In the Privy Council.

No. 37 of 1895.

FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE ATTORNEY GENERAL FOR ONTARIO - - *Appellant,*

AND

(1) THE ATTORNEY GENERAL FOR THE DOMINION OF CANADA AND (2) THE DISTILLERS AND BREWERS' ASSOCIATION OF ONTARIO - - *Respondents.*

In the Matter of CERTAIN QUESTIONS referred to THE SUPREME COURT OF CANADA By HIS EXCELLENCY THE GOVERNOR GENERAL OF CANADA.

SUBJECT:

PROVINCIAL JURISDICTION.
PROHIBITORY LIQUOR LAWS.

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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RECORD OF PROCEEDINGS.

IN THE SUPREME COURT OF CANADA.

RECORD.

No. 1. Certification of documents by Registrar of Supreme Court of Canada, 10th April 1895.

In the matter of certain Questions referred by His Excellency the Governor General in pursuance of an Order in Council, approved of by His Excellency on the 26th day of October 1893. Subject: Provincial Jurisdiction, Prohibitory Liquor Law.

I, ROBERT CASSELS, Registrar of the Supreme Court of Canada, hereby certify that the printed document annexed hereto marked A. is a true copy of the original Order of reference filed in my office in the above matter, that the printed documents also annexed hereto marked B. C. D. E. and F. are true copies of the factums of the Solicitor General for the Dominion of Canada the Attorney General of Ontario the Government of the Province of Quebec the Attorney General of Manitoba, and the Distillers' and Brewers' Association respectively deposited in said matter and that the document marked G. also

p. 4292,

RECORD.

No. 1. Certification of documents by Registrar of Supreme Court of Canada, 10th April 1895—*continued.*

annexed hereto is a true copy of the formal opinion of this Court in the said matter And I further certify that the document marked H. also annexed hereto is a copy of the opinions of their Lordships, Mr. Justice Gwynne, Mr. Justice Sedgewick and Mr. Justice King and of the dissenting opinions of their Lordships the Chief Justice and Mr. Justice Fournier as certified by C. H. Masters Esquire the assistant reporter of this Court.

Dated at Ottawa, this 10th day of April, A.D. 1895.

ROBERT CASSELS, Registrar.

"A."

CERTIFIED COPY of a Report of a Committee of the Honourable the Privy Council, approved by His Excellency the GOVERNOR GENERAL IN COUNCIL, on the 26th October 1893.

RECORD

No. 2. Report of Committee of the Privy Council (Canada), approved by the Governor General in Council, 26th October 1893.

The Committee of the Privy Council have had under consideration a Report, dated 21st October 1893, from the Minister of Justice, wherein he recommends that, pursuant to the provisions of the Revised Statutes of Canada, Chapter 135, and intituled "The Supreme and Exchequer Court Acts," as amended by Section 4 of the Act passed in the 54th and 55th years of Her Majesty's reign, chaptered 25, the following questions be referred to the Supreme Court of Canada, for hearing and consideration, viz.:—

1. Has a Provincial Legislature jurisdiction to prohibit the sale within the Province of spirituous, fermented or other intoxicating liquors?

2. Or has the Legislature such jurisdiction regarding such portions of the Province as to which the Canada Temperance Act is not in operation?

3. Has a Provincial Legislature jurisdiction to prohibit the manufacture of such liquors within the Province?

4. Has a Provincial Legislature jurisdiction to prohibit the importation of such liquors into the Province?

5. If a Provincial Legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such Legislature jurisdiction to prohibit the sale, by retail, according to the definition of a sale by retail, either in Statutes in force in the Province at the time of Confederation, or any other definition thereof.

6. If a Provincial Legislature has a limited jurisdiction only as regards the prohibition of sales, has the Legislature jurisdiction to prohibit sales subject to the limits provided by the several sub-sections of the 99th Section of "The Canada Temperance Act," or any of them (Revised Statutes of Canada, Chapter 106, Section 99).

7. Had the Ontario Legislature jurisdiction to enact the 18th Section of the Act passed by the Legislature of Ontario, in the 53rd year of Her Majesty's Reign, and intituled "An Act to improve the Liquor License Acts," as said section is explained by the Act passed by the said Legislature, in the 54th year of Her Majesty's Reign, and intituled "An Act respecting Local Option in the matter of liquor selling?"

The Committee concur in the foregoing recommendation of the Minister of Justice, and submit the same for Your Excellency's approval.

(signed) JOHN J. MCGEE, Clerk of the Privy Council.

"B."

SUPREME COURT OF CANADA.

SUBJECT: PROVINCIAL JURISDICTION.

PROHIBITORY LIQUOR LAWS.

FACTUM of the Solicitor General of Canada.

RECORD.

No. 3.
Factum of the Solicitor General of Canada.

THE following are the questions submitted to the Supreme Court of Canada for adjudication:

1. Has a Provincial Legislature jurisdiction to prohibit the sale, within the Province, of spirituous, fermented, or other intoxicating liquors?

2. Or has the Legislature such jurisdiction regarding such portions of the Province as to which the Canada Temperance Act is not in operation?

3. Has a Provincial Legislature jurisdiction to prohibit the manufacture of such liquors within the Province?

4. Has a Provincial Legislature jurisdiction to prohibit the importation of such liquors into the Province.

5. If a Provincial Legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such Legislature jurisdiction to prohibit the sale, by retail, according to the definition of a sale by retail, either in Statutes in force in the Province at the time of Confederation, or any other definition thereof?

6. If a Provincial Legislature has a limited jurisdiction only as regards the prohibition of sales, has the Legislature jurisdiction to prohibit sales subject to the limits provided by the several sub-sections of the 99th section of "The "Canada Temperance Act," or any of them (Revised Statutes of Canada, c. 106, s. 99).

7. Had the Ontario Legislature jurisdiction to enact the 18th section of the Act passed by the Legislature of Ontario, in the 53rd year of Her Majesty's Reign, and intituled "An Act to improve the Liquor License Acts," as said section is explained by the Act passed by the said Legislature, in the 54th year of Her Majesty's Reign, and intituled "An Act respecting Local Option in the "matter of liquor selling?"

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No. 3. Factum of the Solicitor General of Canada—*continued.*

The undersigned respectfully submits that to the first question the answer is
Not irrespective of quantity. By retail
Yes.

To the second the answer is
Yes.

To the third question
No.

To the fourth question
No.

To the fifth question
Yes. Parliament defines what is wholesale and what is retail under regulation of Trade and Commerce.

To the sixth question
Yes.

To the seventh question
Yes.

In determining these questions, reference must be had to the Sections 91 and 92 of the British North America Act. We must consider not only that Act but the state of the law in the different Provinces at the time of Confederation, and seek to guide ourselves by the jurisprudence since established by the numerous decisions rendered by the courts on the subject of jurisdiction, Dominion and Provincial.

In the first place, it is almost needless to discuss whether a Province has the power to prohibit irrespective of quantity. The British North America Act, Section 91, Sub-section 2, gives to the Dominion Parliament the regulation of trade and commerce. That it was meant the Dominion should have the general control of that branch of legislation is apparent from the fact that all cognate subjects have been allotted to that Parliament, navigation and shipping, currency and coinage, banking, incorporation of banks and issue of paper money, weights and measures, bills of exchange and promissory notes, bankruptcy and insolvency, all of which may be considered as the great agents of, or largely influencing the operations of, trade and commerce.

The regulation of trade and commerce as construed by the Privy Council in the case of The Citizens' Insurance Company *v.* Parsons was defined in the following words:—

"Construing therefore the words 'regulation of trade and commerce' by "the various aids to their interpretation above suggested, they would include "political arrangements in regard to trade requiring the sanction of Parliament, "regulation of trade in matters of inter-provincial concern, and it may be they "would include general regulation of trade affecting the whole Dominion."

It would seem, then, that this regulation of trade and commerce gives jurisdiction over imports and manufactures, prominent amongst which are the

importation of wines and intoxicating liquors and the manufacture of those within the Dominion.

Prior to Confederation of the Provinces, the united Province of Upper and Lower Canada had only one Parliament. In that Parliament general laws were passed for old Canada and provincial laws for the Provinces respectively. We find in that legislation a classification of subjects which will greatly assist in determining the questions submitted. Referring to the Consolidated Statutes of Canada (1859), we have there all the legislation regarding the importation of liquors and the manufacturing of the same. The Excise laws are side by side with the Customs enactments, thus showing that prior to Confederation the importation and manufacture of spirituous liquors, were subjects of general concern in which the trade and commerce of the united provinces were involved. In the Consolidated Statutes of Upper Canada and those of Lower Canada, as applied to each province, we find powers granted to each, under their municipal institution, to deal with the licensing and prohibition of the sale by retail of intoxicating beverages, and in the legislation thus regulating the liquor traffic by retail we find Parliament decreeing what shall be considered sale by wholesale and sale by retail.

The general powers thus possessed by the provinces were conferred upon the Dominion Parliament, and included therein was the power to define what is wholesale and what is retail trade. This view is upheld by the Privy Council when maintaining the validity of the Canada Temperance Act. The Provincial Legislatures have not the right to prohibit the sale, generally, of intoxicating liquors, but they have the right to prohibit their sale by retail.

The Provincial Legislatures have control of our municipal institutions, and it has been held by the Court of Queen's Bench in Appeal, of Quebec, as well as by the Court of Appeal for Ontario; the first in the case of Sulte *v.* Three Rivers, 11 Supreme Court Reports, 25; the second in *re* Local Option Act, O. A. R. vol. xviii., page 572, that under municipal institutions prohibitory legislation may be passed under certain conditions, *i.e.*, the retail trade for such commodities after the observance of certain formalities. Clements, commenting upon the judgment in the Three Rivers case, says, "It was broadly held that a "Provincial Legislature has the power under municipal institutions to pass a "prohibitory law or a liquor law which is prohibitory except under certain con- "ditions." Referring to the decision of the Court of Appeal of Ontario *in re* Local Option Act, the same author says at page 370:—

"The decision of the Court of Appeals for Ontario *in re* Local Option Ac "leaves the matter in this peculiar position: That by united action on the "part of the various municipalities throughout the province the total prohibi- "tion of the liquor traffic may possibly be effected, but that a Provincial "Legislature has no power to do directly what it may empower a municipality "to do."

Judge Burton, in the case just referred to, says, at page 586, same report:—

"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

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No. 3.
Factum of the Solicitor-General of Canada—*continued.*

" municipal institutions, the local legislature's power to prohibit was included, " and if the power, the exclusive power to deal with this question."

Lareau, in his *Histoire du Droit Canadien, Jurisprudence Constitutionnelle,* at page 387, after discussing the question at length, says :—

" Les législatures provinciales ont donc le pouvoir pour les fins locales, " d'adopter un règlement prohibant la vente des spiritueux sous certaines " conditions."

And Clements, at page 371, commenting upon the whole subject, says :—

" The conclusion appears to us unavoidable that if a local legislature has " power under 'municipal institutions' to authorise a municipal body of its " own creation to prohibit the traffic in any commodity, the use or abuse of " which may tend to the disturbance of the peace of the community, or to " prejudicially affect its health or morals, the legislature itself must necessarily " have the power to pass a general law prohibiting the traffic in such com- " modity throughout all the municipalities of the province. If the conclusion be " unsound, the premises must go, and then we must fall back upon some class " enumerated in Section 92, other than 'municipal institutions,' as supporting " the power to regulate, to the extent of prohibition, the traffic in particular " commodities within a province. If regulation, conditionally prohibitive, be not " an infringement of the power of the Dominion Parliament to regulate trade and " commerce as those words have been construed by the various judgments, " above cited, of the Judicial Committee of the Privy Council, it seems difficult " to appreciate how the absolute prohibition of traffic in such commodities as " above indicated can be such infringement. It cannot be by reason of the " extent of interference with 'trade and commerce,' for a 'regulation' of the " traffic in one commodity may cause greater interference than a total pro- " hibition of the traffic in several others."

It is difficult to conceive what argument could be adduced against the jurisdiction of the legislature regarding such portions of the province as to which the Canada Temperance Act is not in operation. Upon the first four questions submitted, the argument of the Province of Quebec placed before the Privy Council in the matter of the validity of the Liquor License Act of 1883 and the amending Act is most cogent. The contention of the province was summed up as follows :—

1st. That the Dominion Parliament can prohibit the importation of liquor into Canada.

2nd. That the Dominion Parliament can prohibit its manufacture within the country.

3rd. That the Dominion Parliament can exercise legislative control over the wholesale trade in liquor, so far as the Second Section of Article 91 of the British North America Act of 1867 would regard it as a matter of " trade and commerce."

That the local legislatures and the municipal organizations of the several provinces have exclusive control of those who are to deal in it after it passes from the hands of those who have imported it or manufactured it, and consequently the exclusive right to license individuals to deal in it, the charging of a license fee for such permit, the prescribing of what qualifications they shall possess as individuals, or what local sanction they shall obtain.

That the right to prohibit, in any particular municipal corporation, the sale of liquor by retail is, under existing valid legislation, within the exclusive control of the existing municipal councils and of the people comprising the municipal corporations by virtue of the authority conferred upon them by the legislation anterior to confederation or passed by the local legislature since that period.

That *per contra* the Dominion Parliament has no authority to deal with the question of local prohibition, or to revoke or supplant provincial legislation on the subject.

These are sound views. The judgment of the Privy Council in Russell and the Queen in no way conflicts with the contentions therein set forth. The Temperance Act was held to be, as it was, a general law for the peace, order, and good government of the Dominion. The rights of the provinces to deal with the subject are derived from their control over municipal institutions, as already shown. The Province of Quebec in its argument concedes the control of the importation and manufacture of intoxicating liquors to the Parliament of the Dominion, but it is properly urged on behalf of the Province, at page 38 of the official record :

"In legislating respecting the traffic in liquor, its manufacture within the "country or its importation from abroad, it is necessary to distinguish between "the wholesale and retail trade; that whatever may or can be said respecting "the control of the wholesale trade, and of its manufacture or importation, "being within the competence of the Dominion Parliament, the retail trade, "the licensing of persons wishing to engage in it, and the general legislation "of the traffic, is a municipal institution or a matter of local control, of th "nature of a police regulation."

The province could not very well have urged any other contention with reference to the importation and manufacture of intoxicating liquors. As already mentioned in the old United Provinces of Canada, legislation with reference to customs and excise was always dealt with as a matter of general concern. In the Consolidated Statutes of Canada, 1859, we find: "An Act "respecting duties of Customs and the collection thereof," Chapter 17, whilst Chapter 19 is "An Act respecting duties of excise on distillers and brewers, "and the spirits and beer made by them." Such legislation was never considered as provincial *quoad* one or the other of the united provinces of Upper or Lower Canada; on the other hand, the Lower Canada Municipal Act is to be found in the Consolidated Statutes of Lower Canada, just as the corresponding Act for Upper Canada is inserted in the statutes specially applicable to that province. In the Consolidated Statutes of Lower Canada, referred to under

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No. 3.
Factum of the Solicitor-General of Canada—*continued.*

the title of " Special Powers of County Councils," we find under the caption " Sale of Spirituous Liquors " :—

Section 26, ss. 10 : " Every County Council shall also have power to make, " in the month of March of every year, by-laws (not being inconsistent with the " provisions of Chapter 6 of these Consolidated Statutes), for the following " objects :—

" 11. For prohibiting and preventing the sale of all spirituous, vinous, " alcoholic and intoxicating liquors, or to permit such sale, subject to such " limitations as they shall consider expedient."

Not being inconsistent with Chapter 6, refers to an Act respecting tavern-keepers, and makes a special exception in Section 1 regarding distillers licensed under the Consolidated Statutes of Canada, Chapter 19.

Sub-section 16 of Section 27, enacts as follows: " Every local council may " make by-laws to prevent or prohibit the sale of all spirituous, vinous, alcoholic " and intoxicating liquors, in any year when the County Council has failed in " the month of March to regulate by by-law such sale."

Sub-section 9 of Section 249, 29 & 30 Vict., c. 57, municipal institutions of Upper Canada passed on the eve of Confederation of the British North American Provinces contains similar provisions.

Thus we have to assist us in determining what was meant by the regulation of trade and commerce the state of things and their mode of treatment by old Canada prior to confederation. The classification made by old Canada in dealing with those subjects in her legislation may well be considered conclusive as to the right of the Dominion Parliament to control the importation and manufacture of intoxicating liquors. Whilst admitting those rights of control to the Dominion Parliament, the Province of Quebec contended most strenuously for the right of prohibition by retail. After quoting the judgment of the Privy Council in Parsons *v.* The Queen, on the construction to be placed upon the words " regulation of trade and commerce," the province invokes by way of analogy numerous decisions in the courts of the United States in support of the general principle contended for. *Vide* page 24, official record.

The fifth question in effect asks what shall be considered sale by retail. There is no doubt that a province may prohibit by retail, at least we have already attempted to establish that in the early part of this argument. If a provincial legislature can empower municipalities to enact prohibitive legislation, it must logically be held to possess the power it thus delegates. The question, what is retail ought to be governed by the Dominion Statute. The regulation of trade and commerce coming within the jurisdiction of the Dominion Parliament, that body has the right to define what is wholesale and what is retail. The importance of such a definition can easily be realised by the fact, that the question has been raised in many of the arguments that have taken place in the suits brought before the courts upon constitutional questions. At the date of confederation there was not uniformity in the regulations of the different provinces as to the quantities that were to establish the difference between

wholesale and retail trade in the liquor traffic. The Dominion Parliament, by Sub-section 8 of Section 99 of the Canada Temperance Act, has provided that a wholesale transaction shall not be less than 10 gallons.

To the sixth question, the inevitable answer from the foregoing argument is in the affirmative.

The matter contained in the seventh question has been so exhaustively dealt with by the Court of Appeals of Ontario in its recent judgment, to be found in the Ontario Appeal Report, Vol. XVIII., page 572, *in re* Local Option Act, that it is only necessary to refer to the conclusive reasoning of their Lordships on that subject.

(signed) J. J. CURRAN,
Solicitor General for Dominion of Canada.

Ottawa, 2nd April 1894.

"C."

IN THE SUPREME COURT OF CANADA.

In the Matter of Questions referred to the Supreme Court of Canada by HIS EXCELLENCY THE GOVERNOR GENERAL under ORDER IN COUNCIL of 26th October 1893, as to PROVINCIAL JURISDICTION *re* PROHIBITORY LIQUOR LAWS.

FACTUM on behalf of the Attorney General of Ontario.

RECORD.

No. 4. Factum of the Attorney General of Ontario.

With regard to the questions above referred, it is respectfully submitted in the first place, that the first four questions should be answered in the affirmative.

I.

As to the prohibition of the sale of intoxicating liquors, we find that, before Confederation, in at least three of the four provinces of which the Dominion was at first composed, prohibitory powers formed an integral part of the municipal law.

For instance, under the Lower Canada Consolidated Statutes (1861), Chapter 24, Section 26, every county council might in the month of March make by-laws:

"11. For prohibiting and preventing the sale of all spirituous, vinous, "alcoholic, and intoxicating liquors, or to permit such sale subject to such "limitations as they shall consider expedient:

"12. For determining under what restrictions and conditions, and in what "manner the revenue inspector of the district shall grant licenses to shop-"keepers, tavern-keepers, or others, to sell such liquors."

Section 27, Sub-section 16 of the same Act reads as follows: "Every local "council may make by-laws to prevent or prohibit the sale of all spirituous, "vinous, alcoholic and intoxicating liquors, in any year when the county "council has failed in the month of March to regulate by by-law such sale."

For this last provision the following was substituted in 1866, by 29-30 Vict. c. 32, s. 2:

"16. Before the second Wednesday in March of each year, any local "council may pass a by-law for preventing and prohibiting the sale of any "spirituous, vinous, alcoholic and intoxicating liquors."

Analogous provisions are to be found in the special charters of cities which did not come under the Municipal Act. *See* as to Three Rivers, 20 Vict., c. 129, s. 37.

As to Upper Canada, similar provisions are to be found in 22 Vict., c. 99, s. 245, sub-s. 6, and in Consolidated Statutes, Upper Canada (1859), Chapter 54, Section 246, Sub-section 6. The law in force at the time of Confederation is to be found in 29-30 Vict. c. 51, and is as follows: " 249. The council of every " township, town, and incorporated village, and the commissioners of police in " cities may respectively pass by-laws * * *

" 9. For prohibiting the sale by retail of spirituous, fermented, or other " manufactured liquors in any inn or other house of public entertainment; " and for prohibiting totally the sale thereof in shops and places other than " houses of public entertainment; provided the by-law, before the final passing " thereof, has been duly approved by the electors of the municipality in the " manner provided by this Act."

In Nova Scotia as to the power of the Sessions, *see* 21 Vict. c. 47, and Rev. Stat. N. S. (3rd Series), Chapter 19. *See* also Keefe *v.* McLennan, 2 Russ. and Chapter 5.

The expression " Municipal Institutions " in Section 92, Sub-section 9 of the B. N. A. Act was taken from the Quebec Resolutions (No. 43), so that it was evidently used in a sense quite well understood by the framers of these resolutions; and it is very suggestive that " An Act respecting the Municipal " Institutions of Upper Canada " is the title of the successive Acts, 22 Vict. c. 99 (1858); Con. Stat. U. C., c. 54 (1859); and 29-30 Vict. c. 51 (1866).

In Slavin and the Corporation of Orillia, 36 U. C. Q. B., at page 176, Richards, C. J. says: " When words and expressions are imported into that Act " (the B. N. A. Act) which have been in common use in legislating for these " Provinces, we must continue interpreting these words in the same manner " and to mean the same thing as we decided they meant in Statutes passed by " our own legislatures." And in the same case, at page 175: " 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 Legislatures 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? "

This view has also received the sanction of the Privy Council in Hodge *v.* The Queen, 9 App. Cas. 117, when their Lordships, speaking of the Ontario License Act, say at page 131: " These 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 laws passed by the Local Parliaments."

See also Regina *v.* Taylor, 36 U. C. Q. B., pp. 212-214.

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No. 4. Factum of the Attorney General of Ontario—*continued.*

In the case of Sulte *v.* Three Rivers, 11 S. C. R. 25, the present Chief Justice of this Court said, p. 32 : " I agree entirely with the judgment delivered " by Mr. Justice Ramsay in the Court of Queen's Bench." &c.

The judgment referred to is found in 5 Quebec Legal News, p. 330 ; Mr. Justice Ramsay, after referring to the legislation on the subject before Confederation, says, p. 333 : " We cannot help thinking that this was sufficient to " bring prohibitory liquor laws within the powers of local legislation as forming " part of ' municipal institutions ' within the meaning of the B. N. A. Act." And again, p. 334 : " We hold, then, that under a proper interpretation of Sub- " section 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."

In Sulte *v.* Three Rivers, Gwynne, J., says, p. 43 :—" I cannot doubt that " by item 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 organised in some of the provinces."

While it is true that the provisions in the Municipal Acts before confederation relate chiefly to what was then considered the retail traffic, it is submitted that the effect of the decision of the Privy Council regarding the Dominion License Acts of 1883 and 1884, is to show that there is no substantial difference as to power between what may have been called retail and wholesale.

A very full review of the cases and discussion of this point is to be found in the case of Lepine *v.* Laurent, 14 Quebec Legal News, 369 ; 17 Q. L. R. 226, when Mr. Justice Lynch upheld the right of the town of Magog to prohibit the sale by wholesale as well as by retail under a Quebec statute.

It is to be observed that in Russell *v.* The Queen, 7 App. Cas. 829, sub-section 8 of section 92 of the B. N. A. Act was not considered, and as pointed out by Mr. Justice Ramsay in Three Rivers *v.* Sulte, at p. 334, the Privy Council in the Russell case " has not either expressly or by implication " maintained that the Dominion Parliament can alone pass a prohibitory " liquor law."

In so far as there is any apparent conflict between the decision in Russell *v.* The Queen, and an affirmative answer to the first question now submitted, it is fully met by the judgment in the Hodge Case, where their Lordships say at p. 130 :—" The principle which that case (Russell *v.* The " Queen) and the case of the Citizens' Insurance Company (7 App. Cas. 96), " illustrate is, that subjects which in one aspect and for one purpose fall within " section 92, may in another aspect and for another purpose fall within " section 91."

It is further to be borne in mind that in Russell *v.* The Queen, it was a Dominion Act that was under consideration, and the expression above quoted from the Hodge Case is particularly applicable, as prohibitory legislation would

appear to be peculiarly one of those "subjects which in one aspect and for one "purpose may fall within section 92, and in another aspect and for another "purpose may fall within section 91." The questions proposed on this point comply with the conditions laid down in the Hodge Case, in that they "do not "conflict with the provisions of the Canada Temperance Act, which does not "appear to have as yet been locally adopted."

The Dominion License Acts of 1883 and 1884 contain many prohibitory provisions, and although it appears from the official shorthand report of the argument before the Privy Council that these were specially brought to their Lordships' attention, yet no reservation was made in their favour, as was done with the adulteration clauses. *See* proceedings pp. 19, 20, 79, 159, 160 and 170. *See* also Cassels' Digest, p. 543, and 4 Cartwright, p. 342.

Such an Act as that now proposed might also be said to come within the jurisdiction of the Provincial Legislatures, under what has been called the Police Power, which is in reality comprised under the head of "Municipal "Institutions," and "matters of a merely local nature" with the provisions of sub-section 15 to aid in its enforcement.

The prohibitory powers vested in the municipal councils of cities by Con. Stat. U. C., chapter 54, section 246, were by the Act of 1866, section 249, transferred to the Commissioners of Police, who were thus recognised as municipal officers.

In the Hodge Case their Lordships speak of the resolutions of the License Commissioners as "police or municipal regulations" (pp. 131 and 133), and of the appointment of the commissioners by the Legislature as confiding "to a "municipal institution or body of its own creation authority to make by-laws "or resolutions" (p. 132). And again, p. 133: "The provincial Legislature "having thus the authority to impose imprisonment, with or without hard "labour, had also power to delegate similar authority to the municipal body "which it created, called the License Commissioners."

In Reg. *v.* Frawley, 7 Ont. A. R. at p. 264, Spragge, C.J., says: "It is, "I think, clearly so (*intra vires*) as a matter of police regulation, and being so "falls within one of the enumerated classes, viz., municipal institutions." *See* also the remarks of Richards, C.J., in Slavin and Orillia, 36 U. C. Q. B. at pp. 171, 177, and 179.

Striking illustrations of what are strictly police powers conferred upon municipal councils may be found in Con. Stat. U. C., chapter 54, section 282, with its list of 11 subjects under the head of "Public Morals," and also in the special charters granted to the various cities in Lower Canada, Nova Scotia, and New Brunswick. *See* also on this point, Cooley on Constitutional Limitations (6th ed.) pp. 704, 716.

Further, the restriction and regulation of the sale of intoxicating liquors being under the control of the provincial legislatures, as has been settled by The Queen *v.* Hodge, and The Dominion License Act Case, it is submitted that

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No. 4. Factum of the Attorney General of Ontario—*continued.*

the right to prohibit logically follows. The principle enunciated by the late Chief Justice of this Court in Fredericton *v.* The Queen is impregnable, although his application of it has been practically overruled by the subsequent decisions above mentioned. He says, p. 537: "It is said that a power to "regulate does not include a power to prohibit. Apart from the general "legislative power which I think belongs to the Dominion Parliament, I do not "entertain the slightest doubt that the power to prohibit is within the power to "regulate." *See* also the cases in the U. S. Supreme Court cited by him, and the reasoning of the judges of that court on this point.

The following additional authorities on the foregoing points may also be referred to:

Reg. *v.* Taylor, 36 U. C. Q. B., 183.

Cooey *v.* Corporation of Brome, 14 L. N., 370.

Blouin *v.* Corporation of Quebec, 7 Q. L. R., 18.

Molson *v.* Lambe, M. L. R., 2 Q. B., 381.

Poulin *v.* Corporation of Quebec, 9 S. C. R., 185.

Danaher *v.* Peters, 17 S. C. R., 44.

A prohibitory law such as that in question is one that would place the sale of intoxicating liquors upon something of the same footing as poisons have been placed by provincial legislation in most of the provinces, and the constitutionality of such legislation has never been questioned. For illustrations of these, *see* Rev. Stat. Ont. chapter 151, section 20; Rev. Stat. Que., Art. 4035; Rev. Stat. N. S. (5th series), chapter 25 section 7; also Bennett *v.* Pharmaceutical Association of Quebec, 1 Dorion Q. B., 336.

II.

In the absence, at least, of conflicting Dominion legislation, it is also submitted that a prohibitory law would be within the jurisdiction of the Local Legislatures under sub-section 16 of section 92, as dealing with a merely local matter in the Province.

Not being one of the enumerated subjects assigned to the Dominion in section 91, it would not consequently be taken out of sub-section 16 of section 92.

At the most it would be one of those subjects coming within the language used in Hodge *v.* The Queen "which in one aspect and for one purpose might "fall within section 92, and in another aspect and for another purpose might "fall within section 91."

It might also come within the principle laid down in such cases as L'Union St. Jacques *v.* Belisle, L. R. 6 P. C. 31 (1874), where the possibility of Dominion legislation interfering with the local Act was held not to take the latter from

under Sub-section 16; or in The Attorney-General of Ontario *v.* The Attorney-General of Canada, 10 Law Times Reports 305, decided in the Privy Council on 24th February 1894. In this latter case, where the validity of the Ontario Act relating to assignments was in question, the following language was used: "Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation, inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects as might be properly treated as ancillary to such a law, and therefore within the powers of the Dominion Parliamen, are excluded from the legislative authority of the Provincial Legislature, when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence."

III.

If it should be claimed on the opposite side that such prohibitory legislation does not come within Sub-sections 9 and 16 of Section 92, on account of it coming within Section 91, Sub-section 2, "The Regulation of Trade and Commerce," perhaps the best answer would be that given in the case of Citizens' Insurance Company *v.* Parsons, 7 App. Cas., at p. 112. It is there said: "Regulation of trade and commerce may have been used in some such sense as "the words 'regulations of trade' in the Act of Union between England and "Scotland, and as these words have been used in Acts of State relating to trade "and commerce. Article V. of the Act of Union enacted that all the subjects "of the United Kingdom should have full freedom and intercourse of trade and "navigation to and from all places in the United Kingdom and the Colonies; "and Article VI. enacted that all parts of the United Kingdom, from "and after the Union should be under the same 'prohibitions, restrictions "'and regulations of trade.' Parliament has at various times since "the Union passed laws affecting and regulating specific trades in "one part of the United Kingdom only, without its being supposed that it "thereby infringed the Articles of Union. Thus the Acts for regulating "the sale of intoxicating liquors notoriously vary in the two kingdoms So "with regard to Acts relating to bankruptcy, and various other matters. "Construing, therefore, the words 'regulation of trade and commerce' by the "various aids to their interpretation above suggested, they would include "political arrangements in regard to trade requiring the sanction of Parliament, "regulation of trade in matters of inter-provincial concern, and it may be "that they would include general regulation of trade affecting the whole "Dominion."

In the subsequent case of Bank of Toronto *v.* Lambe, 12 App. Cas., at p. 586, the following language was used: "The words 'regulation of trade and "commerce' are indeed very wide, and in Severn's Case it was the view of the "Supreme Court that they operated to invalidate the license duty which was "there in question. But since that case was decided the question has been "more completely sifted before the committee in Parsons' Case, and it was

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No. 4. Factum of the Attorney General of Ontario—*continued.*

" found absolutely necessary that the literal meaning of the words should be " restricted, in order to afford scope for powers which are given exclusively " to the Provincial Legislatures. It was there thrown out that the power of " regulation given to the Parliament meant some general or inter-provincial " regulations."

IV.

What has been said regarding the prohibition of the sale of intoxicating liquors is also applicable to the Manufacture. The control or suppression of the manufacture may well be considered as ancillary to the suppression of the sale, and so come within provincial jurisdiction.

Under municipal Acts large powers have always been conferred as to buildings, and the carrying on of manufactures or trades that might be considered injurious or objectionable. For instance, under Con. Stat. U. C. c. 54, s. 294, the council of every city, town, and incorporated village, might pass by-laws :—

"20. For preventing and abating nuisances."

"23. For preventing or regulating the erection or continuance of " slaughter-houses, gasworks, tanneries, distilleries, or other manufactories " or trades which may prove to be nuisances."

"32, For regulating the keeping and transporting of gunpowder, for " regulating magazines, for storing gunpowder, &c."

Also for regulating chimneys, &c.

The Legislature which would have authority to legislate on these subjects on account of the danger from fire, explosion, &c., would certainly also have authority to legislate, concerning them, if it considered them objectionable for any other reason, and the sufficiency of the reason could not be inquired into.

In the case of manufacture there would be even less ground than in the case of sale for claiming that it falls under " the regulation of trade and commerce." There would also be stronger ground for claiming that it comes under matters of a merely local nature in the province.

