[HIGH COURT OF AUSTRALIA.]

BEETHAM . . . . . APPELLANT;
PLAINTIFF,

AND

TREMEARNE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 2, 5.

Griffith C.J., Barton and O'Connor JJ.

Local authority—By-law—Unreasonableness—Tick pest—Notice to dip—Permit to travel—Costs.

Respondent was prosecuted under a by-law made under the *Local Authorities Act* 1902 (Queensland). By clause 2 of the by-law, it was provided that "no owner of stock shall commence to travel the same into, out of, or through the shire unless he has obtained from an inspector a permit authorizing him so to do." Before commencing to travel stock, the owner was required to give to the inspector seven days' notice in writing of his intention. Respondent received notice from the inspector, given under another clause of the by-law, requiring him to dip certain of his cattle within seven days. He thereupon, without any permit, but intending to comply with the notice, took the cattle out of the shire to a dip in another shire.

Held, that the notice to dip did not amount to a permit to travel out of the shire, and that the respondent having taken the cattle out of the shire without a permit was guilty of an offence under the by-law.

Decision of the Supreme Court of Queensland: *Beetham* v. *Tremearne*, (1905) St. R. Qd., 99, reversed.

APPEAL from a decision of the Supreme Court of Queensland, (1905) St. R. Qd., 99.

A complaint was laid under By-law No. 7* of the Shire Council

*By-law No. 7, clause 2:—"No owner of stock shall commence to travel the same into, out of, or through the Shire unless he has obtained from an Inspector a permit authorizing him so to do.

Every owner of stock shall, before commencing to travel the same into, out of, or through the Shire give seven days' notice in writing to an Inspector of his intention so to do.

On receipt of such notice, the Inspector may issue to such owner a permit to travel such stock into, out of, or through the Shire as the case may be; or if in the opinion of the Inspector

of Southport by appellant against respondent, that he, "being the owner of stock, travelled the said stock out of the Shire of Southport without obtaining from the Inspector a permit authorizing him to do so as provided by clause 2, By-law 7." The by-law was made under the *Local Authorities Act* 1902. The magistrate having dismissed the complaint, stated the following case for the opinion of the Supreme Court:—

The appellant, an Inspector under the by-law, caused the respondent to be served with the following notice:—"Dear Sir, I have inspected your cattle in the paddock opposite the Sugar Mill, and find them badly infested with ticks. If you do not dip them within seven days, I shall take action at once." The respondent after the receipt of the notice and in consequence thereof caused the cattle to be taken out of the Shire to a dip known as "Stephen's Dip," and there duly and properly dipped the cattle. The respondent *bonâ fide* believed that he was complying with the notice and that the said notice amounted to a permit to take the cattle out of the Shire to the dip. There was a dip at which the stock could have been dipped within the boundaries of the Shire, but Stephen's dip was the nearest and most convenient. The question of law for the decision of the Supreme Court was whether the magistrate was right in dismissing the complaint.

The Full Court (*Cooper* C.J. and *Power* J.) dismissed the appeal with costs.

Feez, (with him *Stumm*) for respondent, moved to rescind the order for special leave to appeal, on an affidavit that a resolution was passed by the Southport Shire Council that appellant's solicitors be instructed to discontinue the proceedings.

Other affidavits on the point were read.

Lukin, for appellant. There has been no withdrawal of our instructions to proceed.

Feez in reply

such stock are affected by the pest, he may refuse to issue such permit unless and until such stock shall to his satisfaction be dipped &c."

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Per Curiam.—Leave to appeal was granted on the application of a duly authorized officer of the Council. The appeal is being still prosecuted in the name of that officer. It is alleged that his authority has since been withdrawn, but we think that the fact is not established.

Lukin, for appellant. The Full Court judgment proceeded mainly on the construction of the word "through" in the by-law. Here the cattle were taken "out of" the Shire. The effect of the decision is that immediately notice to dip is given the cattle may be taken out of the Shire. Under those circumstances, the by-law would be useless.

[BARTON J.—Seven days' notice is required when a permit is asked to travel stock out of the Shire. The notice to dip was a seven days' notice. Before obtaining the permit to travel, the time for dipping might have expired.]

If it were thought proper to dip within the Shire, the permit to go outside for the purpose of dipping would be refused.

