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In re PROVINCIAL JURISDICTION TO PASS PROHIBITORY LIQUOR LAWS.

SPECIAL CASE REFERRED BY THE GOVERNOR GENERAL IN COUNCIL.

Reference by Governor in Council—Constitutional law—Prohibitory laws—Intoxicating liquors—British North America Act, secs. 91 and 92—Provincial jurisdiction — 53 Vic. chap. 56 sec. 18 (O.)—54 Vic. chap. 46 (O.)—Local option—Canada Temperance Act, 1878.

1. A provincial legislature has not jurisdiction to prohibit the sale, either by wholesale or retail, within the province, of spirituous, fermented or other intoxicating liquors.

Per the Chief Justice and Fournier J. dissenting: A provincial legislature has jurisdiction to prohibit the sale within the province of such liquors by retail, but not by wholesale; and if any statutory definition of the terms wholesale and retail be required, legislation for such purpose is vested in the Dominion as appertaining to the regulation of trade and commerce.

2. A provincial legislature has not jurisdiction to prohibit the manufacture of such liquors within, or their importation into, the province.

3. The Ontario legislature had not jurisdiction to enact the 18th section of the Act 53 Vic. ch. 56, as explained by 54 Vic. ch. 46. The Chief Justice and Fournier J. dissenting.

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, by order in council bearing date the twenty-sixth day of October, in the year of our Lord one thousand eight hundred and ninety-three, passed pursuant to the provisions of the Revised Statutes of Canada, chapter 135, and intituled: "The Supreme and Exchequer Courts Act," as amended by section 4 of the act passed in the 54th and 55th years of Her Majesty's reign, chaptered 25, referred to the Supreme Court of

PRESENT:—Sir Henry Strong C.J., and Fournier, Gwynne, Sedgewick and King JJ.

Canada for hearing and consideration the following questions, namely :—

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

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

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

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

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

6. If a provincial legislature has a limited jurisdiction only as regards the prohibition of sales, has the legislature jurisdiction to prohibit sales subject to the limits provided by the several subsections of the 99th section of "The Canada Temperance Act," or any of them (Revised Statutes of Canada, chapter 106, section 99) ?

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

The court stated its opinion to the effect that all the said questions so referred as aforesaid should be an-

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swered in the negative, and the reasons therefor appear from the opinions delivered by their Lordships Mr. Justice Gwynne, Mr. Justice Sedgewick and Mr. Justice King, hereinafter given. His Lordship the Chief Justice, and his Lordship Mr. Justice Fournier, dissenting from the opinion of the majority of the court, were of opinion that the said questions should be answered in the affirmative, with the exception of questions three and four, which they were of opinion should be answered in the negative, and the reasons therefor appear from the opinions of the Chief Justice and Mr. Justice Fournier, also hereinafter given.

Curran Q.C., Solicitor-General of Canada for the Dominion.

Cartwright Q.C., Deputy Attorney General, and *Maclaren* Q.C., for Ontario.

Cannon Q.C., Assistant Attorney General, for Quebec.

Maclaren Q.C., for Manitoba.

Wallace Nesbitt and *Saunders*, for the Distillers and Brewers' Association by leave of the court under 54 & 55 Vict. ch. 25 sec. 4.

The Solicitor-General.—The main question to be decided upon this reference is, whether a provincial legislature has jurisdiction to prohibit within the province the sale, manufacture or importation of spirituous, fermented or other intoxicating liquors ?

It is hardly necessary to discuss whether the province has the right to prohibit the sale of liquor irrespective of quantity. By the British North America Act the regulation of trade and commerce is absolutely within the power and jurisdiction of the Dominion Parliament, and for a province so to prohibit would be an infringement upon the powers that have thus

been conferred in a distinct and positive manner upon that parliament.

It is true that the Dominion License Act, 1883, was held by the Privy Council to be *ultra vires*, and it has been contended that the judgment in that case was in conflict with *Russell* v. *The Queen* (1) which held the Canada Temperance Act to be *intra vires*, but that tribunal pointed out that there was no conflict, that in deciding the Canada Temperance Act case they proceeded upon a certain line, and in deciding the License Act case they were proceeding upon a different line. I wish to refer to a statement made by the Chief Justice in a case many years ago, one of the very first cases in this court, *Severn* v. *The Queen* (2), which I think is of some importance :

> Some arguments addressed to the court seem to have been intended to elicit opinions as to the locality of the power of prohibiting legislation with reference to the trade in spirituous liquors, wine and beer. This, so far as retail trade is concerned must depend upon the proper answer to two questions :—First, do the local legislatures possess what is called the police power ? Secondly, if they do, does it authorize them to legislate so as to prohibit or only to regulate the retail traffic in liquors ? The decision of this case does not call for any answer to either of these questions, and I therefore forbear from expressing any opinion upon them.

I quote this to show that this case presents a feature which comes up for the first time and I am satisfied that there will be found in the decisions of the Privy Council reasons why there should be, for the proper adjudication of this question and the determination of where the power to prohibit lies, a definition given, as I think a definition has already been given in the Canada Temperance Act (3), of what is wholesale and what is retail, and my first contention is that the power to determine that must lie in the authority having the regulation of trade and commerce, the superior power.

(1) 7 App. Cas. 829. (2) 2 Can. S.C.R. 70.
(3) Sec. 99, subsec. 8.

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In *Russell* v. *The Queen* (1), the Privy Council, in affirming the judgment which maintained the constitutionality of the Temperance Act, gave their concurrence and sanction to the definition which was given by the Dominion Parliament as to what is wholesale.

In the case of *Citizens Insurance Co.* v. *Parsons* (2), the Privy Council say that in construing the words "regulation of trade and commerce" they would include political arrangements in regard to trade requiring the sanction of parliament, the regulation of trade in matters of inter-provincial concern, and it may be that they would include the general regulation of trade affecting the whole Dominion.

The legislation with regard to trade and commerce, to my mind, gives to the Dominion the control of the importation and manufacture of intoxicating liquors. That is a branch of the subject which I think requires but very little elaboration. The definition which I have just read here stating that this would include political arrangements in regard to trade requiring the sanction of parliament, seems to be self-evident. If we wish to make a treaty of commerce with France with regard to wines, or with the United States with regard to our trade relations, the Dominion Parliament has in the past, without any question, made such arrangements, and there is no doubt that here the judgment of their Lordships comes directly into play when they speak of arrangements in regard to trade requiring the sanction of parliament, the commerce or trade in matters of inter-provincial concern; here we have the manufacture of liquors in our country, a very large industry, in which persons in the different provinces are engaged, and in our inter-provincial trade these commodities play a very important part. They say this would include the general regulation of trade

(1) 7 App. Cas. 829. (2) 7 App. Cas. 113.

affecting the whole Dominion. The wholesale traffic, at all events, is one which involves every province, and which needs to be regulated by a parliament having jurisdiction over the whole area of the country.

I may state here that we have also, in the classification of these subjects in the statutes of old Canada prior to confederation, something that may guide us, to some extent at all events, in arriving at our conclusion upon this point. If we take up the Consolidated Statutes of Canada of 1859, we find there that the subjects which fell under the general control, which affected the two provinces generally, were disposed of in the general consolidation of the statutes, including all the legislation regarding the importation and manufacture of liquors. The excise laws are side by side with the customs enactments showing that such importation and manufacture were subjects of general concern in which the trade and commerce of the united provinces were involved.

[The learned Solicitor General then referred at length to the case of *Sulte* v. *Three Rivers* (1); Lareau (2); Clements on the Canadian Constitution (3); and *In re Local Option Act* (4); contending, that the power of prohibiting by retail was given to local legislatures under the words "municipal institutions" in section 92 British North America Act.]

All parties in discussing this question, the local legislature in legislating upon it, the Dominion in legislating upon it, have felt that there was an absolute necessity to draw a distinction between wholesale and retail.

The constitution will be utterly unworkable if you cannot draw a distinction between wholesale and retail. If, under municipal institutions, the legisla-

(1) 11 Can. S. C. R. 25.
(2) P. 387.
(3) P. 371.
(4) 18 Ont. App. R. 572.

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ture of a province could delegate to a municipality the power to prohibit, to absolutely prohibit by retail, I say that in logic, and common sense, it must have that power vested in itself. No doubt I am met by the argument that the Privy Council has decided that there is no distinction as to retail at all. The regulation of trade and commerce is vested in the Dominion Parliament, and there is no more important or essential element in the regulation of trade and commerce than the definition as to what is wholesale and what is retail. There must be some authority.

The sixth question is: "If a provincial legislature has a limited jurisdiction only, as regards the prohibition of sales, has the legislature jurisdiction to prohibit sales, subject to the limits provided by the several subsections of the 99th section of the Canada Temperance Act, or any of them?"

I have sought to point out that the 99th section of the Canada Temperance Act was the governing and the defining point. The answer to this must be in the affirmative.

My learned friends, who represent the distillers, say that this is an ambiguous question, and proceed to discuss it as though they were discussing the second question over again. Under this section 99 it will be noticed that the Dominion Parliament was very careful in all its subsections with regard to the rights which were dealt with. There was the question, for instance, of religious liberty, and there was the one exception made with regard to the manufacture or importation or sale of wine for sacramental purposes.

The Dominion Parliament having within its control the protection of the civil and religious liberty of the people in this Dominion, and the peace, order and good government of the people, no local legislature could prohibit, for instance, the sale of wine for sacra-

mental purposes, and thus deprive some of the largest bodies of christians in the Dominion of the right of exercising freely their religious ideas and convictions. So it would be, under trade and commerce, with regard to that subsection which states that intoxicating liquors or alcohol may be sold for the purpose of mechanical developments of various kinds. Alcohol may be necessary in the carrying on of a whole host of trades in the country and have none of the attributes of alcoholic beverages when manufactured. No local legislature could possibly have the power to prohibit the use of alcohol in carrying out those works which are necessary for the development of trade and commerce in the Dominion.

As to the last point I agree that the judgment of the Court of Appeal for Ontario is good and sound in every respect.

[The Chief Justice: I shall call upon counsel in the order of precedence of the lieutenant governors. I will call upon Ontario first.]

Maclaren Q.C. I appear for the province of Manitoba as well as Ontario. My learned friend Mr. Cartwright appears for Ontario with me. I appear for Manitoba alone. My instructions from the two Attorneys General are the same.

With regard to the position of this question, I submit, may it please your Lordships, that it is useful to look at the state of matters at the time of confederation. The British North America Act of 1867 was no doubt passed with a view to the existing state of things.

The phrases that are there used are largely taken from the headings of legislation that was then on the statute book of old Canada, among them being trade and commerce and "municipal institutions"—so that I would first ask your Lordships to interpret the ex-

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pression used in those sections of the British North America Act based on the Quebec resolutions not by an Imperial dictionary exclusively but by a Canadian dictionary, so to speak.

Looking then at the state of the law before confederation, which, I think, we may do, we find, for instance, the Consolidated Statutes of Lower Canada which have been referred to by the Solicitor General giving the power of prohibiting the sale of spirituous liquors to the municipal council. (Chap. 24.) The state of the law apparently in Upper Canada at this time was that a prohibitory law could be passed prohibiting shop and tavern licenses, but not the sale in original packages. I am not aware exactly where this importation in original packages came from, but you could not sell 100 gallons provided it was not in the original packages, in other words, if bulk was broken; it would then cease to be protected. With regard to the other two provinces of which the Dominion was originally composed I speak with less certainty and positiveness; but, so far as I am able to understand the statutes of those provinces, there were, for the rural parts at least, not the same kind of municipal institutions as had been adopted or adapted to Lower and Upper Canada.

So far as I can form an opinion from looking over the statutes of the provinces of Nova Scotia and New Brunswick, it seems to me that to this day, for instance in Nova Scotia, they deal directly with a good many matters relating to roads and the like which in the provinces of Ontario and Quebec were, even before confederation, left to municipal authorities. I notice money grants and the like. I infer from the state of legislation that some of the details of this legislation were not so fully or generally carried out as they

were in Upper and Lower Canada at the time of confederation.

The province of Manitoba has adopted in entirety the Ontario municipal system, but it has been created since the British North America Act, which it cannot therefore help to interpret.

So that my argument on that point is that when the legislatures of the provinces, and the British North America Act legislating respecting those provinces, used that title "municipal institutions," we may assume they used it giving to it the well established meaning it had in the country with regard to which they were legislating.

However, we have to admit this, that some of the enumerated subjects in section 91 were matters that were formerly under the head of "municipal institutions," and I could not pretend to argue that those subjects which are given by name to the Dominion, such as "weights and measures" in section 91, are not taken out of the respective categories in section 92 under which they might otherwise fall, but my argument is that that is limited to those subjects which are taken out by name.

