
THE MAYOR, ALDERMEN, AND }
COMMONALTY OF THE CITY } APPELLANTS; ¹⁸⁸⁰
OF FREDERICTON..... } *Feb'y. 12.
*April 13.

AND

THE QUEEN, ON THE PROSECU- }
TION OF THOMAS BARKER..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Canada Temperance Act, 1878, Constitutionality of—Powers of Dominion Parliament—Secs. 91 and 92, B. N. A. Act, 1867—Power to prohibit sale of Intoxicating Liquors—Distribution of Legislative Power.

- Held*,—1. That the Act of the Parliament of *Canada*, (41 Vic., c. 16,) "An Act respecting the traffic in intoxicating liquors," cited as "*The Canada Temperance Act, 1878*," is within the legislative capacity of that body.
2. That by the *British North America Act, 1867*, plenary powers of legislation are given to the Parliament of *Canada* over all matters within the scope of its jurisdiction, and that they may be exercised either absolutely or conditionally; in the latter case the legislation may be made to depend upon some subsequent event, and be brought into force in one part of the Dominion and not in the other.

* PRESENT.—Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, J. J.

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3. That under sub-sec. 2 of sec. 91, *B. N. A. Act*, 1867, "regulation of trade and commerce," the Parliament of *Canada* alone has the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it, and the Court has no right whatever to enquire what motive induced Parliament to exercise its powers.

[*Henry, J.*, dissenting.]

**APPEAL** from a judgment of the Supreme Court of *New Brunswick*, quashing a return to a *mandamus nisi*, and ordering a peremptory *mandamus* to be issued in the cause.

On the 1st day of May, 1878, the second part of *The Canada Temperance Act*, 1878, which prevents the sale of spirituous or intoxicating liquors, with certain exceptions, was brought into force in the City of *Fredericton, N. B.*, pursuant to the provisions of the first part of that act.

On the 18th day of October, 1878, The Supreme Court of *New Brunswick*, upon the application of *Thomas Barker*, who kept an hotel in *Fredericton*, issued a *mandamus nisi* to the Mayor, Aldermen and Commonalty of the City of *Fredericton*, commanding them to issue a license to the said *Thomas Barker*, to sell spirituous liquors by retail within the said city in his hotel, or to shew cause to the contrary.

The Mayor, &c., duly made answer and return to the writ of *mandamus*, refusing to grant the license for the following reasons viz: "That *The Canada Temperance Act*, 1878, was declared in force in the City of *Fredericton*, on the first day of May last, and therefore the city council could not grant a license to *Thomas Barker* to sell spirituous liquors by retail contrary to the provisions of that act."

Upon motion to quash the return and for the issue of a peremptory *mandamus* all parties were heard by counsel. It was agreed that the only question which the Court should be called upon to decide was as to the

power of the Parliament of *Canada* to pass *The Canada Temperance Act*, 1878; all technical and other objections were waived.

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In Michaelmas Term, 1879, the Court, consisting of the Chief Justice *Allen* and Judges *Weldon*, *Fisher*, *Wetmore*, and *Palmer*, gave judgment, holding *The Canada Temperance Act*, 1878, void, as being *ultra vires* of the Parliament of *Canada*; *Palmer*, J., dissenting (1). The issue of a peremptory *mandamus* was then ordered.

From this judgment the Mayor etc. appealed to the Supreme Court of *Canada*.

Mr. *Lash*, Q. C., for appellants:

The question to be decided on this appeal is whether Mr. *Barker* was entitled to a *mandamus* compelling the City Council to give him a license to sell spirituous liquors in the city of *Fredericton*, where *The Canada Temperance Act*, 1878, was brought into force. None of the detail provisions of the Act are brought in question for decision, the broad question being the power of the Parliament of *Canada* to pass the second and third parts of the Act, which prohibit under certain penalties the sale of spirituous liquors except upon certain specified conditions.

I propose to submit to the Court three positions upon which I intend to base my argument:—

First.—That as to all matters relating to the internal affairs of *Canada* and the Provinces composing it, and to the good government of the same, full legislative authority is vested either in the Parliament of *Canada*, or in the Provincial Legislature, or in both; in other words, that there is no reserved power respecting those matters in the Imperial Parliament. Second.—That the Provincial Legislatures have only such legislative powers as have been specifically conferred upon them by the *B. N. A. Act*, and that the whole

(1) See 3 Pugs. & B. 139.

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balance of the legislative power over the internal affairs of *Canada* and the Provinces composing it rests with the Parliament of *Canada*. Third.—That when the powers specifically conferred upon the Dominion Parliament clash with the powers of the Provincial Legislatures, the latter must give way.

If these propositions be sound it follows, that in order to establish, as between the Dominion Parliament and the Provincial Legislatures, that a power does not exist in the Dominion Parliament, it must first be shewn that such power is vested in the Local Legislatures.

I will therefore first argue that the power to pass *The Canada Temperance Act*, 1878, is not within the legislative authority of the Provincial Legislatures. The act by sec. 99 prohibits the sale of liquor by *every body* in those places within which the act may be brought into force, except for certain purposes. Then, by the 100 section *et seq.* the act provides for penalties and prosecutions for offences against the second part of the act. Can it be said that the power to pass this legislation exists in Provincial Legislatures? It is contended on the part of the respondent that the act is within the powers of those Legislatures because they have power over the subject of "Shop, saloon, tavern, auctioneer and other licenses, in order to the raising of a revenue for Provincial, Local or Municipal purposes" (1), and over the subject of Municipal Institutions and of property and civil rights in the Province (2), and over "matters of a merely local nature in the Province (3).

It will be observed that the 9th sub-section gives legislative authority over the *licenses* to be issued and not over the traffic to be carried on in the shop, saloon, &c. Legislative authority over that part of the business relating to the sale of liquor by a saloon-keeper,

(1). B. N. A. Act, sub-sec. 9, section 92. (2). Ibid. sub-sec. 13.

(3). Ibid. sub-sec. 16.

as well as to the sale of goods and merchandise by a shop-keeper, belongs exclusively to the Parliament of <sup>1880</sup> *Canada*, by reason of the commercial nature of <sup>CITY OF</sup> *Fredericton* <sup>FREDERICTON</sup> the transactions. The case of *Severn v. The Queen* (1) <sup>v.</sup> *THE QUEEN.* seems to admit, that Provincial Legislatures cannot pass any law which would amount to prohibition. But, it is said, this act virtually takes away the right specifically given to Local Legislatures to issue tavern licenses. I submit it does not do so, for the power to issue the license remains, but I must admit that its usefulness is gone.

I contend that if there be legislative authority over any particular subject matter, that authority may be exercised notwithstanding that the exercise of it may affect the revenue derived from the precise condition of that matter before the exercise of such authority.

For instance, the Local Legislatures have authority to impose direct taxation for the purpose of raising a revenue. Suppose the Legislature imposes a poll tax upon aliens, that would not prevent the Dominion Parliament from naturalizing those aliens, thus depriving the Province of that source of revenue. So with the sale of liquor. If the Parliament of *Canada* can as a regulation of trade prevent its sale, the fact that the prevention will deprive the Provincial Authorities of a source of revenue cannot affect the power to prevent. Some other clause, then, must be looked to.

The next clause relied upon is sub-section 8, relating to "Municipal institutions in the Provinces." It is said that *Fredericton*, being a municipality having control over this subject before confederation, the power cannot be taken away. I contend that the Dominion Parliament can pass laws which interfere with the powers exercised by municipalities previous to confederation, so far as relates to matters within the authority of Parlia-

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ment. Will it be said, that Parliament has no control over the power possessed by municipalities before confederation over weights and measures. Such power existed previous to confederation, in certain municipalities. The same might be said of other matters.

It is also contended that this law, having for its object the suppression of drunkenness, is a police regulation and so within the powers of municipalities, and reference is made to the remarks of Your Lordship, the Chief Justice, in *Regina v. Justices of Kings* (1).

[THE CHIEF JUSTICE:—I think I said nothing that may be interpreted as to say the Local Legislatures had power to prohibit ?]

No, my Lord, and what was stated is quite consistent with the fact—that the Local Legislatures have certain powers, the exercise of which would tend to prevent drunkenness, but it does not follow that the sole right to legislate so as to prevent drunkenness rests with the Local Legislatures; the Legislatures may attain that end in one way, Parliament may attain it in another. The question here is not: is the object of this legislation within the powers of Parliament or of a Legislature? But the question is, are the means used within those powers? The means used in this case are certainly not in the local authority.

Great stress has been laid by the Court below upon the preamble of the Act, and it is said that it is not within the powers of Parliament, because the preamble shews that it is an Act for the promotion of temperance, and not a regulation of trade or commerce.

To this I answer, (a) that if Parliament possessed power to pass the Act without any preamble shewing its reasons for passing it, the insertion of the preamble declaring the reasons could not take away or affect the power so possessed, and that although the preamble

may properly be looked to for the purpose of assisting in the construction of the Act as passed, and of ascertaining the meaning of the language used, yet it can have no effect upon the power of Parliament to pass the Act nor can it limit, except as a matter of construction, the effect of the language used, (b) that if the preamble be looked at at all, it must be looked at as a whole, and it expressly declares one of the reasons for passing the Act to be "that there should be uniform legislation in all the Provinces *respecting the traffic* in intoxicating liquors."

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Mr. Justice *Fisher* in his judgment says that the Act is not a regulation of trade and commerce, because in his opinion its provisions are unnecessary to such regulation, but he admits that, if such provisions be necessary, the Act is within the powers of Parliament.

To this I answer that the necessity for an Act is a matter entirely for decision by Parliament, and that the Court, except as a matter of construction, cannot deal with it.

Judges *Fisher* and *Weldon* refer to the unequal partial effect of the Act, and seem to rely upon this as a reason why it is not a regulation of trade.

To this I answer, that the power of our Parliament to regulate trade does not depend upon the effect of the regulation being equal with respect to all, or upon the regulation effecting all parts of *Canada* at once.

The next sub-section relied on by the respondent is 13 of sec. 92., viz. : "Property and Civil Rights in the Province." I do not understand that the respondent contends that by virtue of those powers the legislature could have passed this Act, but they say it is an *interference* with such powers. The appellants contend that this fact does not affect the general powers of Parliament, as if there be such interference the powers of the Local Legislature must give way.

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The respondents are therefore confined to the contention that the necessary power exists in the legislature under sub-section 16 of sec. 92, relating to matters of a merely local or private nature in the Province.

To this it is answered, that by the latter part of sec. 91, it is expressly provided that any matter coming within sec. 91, shall not be deemed to come within the class included in sub-section 16 of sec. 92.

It is further said that, as by the sec. 121 of the *British North America Act* provision is made that articles, the growth &c. of one Province, shall be admitted free into the other Provinces, the power to import implies the power to sell, and that Parliament could not therefore interfere with that power. But the right to sell exists quite independently of the right to import. The *B. N. A. Act* does not declare that any article, which may be admitted to pass from one Province to another, may be sold in that other Province. It is not because an article is admitted to pass free from one Province to another that it can be legally sold. Immoral prints might be sent from one Province to another, but they could not be sold without an offence being committed, because the law says such things shall not be sold. There must be some legislative authority to destroy the power to sell. Certainly it can only be the authority of the Dominion Parliament.

It is contended that because the Act affects only particular districts, it is not general legislation, and therefore *ultra vires*. There is nothing in the *B. N. A. Act* which says that the powers of Parliament must be executed in any particular way or over the whole of *Canada* at once. Constantly there is partial legislation in a geographical sense. Take, for instance, the *Blake Act* against the carrying of fire arms. There is no authority to say it must be exercised generally in a geographical sense.

In addition to the regulation of trade and commerce, I will also contend that under the 27 sub-section of sec. 91, relating to the criminal law, the Dominion Parliament had power to pass this Act.

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The power to legislate upon the Criminal law includes the right to declare Acts, in themselves lawful, to be no longer lawful, if Parliament thinks that the public good requires it. Drunkenness is a fruitful source of all kinds of crime. In legislating to promote temperance, Parliament is, in an eminent degree, dealing with the criminal law.

It is not obliged to wait till liquor has been sold and then drunk till intoxication has ensued and crime has been committed, before dealing with the subject. It has the right to legislate and attack the cause. Finding a cause lawful in itself productive of such criminal effects, it can, as part of the criminal law, declare that cause to be an offence, and so if possible obliterate the most fruitful source of crime known to exist. Drinking liquor was not *per se* a criminal offence, but this law was against the sale, not against the drinking of liquor. Carrying arms was not *per se* unlawful, but Parliament in its wisdom has deemed it advisable to make it an offence. Drunkenness, according to the reports of grand juries and other authorities, was one of the most fruitful sources of crime, and there was no reason why Parliament should not deal with it as had already been done with the practice of carrying arms.

