appeal should be allowed as to all but the 2½ feet strip of frontage.

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CRAINE v. AUSTRALIAN DEPOSIT AND MORTGAGE BANK LTD.

Appeal allowed with costs. Judgment varied by limiting it to the recovery of a strip 2 feet 6 inches wide along Washington Street. Judgment for the defendant as to the residue without costs.

Solicitors, for the appellant, *Croft & Rhoden.*
Solicitors, for the respondents, *Davies & Campbell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

PRESIDENT &c. OF THE SHIRE OF TUNGAMAH . . . . . } APPELLANTS;

AND

MERRETT AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 8, 9, 10, 14.

Griffith C.J., Barton and Isaacs JJ.

Local Government — By-law — Validity — Traction Engine — "Vehicle — Local Government Act 1903 (*Vict.*) (*No.* 1893) *secs.* 197 (23), (29), (34), 495, 594.

By sec. 197 of the *Local Government Act* 1903 (Vict.) it is provided that a municipality may make by-laws for the following purposes (*inter alia*) :—

"(23) Regulating the hours during which and conditions on which locomotive engines or rollers impelled by steam or electricity may proceed over any road."

"(29) Prohibiting or regulating the use on any road of any vehicle not having the nails on its wheels countersunk in such manner as may be specified

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in such by-law or having on its wheels any bars spikes or other projections forbidden by such by-law."

"(34) Generally for maintaining the good rule and government of the municipality."

By sec. 594 it is provided that "it shall be lawful for any municipality to make by-laws not inconsistent with the provisions of this Part for regulating the hours during which and conditions on which traction engines may proceed over any street or road."

Held (*Isaacs* J. doubting), that a traction engine is a "vehicle" within the meaning of sec. 197 (29).

Ahern v. *Cathcart*, (1909) V.L.R., 132; 30 A.L.T., 156, overruled.

A municipality made a by-law prohibiting the use on a public highway of any traction engine having on its wheels any bars, spikes, grips, or other projections, but providing that this prohibition should not apply to (*a*) any traction engine used only for hauling agricultural machinery if the projections on the driving wheels conformed to certain specified conditions; (*b*) any traction engine the driving wheels of which were cylindrical and smooth soled and had no other projections than those specified, provided that in the last-mentioned case the owner of the traction engine had previously obtained the written permission of an officer of the Council to use it on specified roads and that it was used on those roads, and that the owner had agreed in writing to pay the cost of any damage that might be done to any road, bridge or culvert by the engine or any vehicle drawn by it. The by-law further provided that no person should use in any public highway any traction engine unless there were carried on the engine, or on some vehicle drawn by it, four wooden planks of specified dimensions upon which the engine should cross over any bridge or culvert.

Held, that the by-law was within the power conferred by secs. 197 and 594, and was valid.

Decision of the Supreme Court of Victoria: *Merrett* v. *President &c. of the Shire of Tungamah*, (1912) V.L.R., 248; 34 A.L.T., 35, reversed.

APPEAL from the Supreme Court of Victoria.

The President, Councillors and Ratepayers of the Shire of Tungamah, purporting to act under secs. 197 (29) and 594 of the *Local Government Act* 1903, made a by-law which, so far as is material, was as follows:—

"Bars, Spikes, Grips, or other Projections on Wheels.

"1. No person shall use or cause or procure any other person to use on any public highway any traction engine or other vehicle having on its wheels any bars, spikes, grips, or other projections:—

"This prohibition, however, shall not apply to—

"(*a*) Any traction engine, used only for hauling agricultural machinery, or hauling a vehicle containing such machinery only, if the projections on the driving wheels of such engine consist only of bars at least two and three-quarter inches in width and not more than one and one-sixteenth of an inch in thickness, and the space intervening between such bars does not exceed five inches, or

"(*b*) Any traction engine the driving wheels of which are cylindrical and smooth soled, and having no projections thereon other than diagonal bars of not less than three inches in width nor more than three-quarters of an inch in thickness, and extending the full width of the tire, and the space intervening between such cross bars not exceeding three inches; provided in such last mentioned case—

"(i.) That the owner of such engine has previously obtained from the Council or an officer of the Council duly authorized in that behalf a permit in writing specifying the public highways on which it may be used, and that the engine is being used on one of the highways so specified.

"(ii.) That the owner has agreed in writing to pay to the Council the cost of making good any damage done to any roadway bridge or culvert by such engine or any vehicle drawn by it.

"(iii.) That such engine is not being used (unless with the written consent of the Council or an officer of the Council duly authorized in that behalf) to haul more than two vehicles, exclusive of any vehicle solely used for carrying water for such engine.

