

CANADA / JUDGMENT

Huson v. South Norwich (Township)

(1895) 24 SCR 145

COURT

Supreme Court of Canada

DECIDED

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Huson v. South Norwich (Township)

Collection

Supreme Court Judgments

Date

1895-01-15

Report

(1895) 24 SCR 145

Judges

Henry, William Alexander; Strong, Samuel Henry; Fournier, Téléphore; Taschereau, Henri-Elzéar; Gwynne, John Wellington; Sedgewick, Robert

On appeal from

Ontario

Subjects

Constitutional law

Decision Content

Supreme Court of Canada

Huson v. South Norwich (Township), (1895) 24 S.C.R. 145

Date: 1895-01-15

William Huson (Plaintiff) Appellant;

and

The Municipal Council of the Corporation of the Township of South Norwich (Defendants)
Respondents.

1893: May 9, 10; 1895: January 15.

Present: Sir Henry Strong C.J., and Fournier, Taschereau, Gwynne and Sedgewick JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Local Option Act—53 Vic. ch. 56 sec. 18 (O.)—54 Vic. ch. 46 (O.)—Constitutionality—Prohibition by retail—Powers of local legislatures.

The statute 53 Vic. ch. 56 sec. 18 (O) allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors is intra vires the Ontario legislature, as is also sec. 1 of 54 Vic. ch. 46, which explains it, but the prohibition can only extend to sale by retail. In re Local Option Act (18 Ont. App. R. 572) approved. Gwynne and Sedgewick JJ. dissenting.

APPEAL from a decision of the Court of Appeal for Ontario[1] reversing the judgment of Galt C.J., who quashed a by-law of the township of South Norwich as being ultra vires. The appeal was first argued as to the validity of the by-law under the Municipal Act[2], and the court held, affirming the decision of the Court of Appeal, that the objections were insufficient to quash the by-law in question[3].

The question as to the constitutionality of sec. 18 of 53 Vic. ch. 56 (O.), as explained by sec. 1 of 54 Vic. ch. 46, also having been raised on this appeal, was by order of the court subsequently argued.

Duverniet and Galt, for appellant. Maclaren Q.C. and Titus, for respondent.

The court reserved judgment until after the argument of the special case submitted by the Governor General in Council in the matter of prohibition of the trade in intoxicating liquors, in which the same question as was involved in this case came under consideration[4].

THE CHIEF JUSTICE.—All questions involved in this appeal, save that relating to the constitutional validity of the 18th section of the Ontario statute, 53 Vic. ch. 56, entitled: “An Act to improve the Liquor License Laws,” as explained and limited by the Ontario statute, 54 Vic. ch. 46, sec. 1, have been already disposed of[5]. This remaining point we have now to determine.

I am of opinion that these enactments were intra vires of the provincial legislature. The learned judges of the Court of Appeal, in the case of The Local Option Act[6], have dealt fully with this identical question, and I so entirely agree with both their reasons and conclusions that I might well have contented myself with a reference to that case without adding to the mass of judicial decisions already accumulated on the subject. There appear to me, however, to be some additional reasons, which I will state as succinctly as possible.

We are precluded, by the decision of the Privy Council in the case of Russell v. The Queen[7], and by that of this court in The City of Fredericton v. The Queen[8], from holding that under subsection 8 of section 92 of the British North America Act the exclusive power of prohibiting the

sale of liquor by retail, including the enactment of what are called local option laws, was given to the provinces as an incident of the police power conferred by the words “municipal institutions.” That those words do confer a police power to the extent of licensing and regulating was decided by the Privy Council in the case of *Hodge v. The Queen*[9]. The question then is narrowed to this: Have the provinces, under this subsection 8, a power concurrent with that of the Dominion to enact prohibitory legislation to be carried into effect through the instrumentality of the municipalities or otherwise, either generally or to the extent of the power of prohibiting which had been conferred on municipal bodies by legislation enacted prior to confederation and in force at that date?

