ALPHONSE POULIN .....APPELLANT; 1883

*Mar. 5.

AND

1884

THE CORPORATION OF QUEBEC.....RESPONDENT. *Feb'y. 19.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC (APPEAL SIDE).

42 & 43 *Vic., ch.* 4, *sec.* 1 (*P.Q.*), *construction of—Prohibition, writ of—Sale of liquors—Police regulation.*

Under the authority of the Act of the Legislature of *Quebec*, 42 & 43 *Vic.*, ch. 4, sec. 1, a penal suit was, on the 20th of January, 1880, instituted against *P.* in the name of the corporation of *Q.*, before the Recorder's Court of the city of *Q.*, alleging that "on Sunday the 18th day of January, 1880, the said defendant has not closed, during the whole of the day, the house or building in which he the said defendant, sells, causes to be sold, or allows to be sold, spirituous liquors by retail, in quantity less than three half pints at a time, the said house or building situate, &c." *P.* was convicted.

A writ of prohibition, to have the conviction revised by the Superior Court, was subsequently issued, and upon the merits was set aside and quashed.

Held (Per *Ritchie*, C.J., and *Strong* and *Fournier*, JJ.),—That the provisions of the Provincial Statute 42 & 43 *Vic.*, ch. 4, ordering houses in which spirituous liquors, &c., are sold, to be closed on Sundays and every day between eleven o'clock of the night until five of the clock of the morning, are police regulations within the power of the Legislature of the Province of *Quebec*, and as the complaint was clearly within the Act, the recorder could not be interfered with on prohibition.

Per *Henry*, *Taschereau* and *Gwynne*, JJ., That the penalty imposed upon *P.* by the recorder was not authorized by the statute, even if such statute was *intra vires* of the Provincial Legislature, and that the prohibition was therefore rightly granted.

The court being equally divided, the appeal was dismissed without costs.

PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.

1884

POULIN v. CORPORATION OF QUEBEC.

APPEAL from a judgment of the Court of Queen's Bench for the Province of *Quebec* (Appeal side). The following case was submitted to the Supreme Court of *Canada*;

"At its session of 1879, the Legislature of *Quebec* passed an Act containing the following enactments:

"Every person licensed or not licensed to sell by retail in quantities less than three half pints in any city, town or village whatsoever, spirituous liquors, wine, beer, or temperance liquors, shall close the house or building in which such person sells or causes to be sold, on any and every day of the week from midnight until five o'clock in the morning, and during the whole of each and every Sunday in the year; and during the same period, no person shall sell, or cause or allow to be sold or delivered, in such house or building, or in any other place, spirituous liquors, wine, beer, or temperance liquors, the whole under a penalty for each and every infringement of the present provisions, of a fine not less than thirty dollars and not exceeding seventy-five dollars and costs, and in default of payment of such fine, to an imprisonment for a period not exceeding three months in the common gaol of the district in which the said infringement occurred."

"On the 18th of January, 1880, the appellant was, and had been for some time before, keeping a restaurant within the limits of the city of *Quebec*.

"Being prosecuted by the respondent before the Recorder's Court of the city of *Quebec* for infringement of that statute, he pleaded to the jurisdiction of the court, and especially the unconstitutionality of the Act as being *ultra vires* of the Legislature of *Quebec*. He was, nevertheless, on the 17th of February, 1880, condemned to pay a fine of $40 and $1.65 costs.

"The appellant sued out and obtained a writ of prohibition to prevent execution of that judgment.

"It was proved in the case, that on the day mentioned in the conviction, viz., the 18th of January, 1880, the appellant was keeping a restaurant within the limits of the city of *Quebec*, where he used to retail spirituous liquors in quantities less than a half pint, and that, although the said day was on Sunday, he had not kept his establishment closed.

"On that proof the Superior Court quashed the writ of prohibition."

Mr. *F. Langelier*, Q. C., for appellant:

This appeal involves the decision of two questions of law: 1st. Can a local legislature pass a law prohibiting the sale of spirituous liquors on Sundays and at certain hours of other days? 2nd. Does the statute of *Quebec*, 42-43 *Vic.*, ch. 4, sec. 1, punish the selling only of liquors within the prohibited time, or also the opening of the establishment where they are sold.

