[HIGH COURT OF AUSTRALIA.]

THE COUNTRY ROADS BOARD . . . APPELLANT;

AND

NEALE ADS PROPRIETARY LIMITED . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1930.

MELBOURNE, *Feb.* 21; *March* 20.

Knox C.J., Isaacs, Gavan Duffy, Starke and Dixon JJ.

By-law — Validity — Hoardings — Advertisements — Power to regulate or prohibit — Prohibition unless act done with consent of Authority—Country Roads Board —Country Roads Act 1915 (*Vict.*) (*No.* 2635), *sec.* 61; *Country Roads Act* 1927 (*Vict.*) (*No.* 3568), *sec.* 3*—*Country Roads Act* 1928 (*Vict.*) (*No.* 3662), *sec.* 60*—*Local Government Act* 1915 (*Vict.*) (*No.* 2686), *sec.* 198 (1)*—*Local Government Act* 1928 (*Vict.*) (*No.* 3720), *sec.* 198 (1).*

The Country Roads Board was empowered to make by-laws for the purpose of "regulating or prohibiting the erection and construction of hoardings on or in the vicinity of State highways or regulating, restricting, preventing or controlling the exhibition of advertisements on or in the vicinity of State highways." In exercise of this power the Board passed a by-law of which the effect of clauses 3 and 4 was to forbid advertising hoardings and advertisements near State highways unless the consent of the Board was given after it had considered whether certain specified objections existed. Clause 5

* Sec. 60 of the *Country Roads Act* 1928 (Vict.), consolidating the provisions of sec. 61 of the *Country Roads Act* 1915 and sec. 3 of the *Country Roads Act* 1927, provides:—"60. Subject to the provisions hereinafter contained by-laws may be made by the" Country Roads "Board and published in the *Government Gazette* for the purposes mentioned in this Part and for the purposes following:— . . . (*d*) Regulating or prohibiting the erection and construction of hoardings on or in the vicinity of State highways or regulating restricting preventing or controlling the exhibition of advertisements on or in the vicinity of State highways; and (*e*) In relation to hoardings or advertisements on or in the vicinity of State highways—any purposes for or in connection with which the council of any municipality may under sub-section 1 of section one hundred and ninety-eight of the *Local Government Act* 1928 make by-laws relating to hoardings or advertisements. In this section 'hoarding' means structure for the exhibition of advertisements, and includes sky-sign. Nothing in paragraph (*e*) of this section shall be construed as limiting the

authorized the service of an order of the Board directing the removal of hoardings, whether constructed before or after the passing of the by-law, when certain conditions were fulfilled, and clause 6 enabled the Board, upon non-compliance with its order, to cause the hoardings to be removed and to sell the materials and reimburse the expenses of removal. Clause 7 enabled the Board by its agent to obliterate or remove any such advertisement if in its opinion it was objectionable.

Held, by the whole Court, that the by-law was valid.

Miller v. *City of Brighton*, (1928) V.L.R. 375; 49 A.L.T. 249, overruled.

And *held*, by *Knox* C.J., *Starke* and *Dixon* JJ., that when the purpose of a power includes both prohibiting and regulating, it authorizes a by-law which forbids conditionally, although the conditions may properly be described as regulatory.

Decision of the Supreme Court of Victoria (Full Court): *Neale Ads Pty. Ltd.* v. *Country Roads Board*, (1930) V.L.R. 169, reversed.

APPEAL from Supreme Court of Victoria.

The Country Roads Board made a by-law under the provisions of sec. 61 of the *Country Roads Act* 1915 (Vict.) as amended by sec. 3 of the *Country Roads Act* 1927 "for regulating the exhibition of advertisements and the erection of hoardings on or in the vicinity of State highways, and for other purposes." The material provisions of the by-law were as follows:—"(1) This by-law may be cited as the *Hoardings and Advertisements By-law* 1927, and shall come into

generality of the provisions of paragraph (*d*) of this section."

