WILLIAM VIRGO.....APPELLANT ; 1893

AND Nov. 2, 3.

THE MUNICIPAL CORPORATION OF THE CITY OF TORONTO..... } RESPONDENTS. 1894 *Feb. 20

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—By-laws—Power to license, regulate and govern trades—Prohibition of trading in certain streets—Ontario Municipal Act R. S. O. (1887) *c.* 184—*Repugnancy.*

The power given to municipal councils by sec. 495 (3) of the Ontario Municipal Act to pass by-laws for licensing, regulating and governing hawkers, etc., in their respective trades does not authorize the Toronto City Council to prohibit the carrying on of these trades in certain streets. Fournier and Taschereau JJ. dissenting.

A by-law of the City Council provided that no license should be required from any peddler of fish, farm and garden produce, fruit and coal oil, or other small articles that could be carried in the hand or in a small basket.

Held, affirming the decision of the Court of Appeal, Gwynne and Sedgewick JJ. dissenting, that a subsequent by-law fixing the amount of a license fee for fish hawkers and peddlers was not void for repugnancy.

APPEAL from a decision of the Court of Appeal fo Ontario (1), refusing to quash secs. 12 (2*a*) and 43 (2*a* of by-law no. 2934 of the City Council of Toronto.

The sections of the by-law and the grounds upon which the motion to quash was made sufficiently appear in the judgments of this court. Sec. 12 (2*a*) prohibited hawkers and petty chapmen from carrying on their business in certain specified streets in Toronto and was claimed to be in restraint of trade and not within the power of the council to pass under sec. 495 subsec. 3 of the Municipal Act. The other section

*PRESENT : Fournier, Taschereau, Gwynne, Sedgewick and King JJ

(1) 20 Ont. App. R. 435.

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attacked fixed the annual license fee of fish hawkers and peddlers who, it was claimed, were exempt from license by a former by-law, and was attacked on the ground of repugnancy. The motion to quash was made before Galt C.J. who held both sections valid and the Court of Appeal affirmed his decision.

DuVernet for the appellant. The Municipal Act only authorizes by-laws to license, regulate and govern. It must be construed strictly against the municipality. *Reg.* v. *Smith* (1); *In re Borthwick & Corporation of Ottawa* (2); *Reg.* v. *Dowling* (3).

Sec. 12 (2*a*) is in restraint of trade and therefore *ultra vires*. *Chaddock* v. *Day* (4); *Hughes* v. *Recorder's Court* (5).

And it is, in effect, prohibitory and void on that account. *In re Brodie & Corporation of Bowmanville* (6); *In re Barclay & Municipality of Darlington* (7); *Bannan* v. *City of Toronto* (8).

A trade lawful in itself cannot be prohibited on the ground of nuisance. *Davis* v. *Municipality of Clifton* (9); *Nash* v. *McCracken* (10); *Reg.* v. *Wood* (11); *Calder Navigation Co.* v. *Pilling* (12).

That the Council exceeded its powers, see also *Reg.* v. *Justices of Kings* (13); and that the by-law improperly discriminated in favour of shop-keepers *Reg.* v. *Pipe* (14); *Reg.* v. *Flory* (15).

Mowat for the respondents. Shop-keepers are favoured in law as against peddlers. Chitty on Commerial law (16).

(1) 4 O. R. 401.
(2) 9 O. R. 114.
(3) 5 All. (N.B.) 378.
(4) 75 Mich. 527.
(5) 75 Mich. 574.
(6) 38 U. C. Q. B. 580.
(7) 12 U. C. Q. B. 86.
(8) 22 O. R. 274.
(9) 8 U. C. C. P. 236.
(10) 33 U. C. Q. B. 181.
(11) 5 E. & B. 49.
(12) 14 M. & W. 76.
(13) 2 Pugs. (N.B.) 535.
(14) 1 O. R. 43.
(15) 17 O. R. 715.
(16) Vol. 2 p. 163.

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Confining a business to certain parts of the city is a regulation and not restraint of trade. *Maxim Nordenfelt Co.*, v. *Nordenfelt* (1).

