IN THE PRIVY COUNCIL.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

SUBJECT,

Provincial Jurisdiction *re* Prohibitory Liquor Laws.

JUDGMENT OF ONTARIO COURT OF APPEAL
IN RE LOCAL OPTION ACT.

JUDGMENT OF QUEBEC COURT OF QUEEN'S BENCH IN
HUNTINGDON VS. MOIR.

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1891*
Sept. 23.

IN *RE* LOCAL OPTION ACT.

[*Reported 18 Ontario Appeal Reports 572.*]

Intoxicating liquors—Constitutional law—Liquor License Act—Local Option—Sale by wholesale—Sale by retail.—53 Vict. c. 56, sec. 18 (O.)—54 Vict. c. 46, sec. 1 (O).

Section 18 of 53 Vict. c. 56 (O.) allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors is *intra vires*, the Ontario Legislature, as is also section 1 of 54 Vict. c. 46 which explains it, but the prohibition can only extend to sale by retail.

A by-law omitting to provide a penalty for its violation is not necessarily bad.

Pursuant to the provisions of 53 Vict. c. 13 (O.), "An Act for expediting the decision of Constitutional and other Provincial questions," the following questions were referred to this Court for determination.

1. Had the Legislature of Ontario jurisdiction to enact the 18th section of the Act passed in the 53rd year of Her Majesty's reign, chaptered 56, and entitled, "An Act to improve the Liquor License Laws"?

2. Or had the Legislature jurisdiction to enact the said section as explained by section 1 of 54 Victoria, chapter 46?

3. Has the council of a township, city, town and incorporated village authority to pass by-laws for prohibiting the sale of liquors in the original packages in which the same have been received from the importer or manufacturer; provided that the by-law before the final passing thereof has been duly approved by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act?

4. Is a by-law in terms of section 18 of 53 Victoria, chapter 56, or as explained by section 1 of 54 Victoria, chapter 46, invalid, where the by-law does not provide a fine or penalty for sales contrary to its provisions?

Present:—HAGARTY, C.J., BURTON, OSLER, AND MACLENNAN, JJ.A.

HAGARTY, C.J.O. :—

(The learned Chief Justice read the questions and continued):

From an early period, at least as far back as 12 Vict. c. 81 (1849), municipalities had the power to regulate tavern licenses and to limit their number.

In 1853, by 16 Vict. c. 184, sec. 3, sub-sec. 2, they were given power to pass by-laws "for preventing absolutely the sale of wine, brandy or other spirituous liquors, ale or beer or any of them, by retail within the municipality," with a saving clause as to sale in original packages containing not less than five gallons.

In 1858, 22 Vict. c. 99, sec. 245, sub-sec. 6, there is a clause, identical with that re-enacted in the statute on which our opinion is sought, for prohibition subject to the approval of the electors.

This is repeated in C. S. U. C. c. 54, sec. 246 (1859), authorizing the prohibition of sale by retail. Then 23 Vict. c. 53 (1860), limited the number of licenses to be granted in municipalities, section 5 declaring that it was not to restrict municipal councils from further limiting the number or passing any other by-law under section 246 of C. S. U. C. c. 54.

In 1864 the Legislature passed the Act 27-28 Vict, c. 18 (commonly called the Dunkin Act). Section 1 provided that the municipal council of every county, city, town, township, etc., should have power to pass a by-law for prohibiting the sale of liquor and the issuing of licenses within such county, etc., and full provision was made as to its being approved by the electors. Section 2, sub-section 3, allowed distillers and brewers to sell in not less than certain named quantities. The brewers and distillers' clause still appears in R. S. O. (1887) c. 194.

In 1866, in 29-30 Vict. c. 51, sec. 249, sub-sec. 9, is the clause allowing a by-law for prohibiting the sale in taverns by retail, and for prohibiting totally the sale thereof in places other than houses of public entertainment, and this clause is identical with the clause now in question. Section 252 declares that no license shall be necessary for selling liquor in original packages.

Confederation took place on 1st July, 1867.

The first Ontario legislation seems to be 1869, 32 Vict. c. 32; "The Tavern and Shop Licenses Act." Section 6 empowers municipalities to pass by-laws in terms identical with the clause in question. See sub-section 7.

Section 40 repeals the sections 249 to 263 of the Act of Canada of 1866, cited above. This section 249 is that allowing such a by-law before Confederation, and thus the same statute repealing the clause re-enacts it in the same terms.

So things remained under the last Act from 1869 to 1874.

In 1874, 37 Vict. c. 32, amended and consolidated another Act, not bearing on this point, and the prohibition clause was omitted in declaring the powers (section 9) of municipalities in counties where the Temperance Act of 1864 was not in force, leaving however the power to regulate and to define the conditions and qualifications requisite for obtaining licenses and the power to limit the number. And see 40 Vict. c. 18 (O.), and R. S. O. (1877), c. 182.

53 Vict. c. 56 is an Act amending the Liquor License Laws. Section 18 is as follows:

(The learned Chief Justice read the section and continued):

We must notice the Canada Temperance Act of 1878, a Dominion Act whose validity has been affirmed in the Privy Council, 41 Vict. c. 16.

It takes up the general principle of the Canada Act of 1864 (called the Dunkin Act). It extends over the Dominion, and provides an elaborate set of provisions for taking the votes of county and city electors on the proposed prohibition by-laws, and provides for the repeal in certain cases of similar by-laws, under the Act of 1864.

It contains most stringent provisions against the sale or barter of every intoxicating liquor.

Sec. 99, sub-sec. 2, provides that no license to distillers or brewers, nor to any steamboat or vessel, nor any other license shall avail against any violation.

Sub-section 3 provides for its use for sacramental or medicinal purposes. Sub section 5 provides that any cider producer or licensed distiller or brewer in a prohibition county or city may sell at his premises, not under specified quantities, only to druggists or others licensed or to persons who he has reason to believe will forthwith carry the same beyond the limits of the prohibition district. By sub-section 6 leave is given to companies making native wine to sell it in certain quantities.

By sub-section 7 manufacturers of native wine when authorized so to do by license from the municipal council or other authority having jurisdiction where the manufacturing is carried on may sell the same in named quantities.

By sub-section 8 a merchant or trader exclusively in wholesale trade, when duly licensed to sell liquor by wholesale, may sell in named quantities to druggists or to persons who as he believes will forthwith carry the same out of the county, etc., etc.

It is clear that no license can avail against any violation of the Act except within the allowed limits.

The Act contemplates the issuing of licenses to brewers and distillers and manufacturers of native wine.

For at least thirteen years prior to Confederation municipalities had this power of prohibiting the sale of liquor. The power existed at Confederation and was continued by Ontario legislation in "The Liquor License Act" down to 1874. The Dominion Act then interposed.

Now the Ontario Legislature revives the dropped clause.

Under the Confederation Act "Municipal Institutions in the Province" are in the class of subjects within exclusive provincial regulation.

It may be safely said that there is no apparent intention in the Confederation Act to curtail or interfere with the existing general powers of municipal councils, unless the Act plainly transfers any of such existing powers to the Dominion jurisdiction.

Where either the Legislature of Canada before, or the Dominion Parliament after, Confederation provided enactments as to prohibition inconsistent with the municipal regulations, the latter must give way.

When either under the Act of 1864 or of 1878, a county passed a prohibition Act the powers of a township so to do would be at least in abeyance.

I read the clause 18 restoring the old powers to the municipality to apply only to places where neither of these Acts is in force, and to apply only so long as the Dominion Act shall not be applied to it.

The Local Legislature specially disclaim any exercise of jurisdiction beyond the revival of provisions in force at Confederation.