The remaining point taken by the respondent is, that this act is a delegation of powers and that the Dominion Parliament has no power to delegate its powers. In this case there has been no delegation of authority, but merely conditional legislation. See *Queen vs. Burah* (1). Here the act has been passed and its effect is suspended, until certain conditions precedent

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are performed, and then the act by virtue of its own self comes into force. I contend that the same power, with respect to the matters within its control, exists in the Parliament of *Canada* as exists in the Parliament of *Great Britain*, and if the power of delegating it exists here, the *British North America Act* itself is a delegation of authority from the Imperial Parliament. To sum up shortly I contend :

(1). That the Act is within the powers of Parliament because it could not have been passed by the legislature of the Province.

(2). That it is a regulation of trade and commerce.

(3). That even if not a regulation of trade it is within the Criminal law.

Mr. *Maclaren* followed on behalf of the appellant :—

As to the question of delegation, the cases cited in the respondent's factum are State decisions in the *United States*. It is scarcely necessary to point out the difference between the two systems. There the residuum of power is in the people and not in the legislature. It is however now recognized, that conditional legislation, or laws known as local option laws, are quite within the limits of their powers. See *Cooley* on Cons. Lim. (1).

In *Quebec* a large number of by-laws depend on their going into effect on the vote of the people. If the Local Legislatures had this power, surely the Parliament of *Canada* had the same power.

The *Dunkin* Act, which this act supersedes, came into force in the same way, for it left it optional to the municipalities to put it into operation. The constitutionality of that act was never questioned, before confederation. Then also there is the Act 32 Vic. c. 24, since confederation, "An Act for the better preservation of peace in the vicinity of Public Works," which provides that arms are not to be carried nor *liquors* to be sold within

(1) P p. 117, 120, 122 note.

certain limits of Public Works. This last act was only brought into force at the option of the Governor in Council. This last act also shows that the prohibition of the sale of liquors, has been considered as coming within the criminal jurisdiction given to the Dominion Parliament. I might also cite the Supreme and Exchequer Court Act which came into force by proclamation.

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However, the appellant chiefly relies on sub-sections 2 and 27 of sec. 91, as giving power to the Dominion Parliament to pass *The Canada Temperance Act*, 1878.

A great deal of stress is laid on the preamble of the act, which seems to be the stumbling block to the working of the act in *New Brunswick*. The Judges of the Court below have assumed that this is not an act to regulate trade and commerce, but only to promote temperance.

[THE CHIEF JUSTICE: If the power to regulate trade and commerce exists and the exercise of that power has an effect on temperance, can it be a reason to interfere with the power?]

Our answer is that they have power to regulate trade and commerce in such a way as to promote the *good* government of the country. Then also it is said, that this act interferes with the exclusive control given to the Local Legislatures over municipal institutions in the Province, and matters affecting civil rights and property. My contention is that the Dominion Parliament has full power to legislate upon all matters strictly within its jurisdiction, no matter what effect it may have on classes of matters comprised in those assigned by sec. 92 to the legislatures of the Provinces; and I base my contention on the concluding lines of sec. 91. The Court below has not given full force to the words, "*shall not be deemed to come within the class of matters of a local &c.*"

[THE CHIEF JUSTICE: The Dominion Parliament can deal with shipping, and can it not do so irrespective of

1880 the power given to the Local Legislatures as to the
 CITY OF *civil* rights over the subject ?]
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 THE QUEEN. Certainly, my Lord, my impression is that that sub-
 section 16 of sec. 92 includes many subjects previously
 mentioned.

[HENRY J. : Do you draw any line as to *trade and commerce* ? This question is the most important one bearing upon the case. In dealing with trade and commerce, there is hardly any question of property or civil rights which could not be touched upon in some way. The main question is as to where the line should be drawn ?]

Altho' I do not feel confident in drawing a line, I would say this : Where there is an apparent conflict, in so far as it is a *bonâ fide* regulation of *trade and commerce*, the local interest must give way. I think this is a fair construction to put on the concluding words of section 91.

If the law were otherwise, the sub-section 13, *civil rights*, would take away the Dominion power altogether. In dealing with property and civil rights, there are many matters of commerce with which the Local Legislatures could deal, if Dominion authority was not considered paramount. The Dominion Parliament could not even legislate on criminal matters. All I am prepared to argue for the present is that the preamble of the act comes within sub-sec. 2 of sec. 91.

The word *traffic* is synonymous with *trade*. The traffic in intoxicating liquors has always been considered a branch of trade. The first decision is to be found in the legislative Journals of 1855 of the old Province of *Canada* (p. 957, 2 part). A Bill was introduced to prevent traffic in intoxicating liquors, and Speaker *Sicotte*, now one of the Judges of the Superior Court of *Quebec*, decided that the Bill related to trade, and as such should have originated in committee of the whole, and on that

ground it was thrown out. The courts in *Quebec* have unanimously held that the Local Legislatures had no legislative authority to pass a prohibitory liquor law. See *Sauvé v. The Corporation of the County of Argenteuil* (1); *Hart v. La Corporation du Comté de Missisquoi* (2); *Poitras v. Corporation of the City of Quebec* (3); *Cooley v. Corporation of the County of Brome* (4); *Spedon v. Parish of St. Malachie* (5); and *Regina v. The Justices of King's County* (6).

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The power of the Parliament of *Canada* over this subject matter is much more extensive than that of Congress in the *United States*. Parliament has power to deal with foreign as well as domestic trade, while Congress only deals with the former. *Story* on Constitution of *United States* (7). It is also contended that this is not a regulation of trade and commerce, but a prohibition. To this it is answered that, whether the Act be a prohibition or a regulation of the sale, it is equally within the powers of Parliament which alone can deal with respect to the Criminal law and to trade and commerce. *Story* on the Constitution of the *United States* (8); *Gibbons v. Ogden* (9).

Chief Justice *Allen* in the Court below says: "had this Act prohibited the sale of liquor, instead of merely restricting and regulating it, I should have had no doubt about the power of Parliament to pass such an Act."

The next inquiry is, whether an Act can be unconstitutional from the motives with which it is passed. I contend the motive cannot be inquired into. *Story*, *ibid.* (10).

Mr. *Kaye*, Q. C., for respondent :

In the distribution of Legislative powers, the *British North America Act*, 1867, part 6, section 92, assigns exclusively to the Provincial Legislatures the power of

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| (1) 21 L. C. Jur. 119. | (6) 2 Pugs. 535. |
| (2) 3 Q. L. R. 170. | (7) Sec. 1056. |
| (3) 9 Rev. Leg. 531. | (8) Sec. 1064. |
| (4) 21 L. C. Jur. 182. | (9) 9 Wheaton 23; 1 Kent's |
| (5) C.C. Beauharnois, Bélanger, J., | Comm. p. 432. |
| not reported. | (10) Sec. 1067, 1090, 1092. |

1880 legislation in relation to all matters coming within
 CITY OF *inter alia*—
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 order to the raising of a Revenue for Provincial, Local,
 or Municipal purposes.

Class 13 —Property and Civil Rights in the Provinces.

Class 16—Generally all matters of a merely local or
 private nature in the Province.

The power thus assigned excludes any like power in
 the Parliament of *Canada*.

The exception in sub-section 29 of sec. 91 qualifies
 anything done of a *private* or *local* nature under the
 enumerated powers of sec. 91 and not any thing done
 under sec. 92. The object was, that if the Dominion
 Parliament, in legislating on some of the subjects enum-
 erated in sec 92, necessarily comprised something of a
private or *local* nature, such legislation would still be
 valid. Matters of a public nature are not qualified. If
 a power of a public nature is given by sec. 92 to the
 Local Legislatures, there is no power given to the Do-
 minion Parliament to destroy that power. Thus the
 power given of raising a revenue, either by direct
 taxation, or by shop and saloon licenses, is a matter of
 a public nature, and I contend that there is no power
 vested in the Dominion Parliament by which it might
 destroy the sources of Provincial revenue. The intro-
 duction of these words *local* or *private* must have some
 meaning. Now, the only meaning you can give to the
 words *local* or *private* is, that if there are *public* matters
 assigned exclusively to the Local Legislatures by the
 92 sec., then the Dominion Parliament cannot affect
 them. If the raising of money is not a *public* matter,
 my argument goes for nothing, but if it is, upon the
 plain language of the Act, there is no power in the
 Dominion Parliament to destroy it. The Provinces con-

sented to a union on the condition of being able to raise a revenue out of licenses. 1880

[THE CHIEF JUSTICE:—Your reasoning would lead you to the belief that the Provincial Legislatures have power to prohibit the sale of liquors.] CITY OF
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I cannot see that it leads to that.

[THE CHIEF JUSTICE:—Then according to your argument you must hold that there is no power in *Canada* to deal with these matters, and that our Parliament had not, as Mr. *Lash* contended it had, a Constitution as perfect with reference to matters placed under its control as that of *Great Britain*.]

I do not think it possible to say this Dominion has such a Constitution as that of *Great Britain*. Their power is unlimited, because it is uncontrollable. Is it the same here? is not the power here controlled by the British Parliament? Whatever power exists, must be found in the *British North America Act*. If it had been the intention to give unlimited power to the Dominion, why not have had Legislative Union. What power exists to do away with the French language. So it is, I contend, with this subject-matter; it is not one which comes within the control of the Dominion Parliament.

It is contended that *The Canada Temperance Act* legislates on a matter which comes within class 2 of sec. 91: "The Regulation of Trade and Commerce."

Now, the same remark applies here, that the exercise of the power under class 2 cannot affect any matters in section 92 which are of a local or private nature; and that as class 9 of section 92 is of a local or private nature, it is not within the competency of the Dominion Parliament to legislate upon it.

Further, I submit that the term "Regulation" applies only to what concerns Trade as such—something having for its object to advance or benefit trade, and not to regulate the morals of traders. Thus it would not

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be competent to the Dominion Parliament to declare that no person should trade who was addicted to the habit of smoking, or that no one should be allowed to trade unless he attended some Christian place of worship.

It may be difficult to give the exact definition of "Regulation," but it is submitted that a law against drunkenness is in no sense a law for the regulation of trade.

It is to-day urged that this law was for the purpose of increasing sobriety, but to-morrow a law might be passed to make the people religious, or to make them follow a certain religion. The simple question is, can this law be said to be a regulation of trade, or is it merely a law for another purpose but affecting matters of trade?

See *Calder Navigation Co. v. Pilling* (1), where a distinction is made between the laws which a Canal Corporation were empowered to make for the good and orderly using the navigation, and rules which the Corporation made to regulate the moral and religious conduct of bargemen employed on the canal.

Then, it is said, that *The Canada Temperance Act* legislates on a matter which comes within the class of subjects No. 27, "The Criminal Law."

This power is limited, so far as concerns the class of matters in section 92, in its exercise to such of the matters enumerated in that section as are of a local or private nature. Thus, it would not be competent to the Dominion Parliament to declare that it shall be a crime to amend the constitution of the Province (sub-section 1), or to impose direct taxation within the Province, in order to raising of a revenue for Provincial purposes; neither can it make it a crime to do any of the matters in sub-sections 3, 4, 5, 6, 7, 8, or 9; none of which are matters of a local or private nature. So it would not

be competent to the Dominion Parliament to declare it criminal to solemnize marriage in the Province.

Local Legislatures have the power to deal with police regulations, and to impose fines for a breach of the laws. Municipalities have power to prevent the sale of liquor on Sunday, and I do not think it would be for a moment contended that the Local Legislature had not power to authorize these restrictions. If it is held that this was a regulation of trade, and that the Dominion Parliament had power to override the Provincial laws and to legalize the sale of liquor on Sunday, it will considerably astonish the people who had advocated Confederation. Under the pretext of regulating trade they might prohibit the sale of tobacco. The simple statement of an object in passing a certain law cannot justify the Dominion Parliament in interfering with matters under control of the Local Legislatures. If this is not a regulation of trade it is a police matter, not a criminal law. It is not to prevent crime, for selling liquor is no crime; but to prevent the consequences of selling liquor.