Under Con. Stat. U. C. Chapter 54, Section 266, a municipal council might pass a by-law: " 10. For preventing the growth of weeds detrimental to good " husbandry." Could not the Legislature, which has the right to give a municipality such power, enable it to pass a by-law to prevent the growth of tobacco, for example? And this, notwithstanding the Dominion levies an excise duty upon it. And the Legislature might exercise its power in this respect directly instead of indirectly through the municipality. Could not a Provincial Legislature prohibit the growth of poppies in order to suppress the opium trade?

See Hamilton Powder Company *v.* Lambe, 30 L.C.J. 13, M.L.R. 1, Q.B. 460.

V.

With regard to Importation, the foregoing will, in a great measure, apply. If the sale and manufacture come within the provincial jurisdiction, and the regulation or suppression of the importation of intoxicating liquors be considered necessary fully to carry out the former, then it also would fall within the power of the Provincial Legislature.

The fact that the Dominion Parliament levies a custom duty on imported liquors would be no more conclusive against the power than would the levying of a tax by the Dominion on provincial corporations prevent the Legislature from dissolving existing corporations or ceasing to create new ones.

It is submitted that Section 121 of the B.N.A. Act, which enacts that "All articles of the growth, produce or manufacture of any one of the "provinces shall, from and after the Union, be admitted free into each of the "other provinces," is meant to prevent the levying of inter-provincial customs, duties, or octroi, and does not interfere with a prohibitory law.

For instance, under Con. Stat. U. C., Chapter 54, Section 294, municipalities might pass by-laws: "28. For providing for the health of the "municipality and against the spreading of contagious or infectious diseases." Under this power, surely, the importation of rags from a locality where cholera or small-pox was raging might be prevented. And the Legislature which could create a municipality and authorise it to pass such a by-law, could surely pass an Act itself to the same effect applicable to the whole or a part of the province.

VI.

It is respectfully submitted that the validity of the Ontario Local Option Act, 53 Vict. c. 56, s. 18, is beyond question. It reads as follows:—

"18. Whereas the following provision of this section was, at the date of "Confederation, in force as a part of The Consolidated Municipal Act (29 & "30 Vict. c. 51, s, 249, ss. 9), and was afterwards re-enacted as Sub-section 7 "of Section 6 of 32 Vict. c. 32, being The Tavern and Shop License Act of "1868, but was afterwards omitted in subsequent consolidations of The "Municipal and The Liquor License Acts, similar provisions as to local "prohibition being contained in The Temperance Act of 1864, 27 & 28 Vict. "c. 18; and the said last mentioned Act having been repealed in municipalities "where not in force by The Canada Temperance Act, it is expedient that "municipalities should have the powers by them formerly possessed; it is "hereby enacted as follows:—

"The council of every township, city, town and incorporated village, may "pass by-laws for prohibiting the sale by retail of spirituous, fermented, or "other manufactured liquors in any tavern, inn, or other house or place of "public entertainment, and for prohibiting altogether the sale thereof in shops

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" and places other than houses of public entertainment: Provided that the " by-law, before the final passing thereof, has been duly approved of by the " electors of the municipality in the manner provided by the sections in that " behalf of the Municipal Act; provided further, that nothing in this section " contained shall be construed into an exercise of jurisdiction by the Legislature " of the Province of Ontario beyond the revival of provisions of law which " were in force at the date of the passing of the British North America Act, " and which the subsequent legislation of this Province purported to repeal."

The amending Act of 1891 was passed to put it beyond doubt that the Act of 1890 was intended to prohibit sale by retail only, as was the case under the Act of 1866.

The clause in the Act of 1866 was re-enacted by 32 Vict. c. 32, and remained part of the municipal law of Ontario until 1874, when it was repealed by 37 Vict. c. 32, s. 61.

If the Act of 1890 is *ultra vires,* then the repealing Act of 1874 was so also, and the Act of 1866 would still be in force.

The corresponding provisions for Lower Canada above cited were substantially re-enacted in the Quebec Municipal Code as Article 571, and are still in force there.

The validity of these enactments has been upheld by unanimous judgments of the Courts of Appeal in these two Provinces. *In re* Local Option Act, 18 Ont. A. R. 572; Corporation of Huntingdon *v.* Moir, M.L.R., 7 Q.B. 281.

Reliance is placed upon the reasons given in these two judgments and upon the arguments in the first part of this factum regarding the prohibition of the sale.

The question of the power of the Dominion under " The Regulation of " Trade and Commerce " cannot fairly arise in this matter, as it is merely the retail sale in a particular municipality that is interfered with, which clearly comes under the head of " Municipal Institutions " and matters of merely " local nature."

In the Hodge Case, their Lordships of the Judicial Committee say, " That " Act is so far confined in its operation to municipalities in the Province of " Ontario, and is entirely local in its character and operation." This is literally true of the Local Option Act, which only authorises a by-law in a single municipality at a time, so that it is even more local in its nature than the License Act.

But the Local Option Act may also be sustained as a license law. The Ontario License Act, R.S.O, Chapter 194, provides for three main classes of licenses, viz., tavern, Section 18; shop, Section 31, and wholesale, Section 34.

The proper test of the validity of the Act of 1890 is not to look at it as an isolated piece of legislation, but to inquire whether the License Act as amended by it is valid.

Now, the Ontario Legislature might have provided for only one class of licenses or any number. The effect of the Act of 1890 is to allow shop licenses or tavern licenses or both to be cut off, wholesale licenses would still remain for each municipality, either alone or with either shop or tavern licenses, according to the nature of the municipal by-law or by-laws which have been approved by the electors.

By the Dominion License Act, 1883, Section 45, it was provided that that Act should not affect the prohibitory powers of local councils in Quebec. By the amending Act of 1884, Section 12, the following was added: "2. In every "town, village, parish and township in the Province of Quebec, the municipal "council thereof may by by-law restrict or prohibit within the limits of such "town, village, parish or township, the sale of intoxicating liquors." When the Privy Council declare that "the Liquor License Act, 1883, and the Act of 1884 "amending the same are not within the legislative authority of the Parliament "of Canada," the above provisions were declared *ultra vires* with the rest of these Acts, the only exception being as to "the provisions relating to adultera- "tion," which, their Lordships said, would, if separated from the rest of the Acts, be within the authority of the Dominion Parliament. *See* 4 Cartwright, p. 342.

It is respectfully submitted that, as under the above decision the power was held not to be in the Dominion, it must belong to the Provinces, as under our Constitution it must belong to either the one or the other.

J. J. MACLAREN.

J. R. CARTWRIGHT.

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No. 5. Factum of the Government of the Province of Quebec.

"D."

IN THE SUPREME COURT OF CANADA.

In the Matter of Questions referred to the SUPREME COURT OF CANADA, by HIS EXCELLENCY THE GOVERNOR GENERAL, in pursuance of an ORDER IN COUNCIL, approved of by HIS EXCELLENCY on the 26th day of October 1893. Subject: PROVINCIAL JURISDICTION, PROHIBITORY LIQUOR LAWS.

FACTUM of the Government of the Province of Quebec.

The undersigned humbly submits, on behalf of the Government of the Province of Quebec, that the different questions referred to the Supreme Court of Canada, for hearing and consideration relating to the jurisdiction of Provincial Legislatures to enact prohibitory intoxicating liquor laws, should be decided as follows:—

1. Has a Provincial Legislature jurisdiction to prohibit the sale, within the province, of spirituous, fermented or other intoxicating liquors?

The rules which the Government of this province follow on this question are those laid down by the judgments rendered in the following cases:

Slavin *v.* Village of Orillia, Q.B., Ontario, Cartwright "Cases on the B. N. A. Act," Vol. 1, page 688.

Corporation of Three Rivers *v.* Sulte, Q. B., Quebec, idem, Vol. 2, page 280.

Blouin *v.* Corporation of Quebec, Superior Court Quebec, idem, Vol. 2, page 368.

Regina *v.* Justices of Kings, Supreme Court, N. B., idem, Vol. 2, page 499.

Poulin *v.* Corporation of Quebec, Supreme Court of Canada, idem, Vol. 3, page 230.

Sulte *v.* Corporation of Three Rivers, Supreme Court of Canada, idem, Vol. 4, page 305.

In the light of these decisions the above question might be answered as follows:

Provincial Legislatures have no jurisdiction to totally prohibit the sale, within the province, of spirituous, fermented or other intoxicating liquors, as

this would be interfering with the regulation of trade and commerce over which the Dominion Parliament alone has jurisdiction. But, under the exclusive legislative authority given to Provincial Legislatures with regard to "municipal institutions" and to "matters of a merely local or private nature "within the province," (B. N. A. Act, Sec. 92, Sub-sections 8 and 16), Provincial Legislatures can confer on municipal corporations power to pass by-laws prohibiting the sale of spirituous liquors by retail in shops and places of public entertainment and limiting the number of tavern licenses, within the province.

2. Or has the Legislature such jurisdiction regarding such portions of the province as to which the Canada Temperance Act is not in operation?

No, except, as stated above, and under the further reserve of the right of Provincial Legislatures to authorize the issuing of licenses for the wholesale or retail sale of intoxicating liquors, "in order to the raising of a revenue for "provincial, local or municipal purposes." B. N. A. Act, Sec. 92, Sub-section 9.

3. Has a Provincial Legislature jurisdiction to prohibit the manufacture of such liquors within the province?

No.

4. Has a Provincial Legislature jurisdiction to prohibit the importation of such liquors into the province?

No.

5. If a Provincial Legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such Legislature jurisdiction to prohibit the sale, by retail, according to the definition of a sale by retail, either in statutes in force in the province at the time of confederation, or any other definition thereof?

Yes, as stated in answer to question one.

Under this head, Articles 561 to 570, both inclusively, of our Municipal Code, have been enacted and are in force throughout the province in all municipalities not governed by special charters.

In the latter, special provisions, to the same effect, are generally embodied in their acts of incorporation.

6. If a Provincial Legislature has a limited jurisdiction only, as regards the prohibition of sales, has the Legislature jurisdiction to prohibit sales subject to the limits provided by the several sub-sections of the 99th Section of "The Canada Temperance Act" or any of them. (Revised Statutes of Canada, Chapter 108, Section 99.)

No. In municipalities in which "The Canada Temperance Act" or "The Dunkin Act" are in force, Provincial Legislatures may provide for the enforcement of said Acts through the medium of provincial officers appointed and paid for according to provincial legislation.

RECORD.

No. 5.
Factum of the Government of the Province of Quebec—*continued.*

License Commissioners of Frontenac *v.* County of Frontenac, Cartwright "Cases on the B. N. A. Act," Vol. 4, page 683.

Articles 879 to 884, both inclusively, of the Revised Statutes of the Province of Quebec, were enacted by the Legislature of this Province for this purpose.

7. Had the Ontario Legislature jurisdiction to enact the 18th Section of the Act passed by the Legislature of Ontario, in the 23rd year of Her Majesty's Reign, and intituled: "An Act to improve the Liquor License Acts," as said section is explained by the Act passed the said Legislature in the 54th year of Her Majesty's Reign, and intituled: An Act respecting Local Option in the matter of Liquor selling"?

The Government of the Province of Quebec has no opinion to express upon this last question.

L. J. CANNON,

Assistant Attorney General, P. Q.,
on behalf of the Province of Quebec.

Ottawa, 1 May 1894.

"E."

No. 6.
Factum of the Attorney General of Manitoba.

IN THE SUPREME COURT OF CANADA.

In the Matter of Questions referred to the SUPREME COURT of CANADA by HIS EXCELLENCY THE GOVERNOR GENERAL under ORDER IN COUNCIL of 26th October 1893, as to PROVINCIAL JURISDICTION *re* PROHIBITORY LIQUOR LAWS.

FACTUM on behalf of the Attorney General of Manitoba.

WITH regard to the questions above referred, it is respectfully submitted, in the first place, that the first four questions should be answered in the affirmative.

I.

As to the prohibition of the sale of intoxicating liquors, we find that, before confederation, in at least three of the four Provinces of which the Dominion was at first composed, prohibitory powers formed an integral part of the municipal law.

For instance, under the Lower Canada Consolidated Statutes (1861), c. 24, s. 26, every county council might in the month of March make bye-laws:

"11. For prohibiting and preventing the sale of all spirituous, vinous, "alcoholic, and intoxicating liquors, or to permit such sale subject to such "limitations as they shall consider expedient:

"12. For determining under what restrictions and conditions, and in what "manner the revenue inspector of the district shall grant licenses to shop-"keepers, tavern-keepers, or others, to sell such liquors."

Section 27, Sub-section 16, of the same Act reads as follows: "Every local "council may make bye-laws to prevent or prohibit the sale of all spirituous, "vinous, alcoholic, and intoxicating liquors, in any year when the county "council has failed in the month of March to regulate by bye-law such "sale."

For this last provision the following was substituted in 1866, by 29–30 Vict., c. 32, s. 2:

"16. Before the second Wednesday in March of each year, any local "council may pass a bye-law for preventing and prohibiting the sale of any "spirituous, vinous, alcoholic, and intoxicating liquors."

Analogous provisions are to be found in the special charters of cities which did not come under the Municipal Act. See as to Three Rivers, 20 Vict., c. 129, s. 37.

As to Upper Canada, similar provisions are to be found in 22 Vict., c. 99, s. 245, Sub-section 6, and in Consolidated Statutes, Upper Canada (1859), p. 4292.

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No. 6.
Factum of the Attorney General of Manitoba—*continued.*

c. 54, s. 246, Sub-section 6. The law in force at the time of Confederation is to be found in 29-30 Vict. c. 51, and is a follows: "249. The council of every "township, town, and incorporated village, and the commissioners of police in "cities may respectively pass bye-laws * * *

"9. For prohibiting the sale by retail of spirituous, fermented, or other "manufactured liquors in any inn or other house of public entertainment; and "for prohibiting totally the sale thereof in shops and places other than houses "of public entertainment; provided the bye-law, before the final passing thereof, "has been duly approved by the electors of the municipality in the manner "provided by this Act."

In Nova Scotia, as to the power of the Sessions, see 21 Vict., c. 47, and Rev. Stat., N. S., (3rd Series), c. 19. See also Keefe *v.* McLennan, 2 Russ. and Ch., 5.

The expression "Municipal Institutions" in Section 92, Sub-section 9, of the B. N. A. Act was taken from the Quebec Resolutions (No. 43), so that it was evidently used in a sense quite well understood by the framers of these resolutions, and it is very suggestive that "An Act respecting the Municipal "Institutions of Upper Canada," is the title of the successive Acts, 22 Vict. c. 99, (1858); Con. Stat. U. C., c. 54, (1859); and 29-30 Vict. c. 51, (1866).

In Slavin and the Corporation of Orillia, 36 U. C. Q. B. at page 176, Richards, C. J., says: "When words and expressions are imported into that Act "(the B. N. A. Act) which have been in common use in legislating for these "Provinces, we must continue interpreting these words in the same manner and "to mean the same thing as we decided they meant in statutes passed "by our own legislatures." And in the same case, at page 175: "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 Legisla-"tures 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?"

This view has also received the sanction of the Privy Council in Hodge *v.* The Queen, 9 App. Cas. 117, when their Lordships, speaking of the Ontario License Act, say at page 131: "These 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 laws passed by the local parliaments."

See also Regina *v.* Taylor, 36 U.C.Q.B. pp. 212-214.

In the case of Sulte *v.* Three Rivers, 11 S.C.R. 25, the present Chief Justice of this Court said, p. 32:— "I agree entirely with the judgment delivered by "Mr. Justice Ramsay in the Court of Queen's Bench," etc.

The judgment referred to is found in 5 Quebec Legal News, p. 330; Mr. Justice Ramsay, after referring to the legislation on the subject before confederation, says, p. 333 :—"We cannot help thinking that this was sufficient to "bring prohibitory liquor laws within the powers of local legislation as forming "part of 'municipal institutions' within the meaning of the B. N. A. Act." And, again, p. 334 :—"We hold then that under a proper interpretation of "Sub-section 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."

In Sulte *v.* Three Rivers, Gwynne, J., says, p. 43:—"I cannot doubt that by "item 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 organised in some of the provinces."

While it is true that the provisions in the Municipal Acts before confederation relate chiefly to what was then considered the retail traffic, it is submitted that the effect of the decision of the Privy Council regarding the Dominion License Acts of 1883 and 1884, is to show that there is no substantial difference as to power between what may have been called retail and wholesale.

A very full review of the cases and discussion of this point is to be found in the case of Lepine *v.* Laurent, 14 Quebec Legal News, 369; 17 Q.L.R. 226, when Mr. Justice Lynch upheld the right of the town of Magog to prohibit the sale by wholesale as well as by retail under a Quebec statute.

It is to be observed that in Russell *v.* The Queen, 7 App. Cas. 829, Sub-section 8 of Section 92 of the B. N. A. Act was not considered, and, as pointed out by Mr. Justice Ramsay in Three Rivers *v.* Sulte, at p. 334, the Privy Council in the Russell case "has not either expressly or by implication main-"tained that the Dominion Parliament can alone pass a prohibitory liquor law."

In so far as there is any apparent conflict between the decision in Russell *v.* The Queen and an affirmative answer to the first question now submitted, it is fully met by the judgment in the Hodge Case, where their Lordships say at p. 130 :—"The principle which that case (Russell *v.* The Queen) and the case "of the Citizens' Insurance Company (7 App. Cas. 96) illustrate is, that "subjects which in one aspect and for one purpose fall within Section 92, may "in another aspect and for another purpose fall within Section 91."

It is further to be borne in mind that in Russell *v.* The Queen, it was a Dominion Act that was under consideration, and the expression above quoted from the Hodge Case is particularly applicable, as prohibitory legislation would appear to be peculiarly one of those "subjects which in one aspect and for one "purpose may fall within Section 92, and in another aspect and for another "purpose may fall within Section 91." The questions proposed on this point comply with the conditions laid down in the Hodge Case, in that they "do not "conflict with the provisions of the Canada Temperance Act, which does not "appear to have as yet been locally adopted."

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No. 6. Factum of the Attorney General of Manitoba—*continued.*

The Dominion License Acts of 1883 and 1884 contain many prohibitory provisions, and although it appears from the official shorthand report of the argument before the Privy Council that these were specially brought to their Lordship's attention, yet no reservation was made in their favour, as was done with the adulteration clauses. See Proceedings, pp. 19, 20, 79, 159, 160 and 170. See also Cassels' Digest, p. 543, and 4 Cartwright, p. 342.

Such an Act as that now proposed might also be said to come within the jurisdiction of the Provincial Legislatures, under what has been called the Police Power, which is in reality comprised under the head of "Municipal "Institutions," and "matters of a merely local nature" with the provisions of Sub-section 15 to aid in its enforcement.

The prohibitory powers vested in the municipal councils of cities by Con. Stat. U.C., c. 54, s. 246, were by the Act of 1866, Section 249, transferred to the Commissioners of Police, who were thus recognised as municipal officers.

In the Hodge Case their Lordships speak of the resolutions of the License Commissioners as "police or municipal regulations" (pp. 131 and 133), and of the appointment of the commissioners by the Legislature as confiding "to "a municipal institution or body of its own creation authority to make bye-laws "or resolutions" (p. 132). And again, p. 133:—"The Provincial Legislature "having thus the authority to impose imprisonment, with or without hard "labour, had also power to delegate similar authority to the municipal body "which it created, called the License Commissioners."

In Reg. *v.* Frawley, 7 Ont. A. R., at p. 264, Spragge, C. J., says:—"It is "I think clearly so (*intra vires*) as a matter of police regulation, and being so "falls within one of the enumerated classes, viz., municipal institutions." See also the remarks of Richards, C. J., in Slavin and Orillia, 36 U. C. Q. B., at pp. 171, 177 and 179.

Striking illustrations of what are strictly police powers conferred upon municipal councils may be found in Con. Stat. U. C., c. 54, s. 282, with its list of 11 subjects under the head of "Public Morals," and also in the special charters granted to the various cities in Lower Canada, Nova Scotia and New Brunswick. See also on this point, "Cooley on Constitutional Limitations" (6th ed.), pp. 704, 716.

Further, the restriction and regulation of the sale of intoxicating liquors being under the control of the Provincial Legislatures, as has been settled by The Queen *v.* Hodge, and The Dominion License Act Case, it is submitted that the right to prohibit logically follows. The principle enunciated by the late Chief Justice of this Court in Fredericton *v.* The Queen is impregnable, although his application of it has been practically overruled by the subsequent decisions above mentioned. He says, p. 537:—"It is said that a power to "regulate does not include a power to prohibit. Apart from the general "legislative power which I think belongs to the Dominion Parliament, I do not "entertain the slightest doubt that the power to prohibit is within the power

" to regulate." *See* also the cases in the United States Supreme Court cited by him, and the reasoning of the judges of that court on this point.

The following additional authorities on the foregoing points may also be referred to :—

Reg. *v.* Taylor, 36 U. C. Q. B. 183.

Cooey *v.* Corporation of Brome, 14 L. N. 370.

Blouin *v.* Corporation of Quebec, 7 Q. L. R. 18.

Molson *v.* Lambe, M. L. R. 2 Q. B. 381.

Poulin *v.* Corporation of Quebec, 9 S. C. R. 185.

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A prohibitory law such as that in question is one that would place the sale of intoxicating liquors upon something of the same footing as poisons have been placed by provincial legislation in most of the provinces, and the constitutionality of such legislation has never been questioned. For illustrations of these, *see* Rev. Stat. Ont. c. 151, s. 20 ; Rev. Stat. Que. Art. 4035 ; Rev. Stat. N. S. (5th series) c. 25, s. 7 ; also Bennett *v.* Pharmaceutical Association of Quebec, 1 Dorion Q. B. 336.

II.

In the absence, at least, of conflicting Dominion legislation, it is also submitted that a prohibitory law would be within the jurisdiction of the local Legislatures under Sub-section 16 of Section 92, as dealing with a merely local matter in the province.

Not being one of the enumerated subjects assigned to the Dominion in Section 91, it would not consequently be taken out of Sub-section 16 of Section 92.

At the most it would be one of those subjects coming within the language used in Hodge *v.* The Queen, " which in one aspect and for one purpose might " fall within Section 92, and in another aspect and for another purpose might " fall within Section 91."

It might also come within the principle laid down in such cases as L'Union St. Jacques *v.* Belisle, L. R. 6 P. C. 31 (1874), where the possibility of Dominion legislation interfering with the local Act was held not to take the latter from under Sub-section 16 ; or in The Attorney General of Ontario *v.* The Attorney General of Canada, 10 Law Times Reports 305, decided in the Privy Council on 24th February 1894. In this latter case, where the validity of the Ontario Act relating to assignments was in question, the following language was used : " Their Lordships do not doubt that it would be open to " the Dominion Parliament to deal with such matters as part of a bankruptcy " law, and the provincial Legislature would doubtless be then precluded from " interfering with this legislation, inasmuch as such interference would affect " the bankruptcy law of the Dominion Parliament. But it does not follow that " such subjects as might be properly treated as ancillary to such a law, and " therefore within the powers of the Dominion Parliament, are excluded from

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No. 6. Factum of the Attorney General of Manitoba—*continued.*

"the legislative authority of the provincial Legislature, when there is no "bankruptcy or insolvency legislation of the Dominion Parliament in "existence."

III.

If it should be claimed on the opposite side that such prohibitory legislation does not come within Sub-sections 9 and 16 of Section 92, on account of its coming within Section 91, Sub-section 2, "The Regulation of "Trade and Commerce," perhaps the best answer would be that given in the case of Citizens' Insurance Co. *v.* Parsons, 7 App. Cases, at p. 112. It is there said: "Regulation of trade and commerce may have been used in some such "sense as the words 'regulation of trade' in the Act of Union between England "and Scotland, and as these words have been used in Acts of State relating to "trade and commerce. Article V. of the Act of Union enacted that all the "subjects of the United Kingdom should have full freedom and intercourse of "trade and navigation to and from all places in the United Kingdom and the "Colonies; and Article VI. enacted that all parts of the United Kingdom, from "and after the Union, should be under the same 'prohibitions, restrictions, and "'regulations of trade.' Parliament has at various times since the Union "passed laws affecting and regulating specific trades in one part of the United "Kingdom only, without its being supposed that it thereby infringed the "Articles of Union. Thus the Acts for regulating the sale of intoxicating "liquors notoriously vary in the two kingdoms. So with regard to Acts "relating to bankruptcy and various other matters. Construing, therefore, the "words 'regulation of trade and commerce' by the various aids to their "interpretation above suggested, they would include political arrangements in "regard to trade requiring the sanction of Parliament, regulation of trade in "matters of inter-provincial concern, and it may be that they would include "general regulation of trade affecting the whole Dominion."

In the subsequent case of Bank of Toronto *v.* Lambe, 12 App. Cas., at p. 586, the following language was used: "The words 'regulation of trade and "'commerce' are indeed very wide, and in Severn's case it was the view of "Supreme Court that they operated to invalidate the licence duty which was "there in question. But since that case was decided the question has been "more completely sifted before the Committee in Parson's case, and it was "found absolutely necessary that the literal meaning of the words should be "restricted, in order to afford scope for powers which are given exclusively to "the provincial Legislatures. It was there thrown out that the power of "regulation given to the Parliament meant some general or inter-provincial "regulations."

IV.

What has been said regarding the prohibition of the sale of intoxicating liquors is also applicable to the manufacture. The control or suppression of the manufacture may well be considered as ancillary to the suppression of the sale, and so come within provincial jurisdiction.

Under municipal Acts large powers have always been conferred as to buildings, and the carrying on of manufactures or trades that might be considered injurious or objectionable. For instance, under Con. Stat. U. C. c. 54, s. 294, the council of every city, town and incorporated village might pass by-laws:—

"20. For preventing and abating nuisances."

"23. For preventing or regulating the erection or continuance of slaughter-"houses, gas works, tanneries, distilleries, or other manufactories or trades "which may prove to be nuisances."

"32. For regulating the keeping and transporting of gunpowder, for "regulating magazines for storing gunpowder," etc.

Also for regulating chimneys, etc.

The Legislature which would have authority to legislate on these subjects on account of the danger from fire, explosion, etc., would certainly also have authority to legislate concerning them if it considered them objectionable for any other reason, and the sufficiency of the reason could not be inquired into.

In the case of manufacture there would be even less ground than in the case of sale for claiming that it falls under "the regulation of trade and "commerce." There would also be stronger ground for claiming that it comes under matters of a merely local nature in the province.

Under Con. Stat. U. C. c. 54, s. 266, a municipal council might pass a bye-law: "10. For preventing the growth of weeds detrimental to good "husbandry." Could not the Legislature, which has the right to give a municipality such power, enable it to pass a bye-law to prevent the growth of tobacco, for example? And this, notwithstanding the Dominion levies an excise duty upon it. And the Legislature might exercise its power in this respect directly instead of indirectly through the municipality. Could not a Provincial Legislature prohibit the growth of poppies in order to suppress the opium trade?

See Hamilton Powder Co. *v.* Lambe, 30 L.C.J. 13, M.L.R. 1, Q.B. 460.

V.

With regard to importation, the foregoing will in a great measure apply. If the sale and manufacture come within the provincial jurisdiction, and the regulation or suppression of the importation of intoxicating liquors be considered necessary fully to carry out the former, then it also would fall within the power of the Provincial Legislature.

The fact that the Dominion Parliament levies a Customs duty on imported liquors would be no more conclusive against the power than would the levying of a tax by the Dominion on provincial corporations prevent the Legislature from dissolving existing corporations or ceasing to create new ones.

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It is submitted that Section 121 of the B.N.A. Act, which enacts that "All "articles of the growth, produce, or manufacture of any one of the provinces "shall, from and after the Union, be admitted free into each of the other pro- "vinces," is meant to prevent the levying of inter-provincial Customs duties, or *octroi*, and does not interfere with a prohibitory law.

For instance, under Con. Stat. U.C., c. 54, s. 294, municipalities might pass by-laws: "28. For providing for the health of the municipality and "against the spreading of contagious or infectious diseases." Under this power, surely, the importation of rags from a locality where cholera or small-pox was raging might be prevented. And the Legislature which could create a municipality and authorise it to pass such a bye-law, could surely pass an Act itself to the same effect applicable to the whole or a part of the Province.

VI.

It is respectfully submitted that the validity of the Ontario Local Option Act, 53 Vict. c. 56, s. 18, is beyond question. It reads as follows:

"18. Whereas the following provision of this section was at the date of "Confederation in force as a part of The Consolidated Municipal Act (29 "and 30 Vict. c. 51, s. 249, sub-sect. 9) and was afterwards re-enacted as "sub-sect. 7 of s. 6 of 32 Vict. c. 32, being The Tavern and Shop License "Act of 1868, but was afterwards omitted in subsequent consolidations "of The Municipal and the Liquor License Acts, similar provisions as to local "prohibition being contained in The Temperance Act of 1864, 27 and 28 "Vict. c. 18; and the said last mentioned Act having been repealed in "municipalities where not in force by The Canada Temperance Act, it is "expedient that municipalities should have the powers by them formerly "possessed; it is hereby enacted as follows:

"The council of every township, city, town, and incorporated village may "pass bye-laws for prohibiting the sale by retail of spirituous, fermented, or "other manufactured liquors in any tavern, inn, or other house or place of "public entertainment, and for prohibiting altogether the sale thereof in shops "and places other than houses of public entertainment: Provided that the "bye-law, before the final passing thereof, has been duly approved of by the "electors of the municipality in the manner provided by the sections in that "behalf of The Municipal Act; provided further, that nothing in this section "contained shall be construed into an exercise of jurisdiction by the Legislature "of the Province of Ontario beyond the revival of provisions of law which "were in force at the date of the passing of The British North America Act, "and which the subsequent legislation of this province purported to repeal."

The amending Act of 1891 was passed to put it beyond doubt that the Act of 1890 was intended to prohibit sale by retail only, as was the case under the Act of 1866.

The clause in the Act of 1866 was re-enacted by 32 Vict. c. 32, and remained part of the municipal law of Ontario until 1874, when it was repealed by 37 Vict. c. 32, s. 61.

If the Act of 1890 is *ultra vires* then the repealing Act of 1874 was so also, and the Act of 1866 would still be in force.

The corresponding provisions for Lower Canada above cited were substantially re-enacted in the Quebec Municipal Code as Article 571, and are still in force there.

The validity of these enactments has been upheld by unanimous judgments of the Courts of Appeal in these two provinces. *In re* Local Option Act, 18 Ont. A. R. 572; Corporation of Huntingdon *v.* Moir, M.L.R., 7 Q.B. 281.

Reliance is placed upon the reasons given in these two judgments and upon the arguments in the first part of this factum regarding the prohibition of the sale.

The question of the power of the Dominion under "The Regulation of Trade and Commerce" cannot fairly arise in this matter, as it is merely the retail sale in a particular municipality that is interfered with, which clearly comes under the head of "Municipal Institution" and "Matters of a merely local "nature."

In the Hodge case, their Lordships of the Judicial Committee say, "That "Act is so far confined in its operation to municipalities in the Province of "Ontario, and is entirely local in its character and operation." This is literally true of the Local Option Act, which only authorises a bye-law in a single municipality at a time, so that it is even more local in its nature than the License Act.

But the Local Option Act may also be sustained as a license law. The Ontario License Act, R.S.O. c. 194, provides for three main classes of licenses, viz., tavern, section 18; shop, section 31; and wholesale, section 34.

The proper test of the validity of the Act of 1890 is not to look at it as an isolated piece of legislation, but to inquire whether the License Act as amended by it is valid.

Now, the Ontario Legislature might have provided for only one class of licenses or any number. The effect of the Act of 1890 is to allow shop licenses or tavern licenses, or both, to be cut off, wholesale licenses would still remain for each municipality, either alone or with either shop or tavern licenses, according to the nature of the municipal bye-law or bye-laws which had been approved by the electors.

By the Dominion License Act, 1883, Section 45, it was provided that that Act should not affect the prohibitory powers of local councils in Quebec. By the amending Act of 1884, Section 12, the following was added:—"2. In "every town, village, parish, and township in the Province of Quebec, the

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" municipal council thereof may by bye-law restrict or prohibit within the " limits of such town, village, parish, or township the sale of intoxicating " liquors." When the Privy Council declared that " the Liquor License Act, " 1883, and the Act of 1884 amending the same are not within the legislative " authority of the Parliament of Canada," the above provisions were declared *ultra vires* with the rest of these Acts, the only exception being as to " the " provisions relating to adulteration," which, their Lordships said, would, if separated from the rest of the Acts, be within the authority of the Dominion Parliament. See 4 Cartwright, p. 342.

It is respectfully submitted that, as under the above decision the power was held not to be in the Dominion, it must belong to the Provinces, as under our Constitution it must belong to either the one or the other.

J. J. MACLAREN.

"F."

IN THE SUPREME COURT OF CANADA.

In the Matter of certain Questions referred by the PRIVY COUNCIL OF CANADA to the SUPREME COURT for hearing and consideration *in re* PROHIBITION under R.S.C. 1886, c. 135, and 54 and 55 Vict., c. 25, s. 4. (26th October 1893.)

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No. 7. Factum of the Distillers and Brewers' Association of Ontario.

QUESTION 1.

Has a Provincial Legislature jurisdiction to prohibit the sale within the Province of spirituous, fermented or other intoxicating liquors?

