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that the recital in question is of a less high character; but reading the contract and the documents it incorporates, as a consistent whole, and not denying to the recital its weight as an honest declaration inducing the contract, I am driven to the conclusion that the parties intended the Council to be bound.

I therefore agree that this appeal should be allowed.

Appeal allowed. Judgment for plaintiffs on demurrer with costs. Respondents to pay costs of the appeal.

Solicitors, for the appellants, *Minter, Simpson & Co.*

Solicitors, for the respondents, *Dawson, Waldron & Glover.*

B.L.

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[HIGH COURT OF AUSTRALIA.]

THOMAS PLUNKETT . . . . . APPELLANT;

AND

WILLIAM SMITH . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 18, 24.

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

By-law—Validity—Municipalities Act 1906 (*W.A.*) (*No.* 32 *of* 1906), *secs.* 179, 304, 308, 335.

A by-law made by a municipal Council provided that:—"Every person who shall hereafter erect alter or add to any building shall comply with the following regulations:— . . . . (*e*) No fascia or projecting eave constructed of inflammable material shall be erected at a less distance than 2 ft. 6 in. from the boundary of an adjoining property."

Held, that the by-law was invalid, there being nothing in Part XV. of the *Municipalities Act* 1906 to give the Council power to regulate the material or structure of roofs, except as to the covering.

Decision of the Supreme Court of Western Australia reversed.

APPEAL from a judgment of the Full Court of Western Australia pronouncing a certain by-law made by the Municipal Council of Leaderville to be valid.

The by-law and the facts are set out in the judgment of *Griffith* C.J. hereunder.

Pilkington K.C. (with him *Lohrmann*) for the appellant. If it was intended to prohibit eaves and fascia of wood the Act would have specifically provided for such a case. The learned Judges fell into error when they held that any by-law might be made, the object of which was to prevent fire. The proper test is: Does the by-law in question carry out the provisions of the Act. The learned Judges' reasoning would give the Council power to legislate at large for the prevention of fire—a power which is not given by the Act. (See secs. 304 and 308 of the *Municipalities Act* 1906). The Act only gives power to make by-laws for the prevention of fire on certain specified points. If a specific provision is made in the Act as to particular portions of a house, and then power is given to make by-laws to deal with other portions, it cannot be said that power is given to make by-laws dealing with the whole structure. [He referred to *Thomas* v. *Sutters* (1); *Burnett* v. *Berry* (2); *Institute of Patent Agents* v. *Lockwood* (3); *Rossi* v. *Lord Provost &c. of Edinburgh* (4); *Widgee Shire Council* v. *Bonney* (5); *White* v. *Morley* (6); *Stiles* v. *Galinski* (7).]

Villeneuve-Smith (with him *H. P. Downing*), for the respondent. Under sec. 179 (52) the Council has power to make a by-law such as the one in question.

[GRIFFITH C.J.—Does sec. 179 give the Council a plenary legislative power for the prevention of fire ?]

Sec. 335 (1) (*c*) also gives the Council power to make the by-law. [He referred to the following cases:—*Institute of Patent Agents* v. *Lockwood* (3); *Slattery* v. *Naylor* (8); *Kruse* v. *Johnson* (9): *Gentel* v. *Rapps* (10).]

(1) (1900) 1 Ch., 10.
(2) (1896) 1 Q.B., 641.
(3) (1894) A.C., 347.
(4) (1905) A.C., 21.
(5) 4 C.L.R., 977.
(6) (1899) 2 Q.B., 34, at p. 39.
(7) (1904) 1 K.B., 615, at p. 625.
(8) 13 App. Cas., 446, at p. 449.
(9) (1898) 2 Q.B., 91.
(10) (1902) 1 K.B., 160.

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Pilkington K.C., in reply. Secs. 304 and 308 are against the contention of the respondent. The maxim "*expressio unius exclusio alterius*" applies. Sec. 179 (52) has no application. The words relied on "good rule and government of the municipality" are, no doubt, wide, but suggest rather rules of conduct and the general management of municipal affairs, the suppression of disorder, etc., *e.g.*, betting in the streets. [He also referred to secs. 335 (*c*) and 296.]

Cur. adv. vult.

October 24.