Besides which, the *British North America Act* assumes the existence, after Confederation, of "Taverns," from which licenses can be issued, in order to the raising of a revenue for Provincial, local, or municipal purposes, and it could not be the intention of the act to include under the term "Criminal Law," those matters which are by the *British North America Act* held to be legal, and which are relied upon as a source of revenue for the Provinces. It is, therefore, submitted that *The Canada Temperance Act* is not an act of legislation on Criminal Law within the meaning of the *British North America Act*, class 27, sec. 91.

Now, if we take up the *B. N. A. Act* and read the 91st section, we find there that certain powers are given to the Dominion Parliament. It is the voice of the Provinces, speaking through the Imperial Parliament, giv-

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ing to the Senate and the House of Commons power to make laws for them. In this case Parliament has not exercised these powers, but allows the present law to come into force, when sanctioned by a portion of the people. This is a violation of the fundamental principle upon which this power was given to them, it virtually delegates to a portion of the people the power of controlling the legislation of the Province. The great struggle in consummating Confederation was to protect the minorities. The strongest guarantee of integrity in the Dominion Parliament is the responsibility of members to their constituents, but such a law as this is nothing less than an attempt to shift that responsibility to a section of the people. By referring to the Debates on Confederation, p. 547, it will be seen that the intention of the framers of the *Quebec* resolutions was to preserve the family life of the Provinces, and that it was for the purpose of having a uniform law throughout the Dominion, that the legislative control over the criminal law was given to the Parliament of *Canada*. This law, however, makes it a crime to sell spirituous liquors only in certain sections of the Dominion. The question here is whether they could delegate their power and ask the people to say whether a crime would be created. Local option laws involving the delegation of power might occur in the *States*, or in *England*, where there are legislative bodies with plenary powers, but not in *Canada*. Where the carrying out of a law is left to the people, it is not delegation, but is execution. To carry out a law already passed, is different from legislating one for one section of the Dominion.

The question here seems to me to be what Parliament did, had they power to do? We do not come to ask where the power exists.

There is another point to which I will refer before concluding :—

The *British North America Act*, section 121, provides that all articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the union, be admitted free into each of the other Provinces. The power to import free, implies a power to sell.

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The *Canada Temperance Act* takes this power from the importer of beer, ale, cider, and other liquors, as well where these liquors are the manufacture of another Province, as in other cases; it therefore violates the provisions of section 121.

Section 121 was intended to secure free trade between the Provinces in all articles of growth, produce, or manufacture of any one of the Provinces. The *Canada Temperance Act* gives a local manufacturer of certain articles, e.g. beer, etc., a power to sell, while it takes such power from the manufacturer in another Province. This is opposed to the spirit and meaning of the 121 section, and I submit that on this ground the act is *ultra vires*.

Mr. *Christopher Robinson*, Q.C., followed on the part of the Respondent :—

My learned friend who is with me has exhausted the points, and put them so forcibly that there can be no advantage in repeating them. I will however make a few observations as to the rules to be observed in construing this act. I think in construing our Constitution we may look at the debates, especially when the words of the act are to be found in the resolutions passed previously. Now, if we find that the construction given to these resolutions is that construction which we represent ought to be put on these important sections of the *B. N. A. Act*, it cannot be said not to be a valuable authority, just as the *Federalist* is looked upon as of the greatest authority in construing the *United States* constitution. In *Smiles*

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v. *Belford* (1) the Court read the debates. Now, we find that previous to Confederation the Provinces had plenary powers of legislation and the *B. N. A. Act* was to give certain powers belonging to them to the Federal Parliament. We know that it was desirable, as stated by Sir *John A. Macdonald*, to have federal laws uniform, and that the Provinces reserved to themselves all laws not uniform and general.

The language used by Lord *Selborne* in the case of *L. Union S. Jacques v. Belisle* (2) is very applicable. "Their Lordships observe that the scheme of enumeration in that section is to mention various categories of *general* subjects which may be dealt with by legislation. * * * Well, no such *general* law covering this particular association is alleged ever to have been passed." Now, I cannot help thinking that looking at the powers given to the Dominion Parliament by this act, we are wrong in saying our constitution is similar in principle to that of *Great Britain*. The British Parliament is supreme, whilst here any party can refuse to obey an act until he has tested in the courts the constitutionality of that act.

It is said we have no right to question the motive or intention of the Legislature. Now, in order to keep a Legislature within its limits, it is necessary often to ascertain what the motive was.

Take for example the *License* cases (3). If they impose licenses for other than legal purposes, then the act is void. The same principle was laid down in *Gibbons v. Ogden* (4). Here we contend that the act was not a regulation of *trade and commerce*, and it is therefore necessary to look to the motives. Altho' it must be admitted that the act does touch regulations of trade and commerce, yet it cannot be denied, as appears by

(1). 1 Ont. App. R. 444.

(2). L. R. 6 P. C. 36.

(3) 5 How. 583.

(4) 9 Wheaton 1.

the preamble of the act, that they had some other object in passing the act, and if that object is beyond their jurisdiction, the law must be declared unconstitutional. This act is sustained upon the ground (*inter alia*) that it is a criminal law. Of course so soon as an action is made a crime by law, the law referring to it must be held to belong to the criminal code. But if the Dominion Parliament can make anything a crime, they can practically get possession of all the *civil rights* exclusively assigned to the Local Legislatures.

It is also contended that it comes within the class of subjects enumerated in the 91st section, under "trade and commerce." No doubt the subject-matter of trade and commerce is within the jurisdiction of the Dominion Parliament, but only in so far as not affected by the police regulations made by the Provincial Parliament. Local Legislatures have certain powers over "trade and commerce," viz.: prohibition of trading on Sunday and of selling liquor within prescribed hours, and to that extent "trade and commerce" is within the supervision of the Local Legislatures.

The learned counsel then referred also to the following authorities:—*Abbott's Law Dic.* Vo. "Regulation"; *Cooley on Constitutional Limitations* (1); *Hardcastle on Construction of Statutes* (2); *Sedgwick, Stat. and Cons. Law* (3).

Mr. *Lash*, Q. C., in reply:—

Sec. 92 *B. N. A. Act* is qualified by sec. 91. The following words are very important:" And for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that, *notwithstanding anything in this Act*, "the Parliament has under that section absolute and complete power.

(1) 4th Ed. p. 128.

(2) 2 Vol. p. 138.

(3) P. 148.

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over the subject-matters defined in the section notwithstanding anything in sec. 92. Under section 129 the power is given to change the existing law, and it is for the Court to say where the power exists. I claim that the power to change the law in force at the time of Confederation, so as to prohibit the sale of liquor or other things, does not belong to the Local Legislatures, and, therefore, it must be within the powers of the Dominion Parliament.

THE CHIEF JUSTICE :—

This is an appeal from the judgment of the Supreme Court of *New Brunswick*, quashing a return to a mandamus *nisi* and ordering a peremptory mandamus to be issued in this cause.

The Supreme Court of *New Brunswick*, by writ of mandamus *nisi*, commanded the appellants to grant a license to *Thomas Barker*, to sell spirituous liquors by retail within the city of *Fredericton*, in the hotel occupied by him in that city. The appellants returned to this writ that they refused and still did refuse to grant such license, "for the following reasons to the contrary, viz. :—*The Canada Temperance Act of 1878* was declared in force in the said city of *Fredericton*, on the 1st day of May last, and therefore the City Council could not grant a license to the said *Thomas Barker* to sell spirituous liquors by retail, contrary to the provisions of that Act."

The Supreme Court, upon reading the mandamus *nisi*, the said return, and upon hearing counsel of the respective parties, made an order that the said return be quashed and that a peremptory mandamus be issued.

The present appeal is from the order so made.

The Respondent contends that the return is insufficient and that the order for the issue of a peremptory writ of mandamus should be affirmed, on the ground

that *The Canada Temperance Act of 1878* is *ultra vires* the Parliament of *Canada*; and this is the only point submitted for our consideration.

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The Act in question is entitled "An Act respecting the traffic in intoxicating liquors," and the preamble sets forth that

Whereas it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors :

Therefore Her Majesty, &c., enacts, &c.

After several preliminary sections, the first of which declares that "this Act may be cited as "*The Canada Temperance Act, 1878*," and the second defines the meaning of the expression "intoxicating liquors," and others, not pertinent to the question now to be discussed, the Act is divided into three parts. The first provides for "Proceedings for bringing the second part into force;" and the second provides for the "Prohibition of traffic in intoxicating liquors;" and the third for "Penalties and Prosecutions for offences against the second part."

The preliminary proceedings necessary to be taken, before the Act can come into operation, are to be commenced by a petition to the Governor in Council, praying that the second part of the Act shall be in force and take effect in the county or city named, and that the votes of the electors be taken for and against the adoption of the petition, and such petition is to be embodied in a notice to the Secretary of State, signed by electors qualified and competent to vote at the election of a member of the House of Commons, in the county or city, to the effect that the signers desire that the votes of all such electors be taken for and against the adoption of the petition; and that together with, or in addition to, every such notice, there shall be laid before the Secretary of State evidence that there are appended to it the genuine signa-

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tures of at least one-fourth in number of all the electors in the county or city named in it, and that such notice has been deposited in the office of the Sheriff, or Registrar of Deeds, of or in the county or city, for public examination by any parties, for ten days preceding its being laid before the Secretary of State; and that two weeks previous notice of such deposit had been given in two newspapers published in or nearest to the county or city, and by at least two insertions in each paper; and in case it appears to the satisfaction of the Governor General in Council, that such notice has appended to it the genuine signatures of one-fourth, &c., and has been duly deposited, &c., His Excellency may issue a proclamation under this part of this Act.

The Act then prescribes what is to be set forth in the proclamation, and makes provisions special and general for the holding of a poll for taking the votes of the electors for and against the petition, with numerous other provisions in connection therewith for securing a fair and honest vote, and for the prevention of corrupt practices, &c., &c.

The 96th section provides that

When any petition embodied as aforesaid in any notice and in any proclamation under this the first part of this Act has been adopted by the electors of the county or city named therein and to which the same relates, the Governor General in Council may, at any time after the expiration of sixty days from the day on which the same was adopted, by Order in Council published in the *Canada Gazette*, declare that the second part of this Act shall be in force and take effect in such county or city upon, from and after the day on which the annual or semi-annual licenses for the sale of spirituous liquors then in force in such county or city will expire; provided such day be not less than ninety days from the day of the date of such Order in Council; and if it be less, then on the like day in the then following year; and upon, from and after that day the second part of this Act shall become and be in force and take effect in such county or city accordingly.

Provision is then made that such Order in Council



shall not be revoked for three years, and then only on similar petition, notice and similar proceedings.

It is contended, that assuming the Parliament of <sup>1880</sup>  
Canada has the power to pass an Act for the prohibition <sup>CITY OF</sup>  
of traffic in intoxicating liquors provided for by the <sup>FREDERICTON</sup>  
second part of the Act, that the first part of the Act is a <sup>v.</sup>  
delegation of legislative powers to a portion of the <sup>THE QUEEN.</sup>  
people ; that the Dominion Parliament have no right to  
delegate such powers, or to make its regulation subject  
to, or conditional on, its acts being adopted by any  
other body.

It cannot be doubted, and indeed it was admitted by Mr. *Kaye* in his very able argument on behalf of the respondent, that the Parliament of *Great Britain* has the general power of making such regulations and conditions as it deems expedient with regard to the taking effect or operation of laws, either absolute, or conditional and contingent ; and in his factum he says :—

It may also be conceded that a body like that of the Provincial Parliament before Confederation could and did pass acts of a like kind, which it was not competent to a judicial tribunal to question.

Although the Dominion Parliament does derive its powers from the *British North America Act*, it cannot, I think, be successfully disputed that with respect to those matters over which legislative authority is conferred, plenary powers of legislation are given “as large and of the same nature as those of the Imperial Parliament itself,” and therefore they may be exercised either absolutely or conditionally, and, as was established by the Privy Council in the case of *The Queen v. Burah* (1), cited in *Valin v. Langlois* (2), leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend. The Parliament of *Great Britain* having, as I think, conferred on the Dominion Parliament this general, absolute, uncon-

(1) L. R. 3 App. Cases 904.

(2) 3 Can. S. C. R. 17.

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trolled authority to legislate in their discretion, on all matters over which they have power to deal, subject only to such restrictions, if any, as are contained in the *B. N. A. Act*, and subject, of course, to the sovereign authority of the British Parliament itself, with reference to the question under consideration, I can find in the *B. N. A. Act* no limitation, either in terms or by necessary implication, of the general power so conferred, and without which the legislative power should not, in my opinion, be limited by judicial interpretation. In the *United States*, where frequent discussions have arisen under the written constitutions, Federal and State, by which the legislative powers are limited and restricted, Mr. *Cooley*, in his work on statutory limitations thus states the doctrine as there understood (1) :

But it is not always essential that a legislative act should be a completed statute, which must in any event take effect as law at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event.