As I understand the various interpretations given to the Confederation Act in its distribution of legislative powers, in the Privy Council and in the Supreme Court, and without attempting to cite from the voluminous authorities on the subject, I arrive at the conclusion that the Legislature of Ontario had jurisdiction to pass the 18th section.

The effect is to leave the power of prohibition in the municipalities as it was for so many years before and at the time of the Imperial settlement of the constitution of our Dominion.

I do not overlook the question raised as to this being an alleged interference with "Trade and Commerce." See *Russell* v. *The Queen*, 7 App. Cas. 829. The opinion of the Supreme Court in that case, that a general law like the Canada Temperance Act, came within the exclusive power of the Parliament of Canada, is thus noticed, the Privy Council declaring that they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges who also held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject "The regulation of Trade and Commerce" enumerated in that section, and was on that ground a valid exercise of the legislative powers of the Parliament of Canada.

The Privy Council decided the case on other grounds.

I am wholly unable to see how the power granted to township municipalities to prohibit the retail sale of liquor by any reasonable construction comes within the words "Trade and Commerce" as used in the Federation Act. The power, as already pointed out, had been for many years vested in the townships. If such a construction prevail it would seem to me to interfere most extensively with many powers granted by our Municipal Acts. They are full of provisions not only for licensing but for regulating, governing, and in many cases preventing acts locally affecting trade and commerce in the locality, such as: Auction sales of goods; hawkers and peddlers; regulating ferries; for preventing exhibitions held or kept for hire or profit; bowling alleys, and other places of amusement; limiting the number of victualling houses; regulation of markets and the sale of certain goods therein, and on the streets—most extensively interfering with the rights of sale and trading in cities and towns; for regulating and preventing various manufactories; preventing dangerous trades; forestalling and regrating, etc., etc.

All these powers existed at Confederation, and I am of opinion that there can be no interference with such power by any fair interpretation of the words "Trade and Commerce."

I arrive at these conclusions in my view of this prohibitory clause. I read it as it stands in the Act of 1868, and in connection with the rest of that Act, and especially with the 252nd section.

Although it uses the words "prohibiting totally the sale thereof" I think these words must refer to the preceding words which deal with the selling by retail, and merely prohibit such selling in every place.

The subject of the legislation in the Act was the granting of shop and tavern licenses, for limiting their number, etc., and councils are allowed to prohibit the sale by retail in inns or houses of entertainment, and wholly to prohibit the sale thereof in shops and places other than houses of public entertainment. I read this as necessarily confined to the retail trade, which is the subject dealt with, and for which a license is required.

Then when section 252 declared the general law to be that no license should be required to sell in packages of not less than five gallons, it could not I think be intended that such rights should be destroyed under the wording of the prohibitory clause, or in other words, that such clause extended to the sale of liquors in manufactories within the municipality in the specified larger quantities. I think the general wording of the Act and its general clauses clearly indicate that this prohibitory clause is dealing solely with the retail business. The practice of "drinking," as generally understood in the country, is aimed at, whether it may occur in tavern, shop or any place.

I think it to be a strained and unnecessary construction to apply it to all the dealings of brewers and distillers in the sale of their goods in the ordinary course of their business. If they sell in the style of the tavern-keepers in the retail drinking business they bring themselves within the by-law.

The late Sir William Richards, in his judgment in *In re Slavin and Orillia*, 36 U. C. R. 159, clearly recognizes the meaning of the section to be confined to the retail business.

So construed it can hardly be said to infringe on the subject of "Trade and Commerce" which belongs to the Dominion authority.

The following question has also been submitted for our opinion.

[The learned Chief Justice read the third question and continued :]

I cannot but regret that it should be thought proper to submit such a question to this Court.

It is not a question as to any course or action taken or to be taken by the Executive Government, but it refers wholly to the course to be adopted by the municipal authorities in the introduction and passing of their by-laws.

It is in effect the same as asking a definition of the powers of assignees in insolvency, or of sheriffs, registrars, or of railway or other companies chartered by the Province.

I think, with much respect, that a perusal of the Act of 1890, c. 53, would not lead ordinary minds to the opinion that although the letter authorizes the submission of "any matters which he (the Lieutenant-Governor) thinks fit to refer," it would be reasonable to expect this application of the general language to questions, not as to the validity of acts of the Legislature or the Executive, but as to the acts of municipal or trading corporations or of any class of officials.

The Legislature in the late Act, 54 Vict. c. 46, disclaims all interference with the 252nd section of the Municipal Act, 29-30 Vict. c. 51, passed by Canada, as to tavern or shop licenses being required for the sale of liquors in the original packages of not less than five gallons or one dozen bottles, save in so

far as modified by sub-section 9 of section 249, being the section as to by-laws for prohibition. No notice is taken of the repeal by the Local Legislature of this 252nd clause and a large number of others by the statute 32 Vict. c. 32.

This leaves it, as I understand, conceded that the brewers and distillers' clause remains still the law of the land. If so, I consider that they may sell the quantities mentioned in the original packages; in other words, that the municipality cannot interfere with their action. After so selling it would then seem to follow that the purchaser could not retail the contents or sell after bulk broken. But the words of the section 252 go further and appear to authorize a sale of the original packages as received from the manufacturers, that is, the distillers. If this section be held to govern it will have this construction.

I think the intention of the legislatures, both Federal and Provincial, has been throughout to preserve the trade interests of brewers and distillers as distinct from the retail dealers.

I therefore answer the third question in the negative.

As to the fourth question, I answer it in the negative. I do not consider that a by-law omitting to provide a penalty is necessarily bad. In may be ineffective, but I do not think any court would quash it on any such ground. Besides there might be some general law in existence providing for penalties under all by-laws.

BURTON, J. A.:—

This is a somewhat novel proceeding, under a recent Act of Parliament, not unprecedented to a limited extent even in England, but rendered more necessary here in consequence of the great variety of constitutional questions which are constantly arising under our Federal system, and the injustice of subjecting individual litigants to the delay and expense of having them decided in the particular suits in which they are interested; and if confined to important questions it would seem to be a very salutary piece of legislation.

The questions raised here are in my opinion of that character.

There has been at various times a great diversity of opinion upon them, and that probably still exists to a considerable extent. These questions have been already stated by the learned Chief Justice, and I need not repeat them.

The argument took a much wider range than would appear to be strictly requisite for a determination of the questions submitted, and the learned Chief Justice has quoted very largely from the statutes previous to Confederation, for the purpose of showing that the right to prohibit was vested in the municipal bodies at that time, and much of the argument was based upon that fact. I have also travelled over more ground than is strictly necessary, believing that I can thereby make my conclusions, and my reasons for those conclusions, more clear and distinct.

It does not suggest itself to my mind as at all conclusive in favor of the power of the Local Legislature to deal with the subject of prohibition under the words "municipal institutions," that provisions in reference to that subject were, at the time of the passing of the Confederation Act, to be found in our own Municipal Acts, and had been so for many years.

It must not be forgotten that the Legis.ature of the old Province of Canada which passed those Acts had plenary powers of legislation, including the power to regulate trade and commerce, to deal with the criminal law, and in fact all the powers which are now distributed between the Parliament of the Dominion, and the legislatures of the provinces.

Having that power it was clearly competent to the Legislature to confide to a municipal council or any other body of its own creation, or to individuals of its selection, authority to make by-laws or resolutions as to subjects specified in the enactment, with the object of carrying it into effect; and the provision in question being found therefore within a Municipal Act in one of the provinces furnishes no conclusive evidence that by the words "municipal institutions" it was intended to confer every power which might be contained in such an Act upon the legislatures of the provinces.

It is proper to enquire therefore what was the extent of the grant given under that designation.

