[HIGH COURT OF AUSTRALIA.]

THE MAYOR, ALDERMEN, COUNCILLORS AND CITIZENS OF THE CITY OF MELBOURNE . . . . . APPELLANT;

AND

BARRY . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, Nov. 14, 15, 16.

SYDNEY, Dec. 15.

Knox C.J., Isaacs and Higgins JJ.

Local Government—By-law—Validity—Ultra vires—Regulation of processions—Prohibition, unless with consent of council—Police regulation—Statute—Interpretation—Judicial decision upon interpretation—Subsequent re-enactment of statute—Consolidating Act—Local Government Act 1915 (*Vict.*) (*No.* 2686), *secs.* 188, 197 (10), (22), (37), 198, 199, 203, 204, 206, 208, 209, 223, 224, 229, 719 —*Local Government Act* 1874 (*Vict.*) (*No.* 506), *sec.* 213 (XVII.)—*Local Government Act* 1890 (*Vict.*) (*No.* 1112), *sec.* 191 (XIX.)—*Local Government Act* 1903 (*Vict.*) (*No.* 1893), *sec.* 197 (22), (34)—*Police Offences Act* 1915 (*Vict.*) (*No.* 2708), *sec.* 6 —*Police Offences Act* 1878 (*Vict.*) (*No.* 630), *sec.* 2—*Police Offences Act* 1890 (*Vict.*) (*No.* 1126), *sec.* 6—*Police Offences Act* 1912 (*Vict.*) (*No.* 2422), *sec.* 6—*Acts Interpretation Act* 1890 (*Vict.*) (*No.* 1058), *sec.* 32—*Acts Interpretation Act* 1915 (*Vict.*) (*No.* 2609), *sec.* 33—*Unlawful Assemblies and Processions Act* 1915 (*Vict.*) (*No.* 2743), *sec.* 10.

Sec. 197 of the *Local Government Act* 1915 (Vict.) provides that "Subject to the provisions hereinafter contained by-laws may be made for any municipality for the purposes mentioned in this Act and for the purposes following:— . . . (10) Suppressing nuisances: . . . (22) Regulating traffic and processions: . . . (37) Generally for maintaining the good rule and government of the municipality." Sec. 6 of the *Police Offences Act* 1915 (Vict.) provides that "Any local authority may from time to time make rules and regulations for the route to be observed by all carriages carts vehicles and persons and for keeping order in the carriage and footways and public places and for preventing any obstruction thereof whether by the assemblage of persons or otherwise."

A by-law of the City of Melbourne provided that "No processions of persons or of vehicles . . . shall, except for military or funeral purposes, parade or pass through any street unless with the previous consent in writing of the Council given under the hand of the Town Clerk and by the route specified in such consent, and unless and until the recipient of such consent has given at least twenty-four hours' notice with particulars of such consent and route to the officer in charge of the City Police."

Held, by *Isaacs* and *Higgins* JJ. (*Knox* C.J. dissenting), that the by-law was not authorized either by sec. 197 of the *Local Government Act* 1915 or by sec. 6 of the *Police Offences Act* 1915.

Rider v. *Phillips*, (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37, and *Bannon* v. *Barker*, (1884) 10 V.L.R. (L.), 200, distinguished.

Decision of the Supreme Court of Victoria: *Barry* v. *City of Melbourne*, (1922) V.L.R., 577; 44 A.L.T., 20, affirmed.

APPEAL from the Supreme Court of Victoria.

The Council of the City of Melbourne on 9th November 1921 purported to make a by-law (No. 162) which was in the following terms:—

"A by-law of the City of Melbourne, made under Part VII. Division 1 of the *Local Government Act* 1915 and numbered 162, to amend the provisions of by-law No. 142 with reference to Street Processions.

"Whereas it is desirable to amend the provisions of by-law No. 142 with reference to street processions: Now therefore the Council of the City of Melbourne doth hereby in exercise of the powers conferred by Act 6 Geo. V. No. 2686 and by every other Act or power enabling it in that behalf make the by-law and order as follows:—

"1. This by-law shall from and after the date of same coming into operation be read and construed as one with by-law No. 142 intituled 'A by-law of the City of Melbourne made under Part VII. Division 1 of the *Local Government Act* 1915 and numbered 142, to repeal the regulations made on the eleventh day of December, one thousand nine hundred and sixteen, and to amend and add to certain clauses in by-law No. 134.'

"2. Clause 12 of the said by-law No. 142 shall as from the commencement of this by-law be and the same is hereby repealed, and

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the next following clause hereof shall be enacted and read in lieu thereof. Provided that such repeal shall not prejudice or affect any prosecution for any act or omission or any penalty incurred by reason of any contravention of such clause prior to the commencement of this by-law.

"3. No processions of persons or of vehicles or motor-cars or of any combination of persons, vehicles or motor-cars shall except for military or funeral purposes parade or pass through any street unless with the previous consent in writing of the Council given under the hand of the Town Clerk and by the route specified in such consent, and unless and until the recipient of such consent has given at least twenty-four hours' notice with particulars of such consent and route to the officer in charge of the City Police."

By-law No. 142 purported to be made under Part VII., Div. 1, of the *Local Government Act* 1915, and also as rules and regulations under sec. 6 of the *Police Offences Act* 1915; and clause 12 thereof was identical with clause 3 of by-law No. 162, except that the words "the Lord Mayor or the Town Clerk" stood in place of the words "the Council given under the hand of the Town Clerk."

On the application of John Barry an order *nisi* was granted by the Supreme Court calling upon the Mayor, Aldermen, Councillors and Citizens of the City of Melbourne to show cause why by-law No. 162 should not be quashed, either wholly or in part, on the ground (*inter alia*) that the said by-law was *ultra vires* and illegal and beyond the powers conferred by sec. 197, sub-sec. 22, of the *Local Government Act* 1915.

The Full Court of the Supreme Court, by a majority (*Irvine* C.J. and *Macfarlan* J., *McArthur* J. dissenting), made the order *nisi* absolute and ordered that the whole of the by-law be quashed: *Barry* v. *City of Melbourne* (1).

From that decision the Corporation of the City of Melbourne, by special leave, now appealed to the High Court.

The nature of the arguments sufficiently appears in the judgments hereunder.

Latham K.C. and *Lowe*, for the appellant.

(1) (1922) V.L.R., 577; 44 A.L.T., 20.

Pigott (with him *L. B. Cussen*), for the respondent.

During argument reference was made to *Rider* v. *Phillips* (1); *Bannon* v. *Barker* (2); *Toronto Municipal Corporation* v. *Virgo* (3); *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (4); *Mitchell* v. *Simpson* (5); *In re Budgett*; *Cooper* v. *Adams* (6); *Dale's Case* (7); *Townsville Harbour Board* v. *Scottish Shire Line Ltd.* (8); *Kruse* v. *Johnson* (9); *Slattery* v. *Naylor* (10); *Widgee Shire Council* v. *Bonney* (11); *Co-operative Brick Co. Proprietary Ltd.* v. *Hawthorn Corporation* (12); *Cook* v. *Buckle* (13); *Tungamah Shire* v. *Merrett* (14); *Elwood* v. *Bullock* (15); *Metropolitan Meat Industry Board* v. *Finlayson* (16); *Levingston* v. *Heidelberg Shire* (17); *Bennett* v. *Daniels* (18); *Parker* v. *Bournemouth Corporation* (19); *Moorman* v. *Tordoff* (20); *Rossi* v. *Edinburgh Corporation* (21); *Waite* v. *Garston Local Board of Health* (22); *Dick* v. *Badart* (23); *Calder and Hebble Navigation Co.* v. *Pilling* (24); *Staples & Co.* v. *Mayor &c. of Wellington* (25); *Yabbicom* v. *King* (26); *Yick Wo* v. *Hopkins* (27); *Ex parte Lewis* (28); *Beatty* v. *Gillbanks* (29); *Lowdens* v. *Keaveney* (30); *Re Frazee* (31); *Anderson* v. *City of Wellington* (32); *State ex rel. Garrabad* v. *Dering* (33); *Bennett* v. *Blackpool Local Board of Health* (34); *Jay* v. *Johnstone* (35); *Trimble* v. *Hill* (36); *Gunner* v. *Helding* (37); *Mercantile Finance Trustees and Agency Co. of Australia* v. *Hall* (38); *Clark* v. *Wallond* (39);

(1) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.
(2) (1884) 10 V.L.R. (L.), 200.
(3) (1896) A.C., 88.
(4) (1896) A.C., 348.
(5) (1890) 25 Q.B.D., 183, at p. 190.
(6) (1894) 2 Ch., 557, at p. 561.
(7) (1881) 6 Q.B.D., 376.
(8) (1914) 18 C.L.R., 306.
(9) (1898) 2 Q.B., 91.
(10) (1888) 13 App. Cas., 446.
(11) (1907) 4 C.L.R., 977.
(12) (1909) 9 C.L.R., 301.
(13) (1917) 23 C.L.R., 311.
(14) (1912) 15 C.L.R., 407, at pp. 413, 423.
(15) (1844) 6 Q.B., 383.
(16) (1916) 22 C.L.R., 340, at p. 348.
(17) (1917) V.L.R., 263; 38 A.L.T., 163.
(18) (1912) 12 S.R. (N.S.W.), 134.
(19) (1902) 86 L.T., 449.
(20) (1908) 98 L.T., 416.
(21) (1905) A.C., 21, at p. 26.
(22) (1867) L.R. 3 Q.B., 5.
(23) (1883) 10 Q.B.D., 387.
(24) (1845) 14 M. & W., 76, at p. 84.
(25) (1900) 18 N.Z.L.R., 857, at p. 862.
(26) (1899) 1 Q.B., 444.
(27) (1886) 118 U.S., 356.
(28) (1888) 21 Q.B.D., 191, at p. 197.
(29) (1882) 9 Q.B.D., 308.
(30) (1903) 2 I.R., 82.
(31) (1886) 6 Am. St. R., 310.
(32) (1888) 10 Am. St. R., 175, at p. 182.
(33) (1893) 36 Am. St. R., 948, at p. 953.
(34) (1859) 28 L.J. M.C., 203.
(35) (1893) 1 Q.B., 25.
(36) (1879) 5 App. Cas., 342.
(37) (1902) 28 V.L.R., 303, at p. 319; 24 A.L.T., 48.
(38) (1893) 19 V.L.R., 233; 14 A.L.T., 291.
(39) (1883) 52 L.J. Q.B., 321.

