

LAURENT PIGEON (PETITIONER)..... APPELLANT;	1889 <hr style="width: 50%; margin: 0 auto;"/>	
AND	*Nov. 18.	
THE RECORDER'S COURT AND } THE CITY OF MONTREAL... }	1890 <hr style="width: 50%; margin: 0 auto;"/>	RESPONDENTS. *Mar. 10.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Prohibition—By-law respecting sale of meat in private stalls—Validity of—37 V. c. 51, s. 123, sub-secs. 27 and 31 (P.Q.)—Power of Provincial Legislature to pass—B. N. A. Act, sub-sec. 9 of s. 92—“Other licenses.”

The Council of the City of Montreal is authorized by sub-secs. 27 and 31 of s. 123 of 37 V., c. 51, to regulate and license the sale, in any private stall or shop in the city outside of the public meat markets, of any meat, fish, vegetables or provisions usually sold in markets.

Held, affirming the judgments of the courts below, that the sub-secs. in question are *intra vires* of the Provincial Legislature. Also that a by-law passed by the city council under the authority of the above-named sub-secs fixing the license to sell in a private stall at \$200 in addition to the 7½ per cent. business tax, levied upon all traders under another by-law and which the appellant had paid, is not invalid.

Per Strong J.—That the words “other licenses” in sub-sec. 9 of sec. 92 of the B. N. A. Act include such a license as the Provincial Legislature have empowered the City of Montreal to impose by the terms of the statute now under consideration. *Lamb v. Bank of Toronto* (12 App. Cas. 575) and *Severn v. The Queen* (12 Can. S.C.R. 70,) distinguished.

APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal Side) (1) confirming a judgment of the Superior Court which had dismissed the appellant's petition for a writ of prohibition.

*PRESENT :—Sir W. J. Ritchie C.J. and Strong, Taschereau, Gwynne and Patterson JJ.

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The petition had for its object the obtaining of a writ of prohibition enjoining the recorder's court and the city of Montreal from proceeding in the case before the said recorder's court, wherein the city of Montreal was complainant and the said appellant defendant. The complaint was to the effect that appellant, a butcher, had illegally exposed for sale on a private stall, outside of the public meat markets, meat ordinarily bought and sold on public meat markets, without having obtained a license from the city council, the whole in violation of by-law No. 131, intituled, "By-law Concerning Markets" then in force in the city of Montreal; the petition, praying for the writ of prohibition, alleged that the by-law, in virtue of which the city of Montreal was proceeding against the appellant, was *ultra vires* and, consequently, had no legal existence. The Corporation of Montreal answered the petition by pleading that the by-law and the statute upon which it rests are legal and constitutional and valid to all intents and purposes.

The by-law and the statute in question are referred to at length in the judgments of the court hereafter given.

Geoffrion Q.C. and *Madore* for appellant.

Even if the statute is *intra vires* of the legislature the by-law is *ultra vires* and not authorised by the statute: 1st, because by sec 78 of 39 Vic. ch. 52, the business tax upon butchers is limited to $7\frac{1}{2}$ per cent. and if it had been the intention to impose a tax over and above this business tax the legislature would have said so in special terms; 2nd, because the words "such sum as may be fixed by such by-law," 37 Vic. ch. 51, sec. 123, must be understood as only giving authorisation to impose such fee as will cover the necessary expenses for issuing the license and that fee has been fixed by sec. 49 of the by-law at \$2.00; 3rd, because it

imposes upon a certain class of the community a burden of taxation heavier than that of other citizens.

The learned counsel cited Dillon (1); *Walker v. City of Montreal* (2), Cooley on Taxation (3); Cooley on Constitutional Limitations (4); 39 Vic. ch. 52, (P. Q.)

Ethier for respondent.

There can be no question now as to the constitutionality of the statute.

As to the second point raised by the appellant that having paid the $7\frac{1}{2}$ per cent. business tax levied under 39 Vic., ch. 52, he is not bound to pay another tax as a butcher; this tax of $7\frac{1}{2}$ per cent. is a business tax levied on all traders, and the other is a specific duty levied on private butchers' stalls, and the Legislature has conferred in plain terms on the corporation the privilege of exacting and collecting both.