Does it mean only the creation and erection of municipalities with such powers as are of the essence of municipal institutions, and necessarily incident to and essential to their existence, or does it include the powers and functions which, at the time of Confederation, were ordinarily exercised to a greater or less extent by the municipalities of all the provinces?

It may not without some reason be contended that there is no inherent connection between the liquor traffic and municipal institutions, which is perfectly true, but there was, if I may so express myself, a constitutional connection. In, I believe, all the provinces the power to regulate, by the granting licenses to sell, intoxicating liquors existed; whilst in many the power to regulate even to the extent of prohibiting it altogether existed as a matter of police or municipal regulation, so that we have to regard it in the view that at that time the regulation and prohibition had come to be regarded as municipal regulations which were guaranteed to the provinces under Confederation, and made part of their rights by section 92.

I come therefore individually to the conclusion, although this point has not as yet been passed upon by the Judicial Committee, that under the term "municipal institutions" the Local Legislatures' power to prohibit was included; and if the power, the exclusive power to deal with this question.

Being then a matter of that kind, and one of a merely local nature, that is to say, confined to the Province, the onus is on those who contend that it is *ultra vires* to show that it comes within the powers granted to the Dominion in the 91st section.

The *ratio decidendi* in *Russell* v. *The Queen*, 7 App. Cas. 829, in the Privy Council proceeded, as I understand it, upon this principle:

The Judicial Committee there held that the case fell, *prima facie*, within section 91 under the general power (in addition to the enumerated powers) to make laws for the peace, order and good government of Canada, and it became necessary, therefore, to ascertain whether it also fell within the enumerated classes of subjects in section 92 assigned exclusively to the provincial legislatures.

It appears upon the face of the judgment that there were only three classes of subjects under which the appellants' counsel contended that the case came under section 92, viz.:

1. Shop and tavern licenses for the raising of a revenue.

2. Property and civil rights in the Province.

3. Matters of a local and private nature within the Province.

It is perfectly clear that it did not fall within any of these.

I have gone to the trouble of obtaining the factum or case presented to the Judicial Committee in that appeal, and find that no reliance was placed on sub-section 8, but it was mainly argued that the power of the Province to deal with the question was derived from sub-section 9, and Sir Richard Couch in commenting upon it in a subsequent case says: "I do not recollect section 8 being relied on. I think all the clauses that were relied upon in the argument are noticed in the judgment."

It is perhaps not a matter of surprise that sub-section 8 was not quoted in the factum when we recall the fact that the case arose in the Province of New Brunswick where the municipal powers conferred by the legislature appear to have been of a more restricted nature than in some of the other provinces, and not to have expressly authorized prohibition, and it may have been supposed that the municipality had only power to regulate in a particular way. Be that as it may, the Privy Council do not appear to have had their attention drawn to it.

It is sometimes said that although this sub-section 8 was not called to the attention of the Judicial Committee in *Russell* v. *The Queen*, that that case was reconsidered and affirmed in *Hodge* v. *The Queen*, 9 App. Cas. 117, but the same remark applies to that decision. The Judicial Committee were not in that case considering, nor would their attention be drawn to that sub-section nor to 29-30 Vic. c. 51, sec. 249, sub-sec. 9. The question there arose under the provisions of the Ontario Liquor License Act of 1877, which dealt with a totally different matter. I consider it as a mere affirmance of the principle of decision laid down not only in *Russell* v. *The Queen*, but in a number of other cases, and I venture very humbly to submit that if this sub-section 8 had been brought to their Lordships' attention and they had placed the same interpretation upon it which I have done, it would have followed as of course that for the reasons given in that judgment that decision would have been different.

And now, I wish to notice a point upon which I think a good deal of misconception has existed. It has never been suggested in the Judicial Committee (although I have seen some such opinion expressed in other quarters), that in any case which comes under the residuary legislation of the Dominion, that legislation can in any sense override a subject which comes under the specific enumeration contained in section 92.

Thus *prima facie* in the *Russell Case* under the words "peace, order and good government" of Canada the power would exist to pass a prohibitory liquor law, but whenever you find in section 92 "municipal institution" interpreted as we are interpreting them, the right of the Dominion to legislate upon the subject is displaced; otherwise, as remarked by Mr. Justice Strong, the Dominion Parliament by generalizing a law and making it applicable to the whole Dominion could nullify the powers reserved to the provinces under the Constitutional Act. And he quotes in confirmation of his opinion a question put to counsel by the President of the Privy Council, "Do you mean that by generalizing the powers contained in section 92, the Dominion Parliament can take away the powers of the Local Legislature?" A moment's consideration will show that they possess no such power.

I think the principle must be clear that neither the Dominion Parliament nor the Local Legislature can attract to itself a jurisdiction in matters assigned exclusively to the other power by the mere device of enlarging the geographical area so as to include the whole of the provinces, nor in the other case by restricting the area within which the power is to be exercised.

And I wish to add that there is no such thing as over-lapping contemplated in the Act, nor any such principle as local legislation giving way to or being over-borne by Dominion legislation, as would appear sometimes to occur in the courts of the United States, except in the two cases provided for by section 95. With the exception of those two cases the distribution of legislative functions is of an exclusive character, and being exclusive, if it falls within the jurisdiction of one Parliament it is necessarily excluded from that of the other. Once we find that the power to regulate or prohibit the sale of intoxicating liquors is given under section 92, it must be read as an exception to section 91, which would then read: the Parliament may make laws for the peace, order, and good government of Canada, but this is not to interfere with the right granted exclusively to the local legislatures to regulate the liquor traffic.

That this is the view taken by Lord Hobhouse in the Privy Council appears where he says that *Russell* v. *The Queen* does not intend to decide that if the subject is one attributed to the provincial legislature the Dominion can get seizin of it by extending it beyond the province.

The two cases mentioned in section 95 are agriculture and immigration where the powers are concurrent, and here of course provision had to be made for one or other giving way in the event of their clashing, and so it is specially provided that the local legislation in those two cases should be valid only so far as it does not conflict with that of the Parliament of Canada.

There is in my opinion no general rule or principle, and no ground for the contention that I have sometimes heard advanced, that in case of conflict the legislation of the Dominion must prevail; on the contrary there can be no such conflict. Each is supreme upon the subjects entrusted to it, and it was assumed in the Imperial Act that there could be no conflict except in the two enumerated cases.

If for the reasons I have mentioned this subject does fall within sub-section 8 as a portion of the municipal institutions of the province, is there anything in any of the powers assigned exclusively to the Parliament of Canada to conflict with it?

The only one which can by any stretch of interpretation be held to do so is that relating to the regulation of trade and commerce, and many of the remarks I have made will equally apply to this branch of the case.

It I am correct in assuming that the right to pass a prohibitory law exists in the Local Legislature, even if it does incidentally affect trade and commerce, it must be held, in the language of that eminent and lamented judge the late Chief Justice Dorion, that this incidental power is included in the right to deal with it; in other words, the right so to deal with trade and commerce must be regarded as an exception to the general power.

I should not regard the words "regulation of trade and commerce" in their unlimited sense, even if uncontrolled by the context in section 92 and other parts of the Act, as extending to such a regula-

tion as a prohibitory liquor law in a province, but read in connection with sub-section 8 of section 92, they must, I think, be read as if it had contained a proviso to this effect, " but so as not to interfere with the right reserved exclusively to the provincial legislature to prohibit the sale of intoxicating liquors."

That is the rule of interpretation laid down by the Privy Council in a very early case, viz., that sections 91 and 92 are to be read together, and the language of one interpreted, and where necessary modified, by that of the other.

