

ORIGINAL CIVIL.

Before Mr. Justice Batty and Mr. Justice Starling.

GELL, APPELLANT, v. TAJA NOORA (ORIGINAL PETITIONER),
RESPONDENT.*

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February 2.

License—License of public conveyances—Power of Commissioner of Police to grant licenses—Discretion to refuse license—Bombay Act VI of 1863, section 6—Specific Relief Act (I of 1877), section 45—Practice.

Section 6 of Bombay Act VI of 1863 empowers the Commissioner of Police in Bombay to grant licenses for public conveyances and provides that he "may in his discretion refuse to grant any such license for any conveyance which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public." Under this section the Commissioner is bound to exercise his discretion in each case. This discretion is not an absolute one, but one which is to be exercised after he has made himself acquainted with the conveyance to be licensed and has considered whether it, as an individual carriage, is fit for the conveyance of the public.

Where it appeared that the Commissioner of Police had approved of a certain pattern of victoria as a public conveyance in Bombay and refused to license victorias which did not conform to that pattern,

Held, that his refusal on that ground was illegal, and under section 45 of the Specific Relief Act (I of 1877) he was ordered to issue the licenses asked for.

Per Russell, J.—Under rule 577 of the High Court Rules all applications under section 45 of the Specific Relief Act (I of 1877) should be made by motion and not by petition.

APPEAL from an order dated the 22nd September, 1902, made by Russell, J., ordering the Acting Commissioner of Police, Bombay (the appellant), to grant forthwith to the petitioner (respondent) licenses for ten victorias under the provisions of Bombay Act VI of 1863.

The respondent (petitioner) Taja Noora was an owner of public or hack victorias and earned his living by plying the same for hire in Bombay.

The appellant was the Acting Commissioner of Police in Bombay.

On the 13th September, 1899, the Commissioner of Police (Mr. Kennedy) issued the following notice:

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Superintendents of Police and Public Conveyance Inspectors are directed to inform the owners of hack victorias and *rekhlas* in their respective divisions that the annual inspection of public conveyances will commence on Tuesday the 10th day of October, 1899, and will conclude on the 15th January, 1900.

The backs and sides of victorias inside must be lined with good lining leather and the cushions covered with the same material.

The hood must be lined with superior dark blue or dark green broadcloth, the carriage properly painted and varnished and supplied with good harness and lamps. Horses for use in public conveyances should be 14-2 hands and upwards.

All the owners of hack victorias should be informed that no victorias will be passed unless the bodies of them are painted yellow.

All new victorias must be of the pattern victoria to be seen at the head Police office, and no victoria of size or shape other than of the pattern victoria will be passed after the 10th October, 1899. This victoria is to seat three passengers only.

All new *rekhlas* must have the entrance at the back with an iron step below.

Each owner of public conveyances must on bringing up the conveyance for inspection produce an application for a license setting forth that he is the real owner and that neither the conveyance nor horse nor harness is mortgaged.

On a conveyance coming up for inspection, the licensed driver must come up also with it, bringing with him two suits of khaki and breeches.

(Signed) H. KENNEDY,
Commissioner of Police.

Bombay, 13th September 1899.

One of the Inspectors of the Bombay Police swore that he personally communicated the effect of these orders to the petitioner Taja Noora, who resided in his district, and that to his personal knowledge Taja Noora attended at the head Police office and inspected the new pattern victoria kept there for the purpose.

In February, 1902, the petitioner was desirous of obtaining licenses under Bombay Act VI of 1863 for ten new victorias which he had recently built. On the 25th February, 1902, he requested to be informed when and where he should produce the victorias for inspection by the Acting Police Commissioner. The latter subsequently called at the petitioner's stables and inspected the victorias.

On the 10th March, 1902, the Solicitors of the petitioner wrote the following letter to the Acting Police Commissioner :

SIR,—We are instructed by Taja Noora that the Acting Deputy Commissioner called at his stable and inspected the victorias referred to in our letter to you of

the 25th ultimo, but our client has not yet been supplied with the licenses to ply the victorias. Under the circumstances we have to request you to direct the licenses in question to be issued to our client without further delay.

