LIQUOR LICENSE ACT, 1886.

JUDGMENT

— OF —

HON. MR. JUSTICE WEATHERBE.

Concurred in by Hon. Mr. Justice Ritchie and read as a Dissenting Judgment in the case of The Queen v. Ronan; argued before the Supreme Court of Nova Scotia, April 2nd, 1891; decided September 17th, 1891.

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THE Canada Temperance Act is a Dominion statute for restricting the sale of intoxicating liquors and making it a criminal act, as Sir Montague Smith described it, for any one, except the manufacturer, in certain quantities, and an officer appointed to dispose of it for certain purposes in smaller quantities, to sell or barter the same.

It is not entirely prohibitory. It is an act by which a majority of electors in any county in the Dominion can secure the restrictive sale above mentioned.

One of the objects of the act, recited in the preamble, is that it is very desirable to promote temperance in the Dominion. This, evidently, is the main object of the legislation, to promote temperance in those localities where drunkenness exists.

The right of the Dominion to pass the act was challenged in the Privy Council, (7 App. Ca., 829). Mr. Benjamin argued that this act was a subject of legislation exclusively for the province. He referred to sections 91 and 92 of the B. N. A. Act and especially to sub-sections 9, 13 and 16 of section 92. The act had been held *ultra vires* the Dominion by a majority of the Supreme Court of New Brunswick, and this judgment had been reversed by a majority of the Supreme Court of Canada on appeal.

At the close of Mr. Benjamin's argument in the Privy Council their lordships did not require to hear counsel in reference to the impeached act being within sub-sections 9 and 13, but only in regard to sub-section 16; that is, they were convinced that the act was not an interference with the exclusive power of the province to authorise licenses for the sale of liquor and they did not consider the matter a

question of property and civil rights in the province. They desired, however, to hear counsel as to whether the act was not a matter of a merely local and private nature in the province. Then it was argued in support of the right of the Dominion to pass the act, that it was one, not of a local or private nature, but that it was one dealing with drunkenness, affecting the whole community, its character, health and efficiency. It was contended "that one test whether a matter was merely local or private was the magnitude of the interests involved, such as temperance, education, public rights, health, &c." It was also contended that the case came within the words "regulation of trade and commerce" in sec. 91, sub-section 2.

The court, Sir Montague Smith delivering the judgment, held that the subject-matter of the act did not come within any of the subjects assigned to the province, but that it was one exclusively within the power of the Dominion to pass. Eliminating his statement of the case and his recital of the argument of Mr. Benjamin, which he disposed of in detail, his reasons are comprised in a brief space. He refers to the preamble of the act in which the expressions that "it is very desirable to promote temperance" and that "there should be uniform legislation in all the provinces respecting the traffic in intoxicating liquors" are used. He says the effect of the act in any county or town where adopted is to "prohibit the sale, except in wholesale quantities, or for certain specified purposes, and to regulate the traffic in the excepted cases, and to make sales otherwise than as prescribed criminal offences."

He decides expressly that, though the effect of the act were prejudicial to the revenue otherwise derivable from licenses, "it does not follow that the Dominion Parliament might not pass it by virtue of its general authority to make laws for the peace, order and good government of Canada."

The court held that if the argument that the power given to the province to make laws respecting licenses prevents

the Dominion from legislating respecting any article covered by such licenses were to prevail, laws necessary for the public good or the public safety could not be enacted at all.

Does not the reference of Sir Montague Smith to "temperance" in the preamble and the above phrases shew the opinion of the Privy Council to be that all temperance laws, or laws for the public good or safety, or in other words, morality and good order in the community, are exclusively within the power of the Dominion, and therefore that the province cannot pass such laws? Otherwise what mean the words "could not be enacted at all?"

In referring to the act in question, (the Canada Temperance Act,) he says:

"It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale of poisonous drugs, or of dangerously explosive substances."

Does not this shew the opinion of the Privy Council to be that an act which places restrictions on the sale of a deleterious substance, namely, intoxicating liquors, is exclusively for the Dominion.

Then the court proceeds with these suggestive words:

"A law placing restrictions on their sale, custody or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to 'property.' What parliament is dealing with is not a matter in relation to property and its rights, but one relating to public order and safety."

Is this not a declaration as distinct as it can be made, by the highest court of appeal, that a law restricting the sale or custody of spirituous liquors, because the free sale or use of them is dangerous to public safety, cannot be passed by the province, but can only be enacted by the Dominion? I am not arguing that it is so, but that the Privy Council has held it to be so.

