[HIGH COURT OF AUSTRALIA.]

STEVENS . . . . . APPELLANT;

AND

PERRETT . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1935.

BRISBANE, *July* 5, 11.

Rich, Dixon and McTiernan JJ.

Local Government—By-law—Permits for heavy or extraordinary traffic—Registration fees under Main Roads Acts—Like fees or rates payable under by-law—Validity of by-law—Conflict between Main Roads Acts and by-law—Main Roads Acts 1920-1929 (*Q.*) (10 *Geo. V. No.* 26—20 *Geo. V. No.* 23), *Schedule, clause* 13—*Local Authorities Acts* 1902-1934 (*Q.*) (2 *Edw. VII. No.* 19—25 *Geo. V. No.* 32), *secs.* 203, 204, *Fourth Schedule, subjects* 15, 19, 29, 51, 63.

By the *Local Authorities Acts* 1902-1934 (Q.) powers to make by-laws are conferred which include, in effect, the purposes of (i.) defining extraordinary traffic having regard to the average expense of repairing roads and regulating and restricting extraordinary traffic on roads or specified roads; (ii.) licensing vehicles kept for hire; (iii.) licensing persons who by means of vehicles carry on certain businesses, such as carriers; (iv.) regulating the weight of loads. The statute contains a general provision that by-laws may provide for the issue or making of licences, registrations or permits to or with respect to persons and property and the payment of reasonable licence, registration and permit fees. By the *Main Roads Acts* 1920-1929 (Q.) the Governor in Council is empowered to levy annual fees or rates upon the registration of motor vehicles according to class, horse power or otherwise and, while such fees or rates are in force, any by-laws of local authorities under which like fees are made payable shall cease to have effect. The Governor in Council exercised this power.

A by-law of a local authority assumed to impose upon applications for licences or permits in respect of motor vehicles, an annual fee graduated according to maximum load capacity, beginning at £6 for one ton or under

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and rising to £30 for over five tons. It required licences or permits for vehicles kept for hire for vehicles by means of which specified businesses, such as that of a cream carter, are carried on and for vehicles which it classified as "heavy or extraordinary traffic." It defined this class to include all vehicles moved by mechanical power capable of carrying one ton or more.

Held that the true scope and purpose of the by-law was to impose upon those categories of vehicle which appeared to be within the jurisdiction of the local authority a levy calculated according to an ascending scale upon load capacity and exacted by requiring an annual licence or permit; and therefore, *semble*, it was not a real exercise of the power to make by-laws of the nature described above; and in any case it attempted to levy fees "like" those imposed by the Governor in Council. The by-law was consequently held to be of no force or effect.

Decision of the Supreme Court of Queensland (Full Court): *Stevens* v. *Perrett*; *Ex parte Perrett*, (1935) Q.S.R. 207, affirmed.

APPEAL from the Supreme Court of Queensland.

The Kilkivan Shire Council, by its engineer Stanley Fenton Stevens, laid a complaint in the Court of Petty Sessions, Goomeri, that one P. M. Perrett caused to be used upon a road within the shire a motor vehicle having a carrying capacity of one ton and upwards without first having obtained from the council a permit to do so as required by by-law No. 136 of the Kilkivan Shire Council. Perrett had paid the registration fee due under the *Main Roads Acts* (Q.) and regulations on the motor vehicle, the subject of the charge, but refused to pay the shire council the fee alleged to be due under by-law No. 136. The effect of the statutory provisions involved is given in the judgments hereunder.

The police magistrate before whom the complaint was heard convicted Perrett of an offence under the by-law, imposed a fine, and ordered the payment of costs. From this conviction and order Perrett appealed by way of quashing order to the Full Court of the Supreme Court of Queensland. The Full Court quashed the conviction: *Stevens* v. *Perrett*; *Ex parte Perrett* (1).

From this decision, pursuant to special leave, the Shire Council, by its engineer Stanley Fenton Stevens, now appealed to the High Court.

