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JOHN SEVERN.....APPELLANT;

AND

THE QUEEN.....RESPONDENT.

ON APPEAL FROM A JUDGMENT OF THE COURT OF QUEEN'S BENCH FOR ONTARIO.

Sale of Liquor—37 Vic., Ch. 32 O.—British North America Act 1867, secs. 91, 92.—Brewer, trade of—Licenses, powers of Dominion and Provincial Legislatures to impose.

S., after the passing of the Act 37 Vic., ch. 32, *O.*, intituled "An Act to amend and consolidate the law for the sale of fermented or spirituous liquors," then being a brewer licensed by the Government of *Canada* under 31 Vic., ch. 8, *D.*, for the manufacture of fermented, spirituous and other liquors, did manufacture large quantities of beer and did sell by wholesale for consumption within the Province of *Ontario* a large quantity of said fermented liquors so manufactured by him, without first obtaining a license as required by the said Act of the Legislative Assembly of *Ontario*. The Attorney General thereupon filed an information for penalties against *S.* On demurrer to the information the special matter for argument was that the Legislature of the Province of *Ontario* had no power to pass the statute under which the penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by *wholesale*, as stated in the information.

Held,—On appeal, that the Act of the Provincial Legislature of *Ontario*, 37 Vic. ch. 32, is not within the legislative capacity of that Legislature.

2. That the power to tax and regulate the trade of a brewer, being a restraint, and regulation of trade and commerce, falls within the class of subjects reserved by the 91st sec. of the *British*

* PRESENT:—Sir William Buell Richards, Knight, C.J., and Ritchie, Strong, Taschereau, Fournier and Henry, JJ.

North America Act for the exclusive legislative authority of the Parliament of *Canada*; and that the license imposed was a restraint and regulation of trade and commerce and not the exercise of a police power.

3. That the right conferred on the *Ontario* Legislature by sub-sec. 9, sec. 92 of the said Act, to deal exclusively with shop, saloon, tavern, auctioneer and "other licenses," does not extend to licenses on brewers or "other licenses" which are not of a local or municipal character.

Regina vs. Taylor, 36 U. C. Q. B. 218, over-ruled.

[*Ritchie* and *Strong*, JJ., dissenting.]

APPEAL from a judgment of the Court of Queen's Bench for *Ontario*, over-ruling the demurrer of the defendant, *John Severn*, to the criminal information filed against him by the Attorney General of the said Province on behalf of Her Majesty the Queen, in the said Court, on the 23rd day of January 1877.

This appeal was brought directly to the Supreme Court, by consent of parties, under sec. 27 of *the Supreme and Exchequer Court Act.*

The information was for the contravention by the defendant of the provisions of the Act of the Legislature of *Ontario*, 37 Vict. ch. 32, respecting the sale of fermented or spirituous liquors, in that the defendant "on the nineteenth day of January, in the year of our Lord aforesaid, at the Town of *Yorkville*, in the County of *York* aforesaid, after the passage of a certain Act of the Legislature of the Province of *Ontario*, made and passed in the thirty-seventh year of the reign of our Sovereign Lady the present Queen, intituled 'An Act to amend and consolidate the law for the sale of fermented and spirituous liquors,' then being a brewer licensed by the Government of *Canada* for the manufacture of fermented, spirituous and other liquors, did manufacture a large quantity of fermented liquors, to wit., one thousand gallons of beer, and afterwards, to

1878

SEVERN v. THE QUEEN.

wit, on the twentieth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, at the Town of *Yorkville* aforesaid, in the County of *York* aforesaid, unlawfully and wilfully and in contravention of the said Act of the Legislature of the Province of *Ontario*, did sell by wholesale a large quantity of the said fermented liquor so manufactured by the said *John Severn* as aforesaid, to wit., five hundred gallons of beer, for consumption within the Province of *Ontario*, to wit., at the Town of *Yorkville* aforesaid, in the County of *York* aforesaid, without first obtaining a license, as required by the said Act of the Legislative Assembly of the Province of *Ontario*, to sell by wholesale, under the said Act, liquors so manufactured by him the said *John Severn* as aforesaid, for consumption within the said Province of *Ontario*, and without having obtained any shop license or any other license under the said Act, or under the Act passed by the said Legislature of *Ontario*, in the thirty-ninth year of the reign of our Sovereign Lady the present Queen, intituled 'An Act to amend the law respecting the sale of fermented or spirituous liquors,' to sell wholesale, as a brewer, liquor, in wilful contravention of the said Act of the Legislature of the Province of *Ontario*, passed and made as aforesaid, and in contempt of our Sovereign Lady the Queen and her laws, and to the evil example of all others in the like case offending, and contrary to the form of the Statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity."

On the 25th January, 1877, the said *John Severn* by his attorney *F. Osler*, having heard the information read, said: that the information and the matters therein contained are not sufficient in law, and that the defendant is not bound to answer the same.

One of the points to be argued was that the Legis-

1878

SEVERN v. THE QUEEN

lature of the Province of *Ontario* had no power to pass the Statute under which the said penalties were sought to be recovered, or to require brewers to take out any license whatever for selling fermented or malt liquors by wholesale, as stated in the information.

The Attorney General joined in demurrer.

In a case of a similar information, *The Queen* v. *James Taylor* (1), the Court of Queen's Bench gave judgment for the defendant on the demurrer to the information. The Court of Error and Appeal for the Province of *Ontario* reversed the judgment of the Court of Queen's Bench and overruled the demurrer of *James Taylor*.

An appeal was subsequently prosecuted by the said *James Taylor* to the Supreme Court of *Canada*, when, after argument, the Supreme Court decided (2) that it had no jurisdiction to entertain the said appeal, inasmuch as the judgment appealed against was prior to the organization of such Court.

In consequence of this decision, *Harrison*, C. J., delivered the judgment of the Court of Queen's Bench as follows:

"We have read the decision of the Court of Appeal in *Regina* v. *Taylor*, 36 U. C. Q. B. 218, reversing the decision of this Court, reported at p. 183 of the same volume.

"If the Court of Appeal were a Court of final resort, we should, in the present case, follow the decision of the Court of Appeal without observation of any kind. But as the Court of Appeal is not a Court of final resort, and as we are informed that it is the intention of the defendant in this case, with the consent of the Crown under section twenty-seven of the Supreme Court Act, at once to carry this case to the Supreme Court; and so, if possible, have *Regina* v. *Taylor*, 36

(1) 36 U. C. Q. B. 218. (2) 1 S. C. Can. R. 65.

1878

SEVERN v. THE QUEEN.

U. C. Q. B. 218, reversed; we, in deference to the existing decisions of the Court of Appeal, and not from any actual conviction that it is correct, follow it, and give judgment for the Queen."

The Act in dispute under this appeal is the 37 Vic., chap 32, of the *Ontario* Legislature.

The clauses considered were the following:

"Section 24. No person shall sell by wholesale or retail, any spirituous, fermented or other manufactured liquors within the Province of *Ontario*, without having first obtained a license under this Act, authorizing him so to do. Provided that this section shall not apply to sales under legal process, or for distress, or sales by assignees in insolvency."

"25. No person shall keep or have in any house, building, shop, eating-house, saloon or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented, or other manufactured liquors, for the purpose of selling, bartering or trading therein, unless duly licensed thereto, under the provisions of this Act."

The two preceding sections, by sect. 26, not to prevent a brewer or distiller duly licensed by the Dominion of *Canada* from keeping, having, or selling any liquor manufactured by him. Provided that such brewer, distiller, &c., is further required to first obtain a license to sell by wholesale under that Act the liquor so mannfactured by him when sold for consumption within this Province, but not in quantities less than prescribed by section 4 of the Act.

Section 22 enacts: "There shall be paid * * * for each license by wholesale a duty of fifty dollars." All the duties under this section are for the purposes of Provincial revenue.

Section 4. "A license by wholesale" shall be construed to mean a license for selling, bartering or traffick-

ing, by wholesale only, in such liquors in warehouses, stores, shops, or places other than inns, wine, ale or beer houses, or other houses of public entertainment, in quantities not less than five gallons in each cask or vessel, at any one time; and in case where such selling by wholesale is in respect of bottled ale, porter, beer, wine or other fermented or spirituous liquor, "each such sale shall be in quantities not less than one dozen bottles of at least three half pints each, or two dozen bottles of at least three-fourths of one pint each, at any one time."

Mr. *J. Bethune*, Q.C., for Appellant:—

The Statute in question, 37 Vic., ch. 32, *O.*, was passed to consolidate the license laws of the Province, but it not only consolidates but amends these laws.

In the consolidated Act there is no special amendment so far as brewers are concerned. Section 4 defines license by "wholesale." The effect of which seems to compel brewers to take out a license at an expense of $50 before selling by wholesale. Now, the Dominion Government derives its income from customs and excise, which are regulated by 31 Vic., ch. 8 *D.* By the 2nd section of that Act the word "brewer" is defined, and by the 3rd it is stated that no other person than a licensed brewer can carry on business or trade, &c. The Dominion Government thereby assumed jurisdiction of this matter. The point of importance is, what are the relative rights and relative jurisdiction of the Dominion Parliament and Provincial Legislatures over this subject-matter?

The only authority under which the Provincial Legislature claims the power of making laws in relation to matters relating to *trade* and *commerce* is under sec. 92, sub-sec. 9, of *B. N. A. Act.* But the whole of that section must be governed by sec. 91, and under sub-sec. 2, sect.

1878

SEVERN v. THE QUEEN.

91, the regulation of trade and commerce belongs exclusively to the Dominion Parliament. The fair construction of the words *trade* and *commerce* includes both internal and external trade.

The Dominion Government derives its income from customs and excise, which are regulated by 31 Vict., ch. 8, *D.* Under sec. 91, sub-secs. 2 and 3, the Dominion Parliament has the power to pass laws for "the regulation of trade and commerce" and "the raising of money by any mode or system of taxation."

Now, the right of the *Ontario* Legislature to pass and maintain the provisions of this Act must rest either upon its power to impose direct taxation within the Province, in order to the raising of a revenue for provincial purposes, or upon its power to legislate upon matters relating to licenses and municipal institutions. It cannot be denied that the whole *British North America Act* shews that it was intended to divide the jurisdiction between the two Legislative bodies, the jurisdiction of each being complete as to cases within its power. See upon this point the judgment of the Court of Appeal for *Lower Canada* in *Ex parte Dansereau* (1); *Dow* v. *Black* (2); *L'Union St. Jacques de Montreal* v. *Belisle* (3).

Then, can this Act be sustained under sec. 92, sub-sec. 2 of the *B. N. A. Act*; in other words, is this charge or duty imposed upon brewers a direct or indirect tax? Appellant contends that it is an indirect tax, the effect of which is to raise the price and value of the beer by at least the amount of the tax. Imposing a tax upon the steamboat instead of the passengers which it carries, is an indirect tax: *Gibbons* v *Ogden* (4). The Imperial Parliament treat this as an indirect tax,

(1) 19. L. C. Jur. 210.
(2) L. R. 6 P. C. App. 280.
(3) L. R. 6 P. C. App. 34.
(4) 9 Wheaton 231.

1878

SEVERN v. THE QUEEN

because they would not have given the power by sub-section 9 if it was direct. The judgments of the Court of Queen's Bench and the Court of Appeal in *Queen* v. *Taylor* agree as to this. But it is contended that the *Ontario* Legislature possess the right of imposing this tax under sub-sec. 9 of sec. 92 of the *B. N. A. Act.* Now, this sub-section must be looked upon as giving an exceptional right, limited in its character, to impose indirect taxation. You must either restrict this power of granting "other licenses" or give the Local Legislature a jurisdiction as complete and as full as that of the Dominion Legislature. Now, the trade of a brewer is one regulated exclusively by the laws of the Dominion of *Canada*, and the history of trade and distilling shows that brewing was always regarded as coming under the Excise Laws.

Reg. v. *Justices of Surrey* (1); *Burns's* Justice of the Peace (2); *Con. Stats. of Canada*, cap. 19; *Con. Stats. of Lower Canada*, cap. 6, sec. 1; cap. 24, sec. 26, sub-sec. 10; 27 and 28 Vic. cap. 3; 29 Vic. cap. 3; *Revised Stats. of Nova Scotia*, cap. 17 and 19; *Revised Stats. of New Brunswick*, vol. 1, cap. 18; *Crabbe's* History of English Law (3); Temperance Act of 1864, of the Province of *Canada*; *Quebec* Resolutions, which constituted the foundation of the Imperial Act; Journals Legislative Assembly of the Province of *Canada* (4); Journals of same Assembly (5); 29th Resolution sub-sect. 4; Lord *Carnarvon's* explanation, on the second reading of the Bill in the House of Lords, shows that these resolutions were the basis of the Statute (6).

The jurisdiction as to excise was intended to be in the Dominion Parliament, and would therefore be

(1) 2 T. R. 504.
(2) Vol. 2, p. 190.
(3) Pp. 477, 482.
(4) Vol. 24, Pp.203, 209.
(5) Vol. 26, p. 362.
(6) Hansard, Vol. 185, p. 563.

1878

SEVERN v. THE QUEEN.

exclusive. One method of regulating excise is by taxation : *Story* on the Constitution (1). The only head of concurrent jurisdiction is under section 95, and even then Provincial Legislatures must yield to Dominion when they conflict.