Then the judgment further states that laws making it a criminal offence "for a man to set fire to his house, on the

ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal; though affecting, in some sense, property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights."

This is an argument to shew "that a law making it criminal to sell liquor, except under restrictions, is not a law respecting civil rights or property, but a law respecting crime, and is for the Dominion exclusively."

He also argues that "a law which prohibited or restricted the sale or exposure of cattle having a contagious disease," is not under section 92, but is a law which only the Dominion can pass, clearly showing that he regarded the Canada Temperance Act as one which might properly be held to be an act, not prohibitive, but only restrictive,—which shews that the province of New Brunswick could not pass a law to restrict the sale of dangerously infected cattle, spirituous liquors, or such like deleterious things.

Then speaking of these several kinds of laws, this binding authority proceeds to lay it down that:

"Laws of this nature designed for the promotion of public order, safety, or morals, subjecting parties to punishment, belong to the subject of public wrongs rather than to that of civil rights."

They are described by his lordship to be:

"Of a nature which fall within the general authority of parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the parliament of Canada."

The learned Chief Justice of New Brunswick had said in the judgment appealed from, in commenting upon the Dominion act restricting and regulating the sale of liquor, as follows:

"Had this act prohibited the sale of liquor instead of merely restricting and regulating it, I should have had no doubt about the power of parliament to pass such an act;

but I think an act which in effect authorises the inhabitants of each town or parish to regulate the sale of liquor and to direct to whom, for what purposes, and under what conditions liquors may be sold therein, deals with matters of a merely local nature, which, by the terms of the 16th sub-section of section 92, are within the exclusive control of the local legislature."

Sir Montague Smith took the trouble to quote the whole of these words, used by the Chief Justice of New Brunswick, to explicitly point out that "their lordships cannot concur in this view." He then refers to the preamble of the act to shew that the object of the Dominion was to secure uniform legislation in all the provinces respecting the traffic, "with a view to promote temperance in the dominion."

After stating, it is true, that the prohibitory and penal parts of the act are only to come into force in any county or city upon the adoption of a petition, &c., he says, "this does not convert the act into legislation respecting a merely local matter." He says:

"That the act is clearly meant to apply a remedy to an evil which is assumed to exist throughout the Dominion and the local option no more localises the subject and scope of the act than a provision in an act for the prevention of contagious diseases in cattle that an officer should proclaim in what districts it should come into effect would make the statute itself a mere local law for each of these districts."

He adds that "in statutes of this kind the legislation is general and the provision for special application of it to particular places does not alter its character."

I understand by this that the evil of drunkenness or intemperance is assumed by the act to exist in different parts of the Dominion, and from time to time might become prevalent or "break out" just as contagious diseases in cattle might break out, and so a remedy would become necessary from time to time in different localities. I suppose it is for this reason that there is a provision for a majority in any locality to repeal the act in that place, that is when the disorder is stamped out.

Therefore it is said that "in statutes of this kind the legislation is general." I suppose the inference to be that legislation of this kind is exclusively for the Dominion. I do not know whether it is contended that legislation of this kind or laws relating to the suppression of drunkenness or contagious diseases may be passed by both the province and the Dominion. I understand that only one legislature can deal with a given subject, and therefore I take the meaning of the decision to be that an act to promote temperance, or a temperance act, as Sir Montague Smith terms the Canada Temperance Act, or a law, to continue the use of his language, "placing restrictions" on the "sale or custody of intoxicating liquors," on the ground that the free sale or use of them is dangerous to the public safety, is a law which can be passed exclusively by parliament and not by a legislature of a province; that such laws are so confined to the Dominion jurisdiction because they do not come within the subjects assigned to a province, but "are designed for the promotion of public order, safety, or morals," and having such objects in view, can be passed only by the Dominion.

It was in view of this case of *Russell* v. *The Queen*, and the decision, after able argument in the Privy Council, having first been decided against the crown in New Brunswick, in a judgment which was reversed in the Court of Appeal at Ottawa,—it was in view, I suppose, of of this binding decision of a court whose tradition is not to overrule its decisions, that when a similar question arose before us in *The Queen* v. *McDougall*, the Attorney General and Mr. Russell, admitting on the part of the Crown that our act was not a license act, conceded that if it was a temperance act it could not prevail and must be laid aside by the court.