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Cassell v. *Jones* (1); *De Morgan* v. *Metropolitan Board of Works* (2); *McGill* v. *Garbutt* (3); *Gray* v. *Sylvester* (4); *Conservators of Mitcham Common* v. *Cox* (5); *Haywood* v. *Mumford* (6); *Ex parte Zuckerman* (7).

Cur. adv. vult.

Dec. 15. The following written judgments were delivered :—

KNOX C.J. This is an appeal by special leave from an order of the Supreme Court of Victoria in Full Court (*Irvine* C.J. and *Macfarlan* J., *McArthur* J. dissenting) making absolute an order *nisi* to quash by-law No. 162 of the City of Melbourne. That by-law purported to be made in exercise of the powers conferred by Act 6 Geo. V., No. 2686 (*Local Government Act* 1915) and by every other Act or power enabling the Council in that behalf. It is not now disputed that the formalities prescribed for the making of by-laws were complied with in this case, the sole question for decision being whether the by-law is within the powers of the Council.

The appellant's counsel relied on sec. 197, sub-secs. 22 and 37, of the *Local Government Act* 1915, and alternatively on sec. 6 of the *Police Offences Act* 1915, as conferring the necessary power. They argued (1) that in earlier statutes dealing respectively with the same subject matter the same words had been judicially interpreted by the Supreme Court of Victoria as authorizing the making of by-laws indistinguishable from by-law No. 162, and that Parliament must be taken to have used these words in the Acts of 1915 in the meaning which had been placed upon them by the decisions of the Court on the earlier Acts; and (2) that the words of the enactments properly construed without regard to previous legislation or to judicial decisions thereon authorized the making of this by-law.

By sec. 213 of the *Local Government Act* 1874 it was provided that "Subject to the provisions hereinafter contained by-laws may be made for any municipality for the purposes mentioned in this Act and for the purposes following . . . (XVII.) For regulating traffic

(1) (1913) 108 L.T., 806.
(2) (1880) 5 Q.B.D., 155.
(3) (1886) 5 N.Z.L.R., 73.
(4) (1897) 46 W.R., 63.
(5) (1911) 2 K.B., 854, at pp. 875, 881.
(6) (1908) 7 C.L.R., 133.
(7) (1888) 9 N.S.W.L.R., 463.

and processions and generally maintaining the good rule and government of the municipality." Purporting to act under this authority a municipal council made a by-law in the following terms, viz. :— "No procession of persons or of vehicles or both for other than funeral purposes shall parade or pass through any of the streets unless with the previous consent in writing of the Mayor, or in his absence the Town Clerk of the City, and only by the route specified in such consent, nor unless and until the recipient of such consent shall have given at the least twenty-four hours' notice with particulars of such consent and route to the officer in charge of the City Police." A prosecution having been instituted for a breach of this by-law, the justices dismissed the complaint and stated a case for the opinion of the Supreme Court; the question stated being whether the justices had properly dismissed the complaint and whether the by-law was valid or was illegal as not being sanctioned by the *Local Government Act* 1874 and so *ultra vires*. When the case stated came before the Supreme Court in Full Court (*Rider* v. *Phillips* (1)) three reasons were put forward in support of the decision of the justices, namely: first, that a power to regulate does not give power to prohibit at the discretion of an individual; second, that the power to control traffic exists if at all in the Council, and cannot be delegated to its Mayor or Town Clerk; third, that the by-law was unreasonable. The Court (*Higinbotham* J. and *Holroyd* J.) held that the determination of the justices was erroneous in point of law, and ordered the matter to be remitted to the justices. In delivering the judgment of the Court *Higinbotham* J. said (2): "On the whole, we are of opinion that none of the objections to this by-law have been sustained, and that it has not been shown to be in any respect unreasonable." This was clearly a decision that the by-law was valid, and, having regard to the argument of counsel quoted above, must be taken as establishing that the by-law was within the power conferred by sec. 213 (XVII.) of the Act of 1874.

This case having been decided under the *Local Government Act*, the validity of a regulation of the City of Melbourne in the same terms made under sec. 2 of the *Police Offences Act* 1878, No. 630, was

(1) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.

(2) (1884) 10 V.L.R. (L.), at p. 152; 6 A.L.T., at p. 39.

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challenged in the case of *Bannon* v. *Barker* (1). In that case the Full Court (*Higinbotham* and *Williams* JJ.) held that the question was concluded by the decision in *Rider* v. *Phillips* (2), and consequently held the regulation to be valid. Referring to the last-mentioned decision, *Higinbotham* J. said (3): "The reasons for holding the by-law to be a lawful exercise of the power under which it was made, appear to us to apply with equal force to establish the validity of the present regulation."

In the year 1890 the statutes of Victoria were consolidated under the supervision of *Higinbotham* C.J. The explanatory paper laid before both Houses of Parliament with the consolidating Bills when they were introduced is printed in vol. I. of the authorized edition of the Victorian Statutes of 1890, and states (at p. ix.) that the "design of the work is one of pure consolidation, and involves no attempt to introduce substantial amendments of the existing statute law." The consolidated Bills became law on 31st July 1890 by force of sec. 32 of the *Acts Interpretation Act* 1890, which contained also the necessary saving clauses. The *Local Government Act* 1890, which thus came into existence, reproduced in sec. 191 (xix.) the provisions of sec. 213 (XVII.) of the Act of 1874, and the *Police Offences Act* 1890 reproduced in sec. 6 the provisions of sec. 2 of the Act of 1878, No. 630. In 1903 the *Local Government Act* 1903—described as an Act to consolidate and amend the laws relating to local government—was passed. The provisions of sec. 213 (XVII.) of the Act of 1874 and of sec. 191 (xix.) of the Act of 1890 were re-enacted by sec. 197, sub-secs. 22 and 34, the only alteration being in the severance of the words "traffic and processions," which were placed in sub-sec. 22, from the other words, which were placed in sub-sec. 34. A further consolidation of the statutes was effected in 1915. The provisions of sec. 197, sub-secs. 22 and 34, of the *Local Government Act* 1903 were re-enacted by sec. 197, sub-secs. 22 and 37, of the consolidated Act, in pursuance of which by-law No. 162 was made.

The provisions of sec. 6 of the *Police Offences Act* 1890 were re-enacted *totidem verbis* in sec. 6 of the *Police Offences Act* 1912 (an

(1) (1884) 10 V.L.R. (L.), 200. (2) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.
(3) (1884) 10 V.L.R. (L.), at p. 202.

Act to consolidate and amend the law), and again in sec. 6 of the *Police Offences Act* 1915.

It may be noted that, in the authorized edition of the Statutes of 1890 and 1915, foot-notes to sec. 191 of the *Local Government Act* 1890 and to sec. 197 of the Act of 1915 draw attention to the decision in *Rider* v. *Phillips* (1). It may also be noted that in sub-sec. 21 of sec. 197 of the Act of 1915 an amendment has been made by the insertion of the word "prohibiting" in order to meet the position created by the decision of this Court in *Co-operative Brick Co. Proprietary Ltd.* v. *Hawthorn Corporation* (2), and attention was drawn to this amendment in a foot-note. The consolidating Acts of 1915 were brought into force by sec. 33 of the *Acts Interpretation Act* 1915.

In my opinion there is, in the circumstances of this case, nothing to rebut the presumption that Parliament in re-enacting these provisions knew the interpretation which had been put upon them by the Supreme Court in the cases above referred to and intended it to be followed in construing the later enactments. The rule applicable in this case was stated by *James* L.J. in *Ex parte Campbell*; *In re Cathcart* (3), as follows: "Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them." (See also *Mersey Docks and Harbour Board* v. *Cameron* (4).)

Mr. *Pigott* for the respondent argued that the rule was only applicable when there had been a series of decisions on the earlier Act, and consequently should not be applied in the present case, *Rider* v. *Phillips* (1) being in effect the only case in which a construction was put upon the earlier Act. But in *Ex parte Campbell* (5) there had been, so far as appears, but one decision on the words of the earlier Act. Moreover, the fact that there is no reported case in which the points decided in *Rider* v. *Phillips* and *Bannon* v. *Barker* (6) were again raised tends rather to show that those decisions

(1) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.
(2) (1909) 9 C.L.R., 301.
(3) (1870) L.R. 5 Ch., 703, at p. 706.
(4) (1865) 11 H.L.C., 443, at p. 480.
(5) (1870) L.R. 5 Ch., 703.
(6) (1884) 10 V.L.R. (L.), 200.

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were regarded as definitely settling that the by-laws then under consideration were within the powers conferred on the by-law making body by the provisions of the respective Acts. He contended also that if the rule was to be applied in the present case, it should be applied in favour of the construction contended for by the respondent, on the ground that it must be assumed that in 1915 Parliament knew of the decisions in *Toronto Municipal Corporation* v. *Virgo* (1) and *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2), and must be taken to have used the word "regulating" in the meaning attributed to it by those decisions. Assuming that Parliament must be taken to have been aware of those decisions —which, in my opinion, is open to doubt—the argument cannot be supported, for they were decisions on the meaning of provisions in other enactments not dealing with the same subject matter as the provisions now under consideration. With regard to the effect of these decisions I desire to adopt what was said by *McArthur* J. in the Supreme Court (3):—"The only bearing they have on the present case . . . is that they afford ground for argument that the grant of a power to regulate does not give power to prohibit. The most that can be said of them is that if they had been decided prior to *Rider* v. *Phillips* (4) the Court might have decided that case differently." It may also be observed that in those cases the by-law under discussion was considered to amount, in effect, to a total prohibition, whereas the by-law considered in *Rider* v. *Phillips* was no more than a prohibition *sub modo*.