"(iv.) That the loading of any vehicle drawn by such engine does not exceed nine tons in weight, including the weight of such vehicle.

"(v.) That the weight carried by any vehicle drawn by such engine (including the weight of such vehicle) does not exceed three hundredweight for

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each half-inch of bearing surface of the tire or felloe of each wheel of such vehicle."

"Wooden Planks to be carried on Engine &c.

"8. No person shall use or cause or procure to be used on any public highway any traction engine unless there is carried on such engine, or some vehicle drawn by the same, at least four wooden planks at least 12 inches in width, four inches in thickness, and at least twelve feet in length, and when crossing any bridge or culvert the driver or the person in charge of such engine shall lay down such planks and no engine shall be permitted to cross over any bridge or culvert except on such planks."

An order *nisi* was obtained by Charles Edward Merrett and William Whiteman calling upon the municipality to show cause why the by-law should not be quashed wholly or in part for the illegality thereof on the grounds:—

1. That the by-law and every clause thereof was wholly unwarranted by the *Local Government Act* 1903, secs. 197 and 594, and had no warrant or authority under any other law.

2. That the by-law was unreasonable and capricious.

On the return of the order *nisi* the Full Court, to which the matter was referred, quashed clauses 1 and 8 of the by-law above set out on the ground of the illegality thereof: *Merrett* v. *President &c. of the Shire of Tungamah* (1).

The respondents to that order *nisi* now appealed to the High Court from that decision.

Irvine K.C. and *Hassett*, for the appellants. The by-law can be supported under either sec. 197 (29) or sec. 594 of the *Local Government Act* 1903. A traction engine is a "vehicle" within sec. 197 (29), and the decision in *Ahern* v. *Cathcart* (2) to the contrary is wrong. The word "vehicle" in ordinary colloquial use is applied generally to anything which goes on wheels over the roads. It should not be limited to its etymological meaning. In *Cannan* v. *Earl of Abingdon* (3) a bicycle was held to be a vehicle. When the *Local Government Act* 1903 was passed there were no other vehicles having bars or spikes on the wheels

(1) (1912) V.L.R., 248; 34 A.L.T., 35. (2) (1909) V.L.R., 132; 30 A.L.T., 156.
(3) (1900) 2 Q.B., 66.

except traction engines. Limiting the dimensions and position of the bars on the wheels is regulating the conditions on which traction engines may proceed over the roads, as are also the other provisions of clause 1 of the by-law. As to clause 8 the appellants could, in regulating the conditions on which the roads might be used, prescribe that planks should be put down and used when crossing bridges or culverts, and it is ancillary to that power to require planks to be carried.

Mitchell K.C. and *Starke*, for the respondents. The word "vehicle" in sec. 197 (29) does not include a traction engine. A "vehicle" is something for carrying goods or passengers. Part XXIII. of the Act deals with the regulation of traction engines, and it was not the intention to deal with them also under the description of vehicles. They referred to *Rossi* v. *Edinburgh Corporation* (1); *Gentel* v. *Rapps* (2); *Ferrier* v. *Wilson* (3); *Ahern* v. *Cathcart* (4). A power to prohibit the use of traction engines on roads would be inconsistent with the provisions in Part XXIII. where a right is given to persons to use the roads subject to certain conditions. It is a matter of structural necessity that traction engines should have cross bars on the wheels. If there is any power to prohibit the use of traction engines, it must be limited to those traction engines the structure of whose wheels is of an unusual character. A right to prohibit the use of traction engines with cross bars on their wheels would be so inconsistent with the right of traction engines to use the roads that sec. 197 (29) should be construed as not applying to traction engines. A by-law prohibiting the use of traction engines of the ordinary normal construction would be unreasonable: *Williams* v. *Weston-super-Mare Urban District Council* (5); *Parker* v. *Mayor &c. of Bournemouth* (6); *White* v. *Morley* (7); *Attorney-General* v. *Scott* (8).

[GRIFFITH C.J. referred to *Bell* v. *Day* (9).

ISAACS J. referred to *Thomas* v. *Sutters* (10).]

(1) (1905) A.C., 21.
(2) (1902) 1 K.B., 160, at p. 166.
(3) 4 C.L.R., 785, at p. 791.
(4) (1909) V.L.R., 132; 30 A.L.T., 156.
(5) 98 L.T., 537.
(6) 86 L.T., 449.
(7) (1899) 2 Q B., 34, at p. 39
(8) (1904) 1 K.B., 404.
(9) 2 Qd. L.J., 180.
(10) (1900) 1 Ch., 10.