Either the words "other licenses" must be construed to be of the same class as those mentioned in the preceding part of the sub-section : *East London Water Works* v. *Mile End Old Town* (2) ; *Reed* v. *Ingham* (3) ; *Williams* v. *Golding* (4) ; this is also the view taken by *Torrance*, J., in the case of *Angers* v. *The Queen Insurance Co.*, decided at *Montreal*, in April 1877 (5) ; —or must be held to mean such licenses as were before the passing of the Imperial Act under municipal or local control : *Maxwell* on Statutes (6).

If the term "other licenses" be not thus limited, the Legislature may require anything to be licensed, for instance, may require a license to be taken out by a captain of a vessel, or by a banker, or official assignee.

There are a large class of local licenses of minor importance than those enumerated in this sub-section, such as those enumerated in the Municipal Act of 1866.

As to the argument put forward on behalf of the Crown, in support of the judgment in this case, that the Act is not *ultra vires*, because it has reference to a subject-matter over which its powers are as full and complete as those of the Dominion Parliament as a matter of police, Appellant contends that power is a grant from the Dominion Government, a branch of criminal law over which the Dominion has entire control.

What is known in the *United States* as police power

(1) Section 971.
(2) 17 Q. B. 512.
(3) 3 E. & B. 889.
(4) L. R. 1 C. P. 69.
(5) 21 L. C. Jur. 81.
(6) Page 308.

in the States is founded upon the right which exists on the part of the State Legislatures to make laws for the good government of the State in all cases in which jurisdiction is not given to the Congress.

The jurisdiction to enact Criminal Laws, except for offences committed on the high seas and offences committed against the *United States* Government, exists on the part of the State Legislatures. The basis of the right to make laws of police is Criminal Law. *License Cases* (1).

The cases decided by the *United States* Courts as to laws on the nature of police do not apply with equal force to *Canada*, because the Provincial Legislatures have jurisdiction only in such matters as are expressly mentioned in section 92.

This is plain from section 91.

The *Quebec* resolutions numbered 29, 43 and 45 shew that this was what was intended.

As to the power of disallowance, that power belongs to only one branch of the Dominion Parliament and can be exercised in different ways. In the *United States* it is held that the moment Congress exercises its power over a subject-matter the State has no control, provided that Congress was first to exercise it.

It is further contended on the part of the respondent, that the power to sell in *Ontario* must come from the *Ontario* Government and that under the Act it can be called a shop license.

The answer to this will be found in *Brown* v. *State of Maryland* (2). It is as much a part of the trade of the brewer to sell as to manufacture.

(1) 5 Howard, at pages 590, 591, 592, and 625; Story on the Constitution, 4th edtion, sect. 1954; Cooley on Const. Limitations, 483; Dwarris on Stats. by Potter, p. 450, and subsequent pages; Blackstone's Coms., vol. 4, page 113.

(2) 12 Wheaton, pp. 442, 443, 446.

1878

SEVERN v. THE QUEEN.

It would be mockery to say: I will give you the right to manufacture, but the Provincial Legislature says you must get a shop license before you can sell. See also *Kent's* Commentaries (1).

If this sub-section 9 of section 92 gives power to require a license to be taken out by a brewer, the Legislature has power also to require the license to be obtained from the municipality or from the Provincial Government, or from both. This would very much embarrass this branch of trade, and might so fetter it as to destroy it.

Mr. *Mowat*, Q. C., Attorney General for *Ontario*, (Mr. *Crooks*, Q.C., with him) for the Respondent:

I claim for the Provinces the largest power which they can be given: it is the spirit of the *B. N. A. Act*, and it is the spirit under which Confederation was agreed to. If there was one point which all parties agreed upon, it was that all local powers should be left to the Provinces and that all powers previously possessed by the Local Legislatures should be continued unless expressly repealed by the *B. N. A. Act*. The larger powers given to the Dominion were for the purposes of nationality, so that in construing the *B. N. A. Act*, the intention was not to take from Provincial authorities any more than what was necessary. Take, for instance, the Administration of Justice; nothing in the Act says to whom belong the executive powers of the Administration of Justice, yet from the very beginning it was assumed that the local authorities have the same powers as before Confederation. We find that express power was given by ch. 128, 14 and 15 Vict., to the City of *Montreal* to tax brewers. The same power may surely be trusted to a Provincial Government. Another point of great importance is the provision in the Act

(1) 12 Ed. vol. 1, p. 439.

(sect. 90) by which legislation of the Local Legislatures can be vetoed. The relations of the Provinces here is different from that which the States bear to the *United States*. There Courts alone have power to declare when the States have usurped the higher powers of Congress, whilst here ample power is given to the Dominion Parliament of protecting itself.

This Act has now been in operation for several years. It has been contended that it is only one branch of the Parliament that has the right of disallowing the Provincial Acts. I think it will be admitted by all parties here that the Governor General must take the advice of his council when vetoing local Acts.

This power of disallowance should be taken into consideration when the policy of the Act is urged against us.

The regulation of the sale of all liquor for consumption in the Province, whether manufactured in the Province or not, is of Provincial concern, and the immunity of the person manufacturing in the Province, as part of the Dominion, under the excise regulation of the Inland Revenue Department, no more makes him free of provincial regulations than the person importing liquor under the Customs regulations of another Department.

Section 92 of the *B. N. A. Act*, 1867, confers upon the Legislature of each Province the jurisdiction of making laws so as to exclude the authority of the Parliament of *Canada* in relation to matters coming within the classes of subjects enumerated in that section, and where the Legislature possesses jurisdiction the Court has no power to review the exercise of it.

Where there is jurisdiction the will of the Legislature is omnipotent according to British theory, and knows no superior law in the sense in which the American Courts are accustomed to adjudicate upon constitutional questions.

1878

SEVERN v. THE QUEEN.

See *Blackstone* (1); *Sedgwick* Statutory and Constitutional Law (2); *De Tocqueville's* Democracy in America, Cap. 6; *Broom's* Constitutional Law (3); *Pomeroy's* Constitutional Law (4); *Story* on the Constitution of the *U. S.* (5); *Cooley's* Constitutional Limitations (6); and cases commented on in these authorities.

The requirement of the license is neither obnoxious as being an indirect mode of taxation, nor as being repugnant to the jurisdiction of the Dominion in the regulation of trade and commerce.

The tax here is direct upon the person, and not upon the commodity, with the view of enhancing the selling price thereof to the extent of the tax imposed.

See as to nature of tax, *Fawcett's* Political Economy (7); *Baxter* on Taxation (8); *Bowen's* Political Economy (Mass.) (9).

The taxing power is also commensurate with, and essential to, the existence of the Government, and this mode of its exercise is not excluded from Provincial jurisdiction.

See *Marshall*, C. J., in *Providence Bank and Billings*, (10); *McCulloch and State of Maryland* (11); *In re Slavin* and *The Corporation of Orillia* (12); *Marshall*, C. J., in *Gibbons* v. *Ogden* (13); *Story* on the Constitution of the *U. S.* (14).

Now, amongst the matters in which the Provincial Legislature has this exclusive jurisdiction under class 9 are included "shop, saloon, tavern, auctioneer, and other licenses in order to the raising of revenue for provincial, local, or municipal purposes."

(1) Blackstone's Comm. by Kerr, Vol. I, p. 36.
(2) Pomeroy's Ed. 1874, and cases in note Pp. 404-5.
(3) P. 795.
(4) Secs. 142, 143, 306 and *post.*
(5) Ed. 1873 Book 3, ch. 3.
(6) Ed. 1871, pp. 2, 4 and 86.
(7) Book 4, ch. 3, p. 477.
(8) Pp. 15, 20 and 21.
(9) P. 436.
(10) 4 Peters 541, 561-3.
(11) 4 Wheaton 316, 428.
(12) 36 U. C. Q. B. 172.
(13) 9 Wheaton 203.
(14) Sec. 1068.

(*a*). The term "shop" may as well cover the license to a brewer when selling for consumption in *Ontario* as any other seller by wholesale or retail. The brewer, *quoad hoc*, is in the like position. The same policy, whether of police or revenue, would also equally apply.

(*b*). The term "licenses" is most general, and would include as a subject-matter not only all dealers in any commodity, but trades, professions and occupations.

See *Baxter* on Taxation (1).

(*c*). The Rule of *ejusdem generis* is inapplicable here —first, in there being no controlling or particular classes to refer to in order to determine the like classes, to which the word "other" might be referred with any definiteness; and, secondly, because the latter words enlarge "other Licenses" into all such as the Legislative authority may consider necessary to the raising of a Provincial revenue.

The learned Counsel referred to the cases cited in the judgment of *Draper*, C. J., in the Court of Appeal, in the *Queen* v. *Taylor* (2); in addition to which he cited: *Fleury* v. *Moore et al.* (3); *Regina* v. *Boardman* (4); *Canada Central Railway* v. *Regina* (5); *Regina* v. *Longee* (6); *Sanson* v. *Bell* (7); *Oswald* v. *Berwick-on-Tweed* (8); *Reed* v. *Ingham* (9); *Martin* v. *Hemming* (10); *In re Mew* (11); *License Case* (12); *Ward* v. *Maryland* (13); *The License Taxes Cases* (14); *Cooley* v. *Board of Wardens* (15); *Board of Excise* v. *Barrie* (16); *Bode* v. *Maryland* (17); *Nathan* v. *Louisiana* (18); *Com-*

(1) Pp. 34, 35.
(2) 36 U. C. Q. B. 218.
(3) 34 U. C. Q. B. 319.
(4) 30 U. C. Q. B. 553.
(5) 20 Grant 273.
(6) 10 C. L. J. N. S. 135.
(7) 2 Camp. 39.
(8) 5 H. L. 856.
(9) 3 E & B. 889.
(10) 18 Jur. 1002.
(11) 31 L. J. N. S. Bkptcy, 89.
(12) 5 Howard 504.
(13) 1 American R. 50.
(14) 5 Wallace 463.
(15) 12 Howard R. 509.
(16) 34 N. Y. R. 657.
(17) 7 Gill 326.
(18) 8 Howard 73.

1878

SEVERN v. THE QUEEN.

monwealth v. *Hoothooke* (1); *Illinois* v. *Thurber* (2); *Brown* v. *State of Maryland* (3).

Supposing, now, this Act is viewed as an Imperial Act the word "other" must be accepted in its broadest sense; 2 *Burns's* Justice of the Peace, (4); *Baxter* on Taxation (5); *Peto* on Taxation (6); *Broom's* Maxims (7).

The practice of the *United States* also may be referred to. How was this word accepted there. See *Hilliard* on Taxation (8); *Strong* on Constitutional Law, 1,053; *Rev. Stats. U. S.* (9).

The Provincial jurisdiction over licenses is not confined to shops and places where the sale is by retail, and the true construction to be given to sub-section 9 of sec. 92, is that the words "and other licenses" include the superior as well as the inferior grade of licenses.

Mr. Crooks, Q. C., followed on the part of the Respondent:—

By the *British North America Act* we are given a constitution similar to the English constitution. In each Province a *plenum imperium* was constituted and not a subordinate authority, or one with only such powers as were specifically conferred. Once jurisdiction is given over a subject matter, the power is absolute. The case of *L'Union St. Jacques de Montreal* v. *Belisle* (10), seems to support this view.

The only question before the Court is whether the enacting body acted *ultra vires*.

By the *British North America Act* two sovereign bodies

(1) 10 Allen 200.
(2) 13 Illinois 554.
(3) 12 Wheaton 419.
(4) 30th ed., 193, 194.
(5) Pp. 34 and 35.
(6) P. 170.
(7) Pp. 585, 588.
(8) P. 49, sec. 9.
(9) P. 625, sec. 3,243.
(10) L. R. 6 P. C. App. 35.

were created, viz: the Dominion Parliament, and the Local Legislatures. There is no question of the one being subordinate to the other. The Act has to be construed as an Imperial Act and the jurisdiction given to the Local Legislatures must be absolute and complete. Assuming this, Respondent contends that this Statute was enacted by the *Ontario* Legislature in the exercise of that sovereignty.

The Provincial Legislature possesses inherent constitutional power to enact all such laws as it thinks best for the welfare of the people of the Province, and to secure this end to prohibit the sale, traffic, or disposal of spirituous liquor or other commodities which the Legislature may deem injurious. With respect to such matters its powers are as full and complete as those of the Dominion and Imperial Parliaments in relation to matters Canadian and Imperial respectively.

The principle of the maxim *salus populi suprema lex* is strictly applicable, and sustains the Provincial jurisdiction.

See *Lieber's* Legal Hermeneutics (1); *Sedgwick* on Stat. and Constit. Law (2).

Lord *Selborne*, in the case of *L'Union St. Jacques* v. *Belisle* (3), puts it thus:—

"The scheme of the 91st and 92nd sections is this: By the 91st some matters—and their Lordships may do well to assume, for the argument's sake, that they are all matters except those afterwards dealt with by the 92nd section; their Lordships do not decide it, but for the argument's sake they will assume it—certain matters, being upon that assumption all those which are not mentioned in the 92nd section, are reserved for

(1) Chap. 6., sec. x.
(2) C. 10 p. 404 (Pomeroy's ed. 1874) and cases in note.
(3) L. R. 6 P. C. App. 35.