Sec. 198 (1) of the *Local Government Act* 1928 (Vict.), consolidating the provisions of sec. 198 (1) of the *Local Government Act* 1915, provides:—"198. (1) The council of every municipality with the approval of the Governor in Council may make by-laws for the following purposes or any of them or for any purpose in connection therewith:—(*a*) Regulating and restraining the erection and construction of buildings, erections, or hoardings or of fences abutting on or within ten feet of any street or road. (*b*) Requiring the pulling down and removal of buildings, erections, or hoardings or of fences abutting on or within ten feet of any street or road. (*c*) Authorizing the council to pull down and remove buildings, erections, or hoardings or fences erected or constructed contrary to any such by-law or not pulled down or removed as required by or under any such by-law, and to sell the materials and apply the proceeds in reimbursing the expenses of pulling down and removing such buildings, erections, hoardings, or fences and in paying into the municipal fund any fees or penalties due by the owner thereof. For the purpose of this paragraph and paragraphs (*a*) and (*b*) 'hoarding' means structure used for the exhibition of advertisements and includes sky-sign. (*d*) Regulating restricting or preventing the exhibition of advertisements in such places and in such manner or by such means as to affect injuriously the amenities of a public park or pleasure promenade or to disfigure the natural beauty of a landscape. (*e*) Regulating and controlling all advertisements attached or fixed to or painted on any hoardings or on any building or on any fence rock cliff or tree. (*f*) Appointing fees which may be charged and received by the council for any act done or to be done by any of its officers under such regulations and for any permit or licence to be issued by the council."

H. C. OF A. 1930.

COUNTRY ROADS BOARD v. NEALE ADS PTY. LTD.

operation upon the date of publication thereof in the *Government Gazette*. (2) 'The Board' in this by-law means the Country Roads Board. (3) No person shall, without the consent in writing of the Board, erect or construct, or cause to be erected or constructed, on or in the vicinity of any State highway, any hoarding for the exhibition thereon of advertisements of any description, or attach, fix to, or paint any advertisement on any building, fence, rock, cliff, tree, or elsewhere on or in the vicinity of any such highway. (4) The Board may, in its absolute discretion, refuse its consent to the exhibition of advertisements in such places and in such manner and by such means on or in the vicinity of any State highway as in the opinion of the said Board will be an obstruction to the vision of persons using any such highway, or will affect or be likely to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape. (5) If the Board is satisfied that any hoarding, whether constructed before or after the passing of this by-law, on or in the vicinity of any State highway is objectionable or unsightly, or is an obstruction to the vision of persons using such highway, or is in such a state of disrepair as to be dangerous to the public, it may by order direct the removal thereof, or the making of such alteration thereof as to the Board seems necessary. A copy of such order may be served upon the owner of the hoarding, and on the owner for the time being of the land on which the same is erected, either personally or by affixing the same to some conspicuous part of such hoarding. (6) If within the time prescribed in the said order the hoarding has not been removed or altered as directed, the Board may, by its agent duly authorized in writing, enter on the land on which such hoarding stands, and pull down and remove, or cause the same to be pulled down and removed, and sell the materials and apply the proceeds in reimbursing the expenses of pulling down and removing such hoarding, and in paying into the Country Roads Board Fund any fee or penalties due by the owner thereof. (7) The Board may also, by its agent authorized as aforesaid, abolish, obliterate, or remove any advertisement attached, fixed to, or printed upon the road surface of any State highway, or upon any hoarding, building, fence, rock, cliff, tree, or elsewhere on or in the vicinity of any such highway, if

in its opinion such advertisement is unsightly, objectionable, or otherwise undesirable. (8) Any person who contravenes any of the provisions of this by-law shall be guilty of an offence, and for every such offence shall be liable to a penalty of not more than twenty pounds."