ARGUMENT.

This question in reality covers the whole ground and applies as much to the sales by brewers, distillers, and wholesale dealers as to holders of tavern and shop licenses who are called retail dealers. An affirmative answer to this question would render the consideration of the remaining six questions unnecessary for the reason that if the sale of liquor could be restrained by provincial legislation absolutely and unconditionally, even the question of importation and manufacture would cease to have any special significance, as if the sale of a commodity can be controlled and forbidden by one authority it would be a matter of the smallest consequence that some other authority might be held to have the power to regulate its manufacture and importation, and in this sense the power to prohibit the sale is by far the most important aspect of the whole question.

It would be a sufficient answer to this question No. 1 (framed as it is in terms of the widest and most comprehensive character, without qualification of any kind) to point out that on an affirmative answer to the question being given, there would immediately arise a positive and direct conflict between the powers of the Federal and Provincial Legislatures on the question of prohibition. That as this question makes no exception in favour of the Canada Temperance Act, and as it does not suggest any limitations of any kind, it would follow from an affirmative answer that even in counties in which the said Act has been locally adopted, and in which it is now in active operation, it might be over ridden and superseded by provincial legislation on the same subject. As this is an impossible condition of things, according to all authorities, it would not appear necessary to further controvert the proposition. As, however, this question is only one of a series which when taken together are apparently intended to raise the question of the right of the Provinces to pass prohibitory

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legislation subject to the Canada Temperance Act, it is proposed in the first instance (although unnecessary for the purpose of an answer to this question No. 1) to discuss the general proposition as to the right of a Provincial Legislature to pass a prohibitory Act applicable to the whole Province, having regard to the fact that the Canada Temperance Act is in force throughout the country and that the said Act has been held to be within the competence of Parliament by the Court of last resort.

Before it can be held that the Provincial Legislatures have the power to pass a general prohibitory law applicable to the whole Province, the power to do so must be shown to come within one or other of the various sub-sections of Section 92 of the B. N. A. Act, for unless it comes within Section 92 the Provinces can have no power in the premises.

The only sub-sections of Section 92 under which this power can arise are :

(8.) Municipal Institutions.

(13.) Property and Civil Rights in the Province.

(16.) All matters of a merely local or private nature in the Province.

And as to these the first is no doubt the most important, "Municipal Institutions."

The widest interpretation which has as yet been given to these words in their relation to the liquor traffic is the right of the Provincial Legislatures to empower municipal councils to pass bye-laws to prohibit the traffic, either partially or entirely, within their respective jurisdictions. It is admitted by many of the learned judges who have expressed an opinion on the question, that there is no inherent connection between the regulation of municipal institutions and prohibition of the liquor traffic, but it is contended that the words "regulation of municipal institutions," used in Sub-section 8 of Section 92, must include all the powers possessed by municipal institutions at the time of Confederation, and as the power of prohibition to a greater or less degree was possessed by most of the provinces at the time of Confederation, these powers they still have.

This is the view of Chief Justice Richards in Slavin *v.* Orillia, 36 U. C., Q.B., 159 (I. Cart. p. 688). The same view was taken by Mr. Justice Ramsay in Sulte *v.* The Corporation of Three Rivers. The learned judge in that case says (2 Cart. p. 283) :

"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-section 8, it would not justify "the Local Legislature in passing a prohibitory liquor law, but it may fairly "be argued whether it was the intention of the Imperial Parliament in an "enumeration of this sort to confine 'municipal institutions' to those matters "only which are the essence of municipal institutions. If such was the intention of Parliament, a wide field for speculation was left open, or it was "contemplated to restrict municipal institutions within very narrow limits.

" It would seem, however we have not to determine what institutions are " essential to municipal existence in the abstract, but the meaning of the term " at the time of Confederation. 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. It was introduced under " the title of 'The Municipal and Road Act,' roads and their maintenance, " bridges, ferries, fords, preventions of abuses prejudicial to agriculture, police " regulations, and many other matters are subject to municipal control, " amongst other things, county councils were given the power to make bye-
10 " laws 'for prohibiting and preventing the sale of spirituous, vinous, alcoholic, " and intoxicating liquors, or to permit such sale subject to such limitations as " they shall consider expedient.

" For determining under what restrictions and conditions and in what " manner the revenue inspector of the district shall grant licenses to shop- " keepers, tavern-keepers, or others to sell such liquors." (*See* Con. Stat. L. C., cap. 34, Sec. 26, ss. 11 and 12.)

" In 1857 the City of Three Rivers was incorporated, and the 'Municipal " ' Road Act' was repealed as far as it affected or might affect Three Rivers, " the two Sub-sections 11 and 12 above quoted were re-enacted in precisely
20 " the same words for the new incorporation. These Statutes were in force at " the time of Confederation.

" In 1858 an Act was passed styled 'An Act respecting the Municipal " ' Institutions of Upper Canada,' and in that Act powers similar to those just " enumerated as being accorded to Lower Canada, and to Three Rivers " particularly, were given to municipalities in Upper Canada." (*See* Con. Stat. U. C., c. 54, s. 246), " and this legislation was also in force up to the time of " Confederation.

" By the municipal system in force in Nova Scotia prohibitory powers " were possessed by the municipal authorities." (*See* R. St. N.S., c. 133, 6.)

30 " As to New Brunswick we have not found any Statute conferring such " powers, but at any rate we have the two great provinces of Confederation and " one of the smaller ones persistently including amongst municipal institutions " the right to prohibit the sale of strong drink. We cannot help thinking that " this was sufficient to bring prohibitory liquor laws within the power of local " legislation as forming a part of 'municipal institutions' within the meaning " of the B. N. A. Act. With Chief Justice Richards, we think that we ought " to look 'at the state of things existing in the Provinces at the time of passing " ' the B. N. A. Act, and the legislation then in force in the different Provinces " ' of the Confederation, and the general scope and object of Confederation
40 " ' then about to take place,' when determining the value of indefinite terms in " the Act, but in the case of the City of Fredericton *v.* The Queen, it was " decided by the Supreme Court that the Dominion Parliament has alone the " power to pass a prohibitory liquor law. It is true this decision went somewhat " beyond the issue raised, which was as to the right of the Dominion Parliament " to pass a prohibitory liquor law, which is quite a different thing, still we " presume the point was fully argued before the Court."

p. 4292.

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And further on Mr. Justice Ramsay says:

" We hold, then, that under a proper interpretation of Sub-section 8, the " right to pass prohibitory liquor law for the purposes of municipal institutions, " has been reserved to the local legislatures by the B. N. A. Act."

The latest Ontario case on the subject is what is called the Local Option Case, 18 O. A. R. p. 572. In this case the Court was asked to give an opinion as to whether a certain provision of the Ontario Legislature reviving a provision of law in force at the time of Confederation whereby the council of every township, city, town and incorporated village might pass bye-laws for prohibiting the sale by retail of spirituous, fermented or other manufactured liquors, in every tavern, inn, or other place of public entertainment was valid. Three of the members of the Court answered the question affirmatively. Mr. Justice Osler declined to give any opinion. Mr. Justice Burton, departing somewhat from the rule laid down by the Privy Council in similar cases, takes a wide range, and, in his judgment, deals with the whole question. He says, on page 584 :—

" 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 will constantly arise under our federal system and the injustice of " subjecting individual litigants to the delay and the 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 are, in my opinion, of that character. There has been " at various times a great diversity of opinion upon them, and their number " 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 favour of the power of the Local Legislature to deal with the " subject of prohibition under the words 'municipal institutions' that those " provisions in reference to that subject were, at the time of the passing of the " Federation Act, to be found in our own Municipal Acts and had been so for " many years. It must not be forgotten that the Legislature of the old Provinces " 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 for the Legislature to confide to the municipal " council, or any other body of its own creation, or to individuals of its

" selection, authority to make bye-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, within a municipal Act in one of the Provinces furnished " 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 " Legislature of the Provinces. It is proper to inquire, 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."

But this view of the matter clearly conflicts with the judgment of the Privy Council in Russell *v.* the Queen, which the learned judge appears to admit. His Lordship therefore enters upon an analysis of the judgment in that case, in the course of which he says:

" 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 " Sub-Section 8 being relied on. I think all the clauses that were relied upon " in the argument were 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 authorised prohibition, and it may have been supposed that " the municipality had only power to regulate in a particular way. Be that as " 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

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" 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 Vict. c. 51, sec. 249, ss. 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."

It is somewhat difficult to follow His Lordship when he says that for the reasons given in that judgment that decision would probably have been different had Sub-section 8 of Section 92 been called to their Lordships' attention. Mr. Justice Burton does not say which of the reasons of the Privy Council he refers to, and this difficulty in following the learned Judge is increased by the concluding words of the Privy Council in Russell *v.* The Queen. These words are as follows:—

" Their Lordships having come to the conclusion that the Act in question " does not fall within any of the classes of subjects assigned exclusively to the " Provincial Legislatures, it becomes unnecessary to discuss the further question " whether these provisions also fall within any of the classes of subjects " enumerated in Section 91. In abstaining from this discussion, 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 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 com- " 'merce,' enumerated in that section, and was on that ground a valid exercise " of the legislative power of the Parliament of Canada."

But Mr. Justice Burton would almost appear to have forgotten that Russell *v.* The Queen was virtually an appeal from Fredericton *v.* The Queen, in which appeal the judgment of this honourable Court was sustained by the Privy Council, and it must be assumed that the learned Judges of this Court were as fully aware as Mr. Justice Burton himself, both of the existence and effect of Sub-section 8 of Section 92, but notwithstanding that, they arrive at an exactly opposite conclusion to that at which Mr. Justice Burton arrives on this point.

The following is an extract from the judgment of Mr. Justice Gwynne in Fredericton *v.* The Queen, from which Russell *v.* The Queen was virtually an appeal (2 Cart., p. 53):—

" All the arguments upon which has been based the contention that the " Act in question, the Canada Temperance Act, 1878, is *ultra vires* of the " Dominion Parliament are attributable wholly, as it seems to me, to a want of " due appreciation of the scheme of Constitutional Government embodied in " the British North America Act, and to a misconception of the terms and " provisions of that Act. Historically we know that the terms of a feasible

" scheme of union of all the B.N.A. Provinces constitutes a subject which, for
" many years, engaged the attention of public men in those provinces, that the
" matter became the subject of debate in the legislatures of the several pro-
" vinces, that eventually the views of public men of all political parties were
" moulded into the shape of resolutions, which, having been subjected to the
" most careful consideration and criticism in the Provincial Legislatures, and to
" the consideration also of the Imperial authorities in consultation with
" delegates sent for the purpose to England by the respective provinces, were,
" after having been revised and amended, reduced into the form of a
" Bill which the Imperial Parliament, at the special request of the
" Provinces, passed into an Act. The object of this Act was, by the exercise of
" the sovereign Imperial power, called into action by the request of the then
" existing Provinces of Canada, Nova Scotia and New Brunswick, to revoke the
" constitutions under which those Provinces then existed, and, as the Preamble
" of the Act recites, to unite them federally into one Dominion under the crown
" of the United Kingdom of Great Britain and Ireland, with a constitution
" similar in principle to that of the United Kingdom—to sow, in fact, the seed
" of the parent tree, which, growing up under the protecting shadow of the
" British Crown until it should attain to perfect maturity, would, in the progress
" of time, become a nation identical in its features and characteristics with that
" from which it had sprung, and to which in the meantime should be given the
" new name of 'Dominion,' significant of the design conceived and of the
" anticipated fortunes of this new creation.

" The Act then proceeds to show that the mode devised for founding this
" new 'Dominion' and for giving to it a constitution similar in principle to
" that of the United Kingdom, was to constitute it a quasi-Imperial sovereign
" power, invested with all the attributes of independence as an appendage of
" the British Crown, whose executive and legislative authority should be
" similar to that of the United Kingdom, that is to say, as absolute sovereign
" and plenary as consistently with its being a dependency of the British Crown,
" it could be in all matters whatsoever save only in respect of matters of a
" purely municipal, local, or private character—matters relating (to use the
" language of a statesman of the time) 'to the family life' (so to speak) of
" certain subordinate divisions termed provinces carved out of the Dominion,
" and to which provinces legislative jurisdiction limited to such matters was to
" be given. The inhabitants of those several provinces being as such, members
" of this quasi-Imperial power termed the Dominion of Canada, might in some
" matters have interests *qua* inhabitants of the particular province in which
" they should live distinct from or conflicting with the general interests which
" they would have as constituent members of the Dominion. In order to
" prevent the jarring of those distinct or conflicting interests and to maintain the
" peace, order and good government of the whole, it would be necessary in any
" perfect measure that provisions should be made for such a contingency, that
" the subordinate should yield to the superior, the lesser to the greater, and that
" in respect of any matter over which the several provinces might be given
" any legislative authority concurrently with the Dominion Parliament, the
" authority of the latter when exercised should prevail to the exclusion, and, if
" need be, to the extinction of the provincial authority."

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And in the result his Lordship upheld the validity of the Canada Temperance Act, 1878.

It is submitted then that the assumption that if Sub-section 8 of Section 92 had been called to the attention of the Privy Council the result would have been different is not supported. And if this assumption fails, the whole argument fails, as it cannot be contended that the Provinces have entire jurisdiction in this matter while the judgment of the Privy Council in Russell *v.* The Queen remains. This indeed seems to be the view of Mr. Justice Burton himself (p. 591), and he, therefore, suggests that the results would have been different in that case had the matter been differently presented. It ought in this connection to be mentioned that his Lordship is in error in stating that in Hodge *v.* The Queen (in which Russell *v.* The Queen was expressly affirmed and approved) the attention of the Privy Council was not called to Sub-section 8 of Section 92 (respecting Municipal Institutions). By a reference to the judgment of the Privy Council in that case it will be seen that this Sub-section 8 was expressly referred to in the following language, "The subjects of legislation in the Ontario Act of 1877, Sections 4 and 5, "seem to come within the heads Nos. 8, 15, and 16 of Section 92 of British "North America Statute, 1867." (3 Cart., p. 161 ; 9 App. Cas. 117).

The power of a Provincial Legislature to pass a prohibitory law for the entire Province appears to have been expressly determined in the negative by the judgment of the Privy Council in Russell *v.* The Queen. Referring to the last-named case in Hodge *v.* The Queen, (9 App. Cas. p. 129) their Lordships said :—

"The sole question there was whether it was competent to the Dominion "Parliament, under its general powers, to make laws for the peace, order and "good government of the Dominion, to pass the Canada Temperance Act, "1878, which was intended to be applicable to the several provinces of the "Dominion, or to such parts of the provinces as should locally adopt it. It "was not doubted that the Dominion Parliament had such authority under "Section 91, unless the subject fell within some one or more of the classes of "subjects which by Section 92 were assigned exclusively to the Legislatures of "the Provinces," and in the result their Lordships decided that the subject (*i.e.*, Prohibition) had not been exclusively assigned to the Provinces under Section 92, and therefore there was nothing to prevent the Dominion Parliament from passing a general Act applicable to the whole Dominion. It is a fair deduction, if indeed it is not a necessary conclusion, that the Provincial Legislatures have not the power to pass a general prohibitory law applicable to the entire Province. Having regard to the fact that the Canada Temperance Act might be rendered local in its operation, it was necessary to determine this provincial question before a decision could be arrived at, and at the hearing the question was fully argued. This was in effect the gist of the whole matter. The rule adopted by the Privy Council in determining questions arising under the B.N.A. Act is to ascertain in the first place whether or not the subject matter has been exclusively assigned to the Provinces under Section 92. That rule was observed in the Russell case, and it was expressly held that the subject

had not been so assigned. Identically the same question is now put to this Court, and it is submitted that it has already been answered in advance by the Privy Council in the case cited, and that the whole decision in that case sustaining the Canada Temperance Act rests upon that finding, and the effect of answering this Question No. 1 affirmatively would be among other things to reverse that finding.

The nature and character of prohibitory legislation, whether enacted by the Federal or the Provincial Legislatures, must necessarily be similar, and for this reason also (the field being already occupied by Federal legislation), the Provinces can have no jurisdiction, always assuming that there is no place for concurrent jurisdiction on this subject, which appears to be granted on all sides. In this connection attention may be called to the fact that the Canada Temperance Act is both general and local in its character; general in so far as it embraces the whole country, and local, inasmuch as it is only in active operation in those localities where it has been specially adopted, and in which a provincial prohibitory law would come into direct and immediate conflict with it.

We submit further that the judgment of the Privy Council in Hodge *v.* The Queen (9 App. Cas. 117) does not conflict in any way with the contention that the subject of prohibition has not been specially assigned to the Provincial Legislatures. Such a conflict would involve a reversal or qualification of the judgment in the Russell case, and in Hodge *v.* The Queen it is expressly stated that no such thing is intended. On the contrary, their Lordships say, " We do " not intend to vary or depart from the reasons expressed for our judgment " in that case." It is clear from this that Hodge *v.* The Queen was not intended even to vary or qualify in any way the judgment in the Russell case, and therefore the two judgments must be interpreted so as to be in harmony with each other. This being so, it cannot be urged that the judgment in Hodge *v.* The Queen is in any sense to be regarded as an authority for the contention in favour of provincial jurisdiction in the matter of prohibition, as this would at once conflict with Russell *v.* The Queen and with the provisions of the Canada Temperance Act which that judgment upheld. The essence of the judgment in Hodge *v.* The Queen, so far at least as it affects this reference, appears to be expressed in the following passage (p. 130) :—

" Their Lordships proceed now to consider the subject-matter and legislative " character of Sections 4 and 5 of the Liquor Licence Act of 1877, cap. 181, " Revised Statutes of Ontario. That Act is so far confined in its operations to " municipalities in the Province of Ontario, and is entirely local in its character " and operation. It authorises the appointment of licence commissioners to " act in each municipality, and empowers them to pass, under the name of " resolutions, what we know as bye-laws, or rules to define the conditions and " qualifications requisite for obtaining tavern or shop licences for the sale by " retail of spirituous liquors within the municipality ; for limiting the number " of licences ; for declaring that a limited number of persons qualified to have " tavern licences may be exempted from having all the tavern accommodation " required by law, and for regulating licensed taverns and shops ; for defining

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" the duties and powers of licence inspectors, and to impose penalties for " infraction of their resolutions. These 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 laws passed by the local Parliaments. Their Lordships " consider that the powers intended to be conferred by the Act in question, " when properly understood, are to make regulations in the nature of police or " municipal regulations of a merely local character for the good government of " taverns, &c., licensed for the sale of liquors by retail, and such as are " calculated to preserve in the municipality peace and public decency, and to " repress drunkenness and disorderly and riotous conduct. 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 in the Ontario Act of " 1877, Sections 4 and 5, seem to come within the heads Nos. 8, 15, and 16 of " Section 92 of B. N. A. Statute, 1867."

The meaning of this passage it is not difficult to extract. It is submitted that it was clearly intended to show that their Lordships regarded Sections 4 and 5 of the Liquor License Act of Ontario, 1877, cap. 181, as only authorising police regulations of a merely local character for the purpose of preserving peace and public decency in a municipality such as it would be absolutely necessary for the License Commissioners to possess as incidental to the proper control and regulations of taverns so long as the Canada Temperance Act is not adopted. The language of the judgment makes it plain that it is not to be construed as asserting, either directly or by implication, the possession of powers on the part of Provincial Legislatures, which are inconsistent with the provisions of the Canada Temperance Act, nor is it to be construed as varying or qualifying in any degree any of the doctrines or propositions laid down by the Privy Council in delivering that judgment. This view of the matter is amply sustained by the express words of the judgment itself, and effectually disposes of the contrary contention that the two judgments are inconsistent, or that the latter judgment in any way lessens the force or effect of Russell *v.* The Queen. By this latter judgment the Canada Temperance Act of 1878 was, in effect, held to over-ride the Ontario Liquor License Act passed in the previous year, and the Court is now, in effect, asked to say whether the principle cannot be reversed by allowing prohibitory legislation, hereafter to be passed by the Ontario Legislature, to operate throughout the Province, either to the exclusion of, or concurrently with, the prohibitory legislation of the Federal Parliament already in force within the Province.

Conversely, the same proposition was considered by the Privy Council in the matter of the Canada Liquor License Act, 1883. The Judicial Committee had already, in the case of Hodge *v.* Queen, upheld the validity of certain provisions of the Ontario License Act, the effect of which was incidentally to establish the validity of the entire Act, including the right of the Province to regulate the issue of liquor licenses. The Canada Liquor License Act was largely a transcript of the Ontario Liquor License Act, but was made applicable

to the entire Dominion. On the argument of the question as to the constitutionality of the Canada License Act, it was pointed out (p. 121) on behalf of the Province of Ontario, that the effect of upholding the validity of the last-named Act would be "that you would have two concurrent Acts, both of which "have been declared by your Lordships to be within the power of the Local "Legislatures; you would have two concurrent Acts, each working through "precisely the same machinery in character; you would have a licensing body "appointed by the Governor General, you would have another licensing body "appointed by the Lieutenant Governor, and each exercising the duty of "licensing." The Act in question was held to be *ultra vires.*

Substantially the same proposition is presented in this reference, the subject-matter being the prohibition of the liquor traffic instead of the licensing of it, and with this further difference that such subject-matter has been declared by competent authority to be within the jurisdiction of the Federal Parliament instead of within that of the Provincial Legislatures, but the results would, in other respects, be the same in the event of it being held that the Provincial Legislatures had prohibitory jurisdiction. There would then be concurrent Acts emanating from different sources, but directed towards the same object, dealing with the same subject-matter, and possibly in a large degree employing the same or similar machinery for a common purpose,—the suppression of the traffic in intoxicating liquors.

So far we have dealt only with Sub-section 8. Sub-section 13, "Property "and Civil Rights," now demands some attention. The question, however, on this head appears to have been effectually disposed of by the judgment of the Privy Council in Russell *v.* The Queen. The following extract is taken from the judgment of their Lordships in that case:—

"Next, their Lordships cannot think that the Temperance Act in question "properly belongs to the class of subjects, 'Property and Civil Rights.' It has, "in its legal aspect, an obvious and close similarity to laws which place "restrictions on the sale or custody of poisonous drugs or of dangerously "explosive substances. These things, as well as intoxicating liquors, can, of "course, be held as property, but a law placing restrictions on their sale, custody, "or removal on the ground that the free sale or use of them is dangerous to "public safety, and making it a criminal offence punishable by fine or imprison-"ment to violate these restrictions, cannot properly be deemed a law in relation "to property in the sense in which those words are used in the 92nd section. "What Parliament is dealing with in legislation of this kind, is not a matter in "relation to property and its rights, but one relating to public order and safety. "That is the primary matter dealt with, and though incidentally the free use of "things in which men may have property is interfered with, that incidental "interference does not alter the character of the law. Upon the same con-"siderations the Act in question cannot be regarded as legislation in relation "to civil rights. In however large a sense these words are used, it could not "have been intended to prevent the Parliament of Canada from declaring and "enacting certain uses of property and certain acts in relation to property to be "criminal and wrongful. Laws which make it a criminal offence for a man "wilfully to set fire to his own house on the ground that such an act endangers

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" the public safety, or to overwork his horse on the ground of cruelty to the " animal, though affecting in some sense property, and the right of a man to do " as he pleases with his own, cannot properly be regarded as legislation in " relation to property or to civil rights. Nor could a law which prohibited or " restricted the sale or exposure of cattle having a contagious disease be so " regarded. Laws of this nature, designed for the promotion of public order, " safety, or morals, and which subject those who contravene them to criminal " procedure and punishment, belong to the subject of public wrongs rather than " to that of civil rights. They are of a nature which fall within the general " authority of Parliament to make laws for the order and good government of " Canada, and have direct relation to criminal law, which is one of the " enumerated classes of subjects assigned exclusively to the Parliament of " Canada.

" It was said in the course of the judgment of this Board in the case of " The Citizens' Insurance Company of Canada *v.* Parsons, that the two " Sections (91 and 92) must be read together, and the language of the one " interpreted and, where necessary, modified by that of the other. Few, if " any, laws could be made by Parliament for the peace, order, and good " government of Canada which did not, in some incidental way, affect pro- " perty and civil rights, and it could not have been intended, when assuring to " the provinces exclusive legislative authority on the subject of property and " civil rights, to exclude the Parliament from the exercise of this general power " whenever any such incidental interference would result from it.

" The true nature and character of the legislation in the particular instance " under discussion must always be determined in order to ascertain the class of " subjects to which it really belongs. In the present case it appears to their " Lordships for the reasons already given that the matter of the Act in question " does not properly belong to the class of subjects, ' Property and Civil Rights,' " within the meaning of Sub-section 13."

It is submitted that the character of the law would not be altered by confining its operation to a single Province. If a prohibitory liquor law when applied to a city or county under the Canada Temperance Act, 1878, does not fall with the category of " Property and Civil Rights " it can scarcely be successfully contended that it would be embraced in that category by virtue of its being applied to an entire Province.

Exactly the same argument applies in regard to Sub-section 16, " Generally " all matters of a merely local or private nature in the province." It was contended before the Privy Council in the Russell case that the Canada Temperance Act was *ultra vires* on the ground that it came within this Sub-section 16, but their Lordships said, " we cannot concur in this view." We submit then that if it is not a matter of a local nature when brought into operation in a single county under the Canada Temperance Act it cannot become so by being brought into operation throughout the whole of a province at the instance of another jurisdiction.

But this is only what may be called the negative side of the argument under Section 92, and although it is, as we believe, abundantly sufficient to sustain our contention, it is perhaps as well to examine the positive side under

Section 91. Fortunately, in this aspect of the case we have a broad foundation to build upon, and this is none other than the Canada Temperance Act itself. It may be as well to cite the leading provisions of that Act pertinent to this inquiry.

"The Act is divided into three parts (Section 3). The first relates to pro- "ceedings for bringing the second part into force, the second part to the "prohibition of traffic in intoxicating liquors, and the third part to the prose- "cution of offences against the second part of the Act. Under Section 4 of "the Act a petition may be presented to the Governor in Council for bringing "the second part of the Act into force in any county or city. This petition "may be in form 'A' in the Schedule to the Act, and is to the following "effect:—

"*To the Honourable the Secretary of Stat for Canada:*

"Sir,—

"We, the undersigned electors of the County (or City) of , "request you to take notice that we propose presenting the following petition "to His Excellency, the Governor General, namely:

"*To His Excellency the Governor General of Canada in Council:*

"The Petition of the electors of the County (or City) of , "qualified and competent to vote on the election of a Member to the House of "Commons in the said County (or City) respectfully shows

"That your Petitioners are desirous that the second part of the Canada "Temperance Act should be in force and take effect in the said County (or "City)

"Wherefore your Petitioners humbly pray that your Excellency will be "pleased by an Order in Council under the 95th Section in the said Act to "declare that the second part of said Act shall take force or effect in the said "County (or City)

"And your Petitioners will ever pray, etc.

"And that we desire that the votes of all the electors of the said County (or "City) shall be taken for and against the adoption of said petition."

The petition asks that the votes of all the electors of the County or City be taken for and against the adoption of said petition.

Section 5 of the Act enacts as follows:—

Such petition may be embodied in a notice in writing addressed to the Secretary of State for Canada, and signed by electors qualified and competent to vote on the election of a member to the House of Commons in the County or City to the effect that the signers desire that the votes of all of such electors be taken for or against the adoption of the petition. This proceeding is followed by the issue of a proclamation inserted in the "Canada Gazette" as well as in the Official Gazette of the Province in which the County (or City) is situate, and this proclamation announces, among other things, the day on which the poll for taking the votes of the electors for and against the petition will be held. (Section 9.)

The next important section is 56, which provides as follows:—

" If one half or more of all the votes polled are against the petition the same " shall be held not to have been adopted, and the returning officer shall make " his returns to the Governor in Council accordingly."

Section 57 is in the following terms:—

" If more than one-half of all the votes polled are for the petition the same " shall be held to have been adopted, and the returning officer shall make his " returns to the Governor in Council accordingly."

The next section of the Act pertinent to this question is Section 94 as follows:—

" When in any County or City one half or more of all the votes polled have " been against the adoption of any petition embodied as aforesaid in any notice and " in any proclamation under the first part of this Act, no similar petition shall " be put to the vote of the electors of said County or City for a period of three " years from the day on which said vote was taken." This section has an important bearing upon the general question of provincial prohibition. It establishes beyond a doubt the principle of local option, and declares that when a majority of votes has been polled against the adoption of the Act no similar petition shall be put to the vote of the electors of such County or City for a period of three years from the day on which said vote was taken. This section in effect declares that the local option principle, and that principle alone, shall govern in the matter of the prohibition of the liquor traffic, and that if a majority of the electors of any County or City are opposed to prohibition it shall not be forced upon them, or, in other words, that prohibition cannot be enforced without their express consent, and, moreover, that they cannot even be asked to pass upon this question oftener than once in three years whether the Act has been adopted or rejected.

The Canada Temperance Act provides that the question shall be determined by a majority of the qualified electors under the provisions of that Act. If this question (No. 1) were answered affirmatively, the Canada Temperance Act would cease to govern. The Provinces might at once pass a law enacting absolute prohibition throughout the province independent of the wishes of the electors. In no sense would such a power be compatible with the Dominion Act, but would be, on the other hand, in direct defiance of it. It must be observed in this case that the Federal Act completely occupies the ground which the provinces seek to occupy, and as there cannot possibly be concurrent jurisdiction on this question there does not appear the slightest ground to support the contention that this question should be answered affirmatively. If one province can pass a prohibitory law, then every province can do so, and what then would become of the Canada Temperance Act? It would clearly be a nullity. It is now the law of the whole country. If prohibition is desired in any county or city it can be obtained by means of the Canada Temperance Act, provided a majority of the electors are in favour of it, and unless a majority are in favour of it the Act in effect declares that prohibition shall not be enforced.

Can the provinces be allowed, in face of this Statute, without either qualification or limitation of any kind, to invade the field already fully occupied by

the Federal Parliament to introduce a new principle; that is to say, absolute prohibition instead of local option, to do away, if they think fit, with the exemptions now enjoyed under the 99th Section of the Canada Temperance Act, to adopt a fresh scale of punishments, and generally to destroy the entire effect of the whole Act. This would certainly be reversing the order of things to which we have grown accustomed. In short, our contention is that the possession of this power by the province would be absolutely incompatible with the provisions of the Canada Temperance Act. A single illustration will put the whole question in a very strong light. The temperance agitation has now reached an acute stage. Supposing it should be determined, if possible, to bring the Canada Temperance Act into force in every county, say in Ontario, and let us suppose that all the proper steps have been taken for this purpose, that in due course a vote is taken, the result being that in half the counties it is rejected, and in the other half adopted. Then let us suppose that this question (No. 1) is answered affirmatively, we would then be face to face with the difficulty already pointed out. The province could ignore the decision in both cases, and might bring into operation a prohibitory law of a permanent and entirely different character to the Canada Temperance Act. The latter Act declares that as to those counties which have adopted the Act, prohibition, according to the terms of that Act, shall be in force until the Order in Council is revoked, but at the end of three years the question can again be submitted to the electors (s. 96), and as to those counties which have rejected the Act it is just as clearly declared that a prohibitory law shall not be enforced for the like period of three years (s. 94).

That a direct conflict would at once arise between provincial and federal legislation, should this question be answered affirmatively, admits of no doubt, and this consideration appears fatal to the provincial contention. It is necessary to bear in mind that the Federal Parliament has the power at any time to apply this same local option principle to an entire province just in the same way that it is now applied to a county or city. How can this power be deemed compatible with the right of a provincial Legislature to enact an absolutely prohibitive law applicable to the whole province? It cannot be denied that the two propositions are utterly inconsistent. To answer this question (No. 1) in the affirmative would be to declare that there is concurrent jurisdiction on this subject, and this cannot be the case. On this point, Mr. Justice Henry, in the Fredericton case, says: "It has, I think, been legitimately "contended that in reference to all but one or two subjects not in any way "connected with the matter under consideration, the Legislative powers of the "Parliament of Canada and the local Legislatures are not concurrent, but fully "distributed and in part enumerated." It is submitted that in upholding the authority of the Canada Temperance Act in Russell *v.* The Queen, the Privy Council in effect declared that the provincial Legislatures had not this jurisdiction.

We further submit that the prohibition of the liquor traffic in a province is a matter belonging to "trade and commerce," and, therefore, coming within Subsection 2 of Section 91. In support of this contention we rely upon the judgment of this Court in the well-known case of Fredericton *v.* The Queen.

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In that case it was distinctly held that the Canada Temperance Act came within the jurisdiction of Parliament on account of the subject-matter being a branch of trade and commerce, a proposition which the Privy Council did not dissent from in Russell *v.* The Queen. We invoke the judgment of this Court in the Fredericton case against the contention of the provinces in this reference. If the question is one of trade and commerce when applied to a county or city it will hardly cease to be so when applied to an entire province. It will not be necessary to quote from the judgment delivered in that case at any great length, but a few passages will perhaps assist in emphasizing the point we desire to make.