GRIFFITH C.J. In this case a question is raised as to the validity of a by-law made by the Municipal Council of Lederville in these terms: "Every person who shall hereafter erect alter or add to any building shall comply with the following regulations:—(*e*) No fascia or projecting eave constructed of inflammable materials shall be erected at a less distance than 2 ft. 6 in. from the boundary of an adjoining property." Two objections were taken to its validity; first, that the Municipal Council had no authority to make it, and, secondly, that if they had, it is bad on the ground that it is unreasonable. The learned Judges of the Supreme Court held that the Council had authority to make it, and that it was reasonable.

With respect to the question of reasonableness, apart from the legal difficulty there always is in holding a by-law within the power of a local authority to be unreasonable, as was pointed out by this Court in the case of *Widgee Shire Council* v. *Bonney* (1), it is impossible, in the present case, to say that the by-law is unreasonable if the Council had power to make it.

But the reasonableness or even desirableness of a by-law is quite irrelevant to the question of power to make it. That power must be found in the words of the Statute. In this case the provisions relied upon are contained in the *Municipalities Act* 1906. Part XV. of that Act, comprising secs. 294 to 336, is headed "Buildings." Sec. 304 provides that, "No roof of any house or other building shall be covered with any other material than slate, tiles, metal, glass, artificial stone, cement, or shingles,

(1) 4 C.L.R., 977.

or other material approved of by the Council." That section, it will be observed, deals with the covering of roofs, and has nothing to say to the structure of the roof itself or the material of which that structure is to be composed. Sec. 308 provides that, "No building shall be erected within any municipal district the external walls of which building shall be wholly or in part of wood, canvas, thatch, or other inflammable material, or the internal partitions or ceilings whereof shall consist either wholly or in part of calico, canvas, paper, or other inflammable material, nor shall any verandah or balcony to any house or building be roofed with canvas or other inflammable material." But, if any building is constructed contrary to the provisions of that section, the Council may order it to be removed, or they may, in their discretion, permit by written licence the erection of a building which does not comply with those provisions under such conditions as they may impose. Again, in that section there is nothing about the structure of roofs. Sec. 335, which is in the same Part XV., authorizes the Council to make by-laws with respect to various matters enumerated, relating to buildings, plans, levels, foundations, thickness and height of walls, party walls, height, size, dimensions, lighting, and ventilation of rooms, the removal of walls contrary to the by-laws, the construction of staircases. Pl. (*d*) is in these terms, "The construction and erection, size, and position of parapets, flues, and fireplaces in any building"; while the final placitum (*k*) is "generally for the carrying out of this Part of this Act." Possibly that last provision would authorize the making of a by-law giving a general approval under the powers of sec. 304 to a particular kind of material for the covering of roofs, but it certainly would not authorize the Council to substitute for the discretion conferred upon it by sec. 308 and to be exercised in each particular case, a general rule prescribed by by-law. I can find nothing, having regard to the contents of that Part of the Act, to warrant the suggestion that the Council has power to regulate the material or structure of roofs. The legislature has dealt with two particular matters in connection with buildings—the material of the covering of roofs, and the material of walls and internal partitions; but has said nothing about the material or structure

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of roofs. I am unable, therefore, to agree with the Full Court in thinking that this provision, on which they relied, authorizes the by-law in question. I can find nothing to justify me in holding that regulating the structure of roofs is in any way carrying out that Part of the Act.

Another section relied upon before the Court in support of the by-law is sec. 179, which may be called the general by-law section, and authorizes the Council to make by-laws upon some scores of subjects. The powers relied upon are contained in pl. 15 (*a*), which provides for the making of by-laws "for the prevention, suppression, and speedy extinguishment of fires." Now, that must be read with the context. Pl. 15 (*g*) is "preventing the stacking, and regulating the storage and keeping of any hay, straw, bark, thatch, reeds, coal or firewood." Pl. 15 (*h*) is "for the proper construction of buildings and premises wherein hay, straw, timber or thatch may be sold or stored." Pl. 15 (*i*) relates to preventing the erection of tents or other structures of inflammable material without the consent of the Council, corresponding with the power given in sec. 308. Pl. 15 (*j*) relates to the kind and quality of inflammable or combustible materials, or substances to be kept at any one time in one place, while pl. 15 (*k*) relates to stacking of various inflammable substances in the open air. The provisions from (*a*) to (*f*) inclusive, which I have not read, are superseded if an Act called the *Fire Brigades Act* is in force in the municipality. Now, reading these provisions together, I do not see anything in them to authorize the general regulation of material used in the structure of buildings or in the structure of roofs of buildings. The powers seem to me to be given entirely *alio intuitu*—the prevention of the outbreak of fires in some such ways as are mentioned in the section. That is taking them by themselves, but when those provisions are read with Part XV of the Act, which contains express provision as to the materials of walls and of the covering of roofs, they show still more clearly the extent to which the legislature intended that these matters should be governed by rigid rule.