This would be my view were I at liberty to state my own opinion, but as at present advised I think we are bound by the decision of the Supreme Court in *City of Fredericton* v. *The Queen*, 3 S. C. R. 505, where that Court held, Henry, J., dissenting, that the power to deal with this subject was embraced within sub-section 2 relating to the regulation of trade and commerce. It is true that the decision in the Privy Council proceeded upon other grounds, but they say expressly, " We must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges who held that the Act fell within that section."

It seems to me that until expressly reversed or reconsidered that judgment is binding upon us, whatever may be my own opinion.

In the same way the judgment of the Judical Committee, though based upon a state of facts which rendered any other judgment in my opinion impossible, is, until reconsidered upon the additional material to which I have referred, binding upon me as a judgment.

If therefore, we had been dealing with the general question as to the right of the Provincial Legislature to pass a prohibitory Liquor Law, I should have been constrained to hold such legislation, contrary to my own opinion, *ultra vires ;* but the question is confined, as I understand it, to the power of the Legislature to re-enact sub-section 9 controlled, as it was supposed to be controlled at the time of Confederation, by section 252.

Sub-section 9 is not very clearly expressed, and I must confess that my first reading of it led me to the conclusion that it referred to two distinct matters: 1st, the prohibiting the sale by retail in any inn, and 2nd, the prohibition altogether, whether by wholesale or retail in any place, but upon further reading the various Acts then in force relating to fermented or other manufactured liquor, and section 252, I am satisfied that the whole section was intended to be confined to sales by retail in inns, and such sales as were authorized by shop licenses, and I adopt my brother Maclennan's reasoning upon this branch of the case. Being therefore, a mere police regulation for the sale by retail the enactment is not open to the possible objection to which I have referred.

I answer the two first questions therefore in the affirmative.

Question three I answer in the negative, assuming as I do that the question is confined to the power of those bodies under the enactments referred to in the two previous questions now reviewed.

As to question four I do not consider a by-law under these sections necessarily invalid because it omits to provide a penalty.

MACLENNAN, J. A.:—

The first matter to be considered is the extent of the enactment of the late Province of Canada, 29-30 Vict. c. 51, sec. 249, sub-sec. 9, which has been re-enacted by the Acts in question.

The first member of the enactment authorizes the prohibition of sales by retail in any tavern, inn, or other house of public entertainment. It leaves sales by wholesale untouched, and it does not interfere with sales in other places than inns and places of public entertainment. The other member of the section then appears to deal with *all* kinds of sales, not merely those by retail, and with *all* places except houses of public entertainment, and would seem to authorize total prohibition both wholesale and retail in all places within the municipality, with the single exception of houses of public entertainment. If that were the effect of the enactment it would seem to be very strange, for then under the by-laws which have been laid before us, which have put both members of the enactment in force, liquor could still be sold in houses or places of public entertainment but only by wholesale, and could not be sold anywhere else either by wholesale or retail. The legislature could hardly have intended anything so absurd as that, and yet that would appear to be the meaning of the enactment standing by itself.

I think, however, when the history of the legislation, the other co-existing enactments on the subject, and the context of the enactment itself are looked at, it will be quite apparent that the second member of the enactment must be construed as referring to sales by retail only, as well as the first, and that it was not intended thereby to confer any power on the municipalities to prohibit sales by wholesale.

The first power of actual prohibition, as distinguished from mere licensing which was conferred on municipalities was in 1853 when by 16 Vict. c. 184, sec. 3 (2), townships, villages and towns were authorized to pass prohibitory by-laws, but that prohibition was distinctly confined to sales by retail; and it was declared that selling in the original packages, in which the liquor was received from the importer or manufacturer, and not containing respectively less than five gallons, or one dozen bottles, should not be held to be a selling by retail.

The law remained in this state until the year 1858, when by the Consolidated Municipal Act of that year, 22 Vict. c. 99, sec. 245, sub-sec. 6, the enactment was cast substantially into the form which is now before us for consideration.

After that the clause was twice re-enacted, first in the Consolidated Municipal Act of 1866, sec. 249, sub-sec. 9, and again in the year 1869, by 32 Vict. c. 32, sec. 6, sub-sec. 7; but there was a slight change made in these two re-enactments by the insertion of the word "totally" in the Act of 1866, and the word "altogether" in the Act of 1869, after the word "prohibiting" in the second member of the enactment.

I think it is very clear that as the clause stood in the Act of 1858 it left the law as to sales by wholesale untouched. It meant no more than this: municipalities may prohibit sales by retail in public houses, and they may also prohibit such sales in shops and other places. The prohibition of retail sales might be confined to public-houses, or it might be extended to shops and all other places throughout

the municipality, the kind of sale which was meant to be dealt with in the second part of the clause, being the same kind that was described in the first, namely, sale by retail.

The meaning and use of the words *totally* and *altogether* introduced in the subsequent re-enactments are not at first sight obvious. But that becomes apparent on examining sub-section 1, which defines shop licenses as licenses for the *retail* of liquor in quantities not less than a quart, in shops, stores or places other than inns or places of public entertainment. By sub-section 1, sales in shops, stores or places other than inns, etc., are prohibited in quantities less than a quart, unless under license; but by sub-section 9, sales in such places may be prohibited totally or altogether. The shopkeeper's power of selling by retail was already subject to a partial prohibition under sub-section 1, namely, as to quantities less than a quart; by this sub-section (9) his selling by retail may be prohibited altogether. The partial prohibition to which he was before subject in his retail business, namely in quantities less than a quart, might now be made total. I think that is the sole force and effect of the words "totally" and "altogether."

Sub-sections 1 and 9 are parts of the same section, and in sub-section 1 the sales intended to be dealt with are divided into two classes: the first class comprises sales in inns, alehouses, beerhouses, and any other houses or places of public entertainment; the other class comprises sales in shops, stores or places other than inns, alehouses, beerhouses, or places of public entertainment. In both classes the sales referred to are expressly limited to sales by retail. When we come to sub-section 9, the same two classes are dealt with, but in briefer and less expanded language. There is the inn or public-house, and there are the shops and places other than the public-house. Sub-section 1 provides for the licensing of these two classes of places respectively, and sub-section 9 provides for prohibition in the same places, classifying them in the same way. To my mind it is irresistible that the sales intended to be dealt with are the same throughout, namely sales by retail only, although the word is not repeated with reference to shops. This construction makes the enactment sensible and consistent, and relieves it from what would otherwise, I think, appear to be an absurd meaning.

I think this construction is aided by section 247 of the Act of 1858 (or section 252 of the Act of 1866) which declares that no tavern or shop license shall be necessary for selling in the original packages in which it is received from the importer or manufacturer so long as they contain not less than five gallons or one dozen bottles. That section took the place of the exception in the Act of 1853 already referred to, and defined what was wholesale and what was retail, for the purposes of the Act. I do not, however, think that section was essential to the construction which I put upon section 249.

In *In re Slavin and Orillia*, 36 U. C. R. at pp. 176, 177, the late Chief Justice Richards, in delivering the judgment of the Court, expressed the opinion that the prohibiting power of this section was confined to sales by retail, and he pointed out that prior to Confederation the Legislature of Canada limited the granting of licenses to persons who sold by retail, and did not require the manufacturer or importer to obtain a license to sell by wholesale; and that legislation as to excise or manufacture, and the licensing of those engaged in that business, was kept distinct from the legislation as to shop and tavern licenses.

The enactment in question then, in 1866 and 1869, and until it was repealed by 37 Vict. c. 32, sec. 61, was merely a power granted to municipalities to prohibit the *retail* traffic in liquors. It was not a power of *total* prohibition, but a comparatively small power confined to retail business, and was the same which was conferred first in the year 1853, and which was possessed by the municipalities unimpaired at the time of Confederation.