I think therefore that the provisions of sec. 197 (22) of the *Local Government Act* 1915 and sec. 6 of the *Police Offences Act* 1915 must be interpreted as intended to authorize the making of by-laws in the terms of those which were the subject of the decisions in *Rider* v. *Phillips* (4) and *Bannon* v. *Barker* (5) respectively. The only difference between the by-laws in those cases and the by-law in the present case is that in the former the consent required was that of the Mayor or Town Clerk while in the latter the consent required is that of the Council. I agree with *McArthur* J. in thinking that the difference

(1) (1896) A.C., 88.
(2) (1896) A.C., 348.
(3) (1922) V.L.R., at p. 597; 44 A.L.T., at pp. 25-26.
(4) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.
(5) (1884) 10 V.L.R. (L.), 200.

is immaterial in considering the question whether the by-law is *ultra vires* or not. All the arguments addressed to us by counsel for the respondent for the purpose of establishing that this difference was substantial, or a difference in principle, appear to me to be based, really though not ostensibly, on the possibility of an abuse of power by the Council. It is now well settled that when the extent of a power is the question to be decided, suggestions of a possible abuse of the power are irrelevant and afford no ground for limiting its extent.

I think that on the first ground put forward by the appellant the appeal should be allowed. Having arrived at this conclusion, I express no opinion on the second ground submitted.

ISAACS J. Before construing the relevant enactment as *res integra*, I shall refer to the ground upon which *McArthur* J. held that the by-law was valid. It was that in two prior cases in 1884 the Supreme Court had laid down the law as to the interpretation of the sub-section now under consideration, and that, by repeating the words of the statute in later legislation, the Victorian Parliament had assented to the interpretation placed on its words and, therefore, that that interpretation must be accepted by the Court as the intention of the Legislature without the Court considering for itself whether that is the true construction or not. I may say at once I fully understand and appreciate the difficulty which the learned Judge felt, and I admit the position is one that does not carry its solution on the surface. But, when carefully examined, the difficulty disappears.

Whether subsequent legislation amounts to an adoption of a judicial decision, so as to incorporate that decision as part of the legislation and thereby give to the words of the Legislature a specific meaning even though a Court would otherwise attribute another meaning to them, depends entirely on the proper construction in that regard to be placed on the later enactment. And that is, of course, affected by the nature of the decision and the circumstances under which the Act was passed as well as its literal terms, unless those terms are in themselves explicit.

I have examined the four cases mentioned by *McArthur* J.

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and the passage referred to in *Maxwell on Statutes*, 6th ed., p. 542. Three of them do not solve the difficulty in this case, and the fourth really assists the view opposite to that for which it was cited. The passage in *Maxwell* summarizes three of the cases. It is as follows: —"It may be taken for granted that the Legislature is acquainted with the actual state of the law. Therefore, when the words of an old statute are either incorporated in, or by reference made part of, a new statute, this is understood to be done with the object of adopting any legal interpretation which has been put on them by the Courts." That is supported by a note referring to the four cases cited by *McArthur* J. The first is *Dale's Case* (1). That was a case where *new* legislation (that is, new as distinguished from mere consolidation)—53 Geo. III., c. 127, sec. 1—expressly incorporated by reference certain provisions in an Act of Elizabeth which had already received interpretation, and expressly declared that they should be applied as if repeated. Parliament there, looking for words to express its will, found words which had been judicially settled, by what *James* L.J. termed (2) "the decisions of many eminent Judges," to have a definite meaning; and it was accordingly held that that was the meaning intended by Parliament in its new legislation. The next is *Greaves* v. *Tofield* (3), where Parliament, when framing a *new* Act on one subject, deliberately took from an old Act on another subject, though *in pari materiâ*, certain specific phraseology that had received judicial interpretation and was well understood in that meaning, and Parliament introduced that phraseology into the new statute. Even in those circumstances *Jessel* M.R. thought the words should be construed as *res integra*, but the Court of Appeal held that this was legislation *in pari materiâ* with the older statutes as they had been construed in a long course of decisions, and that Parliament must therefore have intended in the new Act to attach the accepted meaning to the old words. The third case mentioned is *Jay* v. *Johnstone* (4). There the Legislature in passing a *new* Act—the *Real Property Limitation Act* of 1874—made a new period of limitations, and in so doing adopted the wording of an earlier Act which had received a meaning, not by one judgment only, but by

(1) (1881) 6 Q.B.D., at p. 453.
(2) (1881) 6 Q.B.D., at p. 452.
(3) (1880) 14 Ch. D., 563, at p. 571.
(4) (1893) 1 Q.B., 25, 189.

what *Lindley* L.J., in the Court of Appeal (1), called "the decisions of forty years." A case of the same kind may be added here—*Ex parte Campbell* (2), where *James* L.J. said: "When once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them." The only case referred to by the learned Lord Justice, speaking in 1870, was one in 1818, namely, *Ex parte Vogel* (3). But it appears from *Archbold's Bankrupt Law*, dated 1856, p. 396, that in that year the decision was regarded as settled. It was of such a nature that I presume the Bankruptcy Courts had constantly acted upon it for over forty years before the new legislation. The fourth case cited by *McArthur* J. is *Clark* v. *Wallond* (4), in which *Mathew* J. makes an observation *in arguendo*. The statute under consideration there, however, was 45 & 46 Vict. c. 50, the *Municipal Corporations Act* of 1882, which was a consolidation Act "with amendments." It is true that on the page mentioned the learned Judge observed that "The Legislature have reproduced the words upon which the case of *Maude* v. *Lowley* (5) was decided, and they must be taken to have known the interpretation that had been put upon them in that case." But that was a passing observation, and the Court considered its judgment and two days afterwards judgment was delivered. As I read the judgments, including that of *Mathew* J., the learned Judges proceeded, not upon any notion that the Legislature had itself settled the point by adopting a prior decision, but that, having regard to the words of the Act and to the prior decision upon similar words, the Court was bound upon ordinary principles to follow the decision of the Court in the prior case. I do not regard the decision in *Clark* v. *Wallond* as supporting the appellant's position at all. In view of the fact that the Act was a consolidation Act, though with amendments, it appears to me, having regard to the course

(1) (1893) 1 Q.B., at p. 192.
(2) (1870) L.R. 5 Ch., at p. 706.
(3) (1818) 2 Barn. & Ald., 219.
(4) (1883) 52 L.J. Q.B., at p. 322.
(5) (1874) L.R. 9 C.P., 165.

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taken by the Court, to rather aid the respondent. If the decision had rested on legislative interpretation, it might have been much more helpful in principle to the appellant. I would, moreover draw attention to the circumstance that in *Maxwell*, at the foot of p. 542, and after quoting the authorities referred to, there are these words: "*As to Consolidation Acts, see sup.* p. 109." This indicates that what has just been stated as the rule does not refer to consolidation Acts but to "new" Acts. At p. 109 occurs this statement: "In a consolidation Act . . . it will be found that the language bears the meaning attached to it in the original enactment." Authorities are cited. One of them is *Mitchell* v. *Simpson* (1), in which the Court of Appeal gave to words in the new Act the same meaning as had been attached by judicial decision to similar words in a former Act. But that was not because the Legislature had adopted a decision, but because the new Act, being a consolidation Act, could not be supposed to change the law, and it would be as wrong to disregard judicial decisions after the consolidation as it would have been if the old Act had remained in force. See particularly, at p. 192, the concluding paragraphs of the judgment of *Fry* L.J. Another decision cited is *In re Smith*; *Hands* v. *Andrews* (2), and the same observations apply to it. Another is a reference to Lord *Watson's* observations in *Smith* v. *Baker* (3). There his Lordship says: "The reasoning of Lord *Field* and *Cave* J., in *Clarkson* v. *Musgrave* (4), although the decision turned upon the terms of the *County Courts Act* 1875, is *in pari materiâ*, and is, in my opinion, equally applicable to the statute of 1888." That is quite opposed to any rigid doctrine of legislative interpretation forcing the hands of the Court. The same observation may be made as to the last reference made in *Maxwell* on p. 109, namely, Lord *Herschell's* words in *Bank of England* v. *Vagliano* (5).

The result of these cases, in my opinion, is that, when Parliament is considering *de novo what* the law shall be on any given subject, and it finds in a previous Act words which have received by judicial interpretation a well settled meaning or effect, and introduces those

(1) (1890) 25 Q.B.D., 183.
(2) (1893) 2 Ch., 1.
(3) (1891) A.C., 325, at p. 349.
(4) (1882) 9 Q.B.D., 386.
(5) (1891) A.C., 107, at p. 144.

words verbatim or without any appreciable difference, merely accommodating them to their new surroundings, they are generally presumed by a Court to have been adopted in the accepted sense. But even then, there is no rigid rule of law on the subject. It is a judicial rule of construction founded on the well-known principle that, when words have generally acquired a meaning other than their primary meaning in a certain collocation, that is their natural meaning in that collocation, and they would be so understood by those to whom they are addressd. A Court must in every case have regard to the whole position, and determine upon a construction of the whole Act whether Parliament has in the particular provision adopted that other meaning judicially affixed instead of what must be assumed to be the primary meaning of the words it uses which a Court unfettered might otherwise act upon. What, then, are for this purpose the relevant circumstances here ?

The cases of *Rider* v. *Phillips* (1) and *Bannon* v. *Barker* (2) were decided in 1884. (I defer for the moment any examination of what was then decided.) In 1890 the Victorian Legislature consolidated its principal statutes including the *Local Government Act*. The effect of that consolidation is well stated in the Full Court case of *Mercantile Finance Trustees and Agency Co. of Australia* v. *Hall* (3), decided in 1893. There the Court held that the consolidation had not changed the law. *Holroyd* J. stated as to the consolidating Acts (4) :—" They were not intended to change the law in any single particular, and of that there cannot be the least doubt. Numerous clauses have been introduced into them for the express purpose of providing against such a possible contingency; and especially is this evidenced by that one clause in the *Acts Interpretation Act* which provides that where two apparently inconsistent provisions which were originally of different dates have been repealed and re-enacted in a consolidating Act the original priority of date is to be regarded in their interpretation, because one may possibly repeal the other by implication and that repeal by implication is not to be prevented by reason of these two provisions being repeated in

(1) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.
(2) (1884) 10 V.L.R. (L.), 200.
(3) (1893) 19 V.L.R., 233; 14 A.L.T., 291.
(4) (1893) 19 V.L.R., at p. 240.

