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DAVID SEGAL (PLAINTIFF).....APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT)RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Prohibition—Writ—Municipal law—Recorder's Court—Jurisdiction—Canvassers—Licence—By-law—Ultra vires—Company having licence—Employee canvassing without licence—Arts. 50, 1003 C.C.P.

The appellant was employed by the Fuller Brush Company, of Hamilton, Ontario, to canvass in the city of Montreal for orders for his employer's goods. Section 29 of by-law 432 of the city of Montreal provides that "no person, corporation or firm shall do business * * * as * * * canvasser * * * without having previously obtained a licence * * *," such by-law having been passed under authority of the city's charter enacted by the provincial legislature. The appellant was brought before the Recorder's Court on a complaint that he was "unlawfully doing business * * * as a canvasser * * * without having previously obtained a licence * * *." The company itself had obtained from the city authorities a licence to canvass for the sale of its goods and that licence was in full force at the time proceedings were taken against the appellant. Upon judgment having been given against him and as no right of appeal existed by statute, the appellant petitioned the Superior Court for a writ of prohibition commanding the Recorder's Court and the city to discontinue all proceedings against him in the matter, on the grounds that the appellant did not come within section 29 of the by-law as he was

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

(1) [1931] A.C. 310, at 327.

merely an instrument by means of which the company was carrying on business under its licence and that the by-law was, moreover, illegal and *ultra vires* as being indirect taxation.

Held that the appellant was not entitled to the issue of a writ of prohibition, inasmuch as, the action before the Recorder's Court being for the enforcement of a by-law, that court had jurisdiction under article 484 of the city charter to determine the law involved, as well as the facts, in order to decide whether or not the appellant had committed a breach of such by-law. A writ of prohibition does not lie to review an erroneous judgment of a judge of an inferior court from which no right of appeal has been given by statute. The functions of the Superior Court, on an application for such a writ under article 1003 C.C.P. are not those of a court of appeal; the Superior Court has nothing to do with the merits of the dispute between the parties but is concerned only to see that the inferior court does not transgress the limits of its jurisdiction.

Held, also, that the by-law and the enabling statute were not *ultra vires.* Section 92 (9) of the B.N.A. Act gives the provincial legislature exclusive power to make laws in relation to "shop * * * and other licences in order to the raising of a revenue for provincial, local or municipal purposes," and the effect of the by-law was to provide additional revenue for the city of Montreal.

Held, also, per Duff, Newcombe, Rinfret and Lamont JJ., that the appellant was not doing business as canvasser within the meaning of the by-law and was under no obligation to take out a licence. Anglin C.J.C. expressed no formal opinion, although being disposed to concur with the majority of the court, if it had been proper to determine that matter.

Judgment of the Court of King's Bench (Q.R. 46 K.B. 375) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, de Lorimier J. (2), and dismissing the appellant's petition for a writ of prohibition.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

L. M. Gouin K.C. for the appellant.

G. Saint-Pierre K.C. for the respondent.

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Lamont and I agree in his conclusion that this appeal must be dismissed on the ground that the Recorder's Court had jurisdiction to determine the law involved, as well as the facts, in order

(1) (1929) Q.R. 46 K.B. 375.

(2) (1929) Q.R. 46 K.B. 375, at 377.

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to decide whether or not the appellant had committed a breach of the by-law in question.

As Mr. Justice Lamont says,

> In an action for the enforcement of a by-law (which this action clearly is) the Recorder, in my opinion, has jurisdiction—in fact it is his duty—to determine, not only all facts relevant to the case but also the meaning to be put on the by-law. How else can he try the action?

It is well settled law that a judge cannot give himself jurisdiction by wrongly finding as facts the existence of conditions essential to his jurisdiction. On the other hand, it is equally well settled that, where it is necessary for a judge to interpret a statute or by-law, in order to determine whether the facts established come within its purview, the interpretation of such statute or by-law, so far as may be necessary to his decision, is as much within his jurisdiction as is the finding of the relevant facts themselves.

In *The Queen* v. *Bolton* (1), it is said that

> The test of jurisdiction under this rule is, whether or not the justices had power to enter upon the enquiry, not whether their conclusions, in the course of it, were true or false—

and this applies equally whether the conclusion be one of law or fact. As was said by Riddell J.A., in *Township of Ameliasburg* v. *Pitcher* (2),

> * * * if it be necessary to interpret a statute simply to decide the rights of the parties, prohibition will not lie, however far astray the division court judge may go.