Coming to the conclusion that the enactment in question is confined in both its members to sales by retail, I think it follows clearly that it was competent to the Legislature of Ontario to re-enact it as falling within the class of subjects, " Municipal Institutions in the Province," under sub-section 8 of section 92 of the B. N. A. Act. It is unnecessary to repeat the argument which has been so fully and forcibly elaborated by other judges, beginning with the late lamented Chief Justice Richards in *In re Slavin and Orillia*, 36 U. C. R. 159, above referred to. At page 175, with reference to the very enactment in question, he says: " As far as the Province of Upper Canada was concerned, the delegates" (for procuring the B. N. A. Act) " who represented the views of that section of the United Province of Canada, well knew what the municipal institutions of Upper Canada were, and some of them had probably introduced and carried through the Legislature, only a short time before, the Act passed on 15th August, 1866, entitled, ' An Act respecting the Municipal Institutions of Upper Canada,' 29-30 Vict. c. 51. They knew that in the sections of that Act already referred to the power was granted to the municipalities in Upper Canada, under certain circumstances, to limit the number of taverns and to prohibit the licenses of shops for the sale of spirituous liquors in the several municipalities. When, then, this Imperial Act uses the very words of the title of this bill in giving as one of the class of subjects on which the Provincial Legislature may pass laws, viz., ' Municipal Institutions in the Province,' can there be any reasonable doubt that it was expected and intended that the " municipal institutions " which were to be constituted under that authority, would possess the same powers as those which were then in existence, under the same name, in the Province. I should think not."

In *Sulte* v. *Three Rivers*, 11 S. C. R. 25, at pp. 40 *et seq.* Mr. Justice Gwynne enters still more elaborately into the argument, and at p. 43 says: " I cannot doubt that by item No. 8 of section 92 which vests in the provincial legislatures the exclusive power of making laws in relation to municipal institutions, the authors of the scheme of Confederation had in view municipal institutions as they had then already been organized in some of the provinces; and that the term as used in the B. N. A. Act, unless there be some provision to the contrary in section 91 of the Act, comprehends the powers with which municipal institutions, as constituted by Acts then in force in the respective provinces, were already invested for regulating the traffic in intoxicating liquors in shops, saloons, hotels and taverns, and the issue of licenses therefor, as being powers deemed necessary and proper for the beneficial working of a perfect system of local municipal self-government."

In delivering the judgment of the Quebec Court of Appeal, in the case last mentioned, Mr. Justice Ramsay went further than is necessary for the decision of this case, and held that the right to pass a prohibitory liquor law for the purposes of municipal institutions had been reserved to the local legislatures by the B. N. A. Act; and in upholding that judgment in the Supreme Court, Mr. Justice Strong

says he entirely agrees with the judgment delivered by Mr. Justice Ramsay. I am not sure, however, that he means to express approval of that judgment to the full extent expressed by the learned Judge of the Court below, as the affirmance of the judgment did not absolutely require it.

It is not necessary for the purpose of answering the questions before us, to determine how far by reason of the existence, at the time of Confederation, of the Dunkin Act, the provinces may, under sub-section 8 of section 92, have the power of absolute prohibition, and I desire to express no opinion on that point one way or the other. It is enough to say that I think it clear that under that section the province has the power to revive the enactment in question, and that our answer to the first two questions ought to be in the affirmative.

10 With regard to the third question, I am of opinion that as incidental to the power to prohibit the retail traffic in liquor the province must have the power, acting *bona fide*, to define from time to time what constitutes retail traffic. We have seen what the definition was in the Act of 1853. It was substantially the same under the Acts of 1858 and 1866. This has been changed, and is now regulated by the R. S. O. (1887), c. 194, sec. 2, sub-secs. 2, 3 and 4. In my opinion the municipalities named in the third question cannot at present prohibit under the revived enactment such sales as are described in sub-section 4.

In answer to the fourth question, I am of opinion that the want of a penalty does not invalidate such a by-law.

OSLER, J. A., declined to give any opinion.

1891*
March 21.

CORPORATION OF THE VILLAGE OF HUNTINGDON,
(Respondent in Court below),

and

HON. J. E. ROBIDOUX, *es-qual*,
(Intervenant in Court below),
Appellants;

and

JAMES MOIR,
(Petitioner in Court below),
Respondent.

[*Reported 7 Montreal Law Rep. 281—Q. B.*]

Constitutional law—Sale of intoxicating liquors—Municipal corporation—Art. 561, M. C.—R. S. Q. 6118.

Held;—That article 561 of the Municipal Code, as amended by 51-52 Vict., ch. 29, s. 6 (R. S. Q. 6118) by which a municipality is authorized to prohibit the sale of intoxicating liquors in quantities less than two gallons, within the limits of the municipality, is within the powers of the Provincial Legislature.

DOHERTY, J., in rendering the judgment stated that the question had already been settled by the highest tribunals. The right of the Provincial Legislature to pass prohibitory liquor laws existed as incidental to municipal institutions. The local legislature had authority to enact Article 561 of the Municipal Code, and the corporation of Huntingdon had the right to pass the by-law in question. His Honor did not think it necessary to detain the bar by entering into a lengthy examination of the case, as the question had come up before, and had been settled by the highest courts. The judgment of the court below which quashed the by-law, would therefore be reversed. The appeal of the Attorney-General would also be maintained.

**Present*:—DORION, C.J., and BABY, BOSSÉ, DOHERTY and CIMON, JJ.

The judgment is as follows:

"The court, etc. . . . .

"Considering that Article 561 of the Municipal Code, and the matters thereby provided for, are within the competency and powers of the legislature of this province, and not *ultra vires* thereof, as in this cause pretended and pleaded by the respondent, by his petition in this behalf produced;

"And considering therefore that the municipal council of the corporation, appellant to this court, in passing and enacting the by-law appealed against by respondent to the Circuit Court from the judgment of which this appeal hath been taken, was competent and acted *intra vires* under said article in passing said by-law, and that the same is in all respects legal and binding for all the purposes thereof and of the said article;

"And considering that there is error in the judgment *a quo*, to wit, the judgment rendered on the 26th day of May, 1890, by the Circuit Court for the County of Huntingdon, in the District of Beauharnois, in this, that it held and holds the contrary, and that said article and by-law were so *ultra vires*, and the conclusions of the Attorney-General unfounded;

"Doth reverse and make void the said judgment; and rendering the judgment which the court below ought to have rendered as well on the respondent's said petition as on the intervention in this cause filed by the Attorney-General doth dismiss the said petition, with costs as well in the court below as in this court, in favor of the corporation appellant, and against the said James Moir, the respondent, and maintain the said intervention without costs."

1891
Sept. 10.

SUPERIOR COURT—DISTRICT OF ST. FRANCIS.

LEPINE v. LAURENT.

[Reported 14 Legal News, 369].

Constitutional Law—Powers of Provincial Legislature—Sale of Liquor—53 Vict. (Q.) ch. 79, s. 39.

Held:—That the Provincial Legislature has the right to confer on municipalities power to prohibit the sale of intoxicating liquors by wholesale as well as by retail, and that 53 Vict. (Q.) ch. 79, s. 39, by which the town of Magog is authorized to restrain, regulate or prohibit the sale of any spirituous, vinous, alcoholic or intoxicating liquors by retail or wholesale within the limits of the town is *intra vires*.

The following judgment was delivered by Mr. Justice Lynch, at Sherbrooke, in the case of Napoléon Lepine, of Magog, petitioner, against Arthur P. Laurent, collector of provincial revenue, to compel the respondent to issue a wholesale liquor license to the petitioner.

LYNCH, J.:—

In 1890 the Legislature of Quebec, by the Act 53 Vict., ch. 79, incorporated the town of Magog; and by section 39 power was given the municipal council to pass by-laws, among other purposes: "To restrain, regulate or prohibit the sale of any spirituous, vinous, alcoholic or intoxicating liquors, "by retail or wholesale, within the limits of the town."