Chief Justice Ritchie, amongst other things, says: "It is contended that this "is strictly a Temperance Act, passed solely for the promotion of temperance, "and not an Act dealing with any of the matters within the power of the "Dominion Parliament; that the power to deal with the sale of spirituous "liquors and the granting of licences therefor, and laws for the prevention of "drunkenness and the like character of preventive means, are within the exclu- "sive power of the local Legislatures, and the recital of the Act is relied on as "indicating conclusively its character.

"If the Dominion Parliament legislates strictly within the powers conferred "in relation to matters over which the B.N.A. Act gives it exclusive legislative "control, we have no right to inquire what motive induced Parliament to exercise "its powers. The Statute declares 'it shall be lawful for the Queen, by and with "the advice and consent of the Senate and House of Commons, to make laws for "the peace, order, and good government of Canada in relation to all matters not "coming within the classes of subjects by this Act assigned exclusively to the Legis- "latures of the provinces,' and notwithstanding anything in the Act, the exclusive "legislative authority of the Parliament of Canada extends to all matters "coming within the classes of subjects enumerated, of which the regulation of "trade and commerce is one; and any matter coming within any of the classes "of subjects enumerated shall not be deemed to come within any of the classes "of matters of a local or private nature comprised in the enumeration of the "classes of subjects by the Act assigned exclusively to the Legislatures of the "provinces. If, then, Parliament in its wisdom deemed it expedient for the "peace, order and good government of Canada so to regulate trade and "commerce as to restrict or prohibit the importation into, or exportation out of, "the Dominion, or the trade or traffic in or dealing with any articles in respect "to which external or internal trade or commerce is carried on, it matters not, "so far as we are judicially concerned; nor had we, in my opinion, the right "to inquire whether such legislation is prompted by a desire to establish "uniformity of legislation with respect to the traffic dealt with, or whether it be "to increase or diminish the volume of such traffic, or to encourage native "industry or local manufactures, or with a view to the diminution of crime, or "the promotion of temperance, or any other object which may, by regulating "trade and commerce or by any other enactment within the scope of legislative "powers confided to Parliament, tend to the peace, order and good government "of Canada. The effect of a regulation of trade may be to aid the temperance "cause, or it may tend to the prevention of crime, but surely this cannot make

" the legislation *ultra vires* if the enactment is, in truth and fact, a regulation " of trade and commerce, foreign or domestic.

" The power to make the law is all we can judge of; and the recital in the " Act so much relied on ought not, in my opinion, to affect in any way the " enacting clauses of the Act which are in themselves abundantly plain and " explicit, requiring no elucidation from, and admitting of no control by, the " recital, which can only be invoked in explanation of the enacting clauses if " they be doubtful. Why it was deemed necessary to insert the self-evident " abstract proposition 'that it is very desirable to promote temperance in the " Dominion' and to enact that this Act may be cited as 'The Canada Temper- " ance Act, 1878', does not seem very apparent when the title of the Act itself " was 'An Act respecting the traffic in intoxicating liquors,' and it contained a " recital that it was desirable there should be uniform legislation in all the " Provinces respecting such traffic, which shows the legislation on its face " immediately within the power of Parliament. It may be that all who voted " for this Act may have thought it would promote temperance and were " influenced in their vote by that consideration alone and desired that idea " should prominently appear. Still, if the enacting clauses of the Act itself deal " with the traffic in such a manner as to bring the legislation within the power " of the Dominion Parliament, no such declaration in the preamble or permis- " sive title can so control the enacting clauses as to make the Act *ultra vires*, " though it must be admitted that the introduction of this temperance element " on the face of the Act may have very much stimulated the idea which has " been so much relied on that the legislation was not a regulation of trade and " commerce, but was for the suppression of intemperance—a matter assumed to " be within the exclusive power of the Local Legislatures, and so beyond the " powers of the Dominion Parliament. If we eliminate from the recital in the " Act the abstract proposition and the permissive clauses to cite the Act as the " 'Canada Temperance Act of 1878, there does not appear to be a word in the title, " preamble or enacting clauses from which the slightest inference could be " drawn that Parliament was dealing with a subject-matter other than simply " as the regulation of trade and commerce in respect to the traffic in those " particular articles of intoxicating liquors. It has also been contended that no " legislative powers to prohibit exist in the Dominion. I must respectfully, " but most emphatically, dissent from this proposition, I cannot for one " moment doubt that by the B.N.A. Act, plenary power on legislation was vested " in the Dominion Parliament and Local Legislatures respectively to deal with " all matters relating purely to the internal affairs of the Dominion, unless, " indeed, anything can be found in the Act in express terms limiting such " power, each, of course, acting within the scope of their respective powers; " and therefore, where one has not the power so to legislate, it necessarily " belongs to the other. If this be so, then the question is: Is this legislation " within the powers conferred on the Dominion Parliament, or does it encroach " on the powers exclusively confided to the Local Legislatures? For, with its " expediency, its justice, or injustice, its policy or impolicy, we have nothing " whatever to do."

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And further on his Lordship says :—

" It has been likewise very strongly urged that the Dominion Parliament " cannot have the right to prohibit the sale of intoxicating liquors as a beverage, " because to do so would interfere with the right of the Local Legislatures to " grant licenses and to deal with property and civil rights and matters of a " purely local character, and so with the right of the Local Legislatures to raise " a revenue by means of shop and tavern licenses. I fail to appreciate the force " of this objection. If substantial, it would prohibit to a great extent the " Dominion Parliament from legislating in respect to that large branch of trade " and commerce carried on in intoxicating beverages, and so take away the full " right to regulate alike foreign and internal matters. If they cannot prohibit " internal traffic because it prevents the Local Legislatures from raising a " revenue by licensing shops and taverns, the same result would be produced if " the Dominion Parliament prohibited its importation or manufacture. For, " by the same process of reasoning, it must follow that they could not prohibit " its importation or manufacture, or in any way regulate the traffic whereby the " sale or traffic should be injuriously affected, and so the value of licenses be " depreciated or destroyed. In my opinion, if the Dominion Parliament, in the " exercise of, and within its legitimate and undoubted right to regulate trade " and commerce, adopts such regulations as in their practical operation conflict " or interfere with the beneficial operation of local legislation, then the law of " Local Legislature must yield to the Dominion law, because matters coming " within the subjects enumerated as confided to Parliament are not to be " deemed to come within the matters of a local nature comprised in the " enumeration of subjects assigned to the Local Legislatures. In other words, " the right to regulate trade and commerce is not to be over-ridden by any " local legislation in reference to any subject over which power is given to the " Local Legislatures."

And in conclusion his Lordship says :—

" When I had the honour to be Chief Justice of New Brunswick, the " question of the right of the Local Legislatures to pass laws prohibiting the " sale or traffic in intoxicating liquors came squarely before the Supreme Court " of that Province, and that Court in the case of Regina *v.* The Justices of " King's County, unanimously held that under the B.N.A. Act, the Local " Legislature had no power or authority to prohibit the sale of intoxicating " liquors, and declared the Act with that intent *ultra vires*, and therefore " unconstitutional. I have carefully reconsidered the judgment then pronounced, " and I have not had the least doubt raised in my mind as to the soundness of " the conclusion at which the Court arrived on that occasion. I then thought " the Local Legislature had not the power to prohibit, I think the same now. " I then thought the power belonged to the Dominion Parliament, I think so " still, and therefore am constrained to allow this appeal."

And Mr. Justice Taschereau, in the same case, says :—

" If this Act would be *ultra vires* of the Provincial Legislatures, because the " B.N.A. Act does not give them the power to enact it, I fail to see why it is " not *intra vires* of the Dominion Parliament. Then, it seems to me, under the " words 'regulation of trade and commerce,' the B.N.A. Act expressly gives

" the Dominion Parliament the right of this legislation. It may, it is true, " interfere with some of the powers of Provincial Legislatures, but Section 91 " of the Imperial Act clearly enacts that, notwithstanding anything in this Act, " notwithstanding that the control over local matters, over property and civil " rights, over tavern licenses for the purpose of raising the revenue, is given to " the Provincial Legislatures, the exclusive legislative authority of the Dominion " extends to the regulation of trade and commerce; and this Court has " repeatedly held that the Dominion Parliament has the right to legislate on all " the matters left under its control by the Constitution, though in doing so it may " interfere with some of the powers left to the local Legislatures. That the Act in " question is a regulation of the trade and commerce in spirituous liquors seems " to me very clear. It enacts when, where, to whom, by whom, and under " what conditions this traffic and commerce will be allowed and carried on. " Are these not regulations? Some of the learned Judges in the Court below " say that the Act is *ultra vires* because it prohibits and does not regulate, " while another learned Judge of that Court says that it is *ultra vires* because it " regulates and does not prohibit. To my mind, it is a regulation whether it is " taken as prohibiting or as regulating the trade in liquors. A prohibition is a " regulation.

" But it has been said, the Temperance Act is not an Act concerning the " regulation of trade and commerce, because it is not an Act for the regulating " of trade and commerce, but only a Temperance Act. To this I may well " answer by the following words of Taney, C. J., in the license case (5 Howard " 504, 583): 'When the authority of the State law making regulations of com- " merce is drawn into question in a judicial tribunal, the authority to pass it " cannot be made to depend upon the motives which may be supposed to have " influenced the Legislature, nor can the Court inquire whether it was intended " to guard the citizens of the State from pestilence and disease, or to make " regulations on trade and commerce for the interests and convenience of trade. " The object and motives of the State are of no importance and cannot " influence the decision. It is a question of power.'

" These words may well be applied here. Is the Temperance Act of 1878 " a regulation of trade and commerce, or of an important branch of trade and " commerce? I have already said that it seems to me plain that it is so. Then, " is it the less so because it has been enacted in the view of promoting " temperance, or of protecting the country against the evils of intemperance? " If for this object the Parliament has thought fit to make a regulation of the trade " and commerce in spirituous liquors, does it lose its character of being a " regulation of this trade by reason of the motives which prompted the legislator " to enact this regulation? I cannot see it. I hold, then, that the Canada " Temperance Act, 1878, is constitutional, and that this appeal should be " allowed."

Mr. Justice Gwynne, from whose judgment we have already cited, takes the same view, as does also Mr. Justice Fournier; the only member of the Supreme Court who dissented was Mr. Justice Henry.

It can hardly be denied that an industry that is prosecuted within every part of the Dominion, and from which the Treasury derives annually several

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No. 7. Factum of the Distillers and Brewers' Association of Ontario —*continued.*

millions of dollars, is a very important branch of trade and commerce, and that at the time of Confederation it must have been so regarded by the framers of the B. N. A. Act, as it was at that period also a very important source of revenue to the Federal Government.

We submit, then, that from whatever side this question (No. 1) is approached the conclusion reached is the same, and that a negative answer should be returned.

QUESTION 2.

Or has the Legislature such jurisdiction regarding such portions of the province as to which the Canada Temperance Act is not in operation?

ARGUMENT.

This question is precisely like the last except that it introduces the qualification as to area, and the only thing which we propose to discuss in connection with this question is the effect of that qualification. In all other respects the argument will be the same as in Question No. 1.

It seeks to divide a province on this question of prohibition into two distinct parts, the suggested basis of division being a line, so to speak, drawn between those parts of a province which have adopted the Canada Temperance Act and those which have not. The effect of such a division can be perceived at glance. Let us suppose that half the counties in Ontario have adopted the Act, and as to the other half, some of them have rejected it, and in the rest of them it has not been submitted. This being the state of things we will suppose that this Question No. 2 has been answered affirmatively, and the Ontario Legislature has determined to use its new-found powers, and proceeds to pass a prohibitory law absolutely suppressing the liquor traffic in every part of the province which has not already adopted the Canada Temperance Act. We should then have in force in one part of the province a voluntary prohibitory law subject to the exemptions and exceptions mentioned in Section 99 of the Canada Temperance Act, which is as follows:

1, "From the day on which this part of this Act comes into force and "takes effect in any county or city, and for so long thereafter as the same "continues in force therein, no person shall within such county or city by "himself, his clerk, servant or agent, expose or keep for sale, or directly or "indirectly on any pretence or upon any device, sell, or barter, or in consider-"ation of the purchase of any other property, give to any other person any "intoxicating liquor.

2. "No act done in violation of this Section shall be rendered lawful by "reason of

(*a*) "Any license issued to any distiller or brewer, or

(*b*) "Any license for retailing on board any steamboat or other vessel,

" brandy, rum, whiskey or other spirituous liquors, wine, ale,
" beer, porter, cider, or other vinous or fermented liquors, or

(*c*) " Any license for retailing on board any steamboat or other " vessel, wine, ale, beer, porter, cider or other vinous or fermented " liquors, but not brandy, rum, whiskey, or other spirituous " liquors, or

(*d*) " Any license of any other description whatsoever.

3. " Provided always that the sale of wine for exclusively sacramental " purposes may, on the certificate of a clergyman affirming that the wine is " required for sacramental purposes, be made by druggists and vendors thereto " specially licensed by the Lieutenant Governor in each province, but the " number of such licensed druggists and vendors shall not exceed one in each " township or parish, or two in each town, or one for every four thousand " inhabitants in each city.

4. " Provided also that the sale of intoxicating liquor for exclusively " medicinal purposes, or for *bonâ fide* use in some art, trade or manufacture, " may be made by such licensed druggists and vendors, but such sale when " for medicinal purposes shall be in quantities of not less than one pint, to be " removed from the premises, and shall be made on the certificate of a medical " man having no interest in the sale, affirming that such liquor has been " prescribed for the person named therein; and when such sale is for use in " some art, trade or manufacture, the same shall be made only on a certificate " signed by two justices of the peace, of the good faith of the application, " accompanied by the affirmation of the applicant that the liquor is to be used " only for the particular purposes set forth in the affirmation, and such " druggist or vendor shall file the certificates and keep a register of all such " sales, indicating the name of the purchaser and the quantity sold, and shall " make an annual return of all such sales on the 31st day of December in every " year to the collector of inland revenue, within whose revenue division the " county or city is situated.

5. " Provided also that any producer of cider in the county may at his " premises, and any licensed distiller or brewer having his distillery or brewery " within any county or city, may at such distillery or brewery expose and keep " for sale such liquor as he manufactures thereat, and no other, and may sell " the same thereat, but only in quantities of not less than 10 gallons, or in the " case of ale or beer not less than eight gallons at any one time, and only to " druggists and vendors licensed as aforesaid, or to such persons as he has good " reason to believe will forthwith carry the same beyond the limits of the " county or city, and of any adjoining county or city in which this part of this " Act is then in force, and to be wholly removed or taken away in quantities " not less than ten gallons, or in case of ale or beer not less than eight gallons " at a time.

6. " Provided also that any incorporated company authorised by law to " carry on the business of cultivating and growing vines and of making and " selling wine and other liquors produced from grapes, having their manu- " factory within such county or city, may thereat expose and keep for sale " such liquor as they manufacture thereat, and no other, and may sell the same

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—continued.

" thereat, but only in quantities not less than 10 gallons at any one time, and " only to druggists and vendors licensed as aforesaid, or to such persons as they " have good reason to believe will forthwith carry the same beyond the limits " of the county or city and of any adjoining county or city in which this part " of this Act is then in force, and to be wholly removed and taken away in " quantities not less than 10 gallons at a time.

7. " Provided also that manufacturers of pure native wines, made from " grapes grown and produced by them in Canada, may, when authorised so to " do by license from the Municipal Council or other authority having juris- " diction where such manufacture is carried on, sell such wines at the place " of manufacture in quantities of not less than 10 gallons at one time, except " when sold for sacramental or medicinal purposes, when any number of gallons " from one to 10 may be sold.

8. " Provided also that any merchant or trader exclusively in wholesale " trade and duly licensed to sell liquor by wholesale, having his store or place " for sale of goods within such county or city, may thereat keep for sale and " sell intoxicating liquor, but only in quantities of not less than 10 gallons at " any one time, and only to druggists and vendors licensed as aforesaid or to " such persons as he has good reason to believe will forthwith carry the same " beyond the limits of the county or city and of any adjoining county or city in " which this part of this Act is then in force, to be wholly removed and taken " away in quantities not less than 10 gallons at a time.

9. " In any prosecution against a producer, distiller, brewer, manufacturer, " merchant or trader under this section, it shall lie upon the defendant to " furnish satisfactory evidence of having good reason for believing that such " liquor would be forthwith removed beyond the limits of the county or city " and of any adjoining county or city in which this part of this Act is then in " force, for consumption outside the same."

And for violation of this law offenders would be liable to the pains and penalties provided by Section 100 of the said Act, which is as follows :—

1. " Everyone who, by himself, his clerk, servant or agent, exposes or keeps " for sale, or directly or indirectly on any pretence or by any device sells or " barters, or in consideration of the purchase of any other property, gives to any " other person any intoxicating liquor in violation of the second part of this " Act, shall, on summary conviction, be liable to a penalty of not less than " $50.00 for the first offence, and not less than $100.00 for the second offence, " and to imprisonment for a term not exceeding two months for the third and " for every subsequent offence.

2. " Everyone who, in the employment or on the premises of another, so " exposes or keeps for sale, or sells, or barters, or gives in violation of the " second part of this Act, any intoxicating liquor, is equally guilty with the " principal, and shall, on summary conviction, be liable to the same penalty or " punishment.

3. " All intoxicating liquors in respect to which any such offence has been " committed, and all kegs, barrels, cases, bottles, packages or receptacles of any " kind whatever, in which the same are contained shall be forfeited."

At the end of three years this law might be revoked under Section 96 which requires certain formalities to be observed as therein set forth, but the effect of the revocation instead of being the abolition of prohibition, as is the evident intention of the Canada Temperance Act would be to instantly bring into operation the Provincial Prohibitory Act, or in other words, to exchange voluntary for involuntary prohibition under another jurisdiction with, it might be another set of exemptions instead of those provided under Section 99 of the Canada Temperance Act, or perhaps none at all, with a new scale of punishments for offences, with perhaps, a new set of offences, and, in short, an entirely new law, and this law might in turn be abrogated by simply re-adopting the Canada Temperance Act. Such a state of things would be absolutely opposed both to the spirit and letter of the Canada Temperance Act, inasmuch as the local option principle upon which it is based would be entirely destroyed. Such a division of legislative power would be semi-concurrent in its nature and effect and would be the more objectionable on that account. It would destroy the line of demarcation between the Dominion and Provincial legislation which the B. N. A. Act is supposed to have created.

An examination of the effect which would be produced by an affirmative answer to this question (No. 2) in those parts of the Province which had rejected the Act by a vote of the majority of the electors shows that a Provincial prohibitory law would be in direct conflict with the Canada Temperance Act for this reason : Section 94 of the last named Act provides that if the Act has been rejected it shall not be submitted again for three years, the meaning of which is, it is submitted, that the Dominion Parliament has, in the exercise of its lawful functions, determined that recourse shall be had to the principle known as local option in the settlement of the question of prohibition. That it is not expedient to submit the question to the people oftener than once in three years, whether the verdict is favourable to the Act or not, and that effect shall be given to that verdict in the premises. This verdict would, however, be totally disregarded should a Provincial prohibitory law be passed, based not on the local option principle, but on the will of the Legislature, and such a law the Provincial Legislatures would be empowered to pass should this question be answered affirmatively. The same result would follow in the case of those parts of the Province in which the Canada Temperance Act had not been submitted. They would have thrust upon them without their consent, and contrary to the meaning and intent of the said Act, a prohibitory law.

For this reason it is submitted that Question No. 2 should also be answered negatively.

Question 3 and Question 4.

Question 3.—Has a provincial legislature jurisdiction to prohibit the manufacture of such liquors within the province ?

Question 4.—Has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province ?

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No. 7. Factum of the Distillers and Brewers' Association of Ontario —*continued.*

ARGUMENT.

These two questions belong to the same class and may be conveniently considered together.

If the jurisdiction with regard to these two questions were held to be separate, it is obvious that one might be used to neutralise the other. It could not therefore have been intended that the jurisdiction in relation to manufacture and importation should be divided, and unless both these powers are within the jurisdiction of the province it is submitted that neither of them is so.

If the view of the Supreme Court in Fredericton *v.* The Queen be correct, that the prohibition of the liquor traffic is a branch of "trade and commerce," and on that account solely within the powers of the Federal Legislature, then, *a fortiori*, the manufacture of the liquor itself must necessarily be so.

To permit the provincial Legislature to prohibit the manufacture of intoxicating liquor (which under the definition would include native wines) would also be in direct conflict with Sub-sections 6 and 7 of Section 99 of the Canada Temperance Act, and under which said sub-sections the said manufacturer has the right to sell and dispose of the said wines subject to the stipulations and conditions therein mentioned.

The right to sell a specific manufactured commodity necessarily implies the right to manufacture such commodity.

No reference is made in either of the said Questions 3 and 4 to the provisions of the Canada Temperance Act, but the said questions are submitted without qualification of any kind. As to "importation," involving as it often does political and international arrangements under treaty and otherwise, it clearly comes within the largest definition of "trade and commerce" which can possibly be framed, and is easily within the definition laid down by the Privy Council in Citizens' Insurance Company *v.* Parsons, 7 App. Cas. 96.

Further, it is submitted that both manufacture and importation are subjects of the deepest inter-provincial concern. The prohibition of the manufacture of a commodity in one province might seriously prejudice another province, and cannot therefore be held to be within the powers of Provincial Legislatures.

Both the importation and manufacture of spirituous and malt liquors are matters affecting the customs and excise laws of the Dominion, and are in other respects under the jurisdiction of the Federal Parliament, and have always been recognized to be within the jurisdiction of the latter.

To transfer this power to the Provincial Legislatures would be to seriously interfere with the right of the Dominion to raise its revenue by "any mode or system of taxation" which it has under Sub-section 3 of Section 91. Millions of dollars are now derived by the Federal Treasury from this source. At the time of Confederation, the liquor traffic must have been regarded as a very important branch of trade and commerce, as at that period also it produced a large revenue.

Finally, it is submitted that the right to prohibit either the manufacture or importation of intoxicating liquors into or within any province is nowhere in the B.N.A. Act assigned to the Provincial Legislatures, and for this reason the question should be answered in the negative.

QUESTION 5.

If a Provincial Legislature has not jurisdiction to prohibit sales of such liquors irrespective of quantity, has such Legislature jurisdiction to prohibit the sale by retail, according to the definition of sale by retail either in the Statutes in force in the Province at the time of Confederation or any other definition thereof?

ARGUMENT.

The Act in force in Upper Canada at the time of Confederation being the Act of 1866 (29 and 30 V. c. 51) did not define "retail" sale in *taverns* (see sec. 249 and s.s. 1).

By the same Act "retail" sale in *shops* is defined to be not less than one quart.

By Section 252 of the same Act (29 and 30 V. c. 51) no license was required for five gallons or one dozen bottles, *the quantity which each bottle might contain not being specified.*

The first definition in Ontario of a "retail tavern license" is to be found in the Statutes of 1874 (37 V. c. 32, sec. 2), wherein such a license is described as being a license to sell in quantities "less than one quart."

By Section 3 of the last-named Act a "shop license" is defined to be a license to sell by "retail" in quantities not less than three half-pints.

By Section 4 of the said Act a "wholesale license" is defined to be a license to sell in quantities of not less than five gallons or in one dozen bottles of three half-pints, or two dozen bottles of three-fourths of a pint each.

The Ontario Liquor License Act now in force is chapter 194, R.S.O. 1887, with its numerous amendments.

The definitions in the last-mentioned Act as to "wholesale" and "retail," are substantially the same as those contained in the Act of 1874 (s. 2, s.s. 2, 3, 4).

A peculiar feature of the law is that the wholesale limit of five gallons, under the present Ontario Act, would become ten gallons if the Canada Temperance Act were in force (see R.S.C. 1886, c. 106, s. 99, ss. 8).

The state of the law in this respect, in Ontario, previous to Confederation, was quite as singular owing to the fact already mentioned that the quantity

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which each bottle might contain was not defined. For the sale of one dozen bottles containing, say, one pint each, no license was required, whereas for eleven bottles containing a quart each a license would be needed, the effect of which would be that the lesser quantity would be regarded as wholesale and the larger as retail, showing that the distinction between what is called "wholesale" and "retail" is really arbitrary, and that although for certain purposes it may be a convenient expression, it has no legal signification in the premises.

The decision of the Privy Council in the case of the Dominion Liquor License Act, 1883, supports the contention that there is no legal distinction in this respect which can, in any sense, determine the question of jurisdiction, and the Act, which provided for the issue of "wholesale" and "vessel" licenses as well as what were called "retail" licenses, was held to be *ultra vires* (see report of the proceedings in that case before the Privy Council, filed herewith, pp. 91–137).

The distinction is arbitrary and could be altered from time to time either by the Federal or the Provincial Legislatures.

No decision, it is submitted, can, in any case involving a question of jurisdiction, be based upon any alleged or customary distinction between "wholesale" and "retail," definitions of which may be lawfully framed from time to time differing from previous definitions as the exigencies of trade or the will of the Legislature may dictate. Sir Montague Smith, one of the members of the Judicial Committee of the Privy Council, in the course of the argument on the case cited in this paragraph, speaking of sales in bottles, says: "It is a convenient phrase to express the meaning instead of repeating every time the number of bottles," and he also says: "Whether he sells one bottle or twelve he is selling by retail."

It is submitted that there is no distinction whatever between wholesale and retail trade upon which any decision could be based in any matter involving the question of jurisdiction, and that the terms "wholesale" and "retail" are merely convenient phrases for licensing purposes.

It is further submitted that the Legislature which has the right to prohibit the sale of eleven bottles, which is called "retail," must have the right to prohibit the sale of twelve bottles, which is called "wholesale."

It is further submitted that this power in its entirety belongs to the Federal Parliament, and attention is called to the fact that the Canada Temperance Act prohibits the sale of liquor wherever the Act is adopted, without regard to the distinction between wholesale and retail, subject to certain exemptions and exceptions which the said Act allows.

Were this question (No. 5) answered affirmatively a most anomalous and unsatisfactory result would be reached, as it would be impossible to prevent either the Federal or the Provincial Legislatures from adopting some new definition of the terms "wholesale" and "retail" whenever they might see fit.

One Legislature might define any quantity less than 10 gallons as retail, while the other might define any quantity over five gallons as wholesale, and these in turn might be altered from time to time, and as a consequence the line of demarcation suggested in this Question No. 5 is absolutely unreal, and for the reasons given can obviously afford no permanent basis for the settlement of an important question of jurisdiction, which, as already stated, appears to have been effectually disposed of by the judgment of the Privy Council in the case last cited.

It is further submitted that an affirmative answer to this question would bring about a conflict with certain provisions of the Canada Temperance Act. If a Provincial Legislature has the right to prohibit what is called the retail sale, such Legislature might, even in localities where the Canada Temperance Act has been adopted, prevent the sale of small quantities by druggists and others under the authority of Section 99 of said Act.

It must be observed that this Question No. 5 entirely ignores the Canada Temperance Act, and in this respect resembles Question No. 1.

It is submitted that this question should be answered in the negative.

QUESTION 6.

If a Provincial Legislature has a limited jurisdiction only as regards the prohibition of sales, has the Legislature jurisdiction to prohibit sales subject to the limits provided by the several sub-sections of the 99th section of the Canada Temperance Act, or any of them? (R.S.C., c. 106, s. 99.)

ARGUMENT.

This question is somewhat ambiguously framed, but it is apparently directed to the inquiry whether in those parts of the province in which the Canada Temperance Act is not in operation a Provincial Legislature can prohibit the sale of intoxicating liquor subject to the limits provided by Section 99 of the said Act, or any of the Sub-sections of said Section.

It has already been shown in relation to Question No. 2 that there can be no division as to area for the purpose of conferring jurisdiction on a Provincial Legislature.

This question introduces a very novel kind of limitation derived from Section 99 of the Canada Temperance Act. The limitations intended are presumably those contained in s.s. 3-8, inclusive of said Section 99, being a part of R.S.C., 1886, c. 106.

No more fanciful basis for a division of authority could possibly be suggested than that contained in this question.

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The sub-sections in question are in reality exemptions from the general operation of the Act, and in that respect resemble the exemption clauses of the Assessment and Execution Acts.

Had the Canada Temperance Act consisted only of these exemption clauses the proposed line of division between the Federal and Provincial Legislatures on this subject would have been less difficult to understand, but why they should be taken out of the body of a Federal Act to form a foundation on which to build provincial legislation of the same general character is not quite so clear. The whole subject matter is dealt with by the Federal Act, of which the limitations in question form but a very small part.

It is surely an incontrovertible proposition that if Section 99 of the Canada Temperance Act is valid for the purpose of creating exemptions, that part of the Act which deals with non-exemptions must be held to be equally good, especially in view of the fact that the entire Act has been declared *intra vires* of the Dominion Parliament, and if the whole Act be good it excludes, it is submitted, the jurisdiction of the provincial Legislatures over the same subject-matter.

The right to deal with exemptions on any subject necessarily involves the right to deal with non-exemptions, whether the subject-matter relate to the sale of liquors, the assessment of property for the purposes of taxation, the seizure of goods liable to execution, or otherwise.

The authority which created the exemptions mentioned in Section 99 of the Canada Temperance Act could enlarge those exemptions to any extent, so as practically to deal with the whole matter in the form of exemptions.

Whenever, by its own inherent force, the said Section 99 operates, the whole Act must necessarily operate by virtue of the same cause. There can, consequently, be no room for a divided jurisdiction on the basis here suggested.

For the foregoing, among other reasons, it is submitted that this question should be answered in the negative.

Question 7.

Has the Ontario Legislature jurisdiction to enact the 18th Section of the Act passed by the Legislature of Ontario in the fifty-third year of Her Majesty's reign, and entitled "An Act to improve the Liquor License Acts," as the said section is explained by the Act passed by the said Legislature in the fifty-fourth year of Her Majesty's reign entitled "An Act respecting the Local Option Principle in the matter of Liquor Selling"?

The 18th Section of the Act (53 V. c. 56) referred to in the question is preceded by a preamble, and is as follows:—

"Whereas the following provision of this section was, at the date of "Confederation, in force, as a part of the Consolidated Municipal Act (29 and

"30 V., c. 51, s. 249, sub-s. 9) and was afterwards re-enacted as sub-s. 7 of s. 6 "of 32 V., c. 32, being The Tavern and Shop License Act of 1868, but was "afterwards omitted in subsequent consolidations of The Municipal and The "Liquor License Acts, similar provisions as to local prohibition being contained "in the Temperance Act of 1864, 27 and 28 V., c. 18; and the said last- "mentioned Act having been repealed in municipalities where not in force by "the Canada Temperance Act, it is expedient that municipalities should "have the powers by them formerly possessed; it is hereby enacted as "follows:—

"The Council of every township, city, town and incorporated village may "pass bye-laws for prohibiting the sale by retail of spirituous, fermented or other "manufactured liquors in any tavern, inn, or other house or place of public "entertainment, and for prohibiting altogether the sale thereof in shops and "places other than houses of public entertainment: Provided that the bye-law, "before the final passing thereof, has been duly approved of by the electors of "the municipality in the manner provided by the sections in that behalf of The "Municipal Act: Provided further that nothing in this section contained shall "be construed into an exercise of jurisdiction by the Legislature of the Province "of Ontario beyond the revival of provisions of law which were in force at the "date of the passing of the British North America Act, and which the subse- "quent legislation of this province purported to repeal."

The Act 54 V. (cap. 46, s. 1) referred to in the question as explaining the said Section 18 is as follows:—

"It is hereby declared that the Legislature of this province by enacting "Section 18 of the Act to improve the Liquor License Laws, passed in the 53rd "year of Her Majesty's reign, chaptered 56, for the revival of provisions of law "which were in force at the date of the British North America Act, 1867, did "not intend to affect the provisions of Section 252 of The Consolidated "Municipal Act, being chapter 51 of the Acts passed in the 29th and 30th years "of Her Majesty's reign by the late Parliament of Canada, which enacted that "'no tavern or shop license shall be necessary for selling any liquors in the "original packages in which the same have been received from the importer or "manufacturer; provided such packages contain respectively not less than five "gallons or one dozen bottles,' save in so far as the said Section 252 may have "been affected by the ninth Sub-section of Section 249 of the same Act, and "save in so far as licenses for sales in such quantities are required by The "Liquor License Act; and the said Section 18 and all bye-laws which have "heretofore been made or shall hereafter be made under the said Section 18, "and purporting to prohibit the sale by retail of spirituous, fermented or "other manufactured liquors, in any tavern, inn, or other house or place of "public entertainment, and prohibiting altogether the sale thereof in shops "and places other than houses of public entertainment, are to be construed "as not purporting or intended to affect the provisions contained in the said "Section 252, save as aforesaid, and as if the said Section 18 and the said "bye-laws had expressly so declared."

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ARGUMENT.

This question has already been the subject of judicial interpretation by the Court of Appeal for Ontario to which it was submitted under the authority of an Act of the Ontario Legislature entitled "An Act for Expediting the "Decision of Constitutional and other Questions" (53 V. c. 13).

Pursuant to leave given, counsel were heard before the Court (composed of Hagarty C J.O., Burton, Osler and Maclennan, J.J.A.), on the 28th of May, 1891.