1st. Can a local legislature prohibit the sale of spirituous liquors on Sundays and at certain hours of other days?

It is now beyond all doubt that local legislatures cannot totally prohibit the sale of such liquors. This court, in the case of the *City of Fredericton* v. *The Queen* (1), has laid down as a rule. 1st. That the power to enact such a prohibition cannot belong to both the local legislatures and the Parliament of *Canada*. 2nd. That it belongs to the Parliament of Canada; and that ruling has been confirmed by the Privy Council in the case of *Russell* v. *The Queen* (2).

There would be no difficulty, therefore, if the statute in question contained a complete prohibition; but it is contended that the ruling of this court cannot apply to it because it does not prohibit, but only restricts the sale of spirituous liquors.

(1) 3 Can. S. C. R.. 505 & 574. (2) 7 App. Cases 829.

1884

POULIN v. CORPORATION OF QUEBEC.

I submit that this is a mere quibble. A restriction is a partial prohibition; in the present case the prohibition is for Sundays and for certain hours of other days. If this reasoning was to prevail, nothing would be easier for a local legislature than to encroach upon the exclusive power of the Parliament of *Canada* to prohibit such trade; all they would have to do would be to prohibit the sale at all times, save a few minutes every day, or every week.

It has been contended that such a statute is within the class of local statutes, or of statutes concerning municipal institutions.

Even were that true, it would not affect the question at issue. That statute unquestionably deals with and regulates a certain trade or commerce. Therefore, according to the decision in the case of *Fredericton*, it cannot be considered as being within the powers of local legislatures.

But it is not true that the statute in question is a mere municipal regulation, or a law of a local nature. It is admitted to be intended to repress intemperance, to prevent drunkenness; therefore its object is one of general interest; intemperance and drunkenness are just as much evils in *Halifax* as in *Quebec*.

If the object of the law is of general interest, are the means enacted for that purpose of a local nature? Not at all; those means consist in compelling those who sell spirituous liquors by retail, to close their establishments at certain times, and in preventing them from selling within certain hours. Now there is nothing local in those means; they would be just as effective at *Winnipeg* as at *Charlottown*. *Russell* v. *The Queen* (1).

The power to enact such a law is not included in the power given to local legislatures to regulate municipal institutions. The object of such institutions is to

(1) 7 App. Cases 829.

give to each locality the particular regulations required by its local wants. No municipal institutions would be needed if the making and keeping of roads, bridges, the prevention of abuses prejudicial to agriculture, could be regulated in the same manner all over the country. But they are necessary on account of the fact that a special regulation is required for each locality.

My second point is that even under the statute (if constitutional) the conviction is illegal.

The object of the statute is the prevention of drunkenness on Sundays. The means adopted to arrive at it consist in prohibiting the sale on such days of intoxicating liquors. Therefore, what it must punish is the selling, not the keeping open of the establishments where such liquors are sold. The order given to close them is only to secure the non-selling, it is a mere directory enactment. Knowing that there is more danger of liquor being sold there than elsewhere, it is directed that those establishments must be kept closed.

So much for the spirit of the law. The letter of the statute is in accordance with it. It orders first the closing of establishments where spirituous liquors are retailed, but enacts no penalty against those who keep them open. Then, in another sentence it forbids the selling of such liquors either in those establishments, *or in any other place* under a penalty of $30 to $75 *for every infringement of the present provisions.* The present provisions are those prohibiting the selling, the causing to be sold, the allowing to be sold, the allowing to be delivered, spirituous liquors.

The statute being a penal law, it is needless to say that it cannot be extended from one case to another; the penality it inflicts cannot be imposed for an offence for which it does not enact it.

Mr. *C. P. Pelletier*, Q. C., for respondent:

The writ of prohibition is an extraordinary remedy,

1884

POULIN v. CORPORATION OF QUEBEC.

which cannot be used as collateral if there exists any other recourse. In the present instance, the law (42-43 *Vict.*, ch. 4, sec. 3) seems desirous to admit such recourse, by enacting: that if a writ of *certiorari* is issued to have a conviction rendered under the said law revised by the Superior Court, the party convicted shall be obliged to deposit into the hands of the clerk of the inferior court the amount of the fine and costs.