When no lawyer can be found who will undertake to say how far the legislature of the province may go in dealing with this subject of traffic in spirituous liquors, or to what extent the parliament of the Dominion may pass laws on the subject, when no lawyer will undertake to draw the

line limiting the power of the provincial legislature, I think it more likely that both the federal and provincial legislatures will be found, in their enactments, to have overstepped the bounds of their respective powers, rather than to have restricted themselves within the limits assigned to them.

Our duty is first to say what is the intention, or effect, or meaning, or scope of the enactment, and, secondly, to say whether the province has the right and power to make a law so interpreted, or having such effect, meaning, or scope. Is the general scope and intention of this act to restrict the traffic in a beverage admittedly to the last degree terrible and dangerous and evil in its effects when used, as it is in exceptional cases, to excess; or is it framed for the purpose of raising a revenue for municipal purposes? It is admitted that it is not in its general scope and intention a license law to raise money. I doubt whether it does not cost more to operate the act than it yields. If it is found, upon examination of its language, to be framed for the purpose of preserving or promoting public order, safety, or morals, by regulating, restricting and to a certain extent limiting, interfering with, or preventing the free sale and use of these deleterious and dangerous drinks, then is the act of the province valid?

We are told that the act before us is, in almost all respects, similar to the New Brunswick act, and that the Supreme Court of Canada has pronounced that act within the power of a province to pass. Even if this were the case, and if, in our view, the Privy Council has made a decision covering this question, independent judgment or adherence to the views of their lordships in the Supreme Court of Canada would be out of the question, but I am obliged entirely to dissent from the proposition that our enactment is in its scope and general effect identical with the New Brunswick act. We all know how a few seemingly harmless clauses, even a few phrases, a line, or even a word inserted in a law, may entirely change or disfigure the whole features of the legislation. I do not say that is the

case here. I desire to strain the words of this act in order that the decisions of the appellate courts may throw some light upon our task.

I have purposely called attention to the language of Sir Montague Smith, in his forcible words, to prove that the Dominion has exclusive power to pass what he terms a temperance act. We cannot, perhaps, do justice to this subject, without answering the enquiry, "is the act under discussion a temperance act?" No judicical notice has been taken in the judgments delivered in this court, and no attempt has been made at the bar to grapple with the significant phrase "temperance" used by the legislature in our enactment.

As I understand it, the restriction, regulation, or prohibition of the sale of spirituous liquors, by our enactment, is dependent in some measure, if not absolutely, on the will or future determination of a number of societies in the province, recognized by the legislature, devoted to the cause of temperance. I regard the provision of the act on this subject as one of the chief provisions of the act and I think if it were not a matter of public notoriety, in and out of the legislature, that this enactment was made and constantly amended in the interest of the "prohibitionists," we could see by this provision that the object of the law was to control the traffic in drink so as to prevent intemperance. Indeed Mr. Russell, in arguing the case for the Crown, directly contended that the province has a right to pass a law to take away intoxicating liquor from a man without compensation, and destroy it on account of the injury arising from its use.

What we have to determine in this case is whether our act is not intended to restrict the sale or custody of spirituous liquors because the free sale or use of them is dangerous, or, in other words, whether it does not bear a close "similarity to laws which place restrictions on the sale of poisonous drugs," or whether at any rate the enactment is not intended to restrict or put an end, if possible, to the traffic in this article of commerce, manufactured or imported.

To quash the conviction before us it may not be necessary to go so far as to answer this in the affirmative, because we must, after getting at the intentions of this act, go so far as to ascertain within what provision of section 92, of the B. N. A. act it comes to pronounce it *intra vires*. But let us first see if the legislation with which we are dealing is not such as Sir Montague Smith would have brought within the exclusive power of the Dominion.

By selecting the main and important provisions of the enactment—those which cause the great contention—and shortly stating them, I think we shall more readily observe the true intention. What are these provisions? What follows is submitted as a substantial view of the promoters and friends of the act:

"1. No license shall issue for the sale of wine, cider, beer, or spirits, except subject to and under the direction of an inspector.

2. Such inspector shall be a member in good standing of a temperance organization, and in the absence of such organizations or upon their dissolution in the province the sale shall be prohibited.

3. In no case shall there be any trade, traffic, or sale in such liquors unless the proposed vendor shall first fit up a hotel or premises, and thereafter procure three-fifths of the ratepayers in the district, who shall inspect and be satisfied with the premises, and inquire into the character of the person, where he is unknown, and certify:

(*a.*) That sale of liquor is desirable in the locality;

(*b.*) The fitness of the building and the petitioner for the business.

