In the Privy Council.

No. 50 of 1894.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE MUNICIPAL CORPORATION OF THE CITY OF TORONTO . . . . . *Appellants,*

AND

WILLIAM VIRGO . . . . . *Respondent.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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RECORD OF PROCEEDINGS.

RECORD.

"A."

Case on Appeal to the Supreme Court of Canada.

"A."

IN THE SUPREME COURT OF CANADA.

CASE ON APPEAL TO THE SUPREME COURT OF CANADA.

Contents:—

No. 1. Statement of Case on Appeal to the Court of Appeal of Ontario.

In the Court of Appeal for Ontario.

An Appeal from the Judgment of the Honourable Chief Justice Sir Thomas Galt.

In the matter of

William Virgo . . . . . *Appellant,*

and

The Municipal Corporation of the City of Toronto . . . *Respondents.*

STATEMENT of Case.

This is an Appeal from the Judgment of the Honourable Chief Justice Sir Thomas Galt, delivered upon the 17th day of September, 1892, whereby the application of the above-named William Virgo, to quash that portion of By-law No. 2,934, of the said Corporation, which is designated thereby as Sub-section 2A of Section 21, in amendment of that section of By-law No. 2,453, and that portion of By-law No. 2,934 designated thereby as Sub-section 2A of Section 43, in amendment of that section of said By-law No. 2,453, was dismissed with costs.

No. 2. Notice of Motion to quash, dated 13th July, 1892.

In the High Court of Justice, Queen's Bench Division.

In the Matter of William Virgo and the Municipal Corporation of the City of Toronto.

Take notice that a motion will be made before the presiding judge in Court in the Queen's Bench and Common Pleas Divisions at Osgoode Hall, Toronto, on

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No. 2. Notice of Motion to quash, dated 13th July, 1892 —*continued.*

Friday, the 11th day of July, 1892, at the hour of ten o'clock in the forenoon, or so soon thereafter as the Court shall sit or counsel may be heard, for an order quashing that portion of By-law No. 2,934 of the above-named Corporation, which is designated thereby as Sub-section 2A of Section 12, in amendment of that section of By-law No. 2,453, and that portion of said By-law No. 2,934 designated thereby as Sub-section 2A of Section 43, in amendment of that section of said By-law No. 2,453, with costs, upon the following grounds, amongst others:

1. That certain licensees under the by-law, as amended by said Sub-section 2A of Section 12, are not permitted to exercise their calling within the city as a whole.

2. That licensees are excluded by said sub-section, in the carrying on of their calling, from the main thoroughfares of the city, and the busiest and most active portions of such thoroughfares.

3. That the amending Sub-section 2A of Section 12 violates the proviso in Sub-section 3 of Section 495, R. S. O., cap. 184, by preventing persons exempted by the Municipal Act from taking out a license from operating in the whole city.

4. That said Sub-section 2A of Section 12 of By-law No. 2,934 is in restraint of trade, and wholly unreasonable.

5. Such amending Sub-section 2A of Section 12, and Sub-section 2A of Section 43, would have the effect of preventing those exempted by the original Sub-section 2 of Section 12 of By-law No. 2,453, from carrying on their calling without first obtaining a license.

6. That such amending Sub-section 2A of Section 12, and Sub-section 2A of Section 43, as read with the original respective sub-sections, practically prevents those so exempted from taking out a license from carrying on business altogether.

7. That Sub-section 2A of Section 43 is repugnant to the closing proviso of Sub-section 2 of Section 12 of By-law No. 2,453, in exacting a license from fish pedlars.

8. That such Sub-section 2A of Section 43 sets up an unjust and unauthorized discrimination in favour of a certain class of pedlars.

And take notice that in support of such application will be read the affidavits of William Virgo, Samuel Fieldhouse, Joseph Pocock, J. N. Fish, Harry Walker, W. R. Weller, Samuel Brooks, Oliver Spanner, and the exhibits thereto, and the recognizance duly entered into by the applicant with Samuel Fieldhouse and Joseph Pocock as sureties, and duly approved by the Judge of the County of York, also filed.

Dated at Toronto this 13th day of July, 1892.

DU VERNET & JONES,
Solicitors for Applicant.

To the Mayor and Corporation
of the City of Toronto.

No. 3. Affidavit of William Virgo, sworn 12th July, 1892.

AFFIDAVIT of William Virgo.

I, William Virgo, of the City of Toronto, in the County of York, trader, make oath and say:

I am, and was at the time of the passage of the by-law in question herein, a resident of the said City of Toronto.

2. The paper writing now produced and shown to me and marked Exhibit "A" to this my affidavit, is a certified copy under the seal of the Corporation of the City of Toronto of By-law No. 2,934 of said Corporation, relating to the business of hawkers and pedlars, and sought to be quashed in this action, and the same was received by me from the hands of the Clerk of the Municipality of the City of Toronto on Friday, the eighth day of July, 1892, and the paper writing now produced and shown to me and marked Exhibit "B," to this my affidavit, is a certified copy of By-law No. 2,717, of the said Corporation and the same was received by me from the hands of the Clerk of the Municipality of the City of Toronto on Friday, the eighth day of July, 1892.

3. I was desirous of taking out a license under the said by-laws for the present license year, but declined doing so by reason of the conditions restricting the business of a hawker and pedlar under such license to specified quarters of the City of Toronto.

4. There were about one hundred and fifty hawkers and pedlars operating under license in the City of Toronto for the year last past, and that number, if not more, would be willing to renew said licenses if it were not for the restrictive provisions before mentioned.

5. It is exceedingly injurious to the carrying on of the business of a hawker and pedlar to be limited in his operations to certain streets of the said city, and particularly where, as is the case here, the license excludes the principal thoroughfares of the city, and the busiest parts of such thoroughfares from the field of operations.

W. VIRGO.

Sworn before me at the City of Toronto, in the County of York, this 12th day of July, 1892.

W. H. WILLIAMS,
A Commissioner, &c.

No. 4. Affidavit of Joseph Pocock, sworn 12th July, 1892.

AFFIDAVIT of Joseph Pocock.

I, Joseph Pocock, of the City of Toronto, in the County of York, trader, make oath and say:—

1. I am President of the Licensed Pedlars' Association, and have been such for four years. I have been engaged in my profession in Toronto for sixteen years.

2. I was a duly licensed pedlar up to 30th June, 1892, but I have not taken out a license for the current year as I do not consider it possible to earn an adequate living under the restrictions now imposed.

3. The fee imposed is altogether too high, and in the present state of trade

RECORD.

No. 4. Affidavit of Joseph Pocock, sworn 12th July, 1892 —*continued.*

amounts to a practical prohibition, especially while pedlars are restrained from selling on the busiest and most important thoroughfares of the city.

4. Numerous cases of hardship have come under my notice in which persons have been thrown out of employment owing to the difficulty of making the business of peddling pay. Others have disposed of their licenses at great sacrifices owing to the same reason.

5. The inhabitants of Toronto would be deprived of a very useful class of merchants if the business of peddling were destroyed, as is now threatened. Many housekeepers whose duties detain them at home are enabled to buy fruit, fish, coal oil, etc., at their own doors, which otherwise would be impossible. I presented a petition to the Municipal Council against the proposed restrictions, signed by over 5,000 *bonâ fide* ratepayers.

J. POCOCK.

Sworn before me at the City of Toronto, in the County of York, this 12th day of July, 1892,

JOHN A. PATERSON,
A Commissioner, etc.

No. 5. Affidavit of Samuel Fieldhouse, sworn 13th July, 1892.

AFFIDAVIT of Samuel Fieldhouse.

I, Samuel Fieldhouse, of the City of Toronto, in the County of York, pedlar, make oath and say:

1. The restrictions imposed by By-law No. 2,934 of the City of Toronto, are extremely unreasonable and unfair towards pedlars of fish, fruit, coal oil, etc., as the amending by-law prohibits the carrying on of the calling of a pedlar on the busiest and most important thoroughfares of the city.

2. Even before such restrictions were in force it was a difficult matter to make the business of peddling pay, and the restrictions which are now imposed will make it extremely difficult to earn a living.

3. Various persons that I know of have been forced to retire from business owing to the impossibility of earning a living, such impossibility being caused by the said restrictions and by the large license fee which is exacted.

SAMUEL FIELDHOUSE.

Sworn before me at the City of Toronto, in the County of York, this 13th day of July, 1892.

R. G. SMYTH,
A Commissioner, etc.

No. 6. Affidavit of Samuel Brooks, sworn 11th July, 1892.

AFFIDAVIT of Samuel Brooks.

I, Samuel Brooks, of the City of Toronto, pedlar, make oath and say:

1. I was during the license year from June 30th, 1891, to June 30th, 1892, a duly licensed pedlar under By-law No. 2,717 of the City of Toronto.

2. I have not taken out a license for the current year as I do not see how I

No. 6.
Affidavit of Samuel Brooks, sworn 11th July, 1892
—*continued.*

can make the business pay under the burdensome restrictions which have been imposed by the amending by-law.

3. The business of a pedlar is an arduous one, and the profits exceedingly precarious and small. I find it difficult to make an adequate living, and last year had to dispose of some of my personal chattels at a heavy sacrifice in order to raise funds to pay the heavy fee exacted.

4. The by-law in question amounts to a practical prohibition of my calling, as it will be impossible to make it pay without selling on the prohibited streets.

SAMUEL BROOKS.

Sworn before me at the City of Toronto, in the County of York, this 11th day of July, 1892.

R. G. SMYTH,
A Commissioner, &c.

No. 7.
Affidavit of Harry Walker, sworn 11th July, 1892.

AFFIDAVIT of Harry Walker.

I, Harry Walker, of the City of Toronto, pedlar, make oath and say:

1. I was during the license year from June 30th, 1891, to June 30th, 1892, a duly licensed pedlar under By-law No. 2,717 of the City of Toronto.

2. The by-law now in force, being By-law No. 2,934, restricts and prohibits the sale by pedlars of their merchandise on certain public streets in the City of Toronto, such restrictions and prohibition being a most serious blow to the carrying on of my calling. The streets upon which my calling is prohibited to be carried on are the busiest and most frequented in the city, and the ones upon which pedlars obtain their principal sales.

3. The by-law in question practically amounts to a prohibition of my calling, as I cannot carry on a lucrative business without frequenting the streets prohibited.

4. I have not taken out a license for the current year, as I do not see how I can make the business pay.

H. WALKER.

Sworn before me at the City of Toronto, this 11th day of July, 1892,

R. G. SMYTH,
A Commissioner, etc.

No. 8.
Affidavit of Oliver Spanner, sworn 13th July, 1892.

AFFIDAVIT of Oliver Spanner.

I, Oliver Spanner, of the City of Toronto, in the County of York, taxidermist, make oath and say:

1. I carry on business at No. 265 Yonge Street, in the said City of Toronto, and reside at the same place.

2. Pedlars are restricted by By-law No. 2,934 from carrying on business on this part of Yonge Street, as well as upon most of the busiest and most important thoroughfares of the city.

RECORD.

No. 8. Affidavit of Oliver Spanner, sworn 13th July, 1892 — *continued.*

3. Such restriction is prejudicial to myself and to other residents of the city, and is extremely unreasonable and unfair to pedlars, who had great difficulty in earning an adequate living even when they were allowed to sell on all the streets of the city.

4. Pedlars of fish, fruit, coal oil, etc., serve a very useful purpose in the community, as housekeepers are enabled to purchase goods at their doors where in many cases it would be impossible for them to leave their homes to go shopping, and if the present by-law is upheld or insisted upon, there is every reason to believe that the business of peddling will be destroyed, as pedlars will not be able to make their calling lucrative while they are compelled to pay heavy license fees and are restricted from selling on the busiest and most important thoroughfares.

OLIVER SPANNER.

Sworn before me at the City of Toronto, in the County of York, this 13th day of July, 1892,

BRONTE M. AIKINS,
A Commissioner, etc.

No. 9. Affidavit of W. B. Weller.

AFFIDAVIT of W. B. Weller, 277 Church Street, Toronto, to same effect as affidavit of Oliver Spanner.

No. 10. Affidavit of J. N. Fish, sworn 11th July, 1892.

AFFIDAVIT of J. N. Fish.

I, Jasper Noble Fish, of the City of Toronto, in the County of York, student-at-law, make oath and say:

1. That I am a student in the office of Messrs. Du Vernet & Jones, solicitors for the above-named William Virgo.

2. The total receipts of the Corporation of the City of Toronto for the year 1891 from license fees other than those received for liquor licenses were $31,174.34, as shown at page 33 of the Annual Report of the City Treasurer of the City of Toronto now shown to me and marked Exhibit "A" to this my affidavit.

3. The amount received as fees for pedlars' and hawkers' licenses for the year 1891 was $4,943.10, as shown by the same exhibit, and as shown also by the letter of Robert Awde, dated July 11th, 1892, now shown to me and marked Exhibit "B" to this my affidavit.

4. The whole running expenses of the department of the General Inspector of Licenses, including the salary of the said inspector, for the same time were $4,386.97, as shown at page 76 of the said report of the City Treasurer of the City of Toronto, now shown to me and marked Exhibit "C" to this my affidavit.

5. The said General Inspector of Licenses, Mr. Robert Awde, as I am informed by himself and verily believe, in addition to his duties as General Inspector of Licenses, is Inspector of Food for the City of Toronto, Inspector of Live Cattle for the City of Toronto, Inspector of Dead Meat for the City of

No. 10.
Affidavit of J. N. Fish, sworn 11th July, 1892
—*continued.*

Toronto, Inspector of Markets, Inspector of Bread, Inspector of Weights and Measures, of Farm and Garden Produce, and it is for the performance of his duties in all these capacities that he receives the salary of $1,500 mentioned in the report hereinbefore referred to.

6. Now shown to me and marked Exhibit "D" to this my affidavit is a copy of the Estimates of the City of Toronto for the year 1892, and shows at page 38 the estimated expenditure in respect of the License Department, which is the department in question.

J. N. FISH.

Sworn at Toronto, this 11th day of July, 1892.

No. 11.
Statement of Robert Awde, General Inspector of Licenses.

STATEMENT of Robert Awde,
General Inspector of Licenses.

The receipts of my department for 1891 were—

Total amount of licenses . . .	$31,191 80
Rents of public halls	1,733 35
	$32,925 15

I am also inspector of food, inspector of live cattle and dead meat, fish, fruit, poultry, etc., inspector of markets, inspector of bread, inspector of weights and measures, of farm and garden produce.

The expenses of my department are principally composed of my own salary —$1,500—and salary of three assistants at $6 per day.

The appropriations for my department for this year are:

General expenses of the department .	$3,000 00
My own salary	1,500 00
	$4,500 00

No. 12.
By-Law No. 2,453.

BY-LAW No. 2,453.

Sub-sec. 2 of Section 12, and Sub-sec. 2 of Section 43 of By-law No. 2,453.

A by-law respecting the appointment of a general inspector of licenses and the issue of licenses in certain cases.

Passed 13th January, 1890.

The Municipal Council of the Corporation of the City of Toronto enacts as follows:—

12. There shall be taken out by

"(1) . . . . . .

"(2) All hawkers, petty chapmen, or other persons carrying on petty trades, "or who go from place to place, or to other men's houses, on foot or with any "animal bearing or drawing any goods, wares, or merchandise for sale, or in or "with any boat, vessel or other craft, or otherwise carry goods, wares, or

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No. 12. By-Law No. 2,453 —*continued.*

" merchandise for sale; except that no such license shall be required for hawking, " peddling or selling from any vehicle or other conveyance goods, wares or " merchandise, to any retail dealer, or for hawking or peddling goods, wares or " merchandise the growth, produce or manufacture of this province, not being " liquors within the meaning of the law relating to taverns or tavern licenses, if " the same are being hawked or peddled by the manufacturer or producer of " such goods, wares or merchandise, or by his *bonâ fide* servants or employees, " having written authority in that behalf, and such servant or employee shall pro- " duce and exhibit his written authority when required so to do by any municipal " or peace officer; nor from any pedlar of fish, farm and garden produce, fruit " and coal oil, or other small articles that can be carried in the hand or in a " small basket, nor from any tinker, cooper, glazier, harness mender, or any " person usually trading or mending kettles, tubs, household goods or umbrellas, " or going about and carrying with him proper materials for such mending."