Please let us know on what day our client should attend your office to receive the licenses.

(Signed) CRAWFORD, BROWN & Co.

To this letter the Acting Police Commissioner replied on the 17th March, 1902, as follows :

GENTLEMEN,—With reference to your letters of the 25th February last and the 10th instant to my address, I have the honour to inform you that I have myself seen your client Taja Noora and have given him to understand that he cannot have the licenses he applies for. My reasons for refusing to grant these licenses are as follows.

2. Three years ago Mr. Kennedy informed all owners of public victorias that after a certain date no victoria not built according to a certain pattern would be passed for hire, and in order that there should be no misunderstanding on the point he had a specimen conveyance kept at the head Police office for their guidance.

3. Your client Taja Noora was one of the owners so warned, and notwithstanding that the date so fixed expired two years ago, he has chosen to build a number of new victorias of the very type condemned by Mr. Kennedy. These are the conveyances I this morning saw. As he has taken upon himself to ignore what every other conveyance owner has submitted to, he has no one but himself to thank if he suffers any loss by the rejection of his conveyances.—I have, &c.

(Signed) H. G. GELL,
Acting Commissioner of Police.

On the 18th March, 1902, the petitioner's Solicitors wrote the following letter to Mr. Gell, the Acting Commissioner of Police :

SIR,—We are informed by Taja Noora that he attended your office yesterday at 10 A.M., and produced for inspection by you his ten victorias, when you informed him that you declined to give him licenses to ply the same.

We are instructed to state that our client has incurred considerable expense over the victorias, and he will suffer great loss if he is not permitted to ply the victorias which, we are instructed, are in good condition and fit to be used by the passengers, and are of the same kind as many other public conveyances which ply for hire in Bombay.

We are further instructed to request you to state in what way you consider the victorias "to be insufficiently found or otherwise unfit for the conveyance of the public" within the meaning of section 6 of the Public Conveyances Act

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(Bombay Act VI of 1863), so that our client may know what alterations he is required to make so as to entitle him to obtain the necessary licenses to enable the victorias to be plied for hire.

An early answer will oblige.

(Signed) CRAWFORD, BROWN & CO.

To this letter the Acting Commissioner replied as follows :

Bombay, 18th March, 1902.

GENTLEMEN,—In continuation of my office No. $\frac{2871}{40}$ A of the 17th instant, I have the honour to inform you that if your client Taja Noora will call at this office he will be told in what way I consider his conveyances fail to come up to the proper standard.—I have, &c.

(Signed) H. G. GELL,
Acting Commissioner of Police.

The licenses were refused. The petitioner, thereupon, presented a petition to the High Court under section 45 of the Specific Relief Act (I of 1877), praying for an order directing the Police Commissioner to grant licenses for the said ten victorias. In his petition he denied that he had ever seen any pattern victoria. After referring to section 6 of Bombay Act VI of 1863 he said :

7. It appears, however, from the said Acting Police Commissioner's letter of the 17th March, 1902, that he refused to grant the said licenses to me, not because he considered the said ten victorias to be insufficiently found or otherwise unfit for the conveyance of the public, or me to be unfit to be entrusted with the same (on which grounds alone, as I submit, the Police Commissioner was empowered to refuse to grant the said licenses), but because the said victorias did not conform to the pattern referred to in the said letter.

8. I say that my said ten victorias are substantially built, well equipped and in every way sufficiently found and fit for the conveyance of the public, and I say further that licenses have this year been granted by the said Acting Police Commissioner in respect of a large number of hack victorias of the same pattern as that of my said ten victorias.

9. I submit that the said Acting Police Commissioner had no power to refuse to grant to me the said licenses upon the grounds stated in his said letter or otherwise, and that his refusal aforesaid was and is illegal.