The writ of prohibition, moreover, cannot be issued after conviction, unless the want of jurisdiction of the inferior tribunal appears upon the face of the record. See *High*, Extraordinary Legal Remedies (1).

Then as to appellant's contention that the only fact of not closing his tavern during the time prescribed for that by the statute does not constitute an offence, and that according to the wording of the statute, there is no offence, if there is not at the same time a sale of liquors. Such pretension will be found not maintainable, if we merely refer to the preamble of the statute above cited, 42–43 *Vic.*, ch. 4, which reads as follows:

"Whereas doubts have arisen with respect to the right of certain city and town corporations, in virtue of the laws and statutes relating to them, to compel tavern keepers to close their taverns at certain hours of the day; and whereas it is expedient to dispel such doubts, and to clearly define and extend the powers which the said corporations should possess: Wherefore, &c., &c."

Before the other courts, the appellant has pretended not only that to establish an offence it would have been necessary for the respondent to prove a sale of liquors, but he has also pretended that the Legislature of *Quebec* had no right to prohibit the sale of intoxicating liquors on Sundays.

(1) Nos. 767, 769, 770, 772, 774.

As the complaint in this case is only "for not having closed," and not for "having sold," if the statute is interpreted as making an offence of the mere fact of "not closing," and if the conviction against the appellant is found to be valid, it is of little moment, for the ends of this case, to consider the question of the prohibition of selling liquor on Sundays.

However, as that incidental question has been strongly dwelt upon before the other Courts, and as the other courts have considered it with much attention, it may be convenient also to consider it just now.

Although the Parliament of *Canada*, under the power given to it to regulate trade and commerce alone, has the power to prohibit the trade in intoxicating liquors, yet the provincial legislatures, under the power given to them, may for the preservation of good order in the municipalities which they are empowered to establish and which are under their control, make reasonable police regulations, may to some extent interfere with the sale of spirituous liquors;

The provisions of the provincial statute 42–43 *Vic.*, ch. 4, ordering houses in which spiritous liquors, etc., are sold to be closed on Sundays and every day between eleven o'clock of the night until five of the clock of the morning, are police regulations within the power of the legislature of the Province of *Quebec*.

The reasons for arriving at this conclusion are fully stated by the Chief Justice *Meredith* in the case of *Blouin* v. *The Corporation of the City of Quebec* (1), and I rely upon that decision.

RITCHIE, C. J.:—

I cannot see how it can be said that prohibition will not lie without first determining whether the Act is *ultra vires* or not, for if the Act is *ultra vires*, then I can

(1) 7 Q. L. R. 18.

1884

POULIN v. CORPORATION OF QUEBEC.

see no reason why prohibition would not be a proper remedy, because there could then be no pretence that the Recorder's Court could have jurisdiction over an offence alleged to be created by a statute which had no legal existence; but holding the Act to be *intra vires*, I fully appreciate the position taken by Mr. Justice *Ramsay*, that the Recorder's Court having jurisdiction over the subject-matter legislated on, however badly it may judge, it cannot be stopped by prohibition, on the pretext that it has misconstrued the Act.

Mr. Justice *Ramsay* clearly acted on this view, for before holding that prohibition would not lie, he expressly held that the Local Legislature had authority to prohibit or regulate the sale of liquors in saloons or taverns on Sundays, or at particular times, as being purely a matter of police regulation, and consequently within the powers of municipal corporations.

When, in the case of *Regina* and the *Justices of Kings* (1), I was called upon to adjudicate on the right of the Provincial Legislatures to prohibit absolutely the sale of spirituous liquors, and I arrived at the conclusion that the legislative power to do this rested with the Dominion Parliament, I advisedly and carefully guarded the enunciation of that conclusion in these words: "We by no means wish to be understood that the Local Legislatures have not the power of making such regulations for the government of saloons, licensed taverns, &c., and sale of spirituous liquors in public places, as would tend to the preservation of good order and prevention of disorderly conduct, rioting or breaches of the peace. In such cases, and possibly others of a similar character, the regulations would have nothing to do with trade or commerce, but with good order and local government, matters of municipal police and not of commerce, and which municipal institutions are peculiarly competent to manage and regulate."