The appellant, Neale Ads Pty. Ltd., was a company which carried on the business of advertising contractors, and, alleging that it was aggrieved by the by-law, applied to the Supreme Court of Victoria under sec. 203 of the *Supreme Court Act* 1915 (sec. 189 of the *Supreme Court Act* 1928) to quash the by-law either wholly or in part for the illegality thereof on the grounds (1) that the conditions upon which the consent of the Country Roads Board referred to in clauses 3 and 4 of the by-law will be granted or refused should be set out in the by-law; (2) that the Country Roads Board has no power or authority to confer upon itself the discretionary powers purported to be conferred by clauses 4 and 5 of the by-law, and (3) that the Country Roads Board has no power or authority to confer upon itself the power to abolish, obliterate or remove advertisements purported to be conferred by clause 7 of the by-law.

The application was referred by *Macfarlan* J. to the Full Court and came on for hearing before *Cussen*, *McArthur* and *Lowe* JJ. The majority of the Court (*Cussen* and *Lowe* JJ.) were of opinion that the whole by-law should be quashed. They considered that clauses 3 and 4 left the power to dispense with compliance with the prohibition in the hands of the Board, and that, the conditions of dispensation not being contained in the by-law itself, the clauses were *ultra vires* for the reasons expressed in *Miller* v. *City of Brighton* (1). They also considered that, for the reason above stated, clause 5 was invalid inasmuch as it left each case to the unfettered discretion of the Board, and that clause 6 depended on and fell with clause 5, and that clause 7 was to some extent dependent on clause 6 and also reserved to the Board the same unfettered discretion which was fatal to the earlier clauses. *McArthur* J. was of opinion that clauses 3, 4 and 5 of the by-law were valid, and that only clause 7 should be quashed:—*Neale Ads Pty. Ltd.* v. *Country Roads Board* (2).

(1) (1928) V.L.R. 375, at p. 383; 49 A.L.T. 249, at p. 252.
(2) (1930) V.L.R. 169.

H. C. OF A. 1930.

COUNTRY ROADS BOARD v. NEALE ADS PTY. LTD.

From the order of the Full Court quashing the whole by-law the Country Roads Board now, by special leave, appealed to the High Court.

C. Gavan Duffy, for the appellant. The case of *Miller* v. *City of Brighton* (1) was wrongly decided. That case purported to follow *Melbourne Corporation* v. *Barry* (2) and not to follow *Williams* v. *Weston-super-Mare Urban District Council* (3), because the Full Court thought that *Melbourne Corporation* v. *Barry* was contrary to the English decision. In *Miller's Case* the Court was wrong in holding that, even if there was power to prohibit, the by-law must contain the whole prohibition and that it could not reserve the right to prohibit to the Council. [Counsel referred to *Barry's Case* (4).] [He was stopped.]

Eager (with him *Clyne*), for the respondent. The whole by-law should be quashed, for the reasons given by the majority of the Full Court. Clause 3 is bad because it leaves an unfettered discretion in the Board to give or withhold consent. Sec. 3 of the *Country Roads Act* 1927 confers a more limited power on the Board than that conferred by sec. 198, sub-secs. 1 and 2, of the *Local Government Act* 1915 (Vict.) on a municipality to make a by-law. As to clause 4 of the by-law, it is not a law at all and there is no authority for its enactment. It is merely a pious declaration of intention as to the future conduct of the Board. It does not impose any duty on any person, and has no proper place in a by-law. If all that clause 4 does is to make a declaration of what the Board intends to do, it is harmless; otherwise there is no authority for its enactment. As to clause 5 there is no statutory power given to the Board to direct the removal of a hoarding. Such removal might have been directed if the Board had the powers conferred by sec. 198 (2) of the *Local Government Act* 1915, but such powers were not conferred. Clause 7 is also without statutory authority. Sec. 198 (2) of the *Local Government Act* 1915 gives a municipal council power to pass such a by-law, but the Board has no such power. This is not a power of regulating or controlling the exhibition of advertisements and, in any event, such regulation or control must be exercised by

(1) (1928) V.L.R. 375; 49 A.L.T. 249.
(2) (1922) 31 C.L.R. 174.
(3) (1907) 98 L.T. 537.
(4) (1922) 31 C.L.R., at pp. 198, 200, 208.

the Board and not by its agent. The by-law should state the conditions on which the advertisement is to be removed.