The doctrine of inequality of taxation or unreasonableness of taxation has taken rise in England, where unincorporated bodies were recognised by the courts when they had held and exercised privileges from time immemorial and their by-laws were acknowledged as binding on the corporators, provided such by-laws were reasonable, uniform and not oppressive. In the United States' constitution there are to be found provisions which have induced the American courts to declare null and void by-laws considered as unequal, unreasonable or unjust. On the contrary, in the Provinces of Ontario and Quebec, the Local Legislatures have the whole municipal system under their control, and it cannot be presumed by the courts that they exercise that control unreasonably or unjustly. *Attorney General v. The City of Montreal* (5); *Mallette v. City of*

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(1) 3 Ed. 1 Vol. pp. 115, 116, 357. (3) P. 408.

(2) 5 Leg. News 201; 1 M. L. R. (4) No. 495.

Q.B. 469

(5) 24 L.C.J. 259.

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Sir W. J. RITCHIE C. J. concurred with TASCHE-

STRONG J.—This was a proceeding in prohibition to restrain the recorder's court from proceeding to hear and determine an action instituted by the city of Montreal against the present appellant to recover the fine imposed for an infraction of a by-law of the city, which required all persons exposing meat for sale in any private stall or shop outside of the public meat markets to take out a license, for which license the sum of two hundred dollars was, by the same by-law, required to be paid. The appellant who was, at the time of the action being brought, keeping a private stall for the sale of butcher's meat at the corner of St. Denis and St. Catherine streets, in the city of Montreal, refused to submit to the by-law and to pay the license fee of \$200 for the year from May 1886 to May, 1887.

Thereupon, the city instituted an action in the recorder's court to recover the fine prescribed for breach of the by-law, upon which the appellant took proceedings in Prohibition, making the recorder's court and the city both parties, defendants. A writ to appear and answer having been granted by the Superior Court, the city pleaded thereto, first, a peremptory exception insisting that the appellant was precluded from raising any objection to the by-law imposing the fee for the license, inasmuch as the city was entitled to the benefit of the prescription enacted by sec. 12 of 42 and 43 Vic. ch. 53, the period of three months from the date of the passing of the by-law having elapsed before the commencement of the action. Secondly, the city

(1) 24 L.C.J. 263.

(2) 8 Q.L.R. 187.

(3) 1 Vol. p. 440, No. 353.

pleaded a general defence on the merits insisting on the validity of the by-law and on the constitutionality of the statute pursuant to which it was passed.

The appellant having filed an answer and replication the parties went to proof, and the cause was subsequently heard before Mr. Justice Mathieu, in the Superior Court, who dismissed it, and the appellant having taken an appeal to the Court of Queen's Bench that court affirmed the judgment of the Superior Court. The present appeal was then taken to this court.

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By the Provincial Statute, 37 Vic. ch. 21, sec. 123, sub-sec. 27, the city of Montreal is authorized

To establish and regulate public markets and private butchers' or hucksters' stalls, and to regulate license or restrain the sale of fresh meats, vegetables, fish or other articles usually sold in markets.

By sub-sec. 31 of the same section it is enacted that the city shall have power

To order that all kinds of live stock, and all kinds of provisions and provender, whatsoever, usually bought and sold in public markets that may be brought to the said city for sale, shall be taken to the public markets of the said city, and there exposed, and that neither the said live stock, nor the said provisions or provender, shall be offered or exposed for sale, or to be sold or purchased elsewhere in the said city than on the said public markets; but the city Council may, if they deem it advantageous, by a by-law to be passed for that purpose, empower any person to sell, offer or expose for sale in any place beyond the limits of said markets or market stalls of the said city meat, vegetables and provisions usually bought and sold on public markets upon such person obtaining a license for that purpose from the said council for which he shall pay to the city Treasurer such sum as may be fixed by such by-law, and by conforming with the rules and regulations contained in the said by-law.

