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No evidence was given as to what other or further inspection or examination the defendant should have made. In these circumstances, it seems to me that the Court is not qualified by its own experience or knowledge, or by what is called common knowledge, to find that the ladder was obviously unsafe in design and workmanship, or that the defendant should have made some other or further inspection than that which he deposed to. I, at least, am unable, without evidence, to say either that the ladder was obviously unsafe in design or workmanship, or that, had the defendant made some other or further inspection, he would have discovered that the ladder was unsafe.

Applying then the propositions of law which I have stated to the facts and circumstances in evidence, I am of opinion that the plaintiff failed to establish that the defendant was negligent, or in other words failed to establish that the defendant neglected to perform the duties which the law required him to perform in reference to the plaintiff, and for these reasons I would allow the appeal and dismiss the action with costs.

Appeal dismissed (FERGUSON, J.A., *dissenting*).

[APPELLATE DIVISION.]

RE STRONACH.

1928.
Jan. 16.

Municipal Corporations—By-law Prohibiting Housing of Motor-trucks in Buildings in Specified Areas in City—Municipal Act, R.S.O. 1914, ch. 192, sec. 409 (2f) (9 Geo. V. ch. 46, sec. 17, and 10 & 11 Geo. V. ch. 58, sec. 15)—Application of Qualifying Words to Remote Antecedent—General Rules of Construction of Statutes and By-laws—Conviction for Breach of By-law Quashed.

A city by-law, passed under the authority of sec. 409 of the Municipal Act, R.S.O. 1914, ch. 192, provided that "no building for the housing of motor-trucks or apparatus used in any truck cartage business shall be located, erected or used on the property abutting on any of the highways or parts thereof nor in any of the blocks or areas set forth in the schedule . . . of this by-law." Motor-trucks of a dairy company, used solely for the purpose of delivering milk, and not used in a truck cartage business, or for the purpose of trucking or cartage for others or for the public, were housed upon premises situated within one of the areas of the city specified in the schedule:—

Held, that the words of the by-law, "used in any truck cartage business," referred to "motor-trucks" as well as to "apparatus."

The by-law therefore applied only to motor-trucks used in the business described; and the company's motor-trucks, not being used in any

truck cartage business, did not come within the prohibition of the by-law or of the statute under which it was passed.

The grammatical rule of construction restricting the application of the qualifying clause to the immediate antecedent is not universal, and will give way where a reasonable interpretation or the context requires it.

Statement of principles governing the interpretation of statutes and by-laws and review of the authorities.

1927.
RE STRONACH.

AN appeal by Stronach from the dismissal by one of the Judges of the County Court of the County of York (sitting in a Division Court) of an appeal to him by Stronach from his conviction by the Police Magistrate for the City of Toronto for a breach of a by-law of the city, No. 8754, in that the appellant "did house motor-trucks on premises known as 45 Soudan-avenue, in the said city of Toronto, in contravention of the said by-law."

November 28, 1927. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, FERGUSON, and GRANT, JJ.A.

A. J. Thomson, for the appellant, argued that the words of the by-law "used in any truck cartage business" qualify the preceding words "motor-trucks or apparatus," and not "apparatus" alone. The trucks housed were not used in the truck cartage business. The conviction violates the general rule of construction and disregards the general object of the statute, the Consolidated Municipal Act, 1922, 12 & 13 Geo. V. ch. 72, sec. 409, subsec. 2. Reference to *Great Western Railway Co.* v. *Swindon and Cheltenham Extension Railway Co.* (1884), 9 App. Cas. 787, at p. 808.

G. R. Geary, K.C., for the complainant, respondent, contended that, if effect were given to the argument of counsel for the appellant it would lead to the anomaly that other trucks are prohibited by the by-law, but the appellant with his milk-trucks is not. In any event, the defendant's trucks are used in the delivery of milk about the city, and therefore in the truck cartage business. The Legislature could not have intended to make a distinction between a truck used in the truck cartage business and a truck used in the delivery of milk. The sentence should be interpreted according to the ordinary grammatical rules of construction. "Motor-truck" is self-contained and has a meaning of its own, which "apparatus" has not. The ordinary rule that words qualify the word immediately preceding them should be applied. Reference to Beal's Cardinal Rules of Legal Interpretation, 2nd ed., p. 66.