C. Gavan Duffy, in reply.

Cur. adv. vult.

March 20.

The following written judgments were delivered :—

KNOX C.J., STARKE AND DIXON JJ. This is an appeal by special leave from a decision of the Full Court of Victoria quashing a by-law of the Country Roads Board. The subjects with which the by-law deals are the erection of hoardings and the exhibition of advertisements near State highways. The Board may, by resolution, declare to be a State highway any highway which, in its opinion, is of sufficient importance to be so declared, and thereupon the highway comes under the care of the Board, and is maintained by it (secs. 5-8 of the *Highways and Vehicles Act* 1924, now in Part III. of the *Country Roads Act* 1928). The Board is empowered to make by-laws for purposes which include " Regulating or prohibiting the erection and construction of hoardings on or in the vicinity of State highways or regulating, restricting, preventing, or controlling the exhibition of advertisements " (sec. 3 of the *Country Roads Act* 1927, now sec. 60 (*d*) of the *Country Roads Act* 1928). In an attempt to exercise this power, the Board, by clause 3 of the by-law, forbad any person without the consent in writing of the Board, in effect, on or in the vicinity of a State highway to erect any " hoarding for the exhibition thereon of advertisements " or to place any advertisements upon any natural or other objects. Clause 4 provides that the Board may in its absolute discretion refuse its consent to the exhibition, on or in the vicinity of a State highway, of advertisements which, in its opinion, are open to any of the objections which the clause specifies. The meaning or the application of this provision appears to have been doubted because it does not in terms refer to the erection of hoardings but only to the exhibition of advertisements, and because much of the language in which the grounds for refusing consent are expressed is derived from sec. 198 (1) (*d*) of the *Local Government Act* 1915 (now 1928). But the phrase " consent to the exhibition of advertisements " seems a compendium which, although

H. C. OF A. 1930.

COUNTRY ROADS BOARD v. NEALE ADS PTY. LTD.

KNOX C.J. STARKE J. DIXON J.

not exact, is practically sufficient to describe the consent referred to in the preceding clause, and there can be no real doubt that clause 4 states, whether exhaustively or not, grounds upon which the Board may withhold its consent under clause 3. Thus the effect of those two clauses is to forbid advertising hoardings and advertisements near State highways unless the consent of the Board is given after it has considered whether certain specified objections exist.

In the Full Court, *Cussen* J. and *Lowe* J., *McArthur* J. dissenting, were of opinion that clause 3 violated the principle which, in the case of *Miller* v. *City of Brighton* (1), the Full Court, consisting of *Mann* J., *McArthur* J. and *Lowe* J., had formulated after they had examined the reasons given in this Court for the judgment in *Melbourne Corporation* v. *Barry* (2), and considered them in relation to other authorities. This principle was expressed in *Miller's Case* (3) by *Lowe* J., who delivered the judgment of the Court, in the following passage :—" The conclusion at which we thus arrive leads to a uniform rule which applies to all by-laws, whether they be made under a power to prohibit or a power to restrain, or a power to regulate, namely, that the by-law itself must, in the language of *Mathew* J. in *Kruse* v. *Johnson* (4), ' contain adequate information as to the duties of those who are to obey,' and we add for ourselves, it does not fulfil this requirement unless the prohibition, or restraint, or regulation, as the case may be, appears from the by-law itself." It may be said that in the present case these conditions thus stated are literally complied with, because there does appear on the face of the by-law an explicit prohibition of hoardings and advertisements without the Board's consent ; and *McArthur* J. was of this opinion. But it was not in this sense that *Cussen* J. and *Lowe* J. understood the " uniform rule," and in *Miller's Case* the Court had said (5) :— " In truth, the view that though the prohibition must, the dispensation from the prohibition need not, appear in the by-law itself seems founded on the fallacy of supposing that the power of dispensation exists apart from the power to prohibit. There is no power to dispense save as part of the content of the power to prohibit ; and

(1) (1928) V.L.R. 375 ; 49 A.L.T. 249.
(2) (1922) 31 C.L.R. 174.
(3) (1928) V.L.R , at pp. 383, 384 ; 49 A.L.T., at p. 252.
(4) (1898) 2 K.B. 91, at p. 108.
(5) (1928) V.L.R., at p. 383 ; 49 A.L.T., at p. 252.