It is established by *Russell v. The Queen*[10] that the Dominion, being invested with authority by section 91 to make laws for the peace, order and good government of Canada, may pass what are denominated local option laws. But, as I understand that decision, such Dominion laws must be general laws, not limited to any particular province. It is not competent to parliament to draw to itself the right to legislate on any subject which, by section 92, is assigned to the provinces by legislating on that subject generally for the whole Dominion, but this is of course not done where, in the execution of a power expressly given to it by section 91, the federal legislature makes laws similar to those which a provincial legislature may make in executing other powers expressly given to the provinces by section 92. Therefore it appears to me that there are in the Dominion and the provinces respectively several and distinct powers authorizing each, within its own sphere, to enact the same legislation on this subject of prohibitory liquor laws restraining sale by retail, that is to say, the Dominion may, as has already been conclusively decided, enact a prohibitory law for the whole Dominion, whilst the provincial legislatures may also enact similar laws, restricted of course to their own jurisdictions. Such provincial legislation cannot, however, be extended so as to prohibit importation or manufacture, for the reason that these subjects belong exclusively to the Dominion under the head of trade and commerce, and also for the additional reason that the revenue of the Dominion derived from customs and excise duties would be thereby affected. That there may be, in respect of other subjects, such concurrent powers of legislation has already been decided by the Privy Council in the case of *Attorney General of Ontario v. Attorney General of Canada*[11], where this question arose with reference to insolvency legislation. I venture to think the present even a stronger case for the application of such a construction than that referred to. To neither of the legislatures is the subject of prohibitory liquor laws in terms assigned. Then what reason is there why a local legislature in execution of the police power conferred by subsection 8 of sec. 92 may not, so long as it does not come in conflict with the legislation of the Dominion, adopt any appropriate means of executing that power, merely because the same means may be adopted by the Dominion Parliament under the authority of section 91 in executing a power specifically given to it? It has been decided by the highest authority that there are no reasons against such a construction. This is indeed even a stronger case for recognizing such a concurrent power than the case of the *Attorney General of Ontario v. Attorney General of Canada*[11], because bankruptcy and insolvency laws are by section 91 expressly attributed to the exclusive jurisdiction of the Dominion. In the event of legislation providing for prohibition enacted by the Dominion and by a province coming into conflict the

legislation of the province would no doubt have to give way. This was pointed out by the Privy Council in the Attorney General of Ontario v. The Attorney General of Canada[12], and although the British North America Act contains no provision declaring that the legislation of the Dominion shall be supreme, as is the case in the constitution of the United States, the same principle is necessarily implied in our constitutional act, and is to be applied whenever, in the many cases which may arise, the federal and provincial legislatures adopt the same means to carry into effect distinct powers.

That a general police power sufficient to include the right of legislating to the extent of the prohibition of retail traffic or local option laws, not exclusive of but concurrent with a similar power in the Dominion, is vested in the provinces by the words “Municipal Institutions in the Province” in subsection 8 of chapter 92 is, I think, a proposition which derives support from the case of Hodge v. The Queen[13]. It is true that the subject of prohibition was not in question in that case, but there would seem to be no reason why prohibitory laws as well as those regulating and limiting the traffic in liquors should not be included in the police power which under the words “Municipal Institutions” it was held in Hodge v. The Queen¹³, to the extent of licensing, the provinces possessed. The difference between regulating and licensing and prohibiting is one of degree only.

As regards the objection that to recognize any such right of legislation in a province not extending to the prohibition of importation and manufacture would be an infringement of the power of the Dominion to regulate trade and commerce, I am not impressed by it. The retail liquor traffic can scarcely be regarded as coming directly under the head of trade and commerce as used in the British North America Act, but as the subjects enumerated in section 92 are exceptions out of those mentioned in section 91 it follows that if a police power is included in subsection 8 of the former section, the power itself and all appropriate means of carrying it out are to be treated as uncontrolled by anything in section 91. Moreover, Hodge v. The Queen[14] also applies here for, although in a lesser degree, yet to some extent, the restriction of the liquor trade by a licensing system would affect trade and commerce. On the whole I am of opinion that the provincial legislatures have power to enact prohibitory legislation to the extent I have mentioned, though this power is in no way exclusive of that of the Dominion but concurrent with it.

If I am wrong in this conclusion it is sufficient for the decision of this appeal to hold, as I do, that the legislature of Ontario had power to repeal and re-enact the legislation in force at the date of the Confederation Act, which gave municipal councils the right to pass by-laws absolutely prohibiting the sale of liquor by retail within certain local limits. Having regard to the history and objects of confederation I can scarcely think it possible that it could have been intended by the framers of the British North America Act to detract in any way from the jurisdiction of the provinces over their own several systems of municipal government. If the words “Municipal Institutions” in subsection 8 are to have any meaning attributed to them they must surely be taken as giving authority to repeal, re-enact and remodel the laws relating to all municipal legislation then in force. In *Re Slavin and Orillia*[15] this was the view of the Ontario Court of

Queen's Bench, and Chief Justice Richards, in his judgment on that case, puts forward powerful arguments in support of that conclusion. These reasons, as well as those given for the judgment of the Court of Appeal in the Local Option Case, have convinced me that at least to the extent last mentioned (even if I am wrong in my first proposition) the provinces have the power to legislate. As the enactments now in question are reproductions of those in force at the date of confederation they were therefore intra vires of the Ontario legislature. In the case of *Severn v. The Queen*[16] I expressed some doubt as to the decision in *Re Slavin and Orillia*¹⁵, upon the ground that the effect of that case would be to make the law vary in the different provinces. These observations were not material to the judgment I then gave, which was founded entirely on the 9th subsection of section 92, and I have now come to the conclusion that they were not well founded.

The appeal must be dismissed with costs.

FOURNIER J.—I concur.