10. I do not know of and have been unable to ascertain the existence of any rule authorising the Police Commissioner to prescribe a pattern to be conformed to by all owners of conveyances intended to be plied for hire in Bombay, and I will, if necessary, contend that any rule purporting to give such authority is *ultra vires* and of no effect.

14. I had shortly before the completion of my said ten victorias purchased good and costly horses to work in the same, but owing to the refusal of the said Acting Police Commissioner to grant me the said licenses the said victorias and horses are unused, and I have been ever since such refusal aforesaid and now am incurring considerable loss in respect of the same, inasmuch as I have to house and keep the same without earning anything thereby, and my property and my personal right to earn a living by plying the said victorias for hire have been and are being seriously injured.

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The Acting Commissioner of Police (the appellant) in his affidavit stated as follows (paragraphs 3--8) :

3. That it has always been the object of successive Commissioners of Police in Bombay to improve the class of public conveyances in Bombay in the interests of the public, and in furtherance of that object such changes have from time to time been introduced in the style of public conveyances as have appeared to be desirable.

4. As late as about 1832, so far as I remember, the public hack conveyance used in Bombay was a buggy seating two passengers and the driver, but numerous complaints from the public were made as to this style of public conveyance which was objectionable on various grounds and consequently an endeavour was made to introduce Hansom cabs and a style of conveyance called a victoria. The victorias were introduced, so far as I remember, between 1882 and 1884 and were then built to carry three passengers. In compliance with the wishes of the public, the pattern of public victoria was in 1893 altered so as to carry four passengers. This pattern of victoria for four passengers continued in use for some time, but in 1899 it became apparent that the class of horses obtainable and available for use and used in such public conveyances was not fit to pull such a heavy type of victoria and it became necessary in the opinion of Mr. Hartley Kennedy, the then Commissioner of Police, in the interests of the public to reduce the carrying capacity of public victorias to three passengers and to take steps that conveyances lighter in weight should be introduced, and it is in this direction as to the style of new public conveyance which would be licensed which the said Taja Noora has admittedly neglected to pay attention to.

5. When the alteration was so decided upon in 1899, Mr. Hartley Kennedy considered that it would be easier and more beneficial for public conveyance owners to copy a pattern victoria than to follow specifications on paper and, therefore, a sample victoria was placed for inspection by such owners at the head Police office. The public conveyance owners without exception, and including Taja Noora, the applicant, inspected the sample victoria and intimated that they were quite ready to follow the directions given and made no objection to the style of victoria decided upon for future building and licensing, which they agreed was suitable for the class of horses used in Bombay public conveyances.

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Mr. Kennedy directed that, though no new conveyances thereafter built of the old pattern should be licensed, owners of public conveyances would be permitted to bring up to be licensed any victorias of the old pattern as had already been built before the date of the issue of the new directions, provided that such conveyances of old pattern were offered as substitutes for public conveyances condemned as unfit for further use.

7. Until recently Taja Noora brought up no new victorias of the old pattern to be passed for licenses and he admits in his petition that the victorias, which he now seeks to have licensed and which, I say, are of the obsolete pattern condemned by Mr. Kennedy, were built by him after the directions mentioned in paragraphs 4 and 6 hereof were issued by the Commissioner of Police.

8. I am advised that the Commissioner of Police is justified in refusing to license a style of victoria which in his opinion is undesirable and unfit as a public conveyance in Bombay having regard to the interests and wants of the public and the quality of the horses obtainable and available for use and used in Bombay in public conveyances, and actuated by these considerations I have exercised the discretion vested in me and have refused to license the new victorias of Taja Noora, as I am of opinion that under the circumstances they are unfit for the conveyance of the public in Bombay.

The petition was heard by Russell, J., who after argument delivered the following judgment :

RUSSELL, J.:—On the 18th July, 1902, the applicant Taja Noora presented a petition under the Specific Relief Act (I of 1877) and Bombay Act VI of 1863, praying that the Commissioner of Police, Bombay, should be ordered to grant him licenses under Bombay Act VI of 1863 for ten victorias of which he is the owner.