Then, as to clause 9, it may have been inserted giving the legislature the license power for the purpose of revenue for this reason: the Dominion is given, under section 91, the right to raise a revenue by any system of taxation, and the only power given to the local to tax is by direct taxation within the province. The Privy Council has decided, in the insurance and other cases, that licenses are a sort of indirect taxation, so that if they had not put in that section (subsection 9) it might be presumed that the local legislatures were not authorised to raise a revenue by that indirect means of taxation, viz., licenses.

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Then with regard to this question of "municipal institutions," one of the clearest utterances of the doctrine is that laid down by the first Chief Justice of this court in an Ontario case, *Re Slavin* and *Orillia* (1), which puts this matter better than I could do.

I would also refer to the case mentioned by his Lordship the Chief Justice, *The Queen* v. *Taylor* (2) where there is a very thorough discussion of this branch of the subject. It is practically the same case as came before this court later in *Severn* v. *The Queen* (3). See also *Sulte* v. *Three Rivers* (4).

I have to admit that the regulations by "municipal institutions" before confederation were very largely of what might be considered retail, not exclusively, but in a general sense. In the province of Ontario, for instance, original packages were exempt from municipal supervision in case the original package contained a certain quantity. Prior to the decision in the License Act of 1883 it might have been open to argument, as the Solicitor General has argued, that there was a difference between wholesale and retail, but I respectfully submit that since the decision in the Liquor License Act case we are justified in assuming, for such purposes as we are arguing to-day, that there is really no difference between wholesale and retail, and that the two must stand or fall together. I am speaking now only of the sale. That I claim is the effect of the decision in the case of the License Act of 1883, the McCarthy Act, and the amending Act of 1884. When the matter was argued before this court the wholesale trade was referred to as properly coming under the matter of regulation of trade and commerce, but not shop or tavern licenses, or the retail trade; your Lordships were drawing a line of

(1) 36 U.C.Q.B. 176.
(2) 36 U.C.Q.B. pp. 212 to 214.
(3) 2 Can. S. C. R. 70.
(4) 11 Can. S. C. R. 25.

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distinction and demarcation which was swept away by the Privy Council; they said in effect, that not only was the retail trade to be licensed, and regulated at least, by the provinces, but the wholesale trade as well.

There is a case as to the difference between wholesale and retail which I would like to refer to as a part of my argument. It is the case of *Lepine* v. *Laurent* (1) decided in 1891.

The next point I would refer to is this, that in the case of *Russell* v. *The Queen* (2), which was cited by my learned friend, and which I think will be used by our friends on the other side to show that we have not the power of prohibiting, the case of "municipal institutions" was not considered; that appears from the report itself.

In this case we are not called upon to reconcile conflicting legislation. That may come up hereafter, but for the present your Lordships are only asked whether the provinces have such power, assuming that the Dominion has not exercised it. That, I think, is a fair way of putting the questions which have been submitted by His Excellency in the present case, and for that purpose I think it is useful to remember, in considering *Russell* v. *The Queen* (2), that what was in question there was a Dominion Act, and the expression used in *Hodge* v. *The Queen* (3) is particularly applicable, because I claim that prohibitory legislation is one of those very questions or subjects which, in one aspect and for one purpose, may well fall within section 92, and in another aspect, and for another purpose, may fall within section 91. In *Hodge* v. *The Queen* (3) the possible conflict is referred to and their Lordships base their decision on the ground that there is no conflict.

(1) 14 Legal News 369; 17 Q. L. R. 226.

(2) 7 App. Cas. 829.

(3) 9 App. Cas. 117.

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(The learned counsel then reviewed the argument of counsel and the effect of the decision of the Privy Council on the McCarthy Act.)

With regard to the question of regulation, I think this much can be said, that the decision in *Hodge* v. *The Queen* (1), and the decision on the McCarthy Act, at least have settled this, that the licensing and the regulation of the liquor traffic are in the provinces. That, I think, is the outcome of these discussions. I think they have decided that they have the regulation. My argument is that the power to prohibit is involved in the power of regulation, and I attach some importance to that principle. I do not know that I have ever seen that more tersely put than by his Lordship the late Chief Justice of this court in the case of *Fredericton* v. *The Queen* (2).

It is difficult to say that a provincial legislature can prohibit 499 people out of 500 from engaging in something, but that they cannot prohibit the 500th.

The powers which we are now claiming for the provincial government are the powers which all the provinces have since confederation exercised, almost without challenge, regarding the sale of poisons and such substances under the Pharmacy Acts that have been passed in the various provinces. For instance, in the Ontario Act, which is chapter 151 of the Revised Statutes of Ontario, section 26 makes provision as to the sale of these poisons. The only case of which I am aware where the validity of these acts came up, and where the constitutional question was raised, was in the province of Quebec, in the case of *Bennett* v. *The Pharmaceutical Association of the Province of Quebec* (3).

We claim provincial authority on this subject of prohibition under the head of "matters of a local and

(1) 9 App. Cas. 117. (2) 3 Can. S.C.R. p. 537.
(3) 1 Dor. Q. B. 336.

private nature" in subsection 16, as well as under "municipal institutions." If it should be objected to us on the other side that this is really an interference with the Canada Temperance Act, or with the authority of *Russell* v. *The Queen* (1), our answer to that is this, that we have the authority of the Privy Council not only for the principle laid down in *Hodge* v. *The Queen* (2), but also that this power of legislation may exist concurrently in the two bodies.

The first case in which, I think, that principle was clearly laid down, was *L'Union St. Jacques* v. *Bélisle* (3). Lord Selborne gave the judgment in that case. The next case in which the same doctrine was laid down, is *Cushing* v. *Dupuy* (4). I refer particularly to page 415.

We find this same rule laid down in the recent case regarding the Assignment Act of Ontario, 1894 (5). So that our argument on this ground is, that so long at least as the Dominion Parliament has not passed a prohibitory law, that it is competent for the local legislature to pass such a prohibitory law as is referred to in the questions before your Lordships.

Assuming then that the province might have the power, under one or other of those heads in section 92, to pass it, if it be not taken out of their hands by something that is found in section 91, the only one of the enumerated classes that have been suggested on the other side as interfering with it, is the regulation of trade and commerce. Now, I submit that such a law as your Lordships are now asked about does not properly come within the regulation of trade and commerce, within the meaning of section 91 of the British North America Act.

If we are looking for the origin of things, it is possible that the words "trade and commerce" may have

(1) 7 App. Cas. 829.
(2) 9 App. Cas. 117.
(3) L R 6 P.C. 31.
(4) 5 App. Cas. 409.
(5) [1894] A. C. 189.

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been taken from the Consolidated Statutes of Canada. There are 22 chapters of the Consolidated Statutes of Canada that are grouped together under the title of "trade and commerce." It is instructive to notice that, with I think two exceptions, all the subjects that are treated of in the Consolidated Statutes of Canada, under the head of "trade and commerce," are assigned to the Dominion. One is the protection of persons dealing with agents, and the other is as to limited partnerships.

As to the meaning of the words "regulation of trade and commerce," the first authoritative definition of the meaning of the words "trade and commerce" is that found in *Citizens' Ins. Co.* v. *Parsons* (1). There their Lordships laid down a definition which, I think, is very strongly in favour of the position taken by us to-day. I think the words were taken from this side of the Atlantic, and the key to the interpretation, if they are used in any technical sense, is rather to be sought on the continent of America than on the continent of Europe.

The only other discussion as to the meaning of trade and commerce, to which I will refer, is found in *Bank of Toronto* v. *Lambe* (2). On this question relating to the sale, there are a number of cases in our own courts, as *The Queen* v. *Taylor* (3); *Ex parte Cooey* (4); *Blouin* v. *Corporation of Quebec* (5); *Molson* v. *Lambe* (6); *Poulin* v. *Corporation of Quebec* (7); *Danaher* v. *Peters* (8).

So far I have spoken of the sale exclusively. Nearly all that has been said regarding the sale applies also to the manufacture, with this exception, I think, that

(1) 7 App. Cas. 112.
(2) 12 App. Cas. 586.
(3) 36 U.C.Q.B. 183.
(4) 21 L. C. Jur. 182.
(5) 7 Q.L.R. 18.
(6) M.L.R. 2 Q.B. 381.
(7) 9 Can. S.C.R. 185.
(8) 17 Can. S.C.R. 44.

manufacture is in a certain sense more local in its nature than even sale.

So far as it is a question of power, I think if the local legislature found it necessary, to effectually carry out the power of prohibiting the sale to prohibit the manufacture, it would so extend.

And the fact that the Dominion Parliament has the right to tax imports, or to put an excise tax upon manufactures, is no ground for withdrawing this from the local authority.

The only other remaining question which I think it necessary to refer to specially is the last, as to the validity of the Local Option Act, which I will do very briefly.

A great deal of that which I said with regard to the sale, in the earlier part of my argument, will apply to this seventh question; in fact, I found it impossible to separate the discussion of the first question submitted to your Lordships from the last question. I have put in the factum the principal points upon which I rely, in addition to those that were urged in the case of *Huson* v. *South Norwich*.

I refer especially of course to the reasons given by the Court of Appeal in the *Local Option Case* (1).

I would also refer to a decision of the Court of Queen's Bench of Quebec *Corporation of Huntingdon* v. *Moir* (2), on article 561 of the Municipal Code, corresponding to the Local Option Act, and to the analogous case in Nova Scotia of *Keefe* v. *McLennan* (3).

The other ground to which I would refer with regard to this local option matter, is that the Ontario local option law may be sustained as a license law. Briefly, I put it in this way. Under the Ontario license law there are three classes of licenses to be

(1) 18 Ont. App. R. 572. (2) M.L.R. 7 Q.B. 281.
(3) 2 R. & C. 5.

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given, wholesale, shop and tavern. Under the Local Option Law you may abolish shop, leaving wholesale and tavern, or you may pass a by-law abolishing tavern, leaving wholesale and shop; or you may pass a by-law or by-laws abolishing shop and tavern, leaving only wholesale. I submit that that is still a license law, and that under the authority to pass a license law the province of Ontario had power to pass the local option law, and that it may be sustained as a license law. That, briefly, is the ground upon which we claim the validity of the local option law of Ontario.

Under that Act wholesale licenses may issue, and cannot be prohibited, so that the point I am making is that this may be sustained as a license law inasmuch as wholesale licenses may issue in any event.

Cartwright Q.C.—My learned friend has gone so very fully into the matter that really there is very little with which I need trouble your Lordships. As I judge from the factums, we are all agreed that the important question is the question of sale; but, before passing to the question of sale, I would just make this observation with regard to the question of importation. It will, I think, be argued on behalf of the brewers and distillers that the right to import, if that be found to be in the Dominion, would necessarily include the right to sell. That, I submit, by no means follows. It is contrary altogether to the decisions in the United States, and I think it is contrary to the observations which have been made by the Privy Council. In two cases, *Citizens Insurance Co.* v. *Parsons* (1) and *Colonial Building and Investment Association* v. *Atty. Gen. of Quebec* (2), it has been suggested that while the Dominion may have the power to incorporate companies, with power to deal in lands and so forth,

(1) 7 App. Cas. 96. (2) 9 App. Cas. 167.

throughout the Dominion, it may still be quite possible that a company so incorporated could do no business in any province in consequence of the laws of the province with regard to land preventing them from so dealing. That, I submit to your Lordships, would be entirely analogous to the question of importation carrying with it the right to sell.

Then, it may be that those corporate bodies so constituted, and given, to some extent, life, have to go to the provinces to get further legislation in order to enable them to really fulfil the purposes for which they were principally incorporated.

Coming to the other question, as regards the right to sell, that of course would be claimed under the head of "municipal institutions," subsec. 8 of sec. 92, and what I suggest to your Lordships as the true view is, to look at "municipal institutions," if I may say so, historically, and see what "municipal institutions" included at the time the British North America Act was framed.

Looking at the British North America Act, there is no indication of anything to show that it was in any way intended to cut down or modify the powers that were then possessed by the various provinces with regard to their own affairs, but that all the powers that were then possessed with regard to the municipalities were intended to be continued. Then we find that in Ontario, Quebec and Nova Scotia these powers were found in the Municipal Acts, or the Acts relating to municipal affairs, and the highest courts of all those provinces have held that these powers remained in the provinces. That, I submit to your Lordships, is a strong argument in favour of the power, to the extent to which it is found in existence in 1867.