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Under sec. 495 agreements may be made in respect of excessive weights passing along roads, and there is no power by by-law to compel the making of agreements whether the weights are excessive or not. As to the weights that may pass along roads sec. 569 indicates the measure, and this by-law goes beyond that section.

[ISAACS J. referred to *Lord Aveland* v. *Lucas* (1).]

Clause 8 of the by-law makes it a distinct offence not to carry the requisite planks. That is not regulating the conditions of proceeding along roads.

Irvine K.C., in reply, referred to *Co-operative Brick Co. Proprietary Ltd.* v. *Mayor &c. of Hawthorn* (2); *Widgee Shire Council* v. *Bonney* (3).

[GRIFFITH C.J. referred to *Plunkett* v. *Smith* (4).]

Cur. adv. vult.

Oct. 14.

GRIFFITH C.J. This was an application to quash a by-law made by the appellant municipality relating to traction engines. The Supreme Court ordered that clauses 1 and 8 of the by-law should be quashed. The provisions of the *Local Government Act* 1903, which were relied upon by the appellants to justify the making of the by-law, and under which they formally purported to act, are contained in sec. 197 and sec. 594. Sec. 197 enumerates a number of subjects upon which by-laws may be made by municipalities. No. 29 is, "prohibiting or regulating the use on any road of any vehicle not having the nails on its wheels countersunk in such manner as may be specified in such by-law or having on its wheels any bars spikes or other projections forbidden by such by-law." The relevant words are "having on its wheels projections forbidden by such by-law." Sec. 594, which is included in Part XXIII. of the Act, provides that "it shall be lawful for any municipality to make by-laws not inconsistent with the provisions of this Part for regulating the hours during which and conditions on which traction engines may

(1) 5 C.P.D., 211; 351.
(2) 9 C.L.R., 301, at p. 306.
(3) 4 C.L.R., 977.
(4) 14 C.L.R., 76.

proceed over any street or road." The Supreme Court, following a previous decision of that Court in *Ahern* v. *Cathcart* (1), held that the term "vehicle" in paragraph 29 of sec. 197 did not include traction engines. In that case they founded their judgment, as I understand, upon reference to dictionaries. They thought that the term "vehicle" meant something drawn, in which things were intended to be carried. Their attention was not directed to the English *Locomotives on Highways Act* 1896, which my brother *Isaacs* mentioned during argument, in which the term "vehicle" is expressly used to mean a machine drawing as well as the thing drawn. That Act, which made provision for the exemption from certain provisions of certain vehicles, uses the expression "vehicles so exempted whether locomotives or drawn by locomotives." So that the English Parliament, at any rate, thought in 1896 that the term "vehicle" might be properly applied to a locomotive drawing other vehicles. I should have thought, from what I know of the use of the word "vehicle" in Australia, that in 1903 it would include a structure running on wheels and drawing another as well as the structure drawn. This is not a matter of law but a question of the meaning of words. I am confirmed in that view by the fact that in 1903 there were not, so far as I know, any vehicles in use on roads in Australia having projections on their wheels except traction engines. I am, therefore, of opinion that the term "vehicle" in paragraph 29 includes traction engines.

Now, the power given by sec. 197 (29) is to prohibit or regulate the use of vehicles having on their wheels projections forbidden by the by-law. There is, of course, in strict grammar, a contradiction in terms in that paragraph. Regulating the use of vehicles having forbidden projections on their wheels is an inaccurate expression, but it must be construed reasonably, and the word "forbidden" must be read as "forbidden" *sub modo*. The result is that under that provision a municipality has power to make by-laws regulating, that is, imposing conditions upon, the use of vehicles of that kind. The case of *Williams* v. *Weston-super-Mare Urban District Council* (2), a decision of a Divisional Court, is entirely in accordance with that view. I think, there-

(1) (1909) V.L.R., 132; 30 A.L.T., 156. (2) 98 L.T., 537.

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fore, that the appellants had power to regulate the use of traction engines.

I now turn to the terms of the by-law. Clause 1 is sought to be supported under both sec. 197 and sec. 594. That clause provides that "No person shall use . . . on any public highway any traction engine or other vehicle having on its wheels any bars, spikes, grips or other projections. This prohibition, however, shall not apply to . . . (*b*) Any traction engine the driving wheels of which are cylindrical and smooth soled, and having no projections thereon other than diagonal bars of not less than three inches in width nor more than three-quarters of an inch in thickness, and extending the full width of the tire, and the space intervening between such cross bars not exceeding three inches, provided in such last mentioned case"—that is, in the case of traction engines which comply with the requirements of clause (*b*)—certain conditions shall be observed.

