

1880 HENRI JONAS.....APPELLANT ;
*Oct. 27, 28. AND
 1881 HUMPHREY T. GILBERT.....RESPONDENT.
*Feb'y. 11. ON APPEAL FROM THE SUPREME COURT OF NEW
 BRUNSWICK.

By-law—Power to impose License Tax—Discrimination between residents and non-residents—33 Vic., c. 4 (N. B.).

J. brought an action against *G.*, the Police Magistrate of the city of *St. John*, for wrongfully causing the plaintiff, a commercial traveller, to be arrested and imprisoned on a warrant issued on a conviction by the Police Magistrate, for violation of a by-law made by the common council of the city of *St. John*, under an alleged authority conferred on that body by 33 *Vic.*, c. 4, passed by the Legislature of *New Brunswick*. Sec. 3 of the Act author-

*PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

ized the mayor of the city of *St. John* to license persons to use any art, trade, &c., within the city of *St. John*, on payment of such sum or sums as may from time to time be fixed and determined by the common council of *St. John*, &c.; and sec. 4 empowered the mayor, &c., by any *by-law* or *ordinance*, to fix and determine what sum or sums of money should be from time to time paid for license to use any art, trade, occupation, &c.; and to declare how fees should be recoverable; and to impose penalties for any breach of the same, &c. The *by-law* or *ordinance* in question discriminated between resident and non-resident merchants, traders, &c., by imposing a license tax of \$20 on the former and \$40 on the latter.

Held,—That assuming the Act 33 *Vic.*, c. 4, to be *intra vires* of the Legislature of *New Brunswick*, the *by-law* made under it was invalid, because the act in question gave no power to the common council of *St. John*, of discrimination between residents and non-residents, such as they had exercised in this *by-law*.

APPEAL from a judgment of the Supreme Court of *New Brunswick*, whereby judgment was given for the Defendant (respondent).

William Sandall, as Chamberlain of the City of *Saint John*, *New Brunswick*, made a complaint to *Humphrey T. Gilbert*, the Police Magistrate of the City of *Saint John*, that *Henri Jonas*, who was not a free citizen of the said City or a registered freeman, or paying rates or taxes in the said City, did, at the City of *Saint John*, on the seventeenth day of June, in the year of our Lord one thousand eight hundred and seventy-nine, engage in mercantile business by selling or offering for sale goods to persons in the City of *Saint John* without being duly licensed therefor, as provided by the ordinance of the Mayor, Aldermen and Commonalty of the City of *Saint John*.

That the said Police Magistrate, upon such complaint being made, on the eighteenth day of June, in the year of our Lord one thousand eight hundred and seventy-nine, issued a summons for the said *Henri Jonas* to appear before him, the said Police Magistrate, at the

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Police office in the City of *Saint John*, on the nineteenth day of June then next, to answer the said complaint, and shew cause, if any he had, why a fine of twenty dollars as provided in said by-law or ordinance, should not be imposed upon him for violating the said by-law.

That in pursuance of the said summons the said *Henri Jonas* attended, and on hearing the matter of the said complaint and the evidence adduced, the said *Henri Jonas* was adjudged to be guilty of violating the said by-law, and a fine of twenty dollars was imposed upon him; but the said *Henri Jonas* having no goods and chattels whereon to levy the said fine or penalty thus imposed, a warrant was issued by *Humphrey T. Gilbert*, the Police Magistrate, under which the said *Henri Jonas* was arrested and imprisoned, and he then paid the fine of twenty dollars.

Thereupon *Henri Jonas* brought an action against the said *Humphrey T. Gilbert* for such arrest and imprisonment; and to his declaration the defendant demurred, alleging that from the proceedings set out therein, namely, the complaint, summons, conviction and arrest, and the plaintiff having no goods and chattels whereon to levy the fine or penalty, the defendant was warranted in his proceedings, and the declaration disclosed no cause of action against the defendant as such Police Magistrate.

The plaintiff joined in demurrer, and contended that the Act of Assembly under which said by-law was made was *ultra vires* the Legislature, and also that the by-law or ordinance of the Mayor, &c., was void in law, and therefore the defendant acted without jurisdiction, and the proceedings could not be sustained.

In Trinity Term last, the Second Division of the Supreme Court, consisting of Judges *Weldon*, *Fisher* and

Wetmore, gave judgment for the defendant on the demurrer.

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The Acts of the Legislature of *New Brunswick* and the by-law or ordinance in dispute in this case are referred and set out at length in the judgment of Court hereinafter given.

As the Court held that it was not necessary to enter into the question raised whether the Act 33 Vic., ch. 4, *N. B.*, is or not *ultra vires* of the provincial Legislature, nor the question whether or not a commercial traveller is a person within the operation of the Act, the elaborate arguments of counsel on these points are omitted.