TASCHEREAU J.—In view of the declaratory Act of 1891, 54 V. c. 46, Ont., the appellant's contention that the by-law in question prohibits entirely the sale of intoxicating liquors in South Norwich, and that sec. 18 of 53 V. c. 56 empowers the municipal councils to enact a total prohibition of the liquor traffic within their territorial limits, have to be considered as abandoned. The only question therefore now to be determined here is as to the power of municipalities, in Ontario, to prohibit the retail traffic of liquors within their respective limits, as it was vested in them before confederation.

In my opinion the answer to the question thus limited is correctly given by the Court of Appeal in this case and in *Re Local Option Act*[17]. The powers which the provincial legislatures and the municipal authorities have exercised in the matter since the coming into force of the British North America Act, now over 26 years, with the acquiescence of the federal authority, a power expressly sanctioned in numerous instances in Ontario and Quebec by judicial authority, might be curtailed or affected more or less by a federal prohibitive law if parliament has the power to pass one, but that is not the question here, and it will be time enough to consider it when parliament shall have legislated in that sense, if it ever does.

Suffice it for me to say, for the purposes of this case, that, in my opinion, under subsec. 8 of sec. 92 of the British North America Act, the legislation in question and the by-law assailed by the appellant are intra vires. As said in *The Queen v. Taylor*[18] by Wilson J., whose language I cannot do better than to borrow:

The act of the Ontario legislature in imposing a tax for a license on shop-keepers, and tavern-keepers and others of the like class for selling by retail, or for continuing the power to municipalities to prohibit the retail of spirituous liquors, is not in excess of the provincial power, although I conceive it to be partly a regulation of trade and commerce, because before and at the time of the confederation of the provinces the different municipalities in this province possessed that power and privilege, and it was not taken away or qualified in any way by the Confederation Act. That act, too, was in fact passed, and must be presumed to have been passed by the Imperial

Government with a full knowledge at the time of the state of our law which was affected by the Imperial Act then under consideration, and among other matters, that part of our law which related and relates to municipal institutions, as they existed at that time, because over “municipal institutions in the province” exclusive power was then conferred by it upon the Provincial Legislature.* * And I am of opinion that the right to regulate the sale of such liquors by retail, and also the entire prohibition of their sale in any municipality, relates to a matter of a merely local or private nature in the province.* * It partakes largely of a police regulation.

These remarks of Mr. Justice Wilson are in no way affected by the decision of this court in *Severn v. The Queen*[19], where that case of *The Queen v. Taylor*[20] was under review.

A valuable opinion by Richards C.J., in the sense of Mr. Justice Wilson’s aforesaid remarks, is to be found in *Re Slavin and Orillia*[21]. And later, in this court, in *Sulte v. The Corporation of Three Rivers*[22], Mr. Justice Gwynne said:

I cannot doubt that by item no. 8 of sec. 92, which vests in the provincial legislatures the exclusive power of making laws in relation to municipal institutions, the authors of the scheme of confederation had in view municipal institutions as they had already been organized in some of the provinces, and that the term, as used in the British North America Act, unless there be some provision to the contrary in sec. 91 of the act, comprehends the powers with which municipal institutions as constituted by acts then in force in the respective provinces, were already invested for regulating the traffic in intoxicating liquors in shops, saloons, hotels and taverns, and the issue of licenses therefor, as being powers deemed necessary and proper for the beneficial working of a perfect system of self-government. Unless, then, there be some provisions in the British North America Act to the contrary, the legislature of the Province of Quebec had full power in any act passed by it creating a municipality, or in any act amending or consolidating the acts already in force incorporating the city of Three Rivers, to insert the provisions in question here, which are contained in the 74th, 75th and 101st sections of 38 Vic. ch. 76.

Now, the 75th section of the Act so referred to by the learned judge as being *intra vires* of the provincial legislation, enacts that: The said council shall have power to make by-laws for restraining and prohibiting the sale of any spirituous wines, alcoholic or intoxicating liquor.

Mr. Justice Henry, in the same case, said:

It has been argued that because a prohibitory act of the legislature of any of the provinces, would be an interference with trade and commerce * * such an act would be *ultra vires* * * I cannot adopt that proposition...

The City of Fredericton v. The Queen[23] does not determine, as seems to be assumed by the appellant, that the Dominion Parliament has alone the power to prohibit the sale of liquor. The only point determined in that case is that the Temperance Act of 1878 is constitutional. Anything that was said outside of that question in that case, as well as in many others relied upon by the appellant, was *obiter dictum* and of no binding authority. And the reporter’s summaries in some of those cases are misleading.

The case here is unfettered by any authority. In answer to the contention that by its decision in *Russell v. The Queen*[24], where *Fredericton v. The Queen*²³ was under review, the Privy Council had determined that the whole subject of the liquor traffic was given to Parliament, Sir Barnes Peacock in *Hodge v. The Queen*[25], said:

It appears to their Lordships however, that the decision of this tribunal in that case has not the effect supposed, and that, when properly considered, it should be taken rather as an authority in support of the judgment of the Court of Appeal.

