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## *HOMICIDE BY NECESSITY.*

### SUPREME COURT OF ALABAMA.

January 26, 1893.

ARP v. THE STATE.

Arp was convicted in July, 1892, at the Alabama Circuit Court, of murder in the first degree, and was, accordingly, sentenced to death. He had murdered one Payne, in order to prevent him from appearing against him and two other men, Buckhalter and Leith, charged with retailing whiskey without a licence. Arp's excuse for the homicide was 'that Buckhalter and Leith threatened to take his life unless he killed the deceased; that they were present, armed with double-barrelled shot-guns, and threatened to kill him unless he killed deceased, and that it was through fear and to save his own life he struck deceased with an axe.' On this phase of the evidence the Circuit Court was asked to give the following charge: 'If the jury believe from the evidence that the defendant killed Payne under duress, under compulsion from a necessity, under threats of immediate impending peril to his own life, such as to take away the free agency of the defendant, then he is not guilty.' The Court refused this charge, and the refusal was upheld by the Supreme Court in Error. In delivering judgment, Mr. Justice Coleman said:—

This brings up for consideration the question: What is the law when one person, under compulsion or fear of great bodily harm to himself, takes the life of an innocent person; and what is his duty, when placed under such circumstances? The fact that the defendant had been in the employment of Buckhalter is no

excuse. The command of a superior to an inferior, of a parent to a child, of a master to a servant, of a principal to his agent, will not justify a criminal act done in pursuance of such an act. (1 Bish. Crim. Law, s. 355; *Reese* v. *State*, 73 Ala. 418; Bl. Com. s. 27.) In a learned discussion of the question to be found in *Com.* v. *Neal*, 1 Lead. Crim. Cas. 81, and note, p. 91, by Bennett and Heard, it is declared that 'for certain crimes the wife is responsible, although committed under the compulsion of her husband. Such are murder,' &c. To the same effect is the text in 14 Am. & Eng. Enc. Law, 649, and this Court gave sanction to the rule in *Bibb* v. *State*, 95 Ala. 31.

In Ohio a contrary rule prevails in regard to the wife. (*Davis* v. *State*, 15 Ohio, 72.) In Arkansas there is a statute specially exempting married women from liability when 'acting under the threats, commands, or coercion of their husbands': but it was held under this Act there was no presumption in favour of the wife accused of murder, and that it was incumbent on her to show that the crime was done under the influence of such coercion, threats, or commands. (*Edwards* v. *State*, 27 Ark. 493, reported by Green in 1 Crim. Law, 741.)

In the case of *Beal* v. *State*, 72 Ga. 200, and also in the case of *People* v. *Miller*, 66 Cal. 468, the question arose upon the sufficiency of the testimony of a witness to authorise a conviction for a felony, it being contended that the witness was an accomplice. In both cases the witness was under fourteen years of age. It was held that if the witness acted under threats and compulsion he was not an accomplice. The defendants were convicted in both cases.

The learned judge referred to *Regina* v. *Crutchley*, 5 C. & P. 133; 1 Hawk. P. C. 28, s. 26; 1 Hale, P. C. c. 8, pp. 49-51: 4 Black. Com. s. 30; East, P. C. 294; and *Regina* v. *Tyler*, 8 C. & P. 616, and then proceeded:—

In the case of *Respublica* v. *McCarty*, 2 Dall. 86, when the defendant was on trial for high treason, the Court uses this language: 'It must be remembered that in the eye of the law nothing will excuse the act of joining an enemy but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage on property.' The same rule in regard to persons charged with treason as that stated in Hale P. C. is declared in Hawkins (vol. i. chap. 17, s. 28, and note), and both authors hold that the question of the practicability of escape is

