2. 1946

In the Privy Council.

No. 2 of 1940.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO.

IN THE MATTER of a Reference as to the validity of Parts I, II and III of The Canada Temperance Act, R.S.C. 1927, Chapter 196

AND IN THE MATTER of The Constitutional Questions Act, R.S.O. 1937, Chapter 130

AND IN THE MATTER of the Consolidated Rules of Practice.

BETWEEN

THE ATTORNEY-GENERAL OF ONTARIO .. .. *Appellant,*

AND

THE MODERATION LEAGUE OF ONTARIO, THE CANADIAN TEMPERANCE FEDERATION, THE ONTARIO TEMPERANCE FEDERATION, THE TEMPERANCE FEDERATIONS OF THE COUNTIES OF PERTH, PEEL, HURON AND MANITOULIN ISLAND, THE UNITED CHURCH OF CANADA, THE SOCIAL SERVICE COUNCIL OF THE CHURCH OF ENGLAND AND THE ATTORNEY-GENERAL OF CANADA .. .. *Respondents.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

In the Privy Council.

No. 2 of 1940.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO.

IN THE MATTER of a Reference as to the validity of Parts I, II and III of The Canada Temperance Act, R.S.C. 1927, Chapter 196

AND IN THE MATTER of The Constitutional Questions Act, R.S.O. 1937, Chapter 130

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BETWEEN

THE ATTORNEY-GENERAL OF ONTARIO .. .. *Appellant,*

AND

THE MODERATION LEAGUE OF ONTARIO, THE CANADIAN TEMPERANCE FEDERATION, THE ONTARIO TEMPERANCE FEDERATION, THE TEMPERANCE FEDERATIONS OF THE COUNTIES OF PERTH, PEEL, HURON AND MANITOULIN ISLAND, THE UNITED CHURCH OF CANADA, THE SOCIAL SERVICE COUNCIL OF THE CHURCH OF ENGLAND AND THE ATTORNEY-GENERAL OF CANADA .. .. *Respondents.*

RECORD OF PROCEEDINGS.

No. 1. The Canada Temperance Act Revised Statutes of Canada 1927, Chapter 196.

No. 1.

The Canada Temperance Act Revised Statutes of Canada 1927, Chapter 196.

(*Separate document.*)

In the Supreme Court of Ontario.

No. 2. Order in Council approved by The Honourable The Lieutenant Governor of the Province of Ontario submitting Case to the Supreme Court of Ontario. 1st June, 1939.

No. 2.

Order in Council approved by The Honourable The Lieutenant Governor of the Province of Ontario submitting Case to the Supreme Court of Ontario.

Approved and ordered the 1st day of June, A.D. 1939.

ALBERT MATTHEWS.

Filed
June 2, 1939
The Court of Appeal
Supreme Court of Ontario.

Ontario

Executive Council Office.

To the Honourable Albert Matthews, Lieutenant-Governor of the Province of Ontario.

Report of a Committee of the Executive Council on Matters referred to their consideration.

Present :

The Honourable
Mr. Hepburn in the Chair.
Mr. Conant
Mr. Campbell
Mr. Kirby

On Matters of State

May it please your Honour.

Whereas it has been represented to His Honour the Lieutenant-Governor of Ontario by the Attorney-General as follows :—

The Canada Temperance Act was passed by the Parliament of Canada in 1878, being 41 Vict. Chapter 16. The said Act and the succeeding legislation, namely, R.S.C. 1886, Chapter 106, R.S.C. 1906, Chapter 152, and R.S.C. 1927, Chapter 196, Parts I, II and III were, by Orders of the Governor-General in Council passed on the dates hereinafter mentioned, brought into actual operations in 17 local municipalities only throughout the Dominion, namely :—

Ontario—

District of Manitoulin, April 4, 1913
County of Huron, April 28, 1914
County of Perth, April 18, 1914
County of Peel, September 1, 1915

Quebec—

City of Thetford Mines, May 10, 1913

Manitoba—

Electoral District of Lisgar, June, 1881
Electoral District of Marquette, December 3, 1880

In the Supreme Court of Ontario.

No. 2. Order in Council approved by The Honourable The Lieutenant Governor of the Province of Ontario submitting Case to the Supreme Court of Ontario. 1st June, 1939— *continued.*

New Brunswick—

County of Carleton, June 28, 1879
County of Northumberland, November 4, 1880
County of York, March 31, 1879,
County of Queens, September 4, 1879
County of Kings, September 1, 1879
County of Albert, June 28, 1879
County of Westmorland, May, 10, 1880

Nova Scotia—

Yarmouth, August 2, 1884
Guysborough, September 5, 1885
Digby, January 10, 1881

And whereas the operation of the said Statutes was by Orders of the Governor-General in Council dated as hereinafter mentioned suspended in the following local municipalities, namely :—

New Brunswick—

County of Carleton, November 23, 1917
County of Northumberland, November 23, 1917
County of York, November 23, 1917
County of Queens, January 4, 1918
County of Kings, March 7, 1918
County of Albert, July 18, 1918
County of Westmorland, May 22, 1918

Nova Scotia—

Yarmouth, February 5, 1920
Digby, November 4, 1922
Guysborough, June 16, 1923

Ontario—

County of Huron, November 12, 1920
County of Perth, November 12, 1920
County of Peel, March 24, 1921

And whereas at the date of the bringing into force of the Canada Temperance Act, R.S.C. 1927, namely, on the 1st day of February, 1928, Chapter 196, by proclamation of His Excellency the Governor-General in Council dated the 22nd day of December, 1927, the handling of intoxicating liquor in the Dominion of Canada had been taken out of private hands and was either placed exclusively under the direct control of the various provincial governments by virtue of the respective Liquor Control Acts of the Legislatures of those Provinces or was entirely prohibited by provincial legislation ;

And whereas by virtue of Parts IV and V of R.S.C. 1927, Chapter 196, passed in 1916, 1917 and 1919 respectively, and other Statutes of the Parliament of Canada, importation of intoxicating liquor into the several Provinces was restricted or prohibited in aid of the said respective provincial Statutes ;

In the Supreme Court of Ontario.

No. 2. Order in Council approved by The Honourable The Lieutenant Governor of the Province of Ontario submitting Case to the Supreme Court of Ontario. 1st June, 1939—*continued.*

And whereas doubts have arisen whether the said Canada Temperance Act, R.S.C. 1927, Chapter 196, is within the legislative competence of the Parliament of Canada;

And whereas the Court of Appeal of New Brunswick in 1936 declared in the case *Rex* v. *Jones* that the said Canada Temperance Act, R.S.C. 1927, Chapter 196, was ultra vires.

And whereas the Attorney-General is of opinion that it is expedient that the question in controversy as to whether or not the said Act was within the legislative competence of Parliament should be referred to the Court of Appeal for Ontario for hearing and consideration.

Upon the recommendation of the Honourable the Attorney-General, the Committee of Council advise that Your Honour the Lieutenant-Governor in Council in the exercise of the powers conferred by The Constitutional Questions Act, R.S.O., Chapter 130, do refer to the Court of Appeal for Ontario for hearing and consideration the following question:—

Question: Are Parts I, II and III of the Canada Temperance Act, R.S.C. 1927, Chapter 196,—constitutionally valid in whole or in part, and if in part, in what respect?

Respectfully submitted,

1st June, 1939.

M. F. HEPBURN,
Chairman.

C. F. Bulmer
C.E.C.

No. 3. Affidavit of Mr. W. B. Common, K.C. 2nd June, 1939.

No. 3.

Affidavit of Mr. W. B. Common, K.C.

In the Supreme Court of Ontario.

IN THE MATTER OF a reference as to the validity of Parts I, II and III of the Canada Temperance Act, R.S.C. 1927, Chapter 196.