H. C. OF A. 1930.

COUNTRY ROADS BOARD v. NEALE ADS PTY. LTD.

Knox C.J. Starke J. Dixon J.

course no point when the bylaw-making power includes the purpose of prohibiting. Indeed, in *Miller's Case* (1), both in the judgment of *Irvine* C.J. and in that of the Full Court, an objection of an opposite character is suggested when the power exercised is that of prohibiting. *Irvine* C.J. said (2):—"Had it been free from authority I should think 'prohibit' carried this particular matter no further than 'regulate,' inasmuch as though 'regulating' includes 'prohibiting,' in part at least, 'prohibiting' can hardly include 'regulating.' I should have thought, too, that a power to prohibit did not include a power to license, and that a by-law enabling something to be done by leave is not a by-law prohibiting that thing." This view rests upon an interpretation of the word "prohibit" which leaves it unsatisfied by anything short of entire and unconditional suppression. It may well bear this meaning in some contexts and in relation to some subject matters, but when prohibiting some course of conduct is expressed to be the purpose of a bylaw-making power, it would more often be understood to confer authority to forbid all or any part of that course of conduct and to do so absolutely or subject to any condition which appeared convenient. At least it is clear that when the purpose of a power includes both prohibiting and regulating, it must authorize a by-law which forbids conditionally, although the conditions may properly be described as regulatory.

The power given to the Country Roads Board now in question does include both prohibition and regulation. It is true that the statutory provision uses the disjunctive "or," but it plainly means to describe or define one power or purpose—not two, to be exercised in the alternative. But the reasoning upon which the principle or "uniform rule" of the Victorian Full Court is based is directed to the character of the condition prescribed by the by-law, namely, the consent of the council. This the Court described as a dispensation. This term is commonly applied to the exercise of a power to suspend the obligation of a law, or to excuse from obedience to its commands. The consent of the Board, however, is not an independent power of abrogation, but a condition upon which the tenor of the by-law makes its operation depend. As the passage already

(1) (1928) V.L.R. 375; 49 A.L.T. 249.
(2) (1928) V.L.R., at p. 377; 49 A.L.T., at p. 249.

it follows, in our opinion, as a matter of reason, that the prohibition which must appear in the by-law itself is the whole prohibition; or, in other words, that the prohibition, together with the conditions under which the dispensation will be granted, must so appear." In reaching this result, the learned Judges were much influenced by methods of reasoning which had been used in support of a restrictive interpretation of powers of regulation but which, in their opinion, were of equal application when the purpose of the bylaw-making power was to prohibit or restrain. Indeed, in *Barry's Case* (1) *Higgins* J. expressly says that even if it be assumed that the power then in question sanctions a by-law prohibiting a procession because of its nature or purpose, the prohibition must be by by-law, not by the Council acting at an ordinary meeting, and by the chance majority at that meeting. After thus referring to a by-law which forbad processions without the Council's consent, *Higgins* J. proceeds to rely upon the provisions of the *Local Government Act* which prescribe the manner of making by-laws; provisions upon which *Isaacs* J. had also relied (2). The actual decision of this Court in *Barry's Case*, however, was based upon the restricted meaning which the word "regulate" appears primarily to bear; a meaning expressed in the often quoted words of Lord *Davey* in *Toronto Municipal Corporation* v. *Virgo* (3): "There is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed." This distinction was expressly referred to and maintained in the judgment of *Isaacs* J. in *Barry's Case* (4), who said: "The real truth is that the Council's by-law is framed exactly as if the word 'prohibiting' were used in the sub-section instead of the word 'regulating'; and that is, of course, a fundamental error and cannot be justified."