1878

SEVERN v. THE QUEEN.

the exclusive legislation of the Parliament of *Canada*, called the Dominion; but, beyond controversy, there are certain other matters, not only not reserved for the Dominion Parliament, but assigned to the exclusive power and competency of the Provincial Legislature in each Province,—among those the last is thus expressed: 'Generally all matters of a mere local or private nature in the Province.'"

The aim of the Statute here was not to interfere with the general jurisdiction of the Dominion Government.

It is not an absolute prohibition for sale generally, but only a charge when sold for consumption within the Province of *Ontario*. It is only when the brewer ceases to be a manufacturer and becomes a trader. If the contention of the Appellant was correct, the consequence would be that the brewer could not sell by retail. See *Cooley* at p. 581, see also *Pomeroy's* Const. Law, 285 to 297, 332.

The expression "license" has not a limited application in our Statutes, and wholesale traders have been obliged to take out licenses for municipal revenue (1).

The argument of the Appellant to be consistent would have to exclude pedlers and hawkers:—see *In re Duncan* (2).

This case came under the *Dunkin* Act, which is still in force. If municipalities have this power surely the Provincial Parliament cannot be denied it. Licenses of any description cannot be limited by any power held by the Dominion Government. There may be here, as in the *United States*, two powers that may tax the same subject. See also *Broom's* Maxims (3), *Maxwell* on Statutes (4).

(1) 29 and 30 Vic. ch. 51, sec. 250; C. S. U. C., 22 Vic., ch. 54, sec. 246; 43 Geo. III. ch. 14 secs. 2 & 7; 43 Geo. III. ch. 9; 58 Geo. III. ch. 6.

(2) 4 Revue Leg. 228.

(3) Pp. 585, 588.

(4) Pp. 292, 303.

1878

SEVERN v. THE QUEEN.

Mr. *Bethune*, Q.C., in reply :—

At the time of Confederation all *wholesale* licenses had been abolished. As to the power of disallowance by sec. 56, it has principally reference to the disallowance of valid laws for political reasons.

The *Dunkin* Act never touched the wholesale trade of brewers, but only prevents them from selling by the glass, and this Act could not be repealed by the Local Government.

The tax is imposed upon the brewer in *Ontario*, and is therefore a tax upon the sale of his goods and merchandise in *Ontario*, which can affect the trade of the other Provinces.

1878

Jan'y. 28.

THE CHIEF JUSTICE:

In deciding important questions arising under the Act passed by the Imperial Parliament for federally uniting the Provinces of *Canada*, *Nova Scotia* and *New Brunswick*, and forming the Dominion of *Canada*, we must consider the circumstances under which that Statute was passed, the condition of the different Provinces themselves, their relation to one another, to the Mother Country, and the state of things existing in the great country adjoining *Canada*, as well as the systems of government which prevailed in these Provinces and countries. The framers of the Statute knew the difficulties which had arisen in the great Federal Republic, and no doubt wished to avoid them in the new government which it was intended to create under that Statute. They knew that the question of State rights as opposed to the authority of the General Goverment under their constitution was frequently raised, aggravating, if not causing, the difficulties arising out of their system of government, and they evidently wished to avoid these evils, under the new state of

1878

SEVERN v. THE QUEEN.

things about to be created here by the Confederation of the Provinces.

In distributing the Legislative powers, the *British North America Act* declares the Parliament of *Canada* shall, or, as the 91st section reads,

> It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws, for the peace, order and good government of *Canada*, in relation to all matters not coming within the classes of subjects assigned *exclusively* to the Legislatures of the Provinces.

And then, for greater certainty, that section defines certain subjects to which the exclusive legislative authority of the Parliament extends. Amongst other things are mentioned :

> 2. The regulation of trade and commerce.
> 3. The raising of money by any mode or system of taxation.

Certain other subjects of a general and quasi-national character are then referred to and mentioned, as coming within the powers of the Dominion Parliament.

The causing a *Brewer* to take out a license and pay a certain sum of money therefor, as required by the *Ontario* Statutes, is a means of raising money, and it, of course, is a tax ? And there can be no doubt it is an indirect tax ; and it is equally beyond a doubt that it is a means which may be resorted to by the Dominion Parliament for the raising of money. When, then, it is mentioned in the Statute under consideration that the Dominion Parliament may raise money under any mode or system of taxation, and when, in the same Act, the taxing power of the Provincial Legislature is confined to *direct taxation* within the Province, in order to the raising of a revenue for provincial purposes, it seems to me beyond all doubt (except so far as the same may be qualified by No. 9 of section 92) that it was introduced not to allow the Provincial Legislature the right to impose indirect taxes for provincial or local purposes.

The fact, that in most European Countries, as well as in the *United States* and in the North American Provinces, by far the larger portion of the ordinary revenue was raised by indirect taxes, seems to indicate that the framers of the *British North America Act* considered this so important a power that it was not intended to intrust it to the Local Legislatures. The power of taxation, being so essential to the maintenance of a Government, must necessarily be viewed as of the greatest importance to every Government, and it is mentioned as No. 3 of the powers of the Dominion Parliament, and No. 2 of the Provincial Legislatures.

Looking, then, at these provisions as they stand thus far, it would be reasonable to hold, in the absence of any other provision, that the framers of the Statute did not intend that the Provincial Legislatures should have any but the power of direct taxation for raising a revenue for provincial purposes.

It is not necessary to say much as to the effect of raising money by direct and indirect taxation. When each inhabitant is compelled to pay a sum of money to a tax-gatherer he knows and understands what he pays, and will no doubt look sharply after the expenditure of money so extorted from him. But when the tax is indirectly imposed, and the payer recoups himself by an extra charge for the commodity he deals in, the purchaser may buy the article or not as he pleases: the money he pays is more like a voluntary payment for what may, perhaps, be considered a luxury, and when paid he does not look so sharply into the matter as he does in the payment of a direct tax. It is therefore obvious, that the Provincial Legislatures would be much more likely to exercise prudence in the character of the expenditure of money if they are compelled to raise it by direct taxation.

1878

SEVERN v. THE QUEEN.

Besides this, the taxation for purely local purposes before Confederation was mostly direct, whilst that for the general purposes of the Provincial Government was indirect, and generally from customs and excise. In most of the Provinces, a large portion of the indirect taxes, which might be considered as arising in the particular localities and were collected through the medium of licenses, was applied to local and not general or provincial purposes. We must assume this was known to the framers of the *British North America Act*, and that, whilst they were in effect prohibiting the Local Legislatures from levying indirect taxes, they did not wish to deprive these Provinces or localities of the revenue which the local or municipal authorities had been for many years receiving and applying to purely local purposes. In that view, then, when framing sec. 92 of the Statute, and by No. 8 providing for making laws for "municipal institutions in the Provinces," attention would be naturally drawn to the powers conferred on those bodies in the several Provinces, and the means which they had of raising money, and they would find, that in most, if not all, of the Provinces, the amount to be paid for tavern licenses was fixed by the local or municipal authorities, and the larger portion of the money arising from that tax was applied to the municipal or local purposes in contra-distinction to provincial or general purposes. If that system was to be continued it would be necessary to make special provision therefor, inasmuch as the tax by license was an indirect mode of taxation, and the Dominion Parliament was intended alone to possess it. Giving power to the Local Legislature to legislate as to "shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes," was certainly one mode of doing this. Suppose the word "provincial" had not been there, would

not the fair meaning be that it was intended to be confined to licenses which were of a local character, and when it appears that part of the revenue derived from the tavern and shop licenses, as in *Canada*, had gone into the provincial chest, an obvious reason existed for adding provincial to the local or municipal purposes. In the Province where the most complete system of municipal institutions existed (and which is now the Province of *Ontario*), the shop and tavern licenses were issued on the certificates granted under the authority of by-laws passed by the municipalities, or in cities by the Police Commissioners, and the monies received therefor, except the amount payable to the Provincial Government by way of duty, belonged to the corporation of the municipality in which they were issued. The revenue from auctioneers licenses was applicable to local objects. There were issued under municipal authority a great number of other licenses, including auctioneer, which were specially named and referred to in the *Municipal Institutions Act* applicable to *Upper Canada* then in force, to name which minutely would have been pursuing a course not desirable or convenient to adopt in an Act of Parliament of the character of the one under consideration, but very proper in a Statute establishing municipal institutions and defining their powers.

Mr. Justice *Wilson*, in his very elaborate judgment in the *Queen* v. *Taylor* (1), refers to the class of licenses which seem to have

> a proper connection with and affinity to those licenses which are commonly mentioned and found along with shop, saloon, tavern and auctioneer licenses,

and then mentions licenses on billiard tables, victualling houses, ordinaries, houses where fruit, &c., are sold, hawkers, pedlers, transient traders, livery stables, intelligence offices, &c.

(1) 36 U. C. Q. B. 183.

1878

SEVERN v. THE QUEEN.

In some of the Provinces a portion of the monies from shop, saloon and tavern licenses (and perhaps also auctioneers licenses) formed part of the Provincial revenue. The mentioning of these by name shews that the power to legislate as to them was intended to be given to the Local Legislatures, and thus to interfere with what would otherwise have been the exclusive right of the Dominion Parliament to legislate on the subject. These were matters in which the municipalities were peculiarly interested, and as to which the local authorities would be much more likely to work out the law in a satisfactory manner. In fact, as to the "other licenses" the Dominion Parliament would be meddling with parish business if they undertook to legislate about them. We can, therefore, see very good reasons why these licenses as to local and municipal matters should be under the control of the Local Legislatures, and equally good reasons why, as regards licenses for such matters as would be likely to affect trade and commerce and the revenue derivable from the excise and customs, these latter affecting great and paramount interests, no express power was given to the Local Legislatures.

It seems to me, in naming "shop, saloon and auctioneer" licenses the intention was to shew that, as these licenses might possibly be considered applying to objects from which the Dominion revenue was likely to be derived, though really matters of local concernment, it would be better to name them and leave the other unimportant licenses to be covered by the words "and other licenses."

If it had been intended to allow the Local Legislatures to tax manufactures, and particularly the manufactures of malt and alcoholic liquors, from which so large a part of the public revenues had been, and was likely to be, raised, it would have been mentioned, and mentioned in other terms than "and other licenses."

The Province of *Canada*, before Confederation, being the largest territorially, having a greater population and raising a larger revenue than either of the other Provinces, and being formed by the union of two Provinces having different laws and to some extent different interests, would naturally attract attention as the portion of the country where some of the objects of Confederation had been practically worked out. The legislation which had prevailed there would naturally be referred to, and would probably have its effect in moulding the measure which was to effect the destinies of so important a member of the new Confederacy, and which was to be worked out there in common with the other Provinces. I think we may, without violating any of the rules for construing Statutes, look to the legislation which prevailed in any or all of the Provinces, in order to enable us to be put in the position of those who framed the Laws and give assistance in interpreting the words used and the object to which they were directed.

Now, in considering the meaning to be attached to the words "shop licenses"—(I am not aware that they were used as applicable to licenses in any other of the Provinces)—we find in referring to the *Municipal Institutions Act of Upper Canada* then in force, 29 and 30 Vic., cap. 51, "shop licenses" are said to be licenses for the retail of spirituous, fermented or other manufactured liquors in quantities not less than one quart in shops, stores or places other than inns, ale houses or places of public entertainment. "Tavern licenses" is a term of more general use, and probably had substantially the same meaning throughout all the Provinces, and that class of license is referred to in the same Statute and section as licenses for the retail of the same description of liquors to be drunk in an inn, ale-house, beer-house, or any other house of public entertainment in which the same is sold.

1878

SEVERN v. THE QUEEN.

The anomaly of allowing the Local Legislatures to compel a manufacturer to take out a license from the Local Government to sell an article which has already paid a heavy excise duty to the Dominion Government, and after he has paid for and obtained a license from the Dominion Government to do the very same thing, is obvious to every one. It is not doubted that the Dominion Legislature had a right to lay on this excise tax and to grant this license, and the act of the Local Legislature forbids and punishes the brewer for doing that which the Dominion Statute permits and allows. Here surely is *what seems* a direct conflict and interference with the act of the Dominion Legislature, and such a conflict as the framers of the *British North America Act* never contemplated or intended.

I should be very much surprised to learn that any gentleman concerned in preparing or revising the *British North America Act* ever supposed that under the term "and other licenses" it was intended to confer on the Local Legislatures the power of interfering with every Statute passed by the Dominion Parliament for regulating trade and commerce, or for raising money under customs and excise laws. If it be decided that the words used confer the power in the broad sense contended for, there can hardly be an occupation or a business carried on which may not need a license from the Local Legislature, and if they have the right to impose that kind of taxation why should they be restricted from doing so?

I have already intimated that the largest portion of the revenues of *Canada* will probably be derived from duties raised under customs and excise laws, and that the power of direct taxation will seldom be resorted to; but that it was undoubtedly necessary, to guard against all possible contingencies as to a deficient revenue, to give to the Dominion Parliament the power of direct taxation.

It may be urged that in this way a conflict may arise between the two authorities. When a tax is directly imposed the power imposing it authorises its own officers to collect it, but when the conflict arises from a license the party who is required to take out the license may or may not do so as he pleases, and he may cease to carry on the business, and in that way deprive the Government of the revenue it would otherwise have received.

I do not think it necessary for the elucidation of my views to reiterate the arguments contained in the very elaborate judgment of Mr. Justice *Wilson*, in the case of the *Queen* v. *Taylor*. That judgment was prepared when I was a member of that Court, after a most careful consideration and consultation with all the Judges of the Court.