4. Petitioner, if he persists in engaging in the traffic, must also prove to the satisfaction of the inspector;

(*a.*) That each signer resides in the district.

(*b.*) That each signer is identical with the person of the same name on the assessment roll.

(*c.*) That he owns the property for which he is assessed.

5. He must pay $10 to enable the inspector to detect, if possible, defects in his petition and proofs.

6. He shall then pay for a license.

7. Objections may then be taken by every ratepayer separately.

(*a.*) As to the fame of the applicant.

(*b.*) That the premises are out of repair.

(*c.*) That the license is not required.

8. Trials on the above cases shall proceed before the inspector, who shall report on every trial and return the evidence to the Municipal Council

9. All these cases may be re-tried before the council.

10. The council shall not be bound by legal evidence.

11. After this the council may bring on new investigations.

12. In case petitioner should succeed in all these trials, and all the above requisites are complied with, but not otherwise, the council, in its discretion, may entertain the application.

13. In case petitioner still persists in requiring that a license should be issued, no one shall sell under it who cannot beforehand ascertain in each case whether the purchaser intends to re-sell and be able to prove such intentions. (Of course this is impossible.)

14. The inspector may summon any one before his father or other relative, who happens to be a justice, for violation of the act. (The temperance organization may always appoint for inspector the son or brother of the stipendiary.)

15. If the officer fails he shall pay no costs, however unjustifiable the prosecution.

16. There shall be no appeal or *certiorari*.

17. Proof of a counter, bottle, jug, mug, or drinking glass in any shop, formerly used as a grocery and liquor store, shall be *prima facie* evidence of violation of the act.

18. Any one in possession of liquor is liable to have it seized and destroyed by an officer breaking into his house or premises, or houses may be broken into without reasonable grounds of belief. but merely on belief, though they contain no liquor."

The above, I think, is a fair abstract of the enactment in question, and I think this form of stating the substance will enable us to ascertain whether it is intended to obtain money by this means from licenses and preserve order, or whether the object of the law is not to prevent any person from obtaining a license.

It is true there are persons constantly selling liquors and licenses are issued, but I doubt whether all these provisions are enforced; in fact we know they could not possibly be complied with. If these provisions were to be stringently enforced would any reasonable man invest money in such a trade? If he does invest money so is it not because he does believe that the law is intended to be prohibitive, and is consequently invalid?

If this enactment, stripped of all extraneous matter, is such as to deter all reasonable men from investing money in the trade, with the intention of abiding by the provisions of the law, then it so interferes with trade and is so prohibitory in its character as to be invalid as a provincial act.

I have read the deliverance of the Privy Council. Without further imperial legislation that judgment, I understand, must remain law. The Privy Council is bound by it so far as it is the interpretation of the British North America act, and every one is safe in assuming it to be law. On the occasion of the judgment in *Russell* v. *The Queen*, and on one other occasion only has the Privy Council attempted to offer reasons for an interpretation of the Imperial act relating to the sale of liquors. This other occasion was in *Hodge* v. *The Queen*, 9 App. Ca., 117. I refer to it, not because the Privy Council has overruled *Russell* v. *The Queen*, for in this later case they expressly confirm the law as laid down in the first decided case, but I refer to it because it is said to be more applicable to the question discussed than *Russell* v. *The Queen*, and, being the more recent case, it may create a stronger impression and assist us more than Russell's case in determining the question before us.

In *Hodge* v. *The Queen*, 9 App. Ca., 117, there was a tavern license issued by commissioners authorized by the province of Ontario to make rules that billiard rooms in taverns should be shut on Saturday night at 7 o'clock. There was a conviction for keeping the room open after that hour.

A board of commissioners for each city or district was provided, and each board was to make rules for each place and impose penalties. The only question actually before the court was as to the validity of the conviction for keeping open the billiard room. If there was power to enforce the rule as to that one thing it was so distinct in the rules as to have been enforced irrespective of most, if not all the other rules; but it may be assumed the province empowered the issuing of tavern licenses, authority for which, no doubt, is expressly given in terms in the Imperial act. There is nothing to shew in that case an intention to put an end to intemperance, or to restrict or put an end to the trade in intoxicating liquors. That the act was not a reasonable and fair license law no one pretended to say, and no one could say that it was not such a law as has always been conceded might be passed for retailing liquors in this province. In support of the conviction it was contended only that "the liquor trade, like all other trades, is subject to local regulation for purposes of police," that the commissioners were a municipal institution," that "the interfence with trade and commerce was only incidental." It was admitted that *Russell* v. *The Queen* establishes the right of the Dominion to legislate on the liquor traffic as a matter affecting the peace, order and good government of Canada," and that "this is not inconsistent with the right of the province to legislate on the same subject for the purposes of police."