And by sub. sec. 32 of the same section further power was given to the city

To impose a duty on all private marts in the said city or that may hereafter be established therein for the sale of cattle, provisions or provender or of anything else whatsoever that is usually sold on public markets with power to regulate and fix the said duty as regards each particular mart as the said council may see fit.

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On the 9th of June 1882 the city Council of Montreal passed a by-law which contained amongst others the following provisions. By section 44 it was enacted

No person shall sell or expose for sale in any private stall or shop in the city outside of the public meat markets aforesaid any meat, fish, vegetables or provisions usually bought and sold on public meat markets, unless he shall have obtained a license from the said council as before provided.

Section 45 ;

The said council upon the recommendation of the market committee may from time to time issue license under the hand of the mayor to persons who desire to sell or expose for sale in such private stalls or shops outside of the said public meat markets as shall be designated in such licenses any such meat, fish, vegetables or provisions : provided the place so designated be not less than five hundred yards distant from the centre of any of the said public meat markets.

Section 46 ;

For each and every such license there shall be paid to the city Treasurer by the person applying for the same at the time of his making such application, the sum of \$200.

Section 47 ;

All licenses so issued shall expire on the first day of May after the date thereof unless sooner revoked and shall be renewable every year at the discretion of the said council.

And section 95 of the same by-law was in the words following :—

Any person violating and contravening any of the provisions of this by-law, for which a penalty is not hereinbefore provided, shall for each offence be liable to a fine and, in default of immediate payment of said fine and costs, to an imprisonment, the amount of said fine and the term of said imprisonment to be fixed by the Recorder's Court at its discretion, and any person who shall violate any such provision of the said by-law shall moreover be liable to the penalty mentioned in this section for each and every day that such violation or contravention shall last which shall be held to be a distinct and separate offence for each and every day as aforesaid ; provided that such fine shall not exceed forty dollars and the imprisonment shall not be for a longer period than two calendar months for each and every offence as

aforesaid ; the said imprisonment, however, to cease at any time before the expiration of the term fixed by the said Recorder's Court upon payment of the said fine and costs.

The first pretension of the appellant is that sec. 46 of the by-law requiring the payment of \$200.00 for a license to sell meat outside the public markets is not authorized by the statute, and is therefore in excess of the powers of the council and absolutely null and void. The argument in support of this proposition is that sub.-sec. 31 of sec. 123 of the statute is to be interpreted as conferring powers of police regulations only and not taxing powers ; that the sum to be fixed by the by-law as that to be paid for the license is not intended as a tax or impost for revenue purposes, but merely as an indemnity for the expense and trouble of issuing the license ; and that the sum of \$200 is for that purpose excessive in amount. There is no force whatever in this argument. Had the city council only possessed the police power (and it would have been restricted to that if the mere power to regulate, and for that end to license, had been conferred without any express provision authorizing the exaction of a sum to be paid for the license) there might have been some color for this contention ; but when we find the legislature authorizing the city council to impose such charge for the license as it should think reasonable, without any reference to the payment being by way of indemnity, as a fee for the trouble and expense involved in issuing the license an interpretation which would restrict the words in which the statute is expressed in the way contended for would be nothing short of legislation and is therefore entirely inadmissible.

The language of the statute being such as it is it would be impossible for any court, without arrogating to itself the power of revising and controlling the acts of the council, a jurisdiction for which no authority

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can be derived either from statute or common law, to say that the fee to be paid must be limited in amount to a sum which should appear to the court to be reasonable as a mere remuneration for the labor and expense of issuing the license. Such a construction of the statute is not only not warranted by its language, but would moreover be most objectionable as conferring on a court of justice an unusual and inconvenient jurisdiction which it could never satisfactorily exercise. If, however, the Legislature had itself no authority to confer upon the city council other than police powers, such an interpretation as that just referred to might have been unavoidable, but, as it will appear when we come to consider the constitutional validity of the statute, the Legislature did possess the power not only to authorize the city to regulate, and indeed to prohibit altogether, the sale of meat out of market as an exercise of the police power, but also the power to impose a tax in aid of a revenue for municipal purposes by means of licenses issued to persons upon whom privileges in this respect might be conferred. These considerations lead to the conclusion that it is impossible to say that the words "for which he shall pay such sum as may be fixed by the by-law," are not to be construed in their ordinary, primary meaning as conferring on the city council absolute and unrestricted power and discretion as regards the amount to be paid for the issue of any licenses they may think fit, by a by-law duly passed, to sanction.