On the 23rd of September, 1891, a judgment on the question submitted was given by the majority of the Court (Mr. Justice Osler declining to express any opinion). That judgment answered affirmatively Questions 1 and 2 in that reference (which are substantially the same as Question No. 7 in the present reference). The remainder of the questions dealt with by the Court of Appeal in that reference, although growing out of the same subject matter, do not affect the present case.

A report of the judgment will be found in 18 O.A.R., p. 572, from which the following passages are taken. Chief Justice Hagarty said (p. 577):—

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

"In 1853, by 16 Vic. 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 Vic. 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 pro- "hibition subject to the approval of the electors.

"This is repeated in C S.U.C. c. 54, sec. 246 (1859), authorizing the pro- "hibition of sale by retail. Then 23 Vic. 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 Vic. 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 Vic. 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 of July, 1867.

"The first Ontario Legislation seems to be 1869, 32 Vic. 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. The Section 249 is that allowing such a by-law before Con- "federation, 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 Vic. 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 Vic. c. 18 (O) and R.S.O. "(1877) c. 182.

"We must notice the Canada Temperance Act of 1878, a Dominion Act "whose validity has been affirmed in the Privy Council, 41 Vic. 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-law, and provides for the repeal of 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 pro- "hibition district. By Sub-section 6 leave is given to companies making "native wine to sell it in certain quantities.

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"By Sub-section 7 manufacturers of native wine, when authorised 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.

"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 Confedera- "tion 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 Parlia- "ment 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 pro- "hibition 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 or 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, &c.

"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.

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"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 word- "ing 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 retail business. The practice of 'drinking,' as generally under- "stood 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- "keeper in the retail drinking business they bring themselves within the "bye-law.

"The late Sir William Richards, in his judgment *in re* Slavin and Orillia, "36 U.C.R. 159, clearly recognises 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 Dominion authority."

Mr. Justice Burton's Judgment in this case has already been quoted by reference to which it will appear that his Lordship individually is in favour of, according to the provinces, the fullest jurisdiction on the question of prohibition. The following additional passages taken from Mr. Justice Burton's Judgment are important. He says (18 O.A.R., page 590):

"If 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 regulation 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 The 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 re-considered that judg- " ment is binding upon us, whatever may be my own opinion.

" In the same way the judgment of the Judicial Committee, though based " upon a state of facts which rendered any other judgment, in my opinion, " impossible, is, until re-considered 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 the 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 : first, the prohibiting the sale by retail in any inn, and, second, 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 authorised by shop licenses, and I adopt my brother Mac- " lennan'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."

Mr. Justice Maclennan adopts fully the view of Chief Justice Hagarty. A single quotation from his Lordship's judgment will show this to be the case. He says (page 596) :

" 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."

This judgment, in the " Local Option Case " just cited, as in fact all the judgments on the same side, beginning with Slavin *v.* Orillia, pronounced by the late Chief Justice Sir William Richards, rests upon the assumption that all

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the powers which were vested in municipal bodies at the time of Confederation are embraced within Sub-section 8 of Section 92 of the B. N. A. Act, and if this assumption is not well founded, and it is confidently submitted that it is not, nothing remains to sustain the judgments, it being admitted by Mr. Justice Burton and the other learned judges who favour the provincial contention, that there is no inherent connection between municipal institutions on the one hand and the prohibition of the liquor traffic on the other.

Leaving aside the fact, which, in itself would, it is submitted, be a sufficient answer to the foregoing contention, that certain subjects, which before Confederation were dealt with by municipal bodies in some of the Provinces, have by Section 91 of the B. N. A. Act been specially assigned to the Dominion Parliament, such, for instance, as "weights and measures," we have a direct conflict in respect of prohibitory legislation as a result of the judgment of the Court of Appeal in the Local Option case herein cited, and which is founded upon the doctrine above alluded to in respect of municipal institutions.

The Canada Temperance Act (Section 4) authorises "cities" to bring into operation the said Act by a vote of the majority of the electors of the said city entitled to vote on the election of a Member of the House of Commons (Section 12), the effect of which would be to prohibit the sale of liquors in said city subject to certain exemptions mentioned in Section 99 of said Act.

Section 18 of 53 Vict. c. 56 (Ont.) among other things authorises the Municipal Council of any city to pass a by-law prohibiting the "retail" sale of liquor therein absolutely, subject to the appproval of the municipal electors of such city, in the manner provided by the sections in that behalf of the Municipal Act.

These provisions are directly in conflict and absolutely incompatible one with the other; one of them must therefore necessarily be *ultra vires*, and yet they have both been declared valid, the former by the Privy Council, and the latter by the Ontario Court of Appeal.

It should be observed that the franchises adopted are entirely dissimilar. Some of those who would be entitled to vote under the Federal Act would be excluded under the Municipal By-law passed under the authority of the Provincial Legislation, and *vice versâ.*

The exemptions under the Federal Act are not recognised by the Provincial Act. The anomaly is complete. This example shows conclusively that the doctrine that whatever powers were possessed by municipal bodies at the time of Confederation still belong to the Provincial Legislatures cannot be supported, as the application of such a doctrine produces a conflict of authority. It is unnecessary for the purpose of answering Question No. 7 to determine whether or not the "retail" sale of liquor is a branch of "trade and commerce."

It is submitted that if any part of said Section 18 is *ultra vires*, that the whole section is void.

It has already been shown that there is no legal distinction between wholesale and retail trade so far as the same relates to the division of the powers between the Provincial and Dominion Legislatures.

Municipal institutions varied so greatly in the different Provinces at the time of Confederation that the application of the doctrine mentioned would be impracticable, and if strictly applied, instead of producing uniform results, would lead to chaos and confusion. The municipal powers of a prohibitory character exercised by the Province of Ontario at Confederation were unknown in New Brunswick. A principle of interpretation should be applied which will produce uniform results. It is submitted that the proper interpretation to be given to Sub-section 8 is that the said sub-section embraces everything which inherently belongs to municipal institutions not inconsistent with the powers assigned to the Federal Parliament under Section 91.

If a Provincial Legislature can authorise a Municipal Council to pass prohibitory legislation by by-law, the Legislature can pass the same directly. It cannot delegate powers which it cannot exercise itself, and it cannot exercise such powers without derogating from the prohibitory powers of the Federal Parliament as determined by the Privy Council in Russell *v.* The Queen, and by the Supreme Court in Fredericton *v.* The Queen.

Further it is submitted that the application of the doctrine laid down by Hagarty, C. J., in the Local Option Case, when applied to the state of facts which existed at the moment of the delivery of his Lordship's judgment, destroys the validity of the said Section 18.

His Lordship says (p. 580): "It may be safely said that there is no "apparent intention in the Federation 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."

Now this is precisely what has happened in the present case. The B. N. A. Act did transfer, according to the authority of Russell *v.* The Queen, to the Dominion jurisdiction the right to authorise cities to enact prohibitory legislation subject to the approval of the electors of such city; and further, the Dominion Parliament has exercised that right by enacting in 1878 the Canada Temperance Act empowering the cities to adopt prohibitory legislation subject to the terms of the Act and to the approval of a majority of such of the electors as are entitled to vote for a Member of the House of Commons. This law has been in force since 1878, and is still in force in every part of Canada, including Ontario.

In 1890 (by the said Section 18) the Ontario Legislature, ignoring the Canada Temperance Act in this behalf, did, under cover of reviving certain provisions of law which were in force at and before the date of Confederation, enact almost precisely similar legislation with regard to cities as already existed

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under the Canada Temperance Act, 1878, and at the present moment it is apparently open to the electors of any city in Ontario to adopt either one Act or the other. It may be observed that both are based upon the Local Option Principle, both are directed toward the same object, both deal with the same subject-matter, almost in the same way, and are clearly inconsistent with each other.

It is submitted that for the reasons given by Chief Justice Hagarty himself, the said Section 18 is *ultra vires*, and Question No. 7 should therefore be answered in the negative.

[There is filed herewith* a copy of the Report of the proceedings before the Judicial Committee of the Privy Council on the hearing of the Petition to the Governor-General of Canada in relation to the Dominion Liquor License Acts of 1883 and 1884, and special reference is made to the following pages thereof, namely, pages 64, 65, 66, 67, 82, 83, 84, 87, 89, 90, 91, 106, 107, 108, 109, 116, 117, 118, 119, 120, 121, 137, 138, 147, 160, 161 and 170.]

[**Not sent.*]

SUMMARY OF ARGUMENT.

1. That the power to prohibit the sale of intoxicating liquors within a Province does not reside in the Legislature of that Province, for the following reasons:

(*a*) Such power would be inconsistent with the "Canada Temperance Act, 1878," which has been declared valid by the Privy Council in Russell *v.* The Queen.

(*b*) Such power has not been specifically assigned to the Provincial Legislatures by the B.N.A. Act.

(*c*) Such power is a branch of "Trade and Commerce" within the meaning of Sub-section 2 of Section 91 of the B.N.A. Act, and if not within the said sub-section, is still within the general powers of the Dominion Parliament, under Section 91 of the said B.N.A. Act.

2. That the Province cannot be divided into two parts on the basis suggested by Question 2 for the reason that the Canada Temperance Act is in force throughout Canada, and applies to every part of the Province, and those who reject the Act are as much entitled to the benefit of its provisions as those who adopt it, in pursuance of the express terms of the Act, which are quoted at length in the argument herein.

3. That the prohibition of both the importation and manufacture of intoxicating liquors, referred to in Questions 3 and 4, belong to "Trade and Commerce," and are thus within the jurisdiction of the Dominion Parliament.

4. That there is no legal distinction between "wholesale" and "retail" quantities, so far at least as concerns a division of the powers of the Dominion and Provincial Legislatures respectively under the B.N.A. Act, and that such phrases are merely convenient terms for the purpose of regulating licenses.

5. That the proposal to enact Provisional Legislation subject to the limitations provided by the several Sub-sections of Section 99 of the Canada Temperance Act, is altogether fanciful and cannot be supported on any ground whatever.

6. That the 18th Section of the Act 53 Vict., c. 56, referred to in Question 7, which among other things, empowers the council of any "city" to pass bye-laws subject to the approval of the municipal electors, for prohibiting the sale by retail of intoxicating liquors within such city, is *ultra vires* even according to the doctrine laid down by Chief Justice Hagarty, who upheld its validity, inasmuch as it conflicts in an important particular with the provisions of the Canada Temperance Act, 1878, which also applies to "cities."

WALLACE NESBITT,
E. SAUNDERS,

Counsel for the Distillers and Brewers' Association.

No. 8.
Certified Judgment of the Supreme Court of Canada, 15th January 1895.

"G."

IN THE SUPREME COURT OF CANADA.

Tuesday the Fifteenth day of January, A.D. 1895.

Present:

The Honourable Mr. Justice Taschereau,
The Honourable Mr. Justice Gwynne,
The Honourable Mr. Justice Sedgewick.
The Honourable Mr. Justice King.

The opinions of the Honourable the Chief Justice and of the Honourable Mr. Justice Fournier were announced by the Honourable Mr. Justice Taschereau, who was not present at the hearing and who took no part in the opinion of the Court.

In the matter of certain questions referred by His Excellency the Governor General in pursuance of an Order in Council approved of by His Excellency on the 26th day of October 1893. Subject: Provincial Jurisdiction, Prohibitory Liquor Laws.

His Excellency the Governor General in Council by Order in Council bearing date the 26th day of October in the year of Our Lord 1893 passed pursuant to the provisions of the Revised Statutes of Canada, chapter 135, and intituled "The Supreme and Exchequer Courts Act," as amended by Section 4 of the Act passed in the 54th and 55th years of Her Majesty's reign, chaptered 25, having referred to the Supreme Court of Canada for hearing and consideration the following questions, namely:

(1.) Has a Provincial Legislature jurisdiction to prohibit the sale within the province of spirituous fermented or other intoxicating liquors?

(2.) Or has the Legislature such jurisdiction regarding such portions of the province as to which the Canada Temperance Act is not in operation?

(3.) Has a Provincial Legislature jurisdiction to prohibit the manufacture of such liquors within the province?

(4.) Has a Provincial Legislature jurisdiction to prohibit the importation of such liquors into the province?

(5.) If a Provincial Legislature has not jurisdiction to prohibit sales of such liquors, irrespective of quantity, has such Legislature jurisdiction to prohibit the sale, by retail, according to the definition of a sale by retail, either in Statutes in force in the province at the time of confederation, or any other definition thereof?

(6.) If a Provincial Legislature has a limited jurisdiction only as regards the prohibition of sales, has the Legislature jurisdiction to prohibit sales subject to the limits provided by the several sub-sections of the 99th Section of "The Canada Temperance Act," or any of them (Revised Statutes of Canada, Chapter 106, Section 99)?

No. 8. Certified Judgment of the Supreme Court of Canada, 15th January 1895—*continued.*

(7.) Had the Ontario Legislature jurisdiction to enact the 18th Section of the Act passed by the Legislature of Ontario in the Fifty-third year of Her Majesty's reign, and intituled "An Act to improve the Liquor License Acts," as said section is explained by the Act passed by the said Legislature in the 54th year of Her Majesty's reign, and intituled "An Act respecting Local Option in the matter of Liquor Selling"?

And the said questions having come before this Court for hearing on the first, second, and fourth days of May, in the year of our Lord One thousand eight hundred and ninety-four, in presence of Her Majesty's Solicitor General for the Dominion of Canada, who appeared on behalf of the said Dominion of Canada; Mr. J. J. Maclaren, Q.C., and Mr. Cartwright, Q.C., Deputy Attorney General for Ontario, who appeared on behalf the said Province, the said Mr. J. J. Maclaren also appearing on behalf of the Province of Manitoba; Mr. Cannon, Q.C., Assistant Attorney General for the Province of Quebec, who appeared on, behalf of the said Province; and Mr. Wallace Nesbitt, Q.C., and Mr. Saunders, who appeared on behalf of the Distillers and Brewers' Association of Ontario, whereupon, and upon hearing what was alleged by counsel aforesaid, this Court directed that the matter of the said reference should stand over for consideration, and the same having come before this Court this day, this Courtdid state its opinion to the effect that all the said questions so referred as aforesaid should be answered in the negative, and the reasons therefore will appear from the judgments delivered by their Lordships, Mr. Justice Gwynne, Mr. Justice Sedgewick, and Mr. Justice King, a true copy whereof is hereto annexed. His Lordship the Chief Justice and his Lordship Mr. Justice Fournier dissenting from the opinion of the majority of the Court, and being of opinion that the said questions should be answered in the affirmative, with the exception of questions three and four, which they were of opinion should be answered in the negative, a true copy of the Judgments of their said Lordships, the Chief Justice and Mr. Justice Fournier being also hereunto annexed.

All which is respectfully certified under the seal of the Supreme Court of Canada.

RECORD.

No. 9.
Judge's reasons.
The Chief Justice.

In re Prohibition.

THE CHIEF JUSTICE.—My reasons for the foregoing answers will appear from my judgment in Huson *v.* South Norwich. I have only to add that I do not think any statutory definition of the terms "wholesale" and "retail" is requisite, but if legislation is required for such purpose it is vested in the Dominion as appertaining to the regulation of trade and commerce.

I answer the third and fourth questions in the negative, because the prohibition of manufacture and importation would affect trade and commerce, and so must belong to the Dominion; and further, for the reason that prohibition to that extent would affect the revenue of the Dominion derived from the customs and excise duties.

HUSON *v.* SOUTH NORWICH.

THE CHIEF JUSTICE.—All questions involved in this appeal, save that relating to the constitutional validity of the 18th section of the Ontario Statute, 53 Vic., c. 56, entitled: "An Act to improve the Liquor License Laws," as explained and limited by the Ontario Statute, 54 Vic., c. 46, Section 1, have been already disposed of. This remaining point we have now to determine.

I am of opinion that these enactments were *intra vires* of the provincial legislature. The learned judges of the Court of Appeal, in the case of the Local Option Act (*), have dealt fully with this identical question, and I so entirely agree with both their reasons and conclusions, that I might well have contented myself with a reference to that case without adding to the mass of judicial decisions already accumulated on the subject. There appear to me, however, to be some additional reasons, which I will state as succinctly as possible.

We are precluded, by the decision of the Privy Council in the case of Russell *v.* The Queen (†), and by that of this court in The City of Fredericton *v.* The Queen (‡), from holding that under sub-section 8 of section 92 of the British North America Act, the exclusive power of prohibiting the sale of liquor by retail, including the enactment of what are called local option laws, was given to the provinces as an incident of the police power conferred by the words "municipal institutions." That those words do confer a police power to the extent of licensing and regulating was decided by the Privy Council in the case of Hodge *v.* The Queen (§). The question then is narrowed to this: Have the provinces, under this sub-section 8, a power concurrent with that of the Dominion to enact prohibitory legislation to be carried into effect through the instrumentality of the municipalities or otherwise, either generally or to the extent of the power of prohibiting which had been conferred on municipal bodies by legislation enacted prior to confederation and in force at that date.

It is established by Russell *v.* The Queen (‖) that the Dominion, being invested with authority by Section 91 to make laws for the peace, order and good government of Canada, may pass what are denominated local option laws.

(*) 18 Ont. App. R. 572. (†) 7 App. Cas. 829. (‡) Can. 3 S.C.R. 505.
(§) 9 App. Cas. 117. (‖) 7 A. C. 829.

But, as I understand that decision, such Dominion laws must be general laws, not limited to any particular province. It is not competent to Parliament to draw to itself the right to legislate on any subject which, by Section 92, is assigned to the provinces by legislating on that subject generally for the whole Dominion, but this is, of course, not done where, in the execution of a power expressly given to it by Section 91, the Federal Legislature makes laws similar to those which a Provincial Legislature may make in executing other powers expressly given to the provinces by Section 92. Therefore it appears to me that there are in the Dominion and the provinces, respectively, several and distinct powers authorising each, within its own sphere, to enact the same legislation on this subject of prohibitory liquor laws restraining sale by retail, that is to say, the Dominion may, as has already been conclusively decided, enact a prohibitory law for the whole Dominion, whilst the Provincial Legislatures may also enact similar laws, restricted, of course, to their own jurisdictions. Such provincial legislation cannot, however, be extended so as to prohibit importation or manufacture, for the reason that these subjects belong exclusively to the Dominion under the head of trade and commerce, and also for the additional reason that the revenue of the Dominion derived from customs and excise duties would be thereby affected. That there may be, in respect of other subjects, such concurrent powers of legislation has already been decided by the Privy Council in the case of Attorney General of Ontario *v.* Attorney General of Canada (*), where this question arose with reference to insolvency legislation. I venture to think the present even a stronger case for the application of such a construction than that referred to. To neither of the legislatures is the subject of prohibitory liquor laws in terms assigned. Then what reason is there why a local legislature in execution of the police power conferred by Sub-section 8 of Section 92 may not, so long as it does not come in conflict with the legislation of the Dominion, adopt any appropriate means of executing that power, merely because the same means may be adopted by the Dominion Parliament under the authority of Section 91 in executing a power specifically given to it. It has been decided by the highest authority that there are no reasons against such a construction. This is indeed even a stronger case for recognising such a concurrent power than the case of The Attorney General of Ontario *v.* Attorney General of Canada (‡), because bankruptcy and insolvency laws are by Section 91 expressly attributed to the exclusive jurisdiction of the Dominion. In the event of legislation providing for prohibition enacted by the Dominion and by a province coming into conflict, the legislation of the province would no doubt have to give way. This was pointed out by the Privy Council in The Attorney General of Ontario *v.* The Attorney General of Canada (*), and although the British North America Act contains no provision declaring that the legislation of the Dominion shall be supreme, as is the case in the constitution of the United States, the same principle is necessarily implied in our constitutional act, and is to be applied whenever in the many cases which may arise, the federal and provincial legislatures adopt the same means to carry into effect distinct powers.

(*) [1894] App. Cas. 189.

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That a general police power sufficient to include the right of legislating to the extent of the prohibition of retail traffic or local option laws, not exclusive of but concurrent with a similar power in the Dominion, is vested in the provinces by the words "Municipal Institutions in the Province" in Sub-section 8 of chapter 92 is, I think, a proposition which derives support from the case of Hodge *v.* The Queen*. It is true that the subject of prohibition was not in question in that case, but there would seem to be no reason why prohibitory laws as well as those regulating and limiting the traffic in liquors should not be included in the police power which under the words "Municipal Institutions" it was held in Hodge *v.* The Queen*, to the extent of licensing, the provinces possessed. The difference between regulating, and licensing and prohibiting is one of degree only.

As regards the objection that to recognize any such right of legislation in a province not extending to the prohibition of importation and manufacture would be an infringement of the power of the Dominion to regulate trade and commerce, I am not impressed by it. The retail liquor traffic can scarcely be regarded as coming directly under the head of trade and commerce as used in the British North America Act, but as the subjects enumerated in Section 92 are exceptions out of those mentioned in Section 91, it follows that if a police power is included in Sub-section 8 of the former section, the power itself and all appropriate means of carrying it out are to be treated as uncontrolled by anything in Section 91. Moreover, Hodge *v.* The Queen* also applies here, for although in a lesser degree, yet to some extent, the restriction of the liquor trade by a licensing system would affect trade and commerce. On the whole, I am of opinion that the provincial legislatures have power to enact prohibitory legislation to the extent I have mentioned, though this power is in no way exclusive of that of the Dominion, but concurrent with it.

If I am wrong in this conclusion it is sufficient for the decision of this appeal to hold, as I do, that the legislature of Ontario had power to repeal and re-enact the legislation in force at the date of the Confederation Act, which gave municipal councils the right to pass by-laws, absolutely prohibiting the sale of liquor by retail within certain local limits. Having regard to the history and objects of confederation, I can scarcely think it possible that it could have been intended by the framers of the British North America Act to detract in any way from the jurisdiction of the provinces over their own several systems of municipal government. If the words "Municipal Institu-" tions" in Sub-section 8 are to have any meaning attributed to them, they must surely be taken as giving authority to repeal, re-enact, and remodel the laws relating to all municipal legislation then in force. In Slavin *v.* Orillia (†) this was the view of the Ontario Court of Queen's Bench, and Chief Justice Richards, in his judgment on that case, puts forward powerful arguments in support of that conclusion. These reasons, as well as those given for the judgment of the Court of Appeal in the Local Option Case, have convinced me that at least to the extent last mentioned (even if I am wrong in my first proposition) the provinces have the power to legislate. As the enactments now in question are reproductions of those in force at the date of confederation, they were therefore *intra vires* of the Ontario legislature. In the case of

* 9 App. Cas. 117. † 36 U.C.Q.B. 159.

Severn *v.* The Queen* I expressed some doubt as to the decision in Slavin *v.* Orillia,† upon the ground that the effect of that case would be to make the law vary in the different provinces. These observations were not material to the judgment I then gave, which was founded entirely on the 9th sub-section of section 92, and I have now come to the conclusion that they were not well founded.

The appeal must be dismissed with costs.

Fournier, J.

FOURNIER, J.—In the matter of questions referred to the Supreme Court of Canada by His Excellency the Governor General, in pursuance of an Order in Council, 26th October 1893, on the subject, Provincial Jurisdiction Prohibitory Liquor Laws, I concur in the conclusions arrived at by the Chief Justice of this Court, and adopt his answers to the seven questions submitted.

Gwynne, J.

GWYNNE, J.—[After stating the questions submitted to the Supreme Court of Canada, proceeded as follows :]

In construing the language of the British North America Act of 1867 defining the jurisdiction of the Dominion Parliament and of the provincial legislatures we must never lose sight of the fact this language is that of the resolutions adopted in 1864 by the provincial statesmen assembled in Quebec by the authority of Her Most Gracious Majesty for the purpose of framing the provisions of a constitution for federally uniting the British North American provinces into one government under the British Crown and that the British North America Act was passed merely for the purpose of giving legislative form to the terms and provisions of a treaty of union between the respective provinces forming the confederation and the Imperial Government, as such terms and provisions are expressed in the resolutions adopted by the framers of the constitution and by the respective legislatures of the Provinces of Canada, Nova Scotia and New Brunswick, and by the Imperial Government. So likewise must we keep ever present to our minds the fact that the main object of these provincial statesmen, who were the authors and founders of our new constitution, in framing their project of confederation, was to devise a scheme by which the best features of the constitution of the United States of America, rejecting the bad, should be grafted upon the British constitution; and to vest in the provincial legislatures exclusive jurisdiction over all matters of a purely provincial, local, municipal and domestic character, and in the general or central legislature exclusive jurisdiction over all matters in which, as being of a general, quasi-national and sovereign character the inhabitants of the several provinces might be said to have a common interest distinct from the particular interest they would have in matters affecting the local, municipal and domestic affairs of the particular province in which each should reside.

That this was the main design of the scheme of confederation proposed by the framers of our constitution, and as intended by the resolutions adopted by them, is abundantly apparent from the speeches accompanying the submission

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* Can. 2 S.C.R. 70. † 36 U.C.Q.B. 159.

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of the resolutions to the legislatures of the provinces for their adoption. The late Sir John Macdonald, the chief of the provincial statesmen engaged in framing the resolutions, when presenting them to the legislature of the Province of Canada for their adoption, says:

"We must consider the scheme in the light of a treaty; the whole scheme "of confederation, as propounded by the conference, as agreed to and sanctioned "by the Canadian government, and as now presented for the consideration of "the people and the legislature, bears upon its face the marks of compromise."

And again:

"In the proposed constitution all matters of general interest are to be "dealt with by the general legislature, while the local legislatures will deal with "matters of local interest."

Again, referring to the constitution of the United States of America, he says:

"We can now take advantage of the experience of the last seventy-eight "years during which the constitution of the United States has existed, and I "am strongly of opinion that we have in a great measure avoided in this "system which we propose for the adoption of the people of Canada the defects "which time and events have shewn to exist in the American constitution."

And again:

"We have strengthened the general government, we have given the "general legislature all the great subjects of legislation, we have conferred on "them not only specifically and in detail all the powers which are incident to "sovereignty, but we have expressly declared that all subjects of general interest "not distinctly and exclusively conferred upon the local government and local "legislatures shall be conferred upon the general government and legislature."

And again:

"I shall not detain the House by entering into a consideration at any "length of the different powers conferred upon the general Parliament as "contra-distinguished from those reserved to the local legislatures, but any "honourable member in examining the list of different subjects which are to "be assigned to the general and local legislatures respectively will see that all "the great questions which affect the general interests of the confederacy as a "whole are confided to the Federal Parliament while the local interests and "local laws of each section are entrusted to the care of the local legislatures."

The late Mr. George Brown, then president of the executive council of the Province of Canada, and also one of the delegates who framed the constitution, said:

"All matters of trade and commerce, banking and currency and all "questions common to the whole people we have vested fully and unre-"strictedly in the general government."

And again:

"The crown authorised us specially to make this compact and has heartily "approved of what we did."

And he ascribed the terms of the scheme of confederation as embodied in the resolutions to Lord Durham's report wherein he suggested a union of the provinces;

"upon a plan of local government by elective bodies subordinate to the general "legislature and exercising complete control over such local matters as do not "come within the province of general legislation, and that a general executive "upon an improved principle should be established, together with a supreme "court of appeal for all the North American colonies."

And, again, he said that:

"No higher eulogy could be pronounced upon the scheme produced than "that which he had heard from one of the foremost of British statesmen, namely, "that the system of government which we propose seemed to him a happy "compound of the best features of the British and American constitutions."

Sir Geo. Etienne Cartier, then Attorney General of Canada East and another of the framers of the constitution for the proposed confederacy, said as to the proposed scheme in advocacy of its adoption by the Canadian Legislature:

"Questions of commerce, of international communication and all matters "of general interest would be discussed and determined in the general "legislature."

And, again, he said that in all their proceedings the framers of the constitution had the approbation of the Imperial Government, and, in fine, he said:

"I have already declared in my own name and on behalf of the Govern- "ment that all the delegates who go to England will accept from the Imperial "Government no act but one based upon the resolutions if adopted by the "House and will not bring back any other."

The Resolutions having been adopted by the Legislatures of Canada, Nova Scotia, and New Brunswick were transmitted to the Imperial Government, and, at the request of that Government a conference was held upon them in England between delegates from those Provinces and the Imperial Government, at which conference the Resolutions were adopted almost verbatim, with a slight modification as to the power of the executive Government of the Confederacy introduced at the suggestion of the Imperial Government for the purpose of still further strengthening the central executive of the proposed confederacy, such modification consisting in expunging the 44th Resolution, which proposed to vest in the provincial executors the power of pardon of criminal offences, as to which Resolution Sir John Macdonald had said, when submitting the Resolutions to the Canadian Legislature, that this was a subject of Imperial interest, and that if the Imperial Government should not be convinced by the argument they would be able to press upon them for the continuance of the Clause (the 44th Resolution) they could, of course, as the overruling power, set it aside. Accordingly at the conference in England it was, with the assent of the provincial delegates, set aside and expunged, and that power of pardon was vested in the central or general government, and in other respects the language of the Resolutions was not only substantially but almost *verbatim et literatim* embodied in a Bill agreed upon by the provincial delegates and the Imperial Government as the Bill to be presented to Parliament to be passed into an Act.

In Her Majesty's Address to both Houses upon the opening of Parliament

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in February 1867 she was pleased to refer to the proposed scheme of confederation in the following manner:—

"Resolutions in favour of a more intimate union of the provinces of Canada, "Nova Scotia and New Brunswick, have been passed in their several Legisla- "tures and delegates duly authorised and representing all classes of colonial "parties and opinion, have concurred in the conditions upon which such a "union may be best effected. In accordance with their wishes a Bill will be "submitted to you which, by the consolidation of colonial interests and "resources will give strength to the several provinces as members of the same "empire, and animated by feelings of loyalty to the same sovereign."

Lord Carnarvon, then Colonial Minister, in presenting this Bill to Parliament, explained its intent and purpose, saying, among other things, with reference to the said resolutions, that they, with some slight changes, formed the basis of the measure he was submitting to Parliament; that to those resolutions all the British provinces in North America were consenting parties, and that the measure founded upon them must be accepted as a treaty of union. Then, referring to the distribution of powers, he said:—

"I now pass to that which is perhaps the most delicate and most important "part of this measure, the distribution of powers between the Central Govern- "ment and the local authorities; in this, I think, is comprised the main theory "and constitution of Federal Government; on this depends the principal "working of the new system."

And again:

"The real object which we have in view is to give to the Central Govern- "ment those high functions and almost Sovereign Powers by which general "principles and uniformity of legislation may be secured in those questions "that are of common import to all the provinces, and at the same time to retain "for each province such an ample measure of municipal liberty and self- "government as will allow, and, indeed, compel them to exercise those local "powers which they can exercise with great advantage to the community."

And again:

"In this Bill the division of powers has been mainly effected by a distinct "classification; that classification is four-fold: 1st. Those subjects of legisla- "tion which are attributed to the Central Parliament exclusively; 2nd. Those "which belong to the provincial legislatures exclusively; 3rd. Those which "are the subject of concurrent legislation; and, 4th. A particular subject which "is dealt with exceptionally."

Then, as to the subjects of concurrent jurisdiction, he says:

"There is, as I have said, a concurrent power of legislation to be exercised "by the Central and the Local Parliaments. It extends over three separate "subjects, immigration, agriculture, and public works."

Then, in reply to a question asked by a noble Lord, "Whether by the terms "of arrangement that had been come to, Parliament was precluded from making "any alteration in the terms of the Bill"?

He said that:

"It was, of course, within the competence of Parliament to alter the pro- "visions of the Bill, but he should be glad for the House to understand that

" the Bill partook somewhat of the nature of a Treaty of Union, every single " clause of which had been debated over and over again, and had been submitted " to the closest scrutiny, and, in fact, as each of them represented a compromise " between the different interests involved, nothing could be more fatal to the " Bill than that any of those clauses, which were the subject of compromise, " should be subject to such alteration ; that, of course, there might be alterations " which were not material, and which did not go to the essence of the measure " and he would be quite ready to consider any amendments that might be " proposed in Committee, but that it would be his duty to resist the alteration " of anything which was in the nature of a compromise, and which, if carried, " would be fatal to the measure."

Accordingly the Bill was passed as introduced, without any alteration whatever, as the British North America Act of 1867.