And is it not evident that when holding, as they did, the Liquor License Act of 1883 to have been ultra vires of the Dominion Parliament, their Lordships cannot have been of opinion that the whole control over the liquor traffic was vested in the Dominion Parliament? The inference from their decision on that license Act, I take it, is all the other way. And, in this court Mr. Justice Gwynne, in *Sulte v. The Corporation of Three Rivers*[26], said:

It seems to be supposed that the judgment of this court in the *City of Fredericton v. The Queen*[27], is an authority to the effect that since the passing of the British North America Act it is not competent for a provincial legislature to restrain or prohibit, in any manner, the sale of any spirituous liquors.^{***} But the *City of Fredericton v. The Queen*²⁷ raised no such question, nor is any such point professed to be decided by our judgment in that case.* * What was decided was that the provincial legislatures had not jurisdiction to pass such an Act as the “Canada Temperance Act of 1878,” and that the Dominion Parliament alone was competent to pass it; and of this opinion also, was the Judicial Committee in *Russell v. The Queen*[28].

And Mr. Justice Ramsay in Montreal must have shared in this opinion when he said in that same case in the Court of Appeal[29], in reference to the Privy Council’s decision in the case of *Russell v. The Queen*²⁸: “It has not, either expressly or by implication, maintained that the Dominion Parliament can alone pass a prohibitory law.”

The appellant’s contentions have, it seems to me, been rendered the more untenable by the decision of the Privy Council of February last in the Ontario Insolvency case[30].

It results from that case, if I do not misunderstand it, that there are, under the British North America Act, subjects which may be dealt with by both legislative powers, and that the provincial field is not to be deemed limited by the possible range of unexercised power by the Dominion Parliament, so that a power conferred upon the latter, but not acted upon, may, in certain cases, be exercised by the provincial legislatures, if it fall within any of the classes of subjects enumerated in section 92. In my opinion these propositions, which are now the law of the country, have here their full application.

And where would the provinces be on this question of the liquor traffic if it were not so? At the mercy of the federal power, that is to say, at the mercy of each other. Ontario, for instance, might desire to prohibit the liquor traffic through the municipal authorities, as they had the power to do before confederation, but Ontario would be unable to do so if the other provinces, either by directly refusing it in parliament or simply by not dealing at all with the question, refused to permit it.

That is surely not Canada's constitution.

The inaction of the Dominion law giver cannot have such consequences.

It cannot be that, simply because the Dominion authority will not prohibit all over the Dominion, the trade must be permitted everywhere in the provinces. It does not follow that because the provinces have the right to license they must license. Questions of power, as said by Marshall C.J., in *Brown v. State of Maryland*[31], cannot depend on the degree to which it may be exercised; if it may be exercised at all it must be exercised at the will of those in whose hands it is placed.

In cases of implied limitations or prohibitions of power it is not sufficient to show a possible or potential inconvenience; there must be a plain incompatibility, a direct repugnancy, or an extreme practical inconvenience, leading irresistibly to the same conclusion[32].

And I cannot see any such incompatibility or repugnancy in allowing one authority to prohibit when the other does not, though it might have the power to do so. It has earnestly been urged on the part of the appellant that, as a consequence of the Dominion Temperance Act of 1878, the provinces are now deprived of any power that they might previously have had of prohibiting or empowering the municipalities to prohibit the liquor trade.

But I fail to see such a consequence attached to that Act. There is it seems to me no incompatibility between the two, between that Act and the power of the municipalities to prohibit.

How can that Act of 1878 be deemed to be more incompatible with this power of the municipalities, than was the Temperance Act of 1864, with the same powers of the same municipalities? In the main, this Act of 1878 is but a reproduction of the Act of 1864; or, at least, both are based on the same principle. Now, in 1864, when the Temperance Act was enacted by the same legislature that had unlimited control as well over the municipalities as over the liquor traffic, the provisions of that Temperance Act were not deemed to be incompatible with the powers already possessed by the municipalities on the subject, which remained intact. And that they were not incompatible, I apprehend, will not be gainsaid. A statute, like the Dominion License Act of 1883 to license the trade or authorize the municipalities to license it, might be, and in fact would be, in the absence of the necessary provisions to avoid it, repugnant to or inconsistent with a prohibitory Act. But I fail to see that two prohibitory Acts, assuming the Temperance Act of 1878 to be a prohibitory Act, must necessarily be repugnant to one another, even where enacted by different authority, or even where the power to prohibit is conferred on two different bodies, specially where the jurisdiction of the two is not territorially the same, as is

the case with this double legislation on this matter. For, by the federal Act of 1878, it is only to county and city municipalities and federal electors that is granted the power to prohibit, whilst by the Ontario Act, it is in local municipalities and provincial electors that the power is vested. In Quebec it is the municipal electors, when a submission to the people is ordered.