The next question is whether these conditions are such as may lawfully be imposed under the power to regulate. The first condition is:—"That the owner of such engine has previously obtained from the Council, or an officer of the Council duly authorized in that behalf, a permit, in writing, specifying the public highways on which it may be used, and that the engine is being used on one of the highways 'so specified.'" It is contended that the appellants had no right to impose such a condition. But here we must have regard to the surrounding circumstances. The variations of soil in Australia are infinite. There are many parts of the country in which to use a heavy traction engine on the roads would be practically to destroy them. Many of the roads are quite unformed, and many only partially formed and only fit for light traffic. It would, therefore, be most reasonable for a shire Council to say "If you want to use a traction engine in this shire you shall only use it on such roads as we tell you." That that is a thing contemplated by the legislature is shown by the provisions of sec. 586, which is in Part XXIII., in which sec. 594 also occurs, and which deals specifically with traction engines. Sec. 586 provides that the owner of a traction engine desiring to enter a populous part of a shire is bound before doing so to give notice to the shire secretary that he is going to do so, and that

the shire secretary may prescribe the roads that may be used. I think, therefore, that that condition is not unauthorized. If necessary, I should hold that it fell within the general power contained in sec. 197 (34) to make by-laws "generally for maintaining the good rule and government of the municipality," which, whatever interpretation is put upon it, certainly includes any matter which the legislature have plainly said they think to be for the good rule and government of the municipality.

The next condition is, perhaps, more difficult to deal with. It is, "That the owner has agreed, in writing, to pay to the Council the cost of making good any damage done to any roadway, bridge, or culvert by such engine, or any vehicle drawn by it." It is said that that is seeking to impose upon a person who is using a lawful instrument of travel a condition that he shall incur a pecuniary liability which the law does not impose upon him. That argument impressed me for some time, but, on reference to sec. 495, I find a general provision that under certain circumstances if damage is caused to a street or road by any excessive weight passing along the same, the Council "may recover . . . from any person by whose order such weight has passed along such street or road the amount of such expenses" (that is, the expenses of repairing the street or road) "as may be proved . . . to have been incurred by such Council by reason of the damage arising from such weight." Similar provisions have been in force in England for many years, and the term "excessive weight" has been interpreted to mean a weight greater than is carried in the normal use of the roads. It certainly cannot be said that in a country district of Victoria driving a traction engine is a normal mode of traffic on ordinary roads. So that, the legislature having enacted that a person taking heavy weights over a road should be liable to pay the cost of any damage thereby occasioned, a stipulation in a by-law that a traction engine shall not use the roads in a particular municipality unless the owner of the engine agrees to pay the cost of making good any damage to the roads, cannot be said to be *ultra vires*. This particular shire is, I understand, situated upon the Murray River, and we all know what would be the condition of the roads there before they are properly formed. The other con-

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ditions, which relate to the number of vehicles drawn, the weight of the loading of those vehicles, and the weight per half-inch of the bearing surface of each wheel, are clearly unobjectionable.

I think, therefore, that clause 1 can be supported as good under sec. 197 (29). It is contended that it may also be supported under sec. 594 which, as I have said, authorizes Councils to make by-laws for regulating the conditions on which traction engines may proceed over any street or road. As at present advised, I am disposed to think that the words "proceed over" assume that the engine is one that in point of construction may lawfully use the road. I say "in point of construction" as distinguished from the mode of use, and I am disposed to think that the word "proceed" refers, not to the construction of the engine, but to its mode of use. However, in the view I take of sec. 197 (29), that matter is unimportant.

I pass now to clause 8, which applies to all traction engines, whether having projections on their wheels or not. It provides that no person shall use a traction engine on a highway unless there are carried on the engine four planks of a specified size for the purpose of their being put down on bridges or culverts, so that the traction engine may run upon them in crossing the bridges or culverts. Now, I think the power to prescribe conditions on which traction engines may proceed over roads includes a power to prescribe precautions to be taken so as not to injure roads or bridges—in particular, bridges—over which the traction engines pass. The precaution of laying down solid planks to distribute the weight of an engine in passing over a light bridge or culvert is an obvious one. It is said that it is difficult to carry out the provision. That is a matter for the municipality to consider, not for us. I think, therefore, that requiring planks to be put down on a bridge or culvert is justified. One of the learned Judges of the Supreme Court thought that, even if that were so, it would not justify the first portion of the clause, requiring the planks to be carried by the traction engine. But, with great respect, I would invert the reasoning. If there is power to require the use of planks, then I think there is also power to ensure that that precaution shall be taken, and to require that traction engines shall always be in a condition to

comply with the precaution. When a traction engine comes to a place where the planks should be used, there may be no officer of the Council at hand to see that they are used. It seems to me, therefore, that the carrying of the planks is incidental to the requirement that they shall be used, just as a by-law requiring that a vehicle when descending a particular hill shall use skids under one or more of its wheels would be idle if the vehicle were not required to carry skids. In the same way, a provision that lamps shall be used on vehicles during certain hours would be very incomplete if there were no provision that lamps should be carried.

