsewhere\(^76\) but it appears that their effect on the certainty test in this context has been rather more significant. They have operated to prevent the courts from making the inference in relation to grants of legislative power that Parliament

---

73. *(1904)* 24 N.Z.L.R. 417.
74. Stout C.J., Cooper and Chapman J.J.
75. *Supra*, at 425.
still intended certainty to govern its exercise in this
manner. The question has now become not one of certainty at
all but of whether such legislation is authorised either by
the particular grant of power in question - for example, if
a bylaw purports to impose a prohibition coupled with a
dispensing power under an authorisation to regulate? - or
by the above sections of the Municipal Corporations, Counties
and Bylaws Acts.78

It should be noted, however, that the sections protect
only bylaws, and not orders, special orders, resolutions or
notices. But on no occasion does any such instrument appear
to have been reviewed by the Supreme Court for uncertainty
arising from the delegation or reservation or power.

Mention should be made too of section 2(2) Statutes
Amendment Act 1945, whose history and effect were considered
by the Court of Appeal in Hawke's Bay Raw Milk Producers
Co-operative Co. Ltd v. N.Z. Milk Board.79 That section
provides:

77. See e.g. Hazeldon v. McAra [1948] N.Z.L.R. 1087;

78. See e.g. Munt Cottrell and Co. Ltd v. Doyle (1904) 24
N.Z.L.R. 417; Meredith v. Whitehead [1918] N.Z.L.R.
1041; Bremner v. Ruddenklan [1919] N.Z.L.R. 444;
Christchurch City [1935] N.Z.L.R. 64; Hanna v. Auckland

judgement of the Court (Gresson P., Cleary & McGregor J.J.).
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.

It is not possible in this work to consider the possible effects of the subsection on the common law rules relating to delegation. 80 It does however, appear to prevent objections of uncertainty that might arise from the reservation of discretionary power, from being raised against statutory regulations.

The courts of this country appear no longer to regard uncertainty per se as going to validity in cases of reservation or delegation of discretionary power, although it may possibly still go to the issue of whether a particular discretion is, under section 13(2) Bylaws Act 1910, so great as to be unreasonable. 81

In some other jurisdictions, however, it is possible that there has been no similar legislative intervention. The Reports reveal the occasional and isolated instance of certainty having been accepted as a factor of validity in this context. 82

80. The reader is referred to the works mentioned in footnote 76 supra, and also to C. C. Aikman, 'Subdelegation of the Legislative Power' (1960) 3 V.U.W.L.R. 69, at 95-105.
(f) Vagueness

It is seldom that mere vagueness will deter the courts from construing provision in contracts, trusts, and wills. Again, however vague the provision may be, the courts approach its construction with the purpose of distilling from it what meaning is possible, determined to fall back on invalidity only in the case of unintelligibility.

In public law, there is evidence again of confusion between adopting that approach, and in recognising that the certainty test may provide an alternative to refined analysis. What tends to determine whether or not vagueness is fatal to the validity of a provision in a public law instrument is the weight placed by the judge upon the various factors outlined earlier in this chapter. By and large, however, the certainty test has meant that vagueness that would in a contract or a will be construed by the court, may be fatal to a bylaw.

The provisions that the courts have demonstrated least willingness to construe in public law instruments are those that contain high order abstractions. They may for example call for a value judgement on the part of those bound to comply. A number of Canadian cases relating to 'early closing' bylaws afford examples of this. In one case,

82. Cont.

Re Bunce and Town of Cobourg 83 such a bylaw provided that

A shop which specializes in the sale by retail of small manufactured articles of small value in personal or household adornment...

might remain open after normal closing times. In addition to its finding that the bylaw was discriminatory, the Ontario Court of Appeal found the provision uncertain, asking

How small is 'small' as that word qualifies both the size of the article and its value? 84

Similarly, in City of Dartmouth v. S.S. Kresge Co. Ltd 85 and Marilyn Investments Ltd v. Rural Municipality of Assiniboia 86 a bylaw that excluded shops whose 'principal business carried on' was one of eight businesses specified, and a bylaw that required shops to remain closed until 'normal morning hours of opening' respectively were held too uncertain to be valid.