The Privy Council in *Hodge v. The Queen*[33] considered that the Ontario License Act does not conflict with the federal Temperance Act of 1878. A fortiori would I say, two prohibitory Acts need not necessarily conflict with one another.

I do not lose sight of the fact that, as a local municipality forms part of a county municipality, where the federal Act of 1878 is put into operation in a county it necessarily follows that it is in operation in every one of the local municipalities included in it. The only consequence of this, however, is that the working of the provincial Act, or of a by-law under it, or the machinery by which it is put in operation, may be superseded or suspended in the municipalities where the Act of 1878 is in force, but I do not see in that any inconsistency with the power of the province to pass it, as long as the Act of 1878 is not acted upon, and revive it when the other one ceases to operate where it has been put in operation.

The federal Act cannot at all be considered as legislation over the powers of the municipalities. It does not purport to be anything of the kind. It has no connection whatever and could have none with the municipal system of the different provinces. It is controlled altogether by a majority of federal electors, but that, it is obvious, may not be at all the majority of municipal electors in a municipality, when that is required as in the province of Quebec and, in fact, cannot be under the statutes at present in force in some of the provinces whereby women, for instance, are entitled to vote at municipal but not at federal elections. Likewise, for the provincial electors, where as in Ontario these by-laws under the provincial Act depend on their votes. The majority of them may not be at all a majority of federal electors, or vice versa.

And the respondents, I assume, would not have any objection to submit to the Temperance Act of 1878, if it was put into force in the county of which they form part. All that they claim is home rule, the right to put a stop to drinking and to taverns within their own territorial limits, even if the rest of the province, or all the other municipalities of their own county, choose to do otherwise for their own people. They should be as free to do so now as they were before Confederation, though the provinces of British Columbia, Prince Edward Island, Quebec, or all of them and all the other municipalities of Ontario, may favour, within their territorial limits, a different policy. Whenever the federal Parliament prohibits entirely the liquor traffic in the Dominion, assuming always for the purposes of this case that they have the power to do so, the respondents will not complain; the very object they are now contending for will be attained. What they ask is to be at liberty to do so for themselves till Parliament does so for the whole Dominion.

And again: By an express provision of the Temperance Act of 1878, if the Act is rejected by the federal electors it cannot be submitted to them again for a period of three years. Now, if within these three years, a local municipality, and a majority within it of the provincial or municipal

electors where that is required, desire to prohibit the liquor traffic within its limits, is there anything, in allowing them to do so, inconsistent with the Temperance Act of 1878, or repugnant to it? It is all the other way, it seems to me. It perfects it: it aims at the same result; it provides for the promotion of temperance, where the Act of 1878 fails; it promotes temperance wherever the Act of 1878 cannot penetrate, it replaces it in any county, where a majority of the federal electors will not allow it to come in, or where no attempt is made to put it in operation. And is there, in that case, any inconsistency, or danger of a clashing of powers, in conceding to a local municipality the power to prohibit within its own limits though the rest of the county is in favour of licensing?

And can it not be said of the enactment now under consideration, what their Lordships said of the statute in *Hodge v. The Queen*[34], that it is “confined to municipalities in the Province of Ontario and is entirely local in its character and operation.”

The federal Parliament has, for instance, the right, I presume, of prohibiting the sale of dynamite or opium or any other poison all through the Dominion. The appellant would contend that, if Parliament has not enacted such a law, the provincial legislature cannot authorize the municipalities to prohibit the sale of such articles within their limits. Such a contention cannot prevail. There are a large number of subjects which are generally accepted as falling under the denomination of police regulations over which the provincial legislatures have control within their territorial limits, which yet may be legislated upon by the federal Parliament for the Dominion at large. Take, for instance, the closing of stores and cessation of trade on Sundays. Parliament, I take it for granted, has the power to legislate on the subject for the Dominion, but, until it does so, the provinces have, each for itself, the same power.

This shows, it seems to me, that the word “exclusively” in section 92 of the British North America Act is not susceptible of the wide construction that the appellant would put upon it. Then here, all that the respondent contends for is the municipal power to prohibit the liquor trade, or the power to prohibit as a part of the municipal institutions of the province, and that the power of the provincial legislatures over those institutions and the municipal system in general is exclusive. The federal parliament cannot in any way touch them.

On the appellant’s contention that such a prohibition by the municipalities is a regulation of trade and commerce, and therefore ultra vires of the provincial legislature, I need not dwell.

It is settled that these words “regulation of trade and commerce” in the British North America Act do not bear the wide construction that the appellant would here contend for. *Citizens Ins. Co. v. Parsons*[35]; *Hodge v. The Queen*[36]; *Bank of Toronto v. Lambe*[37]; *Bennett v. The Pharmaceutical Assoc. of Quebec*[38]; *Pillow v. The City of Montreal*[39].