It is stated in the judgment that *Russell* v. *The Queen*, when properly understood, is not an authority in support of the appellant's contention, and their lordships do not intend to vary or depart from the reasons expressed for their judgment in that case.

The court said the impugned license act "was entirely local in its character," and explained that by saying that it appointed commissioners to make regulations for each municipality for limiting the number of tavern or shop licenses, for exempting certain licensees from having all the accommodation required by law, for regulating the taverns and shops, and for defining the duties and powers of license inspectors, and to impose penalties.

The court, after commenting on these duties of the commissioners, proceed to say:

"These seem to be all matters of a merely local nature in the province and to be similar to though not identical in all respects with the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments"

In addition to the above language all that is said that is useful in Hodge's case is as follows:

"Their lordships consider that the powers intended to be conferred by the act in question, when properly understood, are to make regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., licensed for the sale of liquors by retail, and such as are calculated to preserve in the municipality peace and public decency and repress drunkenness and disorderly and riotous conduct. As such they cannot be said to interfere with the general regulation of trade and commerce, which belongs to the Dominion Parliament, and do not conflict with the provisions of the Canada Temperance Act, which does not appear to have as yet been locally adopted."

Whether the integrity of the Ontario act escaped the Privy Council by reason of its peculiarly local character, it is difficult to say. The main scheme of the act seems to be to leave to local commissioners the power to make all the regulations relating to the retail trade in shops and taverns, and all the restrictions necessary in those places where the commissioners are, and to preserve public decency and repress drunkenness and disorderly and riotous conduct in those places.

It is very striking in *Russell* v. *The Queen* that one of the chief reasons assigned by the Privy Council for holding that the Dominion had exclusive power to pass the Canada Temperance Act was that it was "passed with a view to promote temperance," and in Hodge's case, in which the court expressly renounce any idea of departing from the reasons given for their former decision, they mention among the reasons why the province had exclusive power to pass the Liquor License Act, the repression of drunkenness in the municipality."

It is clearly shown that the words "in the Dominion," which would seem to qualify the phrase "to promote temperance" did not weigh with the Privy Council, because it is admitted in their judgment that the Canada Temperance Act was intended to be called into exercise in those municipalities where drunkenness happened, for the time being, to prevail.

It is quite obvious that there was, in the mind of the Privy Council, a distinction between the "promotion of temperance" and "the repression of drunkenness." The first is not directly and immediately necessary for the preservation of law and order. The other is instantly and constantly required for police and municipal purposes. The province, says the court, may authorise commissioners in a locality to pass rules for the prevention of drunkenness, and may impose a penalty where necessary for the order of that particular locality. That whole subject is entirely in the discretion of the province. They may prevent drunkenness, but they must not prevent the proper or qualified use of the beverages the excessive use of which produces drunkenness. In so far as it is necessary to shut a billiard room in a place where persons are likely to assemble and drink to excess, commissioners in that locality who may know the circumstances and can conveniently regulate the traffic without suppressing it, may be empowered by the province to impose penalties for the infraction of their rules. But for the promotion of temperance in a locality or municipality where drunkenness prevails, to bring that community back to a state of general good order, and to put an end to the vice of drunkenness as you would to a contagious disease, it is necessary to obtain Dominion legislation to confer that power on the electors of a municipality. To prevent the sale of poison or other deleterious substances Dominion legislation is necessary. In a provincial license law we are bound to recognize the custom of using intoxicating liquors, and every man, in such a law, must have secured to him the right to buy the article. The trade in such a commodity must not be prevented.

The Dominion may restrict or entirely put an end to the trade, and may even prevent entirely the manufacture or use of the article. It is admitted that if the operation of the enactment before us prevents any one from purchasing what wines and liquors he requires for consumption in a reasonable way and not by stealth it is invalid.