From the above extracts it is apparent that that Act is but the reduction into legislative form of a treaty, after the fullest deliberation previously agreed upon between the provincial statesmen who were the originators and framers of the scheme of confederation contained therein and Her Majesty's Imperial Government, and such being the history of the origin of the scheme and of the treaty of union and of its embodiment in an Act of Parliament, when a question should arise which should create any doubt as to whether a particular subject of legislation comes within any of the items enumerated in Section 92, and so under the exclusive jurisdiction of the provincial legislatures, or within Section 91 and so under the exclusive jurisdiction of the Dominion Parliament, the doubt must be solved by endeavouring to ascertain the intention of the framers of the scheme and the parties to such treaty. From the above extracts it is also apparent that the essential feature of the scheme of confederation was that the legislative jurisdiction conferred upon the central and provincial legislatures respectively should be exclusive upon all subjects placed under the jurisdiction of each, save only the three subjects which were made the subjects of concurrent jurisdiction ; and that such exclusive jurisdiction conferred upon the central legislature, that is to say, the Dominion Parliament, extended over all matters of a *quasi* national and sovereign character and over all matters of common import and general interest, which affect the general interests of the confederacy as a whole, that is to say, over all matters in which the people of the confederacy as a whole may be said to have a common interest ; and that the exclusive jurisdiction of the provincial legislatures was restricted to matters of a merely private, provincial, municipal, and domestic character, all of which matters are comprehended in the subjects enumerated in the several items in Section 92 of the Act, which under the heading, " Exclusive Powers of Provincial Legislatures," declares that :

" In each Province the Legislature may exclusively make laws in relation to " the matters coming within the classes of subjects hereinafter enumerated."

Then follow 16 items, every one of which can with the utmost propriety be said to relate to subjects of a purely local, private, provincial, municipal, and domestic character. But by Section 91, it is declared that :

" It shall be lawful for the Queen, by and with the advice and consent of

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" the Senate and House of Commons, to make laws for the peace, order, and " good government of Canada in relation to all matters not coming within the " classes of subjects by this Act assigned exclusively to the legislatures of the " provinces, and for greater certainty, but not so as to restrict the generality " of the foregoing terms, it is hereby declared that, notwithstanding anything " in this Act, the exclusive legislative authority of the Parliament of Canada " extends to all matters coming within the classes of subjects next hereinafter " enumerated, that is to say."

Then followed 29 items, the second of which is :

" The regulation of trade and commerce."

The section then closes with this provision :

" And any matter coming within any of the classes of subjects enumerated " in this section shall not be deemed to come within the class of matters of a " local or private nature comprised in the enumeration of the classes of subjects " by this Act assigned exclusively to the legislatures of the provinces."

It has been sometimes, and still is by some, suggested that this provision refers grammatically only to item 16 of Section 92, but this is a too critical construction of the Act for what the enactment plainly says is : that any matter coming within any of the classes of subjects enumerated in Section 92 shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act exclusively assigned to the legislatures of the provinces, thus, as I submit, and if I may be permitted the expression, explicitly implying that, as the fact in truth appears to me to be, all the matters exclusively assigned to the provincial legislatures by the enumeration contained in Section 92 were (within the intent of the framers of the scheme of confederation, and so within the meaning of the British North America Act, 1867) of a purely local and private nature ; that is to say, of a purely provincial, municipal, and domestic character as distinguished from matters of common import and general interest to the people of the confederacy as a whole. The true effect of this provision in Section 91 is, plainly as it appears to me, to give expressly to the Dominion Parliament for the purpose of exclusive legislation upon all matters coming within the several subjects enumerated in Section 91 legislative power, if required, over all the subjects enumerated in the 16 items of Section 92, every one of which relates to matters of a purely provincial, municipal, private or domestic character, that is to say, " of a local and private nature," so that legislation by the Parliament upon any of the subjects comprehended within any of the items enumerated in Section 91 may be complete and effectual notwithstanding that for such purpose interference with some or one of the subjects comprehended in the enumeration of subjects in Section 92 should be necessary, such interference by the Dominion Parliament with any of the subjects enumerated in Section 92 shall not be deemed to be an encroachment upon or interference with the legislative powers conferred upon the provincial legislatures.

Now, according to the canons of construction as laid down by this Court in Fredericton *v.* The Queen (*) and by the judicial committee of the Privy

(*) 3 Can. S. C. R., 505.

Council in Russell *v.* The Queen (*) (between which I do not find there is any substantial difference) if the jurisdiction to prohibit absolutely the carrying on of the trades under consideration, or of any trade, whether by retail or wholesale is not comprised in some or one of the items enumerated in Section 92 of the Act the provincial legislatures have no such jurisdiction, but the same is expressly and exclusively vested in the Dominion Parliament; and even though a particular subject of legislation may be capable of being construed to come within the Section 92, reading that section by itself, still if that subject comes within any of the items enumerated in Section 91, it is taken out of the operation of Section 92, which in such case is to be construed as not comprehending such subject.

Now the several questions in the case submitted to us are resolvable into this one, namely: Is jurisdiction to prohibit absolutely the manufacture in any province of the Dominion of Canada, or the importation into the province, or the sale therein either by wholesale or retail, of spirituous, fermented or other intoxicating liquors vested in the Dominion Parliament or in the legislatures of the respective provinces? In Fredericton *v.* The Queen this question directly arose, and the judgment of this Court therein proceeded upon two grounds: First, that the provincial legislature had no jurisdiction over any subject-matter not coming within some or one of the classes of subjects specially enumerated in Section 92 of the Act, and that upon principle and the authority of the judgment of the Supreme Court of the Province of New Brunswick in the Queen *v.* The Justices of King's County (†), which judgment this Court approved of and affirmed, the subject of absolute prohibition of the sale of intoxicating liquors (such being the character and purpose of the Act then under consideration) did not come within any of the classes of subjects particularly enumerated in, and contemplated by, Section 92 as being placed under the jurisdiction of the provincial legislatures; and, secondly, that jurisdiction over such subject, that is to say, absolute prohibition of the trade in intoxicating liquors was expressly and exclusively conferred upon the Dominion Parliament by the 91st Section, item No. 2. In Russell *v.* The Queen, wherein the same question arose as in Fredericton *v.* The Queen, the judicial committee of the Privy Council, while proceeding wholly upon the first of the above grounds, guard themselves from being considered as dissenting from the second ground, upon which this court proceeded in Fredericton *v.* The Queen, by the following language:—

"Their lordships having come to the conclusion that the Act in question "does not fall within any of the classes of subjects assigned exclusively to the "provincial legislature, it becomes unnecessary to discuss the further question "whether its provisions also fall within any of the classes of subjects "enumerated in Section 91. In abstaining from this discussion, 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 held that "the Act, as a general regulation of the traffic in intoxicating liquors through-"out the Dominion, fell within the class of subject 'the regulation of trade and

(*) 7 App. Cas. 829. (†) Pugs, 535.

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" ' commerce ' enumerated in that section, and was on that ground a valid " exercise of the legislative power of the Parliament of Canada."

It has, however, frequently been, and still is contended by some, but in my opinion without any sufficient grounds, that there are passages in some of the judgments of their lordships of the Privy Council, upon the construction of the British North America Act, 1867, which tend to the conclusion that the judgment of this court in Fredericton *v.* The Queen, cannot be sustained upon the second of the above grounds upon which this court proceeded, namely, that the act under consideration there being for the absolute prohibition of the trade in intoxicating liquors (although by adoption of the principle of local option) was within the exclusive jurisdiction of the Dominion Parliament, under Section 91, Item No. 2, of the British North America Act, which enacts that " notwithstanding anything in the Act, the exclusive legislative authority " of the parliament of Canada extends over all matters coming within," among other terms, that of " the regulation of trade and commerce."

It is true that their Lordships of the Privy Council in the Citizens Insurance Company *v.* Parsons* upon a very different subject from that of prohibition of the exercise of the trade in intoxicating liquors threw out merely the suggestion that possibly the expression " the regulation of trade and " commerce " in Item No. 2 of Sec. 91 may have been used in some such sense as the words " regulations of trade " in the Act of Union between England and Scotland†, and as those words in the Acts of State relating to trade and commerce, but in construing expressions used in the British North America Act, 1867, we must never, as I have already observed, lose sight of the fact that those expressions are but the embodiment of the terms and provisions of the treaty prepared by the provincial statesmen assembled at Quebec by authority of Her Majesty the Queen, and concurred in by Her Majesty's Imperial Government, for the purpose of federally uniting the British North America provinces into one Government, and we must always keep prominently present to our minds that the object of the framers of our constitution, in framing its terms and provisions was, as abundantly appears from the above extracted passages from their speeches, to adopt the best features of the constitution of the United States of America, the only federal constitution with which they were familiar, and to which they would naturally look for light as to what they should adopt, and what alter or reject, when engaged in the task of distributing the legislative powers between the Dominion Parliament and the legislatures of the confederated provinces. Contemplating, as they were, the engrafting of what they considered the best features of the constitution of the United States of America upon the British constitution, for the purpose of framing a federal constitution for the union of the British North America provinces into a confederacy under one central government, it is, to my mind, with great deference I say it, altogether inconceivable that the framers of our constitution should have had present to their minds the Act of Anne, or any Act of State of the Imperial Government; neither the one nor the other of these could be expected to throw any light upon the subject in which they were engaged,

* 7 App. Cas. 112.

† 6 Anne c. 11.

namely, the distribution of legislative powers between the Central or Dominion Parliament and the legislatures of the provinces of the proposed confederacy, while, on the contrary, it was quite natural and to be expected that they should have had constantly present to their minds the constitution of the United States of America, the best features of which they desired to adopt, and to alter or reject those which did not seem to them to be desirable to be adopted. We must, therefore, I submit, be excused if we confidently affirm that in making provision for the distribution of legislative powers between the Dominion Parliament and the legislatures of the confederated provinces, and in such distribution making provision that the Dominion Parliament should have exclusive jurisdiction in all matters coming within "the regulation "of trade and commerce" in Item No. 2 of Section 91, neither wes the Act of Union between England and Scotland, nor any Act of State of the Imperial Government relating to trade and commerce, ever present to the minds of the framers of our constitution, but that what in fact was so present was the constitution of the United States of America, the best features in which they were engaged in grafting upon the British constitution for the purpose of forming a new and more perfect constitution for the proposed confederacy of the British North America Provinces; and that what they intended by the particular expression under consideration was to place "fully and unrestrictedly" (to use the language of the late Mr. George Brown, above extracted) unlimited and exclusive jurisdiction in the Dominion Parliament over all matters of trade and commerce in every part of the Dominion, and that what they had in view in so doing was to strengthen the Central Parliament, and to effect thereby an improvement in the constitution of the proposed confederacy over that of the United States of America, the central legislature of which has jurisdiction only over inter-State trade and commerce and that with foreign countries. If the framers of our constitution had contemplated conferring upon the Dominion Parliament only such a limited jurisdiction as that possessed by the Congress of the United States, they would have had no difficulty, and, doubtless, would not have failed in so expressing themselves; on the contrary, the language they have used is of a most unlimited character, and exhibits no intention of having such a limited construction. No argument in favour of such a limited construction can, I submit, be fairly drawn from the fact that jurisdiction is independently given by Items 15, 18, and 19 of Section 91 over banking, bills of exchange, intreest, and the like, which may be said to be matters coming within the classes of subjects coming under the terms "trade "and commerce" for this repetition of powers involved in the enumeration of items appears to have been inserted for greater certainty, and there is, I think, an intention sufficiently manifested on the face of the Act that the enumeration of particulars should not be construed so as to limit and restrict the operation and construction of general terms in which the particulars may be included.

Then it was contended that a passage in the judgment of the Privy Council in Hodge *v.* The Queen * is in favour of the contention that the jurisdiction to declare that the trades of manufacturing, and that of importing, and that of

* 9 App. Cas. 117.

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selling intoxicating liquor, shall be illegal, and shall not be carried on, is vested in the Provincial Legislatures under Section 92. If it be, it must be, under the express terms of the Act exclusively so vested.

Now, the passage relied upon in support of this contention is that wherein their Lordships say, "that the principle established by their judgment in the "Citizens' Insurance Company *v.* Parsons, and Russell *v.* The Queen is that "subjects which in one aspect and for one purpose fall within Section 92 may "in another aspect and for another purpose fall within Section 91." What this passage conveys simply is that a particular subject-matter may have two aspects in which it may be viewed, and that viewed in one of such aspects jurisdiction over it may be exclusively vested in the Provincial Legislatures under Section 92, and that viewed in the other of such aspects, jurisdiction over it so viewed may be exclusively vested in the Dominion Parliament, and what I understand their Lordships by that passage to say is, that for the purpose of determining whether a particular subject, having two aspects in which it may be viewed, comes under Section 91 or Section 92 regard must be had to the aspect in which the particular subject for the time being under consideration is to be viewed, not that a subject which according to the true construction of Section 91 comes within one of the classes of subjects there enumerated, and which is therefore under the exclusive jurisdiction of the Dominion Parliament, by the express terms of this section, can, nevertheless, by force of Section 92, be under the jurisdiction of Provincial Legislatures.

What is the true construction of the term "the regulation of trade and "commerce," as used in Section 91, Item 2 is a matter which of course is fairly open to argument, and is to be determined, in my opinion, for the reasons already given, by ascertaining the intent of the framers of our Constitution, which intent is, in my opinion, as I have above stated; but once it is determined that a particular subject under consideration does come within that term, the jurisdiction over it is vested exclusively in the Dominion Parliament, and being so, cannot be legislated upon by a Provincial Legislature There is no concurrent jurisdiction given to both, save only over the three subjects specially designated in the Act as being subject to concurrent jurisdiction.

The subject which we have now under consideration is the right of absolutely prohibiting the carrying on of the trades of manufacturing, importing and selling spirituous liquors, the right, in fact, of declaring by legislative authority that these trades, or some or one of them, shall not be carried on; that the carrying of them on shall be absolutely unlawful. This subject does not admit of two aspects. Between pronouncing the carrying on of a particular trade to be absolutely unlawful, and prescribing the manner in which, and the persons by whom, that trade, being lawful, shall be carried on, there is a vast difference. Fredericton *v.* The Queen, and Russell *v.* The Queen are cases dealing with the former of such subjects, and Hodge *v.* The Queen and Sulte *v.* Three Rivers (*) are cases dealing with the latter. In Fredericton *v.* The Queen, and Russell *v.* The Queen, the question was as to

* 11 Cas. S. C. R. 25.

jurisdiction in the case of prohibition. In the former of those cases this court held that the Provincial Legislatures had not under Section 92 any jurisdiction to pass the Act then under consideration, the purpose of which was to legislate upon that subject; and that by force of Section 91, Item 2, the Dominion Parliament had expressly exclusive jurisdiction to pass it. In Russell v. The Queen their Lordships of the Judicial Committee of the Privy Council, while expressing no opinion as to the applicability of Section 91, Item 2, held that there was nothing in Section 92, conferring on the Provincial Legislatures jurisdiction to pass the Act in question, the sole purpose of which was in relation to the absolute prohibition of the trade. In Hodge v. The Queen on the other hand they held that the Provincial Legislatures had exclusive jurisdiction over the regulation of the manner in which and the persons by whom the trade, being a lawful one, might be carried on, a subject-matter as different as it is possible to conceive from jurisdiction legislatively to declare the carrying on of the trade to be absolutely unlawful. Here, then, we have an illustration of the application of the language of their Lordships in the passage above extracted from their judgment in Hodge *v.* The Queen, namely, if we regard the traffic in intoxicating liquor in the aspect of total prohibition of the carrying on of the trade, that is to say, eliminating it from the category of lawful trades, in that aspect the jurisdiction is exclusively in the Dominion Parliament; but if we regard it in the aspect of regulating the manner in which and the persons by whom the trade, being a lawful one, may be carried on in a particular province, or a particular locality of a province, that is a subject exclusively within the jurisdiction of the Provincial Legislatures. Between the judgments in these cases there is no contradiction, nor have I been able to see in any of the judgments of their Lordships of the Privy Council anything which can be said to manifest judicial dissent from either of the grounds upon which the judgment of this court in Fredericton *v.* The Queen proceeded. It seems, however, to be a matter of no importance whether the question, as to where is vested jurisdiction over total prohibition of the trade, is rested upon both of the grounds upon which this court proceeded in Fredericton *v.* The Queen, or upon the single ground upon which their Lordships of the Privy Council proceeded in Russell *v.* The Queen. The report of the proceedings in the Privy Council of the case of the Liquor Licence Acts of the Dominion Parliament of 1883 and 1884, which has been laid before us as part of the present case, contains observations of their Lordships recognising the distinction which I confess, to my mind, appears very plain between the right to prohibit the carrying on of a particular trade, and so to destroy it and deprive it of lawful existence and the right to regulate the manner in which and the persons by whom the trade, being a lawfully existing one, shall be carried on.

Sir Montague Smith there in the course of the argument of counsel said :

" The distinction, if it be one, between the Act in Russell *v.* The Queen, " and this Act (the Act of 1883 then under consideration) is that that (in " Russell *v.* The Queen) was a prohibition Act applying to the whole of the

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" Dominion regardless of what had been done and prohibiting the liquor traffic.
" I do not wish to say how it is, but the question is whether this (the Act of
" 1883) is not, whatever terms it may use in the Preamble, really regulating in
" each province the liquor traffic ? "

And again :

" of course you must look at every Act and see what is the scope and object
" and purpose of it. This (the Act of 1883) is not really to prohibit but it is
" to limit."

And again :

" the main object of the Act is not to prevent the liquor traffic but to
" regulate it."

And again :

" to my mind there is a distinction between the two Acts."

that is to say, between the prohibition Act under consideration in Russell *v.* The Queen and the Dominion Liquor License Act of 1883 which was but a regulating Act. The fact that the latter Act applied to the whole Dominion made no difference, for it may, I think, be said to be obvious that the Dominion Parliament never could acquire jurisdiction over a subject-matter placed by Section 92 under the exclusive jurisdiction of the Provincial Legislatures by assuming to legislate upon such subject for the whole Dominion. So neither could a Provincial Legislature acquire jurisdiction over a subject coming within any one of the classes of subjects enumerated in Section 91 by restricting the application of an Act of the Provincial Legislature upon such subject to the limits of the province.

But it is argued that neither in Fredericton *v.* The Queen nor in Russell *v.* The Queen was the Item No. 8 of Section 92 referred to or considered, and that therefore their Lordships' judgment in Russell *v.* The Queen and that of this court in Fredericton *v.* The Queen are open to review upon the question of prohibition now under consideration. From the fact that this item was not relied upon in those cases it may fairly be inferred that it never was considered by the courts or the bar to be applicable. The jurisdiction conferred by that item seems to be, that of establishing and maintaining municipal institutions. When the framers of our constitution were conferring upon the Provincial Legislatures exclusive jurisdiction to make laws in relation to " municipal " institutions in the province," they had no doubt in view municipal institutions such as existed at the time of confederation, but this Item No. 8, Section 92 says nothing as to the powers with which such municipal institutions may be invested ; that seems to have been left to the discretion of the Provincial Legislatures to be exercised within the limits of their own jurisdiction, and would reasonably comprehend within such limits all such powers as were then possessed by such municipalities, and which were essentially necessary to the good working of such institutions, or had always been possessed by all such institutions, as for example the power of issuing licenses to the persons to be engaged

in the traffic in intoxicating liquors, and the power of regulating the manner in which such persons should carry on the trade in shops, saloons, hotels or taverns, which as being matters purely provincial, municipal and domestic character, were subject to jurisdiction over which was intended to be exclusively vested in, the provincial legislatures; and this is what Sulte *v.* Three Rivers decides, and what was intended to be conveyed by the passage from my judgment in that case which was cited by the learned counsel who argued the present case upon behalf of the province of Ontario; but a special power only then recently for the first time conferred upon municipalities in the province of Canada, and which had never been conferred upon municipalities in any of the other provinces could never be said to be a power essentially necessary to the good working of such institutions; such power therefore cannot be held to be comprehended in item eight of that section.

In this subject is involved the particular consideration of the last of the questions submitted to us, namely, whether the 18th section of the Act of the legislature of Ontario, 53 Vict. c. 56, is, or is not, *ultra vires*. The jurisdiction assumed to be exercised by the Ontario legislature in this section is not a jurisdiction which is claimed to be conferred upon provincial legislatures by anything expressed in Section 92 of the British North America Act, but a jurisdiction which is contended to be impliedly vested in the Ontario Legislature, arising from the fact that municipalities in the late province of Canada had at the time of confederation, by virtue of special Acts of the legislature of that province, power to prohibit, by bye-laws to be passed and adopted in the manner prescribed by the special Act, the sale by retail of spirituous liquors within the limits of the municipality passing such bye-laws, a power which was not possessed by municipalities in the province of Nova Scotia, or in that of New Brunswick, and such Acts being repealed, it is contended that the legislature of Ontario has jurisdiction to revive their provisions. That the legislature of the late province of Canada had jurisdiction to pass an Act in prohibition of all traffic in intoxicating liquors, or in any other article of trade may be admitted to be unquestionable, but I apprehend it cannot admit of doubt that unless the provincial legislatures have, all of them, under their new constitution, jurisdiction to pass an Act *de novo* for the purpose of prohibiting absolutely within their respective provinces the sale of intoxicating liquors, the legislature of Ontario has no special jurisdiction to invest municipalities with such a power by passing an Act purporting to revive the provisions of an Act passed by the legislature of the late province of Canada within its jurisdiction, and which conferred such a power upon municipalities of the said late province of Canada. The question therefore involved in the seventh question is precisely the same as that involved in the first and subsequent questions, namely: Have provincial legislatures of the confederacy, under their new constitution, jurisdiction to make laws in prohibition of the trades of manufacturing, of importing or of selling spirituous liquors by wholesale or by retail?

The precise history of the legislation recited in the 18th section of the Ontario Act, 53 Vict. c. 56 and upon which the legislature of the province rest the jurisdiction assumed by them in enacting the provisions of that section is as follows: The legislature of the late province of Canada, by a special Act passed

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in 1864, 27 & 28 Vict. c. 18, conferred power upon the councils of municipalities to pass bye-laws in prohibition of the sale of intoxicating liquors within the limits of the municipality, subject to certain conditions involving the adoption of the principle of what is called local option. In the consolidation of the Statutes of the late Province of Canada the provisions of the said Act 27 & 28 Vict. c. 18 were consolidated in one of the chapters of the said consolidated Statutes as Section 249 Sub-section 9 of "The Consolidated Municipal "Act," viz., 29 & 30 Vict. c. 51. The whole of this Section 249 was expressly repealed by an Act of the Ontario Legislature passed in 1869, 32 Vict. c. 32, but its terms were, either inadvertently or by design, repeated in Sub-section 7 of Section 6 of the latter Act. In 1874 the Legislature of Ontario passed another Act, 37 Vict. c. 32, entituled "An Act to amend and consolidate the "law for the "sale of fermented and spirituous liquors," and thereby the said Act 32 Vict. c. 32, and another Act amending the same, 32 Vict. c. 28, and also an Act, 36 Vict. c. 48, entituled "An Act to amend the Acts respecting tavern and shop "licences" were wholly repealed, and new provisions were enacted, but among such provisions there was nothing of the nature of the provisions which had been in Sub-section 7 of Section 6 of the repealed Act 32 Vict. c. 32, but in lieu thereof provision was made for regulating the issue of licences for the sale of intoxicating liquors in each municipality by an officer to be appointed by the Lieutenant Governor to be called "the issuer of licences."

Now, upon and from and after the passing of this Act, the only authority, if any there was, which municipalities in the Province of Ontario had, or could claim to have, to pass a bye-law in prohibition of the sale of intoxicating liquors was in virtue of the provisions of the above recited Act of the Legislature of the late Province of Canada, 27 & 28 Vict. c. 18, of 1864, and of Section 129 of the British North America Act, 1867, which enacted that:

"Except as otherwise provided by this Act, all laws in force in Canada, "Nova Scotia or New Brunswick at the union, &c., shall continue in Ontario, "Quebec, Nova Scotia or New Brunswick respectively, as if the union had not "been made, subject nevertheless, except with respect to such as are enacted "by, or exist under, Acts of the Parliament of Great Britain, or of the United "Kingdom of Great Britain and Ireland, to be repealed, abolished or altered "by the Parliament of Canada or by the legislatures of the respective provinces, "according to the authority of the Parliament and of the legislatures under this "Act."

It being then only in virtue of this Act, 27 & 28 Vict. c. 18, that municipalities in the Province of Ontario possessed, if they possessed, the power to pass bye-laws in prohibition of the sale of intoxicating liquors, such power must necessarily absolutely cease upon the repeal of that Act. But in 1878 the Dominion Parliament, regarding the prohibition of the sale of intoxicating liquors to be a subject over which exclusive jurisdiction was conferred upon the Parliament, and in exercise of the right reserved to Parliament by said Section 129 of the British North America Act, passed the Canada Temperance Act of 1878, whereby, as is recited in the said 18th section of the Ontario Act, 53 Vict. c. 56, the above Act of 1864, 27 & 28 Vict. c. 18, was absolutely repealed, save as regards localities where the Act had then already been acted upon, and

power is conferred by the Act of 1878 upon all electors in every municipality in every province of the dominion qualified and competent to vote at the election of members of the House of Commons, upon certain conditions, and in adoption of the principle of local option to prohibit the sale of intoxicating liquors in every municipality adopting the provisions of the Act. This Act, as an Act in prohibition, has been held by the Judicial Committee of the Privy Council in England in Russell *v.* The Queen, and by this Court in Fredericton *v.* The Queen, to have been within the jurisdiction of the Dominion Parliament and not to have been within the jurisdiction of a provincial legislature; the object sought to be attained by the said 18th section of the Ontario Statute, 53 Vict. c. 56, would seem to be to re-open the question adjudicated upon in those cases, and mainly upon the suggestion that Item 8 of Section 92 of the British North America Act, was not considered by the Judicial Committee of the Privy Council, or by this Court in those cases. In my opinion, there is nothing in this Item No. 8 of Section 92, or in any part of the British North America Act which calls for or justifies any qualification of the language of their Lordships of the Privy Council as above cited from their judgment in Russell *v.* The Queen; and the principle established by that judgment, is, in my opinion, that jurisdiction over the prohibition of the trade in intoxicating liquors, whether it be in the manufacture thereof, or the importation thereof, or the sale thereof either by wholesale or retail, is not vested in the provincial legislatures, but is exclusively vested in the Dominion Parliament. If the provincial legislatures have jurisdiction to prohibit absolutely the sale of intoxicating liquors, it must, I think, be admitted that they have like jurisdiction over the manufacturing, and also over the importation thereof, nay, more, as the Act gives them no more jurisdiction over the prohibition of the exercise of one trade than of another they would equally have jurisdiction to prohibit the manufacture of tobacco, cigars, &c., the importation of opium, and the manufacture, importation and sale of any other article of trade, and so in fact they would have that sovereign legislative jurisdiction over every trade, and over those general subjects in which the people of the confederacy, as a whole, are interested, and thus the main object which the authors and founders of the confederacy had in view in framing the terms and provisions of our constitution as to the distribution of legislative jurisdiction between the Dominion Parliament and the legislatures of the provinces would be defeated. In addition to the ground upon which their Lordships of the Privy Council proceeded in Russell *v.* The Queen, this Court held, as already observed, in Fredericton *v.* The Queen, that exclusive jurisdiction over the prohibition of the sale of spirituous liquors which was the subject matter of legislation in the Canada Temperance Act of 1878, was a subject placed expressly under the exclusive jurisdiction of the Dominion Parliament by Section 91, Item 2, of the British North America Act. That judgment has never been reversed, nor, in my opinion, shaken, and while it stands unreversed by superior authority, I consider this Court to be bound by it. If ever it should be reversed, it will, in my opinion, be a matter of deep regret, as defeating the plain intent of the framers of our constitution and imperilling the success of the scheme of confederation.

Upon the whole, then, in answer to the several questions submitted to us,

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I am, for the reasons above stated, of the opinion that upon principle—that is to say, upon the true construction of the British North America Act, 1867, apart from all authority– and upon authority, that is to say, upon the authority of the judgment of the Privy Council in Russell *v.* The Queen, apart from Fredericton *v.* The Queen, and upon the authority of the judgment of this Court in Fredericton *v.* The Queen, apart from Russell *v.* The Queen, the several questions submitted to us in this case must be all answered in the negative.

Sedgewick, J

SEDGEWICK J.—A study of Sections 91 and 92 of the British North America Act leads one to the conclusion that the following proposition may be safely adopted as a canon of construction, viz. :—

When a general subject is assigned to one legislature, whether federal or provincial, and a particular subject, forming part or carved out of that general subject, is assigned to the other legislature, the exclusive right of legislation, in respect to the particular subject, is with the latter legislature. For example, Parliament has marriage, but the legislatures have the solemnization of marriage. On that subject they are paramount and supreme. So, too, the legislatures have "property and civil rights," words in themselves as wide almost as the whole field of legislation; but, parcelled out from that wide field, Parliament has a number of particular and specific subjects where it likewise is paramount and supreme. Among them is "the regulation of trade and "commerce." So far Parliament has complete and exclusive jurisdiction as to that. But we have to go farther. We have to turn again to Section 92, and we find that "shop, saloon, tavern, auctioneer, and other licenses," a subject carved out of "trade and commerce" is given to the legislatures. If the principle above enunciated is sound, then Parliament can only regulate the liquor trade or legislate in respect to it, subject to the paramount and controlling right of the local legislature in respect to liquor licenses for revenue purposes. The enumeration and assigning of the particular subject to the one body overrides and controls the other body, although charged with the general subject, and that, too, without reference to the question of subordination or co-ordination between the wo bodies.

Another principle of construction in regard to the British North America Act must be stated, viz., it being in effect a constitutional agreement, or compact, or treaty, between three independent communities or commonwealths, each with its own parliamentary institutions and government, effect must, as far as possible, be given to the intention of these communities when entering into the compact, to the words used as they understood them, and to the objects they had in view when they asked the Imperial Parliament to pass the Act. In other words, it must be viewed from a Canadian standpoint. Although an Imperial Act to interpret it correctly, reference may be had to the phraseology and nomenclature of pre-confederation, Canadian legislation, and jurisprudence, as well as to the history of the union movement and to the condition, sentiment, and surroundings of the Canadian people at the time. In the British North America Act it was in a technical sense only that the

Imperial Parliament spoke; it was there that in a real and substantial sense the Canadian people spoke, and it is to their language, as they understood it, that effect must be given.

Can a local legislature absolutely prohibit the traffic in intoxicating liquors? That is the substantial question before us. The correct solution of the problem is largely affected (although not concluded) by the meaning that is to be given to the words "the regulation of trade and commerce" in Section 91. That these words in their plain and ordinary meaning are wide enough to include the liquor traffic is unquestioned; the making of liquor, its sale, that is a trade or business, the dealing in it, the buying and selling of it for purposes of profit, that is commerce. But was this particular trade, the liquor business, intended to be included in the general words? That is the question, And as I have already suggested, the true answer is to be sought not so much from the rules of statutory construction laid down in the text-books in regard to ordinary enactments, as by reference to provincial statutes and jurisprudence at the time of the union, and to the circumstances under which that union as well as its particular character took shape and form.

It was in 1864 that the Quebec convention was held. Upper and Lower Canada, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland were represented. The Quebec resolutions were passed, and these resolutions having been adopted by the three legislatures of Canada, Nova Scotia and New Brunswick formed the basis of the Union Act of 1867. The union was a federal, not a legislative union. The English-speaking provinces (considering Upper Canada as a province) were in the main in favour of a legislative union; but Lower Canada, properly tenacious of "its language, its institutions. and its laws," secured as they had been by international treaty and Imperial enactment, desired a provincial legislature in order to the perpetuity of these rights, rights which it was thought might be invaded were they to be left to the mercy of a sovereign and untrammelled legislature, the large majority of which would necessarily belong to the English-speaking race. And so the question was, a federal union or none at all. That being decided, the question of distribution of powers arose. To what powers shall the federal Parliament succeed; what powers shall the provincial legislatures retain? The American civil war was just closing, a conflict which, from a legal standpoint had its origin in a dispute as to the constitution of the United States, the question of State rights; that controversy was not to be a ground of strife in the new nation, and so, first and foremost it was agreed that the central Parliament was to have plenary legislative authority, and that the local legislatures should have jurisdiction over such subjects alone as were expressly enumerated, and in terms assigned to them. I have said that the Lower Canadian delegates were determined to maintain their peculiar institutions by means of a local legislature; but they were none the less desirous of giving the central authority all jurisdiction compatible with that determination, including generally those subjects that would be common to the whole Canadian people, irrespective of origin or religion. Now the English criminal law was the law of Lower Canada; it had become part of that law in 1764; and Lower Canada was satisfied with it. It would, therefore, be the common heritage of the new Dominion, and by common consent it was given as a subject of jurisdiction to the central Parliament.

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Then, too, the Lower Canadian Legislature and people had long previously adopted of their own free will the general principles of English commercial law. As early as 25 Geo. III., they had made the laws of England the rules of evidence in all commercial matters. They had adopted practically without variation the English law respecting bills of exchange and promissory notes, partnerships, the limitations of actions in commercial cases and even the statute of frauds. In 1864, they had accepted a general law of bankruptcy, limited, however, to traders only, and had previously adopted the practice of the English courts in the trial of commercial cases. Commercial law was not in that class of "institutions and laws," which they regarded as peculiarly their own, and they were willing and anxious, seeing how the future progress and prosperity of the country would largely depend upon its trade and commerce, upon the growth, manufacture, and interchange of commodities throughout the whole Dominion, irrespective of and untrammelled by provincial boundaries or provincial enactments, that the federal Parliament should alone legislate in respect thereto, so that as there would be a common criminal law throughout Canada there should be a common commercial law as well. And that was in fact the common aim and object of all the provinces. But how give expression to this aim? In making that clear what form of words should be used? A question not difficult of solution.