And see *Simson* v. *Moss* (2).

FOURNIER J.—I am of opinion that the judgment of the court below should be affirmed.

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-laws impeached are 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.

GWYNNE J.—Upon the 13th day of January, 1890, the municipal council of the City of Toronto passed a by-law, designated as no. 2453, and intituled :

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 subsec. 2 of sec. 43 of the by-law no. 2453, and substituted another subsection in lieu thereof. By another by-law passed on the 26th day of October, 1891, the said municipal council further amended sec. 12, and the sec. 43 as amended by the said by-law of the 23rd June, 1890.

The sections 12 and 43 of the by-law no. 2453 as so amended, are as follows :—

(1) (1893) 1 Ch. 630. (2) 2 B. & Ad. 543.

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The municipal council of the city of Toronto enacts as follows :

Sec. 12. Licenses shall be taken out by :

Subsec. 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 or 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.

Subsec. 2a. No person named and specified in subsection 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 Westminster Street ; 7. Dundas Street, from Queen Street to St. Claren's Avenue ; 8. Wellington Street, from Church Street to York Street.

Sec. 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 :

Subsec. 2a. For a license to any one following the calling of a hawker, peddler or petty chapman, with a two-horse vehicle, $40 ; (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 ; (4) on foot, with a hand-barrow or wagon pushed or drawn, $7 ; (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.

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

Now it is to be observed that the above subsection 2*a* of said section 12 and subsection 2*a* of said section 43 were introduced into and made part of said by-law no. 2453 by the by-law passed upon the 26th of October 1891, while the subsection 2 of said section 43 was introduced into and made part of said by-law 2453 by the by-law passed on the 23rd day of June, 1890. It is objected to this by-law as thus amended that subsection 2*a* 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 unauthorized 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 2nd 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 subsection 2*a* 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.

Subsection 2*a* 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 section 2 of said section 43 enacts and

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declares that hawkers or 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 and 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.

In *Freemantle* v. *the Company of Silk Throwsters* (1) 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) 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

(1) 1 Lev. 229 [A.D. 1667]. (2) 2 Keb. 27 [A.D. 1666].

a city—for there any trade that might be a nuisance might be restrained.

Player v. *Vere* (1) 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. II. 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 should be allowed or permitted to work for hire within the city or the 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 car-room; and 20s. and no more or greater fine upon any admittance or alienation of a car-room, 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 afore-

(1) T. Raym. 288 and 324 A.D. 1678.

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said, 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 so 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) 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 the 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) 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 brewer's servant should be abroad in the streets with his dray or cart after 1 o'clock in the afternoon, between Michaelmas and Ladyday, and from thence after eleven in the forenoon, under the penalty of 20s., the court was of

(1) 1 Str. 675 A.D. 1726. (2) 2 Str. 1085.

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) 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* (2) it was held, following *Wannel* v. *The City of London* (3), that a by-law 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* (4), 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 chap. 3, and so the by-law was held to be good as a reasonable regulation of trade. This case simply decides that a

(1) 1 Burr. 13.
(2) 3 Burr. 1323.
(3) 1 Str. 675.
(4) Cowp. 269.

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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 *Chamberlain of the City of London* v. *Compton* (1) 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.

The case of *The Gunmakers Society of London* v. *Fell* (2), 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 handgun 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* v. *Reynolds* (3). 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* 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

(1) 7 D. & R. 597. (2) 1 Willes 384.
(3) 1 P. Wm. 181.

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.* v. *Nordenfelt* (1), the Court of Appeal in England review all the cases of contracts in any way in restrant of trade from *Mitchel* v. *Reynolds* (2) down to the present time, and show 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 (3):—

> In *Rousillon* v. *Rousillon* (4), 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 covenant 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.* v. *Lorsont* (5), and is in my opinion the doctrine to which modern authorities have been gradually approximating. But I cannot 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 a distinction between partial and general restraint of trade and the distinction cannot be ignored. But what is more important than nomenclature or classification 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 (6):

> General restraints or in other words restraints 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 to trade can

(1) [1893] 1 Ch. 630.
(2) 1 P. Wm. 181.
(3) P. 649.
(4) 14 Ch. D. 351.
(5) L. R. 9 Eq. 345.
(6) P. 662.