Here, the facts are either admitted or established beyond dispute; there is no controversy as to them. So, the only question for determination by the Recorder's Court was whether or not, upon the facts, the by-law in question, properly construed, covered the case. The determination of this question of law was as much a part of the duty of the Recorder, imposed on him by Art. 484 of the Charter of the city of Montreal, as would have been the determination of the facts themselves, if in dispute. The only matter open for consideration in such a case is whether or not the tribunal sought to be prohibited had the right to enter on the enquiry; and not at all, assuming such right, whether its conclusion was or was not correct.

By Art. 1003 of the Code of Civil Procedure it is provided that,

> The writ of prohibition lies whenever a court of inferior jurisdiction exceeds its jurisdiction.

(1) [1841] 1 Q.B. 66.

(2) (1906) 13 O.L.R. 417 at 420.

This particular article dealing with the writ of prohibition is exclusive of any general supervising jurisdiction of the Superior Court to be inferred from Art. 50, C.C.P. To hold otherwise would be to violate the well-known rule of legal interpretation, *Generalia specialibus non derogant.* As Mr. Justice Lamont says,

> Dealing with the question of prohibition, it is important to bear in mind that the functions of the Superior Court are in no sense those of a court of appeal. It has nothing to do with the merits between the parties; it is concerned only to see that the Recorder's Court does not transgress its jurisdiction.

If it were proper now to determine that matter, I would be disposed, as at present advised, to take the view of my brother Lamont in regard to the proper interpretation of by-law no. 432. I, however, confine my decision to the point that the defendant failed to establish want of jurisdiction in the Recorder's Court.

On the issues raised, as to the by-law being illegal, *ultra vires* and unconstitutional, I entirely agree with the views expressed by my brother Lamont.

The judgments of Duff, Newcombe, Rinfret and Lamont JJ. were delivered by

LAMONT J.—This is an appeal from the judgment of the Court of King's Bench (District of Montreal) reversing an order of the Superior Court by which the respondent (hereinafter called the " City ") and the Recorder's Court of the city of Montreal were enjoined from continuing proceedings in that court against the appellant. By a summons issued by the City the appellant was, on February 18, 1925, brought before the Recorder's Court on a complaint that he was, on February 9, 1925,

> unlawfully doing business within the city of Montreal as a canvasser in St. Matthew street without having previously obtained a licence from the said city and without having paid the city treasurer the sum of $100, contrary to the by-law of the said city in such case made and provided.

On being served with the summons the appellant, by his attorneys, wrote to the clerk of the Recorder's Court and claimed that the court was without jurisdiction to determine the complaint against him as the by-law under which he was sued was illegal, *ultra vires* and unconstitutional. The section of the by-law (no. 432), which the appellant was charged with having violated, in part reads as follows:—

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Sect. 29. No person, corporation or firm shall do business within the city of Montreal, as auctioneer, pawnbroker, junk or second-hand dealer, pedler, hawker, huckster, itinerent trader, public vendor, canvasser * * * without having previously obtained a licence from the city and without having paid to the City Treasurer the following sums or those which may be fixed by the civic by-laws:

(Canvassers) $100.00

Before the Recorder evidence was submitted by the City that on the day in question the appellant had gone from house to house soliciting orders for brushes and exhibiting samples which he carried with him, and that, when questioned, he had admitted that he did not have in his own name a licence from the city to canvass. On his part the appellant submitted evidence that he was an employee of the Fuller Brush Company, Limited, the head office of which was in Hamilton, Ontario; that the company was incorporated by Dominion letters patent and was authorized to carry on business throughout the Dominion of Canada by its

representatives, salesmen and agents going from house to house displaying samples, circulars and pictures of the goods manufactured by or being sold by the company and taking orders for such goods to be subsequently delivered;

that, on October 5, 1924, the company had obtained a licence to canvass in private houses in Montreal for the sale of its goods, and other articles, and that the licence was in full force and effect at the time proceedings were taken against him. He also put in evidence his contract of employment with the company which shewed that it was his contractual duty to go from one private house to another within the territory assigned to him and canvass for orders for his employer's goods; that his whole time belonged to the company; that he was entirely under its control and had contracted not to sell the merchandise of anyone else. For his services he received a salary of $12 per week and a commission of 15 per cent on the amount of his sales. On these facts it was contended on behalf of the appellant that he did not come within section 29 of the by-law above quoted, inasmuch as his company had a licence to canvass and he was merely the instrument by means of which the company was carrying on business, under its licence. The Recorder, however, found him guilty of violating the by-law and imposed on him a penalty of $40 and costs and, in default of payment, two months imprisonment, basing

his judgment on the case of *City of Montreal* v. *Leslie Davignon,* decided by him some time previously.