Mr. *Bethune*, Q. C., and Mr. *McLaren*, for appellant :

The Common Council have no power in reference to matters of trade to discriminate against non-residents ; if such Council has the power to compel persons doing business in the City of *Saint John* to take out a license they must take the same license fee payable by non-residents as by residents.

The charter gave no power to the Common Council to distinguish between residents and non-residents of the City as to the amount of fee to be paid for a license,—it simply restrained all but freemen from trading. And even if the Act 33 Vic. c. 4 gave power to the Common Council to put a license in the place of freedom, it gave the City Council no power to distinguish between residents and non-residents ; if the Act gave that power, it is claimed it was *ultra vires* the Local Legislature ; if it did not and the by-law of the City so discriminates, then the by-law is *ultra vires* the Common Council. Does this Act authorize the City Council to say, for example, residents can do business here by paying \$20 per year, non-residents by paying \$500 per year ? Is not this discrimination not contemplated by the Legislature ?

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Yet, this is the principle the City of *St. John* under its by-law seeks to enforce. If the Act 33 Vic. c. 4 had provided that residents and non-residents should be licensed instead of being made freemen, it might be said that to a certain extent it was relaxing the restraint, &c, but it says in effect that the Common Council may make a by-law putting as much heavier a license fee upon non-residents than upon residents as they please, whereby the power is given the Common Council to altogether prohibit non-residents from doing business in the City. A by-law must not go beyond the statute. *Hardcastle*, on Statutes (1), *Cooley* on Taxation (2). *Dillon*, on Municipal Corporations (3).

Dr. *Tuck*, Q. C., for respondent:—

The point is whether 33 Vic., c. 4 is constitutional, and not whether 33 Vic. c. 4 gave power to the Common Council of *St. John* to pass the by-law in question. However I will first answer the argument of my learned friends on this branch of the case. I admit that under the original charter, no power was given to tax wholesale dealers, but the object of 6 Vic., c. 35, was to enlarge the powers of the Council, in order to reach all traders. Then 33 Vic., c. 4, was passed, and under that Act I contend that *any body* doing business within the city of *St. John* may be taxed. Now if the General Assembly had power to pass 33 Vic., c. 4, then this Act gave to the Common Council of *St. John* the power to make this by-law. If the Act gives them power to tax, it gives them power to tax them \$20 or \$40, there is no restraint.

See *American Express Co. v. City of St. Joseph* (4); *Cooley*, on Taxation (5).

(1) P. 151.

(2) P. 14.

(3) S. 593.

(4) 27 American Rep. 383.

(5) Pp. 209, 408.

The judgment of the Court was delivered by
RITCHIE, C. J. :

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This was an action against the Police Magistrate of the city of *St. John* for wrongfully, as it is alleged, causing the plaintiff to be arrested and imprisoned on a warrant issued on a conviction by the Police Magistrate, for a violation of a by-law made by the mayor, aldermen and commonalty of the city of *St. John*, under an alleged authority conferred on that body by the 33 *Vic.*, c. 4, passed by the Legislature of *New Brunswick*, which Act plaintiff contends was *ultra vires* of the Legislature of *New Brunswick*, or if it had the legislative power to pass it, the by-law or ordinance made by the corporation of *St. John* was not justified or authorized by the said Act.

We do not think it necessary to enter into the question raised as to whether the Act 33 *Vic.*, c. 4, *N. B.*, is or not *ultra vires* of the provincial Legislature, nor the question whether or not a commercial traveller is a person within the operation of the Act, for we are of opinion that the by-law or ordinance made under it is invalid, and therefore conferred no power or jurisdiction on the Police Magistrate of *St. John* to convict and imprison for its violation.

By the charter of the city of *St. John*, dated the 18th May, 1775, confirmed by 24 *Geo. III*, c. 46, it was ordained "that no person whatever not being a free citizen of the said city shall at any time hereafter use any art, trade, mystery or occupation within the said city liberties and precincts thereof, or shall by himself, themselves, or others, sell or expose to sale, any manner of goods, wares, merchandizes, or commodities by retail in any house, shop, place, or standing within the said city, or the liberties, or the precincts thereof (save in the times of public fairs), &c." The charter likewise provided that none shall be made free, but natural-born

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subjects, or such as are naturalized or made denizens; blacks were excluded from the privilege of becoming free citizens, but it was ordained that the mayor might license them to reside and carry on business in the city. This charter was amended by 6 *Vic.*, c. 35, an Act for the amendment of the charter of the city of *St. John*, whereby it was enacted:—

Section 3. That it shall and may be lawful for the mayor of the said city, and he is hereby authorized to license persons being natural-born British subjects, or such as shall become naturalized or be made denizens, to use any art, trade, mystery or occupation, or carry on any business in merchandize, or otherwise, within the said city, on paying yearly such sum, not exceeding five pounds nor less than five shillings, to be fixed and determined by an ordinance of the corporation for the use of the mayor, aldermen and commonalty of the said city of *Saint John*, together with the fees of office; and be subject also to the payment of all other charges, taxes, rates or assessments as any freeman or other inhabitant of the said city may by law be liable to or chargeable with.

