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 COAL  
 COMPANY.

They will, therefore, humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitor for appellants : *G. M. Light.*

Solicitors for respondents : *Fooks, Chadwick, Arnold & Chadwick.*

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[PRIVY COUNCIL.]

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 1895  
 July 25;  
 Nov. 16.

MUNICIPAL CORPORATION OF THE  
 CITY OF TORONTO . . . . . } APPELLANTS ;

AND

VIRGO . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

*Ontario Revised Statutes, 1887, c. 184, s. 495—Construction—By-laws—Power to Regulate a Trade does not include power to prohibit.*

A statutory power conferred upon a municipal council to make by-laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorize the making it unlawful to carry on a lawful trade in a lawful manner :—

So *held*, where, under c. 184 of Revised Statutes of Ontario, 1887, s. 495, a municipal by-law was passed prohibiting hawkers from plying their trade in an important part of the municipality, no question of apprehended nuisance having been raised.

APPEAL by special leave from an order of the Supreme Court of Canada (Feb. 20, 1894), reversing by a majority an order of the Court of Appeal for Ontario (May 9, 1893), which unanimously affirmed an order of Galt C.J. The earliest order had dismissed an application to quash s. 12, sub-s. 2a of by-law 2934, which amended by-law 2453, s. 12, by which amendment the original by-law was made to read as set out in their Lordships' judgment.

The case is reported in Sup. Ct. Canada Reports, vol. xxii. p. 447.

\* *Present* : LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

*Blake, Q.C.* (Ontario Bar), for the appellants, contended that the intention of the Ontario Municipal Act (3 Revised Stat. Ont. 1887, c. 184), when its various sections were read together (see especially s. 495, sub-s. 3, and s. 503, sub-ss. 3 and 4), clearly was to commit to municipalities a full and unrestricted control and government of the class of traders affected by the by-law in question. The words used are "regulate," "control," and "prevent." Though "prevent" is not used in every section, a power to regulate includes a power of such partial prohibition as is here enacted. The by-law was passed in good faith, in the belief that the good government of the city required that hawkers should be excluded from the comparatively small area to which the by-law applied. It was unnecessary to shew the reasons on the face of the by-law; its probable object was to prevent over a limited area the nuisance of obstructed traffic and noisy demonstration. Nothing short of total prohibition in such area would be effectual. The prohibition could not be limited to such particular cases as turned out to be a nuisance. No ground was shewn for setting aside this by-law as unreasonable. [Reference was made to *Johnson v. Mayor of Croydon* (1); *Slattery v. Naylor*. (2)]

*Avory and Du Vernet* (of the Ontario Bar), for the respondent, contended that the by-law in question was clearly bad in this respect, that it dealt with all persons "named and specified" in the original by-law which it purported to amend. Those persons included numerous classes of dealers besides hawkers and pedlars, and as regards them they were outside the scope of s. 495 of the Municipal Act. The by-law was also contrary to s. 286, by which municipalities are restrained from interfering with traders except when expressly authorized. The words in the enabling section are "licensing, regulating, and governing." These powers cannot be exercised separately—the municipality cannot regulate where it cannot license. The exceptions and provisoes contained in s. 495, sub-s. 3, are introduced so as not to trench on the powers of the Dominion Parliament under s. 91, sub-s. 2, of the British North America Act, 1867, to regulate trade and commerce. To regulate trade

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

(2) 13 App. Cas. 446.

J. C. apart from licensing is ultra vires the provincial legislature.  
 1895 A delegated authority to regulate must be construed strictly,  
 MUNICIPAL and does not include a power to prohibit: see *Keep v. Vestry of*  
 CORPORATION OF CITY OF *St. Mary's, Newington* (1); *Dick v. Badart* (2); *Calder Navigation Co. v. Pilling* (3); *Davis v. Municipality of Clifton* (4);  
 TORONTO *v. In re Barclay and Municipality of Darlington* (5); *Reg. v. Johnstone* (6); *In re Brodie and Corporation of Bowmanville*. (7)  
 VIRGO. It was contended also that the by-law was unreasonable and unfair and in restraint of trade.

*Blake, Q.C.*, replied.

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The judgment of their Lordships was 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 Sir Thomas Galt C.J. 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-s. 2*a* of s. 12 of by-law 2934, in amendment of s. 12 of by-law 2453. The last-mentioned section as amended requires a licence 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 merchandise for sale; except that no such licence 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 licences, if the same are being hawked or peddled by the

(1) [1894] 2 Q. B. 524.

(4) 8 U. C. (C.P.) 238.

(2) 10 Q. B. D. 387.

(5) 12 U. C. (Q.B.) 86.

(3) 14 M. & W. 76.

(6) 38 U. C. (Q.B.) 551.

(7) 38 U. C. (Q.B.) 580.

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 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."

Sub-s. 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-s. 2 of this section (whether a licensee or not) shall, after the first day of July, 1892, prosecute his calling or trade in any of the following streets and portions of streets in the city of Toronto."

Then follows an enumeration of 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), s. 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 licence for exercising such calling within the county, city or town, and the time the licence 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

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of any municipality within the county with licences, 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 licence shall be required for hawking, peddling, or selling from any vehicle or other conveyance any goods, wares or merchandise, to any retail dealer, or for hawking or peddling any goods, wares or merchandise, the growth, produce or manufacture of this province, not being liquors within the meaning of the law relating to taverns or tavern licences, if the same are being hawked or peddled by the manufacturer or producer of such goods, wares or merchandise, or by his bonâ fide servants or employees having written authority in that behalf ; 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 s. 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 s. 489, sub-ss. 25, 26, 28, 29, 44, 46, 51, and s. 496, sub-ss. 3, 13, 14, and 15. The language of these sub-sections—"preventing or regulating"; "preventing or regulating and licensing"—tends to shew 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,

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that a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize 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.

Solicitors for appellants: *Freshfields & Williams.*

Solicitors for respondent: *Poole & Robinson.*