As regards the objection that the amount required to be paid is so excessive as to be prohibitory the plain answer is, in the first place, that it has not been made to appear that it is prohibitory, that there is nothing to show that the advantage to be derived from the privilege of selling out of market may not be such that this license fee is relatively moderate and fair ; and

in the next place even if the charge were exorbitant and prohibitory the council have power, if they should think it advantageous to the city so to do, to prohibit sales out of market altogether, and having this power they may, if for any reason they choose to do so, exercise it by imposing a license fee so large in amount as to be in effect a prohibition. Further, it may be answered that although it might be an objection to the exercise of a mere power to regulate, excluding all powers not only to prohibit the sale out of market but also to tax by means of licenses for revenue purposes, yet when the power of taxing is conferred it never can be objected to an instance of its exercise that the tax imposed is prohibitory in its operation; in all such cases the amount of the tax must rest exclusively in the discretion of the body possessing the power to impose it.

On the whole, upon the only admissible interpretation of the statute I conclude that the city Council were by it invested with all the powers they assumed to exercise by the by-law.

Next it is pretended that the 31st sub-sec., to which the authority of the council to pass the by-law must be ascribed, is itself *ultra vires* of the Provincial Legislature. It is said that the 92nd section of the British North America Act does not confer on the Provinces the right to invest a municipal council with powers of taxation such as this enactment assumes to confer upon the city of Montreal. The answers to this relied upon by the learned advocates for the city are, I think, clear and conclusive. For myself I prefer to select one of these grounds and to rest my judgment exclusively upon that.

It may be that since the decision of the Judicial Committee in the case of *Lamb v. The Bank of Toronto*

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(1), a tax for municipal purposes, to be collected by means of a license imposed upon a person carrying on a specific retail trade as a condition of being permitted to carry it on in a particular manner, or in a particular place as in the present case, is not to be regarded as an instance of indirect taxation. If this is so it would, of course, be conclusive of the question of legislative authority which has been raised in the present case but, without in the slightest degree presuming to depart from any decision of the Privy Council, I am prepared for the purposes of the present judgment to assume the correctness of the appellant's contention that this is an indirect tax and to deal with the case upon that basis.

Then looking at the case in this way I have no hesitation in ascribing the authority of the Legislature of the Province of Quebec to pass the provision of the statute now impugned to the 9th sub-section of section 92 of the British North America Act. The words of that section are as follows, "Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising a revenue for provincial, local, or municipal purposes." If it were necessary to do so I should be prepared to hold that the words "other licenses" include such licenses as the Legislature have empowered the city of Montreal to impose by the terms of the statutes now under consideration. It never has been decided by any court of appeal that the words "other licenses" are to have no meaning whatever, and that the clause is to be restricted to the four named but incongruous cases of "shops, saloons, taverns and auctioneers." The case of *Severn v. The Queen* (2) did not decide this but merely determined that a construction which would include licenses to brewers under the words "other licenses" was inadmissible for the reason that

(1) 12 App. Cas. 575.

(2) 2 Can. S.C.R. 70.

it would conflict with the exclusive power to regulate trade and commerce which was vested in the Dominion. And even as regards this construction of the 9th sub-sec., if the decision in *Severn v. The Queen* (1) has not been over-ruled observations not in accordance with it are certainly to be found in the later decisions of the Privy Council. I do not, however, base my opinion on these words "other licenses" being comprehensive of a license tax such as this, but on what appears to me to be the indisputable ground, that this is a shop license power to authorize the imposition of which is in so many words conferred on the Provincial Legislatures by sub-sec. 9 of sec. 92. There is nothing in the context restraining the meaning of the word "shop" to any particular species of shop, or to a shop in which any specific commodity is dealt in, and that being so, there is nothing whatever to exclude from its operation a shop such as that kept by the appellant for the sale of butchers' meat. This seems, by itself, conclusive of the question of constitutional validity, and to preclude all objections to the statute.