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one Act and therefore made on the same day." I entirely agree with those observations. In passing those Acts, Parliament was addressing its mind not to the *matter* but the *form* of the law, and was considering not *what* it should enact but *how* existing law should be arranged. Statutory provisions were collected and systematized, but with the intention that their effect was to be precisely the same after the work was completed as before, with the additional advantage that that effect could be more readily perceived. Consequently, in 1890, and until 1903, no intention can be imputed to the Legislature to affect the original meaning of the relevant enactment as it was immediately before *Rider* v. *Phillips* (1) was decided. The Act of 1903, however, was of a different character. It is intituled " An Act to consolidate and amend the laws relating to local government." There Parliament did set its mind to consider what the law should be in relation to municipalities. Among other things it expressly included in certain provisions of the scheme the City of Melbourne, and among other provisions is sec. 197. The question whether the judicial decision in *Rider* v. *Phillips* and *Bannon* v. *Barker* (2) is stamped with the legislative seal must, therefore, be carefully examined. I entirely accept the initial words quoted from *Maxwell* at p. 542, namely, " It may be taken for granted that the Legislature is acquainted with the actual state of the law." It is therefore necessary to see what it was that the Victorian Legislature would reasonably consider was the actual state of the law.

Since 1884, when *Rider* v. *Phillips* (1) was decided, there had been some very important pronouncements by the Privy Council. In 1888 a new and very distinct landmark was erected by the Privy Council with respect to the validity of by-laws. In *Slattery* v. *Naylor* (3) the question arose as to the power of the Borough of Petersham in New South Wales to make a by-law prohibiting burials in any then existing cemetery within 100 yards of any public building, place of worship, school-room, dwelling-house, public pathway, street, road or place whatsoever within the Borough. This had the effect of entirely and absolutely closing up a certain cemetery. That was absolute prohibition, no doubt, as to that

(1) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.

(2) (1884) 10 V.L.R. (L.), 200.

(3) (1888) 13 App. Cas., 446.

cemetery; and the Privy Council had to consider whether that accorded with the power to "regulate" given by the Act. Their Lordships held that it did, but for a very distinct reason. The power given was to regulate "the interment of the dead" generally throughout the whole Borough. No doubt, the council could not "prohibit" the interment of the dead throughout the whole Borough. That was the very thing to be "regulated," not destroyed. But in regulating the wider thing, they might prohibit a part, and therefore prohibition, even absolute, of a part of the subject matter to be regulated is no departure from "regulation" of that subject matter. That was the first point distinctly determined by *Slattery* v. *Naylor* (1). Then their Lordships dealt with the argument as to "unreasonableness." That argument was supported, first, by saying that there was no necessity for any prohibition at all. The Judicial Committee disposed of that by saying there was no evidence on the point. Then "unreasonableness" was urged on the ground of the prohibition—if any prohibition were necessary—being too absolute. This was disposed of by pointing out the difference between the old authority by charter and the analogous powers of newer corporations similarly treated, on the one hand, and the confidence reposed by later legislation in local government bodies created for self-government, on the other hand. As to the latter, "unreasonableness" was regarded as probably open only in very extreme cases. Evidently their Lordships were thinking of "unreasonableness" so extreme as manifestly to exceed the contemplated ambit of power. That case then laid down one point very distinctly, namely, the meaning of regulation as related to prohibition, and strongly suggested the limit of "unreasonableness" as a ground for curial interference. Then, before 1903, came the case of *Toronto Municipal Corporation* v. *Virgo* (2). There the power granted to a municipal council of Toronto was to "pass by-laws for the following purposes:—For licensing regulating and governing hawkers," &c. A by-law was made, absolutely prohibiting hawking in certain specified portions of Toronto. Lord *Davey*, in delivering the judgment of the Board, said (3): (1) "No doubt the regulation and governance of a trade

(1) (1888) 13 App. Cas., 446.
(2) (1896) A.C., 88.
(3) (1896) A.C., at p. 93.

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may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order." That, so far, was exactly in line with *Slattery* v. *Naylor* (1). Then said Lord *Davey*: (2) "But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed." That is stating in express language the underlying principle of the former case. It adjusts the two ideas connoted in the regulation of a given subject: (1) the prohibition of part as an incidental and (2) the conservation of the subject as the entity in view. That general and primary connotation was, in their Lordships' opinion, confirmed by the wording of the Act itself. Applying those legal considerations to the by-law, the Board found that prohibition had, in view of the circumstances, been taken so far as to go beyond the permitted regulation and governance of the subject matter and to be outside the limits of power. As to "unreasonableness," it was not dealt with separately because, Lord *Davey* said (2), the contentions of *ultra vires* and of being in restraint of trade and unreasonable ran very much into one another and the second was unnecessary to be considered separately. In the same year, in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3), the central doctrine of the *Toronto Case* (4) was repeated.

Now, when the Victorian Act of 1903 was framed, no doubt partly consolidating and partly amending, what should a Court assume to have been the intention of the Legislature when repeating the enactment as to "regulating traffic and processions"? Could it be assumed to ignore the binding decisions of the Privy Council that regulation of a subject connoted its non-prohibition, while equally connoting the prohibition of some of its incidents? Could it be assumed to intend that Victorian Courts would disregard those decisions in relation to that enactment? Or is the proper assumption that it intended its words to have their original natural meaning as tested by the law formulated by the supreme tribunal?

(1) (1888) 13 App. Cas., 446.
(2) (1896) A.C., at p. 93.
(3) (1896) A.C., at p. 363.
(4) (1896) A.C., 88.

What is there in *Rider* v. *Phillips* (1)—for *Bannon* v. *Barker* (2) is not an independent decision—to militate against that? The judgment distinctly stated that it proceeded on "unreasonableness." It stated that regulation connoted "some prohibition." That was no new doctrine. In 1790 Lord *Loughborough* C.J. said in *Butchers' Co.* v. *Morey* (3), and speaking of trade regulations, that "every regulation is more or less a restraint." So far *Rider* v. *Phillips* may be accepted as in accord with recognized law. Then it went on to say (4) that, assuming "prohibition" (by which I understand "some prohibition") was permissible, a by-law specifying in advance the kinds or classes of processions permitted would be ineffectual, because easily evaded. Therefore, it was held, express enumeration of permitted processions was not necessary. In other words, the mere absence of such enumeration, in view of the rest of the by-law, was not unreasonable. Then it proceeded to hold that it was not "unreasonable" to delegate to the mayor or town clerk the power of giving permission, because that was for the benefit of applicants by giving them greater and more frequent opportunities for getting leave. And further that the arbitrariness of this power in the hands of the officials was not a reason for holding it bad. One sentence on p. 152 is very important, namely, "It must be assumed, we think, that the power conferred by this by-law will only be exerted in cases where public order or convenience may require." That, as will be presently shown, is contrary to high authority. Finally, this is said: "On the whole, we are of opinion that none of the objections to this by-law have been sustained, and that it has not been shown to be in any respect *unreasonable*."

Now, in 1903 what would the Legislature have thought on the assumption that it was aware of legal decisions? It would have thought the legal interpretation placed by the Victorian Court on the power of "regulating traffic and processions" was that the test was whether the by-law taken as a whole was "unreasonable," but that the Privy Council had ruled that that was not the test. The

(1) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.
(2) (1884) 10 V.L.R. (L.), 200.
(3) (1790) 1 H. Bl., 370, at p. 375.
(4) (1884) 10 V.L.R. (L.), at p. 151; 6 A.L.T., at p. 38.

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Legislature would have seen that in both Courts it was considered that regulation implies "some prohibition," but not total prohibition; and then it would have seen that whereas the Privy Council thought unreasonableness was only for extreme cases, the Victorian Court thought that the proper course in all cases was to consider the circumstances in order to judge of "unreasonableness" of the prohibition applied. It would also see that the Victorian Court thought complete enumeration of permitted or prohibited processions unwise and unnecessary in a by-law. It would further observe that one reason for holding the by-law valid was that powers, however wide in terms, would be assumed to be exercised within legal limits. Now, as we assume the Legislature was acquainted with the law and as we cannot assume it acted inconsistently, which set of decisions are we to presume it adopted? Clearly, I should say, the Privy Council decisions. If it adopted the Victorian decision as to "regulating" processions, it must necessarily adopt it as to that word in every other case in the section where it occurs. On the whole, I cannot see any ground for presuming that the Legislature placed authoritatively in its words any interpretation governing the Courts that regulation meant either (1) complete prohibition where the council for any reason whatever, open or secret, chose to have prohibition, or (2) absence of any control whatever, wherever the council for any reason whatever, open or secret, chose to have it so. But that is the basis of the first contention of the appellant. I reject it.

In my opinion there is no legislative interpretation of its own words, but they are left to operate in their own proper signification. To apply the words of Lord *Russell* C.J. in *Logsdon* v. *Booth* (1), it has not been "shown that the Legislature had subsequently legislated in a way which demonstrated that it was accepting and adopting the law as so laid down, and that it proceeded to further legislate on the express or clearly implied acceptance of that declaration of the law." The Court is not therefore prevented from construing them in their true meaning, and this I proceed now to consider.

The appellant Corporation maintains the validity of the ordinance, as it may be called for the moment, on two distinct powers, namely, the

(1) (1900) 1 Q.B., 401, at pp. 413-414.

Local Government Act 1915 and the *Police Offences Act* 1915. These have to be separately considered. The *Local Government Act* 1915 enables the City of Melbourne, by sec. 197, to make by-laws for certain "purposes." Part VII. is the relevant portion of the Act. It is headed: "By-laws, regulations and joint regulations." I may say at once that "regulations and joint regulations" so far as they may be made under *that* Act, are irrelevant here, because by sec. 199 they relate only to the Thirteenth Schedule and therefore are not to the purposes of sec. 197. The heading of Division 1 of the Part is "For what purposes by-laws &c. may be made." The word "purposes" there means the objects to be accomplished in each case. It is therefore a word of limitation, indicating that the Legislature has not left the Corporation at large with respect to the matters mentioned but requires the Corporation to treat each "purpose" enumerated as a distinct object or subject matter to be considered as a distinct entity. The governing words of sec. 197 are as follows: "Subject to the provisions hereinafter contained by-laws may be made for any municipality for the purposes mentioned in this Act and for the purposes following"; then follows the enumeration of 37 separately arranged purposes. The words "subject to the provisions hereinafter contained" are the first limitation, and the word "purposes" is another.

