

BRITISH COLUMBIA

JUNE 10TH, 1909

FULL COURT

REX v. SANG CHONG

Municipal Corporations ----By-law. Regulating Peddlers -- Prohibition of Trade during Certain Hours -- Reasonableness ---- Ultra Vires ---- Vancouver Incorporation Act, sec. 125, sub-secs. 63, 66, 68, 110 ---- **Interference with Rights of Citizens.**

Appeal by defendant from order of CLEMENT, J., refusing to quash a conviction for an infraction of a by-law of the city of Vancouver.

The appeal was heard by HUNTER, J., IRVING, J., MORRISON, J.

Farris, for the defendant.

J. K. Kennedy, for the prosecutor.

Morrison, J.: -- The City of Vancouver passed a by-law to regulate their market, paragraph 4 of which reads as follows: --

"No peddler shall peddle any dairy produces (except milk) or garden or field produce or fruit in any part of the city before the hour of 10 o'clock on any market days as defined in section 2 hereof, and *no person other than a consumer buying for his own use shall buy or bargain for any goods exposed* in the market before the said hour of 10 o'clock a.m."

For an infraction of this section of the by-law the defendant was fined, and the matter is brought before us **by certiorari proceedings.**

One of the grounds upon which this by-law is sought to be quashed is that the provision in question is unreasonable. A very effective answer to this ground of objection is found in the course of the decision of *Lord Hobhouse in Slattery v. Naylor*, 13 App. Cas. 452-3, where in part he says that **in determining whether or not a by-law is reasonable it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned.** And then his Lordship goes on to point out that where the legislature has taken the precaution to ensure that the council represents the feelings and interests of the community for which it makes laws; that, if it is mistaken, its composition may promptly be altered; that its by-laws shall be under the control of the Supreme Executive; and that ample opportunity shall be given to criticise them in the legislature; then there should be strong reluctance shewn before questioning the reasonable character of by-laws made under such circumstances, and there should be doubt whether they ought to be set aside as unreasonable by a Court of law unless it be in some very extreme case. And again in *Hanrahan v. Leigh-on-Sea Urban Council*, 78 L. J. K. B. 238, Walton, J., says: "We must construe these by-laws (sanitary) according to their plain sense, without regard to consequences, the legislature having assumed that the local authorities would act in a reasonable manner."

But, assuming that the provision is a reasonable one, yet the point is raised that it is *ultra vires* the council, because **it is a prohibition** and not a regulation of the business of hawkers.

Mr. Farris laid stress upon Lord Davey's observation upon certain authorities cited in the *Virgo case*. [1896] A. C. 88, that all though them **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 authorize the making it unlawful to carry on a lawful trade in a lawful manner.**

Here the appellant was prohibited during a certain period from plying his trade at all, as in the *Virgo case*. The continuity of the trade's existence as broken.

Lord Davey goes on to say that the real question is whether under a power to regulate and govern hawkers, etc., the council may prohibit, there being no question of any apprehended nuisance; and he continues: "**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.**"

There is no question of nuisance or maintenance of order here, the provision, in my opinion, being solely for the protection of the market. **It seems to me, therefore, that the council have no power to restrict the appellant as they have done in the lawful exercise of his business.**

I would allow the appeal.

IRVING, J.: -- In my opinion we should upset this conviction, on the ground that the 4th section of **the by-law is beyond the powers conferred** upon the city of Vancouver.

There are two sub-sections (if any) of sec. 125 of the Incorporation Act, under which this 4th section could be upheld, vis., sub-sec. 63, "for establishing markets and stock yards and for regulating the same;" and sub-sec. 66, "for preventing or regulating criers and vendors of any vegetables, etc., from practising their calling in ay public markets, public sheds, and vacant lots, and the streets and lanes adjacent to the market."

The legislature by sub-sec. 66 expressly authorised the council to prevent (and regulate) criers from practising their calling in the streets and lanes in the city adjacent to the market. It was intended that the city should have the power that they profess to exercise by this 4th section of the by-law, the words "adjacent to the market" would be wholly unnecessary.

The question is not absolutely plain, but **in such a case as the present, which restrains or limits a man's right to carry on his trade in the ordinary way, we ought to be satisfied that the right has been taken away from him before we uphold any by-law to that effect.**

Among the normal rights which are available to every British subject against all the world are : (1) personal safety and freedom; (2) one's good name; (3) the enjoyment of the advantages ordinarily open to all the inhabitants of the country, e.g., the unmolested

pursuit of one's trade or occupation and free use of the highways; (4) freedom from malicious vexation by legal process; and (5) to one's own property.

Where a restraint is sought to be put upon any person in respect of the exercise of any of those natural rights, I think it is the duty of the Court to assume that the legislature did not intend to interfere with them, unless clear and unequivocal words have been used.

In this case there is an interference with the right of the peddler to carry on his business at the hour he thinks best suited for peddling, and there is also an interference with the right of the citizen to purchase in (to him or her) the most convenient market.

I would quash the conviction.

HUNTER, C.J.: -- I think the by-law impugned may be supported under sub-secs. 68 and 110 of sec. 125 of the Incorporation Act.

It was argued that a prohibition on a peddler from peddling garden produce before 10 a.m. on market days was not an enactment regulating peddlers, and reliance was placed on the *Virgo case*, [1896] A. C. 88. It was there held that a by-law which purported to be passed on the regulating powers possessed by the city of Toronto, and which prohibited peddlers from plying their trade at all on certain streets, was in reality *pro tanto* [as far as it can go] prohibitory, and therefore to that extent *ultra vires*, but I am unable to see how it can be quoted as an authority in support of the proposition that a by-law which allows peddling during certain hours and forbids it during other hours, can be said to be prohibitory and not regulatory. In fact Lord Davey says, at p. 93: "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."

I would dismiss the appeal.

Appeal allowed and conviction quashed, HUNTER, C.J., dissenting.

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