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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 Co.* v. *Fell*), unless it be made to appear 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* (1) 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, said:

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 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 conduct 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 boatmen 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 powers 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

(1) 14 M. & W. 76.

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navigation, that is to say, to regulate in what manner and order th navigation should be used so as to secure to the public the greatest convenience in the use of it.

And Rolfe B., in his judgment, says (1):

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 boatmen and bargemen connected with it, that is to say, in order that the navigation 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 navigation 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 Baron 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 had 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 corporations acts viz. *Everett* v. *Grapes* (2), wherein a by-law passed by the town council of the borough of New Port in the Isle of Wight in conformity with all the formalities prescribed by 5 & 6 Wm. IV., ch 76, and

(1) P. 89.

(2) 3 L. T. N. S. 669.

duly allowed under the provisions of the statute in that behalf by Her Majesty in Council, was in the following terms:—

Every person who shall keep or suffer to be kept any swine within the said borough from the 1st day of May to the 31st day of October inclusive, in any year, shall for every such offence forfeit and pay the sum of 5s. and the further sum of 2s. 6d. for every day the same shall continue.

The section of the act 5 & 6 Wm. IV., 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 throughout 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 have the qualification annexed (to be good) that the trade is conducted so as to be a nuisance.

So in *Johnson* v. *Mayor of Croydon* (1), where by a by-law passed by the town council of the borough of Croydon under the powers conferred by 45 & 46 Vic., ch. 50, sec. 23, which is identical in its terms with sec. 90 of 5 & 6 Wm. IV., ch. 76, it was enacted that no person not being a member of Her Majesty's army or 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-

(1) 16 Q. B. D. 708.

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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 any body, or not.

So likewise in *Munro* v. *Watson* (1), where a by-law was passed by the town council of the borough of Ryde, under the authority of sec. 90 of 5 & 6 Wm. IV., ch. 76, whereby it was enacted that every person who in any street should sound, or play upon, any musical or noisy, instrument, or should 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 invested 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 in itself is 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 Municipal Institutions Act of Ontario, ch. 184 of the

(1) 57 L. T. N.S. 366.

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Revised Statutes, gives authority to the council of the municipality of the city of Toronto to pass the subsections of the by-law now under consideration.

The 283rd section of the act invests 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 285th section enacts that in all cases where the councils are authorized 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 section 489, subsection 41, they are empowered to pass by-laws for preventing and abating public nuisances, and by section 495, which is the only section which has been appealed to by the respondents in support of the subsections of the by-law under consideration which are impugned, they are empowered to pass by-laws for the following purposes among others :—

Sec. 495, subsection 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.

Subsection 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 merchandize, the growth produce or manufacture of this province not being liquors, &c., &c., 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 on that behalf; and

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provided also that nothing herein contained shall affect the powers of any council to pass by-laws under the provisions of section 496 of this act.

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

Subsection 27. For regulating or preventing the encumbering, injuring or fouling by animals, vehicles, vessels or other means of any road, street, square, alley, lane, bridge or other communication.

Subsection 36. For regulating the conveyance of traffic in the public streets and the width of the tires and wheels of all vehicles used for the conveyance of articles of burden, goods, wares or merchandise and for prohibiting heavy traffic and the driving of cattle, sheep, pigs and other animals on 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 subsection of section 495 of the act is that nothing contained in the immediately preceding proviso to the same subsection, recognizing and affirming and confirming the common law right of all persons to hawk, peddle and sell from any vehicle or 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 therefor 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 subsections 27 and 36 of section 496. All the persons named in the first proviso of section 495 are, if the subsection 2*a* of section 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, their trades and callings, their right to carry on which in the entire city is recognized, 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 subsection 3 of section 495 as being entitled to carry on the business of hawkers, etc., without a license, the impugned subsection 2*a* of section 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 :

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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 subsection, 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 municipal 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 subsection 2*a* 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. 2nd. From several sections in the act it is apparent

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that the legislature recognized the great difference which (as said by Harrison C.J. in *Reg.* v. *Johnston*, (1)) 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 authorize by-laws imposing such restraint upon any of them, in the exercise of their respective trades, as is purported to be imposed by the impugned subsection 2*a* of section 12 of the by-law under consideration.