Fahey (with him *Lukin*), for the appellant. There is a distinction between levying fees in respect of vehicles and prohibiting the use of

(1) (1935) Q.S.R. 207.

vehicles on roads if fees are not paid. By-law 136 is not a by-law of a local authority under which like fees or rates are made payable. The fees are payable to the shire council for a permit, and are not like fees to those payable under the *Main Roads Acts*. These fees are not payable for registration. The *Main Roads Acts*, by sec. 40 sub-sec. 5, recognize the distinction between registration and permits. The *Local Authorities Acts* (Q.), by sec. 204 (6) and clause 29 of the Fourth Schedule, also recognize this distinction. The *Main Roads Acts* only forbid the levy by a local authority of a registration fee *simpliciter*. This is a permit for the use of extraordinary traffic on roads. There is a clear distinction between a registration and a permit. Under the by-laws a permit is granted for the use of roads. Under the *Main Roads Acts* provision is made for the registration of vehicles. There is such a divergence that the fees are not like fees. The subject matter of the franchise is different. The shire council issues permits for extraordinary traffic. The *Main Roads Acts* register all traffic as vehicles. The purposes of the Acts are entirely dissimilar. The fees payable under the by-laws are not like fees in amount or manner of assessment as those payable under the *Main Roads Acts*. The fees payable under the by-laws are dependent upon load capacity. The fees payable under the *Main Roads Acts* depend on power weight. The word "like" means "the same" (*Lord Advocate* v. *Moray* (*Countess of*) (1); *Bradlaugh* v. *Clarke* (2)). This was a question of fact for the police magistrate, and it was competent for him to have found that they were not like fees. If there was any evidence to justify the findings of the police magistrate the Court will not disturb those findings (*Inland Revenue Commissioners* v. *Lysaght* (3)). A finding of law should be treated as a finding of fact. There was evidence on which the police magistrate could find that the fees payable under the *Main Roads Acts* and regulations were not like fees, and that being so this Court will treat the matter as a question of fact and not disturb the finding of the magistrate. Under the *Heavy Vehicles Act* 1925 (Q.), sec. 5 (5), it is contemplated that the by-laws of local authorities and the *Main Roads Acts* and

(1) (1905) A.C. 531, at p. 539. (2) (1883) 8 App. Cas. 354, at p. 357.
(3) (1928) A.C. 234.

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regulations should apply side by side. (See also the *State Transport Act* 1932 (Q.), sec. 15.)

McGill K.C. (with him *Matthews*), for the respondent. In order to determine what is meant by like fees or rates under the *Main Roads Acts* and regulations it is not necessary to look for similarity of terms and names. It does not matter if it is called licence, permit, or registration, if the fee is paid in respect of the same subject matter. The intention of clause 13 of the schedule of the *Main Roads Acts* was to prevent duplication of something. Apart from par. 3 of clause 13 the object of the *Main Roads Acts* and regulations is to require registration of all vehicles using roads controlled by the Main Roads Board. Registration under these Acts amounts to a licence or permit to use the roads. There is prohibition of the use of motor vehicles where the fee has not been paid. The registration contemplated is not registration *simpliciter*, but something which carries with it permission to use the road. The prohibition indicates the nature and purpose of registration, and affords an explanation of the duplication to be prevented. The object was to establish a system of licences and permits to use vehicles on the roads. Clause 13 contemplates something being done under the *Local Authorities Acts* which is like that being done under clause 13. It is obviously intended to avoid a duplication. That duplication was more than the mere registration of vehicles. If the power is to impose an annual levy in the nature of a licence fee it is a like fee. Like does not mean like in every particular but substantially the same. The fact of registration under the *Main Roads Acts* and regulations is to confer a permit or licence to use the roads. The prohibition against use of vehicles unless the fee is paid means a fee for the privilege of using the roads. The by-law contains the same prohibitions as regards certain motor vehicles as the *Main Roads Acts* and regulations. Under the by-law and under the *Main Roads Acts* and regulations the same thing is forbidden, that is, the use of the roads is prohibited unless the fees have been paid. Consequently the fees charged under the by-laws are like fees to those payable under the *Main Roads Acts* and regulations. There is a conflict and the *Main Roads Acts* and regulations prevail. In the interpretation of

the word "like" one does not look for identity (*Great Western Railway Co.* v. *Sutton* (1)). By-law 136 is invalid. It purports to be made under subject 19 of the Fourth Schedule of the *Local Authorities Acts*, "Extraordinary Traffic." The power to regulate and restrict traffic does not authorize the requirement to apply for a licence. The power to regulate does not give power to prohibit. The by-law consequently is not authorized by the schedule to the *Local Authorities Acts* (*Melbourne Corporation* v. *Barry* (2) ; *Williams* v. *Melbourne Corporation* (3) ; *Co-operative Brick Co. Pty. Ltd.* v. *Mayor &c. of the City of Hawthorn* (4) ; *The Country Roads Board* v. *Neal Ads Pty. Ltd.* (5)).