Then, if it is said that the question of trade and commerce in any way comes in conflict, I submit that

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"trade and commerce" must be modified, so far as may be necessary, in order to give full effect to what is covered by "municipal institutions." Because, looking at section 92, the particular phrase at the beginning of the section is, "that in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated." So that their power is to cover all those matters that necessarily, or for convenience, come within these purposes.

Then we find "municipal institutions" followed, in section 92, with the provision about licensing shops, and so on. That is really, I think, the only mention that there is of anything, in terms, which relates to liquor.

Then, turning to the decisions, I submit nobody can deny now that the whole question of regulation, by way of licensing and so forth, is entirely in the hands of the province in the most absolute form. The Dominion cannot interfere with it, and it would be strange if under the power to regulate concerning trade and commerce the Dominion could prohibit a traffic which it cannot regulate.

The mere fact that such an Act as the Canada Temperance Act was held to be valid and within the power of the Dominion Parliament does not of itself, looking at that decision, take away the prohibitory power of the province.

To a certain extent licensing Acts include prohibitory provisions. For instance, sales are not allowed on Sundays or on polling days, nor are sales allowed to be made to particular persons. Nobody disputes that such legislation by the provinces is perfectly valid, and yet, if you can prohibit selling on Sunday, why not on Monday? And if on a polling day, why not on some other day? Whether it be wholesale or retail,

there is nothing to show that that power was intended to be taken away, and that it comes in, reasonably and properly, under the term "municipal institutions."

As the points have been so fully gone over by my learned friend I do not think I need further occupy your Lordships' time.

Cannon Q. C.—Although the question in this case is a most important one to the province of Quebec, on account of the position taken by the Dominion Government in the factum filed in this court, and also the position taken by the learned Solicitor General of Canada in his argument, the remarks which I have to offer to this court on behalf of the province of Quebec will be very brief. The Dominion of Canada, and the Solicitor General, have admitted all the rights which the province of Quebec claim on this question; they have even admitted a little more, on one point, than the province of Quebec claims.

In the light of the different decisions rendered on these questions of prohibitory liquor laws, and of the different cases cited, the province of Quebec has interpreted the question now before the court in the following manner, or has assumed that it had, on this question of prohibitory liquor laws, the following power:—

First of all, the province of Quebec claims the right of licensing the wholesale and retail sale of liquor; and it does now, practically, under the laws in force in the province.

Secondly, the province claims the right of limiting the number of liquor licenses throughout the province, and does so through the medium of municipal councils. It does so throughout the province under the authority of the Municipal Code, and in the larger cities and towns through the medium of license commissioners, at least for Quebec and Montreal.

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Thirdly, the province claims the absolute right of prohibiting the retail sale of liquor.

Throughout the province of Quebec we claim the right to absolutely prohibit the retail sale of intoxicating liquors, and, practically, we have been doing so since confederation.

Then comes the question of the definition of wholesale and retail. Because of the arguments which have been presented to this court by the different learned counsel who have preceded me I think I should say a few words on behalf of the province of Quebec.

We have, to a certain extent, in the province of Quebec, defined retail sale. Our definition may be wrong but, of course, we will hold to it, until we are corrected by this court, or perhaps later on by the Privy Council. The definition of retail sale is found in the laws of the province of Quebec, article 561 of the Municipal Code. Under that article power is given to all municipal councils, by means of a by-law, to prohibit the sale of intoxicating liquors within its limits under a quantity of two imperial gallons, or twelve bottles of three half pints. That is the definition which the province of Quebec gives to wholesale and retail liquor selling; two gallons is wholesale and under that quantity is retail according to this provision of our Municipal Code.

In numerous instances municipalities have prohibited the retail sale of intoxicating liquors. And the law provides that when such a by-law has been passed a copy of it is forwarded to the collector of the provincial revenue of the district in which the municipality exists, and from the date of the receipt of this by-law, until its repeal, the collector of the provincial revenue is debarred from issuing licenses for the sale by retail of intoxicating liquors in that municipality.

The only thing which the province claims in respect of sale by wholesale is to make the vendor take out a license for the purposes of revenue and that is what we have done for years past, under our license law which is now embodied in our Revised Statutes. Every wholesale vendor of intoxicating liquors is bound to take out a license; and now, the only preliminary for the taking out of that license is the payment of the fee fixed by the Quebec license law.

I would further add, that the government of the province of Quebec is of opinion that total prohibition is the cessation of trade and commerce in a certain article, intoxicating liquors for instance, and that the cessation of trade and commerce in that certain article must necessarily be regulating trade and commerce, and that, consequently, total prohibition by a provincial legislature is *ultra vires*. I cover by those words the prohibition of manufacture and importation.

The learned counsel for the province of Ontario claim that there is no difference between wholesale and retail as to licenses under municipal institutions. The government of the province of Quebec, in the past legislation which has been adopted, and which is still in force, has not adopted that view of the question. It being a matter of the regulation of trade and commerce the provincial legislature thinks it has no right to totally prohibit the manufacture or importation of intoxicating liquors. We do not claim that right before this court now, nor do we claim the right of prohibiting the wholesale sale of spirituous liquors, thinking that that also would be regulating trade and commerce, which is not within the purview of the powers of the local legislature.

We consider that the retail prohibition of the sale of spirituous liquors is rather in the nature of a municipal regulation, within the powers of the local legisla-

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ture. As I before stated, the power of prohibiting the retail sale of spirituous liquors we have claimed in the past, and have enacted legislative provisions to enforce such retail prohibition in whatever municipalities wish to do so. We still claim that we have the power to do so in the future.

Wallace Nesbitt for the Brewers and Distillers Association :—

As I understand the principle of construction that has been adopted, both by your Lordships' court and by the Privy Council it is, first to inquire whether the particular matter falls within the exclusive jurisdiction of the province because, if your Lordships find that it does not fall within any of the specially enumerated clauses of section 92, then, so far as these questions are concerned, the court is done with it. For that canon of construction I refer to *Russell* v. *The Queen* (1).

Then the next canon of construction to which I ask your Lordships' attention is this: If it fall within any of the classes enumerated in sec. 92, then the further question would arise, viz., whether the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and so does not still belong to the Dominion Parliament.

A further canon of construction has been laid down in *Atty. Gen. of Ontario* v. *Atty. Gen. of Canada* (1), and in *Tennant* v. *Union Bank* (2). If it falls within section 91 and you find it legislated upon, then this follows:—That although it may be within section 92, if it has already been legislated upon by the Parliament of the Dominion, under section 91, then the local legislation is of no effect.

Now, I take the canons of construction, as laid down in the Privy Council up to date, to be these: First, you

(1) 7 App. Cas. 829.
(2) [1894] A. C. 31.

(1) [1894] A. C. 189

are to look at the character of the legislation and see if it comes within section 92. If it comes within section 92 you may legislate, subject to this, that if it is inconsistent in the slightest degree with ancillary legislation under section 91, then the legislation of the local must go. Lastly, until it conflicts, either with ancillary legislation, or direct legislation, it may be good under a certain aspect of section 92. If I am correct in that the following result is patent:—If this is really prohibitive legislation that you are asked to pass upon, and it does not fall within any one of the sections of 92, then my task is done; but, supposing your Lordships do not follow me to that extent, if I am able to demonstrate that it conflicts with legislation as to which the Dominion Parliament has a power to legislate, even ancillary legislation, if I may so describe it, and that the Dominion has already taken up the field, then again my task is accomplished, and all these questions must be answered in the negative.

My first proposition therefore, is, that this does not come within section 92 in any particular, under any one of the heads, that it is in fact prohibitive legislation that your Lordships are asked to say the provinces are entitled to pass. If I am right in that, and it does not come under section 92, as I say, I am through; but, I go a step further, and say, even if it could be said to be under sec. 92 it conflicts directly with a piece of legislation which has already been declared to be valid by the Privy Council, which is in force, viz., the Scott Act, and the two cannot consistently stand together.

Now, *Russell* v. *The Queen* (1) decides that prohibition belongs to the Dominion, *Hodge* v. *The Queen* (2) that licensing belongs to the province, and the McCarthy Act case that neither one conflicts with the other, but that the McCarthy Act was simply a piece of legislation

(1) 7 App. Cas. 821. (2) 9 App. Cas. 117.

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of the type and character, if I may so describe it, of a licensing Act, and was therefore *ultra vires*, because it conflicted with the exclusive power which was granted to the legislatures.

Then, if the provinces claim also a field of legislation as to that, we say it has already been taken up with the Scott Act.

Now, if the Privy Council has decided anything it has decided this, that there can be no line of demarcation drawn between wholesale and retail. Therefore what you are asked to decide here is: Can they pass a prohibitive law? Your Lordships are not asked to say whether they can pass a retail prohibitive law. That is not the question submitted. Dealing with question 1, it is a prohibitive law, as such, irrespective of quantity, and as such, we ask your Lordships' answer.

Then that brings me to the particular argument as to whether this in fact does come within any of the clauses of section 92.

Mr. Justice Burton, in the Local Option Case, said that the sub-head of "municipal institutions" had never been drawn to their Lordships' attention. All I can say in answer to that is, that in the McCarthy Act case their Lordships of the Privy Council say that they think the subject of "municipal institutions" has nothing whatever to do with the subject of prohibition.

For the purpose of this argument there can be no distinction between wholesale and retail. The provinces have not the power to prohibit retail traffic, and cannot create the power by saying it is part of "municipal institutions," because it only relates to a bottle. It must, in the same way, relate to fifty gallons or fifty barrels, if it is part of municipal power. I submit, therefore, that the effect of the British North

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America Act upon that is simply this, that under the head of "municipal institutions," subsection 8 embraces everything which inherently belongs to municipal institutions, not inconsistent with the power assigned to the Federal Parliament under section 91.

Then when you find the Privy Council, in express words, saying in *Russell* v. *The Queen* (1) that this prohibition legislation does not fall within section 92, when you find their attention drawn expressly to subsection 8 in *Hodge* v. *The Queen* (2), and they again affirm *Russell* v. *The Queen* (1), and still again in the McCarthy Act Case, surely it cannot be said that in their Lordships' opinion, under "municipal institutions," anything in relation to prohibition of the liquor traffic could be said to come. Then, if it does not come under that head, I do not understand it is pretended it can come under any other head of section 92, and that of course would relieve me from following the discussion any further, as to the right of the local to pass a prohibitive law.

If a province can pass prohibition it can, in effect put a tax upon other provinces, because it destroys the ability to raise a revenue by the Dominion, and therefore it becomes interprovincial, as a matter of trade and commerce. Take, for instance, the illustration given by one of your Lordships this morning, supposing all the distilleries and breweries in this province were to be closed by prohibition, absolutely closed, they could neither manufacture nor sell, because it is that broad class of legislation that you are asked to deal with, if such a course were adopted the result would be, that the taxes or revenue would have to be raised in some other way, and the other provinces would, either directly or indirectly, have to contribute to the general deficit that would occur.

(1) 7 App. Cas. 829. (2) 9 App. Cas. 117.

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We can also invoke what is called the historical argument on the subject of the liquor traffic, and I submit that you find in that very section 92 the liquor case expressly dealt with by subsection 9. Therefore, it is only fair to assume that all that was delegated to the local legislatures was that which was expressly delegated by the very words, viz., the regulation of the traffic, by the licensing of shops, saloons, taverns and so on. Is that not a fair argument? If you find they give express power on the subject of liquor, is it fair to ask under some other term, as to which it cannot be said to be inherently connected, an implied power to be given beyond the express power of section 9?

I would refer to the cases of *Bennett* v. *Pharmaceutical Society* (1); *The Queen* v. *Justices of King's* (2); *Re Barclay* and *The Township of Darlington* (3); *Re Brodie* and *Bowmanville* (4); *Ex parte Cooey* (5).

[The learned counsel then argued that the right was with the Dominion as a "regulation of trade and commerce."]

Saunders follows on the same side:—I propose to deal in the brief argument which I shall address to your Lordships, solely with question no. 7, which has been before this court in the case of *Huson* v. *The Township of South Norwich.*

Question no. 7 purports on the face of it to deal with only retail trade, but, according to all the authorities that have been cited, there is no distinction between wholesale and retail as to this question. This must be so for it would be impossible to define what is wholesale and retail. There is no harmony on the matter in the legislation of the different provinces or even in different legislative acts of the same province.

(1) 1 Dor. Q. B. 336.
(2) 2 Pugs. 535.
(3) 12 U.C.Q.B. 91.
(4) 38 U.C. Q.B. 580.
(5) 21 L.C. Jur. 182.