The fact, that that judgment was reversed in the Court of Error and Appeal of *Ontario*, and that so many of my learned Brothers in this Court dissent from the views there expressed, of course, naturally creates in my mind some distrust as to the correctness of my own conclusions. It may be that I do not take a sufficiently technical view of the matter, that I look too much to the surrounding circumstances and the legislation which I consider applicable to the subject, and that my mind is too much influenced by those circumstances But I consider the question to be decided is of the very greatest importance to the well working of the system of Government under which we now live. I consider the power now claimed to interfere with the paramount authority of the Dominion Parliament in matters of trade and commerce and indirect taxation, so pregnant with evil, and so contrary to what appears to me to be the manifest intention of the framers of the *British North America Act*, that I cannot come to the conclusion that it is conferred by the language cited as giving that power.

1878

SEVERN v. THE QUEEN.

By the interpretation I give to the words, limiting them to the "other licenses" which are of a local and municipal character, and giving full force to the words "shop, saloon, tavern and auctioneer licenses," I think I carry out the intention of the *British North America Act*, and make all the powers harmonise. Those of the Dominion Parliament to regulate trade and commerce and to exercise the power of indirect taxation, except the shop, tavern, saloon and auctioneer licenses, and those of a purely local and municipal character; and the Local Legislature has the powers so excepted out of the exclusive powers of the Dominion Parliament, together with the right of direct taxation.

It is suggested that, as under section 90 of the Statute the Governor General may disallow any Act of a Local Legislature likely to cause a conflict with Statutes of the Dominion Parliament, any apprehended difficulty or inconvenience might be avoided by the exercise of that power.

Under our system of Government, the disallowing of Statutes passed by a Local Legislature after due deliberation, asserting a right to exercise powers which they claim to possess under the *British North America Act*, will always be considered a harsh exercise of power, unless in cases of great and manifest necessity, or where the Act is so clearly beyond the powers of the Local Legislature that the propriety of interfering would at once be recognised.

My views may be briefly summed up thus:—

I consider, under the *British North America Act*, the power to regulate trade and commerce rests exclusively with the Dominion Parliament, as also the right to raise money by the mode of indirect taxation, except so far as the same may be expressly given to the Local Legislatures.

Making it necessary to take out and pay for a license

to sell by wholesale or retail, spirituous, fermented or other manufactured liquors, is raising money by the indirect mode of taxation.

I think all the authority given to the Local Legislatures to exercise the power of raising money by the indirect mode of taxation is contained in sec. 92 of the *British North America Act*, which gives power to legislate on the subject of

8. Municipal institutions in the Province.

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

Looking at the state of things existing in the Provinces at the time of passing the *British North America Act*, and the legislation then in force in the different Provinces on the subject, and the general scope and object of Confederation then about to take place, I think it was not intended by the words "other licenses" to enlarge the powers referred to beyond shop saloon and tavern licenses in the direction of licenses to affect the general purposes of trade and commerce and the levying of indirect taxes, but rather to limit them to the licenses which might be required for objects which were merely municipal or local in their character.

If the power can be properly exercised by the Local Legislatures to raise money by this indirect mode of taxation, I cannot doubt it will be largely exercised, and probably without reference to the effect it may have on the means which the Dominion Parliament may resort to for the purpose of raising a revenue. It is a significant fact that since the passing of the Act requiring manufacturers of spirituous, malt, or other manufactured liquors to take out a license to sell by wholesale, the Legislature of *Ontario* has increased the sum payable for such licenses from fifty dollars to one hundred and fifty dollars.

1878

SEVERN v. THE QUEEN.

I think the appeal should be allowed with costs, and judgment in the Court below entered for the Defendant on the demurrer to the information with costs.

RITCHIE, J.:—

The only question raised in this case is: Has the Legislature of *Ontario* authority to raise a revenue from brewers by requiring them to take out licenses to enable them to carry on their business and dispose of their beer within the Province of *Ontario*?

This I should feel no difficulty in answering in the negative, but for sub-section 9 of section 92 of the *British North America Act*, 1867.

No doubt this is an indirect tax, and Local Legislatures are, by the *British North America Act*, confined in their power of raising money to direct taxation within the Province, in order to the raising of a revenue for provincial purposes, except so far as their power is extended by section 92, which authorizes the Legislature in each Province exclusively to make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, of which sub-section 9 specifies:

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

This brings up the question on which, I humbly think, this case turns, viz., what licenses did the Legislature intend to cover by the words, "and other licenses?" Had the licenses specified in this section been *ejusdem generis*; had they been confined to those which, throughout the Dominion, previously to Confederation, had been granted only by municipal authorities; and had the revenue authorized to be raised been for municipal purposes alone, I should have thought there was much force in the contention that the words "and other licenses" should be read in a restricted

1878

SEVERN v. THE QUEEN.

sense. We are not, in my opinion, to look to the state of the law at the time of Confederation in the adjoining Republic, or the difficulties there experienced, as affording any guide to the construction of the *British North America Act*; nor, with all respect for the Province of *Ontario*, do I think the Act should be read by the light of an *Ontario* candle alone, that is, by the state of the law at the time of Confederation in that Province, without reference to what the law was in other parts of the Dominion. If the law at the time of Confederation is to be looked at as affording a key to the construction of the Statute, then the state of the law throughout the Dominion must, I think, be looked at, and not that of any individual Province; as I think it clear that the Statute was to have a uniform construction throughout the whole Dominion, and the powers of all the Local Legislatures were to be alike. But, as the case stands, I can see no reason why the golden rule, as it has been often called, by which Judges are to be guided in the construction of Acts of Parliament, should be departed from, viz., to read the words of an Act of Parliament in their natural, ordinary and grammatical sense, giving them a meaning to their full extent and capacity, there being nothing to be discovered on the face of the Statute to show that they were not intended to bear that construction, nor anything in the Act inconsistent with the declared intention of the Legislature.

I cannot think it was intended to confine the powers of the Local Legislature, for the raising of a revenue for provincial purposes, to licenses of a purely municipal character granted, most frequently, rather with a view to police regulations than for purposes of revenue, and which, when granted for the latter object, could hardly be supposed to be more than adequate for local and municipal purposes. I think the power given under sub-section 9 should be construed as intended to

1878

SEVERN v. THE QUEEN.

furnish the Local Legislature with the means of raising a substantial revenue for provincial purposes from all such licenses as at the time of Confederation were granted in the now Dominion, either by provincial or municipal authority.

I have said before, the licenses named are not *ejusdem generis*, for certainly auctioneer licenses are not *ejusdem generis* with tavern licenses, nor always granted by the same authority; for in *New Brunswick*, while tavern licenses were granted by the municipal authority, auctioneer licenses were granted by the Lieutenant-Governor; and so with respect to distillers, an annual license had to be obtained from the Provincial Treasurer; so also formerly with respect to hawkers, pedlers and petty chapmen, a provincial duty was imposed, and they were required to take a license from the Treasurer of the Province (1); and again, in *New Brunswick*, licenses, other than those of a police or municipal character, were granted by municipal authority as licenses for the sale of liquors by wholesale, no person being allowed to sell any liquor by wholesale without license, which liquors the Statute declared *inter alia* to be:

Ale, porter, strong beer, or any other fermented or intoxicating liquor.

From this brewers were not exempt, there being no exception in their favor. And by the 6 Vic. ch. 35 it was enacted:

Sec. 3. That it shall and may be lawful for the mayor of the said city (*St. John*), and he is hereby authorized to license persons being natural born British subjects, or such as shall become naturalized or be made denizens, to use any art, trade, mystery or occupation, or carry on any business in merchandize or otherwise, within the said city, on paying yearly, such sum not exceeding five pounds, nor less than five shillings, to be fixed and determined by an ordinance of

(1) See 9 & 10 Geo. IV. c. 27.

the corporation, for the use of the mayor, aldermen and commonalty of the said city of *St. John*, together with the fees of office, and be subject also to the payment of all other charges, taxes, rates, or assessments as any freeman or other inhabitant of the said city may, by law, be liable to or chargeable with.

Sec. 4. And that aliens, the subjects of any other country at peace with *Great Britain*, may be licensed, by the mayor of the said city, to use any art, trade, mystery or occupation, or to carry on any business in merchandise or otherwise, within the said city, on paying annually for the use of the mayor, aldermen and commonalty of the said city, a sum not exceeding twenty-five pounds, nor less than five pounds, together with fees of office to be regulated by an ordinance of the corporation, and be subject also to the payment of all other charges, taxes, rates or assessments as any freeman or any other inhabitant of the said city may, by law, be liable to or chargeable with.

Therefore, I think the rule *noscitur a sociis* cannot apply in this case.

It is said this construction conflicts with the power of the Dominion Government to regulate trade and commerce, and the raising of money by any mode or system of taxation. All I can say in answer to that is, that so far, and so far only, as the raising of a revenue for provincial, municipal and local purposes is concerned, the *British North America Act*, in my opinion, gives to the Local Legislatures not an inconsistent but a concurrent power of taxation, and I fail to see any necessary conflict; certainly, no other or greater than would necessarily arise from the exercise of the power of direct taxation and the granting of shop and auctioneer licenses specially vested in the local legislatures. It cannot be doubted, I apprehend, that both the Local Legislatures and Dominion Parliament may raise a revenue by direct taxation, and, if so, why may not both raise a revenue by means of licenses? There need be no more conflict in the one case than in the other. The granting of shop and auctioneer licenses necessarily interferes with trade and commerce, the former with

1878

SEVERN v. THE QUEEN.

retail trade, the latter with both wholesale and retail trade; for, in large business centres, auctioneers' sales on a wholesale scale are of daily occurrence.

Should at any time the burthen imposed by the Local Legislature, under this power, in fact conflict injuriously with the Dominion power to regulate trade and commerce, or with the Dominion power to raise money by any mode or system of taxation, the power vested in the Governor General of disallowing any such legislation, practically affords the means by which serious difficulty may be prevented. But I do not think we have any right to suppose for a moment that the Local Legislatures would legislate save for the legitimate purpose of raising a revenue, and not so as to interfere unnecessarily or injuriously with the legislation of the Dominion Parliament, still less, so as to destroy the very business from which the revenue is to be derived.

I think the construction I have indicated of the words "and other licenses" is not only in accordance with the literal interpretation of the language, but is consistent with the policy and purview of the Statute, which, as I said before, in my opinion, was to give to the Local Legislatures the rights and power, in addition to direct taxation, to raise a substantial revenue, for provincial, as well as for municipal, purposes, by means of licenses such as were and might have been granted at the time of Confederation by the several Provincial Governments and municipal authorities, and is not confined to licenses which are of a purely municipal character, and from which I do not think a brewer is any more exempt than a shop-keeper or auctioneer. He could not sell by wholesale in *New Brunswick* at the time of Confederation without a license, and I do not think he can do so now in *Ontario*.

It may be right for me to say that it is only under

the words "and other licenses," and solely in order to the raising of a revenue for the purpose named in sub-section 9, that, in my opinion, the Local Legislatures have the right of imposing this burthen or tax on brewers.

STRONG, J.:—

I am of opinion that the judgment of the Court below ought to be affirmed.

As this Court is now, for the first time, dealing with a question involving the construction of that provision of the *British North America Act* which prescribes the powers of the Provincial Legislatures, I do not consider it out of place to state a general principle, which, in my opinion, should be applied in determining questions relating to the constitutional validity of Provincial Statutes. It is, I consider, our duty to make every possible presumption in favor of such Legislative Acts, and to endeavor to discover a construction of the *British North America Act* which will enable us to attribute an impeached Statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it; and in doing this, we are to bear in mind "that it does not belong to Courts of Justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it."

It must, therefore, before we can determine that the Legislature of the Province of *Ontario* have exceeded their powers in passing this Act, be conclusively shown that it cannot be classed under any of the subjects of legislation enumerated in section 92 of the *British North America Act*, which is to be read as an exception to the preceding section.

1878

SEVERN v. THE QUEEN

The provision contained in the 26th section of the *Ontario* Act, 37 Vic., cap. 32, does not require all brewers to obtain licenses to enable them to sell the beer manufactured by them; but the restriction against selling without license is confined to the sale by wholesale of beer sold for consumption within the Province. I cannot well see with what object the distinction was made between beer to be consumed in, and that to be consumed without, the Province, unless it was either upon the assumption, that the right exclusively conferred upon the Parliament of the Dominion to regulate trade and commerce did not extend to the internal trade of the Provinces; or upon the supposition, that the law would be authorized by the right to legislate in exercise of what was designated in the argument of this case as the police power, which, it was contended, the Provinces possess. Neither of these grounds constituted valid reasons for making this discrimination.

That the regulation of trade and commerce in the Provinces, domestic and internal, as well as foreign and external, is, by the *British North America Act*, exclusively conferred upon the Parliament of the Dominion, calls for no demonstration, for the language of the Act is explicit.

With reference to the police power, I am of opinion also, for a reason which I will state hereafter, that the distinction could have no legal effect.

I regard the Act, therefore, as one, the validity of which is to be tested precisely in the same manner as if it had required all persons carrying on the trade of brewing in the Province of *Ontario* to qualify themselves by taking out licenses.