I may mention, at the outset, that this procedure is wrong, for by rule 577 of the Bombay High Court Rules, applications under section 45 of the Specific Relief Act must be made by motion. In future if this procedure is not adopted, this Court will be compelled to reject the application. In the present case, however, I treat the petition as a notice of motion and affidavit in support thereof.

Paragraphs 1, 2, 3, 4, 5, 7, 8 and 9 of the petition set out the material facts and submissions of the applicant's case :

1. I am and for several years past have been earning my living by owning and plying for hire several public or hack victorias in Bombay.

2. In or about the middle of 1901 I commenced to have built ten new victorias with the intention of plying the same for hire in Bombay, and the said

victorias were built in accordance with a pattern introduced by the late Police Commissioner, Mr. Vincent, and then (and now) commonly in vogue in Bombay.

3. The said victorias were complete and ready for use on the 1st March, 1902, and on the 2nd March, 1902, I applied to Mr. Gell, then (and now) Acting Police Commissioner, to grant to me the necessary licenses for the same under sections 2 and 6 of Bombay Act VI of 1863 (an Act for the Regulation of Public Conveyances in the Town, Suburbs and Harbour of Bombay), and I produced the said ten victorias before the said Acting Police Commissioner for his inspection and orders, and duly complied with all the Police Rules relating to the grant of licenses as aforesaid, but the said Acting Police Commissioner refused to grant the licenses applied for by me.

4. The grounds upon which the said Acting Police Commissioner refused to grant the said licenses to me appear from his letter of the 17th March, 1902 [which has been set out above, page 309].

5. I am advised that upon the true construction of the provisions of the said Bombay Act VI of 1863, under which Act, I am advised, the Bombay Police Commissioner grants licenses for conveyances, the Police Commissioner has no power to refuse to grant to me the licenses applied for except under the proviso to section 6 of the said Act, and that save as aforesaid it is incumbent upon the Police Commissioner to grant to me licenses for my said victorias.

7. It appears, however, from the said Acting Police Commissioner's letter of the 17th March, 1902, that he refused to grant the said licenses to me, not because he considered the said ten victorias to be insufficiently found or otherwise unfit for the conveyance of the public, or me to be unfit to be entrusted with the same (on which grounds alone, as I submit, the Police Commissioner was empowered to refuse to grant the said licenses), but because the said victorias did not conform to the pattern referred to in the said letter.

8. I say that my said ten victorias are substantially built, well equipped and in every way sufficiently found fit for the conveyance of the public, and I say further that licenses have this year been granted by the said Acting Police Commissioner in respect of a large number of hack victorias of the same pattern as that of my said ten victorias.

9. I submit that the said Acting Police Commissioner had no power to refuse to grant to me the said licenses upon the grounds stated in his said letter or otherwise, and that his refusal aforesaid was and is illegal.

The reasons why the Commissioner of Police has refused to grant the licenses are thus set forth in paragraphs 3—8 of his affidavit of the 25th August, 1902 [above set out: see page 311].

From this and the other affidavits in the case I have come to the conclusion that the real and only ground on which the licenses have been refused is that the ten victorias in question do not conform to the pattern which Mr. Hartley Kennedy had

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made and of which, I find on the affidavits, the applicant had due notice.

On the 13th September, 1899, the notice (Exhibit A to Mr. Power's affidavit of 10th September, 1902) was issued [which is set out above : see page 308].

The question arises, therefore, whether the Commissioner of Police is justified by law in requiring all hack victorias to comply with a "sealed pattern." Section 6 of the Bombay Act VI of 1863 provides as follows :

Licenses issued under section 2 of this Act shall usually be granted on the 1st January in each year, but the Commissioner of Police or Master Attendant may at any other time grant licenses, and shall always at the time of granting every license, and at all other times when necessary, cause to be painted and branded upon a conspicuous part of every such public conveyance such number and inscription as are required by section 2: Provided that the said Commissioner of Police or Master Attendant may in his discretion refuse to grant any such license for any conveyance which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public, or to any applicant whom he may consider from youth, bad character, or for other reason unfit to be entrusted with the same.

