Solicitors, for the appellants, *Dobson, Mitchell & Allport.*
Solicitors, for the respondent, *Simmons, Crisp & Simmons.*

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DAVIES BROS. LTD. *v.* BOND.

[HIGH COURT OF AUSTRALIA.]

PAGE . . . . . APPELLANT;
INFORMANT,

AND

KING . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART. *Feb.* 21.

Griffith C.J., Barton and Isaacs JJ.

By-law—Validity—Width of tyres—Width prescribed with respect to weight of load carried—Standard for ascertaining weights by measurement—Local Government Act 1906 (*Tas.*) (6 *Edw. VII. No.* 51), *sec.* 205 (13), *Pl.* 6.

A by-law made by a municipal council and purporting to be in pursuance of sec. 205 (13), Pl. 6 of the *Local Government Act* 1906 prescribed the width of tyres of wheels of vehicles with respect to the weight of the load carried, and also a standard for ascertaining weights by measurement.

Held, on the terms of the by-law, that the intention was that the weight should be ascertained by the standard alone, and therefore, that the part of the by-law prescribing the standard was not severable from the rest of the by-law.

Held, also, that the prescribing of such a standard was not authorized by the *Local Government Act* 1906, and that the whole by-law was invalid.

Decision of the Supreme Court of Tasmania (*Dodds* C.J.) affirmed.

APPEAL from the Supreme Court of Tasmania.

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At the Court of Petty Sessions at Launceston an information was heard whereby W. King was charged for that he "did on 28th January 1911, at Hobbler's Bridge Road, Newstead, in the municipality of St. Leonards, drive and use a vehicle, to wit, a timber truck or waggon on four wheels, so laden that each of the tyres of the said four wheels was then carrying a weight (exclusive of the weight of the said vehicle) of more than 400 pounds per inch contrary to the provisions of by-law No. 7, r. 2, passed by the council of the said municipality. The by-law referred to purported to be made pursuant to the *Local Government Act* 1906 and provided as follows:—"2. The width of the tyre of every wheel of any vehicle used upon any road in the municipality of St. Leonards shall be of the following dimensions; that is to say:—Such tyre shall be of the width of one inch for every 400 lbs. weight or part thereof carried upon the wheel, and exclusive of the weight of the vehicle; for example, a two-wheeled vehicle with 2½ inch tyres may carry a total weight of 2,000 lbs. being 400 lbs. for every inch of tyre, and proportionately with four-wheeled vehicles. The following shall be the standard weights and measurements for the purpose of determining loads carried on the roads in all kinds of two and four-wheeled vehicles; and every person who is guilty of any breach of this rule shall for every offence incur a penalty not exceeding Five Pounds:

"A reputed 4-bushel sack of wheat shall be deemed to weigh 240 lbs. avoirdupois.

. . . . .

"100 superficial feet of hardwood timber shall be deemed to weigh 430 lbs. avoirdupois.

"1 cubic foot of hardwood timber shall be deemed to weigh 54 lbs. avoirdupois.

. . . . .

"Large sized boilers and machinery are exempted from the provisions of this rule.

"3. With a view of enforcing Section No. 2, any member or officer of the Council of the Municipality of St. Leonards, or any police officer, is empowered to stop all loaded vehicles of any description for the purpose of ascertaining the weight of the load carried thereon: . . . ."

Upon the hearing it was proved that the vehicle driven by the defendant was a four-wheeled timber truck or waggon, the tyres of each wheel being 4 inches in width; that the waggon was laden with hardwood timber; and that the weight of the load of timber was ascertained by weighing it on a weigh-bridge at Newstead and amounted to 8,288 lbs., or 1,888 lbs. in excess of the weight allowed by the by-law. No evidence was called for the defence. It was contended on behalf of the defendant that no evidence had been adduced to show that the net weight of the load of timber had been ascertained by measurement, that evidence of the exact net weight ascertained by any other means was irrelevant, and that the information should therefore be dismissed. The Police Magistrate upheld this contention and dismissed the information, and on the application of the informant he stated a case for the opinion of the Supreme Court by way of appeal asking the following questions:—

1. Whether the informant in endeavouring to prove a breach of the by-law was limited to evidence to show that the weight of the load of timber was determined by measurement only.

2. Whether the Police Magistrate should have acted on the evidence adduced showing the actual weight of the timber carried on the waggon and convicted the defendant.

The Supreme Court (*Dodds* C.J.) upheld the determination of the Police Magistrate and dismissed the appeal.