to be considered, and that if the person thus acting under compulsion continued in the treasonable acts longer than was necessary, the defence *pro timore mortis* will not be available. This principle finds further support in the case of *U. S.* v. *Greiner*, tried for treason, reported in 4 Phila. 396 in the following language: 'The only force which excuses on the grounds of compulsion is force upon the person, and present fear of death, which force and fear must continue during all the time of military service; and that it is incumbent in such a case who makes force his defence to show an actual force, and that he quitted the service as soon as he could.' 1 Whart. Crim. Law, s. 94, under the head of 'Persons under Compulsion,' says: 'Compulsion may be viewed in two aspects: (1) When the immediate agent is physically forced to do the injury—as when his hand is seized by a person of superior strength, and is used against his will to strike a blow, in which case no guilt attaches to the person so coerced; (2) when the force applied is that of authority or fear. Thus when a person, not intending wrong, is swept along by a party of persons whom he cannot resist, he is not responsible if he is compelled to do wrong by threats on the part of the offenders instantly to kill him, or to do him grievous bodily harm, if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence. Thus it is a defence to an indictment for treason that the defendant was acting in obedience to a *de facto* Government, or to such concurring and overbearing sense of the community in which he resided as to imperil his life in case of dissent.' In section 1,803*a* of the same author (Wharton) it is said: 'No matter what may be the shape compulsion takes, if it affects the person, and be yielded to *bona fide*, it is a legitimate defence.'

We have examined the cases cited by Mr. Wharton to sustain the text, and find them to be cases of treason or fear from the party slain, and in none of them is there a rule different from that declared in the common law authorities cited by us. Bishop, Crim. Law, sections 346-348, treats of the rules of law applicable to acts done under necessity and compulsion. It is here declared 'that always an act done from compulsion or necessity is not a crime. To this proposition the law knows no exception. Whatever it is necessary for a man to do to save his life is, in general, to be considered as compelled.' The cases cited to these propositions show the facts to be different from those under consider-

ation. The case referred to in *Reniger* v. *Fogossa*, 1 Plow. 19, was where the defendant had thrown overboard a part of his cargo of green wood, during a severe tempest, to save his vessel and the remainder of his cargo. The other (*Regina* v. *Bamber*, L. R. 5 Q. B. 279) was for the failure to keep up a highway, which the encroachments of the sea had made impossible; and that of *Tate* v. *State*, 5 Blackf. 73, was also that of a supervisor of a public highway; and the others were cases of treason, to which reference has been made. In section 348 the author cites the rule laid down by Russell, and also of Lord Denman, and in 1 East, P. C., to which reference has already been made. In section 845 the same author (Bishop, 'Crim. Law.' 7th edit.) uses the following language: 'The cases in which a man is clearly justified in taking another's life to save his own are when the other has voluntarily placed himself in the wrong. And *probably*, as we have seen, it is never the right of one to deprive an innocent third person of life for the preservation of his own. There are, it *would seem*, circumstances in which one is bound even to die for another.' The italics are ours, emphasised to call attention to the fact that the author is careful to content himself more with reference to the authorities which declare these principles of law than an adoption of them as his own. The authorities seem to be conclusive that at common law no man could excuse himself, under the plea of necessity or compulsion, for taking the life of an innocent person.

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## *THE QUEBEC BUSINESS TAX.*

The following opinion, obtained some time ago from Messrs. Macmaster, Q. C., and Greenshields, Q. C., will be of interest on account of the cases to which reference is made; but we reproduce it without in any way concurring in the conclusion, the question of the power of the legislature to pass the Act, as it seems to us, having already been settled by the Privy Council in *Bank of Toronto & Lambe*:—

Our opinion is asked by a committee of the citizens of Montreal, acting on behalf of a large number of manufacturers and traders, as to the validity of "an act respecting certain licenses" (55 and 56 Victoria, cap. 10), obliging manufacturers and traders, on or before the first of October in each year, to take out a license for the transaction of their business, and to pay in each

case a specified sum of money therefor, under pain, in default, of penalty and imprisonment.

In determining this question, it is not for us to consider whether the legislation in question is wise or unwise, necessary or unnecessary, reasonable or oppressive. These are questions for the legislator and the taxpayer, which do not fall within the domain of legal enquiry.

That Parliament is supreme is a common saying; but it has reference to countries where there is but one parliament. In Canada we have a division of legislative power between the Federal or Dominion Parliament, and the Legislatures of the several provinces. Each of these law-making bodies is supreme within its own jurisdiction, and when the enquiry arises as to whether any piece of legislation has been competently enacted or not, the first question is whether the principal subject matter and purpose of the act fall within the jurisdiction of the enacting body.

Parliament or the legislature is therefore only supreme in Canada when the subject and objects of its enactment fall within its own jurisdiction.