Thus subsection 3 of section 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 on 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 subsection 4 also for preventing vendors of small ware (that is to say petty chapmen), from practising their calling in the market place, or in the public streets and vacant lots adjacent to the market. Now if the impugned subsection 2*a* of section 12 of the by-law under consideration be good this special provision in section 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 subsection 2*a* of section 12 is not conferred upon the plain principle that *expressio unius est exclusio alterius*. So likewise by sec-

(1) 38 U.C.Q.B. 551.

tion 489 councils are authorized to pass by-laws by subsection 25, "for preventing or regulating" and licensing exhibitions of wax works, menageries, &c. &c., and by subsection 44 "for preventing or regulating" the erection or continuance of slaughter houses, gas works, tanneries, distilleries or other manufactories or trades which may prove to be nuisances, and by subsection 45 "for preventing or regulating" the keeping of cows, goats, pigs and other animals and defining limits within which the same may be kept, and by subsection 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 subsection 3 "for preventing or regulating" the firing of guns or other fire-arms and the firing or setting off of fire balls, squibs, crackers or fire works, and for preventing charivaries and other like disturbances of the peace, and by subsection 13 "for preventing or regulating" the use of fire or lights in stables, cabinet makers' shops, carpenters' shops and combustible places, and by subsection 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 subsection 2*a* of section 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

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fit to buy from them, a right expressly secured to them by this ch. 184 section 495 itself, but householders also especially of the poorer class who more than the richer 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 no. 5 of their printed reasons in support of their power to make the enactment in question, namely, 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 (1), 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 peddlers, the character of the local trader is better known, and therefore there is greater security for the respectability of his dealings. He contributes also by the number of persons he employs and the taxes he pays, much more than the itinerant trader, to promote the wealth and increase the prosperity 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 com-

(1) P. 952.

ply with the law. And the question simply is, as it was in *The Calder Navigation Company* v. *Pilling* (1), 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 chap. 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 subsection 2*a* of section 12 of the by-law under consideration, and upon the principle involved in all the cases above cited, and upon a true construction of chap. 184 of the Revised Statutes of Ontario that subsection is unreasonable, *ultra vires* and invalid. The cases of *Barclay* v. *Darlington* (2); *Davis* v. *Municipality of Clifton* (3); *Regina* v. *Johnston* (4); and *Brodie* v. *Bowmanville* (5), 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 *In re Kiely* (6), 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

(1) 14 M. & W. 76.
(2) 12 U.C.Q.B. 86.
(3) 8 U.C.C.P. 236.
(4) 38 U.C.Q.B. 551.
(5) 38 U.C.Q.B. 580.
(6) 13 O.R. 451.

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the power to prohibit any livery stable being kept in any of the streets named in the subsection of the by-law under consideration, and within which hawkers and petty chapmen are prohibited from pursuing their calling, 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 chap. 184 R.S.O., with which I have dealt.

Now as to subsection 2 (*a*) 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 merchandize to any retail dealer.—Nor 2nd from any peddler of fish, farm and garden produce, tinker, cooper, &c., &c., &c. Then sec. 43 say :—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 :—Subsection 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 $7.50 ; (5) with a creel or large basket crate $2.50.
>
> Subsection 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, 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 prescribed by subsec. 2 (*a*) of sec. 43 to be paid by hawkers of fish with a horse and vehicle, because that the by-