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Therefore, although this question deals with retail, it is illusory, because in dealing with retail it deals with the whole question; and, however question seven is answered, question one must be answered in the same way. That I apprehend would be a sufficient answer perhaps to this point, but I am prepared to go further, and to submit that even if you were prepared to concede absolute prohibition to the province, and the right to control it, still I should be entitled to ask your Lordships to hold that the legislation referred to in question no. 7 was *ultra vires*, because it comes into conflict with the most important provision of the Canada Temperance Act.

[The learned counsel then dealt at some length with the Local Option Act pointing out that it was not in any way ancillary to the Canada Temperance Act but an independent piece of legislation, and the two could not stand together.]

My learned friend Mr. Maclaren, suggests that your Lordships can treat it as a License Act. That, of course, would be perfectly impossible. You cannot alter the character of it by tacking it on to a License Act. The character of this prohibition clause is prohibition. The question was gone over very fully in the McCarthy Act Case, and the Privy Council would not hear of it for a moment.

My learned friend Mr. Nesbitt has already referred to the Quebec cases, and I think it is shown that they do not constitute any sort of guide, because, according to the argument of my learned friend Mr. Cannon, they did what was clearly irregular. While the Dunkin Act was in existence they dealt with prohibition under statutes of their own. The Attorney General of Ontario, no mean authority upon constitutional law, did not do that. In 1874, so soon as he assumed the office of Attorney General, he had that altered. He has re-

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cognized all along the existence of the doubt, which within twelve months he has he has given expression to, as to whether the province of Ontario or any province has the right to pass any prohibition law whatever.

I wish for a moment to refer to the judgment of Mr. Justice Burton, who is perhaps, with the exception of the late lamented member of this court, Mr. Justice Henry, the strongest provincialist we have had upon the bench, and he also concurs in upholding this judgment, and, in the course of it, in order that he might not be misunderstood, he makes use of words, as he says, much against his will, to the effect that it would be utterly impossible to hold that prohibition is in the province.

I have only a few other observations to make in connection with the points that I have already suggested as to the conflict that arises, and it incidentally established another point which is important in this way:— During the course of this argument we have heard a great deal about the pre-confederation argument as to "municipal institutions." It is said that the powers that they exercised before confederation are powers they are still to continue to exercise, unless they are specially transferred to the Dominion Parliament. If there is a conflict, as I say there is, as to cities it follows of course that that contention is unsound. So soon as you begin to apply it, what follows? Why, a conflict of the clearest and most unequivocal kind. If that is not an answer to the pre-confederation argument it seems impossible that any answer can be made. The conflict is clear and distinct. If it produces a conflict it is unsound in principle; if unsound in principle, it cannot be supported.

Just one word with regard to the position taken by the learned Solicitor General. I submit, my Lord, that his position here is untenable. He has either gone too

far or not far enough. The concessions he makes here, and I consider that they are concessions, and nothing but concessions, should not affect this question. The question is, not what he is willing to concede to the provinces, but: What is the strict construction of the British North America Act? And that is particularly necessary in view of the fact that this question is very likely to be carried to the Privy Council. We ask for a strict construction of the British North America Act, because if they are merely concessions made these concessions could of course be withdrawn. Independent of these concessions we ask for a strict construction of the British North America Act. We think it is of the greatest importance not only respecting our client, but in the public interest. The concessions which the learned Solicitor General has thought fit to make, if they are concessions, should have nothing whatever to do with the matter.

The Solicitor-General.—I desire to say one word as to the very important statements made by my learned friend Mr. Nesbitt regarding the action or intention of the legislature of the province of Quebec, concerning the Dunkin Act, in which he has been entirely misled by the interpretation which he has given to the judgments referred to, amongst others the judgment in the case of *Ex parte Cooey* (1). The opposite is exactly the fact, and it is most important to note it.

The court in that case held that the provisions of the Temperance Act of 1864 had not been repealed or amended by the Municipal Act, or the subsequent legislation so as to prevent enactment of a by-law thereunder for the sale of intoxicating liquors, or to prevent prohibition, but pointed out that the legislature had shown its authority by interfering most directly and legislating most clearly upon very many of the most

(1) 21 L. C. Jur. 182.

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important sections of the Dunkin Act. There is another holding, that the regulation of the traffic in intoxicating liquors is within the jurisdiction of the Parliament of Canada. My learned friend in his main argument the other day went on to quote from the Canada Temperance Act to show that the Dominion Parliament had undertaken by that to say that sections 1 to 10, both inclusive, of the Temperance Act of 1864, were repealed as to every municipality, and so forth, and he argued that no exception having been taken it was a concession, on the part of all concerned, that the Dominion Parliament had the right.

But in 1870, two or three years after confederation, the province of Quebec had already enacted exactly the same thing, that is to say, by subsection 12 of section 197 of the License Act of the province of Quebec, it was decreed that the act 27 & 28 Vic. ch. 8, should be repealed. If your Lordships will refer to the Revised Statutes of the province of Quebec, you will find that statement made. I refer to vol. 2, appendix A, 27 & 28 Vic. sections 1, 10, 37, 38, 50, 51 and 53. These are all important sections of the Canada Temperance Act (the first Canada Temperance Act), which was the Act of 1864, known as the Dunkin Act, which were not only interfered with, but have actually been repealed, by the legislature of the province of Quebec, and it is the universal holding that our provincial authorities have all the powers that were granted under that Act, and they may either repeal them or leave them in force, or re-enact them if they have been repealed. I have just made that little digression, because I wished to correct what I thought was a false impression at the time made by my learned friend, no doubt, simply by taking the instructions from the statutes that he had quoted instead of referring directly to the repealing section of the statutes themselves.

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The province of Quebec is with the position assumed by the Dominion of Canada upon all points except one, that is to say, who shall have the right to determine what is wholesale and what is retail. My learned friends from Ontario, of course, differ from us on the point I have just mentioned. The question of wholesale and retail is one that has occupied the attention of the legislatures from the time the first Act was passed. From the very first Act that was passed until the last, which resumed pretty much all the former legislation, they all contained provisions defining the difference between wholesale and retail.

To sum up, I contend, first of all, that the Dominion has power to pass a general law for the peace, order, and good government of the Dominion, such as the Canada Temperance Act. That has been decided. The licensing power has been determined as being in the hands of the provinces. But the question of prohibition, either partial or total, has never come up yet; and the important point, I think, to be determined is that one point, as to where the power lies to fix the difference between wholesale and retail.

The Dunkin Act has been referred to here, and its bearing upon this question is extremely forcible. We can look at it to see what were the extraordinary powers exercised at that time by the municipalities of the province of Canada.

If the legislature of the province which had absolute power to pass a prohibitory by-law, in so far as the retail trade is concerned, were to pass legislation of that kind, and the Dominion Parliament, under its general power which has been granted to it for the peace, order and good government of this community, were to pass a general law, would that kill the local act? Supposing that a legislature had passed an Act within its power for prohibition, would that, as my

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learned friends here contend, render that law of the legislature a nullity? Not at all. It might cause it to be dormant. The superior power, having passed a law which necessarily would come into effect for the peace, order and good government of the country, according to the judgment rendered in *Russell* v. *The Queen* (1), that law would extend its influence, and its effect, over the whole Dominion. But supposing that two or three provinces of the Dominion, by concentrating the votes of their representatives in Parliament, were to secure the repeal of the whole of that legislation, would the province where the former legislation had passed be deprived of the expression of the will of the people, having perhaps, in the Dominion Parliament, through its representatives voted against a repeal of the law? Would not that law which already was on the statute-book, which remained dormant, just as the by-law I have referred to in the Dunkin Act, not revive again, in so far as the local matters of that province were concerned? I contend that it would, and that no logical reason can be advanced to the contrary.

Dealing now for one moment again with the question of concurrent jurisdiction, which my learned friends here scout, I think that looking not only at the British North America Act, but at the judgments that have been rendered, that over and over again it has been held, as it must be, that there are special powers confided to each, and concurrent powers, and that sometimes the exercise of one power must over-ride the other. I will just refer your lordship to a case of *Coté* v. *Paradis*, in the Court of Queen's Bench (Quebec) (2), in 1881, and what was there held.

Then what has happened in our own country? When the insolvency legislation which began under the Abbott Act was all swept away, some time about

(1) 7 App. Cas. 829. (2) 1 Dor. Q.B. 374.

1878, I think, the provincial legislation revived, and has been in force ever since, and has been changed and modified from time to time by the province of Quebec and other provinces.

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In conclusion, I will remark that the learned counsel for the brewers and distillers, whom I have listened to with a good deal of attention, and who have certainly put a great deal of learning into their arguments, have put this difficulty before the court:—They say, look at the effect upon the revenue; look at the provisions which were made by the British North America Act, and the obligations that were entered into upon one side and the other. Are they to be upset by prohibitory legislation, such as it is said the provinces have a right to pass? It would prohibit the right of the Dominion to levy money, and where are the funds to come from to meet these obligations they have contracted towards the provinces? All that, no doubt, presents a difficulty, but it is not one that can influence this court for one moment, because, if the Dominion were to exercise the power which these learned gentlemen say it undoubtedly has, of passing the general prohibitory law, which we all admit it has, to strike out the manufacture, the importation, and sale generally of intoxicating liquors, that would interfere with the right of the provinces to levy, by way of license, and so forth, direct taxation. But that would have simply to go by the board. New arrangements would have to be made by the legislatures and parliament. They would have to face a new state of affairs. That, I contend, is no argument at all, and cannot affect for one moment the principle that is at stake in this discussion. And if the legislature cripples to some extent the Dominion, the Dominion on the other hand, by exercising its still larger power, may destroy, to a very great extent, and perhaps entirely, the principal source of revenue of the

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province. That being the case, the people of Canada, through their representatives having exercised their indubitable right, those who are charged with the administration of public affairs as statesmen will have to face the new difficulty, and solve it, as they have other things in the past.

THE CHIEF JUSTICE.—My reasons for the foregoing answers will appear from my judgment in *Huson* v. *South Norwich* (1). I have only to add that I do not think any statutory definition of the terms "wholesale" and "retail" is requisite, but if legislation is required for such purpose it is vested in the Dominion as appertaining to the regulation of trade and commerce.

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

FOURNIER J.—I concur in the conclusions arrived at by the Chief Justice of this court, and adopt his answers to the seven questions submitted.

GWYNNE J.—[After stating the questions submitted His Lordship proceeded as follows:]

In construing the language of the British North America Act of 1867 defining the jurisdiction of the Dominion Parliament and of the provincial legislatures we must never lose sight of the fact that this language is that of the resolutions adopted in 1864 by the provincial statesmen assembled in Quebec by the authority of

(1) See ante p. 145.

Her Most Gracious Majesty for the purpose of framing the provisions of a constitution for federally uniting the British North American provinces into one government under the British Crown and that the British North America Act was passed merely for the purpose of giving legislative form to the terms and provisions of a treaty of union between the respective provinces forming the confederation and the Imperial Government, as such terms and provisions are expressed in the resolutions adopted by the framers of the constitution and by the respective legislatures of the provinces of Canada, Nova Scotia and New Brunswick, and by the Imperial Government. So likewise must we keep ever present to our minds the fact that the main object of these provincial statesmen, who were the authors and founders of our new constitution, in framing their project of confederation, was to devise a scheme by which the best features of the constitution of the United States of America, rejecting the bad, should be grafted upon the British constitution; and to vest in the provincial legislatures exclusive jurisdiction over all matters of a purely provincial, local, municipal and domestic character, and in the general or central legislature exclusive jurisdiction over all matters in which, as being of a general, quasi-national and sovereign character, the inhabitants of the several provinces might be said to have a common interest distinct from the particular interest they would have in matters affecting the local, municipal and domestic affairs of the particular province in which each should reside.

That this was the main design of the scheme of confederation proposed by the framers of our constitution, and as intended by the resolutions adopted by them, is abundantly apparent from the speeches accompanying the submission of the resolutions to the legislatures of the provinces for their adoption. The late Sir John

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Macdonald, the chief of the provincial statesmen engaged in framing the resolutions, when presenting them to the legislature of the province of Canada for their adoption, says:

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

And again:

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

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

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

And again:

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

And again:

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

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

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

And again:

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

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

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

And again he said that:

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

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

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

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

I have already declared in my own name and on behalf of the Government that all the delegates who go to England will accept from

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the Imperial Government no act but one based upon the resolutions if adopted by the House and will not bring back any other.