It was argued for the Crown, and particularly pressed by one of the learned counsel, Mr. *Crooks*, that the fee payable for this license was a direct tax, or in the

nature of a direct tax, and so authorized by section 92, sub-section 9.

I do not think this argument well founded. It might not be easy to specify *a priori* what is meant by a direct tax under that sub-section. One species of tax which would be a direct tax suggests itself at once,—a capitation tax; but it is not material to pursue the enquiry, as it is evident that, accepting the meaning given to the term "indirect tax" by political economists, a tax on manufactures by means of a license is within the definition, since the payment of it ultimately falls upon the consumer. Licenses are always classed by economists with excise taxes. The authorities referred to in the judgment of the late Chief Justice of the Court of Appeal in *The Queen* v. *Taylor* seem conclusive as to this.

It was also contended by counsel for the Respondent, that under the words "Municipal Institutions in the Province," which constitute sub-section 9 of sec. 92, or under sub-section 16 of the same section, which gives legislative power in "all matters of a merely local or private nature in the Province," the Provincial Legislatures possess authority to legislate in exercise of what American authorities have conveniently termed the "Police Power"—meaning a power to legislate respecting ferries, markets, fares to be charged for vehicles let for hire, the regulation of the retail sale of spirits and liquors, and on a number of other cognate but indefinite subjects, which, in all countries where the English municipal system, or anything resembling it, prevails, have been generally regarded and dealt with as subjects of municipal regulation (1).

Without expressing any opinion as to the soundness

(1) See *Munn* v. *Illinois*, 4 Otto, 125 et seq.; Potters Dwarris p. 462; Dillon on Municipal Corporations, sec. 93.

1878

SEVERN v. THE QUEEN.

of this argument, I am of opinion, that, even if it was entitled to prevail, it could not warrant the imposition of a license tax upon the manufacture or wholesale sale of beer, any more than it would authorize a similar tax upon any other manufacture or commerce by wholesale.

I think, however, that in ascribing the power of the Legislature to pass this Statute to sub-section 9 of section 92, the learned counsel for the Crown put their case upon the true ground. That provision is in the following words:

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

In the *Queen* v. *Taylor* (1), the Court of Appeal of *Ontario*, adjudicating upon the question now before this Court, determined that the words "other licenses," as used in this section, gave power to impose licenses upon persons carrying on the trade of brewers.

This conclusion was reached by the consideration that all powers conferred in section 92 were to be read and regarded as exceptions to those enumerated in section 91, and by that section given to Parliament. That section 92 was, therefore, to be construed as if it had been contained in an Act of the Imperial Parliament, separate and apart from section 91, and is, therefore, to be read independently of that section. The rule applied in the construction of Statutes, which restrains general words following specific words to subjects *ejusdem generis* with those specifically mentioned, was thought not to be applicable, inasmuch as the specific words were not *ejusdem generis* with each other, and it was, therefore, impossible to say with which class of the specific classes mentioned the general words should be associated; in short, it was held to be impossible to apply to this clause the well known maxim of interpretation *noscitur a sociis*.

(1) 36 U. C. Q. B. 218.

1878

SEVERN v. THE QUEEN.

The words "other licenses" were therefore held to be susceptible of only one construction, that which attributed to them the same meaning as if the expression in the Act had been "any licenses," or "all licenses," standing alone, unconnected with any specific words.

I was a party to the judgment in *The Queen* v. *Taylor*, and a careful consideration since has not only not led me to discover any error in it, but has brought to my notice authorities not quoted to the Court of Appeal, as well as some additional reasons for adhering to the decision.

In *Regina vs. Payne* (1) this principle of construction was applied. A recent text writer (2), gives a succint statement of this case and of the principle involved in it which I adopt, and which is contained in the following quotation :

> Further, the principle in question applies only where the specific words are all of the same nature. When they are of a different nature, the meaning of the general word remains unaffected by its connection with them. Thus, where an Act made it penal to convey to a prisoner, in order to facilitate his escape, "any mask, dress or disguise, or any letter, or any other article, or thing," it was held that the last terms were to be understood in their primary and wide meaning, and as including any article or thing whatsoever, which could in any manner facilitate the escape of a prisoner, such as a crowbar. Here, the several particular words "disguise" and "letter," exhausted whole genera, and the last general words must be understood, therefore, as referred to other genera (3).

It is scarcely possible to suppose an authority more exactly in point than that just cited. The only difference in principle between the two cases being, that, in the instance quoted, this rule of construction was applied in a criminal case and against the prisoner ; here, it was applied by the Court of Appeal in support of a pre-

(1) L. R. 1 C. C. 27.
(2) Maxwell on Statutes, p. 303.
(3) *R.* v. *Edmundson*, 2 E. & E. 77 ; *Young* v. *Grattridge*, L. R. 4 Q. B. 166 ; *Harris* v. *Jenns*, 9 C. B. N. S. 152 ; *Pearson* v. *Hull Local Board of Health*, 3. H. & C. 921.

1878

SEVERN v. THE QUEEN.

sumption which the highest authorities, and which reason, if there was no authority, tell us ought always to be made in favor of the constitutional validity of a Legislative Act.

But without any reference to authority, the impossibility of saying by which of the particular expressions "shop, saloon, tavern or auctioneers," the general words were to be restrained ought, I venture to say, with deference to those who differ from me, to force the broad construction of the words "other licenses" upon a court called upon to construe this clause, as a necessary and unavoidable interpretation (1).

Then, the attribution of this meaning to the clause under consideration does not lead to any harsh or unreasonable consequences. The result of it is, that the people of the Provinces have the power, through their representatives, to tax themselves for Provincial, local or municipal purposes, by means of licenses, to any extent they may choose; which may, perhaps, not be considered to be an extravagant power, when it is remembered that the license tax is the only source of Provincial Revenue other than the Public Lands, the subsidy from the general government, and money raised by direct taxation, which, however ample in this particular Province, and at the present time, may not, in other Provinces, or in this, at some future time, be productive of sufficient income to meet the expenditure required for carrying on the Provincial Government.

The imposition of licenses authorized by this subsection 9, is, it will be observed, confined to licenses for the purposes of revenue, and it is not to be assumed that the Provincial Legislatures will abuse the power,

(1) See *Cadett* v. *Earle*, L. R. 5 Ch. Div. 710, per Sir George Jessell, Master of the Rolls, decided since this judgment was delivered.

or exercise it in such a way as to destroy any trade or occupation. Should it appear explicitly on the face of any Legislative Act that a license tax was imposed with such an object, it would not be a tax authorized by this section, and it might be liable to be judicially pronounced *extra vires*. And however carefully the purpose or object of such an enactment might be veiled, the foresight of those who framed our constitutional Act led them to provide a remedy in the 90th section of the Act, by vesting the power of disallowance of Provincial Acts in the Executive Power of the Dominion, the Governor General in Council. There is, therefore, no room for the application of any argument *ab inconvenienti* sufficient to neutralize the rule of verbal construction already referred to.

I have considered, with all the attention in my power, the reasoning which the Chief Justice has enunciated in his judgment to day, as well as in his former judgment in the case of *Slavin* v. *Orillia* (1); but I am unable to accede to the doctrine that we are to attribute to the words "other licenses" the same meaning as though the expression had been "such other licenses as were formerly imposed in the Province," or equivalent words.

The result of such a construction would be, that the same words would have a different meaning in different Provinces, and that the several Provincial Legislatures would have different powers of taxation, though the power is included in the same grant. This, it appears to me, would be in direct contravention of the principle which forbids a different interpretation being given to a general law in different localities, however much local laws or usages may favor such diverse interpretations (2).

(1) 36 U. C. Q. B. 172.

(2) *R.* v. *Hogg*, 1 T. R. 721; *R.* v. *Saltren*, Cald. 444.

1878

SEVERN v. THE QUEEN.

However, apart from authority, I cannot think this was the intention of the Imperial Parliament. I think everything indicates that co-equal and co-ordinate legislative powers in every particular were conferred by the Act on the Provinces, and I know of no principle of interpretation which would authorize such a reading of the *British North America Act* as that proposed. Had such been the design of the framers of the Act, the meaning of which I can only discover from the words in which it is expressed, we should have found the case provided for.

The objection, that the wider construction which I have attributed to sub-section 9 brings that provision into collision with sub-section 2 of section 91, which confers the power of regulating trade and commerce on the Parliament of the Dominion, is, I think, fully answered by reading the subjects enumerated in section 92 as excepted from section 91. It is, I conceive, the duty of the Court so to construe the *British North America Act* as to make its several enactments harmonize with each other, and this may be effected, without doing any violence to the Act, by reading the enumerated powers in section 92 in the manner suggested, as exceptions from those given to the Dominion by section 91. Read in this way, sub-section 2 must be construed to mean the regulation of trade and commerce, save in so far as power to interfere with it is, by section 92, conferred upon the Provinces. Imposing licenses on auctioneers and shops is an undoubted interference with trade and commerce; and if the words "other licenses" have the wide primary meaning which, I think, is to be attributed to them, why should they be cut down and regarded as inconsistent with sub-section 2, any more than the words authorizing specific licenses? The reading of sub-section 2 of section 91, as subject to the exception of auctioneer and shop licenses, is absolutely

necessary to reconcile the two clauses, and, if that be so, upon what principles can the classes of licenses, whatever they may be, which are covered by the words "other licenses," be excluded from the exception? The words "other licenses" must either be silenced altogether, or else, whatever they may mean in conjunction with the preceding specific words, they must be read as an exception to sub-section 2 and every other enumeration of section 91, with which they would conflict if otherwise construed.

That Parliament has a general unrestrained power of taxation can make no difference. The same answer applies to this objection as that just suggested as regards sub-section 2; but, in addition, there is no repugnancy or inconsistency between this general power of taxation in the Dominion and the restricted right to tax in the Provinces.

It is true, that the same tax might be laid on by both Legislatures, but this constitutes no such absurd or unjust consequence as would necessitate a rejection of the obvious primary meaning of the words of the Act. If in section 91 unlimited power of taxing is given, and in section 92 power is given to tax brewers, and I read the act as if that had been expressed in so many words, there would not, so far as I can see, be any inconsistency.

The general Legislature can undoubtedly tax auctioneers, and by express words the Local Legislatures have authority to do the same. The Act, therefore, contains internal evidence that the double power of taxation was not considered inconvient or absurd. The protection of the people against oppressive taxation was left to their representatives in the Provincial Legislatures as well as in Parliament.

Some arguments addressed to the Court seem to have

1878

SEVERN v. THE QUEEN.

been intended to elicit opinions as to the locality of the power of prohibiting legislation with reference to the trade in spirituous liquors, wine and beer. This, so far as retail trade is concerned, must depend on the proper answers to two questions: 1st, Do the Local Legislatures possess what is called the "police power"? 2nd, If they do, does it authorize them to legislate so as to prohibit, or only to regulate, the retail traffic in liqours? The decision of this case does not call for any answer to either of these questions, and I therefore forbear from expressing any opinion upon them, since such an opinion would, in my point of view, be extra judicial, and therefore improper.

My conclusion is, that it was within the competence of the Legislature of *Ontario* to pass the Statute in question, and that this appeal should therefore be dismissed with costs.

TASCHEREAU, J.:—

The only question submitted for our decision is, whether the Legislature of *Ontario* had the power to pass the statute 37 Victoria, chapter 32, under which the Appellant was condemned, requiring Brewers to take out a license for selling fermented or malt liquor by wholesale.

I must confess, that for some time I had strong doubts against the legality of the pretensions of the Defendant *Severn*, amounting very nearly to conviction; but after long and mature deliberation I came to the conclusion that the sections of that Act applicable to the Defendant were *ultra vires*.

On reference to section 92 of the *British North America Act*, 1867, we find that the subjects of *exclusive* Provincial Legislation are determined in somewhat concise language; but, nevertheless, with sufficient

explicitness to be well ascertained after a careful examination of the whole Act.

On reference to sub-section 2 of section 92, we find that direct taxation only is one of the privileges of Local Legislatures, in order to raise a revenue for Provincial purposes; and, under sub-section 9 of this same section 92, it is enunciated that their powers shall extend to make laws about

> Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes;

but it is evident, that in adjudicating on the extent of sub-section 9 of section 92, we must read it in connection with the remainder of the Act itself, and more particularly with sub-sections 2 and 29 of section 91, which indicate the powers of the Parliament of *Canada*.

Under sub-section 2 of section 91, the Parliament has the exclusive regulation of trade and commerce, and under sub-section 29 of section 91, it is declared that

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

From section 122 of the *British North America Act* we can safely infer that the Parliament of *Canada* has *exclusive* jurisdiction as to excise.

Coming to sub-section 2 of section 92 of the *British North America Act*, I say that it is out of the question for the Crown to rest its case on this sub-section; for, according to it, the only tax the Government of *Ontario* could raise would be a direct one, and not an indirect one, such as the one complained of. The authorities quoted at the Bar warrant this interpretation of the nature of the tax.

> A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are

1878

SEVERN v. THE QUEEN.

those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another (1).

Now, from what I have read and heard, I think there is no difficulty in assuming that the tax imposed on the Brewer selling by wholesale in the present case, is an indirect tax, so that this question should not be further pressed against the Defendant *Severn*.

