The judgment should therefore be reversed, and a verdict entered for the defendant.

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DEANE v. CITY BANK OF SYDNEY.

Appeal allowed. Order appealed from discharged. Verdict for the plaintiffs set aside and verdict entered for the defendant. Respondents to pay costs throughout.

Solicitors for the appellant, *Deane & Deane.*
Solicitors for the respondents, *Leibius, Black & Way.*

B. L.

[HIGH COURT OF AUSTRALIA.]

KEMP . . . . . APPELLANT;
DEFENDANT,

AND

BARBER . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Local Government—By-law—Interpretation—Regulation of traffic and processions—"Footway" defined to include "public place"—Ejusdem generis—Local Government Act 1915 (*Vict.*) (*No.* 2686), *sec.* 197.

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MELBOURNE, *Sept.* 16.

Barton, Gavan Duffy and Rich JJ.

Sec. 197 of the *Local Government Act* 1915 provides that by-laws may be made for any municipality for certain purposes, including "(22) regulating traffic and processions." By a by-law made under that power it was provided that in the by-law, unless the context otherwise required, the word "footway" should include "every footpath, lane, thoroughfare or other public place

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within " the municipality " habitually used by pedestrians." It also provided that no person should " upon any street or footway to the obstruction or annoyance of any other person thereon give out or distribute to bystanders or passers-by any handbills, placards," &c.

Held, that the word " footway " in the by-law was limited to places used as thoroughfares for the public passing and repassing therein, and, therefore, that the distribution of pamphlets in a public park consisting of a piece of land fenced in and having no paths or footways across it and used as a place for holding public meetings, was not within the prohibition in the by-law.

Decision of the Supreme Court of Victoria (*Madden* C.J.) reversed.

APPEAL from the Supreme Court of Victoria.

An information was heard at the Court of Petty Sessions at Melbourne whereby Alexander Barber, an officer of the Council of the City of Melbourne, charged that Thomas Francis Kemp on 13th January 1918 did at Melbourne give out certain pamphlets to bystanders to the annoyance of persons in a public place, to wit, Flinders Park, contrary to a certain by-law of the City of Melbourne. The by-law in question was entitled " A By-law of the City of Melbourne made under Part VII., Division 1, of the *Local Government Act* 1915, and numbered 134, to amend and consolidate the By-laws and Regulations with reference to street traffic." It recited that " Whereas numerous by-laws have from time to time been made by the Council of the City of Melbourne dealing with and regulating the traffic of the said City, and whereas it is desirable to add to, amend and consolidate such by-laws." By clause 1 of the by-law it was provided that, unless the context otherwise requires, " ' footway ' includes every footpath, lane, thoroughfare or other public place within the City habitually used by pedestrians and not by vehicular traffic," and " ' street ' includes every highway, road, carriageway, lane, thoroughfare or other public place within the City other than a footway." Clause 33 provides that " No person upon any street or footway shall to the obstruction or annoyance of any other person thereon give out or distribute to bystanders or passers-by any handbills, placards, notices, . . . pamphlets, or papers, and no person shall litter any street or footway by scattering or throwing down handbills, placards, notices, . . . pamphlets, or papers."

Flinders Park, which is otherwise known as the "Yarra Bank," is a flat piece of land bounded on the south by Batman Avenue and on the north by the railway. It is fenced off from Batman Avenue by a single-rail iron fence. There are no paths across the Park, which is used as a place for holding public meetings. The evidence was to the effect that on the afternoon of 13th January 1918 the defendant was standing on a box in the Park addressing about a hundred people and distributing pamphlets, and a constable said that the distribution was "to the annoyance of the bystanders." Evidence was also given that the Park was "a public place within the City of Melbourne, and was habitually used by pedestrians and not by vehicular traffic." The defendant, having been convicted and fined ten shillings, obtained an order *nisi* to review the decision on the grounds (*inter alia*) that the distribution was not shown to be to the annoyance of the bystanders and that Flinders Park was not shown to be a footway or street within the meaning of the by-law. The order *nisi* having been discharged by *Madden* C.J., the defendant now, by special leave, appealed to the High Court substantially on the same grounds as those of the order *nisi* to review.