Fahey, in reply. The argument on behalf of the respondent is based on misapprehension. The proviso to clause 13 of the schedule to the *Main Roads Acts* applies only to the first paragraph of the clause. It does not apply to par. 3 of clause 13. The respondent's argument is based on the assumption that the proviso applies to the third paragraph. The omission of the proviso to the third paragraph is significant. The proviso therefore applies only to registration *simpliciter* and not to prohibition. The by-law is directed to the use of motor vehicles on roads and not to their registration. The subject matter to which any likeness must apply is registration and not to prohibition. The local authority may make a by-law restricting heavy traffic. There is strong authority to show that the power to license is not limited by the heading to subject 19 of the schedule of the *Local Authorities Acts*, but is an independent power in the local authority to issue licences and require fees to be paid under sec. 204, sub-sec. 6, and subject 29 of the schedule (*Cook* v. *Buckle* (6)).

Cur. adv. vult.

July 11.

THE COURT delivered the following written judgment :—

The respondent was summarily convicted under a by-law of the Shire of Kilkivan upon a charge of using upon a road within the

(1) (1869) L.R. 4 H.L. 226, at pp. 247, 260.
(2) (1922) 31 C.L.R. 174.
(3) (1933) 49 C.L.R. 142, at pp. 155, 159.
(4) (1909) 9 C.L.R. 301, at p. 307.
(5) (1930) 43 C.L.R. 126, at p. 133.
(6) (1917) 23 C.L.R. 311.

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shire a motor vehicle having a carrying capacity of one ton and upwards without first obtaining from the council a permit so to do.

The question for our decision is whether the by-law purporting to create the offence has any operation.

The by-laws of the Shire of Kilkivan are embodied in one instrument which was adopted on 6th July and approved by the Governor in Council on 11th August 1932. The by-law under which the respondent was charged is contained in a chapter intituled " Traffic and heavy traffic " in the preliminary division into chapters, and " Traffic and extraordinary traffic " in the body of the instrument. The chapter includes a detailed regulation of the driving of vehicles and the riding of motor cycles, bicycles and horses. Then it proceeds to forbid the use of certain vehicles without a licence or a permit. Vehicles moved by mechanical power, if capable of carrying a ton or more and vehicles drawn by six horses or oxen if of that capacity are classified as " heavy or extraordinary traffic " and may not be driven on any road without a permit. It is under this provision that the respondent was convicted. A closer consideration of its terms will become necessary. Vehicles kept for hire or for (the use of) which any payment or remuneration is received must be licensed. Vehicles by means of which specified businesses are carried on must be licensed. The businesses are those of a carrier, carter, fuel carter, cream carter, and water drawer. In each case the permit or licence must be obtained from the council, but, in the case of heavy or extraordinary traffic, upon an application giving the prescribed particulars and upon payment of the fees, it may be issued by the clerk of the shire, who in all cases signs the licence or permit. A separate clause sets out a table of permit and licence fees for all cases, payable at or prior to the application for a permit or licence. For vehicles moved by mechanical power an annual fee is prescribed graduated according to the maximum load capacity of the vehicle. The graduated scale begins at £6 for one ton or under and goes to £30 for over five tons.

The respondent is a cream carter and used a two-ton truck. He was, therefore, required according to the provisions of the by-law, to have a licence as a cream carter and a permit as a user of extraordinary traffic. The fee for a truck of a capacity of two tons is £10 per annum.

