

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Charles Russell v. The Queen, on the in-
formation of Woodward, from the Supreme
Court of New Brunswick, delivered 23rd June
1882.*

Present :

SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.
SIR JAMES HANNEN.
SIR RICHARD COUCH.

This is an appeal from an order of the Supreme Court of the Province of New Brunswick, discharging a rule Nisi which had been granted on the application of the Appellant for a certiorari to remove a conviction made by the Police Magistrate of the city of Fredericton against him, for unlawfully selling intoxicating liquors, contrary to the provisions of "the Canada "Temperance Act, 1878."

No question has been raised as to the sufficiency of the conviction, supposing the above-mentioned statute is a valid legislative Act of the Parliament of Canada. The only objection made to the conviction in the Supreme Court of New Brunswick, and in the appeal to Her Majesty in Council, is that, having regard to the provisions of "the British North America Act, 1867" relating to the distribution of legislative powers, it was not competent for the Parliament of Canada to pass the Act in question.

The Supreme Court of New Brunswick made
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the order now appealed from in deference to a judgment of the Supreme Court of Canada in the case of the City of Frederickton *v.* The Queen. In that case the question of the validity of "the Canada Temperance Act, 1878," though in another shape, directly arose, and the Supreme Court of New Brunswick, consisting of six Judges, then decided, Mr. Justice Palmer dissenting, that the Act was beyond the competency of the Dominion Parliament. On the appeal of the City of Frederickton, this judgment was reversed by the Supreme Court of Canada, which held, Mr. Justice Henry dissenting, that the Act was valid. (The case is reported in 3rd Supreme Court of Canada Reports, p. 505.) The present appeal to Her Majesty is brought, in effect, to review the last-mentioned decision.

The preamble of the Act in question states that "it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors." The Act is divided into three parts. The first relates to "proceedings for bringing the second part of this Act into force;" the second to "prohibition of traffic in intoxicating liquors;" and the third to "penalties and prosecutions for offences against the second part."

The mode of bringing the second part of the Act into force, stating it succinctly, is as follows: On a petition to the Governor in Council, signed by not less than one fourth in number of the electors of any county or city in the Dominion qualified to vote at the election of a member of the House of Commons, praying that the second part of the Act should be in force and take effect in such county or city, and that the votes of all the electors be taken for or against the adoption of the petition, the Governor General, after certain prescribed notices and evidence, may issue a

proclamation, embodying such petition, with a view to a poll of the electors being taken for or against its adoption. When any petition has been adopted by the electors of the county or city named in it, the Governor General in Council may, after the expiration of 60 days from the day on which the petition was adopted, by Order in Council published in the Gazette, declare that the second part of the Act shall be in force and take effect in such county or city, and the same is then to become of force and take effect accordingly. Such Order in Council is not to be revoked for three years, and only on like petition and procedure.

The most important of the prohibitory enactments contained in the second part of the Act is Section 99, which enacts that, "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, unless it be for exclusively
 " sacramental or medicinal purposes, or for
 " *bonâ fide* use in some art, trade, or manu-
 " facture, under the regulation contained in the
 " fourth sub-section of this section, or as herein-
 " after authorized by one of the four next sub-
 " sections of this section, 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 consideration of the pur-
 " chase of any other property give, to any other
 " person, any spirituous or other intoxicating
 " liquor, or any mixed liquor, capable of being
 " used as a beverage, and part of which is
 " spirituous or otherwise intoxicating."

Sub-section 2 provides that "neither any
 " license issued to any distiller or brewer" (and
 after enumerating other licenses), "nor yet any
 " other description of license whatever, shall in

“ any wise avail to render legal any act done in violation of this section.”

Sub-section 3 provides for the sale of wine for sacramental purposes, and Sub-section 4 for the sale of intoxicating liquors for medicinal and manufacturing purposes, these sales being made subject to prescribed conditions.

Other sub-sections provide that producers of cider, and distillers and brewers, may sell liquors of their own manufacture in certain quantities, which may be termed wholesale quantities, or for export, subject to prescribed conditions, and there are provisions of a like nature with respect to vine-growing companies and manufacturers of native wines.

The third part of the Act enacts (Sec. 100) that whoever exposes for sale or sells intoxicating liquors in violation of the second part of the Act should be liable, on summary conviction, to a penalty of not less than fifty dollars for the first offence, and not less than one hundred dollars for the second offence, and to be imprisoned for a term not exceeding two months for the third and every subsequent offence; all intoxicating liquors in respect to which any such offence has been committed to be forfeited.