The first point that occurs to me is that the section refers to the conveyance itself only. It does not refer in any way to the horse which is to draw the conveyance. It is clear from Mr. Gell's affidavit that the reason why the sealed pattern was adopted was that horses to draw heavy victorias are not easily procurable in Bombay. Nor do I find anything in that section which authorizes the Commissioner of Police to say that he will not license any victoria unless it is painted yellow and complies with the other details in the notice I have above referred to. In fact, it appears to me that if I am to hold that every victoria must conform to the sealed pattern I should do away with the discretion which the Commissioner of Police has to exercise under the Act. How a man is to exercise his discretion as to an object with regard to which he declines to exercise such discretion, unless the object complies with a "sealed pattern," I fail to see. I find direct authority for this in the case before the Court of Appeal in England of *Wood v. Widnes Corporation*.⁽¹⁾

(1) (1898) 1 Q. B. 463.

The head-note of that case runs as follows :

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Section 36 of the Public Health Act, 1875, which empowers a local authority to give notice requiring the owner of a house to provide a sufficient water-closet, earth-closet, or privy, and in case of non-compliance empowers the local authority to do the necessary works and recover the expenses, does not empower such authority to enforce a general resolution that in all such cases within their jurisdiction a particular system shall be adopted ; but they are bound to exercise their discretion in each particular case, and consequently a notice in accordance with the general resolution and requiring compliance with its provisions is invalid.

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The Lord Chancellor, in the course of his judgment, said :

I find it impossible to look at the dates of the various resolutions and notices without coming to the conclusion that it was the intention of the respondents to enforce a particular scheme of sanitation without reference to the exigencies in any particular case, and that notice was intended to carry out that view. The notice consequently was not one authorized by the statute.

In the same case A. L. Smith, L.J., expressed the following opinion :

I agree with the Division Court that this was an attempt to enforce a general scheme so that where there were defective closets they should be altered to others of a particular kind. When once that question of fact is arrived at, the judgment appealed against must stand. There is another ground upon which it can be supported—that this notice was one that ordered the provision of closets according to a particular plan to be found at the board room of the respondents, and intimated that if the work was not done in accordance with that plan, then the authority would themselves do the work, and charge the appellant with the expense. Supposing that the appellant did not like the plan approved by the respondents, but desired to put up water-closets of the latest type, his doing this would not have been a compliance with the notice ; and on this ground I think the notice was bad, because it gave the appellant no option to put up, as required by the statute, sufficient closets.

Applying the reasoning in these judgments to the present case, it appears to me that, if the most perfect and up-to-date victoria was submitted for a license, the Commissioner of Police, according to his present argument, would be bound to decline to license it, because it did not comply with his sealed pattern.

While fully sympathising with the attempt of the Commissioner of Police to improve the victorias in Bombay, which are an eyesore, I cannot think that his action herein is justified by the section of the Act above set out.

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I accordingly grant the prayer of the petition. I order the Commissioner of Police to grant licenses forthwith in respect of the ten victorias in question. I order him to bear his own costs and pay half the costs of the petitioner, who is to bear half his own costs. I make this latter order, as I am satisfied on the affidavits that the petitioner's statements that he had no notice or knowledge of the pattern victoria are untrue.

The Acting Commissioner of Police appealed.

Scott (Advocate General) for the appellant (Commissioner of Police):—Section 6 of Bombay Act VI of 1863 gives the Commissioner absolute discretion. The Commissioner in his affidavit says that he saw the victorias in question and after inspection and using that discretion he refused the licenses. This Court will not interfere with his decision. The Judge below was wrong in holding that the licenses were refused because the victorias were not built according to a certain pattern. There is nothing to show that influenced the Commissioner. He, no doubt, had good reasons for refusing the licenses: *Wood v. Widnes Corporation* ⁽¹⁾; Stat. 10 and 11 Vic., cap. 89.