From this decision the informant, by special leave, appealed to the High Court.

Waterhouse, for the appellant. Assuming the whole by-law to be valid the scale for ascertaining weights by measurement is only an alternative method of ascertaining weights. It would be a good defence to show that either the weight as ascertained by measurement, or the actual weight, was not greater than that prescribed. The meaning of the words "shall be deemed" depends upon the purpose for which the standard is to be used: *Ex parte Walton*; *In re Levy* (1). Assuming that the council had no power under the *Local Government Act* 1906 sec. 205 (13) to prescribe a standard for ascertaining weights by measurement, that portion of the by-law is severable from the rest of it.

(1) 17 Ch. D., 746.

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Roughan Clarke, for the respondent. If the by-law contains two methods of ascertaining weight it is bad for uncertainty: *Knight* v. *Halliwell* (1). There is no power under sec. 205 of the *Local Government Act* 1906 to impose the standard and, as the intention is that the weight must be fixed by that standard alone, the whole by-law is invalid. [He referred to *Hunter* v. *McLean* (2).]

Waterhouse, in reply.

GRIFFITH C.J. The respondent in this case was charged before a Police Magistrate with the breach of a by-law of the Municipality of St. Leonards which prescribes that "the width of the tyre of any vehicle used upon any road in the Municipality of St. Leonards shall be of the following dimensions; that is to say: —Such tyre shall be of the width of 1 inch for every 400 lb. weight or part thereof carried upon the wheel, and exclusive of the weight of the vehicle; for example, a two-wheeled vehicle with 2½ inch tyres may carry a total weight of 2,000 lb. being 400 lb. for every inch of tyre, and proportionately with four-wheeled vehicles. The following shall be the standard weights and measurements for the purpose of determining loads carried on the roads in all kinds of two and four-wheeled vehicles; and every person who is guilty of any breach of this rule shall for every offence incur a penalty not exceeding Five Pounds." Then follows a series of rules by which weight is to be deduced from measurements, the basis of measurement being in some cases bags, in others cubic contents. With regard to hardwood timber it is prescribed that 100 superficial feet shall be deemed to weigh 430 lbs. avoidupois and that 1 cubic foot shall be deemed to weigh 54 lbs. avoidupois. The phrase "the following shall be the standard weights and measurements" is inaccurately expressed. It evidently means "the following shall be the standard for ascertaining weight by measurement." The respondent was charged with driving and using a vehicle, to wit a timber truck or waggon on four wheels, so laden that each of the tyres of the said four wheels was then carrying a weight (exclusive of the

(1) L.R. 9 Q.B., 412. (2) 27 N.Z.L.R., 231.

weight of the said vehicle) of more than 400 lbs. per inch." The load that he was carrying was hardwood. By the rule for ascertaining weights from measurements it appears that the specific gravity of hardwood is assumed to be ·88, whereas we all know that its specific gravity is greater than unity. On the other hand the specific gravity of firewood (by cubic contents) is assumed to be greater than that of solid hardwood.

On the hearing of the charge the prosecutor proved that the weight of the load of hardwood which the respondent was carrying was about 29 per cent. greater than that which he was allowed to carry—400 lbs. per inch of tyre per wheel—but it would seem to have been about the proper weight if calculated by measurement according to the schedule, having regard to the real weight of hardwood.

The Magistrate refused to convict the respondent, and, on appeal, the learned Chief Justice refused to disturb the decision. An appeal is now brought to this Court on the assumption that the by-law is valid. I will first deal with the case on that assumption. It must, I think, be taken that the schedule is intended to afford a means by which a carter may know what quantity of goods he may safely put upon his vehicle without transgressing the by-law. No evidence was offered to show that he had put on his waggon more than was allowed by the by-law, if the weight was ascertained by quantity. And as I have already said, it was quite likely that he had not done so.

The objection was taken by the respondent that, on a prosecution under the by-law, the test of weight is the prescribed standard, so that, if the weight of the load ascertained according to that standard is greater than 400 lbs. per inch of tyre, the carter must be convicted whatever the actual weight. If that be so—and it appears to be the clear meaning of the by-law—then conversely if the carter is not carrying more than the allowed weight as ascertained by the prescribed standard, he is not guilty. It was consequently necessary to establish the measurement of the load, which was not done. If therefore the by-law is good, the evidence was insufficient, unless that part of the by-law which prescribes the standard is to be treated as severable from the rest of the by-law. It is impossible to say what the municipal body

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would have done if they had not thought that they were competent to lay down the arbitrary rules for ascertaining the weights of loads. That the object of the rule is that weights shall be ascertained by measurement is clearly shown by the next paragraph of the by-law, which authorizes any member or officer of the municipality or any police officer to stop all loaded vehicles for the purpose of ascertaining the weight of the load carried thereon—obviously by inspection and measurement, for weighbridges are not available all over the district. So that, on the by-law as it stands, the prosecutor failed to establish his case.