On the 13th April, 1891, the council of the town of Magog passed the following by-law: "It is "hereby enacted that on and after the 1st day of May, 1891, the granting of licenses for the sale of "spirituous, vinous, alcoholic or intoxicating liquors in any quantities, by wholesale or retail, in stores, "shops and all other places (excepting hotels) within the limits of the town of Magog, is hereby pro- "hibited, and the granting of certificates for such sale will be refused by this council in accordance "with the provisions of article 39 of the Act of incorporation of the town of Magog and other provi- "sions of the statutes of the Province of Quebec."

It would appear that prior to the 1st of May last, petitioner had a license for the sale of liquor by wholesale at said town of Magog; and that he subsequently applied to the defendant, the collector of provincial revenue for said district, for the renewal of such wholesale license, tendering him therefor the fees fixed by the statute 54 Vict., cap. 13, sec. 12. To this tender formally made by a notary public, defendant answered that he could not accept, that he must be governed by the dispositions of the Act 53 Vict., cap. 79, and of the by-law passed by the corporation of Magog in virtue of this statute, so long as that by-law remains in force.

On the 17th August last, petitioner applied to this court for the issuance of a writ of mandamus, addressed to the defendant, ordering him to appear and show cause why a peremptory writ should not

issue, enjoining him to grant petitioner the wholesale license for which he had applied; and with the petition was a deposit of the amount of fees required by law. It was ordered that a copy of the petition should be served on the defendant, with a notice that the same would be heard on the 20th.

On the last named day petitioner and defendant appeared by their respective counsel, and the corporation of the town of Magog applied to be permitted to appear and to be heard by counsel, which application was granted. The main facts relied on by petitioner were admitted at the argument, and the only question at all seriously discussed was the constitutional right of the Quebec Legislature to authorize the council of Magog to prohibit the sale of liquor as had been done by the section of the Act of incorporation above quoted. It was incidentally suggested by defendant's counsel that the allegations of the petition did not disclose a right to the writ of mandamus, and that the more correct proceeding on the part of petitioner, would be an action to set aside the by-law. It is alleged that it was the duty of defendant, on payment of the prescribed fee, to have granted petitioner his license; and if that be so the writ is clearly demandable under par. 2 of art. 1022 C. P. In the Sulte case, which was not unlike the present one as regards the principle involved, the proceeding was by mandamus, and the defendant raised the same objection, but it was overruled, and the case went to the Queen's Bench and Supreme Court. On the suggestion of petitioner's counsel the Attorney-General has been notified to appear if he saw fit; and he has declined to do so.

The issue, therefore, is clear and distinct, and, although differing in some respects from that presented in what may now be regarded as the leading and decisive cases affecting the respective powers of Parliament and of legislature, recourse must be had to them to aid in determining where the legislative power rests. As regards the matter now under consideration, the sole questions are, had the legislature the right to confer upon the Magog council the power to pass a by-law to prohibit the sale of liquor by wholesale, and was defendant bound to observe such by-law.

Our jurisprudence on the general question of prohibitory power was, certainly, for several years after Confederation, in what may be designated an embryo state, not having received the full development which has more recently been given to it by the pronouncements of the highest courts of the Province, of the Dominion and of the Empire. Among the early decisions which are quoted in support of the view that Parliament alone can deal with the question of prohibition, is that of Cooey and the County of Brome. Having been counsel in that case, I know something of what the issues really were. It was on a petition to set aside a by-law adopting the Temperance Act of 1864, which it was contended had been repealed, as regards the Province of Quebec, by the Municipal Code and the License Act. The late Mr. Justice Dunkin did hold that the legislature had not repealed, and could not repeal, the Temperance Act. His judgment was set aside by the Court of Appeals on a different ground—an informality in the manner of taking the vote. I find, however, that the members of that court expressed their views freely on the question of legislative power. The late Sir Antoine Dorion said: "Before "the union of the Provinces was effected by Confederation, the power to prohibit the sale of intoxicat- "ing liquors had already been conferred by the Temperance Act of 1864, to the municipalities of the "Provinces of Upper and Lower Canada. It was by that Act made a matter of local and municipal "regulation. By the Confederation Act all the laws then in force in the several provinces were con-

" tinued (sec. 129) and municipal institutions (sub-sec. 8) as well as all matters of a merely local or " private nature in each province (sub-sec. 16, sec. 92) were placed under exclusive legislative control of " the several provinces. In the absence of any expressions to restrict the powers so conferred, they " must be understood to comprise all those matters, which at the time the union was effected, had been " considered by the then existing legislatures as belonging to municipal institutions and as being of a " local or provincial character. This would comprise the authority which the legislature of Upper " Canada had already delegated to the several municipalities to prohibit the sale of intoxicating liquors " within the limits of such municipalities. The meaning of the words trade and commerce as used in " the second sub-section of sec. 91 of the B. N. A. Act ought to be restricted to those branches of com- " merce of a broader application than those already enumerated and which are specially provided for " in sec. 91, such as the import and export trade of the country, customs and excise duties, and generally " all those matters of trade affecting the whole Dominion, or more than one of the provinces or their " trade relations with one another, or with the Empire or any of its possessions. I do not wish here " to lay down as a rule that there are no cases in which the Dominion Parliament could not regulate " or prohibit the sale of intoxicating liquors or other articles of trade within the provinces composing " the Dominion.

" It is not necessary to express any opinion what might be the authority of the Dominion Parlia- " ment in certain possible contingencies; it suffices for this case to say that the Temperance Act of 1864 " must be considered as belonging to the latter class of subjects coming within the description of local " or police regulations, and this I believe is the opinion of all the members of this court.

" From the best consideration I have been able to give to the question now under review, I have " come to the conclusion that the legislature of the Province of Quebec had full power to deal with the " Temperance Act of 1864, and to alter and repeal any of its provisions conferring on municipal councils " the right to prohibit the sale of intoxicating liquors within their municipality."

Mr. Justice Ramsay said: " Fortunately we are not called upon to reconsider sub-sec. 9 of sec 92 " of the B. N. A. Act, for a prohibition to sell intoxicating liquors is certainly not a license, and it can- " not assist in raising a revenue. Then is a prohibition to sell intoxicating liquors within the limits of " a local municipality, a matter of a merely local or private nature in the province, and furthermore " does it interfere with the regulation of trade and commerce? I cannot think that the exclusive " power to regulate trade and commerce can be interpreted in an absolute manner; and we must there- " fore constantly enquire whether the matter does not more exclusively belong to some local power. " Here it is contended that a prohibitory by-law is not dependent on the municipal institutions of the " province. But, as it has already been observed, the Act of 1864 evidently treats it as a municipal " matter, and to attempt to treat these local prohibitions as a regulation of trade and commerce appears " to me to be ridiculous exaggeration. I therefore think that the local legislature has the right to deal " with the prohibition."

Mr. Justice Cross said: " Municipal government may include much that concerns the regulation " of trade, and laws affecting trade may interfere largely with municipal regulations. When special

"trading operations become prejudicial to public health and morals, the higher law of the public good "would seem to require the supremacy of the local municipal control to restrain the mischief of laws "of the class to regulate trade which should be general, not local or special in their application. To "prevent abuses resulting from the sale of intoxicating liquors on Sunday, or at inopportune places, "might be held to be reasonable exercise of local municipal power, although it might affect the volume "of trade in these articles. We find the power to prohibit the sale of intoxicating liquors distinctly "attributed to, and exercised by, our municipal institutions before Confederation; and, being already "invested with that power, we have no warrant for divesting them of it, and must, therefore, leave "them in possession of it."