In truth, the essence of the objection to which the actual decision in that case gave effect was that the by-law by forbidding processions subject to a condition operated to prohibit them completely if and in so far as the condition was unfulfilled. Such an objection has of

(1) (1922) 31 C.L.R., at p. 208.
(2) (1922) 31 C.L.R., at p. 195.
(3) (1896) A.C. 88, at p. 93.
(4) (1922) 31 C.L.R., at p. 200.

quoted from the judgment in *Miller's Case* (1) shows, the Full Court treated the dispensation as a discretionary power which could not be granted in the exercise of an authority to make by-laws for the purpose of prohibiting and (presumably) regulating. It considered that such a power authorized no more than "prohibition together with conditions under which dispensation could be granted." But once it is realized that the power authorizes prohibition, complete or partial, conditional or unconditional, what reason is there for denying that the condition may be the consent, or licence, or approval of a person or a body? The answer that there is none was given by the Divisional Court and approved by the Court of Appeal in *Williams* v. *Weston-super-Mare Urban District Council* (2); and we respectfully agree. The supposition or suggestion that the conditions or circumstances should be defined in which the consent, licence, or approval must be given can rest only upon some justification other than the words in which the power is conferred.

From the passage in the judgment of *Higgins* J. in *Barry's Case* (3) already referred to, it appears that he considered that such a justification in the case of municipal councils might be found in the view that the procedure prescribed for making by-laws impliedly forbids the choice of the council as the repository of any discretion upon which the operation of the by-law may be conditioned. But this view rests upon an implication which the canons of interpretation scarcely warrant. The municipal council must conform to the prescribed procedure in formulating a prohibition, conditional or unconditional; but why does this requirement import any limitation in the exercise under the by-law of powers or authorities upon which it, in terms, makes the extent of its prohibition depend? But in any case no such argument is available in the case of the Country Roads Board, a distinction upon which the dissent of *McArthur* J. turned.

The whole controversy illustrates the danger which attends the formulation of principles and doctrines and all reasoning a priori in matters which in the end are governed by the meaning of the language in which the Legislature has expressed its will. The simple

(1) (1928) V.L.R., at p. 383; 49 A.L.T., at p. 252.

(2) (1907) 98 L.T. 537; (1910) 103 L.T. 9.

(3) (1922) 31 C.L.R., at p. 208.

H. C. OF A. 1930.

COUNTRY ROADS BOARD v. NEALE ADS PTY. LTD.

Knox C.J. Starke J. Dixon J.

question in this case is whether a clause which forbids hoardings and advertisements without the consent of the Board answers the description of a by-law "prohibiting or regulating the erection of hoardings, or regulating, restricting, preventing, or controlling advertisements." If the Full Court had felt itself at liberty so to propound the question and to answer it upon a consideration only of the terms used, probably it would have felt no difficulty in giving the affirmative answer which this Court considers to be required.

Clauses 5, 6 and 7 of the by-law need separate consideration. Clause 5 authorizes the service of an order of the Board directing the removal of hoardings whether constructed before or after the passing of the by-law when certain conditions are fulfilled, and clause 6 enables the Board, upon non-compliance with its order, to cause the hoardings to be removed, and to sell the materials and reimburse the expenses of removal. Such a provision is not authorized by so much of sec. 3 of the *Country Roads Act* 1927 as has been already quoted. But sec. 3 goes on to empower the Board in relation to hoardings or advertisements on or in the vicinity of State highways to make by-laws for or with respect to any purposes for or in connection with which the council of a municipality may under sub-sec. 1 of sec. 198 of the *Local Government Act* 1915 make by-laws relating to hoardings or advertisements. Par. (*b*) of sec. 198 (1) authorizes by-laws for the purpose of, or any purpose in connection with, "requiring the pulling down and removal of . . . hoardings." According to a decision of the Full Court of Victoria, *Levingston* v. *President &c. of Shire of Heidelberg* (1), the words which occur at the end of this paragraph "abutting on or within ten feet of any street or road" apply only to the word "fences" and do not qualify "hoardings." This decision was not challenged at the bar, and it has stood so long that we do not propose to consider its correctness. But clauses 5 and 6 do not themselves impose any obligation upon anyone to remove hoardings, whether specified or to be specified. They operate only to enable the Board after notification directing the removal to perform itself the work of removal. On the whole we think that it is not essential that a legal duty to comply with the directions should be imposed, and that these clauses are within the