Lowndes for the respondent (petitioner):—It is clear from the affidavits and the letters that the licenses were refused because the victorias were not of a certain pattern prescribed by the Commissioner's predecessor. That is not an exercise of his own discretion as required by the section. The section does not sanction an attempt to compel the use of a certain type of victorias. The discretion of the Commissioner must be applied to each particular case: see *per* Lord Halsbury in *Wood v. Widnes Corporation* ⁽¹⁾; and it must be exercised only as to whether the vehicle is "insufficiently found or otherwise unfit." These words do not permit any regard to be paid to the fitness of the horses used in the vehicles. There is no discretion given as to that. It could not be said "that the question of whether a railway carriage was insufficiently found or otherwise unfit" included the question of the character of the engine that was to draw it.

⁽¹⁾ (1898) 1 Q. B. 463.

BATTY, J. :—The questions in this appeal are whether the Commissioner of Police, in refusing to grant license to the petitioner under section 6 of Bombay Act VI of 1863, exercised the discretion vested in him by that section. If he did so, then unquestionably the Courts could not interfere: *Attorney-General v. Great Western Railway Company* ⁽¹⁾; *Reg. v. Collins* ⁽²⁾; *Khando v. Appaji* ⁽³⁾ and cases therein cited. But the ground of refusal should show that it was a ground to which the power extended: *Queen v. Sykes* ⁽⁴⁾; *Ex parte Smith*.⁽⁵⁾ In this case the power given is to refuse a license only when the Commissioner considers that the conveyance for which it is required is insufficiently found or otherwise unfit for the conveyance of the public, or that the applicant is open to certain objections. This clearly calls for the exercise of discretion in each particular case, and “an exercise of the power in the fetters of self-imposed rules, purporting to bind the authority in all cases, would not be within the Act”: Maxwell on Statutes, page 149. In *Wood v. Widnes Corporation* ⁽⁶⁾ the *ultra vires* action complained of had gone somewhat further and had attempted to enforce by notice the adoption of a particular system, and it was observed that had the notice merely been to the effect that it might be convenient to the public to know that a particular form of construction would satisfy the requirements of the Corporation, there could have been no harm in it. In the present case there is no question raised as to the invalidity of any such order prescribing uniformity, and the question here depends rather on the applicability of the principle laid down by Turner, L.J., in *Tinkler v. Wandsworth Board of Works*,⁽⁷⁾ that it is no less *ultra vires* to act in a particular case on such a general and self-imposed rule as to prescribe such a rule for uniform compliance in all cases. The question here, therefore, is not whether such a rule was made, but whether it was the reason on which the refusal of the license was based, excluding all consideration as to the individual fitness of each conveyance in question.

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(1) (1877) 4 Ch. D. 735 at pp. 744-745.

(4) (1875) 1 Q. B. D. 52.

(2) (1876) 2 Q. B. D. 30.

(5) (1878) 3 Q. B. D. 374.

(3) (1877) 2 Bom. 370 at p. 373.

(6) (1898) 1 Q. B. 463.

(7) (1853) 2 DeG. & J. 261.

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The adoption of principles approved by, or founded on the experience of, a predecessor in office is not necessarily open to objection, and might be desirable to maintain continuity. But the principles adopted must be strictly limited to the attainment only of those requirements which the Act enables the authority to enforce, and, when those requirements are satisfied, cannot prescribe variance in the mode of compliance.

It has been urged in appeal that the requirements of section 6 of the Act (Bombay Act VI of 1863) extend only to the equipments of conveyances and that the words "otherwise unfit" must be construed as relating only to defects *ejusdem generis* with the defects in equipment, and that neither of the expressions used would permit any consideration of the motive power to be employed. That the words "otherwise unfit," as more general than the preceding words "insufficiently found," may be limited thereby, may be conceded. But the phrase "insufficiently found" constitutes as the ground of objection, not the "findings" or "equipments," but their "insufficiency," and therefore limits objections on the ground of unfitness to "insufficiency," which is the only mode of unfitness mentioned, and not to the objects in which unfitness may be detected, which would be merely tautological and nugatory. The word "unfitness" is generic in relation to insufficiency, but has no such connection with equipments. The phrase "otherwise unfit for the conveyance of the public" is, therefore, susceptible of being construed as "otherwise defective" for the purpose mentioned.