Now, can the Crown justify the Act in question in this cause under subsection 9 of section 92 of the *British North America Act*, which grants to Provincial Legislatures in the Dominion of *Canada* the right of making laws about shop, saloon, tavern, auctioneer and other licenses? I think not. This power would evidently clash with the Dominion power of regulating trade and commerce, and of imposing duties thereon, and exacting licenses. If this right existed, both Parliament and Provincial Legislatures would possess an equal right to impose a duty and exact licenses.

But what is the meaning of the words "*and other licenses,*" immediately following the words "shop, saloon, tavern, auctioneer?"—I answer, that taken in connection with all the surrounding circumstances, and with the various sections of the *British North America Act*, they certainly cannot mean anything which could be interpreted as granting such powers as those claimed by the *Ontario* Legislature. They must not be so interpreted as to clash with the general spirit of that last mentioned Act and its special enactments. In a word, they cannot be so interpreted as to give to the *Ontario* Legislature a right to affect the general control of the Dominion over trade, commerce and excise, and its sovereignty over the country, by diminishing some of its principal sources of revenue. If these words mean what is contended

(1) Mill's Principles of Political Economy, Vol. 2, Ed. 1871, p. 415.

1878

SEVERN v. THE QUEEN.

for by the prosecution, sub-section 29 of section 91 of the *British North America Act* is nonsensical and should be struck out of the statute. But these words may and must mean all matters and regulations of Police and the government of those saloons, taverns, auctioneers, &c., &c. ; and if these words can not bear this last interpretation, the section has no meaning, or is *ultra vires*. I therefore say, that the Defendant *Severn* could not be legally convicted under the Act in question, as he has been by the judgment appealed from in the present case, and that that judgment should be reversed.

FOURNIER, J.:—

[TRANSLATED.]

The only question to be decided in this case arises on the constitutionality of a law of the Province of *Ontario*, imposing upon brewers and distillers the obligation of taking out a license of $50, in order that they may sell their products within the said Province.

The question we have therefore toconsider is, whether the law in question is, or is not, in direct conflict with the *British North America Act*, and, more particularly, 1st, with No. 2 of section 91, relating to the "regulation of trade and commerce," and, 2ly, with section 122, which gives to the Parliament of *Canada* the control over the custom and excise laws, and, therefore, beyond the limits of the jurisdiction of the *Ontario* Legislature.

The principal provisions in the *British North America Act*, which have reference to the present question, are the following:

Sec. 91 gives power to the Parliament of *Canada*

To make laws for the peace, order, and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of

1878

SEVERN v. THE QUEEN.

the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the classes of subjects next hereinafter enumerated :

Amongst others—

2nd. The regulation of trade and commerce.

3rd. The raising of money by any mode or system of taxation.

* * * * *

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

Sec. 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated :

Amongst others—

2. Direct taxation within the Province in order to the raising of a revenue for Provincial purposes.

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

Sec. 95. In each Province the Legislature may make laws in relation to agriculture in the Province, and to immigration into the Province, and it is hereby declared that the Parliament of *Canada* may from time to time make laws in relation to agriculture in all or any of the Provinces, and to immigration into all or any of the Provinces ; and any law of the Legislature of a Province relative to agriculture or immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of *Canada*.

Sec. 122. The custom and excise laws of each Province shall, subject to the provisions of this Act, continue in force until altered by the Parliament of *Canada*.

Before considering the two points above mentioned, I think it necessary to review briefly the argument of the learned counsel of Her Majesty, founded on their interpretation of the words "and other licenses," in paragraph 9 of section 92. They contend, as it was contended by the Court of Appeal of *Ontario*, in the case of *The Queen* v. *Taylor*, where the same question

arose, that the expression made use of is large enough to give jurisdiction to the *Ontario* Legislature to pass the law in question.

Now, if these terms are not to have the broad signification which, at first sight, their general meaning seems to convey, what restrictions should be put on them? What subjects would be susceptible of taxation by the mode of licenses, and what subjects would be exempt from such taxation? The line of division is no doubt somewhat difficult to be drawn, in consequence of a vagueness and want of precision in drafting the paragraph in which these expressions are to be found; but the Dominion, no more than the Provinces, can increase its jurisdiction by its own legislation; and we must therefore, notwithstanding the delicacy of the task, have recourse to a judicial interpretation in order to know the limits of both powers.

Is it true, as is contended by the learned counsel of Her Majesty, that, being unable to construe the words "and other licenses" in paragraph 9 according to the ordinary rule that general words following specific words must be taken to mean something of the same kind, *ejusdem generis*, the power to impose licenses is therefore absolute and unlimited?

They lay down their proposition as follows:

The rule of *ejusdem generis* is inapplicable here, first, in there being no controlling or particular classes to refer to in order to determine the like classes to which the word "other" might be referred with any definiteness; and 2ndly, because the latter words enlarge "other licenses" into all such as the legislative authority may consider necessary to the raising of a revenue.

It is true that "auctioneer" licenses were for a long time regulated by a different law from that which regulated the granting of licenses for shops, taverns, saloons, &c. But even before Confederation the Legislature of *Canada* had assimilated them, at least in the Province of *Upper*

1878

SEVERN v. THE QUEEN.

Canada, to these other licenses, and had subjected them, with the latter, to the control of the municipalities. They had, at least for that Province, become *ejusdem generis*. In *Lower Canada* the revenue derived from them had ceased to be appropriated for the general use of the Government, in order to form part of the seigniorial indemnity fund, for the purpose of paying off the dues of the *censitaires* which the Government had undertaken to pay.

Without attaching more importance than is necessary to the application of the rule of *ejusdem generis*, is it not more logical to suppose that the Imperial Legislature, finding already in some of the laws these licenses treated as of the *same kind* as other licenses, did likewise, and dealt with them as belonging to the one class; and, therefore, should we not apply in construing this 9th paragraph the rule of *ejusdem generis*? Otherwise, we must come to the conclusion that the insertion of the word "auctioneer," which, no doubt, was put in to give the Local Government a further source of revenue, would have the effect of giving to the Local Legislature an unlimited power to tax by means of licenses. This cannot have been the intention of the Imperial Parliament. They cannot, by the insertion of that word, have made a provision which would have the effect of destroying the financial system of both the Dominion and the Provinces established by the Constitution. The intention was no doubt that they should have a limited signification in accordance with the distinct powers so carefully allotted to the Federal and Local Governments.

Moreover, I am far from admitting that the word "other," coming immediately after an enumeration, can always have that broad meaning; on the contrary, I am of opinion that it should nearly always be accepted in a restricted sense, and that the cases in which its

1878

SEVERN v. THE QUEEN.

signification is absolute and unlimited are exceptional.

This is the rule as laid down by Chief Justice *Erle* in the case of *Williams* v. *Golding* (1), when construing the words "other person;" and by Lord *Campbell*, Chief Justice, in the case of *Reed* v. *Ingham* (2), while interpreting the words "other craft."

See also the case of *The East London Waterworks Co.* v. *The Trustees of Mile End Old Town* (3); and the case of the *King* v. *The Justices of Surrey* (4).

Besides, if these words "and other licenses" should not be construed (which I do not admit) according to the above ordinary rule, would it follow that there is not to be found in the Constitutional Act itself, taking a general view of it, as well as of certain of its provisions, a mode of solving this question conformably to the spirit of the Act, rather than according to the views of the learned Counsel of Her Majesty?

First, was it not the clear intention of the Imperial Parliament to establish two distinct Governments, with special and exclusive powers, in order to avoid all conflict between the different authorities?

To prove this it is not necessary to refer to the circumstances before the present state of affairs. The clear and precise terms of the Constitutional Act itself are sufficient to show this. It may be as well, however, to remark, that the *British North America Act* contains in substance hardly anything more than the *Quebec* resolutions, their object at that time being, most certainly, to constitute two distinct Governments with different and exclusive powers. This is also, in effect, what the new Constitution provides for, especially by sections 91 and 92, which distribute the legislative power to the Dominion and Provincial Legislatures.

(1) L. R. 1 C. P. 77.
(2) 3 E. & B. 889.
(3) 17 Q. B. 521.
(4) 2 Term R. Pp. 504. 510.

1878

SEVERN v. THE QUEEN.

The 91st section gives to the Federal Parliament the general power of taxation, a sovereignty over all subjects, except those specifically mentioned in section 92, as being subjects exclusively belonging to the Local Legislatures. We find, among the exclusive powers given to the Federal Parliament, the power of *regulating trade and commerce.*

This power, being full and complete, cannot be restricted, unless by some specific provision to be found in the *British North America Act.*

For this reason, the relative position of the Provinces towards the Federal Parliament is far different from that of the States towards the *United States* Congress. Here the power to regulate trade and commerce, without any distinction as to interior and exterior commerce, belongs *exclusively* to the Dominion Parliament, whilst, in the *United States*, Congress has power only to deal with exterior or foreign commerce, commerce between the different States and that with the Indian tribes. The States, not having delegated to Congress the power of regulating interior commerce, still have power to legislate on it as they please. We should not, therefore, look to the numerous decisions rendered on the laws relating to the interior commerce as precedents applicable to the present case, but rather to the decisions given on laws passed by the State Legislatures which happened to come in conflict with the power of Congress to deal with exterior commerce.

There is a decision, rendered as early as 1827, which has always been looked upon as being the true construction of that article of the Constitution of the *United States* which gives Congress power to regulate exterior commerce, and which is very applicable to the present case. It is that rendered in the case of *Brown* v. *State of Maryland* (1). In order to raise revenue to

(1) 12 Wheaton 419.

meet the expenses of the State, the Legislature of *Maryland* passed a law, by which, amongst other things, importers of foreign merchandise enumerated in the law, or such other persons as should sell by wholesale such merchandize, were directed to take out a license, for which they were to pay $50, before selling any of the imported goods, subjecting them, in case of neglect or refusal, to forfeit the amount due for the license and to a penalty of $100.

Brown, who was an importer residing in the city of *Baltimore*, refused to pay this tax, and an information was, in consequence, laid against him before the State Court, which declared the law to be valid and condemned him to pay the penalty prescribed.

This judgment was appealed by means of a writ of error to the Supreme Court, which Court, for the reasons so ably propounded by the learned Chief Justice *Marshall*, declared the law void as coming in conflict with the power of Congress to regulate exterior commerce.

The question here naturally arises, what was the extent of that power? This question was considered at great length in the case of *Gibbons* v. *Ogden* (1), by Chief Justice *Marshall*, who answered it as follows:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed by the Constitution.

Since this is the law in the *United States*, there is an additional reason why it should be so declared here, where our Constitution does not acknowledge, as in the *United States*, a division of power as to commerce.

The law declared void in the case of *Brown* v. *The State of Maryland* was of the same kind as the one

(1) 9 Wheaton 231.

1878

SEVERN v. THE QUEEN.

enacted by the Province of *Ontario*. The only difference was that that law reached the importer, whilst the law under consideration here is directed against the manufacturer.

But is there not a perfect analogy between the two parties? Have not both the importer and the manufacturer the one object, viz.: to sell their goods? Both, the first by purchasing in a foreign market, the latter, by his industry, have filled their stores with goods which they cannot put into commercial circulation until they have paid the duties imposed upon them.

The importation of foreign goods, no doubt, is subject to the regulations of trade and commerce, but not more so than manufactured articles which are subject to the excise laws. If the Local Government have the right to tax the latter, they have the same right to tax the importer, by prohibiting him, as it is contended they have the right to prohibit the manufacturer, from selling his merchandise if he has not previously taken out a license allowing him to sell.

If this contention is well founded, the payment of the custom and excise duties would not be all that the importer and the brewer would have to calculate upon before offering their goods for sale, for they would also have to pay another duty in the shape of a license fee.

It is also contended, that in this case the Federal Government having regulated only the manufacture of the beer, it was in the power of the Local Government to regulate its sale.

The following answer could be made to this argument, viz.: that if the Federal Government, in the exercise of its power, has not deemed it necessary to restrict the sale of beer, it was because its intention was to leave it free. The regulations need not consist only of

restrictions. By imposing those mentioned in 31 Vic. ch. 8, was it not in effect enacting that there would be no others? To leave or to declare free a commerce, is it not exercising the power of regulating such commerce just as much as to impose upon it certain restrictions? To impose upon beer consumed in the Province of *Ontario* a tax which is not imposed upon beer consumed in the other Provinces, is to decree that there shall be a difference of price in favor of consumers of beer in the other Provinces against consumers in *Ontario*. It is regulating that commerce in such a way as to give to the first named an unjust preference which the Federal Government itself could not give without violating the principles upon which assessments are made. It would be strange, indeed, if the Legislature of *Ontario*, by assuming this jurisdiction under the pretence of its being a license, could have over this matter more power than has the Federal Government.

The power to tax is no doubt necessary to the existence of the Local Governments, but it is limited and proportioned to the extent of their jurisdiction. Fulfilling only certain duties of a Government within certain limits, the power to tax was in consequence divided between the Federal and Local Governments. To the first, whose jurisdiction is larger, belongs the power of raising money by all modes of taxation, whilst Local Governments can only do so by direct taxation (1) and by the issuing of licenses. Moreover, the tax imposed in the shape of a license by the law of *Ontario* on the sale of beer which has not yet been taken away from the stores of the brewer, is an indirect tax which must be borne by the consumer (1).

(1) B. N. A. Act, 1867, sec. 92, par. 2.

(2) See McCulloch on Taxation, 2 Ed., Pp. 1, 147, 242, 321; also Mill's Principles of Political Economy, Ed. 1872, Pp. 495, 496, 505.