(1) (1917) V.L.R. 263; 38 A.L.T. 163.

powers described by sec. 198 (1) (*b*) and (*c*). Clause 6 is supported by par. (*c*) of sec. 198 (1) because that paragraph includes power in relation to hoardings constructed contrary to a by-law or "not pulled down or removed as required by or under any such by-law," namely, a by-law under par. (*b*), and clause 5 appears to us to be such a by-law.

Clause 7 is based upon sub-sec. 2 of sec. 198, which, however, is not incorporated by the *Country Roads Act* 1927. So much of sec. 3 of that Act, however, as has been already set out includes a power to make by-laws for the purpose of regulating, restricting, preventing, or controlling the exhibition of advertisements on or in the vicinity of State highways. The word "exhibition" may mean the act of placing the advertisement where it may be seen, or it may extend to the continued display of the advertisement after it has been so placed. On the whole, the latter seems the proper interpretation of the provision. Upon this interpretation a by-law is authorized which controls or prevents the continued display of advertisements. Clause 7 does no more than this, and is therefore good.

Clause 8 was not attacked, but in any case it creates no liability which would not exist under sec. 69 of the *Country Roads Act* 1915 (now sec. 92 of that of 1928).

The appeal should be allowed, but without costs in view of the fact that no appeal lay as of right. The order of the Supreme Court should be discharged and the order nisi discharged with costs. The sum of £15 paid into the Supreme Court by the respondent should be paid out to the appellant.

ISAACS J. In my opinion the by-law No. 2 which has been impeached is valid throughout. It consists of eight clauses, the first and second being formal only. Clause 3 is the centre of attack. It purports to prohibit certain acts, "without the consent in writing of the Board." This is the qualifying phrase which is said to mar the by-law, by leaving the prohibition undefined.

Before examining the law, it is desirable to observe that in construction the prohibition extends to "hoardings" and to "advertisements." As to general locality, clause 3 limits it both as to hoardings and advertisements by the words "on or in the

H. C. OF A. 1930.

COUNTRY ROADS BOARD v. NEALE ADS PTY. LTD.

ISAACS J.

vicinity of any State highway." The Board is so far carefully acting within the legal territory marked out in sec. 3 of Act No. 3568. As to hoardings, the subject matter is restricted to hoardings " for the exhibition thereon of advertisements of any description "; and as to the description of advertisements, they are all advertisements attached, fixed to, or painted on anything whatsoever, in the locality mentioned. But the qualifying phrase as to the Board's consent is not left to operate as if clause 3 stood alone. It is limited by clause 4, which marks out the sphere of consideration which the by-law commits to the Board in giving or refusing its consent. That sphere is the same as that which the legislation has itself adopted in sec. 198 (1) (*d*) of the *Local Government Act* 1915, together with an obviously proper consideration in the interests of safety. The power, therefore, of the Board to " refuse its consent " (clause 4) is limited to the considerations mentioned. It is not an arbitrary power, and it is manifestly a perfectly reasonable mode of dealing with the subject, if the law permits it.

The Supreme Court, by a majority, has held that the law does not permit that course, but that the prohibition of a hoarding or an advertisement, in order to be valid, must be ascertainable from a comparison of the by-law itself with the hoarding or advertisement itself. That means a practical impossibility unless the prohibition is total and absolute, for it would need prophetic vision to indicate with necessary precision what and where advertisements will be objectionable, and to leave the decision to various legal tribunals would introduce such diversity and uncertainty, as well as expense, as to make the remedy worse than the disease.