Upon judgment being given against him the appellant petitioned the Superior Court for a writ of prohibition commanding the Recorder's Court and the City to discontinue all proceedings against him in the matter. The Superior Court held that the City was not authorized by the by-law to require the appellant to furnish himself with a licence in his own name in addition to the licence held by him employers, and that in imposing a penalty upon the appellant for want of such licence the Recorder's Court had exceeded its jurisdiction. He therefore directed the writ of prohibition to issue.

Against the granting of the writ the City appealed to the Court of King's Bench (Appeal Division). That court held that it was for the Recorder to determine whether or not the appellant was doing business as a canvasser within the meaning of the by-law and, if his decision on this point was erroneous, an erroneous decision on a matter which the Recorder was competent to try did not justify the issue of a writ of prohibition. The judgment of the Superior Court (granting prohibition) was, therefore, set aside. From the judgment of the Court of King's Bench this appeal is brought.

Before dealing with the question of the Recorder's jurisdiction, I shall consider whether or not the by-law required the appellant to have a licence to canvass in his own name in view of the fact that his employers had one and he was merely canvassing for the sale of their goods.

By paragraph (*g*) of the by-law " canvasser " is defined as follows:—

> (*g*) *Canvasser* shall apply to every person canvassing, in private houses, for orders for the sale of goods, provisions or any other article whatsoever, but not to the head or the regular and salaried employee of a business firm who, occasionally and in the ordinary course of business, goes into a private house to take an order, at the previous request of a customer, nor to commercial travellers.

That what the appellant was doing brought him within this definition is not disputed, but it is pointed out that the prohibition in section 29 is not against canvassing, but against " doing business as canvasser " and, it is contended, that to do business as canvasser, within the meaning of this by-law, imports doing it by the canvasser on his own

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account and does not include an employee who is merely carrying out his employer's instructions. Whether the employee as well as the corporation was required to have a licence is entirely a question of the legislative intention as disclosed in the by-law. This intention is to be ascertained from the language used, the nature of the by-law, and the object sought to be attained thereby. In construing the by-law the paramount duty of the judicial interpreter is to give the language thereof its plain and rational meaning and to promote its object. *Maxwell on Interpretation of Statutes,* 7th ed., page 226.

The nature and object of the by-law are apparent. Article 364 of the City's charter, as amended by 9 Edw. VII, c. 81, art. 16, authorizes the City to impose and levy:—

> A special tax not exceeding $200 on * * * hawkers, pedlers, canvassers, hucksters, second-hand dealers and on all itinerant traders doing business in the city * * *.

Article 365 provides that this tax may be imposed in the form of a licence and section 53 of the by-law authorizes the Recorder to impose a fine, not exceeding $40 and, in default of payment, imprisonment for two months, for the infraction of the above quoted part of section 29. The by-law, therefore, is a taxing measure enacted for the purpose of obtaining revenue for the City. That the legislature was within its jurisdiction in authorizing the City to impose and levy the special tax referred to is, in my opinion, beyond dispute. The only questions on this branch of the case are: What does the by-law, properly interpreted, mean, and does that meaning carry it beyond the authority given to the City by the legislature?

It is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language. A subject is not to be taxed unless the taxing statute clearly imposes upon him the obligation to pay. According to the by-law the tax is levied upon those who are doing certain classes of business within the City, and is imposed irrespective of whether the business is being done by a person, corporation or firm. The fact that it is in the form of a licence in no way alters its character as a tax, for it is only a tax that the City, under the statute, is authorized to impose.

The prohibition contained in section 29, above quoted, is against any person, corporation or firm doing business as canvasser within the City without having previously obtained a licence therefor. What did the framers of the by-law mean when they used that language? Can they reasonably be held to have meant anything other than that if any person, corporation or firm paid the tax and obtained the licence, he or it, as the case might be, would be at liberty to do business as canvasser in the City? A corporation, however, can only do business by its employees or agents, as the City, when enacting the by-law, well knew. Must we not therefore conclude that it was intended, when the by-law was enacted, that every corporation paying the tax and obtaining a licence to canvass would be entitled to canvass by its employees or agents?