" 43. There shall be levied and collected from the applicant for every license " granted for any business or object in this by-law specified as requiring a " license, a license fee as follows:

" (1) . . . . . .

" (2) For a license to follow the calling of a hawker, pedlar or petty chap- " man (1) with a horse, mule, or other animal and vehicle, an annual fee of $25.00; (2) on foot, an annual fee of $5.00.

No. 13. By-Law No. 2,934.

No. 2,934.

A By-law to Amend By-Law No. 2,453 respecting the issue of Licenses.

(Passed October 26th, 1891).

The Municipal Council of the Corporation of the City of Toronto enacts as follows:

I.

Section 12 of By-law No. 2,453 is hereby amended by adding thereto the following sub-section:

2 (*a*) No person named and specified in Sub-section 2 of this section (whether a licensee or not) shall, after the 1st day of July, 1892, prosecute his calling or trade in any of the following streets and portions of streets in the City of Toronto:

(1) Yonge Street, from the Bay to the Canadian Pacific Railway tracks; (2) Queen Street, from Pape Avenue in St. Matthew's Ward to Jamieson Avenue in St. Alban's Ward; (3) King Street, from the River Don to Niagara Street; (4) Spadina Avenue, from King Street to College Street; (5) College Street, from Spadina Avenue to Bathurst Street; (6) Parliament Street, from Queen Street to Winchester Street; (7) Dundas Street, from Queen Street to St. Claren's Avenue; (8) Wellington Street, from Church Street to York Street.

II.

Section 12 of the said By-law 2,453 is further amended by adding thereto the following sub-section:

No. 13. By-Law No. 2,934 —*continued.*

14 (*a*) No license shall be issued to the owner or keeper of any business specified in Sub-sections 13 and 14 hereof, to be carried on upon any premises situate on Yonge, Queen or King Streets in the City of Toronto.

III.

Section 43 of the said By-law 2,453, as amended by By-law No. 2,717, is further amended by adding to Section 43 thereof the following sub-section:

2 (*a*) Provided that the annual fee for a fish hawker or pedlar shall be (1) with a horse, mule or other animal and vehicle, $10; or (2) on foot, $2.50.

I certify that I have examined this bill and that it is correct.

JOHN BLEVINS, City Clerk.

Council Chambers, Toronto, October 26th, 1891.

(L.S.) E. F. CLARKE, Mayor.

Certified a true copy.

JOHN BLEVINS, City Clerk.
GEORGE VERRAL, Alderman.

(Seal.)

No. 14. By-Law No. 2,717.

No. 2,717, a By-law to Amend By-laws Nos. 2,453, 2,454, 2,469 and 2,470 Affecting the Department of Licenses.

[Passed June 23rd, 1890.]

The Municipal Council of the Corporation of the City of Toronto enacts as follows:

I.

. . . . . .

Sub-section 2 of Section 43 is hereby struck out and the following substituted therefor:—2. For a license to anyone following the calling of a hawker, pedlar or petty chapman (1) with a two horse vehicle, $40.00; (2) with a one horse vehicle, $30.00; (3) on a street corner or other place where permission is given therefor other than in a house or shop, $15.00; (4) on foot with a handbarrow or waggon pushed or drawn, $7.50; (5) with a creel or large basket-crate, $2.50. And the General Inspector of Licenses shall furnish each such licensee with a suitable badge, to be worn by said licensee in a conspicuous place while plying his trade.

No. 15. Order dismissing Motion to quash, 17th Sept., 1892.

In the High Court of Justice—Queen's Bench Division.

The Honourable Chief Justice Sir Thomas Galt.

Saturday the 17th day of September, A.D. 1892.

In the matter of William Virgo and the Municipal Corporation of the City of Toronto.

Upon motion on the sixth day of September A.D. 1892, by Mr. Du Vernet, counsel for the applicant, for an order quashing that portion of By-law No. 2,934

RECORD.

No. 15. Order dismissing Motion to quash, 17th Sept., 1892 —*continued.*

of the above-named Corporation, which is designated thereby as Sub-section 2A of Section 12, in amendment of that section of By-law No. 2,453, and that portion of said By-law No. 2,934 designated thereby as Sub-section 2A of Section 43, in amendment of that section of said By-law No. 2,453, with costs, upon the following grounds amongst others:

1. That certain licensees under the by-law, as amended by said Sub-section 2A of Section 12, are not permitted to exercise their calling within the city as a whole.

2. That licensees are excluded by said sub-section, in the carrying on of their calling, from the main thoroughfares of the city, and the busiest and most active portions of such thoroughfares.

3. That the amending Sub-section 2A of Section 12, violates the proviso in Sub-section 3 of Section 495, R.S.O., Cap. 184, by preventing persons exempted by the Municipal Act from taking out a license from operating in the whole city.

4. That said Sub-section 2A of Section 12 of By-law No. 2,934 is in restraint of trade, and wholly unreasonable.

5. Such amending Sub-section 2A of Section 12 and Sub-section 2A of Section 43 would have the effect of preventing those exempted by the original Sub-section 2 of Section 12 of By-law No. 2,453, from carrying on their calling without first obtaining a license.

6. That such amending Section 2A of Section 12, and Sub-section 2A of Section 43, as read with the original respective sub-sections, practically prevents those so exempted from taking out a license from carrying on business altogether.

7. That sub-section of Section 43 is repugnant to the closing proviso of Sub-section 2 of Section 12 of By-law No. 2,453, in exacting a license from fish pedlars.

8. That such Sub-section 2A of Section 43 sets up an unjust and unauthorized discrimination in favour of a certain class of pedlars, and judgment upon said motion having been reserved until this day.

IT IS ORDERED, That the said motion be and the same is hereby dismissed.

AND IT IS FURTHER ORDERED, That the said William Virgo do pay the Corporation of the City of Toronto their costs of the said motion forthwith after taxation thereof, on motion of Mr. H. M. Mowat, of counsel for the City of Toronto.

By the Court.

JAMES S. CARTWRIGHT,
Registrar.

No. 16. Judgment of Galt, C.J., dated 17th Sept., 1892.

JUDGMENT of Galt, C.J.

Delivered 17th September, 1892.

This is a motion by Du Vernet to quash that portion of By-law 2,934 which enacts that "Section 12 of By-law 2,453 is hereby amended by adding thereto the "following sub-section:—Sub-section 2, No person named and specified in sub-"section 2 of this section, viz., all hawkers, petty chapmen, or other persons

No. 16.
Judgment of Galt, C.J., dated 17th Sept., 1892
—*continued.*

" carrying on petty trades, etc. (whether a licensee or not) shall after the first " day of July, 1892, prosecute his calling or trade in any of the following streets " and portions of in the City of Toronto." Here follows an enumeration of certain specified streets, being the principal streets in the city.

By Sec. 495 of R. S. O., ch. 184, it is expressly enacted that the council of any city may pass by-laws "for licensing, regulating, and governing hawkers, or " petty chapmen, and other persons carrying on petty trades," etc. Under the authority thus conferred I can see no ground for contending that the council may not pass a by-law for "regulating" and "governing" the parties referred to as respects such portions of the city in which they shall not be at liberty to carry on their business.

This motion therefore fails.

There was also objection taken to "that portion of said By-law 2,934, " designated thereby as amending sub-section 2A of section 43, which is as follows:— ' Provided that the annual fee for a fish hawker or pedlar shall be (1) with a ' horse, mule or other animal and vehicle, $10; or on foot, $2.50;' on the ground " (7) that the sub-section is repugnant to the closing proviso of Sub-section 2 of " Section 12 of By-law 2,453 in exacting a license from fish pedlars." There is nothing in this objection. It simply amounts to this, that the council have deemed it expedient to amend the original by-law by enacting that a license shall now be taken out by fish hawkers or pedlars, which was not required when the by-law was first enacted.

(8) That Sub-section 2A of Section 43 sets up an unjust and unauthorised discrimination in favour of a certain class of pedlars, in other words, that in case of fish hawkers or pedlars they should be charged less than other pedlars. This was a matter plainly for the consideration of the Council.

Motion dismissed with costs.

Du Vernet for motion.
Mowat for the City of Toronto.

No. 17.
Reasons for Appeal to the Court of Appeal for Ontario.

In the Court of Appeal for Ontario.

REASONS for Appeal.

The Appellant submits that the judgment of the learned Chief Justice Sir Thomas Galt is wrong, and that the sections of the by-law in question should have been quashed upon the following, amongst other grounds:

1. The first part of By-law No. 2,934 is *ultra vires* of the Municipal Council, in that it is made to apply to persons whether licensees or not, whereas it is provided by R.S.O., cap. 184, section 495, sub-section 3, that the provision is not to apply to manufacturers, producers and others. By R.S.O., cap. 184, sect. 286, municipalities are restrained from interfering with traders, except where expressly authorized.

2. The Municipal Corporation had no power to pass a by-law restraining pedlars and hawkers from carrying on their calling on all the streets of the city. Such restriction is as unauthorized as would be the restriction of vendors of milk, cabmen and other licensees who are licensed in the same manner.

3. The power given to the said Municipal Council by sec. 495, sub-sec. 3,

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No. 17. Reasons for Appeal to the Court of Appeal for Ontario —*continued.*

R.S.O., cap. 184, is to issue licenses to hawkers and others to exercise their calling within the city as a whole, and no provision is made for the issuing of partial licenses.

4. The said first part of By-law No. 2,934 is unreasonable in that licensees are excluded from carrying on their calling on the main thoroughfares and in the busiest and most active localities of the city.

5. The power given to municipalities by said sub-section is only a power to "license, regulate and govern." A power to limit, prohibit or restrict is always given in explicit terms, *e.g.*, "For preventing or regulating the carrying on of "manufactories or trades dangerous in causing or promoting fire." Sec. 496, sub-sec. 14.

6. No power is given to municipalities by said sub-section 3, section 495, to make a by-law applicable only to certain parts of the city; such a power must be given in explicit terms, as, *e.g.*, sec. 496, sub-sec. 25, providing for the removal of snow.

7. The said first part of By-law No. 2,934 is unreasonable and unfair, not only to licensees, but to residents on the prohibited streets, as the latter are unable to purchase coal-oil and other household supplies at their doors.

8. The said by-law is unreasonable and unfair to merchants on unprohibited streets, as merchants on other streets have an unfair advantage over them.

9. The said by-law is unreasonable and unfair, as it is apparently passed solely in the interests of a certain class in the community, namely, shopkeepers carrying on business on prohibited streets.

10. Sub-section 2A, of section 43, of By-law No. 2,453, is repugnant to the closing proviso of sub-sec. 2, of sec. 12, of By-law 2,453, in exacting a license from fish pedlars. The last-mentioned sub-section which exempts fish pedlars from license fees has never been repealed.

11. Said sub-section 2A of section 43, sets up an unjust and unauthorised discrimination in favour of a certain class of pedlars, pedlars of fish being given an unfair advantage.

The Appellant relies upon the following authorities among others:—

Bannan *v.* City of Toronto, 22 O.R. 274.
Danaher *v.* Peters, 17 S.C.R., 44. Judgment of Taschereau, J., at p. 48, and Gwynne, J., at p. 54.
Regina *v.* Pipe, 1 O.R., 40.
Reg. *v.* Johnston, 38 U.C.R., 549.
McKnight *v.* Toronto, 3 O.R., 284.
Re Snell and Belleville, 30 U.C.R., 93.
Jonas *v.* Gilbert, 5 S.C.R., 356.
Reg. *v.* Flory, 17 O.R., 715.
Yates *v.* Milwaukee, 10 Wall. U.S., 497.
Reg. *v.* Chapman, 1 O R., 582.
Re Marshall and Simcoe, 22 O.R.
City of Montreal *v.* Walker, Montreal L.R., 1 Q.B. 469.

E. E. A. DU VERNET,
Counsel for Appellant.

No. 18.
Reasons against Appeal.

Reasons against Appeal.

The Judgment of Chief Justice Galt should be upheld for the following amongst other reasons:—

1. The Legislature by the Municipal Act, sec. 495, ss. 3, intended to give cities full power over traders of the sort dealt with by the By-law 2,934, and when conferring the power used the words "licensing, regulating and governing." No stronger words can be suggested. The word "prevent" is not necessary to be used in the Statute to make the by-law good, for total prevention is not attempted. If the word "regulate" alone had been used, there would have been power in the city council to confine the operations of pedlars to certain portions of the city (Re Kiely, 13 O.R. 451).

2. If then the power is in the municipalities to deal with pedlars, it is not the duty of the Courts to interfere, when the regulation is one which requires the exercise of discretion. If it were otherwise the Courts would be continually asked, in applications like the one in question, to put themselves in the place of the municipal council, and a great deal of the municipal business of the county would be done from Osgoode Hall, which would be an impropriety.

3. It is a matter of common knowledge that hawkers and pedlars are apt to become a nuisance and objectionable to the mass of the people by uttering their shrill cries on streets where there is already the inavoidable din and noise of traffic. Their calls being unusual and varied, tend to disturb and distract business men in their offices. They tend to overcrowd the street, also, and by standing in one place, or moving as slowly as their business requires, to obstruct traffic.

4. The streets from which they are excluded by this by-law compose but a small proportion of the streets of Toronto and are streets already supplied with shops.

5. Permanent shop-keepers who pay taxes on real property, and who are supposed to have more stake in the community are favoured in law as against pedlars because they are of more use to trade and the community. (See 2 Chitty, Commercial Law, p. 163; Burns, Justice of the Peace, p. 952; Simson *v.* Moss, 2 B. & Ad., 543; Allen *v.* Benjamin, 5 C.B., N.S., pp. 299, 304; 50 Geo. III., cap. 14, sec. 7 [Imp.]).

6. The contention of the applicant in his first reason for appeal, that the proviso in Section 495, makes the section not apply to manufacturers, producers and others is only good so far as the power of "licensing" is concerned. The power to "regulate and govern" remains intact and properly so. The intention was to provide only against the imposition of a license fee on the class mentioned. The applicant herein is not one of that class. Section 286 of the Municipal Act is directed against the creation of monopolies.

7. There is no evidence whatever that the by-law was passed in the interest of a class, namely, shopkeepers. Such a suggestion should not have been made in the reasons for appeal, and the Court should refuse to listen to the suggestion when it is made.

8. The amount of the license fee is purely a question of discretion, and the power "to fix the sum to be paid" as given by the by-law is conclusive. Therefore Walker *v.* City of Montreal, Montreal L.R., Q.B. 469, does not apply.

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No. 18. Reasons against Appeal —*continued.*

9. Sub-section 2*a* of Section 43 is not repugnant to Section 12 (2), because the latter relates to fish that can be carried "in the hand or small basket." Sub-section 2*a* relates to the more important business of fish peddled from vehicles drawn by animals, or from a push-cart or other capacious vehicle propelled by the pedlar, walking.

10. There is no discrimination in this by-law between different classes, therefore the cases cited by the Appellant to support that contention does not apply.

H. M. MOWAT,
For the Respondents. 10

No. 19. Certificate of Court of Appeal of Order dismissing Appeal from Judgment of Galt, C.J., dated 9th May, 1893.

CERTIFICATE of the Court of Appeal of Order dismissing Appeal from Judgment of Galt, C.J.

In the Court of Appeal for Ontario.

Tuesday, the ninth day of May, 1893.