Now a license must under section 4 specify the number of horses or other animals by which the conveyance shall be drawn, and therefore in granting the license the Commissioner must necessarily consider, with reference to the number of horses to be specified, and the structure of the vehicle, whether it is defective for the purpose of conveying the public. If the number of horses provided is insufficient for that purpose, it is insufficiently found, and if defective in structure or material, it is otherwise unfit. If the motive power could be ignored, an immoveable machine might be approved. The line must manifestly be drawn before absurdity is reached. And the line has manifestly been drawn by the Legislature at insuitability

for the purpose designated, as to the existence of which, in each particular case, the Commissioner is the sole judge.

The only question is, therefore, in my opinion, whether the Commissioner really considered the fitness for the purpose of these particular conveyances, not ignoring the sufficiency of the motive power to be specified in the license as among the accessories to be provided. This is a mere question of fact, and one as to which the Commissioner alone could supply the answer. A bare statement that these particular conveyances had been considered and held by the Commissioner to be unfit for the conveyance of the public on the ground that they were too heavy for the motive power provided, would have sufficed, but the Advocate General, who appears to support the appeal, is unable to point to any passage in the Commissioner's affidavit which contains such a statement. We have been asked to infer that the Commissioner must have meant that he had so considered the particular vehicles. But the affidavit was formally drawn up when legal advice as to what was required was available, and if the statutory condition had been fulfilled there could have been no difficulty in saying so. Nothing short of a clear statement to that effect ought, I think, to be accepted.

Reference has been made to a letter from the Commissioner to the Solicitors for the respondent, in which the Commissioner states that he had that morning seen the conveyances. The reason therein assigned is, however, not that on such inspection the conveyances appeared to the Commissioner insufficiently found or otherwise unfit, but that the petitioner had chosen to build new victorias of a type condemned and thus taken on himself to ignore a rule that every other owner of conveyances had submitted to. Whether the conveyances in question were, apart from their resemblance to the condemned type, insufficient or unfit is not distinctly affirmed in this letter. In paragraph 8 of his affidavit the Commissioner says: "Indeed I have exercised the discretion vested in me and have refused to license as I am of opinion. that *under the circumstances* they are unfit, &c." The circumstances adverted to are manifestly those stated above and specially in paragraph 8, viz., the victorias were of an obsolete pattern built after the directions issued. So

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that the ground of refusal would appear to be that the *pattern* was disapproved and the directions contravened. The directions were, as already observed, *ultra vires*, and there is no power to refuse a license on the ground that a pattern is obsolete or open to objections, unless the Commissioner is able to say that in the particular instances before him the Commissioner is satisfied that the defects appearing in the pattern have been reproduced, which render them unfit for the conveyance of the public. The Commissioner may have meant this, but his language is more consistent with the inference that his refusal was based, not on defects noted in the particular victorias in question, but on defects observed in victorias of a similar type, which may or may not, for all that appears in the affidavit or correspondence, have been avoided in these particular instances. It is quite conceivable that a pattern may be preserved and its defects remedied by the use of other material or otherwise. I am not therefore satisfied that the decision of the lower Court is wrong and think the appeal should be dismissed with costs.

STARLING, J. :—Under Bombay Act VI of 1863, sections 1 to 6, provision is made for the granting of licenses in respect of land and water conveyances; and by section 6 a discretion is given to the Commissioner of Police to refuse to grant a license for any land conveyance “which he may consider to be insufficiently found or otherwise unfit for the conveyance of the public”; but under these provisions, while the Commissioner has a discretion, it is not an absolute one, but one which is to be exercised after the Commissioner has made himself in some way acquainted with the character of the carriage to be licensed, and has considered whether it, as an individual carriage, is fit for the conveyance of the public. In the exercise of this discretion he is not to fetter himself with rules which would prevent him in each case being quite free to consider the merits of each particular carriage.