There are some subjects in respect of which the Parliament of Canada and the Legislatures of the provinces have concurrent power; but it is not necessary to consider these at present.

Our statutory constitution is the British North America Act of 1867, enacted by the Imperial Parliament, and declared in the preamble to be "a constitution similar in principle to that of the United Kingdom." In truth, our constitution being federal in principle, and not legislative like that of Great Britain and Ireland, is entirely dissimilar in respect of legislation to that of Great Britain, so much so that Mr. Dicey, in his celebrated work on "The Law of the Constitution," has characterized the prefatory statement in the preamble of the British North America Act as an instance of "official mendacity."

Our constitution resembles that of Great Britain more in the unwritten law of the constitution than in its statutory enactments.

By sections 91 and 92 of the British North America Act, called for convenience the Confederation Act, a distribution of legislative powers is made between the Parliament of Canada and the Legislatures of the provinces.

To the Canadian Parliament is assigned by section 91 plenary power to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the provinces. Then "for greater certainty, but not so as to restrict the generality of the powers so conferred upon the Parliament of Canada, it is expressly declared that (notwithstanding anything in this act) the exclusive legislative authority of the Parliament of Canada extends to" certain specified enumerated classes of subjects, among others "The Regulation of Trade and Commerce," "Postal Service," "Militia," Banking," "Currency and Coinage."

Familiar instances are given, and in respect of all such matters the Parliament of Canada has, notwithstanding anything in the Confederation Act, exclusive legislative authority, and if the subject matter and purpose of the legislation falls under the description of anyone of those headings, the Legislature of the province has not a vestige of legislative authority over it.

The legislature of Quebec, therefore, could not impose one cent's duty or tax on a bushel of beans going out or coming into the province, could not authorize the raising of a corporal's guard of soldiers wearing the Queen's uniform, and could not issue paper money or metal coin to the value of five cents. But while this is so, it will be found that the powers of legislation vested in the provinces are large and exceedingly important.

The province may, by section 92 of the British North America act, exclusively make laws in relation to matters coming within the classes following:—"Direct taxation in the province in order to the raising of a revenue for provincial purposes," "the borrowing of money on the sole credit of the province," "municipal institutions in the province," "shop, saloon, tavern, auctioneer and other licenses. in order to the raising of a revenue for provincial, local or municipal purposes," "the solemnization of marriage in the province," "property and civil rights in the province," "and generally all matters of merely local or private nature in the province." The legislature of Quebec could, therefore, repeal the Civil Code, and substitute for it the laws of the Medes and Persians, in so far as these laws concern property and civil rights. It cannot issue a penny piece of current coin, but it can sell the credit of the province—while the credit is saleable—to an extent sufficient to bankrupt the exchequer; and, though it cannot tax the incoming bushel of beans, it has,

in fact, been judicially held on the highest authority that it can tax millions of money that never ventured across our boundaries, if the financial institution controlling these funds has an agency doing business within our confines. It may exclusively make laws in reference to "municipal institutions," and that apparently harmless expression, popularly associated with township and county government, has been judicially interpreted to embrace an *imperium in imperio* of wide dimensions. In virtue of these words, the province can competently authorize a city to say when its taverns shall be closed and opened, when the billiardist must put down his cue, and it is an open question whether it could not enact the hours for closing theatres and commencing divine service. It may make police regulations, and though it cannot uniform a single soldier under the colors of the Queen, it may engage an army as large as the Tzar's to enforce these regulations.

Saving the office of lieutenant-governor, who is an integral part of the Legislature, representing there the Queen and the Federal authority, it can amend its own constitution and, possibly, abolish itself, or put the Legislative Council and Assembly in commission for a number of years. We will not go so far as to say that it could appoint an official liquidator for provincial affairs, for under the British system there must be a Government, and "the Queen's Government must be carried on," come what will.

Saving the restriction as to the office of Lieutenant-Governor, it could substitute for the present provincial constitution one exactly similar in terms to that of the Bulgarian Sobrange.

No one can therefore doubt that the powers of the local Legislature are large and important.