Before the introduction of the federal system there was no difficulty whatever in dealing with the subject. Each province had absolute power. Now, when the Dominion and the province constantly claim the right to legislate on the subject under the B. N. A. Act, it is for the court to determine the limitation of the respective powers. If, in what may be called a license act, there is found to be an intention to do more than to raise money from the issue of licenses, the question is how much more? It is true enough that because in such an act there happen to be words which, properly construed, restrict the trade in whiskey and make it in some cases punishable to sell strong drink, even with a license, it does not follow that the act, or any part of it, is invalid. It may be very difficult indeed to interpret such an act. I think it is in this case without due examination. There may evidently be an intention in a license act to repress drunkenness in a qualified sense, and yet, as we have seen, the act may be exclusively within the power of the province. We must read the whole act. If we find, even in a license act, provisions which shew clearly that the main intention and scope of the act is to put an end to drunkenness, and, if we find that such an act, strictly carried out, would make it intolerable for any man to engage in the trade, then our inquiry must be still whether the province has not such a power. Counsel for the Crown in this case, contends, as I have mentioned, that the legislature of the province has the exclusive power. No doubt the legislature desires to have such a power, and they have a right to get that power by any form of words which would secure it to them, the most difficult or the simplest to construe. They have a perfect right to take a license act, pure and simple, and add clause upon clause and

word upon word until they reach the entire limit of their power. I have mentioned in a previous case the difficulty of the task, either for the Dominion or Provincial legislature, under the federal system, to exhaust in an act the full measure of their power without encroaching upon the power of the other. This renders our duties more difficult, but we must, notwithstanding, interpret these acts as often as they come before us.

I have compared the New Brunswick License Act of 1887 with that of Nova Scotia of 1886, and I should judge the larger number of clauses of the former are copied from the latter act, and the general framework is the same, as we were informed at the argument. And I have also carefully read the decision of *Danahar* v. *Peters*, appealed from the Supreme Court of New Brunswick to the Supreme Court of Canada, 17 S. C. C., 44.

The New Brunswick act permits the sale of liquor in hotels, saloons and taverns to be drunk in the ordinary way, and to be drunk at bars. The minimum license fee is $25, and the applicant only requires to present a petition of one-third of the ratepayers. And that act permits wholesale dealers to sell in quantities of one pint. Though I say most of the clauses appear to have been copied from the Nova Scotia act there is a very essential difference between the two acts, so much so that while a court or judge might come to the conclusion that one act was intended chiefly to restrict or prohibit the sale, the same judge or court might be compelled to decide that the other act was not so intended.

Some of those clauses and provisions of the Nova Scotia act, which have been relied on, and to which I have referred in *Queen* v. *McKenzie*, 23 N. S. R., 6, and which, perhaps, show the strongest intention to make the Nova Scotia act a prohibitory or temperance act, are carefully omitted in the New Brunswick act, though the preceding and following sections are *verbatim* copies of our act.

I have already referred to the trials of the objections to be raised against a petition to take place before the inspector

and before the Municipal Council. When these are concluded, in the New Brunswick act, there is no further investigation possible, whereas in our act there may be still further investigations and trials under words carefully left out of the New Brunswick act.

Perhaps one of the strongest arguments to shew that our act is prohibitory in its character is the provision which gives the whole operation over to the action of the temperance organizations. That provision is in our original act. Though before the daughtsman of the New Brunswick act, he omitted all reference to such a provision, whereas our legislature has, by amendment, made the provision more stringent still.

If there is one provision in our act which, if enforced would practically prevent a liquor dealer from carrying on business, it is that in sub-sections 1 and 2 of section 53 of the act, which lays the burden of proving that liquor sold by retail was not purchased for the purpose of re-selling the same, in all cases upon the licensee. The clause immediately preceding this in our act is copied *verbatim* in the New Brunswick act. So is the clause immediately following the prohibitory clauses, but the prohibitory clauses are entirely omitted from the New Brunswick act, which omission, I think, as well as other omissions, might be cited in a case under the New Brunswick act to shew that it was the intention of the legislature of that province to pass a mere license act.

Then the clause relied on giving power to search in any private residence for liquor without grounds of belief is not in the New Brunswick legislation. Neither are the clauses about which there has been so much litigation, taking away, practically, all power of appeal or *certiorari* and preventing one, however clearly innocent of a violation of the act, from having costs, and permitting a prosecutor to select a relative as the justice before whom to try his case. All these have been referred to to show that our act is intended to be prohibitory.

When the New Brunswick tavern and saloon provisions are read, and it is found that the most ample provision is made for drinking at bars and in all parts of the premises, and when so small a quantity as a pint may be got at a shop or wareroom, and when the provisions of our hotel license are found to be so hedged around as to make the sale practically impossible, and to prevent the existence of a bar, the characters of the two acts in their largest features are found to be extremely dissimilar.