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

In Her Majesty's address to both houses upon the opening of parliament in February, 1867, she was pleased

to refer to the proposed scheme of confederation in the following manner :—

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

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

I now pass to that which is perhaps the most delicate and most important part of this measure, the distribution of powers between the central government and the local authorities; in this I think is comprised the main theory and constitution of federal government; on this depends the principal working of the new system.

And again:

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

And again:

In this bill the division of powers has been mainly effected by a distinct classification; that classification is four-fold: 1st. Those subjects of legislation which are attributed to the central parliament ex-

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clusively; 2nd. Those which belong to the provincial legislatures exclusively; 3rd. Those which are the subject of concurrent legislation; and 4th. A particular subject which is dealt with exceptionally.

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

> There is as I have said a concurrent power of legislation to be exercised by the central and the local parliaments. It extends over three separate subjects—immigration, agriculture and public works.

Then in reply to a question asked by a noble lord, whether by the terms of arrangement that had been come to, Parliament was precluded from making any alteration in the terms of the bill?

He said that:

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

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

From the above extracts it is apparent that that Act is but the reduction into legislative form of a treaty, after the fullest deliberation previously agreed upon between the provincial statesmen who where the originators and framers of the scheme of confederation contained therein and Her Majesty's Imperial Government, and such being the history of the origin of the scheme and of the treaty of union and of its embodiment

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

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

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

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

Then follow twenty-nine items, the second of which is:

> The regulation of trade and commerce.

The section then closes with this provision:

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

It has been sometimes, and still is by some, suggested that this provision refers grammatically only to item 16 of sec. 92; but this is a too critical construction of the Act, for what the enactment plainly says is that any matter coming within any of the classes of subjects enumerated in sec. 92 shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act exclusively assigned to the legislatures of the provinces, thus, as I submit—and if I may be permitted the expression—explicitly implying that, as the fact in truth appears to me to be, all the matters exclusively assigned to

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the provincial legislatures by the enumeration contained in section 92 were (within the intent of the framers of the scheme of confederation and so within the meaning of the British North America Act, 1867) of a purely local and private nature, that is to say, of a purely provincial, municipal and domestic character as distinguished from matters of common import and general interest to the people of the confederacy as a whole. The true effect of this provision in section 91 is plainly, as it appears to me, to give expressly to the Dominion Parliament, for the purpose of exclusive legislation upon all matters coming within the several subjects enumerated in section 91, legislative power, if required, over all of the subjects enumerated in the 16 items of section 92, every one of which relates to matters of a purely provincial, municipal, private or domestic character, that is to say, "of a local and private nature," so that legislation by the Parliament upon any of the subjects comprehended within any of the items enumerated in section 91 may be complete and effectual notwithstanding that for such purpose interference with some or one of the subjects comprehended in the enumeration of subjects in section 92 should be necessary, and such interference by the Dominion Parliament with any of the subjects enumerated in section 92 shall not be deemed to be an encroachment upon or interference with the legislative powers conferred upon the provincial legislatures.

Now according to the canons of construction as laid down by this court in *Fredericton* v. *The Queen* (1) and by the Judicial Committee of the Privy Council in *Russell* v. *The Queen* (2) (between which I do not find there is any substantial difference) if the jurisdiction to prohibit absolutely the carrying on of the trades under consideration, or of any trade,

(1) 3 Can. S. C. R. 505. (2) 7 App. Cas. 829

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whether by retail or wholesale, is not comprised in some or one of the items enumerated in sec. 92 of the act the provincial legislatures have no such jurisdiction, but the same is expressly and exclusively vested in the Dominion Parliament; and even though a particular subject of legislation may be capable of being construed to come within sec. 92 reading that section by itself still if that subject comes within any of the items enumerated in sec. 91 it is taken out of the operation of sec. 92 which in such case is to be construed as not comprehending such subject.

Now the several questions in the case submitted to us are resolvable into this one, namely: Is jurisdiction to prohibit absolutely the manufacture in any province of the Dominion of Canada, or the importation into the province, or the sale therein either by wholesale or retail, of spirituous, fermented or other intoxicating liquors vested in the Dominion Parliament or in the legislatures of the respective provinces? In *Fredericton* v. *The Queen* (1) this question directly arose and the judgment of this court therein proceeded upon two grounds. 1st, that the provincial legislature had no jurisdiction over any subject matter not coming within some or one of the classes of subjects specially enumerated in sec. 92 of the Act and that upon principle and the authority of the judgment of the Supreme Court of the province of New Brunswick in the *Queen* v. *The Justices of King's County* (2), which judgment this court approved of and affirmed, the subject of absolute prohibition of the sale of intoxicating liquors (such being the character and purpose of the Act then under consideration) did not come within any of the classes of subjects particularly enumerated in, and contemplated by, sec. 92 as being placed under the jurisdiction of the provincial legislatures; and 2nd, that jurisdiction over such

(1) 3 Can. S. C. R. 505. (2) 2 Pugs. 535.

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subject, that is to say, absolute prohibition of the trade in intoxicating liquors was expressively and exclusively conferred upon the Dominion Parliament by the 91st sec., item no. 2. In *Russell* v. *The Queen* (1), wherein the same question arose as in *Fredericton* v. *The Queen*, (2) the Judicial Committee of the Privy Council, while proceeding wholly upon the first of the above grounds, guard themselves from being considered as dissenting from the second ground, upon which this court proceeded in *Fredericton* v. *The Queen* (2), as follows:

> Their Lordships having come to the conclusion that the act in question does not fall within any of the classes of subjects assigned exclusively to the provincial legislature, it becomes unnecessary to discuss the further question whether its provisions also fall within any of the classes of subjects enumerated in section 91. In abstaining from this discussion, they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges who held that the act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subjects "the regulation of trade and commerce" enumerated in that section, and was on that ground a valid exercise of the legislative power of the Parliament of Canada.

It has, however, frequently been and still is contended by some, but in my opinion without any sufficient grounds, that there are passages in some of the judgments of their Lordships of the Privy Council upon the construction of the British North America Act, 1867, which tend to the conclusion that the judgment of this court in *Fredericton* v. *The Queen* (2) cannot be sustained upon the second of the above grounds upon which this court proceeded, namely, that the Act under consideration there being for the absolute prohibition of the trade in intoxicating liquors (although by adoption of the principle of local option) was within the exclusive jurisdiction of the Dominion Parliament under sec. 91 item no. 2 of the British North America Act which enacts that "notwithstanding anything in

(1) 7 App. Cas. 829. (2) 3 Can. S. C. R. 505.

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the Act the exclusive legislative authority of the parliament of Canada extends over all matters coming within," among other items, that of "the regulation of trade and commerce."

It is true that their Lordships of the Privy Council in the *Citizens Insurance Company* v. *Parsons* (1) upon a very different subject from that of prohibition of the exercise of the trade in intoxicating liquors threw out merely the suggestion that possibly the expression "the regulation of trade and commerce" in item no. 2 of sec. 91 may have been used in some such sense as the words "regulations of trade" in the Act of Union between England and Scotland (2), and as those words in the Acts of state relating to trade and commerce, but in construing expressions used in the British North America Act, 1867, we must never, as I have already observed, lose sight of the fact that those expressions are but the embodiment of the terms and provisions of the treaty prepared by the provincial statesmen asembled at Quebec by authority of Her Majesty the Queen, and concurred in by Her Majesty's Imperial Government, for the purpose of federally uniting the British North American provinces into one government, and we must always keep prominently present to our minds that the object of the framers of our constitution in framing its terms and provisions was, as abundantly appears from the above extracted passages from their speeches, to adopt the best features of the constitution of the United States of America, the only federal constitution with which they were familiar, and to which they would naturally look for light as to what they should adopt and what alter or reject, when engaged in the task of distributing the legislative powers between the Dominion Parliament and the legislatures of the confederated provinces. Contemplating, as they

(1) 7 App. Cas. 112.

(2) 6 Anne c. 11.

were, the engrafting of what they considered the best features of the constitution of the United States of America upon the British constitution, for the purpose of framing a federal constitution for the union of the British North American provinces into a confederacy under one central government, it is, to my mind, with great deference I say it, altogether inconceivable that the framers of our constitution should have had present to their minds the Act of Anne, or any act of state of the Imperial Government; neither the one nor the other of these could be expected to throw any light upon the subject in which they were engaged, namely, the distribution of legislative powers between the central or Dominion Parliament and the legislatures of the provinces of the proposed confederacy, while, on the contrary, it was quite natural and to be expected that they should have had constantly present to their minds the constitution of the United States of America, the best features of which they desired to adopt, and to alter or reject those which did not seem to them to be desirable to be adopted. We must therefore, I submit, be excused if we confidently affirm that in making provision for the distribution of legislative powers between the Dominion Parliament and the legislatures of the confederated provinces, and in such distribution making provision that the Dominion Parliament should have exclusive jurisdiction in all matters coming within "the regulation of trade and commerce" in item no. 2 of sec. 91, neither was the Act of Union between England and Scotland, nor any Act of state of the Imperial Government relating to trade and commerce, ever present to the minds of the framers of our constitution, but that what in fact was so present was the constitution of the United States of America, the best features in which they were engaged in grafting upon the British constitution for the pur-

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pose of forming a new and more perfect constitution for the proposed confederacy of the British North American provinces; and that what they intended by the particular expression under consideration was to place "fully and unrestrictedly" (to use the language of the late Mr. George Brown above extracted), unlimited and exclusive jurisdiction in the Dominion Parliament over all matters of trade and commerce in every part of the Dominion, and that what they had in view in so doing was to strengthen the central parliament and to effect thereby an improvement in the constitution of the proposed confederacy over that of the United States of America, the central legislature of which has jurisdiction only over interstate trade and commerce and that with foreign countries. If the framers of our constitution had contemplated conferring upon the Dominion Parliament only such a limited jurisdiction as that possessed by the Congress of the United States they would have had no difficulty, and doubtless would not have failed, in so expressing themselves; on the contrary the language they have used is of a most unlimited character and exhibits no intention of having such a limited construction. No argument in favour of such a limited construction can, I submit, be fairly drawn from the fact that jurisdiction is independently given by items 15, 18 and 19 of section 91, over banking, bills of exchange, interest and the like, which may be said to be matters coming within the classes of subjects coming under the terms "trade and commerce" for this repetition of powers involved in the enumeration of items appears to have been inserted for greater certainty, and there is, I think, an intention sufficiently manifested on the face of the Act, that the enumeration of particulars should not be construed so as to limit and

restrict the operation and construction of general terms in which the particulars may be included.

Then it was contended that a passage in the judgment of the Privy Council in *Hodge* v. *The Queen* (1) is in favour of the contention that the jurisdiction to declare that the trades of manufacturing and that of importing and that of selling intoxicating liquor shall be illegal and shall not be carried on, is vested in the provincial legislatures under sec. 92. If it be, it must be, under the express terms of the Act, exclusively so vested.

Now the passage relied upon in support of this contention is that wherein their Lordships say

> that the principle established by their judgment in the *Citizens Insurance Co.* v. *Parsons* and *Russell* v. *The Queen* is that subjects which in one aspect and for one purpose fall within sec. 92 may in another aspect and for another purpose fall within sec. 91

What this passage conveys simply is that a particular subject matter may have two aspects in which it may be viewed and that viewed in one of such aspects jurisdiction over it may be exclusively vested in the provincial legislatures under sec. 92, and that viewed in the other of such aspects jurisdiction over it may be exclusively vested in the Dominion Parliament, and what I understand their Lordships by that passage to say is that for the purpose of determining whether a particular subject having two aspects in which it may be viewed comes under sec. 91 or sec. 92 regard must be had to the aspect in which the particular subject, for the time being under consideration, is to be viewed, not that a subject which according to the true construction of sec. 91 comes within one of the classes of subjects there enumerated and which is therefore under the exclusive jurisdiction of the Dominion Parliament, by the express terms of this section, can, nevertheless, by force of section 92, be under the jurisdiction of provincial legislatures.

(1) 9 App. Cas. 117.

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

The subject which we have now under consideration is the right of absolutely prohibiting the carrying on of the trades of manufacturing, importing and selling spirituous liquors, the right, in fact, of declaring by legislative authority that these trades, or some or one of them, shall not be carried on; that the carrying of them on shall be absolutely unlawful. This subject does not admit of two aspects. Between pronouncing the carrying on of a particular trade to be absolutely unlawful, and prescribing the manner in which, and the persons by whom, that trade, being lawful, shall be carried on, there is a vast difference. *Fredericton* v. *The Queen* (1) and *Russell* v. *The Queen* (2) are cases dealing with the former of such subjects, and *Hodge* v. *The Queen* (3) and *Sulte* v. *Three Rivers* (4) are cases dealing with the latter. In *Fredericton* v. *The Queen* (1) and *Russell* v. *The Queen* (2) the question was as to jurisdiction in the case of prohibition. In the former of those cases this court held that the provincial legislatures had had not under section 92 any jurisdiction to pass the

(1) Can. S. C. R. 505.
(2) 7 App. Cas. 820.
(3) 9 App. Cas. 117.
(4) 11 Can. S. C. R. 25.