Reliance is also placed upon the concluding *placitum* (52) of sec. 179, which authorizes the Council to make by-laws for ensuring the good rule and government of the municipality, and the

convenience, comfort and safety of the inhabitants. Whatever those words might mean in a different context, I do not think that in this context they can be extended to cover matters which are intended to be excluded from the specific provisions I have referred to. The rule *expressum facit cessare tacitum* is, I think, particularly applicable to such a case. The conclusion, therefore that I come to is that on the subject of materials of walls and the covering of roofs, a particular intention is expressed in the Act as to the extent to which the Legislature was willing to interfere or give power to interfere, and that that particular intention leaves no room for an inference of a general intention, such as has been set up. Consequently I think that there is no power conferred by the Act upon the Council to regulate the materials of which roofs are constructed except as to the covering.

The eaves or fascia dealt with by the by-law are part of the structure either of the roof or of the wall. It is not suggested that they are part of the covering of the roof. If they are part of the roof, and not of the covering, then there is no power to make a by-law regulating them. If they can be regarded as a part of the wall—which was suggested, although the suggestion was withdrawn and afterwards pressed again—sec. 308 deals with that matter, and the power given to the Council is to exercise a particular discretion, but not to regulate the matter by by-laws. I am therefore unable to find the power relied upon in the Act. If a municipality has no power to deal with a particular subject matter at all, it cannot deal with a part of it, however desirable regulation with regard to such part might be; and the effect of the limitation of the application of the by-law to eaves or fascia within 2 feet 6 inches of the boundary of the property is quite irrelevant to the question of the existence of the power, although if the power existed it might be very relevant to the expediency of exercising it. For these reasons I am very reluctantly compelled to the conclusion that the Council had no power to make the by-law, and that the appeal must be allowed on that ground.

BARTON J. I am of the same opinion. I do not propose to add anything except to say that I share in the reluctance which His

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Honor has expressed, for the by-law is in the best interests of the inhabitants, and a very reasonable one. It is a great pity that the Act does not include powers sufficient to cover the making of such a regulation.

O'CONNOR J. If it was within the power of the municipality to make the by-law now under review it is clear that the by-law itself is not unreasonable. Indeed, the objection of unreasonableness was not seriously argued in this Court. The real matter in controversy is whether the by-law is *ultra vires*. A number of cases were cited in the course of the argument, but they all turn on the wording of particular Statutes, and throw no light on the meaning of the statutory provisions which the Court has to interpret. Where, as in this case, a municipal body asserts the power to restrain by by-law the liberty which every man *primâ facie* has to build his house in the mode he thinks fit, provided he does not thereby injure his neighbour, it is bound to establish that the legislature has conferred the power in clear language. Mr. *Villeneuve-Smith*, on behalf of the municipality, contended that the necessary power was contained in the *Municipalities Act* 1906, and he relied upon several sections which I shall take in their order. Sec. 179 empowers the municipality to make by-laws with reference to a variety of subjects, covering practically the whole scope of the Act. It is contended that the necessary power is to be found in the general terms of sub-sec. 52 of that section, and particularly in the words, quoting only those that are material, "the good rule and government of the municipality and the . . . . safety of the inhabitants thereof." No doubt the adoption of precautions against fire is one of the ways in which the good rule and government of the municipality may be secured. Taking the words in their wider sense they would include the exercise of all the powers which the Act, by its several sections, expressly confers on the municipality. But general words in such a section cannot be so interpreted when the Act enacts, as this does specifically with respect to every subject matter within its purview, the manner in which the good rule and government of the municipality and the safety of the inhabitants is to be carried out. The precaution of fire is one of these