Where a by-law is capable of two possible constructions, that construction should be given which will support it and not that which will render it void: *Curtis* v. *Stovin* (1); and although one portion of a by-law may be void, the remaining portion may be enforceable: *Dyson* v. *London and North Western Railway Company* (2); *Metropolitan Transit Commissioners* v. *Berry* (3).

[BARTON J. referred to *Slattery* v. *Naylor* (4).]

Where a by-law is within the scope of the legislative powers of a local authority, the Court will be slow to avoid it on the ground of unreasonableness: *Browne* v. *Cowley* (5); *Sankey* v. *Plover* (6); *Calder* v. *Lewis* (7). *Mens rea* is not an essential ingredient in offences of this kind: *The Queen* v. *Prince* (8).

Feez (with him *Stumm*), for respondent. No question of the reasonableness of the by-law was ever raised, nor is it raised

(1) 22 Q.B.D., 513.
(2) 7 Q.B.D., 32
(3) 9 Q.L.J., 117.
(4) 13 App. Cas., 446, at p. 453.
(5) 6 Q.L.J., 234.
(6) (1903) St. R. Qd., 63.
(7) 7 Q.L.J., 150, *per Griffith* C.J., at p. 160.
(8) 44 L.J. M.C., 122.

now. The by-law placed the respondent in a dilemma, unless the order to dip is construed to amount to a permit to travel the stock to the dip. The appellant contends that the respondent committed an offence against the by-law by moving without a permit. This he could not obtain till after seven days—the period within which he was ordered to dip. If the Court was wrong, it was on the question of the construction of the by-law; it did not decide on the ground that the by-law was unreasonable. The Court held that the order to dip was in effect a permit to travel. The mere taking of stock to a dip is not a "travelling" of stock within the meaning of the by-law. [He cited *Heaslop* v. *Burton* (1).]

The Queensland Criminal Code provides (sec. 24) that "a person who does or omits to do an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject." Here the respondent believed he was ordered to go to the dip, and that such order amounted to a permit to travel: *Sherras* v. *de Rutzen* (2).

[GRIFFITH C.J.—That was not a mistake of fact, but as to the effect of the document.]

Whatever the decision of the Court may be, respondent could only have been guilty of a mere technical offence, and should not be deprived of his costs: *Forget* v. *Ostigny* (3).

Lukin in reply.

Cur. adv. vult.

June 5.

GRIFFITH C.J. This is an appeal from the Supreme Court of Queensland dismissing an appeal from justices who had refused to convict the respondent upon a charge of a breach of a by-law, the charge being that he had travelled stock out of the Shire of Southport without having obtained a permit authorizing him to do so. The by-law was made by the Council of the Shire under

(1) (1902) St. R. Qd., 259. (2) (1895) 1 Q.B., 918.
(3) (1895) A.C., 318.

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the authority of the *Local Government Act* 1902. Towards the end of the nineties what was called the tick pest had become a very serious thing in Queensland, and provision was made by the legislature in the year 1898 by which large powers were conferred upon the Diseases of Stock Board for preventing the travelling of animals infected with ticks from one part of the State to another. We know that a fence was actually erected between parts of the Colony of New South Wales and the Colony of Queensland, and Queensland was divided into several different areas, and the moving of cattle from one area to any other area was prohibited under a heavy penalty. In 1902 the legislature conferred powers to deal with this pest upon local authorities, authorizing them to exercise those powers by by-laws. Amongst the subjects on which they were authorized to make by-laws was "Regulating or prohibiting the introduction into or the removal from the area or part thereof of any pest" (No. 41 of Schedule to *Local Authorities Act*), and in the same number they are empowered to make regulations "Prescribing methods and appliances for the effectual destruction of pests." The term pest is defined by the Act as meaning "any animal or bird infesting or devouring any tree, plant, vegetable, or product thereof," and it includes "any insect matter or thing infesting or causing disease in any animal which in each case has been declared a pest under the Act." The pest dealt with by the by-law in question was the insect known as the cattle tick ("*Ixodes bovis*"), which had been duly declared a pest under the Act. The second clause of the by-law provides that no owner of stock shall commence to travel the same into, out of, or through the Shire unless he has obtained from the Inspector a permit authorizing him to do so. It goes on to provide that every owner of stock shall before commencing to travel into, out of, or through the Shire give seven days' notice of his intention so to do. On receipt of the notice the Inspector may issue a permit to travel the stock into, out of, or through the Shire as the case may be; or if in the opinion of the Inspector the stock are affected by the pest, he may refuse to issue a permit unless and until they are dipped in a dip as prescribed, or dressed or treated with certain prescribed medicaments. Now, in construing the by-law regard must be