January 16, 1928. The judgment of the Court was read by GRANT, J.A.:—The relevant section of the Municipal Act, R.S.O.

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1914, ch. 192, in so far as material to this appeal, is sec. 409(2), and it reads as follows:—

"409. By-laws may be passed by the councils of cities.

Location of Stables etc.

"2. For regulating and controlling the location, erection and use of buildings as livery boarding or sales stables, and stables in which horses are kept for hire or kept for use with vehicles in conveying passengers, or for express purposes, and stables for horses for delivery purposes, laundries, butcher shops, stores, factories, blacksmith shops, forges, dog kennels, hospitals or infirmaries for horses, dogs or other animals and for prohibiting the erection or use of buildings for all or any or either of such purposes within any defined area or areas or on land abutting on any defined highway or part of a highway;

"(*a*) The by-law shall not be passed except by a vote of two-thirds of all the members of the council;

(*b*) This paragraph shall not apply to a building which was on the 26th day of April, 1904, erected or used for any of such purposes, so long as it is used as it was used on that day."

By an amending Act of 1919, 9 Geo. V. ch. 46, sec. 17, a paragraph was added to sec. 409, which, as amended in 1920, by 10 & 11 Geo. V. ch. 58, sec. 15, reads as follows:—

"2*f*. Paragraph 2 of this section shall also apply to tents, awnings, or other similar coverings for business purposes and buildings for the housing of motor-trucks or apparatus used in any truck cartage business, but this paragraph shall not apply to any such tent, awning or building which was on the 1st day of May, 1919, erected or used for any such purpose so long as it was used on that day."

The by-law passed by the city council, under and pursuant to the statute, in so far as it bears upon the subject-matter of the appeal, reads as follows:—

"No tent, awning or other similar covering for business purposes and no building for the housing of motor-trucks or apparatus used in any truck cartage business shall be located, erected or used on the property abutting on any of the highways or parts thereof nor in any of the blocks or areas set forth in the schedule in section III. of this by-law."

It is agreed that the premises in question on Soudan-avenue come within the description of property covered by the clause of the by-law above quoted.

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The appellant is the manager of Caulfield's Dairy and, although not properly speaking the owner of the trucks in question, it was agreed by counsel that the question of the ownership should not be raised or considered upon the appeal, as it was expressly waived before the learned County Court Judge. The motor-trucks of the Caulfield Dairy Company are housed in a garage, a building which was formerly a stable, on the premises known as street No. 45 Soudan-avenue. The trucks are used solely for the purpose of delivering the milk of the dairy company, and are not used in a truck cartage business, or for the purpose of trucking or cartage for others or for the public.

It is the contention of the complainant that the motor-trucks in question are being "housed" upon the premises 45 Soudan-avenue, and that this constitutes a breach of the by-law, no matter what use may be made of the trucks. In other words, the contention of the complainant is that the qualifying phrase, "used in any truck cartage business," applies only to the word "apparatus," the last antecedent, and does not apply to "motor-trucks." The learned County Court Judge has given effect to this contention, and has affirmed the conviction.

The appellant contends that the qualifying phrase, "used in any truck cartage business," should be read as applying to "motor-trucks" as well as to "apparatus;" and that, as admittedly the trucks are not being used in any truck cartage business, therefore no breach of the by-law has been committed.

The learned County Court Judge, in his reasons for judgment, has based his decision upon the strict grammatical rule of construction, whereby the qualifying clause is restricted in its application to the immediate antecedent. That this is not a rule of universal application is abundantly clear on the authorities.

"It is true that, in strict grammatical construction, the relative ought to apply to the last antecedent; but there are numerous examples in the best writers to shew, that the context may often require a deviation from this rule, and that the relative may be connected with nouns which go before the last antecedent, and either take from it or give to it some qualification:" Lord Abinger, C.B., in *Staniland* v. *Hopkins* (1841), 9 M. & W. 178, at p. 192.