I, William Belmont Common, of the City of Toronto in the County of York, King's Counsel, make oath and say:

1. That I am the Senior Solicitor for the Attorney-General for the Province of Ontario, and as such have knowledge of the matters herein deposed to;

2. That by Order-in-Council dated the 2nd day of June, A.D. 1939, His Honour the Lieutenant-Governor in Council for the Province of Ontario, did, pursuant to the provisions of the Constitutional Questions Act, R.S.O. 1937, Chapter 130, refer the following question to the Court of Appeal for Ontario:

> "Are Parts I, II and III of the Canada Temperance Act, R.S.C. 1927, Chapter 196, constitutionally valid in whole or in part, and if in part, in what respect?"

In the Supreme Court of Ontario.

No. 3
Affidavit of Mr. W. B. Common, K.C.
2nd June, 1939—
continued.

3. I have been advised by those interested and verily believe that the only persons or parties interested in this reference, and who may be entitled to be heard upon the hearing are as follows :

The Attorney-General for Canada
The Moderation League of Ontario
The Canadian Temperance Federation
The Ontario Temperance Federation
The Women's Christian Temperance Union
The Social Service Department of the Anglican Church
The Social Service Department of the Baptist Church in Canada
The Presbyterian Church in Canada
The United Church of Canada
The Salvation Army
Sons of Temperance
Huron County Temperance Federation
Manitoulin Island Temperance Federation
Perth County Temperance Federation
Peel County Temperance Federation.

Sworn before me at the City of Toronto in the County of York, this 2nd day of June, A.D. 1939.
"A. E. HALL"
A Commissioner, etc.

"W. B. COMMON."

No. 4.

No. 4.
Order for directions.
2nd June, 1939.

Order for Directions.

In the Supreme Court of Ontario.

The Honourable the Chief Justice of Ontario } Friday, the 2nd day of June, A.D. 1939.

IN THE MATTER OF a reference as to the validity of Parts I, II and III of the Canada Temperance Act, R.S.C. 1927, Chapter 196.

Upon the application of the Attorney-General for the Province of Ontario for directions in the reference relating to the question referred by His Honour the Lieutenant-Governor in Council for hearing and consideration by the Court of Appeal for Ontario under the provisions of the Constitutional Questions Act, R.S.O.1937, Chapter 130 ;

In the Supreme Court of Ontario.

No. 4. Order for directions. 2nd June, 1939— *continued.*

And upon hearing read the order-in-council dated the 1st day of June, A.D. 1939, setting forth the said question;

And upon reading the affidavit of William Belmont Common, Senior Solicitor for the Attorney-General for the Province of Ontario, filed herein;

And upon hearing what was alleged by counsel for the applicant, the Attorney-General for the Province of Ontario;

It is ordered that the said reference be set down for hearing at the present sittings of this honourable Court on the 26th day of June, A.D. 1939.

It is further ordered that the following parties, that is to say, the Attorney-General for Canada, the Moderation League of Ontario, The Canadian Temperance Federation, The Ontario Temperance Federation, The Women's Christian Temperance Union, The Social Service Department of the Anglican Church, the Social Service Department of the Baptist Church in Canada, The Presbyterian Church in Canada, The United Church of Canada, The Salvation Army, Sons of Temperance, Huron County Temperance Federation, Manitoulin Island Temperance Federation, Perth County Temperance Federation and Peel County Temperance Federation be notified of the hearing of the argument on the said reference by delivering to them by prepaid registered mail or personal service, on or before the 6th day of June, A.D. 1939, a notice of the hearing of the said reference, and a copy of the said order-in-council, as well also as a copy of this order.

And it is further ordered that the Attorney-General for the Province of Ontario, the Attorney-General for Canada, the Moderation League of Ontario, The Canadian Temperance Federation, The Ontario Temperance Federation, The Women's Christian Temperance Union, The Social Service Department of the Anglican Church, The Social Service Department of the Baptist Church in Canada, The Presbyterian Church in Canada, The United Church of Canada, The Salvation Army, Sons of Temperance, Huron County Temperance Federation, Manitoulin Island Temperance Federation, Perth County Temperance Federation and Peel County Temperance Federation be at liberty to file memoranda of law of their respective arguments on or before the 19th day of June, A.D. 1939, and that they be at liberty to appear personally or by counsel upon the argument of the said reference.

And it is further ordered that the said parties be at liberty to include in their memoranda of law a reference to such statutes, orders-in-council and other documentary material as they may consider to be relevant to the question referred to this honourable Court for hearing and consideration as aforementioned, upon and subject to the condition that the said parties shall furnish to each other a list of such statutes, orders-in-council or documentary material on or before the 19th day of June, A.D. 1939.

"CHAS. W. SMYTH"
Registrar, S.C.O.

Entered O.B. 171, page 343
June 2nd, 1939.
E.B.

No. 4.
Order for directions.
2nd June, 1939—
continued.

Endorsement.

Service of a copy hereof admitted this 2nd day of June, A.D. 1939.

"WRIGHT & MCMILLAN."

Solicitors for
Canadian Temperance Federation
Ontario Temperance Federation
The Temperance Federations for the Counties of Perth, Peel, Huron and Manitoulin Island.

"SMITH, RAE, GREER & CARTWRIGHT"

Solicitors for The Moderation League of Ontario.

A copy hereof received this 3rd day of June, A.D. 1939.

"C. P. PLAXTON"

For the Attorney-General of Canada.

No. 5.

No. 5.
Notice of hearing to parties concerned.
2nd June, 1939.

Notice of hearing to parties concerned.

In the Supreme Court of Ontario.

IN THE MATTER OF a reference as to the validity of Parts I, II and III of the Canada Temperance Act, R.S.C. 1927, Chapter 196.

Take Notice that the reference herein has by Order of the Honourable the Chief Justice of the Province of Ontario, dated the 2nd day of June, A.D. 1939, been set down for hearing at the present sittings of the Court of Appeal for Ontario on the 26th day of June, A.D. 1939, and you are hereby notified of the hearing of the said reference pursuant to the terms of the said Order, a copy of which is hereto annexed.

Dated at Toronto, this 2nd day of June, A.D. 1939.

WILLIAM B. COMMON,
Solicitor for the Attorney-General for the Province of Ontario.

To: The Attorney-General for Canada.
The Moderation League of Ontario.
The Canadian Temperance Federation.
The Ontario Temperance Federation.
The Women's Christian Temperance Union.

In the Supreme Court of Ontario.

No. 5. Notice of hearing to parties concerned. 2nd June, 1939— *continued.*

The Social Service Department of the Anglican Church.
The Social Service Department of the Baptist Church in Canada.
The Presbyterian Church in Canada.
The United Church of Canada.
The Salvation Army.
Sons of Temperance.
Huron County Temperance Federation.
Manitoulin Island Temperance Federation.
Perth County Temperance Federation.
Peel County Temperance Federation. 10

No. 6. Appellant's Notice of Motion. 14th June, 1939.

No. 6.

Appellant's Notice of Motion.

In the Supreme Court of Ontario.

IN THE MATTER OF a Reference as to the validity of Parts I, II and III of the Canada Temperance Act, R.S.C. 1927, Chapter 196.

AND IN THE MATTER OF The Constitutional Questions Act, R.S.O. Chapter 130.

AND IN THE MATTER OF the Consolidated Rules of Practice.

Take Notice that the Court of Appeal for Ontario will be moved at Osgoode Hall in the City of Toronto on Monday, the 26th day of June, 1939, at the hour of eleven o'clock in the forenoon (Daylight Saving Time) or so soon thereafter as the motion can be heard, on behalf of the Attorney-General for Ontario for judgment giving the opinion of the court on the following question, namely :— 20

> Are Parts I, II and III of the Canada Temperance Act, R.S.C. 1927, Chapter 196, constitutionally valid in whole or in part, and if in part, in what respect ?

and for such further or other as may seem just ;

And Take Notice that in support of the said application will be read the Order of the Lieutenant-Governor of the Province of Ontario in Council made the 1st day of June, 1939, and such further and other material as counsel may advise. 30

Dated the 14th day of June, 1939.