It was likewise held by the United States Supreme Court, in *Cooley v. The Board of Wardens*[40], that a state law, establishing certain pilotage regulations conceded to be regulations of commerce, was valid until superseded by the federal legislative power. And, as said by Mr. Justice Field, in *Sherlock v. Ailing*[41]:—

Legislation, in a great variety of ways, may affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the constitution.

Cases to that same import are *Ex parte McNeil*[42]; *Willson v. The Blackbird Creek Marsh Co.*[43], and *Gilman v. The City of Philadelphia*[44]. If the provinces were deprived of the right to all legislation whereby it might be said that trade and commerce are in some way regulated, or more or less affected, very shadowy indeed would be many of the powers conferred upon them in express terms by sec. 92 of the British North America Act:

To apply to this case what Mr. Justice Swayne, delivering the judgment of the United States Supreme Court in *Railroad Co. v. Fuller*[45], said of the United States constitution on the same subject, assuming that this statute in question constitutes, in a sense, a regulation of trade and commerce, it is a regulation of such a character as to be valid until superseded by the paramount action of the federal authority. And it may very well be, notwithstanding what was said in this court in *City of Fredericton v. The Queen*[46], that if Parliament has the power to prohibit the liquor trade for the whole Dominion, it is not at all under the words “regulation of trade and commerce” of section 91 of the British North America Act that it gets it. However, that is not the question here. I may, nevertheless, notice what Mr. Justice Harlan, of the United States Supreme Court, said before the Behring Sea Tribunal, on the question whether a power to regulate includes a power to prohibit:—

The British counsel contended that it is beyond the power of the arbitrators to prescribe regulations of that character (to prohibit). They argued that the tribunal could not do indirectly what they could not do directly; that prohibition, in terms or by the necessary operation of regulations, is not regulation; that the power to regulate is not a power to prohibit... When enforcing the view last stated, counsel asked us whether a power given by the legislative department to a municipal corporation to regulate, within its limits, the sale of ardent spirits would give to such corporation authority to prohibit all sales of such spirits. Perhaps not. But the case put does not meet the one before the tribunal... It is mere play upon words to say, in respect to this treaty, that prohibition is not legislation[47].

I now pass to the provincial statutory laws on the subject.

The learned judges of the Court of Appeal, in the Local Option Case[48], have said all that can be said upon the Ontario municipal law of any import on this question. Let us see now what light a Quebec candle, or a reference to the Quebec law of municipalities, might throw upon it.

In 1774, by the 14th Geo. III. c. 88, s. 5 (see 35 Geo. III. c. 88, of Lower Canada, and 13 & 14 Vic. c. 27, of the late province of Canada), a license fee was imposed by the Imperial Parliament upon the sale of liquors in the Province of Quebec as then constituted. That Act is still in force in Quebec, if not in Ontario. The revenues from these licenses were to fall into the provincial fund, but in 1845, by the 8 Vic. c. 72, the legislature of the late Province of Canada decreed that the revenues from houses of public entertainment and tavern licenses were thereafter to be appropriated for municipal purposes.

In 1847, by 10 & 11 Vic. c. 7, the municipalities were given de novo the power to increase the price for liquor licenses.

In 1851, by 14 & 15 Vic. c. 100, a larger control over the liquor traffic was assumed by the legislature, and a new system of tavern licenses was established. Its main feature consisted in this that traffic in liquor was prohibited everywhere, except when allowed by the discretionary powers of municipal councils and municipal electors. *Smart v. The Corporation of Hochelaga*[49]. By section 21 the revenue from liquor licenses was again given to the municipalities. In 1853, by 16 Vic. c. 214, an Act to the same effect, with certain modifications, was passed for the cities of Montreal and Quebec.

In these cities the power to grant or refuse licenses was by that Act vested in the police magistrates, but they had no power to license except upon the petition of a certain number of municipal electors. All the license Acts in the province have since, likewise, made the granting of licenses dependent upon the municipal councils or municipal electors.

I need only refer for this to the Consolidated Statutes of Lower Canada c. 6 s. 9, and to arts. 829-835, and following, of the Revised Statutes of 1888, in both of which these License Acts are all condensed. A provision is to be found in every one of them that no licenses are to be issued in the municipality wherein a prohibitory by-law is in force. So much for the License Acts.

Now for the Municipal Acts. In 1855, by 18 Vic. c. 100, whereby the present municipal system of the province was inaugurated, local councils were empowered in express terms, section 23, subsection 6, to prohibit absolutely the retail traffic in liquors within the territorial limits of the municipality. In 1856, by 19 & 20 Vic. c. 101, sec. 8, the county councils were authorized to prohibit entirely, in March of each year, the sale of spirituous liquors within the county. And by section 11 the local councils were authorized to pass such a by-law for their own municipalities whenever the county council had allowed the month of March to expire without having passed one for the county.