(1) 15 New Brunswick R. (2 Pugs.) 535.

I still think, as I did then, that a provision such as section 1, of the 42 and 43 *Vic.*, ch. 4, *Quebec* Act, is within the legislative authority of the Provincial Legislature, as being simply a local police regulation, and which the Local Legislature has, as incident to its power to legislate on matters in relation to municipal institutions, a right to enact.

As at the time of the passing of this Act and at the time of the committing of and conviction for the alleged breach of the law, there was no Dominion legislation contravening in any way the provisions of this provincial law, it is not necessary, for the purposes of deciding this case, to inquire or determine if, and in what particulars and to what extent, the legislation of either will prevail over that of the other, when the Dominion Parliament, is legislating for the peace, good order, &c., of the Dominion—or on the subject of trade and commerce in connection with the traffic in intoxicating liquors—should the Dominion legislation conflict with the Provincial.

In the view I take of the inapplicability of the remedy by prohibition, the Act being, in my opinion, *intra vires*, it is unnecessary to express any opinion as to the construction of the 1st. sec., 42 and 43 *Vic.*, ch. 4, though I by no means wish it to be understood that I think the construction placed on the statute by the Recorder's Court incorrect. I merely express no opinion on it, as not being necessary for the determination of the case before us.

STRONG, J.:—

I agree with the Chief Justice that the attempt to impeach the constitutional validity of the statute under which the appellant was convicted, as being *ultra vires* of the Legislature of the Province of *Quebec*, altogether

1884

POULIN v. CORPORATION OF QUEBEC.

Strong, J.

fails. In the *Queen* v. *Taylor* (1), I expressed my concurrence in the decision of the Supreme Court of *New Brunswick*, in the case of the Justices of *Kings*, in which it was held that under the authority conferred by the *British North America* Act to legislate respecting Municipal Institutions, the Provincial Legislature possessed that power generally denominated the police power, to regulate the sale of spirituous and intoxicating liquors, and I adhere to that opinion. Then, I think that this appeal must be disposed of without pronouncing any opinion upon the question of statutory interpretation which was argued before us, for it is plain, as I read the authorities, that this is not a case in which the writ of prohibition will lie.

Article 1031 of the *Quebec* Code of Civil Procedure is in these words:

> Writs of prohibition are addressed to courts of inferior jurisdiction whenever they exceed their jurisdiction.

This is an exact definition of a writ of prohibition, according to English law, and I therefore assume, in the absence of any further provision upon that head in the code of procedure and of any jurisprudence of the courts of the Province of *Quebec* to the contrary, that the use of and the proceedings upon this writ of prohibition, which is derived from the law of *England*, is to be regulated by the well established practice of the English courts relating to it.

The office of the writ of prohibition is, as in the article of the code of civil procedure before extracted is declared in so many words, to restrain inferior courts from exceeding their jurisdiction,—that is, not from exercising a jurisdiction which they alone can exercise, if any court can exercise it at all, but from usurping jurisdiction by encroaching upon that of other and superior tribunals.

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

That the proper use of the writ is restricted to such cases as those first mentioned is shown by Mr. *High* in the following passage from his treatise on Extraordinary Remedies (1).

It follows from the extraordinary nature of the remedy, as already considered, that the exercise of the jurisdiction is limited to cases where it is necessary to give a general superintendence and control over inferior tribunals, and it is never allowed except on a usurpation or abuse of power, and not then unless the existing remedies are inadequate to afford relief. If, therefore, the inferior court has jurisdiction of the subject-matter in controversy, a mistaken exercise of that jurisdiction, or of its acknowledged powers, will not justify a resort to the extraordinary remedy by prohibition.