W. B. COMMON, ESQ.,
Solicitor for the Attorney-General for the Province of Ontario.

To—

the Attorney-General for Canada,

And to—

his solicitors,
Messrs. McRuer, Mason, Cameron & Brewin.
372 Bay Street, Toronto.

To—

the Moderation League of Ontario,

And to—

its solicitors,
Messrs. Smith, Rae, Greer & Cartwright.
320 Bay Street, Toronto.

To—

The Canadian Temperance Federation.

And to—

its solicitors,
Messrs. Wright & McMillan,
38 King Street West, Toronto

To—

The Ontario Temperance Federation,

And to—

its solicitors,
Messrs. Wright & McMillan.
38 King Street West, Toronto.

To—

the United Church of Canada,

And to—

its solicitor,
A. T. Whitehead, Esq.,
299 Queen Street West, Toronto.

In the Supreme Court of Ontario.

No. 7.

The following documents are printed separately in the Appendix.

No. 7.

Memorandum of law and fact of The Attorney-General of Ontario.

No. 8.

No. 8.

Memorandum of law and fact of The Moderation League of Ontario.

No. 9.

No. 9.

Memorandum of law and fact of The Canadian Temperance Federation, The Ontario Temperance Federation and The Huron County Temperance Federation, Manitoulin Temperance Federation and Peel Temperance Federation.

No. 10.

No. 10.

Memorandum of law and fact of The United Church of Canada.

No. 11.

No. 11.

Memorandum of law and fact on behalf of The Social Service Council of the Church of England in Canada.

No. 12.

Memorandum of law and fact on behalf of The Social Service Board of the Baptist Association of Ontario and Quebec.

In the Supreme Court of Ontario.

No. 12.

No. 13.

No. 13.

Memorandum of the Governing Council of The Salvation Army, Canada East.

No. 14.

No. 14.

Memorandum of law and fact of the Attorney-General of Canada.

No. 15.

No. 15.

List of all Cities, Counties or Districts wherein the Canada Temperance Act has ever been brought into force.

No. 16.

No. 16.

Copy, Resolution of the Legislative Assembly of Ontario dated 26th March, 1873.

No. 17.

No. 17.

Copy, Resolution of the Legislative Assembly of Ontario dated 27th March, 1939.

In the Supreme Court of Ontario.

No. 18. Certificate of the Supreme Court of Ontario. 26th September, 1939.

No. 18.

Certificate of the Supreme Court of Ontario.

In the Supreme Court of Ontario.

The Honourable Mr. Justice Riddell
The Honourable Mr. Justice Fisher
The Honourable Mr. Justice Henderson
The Honourable Mr. Justice McTague
The Honourable Mr. Justice Gillanders

Tuesday the 26th day of September A.D. 1939.

IN THE MATTER OF a Reference as to the validity of Parts I, II and III of the Canada Temperance Act, R.S.C. 1927, Chapter 196,

L.S. AND IN THE MATTER OF The Constitutional Questions Act, R.S.O. Chapter 130,

AND IN THE MATTER OF the Consolidated Rules of Practice.

Whereas the Honourable the Lieutenant-Governor in Council by Order dated the 1st day of June, A.D. 1939, passed pursuant to the provisions of The Constitutional Questions Act, Revised Statutes of Ontario, Chapter 130, referred to this Court for hearing and consideration the question hereinafter set out :—

" Are Parts I, II and III of the Canada Temperance Act, Revised Statutes of Canada, 1927, Chapter 196,—constitutionally valid in whole or in part, and if in part, in what respect ? "

AND WHEREAS upon the application of the Attorney-General for Ontario for directions, the Honourable the Chief Justice of Ontario by order dated Friday the 2nd day of June, 1939, pursuant to Section 4 of The Constitutional Questions Act directed that certain classes of persons be notified of the hearing, and the said question having come before this Court for hearing on the 26th, 27th, 28th and 29th days of June, A.D. 1939, in the presence of counsel for the Honourable the Attorney-General for Ontario, of counsel for the Moderation League of Ontario, of counsel for the Canadian Temperance Federation, the Ontario Temperance Federation and the Temperance Federations for the Counties of Perth, Peel, Huron and Manitoulin Island, of counsel for the United Church of Canada and The Social Service League of the Church of England, and of counsel for the Attorney-General for Canada ;

Upon hearing what was alleged by counsel aforesaid, and having taken into consideration the matter of the said Reference, and this Reference having been adjourned to this day, this Court did answer the said question as follows :—

" This Court is of opinion (Mr. Justice Henderson dissenting) that Parts I, II and III of the Canada Temperance Act, Revised Statutes of Canada, 1927, Chapter 196, are within the legislative competence of the Parliament of Canada."

In the Supreme Court of Ontario.

No. 18. Certificate of the Supreme Court of Ontario. 26th September, 1939—*continued.*

And this Court Doth Certify the opinions delivered in writing were as follows :—

1. Opinion of the Honourable Mr. Justice Riddell.
2. Opinion of the Honourable Mr. Justice Fisher.
3. Opinion of the Honourable Mr. Justice Henderson.
4. Opinion of the Honourable Mr. Justice McTague.

The Honourable Mr. Justice Gillanders agreed with the opinion of the Honourable Mr. Justice McTague.

A true copy of each of which is attached hereto.

" CHAS. W. SMYTH "
Registrar of the Supreme Court of Ontario.

No. 19.

No. 19. Reasons for Judgment.

Reasons for Judgment.

C.A.

In the matter of a reference as to the validity of Parts I, II, III of the Canada Temperance Act, R.S.C., 1927, Chapter 196.

And in the matter of the Constitutional Questions Act, R.S.O., Chapter 130.

And in the matter of the Consolidated Rules of Practice.

Gordon D. Conant, K.C., Attorney-General for the Province of Ontario, R. L. Kellock, K.C., and W. B. Common, K.C., of Counsel for the Attorney-General for the Province of Ontario.

W. N. Tilley, K.C., J. R. Cartwright, K.C., and Bethune L. Smith, K.C., for the Moderation League of Ontario.

J. C. McRuer, K.C., and F. A. Brewin, for the Attorney-General for Canada.

H. E. Langford, Peter Wright and W. G. C. Howland, for The Canada Temperance Federation, The Ontario Temperance Federation, Huron County Temperance Federation, Manitoulin Temperance Federation and Peel Temperance Federation and Perth Temperance Federation.

A. T. Whitehead, for the United Church of Canada and The Social Service League of the Church of England.

Argued June 26th, 27th, 28th and 29th, 1939.

(A) RIDDELL J.A. : This is the case of a reference by His Honour, the Lieutenant-Governor in Council for hearing and consideration by the Court of Appeal under the provisions of The Constitutional Questions Act, R.S.O. (A) Riddell J.A.

In the Supreme Court of Ontario.

No. 19.
Reasons for Judgment
(A) Riddell J.A.—
continued.

1937, cap. 150—the matter for our consideration being as to the Canadian Temperance Act being in force now in Ontario.

The case was argued at very great length—not too great length, be it said—by the several counsel who were heard, and with much particularity, ability and candor.

Many cases—I have noted more than fifty—were dealt with exhaustively and certain statutes cited. No objection can be made to the manner in which the case was treated by all counsel; and, I venture to say, that nothing was left unsaid that could possibly assist either contestant.

I do not go into the authorities, as in my view the sole question calling for decision is whether the case of *Russell* v. *The Queen* [1882] 7 A.C. 829, was properly decided.