1878

SEVERN v. THE QUEEN.

This new tax, no doubt, would have, as had the previous ones, to be added to the original cost of the beer, in order that it may be paid by the purchaser. With such means at their disposal, the Local Governments might control and regulate commerce and impose indirect taxes with as great security as if the power to do so was given to them instead of being specially taken away. Such a law comes certainly in conflict with the power of the Federal Government to regulate trade and commerce, and to impose indirect taxes.

If it should be admitted that the different Governments have concurrent power to impose taxes on the commodities subject to excise, who could draw the line where each Government would have to stop? If this power belongs to the Local Government, the exercise of that power must be complete, and be made use of according to the best of their judgment whenever the raising of money would be necessary. Now, in exercising such a power, might it not happen that the taxes imposed would be so high as, practically, to considerably diminish, if not exhaust, this source of revenue? What would then be the position of the Federal Government; how could it meet its obligations? Were not the duties of customs and excise left to the Federal Government, from which source it collects the largest part of its revenue, in consequence of having to bear the public debt of the Provinces and the expenses of a General Government? Could we, without violating the Constitutional Act, alter this position? To declare that both Governments have an equal right to legislate on these sources of revenue would place the Federal Government in the impossibility of meeting its obligations towards its creditors. By appropriating this revenue to other purposes, it would in fact be diminishing the security on which these creditors, when the Constitution was adopted,

had the right to count for the recoupment of their advances. Legislation which would transfer to the Provincial Legislatures the control over these sources of revenue would not fail to considerably embarrass the Federal Government, and at the same time effectively affect its credit.

It must also be remembered, that under our actual political system the Dominion, having taken upon itself the burden of the provincial debts, the Provinces, when Confederation was established, found themselves with a blank sheet on the debit side of their account, whilst there remained to their credit the Crown lands, the Federal subsidy, the power of direct taxation, and lastly, the *limited* power, in my opinion, to raise a revenue by means of licenses. A construction which would, moreover, give them the almost unlimited power of indirect taxation concurrently under the pretext of its being a license, would, no doubt, be the means of promptly and surely creating disorder and finally break up the Constitution. As soon as there would be confusion with regard to these sources of revenue, there would remain no more reason for a division of the legislative powers between the Federal and Local Governments. The confusion of the revenues would inevitably result in a fusion of the Governments. It would be the downfall of the present structure built with such care.

Fortunately, however, such a calamity is not to be feared, for the Constitution, in my opinion, contains no provision which can have the effect of bringing about such dangerous consequences. The prudence of the legislature, in giving to each Government special legislative powers, has averted such a danger. Each Government has legislative authority over certain subjects, and it is only over these subjects that each

1878

SEVERN v. THE QUEEN.

can exercise its powers. With the exception of agriculture and immigration, there is no subject-matter over which there can exist concurrent powers of legislation (1); and even then, should there be conflict, the authority of the Parliament of *Canada* is supreme.

By the remarks which I have just made on the consequences of the adoption of the construction contended for by the Respondent, I do not mean to argue that the exercise, nor even the possibility of abusing this power to tax by license, is a reason why it should not exist; for we can abuse all things. The proper way, no doubt, of solving this question is by referring to the express terms used in the Constitutional Act. But the clauses already cited show clearly to whom belongs this power assumed by the *Ontario* Legislature. The only reason for making these observations was to show that the interpretation adopted by the Respondent, would create a state of things quite different from that which the Imperial Parliament intended for us when they passed the *British North America Act.*

Nevertheless, I will add in support of my mode of reasoning, a passage of Chief Justice *Marshall's* opinion in the case of *Brown* v. *The State of Maryland* (2), and I also contend that in this case we should apply this ordinary rule of construction, that when a law is doubtful or ambiguous, it should be interpreted in such a way as to fulfil the intentions of the legislator, and attain the object for which it was passed. *Marshall*, C. J., says:

> We admit this power to be sacred [the State power to tax its own citizens, on their property within its own territory]; but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the States may be so

(1) B. N. A. Act, 1867, sec. 95. (2) 12 Wheaton 448.

exercised as to come in conflict with those vested in Congress. When this happens that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the General and State Governments as a vital principle of perpetual operation. It results necessarily from this principle, that the taxing power of the State must have some limits. It cannot reach and restrain the action of the National Government within its proper sphere. It cannot reach the administration of justice in the Courts of the Union, or the collection of the taxes of the *United States* or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing in their transit through the State from one port to another for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing from the State itself to another State, for commercial purposes? These are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and effect materially the purpose for which that power was given. We deem it unnecessary to press the argument further, or to give additional illustrations of it, because the subject was taken up, and considered with great attention in *McCulloch* v. *The State of Maryland* (1), the decision in which case is, we think, entirely applicable to this.

The reasoning of the Supreme Court in that case, under a system of Government which left to the States the regulation of the interior commerce, is not only applicable to the present question, but should have more weight from the fact that under our system the Federal Government has the *exclusive* power over commerce.

But, secondly, this Statute of the Province of *Ontario* not only comes in conflict with paragraph 2 of section 91, relating to the regulation of trade and commerce, but also with sec. 122 of the *B. N. A. Act*, giving to the Federal Government the power to regulate all

(1) 4 Wheaton 316.

1878

SEVERN v. THE QUEEN.

matters of excise. The trade of brewing, here as well as in *England*, has always been regulated by the excise laws. Before Confederation the same state of things existed in all the Provinces of the Dominion. Under the new *régime* this trade is still regulated by the excise laws, which, as we have seen by section 122 already cited, are subject to Federal legislation. It is true this section does not, as do sections 91 and 92, positively declare that it is an exclusive power, but, as it is given without any restriction, it can only be possessed by the Federal Government. The very fact of this power not being comprised in the enumeration of exclusive powers given to the Local Governments, takes away from them all jurisdiction over this matter. It is for this reason, no doubt, that on the 21st December, 1867, the Parliament of *Canada*, exercising the power which it had by sec. 122, abolished all the excise laws of *Canada*, as well as those of the Provinces of *Nova Scotia* and *New Brunswick*, and regulated, at the same time, by a very complete law this important trade in its most minute details.

Section 3 of 31 Vic. ch. 8 declares:

> From and after the passing of this Act, no person, except such as shall have been licensed as herein provided, shall carry on the business or trade of a distiller, or brewer, or maltster, or of a manufacturer of tobacco, or use any utensil, machinery or apparatus suitable for carrying on any such trade or business subject to excise.

Section 26 imposes on the brewer the obligation of taking out a license, the price of which is fixed at $50, in order that he may carry on his trade. He is also subject to a tax of one cent per pound of malt used in the brewery. In addition to this, he is subjected to a severe superintendence in all his operations, of which he is bound, under pain of heavy penalties, to render a minute account to the Inland Revenue Department.

This is certainly a trade, a commerce, over which the Federal Government has fully exercised its exclusive

1878

SEVERN v. THE QUEEN

power of regulation. Can it be said after this, that because this Statute only regulates the manufacture of the beer, the Provinces are still at liberty to prevent its sale until a license fee of $50 is paid as directed by the 23rd section of the *Ontario* Act ? Should a brewer, after having paid to the Federal Government the duties above mentioned, and after being obliged to submit to numerous and inconvenient restrictions, still find himself in the strange position of not being allowed to take his products out of his stores? The agent of the Local Government would have the right to appear and say to him: The Federal Government can very well allow you to manufacture, but my Government will not allow you to sell unless you purchase from us, by paying a $50 license fee, the right of selling. Would not such a prohibition be clearly contrary to the Act of the Federal Parliament authorizing the brewer to manufacture ? Can you give him the right to carry on his trade in virtue of the license fee paid to the Federal Government without, at the same time, giving him the right to sell the products of his trade? Do manufacturers manufacture for the sole pleasure of accumulating their products in their stores ? Is not the manufacturer's sole aim to sell his manufactured articles; and does not the right to manufacture necessarily imply the right to sell ? Here, again, the reasoning of Chief Justice *Marshall*, on the right to import, in the case already cited (1), is applicable :

> We think, then, that if the power to authorize a sale exists in Congress, the conclusion is that the right to sell is connected with the law permitting importation, as an inseparable incident. * * * The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on that part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

(1) *Brown* v. *The State of Maryland*, 12 Wheaton 448.

1878

SEVERN v. THE QUEEN.

The power to authorize the manufacture of an article must necessarily imply, as does the right to import, the right to sell. I am therefore of opinion, that the law of *Ontario* in prohibiting the sale of beer, unless the party complies with its exactions, comes in conflict with the 122nd section giving to the Federal Government the power over excise.

Now, the tax imposed by the Act in question, it is true, is only $50, but it might as well have been $500. If the Legislature have the right to impose this tax, the power must be plenary, and would be exercised according to their judgment and whenever the necessity of increasing the revenue arose. Already, since assuming this jurisdiction, the Legislature has increased the tax from $50 to $150, and if the power exists nothing could prevent them from fixing the amount so high as to virtually render impossible the collection of the excise duties on this article.

Moreover, if this law relating to brewers and distillers is legal and constitutional, there can be no doubt that a law could be passed reaching the manufacturer of tobacco, of coal oil, of vinegar, in fact of all articles subject to excise. The Local Government could even go further, and under the shape of a license reach the importer in the same manner as the brewer.

If there was concurrent jurisdiction, what would happen when the collector on the part of the Federal Government would come to seize for arrears of taxes? Let us suppose that the collector of the Local Government has anticipated him, and for duties which were owing to his Government had seized and closed the brewery. He is the first on the spot, and, if he exercises a legitimate power belonging to his Government, he has the right to forbid the Federal Officer to come with-

in the brewery. This latter officer, however, in virtue of the Dominion Statute has the most plenary powers; at all times he has access to the brewery. A conflict of authorities would necessarily take place; which authority should yield? For my part, not believing in the legal possibility of such a conflict, I need not seek for the means of avoiding it.

But the learned Counsel of Her Majesty, whose argument, should it prevail, would inevitably bring about this conflict, believe, that with the aid of the right of *veto* which belongs to the Federal Government, all interests might be conciliated, and the above inconvenient results avoided. The difficulty, they say, would be easily settled. The constitution, by giving the right of vetoing Provincial Legislation, has prudently given the means, if not to prevent, at least to put a stop to such conflicts of authorities. Such a law would be directly opposed to the interests of the Federal Government, and they would be justified in disallowing it by exercising their right of veto.

No doubt this extraordinary prerogative exists, and could even be applied to a law over which the Provincial Legislature had complete jurisdiction. But it is precisely on account of its extraordinary and exceptional character that the exercise of this prerogative will always be a delicate matter. It will always be very difficult for the Federal Government to substitute its opinion instead of that of the Legislative Assemblies in regard to matters within their province, without exposing themselves to be reproached with threatening the independence of the Provinces.

What would be the result if the Province chose to re-enact a law which had been disallowed? The cure might be worse than the disease, and probably grave complications would follow.

1878

SEVERN v. THE QUEEN.

It cannot, therefore, be argued, that because this right exists we must adopt an interpretation which would lead to the necessity of having recourse to it.

Before concluding my remarks, I wish to add a few words with regard to three of the principal points of argument relied on by the learned counsel for Her Majesty in support of the validity of this law. They contend they can justify the law, 1st, by the inherent constitutional power which the Local Legislatures, they say, possess to make laws for the general welfare of the people of the Province; and that, to give effect to their purport, they have the power to prohibit the sale of spirituous liquors and of such other articles as might be considered injurious; that is to say, that in order to exercise this power, they have jurisdiction over this matter; 2nd, by paragraph 13, section 92, relating to property and civil rights in the Province; 3rd, by paragraph 16 of the same section, giving them jurisdiction generally over all matters of a merely local or private nature in the Province.

In my above observations on the division of the legislative powers, I believe I have answered the argument of that plenary power, *plenum imperium*, which the learned counsel contend the Local Governments possess. I will only add, that while there can be no question of their exercising the police powers, the license imposed by this law is evidently exacted for the purpose of raising a revenue. In support of the view I take with regard to the nature of this license, I will cite *Cooley* on Constitutional Limitations (1):

> License laws are of two kinds: those which require the payment of a license fee by way of raising a revenue, and are, therefore, the exercise of the power of taxation; and those which are mere police regulations, and which require the payment only of such license fee as will cover the expenses of the license and of enforcing the regulation.

(1) P. 586.

Nor can the fact that the Local Government has the power over property and civil rights be relied on. The passage I have quoted above from Chief Justice *Marshall's* opinion in reference to the State power over property and civil rights is such a complete answer to this point that I need but refer to it.

As to the third point, that it affects a matter purely local and private in the Province, I think I have also proved that this argument cannot apply in this case. The license imposed by this law is of a nature to affect all the Provinces, and it amounts in reality to an exercise of the power of regulating commerce.

For these reasons, I have come to the conclusion that the law under consideration is *ultra vires*. These reasons can be summed up as follows:—

1st. The law in question is void because it comes in conflict with the power of the Federal Parliament to regulate trade and commerce under paragraph 2, sec. 91.

2nd. Because the terms "and other licenses," in paragraph 9, sec. 92, are limited by the interpretation to be given to paragraph 2 of sec. 91. In order to conciliate these two provisions, the words "other licenses" must be read as if they were followed by these words: "not incompatible with the power of regulating trade and commerce."