had to the nature of the evil intended to be dealt with. These ticks are small insects, infesting animals sometimes in very large numbers, and when stock travel the insects are apt to drop off, and may so infect the whole of the neighbourhood through which the animals pass. Danger, therefore, is incurred by moving stock. There are other dangers, for the insects can be carried by birds, but that cannot be avoided. The danger the by-law seeks to avoid is the transmission of the pest by travelling animals, and the legislature authorized the local authority not only to protect the Shire itself, but to protect other parts of the State, for they are authorized to prohibit the removal of stock from the Shire as well as its introduction. Stopping at clause 2 for a moment, there is no doubt as to the meaning of the words "no owner shall commence to travel stock out of the Shire without a permit." That is a positive prohibition. If the owner of stock desires to take his stock out of the Shire he must give notice to the Inspector, and ask for a permit, but the Inspector is not bound to grant it. On inspection he may think that the stock are in such a condition that to move them would impose a danger of infection upon the stock in the paddocks or in the country through which they would pass to get out of the Shire. He may, therefore, in his discretion, for the protection of other stock in the Shire itself, and for the protection of stock out of the Shire, require that, before they are moved, they shall be dipped or treated so as to avoid that danger. And it is quite clear that the intention of the owner cannot make any difference. The danger is just as great when the intention is to go to the nearest dip as it is when it is to take the stock to the slaughter yard. Clause 5 of the By-laws provides: "When any stock are, in the opinion of an Inspector, affected by the pest he may, by notice in writing signed by him and given to or served on the owner of such stock, order that, before the expiration of seven days from the day on which such notice is given to or served on such owner," the stock shall be dipped or treated in the prescribed manner. If the order is to dip them, the owner has three courses open. He may dip them on his own premises if he can. If he has not a dip on his own premises, he may propose to dip them somewhere else, and the other place may be within the Shire, or outside of the

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Shire. If he desires to take them out of the Shire, the provision of clause 2 of the by-laws applies, which says that he must obtain a permit before he does so. All that seems perfectly plain; there is no inconsistency between the two provisions.

I pass now to the facts of the case. It is admitted that the respondent had received a notice from the Inspector of the Shire requiring him to dip his cattle. He thereupon proceeded to take them out of the Shire without asking for a permit, and thereupon he was charged with a breach of the by-law. Obviously he had transgressed the by-law. The defence set up was that the order to dip the stock amounted of itself to a permit to take them out of the Shire. The reasoning upon which that contention is based is not very clear, but it was put in this way: The notice to dip is a notice to do so within seven days; and, as an owner desiring to take stock out of the Shire must give seven days' notice before he does it, the two periods conflict with one another. He is required to get them dipped within seven days; he proposes to take them out of the Shire to get them dipped; and he must give seven days' notice of his intention to take them out: therefore it would be unreasonable under these circumstances to require him to get a permit before taking them out of the Shire. Why? He need not take them out of the Shire unless he likes. If he prefers to take them out he must obey the law, that is to say, he must not expose his neighbours to the danger of infection without getting a permit, which will only be granted after proper precautions to avoid danger of infection to the intervening roads. The learned Chief Justice, who delivered the judgment of the Supreme Court, spoke of the two clauses as incompatible. I have endeavoured to show that they are not. He said it would be unreasonable to expect a compliance with clause 2, which says that the owner must not take stock out of the Shire without a permit, from an owner who had received a notice under clause 5. If the order to dip stock could be construed as operating in itself as an order requiring the owner to take them out of the Shire for the purpose, possibly the absolute prohibition contained in by-law No. 2 might, as applied to such a case, be unreasonable. But the order cannot, as I have shown, be so construed. On the plain construction of by-law 2 the defendant has committed a breach of it, and there