There is nothing in *Barry's Case* (1) to invalidate the by-law. *Barry's Case* was decided on a power of " regulating " traffic, and not of " prohibiting " it. A by-law that under the lesser power of regulation assumed to prohibit processions unless with the consent of the town clerk was held invalid. If the by-law had been in the form of an absolute prohibition, it would have been equally invalid (*Municipal Corporation of City of Toronto* v. *Virgo* (2); and see

(1) (1922) 31 C.L.R. 174.

(2) (1896) A.C. 88.

President &c. of Shire of Tungamah v. *Merrett* (1)). *Barry's Case* (2) is, therefore, no authority for the decision appealed from in this case. In the present case there exists the statutory power to prohibit either entirely or partially. The prohibition adopted is not entire, but only extends to instances where the act is done without the written consent of the Board, the power of refusal being limited as mentioned. As I pointed out during the argument, the two positions are essentially different. The power of regulation may, and almost necessarily does, involve some restriction or prohibition. The body entrusted with the power to regulate must in some sufficient way mark out whatever limits of prohibition are to exist. That is to say, legal rights otherwise existing are not to be cut down at the discretion of some individual or individuals, but must be dealt with by the law. And they are not properly dealt with in that case by first exercising the power of prohibition which is not conferred. But where the by-law itself prohibits, and in the absence of a written consent prohibits completely, the consent if refused simply leaves the by-law to operate without it, and if given satisfies the provision of the by-law by a *factum* which excludes the given case from its operation. Clauses 3 and 4 are complementary, and, read together, are valid. Clause 5, being limited in locality as before, is valid under the powers referentially included in sec. 3 of the Act No. 3568. Clause 6, which, if dependent solely on sec. 198 (1) (*e*), might be questioned because clause 5 did not go on to require the owner to comply with the order (as to which I say nothing), is nevertheless valid, because the subject matter is conveyed by sec. 3 of the Act No. 3568, the hoardings being those " on or in the vicinity of any State highway." Clause 5 may be regarded, for this purpose at all events, as introductory to clause 6, and as identifying the hoardings included in the latter clause. Clause 7 is similarly valid.

The appeal should, therefore, be allowed, and the order nisi discharged.

GAVAN DUFFY J. agreed with the judgment of *Isaacs* J.

(1) (1912) 15 C.L.R. 407, at p. 424. (2) (1922) 31 C.L.R. 174.

H. C. OF A. 1930. COUNTRY ROADS BOARD v. NEALE ADS PTY. LTD.

Appeal allowed without costs. Order of the Supreme Court discharged and in lieu thereof order nisi discharged with costs. The sum of £15 paid into the Supreme Court by the respondent to be paid out to the appellant.

Solicitor for the appellant, *Frank G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Maurice Blackburn & Tredinnick.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN GUARANTEE CORPORATION LIMITED . . } APPELLANT;

AND

BALDING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF BANKRUPTCY (DISTRICT OF VICTORIA).

H. C. OF A. 1930. MELBOURNE, *Feb.* 20. SYDNEY, *April* 14. Isaacs, Starke and Dixon JJ.

Debts—Future Debts—Book debts—Assignment—Registration—Future instalments of hire—"Future debts . . . although not incurred or owing at the time of the assignment"—Hire-purchase agreement—Non-registration as assignment of book debts—Invalidity of assignment—Assignee not entitled to general property in or to charge or equitable security over property assigned—Instruments Act 1915 (*Vict.*) (*No.* 2672), *secs.* 127, 180, 181—*Instruments Act* 1928 (*Vict.*) (*No.* 3706), *secs.* 27, 80, 81.

Traders, who afterwards made a deed of arrangement, obtained advances upon the security of assignments of hire-purchase agreements which were so framed that (i.) after the first period of hire the hirer's right to retain the