Another Canadian example is afforded by Re Surrey Zoning Bylaw 1954 No.1291 87 where a bylaw authorised the establishment of utility transmission lines, so long as they would not 'adversely affect the orderly development' of the area through which they passed. Again, vagueness was fatal to its validity.

Vagueness has but occasionally served to invalidate

---

bylaws in this country however. It was cited as a ground of invalidity by Sir Michael Myers C.J. in Page v. Harvey (along with unreasonableness and repugnancy) in respect of a bylaw that prohibited the presence of liquor in any public hall 'at or during any function therein of which dancing forms part'. Similarly McGregor J. in Martin v. Smith took the view that a bylaw that rendered it an offence to 'cause suffer or permit any damage or injury' to 'any prepared or cultivated grass plot' might be bad for vagueness. Again, however, the bylaw was found in addition to be repugnant and unreasonable.

By and large, the New Zealand courts have attempted to construe vague bylaws, and there appears only one occasion on which vagueness along has been held to induce invalidity. In Masterton Co-operative Dairy Co. Ltd v. Wairarapa Milk Board the New Zealand Court of Appeal considered a bylaw of the defendant Board that required a respsapplication for a milk licence from companies that experienced a change in

88. [1939] N.Z.L.R. 325. The bylaw still, however, appears in the Dunedin City Bylaws.
their 'effective management and control'. Hutchison J. in the Supreme Court was prepared to construe the bylaw, and held it sufficiently certain. But the Court of Appeal was unanimous in holding the bylaw too vague, in that it failed to state the criteria by which the change might be measured. McCarthy J. stated:

...there are obviously a great number of companies where it is difficult, if not impossible, to say where effective management and control of the business lies by virtue of the shareholding, except perhaps to observe, in a general way, that it must lie ultimately in all the shareholders called together in a body.

His Honour considered the difficulties inherent in applying this bylaw with certainty to many companies to be too substantial for the bylaw to be valid.

The Australian courts too have preferred generally to adopt the course of construing allegedly vague provisions so as to render them certain. Thus phrases such as 'substantially identical' and 'business of a class normally carried on in a shop' have been held on contextual considerations to be sufficiently certain. But where the context fails to provide adequate guidance, the courts there,

---

92. Ibid., 774.
93. Ibid., at 778 per North P., 780-781 per Turner J., 783 per McCarthy J.
94. Ibid., 783.
95. Fraser Henlein's Pty. Ltd v. Cody (1945) 70 C.L.R. 100, at 114.
too, have been prepared to hold subordinate legislation
certain and void. Thus a requirement to let a dwelling
house at 'a reasonable rental' has been held void,97 while on
the other hand, an exemption from a prohibition imposed by
a regulation arising where a defendant supplied 'a reasonable
quantity of the declared goods' or made 'reasonable provision
for private consumption' has been held valid, the concept of
reasonableness apparently acquiring sufficient flavour from
its context.98

But in adopting the narrow view of *ultra vires*, the
Australian courts have insisted that in the exercise of such
powers as to 'fix', 'specify' or 'define' prices or other
matters, resort cannot be had to purely subjective criteria.99
A vague provision purportedly promulgated under such a
power will thus be open to direct challenge in respect of
its vagueness.100

It will be recalled that one factor that the courts
have on occasion taken into account in determining the
extent to which the validity of subordinate legislation
should be governed by considerations of certainty has been