It has likewise been urged that this Act affects only particular districts, that it is not general legislation, and therefore is *ultra vires*. I am entirely unable to appreciate this objection. If the subject matter dealt with comes within the classes of subjects assigned to the Parliament of *Canada*, I can find in the Act no restriction which prevents the Dominion Parliament from passing a law affecting one part of the Dominion and not another, if Parliament, in its wisdom, thinks the legislation applicable to and desirable in one part and not in the other. But this is a general law applicable to the whole Dominion, though it may not be brought into active operation throughout the whole Dominion.

This brings us to the consideration of the really substantial question in this case, which arises under the

second part of the Act, viz.: Has the Dominion Parliament the power of prohibiting the traffic in intoxicating liquors in the Dominion or in any part of it?

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Sec. 99 enacts that—

From the day on which this part of this Act comes into force and takes effect in any county or city, and for so long thereafter as the same continues in force therein, no person, unless it be for exclusively sacramental or medicinal purposes, or for *bonâ fide* use in some art, trade or manufacture under the regulation contained in the fourth sub-section of this section, or as hereinafter authorized by one of the four next sub-sections of this section, *shall, within such county or city, by himself, his clerk, servant or agent, expose or keep for sale, or directly, or indirectly, on any pretence or upon any device sell or barter, or in consideration of the purchase of any other property give,* to any other person, any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage, and part of which is spirituous or otherwise intoxicating.

The second sub-section provides that—

Neither licenses to distillers or brewers,—nor for retailing on board any steamboat or vessel,—nor yet any other description of license whatever,—shall in any wise avail to render legal any act done in violation of this section.

Sub-section 3 provides for the sale of wine for exclusively sacramental purposes, and sub-section 4 for the sale of intoxicating liquor for exclusively medicinal, or for *bonâ fide* use in some trade or manufacture.

Sub-section 5 contains a proviso—

That any producer of cider in the county, or any licensed distiller or brewer, having his distillery or brewery within such county or city, may thereat expose and keep for sale such liquor as he shall have manufactured thereat, and no other; and may sell the same thereat, but only in quantities not less than ten gallons, or in the case of ale or beer not less than eight gallons at any one time, and only to druggists and others licensed as aforesaid (that is to sell for sacramental, medicinal and trade purposes,) or to such persons as he has good reason to believe will forthwith carry the same beyond the limits of the county or city, and of any adjoining county or city in which the second part of this Act is then in force, and to be wholly removed and taken away in quantities not less than ten gallons, or in the case of ale or beer not less than eight gallons at a time.

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Sub-section 6 contains a proviso of a similar character in favor of—

Any incorporated company authorized by law to carry on the business of cultivating and growing vines and of making and selling wine and other liquors produced from grapes, having their manufactory within such county or city.

With a further proviso by sub-section 7—

That manufacturers of pure native wines made from grapes grown and produced by them in the Dominion of *Canada*, may, when authorized to do so by license from the municipal council or other authority having jurisdiction where such manufacture is carried on, sell such wines at the place of manufacture in quantities of not less than ten gallons at one time, except when sold for sacramental or medicinal purposes, when any number of gallons from one to ten may be sold.

And by sub-section 8 it is provided also—

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

It is contended that this is strictly a temperance act, passed solely for the promotion of temperance, and not an act dealing with any of the matters within the power of the Dominion Parliament—that the power to deal with the sale of spirituous liquors and the granting of licenses therefor, and laws for the prevention of drunkenness, and of the like character of preventive means, are within the exclusive power of the Local Legislatures, and the recital of the Act is relied on as indicating conclusively its character.

If the Dominion Parliament legislates strictly within the powers conferred in relation to matters over which the *British North America Act* gives it exclusive legisla-

tive control, we have no right to enquire what motive induced Parliament to exercise its powers. The statute declares it shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of *Canada*, in relation to all matters not coming within the class of subjects by this act assigned exclusively to the legislatures of the Provinces, and, notwithstanding anything in the act, the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the classes of subjects enumerated, of which the regulation of trade and commerce is one; and any matters coming within any of the classes of subjects enumerated shall not be deemed to come within the classes of matters of a local or private nature comprised in the enumeration of the classes of subjects by the act assigned exclusively to the legislatures of the Provinces. If then, Parliament, in its wisdom, deems it expedient for the peace, order and good government of *Canada* so to regulate trade and commerce as to restrict or prohibit the importation into, or exportation out of the Dominion, or the trade and traffic in, or dealing with, any articles in respect to which external or internal trade or commerce is carried on, it matters not, so far as we are judicially concerned, nor had we, in my opinion, the right to enquire whether such legislation is prompted by a desire to establish uniformity of legislation with respect to the traffic dealt with, or whether it be to increase or diminish the volume of such traffic, or to encourage native industry, or local manufactures, or with a view to the diminution of crime or the promotion of temperance, or any other object which may, by regulating trade and commerce, or by any other enactments within the scope of the legislative powers confided to Parliament, tend to the peace, order and good government of *Canada*. The effect of a regula-

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1880      tion of trade may be to aid the temperance cause, or it  
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 FREDERICTON      cannot make the legislation *ultra vires*, if the enactment  
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 — foreign or domestic.

The power to make the law is all we can judge of; and the recital in the act so much relied on ought not, in my opinion, to affect in any way the enacting clauses of the act, which are in themselves abundantly plain and explicit, requiring no elucidation from and admitting of no control by the recital, which can only be invoked in explanation of the enacting clauses if they be doubtful. Why it was deemed necessary to insert the self-evident abstract proposition that "it is very desirable to promote temperance in the Dominion," and to enact that this Act may be cited as "*The Canada Temperance Act, 1878*," does not seem very apparent, when the title of the Act itself was "An Act respecting the traffic in intoxicating liquors," and it contained a recital, that it was desirable there should be uniform legislation in all the Provinces respecting such traffic, which shows the legislation on its face immediately within the power of Parliament. It may be, that all who voted for this Act may have thought it would promote temperance, and were influenced in their vote by that consideration alone, and desired that idea should prominently appear. Still, if the enacting clauses of the Act itself deal with the traffic in such a manner as to bring the legislation within the powers of the Dominion Parliament, no such declaration in the preamble or permissive title can so control the enacting clauses as to make the Act *ultra vires*; though it cannot be doubted that the introduction of this temperance element on the face of the Act may have very much stimulated the idea, which has been so much relied on, that the legislation was not a regulation of trade and commerce, but was for

the suppression of intemperance, a matter assumed to be within the exclusive power of the Local Legislatures, and so beyond the powers of the Dominion Parliament. If we eliminate from the recital in the Act the abstract proposition and the permissive clause to cite the Act as "*The Canada Temperance Act, 1878*," there does not appear to be a word in the title, preamble or enacting clauses from which the slightest inference could be drawn that Parliament was dealing with a subject-matter, other than simply as a regulation of trade and commerce in respect to the traffic in those particular articles of intoxicating liquors.

It has also been contended that no legislative powers to prohibit exist in the Dominion. I must respectfully, but most emphatically, dissent from this proposition. I cannot for one moment doubt, that by the *B. N. A. Act* plenary power of legislation was vested in the Dominion Parliament and Local Legislatures respectively to deal with all matters relating to the purely internal affairs of the Dominion, unless, indeed, anything could be found in the Act in express terms limiting such power, each, of course, acting within the scope of their respective powers; and, therefore, where one has not the power so to legislate, it necessarily belongs to the other. If this be so, then the question is: is this legislation within the powers conferred on the Dominion Parliament, or does it encroach on the powers exclusively confided to the Local Legislature? For, with its expediency, its justice or injustice, its policy or impolicy, we have nothing whatever to do.

Much has been said as to the analogy of the Dominion Parliament and Local Legislatures with the Congress of the Federal Government and the State Legislatures of the *United States*. But the constitution of the *United States* and the constitution of the States, as regards the powers which each may exercise,

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are so different from the relative powers of the Dominion Parliament and Provincial Legislatures, that the cases to be found in the American books, with regard to the powers of the State Legislatures in prohibiting the sale of intoxicating liquors, afford no guide whatever in the determination of the powers of the Local Legislatures and the Dominion of *Canada*. The Government of the *United States* is one of enumerated powers, and the Governments of the States possess all the general powers of legislation. Here we have the exact opposite. The powers of the Provincial Governments are enumerated and the Dominion Government possesses the general powers of legislation. Therefore we are told by Mr. *Cooley* that

When a law of Congress is assailed as void, we look in the National Constitution to see if the grant of specified powers is broad enough to embrace it, but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the *United States*, or of the State, we are able to discover that it is prohibited. We look in the Constitution of the *United States* for grants of legislative power, but in the Constitution of the State to ascertain if any *limitations* have been imposed upon the complete power with which the Legislative department of the State was vested in its creation. Congress can pass no laws but such as the Constitution authorizes, either expressly or by clear implication, while the State Legislature has jurisdiction of all subjects in which its legislation is not prohibited (1).

With us the Government of the Provinces is one of enumerated powers, which are specified in the *B. N. A. Act*, and in this respect differs from the Constitution of the Dominion Parliament, which, as has been stated, is authorized "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 the Act assigned exclusively to the Legislatures of the Provinces";—and that "any matter coming within any of the classes of subjects enumerated shall not be deemed to come within the class of matters of a local or private

(1) *Cooley*, Cons. Lim., 173.



nature comprised in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the Provinces." Therefore "the regulation of trade and commerce," being one of the classes of subjects enumerated in sec. 91, is not to be deemed to come within any of the classes of a local or private nature assigned to the Legislatures of the Provinces.

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To my mind, it seems very clear that the general jurisdiction or sovereignty which is thus conferred emphatically negatives the idea that there is not within the Dominion legislative power or authority to deal with the question of prohibition in respect to the sale or traffic in intoxicating liquors, or any other articles of trade or commerce.

It is said that a power to regulate does not include a power to prohibit. Apart from the general legislative power which, I think, belongs to the Dominion Parliament, I do not entertain the slightest doubt that the power to prohibit is within the power to regulate. It would be strange, indeed, that, having the sole legislative power over trade and commerce, the Dominion Parliament could not prohibit the importation or exportation of any article of trade or commerce, or, having that power, could not prohibit the sale and traffic, if they deemed such prohibition conducive to the peace, order and good government of *Canada*.

There seems to be no doubt on this point in the *United States*. Mr. *Story* on the Constitution of the *United States*, with reference to the regulation of foreign commerce, which belongs to the National Government (as the regulation of both foreign and internal trade and commerce does to the Dominion Government) says :

The commercial system of the *United States* has also been employed for the purpose of revenue ; sometimes for the purpose of

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prohibition ; sometimes for the purpose of retaliation and commercial reciprocity ; sometimes to lay embargoes ; sometimes to encourage domestic navigation, and the shipping and mercantile interests by bounties, by discriminating duties, and by special preferences and privileges ; and sometimes to regulate intercourse with a view to mere political objects, such as to repel aggressions, increase the pressure of war, or vindicate the rights of neutral sovereignty (1).

So in the case of the *United States v. Halliday* (2), in reference to the rights of Congress under its power to regulate commerce with the Indian tribes, the Supreme Court of the *United States* held that that power extended to the regulation of commerce with the Indian tribes and with the individual members of such tribes, though the traffic and the Indian with whom it was carried on were wholly within the territorial limit of the State. The Act made it penal to sell spirituous liquors to an Indian under charge of an Indian agent, although it was sold outside of an Indian reserve and within the limits of a State. The Court held the Act constitutional and based upon the power of Congress to regulate commerce with the Indians.

The contention in this case, as put by the learned Judge who delivered the judgment of the Court, was, "that so far as the Act was intended to operate as a police regulation to enforce good morals within the limits of a State of the Union, that belongs exclusively to the State, and there is no warrant in the Constitution for its exercise by Congress. If it is an attempt to regulate commerce, then the commerce here regulated is a commerce wholly within the State—among its own inhabitants or citizens, and not within the powers conferred on Congress by the commercial clause." But the Court thus deals with this contention—Mr. Justice *Miller* says :

The Act in question, although it may partake of some of the qualities of those Acts passed by State Legislatures, which have been referred to the police powers of the State, is, we think still more clearly

(1) Story, Con. U. S., s. 1076.