For these reasons, I think that the requirement that planks shall be carried is merely incidental to the requirement that they shall be used while crossing bridges or culverts, and that clause 8 of the by-law is a good exercise of the power conferred by sec. 594.

I am therefore of opinion that the application to quash should have been refused, and that this appeal should be allowed.

BARTON J. I will first consider clause 8 of the by-law—the clause prescribing the carrying of four planks of certain dimensions to be laid down when the traction engine is about to cross a bridge or culvert. Sec. 594 gives power to regulate "the conditions on which traction engines may proceed over any street or road." The requirement that a traction engine shall carry these planks and lay them down when crossing a bridge or culvert, and shall not cross a bridge or culvert except on such planks, is, in my opinion, a "condition on which traction engines may proceed over any street or road." I see no material distinction between allowing an engine to proceed over a road and permitting the use of the engine on the road, since the ordinary use of the road is to proceed over it, and I do not think that any other use is meant. A bridge or culvert is part of a road. The objection that the power given does not cover a condition that engines must carry planks would, perhaps, be a good objection if it stood by itself. But it is prescribed in conjunction with a requirement that a bridge or culvert must be crossed on such planks. It is to ensure the use of them that their carriage is required. It is the

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same as if the paragraph said that engines must not cross the road except on four or more planks of these dimensions, and to that end an engine must carry four or more planks. To demand the carriage of them is an ancillary provision to make the main requirement of using them in traversing a bridge more effective. It is within the power. So far as the objection is that the requirement is unreasonable, it is clear that the legal sense of that term is not that the requirement is unreasonable if it is greater than a Judge thinks necessary or desirable. Reasonableness is in the main a question for a representative body like a shire Council to determine, and, if there is any case in which a determination on such a subject is fatal to a by-law, it would have to be an extreme one. That is the effect of the authorities.

Passing on to the rest of the by-law, I am not sure that sec. 594 does not cover the first clause, with part of the proviso attached, as conditions on which traction engines may proceed over roads. But assuming it does not, then the by-law would be *ultra vires* unless in sec. 197 (29) the word "vehicle" includes a traction engine. The terms of sec. 197 (29) are [His Honor read it and continued:] The main objection on this part of the case is that a traction engine is not a "vehicle," and that is the opinion which commended itself to the learned Judges of the Supreme Court in *Ahern* v. *Cathcart* (1). No doubt the objection that the word "vehicle" does not include a traction engine is highly arguable. I have come, on the whole, to the conclusion that the intention of Parliament in making this provision was to include traction engines amongst other vehicles. The sub-section is almost a transcript from an English Act, the *Highways and Locomotives Act* 1878 (41 & 42 Vict. c. 77). The third and second sub-sections of sec. 26 of that Act differ from sec. 197 (28) and (29) of the Victorian Act only in this respect, that where the English Act uses the words "waggon wain cart or other carriage drawn by animal power," the Victorian Act uses simply the word "vehicle." Without question that term does not preserve the restriction as to the means of traction. Does it preserve the restriction as to the kind of appliance? It is evident that the provisions of the English Act were before the framers of those two

(1) (1909) V.L.R., 132; 30 A.L.T., 156.