And the case of *Lord Camden* v. *Home* (2), referred to in the judgment of Mr. Justice *Ramsay* in the Court of Queen's Bench, is decisive to the same effect. In that case it was expressly decided that it afforded no ground for a prohibition that a court having a special statutory jurisdiction, which it alone, to the exclusion of all other courts, possessed, had so construed a statute as to exclude from its operation a case which, upon a proper legal construction of the enactment, was embraced in its terms. Mr. Justice *Ashurst* there says:

It is admitted that the Courts of Admiralty have exclusive jurisdiction in all cases of prize; and if so, they must have the same jurisdiction over all other matters that arise incidentally, either in construing acts of parliament or proclamations, in order to form their opinion on the principal question.

Again, in the same case, Mr. Justice *Buller* says:

In such cases the only point for our consideration is whether the court to which the prohibition is prayed has a jurisdiction over the subject. Whatever may have passed in the several cases on this subject in the last century, the grounds for granting and refusing prohibitions are now clearly and accurately defined. If the court below have jurisdiction over the subject, though they mistake in their judgment, it is no ground for a prohibition, but is only matter of appeal.

(1) Sec. 767. (2) 4 T. R. 382.

1884

POULIN v. CORPORATION OF QUEBEC.

Strong, J.

Upon the principles of these authorities it has long since been decided that this writ cannot be used as a substitute for a *certiorari* or an appeal, for it is now well settled to be a preventive and not a corrective remedy. Applying these authorities to the present case, it is clear that in the proceedings before the Recorder of *Quebec* there was no such excess of jurisdiction as warranted the issuing of a writ of prohibition. It cannot be pretended that if any offence within the 42 and 43 *Vic.*, cap. 4, sec. 1, was committed by the appellant, the Recorder's Court had not jurisdiction of it and was not bound to proceed to try and determine the complaint summarily; there was, therefore, no encroachment upon the jurisdiction of any other court in the course which was taken by the recorder. He was bound to interpret the statute and to convict or acquit according to his interpretation of it, and upon the evidence before him, and he did this and no more.

To say this, is sufficient to show that the writ of prohibition issued improvidently and was properly quashed. No one can say it was not the bounden duty of the recorder to interpret the statute and proceed according to the construction he placed upon it,—and if that be so to award a writ of prohibition in such a case would be to prohibit a judicial officer from doing his duty. At most, the appellant can only complain that he has been aggrieved by an erroneous judgment, not that he has been prejudiced by the sentence of a court which had no jurisdiction of the subject-matter, and his proper remedy in this case is an appeal, if one is given by statute, or a writ of *certiorari* to remove the conviction into the Superior Court, where it may be quashed if error appears upon its face.

I am of opinion that we ought to hold the writ of

prohibition to have been properly quashed, and to dismiss the appeal.

1884

POULIN v. CORPORATION OF QUEBEC.

FOURNIER, J., concurred with the Chief Justice.

HENRY, J.:

Independently of the question—the main one argued before us—of the constitutionality of the statute under which the prosecution in this case was commenced, there are two others demanding our previous consideration.

The particular section of the Act in question is as follows: [His Lordship read the section (1)].

The appellant was prosecuted under that section by the respondent corporation in the Recorder's Court of the city of *Quebec*, and the charge against him is that—

On Sunday, the eighteenth day of January, one thousand eight hundred and eighty, the said defendant (now appellant) has not closed, during the whole of the day, the house or building in which he, the said defendant, sells, causes to be sold, or allows to be sold, spirituous liquors by retail, in quantity less than three half pints, at a time, the said house or building situate at the corner of *St. John* and *St. Ursule* streets, in the Province of *Quebec*.

The first question then is, does the charge against the appellant, as so stated, of not keeping closed on the Sunday named, his house or building, he being a person holding a license to sell spirituous liquors in quantities less than three half pints, render him liable to the penalty imposed by that section; or, in case of failure to pay the fine, as therein mentioned, to be imprisoned for a period not to exceed three months. Penal statutes are to be strictly construed; and, if the construction is reasonably doubtful as to the offence created by a penal Act, we are bound, by every authority, to declare it inoperative to that extent. A penal offence must be reasonably certain;

(1) See page 186.