(2) 3 Wall. 407.

entitled to be called a regulation of Commerce. "Commerce," says Chief Justice *Marshall*, in the opinion in *Gibbons vs. Ogden* to which we so often turn with profit when this clause of the Constitution is under consideration, "Commerce undoubtedly is traffic, but it is something more, it is intercourse." The law before us professes to regulate traffic and intercourse with the Indian Tribes. It manifestly does both. It relates to buying and selling and exchanging commodities, which is the essence of all commerce, and it regulates the intercourse between the citizens of the *United States* and those Tribes, which is another branch of commerce and a very important one.

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If the Act under consideration is a regulation of commerce, as it undoubtedly is, does it regulate that kind of commerce which is placed within the control of Congress by the Constitution? The words of that instrument are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." Commerce with foreign nations, without doubt, means commerce between citizens of the *United States* and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian Tribes, means commerce with the individuals composing those Tribes. The Act before us describes this precise kind of traffic or commerce, and therefore comes within the terms of the constitutional provision.

Is there anything in the fact that this power is to be exercised within the limits of a State, which renders the Act regulating it unconstitutional?

In the same opinion to which we have just before referred, Judge *Marshall*, in speaking of the power to regulate commerce with foreign States, says: "The power does not stop at the jurisdictional limits of the several States. It would be a very useless power if it could not pass those lines. If Congress has power to regulate it, that power must be exercised wherever the subject exists." It follows from those propositions, which seem to be incontrovertible, that if commerce or traffic, or intercourse, is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian Tribe, or any person who is a member of such Tribe, is absolute, without reference to the locality of the traffic, or locality of the Tribe, or of the member of the Tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single State, than commerce with the Indian Tribes.

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

any local legislation in reference to any subject over which power is given to the Local Legislature.

A case, precisely analogous in principle to this, is to be found in the Reports of the *United States*' Supreme Court (1), where the State Legislature had the control of the internal commerce, and the Federal government the right to raise a revenue by licenses, while here the Dominion Government have the control of the internal trade and commerce, and the Local Legislatures the right of raising a revenue by granting licenses. It was not doubted that where Congress possessed constitutional power to regulate trade and commerce, it might regulate it by means of licenses, and in case of such a regulation a license would give authority to the licensee to do whatever its terms authorized, but that very different considerations applied to the internal commerce or domestic trade of the States, over which Congress had no power to regulate, nor any direct control, but the power belonged exclusively to the States. There the power to authorize a business within the State was held plainly repugnant to the exclusive power of the State over the same subject. So here, over trade and commerce the Local Legislature have no power of regulation nor any direct control, and therefore the power of the Local Legislature to authorize a business is equally repugnant to the power of the Dominion Parliament over the same subject; and therefore, while Congress had the power to tax, it was held to reach only existing subjects and could not authorize a trade or business within a State, in order to tax it; that if the licenses were to be regarded as giving authority to carry on the branches of business which they license, it would be difficult, if not impossible, to reconcile the granting of them with the constitution. But it was held that it was not necessary to regard the laws as giving such authority, that, so far

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(1) License Tax Cases, 5 Wall. 462.

1880 as they related to trade within State limits, they gave  
 CITY OF none and could give none.  
 FREDERICTON If this same principle is applied here, the right of the  
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 censees no authority to exercise trade or carry on business prohibited by the Dominion Parliament having this control of trade and commerce. I think it equally clear, that the Local Legislatures have not the power to prohibit, the Dominion Parliament having, not only the general powers of legislation, but also the sole power of regulating as well internal as external trade and commerce, and of imposing duties of customs and excise ; and having by law authorized the importation and manufacture of alcoholic liquors, and exacted such duties thereon, and so far legalized the trade and traffic therein, to allow the Local Legislatures, under pretence of police regulation, on general grounds of public policy and utility, by prohibitory laws to annihilate such trade and traffic, and practically deprive the Dominion Parliament of a branch of trade and commerce from which so large a part of the public revenue was at the time of confederation raised in all the Provinces, and has since been in the Dominion, never could have been contemplated by the framers of the *B. N. A. Act*, but is, in my opinion, in direct conflict with the powers of Parliament, as well over trade and commerce, as with their right to raise a revenue by duties of import and excise.

When I had the honor to be Chief Justice of *New Brunswick*, the question of the right of the Local Legislatures to pass laws prohibiting the sale or traffic in intoxicating liquors came squarely before the Supreme Court of that Province and that Court, in the case of *Regina v. The Justices of King's County* (1), unanimously held that under the *B. N. A. Act* the Local Legislature had no power or authority to prohibit

(1) 2 Pugs. 535.

the sale of intoxicating liquors, and declared the Act passed with that intent *ultra vires*, and therefore unconstitutional. I have carefully reconsidered the judgment then pronounced, and I have not had the least doubt raised in my mind as to the soundness of the conclusion at which the Court arrived on that occasion. I then thought the Local Legislature had not the power to prohibit. I think the same now. I then thought the power belonged to the Dominion Parliament, I think so still, and therefore am constrained to allow this appeal.

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FOURNIER, J. :—

After having carefully considered the important questions which arise on this appeal, and having had the opportunity of taking communication of the able and elaborate judgment of the Chief Justice, I need only say that I entirely concur in the view taken by him as to the constitutionality of *The Canada Temperance Act*, 1878, and that the appeal should be allowed.

HENRY, J. :—

This case—argued before us a few weeks ago—being, in my judgment, one of the most important that has arisen, or is likely to arise and be presented for our decision, called for the most serious and deliberate consideration.

The issue raised is as to the constitutionality of an Act passed by the Parliament of *Canada*, in 1878, entitled, “An Act respecting the Traffic in Intoxicating Liquors,” and which provides that it may be cited as, “*The Canada Temperance Act*, 1878.” Prefixed to the Act is a preamble as follows :

Whereas it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors.