97. *Ex parte Thompson*; *Re Clarke* (1945) 45 S.R.(N.S.W.)
193, at 198.
98. *Ex parte Callinan*; *Re Russell* (1945) 45 S.R.(N.S.W.)
358, at 362. Another important factor there however, was
that the same Regulation had previously been the subject
of deliberation in the High Court, where no objection had
been raised to its validity.
99. See e.g. *King Gee Clothing Pty. Co. Ltd v. Commonwealth*
(1945) 71 C.L.R. 184; *Cann's Pty. Ltd v. The Commonwealth*
100. See e.g. *Trief v. Charles Parsons & Co. Ltd* (1946) 46 S.R.
(N.S.W.) 265; *Brudenell v. Nestle Co. (Aust.) Ltd* [1971]
V.R. 225.
the practicability of insisting upon greater certainty. Where the subject matter of a provision is incapable of close definition the courts have accordingly tended to allow a greater degree of vagueness. In particular has this been so when questions of aesthetics, as might arise under town planning legislation, are involved. 101

5. Conclusions

The most striking feature of the certainty test in public law is the wide variation in its application. It is not surprising perhaps, given the subjective nature of any assessment of degrees of uncertainty, that different judges in the one case should hold quite different views of its effect in that case. But it is another matter when different judges adopt quite different basic approaches to the problem. It is unfortunate that the courts of this country have not yet found it necessary to consider which approach ought to be consistently adopted, and what other considerations ought to be balanced.

To this writer the present situation in public law represents a clumsy compromise between the general private law approach of regarding invalidity as a measure of the last resort, and the original rigorous public law test propounded

The types of uncertainty that cause most difficulty in public law are vagueness and ambiguity. Uncertainty arising from delegation and reservation, and from so-called 'meaningless' provisions seems better regarded in terms of power, rather than under the certainty test. One may perhaps be forgiven too for the assumption that inaccuracies and omissions, as a result of other controls over the exercise of subordinate legislative powers, do not represent a serious problem.

Vagueness and ambiguity, however, are inherent in spoken and written language. Although careful drafting may serve to minimise the risk of confusion, it is inevitable that in any legislative provision both vagueness and ambiguity will be present to some degree. In the context of a statute there is no practical choice but to construe the defective provision. Whether or not the alternative course available in the case of some subordinate legislation is logical, and capable of sufficiently objective application is a difficult question to answer. An attempt is made in the following chapter.
PART FOUR

CONCLUSIONS
1. Certainty and Judicial Attitudes

It is clear that in private law at least, the degree of certainty that the courts will require in any given provision is dependent largely upon preconceived attitudes towards and policies in respect of the type of provision concerned. So far as contract is concerned, judicial policy is to maintain freedom of contract, and not to place unnecessary restrictions upon the manner in which persons desiring to bind one another may do so. This involves that the court must strive to uphold contracts notwithstanding uncertainties arising from their wording, and that as a result uncertainty will seldom have the result of invalidating concluded contracts.

In the case of wills, the inability of a testator to make a fresh document in the event of his first being held invalid, has the result of causing the courts to strive to an even greater extent, should that be possible, to uphold testamentary instruments. But there are a number of formal restrictions imposed on persons desiring to make wills by statute. Uncertainty may therefore be relevant to whether the will making power conferred by the Wills Act 1837 has been properly exercised. Uncertainty in the objects of the testator's bounty may mean that the testamentary power has been delegated to too great an extent. Similar
difficulties arise in the case of trusts, where it was thought for some years that the principle that trusts should be capable of execution by the court in the event of trustees defaulting, and that the court could execute it only by ordering equal distribution demanded that every member of a class of objects intended to be benefitted under a trust power should be readily ascertainable. But with the realisation of the unsound basis of this reasoning, the degree of uncertainty required was altered, so that now a significantly less degree of certainty will not necessarily spell invalidity.

It is in the context of the rules relating to certainty in conditions subsequent, on the one hand, and charitable gifts on the other, however, that the dependence of the certainty test upon judicial attitudes arising from other factors becomes most apparent. The courts insist upon a high degree of certainty in conditions subsequent because of the harsh or unconscionable way in which they may work. Their insistence is tempered also by the fact that many such clauses are distasteful, operating to impose strict and often unreasonable control over the behaviour of beneficiaries, whose divergence from the narrow path prescribed for them is liable to result in the forfeiture of the gift. The development of this attitude has been assisted by the fact that the failure of a condition subsequent, unlike that of a condition precedent, does not involve the failure of the gift. It may be argued that this effect is likely to be at least closer to
the settlor's or testator's intention than the effect of invalidity of any other part of his instrument.