This decision, I have for fifty years thought might be reversed by a body with that power; but while it has been considered in many cases, it has never been reversed and we must take it that it is binding authority. We must always bear in mind that we sit in Court, not as individual lawyers with the right to give judgment according to what our individual opinion may be as to what ought to be the law, but we are to give judgment according to what we find stated by authorities, whose opinions are binding on us. And *stare decisis* is still as always a big guiding principle.

So, in the present case, I think that we are not at liberty to disregard what the Judicial Committee has declared in a judgment to be the law. And I conceive it makes no difference on what ground they proceeded—they gave as an authoritative statement of what the law is.

It is suggested that a change of circumstance might modify the law as laid down. While I do not accede to that proposition, I would point out that we have no evidence of change of circumstances, and we cannot take judicial cognisance of anything of the kind.

For this reason only I would answer the question by saying that *Russell* v. *The Queen* is still law—it is not a case for costs.

(B) Fisher J.A.

(B) FISHER J.A.: This Court has been asked to express an opinion upon a case of a reference under the provision of the Constitutional Questions Act, R.S.O. 1937, c. 150.

The question submitted is:—

> "Are Parts I, II and III of the Canada Temperance Act, R.S.O. 1927, c. 196, constitutionally valid in whole or in part, and if in part, in what respect?"

The constitutional validity of the Canada Temperance Act was tested in our Courts and finally by the Privy Council in *The Queen* v. *Russell* [1882] 7 A.C. 829. The Privy Council by its judgment declared that the Act was intra vires the Dominion of Canada and based its decision on "public order and safety."

The Attorney-General, Mr. Tilley and Mr. Kellock all vigorously argued that the validity of the Act must now be decided from the standpoint of the "changed conditions and circumstances" existing since the passing of the Act and of conditions existing at the present time in the Dominion of Canada;

that the Act was passed as a result of many petitions presented to Parliament, and of the speeches made by some of its members, extracts from which are to be found in the reports of the Select Committee of the House of Commons referred to at page 3 of Mr. Tilley's statement of fact and law.

At page 3 of the report it is stated that four-fifths of the crimes committed in the Province of Ontario were " directly or indirectly connected with the manufacture, sale and consumption of intoxicating liquors," and that out of 28,289 commitments to gaols for the three previous years, 21,236 were committed either for drunkenness or for crimes purported under the influence of drink ; and further contentions are that since the passing of the Act, comments were made by the Privy Council Board in the *Snider case* [1925] A.C. 396, and in many other cases up for decision in the Privy Council—to which we were referred, but in the view I take of this case, need not be specifically referred to or distinguished—in which there were expressions of opinion by different members of the Board, indicating that *The Queen* v. *Russell* was not properly decided ; that the Act was not acceptable to the citizens of the Dominion as only seven municipalities took advantage of the Local Option features of it, and are the only municipalities now under the Act, and also that the Province of Ontario has passed The Liquor Control Act for the sale and distribution of intoxicating liquors, and supplementary legislation by the Dominion in enacting Parts IV and V of The Canada Temperance Act relevant to the importation of intoxicating liquors.

In dealing with those and other contentions, it is to be observed that to-day we have The Canada Temperance Act unrepealed, and a decision of the Privy Council, after a full consideration of the whole Act—as clearly appears in the reasons and the decision in *The Queen* v. *Russell*—declaring the Act was intra vires Dominion of Canada.

The comments made in the several decisions by members of the Board and referred to on the argument were obiter, and it is to be noted that no member of the Board would go so far as to state that *The Queen* v. *Russell* was wrongly decided. It was, as stated, argued that The Canada Temperance Act was passed by Parliament because of the then existing conditions to which I have made some reference, and also that the Board assumed there was a great emergency, and because of these conditions, and for that reason *The Queen* v. *Russell* was decided. If that was the real reason, the question now arising is : What are the present conditions in Canada in so far as they relate to the changed circumstances and conditions ?

Upon that question this Court, on the argument, was not furnished with any evidence establishing that the conditions since The Canada Temperance Act was passed have improved, and that the crisis since 1878 has entirely passed.

We were not referred to any changed circumstances and conditions existing in any of the other Provinces of the Dominion since the Act was passed other than the provincial legislation dealing with intoxicating liquors and the amendments to The Canada Temperance Act, and my difficulty is, that even if this Court has any jurisdiction or right to express an opinion—

In the Supreme Court of Ontario.

No. 19. Reasons for Judgment. (B) Fisher J.A.— *continued.*

the Act being Dominion-wide—any changed circumstances and conditions in the other Provinces should be before this Court for consideration.

In my view there are only two methods open, one is to obtain, if possible, a decision of the Privy Council reversing *The Queen* v. *Russell*, and the other is to have Parliament enact legislation to repeal the Act. I do not think this Court has any right to enter into the moral and social value of the Act and its effect, or to enter the area of the " changed circumstances and conditions "—that being a question peculiarly for the duly elected representatives of Canada to consider and determine and for the Government of the Dominion to repeal the Act if thought advisable. It is, in my opinion, entirely for Parliament to act and is not open to this Court to try and determine such an issue. I can see no escape from the conclusion that an Act, valid when passed, remains valid until the Act is repealed or declared ultra vires by the Courts.

There is another and, I think, formidable ground precluding this Court from expressing an opinion, and that is, the Court is bound, since the decision in *The Queen* v. *Russell* by the principle known as stare decisis. It may well be that if this Court had had *The Queen* v. *Russell* up for consideration that a different result would have been reached, but at this stage and on this reference I do not think it proper to express any opinion as to whether that case was properly decided.

For these reasons I would answer the question that The Canada Temperance Act is constitutionally valid. It is not a case for costs.

(C) Henderson J.A.

(C) HENDERSON J.A.: Reference by the Lieutenant-Governor of the Province of Ontario, upon the recommendation of the Attorney-General and advice of a Committee of the Executive Council dated June 1st, 1939. The order-in-council is in the following words:

(Printed at pp. 4-6.)

In the view which I take, it will be useful to review some of the public records which indicate the situation which was before Parliament, and the conditions and circumstances under which the Canada Temperance Act was enacted in 1878 and also what prior statutes regarding the sale of liquor were in force in Upper Canada.

The Municipal Act of Upper Canada, Consolidated Statutes of 1866, chapter 51, contained also the License law. This licensing law preserved the right to municipalities to prohibit the sale of liquor if a majority of the electors within the municipality so declared, 29-30 Victoria, chapter 51, sections 249 to 267.

By the provisions of the Tavern and Shop License Act, (1869) 32 Victoria, chapter 32, the provisions respecting licensing and sale of liquor were separated from the Municipal Act. The Tavern and Shop License Act was consolidated in The Sale of Spirituous Liquor Act, (1874) 37 Victoria, chapter 32. In this Act the local option provisions were repealed and not re-enacted.

Between 1874 and 1878 the Temperance Act of 1864 (27-28 Victoria, chapter 18) known as the Dunkin Act, was in force in Ontario.

In the years 1873 to 1876 many petitions for the enactment of a prohibitory law were presented to both Houses of Parliament:

" In the year 1873 the number of such petitions was very great. In the House of Commons that year, on motion of Sir John A. Macdonald, a committee was appointed to consider such petitions. The committee subsequently requested a grant of money, to be expended in analysing liquors with a view to ascertaining the extent to which adulterations were practised. The grant was made. Later, the same committee presented a report, which was printed, containing a strong declaration in favour of total prohibition.

" In 1873 the Legislative Assembly of Ontario by resolution authorised a memorial to the Parliament of Canada praying for legislative action regarding the traffic in intoxicating liquors and in the following year the Legislative Assembly of New Brunswick presented a similar petition.

" In 1874 many more petitions were presented. The House of Commons again appointed a committee to consider the question. This committee reported, recommending that steps be taken to obtain information about the working of prohibitory laws in the United States. The recommendation was adopted by the House of Commons, and after the close of the session a royal commission was appointed, which made an investigation of the subject committed to it and presented a report.