In the Matter of

William Virgo . . . . . *Appellant,*

and

The Municipal Corporation of the City of Toronto . . . *Respondents.*

This is to certify that the appeal of the above named appellant from the judgment of the Honourable Sir Thomas Galt, Knight, Chief Justice of the Common 20 Pleas Division of the High Court of Justice of Ontario, pronounced on the Seventeenth day of September, 1892, having come on to be argued before this Court on the third day of February last, whereupon and upon hearing counsel as well for the appellant as the respondents, this Court was pleased to direct that the matter of the said appeal should stand over for judgment, and the same having come on this day for judgment: It was Ordered and Adjudged that the said appeal should be and the same was dismissed with costs to be paid by the appellant to the respondents forthwith after taxation thereof.

A. GRANT,
Registrar. 30

No. 20. Judgments of Court of Appeal.

JUDGMENTS OF COURT OF APPEAL.

May 9th, 1893.

Osler, J.A., 9th May, 1893.

Osler, J.A.,—

I have examined the several sections and sub-sections of the Municipal Act conferring police powers upon the corporation, and am of opinion that the words of section 495, sub-section 3, are wide enough to support this by-law which restrains the persons mentioned in that sub-section, and in clause 2 of section 12

of by-law 2,453, from prosecuting their calling or trade in certain specified streets and parts of streets in the city. Whatever difficulty there is in the case is caused by the loose, inaccurate and promiscuous way in which the facultative words have been used in the various sections and sub-sections of the Act, thus affording ground for the argument that the power to restrain within territorial limits was not conferred by the particular enactment in question. But words conferring the power to *license, regulate and govern* are very large, and while no doubt falling short of a power to prohibit absolutely, cannot, it appears to me, have their full force if we deny that under them the city may impose the rule or restraint within the city which this by-law imposes, and may guide and restrict the persons affected by it as to where they shall not carry on their trade therein. "To "govern" is "to regulate by authority, to keep within the limits prescribed by "law, to control, to restrain." I am not much in favour of invoking the aid of a dictionary in the construction of a statute; but it must be conceded that the powers which this by-law professes to execute, are powers of regulation and government within the natural meaning of the words used in the Act, which surely have relation to the control of time, place and manner.

I have not succeeded in finding any case upon the precise point in our own Courts, but there is a *dictum* of the late Chief Justice Sir Adam Wilson, whose familiarity with municipal law is well known, in *re* Kiely, 13 O.R., 451, 456, where the question arose on a by-law passed in pursuance of a supposed power to "regulate and license" the owners of livery stables.

The learned Chief Justice says: "The power to regulate confers upon the "commissioners the power to declare in what locality or localities such stables "shall be allowed."

In Barbier *v.* Connolly, 113 U. S., 27, it was held that a municipal ordinance prohibiting from washing and ironing in public laundries or washrooms within defined territorial limits, from ten o'clock at night to six in the morning, was a purely police regulation within the competency of a municipality possessed of the ordinary powers belonging to such bodies. This case was followed in Soon Hing *v.* Crowley, 113 U. S., 703, where the Court refer in addition to the constitution of California, from which state the appeal came, which declares that "any city, "county, etc., may make and enforce within its limits, all such local police, "sanitary and other regulations as are not in conflict with general laws."

In Rex *v.* Harrison, 3 Burr., 1,322, a custom for the overseeing, correcting and governing of the several persons using arts, trades, mysteries, etc., etc., within the City and liberties of London, was held to support a by-law that to entitle a person to carry on the trade of a butcher in London he must be free of the Butchers' Company.

In Bosworth *v.* Hearne, 2 Str. 1,085, where the City of London had by customary law the regulation of carts, a by-law that no drayman or brewer's servant should be abroad in the streets with his dray or cart after one o'clock in the afternoon, between Michaelmas and Lady Day, and from thence after eleven o'clock in the forenoon, was held good. These cases are referred to in the recent remarkable and interesting case of The Maxim Nordenfeldt Guns and Ammunition Co. *v.* Nordenfeldt, 9 Times L. R., 150 (now reported, [1893] 1 Ch. 630), as illustrations of those in which rules regulating trade have been distinguished

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Osler, J.A., 9th May, 1893
—*continued.*

from those made in restraint of it, although in Bosworth *v.* Hearne, 2 Str. 1,085, a general restriction was imposed limited only as to time, which, if the by-law had been regarded as one in restraint of trade, and not in regulation of it, would have been void. *A fortiori* then it appears to me that a by-law passed under a statutory power to pass by-laws to regulate and govern, and which restricts the person subjected to it from carrying on their business within certain limits of space only, and with no restriction as to time, is unobjectionable, applying to such a by-law the principal on which contracts even in restraint of trade are held good. There is no suggestion that this by-law was not passed in good faith. It is not on its face unreasonable, and there is no evidence before us that it is so in fact.

I see nothing in Clause 2*a*, added to Section 43 of by-law 2,453 by by-law 2,934, which is inconsistent with Section 12 (2) of the former by-law. The license fee imposed by the amending clause is imposed on a different description of fish hawker or pedlar from the one mentioned in Section 12 (2) who is exempted by that Act.

On the whole I am of opinion that the judgment of Sir Thomas Galt, C.J., should be affirmed.

Maclennan, J.A.

Maclennan, J.A.,—

I have come to the conclusion that this judgment ought to be affirmed.

The Act authorises a by-law for "licensing, regulating, and governing "hawkers," etc., and what this by-law does is to restrict them from carrying on their bnsiness in certain named streets, or parts of streets, within the city. The question is whether this is a lawful regulation. The argument is that it is not, but that instead of regulating it prohibits the business in question; and it cannot be denied but that within the defined limits it does prohibit. There seems to be no case in our own Courts which decides the point, nor do any of the nnmerous cases to which we have been referred afford much assistance in its determination. In *re* Kiely, 13 O. R. 451, the late Chief Justice Wilson expressed the opinion with reference to the power given to Police Commissioners "to regulate and "license the owners of livery stables;" that "the power to regulate confers upon "the Commissioners the power to declare in what locality or localities such stables "shall be allowed." But this was said *arguendo*, and it may be said to be only a *dictum*. It is, however, valuable as the opinion of a Judge who had a very great knowledge of municipal law.

Every regulation of a business necessarily interferes with it, and with those who are engaged in it, more or less. It is a restraint upon it—imposes a rule or rules to which the parties must conform, and by which they must be governed. The business is not to be prohibited, it is to be permitted, but it is to be carried on under prescribed regulations.

In exercising the power given by the statute of course the municipal authority must act *bona fide*, and in the public interest, and may not prohibit by a pretence of regulating. But so acting it seems to me the power of regulation must include reasonable restrictions as to time, place and manner. The law favours trade. The general rule is that all restraints of trade, if nothing more appear, are bad. In Mitchell *v.* Reynolds, 1 P. Wms. 181. where that rule is laid

down in an elaborate judgment of Lord Macclesfield, restraints of trade by agreement or bond, and restraints by by-law are treated as depending on the same principle; and as to restraints by by-law, he says (p. 148): "All by-laws made "to cramp trade in general are void," but "by-laws made to restrain trade, in "order to the better government and regulation of it, are good in some cases, "viz., if they are for the benefit of the place, and to avoid public inconveniences, "nuisances," &c. And in the reports of Willes, C.J., at p. 388, is the case of Gunmakers of the City of London *v.* Fell, in which that learned Judge says :— "But to this general rule (that is, that all restraints of trade are bad) there are "some exceptions; as first, that if the restraint be only particular in respect to "the time or place, and there be a good consideration given to the person "restrained, a contract or agreement upon such consideration so restraining a "particular person may be good and valid in law, notwithstanding the general "rule; and this was the very case of Mitchell *v.* Reynolds, where such a bond was "holden to be good. So likewise if the restraint appear to be of a manifest "benefit to the public, such a restraint by a by-law or otherwise may be good. "For it is to be considered rather as a regulation than a restraint, and it is for "the advantage and not the detriment of trade that proper regulations should "be made in it." The by-laws which were then in question were made by the Gunmakers' Company, and related to their own trade. The authority for making them was under a charter, which empowered them to make ordinances concerning the trade and mystery of gunmaking, and the well ordering and government thereof, within the City of London and within four miles thereof. The decision is in favor of the legality of restraint as to time and place. Here the power of regulation is given to the municipality. It is given for the benefit of the general public. Therefore if the public good requires it, I think the business in question may be restrained as to time and place. It is prohibited on a number of streets, but the rest of the city and the rest of the province are open.

It is not suggested that the by-law was passed for any other reason than the public good ; and if that is so, I think it is a good regulation, aad that it was within the power of the Council to pass.

I think, too, the by-law can be supported on this point by another section, viz., 503 (3) for preventing or regulating the sale by retail in the public streets of any meat, vegetables, fruit, &c.

It was also argued that the by-law was void because it affected persons who had taken out licenses, and also persons who were exempt from license by the express provisions of the Act. I think there is nothing in that objection, for the municipality has power both to license and to regulate, and not merely to do either the one or the other; and the provision relied upon merely exempts the persons described therein from license, but not from regulation. It follows that the city may regulate both persons licensed and persons exempt from license.

It was also contended that Sub-section 2A of Section 43 is repugnant to the closing proviso of Section 2 of Section 12, in exacting a license from fish pedlars, and that the same sub-section discriminates unlawfully in favour of pedlars of fish. I think these objections also fail. If a by-law is inconsistent with or repugnant to an earlier by-law it is not therefore void. So far as there is any such inconsistency or repugnancy the first by-law may perhaps be to that extent

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repealed or modified, but the new by-law being the last expression of the mind of the enacting power must prevail, if in itself *intra vires*. And, as to discrimination, there can be no such question raised as between pedlars of fish and pedlars of other commodities, because there is and can be no competition between them.

I am therefore of opinion that all the objections which have been urged before us to the judgment fail, and that it should be affirmed.

Hagarty, C.J.O., and Burton, J.A., concurred.

Hagarty, C.J.O., and Burton, J.A., concurred.

Appeal dismissed with costs.

No. 21. Appellants' Factum.

"B."

In the Supreme Court of Canada.

Virgo *Appellant* v. Corporation of Toronto *Respondents*.

APPELLANT'S FACTUM.

This is an Appeal from the Judgment of the Court of Appeal for Ontario, affirming an order of the Honourable Chief Justice Sir Thomas Galt, dismissing with costs the appellant's motion to quash that portion of by-law No. 2,934, of the Corporation of the City of Toronto, which is designated thereby as Sub-section 2A of section 21, in amendment of that section of by-law No. 2,453, and that portion of said by-law No. 2,934, designated thereby as sub-section 2A of section 43 in amendment of that section of by-law No. 2,453.

By section 495, sub-sect. 3, R.S.O., cap. 184,

"The council of any county, city and town, separated from the county for "municpal purposes, may pass by-laws for the following purposes:—

Hawkers and Peddlers.

"3. For licensing, regulating and governing hawkers or petty chapmen and "other persons carrying on petty trades, or who go from place to place or to "other men's houses, on foot or with any animal bearing or drawing any goods, "wares or merchandise for sale, or in or with any boat, vessel or other craft, or "otherwise carrying goods, wares or merchandise for sale, for fixing the sum to "be paid for a license for exercising such calling within the county, city or town, "and the time the license shall be in force;

"PROVIDED always that no such license shall be required for hawking, "peddling or selling from any vehicle or other conveyance any goods, wares or "merchandise to any retail trader, or for hawking or peddling any goods, wares "or merchandise, the growth, produce or manufacture of this province, not being "liquors within the meaning of the law relating to taverns or tavern licences, if "the same are being hawked or peddled by the manufacturer or producer of "such goods, wares or merchandise, or by his *bonâ fide* servants or employees "having written authority in that behalf."

The by-law in question requires licenses to be taken out by hawkers, petty chapmen and other persons carrying on petty trades, etc., (as described in the Municipal Act), and it exempts from its operation those "hawking, peddling or selling from any vehicle," etc. (as provided in the sub-section of the Municipal Act relating to manufacturers and producers).

This by-law, which was passed on the 13th January, 1890, was amended on 26th October, 1891, by a provision that "No person named and specified in "sub-section 2 of the by-law" (hawkers, petty chapmen, etc.), "*whether a* "*licensee or not*, shall after the 1st day of July, 1892, prosecute his calling or "trade on any of the following streets or portions of streets in the City of "Toronto":—

"(1) Yonge Street, from the bay to the Canadian Pacific Railway tracks; "(2) Queen Street, from Pape Avenue, in St. Matthew's Ward, to Jamieson "Avenue in St. Alban's Ward; (3) King Street, from the River Don to Niagara "Street; (4) Spadina Avenue, from King Street to College Street; (5) College "Avenue, from Spadina Avenue to Bathurst Street; (6) Parliament Street, from "Queen Street to Winchester Street; (7) Dundas Street, from Queen Street to "St. Claren's Avenue; (8) Wellington Street, from Church Street to York "Street."

The evidence adduced on behalf of the applicant, which is uncontradicted, shows that the above-named streets are the principal streets of the city. Galt, C.J., in his judgment finds that they are such, and the affidavits filed proved that the restriction contained in the amended by-law amounts to a practical prohibition. See affidavit of applicant: "It is exceedingly injurious to "the carrying on of the business of a hawker and peddler to be limited in his "operation to certain streets of the said city, and particularly where, as is the "case here, the license excludes the principal thoroughfares of the city, and the "busiest part of such thoroughfares, from the field of operations."

The affidavit of Joseph Pocock sets forth: "I do not consider it possible "to earn an adequate living under the restrictions now imposed."

"3. The fee is altogether too high, and in the present state of trade amounts "to a practical prohibition, especially while peddlers are restrained from selling "on the busiest and most important thoroughfares of the city."

See also affidavit of Samuel Fieldhouse:

"1. The restrictions imposed by by-law No. 2,934, of the City of Toronto, "are extremely unreasonable and unfair towards peddlers of fish, fruit, coal oil, "etc., as the amending by-law prohibits the carrying on of the calling of a "peddler on the busiest and most important thoroughfares of the city."

See also affidavit of Samuel Brooks:

"4. The by-law in question amounts to a practical prohibition of my "calling, as it will be impossible to make it pay without selling on the prohibited "streets."

Harry Walker, another peddler, deposes:

"The by-law now in force, being by-law No. 2,934, restricts and prohibits "the sale by peddlers of their merchandise on certain public streets in the City "of Toronto, such restrictions and prohibition being a most serious blow to the "carrying on of my calling. The streets upon which my calling is prohibited to "be carried on are the busiest and most frequented in the city, and the ones upon "which peddlers obtain their principal sales."

The applicant obtained affidavits also from Oliver Spanner and W. B. Weller, two citizens unconnected with the business of peddling, whose contention is uncontradicted:

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—*continued.*

" 3. Such restriction is prejudicial to myself and to other residents of the " city, and is extremely unreasonable and unfair to peddlers, who had great " difficulty in earning an adequate living even when they were allowed to sell on " all the streets of the city."

The proviso contained in the Act respecting manufacturers and producers is embodied in the bye-law in the following clause, "Except that no such license " shall be required for hawking, peddling or selling from any vehicle or other " conveyance, goods, wares or merchandise to any retail dealer, or for hawking or " peddling goods, wares or merchandise, the growth, produce or manufacture of " this province, not being liquors within the meaning of the law relating to taverns " or tavern licenses, if the same are being hawked or peddled by the manufacturer " or producer of such goods, wares or merchandise, or by his *bona fide* servants or " employees, having written authority in that behalf, and such servant or employee " shall produce and exhibit his written authority when required so to do by any " municipal or peace officer; nor from any peddler of fish, farm and garden " produce, fruit and coal-oil, or other small articles that can be carried in the hand " or in a small basket, nor from any tinker, cooper, glazier, harness mender, or " any person usually trading or mending kettles, tubs, household goods or " umbrellas, or going about and carrying with him proper materials for such " mending."