is nothing unreasonable in reading it as a positive prohibition against removing stock without a permit. That the enforcement of the by-law under particular circumstances might be considered hard does not make the by-law itself unreasonable. We have nothing to do with the harshness of the proceeding. We allowed this appeal to be brought, because the question whether clause 2 if construed in such a case as an absolute prohibition—as it is in plain terms—was reasonable seemed to be a matter of considerable public importance. I cannot therefore see my way to any other conclusion than that the defendant committed a breach of a valid by-law for which he should have been convicted. Some difficulty appears to have been created in the minds of the learned Judges from the use of the word "through" in clause 2 which says: "No owner of stock shall commence to travel the same, into, out of, or through the Shire." It was contended that the word "through" refers only to stock passing through the Shire from end to end, in at one boundary and out at another. In answer to that it was said that, as both going into and going out of the Shire are expressly prohibited, the word if so construed would be unnecessary and meaningless. And it was pointed out that there may be as much danger in stock travelling from one end of the Shire to the other, although all the time within its boundaries, as there would be in taking them out of it. But these are matters with which we are not concerned. We are dealing only with the by-law so far as it prohibits the taking of stock out of the Shire. I express no opinion as to the meaning of the word "through," nor do I express any dissent from the opinion of the learned Judges as to its meaning, which is certainly the most convenient and beneficial construction to be put upon it. It will be time enough to deal with that when the question arises before us, but upon the meaning of the provision that an owner shall not commence to travel stock out of the Shire, without a permit, I cannot entertain any doubt. For these reasons I think that the appeal from the justices ought to have been allowed; but under the circumstances of the case, as it appeared that the respondent *bonâ fide* believed that he was authorized in doing what he did, I think the appeal might very properly have been allowed without costs. In my opinion this appeal should be allowed with costs,

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and the appeal to the Supreme Court should have been allowed, but without costs, and that that order should be substituted for the order made.

BARTON J. I am entirely of the same opinion, and I think there is no necessity to add anything.

O'CONNOR J. The defence was put upon two grounds by Mr. Feez. The first was that the document, which is called a notice, really amounted to a permit enabling the stock to be travelled out of the Shire. The words of the notice on the face of them cannot bear that interpretation. There are no words of permit. It is a notice that if the stock are not dipped within seven days, the Inspector, the Chairman, will take action at once. It is said that the notice ought to be interpreted as a permit, because it is unreasonable that any further permit should be required under the circumstances. Now, if one looks at the by-laws it seems plain that a permit is required before stock are allowed to travel, if the regulations are to be interpreted so as to effect the object which the whole of these regulations aim at. When once stock have been adjudged by the Inspector to be infected, these regulations put the stock in a certain sense under the control of the law. The Inspector, knowing that the stock are infected, has certain duties cast upon him. The first of these duties is that he himself has to see, under regulation 5, that the stock are dipped. The words of the regulation are: "Such dipping, dressing, or treatment shall in every case be carried out under the superintendence and to the satisfaction of an inspector." The Inspector therefore must be present while the dipping is going on. Now it is essential to enable that duty to be carried out—it is absolutely essential—that the dipping should take place within his jurisdiction. The regulations give him no jurisdiction outside his own Shire, and to say that this notice to dip is a permit to take the stock out of the Shire would imply that he has given a permit to take those stock somewhere out of his jurisdiction, to be dipped at a place in which he could not insist that the dipping should be carried out under his superintendence. It appears to me therefore impossible on the words of this notice and in the circumstances