In 1860, by 23 Vic. ch. 61, the Municipal Act was consolidated, but the above provisions of the statute of 1856 were left intact. Also in the Consolidated Statutes of 1861, ch. 24, these enactments are re-enacted without any alterations; as secs. 26 sub-secs. 10 and 11, and sec. 27, sub-sec. 16, respectively.

The terms are unequivocal: "Every municipal, county (or local) council may make by-laws for prohibiting and preventing (to prevent or prohibit) the sale of any spirituous liquors." In 1866 (29 & 30 Vic. ch. 32), sec. 16 of sec. 27 of the Consolidated Municipal Act of 1861, ch. 24, above referred to, was repealed, and replaced by a provision giving to local councils, before the second Wednesday of March of each year, the power to prohibit the sale of any spirituous liquors.

This Act, passed only two years after the Temperance Act of 1864, must be taken as another unequivocal declaration of the legislature of the late province of Canada that the power of the municipal authorities had not been, in any way, diminished or restricted by the said Temperance Act, and that these powers were not inconsistent with or repugnant to those conferred by the said Act.

Such was, in the province of Quebec, the state of the statutory law, on the subject, at confederation.

I need hardly say that it results clearly from it, whatever its consequences may be on the question now under consideration, that the whole system of legislative supervision over the liquor traffic was so closely identified with the municipal system of the province and so blended with it that they formed only one. The “constitutional connection” between the two, to use Mr. Justice Burton’s expression, was complete. And up to the present day the two are so worked and put in operation as one that every year, in a large number of the municipalities, the only, or at least the principal, question at the election for councillors is prohibition or no prohibition. This is a matter of public notoriety in the province. Now, not long after the coming into force of the British North America Act the Quebec Legislature, in 1870, enacted a municipal code and, in continuance of the policy that had theretofore prevailed in the Province of treating the control over the liquor traffic as a part of the municipal institutions, and leaving it to be as theretofore a marked feature of the power vested in the municipal authorities, it conferred upon each local council, by sec. 561 thereof, the power to prohibit and this, by extension of the power, “at any time” during the municipal year, the retail sale of intoxicating liquors. And that enactment, with slight amendments (art. 6118, Rev. Stat. of 1888), has remained in force up to the present day unchallenged by the federal authority and has been acted upon through the Province in a number of municipalities.

And at this very moment there are no less than 158 localities in the province, as I gather from official sources, where the retail sale of liquors is entirely prohibited under that statute. That has been in the province the average yearly number of such by-laws since 1867. And, as in Ontario, I may remark, the enforcement of all such regulations, restrictions and prohibitions is performed by the police force of the locality where such force exists, and forms a part of the police duties, under the control of the police courts and police commissioners. In fact, in many of the rural municipalities, the only annual police regulation is a prohibitory by-law.

If the appellant’s contentions were to prevail all this legislation, all these hundreds of by-laws passed every year since 1867, were and are each and every one of them perfect nullities, not worth the paper they were written upon.

The legislature of Quebec, besides the statutes I have referred to, has since the municipal code, and after the passing of the federal Temperance Act re-enacted, in 1888, as law enforced in the province, the Temperance Act of 1864, by art. 1095 of the Revised Statutes which reads as follows:

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The municipal council of every city, town, township, parish or incorporated village, shall have the power under the authority and for the enforcement of this section, and subject to the provisions and limitations, at any time, to pass a by-law prohibiting the sale of intoxicating liquors,

without submitting it to the electors. The legislature of Ontario, in 1887, by the Revised Statutes, likewise considered the Temperance Act of 1864 as still in force within that province.

Now, what is the jurisprudence on the question in the province of Quebec?

I will refer, of course, only to the Court of Appeal.

I find only two cases, in that court, on the question, but they are both so express and clear that unreversed as they stand, they settle, beyond doubt, the jurisprudence, as far as the province goes.

In *Sulte v. The Corporation of Three Rivers* (1882)[50], the Court of Appeal, in Montreal, unanimously held that, at the time of confederation, the right to prohibit the sale of intoxicating liquors was possessed by the municipal authorities, and consequently is to be deemed included in the powers vested in the provincial legislatures, under the words “provincial institutions” of subsec. 8, sec. 92 of the British North America Act, and this in no equivocal terms.

We hold then, said Mr. Justice Ramsay for the court, that the right to pass a prohibitory liquor law for the purposes of municipal institutions has been reserved to the local legislatures by the British North America Act.

That case was affirmed in this court[51], though not upon the ground taken by the Montreal Court of Appeal. The point was not dealt with one way or the other.