Notwithstanding this exemption the amended by-law containing the restriction as to streets is made to apply to all persons whether lisensees or not.

Moreover, by sect. 286, R.S.O., cap. 184, it is enacted, " No council shall " have the power to give any person an exclusive right of exercising, within the " municipality, any trade or calling, or to impose a special tax on any person " exercising the same, or to require a license to be taken out for exercising the " same, unless authorised or required by statute so to do; but the council may " direct a fee, not exceeding $1.00, to be paid to the proper officer for a certificate " of compliance with any regulations in regard to such trade or calling."

Notwithstanding the provision contained in By-law No. 2,453, exempting peddlers of fish from licenses, there is a repugnant provision in By-law No. 2,934, as follows:—

" 2 (A). Provided that the annual fee for a fish hawker or peddler shall be: " (1), with a horse, mule or other animal and vehicle, $10.00; or (2), on " foot, $2.50."

From the judgment of the Court of Appeal the Appellant now appeals to this Court, upon the grounds that the said by-law is not authorised by the Municipal Act; that under the garb of regulating and governing the business of hawking and peddling it in reality restricts and prohibits the said trade in the City of Toronto. That it is unreasonable and in restraint of trade and against the common weal, that it was passed in the interest of a certain class of citizens and is a species of objectionable class legislation, and that it discriminates unjustly in favour of a certain class of hawkers. These and other reasons for appeal are set out in greater detail in the paragraphs following.

The Municipal Act, R.S.O. cap. 184, sect. 495, sub-sect. 3, confers no power upon the municipal council to pass a by-law prohibiting hawkers and peddlers from carrying on their calling on all the streets of the City of Toronto. The

power delegated to the subordinate authority by the said sub-section is one of regulation—not of prohibition. Such delegation of authority is not to be enlarged beyond the words of the section to enable subordinate bodies to exercise powers with which it would be dangerous to entrust them and which are not within the meaning and intent of the Statute creating them. It is a rule of construction well established that the Act delegating authority to an inferior should be strictly construed. The legislative power of a corporation is not only restricted by the Statute Law but by the general principle and policy of the Common Law. Indeed, wherever a by-law seeks to alter a well settled and fundamental principle of the Common Law, or to establish a rule interfering with the rights or endangering the security of individuals or the public, a statute or other special authority emanating from the creating power must be shown to legalise it expressly or by implication.

It is upon this principle that though many by-laws passed by the ancient municipal corporations in England for the regulation of trade have been adjudged good, yet many have been adjudged void as in restraint of trade and an oppression of the subject. (See Argell & Ames on Corporations, p. 335). On the same page of the same work a case is cited in which the Courts held that a by-law was void because it required that hucksters should pay for a license, and it did not expressly appear that prudence required such a by-law. "No man in any "municipality should be prevented from the exercise of a lawful calling by mere "inference," Reg. *v.* Johnston, 38 U.C.R., 549, Harrison, C.J., at p. 551.

The case of Calder Navigation Co. *v.* Pilling, 14 M. & W., 76, 87, and Elwood *v.* Balk, 6 Q.B., 383, cited in Baker *v.* Municipal Council of Paris, 10 U.C.R., at p. 625, show the caution which the Courts of England feel it incumbent on them to exercise in preventing any unreasonable or unwarrantable extension of the legislative power committed to municipal bodies, and in taking care that the authority to alter the law of the land in matters of general application shall be confined to the supreme legislature. See also *re* Barclay and Township of Darlington, 12 U.C.R., 86, and *re* Graystock and Municipality of Ontonabee, 12 U.C.R., 458.

In *re* Brodie and Corporation of Bowmanville, 38 U.C.R., 583, Harrison, C.J., says: "A superintending power of a judicial character is necessary to be "exercised in order to keep municipal bodies within legal and reasonable limits in "the exercise of the power delegated to them by the Legislature. The municipal "powers are not only limited, but must be reasonably exercised, and not only "strictly within the limits conferred by the Legislature but in perfect subordina-"tion to the law of the land." For example, there must not be any unnecessary interference with trade (Durham *v.* City of Rochester, 5 Cow., 462) or the sanctity of private business (Trustees of Village of Clinton *v.* Phillips, 11 American Reports, 52) or the liberty of the subject (Mayor of Memphis *v.* Wingfield, 8 Humphrey, 707). "An Act of Parliament which abridges the liberty of "the subject ought to receive the strictest construction. Nothing ought to be "holden to come under its operation that is not expressly within the letter and "spirit of the Act." (Best, C.J., in Tucker *v.* Halcomb, 4 Bing., 183).

The words of the enabling sub-section of the Municipal Act are "licensing, "regulating and governing," and it is submitted that under the power of

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—*continued.*

regulating and governing is not included, nor is it the intent of the Legislature that there should be included, the power of prohibiting altogether the exercise of the trade or calling in question in those parts of Toronto mentioned in the by-law. Mr. Justice Osler in his judgment says that the words fall short of a power to prohibit absolutely, but that any provision short of absolute restriction is within the power of the Council. By attaching so wide a meaning to the words of the section, the Council could virtually prohibit hawking and peddling by restricting hawkers and peddlers in the exercise of their calling to a street or part of a street remote from the business part of the city. By extending the area of restriction the Council could, by adopting Mr. Justice Osler's interpretation of their powers under the section, in reality do that which the learned Judge says they cannot do—totally prohibit these trades within the city. It is submitted that the words "regulate and govern," in the section of the Municipal Act, are properly applicable to the manner and time of using the streets, to a limitation of the hours within which hawkers and peddlers may hawk their wares, to a prohibition of horns or bells on the public streets, or to the public outcry of vendors, to the prevention of the overcrowding and obstruction of streets and public places, but not to debarring such vendors altogether from the streets of the city. Free competition and intercourse is of the essence of trade, and it is inconceivable that under a power of governing and regulating there should be claimed a power to stifle traffic by restrictive enactments and high licenses. The object of a regulative by-law should be the prevention of any public harm or the promotion of any public good, and not the restriction of the rights of vendors or the inconvenience of citizens or to hinder competition.

"Some by-laws may be to prevent, while the greater part are to regulate. "There is a great difference between prevention and regulation" (Harrison, C. J., in Reg. *v.* Johnston, 38 U.C.R. at page 551). In Baker *v.* Municipal Council of Paris, 10 U.C.R., at page 624, Robinson, C. J., says: "To allow municipal "corporations to prohibit the use by anyone of what the law does not prohibit, "though only at certain times, would, we apprehend, be found inconvenient in "its effects, for there might be as many different regulations as there are different "municipalities. Some might be for taking a much wider range in their restric-"tions than others, and if there is to be a discretion recognised of prohibiting at "all, there could be no clear and satisfactory line that we could draw as to the "extent to which they might carry their prohibitions. They must leave such "matters, we apprehend, to be dealt with by the Legislature."

In *re* Nash and McCracken, 33 U.C.R., at p. 188, Wilson, C.J., in delivering the judgment of the Court says: "In Everett *v.* Grapes, 3 L.T.N.S., 669, a by-"law was held bad for imposing a fine upon any person 'who shall keep or "'suffer to be kept any swine within the said borough from the 1st day of May "'to the 31st of October, inclusive, in any year,' because the by-law was not for "regulation merely, but was in restraint of trade." And Crompton, J., says in the same case, "by-laws of this kind always have the qualification 'so as to be a "'nuisance.'" See also Pirie *v.* Corporation of Dundas, 29 U.C.R., 401.

"If a by-law really prohibitory in its character be passed under pretence of "being merely a regulation, the by-law will be quashed." Harrison, C. J., in *re* Brodie and Corporation of Bowmanville, 38 U.C.R., at p. 584. The remarks of

the late Chief Justice Sir Adam Wilson in *re* Kiely, 13 O.R., 451, as to the interpretation of the words "to regulate" were made *arguendo* and must be considered as a dictum merely.

In the Municipal Act, whenever the power to prohibit has been given, it has been conferred by express provision, and the absence of such power in sub-section 3 of section 495 is a strong argument against the prohibitive clauses of the by-law. The power to license and the putting into effect of any license system implies a right in the person licensed to trade, and is therefore inconsistent with prohibition unless the power to prohibit be expressly granted.

The following are sections of the Municipal Act where the power to prohibit is given in explicit terms:—

Sub-section 15 of section 489—Power is given to prohibit the running at large of dogs under the word "restraint," and in note "s" to that section, in Harrison's Mun. Manuel, it is stated that the power is not merely to regulate but to restrain the running at large of dogs.

Sub-section 25 of same section—The words are "for preventing or regulating "or licensing exhibitors," etc.

Sub-section 26; as to bowling alleys—"Preventing bowling alleys."

Sub-section 32—"Preventing" the sale of liquor to apprentices.

Sub-section 33—"Preventing" the posting of placards.

Sub-section 35—Where the word "suppress" is used.

Sub-section 36—"Suppressing" gambling houses.

Many other instances may be gathered from the same section (489). So in section 496, sub-section 14: "For preventing or regulating the carrying on of "manufactures or trades dangerous in causing or promoting fire."

If the council could prohibit peddlers in this way, under the words of section 495, sub-section 3, from exercising their calling on certain streets, they would also have the right to interfere with numerous other licensed trades where the same language is used, *e.g.*: milk dealers, cabmen, restaurants, etc. In McKnight *v.* City of Toronto, 3 Ont. R., 284, where section 496 read as follows: "For preventing or regulating the erection," etc., and the Act of 1883, as follows: "Including the keeping of cattle and pigs or swine and cattle, or cow byres and "piggeries." Held—that a by-law creating a general prohibition against the keeping of pigs was *ultra vires*. At p. 288 Mr. Justice Wilson says: "A general "prohibition, therefore, against the keeping of pigs within the city, although the "keeping of them is not pretended to be a nuisance, cannot be maintained."

Where words of prevention are absent, as in section 495, sub-section 3, it is submitted that the council have no authority to prevent the carrying on of trades on certain public streets, unless such trades are carried on so as to be a public nuisance.

For an example of a power to make a by-law applicable to certain parts of the city, reference may be had to section 496, sub-section 25, providing for the removal of snow, where such power is conferred in explicit terms.

The said sub-section 2A, of section 12, of by-law No. 2,934, is in restraint of trade and wholly unreasonable. It restricts free competition and individual enterprise and acts oppressively against the humble tradesman, while it fosters the large establishments on the favoured streets. "The law is at all times very

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Appellants' Factum
—*continued.*

" jealous of interference of any kind with business which is lawful. And there is " good reason for this jealousy. The more men there are ready and willing to do " particular work, the more cheaply and more efficiently it is usually done. The " great law governing the conduct of man in serving his fellow men is the law of " competition. The less that law is interfered with the better for the general " interests of society."

" To compel citizens under pretence of a by-law to pay to a favoured few for " any work much more than they can have the same work done for by others is to " legalise extortion." Reg. *v.* Johnston, 38 U.C.R., pp. 552, 553.

A by-law that no butcher by trade, though free of the city, shall exercise his trade in the city without being free of the " Butcher's Company " was held bad as in restraint of trade. Harris *v.* Goodman, 1 Burr., 14.

A by-law that no person wishing to sell fresh meat in quantities less than by the quarter carcase in a stall or shop shall pay $40 for a certificate to sell was held bad as in restraint of trade. Snell *v.* Corporation of Belleville, 30 U.C.R., 81.

A by-law that no person not being free of the Pewterers' Company shall exercise the trade of pewterer in London was held bad as in restraint of trade. Chamberlain of London *v.* Compton, 7 D. & R., 597.

See also Gunmakers of London *v.* Fell, reported in Willes' Reports, 384, where the Court says at p. 388: " The general rule is that all restraints of trade " (which the law so much favours), if nothing more appears, are bad "; and at p. 289: " So likewise if the restraint appears to be a manifest benefit to the " public, such a restraint, by a by-law or otherwise, may be good. For it is to be " considered rather as a regulation than a restraint, and it is for the advantage and " not the detriment of trade that proper regulations should be made in it."

But there is no pretence or evidence that the by-law in question is for the manifest benefit of the public. The respondents' argument (reasons against appeal No. 5) that shopkeepers ought to be favoured in law as against peddlers, indicates the real object of the by-law which is purely a piece of class legislation, not intended to be passed in the interests of the community. Indeed, it appears in evidence, and it is not contradicted, that the community are inconvenienced by the restrictive by-law. See affidavit of Oliver Spanner.

" 4. Peddlers of fish, fruit, coal-oil, etc., serve a very useful purpose in the " community, as housekeepers are enabled to purchase goods at their doors where " in many cases it would be impossible for them to leave their homes to go " shopping."

In Pearce *v.* Bartrum, 1 Cowper's Reports, 269, Sergeant Glenn, in showing cause and supporting the by-law, admitted that if it was in restraint of trade it would be a fatal objection, but he submitted that the prohibition in this case was a nuisance at Common Law. Lord Mansfield says: " The by-law in question is not " a restraint of trade, but only a regulation of it in this particular city." And Aston, J., held that as it was a regulation and as it was reasonable it should be upheld.

See also *re* Draper and the Municipality of Clifton, 8 U.C.C.P., 238, where Draper, C.J., at p. 238, delivered the judgment of the Court: " The absolute " prohibition of any particular occupation not in itself unlawful and only a " nuisance from its abuse cannot, I think, be held to come fairly within a general

"power to make by-laws for the peace, welfare and good government of a "town."

In Reg. *v.* Coutts, 5 O.R., 644, where Mr. Justice Rose reviews instructively the legislation in regard to hawkers and petty chapmen and other persons carrying on petty trades, it was held that a municipality could not pass a by-law prohibiting unlicensed traders from sending out agents to take orders from private houses for goods, and subsequently delivering the goods.

In Pirie *v.* Corporation of Dundas, 29 U.C.R., 401, Wilson, J., at p. 408, says: "If trade is to be encouraged it is not to be done by fostering large "establishments, but by giving free scope to individual interprise. Trade and "manufactures owe more to the 'self help' of humble and zealous men than to "all the combinations of wealth that have ever been formed."

In *re* Milloy and the Municipal Council of Onondaga, 6 O.R., 573, Mr. Justice Rose says at p. 577: "If the municipality should attempt to enforce the provi- "sions in an unreasonable manner the Court could interfere"; and at p. 579 "The law must not be made in respect of a matter not within the authority of "the body enacting it, nor to operate upon persons or in a district not subject to "their control."

The by-law in question is passed in the interests and at the desire of the storekeepers and merchants, who wish to have a monopoly of this class of business, and on this ground, that it discriminates in favor of the storekeepers, it is clearly bad. It is unreasonable and unfair, not only to licensees but to residents on the prohibited streets, as the latter are unable to purchase fruits, fish, coal-oil and other household supplies at their doors. See Caswell *v.* Cook, 11 C.B.N.S., 637, where it is stated at p. 652, "the statute will at the same time protect the "interests of the poorer portion of the community who might be seriously incom- "moded if a great variety of perishable articles could not be carried for sale from "house to house."

It is unreasonable and unfair to merchants on unprohibited streets, as merchants on the other streets are not open to the competition of hawkers and peddlers, and thus have an undue advantage over them.

It is unreasonable in that it is apparently passed solely for the interests of a certain class in the community, namely, the storekeepers carrying on business on prohibited streets. It is clearly bad under the provisions of section 286 of the Municipal Act, which provides that no council shall have the power to give any person an exclusive right of exercising within the municipality any trade or calling, or to impose a special tax on any person exercising the same. All the authorities on this point are collected in Harrison's Municipal Manual 5th ed., pp. 213-4.