I have quoted thus largely from the views of the learned judges of the Provincial Court of Appeal in the Cooey case—which, so far as I know, are not reported—in order to show how the opinions expressed thus early (1878) by them were afterwards, in the main, adopted by the higher appellate courts, which were subsequently called upon to judicially interpret secs. 91 and 92 of the Union Act, regarding the respective powers of Parliament and legislature to deal with the vexed questions of license and prohibition. I ought to say, to correct a false impression, that the judgment of the Court of Appeal in the Cooey case was set aside by the Supreme Court by consent, the petitioner not caring to proceed further.

In 1877 the legislature of Ontario adopted the "Liquor License Act," which contained stringent provisions respecting the regulation of the sale of spirituous liquors, and gave rise to what is known as the Hodge case, which was adjudicated upon by the Privy Council the 13th December, 1883.

In 1878 Parliament passed "The Canada Temperance Act," which permitted the electors of any municipality to declare in favour of the prohibition of the traffic in intoxicating liquors within the limits of that municipality. The Russell case resulted from this legislation and was pronounced upon by the Privy Council on the 23rd June, 1882.

In 1883 Parliament, largely influenced by inferences drawn from the judgment of the Privy Council in the Russell case, legislated respecting the sale of intoxicating liquors, and the issue of licenses therefor. This legislation was regarded with great disfavour by all the provinces, and a joint case to test its constitutionality was submitted to the Supreme Court which declared it *ultra vires* of the powers of Parliament in its general principles; and this view was confirmed by the decision of the Judicial Committee of the Privy Council rendered on the 12th day of December, 1885.

While their Lordships of the Privy Council have in these three important judgments remained strictly within the issues submitted to them, they have laid down as applicable to each distinct case certain general principles of interpretation, which must always serve as determining tests in construing the powers of Parliament and legislature in dealing with the regulation of the liquor traffic.

The ruling on "The Liquor License Act of 1883" has set at rest all controversy regarding the question as to where lies, under the constitution, the licensing power. It is thus tersely expressed "that the Liquor License Act of 1883 and the Act of 1884, amending the same, are not within the legislative authority of the Parliament of Canada."

By the Russell case it is determined that Parliament had authority to pass "The Canada Temperance Act of 1878," and it is declared: "Parliament does not treat the promotion of temperance as desirable in one province more than in another, but as desirable everywhere throughout the Dominion, Parliament deals with the subject as one of general concern to the Dominion upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it."

By the Hodge case it is decided that "The Liquor License Act of 1877 is so far confined in its "operation to municipalities in the Province of Ontario, and is entirely local in its character and opera- "tion," that the regulations which may be adopted under it, "seem to be all matters of a merely local "nature in the province, and to be similar to, though not identical in all respects with, the powers then "belonging to municipal institutions under the previously existing law passed by the local parliament. "Their Lordships consider that the powers intended to be conferred by the Act in question, when pro- "perly understood, are to make regulations in the nature of police or municipal regulations of a merely "local character, as such they cannot be said to interfere with the general regulation of trade and "commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the "Canada Temperance Act, which does not appear to have as yet been locally adopted. The subjects "of legislation—seem to come within the heads Nos. 8, 15 and 16 of sec. 92, of the B. N. A. Act."

Since the rendition of these judgments, or at least of some of them, our courts have had occasion in several instances to apply them. In the Sulte case, to which reference has already been made, the late Mr. Justice Ramsay in rendering the unanimous judgment of the Court of Queen's Bench, October 7th, 1882 (5 Leg. News, p. 330) said: "It may be at once conceded that the power to pass prohibitory "liquor laws is not essential to the existence of municipal institutions, and that consequently in a very "restricted reading of sub-sec. 8 (sec. 92) it would not justify the local legislature in passing a prohibi- "tory liquor law. In so far as the Province of Quebec is concerned, municipal institutions were the "creation of special statutes. The general Act was passed no longer back than 1855. Among other "things county councils were given the power to make by-laws for prohibiting and preventing the sale "of all spirituous, vinous, alcoholic and intoxicating liquors, etc." "These statutes were in force at the "time of Confederation." . . We hold, then, that under a proper interpretation of sub-sec. 8 the "right to pass a prohibitory liquor law for the purposes of municipal institutions has been reserved to "the local legislatures by the B. N. A. Act. We have suspended our judgment in this case for an "unusual length of time, awaiting the decision of the Privy Council in the case of *Russell* v. *The Queen*. "It has not either expressly or by implication maintained that the Dominion Parliament can alone "pass a prohibitory liquor law." The Sulte case went to the Supreme Court, where the judgment of the Court of Queen's Bench was unanimously confirmed January 12th, 1885 (11 Can. S. C. R. p. 25) The Chief Justice. "The case of *Hodge* v. *The Queen* just decided by the Privy Council covers the "constitutional question." STRONG, J. "I agree entirely with the judgment delivered by Mr. Justice "Ramsay. *Hodge* v. *The Queen*, decided by the Privy Council since the judgment of the Court of "Queen's Bench was delivered, having put an end to the question, any further discussion of it is "unnecessary." FOURNIER, J. "The constitutional question has now to my mind been definitely

"settled by the decision of the Privy Council in the case *Hodge* v. *The Queen*." GWYNNE, J. "It "seems to be supposed that the judgment of this court in the *City of Fredericton* v. *The Queen* "is an authority to the effect that since the passing of the B. N. A. Act, it is not competent for provin- "cial legislatures to restrain or prohibit in any manner, the sale of any spirituous liquors, and that "therefore the legislature of the Province of Quebec could not invest the corporation of the city of "Three Rivers with the powers purported to be vested in them by the 74 and 75 secs. of the Act, 38 "Vict., ch. 76, and that the Dominion Parliament alone could enact the provisions contained in the 75th "sec. (the 1st par. of which reads for restraining and prohibiting the sale of any spirituous, etc.) "What was decided in the *City of Fredericton* v. *The Queen* was, that the provincial legislature had 10 "not jurisdiction to pass such an Act as 'The Canada Temperance Act of 1878,' and that the "Dominion Parliament alone was competent to pass it: but there was nothing whatever in the decision "calculated to call in question the right of the provincial legislatures to insert in all Acts in relation to "municipal institutions, such provisions as those in question here."

In Molson and Lambe (M. L. R. 2 Q. B. 381) the Court of Appeal again maintained the constitutionality of the Quebec License Act, the Chief Justice remarking that they were to be governed by the decision in the Hodge case, followed by the last decision rendered "by the Privy Council, holding that "the right to legislate on the issue of licenses for the sale of liquor by wholesale or by retail, belonged "to the local legislatures." This case went to the Supreme Court, where the appeal was dismissed. All of the judges concurred in saying that they regarded the constitutional question as definitely 20 settled. Gwynne, J., observed: "All of these judgments rest upon the foundation that laws which "make, or which empower municipal institutions to make regulations for granting licenses for the sale "of intoxicating liquors in taverns, shops, etc., are laws which, as dealing with subjects of a purely "local, municipal, private and domestic character are *intra vires* of the provincial legislature."

In the last reported case bearing on this matter, of which I have any knowledge, *Moir and Village of Huntingdon* (20 R. L. 684) the Court of Queen's Bench held, that the power conferred upon local councils by art. 561 of the municipal code to prohibit the sale by retail of intoxicating liquor, was within the competency of the legislature of the province.