As to the point that the by-law imposes double taxation inasmuch as the appellant was, in addition to this license tax, liable to pay the general business tax of $7\frac{1}{2}$ per cent. on the annual value of the premises in which he carried on his business, there is manifestly no weight in it either as an independent ground for attacking the validity of the by-law, or as having incidentally an influence on the construction which ought to be put upon the statute. The two taxes are imposed on entirely different subjects; one is a personal tax payable for the right to exercise a particular privilege by way of exemption from a general law, the other is a general tax in respect of the property upon which any trade or occupation is carried on. The two taxes

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are, therefore, not identical, and the imposition of both can in no sense be regarded as double taxation.

It seems to be extremely doubtful, to say the least, if the writ of prohibition was the appropriate remedy in the present case. That writ is only applicable to restrain an excess of jurisdiction by inferior courts.

Strong J. The recorder's court would not, however, have exceeded its jurisdiction even though the by-law might have been bad, or the statute *extra vires*, if it had proceeded to hear and determine the action instituted by the city. If any court had jurisdiction the recorder's court had it; the appellant's defences therefore, that the by-law and statute were invalid, did not, strictly speaking, constitute objections to the jurisdiction, but were, rather, objections on the merits to the foundation of the action in point of law.

The appeal must be dismissed with costs.

TASCHEREAU J.—By its charter the city of Montreal is authorized by section 123, sub-sec. 27, to “establish and regulate public markets and private butchers’ or hucksters’ stalls; and to regulate, license, or restrain the sale of fresh meats, vegetables, fish or other articles usually sold on markets;”—Then, by sub-sec. 31: “To order that all kinds of live stock and all kinds of provisions and provender whatsoever, usually bought and sold in public markets, that may be brought to the said city for sale, shall be taken to the public markets of the said city and there exposed; and that neither the said live stock nor the said provisions nor provender, shall be offered or exposed for sale or to be sold or purchased elsewhere in the said city, than on the said public markets; but the city council may, if they deem it advantageous, by a by-law to be passed for that purpose, empower any person to sell, offer or expose for sale, in any place

" beyond the limits of said markets or market stalls of
 " the said city, meat, vegetables and provisions usually
 " bought and sold on public markets, upon such person
 " obtaining a license for that purpose from the said
 " council, for which he shall pay to the city treasurer
 " such sum as may be fixed by such by-law, and by
 " conforming with the rules and regulations contained
 " in the said by-law."

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Relying on these dispositions, the council of the city of Montreal passed, on the 9th of June, 1882, a by-law called "by-law concerning markets" bearing No. 131, which, among other dispositions, enacts as follows:—

Article V. Private Stalls.

Sec. 44. No person shall sell or expose for sale in any private stall or shop in the city, outside of the public meat markets aforesaid, any meat, fish, vegetable, or provisions usually bought and sold on public meat markets, unless he shall have obtained a license from the said council, as hereinafter provided.

Pigeon, the appellant, having been sued before the recorder's court, in Montreal, for having exposed meat for sale in a private stall, without a license, in violation of the dispositions of the aforesaid by-law, took out a writ of prohibition to enjoin the said court from further proceeding in the cause on the ground that the said by-law was null and void, and that the court had no jurisdiction. The two courts below unanimously quashed the writ of prohibition, and the appellant now asks the reversal of these judgments. I am of opinion that his appeal should be dismissed. His contentions are altogether unfounded.

As to the constitutionality of the sections above referred to in the city of Montreal's charter there is no room for controversy, and the appellant himself, though he had alleged in his declaration that these sections were unconstitutional, very properly, in his factum and at the hearing before us, abandoned that ground of his action. He contends now, not that the

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statute is *ultra vires* of the Quebec legislature, but that the by-law under that statute and upon which he was sued before the recorder's court is *ultra vires* and not authorized by this statute.