In the case of Uriah Donnelly and the Corporation of the Township of Clarke, 38 U.C.R., 599, Chief Justice Hagarty, in delivering the opinion of the Court, says:—"I do not see how it can be allowed to the council to make the amount "payable to depend on the part of the municipality in which the applicant may "live. The distinction is, I think, unwarranted. It seems to come within the "spirit, at least, of section 224 of the Municipal Act of 1873, which prohibits "as well the giving to any person the exclusive right of exercising within the "municipality any trade or calling, as the imposing of a special tax on any person

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Appellants' Factum
—*continued.*

" exercising the same. They must not make him pay more or less according " to the place in which he happens to reside, except when specially permitted " by statute. To hold otherwise would, I think, be very unfair both in principle " and practice."

" See also the case of Reg. *v.* Pipe, 1 O.R., 43, where Mr. Justice Osler says, " at p. 45:—" In other words, the by-law confers a particular privilege on such " persons, and exempts them from its operation. A by-law so unequal in its " application is *ultra vires* of the corporation. They had no more power, in my " opinion, to create such exceptions as I have referred to than they would have " had to confine the operation of the by-law to a particular ward."

In Reg. *v.* Flory, 17 O.R., 715, a by-law was held bad because it discriminated between different classes of buyers and different classes of tradesmen.

The case of Jonas *v.* Gilbert, 5 S.C.R., 356, appears to be much in point. Ritchie, C.J., in giving judgment says, at p. 365:—" A power to discriminate " must be expressly authorised by law, and cannot be inferred from general " words such as are used in this Statute . . . and the intention of the " Legislature to confer this power of discrimination must, I think, explicitly " and distinctly appear by clear and unambiguous words." Also at p. 366:— " The Legislature never could, I think, have intended that the Corporation of St. " John should have the arbitrary power of burdening one man or one class " of men in favour of another, whereby the one might possibly be enabled to " carry on a prosperous business at the expense of the other, but must have con- " templated that the burden should be fairly and impartially borne. . . . " Unless the legislative authority otherwise ordains, everybody having property " or doing business in the country is entitled to assume that the taxation shall be " fair and equal, and that no one class of individuals or species of property shall " be unequally or unduly assessed. . . . Still, in construing Acts of Parlia- " ment imposing burthens of this description, we must assume, in the absence of " any provision clearly indicating the contrary, that the Legislature intended " the Act to be construed on the principle of uniformity and impartiality; and in " this case I think it never could have been the intention of the Legislature " not only to discourage the transaction of business in the City of St. John, but " to do injustice to those seeking to do business there by granting to any one " person or class pecuniary advantages over other persons or classes in the " same line of business; in other words, to restrain the right of any particular " individual or class to do business in the city by enabling the corporation to " favour by the imposition of a license tax the individual or class at the expense " of other individuals or classes transacting the same business, thereby enabling " certain individuals or classes to do business on more favourable terms in the " one than the other."

The said sub-section 2A of section 43, sets up an unjust and unauthorised discrimination in favour of a certain class of peddlers—peddlers of fish having an unfair advantage over other hawkers and peddlers by being charged a smaller license fee.

Sub-section 2A of section 43, is repugnant to the closing proviso of sub-section 2 of section 12 of by-law No. 2,453, in exacting a license from fish peddlers. The sub-section 2A of section 43, is added by way of amendment to

the provisions of sub-section 2 of section 12, and the by-law contains conflicting provisions as to fish peddlers, and it is submitted is therefore void as to them.

The first part of By-law No. 2,934 is *ultra vires* of the Municipal Council in that it is made to apply to persons whether licensees or not, whereas it is provided by section 495, sub-section 3 of the Municipal Act, that the provision is not to apply to manufacturers, producers and others. It is contrary to the provisions of section 286 of the Municipal Act, by which municipalities are restrained from interfering with traders except when expressly authorized. The words in the enabling section are "licensing, regulating and governing." The words are coupled together and not used disjunctively. The powers of licensing and regulating are to be conjoined and not to be exercised separately so as to enable the municipality to regulate where it cannot license. The sub-section of the Municipal Act contained the exemptions therein mentioned in order that no question could be raised as to whether it trenched on the powers of the Dominion Parliament contained in B.N.A. Act, section 91, sub-section 2, the regulation of trade and commerce. Apart from licensing, the section of the Municipal Act cannot confer the power of regulating, for such power is not *intra vires* of the Provincial Legislature. The by-law in question prohibits the sale of certain articles on certain streets of the city, and is therefore regulative of "trade and commerce" within section 91 of the B.N.A. Act. In Brown *v.* Maryland, 12 Wheaton 446, where the question was one as to regulation of foreign commerce, Chief Justice Marshall says:—"Commerce is intercourse. One of its most ordinary ingredients "is traffic. It is inconceivable that the power to authorise this traffic, when "given in the most comprehensive terms, with the intent that its efficacy should "be complete, should cease at the point where its continuance is indispensable to "its value. To what purpose should the power to allow importation be given "unaccompanied with the power to authorise a sale of the thing imported? Sale "is the object of importation and is an essential ingredient of that intercourse "of which importation constitutes a part. It is as essential an ingredient, as "indispensable to the existence of the entire thing, then, as importation itself. "It must be considered as a component part of the power to regulate commerce."

A by-law may be unreasonable as a regulation in its discrimination between citizens residing in, and those outside the limits of the corporation. Its direct tendency may be to create monopoly. It is incompetent for a corporation to erect walls of exclusion against persons without its limits, or obstruct free commerce and trade between them and its own inhabitants. State *v.* City of Hoboken, 4 Vroome, 280. By the exclusion of manufacturers and producers from trading on the principal streets of the city (the words "whether licensees or not" in the amended by-law effecting that exclusion) the respondents have obstructed traffic between citizens and those outside the limits of the city.

See also Frederickton *v.* The Queen, 3 S.C.R., 541; Reg. *v.* Justices of Kings, 2 Cart., 499: De St. Aubyn *v.* La France, 2 Cart., 392, where it is laid down that the Provincial Legislature cannot directly or indirectly prohibit the sale of articles of commerce.

The license fees imposed are unfair and unreasonable and beyond what is required to pay the expenses of collection. It is not intended that the city should raise a revenue from licenses, but that through the license system it should exercise superintendence over trades and callings which are liable to abuse.

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No. 21. Appellants' Factum —*continued.*

When authority is given to require the possession of a license as a condition for selling, a reasonable fee, to cover probable expenses, can be demanded. But the exaction of sums in excess of such expenses can be nothing else than a tax upon such business. City of Montreal *v.* Walker, Montreal L.R., 12 B., 469; State *v.* City of Hoboken, 4 Vroome (N.J.), 280.

" Authority in a municipal corporation to regulate and license the business " of peddling does not warrant a tax upon such business, especially where it " discriminates against non-residents."

" Authority under a charter to pass by-laws and ordinances to license, control " and regulate or prohibit a business or traffic within a municipality gives no " power to impose a tax for revenue purposes." Muhlenbrinck *v.* Commissioners, 36 Am. Rep., 518.

The statement of the Inspector of Licenses shows that the total amount received from licenses within the city for the year 1891 was $31,191.80, while the expenses of the department for the same year were $4,500 only. It is clear, then, that by extorting such large license fees the city are taxing licensees a second time. From the affidavits filed on the motion to quash the excessive license fee imposed on hawkers and peddlers is a hardship and oppression on the humble people engaged in such callings, and practically prohibits them from carrying on business.

It is submitted that Mr. Justice Maclennan was in error in holding that the by-law may be supported under sec. 503, R.S.O., cap. 184, which is an enactment referring to the establishment of markets. See City of Burlington *v.* Dankwardt, Supreme Court, Iowa, Oct. 26th, 1887 (73 Iowa, 170) which decided that the provisions of Code Iowa, s. 456, that cities shall have power to establish and regulate markets, does not empower a city council to make an ordinance forbidding the peddling of meats. " The power given by statute is to establish and regulate " markets. The city cannot go beyond the power thus given. Now, an ordi- " nance which is designed merely to prevent peddling meats does not appear " to us to be an ordinance to establish and regulate markets; it seems to be an " ordinance designed to favor private butcher shops in the city, if there are any. " But it does not establish such shops.

" It may be that the inhabitants of Burlington have no means of buying " meat except from street peddlers. We do not think the city council can inter- " fere with such occupation until it has established a meat market; and not then " unless it may be as a regulation of the market. To sustain the plaintiff, we " should be obliged to hold that the design of the statute was to give the power " to regulate the mode of selling meat in the absence of specific markets, but, in " our opinion, we should not be justified in so doing."

The clear inference from the use of the word "prevent" in an enactment relating to the establishment and regulation of markets, and the omission of that word from the enactment respecting peddlers, is that there was a clear intention to limit the power to prevent to the market enactment, which, moreover, is only applicable to certain hours of the day. It is not contended by the respondents, nor is it suggested elsewhere than in the judgment of the Hon. Mr. Justice Maclennan, that the by-law was passed under sec. 503 of the Municipal Act.

It is submitted that on these grounds the by-law which is attacked is invalid, and that the appeal should be allowed.

The following additional authorities are referred to:

Bannan *v.* City of Toronto, 22 O.R., 274.

Yates *v.* Milwaukee, 10 Wall., U.S., 497.

E. E. A. Du Vernet,
Counsel for Appellant.

"C."

In the Supreme Court of Canada.

In the matter of

William Virgo . . . . . *Appellant,*

and

The Municipal Corporation of the City of Toronto . . *Respondents.*

Factum for the Respondents.

This is an appeal from the unanimous judgment of the Court of Appeal for Ontario, sustaining the judgment of Chief Justice Sir Thomas Galt, who dismissed an application to quash certain portions of By-law 2,934 of the City of Toronto, which excluded peddlers from plying their trade on several of the principal business streets, and also fixed the license fees for certain peddlers at certain amounts.

The respondents rely on the reasons and statements of law in the opinions of Mr. Justice Osler and Mr. Justice Maclennan of the Court appealed from.

The regulation of peddlers is one peculiarly within the jurisdiction of municipal authorities, and the Legislature, when conferring the power to regulate, used very strong words, namely, the power of "licensing, regulating and governing." There is no attempt made by the by-law to prohibit peddling altogether. It is merely a wise regulation in a large and growing city, of a class of merchants who are commonly known to often make themselves objectionable to the mass of the people by obstructing the street and uttering shrill cries which tend to disturb and distract. If the word "regulate" alone had been used in the Municipal Act (s. 495, s-s. 3), there would have been power in the municipal council to confine the business of peddlers to certain portions of the city (see the opinion of Chief Justice Wilson *in re* Kiely, 13, O.R. 351).

It once being determined that there is power in municipal councils to use their discretion in the regulation of this class, the courts should follow the well-known and wise rule of not interfering with such discretion. If the rule or practice were otherwise, persons regulated or interfered with by municipal ordinances would continually be applying to the courts, in the hope that the judgment and discretion of judges would differ from that of the municipal councillors making the ordinances. Obviously this would work mischief.

The restriction is a reasonable one, as the streets on which peddling is prohibited comprise but a small proportion of the thoroughfares of Toronto, and are streets already supplied with shops. It is a regulation, not a restraint of trade. (Maxim *v.* Nordenfeldt, (1893) 1 Ch. 630.)

Shopkeepers who pay taxes on their property, and who are supposed to have more stake in the community, being permanently settled as citizens, are favored

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No. 22. Respondents' Factum —*continued.*

in law as against peddlers. (See Chitty's Commercial Law, vol. 2, page 163; Burns' Justice of the Peace, page 952, and cases there cited).

It is contended by the Appellant that the by-law in question should make an exception in favour of manufacturers and producers of their own goods, because they are excepted from the classes who may be required to be licensed (under section 495). But the power in the sub-section in question here is wider than mere licensing, and includes regulation and governance, and must extend to peddlers, whether licensed or not.

The amount of the license fee is moderate. In any event it is not so great as to be prohibitive, and the amount being purely a question of discretion with the municipal council cannot be interfered with.

Section III. of the amending by-law is not repugnant to section 12 (2) of the principal by-law. They deal with different cases, the one with fish peddled from large vehicles drawn by animals, or from a push cart or other capacious vehicle. The main by-law extends only to fish carried "in the hand or small basket." In any event, the amending by-law, being last in time, must be taken to repeal all inconsistent enactments.

The by-law does not discriminate between individuals in the same class. There can be no competition between the peddlers of fish and the peddlers of other commodities. Therefore there is no discrimination which is unjust.

H. M. MOWAT,
Counsel for the Respondents.

"D."

[*Vide* Order of Supreme Court of Canada printed *post* pp. 49, 50.]

No. 23. Reasons of Judges of the Supreme Court.

"E."

REASONS OF JUDGES OF SUPREME COURT.

Re Virgo and the City of Toronto.

Fournier, J. Fournier, J.—I am of opinion that the judgment of the Court below should be affirmed.

Taschereau, J. Taschereau, J.—I would dismiss this appeal. I think that Mr. Justice Maclennan's reasoning in the Court of Appeal amply demonstrates that the by-law impeached is perfectly legal and *intra vires* of the corporation.

It would require a stronger case than the Appellant has in my opinion made to bring me to reverse the unanimous judgment of two Ontario Courts, on the Ontario Municipal Acts.

Sedgewick, J. Sedgewick, J.—I concur in allowing the appeal for the reasons given by my brother Gwynne.

King, J. King, J.—The question in this appeal is as to the validity of certain by-laws of the City of Toronto relating to peddlers, petty chapmen and other like persons. The Municipality Act of Ont. sec. 495 (3) empowers the council of any county, city and town separated from the Co. for municipal purposes to make by-laws for licensing, regulating and governing hawkers or petty chapmen and other persons carrying on petty trades or who go from place to place or to other men's houses on foot or with any animal bearing or drawing any goods, wares or merchandise for sale or in or with any boat, vessel or other craft or otherwise

carrying goods, wares or merchandise for sale, and for fixing the sum to be paid for a license for exercising such calling within the county, city or town the time the license shall be in force. . . . Provided always that no such license shall be required for hawking, peddling or selling from any vehicle or other conveyance, any goods, wares or merchandise to any retail dealer; or for hawking or peddling any goods, wares or merchandise the growth, produce or manufacture of this province (not being liquors within the meaning of the law relating to taverns or tavern licenses) if the same are being hawked or peddled by the manufacturer or producer of such goods, wares or merchandise or by his *bonâ fide* servants or employees having written authority in that behalf. By a law No. 2,453 passed by the Municipal Council of the Corporation of the City of Toronto on the 13th January, 1890, it was ordained that licenses should be taken out by " all hawkers, " petty chapmen or other persons carrying on petty trades (following the language " of the Act) excepting however those whom the Act excepted," and further excepting " peddlers of fish farm and garden produce, fruit and coal-oil or other " small articles that can be carried in the hand or in a small basket, also tinkers, " coopers, glaziers, harness menders and persons usually trading or mending " kettles, tubs, household goods or umbrellas, and persons going about and " carrying with them proper materials for such mending." On 26th Oct., 1891, a By-law No. 2,934 was passed in amendment of the above by the addition of the following:—

" No person named and specified in sub-sec. 2 of this section" (*i.e.*, in the sub-sec. already cited) " (whether a licensee or not) shall after the first day of July, " 1892, prosecute his calling or trade in any of the following streets and portions " of streets in the City of Toronto."

Then follows an enumeration of streets and parts of streets which it is said on argument comprises the leading business streets of Toronto, and covers an extent of about ten miles. An application to quash this latter by-law was dismissed by the learned Chief Justice of the Common Pleas and his decision was sustained by the Court of Appeal.