Now, the first thing that claims our attention in reading the enumeration of purposes is that in all but two they begin with the present participle of a verb such as "carrying out," "regulating," "preventing," "prohibiting," &c. In the two exceptional cases they each begin with a word equally indicative of action, namely, "the adoption" of provisions and the "destruction" of rats, &c. The next thing to observe is the distinctive use of "regulating" in some cases and "prohibiting" in others, and in a third class the words "regulating or prohibiting." Finally, the 37th purpose is "Generally for maintaining the good rule and government of the municipality." The Council calls in aid for the ordinance now under consideration three of these enumerated purposes, viz., 10, 22 and 37. No. 10 is "Suppressing nuisances"; No. 22 is "Regulating traffic and processions," and No. 37 is as above stated. As to No. 10, it may be disposed of at once by reference to *Gunner* v.

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Helding (1), in which the Full Bench of the Supreme Court of Victoria held that the sub-section means "the suppressing of nuisances which are nuisances at common law—*Higgins* v. *Egleson* (2)—and it possibly refers also to nuisances which in fact already exist, and therefore contemplates the getting rid of existing nuisances as contradistinguished from the prevention of nuisances which do not exist." It was not necessary to consider whether the "possibility" was the "fact," but the suggestion is a strong one, and I think it is right. A procession may not be a nuisance; processions generally cannot be "suppressed as nuisances." That sub-section may be laid aside. I pass over sub-sec. 22 for the purpose of saying that sub-sec. 37 is no doubt important in this case for a reason subsequently stated but not for the purpose relied on. As a power in aid of this by-law its assistance is insufficient. It cannot overcome the objection raised to the general prohibition of the ordinance. It confers a power, not of extending the other powers, but of aiding them if need be or of making independent ordinances in matters *ejusdem generis* with the specific powers of the Act (see *In re Kyneton Municipal Council*; *Ex parte Gurner* (3)).

Sub-sec. 22 remains, namely, "Regulating traffic and processions." Much turns on the effect of the word "regulating." I have already dwelt on the interpretation of this word as stated by the Privy Council in *Virgo's Case* (4) and repeated in the *Ontario Case* (5). But the Judicial Committee in the latter case did *in arguendo* give some very valuable illustrations of the distinction between "regulation" and "prohibition" and of the meaning of the expression that regulation connotes some prohibition. The argument of counsel on this point appears clearly enough in the regular report (6). But the observations of Lord *Halsbury* L.C., Lord *Herschell* and Lord *Watson* on this point during the argument are not there reported. On two occasions I have stated them in decisions of this Court, namely, in *Tungamah Corporation* v. *Merrett* (7) and, in collaboration with my learned brother *Rich*, in *Metropolitan Meat Industry*

(1) (1902) 28 V.L.R., at p. 319.
(2) (1877) 3 V.L.R. (L.), 196.
(3) (1861) 1 W. & W. (L.), 11.
(4) (1896) A.C., 88.
(5) (1896) A.C., 348.
(6) (1896) A.C., at pp. 353-355.
(7) (1912) 15 C.L.R., at pp. 423-424.

Board v. *Finlayson* (1). It seems singular that these very important observations of the learned and eminent Lords I have mentioned, though emphasized in judgments of the High Court, should not have been referred to in the course of this case until I directed attention to them. They go to the heart of the contention that regulation of a subject matter may be satisfied by prohibition of that subject matter. I shall not repeat the passages I have referred to, but, while again pointing out their authoritative and explanatory force in this connection, I would quote the illustration given by Lord *Halsbury*. He 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*." That, in the absence of controlling statutory provision, is the natural meaning of regulation, and is the key to the whole position, and harmonizes *Slattery's Case* (2), *Virgo's Case* (3) and the *Ontario Case* (4). Among the provisions subject to which by-laws may under sec. 197 be made are secs. 204, 206, 208, 209, 222, 223, 229 and 719. The effect of those sections, so far as necessary for the present occasion, may be thus stated :—(1) Every by-law must be passed by a special order of the Council and sealed with the municipal seal. (2) After the resolution has been agreed to it is to be open for public inspection, apparently that is before sealing. (3) After sealing, the by-law is to be published in the *Government Gazette* at length, or if not at length it is to be open for free public inspection, and a printed copy available at a charge not exceeding one shilling. (4) A penalty not exceeding £20 may be imposed by the by-law itself, not merely for contravention but even £20 for the same act having several effects. (5) An offence against a by-law is an offence against the Act, and, if no penalty is specifically imposed, the penalty is a maximum of £20. (6) The Governor in Council may repeal a by-law. The conclusion I draw from this is that, while full confidence is reposed in the Council as representative for local government purposes of the residents of the municipality, it is

(1) (1916) 22 C.L.R., at p. 348.
(2) (1888) 13 App. Cas., 446.
(3) (1896) A.C., 88.
(4) (1896) A.C., 348.

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expected to be as careful and explicit in its regulations as circumstances can reasonably permit, to act formally and to give the required publicity to the restrictions it imposes on individual liberty, particularly in view of the penalties it may impose directly or indirectly, and in view of the proper information from the by-law itself of the new restrictions, so that the Central Government itself may have a fair opportunity of judging whether they shall be permitted to remain or not.

Now, as to the word "procession." A procession is *primâ facie* a moving assemblage of individuals for a common purpose, and, if on a highway, using the highway for the normal purpose of passage. It is not necessarily unlawful in any way. If other individuals have their way impeded to any extent by the procession, that amounts *primâ facie* to a mere conflict of rights which should be reasonably adjusted by the parties concerned. It cannot be regarded, as it has inferentially been suggested in argument, as primarily an outlaw or as a wild beast that needs strict control for the safety of the public. It does not normally denote an unlawful assembly. The *Unlawful Assemblies and Processions Act* 1915 makes certain specified processions unlawful. But at common law we have the statement of Sir *James Stephen* in his *Digest of the Criminal Law*, 5th ed., art. 75, that an unlawful assembly is "an assembly of three or more persons—(*a*) with intent to commit a crime by open force; or (*b*) with intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it." This was approved by *Charles* J. in *R.* v. *Cunninghame Graham* (1). The same case shows there is no right of "public meeting" in a public thoroughfare. A thoroughfare is for the purpose of passing and repassing. But a procession passing along a public thoroughfare is, to begin with, no more than a number of individuals exercising in the aggregate the individual right of each to pass along the thoroughfare. The common purpose of the procession or its incidents may make the procession unlawful, but that depends on whether some unlawfulness exists either at common law or by statute. So far as

(1) (1888) 16 Cox C.C., 420, at p. 427.

a procession is unlawful apart from a by-law, the law already provides for it and the by-law is unnecessary and futile. A by-law is for the purpose of imposing still further restrictions and new penalties on what would otherwise be a lawful procession. Common justice, therefore, dictates that except where the Legislature has clearly empowered a council to make its own unfettered and unregulated will at the moment the test of legality or illegality, a council having the power of "regulating by by-law" should state its requirements in the by-law as explicitly as circumstances reasonably permit. Otherwise, how are individuals to attempt to conform to law without a total surrender of their right innocently and unaggressively to use the King's highway in company on occasions that frequently represent great and important national, political, social, religious or industrial movements or opinions? It would require very explicit words in an Act of Parliament to induce me to believe the Legislature, in the name of regulation, contemplated such unregulated authority as is assumed by the by-law before us. The case of *Dick* v. *Badart* (1) is sufficiently similar to be an authority on this point, if authority were needed. The by-law says: "No processions of persons or of vehicles or motor-cars or of any combination of persons, vehicles or motor-cars shall except for military or funeral purposes parade or pass through any street unless with the previous consent in writing of the Council given under the hand of the Town Clerk and by the route specified in such consent, and unless and until the recipient of such consent has given at least twenty-four hours' notice with particulars of such consent and route to the officer in charge of the City Police." The effect, in plain language, may be thus stated: All processions, except military and funeral processions, are absolutely prohibited in every street large or small, populous or not, and however innocent or praiseworthy their purpose, however inoffensive or orderly and free from any material obstruction to traffic or other objection, unless the Council chooses for any reason it likes to say "Yes." It may say "Yes" for any reason whether connected with its proper functions as a local governing body or not; it may say "No" for any reason; and it need not assign any reason for either an affirmative or a negative attitude; it need not say either "Yes" or "No" at all, and then

(1) (1883) 10 Q.B.D., at p. 393.

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the prohibition stands *simpliciter*. No one desiring to take part in a procession has any opportunity by way of right of knowing what matters the Council will consider fatal. One essential is the absolute will of the Council unregulated by any law. *Voluntas stet pro ratione.* The other conditions are additional, and so need not be considered. And the only exception the Council makes is as to "funerals"; for military processions are in any case beyond its control, being under Federal law. The Council may, within the ambit of this by-law, permit an Oddfellows' procession to-day and in precisely similar circumstances refuse the Foresters to-morrow, it might permit the Druids' procession and refuse the Eight Hours' procession, it might permit a party procession of one political faith and refuse one of another political faith, with no difference between them except that of politics. And, as I say, that is all without any rule to guide it and simply making its chance will law; not the will stipulated by Parliament to be framed as a special resolution and then published and sealed and afterwards notified publicly *in extenso*, but its will declared by a simple resolution carried perhaps *sub silentio* or even by a mute abstinence from any declaration at all. Why, then, should so arbitrary a power be inserted at all? There appears to be no British precedent for it in the case of any municipal corporation, though where corporations such as in *Gray* v. *Sylvester* (1) are the proprietors they may of course, like any other proprietor, require their consent in certain cases consistently with their scheme. The only precedent for this by-law produced to the Court was one from an American State—*Re Frazee* (2). I can see no necessity whatever for such a condition. I know that in *Rider* v. *Phillips* (3) the learned Judges say: "It would be practically impossible to define or to enumerate every species of objectionable procession so as to prevent the law from being evaded and defeated in those cases where it was most needed for the convenience of traffic and the preservation of order in the streets." With infinite respect, I venture to express the opinion that that is not sound. In the first place it mistakes the "purpose" of the power. The statutory "purpose" is not "prohibition" of objectionable processions. It is stated to be the

(1) (1897) 46 W.R., 63.
(2) (1886) 6 Am. St. R., 310.
(3) (1884) 10 V.L.R. (L.), at p. 151; 6 A.L.T., at p. 38.