1884

POULIN v. CORPORATION OF QUEBEC.

Henry, J.

and if open to two constructions, it cannot be so. There are two provisions in the section, one obliging the keeping closed, during every Sunday, the house or building in which a person sells liquors; the other, forbidding the selling, during the same period, in such house or building, or in any other place, spirituous liquors, wine, beer or temperance drinks, "the whole under a penalty for each and every infringement of the present provisions of a fine," &c. The second provision is coupled to the first by the copulative "and," which makes, as I read the section, the one a part of the other, and requiring a breach of both to constitute the offence, "the whole under a penalty for each and every infringement of the present provisions." The penalty is for the infringement of the present provisions,—that is a breach of both. When the provisions are connected by the word "and," I read the section and construe it as if, instead of the words used, the provision was worded thus: "and during the same period shall not sell, &c., in such house or building, or in any other place, spirituous liquors, &c.,—the whole, that is, for not closing the house and for selling spirituous liquors, &c., under a penalty, &c. We are to construe the language of a statute as it is commonly used and understood. We may speculate as to what the Legislature intended; but we are bound to ascertain the true meaning of a statute by its own language; and if thereby we are forced to any particular conclusion, we are not permitted to say that the Legislature meant other than what the language used warrants. If the two provisions had been coupled by the disjunctive "or," with suitable accompanying language, we might be disposed and permitted to give a different construction to that part of the section which creates the penalty for infringement. An opposite construction would be, at all events, open to serious doubts, and the double

1884

POULIN v. CORPORATION OF QUEBEC.

Henry, J.

penalty should not therefore be imposed. I am of opinion that the writ against the appellant charges no complete offence, but merely one of the two ingredients necessary to constitute it. No offence in law being charged there could be no valid conviction.

The other question, although not raised on the argument, is taken by one of the learned judges in the court below, and therefore is entitled to consideration. The learned judge referred to gave it as his opinion, that "prohibition" does not lie in this case and that the writ should be quashed under the decision in the case of *Lord Camden* v. *Home* (1), but more especially from the dicta of Mr. Justice *Buller* in that case. I have studied that case and the dicta referred to. The learned judge referred to, in his judgment in that case, said:

> Whatever may have passed in the several cases on this subject in the last century, the grounds for granting and refusing prohibitions are now clearly and accurately defined. If the court below have jurisdiction over the subject and though they mistake in their judgment, it is no ground for a prohibition, but is only a matter of appeal. And the rule equally clear is, that after sentence the courts of common law never grant a prohibition to inferior courts, unless the want of this jurisdiction appear on the face of the libel.

I will deal with the matter before us in the light of the two rules so laid down.

In the first place, as to the jurisdiction of the Recorder's Court over the subject. If I am right in my construction of the section before given, can it be said that that court had jurisdition to try, as an offence, what was not one? The prosecution against the appellant was to cause the imposition of a penalty upon him for not keeping his house closed on a Sunday. If that was *per se* an offence for which no penalty was imposed, how could the Recorder's Court give itself jurisdiction to try what was not an offence and to impose a penalty, under circumstances unauthorized by the section? As

(1) 4 T. R. 396.

1884

POULIN v. CORPORATION OF QUEBEC.

Henry, J.

I construe the statute, he would have jurisdiction only where the two provisions were alleged to have been infringed. I think, therefore, the prohibition in this respect was properly awarded, and the want of jurisdiction was sufficiently apparent on the face of the process by which the prosecution was commenced. I think this case is, therefore, within the terms of the two legal propositions asserted by Mr. Justice *Buller*.

The writ of prohibition in this case was issued after judgment. *Lloyd*, in his treatise on the writ of prohibition, at page 11, says :

> No prohibition, therefore, can go before the commencement of the action, but as soon as the action is commenced, for instance, as soon as the plaint is entered in the new county courts, the application may be made. * * * This, however, can only be done in cases where the defect of jurisdiction appears on the face of the pleadings.