"It must be admitted that, every relative ought to be referred, not perhaps to the next antecedent 'which will make sense with the context,' but to that to which the context appears properly to attract it:" Lord Chelmsford in *Eastern Counties etc. Railway*

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Cos. v. *Marriage* (1860), 31 L.J. Ex. 73, at p. 90. The case is also reported in 9 H.L.C. 32.

"It must on all hands be admitted that, both in writing and speaking, the antecedent really referred to has often to be made out by the good sense of the hearer or reader rather than by the position of a word in the sentence; frequently the actual last antecedent would make nonsense; and it seems conceded you must then go back to some other antecedent, and a curious question may be raised as to the degree of absurdity and injustice which may be tolerated rather than retire to an earlier antecedent. The judicial exposition of any document ought to be the reasonable one, and not emphatically the grammatical one:" *ib.*, *per* Pollock, C.B., 31 L.J. Ex. at p. 86.

"*Primâ facie,* no doubt, the words would apply to the antecedent clause before them; but we may look at the rest of the deed, and, if necessary, apply the words, not to the antecedent next before them, but to the one next before that. This view of the construction to be put on a deed is supported by the decision in the House of Lords in *Eastern Counties etc. Railway Cos.* v. *Marriage,* 9 H.L.C. 32;" Channell, B., in *Tetley* v. *Wanless* (1866), L.R. 2 Ex. 21, at p. 29.

Lord Bramwell, in *Great Western Railway Co.* v. *Swindon and Cheltenham Extension Railway Co.,* 9 App. Cas. 787, at p. 808:—

"First, I think that as a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all. For instance, 'horses, oxen, pigs, and sheep, from whatever country they may come,' the latter words would apply to horses as much as to sheep."

It is manifest that the grammatical rule of construction is, at best, of *primâ facie* application only, and will give way where a reasonable interpretation or the context requires it to do so.

The law is also well established that common law rights are not held to have been taken away or affected by a statute, or by-law passed under its authority, unless it is so expressed in clear language, or must follow by necessary implication, and in such cases only to such an extent as may be necessary to give effect to the intention of the Legislature thus clearly manifested.

"It is settled by numerous authorities that a by-law restricting the carrying on of a lawful business or calling or the doing of an otherwise lawful act is to be strictly construed:" Meredith & Wilkinson's Canadian Municipal Manual, p. 254.

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"There is ample authority also for the proposition that the power of a municipality to pass by-laws restricting common law rights can only be found in language clear and distinct:" *Watt* v. *Drysdale* (1907), 17 Man. L.R. 15, at pp. 20 and 21, quoted with approval by Richards, J.A., delivering the judgment of the Court of Appeal of Manitoba in *Doble* v. *Canadian Northern Railway Co.* (1916), 27 D.L.R. 115, at p. 117.

"Municipal corporations, in the exercise of the statutory powers conferred upon them to make by-laws, should be confined strictly within the limits of their authority, and all attempts on their part to exceed it should be firmly repelled by the Courts. *A fortiori* should this be so where their by-laws are directed against the common law right, and the liberty and freedom of every subject to employ himself in any lawful trade or calling he pleases:" Osler, J.A., in *Merritt* v. *City of Toronto* (1895), 22 A.R. 205, at p. 207.

"Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons; and it is therefore expected that if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt:" Maxwell on the Interpretation of Statutes, 6th ed., p. 501.

Apart from the provisions of the by-law, which follows the language of the statute, the defendant and his dairy company enjoyed the common law right to keep the motor-trucks in question upon the premises at 45 Soudan-avenue, if they chose to do so. If that common law right is to be taken away, it must be by clear language, the meaning and intention of which cannot easily be misunderstood. In our opinion, this requirement has not been complied with in the present case. There is no apparent and sufficient reason why the housing of the apparatus should be forbidden only if it be "used in any truck cartage business;" but the housing of a motor-truck should be forbidden, no matter what use is being made of it, or indeed if it is not being used at all. If the contention of the complainant be carried to its logical conclusion,

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no man who lives in Soudan-avenue could store or house a motor-truck in his garage, even though it were put up there for the winter, and were not being used at all. I do not think that any such result was either contemplated or intended by the Legislature in passing this section of the statute, upon which the by-law must depend for its validity and interpretation. If the Legislature had any such intention, it has not been so clearly expressed as to justify a construction which interferes so seriously with established common law rights.