The Judicial Committee of the Privy Council has tersely defined "the true character and position of the provincial Legislatures" in the case of Hodge and the Queen, (Law reports, 9 Appeal Cases 132) as follows:—

"They are in no sense delegates of, or acting under any mandate from, the Imperial Parliament. When the British North America act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed

and could bestow. Within these limits of subjects and area the local Legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of the Dominion would have, under like circumstances, to confide to a municipal institution or body, of its own creation, authority to make by-laws or resolutions as to the subjects specified in the enactments, and with the object of carrying the enactment into operation and effect."

The Judicial Committee has also put down a rule or method for determining whether legislation falls under section 91 (enumerating the powers of the federal Parliament) or under section 92 (enumerating the powers of the Local Legislatures).

"The first question is whether the act impeached in the present appeal (providing that fire insurance policies in Ontario should be subject to certain statutory conditions) falls within any of the classes of subjects enumerated in section 92, and assigned exclusively to the Legislatures of the provinces; for if it does not it can be of no validity, and no other question would then arise. It is only when an act of the provincial Legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the provincial Legislature is, or is not, thereby overborne." (*Citizens Insurance Co.* v. *Parsons*, Law Reports, 7 Appeal Cases 96 et seq.)

Let us apply that test to this case. Admitting for the moment that the subject matter of the legislation here *prima facie* falls within the sub-section of section 92, which permits the local Legislature exclusively to make laws in relation to "shop, tavern, saloon, auctioneer, and other licenses in order to the raising of a revenue for provincial, local or municipal purposes," does it also fall within one of the enumerated classes of subjects in section 91, and is the power of the provincial Legislature thereby overborne? Does the provincial enactment in this case contravene the power not merely vested in the Parliament of Canada, but declared to be vested "exclusively," notwithstanding anything in the act, to legislate in respect to "the regulation of trade and commerce?" Can the Legislature of Quebec, consistently with the existence of exclusive power in the Parliament of Canada to legislate in respect to trade and commerce, say to a trader or manufacturer, doing business in the province of Quebec, "You must pay an annual license fee of $50 or $100 per year on your business as a trader or manufacturer, and if you do not, you will be fined and sent to jail for one month?" If it may do so it may increase the fee, penalty or imprisonment by twenty-fold or one hundred-fold.

What would be the effect if the Legislatures of all the provinces imposed at the same time a direct tax upon the banks similar to that imposed and collected in Quebec? The same capital would be subject to taxation seven times, once in each province.

Is the existence of such a power in the Legislature consistent with the existence of an exclusive power in the Dominion Parliament to regulate trade and commerce? If it is, a time may come when the exclusive authority of the Dominion Parliament would be reduced to a fiction, when there would be no trade or commerce left to regulate. It is no answer to this to say that it is not to be assumed that the Legislature would tax trade and commerce out of existence, for, if it has the power to levy the tax it can make the levy small or large according to its caprice or necessities.

The real question is not whether it may tax moderately or excessively, wisely or unwisely, but whether it can tax trade and commerce indefinitely, consistently with the regulating power of the Dominion Parliament. If it can, Federal power over trade and commerce is reduced to a shadow.

Suppose that each of the provinces taxed the business of manufacturers and traders to the verge of annihilation and that the Dominion Parliament, in order to preserve the nation from becoming a purely pastoral country, passed an act regulating trade and commerce throughout the Dominion, and providing that the business of a trader or of a manufacturer should be exempt from taxation of every kind, or that a bounty should be paid to every person engaging in the business of manufacturing and trading, such act not touching in any way the rights of the provincial legislatures to tax property and all persons rateably and equally within the provinces, would such an act be *ultra vires* of the Federal Parliament? We think not. And if not, what would become of the License act in question? The supposed Federal act and the present License act could not exist concurrently. It is no answer to say that the Dominion Parliament has not passed such an act. The real question is, are the Federal powers transgressed now?

Regard must be had to the true confines of legislative jurisdiction between the legislature and parliament, according to the true intent and meaning of the imperial statute, whether colonial legislation, federal or provincial, may have supervened or not.

In like manner the Federal Parliament must not transgress the domain of the Provincial Legislature.

If, for example, the Parliament of Canada should enact that marriage throughout the Dominion of Canada might be solemnized "by jumping a broomstick," provided a fee of $50 were first paid to a collector of federal revenue, such legislation would be *ultra vires* as a transgression of the exclusive power of the local Legislatures over "the solemnization of marriage," and as not being an enactment coming within the general power vested in Parliament to legislate in respect to "the peace, order and good government" of the country.