It is the longstanding benevolent judicial attitude towards charities, too, which dictates the requirements of certainty in that context. A gift for charity will never fail for uncertainty, for the courts will always ensure that charity will benefit, even although it may be necessary for the Attorney-General representing the Crown as parens patriae to intervene and propound a scheme for the carrying out of the trust.

In all of the instances discussed above, judicial attitudes towards specific types of provisions are clear, and in some cases have remained unaltered for centuries. It is submitted that the primary reason for the divergence in application of the certainty test to subordinate legislation is the lack of any such clear and longstanding attitudes. In the case of bylaws for example, judicial attitudes are clearly ambiguous. On the one hand there is the view that the courts, being vested with inherent powers over the legislation of local bodies, have a duty to ensure that those bodies do not stray outside the powers conferred upon them. The role of the courts is seen as one of protecting the private rights of citizens by ensuring that abuse or excess of power will lead inevitably to invalidity. But on the other hand there is the benevolent view - that the role of the court is to uphold bylaws unless it is quite impossible to do so. Under this view the certainty test
becomes equated with that applied in the case of contracts — that only where a provision is incapable of being attributed a sensible meaning will it fail. In all other cases the requirement is that the language be so construed as to render it certain, and within power.

The conflict between those two approaches to the question of the validity of bylaws generally has never been satisfactorily resolved in this country. Its resolution in England has been in favour of the latter approach, so that the courts there are now consistent in requiring that only unreasonableness or uncertainty of an overwhelming degree will render a bylaw outside power. A similar result pertains in Australia.

Only when a consistent approach to bylaw validity generally is adopted in this country, it is submitted, is it likely that the certainty test will lose its present aura of being a subjective test of validity, and its application to any bylaw cease to be at the whim of the individual judge.

2. Some Anomalies of the Test in Public Law

If certainty as a test of validity is to retain any credibility, it is clear that rationalisation of its mode and extent of operation is necessary. It is undeniable that there is a number of anomalies that accompany the test as it has been applied in public law. There is for example the fact that it is a test which is applicable to bylaws yet inapplicable to statutes. Ought the effect of uncertain language in the two types of legislation to be quite different? There are a number of
possible distinctions between the two which might be seen as justifying the different effects. Not the least of these derives from the skill of the Parliamentary draftsman which is seldom capable of being equalled with consistency by local body legal advisers.

But the different effects of uncertainty in the two types of legislation lead inevitably to anomalies as was demonstrated clearly in Fawcett Properties Ltd v. Buckingham County Council.¹ In that case, it may be recalled, the wording of a planning condition that was alleged to be uncertain had been adopted verbatim by the local authority from a statute. The basic issue was whether the validity of the condition should be governed by the principles relating to bylaws, or the principles relating to statutes. The divergence in the approaches adopted in both the Court of Appeal and the House of Lords demonstrates one anomaly of the test.

A similar instance might be found in the case where a contract incorporates into it the terms of a bylaw. The same provision would then be subject to different tests of validity depending upon whether it was tested in the context of the contract, or of the bylaw. If found invalid as a bylaw, it is likely that it would continue to operate as a

term of the contract, unless the uncertainty were so great as to induce invalidity in that context as well.\(^2\)

In its original form the certainty test required of bylaws that they contain adequate information as to the duties of those bound by them, and in such a form as might be readily intelligible to those people. It might be argued that such a requirement is anomalous today. It could be said, for example, that the requirement springs from a nineteenth century legal philosophy that saw law as a series of commands backed by sanctions, so that compliance with the law required a knowledge of its provisions in order that behaviour might be moulded so as to avoid penalty. As H.L.A. Hart so clearly demonstrated, however, this is not a viable concept of law.\(^3\) Rarely are individuals aware of the precise wording and details of laws affecting them. Is there then any merit in requiring that that wording should be in a form readily understandable to the layman?