The second section provides for the repeal of several

1880 sections of the Act of *Canada*, known as "*The Temper-*  
 ~~~~~  
 CITY OF *ance Act*, 1864." The Act also indirectly repeals all the
 FREDERICTON Acts in force, in all the Provinces, for the issue of li-
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 necessarily affects and controls the Provincial legisla-
 tive functions provided for by sub-section 9 of section
 92 of the "*British North America Act*, 1867."

It provides, that on a petition of one-fourth of the electors of any county or city, to the Governor General in Council, a poll shall be taken; and a majority of the electors are authorized to decide, whether or not the Act shall go into operation within the county or city, as the case might be. If the answer should be in the affirmative, the prohibition contained in section 99, and the following sections, called the "Second Part" of the Act, become operative.

It has, I think, been legitimately contended, that in reference to all but one or two subjects, not in any way connected with the matter under consideration, the legislative powers of the Parliament of *Canada* and Local Legislatures are not concurrent, but fully distributed, and in part enumerated.

It is contended that Parliament had the necessary power to pass the Act—1st, under the general provision of section 91; 2nd, under the 2nd sub-section, "The regulation of Trade and Commerce"; and 3rd, under sub-section 27, "The Criminal Law," except the constitution of "Courts of Criminal Jurisdiction," but including the "Procedure in Criminal cases," and, in connection with, and supplementing them, the concluding clause of section 91 which 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.

That position is contested on the other side. 1880

The right to provide for the issuing of licenses for the sale of spirituous liquors is claimed for the Local Legislatures. CITY OF
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The leading clause of section 92 is as follows :

In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say, &c.:

Sub-section 9 :—

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

Sub-section 13 :—

Property and civil rights in the Province.

Sub-section 15 :—

The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the Province made in relation to any matter, coming within any of the classes of subjects enumerated in this section.

And 16 :—

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

It has been properly said, that it is a serious matter to consider and decide that an Act of a Legislature is *ultra vires*; but it is much more serious and unfortunate, by any judicial decision, to destroy the constitution of a country. The importance of our decision arises, not nearly so much from any effect it may have on the Act in question, which, in itself, claims from us the most patient and deliberate consideration, but from the general result, in view of the constitutional relations established by the Imperial Act in question, as provided in the sections referred to in regard to other subjects.

A few days ago, I ascertained that my learned brethren were disposed to arrive at conclusions differ-

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ent from those which I considered the correct ones; and I have endeavoured, as far as other judicial duties permitted, to formulate the views I entertain, so as, at as early a moment as possible, to be able with my colleagues to give the result of our deliberations. Knowing the great interest taken in the subject, and it being desirable that Parliament—now sitting—should be informed of the result, I have felt bound to hasten the preparation of my judgment, but, in doing so, am obliged rather to give the conclusions at which I have arrived, than the argument at length in favor of them, or in detail the reasons by which I have been actuated.

It is contended that, inasmuch as the Local Legislatures could not provide as is done by this Act, Parliament necessarily must have the power it exercised. The proposition, as a general one, may be admitted, but there may be, and, I think, there are, exceptions, and that this may fairly be considered one of them. The position was assumed at the argument by the Counsel of the appellant, but not debated.

It was decided by the Court in *New Brunswick*, that municipal authorities under the Local Legislature had not the right to refuse to grant licenses, because it was an interference with trade and commerce; but the Court in *Nova Scotia* decided to the contrary. It has, therefore, not had that judicial sanction either way that would call upon us, without full independent consideration and inquiry, to adopt either view. I think that in this case we are to be guided by other considerations. If the Local Legislatures have not the power to refuse licenses, or to authorize municipal bodies to do so, because interfering with the prerogative of Parliament as to trade or commerce, it does not necessarily follow that Parliament can do so. If by the Imperial Act the Local Legislatures have the prerogative, of dealing with the subject

of shop and tavern licenses, that prerogative is just as full and complete as that of Parliament in the other case, and as much entitled to be maintained independent of the consideration of the other proposition. We must decide upon the relative functions and prerogatives by the several specific and general provisions of the Imperial Act, and our ascription of powers to either must be in accordance with, and can go no further than, the Act prescribes.

If there be not concurrent legislative powers and the act is *intra vires*, then the necessary conclusion is, that all the local legislation on the subject of shop, saloon, tavern, and auctioneers' licenses since the first of July, 1867, has been *ultra vires*. Under such circumstances, it would be interesting to enquire, where there is any law in force restraining the sale of spirituous liquors in counties or cities who have not adopted *The Canada Temperance Act*, 1878.

By the construction put by the Supreme Court of the *United States* upon its constitution, concurrent jurisdiction has been found to exist in relation to several subjects; and legislation, by the States, has been decreed to be *intra vires* in many cases, until Congress legislated on the same subject. The Imperial Act, however, provides against such intermediate legislation, and gives to Parliament and the Local Legislatures exclusive jurisdiction, not contingent upon previous legislation by either. If this act is sustained as *intra vires*, the result is to leave the sale of spirituous liquors contingent upon the vote of each county or city. One county or city where the act is applied will have the prohibition, and the county or city which has not, or does not adopt it, will have no legislative restriction upon the sale. A decision of this case contrary to my views must produce that result. It is therefore most important, in the best inter-

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1880 ests of the country, that the correct solution should be
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FREDERICTON In order properly to construe the Imperial Act, it is
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 United Provinces before the union. Each had what
 may be properly called plenary powers of legislation,
 in respect of provincial subjects. In the agreement for
 the union, provision was made for the general powers of
 Parliament and the Local Legislatures, as well as for the
 "ways and means" by which each was to be sustained.
 It was by a surrender of the local legislative power,
 to the extent agreed upon, that the powers of the Parlia-
 ment were agreed to be given. It was in the nature of
 a solemn compact, to be inviolably kept, that the rights
 and prerogatives of both were adopted, and the agree-
 ments entered into were intended to be carried out by
 the Act mentioned. That that compact cannot be chang-
 ed by one, any more than another of the contracting
 parties, is a proposition embodied in despatches from
 the Imperial Government, and one of which, I think,
 cannot be gainsaid. It is, therefore, only permissible to
 construe the act in conformity with that consideration.

The first, and, as I think, the only important consid-
 eration, is the extent to which effect should be given to
 the provision "The regulation of Trade and Commerce;"
 and, admitting for the moment the power of Parliament
 to pass the act in reference to that subject, has it properly
 dealt with it? In deciding upon this question, our first
 inquiry is, whether Parliament intended the act as a re-
 gulation of trade or commerce? It does not necessarily
 follow, that if one in the pursuit of one purpose or ob-
 ject does an unjustifiable act, he can take shelter under
 a right he did not intend to assert or act on. There are
 circumstances in which, in such a case, the party would
 not be held justified.

The preamble of an act will not, of course, by itself,

give or take away jurisdiction to legislate. If, however, the legislature plainly shows by the preamble and provisions of the act that the legislation was directed, not in the pursuance of legitimate power, but in reference to a subject over which it had no jurisdiction, I am far from thinking it would be legitimate. We cannot assume any legislature would so act.

The preamble informs us that it was "*very desirable to promote temperance*," and the Act is provided to be cited as "*The Canada Temperance Act, 1878*." The object is therefore patent, but it is contended that the subsequent words in the preamble—

And that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors—

makes a direct reference to *trade and commerce*. If the words last quoted stood alone, they would, to the extent they go, support the contention, but following the previous expression of the desire to *promote temperance*, we should construe them as only the expression of the idea, that to *promote temperance* uniform legislation respecting the traffic in spirituous liquors was deemed necessary as a means to the end, and not as at all intended as a regulation of trade and commerce.

By the 3rd section, certain sections of the Temperance Act of 1864, were repealed, but nothing is contained in the Act at all referring to *trade or commerce*. It is, therefore, plain and palpable, that the subject of trade or commerce was not at all present in the Parliamentary mind. The act, taken all together, shows it was not passed by Parliament as a regulation of trade or commerce. I have serious doubts, whether in such a case we would not be wrong in concluding that Parliament ever intended it as such, or that we should, in view of any power it had over the subjects of trade or commerce which it clearly did not intentionally exercise, give effect to the Act passed avowedly for a totally different purpose.

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It is not however, necessary for me to rest my decision wholly on that point, as there are others more serious and important. The great and important question arises as to the effect to be given to the term "The regulation of Trade and Commerce," taken as we are bound to take it, in connection with the provision for licensing shops, saloons, taverns, &c. We are to consider the matter of the regulation of trade and commerce, not only as to the scope and meaning of the term in its full force, but in relation to the licensing power expressly given to the Local Legislatures.

Mr. *Story*, in his work of high authority on the constitution of the *United States* (1), quotes approvingly from a judgment of the Supreme Court principles of construction applicable to this case:—

The Government, then, of the *United States* can claim no powers which are not granted to it by the constitution, and the powers granted to it must be such as are expressly given, or given by necessary implication. On the other hand, this instrument, like every other grant, is to have a reasonable construction according to the import of its terms. And when a power is expressly given in general terms, it is not to be restrained to particular cases, *unless that construction grow out of the context expressly, or by necessary implication*. The words are to be taken in their natural and ordinary sense, and not in a sense unreasonably restricted or enlarged.

He says (2):

On the other hand, a rule of equal importance is not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. * * * Nor should it ever be lost sight of, that the Government of the *United States* is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is *pro tanto* the establishment of a new constitution.

Vattel in his second book, chap. 17 sections, 285, 286 says:

But the most important rule in cases of this nature is, that a con-

(1) Section 417.

(2) Section 426.

stitution of Government does not, and cannot, from its nature, depend in any great degree upon verbal criticism or upon the import of single words. Such criticism may not be wholly without use ; it may sometimes illustrate or unfold the appropriate sense ; but unless it stand well with the context and subject matter, it must yield to the latter. While, then, we may well resort to the meaning of single words to assist our enquiries, we should never forget that it is an instrument of Government we are to construe ; and, as has been already stated, that must be the truest exposition which best harmonizes with its design, its objects and its general structure.

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Taking, then, the provisions in regard to trade and commerce, according to the reliable authority I have first quoted, and all governing ones, in their natural and obvious sense in the relation in which they are placed, "and not in a sense unreasonably enlarged," how should we construe them ?

The right to legislate in regard to the licenses in question is clearly with the Local Legislatures, if not controlled by the provision for the regulation of trade and commerce alone, or through the operation of the concluding clause of section 91. If the two sub-sections stood alone, I should have little difficulty in concluding that sub-section 9 of 92 was intended to and does control sub-section 2 of 91, for, I think, we would be bound to conclude that by the express and specific terms of sub-section 9 of 92, the subject matter was intended to be free from the operation of the general provision in regard to trade and commerce. We are not to decide upon the comprehensiveness, of the latter provision as if standing alone, but to ascertain if, in the employment of the general term, and the giving of power to another body to deal specifically with a subject that might be otherwise considered to be embraced by the general term, it was not intended that the specific power should not be considered as excepted from the general provision. We are bound, I think, to conclude that in using the general term it was not intended to

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reach the subject specifically provided for in sub-section 9 of 92. It was clearly intended to give the licensing power to the Local Legislature, because the section so plainly and unequivocally so provides; but then it is contended the concluding clause of 91 over-rules the specific provision in sub-section 9 of 92, and virtually ignores it, if the general term as employed in regard to trade and commerce includes the subject matter. That, however, drives us back to the original proposition, and makes the contention no better. So that, if the regulation of trade and commerce, as provided for in the general terms used, was not intended to embrace the subject so far as to nullify the specific provision for shop and other licenses, and therefore not to that extent included in the general provision for trade and commerce, the concluding clause would be inapplicable to it. There are, however, other important considerations not to be lost sight of.

When the union was negotiated and the Imperial Act passed, the leading idea was that in the large and extensive subjects affecting all the Provinces the General Parliament should legislate, and the smaller and less important subjects should be left to the Local Legislatures; and from the whole object of the union, and the Act by which it was formed, we may gather that the same principle would be properly applicable to the matter of trade and commerce.

We may therefore, I think, reasonably conclude that the regulation of trade and commerce referred to was, when taken in connection with the whole scope and object of the act, intended to apply to the general features, and not to the minute and trifling subjects, which might otherwise be considered as included. There are numberless subjects, more or less connected with trade and commerce, and which would be properly classed as coming within the classes of subjects given expressly

to the Local Legislatures, but which are of so unimportant a character, as affecting the general trade and commerce of the Dominion, that the Union Act may be fairly construed as not intended to give to the general Parliament the power to regulate them; but if everything connected with trade or commerce, however remotely, is decided to be exclusively with the general parliament, all the local acts in reference to such matters would be *ab initio* void. The general Parliament legitimately provides for manufactures, and for the importation of goods. It provides rules to govern parties importing such goods. Free interchange of all articles was provided for between the United Provinces, and when spirituous or other articles are imported, and the duties paid, they pass free from one Province to another. They are then clear of any claim over them of the general Parliament or government, and under the terms "property and civil rights" become amenable to local legislation. Taking, then, the provision for the legislation as to licenses for the sale of spirituous liquors in shops, &c., and the whole act, and its objects, can it be reasonably claimed that that provision was not intended to leave the subject matter clear of the operation of the general provision in regard to trade and commerce?

A question has been raised, whether the general Parliament could not wholly prohibit the manufacture, or importation of spirituous liquors. That question, however, is not involved in the issue before us. It is time enough to debate it when a necessity arises to do so. The one we have to consider is that Parliament, having authorized the importation and manufacture of spirituous liquors, and having received the revenue therefrom can it, by assuming the right to legislate for the promotion of temperance, although to some extent affecting trade and commerce, deprive the Local Legislatures, and

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1880 the people of the several Provinces, of the right to raise