But there is another and more serious objection which is of general importance, and to which I must refer. The *Local Government Act* 1910 by sec. 205 (13), Pl. 6, authorizes the Council to make by-laws prescribing, amongst other things, "the width of, and other conditions respecting, the tyres of wheels of vehicles in the municipality, either with respect to the weight of the load carried, or with respect to the diameter of the axles of such vehicles." This by-law does not deal with the diameter of the axles, but only with the question of weight. The only authority given in this regard is to prescribe the width with respect to the weight of the load carried. That means real weight, not supposed or notional or imaginary weight prescribed by rules laid down by the municipality. But that is not the by-law they have made, unless the second part of it, prescribing the standard of comparison between measurement and weight, can be severed from the rest. It is impossible as the by-law is framed so to sever it. If we held that it could be severed we should in fact be making quite a different by-law from that which the Council themselves made.

The by-law as it stands is invalid, and we cannot hold that the respondent should have been convicted upon the ground that, if it had been differently framed, so as to be valid, he would have been guilty of a breach of it. It may be, and probably is, the fact that rules for ascertaining weight by measurement are of great convenience. It appears from the case cited by Mr. *Clarke* that in New Zealand local authorities are authorized by law to lay down

such rules, but the *Local Government Act* 1910 gives no such authority.

Upon both grounds, therefore, the charge failed, and the appeal must be dismissed.

BARTON J. I am entirely of the same opinion.

Barton J.

ISAACS J. I also agree that this appeal must be dismissed on the ground that the only authority given to make a by-law is to prescribe the width of, and other conditions respecting, the tyres of wheels of vehicles in the municipality, either with respect to the weight of the load carried, or, which is immaterial in the present case, with respect to the diameter of the axles of such vehicles, with another power which also is immaterial here. The by-law which is said to be offended against is one that does prescribe the width of the tyres, namely, one inch for each 400 pounds or part thereof carried upon the wheel. But the by-law also goes on to prescribe as part of the same rule certain standard weights and measurements for the purpose of determining the weight of loads, and it then says that "every person who is guilty of any breach of this rule shall for every offence incur a penalty not exceeding Five Pounds." It appends a detailed schedule showing what measurements shall be deemed in various cases to amount to certain weights, and then it says "large sized boilers and machinery are exempted from the provisions of this rule." But it is all one rule. I do not think it is competent for the municipality to say that that rule is to be treated as if it was a simple enactment that the width of a tyre should be one inch for every 400 pounds or part thereof carried upon the wheel. There is a great deal more than that. The penalty is imposed for the breach of the rule as a whole. I agree with what has been said by the learned Chief Justice, that it would be a different rule if the latter portion were not included. One example may be given which brings it out in very clear relief. A reputed four-bushel sack of barley is to be deemed to weigh 200 pounds. That would mean that you might have two such sacks for each inch of tyre, or eight for each wheel of a four-wheeled vehicle; that is 32 sacks for a load. A man charged might prove that he had actually weighed the barley

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he was carrying and found that it was less than was asserted, and yet the Court, if this rule were in force, would be bound to say "We disregard your evidence. We are told that each sack is to be deemed to weigh 200 pounds." This rule is to be taken as a whole, and a man is either an offender against the rule as a whole or is not an offender at all. The effect of that and the similar provisions is to say indirectly that the width of tyres shall be regulated by quantity or measurement and not by weight. The council are told they may regulate the width of tyres according to the weight carried, and they do it by providing that tyres are to be one inch wide for every 400 pounds carried upon the wheel, and they say that a certain quantity of certain goods shall be deemed to be of a certain weight. That may represent their actual weight or it may not, but that is not regulating the width of tyres according to the weight carried upon the wheel, but indirectly by measurement and it is not what they are empowered to do. When offences are created they ought to be clear and distinct, and, as that portion of the by-law is not, in my opinion, severable from the rest of it, this appeal should be dismissed because a conviction under the by-law could not have been properly sustained.

Appeal dismissed with costs.

Solicitors, for the appellant, *Ritchie & Parker.*

Solicitors, for the respondent, *Law, Weston & Archer.*

B. L.