Now, it appears that, on the 13th September, 1899, the Commissioner of Police, Mr. Kennedy, issued an order setting forth the details of construction which he required to be adopted in victorias presented for license, stating that he had had a sample victoria prepared, and that all new victorias must be of that

pattern. It is clear, however, that the order is illegal, no authority to make it being given in the Act. If this order had been in a slightly different form, and had a note affixed thereto that it would be convenient to the owners of victorias to know that that particular form of victoria would satisfy the requirements of the Commissioner, there would have been no harm in it, but in its present form, in my opinion, it is bad. It is an attempt by the Commissioner to fetter the discretion vested in him by the Act: see *Wood v. Widnes Corporation*.⁽¹⁾ Unauthorized as such an order was, it was still possible that the Acting Commissioner, Mr. Gell, might have exercised his discretion in respect of the victorias in question in this matter independently of this order. If it had appeared by Mr. Gell's affidavit that he had considered these victorias on their own merits, and that on such consideration he was of opinion that they were unfit for the conveyance of the public, this Court could not have interfered; but on going through Mr. Gell's affidavit and the other affidavits in the case made on his behalf, I find no indication of any such independent consideration. It is quite evident that his subordinates consider that these victorias should be rejected solely because they do not conform to the standard pattern introduced by Mr. Kennedy. Further, Mr. Gell's letter of the 17th March, 1902, states as follows: "My reasons for refusing to grant these licenses are as follows." Then follows a statement of Mr. Kennedy's directions about victorias, and the applicant's Solicitor is informed that his client's conveyances were of the condemned type and not in accordance with the sample pattern, and that if he suffers from their rejection it is his own fault. It is quite true that Mr. Gell says he has seen the victorias, but it is quite evident that all he considered in them was whether they were in accordance with the prescribed sample or not. Doubtless Mr. Gell, in the eighth paragraph of his affidavit, says: "I have exercised the discretion vested in me and have refused to license the new victorias of Taja Noora, as I am of opinion, *under the circumstances*, they are unfit for the conveyance of the public in Bombay"; but it is only "under the circum-

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stances," and it is impossible to separate these few lines from the preceding paragraphs of the affidavit and the letter of the 17th March, 1902, since which time Mr. Gell does not suggest that he has given any fresh and independent consideration to the matter. Under these circumstances, I consider this case is on all fours with that of *Wood v. Widnes Corporation*,⁽¹⁾ and the appeal must be dismissed with costs.

Appeal dismissed.

Attorneys for the petitioner-respondent—*Messrs. Smetham, Byrne and Noble.*

Attorney for the Commissioner of Police—*Mr. E. F. Nicholson* (Government Solicitor).

(1) (1898) 1 Q. B. 467.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903.
 February 9.

NATHA KUPAJI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v.
 MAGANCHAND MOTIJI AND OTHERS (ORIGINAL DEFENDANTS),
 RESPONDENTS.*

*Fraudulent conveyance—Transfer of Property Act (IV of 1882), section 53—
 Transfer to one creditor—Good faith.*

One Byramji Kuverji died in June, 1896, indebted to several creditors. Immediately after his death his sons mortgaged his property to Moti Gelaji, one of his creditors. On the 11th August, 1897, another creditor, Jaitha Kupaji, obtained letters of administration to the estate of the deceased, and, as such administrator, sold the property to the son of the mortgagee, the latter having died. Subsequently the plaintiffs obtained a money decree against the estate and sued to establish their right to attach the property, alleging that the sale was void under section 53 of the Transfer of Property Act (IV of 1882). The lower Appellate Court held that the purchase was for value and that there was no evidence of fraud, and it dismissed the suit. On second appeal:

Held, (affirming the decree) that the sale was valid. The fact that it was a sale of the whole of the property of the deceased to one of his creditors made no difference. The only question was whether the transaction was in good

* Second Appeal No. 389 of 1902.