" The agitation was kept up. In 1875 the number of petitions presented was very great. Mr. G. W. Ross moved to have the House of Commons resolve itself into a committee of the whole to consider a resolution in favour of the enactment of prohibition as far as was within the competence of Parliament, as soon as public opinion would efficiently sustain such legislation. Dr. Schultz moved an amendment declaring that it was the duty of the Government to introduce a prohibitory measure at the earliest moment practicable. Mr. Oliver moved an amendment to the amendment, that the House go into committee of the whole to consider means to diminish the evils of intemperance. This amendment was adopted. In committee of the whole, Mr. Ross moved a resolution declaring that the most effective remedy for the evils of intemperance would be a law of total prohibition. An amendment was offered by Mr. Bowell declaring it to be the duty of the Government to propose such a measure. The committee decided in favour of the motion offered by Mr. Ross, and reported the same to the House. No action seems to have been taken upon this report.

" The following are extracts from the Reports of the Select Committee of the House of Commons referred to above :

" Your Committee, to whom were referred the petitions presented in favour of a Prohibitory Liquor Law beg leave, in presenting their Second Report, to call the attention of Your Honourable House to the following considerations, the result of their most careful deliberations, and based upon the facts to which they have had access so far :

" 1. That the traffic in intoxicating liquors is an unmitigated evil—widespread in its effects—reaching with more or less virulence every class of the community, destroying and blighting with its baneful influence the existence of many of the most useful and promising members of society—producing untold domestic misery and destitution, and leading to the

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formation of habits alike opposed to the moral and intellectual advancement and prosperity of the country.

" 2. That the petitions (384 in number) presented to your Honourable House and signed by 39,223 individuals, as well as the petitions from 82 municipalities, and the Legislature of the Province of Ontario praying for a Prohibitory Liquor Law, show that the people of this Dominion are very strongly impressed with the enormity of the evils alluded to, and that, in view of this strong and unequivocal demand, your Committee feel bound to urge the necessity of some actions on the part of Your Honourable House to meet the wishes of the Petitioners and, if possible, remove the evils complained of.

" 3. That in examining the answers received from the Sheriffs, Prison Inspectors, Coroners and Police Magistrates, one hundred and fourteen of whom have voluntarily given evidence, Your Committee find that four-fifths of the crime committed in the Province of Ontario (answers have not yet been received from the other Provinces) are directly or indirectly connected with the manufacture, sales and consumption of intoxicating liquors.

" 4. Your Committee further find, on examining the reports of the Prison Inspectors for the Provinces of Ontario and Quebec, that out of 28,289 commitments to the jails for the three previous years, 21,236 were committed either for drunkenness or for crimes perpetrated under the influence of drink, thus corroborating the statement of the magistrates and others above alluded to.

" 5. Your Committee find also from the reports of one hundred and fifty-three medical men, as well as from statements made by medical practitioners in the United States and Great Britain, that the use of intoxicating liquors as a beverage is not essential to the health or well-being of the community, but that, on the contrary, it often leads to disease and premature death.

" 6. Your Committee have also to report that they have made, as far as time would permit, enquiry into the operation and effect of the Prohibitory Liquor Law in the State of Maine, accepting its operations there as the fairest test of its success, and find that although there are violations of the law, in many cases flagrant and glaring, yet from the evidence received and subjoined to this Report, Your Committee is convinced that a Prohibitory Liquor Law would mitigate if not entirely remove the evils complained of.

" 7. In considering the immediate effect which the passage of a Prohibitory Liquor Law would have upon the revenue of the country, Your Committee are bound to admit that for some time, at least, there might be a falling off, yet in the face of the evils arising from the liquor traffic, alluded to in the first paragraph of this report, they cannot recommend any other course to your Honourable House than a ready compliance with the prayer of the petitioners. The reasons upon which Your Committee base this recommendation are the following :

" (1) Although the revenue arising from the traffic is now very large, amounting last year to $5,034,543.58, yet the expense of the administration of justice, the maintenance of asylums, hospitals and penitentiaries consequent upon the habitual use of intoxicating liquors would be largely diminished, thus furnishing a very considerable effect to the amount lost to the revenue.

" (2) That the capital now invested in the traffic, large as Your Committee believe it to be, would, if diverted to other purposes of trade, add largely, in a very short time, to the general wealth of the country, and open up new and even more profitable sources of industry which in their turn would contribute to the revenue without those baneful associations which vitiate the returns accruing from the Liquor Traffic.

" (3) That the effect upon the industrial prosperity of thousands who are now impoverished by their dissipated habits would be such as to enable them to consume other dutiable goods—the laws of supply and demand being such that wherever there is a surplus of capital it will find for itself some field for investment.

" (4) That it is clearly the duty of Government, when the social, moral and civil standing of the subject is imperilled by the existence of any traffic or trade, that, apart from all considerations of gain or profit, the interests of the subject should not be sacrificed even to the expansion or maintenance of the revenue.

" (5) That the principle of protection to the subject against evils which may be and which are sources of revenue is already conceded in Acts passed on former occasions by the Legislature of Canada, such as the Dunkin Act, Sanitary Laws, and other laws of a similar nature.

" 8. In view of these facts, Your Committee would most respectfully submit to Your Honourable House the importance of speedily removing the evils complained of by the enactment of a Prohibitory Liquor Law—that is a law prohibiting the importation, manufacture and sale of all intoxicating liquors except for medicinal and mechanical purposes, regulated by proper safeguards and checks.

" All of which is respectfully submitted.

" E. V. BODWELL,
" Chairman.

" Your Committee in submitting their Second Report beg leave to call the attention of your Honourable House to the following :

" 1. That the Petitions presented this and the preceding Parliament praying for the passage of a Prohibitory Liquor Law, indicate a state of public feeling that demands the serious attention of the House.

" 2. That the intimate connection between the Liquor Traffic and Crime of all kinds, show that the existing Laws restricting said traffic are entirely inadequate to remove the evils complained of.

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" 3. Whereas the attempts of previous Committees to obtain full and reliable information from documentary evidence, with regard to the operation of Prohibitory Liquor Laws have not been entirely satisfactory, Your Committee is of the opinion that it would be expedient to take such steps as would put the House, in possession of full and reliable information as to the operation and result of such laws in those States of the American Union, where they are now or have been in force, with the view of showing the probable working and effect of such laws in Canada.

" In 1878 the petitioning continued, Requests were made for total prohibition, for the amendment of the Dunkin Act, and for other legislative measures. In that year Parliament dealt with the question by the enactment of the Canada Temperance Act."

I have taken the above extracts from the statement of fact and law submitted on behalf of the Moderation League of Ontario, and I would refer further to this statement as containing from the public records speeches by the Prime Minister of Canada and other Members of Parliament, as showing the view which then existed as to the propriety of this legislation. I take it that upon a reference of this kind it is agreed that the Court is to consult public records and documents, the official Hansard as to the debates in the House, which are material to the subject, and what is common knowledge.

The constitutional validity of the Canada Temperance Act was considered by the Judicial Committee of the Privy Council in *Russell* v. *The Queen*, 7 A.C. 829, and its validity was upheld on the ground that it was legislation passed for the peace, order and good government of Canada.

This case is in reality an appeal from the decision of the Supreme Court of Canada in the case of *City of Fredericton* v. *The Queen*, 3 S.C.R. 505, which also upheld the validity of the Act, and in doing so reversed a decision of the New Brunswick Supreme Court.