3rd. Because the tax imposed by this Act is an indirect tax which the Local Government has no right to impose.

4th. Because it comes in direct conflict with the 31st Vic. chap. 8 relating to excise.

HENRY, J.:—

The information in this case charges the Appellant with a breach of the Act of *Ontario*, 37th Vic., chap. 32, for having sold by wholesale a large quantity of fer-

1878

SEVERN v. THE QUEEN,

mented liquors which he had manufactured, he (the Appellant) then being a brewer licensed by the Government of *Canada* for the manufacture of fermented, spirituous and other liquors. To this information the Appellant demurred, and assigned as one of the grounds of demurrer that the Legislature of *Ontario* had no power to restrict by an Act the sale of such liquors; or to impose a penalty for a breach of the restrictive provisions of the Act by a brewer duly licensed by the Government of *Canada*. This ground of demurrer was fully argued before us, and we, having fully considered it in all its bearings and consequences, have now to give judgment upon it.

The constitutionality of the Act of *Canada*, 31st Vic. chap. 8, under which the Appellant was licensed, is admitted, and it is therefore necessary only to consider whether, in view of that Act, the Legislature of *Ontario* had power to pass an Act requiring a brewer, holding a license under the first mentioned Act, to take out another license, and pay an additional fee, or, in the event of his not doing so, to subject him to penalties, to such an extent even as might effectually render practically useless his license from the Dominion Government. The *Ontario* Act in question, sec. 24, provides:

> No person shall sell by wholesale or retail any spirituous, fermented or other manufactured liquors within the Province of *Ontario*, without having first obtained a license under this Act authorizing him to do so, &c.

Sec. 25:

> No person shall keep or have in any house, building, shop, eating-house, saloon, or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented or other manufactured liquors for the purpose of selling, bartering or trading therein, unless duly licensed thereto under the provisions of this Act.

Sec. 26 recognizes the validity of the licenses granted

by the Government of *Canada*, and provides that sections 24 and 25 shall not prevent any brewer, distiller or other person so licensed

From *keeping*, having, or selling, any liquor manufactured by him, *in any building wherein such manufacture is carried on, &c.* * * * Provided that any such brewer, distiller, or other person, is further required to first obtain a license to sell by wholesale under this Act the liquor so manufactured by him when sold for consumption within this Province, &c.

Sec. 22 fixes the wholesale license fee at fifty dollars for Provincial purposes.

By sec. 4, "wholesale" is defined to be over five gallons, or 1 dozen bottles of three half pints, or two dozen of three-fourths of a pint each.

This Act came into operation on the 24th of March, 1874.

Under the Dominion Act, 31 Vic. chap. 8, before mentioned, the licenses expired on the thirtieth of June in each year, and those granted after the thirtieth of June, 1873, were current when the *Ontario* Act came into operation. Up to the passing of the latter Act a brewer had, by the effect of his license from the Dominion Government, the right, not only to *keep* and *have* for sale, but to *sell* fermented liquors by wholesale. By the latter Act he is not only prohibited from selling but from *keeping* or *having*. Does not that Act, therefore, virtually repeal, if effect be given to it, the Dominion Act in both respects, unless, indeed, the brewer should comply with its exactions? What, in the case of his refusal to accept further conditions to his compact with the Dominion Government, would become of his manufactured stock on hand? The selling and *keeping*, or *having* on hand for sale, or for consumption, in *Ontario*, was prohibited, and his *keeping* or *having* it legally, after the passing of the Act, is made *contingent* on his taking out a license *under it*. He had legally accumu-

1878

SEVERN v. THE QUEEN.

lated a large stock which, by the *Ontario* Act, he is forbidden either to *keep* or *sell* in pursuance of his rights under the license from the Dominion Government. It may be said the extra tax was a light one. No matter how light, it was in contravention of the rights he had acquired; and if the power to change the existing relations be at all admitted, the *extent* of the change cannot be questioned; for that is a question of expediency and parliamentary discretion, which no Court could control or interfere with; and the same power which levied a contribution to the extent of fifty dollars might raise it so high as to break up the manufacture altogether, and thus indirectly render nugatory the Dominion Act and deprive the Government of the revenue it would otherwise receive; and, consequently, as I take it, restrict the effect of the Imperial Act, section 91, sub-sections 2 and 3, which give to the Dominion Parliament the exclusive right of legislation in regard to "the regulation of trade and commerce" and "the raising of money by any mode or system of taxation."

If, indeed, it were contended that the Dominion Act was *ultra vires*, and that the right to provide for the licenses in question was one wholly with the Local Legislature, I could appreciate the contention to some extent; but when the constitutionality of that Act is admitted, I must have better reasons than I have yet heard to induce me to conclude that the Imperial Parliament intended that *both* Legislatures should have power to deal with the same subject. Under the two sub-sections just quoted, and the Dominion Act, the power of the Dominion Government to grant the licenses in question must be admitted, and even if the right of the Local Legislature should have strong reasons to sustain it (which, however, I cannot see), but which, nevertheless, leave it a matter of doubt and speculation, I feel that it is incumbent on us, for many good reasons,

to resolve that doubt against that claim of right. Suppose every Local Legislature in the Dominion were thus to interfere with the proper results to be expected from Dominion legislation in regard to this subject (and if one can do so, why not all ?), who can measure or estimate the extent to which "trade and commerce" might be affected and the revenues of the Dominion diminished; its power to raise "money by any mode or system of taxation" seriously curtailed, and the customs and excise laws of the Dominion, passed as provided by sec. 122 of the Imperial Act, interfered with and rendered nugatory. If the right to legislate as to licenses for brewing be admitted, why not as to licenses to manufacture tobacco and everything else ?

The contention on the part of the Respondent is, that *both* Legislatures have power under the Imperial Act to legislate in regard to the matter before us. While all admit the legislative right of the Dominion Parliament, the power of the Local Legislature is denied. The claim for it has been urged on several grounds, one of which is, that direct taxation for Provincial purposes is given exclusively to the Local Legislatures, and that the license duty sought to be levied by the Act of *Ontario* is a direct tax. I must dissent from that proposition for reasons too well understood to require me to define what a direct tax is, or to show that the imposition in this case is clearly an indirect one.

The legislative power given to the Dominion Parliament is unlimited

> To make laws for the peace, order and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this Act assigned *exclusively* to the Legislatures of the Provinces,

and we need not necessarily consider the provisions of sub-sections 2 and 3 of section 91.

1878

SEVERN v. THE QUEEN.

Everything in the shape of legislation for the peace, order and good government of *Canada* is embraced, except as before mentioned. But sub-section twenty-nine goes further and provides for exceptions and reservations in regard to matters otherwise included in the power of legislation given to the Local Legislatures, and also provides that:

> Any matter coming within any of the classes of subjects enumerated *in this section* shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

"The regulation of trade and commerce" and "the raising of money by any mode or system of taxation" is, however, specially mentioned, and both include the right to make and have carried out all the provisions in the Dominion Act. This position has not been, and cannot be, successfully assailed. The subjects in all their details of which trade and commerce are composed, and the regulation of them, and the raising of revenue by indirect taxation, must, therefore, be matters referred to and included in the latter clause of sub-section 29, before mentioned, and if so,

> Shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Every constituent, therefore, of trade and commerce, and the subject of indirect taxation, is thus, as I submit, withdrawn from the consideration of the Local Legislatures, even if it should otherwise be *apparently* included. The Imperial Act fences in those twenty-eight subjects wholesale and in detail, and the Local Legislatures were intended to be, and are, kept out of the inclosure, and when authorized to deal with the subject of "direct taxation within the Province," as in

sub-section 2 of section 92, and "shop, saloon, tavern, auctioneer, and other licenses," they are commanded, by the concluding clause of sub-section 29, sec. 91, not to interfere by measures for what they may call "direct taxation," or in regard at least to "other licenses," or in reference to "municipal institutions," with the prerogatives of the Dominion Parliament as to the "regulation of trade and commerce," including "Customs and Excise laws" and "the raising of money by any mode or system of taxation." I have already shown, that the exercise of the power contended for by the Legislature of *Ontario* is incompatible with the full exercise of that of the Dominion Parliament, and might be used to its total destruction. The object of the Imperial Act was clearly to give plenary powers of legislation to the Dominion Parliament with the exceptions before stated, and just as clearly to restrict local legislation so as to prevent any conflict with that of the former in regard to the subjects with which it was given power to deal.

The "excise laws" of the Dominion must be affected by an additional license fee being exacted by the Local Government. The "excise" revenues belong solely to the Dominion Government. The Dominion Parliament having imposed a license fee of $50 on a brewer of fermented liquors, might, at an early future, desire to impose, for revenue, a higher fee. It has the acknowledged right to do so; but, in the meantime, the Local Legislature has fully weighted the enterprise of brewing; and the result becomes, therefore, a transfer from the sources of Dominion revenue to the coffers of the Local Government. Who can say, then, that there is not an attempt to collect Provincial revenue from a source clearly appertaining to the Dominion?

But we are asked to hold that, under sub-section 9,

1878

SEVERN v. THE QUEEN.

"shop, saloon, tavern, auctioneer and *other licenses*" will include licenses to brewers, in the position occupied by the Appellant, to sell by wholesale. Such an application can only be made by virtue of the concluding words: "and other licenses." The extent and limit to be given to those words have not been stated or referred to; but some must exist to their application. If applicable to *brewers'* and *distillers'* licenses, which, at the date of the Imperial Act, were completely out of reach of any municipal control, why not extend them to other traders? If uncontrolled, a Local Legislature might organize a *system of licenses*, and indirectly, not only tax, but regulate and restrict certain industries, trades and callings, or might, indeed, virtually prohibit and destroy them. We must reasonably conclude the Legislature meant to restrict the power at some point, and we must determine where that restriction should be imposed, not only from the words of the sub-section in question, but from the tenor and bearing of the whole Act, the state of the law at the time, the peculiar position of the United Provinces and the object of their union, with the means for working out the Constitution provided.

Taking the words themselves, what is the law as to the construction of them? From a review of all the cases cited, and others, I am forced to conclude that the words "and other licenses" must be restricted. We find them preceded by the words "shop, saloon, tavern, auctioneer," and I cannot decide that brewers or distillers are *ejusdem generis* with them or any of them. That they should be, to include the right of legislation claimed, taking the whole of the *Imperial Act* together, is a position too clearly established to be doubted. In *Reed* v. *Ingham* (1) the law

(1) 3 E. & B. 889.

is clearly stated by Lord *Campbell*, C.J.; and also in *East London Water Works Co.* v. *Trustees for Mile End Old Town* (1). In the latter case the word "tenements" had to receive a construction. Referring to it, Lord *Campbell* said "tenements" must be understood according to the antecedent enumeration and as comprising only matters *ejusdem generis*. That rule of construction was followed in *Rex* v. *The Manchester and Salford Waterworks Company* (2), which is admitted to have been well decided. *Coleridge*, Justice, in the same case says:

If the Appellants are liable it is because they occupy a tenement which is ratable. It is admitted that the word cannot have its full meaning in either place where it occurs in the section 30. In the first, it clearly means something inhabited or belonging to a dwelling. In the second, where it is admitted that some restraint must be put upon the construction of the word, *the rule attaches, that a general word following specific ones must be taken to mean something of the same kind.*

A similar construction was put upon general words in *Sandeman* v. *Breach* (3). The 29 Car. 2, chap. 7, provided that

No tradesman, artificer, workman, labourer, or other person or persons should work at their ordinary calling on the Lord's day.

Per Lord *Tenterden:*

It was contended that under the words "other person or persons" the drivers of stage coaches are included. But where general words follow particular ones the rule is to construe them as applicable to persons *ejusdem generis.*

We think the words "other person or persons" cannot have been used in a sense large enough to include the owner and driver of a stage-coach.

I feel bound, therefore, on principle, and as the result of all the cases, to construe the words in question as controlled by the other portions of the Act, and, therefore, not to include power to the Legislature of *Ontario* to legislate for licenses to brewers or distillers to sell by wholesale.

(1) 17 Q. B. 512. (2) 1 B. & C. 630.
(3) 7 B. & C. 100.

1878

SEVERN v. THE QUEEN.

I will not, however, say, that where the terms used are exhaustive of the particular class or subject named, we are bound to apply the principle of construction just stated; and it may possibly be argued that such is here the case in respect of the words preceding "and other licenses." In such a case, where there are no controling conditions, the words might be sufficient to give the right claimed for the Local Legislature; but when considering the objects and purview of the whole Act, and the mode provided for effecting them, I can come to no other conclusion than one founded upon the duty I feel incumbent upon me, of reading the whole Act together, and therein and thereby, and not from the technical reading of a few words in a sub-section, however otherwise important, seek for the intention and meaning of the Legislature. By this mode the Act is made to harmonize in all its parts, and the feasibility of working it out is established. By the other construction, and not in my view the proper one, the evident intention of the Legislature is frustrated, and the legislation itself made absurd and inconsistent, and the working out of the details made most difficult, and, it may be found, totally impossible. I am of opinion, for these reasons, that the Act of *Ontario* in question was *ultra vires*, and that the appeal should be allowed with costs and judgment entered for the Appellant.

Appeal allowed with costs.

Solicitors for Appellant: *Bethune, Osler & Moss.*

Solicitors for Respondents: *Mowat, Maclennan & Downey.*