The only points in *Danahar* v. *Peters* taken in the *factum*, and argued on the contention that the act was *ultra vires* were:

"1. Because the ratepayers could, under the act, prevent licenses being issued.

2. It is in restraint of trade to attach a stigma to the business by preventing members of the council, justices, or teachers from holding licenses."

And Mr. Justice Patterson, in stating the grounds of the argument, says:

"Of the two points raised on this subject one relates to the requirement of a certificate signed by one-third of the ratepayers of the locality as a qualification for obtaining a license, and the other to the disqualification under section 76, of licensed persons from holding commissions of the peace or municipal offices."

And Mr. Justice Gwynne says the prohibition argument was rested on sections 27 and 10, and we must remember, when he says, even of the New Brunswick act, that "we cannot hold the object of the legislature to have been to effect prohibition of the trade," his observations are to be limited to these clauses only which were relied on. We cannot, in other words, suppose him to say that, no matter how stringent may be the conditions required to permit a license, even though they effectually prevent sale, the court could not declare the act, because it was called a license act, *ultra vires* the Provincial Legislature.

Mr. Justice Gwynne, to whose authority, even if his deliverance was not that of the court, which would be

conclusive, the very greatest weight should be given, says in *Danaher* v. *Peters:*

"We cannot hold the object of the legislature to have been to effect prohibition * * under color of an act establishing municipal regulations affecting that trade."

He also says:

"So neither can we hold the certificate of approval of the fitness of the applicant * * or of the place in which he proposes to carry on the trade * * however stringent the provision upon that subject is, to have been enacted for the purpose of effecting prohibition."

And he further says:

"But defects or imperfections in the act or provisions therein which may appear to be, or appear to some to be unreasonable, will not justify us in pronouncing the true object of the act to have been prohibition, total or partial, of the trade of dealing in the sale of liquors, under pretence of establishing municipal regulations upon that subject."

I need hardly say—but saying it I may say in the most emphatic manner, and, if possible, go much further than the distinguished judge above cited—that I think it completely and forever out of the question for this or any other court or judge to suggest, or suppose, or imagine that the legislature should pass an act upon any pretence, or color or with any fraudulent or deceptive purpose whatsoever. It would be as much out of place to suggest such a thing as for the legislature to suggest that the court had used language under pretence of deciding one thing so as to get some other thing decided.

We are bound beyond all question to assume that the legislature acts *bona fide.* And it will be admitted, I think, that where it imposes conditions to the performance of a thing, without the fulfilment of which the thing shall not be done, and the fulfilment of the conditions are obviously next thing to impossible, any judge who sees this must understand that the intention was to render the thing next to impossible to be done.

It will also be admitted that if the legislature said that the sale of liquor should cease entirely unless under license

issued and controlled by an inspector to be appointed by a temperance society if the society saw fit to appoint, it would become obvious that they intended that the question of stopping the traffic in drink should be a matter to be determined entirely by a temperance society. Then if they say that there shall be no traffic in the article unless under direction of one pledged to abstain from the use of the article, if, as I admit, the language is not a mere pretence, they must mean that there is likely to be a more vigorous administration of the restrictions on its use. If they enact that the sale shall stop if the temperance organizations cease to exist, they must mean that if the organizations see fit to dissolve the traffic shall no longer exist. To take the lowest ground, they must mean something by the important clause respecting the temperance organizations. And I think it is fairly suggested that they meant to pass a temperance act, which certainly is not done colorably but quite openly.

Let us assume that the legislature understood that no act could be passed directly aiming at the stoppage of the liquor traffic, but that they understood if prohibition practically resulted from the passage of some act—no matter what act—that then it would be impossible to say that prohibition should not be enforced so long as the given act was to operate. I think they could not depend on this, but I do not see that there is any pretence or deception about it. The truth is it is acknowledged to be most difficult now, under the federal system, to say how far one legislative body can go without encroaching on the powers of the other. And it is certainly not colorable, in an attempt to assert the whole of their powers, to state them too largely and leave it for the courts to limit them.

This brings us back to the simple proposition that if, by reading the act, it is obvious its effect is to restrict, it must be taken to be intended to restrict. No judge, in interpreting an impeached act, would say "it will not do to suppose the legislature intended to restrict, because it is clear they have no right to restrict, and it would be imputing a desire to encroach, which is not to be imputed." This would be obviously illogical.