Act then under consideration, the purpose of which was to legislate upon that subject; and that by force of section 91, item 2, the Dominion Parliament had expressly exclusive jurisdiction to pass it. In *Russell* v. *The Queen* their Lordships of the Judicial Committee of the Privy Council, while expressing no opinion as to the applicability of section 91, item 2, held that there was nothing in section 92, conferring on the provincial legislatures jurisdiction to pass the Act in question, the sole purpose of which was in relation to the absolute prohibition of the trade. In *Hodge* v. *The Queen* on the other hand they held that the provincial legislatures had exclusive jurisdiction over the regulation of the manner in which and the persons by whom the trade, being a lawful one, might be carried on, a subject matter as different as it is possible to conceive from jurisdiction legislatively to declare the carrying on of the trade to be absolutely unlawful. Here then we have an illustration of the application of the language of their Lordships in the passage above extracted from their judgment in *Hodge* v. *The Queen*, namely, if we regard the traffic in intoxicating liquor in the aspect of total jurisdiction of the carrying on of the trade, that is to say, eliminating it from the category of lawful trades, in that aspect the jurisdiction is exclusively in the Dominion Parliament; but if we regard it in the aspect of regulating the manner in which and the persons by whom the trade, being a lawful one, may be carried on in a particular province, or a particular locality of a province, that is a subject exclusively within the jurisdiction of the provincial legislatures. Between the judgments in these cases there is no contradiction, nor have I been able to see in any of the judgments of their Lordships of the Privy Council anything which can be said to manifest judicial dissent

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from either of the grounds upon which the judgment of this court in *Fredericton* v. *The Queen* (1) proceeded. It seems however to be a matter of no importance whether the question, as to where is vested jurisdiction over total prohibition of the trade, is rested upon both of the grounds upon which this court proceeded in *Fredericton* v. *The Queen* (1) or upon the single ground upon which their Lordships of the Privy Council proceeded in *Russell* v. *The Queen* (2). The report of the proceedings in the Privy Council of the case of the Liquor License Acts of the Dominion Parliament of 1883 and 1884 which has been laid before us as part of the present case contains observations of their Lordships recognizing the distinction, which I confess to my mind appears very plain, between the right to prohibit the carrying on of a particular trade and so to destroy it and deprive it of lawful existence and the right to regulate the manner in which and the persons by whom the trade, being a lawfully existing one, shall be carried on. Sir Montague Smith there in the course of the argument of counsel said :

> The distinction, if it be one, between the Act in *Russell* v. *The Queen* (1) and this Act (the Act of 1883 then under consideration) is that that (in *Russell* v. *The Queen* (2)) was a prohibition Act applying to the whole of the Dominion regardless of what had been done and prohibiting the liquor traffic. I do not wish to say how it is but the question is whether this (the Act of 1883) is not, whatever terms it may use in the preamble, really regulating in each province the local traffic.

And again:

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

And again :

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

(1) 3 Can. S. C. R. 505. (2) 7 App. Cas. 829

And again:

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

But it is argued that neither in *Fredericton* v. *The Queen* nor in *Russell* v. *The Queen* was the item no. 8 of sec. 92 referred to or considered and that therefore their Lordships' judgment in *Russell* v. *The Queen* and that of this court in *Fredericton* v. *The Queen* are open to review upon the question of prohibition now under consideration. From the fact that this item was not relied upon in those cases it may fairly be inferred that it never was considered by the courts or the bar to be applicable. The jurisdiction conferred by that item seems to be, that of establishing and maintaining municipal institutions. When the framers of our constitution were conferring upon the provincial legislatures exclusive jurisdiction to make laws in relation to "municipal institutions in the province," they had no doubt in view municipal institutions such as existed at the time of confederation, but this item no. 8 sec. 92 says nothing as to the powers

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with which such municipal institutions may be invested; that seems to have been left to the discretion of the provincial legislatures to be exercised within the limits of their own jurisdiction and would reasonably comprehend within such limits all such powers as were then possessed by such municipalities and which were essentially necessary to the good working of such institutions or had always been possessed by all such institutions, as for example the power of issuing licenses to the persons to be engaged in the traffic in intoxicating liquors and the power of regulating the manner in which such persons should carry on the trade in shops, saloons, hotels or taverns, which as being matters of purely provincial, municipal and domestic character were subject to, jurisdiction over which was intended to be exclusively vested in, the provincial legislatures; and this is what *Sulte* v. *Three Rivers* decides and what was intended to be conveyed by the passage from my judgment in that case which was cited by the learned counsel who argued the present case upon behalf of the province of Ontario; but a special power only then recently for the first time conferred upon municipalities in the province of Canada and which had never been conferred upon municipalities in any of the other provinces could never be said to be a power essentially necessary to the good working of such institutions; such power therefore cannot be held to be comprehended in item 8 of that section.

In this subject is involved the particular consideration of the last of the questions submitted to us, namely, whether the 18th section of the Act of the legislature of Ontario, 53 Vic. chap. 56, is or is not *ultra vires*. The jurisdiction assumed to be exercised by the Ontario legislature in this section is not a jurisdiction which is claimed to be conferred upon provincial legisla-

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

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The precise history of the legislation recited in the 18th sec. of the Ontario Act 53 Vic. ch. 56 and upon which the legislature of the province rest the jurisdiction assumed by them in enacting the provisions of that section is as follows: The legislature of the late province of Canada by a special Act passed in 1864, 27 & 28 Vic. ch. 18, conferred power upon the councils of municipalities to pass by-laws in prohibition of the sale of intoxicating liquors within the limits of the municipality, subject to certain conditions involving the adoption of the principle of what is called local option. The provisions of the said Act 27 & 28 Vic. ch. 18 were consolidated in 1866 as sec. 249 subsec. 9 of the consolidated Municipal Act, viz., 29 & 30 Vic. ch. 51. The whole of this section 249 was expressly repealed by an Act of the Ontario Legislature passed in 1869, 32 Vic. ch. 32, but its terms were, either inadvertently or by design, repeated in subsec. 7 of sec. 6 of the latter act. In 1874 the legislature of Ontario passed another Act 37 Vic. ch. 32 intituled "An Act to amend and consolidate the law for the sale of fermented and spirituous liquors," and thereby the said Act 32 Vic. ch. 32, and another Act 32 Vict. ch. 28, and also an Act 36 Vic. ch. 48 intituled "An Act to amend the Acts respecting tavern and shop licenses" were wholly repealed and new provisions were enacted, but among such provisions there was nothing of the nature of the provisions which had been in subsec. 7 of sec. 6 of the repealed Act 32 Vic. ch. 32, but in lieu thereof provision was made for regulating the issue of licenses for the sale of intoxicating liquors in each municipality by an officer to be appointed by the lieutenant governor to be called "the issuer of licenses."

Now, upon and from and after the passing of this Act, the only authority, if any there was, which municipalities in the province of Ontario had, or could claim

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to have, to pass a by-law in prohibition of the sale of intoxicating liquors was in virtue of the provisions of the above recited Act of the legislature of the late province of Canada, 27 & 28 Vic. ch. 18, of 1864, and of sec. 129 of the British North America Act, 1867, which enacted that:

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

It being then only in virtue of this Act, 27 & 28 Vic. ch. 18, that municipalities in the province of Ontario possessed, if they possessed, the power to pass by-laws in prohibition of the sale of intoxicating liquors, such power must necessarily absolutely cease upon the repeal of that Act. But in 1878 the Dominion Parliament, regarding the prohibition of the sale of intoxicating liquors to be a subject over which exclusive jurisdiction was conferred upon the Parliament and in exercise of the right reserved to parliament by said sec. 129 of the British North America Act, passed the Canada Temperance Act of 1878, whereby, as is recited in the said 18th section of the Ontario Act, 53 Vic. ch. 56, the above Act of 1864, 27 & 28 Vic. ch. 18, was absolutely repealed, save as regards localities where the Act had then already been acted upon, and power is conferred by the Act of 1878 upon all electors in every municipality in every province of the Dominion qualified and competent to vote at the election of members of the House of Commons, upon certain conditions, and in adoption of the principle of local option, to prohibit the sale of

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intoxicating liquors in every municipality adopting the provisions of the Act. This Act, as an Act of prohibition, has been held by the Judicial Committee of the Privy Council in England in *Russell* v. *The Queen* (1), and by this court in *Fredericton* v. *The Queen* (2), to have been within the jurisdiction of the Dominion Parliament and not to have been within the jurisdiction of a provincial legislature; the object sought to be attained by the said 18th section of the Ontario statute 53 Vic. chap. 56, would seem to be to re-open the question adjudicated upon in those cases, and mainly upon the suggestion that item 8 of section 92 of the British North America Act was not considered by the Judicial Committee of the Privy Council or by this court in those cases. In my opinion there is nothing in this item no. 8 of section 92 or in any part of the British North America Act which calls for or justifies any qualification of the language of their Lordships of the Privy Council as above cited from their judgment in *Russell* v. *The Queen* (1); and the principle established by that judgment is, in my opinion, that jurisdiction over the prohibition of the trade in intoxicating liquors, whether it be in the manufacture thereof, or the importation thereof or the sale thereof either by wholesale or retail, is not vested in the provincial legislatures, but is exclusively vested in the Dominion Parliament. If the provincial legislatures have jurisdiction to prohibit absolutely the sale of intoxicating liquors it must, I think, be admitted that they have like jurisdiction over the manufacturing, and also over the importation thereof; nay more, as the act gives them no more jurisdiction over the prohibition of the exercise of one trade than of another they would equally have jurisdiction to prohibit the manufacture

(1) 7 App. Cas. 829. (2) 3 Can. S. C. R. 505.

of tobacco, cigars, &c., the importation of opium, and the manufacture, importation and sale of any other article of trade, and so in fact they would have that sovereign legislative jurisdiction over every trade, and over those general subjects in which the people of the confederacy as a whole are interested, and thus the main object which the authors and founders of the confederacy had in view in framing the terms and provisions of our constitution as to the distribution of legislative jurisdiction between the Dominion Parliament and the legislatures of the provinces would be defeated. In addition to the ground upon which their Lordships of the Privy Council proceeded in *Russell* v. *The Queen* (1), this court held, as already observed, in *Fredericton* v. *The Queen* (2) that exclusive jurisdiction over the prohibition of the sale of spirituous liquors which was the subject matter of legislation in the Canada Temperance Act of 1878 was a subject placed expressly under the exclusive jurisdiction of the Dominion Parliament by sec. 91, item 2, of the British North America Act. That judgment has never been reversed, nor, in my opinion, shaken, and while it stands unreversed by superior authority I consider this court to be bound by it. If ever it should be reversed it will in my opinion be a matter of deep regret, as defeating the plain intent of the framers of our constitution and imperilling the success of the scheme of confederation.

Upon the whole then, in answer to the several questions submitted to us I am, for the reasons above stated, of the opinion that upon principle—that is to say upon the true construction of the British North America Act, 1867, apart from all authority—and upon authority that is to say upon the authority of the judgment of the Privy Council in *Russell* v. *The Queen* (1)

(1) 7 App. Cas. 829. (2) 3 Can. S. C. R. 505.

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apart from *Fredericton* v. *The Queen* (1) and upon the authority of the judgment of this court in *Fredericton* v. *The Queen* (1) apart from *Russell* v. *The Queen* (2), the several questions submitted to us in this case must be all answered in the negative.

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

When a general subject is assigned to one legislature, whether federal or provincial, and a particular subject, forming part or carved out of that general subject, is assigned to the other legislature, the exclusive right of legislation, in respect to the particular subject, is with the latter legislature. For example, Parliament has marriage, but the legislatures have the solemnization of marriage. On that subject they are paramount and supreme. So, too, the legislatures have "property and civil rights," words in themselves as wide almost as the whole field of legislation; but, parcelled out from that wide field, Parliament has a number of particular and specific subjects where it likewise is paramount and supreme. Among them is "the regulation of trade and commerce." So far Parliament has complete and exclusive jurisdiction as to that. But we have to go farther. We have to turn again to section 92, and we find that "shop, saloon, tavern, auctioneer and other licenses," a subject carved out of "trade and commerce," is given to the legislatures. If the principle above enunciated is sound, then Parliament can only regulate the liquor trade or legislate in respect to it, subject to the paramount and controlling right of the local legislatures in respect to liquor licenses for revenue purposes. The enumeration and assigning of

(1) 3 Can. S. C. R. 505. (2) 7 App. Cas. 829.

the particular subject to the one body overrides and controls the other body, although charged with the general subject, and that, too, without reference to the question of subordination or co-ordination between the two bodies.