that have arisen, to interpret this notice as a permit. It is indeed very reasonable that a permit should be required in addition to a notice of this kind. What took place in this case was an indication of that necessity. The stock were not travelled very far. They were travelled something like three miles from the place in which they were inspected and declared infected. Some of them were taken over the river in a public punt, and some of them travelled in a cart, and one can easily understand that it might be a matter of very great importance that the Inspector should have some knowledge of the route that these infected stock were to take to the dip, or the dip to which they were to be taken. Now the law contemplates that this permit shall be given in every case as soon as cattle are found infected, and before they can be moved. That enables the Inspector to have some control over where the cattle are to be taken. It may be, in the interests of the stock in the district, altogether a wrong thing to take them to a particular dip. It may be convenient in the public interest to take them to some other dip, or it may be found impossible to take them to any dip, and then the provision for treating stock on the spot will be carried out. It appears to me that the control of these matters must be in the hands of the Inspector, which would be impossible if his notice to dip cattle which he has found to be infected is to be interpreted as a permit to take them to be dipped wherever the owner thinks fit. If it is a permit to take stock to this dipping place, then equally it would be a permit to take them 50 miles away into the next Shire, if that happened to be the nearest dipping place. An argument has also been urged by Mr. Feez, which certainly impressed me at first, and that was that you could not interpret the word "travel" in sec. 2 of the by-law so as to apply to a case of this kind. As is well known the word "travel" in connection with stock has different meanings in the different States. The word "travel" in many of the Stock Acts, and I think in some of those in this State, has a special meaning, but under these by-laws and in connection with this subject "travel" has no special meaning. Therefore we must interpret the word in its ordinary sense, having regard to the objects of the Statute. It is said that if we interpret the word "travel" in the sense applicable to the circum-

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stances here, that is to say, travelling to a dip after notice has been given, then we are putting the owner of stock in the position of having to comply with the impossible, but I do not think that is so. What is the first step which the owner must take according to these by-laws after he has had notice served upon him? The first step is to get a permit. That permit need not be delayed for seven days. It probably would be given at once, because the cattle cannot move until the permit is given. As soon as that permit is given the cattle may be moved. But it is said that the second part of the by-law would come into operation—that before commencing to travel the stock the owner must give seven days' notice to the Inspector of his intention so to do. I think it is very clear that under these circumstances that regulation would not be applicable, and if it could be applied, the Inspector, who himself had adjudged the stock to be infected, and who himself had given the permit, could not be permitted in any Court to say that there was a breach of the law in the owner not having given seven days' notice in writing to the Inspector of his intention to travel. I can see no inconsistency, and I see nothing unreasonable in the working of these regulations as to dipping. I think, therefore, that the word "travel" must be used in a sense which will give effect to the Act. The same considerations apply on that point, as on the other point I dealt with, that is to say, stock when once they have been adjudged to be infected, must be dipped under the control of the Inspector, and thus the interpretation of the law which gives the word "travel" its ordinary meaning, that is to say, the moving cattle from the place where they are inspected anywhere, in any direction, is that which best carries out the intention of the Act. It is not necessary to decide whether moving cattle from one property to another belonging to the same owner would be travelling them. A question of that sort may arise, and it may cause some difficulty in the interpretation of the word, but in this case there is no doubt whatever that there was "a travelling," because the stock were removed from the place where they were inspected to a place out of the Shire, and they have never returned. For these reasons I entirely concur in the judgment of His Honor the Chief Justice on the case generally, and as to the costs.

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Appeal allowed. Order appealed from discharged, case remitted to justices with directions to convict. The respondent to pay the costs of this appeal.

Solicitors for appellant, *Tully & McCowan.*

Solicitors for respondent, *Stephens & Tozer.*

[HIGH COURT OF AUSTRALIA.]

AH YICK . . . . . APPELLANT;
DEFENDANT,

AND

LEHMERT . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM COURT OF GENERAL SESSIONS OF THE STATE OF VICTORIA.

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MELBOURNE, *August* 2, 3, 7.

Griffith C.J. and Barton J.

The Constitution (63 & 64 *Vict.*, *c.* 12), *secs.* 71, 73, 75, 76, 77—*The Judiciary Act* 1903 (*No.* 6 *of* 1903), *secs.* 30, 33, 34, 39, 68, 79, 80—*Justices Act* 1890 (*Victoria*) (*No.* 1105), *sec.* 127—*Authority of Parliament to confer appellate federal jurisdiction on other Court than High Court—Whether appellate jurisdiction conferred on State Courts—Offence against Commonwealth Law—Summary Conviction—Appeal to State Court—Remedy where Court denies jurisdiction—Mandamus—Appeal.*

Where a Court of a State declines jurisdiction in a matter as to which it is invested with federal jurisdiction, the remedy is by recourse to the appellate jurisdiction of the High Court.

The federal jurisdiction which Parliament is by sec. 77 of the Constitution authorized to confer upon the Courts of the several States, and upon federal Courts other than the High Court, includes both original and appellate jurisdiction.