The contention of the City is that it was authorized by the statute to define, by by-law, who would be considered a canvasser; that under the definition adopted "canvasser" (with certain exceptions not material here) means "every person canvassing in private houses for the sale of goods"; that the appellant was a person within the meaning of this definition, that he had canvassed in the City and, therefore, he came within the by-law.

In order to determine the validity of this contention it is necessary to ascertain what constitutes "doing business as canvasser" when those doing it are considered as subjects of taxation. If the by-law had imposed a tax on every person, corporation or firm doing business as hardware merchant, could such provision reasonably be construed as imposing the tax on every clerk or employee of the hardware merchant engaged in selling his employer's goods? In my opinion it could not, unless language was used making it clear that every clerk or employee selling hardware under his employer's instructions would be considered to be doing business as a hardware merchant. The language of the by-law in question does not, in my opinion, indicate an intention on the part of the City that an employee soliciting orders for his employer's goods, and having no interest in the orders beyond his stipulated remuneration, is to be considered as "doing business as canvasser," rather than the person, corporation or firm whose goods he was endeavouring to sell and whose employee he is. If the City

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had intended the by-law to apply to the individual, whether principal or employee, soliciting in private houses, there was no necessity for mentioning corporation or firm in section 29, for it is not contended that both an employee and his employer must have a licence.

What is meant by "doing business" has been judicially considered in a number of cases.

In *Williamson* v. *Norris* (1), a clerk of the House of Commons was charged with having unlawfully sold intoxicating liquor contrary to the *Licensing Act*. He was employed by the Kitchen Committee of the House, and sold liquor under its direction. The Act provided that

> No person shall sell any intoxicating liquor without being duly licensed to sell the same * * *.

It was held that the Act did not apply to an employee selling liquor the property of his master by his master's orders.

In *Lewis* v. *Graham* (2), the defendant lived at Lewisham but was employed as clerk by a solicitor at his office in London. An action was brought against him in the Lord Mayor's Court. That court had jurisdiction under the Act "if the defendant resided or carried on business within the city." It was contended that he carried on business there. On an application to prohibit the Lord Mayor's Court from continuing proceedings against the defendant, as being without jurisdiction, it was held that the defendant did not carry on business within the city, within the meaning of the Act; that the business there carried on was the business of his employer. In his judgment Lord Coleridge, C.J., at page 782, said:—

> There are two cases in the Court of Exchequer in which the questions were as to the jurisdiction of an inferior court. It was contended in one of those cases that a clerk in the Admiralty, and in the other that a clerk in the Privy Council carried on business within the jurisdiction. In both cases the court held that the clerk did not "carry on his business" for the purposes of the respective Acts within the jurisdiction, because he was a mere servant employed in a department of the state. Those cases would be directly in point except for the word "his" in the Acts on which they arose. But I think that word makes no difference, because the words "carry on business" must mean carry on his business.

And Matthew J., at page 784, said:—

> The *Mayor's Court Act* means "provided the defendant shall carry on 'his' business"—not the business of another. Can it be said that in serving his master in the city, a clerk carries on "his" business there? I think the words "carry on" apply to much more than mere service. The

(1) [1899] 1 Q.B. 7. (2) (1888) 20 Q.B.D. 780.

business of the plaintiff is not even carried on in any fixed place, because it is the business of a solicitor's clerk to carry on business wherever he is instructed to do it. It appears to me that the Act does not apply under these circumstances.

See also *Ex parte Smith* (1).

Counsel for the City referred us to certain decisions of the courts in the Western provinces as supporting his contention. These cases, on examination, afford no assistance in construing the by-law before us. They are all cases under statutory provisions dealing with hawkers and pedlers.

In *Rex ex Rel. Kane* v. *Haworth* (2), the Saskatchewan Court of Appeal held that the person required to be licensed by the *Hawkers' and Pedlers' Act* was the individual who goes from house to house soliciting orders and not the corporation which employed him. That case, in my opinion, is clearly distinguishable. The sections of the statute there applicable read as follows:—

1. In this Act the expression "hawker" or "pedler" means a person who goes from house to house selling or offering for sale goods, wares or merchandise, or * * * but does not include any person selling fresh meat or nursery stock, or products of his own farm or fish of his own catching or the *bona fide* servant or employee of any such person having written authority to sell.

2. No person shall engage in the business of a hawker or pedler within Saskatchewan without first obtaining a licence therefor from the Provincial Secretary and no city, town, village or rural municipality or officer thereof shall issue a licence to any hawker or pedler who does not first produce a provincial licence then in force.