subjects. Sub-sec. 15 of sec. 179 empowers the making of by-laws (*a*) "for the prevention suppression and speedy extinction of fire." It consists of eleven paragraphs laying down specifically the means to be adopted in a variety of circumstances for attaining these objects. Again, in Part XV., relating to buildings, there are several sections to which I shall refer latter, giving a controlling power to the municipality with respect to the material of which buildings are to be constructed, and their construction as a safeguard against fire. The legislature has thus indicated the limits of its interference with the liberty of persons within the municipality to build their houses of such material and in such manner as they may think fit. In my opinion no general words of the Act can empower the municipality to make by-laws extending that interference beyond those limits. The power which the municipality is claiming in this case must be found therefore, if it is to be found at all, either in sub-sec. 15 or in the series of sections in Part XV. which prohibit the use of certain building material and buildings and certain methods of construction as a precaution against fire. In the provisions of sub-sec. 15 of sec. 179 there is certainly no one of the various paragraphs under which the by-law can be sustained. The only paragraphs which concern the construction of buildings are (*h*) and (*c*). The former deals only with the construction of buildings in which hay, straw, timber or thatch may be sold or stored. The latter prohibits the erection without leave of the municipality of any tent pavilion shed or other structure of calico, canvas or other inflammable material. The power claimed clearly cannot be implied from these provisions.

The complainant however based the case of the municipality principally upon the part of the Act relating to buildings and particularly upon sec. 335. That section confers on the municipality power to make by-laws with reference to ten different subjects, all having to do with the erection of buildings and with the material of buildings. Leaving paragraph (*k*) out of consideration for the moment there is no reference, express or implied to fire or to the prevention of fire in any of the other paragraphs. But Mr. *Villeneuve Smith* relied on paragraph (*k*), which is in these words:—"Generally for the carrying out of

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this Part of the Act." The part of the Act referred to contains only six sections which in any way relate to the subject matter of so erecting buildings as to prevent the occurrence of fires. Of these sections 326 and the three sections following may be left out of consideration in this case. They have relation only to inflammatory buildings in public and other places and give special powers to the municipality in relation thereto directed to the prevention of fires. It is upon the two remaining provisions sec. 304 and sec. 308 that the complainant must rely in seeking support for the by-law in the general words at the end of sec. 335. Sec. 304 enacts that no roof of any house or other building shall be covered with any other material than slate, tiles, metal, glass, artificial stone, cement or shingle or other material approved of by the Council. Sec. 308 prohibits the erection of any building having external walls wholly or in part of wood or other inflammable material or having internal partitions ceilings verandahs or balconies in which certain inflammable materials are used. But the municipality is empowered to grant leave to erect buildings of the kind prohibited by the latter section under restrictions as to time and otherwise. Basing his argument on these two sections, Mr. *Villeneuve-Smith's* contention was that the fascia being part either of the wall or of the roof the by-law does no more than supply a detail in the precautions which those two sections direct to be observed for the prevention of fire. Mr. *Pilkington's* reply to this contention is I think unanswerable. The fascia he says is not attached to or part of the external wall but is attached to or part of the roof, but even if it were attached to or part of the wall the case is provided for expressly by sec. 308, which allows the municipality a discretion in such cases. The general by-law making power was not intended to apply to matters thus specifically dealt with by the enactment. The claimant's strongest argument however, is that founded upon sec. 304. The fascia he contends is part of the roof and the prohibition against using fascias of wood where a house is built within a certain distance of the boundary is no more than the supplying of a detail in the prevention of fire from an inflammable roof. If that contention is good it is clear that a by-law might be made controlling the selection of material of which the roof is to be

constructed and the manner of its construction. That is sufficient to show how far the power claimed would extend beyond the express enactment of the legislature. In my opinion sec. 304 itself completely answers the claimant's contention. The legislature has in that section restricted its control to the covering material of the roof, leaving the builder free to construct the roof itself of any material and in any manner he may think fit. In my opinion the legislature has in that way marked the limit of its interference with respect to the material and construction of roofs and the general words at the end of sec. 335 cannot be so interpreted as to restrict the builder's liberty in a matter in which the express enactment of the legislature has left him free. For these reasons I am of opinion that the Act does not authorize the making of the by-law under consideration and that the appeal must be allowed.

Appeal allowed. Judgment appealed from discharged. Appeal from Police Magistrate allowed with costs and conviction quashed. Respondent to pay costs of appeal. Any costs paid to be repaid.

Solicitors, for the appellant, *Lohrmann & McDonald.*
Solicitors, for the respondent, *Downing & Downing.*

J. H.