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As I before stated, the Imperial Act was founded on a compact for the federative union of the several Provinces; and from the explicit and unequivocal terms of section 9 we must conclude that the revenues to be derived from the issue of the licenses mentioned was intended to be permanently secured to the local authorities. Previously to the union, the revenues derived from licenses for the retail of spirituous liquors, I have reason to believe, in all the Provinces, were given to, and appropriated by municipal bodies, for municipal purposes, and I must conclude they were intended to continue so, or, at all events, to leave it to the Local Legislatures to decide whether they should so remain, or be appropriated for other local, or provincial purposes. Whether such revenues were great or insignificant, the principle applicable must be the same. If they amounted to several thousands of dollars, as I presume they did in some of the Provinces, it must be concluded that their retention by the local authorities was considered of importance, and accordingly was a part of the compact. The protection of the right to those revenues is a matter relatively of as much importance to the several Provinces as the protection of the right of the Dominion to the millions of dollars which the act enabled its government and Parliament to collect from the whole body of the people for Dominion purposes. I am free to admit the full scope and meaning of the grant of the power to regulate trade and commerce, and that but for the specific grant of the power to the Local Legislature by section 9 the ground might be covered, but, in the language and doctrine of *Vattel*,

While we may well resort to the meaning of single words, to assist our inquiries, we should never forget that it is an instrument of

Government we are to construe and * * * that must be the truest exposition which best harmonizes with its design, its objects, and its general structure.

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I am of the opinion that is the way we should construe the act of union, and, if we do, we can have but little difficulty in reaching the conclusion that the Act in question is an usurpation of power, and an inroad upon the constitution and prerogatives of the Local Legislatures, and results in depriving them of one of the reservations for local objects intended and provided for by the compact and act of union.

If the General Parliament had the power to legislate as the Act provides, it is only under the provisions I have referred to, and, that power once admitted, what is there to restrain its further legislation—what is there to prevent it from changing and altering the whole principle and framework of the Act, so as, by “the regulation of trade and commerce,” to provide for licenses for the sale of spirituous liquors for any purpose, and to collect a revenue therefrom? The present Act, if *intra vires*, virtually repeals all local acts on the subject of licenses. It prohibits, if the majority in a county or city so wills, the sale of spirituous liquors except for certain purposes mentioned; but, if it has full and complete power over the subject matter, it may remove at any time the prohibitions, and provide for licenses for the sale for other purposes, prescribe duties to be paid for them, and take the revenues that were clearly to my mind, intended for Provincial, Local, or Municipal purposes. This may be called an extreme proposition, on the ground that Parliament would be restrained by motives of expediency; but, in the first place, the working out of the local constitution should not depend upon Parliament, and, in the next, if the Local Legislatures have no power over the subject matter, Parliament must take cognizance of it, or the sale will be wholly unrestricted.

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These considerations are of importance to exhibit the difficulties and wrongs involved in the validation of the Act ; but they are insignificant compared with the consequences, which, in my opinion, must necessarily result in regard to other subjects, and in other respects. If it be finally decided, that the provision for "the regulation of trade and commerce" overrides the power of the Local Legislatures in the matter of licenses, I see no impediment in the way of legislation, in regard to matters affecting in the remotest way trade and commerce, that would not merely restrain and control, but completely nullify, the Local Legislative power in respect of "civil rights and property" and other important interests. It may be said, there is no danger to be apprehended in this respect, and that Parliament could not be expected to legislate with such a result, but my answer is, that we cannot allow any such considerations to affect our judgment. We are required to estimate the powers given severally to Parliament and the Local Legislatures, and it is our duty so to define them that neither will have to depend on the forbearance of the other.

I am fully sensible of the difficulty of laying down any general rule of construction applicable to all cases, or of drawing any line. Each case must largely depend upon its own merits as it arises, and when principles are applied to one case all similar ones will be determined by them. I consider the subject of licenses for the retail of spirituous liquors in shops, saloons, and taverns, is wholly one of the nature of a police regulation, and that it was not intended, either by the compact for union, or the act passed therefor, that the local power should be affected, restrained, or controlled, by any Dominion legislation.

There were other objections to the act, raised by counsel, to which I have not thought it necessary to refer, as I think those I have given sufficient.

I have, however, considered the ground taken on the other side, that Parliament had the right to pass the act under the provision of sub-section 27 of sec. 91, "The Criminal Law," but have been unable to accede to the proposition. I cannot think it was the intention, under that general term, to give to Parliament power to the extent contended for, and I cannot find by the act itself anything that would bring the subject within the category of criminal jurisprudence.

For the reasons I have rather hastily, (when the importance of the issue is considered,) put together, and so imperfectly but I trust intelligibly expressed, I think the appeal should be dismissed, and the judgment below affirmed with costs.

TASCHEREAU, J. :

I am of opinion to allow this appeal. It is clear that *The Canada Temperance Act*, 1878, could not be enacted by the Provincial Legislatures, for the simple reason, that they have only the powers that are expressly given to them by the *B. N. A. Act*, and that the said *B. N. A. Act* does not give them the power to effect such legislation. This has been held in *Reg v. The Justices of King's* (1), in *Hart v. The Corporation of Missisquoi* (2), in *Cooey v. The Municipality of Brome* (3), (reversed in Queen's Bench, *Montreal*, but judgment of Queen's Bench, reversed in Supreme Court, by consent), and in *Poitras v. The Corporation of Quebec* (4); and, in fact, seems to be admitted by all the learned Judges of the Court below who have held this Act to be *ultra vires* of the Dominion Parliament. Well, it seems to me, the admission that the Local Legislatures could not pass such an Act implies an admission that the Dominion Parliament can do so. Once the

(1) 2 Pugs: N. B. 535.

(2) 3 Q. L. R. 170,

(3) 21 L. C. Jur. 182.

(4) 9 Rev. Leg. 531,

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power of legislation over a certain matter is found not to vest in the Provincial Legislatures, the question is solved, and that power necessarily falls under the control of the Dominion Parliament, subject, of course, to the exigencies of our Colonial status.

Section 91 of the Imperial Act is clear on this. It expressly authorizes the Federal Parliament to make laws in relation to *all* matters *not* exclusively assigned to the Provincial Legislatures, and enacts in express terms, that the enumeration given of the classes of subjects falling under the control of the Federal Parliament is given for greater certainty, but not so as to restrict the rights of the Federal Parliament generally over *all* matters *not* expressly delegated to the Provincial Legislatures.

If this Temperance Act would be *ultra vires* of the Provincial Legislatures, because the *B. N. A. Act* does not give them the power to enact it, I fail to see why it is not *intra vires* of the Dominion Parliament. Then, it seems to me, that under the words "regulation of trade and commerce" the *B. N. A. Act* expressly gives the Dominion Parliament the right to this legislation. It may, it is true, interfere with some of the powers of the Provincial Legislatures, but sect. 91 of the Imperial Act clearly enacts that, *notwithstanding anything* in this Act, *notwithstanding* that the control over local matters, over property and civil rights, over tavern licenses for the purpose of raising a revenue, is given to the Provincial Legislatures, the *exclusive* legislative authority of the Dominion extends to the regulation of trade and commerce, and this Court has repeatedly held, that the Dominion Parliament has the right to legislate on all the matters left under its control by the Constitution, though, in doing so, it may interfere with some of the powers left to the Local Legislatures. That the Act in question is a regulation of the *trade and commerce* in

spirituous liquors seems to me very clear. It enacts when, where, to whom, by whom, under what conditions, this traffic and commerce will be allowed, and carried on. Are these not regulations? Some of the learned Judges in the Court below say that the Act is *ultra vires* because it prohibits and does not regulate, whilst another learned Judge of that Court says that it is *ultra vires* because it regulates and does not prohibit. To my mind, it is a regulation, whether it is taken as prohibiting or as regulating the trade in liquors. A prohibition is a regulation.

But it has been said *The Temperance Act* is not an Act concerning the regulation of trade and commerce, because it is not an Act for the regulation of trade and commerce, but only a Temperance Act. To this, I may well answer by the following words of *Taney*, C.J., in re the *License cases* (1) :

When the validity of a State law, making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives, that may be supposed to have influenced the legislation, nor can the Court inquire, whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade. * * * * * The object and motive of the State are of no importance and cannot influence the decision. It is a question of power.

These words may well be applied here. Is *The Temperance Act of 1878* a regulation of *trade and commerce*, or of an important branch of trade and commerce? I have already said that it seems to me plain that it is so. Then, is it the less so because it has been enacted in the view of promoting temperance, or of protecting the country against the evils of intemperance? If for this object the Parliament has thought fit to make a regulation of the trade and commerce in spirituous liquors, does it lose its character of being a

1880 regulation of this trade by reason of the motive which
 CITY OF prompted the legislator to enact this regulation? I can-
 FREDERICTON not see it.

THE QUEEN. I hold, then, that *The Canada Temperance Act*, 1878, is
 constitutional, and that this appeal should be allowed
 with costs.

GWYNNE, J.:—

All the arguments upon which has been based the contention, that the Act in question, "*The Canada Temperance Act*, 1878," is *ultra vires* of the Dominion Parliament, are attributable wholly, as it seems to me, to a want of due appreciation of the scheme of constitutional government embodied in the *B. N. A. Act*, and to a misconception of the terms and provisions of that Act. Historically we know, that the terms of a feasible scheme of union of all the *B. N. A.* Provinces, constitutes a subject, which, for many years, engaged the attention of public men in those Provinces—that the matter became the subject of debate in the legislatures of the several Provinces—that eventually the views of public men of all political parties were moulded into the shape of resolutions, which, having been subjected to the most careful consideration and criticism in the Provincial Legislatures, and to the consideration also of the Imperial Authorities, in consultation with delegates sent for the purpose to *England*, by the respective Provinces, were, after having been revised and amended, reduced into the form of a Bill, which the Imperial Parliament, at the special request of the Provinces, passed into an Act.

The object of this Act was, by the exercise of the Sovereign Imperial Power, called into action by the request of the then existing Provinces of *Canada*, *Nova Scotia*, and *New Brunswick*, to revoke the constitutions under which those Provinces then existed, and, as the

preamble of the Act recites, to unite them federally into one Dominion, under the Crown of the United Kingdom of *Great Britain and Ireland*, with a constitution similar in principle to that of the United Kingdom—to sow, in fact, the seed of the parent tree, which, growing up under the protecting shadow of the British Crown until it should attain perfect maturity, would in the progress of time become a nation, identical in its features and characteristics with that from which it had sprung, and to which, in the meantime, should be given the new name of “Dominion,” significant of the design conceived, and of the anticipated fortunes of this new creation.

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The Act then proceeds to show, that the mode devised for founding this new “Dominion,” and for giving to it a constitution, similar in principle to that of the United Kingdom, was to constitute it as a *quasi* Imperial Sovereign Power, invested with all the attributes of independence, as an appanage of the British Crown, whose executive and legislative authority should be similar to that of the United Kingdom, that is to say, as absolute, sovereign and plenary as consistently with its being a dependency of the British Crown it could be, in all matters whatsoever, save only in respect of matters of a purely municipal, local, or private character—matters relating (to use the language of a statesman of the time,) “*to the family life*,” (so to speak,) of certain subordinate divisions, termed Provinces carved out of the Dominion, and to which Provinces legislative jurisdiction limited to such matters was to be given.

The inhabitants of those several Provinces, being, as such, members of this *quasi* imperial power termed the Dominion of *Canada*, might, in some matters, have interests, *qua* inhabitants of the particular Province in which they should live, distinct from, or conflicting

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with the general interests which they would have as constituent members of the Dominion. In order to prevent the jarring of those distinct, or conflicting interests, and to maintain the peace, order, and good government of the whole, it would be necessary, in any perfect measure, that provision should be made for such a contingency, that the subordinate should yield to the superior—the lesser to the greater ; and that, in respect of any matter over which the several Provinces might be given any legislative authority concurrently with the Dominion Parliament, the authority of the latter, when exercised, should prevail, to the exclusion, and, if need be, to the extinction of the provincial authority.

The scheme therefore comprised a fourfold classification of powers. 1st. Over those subjects which are assigned to the exclusive plenary power of the Dominion Parliament. 2nd. Those assigned exclusively to the Provincial Legislatures. 3rd. Subjects assigned concurrently to the Dominion Parliament, and to the Provincial Legislatures. And 4th. A particular subject, namely, education, which, for special reasons, is dealt with exceptionally, and made the subject of special legislation.

To give effect to this scheme the *B. N. A. Act*, in its 3rd clause, enacts that, upon proclamation being made by Her Majesty, by and with the advice of Her Majesty's most Honourable Privy Council, within six months after the passing of the Act, the Provinces of *Canada*, *Nova Scotia*, and *New Brunswick*, should form and be one Dominion under the name of *Canada*.

Immediately upon the proclamation being issued, the above named Provinces, by force of the above clause, became and were to all intents and purposes divested of their former existence, and became merged in the Dominion so created ; and then the 5th clause, *out of the Dominion so created*, carves four subordinate creations called Provinces and named *Ontario*, *Quebec*, *Nova*

Scotia, and *New Brunswick*, the two latter of which, although being coterminous with those of the extinguished Provinces of like names merged into the Dominion, are notwithstanding wholly new creations, brought into existence solely by the *B. N. A. Act*. The executive and legislative authority of all the Provinces, as at present constituted, as well as of the Dominion, are due to the *B. N. A. Act*, which now constitutes the sole constitutional charter of each and every of them, and which, with sufficient accuracy and precision, as it seems to me, defines the jurisdiction of each.

The 9th section declares, that the executive government and authority of and over *Canada* continues to be and is vested in the Queen; and as to the legislative power the 17th section enacts, that

There shall be one Parliament for *Canada*, consisting of the Queen, an upper house, styled the Senate, and the House of Commons.

And the 91st section, that

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

By this clause, the absolute sovereign power of legislation is vested in a Parliament, consisting of the Queen, a Senate, and a House of Commons, in respect of all matters of every nature and description whatsoever, save and excepting only matters coming within the class of subjects *by the Act itself assigned exclusively* to the Legislatures of the Provinces: over all matters whatsoever, excepting only the excepted matters, the legislative power of the Dominion Parliament is made absolute.

Herein consists the great distinction between the constitution of the Dominion of *Canada*, and that of the *United States of America*,—a distinction necessary in a constitution founded upon, and designed to be similar

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in principle to, that of the United Kingdom of *Great Britain and Ireland*, but deliberately designed specially, as I have no doubt, with the view of avoiding what was believed to be a weakness and defect in the constitution of the *United States*, and to have been the cause of the civil war out of which that country had then but recently emerged. Instead of a confederation of several distinct, independent states, which, while retaining to themselves sovereign power, have agreed to surrender jurisdiction over certain matters to a central government, we have constituted one supreme power, having executive and legislative jurisdiction over all matters, excepting only certain specified matters, being of a local, municipal, domestic, or private character, jurisdiction over which is vested in certain subordinate bodies, termed Provinces, carved out of the territory constituting the Dominion, and which jurisdiction is subject to the control of the Dominion Executive, as the legislative power of the Dominion Parliament is itself subject to the control of Her Majesty in Her Privy Council.