3. No hawker or pedler shall sell or offer for sale any goods, wares or merchandise of any sort or class other than those set forth in his licence.

A perusal of these sections shews that the statute was enacted not merely with the intent of securing a revenue for the province and the municipality, but also with the intent of controlling and limiting the classes of goods which could be offered for sale from house to house. Furthermore the exclusion from the definition of the *bona fide* servant or employee of the persons mentioned in the last clause of section 1, when such servant or employee had written authority to sell, but leaving such servant or employee under the operation of the Act when he had not, seems to me to establish clearly, as the court held, that the Act was framed to apply to the individuals going from house to house and not to their employers. In any event

(1) (1874) 15 N.B.R. 147. (2) (1920) 13 Sask. L.R. 364.

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in that case neither the accused nor his employer had a licence. The employer had applied to the Government for a licence and had tendered the fee but had been refused on the ground that the statute did not contemplate anyone being licensed except the individual who offered the goods for sale or solicited orders. It was quite within the competence of the legislature to require the individual canvasser to take out a licence, and to control the classes of goods he offered for sale.

In *Rex ex Rel. Nalder* v. *Barlow* (1), the expressions "hawker" and "pedler," as defined by the Ordinance, under which the prosecution was laid, expressly included the agent as well as the principal, and Stuart J.A., in his judgment, said:—

> The very use of the word "agent" shews that the reference is to the individual persons.

In the present case the by-law, being a taxing measure, can only be enforced against those upon whom the tax is clearly imposed. The onus was, therefore, on the City to shew that the by-law imposed it upon the appellant. "Doing business," within the meaning of the by-law, imports, to my mind, something more than the acts of a mere employee carrying out, both as to time and service, his master's instructions. It implies that he is wholly or partially carrying on business on his own account as the Recorder held in *City of Montreal* v. *Lafond*. This the appellant was not doing. The tax being a tax on doing business was, in my opinion, intended to be paid by the owner of the business, whether the owner was a person, corporation or firm.

The appellant, therefore, was not doing business as canvasser within the meaning of the by-law and was under no obligation to take out a licence.

Another consideration leads me to the same conclusion. The word "person" in section 29, if used alone, would, by virtue of article 17 (11) of the Civil Code, and section 2 of the by-law, include a corporation unless the context otherwise required. By placing "corporation" in juxtaposition with "person" in the section, the City, in my opinion clearly indicated that "person", as there used, was not intended to include a corporation. But for section 29 the

(1) (1922) 19 Alta. L.R. 66; (1923) 1 D.L.R. 262.

Fuller Brush Company, by virtue of its corporate powers, would have had a right to canvass in private houses in Montreal. That right is interfered with only to the extent of the prohibition in the by-law, that is, it must not be exercised without first obtaining a licence.

The next question we have to consider is whether a writ of prohibition lies to review an erroneous judgment of the Recorder from which no right of appeal has been given by statute. Article 50 of the Code of Civil Procedure reads:

50. Excepting the Court of King's Bench, all courts, circuit judges and magistrates, and all other persons and bodies politic and corporate, within the province, are subject to the superintending and reforming power, order and control of the Superior Court and of the judges thereof in such manner and form as by law provided.

and article 1003 provides as follows:—

1003. The writ of prohibition lies whenever a court of inferior jurisdiction exceeds its jurisdiction.

In dealing with the question of prohibition it is important to bear in mind that the functions of a superior court on an application for a writ are in no sense those of a court of appeal. It has nothing to do with the merits of the dispute between the parties; it is concerned only to see that the Recorder's Court did not transgress the limits of its jurisdiction.

Article 484 of the City's charter deals with the jurisdiction of the Recorder's Court and, in part, reads as follows:

484. The recorder's court has the jurisdiction of a recorder and shall hear and try summarily:

* * *

3. Any action for the enforcement of any by-law.

The principles governing the right to a writ of prohibition have been pretty well established, although in certain cases it is difficult to draw a sharp line between lack or excess of jurisdiction which gives the right, and the improper exercise of jurisdiction which gives no right. The first question which a judge has to ask himself, when he is invited to exercise a limited statutory jurisdiction, is whether the case falls within the defined ambit of the statute; if it does not, his duty is to refuse to make an order as judge; and, if he makes an order, he may be restrained by prohibition. Davey, L.J., in *Farquharson* v. *Morgan* (1).