law in its 43rd 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 subsec. 2 of sec. 12, are not required by the by-law to take out licenses, the subsec. 2 (*a*) 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 subsec. 2 of sec. 12, the by-law enacts that hawkers and peddlers of fish shall not be required to take out a license, the subsec. 2 (*a*), of sec. 43 cannot apply to them, and further, it is to be observed that by subsec. 2 of sec. 43, all persons, hawking, peddling, &c., with a two-horse vehicle are required to pay $40, and with a one horse vehicle $30, and on foot with a crate or basket $2.50. So that the persons respectively paying the said sums of $30 and $2.50 had by the provisions of subsec. 2 of sec. 43 a perfect right to sell fish without being obliged to pay any further fee. Now the contention is that subsec. 2 (*a*) of sec. 43, being subsequent in order to subsec. 2 of sec. 12 and to subsec. 2 of sec. 43, although in the same by-law, must be read not only as repealing the exception of peddlers of fish from subsec. 2 of sect 12, but further as enacting that the persons licensed as hawkers and petty chapmen under subsec. 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 subsec. 2 (*a*) of the sec. 43. 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 passed with some care and accuracy of expression and certainty 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

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of their lawful trades and callings, and as the subsection in question purports to deprive persons of rights which they already possessed, it should be read strictly. I think, therefore, that this subsection 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 exempted from requiring a license for that purpose, and because if such license were required the fee prescribed by subsec. 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 subsections, namely, subsec. 2 (*a*) of sec. 12 and subsec 2 (*a*) of sec. 43, of the by-law under consideration, viz. the by-law of the city of Toronto, no. 2453 as amended.

SEDGEWICK J. concurred.

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 Ontario section 495 (3) empowers the council of any county, city and town separated from the county 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 and the time the license shall be in force. * * * Provided always that no such licenses 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 taverns 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 by-law no. 2453, passed by the municipal council of the corporation of the city of Toronto on 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 in or mending kettles, tubs, household goods or umbrellas, and persons going about and carrying with them proper materials for such mending.

On 26th October, 1891, a by-law no. 2934 was passed in amendment of the above by the addition of the following:—

No person named and specified in subsection 2 of this section—i. e. in the subsection already cited—(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.

Then follows an enumeration of streets and parts of streets which, it is said on argument, comprise 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 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.

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The legislature recognized 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 being 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 on 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 that this privilege of selling to any retail dealer without license is rendered in large degree nugatory (and 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, when 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 any one goods, etc., 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 any one in the large prohibited district of this by-law, or in 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 or 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 section 497 subsec. 9, but is general as to the goods, and absolute in its terms, and covers the whole period of each day and of 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 any one goods, their own produce or manufacture, in the only way in which they can so sell.

Under sec. 493 subsec. 1 authorizing 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* (1) it was held that in certain cases mere words of regulation may authorize 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 em-

(1) 13 App. Cas. 446.

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powered 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, etc., the effect of which was to destroy, without compensation, the private property of owners of burial places therein.

Lord Hobhouse says (1):

> It is difficult to see how the council can make efficient by-laws for such objects as preventing fires, preventing and regulating places of amusement, regulating the killing of cattle and 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 authorized 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 at least as this or like business 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

(1) P. 449.

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. *Gun-makers Co.* v. *Fell* (1); *Bosworth* v. *Hearne* (2). The securing of any public benefit which the council are authorized 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 fields of labour are seriously affected, and that so far the respondents have condescended to give no consideration of public benefit for it. It was put as if the council were not to be called on 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 section 503 subsecs. 3 and 4 authorized 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 wares 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 and vacant lots adjacent thereto," the restriction as to hawkers, etc., is limited to the market place, and public streets and vacant lots adjacent thereto. This not only does not authorize the by-

(1) Willes 389. (2) Str. 1085.

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law in question with its prohibition against selling on many other streets, but seems to show that it is *ultrâ vires*, for when the legislature would, as in this case, prevent hawkers selling on certain streets it does so in terms.

As to the other by-law complained of, no. 2934 (2*a*) in amendment of section 43 of no. 2453, as amended by no. 2717, I agree with the observations 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. The result, in my opinion, is that the judgment appealed from should be affirmed as to by-law no. 2453 sec. 12 (2*a*) but reversed as to by-law no. 2453 sec. 43 (2*a*).

Appeal allowed as to by-law no. 2453 *section* 12 (2*a*) *and affirmed as to section* 43 (2*a*).

Solicitors for appellant: *Du Vernet & Jones.*

Solicitor for respondents: *C. R. W. Biggar.*