It is said the Supreme Court, or a majority of the Supreme Court, has held that it is competent for the legislature to attach conditions to a certificate of a petitioner so stringent as to effect actual prohibition, and the court would be powerless to interfere. Or, in other words, if the production of such a certificate is by the provincial law made a *sine qua non* for carrying on the trade, though practically it should be obvious that the requirements for getting such certificate are so stringent as to render its production impossible, we are prevented by that appellate court from holding this to be a prohibitory act.

And still further it is contended that that court is authority for saying that though the provisions of the provincial license law practically render it impossible to undergo the imposed operations of procuring a license and intolerable to attempt afterwards to sell, yet that these could only be said to be unreasonable, or apparently unreasonable provisions and it would be impossible to say that the intention was to prohibit, wholly or partially.

I think this would be torturing the language of the court. It has been suggested that if we should hold the provisions in our act *intra vires*, such a construction as this would not only encourage but enable the advocates of prohibition to secure other provisions which would render it needless to apply to the Dominion Parliament, the admittedly proper body to pass a prohibitory law.

I think it clear that all the Supreme Court decided on the subject of the New Brunswick license law was that, in the light of the two clauses relied on, however stringent those particular clauses might seem to be, they could not pronounce the intention of the act on that ground to have been prohibition, total or partial. The question here raised as to the scope of the act was not raised, so far as I can observe. I distinctly understand the contrary. The question whether, on the whole face of the act, taking into consideration all its provisions, it was not intended as a temperance act, within the principles to be deduced from the *Russell* and *Hodge* cases, was not discussed or decided.

If that had been decided then the whole question would turn now upon whether our act is to be distinguished from that of New Brunswick. Indeed I ought to go so far as to admit that the more stringent provisions in ours in that case would be insufficient to take the case out of the operation of *Danahar* v. *Peters* if conditions added to a so called license act, in effect stopping the traffic, can be sustained on the ground that to hold such conditions *ultra vires* would be untenable as impeaching the *bona fides* of the legislature.

When the question is raised in the Supreme Court whether, regarding the different restrictions imposed on a trader willing to pay for a license and subject himself to police condition, before he procures the license, and afterwards in his hotel or shop, it is possible to comply with these provisions, one after the other, and run the gauntlet of them all and yet carry on the trade,—when this question arises, it will be necessary for all the sections of the act to be examined together to say whether the intention is not chiefly to curtail the habits of drinking. We can easily imagine many restrictions any one of which now added to the existing ones would put beyond doubt in every mind an intention to curtail and suppress or diminish the evils of drunkenness. If the Supreme Court were invoked on this ground would they come to the conclusion, as argued, that this is not the intention of the act or would they say that, though it is the intention, the act can be enforced to diminish and, if possible, suppress the evil.

For my own part I think the arguments shewing intention in the B. N. A. Act to confer on the province exclusive power to legislate on the subject of spirituous liquor, and to restrict and even to prohibit the traffic and promote temperance, very strong, and I need not say, but for the deliverance of the Privy Council, how I should be inclined to decide. If it appears clear that the decision of that highest court covers the case before us, we cannot, with all respect, however much the judgment in *Danahar* v. *Peters*, may impress us, even if it could not be distinguished, follow it.

The legislature has already made promise to test the question under this act before the Privy Council, and in any case we must shape our views, without attempting independent judgment, merely to deciding whether these convictions are within the principle laid down by the highest court of appeal.

I ought to point out that it should not be supposed that because an act is *ultra vires* the Provincial Legislature it follows that the same enactment is *intra vires* the parliament of the Dominion. It is characteristic of the federal system that an act may be so framed that neither body can give it validity.

It is because I am entirely unable to see that this enactment now before us is anything more or less than a law to make it difficult or impossible to trade in drink, and because I see that it is enacted in the interests of the temperance organizations and because it is so framed that if this class of persons so elect they may prevent the appointment of an inspector and so prevent licenses or sale of drink, that I am driven to decide under the distinct utterances of the Privy Council that it is *ultra vires*.

It becomes unnecessary, in this view, for me to offer an opinion upon the other question raised in this case, namely, whether it is within the province of the Provincial Legislature to pass an act to regulate procedure in those criminal matters which arise in violation of the penal clause provided for the enforcement of an act admittedly within the power of the province to pass. I do not think it follows, even if the license act were *intra vires*, that then the Procedure Act is so. That is, I think, a different question on which, as I say, I need offer no opinion.