Pigott (with him *Ah Ket*), for the appellant. The by-law is essentially one for regulating streets, and has no application to places such as Flinders Park. The authority for the by-law is in the *Local Government Act* 1915, sec. 197, item 22. The regulation of this Park, which is a place of recreation, would fall within Part XXXI. of the Act. The words "public place" in the definition of "footway" should be interpreted *ejusdem generis* with footpath, lane and thoroughfare. [Counsel was stopped.]

There was no appearance for the respondent.

BARTON J. I do not suppose that if the informant were fully represented he could make much answer to this appeal. This is a case in which, under sec. 197 of the *Local Government Act* 1915, there is power in municipalities to make by-laws for "regulating traffic and processions." Under that power the municipality made a by-law for the purpose in which the definition of "footway" is as follows: "'Footway' includes every footpath, lane, thoroughfare

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or other public place within the City habitually used by pedestrians and not by vehicular traffic." Clause 33 of the by-law is as follows: "No person upon any street or footway shall to the obstruction or annoyance of any other person thereon give out or distribute to bystanders or passers-by any handbills, placards, notices, . . . pamphlets, or papers, and no person shall litter any street or footway by scattering or throwing down handbills, placards, notices, . . . pamphlets, or papers." The defendant was fined for distributing pamphlets in a "public place" called Flinders Park. I leave out of consideration the question of annoyance to the public, of which there appears to have been little, if any, evidence, and I come to the more material question: Is Flinders Park a public place in the sense of the by-law? The by-law must be construed within the limits of the power to make it. Flinders Park is not "habitually used by pedestrians" for traffic—in fact there is no traffic there. This by-law was made for the purpose of regulating traffic and processions; that is to say, it was made for giving orderly regulation to the use, in the broad sense, of thoroughfares for traffic, that is, for the public passing and repassing therein. Flinders Park is a flat piece of land adjoining Batman Avenue, which bounds it on the south side, the railway bounding it on the north side. There is no path or footway across it, and it is fenced in with a one-railed fence and is used as a public meeting place. Supposing that the evidence before the magistrates and submitted to the Supreme Court were limited to this statement of the facts, I do not think that the evidence established that Flinders Park is a public place within the meaning of the definition of a "footway" in the by-law. That definition would exceed the scope of the section itself if it dealt with something more than "traffic and processions." Not only, then, is the whole scope of the by-law restricted by the Act, but the restriction is visible from an inspection of the by-law itself. We find that the idea of regulating traffic is made plain in the by-law by such clauses as clause 10, "Every pedestrian upon a footway shall keep to his right hand side of the footway and shall when meeting or overtaking any person pass on the left side of such person," which shows that "footway" as defined means something which is at least definite in direction, and is obviously inapplicable

to a place like Flinders Park; clause 20, "No person shall put, throw, or allow to fall and remain upon any footway the skin or peel or stem of any fruit or the leaves or any part of any vegetable"—if "footway" means places used for traffic that is intelligible, but not if it refers to places like Flinders Park; and clause 21, "No person shall wear or carry in any street or footway any pin or other article or any implement in such a manner as is likely to inflict injury by coming in contact with any other person," which, again, is quite applicable to a thoroughfare used for traffic where persons passing and repassing are liable to jostle one another but is quite inapplicable to Flinders Park. On the whole I do not think that Flinders Park can be considered to be a public place within the by-law; and therefore I think that the evidence did not bring the defendant within the scope and meaning of the by-law as one transgressing it, and that the appeal ought to succeed.

GAVAN DUFFY J. I agree.

RICH J. I agree.

Appeal allowed. Order of Supreme Court discharged. Conviction quashed. Appellant to have costs in Court of Petty Sessions and Supreme Court. Respondent to pay costs of appeal.

Solicitor for the appellant, *B. J. Parkinson.*

B. L.