sub-sections, otherwise they could not have been so nearly identical in form. Therefore some reason is to be sought for the change from "waggon wain," &c., to "vehicle." Was it intended that the word "vehicle" should connote merely the things mentioned in the English Act? Clearly not, for the omission of the words "drawn by animal power" opens the way for a greater variety of appliances. Moreover, there would be no reason for the change, if that were so, except that the word "vehicle" is shorter than the description in the English Act. But where by a subsequent enactment Parliament wishes to prescribe the same thing as has already been prescribed in some prior enactment, it generally repeats the identical words in order that decisions on the meaning of the words in the earlier Act, or the practical application of those words as seen in the ordinary conditions of life, may be available in support of the subsequent enactment. When, therefore, the Victorian Parliament adopted the word "vehicle" in place of the words in the English Act they must have had some reason for doing so, and I find no good reason for it, unless it be that, in legislating 25 years afterwards, the Victorian Parliament, having in view the immense expansion in the kinds and varieties of appliances used for carriage or traction on roads, wished to adopt some form of words more comprehensive than that used in the English Act in order to meet the altered conditions. I think that is what they must have done. We must look for a larger meaning of "vehicle" than one which comprehends only waggons, wains, carts and carriages drawn by animal power. I think the intention was to deal with contrivances other than those drawn by such power, and to include those of more modern invention which would not be included in the terms waggon, wain, cart or other such carriage. That the Victorian Parliament, in looking for a word to supplant the more restricted form of expression in the English Act of 1878, should have turned to the later English legislation, is a most natural thing, and they did turn, I think, to the Act passed in 1896 called the *Locomotives on Highways Act*, passed only seven years before the Act of 1903. Sec. 1 (1) of that Act provides that certain enactments contained in a schedule "shall not apply to any *vehicle* propelled by mechanical power" if it fulfils certain requirements as to weight and construction and does not draw

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more than one vehicle, &c., and "*vehicles* so exempted, whether locomotives or drawn by locomotives, are in this Act referred to as light locomotives." In sub-sec. (2) of the same section we find these words: "In calculating for the purposes of this Act the weight of a *vehicle* unladen, the weight of any water, fuel, or accumulators, used for the purpose of propulsion, shall not be included." So that it is clear that, without including it in a mere definition clause, the English Parliament used the word "vehicle" in that Act as a term including locomotives—at any rate, light locomotives—and it applies the term "vehicle" both to the vehicle which is drawn and to the locomotive which draws it. It seems to me very reasonable to infer that the Victorian Parliament in looking for a larger term than that in the Act of 1878, so as to include in it the more modern appliances which twenty-five years later were being used on roads in the shape of locomotives, turned in 1903 to the English Act of 1896, and that, having done so, they found there the term that suited their purpose, seeing that the English Parliament had used the word "vehicle" to include locomotives used on roads. It also seems to me reasonable to suppose that they were satisfied in their own minds that they might safely use that word for the larger purpose. Our intendment should be, if possible, to support this by-law. The construction I have mentioned is, I think, a reasonable one, and upon it the by-law can be supported. It seems to me, therefore, that the power contained in sec. 197 to deal with traction engines under the term "vehicles" is one which the Parliament intended to confer. One is the more likely to come to that conclusion on a closer examination of sec. 197 (29) because it deals with vehicles having on their wheels spikes or other projections, and in 1903 I think it would have been hard to suggest, and I do not think it was suggested in argument, that there were any vehicles having on their wheels spikes or other projections unless they were of the class of traction engines or road locomotives that had of late years come into use, all or almost all of which had bars on the tires of the wheels. Ordinary vehicles do not have them, as we all know, and it is reasonable to infer that the legislature intended to include other vehicles than those ordinarily used on roads. I

think that is an additional reason for saying that "vehicle" in sec. 197 (29) has a more comprehensive meaning.

I am therefore of opinion that the power given by sec. 197 (29) is one which the appellants might use for the purpose of framing this by-law, and I think, on the whole, that the terms of the by-law are within that power and also within the power given by sec. 594 already referred to. The by-law has been largely quoted, and I do not propose to read it again. If traction engines are, as I think they are, within the power to make by-laws as to vehicles of a certain character mentioned in sec. 197 (29), then clause 1 of the by-law down to the end of paragraphs (*a*) and (*b*) seems to me to be clearly within the power. Once you come to the conclusion that the term "vehicle" has an inclusive meaning, I do not think it can be contended that the terms of the by-law down to that point are not within the section. Then proviso (i) is, I think, a means of regulating the use of traction engines on roads, and, if it is not, this portion of the by-law comes within sec. 594 as a statement of the conditions on which traction engines may be allowed to proceed over the roads. I think the same with regard to proviso (ii), and on that I have nothing to add to the remarks which have been made by the Chief Justice. I think that proviso may fairly be interpreted to be within sec. 594; so that it has, I think, the double cover of sec. 197 (29) and sec. 594. In any case, it and its immediate predecessor are both provisions which come reasonably within the purview of sec. 197 (31).

I think, therefore, all parts of the by-law which are attacked are within the power which the appellants lawfully possess; and therefore I am of opinion that the appellants have made out their case.

ISAACS J. read the following judgment:—

I also think the by-law valid. As to sub-sec. 29 of sec. 197 of the Act, I am not at all prepared to dissent from the view that "vehicle" as there used includes traction engine, but as I have some doubt I prefer to rest my judgment on sec. 594, as to which I have none, and agree with my learned brother *Barton* in thinking this section is sufficient.