The business of hawkers, petty chapmen and of other persons carrying on petty trades who go from place to place and to other men's houses carrying goods for sale is a business that is carried on and prosecuted upon and in the streets. The legislature recognised it as a legitimate business and contemplated that it might be carried on in accordance with what might be considered the natural right to carry on any lawful trade or business, but provided that it might be subjected to be licensed, regulated and governed by the municipal council through by-laws. But by a proviso the legislature declared that the business, or certain forms of it might be carried out in a certain way without being hampered by license fees, or by the obligation to take out a license with all that is implied in this. Thus any hawker, peddler, etc., is not to be required to procure a license for hawking, peddling, etc. from any vehicle or other conveyance any goods, wares or merchandise to any retail dealer or for hawking or peddling any goods, wares or merchandise the growth, produce or manufacture of the province, if the same is being hawked or peddled by the manufacturer or producer of such goods, etc. or by his *bonâ fide* servant or employee. It seems to me this privilege of selling to any retail dealer without license is rendered in large degree nugatory (and

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No. 23. Reasons of Judges of the Supreme Court.

King, J. —*continued.*

entirely so, so far as regards retail dealers whose places of business are on the prohibited streets) if the City Council can prohibit the hawker, etc. from selling at all to such retail dealers. Can it be reasonably concluded that the legislature intended that the council might restrain all selling to retail dealers in large sections of the city where it in terms declined to subject them to the comparatively small restriction involved in the obtaining and paying for a license in respect of such class of sales? The necessary effect of the by-law is to substantially impair rights and privileges recognized by the Statute so as to the right or privilege to sell free from license to anyone goods, &c., the produce or manufacture of the seller, provided they are produced or manufactured in Ontario. Is it consistent with this that all sale of such articles to anyone in the large prohibited district of this by-law or any district or street whatever, which the council are not empowered by this or some other clause of the Municipal Act to close to such a like traffic, shall be prohibited entirely?

The prohibition is not limited to certain times for the promotion of an assumed or real public convenience in the use of the streets or to regulate traffic therein; nor to certain articles referred to in sec. 497 (9), but in general as to the goods, and absolute in its terms, and covers the whole period of each day and every day in the year. This is very different from regulations as to time or mode. It is said to be merely a regulation as to place, but the business which the legislature has said shall be kept free from the necessity of license is a business, which is carried on by going from place to place and to other men's houses, and to exclude ten miles of populated city streets from the field of these people's operations must seriously interfere both with their right freely to sell to retail dealers and with the right freely to sell to anyone goods, their own produce or manufacture, in the only way in which they can so sell. Under sec. 493 (1) authorising the council "to license and regulate plumbers" can it possibly be that these may be restrained as by way of regulation from exercising their calling in and over a particular section of the city.

In Slattery *v.* Naylor 13 App. Cas. 446 (1888) it was held that in certain cases mere words of regulation may authorise prohibition and the taking away of private property but this follows upon the consideration that otherwise the matter cannot in common understanding be efficiently regulated. It was a case where a Municipal Act empowered the council to make by-laws for regulating the interment of the dead and the by-law prohibited interment altogether in cemeteries situated within a certain distance of any dwelling, place of worship, &c., the effect of which was to destroy without compensation the private property of owners of burial places therein.

Lord Hobhouse says (p. 449) "It is difficult to see how the council can "make efficient by-laws for such objects as preventing fires, preventing and regu- "lating places of amusement, regulating the killing of cattle, the sale of butchers' "meat, preventing bathing, providing for the general health, not to mention "others, unless they have substantial powers of restraining people both in their "freedom of action and in their enjoyment of property. The interment of the "dead is just one of those affairs in which it would be likely to occur that no "regulation would meet the case except one which wholly prevented the desired "or accustomed use of the property."

The case also contains observations upon the setting aside of by-laws on the ground of their unreasonableness.

The regulating and governing of the business of hawkers does not (one would think) require that they be prohibited from carrying on their business in certain streets which by the legislature are not authorised to be closed streets to such business and traffic, and which it is not suggested that the Act anywhere gives the Council authority to treat differently from the streets in general of the city so far as this or like business (at least) is concerned.

It was said that the business is objectionable by reason of the street cries used in carrying it on. Then the by-law should have been directed against this.

In addition to objections suggested by the words of the Act, I think that the by-law is in restraint of trade. In terms it is so. It says that the persons shall not carry on their trade in the streets named. It is true that all carrying on of the trade is not prohibited but all carrying on of the trade in large areas is prohibited. It is a partial restraint of trade. As a general principle all by-laws in restraint of trade general or partial, must be reasonable and beneficial to the public or they cannot be supported.—Gunmakers Co. *v.* Fell (Willes 389) Bosworth *v.* Hearne 2 Str. 1085 cas. temp. Hardv. 405. The securing of any public benefit which the Council are authorised to promote is strikingly absent from anything that appears likely to follow upon the enforcement of this by-law. In fact what strikes one as not pleasant in this case is that the rights of these small people over a large part of their accustomed field of labour are seriously affected, and that so far no consideration of the public benefit is condescended to be given for it. It was rather put as if the Council were not to be called in to give reasons.

There is another point. It was suggested that the by-law might be sustained under the powers relating to markets. But while the Council are by sec. 503 (3) and (4) authorised to pass by-laws "for preventing or regulating the sale by "retail in the public streets or vacant lots adjacent thereto, of any meat, "vegetables, grain, hay, fruit, beverages, small ware and other articles offered for "sale and for regulating the place and manner of selling and weighing grain, "meat, vegetables, fish, hay, straw, fodder, wood, lumber, shingles, farm produce "of every description, small ware and all other articles exposed for sale and the "fees to be paid therefor; and also for preventing criers and vendors of small "ware from practising their calling in the market place, public streets or vacant "lots adjacent thereto," the restriction as to hawkers, &c., is limited to the market place and public streets and vacant lots adjacent thereto. This not only does not authorise the by-law in question with its prohibition against selling on many other streets but seems to show that it is *ultra vires;* for when the legislature would as in this case prevent hawkers from selling on certain streets it does so in terms.

As to the other by-law complained of No. 2,934 (2A) in amendment of sec. 43 of No. 2,453 as amended by No. 2,717, I agree with the observation of Mr. Justice Maclennan, and think that although these by-laws may not be easy to construe it is a matter of construction, and that the by-law referred to in this objection should be allowed to stand.

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The result in my opinion is that the judgment appealed from should be affirmed as to by-law No. 2,934 (2A) but reversed as to by-law No. 2,453 sec. 43 (2A).

Gwynne, J.—Upon the 13th day of January 1890, the Municipal Council of the City of Toronto passed a by-law designated as No. 2,453 and entitled "A "by-law respecting the appointment of a general inspector of licenses and the "issue of licenses in certain cases." It is only with the 12th and 43rd sections of that by-law as amended by subsequent by-laws that we are at present concerned. Upon the 23rd day of June, 1890, the same municipal council passed a by-law which, among other things, repealed sub-section 2 of section 43 of the by-law No. 2,453 and substituted another sub-section in lieu thereof. By another by-law passed on the 26th day of October, 1891, the said municipal council further amended sections 12 and the sections 43 as amended by the said by-law of the 23rd June, 1890.

The sections 12 and 43 of the by-law No. 2,453 as so amended are as follows :—

"The Municipal Council of the City of Toronto enacts as follows :—Sec. 12. "Licenses shall be taken out by sub-sec. 2. All hawkers, petty chapmen or "other persons carrying on petty trades, or who go from place to place or to other "men's houses on foot or with any animal bearing or drawing any goods, wares "or merchandise for sale, or in or with any boat, vessel or other craft, or otherwise carry goods, wares or merchandise for sale ; except that no such license "shall be required for hawking, peddling or selling from any vehicle or other "conveyance goods, wares or merchandise to any retail dealer, or for hawking "or peddling goods, wares or merchandise the growth, produce or manufacture "of this province, not being liquors within the meaning of the law relating to "taverns or tavern licenses, if the same are being hawked or peddled by the "manufacturer or producer of such goods, wares or merchandise, or by his *bonâ* "*fide* servants or employees having written authority in that behalf, and such "servant or employee shall produce and exhibit his written authority when "required so to do by any municipal or peace officer, nor from any peddler of "fish, farm and garden produce, fruit, and coal-oil or other small articles that can "be carried in the hand or in a small basket, nor from any tinker, glazier, "harness mender or any person usually trading or mending kettles, tubs, household goods or umbrellas, or going about and carrying with him proper materials "for such mending."

Sub-sec. 2A. No person named and specified in sub-section 2 of this section whether a licensee or not, shall, after the 1st day of July, 1892, prosecute his calling or trade in any of the following streets and portions of streets in the City of Toronto:—

1. Yonge Street from the Bay to the Canadian Pacific Railway tracks.
2. Queen Street from Pape Avenue in St. Matthew's Ward to Jamieson Avenue in St. Albans Ward.
3. King Street from the River Don to Niagara Street.
4. Spadina Avenue from King Street to College Street.
5. College Street from Spadina Avenue to Bathurst Street.
6. Parliament Street from Queen Street to Westminster Street.

7. Dundas Street from Queen Street to St. Claren's Avenue.
8. Wellington Street from Church Street to York Street.

Section 43. " There shall be levied and collected from the applicant for every " license granted for any object or business in this by-law specified as requiring a " license, a license fee as follows:—

Sub-section 2. " For a license to any one following the calling of a hawker, " peddler or petty chapman with a two horse vehicle, $40.00; (2) with a one horse " vehicle, $30.00; (3) on a street corner or other place where permission is given " therefor, other than in a house or shop, $15.00; (4) on foot with a hand barrow " or waggon pushed or drawn, $7.00; (5) with a creel or large basket crate, $2.50, " and the general inspector of licenses shall furnish such licensee with a suitable " badge to be worn by said licensee in a conspicuous place while plying his " trade."

Sub-section 2A. " Provided that the annual fee for a fish hawker or peddler " shall be with a horse, mule or other animal and vehicle $10.00 or (2) on foot " $2.50."

Now it is to be observed that the above sub-section 2A of said section 12 and sub-section 2A of said section 43 were introduced into and made part of said by-law No. 2,453 by the by-law passed upon the 26th of October 1891 while the sub-section 2 of said section 43 was introduced into and made part of said by-law 2,453 by the by-law passed on the 23rd day of June 1890.

It is objected to this by-law as thus amended, that sub-section 2A of said section 12 is wholly void and invalid for the following reasons:—

1st. That it is wholly *ultra vires* of the corporation to pass as constituting an unauthorised and illegal restraint of the common law rights as well as of the statutable rights of persons engaged in carrying on legal, though they be petty, trades, occupations or business, and 2ndly as being unreasonable in this that by the by-law as it now stands amended, persons carrying on the respective trades for which by the section licenses are required to be taken out, while purported to be deprived by the sub-sec. 2A of said section 12, of the right to carry on their trades in the greater part of the populous and profitable portion of the city for carrying on such trades are by the frame of the by-law as amended, required to pay for licenses to carry on their trades in the smaller and least populous and least profitable portion of the city for carrying on their trades, the respective fees which were in fact imposed for licenses, to carry on their respective trades throughout the entire city.

Sub-section 2A of the section 43 was also objected to as invalid, for the reason that it purports to require fish hawkers to pay license fees while the immediately preceding said sub-section 2 of said section 43, enacts and declares that hawkers and peddlers of fish shall not be required to take out any license.

Very many decided cases both ancient and modern some more, some less, and some as it appears, not at all bearing or throwing light upon the question before us have been cited to us upon both sides. In estimating the value of these respective authorities as affecting the present case it is obviously of the first importance, that we should carefully observe the terms in which the authority to pass the respective by-laws under consideration, in the decided cases is expressed, in the Act of Parliament, charter or other instrument by which the authority to pass the respective by-laws was conferred.

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In Freemantle *v.* The Company of Silk Throwsters 1 Ler. 299 (A.D. 1667) a by-law had been passed by the company that none of that company should run above a certain number of spindles in one week. This was held to be a by-law not in restraint of trade but in restraint of monopoly. That none of the members of the company should engross the whole trade; and so was according to what was convenient and good, and the company having by its charter power to regulate its own trade the by-law was held to be good.

In Player *v.* Jenkins 2 Keb. 27 A.D. 1666. It was held that a by-law made by the corporation of the City of London who by immemorial custom had the ordering of carmen and carters in the city that there should be only 420 allowed, and that if any worked unallowed, they should pay 40s. to the Chamberlain of the city, was a good by-law. The reasoning upon which it was sustained was that the trade or business of carmen and carters was not like other trades for that a great number might cause disturbance and a nuisance in the streets and that therefore the number might be restricted, especially in a city, for there any trade that might be a nuisance might be restrained.

Player *v.* Vere T. Raym, 288 & 324, A.D. 1678, was a case arising on a by-law passed by the City of London by way of repeal of and substitution for the by-law upon which the above case in 2 Keble proceeded. In this case the custom and the by-law were both specially pleaded at large as follows:—The custom was that the mayor, aldermen, &c., from time out of mind have had and have the right to order and dispose of carts, cars, car-rooms, carters and carmen, and of all other persons whatsoever working any cars or carts within the city and liberties according to the custom thereof, which custom was confirmed by Parliament in the 7th year of Ric. 2nd. The by-law then repealed the former by-law on the same subject, and reciting that the trade of the city being seriously considered, and to the end that all the streets and lanes of the city may not be pestered with carts or cars, and that His Majesty's subjects may have free passage by coach or otherwise through the said streets and lanes, it was therefore enacted that no more than 420 carts shall be allowed or permitted to work for hire within the city or liberties thereof, and that each of them should be made known by having the city arms upon the shaft of every such cart in a piece of brass with the number upon it, and that 17s. 4d. per annum, and no more, should be received and paid for a caroom; and 20s., and no more or greater fine, upon any admittance or alienation of a caroom which 17s. 4d. per annum and 20s. aforesaid should be wholly applied towards the relief and maintenance of the poor orphans harboured and to be harboured in Christ's Hospital, and that if any person should presume to work any cars or carts within the said city and liberties for hire by himself or servants not being duly allowed as aforesaid, such person for every time of so offending should forfeit and pay the sum of 13s. 4d. to be recovered as provided in the by-law. This by-law was held to be void as far as it related to the fine and rent, but good as to the limitation of the number of cars to be allowed.

Now it is to be observed that the by-law showed upon its face that it was passed for the maintenance of order and good government in the city and to prevent obstructions and nuisances occurring in the streets.

In Wannel *v.* The City of London 1 Stra. 675 A.D. 1726, it appeared that by the custom of London time out of mind the several companies of Freemen of the

City of London had power to pass by-laws to regulate their respective trades, and that a by-law had been made by the Joiners' Company, one of the said companies, which reciting that several persons not free of the Joiners' Company had exercised the trade of a joiner in an unskilful and fraudulent manner, which could not be redressed whilst such persons were not under the order and regulation of the company, and it was therefore enacted that no person should use the trade, who is not free of the company under the penalty of £10. This was held to be a good by-law, as being made in regulation of trade by the persons most competent to judge of the necessities of the trade and to prevent fraud and unskilfulness of which none but a company carrying on the same trade can be judges.

In Bosworth *v.* Hearne 2 Stra. 1085, it was held that a by-law passed by the City of London which by custom time out of mind had the regulation of carts in the city, was good, which enacted that no drayman or brewers' servants should be abroad in the streets with his dray or cart after one o'clock in the afternoon between Michaelmas and Lady Day and from thence after eleven in the forenoon under the penalty of 20s. the Court was of opinion that such a custom was good, and that as the regulation did not in itself appear to the Court to be unreasonable the by-law was good.