I note that upon the argument of the appeal before the Board counsel for the appellant admitted that if the Act applied to the whole Dominion of Canada without Local Option, it would then be within the power of the Dominion Parliament but contended that inasmuch as by the provisions of the Act it came into force only in such municipalities as pass by-laws bringing it into force with the assent of 50 per cent. of the electors voting on the question, it was ultra vires. I note also that neither the Attorney-General of the Dominion nor the Attorneys-General of any of the Provinces were represented at the hearing. In the result the Judicial Committee held that in dealing with the legislation, Parliament was dealing with a matter relating to public order and safety, and not with a matter relating to property and civil rights, and further that the legislation in question was clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion.

This decision has been reviewed, discussed and explained in many constitutional cases since, in all of which the decision although with explanation, is upheld and has never been overruled.

The following are among the cases in which it has been considered :

Hodge v. *The Queen*, 9 A.C. 117 : In this case it was held that the Liquor Licence Act of 1877, chapter 181 of the Revised Statutes of Ontario, which made regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., does not interfere with the general regulations of trade or commerce, but comes within Nos. 8, 15 and 16 of section 92 and is within the powers of the Provincial Legislature.

In this case it is pointed out that subjects which in one aspect and for one purpose fall within section 92 of the British North America Act, 1867, may in another aspect and for another purpose fall within section 91, and Russell's case is there explained upon this footing.

Attorney-General for Ontario v. *Attorney-General for the Dominion and The Distillers' and Brewers' Association of Ontario* [1896] A.C. 348. I quote from the headnote of this case :

" The general power of legislation conferred upon the Dominion Parliament by s. 91 of the British North America Act, 1867, in supplement of its therein enumerated powers, must be strictly confined to such matters as are unquestionably of national interest and importance ; and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless they have attained such dimensions as to affect the body politic of the Dominion.

" Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance affected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or provincial legislature.

" Accordingly the Canada Temperance Act, 1886, so far as it purported to repeal the prohibitory clauses of the old provincial Act of 1864 (27 & 28 Vict. c. 18) was ultra vires the Dominion. Its own prohibitory provisions are, however, valid when duly brought into operation in any provincial area, as relating to the peace, order and good government of Canada ;

" *Russell* v. *Reg.* (7 App. Cas. 829) followed ; but not as regulating trade and commerce within s. 91, sub-sec. 2 of the Act of 1867 ;

" *Citizens' Insurance Co.* v. *Parsons* (7 App. Cas. 98) distinguished and *Municipal Corporation of Toronto* v. *Virgo* (ante, p. 93) followed.

" Held, also, that the local liquor prohibitions authorised by the Ontario Act (53 Vict. c. 56) s. 18, are within the powers of the provincial legislature, but they are inoperative in any locality which adopts the provisions of the Dominion Act of 1886."

Attorney-General of Manitoba v. *Manitoba License Holders' Association*, [1902] A.C. p. 73 :

" The Manitoba Liquor Act of 1900 for the suppression of the liquor traffic in that province is within the powers of the provincial legislature, its subject being and having been dealt with as a matter of a merely local

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nature in the province within the meaning of the British North America Act, 1867, s. 92, sub-sec. 16, notwithstanding that in its practical working it must interfere with Dominion Revenue, and indirectly at least with business operations outside the province."

Attorney-General for the Dominion of Canada v. *Attorney-General for the Province of Alberta and others, and Attorney-General for the Province of British Columbia*, [1916] A.C. 588. In this case it was held that Section 4 of The Insurance Act of 1910 enacted by the Parliament of Canada was ultra vires. The case is of interest here for the statement contained therein that the principle illustrated in Russell's case that subjects which in one aspect come within the authority of the provincial legislatures may in another aspect fall within the authority of the Dominion Legislature, is well-established but ought to be applied with great caution.

In *Re the Board of Commerce Act*, (1919) and *The Combines and Fair Prices Act*, (1919), which was an appeal by special leave from the Supreme Court of Canada upon a case stated, the two Acts in question were held ultra vires the Dominion Legislature since they interfered seriously with property and civil rights in the Provinces, and were not passed in any highly exceptional circumstances such as war or famine which conceivably might render trade combinations and hoarding subjects outside the heads of section 92 and within the general power given by section 91. This case also determined that the Acts in question could not be supported under section 91, head 2 (trade and commerce), since they were not within the general power; nor by section 91, head 27 (the criminal law), because the matter did not by its nature belong to the domain of criminal jurisprudence.

Fort Frances Pulp and Power Company Limited v. *Manitoba Free Press Company Limited and others*, an appeal from the Supreme Court of Ontario, Appellate Division, [1923] A.C. 695, held that the Dominion Parliament has an implied power for the safety of the Dominion as a whole to deal with a sufficiently great emergency, such as that arising from war, although in so doing it trenches upon property and civil rights in the Province, from which subjects it is excluded in normal circumstances. The enumeration in section 92 is not repealed in such an emergency, but a new aspect of the business of Government emerges. The Dominion Government, which in its Parliament represents the people of Canada as a whole, must be deemed to be left with considerable freedom to judge whether a sufficiently great emergency exists to justify an exercise of the power. Held also that the Canadian War Measures Act, 1914, and Orders in Council made thereunder during the war for controlling throughout Canada the supply of newsprint paper by manufacturers and its price, also a Dominion Act passed after the cessation of hostilities for continuing the control until the proclamation of peace, with power to conclude matters then pending, were intra vires.

Toronto Electric Commissioners v. *Snider and others and Attorneys-General for Canada and Ontario*, [1925] A.C. 396. This case, in my opinion, states the footing upon which the present reference should be determined. It is a statement by the Judicial Committee of the Privy Council of the basis upon which

Russell's case rests, and taken in conjunction with the *Fort Frances case* to which I have just referred, is conclusive of the matter before us.

The question before the Board in this case to which I refer as *Snider's case*, arose under the Industrial Disputes Investigation Act (1907), 6 & 7 Edward VII, chapter 20, (Dominion) which provided that upon a dispute occurring between employers and employees in any of a large number of important industries in Canada, the Minister for Labour for the Dominion might appoint a Board of Investigation and Conciliation. The Board was to make investigations, with power to summon witnesses and inspect documents and premises, and was to try to bring about a settlement ; if no settlement resulted, they were to make a report with recommendations as to fair terms, but the report was not to be binding upon the parties. After a reference to a Board a lockout or strike was to be unlawful, and subject to penalties. The Board held that the Act was not within the competence of the Parliament of Canada ; that it clearly was in relation to property and civil rights in the Provinces, a subject reserved to the Provincial Legislatures by section 92, sub-section 13, and was not within any of the overriding powers of the Dominion Legislature specifically set out in section 9 ; that it could not be justified under the general power in section 91 to make laws for the peace, order and good government of Canada, as it was not established that there existed in the matter any emergency which put the national life of Canada in peril.