The powers upon which the shire relied in making the provisions contained in the chapter headed " Traffic and extraordinary traffic " are to be found in what now stand as secs. 203 and 204 and subjects 15, 19, 29, 51 (v), and 63, particularly (ii), (iii), (iv), (ivA), (vi), of the Fourth Schedule of the *Local Authorities Acts* 1902-1934. Sec. 203 confers power to make by-laws with respect to any of the matters in the fourth schedule. Subject 63 of that schedule is " Traffic," that is to say, the clause is so intituled. But the " matters " " with respect to " which the by-laws may be made are described at length under the titles of the respective clauses. Par. ii of subject 63 expresses the power as one, in effect, to require the owners of vehicles kept for hire or of vehicles for the use of which payment or remuneration is received to obtain a licence from the local authority. Par. ivA relates to the regulation of the weight of loads. Par. vi is a power to require persons carrying on the business of carriers, carters, fuel carters, or water drawers by means of any vehicles and porters to obtain licences from the local authorities. Pars. i and ii of subject 19, which is intituled " Extraordinary traffic ", are as follows :—(i) Defining what traffic shall be deemed to be extraordinary traffic having regard to the average expense of repairing roads within the area, which means the district in which the local authority has jurisdiction (sec. 7), or any division or part of an area or division specially affected. (ii) Regulating and, if necessary, restricting extraordinary traffic on roads or any specified roads.

Par. v of subject 51—Roads—is a power over the regulation of the weight of loads or of the use of vehicles likely to injure roads.

Sec. 204 contains the following sub-sections :—" (1) Save as by this Act is otherwise expressly provided, no by-law shall contain any matter contrary to this Act or any law in force in Queensland." " (5) A by-law may leave any matter or thing to be determined, applied, dispensed with, prohibited, or regulated by the local authority from time to time by resolution, either generally or for any classes of cases, or in any particular case. (6) A by-law may provide for the issue or making of licences, registrations, or permits to or with respect to persons and property, and for the payment of reasonable licence, registration and permit fees."

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Subject 29 of the Fourth Schedule, which is intituled " Licences, &c.," after empowering the regulation of the mode of applying for granting, transferring, and renewing licences and permits and the prescribing of conditions, ends as follows: " (iii) Prescribing fees for licences, permits, and registrations and for the renewal thereof."

Subject 15 is the " Delegation of Powers " and enables the local authority by by-law to give any officer power to perform acts on its behalf which include the issue of licences and permits.

Except under these powers and a power over omnibuses, a local authority is not authorized to impose fees or rates on motor vehicles. If the very extensive by-law making power in respect of vehicles which results from the combination of these provisions stood unqualified, the validity of the material part of the by-law would depend upon the inquiry whether when its operation is fully examined the by-law appears to pursue the object of the power to regulate extraordinary traffic, and to that end to define it and to require a permit subject to a fee, or, on the contrary, it discloses an attempt to impose a tax upon vehicles falling within the powers to licence, by a merely ostensible exercise of those powers. But the power to make by-laws given by these provisions is by no means unqualified. At various points it is restrained or encroached upon by the operation of enactments relating to traffic which deal with it independently of local authorities.

Up to the year 1920, the general regulation of motor traffic does not appear to have been undertaken except under the *Traffic Acts* 1905-1916. The operation of those Acts, however, was restricted to the Traffic District of Brisbane and such other traffic districts as were proclaimed. Upon the constitution of a traffic district, the powers and duties of the local authorities ceased with respect to matters to be dealt with under the *Traffic Acts* (sec. 3B), except that the power to make by-laws with respect to the matters described under the head of " Traffic " in subject 19 of the Fourth Schedule of the *Local Authorities Acts* remained exercisable (sec. 204 (9) of those Acts). Powers were conferred upon the Governor in Council to make regulations in reference to traffic resembling the powers of the local authorities. But they went further. For the licensing powers given by the *Local Authorities*

Act 1902 were, in effect, confined to licensing motor drivers (62 (iii), now 63 (iii), of the Fourth Schedule), vehicles kept for hire &c., and their drivers (62 (ii), now 63 (ii)) and the use of vehicles by carriers and the like (62 (vi), now 63 (vi)) and to regulating " heavy " traffic or " extraordinary " traffic (25, now, as amended, 19). But the power of the Governor in Council included the regulation of the use of motors in or upon any road and providing for the registration of motor cars. This power was exercised by regulations for general traffic made in 1911, Part 25 of which established a registration system and Part 27 dealt with public vehicles (*Gazette*, 1911, pp. 76, 77). But at that time the power to charge fees for licences was restricted in point of amount alike in the case of the *Traffic Act* and the *Local Authorities Act*.