In The Chamberlain of London *v.* Godman, 1 Burr, 13, it was held that a by-law of the city to oblige a person who had a right to be free of the city to take up his freedom in some particular company is in restraint of trade and bad, not being shown to be warranted by any special custom ; that a general power to make by-laws for the common good of the citizens gave no power to make such a by-law. But in Rex *v.* Harrison, 3 Burr, 1323, it was held, following Wannel *v.* The City of London, 1 Stra., 675, that a by-law enacting that a butcher in London must be free of the Butchers' Company was a good by-law, the Court saying that the by-law only restored the constitution to what it originally must have been and ought to be, and that it was right and reasonable, and must have been the meaning of the custom that each company should have the inspection of their own trade. In Pierce *v.* Bartrum Cowp. 269 a by-law of the City of Exeter was passed under a charter granted to the city by Queen Elizabeth and which enacted that no butcher or other person should within the walls of the city slaughter any beast upon pain to forfeit for every beast so slaughtered a fine prescribed by the by-law. It was contended that this by-law was void as being in restraint of a common law right of trade, which it was contended nothing but a custom could control, and no custom was shown. The answer to this argument was that the by-law was one which merely restrained and prohibited an act being done which, if done, would be a nuisance at common law and by Statute 4 H. 7 c. 3, and so that by-law was held to be good as reasonable regulation of trade. This case simply decided that a by-law which prohibits an act being done by any person in the conduct of his trade which would plainly constitute a nuisance, cannot in law be said to be in restraint of trade, but rather a reasonable regulation of it.

In The Chamberlain of the City of London *vs.* Compton 7 D. & Ry. 597, it was held that a by-law of the City of London that no person not being free of the Pewterers Company should exercise the trade of a pewterer was a by-law in restraint of trade and in the absence of a special custom to support it, was void.

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The case of the Gunmakers Society of London *v.* Fell Willis 384 arose upon a demurrer to the declaration and it was held that a by-law passed by the Gunmakers Company that no member should sell the barrel of any hand gun ready proved, to any person of the trade not a member, in London or within four miles thereof; and that no member should strike his stamp or mark on the barrel of any person not a member of the company under a penalty of 10s. for each offence, was holden to be in restraint of trade and void, it not appearing from anything set forth in the declaration that there was any adequate reason for these restraints or any consideration to the persons restrained. The charter of the company was set forth in the declaration.

The Lord Chief Justice Willes there said "The general rule is that all "restraints of trade if nothing more appear are bad. This is the rule which was "laid down in the famous case of Mitchel *vs.* Reynolds (1 P. Wm. 181). But to "this general rule there are some exceptions, as first, that if the restraint be only "particular in respect of the time or place, and there be a good consideration "given to the person restrained a contract or agreement upon such consideration "so restraining a particular person may be good and valid in law, notwithstanding "the general rule. And this was the very case of Mitchel *vs.* Reynolds where "such a bond was holden to be good. So likewise if the restraint appear to be a "manifest benefit to the public such a restraint by a by-law or otherwise may be "good; for it is to be considered rather as a regulation than a restraint; and it "is for the advantage and not the detriment of trade that proper regulations "should be made in it."

In Maxim Nordenfelt Gun Co. *vs.* Nordenfelt 1 Chy. div. of 1893 p. 630, the Court of Appeal in England reviews all the cases of contracts in any way in restraint of trade from Mitchel *vs.* Reynolds down to the present time and shows the course of the decisions from time to time leading to the development of the doctrine as at present held in England. After a masterly review of the cases Lord Justice Lindley says (p. 649): "In Rousillon *vs.* Rousillon (14 Chy. Div. "351) Lord Justice Fry in one of those admirable judgments for which he was "so justly celebrated, came to the conclusion that the only test by which to "determine the validity or invalidity of a covenent in restraint of trade, given "for valuable consideration was its reasonableness for the protection of the trade "or business of the covenantee. This accords with the view of Lord Justice "James in Leather Cloth Co. *vs.* Lorsont (L. Rep. 9 Eq. 345) and is in my "opinion the doctrine to which modern authorities have been gradually approxi-"mating. But I cannt regard it as finally settled, nor indeed as quite correct. "The doctrine ignores the law which forbids monopolies and prevents a person "from unrestrictedly binding himself not to earn his living in the best way he "can. Our predecessors expressed their views on this subject by drawing "distinction between partial and general restraint of trade and the distinction "cannot be ignored. But what is more important than nomenclature or classifi-"cation is the principle which underlies both."

And Lord Justice Bowen, after a like review of the cases sums up the result to be as follows (p. 662):—

"General restraint or in other words restraint wholly unlimited in area are "not as a rule permitted by the law although the rule admits of exceptions.

" Partial restraints, or in other words restraints which involve only a limit of " places at which, of persons with whom, or of modes in which the trade is to be " carried on, are valid when made for a good consideration, and where they do " not extend further than is necessary for the reasonable protection of the " covenantee."

Now the rule laid down governing the determination of cases in relation to contracts in restraint of trade can have application in the determination of a case like the present of a by-law passed by a municipal corporation incorporated by Act of Parliament and imposing partial restraints upon the exercise of their trades by persons engaged therein, only upon the principle that what is necessary to support a contract in partial restraint of trade is equally necessary to support the by-law of a municipal corporation imposing partial restraints in the exercise of their trades by persons engaged therein, and that such a by-law is bad (as was held in respect of the by-law under consideration in the case of the Gun Makers Company *vs.* Fell) unless it be made to appear that that there were adequate reasons for making the by-law and sufficient consideration to the persons restrained. Unless it be made so to appear, it is impossible for the Court, whose duty it is, equally as upon a question of reasonable and probable cause arising in an action on the case, to determine as a point of law whether the by-law is reasonable or not efficiently to discharge its functions.

But in the case of a by-law in restraint of trade passed by a municipal corporation there is this difference to be considered, namely, that whereas any individual has power to enter into any contract affecting his own interests and trade not contravening the rules of law applicable to such a contract, no municipal or other corporation incorporated by Act of Parliament can have any power whatever to pass a by-law in restraint of trade, partial or otherwise, unless specially empowered so to do by suitable language in that behalf in an Act of Parliament. And in construing an Act of Parliament relied upon as conferring the power, we must look to the purposes for which the corporation was created and gather the intent of the legislature as to conferring power to make a by-law of the character of the particular one under consideration from a consideration of all clauses of the Act affecting the subject, and not of one isolated clause only. And in so doing we must enquire and consider whether the by-law under consideration does relate to and advance any, and, if any, what purpose for which the corporation was created.

Thus in the Calder Navigation Co. *v.* Pilling, 14 M. & W., 76, a question arose as to the validity of a by-law passed by the Navigation Company which enacted that the navigation should be closed on every Sunday throughout the year, and that no business should be transacted thereon during such time (works of necessity only excepted), nor should any person during such time navigate any boat, &c., nor should any boat, &c., pass along any part of the said navigation on any Sunday except for a reasonable distance for the purpose of mooring the same, and except on some extraordinary necessity, or for the purpose of going to or returning from any place of divine worship under a penalty of £5.

Alderson B. pronouncing judgment, says :—

" The only question in this case is whether this by-law be good or not. For " the purpose of determining that we must look to the powers to make by-laws

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" given by the Legislature to this Company, in order to see whether this by-law " is within the scope of their authority or whether it does not relate to matters " which ought to be left to the general law of the land, by which the general con- " duct of the Queen's subjects is regulated. The power of making by-laws is " conferred upon the company by a local act by which it is enacted that the " company shall have power and authority to make such new rules, by-laws and " constitutions for the good government of the said company and for the good " and orderly using the said navigation and all warehouses, wharfs, passages, " locks and other things that shall be made for the same, and of and concerning " all such vessels, goods and commodities, as shall be navigated and conveyed " thereon, and also for the well governing of the bargemen, watermen and boat- " men who shall carry any goods, wares or merchandise upon any part of the " said navigation. Now looking at these words it appears to me that all the " power which the Legislature intended to give this company with respect to " making laws for the government of this navigation, was solely for the orderly " use of the navigation, that is to say, to regulate in what manner and order, " the navigation should be used so as to secure to the public the greatest " convenience in the use of it."

And Rolf B. in his judgment says: (p. 89).

" The Legislature says to the company You may make by-laws for the " good and orderly navigation of the canal and for the government of the boat- " men and bargemen connected with it, that is to say in order that the navi- " gation may be used with the utmost degree of convenience to every person. " Now the only point which occurred to me was this, whether on a state of facts " properly alleged, a by-law like this might not under peculiar circumstances be " held good. Suppose for instance the company were to come to the conclusion " that in order to secure a due supply of water in the canal, it was necessary to " have no navigation on it during one day out of seven, perhaps they would have " power to close the canal for one day out of seven in order to make the naviga- " tion good during the other six, and in that case to say If this must be done, we " will take Sunday as the fittest day." The by-law was held to be wholly *ultra vires* of the Corporation, Chief Justices Pollock and Platt, B., concurring.

Now it is here to be observed that for the purpose of construing the language used by the Legislature as to conferring power upon the company to pass by-laws for the good government of the company and for the well governing of the bargemen, watermen, and boatmen and of and concerning the vessels, &c. that should be navigated thereon; and in order to arrive at the true intent of the Legislature as to the powers conferred by such language the Court has regard to the purpose for which the corporation was created, namely, for the good and orderly navigation of the canal.

Then there are three cases of by-laws of municipal corporations incorporated by the English Municipal Corporation Acts, viz.: Everett *vs.* Grapes, 3 L.T.N.S. 669 wherein a by-law was passed by the town council of the Borough of Newport in the Isle of Wight in conformity with all the formalities prescribed by 5th and 6th William IV., ch. 76, and duly allowed under the provisions of the statute in that behalf by Her Majesty in Council was in the following terms:—

" Any person who shall keep or suffer to be kept any swine within the said

" borough from the 1st day of May to the 31st of October inclusive, in any year, " shall for every such offence forfeit and pay the sum of 5*s.*, and the further " sum of 2*s.* 6*d.* for every day the same shall continue."

The section of the Act 5 and 6 Wm. 4 ch. 76 sec. 90 in virtue of which the by-law was passed enacted that " It shall be lawful for the council of any borough " to make such by-laws as to them shall seem meet for the good government of the " borough and for the prevention and suppression of all such nuisances as are not " already punishable in a summary manner by virtue of any Act in force through- " out such borough, and to appoint by such by-laws such fines as they shall deem " necessary for the prevention and suppression of such offences." Upon a conviction under that by-law it was set aside upon the ground that the by-law was *ultra vires* of the corporation to pass. The contention in support of the by-law was that it was not in restraint of but merely in regulation of trade but the Court held the by-law void as in restraint of trade holding that all by-laws which restrict the common law right of trading always had the qualification annexed (to be good) that the trade is conducted so as to be a nuisance.

So in Johnson *vs.* Mayor of Croydon 16 Q.B. Div. 708 whereby a by-law passed by the town council of the borough of Croydon under the power conferred by 45 & 46 Vic. ch. 50 sec. 23 which is identical in its terms with sec. 90 of 5th & 6th Wm. 4 ch. 76 it was enacted that no person not being a member of Her Majesty's army of auxiliary forces acting under the commands of his commanding officers should sound or play upon any musical instrument in any of the streets of the borough on Sunday and after a conviction had under this by-law it was held to be void as unreasonable and *ultra vires* as it made playing a musical instrument an offence whether it caused a nuisance or annoyed anybody or not.

So likewise in Munro *vs.* Watson 57 Law Times 366 where a by-law was passed by the town council of the Borough of Ryde under the authority of section 90 of 5th & 6th Wm. 4, ch. 76, whereby it was enacted that every person who in any street shall sound or play upon any musical or noisy instrument, or shall sing, recite or preach in any street without having previously obtained a license in writing from the mayor, and every person who, having obtained such license, should fail to observe, or should act contrary to any of the conditions of such license, should forfeit and pay a sum not exceeding twenty shillings nor less than one shilling. It was held that this by-law was *ultra vires* of the town council to pass, as it professed to suppress what, unless done in such a manner as to constitute a nuisance was upon the principles of the common law perfectly lawful.

These cases seem to establish the principle that the municipal corporations in England created by Act of Parliament although being vested with most ample powers to pass all by-laws necessary for the good government of the municipality have no authority to pass a by-law in restraint of the performance of any act by the inhabitants which is in itself lawful at common law unless it be so done as to create a nuisance or to impose any restraint partial or otherwise upon the exercise of any trade unless either the trade restrained be in itself a nuisance or that not being in itself a nuisance is made a nuisance by the manner in which it is carried on ; it only remains therefore to consider whether the

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Municipal Institutions Act of Ontario Ch. 184 of the revised statutes gives authority to the Council of the Municipality of the City of Toronto to pass the sub-section of the by-law now under consideration. The 283 section of the Act invest the council with the most ample power to pass all such by-laws or regulations as the good of the inhabitants of the municipality requires. The 285 section enacts that in all cases where the council are authorised by the Act or by any other Act to pass by-laws for licensing any trade, calling, &c. &c. or the persons carrying on or engaged in any such trade calling &c. they shall have power to pass by-laws for fixing the sum to be paid for such license and enforcing the payment thereof; by sec. 489 sub-sec. 41 they are empowered to pass by-laws for preventing and abating public nuisances and by sec. 495 which is the only section which has been appealed to by the respondents in support of the sub-sections of the by-law under consideration which are impugned they are empowered to pass by-laws for the following purposes among others;—

Section 495 sub-sec. 2, " For licensing, regulating and governing auctioneers " and other persons, selling and putting up for sale goods, wares, merchandise or " effects by public auction and for fixing the sum to be paid for every such license " and the time it shall be in force."

Sub-section 3, " For licensing, regulating and governing hawkers or petty " chapmen and other persons carrying on petty trades or who go from place to " place or to other men's houses on foot or with any animal bearing or drawing " any goods, wares or merchandise for sale or in or with any boat, vessel or other " craft or otherwise carrying goods wares or merchandise for sale and for fixing the " sum to be paid for a license for exercising such calling within the county, " city, &c., and the time the license shall be in force. Provided always that " no such license shall be required for hawking, peddling, or selling from " any vehicle or other conveyance any goods, wares or merchandise to any retail " dealer or for hawking or peddling any goods wares or merchandise the growth, " produce or manufacture of this province, not being liquors, etc. etc. If the " same are being hawked or peddled by the manufacturer or producer of such " goods, wares or merchandise or by his *bonâ fide* servants or employees having " written authority in that behalf; and provided also that nothing herein con- " tained shall affect the powers of any council to pass by-laws under the provision " of section 496 of this Act."

Now the only clause of this section 496 which can be said to come within this proviso are sub-sections 27 & 36 of the section 496 by which the council of every city, etc. etc. are empowered to pass by-laws.

" Sub-section 27 for regulating or preventing the incumbering, injuring or " fouling by animals, vehicles, vessels or other means of any road, street, square, " alley, lane, bridge or other communication."

Sub-section 36 " For regulating the conveyance of traffic in the public " streets and the width of the tires of wheels of all vehicles used for the convey- " ance of articles of burden, goods, wares, or merchandise and for prohibiting " heavy traffic and the driving of cattle, sheep, pigs, and other animals in " certain public streets named in the by-law."

The plain and indeed the only meaning which can be given to the second proviso to the third sub-sec. of sec. 495 of the Act is that nothing contained

in the immediately preceding proviso to the same sub-section recognising and affirming and confirming the common law right of all persons to hawk, peddle and sell from any vehicle and other conveyance goods, wares and merchandise to any retail dealer within the limits of the city, and the right of all manufacturers and producers of goods manufactured and produced by them within the province to hawk and peddle such goods within the City of Toronto without any license for that purpose from the city should be construed to interfere in any respect with the right of the city council to pass by-laws in respect of the matters contained in sub-sections 27 and 36 of sec. 496. All the persons named in the first proviso of sec. 495 are, if the sub-section 2A of sec. 12 of the by-law under consideration be good, deprived of their right to carry on within the prohibited streets constituting a very large portion of the City of Toronto those trades and callings, their right to carry on which in the entire city is recognised, affirmed and confirmed to them by the proviso. To hold the by-law to be valid as affecting those persons would be to enable the council of the city by a by-law to override and nullify rights confirmed by the Act and by the very section of the Act which is appealed to by the corporation as its authority for making the enactment in the by-law under consideration. As to those persons, therefore, who are named in the first proviso to sub-sec. 3 of sec. 495, as being entitled to carry on the business of hawkers &c, without a licence, the impugned sub-sec. 2A of sec. 12 of the by-law is clearly *ultra vires* and invalid. But it is equally so in my opinion, as affecting hawkers, peddlers and petty chapmen requiring licenses to pursue their calling. For 1st. It is to be observed that the power to pass by-laws "for licensing, regulating and governing" hawkers, petty chapmen etc. is given in precisely the same language as is used in the previous sub-section, empowering the councils to pass by-laws "for licensing, regulating "and governing auctioneers and other persons putting up goods for sale by "auction."