" regulation " of processions so that none may be objectionable. It may happen incidentally that some prohibition occurs, but that is not the prime quest the Legislature has entrusted to the Council. That is of the essence of the matter. In *Williams* v. *Weston-Super-Mare Urban District Council* (1) *Channell* L.J. made this distinction the ground of determination, and held, by reason of the power " to prohibit," that a by-law requiring the corporation's permission for certain matters could be validly made. The learned Judge distinguished *Parker* v. *Bournemouth Corporation* (2) on the ground that there the power was " to regulate," and he observed : " That makes all the difference." What the Council has to " define " or " to enumerate " is not processions but conduct and necessary matters to be observed by processions so that such order and propriety and peace and freedom of traffic and other matters within the ambit of the Council's jurisdiction may be observed and secured. For this purpose it has practically a free hand. It may " regulate," that is, it may state every " regulation " or rule of conduct within the limits of jurisdiction it pleases and every Court will then strive to uphold the Council's exercise of discretion so far as it reasonably can. I see no difficulty in the Council stating the routes which it thinks are suitable or unsuitable for processions or the days or hours. I see no difficulty in guarding against collision of processions by requiring notice beforehand, and prescribing that the procession first notified shall, if the Council so pleases, be the only one on that day, or be followed not sooner than at a stated interval. I see no difficulty in prescribing conditions to avoid any breach of the peace or offence to the citizens generally or undue interference with traffic. In the *Unlawful Assemblies and Processions Act* 1915 Parliament has set an example in sec. 10, where it has specified conduct of processions which it considers objectionable. If the Council adds to that any other conduct over which Parliament has given it the oversight, it may do so.

For the regulation of traffic generally the Council has not said that there shall be no traffic except such as it may consent to. That would be so obviously bad that no one would ever dream of so

(1) (1907) 72 J.P., 54, at p. 56 ; 98 L.T., 537.

(2) (1902) 66 J.P., 440 ; 86 L.T., 449.

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prescribing. But why should it not also be bad if adopted with respect to processions which are in the same sub-section, and are a species of traffic and, being especially named for regulation, are a species not to be "prohibited" as a purpose? The real truth is that the Council's by-law is framed exactly as if the word "prohibiting" were used in the sub-section instead of the word "regulating"; and that is, of course, a fundamental error and cannot be justified. The Council has the duty of openly declaring its will as to "regulation" if it wishes to regulate at all, and, having the duty, it must accept the responsibility. The citizens are entitled to know to what extent their common law rights are restricted. There is no analogy between the prior consent of the Council to a procession at all, and the every day direction of the traffic by a police officer. The only analogy would be prior consent of the Council to any traffic.

By-laws such as No. 3 to No. 9 of by-law No. 142, headed "Regulation of traffic generally," Nos. 10 and 11, headed "Pedestrian traffic," and No. 12, headed "Street processions," are directed to the conduct of traffic at the instant of movement. No. 13, headed "Lawful directions to be complied with," is equally a regulation of conduct at the moment of movement or intended movement. I am not prepared to say it is all supportable, but the direction of a police officer is plainly nothing more than for the purpose of avoidance of collision or danger or breach of peace which might arise from the conflicting exercise of equal rights of passage. It bears no reasonable resemblance to what is challenged here.

In *Rider* v. *Phillips* (1) there is a passage, which I have quoted, in which the Court says it is to be assumed that the local authority will only exert its power where public order or convenience requires. With deep respect, that is not the assumption which a Court is entitled to make in such a case. If Parliament had intended such an assumption it would have said shortly that traffic and processions should be subject to the consent of the Council. There is high authority for what I say. In *Rossi* v. *Edinburgh Corporation* (2) a regulation made by the Edinburgh magistrates was impeached for invalidity, and one argument to uphold it was, as appears at p. 24, that there was an assurance that magistrates would not act

(1) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.

(2) (1905) A.C., 21.

arbitrarily. Learned counsel attacking the by-law properly contended that such an assurance was worthless. Lord *Halsbury* L.C. said as to this (1) :—" When it is said that any Court can construe it so as not to infringe the liberty of the subject, and that they would simply withdraw the licence under certain circumstances, I think in the first place that is an untenable proposition. You have no right to allow to stand that which on its face would involve an undue restriction of the liberty of the subject on the ground that any Court afterwards would construe it so that it should not do so, because it would be *ultra vires* on the face of it. I think that would be wrong in itself, but it would be much more wrong to allow the subject to be called upon to take such a question from Court to Court, and ultimately to your Lordships' House, because they would not interfere with the language which the civic authority had used which, upon the face of it, involved an infringement upon the liberty of the subject." It is settled law that the validity of a regulation must be judged of by what *may* on a fair construction be included in its language, and not by what the administration of it for the time being are inclined to do. In *Repton School Governors* v. *Repton Rural Council* (2) Lord *Sterndale* M.R. (then *Pickford* L.J.) says : " The question is not whether it is possible in some particular cases to find a use of the by-law which is reasonable, but whether the by-law itself looked at in the light of *all* the cases to which it applies is so vague or so unreasonable as to be invalid."

One thing should be clear on the face of the by-law, and that is that the matters insisted on and prescribed by way of regulation come within the jurisdiction of the Council as a municipal institution having limited statutory functions. (*Thomas* v. *Sutters* (3) and *Scott* v. *Pilliner* (4), and cases therein cited, are useful to refer to in this connection.) But there is direct and supreme authority for this position in *R.* v. *Broad* (5), where Lord *Sumner*, speaking for the Judicial Committee, says " the object of the by-laws " is " therefore the limit of the power." That is not observed in this by-law. " Consent " is at large, and the Governor in Council might have no

(1) (1905) A.C., at p. 26.
(2) (1918) 2 K.B., 133, at p. 138 ; 87 L.J. K.B., 897.
(3) (1900) 1 Ch., 10.
(4) (1904) 2 K.B., 855.
(5) (1915) A.C., 1110, at p. 1122.

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means whatever of judging whether the by-law ought or ought not for oppressiveness to be repealed by him.

One or two authorities cited on behalf of the appellant advanced in aid of sub-sec. 22 should be noticed. *Cassell* v. *Jones* (1), *De Morgan* v. *Metropolitan Board of Works* (2) and *Conservators of Mitcham Common* v. *Cox* (3) were cited. In the first, there is some complication as to a lease held by the corporation from the Board of Trade of some part of the foreshore, and, if the corporation had property rights there, the matter is at once without doubt distinguishable. In any case, the point at issue here is really not touched. The two last-mentioned cases depend entirely on the inclosure schemes, and rights of ownership enter so greatly into the question—or at all events rights of control based on property—that they afford no light here. The distinct position of ownership rights in such a case is very pointedly referred to by Lord *Sterndale* M.R. in *Sutton Harbour Improvement Co.* v. *Foster* [*No.* 2] (4). It had also been, with similar clearness, adopted by *Lindley* M.R. and *Chitty* L.J. in *Gray* v. *Sylvester* (5) as the discrimen between the powers of corporations that were proprietors of the seashore and municipal corporations such as the City of Melbourne.

Learned counsel for the Corporation has stated that the effect of upholding the order of the Supreme Court quashing by-law No. 162 would be to leave No. 142 entirely unrepealed. That would, it is said, leave the prohibition still standing, but subject to removal by the consent of the Lord Mayor or Town Clerk instead of the Council. Without discussing the severability of the by-law 162, I am not at all clear—since it has not been argued—what the effect of the quashing order would be in this regard. But, assuming it restored No. 142 in its entirety, the invalidity of that by-law would of course follow on the principle I state in this judgment.

So far, then, as the ordinance is rested on the *Local Government Act*, it is invalid. But it is sought to sustain it as a regulation under the *Police Offences Act* 1915, sec. 6, and, as I gather, principally under the words "for preventing any obstruction thereof" (that is, of

(1) (1913) 108 L.T., 806; 23 Cox C.C., 372.
(2) (1880) 5 Q.B.D., 155.
(3) (1911) 2 K.B., 854.
(4) (1920) 89 L.J. Ch., 540, at p. 543.
(5) (1897) 46 W.R., 63.

streets) whether by the assemblage of persons or otherwise. As pointed out during the argument, the ordinance in this case, No. 162, was not passed as a "regulation" under the *Police Offences Act* but simply and solely as a "by-law." I am not prepared to say that one and the same ordinance can be validly passed as both at the same time. As will appear from what I am about to say, there might be an impossibility of it answering both descriptions at the same time. But, leaving the decision of that question to a necessary occasion, it is clear that there never was any attempt to make No. 162 other than as a "by-law," and no "by-law" can be made under the *Police Offences Act*. An observation in *Bannon* v. *Barker* (1) was referred to. There the Court said: "The distinction which has been sought to be drawn, between a regulation and a by-law, we cannot regard as any other than a verbal one for *the purposes of the present case.*" But the Court states why; namely, that the "reasons for holding the by-law to be a lawful exercise of the power under which it was made, appear to us to apply with equal force to establish the validity of the present regulation." That is to say, the test of "unreasonableness" applied to both "by-law" and "regulation" with equal force. The learned Judges, of course, could not have meant that what the Legislature so carefully distinguished were the same thing. A by-law is made under the *Local Government Act* (sec. 197 or sec. 198). Regulations may be made under *that* Act (sec. 199). But those regulations are limited to the Thirteenth Schedule. A regulation made under "any other Act" (see sec. 203) is made in *manner* provided by the *Local Government Act*. But a by-law requires certain formalities that no regulation needs, as by sec. 209. A by-law may impose penalties up to £20, and even cumulative penalties for acts having various effects (sec. 222). A regulation under the *Local Government Act* cannot impose a penalty (sec. 224). In both cases, by-law or regulation, under the *Local Government Act* where no penalty is otherwise provided the maximum is £20. But in the case of a regulation under the *Police Offences Act that* statute makes its own maximum of £5 (sec. 6). Consequently it is difficult to consider an ordinance of the nature we are considering as both a by-law under one Act and a

(1) (1884) 10 V.L.R. (L.), at p. 202.