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

Can a local legislature absolutely prohibit the traffic in intoxicating liquors? That is the substantial question before us. The correct solution of the problem is largely affected (although not concluded) by the meaning that is to be given to the words "the regulation of trade and commerce" in section 91. That these words in their plain and ordinary meaning are wide enough to include the liquor traffic is unques-

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tioned; the making of liquor, its sale, that is a trade or business, the dealing in it, the buying and selling of it for purposes of profit, that is commerce. But was this particular trade, the liquor business, intended to be included in the general words? That is the question. And as I have already suggested, the true answer is to be sought not so much from the rules of statutory construction laid down in the text books in regard to ordinary enactments, as by reference to provincial statutes and jurisprudence at the time of the union, and to the circumstances under which that union as well as its particular character took shape and form

It was in 1864 that the Quebec convention was held. Upper and Lower Canada, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland were represented. The Quebec resolutions were passed, and these resolutions having been adopted by the three legislatures of Canada, Nova Scotia and New Brunswick formed the basis of the Union Act of 1867. The union was a federal not a legislative union. The English speaking provinces (considering Upper Canada as a province) were in the main in favour of a legislative union, but Lower Canada properly tenacious of "its language, its institutions and its laws," secured as they had been by international treaty and imperial enactment, desired a provincial legislature in order to the perpetuity of these rights, rights which it was thought might be invaded were they to be left to the mercy of a sovereign and untrammelled legislature, the large majority of which would necessarily belong to the English speaking race. And so the question was, a federal union or none at all. That being decided the question of distribution of powers arose. To what powers shall the federal Parliament succeed, what powers shall the provincial legislatures retain? The

American civil war was just closing, a conflict which from a legal standpoint had its origin in a dispute as to the constitution of the United States, the question of State rights; that controversy was not to be a ground of strife in the new nation and so first and foremost it was agreed that the central parliament was to have plenary legislative authority and that the local legislatures should have jurisdiction over such subjects alone as were expressly enumerated and in terms assigned to them. I have said that the Lower Canadian delegates were determined to maintain their peculiar institutions by means of a local legislature; but they were none the less desirous of giving the central authority all jurisdiction compatible with that determination, including generally those subjects that would be common to the whole Canadian people irrespective of origin or religion. Now the English criminal law was the law of Lower Canada; it had become part of that law in 1764; and Lower Canada was satisfied with it. It would therefore be the common heritage of the new Dominion, and by common consent it was given as a subject of jurisdiction to the central Parliament.

Then, too, the Lower Canadian legislature and people had long previously adopted of their own free will the general principles of English commercial law. As early as 25 Geo. III, they had made the laws of England the rules of evidence in all commercial matters. They had adopted, practically without variation, the English law respecting bills of exchange and promissory notes, partnerships, the limitations of actions in commercial cases and even the statute of frauds. In 1864 they had accepted a general law of bankruptcy limited, however, to traders only, and had previously adopted the practice of the English courts in the trial of commercial cases. Commercial law was not in that

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class of "institutions and laws" which they regarded as peculiarly their own, and they were willing and anxious, seeing how the future progress and prosperity of the country would largely depend upon its trade and commerce, upon the growth, manufacture and interchange of commodities throughout the whole Dominion, irrespective of and untrammelled by provincial boundaries or provincial enactments, that the federal parliament should alone legislate in respect thereto, so that as there would be a common criminal law throughout Canada there should be a common commercial law as well. And that was in fact the common aim and object of all the provinces. But how give expression to this aim? In making that clear what form of words should be used? A question not difficult of solution.

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

Reading this classification in the three volumes referred to and comparing it with sections 91 and 92 indubitable evidence will be found that the compilers of the Quebec resolutions were largely aided by the work of 1859, in the selection of words by which the distribution of powers was described. The language of a

large proportion of the 45 enumerated subjects is substantially identical with the language of the classification in the Canadian consolidation.

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

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

In the Revised Statutes of New Brunswick of 1854 there was practically the same classification. Under

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"the regulation of trade in certain cases" were included statutes relating to lime, bark, flour, weights and measures, and lumber, the Interpretation Act (cap. 161 sec. 35) enacting that parts, titles, &c., should be deemed as parts of the statutes.

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

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

Such being the state of the existing legislation and the view that the different legislatures had of the all-inclusiveness of the phrases "trade and commerce"

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and "regulation of trade," what better collocation of words could be used for the purpose of making it clear that Parliament was to have exclusive jurisdiction in all matters relating to trade and relating to commerce, including the importation, manufacture and sale of all kinds of commodities, than that combination of the two phrases, the one from the sea board, the other from the inland provinces, to be found in sec. 91 "the regulation of trade and commerce"? And the words having that meaning, having been placed there for that object, are we not bound to give them the intended effect?

I am not attempting to even criticise the correctness of the conclusion to which their Lordships of the Privy Council came in *Citizens Ins. Co.* v. *Parsons*. I may be permitted, however, with all deference, to suggest that some of the considerations to which I have referred were not presented to their Lordships when the effect of the words under review was being discussed (1). All I suggest is that, inasmuch as the British North America Act was an Act materially affecting, modifying, repealing, pre-existing Canadian statute law, and revolutionizing the constitution of the component provinces, in interpreting that Act reference may and must be had to provincial statute law, rather than to imperial statute law, and that where, as in the present case, the constitutional Act uses a phrase which for years had had a well defined meaning in Canadian legislation, that is the meaning which should be given to it when used in that Act.

And I have this further observation to make. The judgment referred to contains the following: "If the words (trade and commerce) had been intended to have the full scope of which, in their literal meaning, they are susceptible, the specific mention of several of the

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

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other classes of subjects enumerated in section 91 would have been unnecessary; as "15 banking, 17 weights and measures, 18 bills of exchange and promissory notes, 19 interest, and even 21, bankruptcy and insolvency."

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

Besides, in Lower Canada, there had been a long course of jurisprudence as to what constituted "a commercial matter." Some business transactions were held to be commercial matters, others not. In a dispute between an officer of the British army and his wine merchant, a promissory note given for a wine bill was held to be a non-commercial matter. So, I suppose, interest on such a note would be held to be non-commercial. Nor would the case be altered if the note were discounted at a bank. All these questions, and difficult and important many of them have been, were wisely ended, so far as the constitution was concerned, when banking, bills and notes and interest were expressly given to the Dominion. So, too, with weights and measures

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the duty of making by-laws, or enforcing statutes in respect to weights and measures was in some cities and provinces under municipal control. The question would be, is this subject a "matter of trade and commerce," or a municipal matter? Its insertion in 91 settled it. And lastly as to bankruptcy and insolvency. This subject was wisely inserted in 91 in view of the fact already pointed out that in Lower Canada bankruptcy legislation applied to traders only (the phrase "insolvent" being limited in its use to non-traders) and in view too of the further fact that in the jurisprudence of the United States where the constitution gave "the matter of bankruptcies" to congress, it was held that "insolvency" belonged to the state legislatures. The insertion of both in 91, settled for Canada that particular question.

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

Assuming however, that the prohibition of the liquor traffic is a matter of "trade and commerce," the question is not ended. "Property and civil rights" is controlled by the "regulation of trade and commerce," but is there anything in section 92 which controls or modifies "trade and commerce"? In my view there is much. First, there is "direct taxation within the province in order to the raising of a revenue for provincial purposes." That involves the right of taxing, even unto death, institutions incorporated under Dominion law (as was decided by the Privy Council in the Lambe case (1), such institutions obtaining corporate rights in all cases excepting banks, not because of any express

(1) *Bank of Toronto* v. *Lambe* 12 App. Cas. 575.

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powers given to Parliament, but either under "trade and commerce" or under its general authority to legislate in respect to "peace, order and good government," it being clear that the legislatures may incorporate such companies as are formed for provincial objects only (article 11).

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

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

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

Except for the decision of the Judicial Committee in *Russell* v. *The Queen* (1) (the Scott Act case), much might be said to favour the view that the right of the

(1) 7 App. Cas. 829.

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legislatures to regulate the liquor traffic for revenue purposes was unlimited and could not be taken away by virtue of anything in 91, whether "peace, order and good government," or "trade and commerce," or even "the criminal law"; that the central Parliament could not, by virtue of any of its powers, destroy a special power given to the local legislatures for a special and particular purpose, and that the Scott Act itself was an infringement of the provincial rights.

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

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

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The view which has pressed itself upon my mind is that prohibition may be a question of that character, but as it was not so held in *Russell* v. *The Queen* (1), and as it does not substantially affect the result of this reference, I take it for granted that the fallacy to which I have referred is not an element in the present case.)

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

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

Such was then the state of the law, but some historical facts may also be mentioned as having relation to the matter. The question of prohibition had then for years been a vital political question in the maritime provinces; the public mind had been in a perpetual state of turmoil about it, the ablest statesmen of the time had been in public antagonism over it; elections had been won and lost upon it. For two successive

(1) 7 App. Cas. 829.

years prohibitory legislation had been introduced in the Nova Scotia legislature, and a bill of that character was on one occasion successfully carried through the lower house. In New Brunswick a prohibitory law had actually passed and remained in operation for a year. It was then repealed with a reversion to license law. Such then was the attitude of the public mind in two of the three confederating provinces at the time of the union.

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

And the argument in the present case is that because at the time of the union one of the three provinces had given the right of local prohibition to municipalities it must be assumed that the framers of

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

(*a.*) The question of the liquor traffic was dealt with, and I think disposed of, by article 9 in relation to licenses. In the Quebec resolutions and in the proceedings of the three assenting legislatures, the article read "shop, saloon, tavern, auctioneer and other licenses" only; the limitation as to revenue was an addition made in London, with the assent of the colonial delegates there, just before the Act became law (1). The article as first framed would have had a much broader application than it has in its present shape, and possibly might have given prohibitory powers to the legislatures, and I can only suggest that the limitation was imposed for the very purpose of clearly limiting the provinces to regulation only. Besides, if the right to prohibit as well as to regulate is involved in "municipal institutions," if that phrase includes all powers previously given municipalities, including the issuing of all the licenses referred to in article 9, why particularly specify these licenses in a separate article?

(1) See Pope's life of Sir John Macdonald, Appendix vol. 1.

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I have always understood it to be a rule of statutory construction that where special provisions are made in regard to a particular matter and there are in the same statute general provisions broad enough apparently to cover the same matter, the special provisions govern, not the general; the particular intent prevails (2).

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

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

(*d.*) The jurisprudence on the question also throws light. In *Keefe* v. *McLennan* (1) decided in Nova Scotia in 1876, nine years after confederation, a most able judgment was delivered by the learned Equity judge upon the whole question, and neither in the argument, nor in the judgment was it even suggested that the

(1) 2 R. & C. 5.

(2) Potter's Dwarris 272–3; and see *London Assoc. of Ship Owners* v. *London & India Docks Joint Committee*, Lord Justice Lindley 2 Rep. at pp. 30 and 31.

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power claimed came under "municipal institutions." The same observation applied to *Fredericton* v. *The. Queen* in the Supreme Court of New Brunswick (1).

Why this long silence? The words "municipal institutions" were there in section 92, as prominent then as now, but no one in the maritime provinces ever dreamed that "prohibition" was concealed or wrapped up within them. Their Lordships of the Privy Council seemed of like opinion in *Russell* v. *The Queen* (2), decided in 1882, even although at that time *Re Slavin* and *Orillia* (3) had been decided in the Queen's Bench of Ontario, and the question was at the argument expressly raised as stated by the present Lord Chancellor at the argument of the McCarthy case. I take the reason to be that the phrase "municipal institutions" had no such broad meaning as is now contended for.

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

(1) 3 P. & B. 139. (2) 7 App. Cas. 829.
(3) 36 U. C. Q. B. 159.

cruelty to animals, and so in many other cases they possessed powers in respect to subjects now transferred to Parliament.