At page 12:

> It has long been settled that whenever the want of jurisdiction appears on the face of the proceedings, prohibition will go after judgment. It is thus laid down in all the old authorities, and this doctrine has been frequently confirmed since, and is now fully established in practice.
>
> So, if the matter be apparent on the face of the proceedings, it will go after appeal, though the parties have thereby affirmed the jurisdiction of the inferior court *Gouche* v. *Bishop of London* (2).

In *Buggin* v. *Bennett* (3), Lord *Mansfield* said :

> If it appears, on the face of the proceedings, that the court below have no jurisdiction, a prohibition may issue at any time, either before or after sentence, because all is a nullity : it is *coram non judice*.

There is a case to be found, *Jones* v. *Owen* (4), where prohibition was granted by the Court of Queen's Bench, in 1848, which overrules the judgment attributed to Mr. Justice *Buller*, and which goes to show that the writ is grantable, even if the court to which it is directed had

(1) See *Roberts* v. *Humby*, 3 M. & W. 120 ; *Jones* v. *Jones*, 17 L. J. Q. B. 170.
(2) Str. 870.
(3) 4 Burr. 2037.
(4) 18 L. J. Q B. 8.

jurisdiction over the subject-matter, and that even after the judgment was executed.

Several other cases, with the same result, are cited by Lloyd.

I am of opinion the writ of prohibition in this case was properly issued after judgment.

I am, for the reasons I have given, of the opinion that the appeal herein should be allowed, and that the prohibition should be sustained, with costs.

TASCHEREAU, J.:

This Act, 42 and 43 *Vic.*, ch. 4, sec. 1, enacts that:

[His Lordship read the section 1.]

Under the said Act, the present appellant has been prosecuted for that:

On Sunday, the eighteenth day of January, one thousand eight hundred and eighty, the said defendant (now appellant) has not closed, during the whole of the day, the house or building in which he the said defendant, sells, causes to be sold, or allows to be sold spirituous liquors by retail in qunntity less than three half pints at a time, the said house or building situate at the corner of *St. John* and *St. Ursule* streets, in the city of *Quebec*.

And, on the 17th day of February, 1880, was condemned for the said offence to pay a fine of $40, and $1.65 for the costs, and in default of payment of the said sums, to an imprisonment in the common gaol of the district of *Quebec* for a term of two months.

One of the grounds (one taken at the trial before the Recorder) upon which the appellant impugns that conviction is, that it is not authorized by the statute, as no penalty is, as he contends, imposed thereby, for keeping open on Sunday a house or building where liquors are usually retailed; his contention being that the penalty imposed by this latter part of the section, for every infringement of the present provisions, must be read as applying only to the selling, the causing to be sold, the allowing to be sold, the allowing to be

1884

POULIN v. CORPORATION OF QUEBEC.

Taschereau, J.

delivered, spirituous liquors, in such house or building or in any other place.

I think that this objection is well taken. The clause is ambiguous, and the appellant is entitled to the strict construction that must be given to all penal statutes. Assuming, but without deciding, that it had power to do so, the Legislature has no doubt made it an offence to keep a tavern open on Sunday, but, as I read this statute, no penalty is provided for that offence. It, then, is simply an indictable misdemeanor, according to the Federal Act, by which it is decreed that "any wilful contravention of any Act of the Legislature of any of the provinces within *Canada*, which is not made an offence of some other kind, shall be a misdemeanor and punishable accordingly."

I am of opinion, consequently, that the penalty imposed upon the appellant by the Recorder, and that the conviction against him, is not authorized by the statute, and that it is a complete nullity. The Recorder cannot have had jurisdiction to impose a penalty that the statute does not authorize. The whole proceedings before him were *coram non judice*, even if the Act in question was *intra vires*. In the Province of *Quebec*, there are a number of cases where the prohibition has been held to lie in such a case. I would not, in fact, have any doubt upon the subject, if it was not for what has been said by some of my learned brethern.

And while it is undoubtedly true that after a court has proceeded as far as verdict and judgment, or sentence, prohibition will not lie for a want of jurisdiction not apparent upon the record, yet the rule is supported by an overwhelming array of authority, that where the defect or failure of jurisdiction is apparent upon the face of the proceedings which it is sought to prohibit, the superior tribunal may interpose the extraordinary

aid of a prohibition at any stage of the proceedings below, even, after verdict, sentence or judgment (1).