He attempts to support that contention on two grounds, in the following words which I take from his factum : —

Our contention is, that the part of the above by-law concerning private stalls is *ultra vires*, inasmuch as the city charter does not authorise the city of Montreal to impose upon private stalls a tax for revenue purposes, but only gives it the power, as mentioned in sub-sec. 27 of sec. 123, to regulate, license or restrain the sale of fresh meats, vegetables, fish, or other articles usually sold on markets.

We claim that the words "such sum as may be fixed by such by-law" in sub-sec. 31, must be understood as giving an authorisation to impose such fee as will cover the necessary expenses for issuing the license ; and that it is not such an authorisation as is required to give to a municipal corporation the power of taxing.

The last reason which we urged against the by-law and for which we claim it must be declared void, is that it imposes upon a certain class of the community a burden of taxation heavier than that of the other citizens. After having paid seven and a-half per cent. of the value of his premises, Pigeon might have carried on any trade or business, corner of St. Denis and St. Catharine streets ; but so soon as he wants to keep a butcher stall he has to pay, if the by-law is valid, a further sum of two hundred dollars.

The first ground is based upon the fact that the sum fixed by the council for a license to sell in a private stall amounts to \$200. The council, argues the appellant, has taken undue advantage of its power to license and regulate, and has illegally, under pretence of licensing and regulating, imposed a tax. But sub-sec. 31 expressly gives to the council unlimited powers as to the amount of the license to sell outside of the public market, "such sum as may be fixed by such by-law." How could we, in face of these words, declare the by-law illegal because the sum fixed is too high ?

The city council, under these sections, has the exclusive power to grant or refuse and fix the amount of

these licenses, and the exercise of this power cannot be controlled in any way by courts of justice.

The second ground of objection taken by the appellant against the validity of this by-law is also untenable. The seven and a-half per cent. of the annual value of his premises he paid as a business tax under another by-law, which is a tax imposed on all business men generally. The \$200 for a license for a private stall is the price of a privilege, the privilege of selling meat outside of the public markets.

Had the appellant succeeded in having this section of the by-law relating to private stalls declared illegal, this would not have given him the right to sell meat in his private stall. The only consequence would be that no one at all could legally get a license in Montreal to sell outside of the public markets under sec. 13 of the by-law, which enacts that:

Sec. 13. No person shall sell or offer, or expose for sale, in or upon any street, lane, yard, or in any store, shop, dwelling, or other place in the city than one of the meat markets (public or private) established by this by-law, any kind of butchers' meat, fresh pork, turkeys, geese, ducks, poultry, fish, fruits, grain, produce or effects usually brought to and sold on public markets.

I am of opinion we should dismiss the appeal.

GWYNNE J.—The case appears to me to be free from doubt, and the judgment of the court appealed from to be quite correct. Whether there is or is not a double tax levied by the city of Montreal in the present case does not seem to me to be before us, although I do not see any objection to the corporation charging a business tax of $7\frac{1}{2}$ per cent on the value of the rental of the premises, where, under a license to sell meat outside of the public market, a butcher carries on his trade, in addition to the sum paid for the privilege of selling outside of the public market, and for which privilege the statute authorizes the municipality to charge a

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license fee of any amount they think fit. The appellant in the proceeding in the recorder's court, which is sought to be prohibited, is charged with selling meat outside of the public market of the city of Montreal without having obtained the leave of the corporation to do so; that such an act can be prohibited by by-law under a penalty, in case of breach, and that a suit for the recovery of such penalty is within the jurisdiction of the recorder's court to adjudicate upon, cannot be doubted.

The appeal must therefore be dismissed.

PATTERSON J. concurred with TASCHEREAU J.

Appeal dismissed with costs.

Solicitors for appellant: *Laflamme, Madore & Cross.*

Solicitor for respondents: *Rouër Roy.*