By-laws regulating traffic, as distinguished from extraordinary traffic, might require fees the highest of which was £3—the licence fee for an omnibus (*Local Authorities Act* 1902, Fourth Schedule, 62 (xxx)). The same limitation was imposed upon the fees which might be exacted under the regulations of the Governor in Council (*Traffic Act* 1905, Schedule, clause 40). In 1913, it was removed in the case of local authorities (sec. 25, *Local Authorities Amendment Act* 1913).

In 1920, a new power of regulating motor traffic was conferred upon the Governor in Council. By the *Main Roads Act* of that year, he was empowered to make regulations upon a variety of subjects including the following :—" Defining motor vehicles and levying annual fees or rates to be paid upon the registration or renewal of registration of the same according to class and horse power and otherwise. Exempting certain vehicles or classes of vehicles from such fees or rates either wholly or to such extent as is deemed proper. Prohibiting the use upon any road (whether a main road or not) of any motor vehicle in respect of which prescribed fee or rate has not been paid " (*Main Roads Act* 1920, Schedule, clause 13). In pursuance of this power the *Motor Vehicle Regulations* 1921 were made (*Gazette*, p. 1649, 27th May 1921). A motor registration system was set up and registration fees of substantial amount were imposed. The regulation contained the following

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clause :—" 9. All by-laws of any local authority under which like fees are made payable to those prescribed by these regulations shall cease to have effect."

The *Motor Vehicle Regulations* 1921 were soon replaced by revised regulations and this process has been repeated several times. Those now in force are the *Main Roads Regulations* 1933 (*Gazette*, p. 1191, 23rd March 1933). Up to 1925, a provision to the effect of clause 9 was included in each successive regulation adopted. But, in that year, by an amendment of the *Main Roads Acts*, the provision was introduced into the schedule of those Acts by way of a proviso to the power already set out to levy fees upon the registration of cars. The proviso is as follows : " Provided that while any such fees or rates are prescribed to be paid, any by-laws of any local authority under which like fees or rates are made payable shall cease to have effect."

In the same year, by the *Heavy Vehicles Act* 1925, the registration of all motor trucks was provided for ; that is, of motor vehicles used or capable of being used for the carriage of goods. The mode of registration was governed by regulations made by the Governor in Council who was empowered to prescribe fees payable therefor varying according to the class of vehicle, its weight, its load or otherwise. No limit was expressed upon the amount of the fees. Upon registration under the *Heavy Vehicles Act*, the owner ceased to be liable to register under any by-law under the *Local Authorities Acts*, or to pay the fees thereunder. But he remained subject to the regulations under the *Main Roads Acts* and the *Traffic Acts*. Exemptions from its operation were made by the *Heavy Vehicles Act* 1925, and, by the amending Act of 1931, a new and more extensive list was provided. Thus a motor truck, which was exempt, or although not being exempt had not been in fact registered under the *Heavy Vehicles Acts*, remains subject to the by-laws of the local authority. The exemptions cover vehicles kept for the carriage of certain commodities of which cream is one. The respondent availing himself, perhaps, of this exemption, had not registered his two-ton truck under the *Heavy Vehicles Acts* and could not rely upon them to give him immunity from the appellant's by-law. It should be added that

motor omnibuses are to be registered under the *Heavy Vehicles Acts* and, like motor trucks, when so registered are outside the licensing requirement of local by-laws.

The *State Transport Act* 1932 confirmed the freedom given by registration under the *Heavy Vehicles Acts* from the necessity of licensing under by-laws, and extended it to licences required by regulations under the *Traffic Acts* (sec. 15). The same statute made the Commissioner of Main Roads the Registrar of vehicles for the purpose of registering a heavy vehicle (sec. 6). And it made the Transport Board the authority upon whose recommendation the Governor in Council should exercise his powers of making regulations under the Traffic and Heavy Vehicles Acts (sec. 21).