Section 4.—And be it enacted, That aliens, the subjects of any other country at peace with *Great Britain*, may be licensed by the mayor of the said city, to use any art, trade, mystery or occupation, or to carry on any business in merchandize or otherwise, within the said city, on paying annually for the use of the mayor, aldermen and commonalty of the said city, a sum not exceeding twenty-five pounds, nor less than five pounds, together with fees of office, to be regulated by ordinance of the corporation, and be subject also to the payment of all other charges, taxes, rates, or assessments as any freeman or other inhabitant of the said city, may by law, be liable to or chargeable with.

By an Act further in amendment of the charter of the city of *Saint John*, it was enacted: (1)

Section 3.—It shall and may be lawful for the mayor of the city of *Saint John* for the time being, or his deputy for the time being, and he is hereby authorized to license persons being natural-born British subjects, and also such persons as shall become naturalized or be made denizens, and also aliens the subjects of any country at peace with *Great Britain*, to use any art, trade, mystery or occupation, or to carry on or engage in any profession or mercantile or other busi-

ness or employment within the said city of *Saint John*, on payment of such sum and sums of money as may from time to time be fixed and determined by the common council of the city of *Saint John*; all such persons so licensed to be subject also to the payment of all other charges, taxes, rates or assessments, and be liable to such duties and obligations as freemen and other inhabitants of the said city are by law and the charter of said city liable to and chargeable with.

Section 4.—It shall and may be lawful for the mayor, aldermen and commonalty of the city of *Saint John*, in common council, and they are hereby authorized and empowered, by any by-law or ordinance to be from time to time made and ordained for that purpose, to fix and determine what sum and sums of money shall be from time to time paid to the use of the said mayor, aldermen and commonalty, for license to use any art, trade, mystery or occupation, or carry on or engage in any profession or mercantile, or other business or employment in the said city, and to establish such a scale of fees, and sums of money, and to declare how and to whom the same shall be payable, and how recoverable, and from time to time alter and vary the same, as the common council may determine; and also to impose such penalties and forfeitures for any breach of any such by-laws and ordinances as the common council may deem advisable.

Sec. 5. No person not being a free citizen of the said city, shall use any art, trade, mystery, or occupation in the said city, or carry on or engage in any profession or mercantile or other business or employment of any kind whatsoever in the said city, without being duly licensed thereto, as herein provided, under such penalty as may be prescribed in and by any by-law or ordinance of the said mayor, aldermen and commonalty, in common council to be from time to time made and ordained.

Under authority of this Act the mayor, aldermen and commonalty of the city of *Saint John*, did make and order the following by-law and ordinance, namely:

A law relating to persons not being free citizens doing business in the city of *Saint John*.

Be it ordained by the mayor, aldermen and commonalty of the city of *Saint John*, in common council convened, as follows:—

1. Whenever the mayor of the city of *Saint John*, or his deputy for the time being, acting under the authority of an Act of the General Assembly of the Province of *New Brunswick* passed in the thirty-third year of the Reign of Her Majesty *Queen Victoria*, c. 4, entitled "An Act in further amendment of the charter of the city of *Saint*

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John, shall grant a license to any natural-born British subject or person naturalized or made denizen, or to any alien the subject of a country at peace with *Great Britain*, to use any art, trade, mystery or occupation, or to carry on or engage in any profession or mercantile or other business or employment within the said city of *Saint John*; such person not having been assessed in the general assessment of city rates and taxes for the year then next preceding, the mayor or his deputy, as aforesaid, shall demand and receive from any and every such person to whom license shall be granted, as aforesaid, for the use of the mayor, aldermen and commonalty of the said city, the sum of money hereinafter mentioned and specified, according to the following scale, namely:—

Professional men, as barristers, attorneys, notaries, physicians, surgeons, practitioners in medicine or any art of healing, dentists, *if resident, twenty dollars (\$20). If transient persons, not having taken up a residence, forty dollars (\$40).*

Wholesale or retail merchants or dealers or traders, forwarding and commission merchants, lumber merchants or dealers, the agents of merchants or traders, express agents, general brokers, manufacturers, apothecaries, chemists and druggists, *if resident, twenty dollars (\$20). If transient persons, not having taken up a residence, forty dollars (\$40).*

Persons not having their principal place of business in this city, selling or offering for sale, goods, wares and merchandise of any description by sample card, or any other specimen, and the agents of all such persons, forty dollars (\$40).