The learned counsel for the petitioner has sent me up for reference the record of a case from Three Rivers, *Desserveau and Lasalle*, together with the judgment of Mr. Justice Bourgeois therein. 30 The facts there were in the main, as nearly as possible identical with those admitted to exist in this case. The learned judge condemned the collector to issue the license, holding that he had shown no legal reasons for his refusal to do so. I regret very much not to have had an opportunity of examining the reasons which led my brother judge to the conclusion at which he must have arrived that the local council of the parish of St. Anne de la Perade had no authority to pass a by-law, prohibiting the sale of liquor in such manner and to such extent as to divest the collector of provincial revenue of the obligation to deliver a license to sell by wholesale. The conditions here are not however exactly similar to what they were in that case. It is possible that the decision there turned upon the absence of any provision in the municipal code authorizing the council of the parish of St. Anne

de la Perade to pass such a by-law, and that possibly the by-law itself did not apply, and could not be applied, to the case of a wholesale liquor license, and was limited in its operation to the prohibition of the sale of intoxicating liquors in quantities less than three gallons, or one dozen bottles, as authorized by art. 561 of the municipal code, and consequently could not apply to a wholesale license which would be in excess of the power thus delegated. I am not now called upon to determine any such questions. What the petitioner asks me to do, is to declare that the legislature of Quebec had no right or authority under sec. 92 of the B. N. A. Act, to confer upon the municipal council of the town of Magog the power of passing a by-law to prohibit within its limits the sale of liquor by wholesale, as has unquestionably been done by 53 Vict., cap. 79, of the Quebec statutes, sec. 39. The Supreme Court and the Court of Appeals have, in the decisions referred to, supported by the judgment of the Privy Council in the Hodge case, emphatically laid down the doctrine that the regulation of the liquor traffic, wholesale and retail, is within the exclusive control of the local legislature; and the Court of Appeals in the Moir case has affirmed, in the most distinct manner, the right of the legislature to delegate to municipal councils the power of prohibiting the sale of liquor by retail. In the Severn case the Supreme Court went far in the direction of holding that the regulation of, and the right to license, the wholesale trade was not within the attributes of the legislature; but in the Molson case, the Chief Justice remarked: "In view of the cases determined by the Privy Council since the case of *Severn* v. *The Queen* was "decided in this court, which appear to me to have established conclusively that the right and power "to legislate in relation to the issue of licenses for the sale of intoxicating liquors by wholesale and "retail, belong to the local legislature, we are bound to hold that the Quebec License Act of 1878 and "its amendments, are valid and constitutional." It may then be assumed as judicially settled that the legislature of Quebec had and has, under the constitution, the power to delegate to municipal councils the authority to license or to prohibit the sale by retail of intoxicating liquor, and to license the sale by wholesale; but it is said that the same power does not exist concerning the prohibition of the sale by wholesale. Why should the one be treated differently from the other? It may be as important in the interest of the locality, and in some instances possibly more so, to prohibit the sale by wholesale as by retail; and can the one local prohibition be regarded as an interference with the regulation of trade and commerce when the other is not? I must confess my inability to appreciate the distinction. The late Chief Justice Dorion, in the course of his observations in the Cooey case, quoted two decisions of the Court of Queen's Bench of Ontario, which have a decided bearing on the point now under consideration. In the case of *Regina* v. *Taylor*, it was said: "The Ontario legislature has a right to "license or prohibit the sale of liquor in shops or taverns, and in other places of the like kind, because "it has the exclusive power over municipal institutions; and these institutions had before and at the "time of Confederation the exercise of these powers, and because such power, read in connection with "sec. 92, sub-sec. 16 of the Confederation Act, is now a matter of a merely local or private nature in "the province. That power is in restraint of trade, as well as a matter of police. The general regula-"tion of trade and commerce which is vested in the Dominion Government, must be considered to be "modified by the powers which the Ontario legislature, acting in relation to municipal institutions, "may properly exercise." The same court also held in *Slavin* v. *The Corporation of the Village of*

Orillia: "That by-laws passed by municipal corporations wholly prohibiting spirituous liquors in "shops and places other than houses of public entertainment and limiting the number of tavern licenses "to nine, were valid as being within the powers of the corporation, under the 32 Vict., cap. 32, Ont., "and that it was within the power of the provincial legislature to confer such power."

These judgments express my view of the power of the legislature, and they have received their full confirmation by the judgments since rendered and to which I have already referred. Before Confederation our municipal law, ch. 24 of the Con. Sts. of Lower Canada, like that of Upper Canada, recognized the right of municipal councils to prohibit generally the sale of liquors; sec. 26, sub-sec 11, conferred upon all county councils in the month of March of each year, the power to pass by-laws "for prohibiting and preventing the sale of all spirituous, etc., liquors," and by sub-sec. 16 of sec. 27, every local council might make a similar by-law in any year when the county council had failed to do so in the month of March. This power to prohibit generally the sale of liquors, thus unmistakably conferred upon and enjoyed by municipal councils, prior to Confederation, has been held to be continuing and not to have been disturbed by any provision of the Union Act; and it certainly has not since been taken away by any competent authority.

I do not feel that it is necessary for me to pursue the enquiry further. From the best thought and attention which I have been able to give this matter, I have come to the conclusion that the inherent right and responsibility, under the constitution, of controlling municipal institutions in the province belongs to the legislature, and that the legislature may, and from its very nature must, delegate this control to councils, the recognized guardians and administrators of these municipal institutions, and that one of the most important elements of this control is the regulation of the liquor traffic, which may be effected in the discretion of the council, under the power so delegated, either by a general or partial system of license, or by a general or partial system of prohibition, or by a combination of both systems.

Was defendant bound to conform to the requirement of the by-law prohibiting the sale of liquor by wholesale in the town of Magog, and to refuse the license asked for by petitioner?

By the Quebec License Act, 41 Vict., cap. 3, sec. 48, the applicant for a wholesale shop license was obliged to produce the same certificate confirmed by the council, as was required for a hotel license. This formality being observed, and on payment of the requisite duty, he was entitled to his wholesale license, sec. 70, unless the sale in the municipality had been prohibited by by-law, sec. 51. Sec. 48 was amended in 1880, by 43-44 Vict., cap. 11, sec. 14, by taking away the necessity of a certificate for a wholesale license and by providing that "wholesale liquor shop licenses are granted simply upon payment to the proper license inspector of the required duties and fees." This latter provision was not reproduced in the Revised Statutes of Quebec, and has disappeared entirely, so that under art. 892 it is now the duty of the collector of provincial revenue to issue on application a wholesale liquor shop license on payment of the requisite fees, unless he has received, under art. 860, copy of a municipal by-law prohibiting the sale of liquors in the municipality, in which case he is forbidden to issue any license except it be for a steamboat bar or a railway buffet. Here it is admitted that the defendant had received a copy of the by-law in question at the time when the petitioner applied to him for

a wholesale liquor license, and I cannot conceive how it was possible for defendant to have given any other answer than the one which is embodied in the formal tender and offer made to him by petitioner of the requisite fees and which he signed. "*Je ne puis accepter cette offre parceque je dois m'en tenir aux dispositions de l'acte* 53 *Vict*, *ch.* 79 *et du reglement passe par la Corporation de Magog en vertu de ce Statut tant que le dit reglement resté en vigueur.*"

On the whole I consider that sec. 39 of cap. 79, 53 Vict., Quebec, in so far as it authorizes the municipal council of the town of Magog to pass by-laws to restrain, regulate or prohibit the sale of any spirituous, vinous, alcoholic or intoxicating liquors by retail or wholesale within the limits of the town, is within the competency and powers of the legislature of this Province, and not *ultra vires* thereof, that the municipal council of the town of Magog in passing and enacting the by-law which is attacked by petitioner, was competent and acted *intra vires* of the power conferred upon it by said section, that the said by-law is in all respects legal and binding for all the purposes thereof and of said section, and that defendant acted correctly and legally in refusing to accept the tender and offer of petitioner. The petition cannot be granted and is therefore rejected with costs awarded to J. S. Broderick, attorney for defendant.