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regulation under the other. It purports to be the first; a prosecution under it would entitle the Bench to impose a penalty of £20, which would be impossible if it were a Police Offences regulation. The public are entitled to be clearly informed of penal legislation that is to affect them.

I therefore hold that the making of the by-law cannot be sustained under the *Police Offences Act*. But I am equally clear that, as a regulation made under that Act, it is open to the charge of invalidity. The terms are too wide, and are not pointed to the "prevention of obstruction," and the authorities quoted are opposed to its being a permitted exercise of power. It could not be reasonably said that the Council could under that section declare by regulation that there should be "no assemblage of persons" without its prior consent in writing. And yet that is the real contention of the appellant so far as this section is concerned. See and compare sec. 52 of the *Metropolitan Police Act* 1839 (2 & 3 Vict. c. 47).

For these reasons I am of opinion that the judgment of the Supreme Court should be affirmed, and this appeal dismissed.

HIGGINS J. Under sec. 197 of the *Local Government Act* 1915 the Council of the City of Melbourne has power to make by-laws:— "Subject to the provisions hereinafter contained by-laws may be made for any municipality for the purposes mentioned in this Act and for the purposes following:— . . . (22) Regulating traffic and processions." I propose to deal with this purpose first. Purporting to act under the powers contained in the Act, the Council passed a resolution on 3rd October 1921, which was confirmed on 9th November, as by-law No. 162. This by-law recites a desire to amend a previous by-law, No. 142, as to street processions; and it provides that clause 12 of by-law No. 142 be repealed, and a clause No. 3 read in lieu thereof. This new clause 3 is as follows: "No processions of persons or of vehicles or motor-cars or of any combination of persons, vehicles or motor-cars shall except for military or funeral purposes parade or pass through any street unless with the previous consent in writing of the Council given under the hand of the Town Clerk and by the route specified in such consent, and unless and until the recipient of such consent has given at least twenty-four hours'

notice with particulars of such consent and route to the officer in charge of the City Police." The question is, is this by-law within the power conferred on the Council?

The section specifies many purposes for which by-laws may be made—including (4) regulating the supply and distribution of water from waterworks under the management of the council; (10) suppressing nuisances; (13) regulating sewerage and drainage; (14) regulating lighting with gas or otherwise; (18) prohibiting spitting or expectorating on footpaths; (20) regulating or prohibiting the keeping of any place or the keeping or storage of any animal (including birds) or thing in the opinion of the council offensive, injurious to health or dangerous; (21) prohibiting regulating or controlling quarrying or blasting operations (but a by-law *prohibiting* is not to be made without the approval of the Governor in Council); (22) regulating traffic and processions; (23) regulating the hours during which and conditions on which locomotive engines or rollers impelled by steam or electricity may proceed over any road; (24) regulating or prohibiting the use in or on any fence or other erection on land adjoining any street or road of any wire with spikes or jagged projections; (25) prohibiting the throwing, placing or leaving upon any public highway of orange peel, banana peel, or other vegetable matter; (26) regulating or prohibiting the writing, &c., of any letter, &c., or advertisement upon any footpath, &c.; (28) prohibiting or regulating cattle being allowed to graze or wander upon any land not enclosed by a substantial fence; (29) prohibiting or regulating the locking of any wheel of any vehicle (unless a skid-pan, &c.); (30) 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, &c.; (31) prohibiting or regulating the drawing or trailing of any sledge, &c., upon any footway or carriage way; (34) regulating the use of any merry-go-rounds, swing boats, &c.; (37) generally for maintaining the good rule and government of the municipality.

The contrasts in the words of these several purposes show clearly that processions are not to be prohibited, only "regulated," whatever regulation means as applied to processions. The Legislature evidently meant that the Council should not prohibit processions,

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but should make such rules as should ensure to the public the use of the streets with the minimum of inconvenience. Power was therefore given to the Council to regulate processions, by by-law, not to say that some of the public may make processions and others not. The power is to regulate " processions," not to forbid processions or any particular procession. Processions are put by the words of sec. 197 on the same level as merry-go-rounds ; a by-law may " regulate " the use of merry-go-rounds, but may not " prohibit " their use, although a by-law may " prohibit " the throwing of orange peel. If there were power by a by-law to regulate milk-vending, the Council would have no power to deprive any man of his right to make his living by selling milk, but would have power to dictate by by-law the conditions of place, time, manner, &c., under which milk might be sold. As stated by the Judicial Committee of the Privy Council (*Toronto Municipal Corporation* v. *Virgo* (1)), a power to " regulate " seems to imply the continued existence of the thing to be regulated. If there is power to regulate driving, the mere act of driving cannot be made unlawful ; if there is power to regulate the use of motor-cycles, the use of a motor-cycle cannot in itself, without other circumstances, be made an offence ; if there is power to regulate processions, the common law right of the King's subjects to pass through the highways, whether singly or in Indian file, or in groups, or four abreast or in processions cannot be forbidden, although the passage without such precautions as the by-law prescribes can be forbidden.

It must be borne in mind that there is this common law right ; and that any interference with a common law right cannot be justified except by statute—by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted. As stated in *Ex parte Lewis* (2), it is a " right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance." In this, the Trafalgar Square Case, it is contrasted with the claim for right of assemblage on a highway : " A claim on the part of persons so minded to assemble in any numbers, and for so long a time as they please to remain

(1) (1896) A.C., 88.

(2) (1888) 21 Q.B.D., at p. 197.

assembled, upon a highway, to the detriment of others having equal rights, is in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it." See also *Mildred* v. *Weaver* (1); *Rangeley* v. *Midland Railway Co.* (2); *Lowdens* v. *Keaveney* (3). There is, of course, some danger to the public peace from some processions; but the law of Victoria has elsewhere made other provision to meet such danger. Mr. *Pigott* has appropriately referred us to the *Unlawful Assemblies and Processions Act* 1915. By sec. 10: "Any body of persons who . . . join in procession . . . for the purpose of celebrating or commemorating any festival anniversary or political event relating to or connected with any religious or political distinction or differences between any classes of His Majesty's subjects . . . and who . . . have publicly exhibited any banner emblem flag or symbol the display whereof may be calculated to provoke animosity between His Majesty's subjects of different religious persuasions or who are accompanied by any music of a like nature or tendency, shall be . . . an unlawful assembly; and every person present thereat shall be . . . guilty of a misdemeanour." As this section prohibits certain processions, and as the *Local Government Act* does not show any intention of adding to the list of processions to be prohibited, it follows that sec. 197 (22) enables the Council to regulate by by-law processions which are not prohibited, enables the Council by by-law to prescribe times, places, manner, &c., for processions which have not been prohibited. Sec. 197 (22) assumes that processions are not in themselves prohibited by law, unlawful, but allows by-laws regulating innocent processions for the convenience of the public. Every regulation implies restraint, and prohibition of any act contrary to the regulation; but the point is that sec. 197 (22) does not sanction any by-law prohibiting a procession because of its nature or purpose.

Looking now at the impugned by-law, we find that it forbids all processions (other than military or funeral) unless with the previous consent of the Council. By such a provision, if valid, the Council will be enabled to prohibit a procession because of its nature or

(1) (1862) 3 F. & F., 30.
(2) (1868) L.R. 3 Ch., 306, at p. 310.
(3) (1903) 2 I.R., 82.

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purpose. Therefore the by-law is in excess of the power conferred by sec. 197 (22), and unless it can be supported under some other power, it is invalid.

But this is not all. Even if it be assumed that sec. 197 (22) sanctions a by-law prohibiting a procession because of its nature or purpose, the prohibition must be by by-law, not by the council acting at an ordinary meeting, and by the chance majority at that meeting. Under sec. 204, every by-law has to be passed by a "special order" of the council and sealed with the common seal. Under sec. 188, there can be no "special order" unless (*a*) the resolution has been passed at a meeting for which notice of the resolution has been given as for extraordinary business; unless (*b*) the resolution has been confirmed at a subsequent meeting not less than twenty-five days later; unless (*c*) the time for holding the subsequent meeting and the substance of the resolution have been advertised in newspapers twice at least at certain intervals; unless (*d*) notice of the subsequent meeting and of the resolution has been given to each councillor as required for special meetings. Moreover (sec. 206), after any resolution has been first passed a copy thereof must be deposited at the office of the council and be open for inspection by any person; and the advertised notice must state that a copy is open to inspection. Finally, after the sealing, the by-law must be published in the *Government Gazette*. The Legislature has given such power as it has given to regulate processions to two successive concurring council meetings surrounded by all these precautions; and yet this by-law as framed purports to give the power to an ordinary council meeting. If, in place of the consent of the Council to a procession, the consent of the Mayor or any one else were prescribed by the by-law, there would be an obvious delegation of power, and the by-law would, to my mind obviously, be bad; but here there is delegation too—from what I may call the by-law making Council to the ordinary meeting of the Council. In short, this by-law leaves each procession to the mere will of the Council—the very thing that secs. 197, 204, &c., were intended to prevent. If I may be permitted to say so, the Legislature has wisely foreseen that nothing would tend more to produce bitterness and the spirit of faction among the citizens than to allow a mere majority of the

councillors to forbid processions of bodies whose nature or purposes are not acceptable to the majority. The liberty of procession is in many respects a safety-valve.

It will be noticed that this view of the by-law excludes the extreme positions, (1) that a "regulation" cannot prohibit anything; (2) that a regulation by by-law cannot leave the ascertainment of some fact to a policeman or other official. As I have said, every regulation implies restraint, prohibition in some degree; but if the power is to regulate meetings, there is no power to prohibit meetings; and, if the power is to regulate a city, there is no power to prohibit or destroy the city; and a power to regulate processions does not involve a power to prevent or prohibit a procession—there is only a power to make a by-law—a law—specifying the conditions which must be observed. As in the case of *Slattery* v. *Naylor* (1), a power to make by-laws for regulating the interment of the dead does not authorize a by-law prohibiting the interment of the dead: but it authorizes a by-law prohibiting the interment of the dead in certain places. It is quite consistent with the view which I have put that by a by-law for the purpose of regulating traffic vehicles may be directed to move and stop at street corners on the signal of a policeman; but it does not follow that a by-law may forbid processions unless a policeman or the mayor, or the town clerk, or even the council in ordinary meeting assembled, approve of the processions. So far, therefore, as sec. 197 (22) is concerned, this by-law is, in my opinion, beyond the powers of the Council. I have examined the cases cited, and others; but, as *Lindley* M.R. said in *Gray* v. *Sylvester* (2):—"In such a case as this the authorities are not very much use as a guide to the right decision. It is necessary in each case to look at the statutory authority under which the by-law was made and at the language of the by-law."