All that is necessary, therefore, in order to determine whether any particular enactment is *intra* or *ultra vires* of the Dominion Parliament, is to enquire: does or does not the enactment in question deal with, or legislate upon, any of the subjects assigned *exclusively* to the Provincial Legislatures? If it does, it is *ultra*, and if it does not, it is *intra vires* of the Dominion Parliament; but lest, by possibility, doubts might arise in some cases in determining whether a particular enactment did or not deal with any of the subjects assigned *exclusively* to the Provincial Legislatures, the 91st section *ex majori cautela* proceeds to enact

For greater certainty, but not so as to restrict the generality of 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 any

of the classes of subjects next hereinafter enumerated, that is to say :
 (here follow 29 items) and any matter coming within any of the
 classes of subjects enumerated in this section shall not be deem-
 ed 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.

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Here, then, to dispel all doubts, if any should perchance arise in certain cases, and to remove all excuse for any encroachment by the Dominion Parliament upon the jurisdiction of the Local Legislatures, or for any assumption by the latter of the sovereign power and authority of the former, two tests are given by our charter for the ready determination in every case of the question, whether a particular enactment is or not *ultra vires* of the Dominion Parliament, or of the Local Legislatures ; namely :

First,—if to the question “ Does the particular enactment deal with any of the particular subjects enumerated in the 92nd section, assigned exclusively to the Local Legislatures ? a plain answer in the affirmative or negative can be given free from any doubt,—that settles the point. If the answer be in the affirmative, the enactment in question is *beyond* the jurisdiction ; if in the negative, it is *within* the jurisdiction of the Dominion Parliament.

The power to legislate upon every subject rests either in the Dominion Parliament, or in the Local Legislatures, and the Act is precise, that *all matters not exclusively assigned to the Local Legislatures* fall under the jurisdiction of the Dominion Parliament.

But to remove all doubts, in case the enactment under consideration should be of a nature to raise a doubt, whether it does or not deal with one or other of the matters particularly enumerated in the 92nd section, the second test may be applied, namely : “ Does the enactment deal or interfere with any of the subjects particularly, and for greater

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certainty, enumerated in the 91st section? If it does, then, (notwithstanding that it otherwise might come within the class of subjects enumerated in the 92 section), it is within the jurisdiction of the Dominion Parliament, for the plain meaning of the closing paragraph of the 91st section is that, notwithstanding any thing in the Act, any matter coming within any of the subjects enumerated in the 91st section shall not be deemed to come within the class of subjects enumerated in the 92nd section, however much they may appear to do so.

It was argued, that what was intended by this clause was to exclude the subjects enumerated in the 91st section from a portion only of the subjects enumerated in the 92nd section, namely: those only "of a local or private nature," the contention being that the 92nd section comprehends other subjects than those which come under the description of "*local or private*," and so that, in effect, the intention was merely to declare, that none of the items enumerated in section 91 shall be deemed to come within item 16 of sec. 92. If this were the true construction of the clause, it would make no difference in the result, nor would it effect any thing in aid of the contention in support of which the argument was used, for the previous part of the 91st section in the most precise and imperative terms declares, that, "*notwithstanding any thing in the Act*," notwithstanding, therefore, any thing whether of a local or private nature, or of any other character, if there be anything of any other character enumerated in the 92nd section, the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the class of subjects enumerated in the 91st section; but, in truth, all the items enumerated in the 92nd section are of a provincial and domestic, that is to say, of a "local or private" nature. The frame of the 92nd section differs from that of the 91st in its

form. That of the 91st is general, of the 92nd particular; but this is precisely in character with the nature of the jurisdiction intended to be given to each. By the 91 section, the Imperial Parliament unequivocally, but in general terms, declares its intention to be to place under the jurisdiction of the Dominion Parliament *all matters*, excepting only certain particular matters assigned by the Act to the Local Legislatures. This mode of expression seemed to require a particular enumeration of those subjects so to be assigned to the Local Legislatures. The 92nd section, therefore, instead of dealing with the subjects to be assigned to the Local Legislatures in the same general terms as had been used in the 91st section, by placing under the jurisdiction of those legislatures all matters of a purely local or private nature within the Province, (a mode of expression which would naturally lead to doubt and confusion, and would be likely to bring about that conflict which it was desirable to avoid,) enumerates, under items numbering from 1 to 15 inclusive, certain particular subjects, all of a purely provincial, municipal and domestic, that is to say, "of a local or private" character, and then winds up with item No. 16—a wise precaution, designed, as it seems to me, to prevent the particular enumeration of the "local and private" matters included in the items 1 to 15 being construed to operate as an exclusion of any other matter, if any there might be, of a merely local or private nature. The wisdom of this mode of framing the 91st and 92nd sections appears when we read the items enumerated in the 91st section, some of which might be well considered to be matters which would come within some of the subjects enumerated in the 92nd section, but the scheme of the Act being to vest in the local legislatures all matters of a purely provincial, municipal and domestic, or "of a local or private" nature, and in the Dominion Parliament all mat-

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ters which, although they might appear to come within the description of provincial, or municipal, or "local or private," were deemed to possess an interest in which the inhabitants of the whole Dominion might be considered to be alike concerned, and that, therefore, these matters should be under the control of the Dominion Parliament, in order to prevent doubt as to those matters it was, as it seems to me, a necessary and wise provision to make, that *notwithstanding any thing in the Act*, and however much any of the items enumerated in the 91st section might appear to come within the subjects which, as being of a purely "local or private" nature, were enumerated in the 92nd section, yet they should not be deemed to come within such classification or description. We may, then, as it appears to me, adopt, as a canon of construction of these two sections, the rule following:

All subjects of whatever nature, *not exclusively* assigned to the Local Legislatures, are placed under the supreme control of the Dominion Parliament, and no matter is exclusively assigned to the Local Legislatures, unless it be within one of the subjects expressly enumerated in sec. 92, *and is at the same time outside of* all of the items enumerated in sec. 91, by which term "*outside of*" I mean does not involve any interference with any of the subjects comprehended in any of such items.

It was argued, that this rule could not be adopted as one of universal application—that it would not apply to the terms "marriage and divorce," in item 26 of the 91st sec., contrasted with "*solemnization of marriage*," in item 12 of the 92nd section, but these matters respectively are placed in those sections in perfect accord with the scheme of the Act as above defined and with the above rule.

"Solemnization of marriage," that is to say, the power of regulating the form of the ceremony—the mode of its

celebration—is a particular subject expressly placed under the jurisdiction of the Local Legislatures, as a matter which has always been considered to be purely of a local character. It was a matter purely of provincial importance whether the ceremony should take place before the civil magistrate, or whether it should be a religious ceremony; this was a matter in which the inhabitants of the different Provinces might take a different view. It was, therefore, a matter essentially to be regarded as “local,” and as such to be placed under the jurisdiction of the Local Legislatures. It is, therefore, specifically mentioned as exclusively assigned to these Legislatures but, as it is the *solemnization* of the marriage which is the only matter in connection with marriage which is so exclusively assigned, then *all* other matters connected with marriage are, by the express terms of the act, independently of the particular enumeration in the 91st sec., vested in the Dominion Parliament. That there are other matters connected with and involved in the term “marriage” besides the form of the ceremony of its solemnization, there can be no doubt, as, for example, the competency of the parties to the contract to enter into it—the effect upon the status of the children, if presumed to be *de facto* entered into by persons not competent by law to enter into it—its obligatory force when entered into—the power of dissolving the tie when entered into—these are all matters which (inasmuch as the *solemnization* of the ceremony is all that is mentioned in the 92nd sec. in relation to marriage), would come under the control of the Dominion Parliament by the mere force of the clause which enacts that the Dominion Parliament shall have jurisdiction over all matters not exclusively assigned by the Act to the Local Legislatures, without any enumeration whatever of items in the 91st sec.: but, for greater certainty, the Act expressly mentions in the 91st sec.

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1880 "marriage and divorce," and the *rule* taken from the
 CITY OF Act says in effect, that these terms, so used in item 26
 FREDERICTON, in the 91st sec., shall not be deemed to come within the
 v. term "solemnization of marriage" in item 12 of the
 THE QUEEN, 92nd sec. The matters mentioned in these respective
 items are then declared to be diverse and distinct.
 "Solemnization of marriage," is, then, a matter "*outside*
 of" the term "marriage and divorce," in the 91st sec.,
 and the result is that the application of the rule (in perfect
 conformity with the theory of the scheme of the
 Act as above defined,) leaves the power of legislating as
 to the form of the ceremony as a purely local matter,
 under the control of the Local Legislatures, and places
 all other matters connected with marriage, including
 divorce, under the control of the Dominion Parliament.

The only question, then, which we have to consider
 is, does the matter which is the subject of legislation
 in the *The Canada Temperance Act*, 1878, come within
 any of the subjects by the *B. N. A. Act* exclusively as-
 signed to the Local Legislatures?

In the court below, it seems to have been considered
 sufficient to make the Act to be *ultra vires* of the
 Dominion Parliament, if its provisions are of a nature
 to affect injuriously the power given to the Local Legis-
 latures, under item 9 of sec. 92, to legislate in respect of

Shop, saloon, tavern, auctioneer, and other licenses, in order to
 the raising of a revenue for Provincial, Local, or Municipal purposes.

But this is clearly an erroneous view, for nothing can
 be more explicit than the provision of the statute which
 declares that, if power to legislate upon the matter in
 question *is not given, and exclusively given*, to the Local
 Legislatures, it is vested in the Dominion Parliament.
 One of the learned Judges in the Court below seems to
 have inverted the rule expressly laid down in the *B.*
N. A. Act for our guidance when he says that,

Unless the power to pass *The Canada Temperance Act* is given

under the enumerated classes of subjects exclusively assigned to Parliament, the act is ultra vires, as interfering with property and civil rights in the Province, the right to legislate on which is exclusively assigned to the Local Legislatures.

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The converse of this is what in fact the Act says, and although it may be admitted, that if the power to legislate upon any subject is not in the Dominion Parliament it is in the Provincial Legislatures, for all matters must come within the jurisdiction either of Parliament or of the Local Legislatures, yet the unerring test to determine whether the power to pass the act is, or is not, vested in the Dominion Parliament is to enquire, under the application of the rule as I have above stated it, does it, or does it not, deal with a subject jurisdiction over which is given exclusively to the Local Legislatures? for, if not, it is vested in the Parliament.

Now, that the intemperate use of spirituous liquors is the fruitful cause of the greater part of the crime which is committed throughout the Dominion—that it is an evil of a national, rather than of a local or provincial character, will not, I apprehend, be denied. The adoption of any measures calculated to remove or diminish this evil is, therefore, a subject of national rather than of provincial import, and the devising and enacting such measures into law, as calculated to promote the peace, order, and good government of *Canada*, is a matter in which the Dominion at large and all its inhabitants are concerned.

When we find, then, the design of the *B. N. A. Act* to be to impart to the Dominion Parliament a *quasi* national character, and to assign to the legislatures of the Provinces carved out of and subordinated to the Dominion matters only of a purely provincial importance, if the question, whether the power to pass such an Act as the one under consideration, arose upon the construction of the Act, as if it contained [the clause, that :

1880 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
 CITY OF peace, order, and good government of *Canada* in relation to all mat-
 FREDERICTON ters not coming within the class of subjects by this Act assigned ex-
 v. clusively to the legislatures of the Provinces—
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followed by the enumeration of the items in the 92nd section assigned to the Local Legislatures, and without any enumeration of the items which for greater certainty have been inserted in section 91, I should have great difficulty in coming to the conclusion that, under the terms of the 13th item of section 92, namely: "property and civil rights *in the Province*," any power was given to pass such an Act as *The Canada Temperance Act*, 1878, which undoubtedly professes to deal with a subject of a national, rather than of provincial import, but with the enumeration of the particular items inserted in section 91, and regarding the whole scope, object and frame of the Act, it is clear beyond all question, that the Act under consideration is *ultra vires* of the Provincial Legislatures.

Turning to the Act, we find it to be entitled, "An Act respecting the Traffic in Intoxicating Liquors," its object, as stated in its preamble, is to promote temperance as a thing most desirable to be promoted in the Dominion; the means adopted in the Act for attaining this end consist in regulating and restraining the exercise of the trade or traffic in intoxicating liquors. Reading, therefore, the object of the Act to be as it was read in the Court below, namely: to endeavour to remove from the Dominion the national curse of intemperance, and observing that the means adopted to attain this end consist in the imposition of restraints upon the mode of carrying on a particular trade, namely: the trade in intoxicating liquors, it cannot admit of a doubt, that power to pass such an Act, or any Act, assuming to impose any restraint upon the traffic in intoxicating liquors, or to impose any rules or regulations, not

merely for municipal or police purposes, to govern the persons engaged in that trade, and assuming to prohibit the sale of liquors, except under and subject to the conditions imposed by the Act, is not only not given *exclusively*, but is not *at all* given to the Provincial Legislatures. The principle of *Regina v. Justices of King* (1), decided, and properly so decided, in the Court from which this appeal comes, is equally applicable to exclude from the jurisdiction of the Local Legislatures all power to pass such an Act.

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The Act, then, being *ultra vires* of the Provincial Legislatures, as dealing with a subject *not exclusively* assigned to the Provincial Legislatures, *cadit questio*, for that point being so determined, it follows, by the express provision of the *B. N. A. Act*, that it is within the jurisdiction of the Dominion Parliament.

This Court has no jurisdiction other than is given to it by the Act of the Dominion Parliament which constitutes it, and that Act does not authorize it to assume to impose restrictions upon Parliament as to the terms, conditions and provisions to be contained in any Act passed by it upon any subject which is within its jurisdiction to legislate upon. That point being determined, the jurisdiction of Parliament as to the terms of such legislation is as absolute as was that of the Parliament of Old *Canada*. or as is that of the Imperial Parliament in the United Kingdom, over a like subject.

What, therefore, may be the opinion of text writers, or what may be the decision of the *United States* Courts, as to the powers of the Central Government and Congress, or of the legislatures of the several States, upon the like subject, is unimportant, for, as the Dominion Government and Parliament are founded upon the model of, and made similar in principle to, those of the United Kingdom of *Great Britain* and *Ireland*, it fol-

(1) 2 Pugs. 535.

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lows that, once it is established that the subject matter of *The Temperance Act of 1878* is a matter within the jurisdiction of the Dominion Parliament to legislate upon, the provisions of that Act are as valid and binding, and beyond the jurisdiction of this Court to deal with, otherwise than by construing it, as *The Temperance Act of 1864*, from which the Act of 1878 is taken, was valid and binding, and beyond the jurisdiction of the Courts of Old *Canada* to deal with, otherwise than by construing, and as a similar Act in *Great Britain*, if passed by the British Parliament, would be valid and binding upon the Courts there.

It is unnecessary, therefore, to discuss any of the other matters, relied upon in the Court below, and referred to in the argument before us, and the appeal must be allowed with costs.

Appeal allowed with costs.

Solicitors for appellants: *Beckwith & Seeley*.

Solicitor for respondent: *H. B. Rainsford*.