It is respectfully submitted that there is. Particularly is this so where the bylaw is concerned with technical questions, and strict compliance with prescribed standards is necessary to avoid penalty. The bylaws relating to drainage

---

2. See e.g. Lindsay v. Union Steam Ship Co. of New Zealand Ltd [1960] N.Z.L.R. 486, at 500-502 per F. B. Adams J. In that case a bylaw void for unreasonableness was held nonetheless to bind parties who had incorporated it into their contract.

and sewage, and building bylaws, for example, must serve as specific guides to plumbers, engineers, architects and builders planning construction work. 4 It is in this context a salutary principle that vagueness and ambiguity should be avoided wherever possible, despite the fact that the requirement of obtaining a building permit may serve as the buffer on some occasions between noncompliance and the imposition of sanctions.

But whether the application by the courts of a certainty test to subordinate legislation is the best solution in all the circumstances is a different matter.

3. The Future of the Test

It is proposed to study this question from two different points of view. First, there is the likely future of the test should its development continue in the hands of the courts. Secondly, there is the question of legislative intervention and the possible effect this might have.

(a) Judicial development

It was the unsound history of the test, together with the subjectivity that tended to rule its application that led the Australian High Court to reject it as an independent test of validity of subordinate legislation in 1945. Its future

4. Strenuous efforts are now being made by the New Zealand Standards Association to persuade territorial local authorities to adopt as a bylaw the Standard Building Code (N.Z.S. 1900) promulgated by that body under the Standards Act 1965.
in this country may be dependent upon the extent to which these factors are seen in coming years as reflecting adversely upon its status. It must be necessary in the near future for the Supreme Court to give some thought to the relationship between the tests of certainty and reasonableness and repugnancy, and the ultra vires doctrine, and this will bear upon the future of the certainty test. The inconsistencies and anomalies noted in the application of the test in this country may serve as a justification for the courts to adopt the Australian approach. This course, it is submitted, is open in the case of statutory instruments. But for such an approach to be adopted in respect of all subordinate legislation would require a re-evaluation and probably the overruling of a number of Supreme Court, and even Court of Appeal decisions, including that of 1964 in *Masterton Co-operative Dairy Co. Ltd v. Wairarapa Milk Board.* The presence of that decision, it is submitted, renders it unlikely that so radical a course would be adopted.

If the test is to remain, however, it will be necessary to give some consideration to the degree of uncertainty that should operate to invalidate bylaws. In private law, as has been seen, the question of degree varies considerably depending upon the type of provision involved. Thus, the courts might feel able in future bylaw cases, to be guided by the cases relating to defeasance clauses in trusts and

---

wills, or those relating to the interpretation of contracts. It is submitted, however, that neither course is likely to be fully acceptable. A number of judges have already rejected the defeasance clause analogy,\(^6\) while their acceptance of the latter course would involve the denial of the existence of a certainty test.

Given the unsatisfactory and subjective nature of the application and the test at present, it appears not unlikely that its operation in the bylaw context will in future be tempered to a greater extent by the presence of the benevolence test. While the New Zealand courts have maintained for some time that only in limited situations should the validity bylaws be measured by the yardstick of benevolence, it is doubtful if that attitude can remain uninfluenced by recent trends in England.\(^7\) There are signs already of the acceptance of the 'Wednesbury umbrella' approach by New Zealand courts.\(^8\) If this process is continued, there can be little doubt that the onus upon any person seeking to upset a bylaw for uncertainty will become increasingly heavy.

---


The extension of such a test to statutory instruments was expressly left open by Hardie Boys J. in *Strawbridge v. Simeon*, so that a clear and decisive step would be needed to establish the test here. But should the certainty test’s application to bylaws become restricted in the manner described above, it is, it is submitted, unlikely to receive ready acceptance as a yardstick of validity of statutory instruments, except to the extent of its application by the Australian courts.