Thus it appears that the power of local authorities to make by-laws in reference to motor vehicles has suffered a restriction as a result of the various enactments for the control of motor vehicles by a central authority. A by-law cannot impose an obligation to register or pay a fee upon a motor vehicle registered under the *Heavy Vehicles Acts*. It cannot impose an obligation to license or to pay a fee if the area is included in a traffic district where the matter is the subject of regulation unless the by-law can be referred exclusively to subject 19 in the Fourth Schedule to the *Local Authorities Acts*. It cannot operate if it attempts to make fees or rates payable which are like any fees or rates prescribed by the Main Roads Regulations already cited. The Main Roads Regulations in force at the time when the by-law was made imposed fees of the same kind. They were the *Main Roads Regulations* 1927 (*Gazette*, p. 1542, 5th May 1927) as amended.

The scope and purpose of the by-law attacked must be considered in relation to this condition of affairs.

Its most prominent and, no doubt, most important feature is the imposition by clause 155, upon all applications for permits or licences under the provisions relating to traffic or extraordinary traffic, of the same graduated scale of very substantial fees. The fees bear no relation to the cost of administering a registration, licensing or permit system. They are evidently not charges fixed as reasonable fees for the issue of licences or permits. It is not easy to apply to

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them the description of par. iii of subject 29 of the Fourth Schedule, "fees *for* licences permits and registrations." Nor is the description of sec. 204 (6) much more appropriate, viz., "reasonable licence registration and permit fees." The scale applies alike to "heavy or extraordinary traffic" (clause 136) and to vehicles used by "carriers, carters, cream carters, fuel carters, &c." (clause 141). It includes a special fee for motor cars and cycles plying for hire, but otherwise the same scale applies to all vehicles for the use of which payment, recompense, or remuneration is received or receivable (clause 137).

But, as to the last two categories, viz., carriers, &c., and motor cars, &c., plying for hire, it can affect only those vehicles which are not registered under the *Heavy Vehicles Acts*, either because they are exempted from registration under that legislation, or because of the owner's default in registering. The provision as to "heavy or extraordinary traffic" is contained in clauses 136 and 137. It includes all mechanically propelled vehicles having a carrying capacity of one ton. In considering the true character of the by-law, the very large number of vehicles which such a description must include cannot be disregarded. Nor can the circumstances be ignored that the clause defines these vehicles to be "heavy or extraordinary traffic," which is not by any means the same thing as "defining what shall be deemed to be extraordinary traffic having regard to the average expense of repairing roads within the Area" (par. i of subject 19).

The expression "extraordinary traffic" is well known in local government law and its meaning has been judicially declared. (See *Hill* v. *Thomas* (1); *Henry Butt & Co.* v. *Weston-Super-Mare Urban District Council* (2); *Eastbourne County Borough* v. *Fuller & Sons* (3).)

The description in the Fourth Schedule, subject 19, requires the council to consider a particular criterion, viz., the average expense of repairing roads. It does not exclude other elements such as

(1) (1893) 2 Q.B. 333.
(2) (1922) 1 A.C. 340, at pp. 353, 358, 359, 365, 367.
(3) (1928) 93 J.P. 29, at pp. 30, 31.

intensity or frequency, concentration and unusual features. But neither the element specified nor other elements making traffic extraordinary are naturally suggested by the expression "heavy." No doubt the presence of this word in the by-law is traceable to its use in the provision then numbered 29 before it took its present form. But a change was made in the law by excising it, and the use of it in the by-law suggests that the change had not been understood, and that the mere relative heaviness of traffic has been considered enough for its inclusion.

The by-law forbids the use of vehicles included in its operation without a permit, a permit for which payment must be made according to the tonnage scale already mentioned. But another clause (144) provides that, where six tons are carried, a special permit must be obtained from the chairman. This looks very like an expression of the council's opinion of what is the load which ought not to be carried upon its roads, except with the particular allowance of its responsible representative. It thus contributes to the view that clause 136 does not mean to call upon the council to exercise its discretion in each case as to whether the vehicle ought to be allowed to use the roads. If it were not for sec. 204 (5), a general prohibition subject to a power to permit would be considered no regulation (*Melbourne Corporation* v. *Barry* (1); *Williams* v. *Melbourne Corporation* (2)). But does the by-law mean that the permit shall be given or withheld by or according to a resolution of the council as sub-sec. 5 of sec. 204 requires? Clause 136 speaks of its being "obtained from the council," but clause 138 when it requires that it should be signed by the clerk makes it possible for the clerk to grant the permit. In terms clause 136 requires that the person actually driving a vehicle to which it applies and any person, such as an employer, who causes it to be driven, should each have a permit. If it means this, clause 155 would operate to impose two fees. Again, a carrier, carter, or the like must have a "licence" under clause 141, but a permit under clause 136. Either a permit and a licence are indistinguishable or two fees are payable under clause 155.