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The history of the legislation is important.

Until 1891 there was no specific power to make by-laws with reference to traction engines. In that year, by Act No. 1243, it was provided (sec. 46) that sub-sec. XIX. of sec. 191 of the *Local Government Act* 1890, which then began "For regulating traffic and processions," should be amended by adding after the word "processions" these words:—"and the hours during which and conditions on which traction and locomotive engines and rollers impelled by steam or electricity may proceed over any road."

So that the material words conferring the power to make by-laws as to all those machines were precisely the same as in sec. 594 of the present Act, and it is not to be overlooked that the power even then included traction engines.

In 1900, the *Traction Engine Act* (No. 1693) was passed. Sec. 12 said that notwithstanding anything in that Act contained any municipality might make by-laws under sec. 191 of the *Local Government Act* 1890 as amended by the Act of 1891 provided they were not inconsistent with the new Act. So that section was not an enabling but a confirming section with respect to by-laws, the concluding words being words of limitation—perhaps not necessary but still precautionary.

The power, in other words, was still identical with respect to traction engines, as in the case of locomotives, and steam or electric rollers, except so far as cut down by the new Act. But the meaning of the "conditions" on which they might "proceed" was untouched, and it would be difficult to say that all those abnormally heavy and dangerous and destructive machines were intended to have an indefeasible right to pass over every road subject only to conditions not inconsistent with their travelling. In other words, I do not construe the power as then existing to mean that the first and dominant consideration was the right to pass, whatever the road or other damage might be, such as from sparks flying on to adjoining crops, and then if merely mitigating provisions could be devised they might be adopted, but, if not, none must be imposed. It seems to me that from the first some preventive power was granted, but if not, then even now locomotives and steam rollers are uncontrollable in many important respects, affecting persons, property and roads.

In 1903 the Act No. 1893 was passed, and the subject was re-arranged, but, as I read it, there was only a re-arrangement of the sections. Sec. 197, sub-sec. 23, still makes the same provision in respect of locomotive engines, and steam and electric rollers; but traction engines are taken out and are dealt with in a separate place, all relevant provisions being brought together in Part XXIII. The old by-law provision that was contained in the sub-section along with the other engines, as limited by sec. 12 of the Act of 1900, has been reproduced in that limited form in sec. 594.

There is therefore no change of intention indicated. The same words must receive the same interpretation in sec. 197 (23) as in sec. 594. Whatever "conditions" and "proceed" mean in the one, they mean in the other. And all we have to consider as to traction engines is what conditions of that nature would be inconsistent with Part XXIII.; and then, so far as not inconsistent, the conditions adopted by the municipality regulating the right to proceed over roads are those authorized by the legislature, and are law. Before further examining the provisions of Part XXIII. I would here quote some words of Lord *Macnaghten* in *Trevor* v. *Whitworth* (1) which have a general application. His Lordship said:—"When Parliament sanctions the doing of a thing under certain conditions and with certain restrictions, it must be taken that the thing is prohibited unless the prescribed conditions and restrictions are observed."

And another reference of importance may be added. As held by the Judicial Committee in *Slattery* v. *Naylor* (2) and recognized in the *Hawthorn Case* (3), regulation may include prohibition. It depends on what is to be regulated. The regulation of subject matter involves the continued existence of that subject matter, but is not inconsistent with an entire prohibition of some of its occasional incidents. In this connection there is a valuable note in Mr. *Lefroy's* work on *Legislative Power in Canada*, at p. 558, which deserves to be made more generally accessible. Speaking of the then recent argument before the Privy Council in *Attorney-General for Ontario* v. *Attorney-General for The Dominion*

(1) 12 App. Cas , 409, at p. 437. (2) 13 App. Cas., 446.
(3) 9 C.L.R., 301.

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(1), it is stated that "Lord *Herschell* observed:—'It is the regulation of trade generally. One may be said to regulate trade by prohibiting or putting a fetter on a particular trade. If you prohibit all trades, you certainly do not regulate trade; but you may be said to regulate trade by saying certain trades shall be unlawful.' . . . And the Lord Chancellor (Lord *Halsbury*) also said:—'Trade generally may be regulated by prohibiting a particular trade. Take the case of the prohibition of the exportation of wool with which this country was familiar at one time. That was a regulation of trade, and it was a prohibition of a particular trade.' Whereupon Lord *Watson* observed:—'We regulate the trade of these islands in tobacco by prohibiting its production, except to a very limited extent.'" And after quoting the judgment (2) the learned author adds: "This clearly is not saying that as part of a legislative scheme for the regulation of trade the prohibition of a particular trade might not be incidentally involved."