Further, an examination of the general tenor of the provisions of the statute and of the history of the legislation discloses its purpose, namely, to prevent the carrying on of certain businesses in the restricted locality. If the Legislature intended to provide that the owner of property might, by by-law, be prohibited from housing a motor-truck on his premises, one would not look for such an enactment in sections relating to the carrying on of businesses of various kinds. Having in mind the general purport and intention of the legislation, and the above mentioned principles governing its interpretation, I am convinced that the expression "used in any truck cartage business" refers to "motor-trucks" as well as to "apparatus." The motor-trucks, in this case, not being used in any truck cartage business, do not come within the prohibition of the by-law or of the statute under which it was passed.

The appeal, in my judgment, should be allowed with costs, and the conviction set aside, also with costs.

Appeal allowed.

[IN CHAMBERS.]

1928. Jan. 18.

RE IRVINE.

Appeal—Motion to Extend Time—Rule 492 (2), (7)—Intention to Appeal—Delay in Applying—Unusual Circumstances—Rule 600—Scope of.

An order was made, under Rule 492(7), extending the time for appealing from an order of FISHER, J., 33 O.W.N. 188, made upon a motion under Rule 600, although no determination to appeal was formed within the 7 days allowed by Rule 492 (2) and the failure to appeal within the time was not by reason of some slip or oversight.

In granting the extension, applied for 3 weeks after the time had expired, the facts that the time allowed by the Rule was very short, that the solicitor for the two parties desiring to appeal acted with diligence in advising them of the order, and asking for instructions, that one of them lived at a great distance from the solicitor, and that the solicitor had intimated to the solicitors for the opposite party, before the time had expired, the possibility of an appeal, were regarded as unusual circumstances sufficient to warrant the extension.

Quære, whether the question dealt with in the order of FISHER, J., could conveniently or properly be dealt with upon a summary motion under Rule 600.

192 — RE IRVINE.

MOTION by the executors and beneficiaries under the will of John Albert Irvine, deceased, under Rule 492(7),* for an order extending the time for appealing from an order of FISHER, J., 33 O.W.N. 188, made upon a summary application under Rule 600.

January 7. The motion was heard at a sitting of the Weekly Court, Ottawa, by ORDE, J.A., as a Judge of the Appellate Division.

W. F. Schroeder, for the applicants.

Harold Fisher, K.C., for the testator's widow.

January 18. ORDE, J.A.:—The judgment of Fisher, J., was pronounced and the order dated on the 6th December, 1927, upon a motion made under Rule 600 by the executors for advice and directions as to certain questions arising out of the will of the deceased. The motion was heard on the 12th November, 1927, by Fisher, J., at the Ottawa Weekly Court. It appears to have been fully argued, and, judgment being reserved, further written arguments were put in by consent.

The real question involved upon that motion, while arising in the administration of the estate, does not seem to have arisen under the testator's will at all, but, as appears from the judgment, involved the question whether or not there had been a binding agreement to sell certain mining lands made by the testator before his death, which, as was contended, deprived his widow of dower under the provisions of sec. 7 of the Dower Act, R.S.O. 1914, ch. 70, which deprives the wife of dower in mining lands unless the husband dies "entitled thereto."

Whether or not this question, which depended upon the effect of the conduct of the son of the testator in mailing, after the testator's death, an acceptance of an offer to purchase the lands in question signed by the testator immediately before his death, was one which could conveniently or properly be dealt with upon a summary motion under Rule 600 may be doubtful. But the executors launched the motion, the widow raised no objection, and, if the executors and beneficiaries are prejudicially affected by the course they adopted, they have themselves only to blame.

Rule 492 (2) requires an appeal in cases like this to be taken and set down within seven days from the date of the judgment or order; in the present case, not later than the 13th December, 1927.

* See appendices to vols. 30, 40, and 50 of the Ontario Law Reports. The amendments made to Rule 492 are there set forth.