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

(2) (1933) 49 C.L.R., at p. 155.

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The conclusion to be drawn from the considerations disclosed by this examination of the by-law is that, according to its true scope and purpose, it imposes a levy upon those categories of motor vehicle which appeared amenable to the council's jurisdiction. The levy is calculated in an ascending scale upon the load capacity of the vehicles. It is exacted by requiring a licence or a permit, conceptions which are differentiated by no distinguishing quality. The use of the motor vehicle is forbidden unless the licence or permit is obtained and the levy is paid. Further, in the course of defining the vehicles which are to be brought under the category of extra-ordinary traffic and thus become subject to the levy, the widest definition has been adopted and by the word " heavy " a mistaken criterion has been expressed.

In these circumstances it would be difficult to support the by-law as a real exercise of the power. But an even more formidable objection to the by-law necessarily arises if we have correctly estimated its nature. For there can be no doubt that, if such is the character of the by-law, the annual fees or rates which it attempts to impose resemble the annual fees or rates which, by clause 13 of the *Main Roads Acts*, the Governor in Council is authorized to levy and had levied at the date of the by-law. The rates imposed by the by-law differ only in the restricted category of vehicles brought within the authority of the council, their use of tonnage capacity instead of power weight units to calculate the amount payable and the form of the document allowing the use of the vehicle. But they are annual exactions of considerable amount made by means of a licensing system. Indeed it is not easy to see what power the council could exercise which would give rise to " like fees or rates " within clause 13 of the schedule to the *Main Roads Acts*, if such an exaction as those now in question are " unlike " and so outside the clause.

It is to be noticed that clause 13 refers in terms to by-laws in existence when a regulation under the *Main Roads Acts* is made. In the present case there was in existence such a regulation when the by-law was made. But clearly it is implied that a by-law cannot be made producing such a conflict in the case of an existing regulation.

For these reasons we think the provision under which the respondent was prosecuted is void.

The appeal will be dismissed with costs.

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Appeal dismissed with costs.

Solicitors for the appellant, *Nicol Robinson & Fox*, for *S. E. Gatfield*, Goomeri.

Solicitors for the respondent, *Leonard Power & Power*, for *Bond & Wagner*, Kingaroy.

B. J. J.

Foll *Stamps, Commissioner of (Qld) v Counsell* (1937) 57 CLR 248

[HIGH COURT OF AUSTRALIA.]

FAIRBAIRN . . . . . APPELLANT;

AND

COMPTROLLER OF STAMPS (VICTORIA) . RESPONDENT.

H. C. OF A. 1935. MELBOURNE, *May* 15; *Aug.* 12. Rich, Starke, Dixon, Evatt and McTiernan JJ.

Stamp Duties—Deed of settlement—Australian consolidated inscribed stock—Transfer—Transfer not in prescribed form—Transfer of equitable interest—Statutory exemption from duty—"Document relating to . . . the transfer . . . of any stock"—Equitable transfer not within exemption—Commonwealth Inscribed Stock Act 1911-1933 (*No.* 20 *of* 1911—*No.* 5 *of* 1933), *sec.* 52A—*Stamps Act* 1928 (*Vict.*) (*No.* 3775), *sec.* 17, *Third Schedule.*

A deed of settlement otherwise dutiable under the *Stamps Act* 1928 (Vict.) purported to transfer Australian consolidated inscribed stock to a trustee upon the terms of the settlement. The transfer was not in the form prescribed by the *Commonwealth Inscribed Stock Act*, and consequently did not operate to vest in the trustee the legal property in the inscribed stock.