

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of The
Municipal Corporation of the City of Toronto
v. Virgo, from the Supreme Court of the
Dominion of Canada ; delivered 16th November
1895.*

Present :

LORD WATSON.

LORD MACNAGHTEN.

LORD MORRIS.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Davey.*]

This is an appeal from a judgment of the Supreme Court of Canada, reversing by a majority the previous decisions of the Court of Appeal for Ontario, and of Chief Justice Sir Thomas Galt. The question for decision is whether a section of a by-law was competently and validly made by the Corporation of the City of Toronto.

The section in question is designated as sub-section 2a of section 12 of by-law 2934, in amendment of section 12 of by-law 2453. The last-mentioned section as amended requires a license to be taken out by—

“ 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

87322. 100.—11/95.

“ 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 *bona fide* servants or
 “ employees, having written authority in that behalf, and such
 “ servant or employee shall produce and exhibit his written
 “ authority when required so to do by any municipal or peace
 “ officer : nor from any pedlar of fish, farm and garden
 “ produce, fruit and coal oil, or other small articles that can be
 “ carried in the hand or in a small basket, nor from any
 “ tinker, cooper, glazier, harness-mender, or any person
 “ usually trading or mending kettles, tubs, household goods
 “ or umbrellas, or going about and carrying with him proper
 “ materials for such mending.”

Section 2a is the only part of the by-law now complained of. It is in the following words:—

“ No person named and specified in sub-section 2 of this
 “ section (whether a license or not) shall, after the first day
 “ of July, 1892, prosecute his calling or trade in any of the
 “ following streets and portions of streets in the City of
 “ Toronto.”

Then follows an enumeration of eight streets in the City of Toronto. It is stated in the evidence that these streets comprise the busiest and most important thoroughfares of the City.

The statutory power under which the Corporation claim to make this by-law is contained in the Municipal Act of Ontario (c. 184 of the Revised Statutes of Ontario of 1887) Section 495, which so far as is material is in the following words:—

“ The Council of any county, city and town separated from
 “ the county for municipal purposes, may pass by-laws for the
 “ following purposes

“ ‘ 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 :

“ ‘ In case of counties for providing at the discretion of the
 “ ‘ council, either the treasurer or clerk of the county, or the
 “ ‘ clerk of any municipality within the county with licenses, in
 “ ‘ this and the previous sub-section mentioned, for sale to parties
 “ ‘ applying for the same under such regulations as may be
 “ ‘ prescribed in such by-laws:

“ ‘ Provided always that no such license shall be
 “ ‘ required for hawking, peddling or selling from any
 “ ‘ vehicle or other conveyance any goods, wares or merchan-
 “ ‘ dise, to any retail dealer, or for hawking or peddling
 “ ‘ any goods, wares or merchandise, the growth, produce or
 “ ‘ manufacture of this Province, not being liquors within the
 “ ‘ meaning of the law relating to taverns or tavern licenses, if
 “ ‘ the same are being hawked or peddled by the manufacturer
 “ ‘ or producer of such goods, wares or merchandise, or by his
 “ ‘ *bona fide* servants or employees having written authority in
 “ ‘ that behalf; and such servant or employee shall produce and
 “ ‘ exhibit his written authority when required so to do by any
 “ ‘ municipal or peace officer:

“ (a) The word ‘hawkers’ in this sub-section shall include
 “ all persons who, being agents for persons not resident within
 “ the county, sell or offer for sale tea, dry goods or jewellery,
 “ or carry and expose samples or patterns of any of such goods
 “ to be afterwards delivered within the county to any person
 “ not being a wholesale or retail dealer in such goods, wares or
 “ merchandise.”

Reference was also made to Section 503 of the same Act, which occurs under the rubric “Markets.” This section empowers the council of every city town and incorporated village subject to the restrictions and exceptions contained in the last preceding six sections to pass by-laws for:—1. Establishing markets. 2. Regulating markets. 3. “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.”

Their Lordships are not required to construe this section, or to say whether the words “adjacent thereto” do not refer to both public streets and vacant lots and mean adjacent to a market. Having regard to the previous sections under the same rubric they think the clause is one for the protection of the market only, and of limited application.

In the opinion of their Lordships it cannot be relied on in justification of the section now in question and indeed the point was not pressed by the learned Counsel for the Appellants.

It appears to their Lordships that the real question is whether under a power to pass by-laws "for regulating and governing" hawkers &c. the Council may prohibit hawkers from plying their trade at all in a substantial and important portion of the City no question of any apprehended nuisance being raised. It was contended that the by-law was *ultra vires*, and also in restraint of trade and unreasonable. The two questions run very much into each other, and in the view which their Lordships take it is not necessary to consider the second question separately.

No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the Public Authority necessary to prevent a nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shews that when the Legislature intended to give power to prevent or prohibit it did so by express words.

Their Lordships refer (amongst others) to section 489, sub-sections 25, 26, 28, 29, 44, 46, 51, and section 496, sub-sections 3, 13, 14, and 15. The language of these sub-sections:—"preventing or regulating"; "preventing or regulating and licensing"—tends to show that the framers of the Act did not intend to

include a power to prevent or prohibit in a power to regulate or govern. Several cases in the English and Canadian Reports were referred to in illustration of the Respondent's argument. None of these cases are direct authorities, because the Statutes from which authority was derived to make the by-laws there in question were framed in terms different from the Statute now under consideration. But through all these cases the general principle may be traced, that a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorise the making it unlawful to carry on a lawful trade in a lawful manner.

It is argued that the by-law impugned does not amount to prohibition, because hawkers and chapmen may still carry on their business in certain streets of the City. Their Lordships cannot accede to this argument. The question is one of substance and should be regarded from the point of view as well of the public as of the hawkers. The effect of the by-law is practically to deprive the residents of what is admittedly the most important part of the City of buying their goods of or of trading with the class of traders in question. And this observation receives additional force from the very wide definition given to "hawkers" in the Act. At the same time the "hawkers" &c. are excluded from exercising their trade in that part of the City. There was no evidence, and it is scarcely conceivable that the trade cannot be carried on without occasioning a nuisance. The Appellants in their printed case wisely disclaim any intention on the part of the Council to discriminate against hawkers and pedlars in favour of permanent shopkeepers. No other explanation of the object of the by-laws is offered. The

question therefore is reduced to a bare question of power.

Their Lordships on the whole have come to the conclusion that it was not the intention of the Act to give this power to the Corporation. They therefore agree with the majority of the Judges of the Supreme Court and will humbly advise Her Majesty that this appeal be dismissed with costs.