Applying those considerations to Part XXIII. of the present Act: The legislature appears in 1900 to have thought it necessary—not for the purpose of giving greater immunity or freedom of locomotion to traction engines and thus casting additional burdens on municipalities, but for the purpose of safe-guarding public and private property, all of which is evident from the nature of the provisions—to lay down some rules of conduct applicable all over Victoria. Parliament enacted certain hours and certain conditions of its own as to the lawful use of traction engines which no municipality can override. I summarize them:—

(1) No authority can legalize their use if a nuisance at common law (sec. 581). (2) The name and address of the owner must be legibly painted (sec. 582). (3) Between sunset and sunrise a man must go at least 100 yards in front to give the travelling public notice that such engine is "travelling on the road" (sec. 583). (4) Stuffing-boxes and safety-valves must be well packed (sec. 584). (5) Sufficient brakes must be attached (sec. 584). (6) Spark arresters to be attached (sec. 584). (7) Steam not to be blown off (sec. 584). (8) Two men at least to accompany (sec. 585).

(1) (1896) A.C., 348.

(2) (1896) A.C., 348, at p. 363.

(9) May travel between sunrise and sunset subject to notice to municipal clerk who may direct as to road (sec. 586). (10) Maximum rate of travel two and a half miles an hour (sec. 586). (11) Damage to road through digging out engine to be repaired or paid for (sec. 587). (12) Damage to bridges or culverts to be indicated and notified (sec. 588). (13) Driver to be licensed (sec. 590). (14) Engine to stop when requested by driver of a conveyance (sec. 591).

Some of these are concomitant conditions of travel, but some are conditions precedent, as brakes and spark arresters and licensed driver, and name of owner, and man in front. And some of those affect the construction of the engine.

And then, when in sec. 594 the power is given to make further but not inconsistent regulations as to hours and conditions on which such engines may proceed over any road, according to local circumstances, I am clearly of opinion that conditions may be precedent or concomitant, as to construction or management, and that "proceed over the road" is equivalent to "travel over the road," that is, to make use of the road for movement.

As to the provision requiring an agreement to make good damage, and other contents of the by-law, I agree with the learned Chief Justice.

There was some suggestion that the by-law was unreasonable. I will add to what this Court has already said on that subject in such cases as *Widgee Shire Council* v. *Bonney* (1), a few words of Lord Chancellor *Loreburn* as to a town council by-law in *Da Prato* v. *Provost &c. of Partick* (2):—"It is next said that it is unreasonable. All I can say is, here is a specific discretion with regard to a matter of power conferred upon this authority named in the section, and, when they have exercised their discretion in good faith in regard to it, it seems to me that this Court has no power to interfere."

Appeal allowed. Order appealed from discharged, and order nisi discharged with costs. Respondents to pay costs of the appeal.

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

(2) (1907) A.C., 153, at p. 155.

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PRESIDENT &C. OF THE SHIRE OF TUNGAMAH *v.* MERRETT.

Solicitors, for the appellants, *Boothby & Boothby* for *J. A. Hargrave*, Yarrawonga.

Solicitors, for the respondents, *Gillott & Moir.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CREAK . . . . . APPELLANT;
DEFENDANT,

AND

JAMES MOORE & SONS PROPRIETARY LIMITED . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1912.

MELBOURNE, *Oct.* 10, 11, 21.

Griffith C.J., Barton and Isaacs JJ.

Conversion—Sale of stolen goods—Recovery of value of goods from purchaser—Payment by cheque—Proceeds of cheque afterwards coming to hands of owner of goods—Obligation to elect to affirm or disaffirm sale.

If a man, having received a sum of money which is identified as being in fact the proceeds of goods of his that have been sold without his authority, afterwards becomes aware of the fact, he is, as between himself and the purchaser of such goods, *primâ facie* bound to elect whether he will affirm or disaffirm the sale, and the obligation to elect continues until the happening of some new fact which would alter his position to his prejudice if he were still called upon to elect.

If a man, whose servant has stolen his goods and has also stolen his money, afterwards receives from the police money found upon the thief, he is not entitled, without inquiry as to the source of the money, to appropriate it in satisfaction of the stolen money, to the prejudice of the purchaser of the stolen goods, so as to exclude the obligation to elect above stated.

So *held* by *Griffith* C.J. and *Barton* J., *Isaacs* J. dissenting.

Decision of the Supreme Court of Victoria reversed.