Sept. 25,191.

Present : Grenier J.

CRITCHLAW *v.* BOX.

589—*P. C. Kandy*, 26,539.

Municipal Councils Ordinance, s. 122—By-law prohibiting motor cars being driven on a road between certain hours—Not ultra vires.

A by-law (No. 218A) framed under section 122 of the Municipal Councils Ordinance was as follows :—

> " No motor cars, except those going out of town or going to or from a house in Victoria drive, shall be driven on the said drive between the hours of 4.30 P.M. and 6.30 P.M."

Held, that the by-law was not *ultra vires* of the Municipal Council.

THE facts are set out in the judgment.

Elliott, for the appellant.

Walter Pereira, K.C., S.-G., for the respondent.

Cur. adv. vult.

September 25, 1911. GRENIER J.—

The appellant was convicted of a breach of by-law No. 218A of the by-laws of the Kandy Muncipality, in that he drove his motor car round the Victoria drive, Kandy, between the hours of 4.30 P.M. and 6.30 P.M. on July 20, 1911. The by-law is very clearly worded, and there can be no doubt as to its meaning. It is in the following terms : " No motor cars, except those going out of town or going to or from a house in Victoria drive, shall be driven on the said

drive between the hours of 4.30 P.M. and 6.30 P.M." The object the by-law had in view was to keep the Victoria drive free from motor cars at certain hours in the evening, during which the residents of Kandy were accustomed to use it as a safe promenade for walking and driving. The framers of the by-law were careful not to exclude motor cars altogether from the Victoria drive during the hours in question. The by-law allowed motorists to use the Victoria drive, but imposed a condition, which was reasonable, and which enabled them in certain circumstances, emergent or otherwise, to go on the drive. It might sometimes happen that motorists wanted to leave town, or were on their way to town, or that they desired to make calls at houses in Victoria drive, or that they were suddenly obliged to summon a medical man or to see a lawyer. I might multiply cases, but there is no necessity for it ; and the by-law has, therefore, made express provision in the interests of all such motorists as might find themselves placed in the different situations I have mentioned. But what the by-law has distinctly aimed at is that between the hours of 4.30 P.M. and 6.30 P.M. no motorists should be allowed to drive round Victoria drive. I was nearly using the word " spin " as more faithfully descriptive of the way in which motor cars are driven at times, to the discomfort and danger of a large number of people who have the right to use the promenade without incurring any risk to life or limb. I think the Municipal Council of Kandy would have failed in its duty to the public if it had not promptly risen to the occasion and successfully invoked the aid of the Legislature to prevent motorists from making the continuous circuit of a favourite promenade like the Victoria drive, which by reason of its configuration would easily lend itself to accidents and disasters.

It was, however, submitted by the appellant's counsel (1) that the by-law in question was *ultra vires* of the Municipal Council, on the ground that it has expressly prohibited motor cars from going round Victoria drive during certain hours of the day ; and (2) that the by-law is inconsistent with, and not authorized by, section 122 of the principal Ordinance No. 7 of 1887. Both the objections may be regarded practically as one. I really do not see how section 122 can be said not to give the Municipal Council the power to make the by-law under consideration. It was under this very section that the by-law was made, and unless the terms of section 122 are such that the Council clearly exceeded the power given by the Legislature, the Council was entitled to make this by-law and similar by-laws, in order to give effect to section 122 and to make it workable. I think it cannot properly be argued that by-laws have not the force of law, even if they are *intra vires*. Apart from several decisions of this Court, in which the question has been decided in the affirmative, when once by-laws have received legislative sanction, it necessarily follows that they are of equal effect with

Sept. 25,1911

GRENIER J.

Critchlaw v. Box

the substantive enactments under which they are framed. If this were not so, the *raison d'etre* for by-laws would be difficult to discover. Now, it was urged in this case for the appellant that the Municipal Council, although it may have the power to regulate traffic by means of appropriate by-laws, yet did not possess the power to make any by-law which would result in the prohibition of traffic. The proposition, stated broadly as I have stated it, seems a sound one. The learned Solicitor-General was reluctant to admit that had the by-law entirely prohibited the use of motor cars in Victoria drive, and thus interfered with the right of the subject to use a particular mode of locomotion, not dangerous except in the reckless, rash, and negligent use of it, the by-law would have been *ultra vires*. The inclination of my opinion is that such a by-law would be *ultra vires*, but there is no necessity to decide the question here, for there has been no prohibition as contended for by appellant's counsel. The meaning of plain words must not be overlooked in order to found a legal argument. " Regulation of traffic " and " prohibition of traffic " have nothing in common between them. They mean two different state and condition of things. Both assume in the first instance, however, the existence of traffic, but you cannot regulate and prohibit traffic at one and the same time. In the present case all the by-law did was to regulate traffic, and require that within certain hours no motor cars should do the continuous circuit of Victoria drive, but, subject to some conditions, it permitted their use in Victoria drive. Where did the prohibition come in ? If there was any prohibition, and I if am using the word rightly in this connection, it was not directed against the use of motor cars in Victoria drive, but against their use in certain hours, within a certain circuit and in a certain manner. Clearly, therefore, it is a misuse of language to say that there was any prohibition, or that the by-law contained anything which would justify the position taken by the appellant.

The case of *Scott v. Piliner*,[1] which was cited to me by appellant's counsel, as well as the case of *The Attorney-General for Ontario and Attorney-General for the Dominion and the Distillers' and Brewers' Association of Ontario* have no manner of application to the present case. In the case of *The Municipal Corporation of the City of Toronto and Virgo*, which went in appeal to the Privy Council,[2] it was held that a statutory power conferred on 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. That was the case of a by-law prohibiting hawkers from plying their trade in an important part of the Municipality, no question of apprehended nuisance having been raised. It was expressly held that the by-law did warrant the prohibition, and that the effect of it was practically

[1] *K. B. 855.* [2] *(1896) A. C. 88.*

to deprive the residents of what was admittedly the most important part of the city of buying their goods of, or of trading with, the class of traders in question. In the present case the by-law impugned does not amount to a prohibition of motor cars in Victoria drive or in any part of Kandy at all, and there is therefore no analogy between the two cases.

The last point raised involved a pure question of fact. It was argued that it was for the prosecution to prove affirmatively that the appellant did not stop the car at any bungalow in Victoria drive, or that he was not going to or from Kandy. The argument took me by surprise, because there was evidence, such as in the circumstances it was possible for the prosecution to adduce, but the accused did not make the slightest attempt to rebut it, nor did he give evidence himself. Whether he stopped his car at any bungalow, or whether he was going to or from Kandy, were matters peculiarly within his knowledge, and under section 166 of the Evidence Ordinance the prosecution having established a *prima facie* case, it was his duty, and the onus was thrown on him, to rebut it.

The appeal must be dismissed, and the conviction and sentence affirmed.

Appeal dismissed.