The City's complaint was that the appellant had violated the by-law and it asked that it be enforced against him.

(1) [1894] 1 Q.B. 552.

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The action, therefore, being for the enforcement of a by-law, on its face falls within the jurisdiction given by article 484.

In *The Queen* v. *Bolton* (1), it was held, in the analogous case of a magistrate's conviction, that the test of jurisdiction is whether or not the justices had power to enter upon the inquiry, not whether their conclusions in the course of it were true or false. In his judgment Lord Denham, C.J., said:—

> Where a charge has been well laid before the magistrate, on its face bringing itself within its jurisdiction, he is bound to commence the inquiry; in so doing he undoubtedly acts within his jurisdiction and, unless during the course of the inquiry evidence is offered which raises issues which it is beyond his jurisdiction to inquire into, he has jurisdiction to complete the inquiry and make the order he thinks proper.

Mr. Gouin for the appellant in his very able argument, contended that, even although the Recorder had jurisdiction to commence the inquiry, yet the moment it was shewn that the appellant was in the exclusive employ of the Fuller Brush Company, the Recorder's jurisdiction was ousted because the by-law, on its proper construction, did not require the appellant to take out a licence and the Recorder could not be said to have jurisdiction

> when the facts upon which the complaint was based did not constitute an offence, or when there was no evidence whatever shewing an offence.

It is now well settled law that where the jurisdiction of the judge of an inferior court depends upon the construction of a statute, he cannot give himself jurisdiction by misinterpreting the statute. *Elston* v. *Rose* (2); *In re Long Point Co.* v. *Anderson* (3).

The rule was succinctly stated by Riddell, J.A., in *Township of Ameliasburg* v. *Pitcher* (4), in the following language:—

> I think the true rule established by *In re Long Point Company* v. *Anderson* (3), and similar cases, is that if it be necessary to interpret a statute in order to find out whether the division court should decide the rights of the parties at all, then if the division court judge misinterprets the statute and so gives himself jurisdiction to decide such rights, prohibition will lie; but if it be necessary to interpret a statute simply to decide the rights of the parties, prohibition will not lie, however far astray the division court judge may go.

It has also been said that a judge of an inferior court cannot give himself jurisdiction by a wrong decision on

(1) (1841) 1 Q.B. 66.
(2) (1868) L.R. 4 Q.B. 4.
(3) (1891) 18 Ont. A.R. 401.
(4) (1906) 13 O.L.R. 417 at 420.

the facts. With reference to this statement Lord Esher, M.R., in *Regina* v. *Commissioners for Special Purposes of the Income Tax* (1), points out that, although it is correct enough for certain purposes, its application is often misleading. It is correct where the legislature has said that, if certain facts exist, the judge shall have jurisdiction. In such a case the existence of the facts is a condition precedent to the exercise of jurisdiction. The statement, however, is inaccurate where the legislature entrusts the tribunal with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists, as well as jurisdiction on finding that it does exist, to proceed further and do something more. In a case of this kind the jurisdiction is conferred not conditionally upon the facts actually existing, but upon a finding that they do exist. The rule, I think, may be stated in another way, as follows:—

If the existence or non-existence of the jurisdiction of a judge of an inferior court depends upon a question of fact, then, if, upon the facts proved or admitted he has no jurisdiction, his finding that he has jurisdiction will not prevent prohibition, but if the jurisdiction depends upon contested facts and there has been a real conflict of testimony upon some fact which goes to the question of jurisdiction, and the judge decides in such a way as to give himself jurisdiction, a superior court, on an application for prohibition, will hesitate before reversing his finding of fact and will only do so where the grounds are exceedingly strong. *Mayor of London* v. *Cox* (2); *Brown* v. *Cocking* (3); *Liverpool Gas Company* v. *Everton* (4); *Rex* v. *Bradford* (5).

To determine whether prohibition lies in the present case it is essential to see precisely what was decided. In his judgment the Recorder said that

> having regard to the true purpose of the by-law and the discharge of his duties by the accused,

the case was indistinguishable from that of *City of Montreal* v. *Davignon*. Turning to his judgment in the *Davignon* case (a copy of which has been furnished to us), we

(1) (1888) 21 Q.B.D. 313 at 319.
(2) (1867) L.R. 2 H.L. 239.
(3) (1868) L.R. 3 Q.B. 672.
(4) (1871) L.R. 6 C.P. 414.
(5) [1908] 1 K.B. 365, at 371.