We have given extreme instances of legislation in order to illustrate principles that underlie the distribution of legislative power in our constitution, and the better to test their application. We have not failed to give due consideration to the cases that have already been decided in Canada and in England upon the construction of the two sections 91 and 92 of the British North America Act. We have not overlooked the decisions of the Privy Council in the cases of Parsons and the Citizens Insurance company; the Attorney General of Quebec and the Queen Insurance company; the Attorney General of Quebec and Reid; Russell and the Queen; the Bank of Toronto and Lambe, Hodge and the Queen, and other cases in the Privy Council and in our own Supreme Court.

We note that in one of the Privy Council cases their lordships observed that:

"Subjects which in one aspect, and for one purpose, fall within section 92, may, in another aspect, and for another purpose, fall within section 91."

And in another case their lordships observed:

"The two sections must be read together, and the language of the one interpreted, and where necessary, modified by that of the other. In performance of this difficult duty it will be a wise course for those on whom it is thrown to decide each case which arises as best they can; without entering more largely upon the interpretation of the statute than is necessary for the decision of the particular case in hand."

Upon this head, assuming *prima facie* that the Quebec License Act falls within the sub-section permitting the local legislature to make laws in respect of licenses for the raising of a revenue for provincial purposes, we incline to the view that the enactment now under consideration is a transgression of the powers exclusively and absolutely vested in the Federal Parliament relating to "the regulation of trade and commerce."

But can it be said that the provision requiring manufacturers and traders to take out a license, under pain of penalty or imprisonment, comes properly within sub-section of section 92, which authorizes the legislatures to make laws in respect of "shop, saloon, tavern, auctioneer and other licenses." We are of opinion that the license upon traders and manufacturers as provided for in the local statute, does not fairly come within the class of licenses referred to in the words "shop, tavern, saloon, auctioneer and other licenses." The expression "other licenses" in this sentence, it appears to us, means "other licenses" of the same class or the same kind (*ejusdem generis*). The words "other licenses" in the statute must have been used with reference to what could have been reasonably contemplated at the time of their enactment, and if it was intended that the legislature could issue licenses for any purpose, why was there any specification of a class of licenses for shops, taverns, saloons and auctioneers? If it was intended to confer upon the local Legislature the right to tax *ad infinitum*, the Imperial Parliament would have expressed its intention in clearer terms.

We find it difficult to conceive that when the Imperial Parliament restricted the legislatures to "direct taxation," and gave the most unlimited powers of taxation to the Federal Parliament, it could also have intended that the restriction could be avoided by the adoption of a system of discriminating imposts in the form of, and under the name of, licenses.

In rendering judgment in the Supreme Court of Canada, in the case of *Severn* v. *The Queen*, 2 Can. S.C.R. 97, Chief Justice Richards said :—

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

Mr. Justice Fournier, in this case, said :

"Without attaching more importance than is necessary to the application of the rule *ejusdem generis*, is it not more logical to suppose that the Imperial legislature, finding already in some of the laws these licenses treated as of the same kind as other licenses, did likewise, and dealt with them as belonging to the one class; and, therefore, should we not apply,

in construing this 9th paragraph, the rule of *ejusdem generis?* Otherwise we must come to the conclusion that the insertion of the word 'auctioneer,' which, no doubt, was put in to give the local government a further source of revenue, would have the effect of giving to the local legislature an unlimited power to tax by licenses. This cannot have been the intention of the Imperial Parliament. They cannot, by the insertion of that word, have made a provision which would have the effect of destroying the financial system of both the Dominion and the provinces established by the constitution. The intention was, no doubt, that they should have a limited signification, in accordance with the distinct powers so carefully alloted to the Federal and local governments.

"Moreover, I am far from admitting that the word 'other,' coming immediately after an enumeration, can always have that broad meaning. On the contrary, I am of opinion that it should nearly always be accepted in a restricted sense, and that the cases in which its signification is absolute and unlimited are exceptional."