The effect of the Act when brought into force in any county or town within the Dominion is, describing it generally, to prohibit the sale of intoxicating liquors, except in wholesale quantities, or for certain specified purposes, to regulate the traffic in the excepted cases, and to make sales of liquors in violation of the prohibition and regulations contained in the Act criminal offences, punishable by fine, and for the third or subsequent offence by imprisonment.

It was in the first place contended, though not very strongly relied on, by the Appellant's Counsel, that assuming the Parliament of Canada had authority to pass a law for prohibiting and

regulating the sale of intoxicating liquors, it could not delegate its powers, and that it had done so by delegating the power to bring into force the prohibitory and penal provisions of the Act to a majority of the electors of counties and cities. The short answer to this objection is that the Act does not delegate any legislative powers whatever. It contains within itself the whole legislation on the matters with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislate. Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled. Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada, when the subject of legislation is within its competency. Their Lordships entirely agree with the opinion of Chief Justice Ritchie on this objection. If authority on the point were necessary, it will be found in the case of the *Queen v. Burah*, lately before this Board (L. R. 3, Appeal Cases 889).

The general question of the competency of the Dominion Parliament to pass the Act depends on the construction of the 91st and 92nd sections of the British North America Act, 1867, which are found in Part VI. of the statute under the heading, "Distribution of Legislative Powers."

The 91st section enacts, "It shall be lawful
 " for the Queen by and with the advice and con-
 " sent 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 sub-
 " jects 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 of this section, it is
 “ hereby declared that (notwithstanding any-
 “ thing in this Act) the exclusive legislative
 “ authority of the Parliament of Canada extends
 “ to all matters coming within the classes of
 “ subjects next herein-after enumerated ;” then
 after the enumeration of 29 classes of subjects,
 the section contains the following words :—“ 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 Legis-
 “ lature of the Province.”

The general scheme of the British North America Act with regard to the distribution of legislative powers, and the general scope and effect of Sections 91 and 92, and their relation to each other, were fully considered and commented on by this Board in the case of the *Citizens Insurance Co. v. Parsons* (7, L. R. Appeal Cases, 96). According to the principle of construction there pointed out, the first question to be determined is, whether the Act now in question falls within any of the classes of subjects enumerated in Section 92, and assigned exclusively to the Legislatures of the Provinces. If it does, then the further question would arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in Section 91, and so does not still belong to the Dominion Parliament. But if the Act does not fall within any of the classes of subjects in Section 92, no further question will remain, for it cannot be contended, and indeed was not contended at their Lordships' bar, that, if the Act does not come within one of the classes of subjects assigned to the provincial Legislatures, the Parliament of Canada had not, by its general

power "to make laws for the peace, order, and "good government of Canada," full legislative authority to pass it.

Three classes of subjects enumerated in Section 92 were referred to, under each of which, it was contended by the Appellant's Counsel, the present legislation fell. These were :—

9. Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local, or municipal purposes.

13. Property and civil rights in the province.

16. Generally all matters of a merely local or private nature in the province.

With regard to the first of these classes, No. 9, it is to be observed that the power of granting licences is not assigned to the Provincial Legislatures for the purpose of regulating trade, but "in order to the raising of a revenue for provincial, local, or municipal purposes."

The Act in question is not a fiscal law; it is not a law for raising revenue; on the contrary, the effect of it may be to destroy or diminish revenue; indeed it was a main objection to the Act that in the city of Fredericton it did in point of fact diminish the sources of municipal revenue. It is evident, therefore, that the matter of the Act is not within the class of subject No. 9, and consequently that it could not have been passed by the Provincial Legislature by virtue of any authority conferred upon it by that sub-section.

It appears that by statutes of the Province of New Brunswick authority has been conferred upon the municipality of Fredericton to raise money for municipal purposes by granting licences of the nature of those described in No. 9 of Section 92, and that licences granted to taverns for the sale of intoxicating liquors were a profitable source of revenue to the municipality. It was contended by the Appellant's

Counsel, and it was their main argument on this part of the case, that the Temperance Act interfered prejudicially with the traffic from which this revenue was derived, and thus invaded a subject assigned exclusively to the Provincial Legislature. But, supposing the effect of the Act to be prejudicial to the revenue derived by the municipality from licenses, it does not follow that the Dominion Parliament might not pass it by virtue of its general authority to make laws for the peace, order, and good government of Canada. Assuming that the matter of the Act does not fall within the class of subject described in No. 9, that sub-section can in no way interfere with the general authority of the Parliament to deal with that matter. If the argument of the Appellant that the power given to the Provincial Legislatures to raise a revenue by licences prevents the Dominion Parliament from legislating with regard to any article or commodity which was or might be covered by such licences were to prevail, the consequence would be that laws which might be necessary for the public good or the public safety could not be enacted at all. Suppose it were deemed to be necessary or expedient for the national safety, or for political reasons, to prohibit the sale of arms, or the carrying of arms, it could not be contended that a Provincial Legislature would have authority, by virtue of Sub-section 9 (which alone is now under discussion), to pass any such law, nor, if the Appellant's argument were to prevail, would the Dominion Parliament be competent to pass it, since such a law would interfere prejudicially with the revenue derived from licences granted under the authority of the Provincial Legislature for the sale or the carrying of arms. Their Lordships think that the right construction of the enactments does not lead to any such inconvenient consequence. It appears