Insurance agents, money brokers, money changers, exchange brokers, and the agents of all such persons, *if resident, \$20. If transient persons, not having taken up a residence, \$40.*

Persons engaged in manual labor, or hired or employed as workmen or servants to drive any hackney carriage, omnibus or vehicle used for hire, *if resident, \$7.50. If transient persons, not having taken up a residence, twenty dollars (\$20).*

Persons using any art, trade, mystery or occupation, or engaged in any profession, business or employment within the city, not coming under any of the before mentioned, *if resident, twenty dollars. If transient persons, not having taken up a residence, forty dollars (\$40.)*

All such payments to be made at the office of the chamberlain of the said city, and to be over and above all other charges, taxes, rates, or assessments which any inhabitant of the said city may by law be liable to or chargeable with, and also over and above any and all fees and sums of money payable for licenses which, under any statute of the Legislature or by-law of the city corporation, any person may be required to pay for carrying on any special business in the said city.

2. All such licenses granted under this law shall be issued under the common seal of the city, and shall be and continue for a term from the date of such license up to the first day of May next following, and shall expire on such first day of May in each year.

3. Any person, not being a free citizen of the said city of *Saint John*, registered as a freeman thereof, or not having been assessed in the general assessment for the city rates and taxes in and for the year next preceding, who shall at any time use any art, trade, mystery or occupation in the said city, or carry on or engage in any profession or mercantile or other business or employment in the said city of *Saint John* without having been duly licensed therefor, as provided by this law, under license existing and in force, shall forfeit and pay for each and every time he shall so act in contravention of this law, a penalty of twenty dollars, to be sued for, prosecuted and recovered in the name of the chamberlain of the said city for the time being, before the Police Magistrate or sitting Magistrate at the police office, as provided by law, to be paid and applied in manner and to the use directed by the charter of the city of *Saint John* and the laws in force relating to the local government of said city, and in every case on the adjudication of any such penalty and non-payment thereof, the same shall be levied by distress and sale of the goods and chattels of the person upon whom the penalty shall be imposed, and for want of goods and chattels whereon to levy, the person shall be committed to the common gaol of the city and county of *Saint John* for the term of ten days.

This Act, in my opinion, only contemplated and authorized the establishment of a uniform rate to be paid by persons to be licensed under it, to do business in the said city. I think this general power to tax by means of licenses involved the principle of equality and uniformity, and conferred no power to discriminate between residents and non-residents; that this is a principle inherent in a general power to tax; that a power to discriminate must be expressly authorized by law and cannot be inferred from general words such as are used in this statute; that a statute such as this must be construed strictly; and the intention of the legislature to confer this power of discrimination, must, I think, explicitly and distinctly, appear by clear and unambiguous words.

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Mr. *Cooley*, in his work on Constitutional Limitations (1), says :

The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations. It is presumed the legislature has granted in plain terms all it has intended to grant at all.

The legislature never could, I think, have intended that the corporation of *Saint John* should have the arbitrary power of burthening one man or one class of men in favor of another, whereby the one might possibly be enabled to carry on a prosperous business at the expense of the other, but must have contemplated that the burthen should be fairly and impartially borne, and the legislature must be assumed to have been quite alive to the distinction between a general uniform power and a power to discriminate, for by 6 *Vic.*, c. 38, which they were then altering, authority is given to discriminate between British subjects and aliens, which is entirely ignored in the 33 *Vic.* c. 4.

Unless the legislative authority otherwise ordains, everybody having property or doing business in the country is entitled to assume that taxation shall be fair and equal, and that no one class of individuals, or one species of property, shall be unequally or unduly assessed.

Uniformity and impartiality in the imposition of taxes may in many cases, we all know, be very difficult ; still, in construing Acts of Parliament imposing burthens of this description, I think 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 *Saint 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 favor, by the imposition of a license tax, one 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 favorable terms in the one case than the other.

I therefore think, if the legislature contemplated such a departure from uniformity and impartiality as is established by this by-law, such an intention would have been made apparent on the face of the Act and cannot be inferred, and, in the absence of any such declared intention, I think no power of discrimination such as they have exercised in this by-law has been conferred on the corporation of *Saint John*, and therefore the by-law, supposing the local legislature has the power of enacting the 33 *Vic.*, c. 4, is *ultra vires* of that Act, and therefore the defendant had no jurisdiction to act under it or to give it effect as he did.

*Appeal allowed with costs.*

Solicitors for appellant :— *W. Watson Allen.*

Solicitors for respondent :— *W. W. Tuck.*

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