The judgment of Their Lordships in this case, delivered by Lord Haldane, appears to me to afford the footing upon which the question before us must be determined, and I therefore quote at some length from that judgment :

> " A more difficult question arises with reference to the initial words of s. 91, which enables the Parliament of Canada to make laws for the peace, order and good government of Canada in matters falling outside the Provincial powers specifically conferred by s. 92. For *Russell* v. *The Queen* was a decision in which the Judicial Committee said that it was within the competency of the Dominion Parliament to establish a uniform system for prohibiting the liquor traffic throughout Canada excepting under restrictive conditions. It has been observed subsequently by this Committee that it is now clear that it was on the ground that the subject matter lay outside Provincial powers, and not on the ground that it was authorised as legislation for the regulation of trade and commerce, that the Canada Temperance Act was sustained ; see *Attorney-General for Canada* v. *Attorney-General for Alberta*. But even on this footing it is not easy to reconcile the decision in *Russell* v. *The Queen* with the subsequent decision in *Hodge* v. *The Queen* that the Ontario Liquor Licence Act, with the powers of regulation which it entrusted to local authorities in the Province, was intra vires of the Ontario Legislature. Still more difficult is it to reconcile *Russell* v. *The Queen* with the decision given later by the Judicial Committee that the Dominion licensing statute, known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout the Dominion, was ultra vires of the Dominion Parliament. As to this last

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decision it is not without significance that the strong Board which delivered it abstained from giving any reasons for their conclusion. They did not in terms dissent from the reasons given in *Russell* v. *The Queen*. . . . They may have thought that the case was binding on them as deciding that the particular Canada Temperance Act of 1896 had been conclusively held valid, on the ground of fact that at the period of the passing of the Act the circumstances of the time required it in an emergency affecting Canada as a whole. The McCarthy Act, already referred to, which was decided to have been ultra vires of the Dominion Parliament, was dealt with in the end of 1885. Ten years subsequently another powerful Board decided *Attorney-General for Ontario* v. *Attorney-General for the Dominion*, known as the Distillers' and Brewers' case. Lord Herschell and Lord Davey, who had been the leading counsel in the *McCarthy case*, sat on that Board, along with Lord Halsbury, who had presided at it. In delivering the judgment, Lord Watson used in the latter case significant language; 'The judgment of this Board in *Russell* v. *The Queen*, 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.' That decision, he said, 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.'

"The Board held that, on that occasion, they could, not inconsistently with *Russell* v. *The Queen*, declare a statute of the Ontario Legislature establishing Provincial liquor prohibitions to be within the competence of a Provincial Legislature, provided that the locality had not already adopted the provisions of the Dominion Act of 1886.

"It appears to their Lordships that it is not now open to them to treat *Russell* v. *The Queen* as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91. Unless this is so, if the subject matter falls within any of the enumerated heads in s. 92, such legislation belongs exclusively to Provincial competency. No doubt there may be cases arising out of some extraordinary peril to the national life of Canada, as a whole, such as the cases arising out of a war, where legislation is required of an order that passes beyond the heads of exclusive Provincial competency. Such cases may be dealt with under the words at the commencement of s. 91, conferring general powers in relation to peace, order and good government, simply because such cases are not otherwise provided for. But instances of this, as was pointed out in the judgment in *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press* are highly exceptional. Their Lordships think that the decision

in *Russell* v. *The Queen* can only be supported to-day, not on the footing of having laid down an interpretation, such as has sometimes been invoked of the general words at the beginning of s. 91, but on the assumption of the Board, apparently made at the time of deciding the case of *Russell* v. *The Queen*, that the evil of intemperance at that time amounted in Canada to one so great and so general that at least for the period it was a menace to the national life of Canada so serious and pressing that the National Parliament was called on to intervene to protect the nation from disaster. An epidemic of pestilence might conceivably have been regarded as analogous. It is plain from the decision in the *Board of Commerce case* that the evil of profiteering could not have been so invoked ; for Provincial powers, if exercised, were adequate to it. Their Lordships find it difficult to explain the decision in *Russell* v. *The Queen* as more than a decision of this order upon facts, considered to have been established at its date rather than upon general law."

Reference may also be made to *Re the National Products Marketing Act*, 1934, and its amending Act, 1935, in (1936) Canada Law Reports, 398, and particularly to the judgment of the Chief Justice of Canada at page 419.

It was not suggested or argued by counsel who appeared in support of the Statute in question, that any emergency such as that described in *Snider's case* existed in Canada or in any Province of Canada at the time of the passing of the present Act or since. It is manifest, in my opinion, that no such contention can reasonably be made. It is not necessary to discuss whether the emergency which was assumed to exist when the Canada Temperance Act was originally enacted did, in fact, exist. It seems difficult to believe, if Parliament thought at that time that such a state of affairs existed as would in the language of Lord Haldane justify the Act, that such a situation would by any stretch of the imagination be likely to be cured by the passing of a Statute, upon so contentious a matter as the prohibition of the sale of liquor which was not to come into force except in individual municipalities throughout Canada which by a vote of the majority of the electors of such municipalities approved a by-law for the purpose. That, however, is not in my opinion the issue here. What we have to consider is whether such an emergency existed at the date of the passing of the present Statute or since. In this connection I again refer to *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* in [1923] A.C. 695 at page 706 :

" When war has broken out it may be requisite to make special provision to ensure the maintenance of law and order in a country, even when it is in no immediate danger of invasion. Public opinion may become excitable, and one of the causes of this may conceivably be want of uninterrupted information in newspapers. Steps may have to be taken to ensure supplies of these and to avoid shortage, and the effect of the economic and other disturbance occasioned originally by the war may thus continue for some time after it is terminated. The question of the extent to which provision for circumstances such as these may have to be maintained is one on which a Court of law is loath to enter. No authority other than the central Government is in a position to deal

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with a problem which is essentially one of statesmanship. It may be that it has become clear that the crisis which arose is wholly at an end and that there is no justification for the continued exercise of an exceptional interference which becomes ultra vires when it is no longer called for. In such a case the law as laid down for distribution of powers in the ruling instrument would have to be invoked. But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite. In saying what is almost obvious, their Lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and expressed in such decisions as that in October, 1919, in *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146."

And again at page 707 :

> " It is enough to say that there is no clear and unmistakable evidence that the Government was in error in thinking that the necessity was still in existence at the dates on which the action in question was taken by the Paper Control Tribunal."

We were furnished upon the argument with a list of all cities, counties and districts wherein the Act in question has ever been brought into force. According to this list in the Province of Ontario it has at one time or another been brought into force in thirty municipalities and has been suspended and is not now in force in twenty-six of these, leaving only four in which it is in operation.

In Quebec the number of municipalities was originally nine, and it is now in operation in one.

In Manitoba it has been and is in force in a total of two municipalities.

In New Brunswick it has been in force in eleven municipalities and is not now in operation in any of them.

In Nova Scotia it has been in force in thirteen municipalities and it is not now in operation in any of them ; and in Prince Edward Island it has been at one time or another in force in four municipalities and is now in operation in none.

It does not appear ever to have been in force in any municipality in the other provinces.

Counsel upholding the statute contended that the issue before this Court is whether or not we shall overrule the judgment of the Judicial Committee in *Russell's case.* In my opinion that is not the issue. What we have to determine is a matter of fact and upon the determination of that matter of fact must rest the jurisdiction of the Parliament of Canada to pass the Statute, which is the subject matter of the reference.

There can be no doubt that the cause of temperance (and by temperance I mean temperance in its true sense, which is the antithesis of teetotalism and of prohibition) has made great strides since the Canada Temperance Act was first enacted. Open drunkenness which was not considered a disgrace at

that time is so considered now. The most grievous blow which temperance ever sustained was the enactment in Canada and the United States of prohibitory laws in force throughout those countries, which brought forth the bootlegger and in his train the racketeer, who by illicit trafficking amassed millions of dollars and became a wealthy, organised and powerful criminal class.

Since the repeal of those laws, much has been done to overcome the evil, but it is yet by no means completely cured. Nevertheless I think no one would have the hardihood to suggest that an emergency such as that described by Lord Haldane, exists in Canada.

At the present time each Province in the Dominion of Canada, with the exception of Prince Edward Island, has legislation regulating and controlling the sale of liquor within the respective provinces, and the validity of this legislation has been affirmed. In all these Provinces the sale of liquor has been made a Government monopoly and the traffic is regulated and controlled by Government Commissions or Boards charged with the duty of controlling the sale.

In Prince Edward Island there is a prohibitory law.

For these reasons it seems manifest to me that the emergency, if any existed, has wholly passed away and that the foundation and the only foundation upon which *Russell's case* can be supported, no longer exists.

Counsel upholding the statute in question also sought to sustain the jurisdiction of Parliament under the provisions of section 91 (27) " the Criminal Law."