While all are subject to by-laws passed by the council of the municipality to prevent nuisances all, that is to say, auctioneers, hawkers, and petty chapmen as to any power in the muncipal councils to impose any restraint upon them partial or otherwise in the exercise of their respective callings, are placed precisely on the same footing, so that if the enactment in sub-section 2A of section 12 of the by-law under consideration were made in relation to auctioneers, and as so made should be unreasonable or *ultra vires* and invalid, it must be equally so as respects hawkers and petty chapmen, and I must say it seems to me impossible to conceive any reason whatever sufficient to support a by-law imposing such a restraint upon the business of auctioneers.

2ndly. From several sections in the Act, it is apparent that the Legislature recognized the great difference which (as said by Harrison C.J. in Regina *vs.* Johnston 38 U.C. 551) exists between the regulation and the prohibition or prevention of a trade; and from the language of those sections it is apparent that the Legislature, by the authority conferred upon municipal councils to pass by-laws "for licensing, regulating and governing" persons engaged in carrying on the trades of auctioneers, hawkers, peddlers and petty chapmen never intended to authorise by-laws imposing such restraint upon any of them in the exercise of

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their respective trades as is purported to be imposed by the impugned sub-section 2A of section 12 of the by-law under consideration.

This sub.-sec. 3 of sect. 503 which authorizes municipal councils to pass by-laws for establishing markets expressly enacts that they may pass by-laws "for "preventing or regulating the sale by retail in the public streets or vacant lots "adjacent to the market of any meat, vegetables, grain, hay, fruit, beverages, "small ware and other articles offered for sale," and by sub.-sec. 4 also "for "preventing vendors of small wares, that is to say, petty chapmen, from practising "their callings in the market place, or in the public streets and vacant lots "adjacent to the market."

Now if the impugned sub-section 2A, of sec. 12 of the by-law under consideration be good, this special provision in sec. 503 for prevention of sales in certain cases and in particular streets adjacent to the markets would have been wholly unnecessary. Indeed the power of prevention here given being specially confined to streets in the neighbourhood of markets affords the strongest possible argument that the right asserted over the numerous streets mentioned in the impugned sub-section 2A of sec. 12 is not conferred upon the plain principle that *expressio unius est exclusie alterius.* So likewise, by sec. 489, councils are authorised to pass by-laws, by sub-section 25, "for preventing and regulating" and licensing exhibitions of waxworks, menageries, &c. &c. and by sub-section 44, "for preventing or regulating" the erection or continuance of slaughter houses gasworks, tanneries, distilleries or other manufactories or trades which may prove to be nuisances, and by sub-section 45 "preventing or regulating" the keeping of cows, goats, pigs and other animals and defining limits within which the same may be kept; and by sub-section 46 "for regulating or preventing" the ringing of bells, blowing of horns, shouting and other unusual noises or noises calculated to disturb the inhabitants; and so likewise by section 496 sub-sec. 3 "for preventing or regulating" the firing of guns or other firearms, and the firing or setting off of fireballs, squibs, crackers, or fireworks, and for preventing charivaries and other like disturbances of the peace; and by sub-section 13 "for preventing or regulating" the use of fire or lights in stables, cabinet maker's shops, carpenter shops, and combustible places, and by sub-section 14 "for preventing or regulating "the carrying on" of manufactories or trades dangerous in causing or promoting fire.

Now that the enactment under consideration in the said sub-section 2A of sec. 12 is not an enactment for the prevention of any nuisance cannot admit of a doubt, for it prohibits absolutely all hawkers and petty chapmen from carrying on their trades in any of the streets named, even though in the most orderly and unexceptionable manner possible; neither can it admit of a doubt that it is an enactment which imposes restraint upon the exercise of the trade or calling of hawkers, petty chapmen &c. nor are they the only persons prejudiced by such restraint, but the retail dealers also in the prohibited streets who have a right to look to hawkers and petty chapmen for such supplies as they think fit to buy from them, a right expressly secured to them by this ch. 184 sec. 495 itself, but householders also, especially of the poorer class, who more than the rich classes are accustomed to look to hawkers and petty chapmen to supply their wants, and who might be much prejudiced by being prevented from so supplying themselves with

vegetables, fruits and such like perishable articles and with other articles of prime necessity such as coal oil and the services of itinerant menders of kettles, tubs and other household goods, and for this prejudice to all these persons, no reason whatever is suggested unless it be the reason given by the corporation under the item number 5 of their printed reasons in support of their power to make the enactment in question viz.: that "permanent shopkeepers who pay taxes on real "property and who are supposed to have more stake in the community are "favoured in law as against peddlers because they are of more "use to trade and the community," and in support of this as a sufficient reason in support of the enactment, we are referred to Burns Justice of the Peace p. 952 where no doubt it is said that "the trade carried "on by persons keeping fixed establishments is, generally speaking, much more "beneficial to the State than that of itinerant hawkers and pedlars; the character "of the local trader is better known and therefore there is greater security for "the respectability of his dealing. He contributes also by the numbers of "persons he employs and the taxes he pays much more than the itinerant "trade to promote the wealth and increase the property* of the country. "Hence has arisen the expediency of framing laws which may operate as a "restraint upon itinerant traders may diminish their numbers, and while they "prevent any illegal practices, may by obliging such persons to take out "licenses and to submit to certain other regulations, be productive of revenue "and profit." Granting all this to be true, they are still entitled to the protection of the law in carrying on their humble trade equally as all other traders, so long as they comply with the law. And the question simply is, as it was in the Calder Navigation Co. *vs.* Pilling 14 M. & W., and in all other cases wherein a question as to the validity of a by-law has arisen, namely, whether the particular enactment which is questioned is within the authority conferred upon the municipal council of the City of Toronto by the ch. 184 of the revised Statutes of Ontario or whether the subject matter with which the enactment in question assumes to deal is not a matter which ought to be left—and which doth by law appertain to—the general law of the land by which the general conduct of the Queen's subjects is regulated? And the answer to this question in my opinion must be that the municipal council of the City of Toronto had no authority whatever to enact the matter contained in sub-sec. 2A of sec. 12 of the by-law under consideration and upon the principle involved in all cases above cited, and upon a true construction of ch. 184 of the revised Statutes of Ontario, that subsection is unreasonable, *ultra vires* and invalid.

* *Sic.*

The cases of Barclay *vs.* Darlington, 12 U.C. 86, Davis *vs.* Municipality of Clifton, 8 U.C. C.P. 238, Regina *vs.* Johnston, 38 U.C. 551, and Brodie *vs.* Bowmanville, 38 U.C. 580, are cases in the Upper Canada and Ontario Courts which support the view I have taken. The observation of the late Chief Justice Wilson *in re* Kiely 13 Ont. Rep. 451 that the power to regulate livery stables confers the power to declare in what locality or localities they shall be allowed, is merely a dictum of that learned judge. That the power to regulate will include a power to prohibit livery stables being kept in places where or in a manner in which they would be nuisances may be admitted, but the question whether the power to regulate would confer the power to prohibit any livery stable being

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kept in any of the streets named in the sub-section of the by-law under consideration and within which hawkers and petty chapmen are prohibited from pursuing their callings, is a question which I cannot think was present to the learned judge's mind, when he gave expression to the dictum in question. Such a question must be determined by reference to the same authorities as I have cited in connection with the language and intent of the Legislature in passing the Ch. 184 R.S.O. with which I have dealt.

Now as to the sub-section 2A of sec. 43, the by-law as affects the point now under consideration in short substance reads as follows:—

Sec. 12. Licenses must be taken out by all hawkers, petty chapmen, &c., except that no license shall be required 1st for hawking or selling from any vehicle goods wares or merchandise to any retail dealer, nor 2nd from any peddler of fish, farm and garden produce, tinker, cooper, &c., &c., then sec. 43 says:—

" There shall be levied and collected from the applicant for every license " granted for any object or business in this by-law specified, as requiring a " license, a license fee as follows: Sub-section 2. For a license to anyone following " the calling of a hawker, peddler or petty chapman with (1) a two-horse vehicle " $40.00 (2) with a one-horse vehicle $30. (3) On a street corner or other place " where permission is given therefor other than in a house or shop $15.00; (4) " On foot with a hand barrel or wagon pushed or drawn $7.50 (5) With a creel " or large basket crate $2.50; Sub-sec. 2A. Provided that the annual fee for a " fish hawker or peddler shall be (1) with a horse, mule or other animal and " vehicle $10.00; or (2) on foot $2.50."

Now the words "goods, wares and merchandise" in the first exception which all hawkers, &c., &c., are at liberty to hawk and sell from vehicles to retail dealers without requiring a license are sufficiently large to include fish. But these persons, it is admitted by the Corporation are not required to pay the fee of $10.00 prescribed by sub-sec. 2A of sec. 43 to be paid by hawkers of fish with a horse and vehicle, because that the by-law in its 43 sec. enacts that license fees shall be paid only by the persons who are by the by-law required to take out licenses; and as the above persons named in the first exception in sub-sec. 2 of sec. 12 are not required by the by-law to take out licenses, the sub-sec. 2A of sec. 43, cannot apply to them. But for the same reason and upon the same principle, as by the second exception in the same sub-sec. 2 of sec. 12, the by-law enacts that hawkers and peddlers of fish, shall not be required to take out a license, the sub-sec. 2A of sec. 43 cannot apply to them and further it is to be observed that by sub-sec. 2 of sec. 43, all persons hawking, peddling, &c. have to pay specified sums differing according to the manner in which they carry on business.

I find it difficult to concur in this mode of construing an instrument to which over the persons it affects the same force is given as to an Act of Parliament and which, therefore, should be framed with some care and accuracy of expression as certainly as to the persons to be affected by it, especially in cases where restrictions and burthens are imposed upon the people in the exercise of their common law rights, and the pursuit of their lawful trades and callings, and as the sub-section in question purports to deprive persons of rights which they already possessed, it should be read strictly.

I think, therefore, that this sub-sec. cannot be read and construed as suggested, but that it should be pronounced to be *ultra vires* and void, as purporting to impose a burden upon peddlers of fish to pay a fee to entitle them to pursue while they are by the by-law with a two-horse vehicle required to pay $40.00 and with a one-horse vehicle $30.00, and on foot with a crate or basket $2.50, so that the persons respectively paying the said sums of $30.00 and $2.50 had by the provisions of sub-sec. 2 of sec. 43 a perfect right to sell fish without being obliged to pay any further fee.

Now the contention is that sub-sec. 2A of sec. 43 being subsequent in order to sub-sec. 2 of sec. 12 and sub-sec. 2 of sec. 43 although in the same by-law, must be read, not only as repealing the exception of peddlers of fish from sub-sec. 2 of sec. 12, but further, as enacting that the persons licensed as hawkers and petty chapmen, under sub-sec. 2 of sec. 43 and paying the fees there provided shall not be entitled to hawk and sell fish unless by paying the additional sum required by and specified in sub-sec. 2A of the sec. 43 exempted from requiring a license for that purpose and because if such license were required, the fee prescribed by sub-sec. 2 of sec. 43 covers the right to hawk fish as well as all other articles.

The appeal, therefore, must, in my opinion, be allowed with costs, and an order be directed to be issued for quashing the two sub-secs., namely sub-sec. 2A of sec. 12, and sub-sec. 2A of sec. 43 of the by-law under consideration, viz., the by-law of the City of Toronto Number 2,453 as amended.

Certified a true copy.

C. H. MASTERS,
Asst. Rep. S.C.C.

D.

No. 24. Order of Supreme Court of Canada, dated 20th Feb., 1894.

In the Supreme Court of Canada.

Tuesday, the twentieth day of February, A.D. 1894.

Present:—

The Honourable Mr. Justice Fournier.
" Mr. Justice Taschereau.
" Mr. Justice Gwynne.
" Mr. Justice Sedgwick.
" Mr. Justice King.

In the matter of

William Virgo . . . . . *Appellant,*

and

The Municipal Corporation of the City of Toronto . . . *Respondents.*

The appeal of the above-named Appellant from the judgment of the Court of Appeal for Ontario pronounced in the above cause on the ninth day of May in

RECORD.

No. 24. Order of Supreme Court of Canada, dated 20th Feb., 1894 —*continued.*

the year of our Lord one thousand eight hundred and ninety-three affirming the judgment of the Honourable Sir Thomas Galt, Knight, Chief Justice of the Common Pleas Division of the High Court of Justice for Ontario, rendered in the said cause on the seventeenth day of September in the year of our Lord one thousand eight hundred and ninety-two, having come on to be heard before this Court on Thursday and Friday the second and third days of November in the year of our Lord one thousand eight hundred and ninety-three, in the presence of counsel as well for the Appellant as for the Respondents, whereupon and upon hearing what was alleged by counsel aforesaid this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment,

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was allowed, that the said judgment of the Court of Appeal for Ontario, and the said judgment of the Honourable Chief Justice Galt should be and the same were respectively reversed and set aside, in so far as the judgments dismissed an application to quash that portion of by-law number 2,934 of the said corporation which is designated thereby as sub-section 2A of section 12, in amendment of section 12 of by-law number 2,453 of said corporation, and in so far as the said judgments respectively ordered payment of costs by the said Appellant to the said Respondents.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said portion of said by-law number 2,934 of the said corporation which is designated thereby as sub-section 2A of section 12 in amendment of section 12 of by-law number 2,453 of said corporation should be and the same was quashed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said judgment of the Court of Appeal for Ontario and the said judgment of the Honourable Chief Justice Galt in so far as they respectively sustained that portion of said by-law number 2,934 designated thereby as sub-section 2A of section 43 in amendment of section 43 of said by-law number 2,453 should be and the same were respectively affirmed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said Respondents should and do pay to the said Appellant the costs incurred by the said Appellant as well in the said Court of Appeal for Ontario and on the application before the said the Honourable Chief Justice Sir Thomas Galt as in this Court.

No. 25. Registrar's Certificate, dated 24th April, 1894.

In the Supreme Court of Canada.

In the matter of

William Virgo . . . . . *Appellant,*

and

The Municipal Corporation of the City of Toronto . . . *Respondents.*

I, Robert Cassels, Registrar of the Supreme Court of Canada, hereby certify that the printed document annexed hereto, marked A, is a true copy of the original case, filed in my office in the above appeal, that the printed documents

No. 25.
Registrar's Certificate, dated 24th April, 1894
—*continued*

also annexed hereto, marked B and C, are true copies of the factums of the Appellant and Respondents respectively deposited in said appeal, and that the document marked D also annexed hereto is a true copy of the formal judgment of this Court in said appeal; and I further certify that the document marked E, also annexed hereto is a copy of the reasons for judgment delivered by the judges of this Court when rendering judgment, as certified by C. H. Masters, Esquire, the assistant reporter of this Court.

ROBERT CASSELS,
Registrar.

Dated at Ottawa this 24th day of April, A.D. 1894.

Appellants Copy

In the Priby Council.

No. 50 of 1894.

On Appeal from the Supreme Court o
Canada.

BETWEEN

THE MUNICIPAL CORPORATION
OF THE CITY OF TORONTO *Appellan*

AND

WILLIAM VIRGO . . . . *Respond*

RECORD OF PROCEEDINGS.

FRESHFIELDS & WILLIAMS,
5, Bank Buildings, E.C.,
for Appellan

POOLE & ROBINSON,
15, Union Court, Old Broad Street,
for Respond