to them that legislation of the kind referred to, though it might interfere with the sale or use of an article included in a licence granted under Sub-section 9, is not in itself legislation upon or within the subject of that sub-section, and consequently is not by reason of it taken out of the general power of the Parliament of the Dominion. It is to be observed that the express provision of the Act in question that no licences shall avail to render legal any act done in violation of it, is only the expression, inserted probably from abundant caution, of what would be necessarily implied from the legislation itself, assuming it to be valid.

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 imprisonment 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 considerations, 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 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 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 property and civil rights; and it could not have been intended, when assuring to the provinces exclusive legislative authority on the subjects 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 subject 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 was argued by Mr. Benjamin that if the Act related to criminal law, it was Provincial criminal law, and he referred to Sub-section 15 of Section 92, viz., "The imposition of any punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section." No doubt this argument would be well founded if the principal matter of the Act could be brought within any of these classes of subjects; but as far as they have yet gone, their Lordships fail to see that this has been done.

It was lastly contended that the Act fell within Sub-section 16 of Section 92,—“ Generally all matters of a merely local or personal nature in the province.”

It was not, of course, contended for the Appellant that the Legislature of New Brunswick could have passed the Act in question, which embraces in its enactments all the provinces; nor was it denied, with respect to this last contention, that the Parliament of Canada might have passed an Act of the nature of that under discussion to take effect at the same time throughout the whole Dominion. Their Lordships understand the contention to be that, at least in the absence of a general law of the Parliament of

Canada, the provinces might have passed a local law of a like kind, each for its own province, and that, as the prohibitory and penal parts of the Act in question were to come into force in those counties and cities only in which it was adopted in the manner prescribed, or, as it was said, "by local option," the legislation was in effect, and on its face, upon a matter of a merely local nature. The judgment of Allen, C. J., delivered in the Supreme Court of the Province of New Brunswick in the case of *Barker v. The City of Fredericton*, which was adverse to the validity of the Act in question, appears to have been founded upon this view of its enactments. The learned Chief Justice says:—"Had this Act prohibited the sale of liquor, instead of merely restricting and regulating it, I should have had no doubt about the power of the Parliament to pass such an Act; but I think an Act, which in effect authorizes the inhabitants of each town or parish to regulate the sale of liquor, and to direct for whom, for what purposes, and under what conditions spirituous liquors may be sold therein, deals with matters of a merely local nature, which, by the terms of the 16th sub-section of Section 92 of the British North America Act, are within the exclusive control of the local legislature."

Their Lordships cannot concur in this view. The declared object of Parliament in passing the Act is that there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors, with a view to promote temperance in the Dominion. Parliament does not treat the promotion of temperance as desirable in one province more than in another, but as desirable everywhere throughout the Dominion. 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. It is true that the prohibitory and penal parts of the Act are only to come into force in any county or city upon the adoption of a petition to that effect by a majority of electors, but this conditional application of these parts of the Act does not convert the Act itself into legislation in relation to a merely local matter. The objects and scope of the legislation are still general, viz., to promote temperance by means of a uniform law throughout the Dominion.

The manner of bringing the prohibitions and penalties of the Act into force, which Parliament has thought fit to adopt, does not alter its general and uniform character. Parliament deals with the subject as one of general concern to the Dominion, upon which uniformity of legislation is desirable, and the Parliament alone can so deal with it. There is no ground or pretence for saying that the evil or vice struck at by the Act in question is local or exists only in one province, and that Parliament, under colour of general legislation, is dealing with a provincial matter only. It is therefore unnecessary to discuss the considerations which a state of circumstances of this kind might present. The present legislation is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion, and the local option, as it is called, no more localises the subject and scope of the Act than a provision in an Act for the prevention of contagious diseases in cattle that a public officer should proclaim in what districts it should come into effect, would make the statute itself a mere local law for each of these districts. In statutes of this kind the legislation is general, and the provision for the special application of it to particular places does not alter its character.

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 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 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 power of the Parliament of Canada.

In the result, their Lordships will humbly recommend Her Majesty to affirm the judgment of the Supreme Court of Canada, and with costs.