Five years previously the statute law of the then Province of Canada had been revised, consolidated, and classified in three volumes, one volume containing the statute law common to the united province, the others, the statute law applicable exclusively to Upper and Lower Canada respectively. This revision and classification, the work of the most eminent jurists in the province, became by Act of Parliament the statute law of the country, the classification having the same legal force as the statutes classified, just as if there had been a substantive enactment to the effect that thereafter in Canadian legislation the specification of a general subject in the general classification should include all the specific and particular subjects enumerated under that specification.

Reading this classification in the three volumes referred to, and comparing it with Sections 91 and 92 indubitable evidence will be found that the compilers of the Quebec resolutions were largely aided by the work of 1859, in the selection of words by which the distribution of powers was described. The language of a large proportion of the 45 enumerated subjects is substantially identical with the language of the classification in the Canadian consolidation.

Now, let us examine this classification. In the Consolidated Statutes of Canada the whole subject-matter of legislation is divided into 11 titles of which "trade and commerce" is the 4th. Under this title are included, among other subjects, navigation, inspection laws in relation to lumber, flour, beef, ashes, fish, leather, hops, &c., weights and measures, banks, promissory notes and bills of exchange, interest, agents, limited partnerships, and pawnbrokers. In the Consolidated Statutes of Upper Canada under "trade and commerce" are included, among other subjects, commercial law, written promises, chattel, mortgages and trading and other companies. And in the Consolidated Statutes of Lower Canada under the same designation of "Trade and Commerce" are

included the inspection of butter, the measurement and weight of coals, hay and straw, partnerships, the limitation of actions in commercial cases, and the Statute of Frauds.

Let us turn now to Nova Scotia; a few weeks before the convention in Quebec, the Nova Scotia legislature had passed the Revised Statutes of Nova Scotia (third series) divided as in the case of Canada into parts, titles and chapters. One of the titles is "of the regulation of trade in certain cases," and under it are among others, the following subjects:—Partnerships, factors and agents, bills of exchange, currency, mills and millers, regulation and inspection of merchandise, and weights and measures. This classification was practically the same in the first revision in 1851, so that for at least 13 years the expression "regulation of trade" had no uncertain meaning.

In the Revised Statutes of New Brunswick of 1854 there was practically the same classification. Under "the regulation of trade in certain cases" were included statutes relating to lime, bark, flour, weights and measures, and lumber, the Interpretation Act (cap. 161 sect. 35) enacting that parts, titles, &c., should be deemed as parts of the statutes.

It will be observed that in no case is reference made to the liquor traffic under "trade and commerce" or "the regulation of trade." In the Canadian consolidation it is placed under "Revenue and Finance" (sub-head), "Provincial duty on tavern keepers." In the Upper Canada consolidation it is referred to in the Municipal Act (cap. 54,1866), and in two ways; first under the head of "shop and tavern licences," and secondly under the head of "prohibited sale of spirituous liquors." In the Lower Canada consolidation it is referred to under "Fiscal matters." In the Nova Scotia revision under "the public revenue," the Revised Statutes of New Brunswick containing no chapter regulating the liquor traffic.

Now, we have here, I think, a clear indication of what at the time of confederation the Canadian people and legislatures understood to be included within the words "Trade and Commerce." They included, unquestionably, the carrying on of particular trades or businesses, and I think commercial law generally. The actual legislation under "trade and commerce" in regard to certain staple articles of commerce, such as bread, fish, coals, &c., indicates that any other legislation in the same line respecting any other article of commerce would come under the same description, so I take it that the regulation of the liquor traffic, whether by licensing it or prohibiting it altogether, has to do with "trade and commerce."

Such being the state of the existing legislation and the view that the different legislatures had of the all-inclusiveness of the phrases "trade and "commerce" and "regulation of trade," what better collocation of words could be used for the purpose of making it clear that Parliament was to have exclusive jurisdiction in all matters relating to trade and relating to commerce, including the importation, manufacture, and sale of all kinds of commodities, than that combination of the two phrases, the one from the seaboard, the other from the inland provinces, to be found in Section 91, "the regulation of trade "and commerce"? And the words having that meaning, having been placed there for that object, are we not bound to give them the intended effect?

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I am not attempting to even criticise the correctness of the conclusion to which their Lordships of the Privy Council came in the Parsons case. I may be permitted, however, with all deference, to suggest that some of the considerations to which I have referred were not presented to their Lordships when the effect of the words under review was being discussed.* All I suggest is that, inasmuch as the British North America Act was an Act materially affecting, modifying, repealing pre-existing Canadian statute law, and revolutionising the constitution of the component provinces, in interpreting that Act reference may and must be had to provincial statute law, rather than to Imperial statute law, and that where, as in the present case, the constitutional Act uses a phrase which for years had had a well-defined meaning in Canadian legislation; that is the meaning which should be given to it when used in that Act.

And I have this further observation to make. The judgment referred to contains the following:—"If the words (trade and commerce) had been "intended to have the full scope of which, in their literal meaning, they are "susceptible, the specific mention of several of the other classes of subjects "enumerated in Section 91 would have been unnecessary; as 15 banking, 17 "weights and measures, 18 bills of exchange and promissory notes, 19 interest, "and even 21, bankruptcy and insolvency."

Now, circumstances existing in Canada, the then state of jurisprudence, for example, rendered it wise, if not absolutely necessary, that the classes just referred to should be specifically mentioned. The provinces had "property "and civil rights" given them. In one phase or another, almost every enactment in some way affects property and civil rights; the *raison d'être* of constituted society, the *motif* of the social contract, is the protection of property and civil rights. Criminal law, fiscal law, commercial law, in fact all law at some point, or in some way, touches or affects property and civil rights. Leave out several of the subjects mentioned in 92, and there would have been a perpetual conflict between "property and civil rights" on the one hand, and many of the enumerated subjects of 91, on the other; so wisdom suggested *ex abundanti cautelâ* what was done.

Besides, in Lower Canada, there had been a long course of jurisprudence as to what constituted "a commercial matter." Some business transactions were held to be commercial matters, others not. In a dispute between an officer of the British Army and his wine merchant, a promissory note given for a wine bill was held to be a non-commercial matter. So, I suppose, interest on such a note would be held to be non-commercial. Nor would the case be altered if the note were discounted at a bank. All these questions, and difficult and important many of them have been, were wisely ended, so far as the constitution was concerned, when banking, bills and notes and interest were expressly given to the Dominion. So, too, with weights and measures the duty of making bye-laws, or enforcing statutes in respect to weights and measures was in some cities and provinces under municipal control. The question would be, is this subject a "matter of trade and commerce," or a municipal matter? Its insertion in

* P. 277, vol. 1, Cartwright; 7 App. Cas. at p. 112.

91 settled it. And, lastly, as to bankruptcy and insolvency. This subject was wisely inserted in 91 in view of the fact already pointed out, that in Lower Canada bankruptcy legislation applied to traders only (the phrase "insolvent" being limited in its use to non-traders); and in view, too, of the further fact that in the jurisprudence of the United States, where the Constitution gave "the "matter of bankruptcies" to Congress, it was held that "insolvency" belonged to the State Legislatures. The insertion of both in 91, settled for Canada that particular question.

I have ventured to make these observations merely with the view of inviting further consideration and investigation as to the proper functions and jurisdiction of the federal authorities in regard to "trade and commerce," and to the line of delimitation between that subject and "property and civil rights."

Assuming, however, that the prohibition of the liquor traffic is a matter of "trade and commerce," the question is not ended. "Property and civil rights" is controlled by the "regulation of trade and commerce," but is there anything in Section 92 which controls or modifies "trade and commerce"? In my view there is much. First, there is "direct taxation within the province in order to "the raising of a revenue for provincial purposes." That involves the right of taxing, even unto death, institutions incorporated under Dominion law (as was decided by the Privy Council in the Lambe case,*) such institutions obtaining corporate rights in all cases excepting banks, not because of any express powers given to Parliament, but either under "trade and commerce" or under its general authority to legislate in respect to "peace, order and good government," it being clear that the Legislatures may incorporate such companies as are formed for provincial objects only (Article 11).

Secondly, there is (Article 9) "Shop, saloon, tavern, auctioneer, and other "licenses in order to the raising of a revenue for provincial, local, or municipal "purposes."

The effect of this article is practically to give the regulation of the liquor traffic to the Legislatures.

So long as such regulating legislation has as its main object the raising of revenue, it may contain all possible safeguards and restrictions as ancillary to the main object, the effect of which may be to repress drunkenness, and promote peace, order, and good government generally. If, however, a fair examination of an Act purporting to be of this kind leads inevitably to the conclusion that the object of the Legislature in passing it was not the raising of revenue and the licensing and regulating of the traffic for that purpose, but the suppression of the traffic altogether; in other words, that it was intended to be not regulative but prohibitory, such an Act will find no support for its validity from this article. (I will presently inquire whether that support can be found elsewhere.) And, *à fortiori*, the Legislatures cannot under this article pass an Act of absolute prohibition, for that would be in direct conflict with the expressed object for which the power was solely given. The destruction of the traffic would entail the destruction of the revenue, not the raising of it.

Except for the decision of the Judicial Committee in Russell *v.* The Queen†

* Bank of Toronto *v.* Lambe, 12 App. Cases 575. † 7 App. Cases 829.

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(the Scott Act case), much might be said to favour the view that the right of the Legislatures to regulate the liquor traffic for revenue purposes was unlimited, and could not be taken away by virtue of anything in 91, whether "peace, "order and good government," or "trade and commerce," or even "the cri- "minal law;" that the Central Parliament could not, by virtue of any of its powers, destroy a special power given to the local Legislatures for a special and particular purpose, and that the Scott Act itself was an infringement of the provincial rights.

It might be urged that neither body could of itself, by virtue of its given powers, pass a prohibitory law, but that independent legislation on the part of both would be necessary, the Dominion passing an Act prohibiting the traffic in so far only as it had a right to prohibit it, but reserving to the provinces the fullest and freest right under Article 9 to raise revenue from it, and the provinces thereupon passing legislation abrogating the license system, and surrendering their right to revenue from it.

(The theory that if, under our Constitution, one body cannot pass an Act upon any given subject the other necessarily can is a fallacy. A subject may be so composite in its character, may be formed of one or more elements assigned to the one Legislature and of one or more elements assigned to the other, that neither one can effectually deal with the combination. For example, neither Legislature could pass an Act abolishing direct taxation for municipal purposes and authorising the raising of revenue by means of *octroi*, or imposts upon all goods coming in through the city gates, or an Act authorising a province to raise and collect its revenue by indirect taxation. This disability is a necessary incident of the federal system, and if it is to be got rid of, that can only be effected by abolishing the system itself.

The view which has pressed itself upon my mind is that prohibition may be a question of that character, but as it was not so held in Russell *v.* The Queen, and as it does not substantially affect the result of this reference, I take it for granted that the fallacy to which I have referred is not an element in the present case.)

The question now arises: Is the general right of the Federal Parliament to legislate in regard to the liquor traffic, further restrained by Article 8 of Section 92, "municipal institutions in the province"? In other words, can a provincial Legislature, by virtue of that article, absolutely prohibit the traffic?

At the time of the Union the province of Canada had given to municipalities in both sections the right of passing bye-laws prohibiting the sale of liquor. In that province there was also then in force an Act known as the "Dunkin Act," an enactment similar in scope and object to the present Canada Temperance Act, the principle of local option being allowed to operate to its fullest extent. But neither in Nova Scotia nor New Brunswick (as I understand the facts) did local option prevail. It is true that an applicant for license had to comply with certain conditions, one of them, in Nova Scotia, being that his application had to be accompanied by a petition from a fixed proportion of the ratepayers of the locality. To that extent only did local option (if that is local option) exist.

Such was then the state of the law, but some historical facts may also be mentioned as having relation to the matter. The question of prohibition had then for years been a vital political question in the Maritime Provinces; the public mind had been in a perpetual state of turmoil about it, the ablest statesmen of the time had been in public antagonism over it; elections had been won and lost upon it. For two successive years prohibitory legislation had been introduced in the Nova Scotia Legislature, and a Bill of that character was on one occasion successfully carried through the Lower House. In New Brunswick a prohibitory law had actually passed and remained in operation for a year. It was then repealed with a reversion to license law. Such then was the attitude of the public mind in two of the three confederating provinces at the time of the Union.

What meaning then is to be given to "municipal institutions in the "province"? Three answers may be advanced. First, it may mean that a Legislature has power to divide its territory into defined areas, constitute the inhabitants a municipal corporation, or community, give to the governing bodies of officers of such corporations or communities all such powers as are inherently incident to or essentially necessary for their existence, growth and development, and confer upon them as well all such authority and jurisdiction as it may lawfully do under any of the enumerated articles of Section 92. That is the narrowest view. Or, secondly, it may mean that a Legislature may also confer upon municipalities, in addition to these powers, all those powers that were possessed or enjoyed in common by the municipalities or municipal communities of all the confederating provinces at the time of the Union, the *jus gentium* of Canadian municipal law; or, finally, it may mean that a Legislature may confer upon municipalities all those powers which in any province, or in any place in a province, any municipality at the time of the union, as a matter of fact, possessed by virtue of legislative or other authority.

And the argument in the present case is, that because at the time of the Union one of the three provinces had given the right of local prohibition to municipalities it must be assumed that the framers of the Act and all the provincial Legislatures as well as the Imperial Parliament itself, must have intended by the use of the phrase "municipal institutions" to give to the local Legislatures the right to pass prohibitory legislation, and that, too, without reference to municipalities at all. I dissent from this wide proposition. The first view, in my judgment, is the proper one, a view which gives scope for liberal interpretation as to what may constitute the essence of the municipal system, and give due effect in that direction to the municipal *jus gentium* of the three old provinces; and I entertain the strongest doubt if it ever was contemplated by the use of the words "municipal institutions" to make any particular reference to the liquor traffic at all. The following considerations point, I think, in that direction.

(*a*) The question of the liquor traffic was dealt with, and I think disposed of, by Article 9 in relation to licences. In the Quebec resolutions and in the proceedings of the three assenting Legislatures, the article read "Shop, saloon, "tavern, auctioneer and other licences" only; the limitation as to revenue was

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an addition made in London, with the assent of the colonial delegates there, just before the Act became law.* The article as first framed would have had a much broader application than it has in its present shape, and possibly might have given prohibitory powers to the legislatures, and I can only suggest that the limitation was imposed for the very purpose of clearly limiting the provinces to regulation only. Besides, if the right to prohibit as well as to regulate is involved in "municipal institutions," if that phrase includes all powers previously given municipalities, including the issuing of all the licences referred to in Article 9, why particularly specify these licences in a separate article? I have always understood it to be a rule of statutory construction that where special provisions are made in regard to a particular matter and there are in the same statute general provisions broad enough apparently to cover the same matter, the special provisions govern, not the general; the particular intent prevails.†

(*b*) The Collocation of Articles 8 and 9, and the sources from which the phraseology was probably taken point to the same conclusion; the article relating to licences follows the one relating to municipal institutions as if the former were of the less moment. In the Municipal Act of Upper Canada (1866), at page 583, there is a sub-title "Shop and tavern licences," and in the same section and on the same page there is another sub-title "Prohibited sale "of spirituous liquors." May it not be properly suggested that this particular subject was designedly omitted?

(*c*) Considering that the question of prohibition was a vital social and political question (and almost as much so in 1864 as to-day), considering especially the history of the question in the Lower Provinces; I can scarcely bring myself to believe that it was omitted from 92 by reason of "municipal "institutions" containing it. If it had been intended that the provinces should have it, it would have been expressly enumerated. Regulation by means of licence was. Why omit prohibition?

(*d*) The jurisprudence on the question also throws light. In Keefe *v.* M'Lennan decided in Nova Scotia in 1876, nine years after confederation, a most able judgment was delivered by the learned equity judge upon the whole question, and neither in the argument nor in the judgment was it even suggested that the power claimed came under "municipal institutions." The same observation applied to Fredericton *v.* The Queen, in the Supreme Court New Brunswick (‡).

Why this long silence? The words "municipal institutions" were there in Section 92, as prominent then as now, but no one in the Maritime Provinces ever dreamed that "prohibition" was concealed or wrapped up within them. Their Lordships of the Privy Council seemed of like opinion in Russell *v.* The Queen decided in 1882 even although at that time Slavin *v.* Orillia (§) had been decided in the Queen's Bench of Ontario, and the question was at the argument expressly raised as stated by the present Lord Chancellor at the argument of the M'Carthy case. I take the reason to be that the

* *See* "Pope's Life of Sir John Macdonald," Appendix vol.

† Potter's "Dwarris," 272-3: and *see* London Assn. of Ship Owners *v.* London and India Docks Joint Committee, Lord Justice Lindley, 2 Rep. S. R., 1892, 3 ch. p. 247.

‡ 3 P. & B. 139.

§ 36 U.C.Q.B. 159.

phrase " municipal institutions," had no such broad meaning as is now contended for.

(*e*) But there are more weighty considerations than these. Prior to the Union powers of many diverse kinds and varieties were from time to time given to municipalities. The Legislatures conferring them were then supreme. There was then no possible question of jurisdiction or right of legislation; their authority was as unfettered as that of the Imperial Parliament itself. And so it happened that many municipal councils had authority to deal with matters since transferred to the Central Parliament, for example, weights and measures, the inspection of staple articles of commerce, the regulation and control of navigable rivers, and in the case of St. John, N.B., and of the whole of Upper Canada, of public harbours. The preparation of the electoral lists was for the most part with them. In some instances they had authority to deal with the criminal law, with the violation of the dead and cruelty to animals; and so in many other cases they possessed powers in respect to subjects now transferred to Parliament.

When the change came and the field of legislation was parcelled out, one portion to the Dominion and the other to the provinces, the municipalities retained all their powers, but the Local Legislatures did not. If before the Union they had given a municipal council power to regulate a harbour, or to make a bye-law respecting weights and measures, they lost the power of taking it away by virtue of the Union Act, the right being transferred to Parliament alone. There can be no doubt about this; the possession by a municipality of a certain power at the time of the Union affords no guide in the inquiry as to which Legislature may subsequently deal with it. The only test is: Is the power referred to within the subjects of 91 or of 92? Regulations made by Dominion law as well as by local law must be enforced by some sort of machinery. Parliament, I think, may use existing municipal machinery for this purpose; may in respect to those subjects committed to it, such, *e.g.*, as weights and measures, the fisheries inspection, navigation, &c., give to municipal councils power to make bye-laws. But, however this may be it is out of the question, it is absolutely futile to argue that because before confederation the old Legislatures had given power to the municipalities to make regulations in respect to certain subjects, they still have that power, although with their consent these powers were by the Constitutional Act, in so many words, taken from them and given exclusively to Parliament. It follows then that if prohibition is not an essentially component part of the subject matter described by the phrase " municipal institutions," and is " a regulation of trade and commerce," it is a matter for Parliament alone to deal with.

(*f*) But it is argued that what is called " the police power " is possessed by the provinces under " municipal institutions," and that the right in question is a mere incident of the " police power." Now, if by " police power " is meant the right or duty of maintaining peace and order and of seeing that law, all law, whether of Imperial, Federal, or local origin, is enforced and obeyed, then I

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agree that that power is wholly with the provinces. But it is with them, however, not because it specially belongs to "municipal institutions," but because they are charged with the "administration of justice." The Legislatures may delegate this duty to municipal functionaries, but the mode of administration is purely a matter of provincial concern.

If, however, that wide meaning is given to "the police power" which the jurisprudence of the United States has given to it, the power of limiting or curtailing without compensation the natural or acquired rights of the individual for the purpose of promoting the public benefit the power, for instance, which enables a State Legislature to regulate the operation and tolls of a grain elevator in Chicago, or to compel a company to use interlocking switches upon its line of railway—then I say the provinces do not exclusively possess it. It is the common possession of both, to be exercised by both in their respective domains for the common weal.

(*g*) The cases decided in the Privy Council, in my view, practically conclude the question. Russell *v.* The Queen decided that the Canada Temperance Act, a prohibitory Act, was such an Act as the Dominion Parliament might properly pass. It has been put forward, I have already suggested, that provision should have been made for the preservation of the provincial right to raise a revenue by means of liquor licenses, but that judgment is conclusive as it decides in so many words that the Act in question "does not fall within any of the subjects assigned exclusively to the provincial legislatures."

The judgment of the Privy Council on the McCarthy Act was inevitable. That Act unquestionably was an invasion of provincial rights. Its provisions were regulative only. It purported to legislate in respect to liquor licenses and the raising of revenue therefrom, as well as to municipal regulations theretofore prescribed under provincial legislation, its practical effect, if valid, being to make invalid all local statutes then in force having reference to the liquor traffic. It purported to create the machinery, to prescribe the method by which the local authorities might raise a revenue from liquor licenses, a right unquestionably the prerogative of the provincial legislatures, and it therefore fell, destroyed by its own inherent and manifest illegality.

In the Hodge case (*), the question there being:—Was the Ontario Provincial Act regulating the traffic *intra vires* of that Legislature? The decision of the Privy Council was that it was *intra vires*. When the McCarthy Act came up, a Dominion Act also purporting to regulate the traffic, the Privy Council, as a necessary sequence, held that it was *ultra vires* of the Dominion Parliament. It is true their Lordships in the Hodge case intimated that the Ontario License Act came within articles 8, 15, and 16 of section 92, as doubtless many of its provisions in one way or another did, but I do not assume, because article 9 was omitted, that it was intended to be laid down that that article had no relation to the subject of legislation. Many of the provisions of the Act were municipal in their character, and therefore came under 8; were penal in their character, and therefore under 15; merely local, and therefore under 16. But the whole Act was an Act regulating liquor and other licenses

* 9 App. Cas. 117.

with a view of raising a revenue, and therefore under 9 as well. And there, up to the present time, so far as our ultimate appellate tribunal is concerned, and so far as the liquor traffic is concerned, the question rests.

Now, having regard to these decisions of the final appellate tribunal, I cannot help asking myself this question: Supposing the Ontario Legislature passes an Act absolutely prohibiting the sale of intoxicating liquors in the province, whether by retail or wholesale for the present purpose makes no difference, but making no exception as in the Canada Temperance Act in favour of liquors sold for sacramental, chemical, or medical purposes, and that the Canada Temperance Act is in force, say, in the city of Ottawa, and suppose that a lawful sale for such purpose is made; in that case we would have Parliament saying the sale is legal; the Ontario Legislature saying it is not. Which is the valid legislation? There can be but one answer to this question.

Whether the recent decision of the Privy Council in The Attorney General of Ontario *v.* The Attorney General of Canada (*) has a bearing upon the present case may be questioned. It was there decided that the Ontario Legislature having, under "property and civil rights," enacted certain provisions as to the legal consequences of a general assignment for the benefit of creditors, the same provisions that in a Federal bankruptcy law as ancillary thereto might constitutionally be enacted by the Federal Parliament, was within its constitutional right, but only because the Federal Parliament had not taken possession of the field by dealing with the subject. Now, admitting that under "municipal institutions," or "the police power," or "property and civil rights," a province may prohibit the traffic, can it now do so in view of the Canada Temperance Act?

The Federal Parliament has already seized itself of jurisdiction. It has passed the Scott Act. It has prescribed the method by which in Canada prohibition may be secured; and is not any local enactment purporting to change that method or otherwise secure the desired end for the time being inoperative, overridden by the expression of the controlling legislative will?

In my view the provincial legislatures do not possess the right to prohibit the liquor traffic.

Referring now to the specific questions set out in the reference, I have but few observations to make. I cannot in the absence of a specific enactment on the subject recognise any distinction, from a constitutional point of view, between the selling of liquor and its manufacture or importation. If it is admitted that a provincial legislature under "municipal institutions" has power to absolutely prohibit the selling of liquor, it must have incidentally the right of prohibiting the having of it, and as incidental to that right the right as well of making or importing it.

Neither can I, in the absence of a specific enactment on the subject, recognise any constitutional distinction between sale by wholesale and sale by retail notwithstanding the case of Slavin *v.* Orillia; that, apparently, was subsequently conceded with the full concurrence and approval of the Privy Council in "the Dominion Liquor License Act" case (the case on the McCarthy Act).

* 1894 App. Cas. 189.

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In the light of which particular provincial candle are we to investigate the question? In Upper Canada a sale of liquor to the extent of five gallons, or one dozen bottles, was considered a wholesale transaction, the question as to the origin of the package being of vital moment but the capacity of each bottle immaterial. In Lower Canada there was no question as to "original packages," but it was doubtless the case that a sale of three gallons or upwards was "wholesale," the character of a sale between three gallons and three half-pints being left doubtful. In Nova Scotia the line was apparently drawn at 10 gallons, but inasmuch as "shop" licenses could not sell in quantities less than one gallon, and as the distinction between "wholesale" and "retail" did not there receive express statutory recognition, it is left an open question whether the constitutional line between wholesale and retail was at one gallon or 10. In New Brunswick the minimum amount that a wholesale licensee might sell was one pint. Now, in view of this diverse legislation in the several provinces—the five gallons of Ontario, the three gallons of Quebec, the 10 gallons of Nova Scotia, and the pint of New Brunswick—how can this Court arbitrarily define the line or fix the limit between a wholesale and a retail transaction? How can we in the exercise of judicial office determine the delimitating boundary? The Constitutional Act in my view imposes on us no such duty. It does not give colour even to the idea that the right of legislation in either body is to be determined by such questions as quantity or quality, and in my view no such distinction exists.

Neither in my view is there any distinction between those places in Canada where the Canada Temperance Act has been put in force as the phrase is and those places where it has not. The whole Act is an Act applicable to all Canada. Certain cities or municipalities may take advantage of its provisions to secure the kind of prohibition therein contemplated, but it is a law providing for prohibition everywhere. To admit the right of a Legislature to enact a law for the same purpose applicable only to localities that have failed to place themselves under Canadian prohibition is to make the constitutional authority of a Legislature dependent on the whim or fancy for the time being of the public sentiment, a principle in support of which I can find neither authority nor reason. For the reasons stated, I think the seventh question must be answered in the negative, and in my judgment an affirmative answer can be given to none.

J. King.

KING, J.—Upon this continent there are two methods of dealing with the liquor traffic, viz., by license and by prohibition. The latter may be general, or exercised through what is called local option. The licensing system is one of regulation, with only so much of suppression as is incidental to regulation. Prohibition has suppression as its primary and distinct object. No one is likely to confuse the two things.

The licensing system is exclusively within provincial powers. All that is fairly incident to its effectual working goes with it as a branch of local police power. In Hodge *v.* The Queen,* their Lordships, after summarising the clauses of the Ontario License Act then in question, say of them:—

* 9 App. Cas. 117.

" They 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 laws passed " by the local Parliaments. Their Lordships consider that the powers intended " to be conferred by the Act in question, when properly understood, are to make " regulations in the nature of police or municipal regulations of a merely local " character for the good government of taverns, &c., licensed for the sale of " liquors by retail, and such as are calculated to preserve in the municipality " peace and public decency, and to repress drunkenness, and disorderly and " riotous conduct. 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 legisla- " tion in the Ontario Act of 1877, ss. 4 and 5, seem to come within the heads of " Nos. 8, 15, and 16 of Section 92 of the British North America Statute 1867."

The Dominion Parliament having in 1883 passed a general licensing Act applicable to the entire country, this, with an amending Act of 1884, was held *ultra vires* upon a reference of the subject to the Judicial Committee of the Privy Council.

Then, with regard to prohibition, the Canada Temperance Act (*) is a local Option Prohibitory Act. It gives to each county and city throughout the country (or electoral division in Manitoba) the right of determining, by a vote of the Parliamentary electors therein, whether or not the prohibitory clauses of the Act shall be adopted. These clauses prohibit (with some exceptions not material to be now stated) the sale of intoxicating liquors entirely. When locally adopted they continue in operation for three years, and thereafter until withdrawn upon like vote. On the other hand, a vote adverse to local adoption bars the subject for a like period. In City of Fredericton *v.* The Queen (†) the Act was held valid, chiefly as relating to the subject of trade and commerce. In Russell *v.* The Queen (‡), it was sustained on other grounds. Their Lordships, approaching the subject from the side of provincial powers, held that the provisions of the Act did not fall within any of the classes of subjects assigned exclusively to the provincial legislatures. It was therefore, in their opinion, at least within the general, unenumerated, and residual powers of the general parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures.

" It was not doubted," say their Lordships in Hodge *v.* The Queen, referring to their decision in Russell *v.* The Queen, " that the Dominion Parliament had " such authority under Sec. 91 unless the subject fell within some one or more " of the classes of subjects which by Sec. 92 were assigned exclusively to the " legislatures of the provinces."

Referring to the grounds of decision in City of Fredericton *v.* The Queen, their Lordships (who had shortly before in Citizens Ins. Co. *v.* Parsons (§) referred to the words " trade and commerce " in a way that is sometimes sought

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* R. S. C. c. 106. † 3 Can. S. C. R. 505. ‡ 7 App. Cas. 829. § 7 App. Cas. 96.

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to be put in opposition to the views of this court in City of Fredericton *v.* The Queen), say: "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."

In treating of the exclusive powers of the provincial legislatures, Clause 8 of Sec. 92 respecting municipal institutions was not in terms referred to in Russell *v.* The Queen, and this fact has sometimes been made use of in the way of criticism of that case. Indeed, in the argument of the Dominion License Act, one of their Lordships expressed the opinion that Clause 8 of Sec. 92 had not been argued in Russell *v.* The Queen, but the counsel then arguing (the present Lord Chancellor) stated that it appeared from a shorthand note of the argument that the point had been distinctly urged. When City of Fredericton *v.* The Queen (which is known to be substantially the same case) was before this court the point was argued. Mr. Lash, Q.C., one of the counsel for the Act, thus alludes to the argument as adduced by the other side (*): "It is also contended "that this law, having for its object the suppression of drunkenness, is a police "regulation, and so within the powers of municipalities," etc. In Reg. *v.* Justices of Kings (†) Chief Justice Ritchie had previously dealt with the like contention, and in City of Fredericton *v.* The Queen adhered to that decision. To that case I beg to refer.

But what is more pertinent is the fact that, after Clause 8 of Sec. 92 had been fully considered and given effect to in Hodge *v.* The Queen, their Lordships, as though it might be thought to make a difference with Russell *v.* The Queen, took occasion to re-affirm that decision: "We do not intend to vary or depart from the reasons expressed for our judgment in that case."

Now it is important to note that the substantial thing effected by the Canada Temperance Act is the suppression of the liquor trade in the municipalities severally by a separate vote of each. What is effected is local prohibition in all its local aspects. It could not have been really meant by their Lordships that this was outside of the classes of subjects by Section 92, assigned to the provincial legislatures, simply by reason of the Act having operation as a local option Act throughout Canada, while a provincial Act is necessarily limited to the province. That would indeed have been a short road to a conclusion, but it would have confused the boundaries of every subject of legislation, besides rendering unnecessary the particular provisions of the British North America Act, s. 95, respecting concurrent legislation on certain specified subjects. This was recognised in the decision upon the Dominion License Act, where it was held that where a subject, such as the licensing system, is within a class of subjects assigned exclusively to the provinces, the Dominion does not, by legislative provisions respecting it applicable to the entire Dominion, draw it at all within their proper sphere of legislation.

But it is argued that prohibition may in one aspect and for one purpose fall within Section 91, and for another purpose, and in another aspect, fall within Section 92. And inasmuch as it is not possible by general words to enter into the complexities of transactions and distinguish entirely one subject

* 3 Can. S. C. R. 510.

† 2 Pugs. 535.

from another in all its relations, the cases clearly establish that legislative provisions may be within one or other of these sections, according as, in one aspect or another, they may be incidental to the effectual exercise of the defined powers of parliament or legislature. In the effectual exercise of an enumerated power it may be reasonably necessary to deal with a matter which, apart from its connection with such subject, would appear to fall within a class of subjects within the exclusive authority of the other legislature, and in such case there is the ancillary power of dealing with such subject for such purpose, as explained and illustrated in Attorney-General of Ontario *v.* Attorney-General of Canada.* In the application of this principle, the Dominion legislation overrides where the same subject is dealt with through ancillary powers; and, pending the existence of Dominion legislation, the provincial legislation, if previously passed, is in abeyance. If subsequently passed, it is *ultra vires*. In all such cases regard is to be had to the primary purpose and object of the legislation, and (except in the few cases where concurrent legislation is authorised, of which this is not one), the primary object is to be attained through one of the legislative authorities, and not indifferently through either.

Now, prohibitory acts are very single in their aim. Those who favour them may be influenced by variant motives, although probably these vary but little; but the direct, well understood, and plain purpose is the suppression of the liquor trade. This is accustomed to be effected, not incidentally in the effectual carrying out of some larger project of legislation, or as ancillary to something else, but as a principal political object in itself.

If this power exists in the provinces, it must be found either in the enumerations of Section 92, or in what is reasonably and practically necessary for the efficient exercise of such enumerated powers (subject to the provisions of Section 91), otherwise it can in no aspect be within the sphere of provincial legislation.