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find that there the accused was likewise an employee of the Fuller Brush Company and that he was charged with the same offence as the appellant; that the same defences were set up, and that the accused was convicted. After disposing of the constitutional questions raised the Recorder proceeded as follows:—

> Taking up the second main ground of defence, it is established that accused was in the exclusive employ of Fuller Brush Company Ltd. within an assigned territory. * * * The accused reported every morning to an office of the company * * * where he had no exclusive desk room. He would proceed thence to his assigned territory, within the limits of the city and leave in any house he selected a card entitling the recipient to a free brush. Accused, a day or so later, within his own discretion, would call at the houses where he had left the cards, give away a brush and, by means of a case of samples, try and sell some of the large variety of brushes manufactured by the Fuller Brush Co. Ltd. * * *
>
> It is quite clear then, that the accused was *his own master* in so far as his occupation as canvasser is involved. He carried through his selling campaign upon his own initiative, * * *

Did the Recorder by this language mean to hold that once it was established that the accused was soliciting orders for the sale of goods in private houses, the by-law constituted that act "doing business as canvasser," or did he mean that he found as a fact that the accused was doing business as canvasser within the meaning of the by-law? If the former, he misinterpreted the by-law; if the latter, he made an erroneous finding of fact. Does prohibition lie on either view?

A good working rule as to when prohibition lies was laid down by Tyndal, C.J., in the old case of *Cave* v. *Mountain* (1), and was approved and adopted by Lord Denham in *Rex* v. *Bolton* (2), and by Avory J. in *Rex* v. *Bloomsbury Income Tax Commissioners* (3), as follows:—

> But if the charge be of an offence over which, if the offence charged be true in fact, the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the *corpus delicti* brought under investigation.

In the present case the charge was that the appellant had been doing business as canvasser without a licence. If the complaint was true in fact there can be no doubt of the jurisdiction of the Recorder for, in imposing the penalty, he was simply enforcing the by-law. If the charge was not true in fact but the Recorder found that it was, he must

(1) (1840) 1 Man. & G. 257. (2) [1841] 1 Q.B. 66.
(3) [1915] 3 K.B. 768.

still be within his jurisdiction for he cannot have jurisdiction if he decides one way, and be without jurisdiction if he decides the other way.

If the Recorder's judgment is to be considered as a misinterpretation of the by-law, then, applying the rule laid down in *Township of Ameliasburg* v. *Pitcher* (1), we have to ask ourselves if the Recorder construed the by-law in order to find out if he had jurisdiction to decide the rights of the parties at all. The answer to that question must be in the negative for the simple reason that jurisdiction to try the action was not conferred by the by-law but by the statute. (Art. 484). Therefore whether we take the imposition of the penalty as based simply upon the Recorder's finding of fact or upon his construction of the by-law, he was acting within his jurisdiction, and prohibition does not lie.

I quite agree that if the statute had given the Recorder jurisdiction only where the person charged had been actually doing business as canvasser, then, upon this court coming to the conclusion that he had not been doing business, it would be our duty to direct a writ of prohibition to issue. The statute, however, did not so limit his jurisdiction.

A case in this court very similar to the one before us is that of *Molson* v. *Lambe* (2). There the defendant was an employee of Molson & Bros., brewers, and was charged with selling liquor without being duly licensed to do so. His employers, as brewers, had a licence to sell liquor and he contended that, as he was merely an employee of Molson & Bros. and was selling under their instructions, that the statute did not apply to him. He was convicted however, and an application was made to the Superior Court for a writ of prohibition. On appeal to this court it was held that prohibition did not lie.

In *Regina* v. *Judge of Greenwich County Court* (3), it was held that an erroneous decision as to the admissibility of evidence, or a decision without any evidence to support it, given by a county court judge in a matter in which he

(1) (1906) 13 O.L.R. 417. (2) (1888) 15 Can. S.C.R. 253.
(3) (1888) 60 L.T.R. 248.

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has jurisdiction, is not ground for a prohibition. In his judgment Fry, L.J., at page 250, said:—

> In the case of *Home* v. *Earl Camden* (1), Eyre, C.J., says: "It must be admitted that the misinterpretation of either the common or statute law, in a proceeding confessedly within the jurisdiction of these courts, and where they are bound to exercise their judgment upon one or the other, seems to be rather a matter of error, to be redressed in the course of the appeal which the law has provided, than a ground of prohibition." I say, therefore, that this being a proceeding professedly within the jurisdiction of the County Court, the question whether there was any legal evidence upon which to grant a new trial is also within the jurisdiction of that court. A wrong decision of the County Court Judge upon that question is not ground for a prohibition.