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

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(*f*). But it is argued that what is called "the police power" is possessed by the provinces under "municipal institutions," and that the right in question is a mere incident of "the police power." Now, if by "police power" is meant the right or duty of maintaining peace and order and of seeing that law, all law whether of imperial, federal or local origin is enforced and obeyed, then I agree that that power is wholly with the provinces. But it is with them, however, not because it specially belongs to "municipal institutions," but because they are charged with the "administration of justice." The legislatures may delegate this duty to municipal functionaries, but the mode of administration is purely a matter of provincial concern.

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

(*g*). The cases decided in the Privy Council, in my view, practically conclude the question. *Russell* v. *The Queen* (1) decided that the Canada Temperance Act, a prohibitory Act, was such an Act as the Dominion Parliament might properly pass. It has been put forward, I have already suggested, that provision should have been made for the preservation of the provincial right to raise a revenue by means of liquor licenses,

(1) 7 App. Cas. 829.

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but that judgment is conclusive as it decides, in so many words, that the Act in question "does not fall within any of the subjects assigned exclusively to the provincial legislatures."

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

In the Hodge case (1), the question there being:—Was the Ontario Provincial Act *regulating* the traffic *intra vires* of that legislature? the decision of the Privy Council was that it was *intra vires*. When the McCarthy Act came up, a Dominion Act also purporting to *regulate* the traffic, the Privy Council as a necessary sequence, held that it was *ultra vires* of the Dominion Parliament. It is true their Lordships in the Hodge case intimated that the Ontario License Act came within articles 8, 15 and 16 of section 92, as doubtless many of its provisions in one way or another did, but I do not assume, because article 9 was omitted, that it was intended to be laid down that that article had no relation to the subject of legislation. Many of the provisions of the Act were municipal in their character, and therefore came under 8, were penal in their char-

(1) 9 App. Cas. 117.

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acter and therefore under 15, merely local, and therefore under 16, but the whole Act was an Act regulating liquor and other licenses with a view of raising a revenue, and therefore under 9 as well. And there, up to the present time, so far as our ultimate appellate tribunal is concerned, and so far as the liquor traffic is concerned, the question rests.

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

Whether the recent decision of the Privy Council in *The Attorney General of Ontario* v. *The Attorney General of Canada* (1) has a bearing upon the present case, may be questioned. It was there decided that the Ontario legislature having, under "property and civil rights," enacted certain provisions as to the legal consequences of a general assignment for the benefit of creditors, the same provisions that in a federal bankruptcy law as ancillary thereto might constitutionally be enacted by the federal Parliament, was within its constitutional right, but only because the federal Parliament had not taken possession of the field by dealing with the subject. Now, admitting that under "municipal insti-

(1) [1894] A. C. 189.

tutions," or "the police power," or "property and civil rights," a province may prohibit the traffic can it now do so in view of the Canada Temperance Act?

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

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

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

Neither can I, in the absence of a specific enactment on the subject, recognize any constitutional distinction between sale by wholesale and sale by retail notwithstanding the case of *Re Slavin* and *Orillia* (1); that, apparently, was subsequently conceded with the full concurrence and approval of the Privy Council in "the Dominion Liquor License Act" case (the case on the McCarthy Act). In the light of which particular provincial candle are we to investigate the question? In Upper Canada a sale of liquor to the extent of five gallons, or one dozen bottles, was considered a wholesale transaction, the question as to the origin of the

(1) 36 U. C. Q. B. 159.

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

Neither in my view is there any distinction between those places in Canada where the Canada Temperance Act has been put in force (as the phrase is) and those places where it has not. The whole Act is an Act applicable to all Canada. Certain cities or municipalities may take advantage of its provisions to secure the kind of prohibition therein contemplated, but it is a law providing for prohibition everywhere. To admit the right of a legislature to enact a law for the same pur-

pose applicable only to localities that have failed to place themselves under Canadian prohibition, is to make the constitutional authority of a legislature dependent on the whim or fancy for the time being of the public sentiment, a principle in support of which I can find neither authority nor reason. For the reasons stated, I think the 7th question must be answered in the negative, and in my judgment an affirmative answer can be given to none.

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

The licensing system is exclusively within provincial powers. All that is fairly incident to its effectual working goes with it, as a branch of local police power. In *Hodge* v. *The Queen* (1), their Lordships, after summarizing the clauses of the Ontario License Act then in question, say of them :

> They seem to be all matters of a merely local nature in the province and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local Parliaments. Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., licensed for the sale of liquors by retail, and such as are calculated to preserve in the municipality peace and public decency, and to repress drunkenness, and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada

(1) 9 App. Cas. 117.

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Temperance Act, which does not appear to have as yet been locally adopted. The subjects of legislation in the Ontario Act of 1877, ss. 4 and 5, seem to come within the heads of nos. 8, 15 and 16 of section 92 of the British North America statute 1867.

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

Then, with regard to prohibition, the Canada Temperance Act (1) is a local option prohibitory Act. It gives to each county and city throughout the country (or electoral division in Manitoba) the right of determining, by a vote of the parliamentary electors therein, whether or not the prohibitory clauses of the Act shall be adopted. These clauses prohibit (with some exceptions not material to be now stated) the sale of intoxicating liquors entirely. When locally adopted they continue in operation for three years, and thereafter until withdrawn upon like vote. On the other hand, a vote adverse to local adoption bars the subject for a like period. In *City of Fredericton* v. *The Queen* (2), the Act was held valid, chiefly as relating to the subject of trade and commerce. In *Russell* v. *The Queen* (3), it was sustained on other grounds. Their Lordships, approaching the subject from the side of provincial powers, held that the provisions of the Act did not fall within any of the classes of subjects assigned exclusively to the provincial legislatures. It was therefore, in their opinion, at least within the general, unenumerated and residual powers of the general Parliament to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provincial legislatures.

(1) R. S. C. c. 106. (2) 3 Can. S. C. R. 505.
(3) 7 App. Cas. 829.

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"It was not doubted," say their Lordships in *Hodge* v. *The Queen* (1), referring to their decision in *Russell* v. *The Queen*, (2) "that the Dominion Parliament had such authority under sec. 91 unless the subject fell within some one or more of the classes of subjects which by sec. 92 were assigned exclusively to the legislatures of the provinces."

Referring to the grounds of decision in *City of Fredericton* v. *The Queen* (3), their Lordships (who had shortly before in *Citizens Ins. Co.* v. *Parsons* (4) referred to the words "trade and commerce" in a way that is sometimes sought to be put in opposition to the views of this court in *City of Fredericton* v. *The Queen*) (3), say: "We must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other judges who held that the Act fell within that section."

In treating of the exclusive powers of the provincial legislatures, clause 8 of sec. 92 respecting municipal institutions, was not in terms referred to in *Russell* v. *The Queen* (2), and this fact has sometimes been made use of in the way of criticism of that case. Indeed, in the argument of the Dominion License Act, one of their Lordships expressed the opinion that clause 8 of sec. 92 had not been argued in *Russell* v. *The Queen* (2), but the counsel then arguing (the present Lord Chancellor) stated that it appeared from a shorthand note of the argument that the point had been distinctly urged. When *City of Fredericton* v. *The Queen* (3) (which is known to be substantially the same case) was before this court, the point was argued. Mr. Lash Q.C., one of the counsel for the Act, thus alludes to the argument as adduced by the other side: "It is also contended that this law, having for its object the suppression of drunken-

(1) 9 App. Cas. 117.
(2) 7 App. Cas. 829.
(3) 3 Can. S. C. R. 505.
(4) 7 App. Cas. 96.

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ness, is a police regulation, and so within the powers of municipalities," etc. In *Reg.* v. *Justices of Kings* (1), Chief Justice Ritchie had previously dealt with the like contention, and in *City of Fredericton* v. *The Queen* (2), adhered to that decision. To that case I beg to refer.

But what is more pertinent is the fact that, after clause 8 of sec. 92 had been fully considered and given effect to in *Hodge* v. *The Queen* (3), their Lordships, as though it might be thought to make a difference with *Russell* v. *The Queen* (4), took occasion to reaffirm that decision: "We do not intend to vary or depart from the reasons expressed for our judgment in that case."

Now it is important to note that the substantial thing effected by the Canada Temperance Act is the suppression of the liquor trade in the municipalities severally by a separate vote of each. What is effected is local prohibition in all its local aspects. It could not have been really meant by their Lordships that this was outside of the classes of subjects by section 92 assigned to the provincial legislatures simply by reason of the Act having operation as a local option Act throughout Canada, while a provincial Act is necessarily limited to the province. That would indeed have been a short road to a conclusion, but it would have confused the boundaries of every subject of legislation, besides rendering unnecessary the particular provisions of the British North America Act (5) respecting concurrent legislation on certain specified subjects. This was recognized in the decision upon the Dominion License Act, where it was held that where a subject, such as the licensing system, is within a class of subjects assigned exclusively to the provinces, the Do-

(1) 2 Pugs. 535.
(2) 3 Can S.C.R. 505.
(3) 9 App. Cas. 117.
(4) 7 App. Cas. 829.
(5) Sec. 95.

minion does not, by legislative provisions respecting it applicable to the entire Dominion, draw it at all within their proper sphere of legislation.

But it is argued that prohibition may in one aspect and for one purpose fall within section 91, and for another purpose and in another aspect fall within section 92. And inasmuch as it is not possible by general words to enter into the complexities of transactions, and distinguish entirely one subject from another in all its relations, the cases clearly establish that legislative provisions may be within one or other of these sections, according as, in one aspect or another, they may be incidental to the effectual exercise of the defined powers of parliament or legislature. In the effectual exercise of an enumerated power it may be reasonably necessary to deal with a matter which, apart from its connection with such subject, would appear to fall within a class of subjects within the exclusive authority of the other legislature, and in such case there is the ancillary power of dealing with such subject for such purpose, as explained and illustrated in *Attorney General of Ontario* v. *Attorney General of Canada* (1). In the application of this principle, the Dominion legislation overrides where the same subject is dealt with through ancillary powers; and, pending the existence of Dominion legislation, the provincial legislation, if previously passed, is in abeyance. If subsequently passed it is *ultra vires*. In all such cases regard is to be had to the primary purpose and object of the legislation, and (except in the few cases where concurrent legislation is authorized, of which this is not one), the primary object is to be attained through one of the legislative authorities, and not indifferently through either.

(1) [1894] A. C. 200.

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

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

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

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

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

It is further contended, however, that prohibition is local and municipal because that, at the time of the union, two out of the three original members of the union (having then, of course, full power of legislation) had conferred upon the municipalities a local option

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of prohibition (within wider or narrower limits), and had incorporated this provision in the municipal Acts. Even had this been general with all the provinces, I do not think that the conclusion drawn from it is warranted, in view of the whole of the British North America Act; nor perhaps would it support the claim to deal with the matter otherwise than through the like method of municipal local option. But, assuming that a common understanding of words in an unusual sense might be inferred from such a state of things, if it had been general, the fact that in one of the confederating provinces (New Brunswick) there was no such provision, deprives the argument of the weight that only an entire consensus could give to it. In New Brunswick there were at the union two groups of municipal institutions, the representative kind (as in Upper and Lower Canada), throughout part of the province, and the system of local government of counties through the justices in session (as in Nova Scotia), throughout the remaining part. But in neither kind was there vested the power of suppressing the liquor trade. The Act in force in New Brunswick was 17 Vic. c. 15, as from time to time revived and continued (1). This is important, for temperance legislation had gone further in New Brunswick than in any other province. In 1855 an Act was passed (2) prohibiting throughout the province the importation, manufacture and traffic in intoxicating liquors. This was repealed in 1856 (3) amid great political excitement, and the absence of local option at the time of the union was not a casual omission. Notwithstanding the great weight of judicial authority the other way, I cannot, in view of this, give to the words "municipal institutions," as used in the British North America Act, a meaning not

(1) See 20 Vic. ch. 1. [1856]; 33 Vict. ch. 2.
(2) 18 Vict. ch. 36.
(3) 20 Vict. ch. 1.

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

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

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

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

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

The question regarding the Ontario Act of 1890 remains. It has already been incidentally considered. No doubt much latitude ought to be given to the exercise of the licensing power, in the way of restriction or regulation. Prevention of selling in certain ways, at certain times or places, to certain persons, etc., etc., is greatly removed from prohibition proper. But, as I read it, the Act appears to go beyond license and regulation or restriction. It seems substantially to give the power to prohibit altogether. It is true that the Act is expressed to be merely the revival of provisions in force at the union, and since assumed to be repealed by the provincial legislature. But, if the power to pass the Act as a new provision of law does not exist, no more does the power to revive the old law, which, on the other hand, needs no revival so far as Ontario legislation is concerned, inasmuch as it was never effectually repealed by such legislation.

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