The power in question is not an enumerated one. On the contrary, what indirect reference there is to the liquor traffic is made in connection with the license system; and licensing does not import suppression, except, at most, as incidental and subordinate to it.

Then, is the power to prohibit reasonably or practically necessary to the efficient exercise by the province of an enumerated power? It is urged that this is so with regard to clause 8 respecting municipal institutions. The licensing system is ordinarily associated with that subject, and licensing is also pointed at in clause 9; but there is no inherent or ordinary association of prohibition with municipal institutions. Neither in England nor the United States is this so. The state of things in the confederating provinces at the time of union will be referred to hereafter. What is reasonably incidental to the exercise of general powers is often a practical question, more or less dependent upon considerations of expediency. The several judgments of the Privy Council have placed the respective powers of the Dominion and provinces upon the

* [1894] A. C. 200.

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subject on a wise and practical working basis; affirming, on the one hand, the exclusive right of the provinces to deal with license and kindred subjects, and affirming, on the other, the right of the Dominion to prohibit, either directly, or through the method of endowing the several provincial municipalities with a faculty of accepting prohibition or retaining license. Wherein is it reasonably necessary for purposes of municipal institutions that the provinces should have like power of suppression, to be exercised either directly upon the entire province or through the bestowment of a like faculty upon the municipalities? Why (in any proper constitution) should a considerable trade be subjected to prohibition emanating from different legislative authorities in the one country? The suppression of a lawful trade impairs the value of the power to raise revenue by indirect taxation. *Primâ facie* the power that levies indirect taxation has the power to protect trade from suppression and the sole power of suppression. And in a system of government where the provinces receive annual subsidies out of the Dominion treasury, it seems repugnant that the provinces should, through mere implications respecting municipal institutions, possess the power to destroy a large revenue bearing trade. It is for the Dominion to determine for itself whether or not such a trade shall be suppressed, and if so, how, and to what extent. The Dominion has so expressed itself. It has entered every municipality and offered to it the suppression within it of the liquor trade under sanctions of Dominion law.

It is further contended, however, that prohibition is local and municipal, because that, at the time of the union, two out of the three original members of the union (having then, of course, full power of legislation) had conferred upon the municipalities a local option of prohibition (within wider or narrower limits), and had incorporated this provision in the municipal Acts. Even had this been general with all the provinces, I do not think that the conclusion drawn from it is warranted, in view of the whole of the British North America Act; nor perhaps would it support the claim to deal with the matter otherwise than through the like method of municipal local option. But, assuming that a common understanding of words in an unusual sense might be inferred from such a state of things, if it had been general, the fact that in one of the confederating provinces (New Brunswick) there was no such provision, deprives the argument of the weight that only an entire consensus could give to it. In New Brunswick there were at the union two groups of municipal institutions, the representative kind (as in Upper and Lower Canada), throughout part of the province, and the system of local government of counties through the justices in session (as in Nova Scotia), throughout the remaining part. But in neither kind was there vested the power of suppressing the liquor trade. The Act in force in New Brunswick was 17 Vict. c. 42, as from time to time revived and continued.* This is important, for temperance legislation had gone further in New Brunswick than in any other province. In 1855 an Act was passed† prohibiting throughout the province the importation, manufacture and traffic in intoxicating liquors. This was repealed in 1856‡ amid great political excitement, and the absence of local option at the time of the union was not

* See 20 Vict. ch. 1 [1856]; 33 Vict. ch. 2. † 18 Vict. ch. 36. ‡ 20 Vict. ch. 1.

a casual omission. Notwithstanding the great weight of judicial authority the other way, I cannot, in view of this, give to the words "municipal institutions," as used in the British North America Act, a meaning not inherent in them, simply because of this extension of power to the municipalities in several, but not all, of the confederating provinces. It seems to me that the contention in question comes to this, that the words "municipal institutions" are to be read not only as meaning everything inherent in or ordinarily associated with them, but also all other powers exercised by the municipalities of any of the confederating provinces. I must add that, even if the practice had been general, such an excrescence on the municipal system would be removed by the other provisions of the British North America Act.

Assuming, however, that there is such a right in the provinces, and that, in some aspects, prohibitory legislation is within their power, I agree with Mr. Nesbitt (who was permitted to address us on behalf of the Brewers' Association), that no such legislation could have validity while the Canada Temperance Act is in force. The provisions of that Act giving the option are in force throughout the entire country. The option is exercisable everywhere and at any time, and these options (with such other law as is in force) represent what Parliament deemed adequate upon the subject. Why, then, should there be competing local options established under provincial legislation, or a competing system of provincial prohibition?

The Dominion Parliament, in passing the Act, declared an intention to enact a uniform law upon the subject. It assumes the right to prohibit, and fixes the conditions. The freedom of the trade (subject to license and any other unrepealed law), if the conditions are not met, is correlative with its suppression if they are. Mr. Nesbitt has well stated the confusion in the working out of the Canada Temperance Act that would follow upon absolute prohibition by the province, or prohibition through different local options. The result would be very far from uniformity.

As to a distinction between prohibition of the retail trade and that of the wholesale trade, it is a difference of degree and not of kind. The wholesale trade could not long survive the extinction of the retail business throughout a province. The matter has to be looked at broadly, without too much refinement or distinction.

As to the power to prohibit importation, that manifestly and directly affects "trade and commerce" and the power of raising revenue by customs duties. As to the suppression of the manufacture of liquor, this contention interferes with excise and subjects the argument respecting the implied powers of municipal institutions to a great strain.

The question regarding the Ontario Act of 1890 remains. It has already been incidentally considered. No doubt much latitude ought to be given to the exercise of the licensing power, in the way of restriction or regulation. Prevention of selling in certain ways, at certain times or places, to certain persons, &c. &c., is greatly removed from prohibition proper. But, as I read it, the

RECORD.

No. 9. Judges' reasons. King, J.— *continued.*

Act appears to go beyond license and regulation or restriction. It seems substantially to give the power to prohibit altogether. It is true that the Act is expressed to be merely the revival of provisions in force at the Union, and since assumed to be repealed by the provincial legislature. But, if the power to pass the Act as a new provision of law does not exist, no more does the power to revive the old law, which, on the other hand, needs no revival so far as Ontario legislation is concerned, inasmuch as it was never effectually repealed by such legislation.

I therefore answer each of the questions submitted in the negative, with deep acknowledgments to the learned counsel who have been heard on behalf of the several interests before the court.

Certified a true copy.

C. H. MASTERS,
Ass. Rep., S.C.C.

IN THE PRIVY COUNCIL.

No. 37 OF 1895.

FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE ATTORNEY GENERAL FOR ONTARIO - - - - - *Appellant,*

AND

(1) THE ATTORNEY GENERAL FOR THE DOMINION OF CANADA AND (2) THE DISTILLERS AND BREWERS' ASSOCIATION OF ONTARIO *Respondents.*

In the MATTER of CERTAIN QUESTIONS referred to the SUPREME COURT OF CANADA by HIS EXCELLENCY THE GOVERNOR GENERAL OF CANADA.

SUBJECT :

PROVINCIAL JURISDICTION,
PROHIBITORY LIQUOR LAWS.

RECORD OF PROCEEDINGS.

FRESHFIELDS AND WILLIAMS,
for Province of Ontario.

BOMPAS, BISCHOFF AND CO.,
for Dominion of Canada.

LINKLATER AND CO.,
for the Distillers and Brewers' Association of Ontario.

p. 4292.

Judgment.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Attorney-General for Ontario v. *the Attorney-General for the Dominion of Canada, and the Distillers and Brewers' Association of Ontario, from the Supreme Court of Canada; delivered 9th May* 1896.

Present:

THE LORD CHANCELLOR.
LORD HERSCHELL.
LORD WATSON.
LORD DAVEY.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

Their Lordships think it expedient to deal, in the first instance, with the seventh question, because it raises a practical issue, to which the able arguments of Counsel on both sides of the Bar were chiefly directed, and also because it involves considerations which have a material bearing upon the answers to be given to the other six questions submitted in this appeal. In order to appreciate the merits of the controversy, it is necessary to refer to certain laws for the restriction or suppression of the liquor traffic, which were passed by the legislature of the old province of Canada before the Union, or have since been enacted by the Parliament of the Dominion, and by the legislature of Ontario, respectively.

At the time when the British North America Act of 1867 came into operation, the statute book of the old province contained two sets of enactments applicable to Upper Canada, which,

though differing in expression, were in substance very similar.

The most recent of these enactments were embodied in the Temperance Act 1864 (27 & 28 Vict. c. 18), which conferred upon the municipal council of every county, town, township, or incorporated village, "besides the "powers at present conferred on it by law," power at any time to pass a by-law prohibiting the sale of intoxicating liquors, and the issue of licenses therefor, within the limits of the municipality. Such by-law was not to take effect until submitted to and approved by a majority of the qualified electors; and provision was made for its subsequent repeal, in deference to an adverse vote of the electors.

The previous enactments relating to the same subject, which were in force at the time of the Union, were contained in the Consolidated Municipal Act, 29 & 30 Vict. c. 51. They empowered the Council of every township, town, and incorporated village, and the Commissioners of Police in cities, to make by-laws for prohibiting the sale by retail of spirituous, fermented or other manufactured liquors, in any inn or other house of public entertainment; and for prohibiting totally the sale thereof in shops and places other than houses of public entertainment; provided the by-law, before the final passing thereof, had been duly approved by the electors of the municipality in the manner prescribed by the Act. After the Union, the Legislature of Ontario inserted these enactments in the Tavern and Shop License Act, 32 Vict. c. 32. They were purposely omitted from subsequent consolidations of the Municipal and Liquor License Acts; and, in the year 1886, when the Canada Temperance Act was passed by the Parliament of Canada, there was no provincial law authorising the prohibition

of liquor sales in Ontario, save the Temperance Act 1864.

The Canada Temperance Act of 1886 (Revised Statutes of Canada 49 Vict. c. 106) is applicable to all the provinces of the Dominion. Its general scheme is to give to the electors of every county or city the option of adopting, or declining to adopt, the provisions of the second part of the Act, which make it unlawful for any person "by himself, his "clerk, servant or agent, to expose or keep "for sale, or directly or indirectly, on any "pretence or upon any device, to sell or barter, "or in consideration of the purchase of any "other property, give to any other person "any intoxicating liquor." It expressly declares that no violation of these enactments shall be made lawful by reason of any license of any description whatsoever. Certain relaxations are made in the case of sales of liquor for sacramental or medicinal purposes, or for exclusive use in some art, trade, or manufacture. The prohibition does not extend to manufacturers, importers or wholesale traders who sell liquors in quantities above a specified limit, when they have good reason to believe that the purchasers, will forthwith carry their purchase beyond the limits of the county or city, or of any adjoining county or city in which the provisions of the Act are in force.

For the purpose of bringing the second part of the Act into operation, an order of the Governor-General of Canada in Council is required. The order must be made on the petition of a county or city, which cannot be granted until it has been put to the vote of the electors of such county or city. When a majority of the votes polled are adverse to the petition, it must be dismissed; and no similar application can be made within the period of three years from the day on

which the poll was taken. When the vote is in favour of the petition, and is followed by an order in Council, one fourth of the qualified electors of the county or city may apply to the Governor-General in Council for a recall of the order, which is to be granted, in the event of a majority of the electors voting in favour of the application. Power is given to the Governor-General in Council to issue in the like manner, and after similar procedure, an order repealing any by-law passed by any Municipal Council for the application of the Temperance Act of 1864.

The Dominion Act also contains an express repeal of the prohibitory clauses of the provincial Act of 1864, and of the machinery thereby provided for bringing them into operation, (1) as to every municipality within the limits of Ontario in which, at the passing of the Act of 1886, there was no municipal by-law in force, (2) as to every municipality within these limits in which a prohibitive by-law then in force shall be subsequently repealed under the provisions of either Act, and (3) as to every municipality, having a municipal by-law, which is included in the limits of, or has the same limits with, any county or city in which the second part of the Canada Temperance Act is brought into force before the repeal of the by-law, which by-law, in that event, is declared to be null and void.

With the view of restoring to municipalities within the province, whose powers were affected by that repeal, the right to make by-laws which they had possessed under the law of the old province, the legislature of Ontario passed Section 18 of 53 Vict. c. 56 to which the seventh question in this case relates. The enacting words of the clause are introduced by a preamble which recites the previous course of legislation, and the repeal by the Canada

Temperance Act of the Upper Canada Act of 1864 in municipalities where not in force, and concludes thus,—" it is expedient that municipalities should have the powers by them formerly possessed." The enacting words of the clause, with the exception of one or two changes of expression which do not affect its substance, are a mere reproduction of the provisions, not of the Temperance Act of 1864, but of the kindred provisions of the Municipal Act 29 & 30 Vict., c. 51, which had been omitted from the consolidated statutes of the province. A new proviso is added, to the effect that, "nothing in this section contained shall be construed into an exercise of Jurisdiction by the Province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of the British North America Act, and which the subsequent legislation of this province purported to repeal." The legislature of Ontario subsequently passed an Act (54 Vict. c. 46), for the purpose of explaining that Section 18 was not meant to repeal by implication certain provisions of the Municipal Act 29 & 30 Vict. c. 51, which limit its application to retail dealings.

The seventh question raises the issue,—whether, in the circumstances which have just been detailed, the provincial legislature had authority to enact Section 18? In order to determine that issue, it becomes necessary to consider, in the first place, whether the Parliament of Canada had jurisdiction to enact the Canada Temperance Act; and, if so, to consider in the second place, whether, after that Act became the law of each province of the Dominion, there yet remained power with the legislature of Ontario to enact the provisions of Section 18.

The authority of the Dominion Parliament to make laws for the suppression of liquor traffic

in the provinces is maintained, in the first place, upon the ground that such legislation deals with matters affecting "the peace, order, and good "government of Canada," within the meaning of the introductory and general enactments of Section 91 of the British North America Act; and, in the second place, upon the ground, that it concerns "the regulation of trade and commerce," being No. 2 of the enumerated classes of subjects which are placed under the exclusive jurisdiction of the federal Parliament by that section. These sources of jurisdiction are in themselves distinct; and are to be found in different enactments.

It was apparently contemplated by the framers of the Imperial Act of 1867, that the due exercise of the enumerated powers conferred upon the Parliament of Canada by Section 91 might, occasionally and incidentally, involve legislation upon matters which are *primâ facie* committed exclusively to the provincial legislatures by Section 92. In order to provide against that contingency, the concluding part of Section 91 enacts that "any matter coming "within any of the classes of subjects enumerated "in this section shall not be deemed to come "within the class of matters of a local or private "nature comprised in the enumeration of the "classes of subjects by this Act assigned exclu-"sively to the legislatures of the provinces." It was observed by this Board in *Citizens Insurance Company of Canada* v. *Parsons* (7, Ap. Ca. 108), that the paragraph just quoted "applies in its grammatical construction only to "No. 16 of Section 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them, that the language of the exception in Section 91 was meant to include, and correctly describes, all the matters

enumerated in the 16 heads of Section 92, as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these 16 sub-sections, save to the extent of enabling the Parliament of Canada to deal with matters local or private, in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of Clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens Insurance Company of Canada* v. *Parsons* (7, Ap. Ca. pp. 108, 109), and in *Cushing* v. *Dupuy* (5, Ap. Ca. 415); and it has been recognised by this Board in *Tennant* v. *Union Bank of Canada* (1894, Ap. Ca. 46) and in *Attorney-General of Ontario* v. *Attorney-General of the Dominion* (1894, Ap. Ca. 200).

The general authority given to the Canadian Parliament, by the introductory enactments of Section 91, is, "to make laws for the peace, order "and good government of Canada, in relation to "all matters not coming within the classes of "subjects by this Act assigned exclusively to "the Legislatures of the Provinces;" and it is declared, but not so as to restrict the generality of these words, that the exclusive authority of the Canadian Parliament extends to all matters coming within the classes of subjects which are enumerated in the clause. There may, therefore, be matters not included in the enumeration, upon which the Parliament of Canada has power to legislate, because they concern the peace, order and good government of the Dominion. But to those matters which are not specified among the enumerated subjects of legislation, the exception from Section 92, which is enacted by the concluding words of Section 91, has no application;

and, in legislating with regard to such matters, the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by Section 92. These enactments appear to their Lordships to indicate, that the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in Section 92, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation, with respect to any of the classes of subjects enumerated in Section 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by Section 91, would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject enumerated in Section 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

In construing the introductory enactments of Section 91, with respect to matters other than those enumerated, which concern the peace, order and good government of Canada, it must be kept in view that Section 94, which empowers the Parliament of Canada to make provision for the uniformity of the laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick, does not extend to the province of Quebec; and also that the Dominion legis-

lation thereby authorised is expressly declared to be of no effect, unless and until it has been adopted and enacted by the provincial legislature. These enactments would be idle and abortive, if it were held that the Parliament of Canada derives jurisdiction from the introductory provisions of Section 91, to deal with any matter which is in substance local or provincial, and does not truly affect the interest of the Dominion as a whole. Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition, in the interest of the Dominion. But great caution must be observed, in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada. An Act restricting the right to carry weapons of offence, or their sale to young persons, within the province, would be within the authority of the provincial legislature. But traffic in arms, or the possession of them under such circumstances as to raise a suspicion that they were to be used for seditious purposes, or against a foreign State, are matters which, their Lordships conceive, might be competently dealt with by the Parliament of the Dominion.

The judgment of this Board in *Russell* v. *The Queen* (7 Ap. Ca. 829), has relieved their Lordships from the difficult duty of considering whether the Canada Temperance Act of 1886 relates to the peace, order, and good government of Canada, in such sense as to bring its provisions within the competency of the Canadian Parliament. In that case the controversy related to the validity

of the Canada Temperance Act of 1878; and neither the Dominion nor the Provinces were represented in the argument. It arose between a private prosecutor and a person who had been convicted, at his instance, of violating the provisions of the Canadian Act, within a district of New Brunswick in which the prohibitory clauses of the Act had been adopted. But the provisions of the Act of 1878 were, in all material respects, the same with those which are now embodied in the Canada Temperance Act of 1886; and the reasons which were assigned for sustaining the validity of the earlier, are, in their Lordships' opinion, equally applicable to the later Act. It therefore appears to them that the decision in *Russell* v. *The Queen* must be accepted as an authority to the extent to which it goes, namely, that the restrictive provisions of the Act of 1886, when they have been duly brought into operation in any provincial area within the Dominion, must receive effect as valid enactments, relating to the peace, order, and good government of Canada.

That point being settled by decision, it becomes necessary to consider whether the Parliament of Canada had authority to pass the Temperance Act of 1886, as being an Act for the "regulation "of trade and commerce" within the meaning of No. 2 of Section 91. If it were so, the Parliament of Canada would, under the exception from Section 92, which has already been noticed, be at liberty to exercise its legislative authority, although, in so doing, it should interfere with the jurisdiction of the provinces. The scope and effect of No. 2 of Section 91 were discussed by this Board at some length, in *Citizens Insurance Company* v. *Parsons* (7 Ap. Ca. 96), where it was decided that, in the absence of legislation upon the subject by the Canadian Parliament, the legislature of Ontario had authority to impose conditions, as being matters of civil right, upon the business of

fire insurance, which was admitted to be a trade, so long as those conditions only affected provincial trade. Their Lordships do not find it necessary to re-open that discussion in the present case. The object of the Canada Temperance Act of 1886 is, not to regulate retail transactions between those who trade in liquor and their customers, but to abolish all such transactions within every provincial area in which its enactments have been adopted by a majority of the local electors. A power to regulate, naturally, if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation. In that view, their Lordships are unable to regard the prohibitive enactments of the Canadian statute of 1886 as regulations of trade and commerce. They see no reason to modify the opinion which was recently expressed, on their behalf, by Lord Davey, in *Municipal Corporation of the City of Toronto* v. *Virgo* (1896, Ap. Ca. 93), in these terms:— "Their Lordships think there is marked dis- "tinction to be drawn between the prohibition "or prevention of a trade and the regulation or "governance of it, and indeed a power to "regulate and govern seems to imply the "continued existence of that which is to be "regulated or governed."

The authority of the legislature of Ontario to enact Section 18 of 53 Vict. c. 56 was asserted by the Appellant on various grounds. The first of these, which was very strongly insisted on, was to the effect that the power given to each province by No. 8, of Section 92, to create municipal institutions in the province, necessarily implies the right to endow these institutions with all the administrative functions which had been ordinarily possessed and exercised by them before the time of the Union. Their Lordships can find nothing to support that contention

in the language of Section 92, No. 8, which, according to its natural meaning, simply gives provincial legislatures the right to create a legal body, for the management of municipal affairs. Until confederation, the legislature of each province as then constituted could, if it chose, and did in some cases, entrust to a municipality the execution of powers which now belong exclusively to the Parliament of Canada. Since its date, a provincial legislature cannot delegate any power which it does not possess; and the extent and nature of the functions which it can commit to a municipal body of its own creation must depend upon the legislative authority which it derives from the provisions of Section 92 other than No. 8.

Their Lordships are likewise of opinion that Section 92, No. 9, does not give provincial legislatures any right to make laws for the abolition of the liquor traffic. It assigns to them "shop, saloon, tavern, auctioneer and "other licenses, in order to the raising of a "revenue for provincial, local or municipal "purposes." It was held by this Board, in *Hodge* v. *The Queen* (9 Ap. Ca. 117), to include the right to impose reasonable conditions upon the licensees, which are in the nature of regulation; but it cannot, with any show of reason, be construed as authorising the abolition of the sources from which revenue is to be raised.

The only enactments of Section 92 which appear to their Lordships to have any relation to the authority of provincial legislatures to make laws for the suppression of the liquor traffic are to be found in Nos. 13 and 16, which assign to their exclusive jurisdiction, (1) "property and civil rights in the province," and (2) "generally all matters of a merely "local or private nature in the province." A law which prohibits retail transactions, and restricts the consumption of liquor within

the ambit of the province, and does not affect transactions in liquor between persons in the province and persons in other provinces or in foreign countries, concerns property in the province which would be the subject matter of the transactions, if they were not prohibited, and also the civil rights of persons in the province. It is not impossible that the vice of intemperance may prevail in particular localities within a province, to such an extent as to constitute its cure by restricting or prohibiting the sale of liquor a matter of a merely local or private nature, and therefore falling *primâ facie* within No. 16. In that state of matters, it is conceded that the Parliament of Canada could not imperatively enact a prohibitory law adapted and confined to the requirements of localities within the province, where prohibition was urgently needed.

It is not necessary, for the purposes of the the present appeal, to determine whether provincial legislation for the suppression of the liquor traffic, confined to matters which are provincial or local within the meaning of Nos. 13 and 16 is authorised by the one or by the other of these heads. It cannot, in their Lordships' opinion, be logically held to fall within both of them. In Section 92, No. 16 appears to them to have the same office which the general enactment, with respect to matters concerning the peace, order, and good government of Canada so far as supplementary of the enumerated subjects, fulfils in Section 91. It assigns to the provincial legislature all matters in a provincial sense local or private, which have been omitted from the preceding enumeration, and, although its terms are wide enough to cover, they were obviously not meant to include provincial legislation in relation to the classes of subjects already enumerated.

In the able and elaborate argument addressed

to their Lordships on behalf of the Respondents, it was practically conceded that a provincial legislature must have power to deal with the restriction of the liquor traffic from a local and provincial point of view, unless it be held that the whole subject of restriction or abolition is exclusively committed to the Parliament of Canada, as being within the regulation of trade and commerce. In that case, the subject, in so far at least as it had been regulated by Canadian legislation, would, by virtue of the concluding enactment of Section 91, be excepted from the matters committed to provincial legislatures by Section 92. Upon the assumption that Section 91 (2) does not embrace the right to suppress a trade, Mr. Blake maintained, that, whilst the restriction of the liquor traffic may be competently made matter of legislation, in a provincial as well as a Canadian aspect, yet the Parliament of Canada has, by enacting the Temperance Act of 1886, occupied the whole possible field of legislation in either aspect, so as completely to exclude legislation by a province. That appears to their Lordships to be the real point of controversy raised by the question with which they are at present dealing; and, before discussing the point, it may be expedient to consider the relation in which Dominion and provincial legislation stand to each other.

It has been frequently recognised by this Board, and it may now be regarded as settled law, that according to the scheme of the British North America Act, the enactments of the Parliament of Canada, in so far as these are within its competency, must over-ride provincial legislation. But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial Statute whether it does or does not come within the limits of jurisdiction prescribed by Section 92. The

repeal of a provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion; and if the existence of such repugnancy should become matter of dispute, the controversy cannot be settled by the action either of the Dominion or of the provincial legislature, but must be submitted to the judicial tribunals of the country. In their Lordships' opinion, the express repeal of the old provincial Act of 1864 by the Canada Temperance Act of 1886 was not within the authority of the Parliament of Canada. It is true that the Upper Canada Act of 1864 was continued in force within Ontario, by Section 129 of the British North America Act, "until repealed, abolished or altered by "the Parliament of Canada, or by the provincial "legislature," according to the authority of that Parliament, "or of that legislature." It appears to their Lordships that neither the Parliament of Canada, nor the provincial legislatures, have authority to repeal Statutes which they could not directly enact. Their Lordships had occasion, in *Dobie* v. *The Temporalities Board* (7 Ap. Ca. 136) to consider the power of repeal competent to the legislature of a province. In that case, the Legislature of Quebec had repealed a statute continued in force after the Union by Section 129, which had this peculiarity, that its provisions applied both to Quebec and to Ontario, and were incapable of being severed so as to make them applicable to one of these provinces only. Their Lordships held (7 Ap. Ca. 147) that the powers conferred "upon the provincial "legislatures of Ontario and Quebec to repeal "and alter the statutes of the old parlia-"ment of the province of Canada are made "precisely co-extensive with the powers of direct "legislation with which these bodies are invested "by the other clauses of the Act of 1867"; and

that it was beyond the authority of the legislature of Quebec to repeal statutory enactments which affected both Quebec and Ontario. The same principle ought, in the opinion of their Lordships, to be applied to the present case. The old Temperance Act of 1864 was passed for Upper Canada, or in other words for the province of Ontario; and its provisions, being confined to that province only, could not have been directly enacted by the Parliament of Canada. In the present case, the Parliament of Canada would have no power to pass a prohibitory law for the province of Ontario; and could therefore have no authority to repeal, in express terms, an Act which is limited in its operation to that province. In like manner, the express repeal, in the Canada Temperance Act of 1886, of liquor prohibitions adopted by a municipality in the province of Ontario under the sanction of provincial legislation, does not appear to their Lordships to be within the authority of the Dominion Parliament.

The question must next be considered, whether the provincial enactments of Section 18, to any, and if so to what extent, come into collision with the provisions of the Canadian Act of 1886? In so far as they do, provincial must yield to Dominion legislation, and must remain in abeyance unless and until the Act of 1886 is repealed by the parliament which passed it.

The prohibitions of the Dominion Act have in some respects an effect which may extend beyond the limits of a province; and they are all of a very stringent character. They draw an arbitrary line, at 8 gallons in the case of beer, and at 10 gallons in the case of other intoxicating liquors, with the view of discriminating between wholesale and retail transactions. Below the limit, sales within a district which has adopted the Act are absolutely

forbidden, except to the two nominees of the Lieutenant Governor of the province, who are only allowed to dispose of their purchases in small quantities, for medicinal and other specified purposes. In the case of sales above the limit, the rule is different. The manufacturers of pure native wines, from grapes grown in Canada, have special favour shown them. Manufacturers of other liquors within the district, as also merchants duly licensed, who carry on an exclusively wholesale business, may sell for delivery anywhere beyond the district, unless such delivery is to be made in an adjoining district where the Act is in force. If the adjoining district happened to be in a different province, it appears to their Lordships to be doubtful, whether, even in the absence of Dominion legislation, a restriction of that kind could be enacted by a provincial legislature.

On the other hand, the prohibitions which Section 18 authorises municipalities to impose within their respective limits do not appear to their Lordships to affect any transactions in liquor which have not their beginning and their end within the province of Ontario. The first branch of its prohibitory enactments strikes against sales of liquor by retail in any tavern, or other house or other place of public entertainment. The second extends to sales in shops and places other than houses of public entertainment; but the context indicates that it is only meant to apply to retail transactions; and that intention is made clear by the terms of the explanatory Act 54 Vict. c. 46, which fixes the line between wholesale and retail at one dozen of liquor in bottles, and five gallons if sold in other receptacles. The importer or manufacturer can sell any quantity above that limit; and any retail trader may do the same, provided that he sells the liquor in the original

packages in which it was received by him from the importer or manufacturer.

It thus appears that, in their local application within the province of Ontario, there would be considerable difference between the two laws; but it is obvious that their provisions could not be in force within the same district or province at one and the same time. In the opinion of their Lordships, the question of conflict between their provisions which arises in this case does not depend upon their identity or non-identity, but upon a feature which is common to both. Neither statute is imperative, their prohibitions being of no force or effect until they have been voluntarily adopted and applied by the vote of a majority of the electors in a district or municipality. In *Russell* v. *The Queen* (7 Ap. Ca. 841), it was observed by this Board, with reference to the Canada Temperance Act of 1878, "The Act as soon as it was passed became "a law for the whole Dominion, and the "enactments of the first part, relating to the "machinery for bringing the second part into "force, took effect and might be put in motion "at once and everywhere within it." No fault can be found with the accuracy of that statement. *Mutatis mutandis*, it is equally true as a description of the provisions of Section 18. But in neither case can the statement mean more than this, that on the passing of the Act, each district or municipality within the Dominion or the province, as the case might be, became vested with a right to adopt and enforce certain prohibitions, if it thought fit to do so. But the prohibitions of these Acts, which constitute their object and their essence, cannot with the least degree of accuracy be said to be in force anywhere, until they have been locally adopted.

If the prohibitions of the Canada Temperance

Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the legislature of Ontario to pass Section 18, or any similar law, had been superseded. In that case, no provincial prohibitions such as are sanctioned by Section 18, could have been enforced by a municipality, without coming into conflict with the paramount law of Canada. For the same reason, provincial prohibitions in force within a particular district will necessarily become inoperative, whenever the prohibitory clauses of the Act of 1886 have been adopted by that district. But their Lordships can discover no adequate grounds for holding that there exists repugnancy between the two laws in districts of the province of Ontario where the prohibitions of the Canadian Act are not, and may never be in force. In a district which has, by the votes of its electors, rejected the second part of the Canadian Act, the option is abolished for three years from the date of the poll; and it hardly admits of doubt, that there could be no repugnancy whilst the option given by the Canadian Act was suspended. The Parliament of Canada has not, either expressly or by implication, enacted, that so long as any district delays or refuses to accept the prohibitions which it has authorised, the provincial parliament is to be debarred from exercising the legislative authority given it by Section 92, for the suppression of the drink traffic as a local evil. Any such legislation would be unexampled; and it is a grave question whether it would be lawful. Even if the provisions of Section 18 had been imperative, they would not have taken away or impaired the right of any district in Ontario to adopt, and thereby bring into force the prohibitions of the Canadian Act.

Their Lordships, for these reasons, give a general answer to the seventh question in the affirmative. They are of opinion that the Ontario legislature had jurisdiction to enact Section 18, subject to this necessary qualification, that its provisions are, or will become inoperative in any district of the province which has already adopted, or may subsequently adopt the second part of the Canada Temperance Act of 1886.

Their Lordships will now answer briefly, in their order, the other questions submitted by the Governor-General of Canada. So far as they can ascertain from the Record, these differ from the question which has already been answered, in this respect, that they relate to matters which may possibly become litigious in the future, but have not as yet given rise to any real and present controversy. Their Lordships must further observe that these questions, being in their nature academic rather than judicial, are better fitted for the consideration of the officers of the Crown, than of a court of law. The replies to be given to them will necessarily depend upon the circumstances in which they may arise for decision; and these circumstances are in this case left to speculation. It must therefore be understood that the answers which follow are not meant to have, and cannot have, the weight of a judicial determination, except in so far as their Lordships may have occasion to refer to the opinions which they have already expressed in discussing the seventh question.

Answers to Questions I. and II.—Their Lordships think it sufficient to refer to the opinions expressed by them in disposing of the seventh question.

Answer to Question III.—In the absence of conflicting legislation by the Parliament of Canada, their Lordships are of opinion that the provincial legislatures would have jurisdiction to

that effect, if it were shown that the manufacture was carried on under such circumstances and conditions as to make its prohibition a merely local matter in the province.

Answer to Question IV.—Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction, in the wide and general terms in which it is expressed, would probably trench upon the exclusive authority of the Dominion Parliament.

Answers to Questions V. and VI.—Their Lordships consider it unnecessary to give a categorical reply to either of these questions. Their opinion upon the points which the questions involve has been sufficiently explained in their answer to the seventh question.

Their Lordships will humbly advise Her Majesty to discharge the Order of the Supreme Court of Canada, dated the 15th January 1895; and to substitute therefor the several Answers to the seven Questions submitted by the Governor General of Canada which have been already indicated. There will be no costs of this Appeal.

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