In the same case Mr. Justice Taschereau stated:—

"From what I have read and heard, I think there is no difficulty in assuming that the tax imposed upon the brewer selling by wholesale in the present case is an indirect tax, and should not be further pressed against the defendant, Severn."

The Judicial Committee of the Privy Council expressly held in the case of the *Bank of Toronto & Lambe*, L. R., 12 App. Cas., 575, that a tax upon a bank, computable with reference to its paid-up capital and number of agencies in the province of Quebec, is a direct tax competently imposed by the Legislature. "This bank," said their lordships, "is found to be carrying on business there, and on that ground alone, it is taxed. . . . The bank itself is directly ordered to pay a sum of money." But in that case their lordships were careful to observe with reference to the Ontario tax on brewers:—

"In Severn's case (2 Canada Sup. Ct. Rep. 70) the tax in question was one for licences, which, by a law of the Legislature of Ontario, were required to be taken for dealing in liquors. The Supreme Court held the law to be *ultra vires*, mainly on the grounds that such licences did not fall within class 9 of section 92, and that they were in conflict with the powers of Parliament under class 2 of section 91. It is true that all the judges expressed opinions that the tax, being a licence duty, was not a direct tax. Their reasons do not clearly appear, but, as the tax now in question (i.e., in the Bank of Toronto and Lambe,) is not either in substance or in form a licence duty, further examination on that point is unnecessary."

It therefore appears that, in deciding the *Toronto Bank & Lambe*, their lordships did not pass upon that aspect of *Severn & The Queen* that has reference to the "license duty." They were

dealing with a "direct tax," and not with a "license duty." Their lordships, doubtless, purposely abstained from dealing with the question of how far the local legislature can competently impose taxes by "license duty" in adherence to the rule put down in *Parsons & The Queen Insurance Company*, as follows:

"Sections 91 and 92 of the British North America act, 1867, must, in regard to the classes of subjects generally described in section 91, be read together, and the language of the one interpreted, and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain, and give effect to all of them. Each question should be decided as best it can, without entering more largely than is necessary upon an interpretation of the statute."

Their lordships have left themselves untrammelled by the *Bank of Toronto & Lambe* to consider the question submitted to us for opinion.

Since the decision of the Judicial Committee in the *Bank of Toronto & Lambe*, in 1887, a most important judgment has been rendered in the United States—*Leloup* v. *Port of Mobile*, (126 U. S. Supreme Ct. Reps. 640), in which it was decided that the business of the Western Union Telegraph company could not be taxed under an enactment of the state of Alabama on the ground that "telegraphic communications are commerce," and the tax in this instance fell not upon the company's property in the state, but on the business throughout the United States, and therefore transgressed the provisions of the constitution, which vested Congress with power to "regulate commerce with foreign nations and among the states." In this important decision the judgment previously rendered in 1827 by Chief Justice Marshall for the Supreme Court in the case of *Brown* v. *The State of Maryland* (12 Wheaton, 419), and the judgment rendered by Chief Justice Taney in the case of *Almy* v. *California* (24 Howard, 169), were reviewed and approved.

In *Brown* v. *State of Maryland*, it was laid down as law, which has been since consistently followed in the United States, that the "Act of a state legislature requiring all importers of foreign goods by the bale or package, etc., and other persons selling the same by wholesale, bale or package, etc., to take out a license, for which they shall pay $50, and, in case of neglect or refusal, subjecting them to certain forfeitures and penalties, is repugnant to that provision of the constitution of the United States which declares that "no state shall, wthout the consent of

Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares that Congress shall have power "to regulate commerce with foreign nations, among the several states and with the Indian tribes."

In *Almy* v. *State of California* (24 Howard, 169) it was decided that a state stamp tax on bills of lading was void.

The decision in the recent case of *Leloup* v. *The Port of Mobile* followed these cases, the court being unanimous. Mr. Justice Bradley, in delivering judgment said :—

"Can a state prohibit such a company (the Western Union Telegraph company) from doing such a business within its jurisdiction unless it pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit such business altogether. We are not prepared to say that this can be done. But it is urged that a portion of the Telegraph company's business is internal to the state of Alabama, and therefore taxable by the state. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which covers the entire operations of the company...In our opinion such a construction of the constitution leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress...We may here repeat what we have so often said before, that this exemption of interstate and foreign commerce from state regulation does not prevent the state from taxing the property of those engaged in such commerce located within the state, as the property of other citizens is taxed, nor from regulating matters of local concern, which may incidentally affect commerce, such as wharfage, pilotage and the like."