In *Buggin* v. *Bennett* (2), Lord *Mansfield* says:

> If it appears upon the face of the proceedings that the court below have no jurisdiction, the prohibition may be issued at any time, either before or after sentence, because all is a nullity—it is *coram non judice*.

I am of opinion to allow the appeal.

GWYNNE, J.:

I am of opinion that the statute in question, namely, 42nd and 43rd *Vic.*, ch. 4, sec. 1, of the Province of *Quebec*, does not impose the penalty in that section mentioned, upon the person who, although licensed to sell spirituous liquors in quantities in that section mentioned, does not close the house or building in which he sells, or causes to be sold, such liquors during the whole of the Sunday, unless such keeping open, which I take to be equivalent to not closing such building, is accompanied by the sale or delivery in such house or building, of some spirituous liquor, wine, beer or temperance liquor. The words of the statute, shortly expressed, so far as is necessary for the decision of the point in question, are (3). [His Lordship read the words of the statute].

It appears to me to be free from reasonable doubt that this language does not profess to impose the penalty upon the person so licensed to sell for the not closing alone, without more, of the house or building in which the sale usually takes place. If the Legislature contemplated making the not closing, without more, the house or building during the whole of Sunday a distinct offence in itself, subjecting the proprietor of the house or building to the penalty, such intention, to

(1) High Extr. Legal Rem., sec. 774, and cases there cited.

(2) 4 Burr. 2,037.

(3) See page 186.

1884.

POULIN v. CORPORATION OF QUEBEC.

Gwynne, J.

say the least, is very inadequately expressed, and I confess, that to my mind, it is not clear what would constitute the offence in the absence of the fact of any liquor being sold or delivered to any person in the house or building; for example, whether, if the licensed person usually sells the liquors in a room or shop forming part of the house in which he lives, the whole house is to be closed, so that nobody, not even the proprietor, can enter or leave it; or if the door from the street into the room or shop in which the liquors are usually sold, constitutes the sole mode of egress and ingress for the proprietor, between the house and the street, must that door be so closed that the proprietor himself shall not pass out of it, although to go to church or on his return re-enter his house by it? Or if the liquors are all kept in cases behind a bar or counter, would the statute be sufficiently complied with by keeping the cases and the bar or counter locked? Or should the keeping closed be considered as being directed against all persons frequenting the house for the purpose of procuring spirituous liquors there?

But we are not now, in my opinion, called upon to decide what state of facts would constitute the committal of the offence of not closing, if not closing, without more, be an offence under the statute, but whether it is made by the statute an offence in itself, and subject to the penalty mentioned in the statute. and in my opinion it clearly is not—the words "the whole" in the sentence which enacts "the whole under a penalty for each and every infringement of the present provisions of a fine," &c., &c., seem, I think, to express the intention of the Legislature to be that to subject a person to the penalty he must be guilty of a violation of the whole of what is prescribed and prohibited in the section; so, likewise, the use of the words, "every infringement of the present provisions," indicates an

intention to attach the penalty to each infringement of all the provisions of the section. The penalty is not imposed upon every infringement of any of the present provisions, but upon every infringement of the provisions in the plural; that is, of both the provisions of the section, viz. :—on the keeping open and selling.

So reading the Act, it is plain that the complaint charged no offence cognizable under the statute, and the prohibition was therefore rightly granted; and inasmuch as there is no pretence that any spirituous liquor was sold or delivered to any person on the occasion referred to in the complaint, the case does not, in my opinion, raise the question whether the statute which prohibits such sale or delivery be or be not *ultra vires* of the Provincial Legislature, and I do not think that we are called upon to express an opinion upon a point which the facts of the case do not raise, and which is, therefore, unnecessary for the decision of the case before us, and this is the course we pursued in a recent case from *New Brunswick*.

The appeal, in my opinion, should be allowed with costs.

Appeal dismissed without costs.

Solicitors for appellant: *Montambault, Langelier and Langelier.*

Solicitors for respondent: *Pelletier and Chouinard.*