In 1891, in the case of *the Corporation of Huntingdon v. Moir and the Attorney General* intervening party upon the constitutional question[52], the Court of Queen’s Bench again unanimously determined, reversing the judgment a quo, that art. 561 of the Municipal Code vesting the local councils with the right to prohibit the retail traffic in liquors within their territorial limits, is intra vires of the provincial legislature, and that a by-law passed under the provisions to prohibit such traffic is in all respects legal and binding.

It is impossible to get two decisions more directly in point.

This court has never had occasion to pass on the question, but in the case of *Bergeron v. Lassalle*[53] it may not be amiss to remark, the power of the legislature of Quebec to prohibit the sale of liquors in Three Rivers and other cities of that class, relied upon by the respondent, was not questioned either at bar or on the bench, and the court gave due effect to such a prohibition.

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

I have only to add that, in my view of the case, the appeal must fail even if the appellant’s contentions as to the unconstitutionality of the Ontario legislation in the matter were to prevail.

For, if the province of Ontario had not the power to re-enact the sections in question of the Municipal Act, it cannot have had the power to repeal them expressly or impliedly; and consequently they are now in force as they stood at confederation in the Municipal Act of 1866. No reasons to quash the by-law of the municipality respondent as being against the provisions of the statute as it then was, have been assigned by the appellant.

As I conclude this opinion, I am informed by the registrar that a reference to this court which will probably involve the question in issue in this case has been ordered by the federal authorities. I think, however, that the parties here should not be prejudiced by this action of the federal power, and that they are entitled to a judgment on the case they submitted to us.

GWYNNE J.—After the argument of this case upon the first of the questions involved in it, certain questions were submitted to us under an order in council of the 26th of October, 1893, in the matter of prohibition of the trade in intoxicating liquors under the provisions of the statute in that behalf, which questions contained one which raised the precise point in issue in this case and in consequence all further action in this case was deferred until the hearing and argument of the questions submitted by the order in Council. The argument therefore upon the questions so submitted, constituted in effect, in my opinion, a reconsideration and as it were, a rehearing of the questions involved in this case. I have entered fully in my judgment on the questions so submitted into my reasons for my conclusions upon the said questions which include that in this case which judgment contains the only judgment I have to deliver upon every one of the questions therein involved, namely, that they all must be answered in the negative[54].

Appeal dismissed with costs.

Solicitors for appellant: Du Vernet & Jones.

Solicitors for respondent: O'Donohoe, Titus & Co.

[1] 19 Ont. App. R. 343.

[2] R.S.O. [1887] c. 184 sec. 293.

[3] See 21 Can. S.C.R. 669.

[4] See next case.

[5] See *Huson v. South Norwich* 21 Can. S.C.R. 669.

[6] 18 Ont. App. R. 572.

[7] 7 App. Cas. 829.

[8] 3 Can. S.C.R. 505.

[9] 9 App. Cas. 117.

[10] 7 App. Cas. 829.

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- [11] [1894] A.C. 189.
- [12] [1894] A.C. 189.
- [13] 9 App. Cas. 117.
- [14] 9 App. Cas. 117.
- [15] 36 U.C.Q.B. 159.
- [16] 2 Can. S.C.R. 70.
- [17] 18 Ont. App. R. 572.
- [18] 36 U.C.Q.B. 183.
- [19] 2 Can. S.C.R. 70.
- [20] 36 U.C.Q.B. 183.
- [21] 36 U.C.Q.B. 159.
- [22] 11 Can. S.C.R. 25.
- [23] 3 Can. S.C.R. 505.
- [24] 7 App. Cas. 829.
- [25] 9 App. Cas. 117.
- [26] 11 Can. S.C.R. 25.
- [27] 3 Can. S.C.R. 505.
- [28] 7 App. Cas. 829.
- [29] 5 Legal News 330; 2 Cartwright 280.
- [30] Attorney General of Ontario v. Attorney General of Canada [1894] A. C. 189.
- [31] 12 Wheaton 439.
- [32] 1 Story on The Constitution 5 ed. sec. 447.
- [33] 9 App. Cas. 117.
- [34] 9 App. Cas. 117.
- [35] 7 App. Cas. 96.
- [36] 9 App. Cas. 117.
- [37] 12 App. Cas. 575.
- [38] 1 Dor. Q.B. 336.

- [39] 30 L.C. Jur. 1.
- [40] 12 Howard 319.
- [41] 93 U.S.R. 99.
- [42] 13 Wall. 240.
- [43] 2 Peters 250.
- [44] 3 Wall. 728.
- [45] 17 Wall. 560.
- [46] 3 Can. S.C.R. 505.
- [47] Mr. Justice Harlan's opinion before Behring Sea tribunal, page 31.
- [48] In re Local Option Act 18 Ont. App. R. 572.
- [49] 4 Legal News 255.
- [50] 5 Legal News 330; 2 Cartwright, 280.
- [51] 11 Can. S.C.R. 25.
- [52] 20 R.L. 684.
- [53] Cass. Dig. 2 ed. 495.
- [54] See His Lordship's judgment in next case.
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