I have already referred to the *Board of Commerce Act case* [1922], 1 A.C. at 191, which I think is a sufficient answer to this contention because the regulation or prohibition of the sale of liquor does not by its nature belong to the domain of criminal jurisprudence, nor is the statute in question in pith and substance a criminal statute.

Upon this subject *Attorney-General for Ontario* v. *Reciprocal Insurers and Attorney-General for Canada* [1924] A.C. 328 in which it was held that section 508 (c) inserted in the Criminal Code (R.S.C. 1906, chapter 146) by which it was made an indictable offence for any person to solicit or accept any insurance risk except on behalf of a Company or Association licensed under the Insurance Act, 1917, of Canada, was ultra vires the Dominion Parliament as being in reality an interference with a subject matter within the jurisdiction of the Provincial Legislatures, and that its enactment as a criminal matter could not alter its real purpose.

For these reasons I am of opinion that the answer to the question should be that Parts I, II and III of the Canada Temperance Act, R.S.C. 1927, chapter 196, are ultra vires.

I assume that this is not a matter for costs.

(D) McTAGUE J.A.: The constitutional validity of Parts I, II and III of The Canada Temperance Act, R.S.C. (1927), chap. 196, is referred to us for opinion by the Attorney-General for Ontario under the Constitutional Questions Act, R.S.C. (1937), Chap. 130. (D) McTague J. A.

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the Moderation League, and various expressions of opinion in different cases before the Privy Council, are fully dealt with in the reasons of Henderson J.A. I shall refrain from repetition in so far as is consistent with the views I take.

During the argument I expressed doubt as to the right of the Attorney-General to refer to this Court a Dominion statute for consideration as to its validity. The doubts then expressed have not been resolved by any means, but in the view I take of the matter I am willing to assume that the Attorney-General has the right which I questioned during argument.

Were it not for the decision in *Russell* v. *The Queen* [1882], 7 A.C. 829, having in mind subsequent decisions of the Privy Council, I should have no difficulty in holding that in present conditions the parts of the Act questioned are ultra vires of the Dominion Parliament. If one obliterates from the mind *Russell* v. *The Queen*, it seems reasonably clear that legislation of the Dominion Parliament where it infringes on any of the subjects exclusively assigned to the Province under sec. 92 of the British North America Act, can only be justified under the opening words of sec. 91, " Peace, Order and Good Government " where something in the nature of a national emergency exists. *Re Board of Commerce Act* [1922] 1 A.C. 191, *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* [1923] A.C. 695, *Toronto Electric Commissioners* v. *Snider* [1925] A.C. 396, Dicta of Duff, C.J., in *Re The National Products Marketing Act* (1936) S.C.R. 398 at 414 et seq., approved and applied in *Attorney-General for Canada* v. *Attorney-General for Ontario* [1937] A.C. 326.

However, *Russell* v. *The Queen* did actually decide that The Canada Temperance Act (1878) was intra vires the Dominion Parliament. Subsequent amendments and additions to the original Act are not of such a character to take it out of that decision. The decision has been challenged more than once before subsequent Boards of the Privy Council. It has been explained many times, but in my view has never been specifically over-ruled.

My brother, Henderson, is evidently of the opinion that this Court should follow the dicta of Lord Haldane in *Toronto Electric Commissioners* v. *Snider*, and hold that *Russell* v. *The Queen* can now only be supported on the assumption that the Board which decided the case must have deemed that a national emergency existed. From that apparently the deduction is that no such emergency existing now, *Russell* v. *The Queen* can no longer be considered good law. That is exactly the line of reasoning followed by the New Brunswick Court of Appeal in *Rex* v. *Jones* (1937) 1 D.L.R. 193. It is a line of reasoning which is open to the Privy Council, but in my humble opinion not to this Court, so long as the doctrine of stare decisis continues in existence.

The doctrine may be generally stated as follows: decided cases which lay down a rule of law are authoritative and must be followed. The general statement is, of course, subject to qualifications, but not to the qualification, in so far as I know, that a subordinate Court can reverse the decision of a higher co-ordinate Court in any circumstances, or refuse to follow it. The House of Lords is the final Court in England, and its decisions are absolutely binding upon it. *London Tramways Co.* v. *London County Council* [1898] A.C. 375—the headnote " A decision of the House of Lords upon a question

of law is conclusive and binds the House in subsequent cases. An erroneous decision can be set right only by an Act of Parliament." The Court of Appeal in England must follow its own previous decisions. In *Re Olympia Oil & Coke Co.* v. *Produce Brokers Co.* (1915) 112 L.T. 744, and on appeal, 1916 1 A.C. 314. The decisions of our own Supreme Court of Canada until reversed are binding on all Canadian Courts, and the Supreme Court is bound by its own previous decisions. *Stuart* v. *Bank of Montreal* (1909) 41 S.C.R. 516. It seems idle to argue that this Court is not concluded by *Russell* v. *The Queen* because the doctrine has to do with the decision itself, not with the reasons on which the decision is based. As Lord Dunedin put it in *Leeds Industrial Co-Operative Society Ltd.* v. *Slack* [1924] A.C. 851 at 864, "My Lords, if a decision is binding, that is an end of it."

The Privy Council itself long ago suggested that it had a right to be behind its own decisions. *Ridsdale* v. *Clifton* (1877) 2 P.D. 276. The principle seems to have been decided finally in *Read* v. *Bishop of Lincoln* [1892] A.C. 644, where Lord Halsbury said, "In the present case their Lordships cannot but adopt the view expressed in *Ridsdale* v. *Clifton* as to the effect of previous decisions. Whilst fully sensible of the weight to be attached to such decision, their Lordships are at the same time bound to examine the reasons upon which decisions rest, and to give effect to their own view of the law." This may afford some comfort to the applicants before us on argument before the Privy Council, but as a subordinate Court we cannot follow the same principle.

For these reasons it is my view that the question propounded must be answered in the affirmative, namely: that Parts I, II, III of the Act in question are constitutionally valid in their entirety. This is not a case for costs.

Before parting with the matter I might remind those who argued so vigorously for Lord Haldane's conclusions as to the ratio decidendi of *Russell* v. *The Queen* in *Toronto Electric Commissioners* v. *Snider*, that the same eminent Judge said on another occasion (*Cornelius* v. *Phillips* [1918] A.C. 199 at 211) . . . "Dicta by Judges, however eminent, ought not to be cited as establishing authoritatively propositions of law unless those dicta really form integral parts of the train of reasoning directed to the real question decided. They may, if they occur merely at large, be valuable for edification, but they are not binding."

(E) GILLANDERS J.A.: I agree.

(E) Gillanders J.A.

In the Privy Council.

No. 2 of 1940.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO.

IN THE MATTER of a Reference as to the validity of Parts I, II and III of the Canada Temperance Act, R.S.C. 1927, Chapter 196.

AND IN THE MATTER of The Constitutional Questions Act R. S. O. 1937, Chapter 130.

AND IN THE MATTER of the Consolidated Rules of Practice.

BETWEEN

THE ATTORNEY-GENERAL OF ONTARIO *Appellant*,

AND

THE MODERATION LEAGUE OF ONTARIO, THE CANADIAN TEMPERANCE FEDERATION, THE ONTARIO TEMPERANCE FEDERATION, THE TEMPERANCE FEDERATIONS OF THE COUNTIES OF PERTH, PEEL, HURON AND MANITOULIN ISLAND, THE UNITED CHURCH OF CANADA, THE SOCIAL SERVICE COUNCIL OF THE CHURCH OF ENGLAND AND THE ATTORNEY-GENERAL OF CANADA ...*Respondents*.

RECORD OF PROCEEDINGS.

BLAKE & REDDEN,
17, Victoria Street, London, S.W.1,
for Appellant.

CHARLES RUSSELL & CO.,
37, Norfolk Street, London, W.C.2,
for The Attorney-General of Canada and The Temperance Federations.