To like effect were the judgments of the Master of the Rolls and Lopes, L.J.

In an action for the enforcement of a by-law (which this action clearly is), the Recorder, in my opinion, has jurisdiction—in fact it is his duty—to determine not only all facts relevant to the case but also the meaning to be put on the by-law. How else can he try the action?

It is suggested that the same principle should be applied here as in cases of assessments to land tax where it has been held that prohibition will lie if the land in question is, in fact, not subject to land tax. But, as Mr. Justice Bray points out in *Rex* v. *Kensington Income Tax Commissioners* (2), the reason for these decisions is that there is no jurisdiction to assess unless the land is liable to the tax. In each case the extent of the jurisdiction of an inferior court must, in the last resort turn upon the statute conferring jurisdiction.

Counsel for the appellant further contended that even if the Recorder had jurisdiction to try the action yet prohibition would lie if he applied a wrong principle of law to the facts, and he cited 10 Halsbury, 142, where the learned author says:—

> 289. Prohibition lies not only for excess or absence of jurisdiction, but also for the contravention of some statute or the principles of the common law.

The authorities cited in support of the statement are: *Maconochie* v. *Penzance* (Lord) (3); *Veley* v. *Burder* (4); *Gould* v. *Gapper* (5); *White* v. *Steele* (6).

(1) (1795) 2H Blackstone 633, at 536.
(2) [1913] 3 K.B. 870.
(3) [1881] 6 A.C. 424.
(4) (1841) 12 Ad. & E. 265, at 312.
(5) (1804) 5 East 345.
(6) (1862) 13 C.B. (N.S.) 231.

I have perused all these cases and I find that the prohibitions therein granted were directed to the Ecclesiastical or the Admiralty courts, both of which had a special jurisdiction and decided numerous matters coming before them in accordance with the canon or the civil law as distinguished from the common law. In such courts where a statute was given a meaning different from that which the common law courts gave it, or where these courts declared the common law to be something different from that which the common law courts declared it to be, prohibition would issue. The reason for this was that it was the duty of the common law courts under the constitution to declare the common law and expound the statute law and it would have been considered a scandal if a statute or a common law rule were given one interpretation in one court, and another and inconsistent interpretation in another court. The principle upon which prohibition was granted in these cases cannot, however, have any application to the case before us. As was stated by Patterson J. in *In re Bowen* (1):—

> This is not exactly like *Gould* v. *Gapper* (2), where it was held that prohibition lies where a spiritual court puts a wrong construction on a statute. The County Court is different from a court of peculiar jurisdiction; it is a temporal court which proceeds on the same rules as we do ourselves and, therefore, we cannot interfere when it has decided upon the construction of a statute in a subject-matter over which it clearly has jurisdiction.

Even if in other jurisdictions prohibition lies for the misinterpretation of a statute, it cannot apply in this case, for article 1003 C.C.P. limits the cases in which prohibition can be granted in the province of Quebec to those wherein the inferior court has exceeded its jurisdiction.

The last argument advanced on behalf of the appellant was that both the by-law and the enabling statute were *ultra vires* as being indirect taxation. In answer to this contention nothing more, in my opinion, need be said than that the *British North America Act,* section 92 (9), gives the provincial legislature exclusive power to make laws in relation to

> shop, saloon, tavern, auctioneer, and other licences, in order to the raising of a revenue for provincial, local or municipal purposes.

It is not disputed that the object of the by-law was to provide additional revenue for the City of Montreal. In

(1) (1852) L.J. 21 Q.B. 10. (2) (1804) 5 East, 345

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Brewers & Malsters' Association for Ontario v. *Attorney-General for Ontario* (1), the Privy Council had before it the question as to whether the licence required to be obtained by a brewer in order to sell wholesale was direct taxation. It was held that it was. As to subsection 9 of section 92, their Lordships said:—

> They do not doubt that general words may be restrained to things of the same kind as those particularized, but they are unable to see what is the genus which would include "shop, saloon, tavern" and "auctioneer" licences and which would exclude brewers' and distillers' licences.

The appeal should be dismissed but without costs.

Appeal dismissed without costs.

Solicitors for the appellant: *Beaulieu, Gouin & Mercier.*

Solicitors for the respondent: *Saint-Pierre, Damphousse, Butler, Parent & Choquette.*