We have cited largely from this important case, as it has been decided since the *Bank of Toronto & Lambe* in the Privy Council, and as the reasons for the decision are weighty and most convincing.

The people of the United States have had an experience of Federal constitution for over one hundred years, and the opinions of the judges of their Supreme Court unanimously expressed, as in the *Leloup* case, are entitled to the highest consideration.

The decisions of the Judicial Committee of the Privy Council and of our own Supreme Court of Canada are binding authorities

on us, but neither court would disregard the powerful reasoning of the Supreme Court of the United States in the like or similar circumstances.

The taxing power of a state of the American Union is greater than that of a Canadian province, and if a state tax upon business is *ultra vires* there, *a fortiori* it would be here.

We think that the case of the *Bank of Toronto & Lambe*, which their lordships observed was a case of "great constitutional importance," is distinguishable from the case submitted for opinion. A great constitutional question is involved in this case as well as in that. The tax in their case was direct; here it is a tax by license. The official report of the argument before the Privy Council shows that the important cases of *Brown* v. *State of Maryland*, and *Almy* v. *California*, adverted to by us, were not cited. The *Leloup* case was not cited because it was not then decided.

Our opinion does not involve any curtailment of the legislative power of the province to impose "direct taxes" where it can competently impose such taxes, but, on the contrary, the whole field of direct taxation in the province is not trespassed upon. The distinction between a "license duty" and a "direct tax" has not yet been made by the Judicial Committee. The last word upon that subject has not been said.

In our opinion the Quebec statute of 1892, imposing the license in question is *ultra vires* of the Legislature, upon the true construction of the British-North America act of 1867.

(Signed) DONALD MACMASTER.
J. N. GREENSHIELDS.

Montreal, November 26, 1892.

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## *NEW PUBLICATION.*

"LE DROIT PAROISSIAL," by P. B. Mignault, Esq., Q.C. Montreal: Beauchemin & Fils, publishers.

The present work, comprising nearly 700 pages, is the first that has appeared in this province which treats fully the subject of parochial law. The work published by the late Mr. Justice Beaudry, "Le Code des Curés," forms an interesting introduction to the subject, but since its appearance several cases of importance have come before the courts which have added largely to our knowledge of this branch of law.

Mr. Mignault, Q.C., who has already made his mark as a legal author in his valuable commentary on the Code of Procedure and his Manual of Parliamentary Law, has treated the subject of parochial law with his customary clearness and ability. It may be observed that he discusses the subject with respect only to the Catholic parish, which in this province is governed by a special code of laws, many of them unwritten and founded on immemorial usage.

Mr. Mignault has divided his work into four parts in what seems to be the natural classification. Beginning by the mission, which in this province is generally understood to be a settlement which has not yet been raised to the rank of parish, the author treats successively of the religious and civil parish, showing the manner in which each is called into existence.

The parish being erected, the next question is: How is it governed? Four elements share in this government: the bishop, the *curé*, the *fabrique* and the parishionners. To define the powers of each so as to prevent clashing, is no doubt a very delicate question, and therein chiefly lies the extreme intricacy of our parochial law. This part of Mr. Mignault's work comprises some 300 pages.

The third part treats of parochial property and incidentally of the building of churches and of the administration of cemeteries. Here the author had merely to explain a written law, the subject matter being governed by statutes of a most minute character.

The fourth part of Mr. Mignault's book contains some statutory provisions with respect to the maintenance of order in churches, etc.

While merely a law book—and the author is very careful to explain that it has no other character, controversy of a non-legal nature being rigorously excluded—Mr. Mignault's new work contains much historical and statistical information. We would merely refer to the list of parishes which have no *fabrique* and to the inquiry as to the origin of the *fabrique* itself.

An appendix to the work gives a large number of formulas as well as the text of chapter ix. of the Consolidated Statutes for the Province of Quebec.

The printing and binding have been executed in a satisfactory manner, the work being presented in a form which adapts it to the library of the ecclesiastic as well as to the shelf of the practitioner.