The appellant has also relied on sec. 197 (10), the power to make a by-law for the purpose of "suppressing nuisances"; and on sec. 197 (37) for the purpose "generally for maintaining the good rule and government of the municipality." It is sufficient to say that this by-law has the effect, if valid, of suppressing processions which

(1) (1888) 13 App. Cas., 446. (2) (1897) 46 W.R., 63.

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are not nuisances (see *Higgins* v. *Egleson* (1)); and that full effect can be given to the general power in sec. 197 (37) without treating it as enabling the Council to destroy the common law right of walking in procession.

The only point as to which I have felt any doubt in this case is that put by *McArthur* J. in his judgment. In 1884 there was a decision of the Supreme Court of Victoria affirming the validity of a by-law prohibiting processions, a by-law which contained the same provisions as the present by-law except that the consent of the Mayor or Town Clerk had to be obtained, not the consent of the Council (see Act of 1874, sec. 213 (XVII.); *Rider* v. *Phillips* (2)). The purpose for which a by-law could be made was "for regulating traffic and processions and generally maintaining the good rule and government of the municipality." The concluding general words were attached at that time to this power only, and they may have led the Court to give a more liberal interpretation to this power than it would otherwise have given or given to the other powers. The Act was consolidated in 1890, in a general consolidation of the Acts, and the words were retained. Then in 1903 there was an Act passed "to consolidate *and amend* the laws relating to local government"; and in this Act the only relevant change was that the concluding general words were separated from the words "for regulating traffic and processions"; and were put as an independent power at the end of the list of purposes. Then in 1915 there was an Act passed, in a general consolidation, "to consolidate the law relating to local government"; and it contained the same words as the 1903 Act. It is urged that, as the Legislature made no substantial change in 1903 in the words which had been interpreted by the Supreme Court in 1884, it used the words with such interpretation as was put upon them by that Court. The appellant urges that we should apply the rule, and treat the by-law as valid, even if in our opinion it is not valid. The rule as most deliberately and maturely stated by *James* L.J. appears in *Greaves* v. *Tofield* (3): "The safe and well-known rule of construction is to assume that the Legislature when using well-known words upon which there have

(1) (1877) 3 V.L.R. (L.), 196. (2) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.
(3) (1880) 14 Ch. D., at p. 571.

been well-known decisions uses those words in the sense which the decisions have attached to them." One difficulty in applying this rule is that we cannot say what decisions are "well-known," that there is no evidence how far *Rider* v. *Phillips* (1) was "well-known," and that evidence on the subject would not be admissible. But, passing by this difficulty, it seems to me that neither in the case of *Rider* v. *Phillips*, nor in the case of *Bannon* v. *Barker* (2), which professed to follow that case though under a different Act, is there any clear pronouncement as to the meaning of the word "regulate" in the expression "for regulating processions." Counsel who attacked the by-law did not even take the precise points with which we have to deal. The first objection taken by counsel was "that a power to regulate is not a power to prohibit *at the discretion of an individual*"—that is to say, that the discretion was entrusted to the Mayor or Town Clerk, not to the Council. The second objection was that the power to control traffic exists if at all in the Council, and cannot be delegated to its Mayor or Town Clerk. It was not even suggested in the argument that the discretion must be exercised by the Council in its by-law making capacity, under all the precautions of a "special order," &c. The third objection was that the by-law was unreasonable. The two Judges who gave the decision concentrated their attention on this last objection. As *Higinbotham* J. said, giving the judgment of himself and *Holroyd* J. (3): "Several objections have been urged in the argument before us against the validity of the by-law, but they all resolve themselves into one—viz., that it is unreasonable." At that time the decision of the Judicial Committee in *Toronto Municipal Corporation* v. *Virgo* (4) had not been given, a decision which showed (probably for the first time) that a power to regulate implies the continued existence of the thing to be regulated, and that a power to regulate a subject does not authorize the donee of the power to prohibit the subject matter. Whatever be the limits of this rule of construction on which the appellant relies (it is a mere rule of construction and must yield to circumstances), it is obvious that it must be applied with the greatest

(1) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.
(2) (1884) 10 V.L.R. (L.), 200.
(3) (1884) 10 V.L.R. (L.), at p. 150; 6 A.L.T., at p. 38.
(4) (1896) A.C., 88.

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caution; and that the Courts should not be forced to treat as good law that which they see to be bad law, unless it is absolutely clear that the Legislature in its subsequent Act must have been faced by a judicial pronouncement which is clear, definite, and unmistakable as to the same point in the previous Act. Most if not all of the cases cited to us on the subject of the rule are cases in which a definite meaning had been given to some word or words. Perhaps the same rule applies also to definite principles laid down; but it cannot be said that any definite meaning was given in *Rider* v. *Phillips* (1) to the words "for regulating processions," or that any definite principle was laid down other than the principle that the by-law discussed in *Rider* v. *Phillips* was "not unreasonable." This principle does not directly conflict with the principle on which the Supreme Court decided that this by-law is invalid; and, in my opinion, this Court ought not to treat itself as being, in effect, estopped from construing and applying to the power in question what it regards as the true principle.

As for the cases cited, the case of *Jay* v. *Johnstone* (2) went, as my brother *Isaacs* pointed out, to the Court of Appeal (3). The case turned on the meaning of the word "judgment." Under the Act 3 & 4 Wm. IV. c. 27, on the same subject, the word had received judicial interpretation in 1847; and that interpretation was applied in 1892 to the same word in the same context. As *Lindley* M.R. said (4): "That decision has been accepted and acted upon by everybody without question ever since; and the law, as settled by that authority *and by other decisions that followed it*, was shortly to this effect—that under that Act a judgment was barred after twenty years." To adopt the appellant's argument would be "*to reverse the decisions of forty years.*" *Bowen* L.J. concurred. In *Dale's Case* (5) the dictum of *James* L.J. as to the rule of construction is addressed to the words used in an Act, 5 Eliz. c. 23, "and to the decisions of many eminent Judges upon that statute" and to the re-enactment of part of that Act by 53 Geo. III. c. 127, and to the absence in 12 & 13 Vict. c. 109 of any words altering, expressly or by

(1) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.
(2) (1893) 1 Q.B., 25.
(3) (1893) 1 Q.B., 189.
(4) (1893) 1 Q.B., at p. 190.
(5) (1881) 6 Q.B.D., at p. 452.

implication, the law as laid down under the previous Acts by a succession of decisions.

No reliance can be safely placed, for the rule of construction, on the case of *Clark* v. *Wallond* (1); for the words attributed to *Mathew* J. and quoted by *McArthur* J. were made during the argument, and were not repeated in the judgment. The Judges of the Divisional Court, except *Lopes* J., all approved of the construction given to the words in the previous case; and *Lopes* J. accepted the previous decision as binding on him. I should infer that this case was a mere instance of a Court following the decision of a Court of co-ordinate jurisdiction.

But I quite concur with Mr. *Latham*, counsel for the appellant, in the view that if the rule of construction were applicable to this case at all, it is as binding on us, sitting in a Court of Appeal, as on the Supreme Court. We have to find the intention of the Legislature as expressed in its words; and, if and so far as the meaning of the words has to be ascertained with the aid of well-known decisions given before the Act now in question, we should accept the rule even if it involves the giving of different interpretations to the same words in the same context in different States.

As to the effect of sec. 6 of the *Police Offences Act*, I feel no doubt. Under that section, the local authority (here the Council of the City of Melbourne) has power to make rules and regulations for "keeping order in the carriage and footways and public places and for preventing any obstruction thereof whether by the assemblage of persons or otherwise." It is sufficient to say that this power is directed not against processions in themselves, but rather against assemblages and disorder; that the by-law prohibits (except with the consent of the Council to the particular procession) processions whether they obstruct or tend to disorder or not; that it purports to give a power to an ordinary meeting of Council which the Legislature wanted to give to the Council only in its by-law making function, with definite safeguards; and that the by-law, therefore, transgresses this power. I say nothing as to the distinction between "by-laws" and "regulations."

The rule of construction does not apply; for the decision in

(1) (1883) 52 L.J. Q.B., 321.

H. C. OF A. 1922.

MELBOURNE CORPORATION v. BARRY.

Bannon v. *Barker* (1) merely followed that in *Rider* v. *Phillips* (2) under a different Act, and laid down no definite construction of the words of the particular power, or any definite principle other than as to unreasonableness.

In my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *H. E. Elliott.*

Solicitors for the respondent, *Warming & Mulcahy.*

B. L.

(1) (1884) 10 V.L.R. (L.), 200. (2) (1884) 10 V.L.R. (L.), 147; 6 A.L.T., 37.

[HIGH COURT OF AUSTRALIA.]

F. & G. HOOPER LIMITED . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

H. C. OF A. 1922.

BRISBANE, *June* 21.

SYDNEY, *Sept.* 8.

Knox C.J. Gavan Duffy and Starke JJ.

War-time Profits Tax—Partnership—Sale of business to company—Majority of shares held by former partners—Method of assessment—Pre-war standard of profits—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 7, 16.

Sec. 16 of the *War-time Profits Tax Assessment Act* 1917-1918 provides, by sub-sec. 3, that "the pre-war standard of profits shall, subject to the provisions of this Act, be taken to be the amount of the profits arising from the business on the average of any two of the last three pre-war trade years, to be selected by the taxpayer," &c.; and, by sub-sec. 6, that "where owing to the recent commencement of a business there has not been one pre-war trade year the pre-war standard of profits shall be . . . (*b*) a profits standard computed by reference to the income arising from any trade, business," &c., "whether