(b) *Legislative intervention*

It will be recalled that statutory abolition of the certainty test was proposed in this country in 1910, but that the proposal was later dropped. It is submitted that legislation bearing directly on the certainty test is not warranted at this stage. Its confused and unsatisfactory condition renders it a more likely object of judicial reform, than might be the case had its application come to be determined according to a set of hard and fast rules. As Lord Wilberforce observed recently, the common law thrives on ambiguity if sometimes unconsciously, enabling its development to accord with future social needs.

10. This is assuming that the decision of Wild C.J. in *Lee v. Marine Department*, Supreme Court, Hamilton, 1970 (unreported) is accorded a narrow interpretation or overlooked in later cases.
But while direct interference with the extent of judicial control may be undesirable, it is submitted that strong reasons exist for closer controls of a political or other indirect type over the wording of subordinate legislation. It is conceded that from a political point of view, closer non-judicial control over bylaws would not be easy to achieve. The extent to which local bodies value their autonomy and the jealousy with which they strive to protect is well enough known.

The Bylaws Act 1910 provides machinery whereby bylaw making authorities are enabled to have bylaws confirmed by the Minister of Internal Affairs. The limitation that such confirmation shall have no bearing upon issues of validity arising otherwise than from irregularities in adoption procedure, and the optional nature of the provisions, however, have meant that local authorities have only occasionally taken advantage of it.

A possible answer to the present problem would be to extend the protection extended by the Minister's certificate in such a manner as to exclude all attacks, including that based on certainty, upon the validity of bylaws, while retaining the optional machinery. But it is highly undesirable that judicial review ought to be excluded in

12. Sections 3, 4, 5, 6 and 7.
13. See s.8.
such a manner, and it is clear that the courts would strive to avoid the effect of such privative legislation. 14

The solution which suggests itself as most desirable to this writer is the imposition of a requirement that bylaws first receive the approval of a competent and skilled drafting body, whose function it would be to ensure that the standard of drafting was in line with that of statutory and direct subordinate legislation. The Parliamentary Law Drafting Office would appear to be an ideal body for this purpose. While the political implications of such a move may be thought to be strictly speaking outside the ambit of this work, two practical advantages call for brief comment. The first is the welcome possibility of the expenditure of less public money in the defence of bylaws in the courts. The second is the prospect of achieving a measure of uniformity in local body legislation that is far from being apparent today. It is noteworthy that all bylaws of English local authorities require Ministerial approval, a requirement that is less frequently imposed by the legislature in this country. One writer has observed that such approval is in England rarely extended to bylaws that fail to follow the model bylaws prepared by the supervising government department. 15

14. It would be most difficult to effect a clause excluding review on questions of vires: see e.g. Anisminic v. Foreign Compensation Commission [1969] 2 A.C. 147.
Given that the original rationale behind the test of certainty was that bylaws should be clear and free from ambiguity, affording complete information to those bound by them, it is submitted that such a result may well be more effectively achieved through the method outlined above, than through the occasional and unpredictable attack in the courts. This is not to imply, however, that the judicial test should be excluded. It was the presence of practical controls over bylaws in England that led Lord Russell of Killowen C.J. in *Kruse v. Johnson* 16 to propose the benevolent approach to bylaw validity in that country, and the absence of similar controls in New Zealand that led the Supreme Court here to limit the extent of the benevolent test.

In the event of provision being made for closer checking of local subordinate legislation by a central body, it is likely that objections of uncertainty would rapidly come to be regarded as subject to the full rigour of the benevolent test in this country as well.

There is clearly a trend today towards more liberal interpretation of private law instruments, and none of the instances in that sphere where high degrees of certainty are insisted upon has escaped criticism in recent years. Possible hardships that might arise from a trend towards the more liberal interpretation of bylaws and the possible decline of

the certainty test, might, it is submitted, be beneficially resolved through the strengthening of non-judicial controls over their content.